ILA – Annual Conference 2017

This year's Annual Conference was held at the Royal College of Physicians in London. Over 100 delegates attended.

We were delighted and very grateful to have as our Conference Chair **Leon Zwier, head of reconstruction and insolvency, Arnold Bloch Leibler**, who had travelled from Melbourne for the Conference. In his opening comments, Leon highlighted how Australia has progressed from an ultra-conservative insolvency culture, focussing on the strict enforcement of legal and security rights, via the introduction of the voluntary administration regime in 1993, which, with its focus on the rescue of the company, was seen as a revolutionary step, through the early 2000s, when US noteholders and debt traders entered the market, with a radically new approach to rehabilitation. Schemes have come back to the fore and Australia is moving to a DIP jurisdiction. Only the week before the Conference, a bill was introduced to reform the draconian wrongful trading laws, which reflects the influence of US law, and a less judgmental cultural view domestically to risk-taking.

As in previous years, legal developments in the insolvency and restructuring field, and forecasts for the future, were put into the broader economic context. **Trevor Williams, former Chief Economist of Lloyds Bank Commercial Banking, and visiting professor at the University of Derby** spoke on **The UK Economic Outlook – Brexit and Other Challenges**. Trevor identified key global challenges for the UK economy, from potential US protectionism, Brexit, a slowdown in China, to the renewed crisis in the Middle East. Brexit has been identified in recent surveys of London based investors as the key challenge to the UK in the medium term (with 71% of those surveyed favouring a soft Brexit). Trevor's presentation identified the numerous possible post-Brexit outcomes for the UK, noting that, on average, trade deals take at least five years to negotiate. Trevor also took delegates through forecasts for the UK economy. Employment is at a record high, driven by increases in the service sectors. However, real pay has stagnated, household debt is on the rise again, and the savings ratio has fallen – a rise in interest rates could hurt many.

Patrick Corr of **Sidley Austin LLP** then gave a presentation on **Directors' Duties: Ripe for Reform?**, linked to the BEIS Green Paper on Corporate Governance, asking whether it is naïve to assume that directors will act with a social conscience if this legally imposed on them, unless there is also a good business case. Is section 172 CA 2006 fit for purpose? If the system is weak, is it ripe for reform and if so, how should it be reformed? The real issue appears to be the lack of accountability. The overriding duties of directors are still to shareholders, and there remain obstacles for other stakeholders to obtain redress (the duties are owed to "the company"). Would concepts of "enlightened shareholder value" be better suited to a voluntary code of practice? Finally, if a real connection cannot be achieved between the legislative aims of stakeholder participation and optimum financial results for shareholders, the danger, as a senior investor remarked to Patrick many years ago, is that "cows move on to better grazing".

The conference then moved on to pre-packs, with some **Reflections on the operation of the pre-pack reforms** by **Linton Bloomberg of Weil, Gotshal & Manges (London) LLP**, focusing on the workings to date of the pre-pack pool. At its launch in late 2015, it was envisaged that, based on 2014 figures, the pool would be called to consider in the region of 600 proposed pre-pack transactions with connected parties. The declining number of administrations overall has had an impact on the number of prepacks, with some 237 connected party transactions being recorded in 2016. Of these, the Prepack Pool Report released on 3 March 2017 notes that 53 were referred to the pool. Of those referred, only 6 produced a negative opinion (of which 5 proceeded anyway). From the profession's standpoint, the low number of referrals reflects the lack of incentive to do so

for buyers, who, if acting reasonably, are unlikely to suffer any consequences from a non-referral. The government does however have another three years to decide whether to introduce regulations and controls governing pre-packs. Whilst there may be little appetite to do so at that time, the "noise" surrounding prepacks has not died down (witness recent comments on recent high-profile deals). There remains a fear that the benefits of prepacks (in terms of job and value preservation) might still be affected, as a response to pressures on the government from some disgruntled unsecured creditors. Whilst there is evidence of some resistance towards the pool referral system from purchasers, Linton stressed that failure to comply with the terms of SIP 16 can have consequences for practitioners – including disciplinary proceedings, and a fine.

David Allison QC and Adam Al Attar, South Square followed with an **Update on Schemes of Arrangement,** looking at key developments in schemes jurisprudence. The presentation first focussed on recent decisions on the impact of the Recast Judgments Regulation and the jurisdiction of the English court in cross-border schemes, analysing the conflicting decisions on the "Art 8 gateway", between the "one creditor is enough" approach in *Metinvest* and *DTek* (which David considers is the correct approach, being certain and predictable) and the "sufficiently large body of creditors" requirement seen in *VGG* and *Global Garden Products*. David then considered the "Art 25 gateway", in particular the uncertainties regarding the approach to asymmetric jurisdiction clauses, contrasting the different approach between the Chancery Division (*Global Garden*) and the Commercial Court (*Commerzbank*). Adam then spoke on recent judicial approaches to class composition and class issues, including on questions of participation in new money, consent and underwriting fees and director nomination rights. The presentation closed with a consideration of the knotty issue of vote splitting, and the recent decision in *Dee Valley Group*.

The Conference was generously sponsored by this year's **Sponsors of the ILA, Global Loan Agency Services Limited** (GLAS). GLAS's roles as agent and trustee have expanded from direct lending transactions and restructurings (including on many of the largest and most significant recent restructurings) to now include syndicated lending and structured finance deals, and it now operates across the world, with offices in London, New York, Singapore, Melbourne and Sydney. Boris Betremieux gave an overview of GLAS' role and functions as restructuring agent, both generally and specifically by reference to the recent Abengoa restructuring, which comprises both debt for debt and debt for equity swaps. GLAS had acted as Margin Agent under earlier rescue financings for Abengoa, and this previous involvement, together with its expertise both in Spain and in high profile European restructurings, and its independence, were key to GLAS' appointment.

The final session of the morning comprised presentations respectively by **John Disson of Standard Bank Group, Will Wright of KPMG** and **Mike Jervis of PricewaterhouseCoopers LLP** on the **Challenges facing the key sectors of Oil and Gas, Retail, and Elderly Healthcare**. Whilst the upstream oil and gas sector had been riding high with premium asset values, the fall in oil prices in January 2016 had a dramatic effect, and was one of the worst years for the industry in decades: I in 3 defaulted on high yield bonds and 16 UK energy companies became insolvent, with service companies also suffering. The fall in share prices reflected the global economic slowdown, and reduced demand, the increasing opportunities for "unconventional oil" (fracking etc) and OPEC's strategic decision to keep oil prices low. Although cautious about recovery, and predicting there will still be insolvency and restructuring opportunities in the sector, John believes it is turning the corner (oil prices are slowly climbing back), and we are likely to see an increase in M&A transactions and private equity interest.

That optimism was not shared by Will in his review of the UK retail sector – his forecast, shared by many, is that this will be a very bad year. The pressure of declining margins (including from the

introduction of the national living wage and increased business rates) and increasing expenditure from price inflation will exacerbate the effect of growth stagnation and a re-channelling of consumer spending into non-retail leisure activities. Retailers will need to be nimble and exploit technological and multi-channel innovations.

Mike closed the session with a focus on the elderly care sector, which Mike described as being at a turning point. The key challenges are the growing number of over-80s with increasingly acute care needs, the on-going pressure on local authority and NHS funding and therefore on the fees paid to independent care providers (which in turn are under pressure from growing costs, with the cost of the Living Wage estimated at £3.8bn by 2020), limited investment in the sector (leading to a contraction in supply), the shortage of carers and nursing staff and the impact of policy changes in legislation and of a tougher inspection regime. Whilst these pressures, and those on the NHS as a whole of an increasingly elderly population, are receiving increased attention and press coverage, the government's response is unclear. The Social Care Precept announced in November 2015 allows councils to increase council tax by 3% in 2017 and 2018 to fund adult social care – however in December 2016, it was announced local authorities would be precluded from raising the precept in FY20. Whilst it is estimated that the precept will raise some £2bn in total by FY20, and the Better Care Fund will provide additional funds, estimates also suggest that a significant funding gap, well in excess of £2.6 bn, will remain.

The afternoon opened with a panel presentation led by **Ken Baird, Freshfields LLP**, considering **Cross-border recognition of insolvency proceedings post-Brexit. Barry Isaacs QC, South Square**, first addressed delegates on the possible outcomes for recognition of insolvency proceedings post-Brexit, both by the UK of EU insolvency proceedings, and by remaining member states of UK procedures. The "inbound" possibilities might include relying on the CBIR and/or amending s 426 to include member states. Neither of these however would address the recognition of foreign insolvency judgments (where the common law approach, already restricted post-*Rubin,* has been further limited by *Singularis*). The "outbound" outcomes could range from the continued application of the Insolvency Regulation, bilateral agreements (assuming member states are competent to enter into them), reliance on the Model Law (poorly adopted to date within the EU) or reliance on the member states' individual principles of private international law. **James Douglas, Ropes and Gray LLP**, then spoke on the possible impact of Brexit on schemes of arrangement, noting that English schemes are a key feature and a valuable USP of the UK restructuring industry, in particular the ability to release third party guarantors. After taking delegates through the extent to which English schemes currently depend on EU legislation, James then examined the possible effect of Brexit (assuming the current position is not retained through equivalent laws). Although currently rare, an inability to look to the Insolvency Regulations would preclude the existing possibility of "wrapping" a scheme that would otherwise fail the domestic jurisdiction tests with a formal insolvency process, whilst the loss of the Judgments Regulation might make it more difficult to persuade an English court the scheme would be recognised (requiring instead evidence of the relevant jurisdiction's rules or private international law) – although Rome I will continue to apply in Europe in relation to English law governed obligations. Independently of Brexit, other jurisdictions are seeking to develop their own restructuring/schemes regimes, which may have an impact on the UK's pole position – but for the moment we retain unrivalled experience and expertise. **Kay Morley, Jones Day**, followed with a presentation on the impact of the EU proposals on harmonisation of insolvency law, and whether there is a danger of the UK being left behind (irrespective of where Brexit comes out). Noting the (rather alarming) fact that four member states have no insolvency or restructuring law at all, Kay summarised the key features of the EU proposals. Whilst these have been described as a "European Chapter 11", the proposals envisage a significantly lesser role for the court than in US Chapter 11

proceedings. Whilst this may ensure costs are not prohibitive, will stakeholders be adequately protected? And how will negotiations on critical valuation issues, for the proposed cross-class cram down, pan out? The UK has separately proposed its own domestic reforms, in the Insolvency Service's Review of the Corporate Insolvency Framework. Should the UK now seek to introduce an "English Chapter 11" and would this contribute to the UK maintaining an integral role in the European restructuring landscape? Much food for thought, although the extent to which insolvency and restructuring will be a prominent feature of Brexit negotiations remains to be seen.

Louise Hutton, Maitland Chambers followed with a presentation on **What to watch out for in the new Insolvency Rules**. Louise's presentation took delegates through the structure of the new Rules and transitional provisions, the inclusion of "non-legislative notes", which identify the provisions of the 1986 Act to which a particular rule relates, and cross-refer to other relevant provisions in the Rules, and the new provisions relating to communications with creditors and decision-making processes. Louise also highlighted that, whilst the new Rules have been presented as being procedural in nature, it is recognised that a number of provisions, relating to statutory interest in administration and set off in administration and liquidation, do have substantive effect. We also await the Supreme Court's decision in the *Lehman Waterfall I* appeal, which will consider whether the currency conversion rule is procedural, or has a substantive effect on the creditor's underlying right to be paid the debt in the relevant foreign currency.

The last session of the Conference was a lively panel discussion, chaired by **Tony Bugg, Linklaters LLP**, who invited speakers from four different jurisdictions to present and argue **Clashing Patriotic viewpoints: Why my system is best**, which pitted **Leon Zwier** (Australia), **Hon James M Peck, Morrison and Foerster LLP** (USA), **Alexandra Bigot, Wilkie Farr & Gallagher LLP** (France) and **Chris Howard, Sullivan & Cromwell LLP** (England) against each other. Tony invited the panel to give their views on the cultural and philosophical differences in their home jurisdiction and how this impacts on local insolvency law and practice, the attitude to rehabilitation vs creditor rights, the best tools available, and their assessment of how effective their domestic regime is in dealing with insolvency and restructuring. Unsurprisingly, panel members were broadly keen to support and promote their domestic regime. They did however acknowledge shortcomings. In Australia, despite the cultural shifts Leon had alluded to in his opening remarks as Chair, some stigma still attaches to the voluntary administration procedure, which is as a result not used to rehabilitate companies. Chapter 11 is not perfect: it is often expensive, contentious and uncertain; more esoterically, constitutional limitations on matters which bankruptcy judges are able to adjudicate on can lead to costly appeals. English restructurings would benefit from cross-class cram down and a robust DIP finance regime. France's labour laws are renowned, but what is perhaps less well known, but equally problematic, is the prescribed separate class for bondholders. The last word, on post-Brexit consequences, went to Chris Howard, who sees any period of uncertainty as a danger to the UK restructuring framework. Moving ahead, any initiatives to reinforce the concept of COMI, or to expressly exclude schemes from the current framework, could deal a body blow.

The feedback from delegates has been very positive. The Association expresses its gratitude again to our speakers, sponsors and attendees.