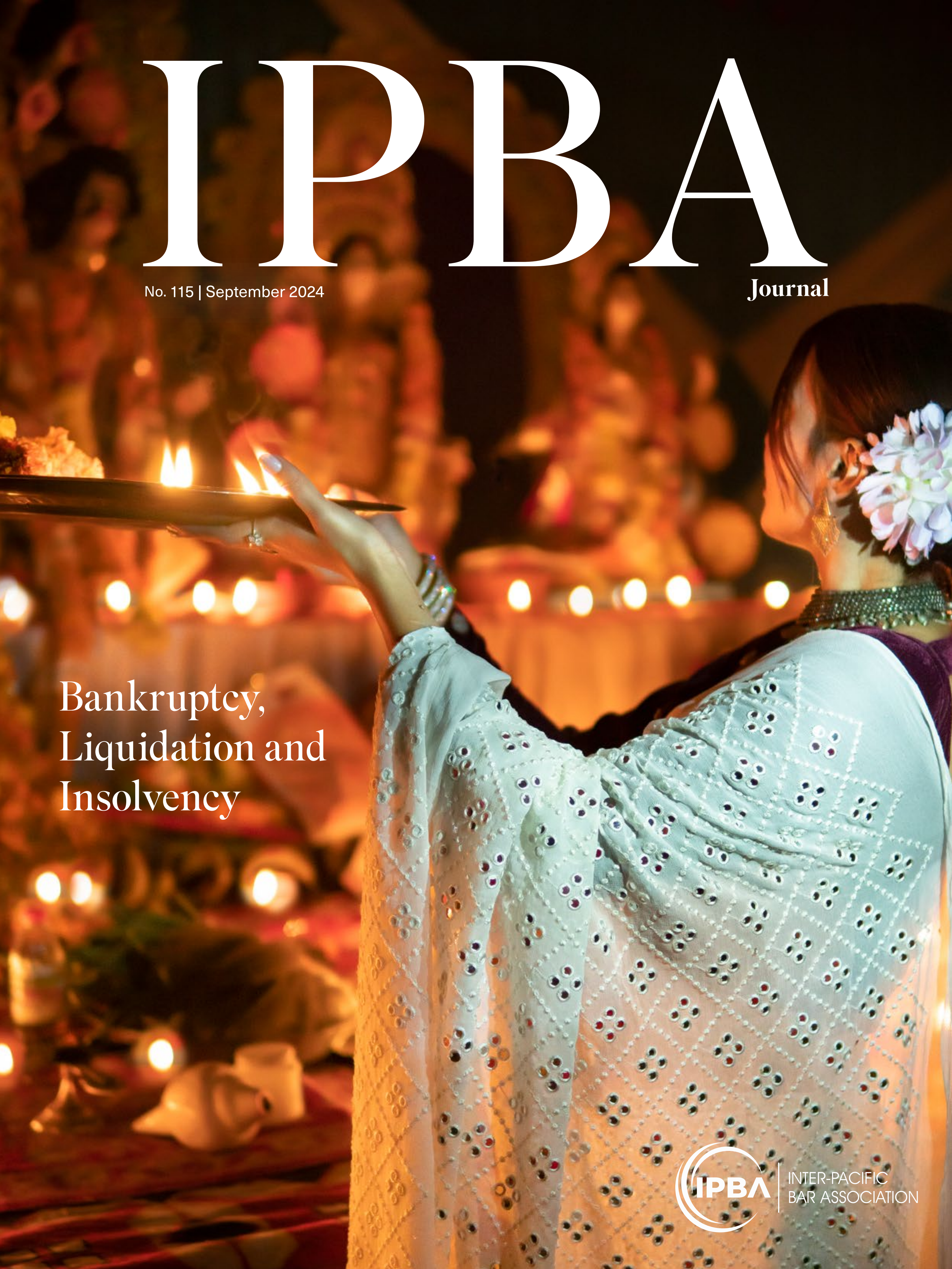

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Bankruptcy, Liquidation and Insolvency

IPBA INTER-PACIFIC BAR ASSOCIATION

CONTENTS

IPBA Journal September 2024

47 Durja Puga

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The President's Message


Miyuki Ishiguro

As you may be aware, the most important purpose of the IPBA could be said to be the 'Spirit of Katsuura'. This purpose was set up by the so-called founding members of the IPBA led by the late Nobuo (Nosei) Miyake who was the first Secretary-General and the eleventh President of the IPBA. Katsuura is a small town in Chiba Prefecture, east of Tokyo, where the second house of Nosei is located, and it is where the founding members had extensive meetings to discuss the purpose of the IPBA.

Recently, the concept of the 'Purpose' has become very popular in managing commercial enterprises such as listed companies. But the IPBA had emphasised this concept from its beginning in 1991, 33 years ago. According to the 'Spirit of Katsuura', the primary purpose of the IPBA is to provide a forum for lawyers to get together, exchange views and make friends. This purpose is reflected in our Constitution in the section outlining the IPBA objectives, namely, to provide members with opportunities to meet and exchange ideas with other lawyers who live in, or are interested in, the Asia-Pacific region.

At the occasion of the 32nd Annual Meeting and Conference in Tokyo held last April, a memorial ceremony was held for the late Nosei Miyake who had sadly passed away in October 2023 and we also had a memorial talk session for him led by his old friends. In addition, the IPBA also issued a booklet in his memory. With these memorial activities, we came to strongly remember the most important purpose of the IPBA, the 'Spirit of Katsuura'.

Reasons for joining the IPBA may differ from member to member, but the 'Spirit of Katsuura' explicitly symbolises the difference between the IPBA and other international organisations. Personally, I have no set reasons for why I joined or have continued to be a member of the IPBA. I have not had any referral related to my specialised practice area—capital market transactions—from overseas friends of the IPBA nor have I asked any overseas IPBA friends to assist with capital market transactions in which I was involved. Occasionally, I have had referrals on international anti-trust matters or dispute resolution matters from my overseas IPBA friends, but the referrals were transferred to my colleagues at the firm. So, building business networking was not the reason for me to join the IPBA. However, I met so many outstanding Japanese business lawyers who were super experts in their own areas when I joined the IPBA and have attended events organised by the Japan Chapter of the IPBA. These were very rare opportunities to meet and exchange ideas with high-profile top lawyers and/or rising young lawyers in other firms in Japan and it was the IPBA that provided me with such opportunities, as envisaged by the 'Spirit of Katsuura'. In addition, when I attended the Annual Meeting and Conferences outside of Japan, I could always meet and soon become friends with so many nice, kind and outstanding overseas lawyers who seem to share the 'Spirit of Katsuura'. That may be the real reason why I joined and continue to be a member of the IPBA. I will continue to love the IPBA as I hope you may also.

The Secretary-General's Message

This issue of the Journal deals with 'Restructuring, Insolvency and Liquidation', a timely topic in the light of the need for a systematic review of insolvency proceedings, which in some jurisdictions may have seen an increase in activity coming out of the pandemic. The stigma that surrounds such proceedings for the companies involved has to be addressed while simultaneously resolving the age-old question of time and costs versus desired outcome. Rehabilitation is generally preferred as it is perceived as the better option for the business community and we all hope that legal procedures will result in practical solutions. In cases where liquidation is inevitable, a measured legal approach is hoped for to serve the interests of all stakeholders and to lessen the pain for all concerned. Advances in technology may also offer some solutions for the courts in arriving efficiently at a solution. I look forward to reading the articles in this edition and, more importantly, to attending the sessions that the Insolvency Committee, under the leadership of its current Chair, Hiroe Toyoshima, may have for us in Chicago.

I must take time here to give a warm congratulations to our very first Nobuo Miyake Fellow: Manas Kumar Chaudhuri. His project is on Competition Law and he plans to map out economic laws in various jurisdictions in a 'Hub & Spoke Model'. Using this model, he hopes to assess what would be efficient in economic terms with the best outcomes possible. It is a very ambitious project indeed and we should all be excited to see the results. For the favoured few who would be asked to assist him in his project, please do make yourselves available!

For those of you who have not yet registered for Chicago, please do register soonest and take advantage of the early bird conference rates! The numbers for early bird registration for the Chicago conference have broken records so it is unlikely that the early bird registration deadlines will be extended. So, do hurry.

In the meantime, our President-Elect Michael Chu has a wonderful surprise waiting for you in Chicago. It will be a wonderful slice of Americana. On the welcome night we get to go to Wrigley Field to watch a major league baseball game! Here's just a piece of trivia: Wrigley Field is the second oldest ballpark in the world. It will be a game between no less than the LA Dodgers against the Chicago Cubs and none other than the amazing Shohei Ohtani is expected to play that evening, perhaps along with the Cubs' pitcher, Shota Imanaga! It will be an epic game and tickets are already in demand. There will be limited seats available on a first-come-first-served basis to conference registrants only. Each early registration will receive the option for one free ticket, which includes transportation to the stadium and a food voucher for use there. Limited additional tickets may be available to early registrants for their guests. For top conference sponsors, we will make available a limited number of all-inclusive suites at an additional charge. So do register and be ready to be among those who will have the chance to get these tickets and reserve a suite. This is a once-in-a-lifetime experience, and is only the first day of the conference! See you all in Chicago!

Jose Cochingyan III

Publication Committee Chair's Message

Olivia Kung

Dear Readers,

Welcome to the exciting new edition of our journal, featuring fresh sections dedicated to peculiar laws from around the world, updates on law from our committees, insights into global cultures and festivals, as well as highlights from recent IPBA events.

I would like to express my sincere gratitude to all the contributors who have generously shared their work for our new sections! It has been a truly enlightening journey to delve into the various laws and cultures that influence our global community. With our members spanning diverse regions across the world, the Journal serves as an invaluable platform for exchanging legal insights and ideas, while also enriching our understanding of each other's cultures.

In line with our long-established tradition of highlighting a central theme in each issue, this edition will spotlight a critical theme: Bankruptcy, Liquidation and Insolvency.

In light of the recent global financial downturn, many businesses and individuals are confronted with the difficult choice of either winding down their operations or declaring bankruptcy. This challenging landscape has spurred significant interest among our members, resulting in a remarkable influx of article submissions.

The contributions we have received span a broad spectrum of issues, including but not limited to:

- *Legal Framework and Processes:* An overview of the laws governing insolvency and the procedural steps involved.
- *Dispute Resolution:* Insights into arbitration processes for resolving disputed debts.
- *Impact on Employees:* Exploring how insolvency affects the workforce and employee rights.
- *Cross-Border Insolvency:* Challenges and considerations in international insolvency cases.
- *Environmental, Social, and Governance (ESG) Issues:* Examining the intersection of insolvency and ESG principles.

I hope that the articles will offer valuable insights into this area of law across various jurisdictions for those of you practising in this field or looking to deepen your understanding of these legal matters.

Last but not least, I hope that you love the Journal's new look as much as I do. If you have any feedback or suggestions, please don't hesitate to reach out. Happy reading!

Events

Hong Kong

IPBA Regional Conference in Hong Kong

The 2024 Hong Kong IPBA Regional Conference was held on 1 March 2024 at the Grand Ballroom of Hotel Alexandra. AIA was its Platinum Sponsor and Cathay Pacific its Exclusive Airline Sponsor.

Hong Kong has been recovering from the rampage of the COVID years (from January 2020 to January 2023) and there is a determination in the city to regain its shine as the premier East-meets-West financial hub. The Organising Committee therefore chose ‘Hong Kong: Back to Business’ as the theme of the Conference. It also decided to hold panel discussions on four relevant and captivating legal topics: family office, international arbitration, green finance and corporate restructuring.

The IPBA is known for networking opportunities. A well-attended cocktail

reception was held on the eve of the Conference at The Hong Kong Club, a premium venue at the heart of the business district.

The Conference began with a scintillating opening speech by Dr The Hon. Geoffrey Ma, former Chief Justice of the Hong Kong Court of Final Appeal. Mr Justice Ma emphasised Hong Kong's commitment to the rule of law and judicial independence. He outlined the constitutional framework under the Basic Law, highlighting protections for fundamental rights and freedoms, including judicial independence and common law principles. He also responded to criticisms of Hong Kong's legal system and emphasised the importance of transparency and accountability in maintaining public confidence. He reassured the audience of the judiciary's apolitical nature and the continued relevance of Hong Kong's legal system beyond 2047, underscoring its role in providing a stable foundation for business and community trust. Olivia Kung, the IPBA Publications Committee Vice-Chair (as she then was), then gave an introduction to the IPBA (for those not already IPBA members). She also spoke with confidence and commitment on the upcoming innovative changes to the IPBA's publications.

The first panel discussion on positioning Hong Kong as a family office hub was moderated by Eunice Tan, with Jeremy Lam, Richard Grasby and Daphne Duan as speakers. The panel discussed Hong Kong's attractiveness as a top location for family offices. With a strong legal framework and a favourable tax climate, Hong Kong provides exceptional flexibility and efficiency in establishing family offices. The new tax concessions provided in the Inland Revenue Amendment Ordinance were also explored. Besides the legal environment, Hong Kong's strategic location as a gateway to China, while maintaining strong worldwide links and its sophisticated financial infrastructure, also makes it stand out from its peer competitors.

The second panel discussion on how to return international arbitration to being cheap and quick was moderated by Denis Brock with Mariel Dimsey, Joanne Lau, Ben Bury and Cameron Hassall as speakers. The panel discussion focused on restoring international arbitration's core benefits of cost-effectiveness, speed and finality. The panel emphasised the importance of proactive case management under HKIAC rules and making clear the procedural rules to parties. Attendees joined the panel in exploring creative costs arrangements and reached the conclusion that Hong Kong's arbitration regime remained a robust and reliable alternative to traditional litigation.

Lunch then followed, during which the highlight was the speech from Duncan Lee, AIA's Director of Investment ESG. He spoke of his responsibility for driving ESG integration within AIA's Group Investment function, as well as continuously improving the AIA Investment ESG operating model, to consistently and significantly impact AIA's long-term financial results and its customers by driving sustainable behaviour with world-class investment solutions, expertise, industry leadership and best practices in process, control and systems.

The third panel discussion on mobilising capacity for green finance and sustainability was moderated by Vivien Teu with Karen Chan, Brian Tang and Ricco Zhang as speakers. The speakers delved into Hong Kong's recent development in the field of green finance, including more stringent ESG requirements for listed

companies. The panel also highlighted the development of sustainability bonds and the role of climate-conscious lawyering. The integration of ESG terms in commercial agreements was considered an important move for promoting sustainable finance, while the panel also explored the potential risk of litigation created by these terms. The panel discussed how these initiatives align with global standards and leverage Hong Kong's strengths as an international financial centre.

The fourth panel discussion on corporate rescue and getting back to business was moderated by Cos Borrelli with Dan Anderson, John Marsden and Eva Sit SC as speakers. The panel focused on Hong Kong's legislative reforms and cross-border arrangements that had solidified its position as Asia's premier financial and debt restructuring hub. The panel discussed the existing statutory framework for liquidation, the mechanism for cross-border insolvency cooperation with Mainland China and the recently passed corporate rescue bill. The panel further examined the demand for more creditor-friendly legislation and compared Hong Kong's regime with international practices, notably Chapter 11 Bankruptcy Codes in the US and Singapore's restructuring efforts.

Closing remarks were made by Jose Cochingyan, IPBA Secretary-General, who summed up the discussions in a crisp and concise fashion. He also drew the name of the winner of the lucky draw for a Cathay Business Class Hong Kong/Tokyo return ticket. The lucky winner was Sun Yabo, a lawyer from Guangzhou.

The Conference ended on a happy note with all looking forward to the next Hong Kong Regional Conference.

Fred Kan
Senior Partner, Fred Kan & Co, Hong Kong

France

IPBA Annual Dinner

In order to gather the Inter-Pacific Bar Association community and introduce the Association to as many colleagues with an interest in the Asia-Pacific region as possible, Frédéric Dal Vecchio (JCM France) arranged two annual dinners in Paris, bringing together between 25 and 45 lawyers and in-house counsel. The first dinner in January welcomed the President-Elect as part of the promotion of the annual congress and the second in June celebrated the beginning of summer in Europe. These festive events, which were much appreciated by our colleagues, enabled them to discover

the IPBA and a number decided to join us after listening to the various speeches given at the beginning of each dinner by the President-Elect and the JCM France on how the IPBA is organised, what it offers to its members (in particular the annual conference and the regional conferences), the association's membership database, and the networking activities which provide visibility on the various social networks and generate profitable contacts for IPBA members. In this respect, the various posts concerning the IPBA dinners in France generated between 2,000 and 2,500 views and were relayed through the respective networks of our colleagues.

These dinners were an opportunity to bring together colleagues from all areas of business and commercial law working as individuals and in small or large law firms. Colleagues

visiting or practising in Europe took advantage of their stay in France to take part in the Parisian dinners—it is not unusual to welcome visitors from Germany, Switzerland, Luxembourg, Belgium, Great Britain, Portugal, the Netherlands and the UAE, but also from Asia (Japan, Cambodia, Thailand, Singapore, Vietnam and Hong Kong) or Latin America (Brazil). These convivial moments help to maintain and develop the Katsuura spirit among members, and future members, of the Inter-Pacific Bar Association.

Frédéric Dal Vecchio

Partner, Frédéric Dal Vecchio, Neuilly-Sur-Seine

Webinar

Establishing Yourself in International Arbitration

On 14 March 2024, the IPBA's Legal Development and Training Committee successfully hosted a webinar entitled 'Establishing Yourself in International Arbitration'. Moderated by Martin Polaine from Brooke Chambers in London and Keanu (Long) Ou from Jin Mao Partners in Shanghai, the event featured distinguished speakers Karen Gough from 39 Essex Chambers in London, Liyu (Denning) Jin from Jin Partners in Shanghai, and Steven Lim from 39 Essex Chambers in Singapore.

The webinar's primary focus was exploring strategies and overcoming challenges in establishing a successful career in international arbitration. The speakers shared their experiences, offering insights into the pathways they took, the obstacles they encountered and providing practical advice for those seeking to build a career in this field.

The discussion began with the speakers recounting how they transitioned into international arbitration. Despite having different career paths, they all faced similar challenges, such as gaining recognition and establishing a reputation in the highly competitive international arbitration arena.

In addressing how to build a practice as an arbitrator, the speakers emphasised the importance of accumulating industry experience, continuously improving one's expertise and actively seeking opportunities to serve on arbitration panels to enhance one's professional standing.

When discussing the development of a practice as a party representative, the speakers highlighted the significance of networking, gaining experience in handling complex cases and understanding the intricacies of different legal systems.

A critical topic explored was whether it is advisable to focus on different

regions when serving both as an arbitrator and as a party representative to avoid conflicts of interest. The speakers offered their strategies for effectively managing these dual roles, advising practitioners to be cautious in their regional choices and to thoroughly consider potential conflicts.

The value of mentorship and shadowing programs was also strongly emphasised. The speakers agreed that learning from experienced professionals is crucial not only for skill development but also for accelerating one's career progression in international arbitration.

The webinar concluded with a lively Q&A session, where participants had the opportunity to engage directly with the speakers, delving deeper into the topics discussed. The event provided a wealth of knowledge and practical advice for practitioners at all levels, offering inspiration and guidance for those new to the field as well as seasoned experts. The successful conclusion of this webinar highlighted the importance of such platforms for knowledge exchange and professional development within the international arbitration community.

Keanu Ou
Counsel, Jin Mao Partners, Shanghai

Martin Polaine
Barrister, Brooke Chambers, London

Webinar

Educating Transactional Lawyers: A Panel Discussion on Training Lawyers for Transactional Practice

On 16 April 2024, the IPBA Legal Development and Training Committee ('LDTC') hosted a webinar on the topic of 'Educating Transactional Lawyers: A Panel Discussion on Training Lawyers for Transactional Practice'. This webinar was moderated by Raphael Tay of LAW Partnership, Malaysia. The panel of speakers consisted of Dr Arm Tungnirun (Chulalongkorn University, Thailand), Ong Ee-Ing (Singapore Management University, Singapore), James Jung (College of Law, Australia) and Dr Jason Chuah (University of Malaya, Malaysia), who discussed the gaps in current legal education systems that tend to emphasise litigation-centric curricula. The speakers highlighted that most law schools primarily focus on substantive law and legal analysis through case law, preparing students mainly for litigation rather than transactional practice. Given the rise of complex transactions like mergers and acquisitions, there is a growing need to balance law school curricula by incorporating transactional skills, such as negotiation, drafting, risk management and business acumen, which are vital for a career in transactional law.

The panellists emphasised the importance of experiential learning to bridge the gap between academic knowledge and the practical skills needed for transactional practice. They advocated for integrating more hands-on opportunities such as clinics, simulations and internships into legal education. For instance, Chulalongkorn University's new LLB program and Singapore Management University's 'practice-ready' courses, including their 'corporate transactions track', were cited as progressive examples. Both programs offer students exposure to real-world transactional law through specialised courses on contract drafting, negotiation tactics and M&A. Despite these efforts, challenges remain, particularly in translating practical expertise into effective teaching methods. The panel concluded that law schools should foster partnerships with practising firms to provide mentorship and exposure to real-world legal environments. They suggested that both legal practitioners and educational institutions share the responsibility of creating practice-ready professionals, with further emphasis on developing specialised tracks tailored to different legal career paths.

Rahael Tay
Partner, RDS Partnership, Kuala Lumpur

Vietnam

IPBA Regional Conference and Cocktail Reception in Ho Chi Minh City – Vietnam: The New Investment Terminus

On 6 September 2024, the Vietnam Chapter of the Inter-Pacific Bar Association hosted its Regional Conference and Cocktail Reception at the New World Saigon Hotel, Ho Chi Minh City. Themed 'Vietnam: The New Investment Terminus', this event brought together international and local legal experts and investors to explore the key factors driving foreign investment into Vietnam. The Conference highlighted the country's growing significance as a strategic hub for trade, manufacturing and innovation, making it a prime location for foreign direct investment ('FDI').

The Conference was honoured to welcome Mr Michael Chu, IPBA President-Elect, to visit Vietnam to promote IPBA Chicago 2025.

Opening Remarks and Conference Agenda

The event kicked off at 1:30 PM with welcome remarks from Ms Diep Hoang, Partner at Dilinh Legal and IPBA JCM for Vietnam, who introduced the Conference's goals and outlined the importance of Vietnam's evolving role in the global economy. The agenda featured a variety of presentations by notable speakers, each shedding light on different aspects of Vietnam's economic and investment landscape.

FDI Trends and Key Drivers

The session of Zunu Lee (Joon-Woo Lee), Director at Yoon & Yang (Vietnam) LLC and Cross-Border Head of Yoon & Yang LLC, focused on the current FDI trends and the factors driving foreign investment into Vietnam. Mr Lee highlighted the accumulated FDI in Vietnam as of March 2024, with South Korea leading with USD86.9 billion invested across 9,931 projects, followed by Singapore and Japan.

Vietnam's major trade partners in 2023 included China, the USA and South Korea, with South Korea ranking third in terms of trade volume. Mr Lee also emphasised key drivers of FDI, including land, infrastructure, labour, technology, capital, policy stability and incentives for investors.

Investing in Vietnam: Go Global with High Quality

Tran Ngoc Linh, Senior Partner at Dentons LuatViet, further examined Vietnam's appeal as a business-friendly environment, especially in the manufacturing and processing sectors. Ms Linh emphasised the country's strategic position and commitment to high-quality growth through its active engagement in international free trade agreements ('FTAs').

Ms Tran Ngoc Linh further elaborated on the various tax and customs incentives available to foreign businesses, such as corporate income tax reductions, exemptions for value-added tax on certain goods, and simplified customs procedures. These incentives, coupled with Vietnam's focus on high-tech industries and infrastructure development, create a favourable climate for foreign enterprises. Ms Linh also provided a comprehensive introduction on procedures related to company establishment along with some notable employment issues in Vietnam.

Intellectual Property: Investing in IP Assets and Understanding Trade Dispute Risks

Mr Michael Chu and Mr Jay Reiziss, Partner at McDermott Will & Emery, addressed the significance of IP in Vietnam's evolving business environment. They emphasised the

importance of developing strong IP portfolios to protect against legal disputes and trade risks. With Vietnam's IP laws increasingly aligning with international standards, businesses can better safeguard their patents, trademarks and trade secrets.

They also highlighted some key differences between the IP laws in Vietnam and other jurisdictions. These include shorter patent protection terms in Vietnam (10 years compared to 20 years in the US), a reliance on administrative bodies for trademark enforcement in Vietnam rather than courts, and a stronger focus on digital and software-related IP in the US. They elaborated on some notable issues for Vietnamese firms to consider when dealing with the US, as well as best practices for foreign investors in Vietnam's IP landscape. At the end of the presentation, they also discussed the US trade remedy laws, emphasising that understanding antidumping, countervailing duties and IP trade remedies are key for advising clients.

Legislative Reforms and Foreign Investment in Real Estate

Hai Nguyen (Partner, YKVN) provided insights into the legislative reforms affecting foreign investment in Vietnam's real estate sector. He discussed several policy highlights and drew attention to the change in the definition of foreign-invested companies for the purposes of land law.

Mr Nguyen also explained the pathways available to foreign investors looking to enter Vietnam's real estate sector, including participating in land auctions, bidding, acquiring land slots in IZ or hi-tech parks, and acquiring equity in local companies or acquiring a real estate project under development. He also provided a comprehensive guideline for owning houses in Vietnam by non-residents.

Conclusion and Networking Reception

The Conference concluded with a panel discussion featuring all of the speakers, led by Mr Raphael Tay, Partner at Law Partnership. This was followed by closing remarks from Mr Bui Tien Long, Partner at Likon Law. The day ended with a cocktail networking reception, allowing attendees to exchange insights and explore potential partnerships.

With over 65 attendants, the IPBA Regional Conference in Ho Chi Minh City provided invaluable perspectives on Vietnam's growing role as an investment hub and offered valuable insights for those looking to capitalise on its dynamic market.

Diep Hoang
Partner, Dilinh Legal, Ho Chi Minh City

Something New

Digital Dominant Enterprises Soon to Face Per Se Illegal Challenges in Competition Laws

Introduction and Background

The liberalisation of economies across nations in and around the early nineties of the previous century and the adoption of modern competition laws based on the rule of reason[1] by successive sovereigns has immensely benefitted dominant enterprises from being investigated and penalised for every complaint which may be filed or is likely to be filed by aggrieved parties against them before antitrust authorities from time to time. To date, nearly 140 countries have adopted modern competition laws.

The standard of proof for concluding that there has been contravention of the law justifying a penal order against a dominant enterprise has been 'abuse of dominance' and not 'dominant position per se', hence making available to such enterprises defendable safe harbour arguments.[2] In competition law investigations, such a standard of proof primarily means that the assessment of unilateral economic and commercial conduct and the position of market power of a dominant enterprise thereof must be investigated within the ecosystem in which it operates. Therefore, investigation cannot merely establish 'dominance' of the enterprise in the relevant product or geographic markets to conclude contravention of the law but it must be a conduct-based analysis of 'abuse of such dominant position'.

Therefore, the importance of and reliance on microeconomic theories, coupled with the procedural standard of the rule of reason, more particularly in abuse of dominance cases, has meant that a reasonably complex evidentiary standard of proof against any dominant enterprise has become unavoidable in competition law adjudication. Competition/ antitrust law is essentially a mix of microeconomics and law so that every investigation by a competition authority assumes a complex procedure which at times takes longer to reach a logical conclusion. Contrary to the foregoing, the intent of the law is against delay as markets are too dynamic and any uncertainty arising out of procedural delay could make any final orders infructuous.

Until recently, the procedural law to inquire into and investigate any allegations of abuse of dominance has mostly been based on the analysis of market effects which any dominant enterprise may cause or is likely to cause upon other stakeholders in those markets. Thus, depending on the consequences of economic harm, as may be evident from the unilateral conduct of the dominant enterprise(s), the competition authorities may resolve such harm either by behavioural or structural remedies as per the statutory provisions which govern the authorities. Behavioural remedies are typically based on directing the contravener with a 'cease and desist' order and/or 'imposing penalties' both on the enterprise as well as on the individuals of the enterprises who are found to have been responsible for and/or contributed to the occurrence of such contraventions. Structural remedies—though not a common feature—at times are resorted to when the behavioural remedies do not adequately meet the remedial standards *qua* the harm to stakeholders. These remedies typically consist of directing division of the dominant enterprises when the proposed division which is likely to be hived off is directed to be acquired by some other independent enterprises under the supervision of the authority via independent external monitory agencies to complete the process of the acquisition.

However, the analysis of 'effects on markets' and the investigative techniques thereof have been undergoing rapid changes. The procedural standards of the rule of reason, especially in respect of non-traditional market players, are increasingly becoming debatable. Thus far, the evolution of the competition law, relating to the abuse of dominance, has more or less been in respect of traditional enterprises or, simply put, in a market structure where buyers and sellers are primarily operating physically.

The markets gradually changed from physical to online and have, in the last few years, especially after the Covid pandemic, exponentially been tilting towards online models. This shift has brought with it multiple opportunities and challenges of doing business. These disruptions have engaged the attention of competition authorities to assess and meet these newer challenges. To name a few challenges in online marketplaces, one example is the concept of 'multisided markets' where an individual, for example, may be a traveller and require options of travel besides boarding and lodging and local transportation at the destination. Thus, the online marketplaces may be equipped to provide multiple services through a network, for example, from airline ticketing to hotel reservations to arranging the services of local cab aggregators to arranging business meetings; the list goes on. Therefore, 'network effects' have become one of the key elements for understanding the overall online market when each market, within the business chain, is a separate independent business and the ultimate beneficiary is an individual traveller. The ultimate beneficiary undoubtedly becomes better off as far as overall enhancement of economic efficiencies are concerned, although at a higher total cost. The nuances of these interconnected independent online markets are so complex that the competition authorities need to enhance their domain knowledge on technology beyond the classical literature of competition law relatable to traditional markets. Physical interfaces in the online marketplaces between upstream raw material suppliers and end consumers via the manufacturers and distributors have blurred.

These inherent challenges between traditional and online marketplaces have prompted policymakers and other stakeholders to think beyond the classical literature of competition economics and law which ultimately resulted in suggesting a comprehensive competition law for regulating enterprises operating within digital markets. The Digital Markets Act ('DMA') was introduced by the European Union ('EU').[3] Other nations followed it for their respective jurisdictions based on their overall economic policies and governing constitutions. The core intent and objectives of DMA-type legislation is to monitor, regulate and control the unfettered growth of big digital enterprises—popularly called the 'Big Tech' companies—from disrupting the market ecosystems. The market disruptions by Big Tech companies may marginalise the rest of the players in the markets. Such marginalisation may force many enterprises to exit the markets prematurely and permanently. The top Big Tech enterprises, per the DMA, are primarily Google, Meta, Apple, Microsoft and Amazon ('Big Tech').

Indian Scenario

Pursuant to publishing the 53rd Report of the Parliamentary Standing Committee, a Committee on Digital Competition Law was constituted by the Government of India[4] ('the Committee') to review the existing regime under the Competition Act 2002 (as amended from time to time) and to evaluate the need for an *ex-ante* procedure for digital markets as opposed to the existing *ex-post facto* procedures of competition law framework for all markets operating within India. The Committee held a series of consultations with key stakeholders, but not expressly with consumer associations, and examined both the domestic legal framework and the international regulatory practices for regulation of digital services. A policy document dated 27 February 2024 was published in early March 2024 and the digital competition policy and

the Draft Digital Competition Bill were made available to stakeholders for comments, if any. The policy document of the Digital Competition Law states as follows:

> Widespread adoption of technology and rapid growth of digital businesses have had a significant impact on the Indian society and the economy. Digitalisation has fundamentally changed the way consumers interact with each other and with providers of goods and services.
>
> Digitalisation may have several pro-competitive benefits. Market contestability and fair practices encourage innovation and the creation of new products and services. A robust governance framework is, however, needed to support an orderly expansion of the digital ecosystem and address potential anti-competitive harm.
>
> The current ex-post framework under the Competition Act, 2002 was conceived with a view to ensuring contestability and fairness in traditional markets, at a time when it was not possible to imagine the current scale of digitalisation. Certain aspects of the ex-post framework, including the time-consuming nature of enforcement proceedings, may not be appropriate for digital markets, given the unique characteristics of such markets. Recent times have also seen widespread stakeholder concerns about potential anti-competitive behaviour of large enterprises providing digital services.[5]

Interestingly, the principal competition law of India, the Competition Act 2002, has been comprehensively amended in April 2023[6], which attempts to meet the gaps in the enforcement of principal law relating to 'abuse of dominance' more cogently. The procedural or operational regulations of the newer amended provisions are currently being notified by the Competition Commission of India ('CCI') from time to time, ensuring smooth implementation of the amended law. The existing Competition Act 2002 is sector agnostic legislation. It empowers the CCI to investigate both traditional and non-traditional, that is, the digital enterprises as and when allegations have been made before it by aggrieved parties. Thus far, even Big Tech enterprises have repeatedly been investigated by the CCI along with its investigating wing, the office of the Director General ('DG'), and quite a few such adjudicatory actions are sub-judice, either before the Appellate Tribunal or before the CCI. It is noteworthy that some of the Big Tech enterprises challenged the investigating processes along with the jurisdiction of the CCI and the DG before the Constitutional Courts ('High Courts of India') in writ jurisdictions but failed to convince these higher courts, including the Supreme Court of India, in final appeals. Thus, despite being a sector agnostic authority, the CCI's jurisdiction to investigate Big Tech in allegations of abuse of dominance in digital markets has been settled at the highest level of the judicial hierarchy in India.

With the introduction of the Digital Competition Policy and the Draft Digital Competition Bill ('DCB'), the existing strong enforcement mandate of the CCI and its investigating wing may become far stronger than ever before against digital enterprises. However, it is reiterated that the Supreme Court of India has repeatedly confirmed the jurisdiction of the CCI on merits and points of law to investigate allegations of abuse of dominance against digital enterprises and all such decisions besides binding the CCI, bind all other inferior courts of India.

It is interesting to note that the Committee, besides other recommendations, has recommended two important aspects while issuing the Policy Document. First, it laid down a framework of 'enforcement' and second, it also suggested possible 'remedies'. These recommendations are shared verbatim below.

> ***Enforcement***
> The Committee recommends borrowing the procedural framework from the Competition Act for the purposes of the Draft Digital Competition Bill (DCB), given that the enforcement of both these laws is to be entrusted with the CCI. The Committee also strongly advises that the CCI must strengthen the capacity of its Digital Markets and Data Unit with experts from the field of technology to keep pace with the rapid evolution of digital markets. Further, the Committee recommends instituting a separate bench within the National Company Law Appellate Tribunal to ensure timely disposal of appeals filed against the CCI's orders, particularly those relating to digital markets.
>
> ***Remedies***
> The Committee proposes that a monetary penalty for noncompliance with ex-ante

obligations is restricted to a maximum of 10% of the global turnover of the Systemically Significant Digital Enterprises ('SSDE') in line with the penalty regime under the Competition Act. Additionally, in cases where the SSDE is part of a group of enterprises, the Committee recommends that the 'global turnover' cap is calculated in relation to the turnover of the entire group. The Committee further recommends that the precise quantum of penalty be determined by the CCI with due regard to the penalty guidelines under the Draft DCB. In addition to the above, separate penalties have been provided for contraventions resulting from incorrect reporting and vicarious liability of key managerial persons.

The DCB of India is a subset of the existing Competition Act of India. The DCB limits the CCI's mandate to adjudicate and regulate only dominant Big Tech Companies including enterprises of Indian origin breaching the thresholds *via* the *per se illegal ex-ante* route, unlike abuse of dominance based on the rule of reason per the principal Competition Act. It does not, therefore, confer any mandate on the CCI to adjudicate or regulate collusive conduct of competing Big Tech enterprises, more specifically antitrust breaches relating to cartels and bid rigging.

Conclusion

We need to wait and watch the unfolding of these newer regulatory challenges intended to be implemented against dominant Big Tech enterprises. Last but not least, the end consumers who, to my mind, may have benefitted from digital ecosystems thus far but may not have been seriously consulted while drafting the Digital Competition Bill, may like to share their views if the opportunity is given to them. If one were to conduct a survey of the ordinary prudently informed Indian citizen, including perhaps those of any other nations, and raise a single question as to whether they are aware of digital competition law, I am sure that nearly a majority, which could go as high as 75 per cent, may feign ignorance about this hot topic engaging the attention of all stakeholders except consumers. That is precisely the bottom line and takeaway of this article. It is too early to either support the Draft Digital Competition Bill of India or discard the same forthwith without assessing its merits and demerits. There are substantial overlaps with other legislation which may impact enforcement of the proposed DCB, hence the competition authority must upgrade its domain knowledge as also recommended by the high-powered Committee. The laws relating to information technology, data privacy and intellectual property of India are some of the laws which may need to be looked into carefully to ensure harmony among independent enforcing authorities and to minimise the waiting periods in concluding important quasi-judicial decisions.

Endnotes

[1] An analysis to determine if an agreement possibly restricts competition through examination of the agreement's positive and negative antitrust effects.

[2] Rules used to find that conduct is lawful (as opposed to presumptions of illegality) in certain situations and if certain conditions are met.

[3] The DMA entered into force on 1 November 2022, the Rules started applying on 2 May 2023, thresholds were notified on 3 July 2023, designation of gatekeepers was announced on 6 September 2023 and obligations of enterprises commenced in March 2024.

[4] 6 February 2023.

[5] Extract from the Preface of the Policy document of Digital Competition Law.

[6] Obtained assent of the President of India on 11 April 2023.

Manas Kumar Chaudhuri
Partner and Lawyer, Khaitan & Co, Delhi

Manas Kumar Chaudhuri is a Competition and Antitrust Law Partner in Khaitan & Co, a full-service Indian Law Firm, and is currently Co-Chair of the IPBA Competition Law Committee. His qualifications include B.Sc., M.A. (History), LL.B., LL.M., PG Diploma in International Law, Institutions and Diplomacy and PG Diploma in Personnel Management and Industrial Relations.

Manas has over 24 years of experience and advises Indian and foreign clients on competition law and policy and related legal/regulatory issues including merger control. He regularly argues before the Competition Commission of India and the National Company Law Appellate Tribunal and occasionally before the higher constitutional courts on competition law matters.

Legal Perspectives on Foreign Entities' Participation in China's Insolvency Proceedings

With the deepening of global economic integration, cross-border insolvency cases are increasing and the need for cross-border insolvency cooperation is becoming more and more urgent. As an important part of the world economy, the construction and improvement of China's cross-border insolvency legal system is of great significance for protecting the legitimate rights and interests of domestic and foreign creditors and promoting international economic cooperation. This article conducts an in-depth discussion on the legislative status, judicial practice and challenges faced by China's cross-border insolvency recognition and assistance, and puts forward corresponding suggestions for improvement, with a view to providing a reference for foreign entities to participate more effectively in insolvency proceedings in China.

Introduction

In the context of economic globalisation, it has become normal for enterprises to carry out overseas transactions and cross-border operations and the problem of cross-border bankruptcy has also become prominent. Cross-border insolvency involves different national and regional legal systems, judicial systems and creditor interests, so its handling is far more complicated than domestic insolvency cases. China has also faced increasing challenges in the field of cross-border bankruptcy in recent years. The purpose of this article is to analyse the current situation of cross-border bankruptcy recognition and assistance in China, and to discuss how to better integrate with international standards and improve the efficiency and fairness of cross-border bankruptcy treatment.

Current Status of China's Legislation on Cross-border Insolvency Recognition and Enforcement

In 2007, China implemented the 'Law of the People's Republic of China on Enterprise Bankruptcy', Article 5 of which provides that it shall also be effective for the debtor's property located outside of China, for legally

effective verdicts or rulings made by foreign courts on bankruptcy cases, if they involve the debtor's property within the territory of China and the foreign court applies for or requests recognition and execution from the Chinese court, the Chinese court will conduct a review based on international treaties or the principle of reciprocity.

It is the first time that China has legislatively clarified the recognition and assistance mechanism for cross-border bankruptcy, providing a legal basis for Chinese courts to handle cross-border bankruptcy cases. However, the provisions of the law are relatively principled and lack specific operational rules, resulting in many uncertainties in practice.

In 2021, 'Opinions of the Supreme People's Court on Launching a Pilot Project on Recognizing and Assisting Bankruptcy Proceedings in the Hong Kong Special Administrative Region' ('Opinions') was issued. The Supreme People's Court and the Government of the Hong Kong Special Administrative Region ('HKSAR') held talks and consultations on the reciprocal recognition of, and assistance to, bankruptcy proceedings by the courts of Mainland China and the HKSAR in connection with judicial practice. It also clarifies that the pilot shall be taken in areas as Shanghai, Xiamen and Shenzhen.

The Opinions adopt the principle of universalism of amendment, and while adhering to the attitude of cooperation, it also stipulates the conditions and methods of recognition and assistance, which is embodied in the following aspects:

1. It clearly recognises and assists the conditions for Hong Kong bankruptcy proceedings and controls risks.

2. The appropriate regulation of the performance of duties by Hong Kong bankruptcy liquidators in Mainland China and the performance of duties involving major property rights and interests in Mainland China shall be separately approved by the courts of the PRC.

3. After the courts of the PRC recognise the Hong Kong bankruptcy proceedings, they may appoint a Mainland China bankruptcy administrator to handle the debtor's assets and affairs upon application.

4. The debtor's bankruptcy estate in Mainland China gives priority to the repayment of the Mainland's preferential creditor's rights and pays attention to protecting the interests of the Mainland's creditors.

Judicial Practice of Cross-Border Insolvency Recognition and Enforcement in China

In recent years, China's courts have actively explored cross-border bankruptcy recognition and assistance. In the judicial practice of China's bankruptcy judgments being recognised, a typical example is that on 12 August 2014, Gloria M Burns, Chief Judge of the US Bankruptcy Court for the District of New Jersey, approved a petition filed with the US court by representatives of Zhejiang Jianshan Optoelectronics Co., LTD., which was undergoing bankruptcy reorganisation proceedings in China, recognising the extraterritorial effect of the Chinese bankruptcy reorganisation process in the United States in this case and immediately granting corresponding bankruptcy relief.[1]

In 2020, an applicant of Hong Kong filed an application for the appointment of provisional liquidators in respect of Ando Credit Limited, a Hong Kong company. The applicant made it clear to the court that the appointment of provisional liquidators was to seek judicial recognition in Mainland China so that the Hong Kong liquidators could recover the huge amount of receivables owed by Mainland debtors to Antao. In considering the application, the judge held that under the Law of the People's Republic of China on Enterprise Bankruptcy, liquidators appointed by the Hong Kong courts can be recognised by the courts of the PRC and finally granted the applicant's application and specifically allowed the provisional liquidators to apply to the Bankruptcy Court of Shenzhen for recognition, subject to the approval of the Hong Kong Court at all stages.

In 2023, The First Intermediate People's Court of Beijing Municipality applied the principle of reciprocity in law to recognise the bankruptcy ruling made by the Court of Aachen, recognised the status of the German bankruptcy administrator, and allowed it to perform necessary duties in Mainland China.[2] The Third Intermediate People's Court of Shanghai Municipality recognised the compulsory liquidation proceedings and the status of the liquidators of Ozner International Group Limited in Hong Kong and allowed the liquidators to perform their duties in accordance with the law in Mainland China.[3]

Such cases not only demonstrate the openness of Chinese courts in cross-border bankruptcy cooperation, but also provide valuable experience for the improvement of China's cross-border bankruptcy legal system. In spite of this, the judicial practice of cross-border bankruptcy recognition and assistance in China still faces many challenges. On the one hand, there is a conflict of laws in the recognition of foreign bankruptcy proceedings due to the differences in the bankruptcy legal systems of different countries. On the other hand, cross-border bankruptcy cases involve multiple interests, and how to balance the interests of all parties and ensure fairness and impartiality is an issue that the judiciary needs to think about in depth.

Proposals for Foreign Entities' Participation in China's Insolvency Proceedings

The proposal for foreign entities to participate in bankruptcy proceedings in China can be summarised and elaborated from the following aspects based on existing legal provisions and international cooperation practices:

Understand China's Legal Framework on Bankruptcy and Make Use of Cross-Border Mutual Legal Assistance Mechanisms

Foreign entities should first understand the Law of the People's Republic of China on Enterprise Bankruptcy and related judicial interpretations, especially the provisions on cross-border bankruptcy, understanding how the debtor's property outside the territory of China can be included in the scope of the bankruptcy estate. It can also seek cross-border judicial assistance from Chinese courts, as well as relevant international treaties or reciprocity principles signed with China.

Cooperate with Insolvency Administrators in China

In Chinese bankruptcy proceedings, foreign entities can establish cooperative relations with the bankruptcy administrators appointed by the court in China to jointly promote the bankruptcy proceedings. After being appointed by the court, the bankruptcy administrator has the right to exercise rights and assume obligations on behalf of the debtor, and foreign entities can protect their rights and interests through cooperation with the bankruptcy administrator.

Application for Recognition and Assistance

For liquidators or bankruptcy administrators, an application to the presiding court of the case for recognition of the foreign bankruptcy proceedings and the status of the liquidators or bankruptcy administrators can be taken in order to perform duties in China. During the application process, sufficient evidence and information shall be provided to prove that the bankruptcy proceedings meet China's review standards.

For foreign creditors, pay attention to the announcement of bankruptcy cases in China and contact the bankruptcy administrator to declare the creditor's rights within the deadline of the announcement. Such announcements are usually issued on the website of the National Enterprise Bankruptcy Information Disclosure Platform.

Conclusion

With the advancement of global economic integration, the issue of cross-border bankruptcy has become increasingly important. Although China has made progress in this area, it still faces many challenges. By refining legislation and strengthening international cooperation, China can further improve its cross-border bankruptcy legal system to better adapt to the development trend of global economic integration.

**Any reference to 'Hong Kong' or 'Hong Kong Special Administrative Region (HKSAR)' herein shall be construed as a reference to the 'Hong Kong Special Administrative Region of the People's Republic of China'.*

Endnotes

[1] Jingxia Shi and Yuanyuan Huang, 'Milestones on Cross-Border Insolvency Cooperation Between China and USA: Commentary on the Jianshan Guangdian Cases', Journal of Law Application, (2017), Vol4, pp 51–58.

[2] Case no., (2022)京01破申786号.

[3] Case no., (2022)沪03认港破1号.

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How to Successfully Handle Employee Issues in an Enterprise Bankruptcy: Challenges and Key Solutions in China

The bankruptcy of an enterprise significantly impacts every employee involved. and the placement of employees is a critical step during the bankruptcy process. Based on legal provisions and our practical experience, the authors have compiled in this article the latest common issues and advice regarding employee placement in China

Different Requirements for Employee Placement Based on Different Bankruptcy Applicant Entities

Introduction

With regards to the initiation of bankruptcy proceedings in relation to an enterprise, a bankruptcy application may be filed by creditors, debtors or individuals responsible for liquidation when the corporate entity has been dissolved but has not been liquidated or has not completed liquidation and its assets are insufficient to settle its debts. The requirements for employee placement differ depending on the entity filing the application.

For instance, when the debtor files for bankruptcy, according to Article 8 of the PRC Enterprise Bankruptcy Law, the employee placement plan and the statement of payment of employees' wages and contribution of social insurance premiums must be provided as essential documents when submitting the bankruptcy application to the court. If these documents are not provided or fail to meet the requirements, the court will not accept the bankruptcy application.

However, for creditors, according to Article 11 of the PRC Enterprise Bankruptcy Law, the employee placement plan is not a required document in the bankruptcy application. Nevertheless, the debtor must cooperate with the court in submitting relevant documents, such as wage payments and social insurance contributions.

Formulating Employee Placement Plans When the Debtor Files for Bankruptcy

A. Preliminary Preparations

The debtor should first conduct a thorough investigation of its current employment relations, including employees' names, gender, ages, years of service, average wages over the past 12 months, contract types and any special circumstances. Additionally, the survey should determine whether the debtor has any outstanding wages, unpaid social insurance premiums or housing fund contributions. This helps calculate the cost of employee placement.

The attitudes and emotional state of employees in relation to this employee placement plan are also important aspects that the debtor should understand. Fully and accurately understanding these factors will facilitate better negotiations and communication with employees, help properly alleviate their emotions and prevent collective incidents.

During cost calculation, the debtor should pay attention to:

1. the cost calculation of statutory severance pay; and
2. determination of the termination date of employment contracts in bankrupt enterprises.

According to Article 46 of the PRC Employment Contract Law, when terminating or dissolving employment contracts under Articles 36, 41(1) and 44(4), employers must pay statutory severance pay. The calculation of statutory severance pay is related to years of service and the termination date of the employment contract directly affects the calculation of years of service. Therefore, determining the reference date for the termination of employment contracts in a bankrupt enterprise is a crucial issue for cost calculation. Recent judicial cases show that the courts tend to consider the date of the bankruptcy declaration as the termination date of employment contracts. This is because, upon the declaration of bankruptcy, the employer's qualification as a party to the employment contract ceases to exist. Additionally, for employees hired before 1 January 2008, the effective date of the PRC Employment Contract Law, segmented calculations following different applicable formulas should be considered.

B. Procedures for Drafting Employee Placement Plans

As per Article 4 of the PRC Employment Contract Law, employee placement plans, being major issues directly affecting employees' interests, must follow these procedures:

1. Discussing the plan with the employee representative assembly or all employees, proposing the plan and opinions and negotiating equally with the trade union or employee representatives.

2. During the implementation of the employee placement plan, if the trade union or employees find it inappropriate, they have the right to propose modifications through negotiation.

3. The employee placement plan must be publicised or communicated to the employees.

The PRC Company Law, effective from 1 July 2024, emphasises employees' rights to democratic management and participation in corporate governance, in which Article 17(3) adds that during bankruptcy application, the opinions of the trade union and employees must be heard, aligning with the democratic procedures required by Article 4 of the PRC Employment Contract Law.

In principle, no trade union or employee's consent to the placement plan is required before implementing. However, state-owned enterprises face stricter requirements and more complex procedures, including the requirement to obtain the consent of the majority of employees to the placement plan.

C. Content of Employee Placement Plans
Generally, typical employee placement plans include:

1. Background, applicable laws and guiding principles. That information will help both the employees and the trade union understand the reasons and circumstances of this employee placement.

2. Employee categories and placement options. Enterprises usually categorise employees based on their employment status and any exceptional circumstances are considered. The categories include, but are not limited to, direct hiring, labour dispatch, outsourcing, rehired retirees and special groups, such as sickness, work-related injuries and female employees during pregnancy, childbirth and breastfeeding. The placement options typically include termination, dissolution or alteration of employment contracts. For terminated or dissolved employment contracts, the placement plan should clearly outline the statutory severance pay methods. For employment contracts with changed parties, the plan should specify the details regarding the new contracting entity, the cumulative calculation of years of service, the new position and the salary and benefits post-change.

3. Other issues. The placement plan might address, for example, overdue wages, social insurance fees and housing provident fund issues and specify measures for handling or paying these arrears.

D. Submission of Employee Placement Plans with Bankruptcy Applications
When the debtor applies for bankruptcy, they must submit the employee placement plan and the status of wage payments and social insurance contributions as per Article 8 of the PRC Enterprise Bankruptcy Law.

The above outlines the work that the debtor, as the bankruptcy petitioner, must undertake regarding the employee placement plan.

No Mandatory Requirement for the Employee Placement Plan When Creditors Apply for Bankruptcy

For bankrupt enterprises when creditors submit applications, according to Article 11 of the PRC Enterprise Bankruptcy Law, the court shall serve the debtor within five days from the date of the ruling. The debtor shall, within 15 days from the date of service of the ruling, submit to the court a statement of assets, a list of debts, a list of creditors, relevant financial accounting reports, and information on the payment of employee wages and the contribution of social insurance premiums. If the enterprise refuses to submit to the court or submits false information regarding the payment of employee wages and the payment of social insurance premiums, the court may impose fines on the responsible individuals in accordance with the law.

Therefore, the debtor only needs to cooperate with the court to submit relevant personnel information, namely the payment of employee wages and the contribution of social insurance premiums, without the need to submit an employee placement plan.

Employee Creditor Rights

Handling Employee Creditor Rights Post-Court Acceptance of Bankruptcy Application

After the court accepts the bankruptcy application and until the end of the bankruptcy process, two major entities play crucial roles: the administrator appointed by the court, responsible for managing the debtor's property and investigating its status and the creditors' meeting, which verifies claims, supervises the administrator and makes decisions on major issues.

When the court accepts a bankruptcy application, an administrator is simultaneously appointed. The formation of the creditors' meeting requires the declaration of creditor rights. Creditors who have declared their creditor rights pursuant to the law shall be the members of the creditors' meetings, having the right to participate in creditors' meetings.

Although employee creditor rights generally do not require declaration (handled by the administrator's investigation), according to Article 59 of the PRC Enterprise Bankruptcy Law, employees and trade union representatives should participate in creditors' meetings and express opinions on relevant matters.

The steps for an administrator handling employee creditor rights are discussed below.

Declaration and Investigation of Employee Creditor Rights

According to Article 48 of the PRC Enterprise Bankruptcy Law, employee creditor rights do not require proactive declaring by creditors but are investigated by the administrator. The administrator may request the debtor to provide documents such as employment contracts, attendance records and labour arbitration awards and then publicise a list of employee creditor rights. After completing the basic investigation, the administrator can gather information from employees and inquire about unpaid wages to supplement any gaps in the initial voluntary investigations, similar to a declaration process.

Determination of Employee Creditor Rights' Scope

The definition of 'wages' in employee creditor rights has been a point of contention in recent cases. While 'wages owed by the debtor to the employees' is defined in the PRC Enterprise Bankruptcy Law, the concept of 'wages' under labour laws might differ from the same term used in bankruptcy laws. For instance, whether performance-based bonuses linked to achievements constitute part of the 'wages' or 'wages owed by the debtor to the employees' varies among different courts. Therefore, bankrupt enterprises need to pay particular attention to how to determine the scope of employee creditor rights.

Publicising Employee Creditor Rights

As per Article 48(2) of the PRC Enterprise Bankruptcy Law, the administrator must publicise the list of employee creditor rights after investigation. Employees can request corrections if they disagree with the list. If the administrator refuses, employees can file a lawsuit in the court.

Common Issues and Solutions in Employee Placement During Bankruptcy

Status of Employment Relations During Bankruptcy Reorganisation

During bankruptcy reorganisation, employment relations can either be terminated or continue, but both carry certain peculiarities due to the abnormal status of the enterprise.

A. Dissolution of Employment Relations

<u>Legal Basis</u>

During bankruptcy reorganisation, the debtor enterprise can reduce personnel according to Article 41 of the PRC Employment Contract Law following the legal procedure: (1) the debtor shall explain the situation to the trade union or all employees 30 days in advance and seek the opinion of the trade union or the employees; and (2) the debtor may carry out the retrenchment exercise upon reporting the retrenchment scheme to the labour administrative authorities. Interpretations of this reporting requirement vary by region—some see it as a mere record-keeping step, while others require administrative approval.

However, the above procedure will not be required if the number of collectively terminated employees is less than 20 and 10 per cent of the total employees.

<u>Expenditure</u>

Article 82 of the PRC Enterprise Bankruptcy Law outlines a different approval process for paying statutory severance pay during reorganisation, which is different from the process for paying statutory severance pay under other normal circumstances. If the reorganisation plan has been approved and the court has ruled on it, the debtor must pay employees according to the plan. If the debtor fails to execute the reorganisation plan, the court can terminate the plan and declare bankruptcy upon request by the administrator or interested parties, with employee benefits and legal compensation addressed according to liquidation priorities.

B. Continuation of Employment Relations

After reorganisation begins, the enterprise continues operations and the administrator takes over. Although the enterprise is in bankruptcy proceedings, the corporate entity remains and employment contracts with employees can continue, which includes wages, social insurance and housing fund payments. Under Article 25 of the PRC Enterprise Bankruptcy Law, during the period of bankruptcy and reorganisation of an enterprise, the administrator shall have the relevant management authority in respect of employment relations and other matters, and at this point in time, if it involves any change in the salary standards and other treatment of the employees, in principle, it shall still be subject to the consensus of the administrator and the employees and the signing of a written agreement on the change in accordance with the provisions of the PRC Employment Contract Law.

Priority of Security Interests and Employee Creditor Rights

Article 113 of the PRC Enterprise Bankruptcy Law explicitly states:

> After the bankruptcy property is used to pay off bankruptcy expenses and common debts, it shall be used to pay off debts in the following order: (1) Wages, medical expenses, disability allowances, and pensions owed to employees, basic pension insurance and basic medical insurance premiums owed and required to be transferred into employees' personal accounts, and compensation payable to employees as stipulated by laws and administrative regulations ...

This grants priority to employees' claims in the bankruptcy property distribution process, second only to bankruptcy expenses and common debts.

According to Article 109 of the PRC Enterprise Bankruptcy Law, creditors with secured rights over specific property of the debtor have the right to priority repayment with respect to that specific property. Consequently, creditors with secured rights over specific property of the debtor have priority over employees' claims in the repayment of that specific property.

Conclusion

Employee placement in corporate enterprise bankruptcy is often more complex than the procedures outlined, especially in cases involving numerous employees across regions with historical unresolved issues, such as wage or social insurance arrears. Despite the complexities, lawful and reasonable employee placement remains a paramount concern and the key to the business's success in bankruptcy. Therefore, having reliable and experienced labour law experts involved in the bankruptcy process is crucial in China.

Endnotes

[1] The PRC Enterprise Bankruptcy Law (2006).
[2] The PRC Employment Contract Law (2012).
[3] The PRC Company Law (2023).

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Legislation and Practice of Bankruptcy Liquidation and Reorganisation in China

Introduction

In May 2023 the World Bank issued two important documents, namely the Business Ready (B-READY) 'Methodology Handbook' and 'Manual and Guide' for the Assessment of the New Business Environment, in which commercial bankruptcy was explicitly listed as one of the assessment indicators. Bankruptcy has become an important part of economic development recognised by the international community.

As far as China is concerned, the word 'bankruptcy' has a strong negative meaning in the traditional sense. Chinese people like to say 'booming business' and 'Gong Xi Fa Cai'. When they hear that someone is bankrupt, they will think that the person has fallen into a penniless and miserable situation. However, bankruptcy under the modern concept of rule of law is actually the common protection of the rights and interests of honest people, legitimate enterprises and creditors. In order to consolidate this awareness of the rule of law and establish and improve the relevant judicial system, China has made great efforts over the years and achieved remarkable results.

From the perspective of a Chinese lawyer in the field of bankruptcy, the development of bankruptcy procedure in China can be roughly divided into the practical stage of bankruptcy liquidation and the innovative exploration stage of bankruptcy reorganisation, which will be explored further in this article.

Bankruptcy Liquidation

As far as the practical stage of bankruptcy liquidation is concerned, China has completed the exploration of the first bankruptcy case discussed below, before promulgating the first national bankruptcy law.

Against the background of the lack of bankruptcy law in the early stage, Shenyang City was the first to embark on the difficult and tortuous road of exploration from June 1984, when the Collective Economic Office of Shenyang Municipal Government undertook the preparatory work for the bankruptcy 'experiment'. After investigation and demonstration, six drafts were changed and the drafting of the Trial Provisions on Bankruptcy and Bankruptcy of Urban Collective Industrial Enterprises in Shenyang ('Trial Provisions') was basically completed by the beginning of 1985. It was formally adopted at a meeting on 9 February 1985 and issued in the form of municipal government documents.

At that time, Shenyang Explosion-Proof Equipment Factory, which was founded in 1966, had been losing money and owed a large amount of foreign debt by the end of 1984, with the total amount of debt as high as 480,000 yuan. On 3 August 1986, the Shenyang Municipal Government held a press conference to officially announce the bankruptcy of Shenyang Explosion-Proof Equipment Factory. Xinhua News Agency sent out the news of 'the first enterprise officially declared bankrupt after the founding of New China' extremely quickly, which aroused strong repercussions at home and abroad.

Subsequently, on 2 December 1986, the 18th Plenary Session of the Standing Committee of the Sixth National People's Congress of China discussed and adopted the Enterprise Bankruptcy Law of the People's Republic of China (for Trial Implementation), which stipulated that the Law on Industrial Enterprises Owned by the Whole People shall be implemented three months after its implementation.

On 27 August 2006, the 23rd meeting of the Standing Committee of the Tenth National People's Congress of the People's Republic of China adopted and promulgated the Enterprise Bankruptcy Law of the People's Republic of China for the first time, which came into effect on 1 June 2007 and has been revised and used several times. At present, the law has 12 chapters, including:

1. general provisions;
2. application and acceptance;
3. administrator;
4. debtor's property;
5. bankruptcy expenses and common interest debts;
6. declaration of creditor's rights;
7. creditors' meeting;
8. reorganisation;
9. reconciliation;
10. bankruptcy liquidation;
11. legal liability; and
12. supplementary provisions.

The Law clearly stipulates many internationally recognised basic systems and practices in bankruptcy proceedings. The first is the system of isolation of bankruptcy property, that is, unless there are special circumstances, the liquidation of debts of bankrupt enterprises is limited to the bankruptcy property of the enterprise and the shareholders of enterprises do not need to bear joint and several liability for the liquidation of debts. Article 120 stipulates that if the bankrupt has no property to distribute, the administrator shall request the people's court to make a ruling to terminate the bankruptcy proceedings. The second is to appoint the bankruptcy administrator and let him perform the duties of managing the bankrupt enterprise. The third is to vote on many substantive issues in the bankruptcy proceedings in the form of creditors' meetings, such as the distribution of bankruptcy property, so as to take into account the interests of the subjects holding the most creditor's rights and interests, as far as possible, etc.

The promulgation of this law has greatly promoted the actual implementation of bankruptcy proceedings in China. Statistics from the Supreme People's Court of China show that from 2007 to 2020, courts nationwide accepted 59,604 bankruptcy cases, while from 2007 to 2015, the total number of bankruptcy cases accepted by courts ranged from 2,000 to 4,000. After 2016, the number of bankruptcy cases increased significantly, with 4,076 accepted in 2016, 7,405 accepted in 2018 and 13,369 accepted in 2020.

As far as Shanghai is concerned, according to the 'Overview of the Fifth Anniversary Work of the Shanghai Bankruptcy Court' issued by the Third Intermediate People's Court of Shanghai on 29 February 2024, since its establishment in February 2019, the Shanghai Bankruptcy Court has accepted 13,363 of various cases and concluded 11,507. Among the accepted cases, there were 6,473 bankruptcy cases, 5,075 compulsory liquidation cases and 1,815 derivative litigation cases. Through bankruptcy liquidation procedures, a total of 355.4 billion yuan of creditor's rights of more than 31,000 were cleared up and a total of 25.79 billion yuan worth of deposited assets were cleared up and disposed of, and more than 10,000 cases of execution backlog were resolved.

Bankruptcy Reorganisation

With the maturity of bankruptcy liquidation, there is a growing demand for the exploration of bankruptcy reorganisation in the field of bankruptcy in China. The majority of people, including legal practitioners, have

gradually realised that the greatest value and fundamental purpose of bankruptcy work may not always be to cancel enterprises that are difficult to operate and insolvent. On the contrary, if we can revitalise enterprises through a series of legal measures such as reorganisation, introduction of funds, debt reconciliation and so on, so that they can resume normal production and operation, it may create more valuable legal value, economic value and social value. Therefore, it is not advisable to simply and crudely liquidate and shut down enterprises.

At present, more and more enterprise debtors or creditors are directly applying to the people's court for reorganisation of debtors in accordance with the relevant provisions of the Enterprise Bankruptcy Law. Within six months from the date of the people's court's ruling on the reorganisation of the debtor, the debtor or the administrator shall submit a draft reorganisation plan to the people's court and the creditors' meeting at the same time. The draft reorganisation plan generally includes:

a. the debtor's business plan;

b. the classification of creditor's rights;

c. the adjustment plan of creditor's rights;

d. the repayment plan of creditor's rights;

e. the time limit for the implementation of the reorganisation plan;

f. the supervision period for the implementation of the reorganisation plan; and

g. other plans conducive to the debtor's reorganisation.

When all the voting groups of creditors adopt the draft reorganisation plan, the reorganisation plan shall be adopted. Within ten days from the date of adoption of the reorganisation plan, the debtor or the administrator will apply to the people's court for approval of the reorganisation plan. If the people's court considers that it meets the requirements of the Enterprise Bankruptcy Law after examination, it will decide to approve, terminate the reorganisation procedure and make a public announcement within 30 days from the date of receipt of the application.

In recent years, on the basis of bankruptcy reorganisation, China has further carried out the pilot work of bankruptcy pre-reorganisation. The essence of pre-reorganisation is that the debtor or creditor applies to the court for pre-reorganisation before formally starting the reorganisation procedure. The debtor carries out various affairs under the guidance and assistance of professional intermediaries and carries out independent negotiations with relevant stakeholders. The court shall give corresponding guidance, supervision and necessary judicial coordination, promote the relevant stakeholders to actively negotiate and form a draft reorganisation plan and ensure the smooth connection between the out-of-court reorganisation and the reorganisation procedure.

The charm of pre-reorganisation lies in its higher degree of freedom and flexibility compared with reorganisation cases. Taking the Procedures for Handling Pre-Reorganization Cases of the Shanghai Bankruptcy Court as an example, Article 7 (Determination of Temporary Administrator) states that the debtor or the major creditor whose total amount of claims accounts for more than half of the known total amount of claims may nominate a temporary administrator in writing to the court. If the nominated person has been included in the list of administrators and there is no situation in which he is not suitable to act as a temporary administrator, the court shall determine that he is a temporary administrator.

As the core of the operation of the whole bankruptcy procedure, the administrator can be determined by the debtor and the creditor through consultation, which undoubtedly gives the parties great freedom to introduce professional reorganisation service teams, carry out enterprise relief services efficiently and smoothly, further reduce the large occupation of judicial resources by bankruptcy court procedures, and improve the efficiency of market resource allocation.

Reorganisation Cases

Taking Shanghai as an example, after the implementation of the pre-reorganisation mechanism, distressed enterprises have been rescued as soon as possible, creating innovative breakthroughs in many bankruptcy fields with pilot significance. For example, during the period of pre-reorganisation, ZK Engineering tried to introduce a trust plan to dispose of assets and debts and successfully transferred to reorganisation. The listed company Trendzone Holdings is the first successful case of pre-reorganisation to reorganisation of a convertible bond issuer listed on the Shanghai Stock Exchange.

At the same time, the Shanghai bankruptcy court also undertook the task of a cross-border bankruptcy pilot. Through the first batch of institutions to undertake the pilot task of cross-border bankruptcy, it has actively carried out the first trial of cross-border bankruptcy. In the bankruptcy case of Huaxin Group, it was the first time that the Hong Kong courts recognised and assisted mainland bankruptcy proceedings. It accepted the first case of Shanghai International Corporation, a Japanese enterprise, applying for recognition and assistance in Japanese civil regeneration proceedings and ruled to recognise the Japanese bankruptcy proceedings and the status of the administrator.

Concluding Remarks

All of these highlight the development characteristics of China's commercial bankruptcy system, which keeps pace with the times, adapts to local conditions and applies laws in accordance with their aptitude and reflects that the legislation and practice of bankruptcy liquidation and reorganisation in China are still alive and full of vitality.

As legal practitioners, we often deeply feel the importance of legal services to the real economy. A good business environment requires not only the ability to attract investment, but also the ability to enable enterprises to make a comeback or end smoothly in the predicament they are facing. The survival of each enterprise is the microcosm of the macro-real economic situation and the relief of enterprises is the practical contribution to the social economy, which is worthy of our long-term pursuit.

In the future, the legal system of bankruptcy liquidation and re-organisation in China will improve day-by-day and the bankruptcy administrator, as a new industry and profession, will have great potential. A city with an active economy in the whole cycle will open up broad prospects for the practice of bankruptcy administrators.

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Restructuring, Insolvency and Liquidation in Poland

Introduction

Due to the changing economic situation in the world economy, one can notice a significant increase in interest in issues related to bankruptcy, restructuring and also liquidation. Entrepreneurs struggling with the various financial problems of their companies very often have to make a difficult decision related to the initiation of restructuring or bankruptcy or liquidation proceedings.

Restructuring, Bankruptcy and Liquidation

It should be noted here that restructuring proceedings and bankruptcy proceedings are significantly different from each other and which one to choose depends on the individual situation of a specific enterprise, in particular its financial situation. It should be emphasised that in the Polish legal system there are various legal Acts regulating the above-mentioned issues. First of all, it should be noted that bankruptcy proceedings are regulated by the Act of 28 February 2003 ('Bankruptcy Law'), while restructuring is regulated by the Act of 15 May 2015 ('Restructuring Law').

In this author's opinion, it is worth presenting a brief description of the above-mentioned proceedings, taking into account the differences between them.

Restructuring

It should be emphasised that restructuring is a process aimed at avoiding bankruptcy. It aims primarily to reach an agreement between the debtor and creditors; that is, this is a process that allows you to settle financial arrears and prevent bankruptcy. As part of an arrangement with creditors, the institution of the division of the debt into installments is very often used and it frequently happens that the debtor undertakes to repay the debt after the

creditor has previously written off part of the arrears. Restructuring is therefore intended to enable the company to continue operating and improve its financial situation. It is also worth pointing out that Polish law distinguishes between four types of restructuring proceedings, such as rehabilitation proceedings, arrangement proceedings, proceedings for approval of the arrangement and accelerated arrangement proceedings.

Bankruptcy

An important difference between restructuring and bankruptcy proceedings is that restructuring is addressed to both entrepreneurs at risk of insolvency and those already insolvent, while bankruptcy is intended for insolvent entrepreneurs. Bankruptcy may therefore be declared only when the conditions provided for in the Bankruptcy Law are met, and in accordance with Article 10 of the above-mentioned Act, bankruptcy is declared in relation to a debtor who has become insolvent. Bankruptcy therefore concerns situations in which an agreement between the debtor and creditors is not possible. As a rule, the initiation of bankruptcy proceedings results in the termination of the business activity of a given entrepreneur and is associated with the sale of the debtor's assets, which then enables the satisfaction of his creditors. Another important rule is that bankruptcy cannot be declared in the period from the opening of restructuring proceedings to its completion. In the event of a conflict between the bankruptcy application and the restructuring application, the restructuring application will be considered first.

Liquidation

Due to the subject of this article, it is also necessary to briefly refer to the Polish legal regulation regarding the liquidation of enterprises. Proceedings aimed at the liquidation of an entrepreneur are conducted based on the provisions of the Commercial Companies Code, taking into account the rules applicable to a given type of company. Liquidation is a procedure leading to the closure of the company's affairs, to its actual immobilisation. A company that goes into liquidation will operate only to a limited extent until it is removed from the register of entrepreneurs. An important difference between liquidation and declaring bankruptcy is that liquidation is an entrepreneur's decision, which he can make even when the enterprise is operating properly and when the company has no financial problems, unlike bankruptcy, the basic condition of which, as already indicated above, is the entrepreneur's insolvency. Of course, the vast majority of liquidation cases are related to problems in the operation of the entrepreneur, but there are no legal obstacles for the entrepreneur to start liquidation even when the economic situation improves. It is also worth adding that the reasons for the liquidation of an entrepreneur are specified in company agreements and result from the Commercial Companies Code. The grounds for liquidation may vary, including: relating to an internal conflict between partners, inability to achieve the purpose for which a given company was run, loss of a licence or business permit, or financial issues.

Amendments to Restructuring and Bankruptcy Laws

In terms of the issue discussed in this article, it is also worth paying attention to the planned amendment to the Restructuring Law and Bankruptcy Law. The proposed changes in the law result from the need to implement into the national legal order Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019 on the framework for preventive restructuring; debt relief and business bans and on measures to increase the effectiveness of proceedings regarding restructuring, insolvency and debt relief; and amending Directive (EU) 2017/1132 ('Restructuring and Insolvency Directive'). The primary goal of the planned changes is to protect the market and jobs, as well as to provide assistance to entrepreneurs. The above-mentioned Directive is aimed primarily at harmonising the regulations regarding restructuring proceedings in Member states of the EU in order to ensure the proper functioning of the internal market. The restructuring proceedings are intended to enable entrepreneurs in difficulty to continue their operations and to prevent job losses. The proposed changes are also aimed at modernising regulations in the field of restructuring and bankruptcy law and eliminating irregularities in the process of selecting restructuring advisors to act as supervisors, managers or trustees. The planned changes are to be introduced in the third quarter of 2024.

Cross-Border Bankruptcy Proceedings

In the context of the analysed issue, it is also necessary to mention cross-border bankruptcy proceedings, which are regulated by Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 regarding bankruptcy proceedings. It should be emphasised that this Regulation is binding in its entirety and is directly applicable in the Polish legal order. In accordance with the provisions of the above-mentioned Regulation, the opening of bankruptcy proceedings in one of the EU member states has effects in other member states. Pursuant to the provisions contained in the above-mentioned Regulation, the courts of the member state in whose territory the debtor's centre of interests is situated have jurisdiction to open insolvency proceedings. The court's jurisdiction to declare bankruptcy is determined by determining the so-called 'COMI'—centre of main interests—the main centre of basic activity, that is, the place where the debtor mainly manages his business.

In terms of the application of cross-border bankruptcy proceedings, it is also important that the above-mentioned Regulation does not introduce uniform bankruptcy proceedings in all member states, which means that the proceedings are conducted according to national regulations. The law applicable to bankruptcy proceedings and their effects is therefore the law of the member state in which the proceedings were initiated. Pursuant to the provisions of the Regulation, a judgment on the opening of bankruptcy proceedings produces in any other member state, without the need to complete any formalities, the effects resulting from the law of the state in which the proceedings are opened. Moreover, the effects of the proceedings cannot be challenged in other member states.

Taking into account the above, in summary, it should be emphasised that a decision declaring bankruptcy issued by a court of one of the member states, as part of cross-border bankruptcy proceedings, will also produce legal effects in Poland. Therefore, if the court of one of the member states has jurisdiction due to the place where the entrepreneur's main centre of activity (COMI) is located, the proceedings will be conducted in accordance with the regulations in force in that country and the effects of bankruptcy will be determined according to these regulations. In such a case, Polish authorities will be obliged to comply with the consequences of the announced bankruptcy without the need to fulfil additional formalities.

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Disputed Debts: The Interplay between Arbitration and Insolvency Law from an Offshore Perspective

It is received wisdom that a winding-up order will not be made if the debt demanded in a statutory demand or relied upon in the context of a winding-up petition is genuinely disputed on substantial grounds. However, ascertaining what constitutes a genuine dispute is not always easy. As supported by long-established jurisprudence, the court is entitled to enquire into the substantiality of the dispute rather than taking at face value the company's assertion or belief that there is a dispute. Nevertheless, the principle is often tested when the dispute is subject to an arbitration agreement. This article takes a closer look at this evolving issue from the lens of offshore jurisdictions, with some interesting developments freshly coming from offshore courts.

Disputed Debts—Established Principles

Where the petition debt is not disputed, the company's failure to pay the sums claimed entitles the petitioner to a winding-up order *ex debito justitiae*.[1] However, it is an abuse of process to make a statutory demand or present a winding-up petition based on a claim in respect of which there is a genuine dispute on substantial grounds.[2] The meaning of substantiality is 'real as opposed to frivolous'.[3]

The rationale for this rule of practice is to prevent abuse of process, as elaborated by the Privy Council in Ebbvale Ltd v Andrew Lawrence Hosking:

> Sometimes a petitioner who presents, or threatens to present, a winding-up petition seeks not to obtain an actual order but rather, by the application of pressure on the company and in particular through the prospect of damaging publicity as a result of the requisite advertisement of the petition, to cause it to act in a particular way. Such is a classic example of abuse of the process of the Court, which will lead it to accede to an application by the company to stay the petition or by injunction, to preclude its presentation.[4]

In determining the substantiality of the dispute, the courts have found that a mere assertion by the company that the petitioner's debt is disputed is not enough,[5] nor is it sufficient for the company to have a 'mere honest belief that payment is not due'.[6] The Court is entitled to enquire into the basis for the alleged dispute and there must be a positive statement of the grounds of dispute with supporting relevant details to demonstrate that those grounds are substantial.[7] In the case In re Claybridge Shipping Co SA,[8] Oliver LJ said that the court should not shy away from examining the evidence to determine the threshold question of whether the dispute is genuine and substantial because it is 'only too easy for an unwilling debtor to raise a cloud of objections on affidavits and then to claim that, because a dispute of fact cannot be decided without cross-examination, the petition should not be heard at all but the matter should be left to be determined in some other proceedings'.[9]

The courts in offshore jurisdictions, such as the Cayman Islands and the British Virgin Islands ('BVI'), have close regard to the English common law practice in general. Claybridge was reaffirmed in the Cayman Islands by Kawaley J in Re Sky Solar,[10] citing the decision of Parker J in Re Primus Investments Fund, LP.[11] In the BVI, the test as to whether a dispute relating to a debt is genuine was set out in Sparkasse Bregenz Bank AG v Associated Capital Corporation,[12] where the Court held that:

> … the dispute must be genuine in both a subjective and objective sense. That means that the reason for not paying the debt must be honestly believed to exist and must be based on substantial or reasonable grounds. Substantial means having substance and not frivolous, which disputes the Court should ignore. There must be so much doubt and question about the liability to pay the debt that the Court sees that there is a question to be decided.[13]

In China Minsheng Banking Corp., Ltd v Tai Feng Investments Limited,[14] the BVI Court emphasised the importance of contemporaneous documentary evidence in satisfying the test for substantiality.

Tension between Arbitration Clause and Insolvency Law

If there are no genuine disputes on substantial grounds, the court will not prevent a winding-up proceeding however genuinely the company wishes to dispute the debt.[15] However, a line of case law suggests that the analysis might be different where the creditor's petition relies on a disputed debt arising out of a contract subject to an arbitration agreement.

The English Court of Appeal in Salford Estates (No 2) Ltd v Altomart Ltd[16] has established the English approach to this issue. The High Court judge considered himself bound by Rusant Ltd v Traxys Far East Ltd,[17] where the court held that it was not up to the court to decide if there was a dispute at all when an arbitration clause was in place in the parties' contract. The Court of Appeal disagreed. It held that the mandatory stay provided for in section 9 of the Arbitration Act 1996 (UK) does not apply to a winding-up petition based on a disputed debt.

Nevertheless, the Court of Appeal in Salford Estates further held that the court has a discretionary power under the Insolvency Act 1986 (UK), s 122(1) to wind-up a company and that the court should, save in wholly exceptional circumstances (which the judge found difficult to envisage), exercise its discretion consistently with the legislative policy embodied in Arbitration Act 1996.[18] The Court of Appeal considered that the exercise of the discretion otherwise would 'inevitably encourage parties to an arbitration agreement as a standard tactic to bypass the arbitration agreement and the 1996 Act by presenting a winding-up petition', contrary to parties' autonomy and the legislative policy of the 1996 Act.[19]

By way of comparison, the Court of Appeal held in BST Properties Limited v Reorg-Apport Penzugyi RT[20] that the existence of an exclusive jurisdiction clause in favour of the courts of a foreign state did not prevent the English court from determining whether the claimed debt was genuinely disputed on substantial grounds. This was followed most recently by Hex Technologies Ltd & Ors v DCBX Ltd,[21] but the court noted that the decision in BST Properties might in the future be revisited by the Court of Appeal in light of the decision in Salford Estates.

Recent Decisions in Offshore Jurisdictions

Privy Council Decision in Family Mart China Holding Co Ltd

New judgments have been delivered in both the Cayman Islands and the BVI regarding the interaction of an arbitration clause and a creditor's winding-up in light of the Privy Council decision in Family Mart China Holding Co Ltd v Ting Chuan (Cayman) Holding Corporation.[22] The Board in Family Mart opined that 'it is uncontested now that, as a general rule, the law of the Cayman Islands, like English law and the law of many other jurisdictions, respects the rights of parties to agree to have their disputes determined by a private arbitral tribunal'.[23] Moreover, 'it is important in cases which arise out of domestic legislative provisions implementing the New York Convention to have regard to jurisprudence in other contracting states to promote legal certainty in the jurisprudence relating to international arbitration'.[24] These comments have been considered in two recent Cayman Islands and BVI cases, discussed below.

Re BPGIC Holdings Limited[25]

In this case, the Cayman Islands court was asked to address the issue of 'whether the petition should be stayed or dismissed pending resolution of the disputed debt by a foreign arbitral tribunal without an inquiry by this Court as to whether the debt is genuinely disputed on substantial grounds'.[26] Ramsey-Hale CJ held on a preliminary point that Family Mart did not change the court's approach to creditors' winding-up petitions, that is, where a winding-up petition is brought on the basis of a disputed debt subject to an agreement to arbitrate, the court nevertheless must embark upon an enquiry as to whether the debt is bona fide disputed on substantial grounds. The judge noted that such an approach may be inconsistent with the internationalism endorsed by the Privy Council in Family Mart, but it is consistent with Cayman law with respect to stays in favour of foreign arbitration and with the long-standing approach of the courts on applications to stay or dismiss petitions on the ground that the debt is disputed.[27]

Waterfront Property Investment Limited v Arius Litigation Funding Limited[28]

The BVI approach is currently under consideration at the appellate level. In Sian Participation Group (In Liquidation) v Halimeda International,[29] the Eastern Caribbean Court of Appeal held that a debtor is not entitled to an automatic stay of the liquidation proceedings under section 18(1) of the Arbitration Act by merely invoking the existence of an arbitration agreement. The case has been appealed to the Privy Council with the question 'What is the correct approach to determining a creditor's winding-up application pursuant to section 162(1)(a) of the Insolvency Act 2003 (BVI) in circumstances where the debt is disputed and is subject to an arbitration agreement?'. The Board has heard the parties on 19 March 2024.

Awaiting the Privy Council's decision in Sian, a recent BVI judgment in Waterfront emphasised the 'very powerful pronouncements about the paramountcy of parties' agreement to arbitrate' in Family Mart.

Setting aside the statutory demand in question, the judge opined that: 'I am of the view, particularly in light of the analysis in Family Mart, that, other than noting that there is in fact a dispute, which dispute there obviously is and which has been referred to arbitration, the Court should make no further enquiry than that'.[30]

Also mentioned in the court's decision was the undertaking offered by the creditor to withdraw the arbitration proceeding premising on dismissal of the setting aside application. The court commented 'it is important for this Court to frown upon' such an undertaking that is 'nakedly self-serving and appears to recognise the clearly abusive conduct of pursuing arbitration proceedings (as contractually agreed between the parties) on the one hand, and on the other filing a statutory demand'.[31] The court would not countenance such an approach.

In reaching her decision, the judge distinguished a series of cases including Re BPGIC Holdings and Sian. In particular, Mangatal J distinguished Sian on the ground that in that case no arbitration had already been started and it was not a case involving the setting aside of a statutory demand. The judge further noted that the court is exercising its discretion under section 157(2) of the BVI Insolvency Act[32] on the basis of an extant arbitration and is not making an order for a mandatory stay under section 18 of the Arbitration Act.[33]

Comments

It is increasingly common for arbitration clauses to be incorporated into commercial contracts. On the one hand, a debt must be disputed on some substantial ground to justify the prevention of presentation or continuation of a winding-up petition. On the other hand, for pro-arbitration considerations, the courts may be inclined to exercise their discretion to discourage parties to an arbitration agreement from tactically bypassing it by presenting a winding-up petition. Considering the English approach and recent developments in the offshore jurisdictions in light of the Privy Council decisions, while the test of substantiality is still the established rule of practice, one cannot rule out the risk of additional obstacles for a creditor who wishes to bring winding-up proceedings against the company based on a debt due under a contract that contains an arbitration agreement. Both parties and practitioners need to keep a watchful eye on any further developments in this area.

*(*Please note that this article is intended to provide a very general overview of the matters to which it relates. It is not intended as legal advice and should not be relied on as such.)*

Endnotes

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3 *Arena Corporation Ltd v Customs Excise* [2004] EWCA Civ 371; *Mann v Goldstein* [1968] 1 WLR 1091 at 1096.
4 *Ebbvale Ltd v Andrew Lawrence Hosking* [2013] UKPC 1 at para [26].
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6 *Re a Company (No 0010656 of 1990)* [1991] BCLC 464.
7 *Re General Exchange Bank Ltd* (1866) 14 LT 582.
8 [1997] 1 BCLC 572.
9 *Ibid* at 579.
10 FSD 0190 OF 2020, delivered 12 October 2020.
11 FSD 0076 OF 2020, delivered 16 June 2020.
12 [2002] 5 JBVIC 0301.
13 *Ibid* at para [3].
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15 *Forsayth NL v Juno Securities Ltd* (1991) 4 WAR 376.
16 [2015] 3 WLR 491.
17 [2013] EWHC 4083 (Comp).
18 [2015] 3 WLR 491 at paras [39]–[41].
19 [2015] 3 WLR 491 at para [40].
20 [2001] EWCA Civ 1997.
21 [2023] EWHC 537 (Ch).
22 [2023] UKPC 33.
23 *Ibid* at para [25].
24 *Ibid* at para [28].
25 FSD 248 of 2023, delivered 20 November 2023.
26 *Ibid* at para [3].
27 *Ibid* at para [29].
28 BVIHCM2023/0192, delivered 27 March 2024.
29 BVIHCMAP 2021/0017, delivered November 2022.
30 BVIHCM2023/0192, delivered 27 March 2024 at para [44].
31 *Ibid* at para [47].
32 The Insolvency Act, s 157(2) provides that the court may set aside a statutory demand if it is satisfied that substantial injustice would otherwise be caused or for some other reason.
33 BVIHCM2023/0192, delivered 27 March 2024 at para [45].

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Integrity ESG in Insolvency: A Sustainable Approach

Insolvency can be a challenging process for any organisation. But what if there is a more sustainable approach now available in order to tackle this concern. Integrating Environmental, Social and Governance ('ESG') principles can turn it into an opportunity for sustainable transformation. This article explores the role of integrity in applying ESG frameworks during insolvency, ensuring not only compliance but also long-term resilience and ethical stewardship.

Understanding Integrity ESG

Integrity in ESG refers to the adherence to ethical principles and honesty within the context of an organisation's ESG practices. This encompasses ensuring that a company's actions, reporting and communications related to environmental impact, social responsibility and corporate governance are genuine, transparent, and not misleading.

Companies that demonstrate high integrity in their ESG practices are more likely to earn trust from investors, customers and other stakeholders.[1] Integrity helps reduce the risk of scandals, legal issues and reputational damage that can arise from misleading or unethical practices. Genuine ESG efforts contribute to sustainable long-term business success by addressing the interests of a broader range of stakeholders, fostering a positive company image and ensuring regulatory compliance.

However, maintaining integrity in ESG poses challenges, such as greenwashing or navigating complex regulatory landscapes. To ensure ESG integrity, companies can conduct regular independent audits and standardised reporting frameworks like the Sustainability Accounting Standards Board ('SASB'). Integrating integrity into ESG practices is essential for building sustainable and ethical businesses.

Integrating ESG Principles Into Insolvency Framework

The incorporation of ESG considerations has significantly impacted the landscape of insolvency and bankruptcy. Traditionally, these proceedings primarily emphasised financial and legal facets. However, the growing recognition of the broader implications of business practices has prompted a re-evaluation of how stakeholders approach insolvency and bankruptcy cases.

While ESG principles can't directly guarantee saving a company from insolvency, they can indirectly contribute to a company's financial health and resilience in the long run, making them less susceptible to insolvency, as discussed below:

1. *Improved Reputation and Investor Attraction:* Strong ESG practices can enhance a company's reputation as a responsible and sustainable business. This attracts investors who increasingly prioritise ESG factors in their investment decisions. With easier access to capital, companies can better manage financial difficulties.

2. *Stronger Stakeholder Relationships:* ESG practices emphasise good corporate governance and transparency. Stronger relationships can lead to increased brand loyalty, more favourable business terms with suppliers, and potentially community support during challenging times. It's crucial to transparently involve creditors, employees, communities and other impacted parties in a comprehensive manner.

3. *Reduced Risk and Cost:* Proactive environmental practices, such as reducing waste or using cleaner energy, can lower operational costs and minimise the risk of fines or penalties for environmental violations. This reduction may help with some financial distress.

4. R*egulatory Landscape:* Regulations are requiring companies to consider ESG factors in their operations. This is because ESG factors can impact a company's financial health. Courts and insolvency experts may now look at a company's environmental ESG record when assessing financial trouble.

5. *Valuation and Asset Recovery:* In insolvency or bankruptcy situations, the performance of ESG factors can significantly affect the valuation and recovery assets. Prospective buyers, investors or creditors are now more inclined to consider a company's environmental and social footprint when evaluating its worth and prospects for recuperation. Assets with favourable ESG characteristics might command higher valuations than those with environmental liabilities or reputational risks.

6. *Approaches to Sustainable Restructuring and Revival:* Considering ESG factors when devising turnaround and restructuring strategies can be advantageous. The importance of integrating ESG principles into company plans, operational protocols and business models is increasingly recognised by insolvency professionals and specialists.[2]

Key Strategies

The following are key strategies that companies should consider in terms of integrity ESG in insolvency:

1. *Environmental Impact Assessments:* Mandate environmental impact assessments for resolution plans, especially for companies in polluting industries.

This would ensure environmental risks are addressed during the restructuring process.[3]

2. *Employee Rights:* Include provisions protecting employee rights during insolvency proceedings. This could involve ensuring minimum severance packages or prioritising plans that retain jobs.

3. *Community Impact:* Consider the impact of insolvency on surrounding communities. Resolution plans could be evaluated based on how they minimise job losses and social disruption.

4. *Disclosure Requirements:* Mandate disclosure of ESG practices and potential risks in resolution plans. This would increase transparency and attract responsible investors.[4]

Real World Examples

PG&E Bankruptcy

In 2017 and 2018, wildfires ignited by PG&E's equipment caused widespread devastation in Northern California. These fires resulted in hundreds of thousands of acres burned, over 100 deaths and billions of dollars in damages. Facing lawsuits from victims, insurance claims and government penalties, PG&E's liabilities became overwhelming. PG&E initiated bankruptcy proceedings following an assessment of a US$30 billion liability stemming from wildfires. This move marked one of the most significant utility bankruptcies to date. In January 2019, PG&E filed for Chapter 11 bankruptcy protection. This allowed them to restructure their finances while continuing operations. Recognising the public outrage and the need to rebuild trust, PG&E incorporated ESG principles into their restructuring plan.

In examining the role of ESG considerations in the context of PG&E's insolvency proceedings, several key factors emerge. Despite PG&E's low safety score, its commitment to sustainability initiatives and renewable energy contracts played a crucial role in shaping investor perceptions during the bankruptcy process. According to analysis from Morningstar Direct, out of 2,008 ESG strategies globally, only 75 funds held PG&E, representing 3.7 per cent of ESG funds. Furthermore, the integration of ESG principles into PG&E's governance structure, including the establishment of board committees focused on sustainability and the appointment of a Chief Sustainability Officer, bolstered investor confidence amidst the company's financial challenges.

Thematic investment strategies, particularly those focused on sustainability themes such as affordable and clean energy, may have influenced the decision of certain ESG funds to hold PG&E stock despite its safety score. Moreover, PG&E's long-term sustainability focus, exemplified by its extensive renewable energy contracts worth US$34.5 billion, and commitment to environmental and social responsibility as outlined in its Corporate Responsibility and Sustainability Report, signalled to stakeholders a dedication to long-term resilience and responsible business practices.

Finally, PG&E's engagement with local communities and stakeholders through initiatives such as renewable energy projects and community outreach efforts fostered goodwill and support during the insolvency proceedings.

The Carillion Case

Carillion, a UK-based construction and services company, collapsed in 2018, resulting in one of the largest corporate insolvencies in British history.[5] The company's insolvency raised questions about its governance practices, financial management and sustainability considerations.

Here is what went wrong: financial mismanagement, ignoring environmental risks and poor labour relations.[6] Carillion focused on aggressive accounting practices and winning new contracts at unsustainably low prices. This prioritised short-term profits over long-term stability. Asbestos issues in some of Carillion's older buildings became a major financial burden. They lacked proper management of environmental hazards. Carillion also faced criticism for neglecting employee wellbeing and fair wages. This could have contributed to lower morale and productivity.

ESG regulations were present in the UK, but they likely weren't robust enough to prevent Carillion's collapse. Existing regulations might have emphasised disclosure of ESG practices, but not necessarily have mandated strong environmental or social practices themselves. Enforcement mechanisms for ESG regulations might have been weak, allowing companies to prioritise financial gain over responsible practices. The company's downfall was precipitated by its neglect of these essential components, with financial mismanagement, ignored environmental risks and poor labour relations at the core of its failure. Had Carillion complied with robust ESG regulations, it is likely that the disastrous outcome could have been avoided. Stronger adherence to ESG principles would have fostered long-term stability, better environmental risk management and enhanced employee morale and productivity. Moreover, adopting ESG frameworks could have provided a pathway for restructuring as well. The Carillion case serves as a reminder that prioritising ESG is not just a regulatory requirement but a strategic imperative for sustainable business success.

Insights Gained

These offer critical insights into the impact of ESG principles on corporate stability and resilience. For PG&E, the integration of ESG principles played a pivotal role in its restructuring efforts, whereas Carillion's collapse illustrates the dire consequences of neglecting ESG principles.[7]

Benefits of ESG

While the Carillion case occurred in the UK, its lessons are relevant globally in the corporate landscape. Regulatory bodies globally can play a proactive role in promoting ESG disclosure and accountability to mitigate the risk of insolvency and safeguard investor interests. Here are some of the key advantages:

1. *Trust Building:* Maintaining regular and transparent communication about the restructuring plan, challenges and proposed solutions builds trust and fosters a sense of collaboration.

2. *Acting Ethically:* Especially in a crisis like insolvency, stakeholders look for companies to act ethically. This includes fair treatment of creditors, responsible employee layoffs and honouring contractual obligations as much as possible.

3. *Long-Term Sustainability:* Incorporating ESG principles means considering the social and environmental impact of the company's actions, even during insolvency. This could involve focusing on workplace safety, minimising environmental damage during the restructuring processes or prioritising responsible sourcing practices. A company's reputation is an important asset, even during insolvency. Demonstrating a commitment to ESG principles can help mitigate reputational damage.

4. *Employee Morale:* Employees are often impacted by insolvency. A company that prioritises fair treatment and social responsibility during restructuring can help maintain employee morale and reduce turnover. This can be crucial for the company's future success.

5. *Assessment and Disclosures:* ESG emphasis on regular assessment of both financial and environmental risks of the company helps in realising any potential financial risks. Regular disclosures or ESG reporting also acts similarly in order to improve the overall performance.

Regulations

The traditional view of insolvency proceedings often paints a picture of loss and negativity. But integrating ESG factors into insolvency processes holds immense potential to benefit both companies and society as a whole. This innovative approach aligns companies with leading frameworks such as the UN Sustainable Development Goals ('SDGs'), India's Insolvency and Bankruptcy Code ('IBC'), the Task Force on Climate-Related Financial Disclosures ('TCFD'), the Sustainability Accounting Standards Board ('SASB'), the Paris Agreement on Climate Change, and the UK Corporate Governance Code. By embracing these guidelines, companies undergoing financial restructuring can even emerge from insolvency in a stronger position.

The power of these frameworks lies in their collective focus on transparency, responsible governance and climate risk assessment. For example, the UN SDGs provide a blueprint for aligning business practices with global sustainability goals. Meanwhile, the IBC can be leveraged to incorporate ESG reporting during insolvency proceedings. This could even attract the attention of ESG-focused investors.

Additionally, the TCFD's framework[8] guides companies in disclosing climate risks effectively, while SASB standards ensure clear communication of ESG performance—crucial aspects for building trust with stakeholders.[9]

Furthermore, aligning with the Paris Agreement ensures that insolvency plans contribute positively to national climate goals. This not only benefits the environment, but also demonstrates a company's commitment to responsible corporate citizenship. Finally, the UK Corporate Governance Code emphasises the importance of considering societal and environmental impacts even during restructuring. This holistic approach ensures that companies do not solely focus on short-term financial gains during challenging times.

By integrating these frameworks, businesses undergoing insolvency can maintain stakeholder confidence, enhance transparency and contribute to a sustainable future. Ultimately, integrating ESG factors into insolvency proceedings fosters a more sustainable and responsible approach to corporate restructuring.

Conclusion

In essence, ESG is not a magic bullet for insolvency, but it is a strategic approach that can strengthen a company's overall health and preparedness for financial challenges. Incorporating ESG principles into insolvency proceedings requires a holistic approach that balances economic, social and environmental objectives. By enhancing stakeholder communication, strengthening governance, fostering social innovation and leveraging competitive and cooperative mechanisms, corporations can navigate insolvency more effectively and contribute to sustainable development. Some countries are already exploring integrating ESG factors into their bankruptcy frameworks. Studying these attempts can provide valuable insights globally. This win-win proposition transcends borders. The world shouldn't just explore ESG integrated insolvency frameworks, it should wholeheartedly adopt them. It is not just a trend, it is a necessity. Let's transform insolvency from a financial dead end into a springboard for a more responsible and sustainable future.

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Cross-Border Insolvency in India

Introduction

The incorporation of cross-border insolvency into India's Insolvency and Bankruptcy Code 2016 ('IBC') has sparked considerable discussion within the Indian legal fraternity. While the IBC does not have a comprehensive formal framework to deal with cross-border insolvency, certain provisions of the law permit bilateral agreements between the Indian government and other nations to address cross-border issues. However, these provisions provide merely provisional solutions, potentially resulting in inconsistent and conflicting rules for cross-border resolutions and remain unutilised till date.

The insolvency proceedings of the popular Indian airline Jet Airways, which took place in two separate jurisdictions—India and the Netherlands—starkly highlighted this lacuna in the law. Given that India neither has legislation to deal with cross-border insolvency nor any bilateral agreements with the Netherlands to facilitate the enforcement of the provisions of the IBC, the insolvency tribunals were left to judicially innovate a solution. Accordingly, the tribunals facilitated collaboration between the Indian insolvency professional and the Dutch trustee which led to the development of a cross-border insolvency protocol. The protocol established crucial points of cooperation, such as designating India as the 'centre of main interests', outlining guidelines for the Dutch trustee, granting insolvency professionals the right to participate in proceedings across jurisdictions and fostering information sharing and communication.

While the ad-hoc solutions devised by the insolvency tribunal in the case of Jet Airways provided a temporary fix to a complex cross-border case, they were not sufficient for long term resolution. It was well acknowledged by the lawmakers that in today's globalised corporate environment, the implications of cross-border insolvency cannot be overlooked if India aspires to implement a comprehensive and durable insolvency law. They recognised that ad-hoc solutions and the incomplete framework under the IBC are insufficient for this purpose. Consequently, multiple government committees have been established to recommend a robust framework capable of effectively addressing cross-border insolvencies. This article delves into the key elements of the proposed cross-border insolvency framework for India and identifies the missing components that need to be addressed.

Proposed Framework for Cross-Border Insolvency in India

The Insolvency Law Committee ('ILC'), constituted by the government of India to scrutinise the IBC's functionality and implementation, proposed a draft insolvency framework in a 2018 report ('Proposed Framework'), primarily based on the UNCITRAL Model Law on Cross-Border Insolvency 1997 ('Model Law'). The Proposed Framework envisages the establishment of a procedural law to govern cross-border insolvency proceedings for debtors with assets or creditors in multiple jurisdictions. Mirroring the Model Law, this framework relies on four essential elements for the administration of cross-border insolvency cases: access, recognition, relief (assistance) and cooperation.

Under the proposed framework, a foreign insolvency representative is entitled to apply to the Indian insolvency tribunal (known as the National Company Law Tribunal ('NCLT') for recognition of foreign insolvency proceedings in which they have been appointed. Upon recognition, the foreign representative may participate in proceedings concerning the corporate debtor under the IBC.

Regarding the recognition of proceedings, if foreign insolvency proceedings are occurring in a country where the debtor has its centre of main interest ('COMI'), they are recognised as 'main proceedings'. Conversely, if such proceedings occur where the debtor has an establishment, they may be recognised as 'non-main proceedings'. Recognition of a foreign proceeding as a main proceeding results in the grant of certain automatic reliefs, such as prohibiting the initiation or continuation of suits against the corporate debtor, imposing a moratorium on the transfer of the debtor's assets and restricting the enforcement of security interests by creditors. Additionally, the NCLT may grant discretionary reliefs to protect the corporate debtor's assets or the creditors' interests, which may also be extended upon the recognition of a non-main proceeding. However, the recognition of a non-main proceeding would not result in the automatic grant of reliefs, unlike in the case of main proceedings.

The Proposed Framework also includes provisions for cooperation and communication between domestic courts, foreign courts, resolution professionals, liquidators and foreign representatives. It encourages coordination of concurrent insolvency proceedings in different countries by promoting cooperation between courts.

Subsequently, another committee, namely the Cross-Border Insolvency Rules/Regulations Committee ('CBIRC-I'), in its 2020 report, recommended a regulatory framework for the effective implementation of the Proposed Framework. Alongside these recommendations, the CBIRC-I advocated for the substantial adoption of the Judicial Insolvency Network Guidelines 2016 to facilitate communication and cooperation between the NCLTs, foreign courts, foreign representatives and Indian insolvency professionals with suitable modifications and the adoption of appropriate provisions from the NAFTA Guidelines 2000 and the EU Guidelines 2014 to suit the Indian context where necessary. The CBIRC-I also suggested that, while redrafting guidelines, the ALI Guidelines on cooperation in international insolvency cases may also be taken into account. Additionally, to foster greater cooperation, the CBRIC-I recommended that foreign representatives could apply for cooperation under Part Z without having applied for recognition. However, in such applications, the NCLT must not grant any relief that ought to be granted only in respect of recognised foreign proceedings.

Following this, the Indian Ministry of Corporate Affairs ('MCA') proposed modifications to the Proposed Framework. Key modifications included the exclusion of the pre-packaged insolvency resolution framework (currently applicable only to micro, small and medium enterprises in India) and financial service providers from the Proposed Framework. Additionally, it proposed the insertion of an explanation to the Proposed Framework to clarify that the NCLTs may enforce judgments arising from recognised foreign proceedings.

The second modification proposed was to counter the UK Supreme Court's decision in Rubin v Eurofinance SA, where the court refused to enforce judgments from recognised foreign proceedings in New York. The UK Supreme Court held that neither Article 7 (additional assistance) nor Article 21 (relief that may be granted upon recognition of a foreign proceeding) of the Model Law, as implemented through the Cross-Border Insolvency Regulations 2006, expressly provided the necessary authority. Furthermore, under common law and the UK Insolvency Act 1986, foreign judgments could not be enforced in England and Wales unless the parties were present in or had submitted to the foreign jurisdiction. This interpretation was heavily criticised by practitioners across the globe as it rendered the Model Law ineffective by recognising proceedings without enforcing judgments.

The UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments 2018 ('MLIJ') addresses this disparity in the handling of insolvency-related judgments that arise due to legal differences between the different jurisdictions. The MLIJ also includes an 'Article X' (intended to be added to the Model Law), which states that the recognition of insolvency-related judgments is a form of assistance that can be granted under the Model Law. Thus, the MCA noted and acknowledged that such a provision would remove the ambiguity previously present in the Model Law in that area and would further lend clarity to the law and prevent inconsistent interpretations by different fora.

Missing Elements and Pitfalls

While the Proposed Framework largely derives from the Model Law, its adoption is recommended with certain deviations that may pose challenges in the broader context. For instance, the ILC has suggested applying the Proposed Framework based on 'legislative reciprocity', meaning that India will recognise and enforce foreign court judgments or orders only if the foreign country has adopted the Model Law or a similar legislation. This insistence on reciprocity could unduly limit the NCLT's ability to find comprehensive solutions to cross-border insolvency issues, as no framework would be available to address cross-border issues arising from non-reciprocal countries. Additionally, reciprocity increases the evidentiary requirements needed to apply cross-border provisions.

Moreover, under the Model Law, a foreign representative can commence proceedings under the laws of the enacting state if the preconditions for initiation of such proceedings are met. However, India has taken a restrictive stance, permitting only foreign creditors to initiate proceedings under the IBC. Foreign creditors may be passive and reluctant to start insolvency proceedings in unfamiliar jurisdictions, especially if they anticipate minimal recoveries. Foreign representatives might be better positioned to demonstrate defaults and meet other prerequisites for initiating insolvency proceedings.

Furthermore, unlike the Model Law, which allows courts in an enacting country to provide interim relief to protect the debtor's assets or the creditors' interests pending the acceptance of an application for recognising foreign proceedings, the ILC has not recommended granting such power. This recommendation is based on the premise that the NCLTs lack the authority to grant interim relief until an insolvency proceeding filed under the IBC has been admitted. Recognition of foreign proceedings is a time-consuming process and the absence of interim relief in urgent situations may risk asset stripping and depletion of value.

Most importantly, there has been considerable debate about whether enacting provisions in *pari materia* to the Model Law—which primarily addresses cross-border insolvency of single corporate entities—will suffice to manage insolvencies of group companies, a significant economic reality today. Group structures are highly popular among Indian companies, which establish branches, subsidiaries and associate companies in foreign jurisdictions. Indian companies also list securities on international stock exchanges, leveraging dual listing permissions, with capital deployment often occurring through global subsidiaries or joint ventures. The global economy is increasingly shaped by digital transformation and the proliferation of complex corporate structures spanning multiple jurisdictions, facilitating business operations that transcend traditional borders. Implementing a clear and recognised framework for cross-border insolvency for corporate groups would mitigate the reliance on judicial discretion and synthetic restructuring processes, as seen in the cases of Jet Airways and Videocon. Such ad-hoc approaches render the process uncertain and unpredictable, which is perceived as a significant shortcoming at a global level. While India has deliberated on enacting a framework for group insolvency, there has been minimal discussion on integrating it with cross-border insolvency to resolve the insolvencies of group companies across multiple jurisdictions. Currently, the focus has been solely on group insolvency within a domestic context.

Conclusion

Despite years of discussions regarding the enactment of a cross-border insolvency framework in India, its implementation timelines remain uncertain. Further, while adopting the Model Law could offer a more extensive framework for collaboration and cooperation with foreign jurisdictions, the missing elements as highlighted above need to be addressed to ensure that India keeps pace with the rapidly changing economic, financial and social circumstances wherein a global cross-border restructuring and insolvency framework is an essential component.

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Misha is a partner of Shardul Amarchand Mangaldas & Co with over 18 years of experience in dispute resolution and insolvency and bankruptcy practice. With the enactment of the Insolvency and Bankruptcy Code 2016, Misha has been spearheading the insolvency and bankruptcy practice at the firm while consolidating her experience in corporate insolvency, restructuring and banking matters under the old regime. In addition to regular court appearances, Misha has also been involved in advisory work, especially in relation to insolvency and bankruptcy laws and economic offences. She is a member of the Bar Council of India.

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Celebrations

Durga Puja ~ India

Durga, the ancient Hindu Goddess, overwhelmingly worshipped in India, is the symbol of the victory of right over wrong. A celebration—popularly called the Durga Puja—is traditionally held for five days throughout India, with Eastern India leading the festivities with much greater fervour than the rest of India. Held annually during the Indian calendar months of September or October, the celebration for 2024 was held from 9 to 13 October. This article explores the history, meaning, continued relevance and many facets of this important festival.

An Historial and Ancient Symbol of the Indian Way of Life

The Durga Puja is one of the most adored cultural-cum-religious social fusions of public celebrations in the Eastern States of India, led by the State of West Bengal and followed by Assam, Odisha and then the rest of India.

'Women Power'—as envisioned and inserted as one of the enabling provisions of the Constitution of India in 1950 by its Founding Fathers—has always been a part of the Indian way of life as per the historical textbooks of ancient Indian history and scriptures; hence the Durga Puja celebrations have been accepted by Indians as the continuance of the traditional ancient Indian historical social traditions and culture. Thus, although it is celebrated primarily in the Eastern Part of India, over the decades it gained popularity in all of the other States of India. Among the several festivals of India, the Durga Puja strongly indicates India's unity in diversity.

Representing the Victory of Right/Good over Wrong/Evil and a Symbol of 'Women Power'

As part of the Durga Puja, very special religious offerings are made by devotees that celebrate the victory of the Goddess Durga over a male demon king, Mahishasura (from the Sanskrit language—'mahisha' the 'buffalo' and 'asura' the 'demon'). As an asura, the ancient texts elaborate that Mahishasura waged war against the Male Gods 'devas' as the devas and asuras were perpetually in conflict. Mahishasura had gained the boon that no man could kill him. In the battles between the devas and the asuras, the devas, led by the God Indra, the King of the devas, were defeated by Mahishasura. Consequent to their defeat, the devas are believed to have assembled in the mountains where the combined divine energies of the Hindu trinity of Gods—Brahma, Vishnu and Shiva—coalesced to create the Goddess Durga. The newborn Durga led a battle against Mahishasura, riding a lion, and killed him. Thereafter, she was named Mahishasuramardini, meaning The Killer of Mahishasura. The rest is part of the traditional cultural history of India, which despite having changed on several occasions, unambiguously remained constant.

Durga Puja is also associated with the myth of akalbodhan ('untimely awakening'), in which Durga was invoked by the warrior prince Rama, signifying a period of special access to the Goddess at a time which was not customary and when she was at rest. The Hindu epic, the Ramayana, tells the story of the abduction of Rama's wife, Sita, by the demon king Ravana and the war that followed. A Bengali version of the epic, composed by the 14th-century poet Krittivas, offers an alternative telling of Rama's ultimate victory and establishes the celebration of Durga Puja in autumn, a deviation from the customary festive period during the harvest season earlier in the year. In Krittivas's rendering, Rama prays to Durga for assistance on the battlefield after failing to defeat Ravana and his powerful brother Kumbhakarna. Pleased, she grants him divine support and enables him to vanquish Ravana on the 10th day. According to the myth, Rama gathers 108 (a numerologically significant number in Hinduism) lotuses as a sacred offering but can find only 107 at the time of prayer. Undaunted, he prepares to pluck out one of his own eyes to replace the missing flower when Durga appears and restores the last lotus, revealing its absence to have been a test of Rama's devotion.

Durga Puja thus signals the victory of right/good, symbolised by Durga and Rama, over wrong/evil, represented by Mahishasura and Ravana.[1]

Wide Popularity and Economic Impact of Durga Puja

Under the overall 'secular principles' of current Indian society and governance, the Durga Puja has been gaining wider acceptance than ever before among youths and older generations equally. Coupled with such acceptance, the Indian digital ecosystems have been an additional contributor to these social concepts. Besides social convergence within India, this popular celebration has for the last few decades also been gaining tremendous popularity among the Indian diaspora settled across overseas countries and thereby it has slowly been gaining economic momentum for a separate class of business enterprises. The rough estimated annual budget of Durga Puja in West Bengal is believed to be at INR32.377 crores (GBP3.29 billion or USD4.53 billion), which is the size of the economy of many smaller countries across the world. Thus, besides being a religious-social function, it is also a very formidable economic activity across India spanning over at least five days.

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Endnote

[1] See Encyclopedia Britannica, available at www.britannica.com/topic/Durga-Puja (accessed on 8 October 2024).

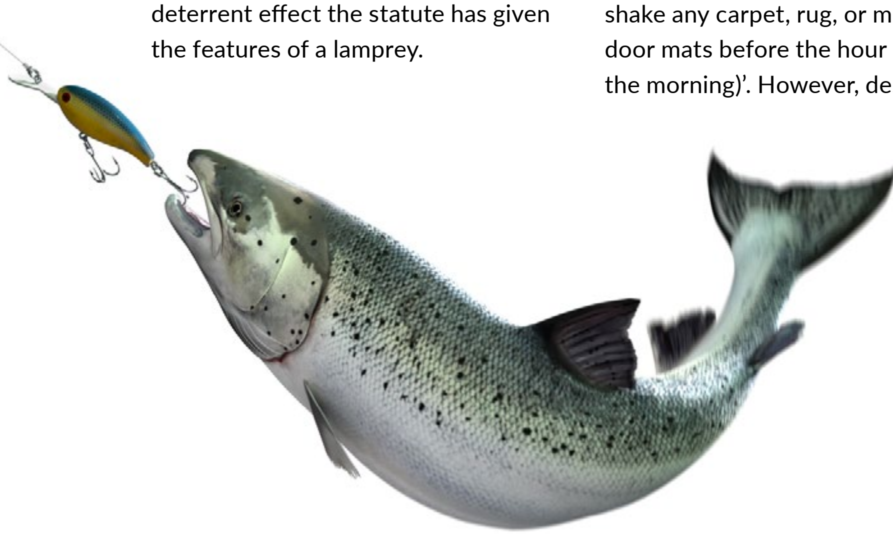
Did You Know?

Interesting Laws Around the World

Liberty constraints in the UK

Fundamental British values include individual liberty and the rule of law. There is occasionally a tension between these two values, such as when a law unjustifiably constrains individual liberty. Three British laws—which are still in force in 2024—illustrate this.

First, it is illegal to handle 'salmon, trout, eels, lampreys, smelt and freshwater fish' in suspicious circumstances under section 32 of the Salmon Act 1986 (UK). For readers who do not know what a lamprey is, it is a jawless fish with a toothed funnel-like sucking mouth which feeds by boring into the flesh of other creatures to consume their flesh and/or blood. It is unclear to this author what deterrent effect the statute has given the features of a lamprey.



Second, all whales and sturgeons found on the British coast are the property of the Crown under the Prerogativa Regis 1322. In 2004, Welsh fisherman Robert Davies caught a 120kg sturgeon and promptly offered it to the Queen, only to be told by facsimile from Buckingham Palace that he could 'dispose of it as he saw fit'. Mr Davies then sold it at auction, only for the police to then step in on the basis that the fish was a protected species.

Third, at least in London, it is illegal to beat or shake any carpet or rug in any street unless it is a doormat that is so beaten or shaken between the hours of midnight and 8 a.m. under section 60 of the Metropolitan Police Act 1839, which provides that no person 'in any thoroughfare shall beat or shake any carpet, rug, or mat (except door mats before the hour of eight in the morning)'. However, despite this author's research, there does not appear to be any report of this law being enforced.

Lest one thought modern Britan to be a particularly repressive place, fear not. Two other British laws—since repealed—show the progress made.

It used to be illegal to wear anywhere in the realm 'monstrous and outrageous greatness of hose' or 'double ruffs' (which were described in the statute as 'outrageous') under the Statutes of Apparel 1562. Those caught by the fashion police were not given a slap on the wrist, but rather were visited with 'pain of forfeiture of the same and of imprisonment and fine at the Queen Highness's pleasure for every such offense'.

It also used to be that every Englishman between the ages of 17 and 60 (with various exemptions) had to keep a longbow and regularly practise archery under the Unlawful Games Act 1541. This duty further extended to longbow tuition to children, where the Act provided that 'every Man having a Man-child or Men-children in his House, shall provide, ordain, and have in his House for every Man-child being of the Age of seven Years and above, till he shall come to the Age of seventeen Years, a Bow and two Shafts to induce and learn them'.

(For the avoidance of doubt, nothing in this article is intended to be legal advice.)

Joe-han Ho

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Protection of Traditional Knowledge in Indonesia

Indonesia is a multicultural country with diverse ethnicities, cultures and religions, leading to a wealth of cultural creations, knowledge and traditions. Where such creations, knowledge and traditions are owned by a certain community and have become part of the identity of that community, they may be protected by Indonesian law as communal intellectual property.

One type of communal intellectual property is traditional knowledge. A well-known example is a form of martial arts known as pencak silat. This martial art was traditionally performed when welcoming guests, usually accompanied by gondang borogong music, and is registered as traditional knowledge from Riau, Indonesia.

New Regulation on Communal Intellectual Property

Traditional knowledge used to be regulated by a number of laws, including three separate ones on copyright, patents and cultural advancement. However, in December 2022, the Indonesian government issued Government Regulation No 56 of 2022 on Communal Intellectual Property ('GR 56/2022'), establishing a single set of rules for the definition and protection of traditional knowledge. One of the aims of the regulation is to encourage the registration of communal intellectual property, which was part of the government's priority program for 2023.

Under GR 56/2022, traditional knowledge is defined as ideas and concepts that contain local values resulting from real experiences of interacting with the environment and that are developed continuously and passed on to the next generation. The Regulation recognises the following categories of traditional knowledge:

- traditional methods or processes;
- technical proficiency;
- skills;
- learning;
- agricultural knowledge;
- technical knowledge;
- ecological knowledge;
- knowledge related to genetic resources;
- knowledge of medicine, traditional medicine and healing procedures;
- economic systems;
- social organisation systems;
- knowledge related to the behaviour of nature and the universe; and
- other forms of knowledge.

Traditional knowledge is a moral right belonging to the community, requiring any user of the traditional knowledge to acknowledge its origin and use it in a manner that maintains its identity and value to the community.

Recordation of Traditional Knowledge

The government is obliged to inventory, care for and maintain traditional knowledge. Currently, unlisted traditional knowledge must be recorded with the Ministry of Law and Human Rights ('MOLHR') or the relevant minister, non-ministerial government institution or regional government. A recordation application can be submitted online by the community to which the traditional knowledge belongs or by the relevant regional government.

The following documents must be submitted as part of the application:

- the prescribed application form;
- descriptions of the traditional knowledge;
- supporting data; and
- a written statement of support for the protection, preservation, development and use of the traditional knowledge, signed by the regional government.

The descriptions of the traditional knowledge should include:

- name of the traditional knowledge;
- community of origin;
- form of the traditional knowledge (for example, written or non-written);
- region/location of the community of origin;
- type of traditional knowledge (for example, dance, craft, clothing); and
- documentary evidence of the traditional knowledge (for example, a video recording).

Once an application for recordation has been submitted, the authorities will conduct a formality review to ensure that all required documents have been submitted. They will then form a team to conduct a verification review to determine if the knowledge meets the definition of traditional knowledge set out in GR 56/2022. If it is determined that the knowledge meets the definition, it will be recorded in the Communal Intellectual Property Database developed by the MOLHR's Directorate General of Intellectual Property. Currently, there are around 10,475 communal intellectual properties recorded in the database, of which over 500 are traditional knowledge.

The recordation of traditional knowledge helps to prevent the exploitation of knowledge in a manner that is not in accordance with the values and meaning given to it by the community of origin. Recordations can also be used to facilitate the resolution of legal disputes. Moreover, the authorities are required to maintain recorded traditional knowledge, including through education and promotion, and ensure that it is used for the benefit of the community of origin.

Use and Safeguarding of Traditional Knowledge

Anyone can use traditional knowledge that is recorded in the Communal Intellectual Property Database, provided they acknowledge its origin and use it in a manner that maintains its identity and value to its community. However, anyone who wishes to use traditional knowledge that is recorded as sacred, secret or strictly held (for example, holy books) may only do so with the permission of the community. Moreover, if a person wishes to use traditional knowledge for commercial purposes, they must share a portion of the monetary or nonmonetary benefits with its community.

Conclusion

Indonesia's mechanisms for protecting traditional knowledge are a step forward in safeguarding the cultural heritage and intellectual property of its diverse communities. With the issuance of Government Regulation No 56 of 2022 on Communal Intellectual Property, Indonesia has established a comprehensive framework for defining, recording and regulating traditional knowledge. This regulation not only acknowledges the communal ownership of traditional knowledge but also emphasises the importance of maintaining its authenticity and value within the respective communities. By requiring recordation and acknowledgment of origin for any use of traditional knowledge, Indonesia aims to prevent its exploitation while promoting its respectful and beneficial utilisation. Through these measures, Indonesia is not only preserving its rich cultural heritage but also fostering a framework of respect and reciprocity among its diverse communities and those who seek to engage with their traditional knowledge.

Karenina Aulia

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IPBA NEW MEMBERS

June to August 2024

We are pleased to introduce our new IPBA members who joined our association from June to August 2024. Please welcome them to our organisation and kindly introduce yourself at the next IPBA conference.

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