

JOURNAL OF BANKING AND FINANCE LAW AND PRACTICE

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ARTICLES

The UNCITRAL Model Law on Cross-Border Insolvency and its impact on maritime creditors – Jennifer Devlin

The UNCITRAL Model Law on Cross-Border Insolvency has recently been enacted both in New Zealand and in many of its major trading partners. This article contends that the Model Law automatic stay as implemented in New Zealand's *Insolvency (Cross-border) Act 2006* is too broad and will have a negative impact on secured creditors, which, it is argued, include most maritime claimants. Further, as the requirement for adequate protection for creditors before assets can be turned over for distribution overseas will never be satisfied in the case of maritime creditors, admiralty actions should be allowed to proceed in New Zealand despite foreign insolvency proceedings. 95

Banks and de facto directorships – Martin Markovic

Banks and major secured creditors frequently work closely with financially distressed corporate clients in what are termed "business workouts". This article examines the potential risks to banks involved in business workouts of becoming attractive targets for liquidators for insolvent trading litigation if the bank's corporate client goes into liquidation. The article examines the risks of banks falling within the statutory definition of "de facto director" pursuant to s 9(b)(i) of the *Corporations Act 2001* (Cth). The article provides a critical examination of *Emanuel Management Pty Ltd (in liq) v Fosters Brewing Group Ltd*, arguably, the leading Australian case on this topic. The article provides a review of the procedures and conditions which a bank may require in a business workout with respect to their potential relevance to the bank's risk of de facto director status. A brief examination is provided with respect to whether or not banks may avoid risks of de facto director status in business workouts by engaging consultants. Finally, the key finding of the article is that a bank's risk of de facto director status in a business workout may be significantly influenced when a bank's conduct and the conditions result in the bank exercising real influence in the corporate governance of its client company. 123

An intensifying threat to commercial letters of credit: The Trade Practices Act – Angelique Leondis

This article analyses whether the autonomy of commercial letters of credit should be subject to the prohibitions on unconscionable conduct in ss 51AA and 51AC of the *Trade Practices Act 1974* (Cth). In so doing, it analyses the legislative intention and policy interests behind ss 51AA and 51AC and the policy interests relevant to commercial letters of credit. The article considers the actions the courts can take to avoid applying ss 51AA and 51AC to commercial letters of credit, including exercising their discretion against granting an injunction or granting an injunction on a slightly broader fraud exception to the autonomy principle. Finally, it argues for legislative amendment to remove what is starting to constitute a real threat to the efficacy of trade finance in this country. 139

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