



# DEBT WITH DIGNITY

Photography by Samantha Sin

Hong Kong last month hosted the annual conference of INSOL, the international insolvency and restructuring professional group. Its President, James H.M. Sprayregen, talked to [George W. Russell](#) about worldwide legislative trends, the dominance of United States law and the group's international expansion plans

**J**ames H.M. Sprayregen, the veteran Chicago bankruptcy lawyer who assumed the presidency of INSOL International, the federation of national associations of professionals who specialize in insolvency, is under no illusions about where the future of his organization lies.

On a visit to Hong Kong last month for the organization's annual conference, he noted that the INSOL website was recently translated into Chinese. In November 2013, the organization appointed its first Chinese board member, Li Shuguang, a professor at the China University of Politics and Law.

"We've long been perceived as Western and English-speaking but we do consider ourselves as a worldwide organization," Sprayregen says of the 32-year-old group that brings together associations of accoun-

ants, lawyers and other professionals from more than 40 jurisdictions, including the Hong Kong Institute of CPAs.

Sprayregen cites INSOL's extensive China programme, a current focus on Brazil and engagements in Asia-Pacific, Africa and Latin America as evidence of its determined internationalization. "We work in emerging markets with regulators and governments, often in conjunction with partners [such] as the World Bank," he says.

Another key partner is the United Nations Commission on International Trade Law. UNCITRAL, as it is known, created the model insolvency law that INSOL has been trying to propagate worldwide, with limited success.

"It has only been enacted, after 20 years, in 19 countries – kind of a failure," he acknowledges. "One of the INSOL projects is to get it enacted in more places."

INSOL would like the model law to be adopted as it is, but Sprayregen notes pragmatically that there is no one-size-fits-all insolvency regime. "You can't have the same law everywhere," he says. "Even if you do, you can have different results based on social, political and cultural aspects."

The provisions recently written into law under China's Enterprise Bankruptcy Law impress Sprayregen. "I do think it's kind of pro-recovery, designed to save the most jobs and collect the most money for the creditors."

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However, bankruptcy has a long way to go in China in terms of social acceptance. There were about 1,300 corporate bankruptcies in China during 2012, compared with 42,000 in the United States, according to China's Ministry of Law and the U.S. Department of Justice. "We have all this bankruptcy in the U.S. and China has less," says Sprayregen, "but do you really think there's less business failure in China? Of course not."

More than 1.1 million individual Americans went broke in 2012, while China has no legal provision for personal bankruptcy. "In the U.S., we have a fresh start concept and you are given the opportunity to fail and a greater opportunity to succeed. Failure should not scar you for life."

### American power

As one of the best-known bankruptcy lawyers in the world's biggest insolvency jurisdiction – he is a partner with the 105-year-old international law firm Kirkland & Ellis and serves on its worldwide management committee –

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Sprayregen could be expected to hold U.S. law in an especially favourable light.

However, he says he is conscious of the Bankruptcy Code's shortcomings. One of the biggest problems with the U.S. legislation is its politicization, he notes. "Since 1978, the code has been amended about 200 times," he says. "Almost every time it's been changed was because of a case outcome that someone didn't like and went to Congress to lobby for change."

A lot of those amendments have been destructive, he adds. "The one thing we don't have a lobby group for in Washington is debtors. It's always creditors with a financial interest that lobby, whether it's landlords or fishermen or financial industry creditors."

The constant tinkering has prompted a movement – the American Bankruptcy Institute Reform Commission – to revise the code. "I happen to be a member of the committee," says Sprayregen. "There's 15 of us and our charge is to come up with a recommendation to Congress. We decided to – Congress didn't ask us."

Sprayregen acknowledges that the U.S. legal community is aggressively extra-territorial. "We do have a particular arrogance of U.S. law," he says, citing the automatic stay, an injunction that halts actions by creditors, with certain exceptions, to collect from a debtor who has declared bankruptcy under section 362 of the U.S. code.

"The stay not only purports to apply

worldwide, but also intergalactically. That's only half a joke," he adds. "We had some satellite companies that went into bankruptcy and the automatic stay applied to seizure of the satellites."

One aspect of Chapter 11 of the U.S. code that Sprayregen would like to see changed is the requirement that bondholders must unanimously agree to a restructuring. "Under English law, there is basically a collective action clause. There can be a 75 percent vote to agree to a debt restructuring that is legally binding, which we don't have under our high-yield bond indentures.

"The only way to deal with a problem under high-yield bond indentures is either unanimity or taking it through bankruptcy, which is incredibly inefficient," he says. "It's under the Trust Indenture Act of 1938 and it hasn't been amended since then. It's fabulous for professionals but in my mind makes no sense. That would be the biggest thing I would fix in the U.S. system."

### Chapter and verse

By and large, however, Sprayregen is a supporter of the U.S. code, especially Chapter 11, which offers a troubled company pro-

tection from creditors for a limited period to give it a chance to reorganize. "Chapter 11 works pretty well," he says, acknowledging that "it's got warts, and it works better in the bigger cases."

He rejects criticism that there are too many liquidations in the U.S. "Liquidation means, for the most part, that we sell the assets to someone who is going to operate them," he points out. "Especially when you get into the mid-size and above deals, very few assets go out of business or are sold for scrap."

Many bankruptcy professionals criticize insolvent companies who undertake forum

## GOING BROKE: HOW GLOBAL ATTITUDES ARE CHANGING

Insolvency regimes around the world have long been thought of as either creditor-friendly or debtor-friendly. Today, there are much more nuanced approaches that are perceived by INSOL as neither.

"I'm pro-certainty, pro-efficiency and pro-recovery," says INSOL President James H.M. Sprayregen, who visited Hong Kong last month for the organization's annual conference. "And I think I would also characterize INSOL as that."

Last month, Spain overhauled bankruptcy rules to make it easier for troubled companies to avoid liquidation. *Real Ley-Decreto 4/2014*, effective from 10 March, reduces the majority needed for creditor agreements to be approved and facilitates write-offs, maturity extensions and debt-for-equity swaps.

France plans to make it simpler for companies to negotiate with lenders using a court-appointed mediator. Earlier this year, the National Assembly amended the *Loi de Sauvegarde des Entreprises 2005* to create a fast-track procedure for debt restructurings for companies that were going concerns but needed to reduce debt.

In 2012, Germany eliminated the barriers under its insolvency law – *Gesetz zur weiteren Erleichterung der Sanierung von*

*Unternehmen* – to convert debt to equity, which opens the door for new investors, such as distressed debt funds and private equity, to invest in a troubled company. Berlin also introduced a debtor-in-possession basis: Management ceded control to an administrator under the old code.

The common theme of the recent legislation in Europe and elsewhere, including South Africa and Korea, is efficiency. "You see a trend towards more rescue than liquidation with the theory that that will end up in a greater recovery ultimately to creditors and more preservation of jobs," says Sprayregen.

Some Asia-Pacific jurisdictions hope to position themselves as insolvency forums in the mould of Delaware and England and Wales. Singapore is consolidating its individual and corporate bankruptcy legislation to present itself as a regional hub. "Singapore's insolvency regime has not yet been fully developed to deal with cross-border insolvencies," the city-state's Insolvency Law Review Committee noted recently in its recommendations.

Other countries struggle to modernize their codes. The United Arab Emirates, for example, is still mulling a long-awaited insolvency law. Its new federal law, expected this year, might contain features common in other international jurisdictions, such as a moratorium on creditor claims.

In 2009, one of the UAE's constituent emirates, Dubai, performed an emergency

upgrade of its bankruptcy law after a state-owned conglomerate defaulted on US\$24 billion of debt, illustrating Sprayregen's observation that crises tend to spur innovation in insolvency. "They wrote a brand new insolvency code – *Decree 57* – between Friday afternoon and Sunday morning," he says with admiration.

*Decree 57* established a tribunal to handle creditor claims solely against the Dubai World group of companies. Unusually by global insolvency regime standards, the tribunal's decisions are final and there is no recourse to appeal. One of the motives for that was to avoid drawn-out appeals involving recalcitrant bondholders as characterized by the United States system.

"The absence of an appellate mechanism is a critical element of why the regime works," says Christian Adams, a Dubai-based Associate with the Latham & Watkins law firm, which helped draft *Decree 57*. "It doesn't allow individual creditors to extract holdout value when the company can otherwise restructure."

Sprayregen says *Decree 57* illustrates the heterogeneity of insolvency regimes around the world. "We don't necessarily talk about 'best practice,' you might say more 'best fit,'" he says. "We want to be educating people as to what the alternatives are and how things work in other places and what's been good and bad in those places."

shopping in the hope of cutting the best deal with creditors. One recent defaulter, the Taipei-headquartered shipping company TMT Group, last year won the right to a bankruptcy hearing in Texas rather than Taiwan based, at least in part, on assets composed of an advance to the law firm that took its case and a US\$30,000 contract signed days before the company entered Chapter 11.

However, Sprayregen counters that part of the lure of the U.S. system is its consistency of application. "The world is attracted to the places that are most efficient and can get the most recovery." He rejects claims that Delaware, one of the world's favourite venues for bankruptcy cases, bases its ap-

peal on debtor friendliness. "In a lot of our cases, the lenders are the ones who want Delaware because of the certainty and the repetitiveness of cases. You kind of know what's going to happen."

The U.S. code's resilience, he adds, is shown by its replication – at least in part – by many other jurisdictions. "I do think you've seen most countries take an amalgam of some sort of U.S. stuff and some kind of U.K. stuff," he says. "The law enacted over the past six or seven years that's closest to Chapter 11 is China's, interestingly enough," he says.

Sprayregen believes an insolvency system gains more from a highly skilled professional class than perfect legislation. "It's

not just the law. You need a trained judiciary and a trained professional class to make the thing work. That's what you have in Hong Kong – a well-developed professional system and the rule of law."

Comprehensive insolvency systems, he adds, can function without recourse to the judicial process. "In the U.S., a huge number of restructurings are done outside the court system, but are done as if you had used the courts."

### A world of ideas

Halfway into his two-year term as President, Sprayregen acknowledges there is still much to do with INSOL's global agenda.

### FACULTY HELPS ON BOTH SIDES OF THE BOUNDARY

As Hong Kong grapples with framing new legislation to cover corporate restructuring and insolvency, the Hong Kong Institute of CPAs has been the scene of expert discussions, training and networking in the fields for more than 25 years.

The Institute's Restructuring and Insolvency Faculty was established in 2008, succeeding the Insolvency Interest Group, which had been set up in 1987. The faculty runs regular seminars on topical issues, such as recent legal cases.

"In a nutshell, it provides a forum for the promotion of the interests of those professionals practising in the field," says faculty executive committee Chairman Bruno Arboit, Managing Director of Arboit Consulting and an Institute member. "It helps in promoting best practice and speaks on behalf of the profession in making submissions on proposed legislative changes or other matters that may have an impact."

The ongoing debates over the revisions to Hong Kong's insolvency law have been a frequent topic of interest. "The faculty

always seeks to engage its members in respect of such issues and regularly makes submissions to relevant government departments," Arboit says.

Given the often cross-border nature of insolvency, the faculty seeks to foster cooperation with Mainland stakeholders."

For example, in June 2013, a delegation of 16 members visited the Shenzhen Intermediate People's Court and held a roundtable discussion with Mainland judges, lawyers and insolvency practitioners to discuss cross-border issues and recent court cases.

Institute members expect ties to grow stronger as China's system continues to modernize. "[In China,] we are witnessing the growing pains of a brand new insolvency system," says Eddie Middleton, Head of Restructuring at KPMG China in Hong Kong and a faculty member who is the Institute's nominee on the INSOL board.

"We've had the first domestic bond default, and we've real estate companies going bust and trust companies going bust," Middleton observes. "The extent to which the insolvency process is going to be used, or allowed to be used, is something we'll all follow with heightened interest."

Insolvency cases have become more

common in the Mainland with the enactment of the current Enterprise Bankruptcy Law in 2006. Bankruptcies in China rose to 2,100 in 2012 from 1,300 the previous year, according to data from Beijing Siyuan Consultancy. "The development of the law and practice has been phenomenal, as much effort has been put in to promote such development," says Alan Tang, Head of Specialist Advisory Services at ShineWing (HK) CPA, who teaches courses for the Institute's Professional Diploma in Insolvency.

Tang believes there are good prospects for commercial development in restructuring. "Specialized bankruptcy courts have been developed in many major cities and the Supreme People's Court promotes and organizes many training sessions for judges," he points out.

The main outstanding issues include the general lack of transparency and consistency of the judicial system. "A practical conflict is the rights and obligations of judgment creditors who have seized assets of an insolvent enterprise in the creditors' location," says Tang. "These creditors and local courts will not easily release assets for the general benefit of all creditors elsewhere."

**“The velocity of cases and money flows and technology has impacted on restructuring tremendously.”**



“The world is globalizing and obviously large companies for years have operated on a multinational basis,” he says. “But even mid-sized and small companies these days either operate multinationally or their suppliers or creditors or both are multinational. Very few companies are purely domestic.”

In addition to a broader reach, Sprayregen hopes INSOL could attract a wider cross-section of the international business community beyond its current composition of largely accountants and lawyers.

“We are trying to get more lenders involved in INSOL, as well as more hedge funds,” he says. “It would make for a more robust organization if we could get more financial institutions involved.” A lenders group was formed a decade ago but petered out after 2008 when the financial crisis hit and institutions stopped paying

for their delegates to attend INSOL events.

Sprayregen says INSOL will continue to develop its formal agenda of panels, seminars and education. However, he adds, the informal interaction and networking is as important, or sometimes even more, to promote what he calls intellectual curiosity and idea generation on the way various systems work around the world and different ways they can be improved.

The INSOL President sees a unique role for cosmopolitan international financial centres such as Hong Kong. “Coming from the U.S., where we have a fair amount of xenophobia and inward-looking attitudes, including among many professionals, I think there’s a huge role for Hong Kong.”

Professionals in Hong Kong, he adds, are more likely to recognize the value of other insolvency regimes worldwide. “Be-

cause of where it sits and the nature of its population, it has a more worldly and global outlook and more openness to other people’s systems and how those work.”

INSOL’s future success, Sprayregen concludes, will depend on the willingness and ability of accountants and lawyers to work together. “Accountants need to be able to understand the rudimentaries of the legal system, while lawyers have to better understand balance sheets and income statements.”

Technology, he adds, has increased the speed at which professionals work. “The velocity of cases and money flows and technology has impacted on restructuring tremendously.” However, misjudgment and greed are no different from when he started in bankruptcy law more than 30 years ago. “In insolvency, basically there’s nothing new.” **A**