



AMERICAN
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Offshore Spotlight: Latest Developments in Law and Finance in the Offshore Jurisdictions

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Offshore Spotlight – Latest Developments

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Panel

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- Jamie Toynton – Grant Thornton, Channel Islands
- Adam Paul – Kirkland & Ellis, Chicago
- Keiran Hutchison – EY, Cayman Islands
- Peter Hayden – Mourant Ozannes, Cayman Islands

Insolvent Trusts

- Appointment of IPs over Channel Island Trusts:
 - Investec v Glenella
 - Crociani
- Application of insolvency law principles where trust fund is inadequate:
 - Z Trust
 - Investec v Glenella

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Insolvent Trusts

- Investec v Glenella
- Three way dispute over breach of trust and validity of internal debt arrangements
- Royal Court of Guernsey Judgment:
 - Former Trustee personally liable for certain internal trust debts
 - No breach of duty established
- Post Judgment and pending appeals – who controls Trusts Assets?
 - Former Trustee with lien?
 - Current Trustee?
 - Creditor with subrogation rights?

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Insolvent Trusts

- Investec v Glenella
- Receivers appointed 24 January 2014
- Powers:
 - Gather specific assets
 - Take control of underlying asset holding companies
 - Remove directors
 - Gather information from both trustees
- No power to distribute
- Trustees had indemnity for costs of compliance

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Insolvent Trusts

- Crociani
- Judgment Jersey 11 September 2017:
 - Declared appointments of assets – void and no legal effect
 - Declared two changes in trustee – void and no legal effect
 - removed all previous trustees
 - appointed new trustees
 - forbade the final “trustee” receiving or otherwise dealing in trust assets

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Insolvent Trusts

- Crociani
- ordered the 4th Trustee, Mauritius, to pay full value of the Promissory Note ("PN") into court *"as security for its obligation to pay compensation"* for breaches of trust:
 - not collecting the interest on the PN
 - agreeing amendments to the PN
 - assigning PN to final "Trustee"
 - amending Trust provisions, giving final trustee platform for rival proceedings in Mauritius

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Insolvent Trusts

- Crociani
- Judgment - Jersey 15 September 2017 - Receivership
- Receivers appointed over PN
- All former/existing trustees ordered to assign to the Receivers the PN and associated pledge
- Receiver holds the Assets to the order of the court
- Power:
 - Demand and receive all amounts due under PN
 - Exercise all remedies...to collect amounts due
 - Bring, defend, compromise proceedings in any jurisdiction

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Insolvent Trusts

- Z Trusts
- “Insolvent Trust”
 - On the facts, the Trustees remained in office
 - Duty to take account of creditor interests
 - Creditor claims were largely agreed
- No appointment of IPs to wind up the Trusts
- Questions of priority to be resolved:
 - Further hearings on Z Trust
 - Investec v Glenella

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Common Law Recognition

- China Agrotech – Segal J, Grand Court of the Cayman Islands
- Heard on 25 August 2017, Judgment dated 19 September 2017
- Ex parte summons
- Cayman incorporated in the Cayman Islands
- Liquidators appointed in Hong Kong
- Authority of HK Liquidators to apply on behalf of the company for a Scheme of Arrangement in the Cayman Islands

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Private International Law

- HK Liquidators had no authority to act on behalf of the company in the Cayman Islands
- Internal governance
- HK winding up order not binding or enforceable in Cayman
- Significance of appointing liquidators in place of incorporation

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Common Law Power

- Broader than rules of private international law
- Statutory jurisdiction not applicable
- *Singularis* and *Rubin*
- Limits on the common law power
- Scope of the common law power
- The narrow “governance” issue and surrounding circumstances

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Ocean Rig

- Marshall Islands group of companies
- The re-domiciliation of UDW
- Jurisdiction over UDW
- The position of the subsidiaries

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The Scheme

- Restructure of US\$3.7 billion of New York law governed debt
- Debt for equity swap
- Procedure – Cayman scheme v Chapter 11
- Creditor support
- Challenges to the scheme – class composition and fairness

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Chapter 15 Recognition of the Scheme

- Debtors satisfied 109(a) with U.S. debt
- TRO granted despite minority debtholder objections (Highland, Ad Hoc Group)
- Involuntary proceeding not allowed while TRO pending against debtor
- COMI properly shifted; good faith, legitimate reason
- Cayman scheme recognized based on Cayman judge's thorough opinion

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Mood Media Chapter 15

- Canadian CBCA Proceeding: *In The Matter Of An Application Under Section 192 Of The Canada Business Corporations Act, R.S.C. 1985, C. C-44, As Amended, And Rule 14.05(2) Of The Rules Of Civil Procedure And In The Matter Of A Proposed Plan Of Arrangement Of Mood Media Corporation*
- US Chapter 15: *In re Mood Media Corporation, et al.*, Case No. 17-11413 (MEW)
- Judge denied Mood Media's petition for recognition of the Canadian proceedings as foreign non-main proceedings with respect to the U.S.-based Mood Media units.
- Allowed "substantive relief" that was "analogous" to chapter 15 protection.

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Chapter 15 Typical Issues

- Objections to applications for provisional relief including TROs.
- Objections to recognition order and other relief granted based on COMI and public policy.
- Objections to recognition order on grounds that U.S. entities cannot be debtors in a chapter 15 proceeding.
- Motions for relief from the stay granted to debtors in a foreign main proceeding.
- Coordination of the chapter 15 proceedings with the primary foreign proceedings and other foreign recognition proceedings.

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Chapter 15 Recent Developments

- *Stern v. Marshall* issues; permissive application of section 365
 - *In re Bluberi Gaming Technologies, Inc.*, 554 B.R. 841 (Bankr. N.D. Ill. 2016)
- Recognition of U.S. entity in foreign proceeding
 - *In re Karhoo Inc.*, No. 16-13545 (Bankr. S.D.N.Y. 2016)
- Preclusive effect of foreign findings of fact without chapter 15
 - *Trikona Advisers Ltd. v Chugh*, 846 F.3d 22 (2d Cir. 2017)
- No permissive abstention from chapter 15
 - *Firefighters Retirement System v. Citco Group Ltd.*, 788 F.3d 425 (5th Cir. 2015)
- Ability to bring avoidance action under foreign law (not Bankruptcy Code)
 - *Laspro Consultores LTDA v. Alinia Corp. (In re Massa Falida do Banco Cruzeiro do SUL S.A.)*, 567 B.R. 212 (Bankr. S.D. Fla. 2017)

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QUESTIONS?