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ARTICLES

Ipso facto clauses: Should they be enforceable under Pt 5.3A? – *Nicholas Mirzai*

This article provides a critical examination of Australia's existing insolvency regime, focusing in particular on the Pt 5.3A Voluntary Administration (VA) process, and the implications of ipso facto clauses on the ability of domestic corporations to undergo a successful corporate rescue. While the ipso facto clause has attracted some deliberation in several official inquiries in recent times, the result has largely been nothing more than greater confusion and difficulty. Through an analysis of their scope and effect, this article ultimately proposes a legislative amendment addressing many of the issues raised by the various corporate stakeholders affected by ipso facto clauses. The aim is to sufficiently balance both the interests of the company and the company's creditors upon a corporation entering voluntary administration. 4

Adjusting creditor rights against third parties during debt restructuring – *Jason Harris*

Debt restructuring procedures aim to achieve a compromise between the needs of the debtor and its creditors. It is common for business to be conducted using group structures with related parties potentially exposing themselves to broad claims upon the debtor's insolvency, usually in a false hope of reparations. Enterprise groups may seek a global resolution to their disputes by proposing settlement arrangements that will address claims against the primary debtor as well as potential claims against related third parties. Recent decisions concerning the collapses of Lehman Brothers Australian and Opes Prime offer contrasting approaches to the question of whether a formal restructuring procedure (such as a scheme of arrangement or a deed of company arrangement) can include rights that creditors have against third parties. This article considers the potential scope and effect of these decisions and suggests that other mechanisms may also be available, particularly the long-standing but little used s 510 arrangement under voluntary liquidation. 22

Tracing misappropriated funds in a liquidation: The Bishopsgate exceptions – *Christopher Peadon*

Parties seeking to recover misappropriated funds from collapsed entities are often disappointed by reason of the priority of secured creditors and competing claims of other unsecured creditors. However, a party that can trace the misappropriated funds into an asset can defeat all other claims to that asset except for the claim of a bona fide purchaser for value without notice. Such claims sometimes fail because of the principle that funds cannot be traced through on overdrawn account. British courts dealing with the collapse of the Maxwell media empire in the 1990s left the door open to certain exceptions to that principle. The issue may well arise in the litigation flowing out of the spate of recent corporate collapses. It is suggested that the so-called exceptions are inconsistent with the principles of the law of property and should not be recognised by the courts. 37

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