ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following for their learned assistance throughout the preparation of this book:

ARENDT & MEDERNACH
BAKER MCKENZIE
BERNITSAS LAW
BHARUCHA & PARTNERS
BINDER GRÖSSWANG ATTORNEYS AT LAW
BIRD & BIRD SZEPETOWSKI I WSPÓLNICY SP K
CLEARY GOTTLIEB
CLIFFORD CHANCE
DAVIS POLK & WARDWELL LLP
FALUDI WOLF THEISS ATTORNEYS-AT-LAW
GALDINO & COELHO ADVOGADOS
GILBERT + TOBIN
GSK STOCKMANN
MANNBENHAM ADVOCATES LIMITED
MATHESON
OSCÓS ABOGADOS
PRAGER DREIFUSS AG
RESOR NV
SLAUGHTER AND MAY
WEERAWONG, CHINNAVAT AND PARTNERS LTD
WHITE & CASE

© 2018 Law Business Research Ltd
CONTENTS

PREFACE.......................................................................................................................................................... vii
Donald S Bernstein

Chapter 1  AUSTRALIA........................................................................................................................................ 1
Dominic Emmett and Peter Bowden

Chapter 2  AUSTRIA........................................................................................................................................ 15
Gottfried Gassner and Georg Wabl

Chapter 3  BRAZIL........................................................................................................................................ 26
Mauro Teixeira de Faria and Rodrigo Saraiva Porto Garcia

Chapter 4  CANADA........................................................................................................................................ 40
Michael Nowina and Sarah Faber

Chapter 5  ENGLAND & WALES.................................................................................................................. 49
Ian Johnson

Chapter 6  FRANCE......................................................................................................................................... 80
Fabrice Baumgartner and Aude Dupuis

Chapter 7  GERMANY.................................................................................................................................... 89
Andreas Dimmling

Chapter 8  GREECE....................................................................................................................................... 102
Athanasia G Tiene

Chapter 9  HONG KONG............................................................................................................................ 119
Scott Bache, Joanna Charter and Robert Child

Chapter 10 HUNGARY.................................................................................................................................... 135
Zoltán Faludi, Enikő Lukács and Diána Boross-Varga

© 2018 Law Business Research Ltd
## Contents

<table>
<thead>
<tr>
<th>Chapter</th>
<th>Country</th>
<th>Author(s)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Chapter 11</td>
<td>INDIA</td>
<td>Justin Bharucha</td>
</tr>
<tr>
<td>Chapter 12</td>
<td>IRELAND</td>
<td>Julie Murphy-O'Connor</td>
</tr>
<tr>
<td>Chapter 13</td>
<td>ISLE OF MAN</td>
<td>Miles Benham and Carly Stratton</td>
</tr>
<tr>
<td>Chapter 14</td>
<td>ITALY</td>
<td>Gaetano Iorio Fiorelli and Eliana Maria Fruncillo</td>
</tr>
<tr>
<td>Chapter 15</td>
<td>LUXEMBOURG</td>
<td>Pierre Beissel and Sébastien Binard</td>
</tr>
<tr>
<td>Chapter 16</td>
<td>MEXICO</td>
<td>Darío U Oscós Coria and Darío A Oscós Rueda</td>
</tr>
<tr>
<td>Chapter 17</td>
<td>NETHERLANDS</td>
<td>Lucas P Kortmann and Abslem Ourhris</td>
</tr>
<tr>
<td>Chapter 18</td>
<td>POLAND</td>
<td>Bartłomiej Niewczas and Patrycja Piotrowska</td>
</tr>
<tr>
<td>Chapter 19</td>
<td>RUSSIA</td>
<td>Pavel Boulatov</td>
</tr>
<tr>
<td>Chapter 20</td>
<td>SINGAPORE</td>
<td>Nish Shetty, Elan Krishna and Keith Han</td>
</tr>
<tr>
<td>Chapter 21</td>
<td>SPAIN</td>
<td>Iñigo Villoria and Alexandra Borrallo</td>
</tr>
<tr>
<td>Chapter 22</td>
<td>SWITZERLAND</td>
<td>Daniel Hayek and Laura Oegerli</td>
</tr>
<tr>
<td>Chapter 23</td>
<td>THAILAND</td>
<td>Suntus Kirdsinsap, Natthida Pramunorapal, Piyapa Siriveerapoj and Thanawan Kirdsinsap</td>
</tr>
<tr>
<td>Chapter 24</td>
<td>UNITED STATES ............................................................................................................ 330</td>
<td></td>
</tr>
<tr>
<td>------------</td>
<td>-----------------------------------------------------------------------------------------------------------------</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Donald S Bernstein, Timothy Graulich and Christopher S Robertson</td>
<td></td>
</tr>
<tr>
<td>Appendix 1</td>
<td>ABOUT THE AUTHORS............................................................................................................................................ 359</td>
<td></td>
</tr>
<tr>
<td>Appendix 2</td>
<td>CONTRIBUTING LAW FIRMS’ CONTACT DETAILS.................................................................................................. 375</td>
<td></td>
</tr>
</tbody>
</table>
This is the sixth edition of *The Insolvency Review*. Once again this volume offers an in-depth review of market conditions and insolvency case developments in key countries around the world. A debt of gratitude is owed to the outstanding professionals the world over who dedicated their time and talents to this book. Their contributions reflect diverse viewpoints and approaches, which in turn reflect the diversity of their respective national commercial cultures and laws.

The preface to the fifth edition explored the trend in favour of insolvency regimes that offer debtors the opportunity to restructure debts and operations and emerge as going concerns. These regimes generally share certain core features, including an emphasis on reorganisation rather than liquidation, a stay of enforcement proceedings, continuity of management, protections for new financing, and claim classification and voting mechanisms that bind hold-out creditors to the terms of a restructuring if requisite conditions are met. Recent examples evidencing this trend include Singapore’s sweeping reforms to its corporate insolvency laws,¹ which incorporate a number of features similar to those of US Chapter 11 and English schemes, and the recommendations set forth in the Proposal for a Directive of the European Parliament and of the Council on preventive restructuring frameworks, second chance and measures to increase the efficiency of restructuring, insolvency and discharge procedures and amending Directive 2012/30/EU (the Proposed Pre-Insolvency Directive).²

In some jurisdictions, approaches to insolvency that embrace these core principles have tended to favour a variety of interests other than those of creditors. Among other things, some offer enhanced protections to the debtor, shareholders or employees. For example, the new Singapore law lacks a provision that would allow for share capital to be transferred (or extinguished and reissued) to creditors or other parties without the approval of shareholders, and the Proposed Pre-Insolvency Directive does not provide the debtor’s creditors with the opportunity to solicit votes on a competing restructuring plan or valuation estimate. Other jurisdictions (e.g., Mexico) provide certain constituencies, for example workers who are owed wages, priority status over secured creditors.

---

While the trend of favouring non-creditor interests continues to gain traction in some jurisdictions, it is by no means universal. Some countries take a more ‘pro-creditor’ approach. Features of such regimes may include the automatic replacement of existing management with an administrator or liquidator, prohibitions on seeking court protection without creditor consent, the absence of a stay of enforcement proceedings such that secured creditors may foreclose on their property, and required compliance with the absolute priority rule.\textsuperscript{3} While some creditor-friendly features, such as the absolute priority rule, are fully compatible with reorganisation, other features, like the absence of a stay or an absolute requirement that creditors consent to a reorganisation, make it more likely a debtor will liquidate. In such jurisdictions, reorganisation may be difficult or, as a practical matter, impossible without creditor support.

Increasingly, countries cannot be pigeon-holed into ‘pro-creditor’ or ‘pro-debtor’ categories. Rather, the various jurisdictions surveyed in this book and across the globe are on a continuum that ranges from strongly pro-creditor to strongly pro-debtor. Movement in either direction is justified by perceptions of trade-offs, for example between benefits to healthy companies (‘ex ante’ benefits) and benefits for firms in distress and their stakeholders (‘ex post’ benefits).\textsuperscript{4} Creditor friendly regimes tend to claim ex ante benefits such as encouragement of lower borrowing costs, more robust capital markets and incentives for appropriate risk-taking, and optimal allocation of assets to their highest and best uses. Pro-debtor regimes tend to emphasise maximising the total value of assets of insolvent companies, preserving the going-concern value of viable enterprises that would likely be forced to liquidate in an overly creditor-friendly environment, and distributional considerations (such as mitigating hardships to employees and shareholders).

It is difficult to verify whether pro-creditor regimes generate ex ante benefits because the benefits are difficult to isolate and the causes and effects are hard to confirm.\textsuperscript{5} A jurisdiction’s insolvency regime is only one of many factors influencing the availability of and access to credit in a national economy. Recently, however, Germany’s rather abrupt change from a highly pro-creditor insolvency regime to a very pro-debtor insolvency regime provided an opportunity to observe the effects of such a change at work. Earlier this year, the Harvard Law School Bankruptcy Roundtable\textsuperscript{6} (the HLS Bankruptcy Roundtable) reported on a draft article by Canipek, Kind and Wende\textsuperscript{7} evaluating this natural experiment.


The prior German insolvency regime favoured liquidation of the insolvent company and the sale of its assets. As Canipek et al. note, in the case of bankruptcy, existing management had to be replaced with an administrator, who in practice was often a person with limited management skills and a liquidation-oriented attitude. Ninety-nine per cent of all firms that filed for bankruptcy liquidated, with over half doing so within three months of the filing date. On 1 March 2012, the then existing law was amended by the Act of the Further Facilitation of the Restructuring of Companies (ESUG). As discussed in detail in the Germany chapter of this book, ESUG incorporated many debtor-friendly elements, including a three-month stay period and an injunction against secured creditors for the duration of the case. To offer a sense of how significantly ESUG changed the nature of Germany’s insolvency framework, Canipek et al. note that, on the well-known creditor rights index of La Porta et al., which varies between zero (poor creditor rights) and 4 (strong creditor rights), German bankruptcy laws shifted from a score of 3.5 to a score of 1.0.

In the HLS Bankruptcy Roundtable post, Canipek et al. describe the conclusions of their study as follows:

In the study, we show that high-tangible-asset companies – which the reform predominantly affected – turned away from being overly risk-averse at the cost of profitability, relative to low-tangibility control firms. Specifically, weaker creditor rights motivated affected firms to increase financial leverage and to prefer the more flexible unsecured debt. Moreover, affected firms reduced unprofitable but risk-lowering expansions and sold off less profitable but easily-marketable assets that are useful in downturns by providing the liquidity that can prevent bankruptcy. Our results suggest that weaker creditor rights encourage firms to eliminate protection mechanisms formerly constructed to contract around liquidation-oriented bankruptcy provisions. This view is supported by the increased profitability and higher risk of treated firms after the reform.

The stronger pre-ESUG creditor rights not only produced \textit{ex post} deadweight losses in terms of inefficient liquidation, but also discouraged firms to make profitable investment decisions. This reveals \textit{ex ante} inefficiencies of creditor rights, an aspect largely ignored in the extant literature. This conclusion is interesting. If the argument for pro-creditor regimes is that they increase \textit{ex ante} efficiency, then they need to actually deliver \textit{ex ante} benefits. Canipek et al. offer empirical support for the proposition that pro-creditor insolvency regimes do not deliver the predicted benefits for healthy companies, since their selling points (for example, lower borrowing costs) come with inherent costs (for example, incentives to avoid insolvency even when it is inefficient to do so). However, while the HLS Bankruptcy Roundtable post suggests that broad implications may be taken from Canipek et al., the study is narrowly focused on comparing ESUG with the pre-ESUG regime. This leaves open the possibility that there may be combinations of pro-creditor and pro-debtor features in between these extreme formulas – regimes in a ‘middle ground’ – that strike an optimal balance.

In this sixth edition, readers will have the opportunity to consider the merits of restructuring regimes that take each approach and whether regimes that take a middle ground – exhibiting an appropriate combination of pro-debtor and pro-creditor features – are best.

\footnotesize
\begin{itemize}
\item[8] \textit{id. at 7.}
\item[9] \textit{id. at 2.}
\end{itemize}
One such ‘middle-ground’ approach – with a statutory stay of creditor remedies, continuation of the debtor-in-possession, a limited period for the debtor to exclusively control the reorganisation plan process and the possibility of creditor cramdown if the absolute priority rule is followed – will be quite familiar to our American readers.

The recent trend towards legal frameworks that adopt features of Chapter 11 perhaps demonstrates a growing belief that some pro-debtor features, like reorganisation and debtor control, are, on the whole, more conducive to wealth creation and preservation. Perhaps the trend is driven by competition for investment, on the theory that companies and investors would prefer to preserve going concern value in the case of a downturn, as is suggested by Singapore’s recent enactments. Whatever the drivers, I expect that the trend away from liquidation and in favour of reorganisation will continue, and that, within the reorganisation framework, countries will continue to experiment with both pro-creditor and pro-debtor features in an attempt to find the optimal balance.

I once again want to thank each of the contributors to this book for their efforts to make The Insolvency Review a valuable resource. As I have noted in prior editions, this book is a significant undertaking because of the current coverage of developments we seek to provide. As always, my hope is that this year’s volume will help all of us, authors and readers alike, reflect on the larger picture, keeping our eye on likely, as well as necessary, developments, both on the near and distant horizons.

Donald S Bernstein
Davis Polk & Wardwell LLP
New York
September 2018
Chapter 1

AUSTRALIA

Dominic Emmett and Peter Bowden

I INSOLVENCY LAW, POLICY AND PROCEDURE

ii Statutory framework and substantive law

The Corporations Act 2001 (Cth) (Corporations Act) is the primary legislative reference for, amongst other things, the registration, insolvency and reorganisation of companies incorporated in Australia. In the context of insolvency, the Corporations Act prescribes the manner in which an Australian company enters into a formal insolvency process and how its assets are ultimately distributed amongst creditors.

The legislative framework for personal insolvency is set out in the Bankruptcy Act 1966 (Cth) (Bankruptcy Act), which prescribes the manner in which an individual may enter into a personal insolvency agreement or a formal bankruptcy process. Unlike some other jurisdictions, bankruptcy in the Australian context refers to the insolvency of an individual only.

Notwithstanding that the regulation and rules governing corporate and personal insolvency are set out in two separate and distinct pieces of legislation, the Australian government has recently introduced legislative reform, by way of the Insolvency Law Reform Act 2016 (Cth), intended to align to the extent possible the Bankruptcy Act and the Corporations Act and, where possible, create common rules for both corporate and personal insolvency processes.

For the purpose of this chapter, however, we have focused on the statutory framework and substantive law for corporate insolvency processes only.

The broad aim of insolvency law is to balance the interests of the primary stakeholders in an insolvent estate, these being debtors and creditors. A number of formal procedures are available under the Corporations Act in the event of insolvency. These include: receivership (private and court-ordered); voluntary administration; deeds of company arrangement; provisional liquidation; liquidation (voluntary and involuntary, and solvent and insolvent); and schemes of arrangement (court-sanctioned).

The Australian test for solvency is set out in Section 95A of the Corporations Act, which provides that:

A person is solvent if, and only if, the person is able to pay all the person's debts, as and when they become due and payable.

A person who is not solvent is insolvent.

1 Dominic Emmett and Peter Bowden are partners at Gilbert + Tobin.
The courts have not applied Section 95A as a rigid rule but rather as a factual question to be determined as a matter of commercial reality and in light of all the surrounding circumstances. The Section has been applied in a wide and varied manner.

Despite the broad reading of Section 95A, courts have highlighted certain key issues that must be considered when faced with the question of assessing a company’s solvency at a particular point in time. These key issues relate to the ‘cash flow’ test and prospective considerations.

The position in Australia is that the key test of solvency is the cash flow test, rather than the ‘balance sheet’ test (and this is clear from the wording of the legislation). That is, a company must have sufficient cash flow available to it in order to meet its debts as and when they fall due. The balance sheet analysis is not, however, immaterial as the courts have held that it is often relevant in providing background and context for the proper application of the cash flow test.2

ii Policy

There has been a historical view propounded by some that Australia’s insolvency regime has focussed more on punitive measures rather than the rehabilitation of the debtor company. This is in contrast to other jurisdictions3 where it is considered that those insolvency laws better promote restructuring, innovative reorganisations and value preservation. In order to seek to address some of these perceived issues, on 18 September 2017, the Treasury Laws Amendment (2017 Enterprise Incentives No. 2) Bill (TLA Act) received Royal Assent. The TLA Act brought into operation two fundamental changes to Australia’s insolvency laws:

\(a\) a new safe harbour from civil liability for insolvent trading for directors seeking to restructure financially distressed or insolvent companies (i.e., a ‘safe harbour’); and

\(b\) a legislative stay on the enforcement of certain \textit{ipso facto} rights (i.e., an ‘Automatic Stay’ on the enforcement of \textit{ipso facto} rights).

The safe harbour provisions commenced in September 2017 through the introduction of Section 588GA into the Corporations Act. Under this new Section, a director will not be liable for debts incurred by a company while it is insolvent if, ‘at a particular time after the director starts to suspect the company may become or be insolvent, the director starts developing one or more courses of action that are reasonably likely to lead to a better outcome for the company’ than the ‘immediate appointment of an administrator or liquidator to the company’.4

The new safe harbour provisions are not intended to protect directors against more general breach of duty claims. A director will not be able to rely on the new safe harbour provisions where, at the time the debt is incurred, the company has failed to pay employee entitlements or comply with certain reporting or taxation requirements.

The second new development, the introduction into the Corporations Act of an ‘automatic stay’ on the enforceability of \textit{ipso facto} provisions, came into effect from

---

2 For further consideration of the cash flow test, see \textit{Bell Group Limited (in liq) v. Westpac Banking Corporation [No. 9]} [2008] WASC 239.

3 The best example of a liberal insolvency regime is found in Chapter 11 of the US \textit{Bankruptcy Code}. The UK, Germany and Canada have also reformed their insolvency regimes in an effort to promote financial recovery.

4 See Section 588GA of the Corporations Act.
1 July 2018. Broadly, the automatic stay operates to preclude a party from enforcing certain rights (including terminating a contract) simply because the company has entered into certain formal insolvency processes.

The automatic stay will not, however, apply to:

- receiver or controller appointments that are not over the whole or substantially the whole of the company’s assets;
- entry by the company into a deed of company arrangement (DOCA);
- liquidations, other than those immediately preceding a voluntary administration or where the company is fully wound up in connection with a scheme of arrangement;
- rights or self-executing provisions arising under contracts entered into prior to 1 July 2018; and
- certain contract types and rights prescribed in the Regulations and Ministerial Declaration as being exempt from the Automatic Stay.

Pursuant to the new Sections 415E, 434K and 451F of the Corporations Act, a court may lift the automatic stay if the court is satisfied that it is in the interests of justice to do so or where a relevant scheme of arrangement is found to not be for the purpose of avoiding being wound up in insolvency.

iii Insolvency procedures

Formal procedures

The formal insolvency procedures available under Australian law are:

- receivership (both private and court-appointed);
- voluntary administration;
- a DOCA;
- provisional liquidation;
- liquidation (both solvent (members’ voluntary liquidation) and insolvent); and
- a court-sanctioned scheme of arrangement between creditors and the company.

For all insolvency processes, other than for a members’ voluntary liquidation, the individual appointed must be a registered liquidator.

Receivership

The main role of a receiver is to take control of the assets of the company (subject to the security pursuant to which the receiver is appointed) and realise those assets for the benefit of the secured creditor. One or more individuals may be appointed as a receiver or a receiver and manager of the assets. Despite some historical differences, in practice, it is difficult to distinguish between a receiver and a receiver and manager. Receivers are not under an active obligation to unsecured creditors on appointment, although they do have a range of duties under statute and common law.

A receiver can be appointed to a debtor company in the following manner: (1) pursuant to the relevant security document granted in favour of the secured creditor when a company

---

5 Most security interests will allow for the appointment of either. We use these terms interchangeably in this chapter.
has defaulted and the security has become enforceable; or (2) pursuant to an application made to the court. The latter is far less common and, as such, this chapter focuses on privately appointed receivers.

The security document itself will set out the secured party’s rights to appoint a privately appointed receiver (usually by way of a deed of appointment and indemnity). Once appointed, the receiver will be the agent of the debtor company (not the appointee) and will have wide-ranging powers, including the ability to operate the business, sell assets and/or borrow against the secured assets. Those powers are set out in the underlying security document and are supplemented by the receiver’s statutory powers set out in Section 420 of the Corporations Act.

On appointment, a receiver will immediately take possession of the assets subject to the security. Once in control of the assets, the receiver may elect to run the business (if relevant) if he or she is appointed to oversee the whole or substantially the whole of the assets of a company. Alternatively, and depending on the financial circumstances, a receiver may immediately engage in a sale process. When engaging in a sale process, a receiver has a statutory obligation to obtain market value or, in the absence of a market, the best price reasonably obtainable in the circumstances. This obligation is enshrined in Section 420A of the Corporations Act. It is this duty that has presented the most significant stumbling block to the adoption of pre-packaged restructuring processes through external administration that have been seen in, for example, the UK market (colloquially referred to as ‘pre-packs’). This is because of the inherent concern that a pre-pack that involves a sale of any asset without testing against the market could be seen as a breach of the duty under Section 420A.

Having said that, pre-packs are becoming more common in circumstances where time and funding is short and/or the value of that which is being sold is clearly below the value of the secured debt or a sale process with integrity has been conducted prior to the receiver’s appointment.

Once a receiver has realised the secured assets and distributed any net proceeds to the secured creditor (returning any surplus to the company or later ranking security holders), he or she will retire in the ordinary course.

Voluntary administration

The concept of voluntary administration was introduced into Australian law in 1993. Voluntary administration, unlike receivership for example, is entirely a creature of statute. The purpose and practice is outlined in Part 5.3A of the Corporations Act. While voluntary administration has often been compared to the Chapter 11 process in the United States, it is not a debtor-friendly process like Chapter 11. In a voluntary administration, the administrator and creditors control the final outcome to the exclusion of management and members.

---

6 Court appointments normally take place to preserve the assets of the company in circumstances where it may not be possible to otherwise trigger a formal insolvency process.

7 A pre-pack is where a restructure is developed by the secured lenders prior to the appointment of a receiver, and is implemented immediately or very shortly after the appointment is made.

8 The regulation of pre-packs in Australia was flagged in the Productivity Commission’s Report on Business Set-up, Transfer and Closure that was released to the public on 7 December 2015, although no further steps have been taken at this stage.
The object of Part 5.3A is to:

a maximise the chances of the company, or as much as possible of its business, to continue in existence; or

b if the first option is not possible, achieve a better return for the company's creditors and members than would result from an immediate winding up of the company.9

There are three ways an administrator may be appointed under the Corporations Act:

a by resolution of the board of directors that, in their opinion, the company is, or is likely to become, insolvent;10

b a liquidator or provisional liquidator of a company may, in writing, appoint an administrator of the company if he or she is of the opinion the company is, or is likely to become, insolvent;11 and

c a secured creditor that is entitled to enforce security over the whole or substantially the whole of a company's property may, in writing, appoint an administrator if the security interest is enforceable.12

An administrator (often called a 'voluntary administrator') has wide powers to manage the company to the exclusion of the existing board of directors. Once an administrator is appointed, a statutory moratorium is activated, which restricts the exercise of rights by third parties under leases and security interests13 and in respect of litigation claims. This moratorium is designed to give the administrator the opportunity to investigate the affairs of the company, and either implement change or be in a position to realise value, with protection from certain claims against the company.

There are two meetings over the course of an administration that are critical to its outcome. Once appointed, an administrator must convene the first meeting of creditors within eight business days. At this first meeting, the identity of the voluntary administrator is confirmed, the remuneration of the administrator is approved and a committee of creditors may be established. The second creditors’ meeting is normally convened 20 business days after the commencement of the administration (this may be extended by application to the court). At the second creditors’ meeting, the administrator provides a report on the affairs of the company to the creditors and outlines the administrator's views as to the best option available to maximise returns to creditors. There are three possible outcomes that can be put to the meeting: entry into a DOCA with creditors (discussed further below); winding up the company; or terminating the administration14 (this is rare as it would only occur where the company is solvent).

---

9 Section 435A of the Corporations Act.
10 Section 436A of the Corporations Act.
11 Section 436B of the Corporations Act.
12 Section 436C of the Corporations Act.
13 There is, however, an exception to the moratorium on the exercise of rights under security interests in the case of a secured creditor that has security over all or predominantly the whole of the assets of the company and such rights are exercised within the 'decision period' (being 13 business days after the appointment of the administrator).
14 Section 439C of the Corporations Act.
The administration will terminate following the outcome of the second meeting (i.e., either by progressing to liquidation, entry into a DOCA or returning the business to the directors to operate as a going concern (although this is rare)). When the administration terminates, a secured creditor that was previously estopped from enforcing a security interest due to the statutory moratorium becomes entitled to take steps to enforce that security interest unless the termination is due to the implementation of a DOCA approved by that secured creditor.

As noted above, the Automatic Stay on *ipso facto* provisions (referred to earlier in this chapter) will not apply where the company enters into a DOCA. If the creditors of the company resolve at the second meeting that the company should be wound up, the Automatic Stay will apply.

**DOCA**

A DOCA is effectively a contract or compromise between the company and its creditors. Although closely related to voluntary administration it should, in fact, be viewed as a distinct regime as the rights and obligations of the creditors and company will differ from those under administration.

DOCAs are flexible. The terms of a DOCA may provide for, *inter alia*, a moratorium of debt repayments, a reduction in outstanding debt and the forgiveness of all or a portion of the outstanding debt. They may also involve the issuance of shares (subject to certain conditions), and can be used as a way to achieve a debt-for-equity swap through the transfer of shares either by consent or with leave of the court.15

In order for a debtor company to enter into a DOCA, a bare majority of creditors both by value and number voting at the second creditors’ meeting must vote in favour of the company executing a DOCA. Where there is a voting deadlock, for example where there is a majority in number but not in value or vice versa, pursuant to Rule 75-115(3) of the Insolvency Practice Rules (Corporations) 2016 (Cth), the chairperson of the meeting (usually the administrator) may exercise a casting vote in order to pass, or not pass, a resolution. The right to exercise a casting vote is not mandatory and cannot be used where the resolution relates to the administrator’s remuneration.

Once executed, a DOCA will bind the company, its shareholders, directors and unsecured creditors. Secured creditors can, but do not need to, vote at the second creditors’ meeting, and typically only those who voted in favour of the DOCA at the second creditors’

---

15 See Section 444GA of the Corporations Act. We note that the mechanism under Section 444GA was to effect various ‘high profile’ debt for equity restructures such as *Mirabela*, *Nexus Energy*, *Channel Ten* and *Paladin*. © 2018 Law Business Research Ltd
meeting are bound by its terms. Unlike a scheme of arrangement, court approval is not required for a DOCA to be implemented provided it is approved by the requisite majority of creditors.

Upon execution of a DOCA, the voluntary administration terminates. The outcome of a DOCA is generally dictated by the terms of the DOCA itself. Typically, however, once a DOCA has achieved its stated aims it will terminate. If a DOCA does not achieve its objectives, or is challenged by creditors, it may be terminated by the court or in accordance with its terms.

**Provisional liquidation**

A provisional liquidator may be appointed by the court in a number of circumstances. The most commonly used grounds include:

- a) insolvency;
- b) where an irreconcilable dispute at a board or shareholder level has arisen that affects the management of the company; or
- c) if the court is of the opinion that it is ‘just and equitable’ to do so.

A creditor, a shareholder or the company itself has standing to apply for the appointment of a provisional liquidator, although in most cases a creditor will be the applicant. A provisional liquidator will normally only be appointed by the court if there is a risk to the assets of a company prior to a company formally entering liquidation. As such, a provisional liquidator is normally only given very limited powers (i.e., the power to take possession of the assets), and the main role of the provisional liquidator is to preserve the status quo.

A court determines the outcome of a provisional liquidation, and may order either that the company move to a winding up (with the appointment of a liquidator) or that the appointment of the provisional liquidator is terminated.

**Liquidation**

Liquidation is the process whereby the affairs of a company are wound up and its business and assets are realised. A company may be wound up voluntarily by its members if solvent or alternatively, if it is insolvent, by its creditors or compulsorily by order of the court.

---

16 There have been two recent cases challenging the validity of the widely held view that secured creditors are not ‘bound’ by a DOCA unless they vote in favour of it. In Australian Gypsum Industries Pty Ltd v. Dalesun Holdings Pty Ltd [2015] WASCA 95 and Re Bluenergy Group Limited [2015] NSWSC 977, it was held that a DOCA can (if so expressed) have the effect of extinguishing the debt of a secured creditor that did not vote in favour of the DOCA pursuant to Section 444D(1) of the Corporations Act. However, this extinguishment is subject to the preservation of the secured creditor’s ability (by virtue of Section 444D(2)) to realise or deal with its security in respect of its proprietary interest in the secured property and to the extent that its debt was provable and secured assets were available at the date that debt would otherwise be released under the DOCA, without requiring that that debt be preserved into the future or for other purposes.
Voluntary liquidation (members and creditors)

The members of a solvent company may resolve that a company be wound up if the board of directors is able to give a 12-month forecast of solvency (i.e., an ability to meet all its debts within the following 12 months). If not, or if the company is later found to be insolvent, the creditors take control of the process and it converts to a creditor’s voluntary liquidation.

Creditors may also resolve at a meeting of creditors to wind up the company and appoint a liquidator (this may take place at the second meeting of creditors during an administration). If the requisite approvals are obtained in either a members’ voluntary winding up or a creditors’ voluntary winding up, a liquidator is appointed.

Compulsory liquidation

The most common ground for a winding-up application being made to the court is insolvency, usually indicated by the company’s failure to comply with a statutory demand issued by a creditor for payment of a debt. Following a successful application by a creditor, a court will order the appointment of a liquidator.

In both a voluntary and compulsory winding up, the liquidator will have wide-ranging powers, including the ability to challenge voidable transactions and take control of the assets of the company. Most likely, a liquidator will not run the business as a going concern, unless it will ultimately result in a greater return to stakeholders. During the course of the winding up, the liquidator will realise the assets of the company for the benefit of its creditors and, to the extent of any surplus, its members. At the end of a winding up, the company will be deregistered and cease to exist as a corporate entity.

Scheme of arrangement

A scheme of arrangement is a restructuring tool that sits outside a formal insolvency process; that is, the company may become subject to a scheme of arrangement whether it is solvent or insolvent. A scheme of arrangement is a proposal put forward (with input from management, the company or its creditors) to restructure the company in a manner that includes a compromise of rights by any or all stakeholders. The process is overseen by the courts and requires approval by all classes of creditors. In recent times, schemes of arrangement have become more common, in particular for complex restructurings involving debt-for-equity swaps, in circumstances where the number of creditors within creditor stakeholder groups may make a contractual and consensual restructure difficult.

A scheme of arrangement must be approved by at least 50 per cent in number and 75 per cent in value of creditors in each class of creditors. It must also be approved by the court in order to become effective (it requires court approval at two stages). The test for identifying classes of creditors for the purposes of a scheme is that a class should include those persons whose rights are not so dissimilar as to make it impossible for them to consult together with a view to a ‘common interest’. Despite this long-standing proposition, recent case law has suggested that courts may be willing to stretch the boundaries of what would ordinarily be considered the composition of a class and, in doing so, may agree to put creditors in classes even where such creditors within the class appear to have objectively distinct interests.17 Thus, the basis upon which parties have previously grouped creditors into classes is now a less certain benchmark for class composition moving forward.

The outcome of a scheme of arrangement is dependent on the terms of the arrangement or compromise agreed with the creditors but, most commonly, a company is returned to its normal state upon implementation as a going concern with the relevant compromises having taken effect.

The scheme of arrangement process does, however, have a number of limiting factors associated with it, including cost, complexity of arrangements, uncertainty of implementation, timing issues (because it must be approved by the court it is subject to the court timetable and cannot be expedited) and the overriding issue of court approval (a court may exercise its discretion to not approve a scheme of arrangement, despite a successful vote, if the court is of the view that the scheme of arrangement is not equitable). These factors explain why schemes of arrangement tend to only be undertaken in large corporate restructures and in scenarios where timing is not fatal to a restructure.

### iv Starting proceedings

The Federal Court of Australia and the Supreme Courts of each Australian state and territory have jurisdiction to hear matters relating to the insolvency of a corporation (both civil and criminal offences arising from insolvency proceedings).

Matters pertaining to debt recovery and monetary compensation can also be dealt with by other courts such as district courts, county courts and magistrates’ courts within their jurisdictional limits. The judicial institutions have discretion to transfer matters between them if considered appropriate.

It is generally only the Federal Court and the Supreme Courts that have jurisdiction to wind up a company.

Interestingly, two of the more common forms of insolvency process, voluntary administration and receivership, often have no court involvement.

### v Control of insolvency proceedings

For administrations and liquidations, the relevant insolvency practitioner has control of the company itself to the exclusion of the directors.

In an insolvent winding up, the members lose any right to management of the company. The liquidator is vested with wide powers of investigation and inquiry as well as the power to recover and gather in and secure the company’s property. Liquidation does not interfere with the rights of a secured creditor who is able to retain and enforce the security and recover the full amount for the debt owed.

In a voluntary administration, the creditors control the final outcome to the exclusion of management and members, and ultimately decide on the outcome of the company.

Upon execution of a DOCA, the voluntary administration will terminate and the company will no longer enjoy the benefit of any automatic statutory stay or moratorium prescribed in the Corporations Act. Once the DOCA has been executed, a director’s powers are no longer suspended, but they can only exercise their powers consistently with the provisions of the DOCA.

Where the powers granted to a receiver are broadly expressed, as they usually are, the receiver will control the management of the company and its business to the exclusion of the directors.
Following the implementation of a scheme, often an administrator will be appointed (a 'scheme administrator') to implement the terms of the scheme, which role ceases once the scheme is implemented. This is not a requirement under the Corporations Act but is often utilised in large and complex creditors’ schemes.

vi Special regimes
As noted earlier in this chapter, the Corporations Act is the primary legislative instrument for insolvency and restructuring in Australia and governs the insolvency proceedings of all companies incorporated in Australia and companies incorporated or possessing separate legal personality in foreign jurisdictions that carry on business in Australia along with building societies, credit unions and managed investment schemes.

The provisions of the Corporations Act do not govern the potential insolvency proceedings for:

- government agencies;
- state or federal corporate bodies; or
- entities created by statute that are not companies.

The individual statutes creating these bodies will normally provide for their dissolution or winding up.

As a general comment, we note that there is no precedent in Australia for a government-owned enterprise becoming insolvent.

The Personal Property Security Act 2012 (Cth) is the primary legislation in Australia that governs personal property security and is therefore an integral part of restructuring and insolvency law in Australia.

vii Cross-border issues
Australian courts cooperate with foreign courts and insolvency practitioners, and will recognise the jurisdiction of the relevant court in which the ‘centre of main interest’ (often referred to as the ‘COMI’) is located. This approach follows the UNCITRAL Model Law on insolvency (Model Law), which was codified into Australian law through the Cross-Border Insolvency Act 2008 (Cth) (Cross-Border Act).

Under Section 581 of the Corporations Act, Australian courts have a duty to render assistance when required by a foreign insolvency court. Receivers do not have the benefit of taking action in foreign jurisdictions that other insolvency administrators have under the Cross-Border Act. This is because receiverships relate only to a debt owed to the appointer and as such, cannot be said to be ‘collective proceedings’ in terms of the application of the Model Law.

As above, the Cross-Border Act allows for the recognition of foreign proceedings. The court’s power to grant relief appears to also extend to the enforcement of foreign judgments. Furthermore, the Foreign Judgments Act 1991 (Cth) creates a general system of registration of judgments obtained in foreign countries but will only apply to judgments pronounced by courts in countries where, in the opinion of the Governor-General, substantial reciprocity of treatment will be accorded by that country in respect of the enforcement in that country of judgments of Australian courts. While in most cases Australian courts have formally

---

18 Section 8, Cross-Border Insolvency Act 2008 (Cth)
recognised foreign proceedings under Section 581 of the Corporations Act when requested to do so, there have been exceptions. For example, in the case of Yu v. STX Pan Ocean Co Ltd (South Korea), in the matter of STX Pan Ocean Co Ltd (receivers appointed in South Korea) [2013] FCA 680 the Federal Court of Australia was reluctant to grant additional relief as the relief sought would adversely affect any rights that other Australian creditors may otherwise have had, whether under the Corporations Act or otherwise.

An important concept under the Model Law is that of a debtor’s COMI. This is because the determination of whether a foreign proceeding should be recognised as a ‘foreign main proceeding’ or a ‘foreign non-main proceeding’ depends on the location of the debtor’s COMI. This distinction is important because recognition of a foreign proceeding as a ‘foreign main proceeding’ will automatically lead to a stay of actions of individual creditors against the debtor and of enforcement proceedings concerning the assets of the debtor in all non-main jurisdictions (this is not necessarily the case for a ‘foreign non-main proceeding’). Under the Cross-Border Act, there is a rebuttable presumption that a debtor’s COMI is its registered office, or in the case of a natural person, his or her habitual residence.

The Model Law provides no guidance on the standard required for COMI determination. It is noted in the explanatory memorandum for the Model Law that this silence was deliberate as the concept of a COMI has been developed through case law. To that end, we note that Australian courts have applied the general test from Re Eurofood IFSC Ltd [2006] Ch 508 when considering whether this presumption has been rebutted, as follows:

The ‘centre of main interests’ should correspond to the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties.

In addition, the Australian courts will look to and adopt similar reasoning when considering a COMI as similar jurisdictions (such as the bankruptcy courts in the United States) and have equated the concept of COMI with the principle place of business. In considering where the COMI of a debtor or group of companies exists the courts will look at a number of factors, including:

a. the location of the debtor’s headquarters;
b. the location of those who actually manage the debtor;
c. the location of the debtor’s primary assets;
d. the location of the majority of the debtor’s creditors or a majority of creditors who would be affected by the case; and
e. the jurisdiction whose law applies to most disputes.

II INSOLVENCY METRICS

The banking landscape in Australia has changed dramatically over the past few years. We are presently at the midpoint of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services industry (Royal Commission) which is currently expected to be completed at the end of 2018. With increased media spotlight (both traditional and social media) on banking behaviour and with reputational risks now at the forefront of banks’ minds, in general, banks are granting more leniency to borrowers and are less inclined to take active enforcement steps or ‘call in’ their loans. Accordingly, formal appointments are often now seen as the least attractive option or ‘last resort’ in a distressed scenario resulting in a decrease in secured creditor-led enforcement outcomes (i.e., receiverships).
Sectors that have suffered particular distress in recent times include retail (in particular), mining and mining services, property and construction. Increased restructuring activity is expected in each of these sectors in the foreseeable future.

A significant proportion of external administration appointments have continued to result from borrowers breaching financial covenants, not meeting amortisation payments or an inability to refinance at the end of facility terms. In these circumstances, where there are no other options available, directors will invariably opt to appoint a voluntary administrator. Often this will result in concurrent appointments where the secured creditor appoints a receiver ‘over the top’ of a voluntary administrator. Even though receivership appointments have decreased in light of banks’ revised approaches to distressed situations, these dual appointments still occur and are a feature of the Australian restructuring landscape.

Each quarter the Australian Securities and Investment Commission (ASIC) publishes quarterly insolvency statistics outlining the total number of companies which entered into external administration (that is administration, liquidation or receivership) during that quarter and a comparative analysis of the previous quarter and a 12-month comparison.

For the March 2018 quarter, ASIC reported a notional 0.2 per cent increase in external administration appointments against the December 2017 quarter, with a total of 1,813 companies entering into external administration. By contrast, the March 2018 quarterly total was 5.6 per cent higher than the 2017 March quarter being a total of 1,717 companies.

III PLENARY INSOLVENCY PROCEEDINGS

Significant proceedings in the Australian market include the recent restructures of:

a  the Bis Industries Group (Bis Group) involving the implementation of two concurrent creditors’ schemes of arrangement in respect of debt facilities well in excess of A$1 billion. Significantly, this transaction confirmed the Australian application of the use of ‘standstill’ schemes of arrangement as well as the ability to use the scheme process to amend lender voting thresholds under finance documentation;

b  Slater & Gordon Limited (S&G) (arguably the highest-profile restructure for a publicly listed company in the Australian market in 2017) was achieved by way of two inter-conditional schemes of arrangement resulting in S&G’s senior lenders taking control of the S&G Group via a debt for equity swap involving the exchange of 95 per cent of S&G’s equity for a reduction of A$636.6 million in senior secured debt owed by S&G. Significantly, this transaction involved resolution of shareholder class actions (both brought and threatened) against S&G and unusually, utilising a scheme to achieve this outcome in a manner that ensured that there are no future adverse financial consequences for S&G or its directors;

c  Paladin Energy Limited (Paladin) by way of a voluntary administration followed by a DOCA (approved by Paladin’s creditors) involving an extinguishment of certain claims in exchange for the transfer of 98 per cent of the equity from existing shareholders by way of a court application under Section 444GA of the Corporations Act (and without the need for existing shareholder approval – note our above comments regarding Section 444GA of the Corporations Act). The successful outcome demonstrates the flexibility of DOCAs to effect a restructures and recapitalisations and should encourage creditors of listed companies to pursue value-preserving debt-for-equity transactions without the need for shareholder approval, or the need for the 75 per cent in value threshold to be met for each class of creditors as required under a creditors’ scheme;
Ten Network Holdings Limited (Ten) by way of a voluntary administration resulting in a contested bidding process with competing DOCA proposals put forward. A DOCA proposal involving the use of a creditors’ trust mechanism (whereby the DOCA completes and converts into a creditors trust enabling the company to come out of insolvency quickly and the creditors release their claims against the company in exchange for a claim as a beneficiary against the trust) and a court application for orders under Section 444GA of the Corporations Act was accepted by creditors. The Paladin and Ten restructures demonstrate the flexibility of DOCAs and the ability of a deed administrator, under Section 44AGA of the Corporations Act, to transfer shares in a company with leave of the court where this is opposed by the owners of the shares. The court will only grant orders under this Section if ‘it is satisfied that the transfer would not unfairly prejudice the interests of members of the company’. Such shareholders would not be prejudiced, based on the existing case law, if their shares have no ‘economic value’. This provision ensures that existing shareholders are afforded a level of protection and consideration, through the court process, while allowing creditors, or others, to acquire the equity interests through a DOCA when it is fair to do so; and

the Arrium Group of companies (Arrium Group) by way of a voluntary administration involving the use of holding DOCAs (involving the transfer of assets, operations, employees and future sales proceeds within the Arrium Group) and a ‘distribution company’ as a preparatory step in contemplation of an asset sale process that involved a dual-track sale process with competing IPO and business sale options. Public examinations have also been initiated with respect to potential future proceedings against directors and other stakeholders.

IV ANCILLARY INSOLVENCY PROCEEDINGS

There have been no significant ancillary insolvency proceedings in the past 12 months.

Recent case law has, however, foreshadowed the prospect that foreign representatives administering international formal processes in Australia (as part of applying for recognition under the Model Law) might be required to make a security payment into court so as to ensure that local courts are kept better informed of any changes in the status of foreign processes.19

V TRENDS

The Australian economy has experienced only limited growth over the past few years despite record low interest rates. It feels as if we are still recovering from the aftermath of the global financial crisis.

Further, tightening capital adequacy requirements (through the Basel Accords) and prudential standards, and more conservative approaches to risk, have resulted in banks limiting their exposure to certain industries and allowing ‘non-traditional’ lenders (such as hedge funds, investment banks and alternative capital providers) to enter certain sectors.

As a result of the changing risk appetite for banks and the current banking environment, activity in the secondary debt market has decreased significantly. While buyers remain active in Australia and are looking for opportunities, distressed situations have, generally speaking, become more limited. Given the relative stability of the Australian banking sector and the robust prudential regulations imposed on Australian banks, we expect to see an increase in secondary debt trading if economic conditions worsen.

With the Royal Commission ongoing and a very low interest rate environment prevailing (as noted above), it has thus been a subdued year for restructures in the calendar year 2018. We expect that to continue for the remainder of the year. However, with the number of new entrants entering the leveraged finance market and operating at the higher end of the risk curve, together with the numerous industries continuing to face structural difficulties (for example, mining, mining services, construction and retail), this is susceptible to change.

With more and increasingly diverse parties entering the lending market, new legislation having just come into effect and borrowers still vulnerable to interest rates rises and other shocks (such as decreases in commodity prices), the ensuing years could be very interesting in the restructuring and insolvency market in Australia.
Chapter 2

AUSTRIA

Gottfried Gassner and Georg Wabl

I  INSOLVENCY LAW, POLICY AND PROCEDURE

i  Statutory framework and substantive law

The relevant primary legislation is the Austrian Insolvency Code, which provides general rules and thereby builds the framework for the following types of judicial insolvency proceedings for enterprises:

a  bankruptcy proceedings;

b  restructuring proceedings with self-administration; and

c  restructuring proceedings without self-administration.

Other than in other countries (such as Germany), there are no practically relevant preliminary insolvency proceedings in Austria. General rules of the Insolvency Code, such as regarding (among other things) priority of creditors’ claims, a statutory moratorium, termination rights or avoidance, apply to all proceedings mentioned before. The main difference between these proceedings is that bankruptcy proceedings primarily aim to liquidate the debtor’s assets while restructuring proceedings primarily aim to restructure the debtor’s business with support of the majority of creditors. Restructuring proceedings with self-administration are DIP proceedings (i.e., the debtor keeps control of the day-to-day operations).

Special insolvency relevant provisions are in particular also provided by Austrian company law, tax law and employment law, as well as the EU Insolvency Regulation (2015/848) (EIR). In practice, the Austrian Equity Substitution Act, which potentially qualifies loans granted by shareholders as equity (and therefore statutorily subordinated) is also very relevant. The Austrian Business Reorganisation Act provides rules for corporate reorganisation proceedings (which are not insolvency proceedings) in relation to a solvent debtor’s business that affect creditors’ rights to a lesser degree. In practice, such proceedings are rarely applied.

Priority of creditors’ claims

The Insolvency Code does not expressly provide for formal rules on classes or priority of creditors’ claims. Structurally, creditors are prioritised as follows:

a  preferential creditors such as creditors with a right to property regarding assets of the debtor’s estate or secured creditors;

---

1  Gottfried Gassner is attorney at law and partner, and Georg Wabl is attorney at law, at BINDER GRÖSSWANG Attorneys at Law.
b estate creditors that can demand full payment out of the debtor’s estate because their claims arise after opening of the insolvency proceedings (e.g., trade creditors contracting with the administrator or banks granting financing during proceedings);
c unsecured creditors receiving an insolvency quota; and
d statutorily or contractually subordinated creditors.

Statutory moratorium
Individual enforcement actions against the debtor are prohibited in all types of insolvency proceedings (i.e., there is a statutory moratorium). Creditors must instead file their claims in the insolvency proceedings and the insolvency administrator has to scrutinise and approve or reject such claims. In case of rejection, the creditor may sue the administrator for approval. This does not, in principle, apply for preferential creditors whose claims are, as a general rule, not affected by the opening of insolvency proceedings.

Termination rights
The opening of insolvency proceedings does not automatically terminate or amend contracts. However, special provisions of the Insolvency Code allow, under certain circumstances, an eased termination by the debtor (in restructuring proceedings with self-administration) and the insolvency administrator (in restructuring proceedings without self-administration and bankruptcy proceedings). On the other hand, contract partners may be prevented from termination to protect the debtor’s estate from losing contracts which are essential for business continuation. *Ipso facto* clauses (i.e., clauses allowing the termination of a contract just because of the opening of insolvency proceedings over the assets of the other party) are void.

Avoidance
Austrian avoidance rules allow the challenge of legal actions and transactions that have taken place within certain clawback periods before the opening of insolvency proceedings. Avoidance actions are exclusively on the insolvency administrator. A successful challenge forces the other part to return received payments or transferred assets to the debtor’s estate.

The challenged legal action or transaction must:

a have taken place within a certain clawback period before the opening of insolvency proceedings (from six months up to 10 years, depending on the specific avoidance rule);
b have been directly or indirectly detrimental to the insolvency estate; and
c meet the criteria set by one of the avoidance rules provided in the Insolvency Code (avoidance owing to an intent to discriminate, avoidance owing to squandering of assets, avoidance of transactions with no consideration and analogous transactions, avoidance owing to preferential treatment or avoidance owing to knowledge of insolvency).

Avoidance owing to preferential treatment or knowledge of insolvency (one year respectively, six months’ clawback period) are most commonly argued by the insolvency administrator. These two provisions require the debtor’s insolvency and shall protect the principle of equal treatment of creditors (*par conditio creditorum*).
ii  Policy
Since a major insolvency law reform in 2010, debtor-friendly restructuring tools have been actively strengthened. The reform aimed to facilitate the restructuring of viable businesses and to prevent liquidation. Nevertheless, as private workouts (silent out-of-court restructurings) are well established and tested in Austrian restructuring practice, large restructuring cases are often handled without court involvement. The main challenge in such private workouts are certain rules aiming the protection and equal treatment (i.e., pari passu and par conditio creditorum) of creditors (in particular directors’ duty to file for insolvency).

Currently, there are no material reforms envisaged, but existing legislation is regularly evaluated. In response to the EIR, the Austrian legislature has amended the provisions of the Insolvency Code regarding cross-border constellations in an EU and international (i.e., non-EU) context.

Further changes in Austrian insolvency law may be required owing to ongoing harmonisation efforts discussed at an EU level (including a possible EU directive on preventive restructuring frameworks, as proposed by the European Commission in November 2016).

iii  Insolvency procedures
As stated in Section I.i, the corporate insolvency proceedings of the Insolvency Code can be divided into bankruptcy proceedings, restructuring proceedings with self-administration and restructuring proceedings without self-administration.

Bankruptcy proceedings
Bankruptcy proceedings require the debtor’s material insolvency (illiquidity or over-indebtedness) and are initiated after application by the debtor or a creditor.

As soon as proceedings are formally opened, an insolvency administrator is appointed by the court. The administrator is called a Masseverwalter and acts as a liquidator who is in charge to administer and sell the debtor’s assets. Bankruptcy proceedings cannot be debtor-in-possession proceedings (other than restructuring proceedings). Although bankruptcy proceedings aim to sell the debtor’s estate, the priority is on continuing the business to be able to sell it as a whole if this does not jeopardise creditor’s interests.

If continuation of the business is not in the interests of the creditors, the insolvency administrator must shut down the business and sell the assets.

The duration of proceedings may vary from several months up to several years, depending on the respective case. The proceedings end by court order after a final distribution of the insolvency quota.

If a debtor wants to prevent his or her assets from being sold, he or she can still file a restructuring plan at any stage of the proceeding and thereby try to restructure the insolvent entity itself.

Restructuring proceedings
Restructuring proceedings with self-administration (these are debtor-in-possession proceedings) and restructuring proceedings without self-administration both aim at the restructuring of the insolvent entity as a going concern.

---

2  Because of the confidentiality of such restructurings, no detailed statistics are available.
At the beginning of the proceedings, an administrator is appointed by court which either merely supervises the debtor (i.e., in self-administration, the administrator is then called a Sanierungsverwalter) or manages and represents the business in full (i.e., in proceedings without self-administration, the administrator is then called a Masseverwalter as in bankruptcy proceedings).

The proceedings are only called restructuring proceedings if the debtor already presents a restructuring plan together with the initial application to open insolvency proceedings. The plan must provide for a minimum restructuring quota of 30 per cent in case of proceedings with self-administration and 20 per cent in case of proceedings without self-administration (in each case payable within two years).

The restructuring plan must be:

a approved by the creditors' meeting (there is a double-majority requirement, i.e., simple majority of the creditors present in the sanctioning hearing and of the represented capital of claims); and

b approved by the insolvency court (the court can only approve the plan if the plan treats unsecured creditors equally (with rare exceptions), does not affect rights of preferential and estate creditors and if the plan is feasible and appropriate in comparison to an alternative liquidation scenario).

Timely quota payment leads to a debt discharge in the amount exceeding the restructuring quota; hence, the discharge can be up to 80 per cent of the unsecured debt.

Restructuring proceedings are debtor driven. Creditors can neither force the debtor to present a restructuring plan nor present a restructuring plan (or counterproposals) themselves (but they can of course vote on the plan).

Restructuring proceedings can in the best case be finished within around three months (especially in case of self-administration as such must be revoked by court if the restructuring plan is not approved by the creditors within 90 days after opening of proceedings).

**Ancillary insolvency proceedings**

Ancillary insolvency proceedings are mainly relevant within the scope of the EIR. If the centre of main interest (COMI)\(^4\) of the debtor is in another EU member state but the debtor has a branch and assets\(^5\) in Austria, a secondary insolvency proceeding can be opened in Austria which is limited to the ‘Austrian assets’. There are few examples of such proceedings in Austria, but the recent case of NIKI Luftfahrt GmbH\(^6\) has shown the various challenges in connection with ancillary proceedings. The duration of ancillary proceedings opened in Austria mainly depends on the complexity of the main proceedings, the cooperation between the competent courts and the appointed administrators, etc. Generally, proceedings in a cross-border context tend to take longer than ‘purely’ national proceedings.

Outside the scope of the EIR, international jurisdiction is not harmonised and depends on the existence of bilateral treaties. Ancillary proceedings in this context have been rarely relevant so far.

---

\(^4\) Within the meaning of Article 3(1) EIR.

\(^5\) Both within the meaning of Article 3(2) and Article 2 No. 9 and 10 EIR.

\(^6\) Both Austrian and German courts considered themselves competent for main insolvency proceedings. Finally, the main insolvency proceedings were opened in Austria and secondary proceedings were opened in Germany (see further details in Section III.i).
iv Starting proceedings

Bankruptcy proceedings can be commenced by the debtor or creditors (this includes ancillary insolvency proceedings). Restructuring proceedings can only be commenced by the debtor.

General requirement for the opening of insolvency proceedings is the debtor’s insolvency (i.e., illiquidity or over-indebtedness). Illiquidity within the meaning of the Insolvency Code means that the debtor cannot pay all debt as it falls due and is not able to acquire the necessary funds to satisfy all of its due debt within a reasonable period of time. Liabilities becoming due in future or not yet payable (e.g., deferred or statutorily subordinated liabilities) do not have to be considered; only matured liabilities are relevant. Over-indebtedness within the meaning of the Insolvency Code means that the debtor’s liabilities exceed its assets based on liquidation values and the debtor has a negative forecast on its continued existence (negative Fortbestehensprognose). The duty to file for insolvency for directors is linked to illiquidity and over-indebtedness.

Besides, restructuring proceedings may (there is no duty to do so) already be commenced by the debtor in case of impending illiquidity.

Upon commencement by the debtor, proceedings are usually opened very quickly (i.e., within a few days). If creditors commence proceedings, the court must first assess whether the creditor is formally entitled and whether the debtor is indeed insolvent; this process may take weeks or even months.

Debtors may mainly oppose commencements of a creditor by arguing that the debtor is in fact not insolvent or that the creditor is not formally entitled.

v Control of insolvency proceedings

Austrian insolvency proceedings are mainly controlled by the insolvency court and an appointed administrator who must both primarily seek to protect the creditors’ interests. In restructuring proceedings with self-administration, also the debtor can significantly influence proceedings.

Insolvency court

Other than in other countries such as the UK, the insolvency court is involved in all insolvency proceedings from the beginning and involved in, and competent for, all main decisions. The court, among other things, decides on the opening of proceedings, appointment of the administrator and a possible creditors’ committee, the sale of the business or relevant assets and the end of the proceedings.

Besides, the court supervises the proceedings as well as actions of the administrator and the debtor.

Administrator

The administrator is appointed by the court out of a list of potential candidates. In bankruptcy proceedings and restructuring proceedings without self-administration, he or she is called a Masseverwalter; in restructuring proceedings with self-administration, he or she is called a Sanierungsverwalter. Administrators are usually lawyers; in most cases, the individual lawyer and not the law firm is appointed.

Neither the debtor nor creditors can formally influence the court’s selection but they may try to put forward proposals.
The Masseverwalter must in particular manage the debtor’s estate and inventory, administer and sell the debtor’s assets. He or she must meet the objective standards of a professional expert. A breach of the described duties may lead to personal liability. In restructuring proceedings with self-administration, the above tasks are split between the debtor and the supervising Sanierungsverwalter.

**Debtor and directors**

Before the opening of insolvency proceedings, directors are subject to a strict duty to file. As soon as the debtor becomes illiquid or over-indebted, directors must file for insolvency proceedings without undue delay and not later than 60 days. This 60-day period is considered a maximum period. If there are no directors, the duty to file is with controlling shareholders.

Also within insolvency proceedings the debtor is represented by its directors. The role of the debtor depends on the type of proceedings. In bankruptcy proceedings and restructuring proceedings without self-administration, the debtor and its directors are automatically deprived of power from day one. Still, directors remain formally appointed and must cooperate with the administrator. Further, the debtor is party of the proceedings and can thereby challenge court decisions or try to influence the proceedings by presenting a restructuring plan.

In restructuring proceedings with self-administration, the debtor remains in the driver’s seat and the directors can continue running the daily business (supervised by the court appointed administrator).7

**Shareholders**

Commencement of insolvency proceedings does not affect the corporate structure, which is why shareholders keep their formal ownership rights. Still, they can as a general rule neither instruct the administrator nor participate in court hearings (unless they are also creditors). In restructuring proceedings with self-administration, shareholders may try to instruct the self-administrating directors.

There is no statutory debt-to-equity-swap in Austria (thus, shareholders cannot be forced to sell or transfer their shares).

**Creditors**

Creditors cannot actively ‘run’ the proceedings but have certain rights of control. The creditors’ committee (such must, e.g., be appointed by the court in case of the sale of the business and in complex proceedings) must approve certain actions and supervises and supports the administrator.8

Further, creditors have access to the court files, can participate and vote in creditors’ meetings and in court hearings. They can, for example, challenge court decisions or contest claims filed by other creditors. The arguably most important right is the right to vote on and approve or reject a proposed restructuring plan.

---

7 A current topic under discussion is whether directors in self-administration may be subject to the same liability rules as insolvency administrators.
8 Individual creditors do not have a formal right to become part of the committee.
vi Special regimes

Besides the Insolvency Code, special regimes apply for banks (Act on the Recovery and Resolution of Banks), insurance companies (Act on the Supervision of Insurance Companies) and pension funds (Pension Fund Act). Such institutions can still go into bankruptcy proceedings if tools provided in the special regimes do not work out. Rules on restructuring proceedings do generally not apply for such institutions.

There is no concept of a group insolvency in Austria; each entity must be assessed individually and – if necessary – insolvency proceedings must be opened over the assets of each respective entity; usually also different administrators are appointed. Following the EIR, rules on cooperation within group insolvencies have also been included in the Insolvency Code.

vii Cross-border issues

Implications of the EIR have already been addressed before. Foreign insolvency proceedings are automatically recognised in Austria if they are mentioned in Annex A of the EIR. Outside the scope of the EIR, foreign insolvency proceedings are basically recognised if the COMI is in the respective foreign country and basic principles of such foreign proceedings are comparable to Austrian insolvency law.

Challenges in relation to cross-border insolvency often result from the different interpretation of COMI in different member states (as recently shown in the case of NIKI Luftfahrt GmbH). Besides, matters of cross-border cooperation between courts and insolvency administrators have not been extensively tested yet.

Forum shopping of companies is not a frequent problem in Austria as there is a well-functioning private workout practice.

II INSOLVENCY METRICS

The Austrian economy is currently in a period of growth (GDP growth of 3 per cent in 2017 and similar outlook for 2018\(^9\) and steadily decreasing unemployment rates).\(^10\)

Correspondingly, company insolvencies are at an all-time low.\(^11\)

In 2017, around 5,100 companies filed for insolvency,\(^12\) in the first half-year of 2018 around 2,600 so far.\(^13\) This is the lowest rate regarding company insolvencies for 20 years.\(^14\) Most insolvencies were opened in Vienna. Insolvencies with total liabilities of more than €100 million are rather rare (the newest insolvencies in this size were the Imperial-Group,

---


\(^12\) Around 2,000 of them were not opened because of a lack of cost-covering assets.

\(^13\) Around 1,000 of them were not opened because of a lack of cost-covering assets.

\(^14\) At the same time, there is a record rate for private insolvency proceedings in 2018 because of a recent change in legislation.
the Wozabal Group, SFL Technologies and NIKI Luftfahrt GmbH). The vast majority of company insolvencies relates to small companies with liabilities of less than €2 million (around 95 per cent in the first half of 2018).

Almost two-thirds of insolvencies affect relatively young businesses (established 2010 or later). Most insolvencies affect Austrian limited liability companies (around 40 per cent) or individual businesses (also around 40 per cent). Especially insolvencies over stock corporations or private foundations are very rare. Affected industry sectors are in particular construction (around 20 per cent of total company insolvencies in the first half-year 2018), corporate services (around 20 per cent), hospitality (around 13 per cent) and traffic (around 8 per cent, traffic mostly because of the insolvency of NIKI Luftfahrt GmbH).

In 2017, around four-fifths of insolvencies were bankruptcy proceedings (primarily aiming on the winding up of the company) and only around one-fifth restructuring proceedings (primarily aiming on the restructuring of the insolvent entity). Still, statistics do neither show how many businesses were restructured in private workouts nor in how many of the bankruptcy proceedings the business was sold as a going concern or a restructuring plan was presented at a later stage.

### III PLENARY INSOLVENCY PROCEEDINGS

In 2017 and the first half-year 2018, several large plenary insolvency proceedings determined the press landscape. The following list shows the most interesting examples:15

**NIKI Luftfahrt GmbH**

The most followed and discussed insolvency case in the past 12 months was NIKI Luftfahrt GmbH (an Austrian GmbH).16 NIKI was an Austria-based airline company with more than 1,000 employees and more than €150 million of liabilities, which formed part of the German Air Berlin group. Following the opening of insolvency proceedings over the assets of Air Berlin in Germany and after a sale of NIKI to Lufthansa failed, NIKI also filed for insolvency in Germany in December 2017. NIKI was registered in the Austrian companies’ register and its corporate seat was in Austria. However, NIKI argued that its COMI was in fact in Germany because, among other things, its airline operations were to a large part handled by Air Berlin.

Preliminary insolvency proceedings were opened in Germany and the preliminary German insolvency administrator sold most of NIKI’s assets (especially slots) to IAG/Vueling after an exciting bidding process over the Christmas holidays. IAG/Vueling also granted post-commencement financing.

Before closing of this sale, an Austrian creditor challenged the decision of the German insolvency court to open preliminary proceedings in Germany and filed for the opening of main insolvency proceedings in Austria. The creditor argued that the COMI of NIKI was in fact in Austria.

---

15 The list does not address out-of-court restructurings that were also partly discussed in media.

In January 2018, the German court of appeal confirmed the creditor’s argumentation and a few days later, main insolvency proceedings were opened in Austria. This was particularly controversial as there was still the possibility of filing an appeal against the decision of the court of appeal in Germany but the Austrian competent judge argued that there was in fact no German proceeding any more. Therefore, he considered himself competent to open main insolvency proceedings in Austria. In order not to jeopardise a possible sale of NIKI’s business, parties refrained from starting a complex court dispute but rather found a practical solution. The Austrian main insolvency proceedings therefore remained and the German insolvency proceedings were modified into secondary insolvency proceedings.

The Austrian main insolvency administrator and the German secondary insolvency administrator then started a second bidding process and finally sold most of NIKI’s assets to Laudamotion (a new airline established by the Austrian entrepreneur Niki Lauda, the initial founder of NIKI). The insolvency proceedings in Austria and Germany are still pending.

This insolvency especially showed the challenges connected with cross-border insolvencies.

Wienwert
In March 2018, the Wienwert group, a large real estate group with investments in several renown real estate projects, had to file for insolvency (in total 13 separate bankruptcy proceedings). The group was mainly financed by bonds issued towards more than 900 (many of them retail) bondholders in the amount of around €35 million. These bondholders may lose all of their investment as the issuance was structured in a way that the bondholders did not receive security on the real estate itself.

According to the media, the public prosecutor’s office investigates against part of the (former) founders and management of the group (among others, regarding accounting fraud) especially in relation to the bond issuances. Also, the involved insolvency administrators assess possible compensation claims.

In order to allow a bundled representation of interests of bondholders, the insolvency court appointed trustees who are also part of the appointed creditors’ committee. Proceedings are still pending.

Imperial Group
The insolvency of the Austrian Imperial group (in total six restructuring proceedings without self-administration opened in autumn 2017) is remarkable because of the large number of creditors (around 25,000 and many of them retail financial investors) and liabilities of more than €100 million.

18 Austrian law allows this in certain circumstances.
Via a complex participation and membership structure, creditors invested in hotel and apartment real estate of Imperial and a holiday club of the Cordial hotel group as part of the Imperial group.

Because of the large number of creditors, the insolvency administrators offered a standard online tool for creditors to file their insolvency claims.

Imperial and Cordial plan to continue their businesses after the restructuring plans in all six proceedings being confirmed by the creditors and sanctioned by court.

**Wozabal Group**

This insolvency was one of the largest in 2017. Six members of the Wozabal Group filed for insolvency in August 2017 affecting around 800 employees and liabilities of around €114 million. Wozabal is one of the largest textile lessors in Austria but fell into financial difficulties because of a too rapid growth and too many investments which could not be repaid in time anymore.

Within the proceedings, Wozabal offered its creditors a restructuring plan with a quota of 20 per cent. The creditors rejected the plan, which is why the administrator sold the business as a going concern to Salesianer Miettex, a competitor (media reports about a purchase price of around €65 million). Significant parts of the business and most of the jobs could be saved.

The bankruptcy proceedings over Wozabal itself are still pending but show that Austrian insolvency law provides for different ways to rescue a business as a going concern.

**SFL Technologies**

SFL Technologies GmbH is an Austrian technology business focusing on plant, mechanical, façade and steel construction as well as e-mobility, lightning, glass and energy technology. SFL’s insolvency was triggered by the loss of a key project and affected around 190 employees and around €113 million of liabilities.

Proceedings were opened in November 2017 and terminated in May 2018 after the creditors had agreed to an improved restructuring plan offering a 30 per cent quota in April 2018 (the initial restructuring plan offering a 20 per cent quota was rejected by the creditors in January 2018). Within the proceedings, SFL’s business has been restructured and the number of employees was reduced down to around 40.

This insolvency shows how Austrian insolvency law allows the debtor to restructure its business by, for example, shutting down non-profitable parts of the business, taking advantage of eased termination rights, etc. At the same time it shows how creditors can try to force the debtor to improve a proposed plan by rejecting an inappropriate proposal.

**IV ANCILLARY INSOLVENCY PROCEEDINGS**

Ancillary insolvency proceedings do not play a major role in Austria. The best-known example of a cross-border insolvency with main and ancillary proceedings opened in different member states is the case of NIKI Luftfahrt GmbH.

---


V TRENDS

As the Austrian economy is predicted to remain stable or to continue to grow, it is not expected that the insolvency landscape will change substantially within the next year.

Existing legislation is regularly evaluated but for now, no recent legislative changes are envisaged. The harmonisation efforts discussed at an EU level (proposed directive on preventive restructuring frameworks)\(^22\) led to a further dynamic in the respective working groups as it will have to be assessed how to implement such preventive restructuring tools into Austrian law.

Chapter 3

BRAZIL

Mauro Teixeira de Faria and Rodrigo Saraiva Porto Garcia

I INSOLVENCY LAW, POLICY AND PROCEDURE

Statutory framework and substantive law

General

In Brazil, several statutes discipline insolvency and liquidation proceedings. The most prominent legislative instrument is the Bankruptcy and Reorganisation Act, which regulates bankruptcy, judicial reorganisation and extrajudicial reorganisation proceedings applicable to companies, whether they are limited companies, publicly traded stock corporations, private stock corporations or sole proprietorships – with the exclusion of companies controlled by the government.

The purpose of bankruptcy proceedings is to liquidate the company’s assets and distribute its proceeds to its creditors, used as a last resort in case of severe financial hardship. In turn, judicial and extrajudicial reorganisation proceedings are intended to streamline the company’s debt structure, allowing it to preserve its business, retain its workforce and continue to pay taxes. Judicial reorganisation proceedings are entirely carried out under the control and supervision of the bankruptcy court and the judicial administrator, whereas extrajudicial reorganisation proceedings are the result of direct negotiations with each creditor, culminating in the submission of a prearranged plan of reorganisation for court approval.

It is worth mentioning that the Bankruptcy and Reorganisation Act was inspired by Chapter 11 of the US Bankruptcy Code, with numerous adaptations. For instance, under Brazilian law, only the debtor may officially present a plan of reorganisation, and not its creditors. It is also important to note that Brazilian law provides for a system highly concerned with the preservation of the company, which may at times be opposite to the creditors’ interests.

Other insolvency proceedings for specific persons are distributed among different laws. Insolvency for natural persons is governed by certain provisions in the Brazilian Civil Code, and the still effective provisions of the revoked Brazilian Code of Civil Procedure. Liquidation proceedings for limited companies are provided by the Brazilian Civil Code, while stock corporations are liquidated in accordance to the Stock Corporations Act.

---

1. Mauro Teixeira de Faria and Rodrigo Saraiva Porto Garcia are partners at Galdino & Coelho Advogados.
2. Law No. 11,101, dated 9 February 2005, known as Lei de Recuperação de Empresas e Falências, latest amendment Supplementary Law No. 147/2014.
4. Law No. 5,869, dated 11 January 1973, mostly revoked by Law No. 13,105/2015, with the exception of the provisions regarding insolvency proceedings for natural persons, effective until specific legislation is passed.
This chapter will limit its scope to address the bankruptcy and reorganisation proceedings in a more comprehensive manner, rather than approach several subjects without the necessary depth.

**Main effects of bankruptcy and reorganisation proceedings**

There are certain consequences to the commencement of bankruptcy or judicial reorganisation proceedings. The declaration of bankruptcy or the admittance of judicial reorganisation produce the following effects:

- **a** the appointment of a judicial administrator that undertakes the role of examiner and court assistant, supervising the debtor's activity and reviewing the creditor's accounts. In bankruptcy proceedings, the judicial administrator also takes possession of the company's administration and liquidates the assets;
- **b** the stay of legal actions and enforcement proceedings against the debtor for 180 days, except for tax claims, actions that demand an illiquid amount and judicial proceedings concerning claims that are not affected by the debtor's bankruptcy or judicial reorganisation; and
- **c** with respect to tax collection claims and claims that are not affected by the debtor's bankruptcy or judicial reorganisation, the seizure of the debtor's assets or any judicial proceedings that may interfere with the debtor's possession of assets that are essential to the continuity of the business activity are suspended and subject to the bankruptcy court's assessment.

In bankruptcy proceedings, the judicial administrator may choose to satisfy existing contracts if they are financially viable to the estate and may possibly increase its going concern, maximising the company's value. In judicial reorganisation proceedings, all existing contracts are normally fulfilled by the company's administrators, unless they are beyond its economic capacity. In both cases, there is controversy regarding the possibility of the other party terminating the contract based on an *ipso facto* provision, with recent jurisprudence recognising that such a provision is void and case law analysing the singularities of each situation to determine whether to nullify this provision.

In judicial reorganisation proceedings, the sale of assets by the company's administrators is restricted. The sale of permanent assets after the filing requires either the authorisation of the bankruptcy court or a specific provision in the plan of reorganisation, to be approved by the creditors.

**Creditor's claims in insolvency proceedings**

Brazilian bankruptcy law provides particular treatment to secured and unsecured claims. Secured claims may be divided into two categories:

- **a** claims held by creditors with property interests that are in the possession of the debtor, such as chattel mortgage and capital or operating leases. These claims are not affected by bankruptcy or judicial reorganisation proceedings; and
- **b** claims that are secured by certain assets of the debtor's estate, such as pledges and mortgages. These claims are affected by bankruptcy and reorganisation proceedings: in bankruptcy, the creditor is entitled to satisfaction of his or her claim with the earnings from the sale of the secured asset; in judicial reorganisation, the creditor may be subject to a haircut, a deferral of payment or even the loss of the security, if approved by the creditors.
On the other hand, unsecured claims are classified as follows:

- **a** claims arising from the labour legislation or resulting from work-related accidents, with the highest priority both in bankruptcy and judicial reorganisation;
- **b** tax claims, administrative fines and other penalties imposed by government entities. These claims are subject to bankruptcy, but not to judicial reorganisation proceedings;
- **c** claims with special and general privileges established by law;
- **d** claims that have no preference or privilege whatsoever. This class of claims usually encompasses the vast majority of claims in bankruptcy or judicial reorganisation proceedings; and
- **e** subordinate claims, which arise from contractual agreements or legal provisions, or are held by creditors that are shareholders, partners or administrators without an employment relationship.

These unsecured claims are affected by bankruptcy and are discharged with the proceeds from the liquidation of the estate. In judicial reorganisation, all of these claims are also affected, except for tax claims. Moreover, other claims are unimpaired by bankruptcy or judicial reorganisation proceedings, such as administrative expenses, any post-petition claims, advances on foreign exchange contracts and certain bank loans relating to export finance.

### ii Policy

The main purpose of judicial reorganisation proceedings is to protect the company and stimulate economic activity, providing the debtor the tools needed to overcome its economic and financial crisis, in order to maintain the production source, the employment of workers and the interests of the creditors. Usually, a company will only be admitted into judicial reorganisation if it demonstrates its viability. Once a company is considered viable, all efforts are made to preserve it and assure its continuity.

Although it is recommended for companies to resort to judicial reorganisation at the beginning of financial hardship, it is not uncommon to see companies use this instrument as a way to postpone bankruptcy and liquidation, dragging creditors and stakeholders down a long and tortuous road paved with little economic activity, plummeting revenue and even more debt.

On the other hand, extrajudicial reorganisation is a measure used by companies that intend to limit the reputational troubles caused by the filing of a judicial reorganisation. By nature, it is an agreement obtained from direct negotiation with certain creditors – commonly the most important and relevant creditors. The result is an extrajudicial plan of reorganisation that is submitted to the bankruptcy court for validation. For a long time since the enactment of the Bankruptcy and Reorganisation Act, this instrument was seldom used by companies owing to the lack of legal discipline, jurisprudence and case law; only recently has extrajudicial reorganisation gathered interest from companies undergoing financial difficulty.

Finally, when it comes to bankruptcy proceedings, the objective is to maximise the value of the assets and liquidate the company, using the proceeds from the sale to pay the company's creditors. Whenever possible, the judicial administrator will sell the company as a whole, transferring to the buyer all, or most, of the assets, the workforce and the existing contracts. This allows the business to continue, without the responsibility to pay the estate's creditors, which will receive the earnings from the sale according to their priority.
iii Insolvency procedures

Extrajudicial reorganisation proceedings

Considering its transactional nature, the extrajudicial reorganisation proceedings begin with the company presenting the plan of reorganisation to the bankruptcy court for validation. Alongside the plan of reorganisation, the company must present a commitment term for each creditor that approves the plan. If all creditors encompassed by the plan approve it, the bankruptcy court may validate the plan, as long as it fulfils the other legal requirements. However, the plan may be validated if at least three-fifths of the encompassed creditors approve it, in which case the plan will bind the remaining two-fifths of the creditors that did not approve it.

Once the plan is presented to the court, the bankruptcy judge shall order the release of a public notice so that all creditors may submit their opposition, including those that are not affected by the extrajudicial plan of reorganisation. With the resolution of any potential opposition, the bankruptcy court must validate the plan, after which it will start taking effect.

It should be emphasised that not all claims may be impaired by the extrajudicial plan of reorganisation, such as the following: labour-related claims, tax claims, claims held by creditors with property interests that are in possession of the debtor, advances on foreign exchange contracts and certain bank loans relating to export finance.

Judicial reorganisation proceedings

In judicial reorganisation proceedings, the debtor remains in possession of its business, maintaining shareholders’ powers and prerogatives, barring a few occasions when the bankruptcy court, its creditors and even the debtor may replace the company’s management.

When a company is under financial duress, it may file for judicial reorganisation hoping to stay any payments to its creditors and renegotiate its debts.

In the moment of filing, there is no judicial plan of reorganisation and there are usually very few ongoing negotiations with creditors. Once the petition is filed, all existing claims, except for those mentioned previously, are subject to the effects of judicial reorganisation and any payments regarding such debts are halted. These claims will be paid in accordance to the provisions of the judicial plan of reorganisation and may suffer a haircut, have lower interest rates and longer payment schedules, for example.

The Bankruptcy and Reorganisation Act demands that the company meet the following requirements:

a. the petition must explain the causes of the company’s financial hardship and the grounds for restructuring;

b. the company must submit its current financial statement as well as the financial statements for the last three years, its cash flow report and projection, and its bank statements;

c. the petition must also be accompanied by a list of creditors and employees;

d. the controlling shareholders and management must provide a list with their private assets; and

e. the company must present a list of any existing protests of titles and legal actions.

The request is reviewed by the bankruptcy court and, if all legal requirements are fulfilled, the company is admitted into judicial reorganisation. A judicial administrator is appointed, but it does not hold managing powers; it works as a court examiner, reviews the list of creditors, provides an independent opinion on the debtor’s accounts and is heard on almost
every subject regarding the proceedings. At the same time, legal actions and enforcement proceedings against the debtor are stayed for 180 days (as mentioned before), and there is a suspension of the statute of limitations.

Though after the filing, much of the debtor’s corporate information becomes public, the judicial reorganisation proceeding does not interfere in the company’s day-to-day life, considering that the debtor is kept running the business and relatively free to take business-oriented decisions. It must ask the court permission to sell permanent assets, but does not need any previous authorisation to run the business as a whole.

After the company is admitted into judicial reorganisation, its management and administrators negotiate the terms of the plan of reorganisation with its main creditors and submit the plan to discuss and vote at the creditors’ general meeting, if need be. The plan is filed by the debtor before the general creditors’ meeting, and the creditors may present an opposition to the plan before the vote.\(^6\) Although the Bankruptcy and Reorganisation Act provides that only the debtor may submit a plan of reorganisation to the creditors, it is common for creditors to (informally) submit an alternative plan at the general creditors’ meeting, to be reviewed, discussed and even voted by the creditors – however, such a plan needs to be approved by the debtor in order to replace the original plan.

The means of reorganisation that serve as a foundation for the company’s recovery are listed by the Bankruptcy and Reorganisation Act, but such a list does not exclude other possible means of rehabilitation, the following are only examples of the most used methods:

\(a\) modification of the contractual framework, which may include an extension in the payment schedule, an equalisation of financial charges and interest rates, and, most often, a haircut on the face value of the claims;

\(b\) the sale of assets, be it a partial sale of the company’s assets, a lease or the sale of a complete isolated production unit;

\(c\) a conversion of debt to equity in the company; and

\(d\) corporate restructuring, with a transfer of the company’s control, a total or partial spin-off, a merger consolidation, or, simply, the replacement of its managers.

If no creditors oppose the plan of reorganisation presented by the debtor, the court will grant the company’s judicial reorganisation. However, if at least one of the creditors objects to the plan, the general creditors’ meeting must take place to discuss and vote the plan. There are some possible outcomes: if the plan is approved (by double majority – heads and claims), the bankruptcy court simply confirms the plan; if the plan is rejected, the bankruptcy court may allow the debtor to submit an alternative plan, declare the debtor’s bankruptcy, or confirm the plan through cramdown.

In Brazil, there are specific requirements that need to be met in order for the bankruptcy court to confirm the plan via cramdown: approval of the plan by creditors representing more than half the value of all claims present in the meeting, regardless of class; approval of two classes of claims, or at least one class if there are only two classes; and within the class that rejected the plan, the approval of at least one-third of its creditors.

The approval and confirmation of the plan of reorganisation binds all creditors (whether they have approved the plan or not) and results in the novation of the impaired claims. The debtor must remain under supervision of the court and the judicial administrator for two

\(^6\) The debtor must ensure that the plan is economically viable, presenting an economic and financial evaluation based on the company’s assets and properties.
years, after which it may request the court to terminate the judicial reorganisation proceeding, if all the plan’s obligations, within such period, are duly satisfied. If any obligations are defaulted, the bankruptcy court may declare the debtor's bankruptcy, though recently the courts have allowed for the debtor to submit an amendment to the plan for creditor approval, before declaring the company bankrupt.

**Bankruptcy proceedings**

With the declaration of bankruptcy, a judicial administrator is appointed to replace the company's administrators and management. The judicial administrator takes control of the company and seizes all of its assets to be liquidated at a later moment. If the company still performs a business activity, the judicial administrator may choose to preserve it to generate more proceeds and maximise the value of the company's assets when sold.

Following the seizure of the debtor's assets, the judicial administrator shall list and evaluate the assets. This evaluation may consider each asset individually (for instance, a piece of machinery inside a factory) or bundled together in an isolated production unit (the factory and everything needed for it to operate), whichever generates more resources to pay the creditors.

Once the assets are evaluated, the judicial administrator moves on to the judicial sale of the assets, under the bankruptcy court's supervision. There are three different procedures that may be adopted: an open auction of the assets; a sale through sealed proposals, in which the bids are submitted to the bankruptcy court and are opened by the judge and judicial administrator on a predesignated day, time and place; and a two-stage auction, with the submission of sealed proposals in a first stage and a second stage with an auction by oral bidding, in which only interested buyers who have submitted proposals of no less than 90 per cent of the highest bid participate.

The winning bidder will acquire the property without any risks of succession of debts and other obligations originating from the asset or the debtor.

After the sale of assets, the judicial administrator shall distribute its proceeds to the creditors according to the classification of their claims. If all creditors are paid in full (which is very unusual), the remaining balance is transferred to shareholders, pro rata. The judicial administrator then presents a report of its accounts to the bankruptcy court with all necessary documents, and the judge may accept it or not. If the accounts are not accepted, the judicial administrator is responsible for indemnifying the debtor against any damages caused. If the accounts are accepted, the judicial administrator submits a final report, and the court terminates the bankruptcy proceeding.

Notwithstanding, the debtor is only discharged of its obligations: if all claims are satisfied completely; if at least half of the unsecured claims without no preference or privilege have been paid; after five years of the termination of the bankruptcy proceeding, if the debtor, its controlling shareholder or its administrators have not been convicted for committing a crime provided by the Bankruptcy and Judicial Reorganisation Act; and after 10 years of the termination of the bankruptcy proceeding, in case of conviction.

iv  Starting proceedings

**Judicial and extrajudicial reorganisation proceedings**

Only the company may file for judicial or extrajudicial reorganisation (its creditors are not legally allowed to do so), as long as it:

a  has been in activity for at least two years prior to the filing;
has not been declared bankrupt or, if it has, was discharged by a final decision of the bankruptcy court;

has not been granted judicial reorganisation in the previous five years;

has not been granted special judicial reorganisation (for small business entities) in the previous eight years; and

does not have an administrator or manager who has been convicted of any crimes provided by the Bankruptcy and Reorganisation Act.

There are a few entities that are not encompassed by the Bankruptcy and Reorganisation Act and may not file for judicial or extrajudicial reorganisation, such as: governmental entities, public or private financial institutions, credit unions, insurance companies, healthcare companies, supplementary pension companies, cooperatives, associations and natural persons, among others.

The judicial and extrajudicial reorganisation proceeding may involve one company or a group of companies. As for the latter, recently, bankruptcy courts have allowed for a substantive consolidation (and not just a procedural consolidation) of the entire group, with all of its assets responsible for satisfying all of its debts, as if it were a single company. Thus, instead of an individual plan of reorganisation for each company, separate lists of creditors and separate general creditors’ meetings, there is only one plan of reorganisation, one list of creditors and one general creditors’ meeting.

**Bankruptcy proceedings**

On the other hand, the commencement of bankruptcy proceedings may be a result of a request from the debtor or from one of its creditors. In the first case, when the debtor files for bankruptcy, the petition must be accompanied by essential information and documents (much like the petition filed for judicial reorganisation):

- the company must submit a special financial statement (made exclusively for the bankruptcy request), as well as financial statements for the last three years, its cash flow report and projection and its bank statements;
- the company’s articles of incorporation, with the indication of its shareholders, their addresses and a list of their assets;
- a list of the company’s assets and properties, alongside its estimated value and the necessary documents to prove ownership;
- a list of the company’s administrators and management for the previous five years, their positions, their addresses and their equity interest in the company;
- an updated list of creditors; and
- the company’s books and accounts, as required by law.

In the second case, the creditor has the burden of proof regarding the company’s insolvent state and the necessity of the declaration of bankruptcy by the court. The company’s insolvency may be proved by demonstrating that:

- without relevant reason, the company defaulted on an obligation corresponding to more than 40 minimum wages at the time of the request;
- in an enforcement procedure proposed by the creditor, the company did not pay its debt or did not offer any of its assets as attachment, within the legal time frame (what is commonly known as a ‘frustrated enforcement procedure’); and

© 2018 Law Business Research Ltd
the company committed any of the following acts, except in case of judicial reorganisation: the hasty liquidation of the company’s assets; the fraudulent transfer of assets to third parties; the transfer of the whole company without the consent of its creditors and without enough assets to satisfy its debts; and the default on any obligation arising from the plan of judicial reorganisation, among other acts.

However, the company may stay the bankruptcy proceeding if it deposits the amount owed, or if it files for judicial reorganisation, within the legal time frame to present its defence.

v  Control of insolvency proceedings

Bankruptcy, judicial reorganisation and extrajudicial reorganisation proceedings are held before the bankruptcy court where the company’s main establishment is situated, or where the company conducts most of its business. In large cities like São Paulo and Rio de Janeiro, there are specialised bankruptcy lower courts, but in smaller cities, common civil courts hold jurisdiction.

The bankruptcy court has power to determine: whether the company fulfils the requirements for its admittance into judicial or extrajudicial reorganisation; if the plan of reorganisation meets the legal requirements and, with the approval of the majority of creditors, grants judicial reorganisation; analyses the request for bankruptcy and, if need be, declares the company bankrupt; and if the proceedings may be terminated.

It is also an attribution of the bankruptcy court to appoint the judicial administrator in case of bankruptcy or judicial reorganisation, and to oversee the proceedings. During the proceedings, the bankruptcy court holds hearings and decides on relevant matters involving the debtor’s assets and the creditors’ claims.

In turn, the judicial administrator appointed by the bankruptcy court performs different roles in judicial reorganisation and bankruptcy proceedings. In the former, the judicial administrator supervises the debtor’s activities, elaborates a list of claims based on the list submitted by the debtor and the declarations provided by the creditors, presents its opinion in matters relevant to the proceeding and prepares monthly reports. In the latter, the judicial administrator replaces the debtor’s management, initiates the inventory and evaluation of its assets, promotes the sale of the assets and pays the creditors, in accordance with their classification.

vi  Special regimes

Financial institutions and insurance companies are subject to extrajudicial intervention and liquidation proceedings undertaken by the Brazilian Central Bank and are regulated by Law No. 6,024, dated 13 March 1974. However, the trustee appointed by the Brazilian Central Bank, with its authorisation, may commence a bankruptcy proceeding that is governed by the Bankruptcy and Reorganisation Act.

Electrical power companies, as public service providers, are governed by a special regime introduced most recently by Law No. 12,767, dated 27 December 2012. The National Electrical Power Agency intervenes in the company in distress, and its shareholders propose a plan of reorganisation for the Agency’s approval. However, this special regime is not applicable to the holding company, which is still subject to the Bankruptcy and Reorganisation Act.
vii Cross-border issues

There is currently no legislation regarding transnational insolvency, ancillary proceedings and cross-border issues in Brazil. The Bankruptcy and Reorganisation Act adopts the principle of territorialism, which determines the jurisdiction of the country where the company’s assets are situated. In contrast, the principle of universalism (embraced by the UNCITRAL Model Law on Cross-Border Insolvency) asserts that insolvency proceedings should commence in the jurisdiction of the company’s centre of main interests and encourages cooperation between different countries.

Although Brazil has not yet passed an amendment to the Bankruptcy and Reorganisation Act based on the Model Law, case law has allowed for judicial reorganisation proceedings to encompass foreign companies, as long as they are part of a larger economic group with its centre of main interests in Brazil. Examples of this were the submission of foreign companies to the judicial reorganisation proceedings of OGX Group, Sete Brasil Group, OAS Group and Oi Group, all carried out by bankruptcy courts in Brazil. Even without any provision in the Bankruptcy and Reorganisation Act regarding cross-border insolvency, Brazilian courts have cooperated with foreign courts and received its assistance when needed.

II INSOLVENCY METRICS

From 2004 to 2014, Brazilian GDP has annually grown an average of 3.72 per cent (with its peak reaching 7.5 per cent in 2010). However, after the beginning of Operation Lava Jato in early 2014, Dilma Rousseff’s victory in the 2014 presidential election and the decline in market value of several commodities (especially petroleum and iron ore), Brazil entered into a deep recession, with its GDP decreasing 3.8 per cent in 2015 and plummeting another 3.6 per cent in 2016.11

In roughly the same time frame, the economy’s base interest rate (SELIC) was raised by the Brazilian Central Bank from 7.25 per cent in 2013 to 14.25 per cent in 2015, in an attempt to slow down the inflation rate (10.67 per cent in 2015). Unemployment rates skyrocketed from 4.8 per cent in 2014 and reached 13.7 per cent in early 2017.14

The economic crisis deepened with the revelation that several companies colluded with government officials in elaborate corruption schemes involving state-controlled companies, in order to divert funds from government contracts. This worsened the political climate and culminated with President Dilma Rousseff’s impeachment in mid-2016. The presidency was handed over to the Vice President Michel Temer, who took power with a discourse of financial austerity and plans to reinvigorate the economy, with the renewal of the economic cabinet.

---

7 OGX International GMBH and OGX Austria GMBH HSBC CTVM S/A incorporated in Austria.
8 Sete Holding GMBH, Sete International One GMBH and Sete International Two GMBH incorporated in Austria.
9 OAS Finance Limited and OAS Investments Limited incorporated in the British Virgin Islands and OAS Investments GMBH incorporated in Austria.
10 Oi Brasil Holdings Cöoperatief UA and Portugal Telecom International Finance BV incorporated in the Netherlands.
12 Source: www.bcb.gov.br.
13 Source: www.ibge.gov.br.
14 Source: www.ibge.gov.br.
Markets responded well and the Brazilian Stock Exchange went from 51,804 points in 13 May 2016 to 87,652 points in 26 February 2018, even though President Michel Temer was implicated in the large corruption scheme unearthed by Operation Lava Jato in 17 May 2017 (which caused the Brazilian Stock Exchange to plunge 8.8 per cent in one single day). The Brazilian GDP grew 1 per cent in 2017 and is expected to grow another 1.53 per cent in 2018, the inflation rate for 2017 was 2.95 per cent and the projected inflation rate for 2018 is 4.17 per cent. In light of this, the base interest rate was lowered to 7.5 per cent on 25 October 2018.

All this political and financial turbulence caused an increase in the number of bankruptcy and reorganisation proceedings in Brazil, according to the table below. A record 1863 companies filed for judicial reorganisation in 2016, more than twice the number verified two years previously. The information in this chart account for the proceedings commenced after the Bankruptcy and Reorganisation Act, passed into law in 2005.

<table>
<thead>
<tr>
<th>Year</th>
<th>No. of bankruptcy proceedings(^1)</th>
<th>Variation</th>
<th>No. of judicial reorganisation proceedings(^2)</th>
<th>Variation</th>
</tr>
</thead>
<tbody>
<tr>
<td>2005</td>
<td>2,876</td>
<td>-</td>
<td>110</td>
<td>-</td>
</tr>
<tr>
<td>2006</td>
<td>1,977</td>
<td>-31.25 per cent</td>
<td>252</td>
<td>129.09 per cent</td>
</tr>
<tr>
<td>2007</td>
<td>1,479</td>
<td>-25.19 per cent</td>
<td>269</td>
<td>6.75 per cent</td>
</tr>
<tr>
<td>2008</td>
<td>969</td>
<td>-34.48 per cent</td>
<td>312</td>
<td>15.98 per cent</td>
</tr>
<tr>
<td>2009</td>
<td>908</td>
<td>-6.30 per cent</td>
<td>670</td>
<td>114.74 per cent</td>
</tr>
<tr>
<td>2010</td>
<td>732</td>
<td>-19.38 per cent</td>
<td>475</td>
<td>-29.09 per cent</td>
</tr>
<tr>
<td>2011</td>
<td>641</td>
<td>-12.43 per cent</td>
<td>515</td>
<td>8.42 per cent</td>
</tr>
<tr>
<td>2012</td>
<td>688</td>
<td>7.33 per cent</td>
<td>757</td>
<td>46.98 per cent</td>
</tr>
<tr>
<td>2013</td>
<td>746</td>
<td>8.43 per cent</td>
<td>874</td>
<td>15.45 per cent</td>
</tr>
<tr>
<td>2014</td>
<td>740</td>
<td>-0.80 per cent</td>
<td>828</td>
<td>-5.26 per cent</td>
</tr>
<tr>
<td>2015</td>
<td>829</td>
<td>12.03 per cent</td>
<td>1,287</td>
<td>55.43 per cent</td>
</tr>
<tr>
<td>2016</td>
<td>721</td>
<td>-13.03 per cent</td>
<td>1,863</td>
<td>44.76 per cent</td>
</tr>
<tr>
<td>2017(^3)</td>
<td>928</td>
<td>2.71 per cent(^4)</td>
<td>1,420</td>
<td>-23.77 per cent(^5)</td>
</tr>
<tr>
<td>2018</td>
<td>483</td>
<td>-41.73 per cent</td>
<td>753</td>
<td>9.92 per cent</td>
</tr>
</tbody>
</table>

1 Total number of companies declared bankrupt.
2 Total number of judicial reorganisation requests.
3 The numbers account for bankruptcy and judicial reorganisation proceedings until June 2018.
4 Calculated considering the number of companies declared bankrupt until June 2018 (829).
5 Calculated considering the number of judicial reorganisation proceedings until June 2018 (685).

Source: www.serasaexperian.com.br

The table shows a great leap in judicial reorganisation proceedings after the sub-prime mortgage crisis in 2008–2009. In 2015 and 2016, another gradual increase is noticeable, because of the deep recession that Brazil has gone through. Since bankruptcy is considered the last resort for administrators and management, the number of bankruptcy proceedings does not show a growth, but rather a decrease since the enactment of the Bankruptcy and Reorganisation Act in 2005, which offered companies the possibility of commencing reorganisation proceedings to ensure their recovery.

\(^{15}\) Source: www.bmfbovespa.com.br.
\(^{16}\) Source: www.bcb.gov.br.
In the past year, from June 2017 to June 2018, 987 small businesses, 379 mid-sized companies and 233 large companies have filed for judicial reorganisation. In the same time frame, 732 small businesses, 240 mid-sized companies and 115 large companies have been declared bankrupt. Although this information shows the difficult situation Brazilian companies are undergoing, there is hope for a new cycle of economic growth, with the federal government’s commitment to pass laws that limit and reduce government expenses. However, this new cycle depends heavily on the presidential election that will take place on October 2018 and the new President’s economic agenda.

III PLENARY INSOLVENCY PROCEEDINGS

i Oi Group

Oi Group is the largest Brazilian telecommunications company. Several events paved the way to the group’s judicial reorganisation proceeding, including, but not limited to: changes in consumer habits over time; excessive regulation over the telecommunications sector, which has forced Oi to invest in less relevant markets; high interest rates; and substantial enforcement of regulatory fines by the Brazilian Telecommunications Agency.

In parallel with the judicial reorganisation procedure in Brazil, the Dutch Court of Appeals has declared the bankruptcy of two Netherlands-based companies that are part of Oi’s conglomerate and subject to the Brazilian reorganisation proceeding.

Since the first signs of financial deterioration, Oi has been working together with outside financial and legal advisers in Brazil and abroad; their assistance in negotiating with creditors and the evaluation of viable alternatives for recovery has been essential. In the past few months, Oi has implemented an internal restructuring project comprising more than 370 initiatives, which, in general, aim to increase market share and productivity, reduce costs and expenses and bolster operational efficiency.

The group’s total debt subject to the judicial reorganisation proceeding surpasses 65 billion reais, which makes it the largest reorganisation proceeding in Brazilian history. There is also a substantial number of creditors, more than 90,000. On 20 December 2017, the general creditors’ meeting approved the plan of reorganisation, with the possibility of the creditors owning up to 75 per cent of the company, through a conversion of debt to equity. The plan was subsequently confirmed by the US Bankruptcy Court of the Southern District of New York and the Dutch court overseeing the bankruptcy proceeding of the foreign subsidiaries, Oi Brasil Holdings Cöoperatief UA (FinCo) and Portugal Telecom International Finance BV.

ii Eneva Group

Eneva, previously known as MPX Energia S/A, is an energy company that focuses on power generation, as well as oil and gas exploration and production. It is considered one of the sector’s main players.

The company has accumulated debts with financial institutions through project finance operations. Eneva has organised its expansion by using special purpose companies to concentrate its operational activity, but owing to difficult economic conditions the group was not able to fulfil its plans to build power plants. When these subsidiaries did not generate the estimated revenue, Eneva could not satisfy its obligations to financial institutions. Furthermore, the significant increase in the price of electric energy and economic instability
were also deciding factors that contributed to the filing of the judicial reorganisation proceeding in December 2014 by the Eneva Group. The special purpose companies that are party to the government contracts for energy production were not involved in the proceeding.

After a very successful restructuring process, Eneva’s judicial reorganisation proceeding was terminated roughly 19 months after its filling and 11 months after the decision that granted it the legal favour. This time frame is well below the two-year minimum supervision period and is considered one of the most successful judicial reorganisation cases since the enactment of the Bankruptcy and Reorganisation Act.

### iii União das Lojas Leader S/A

União das Lojas Leader S/A (Leader) is one of the largest and most famous Brazilian retail companies. The financial crisis faced by Leader originates from: the increase of interest rates, which made credit more expensive, as well as reducing consumers’ purchasing power; the national and international economic instability, which led to lower exports; and the greater competition between retailers caused by a general decrease in sales.

Seeking the restructuring of its debts with suppliers, Leader filed for extrajudicial reorganisation, which embraces more than 300 suppliers and, although challenging, the company has obtained the approval of more than three-fifths of its creditors. On 20 June 2018, the Rio de Janeiro Court of Appeals confirmed the extrajudicial plan of reorganisation.

### iv Triunfo Group

Triunfo Group is one of the largest Brazilian infrastructure conglomerates. The recent economic instability in Brazil is one of the main reasons for the financial distress suffered by the group, which caused substantial impact on the infrastructure sector and in credit costs. In addition, the Brazilian National Bank of Investment (BNDES) filed enforcement claims against the group’s companies to receive the payment of over 980 million reais. These factors forced Triunfo to negotiate with its creditors and file for extrajudicial reorganisation, to restructure its debts with financial institutions. Triunfo’s debt covered by its extrajudicial reorganisation proceeding amounts to nearly 2.5 billion reais.

The group’s restructuring proceeding is one of the largest and most significant extrajudicial reorganisation cases, considering its total debt and the participation of important creditors, such as BNDES. On 9 February 2018, the Rio de Janeiro bankruptcy court confirmed the extrajudicial plan of reorganisation.

Although the ruling is the object of pending appeals, they did not stay the implementation of the extrajudicial plan of reorganisation. Thus, in compliance with the plan, the company has conducted a reverse Dutch auction in which the creditors had the opportunity to propose haircuts on their own claims. At the end of this auction, the debt restructuring process proved to be very successful, resulting in an average haircut of 55.2 per cent in Triunfo’s debts.

Currently, Triunfo awaits the rejection of the pending appeals against the extrajudicial plan of reorganisation by the São Paulo Court of Appeals.

### IV ANCILLARY INSOLVENCY PROCEEDINGS

Ancillary insolvency proceedings are not mentioned by the Bankruptcy and Reorganisation Act, but despite the lack of legal provisions, in recent years case law has allowed the dialogue between Brazilian bankruptcy courts and foreign courts, mostly in cases in which the foreign subsidiary is part of a larger economic group with its centre of main interests in Brazil.
Examples of this were the submission of foreign companies to the judicial reorganisation proceedings of OGX Group, Sete Brasil Group, OAS Group and Oi Group, as mentioned before.

A major discussion involves the Dutch subsidiaries part of the Oi Group, FinCo and PTIF: the Dutch court has declared these companies bankrupt, and the Brazilian bankruptcy court handling Oi’s judicial reorganisation proceeding has not acknowledged this ruling. Further, the Brazilian court imposed a fine in the event the trustee in the Dutch proceedings fails to respect its decision. In light of this, the trustee requested the recognition of FinCo’s declaration of bankruptcy by the US Bankruptcy Court of the Southern District of New York, the same court that signed off on Oi’s Chapter 15 protection (recognising the judicial reorganisation before the Brazilian court as the main foreign proceeding). The US Bankruptcy Court later acknowledged that the Dutch court and the trustee should comply with the Brazilian bankruptcy court’s rulings.

Once the plan of reorganisation was approved and confirmed by the Brazilian bankruptcy court in the end of 2017, the Dutch court and the US Bankruptcy Court also confirmed the plan, demonstrating a remarkable effort in cooperation between different jurisdictions, with the same goal: the successful recovery of the ailing telecommunications conglomerate.

V TRENDS

One of the many proposals to boost economic growth is an amendment to the Bankruptcy and Reorganisation Act, the Draft Bill No. 10,220, introduced to the Brazilian House of Representatives on 10 May 2018. The first draft was the result of a working group put together with several respected scholars and tasked with the objective of updating the current legislation. Unfortunately, this first draft has been severely modified by the Ministry of Finance, mainly to strengthen the tax authority’s privileges in judicial reorganisation proceedings.

It is worth mentioning, however, that the Draft Bill proposes some relevant changes to the current legislation:

- Financing would be tremendously facilitated with several provisions allowing the encumbrance of assets after the filing for judicial reorganisation;
- the Bankruptcy and Reorganisation Act would no longer separate creditors in different classes in judicial reorganisation proceedings, the debtor would be able to do so in the reorganisation plan, dividing creditors in accordance to their interests and similarities;
- secured claims held by creditors with property interests that are in possession of the debtor, such as chattel mortgage and capital or operating leases, would be affected by judicial or extrajudicial proceedings;
- the termination of contracts based on an *ipso facto* provision would not be allowed, and such a clause would be legally considered void;
- the termination of the judicial reorganisation proceeding would occur at the same time it is granted; and
- financing would be tremendously facilitated with several provisions allowing the encumbrance of assets after the filing for judicial reorganisation.

However, one of the most important changes in the Bankruptcy and Reorganisation Act would be the adoption of the UNCITRAL Model Law on Cross-Border Insolvency, with
its mechanisms for international cooperation, expressly permitting plenary insolvency proceedings at the centre of main interests and ancillary proceedings where the debtor has foreign affiliates. Nevertheless, this draft of the bill still needs to be the object of deliberation in both the House of Representatives and the Senate (where it would be subject to any number of changes) and then passed into law, with the President’s sanction.

It is also relevant to mention that, because of Brazil’s economic instability mentioned above, as well as the increase of judicial reorganisation proceedings, creditors seem more open to directly negotiating their claims with companies in debt. This creates the possibility of a greater number of extrajudicial reorganisation proceedings, seen by stakeholders as a way of avoiding the negative reputational impact of judicial reorganisation proceedings.
I INSOLVENCY LAW, POLICY AND PROCEDURE

i Statutory framework and substantive law

There are three federal statutes that govern insolvency law in Canada: the Bankruptcy and Insolvency Act (BIA), the Companies’ Creditors Arrangement Act (CCAA) and the Winding-Up and Restructuring Act (WURA). The BIA, together with its regulations, is a self-contained code that deals with the liquidation of assets and the restructuring of debts of individuals, partnerships, corporations (other than certain excluded types of corporations) and other business entities that meet residency and minimal debt requirements. The BIA also provides for receiverships where an insolvent entity’s assets and rights are placed in the custody and care of a third party called a receiver. The receiver may continue operations, but more typically, the assets are liquidated. The CCAA, together with its regulations, deals only with the restructuring of the debts of corporations (other than certain excluded types of corporations) and income trusts, that meet certain residency requirements and meet higher minimum debt requirements than those found under the BIA. The WURA deals with the liquidation and restructurings of certain specified entities, such as banks and trust companies; in effect, all of those entities and corporations specifically excluded from the BIA and CCAA.

Of the three insolvency statutes, the BIA represents the most complete code, providing substantive provisions dealing with, inter alia, the scope and breadth of stays of proceedings, distributional priorities, fraudulent transfers, the sale of assets, the treatment of contracts, interim financings, cross-border proceedings, and penalties and sanctions against debtors and their directors for violations under the BIA. The BIA also contains provisions dealing with the appointment of receivers and the rules regarding their conduct. Restructurings under the BIA are by way of ‘proposals’ to creditors. Such proposals bind all affected creditors, if approved by the requisite double majority (two-thirds of proved claims and over 50 per cent of creditors per class) and subsequently by the court.

The CCAA is a more flexible statute than the BIA, allowing courts more discretion in assisting restructuring corporations. For example, under the BIA, a stay of proceedings is limited to a maximum of six months in a proposal, and the scope of that stay is set out and limited by statute. There is no limit to the maximum cumulative length of a stay of proceedings under the CCAA, and the court has significant discretion on the scope of the

---

1 Michael Nowina is a partner and Sarah Faber is a student at law at Baker & McKenzie LLP (Canada).
2 RSC 1985, c B-3.
3 RSC 1985, c C-36.
4 RSC 1985, c W-11.
stay of proceedings beyond what is available under the BIA. Like the BIA, the CCAA also has substantive provisions dealing with distributional priorities, fraudulent transfers, the sale of assets, the treatment of contracts, interim financings and cross-border proceedings. Restructurings under the CCAA are done through a ‘plan of compromise or arrangement’. Such plans, if approved by the requisite double majority (the same as under the BIA), and subsequently by the court, bind all affected creditors.

The WURA is less structured than the BIA or the CCAA and applies primarily to financial institutions. In Canada, the banking system is very stable, and, therefore, there are few proceedings under the WURA.

Both the BIA and the CCAA contain provisions that mandate their review every five years. The BIA and CCAA were last amended in 2009, and the government of Canada launched a public consultation in May 2014 with the release of a discussion paper seeking input on key aspects of Canada’s insolvency regime and its administration. Following a consultation process, a report was tabled before Parliament in 2015, but no further insolvency reforms are on the horizon. Any future reform will occur following a review by a parliamentary committee and it is unclear when any further amendments to the BIA or CCAA will be considered.

ii Policy

With respect to restructurings, whether it is the debts of an individual or business entity, the objective is to provide a debtor in financial difficulty the time and opportunity to restructure and develop a fresh arrangement with creditors with a view to avoiding a bankruptcy liquidation. The goal is to keep debtors in financial difficulty operating and protected from creditors, in order to allow the debtor to stabilise operations and develop a restructuring plan that may then be put to its creditors for consideration. If the requisite majorities approve the plan, it binds all affected creditors and the debtor emerges from bankruptcy protection and continues its (restructured) operations.

iii Insolvency procedures

To reorganise under the BIA, an insolvent debtor must have liabilities of at least C$1,000, carry on business in Canada and be insolvent. A BIA reorganisation is commenced by a debtor either lodging a proposal to creditors with a proposal trustee or filing what is known as a notice of intention (NOI) to make a proposal under the BIA. If a NOI is filed, the debtor has 30 days to file a proposal, which may be extended by a court order for up to five additional months, in periods of no more than 45 days at a time. If the debtor fails to file a proposal by the end of the final period, or if the proposal is rejected, then the debtor is deemed to have made an assignment into bankruptcy. A stay of proceedings is automatically imposed by statute upon a proposal or NOI being filed.

A bankruptcy liquidation commences with either an assignment into bankruptcy by the insolvent debtor or an application for a bankruptcy order by one or more creditors owed at least C$1,000, where the debtor is insolvent and has committed an act of bankruptcy. Once a bankruptcy order or assignment is made, a trustee is appointed over the assets and is charged with collecting and liquidating the assets of the bankrupt with a view to distributing proceeds to creditors. A meeting of creditors takes place shortly after the bankruptcy, and inspectors may be elected by the creditors to oversee and provide instruction to the trustee.
on how the proceeding is conducted. Once the assets are liquidated, the trustee distributes the proceeds to creditors who have filed proofs of claim based on the priorities scheme set out in the BIA.

To reorganise under the CCAA, a company must carry on business in Canada, have total liabilities exceeding C$5 million and be insolvent. CCAA proceedings are commenced with a court application by the reorganising debtor for what is known as an ‘initial order’, which establishes the proceeding and sets out the general parameters, including stays of proceedings, provisions that prohibit creditors from enforcing claims against the debtor, provisions that prohibit contracting parties from terminating contracts with the debtor, interim operational matters for the debtor, the appointment of a monitor, and interim financing. Under the CCAA, there is an initial discretionary stay of proceedings of up to a maximum of 30 days. Thereafter, the stay of proceeding may be extended at the discretion of the court for any additional period of time. In the past, reorganisations have taken the form of the development of a plan of compromise or arrangement, consisting of a proposal to creditors to compromise claims. The time frame in which a debtor has to file a plan is in the discretion of the court. Creditors are grouped into classes based on commonality of interest for purposes of voting and distribution under the plan. A majority in number, representing two-thirds in value of the claim of each creditor class, must approve the plan, as well as the court. If they do, then the plan will be binding on all creditors in the class. The CCAA is silent on the time frame to seek court approval.

Under the WURA, depending on the circumstances, a debtor, a creditor, a shareholder or the Attorney General of Canada may commence a proceeding. A stay of proceedings may be sought from the court by the debtor, creditor, contributory, liquidator or the original applicant. The remedy is discretionary. Upon the making of a winding-up order, an automatic stay is imposed. The WURA provides no restrictions on the amount of time a debtor has to restructure or any restriction on the discretion of the court to grant or restrict such time. There is also no time frame for seeking court approval.

In proceedings under the BIA, CCAA and WURA, any affected party may oppose or seek to lift the stay of proceedings. To do so, creditors must prove that they are likely to be materially prejudiced by the continuance of the stay, or it is equitable on other grounds that the stay be lifted. Unless there are compelling reasons to lift the stay, courts are normally reluctant to do so, especially at the outset of the proceeding, so that the debtor has time to attempt to restructure.

Receiverships can be commenced either under the BIA or under provincial legislation. As an equitable remedy, receiverships take on many forms but typically a receiver is appointed either privately pursuant to a security agreement or by way of court order, and is given certain powers to either operate a business or seize and liquidate assets or sell a business as a going concern, with a view to distributing the proceeds of sale to the creditors of the debtor. Receiverships are a very common remedy for dealing with insolvency in Canada and a useful tool for monetising the business or assets of an insolvent debtor.

iv Control of insolvency proceedings
The overall control of any court proceeding is in the hands of the court as directed and allowed by the relevant insolvency statute. Restructuring proceedings in Canada, save rare exceptions, are commenced and led by the debtor – similar to the debtor-in-possession (DIP) style of restructuring used in the US. The debtor (via management) remains in control of its assets and operations. In all cases, an insolvency professional (almost always a qualified
bankruptcy trustee) will be appointed to act as proposal trustee in a BIA proceeding, as monitor in a CCAA proceeding, and in several possible capacities under the WURA. In each case, this professional acts as the eyes and ears of the court and seeks to ensure that the debtor is complying with the statute and court orders (and provides reports to the court and creditors).

v  Special regimes
As previously noted, individuals and most business entities may file under the BIA and income trusts and most corporations may file under the CCAA. Banks, trust companies, insurance companies, loan companies, building societies, and certain trading companies may only commence proceedings under the WURA.

vi  Cross-border issues
Plenary proceedings in Canada may only be commenced by debtors resident in, carrying on business in, or having assets in Canada. A debtor that has no presence in Canada may not commence a plenary proceeding. Where a debtor carries on business in more than one location, the courts will look at factors such as the location of main operations, the location of management, the location of the majority of creditors and convenience for the majority of stakeholders. Canadian courts have generally expressed a willingness to assist foreign courts where such assistance would not contravene public policy concerns in Canada. With the adoption of most of the UNCITRAL Model Law on Cross-Border Insolvencies in 2009, Canadian courts are now mandated to cooperate with foreign courts, subject to public policy concerns, once an ancillary proceeding is commenced. Pursuant to these regimes, proceedings ancillary to both foreign main and foreign non-main proceedings may be commenced in Canada. Neither the BIA nor the CCAA contain time frames or time restrictions for any such filings. Ancillary proceedings may be commenced by a foreign representative, which is a party appointed in the foreign proceeding. An automatic stay is granted if the proceeding is recognised as a foreign main proceeding, and a discretionary stay may be granted if the proceeding is recognised as a foreign non-main proceeding.

II  INSOLVENCY METRICS
Despite having a growing and relatively stable economy, Canada faces challenges including one of the highest consumer debt-to-income ratios in the G20, changing demographic trends, and the potential impact of lower commodities prices. While the period of 2002–2007 saw a relatively stable consumer insolvency rate, the 2008 downturn pushed it higher in 2009. Since that time, the rate has trended back to pre-recession levels.†

The total number of insolvencies for the 12-month period ending 30 April 2018 decreased by 1.2 per cent compared with the 12-month period ending 30 April 2017. For the 12-month period ending 30 April 2018, individual insolvency filings accounted for 97.1 per cent of total insolvency filings.

In contrast to individual insolvency trends, the business insolvency rate has fallen nearly 70 per cent since 2002. Unlike other periods of economic downturn, the 2008 recession did not result in an increase in business insolvencies. Business insolvencies for the 12-month period ending 30 April 2018 decreased by 2.5 per cent compared with the 12-month period ending 30 April 2017. The two sectors that experienced the largest decrease in the number of insolvencies were educational services and mining and oil and gas extraction. The construction sector experienced the largest increase in insolvencies.

III PLENARY INSOLVENCY PROCEEDINGS

1 Urbancorp Toronto Management Inc. (Re)

In Urbancorp Toronto Management Inc (Re) the Urbancorp group of companies (Urbancorp) commenced proceedings under the CCAA. One of the creditors, Speedy Electrical Contractors Ltd (Speedy), had loaned monies to the principal of Urbancorp and was also owed monies for work performed. Prior to the insolvency, Speedy had threatened to commence legal action if amounts owing to it were not repaid. As a result, the parties entered into an agreement which provided an extension of the time to repay and in exchange granted security over a property owned by one of Urbancorp’s special purpose entities to Speedy. Shortly after, Urbancorp collapsed and commenced insolvency proceedings.

When Speedy sought to rely on its security in the insolvency proceedings, the court-appointed monitor opposed on the basis that the security was a preferential or undervalue transaction and thus unenforceable. The key issue in the case was whether there was any intention on the part of Urbancorp to defraud, defeat or delay a creditor. The monitor sought to rely on the long-standing relationship between the owner of Urbancorp and Speedy, which resulted in Speedy loaning money personally to Urbancorp’s owner, as a factor that gave Speedy leverage to bypass normal economic incentives making the relationship non-arm’s length. The court was not convinced that the transaction was intended to be preferential.
because the conduct of the parties was consistent with a *bona fide* commercial transaction, finding the written communications between the parties showed they were adverse in interest and operating under normal economic incentives.

### ii Arrangement relatif à Bloom Lake

Bloom Lake General Partner Limited, Wabush Resources Inc and related entities (Bloom Lake) received court protection under the CCAA in 2015, and subsequently virtually all of its assets were liquidated. The remaining assets included preference claims valued at approximately C$173 million, and there was proposed settlement of those claims in 2018 that would result in between C$62 and C$100 million available for distribution to the third-party unsecured creditors. Based on this proposed settlement, Bloom Lake sought an order allowing a meeting of creditors to be called to vote on a proposed plan of compromise and arrangement (the Plan) that would distribute the proceeds of the liquidation to creditors. However, it was also anticipated that further negotiations on the form of the Plan would occur right up until the vote.

Employees and retirees held a significant claim of approximately C$103.8 million for post-employment benefits and one of the issues on the motion was how the 2,400 individuals would vote their claims. The non-unionised employees and retirees were represented by several appointed employees (the Representative Employees), and the unionised employees and retirees were represented by their union. Bloom Lake proposed that each individual would vote his or her own claim, but the Representative Employees and the Union sought a discretionary deemed proxy that would apply unless the employee or retiree opted out of it by advising the court-appointed monitor that he or she will attend the meeting in person or appointed a different person to act as proxy. In addition, the union also asserted that it was the only party entitled to vote the claims because it had the right of exclusive representation of its union members. In their opposition to the proxy, Bloom Lake, the monitor and the largest unsecured creditor argued that a deemed proxy would give the Representative Employees and union too much leverage in the voting to take place.

The court had no concerns in authorising a vote on the Plan. On the issue of the discretionary deemed proxy requested by the Representative Employees, the court engaged in a three-part analysis to determine the appropriateness of a discretionary deemed proxy.

First, the court examined whether it was appropriate to give a discretionary deemed proxy at all. On this issue, the court was not satisfied that the union was entitled to vote its members’ claims based on the principle that a union has exclusive representation of its union members. This principle relates to claims under the collective agreement, and the court found that it does not give a union the right to vote for the employees and retirees in all circumstances. Examples cited by the court included that employees retain the right to vote individually on such important issues as the acceptance of a collective agreement or the decision to strike. The court found that the vote on a plan under the CCAA is not the same as a claim arising under the collective agreement and so the union did not have the presumptive right to vote. However, without a deemed proxy a number of employees and retirees votes would be lost, and the court stressed the importance of each member having the right to vote.

---

15 *Arrangement relatif à Bloom Lake*, 2018 QCCS 1657.
It agreed with the Representative Employees and union that a deemed proxy would ensure all members had the opportunity to vote and exercise the leverage that they should have, based on their numbers and the value of their claims.

Second, the court agreed with the Representative Employees and the union that their counsel would be the appropriate persons to exercise the deemed proxy.

Lastly, the court assessed whether the deemed proxy should be discretionary. The Representative Employees and the union had not yet taken a position on whether they would vote for or against the Plan and asked that the proxy holder be allowed to vote the claims in his or her discretion depending on the result of further discussions and negotiations that would take place right up until the vote.

The court held that a discretionary deemed proxy is ‘fundamentally undemocratic’. By making the deemed proxy discretionary, it would prevent the employees and retirees from knowing how their claims would be voted while simultaneously taking away their right to vote and giving it to someone else. The court would not authorise a discretionary deemed proxy – it must either be a deemed proxy to vote for the Plan or a vote against it. Accordingly, the court gave more time for the stakeholders to finalise the Plan to ensure that the employees and retirees knew whether the union and Representative Employees would vote in favour or against the Plan. Once the final position of the proxy was taken the Plan could not be amended without further authorisation from the court. That way, the employees and retirees would have the opportunity to make a real choice, based on the final version of the Plan and in full knowledge of how their claim will be voted if they did not opt out of the deemed proxy.

iii Redwater Energy Corporation

In Redwater Energy Corporation (Re) an insolvent oil and gas company owned stakes in both producing wells and inactive wells licensed by the Alberta Energy Regulator (AER). Following the appointment of a receiver and bankruptcy trustee, applications were brought relating to the sale of producing wells and the disclaimer of inactive wells. The trustee and receiver sought to disclaim inactive wells so as to avoid liability for environmental remediation. At issue was whether the provincial regulatory regime operationally conflicted with the BIA or frustrated its purposes by imposing obligations on the receiver and trustee for environmental remediation and by making the transfer of licences for the producing well subject to conditions relating to the inactive wells. Relying on a trilogy of recent cases by the Supreme Court, the trustee and receiver argued that Alberta’s legislation effectively created a priority for environmental liabilities in bankruptcy and triggered the doctrine of federal paramountcy that renders provincials laws inoperative to the extent of their conflict with federal law.

The Alberta Court of Queen’s Bench agreed with the trustee and receiver and found that certain provisions of the provincial legislation governing the actions of licensees of oil and gas assets did conflict with the BIA, which permits the trustee or receiver to disclaim assets, and, therefore, these provisions did not apply to a receiver and trustee because of the paramountcy doctrine. As a result, a trustee or receiver will be permitted to disclaim inactive wells.

16 ibid. at paragraph 54.
17 2016 ABQB 278.
wells without assuming any liabilities or environmental remediation obligations. In addition, the AER cannot impose conditions on the transfer of producing well licences relating to inactive wells.

The Alberta Court of Appeal upheld this decision, agreeing with the lower court that the regulator’s policy would in effect ‘create a super priority for environmental claims’, which could not be reconciled with the federal objectives of the BIA.

Leave to appeal to the Supreme Court of Canada was granted 18 January 2018, and the case was argued on 15 February 2018. If this decision stands, it may have a significant impact on who bears the environmental remediation costs of abandoned wells and may result in higher costs on other oil and gas companies that pay a levy for ‘orphaned’ wells, which will likely increase in number as they are disclaimed through insolvency proceedings.

IV ANCILLARY INSOLVENCY PROCEEDINGS

Toys ‘R’ Us (Canada) Ltd

In 2017, US retailer Toys ‘R’ Us – Delaware, Inc (Toys US) and its Canadian subsidiary, Toys ‘R’ Us (Canada) Ltd (Toys Canada) initiated Chapter 11 proceedings in the US bankruptcy court. Initiating those proceedings violated the terms of Toys Canada’s credit facilities, which was operating with cash flow positive and a solvent balance sheet at the time. The breach of the lending facilities created a liquidity crisis that rendered Toys Canada technically insolvent, entitling it to protection under the CCAA.

After continuing poor sales, the Chapter 11 proceedings for Toys US began liquidation. As part of the liquidation sale, the shares of Toys Canada were offered for sale. Following a stalking horse bidding process, a buyer and Toys US entered into a share purchase agreement. Toys Canada, which was not a selling party to the agreement, signed on to the agreement to consent to terms that would facilitate its transition from Toys US to the buyer.

A condition of the share purchase agreement required the proposed transaction be approved by both US and Canadian courts. The US bankruptcy court granted approval 24 April 2018, and soon after Toys Canada applied to the Ontario Superior Court of Justice for approval of its acceptance of terms in the share purchase agreement that would facilitate the Toys US share sale to the buyer. The Court had to determine whether Toys Canada could exit the CCAA proceedings without undergoing a restructuring.

The Court praised the agreement as having a positive outcome for Toys Canada and all stakeholders involved and reviewed the three broad ways in which a debtor can emerge from CCAA proceedings:

a the proceedings fail, and the debtor will be liquidated in bankruptcy or otherwise;
b the proceedings succeed, the debtor will be restructured and emerge with a going concern business more or less intact; or
c solvency is restored and the CCAA process terminates without reorganisation being needed – as was the instance in this case.

---

19 2017 ABCA 124, at paragraph 81.
21 Toys “R” Us (Canada) Ltd, 2018 ONSC 2744.
22 Century Services Inc v. Canada (Attorney General), 2010 SCC 60, as cited in ibid., at paragraph 9.

© 2018 Law Business Research Ltd
Toys Canada was a solvent business being purchased from an insolvent owner, and the buyer did not seek to restructure the company. By keeping the business intact, there would be no compromise of any creditor’s claims under the CCAA, and Toys Canada could emerge from the proceedings as if it never entered.

V  TRENDS

i  Commercial insolvencies

In 2017, there were a number of factors that impacted Canada’s insolvency filings including strong economic growth, rebounding oil prices and strong consumer spending. Overall, Canada was the fastest-growing economy in the G7. Unsurprisingly, commercial insolvencies in Canada have been generally stable with a slight decrease from 2017. The sectoral structure of commercial insolvencies has also been relatively consistent from 2007 to date, with the top five industry sectors remaining unchanged and consistently representing approximately 60 per cent of all commercial insolvency filings. These sectors are construction; manufacturing; retail; transportation and warehousing; and accommodation and food services.23 One persistent trend evident in Canada is the use of insolvency laws to decouple insolvent Canadian subsidiaries from a larger corporate group. Prime examples are the dramatic insolvencies of two well-known department stores: Target Canada in 2015 and Sears Canada in 2017. The sheer size of these operations, which employed numerous low and middle-income workers, held significant contracts with manufacturers and possessed large leases in high-value locations, has ignited high-visibility conflicts among creditors and challenges for all parties involved.

ii  Personal bankruptcies

Although the Bank of Canada has repeatedly expressed concern over household indebtedness and the ability of Canadians to withstand a significant increase in interest rates, personal bankruptcies have remained stable as the Canadian economy remains strong and the unemployment rate is at a decade-low. Low interest rates have allowed Canadians to comfortably take on more and more debt. This has led to Canadian households being among the most indebted in the world according to the OECD.24 It follows that the higher debt-to-income ratios will most likely lead to higher insolvency rates as interest rates increase.

Chapter 5

ENGLAND & WALES

Ian Johnson

I INSOLVENCY LAW, POLICY AND PROCEDURE

i Statutory framework and substantive law

The legislative framework underpinning UK insolvency law is principally provided by the Insolvency Act 1986 (IA 1986) and the Insolvency Rules 2016 (IR 2016), which apply to both companies and individuals. They also apply in modified form to certain forms of partnership. Elsewhere, ‘special insolvency regimes’ apply to certain regulated entities, including credit institutions, insurance undertakings and utility companies (see Section I.vi).

The IA 1986 and IR 2016 are supplemented by other legislation, such as the Companies Act 2006 (including the statutory provisions relating to schemes of arrangement used in restructurings) (CA 2006), the Company Directors’ Disqualification Act 1986 and the Law of Property Act 1925 (which, in some cases, governs the ability of a secured creditor to enforce its security).

While European Union law has only a limited effect on the domestic insolvency framework, it governs jurisdiction and recognition in many EU cross-border cases. On 23 June 2016, a referendum was held in which the British public voted to leave the EU, and on 29 March 2017 the prime minister gave formal notice of the United Kingdom’s intention to withdraw, in accordance with Article 50 of the Treaty on European Union, triggering the two-year period for negotiating the terms on which the UK will leave (which could be extended by mutual consent). As discussed in more detail in Section V.i, it is not yet clear what form the exit will take, or what the legal consequences will be. The existing legal framework is expected to remain in place until the UK leaves (and it is anticipated that transitional arrangements may preserve significant aspects of the restructuring and insolvency framework for a longer period), and is, therefore, still discussed in detail in this chapter. The implications for cross-border insolvency are discussed further in Section V.iv.

---

1 Ian Johnson is a partner at Slaughter and May. The author would like to thank Nicky Ellis, a professional support lawyer at Slaughter and May, for her assistance in preparing this chapter.
2 The term ‘UK insolvency law’ is used in this chapter to denote the insolvency laws applicable to England and Wales. Similar laws apply, with modifications, to Scotland and Northern Ireland.
3 These came into force on 6 April 2016, in most cases replacing the Insolvency Rules 1986 in their entirety.
4 With certain significant exceptions, such as the Financial Collateral Arrangements (No. 2) Regulations 2003 (implementing the EU Directive on Financial Collateral Arrangements, which aims to simplify the process of taking and enforcing financial collateral across the EU). The regulations disapply a number of provisions of the IA 1986, including the moratorium on enforcement of security in insolvency processes such as administration and company voluntary arrangements and the order of priority of claims in floating charge realisations.
In the restructuring and insolvency context, the most significant piece of EU legislation is the EC Regulation on Insolvency Proceedings (recast) (No. 2015/848) (the Recast ECIR), which limits the jurisdiction of the English courts to open main insolvency proceedings. The Recast ECIR is directly applicable in all EU Member States except Denmark, in cases where the debtor’s centre of main interests (COMI) is situated in an EU Member State. It imposes a framework of jurisdictional rules governing the opening of all proceedings that fall within its scope and will override the national law of EU Member States where necessary. Certain types of debtor are excluded from the Recast ECIR, the key examples being credit institutions and insurance undertakings, which are subject to separate regulations. Most provisions of the Recast ECIR came into force on 26 June 2017, following an extensive review and subsequent revision of the EC Regulation on Insolvency Proceedings (No. 1346/2000) (Original ECIR). The Original ECIR continues to govern insolvency proceedings that were opened before that date. Throughout this chapter, we use the umbrella term ‘ECIR’ where the position under the Original ECIR and the Recast ECIR is the same.

Where the ECIR applies, main proceedings may only be opened in the UK if the debtor company has its COMI (which is presumed, in the absence of proof to the contrary, to be where the debtor’s registered office is located) in the UK. The company does not have to have been incorporated in an EU Member State. If the company’s COMI is in another EU Member State, secondary proceedings can be opened in the UK if the company has an establishment in the UK. Insolvency proceedings opened in an EU Member State under the ECIR will be automatically recognised without any formality in all EU Member States, including the UK, from the time the judgment opening the proceedings becomes effective in the EU Member State in which the proceedings are opened.

If the company’s COMI is outside the EU, the ECIR will not apply and the UK, in common with other EU Member States, will be free to act in accordance with its existing laws and practice when exercising jurisdiction, opening proceedings and recognising and enforcing proceedings opened within and outside the EU.

ii Policy

Changes to insolvency legislation were introduced under the Enterprise Act 2002 to facilitate corporate rescue. Key amendments included the streamlining of the administration regime and the limiting of the circumstances in which the holder of a qualifying floating charge (QFC holder) can appoint an administrative receiver to realise its security. These changes reflect the shift in policy voiced by successive UK governments over recent years in an attempt to make the UK a more rescue-orientated, debtor-friendly jurisdiction, where entrepreneurship is to be
encouraged and where there should be no stigma attached to business failures in the absence of wrongdoing by the directors of the company. However, when compared with certain other jurisdictions, such as the United States, the UK still appears to be a creditor-friendly jurisdiction. The government has been considering options for the reform of the corporate insolvency framework, including proposals intended to facilitate restructurings and business rescue. As discussed further in Section V.v, it is not clear at present whether these reforms will be pursued.

In the UK, the prevailing approach to treatment of businesses in financial difficulties was traditionally to attempt to achieve a consensual solution to keep businesses going. However, the complexity of capital structures, diverse views of different stakeholders and the flexibility of tools such as schemes of arrangement, company voluntary arrangements (CVAs) and pre-packaged administrations (discussed in subsection iii) have meant that solutions that are not fully consensual have become more commonplace. Often these are used as either a ‘stick’ to encourage consensual negotiations, or to assist with the implementation of a restructuring strategy agreed as part of a broadly consensual process.

iii Insolvency procedures

Introduction – insolvency and rescue procedures

Subject to the applicability of any special insolvency regimes (see Section I.vi) or any jurisdictional limitations imposed by the ECIR, the processes described below can be used to wind up or rescue a company in the UK. In brief, a company (including an overseas company if its COMI is in England or if the company is otherwise found to have sufficient connection with this jurisdiction)\(^{10}\) may be placed into voluntary or compulsory liquidation, unless it is subject to a special insolvency regime. Alternatively, it may be made subject to any of three alternative statutory procedures: administration, CVA or receivership. In addition, a company may have its debts rescheduled or compromised by way of a creditors’ scheme of arrangement (scheme). Unlike liquidation, administrations, CVAs and schemes can be used to rescue a company and may form part of a restructuring plan. The IA 1986 also provides for receivership (including administrative receivership),\(^{11}\) which is a self-help remedy enabling a creditor to recover what it is owed through the realisation of charged assets.

Liquidation

A company may be wound up by way of a ‘members’ voluntary liquidation’ (MVL), which is a solvent liquidation, or a ‘creditors’ voluntary liquidation’ (CVL), which is an insolvent liquidation. A CVL can also be used as an exit route from administration. In a CVL, the creditors will have a greater say than in an MVL and are also able to appoint a liquidation committee to supervise certain aspects of the winding up. A company can also be wound up by the courts as a compulsory liquidation.

In both a voluntary and a compulsory liquidation, the liquidator is under a duty to collect in and realise the assets of the company for distribution to the creditors. There is no prescribed time limit within which to complete this process. The company will then be

\(^{10}\) See Sections 220 to 221 of the IA 1986, which allow for the winding up of foreign companies as unregistered companies.

\(^{11}\) It is not possible to appoint an administrative receiver in respect of a company incorporated outside the UK.
dissolved. If the liquidator believes that he or she could achieve a better result for the creditors were the company to be placed in administration, then he or she may apply to the courts for himself or herself or another person to be appointed as administrator. If main proceedings are pending in another EU Member State, and the company’s COMI is located in that Member State, it will still be possible to commence a CVL in the UK, provided the company has an establishment in the UK. If, however, main proceedings have already been opened in another EU Member State, the English courts must stay the secondary proceedings in whole or in part if requested to do so by the liquidator in the main proceedings.12 The English courts have the power, however, to request the liquidator in the main proceedings to take any suitable measure to guarantee the interests of the creditors in the secondary proceedings and of individual classes of creditors. Such a request may only be rejected if it is manifestly of no interest to the creditors in the main proceedings.

If a company is incorporated outside the UK and the ECIR does not apply (i.e., the company’s COMI is not located in an EU Member State), it may be wound up as an ‘unregistered company’ under the IA 1986 in certain circumstances, including where it is unable to pay its debts or if a court is of the opinion that it is just and equitable to wind it up. There is no statutory guidance as to the criteria that will justify an English court assuming jurisdiction, but case law has identified the following further requirements that must be satisfied before the courts will exercise their discretion to make a winding-up order: (1) there must be a sufficient connection with England; (2) there must be a reasonable possibility, if a winding-up order is made, of benefit to those applying for the winding-up order; and (3) one or more persons interested in the distribution of assets of the company must be persons over whom the courts can exercise jurisdiction. The sufficient connection test may be satisfied by, for example, the presence of assets within the jurisdiction or finance documents that are governed by English law. The courts may also assume jurisdiction where the insolvency procedures in the relevant foreign jurisdiction have been found to be unsuitable or outmoded.13

**Administration**

An administrator can be appointed in cases where a company is, or is likely to become, unable to pay its debts and the purpose of the administration is likely to be achieved. The purpose is set out as a hierarchy of three objectives. The primary objective is to rescue the company as a going concern, failing which the administrator must seek a better result for the company’s creditors as a whole than would be likely in a winding up. If the second objective is not achievable, the third objective is to realise the company’s property for distribution to secured or preferential creditors.

The second objective may be achieved by disposing of the company’s business or its assets by way of a pre-packaged sale (pre-pack), agreed before an administrator is appointed. The sale will then be effected immediately (or soon after) he or she takes the appointment (the administrator is not required to notify the unsecured creditors in advance or obtain their consent). This has proved to be a useful, if at times controversial, restructuring tool and has on occasion been used by foreign companies, with court approval, after migrating

---

12 As discussed in Section I.v, the court may refuse to open secondary proceedings if an undertaking to respect local priorities is in place.

their COMIs to England\(^{14}\) (see Section I.vii). The court held that the industry guidance on the use of pre-packs provided by SIP 16\(^{15}\) had been complied with and expressly gave the administrators liberty to proceed with the pre-pack as, on the evidence, there was no realistic alternative to realising better value for creditors.\(^{16}\) As discussed further in Section V.v, since November 2015, there has been an independent ‘pre-pack pool’ of experienced business people available to scrutinise proposed deals involving connected parties. Use of the pre-pack pool is voluntary but strongly encouraged. It was set up to address concerns about the fairness and transparency of pre-packs involving connected parties, but has not been extensively used to date.

Administration is a ‘collective insolvency proceeding’ for the purposes of Annex A to the Recast ECIR.\(^{17}\)

An administrator cannot be appointed to a company whose COMI is located outside the EU unless it is registered under the CA 2006 or is incorporated in a European Economic Area state other than the UK.\(^{18}\) In this respect, the English courts’ jurisdiction is narrower than that for liquidations where an overseas company can be wound up if it has sufficient connection with this jurisdiction (as discussed earlier in this Section).

The administration will end automatically after one year unless extended by court order or with the consent of the creditors. Extensions are often required in complex cases.

**CVA**

A CVA is an informal but binding agreement between a company and its unsecured creditors to compromise the company’s debts, made with the aim of allowing companies in financial difficulties to avoid liquidation. If the CVA proposal is approved by three-quarters or more (in value) of the company’s creditors, it will bind all creditors who were entitled to vote in the decision-making process, regardless of whether they were in fact notified about it.\(^{19}\) Dissenting creditors and creditors whose votes are required to be left out of account are therefore bound by a resolution of the requisite majority. Secured and preferential creditors will not be bound unless they have given their consent and, therefore, CVAs are less commonly used by companies that have a large amount of secured debt.

---

\(^{14}\) For example, *Hellas Telecommunications (Luxembourg) II SCA* [2009] EWHC 3199 (Ch).

\(^{15}\) A Statement of Insolvency Practice (SIP 16 – Pre-packaged Sales in Administration) was introduced to ensure greater transparency of pre-packs. It sets out the required disclosures that an administrator must make to creditors of the details of any pre-pack agreement and sale.

\(^{16}\) A pre-pack administration can also be combined with a scheme, as seen in the *IMO Carwash* and *McCarthy & Stone* restructurings.

\(^{17}\) Under the Original ECIR, the circumstances in which administration could be used as a secondary proceeding were limited, as secondary proceedings are restricted to winding-up proceedings.

\(^{18}\) But note the exception provided by Section 426 of the IA 1986 that permits the English courts to assist courts having insolvency jurisdiction in other ‘relevant countries’: in *Re Dallhold Estates (UK) Pty Ltd* [1992] BCC 394 the court acceded to the request of a Western Australian court to grant an administration order in respect of an Australian company with assets in this jurisdiction.

\(^{19}\) The IA 1986 and IR 2016 set out various ‘decision procedures’ that may be used when creditors are required to make a decision. Many of these decisions would previously have been made at physical creditors’ meetings, but since the IR 2016 came into force on 6 April 2017, such meetings are now permitted only if the requisite proportion of creditors so request. Challenges on the grounds of unfair prejudice are possible in some circumstances – see further Section I.iv).
A CVA may be used to avoid or supplement other insolvency procedures, such as administration or liquidation, where it can take advantage of the moratorium against creditor action. An optional moratorium is otherwise available for certain small companies. It has the advantage of being a flexible restructuring tool, which can often be swiftly implemented and requires minimal court involvement. It enjoyed some degree of success in the retail sector at the height of the global financial crisis as a way for a company to reach agreement with its landlords and other unsecured creditors, and as discussed further in Section III.i, has recently become popular again for restructurings in the retail and restaurant sector, particularly where compromises with landlords are required.

A CVA is listed as a collective insolvency proceeding in Annex A to the Recast ECIR, which means that it can be proposed by any company, wherever incorporated, provided its COMI is situated in the UK. If the CVA is approved then it will be binding throughout the EU and will have the same effect in any other EU Member State as it does under English law.

Creditors’ scheme of arrangement

A scheme of arrangement is not an insolvency process but falls instead within the ambit of the CA 2006. It is a court-approved compromise or arrangement between a company and its creditors, or any class of them, to reorganise or reschedule the company’s debts. It does not benefit from a moratorium on creditor actions but can be implemented in conjunction with formal insolvency proceedings (administration or liquidation), both of which include a statutory moratorium. In its simplest form, a scheme may be used to vary the rights of a class of creditors and can bind dissentient creditors if the requisite majority or majorities vote in favour of the proposal. It can also be used by companies to amend and extend outstanding loans and implement debt-for-equity swaps, where they have failed to obtain the requisite level of consent under the underlying loan facility. It is also sometimes used to provide a breathing space ahead of a wider restructuring, or strategically as a ‘stick’ or ‘plan B’ in the context of restructuring negotiations to help achieve a consensual deal.

The scheme process takes time, although once the proposal document has been finalised and circulated, it may be possible to complete the procedure in approximately six weeks, subject to court availability. Unlike in a CVA (where the creditors effectively vote as a single
class), it may be difficult to achieve a consensus among affected creditors as to the composition of the various creditor classes. Class composition will be considered at the convening hearing if there are outstanding issues as to fairness. The fact, however, that it is binding on all members of the relevant class (or classes) of creditors, once it has been approved by the appropriate majorities, sanctioned by the courts and delivered to the Registrar of Companies, gives it an important advantage over a CVA.

Schemes are sometimes used by overseas companies, often in circumstances where such companies are unable to obtain the requisite level of approval for the compromise in their own jurisdiction. Sufficient connection has been found in a number of cases on the basis of the underlying facility agreement being subject to English governing law and jurisdiction clauses, including where the relevant clauses have been changed to English law in anticipation of the scheme. The courts will be influenced by whether there is a procedure that is equivalent to a scheme available in the relevant overseas jurisdiction and will also want to be satisfied that the effects of the scheme will be recognised in other jurisdictions. The concern is greater where there are local creditors, opposed to the scheme, who may attempt to ignore its terms and bring claims against the debtor or its assets on the basis of the original (pre-scheme) finance documents (see Section I.vii for further details).

The fact that a scheme is neither a purely informal out-of-court procedure nor a formal court-based procedure, and that it falls outside the scope of the ECIR, has led to some difficulties in relation to its recognition by the courts of certain EU Member States. The Recognition and Enforcement of Judgments in Civil and Commercial Matters (No. 1215/2012) (Judgments Regulation) provides one avenue for recognition, although it has not been conclusively determined whether schemes fall within its scope (see Section I.vii for further details). In cases where recognition under the Judgments Regulation is refused by an overseas court (or recognition is sought in jurisdictions where that regulation does not apply), that court may be able, with the benefit of expert evidence where necessary, to recognise the scheme under private international law. The recognition of schemes remains a controversial topic and, usually, it will be necessary for there to be robust expert evidence on recognition if, for example, there are foreign borrowers or guarantors or if some or all of the debt is foreign-law governed.

The effectiveness of a scheme may, however, be recognised outside the EU in countries that have implemented the United Nations Commission on International Trade Law (UNCITRAL) Model Law on Cross-Border Insolvency in a form that allows for recognition of such processes.

25 Including those whose COMIs are located in another EU Member State. The English courts’ jurisdiction in relation to schemes of foreign companies has been found not to have been fettered by the ECIR: see Re Drax Holdings; Re Inpower [2003] EWHC 2743 (convening hearing: 17 November 2003) and Re Dap Holding NV [2005] EWHC 2092 (sanction hearing: 26 September 2005).

26 See, for example, the decisions relating to Tele Columbus, Rodenstock, PrimaCom, Seat Pagine, Vivacom, Cortefiel and Zlomrex.

27 E.g., Re Apcoa Parking Holdings GmbH & Ors [2014] EWHC 1867 and DTEK Finance BV, Re [2015] EWHC 1164 (Ch), where the governing law in an indenture relating to high-yield bonds was changed from New York law to English law before the scheme application was made.

28 E.g., Chapter 15 of the US Bankruptcy Code, which implements the Model Law in the United States, amended the definition of ‘foreign proceedings’ to include ‘adjustment of debt’, which may include certain schemes of arrangement.
iv Starting proceedings

Liquidation

A voluntary liquidation, whether an MVL or a CVL, is initiated by the company's members passing a resolution (requiring a three-quarters majority vote) that must state either that they are in favour of a voluntary liquidation, in the case of an MVL, or that the company cannot, by reason of its liabilities, continue its business and that it is advisable to wind it up, in the case of a CVL. The directors of the company must give prior notice to any QFC holder and to the appropriate regulator under the Financial Services and Markets Act 2000 (FSMA 2000), if the company is an authorised deposit taker under the Banking Act 2009, of their intention to propose a resolution for voluntary liquidation. The liquidation will commence on the date the resolution is passed. In an MVL, the members appoint the liquidator, while in a CVL, the creditors appoint him or her. If, during the course of an MVL, the liquidator forms the opinion that the company will be unable to pay its debts in full, together with any interest, the liquidation will be converted to a CVL.

A compulsory liquidation is usually initiated by the presentation of a winding-up petition to the court. This will usually be done by the company, the directors or (more often) a creditor. The grounds on which a court can make a winding-up order include where the company is unable to pay its debts or where a court believes it is just and equitable that the company be wound up. The petition must be advertised, either by publication in the London Gazette or in another manner deemed suitable by the court, at least seven days before the hearing. This will provide notice to creditors and other interested parties who may then attend the hearing and bring to the attention of the court material relevant to whether the winding-up order should be made.

If the relevant court is satisfied that the grounds for winding up are met, it will make a winding-up order. The official receiver (an officer of the court) will then automatically assume the role of liquidator until another liquidator is appointed. Receivers and administrators are also able to present petitions and any QFC holder who is entitled to appoint an administrator may apply to the court to have the winding-up order discharged and an administrator appointed.

The court may also appoint a provisional liquidator after the presentation of the winding-up petition but before a winding-up order is made. Provisional liquidation is similar in effect to compulsory liquidation (though the court can limit the provisional liquidator’s powers). Provisional liquidation remains relatively uncommon but may be useful in certain circumstances, for instance if there are concerns that the directors will dissipate the company’s assets between the presentation of the winding-up petition and the making of the winding-up order.

Administration

A company is placed in administration by either making a filing with the court to document an out-of-court appointment or making an application to the court for a court-based appointment. An out-of-court appointment may be made by the company or its directors. It may also be made by a QFC holder although, for reputational reasons, a QFC holder might prefer the application to be made by the directors. This also has the advantage of placing the QFC holder in the position of being able to influence the selection of the administrator. An application for a court-based appointment may be made by the company, its directors or any creditor. This form of application might be the only route available if a creditor has presented a winding-up petition against the company.
In some cases, it may be expedient to seek a court-based appointment: for example, where the proposed administrator wishes to secure court approval for a proposed pre-pack sale of the company or its assets that might otherwise be at risk of being challenged or, in certain circumstances, where there is a cross-border element and there is a concern that the documentation evidencing an out-of-court appointment might not readily be recognised by a foreign court. A court-based application might also be used to avoid the risk of a subsequent challenge as to the validity of an out-of-court appointment on the basis of a procedural irregularity.

A QFC holder is able to seek a court-based or out-of-court appointment if an event has occurred that would allow it to enforce its security. This will typically be a default under a loan agreement or loan notes. This right of appointment may well arise when the company is not insolvent. In all other circumstances, it will be necessary to show that the company is or is likely to become unable to pay its debts and to provide an opinion from the administrator that the purpose of the administration is capable of being achieved.

Where an administrative receiver is in office, the appointment of an administrator must be made by an application to the court. A court will only make an appointment where the appointor of the administrative receiver consents or where the court thinks that the security under which the administrative receiver was appointed is liable to be released or discharged as a preference or a transaction at an undervalue or that the floating charge is voidable for want of new consideration at the time of its creation.

Where a secured creditor retains the right to appoint an administrative receiver, it may use this right to block the appointment of an administrator by appointing an administrative receiver before the appointment of an administrator. A person appointing an administrator must give notice of his or her intention to appoint an administrator to certain persons, including a QFC holder. During the notice period, a secured creditor who retains the right to appoint an administrative receiver may do so or may instead substitute his or her choice of insolvency practitioner as administrator. A QFC holder who does not have the power to appoint an administrative receiver may substitute its choice of insolvency practitioner as administrator even though it cannot block the appointment of an administrator.

An interim moratorium on creditor action arises to protect the company where there is a delay between the applicant filing for administration and the order taking effect (where the court-based procedure is used) or where the applicant is required to give advance notice of their notice of intention to appoint an administrator (where the out-of-court procedure is used). A full moratorium will arise when the appointment takes effect. As previously mentioned, in some cases, a pre-pack sale will be agreed before an administrator is appointed and will be effected on, or soon after, he or she takes up the appointment.

**CVA**

To enter into a CVA, the directors (or, if the company is in administration or liquidation, the administrator or liquidator), after proposing the CVA to the members and unsecured creditors, will appoint an insolvency specialist (normally an accountant) to act as the nominee.29 The

---

29 If the company is in administration or liquidation, the administrator or liquidator will usually act as the nominee.
nominee will report to the court whether, in his or her opinion, the proposal should be put to members and creditors and, if he or she believes it should, seek the approval of the members at a meeting, and of the creditors by way of a qualifying decision procedure.

The CVA can be challenged in court by a creditor or member on the grounds of unfair prejudice or material irregularity (or both). This must be done within 28 days of the filing of the notice of approval with the courts or, if the applicant did not receive notice, within 28 days of the day on which he or she became aware that the qualifying decision procedure had taken place. If there is any uncertainty as regards identifying all the company’s creditors, the CVA process is unlikely to be favoured as it may carry the risk of a late challenge from ‘hidden creditors’.

**Creditors’ scheme of arrangement**

The scheme process is usually initiated by the company (or an administrator or liquidator if the company is in administration or liquidation). The company must first apply to the court for an order giving permission for a meeting (or meetings) of the affected creditors to be convened to vote on the scheme, although this is generally preceded by the issuance of a creditors’ issues letter or ‘practice statement’ letter to outline the key terms of the scheme and set out the company’s views on class and other issues. Any creditors unaffected by the scheme (e.g., those that are to be paid in full or whose debts are not required to be compromised) can be excluded from the scheme. Dissentient creditors whose rights are affected by the scheme will be entitled to vote on it along with other creditors in their class, but if the requisite majority has been achieved that class will be bound and the minority view can be disregarded. If the voting majorities are achieved, a further application is made to the court for an order sanctioning the scheme. The scheme will become effective and binding on affected creditors when it is delivered to the Registrar of Companies.

Affected creditors will have an opportunity to challenge the composition of a class and raise other creditor issues at the convening hearing. In the case of a scheme of an overseas company, the court may also give preliminary consideration as to whether it will ultimately have jurisdiction to sanction the scheme. Any jurisdiction issues will then be considered more fully at the sanction hearing.

If objections to the scheme are later raised by a scheme creditor at the sanction hearing, the court may reject them and refuse to grant leave to appeal. If, however, the court considers that an appeal against a decision to sanction the scheme has a reasonable prospect of success, it may grant a short-term stay before making the sanction order (i.e., so that the order cannot be given efficacy by being delivered to the Registrar of Companies for registration). The stay then gives the dissentient creditor time to seek permission to appeal to the Court of Appeal. However, in practice it is unusual for a scheme decision to be appealed. If the order sanctioning the scheme has already been granted, and has been given statutory effect through registration, it cannot be altered or terminated otherwise than as provided for by the scheme.

---

30 Unless the liquidator or administrator is acting as nominee, in which case he or she does not need to report to the court, but proceeds straight to the decision-making stage.
31 See Practice Statement (Scheme of Arrangements with Creditors) [2002] All ER (D) 57 (Apr), the purpose of which is to enable issues concerning the composition of classes of creditor and the summoning of meetings to be identified and, if appropriate, resolved early in the proceedings.
32 Practice Statement (Companies: Schemes of Arrangement) [2002] 1 WLR 1345.
itself or by a further scheme. The court may set aside a sanction order in cases where it was obtained by fraud, although it will not do so if it is satisfied that the result would be the same had the fraud not been perpetrated.

v Control of insolvency proceedings  
The proceedings will be managed by the insolvency office holder appointed to the company in relation to the insolvency process. In most cases, this will be a qualified insolvency practitioner, as required by the IA 1986, who will be subject to the regulatory regime governing his or her professional conduct.34

As regards the duties of directors in connection with insolvency proceedings, in the UK, while a company is solvent, the duties are owed to the company for the benefit of present and future shareholders and there is no duty to consider creditors’ interests. However, once there is doubt as to the company’s solvency, or it becomes insolvent, the directors must consider the interests of the company’s creditors to minimise the potential loss to them. If a director continues to trade a business after the point at which he or she has realised, or ought to have concluded, that the company had no reasonable prospect of avoiding insolvent liquidation or administration, and he or she does not take every step to minimise losses to creditors, he or she may be liable for wrongful trading. Similarly, a director may be liable for fraudulent trading if he or she allowed a company to incur debt when he or she knew there was no good reason for thinking that funds would be available to repay the amount owed at the time, or shortly after, it became due and payable.

Directors of companies that operate overseas may also be required to act in accordance with the laws of the relevant foreign state, particularly if secondary proceedings are opened in that jurisdiction.

The IA 1986 confers on the liquidator or administrator the power to seek a court order against directors for a contribution to the company’s assets if his or her investigations reveal instances of wrongful or fraudulent trading and to set aside transactions at an undervalue, preferences and transactions defrauding creditors. Alternatively, he or she is able to assign certain of these claims to third parties, including creditors. In addition, he or she is required, under the Company Directors’ Disqualification Act 1986, to submit a report to the relevant secretary of state on the conduct of the directors and former directors of the company that may lead to their disqualification from acting as directors, or being involved in the management of the company, for a specified period. A director who is disqualified may also be required to pay compensation.

As regards the role of the court, its involvement in a voluntary liquidation is minimal, while in a compulsory liquidation it will hear the application for a winding-up order. In an administration, on the other hand, the court’s involvement varies according to whether the process is commenced by way of a court-based or out-of-court application and whether the complexity of the company’s affairs is likely to require the administrator to seek directions. In an out-of-court appointment, the court’s involvement is likely to be limited, in an uncomplicated case, to receiving and processing the documents that must be filed at court.

In a CVA, court involvement is limited to receiving a report from the nominee whether, in his or her opinion, the proposed CVA has a reasonable prospect of being approved and

34 An official receiver (appointed in a compulsory liquidation) is not subject to such a regime. He or she is an officer of the court and responsible directly to it and to the relevant secretary of state.
implemented and whether it should be put to the creditors and members. Notification of the approval (or rejection) of the proposal must then be filed at court within four business days of the members’ meeting.

vi Special regimes

Certain entities are excluded from the general insolvency regimes because of the nature of their businesses. They are subject instead to special insolvency regimes that, in some cases, are based on the administration procedure found in Schedule B1 to the IA 1986.

Certain banks and analogous bodies may be placed into administration (with some modifications) without a court order so long as the consent of the appropriate regulator under the FSMA 2000 is obtained and filed at court. The regulator is also able to participate in the administration proceedings. In addition, the Banking Act 2009 introduced a special administration regime for failing banks and building societies where government intervention is required. More recently, a special administration regime and certain other resolution tools were introduced for investment banks. The Financial Services (Banking Reform) Act 2013 amended the Banking Act 2009 and introduced a modified bail-in tool to the special resolution regime, and further amendments were made by the Bank Recovery and Resolution Order 2014 (SI 2014 No. 3329) (among other instruments), which came into force on 1 January 2015. Bail-in enables the Bank of England to recapitalise a failed institution by allocating losses to its shareholders and unsecured creditors by writing down or converting their claims to equity in a manner that respects the hierarchy of claims in liquidation. It is part of the UK’s response to the Bank Recovery and Resolution Directive (BRRD), which came into force on 2 July 2014. The BRRD is designed to ensure that EU Member States have a harmonised toolkit to effectively deal with an unsound or failing credit institution and requires banks to draw up recovery and resolution plans that set out how they will deal with certain scenarios that could lead to failure. It also gives national authorities additional powers to enable them to intervene when an institution faces financial difficulty. In addition to the bail-in mechanism, these include resolution tools to allow the bank to sell or merge the business with another bank, set up a temporary bridge bank to operate critical functions and to separate good assets from bad ones.

---

35 The procedure is to be used only where there has been a transfer of part of a failing bank’s business, assets or liabilities to a bridge bank or a private sector purchaser under the special resolution regime, leaving an insolvent residual entity. It is designed to ensure that essential services and facilities that cannot be immediately transferred to the bridge bank or private purchaser continue to be provided for a period of time.

36 The Investment Bank Special Administration Regulations 2011 (SI 2011/245). These regulations have been supplemented by the Investment Bank Special Administration (England and Wales) Rules 2011 (SI 2011/1301).

37 The bail-in mechanism included in the 2013 Act was closely modelled on the Bank Recovery and Resolution Directive when it was in draft form, while the legislation introduced on 1 January 2015 included the amendments that were necessary to ensure that it was fully compliant with that Directive.

38 Section 17 of and Schedule 2 to the Financial Services (Banking Reform) Act 2013.
Special regimes also exist for insurance companies, postal services, water or sewerage companies, certain railway companies, air traffic control companies, London Underground public-private partnership companies, building societies and bodies licensed under the Energy Act 2004.

There are no special insolvency rules in English law relating to corporate groups. Instead, each company is treated as a separate legal entity. The Original ECIR did not contain a framework to deal with the insolvency of corporate groups. Instead, in cases where the COMIs of some or all of the individual group companies were located in the same jurisdiction, it was sometimes possible to achieve procedural consolidation of the insolvency proceedings of those companies by placing each of them in an insolvency process in the same jurisdiction (usually that of the parent company’s COMI), where the proceedings were managed by the same insolvency office holder.

The Recast ECIR has expanded the framework for the coordination of insolvency proceedings concerning different members of the same group by obliging the insolvency practitioners and courts involved in the different proceedings to cooperate and communicate with each other. In addition, it gives the insolvency practitioners involved in such proceedings the procedural tools to request a stay of the various other proceedings and to apply for the opening of group coordination proceedings. ‘Group coordination proceedings’ are a new concept introduced by the Recast ECIR, which involve the appointment of an insolvency practitioner to act as ‘group coordinator’ to propose a coordination plan setting out an integrated solution for the group companies subject to relevant insolvency or restructuring processes. Group companies do not have to participate, however, and participating insolvency practitioners are not obliged to follow the group coordinator’s recommendations or the group coordination plan. It is too early to assess how effective these provisions will prove in practice and how frequently corporate groups will take advantage of the group coordination tools.

Under the Original ECIR, it was also sometimes possible to streamline the insolvencies of corporate groups by opening main proceedings in one jurisdiction and effectively preventing the opening of secondary proceedings in other EU Member States by agreeing to respect local priorities (thereby achieving the same outcome for local creditors) or by postponing the opening of secondary proceedings until a global sale has been completed. The Recast ECIR formalises this practice, including provisions enabling insolvency practitioners to give an undertaking to creditors to respect local priorities, and allowing the courts to postpone or refuse the opening of secondary proceedings in some circumstances if they are not necessary to protect the interests of local creditors.

The group coordination provisions broadly received the endorsement of UNCITRAL, which has itself produced a framework for legislation in relation to the insolvency of

---

40 Note, however, the existence of a number of statutes that provide for company groups to be considered as one entity in non-insolvency situations, for example, the CA 2006 with the concept of group accounting; and taxation legislation with concepts such as ‘controlling interests’ and group taxation and tax relief.
41 Typically, this will be where the COMI of the parent, provided it has ‘command and control’ of the group, is located. See, for example, Re Daisytek-ISA Ltd [2003] BCC 562 and Re MG Rover España SA [2006] BCC 599.
enterprise groups. Another initiative encouraged by UNCITRAL is the use of cross-border protocols to facilitate cooperation between courts and practitioners. An early example of this approach was seen in the Maxwell Communications Corporation case, where the UK administrators entered into a protocol with the examiners in the US Chapter 11 proceedings. More recently, attempts have been made to use cross-border protocols (which, rather than being legally enforceable, provide guidelines for cooperation) in certain insolvency situations, such as the Lehman and Madoff insolvencies, with mixed success.

vii Cross-border issues

This section considers the framework for cross-border cooperation and recognition as at the time of writing. The UK’s exit from the EU, which may have a significant impact on this framework, is discussed in Section V. The English courts’ jurisdiction in cross-border insolvency cases derives mainly from one of four key sources: the ECIR, the Cross-Border Insolvency Regulations 2006 (CBIR), Section 426 of the IA 1986 and the common law.

As mentioned in Section I.i, their jurisdiction may be fettered by the ECIR if the company’s COMI is situated in an EU Member State, in which case the court of that state will have jurisdiction to open insolvency proceedings. Before the entry into force of the Original ECIR, if a foreign company was found to have sufficient connection with England, a court could exercise its discretion to wind up that company as an unregistered company under Section 221 of the IA 1986 (see Section I.iii). That jurisdiction is now precluded by the ECIR, although the test remains in place for companies that fall outside its scope. In Re Arena Corporation Ltd, for example, the English court found that a company incorporated in the Isle of Man but with its COMI in Denmark had sufficient connection with England (in the form of assets located in England) to enable it to exercise its jurisdiction under Section 221 of the IA 1986 to wind up the company. Cases such as these, which do not meet the ECIR’s jurisdictional requirements, will be subject to the relevant national law and will be recognised by EU Member States and non-Member States alike in accordance with the rules of private international law.

If the debtor’s COMI is outside the EU, the ECIR will not apply and the UK, like other EU Member States, will be free to act in accordance with its existing laws and practice when exercising jurisdiction, opening proceedings and recognising and enforcing proceedings opened within and outside the EU. It will not be possible, however, to take advantage of the associated provisions under the ECIR, such as automatic recognition in all EU Member States, which are available where main proceedings are opened. This may prove to be a hurdle in group restructurings if some of the debtor companies have substantial connections with one or more EU Member States but fall outside the scope of the ECIR because their COMIs are not situated in an EU Member State.

44 Legislative Guide on Insolvency Law, Part Three: Treatment of Enterprise Groups in Insolvency adopted by UNCITRAL on 5 July 2010 and published on 21 July 2010. Elsewhere, INSOL Europe has recommended the introduction of group proceedings.
45 See the UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation (adopted 1 July 2009).
46 Note, too, the Foreign Judgments (Reciprocal Enforcement) Act 1933, which provides for enforcement in England of civil and commercial judgments made in designated jurisdictions, provided that the judgment has been registered under that statute.
47 Re Arena Corporation Ltd [2003] All ER (D) 277.
48 Recital (33) of the ECIR confirms that Denmark, which exercised its opt-out in relation to the ECIR, is not to be regarded as a Member State for the purposes of the ECIR.
The English courts may otherwise be required to recognise foreign main proceedings and foreign non-main proceedings (the equivalent of main and secondary proceedings under the ECIR) under the CBIR. The CBIR implement the UNCITRAL Model Law on Cross-Border Insolvency, and apply regardless of whether the relevant foreign country has enacted the Model Law.\(^\text{49}\) Upon recognition, relief by way of a moratorium on creditor action is automatically granted while other appropriate relief may be obtained at the court's discretion. There is also a requirement for judicial cooperation on the part of the English courts 'to the maximum extent possible', where recognition is granted.\(^\text{50}\)

Alternatively, the English courts may offer relief and assistance under Section 426 of the IA 1986, which provides for cooperation both between jurisdictions within the UK and between the UK and other designated jurisdictions, which mainly include Commonwealth countries.

In circumstances where the ECIR, the CBIR and Section 426 of the IA 1986 are not applicable, the English courts have an inherent jurisdiction to cooperate with foreign insolvency representatives and recognise foreign proceedings. The granting of recognition will depend on whether the foreign office holder has satisfied the common law principles developed by the English courts. This area was considered in detail by the Supreme Court in *Rubin v. Eurofinance*\(^\text{51}\) where an attempt was made to extend the circumstances in which recognition and assistance would be granted by the English courts.

In a number of cases, foreign companies have migrated their COMIs to the UK in order to take advantage of the UK's established insolvency and restructuring processes. This kind of forum shopping has received judicial support at EU level,\(^\text{52}\) with a clear distinction being made between its use to ensure that the COMI is located in the best place to reorganise the company and its group for the benefit of creditors and, possibly, other stakeholders ('good' forum shopping),\(^\text{53}\) as opposed to its use where the company acts for selfish motives to benefit itself or its shareholders or directors at the expense of creditors ('bad' forum shopping).

The decision in *Hellas Telecommunications (Luxembourg) II SCA*,\(^\text{54}\) where a Luxembourg entity moved its COMI to England three months before entering administration, is significant for its consideration of what is required to effect a successful migration.\(^\text{55}\) The court heard that, at the same time as moving its head office, the company also informed

---

49 The English courts may refuse to provide assistance under the CBIR if it would be manifestly contrary to public policy.

50 In cases of conflict between the obligations of the UK under the ECIR and the provisions of the CBIR, the ECIR will prevail. In essence, the CBIR provide an alternative basis for judicial cooperation where the ECIR does not apply, for example where the debtor's COMI is not situated in an EU Member State or where the type of proceeding (or foreign representative) in question is not covered by the ECIR, or to the extent that they do not conflict with the ECIR.


52 See the opinions of Advocate General Colomer, delivered to the European Court of Justice in Case C-1/04 *Staubitz-Schreiber* [2006] ECR 1-701 and Case C-339/07 *Seagon v. Deko Marty Belgium NV* [2009] ECR 1-767.

53 An early example of 'good' forum shopping can be seen in the *Schefenacker* restructuring, where the holding company of a German automotive supplier moved ownership of its assets and liabilities to a new, English-registered holding company so that it could enter into a CVA.

54 *Hellas Telecommunications (Luxembourg) II SCA* [2009] EWHC 3199 (Ch).

55 A key reason for the COMI shift was to facilitate a pre-pack sale of the company's main asset, its shares in the main trading telecoms company, to a new group company, leaving behind subordinated lenders as creditors of a company with no assets.
creditors of the change of address to London, made a press announcement that its activities were moving to London, opened a London bank account, registered at Companies House as a foreign company and appointed UK-resident individuals as directors of the English company that became its general partner. The court found that, on the evidence presented to it, the presumption in the Original ECIR that the company’s COMI was in Luxembourg was rebutted. It noted that the purpose of the COMI was to enable creditors in particular to know where the company was located and where they would be dealing with it, finding ‘one of the most important features of the evidence’ to be that all negotiations between the company and its creditors had taken place in London.

A cross-border issue also arises in situations where foreign companies, without migrating their COMIs to the UK, make use of an English law scheme of arrangement to compromise or amend the terms of their debt documents. The key issues to be considered include whether the English courts have jurisdiction over the foreign company and whether the scheme will be recognised in the foreign jurisdiction. For example, in such cases, there remains some uncertainty as to the extent to which the Judgments Regulation may affect the English courts’ jurisdiction to sanction the scheme. Judges have generally avoided reaching a firm conclusion as to whether that regulation applies to schemes, instead getting comfortable that, on the facts of each case, even if the regulation were to apply, one or more of the exceptions to the general rule that persons should be sued in the Member State in which they are domiciled would apply so that the English courts have jurisdiction. In many cases, the relevant finance documents have contained a clause conferring jurisdiction on the English courts (most were one-way exclusive jurisdiction clauses but a non-exclusive jurisdiction clause has also been found to be sufficient). In a case concerning the Van Gansewinkel Group, Snowden J took the view that if the jurisdiction provisions of the Judgments Regulation apply to schemes (a point that was not decided) then, in that particular case, it would not limit the court’s jurisdiction to sanction the scheme. If they did apply, he was entitled to regard all scheme creditors as coming within the jurisdiction of the English court under Article 8(1) of Chapter II, which provides that a party may be made a party to proceedings in another EU Member State if one or more of the co-defendants are domiciled in that Member State and it is expedient to hear the claims against all the defendants in a single court. However, he noted that a one-sided exclusive jurisdiction clause for the benefit of the scheme creditors did not amount to submission by those creditors to the jurisdiction of the English court. Therefore, if the jurisdiction provisions of the Judgments Regulation apply to schemes, these schemes could not be brought within the jurisdiction of the English court by virtue of Article 25(1) of Chapter II.

Finally, there is some ongoing debate over the meaning of the term ‘judgment’ in Article 32 of that Regulation in relation to schemes. Despite the wide scope that the term is given by Article 32, some commentators have argued that the procedure for implementing an English scheme is not adversarial in nature and that the sanction order is not, therefore,

56 The Recast ECIR includes new language in relation to the determination of COMI, but the steps taken in this case are still likely to be relevant.
58 Snowden J found that the number of scheme creditors domiciled in England (15 of the 106 creditors, spread across the classes) and the size of their claims (£135 million in total) were sufficient to make it expedient for all scheme claims to be determined together.
a judgment and should not be granted recognition under that regulation. There is likely to be further English and European case law on this topic as schemes remain a popular restructuring tool.

II INSOLVENCY METRICS

There is general agreement among commentators that the uncertainty surrounding Brexit, and the ongoing lack of clarity over the nature of the relationship the UK wishes to have with the EU, is having some effect on the economy, although the impact has not so far been as material as some originally feared. UK gross domestic product (GDP) was estimated to have increased by just 0.2 per cent in the first quarter of 2018. The services industries increased by 0.3 per cent, consistent with the trend of weakening growth in domestic consumer-facing activities, while construction decreased by 0.8 per cent, the weakest growth since the third quarter of 2012. There has been some suggestion that bad weather adversely affected the construction sector, but initial analysis shows weakness throughout the quarter, not just in the period particularly affected by bad weather. Household spending also continued to slow in the first quarter. The June average of independent forecasts for GDP growth (as compiled by HM Treasury) was 1.4 per cent for 2018, increasing to 1.5 per cent for 2019.

The labour market statistics remain favourable, however. The data from February to April 2018 indicated that the employment rate (the proportion of people aged 16–64 in work) was 75.6 per cent, higher than a year earlier and the joint highest since comparable records began in 1971. In a similar vein, the unemployment rate was 4.2 per cent, down from 4.6 per cent a year earlier, and the lowest it has been since 1975.

The 12-month inflation rate was 2.3 per cent in May 2018, up from 2.2 per cent in the year to April 2018. The rate has fallen steadily from a recent high of 2.8 per cent in autumn 2017. The Bank of England’s latest inflation report, which sets out the economic analysis and inflation projections that the Monetary Policy Committee uses to make its interest rate decisions, notes that inflation is projected to reach the target rate of 2 per cent in two years. This projection factors in a gently rising path for the bank rate over the next three years.

In November 2017, the Monetary Policy Committee, whose remit is to set monetary policy to meet the 2 per cent target rate in a way that helps sustain growth and employment, voted to raise the bank rate to 0.5 per cent from 0.25 per cent. This historically low rate had been maintained since August 2016. The Monetary Policy Committee has been clear in its view that the decision to leave the EU is having a noticeable impact on the economic outlook, and that monetary policy cannot prevent the necessary real adjustment as the United Kingdom moves towards new international trading arrangements, or the weaker real income growth that is likely to accompany that adjustment over the next few years, but that it can support the economy during the adjustment process. Its remit allows it, in exceptional circumstances such as these, to balance any trade-off between measures it might take to return inflation to the target rate and the support that monetary policy provides to jobs and activity. However, at the November meeting, it noted that the amount of slack in the economy had steadily reduced and unemployment had fallen to a 42-year low, reducing the

degree to which it was appropriate to allow an extended period of above-target inflation. It was also influenced by strong growth in the global economy, favourable domestic financial conditions and evidence that consumer confidence had remained resilient.63

The rate has remained at 0.5 per cent since November 2017; at the latest Monetary Policy Committee meeting in June 2018, the committee reiterated that any future increases are likely to be at a gradual pace and limited in extent. The committee also noted that a number of preliminary indicators suggest that the reduction in output growth in the first quarter is temporary and not an indication of an underlying trend: for instance, household spending and sentiment appear to have bounced back strongly from the weakness seen in the first quarter.64

The Bank of England reports that the cost of bank funding, which influences the interest rates lenders charge to households and corporates, rose slightly in the first quarter of 2018, but remains low by historical standards.65 The quoted rates on most mortgage products have increased (which may have a knock-on effect on consumer confidence and household spending), but competition between lenders has continued to intensify, and in consequence spreads over appropriate reference rates on new mortgage lending have fallen. Notwithstanding the increase in pricing, mortgage lending continues to grow steadily, and levels of remortgaging have also increased (although two-year fixed rate deals have grown in popularity, and a large number of these products coming up for renewal may in part explain this greater frequency).66 Quoted rates for personal loans remain near historic lows, held down by robust competition in the consumer credit market (again, spreads have tightened following the raise in the bank rate, but lenders have generally accepted a narrower margin rather than passing the increase on to consumers). There has, however, been a modest tightening of the availability of consumer credit over the past year. Lenders have indicated that availability fell significantly in the first quarter of 2018, driven by changing risk appetite and stricter credit scoring criteria, factors which they expect to continue to curtail availability. Lenders reported a slight decrease in demand for consumer credit over the last two quarters, the first since 2015, although overall it remains robust and is expected to increase again over the next few months.67

The cost of corporate credit has increased, driven by the increase in the bank rate and sterling swap rates, but prices still remain low in historical context. Credit supply conditions for corporates remain generally favourable, although there are indications that some lenders have reduced the availability of finance to sectors that are particularly vulnerable to downturns in consumer spending and construction. Survey data indicates that small businesses have observed a slight decrease in credit availability, while larger businesses have perceived it to be generally stable. Despite the broadly favourable supply conditions, the rate of growth in net finance raised by UK businesses from banks, building societies and the capital markets decreased in the second half of 2017, across all business sizes. Bond issuance, in contrast, remained strong in 2017. The Bank of England notes that on balance, the evidence from

63 Monetary Policy Summary and minutes of the Monetary Policy Committee meeting ending on 1 November 2017, 2 November 2017.
64 Monetary Policy Summary and minutes of the Monetary Policy Committee meeting ending on 20 June 2018, 21 June 2018.
65 Bank of England Credit Conditions Review 2018 Q1, p. 4.
67 ibid., p. 7.
surveys and market intelligence from lenders are consistent with continued subdued demand for bank credit across all business sizes in the first quarter of 2018, with lenders citing uncertainty about future conditions as amongst the reasons for the slowdown.68

In the first quarter of 2018, the underlying number of companies entering insolvency (adjusting to exclude anomalous data)69 hit a four-year high, rising by 0.6 per cent compared with the same quarter in 2017, and 13 per cent compared with the previous quarter. The main increase was in CVLs and compulsory liquidations. In the 12 months ending first quarter 2018, the estimated liquidation rate was 0.48 per cent of all active registered companies (or one in 210 of all active companies), up slightly from 0.47 per cent in the 12 months ending in the fourth quarter of 2017. The highest number of insolvencies70 in the 12 months ending in the first quarter of 2018 was in the construction sector, and the second highest was in the ‘wholesale and retail trade & repair of vehicles’ industrial grouping.71 The highest overall number of administrations was also in the construction sector, while the most notable increase was in the retail sector, which accounted for 11 per cent of all administration appointments in 2017, up from 5 per cent in 2016.72

III PLENIARY INSOLVENCY PROCEEDINGS

i High street CVA restructurings

The past year has seen a significant number of restaurants and bricks-and-mortar retailers restructure using CVAs, in particular in order to address lease portfolios that they feel have become unsustainable in light of the challenging conditions on the high street and the continued rise of online retail. The four examples below illustrate this trend, although for Toys R Us the CVA did not ultimately prove sufficient to save the business.

Toys R Us (UK)

Toys R Us was a retailer, founded in 1948, whose main business was the sale of toys. Its global retail presence included stores in over 30 countries, including more than 100 stores in the United Kingdom. On 18 September 2018, Toys “R” Us, Inc, the parent company of the group, and certain of its American and Canadian subsidiaries, filed for Chapter 11.

The group had a highly leveraged capital structure following its buyout in 2005 with reported debt service costs of approximately US$400 million a year.73 The group sought to restructure a portion of its debt maturing in 2019 to achieve a maturity extension and a greater level of liquidity through the Christmas trading period. On 6 September 2018,

68 ibid., pp. 7–8.
69 Following certain changes to claimable expense rules, a large number of connected personal service companies have entered liquidation. As these liquidations were driven by rule changes, excluding these companies from the data gives a more accurate picture of the underlying trends in the economy.
70 Again, excluding the personal services companies from the data in order to show the underlying trends.
72 Practical Law, ‘What’s Market – Company Administrations Trends Report’ 2017 and Q1 2018. This report breaks out the sectors slightly differently: constructions and industrials are grouped together.
the story of a potential Chapter 11 filing leaked, which made suppliers hesitant to provide products, with almost 40 per cent of suppliers reportedly requiring immediate payment for goods.74

The group’s UK business also struggled with competition from online retailers and the impact of tight margins given the cost of its stores. Accordingly, Toys R Us UK sought to reduce its store rental costs using a CVA announced on 4 December 2017. The proposed CVA would have included the closure of at least 26 stores, likely to be the larger loss-making warehouse outlets.

Toys R Us sought the approval of the CVA by the Pension Protection Fund (PPF) (which held more than 20 per cent of creditor votes). Early reports suggested that the PPF was not supportive of the CVA. However, following discussions between the PPF and the company, and an agreement that reportedly included a 10-year commitment to reduce the business’ pension deficit and the provision of security and guarantees,75 the PPF voted for the CVA, which achieved 98 per cent support overall.76

However, the UK business experienced a poor Christmas trading period, which resulted in cash flow concerns, including a £15 million VAT bill. This led the company to seek offers for its UK operations. Hilco Capital, the acquirer of HMV, was reported as a potential buyer through the use of a pre-pack administration.77 A rescue sale did not, however, materialise and the business entered administration on 28 February 2018 with partners of Moorfields Advisory Limited being appointed as Joint Administrators for Toys “R” Us Limited and Toys “R” Us Holdings Limited. The Joint Administrators announced that the stores would continue to trade and that the remaining inventory would be sold as they conducted an orderly wind-down of the business.78 The administrators closed stores throughout spring 2018, with the last stores ceasing to trade in April 2018.79

Jamie’s Italian

Jamie’s Italian was established in 2008. Jamie’s Italian restaurants operate under the well-recognised Jamie Oliver brand, and are priced towards the upper end of the high street chain Italian restaurants.

A number of factors affected the performance of the business, including a legacy of underinvestment in certain older restaurants, investment in locations that proved to be unsuitable for the product offering and commitment to sites with high occupancy costs. At the same time, conditions in the ‘casual dining’ market have become increasingly challenging in the UK: labour costs and business rates have risen, while consumer spending power and confidence have decreased. Recent rapid expansion in the sector means that it is particularly competitive, leaving businesses little scope to pass on increased costs to consumers. These difficulties have also affected a number of other restaurants in the same mid-market sphere, such as the burger restaurant chain Byron and the Italian restaurant chain Prezzo.

To help it manage the challenges it is facing, Jamie’s Italian Limited proposed a CVA with its creditors, with a key aim of placing its lease portfolio on a more sustainable footing.

---

74 ibid.
78 Moorfields Advisory announcement, 28 February 2018.
Its landlords were split into four bands, based on the profitability of the sites. Under the proposals, the business would continue to pay full rent at the top sites, but on a monthly rather than a quarterly basis. Landlords in the second group would have their rent reduced by 30 per cent. Landlords in the third group would have their rent reduced by 75 per cent until May, whereafter the business intended to close the sites, because of poor profitability. The final group comprised landlords who did not receive any payments under the proposal as the sites were not being used for trading. The proposal was approved by 97.44 per cent by value of all creditors on 9 February 2018.

Mothercare plc

Mothercare plc is a UK-listed retailer specialising in clothes and general merchandise for children and expectant parents. Its business has been affected by the changing shopping habits of its customers, who are increasingly shopping online rather than in high-street outlets, as well as by other unfavourable conditions in the retail industry, such as the rising costs of labour and business rates.

In order to put the business on a more sustainable footing, two of Mothercare’s subsidiaries entered into CVAs. Mothercare also revised its committed debt facilities and entered into new shareholder loans and a new debtor backed facility.

The companies that entered into CVAs were Mothercare UK Limited and Early Learning Centre Limited. The aim of the CVA proposals was to restructure Mothercare’s property portfolio, creating cost savings, and removing legacy loss-making stores. These companies’ property leases were divided into four categories, each of which received different treatment under the CVA proposals: the first group comprised sites where the rent was not reduced, but would be paid on a monthly instead of a quarterly basis; the second, sites that were underperforming and where the rent was reduced by 50 per cent; the third, sites that were underperforming, where the company is able to exit the sites by 1 June 2019, with the rent reduced to 30 per cent for the interim period, and the final group, sites where the relevant lease had expired but there were outstanding dilapidations liabilities. Here the dilapidations liabilities were compromised in exchange for 5 per cent of the final monthly rent of the relevant lease. The CVA proposals also compromised certain intra-group balances. The completion of Mothercare UK Limited’s CVA proposals was a condition to some elements of the refinancing.

Another group company, Childrens World Limited, also proposed a CVA, but it failed to gain approval by a narrow margin: 73.3 per cent voted in favour, just short of the requisite majority of 75 per cent. On 9 July 2018, Mothercare announced that Childrens World was being placed into administration.

Following the restructuring, it is anticipated that 19 stores will remain open but benefit from rent reductions, 58 stores will remain open on substantially unchanged terms and rents and that, by June 2019, a total of 60 stores will have been closed.

80 The Telegraph, ‘Jamie’s Italian confirms closures and rent cuts as part of rescue deal’, 9 February 2018.
81 Chairman’s report on the Meetings of the Company and Creditors, 12 February 2018.
82 Mothercare RNS release, 17 May 2018.
83 Mothercare RNS release, 9 July 2018.
84 ibid.
As part of the refinancing plan, Mothercare is, at the time of writing, conducting an equity capital raising to raise approximately £32.5 million in gross proceeds.  

**New Look**

New Look is a ‘fast-fashion’ brand with 593 stores in the UK and 302 stores across Europe, China and Asia. New Look has suffered from a challenging trading performance in a difficult retail environment, which has again been affected by factors such as online competition and weaker consumer confidence.

In order to reduce New Look’s rental cost base and to restore long-term profitability, New Look launched a CVA on 7 March 2018 in order to deliver cost savings by compromising leases. Under the CVA proposal, 60 UK stores were identified for potential closure, along with six sites that were sublet to third parties, and 393 stores benefited from reduced rent (ranging between 15 per cent and 55 per cent) and revised lease terms.

The CVA proposal involved a requirement to make employees redundant at the stores identified for potential closure, and a maximum of 980 employees (out of a UK staff base of 15,300) were expected to be affected. However, New Look indicated that efforts would be made to redeploy employees within the business where possible. On 21 March 2018, 98 per cent of New Look’s creditors voted in favour of the CVA proposals.

**ii Carillion**

Carillion plc was a construction services and facilities management business. A large part of its work was as a supplier to the UK public sector, including 450 contracts with the government across a range of sectors such as healthcare and infrastructure. Carillion entered compulsory liquidation in January 2018, along with 26 other companies in the group. The official receiver is acting as liquidator, and PwC has been appointed as special manager. Special managers are persons appointed by the court to provide assistance, support and expertise to an office holder such as the official receiver.

The liquidation followed a series of announcements by Carillion concerning its financial stability. Beginning on 10 July 2017, the company announced that a review of the group’s contracts had produced an expected contract provision of £845 million. This announcement indicated that there had been a deterioration in cash flows from construction contracts, and a working capital outflow because of the higher than normal completion of construction contracts without replacement. On 29 September 2017, Carillion released its 2017 half-year results; this established a total provision in relation to its contracts of £1.045 billion, a goodwill impairment charge of £134 million in respect of UK and Canadian construction businesses, and an average net debt of £694 million.

Between its half-year results and its eventual liquidation, Carillion sought to enact a number of measures in an effort to improve its working capital and reduce its net debt.
including the proposed sale of its UK healthcare facilities management business, the sale of the economic interest in the group’s Omani business, Carillion Alawi, and a suspension of dividends.

During this period, Carillion continued to negotiate for a further £140 million of committed credit facilities, initially announcing on 29 September 2017 that a term sheet had been agreed with five lenders. On 24 October 2017, the company confirmed that two committed facilities for an aggregate £140 million had been signed. These facilities were available to be drawn immediately, and comprised a £40 million secured facility maturing in April 2018 and a £100 million unsecured facility maturing in January 2019. The company also agreed new committed bonding facilities, the deferral of PPN repayments and certain pension contributions. In aggregate these provided for an increase in committed headroom of between £170 million and £190 million. The company also continued to win new contracts throughout this period. These included contracts with key stakeholders; such as the government, which awarded a £1.4 billion railway contract to a joint venture partnership, in which Carillion was a member.

In its 29 September 2017 interim results announcement, Carillion indicated that it expected to be compliant with its end-of-year financial covenants. However, in November 2017 the company announced that it expected certain contract claim recoveries and business disposals to slip beyond 31 December 2017, which, when combined with lower than expected margin improvements across UK service contracts and a number of other factors, would mean that profits for the full year would be materially lower than current market expectations. The board, therefore, expected that the company’s financial covenants tested at 31 December 2017 would be breached. The company sought to defer the covenant testing date to 30 April 2018, by which time it expected to be implementing a recapitalisation plan. Consent to such deferral was received, and became effective, on 22 December 2017.

Carillion continued to negotiate with its stakeholders, including a presentation of its business plan on 10 January 2018. As of 12 January 2018, the company expected that an agreement might be reached involving a capital raise and a debt-for-equity swap. Discussions continued with key financial and other stakeholders, including the government, in which the company sought short-term financial support to enable it to continue to trade. These efforts were ultimately unsuccessful, and so the board decided to enter compulsory liquidation on 15 January 2018.

Because of the nature and scale of Carillion’s work within the UK, its financial deterioration and ultimate insolvency has received significant media and political scrutiny. The aftermath has so far included a parliamentary inquiry and four regulatory body investigations, including:

- the Financial Reporting Council, the regulator responsible for auditors, accountants and actuaries, which has opened an investigation into the audit of Carillion plc’s financial statements;
- the Financial Conduct Authority, the regulator responsible for financial services firms and financial markets, which is investigating the timeliness and content of certain announcements made by Carillion before its insolvency;
- the Insolvency Service; and
- the Pensions Regulator.
As yet, it is too early to predict the level of recovery, if any, for Carillion’s creditors; however, it is clear, as reported by the special managers, that there is unlikely to be any return for Carillion shareholders.

iii  Lehman Brothers International (Europe)

In the Lehman Brothers International (Europe) (LBIE)\(^93\) administration, the surplus of monies available for distribution after payment of ordinary unsecured claims has given rise to a number of novel and difficult legal questions about entitlement and order of priority, which have been examined in the Waterfall cases.

LBIE entered into an agreement with certain key creditors on 22 December 2017, which provided that settlement of the Waterfall proceedings, payment of the statutory interest and payment of the subordinated debt would be effected through a scheme of arrangement. Scheme creditors were those with provable claims, subject to certain limited exceptions. The scheme creditors were divided into four classes, all of which voted in favour, and the scheme became effective on 20 June 2018. The scheme resolves the following outstanding issues\(^94\) in the administration:

\(a\)  on 24 October 2017, the Court of Appeal upheld the decisions of the High Court on all issues appealed in relation to the Waterfall II A and Waterfall II B proceedings. The Waterfall II A proceedings dealt with a number of issues in relation to creditors’ entitlement to interest on their debts for the period after the commencement of administration (under Rule 2.88 IR 1986), including in relation to currency conversion claims, and the Waterfall II B proceedings considered the construction and effect of certain post-administration contracts, specifically claim resolution agreements and claim determination deeds. As a result of the Waterfall I Supreme Court judgment, all issues in the Waterfall II B proceedings have fallen away. Certain issues in relation to Waterfall II A were still outstanding, with various parties to the proceedings seeking permission to appeal the issues. The scheme renders further appeals unnecessary;

\(b\)  the Waterfall II C proceedings considered points including the interpretation of a number of provisions in the 1992 and 2002 ISDA Master Agreements concerning default interest on sums due following the close-out of transactions. Judgment was handed down by the High Court in October 2016, and certain aspects of the decision were appealed. The scheme provides for a settlement of the outstanding issues, rendering it unnecessary for the appeal to continue;

\(c\)  the administrators applied to court on 28 November 2017 for direction from the High Court as to whether they should comply with the request of a subordinated creditor who was seeking a creditors’ decision to cause the termination of the administration and to start a liquidation. Moving into liquidation was in the interests of the subordinated creditor as, following the Supreme Court’s finding in the Waterfall I proceedings that unpaid statutory interest arising from the administration could not be claimed in a subsequent liquidation, if LBIE had entered into liquidation before paying post-administration

\(\text{\textsuperscript{93}}\)  LBIE, a company of unlimited liability, was the Lehman group’s main European broker-dealer and provided investment banking services on a global basis. It filed for administration on 15 September 2008.

\(\text{\textsuperscript{94}}\)  Explanatory statement in relation to a scheme of arrangement between LBIE and its scheme creditors, circulated on 14 May 2018 and updated on 31 May 2018.
interest, the funds that would have been used to pay post-administration interest would instead have fallen to be paid to the subordinated creditor. Post-administration interest will be paid under the scheme, so these proceedings will no longer be necessary; and in September 2017, a subordinated creditor launched a challenge against the decision of the administrators to admit a proof for an agreed amount, the largest admitted claim in the administration. The scheme will render these proceedings unnecessary.

Following the scheme, the administrators announced on 2 July 2018 that LBIE could pay all statutory interest entitlements in full. The scheme does not end the administration, as it did not resolve all outstanding issues. For instance, litigation is still ongoing to determine whether statutory interest is ‘yearly interest’ for the purposes of the Income Tax Act 2007, and, therefore, whether LBIE is subject to an obligation to withhold amounts representing UK income tax from payments of statutory interest that it makes to creditors.

One issue that was resolved separately, and before, the scheme is the Waterfall III application. The administrators applied to court on 25 April 2016 seeking guidance as to the scope of any contribution claims LBIE may make against its members and related issues. This ultimately led to a commercial settlement, which became effective on 6 September 2017, and the Waterfall III proceedings were dismissed on 20 December 2017.

IV ANCILLARY INSOLVENCY PROCEEDINGS

_Bakhshiyevo v. Sberbank of Russia & Ors_95

In June 2017, the High Court heard an application brought by the foreign representative of OJSC International Bank of Azerbaijan (IBA), the largest commercial bank in Azerbaijan, for an order recognising the restructuring proceedings IBA had entered into under Azeri law as a foreign main proceeding under the CBIR. The court was satisfied that the criteria for recognition were met. Under the CBIR, an automatic stay arises when recognition is granted. The court used its discretion to substitute a wider moratorium, very similar to that under an English administration, as has become common practice in this jurisdiction when the foreign procedure is a restructuring procedure rather than a liquidating one. The moratorium prevented creditors from commencing or continuing any action against IBA or its property without the permission of the court.

IBA proposed a restructuring plan pursuant to the restructuring proceedings, which received the requisite approvals and was consequently binding on all creditors as a matter of Azeri law, including those who did not vote, and those who voted against the plan. Two non-participating creditors, whose claims against the bank arose out of instruments governed by English law, argued that the plan did not bind them, relying on the case law derived principle of English law known as the ‘rule in _Gibbs_’, which provides that an English law governed debt cannot be discharged by a foreign insolvency proceeding, and asserting that they retained their rights to enforce their English law claims, subject only to the moratorium granted under the CBIR.

The Azeri procedure was due to come to a close at the end of January 2018, at which point the moratorium would expire. The foreign representative, therefore, made another

---

95 [2018] EWHC 59 (Ch), 18 January 2016. For the original recognition application, see _OJSC International Bank of Azerbaijan, Re_ [2017] EWHC 2075 (Ch), and the decision to lift the moratorium in part, [2018] EWHC 792 (Ch).
application to the court, seeking to extend the moratorium indefinitely, to prevent the creditors destabilising the plan by enforcing against IBA’s assets once the moratorium fell away.

This application brought into sharp focus the tension between the rule in Gibbs and the concept of modified universalism. In essence, the court needed to decide whether it had the power to grant a permanent moratorium to prevent a creditor enforcing English law contractual rights in a way that ran contrary to the terms of a foreign insolvency proceeding that was binding on all creditors under the relevant foreign law. The court found that it did not have such jurisdiction under the CBIR, because that relief, though procedural in form, would have in all likelihood had the effect of determining the substantive rights of the creditors in question. The court did not have jurisdiction to grant what was in effect substantive discharge or variation of an English law right by the expedient of procedural relief that, as a practical matter, would conform the rights of English creditors with the rights they would have had under the relevant foreign law.

Permission to appeal was granted, and, in a subsequent hearing, the court decided to lift the moratorium in part. The decision to lift the moratorium followed naturally from the court’s decision that it could not extend it, but lifting it fully ahead of the appeal risked rendering the appeal pointless. As at the time of writing, the appeal has not yet been heard.

V TRENDS

i EU referendum and political uncertainty

As discussed in Section I.i, the British public voted to leave the EU on 23 June 2016, and on 29 March 2017 the Prime Minister, Theresa May, gave formal notice of the United Kingdom’s intention to withdraw, triggering the two-year period for negotiating the terms on which the UK will leave. Negotiations on a withdrawal agreement96 are continuing. If implemented, it will cover matters such as citizens’ rights, the financial settlement between the UK and the EU, and arrangements for the transition period (see further Section V.iv for the transitional provisions relating to restructuring and insolvency). It is currently envisaged that the withdrawal agreement will enter into force on 30 March 2019, and that the transition period will run from that date until 31 December 2020. It is intended that the withdrawal agreement will refer to a political declaration setting out an overall understanding of the framework for the future relationship between the UK and the EU, but the withdrawal agreement itself will not govern that relationship, and it is highly unlikely that the details will be agreed before the UK leaves. As at the time of writing, the nature of the relationship has not yet been agreed. On 6 July 2018, following a Cabinet summit, the government announced that it intended to seek a ‘soft’ Brexit deal, under which a UK–EU free trade area for goods and agricultural products would be created, underpinned by a treaty in which the UK committed to adopt new EU rules for goods. Services would be treated separately and would not be as closely aligned. The borders between the UK and the EU would be treated as a combined customs territory, and the UK would charge EU tariffs on goods destined for the EU, but remain free to apply domestic tariffs for goods remaining in the UK. The arrangement would leave the UK free to seek separate trade agreements with non-EU

countries. At the time of writing, detailed negotiations with the EU on the proposal are yet to begin, and it remains to be seen whether the outlines of this deal will prove acceptable. At the same time, there is still significant disagreement domestically, even within the governing Conservative Party. The announcement of the deal prompted the resignation of the Secretary of State for Exiting the European Union (informally known as the Brexit Secretary) and the Foreign Secretary, and further resignations have followed. It is possible that continuing disagreements among Conservative MPs could lead to the proposals being revised, or even destabilise the government and result in a leadership challenge and, potentially, an early general election. The uncertainty surrounding the process is, therefore, likely to continue for some time to come.

ii Insolvency activity

It is very difficult to predict the extent to which the uncertainty generated by the Brexit negotiations will affect the markets over the coming year. Although the economy has proved more resilient than some commentators feared, growth remains sluggish, and there are various indications that consumer confidence remains low, which may increase the pressure on consumer-facing sectors. As the end of the negotiation period approaches, the markets will remain focused on the shape of the future relationship between the UK and the EU, and greater turbulence may follow if market participants regard the developing deal as unfavourable, or if an orderly exit looks unlikely. In recent weeks, businesses have increased pressure on the government to make progress on negotiations or risk losing jobs and investment.

For the time being, however, the debt markets remain liquid and terms for borrowers generally advantageous, although financing costs have risen over the past year. If the uncertainty generated by Brexit does not lead to a general economic slowdown, it is likely that sector specific factors rather than overall market conditions will drive restructurings over the coming year, with some consumer-facing sectors likely to continue to come under increasing pressure.

As illustrated in Section II.i, restaurants are facing particularly challenging conditions. The sector grew rapidly in recent years, and the pressures of increased competition are now being exacerbated by weakening consumer demand. At the same time, input costs are increasing, with sterling depreciation driving up the prices of imported ingredients and the national living wage (an obligatory minimum wage introduced in 2016 and anticipated to rise faster than its predecessor, the minimum wage) driving up labour costs. The competitive environment makes it difficult for businesses to pass on these increased costs to consumers, so profit margins are likely to continue to fall.

Similar pressures are also affecting the retail sector, which is likely to remain under strain if consumers continue to rein in their spending. At the same time, online sales continue to erode the market share of the traditional high street retailers, and chains with large lease portfolios that have failed to adapt their business models are likely find that they are not well placed to weather current market conditions.

The construction and facilities management sector also remains under scrutiny, particularly after the collapse of construction and outsourcing business Carillion (see further Section III.ii). Declining housebuilding is also increasing pressure on the sector, while Brexit uncertainty has led to some projects being delayed or cancelled, and may be making some firms reluctant to make significant investment decisions. Sterling depreciation has led to rising input costs on imported materials, putting pressure on margins. Parts of the construction
industry rely heavily on outsourcing, a business model that may drive down margins, further exacerbating the challenges the sector faces. There has also been a decline in the number of real property transactions, which is likely to have an impact on estate agency businesses.

The shipping sector continues to show some signs of stress on account of overcapacity, and further restructurings may follow. The problems in the oil and gas sectors have abated to some extent as the oil price has stabilised, and the trend away from restructuring towards consolidation and M&A activity is likely to continue. However, some commentators believe that the decline in offshore exploration capex requirements is structural, but that the market has not yet adjusted, and that assuming demand does not return and absorb the excess capacity, further restructurings could follow in the sub-sectors affected.

Depending how negotiations progress, parts of UK industry, such as the automobile sector, that are particularly vulnerable to a Brexit model that leads to trade tariffs and border delays, may also come under increasing pressure, which could lead to delays in investment decisions and, potentially, relocations; this in turn could have a knock-on effect on the supply chain.

iii Practical trends and legislative developments

As discussed in Section III.i, a significant number of high street retailers and restaurant chains are using CVAs to restructure, in particular to agree more favourable terms and conditions for their lease portfolios and to address legacy portfolios that are unsustainable under current market conditions. This is a trend that is likely to continue, as the pressures in these sectors show no signs of abating. However, as CVAs have grown more popular in these sectors, the treatment of landlords has come under increasing scrutiny, and it is possible that we will see more vocal and robust opposition to proposals from landlord groups over the coming year.

Corporate groups with a cross-border presence continue to stress-test a range of restructuring options across the jurisdictions they operate in before deciding how to proceed. Companies with a mixture of English and US law-governed debt in their capital structures continue to weigh up the advantages and disadvantages of US Chapter 11 proceedings and English schemes of arrangement. In general, companies with mixed capital structures may potentially lean more towards Chapter 11 if they need to undergo a significant operational restructuring, particularly in light of the protections available for directors. However, schemes remain a go-to option for financial restructurings, including those involving both English and US law-governed debt.

Schemes of arrangement also remain a popular restructuring tool within Europe. Although there has been more interest in the reformed restructuring regimes in certain other European countries such as Spain, this has not yet translated into serious competition for the UK scheme. In the long term, we may see more restructurings taking place in their ‘home’ jurisdictions, particularly if further EU Member States introduce more effective restructuring procedures into their regimes and/or Brexit makes recognition more complicated in some jurisdictions, and a corresponding decrease in the use of schemes by foreign companies (particularly where complex engineering is required to bring the company within the jurisdiction of the English courts). However, in the short term, we do not expect the reformed regimes to pose a significant challenge to the scheme’s popularity as it will be some time before they are entrenched (or, in the case of new procedures, designed and legislated for) and any teething problems and ambiguities addressed, and, in the interim, many creditors are likely to prefer the tried and tested appeal of the established scheme, in the absence of significant pull factors.
iv The future of cross-border restructuring and insolvency

As discussed in Section I.i, the domestic insolvency regime is largely unaffected by EU legislation, and we would not expect significant legal changes to be required when the UK leaves the EU. However, the framework of mutual recognition of proceedings and judgments provided by the ECIR is very significant for insolvencies and restructurings with an EU cross-border element. EU legislation also provides a framework for the recognition of bank resolutions and insolvency proceedings.

The existing framework remains in place during the two-year negotiating period in the run up to Brexit. The latest draft of the withdrawal agreement97 anticipates that the ECIR and the Judgments Regulation will cease to apply at the end of the transition period. During the transition period, the ECIR will apply to insolvency proceedings provided that the main proceedings were opened before the end of the transition period, the Judgments Regulation will apply to the recognition and enforcement of judgments given in legal proceedings instituted before the end of the transition period, and the provisions of the Judgments Regulation regarding jurisdiction will apply to legal proceedings instituted before the end of the transition period. However, the withdrawal agreement, and the nature of the exit itself, are still the subject of intense negotiation.

The government may at some stage seek to agree a permanent alternative framework for the recognition of insolvency proceedings and judgments, either with individual EU Member States or with the EU as a whole. If an alternative framework is not agreed, domestic law would be applied to determine whether the UK courts could take jurisdiction over a company seeking to make use of an English procedure, and the likelihood of that procedure being recognised in other Member States would need to be determined jurisdiction by jurisdiction. As described in Section I.vii, other bases for bilateral recognition do exist, such as the UNCITRAL Model Law on Cross-Border Insolvency, though not many EU Member States have implemented legislation based on the Model Law. The need to approach each jurisdiction on a case-by-case basis would certainly add complexity to cross-border restructurings, but might also allow the English courts to take a more flexible approach when deciding whether they could take jurisdiction; this ability is one of the aspects of the scheme of arrangement procedure that makes it an attractive restructuring tool.

The direct impact on the scheme of arrangement procedure itself is likely to be less significant. As discussed in Sections I.iii and vii, schemes fall outside the ambit of the ECIR, and English law is used to determine jurisdiction. However, it has not been decided whether schemes fall within the Judgments Regulation. If alternative arrangements are put in place that closely replicate this regulation, the ambiguity is likely to continue. If not, it would fall away once the transition period ends. On the one hand, one route to recognition would have been removed, and recognition and enforcement would need to be considered on a jurisdiction-by-jurisdiction basis; on the other hand, concerns that the regulation might limit the English courts’ jurisdiction to sanction schemes in certain circumstances would also fall away (although they would still need to be satisfied that the scheme would be recognised by some other route in the relevant EU jurisdictions). The government has also indicated that it wants to continue to participate in the Lugano Convention after the UK leaves the EU. The Lugano regime is the predecessor to the Judgments Regulation (although it is not identical

and does not incorporate the revisions that have been made to the original Judgments Regulation), and may provide an alternative route for scheme recognition in the absence of the Judgments Regulation. However, unless the UK becomes a member of EFTA (in which case there is a simplified accession procedure), accession would require the approval of all contracting parties, including the EU.

At present, uncertainties about jurisdiction and recognition do not appear to be affecting the popularity of the UK as a restructuring destination, although it is possible that this could change closer to the end of the transition period if it looks unlikely that a replacement framework will be put in place. It is still too early to say whether leaving the EU will have an adverse effect on the restructuring and insolvency market in this jurisdiction in the long term. If the UK does not continue to participate in the ECIR framework, or agree a similar replacement framework, cross-border procedures that were previously within its scope will increase in complexity, which might affect their attractiveness in a cross-border context. On the other hand, schemes of arrangement are extremely popular despite the need to consider recognition and jurisdiction on a case-by-case basis, and it is possible that if the English courts’ jurisdiction in other proceedings is unfettered, they might in fact increase in popularity in certain circumstances.

v Legislative developments

The government is considering various options for reform of the domestic insolvency framework. Some of the suggestions are quite significant, and if enacted could represent the most significant changes to the domestic insolvency framework since the Enterprise Act 2002. However, it remains to be seen whether legislation will follow from the various consultations and review exercises that are under way.

Consultation on the corporate insolvency and restructuring regime

In May 2016, the government published a consultation seeking views on whether the UK’s corporate insolvency and restructuring regime needed updating in light of international principles developed by the World Bank and UNCITRAL, recent large corporate failures and an increasing European focus on providing businesses with the tools to facilitate company rescue. The consultation focused on four proposals:

- introducing a restructuring moratorium for distressed businesses to benefit from protection against legal action while considering their options for rescue;
- widening the scope of existing legislation that places restrictions on the termination of contracts for essential supplies, with appropriate safeguards for suppliers, to assist distressed businesses;
- introducing a new restructuring procedure, with the ability to bind creditors to a restructuring plan (including provision for cross-class cramdown), to increase the options available to rescue businesses; and
- increasing the availability of rescue finance.

The consultation closed some time ago, and it still remains to be seen whether legislative proposals will follow. In March 2018, the government indicated that it was continuing to engage with various parties on the issues raised in response to the consultation, and that it would set out its planned course of action later this year.
Pre-pack scrutiny
As discussed in Section I.iii, in November 2015, a ‘pre-pack pool’ of experienced business people was established to scrutinise pre-packaged administration sales involving connected parties. This flowed from a government commissioned review into pre-pack sales, which concluded that although in general pre-packs can be an effective restructuring tool, measures could be taken to improve transparency in deals involving connected parties.

Connected party purchasers are now encouraged, on a voluntary basis, to submit an outline of the proposed deal to the pool for review, along with supporting documentation. The process is intended to be quick and cost-efficient: the pool member offers one of three opinions on the proposed sale, and does not comment further (that the case for the pre-pack is not unreasonable; that the case for a pre-pack is not unreasonable but there are minor limitations in the evidence provided; or that the case for the pre-pack is not made).

In its latest annual report,98 the pre-pack pool noted that the rate of referrals fell from one in four eligible cases in 2015–2016 to closer to one in 10 in 2017. The government has indicated that it is undertaking an assessment of the impact of the pool (along with the other recommendations contained in the original review, which the market was encouraged to adopt on a voluntary basis), with a view to deciding whether to exercise certain ‘reserve powers’ to pass measures to regulate administration pre-pack sales involving connected parties. These powers (which were included in the Small Business, Enterprise and Employment Act 2015) expire in May 2020. It is possible that the low rate of referrals might prompt the government to introduce further reforms – for instance making the pool referral process mandatory, but equally it could decide that formal measures are not required.

Consultation on insolvency and corporate governance
The government has also launched a consultation on ways in which formal and informal measures might be used to reduce the risk of major company failures occurring through shortcomings of governance or stewardship. The consultation, which appears to have been prompted by some recent high-profile corporate insolvencies, sought views on a number of proposals, including:

a holding directors of a parent company accountable following the sale of an insolvent subsidiary, if the interests of creditors have been harmed and the harm was foreseeable;
b introducing new powers to allow insolvency office holders to reverse transactions that unfairly strip value from a company in the approach to insolvency;
c extending existing investigatory powers to directors of dissolved companies; and
d strengthening corporate governance in pre-insolvency situations.

The consultation closed in June 2018.

Chapter 6

FRANCE

Fabrice Baumgartner and Aude Dupuis

I INSOLVENCY LAW, POLICY AND PROCEDURE

i Statutory framework and substantive law

French law provides for a well constructed and well tested legal framework to restructure distressed companies, with various pre-insolvency and insolvency proceedings intended to address a wide range of situations. The major reform that took place in 2005 with the introduction of a Chapter 11-type debtor-in-possession procedure known as ‘safeguard’ and subsequent adjustments significantly improved French insolvency law, which is now considered one of the most effective in Europe.

A French company is considered to be insolvent (in ‘cessation of payments’) when due and payable debts exceed available assets. It must file for insolvency within 45 days of the occurrence of such situation.

Fraudulent conveyance rules apply to transactions entered into by the debtor between the date of the debtor’s cessation of payments (which the court can determine occurred up to 18 months before the insolvency filing) and the commencement of the insolvency proceedings. They provide that certain transactions or payments entered into during that period are void, and that any other transaction or payment entered into during that period is voidable if the counterpart was aware of the debtor’s cessation of payments.

ii Policy

Traditionally, French insolvency law favours the continuation of business and the preservation of employment over the interests of the creditors. However, several adjustments improving the situation of the creditors were recently made in the law, in particular to facilitate pre-packaged sale plans, allow creditors to propose alternate reorganisation plans and facilitate debt-to-equity swaps when existing shareholders refuse to vote in favour of such measure.

iii Insolvency procedures

Pre-insolvency proceedings include mandat ad hoc and conciliation. Both essentially consist of a mediation conducted under the authority of a mediator appointed by the court upon request of the company, in order to help it reach an agreement with its creditors, in particular by reducing or rescheduling its indebtedness. The debtor can determine, at its discretion, which creditors will be involved in the process. Agreements reached through such proceedings

© 2018 Law Business Research Ltd
are non-binding on third parties, and the court-appointed mediator has no authority to force the parties to accept an agreement. These proceedings are confidential, subject to one exception: if the conciliation culminates in an agreement that is approved by the court upon request of the debtor company, then such approval becomes public. In addition, if such an approval is granted, creditors that provided new money during the conciliation proceedings or as part of the conciliation agreement will enjoy a priority of payment over all pre-petition and post-petition claims in the event of subsequent insolvency proceedings. *Mandat ad hoc* has no maximum duration, but typically lasts between a few months and a year. Conciliation cannot exceed five months.

Insolvency proceedings include safeguard proceedings – with two variations: accelerated safeguard and financial accelerated safeguard, judicial reorganisation proceedings and judicial liquidation proceedings. These insolvency proceedings are similar to proceedings existing in other jurisdictions. They are not confidential and must involve all of the creditors. They result in a stay on creditors’ enforcement actions for pre-petition claims.

Safeguard and judicial reorganisation proceedings are intended to reorganise the debtor through the implementation of a reorganisation plan that may provide for debt write-offs, debt rescheduling, debt-to-equity swaps, modification of interests rates, amendments of financial covenants or cash contributions to the debtor, by existing stakeholders or newcomers, by way of debt or equity. Plans also frequently contain downsizing commitments by the debtor, such as commitments to dispose of part of the business, or to downsize the workforce and to change all or part of the management team.

In the case of large companies (companies with more than 150 employees or annual sales of more than €20 million), the reorganisation plan must be approved by two committees comprised of the financial creditors and the main trade creditors. In each committee, the majority required for approval is a two-thirds majority of the creditors expressing a vote, based on value. In addition, if the debtor has issued bonds, bondholders must also approve the plan based on the same two-thirds majority. All bondholders vote as a single group, even if there are several bond issues, series or tranches. In the absence of creditors’ committees, or if the committees or bondholders did not vote in favour of the proposed reorganisation plan, creditors are consulted individually on the debt write-offs and debts rescheduling proposed by the debtor.

The maximum duration of the safeguard or reorganisation proceedings is 18 months. Accelerated safeguard and accelerated financial safeguard are significantly shorter, as there are pre-packaged proceedings intended to adopt a reorganisation plan negotiated during conciliation proceedings that is supported by at least two-thirds of the members of each creditors’ committee and of the company’s bondholders. The duration of the accelerated safeguard cannot exceed three months. Accelerated financial safeguard, which applies only to financial creditors and bondholders, has a maximum duration of two months.

Judicial liquidation proceedings are intended to liquidate the assets of the debtor and settle its liabilities when there is no prospect of recovery. This process has no maximum duration, and generally lasts several years. In judicial reorganisation proceedings (if it appears that a reorganisation plan will not permit the recovery of the debtor), as well as in judicial liquidation proceedings, all or part of the debtor’s business can also be sold to a third party under a sale plan.

Where main insolvency proceedings are pending in another EU country (except Denmark) and the debtor has an establishment in France, EU Regulation 2015/848 on
insolvency proceedings allows for the opening in France of secondary insolvency proceedings (safeguard, judicial reorganisation or judicial liquidation). The effects of such secondary insolvency proceedings are limited to the debtor’s assets located in France.

iv  Starting proceedings

Pre-insolvency proceedings (i.e., mandat ad hoc and conciliation) are available when the debtor anticipates legal, economic or financial difficulties and is not in cessation of payments (or has not been in cessation of payment for more than 45 days, in the case of the conciliation). They are commenced by order of the president of the court upon petition of the debtor.

Safeguard proceedings are available when the debtor experiences difficulties that it is not able to overcome and is not in cessation of payments. They are commenced by judgment of the court upon petition of the debtor.

Judicial reorganisation and judicial liquidation proceedings are available when the debtor is in cessation of payments and, with respect to liquidation proceedings, when the debtor’s recovery is manifestly impossible. They are commenced by judgment of the court upon insolvency filing by the debtor, or upon petition of an unpaid creditor or of the public prosecutor.

Secondary insolvency proceedings may be commenced by judgment of the court upon petition of the insolvency practitioner in the main insolvency proceedings, of the debtor, of an unpaid creditor or the public prosecutor (in the latter two situations, only if the secondary proceedings are judicial reorganisation or judicial liquidation proceedings).

Judgments commencing safeguard, judicial reorganisation or judicial liquidation proceedings or refusing to open such proceedings can be appealed by the debtor, by the creditor having requested the opening of the proceedings (if any), by the public prosecutor, and by interested third parties. The appeal of the judgment opening the proceedings does not stay such proceedings. It is not possible to obtain a stay of insolvency proceedings except for secondary proceedings, in which case the court that opened the proceedings must stay the process of realisation of assets if requested by the insolvency practitioner in the main insolvency proceedings.

v  Control of insolvency proceedings

Insolvency proceedings are conducted under the supervision of the commercial court with jurisdiction over the debtor.

When commencing safeguard or judicial reorganisation proceedings, the court usually appoints an administrator to supervise the debtor’s management and help in the preparation of a reorganisation plan and a representative of the creditors. In judicial liquidation proceedings, the court appoints a liquidator in charge of winding up the company. If a sale of the business is considered, the court will usually authorise a temporary continuation of the activity and appoint an administrator to manage the debtor during such continuation and organise the sale of the business. In addition, during insolvency proceedings, any disposal of assets made by the debtor outside the ordinary course of business, any mortgage, pledge, guarantee granted by the debtor, and any settlement entered into by the debtor must be authorised by the judge in charge of the insolvency proceedings.

At the end of the insolvency proceedings, any reorganisation plan or plan for the sale of the business must be approved by the court. In safeguard and judicial reorganisation proceedings, before approving a reorganisation plan that has been voted by the requested majority of the creditors’ committees and bondholders, the court has to verify that the interests
of all creditors are sufficiently protected. Once approved by the court, the reorganisation plan will be binding on all the members of the committees and all bondholders (including those who did not vote or voted against the adoption of the plan). If creditors were consulted individually (either because the creditors’ committees or the bondholders did not vote in favour of the plan, or because the company was too small to have creditors’ committees), the court that approves the plan can impose uniform debt-deferrals for a maximum period of 10 years on non-consenting creditors, but the court cannot impose debt write-offs or debt-to-equity swaps.

The main duty of the directors in connection with insolvency proceedings is to file for insolvency within 45 days of the company’s cessation of payments. After the commencement of insolvency proceedings, there is no shift of fiduciary duties whereby duties formerly owed by directors of a French company to the company’s shareholders would, post-petition, be owed to the company’s creditors. Rather, the duty of the directors will remain, before and after the commencement of a pre-bankruptcy or bankruptcy process, to promote the corporate interest of the debtor, that is, to promote the course of action that, on the whole, will best preserve the interests of all stakeholders, including the debtor’s employees, shareholders, creditors and customers.

vi Special regimes

The general insolvency regime provided by French law is applicable to all legal entities, but regulated entities such as credit institutions and insurance companies are subject to specific additional rules.

With respect to credit institutions, French law was amended to implement Directive 2001/24/EC on the reorganisation and winding up of credit institutions. Insolvency proceedings may only be commenced with respect to a French credit institution after prior authorisation of the Prudential Supervision and Resolution Authority (ACPR). A specific ranking applies to claims against credit institutions, and specific rules are intended to protect certain kinds of financial arrangements, such as netting and repurchase agreements.

With respect to insurance companies, insolvency proceedings may only be commenced upon request of the ACPR, or upon request of the public prosecutor after prior authorisation of the ACPR.

Credit institutions and insurance companies also have to finance insurance funds intended to indemnify the depositors or insured party up to a certain amount in case of default.

There are no special insolvency rules relating to corporate groups under French law, except for the rules provided by the EU Regulation 2015/848 on insolvency proceedings in order to ensure the efficient administration of insolvency proceedings relating to companies of a corporate group located in different EU Member States. Those rules provide for cooperation and communication of information between insolvency practitioners, between courts, and between insolvency practitioners and courts, and allow an insolvency practitioner to request the opening of group coordination proceedings.

vii Cross-border issues

Insolvency proceedings can be opened in France in respect of a foreign EU debtor in accordance with EU Regulation 2015/848 on insolvency proceedings, if the foreign debtor has the centre of its main interests in France. Any insolvency proceedings opened in France (excluding pre-insolvency proceedings) will be recognised throughout the EU.
As far as non-EU debtors are concerned, while a French court may agree to commence insolvency proceedings if the debtor has a significant presence in France, this happens quite rarely in practice, and the effect of such proceedings overseas would be subject to significant uncertainties.

II INSOLVENCY METRICS

Overall, France’s economic situation remains favourable, although the forecasts for 2018 are slightly below 2017 figures and are subject to significant uncertainties due to various factors including rising oil prices, US protectionist policy and tightening monetary policies:

- in 2017, economic growth reached its highest peak since 2007 (+2.3 per cent). In June 2018, the French national statistics institute (INSEE) released its forecasts for economic growth in 2018, which is expected to reach 1.7 per cent;
- investments by French companies have increased by 4.4 per cent in 2017 and are expected to reach 3.1 per cent in 2018;
- the French household investment level has improved moderately in 2017, with a growth of 1.1 per cent. This moderate increase is expected to continue in 2018, with a 1 per cent growth forecast;
- economic growth in 2017 allowed to reduce the unemployment rate in France from 10 to 9 per cent; this reduction is expected to continue in 2018, albeit at a slower pace.

Another sign of the favourable economic climate is the 5.8 per cent decrease in the number of insolvency proceedings opened in France in 2017, dropping from 57,947 to 54,572, compared to 2016. The first half of 2018 has shown a decrease of only 1.4 per cent in company failures compared to the previous year, confirming that 2018 should be less favourable than 2017.

The principal features of recent French insolvency proceedings are as follows:

- as regards the type of proceedings opened, judicial liquidation remains the most commonly used insolvency proceeding (67.9 per cent), followed by judicial reorganisation proceedings (29.8 per cent) and, far behind, by safeguard proceedings (2.2 per cent);
- a quick overview of the companies undergoing insolvency proceedings shows that those employing fewer than three employees represent three-quarters of all the insolvency proceedings opened, whereas companies employing more than 50 people represent less than 1 per cent of this total. Companies employing more than 250 employees only represent a handful of the total, with only 46 insolvency proceedings opened in France in 2017; and
- the construction and real estate market, traditionally representing one quarter of all company failures, specifically benefited from this trend with a 10 per cent decrease in insolvency proceedings opened, compared with 2016. The industrial sector (with the exception of textiles) also benefitted from this trend, with a 5 per cent decrease in insolvency proceedings opened. However, the number of insolvency proceedings in the agricultural sector is constantly increasing.
III  PLENARY INSOLVENCY PROCEEDINGS

Some of the most significant insolvency proceedings that took place in France over the past 12 months are described below:

i  Agripole

Agripole was a French food-processing group owned and managed by Monique Piffaut with more than 3,000 employees and about 20 subsidiaries specialising in ham and sausage products and pre-cooked dishes. The indebtedness of the group stood at €332 million.

In December 2016, following the death of Ms Piffaut, it was discovered that the accounts of the group had been manipulated on her initiative over a period of at least 10 years and included false invoices and fictitious advances on inventories for a total amount of approximately €250 million.

At the request of the companies of the group, the president of the Commercial Court of Paris opened a mandat ad hoc, which was later converted into conciliation proceedings. A financial audit of the group revealed that it would face a significant cash shortage within six months. A conciliation agreement was entered into in February 2017, under which the bank creditors of the group agreed to grant new financing for a total amount of €63.25 million, benefitting from a priority of payment over all pre-petition and post-petition claims in case of subsequent insolvency proceedings, and the French state agreed to grant a €70 million loan. In addition, all creditors agreed to grant a moratorium on their claims and to waive any event of default during one year. The companies of the Agripole group committed to searching for a new shareholder or a buyer for the business, in order to ensure the reimbursement of the creditors under the best possible conditions.

It quickly became clear that selling the group companies as is would not be possible owing to the amount of the indebtedness and the deterioration of the group’s financial situation after the discovery of the fraud. Therefore, negotiations were conducted with potential buyers within the framework of new conciliation proceedings, with a view to selling the ham and sausage products business and the pre-cooked dishes business separately under pre-packaged sale plans.

The best proposal for the sale of the ham and sausage business was made by the cooperative group Cooperl, which committed to taking over all the employees of the branch and offered a price of €33 million for the purchase of the assets. Upon insolvency filing of the companies involved in that business, the Commercial Court of Paris commenced reorganisation proceedings on 2 May 2017, and approved the sale plan for Cooperl on 15 June 2017.

The best proposal for the sale of the Agripole group’s pre-cooked dishes business was a joint offer made by two French groups, Cofigeo and Arterris, which committed to taking over all employees. Upon the insolvency filing of the main company involved in that business, the Commercial Court of Paris commenced reorganisation proceedings on 12 June 2017 and approved the sale plan for Cofigeo and Arterris on 3 October 2017.

ii  CGG

CGG is a global, French-based group operating in the geoscience industry with subsidiaries in various countries, including in the US. The group provides geological, geophysical and reservoir capabilities to its customers, primarily in the global oil and gas industry. The group’s
financial distress is because of the decline in oil prices, which had a dramatic impact on its main clients’ financial resources and, therefore, the demand for the services provided by CGG.

Negotiations with its creditors and shareholders took place in mandat ad hoc proceedings and led to an agreement in principle with key financial creditors on 2 June 2017, providing for the conversion of non-secured debt (US$1.95 billion) into equity, an extension of the maturity of secured debt (US$ 800 million), a US$125 million rights issuance with warrants, open to existing shareholders, and a US$375 million issuance of new second lien senior notes with penny warrants to be provided by eligible unsecured senior note holders under the terms of a private placement agreement. CGG then entered into a lock-up agreement under which those key financial creditors committed to support all reasonable steps in order to ensure proper implementation of the restructuring plan, including a vote in favour of the plan within the framework of French safeguard proceedings and US Chapter 11 proceedings.

On 14 June, the Commercial Court of Paris commenced safeguard proceedings with respect to CGG SA, the group holding company. The company then filed for Chapter 15 proceedings in the US, in order for the French insolvency proceedings to be recognized as foreign principal insolvency proceedings in the US. In addition, 14 subsidiaries of the group filed for Chapter 11 proceedings in the US.

On 28 July 2017, CGG SA obtained the approval of the reorganisation plan in the French safeguard proceedings by the requested majority of the financial creditors’ committee and the bondholders. The reorganisation plan was then approved by the general meeting of shareholders in November 2017, and by the Commercial Court in December 2017. It was recognised by the US court shortly thereafter. The financial restructuring was finalized in February 2018.

iii  Doux

Doux is a French food processing group in the industrial poultry production business, exporting frozen poultry and poultry-based processed products, mainly in the Middle East. It had been subject to insolvency proceedings in 2012/2013 and to a reorganisation plan providing for debt rescheduling over 10 years.

However, owing to competition from cheaper Brazilian chicken in its main Middle Eastern markets after European Union export subsidies were scrapped, Doux lost approximately €35 million in each of the past two years. Therefore, it appeared, at the end of 2017, that Doux would soon be unable to meet its obligations under the reorganization plan and would have no other option than to undergo judicial liquidation by April 2018. The group began to search for potential buyers for the business in order to prepare a pre-packaged sale plan that would be implemented as part of the judicial liquidation and would allow for the preservation of the business and the jobs associated with it.

After several months of negotiation through mandat ad hoc proceedings, the best proposal appeared to be the one made by a consortium of several companies, including LDC, France’s largest poultry processor, Terrena, a French agricultural cooperative that was the main shareholder of Doux, and Almunajem, that was the main client and a minority shareholder of Doux.

Doux then filed for insolvency, and the Commercial Court of Rennes opened liquidation proceedings on 4 April 2018, with a view to approving the pre-packaged sale plan within a few weeks, as Doux no longer had enough cash to continue its activity beyond May 2018. Despite the filing of a competing offer for the purchase of part of Doux’s assets
by Ukrainian company MHP, the Commercial Court issued a judgment on 18 May 2018 approving the sale of the assets to the consortium, as that offer allowed for the possibility of preserving more jobs (about 900 out of 1,200). The sale was supported by major French players in the poultry industry and offered real prospects of development, as LDC committed to build a new plant on the Doux site in Brittany.

iv Ludendo/La Grande Récré

Ludendo is the parent company of France’s largest toy store chain, La Grande Récré, which reached a turnover of €460 million in approximately 400 stores in 2017, but which also has a debt of €150 million. Owing to the ever shrinking toy market and increasing competition from online players, it was forced to file for insolvency in March 2018 and has been placed into judicial recovery proceedings by the Commercial Court of Paris.

The company has worked on a reorganisation plan focusing on its French home market, which provides that only its 104 most profitable French stores will be retained, that 62 stores in France and all 16 stores in Belgium will be closed, and that the stores in Spain and Switzerland will be sold. One-third of all jobs in the chain’s headquarters would be cut under this plan and the repayment of the €153 million in debt would be spread over the next ten years.

In parallel, Fnac Darty has filed an offer for the purchase of part of the business (106 stores in France) for an amount of €16 million, offering to take over 833 employees and to invest €115 million in the business, in particular to renovate the stores. The Commercial court is expected to choose between the reorganisation plan proposed by Ludendo and a sale of the business to Fnac Darty at the end of July 2018.

v France Loisirs

France Loisirs is a book publisher and distributor founded in 1970 based on the model of the book club, where subscribers regularly receive books at discounted prices that are chosen in a quarterly catalogue. After a peak at the beginning of the 1990s, the number of subscribers began to decrease in the 2000s, owing, in particular, to the development of screen culture and of online book purchases.

After its revenue fell from €400 million in 1998 to €180 million in 2016, France Loisirs was forced to file for bankruptcy at the end of 2017, and the Commercial Court of Paris opened judicial recovery proceedings. The company has already closed about 40 stores and will implement a redundancy plan to reduce the workforce from 1,800 to 1,350.

France Loisirs is currently seeking a third party to invest in the business and allow for the implementation of a reorganisation plan.

vi Ascometal

Ascometal is a specialty steelmaker employing 1,400 people in France with an annual turnover of €400 million. It was purchased in 2009 through a leveraged buyout by a US investment fund and was forced to file for bankruptcy in 2014 because it was not profitable enough to support its level of debt. The business was purchased a few months later by a French consortium for €230 million through a sale plan approved by the Commercial Court of Nanterre.

However, the company was again forced to file for insolvency in November 2017 owing to a cash shortage resulting from weak steel prices and rising oil prices in the past two years,
despite the fact that the factories were operating at full capacity. Its subsidiary Ascoval (jointly owned with French steel pipe maker Vallourec), which employs 300 people, also filed for bankruptcy in January 2018. Several offers for the purchase of the business were filed with the Commercial Court of Strasbourg. UK-based Liberty House offered to invest €300 million in both Ascometal and Ascoval. The Swiss-based speciality steelmaker Schmolz + Birkenbach offered to invest €195 million in Ascometal only, but promised to support Ascoval by purchasing its steel for two years.

Although Liberty House seemed to be the best bidder, both in terms of preserving employment and the price offered, the court approved the sale of the business to Schmolz + Birkenbach by a judgment dated 29 January 2018, because it considered that its offer was more credible, with respect to the industrial project and the financing of the investments to be made in the production facilities.

As Ascoval was excluded from the scope of Schmolz + Bickenbach’s purchase offer, offers from third-party bidders for the Ascoval site are expected to be filed in the coming weeks, and the Court of Strasbourg is expected to approve a sale plan in September 2018.

IV ANCILLARY INSOLVENCY PROCEEDINGS

We are not aware of any significant secondary proceedings for foreign-registered companies commenced in France during the past 12 months.

V TRENDS

Insolvency activity should slightly decrease during the coming year, as economic growth is expected to continue to strengthen to about 1.7 per cent in 2018.

Brexit may, however, contribute to an increase in insolvency activity in French courts regarding foreign EU companies. Indeed, a flourishing restructuring business has developed in the UK as English courts have approved schemes of arrangement affecting companies incorporated outside of England. While the impact of Brexit on the availability of UK schemes of arrangement as a restructuring tool for foreign companies remains unclear, EU companies may be more reluctant to petition UK courts, owing to uncertainties regarding the recognition of their judgments within the EU. As the French restructuring regime is among the most effective in the EU, it could become an appealing alternative for foreign companies seeking a forum that offers flexible tools for distressed debtors.
I INSOLVENCY LAW, POLICY AND PROCEDURE

i Statutory framework and substantive law

Germany’s insolvency law can be considered as both old and new.

Insolvency legislation in Germany dates back to 1878, when the Bankruptcy Act established fundamental insolvency principles for the German empire, which was founded just eight years before.

However, it also considered modernised because today’s insolvency law is mainly determined by the German Insolvency Act (GIA), which came into force in 1999 and was substantially amended in 2012. In 2017, a couple of reforms brought some new nuances that we will deal with in more detail later on in this chapter.

Although the GIA always aimed to provide possibilities for in-court restructuring including self-administration, besides general liquidation and post-sale creditor satisfaction, the prevailing principle was the liquidation of the insolvent company and sale of the assets. Thus, German insolvency practitioners felt that German insolvency law is not competitive to foreign insolvency laws that provide for better in-court and out-of-court restructurings.

Consequently, on 1 March 2012 the GIA was amended (ESUG-amendment). Since this amendment, the self-administration tools and influence on the appointment of the insolvency administrator for debtors and creditors have improved, and an umbrella protection proceeding as a special feature of self-administration aimed at an in-court restructuring has been established. However, calls for the introduction of an out-of-court restructuring regime were not heard, but the discussion is continuing, fuelled by the EU Commission initiative for harmonisation of European insolvency law. In 2017, the powers of the insolvency administrator to set aside transactions (clawback provisions) have been cut back, and completely new provisions for group insolvencies have been introduced. The general perception of insolvency practitioners in Germany is that German insolvency law is now more competitive than other European and non-European insolvency legislation,

1 Andreas Dimmling is a local partner at GSK Stockmann. The author would like to thank Ms Sandra Krepler for her very valuable contribution to this article.
2 An English version of the GIA is available at www.gesetze-im-internet.de/englisch_inso/.
3 See Section V.ii.
and the tools for restructuring insolvent companies through an in-court proceeding have been successfully amended.\textsuperscript{4} According to the European Commission, Germany's insolvency regime ranks second among EU Member States when it comes to effectiveness.\textsuperscript{5} 

Still, the general principle of German insolvency law is not the survival of the insolvent company at any cost, but to reach collective satisfaction of the debtor’s creditors on the most attractive terms – either by keeping the company running or by selling its assets (see Section 1 of the GIA).

**General insolvency proceedings (liquidation)**

The proceedings described in the following paragraphs cover the general insolvency proceedings. Special proceedings aimed at restructuring the debtor are discussed in Section I.iii.

**Preliminary insolvency proceedings**

After a filing for insolvency by the debtor or a creditor, the insolvency court starts to examine whether the company is actually insolvent and if there are sufficient assets to meet the expenses of the proceeding in a preliminary insolvency proceeding. The insolvency court appoints a preliminary insolvency administrator (PIA). The debtor and a preliminary creditors’ committee (if established by the court because of the fulfilment of certain thresholds) can suggest or even make a binding proposal for an individual person to be appointed. The PIA controls and limits the power of the management of the insolvent company or takes control of all actions of the debtor.

This ‘preliminary phase’ is unknown to many foreign creditors and debtors and is regularly the source of legal questions such as ‘who is representing the company now?’ and ‘can we continue trading with the company?’. Essentially, and on a very general note, the insolvent company continues its business with its current management but is controlled and limited by the PIA. The debtor can continue its business as long as transactions are confirmed or carried out by the PIA.

Preliminary proceedings do not usually exceed three months because for such period the German state pays the employee’s wages (up to a certain amount) and the debtor is released from paying such wages.

**General insolvency proceedings**

If the court is positive that the debtor is insolvent and enough assets are available, regular insolvency proceedings start and the PIA is replaced by the (final) insolvency administrator (IA). The IA is usually the same person as the PIA.

As of the opening of the general insolvency proceedings, the IA takes full control of all assets of the debtor. The management is still in place, but it loses control of the debtor.

During the proceeding, all rights of taking decisions are with the IA who needs the consent of the creditors' committee or the creditors’ assembly for material actions.


© 2018 Law Business Research Ltd
Creditors of the company who earned their claims before the opening of insolvency proceedings, file their claims against the insolvent estate with the IA and inform the IA about securities granted to them.

There are three classes of creditors: first, there are secured creditors (creditors entitled to separate satisfaction) such as those secured by mortgages or security assignments. They can demand priority of receipt of the money up to full satisfaction of their claim (minus a fee for the IA, which amounts to 9 per cent in many cases) when the asset is sold. If their claim is not fully satisfied, the remaining part will be treated as an unsecured claim.

Secondly, there are unsecured creditors, which are typically suppliers or customers who dealt with the debtor prior to the opening of insolvency proceedings. They only receive the general insolvency quota at the final distribution of the insolvent estate. The average quota in corporate insolvencies is approximately 4–7 per cent of the claim.

Finally, there are subordinated creditors, for example, creditors with subordination agreements by statute, such as lenders of shareholder loans or by individual contract. These creditors usually do not receive any payment on their claims.

Creditors, who have a right of segregation because they are the owner of the asset that only happens to be in the possession of the debtor, are not creditors of the insolvent estate. As a general rule, they can claim return of their assets from the IA. Typically, this can apply to suppliers with extended retention of title clauses – a concept often unknown to foreign suppliers outside of Germany.

A German characteristic of insolvency law is that claims against the insolvent estate that were established during the insolvency proceedings by the PIA or IA are preferential to all unsecured insolvency claims and have to be settled in full and first, together with the insolvency court fees and fees for the IA and creditors’ assembly.

With the exception of that peculiarity, there are no other preferential unsecured creditors, such as tax authorities.

After the IA realises the assets of the company, collects outstanding claims, gives back assets that do not belong to the insolvent estate, settles preferential claims and sets aside unlawful transactions, the unsecured creditors receive the general insolvency quota and the insolvency proceedings end.

The insolvency proceedings are always supervised and led by the insolvency court, and the IA constantly reports to the insolvency court as well as to the creditors’ assembly.

Right to set aside transactions (clawback)

Another special feature of German insolvency law is the broad power of the IA to set aside transactions of the insolvent estate carried out before filing for insolvency proceedings or during preliminary insolvency proceedings. It is a German peculiarity compared to other insolvency law systems that there always is a high risk of clawbacks for all contract partners of the insolvent estate that dealt with the insolvent estate years before the insolvency proceedings were initiated.

---

6 Sections 49 to 51 of the GIA.
7 Section 38 of the GIA.
8 Section 39 of the GIA.
9 Sections 53 to 55 of the GIA.
10 Section 129 et seq. of the GIA.
In the event of a successful clawback, the contractual party of the insolvent estate has to return what was received in full (e.g., purchase price) to the insolvent estate. This party in return only receives an unsecured counterclaim against the insolvent estate (e.g., value of the delivered goods), which will be satisfied with the regular insolvency quota.

After debate for many years between German insolvency practitioners, a reform of the GIA to limit the IA's power in this regard came into force in April 2017. While the general intent of the clawback rules was not challenged, the reform restricts the IA's rights in scope and time. There are three aspects of particular interest.

First, before the reform the IA could set aside transactions that were carried out for a period of up to 10 years before insolvency proceedings were initiated under Section 133 of the GIA. This period is now reduced to a maximum of four years for almost all transactions and contracts (save for some exceptions, in particular when the debtor took actions on purpose to harm creditors while the other party knew about that purpose).

Second, the burden of proof for the IA to set aside a transaction under Section 133 of the GIA has been increased. In particular, when the contract parties had agreed on an instalment plan for payments, before the reform it was assumed that the creditor knew about an assumed bad faith. Now, by regulation of law, instalment repayment plans are no indication for bad faith anymore, but – on the contrary – such instalment repayment plans are an indication that the creditor acted in good faith. This is an important swing for practitioners.

Third, transactions where both parties fulfill their obligations within a short time frame of a maximum of 30 days can only be set aside if the insolvent debtor acted in ‘an unfair manner’. This special variation of bad faith for such short-term transactions is new to German insolvency law, and it will be up to the insolvency courts to determine the boundaries of this concept. Recent court rulings lead to the assumption that there is a change of direction for IAs when setting aside transactions. However, it is too early to tell if this is a permanent trend or just a coincidence.

### Policy
Whenever insolvency proceedings over a business start, it is the IA’s prevailing goal and obligation to seek out the best satisfaction possible for all creditors and present it to the creditors’ assembly. It is this assembly that decides whether to liquidate, sell or restructure the debtor's business.

Liquidation, including a sale of the business assets to a buyer who continues part or all of the business, is still the most likely outcome of such decision (approximately 90 per cent of all corporate insolvency proceedings).

In-court restructuring of the business through insolvency plans (up to 5 per cent) and self-management including umbrella protection proceedings (3 per cent of all corporate insolvency proceedings in 2017) have become more popular and effective since 2012, and are regularly applied in big insolvency cases. Some features of these restructuring tools are outlined in Section I.iii.

### Insolvency procedures
There are two main types of insolvency procedure: the general procedure, ending with liquidation and winding up of the company; and an in-court restructuring through self-administration and an insolvency plan.
Liquidation
See Section I.i. A general corporate insolvency proceeding over a German company typically lasts for a period of three to four years, whereas the main assets of the company that still have value are usually sold within two to six months to one or several investors.

Self-administration and insolvency plan
Although these features have been in place since 1999, they are rarely used in practice, with rates of approximately 3 per cent of all corporate insolvencies until 2017 but amounting to 64 percent for the top 50 corporate insolvencies in 2017.11

In self-administration, the company’s management continues to manage the company when:

a. the company applies for self-administration in its petition for insolvency proceedings; and

b. there are no circumstances that lead to the conclusion that self-administration will be detrimental to creditors.

Instead of a PIA or an IA, the insolvency court appoints an insolvency custodian. This person supervises the debtor and has, to some extent, limited rights similar to an IA (in particular to set aside transactions prior to filing for insolvency) but does not have a direct influence on the management or power of disposal over the assets.

A special type of self-administration is the umbrella protection proceeding that was introduced in 2012. The company can apply for the umbrella protection when it is not likely that the company can be restructured.

Under the umbrella, the company is granted a grace period of up to three months by the insolvency court to present an insolvency plan to creditors. The insolvency court appoints an insolvency custodian as in general self-administration; however, the company is entitled to select the individual person if such person is qualified. During the grace period, creditors of the company cannot pursue their rights by legal enforcement.

When the insolvency plan is presented to creditors, a normal self-administration insolvency proceeding starts and this full insolvency proceeding can be finalised within a few weeks when everything is prepared well. The insolvent company can return from insolvency proceedings without a substantial flaw of having been insolvent as the time period can be very short, no IA was involved, management of the company continued business and the creditors consented to a restructuring result instead of an IA distributing the assets. Therefore, the umbrella protection proceeding has been highly marketed since 2012 as a proceeding that is not regarded as a ‘real’ insolvency by the public. From a legal viewpoint, however, it is an in-court insolvency proceeding.

---

Self-administration does not necessarily lead to a certain outcome of insolvency proceedings. Still, the assets of the company can be sold or the self-administration ends at some stage and is transformed into general insolvency proceedings (this happened to 22 per cent of proceedings that started in self-administration in 2017). An insolvency plan is an instrument that can be used in any of the described insolvency proceedings, thus in a general proceeding, in general self-administration and following the umbrella protection time period. As a general principle, the creditors decide, divided into certain group of creditors, on the distribution of the insolvent estate that may differ from statutory law in a general proceeding. The plan, drawn up by the IA or the insolvency custodian or the management of the company in cooperation with the insolvency custodian, displays the financial situation of the company and points out measures that should be taken and their expected effects. In particular, the plan can provide for a corporate restructuring of the debtor and conversion of debt into equity. The creditors who are affected by the plan are divided into voting groups. A negative vote from one group is irrelevant if there is proof that the insolvency plan is not worse for such group than a distribution under statutory law. After the court has confirmed the plan, too, the debtor supervised by the IA or insolvency custodian has to carry out the prescribed measures.

While self-administration and insolvency plans tend to lead to better satisfaction of creditors than ordinary insolvency proceedings, and tend to be faster and more acceptable to debtors and creditors, in practice they can only be applied to substantial insolvency cases. The reason for that is that they require:

- very professional advisers, which incurs substantial costs for the debtor;
- professional management who are experienced in insolvency; and
- substantial assets and a clear going-concern perspective that favours restructuring over liquidation.

Ancillary insolvency proceedings

If the centre of main interest (COMI) of a debtor is outside Germany but the debtor operates a branch office in Germany, rules on international insolvency apply. As far as the COMI of the debtor is in the EU, EU Regulation 2015/848 applies. Under this Regulation, a secondary insolvency proceeding can be pursued in Germany if the debtor has a branch office in Germany regarding the assets in Germany. European secondary insolvency proceedings are not seen very often in Germany. However, the discussions regarding Niki Luftfahrt GmbH, a subsidiary of Air Berlin plc, brought the spotlight back to this topic. For more detail, see Section III.iii.

If the COMI of the debtor is not within the EU, the GIA provides in Section 354 et seq. for the possibility of creditors to file for a secondary insolvency proceeding regarding the German assets. Again, this procedure is not very common.

iv Starting proceedings

Essentially, the management of a company is obliged to file for insolvency in case of illiquidity or over-indebtedness. The criterion of over-indebtedness is not met on a pure balance sheet

---

13 Section 217 of the GIA.
14 In force since 26 June 2017, replacing EU Regulation 1346/2000/EC.
perspective but primarily depends on the question of whether the company is likely to be prosperous in the future. Thus, companies regularly instruct accounting firms and lawyers to examine if the company is over-indebted.

Illiquidity occurs if the company is – at a certain point in time – unable to pay more than 90 per cent of its debt when due and this situation will not improve over a period of three weeks following such date. If illiquidity or (insolvency) over-indebtedness occurs, the management is obliged to immediately (or at least within three weeks) file for insolvency. If the management does not adhere to such obligation, this is a criminal act and can lead to imprisonment for up to three years.

A company can opt to file for insolvency if the illiquidity is ‘threatening’ (impending illiquidity); in other words if it is likely that the company will be illiquid once the debts become due.

A creditor must have a legal interest in the opening of insolvency proceedings to be entitled to file for insolvency of a debtor. That is the case if the creditor can prove its claim, and it is likely that the debtor is insolvent because, for example, legal enforcement measures against the debtor have failed. The debtor will be heard by the court before preliminary proceedings are commenced.

The competent insolvency court is the local court where the company has its COMI, which is usually the place of its registered business seat.

v Control of insolvency proceedings
The power to make decisions during insolvency proceeding lies mainly with the creditors and the IA.

However, insolvency proceedings are started, supervised and ended by the insolvency court, which takes a more active role than in Anglo-Saxon countries.

Besides the basic obligation of the debtor’s management to file for insolvency when necessary, the management may also be personally liable for other violations of civil and criminal law before and during insolvency proceedings. Managing directors are more likely to be liable towards the insolvent company if they made payments out of the company even though the company was insolvent at that time from a legal perspective. After insolvency proceedings are opened, the management has to cooperate with the IA and provide necessary information to the IA. In self-administration, the management stays in power but must coordinate certain actions with the insolvency custodian.

vi Special regimes
All entities are subject to the GIA. However, some peculiarities apply to financial institutions. Under the German Bank Reorganisation Act – a reaction to the financial crisis of 2008 – only the Federal Finance Supervisory Authority (BaFin) is entitled to file for insolvency proceedings over banks. Usually, before insolvency proceedings are started, BaFin tends to support a restructuring of the bank through a moratorium. With regard to ‘important’ banks from a European point of view, EU Regulations 806/2014 and 1024/2013 and EU Directive 2014/59/EU apply too (Single Resolution Mechanism). In Germany, the Restructuring and Liquidation Act 2014, in particular, incorporates the European rules into national law. This includes the power to sell assets of the bank or to order a compulsory bail-in of bank creditors.

Also, for insurance companies, the right to file for insolvency is limited. Again, only the supervising authority (usually BaFin) is entitled to file for insolvency. Although the
proceedings are governed by the GIA, some special features of the insurance law apply, such as automatic termination of insurance agreements one month after the opening of insolvency proceedings.

With regard to group companies, the GIA was amended in 2017 and now provides for the first time for special group insolvency rules. Now, under the reform, all insolvency proceedings of a ‘group of companies’ can be pooled at one court. Furthermore, the possibility of a uniform appointment of one IA is provided.

The term ‘group of companies’ (Unternehmensgruppe) applies when one company has the possibility of exercising dominant influence on the others or when various companies are subject to an uniform management.

vii Cross-border issues

See Section I.iii.

German insolvency courts acknowledge foreign insolvency proceedings under EU Regulation No. 2015/848 or under Section 343 of the GIA as being valid in Germany as well. However, the German Federal Court does not acknowledge an English scheme of arrangement as being an insolvency proceeding, while for instance the US Chapter 11 or the Italian amministrazione stradordinaria proceedings are recognised as being insolvency proceedings.

II INSOLVENCY METRICS

Corporate insolvencies are at a long-time low in Germany. This is because of a strong and stable domestic economy (2.2 per cent GDP growth in 2017) and cheap terms of financing. The unemployment rate is the lowest it has been for 27 years, and many regions of Germany profit from full employment.

Some 20,200 companies filed for insolvency in 2017 (almost 1,400 lower than in 2016), which is the lowest rate of insolvencies in more than 20 years. In the first half of 2018, 9,900 corporations became insolvent, a decrease of 3.3 per cent compared to the same period last year. It is remarkable that most of the insolvent corporations are very small companies. Over 50 per cent of insolvent companies have an annual turnover of less than €250,000. Eighty-three per cent of insolvent companies employed less than five people, whereas most of them might have even been single-person companies. In 2017, there were 80 insolvency cases involving a turnover of more than €50 million.

Although all industry sectors show decreasing numbers of insolvency cases, a significant drop can be seen in the manufacturing sector (of 6.6 per cent). The service sector continues to have the most insolvencies (56.4 per cent of all corporate insolvencies). In contrast, the

15 For example, Sections 16, 77b, 78, 88 and 88a of the Insurance Supervision Act, and Section 16 of the Insurance Contract Act.


17 5 per cent of the workforce in June 2018, equalling 2.28 million individuals.

18 The total number of insolvency cases in Germany was 116,000 in 2017. Thus, more than 80 per cent are individual bankruptcy proceedings or similar cases.
Germany

construction sector has the highest insolvency quota in comparison with the number of companies (79 out of 10,000). This is followed by commercial enterprises (71 out of 10,000), service industries (60 out of 10,000) and the manufacturing sector (33 out of 10,000).

A person is most likely to be employed in an insolvent company if he or she works for household moving companies, a mail, courier or express service or in a bar. More secure professions include being an accountant or provider of kindergarten services.

The average insolvency quota was reduced from 63 to 62 insolvencies out of 10,000 companies in the first half of 2018.

III PLENARY INSOLVENCY PROCEEDINGS

Since mid-2017 several insolvency proceedings occurred that were significant or had substantial press coverage. The following cases are not exhaustive and shall only serve as an example for various peculiarities.

i Rickmers Holding AG

An industry in turmoil is the shipping industry (see also Section III.iv. regarding P&R container GmbH). Rickmers Holding AG, a shipping company from Bremen, Germany, was one of the big players worldwide. However, the owner Bertram Rickmers had to file for insolvency in June 2017 after a planned restructuring concept failed at the last minute. In the evening before the bondholders were supposed to meet in order to decide about the concept, the biggest creditor HSH Nordbank withdrew the approval for the concept, which led to the insolvency of the company.

The insolvency of Rickmers Holding AG is a result of the long-standing crisis of the shipping sector. It all started with the financial crisis 2008 – many companies invested in bigger ships that they did not need any more afterwards.19 Another competitor of Rickmers, the global shipping player Hanjin from Korea, experienced the same in 2015 and became insolvent.

In September 2017, the Zech Group of Mr Kurt Zech, a prominent building contractor who specialises in investing in insolvent corporations, took over the main assets of Rickmers. The unsecured debtors expect to receive an insolvency quota of approximately 3 per cent.20

ii Air Berlin PLC & Co. Luftverkehrs KG

The most spectacular insolvency case in the past 12 months, is undoubtedly the case of Air Berlin and its subsidiary Niki Airline (see Section III.iii for more detail). Air Berlin was the second biggest airline in Germany after Lufthansa and the seventh biggest airline in Europe.

Following the going public in 2006, Etihad Airways took over the majority of shares in 2012. Although under Etihad management the airline offered even more international flights, Air Berlin increased its annual deficit. Other market players, such as Ryanair, took market shares of Air Berlin in the low budget flight market, and Lufthansa increased its position in the business flight market.

20 https://www.hansa-online.de/2017/10/featured/86595/rickmers-wickelt-sich-ab/.
Therefore, the filing for insolvency on 11 August 2017 was not a total surprise for the 8,500 employees and approximately 30 million customers.

The insolvency court of Berlin appointed Mr Lucas Flöther as insolvency custodian and approved Air Berlin’s application for self-administration. The insolvency expert Mr Frank Kebebus was appointed as chief insolvency officer by Air Berlin. Apart from the main company Air Berlin PLC & Co Luftverkehrs KG, several other group companies filed for insolvency the same day, and Mr Flöther was appointed as well.

The insolvency of Air Berlin was a major political topic in Germany in the summer and autumn of 2017. A bank guarantee by the German state (through the KfW-bank) of €150 million safeguarded continuation of the flights until November 2017, but the money is now almost completely lost for the tax payer. Lufthansa acquired the local airline LGW and several aeroplanes while Easyjet took over a large part of the flight operation in Berlin. Apparently, over one million creditors filed claims with the insolvency custodian. According to Mr Flöther, the proceedings could last for 10 years.

iii  Niki Luftfahrt GmbH

The insolvency of the Austrian/German airline Niki is a result of the insolvency of its parent company, Air Berlin. It was Air Berlin’s insolvency custodian Mr Flöther’s aim to sell Niki as a going concern when he started his position at Air Berlin. However, the contract negotiated between Air Berlin and Lufthansa did not come into force because the European Commission stated that it had serious antitrust concerns regarding Lufthansa taking over the business. Lufthansa then decided to withdraw its offer, and as a result Niki filed for insolvency in Berlin. The local court of Berlin appointed Mr Flöther as PIA, and in a second bidding process IAG won the prize. Still, this was not the end of the story. The Berlin court decision was appealed by a creditor, and the Regional Court of Berlin ruled that Niki’s COMI is in Austria, and, therefore, the insolvency proceedings have to be carried out in Austria. Mr Flöther appealed this decision to the German Federal Court. An Austrian court came to the same decision as the Regional Court in Berlin, appointed an Austrian insolvency administrator, Ms Ulla Reisch, and opened main insolvency proceedings in Austria. This led to great uncertainty over which proceedings prevail. Mr Flöther and Ms Reisch decided to coordinate their efforts (applying the European rules of cooperation for secondary proceedings), although the legal basis for this procedure was uncertain. In the end, Niki Lauda, the original founder of Niki, was selected as best bidder in an Austrian bidding process. IAG’s contract was nullified. Mr Flöther withdrew his appeal to the German Federal Court in Germany, and, therefore, no final court decision (neither on a German nor a European level) was given. Shortly after Niki Lauda had acquired Niki’s assets, he sold 25 per cent of the buying company to Ryanair with an option for Ryanair to increase its share up to 75 per cent. The European Commission decided that the acquisition is in accordance with European anti-trust law on 12 July.

The Air Berlin/Niki case has filled the newspaper headlines in Germany and Austria for days and also started a discussion among European insolvency law experts over how the COMI of a company shall be defined. While in the past most courts applied a more business-centre approach (the location from which the company is operated and controlled),

---
the Niki decisions took a more formal approach (where the statutory seat of the company is, where the flight licence was granted). This discussion is ongoing as the ECJ did not rule on this case.

Another result of the unplanned Niki insolvency is that the German taxpayer to a large extent will not be repaid for the guarantee in the amount of €150 million given by the German state for Air Berlin.

iv P&R Container Vertriebs- und Verwaltungs GmbH

Over decades, tens of thousands of private investors trusted in the business model of P&R containers, an investment fund company south of Munich founded by Mr Heinz Roth. The investors bought shares in containers that P&R acquired and rented out to international shipping companies. The investors had received a good return on their investment for many years, and P&R’s reputation was good.

Quite surprisingly for many investors, P&R filed for insolvency in March 2018. Mr Michael Jaffé was appointed as PIA, and on July 24 the main proceedings were opened. Mr Jaffé resolved that P&R operated through a complex structure of companies, and it seems that many containers were never bought by the P&R group. Meanwhile, the Public Prosecution Office started investigations against current and former directors of P&R and its shareholders, accusing them of fraud. More than 54,000 investors could have lost up to €3.5 billion of their life savings, which makes the P&R case one of the biggest insolvency cases in German insolvency history with regard to economic loss.

IV ANCILLARY INSOLVENCY PROCEEDINGS

Generally, ancillary insolvency proceedings do not play an important role in Germany. There have been no significant recent proceedings although the German Federal Court published one recent decision. The Federal Court states that creditors can still pursue their claims in an ancillary proceeding in Germany even if the debtor has already been discharged in the main procedure in England. With regard to the Niki insolvency case, where the German insolvency proceedings ended as a secondary insolvency proceeding and the Austrian insolvency proceedings are regarded as a primary insolvency proceedings (see SectionIII.iii).

V TRENDS

On a general note, it is not expected that insolvency metrics will change substantially within the next 12 months. As the German economy is stable, corporate insolvencies are expected to remain at a historic low level.

However, trends can be observed in other sectors.

25 BGH NZI 2014, 969.
i  Uncertainty about tax relief of the restructuring profit
A ruling of the German Federal Tax Court at the end of 2016 brought a lot of insecurity into the German restructuring scene. The court overturned the long-time practised tax concession for recapitalisation gains. Many restructuring and insolvency cases were brought to an abrupt halt as the insolvency practitioners were suddenly unsure if the reduction of debt in a restructuring scenario would create tax burden on the corporate estate to be restructured. The German parliament reacted rapidly in order to reduce the turmoil and passed a law in June 2017 to reinstate the situation before the court ruling.

However, the law needs also clearance from the European Commission as it could possibly violate European state aid law. The law will not come into force before such clearance is obtained. The decision of the Commission is expected in 2018 but has not been published yet. The outcome of the European decision is unclear. However, the ECJ ruled in June 2018 that a similar German tax advantage in restructuring situations (Section 8c(1a) KStG) is not prohibited European state aid. This ruling could influence the European Commission decision. For the interim period, the tax administration issued an order that the court ruling shall not have the effect of a general guideline but be reduced to the individual and single case that was decided by the court. However, this order was declared void by another Federal Tax Court decision in April 2018. Therefore, the uncertainty regarding tax relief of restructuring profits continues. Each individual case needs special attention and professional counsel.

ii  Out-of-court restructuring initiative
On 12 March 2014 the European Commission published a recommendation calling for the implementation of a legal framework for efficient pre-insolvency restructurings as part of the general harmonisation of European insolvency law. According to the recommendation, national legislators should provide for out-of-court restructuring proceedings available to debtors that are likely to become insolvent. The European Commission pursued its goals by publishing an action plan in September 2015 and conducted a European consultation process in spring 2016.

This European initiative fuelled the long-existing discussion in Germany as to whether the country needs a special out-of-court restructuring regime. Many experts think that Germany is lacking an important restructuring tool because cramdown proceedings in out-of-court restructurings are not possible under existent law. As a result some companies use foreign restructuring rules, in particular the English scheme of arrangement. Several pressure groups started initiatives in order to persuade the German government to present an out-of-court restructuring bill.

In November 2016, the European Commission published a proposed Directive containing suggestions for such tools; this is now in the law-making process. From this point, the question in Germany is no longer if, but when, a legal instrument for pre-insolvency restructurings will be introduced. However, it will take another two years before the Directive

27  https://juris.bundesfinanzhof.de/cgi-bin/rechtsprechung/document.py?Gericht=bfh&Art=en&Datum=Aktuell&nr=36772&pos=5&anz=29%A.

© 2018 Law Business Research Ltd
becomes binding for all Member States. The new German government that came into office in 2018 stated that it will accelerate the harmonisation of European insolvency law. This could mean that Germany will introduce an out-of-court-restructuring process soon.

iii Review of insolvency act reform (ESUG)

When the GIA was reformed in 2012, the law-makers included a compulsory review of the reform after five years. This review was carried out by an expert group in 2017 and the beginning of 2018. The report has been finalised but has not been published by the German Department of Justice yet. It is expected that following the report further steps to facilitate the restructuring process and to eliminate certain deficiencies of the 2012 reform will be taken by the German government. Potentially, the rules for the umbrella protection proceedings (see Section I. iii) will be modified. A more general review of the 2012 reform comes to the conclusion that the overall trend to more specialised restructuring advice is accelerating: in three out of four cases of the Top 50 insolvencies in 2017, the managing director has been replaced by a restructuring specialist. Additionally, in one-third of these proceedings one of the Top 5 Insolvency law firms and their restructuring specialists have been instructed by the companies.

Chapter 8

GREECE

Athanasia G Tsene

I INSOLVENCY LAW, POLICY AND PROCEDURE

i Statutory framework and substantive law

Greek legislation and regulation pertaining to insolvency

The Bankruptcy Code was enacted by Law 3588/2007 (effective as of 10 July 2007), replacing older provisions on insolvency (both in connection with winding up and rehabilitation). The Bankruptcy Code has subsequently been amended several times, including by Law 3858/2010, 4013/2011, 4336/2015, 4446/2016, 4472/2017, 4491/2017 and 4512/2018. The Bankruptcy Code and each of the above laws amending the Bankruptcy Code include transitory provisions concerning insolvency proceedings opened before the entry into force of the new legislation. This chapter is limited to the insolvency proceedings currently available under the Bankruptcy Code, as amended and in force following its amendment by Law 4512/2018.

The Bankruptcy Code only applies to business undertakings, which include sole traders, partnerships, companies and unincorporated legal entities that pursue a financial purpose. Other laws specifically regulate the winding up and reorganisation of certain regulated entities (such as credit and financial institutions, briefly referred to in Section I.vi).

In addition, Law 4307/2014 regulates certain pre-insolvency proceedings that are available for:

a the settlement of debts of small businesses and professionals, in each case for business loans; and

b the extraordinary debt settlement and special administration of businesses qualifying as merchants under the Bankruptcy Code.

Furthermore, Law 4469/2017 was very recently enacted and regulates out-of-court workouts available to debtors who are individuals and legal entities that are capable of being declared bankrupt, have revenues from business activities and are tax resident in Greece, provided that their financial indebtedness, tax indebtedness or other indebtedness to public law legal entities meets the criteria provided for in that law.

No analysis is included on the proceedings of settlement of debts of small businesses and professional and extraordinary debt settlement of Law 4307/2014 and Law 4460/2017, as they apply if certain criteria are met and are more likely to be relevant to small businesses. Furthermore, with respect to individuals, Law 3869/2010 (as amended and in force) applies

---

1 Athanasia G Tsene is a partner at Bernitsas Law.
to over-indebted individual debtors and provides for separate proceedings, intended to partially discharge and restructure indebtedness arising from non-business bank loans and credit; no analysis is included on these proceedings in this chapter.

**Distributional priorities**

The Bankruptcy Code, the Code of Civil Procedure and the Code for the Collection of Public Revenues include specific provisions on the priority of claims of creditors and distinguish between: (i) claims with a general privilege (a general privilege applies by operation of law and concerns, among others, claims on account of VAT and other taxes, claims of public law entities, claims of employees and social security funds and, under the Bankruptcy Code, also concerns credit facilities granted as rescue funding after the opening of insolvency proceedings subject to certain criteria being met); (ii) claims with a special privilege (which include those of secured creditors); and (iii) unsecured claims.

The opening of insolvency proceedings does not affect the priority ranking of validly created security (claims of item (ii) above) and secured creditors (as opposed to unsecured creditors) can initiate individual enforcement proceedings for their secured claim following the opening of insolvency proceedings against the debtor (provided that, depending on the type and stage of the insolvency proceedings, a stay may be imposed in accordance with the Bankruptcy Code).

The distinction between claims with a general privilege, claims with a special privilege and unsecured claims is critical in the context of distribution of the proceeds of liquidation of the assets over which security has been created. Claims with a general or special privilege are satisfied in priority over unsecured claims.

Where there are only claims with a general privilege and claims with a special privilege, claims with a general privilege may only be satisfied up to one-third of the proceeds of liquidation of the bankruptcy estate. Where there are claims of all three categories (general privilege, special privilege and unsecured), those with a general privilege are satisfied up to 25 per cent, those with a special privilege are satisfied up to 65 per cent and unsecured claims are satisfied up to 10 per cent of the proceeds of liquidation of the bankruptcy estate. Where there are no claims with a special privilege, those with a general privilege are satisfied up to 70 per cent and unsecured claims are satisfied up to 30 per cent of the proceeds of liquidation of the bankruptcy estate. Where there are only claims with a special privilege and unsecured claims, claims with a special privilege are satisfied up to 90 per cent and unsecured claims are satisfied up to 10 per cent of the proceeds of liquidation of the bankruptcy estate.

There is a material exception from the above allocation, as follows: under Article 156a of the Bankruptcy Code, if there are any new claims (arising after 17 January 2018) secured by a pledge or mortgage over assets that were not previously subject to security, allocation will be made in the following order:

1. the generally privileged claims for rescue funding credit facilities;
2. claims benefiting from special privilege (including secured claims);
3. the other generally privileged claims (for taxes etc.) and the claims benefiting from special privilege for expenses incurred for the collection of fruit from the asset; and
4. unsecured claims.

The above are subject only to a super-priority of any claims of employees arising before the declaration of bankruptcy, for unpaid salaries of up to six months, subject to a cap specified
in respect of those employees’ claims and following deduction of court expenses, costs for the administration of the bankruptcy estate, the remuneration payable to the receiver and the collective claims (i.e. those arising after declaration of bankruptcy).

**Vulnerable transactions**

Vulnerability of transactions is determined by reference to the date of ‘cessation of payments’, which is set by the bankruptcy court in its judgment declaring bankruptcy in respect of an insolvent debtor in accordance with the Bankruptcy Code. Cessation of payments means evidenced general and permanent inability of a debtor to pay its debts as they fall due. The date of cessation of payments so set by the court cannot fall earlier than two years prior to the date of the issue of the judgment declaring bankruptcy.

Under Article 42 of the Bankruptcy Code, certain acts carried out by the debtor during the suspect period (which is the period commencing on the date of cessation of payments and ending on the date of the declaration of bankruptcy by the court) are subject to compulsory rescission by the bankruptcy officer. These acts include:

a. any acts of the insolvent debtor carried out without consideration being received in return and that have the effect of reducing the value of the debtor’s estate and any contracts entered into by the debtor for which the debtor received disproportionate consideration;

b. any payment of debts that are not yet due and payable;

c. any repayment of due and payable debts not made by payment in cash or in the pre-agreed manner; and

d. any security interest created over the debtor’s assets to secure a pre-existing debt where the debtor had not pre-agreed to grant such a security interest.

In addition, under Articles 43 and 47 of the Bankruptcy Code, certain acts carried out by the debtor during the suspect period, which are not subject to compulsory rescission as above, may be subject to rescission by the bankruptcy officer. Acts subject to challenge in this manner include:

a. any payment of debts that are due and payable, or any transaction entered into by the debtor for consideration, if the relevant party or creditor (as the case may be) was aware of the cessation of payments and such a payment or transaction is detrimental to the other creditors (and, for these purposes, deemed awareness applies in respect of a person or entity being an affiliate of the debtor within the meaning of Article 32 of Law 4308/2014); and

b. payment of bills of exchange or promissory notes, if the issuer of the bill of exchange was aware, on the date of issue of the bill, that the payer of the bill had ceased to make payments as they fell due, or if the first endorser of the promissory note was aware of the cessation of payments of the issuer of the promissory note.

Exceptionally, certain transactions may be vulnerable even if concluded earlier than the set date of cessation of payments. Under Article 44 of the Bankruptcy Code, acts of the debtor concluded within a period of five years immediately prior to the declaration of bankruptcy, where the debtor intended the act to operate to the detriment of its creditors in general or to benefit certain creditors to the detriment of other creditors, are subject to rescission, if the relevant party was, at the time of the act, aware of the debtor’s intention.
Protection against rescission in certain circumstances

The Bankruptcy Code further provides for protection against rescission in certain circumstances. Under Article 45 of the Bankruptcy Code, no rescission is available in respect of:

a acts falling within the scope of the debtor’s business or of professional activities that are concluded in ordinary circumstances and in the ordinary course of the debtor’s trade;

b acts of the debtor expressly excluded by law from the scope of application of the provisions on rescission during the suspect period (these include mortgages, pre-notations of mortgage and pledges created in favour of banks to secure credit and loan agreements or already existing obligations);

c where a restructuring plan is cancelled because of a failure to implement the plan, acts of the debtor carried out during the implementation stage of the restructuring plan (as defined in the Bankruptcy Code); and

d payments or deliveries by the debtor made in return for consideration of equal value.

Further protection may be available under Article 46 of the Bankruptcy Code (in addition to the protection accorded by other laws transposing into Greek law EU Directives on settlement and payment systems and financial collateral), which provides that:

a in relation to a settlement made or security provided in connection with a transaction in securities on an exchange, the rules regulating that exchange will determine whether such a settlement or provision of security is valid or subject to rescission;

b the provisions that apply to a financial collateral arrangement determine whether the relevant financial collateral arrangement is valid or whether it is subject to rescission; and

c the rules regulating a payment or settlement system or a money market determine whether set-off rights exercised in connection with relevant payments or transactions have been validly exercised or are subject to rescission.

Policy

With respect to the treatment of businesses in financial difficulties, the tendency (on the part of both the creditors and the debtors) is to make efforts to keep failing businesses operating. Partly because of the fact that the Bankruptcy Code was recently enacted and has been repeatedly amended, and, as a result, insufficient market or court precedent could not provide safe guidance to all parties concerned, partly because of inefficiencies of the Greek court system and partly because of the lack of specialised insolvency practitioners, the rehabilitation provisions of the Bankruptcy Code have often been used by debtors as a means of delaying creditors and not in a genuine effort to rehabilitate their failing businesses. The latest amendments of the Bankruptcy Code (in 2017 and 2018) introduced material changes in the provisions regulating the rehabilitation agreement, which are in the right direction but have not yet been tested in practice.

Therefore, creditors (especially banks) have so far tended to prefer to consider out-of-court restructuring arrangements with debtors in financial difficulties well before an actual need to commence any insolvency proceedings under the Bankruptcy Code. These restructuring arrangements mostly concern the restructuring of existing financial indebtedness and may also provide for new funding (whether by existing lenders or shareholders or new investors) or business restructuring measures.
iii Insolvency procedures

Under the Bankruptcy Code (as amended by the New Provisions and the Latest Amendments), the following insolvency proceedings are available for debtors meeting the insolvency criteria:

a bankruptcy, which is regulated by Articles 1–98 of the Bankruptcy Code (except for the simplified bankruptcy proceedings in respect of small debtors (provided that the debtor meets at least two of the following three criteria: (1) the value of the bankruptcy estate does not exceed €150,000; (ii) the net turnover based on the latest financial statements does not exceed €200,000; and (iii) the employees are no more than five in average), which are regulated by Articles 162–163(γ) of the Bankruptcy Code);

b a rehabilitation agreement under the Bankruptcy Code (Articles 99–106(στ)) entered into between a debtor and its creditors and then submitted to the court for ratification, where there is evidence of the actual or foreseeable inability of the debtor to pay its debts as they fall due; and

c a restructuring plan under the Bankruptcy Code (Articles 107–131) following its approval by the court and the creditors.

In addition to the above, special administration is available under Articles 68–77 of Law 4307/2014 (as amended) in respect of business undertakings that are capable of being declared bankrupt and are domiciled in Greece and meet certain criteria.

Bankruptcy and special administration are liquidation proceedings; note, however, that special administration is primarily intended to transfer the assets (or groups of assets) of an undertaking as a whole (and may therefore manage to preserve the business but not the insolvent entity). Rehabilitation agreements (also available pre-bankruptcy in the case of a foreseeable inability to pay debts as they fall due) and restructuring plans (only available after declaration of bankruptcy) are rehabilitation proceedings.

The Bankruptcy Code provides that various steps of the proceedings need to be concluded within specified periods; however, the actual time frame for the proceedings may be longer than what could be expected based on the letter of the law. Based on limited market precedent on successful rehabilitation proceedings, conclusion and ratification of a rehabilitation agreement can be concluded within eight months to one year. Bankruptcy has so far been primarily used for small or relatively small businesses (usually without prospects of rehabilitation) and completion of the proceedings by liquidation can take five years (if the proceedings are not prematurely terminated for lack of funds); there is insufficient precedent on restructuring plans to provide guidance as to whether the strict deadlines provided for under the Bankruptcy Code could be complied with in practice. Special administration is a procedure that has been introduced in replacement of the special liquidation that was made available under an amendment of the Bankruptcy Code; special administration is a procedure required to be completed within a 12-month period and, failing completion, bankruptcy proceedings must be opened.

However, the rehabilitation agreement, restructuring plan and special administration may prove useful in proceedings where there is a workable plan for the business or the assets (as the case may be) and readily available funding by new investors with the agreement of the creditors, in which case these proceedings could operate almost as a ‘pre-pack’ process. The latest amendments of the Bankruptcy Code are intended to make these proceedings more expedient and efficient, including by setting stricter time frames for completion of various stages of these proceedings and by strengthening documentary and expert evidence requirements in connection with the rehabilitation prospects.
With respect to ancillary proceedings in Greece, the provisions of EU Regulation (EC) No. 1346/2000 (the Insolvency Regulation) and EU Regulation (EU) 2015/848 (the Recast Regulation) and of the United Nations Commission on International Trade Law (UNCITRAL) Model Law on Cross-Border Insolvency of 1997 (the UNCITRAL Convention) are relevant.

Under the Insolvency Regulation, all the above proceedings are available in Greece for insolvent debtors having the centre of their main interests (within the meaning of the Insolvency Regulation) in Greece. Council Implementing Regulation No. 663/2014 was adopted in June 2014, replacing Annexes A, B and C of the Insolvency Regulation. This regulation amended the Greek Annex entries so that bankruptcy (including a restructuring plan under the Bankruptcy Code and the simplified bankruptcy proceedings for small debtors) and special liquidation are listed in Annex A and can, therefore, be main proceedings for the purpose of the Regulation; note, however, that special liquidation is no longer available under the Bankruptcy Code and special administration of Law 4307/2014 is not included in the proceedings falling within the scope of the Insolvency Regulation. Rehabilitation proceedings are listed in Annex A to the Recast Regulation and, therefore, are available as main proceedings from 26 June 2017. Where main proceedings have been initiated in another EU country in respect of a debtor having the centre of its main interests in that other EU country, ancillary proceedings are available in Greece under the Bankruptcy Code if that debtor has an establishment in Greece (within the meaning of ‘establishment’ under the Insolvency Regulation). Very limited court precedent is currently publicly available on ancillary proceedings in Greece in connection with an establishment in Greece of a debtor having the centre of its main interests in another EU country.

The UNCITRAL Convention, which applies to non-EU states, was ratified by Law 3858/2010 and may prove very helpful for the purposes of recognition by the Greek courts of insolvency proceedings commenced in another jurisdiction, with a view to protecting assets of the insolvency estate located in Greece.

iv Starting proceedings

Rehabilitation agreement

The rehabilitation procedure (Articles 99–106(στ) of the Bankruptcy Code) is available on the application of the debtor or any creditor in order for the court to ratify a rehabilitation agreement concluded between the debtor and creditors of the debtor (or between creditors of the debtor only).

This procedure is available: (1) in respect of a rehabilitation agreement concluded by the debtor and creditors of the debtor, if there is evidence of an actual or foreseeable financial inability on the part of the debtor to pay its debts as they fall due in a general manner, or evidence that there is a likelihood that the debtor will become insolvent unless rehabilitated; and (ii) in respect of a rehabilitation agreement concluded only by creditors of the debtor, if there is evidence that the debtor is in cessation of payments at the time the rehabilitation agreement was entered into by its creditors.
The court may also sustain the debtor’s application if it assesses that the debtor is already in cessation of payments, provided that the debtor, at the same time, files for bankruptcy and also files an expert report.

Where a rehabilitation agreement has been concluded between the debtor and its creditors, the application for ratification of the rehabilitation agreement filed with the court must be supported by the following documents: (i) a copy of the signed private rehabilitation agreement; (ii) latest available financial statements of the debtor; (iii) certificate of outstanding indebtedness of the debtor towards the Greek state; and (iv) an expert report on the financial condition of the debtor, a list of the debtor’s assets, the accuracy and completeness of the creditors’ list, the market conditions and compliance with the legal criteria for ratification of the rehabilitation agreement, data provided by the debtor, the situation of the market and the satisfaction of the legal requirements for the ratification of the agreement; the expert is selected by the debtor and the contracting creditors.

Where the rehabilitation agreement is concluded only by the debtor’s creditors, the documents of items (ii)–(iv) above must accompany the application for ratification only if already available to the creditors; if there are any missing documents, the court may suspend the issue of its judgment and order the debtor to provide them to the appointed expert (which is selected by the creditors). Eligible experts are banking institutions, certified auditors and auditing firms.

The hearing of the application for the ratification of the rehabilitation agreement is set no later than two months from filing. If the debtor is not a contracting party to the agreement, the debtor must be notified at least 20 days prior to the hearing. The court may also order notification of one or more creditors within a set period before the hearing. Furthermore, a summary of the application should be published in the Bulletin of Judicial Publications within five days from the submission of the application to the court.

There are no particular restrictions on what may be included in a rehabilitation agreement, other than the agreement cannot be against the law. Matters commonly covered may include:

a. the amendment of the financial terms of the creditors’ claims (including, without limitation, changes with respect to the due dates or the interest rate, the replacement of interest payments with payments out of future profits or a change in the ranking order of existing security interests);
b. the conversion of debt into equity whether by the issue of new shares or by the issue of convertible bonds;
c. intercreditor arrangements whether by reference to the status of the creditors as creditors or by reference to their status as shareholders following conversion of debt into equity, including, without limitation, designation of new or different classes of senior and subordinated debt;
d. the reduction of the amount of the creditors’ claims, on account of principal or interest;
e. the sale of the assets of the debtor;
f. the assignment of the administration of the debtor’s business to a third party, the transfer of the business or part of the business of the debtor to a third party or to a company established by the creditors, the stay of individual creditor enforcement following ratification of the agreement for a specified period, such stay not being binding on dissenting creditors beyond three months after ratification of the agreement;
the appointment of a person who will monitor compliance with the terms of the rehabilitation agreement, with the powers and duties provided for in the rehabilitation agreement; and

additional payments that must be made if the debtor's financial condition improves. The rehabilitation agreement may also include termination provisions and may also provide that a breach of its terms operates as a resolutory condition (dialytiki airesi) cancelling the rehabilitation agreement.

It may also include conditions precedent (anavlitiki airesi) with respect to all or any of its five terms, in which case there must be a longstop date within which any such condition precedent must be satisfied. This longstop date must not extend beyond nine months from the date of ratification by the court of the rehabilitation agreement.

The rehabilitation agreement is entered into as a private agreement unless the obligations contemplated therein require the parties to enter into a notarial deed. Where the approval of the general meeting of shareholders of the insolvent debtor is required for the implementation of the rehabilitation agreement, the Bankruptcy Code provides court protection seeking to prevent unreasonable delays or objections on the part of the shareholders by appointing a special representative authorised to exercise their voting rights, in order to efficiently enable the debtor and the creditors to implement the rehabilitation agreement.

The rehabilitation agreement must be approved by the required majority of creditors, being at least 60 per cent of all creditor claims including at least 40 per cent of the secured claims. For quorum and majority purposes, all claims are evidenced on the basis of the books and records of the debtor. Secured creditors vote as a single class.

The hearing of the debtor’s application is set no later than two months from filing. The court will ratify a rehabilitation agreement duly approved by the creditors if the following criteria are cumulatively met:

a. it is likely that the debtor will remain viable following the ratification of the rehabilitation agreement;
b. the rehabilitation agreement is not likely to be detrimental to creditors’ collective recoveries;
c. the rehabilitation agreement is not the result of malicious, wrongful or unlawful acts of the debtor, any creditor or third party, including acts committed in breach of antitrust laws;
d. the rehabilitation agreement treats creditors of the same class equally, provided that deviations from the equal treatment principle may be permitted for a serious business or social reason explained in detail in the court judgment, or where the affected creditors have consented to unequal treatment; and
e. where the ratification of a rehabilitation agreement is requested by the creditors, the debtor is deemed to consent if it has not notified the court that it objects until the hearing of the creditors’ application.

The court will ratify the agreement without assessing whether the criteria of item (a) has been met, if: (i) the agreement includes an explicit statement by the contracting creditors that they agree to the content of the business plan accompanying the rehabilitation agreement; (ii) the agreement includes a detailed list of the contracting and non-contracting creditors and of their respective claims, and also includes specific reference to those creditors (contracting or non-contracting) that will be affected by the agreement and of the way in which they will
be affected; and (iii) the agreement and the accompanying business plan have been duly notified to all non-contracting creditors affected by the agreement (including by publication in accordance with the requirements of the Bankruptcy Code).

The debtor, the creditors (as parties to the rehabilitation agreement) and a representative of the employees have a right to be heard at the ratification hearing. Any party having a legitimate interest may also join in the proceedings without any prior formalities. The court’s judgment ratifying the rehabilitation agreement is only subject to third-party opposition, a remedy available to persons who are not parties to the proceedings. The court’s judgment denying ratification is subject to appeal by a party to the proceedings. The court judgment ratifying or denying ratification of a rehabilitation agreement must be published, without undue delay, with the General Commercial Registry and the Bulletin of Judicial Publications of the Single Fund of Independent Professionals, on application of the debtor or any creditor.

Once ratified by the court, the rehabilitation agreement becomes fully binding on the debtor and on all creditors, including creditors who did not agree to it. It is not binding, however, on creditors whose claims came into existence following the opening of rehabilitation proceedings.

**Bankruptcy**

Under the Bankruptcy Code, bankruptcy proceedings commence by a declaration of the court on the application of any creditor, the debtor or the attorney general, if the debtor is generally and permanently unable to pay its debts as they fall due. Furthermore, the debtor itself is obliged to commence bankruptcy proceedings within 30 days of the date on which it became unable to repay its debts; in addition, the debtor may apply for the commencement of bankruptcy proceedings if there is a likelihood of such inability, provided that the debtor’s application is accompanied by a proposal for a restructuring plan under Articles 107 et seq. of the Bankruptcy Code. Third parties will not receive any notice of an application to commence bankruptcy proceedings.

The Bankruptcy Court declares bankruptcy if, based on the financial information made available to it, the debtor’s estate is sufficient to cover the costs of the proceedings. A judgment of the Bankruptcy Court declaring bankruptcy is enforceable from the morning of the date of its publication by the Bankruptcy Court. However, the bankruptcy declaration may be subject to revocation by the Bankruptcy Court or appeal before the Court of Appeals or the Supreme Court. The declaration may also be opposed or reinvestigated before the Bankruptcy Court. The initiation of any of these proceedings does not, of itself, suspend the enforceability of the bankruptcy declaration.

The purpose of bankruptcy is to ensure that the debtor’s property is liquidated for the satisfaction of the creditors’ claims in accordance with their respective rights of priority.

From the declaration of bankruptcy, a bankruptcy officer is appointed and is responsible for the administration of the debtor for the purposes of liquidating and distributing the proceeds of liquidation to the creditors, in accordance with their respective rights of priority. Commencing from 29 December 2016, as the receiver can be appointed an individual (being a lawyer, an auditor or first rank accountant) certified by the Committee of Insolvency Practitioners and registered with the Registry of Insolvency Practitioners. The debtor is deprived of the administration of its pre-bankruptcy estate but is not deprived of the administration of its post-bankruptcy estate.
A ‘judge rapporteur’ (i.e., a judge of the Bankruptcy Court) is also appointed to supervise the procedure and submit reports when required; the bankruptcy officer will seek the prior approval of the judge rapporteur in relation to various actions during the performance of his or her duties.

During the bankruptcy procedure, creditors can give notice of their claims to the court and the bankruptcy officer. The bankruptcy officer is assisted by the committee of creditors (elected by the meeting of creditors), which also monitors the proceedings. Decisions of the meeting of creditors or of the committee of creditors (as the case may be) are required for various matters (including in respect of the continuation of the operation of the business, if considered necessary to preserve the value of the assets); specific majority percentages apply, depending on the stage of the proceedings and the matter on which decision must be made.

If at any stage it is determined that there is no cash available to finance the bankruptcy proceedings, the court may issue a judgment ordering the cessation of the proceedings. In any case, bankruptcy proceedings will lapse: (i) after a period of 10 years from the stage of the proceedings that is called the union of creditors; (ii) after a period of 15 years from the declaration of bankruptcy; (iii) upon the final approval and ratification of a restructuring plan; (iv) upon completion of liquidation of the bankruptcy estate; or (v) upon repayment of all debts (including interest and principal) which fell due before the declaration of bankruptcy.

Debtors that are individuals may apply to the court for their discharge towards their creditors in respect of debts that were not satisfied from the proceeds of liquidation of the bankruptcy estate. That application may be filed after the second anniversary of the declaration of bankruptcy or after the date of cessation of the bankruptcy proceedings (whichever comes first) and the discharge may be declared by the court if the debtor is found by the court to have acted in good faith and in a spirit of cooperation at the time of declaration of bankruptcy and throughout the bankruptcy proceedings. No discharge can be declared for debts resulting from wilful misconduct or grossly negligent conduct on the part of the debtor. These criteria are not examined and the discharge is effective anyway upon ratification of a restructuring plan.

**Restructuring plan**

A restructuring plan may be initiated on the application to the court of:

- the debtor, either at the same time as its application to be declared bankrupt or within three months of the date of the declaration of bankruptcy (the three-month period may be extended by the court for a further period of not more than one month, provided that it is evidenced that the extension would not be detrimental to the creditors and there are serious indications that the creditors would accept the restructuring plan); or

- creditors representing at least 60 per cent of the total liabilities of the debtor (including at least 40 per cent of secured claims and other claims with a special privilege), together with their application to the court for the declaration of bankruptcy in respect of the debtor. Calculation of the above percentages must be made and confirmed by a qualifying accountant or auditor on the basis of the latest published financial statements of the debtor (or the debtor’s accounting books and records, as the case may be).

For these purposes, the Bankruptcy Code includes specific requirements on the content of the draft restructuring plan. Creditors must approve a draft restructuring plan before it is implemented. Accordingly, creditors will receive notice of the meeting to discuss and vote on the restructuring plan. There is, however, no general obligation to inform third parties of the meeting to consider the restructuring plan.
Creditors secured by a mortgage, pre-notation of a mortgage or a pledge will continue to be secured by that security interest except to the extent that the draft restructuring plan provides otherwise (i.e., the plan can affect secured creditors’ rights). The draft restructuring plan may not provide for the reduction of claims to less than 10 per cent of their original amount and must provide for repayment within three years.

The court will set a date not more than two months from declaration of bankruptcy or from initiation of a restructuring plan process (as the case may be under (a) or (b) above), for the special meeting of the creditors (attended by the judge rapporteur), who will need to discuss and vote on the approval of the restructuring plan. Creditors not affected by the restructuring plan are not entitled to vote at the meeting. Creditors not attending the meeting are deemed to vote in favour of the restructuring plan unless their claim is reduced to nil by the restructuring plan, in which case they are deemed to reject the restructuring plan. The restructuring plan must be approved by creditors representing at least 60 per cent of the total claims against the debtor (including at least 40 per cent of any secured claims).

Following its approval by the creditors, the restructuring plan is submitted to the court for ratification. The debtor and the bankruptcy officer may provide their comments to the court. Any party with a legitimate interest in the debtor’s restructuring may also intervene in the process. If the restructuring plan provides that specific obligations have to be performed or other steps have to be taken by the debtor or by other parties prior to the ratification of the restructuring plan by the court, the restructuring plan will only be ratified by the court following the performance of such obligations or the taking of those steps.

Following the hearing, the court may ratify the restructuring plan or reject the restructuring plan (of its own motion or on the application of a creditor having a legal interest in the plan) on the express rejection grounds provided for in the Bankruptcy Code. The ratifying or rejecting judgment of the court is subject to appeal. The filing of an appeal does not suspend the restructuring process contemplated by the restructuring plan.

When the judgment ratifying the restructuring plan becomes final and conclusive (i.e., it is no longer subject to appeal) the restructuring plan becomes binding on all creditors (including any dissenting creditors, any creditors that have not filed their claims and any creditors that have not attended the meeting of creditors) and the bankruptcy process is concluded. The restructuring plan will then form the basis for the reopening of individual enforcement proceedings against the debtor by creditors. Furthermore, the court’s judgment itself constitutes an enforceable right in respect of any obligation undertaken in the restructuring plan.

The Bankruptcy Code also provides for the circumstances in which a ratified restructuring plan may become void or voidable, and the consequences of cancellation. Furthermore, the restructuring plan is automatically cancelled if the debtor is declared bankrupt by the court after the ratification of the restructuring plan by the court. Following such an automatic cancellation:

- any claims of creditors not fully discharged under the restructuring plan are restored to their status as they existed prior to the ratification of the restructuring plan by the court;
- security interests released under the restructuring plan will not revive unless expressly provided to the contrary in the restructuring plan and annotated in the public books of the competent land register or cadastre;
security interests created pursuant to the restructuring plan continue to secure the relevant secured claims up to the amount and for the time agreed in the restructuring plan unless the restructuring plan provides otherwise; and

claims arising from financing granted after the ratification of the restructuring plan by the court rank as generally privileged claims.

Special administration

Law 4307/2014 (Articles 68–77) introduced special administration, in respect of business undertakings that are capable of being declared bankrupt and are domiciled in Greece. Special administration is available in respect of qualifying debtors that are: (i) generally and permanently unable to pay their debts as they fall due; or (ii) in respect of a debtor being a company limited by shares (société anonyme), meet the criteria for an application for dissolution of the company by court decision under Article 48 of Law 2190/1920 for at least two consecutive financial years (including on the basis that the own funds of the company have fallen below one-tenth of the paid-up share capital).

Special administration commences with the filing of an application to the court of first instance of the debtor's principal place of business; the application is submitted by one or more creditors (including, at least, one credit institution or a financial leasing company or a factoring company supervised by the bank of Greece), provided that such creditor or creditors represent claims of at least 40 per cent of the aggregate debtor's indebtedness. The application must also nominate the proposed special administrator and be accompanied by a declaration by that proposed special administrator that it will accept to take on this role, if appointed by the court.

Upon filing of the application for the special administration any pending insolvency proceedings are automatically suspended. During the period commencing at filing of the application until the issue of the court judgment on the application, the court may, on application by a third party with legitimate interest, order a stay of individual enforcement proceedings against the debtor, a prohibition of disposals by the debtor or any other appropriate preventive measure.

If the debtor is placed under special administration, all enforcement proceedings are automatically suspended until completion of the special administration. Upon publication of the judgment placing a debtor into special administration, the powers of the constitutional bodies and of the management of the undertaking are transferred to the special administrator.

For the appointed special administrator to continue the operation of the business and to cover special administration expenses (including its remuneration), the special administrator may conclude financing agreements or agreements for the supply of goods or services that will benefit from the first ranking privilege of Article 154(a) of the Bankruptcy Code.

The special administrator is mandated to liquidate at least 90 per cent of the book value of the debtor's business and assets through public tender within 12 months from the date of issue of the court judgment on the application for the placement of the debtor into special administration.

Liquidation may be effected either by sale of the business as a whole or by sale of operational parts of the business or by sale of individual assets. The results of the public tender must be ratified by the court. The claims of the creditors will be satisfied out of the proceeds of the liquidation of the debtor's assets.
If the 12-month deadline is not met, the special administration proceedings are terminated and the special administrator must file an application for the declaration of debtor’s bankruptcy.

v Control of insolvency proceedings

All insolvency proceedings under the Bankruptcy Code are opened by court judgment (with the exception of the rehabilitation agreement, which is first entered into between the debtor and creditors and subsequently ratified by the court) and completion of each stage of the proceedings is under the supervision, and subject to a judgment or order, of the competent court.

Creditors can commence bankruptcy proceedings, can also reach a rehabilitation agreement between creditors and submit it to the court for ratification and can also commence special administration proceedings. They can also participate in the proceedings by lodging their claims, supporting (or opposing) various steps of the proceedings (where permitted under the Bankruptcy Code, depending on the type of the proceedings) and also participate in meetings of creditors; specific majority percentages are required by reference to the type and stage of the proceedings under the Bankruptcy Code. Creditors are also entitled to apply for temporary measures intended to preserve the business or the assets of the insolvent debtor (or to oppose any such measures applied for by the debtor, other creditors or other parties, as the case may be) in accordance with the provisions of the Bankruptcy Code.

Specific duties are provided for under the Bankruptcy Code for the members of the board of directors. Failure to file (or delay in filing) for bankruptcy upon cessation of payments exposes the directors to personal and criminal liability. The same applies where bankruptcy results from gross negligence or wilful misconduct of the directors, or in the case of loss-making or extraordinarily risky transactions, inappropriate borrowings, misleading or incomplete company books and records, failure to prepare and approve financial statements or inventories as required by law, undue disposals or deterioration of assets, or preferential payments to the detriment of other creditors. Furthermore, the directors have personal and criminal liability in cases of tax indebtedness, in accordance with tax legislation.

vi Special regimes

Banks, broker dealers, insurance companies and other regulated financial institutions are excluded from the general insolvency regime of the Bankruptcy Code. Specific provisions apply with respect to their reorganisation and winding up; these provisions transpose into Greek law relevant EU Directives. See Section V, on credit institutions and investment firms.

Law 4335/2015 transposes into Greek law EU Directive 2014/59/EU on recovery and resolution of credit institutions and investment firms (the Banks Recovery and Resolution Directive (BRRD)).

The implementation of the BRRD by virtue of Law 4335/2015 has been material for the purposes of the recapitalisation of the Greek banks in 2015 and will provide the authorities with a credible set of tools to intervene sufficiently early and quickly in an unsound or failing institution so as to ensure the continuity of the institution’s critical financial and economic functions, while minimising the impact of an institution’s failure on the economy and financial system. In particular, four resolution tools and powers (sale of business, bridge
institution, asset separation and bail-in) will be immediately available (except that the general bail-in resolution tool did not apply before 1 January 2016) and may be used alone or in combination where the relevant resolution authority considers that:

- an institution is failing or likely to fail;
- there is no reasonable prospect that any alternative private sector measures would prevent the failure of such an institution within a reasonable time frame; and
- a resolution action is in the public interest.

No special insolvency rules apply to corporate groups outside the regulated financial sector.

vii Cross-border issues

The Insolvency Regulation, the Recast Regulation and the ratified UNCITRAL Convention are relevant (within their respective scopes of application) to territorial jurisdiction and cross-border insolvency requiring main proceedings in Greece and secondary proceedings outside Greece or vice versa.

Furthermore, Law 3458/2006 transposes into Greek law EU Directive 2001/24/EC on the reorganisation and winding up of credit institutions with respect to relevant cross-border issues, and Law 4335/2015 transposes into Greek law EU Directive 2014/59/EU on recovery and resolution of credit institutions and investment firms (the Banks Recovery and Resolution Directive; BRRD).

There is limited Greek court precedent concerning cross-border insolvency cases, and none of that precedent deals with matters that could be regarded as controversial in the context of the domestic legislation or of the above provisions that are relevant to cross-border insolvency.

There is market precedent to suggest that in the case of large corporates with activities in different jurisdictions various structures have been used or considered (by means of a change of place of registered office outside Greece or by cross-border corporate transformations) with a view to enabling the debtor and its creditors to achieve restructuring under foreign law, primarily in order to ensure successful completion within a shorter period and protect against uncertainties resulting from the recent enactment and subsequent amendments of the Bankruptcy Code. However, the most recent amendments of the Bankruptcy Code are in the right direction and may also prove helpful for the purposes of restructuring, including of large or medium corporates.

II INSOLVENCY METRICS

Greece went into recession during the third quarter of 2008 and has proceeded with fiscal adjustments and structural reforms as required by the Economic Adjustment Programme under the financial support scheme agreed with the Troika (International Monetary Fund(IMF), EC and European Central Bank). During these years of recession, there has been a substantial gradual decline in domestic consumption, investment and fixed capital formation, in parallel with a substantial increase in exports and an unprecedented increase in unemployment (27.8 per cent – the highest level on record).²

The fiscal performance in 2013 resulted in a primary surplus (which allowed the Greek state to return to the international capital markets by issuing new bonds). At the same time, a decline in the interest rate of Greek bonds, a slight increase of household consumption and a slower decline in public consumption, together with an expectation for a stable increase of public expenditure for investment and a strong upward trend of the exports of services (outpacing the marginal contraction expected in the exports of goods) were suggested by economists as indications that in 2014 the Greek economy was on the road to recovery after six years of recession. The political and economic uncertainty in the first semester of 2015 reversed that positive development; the capital controls imposed in June 2015 further strengthened the downward trend of the Greek economy in 2015.

In July 2015, the Greek government submitted a request for financial assistance to the ESM. An agreement was reached between Greece and the European Institutions, with input from the IMF, and the Financial Assistance Facility Agreement with the ESM and the reform agenda set out in a memorandum of understanding were approved on 19 August 2015.

During the first semester of 2015, the political and economic uncertainty, the deterioration of the macroeconomic environment, the outflow of deposits, the increase of non-performing loans and the capital controls had a negative impact on the Greek banks; the ESM Financial Assistance Facility Agreement provided for a specific buffer to be used for potential bank recapitalisation and resolution needs; the recapitalisation of the Greek systemic banks was successfully completed within 2015.

Within the context of the ESM Financial Assistance Facility Agreement specific deliverables have been provided for on the part of the Hellenic Republic, including for the purposes of assessing the currently applicable provisions of the Bankruptcy Code with a view to introducing any further changes that may be considered appropriate. The most recent amendments were introduced as part of these deliverables.

GDP remained flat in the last three years, with a positive development since the first quarter of 2017, combined with an increase of investment cost and positive growth of household consumption. The economy has stabilised after the crisis in 2015, there is a slight but steady drop in unemployment rates (primarily because of an increase in part-time employment) and the primary fiscal balance has been in surplus in the past three years, supported by ongoing fiscal consolidation.

However, the remaining (though relaxed) capital controls, the high taxation rates (combined with persistent estimated tax evasion rates), the volume of non-performing loans (in respect of which Greek banks in the last semester of 2017 started to take radical measures by sales of non-performing portfolios, which are expected to continue) and the limited access to financing continue to present serious challenges and hold back investment, while poverty and inequality remain among the highest in the euro area.
The final review of the ESM Financial Assistance Facility Agreement was successfully completed in June 2018 and the ESM programme has expired; in addition to the short-term debt relief measures that are already in place, medium-term debt relief measures are contemplated in order to ensure debt sustainability. On 11 July 2018, the EU Commission activated an enhanced surveillance framework for Greece, intended to ensure continuation of the implementation of all key reforms adopted under the ESM programme and sustain their objectives, as well as complete certain key structural reforms initiated under the ESM programme against agreed deadlines.

III PLENARY INSOLVENCY PROCEEDINGS

There is no publicly available Greek court precedent concerning recent and significant plenary insolvency proceedings in Greece involving large corporates or corporate groups. The available Greek court precedent involves small and medium insolvency cases, without any major controversial issues and not relevant to complex business or financial restructuring measures; therefore, no points worth noting can be drawn from the available court precedent.

However, during the past 24 months there have been voluntary restructuring arrangements involving:

a multinational groups with a Greek subsidiary outside any insolvency proceedings under the Bankruptcy Code and without a closely foreseeable insolvency of the Greek subsidiary;
b Greek project companies within project finance schemes; and
c Greek corporates in respect of indebtedness under corporate loans.

In all these cases, the arrangements have been entered into in an effort to ensure the continuation of operations and to agree rescheduling of existing indebtedness, new funding (where required) and new inter-creditor arrangements in a timely manner, before the occurrence of any event or circumstance that could present a real risk to the creditors or to the debtor's business. The details of these restructuring arrangements cannot be disclosed, as they are subject to confidentiality, in accordance with the practice followed in financing transactions.

IV ANCILLARY INSOLVENCY PROCEEDINGS

There is very limited publicly available Greek court precedent concerning ancillary insolvency proceedings in Greece for foreign-registered companies during the past 12 months.

---

V TRENDS

Law 4335/2015 (which, among other things, transposed the BRRD into Greek law) and the recent amendments (during the period 2015–2018) of the Bankruptcy Code and of the Code of Civil Procedure, as well as of Law 4307/2014 (including on special administration) and Law 3869/2010 on over-indebted individual debtors were enacted as a prior action for the purposes of the ESM Financial Support Facility Agreement, with the intention of improving the legal framework pertaining to business and non-business insolvency in line with the reforms agreed with the European Institutions and the IMF. It is expected that these reforms will continue to be implemented, including because of the enhanced surveillance framework activated by the EU Commission in July 2018.
Chapter 9

HONG KONG

Scott Bache, Joanna Charter and Robert Child

I  INSOLVENCY LAW, POLICY AND PROCEDURE

i  Statutory framework and substantive law

Hong Kong insolvency law and practice is substantially based on insolvency law and practice in the United Kingdom. Hong Kong does not, however, benefit from the extensive reforms introduced in the United Kingdom by the Insolvency Act 1986 so that, for example, in Hong Kong there is, currently, no ‘rescue’ procedure akin to administration in the United Kingdom. The concept of ‘wrongful trading’ has also not been legislated for in Hong Kong.

Corporate insolvency in Hong Kong remains primarily governed by the remaining provisions of the old companies ordinance, renamed the Companies (Winding Up and Miscellaneous Provisions) Ordinance (CWUMPO), as amended by the Companies (Winding Up and Miscellaneous Provisions) Amendment Ordinance (the Amendment Ordinance), which came into effect on 13 February 2017.

The bulk of the provisions set out in the specialist resolution regime for financial institutions in Hong Kong (FIRO) came into effect on 7 July 2017, meaning that Hong Kong has now largely met its obligations as a member of the Financial Stability Board. Accordingly, while in theory the winding up in Hong Kong of an international bank remains possible, in the case of its financial distress some form of resolution under FIRO is the most likely scenario. While the Hong Kong Monetary Authority, the Securities and Futures Commission (SFC) and the Insurance Authority retain statutory powers to commence administrative proceedings such as the appointment of special managers, as these powers do not relate to insolvency processes they are generally beyond the scope of this chapter.

ii  Policy

The Hong Kong legislature has not modernised Hong Kong insolvency law to keep pace with an increasingly globalised world. A corporate rescue regime was first raised in 1996: the Companies (Corporate Rescue) Bill was then proposed in 2001 but failed to gain legislative acceptance. The Bill remains on the drawing board. Despite this lack of modernisation,
Hong Kong has (and continues to have) a workable restructuring culture largely as a result of judicial pragmatism. This pragmatism is evidenced in the UNCITRAL Model Law on Cross-Border Insolvency, and consequently there is no statutory process for formal recognition of foreign proceedings.

The lack of any rescue procedure in Hong Kong leaves creditors with a stark choice: seek to agree an out-of-court restructuring or turn to a formal liquidation process that will mean the demise of the corporate entity and likely present severe difficulties in saving the underlying business. Prior to 2006, accepted practice in Hong Kong had been to appoint provisional liquidators (PLs) with a view to implementing a restructuring by way of a scheme of arrangement. However, in the decision in Re Legend International Resorts Ltd (Court of Appeal), the Court of Appeal effectively closed off this avenue for companies in distress where its creditors could not also show a jeopardy to assets at the time of the PL appointment.

In recent years there have been a number of cases where the Hong Kong judiciary have shown themselves to be proactive in developing procedures for assisting the restructuring of companies with a Hong Kong connection through a flexible interpretation of the existing legal framework, edging closer to the pre-Legend position. Rather than appoint a PL in Hong Kong, the current approach is to appoint PLs in the jurisdiction of incorporation, where ‘soft-touch’ or ‘restructuring’ PLs are either not prohibited or expressly permitted for the purpose of promulgating a restructuring. The PLs can then approach the Hong Kong court with letters of request and seek recognition orders for general or specific requirements. This is particularly relevant given the prevalence in Hong Kong for companies operating and/or listed in Hong Kong to have been incorporated in offshore jurisdictions such as the British Virgin Islands, the Cayman Islands or Bermuda.

Notwithstanding these developments, Hong Kong remains desperately in need of legislative reform for its insolvency processes. In this regard, there may be some light at the end of the tunnel. The Financial Services and the Treasury Bureau continues to consult with stakeholders on certain issues to be addressed in the amendment bill, the most recent consultation taking place in April 2018. There is an intention to introduce a corporate rescue and insolvent trading bill to the Legislative Council during the 2018/19 session.

The proposals are intended to introduce a method of corporate rescue (to be known as ‘provisional supervision’) akin to administration in the United Kingdom, with a moratorium on the commencement and continuation of proceedings. Critically, this would include the enforcement of security by secured creditors and would start automatically on the entry of the company into provisional supervision. An independent person (the provisional supervisor) would be appointed to take temporary control of the company and consider

---

4 Note, however, the decision in Re China Solar Energy Holdings Ltd [2018] 2 HKLRD 338, where the Hong Kong Court clarified that the decision in Re Legend did not prevent PLs appointed on traditional asset preservation grounds from being granted restructuring powers and implementing such a restructuring through a scheme of arrangement.
5 For example, at the end of 2017, of the 1,794 companies listed on the Main Board of the Hong Kong Stock Exchange, approximately 47 per cent were incorporated in the Cayman Islands and 26 per cent were incorporated in Bermuda.
options for rescuing it. The proposed insolvent trading regime would make a director of a company civilly liable for its insolvent trading, and require the director, on the order of the courts, to pay compensation to the company’s stakeholders. It is currently uncertain whether any bill will include proposals to implement the UNCITRAL Model Law on Cross-Border Insolvency.

iii Insolvency procedures

Leaving aside less formal restructuring processes (which are fairly prevalent in the absence of a statutory corporate rescue regime), the insolvency regime in Hong Kong still revolves primarily around liquidation and provisional liquidation. These formal procedures are often combined with a scheme of arrangement to effect a cramdown of dissenting creditors within the same class where necessary. Hong Kong law relating to schemes of arrangement is largely based on English law, and the body of cases coming out of that jurisdiction are persuasive in Hong Kong. We do not discuss schemes of arrangement in any more detail in this chapter.

Liquidation

Liquidation is also referred to as ‘winding up’, of which there are two types:

a a compulsory winding up or winding up by the courts; and

b a voluntary winding up:

• members’ voluntary winding up (i.e., solvent liquidation), which is not an insolvency process as the directors must file a declaration of solvency; and

• creditors’ voluntary winding up (CVL), initiated by the shareholders of an insolvent company, once it is considered that there is no prospect of a viable restructuring.

Power also exists under Section 228A of the CWUMPO for a director (without first consulting shareholders) to commence a voluntary winding up of the company and seek the appointment of a provisional liquidator. This is rarely used, owing to the particular statutory requirement that no other form of winding up should be reasonably practicable, which the directors must state to be the case (with appropriate justification) in the winding-up statement to be delivered to the Registrar of Companies.

Provisional liquidation

The appointment of a PL can be sought at the time of the presentation of a winding-up petition by the official receiver or any creditor or contributory. The primary objective of such an appointment is to preserve the assets and records of a company, for the benefit of its creditors, in the interim period between the presentation of the winding-up petition and the granting of a winding-up order by a court. It is common for PLs to be appointed in this interim period where the winding-up petition is disputed, but stakeholders can also seek the appointment of PL as an end in itself, provided the necessary criteria are met. The application to the courts for the appointment of a PL is often underpinned by a desire to combat the perceived risk that directors (or shareholders) may dissipate assets of the company in the period before a winding-up order is made and, indeed, it is necessary to satisfy the court that the assets of the company are in jeopardy for the appointment to be made. There is no moratorium on the enforcement of security by secured creditors during the period between the presentation of the petition for winding up and the making of the order for winding up,
or when a PL has been appointed, or when a winding-up order has been made. There is, however, a general stay on proceedings against the company on the making of a winding-up order and on the appointment of a PL.7

In Re Legend International Resorts Ltd (Court of Appeal),8 it was held first that the traditional basis in Hong Kong for the appointment of PLs under Sections 192 and 193 of the CWUMPO (that there had to be a showing of assets in jeopardy) still held direct application. Further, the wording of Section 192 was very clear: the appointment of a PL had to be for the purposes of the winding up. Provided such purpose existed, there would be no objection to giving the PL restructuring powers as well.9 Second, there was still a significant difference between the appointment of PLs on the basis that the company was insolvent and that its assets were in jeopardy, which was permissible, and the appointment of the PL solely for the purpose of enabling a corporate rescue to take place, which was not. Finally, there was no basis in the particular circumstances for the appointment of PLs as the assets of the company were not shown to be in jeopardy.10 While the principles in Re Legend remain the law in Hong Kong, in the recent case of Re China Solar Energy Holdings Ltd11 the court confirmed that the PLs may continue in office to implement a restructuring once those asset preservation concerns cease to apply, holding that this did not defeat the principle of requiring the appointment to be for the purposes of the winding-up.

An alternative approach was adopted in Z-Obee Holdings Ltd12 where the Hong Kong winding-up petition of a company incorporated in Bermuda was stayed and the Hong Kong-appointed PLs ultimately dismissed in order to allow the appointment of provisional liquidators in Bermuda with a specific restructuring power (as allowed under the Bermudian legislation) in Bermuda. Once appointed, the Bermudian PLs were granted recognition in Hong Kong. The court subsequently approved a scheme of arrangement in Hong Kong promoted by the PLs appointed in Bermuda.13 This is of particular importance given that the rule in Gibbs14 continues to apply in Hong Kong, thereby preventing a foreign law scheme of arrangement from being used to compromise Hong Kong-law-governed debt.

Ancillary proceedings

Local procedures15 in Hong Kong allow for ancillary proceedings where main proceedings are pending in another country. In this regard, unregistered companies (for example, a Hong Kong branch of a company incorporated overseas) that have some sufficient connection with Hong Kong can be wound up in what are called ‘concurrent’ proceedings. See Section I.vii.

7 Section 186 of the CWUMPO.
9 Re Review, Re Luen Cheong Tai International Holdings Ltd [2002] 3 HKLRD 610 considered.
12 HCMP 663/2017.
13 Re Z-Obee Holdings Ltd [2018] 1 HKLRD 165.
14 Antony Gibbs and sons v. La Société Industrielle et Commerciale des Métaux (1890) 25 QBD 399. Broadly, the rule is that, as matter of English law, a debt governed by English law may only be validly compromised by an English law process.
15 Section 327 of the CWUMPO.
iv Starting proceedings

CVL

The CVL process is commenced by the passing of a special resolution to wind up the company at a general meeting of the members.16 A meeting of creditors (to be held in accordance with Section 241 of the CWUMPO) should then take place on a date not later than 14 days after the day of the meeting of members, and notice should be given of the meeting to all creditors at least seven days before the day on which the meeting is to be held.

The chair (usually a director of the company) will take creditors’ alternative nominees for the liquidator’s role (if any) – an initial nomination will have been made by the members at the general meeting – and a vote will be taken. In the event of any conflict, the creditors’ choice will prevail.17 The usual practice in Hong Kong is for two liquidators to be appointed who will act jointly and severally. A committee of inspection (COI) may also be established, which will take a prominent advisory role in the CVL, exercising a degree of supervision and control over the liquidator.

Court winding up

The vast majority of winding-up petitions are presented by unsecured creditors, and are most frequently brought on the grounds that a company is unable to pay its debts. However, it should be noted that winding up by the court is not limited to instances where a company is insolvent; a petition can be made to the court where there are ‘just and equitable grounds’ to do so,18 for example, in cases involving suspected fraud.

Under Section 178 of the CWUMPO, a company is deemed unable to pay its debts, in summary, where:

\( a \) the company fails to satisfy – within three weeks of the service of a notice in the prescribed form – a debt exceeding HK$10,000;19

\( b \) the enforcement of a judgment of the court against the company has not been satisfied; or

\( c \) it appears to the court that the company is unable to pay its debts, taking into account the contingent and prospective liabilities of the company. Often, the test relied upon is a cash-flow test, but a balance-sheet test may also be used.

A total of 458 winding-up petitions were presented to the Hong Kong High Court in 2016, 403 were presented in 2017 and 213 were presented between the start of 2018 and 1 August 2018.20

The potential time lapse between the presentation of a winding-up petition and the declaring of a winding-up order may stretch to several months, in particular if the petition is

16 Section 230 of the CWUMPO: the special resolution is one pursuant to Section 228(1)(b) of the CWUMPO, that the company be wound up voluntarily. The meeting is called by the directors of the company on, in the case of a limited company, 14 days’ notice (or such longer period as is prescribed in the company’s articles of association); see Sections 562, 564 and 571 of the Companies Ordinance.
17 Section 242 of the CWUMPO.
18 Under Section 177(1)(f) of the CWUMPO.
19 The Amendment Ordinance has introduced a prescribed form of statutory demand.
20 Numbers are taken from copies taken of the cause book for Company Winding-up Proceedings at the Hong Kong High Court. These numbers do not give an indication of how many of these companies were subsequently wound up, nor under which statutory grounds the petitions were submitted.
opposed. This may present difficulties for creditors and directors, particularly in light of the retrospective calculation of the date of the commencement of the winding-up (deemed to be the date of the presentation of the petition).

**Presentation of a winding-up petition**

The following parties may present a winding-up petition:

- The company;
- Any creditor or creditors;
- A contributory or contributories;
- The official receiver in respect of a company that is being wound up voluntarily;
- The Registrar of Companies;
- The Financial Secretary (in a case falling within Sections 879(1) or 879(3) of the Companies Ordinance, for example, where it is expedient in the public interest);
- The SFC can petition in the public interest in respect of listed companies and leveraged foreign exchange traders; and
- The Insurance Authority can petition in relation to insurers under the Insurance Companies Ordinance.

**Appointment of a liquidator**

On the making of a winding-up order, the official receiver becomes the liquidator of the company pending (unless one has been previously appointed) separate meetings of creditors and contributories of the company to determine who will act as liquidator. Where no agreement can be reached, the official receiver will offer the name of the next person on the rota system of the Administrative Panel of Insolvency Practitioners for Court Windings Up (also known as Panel A or the ‘cab rank’ system). If further disputed, the court will decide who is to be appointed as it sees fit, in the interest of all parties, and it need not have regard for the recommendations of the meetings of either creditors or contributories.

**v Control of insolvency proceedings**

The making of a winding-up order results in the termination of the company directors’ powers of management; the subsequent question of who will exercise control over the company and of the liquidation differs, to a degree, between a CVL and a court winding up.

**CVL**

Liquidators have wide-ranging statutory powers as regards the realisation of the assets of the company and the winding up of its affairs. However, those powers that are exercisable without an element of supervision or prior sanction or permission are narrowly defined (although more extensive in the context of a CVL). Under Section 199(2) of, and Schedule 25 to, the CWUMPO a liquidator has the power to, *inter alia*, sell company property, execute documents and claim in the insolvencies of debtor companies and individuals. A creditor or contributory can refer questions on the exercise of these powers to the court.\(^{22}\)

---

\(^{21}\) The SFC utilised its powers under Section 212 of the Securities and Futures Ordinance in July 2013 for the first time in relation to China Metal Recycling (Holdings) Limited: on 26 February 2015 the Hong Kong High Court ordered that China Metal Recycling (Holdings) Limited be wound up in the public interest.

\(^{22}\) Such a power exists under Section 255(1) of the CWUMPO in respect of a CVL.
The COI, if appointed, will take a general supervisory role and the liquidator will report to or seek advice from the COI on the conduct of the liquidation. The COI also has the power to fix the remuneration of the liquidator.\(^{23}\) The liquidator can only take specified actions where he or she has first obtained the sanction of the COI or the court (or where there is no COI, at a meeting of the creditors), for example, to pay any class of creditors in full or to make a compromise or arrangement with creditors.\(^{24}\) The potential exists, however, for the liquidator to apply to the court for such sanction where this is not forthcoming from the COI, which may be granted if deemed in the best interests of the company.\(^{25}\) The Amendment Ordinance provides for the composition of the COI and procedures in relation to a COI meeting. A COI must consist of not less than three and not more than seven members, with the possibility this might be varied upon application by the liquidator to the court.\(^{26}\)

**Court winding up**

Court supervision of the conduct of a liquidation is more far reaching in the context of a compulsory winding up. Examples of the powers available to the court include:

\(a\) summary cases: In instances where the assets of an insolvent company are likely not to exceed HK$200,000, the court may make an order for the company to be wound up in a summary manner;\(^{27}\) the order may be rescinded should further assets of the company come to light;\(^{28}\)

\(b\) regulating orders: In the interest of efficiency or expediency, the court has the power to dispense with some of the procedural requirements (i.e., for certain meetings to take place);\(^{29}\)

\(c\) staying the winding up: With good reason, the court has a general power to stay the winding-up proceedings at any time after a winding-up order has been made, either altogether or for a limited time;\(^{30}\) and

\(d\) conversion of a compulsory liquidation into a CVL: This concept is unusual, and it has rarely been used.\(^{31}\)

The powers exercisable by a liquidator without sanction are fewer in the case of a compulsory winding up. The general powers of a liquidator under Section 199 of the CWUMPO (which have been reframed by the Amendment Ordinance) are subject to the control of the court, and a request for the review by the court of any action of a liquidator may be submitted by any creditor or contributory.\(^{32}\)

---

23 Section 244(1) of the CWUMPO; in the absence of the COI, the creditors may fix the remuneration of a liquidation.
24 Section 251(1)(a) of, and Schedule 25 to, the CWUMPO.
25 Re Luen Lick Water Drainage Works Ltd, CFI HCCW 209 [2002].
26 Sections 243(1) and 243(1A) of the CWUMPO.
27 This could include the OR or existing PL being the liquidator without holding a meeting of creditors, and there being no COI. The goal of this approach is to minimise the costs of the liquidation.
28 Power of the court exists under Section 227F of the CWUMPO.
29 Power of the court exists under Section 227A of the CWUMPO.
30 Power of the court exists under Section 209 of the CWUMPO.
31 Power of the court exists under Section 209A of the CWUMPO.
32 Creditors or contributories (or a liquidator themselves) may refer questions to the court on the conduct of a court winding up under Section 200 of the CWUMPO.
The court also has the power to remove a liquidator. Creditors may apply for a liquidator to be removed, and may choose to do so where they were unable to secure the initial appointment of their preferred liquidator. 33

Guidance notes as regards a liquidator’s role and his or her investigation of the affairs or assets of a company have been produced by the Hong Kong Institute of Certified Public Accountants. The Amendment Ordinance expands the list of people disqualified from appointment as a liquidator or PL to avoid conflicts of interest.

Reviewable transactions
A liquidator in Hong Kong may seek to challenge the actions of a company (e.g., by invalidating security or voiding transactions) taken during the applicable risk period prior to the company commencing winding up. The length of the risk period varies, depending on the type of challenge and the circumstances of the transaction. The main reviewable transactions are summarised below: the notable exception being that Hong Kong has no wrongful trading provisions.

Unfair preferences
An unfair preference is an act (e.g., granting of security or guarantee) that has the effect of putting a creditor, a surety or a guarantor in a better position than it would otherwise have been in upon a winding up of the company. The general risk period is six months, but is increased to two years if the unfair preference is granted to a person who is connected with the company.

Transactions at an undervalue
A transaction is at an undervalue if the company makes a gift or where there is no consideration or where the consideration is significantly less than the value of the consideration provided by the company. The risk period is five years from the commencement of the winding up and the company must have been unable (or became unable) to pay its debts at the time of the transaction. It is a defence to show that the company entered into the transaction in good faith and for the purpose of carrying on its business and there were at the time reasonable grounds for believing that the transaction would benefit the company.

Avoidance of floating charges
A floating charge will be invalid except, broadly, to the extent of any consideration received by the company at the same time as (and in exchange for) the creation of the charge. The risk period is 12 months, or two years for a transaction with a connected party, from the date of the winding up. The company must also have been unable (or became unable) to pay its debts at the time of creation of the charge.

Extortionate credit transactions
A credit transaction is extortionate if (taking into consideration the credit risks) credit is provided for grossly exorbitant payments (either actual or contingent e.g., on default) or the transaction grossly contravenes principles of fair dealing. The risk period is three years.

33 Power to remove a liquidator exists under Section 252 of the CWUMPO (CVL) and Section 196(1) of the CWUMPO (court winding up).
Fraudulent conveyances

Although rarely invoked, this section provides for the voidability of dispositions made with the intent to defraud creditors. There is no time limit, and the section applies whether or not the company making the disposition is being wound up or insolvent.

vi Special regimes

As stated in Section I.iv, the SFC has unique statutory power to commence liquidation proceedings in respect of particular types of entities. Hong Kong also now has a specialist resolution regime for financial institutions under FIRO.

While the detail of FIRO and the changes wrought by its introduction are outside the scope of this text, it is useful to understand the broad scope of FIRO when considering the landscape of insolvency-related measures available in Hong Kong. FIRO provides a comprehensive resolution regime for the banking, insurance, securities and futures sectors, including branches of financial institutions incorporated outside Hong Kong, locally incorporated holding companies and associated operating entities, clearing houses and recognised exchanges. FIRO provides a full menu of stabilisation options that are available to the resolution authority to utilise where: (1) a within-scope financial institution has ceased, or is likely to cease, to be viable; (2) there is no reasonable prospect that private sector measures outside of resolution would result in the institution becoming viable again within a reasonable period; and (3) the non-viability of the institution poses risks to the Hong Kong financial system. These options include the transfer of the failing financial institution or some or all of its businesses to a commercial purchaser, the transfer of some or all of its businesses to a bridge institution, the transfer to an asset management vehicle, the statutory bail-in of certain obligations and, as a last resort, taking the financial institution into temporary public ownership. The objectives throughout are to promote the stability and effective working of the financial system in Hong Kong (including the continuity of critical financial functions), to protect deposits and insurance policies; to protect client assets and, subject to satisfying the preceding objectives, to protect public funds by containing the costs of resolution.

Recognising the cross-border nature of the business of many financial institutions operating in Hong Kong, FIRO also gives the resolution authority the ability to recognise a foreign resolution process.

vii Cross-border issues

As has already been noted, the Hong Kong courts have wide discretionary powers to wind up a company incorporated outside Hong Kong where the relevant company has some suitable connection with Hong Kong. Recent cases have confirmed that the court will examine closely the need for such proceedings. In Re Pioneer Iron and Steel Company Limited34 the Court of First Instance reiterated that:

a Sections 327(1) and (3) of the CWUMPO give the courts a discretionary jurisdiction to wind up an unregistered company; and

b its jurisdiction would be exercised if the following three core requirements, which had been stated in Re Yung Kee Holdings,35 were satisfied:

---

34 HCCW 322/2010 unreported judgment of 6 March 2013.
• there is a sufficient connection with Hong Kong. In the context of insolvency there is commonly the presence of assets, but this is not essential;
• there is a reasonable possibility that the winding-up order would benefit those applying for it; and
• the court must be able to exercise jurisdiction over one or more persons interested in the distribution of the company’s assets.

The court continued to say that an exceptional case could arise where the connection with Hong Kong was so strong and the benefits of a winding-up order for the creditors of a company so substantial that the court would be willing to exercise its jurisdiction despite the third criterion not being satisfied. This was then tested in Re China Medical Technologies Inc.36 Here the Court of First Instance rejected a petition for winding up where it was not satisfied that it would be able to exercise jurisdiction over one or more persons interested in the distribution of the company’s assets (determining that a Hong Kong-based creditor with a low value claim was not sufficient to meet this requirement) and that the connection with Hong Kong was not strong enough and the benefits of a winding up to the creditors of the company were not so substantial so as to enable the court to exercise its jurisdiction without the third criterion being satisfied. A few months later, new evidence came to light that suggested that persons and bank accounts in Hong Kong had played a key role in a suspected fraud in Hong Kong. The Cayman liquidators sought to reopen the hearing of the petition on the basis that a sufficient connection to Hong Kong was established by the presence of these persons and accounts; the court held that the new evidence showed that there was a sufficient connection with Hong Kong and there was benefit in making a winding-up order, and so such an order was made, notwithstanding that the third core requirement was not satisfied. The Court of Appeal in Hong Kong has subsequently confirmed that this decision was correct, in particular noting that there did not need to be evidence of persons interested in the distribution of assets in HK to sustain such an outcome.37

The three-part test set out above was affirmed by the Court of Final Appeal in the long-running Yung Kee Holdings38 case; the Court of Final Appeal also held that the same test applies whether the winding-up petition has been presented by a creditor or a shareholder. However, the court noted that the factors to which the court will look in determining whether there is a sufficient connection between a (solvent) foreign company and Hong Kong in the context of a shareholders’ petition are different to those to which it looks in the context of a creditors’ petition to wind up an (insolvent) company because the nature of the dispute and the purpose for which the winding-up order is sought are different.

Two recent cases demonstrate that the court takes a dim view of what it sees as deliberate attempts to avoid its jurisdiction to wind up foreign companies. In Penta Investments Advisers Ltd v. Allied Wel Developments Ltd,39 the Court of Appeal found that (among other things) moving the company’s operations out of Hong Kong to the Marshall Islands to claim that it did not presently have a sufficient connection would not prevent a winding-up order being made. As the court said: ‘the connection, once established, remains even after the matters giving rise to the original connection have ceased to exist’. In Re Shandong Chenming Paper

38 Kam Leung Sui Kwan v. Kam Kwan Lai and Ors (FACV No. 4 of 2015).
39 [2017] HKEC 1475.
Holdings Ltd v. Arjowiggins HKK 2 Ltd, the company, which was listed in Hong Kong, had both refused to pay an undisputed judgment debt and attempted to remove its connection to Hong Kong by way of a corporate reorganisation. The court in Hong Kong was not impressed with this behaviour and declined to make an order preventing the creditor from bringing a winding-up petition – see Section III.vi for more details.

While Hong Kong does not have a statutory provision enabling the courts to assist foreign insolvency proceedings, in addition to the power to wind up unregistered companies, the court also has, as a matter of common law, the power to recognise and grant assistance to foreign insolvency proceedings. In Joint Official Liquidators of A Co v. B, the Court of First Instance took the opportunity to issue a reminder that the court may, pursuant to a letter of request from a common law jurisdiction with a similar insolvency law, make an order of a type that is available to a provisional liquidator or liquidator under Hong Kong’s insolvency regime. In this case, a request had been made by the liquidators of a Cayman company, on a letter of application from the Grand Court of the Cayman Islands, for the production of certain documents to the liquidators. In making the order requested, the Hong Kong court noted that the status of a foreign liquidator of a foreign company is the same as that which the directors of that company had prior to the winding up, but that a distinction needed to be made between information and assets, and that in the case of property an application would need to be made by the foreign liquidator for an order vesting him with title to the local property. This approach was followed, and the scope of order granted was expanded, in a line of cases including Re Centaur Litigation SPC. In making the requested orders in Re Centaur, the court included a provision that would require any person wishing to commence proceedings in Hong Kong against any of the companies to first obtain the court’s leave. The judge who made the order stated that the intention was to broadly replicate the impact of the making of a winding-up order in Hong Kong without the need for a petition and the engagement of the entire Hong Kong insolvency regime. Interestingly, in Re Supreme Tycoon Ltd, the court held that a foreign insolvent liquidation commenced in BVI by way of a shareholders’ resolution was eligible for recognition by the Hong Kong court – see Section III.iv.

In The Joint Administrators of African Minerals Ltd (in administration) v. Madison Pacific Trust Ltd, the Court of First Instance was asked, pursuant to a letter of request from the English High Court, to consider providing assistance to insolvency proceedings in England which took the form of an administration of a non-English entity under the supervision of the English High Court. The assistance sought was the recognition of the English proceedings and an order restraining the enforcement over security granted by the company in administration (the secured creditor being incorporated in, and carrying on business in, Hong Kong). For the purposes of the decision, the Court assumed (but without deciding) that the Hong Kong court can, in principle, recognise liquidators appointed in a jurisdiction other than the place of incorporation or administrators appointed by the High Court of England. However, the Court reiterated that although the Hong Kong court can take a generous view of its power to assist a foreign liquidation process, this is limited by the

40 [2017] 4 HKLRD 84.
41 Similar, for example, to Section 426 of England’s Insolvency Act 1986.
44 [2015] HKCU 875.
extent to which the type of order sought is available to a liquidator in Hong Kong under Hong Kong's insolvency regime, common law and equitable principles: as Hong Kong does not have any statutory provision that provides for a moratorium on the enforcement of a secured debt, the court could not make the orders sought.

An important practical issue that arose over the course of 2016 was whether in addition to ordering the production of documents that a liquidator would expect to obtain as a matter of course, the court's common law power extended to ordering the production of documents or examination of persons that would historically have required an application under Section 221 of the CWUMPO.\textsuperscript{45} In \textit{BJB Career Education Co Ltd},\textsuperscript{46} the Court of First Instance made an order, following a request from the Cayman Islands' court for recognition and assistance, for the delivery of documents, answers to questions and oral examination of a director without requiring the foreign liquidators to commence an action under Section 221. This approach was followed in \textit{Re Pacific Andes Enterprises (BVI) Ltd}.

\textsuperscript{47} The court went further in \textit{Bay Capital Asia Fund LP v. DBS Bank (Hong Kong) Ltd},\textsuperscript{48} chastising the defendant bank (and its solicitor) for refusing to hand over documents relating to bank accounts that would ordinarily be freely available to the director of a company.

In practical terms, it is important to remember that Hong Kong does not have a specialist insolvency court. In practice, petitions for winding up and related insolvency law cases appear to be primarily directed to a handful of judges with experience in this area.

\section*{II INSOLVENCY METRICS}

There continues to be a distinct lack of significant formal liquidation processes in Hong Kong. As an indication of how the Hong Kong insolvency regime is viewed externally, the lowest score Hong Kong received from the World Bank’s \textit{Doing Business} report 2018\textsuperscript{49} was in the resolving insolvency section, ranking 43rd, compared to its overall ease of doing business ranking of 5.

The Hong Kong economy remains reasonably buoyant and there are, as a consequence, limited defaults on debt obligations. There has, however, been a recent increase in defaults by companies either listed in or with connections to Hong Kong with significant business operations in China. This is considered further in Section V.

\section*{III PLENARY INSOLVENCY PROCEEDINGS}

\textbf{i Re Z-Obee Holdings Ltd}\textsuperscript{50}

This case is a good example of both the flexibility of the Hong Kong courts and of judicial cooperation across common law jurisdictions. Initially provisional liquidators had been

\textsuperscript{45} Section 221 of the CWUMPO empowered the court to order the production of documents relating to a company or to summon any person who has information about a company’s affairs for an examination; the Amendment Ordinance repealed this section and replaced it with new Sections 286B and 286C.

\textsuperscript{46} [2017] 1 HKLRD 113.

\textsuperscript{47} HCMP 3560/2016, [2017] HKEC 146.

\textsuperscript{48} [2016] HKEC 2377.


\textsuperscript{50} [2018] 1 HKLRD 165.
appointed in Hong Kong to Z-Obee Holdings Limited (a Bermuda-incorporated, Hong Kong overseas registered company). However, concern with the impact of *Re Legend*\(^{51}\) (see Section I.iii (Provisional liquidation)) and the inability to appoint provisional liquidators solely for the purpose of restructuring in Hong Kong meant that the parties had to adopt an unusual and novel approach to the restructuring.

A successful application was made by the company to appoint PLs in Bermuda for the purpose of facilitating a restructuring. (There is no equivalent restriction in Bermuda on appointing PLs solely for the purpose of restructuring, i.e., the restrictions in *Re Legend* do not apply.) The Bermudian PLs were then granted recognition by the Hong Kong Court, which at the same time discharged the PLs who had been appointed in Hong Kong. The recognition expressly recognised that the Bermudian PLs had the power to carry out a restructuring of the company. The Hong Kong court went on to approve a scheme of arrangement proposed by the Bermudian PLs in Hong Kong.

This case is interesting for its novel and pragmatic approach to facilitating restructurings in Hong Kong in the absence of a formal corporate rescue regime and while the restrictions of *Re Legend* apply.

**ii Re China Solar Energy Holdings Ltd\(^{52}\)**

A creditor of China Solar Energy Holdings Ltd, a company incorporated in Bermuda and listed on the Hong Kong Stock Exchange, issued a summons to remove the PLs who had been appointed to the company on the grounds that their sole remaining function was to complete the company’s restructuring. The main thrust of the creditor’s argument was that the decision in *Re Legend*\(^{53}\) prevented PLs from being appointed solely for the purpose of restructuring in Hong Kong. It should be noted that the PLs were originally appointed on asset preservation grounds but were also granted powers to promulgate a restructuring.

The court disagreed with the creditor’s interpretation of *Re Legend* and held that there was nothing in Hong Kong to prevent PLs, properly appointed on asset preservation grounds, from both being granted restructuring powers (as explicitly stated in *Re Legend*) and from using those powers to complete a restructuring. The asset in question was the listing status of the company, and the PLs were appointed in part to protect that listing status. As such, granting the liquidators restructuring powers in connection with preserving that asset was entirely appropriate.

**iii Re China Lumena New Materials Corp\(^{54}\)**

This case clarified the requirements for foreign provisional liquidators to obtain the prior approval of the Hong Kong court in order to deal with assets of the company located in Hong Kong. Whereas the position in Hong Kong as regards information requests has been well established for a few years now (see, for example, *Bay Capital Asia Fund LP v. DBS Bank (Hong Kong) Ltd*,\(^{55}\) where the court held it was necessary to obtain a court order to obtain documents relating to a company’s bank accounts from the bank in question), the position around assets has been less clear.

---

\(^{51}\) [2006] HKCU 357.

\(^{52}\) [2018] 2 HKLRD 338.


\(^{54}\) [2018] HKCFI 276.

\(^{55}\) [2016] HKEC 2377.
By way of background, China Lumena New Materials Corp was a Cayman Islands company to which PLs had been appointed in that jurisdiction. The PLs had been granted formal recognition in Hong Kong but had sought a specific order to transfer amounts held in accounts of the company in Hong Kong out of the jurisdiction. The judge, Harris J, held that transferring assets out of the jurisdiction was a step too far for PLs to take without an order of the court. This tracked the position under the UNCITRAL Model Law on Cross-Border Insolvency (albeit that the Model Law has not been implemented in Hong Kong).

### iv Re Supreme Tycoon Limited

The court in Hong Kong declined to follow the Privy Council’s decision in *Singularis Holdings Ltd v. PricewaterhouseCoopers* that common law powers of recognition in cross-border insolvency cases would not extend to voluntary liquidations. This was in line with the decision of the Singapore court in *Re Gulf Pacific Shipping Ltd.* The Hong Kong court held that a voluntary liquidation was still a collective insolvency proceeding for the benefit of the general body of creditors, and as such it was open to the Hong Kong court to recognise the proceedings under the principle of modified universalism. The court did, however, state that this would not be the case for a solvent winding up, which was more akin a private arrangement.

This case concerned a company, Supreme Tycoon Ltd, incorporated in the British Virgin Islands in respect of which the joint liquidators of its parent company had passed a shareholders’ resolution to place it into voluntary liquidation in the BVI. The liquidators of Supreme Tycoon then sought a recognition order from the Hong Kong Court to obtain information, books and records about the company from third parties in Hong Kong. The case is of interest as it is the first time a court in Hong Kong has granted such a recognition order where the company in question was placed into a voluntary liquidation process.

### v Re Southwest Pacific Bauxite (HK) Ltd

A creditor of Southwest Pacific Bauxite (HK) Ltd issued a petition to wind up the company on the basis of an unpaid statutory demand. Southwest Pacific opposed the petition on the basis that the debt was the subject of a *bona fide* dispute on substantial grounds and related to a management services agreement between the parties that contained a clause requiring any disputes to be resolved by arbitration.

The status of the law in Hong Kong as regards such a scenario was that a company, in order to defeat a winding up petition after non-payment of a statutory demand, would have to demonstrate to the court a *bona fide* defence against the debt: the existence of an arbitration clause in the underlying contract would not itself be sufficient to stay the petition to allow for arbitration to be carried out. However, in this case the court held that a petition should generally be dismissed where the following three elements are present:

* a company disputes the debt relied on by the petitioner;
* the contract under which the debt is alleged to arise contains an arbitration clause that covers any dispute relating to the debt; and

57 [2014] UKPC 36.
59 [2018] 2 HKLRD 449.
the company takes the steps required under the arbitration clause to commence the contractually mandated dispute resolution process and files an affirmation demonstrating this.

The court also stressed that this was not a firm rule and that the court continued to retain its discretion whether or not to admit a petition, for example, to appoint PLs on asset preservation grounds notwithstanding that the above tests were met.

vi  Shandong Chenming Paper Holdings Ltd

Shandong Chenming Paper Holdings Ltd is a conglomerate with interests in papermaking, forestry, finance and real estate. The company is incorporated in China and listed on both the Shenzhen and Hong Kong stock exchanges. In November 2015, a creditor of Shandong Chenming obtained an arbitral award in Hong Kong and was subsequently granted leave by the Hong Kong court to enforce the award. The creditor served a statutory demand, which was not paid. However, the company first obtained an *ex parte* injunction to prevent the creditor from issuing a winding-up petition and subsequently sought a declaration from the Hong Kong court that the three core requirements to wind up an unregistered company would not be met, so as to prevent the creditor from presenting a petition. This was partly based on the company having undertaken a corporate restructuring whereby a direct subsidiary of the company incorporated in Hong Kong was moved to become an indirect subsidiary.

The court dismissed the company’s request for such a declaration. The court did so for a number of reasons and made its views on the company’s conduct very plain indeed. The case turned on the second of the three core requirements: whether the creditor would derive sufficient benefit from the order (the other two requirements being accepted as having been met). The court found that such a benefit could well be derived from the pressure it would place on the company that was solvent and had not disputed its ability to pay the debt in question, given the severe consequences to the company of the appointment of a liquidator. Further, the court rebuked the company for its unethical conduct and found that there was a public interest reason to dismiss the application (over and above the requirement to demonstrate a benefit to the creditor), namely to prevent foreign companies listing on the HKEX but refusing to abide by the laws of Hong Kong. The following passage is worth repeating in full:

> The Company has chosen to have a second primary listing in Hong Kong. An arbitration award has been made against it, which has now become enforceable as a judgment of this Court. The Company does not suggest that it cannot pay the Award. It simply refuses to do so and takes the position that there is nothing the defendant can do about it in Hong Kong. This seems to me to be unacceptable. The Company wishes to take advantage of Hong Kong’s financial system and the legal system that underpins it. Hong Kong’s legal system and courts provide investors both domestically and internationally with confidence in the reliability and integrity of the financial system. The Company’s refusal to honour the Award shows disregard for the integrity of our legal system and, in a non-technical sense at least, contempt for the High Court of Hong Kong. If the Company wishes to be listed in Hong Kong it should honour the Award. . . . There is a public interest in steps being taken to remedy this conduct and to disabuse other Mainland companies of the idea that they can take the

---

60  *Shandong Chenming Paper Holdings Ltd v. Arjowiggins HKK 2 Ltd* [2017] 4 HKLRD 84.
benefit of access to Hong Kong’s financial system without the burden of complying with our laws. In the circumstances of this case the obvious and appropriate step is the winding up of the Company in Hong Kong and the delisting of its H shares.63

Ultimately, the petition was adjourned with Shandong Chenming being required to pay into court the amount of the statutory demand plus interest, totalling HK$389,112,432.44. To date, no winding up of the company has been commenced in Hong Kong.

IV ANCILLARY INSOLVENCY PROCEEDINGS

The key cases involving ancillary insolvency proceedings in Hong Kong are set out in Section I.vii.

V TRENDS

There is general anticipation that insolvency activity in Hong Kong will increase during the coming year. This is largely as a consequence of the commonly held view that the economic cold winds in China will inevitably lead to an upturn in formal insolvency processes in Hong Kong given that there are a number of Hong Kong-incorporated entities and overseas incorporated entities that have their principal place of business in Hong Kong but conduct their key business activities in mainland China. Witness the continued growth in the number of bond defaults in China, hitting around 28.5 billion yuan by the end of July 2018.62 This has fed into defaults by companies with connections to Hong Kong. For example, Hsin Chong Group Holdings Limited, listed on the Hong Kong Stock Exchange with substantial exposures in China failed to redeem its US$300 million 8.75 per cent senior notes in May 2018; a subsidiary of China Energy Resources Chemicals Group missed a redemption payment in May 2018 on its US$350 million 5.25 per cent guaranteed bonds due in 2018 (the notes are listed on the Hong Kong Stock Exchange); and a subsidiary of CW Group Holdings Limited, listed on the HKSE, failed to pay interest on its S$75 million 7 per cent notes due in June 2018.

61 ibid. at paragraph 30.
Chapter 10

HUNGARY

Zoltán Faludi, Enikő Lukács and Diána Boross-Varga

I INSOLVENCY LAW, POLICY AND PROCEDURE

i Statutory framework and substantive law

In Hungary, insolvency proceedings are governed by Act No. XLIX of 1991 on Bankruptcy and Liquidation Proceedings (Insolvency Act), which has been amended from time to time.

The procedural issues that are not otherwise provided for in the Insolvency Act, the provisions of Act CXXX of 2016 on the Civil Procedure on non-contentious judicial civil actions, shall apply, subject to the derogations stemming from the special characteristics of non-contentious proceedings, as well as the general provisions of the Act on the Rules Applicable to Non-Contentious Civil Actions and on Non-Contentious Court Proceedings.

ii Policy

Prior to initiating insolvency proceedings, business entities usually make out-of-court restructuring and reorganisation efforts, and comprehensive negotiations that can be considered as a prevailing attitude to rectify the financial situation of the business entity.

Under the Insolvency Act, pre-insolvency methods or other special court-administered proceedings at the early stage of business entities’ financial distress are not available.

The Insolvency Act allows the financially troubled business entity to initiate bankruptcy proceedings instead of liquidation proceedings, and thus the business entity may make an attempt to rescue the business. If the bankruptcy proceeding fails, it is transformed into a liquidation proceeding by the court.

iii Insolvency procedures

Under the Insolvency Act, there are two types of insolvency proceedings applicable for business entities controlled and supervised by the competent court:

a bankruptcy proceedings that aim at recovering the ordinary course of business, achieving a settlement between the financially troubled business entity and its creditors by granting a temporary relief (payment moratorium) for its financial obligations and enable a reorganisation; and

b liquidation proceedings that aim at the dissolution of the insolvent business entity and the distribution of its assets to its creditors.

---

1 Zoltán Faludi is a partner, Enikő Lukács is an associate and Diána Boross-Varga is an associate at Wolf Theiss Attorneys-at-Law.
**Bankruptcy proceedings**

Bankruptcy proceedings allow the reorganisation and restructuring of the business entity in financial distress. In this context there is no insolvency test, the financially troubled business entity decides on the initiation of bankruptcy proceedings.

In bankruptcy proceedings the debtor is granted a temporary relief (payment moratorium) for a maximum of 365 days if agreed by the creditors. If the debtor and its creditors fail to agree on settlement or if the settlement agreement fails to comply with the law, bankruptcy proceedings are terminated and the court will commence liquidation proceedings.

In bankruptcy proceedings, during the payment moratorium the enforcement of financial claims against the debtor is suspended and the enforcement of such claims cannot be ordered.

In bankruptcy proceedings, claims are categorised as per the following:

- claims with regard to the payment obligations of the debtor during the payment moratorium (e.g., wages and other similar benefits, the related taxes and other similar charges, value added taxes, exercise taxes, payment obligations assumed with a view to carrying on the economic activity, as endorsed by the administrator); and
- secured and unsecured claims notified within the mandatory deadline.

The creditors must file their claims and pay the registration fee within 30 days from the commencement date. The above categories cannot be considered as the order of satisfaction because the settlement agreement concluded between the debtor and the creditors lays down the satisfaction of each claim.

**Liquidation proceedings**

Liquidation proceedings require the insolvency of the debtor. The court orders the liquidation of the debtor if the court determines that the debtor is insolvent. The debtor may only be qualified as insolvent in the following cases:

- the debtor failed to settle or contest its previously uncontested and acknowledged contractual debts within 20 days of the due date, and failed to satisfy such debt upon receipt of the creditor's written payment notice;
- the debtor failed to settle its debt within the deadline specified in a final court decision or order for payment;
- the enforcement procedure against the debtor was unsuccessful;
- the debtor failed to fulfil its payment obligation as stipulated in the settlement agreement concluded in bankruptcy or liquidation proceedings;
- the court has declared the previous bankruptcy proceedings terminated; or
- the debtor's liabilities in proceedings initiated by the debtor or by the receiver exceed the debtor's assets, or the debtor was unable and presumably will not be able to settle its debts on the date when they are due, and in proceedings opened by the receiver the members (shareholders) of the debtor fail to provide a statement of commitment in relation to providing funds necessary to cover such debts when due.

A debtor cannot be qualified insolvent in the above cases inside the deadline specified by the court for the settling of debts.
When liquidation proceedings are commenced all pending enforcement procedures are terminated by the court and the creditors can only satisfy their claims within the liquidation proceedings.

Liquidation proceedings must be completed within two years but in certain cases they may take longer due to any failure to sell the debtor’s assets.

In liquidation proceedings, creditors’ claims are ranked in the following order of satisfaction:

- **a** costs of liquidation;
- **b** parts of claims secured by pledges established before the commencement date of liquidation proceedings, which were not satisfied under the rules applicable to priority;
- **c** alimony claims, life annuity payment claims and compensation benefits to private individuals;
- **d** other claims of private individuals not originating from economic activities (e.g., damages, warranty claims, etc.);
- **e** taxes and other public dues as well as public utility charges;
- **f** other claims (e.g., any unsecured claims);
- **g** default interest and late charges, as well as surcharges, penalties and similar debts; and
- **h** claims held by the shareholder (member) or executive officer or executive employee of the debtor business entity.

In addition, claims that are secured by pledges will enjoy priority in satisfaction irrespective of the order above. In case of secured creditors (i.e., pledgees) a special order of satisfaction prevails, however, there are also costs to be taken into account before the secured creditor’s claim.

The creditors must file their claims within 40 days of the commencement date and at the same time pay the registration fee.

**Starting proceedings**

Bankruptcy and liquidation proceedings are non-contentious proceedings falling within the competence and exclusive jurisdiction of the regional court responsible for the place where the debtor’s Hungarian registered seat is located on the day of submission of the request for opening proceedings.

Under the Insolvency Act, there is no mandatory deadline for filing a request on the commencement of bankruptcy or liquidation proceedings.

The commencement of bankruptcy proceedings and liquidation proceedings becomes effective as of the date they are published in the Company Gazette (a publicly available online platform).

Bankruptcy proceedings can only be initiated by the debtor business entity. The representatives (directors) of the debtor business entity, upon prior approval of its main decision-making body, may request the competent court to commence bankruptcy proceedings.

As of the commencement date of bankruptcy proceedings, the debtor is granted a temporary relief (payment moratorium) for 120 days, which may be extended to 240 days or maximum 365 days if agreed by the creditors.
Liquidation proceedings can be initiated by the debtor business entity, the creditor, the receiver. Further, the court commences liquidation proceedings *ex officio* following unsuccessful bankruptcy proceedings or upon request of the company court or the criminal court.

If the liquidation proceedings are requested by a creditor, the creditor must prove that the debtor is insolvent and specify the reasons for the debtor’s alleged insolvency. A creditor can only request the commencement of liquidation proceedings if the amount of its claim exceeds 200,000 forint.

Upon request of the debtor business entity, the court may allow a maximum period of 45 days for the debtor to settle its debt, except in case of liquidation proceedings following unsuccessful bankruptcy proceedings. A debtor cannot be qualified insolvent inside the deadline specified by the court for the settling of debts.

**Control of insolvency proceedings**

On the one hand, the proceedings are controlled by the competent court that ordered the bankruptcy or the liquidation proceedings, on the other hand (1) the administrator is responsible for conducting bankruptcy proceedings, and (2) the liquidator is responsible for conducting liquidation proceedings.

The main roles of the competent court are (1) the adjudication on objections filed against the administrator or the liquidator during bankruptcy or liquidation proceedings, and (2) the transformation of unsuccessful bankruptcy proceedings into liquidation proceedings.

In both proceedings the most effective procedural tool available for creditors is the objection. By way of filing an objection to the competent court, diligent creditors may contest the unlawful acts or omission of the administrator or the liquidator (in practice, typically the classification of other creditors’ claims, the proposal on the distribution of the debtor’s assets).

In both proceedings, creditors may form a creditors’ committee for the protection of their interests, the representation before the competent court, and especially to keep monitoring the activities of the administrator or the liquidator. Instead of forming a creditors’ committee, creditors may elect to appoint a representative from among themselves. The rules applicable to the creditors’ committee are applicable to the creditors’ representative as well.

In bankruptcy proceedings, a creditors’ committee may be formed if it represents at least one-third of the creditors, provided that such creditors control claims whose amount is at least half of the aggregate amount of claims. In liquidation proceedings, a creditors’ committee may be formed if it represents at least one-third of the creditors, provided that such creditors control at least one-third of aggregate amount of the claims. The creditors’ committee must consist of minimum three and maximum seven members and the creditors operating the select committee may elect a chairperson. The participating creditors must agree on the creditors’ committee’s rights, cost advancing method and accounting issues.

Voting rights shall be held by any creditor who registered its claim (in case of bankruptcy: within 30 days of the commencement of the bankruptcy procedure), paid the registration fee and whose claim is shown under recognised or uncontested claims. Any creditor who failed to participate in person or by way of proxy shall be counted as having voted no. As regards voting rights, creditors shall have one full vote awarded for each recognised or uncontested claim of 50,000 forint. There shall be no fractional votes. Creditors holding claims below the 50,000 forint threshold shall also have one vote. Interest accrued during the term of the stay of payment will not be taken into consideration with respect to voting rights. In the case of
liquidation procedures, the votes of creditors who notified their claims after the 40-day time
limit shall apply this calculation method at a rate of one-half. Decisions shall be adopted by
simple majority.

The establishment of a creditors’ committee may have, among others, the following
practical advantages:

- the liquidator sends a quarterly report on his or her activity and the financial situation
  of the debtor (if there is no creditor’s committee, the information of the individual
  creditors will be verified by the liquidator’s intermediate balance sheet);
- the liquidator informs the creditors’ committee (creditors’ representative) regarding the
  contracts that exceed the scope of day-to-day operations and the termination of existing
  contracts;
- if a creditor’s committee has been formed, the liquidator is obliged to obtain the
  consent of the creditors’ committee to continue the economic activity of the debtor
  during liquidation;
- the liquidator may rent the debtor’s assets only with the approval of the creditor’s
  (creditors’ representative);
- in respect of wage increases after the time of the opening of liquidation proceedings, the
  liquidator may assume any new obligations only upon the committee’s consent;
- in case of the sale of debtor’s assets, the liquidator may forgo the application of sale
  process by way of tender or auction only with prior consent of the creditors’ committee;
- the creditors’ committee may instruct the liquidator to notify the committee on the
  sales procedure, or to make available the appraisal and the sales procedure for the
  creditors for inspection and for monitoring;
- the creditors’ committee may also instruct the liquidator to present the invitation to
  tender and the auction notice in advance to the committee for inspection, including
  the appraised value of the assets offered for sale, subject to the right of consultation; and
- the creditors’ committee may request the court appoint an expert for the cross-verification
  of the appraised value, and shall advance the costs involved.

In bankruptcy proceedings, the directors of a debtor business entity, including its main
decision-making body and owners, shall exercise their respective rights only if it does not
violate the powers vested in the administrator. Directors remain in control over the debtor,
however an administrator monitors, inter alia, the business of the debtor, the approval of the
administrator is required for the new commitments of the debtor and the endorsement of the
administrator is required for the fulfilment of payments from the debtor’s assets.

The directors of the debtor business entity are obliged to:

- cooperate with the administrator;
- provide a statement (1) regarding that the annual financial statement and the interim
  balance sheet give a true and fair view of the financial position of the debtor, and (2)
  regarding the significant changes in the debtor’s financial position since the financial
  statement and the interim balance sheet had been adopted;
- provide a statement indicating the payment service providers holding the debtor’s
  accounts (including account numbers), and investment firms where the debtor has a
  savings account;
- provide a statement of commitment (1) for notifying the payment service providers
  of the filing of the petition for the commencement of bankruptcy proceedings, and
(2) refraining from initiating any payment transaction or credit transfer that would be contradictory to the purpose of the payment moratorium, and from taking any measures by which to provide preferential treatment to any creditor;

e provide a data sheet on the debtor’s financial position, as prescribed by the relevant laws; and

f inform the creditors or creditors’ committee, the employees, the trade unions and the works councils regarding the financial position of the debtor upon their request during the bankruptcy proceedings.

In liquidation proceedings, directors lose their management power over the debtor. As of the commencement date of liquidation, the court appoints a liquidator who becomes the sole representative of the debtor business entity (i.e., replacing the directors), and is responsible for conducting the entire liquidation proceedings. After the commencement of liquidation, only the liquidator shall be authorised to make any legal statements in connection with the assets of the debtor business entity.

The directors of the debtor business entity are obliged to:

a prepare a closing inventory, annual financial statements, closing balance sheet and tax return, and send them to the liquidator and the tax authority within 30 days of the commencement date of the liquidation, as well as provide a statement (1) that the closing inventory, the annual financial statement and the closing balance sheet give a true and fair view of the financial position of the debtor, and (2) regarding any significant changes in the debtor’s financial position since the balance sheet was adopted;

b prepare a list of the documents that may not be discarded, and deliver such documents, as well as archive materials to the liquidator within 30 days of the commencement date of the liquidation, together with the assets according to an itemised inventory, and shall provide information regarding the pending affairs, and declare to have delivered all assets and documents as required;

c provide a statement to the liquidator and the environmental protection authority within 15 days from the commencement date of the liquidation regarding any environmental damages or environmental hazards that may result in penalties or other payment obligations, and expenses relating to the clean-up of such damage;

d disclose information regarding all legal transactions and commitments;

e inform without delay the employees, the cooperative members, the trade unions and the works councils regarding the commencement of liquidation proceedings;

f inform the beneficiaries of the claims specified in the Insolvency Act regarding the opening of liquidation proceedings within 15 days of the commencement date of the liquidation;

g provide information at the liquidator’s request regarding the debtor’s activities prior to the liquidation and the placement of assets, as well as assist the liquidator in his or her activities;

h notify the service provider carrying the securities account of the debtor and the service provider managing other money-market instruments of the debtor regarding the ordering of liquidation proceedings within three business days following the commencement date of the liquidation, as well as the creditors holding a lien, right of enforcement and security deposit, and shall also verify the fulfilment of this notification requirement to the liquidator;
inform the liquidator about fulfilling the obligation of provisioning;
provide a statement of property and other assets controlled by the debtor business entity, supported by documentary evidence, to the liquidator within 30 days from the commencement date of the liquidation, which are beyond the scope of liquidation assets, and shall make them available for the liquidator; and
inform the creditors or creditors’ committee, the employees, the trade unions and the works councils regarding the financial position of the debtor upon their request during the liquidation proceedings.

Special regimes
The Insolvency Act contains special provisions regarding insolvency proceedings of business entities with strategic importance. The Hungarian government, acting in its sole discretion, may qualify any business entity as one that has strategic importance if it considers that the bankruptcy or the liquidation proceedings of such a business entity bears state interest (i.e., special public interest; a significant project from a national economic perspective; or a significant activity from a national economic perspective), and hence its creditors need to be satisfied under a special procedural regime. The Hungarian government is entitled to decide on the qualification of any business entity, even in the case of ongoing bankruptcy or liquidation proceedings, as a strategic business entity.

The most notable implications of such a special regime are the following:

certain procedural rights granted to the creditors under the general regime are limited or excluded;
different procedural deadlines are applied; and
only a state-owned administrator or liquidator can be appointed to control the entire bankruptcy or the liquidation proceedings (including the sale of the assets of the debtor business entity).

The Insolvency Act provides for the possibility of simplified liquidation proceedings. Simplified procedural rules apply to liquidation proceedings of a debtor business entity if its assets are not even expected to cover the costs of the liquidation proceedings, or to those liquidation proceedings that cannot proceed owing to deficiencies in the records or in the bookkeeping of the debtor business entity. In this case, the liquidator informs the creditors and requests them to provide any information they may have concerning the assets of the debtor business entity that are generally available, or to render assistance in conducting liquidation proceedings. If no information or no assistance has been provided upon this request of the liquidator and hence the liquidation proceedings cannot be conducted under the general rules, the liquidator prepares a report thereon and submits a request or recommendation to the court for the distribution of the debtors’ assets among the creditors.

Besides the above special regime regulated by the Insolvency Act, in the case of financial institutions, insurance companies and Hungarian branch offices of foreign business entities’ special insolvency rules are to be applied under the relevant legislation, which defines the proceedings to be followed for insolvency.

Cross-border issues
Insolvency proceedings within the EU are recognised pursuant to the Regulation (EU) No. 848/2015 of the European Parliament and of the Council on insolvency proceedings.
Article 3(1) of the Regulation provides that the courts of the Member State within the territory of which the debtor’s COMI is situated shall have jurisdiction to open insolvency proceedings. The COMI shall be the place where the debtor conducts the administration of its interests on a regular basis and which is ascertainable by third parties. In the case of a company, the place of the registered office shall be presumed to be the COMI in the absence of proof to the contrary. This presumption shall only apply if the registered office has not been moved to another Member State within the three-month period prior to the request for the opening of insolvency proceedings. With the re-tailored definition of COMI the EU Regulation prevents bad or abusive forum shopping.

Pursuant to Article 3(2) of the Regulation, if the debtor’s COMI is situated within the territory of a Member State, the courts of another Member State shall have jurisdiction to open insolvency proceedings against that debtor only if it possesses an establishment within the territory of that other Member State. The effects of those proceedings shall be restricted to the assets of the debtor situated in the territory of the latter Member State.

Hungary has not adopted the UNCITRAL Model Law on Cross-border Insolvency.

II INSOLVENCY METRICS

The total number of business enterprises\(^2\) in Hungary was 1,870,415 at the end of 2017, which represents an increase of approximately 24,314 in comparison with the previous year’s figures.\(^3\)

By contrast to the above trends, the number of liquidation proceedings newly ordered in a given year against partnerships decreased with 15 per cent in 2017, in comparison to 2016, the total number of the newly ordered liquidation proceedings was 6,500. A drop-off with respect to the number of liquidation proceedings was noted in 2015 (after an increase between 2012 and 2014) and this tendency has continued in recent years.

With regard to sectors, 29 per cent of liquidation proceedings were initiated in commerce and 13 per cent in construction – similarly to previous years. The number of liquidation proceedings has increased only in healthcare by 5.6 per cent; in other sectors was a slight decrease apart from information and communication, and education where the decrease was above 20 per cent.

The number of reorganisation proceedings initiated is still surprisingly low, only in total 39 reorganisation proceedings were initiated in 2017 against financially troubled business entities. In comparison with 2016, such numbers show a significant decrease, where 50 reorganisation proceedings were initiated.

III PLENARY INSOLVENCY PROCEEDINGS

The following insolvency proceedings opened in Hungary in recent years are worth highlighting.

---

\(^2\) The term business enterprises is used here as an epitome of for profit business associations, including business entities, private entrepreneurs and other forms of entities and businesses.

\(^3\) Source: https://www.ksh.hu/docs/hun/xftp/gyor/gaz1712.pdf.
**Est Media Vagyonkezelő Nyrt**

Est Media Vagyonkezelő Nyrt is a B-category issuer at the Budapest Stock Exchange, a Hungarian media company with two core businesses: media and telecommunications. The media sector, which is bundled in the EST Media Group Kft, includes print products, interior advertising, online media as well as audio and video downloads (with the corresponding copyright). The telecommunications segment, which is managed through the subsidiary Externet Zrt, is settled and offers internet and telecommunications services. The third division, asset management, is dedicated to establishing the corporate structure and offering new services based on the company’s network technology. In addition, EST MEDIA organises festivals through its subsidiary (Sziget Kft) in Hungary. Est Media Vagyonkezelő Nyrt filed a request on 1 March 2017 to the Regional Court of Budapest to have bankruptcy procedures initiated against itself. The Regional Court of Budapest ordered a payment moratorium (until 18 March 2018) based on the joint request of Est Media Vagyonkezelő Nyrt and its creditors. Lastly, the reorganisation plan of the company was supported by its creditors and approved by the Regional Court of Budapest and therefore the bankruptcy proceeding was terminated.

**Sikér Malomipari Zrt**

The balance sheet of Sikér Malomipari Zrt, has been ranked in 2014 among Hungary’s five largest milling companies, with a liabilities of 6.9 billion forint. By reason of the withdrawal of its creditors, the competition in the sector, the failure of Széchenyi Bank and a fine from the Competition Office for over 300 million forint, Sikér Malomipari Zrt previously faced financial troubles. Sikér Malomipari Zrt has filed a request for bankruptcy against itself and therefore the bankruptcy procedure was initiated by the Regional Court of Tatabánya on 11 February 2017. As the payment moratorium has been passed and the reorganisation proposal of the company has not been supported by its creditors, the Regional Court of Tatabánya ordered the liquidation of Sikér Malomipari Zrt on 20 October 2016. Based on the notice published in the Official Gazette on 10 November 2016, the Hungarian government has qualified Sikér Malomipari Zrt as business entity with strategic importance, and the National Reorganisation Nonprofit Kft has been appointed as new liquidator of the company and hence a special procedural regime within the Insolvency Act is to be applied. The liquidator advertised the mill of the Sikér Malomipari Zrt in Szekszárd, according to the notice published in the Official Gazette, the target price of the 34,000 square metres property and mill equipment is 900 million forint.

**Eurovegas Kft and Ipari Terület Bezenye Kft**

The unique Eurovegas casino, entertainment and hotel project would have been implemented near Hungary’s borders with Austria and Slovakia. The construction of a €300 million casino project struggled under severe financial difficulties. Eurovegas Kft and Ipari Terület Bezenye Kft are the exclusive owners of the real properties in Bezenye and in Hegyeshalom concerned in this project. Eurovegas Kft and Ipari Terület Bezenye Kft have been declared insolvent and liquidation proceedings have been ordered by the Regional Court of Győr against the companies. Accordingly, the court’s order was published in the Company Gazette on 22 July 2016. During the liquidation proceedings, the Hungarian government qualified Eurovegas Kft and Ipari Terület Bezenye Kft as business entities with strategic importance by Government Decree No. 295/2016 (IX.29), and hence the satisfaction of the creditors’ claims needs to be completed under a special procedural regime within the Insolvency Act. New state-owned liquidators (National Reorganisation Nonprofit Kft) were appointed by the
court that controls the liquidation proceedings. The appraised value of the real properties in the liquidation of Eurovegas Kft was 3,437,700,000 forint, and in the liquidation of Ipari Terület Bezenye Kft was 3.01 billion forint. The first round of the public tender was started on 13 January 2017 in both liquidation proceedings but was revoked on 7 February 2017. The next round of the public tender has yet to be scheduled.

Ikarus Egyedi Kft
The Hungarian manufacturer of buses used in urban transport Ikarus Egyedi Kft is currently in the spotlight. Ikarus Egyedi Kft filed for bankruptcy protection on 9 July 2018 to restore the company’s solvency. The Regional Court of Budapest ordered the bankruptcy proceeding and it was published in the Company Gazette on 13 July 2018. The Hungarian government has qualified Ikarus Egyedi Kft as business entity with strategic importance by Government Decree No. 126/2018 (VII.11.), thus the bankruptcy proceeding is to be continued under a special procedural regime.

IV ANCILLARY INSOLVENCY PROCEEDINGS
Secondary and territorial insolvency proceedings may be opened in Hungary in the event that the main insolvency proceedings are pending in another EU Member State, subject to the EU Regulation. Secondary and territorial insolvency proceedings are not common in Hungary; no information is available regarding the commencement of such insolvency proceedings during the past 12 months.

V TRENDS
In the majority of cases, creditors initiate liquidation proceedings against the debtors. In practice, liquidation proceedings may lead to the sale of all or part of the debtor’s business as a going concern to a third party instead of the sale of the individual assets of the debtor’s business. If the debtor has several real properties with different values, it is quite common for the real property portfolio to be sold in its entirety. This usually leads to a much higher value being realised at the end of liquidation proceedings.

It bears mentioning that the number of business entities with strategic importance is increasing and it seems that the Hungarian government is making an attempt to use this procedural tool to mitigate sectorial issues of the Hungarian economy (i.e., usually major players of a given industry area are qualified as business entities with strategic importance).

As far as recent developments are concerned, in accordance with the EU Regulation, an insolvency register has been established in Hungary, which contains the particulars of insolvency proceedings falling within the scope of the EU Regulation, opened in Hungary on or after 26 June 2018. We are of the view that this gap-filling insolvency register may play to the advantage of creditors and may also ensure the transparency and traceability of the insolvency proceedings.

The link to the publicly available Hungarian insolvency register is: https://fizeteskeptelenseg.im.gov.hu/#/.
I INSOLVENCY LAW, POLICY AND PROCEDURE

Statutory framework and substantive law

The extant legal framework pertaining to bankruptcy and insolvency in India comprises several statutes.

The 2018 World Bank report on Doing Business ranks India as 103 out of 190 countries on resolving insolvency up from 136 in 2017. The report also notes that resolving insolvency takes about 4.3 years and costs 9 per cent of the debtor’s estate with the most likely outcome being a piecemeal sale of assets. The average recovery is 26.4 cents per dollar. Notably, the strength of insolvency framework index has increased from six in 2017 to 8.5 in 2018.

In October 2014, the Ministry of Finance established the Bankruptcy Law Reforms Committee (BLRC) to review the law and suggest improvements.

The BLRC’s report resulted in the Insolvency and Bankruptcy Code 2016 (Insolvency Code) approved by Parliament on 12 May 2016. Over the past 12–24 months the Insolvency Code has been brought into effect. In June 2018, an ordinance amending the Insolvency Code (Insolvency Ordinance) was notified, inter alia, to address certain issues on which there had been significant litigation and divergent rulings.

Individuals and partnership firms

The Insolvency Code deals with insolvency for individuals and partnerships.

Companies

The Companies Act 1956 addressed, inter alia, insolvency of companies. The Companies Act 2013 repealed, in stages, the Companies Act 1956 and also addressed insolvency.

The Insolvency Code was approved by parliament in 2016 and brought into force over 2016–2017. At present, the Insolvency Code addresses insolvency, creditors’ winding up

---

1 Justin Bharucha is a partner at Bharucha & Partners.
2 www.doingbusiness.org/rankings.
3 The Presidency Towns Insolvency Act 1909 and the Provincial Insolvency Act 1920 stand repealed.
as well as voluntary winding up, of entities other than those engaged in the financial and securities markets (Financial Sector Entities) with a separate statute being contemplated to address the insolvency of Financial Sector Entities.

The staggered implementation and repeal of the statutes concerned has resulted in some ambiguity as to the status of proceedings instituted under the Companies Act 1956, which remain to be resolved. However, the Insolvency Code stands as a complete code addressing insolvency save for Financial Sector Entities.

**Insolvency Code**

The Insolvency Code applies to companies, limited liability partnerships (LLPs), partnership firms and individuals.

The Insolvency Code first provides an insolvency resolution process and, if resolution fails, liquidation. Separate procedures have been detailed for corporate persons (i.e., companies and LLPs) and for partnership firms and individuals.

The Insolvency Code also provides for insolvency professionals, to be registered under the Insolvency Code, who shall be responsible for implementing the resolution and liquidation processes stipulated under the Insolvency Code.

**Resolution and enforcement processes prescribed by the Reserve Bank of India**

The Banking Regulation (Amendment) Ordinance, 2017 of 5 May 2017 (the Ordinance) empowers the central government to authorise the Reserve Bank of India (RBI) to direct banking companies to initiate the insolvency resolution process provided in the Insolvency Code in cases of defaults.

Pursuant to the Ordinance, an internal advisory committee was constituted by the RBI to recommend parameters based on which individual accounts were to be referred for resolution. It was recommended that all accounts with aggregate outstanding exposure in excess of 50 trillion rupees where at least 60 per cent of such exposure was classified as non-performing assets (NPAs) by the banks be referred to resolution under the Insolvency Code. The central government clarified that the RBI has directed banks to refer 12 accounts meeting the recommended parameters for resolution under the Insolvency Code.

For accounts not satisfying the prescribed parameters, banks have been directed to finalise a viable resolution plan within six months failing to which the account will be referred for resolution under the Insolvency Code.

The constitutionality of the press release was challenged before the Gujarat High Court by Essar Steel India Pvt Ltd (Essar), which was one of the 12 identified accounts,

---

4 That is, a winding up instituted and enforced by creditors that is now addressed by, inter alia, Sections 6, 7, 8, 9, 33 and the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 and the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016. Voluntary winding up of a company is addressed by, inter alia, Section 59 of the Insolvency Code and the Insolvency and Bankruptcy Board of India (Voluntary Liquidation Process) Regulations, 2017.

5 In terms of Section 3(7) of the Insolvency Code, the Insolvency Code does not apply to financial service providers who have been specifically excluded from the definition of ‘corporate persons’. A financial service provider is defined under the Insolvency Code as ‘a person engaged in the business of providing financial services in terms of authorisation issued or registration granted by a financial sector regulator’.

inter alia, on the ground that it violated Article 14 of the Constitution of India⁷ and was an ultra vires exercise of power by the RBI. Essar contended that there was no reasonable basis for classification of the accounts and that the differentia used for such classification had no nexus to the intended objective of dealing with stressed assets. Essar also contended that the economic state of the steel industry in India should also have been considered before subjecting them to insolvency proceedings.

The Gujarat High Court dismissed the petition and upheld the constitutionality of the press release on the basis there can be no challenge to the reasonableness of the classification as the press release merely stipulated a time period for reference to the insolvency resolution process and made no practical classification. The court also ruled that issuing this press release was well within the powers of the RBI provided for by the Banking Regulation Act.

**Revised framework for resolution of stressed assets**

In February 2018 the RBI notified a revised framework for resolution of stressed assets (Revised Framework) repealing the several schemes and mechanisms previously in force.⁸ While the Revised Framework retains some of the key principles of the erstwhile RBI guidelines including early recognition of stress, centralised reporting of credit information, elective right of lenders to convert outstanding balances into equity of the borrower, etc., the resolution mechanism has been significantly revised for consistency with the Insolvency Code inter alia by requiring lenders to mandatorily refer stressed accounts for resolution under the Insolvency Code under certain defined circumstances.

**Occurrence of default and resolution plan by lenders**

All lenders subject to the Revised Framework must adopt policies for timely resolution of stressed assets under the Revised Framework. Immediately on the occurrence of default with respect to any lender, all lenders to that borrower must take steps to cure that default and implement a Resolution Plan. Lenders have the fullest liberty to implement a Resolution Plan provided that credit rating agencies issue a satisfactory credit opinion with respect to the debt which will continue outstanding in terms of the Resolution Plan.

A Resolution Plan must be implemented within 180 days of the day of the first default and will be considered to have been so implemented when the account is no longer in default or, where the Resolution Plan requires Restructuring, where that Restructuring is appropriately documented and perfected by reflection in the accounts of all parties concerned. In July 2018, 24 major Indian lenders, including public sector banks, signed an intercreditor agreement for faster resolution of stressed assets in the 500 million rupees to 5 billion rupees range in consortium lending. This is likely to expedite the resolution process.

**Reference under the Insolvency Code**

Lenders are compelled to file reference before the IBC in two circumstances: (1) they are unable to agree the Resolution Plan within the 180 day timeline (including, pertinently if

---

⁷ Article 14 mandates equality before the law and prohibits arbitrary action by the state. It follows that when the state categorises citizens (including corporate entities) the proposed classification is to be founded on intelligible differentia that must bear a rational nexus to the intended object of such classification.

⁸ The RBI has previously promulgated several schemes for resolution of stressed assets including, inter alia, the corporate debt restructuring scheme, strategic debt restructuring scheme, sustainable structuring of stressed assets, joint lenders forum, etc.
implicitly, the opinion of the credit rating agency(ies) is that residual debt is classified below RP 4; or (2) a Resolution Plan is implanted but the borrower defaults within the ‘specified period’.

Clearly, once reference is so made the Insolvency Code will require that efforts be made to effect a resolution in terms of the Insolvency Code and that will result in further delay with concomitant deterioration of security as well as a Lender accepting a Resolution Plan which does not meet the credit rating requirements prescribed by the Revised Framework. Clearly, this is of greater relevance to the scenario described at (1) above.

In essence, the consequence of failure to agree a Resolution Plan may well result in an untrammelled abnegation of the RBI’s intent in ensuring a healthy book with Indian banks and result in measures that are suboptimal as compared to the standards set out in the Revised Framework.

ii Policy

Refreshingly, policy on insolvency is well developed in India but, not unusually, and as discussed, there seems to be a dichotomy as to the preferred mechanism:

a the recovery imperative: the Securitisation and Asset Reconstruction and Enforcement of Security Interest Act 2002 (SARFAESI) permits secured creditors to enforce their security interest without the intervention of courts. The Enforcement of Security Interest and Recovery of Debts Laws and Miscellaneous Provisions (Amendment) Bill 2016 (Security Bill) approved by Parliament on 9 August 2016 simplifies the recovery process by, inter alia, minimising court intervention. Together with the RBI Guidelines these statutes allow for relatively expeditious enforcement; and

b the route to resolution: the Insolvency Code.

iii Insolvency procedures

Proceedings under the Insolvency Code

As set out in Section I.i, the Insolvency Code sets out a two-stage process: an insolvency resolution process; and in the event that such resolution process is unsuccessful, a liquidation or bankruptcy process as the case may be. Separate procedures have been detailed for corporate persons (i.e., companies and LLPs) and for individuals.

Insolvency resolution process

For corporate persons, the insolvency resolution process may be initiated by a creditor. The Insolvency Code distinguishes between ‘operational creditors’ and ‘financial creditors’, An

9 A person to whom an operational debt is owed and includes any person to whom such debt has been legally assigned or transferred. The Insolvency Code defines an operational debt as a claim in respect of the provision of goods or services, including employment or a debt in respect of the repayment of dues arising under any law for the time being in force and payable to the central government, any state government or any local authority.

10 A person to whom a financial debt is owed and includes a person to whom such debt has been legally assigned or transferred. The Insolvency Code defines a financial debt as a debt along with interest, if any, that is disbursed against the consideration for the time value of money and includes: (1) money borrowed against the payment of interest; (2) any amount raised by acceptance under any acceptance credit facility or its dematerialised equivalent; (3) any amount raised pursuant to any note purchase facility or the issue of bonds, notes, debentures, loan stock or any similar instrument; (4) the amount of any liability in respect of
application for resolution may be preferred by any creditor or group of creditors or by the company itself. The application is submitted to the adjudicating authority, which will admit the application if appropriate.

**Application by financial creditors**

Where an application is made by a financial creditor to initiate the insolvency resolution process, there is no express stipulation providing the debtor with an opportunity of being heard.

A petition challenging this was filed before the Calcutta High Court. While the petition was dismissed the court noted that principles of natural justice, including the right to be heard, must apply, and where the facts of any case require that an *ex parte* or interim order be passed, that *ex parte* order must record the reasons for derogating from the debtor’s right to be heard.

**Application by operational creditors**

Operational creditors may initiate the insolvency resolution process by serving a demand notice to the corporate debtor upon receipt of which the corporate debtor may bring to the notice of the operational creditor the existence, if any, of a ‘dispute’ with respect to the underlying debt. Once the application is admitted the following actions are prohibited:

- any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under SARFAESI;
- transferring, encumbering, alienating or disposing the debtor’s assets or legal rights or interest therein;
- institution of any suits or continuation pending suits or proceedings; and
- an interim insolvency professional takes charge of the company.

Homebuyers with advances to builders undergoing the insolvency resolution process have been elevated to the status of financial creditors by the Insolvency Ordinance.

---

11 In terms of Section 7 of the Insolvency Code.
12 The right of a party to present its case is an essential ingredient of natural justice at Indian law. Illustratively, see *Union of India v. Shiv Raj* (2014) 6 SCC 564.
14 In terms of Section 8 of the Insolvency Code.
15 The scope and meaning of the term ‘dispute’ has been subject to litigation. See ‘Existence of dispute’.

© 2018 Law Business Research Ltd
The interim insolvency professional\textsuperscript{16} manages the company and, \textit{inter alia}, constitutes a committee of creditors and formulates an information memorandum as to the prospects of the company.\textsuperscript{17} A resolution plan is drafted based on the information memorandum and must provide for, \textit{inter alia}, repayment of debts and management of the company. The resolution plan, if then to be approved by 75 per cent of creditors,\textsuperscript{18} is submitted to the adjudicating authority. The adjudicating authority approves or rejects the resolution plan.

The entire resolution process is to be completed within 180 days and only one extension of up to 90 days to such timeline may be provided by the adjudicating authority.

\textit{Settlement by parties subsequent to admission of application}

The Supreme Court recently\textsuperscript{19} upheld the right of the parties to arrive at a settlement and record consent terms after an application for initiation of the insolvency resolution process under Section 7 of the Insolvency Code was admitted by the adjudicating authority. The Supreme Court also upheld the decision of the National Company Law Appellate Tribunal (NCLAT) to disallow a compromise by the parties after the admission of the application while doing so by invoking its inherent jurisdiction and taking into account the fact that all parties were present before it.

The position has now been settled by the Insolvency Ordinance, which provides that the NCLT may permit the withdrawal of an application for initiation of the insolvency resolution process filed by a financial creditor, an operational creditor or the corporate debtor with the approval of 90 per cent or more of the committee of creditors.

\textit{Emerging issues}

Although jurisprudence under the Insolvency Code is nascent, some issues that have already resulted in significant litigation are the meaning of ‘dispute’ at Section 8 of the Insolvency Code as well as the subject of the moratorium protecting the debtor once an application for insolvency has been admitted.

\textit{Existence of a dispute}

The Insolvency Code\textsuperscript{20} permits an operational creditor to file an application with the adjudicating authority for initiation of the insolvency resolution process 10 days after a demand notice is served and the corporate debtor has not: (1) made payment of the underlying debt; or (2) issued a notice\textsuperscript{21} informing the operational debtor of the existence of a dispute in relation to the underlying debt for which the demand notice has been served.

\textsuperscript{16} The committee of creditors may either confirm the appointment of the interim insolvency professional or replace the interim insolvency professional with a different insolvency professional.
\textsuperscript{17} Members of the suspended board of directors or the partners of the corporate person, as well as operational creditors (if the amount of their aggregate dues is not less than 10 per cent of the debt) are entitled to attend the meetings of the committee of creditors; however, they cannot vote at such meetings.
\textsuperscript{18} A creditor’s vote is determined \textit{pro rata} to that creditor’s share of the total debt of the company. Note that debt is classified as ‘operating debt’ and ‘financial debt’ and the creditor’s \textit{pro rata} share is calculated based on this classification.
\textsuperscript{20} In terms of Section 9 of the Insolvency Code.
\textsuperscript{21} In terms of Section 8(2) of the Insolvency Code.
Further to the notification of the relevant provisions of the Insolvency Code, there had been a number of judgments allowing petitions for initiation of the insolvency resolution process where the dispute was raised by the operational creditor after receipt of the demand notice and where no formal court or arbitration proceedings subsisted in respect of the claimed dispute.\(^{22}\)

Equally, there have also been judgments adopting an inclusive definition of the term dispute and holding that disputes raised subsequent to receipt of the demand notice from the operational creditor will bar the initiation of the insolvency resolution process even in the absence of formal court of arbitration proceedings in respect of the same.\(^{23}\) Subsisting appeal proceedings arising out of an arbitral award on a dispute relating to an operational debt have also been held to constitute a dispute.\(^{24}\)

While the position remained in flux, the Supreme Court in September 2017\(^{25}\) considered the issue and, \textit{inter alia}, held that the adjudicating authority need not examine whether the dispute is ‘\textit{bona fide}’ or whether formal dispute resolution has been invoked in respect of the dispute but must instead only consider the following: (1) there is a plausible contention which requires further investigation; (2) a dispute truly exists in fact and is not spurious, hypothetical, illusory, mere bluster, plainly frivolous or vexatious; and (3) the dispute raised by the corporate debtor should be ‘in existence’ (i.e., real as opposed to frivolous or illusory). The Supreme Court also held that the adjudicating authority must not consider: (1) whether the dispute is likely to succeed; nor (2) the merits of the dispute except to the extent of it being patently feeble legal argument or an assertion of fact unsupported by evidence.

\section*{The scope of the moratorium}

The Insolvency Code provides for a moratorium to the corporate debtor during the pendency of the insolvency resolution process. Effectively, recovery actions by the creditors of the corporate debtor including under SARFAESI is prohibited in order to prevent hindrances to the resolution process.

However, there seems to be conflicting views arising with respect to the scope and extent of the properties covered by the moratorium.

The Mumbai bench of the NCLT has on multiple occasions held that the moratorium extends only to the property of the corporate debtor and not its promoters and directors.\(^{26}\) The bench relied on the words ‘its property’ used in Section 14 of the Insolvency Code and held, \textit{inter alia}, that the court cannot add to the language used by the legislature under the umbrella of \textit{ejusdem generis}.\(^{27}\)

\footnotesize

\(^{23}\) Kirusa Software Ltd v. Mobilois Innovations Pvt Ltd, NCLAT Company Appeal (AT) (Insolvency) 6 of 2017; Surbhi Body Products and Godolo and Godolo Exports Pvt Ltd v. Meyer Apparel Ltd; One Coat Plaster and Shival Construction Company v. Ambience Pvt Ltd; Philips India limited v. Goodwill Hospital & Research Centre Limited; PK Ores v. Tractors India Private Limited; MCL Global Steel Pvt Ltd v. Essar Projects India Ltd.

\(^{24}\) Annapurna Infrastructure Pvt Ltd & Ors v. Sowil Infra Resources Ltd.


\(^{26}\) Alpha and Omega Diagnostics (India) Ltd v. Asset Reconstruction Company of India Ltd.

\(^{27}\) Sandria D'Souza and others v. Elektans Shipping.
However, the same bench, on a different occasion, held that a moratorium, if granted, would extend to personal properties of the promoters and directors of the corporate debtor. The position was clarified by the Insolvency Ordinance which has amended the relevant provisions of the Insolvency Code to provide that the moratorium will not be applicable to a surety in a contract of guarantee. Accordingly, the extant position seems to be that the scope of the moratorium is limited only to the assets of the corporate debtor.

It has also been held that the liability of a guarantor is coextensive with the liability of the principal debtor. Therefore if a principal debtor fails to pay, insolvency proceedings against the guarantor can be admitted. Where the debt is subject to the jurisdiction of a foreign court there is no liability on the guarantor where orders of the foreign court show that there was no liability of the principal debtor.

The issue is particularly significant in the Indian context, where personal guarantees from promoters and directors as well as creation of security over their assets for corporate borrowers are common.

It has also been held that a financial creditor cannot exercise set off once the moratorium is in force, while a performance guarantee can be invoked during pendency of the moratorium. It has also been held that rent due from the corporate debtor to a landlord prior to the commencement of the moratorium will not be included in the moratorium since the landlord is not prejudicially affected because of the moratorium.

Strategic sale and restrictive timelines

Further to certain amendments made to rules governing the insolvency resolution process liquidators are now authorised to undertake strategic sale of the assets of the corporate debtor in parcels as well as collectively. However, presently, a timeline of 105 days has been prescribed within which the liquidator is required to identify applicants for the sale. While the intent is to complete the sale process within the 180-day period prescribed for the resolution process, it may be difficult to meet with the prescribed timeline especially in large insolvency proceedings where there are significant assets involved.

Liquidation

If the creditors or the adjudicating authority reject the resolution plan the adjudicating authority must pass a liquidation order. The insolvency professional, acting as liquidator, will collect all claims from creditors, verify such claims and thereafter distribute the assets of the debtor in this order of priority:

a costs relating to the insolvency resolution process and liquidation;
b workmen’s dues and a secured creditor who has relinquished his or her security to be treated equally;
c unpaid dues to employees;
d unsecured creditors;

28 Leo Duct Engineers & Consultants.
30 EXIM Bank of India v. CHL Ltd 2018 146 SCL 43.
33 JAS Telecom Pvt Ltd v. Eolane Electronics Bangalore Pvt Ltd – 2018 144 CLA 89 (NCLAT).
34 Section 53 of the Insolvency Code.
Thereafter, the liquidator will apply to the adjudicating authority for a dissolution order in respect of the debtor.

Enforcement of security interest

In liquidation proceedings, a secured creditor may opt to either realise his or her security interest or relinquish it, in accordance with the provisions of the Insolvency Code. The moratorium during the resolution process precludes the exercise of this right at that time, and such enforcement is possible only if the resolution plan fails or is rejected by the adjudicating authority, both of which lead to the commencement of liquidation proceedings under the Code. Dissenting creditors (i.e., those who vote against the resolution plan) are nonetheless bound by that plan if it is duly approved.

For a secured creditor to realise its security interest, the secured creditor must inform the liquidator of the security interest and the relevant asset subject to which the security interest will be realised. The liquidator will verify this, and thereafter, the secured creditor may realise the security interest in accordance with applicable laws. In the event the enforcement of security interest yields an amount exceeding the debts due to the secured creditor, the secured creditor must tender such excess amount to the liquidator. Alternatively, if the amount yielded is inadequate, the remaining unpaid debts of the secured creditor will be paid by the liquidator in accordance with the order of priority described above.35

Individuals and partnership firms

The Insolvency Code provides for three mechanisms: the fresh start process, the insolvency resolution process and the bankruptcy process.

While the insolvency resolution process and the bankruptcy process for individuals and partnership firms is largely the same as for corporate persons, the fresh start process is unique to individuals and partnership firms. Note that, in real terms, the thresholds to be eligible for a fresh start are fairly low36 and, effectively, the remedy may be availed of only by those at the bottom of the pyramid.37

Fast-track insolvency proceedings

On 14 June 2017, the Insolvency and Bankruptcy Board of India (Fast Track Insolvency Resolution Process for Corporate Persons) Regulations, 2017 were notified providing for

---

35 Section 52 of the Insolvency Code.
36 The eligibility criteria includes, inter alia, a gross annual income not exceeding 60,000 rupees; no ownership of a dwelling unit; and the aggregate value of assets should not exceed 20,000 rupees.
37 Illustratively, for the Startup India programme, thus far out of 728 applications for start-up recognition, 180 are recognised as start-ups; however, only 16 of these have been incorporated post 1 April 2016 and are therefore eligible for tax benefits. See www.thehindubusinessline.com/info-tech/16-startups-considered-for-benefits-under-finance-act/article8876630.ece.
fast track insolvency resolution for small companies. The fast track resolution process is to be completed within 90 days, as opposed to 180 days prescribed for non-fast track proceedings, and this time period can be extended by the adjudicating authority by up to 45 days.

iv  Control of insolvency proceedings

Proceedings under the Insolvency Code

The Insolvency Code provides that the NCLT is the adjudicating authority for matters pertaining to companies and LLPs, while appellate jurisdiction is exercised by the NCLAT. As far as concerns individuals and unlimited partnerships, the adjudicating authority is the Debt Recovery Tribunal (DRT), while appellate jurisdiction is exercised by the Debts Recovery Appellate Tribunal (DRAT). Appeals against orders passed by the NCLAT and the DRAT will lie before the Supreme Court.

As per the relevant stipulations set out in the Insolvency Code, control of insolvency proceedings, once initiated, shall lie with the relevant adjudicating authority and the appellate authority.

Once initiated, the board of directors has no significant role in or control over the insolvency proceedings.

v  Special regimes

The Insolvency Code permits the government to stipulate a separate framework regulating insolvency for financial services firms and such a framework is being proposed. The promulgation of this framework is expected in due course.

vi  Cross-border issues

The Insolvency Code does not adopt the UNCITRAL model of cross-border insolvency. However, it permits the central government to enter into an agreement with the government of any other foreign country to enforce the provisions of the Insolvency Code. Further:

a  the government may direct that the application of provisions of the Insolvency Code in relation to assets or property of corporate debtor or debtor, including a personal guarantor of a corporate debtor situated at any place in a country outside India with which reciprocal arrangements have been made, shall be subject to such conditions as may be specified;

b  while applying the provisions of the Insolvency Code on assets situated outside India, the adjudicating authority may issue a ‘letter of request’ to a competent court of the foreign country where the asset is located;38 and

c  the insolvency professional appointed, while taking custody of the assets of the bankrupt, shall also take control over assets of a corporate debtor that may be located in a foreign country.39 However, this does not include assets of a foreign subsidiary of the corporate debtor.40

---

38  Sections 234 and 235 of the Insolvency Code.
39  Section 18 of the Insolvency Code.
40  Section 36 of the Insolvency Code.
II INSOLVENCY METRICS

Presently, the banking sector in India is faced with a large number of NPAs and stressed accounts. The Financial Stability Report released by the RBI on 26 June 2018 estimates that the gross NPAs of scheduled commercial banks in India increased by 1.4 per cent from 10.2 per cent in September 2017 to 11.6 per cent in March 2018 and that this ratio may further increase to 12.2 per cent by March 2019. The power industry was identified as having the largest debt with negative profitability at the end of March 2018 with telecoms, transport, construction, textile and iron and steel industries also identified as suffering from high leverage and interest burden.

According to a written reply made by the Minister of State for Finance in Parliament in December 2018, the NPAs in the banking sector amount to approximately to 400 billion rupees, while CRISIL, one of the leading credit rating agencies India, in a report released in June 2018 observed that aggregate NPAs in the Indian economy stood at 10,300 billion rupees as of 31 March 2018. CRISIL also noted that additional large exposure corporate accounts amounting to approximately 5,000 billion rupees slipped into the NPA category in the 2018 fiscal year alone taking aggregate slippages in the previous three fiscal years to 13,600 billion rupees. In July 2017, CRISIL released a report suggesting that banks will have to take a haircut of approximately 2.4 trillion rupees to resolve the top 50 NPA accounts in the economy.

In October 2017 the central government announced a 2,100 billion rupee bailout plan for public sector banks in the country in an attempt to resolve the high level of bad debt and to improve their capital position. While the announcement was generally well received by stakeholders including investors, in our view, it remains to be seen whether this will suffice to effectively and conclusively address the NPA issue in the long term.

In some cases, adverse business circumstances with respect to certain specific sectors, for example, iron and steel, may be identified as having contributed to this predicament. However, issues relating to mismanagement of borrower entities as well as lack of sound and proactive lending and recovery policies on the part of the lenders are equally responsible.

The RBI has, in the past few years brought about various schemes aimed at addressing the issue of NPAs and stressed assets. While these schemes have succeeded in providing stakeholders with multiple alternatives to deal with NPAs and stressed assets, in our view, the inconsistencies and overlapping of regimes with other statutory frameworks have somewhat hampered their effectiveness, especially in the context of resolution and restructuring. The Insolvency Code, once operative, is expected to redress these inconsistencies. As far as concerns lenders’ recovery, there is presently a serious issue as to the timelines involved to achieve recovery. The Security Bill, in its statement of objects and reasons, points out that there are at present approximately 70,000 cases pending before the various DRTs pertaining to recovery. While there is an appreciable shortfall in terms of existing resolution infrastructure, the lack of cogent and coherent procedural stipulations in the regulatory framework has also contributed significantly to this issue. However, the Security Bill, passed by Parliament on 9 August 2016, seeks to ensure expeditious resolution of cases involving enforcement of security interest.
III  PLENARY INSOLVENCY PROCEEDINGS

The resolution process that has been made available under the Insolvency Code is plenary in the sense that it requires consent from the majority of all persons concerned. The RBI regulations are, necessarily, lender-centric.

Voluntary winding up is a plenary process.

IV  ANCILLARY INSOLVENCY PROCEEDINGS

There have been no significant recent or pending ancillary insolvency proceedings in India in the past year.

V  TRENDS

While discussing recent trends with respect to insolvency proceedings at Indian law, the ongoing proceedings in relation to the Kingfisher Airlines Limited (Kingfisher) bankruptcy controversy is relevant. Vijay Mallya is under investigation in connection with sums owed to a consortium of lenders led by the State Bank of India, amounting to approximately 90 billion rupees by Kingfisher. The consortium has initiated action under SARFAESI and taken physical possession of Kingfisher House, the headquarters of Kingfisher, valued at 1 billion rupees.

United Breweries (Holdings) Limited (UB Holdings), the ultimate parent of Kingfisher, had provided corporate guarantees to secure contractual payments due from Kingfisher, *inter alia*, in connection with sale and maintenance of aircrafts and other operations. However, Kingfisher defaulted in making these payments in or around 2010 and 2011, and consequently, the corporate guarantees were invoked. UB Holdings in turn defaulted on the payments to be made consequent to the invocation of the corporate guarantees. Accordingly, several winding-up petitions were filed against UB Holdings between March and November 2012. While UB Holdings opposed the winding-up petitions, it simultaneously filed an application before the Karnataka High Court pursuant to Section 536(2) of the Companies Act 1956,\(^41\) for leave to sell certain shares held in its subsidiary United Spirits Limited (USL) to Diageo PLC (Diageo).

The Karnataka High Court granted its leave and Diageo purchased shares of USL. Diageo acquired a 55 per cent stake in USL during the course of 2012 and 2013. However, in February 2016, Vijay Mallya was asked to step down from USL’s board of directors, pursuant to an internal forensic audit enquiry, whereby various legal contraventions were discovered in relation to loans given by USL to the United Breweries Group companies.

Kingfisher has also defaulted in payment of its taxes, and accordingly, the service tax department has seized several of Kingfisher’s assets, including aircraft and helicopters. Additionally, since Vijay Mallya is not presently in India, and is reportedly in London, the service tax department has initiated proceedings to impound his passport and compel him to return to India. In April 2016, the government revoked his passport and requested the UK government to deport him. However, the UK government informed the Indian government that while it could not deport Vijay Mallya, it is willing to assist and cooperate with the

\(^{41}\) Section 536(2) of the Companies Act 1956 states, *inter alia*, that any transfer of shares in the company or alteration in the status of its members made after the commencement of the winding up, shall, unless the court otherwise orders, be void.
government in exploring other alternatives such as extradition and mutual legal assistance. Presently, extradition proceedings are being heard by an English court, and while Mr Mallya had previously cited the poor conditions of Indian jails as one of the reasons for not returning to India, he has according to press reports, expressed his willingness to return to India after proceedings were initiated under the Fugitive Economic Offenders Ordinance, 2018.35

In April 2017, the RBI issued a notification advising banks to review and monitor their exposure to the telecommunications sector in view of the increased stressed levels in the sector and consider making provisions for standard assets in this sector at higher rates.

The Fugitive Economic Offenders Ordinance, 2018 was notified on 21 April 2018 with the objective of deterring economic offenders from evading liability at Indian law by remaining outside the territorial jurisdiction of Indian courts and forcing them to return to India to face trial for scheduled offences. Scheduled offences inter alia include dishonestly or fraudulently preventing debt being available for creditors, dishonour of cheque, etc. The ordinance empowers authorities to inter alia confiscate to the central government any property of the offender. The provisions of the ordinance are wide both in scope and application and may, in our view, operate as a hindrance to the insolvency resolution process where a director, promoter or other key personnel of the corporate debtor is declared a fugitive economic offender.44

The Insolvency Code is still in its early stages, and in the future, there may well be an increase in insolvency proceedings being initiated by the debtors themselves, since the Insolvency Code is geared primarily towards revival and rehabilitation of insolvents. The insolvency resolution process may be effective, especially where debtors are facing genuine stress on account of, inter alia, market conditions, unfavourable changes in regulatory policies, etc. The resolution process and the subsequent resolution plan (if implemented well) will allow stressed businesses to recover, and the extent of financial distress makes this a particularly relevant development for the Indian economy.

VI ANNEXURE I – RIGHTS OF OPERATIONAL AND FINANCIAL CREDITORS

<table>
<thead>
<tr>
<th>Sr. No.</th>
<th>Operational Creditor</th>
<th>Financial Creditor</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>May file an application on occurrence of default provided the operational creditor has sent a demand notice per Section 8 and has not received payment or a notice of dispute within 10 days of issue of notice.¹</td>
<td>May file an application on occurrence of default.²</td>
</tr>
<tr>
<td>2</td>
<td>Default may only be with respect to debt owed to the applicant.³</td>
<td>Default includes a default in respect of debt owed not only to the applicant but any other financial creditor.⁴</td>
</tr>
<tr>
<td>3</td>
<td>It is optional for operational creditors to propose a resolution professional in the application.⁵</td>
<td>It is mandatory for financial creditors to propose a resolution professional in the application.⁶</td>
</tr>
</tbody>
</table>

42 See (i) https://www.livemint.com/Companies/d7F8krFiKqQpowlq0VuAAI/Vijay-Mallya-Fugitive-Economic-Offenders-Ordinance-Bill.html; and (ii) https://www.livemint.com/Companies/zjJDYY7YPbDUwJf7wHwMmVijay-Mallya-willing-to-return-to-India-as-ED-moves-to-sei.html.
43 See Section VI for a brief description of the Fugitive Economic Offenders Ordinance. 2018.
44 Illustratively, see https://www.jckonline.com/editorial-article/modis-specter-haunts-chapter-11/.
45 Measured in terms of stressed and non-performing assets on lenders’ portfolios.
<table>
<thead>
<tr>
<th>Sr. No.</th>
<th>Operational Creditor</th>
<th>Financial Creditor</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Committee of Creditors</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>4</td>
<td>Operational creditors are not entitled to be a part of the committee of creditors.⁷</td>
<td>Financial creditors constitute the committee of creditors.⁸</td>
</tr>
<tr>
<td><strong>Meetings of Committee of Creditors</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>5</td>
<td>Operational creditors have the right to be notified by the resolution professional before any meeting of the committee of creditors provided the sum of their aggregate dues is not less than 10 per cent of the debt of the corporate debtor.⁹</td>
<td>All financial creditors have the right to be notified by the resolution professional before any meeting of the committee of creditors.¹⁰</td>
</tr>
<tr>
<td>6</td>
<td>Operational creditors are permitted to attend the meetings of committee of creditors provided the sum of their aggregate dues is not less than 10 per cent of the debt of the corporate debtor.¹¹</td>
<td>All financial creditors are entitled to attend the meetings of the committee of creditors.¹²</td>
</tr>
<tr>
<td><strong>Voting Rights</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>7</td>
<td>Operational creditors are not entitled to vote at the meetings of committee of creditors.¹³</td>
<td>Financial creditors are allowed to vote in proportion to the debt owed to each financial creditor at the meetings of committee of creditors.¹⁴</td>
</tr>
<tr>
<td><strong>Submission of Financial Information to the Information Utility</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>8</td>
<td>It is optional for operational creditors to submit financial information to the information utility.¹⁵</td>
<td>It is mandatory for financial creditors to submit financial information to the information utility.¹⁶</td>
</tr>
<tr>
<td><strong>Punishment for False Information</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>9</td>
<td>Imprisonment for a term ranging between 1 and 5 years or fine ranging between 100,000 and 10 million rupees.¹⁷</td>
<td>Fine ranging between 100,000 and 10 million rupees.¹⁸</td>
</tr>
</tbody>
</table>

¹ See Section 9(1) of the Insolvency and Bankruptcy Code, 2016.  
² See Section 7(1) of the Insolvency and Bankruptcy Code, 2016.  
³ See Section 9 of the Insolvency and Bankruptcy Code, 2016.  
⁴ See Explanation to Section 7(1) of the Insolvency and Bankruptcy Code, 2016.  
⁵ See Section 9(4) of the Insolvency and Bankruptcy Code, 2016.  
⁶ See Section 7(3) of the Insolvency and Bankruptcy Code, 2016.  
⁷ See Section 21(2) of the Insolvency and Bankruptcy Code, 2016.  
⁸ See Section 21(2) of the Insolvency and Bankruptcy Code, 2016.  
⁹ See Section 24(3)(c) of the Insolvency and Bankruptcy Code, 2016.  
¹⁰ See Section 24(3)(c) of the Insolvency and Bankruptcy Code, 2016.  
¹¹ See Section 76 of the Insolvency and Bankruptcy Code, 2016.  
¹² See Section 75 of the Insolvency and Bankruptcy Code, 2016.  
¹³ See Section 75 of the Insolvency and Bankruptcy Code, 2016.  
¹⁴ See Section 75 of the Insolvency and Bankruptcy Code, 2016.  
¹⁵ See Section 215(3) of the Insolvency and Bankruptcy Code, 2016.  
¹⁶ See Section 215(2) of the Insolvency and Bankruptcy Code, 2016.  
¹⁷ See Section 76 of the Insolvency and Bankruptcy Code, 2016.  
¹⁸ See Section 75 of the Insolvency and Bankruptcy Code, 2016.
I INSOLVENCY LAW, POLICY AND PROCEDURE

Statutory framework and substantive law

Insolvency and restructuring proceedings in Ireland are primarily governed by the Companies Act 2014 (as amended), the Bankruptcy Act 1988 (as amended) and the Personal Insolvency Act 2012 (as amended). These are supplemented by principles of common law.

The Irish legal framework is embedded in the EU framework under the Recast Insolvency Regulation, augmented by the provisions of the Rome Regulation and the Recast Brussels Regulation. The overall Irish framework is both creditor friendly and flexible, featuring processes that facilitate rescue and restructuring of corporate groups with complex structures.

In terms of substantive provisions applicable to insolvency proceedings, a liquidator and any creditor may seek to set aside eligible transactions. Such powers arise (1) where the transaction occurred within specified periods before the company entered into liquidation and (2) where the company was insolvent at the time it entered into the transaction.

Three types of transactions are particularly vulnerable in this regard:

a unfair preference: A transaction in favour of a creditor taking place within six months prior to the commencement of a winding up (or within two years if in favour of a connected person) and made with the dominant intention of putting the other party in a better position than they would have been had the company gone into liquidation;

b avoidance of a floating charge: If a floating charge has been created within 12 months before the commencement of a winding up, it will be invalid unless it can be shown

1 Julie Murphy–O’Connor is a partner in Matheson’s commercial litigation and dispute resolution department and corporate restructuring and insolvency law group.

2 The Companies Act 2014 which came into operation on 1 June 2015 is primarily a consolidation of existing laws; however, certain provisions have been modernised and updated. As regards insolvency and restructuring, it has brought increased clarity of process, and reduced court supervision of insolvency processes.

that immediately after the creation of the charge the company was solvent. However, it will not be invalid to the extent of money or goods or services actually provided as consideration for the charge; and

c fraudulent transfers: A liquidator or creditor of a company can apply to the High Court for the return of assets or for compensation where they can establish that the transfer of the assets had the effect of the perpetration of a fraud on the company, its creditors or its members. However, transactions that are unfair preferences are excluded.

The underlying principle concerning distribution in a liquidation is that the property of a company should be applied \textit{pari passu} in satisfaction of its liabilities. This allows for all creditors, particularly those within the same class, to be treated equally. If the realised assets of a company are insufficient to pay any class of creditors in full, they are paid in equal proportion to their debts.

A combination of legislation, contract law and common law establishes a ‘waterfall’ of claims in insolvency proceedings. The following order of priority is therefore a general guide only:

\begin{itemize}
  \item[a] super-preferential claims (e.g., certain employees’ social insurance contributions);
  \item[b] remuneration, costs and expenses of an examiner that have been sanctioned by the court;
  \item[c] fixed charge holders (a fixed charge holder is entitled to realise its security outside of a winding up of the company);
  \item[d] expenses certified by an examiner;
  \item[e] liquidation costs and expenses;
  \item[f] preferential debts (e.g., certain rates and taxes, wages and salaries);
  \item[g] holders of any charge created as a floating charge;
  \item[h] unsecured debts; and
  \item[i] deferred debts of members.
\end{itemize}

When proceeds are insufficient to meet the claims of one category in full, payments for that category are pro-rated.

\textbf{ii Policy}

The Irish restructuring regime lends itself towards rescue where appropriate. The threshold for each restructuring process is designed so as to ensure that only companies with a genuine prospect of survival can engage in a restructuring process.

‘Examinership’ is a court supervised process whereby a court enforced moratorium is in place on creditor action to facilitate the restructuring and survival of a company.\footnote{Section 509 of the Companies Act 2014.} However, although the Irish framework provides for and encourages restructuring regimes, and the vast majority of examinerships have a successful outcome, the level of examinerships remains relatively low. This is largely because of the fact that it can be a costly process and is, therefore, not suited to every company. Interestingly, in 2017, the number of examinership appointments doubled from that of 2016.\footnote{Deloitte, press releases, ‘Corporate insolvencies in 2017 total 874, down 15 per cent when compared with 2016’, available online at https://www2.deloitte.com/ie/en/pages/about-deloitte/articles/Insolvency-stats-2017-review.html.}
Ireland

Like the UK, it is also possible for companies in Ireland to avail themselves of a statutory ‘scheme of arrangement’, which can be used to implement a variety of arrangements between a company and its creditors or its members. While schemes of arrangement can be used to implement even the most complex of debt restructurings, they are not used as often as the examinership process in Ireland, not least because in an examinership there is a lower voting threshold.

iii Insolvency procedures

Liquidation

An insolvent company can be wound up by the High Court (a compulsory liquidation) or by way of a shareholders’ resolution followed by a creditors’ meeting (creditors’ voluntary liquidation). The general criteria required to liquidate an insolvent company is that the company is unable to pay its debts. This usually entails an assessment of whether (1) the company is unable to pay its debts as they fall due (the ‘cash-flow test’) or (2) the value of the company’s assets is less than its liabilities, taking into account its contingent and prospective liabilities (the ‘balance sheet test’).

The time frame for the completion of a winding up is dependent upon the size of the company and its trading patterns. A relatively straightforward liquidation can complete within a year, however, it is common for larger and more complex liquidation procedures to take significantly longer.

Examinership

Examinership is the main rescue process for companies in Ireland. Although there are a number of differences, international corporates will recognise examinership as being similar in many respects to the Chapter 11 procedures in the US and, to a lesser extent, administration in the UK.

In an examinership, the maximum period in which a company may be under the protection of the court is 100 days. An examiner (a court appointed insolvency practitioner) has to have formulated a scheme, convened creditors’ meetings and reported back to the court by day 100 and the approval of the scheme is typically heard by the High Court shortly thereafter. The scheme must be approved by in excess of 50 per cent (in value and number) of any one impaired class in order for it to be put before the court for approval.

Statutory schemes of arrangement

Although the statutory scheme of arrangement 6 is not necessarily an insolvency process, its flexibility allows it to be used to restructure debt. The scheme is, however, more commonly used in Ireland to give effect to a reorganisation of shareholdings of large corporates and has tended to be the tool of choice for effecting the large scale corporate inversion transactions that have been in vogue in recent times with US and Irish pharmaceutical companies.

In a statutory scheme of arrangement, once a scheme proposal document has been finalised and circulated, it would not be unrealistic for the court process to be completed within eight to 10 weeks. The scheme must be approved by in excess of 75 per cent of value and a majority in number of each class of creditors or members.

---

6 Section 449 of the Companies Act 2014.
Receivership

It is also possible to restructure companies by way of a pre-pack receivership, in which case the sale of a distressed company’s business can be negotiated before it enters into receivership and executed shortly after the receiver is appointed. The aim is to minimise disruption and cost and an advantage is that out-of-the-money junior creditors can be left behind in the insolvent company.

Ancillary insolvency proceedings

The Recast Insolvency Regulation applies to all collective insolvency proceedings relating to a company with its centre of main interests (COMI) in an EU Member State. The regime under the Recast Insolvency Regulation allows for the opening of secondary proceedings in another Member State in which the company has an establishment where main proceedings have been opened and are pending in another Member State.

It is possible for the insolvency office holder in the main proceedings to give a unilateral undertaking to creditors in the secondary proceedings that local distribution and priority rules will be respected as though secondary proceedings were opened there, which generally negates the requirement for secondary proceedings.

It is possible for liquidators of companies in non-EU countries to apply to the court in Ireland under common law for an order in aid of the foreign proceedings. The court has a discretion to grant such an order in appropriate cases.

iv Starting proceedings

The question of who may commence such proceedings depends on which procedure is used.

Compulsory liquidations

In a compulsory liquidation, the court has jurisdiction to appoint a liquidator if it is satisfied that the company is unable to pay its debts or that it is just and equitable to do so. Those entitled to petition the court to liquidate a company include the company itself, a creditor of the company, a contributory of the company and the Director of Corporate Enforcement. A compulsory liquidation is deemed to commence at the time of filing the petition.

Notice of the petition must be advertised which allows parties (including the company itself and its creditors) to object to the appointment of a liquidator at the hearing of the petition.

---

7 Section 564 of the Companies Act 2014.
8 Section 571(5) of the Companies Act 2014 places a restriction on the right of a contributory to apply to have the company wound up. A contributory is not entitled to present a winding up petition unless the shares of which the person is a contributory, or some of them, either (1) were originally allotted to the person or have been held by the person, and registered in the person’s name for at least six months during the 18 months before the commencement of the winding up, or (2) have devolved on the person through the death of a former holder.
Creditors’ voluntary liquidations

A creditors’ voluntary liquidation is usually initiated by the directors of a company. A shareholders’ meeting and creditors’ meeting are called respectively. The shareholders resolve that the company is insolvent, and a liquidator is appointed. A statement of affairs is compiled and presented by the directors at the creditors’ meeting, including a list of creditors and amounts owed.

Examinership

Where a company is, or is unlikely to be, unable to pay its debts, the shareholders, directors or creditors may petition the court to appoint an examiner. It is generally the company itself that petitions the court for the appointment of an examiner. Notice of the petition must be advertised, and it is possible for interested parties to object at the hearing of the petition to the appointment of examiner. It is possible to challenge proposals on the basis that one class of impaired creditors has not voted in favour of the scheme (which could be based on arguments in relation to the composition of classes). Challenges are also possible on the basis that the proposals are unfairly prejudicial to a particular creditor or are not fair and equitable in relation to any class of creditors.

Statutory schemes of arrangement

It is generally the directors of a company who apply to the court to summons a meeting between the members and creditors in order to formulate a scheme of arrangement. However, the company itself, any creditor or member of the company or in the case of a company being wound up, the liquidator may also apply to the court to initiate the process.

Control of insolvency proceedings

Liquidation

Once an insolvent company is in liquidation, the directors’ powers cease and the liquidator assumes the management of the company.

The Companies Act 2014 placed compulsory liquidations on the same footing as a creditors’ voluntary winding up once the order for winding up is made, thereby reducing the supervisory role of the court in favour of greater creditor involvement and liquidator autonomy.

9 Section 510 of the Companies Act 2014 provides that shareholders are those holding not less than 10 per cent of shares carrying the power to vote at general meetings at the time of presentation of the petition.

10 Section 510 of the Companies Act 2014 provides that a creditor includes a contingent or prospective creditor of the company.

11 Section 451(3) of the Companies Act 2014.
Examinership
In an examinership, the company will continue to trade and the directors usually remain in control of a company during the protection period. This is subject to the court’s discretion to direct, upon application, that the examiner assumes some or all of the director’s functions only for the period of examinership. In practice this is rarely done, and usually where there has been a suggestion of some sort of wrongdoing on the part of the directors. The examiner’s scheme of arrangement requires court approval before it becomes binding.

Statutory schemes of arrangement
The directors and shareholders are usually instrumental in putting together the scheme and running the process. As with an examinership, the company can continue trading and the directors can stay in control of the company.

vi Special regimes
Modified insolvency regimes apply in certain sectors and special situations. Examples include the following.

The Insurance (No. 2) Act 1983 provides for the appointment of an administrator to non-life insurance insolvent companies at the request of the Central Bank in certain circumstances with a view to ensuring the survival of the company.

Ireland took a series of exceptional steps to contain the crisis in the banking sector that emerged in 2008. Its strategy included transferring non-performing eligible assets to a government backed entity, the National Asset Management Agency and to provide capital and liquidity to weakened and distressed banks and building societies.

The European Communities (Reorganisation and Winding up of Credit Institutions) Regulations 2011 (SI 48 of 2011) and the Central Bank and Credit Institutions (Resolution) Act 2011 apply to the winding up of credit institutions and banks and aim to provide an effective and expeditious regime for dealing with failing credit institutions.

The Irish Bank Resolution Corporation Act 2013 was enacted in February 2013 and provided for the immediate liquidation of Irish Bank Corporation Limited (IBRC) (formerly Anglo Irish Bank Corporation Limited) by way of ‘special liquidation’. As the special liquidators were appointed by the Minister for Finance, they are obliged to comply with instructions given to them by the minister and are under an obligation to act in the interests of the Irish taxpayer, putting them in a somewhat different position than other liquidators who are answerable primarily to the creditors of the company.

Ireland is an internationally recognised centre of excellence in aviation finance and recently gave effect to the ‘Alternative A’ insolvency remedy of the Aircraft Protocol to the Cape Town Convention on International Interests in Mobile Equipment, the primary purpose of which is to provide a protective regime for aircraft financiers and creditors in insolvency proceedings similar to the US Chapter 11 procedure.

vii Cross-border issues
The Recast Insolvency Regulation applies to all collective insolvency proceedings and some restructuring proceedings relating to a company with its COMI in the EU. The Recast Insolvency Regulation provides for automatic recognition in Ireland of proceedings to which the Recast Insolvency Regulation applies.
Ireland has not adopted the UNCITRAL Model Law on Cross-Border Insolvency Proceedings. For a company who does not have its COMI in the EU, the foreign insolvency officeholder can apply to the High Court pursuant to common law for recognition and an order in aid of the foreign proceedings. In the exercise of that jurisdiction, the Court has given consideration to the following factors:

a. whether recognition is being sought for a legitimate purpose;

b. that there is no prejudice to any creditor in Ireland in affording recognition;

c. that there is no infringement of any local law in affording recognition;

d. where the insolvency procedure in the other state is sufficiently similar to that in Ireland; and

e. that to afford recognition would not infringe public policy in Ireland.

II INSOLVENCY METRICS

The Irish economy has emerged from the aftermath of the financial crisis and is currently experiencing a period of growth. Ireland’s GDP grew by 7.3 per cent in 2017, representing the fastest growth rate in the EU in 2017.\(^\text{12}\) The banking system has shown positive signs of recovery, and the unemployment rate has declined rapidly over the past number of years.

It is not entirely clear what effect the ongoing Brexit negotiations will have on the Irish economy as a whole. However, Ireland is an English-speaking jurisdiction, with a strong and long-standing common law jurisprudence. This provides familiarity of process and procedure regarding substantive legal principles to those accustomed to dealing with UK law. It is anticipated that these factors, together with the fact that the Irish corporate recovery rate is high at 87.7 per cent versus an OECD average of 73 per cent,\(^\text{13}\) will enhance Ireland’s attractiveness as a location for a corporate to base its COMI.

Corporate insolvency activity decreased by 14 per cent in the first quarter of 2018 when compared with the first quarter of 2017.\(^\text{14}\) The construction industry had the highest level of insolvency activity in quarter one of 2018. Notwithstanding increased levels of development and a general surge in the construction industry, it suffered significantly during the financial crisis, and the recent liquidation of Carillion in the UK impacted Ireland, and was blamed in relation to the failed examinership and subsequent liquidation of the Sammon Group in Ireland and the consequent loss of 200 jobs in addition to many more contractors.


III  PLENARY INSOLVENCY PROCEEDINGS

i  In the Matter of Custom House Capital\textsuperscript{15}

The directors of an investment broker firm were disqualified from being appointed or acting as a director of any company following a High Court order. Three former directors of the company were disqualified for 10, 12 and 14 years respectively, 14 years being the longest period of disqualification in the history of company law in this jurisdiction.

The directors in this instance were involved in the misappropriation of €66.5 million in client funds and the concealment of this. The liquidator sought an order for his legal costs and his own costs of the investigation as well as the costs of the court application itself. The liquidator submitted that he was entitled to a costs order against each of the directors jointly and severally on the basis of the rule that costs follow the event.\textsuperscript{16}

The liquidator acknowledged that it is not usual for a liquidator to seek an order for the costs of an investigation preceding a disqualification application in addition to the legal costs, but justified his application having regard to the scale of the dishonesty in which the directors engaged and the subsequent consequences for the firm’s investors. The liquidator was successful in his application. This decision highlights the court’s approach towards directors who behave in a reprehensible manner to the detriment of a company’s creditors.

ii  In the Matter of Custom House Capital\textsuperscript{17}

In a separate application in the same liquidation, the liquidator sought the following directions from the High Court:

\begin{itemize}
  \item [a] how he should distribute monies standing to the credit of pooled bank accounts in which there was a shortfall by reason of the misappropriation;
  \item [b] how he should distribute monies he may recover from properties, funds or companies into which misappropriated monies were paid; and
  \item [c] what, if any, order may or should the court make pursuant to Regulations 157 and 158 of the European Communities (Markets in Financial Instruments) Regulations 2007\textsuperscript{18} in relation to his application to have recourse or rights against client money or financial instruments.
\end{itemize}

In respect of the client monies held in pooled bank accounts where there was a shortfall arising, the court held that the assets should be distributed to the former clients on a \textit{pro rata} basis. The court also applied a form of pooling order directing that monies received from properties, funds or companies into which the misappropriated monies were paid should be also returned to the relevant client accounts \textit{pro rata}.

\textsuperscript{15}  In the Matter of Custom House Capital Limited [2017] IEHC 428.
\textsuperscript{16}  Order 99, Rule 1 of the Rules of the Superior Courts.
\textsuperscript{17}  In the Matter of Custom House Capital Limited [2017] IEHC 484.
The court did not make an order pursuant to the MiFID Regulations permitting the liquidator to have recourse to the remaining client assets as a large portion of the segregated assets had already been distributed by the liquidator without bearing costs and, accordingly, held it would be inequitable for the remaining pooled assets to attract costs.

iii  Re Hayes, a Debtor

This case concerned a borrower couple who had engaged a personal insolvency practitioner (PIP) following difficulty in repaying a loan secured by a mortgage over their family home that had been transferred to an unregulated entity, Shoreline Residential DAC, (the Lender) from IBRC.

The PIP drafted a personal insolvency arrangement (PIA) in relation to the borrowers’ debt. However, this was rejected by the Lender at the creditors’ statutory meeting as being unfairly prejudicial because the proposals regarding the mortgage debt were not sustainable long term. It was proposed that the remaining term be extended from 18 years to 27 years during which period a fixed interest rate would apply.

Referring to the fact the Lender was a fund and not a bank, the court was of the view that the borrower’s loan was akin to a bond as the loan was a secured asset that offered a fixed, albeit long term, return on the investment. Having regard to the Lender’s ‘status’ as a fund, the court held that there was insufficient evidence on which to conclude that the fixed interest rate for the extended term would be unfairly prejudicial and held that the return on the Lender’s investment should be assessed by reference to the bond markets rather than the lending market.

This decision suggests that the court will assess an objection by a secured creditor to a PIA differently depending on whether the creditor is a bank or a loan purchaser that is not a bank. It also demonstrates the court’s preference to approve PIAs which result in debtors remaining in their family home where possible.

iv  Re Callaghan, a Debtor

This case also involved a debtor couples’ proposed PIA providing for a significant write-down of the debt secured on their family home. The secured creditor, KBC Bank (the Bank) was of the view that only a small proportion of the debt should be written off and the remainder of the secured debt should be split evenly in two portions, one to be serviced with certain specified repayments by the debtors and the other to be ‘warehouse’ at zero per cent interest, with the debt to be repaid on the death of the debtors.

The court considered Section 115A(9) of the Personal Insolvency Act 2012, which provides that the court should make an order approving a PIA only where it is satisfied that the PIA will enable:

- the debtor to resolve his indebtedness without recourse to bankruptcy;
- a creditor to recover the debts due to the extent that the means of the debtor reasonably permit; and
- the debtor not to dispose of an interest in or cease to occupy his or her principal primary residence.

---

19  Re Hayes, a Debtor [2017] IEHC 657.
20  Re Callaghan, a Debtor [2017] IEHC 332.
The High Court held that the debtors’ proposed PIA provided a more appropriate solution as the Bank’s proposal was not predicated on an ability to repay and was capable of resulting in the debtor’s estate being insolvent at the end of the term.

Notwithstanding the court’s approval of the debtors’ PIA, this decision is of interest to financial institutions and holders of NPLs as the court confirmed that warehousing of debt is not precluded as a potential solution by the legislation. However, it is clear that such proposals will only be deemed reasonable if they are sustainable and based on an anticipated ability to ultimately repay the warehoused amount.

v  In the Matter of FCR Media Limited

This case concerned FCR Media Limited (FCR), publisher of the Golden Pages and a related Lithuanian company with its COMI in Ireland. FCR had become insolvent as a result of significant changes in its market in recent years due to the prevalence of digital marketing. The European media group of which the FCR was a part decided to withdraw from the Irish market and to withdraw its financial support to FCR. FCR was also burdened by a deficit in its defined benefit pension scheme which had been put in place for employees many years previously.

The scheme of arrangement allowed FCR to avoid liquidation and provided for the inclusion of a pension liability and the wind down of the defined benefit pension scheme with the support of the pension trustees. This case demonstrates the benefits of examinership as it preserved the employment of 73 employees following securing fresh investment in FCR.

vi  In the Matter of KH Kitty Hall Holdings Limited and Others

This case involved a group of seven companies (the Group) all forming part of the Edward Capital Group. The Group had entered into a settlement agreement with one of its secured creditors, Deutsche Bank (DB) to restructure and discharge the Group’s secured debts. The Group subsequently sought to appoint an examiner and DB objected on the basis of the settlement agreement arguing that the petition was an abuse of process and an attempt to renege on the agreement.

The High Court refused the petition to appoint an examiner to four companies in the Group and referenced the primary motivation behind the petition as being an attempt to retain control of the Group. In approving the appointment of an examiner to three of the companies, the court was concerned for the customers and employees of each business and was satisfied that the companies had met the statutory test for examinership (i.e., whether the company had a reasonable prospect of survival). The Group appealed the decision and DB cross-appealed arguing that an examiner should not have been appointed to any of the Group.

The Court of Appeal allowed the appeal and dismissed the cross-appeal holding that the settlement agreement was not, in the circumstances, a bar to the appointment of an examiner. The court confirmed that the statutory test for examinership was met and that an examiner should be appointed to all of the Group companies. In relation to the shareholders wanting to retain control, the court held that the fact that there may have been a commercial incentive in seeking the appointment of an examiner did not constitute an abuse of process having

21  In the Matter of FCR Media Limited (unreported), High Court, 9 November 2017.
22  In the Matter of KH Kitty Hall Holdings Limited and Others [2017] IECA 247.
regard to the factual context of the settlement agreement. The Group has since successfully emerged from the examinership process and has continued to trade under new management and ownership with the preservation of over 300 jobs.

IV ANCILLARY INSOLVENCY PROCEEDINGS

The Recast Insolvency Regulation has not frequently been invoked in the Irish courts.

The High Court recently considered the scope of the Recast Insolvency Regulation in the case of *Healy v. Irish Life Staff Benefits Scheme & Anor*\(^{23}\) in which the plaintiff had been adjudicated bankrupt in 2013 by the High Court of Manchester in the UK. The relevant court order stated that the proceedings are main proceedings for the purposes of the Original Insolvency Regulation which was applicable at that time. The defendant was an employee of the second named defendant and was party to a pension scheme (the Scheme).

The trustee in bankruptcy claimed an entitlement to the plaintiff’s rights and benefits under the Scheme. The plaintiff was discharged from bankruptcy in 2014 and was unsuccessful in his application to the High Court in the UK to have his pension under the Scheme excluded from his estate in bankruptcy. The plaintiff then sought injunctive relief from the Irish High Court in the form of an order preventing the defendants from liaising with the trustee in bankruptcy and from making any payments to the trustee. The defendants contested the jurisdiction of the High Court on the basis of the plaintiff’s COMI.

In relation to whether the pension should form part of the plaintiff’s estate in bankruptcy, the court confirmed that is a matter for determination in the UK proceedings and that, for the court to make the reference to the Court of Justice of the European Union as requested by the plaintiff, would in effect be precisely the type of interference with the UK bankruptcy proceedings that the EU regulations are designed to prohibit.

V TRENDS

In line with the fact that corporate insolvency activity decreased by 14 per cent in quarter one of 2018 when compared with quarter one of 2017, it is anticipated that this trend will continue during the coming year. As discussed above, the dominant reason for this is the fact that the Irish economy is in a growth phase.

Personal insolvency applications, on the other hand, continued to increase during the past 12 months with the number of debtors securing PIAs continuing to rise. Successful PIAs are designed to return debtors to solvency. In comparison to the last quarter of 2017, the first quarter of 2018 saw an increase in the number of applications for PIAs but a decrease in the number of bankruptcies.\(^{24}\)

Linked to the number of applications for PIAs is the high level of NPLs remaining on bank balance sheets which remains well above the EU average.\(^{25}\) However, it is anticipated that there will be a further divestment of NPL portfolios by Irish banks in the coming year which is likely to result in further enforcement proceedings, although perhaps not at the scale seen over the last number of years.

---

\(^{23}\) *Healy v. Irish Life Staff Benefits Scheme & Anor* [2018] IEHC 28


\(^{25}\) See footnote 13.
The Minister for Justice announced on 29 May 2018 that a new bill will be drafted to provide further protections for mortgagors facing repossession proceedings. It has its genesis in a private member’s bill which was published last year but was not substantially progressed (the Keeping People in their Homes Bill). The new bill is intended to apply to repossession proceedings against a mortgagor to whom a PIA under the Personal Insolvency Act 2012 is not available (namely where it has not been possible to put a PIA together, or where one collapses). It is intended to supplement other measures such as the limited legal aid scheme for defaulting mortgagors and the Personal Insolvency Act 2012, in particular the court’s power to overrule a secured creditor’s veto of a PIA where a family home is concerned.

Pre-pack receiverships have been very effectively used in Ireland in recent years. They have also been successfully used in conducting loan to own schemes. There are no formal guidelines which govern pre-packs in Ireland and there has been little judicial consideration of the procedure.26

26 The sale of the Thomas Crosbie media group is an example of a high profile pre-pack in which this firm acted for the secured lender. Although one creditor commenced proceedings challenging the process, the case did not proceed to trial, as the creditor was subject to an order to pay security for costs on the grounds that, amongst other things, the creditor plaintiff had failed to show that the secured creditor did not have at least a prima facie defence to the claims, on the grounds that the secured creditor was entitled to take steps to enforce its security in a manner which protected its legitimate interests. Webprint Concepts Ltd v. Thomas Crosbie Printers Ltd [2013] IEHC 359.
Chapter 13

ISLE OF MAN

Miles Benham and Carly Stratton

I INSOLVENCY LAW, POLICY AND PROCEDURE

In the last edition of this publication we noted that there had been some significant movement in Manx insolvency law especially in the area of the mechanisms available for challenging a sealed winding-up order. At that time we noted that there was an increase in judicial criticism of the Isle of Man’s legislation and rules in respect of winding up. As such reforms do not appear to be high on the legislative agenda there has not been any change to either the legislative framework or the winding-up rules. The Isle of Man courts continue, however, to do an admirable job of ensuring that aging rules continue to function in the modern world. Accordingly, the statutory framework and substantive law remains the same in this edition as in the previous.

i Statutory framework and substantive law

Insolvency law on the Isle of Man is governed primarily by the following legislation:

\[\begin{align*}
\text{a} & \quad \text{the Fraudulent Assignments Act 1736;} \\
\text{b} & \quad \text{the Preferential Payments Act 1908;} \\
\text{c} & \quad \text{the Preferential Payments and Other Acts (Financial Adjustments) Act 1973;} \\
\text{d} & \quad \text{the Companies Act 1931–2004;} \quad \text{and} \\
\text{e} & \quad \text{the Companies Act 2006.}
\end{align*}\]

The primary legislation governing insolvent companies can be found in Sections 155–276 of the Companies Act 1931. This is supported by the Companies (Winding-up) Rules 1934.

The regime in the Isle of Man, perhaps unsurprisingly given its proximity, shares many similarities with the regime in England and Wales and, indeed, with many common law jurisdictions. This is owing in part to the fact that the Isle of Man Companies Act 1931 was based on the Companies Act 1929 (an Act of Parliament). Nevertheless, there are certain idiosyncrasies and features unique to Isle of Man insolvency law and procedure that have developed over time. Added to the divergence in Manx and English and Welsh insolvency law and procedure as a result of the passage of time and interpretation is that the English and Welsh legislation of has been subject to amendment that the Manx legislation has not.

The Fraudulent Assignments Act 1736 states that ‘all fraudulent Assignments of Transfers of the Debtor’s Goods or Effects shall be void and of no Effect against his just Creditors, any Custome or Practice to the contrary notwithstanding’.

---

1 Miles Benham and Carly Stratton are directors of MannBenham Advocates Limited.
2 The Spirit of Montpelier Limited (In Liquidation) and others v. Lombard Manx Limited (18 June 2015).
A transaction will be void under the 1736 Act if, and only if, it is entered into dishonestly (i.e., if the debtor enters into the transaction with the intention to defraud his or her creditors). The 1736 Act applies to present and ascertained future debts at the time of the transaction in question. It does not, however, apply to claims filed after the transaction. Further, assignment or transfer of debtors’ goods is only void against existing creditors; it is not illegal to protect property against future creditors. Accordingly, one may enter transactions with a view to and for the purpose of protecting property against potential future creditors that do not presently exist.

ii Policy

In *Donnell v. Siboney*, Deemster Doyle, then Second Deemster of the Isle of Man, stated that: ‘To present a petition to wind up a company is a very serious step to take. It can result in the death of the company.’

To present a petition to wind up a company is therefore considered to be a serious step and not to be done lightly. It might therefore be argued that there should be some reluctance for the Isle of Man courts to take the step to wind up a company. It is, however, the case that courts are routinely required to make serious decisions on a variety of important issues and the fact that presentation of a winding-up petition might be considered a last resort will not prevent the court from winding up a company where there are good grounds for doing so.

*Lehman Brothers Inc v. Navigator Gas Management Limited* states that:

*It is well-settled law that if a creditor with standing makes application to have a company wound up, and if the court is satisfied that such company is unable to pay its debts, a winding-up order will follow unless there is some special reason to the contrary. Further, in such circumstances and being so satisfied, the court would assume that a winding-up order should be made. The burden rests with any objector to show special reasons why such an order should not be made.*

It follows that if a company is considered to be unable to pay its debts the Isle of Man courts will not hesitate to wind it up unless that company or other objectors can show special reasons not to, and the burden is on them to do so.

The practicality is that if a winding-up petition is presented and a company is deemed unable to pay its debts the chances of its survival are minimal. There are certain mechanisms that allow schemes of arrangement or receivership, but if a company is in financial difficulty and finds itself unable to pay its debts as they fall due, and a creditor in receipt of an undisputed debt wishes to wind up the company, there is a very good chance that the creditor will succeed.

---

3 *In Re Heginbotham* 1999-01 MLR 53.
4 *Jefferies v. Henderson Walker* 1522-1920 MLR 296. The case itself relates to an individual who was adjudged bankrupt, but the principle is equally applicable to companies.
5 10 December 2008, Chancery Division.
6 31 May 2005, Chancery Division.
iii Insolvency procedures

There are a variety of options open in respect of an insolvent company on the Isle of Man:

a it can be wound up either voluntarily by its creditors or by the court or subject to the supervision of the court;

b it can appoint a receiver by way of application to the court or a charge holder can appoint a receiver in accordance with the terms of the security document; and

c a liquidator may make an application to the court to sanction a compromise or a scheme of arrangement.

Winding-up proceedings by the court are discussed in Section I.iv.

There is no provision for the appointment of an administrator in the Isle of Man, nor is there a position of administrative receiver under Isle of Man law. However, foreign administrators are recognised and are likely to be assisted by the Isle of Man courts if such a request is made. The court has sought the assistance of the English High Court under Section 426 of the Insolvency Act 1986 to place an Isle of Man company into administration under the laws of England and Wales.

The Manx legal position on the appointment of receivers is by and large the same as the pre-1986 position in England and Wales. There is no requirement that a receiver should have any qualification as long as he or she has reached full age, although practically it would be difficult to envisage a situation where a receiver would not be an experienced or appropriately qualified insolvency practitioner.

Unless the power to appoint a receiver has been granted by way of debenture or other appropriate agreement, it will be necessary to apply to the court for a receiver to be appointed. The court’s jurisdiction to appoint a receiver in the Isle of Man follows the common law position and will only be exercised to aid some legal or equitable right. The appointment must of course be of some advantage to the applicant and the property in question must have some value.

Appointment of a receiver by debenture or under a charge will be in accordance with the terms of the security document. Subject to any terms to the contract, the appointor may remove or replace the receiver at any point he or she chooses.

The jurisdiction of the Manx court to affect schemes of arrangement has been described as being ‘extremely wide’. A liquidator has power to apply to the court for the summoning of a meeting of the creditors and contributories for a vote to be held upon the scheme. If three-quarters in value of the creditors or members present and voting agree to the scheme of arrangement or compromise then, if this is sanctioned by the court, it is binding on the creditors, members and the liquidator.

---

7 Section 214 of the Companies Act 1931.
8 ibid, Section 162.
9 ibid, Section 243.
10 Section 42 of the High Court Act 1991.
11 Sections 152 and 184(1)(e) of the Companies Act 1931.
15 Sections 152 and 184(1)(e) of the Companies Act 1931.
The Manx courts have a history of proactively assisting overseas courts in respect of insolvency matters. The First Deemster (High Court judge) recently stated\(^\text{16}\) in a case involving US Chapter 11 proceedings of an Isle of Man company that ‘[t]he substantive insolvency proceedings should be confined to one jurisdiction with other courts worldwide, where necessary, acting in an ancillary capacity and recognising and assisting the jurisdiction of the primary court’. In this case the Manx court was content for the US court to be the primary court.

The island’s court system is modern and efficient and ancillary insolvency proceedings can be dealt with in a timely manner.

iv Starting proceedings

The language of the Companies Act 1931 is that insolvency proceedings before the court are commenced in the Isle of Man by way of a winding-up petition\(^\text{17}\). The following parties may commence an application to wind up an Isle of Man company:

\begin{itemize}
\item[a] the company;
\item[b] the Isle of Man Treasury (in respect of public companies in limited circumstances);
\item[c] any creditor or creditors (including contingent or prospective creditors);
\item[d] any contributory or contributories; and
\item[e] 10 or more policyholders in the case of an insurance company.\(^\text{18}\)
\end{itemize}

An application to wind up an Isle of Man company may be made by any or all of the above listed parties either together or separately.

Notwithstanding the foregoing, there are further limitations on when a contributory or a contingent or prospective creditor may bring a winding-up petition. In respect of contributories they are only entitled to present a winding-up petition if their shares were allotted at least six months before the commencement of the winding-up petition (or they have devolved to the contributory through the death of the original holder).\(^\text{19}\) Contributories may present a petition if the members of the company have been reduced below two.

Before an application for winding up by prospective or contingent creditors can be heard by the court they must establish a \textit{prima facie} case for winding up and provide security for costs.\(^\text{20}\)

In addition to the above, the Financial Supervision Commission may present a winding-up petition where it is expedient in the public interest that the company is wound up.\(^\text{21}\)

The Isle of Man courts have discretion on hearing a winding-up petition to make such orders that they see fit and may dismiss, adjourn, make any interim order or any other order that they deem appropriate in the circumstances.\(^\text{22}\) The only limitation on the court’s


\(^{17}\) The new court rules brought in by the Isle of Man Courts of Justice in 2009 now refer to ‘claims’ rather than ‘petitions’, so – more accurately – a winding-up petition should now be a winding-up claim, but for ease of reference and consistency this chapter will make reference to winding-up petitions.

\(^{18}\) Section 164(1) of the Companies Act 1931.

\(^{19}\) ibid at Section 164(1)(a)(i) and (ii).

\(^{20}\) ibid at Section 164(1)(c).

\(^{21}\) See Section III.iii.

\(^{22}\) ibid at Section 165(1).
discretion is that it may not refuse to make a winding-up order on the grounds that the only assets of the company have been mortgaged to or beyond their value or that the company has no assets. Indeed, those will ordinarily be reasons to wind up a company.

Once a winding-up petition has been presented, the company or any creditor or contributory may apply for a stay of the winding-up proceedings or oppose the winding-up proceedings.

While the island’s insolvency legislation does not presently grant the court jurisdiction to review, rescind or vary a winding-up order, the Staff of Government Division has recently confirmed that the Manx courts have an inherent jurisdiction at common law to review, rescind or vary a winding-up order where such an order is necessary in the interests of justice. The manner in which the court will review a winding-up order, the area covered by the courts and how they will exercise their powers are presently uncertain. Presumably, such a review will be on a similar basis to the powers granted under Rule 7.47 of the Insolvency Rules 1986 (an Act of Parliament), although it is not certain at this stage.

v Control of insolvency proceedings

Once the court has appointed a liquidator it is, for all intents and purposes, the liquidator that controls the insolvency proceedings subject to his or her compliance with statute and the Companies (Winding-Up Rules) 1934. The court is required to ‘take cognisance’ of the liquidator’s conduct, and must enquire into any failings by the liquidator and take such action as it may think expedient. The court has power to require a liquidator to attend before it and be examined on oath in respect of the winding up.

The directors of the company must provide the liquidator with a statement of the company’s affairs within 14 days of the winding-up order or the appointment of a provisional liquidator. As soon as is practicable after receipt of the statement of affairs, the liquidator must submit a preliminary report to the court giving, inter alia, the reasons for the failure of the company and whether, in his or her opinion, further enquiry is desirable into the promotion, formation or failure of the company or the conduct of its business.

vi Special regimes

There are no special insolvency rules.

vii Cross-border issues

Because of the size of the Isle of Man, its location and its role as an international business centre, many Isle of Man company liquidations involve cross-border issues.

---

23 Section 166 of the Companies Act 1931.
25 Unlike in England, where Rule 7.47(1) of the Insolvency Rules 1986 provides that the court should have jurisdiction to review, rescind or vary a winding-up order.
26 The Spirit of Montpelier Limited (In Liquidation) and others v. Lombard Manx Limited, 18 June 2015, Staff of Government Division (Appeal Court). In this case the author Miles Benham appeared for the appellant and persuaded the court that there was a common law power for the lower court to review a winding-up order.
27 Section 189 of the Companies Act 1931.
The approach of the Manx court has been to provide assistance to foreign courts and where necessary to seek the assistance of foreign courts, for example, by way of a letter of request. The Manx court has been prepared to extend the scope of Manx common law to assist overseas liquidators when there was no statutory power to provide such assistance.\(^{28}\)

The principle of (modified) universalism is a principle recognised by Manx common law and provides that personal and corporate insolvency should be unitary and universal,\(^{29}\) a principle that was applied by the Privy Council in the case of Cambridge Gas.\(^{30}\)

As the island’s insolvency case law develops there is a clear trend towards assisting overseas courts and claimants rather than putting hurdles in their way. The Manx court of appeal, known as the Staff of Government Division, in the case of *Obertor v. Gaetano*,\(^{31}\) interpreted the Judgments (Reciprocal Enforcement) (Isle of Man) Act 1968 (the 1968 Act) in a purposeful way so as to not require an English judgment creditor to have to register that judgment under the 1968 Act before being able to serve a statutory demand on the judgment.

In *Interdevelco v. Waste2energy Group*,\(^{32}\) the Manx court refused the application of a creditor to wind up an Isle of Man company as the company was already in Chapter 11 proceedings before the United States Bankruptcy Court for the District of Delaware. The court stated that in the circumstances there was no need for ‘additional substantive winding-up proceedings to take place in the Isle of Man’.

II   INSOLVENCY METRICS

As Isle of Man companies are predominantly used for international trade or asset holding, it is the state of the global economy rather than the local economy that determines the number of insolvencies.

As a Crown Dependency, the political situation in the UK can also have an effect on the Isle of Man. It is unknown what, if any, effect the recent referendum on the UK’s membership of the European Union will have on the Manx or indeed the UK economy in the short, medium or long term and what, if any, effect it may have in respect of insolvencies.

III   PLENARY AND ANCILLARY INSOLVENCY PROCEEDINGS

i   Appointment of liquidators provisionally without notice pending the hearing of a claim to wind up a company

There have been two applications before the Manx courts for the appointment of provisional liquidators before the hearing of the winding-up claim that have been brought without notice. These applications have been made by the Isle of Man Financial Services Authority (FSA) (formerly the Financial Supervision Commission (FSC)).

\(^{28}\) *In re Impex Services Worldwide Ltd* 2003-05 MLR 115.


\(^{32}\) See footnote 15.
In *Financial Supervision Commission v. UK Secured Finance Fund PLC* (10 June 2015) the FSC sought an urgent without notice application pursuant to Section 178 of the Companies Act 1931 for the appointment of joint liquidators provisionally in respect of UK Secured Finance Fund Plc.

The court heard that the company in question did not have a registered agent, in breach of Section 74(1) of the Companies Act 2006, and no longer had a manager. As a result of the company having no registered agent the Registrar of Companies had issued notice under Section 183 of the Companies Act 2006 indicating that unless cause is shown to the contrary, the company would be struck off the register. Further, joint controllers had been appointed to the company by the FSC who had reported that the company was cash-flow insolvent and had recommended to the FSC that the company be placed into liquidation as soon as possible. The FSC noted their belief that it was expedient in the public interest that the company was wound up.

In *Isle of Man Financial Services Authority v. New Earth Recycling and Renewables (Infrastructure) PLC and others* (9 June 2016), the FSA again sought appointment of joint liquidators provisionally on a without notice basis.

In that case, the FSA sought appointment of provisional liquidators on the following basis: the companies in question had limited, if any, cash holdings and the directors had indicated that there were insufficient funds to operate on a daily basis or liquidate in an orderly manner; all payments had been frozen; it was not appropriate to allow the companies to continue trading without sufficient liquidity to operate on a daily basis; and the directors had consented to the applications being made and to the provisional appointments. The FSA also believed that the liquidators could preserve any assets that might still be capable of preservation and make necessary enquiries to obtain information on the affairs of the companies.

In both cases the application was granted, despite it being an exceptional step to take. Reference was also made in both cases to the decision of the court in *Unicorn Worldwide Holdings Ltd and others v. P Court Ltd and others*, which sets out the tests to be applied in the appointment of provisional liquidators without notice.

The *Unicorn Worldwide Holdings* case, following a number of English and Welsh authorities, states that there is a two-stage test that must be satisfied before such an appointment can be made.

The ‘first and critical question’ is whether the creditor was ‘likely to obtain a winding-up order on the hearing of their petition’. The second discretionary stage is that the court should consider whether, in the circumstances of the case, it is right that the provisional liquidator should be maintained in office pending the hearing of the claim. *Unicorn Worldwide Holdings* states the following:

Factors that the court should consider include whether there are real questions as to the integrity of the Company’s management and/or as to the quality of the Company’s accounting and record keeping function, whether there is any real risk of dissipation of the Company’s assets and/or any real need to take steps to preserve the same, whether there is any real risk that the company’s books and records will be destroyed and/or any real need for steps to be taken to ensure that they are properly

---

33 2014 MLR 563.
preserved and maintained (which may be so where, for example, there is clear evidence of fraud or almost irrefutable evidence of chaos), whether there is any real need for steps to be taken to facilitate immediate inquiries into the conduct of the Company’s management and affairs and/or to investigate and consider possible claims against directors (e.g. for fraudulent or wrongful trading), whether or not the Company has a realistic prospect of obtaining a validation order under s.127 of the Act (because if it has no such prospect, it may well not be realistically able to trade in any event), and generally which course ‘seems likely to cause the least irremediable prejudice to one party or the other’.

Interestingly, while in both FSC v. UK Secured Finance Fund Plc and FSA v. New Earth Recycling and Renewables (Infrastructure) Plc a provisional liquidator was appointed, the court noted in the latter case that it granted the application with some degree of reluctance as it felt that the risk of dissipation of assets simply wasn’t there. However, the directors of the companies involved had essentially agreed to the FSA’s applications and as such the court was satisfied that the grounds were made out. Had the companies’ directors not been agreeable to the applications then it may well have been that the without notice application would not have been granted.

ii Disclosure and specific disclosure in winding-up claims

Requiring disclosure or making an order for specific disclosure in a winding-up claim has been noted as a highly unusual step to take; however, there have been a couple of cases in the period since the last edition of this work in which such orders have been sought. Those applications have not been successful, but the judgments make clear that the court does have the power to order such disclosure in a winding-up claim and while it might be unusual it will be prepared to make an order if there are good grounds for doing so.

The cases before the Manx courts regarding disclosure in winding-up claims are Gittins and others v. Simpson35 and Secure Nominees Limited v. Origo Partners and others.36

Both cases confirmed that while such order in winding-up proceedings are unusual and exceptional, the court has the discretion to order disclosure and the tests and rules in respect of orders for specific disclosure are the same as they would be in any other application. ‘There is no jurisdiction to make an order for specific discovery unless (1) there was sufficient evidence that documents exist which have not been disclosed; (2) the documents related to matters at issue in the proceedings; and (3) there was sufficient evidence that the documents were in “the possession, custody or power” of the other person.’37

Even when those prerequisites for the jurisdiction exist the court still has discretion as to whether to order discovery. Again, the ordinary rules regarding the making of an order for specific disclosure apply. Documents and classes of documents must be defined precisely; discovery must be necessary to fairly dispose of the matter; and necessity, fairness and proportionality must be considered. The court will also not countenance ‘fishing expeditions’. In most winding-up claims disclosure is likely to be unnecessary and will not be ordered on the grounds that it is not required to fairly dispose of the matter. Where winding up is sought on the grounds of inability to pay a debt, there will ordinarily be evidence of such insolvency or inability to pay the debt such that disclosure is not needed or if there is a genuine dispute over the alleged debt then in the ordinary course the winding-up claim

35 10 December 2015.
36 29 July 2016.
would be dismissed. Where a court is being asked to wind up on the just and equitable ground then, again, in most cases the evidence will be clear on the face of it. If, for example, the claim is brought because of deadlock in the management of the company, such deadlock either exists or doesn’t and disclosure would not be required. There may, however, be circumstances outside of the normal course in which disclosure is necessary.

In Secure Nominees Limited v. Origo Partners and others,38 Deemster Doyle did not find helpful arguments put forward that because disclosure in winding-up matters were rare and exceptional that an order should not be made. While the learned Deemster did not make an order for disclosure in that case, he made clear that the fact that such orders are rare and exceptional is simply a statement of fact and does not form part of the test for determining whether disclosure order should be made. The dispute must always be whether there is jurisdiction to make an order and if so whether the court should exercise its discretion to make one. It follows that if there are good grounds and reasons for making a disclosure order in the specific circumstances of a winding-up claim, highly unusual though that might be, then a disclosure order should be made.

iii Isle of Man Financial Services Authority and Gordon Wilson (provisional liquidator and deemed official receiver of The Eco Resources Fund PCC Plc) and others CHP 2017/28

This case provides useful guidance as to the factors the court will take into account when determining who should act as liquidator in a public interest winding up where there are competing proposals for liquidator.

The court had ordered that Eco Resources Fund PCC Plc (Eco) be wound up and that Gordon Wilson be appointed provisional liquidator and deemed official receiver. Prior to his appointment as provisional liquidator, Mr Wilson had been appointed by the FSA as adviser and controller to Eco. As adviser and controller, Mr Wilson had all the powers to advise or to operate, manage and administer the affairs of Eco. At the first meeting of the creditors and contributories, Mr Wilson (as provisional liquidator) sought resolutions for his appointment as liquidator with no committee of inspection. The creditors and contributories voted against the resolutions, and one creditor subsequently sought the appointment of Mr Simpson as liquidator. Both Mr Wilson and Mr Simpson are highly experienced and respected liquidators, and the question of who should be appointed liquidator of Eco was brought before the court for determination.

After considering the facts, which included that fact that Mr Wilson had been very active in his roles as adviser to and controller of Eco, the court decided that Mr Simpson should act as liquidator.

In considering whom to appoint as liquidator when there are competing nominations, the court advised that it should consider the context within which the competing proposals arise.

His Honour the Deemster Doyle advised when considering competing contenders for the appointment as a liquidator in a public interest winding up, the court should consider all the circumstances of the case including the views of the FSA and the views of contributories and creditors. In a public interest winding up the court will, no doubt, place significant weight on the views of the FSA but those views are not determinative as to who should be appointed

38 Paragraph 54.
The court should consider the interests of those who support and oppose the appointment of the specified individual as liquidator. The court should also consider what is in the best interests of the company and its investors and the reputation of the Island.

The court must consider the independence and impartiality of the proposed candidate. A liquidator, as an officer of the court, should be independent and above suspicion. There must not be any bias, nor any appearance of bias. Where there are circumstances that might predispose a person to favour particular interests, those circumstances must be taken into account and the possibility of unconscious partiality should not be overlooked. The proposed candidate must be independent of interested parties, including the FSA.

His Honour advised that:

The court must carefully consider whether the proposed liquidator is independent and impartial and is untainted by any inappropriate 'baggage', for example previous dealings with the company or those connected with the company or the FSA in respect of the company which make it difficult for such individual to be appointed liquidator over and above a more appropriate candidate. I accept that on occasions an individual’s previous dealings with, or experience of, the company prior to it going into liquidation may be appropriate 'baggage' and may in some cases be regarded as a positive factor in favour of appointing that person as liquidator. In other cases such previous dealings and experience with the company and the FSA may be inappropriate 'baggage' and would be regarded as a negative factor militating against that person being appointed as liquidator, in particular where there is a more suitable candidate who does not have the disadvantage of such inappropriate 'baggage'.

His Honour concluded his judgment by advising that: 'The conduct of a liquidation (even a liquidation in the public interest) is not a matter for the FSA, it is a matter for the liquidator. He who pays the piper does not call the tune in liquidations, including public interest liquidations. The one who foots the bill does not have control of the liquidation. The liquidator acts, and must be seen to act, independently of the Treasury, the FSA, the contributories, the creditors, the officers of the company and any other interested parties.'

iv Isle of Man Financial Services Authority and Michael Simpson (liquidator) CHP 2009/37

The liquidator sought the assistance of the court as to whether the provisions of Section 248 of the Companies Act 1931 applied to the liquidation even after the creditors had been paid the whole of their proved debts for the period up to the commencement of the liquidation. The liquidator was unclear as to whether Section 248 continued to apply if the company was no longer ‘an insolvent company’.

Section 248 of the Companies Act 1931 provides that in the winding up of an insolvent company the rules of bankruptcy are to be applied with regard to the rights of secured and unsecured creditors and debts provable. The rules of bankruptcy are contained in the Bankruptcy Code 1892 and provide that '[i]f there is any surplus after payments of the debts it shall be applied in payment of interest from the date of the receiving order'. If Section 248 continued to apply then unsecured creditors would receive interest at 4 per cent per annum on the amount of their proved debts from the commencement of the liquidation.
A review of the English case law indicated that in England the courts had interpreted Section 248 in a manner that resulted in the Section having no application once the liquidation threw up a surplus, even though the company may have been insolvent at the commencement of the winding up.

The court advised that while Section 248 of the Companies Act 1931 is in the same terms as the English Section 317 of the Companies Act 1948 of Parliament, as the 1931 Act was not consolidating legislation the Section did not need to be interpreted in the same restrictive manner as adopted in England and Wales and could be given its natural meaning.

His Honour Deemster Corlett held that it was inappropriate to follow the English line of authority and that it would be ‘illogical and unfair for the Isle of Man to have an insolvency regime in which different provisions apply in relation to the payment of statutory interest as between a creditor in a bankruptcy and a creditor in a winding up, in cases where there is a surplus’.

His Honour advised that ‘the imposition of statutory interest is the fairest manner of adjusting the rights of creditors’.

v Banners Broker International Limited (In Liquidation) CHP/2014/24

This case concerned an application by the joint liquidators of the Banners Broker International Limited (In Liquidation) (the Company) for the liquidation in the Isle of Man to be stayed until further order and the Isle of Man joint liquidators to be released as the centre of main interest of the liquidation was more closely associated with Canada than the Isle of Man.

In addition the joint liquidators sought the sanction of the court to enter into the transition service and assignment agreement (the Assignment Agreement) that assigns, transfers and conveys to a Canadian receiver, on an ‘as is where is’ basis all of the joint liquidators’ rights, titles and interests in and to the company estate and the joint liquidators should sign the Assignment Agreement forthwith.

The joint liquidators had been installed following the granting of a Manx court order in respect of an Isle of Man-based company.

As the matter unfolded a receiver was appointed in Canada and they in turn discovered that in fact the centre of main interest of the Company was not the Isle of Man but Canada.

The Court in analysing it jurisdiction to grant the orders subject to the application made reference to Section 194(1) of the Companies Act 1931 and relevant authority, stating:

4. Under section 194(1) of the Companies Act 1931 this court has a wide power to make an order staying winding up proceedings:

‘. . . either altogether or for a limited time, on such terms and conditions as the court thinks fit’.

5. Deemster Kerruish in Navigator Gas Transport plc (judgment 4 July 2006) did not consider that the permanent stays sought by the Committee of Inspection in that case were detrimental to any creditor. The learned Deemster noted that the continuation of the liquidations would be against the wishes of the secured creditors. The learned Deemster saw no prejudice to anyone in granting permanent stays. The learned Deemster also considered the ‘commercial morality and the interests of the public at large’.

6. Derek French in Applications to Wind Up Companies second edition at page 369 states:

‘A stay may be ordered if it is more convenient to wind up the company in another jurisdiction. [Footnote 265: Re Oriental Bank Corporation (1884) 10 VLR(E) 154; Re Stewart and Matthews Ltd (1916) 26 Man R 277 – in both cases no creditor objected.’
7. At page 1071 of McPherson’s Law of Company Liquidation third edition by Andrew R Keay it is stated:

‘The effect of an order staying the winding up, if expressed in unlimited terms, is that the winding-up process comes to an end – the whole effect of the winding up ceases, and the company can thereupon resume the conduct of its business and affairs as if no winding up existed. The liquidator is entitled to a discharge.’ 99

The court also noted that:

9. Under section 184(2)(h) of the Companies Act 1931 the liquidator in a winding up by the court shall have the power ‘to do all such other things as may be necessary for winding up the affairs of the company and distributing its assets’. The Joint Liquidators have power to enter into the Assignment Agreement. Moreover, under section 184(3) of the Companies Act 1931 the exercise by the Joint Liquidators of the powers conferred by section 184 is subject to the control of the court. 40

The court, having analysed its jurisdiction under the Companies Act 1931 and case law and having taken consideration of the circumstances of the specific case, ordered that, the liquidation of the Company in the Isle of Man be stayed in favour of the continuation of the receivership in Canada, that the joint liquidators be released, subject to compliance with the various other orders made by the court, sanctioned to entry into of the assignment agreement and required the joint liquidators to enter into the assignment agreement forthwith.

This was the first reported case in the Isle of Man of the transfer of the centre of main interest from the Isle of Man to another competent jurisdiction.

vi The Isle of Man Financial Services Authority v. Louis & Otrs (CHP 2016/73)

This case related to an application surrounding a legal argument focusing on whether an application by the FSA for disqualification orders against two parties under the Company Officers (Disqualification) Act 2009 (the 2009 Act) was within time, and if it was not whether this court should grant leave for the application to proceed.

One point that fell to consideration by the court was in relation to the interpretation which should be given to the wording ‘wound up’ within Section 5(3) of the 2009 Act and hence the time period within which a claim should be brought under that Section.

Section 5(3) of the 2009 Act provides that an application under that Section:

may only be made before the end of the period of 2 years beginning with the day on which the company is wound up or dissolved, unless the High Court grants leave for an application to be made later.

The advocate for the seventh and eight defendant, relying on Section 169 of the Companies Act 1931, submitted that ‘for the purposes of section 5(3) “wound up” means the date of the presentation of the winding up claim and that the two year time period in respect of companies subject to a winding up order would begin to run on that date. 41

40 See paragraph 9 CHP/2014/24.
41 See Paragraph 79 CHP 2016/73.
The advocate for the seventh and eight defendant further submitted that: 'in respect of companies placed into creditors’ voluntary liquidation the two year time period would begin to run from the date of the resolution placing the companies into liquidation'.

In contrast, the advocate for the claimant submitted that 'in respect of those companies subject to a winding-up order the time would begin to run at the completion of the winding up process and in respect of companies placed into creditors’ voluntary liquidation the time would begin to run from the date of the completion of the liquidation.’

Drawing support from the Appeal Division’s helpful judgment in Taylor and another v. AG 2012 MLR 199, the court considered that in construing the words in Section 5(3) of 2009 Act regard such be had to the language of the section, its purpose and its context.

The Court considered that Section 5 of the 2009 Act has the dual purpose of the protection of the public from unfit officers of insolvent companies and the protection of defendant officers of insolvent companies from stale claims.

In considering the point His Honour in his judgment stated that:

The use of the words 'wound up or dissolved’ has created a difficult case of statutory construction, but in my judgment the Manx two year clock starts to tick under section 5(3) of the 2009 Act:

1. in cases where a winding up order is made, from the date when the company is completely wound up;
2. in cases where the company is in creditors’ voluntary liquidation, from the date of the completion of the liquidation; and
3. in respect of companies struck off the register without being wound up, from the date of dissolution.
I INSOLVENCY LAW, POLICY AND PROCEDURE

i Statutory framework and substantive law
The statutory framework for insolvency-related procedures in Italy is primarily set out in Royal Decree No. 267 of 16 March 1942 (the Bankruptcy Law). Other pieces of legislation are provided with regard to specific sectors or situations.

The Bankruptcy Law has undergone extensive revisions in the last decade, which have shifted the focus from the protection of creditors through the liquidation of assets to a wider range of opportunities for discharging debts via composition.

The House of Representatives has recently approved a delegated law bill that aims at thoroughly reforming the Italian Bankruptcy Law, also to rationalise and reorganise the legislative picture.

ii Policy
Insolvency proceedings usually aim at liquidating an insolvent entrepreneur’s assets with full discharge vis-à-vis all creditors.

In recent years, alternative in-court and out-of-court arrangements have been introduced, with the purpose of facilitating the discharge of insolvent companies through compositions with creditors.

iii Insolvency procedures
Traditional Italian insolvency proceedings are formal and require the involvement of courts or other public authorities, regardless of the size of the bankruptcy estate. Consequently, they are usually lengthy and costly, the average duration currently being about seven years. Currently, under Italian law, the main insolvency procedures for rehabilitation or liquidation of a company are the following:

a bankruptcy;
b pre-bankruptcy composition; and
c debt restructuring arrangements.

1 Gaetano Iorio Fiorelli is an of counsel and Eliana Maria Fruncillo is an associate at Baker McKenzie in Milan.

2 Official data updated as at 2015 are reported by Cerved on: https://know.cerved.com/it/studi-e-analisi/la-durata-dei-fallimenti-chiusi-italia-2015. This article particularly points out that the average duration of insolvency procedures has significantly decreased over the past years. On the subject, see also Il Nuovo Diritto delle Crisi d’Impresa, Alberto Jorio, Giuffré Editore, 2009.
Bankruptcy

Bankruptcy is a court-supervised procedure for the liquidation of an insolvent company’s assets and distribution of the proceeds. It results in the company’s dissolution. Bankruptcy applies to business undertakings, with the exception of state entities and small businesses.

The prerequisite for a declaration of bankruptcy is a irreversible state of insolvency. This exists where: (1) the company is in default on its payment obligations; or (2) other evident indicia exist that the company is unable to meet its current liabilities on a regular basis.³

Pursuant to Article 15 of the Italian Bankruptcy Law, bankruptcy cannot be declared if the company’s overdue debt amounts to less than €30,000.

The petition for bankruptcy must be filed with the bankruptcy court of the district where the debtor has its ‘main place of business’ in Italy.

The delegated judge is appointed by the bankruptcy court at the time of adjudication. In the adjudication judgment, the bankruptcy court also appoints a bankruptcy receiver, an accountant or lawyer experienced in insolvency matters and enrolled on a special register maintained by the bankruptcy court. The bankruptcy receiver acts in conjunction with a creditors’ committee, consisting of three to five creditors appointed by the delegated judge, which has an advisory as well as a supervisory role in the bankruptcy procedure. The bankruptcy receiver fixes his or her seal on the assets of the bankrupt entity shortly after his or her appointment. He or she must prepare a liquidation plan within 60 days of the fixing of the seal and not later than 180 days from the bankruptcy judgment for the approval of creditors’ committee members.

The aforesaid plan must indicate the deadline to complete the liquidation of the assets, which cannot anyway go beyond two years from the filing of the judgment declaring bankruptcy, unless the receiver deems it necessary to ask for a longer term and, therefore, specifically justifies this request.

From the time of the adjudication, the debtor is dispossessed. The bankruptcy receiver manages and disposes of the assets under the direction of the delegated judge. The debtor may no longer validly act in court as plaintiff or defendant in relation to the assets. The bankruptcy receiver is vested with such powers upon the authorisation of the delegated judge. However, all pending proceedings in which the debtor is involved are automatically stayed from the date the adjudication is issued.

From the date of the adjudication, no attachment, garnishment or other enforcement action may be initiated or continued against assets of the bankrupt estate. Where such actions have been commenced prior to adjudication, they will be automatically stayed and absorbed in the bankruptcy procedure.

Creditors are required to submit their proofs of claim at least 30 days before the hearing for the verification of the claims. At the hearing, the delegated judge either admits or rejects the claims. Once a review of all claims is completed, the delegated judge issues a statement of liabilities by decree. Creditors may challenge the decree both in connection with their own and other creditors’ claims before the bankruptcy court.

---

³ As regards the non-reversibility of the state of insolvency see, among others: Il fallimento e le altre procedure concorsuali, Luciano Panzani, UTET, 2012; and Italian Supreme Court, judgment No. 4455 dated 28 March 2001.
If proofs of claim are submitted later than 30 days before the hearing, they are considered 'late claims'; however, no late claims are entertained that are submitted later than one year after the judge’s decree issuing the statement of liabilities. Late admitted creditors share only in distributions made after the time of admission.

By default, adjudication involves the cessation of all the activities of the company with a view to a sale of all assets. However, the bankruptcy court may order that business operations be continued whenever cessation could cause ‘serious harm’, provided that the continuation does not adversely affect the creditors of the bankrupt debtor. As an alternative, the delegated judge may, with the consent of the representatives of the creditors, authorise the lease of the business as a going concern to a third party. This can be authorised whenever useful for the purpose of eventually selling the business under more favourable terms.

Finally, the business of the bankrupt company could be sold to a third party en bloc as a going concern, rather than through a sale of the individual assets that comprise it.

A fundamental principle of the Italian Bankruptcy Law is the equal treatment of all creditors (par condicio creditorum), according to which, absent statutory priorities, no creditor may be paid a higher percentage of his or her claim than other creditors. As a consequence, any transaction or payment that has the effect of putting a creditor into a better position than it would otherwise have been vis-à-vis other creditors amounts to a violation of the par condicio principle and, therefore, potentially subject to clawback actions.

The statute of limitations for initiating clawback action proceedings is three years from the declaration of bankruptcy or, if earlier, five years from the act or transaction to be clawed back. A few exemptions from clawback are specifically provided for by the Bankruptcy Law.

It is worth pointing out that the equality principle described above only applies to those creditors who have an unsecured and non-preferred claim. There are in fact two groups of creditors that enjoy preferential treatment: creditors who hold a security interest and creditors who have a preference under law.

Once all the assets have been liquidated and the relevant payments made to creditors, upon request of the bankruptcy receiver or of the debtor, the bankruptcy court declares the bankruptcy closed and the company ceases to exist.4

Pre-bankruptcy composition

Pre-bankruptcy composition is a court-supervised procedure, the purpose of which is to discharge the debtor’s debts and avoid bankruptcy. The debtor must submit a plan, which can provide for:

a the restructuring or discharge of debts in whatever form, including transfer of assets, assumption of debts or any other transaction, including the sale of assets to creditors in satisfaction of their claims, the issuance of shares, quotas or bonds (including convertibles) or other financial instruments;

b the transfer of the assets to a third party (assuntore) who also assumes the debt; creditors of the debtor (or subsidiaries of such creditors); or new companies to be established during the course of the procedure, the shares of which are allocated to the creditors, can act as assuntore; and

c the division of creditors into classes based on criteria (legal position, economic interests, etc.).

4 For further details see: Diritto Fallimentare, Lino Guglielmucci, Giappichelli Editore, 2017; and Il diritto fallimentare e delle procedure concorsuali, Elena Frascaroli Santi, Cedam, 2016.
A pre-bankruptcy composition plan is available to debtors who are in a ‘state of crisis’ (which can be, but is not necessarily, insolvency).\(^5\)

In order to strengthen the position of the unsecured creditors Article 160 of the Italian Bankruptcy Law provides that the pre-bankruptcy proposal shall have to grant the payment of at least 20 per cent of the unsecured creditors’ claims. This provision does not apply to pre-bankruptcy proposals that contemplate business continuation pursuant to Article 186 bis of the Italian Bankruptcy Law.

The pre-bankruptcy composition plan must be submitted to the bankruptcy court of the district where the debtor has its main place of business in Italy.

The debtor must attach to the petition, among other things, a plan containing an analytic description of the means and timing necessary for the implementation of the proposal. The restructuring plan and the documents indicated above must be accompanied by a report of a qualified professional (enrolled in the register of auditors and satisfying certain requisites) who is appointed by the debtor and who certifies the truthfulness of the company’s data and the feasibility of the restructuring plan.

Moreover, in order to give the company in distress more time to prepare a viable pre-bankruptcy proposal, it is also provided that the debtor may file an application for the composition with creditors simply attaching the latest three financial statements, postponing to a later time the filing of the proposal, the plan and the other documents to be annexed thereto.

These other documents must be filed within a term fixed by the delegated judge (from 60 to 120 days). This term can be extended by an additional 60 days maximum. During such a period, creditors are prohibited from starting or continuing enforcement and foreclosure proceedings over the debtor’s assets (the Automatic Stay). The Automatic Stay will be extended for the whole period of the procedure if the debtor is admitted to the pre-bankruptcy composition.\(^6\)

If the bankruptcy court determines that the conditions are met, it will start the procedure, appoint a delegated judge and judicial commissioner and schedule a creditors’ meeting within 120 days. On that occasion, the unsecured creditors are called to vote on the proposal.\(^7\)

The pre-bankruptcy composition plan is approved if the proposal obtains the favourable vote of the majority of the unsecured creditors.

After the creditors’ approval, the bankruptcy court homologates the pre-bankruptcy composition plan and appoints one or more liquidators in order to fulfil the approved plan, if it has to be realised by means of a transfer of assets.

In cases of breach of the pre-bankruptcy composition plan or fraud, bankruptcy may follow, at the behest of the bankruptcy court.

If the pre-bankruptcy composition plan is implemented, the debts are discharged and the debtor may return to ordinary operations (if the assets of the company are still in his possession).

---


\(^6\) For further information on this special type of pre-bankruptcy procedure, see *Il concordato con riserva*, Edoardo Staunovo-Polacco, Giuffrè, 2016.

\(^7\) Secured creditors do not vote, as they have priority over the proceeds of the sale of their security.
Claims arising in the course of the implementation of the plan – not just after homologation but also before homologation (conditional upon the bankruptcy court confirming such priority in the decree of admission) – are granted highest priority and must be paid in full.

A debtor may also, subject to bankruptcy court approval:

a. enter into first priority financing agreements to support the plan, even before having produced all the documentation to be filed together with the request of pre-bankruptcy;

b. according to Decree No. 83/2015, debtors are also entitled to obtain urgent interim finance which is necessary for their business needs without having to file a certification issued by an independent expert; and

c. pay preexisting claims relating to the purchase of goods and services, to the extent that the expert confirms that the purchase is essential for the continuation of the business activity and to ensure the best satisfaction of creditors.

Throughout the procedure, the debtor remains in possession and retains management powers under the supervision of the judicial commissioner and the delegated judge.

The creditors must file a proof of claim with the judicial commissioner. Any disputes regarding these claims will be settled by the bankruptcy court. The creditors' participation in the proceedings is crucial, since they have to vote for or against the debtor's proposal at the creditors' meeting.

The pre-bankruptcy composition plan can also include a tax settlement, applicable also to VAT and unpaid withholding taxes. 8

Debt restructuring arrangements

The Italian Bankruptcy Law allows for debt restructuring arrangements whereby a debtor ‘in a state of crisis’ enters into a composition with creditors that is binding on all the debtor's creditors, provided that:

a. the debt restructuring arrangement is agreed by creditors representing at least 60 per cent of the value of the debts; and

b. the reasonableness and feasibility of the debt restructuring arrangements, the truthfulness of the company's accounting data and the suitability of such arrangements to ensure repayment of those creditors which did not agree with such arrangements are certified by an independent expert, who fulfils the requirements established in Article 67 of the Italian Bankruptcy Law.

In any case, the debtor must guarantee the full satisfaction of creditors who have not approved the arrangements.

The Italian Bankruptcy Law does not mandate a specific format for the debt restructuring arrangement. The parties can freely determine the specific obligations and how these are to be performed. For example, they may include the waiver of interest, guarantees, total or partial transfer of assets, different treatments between different classes of creditors or simple rescheduling.

---

8 For further details on tax settlement see: La transazione fiscale, Mario Cardillo, Aracne, 2016.
The debt restructuring arrangement is subject to homologation (confirmation). If the Bankruptcy Court does not homologate the debt restructuring arrangement, it does not automatically declare the bankruptcy of the debtor, as ‘state of crisis’ does not necessarily amount to insolvency.

During the phase of the filing with the court of the request for the formal confirmation of the debt restructuring arrangement, the company may request court permission to obtain new credit, which would be granted first priority and which may also be secured through pledge, mortgage or by an assignment of receivables by way of security. An opinion of an expert, certifying that the credit is ‘functional to the best satisfaction of creditors’, is required.9

Debt restructuring arrangements can also include a tax settlement, applicable also to VAT and unpaid withholding taxes.10

iv Starting proceedings
Bankruptcy procedure is started on the basis of a petition which may be filed by: (1) the debtor itself; (2) the public prosecutor; or (3) a creditor.

A different regime is of course provided for pre-bankruptcy procedure, composition with creditors and restructuring arrangements, which may only be started by the initiative of the debtor himself or herself.

v Control of insolvency proceedings
During bankruptcy proceedings, the debtor is deprived of the authority to manage and dispose of its assets, and these powers are delegated to a bankruptcy receiver under the direction and supervision of the delegated judge. The judge must approve any extraordinary transactions proposed by the official receiver and appoints the creditors’ committee.

In a composition with creditors, the company is controlled by its management during the whole procedure, even if there is still a supervision of the judicial commissioner (usually an accountant or a lawyer having the powers of a public officer). To carry out specific extraordinary transactions, however, court approval is always required. Finally, in debt restructuring arrangements, the debtor continues to control its business.

vi Special regimes
Forced administrative liquidation
Forced administrative liquidation is a special bankruptcy procedure provided by the Bankruptcy Law that applies, in particular, to insurance companies, credit institutions (banks, investments firms, fund management companies, open-end investment companies and financial intermediaries), cooperative companies, trusts and auditing companies, cooperative consortia granting public contracts and mandatory consortia. Its aim is to liquidate the debtor.

The procedure may be started by the debtor, the directors of an insolvent company, or one or more creditors. The bankruptcy court must seek the advice of the government

9 A more in-depth analysis of debt restructuring arrangements may be found in: Gli accordi di ristrutturazione dei debiti, Carlo Trentini, Ipsoa, 2012.
10 See footnote 7.
agency responsible for supervising the debtor’s company. The judge may initiate proceedings by declaring the debtor insolvent and appointing a liquidator. All legal actions started by creditors against the debtor are then stayed.

The liquidator is assisted by a supervisory committee consisting of between two and five experts in the debtor’s industry. In the case of large businesses, up to three liquidators may be appointed. Unlike other procedures, there is no delegated judge, as the procedure is mainly administrative in nature.

The liquidator must review claims and consider whether a composition is feasible. If so, he or she will prepare a plan of repayment with the debtor, to be submitted to the creditors. If a composition does not appear feasible, arrangements are made for the disposal of the debtor’s assets and the distribution of proceeds among the creditors in the same order of priority as in bankruptcy.11

Extraordinary administration

Extraordinary administration, which is regulated by Law No. 270 of 8 July 1999 (the Prodi-bis Law), applies only to companies (and their affiliates) which had at least 200 employees in the previous year and with total liabilities of at least two-thirds of either their total assets or their turnover in the previous financial year. According to Article 27 of Law No. 270, this procedure is open solely to companies which demonstrate ‘concrete possibilities of recovery of economic balance of their activities’.

The procedure is divided into two phases.

The first phase is mainly focused on the ascertainment of the requisites for the admission of the debtor to this special procedure and is aimed at the declaration of the state of insolvency. In its judgment, the bankruptcy court: appoints the delegated judge who will supervise the procedure and one or three judicial commissioners; set the deadline for the creditors to present their proofs of claim and the date of the hearing at which such claims will be examined by the delegated judge; and decide whether the management of the insolvent company should remain with the debtor or pass to one or three judicial commissioners. The declaration of the state of insolvency produces certain immediate effects, such as, for example, the automatic stay of all legal actions by creditors against the debtor’s assets and the freezing of the accrual of interest.

The second phase results in the admission of the insolvent company to the extraordinary administration procedure or, alternatively, to adjudication in bankruptcy. No later than 30 days from the filing of the judicial commissioner’s report, and taking into account the opinion of the Ministry of Economic Development, the bankruptcy court, should the conditions provided by Law No. 270 be met, declares the opening of the procedure. Otherwise, it declares the debtor company bankrupt. Should the company be admitted to the procedure, the stay of actions continues and clawback actions become possible.

The extraordinary commissioners are empowered to manage the company and its assets under the supervision of the Ministry of Economic Development. They act on the basis of a recovery plan prepared by them and authorised by the Ministry.

11 For more details on this special procedure, see Trattato delle procedure concorsuali – L’amministrazione straordinaria e la liquidazione coatta amministrativa (Vol. V), Lucio Ghia, Carlo Piccininni, Fausto Severini, Utet Giuridica, 2011.
Any debts incurred in the continuation of the business generally will have priority over any other secured and unsecured claim pursuant to Article 111 of the Italian Bankruptcy Law.

Creditors can file their proofs of claim and have right to distribution of proceeds.

Should the recovery programme underpinning the transfer of the business be completed within the term set, the bankruptcy court, upon request of the extraordinary commissioners or ex officio, declares the closing down of the business. The extraordinary administration can at any time be converted into bankruptcy upon request by the extraordinary commissioner, or even ex officio, if the procedure cannot be positively continued. At the end of the procedure, the bankruptcy court will declare the conversion of the procedure into bankruptcy when either the sale of the assets has been not performed within the term stipulated in the programme, or the business has not recovered its ability to regularly perform its obligations.

In the wake of the Parmalat case, the Marzano Decree (Law Decree 347/2003) introduced a faster procedure aimed at saving and turning around large insolvent companies in order to preserve their technical, commercial, productive and employment value. This procedure restructures the company’s debts and sells those assets that are not strategic or do not form part of the company’s core business.

The procedure is focused on restructuring rather than on the liquidation of the debtor’s assets. It is based on the implementation of a two-year recovery plan subject to the minister’s approval.

The recovery plan can provide for the satisfaction of creditors’ claims through a composition, which must specify any conditions of its implementation and describe any offered guarantees. \(^\text{12}\)

vii  Cross-border issues

On 20 May 2015, the European Parliament and the Council enacted EU Regulation No. 848/2015 (the Recast Bankruptcy Regulation), which entered into force on 25 June 2015 and is applicable to insolvency proceedings starting from 26 June 2017, with few exceptions. The new rules also apply to proceedings that provide for the restructuring of a debtor, the ‘hybrid proceedings’, for example the Italian debt restructuring arrangements pursuant to Article 182 bis of the Bankruptcy Law.

This reform does not change the main framework of cross-border insolvency proceedings as set out under Council Regulation (EC) No. 1346 of 29 May 2000 (the EC Bankruptcy Regulation), but anyway introduces some important changes. The ‘centre of the debtor’s main interests’ pursuant to Article 3 of the EC Bankruptcy Regulation – according to which the courts of the Member State within which the centre of the debtor’s main interests is situated is competent to commence the main insolvency proceedings – has been more precisely defined as the ‘place where the debtor carries on the administration of its interest on a regular basis and which is verifiable by third parties’.

Another important amendment is set forth by Article 4 of the Recast Bankruptcy Regulation, stating that the court before which a request to start insolvency proceedings has been filed shall have to examine ex officio whether it has jurisdiction on the case. Should the court decide to open the proceedings, it shall have to specify in its decision if the proceedings are the main proceedings or secondary proceedings, pursuant to Article 3.

\(^{12}\) See footnote 10.
Immediate recognition of the foreign bankruptcy judgments and measures are denied by Italian courts (only) if they may produce effects that are contrary to Italian public policy, for example, if they do not grant all creditors equal treatment.\textsuperscript{13}

Where the EC Bankruptcy Regulation is not applicable, Italian Bankruptcy Law applies. Article 9, paragraph 1 provides that bankruptcy can be declared by the court of the place where the debtor has its ‘main office’. In order to give emphasis to the notion of ‘main office’, Italian case law does not make reference to the place where the productive activity is usually carried out, but to the management centre of the business (i.e., the place where the business decisions of the company are taken).

Pursuant to Article 9, paragraph 2, the transfer of the registered office of a company in the year prior to the filing of the petition for bankruptcy is disregarded for the purpose of determining the venue and jurisdiction of the bankruptcy proceedings of such company.

According to Article 9, paragraph 3, the debtor who has its main office abroad can be declared bankrupt in Italy, even if a declaration of bankruptcy has been rendered abroad. Furthermore, the relocation of the business to a foreign country does not exclude the jurisdiction of Italian courts, if it occurred after the filing of a petition for bankruptcy or the request of the Public Prosecutor.

\section*{II \ INSOLVENCY METRICS}

In the first three months of 2018, the number of Italian companies' closures continued to decrease, also thanks to a persistent downward trend in bankruptcies and other insolvency procedures.

In general, about 2,945 companies were declared bankrupt, 4.6 per cent fewer than in the first quarter of 2017 and well below the 3,700 of 2016. Most of these companies are located in the south of Italy. This is the lowest number since 2010. Also the number of the other insolvency procedures kept decreasing in the first quarter of 2018 – with 370 cases recorded, (i.e., 16.1 per cent fewer than 2017).\textsuperscript{14}

\section*{III \ PLENIARY INSOLVENCY PROCEEDINGS}

Below are a few examples of the most significant insolvency procedures opened in recent years in Italy. The last two cases are a clear example of the serious difficulties faced nowadays by real estate companies in Italy.

\textsuperscript{13} Italian Supreme Court, judgment No. 12,031 of 19 December 1990. Italian legal commentators distinguish between ‘international public policy’ (which refers to the general principles that are universally enforceable, namely the inviolable rights of the individuals) and ‘internal public policy’ (which includes the ethical, economic, political and social principles peculiar to the Italian legal system). Only the first is relevant with respect to the recognition of proceedings. Article 33 of the Recast Bankruptcy Regulation prevents any Member State from recognising an insolvency proceeding and enforcing a judgment relating to it if they are manifestly contrary to the relevant state's public policy, ‘in particular to its fundamental principles or the constitutional rights and liberties of the individual’. It is worth underlining that Article 33 of the Recast Bankruptcy Regulation contains a general definition of ‘international public policy’, which is deemed to be a fundamental principles of any Member State, as well as the constitutional rights and liberties of the individual.

i  Ilva SpA
Ilva SpA is a company engaged in the production, processing and marketing of steel products. It is the biggest steel plant in Italy and one of the largest steel producer in Europe. By decree of the Minister of Economic Development of 21 January 2015 Ilva was admitted to the extraordinary administration procedure. The company was subsequently declared insolvent by judgment of the Court of Milan. Mr Corrado Carrubba, Mr Piero Gnudi and Mr Enrico Laghi have been appointed as official receivers for the company. By decree issued on 30 June 2017, the assessment of ILVA’s credits has been declared final and enforceable by the Court of Milan.

ii  Alitalia SpA
Alitalia SpA is a company based in Italy and engaged in the aviation sector. As of 29 July 2009, Alitalia has been the first airline for domestic flights in Italy. By decree of the Minister of Economic Development of 2 May 2017, Alitalia was admitted to the extraordinary administration procedure provided by Law Decree 347/2003. By judgment of the Court of Civitavecchia dated 11 May 2017 Alitalia was declared insolvent. Mr Luigi Gubitosi, Mr Stefano Paleari and Mr Enrico Laghi have been appointed as official receivers for the company. The procedure is still ongoing.

iii  Grandi Molini Italiani SpA
Grandi Molini Italiani SpA is the biggest producer of soft wheat flour and durum wheat semolina in Italy and one of the biggest in Europe. By petition filed on 3 November 2015, the company requested to be authorised to enter into a composition with creditors pursuant to Article 161 of the Bankruptcy Law. By decree issued by the Court of Rovigo on 5 November 2015, the company got the court’s approval; therefore, Mr Stefano Ambrosini, Ms Stefania Traniello Gradassi and Mr Carlo Salvagnini were appointed by the court as commissioners.

iv  Borsalino Giuseppe & Fratello SpA
Borsalino Giuseppe & Fratello SpA is a luxury Italian hat maker, celebrating its 160th anniversary this year. By judgment issued on 14 December 2017, the company was declared bankrupt by the Alessandria Bankruptcy Court. On 17 April 2018, the first hearing for the examination of the creditors’ claims was held. The procedure is still ongoing.

v  Acqua Pia Antica Marcia SpA in liquidation
Acqua Pia Antica Marcia SpA is an important real estate group of companies headquartered in Rome. The group engages in the airport, construction and tourism businesses and includes the first real estate company born in Italy. It handles five national airports (Milan Malpensa, Milan Linate, Venice, Bologna and Catania). It also develops residential and commercial centres, with a focus on the reconstruction of the architecture of old disused industrial sites. Finally, it manages several luxury hotels (e.g., Grand Hotel Villa Igiea, Grand Hotel et Des Palmes, San Domenico Palace Hotel, Excelsior Palace Hotel and Excelsior Grand Hotel, located in Sicily). By decree issued on 3 July 2013, by the Court of Rome, the company was authorised to enter into a composition with creditors pursuant to Article 161 of the Bankruptcy Law. In the same period, all subsidiaries filed analogous requests and were authorised to start a pre-bankruptcy procedure.
After the creditors’ approval, the pre-bankruptcy composition plan filed by the company was finally homologated by the Rome Bankruptcy Court on 17 December 2014, which appointed a liquidator in order to fulfil the approved plan.

**vi Porta Vittoria SpA**

Porta Vittoria SpA was founded in 2005. The company owned and operated the Porta Vittoria project, one of the most important real estate development projects in Italy, covering an area of about 42,000 square metres and including both commercial and residential buildings, offices and also one hotel. By judgment issued on 29 September 2016, the company, whose debts amounted to about €400 million, was declared bankrupt by the Milan Bankruptcy Court. On 20 February 2017, the first hearing for the examination of the creditors’ claims was held. The procedure is still ongoing.

**IV ANCILLARY INSOLVENCY PROCEEDINGS**

Ancillary or secondary proceedings may be opened in Italy in the event that the main insolvency proceedings are pending in another EU Member State, subject to the EC Bankruptcy Regulation (see Section I.vii).

**V TRENDS**

By Law No. 155 dated 19 October 2017, which entered into force on 14 November 2017, the Italian parliament delegated the government to thoroughly reform the Italian Bankruptcy Law, also through a rationalisation of the legislative picture, within the following 12 months.

The reform shall have to take into account EU Regulation No. 848/2015 (the Recast Bankruptcy Regulation), Commission Recommendation 2014/135 and the UNCITRAL principles on insolvency.

The reform shall have to introduce an effective alert mechanism at the first signs of bankruptcy and limit access to the pre-bankruptcy composition to companies capable of being revived.

Furthermore, a specialist judge will be contemplated for minor bankruptcy cases.

It is also worth highlighting that the reform would fill an important gap in the current Italian legislation, by introducing a specific discipline applicable to the insolvent groups.

Priority shall have to be given to those proceedings whose aim is to overcome the crisis by carrying on the business as a going concern, provided that they are in the interest of creditors.

The reform shall, therefore, boost debt restructuring arrangements and out-of-court debt restructuring plans.
Insolvency proceedings in Luxembourg are governed by the following legislation.

**General insolvency regime**
- the Law of 14 April 1886 on composition with creditors, as amended;
- the Grand Ducal Regulation of 24 May 1935 on controlled management;
- the Code of Commerce, which deals more specifically with stays of payments and bankruptcy proceedings; and

**Main special insolvency regimes**
- Banks and professionals of the financial sector: Law of 18 December 2015 on resolution, recovery and liquidation measures of credit institutions and some investment firms, on deposit guarantee schemes and indemnification of investors.
- Insurance and reinsurance companies and pension funds: Law of 6 December 1991 on the insurance sector, as amended.
- Regulated securitisation entities: Law of 22 March 2004 on securitisation, as amended.

---

1 Pierre Beissel and Sébastien Binard are partners at Arendt & Medernach. The authors wish to thank Thainá Dantas Bacelar for her assistance with the update of this chapter.

The insolvency procedures provided for under Luxembourg law may be divided into those intended to preserve the business of the debtor (i.e., stay of payments, controlled management and composition with creditors) and procedures intended to wind up and realise the assets of the debtor (i.e., bankruptcy and compulsory liquidation).  

Each procedure will be further analysed under Sections I.iii and III.vi, along with the substantive provisions of Luxembourg insolvency law relating thereto.

ii Policy

While Luxembourg insolvency law boasts three specific reorganisation procedures, which are essentially designed to keep failing businesses operating and to facilitate their restructuring into proper going concerns, there have been few cases of such procedures being opened in practice. For instance, there was a total of slightly over 100 cases of controlled management over the past 25 years, roughly half of which ended up in formal bankruptcy proceedings. Neither have there been any cases of composition with creditors nor of stays of payments (relating to general commercial or holding companies) during this time.

There are many reasons for this situation, although this may be more a case of inadequacy of the available instruments for restructuring distressed businesses than the authorities’ willingness to favour bankruptcy and liquidation procedures over reorganisation measures. Among the obstacles to resorting to reorganisation procedures is the requirement generally expressed by the Luxembourg courts that, at the time of the opening of the reorganisation proceedings, the relevant distressed business should still have sufficient assets to settle the estimated costs of the restructuring process, which is not always realistic. The formal conditions for allowing procedures such as compositions with creditors are also too restrictive, as – for example – the approval of a majority in number of the creditors representing at least three-quarters of the debts (i.e., a fairly high threshold) is mandatory.

Importantly, the courts are also entitled to verify at any time during the processing of a request for controlled management proceedings or during the course of the reorganisation itself whether the conditions for opening formal bankruptcy proceedings are met and, under such circumstances, to declare the debtor bankrupt \textit{ex officio}. Finally, the business in the name of which acts of gross negligence or fraud have been committed would typically be denied the benefit of reorganisation measures.

If the Luxembourg courts have so far dealt with more formal bankruptcy (i.e., liquidation) proceedings than reorganisation measures, a change appears to be imminent.

---

3 Article L-1200-1 of the law on commercial companies dated 10 August 1915, as amended, provides for an additional compulsory liquidation procedure that may be opened by the district court at the initiative of the public prosecutor in case of substantial breach of this law. This procedure, being unrelated to the solvency of the company in relation to which it is opened, will not be analysed in this chapter.


5 There have, however, been some cases with regard to regulated entities (see below).

6 See Luxembourg Court of Appeal, 26 July 1982, Moyse.

7 See Luxembourg Court of Appeal, 17 February 1982, Reding et Kunisch and Luxembourg Court of Appeal, 10 February 1982, Pas. 25, 301.
A significant number of bankruptcies (which in 2012 and 2013 exceeded 1,000 per year but amounted to 983 in 2016 and 935 in 2017, respectively), and the general public acknowledgement of a shortage of appropriate instruments to deal with companies experiencing financial difficulties led the government to act and propose an ambitious reform of Luxembourg insolvency law as part of its 2009 governmental programme – under which ‘efforts will be made to favour reorganisations over liquidation’. Such a change of policy was also debated at the Chamber of Deputies in February 2011, where it was expressed that ‘in a period of crisis, the creation of appropriate instruments to deal with businesses facing financial difficulties became a matter of national priority that could not be overlooked’.

So far, the government’s work on this matter has resulted in draft bill No. 6539 on business preservation and modernisation of bankruptcy law, dated 26 February 2013. Up to this date, the legislative process is continuing, in particular, new amendments to the project were published on 6 March 2018 (see Section V.iii, for further details on this draft legislation).

Finally, the period from the financial crisis of 2008 to date saw Luxembourg courts resorting more to stay of payments proceedings in the form applicable to regulated entities, which were opened in some notable cases.

iii Insolvency procedures

Main proceedings

The procedures available in Luxembourg under the general insolvency regime are: (1) compositions with creditors; (2) controlled management proceedings; (3) stays of payments (which all fall within the category of the reorganisation procedures (i.e., aiming at restructuring a business experiencing financial difficulties rather than winding it up)); and (4) bankruptcy proceedings, which essentially involves a liquidation procedure (i.e., a procedure involving the realisation of the assets of the debtor with a view to settling the debtor’s liabilities, either in full or, in case of insufficient assets, in part).

All of the foregoing insolvency procedures are judicial procedures, which means they are all subject to the control of the district court of competent jurisdiction.

Compositions with creditors

A company against which bankruptcy proceedings have been initiated may avoid a declaration of bankruptcy through the approval by the district court of a voluntary arrangement between the debtor and its creditors. Once approved, the voluntary arrangement is binding upon all creditors but will only be applied to the commitments made before such arrangement.

Luxembourg 2009 governmental programme, p. 108.
Draft Bill on business preservation and modernisation of insolvency law No. 6539, p. 1.
See, for example, failed banking institutions Lehman Brothers (Luxembourg) SA, Landsbanki Luxembourg SA, Glitnir Luxembourg SA and Kaupthing Bank Luxembourg SA in 2008–2009 (see Section III.i).
**Controlled management**

A company that is not bankrupt may request that a controlled management procedure be initiated, under which the management of the company is placed under the control of one or more commissioners designated by the court. The aim of an application for controlled management is to allow either a reorganisation or an orderly winding up of a company. Creditors are asked to vote on a reorganisation or liquidation plan, which, if approved, is enforceable against all creditors. Finally, creditors’ enforcement rights are suspended for the duration of the controlled management.

**Stays of payments**

Stays of payments may be granted in cases where companies have suffered temporary liquidity problems, preventing them from settling their due and payable liabilities. As in the case of controlled management, the board of directors (or relevant management body) of the debtor stays in place during the proceedings but acts under the supervision of a commissioner. Creditors’ rights are suspended during the duration of a stay of payments.

**Bankruptcy**

Bankruptcy proceedings are governed by Article 437 et seq. of the Luxembourg Code of Commerce and result in the winding up of the company in relation to which such proceedings have been opened and the recovery of value from its underlying business or assets (if any).

Once bankruptcy proceedings have been opened, the members of the board of directors (or relevant management body) are discharged from their duties and replaced by one or more court-appointed receivers, who administer and realise the debtor’s assets and then distribute the proceeds to the creditors according to the priority order provided for by law. All enforcement actions carried out by unsecured creditors are suspended. Beneficiaries of *in rem* security over assets of the bankrupt company, which are governed by the Law of 5 August 2005 on financial collateral arrangement, may enforce their rights despite the existence of the bankruptcy proceedings.

Certain ‘abnormal’ transactions (e.g., payments of non-matured debts or transfers of assets for no actual consideration) entered into by the company will be declared null and void if they have been performed during the ‘hardening period’, which starts at the moment at which the company is presumed to have ceased paying its creditors, or during the 10 days prior to the hardening period. The starting point of the hardening period may at the earliest be set at a date that is six months prior to the bankruptcy judgment.

Agreements entered into by the debtor are not automatically terminated, except those contracted *intuitu personae* with regard to the debtor and those including a clause of early termination upon insolvency.

Luxembourg law does not set out any mandatory timing in respect of the liquidation of the bankrupt company, which typically takes several months to several years, depending on the size and complexity of the business.

---

14 Article 593 of the Code of Commerce.
16 Article 442 of the Code of Commerce.
17 Courts most often set the hardening period to six months, unless positive evidence is brought that payments ceased at a later time.
Ancillary proceedings
Ancillary or secondary proceedings may be opened in Luxembourg in the event that main insolvency proceedings are pending in another EU Member State, subject to the provisions of Council Regulation (EC) No. 848/2015 on insolvency proceedings. Such proceedings will be restricted to the assets of the debtor located in Luxembourg.¹⁸

In main insolvency proceedings opened in a foreign non-EU jurisdiction with respect to a Luxembourg company, Luxembourg courts would, in principle, not agree to open ancillary proceedings in Luxembourg on the basis of the 'unity of the bankruptcy' principle resulting from case law, according to which the main effects of the foreign bankruptcy will automatically apply to the debtor.¹⁹ To give effect to the enforcement measures contained in the foreign judgment in relation to assets located in Luxembourg, recognition (exequatur) proceedings will, however, be necessary in Luxembourg.²⁰

iv Starting proceedings
Since composition proceedings and stays of payments (under the general insolvency regime) have hardly ever been used in Luxembourg, this section will be limited to the analysis of controlled management and bankruptcy proceedings.

Controlled management
Controlled management may only be applied for by the debtor and will be granted if the district court of competent jurisdiction deems that: (1) the credit of the debtor is undermined; (2) the settlement in full of the debtor’s liabilities is in jeopardy; and (3) controlled management allows the recovery of the debtor’s business or improves the position of the debtor in respect of the sale of its assets.²¹ Case law considers that the debtor must also act in good faith when making the request for an order of controlled management.²²

Bankruptcy
A commercial company is considered bankrupt if: (1) it can no longer pay its debts as they fall due, and (2) it may no longer raise credit.²³ These two conditions must be met cumulatively.

A company may only be declared bankrupt by the district court of competent jurisdiction. Such a decision can be taken on the petition of the company itself, one or more creditors (with respect to a due and payable claim for which a judgment has been notified to the debtor) or the district court, on its own initiative.²⁴ Most bankruptcy decisions are taken upon petition of creditors, which, in 90 per cent of cases, are public authorities.²⁵

¹⁸ Article 34 et seq. of Council Regulation (EC) No. 848/2015 on insolvency proceedings.
²⁰ ibid.
²¹ Article 1 of the Grand Ducal Regulation of 24 May 1935 on controlled management.
²² See Luxembourg Court of Appeal, 17 February 1982, Reding et Kunsch and Luxembourg Court of Appeal, 10 February 1982, Pas. 25, 301.
²³ Article 437 of the Code of Commerce.
²⁴ Article 442 of the Code of Commerce.
²⁵ Draft Bill on business preservation and modernisation of insolvency law, No. 6539, p. 5.
Companies that meet the bankruptcy criteria set out above must file for bankruptcy within one month of the cessation of payments. Failure to do so will create a liability risk for the board of directors (or relevant management body). If the court deems that a bankruptcy situation exists, it will declare the company bankrupt and appoint a receiver who will, *inter alia*, manage the affairs of the company in bankruptcy and represent the interests of the creditors of the company, generally.

**v Control of insolvency proceedings**

This section is limited to the analysis of controlled management and bankruptcy proceedings, given the limited number of compositions with creditors and stays of payments.

**Controlled management**

As with composition proceedings, the court will delegate one of its judges to examine the debtor’s affairs and determine whether there are realistic prospects for a reorganisation. If the court comes to the conclusion, after having reviewed the report of the delegated judge, that reorganisation is possible, it will grant the application for controlled management.

The court will then appoint one or more commissioners, who do not replace the company’s management body but supervise its actions. The members of such a body, therefore, continue to manage the company with a view to reorganising its affairs, subject to certain acts that may not be undertaken without the consent of the commissioners. After having heard the creditors and reviewed the situation of the debtor, the commissioners will draw up their report, which will contain either a reorganisation plan or a liquidation plan. Creditors will afterwards be convened to vote on the proposal at the majority (in number) of creditors representing more than half of the debtor’s aggregate debts. The approved plan will finally need to be sanctioned by the district court.

**Bankruptcy**

The receiver appointed by the district court, having opened the bankruptcy proceedings, must manage the company in good faith during such proceedings under the supervision of a supervisory judge designated by the same court. The board of directors (or relevant management body) may no longer act on behalf of the bankrupt company as of the date of the bankruptcy judgment and, therefore, plays no active role in the administration of the bankruptcy, but the members of the management body still have the obligation to assist the receiver whenever necessary.

Certain actions taken by the receiver will be subject to the approval of either the supervisory judge or the district court. The receiver may, for instance, proceed to the sale of movable or perishable assets of the debtor only with the prior authorisation of the supervisory judge in charge of the bankruptcy. The sale of other assets (non-perishable and immovable) require the approval of the district court, which will determine the conditions for such a sale following a report by the supervisory judge and a hearing of the debtor. Finally, after all

---

26 Article 440 of the Code of Commerce.
27 In the alternative scenario, a bankruptcy order would usually be made shortly thereafter.
28 Article 477 of the Code of Commerce.
proceeds of the assets of the bankrupt company have been distributed among the creditors, the receiver will submit a detailed report about the bankruptcy proceedings to the district court.

vi Special regimes
Refer to Section I for a list of the main special insolvency regimes existing under Luxembourg law. The main differences between the general and special insolvency regimes is that creditworthiness issues are sufficient for opening proceedings under the special regimes and the courts have more freedom under the special regime than the general regime to determine the terms of the reorganisation or liquidation.

No special insolvency rules apply to corporate groups.29

Banks and financial sector professionals
Two separate insolvency procedures are provided for under the Law of 18 December 2015, which may apply to credit institutions and professionals of the financial sector:

a the stay of payments procedure, which will apply in the event that the creditworthiness of the relevant entity is impaired (whether or not it has ceased its payments) and which aims at helping such entity to restore its financial situation by suspending all the payments due to its creditors; and

b the judicial liquidation procedure, which will be applied in the event it becomes apparent that the stay of payments procedure did not restore the relevant entity's financial situation or where the latter is undermined to such an extent that the entity may no longer meet its commitments.30

Stays of payments
A stay of payments, which may be viewed as an observation phase prior to the commencement of formal liquidation proceedings, may only be applied for by the national financial sector regulator, the Commission de Surveillance du Secteur Financier (CSSF), or by the relevant entity itself. Such request will automatically result in the suspension of all payments by the entity and a prohibition on the entity taking any actions without CSSF consent, except for safeguarding measures.

If the district court considers the conditions for a stay of payments to be fulfilled, it will rule accordingly and determine the period for which the stay of payments will be granted (a maximum of six months),31 as well as the terms of such a stay. The court will also appoint

29 Parent companies and subsidiaries are separate entities to which independent insolvency proceedings apply. Luxembourg courts may, however, consolidate the assets of two companies in the event such companies are actually managed as a single entity and consider that these companies represent a single legal entity for the purpose of the insolvency proceedings.

30 Professionals of the financial sector (PFS) are all entities regulated by the Commission for the Supervision of the Financial Sector that are not banks (investment firms such as investment advisers, brokers in financial instruments or wealth managers), specialised PFS (e.g., registrars, custodians, regulated markets operators and debt-recovery professionals) and support PFS (pursuing an activity related to a financial sector activity (e.g., domiciliation agent and IT operator for the financial sector).

31 Article 122(10) of the Law of 18 December 2015. Note, however, that in a recent case involving Kaupthing Bank Luxembourg SA, the district court agreed to extend the initial stay of six months by an additional two months.
one or more provisional administrators who will monitor the entity’s estate and will need to approve any action in respect of the distressed entity, failing which such actions will be deemed null and void.

Judicial liquidation

If the conditions for a judicial liquidation procedure to be opened are met, a request may be made for such purposes by the CSSF or the public prosecutor.

In the event that the district court orders a judicial liquidation, it will appoint a supervisory judge and one or more liquidators. It will then determine the terms of the liquidation, in particular, whether the extent to which the rules governing general insolvency proceedings should apply (which make judicial liquidation proceedings a flexible instrument). Finally, the liquidation decision will automatically result in the withdrawal of any licence to operate granted to the relevant entity by the CSSF.

Other regulated entities

Insurance companies

The insolvency regime applicable to insurance or reinsurance companies and pension funds, as provided for by the amended Law of 6 December 1991 on the insurance sector, substantially mirrors the regime applicable to banks and PFS.

Regulated investment funds, fund managers and securitisation entities

The insolvency procedures applicable to regulated investment funds, management companies and securitisation entities essentially take the same form as those applicable to banks and PFS: stays of payments and judicial liquidation proceedings. The main difference from the regime described above is that the stay of payments is automatically triggered by the withdrawal of the licence of the relevant entity by the CSSF. Judicial liquidation proceedings may be opened at the request of the CSSF or the public prosecutor following such withdrawal. Investors have no rights to request the opening of insolvency proceedings from Luxembourg courts.

vii Cross-border issues

Formal insolvency proceedings opened in an EU jurisdiction prior to 26 June 2017 were subject to Regulation (EC) No. 1346/2000 on insolvency proceedings. This Regulation generally consisted in a good and proven instrument, but there were some uncertainties and constantly evolving case law in particular around the key concept of the ‘centre of main interests’ (COMI) of a debtor, which is used to determine which EU jurisdiction is entitled to open the main insolvency proceedings against such a debtor.

32 UCIs operating as SICAVs, SICAFs or FCPs, investment companies in risk capital (SICARs) or specialised investment funds (SIFs).

33 They may, however, refer the situation to the CSSF, which may in turn withdraw an entity’s licence if it deems that the conditions for such withdrawal have been met.

It could also be difficult to identify a debtor’s COMI in certain cases, which called for a more precise definition of the concept to be adopted, notably to avoid undesirable forum shopping. The European Commission tackled this issue in the form of a proposal for a regulation amending Regulation (EC) No. 1346/2000, followed by the adoption on 20 May 2015 by the European Parliament of Regulation (EU) 848/2015 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast), which replaced Council Regulation (EC) 1346/2000. In general, the new Insolvency Regulation (recast) reflects the lessons learned from the complex procedures that have occurred since the financial crisis. It applies to insolvency proceedings opened after 26 June 2017.

The main issues addressed by the Insolvency Regulation (recast) are essentially:

a. the extension of the scope of the regulation to ‘pre-insolvency’ and ‘hybrid’ proceedings;
b. the amendment of the definition of the COMI and clarification of the circumstances in which the presumption that the COMI is located at the registered office of the debtor may be rebutted;
c. the ability of courts to refuse the opening of secondary proceedings (which may cause practical difficulties and inefficiencies) if they are not necessary to protect the interests of local creditors;
d. the obligation on Member States to organise the publication of cross-border insolvency decisions in a publicly accessible national register and to provide for the interconnection of national insolvency registers; and
e. strict cooperation obligations bearing on courts and insolvency practitioners involved in the insolvency of a corporate group.

Concerning insolvency proceedings opened in a non-EU jurisdiction, the ‘unity of the bankruptcy’ principle applicable in Luxembourg would result in the main aspects of such proceedings automatically applying to the debtor, with no possibility of opening ancillary proceedings in Luxembourg. This has the advantage of resolving most conflicts of jurisdiction between Luxembourg and foreign jurisdictions, but there could be instances where creditors’ rights (e.g., employees) would be better protected if the Luxembourg courts were entitled to open territorial proceedings.

II INSOLVENCY METRICS

Luxembourg’s economy has coped relatively well with the ongoing economic crisis so far and even shows moderate growth prospects. Unemployment and insolvencies are, however, at a high level.

37 That is, to the extent the foreign jurisdiction applies the same conflict of jurisdiction principle. It is otherwise conceivable that main insolvency proceedings be opened in both jurisdictions.
i  **General economic climate**

According to the International Monetary Fund, the projected GDP growth of Luxembourg for 2018 and 2019 is estimated to be 4.3 per cent and 3.7 per cent, respectively, whereas according to the Luxembourg Institute of Statistics and Economics the GDP growth is predicted to be 3.9 per cent in 2018 and 4 per cent in 2019. This is fairly consistent with the average GDP growth of 3.6 per cent per year known during the period from 1995 to 2017.

The unemployment rate was estimated to fall at under 6 per cent for 2018 and 2019. The balance of the public finances should go from a positive balance of 1.5 per cent of GDP in 2017 to approximately 1.1 per cent in 2018 considering a forecast decline of tax income.

Among the country’s strengths are its limited public debt, highly skilled workforce and high standard of living, whereas the dependence on the financial services industry, the fiscal impact of ageing population and, to some lesser extent, the steel industry may be seen as a weakness.

Inflation will likely grow to 1.8 per cent in 2019.

The total net assets of UCIs were estimated at €4,227.532 billion as of April 2018 against €4,148,898 billion as of March 2018, which represents an increase of 1.9 per cent over one month. Considering the period from April 2017 until April 2018, the volume of net assets was largely increased by 7.35 per cent.

The aftermath of the Brexit referendum in the UK also raises questions, with certain studies predicting that its consequences for the UK and the EU will be considerable.

ii  **Insolvencies**

The yearly number of Luxembourg companies declared bankrupt has steadily increased between the 1990s and 2013. The figure was only around 100 in 1990 but was in excess of 500 in 2000 and reached over 1,000 in 2012 and in 2013. The figures decreased to 850 in 2014, rose to 983 in 2016 and slightly decreased to 935 bankruptcies in 2017.

III  **PLENAR INSOLVENCY PROCEEDINGS**

The past years were substantially quieter on the insolvency front than those of 2008 to 2010, which saw dramatic cases such as those involving the Luxembourg subsidiaries of the failed
Icelandic banks and Lehman Brothers Inc. and certain investment funds that essentially invested in Bernard Madoff’s funds. There were nevertheless a few notable cases during the period of review; there is, however, scarce public information available on insolvencies in Luxembourg compared with some larger jurisdictions.

i ABLV Bank

ABLV Bank, the largest independent private bank in Latvia and its Luxembourg subsidiary, ABLV Bank Luxembourg SA (ABLV Lux), have been considered as ‘failing or likely to fail’ by the European Central Bank (ECB) on 24 February 2018. This follows a suspicion of involvement in money laundering linked to one of the illegal arms development programmes in North Korea as alleged by the US Treasury.

The ECB then forced the two entities to liquidate in accordance with local legislation. The ECB justified its decision alleging that ABLV Bank was probably no longer in a position to honour its creditors and to resist massive withdrawals of deposits and that ABLV Lux presented a foreseeable failure. As a result of this statement, the shareholders of ABLV Bank in Latvia decided to go through a voluntary liquidation process.

Meanwhile in Luxembourg, on 19 February 2018, the CSSF filed an application with the Luxembourg District Court dealing with commercial matters for stay of payments by ABLV Lux in accordance with Article 122(6) of the Law of 18 December 2015 on resolution, recovery and liquidation measures of credit institutions and some investment firms, on deposit guarantee schemes and indemnification of investors. The CSSF alleged that this decision follow the decision made by the ECB to impose a moratorium on the ABLV Bank for cause of deterioration of the bank’s financial position. On 9 March 2018, the CSSF request was rejected by the Luxembourg Commercial Court. The Luxembourg Commercial Court has nevertheless decided to grant ABLV Lux the benefit of the stay of payments process but only for a ‘protective’ purpose and for a period of six months.

ii Espirito Santo Group

Banco Espirito Santo SA (BES), whose main shareholders are based in Luxembourg, has reportedly been in financial distress since May 2014. On 20 June 2014, the CSSF requested the Luxembourg Stock Exchange to suspend the shares of Espirito Santo Financial Group SA (ESFG), which at that moment held 25.1 per cent of BES, since the shares of ESFG lost 51 per cent of their value.

Irregularities in the financial statements of Espirito Santo International SA (ESI), one of the shareholders of ESFG through its wholly owned subsidiary Rio Forte Investments

---

49 Landsbanki Luxembourg SA, Glitnir Luxembourg SA and Kaupthing Bank Luxembourg SA and Lehman Brothers (Luxembourg) SA.
50 Luxalpha SICAV, Luxembourg Investment Fund SICAV and Herald (Lux) SICAV.
51 Source: ABLV Bank official website.
52 Source: Luxembourg Wort, 24 February 2018.
53 Source: Luxembourg Wort, 24 July 2018.
54 Source: ABLV Bank official website.
57 Source: Paperjam, 9 March 2018.
SA (RF), appear to be the main source of the difficulties of the group. The amount of the financial manipulation is thought to be around €1.3 billion. ESFG was accused of a loss of €1.549 billion in 2013 against a profit of €775 million in 2012.

ESI asked the district court to be put under controlled management, a request which was promptly acceded to. ESI had to present a restructuring plan to sell its assets and raise funds to pay its creditors. RF in turn announced on 23 July 2014 that it is not able to honour a €897 million debt owed to Portugal Telecom, and asked the district court to place it under controlled management.

Following the submission of the reports of the delegate judge and experts, the District Court of Luxembourg rejected the controlled management requests of ESI and RF by two judgments of 17 October 2014, since the restructuring plans did not convince the Luxembourg judges that ESI and RF would be able to successfully reorganise themselves.

BES was transformed into a bad bank in order to liquidate toxic assets, especially the debt securities of the rest of the group. At the same time, the Portuguese authorities regrouped the healthy assets into a new bank called Novo Banco, which benefited from an equity injection of €4.9 billion financed through a loan of €3.9 billion by the Portuguese government.

In Luxembourg, a judicial inquiry has been opened in respect of ESI, Rio Forte and ESFG. In October 2015, the district court abandoned the criminal case by reason of the good administration of justice, given the Portuguese authorities were in the best position to judge the case.58

In April 2018, the assets at bank for ESI were €28,144,407.69 and US$137,952,324.56, with RF’s cash being €138,284,965.64. Furthermore, the number of claims against ESI was in excess of 1,540, representing approximately €8.1 billion, while this figure exceeded 1,721 in respect of RF, corresponding to more than €4.5 billion. Concerning RF, the sale of certain assets was continued, including that of Companhia Brasileira de Agropecuária – Cobrape, which is still ongoing. The process of selling ES Property SGPS and the related real estate funds FIMES I and FIMES II were, however, suspended, owing to criminal seizures in Brazil and in Portugal.59

iii Telecom Luxembourg Private Operator

Telecom Luxembourg Private Operator SA (TLPO), a major network operator in Luxembourg submitted on 26 September 2016 an application in order to be placed under controlled management.60

In 2015, TLPO had a turnover exceeding €10 million, while it recorded a loss of €2.9 million, bringing its cumulative losses to an amount of €12.1 million.61 While acknowledging the situation in their annual report and keeping a close eye on a potential bankruptcy, the board of directors of TLPO approved the continuation of the company. This survival was sustainable thanks to the support of the main shareholder, BIP Investment Partners SA (BIP).

58 Véronique Poujol, La justice luxembourgeoise se dessaisit, Paperjam, 23 March 2016.
60 Jean-Michel Gaudron, Gestion contrôlée demandée pour Telecom Luxembourg, Paperjam, 26 September 2016.
61 ibid.
BIP’s later withdrawal from TLPO led the latter to insolvency. At the same time, negotiations were undertaken with interested investors, among which Nomotech, a French network operator, and the controlled management submission was filed in parallel in order to enable TLPO to carry out its essential business in the meantime. This was deemed to be of a significant importance since an interruption of internet access to TLPO’s customers, which included certain large financial institutions, could have been dramatic for the Luxembourg financial sector.62

On 16 November 2016, the Tribunal d’arrondissement de Luxembourg delivered a judgment declaring the insolvency of TLPO following a bankruptcy petition submitted by the Company.63 Nevertheless, TLPO’s activity was first taken over by Novotech through its Luxembourg subsidiary Luxnetwork SA.64

iv Assya Asset Management Luxembourg SA
Assya Asset Management Luxembourg SA (AAML) was a regulated asset management company and part of the LSK group (chaired by former IMF Managing Director Dominique Strauss-Kahn), which was declared in judicial liquidation on 17 November 2014 following a total loss of €25.8 million. While the equity of the company was only €1.43 million, a number of debts were owed in different European countries to business partners and tax authorities.

On 3 October 2014, Leyne Strauss-Kahn & Partners (LSK), AAML and Thierry Leyne, the main shareholder of LSK, were held severally liable by a Luxembourg judge to pay €2 million to Bâloise insurance company.

Further to this decision of the district court, AAML requested a suspension of payments for protection against its creditors, a request that the district court of Luxembourg granted by a judgment of 30 October 2014, setting the end of the suspension of payments procedure to 17 November 2014.

AAML lost their licence with the CSSF and was eventually declared in judicial liquidation. By judgments of 17 November 2014, the district court of Luxembourg also declared the bankruptcy of LSK and two other companies in the same group.

The troubles for LSK and AAML are not finished yet as the insurance company Bâloise is suing the previous directors of LSK and AAML, as well as the liquidator Mr Laurent Fisch for management error and for illegal practice of a regulated profession. In 2011, the insurer gave the responsibility to AMML to manage some of its assets with all due diligence. However, AAML invested these assets in companies belonging to LSK in violation of local rules imposing risk diversifications. Bâloise claimed that directors of AMML committed a management error by investing without a gain perspective and with full knowledge of that fact, and thus should be held severally liable.65

62 Alexandra Parachini, La place financière luxembourgeoise a évité une crise majeure, Le Quotidien, 17 November 2016.
63 Tribunal d’Arrondissement de Luxembourg, Extrait, Inscription d’une décision judiciaire au RCS, 17 November 2016.
64 Thierry Labro, NomoTech reprend Luxembourg Telecom, Luxemburger Wort, 17 November 2016.
65 Véronique Poujol, La Bâloise relance les hostilités, Paperjam, 6 May 2016.
Excell Life International SA was an insurance company that was dissolved and subjected to liquidation proceedings on 12 July 2012 by the Luxembourg district court at the request of the regulator of the insurance sector, the Commissariat aux Assurances (CAA), because of the loss of its creditworthiness.

According to the judgment,\(^{66}\) Excell Life was subject to intense scrutiny by the CAA from March 2012 as a result of irregularities discovered in 2010 resulting from unit-linked life insurance contracts that did not conform to the rules set out by the CAA and of certain internal transfers of Lehman Brothers securities. The insurance company was further deemed not to have complied with its solvency margin obligations and that its legally required guarantee fund was insufficient, despite a capital increase made at the request of the CAA in 2011. The CAA also prohibited Excell Life from entering into new insurance contracts during 2010–2011 and finally withdrew its licence in June 2012.

In December 2012, 68 creditors of Excell Life filed joint claims against the CAA and the Grand Duchy of Luxembourg on the grounds of deficiencies in the oversight of Excell Life. It is expected that the processing of these claims will take some time because of criminal proceedings launched in parallel by the public prosecutor against certain directors of Excell Life.\(^{67}\)

The district court of Luxembourg also decided, in a judgment dated 15 July 2013,\(^{68}\) to grant a first dividend of 75 per cent of any realised assets\(^{69}\) to those creditors that had invested in insurance products linked to a limited number of investment funds. This judgment was followed by several others similarly granting a 75 per cent dividend in relation to insurance products issued by Excell Life and linked to certain other investment funds.

In July 2014, creditors who invested into funds that were not invested into the above insurance products commenced proceedings in order to nullify the decision to pay a dividend to their holders. By judgment of 1 April 2015, the District Court of Luxembourg declared that the action was unfounded and dismissed the creditors’ claims, as supporting their request would resulting in denying investors the benefit of a special privilege of insurance creditors on the assets of funds in which they are indirectly invested. The creditors then appealed against this decision in 18 January 2017, and by reformulating the first instance decision, the Luxembourg Court of Appeal ruled that all insurance creditors should be entitled to the benefit of their rights resulting from their realised assets as at 12 July 2002, and no special privilege should be granted.

IV ANCILLARY INSOLVENCY PROCEEDINGS

It appears that no secondary insolvency proceedings were initiated in Luxembourg during the period of review.\(^{70}\) The only apparent case relates to a German company called Schuring Beton GmbH, which had a Luxembourg branch with nine employees. After Schuring Beton


\(^{67}\) Source: d’Land.


\(^{69}\) Estimated at €24,605,546 as of 15 July 2013.

\(^{70}\) Based on an oral exchange with a clerk of the bankruptcy chamber of the Luxembourg district court.
GmbH was declared bankrupt in Germany, those employees successfully requested the opening of secondary proceedings in Luxembourg, where the district court deemed that Schuring Beton GmbH operated an establishment there.71

V TRENDS

i Predicted level of insolvency activity in the coming year

The first results for 2018 show an upsurge in the number of bankruptcies, with 611 insolvencies during the first six months of the year,72 despite the number of bankruptcies dropping from 983 insolvencies in 2016 and 935 insolvencies in 2017.73

ii Practical trends

In recent years, the courts resorted more often to stay of payment proceedings, when deemed necessary, to allow failed banks to reorganise themselves under reduced creditor pressure. This was seen as a positive thing by practitioners as it resulted in useful case law, clarifying the practical conditions under which such proceedings could take place.

The status quo was maintained under the general insolvency regime, with the courts agreeing to the opening of only a few reorganisation proceedings, preferring straightforward bankruptcy declarations. There is, however, a political willingness to promote restructurings over liquidations and appropriate draft legislation is in circulation to that effect.74

Cases of criminal liability opened against directors (or members of the relevant management body) have remained low in recent years.75

iii Expected legislative developments

Expected changes in the insolvency law applicable in Luxembourg result from draft bill No. 6539 on business preservation and modernisation of bankruptcy law, dated 26 February 2013 (the Draft Bill). The Draft Bill is currently under analysis by several commissions within the Parliament.

As discussed in Section II, on 6 March 2018 the Luxembourg government published a modified version of the Draft Bill, further to opinions from various bodies, including the Council of State, which is intended to provide new and tailored tools to distressed companies, and the main objectives of which are the preservation of such companies’ activities and protection of stakeholders (e.g., employees), notably by favouring reorganisations over liquidations.76

The Draft Bill, strongly inspired by the Belgian law on business preservation dated 31 January 2009, is built around four guiding principles: a ‘preventive’ aspect, a ‘restorative’ aspect, a ‘repressive’ aspect and an ‘social’ aspect.

74 The reader will find additional information on these issues under Sections II and V.iii.
75 Rapport des juridictions judiciaires, 2009 and 2012.
76 Luxembourg 2009 governmental programme, p. 108.
Preventive aspect

The preventive measures contained in the Draft Bill essentially allow for the gathering of information from businesses to identify those experiencing financial difficulties at a stage where they may still benefit from efficient reorganisation procedures, and also provide for instruments designed to preserve and reorganise business activities while taking the rights of creditors into account, which entrepreneurs will be able to request on their own initiative.

The information to be gathered on Luxembourg businesses and to be used to determine whether a given business experiences financial difficulties relies on various indicators (e.g., a list of debts due to tax and social security authorities), to be collected by two separate public entities: the Secretariat of the Economic Committee (SEC), which plays a central role concerning non-judicial reorganisation proceedings, and the Evaluation Committee for Businesses in Difficulties, which will analyse on behalf of its members, the public authorities, whether a bankruptcy petition is appropriate.

The reorganisation measures to be made available to distressed businesses under the Draft Bill encompass out-of-court procedures and judicial procedures, which are adapted to the size of the relevant business, and are largely voluntary (i.e., upon request of the business in financial distress).

The first out-of-court procedure available is the conciliation process, whereby the company in financial distress may require from the SEC the appointment of a business arbitrator, whose task may be defined by the interested parties; and the second is the mutual agreement, under which the debtor tries to strike an agreement with two or more of its creditors, possibly with the assistance of a business arbitrator.

If the viability of a company’s activities is threatened, the debtor also has the right to apply for a judicial reorganisation procedure with the relevant district court, which is appropriate where there is a need for measures that may be enforced against third parties. The procedure has three possible outcomes:

a. a stay of payments in respect of measures that are aimed at collecting outstanding debts from the distressed business;

b. a collective agreement, which is enforceable against all creditors, including those that have opposed such an agreement, if a certain number of creditors representing at least half of the aggregate amount of liabilities of the debtor have given their consent; or

c. a transfer under judicial control, whereby a court-appointed agent will organise the transfer of all or part of the assets of the relevant company to ensure the continuity of its activities.

Restorative aspect

The entrepreneur exercising its activity as a natural person (i.e., without limitation of liability) and whose venture has failed may under the Draft Bill be given a ‘second chance’ if he or she is deemed to have acted in good faith, and accordingly not be held personally liable for the outstanding debts of the failed business.

Repressive aspect

The object of the repressive part of the Draft Bill is to prevent entrepreneurs that act in bad faith from abandoning their business and starting a new one with impunity. The Draft Bill also introduces an administrative dissolution procedure without liquidation inspired by Swiss law and aimed at eliminating ‘empty shells’ in a timely and cost-efficient manner by avoiding formal bankruptcy proceedings.
Social aspect

Under the Draft Bill, as a matter of principle, all the rights and obligations resulting from employment contracts are transferred to the purchaser of the assets of the relevant distressed company; however, the Draft Bill also allows the purchaser to choose the employees that it wants to take over, as long as its choice is dictated by technical, economic and organisational reasons.

Although this project is ambitious, authors have already highlighted some difficulties that could rise in term of material resources allocated to the undertakings involved.77 Additionally, according to the Chamber of Commerce, the Draft Bill is not going far enough and should implement a prevention comity whose role would be to help companies before they get into difficulty.78

78 Avis de la Chambre du Commerce, 2 December 2013.
I INSOLVENCY LAW, POLICY AND PROCEDURE

i Statutory framework and substantive law

The Commercial Insolvency Law (LCM), enacted on 12 May 2000 and amended as of 14 January 2014, governs commercial insolvency. It is a federal law and it applies to merchants and traders, individuals and legal entities, including commercial companies, trusts engaged in business activities, financial institutions and state-owned commercial companies and in connection with small businesses with written agreements.

The federal district courts are the only courts with jurisdiction over commercial insolvency proceedings for traders. Non-traders are subject to state and local civil jurisdiction, and there are no specialist insolvency courts. Special federal district courts will be set up to hear insolvency cases.

Insolvency proceedings for traders start when relief begins – that is to say, when it is adjudicated – which creates the bankruptcy estate. Insolvency adjudication creates a special legal situation for the debtor and the stay, subject to the LCM.

Claims being pursued by the debtor and claims against the debtor before the insolvency proceeding adjudication may not be joined to the insolvency proceeding, including those involving arbitration.

Post-insolvency declaration claims, including post-arbitration claims, against a debtor adjudicated in concursoremercantil (bankruptcy) must not join the insolvency proceeding.

The final judgment on pre- and post-insolvency actions will be recognised by the insolvency court without review of the amount of the claim and its priority.

Transactions that may be annulled

In general, all fraudulent transactions executed against creditors and the insolvency estate may be set aside. The LCM defines as ‘felonious’ those fraudulent acts that cause or aggravate the cessation of payments, as provided by law. Such acts may also be set aside.

The LCM prescribes a 270-calendar-day ‘suspect period’ to be reviewed, counting backwards from the date the order for relief was made. This term may be doubled in the case of related subordinated creditors (intercompany or insiders’ debt). A request for a longer review period of up to three years must be filed before the judgment on recognition, ranking and priority is entered. The burden to prove is more flexible to obtain extension of the

---

1 Darío U Oscós Coria is a senior partner and Darío A Oscós Rueda is a partner at Oscós Abogados.
suspicious period without need to prove the actual fraud, which is a separate cause of action. The new retroactive period must be announced by publication in the court’s list of orders and in the Official Gazette of the Federation.

**Directors’ and officers’ liability regime**

Legal standing to enforce action seeking civil liability (damages) when upon fraudulent transactions (voidance actions) may be brought by: (1) one-fifth or more of the allowed creditors; (2) allowed creditors that jointly represent 20 per cent of the total allowed credits; (3) receivers (interventor) (4) the debtor; and (5) shareholders holding 25 per cent of the debtor’s shares. The time-bar on damages actions is five years.

In the context of an insolvency proceeding, the LCM now provides a regime of strict civil and criminal liability for the debtor, debtor’s general director, sole administrator, board of directors, legal representatives and key employees, including insiders and relatives when causing damages in regard to the facts and circumstances provided by the LCM. Damages shall be to the benefit of the estate. Civil liability is joint and several and is independent from criminal liability, which may be from three to 12 years’ imprisonment.

**ii  Policy**

As a matter of public policy, the LCM favours maximising the value of the insolvent estate’s assets as well as the rehabilitation of enterprises (preservation) and creditor’s rights. Consequently, liquidation only takes place when rehabilitation is impossible, reflecting the government’s priorities of the preservation of jobs and of businesses as going concerns. During previous periods of systemic financial distress, the government has set up rescue programmes to assist companies to recover or start afresh, but these programmes have mainly applied following insolvency proceedings.2

** Expedited reorganisations**

Pre-packaged reorganisation is allowed by an agreement between the debtor and creditors holding simple majority 51 per cent of the total debt. The debtor and creditors execute the petition. The debtor must state under oath that it is already in a state of insolvency and explain why, or state that insolvency is imminent within 90 working days and that the creditors signing the petition hold at least simple majority 51 per cent of the total debt. A reorganisation plan proposal must be enclosed with the petition, as well as a preservation plan for the business as an ongoing concern. Full insolvency proceedings will be followed without an audit. Protection measures and stays may be requested and granted upon filing of the petition.

**iii Insolvency procedures**

The insolvency of non-merchants, such as individuals and consumers (civil insolvency), is governed by the state civil codes and state codes of civil procedure. Insolvency proceedings for merchants consist of a single process, comprising two major stages: conciliation and bankruptcy (liquidation). In conciliation, a conciliator is appointed and seeks to establish a reorganisation plan. If no reorganisation plan is agreed, the process is converted into

---

2 The FICORCA (Foreign Exchange Risk Coverage Trust Fund) programme was instigated in 1982, and the FOBAPROA and UCABE programmes in 1995.
bankruptcy (liquidation). A trustee is appointed for liquidation. Conciliation has a 185 calendar days period of time, counted as of the concurso mercantil adjudication, with two possible renewals of 90 calendar days each. It is mandatory that conciliation may not exceed 365 calendar days.

There is also a sub-stage – the initial audit (inspection) – wherein an auditor is appointed to inspect the debtor’s premises and accounts to confirm that the standard for insolvency is met and reports accordingly to the competent district court, which may judge the debtor to be in an insolvency proceeding (known as an insolvency proceeding adjudication).

The LCM is the law providing for the general insolvency procedures available to wind up and rescue companies. The Corporations Law also provides for private out-of-court corporate dissolution and liquidation of a company. In essence these are very similar, again effecting the liquidation of assets to pay creditors, and if there is any balance remaining it goes to shareholders. Corporate liquidation does not, however, provide court orders to stay payments and executions. Liquidators may apply for a voluntary insolvency proceeding seeking a stay.

The debtor remains in possession, as judicial depositary, of the assets during a conciliation proceeding and may continue in its ordinary course of business as a going concern. Assets may be used for such ends, but the conciliator oversees the management of the debtor.

Creditors that supply goods and services may continue to do so. Post-petition creditors may be paid and have priority against estate assets as well as post-financing. Creditors may supervise the debtor by means of a receiver (interventor), who represents and protects creditors’ rights and has the authority to be given debtor’s information and supervise the debtor and report to the court accordingly. The court has full authority to supervise debtors.

From this point, upon concurso mercantil adjudication, the procedural steps of the insolvency proceedings are as follows:

a. pre-debt payment is stayed. No interest is borne on unsecured debt. Secured debt bears interest up to the security’s value and the deficiency becomes unsecured debt. Debts shall be converted to unidades de inversión (UDI) value. The UDI is a unit subject to inflation adjustments, and its value is announced daily and published in the Daily Gazette of the Federation and major national newspapers;

b. the debtor is ordered to surrender its financial statements and accounts;

c. the debtor is ordered to cooperate and allow an auditor (visitor) and conciliator to perform their duties;

d. executions and attachments are stayed, except for labour credits (salaries of the past two years);

e. a suspect period is set (see Section I.i);

f. a summary of the order for relief is published;

g. the order for relief is recorded in public registries;

h. notice is given to creditors to file their claim (proof of claims);

i. the proof of claims process begins; and

j. a certified copy of the order of relief is issued upon request.

As previously mentioned, the LCM favours rehabilitation of the enterprise and liquidation only takes place when rehabilitation is impossible. A reorganisation plan requires approval from 51 per cent of the creditors holding approved claims.

The conciliation phase is intended to create the best conditions for a reorganisation plan. The LCM does not regulate terms or conditions for the plan, but only sets out minimum
rules to ensure its legality. The LCM, however, now provides mandatory notices and access to information to enable interested parties to exercise and protect their rights. Accordingly, the conciliator may recommend that appraisals and studies be conducted when they are necessary to achieve a reorganisation plan, which would be given to creditors through the court. When the conciliator considers that there is an agreement of 51 per cent of the recognised creditors in the plan, he or she will give the plan to the other recognised creditors to give their opinions thereon or to execute the plan.

To approve a viable reorganisation plan that favours all or most creditors under the circumstances, the LCM provides mechanisms to protect the rights of minority creditors by giving them the most favourable terms possible under the plan. This thereby avoids unnecessary or burdensome objections by minorities that, in fact, will benefit from the plan.

Only those creditors with accepted claims may agree on the plan. Labour and tax creditors do not participate in the plan (see Section I.vi). To facilitate approval of the plan, both unsecured and participating secured creditors must be taken into account to determine the necessary majority.

The reorganisation plan, regarding non-participating creditors holding recognised debt, may only provide extension of time to pay the debt or debt discount or combination of both, provided that terms and conditions are equal to those agreed by at least 30 per cent of creditors holding unsecured allowed claims.

The plan may provide for an increase of capital, and shareholders must be notified in order to exercise rights of first refusal. If shareholders do not exercise their rights, the court may simply approve the capital increase.

Dissenting recognised unsecured creditors holding a simple majority or recognised unsecured creditors holding 50 per cent of the debt may veto the plan proposal. If there are no objections, the plan may be approved by the court. Since the approved plan is binding upon absent and dissenting creditors, the most favourable terms and conditions of the plan will be allocated to them.

Upon the court’s approval of the plan, the insolvency process terminates and parties cease to perform their functions.

The plan must provide payment for:

a. labour creditors – up to one year’s wages (the highest priority);

b. consumer creditors;

c. creditors (administration costs and fees of the insolvency estate) whose claims are secured by assets of the estate;

d. claims for burial costs when death of the debtor occurs before the insolvency proceeding;

e. claims for costs of sickness that caused the death of the debtor when the death occurs after the commencement of insolvency proceeding;

f. secured creditors with mortgage or pledge;

g. claims holding a special privilege in law;

h. tax credits;

i. fund for challenged claims and tax credits that have not been determined;

j. unsecured creditors (common creditors);

k. subordinated creditors; and

l. stockholders.

Private agreements between the debtor and any creditor are null and void once relief is granted and the creditor will lose such rights against debtor.
The plan may not release non-debtor parties such as guarantors; it may only bind a debtor and its creditors, but the liabilities of officers, directors, advisers and lenders may be released in writing by the interested party or parties taking legal action against them.

At this stage, recognised creditors may only oppose the plan if due process has not been followed and if mandatory plan standards are not met (due process encompasses access to supporting information and plan viability, as well as full disclosure of the plan's terms and conditions).

A majority of unsecured creditors whose proofs of claim have been allowed may veto the plan. Unsecured creditors not signing the plan may not object to the plan if they are to be paid in full.

Court approval of a plan may be appealed, without a stay, up to the constitutional level of appeal. A successful appeal dismissing the plan on legal grounds is sent back to court. A new plan may be proposed if they are still at the conciliation stage. The plan is subject to approval of 50 per cent of allowed credits otherwise the case turns into a liquidation, where a reorganisation plan may still be approved, but by a requisite of more than 50 per cent of creditors holding allowed claims and that the plan provides for payment for all creditors holding allowed claims, including those not executing the plan. A default on the plan by the debtor also turns the case into a liquidation.

A pre-packaged reorganisation is allowed by agreement between the debtor and creditors holding simple majority of more than 50 per cent of the total debt. The debtor and creditors will execute the petition. It is required that the debtor states under oath that it is already in a state of insolvency and explains why, or states that such insolvency is imminent within 90 working days and that the creditors signing the petition hold at least a simple majority of more than 50 per cent of the total debt. The proposed reorganisation plan must be enclosed with the petition. A full insolvency proceeding will be followed without an audit. Protection measures and stays may be requested and granted upon filing of the petition. The court must approve the plan, whereupon the proceeding ends.

As a reaction to the well-known Vitro case, the 2014 amendments of the LCM now provide for ‘intercreditors debt’ (subordinated debt) providing for a new ranking of creditors holding subordinated debt, namely subordinated creditors, that may by created by:

- contractual agreement or provided by statute law;
- the unsecured intercompany and insiders debt; except for claims of a parent company and individuals that only have control over the debtor for claims ranking. This exception does not include, *inter alia*, casting votes for the reorganisation plan or fraudulent conveyances; and
- late-claim filings.

To prevent fraudulent conveyance of intercompany indebtedness and to give certainty to investors and creditors that their debt would be paid first before certain intercompany obligations, the 2014 amendment provides that where the debtor is a corporation, the following unsecured creditors (statutory insiders) shall be characterised as subordinated in ranking:

- subsidiaries and affiliates of the debtor;
- the director, members of the board of directors, and key officers of the debtor, as well as those of its subsidiaries and affiliates; and
corporations with the same managers, members of the board of directors or key officers similar to those of the debtor (commonality of management).

In the event the insolvent company is put into liquidation, all of the aforementioned creditors shall receive payment only after senior debt claims are paid in full. Claims held by controlling individual shareholders and by the holding company of the debtor were excluded from subordination in payment as lawmakers considered that including such claims would impair their ability to obtain financing from lenders.

Voting of ‘intercompany’ claims
In an intercompany claim, there may be no cramdown of legitimate third-party claims on the basis of an intercompany or insider-debt casting vote. The plan must be agreed by the debtor; creditors representing more than 50 per cent of the sum of all the debtor’s unsecured and subordinated claims; and creditors representing more than 50 per cent of the debtor’s secured or priority creditors.

Further, if intercompany claim holders and insiders (including controlling individual shareholders and holding companies) as subordinated creditors, hold at least (jointly or severally) 25 per cent of the total amount of the credits of (a) and (b), above, then to become effective, the plan must be accepted by creditors representing at least 50 per cent of such credits, excluding from this amount the claims of the insiders.

This rule will not apply when intercompany claim holders and insiders accept the plan as agreed by the rest of the voting claim holders, in which case the simple majority rule applies.

Now, the voting of insider or intercompany claims together with third-party claims will only be sufficient to approve a reorganisation if at least half of the non-insiders vote in favour of the plan.

Subordinated debt and ‘subordinated creditors’
Creditors’ agreement may provide for the total or partial extinction of subordinated debt or other type of treatment thereto, including its subordination or another form of particular treatment.

Interaction before the Mexican courts of indenture trustees and bondholders
Proof of claims may be filed individually by a bondholder, which will be subtracted from the overall proof of claim filed by an indenture trustee representing bondholders. Each bondholder as well as the trustee is entitled to pursue allowed claims, rights, objections and voting rights.

Bondholders meetings shall be conducted as provided under the indenture agreement, the law governing the indenture or by the LCM; the decisions of bondholders’ meetings will have a binding effect.

The extinction of debts
The restructuring plan and the judgment approving it shall be the only document governing the debtor’s obligations towards allowed creditors.
**Mandatory enforcement of the restructuring plan**

Any allowed creditor may request the mandatory enforcement of the restructuring plan by means of a summary proceeding before the court that adjudicated the commercial insolvency.

**Amendment of the plan**

In the case of a change of circumstances that materially affects the fulfilment of the plan, it may be amended in order to satisfy the need to preserve the enterprise.

**Recognition of foreign proceedings**

Chapter 12 of the LCM incorporates the United Nations Commission on International Trade Law (UNCITRAL) Model Law on Cross-Border Insolvency, as discussed in Section I.vii. The LCM allows for ancillary (non-main) insolvency proceedings where main proceedings are pending in another country. There is no automatic recognition of foreign insolvency proceedings.

If the debtor has an establishment in Mexico, recognition follows a full insolvency proceeding that, in theory, may take up to approximately one year for conciliation and up to one further year in the case of liquidation in bankruptcy. If there are appeals up to the Supreme Court, final *res judicata* decisions may take a further year.

If the debtor lacks an establishment but has assets in Mexico, no full insolvency proceeding need be pursued. For a recognition proceeding there is a summary proceeding with the debtor that may last up to three months. Again, appeals up to the Supreme Court may take another year.

**Starting proceedings**

Plenary insolvency proceedings may be voluntary or involuntary. In a voluntary petition or pre-packaged insolvency, there is no initial visit; now the debtor may voluntarily and creditors may involuntarily request an insolvency proceeding in the event of bankruptcy. In an involuntary petition a full insolvency proceeding must be pursued if the debtor opposes. Bankruptcy allows for a reorganisation plan that may be approved by the same voting requirements as in conciliation, provided further that 100 per cent of creditors holding allowed claims are paid, including those not signing the plan.

The LCM provides for the use of standard forms issued by the Mexican Trustee’s Office to speed petition filings and other motions during the proceedings.

The 2014 amendments provide for specialised courts and online proceedings, which are pending to be set up.

Liquidation may now be involuntary. Bankruptcy relief becomes available when the debtor (merchant) requests his or her bankruptcy. Voluntary bankruptcy is adjudicated without full insolvency proceedings; there is no conciliation phase. For a debtor to be placed in bankruptcy by a creditor (i.e., involuntarily) a full insolvency proceeding must be pursued – if the debtor opposes the involuntary proceeding, there is a conciliation phase. A debtor is declared bankrupt by the court if a plan is not agreed upon during the conciliation proceeding or if the debtor does not cooperate with the plan and the conciliator requests a declaration of bankruptcy.
The conditions for initiating an insolvency proceeding are that the debtor must be a merchant, individual or legal entity and that there has generally been a failure to make payments when due. The criteria (insolvency standard) for establishing a general default on payment obligations are that:

- **a** there is a failure to meet payment obligations to at least two creditors;
- **b** the obligations are more than 30 days overdue;
- **c** such overdue obligations represent 35 per cent or more of the total amount of the debtor’s obligations as of the petition filing date; and
- **d** the debtor lacks the cash assets, as defined by the law, to pay at least 80 per cent of the total debts due as of the petition filing date. Cash assets are:
  - cash to hand and deposits on site;
  - deposits and investments due within 90 days of the date of the petition being filed;
  - accounts receivable due within 90 days of the date of the petition being filed; and
  - securities that regularly registered sell-or-buy operations in relevant markets, saleable within 30 banking business days.

Once a declaration of an insolvency proceeding has been made, the conciliation phase is opened (unless the debtor has itself requested the bankruptcy or a creditor has requested it without debtor’s opposition), the substantive effects of which are as follows:

- **a** payments are stayed, except those necessary during the ordinary course of business;
- **b** pre-existing contractual obligations must be performed as agreed by the parties, except for those to which special provisions apply under the LCM;
- **c** all pre-existing obligations become due and have to be fixed in UDIs\(^3\) to determine their amount; and
- **d** matured debts stop accruing interest (all obligations of the debtor are considered matured and interest stops accruing on obligations, but interest will continue to accrue on obligations secured by a mortgage or a pledge, even after the insolvency declarations to the extent of the collateral).

The adjudication of a commercial insolvency is not binding and lacks effect towards third-party debtors, such as guarantors.

The 2014 amendments make clear that assets that are settled under business trust (fideicomiso) are not comprised within the estate and may be separated while in possession of debtor, including when debtor is settlor.

Adjudication against a debtor in an insolvency proceeding may be subject to appeal. A petitioner-creditor is entitled to appeal without stay and, as a general rule, such adjudication may not be stayed. The reasoning behind the ‘no stay in proceedings’ rule is based upon the criteria that continued prosecution of insolvency proceedings follows public policy. The appeal is decided by a court of appeals. The decision of the court of appeals may be further challenged by means of a constitutional action (amparo). Under certain circumstances, the amparo decision may be challenged even further before the Supreme Court of Justice. The insolvency proceeding adjudication may be revoked as of the petition filing date, after all these levels of appeal are exhausted.

---

\(^3\) The UDI is a unit subject to inflation adjustments, whose value is announced daily and published in the Daily Gazette of the Federation and major national newspapers.
Commercial insolvency adjudications may be revoked, based upon the finding of violations of law contemporaneous to the adjudication, with effect as of the petition filing date, even if a full insolvency proceeding has been prosecuted and is virtually finished.

On the other hand, if there is a bankruptcy adjudication based upon voluntary petition seeking insolvency proceeding at the stage of bankruptcy, creditors holding allowed claims may appeal the bankruptcy adjudication without stay. Further levels of appeal asserted by such creditors may not stay proceedings. As in the plenary insolvency proceeding, the bankruptcy proceeding may get up to its termination and be revoked with effects as of the voluntary petition filing date.

Upon the dismissal of a commercial insolvency, management acts as well as bona fide third-party acquisition rights shall be preserved.

Upon dismissal of a commercial insolvency, legal costs and fees may be awarded against the petitioner.

No main foreign insolvency proceeding may be commenced by a foreign representative. If the debtor has an establishment in Mexico, a full insolvency proceeding must be pursued. Upon concurso mercantil adjudication, main foreign proceeding may be recognised, in case recognition petition meets legal requirements. If the debtor lacks an establishment in Mexico, a summary proceeding will be pursued between the foreign representative and the debtor (see Section I.vii).

v Control of insolvency proceedings

Plenary insolvency proceedings are directed and controlled by the court. The court interacts in an insolvency judicial proceeding with all parties with an interest: debtor, creditors, conciliator (while in conciliation stage), trustee (while in liquidation in bankruptcy stage) and interventor. The court provides and approves orders and judgments as well as enforcement thereto. The conciliator and trustee should conduct management functions and provide support to the court to pursue and finish the respective stages of the insolvency proceeding.

Upon filing of a petition for commercial insolvency, the board of directors must assist and cooperate with inspectors, conciliators and trustees with the performance of their duties, and must disclose all relevant information related to the insolvency estate. The board of directors in this situation is the debtor-in-possession, namely judicial depositary, and may continue to run the company as a going concern under the supervision of the conciliator.

vi Special regimes

Workers who are owed wages are excluded; such workers are governed by the Federal Labour Law. Tax claims and claims equivalent to tax claims by the tax authorities (federal, state and municipal), the Mexican Institute of Social Security (IMSS) and the National Workers’ Housing Fund Institute (INFONAVIT) are excluded from general bankruptcy proceedings. ‘Claims equivalent to taxes’ includes the IMSS and INFONAVIT tax quotas employers must pay, which are considered equivalent to taxes. Federal tax credits are governed by the Federal Tax Code and state and municipal tax credits are governed by state tax laws. Labour creditors and tax creditors do not join bankruptcy proceedings and are paid and liquidated by their labour chambers and tax authorities, respectively.

---

4 Labour credits are claims by employees and may include unpaid wages and employment indemnity.
Tax credits and labour credits are included within the total liabilities of the debtor. Tax credits have priority over unsecured credits and over credits secured by a pledge or mortgage, even if these secured credits were perfected and recorded after the notice to the debtor of the tax credits. Tax credits have no priority over labour credits or over alimony for which a lawsuit has been filed before a court.

By law, tax creditors do not join general bankruptcy proceedings. The tax law provides that if a debtor is adjudicated against in an insolvency proceeding, the court must notify tax creditors of such adjudication. Enforcement of tax creditors may be stayed by this adjudication, provided tax creditors had been notified of the filing of the insolvency proceeding petition.

Some assets are excluded from execution, attachment and liquidation in bankruptcy such as alimony, child support, family patrimony, common land, and life insurance in the case of an irrevocable appointment of a beneficiary.

Labour credits are included within the total liabilities of the debtor. However, labour creditors are not obliged to join the insolvency proceeding. Labour credits are, instead, considered under the jurisdiction of the labour courts and are enforced and paid before the labour courts rather than joined to federal or state insolvency courts. The same applies to tax credits, which are considered under the jurisdiction of the tax courts.

Insolvency for companies performing a federal, estate or municipal public service may be adjudicated in insolvency proceedings pursuant to special laws and the provisions of the LCM that do not conflict with such laws. The authority granting the concession may appoint the conciliator and trustee and overview the performance of the company. This authority may gain from the court the removal of debtor in possession and have the court appoint a person to take possession of and manage the situation. Reorganisation plans may also be vetoed by such authority, and in the event of a sale that includes the concession, this authority must approve it.

Under the new financial regime, the banking law provides for an autonomous, independent and special insolvency regime called ‘judicial banking liquidation’, in addition to the administrative control regulations. Such proceedings will be the federal district court-directed liquidation of a bank, and the trustee will be appointed by the Banking Commission. Accordingly, the amendments to the banking law, in the administrative regulation, give greater powers to the financial regulators and provide additional tools for the control, investigation, overview, preventive and protective measures, requirements and sanctions over banks and financial institutions, aimed at more efficiently preventing and remedying situations of financial distress.

Insolvency for insurance, bonds and reinsurance companies is also governed by separate special laws.

Corporate groups
The LCM now regulates groups of companies, and there is no piercing of the corporate veil. The LCM provides that the insolvency proceeding of holding and subsidiary companies will be joint in the same commercial insolvency proceeding, but each company’s insolvency will be conducted in a separate court docket file. The LCM does not provide for these to be combined or consolidated for administrative purposes, nor may their assets or liabilities be pooled for distribution. However, creditors or debtors of the same group of companies may file for joint commercial insolvency as long as one or more of the enterprises of the same group meet the insolvency standard. The court may appoint the same auditor, conciliator or trustee, should it benefit the proceedings.
Mexican corporate law does not provide for the insolvency of corporate groups. Corporate groups consolidate for tax purposes, and labour law recognises a substitute employer among a group of companies. The Law on Financial Groups provides for financial groups of companies, with joint and several liabilities without consolidation. Regarding groups of companies, assets may not be transferred from administration in Mexico to another country.

Based upon case law, jurisprudence, corporate veil may be lifted under certain circumstances of fraud.

vii Cross-border issues

Mexico has incorporated the UNCITRAL Model Law, and accordingly provides recognition and full cooperation on cross-border insolvency. Foreign creditors are granted equal treatment with domestic creditors. The federal judiciary has granted relief sought in support of the Model Law.

Mexico was the first jurisdiction in the world to recognise foreign bankruptcy proceedings and grant international insolvency cooperation thereto, in the Xacur case and the IFS case filed and prosecuted by Oscós Abogados, on behalf of the foreign representative.

Outbound Mexican cases have sought US Chapter 15 ancillary recognition (secondary proceedings) to stay executions, as in Aeromexico, and recognition of reorganisation plan as in Satmex, Metrofinanciera, Corporación Durango, Grupo Iusacel and Vitro. Oro Negro is being prosecuted.

Mexico is not party to any international treaties on insolvency, bankruptcy or reorganisation matters, but has executed two treaties on the recognition of foreign judgments that expressly exclude insolvency, reorganisation, bankruptcy and liquidation.

The LCM incorporates the UNCITRAL Model Law in Chapter 12. The law defines the following terms:

- foreign proceedings: collective judicial or administrative proceedings in a foreign country, including interim proceedings, under a law relating to insolvency, or adjustment of debt proceedings in which the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purposes of reorganisation or liquidation;
- main foreign proceedings: foreign proceedings pursued in the jurisdiction where the debtor’s centre of main interests (COMI) is located;
- no main foreign proceedings: foreign proceedings pursued in the jurisdiction where the debtor has an establishment as described below;
- foreign representative: a person or body, including provisional persons or bodies, empowered in foreign proceedings to administer the reorganisation or liquidation of the debtor’s assets and affairs or to act as a representative of foreign proceedings;
- foreign court: a judicial authority or other body with jurisdiction over the control or supervision of foreign proceedings; and
- establishment: any place of operations where the debtor carries out a non-transitory economic activity with employees and goods and services.

Reciprocity is mandatory. International cooperation may be conducted through Mexican courts and Mexican representatives. Foreign courts and foreign representatives may only act through a Mexican court or Mexican representative, but recognition is not automatic. If a debtor has an establishment in Mexico, full insolvency proceedings under the LCM must be conducted, otherwise, foreign proceedings may be recognised in summary proceedings. In
interpreting and applying Chapter 12, consideration must be given to avoiding any violation of the LCM and public policy – Chapter 12 allows the rejection of recognition when there is any violation whatsoever of the LCM or of any principles of public policy. Protection measures (stay of payments or execution) may be granted following a request being filed for recognition. Upon recognition, additional protective measures may be granted. Foreign proceedings will be recognised as main or non-main proceedings, subject to the debtor’s COMI. Chapter 12 must be interpreted considering its international origin and the need to promote uniformity in its application and the observance of good faith. Chapter 12 may be applied, unless otherwise provided for under international treaties executed by Mexico, except where there is no international reciprocity. Mexico has not executed any international treaties regarding liquidations or reorganisations.

Chapter 12 aims to provide effective mechanisms for dealing with cases of cross-border insolvency with the following objectives: cooperation between Mexican and foreign courts, the increase of legal certainty for trade and investment, fair and efficient administration of cross-border insolvency cases, protection and maximisation of a debtor’s assets, and facilitation of the rescue of financially troubled businesses, thereby protecting investments and preserving employment.

Chapter 12 applies where:

1. assistance is sought in Mexico by a foreign court or a foreign representative in connection with foreign proceedings;
2. assistance is sought in a foreign country in connection with a case under Mexican insolvency law;
3. both foreign proceedings and a case under Mexican insolvency law with the same debtor are concurrently pending (parallel proceedings); or
4. creditors, or other interested parties, in a foreign country want to commence or participate in a case under Mexican insolvency law.

Cooperation and communication between Mexican courts and foreign courts and between Mexican representatives and foreign representatives may be direct, without the need for letters rogatory or any other formality.

In the Xacur and IFS cases simplified written requests from the US bankruptcy courts were fully enforced by the Mexican courts.

II INSOLVENCY METRICS

The real economy is strongly tied to the US markets. Between 1994 and 2017 NAFTA grew 450 per cent with a US$1,600 million daily trade between Mexico and US. Mexico is the third commercial partner of the United States, Canada being first and China second. Mexico is the second export market for the United States. The United States recommends investing in Mexico for great opportunities, including in the amended energy and telecom industries. Mexico is ranked as the 16th world economy. It is the most open market worldwide with the potential to trade with 46 countries under free trade agreements. However, there is some uncertainty about the future owing to the current NAFTA renegotiation and the 1 July 2018 presidential elections where the winning president is of a left–socialist leaning position and owns Morena, the political party that won the majority vote in federal congress, which will enable Andres Manuel Lopez Obrador to control federal congress generally when he takes office on 1 December 2018. In recent years, the level of GDP growth has slowed, and by the
end of 2018 GDP may only be up by 2.3 per cent, which falls short of the level of growth that was expected. Inflation in 2018 is 4 per cent and the international reserves of the central bank, Banxico, were US$173,279 billion as of 26 July 2018. Chinese and global GDP have decreased in recent years, and the global fall in oil prices, the stronger US dollar and China's yuan devaluations have generally affected exchange rates throughout the world, especially those of undeveloped countries including Mexico, where the peso is expected to be 19.50 to the US dollar by the end of 2018.

Mexico's investment ranking has increased with a positive tendency. Public deficit has increased to levels that are still sustainable but it must be prevented from increasing further. The state of the country's capital markets following global capital markets also has an impact, increasing most stock prices. The new stock exchange created in 2017, Bolsa Institucional de Valores BIVA, to provide a more flexible, stronger and open competition with the current Mexican Stock Exchange, started operations July 2018. The markets are still very volatile. Financial forecasts are uncertain, even in the short term. As expected, the US Federal Reserve increased interest rates again, and, given the world's financial distress, inflation is becoming a major concern of the central bank. Major structural amendments (in education, energy, oil and gas, tax and finance, telecoms, tourism, as well as the rule of law, security and anti-corruption) have been implemented. This year's economy indexes have also been less favourable than in previous years. However, it is hoped that the structural amendments will stimulate a fast-growing economy and an increase in economic performance from 2019 to 202, notwithstanding the world's financial distress. The Mexican government urgently needs to create effective internal incentives to increase domestic growth, as well as additional vehicles to reduce the deep poverty of 43.6 per cent (extreme poverty 7.6 per cent) of the population as well as the public deficit. The Brexit vote has shocked the EU economy and, if implemented, after a new possible voting, may have unpredictable effects in the EU and on a global scale. Trump's commercial war by imposing tax on Canadian, Mexican, Chinese and EU imports into the US is rolling back globalisation, destabilising the financial system, weakening US public finances and threatening trust in the US dollar and may perhaps cause a major international financial distress in the economy and growth or even a US recession. Many industries, businesses and enterprises holding derivatives, bonds and foreign currency debt were affected by the 2006 subprime mortgage crisis and the financial crisis of 2008–2009, and were ultimately forced to restructure their debt, mostly by out-of-court settlements and for a small number by a reorganisation plan approved within an insolvency proceeding. Most of these enterprises have been in the process of recovery.

In the first half of 2018, the economy was generally weak, a situation that is expected to continue in the second half of 2018. The economy has not only experienced a contraction but also a strong devaluation and lower oil production and oil prices. The oil sector has been materially hurt generally, and most businesses have had to shut down. By contrast, the tourism industry in Mexico has grown significantly (9.6 per cent), with the number of foreign visitors at 28.6 million people in 2017 (January–September 2017).

In the short term, the financial scenario looks unfavourable, and businesses may face actual or imminent insolvency distress situations (mostly those that carry heavily debts in foreign currency). They will require reshaping and reorganisation of businesses, in out-of-court or insolvency proceedings. The Mexican insolvency regime is now better equipped to provide effective tools for convenient restructurings that distressed businesses should take advantage of in a timely manner, for a fresh start, preventing further financial distress.
In August 2017, ICA, a major Mexican construction company worldwide, with a 65,151 million peso debt until March 2017, filed for pre-package *concurso mercantil*. ICA timely reached a reorganisation plan with its creditors and was approved by the court.

In the first quarter of 2013, large housing construction companies such as Corporación Geo, SAB de CV, Desarrolladora Homex, SAB de CV and Urbi Desarrollos Urbanos SAB de CV defaulted on payment of interest under bond issuances and their stock listings in the stock exchange were suspended. Related businesses and enterprises in the construction industry have been strongly affected by the fall in the construction market and are in deep financial distress. They have already completed reorganisation plans with creditors in a *concurso mercantil* proceeding. Other cases, such as Iusacell, have been successfully reorganised in a *concurso mercantil* proceeding. The Vitro case was settled (2013) after the Mexican reorganisation plan was rejected by a US court because of a violation, *inter alia*, of US public policy, since it included release of a third-party debtor and its corporate and financial restructuring was not fully disclosed to creditors.

Oceanografia, a large Mexican company supplier of Pemex (a state-owned oil company) was charged for fraudulent transactions on a number of accounts receivable owed allegedly by Pemex assigned towards Citi Bank Mexico and was involuntarily placed in *concurso mercantil* upon by a petition filed for the first time by the federal attorney general. Oceanografia reached a reorganisation plan approved by the court.

Insolvency statistics are provided every six months by the Federal Institute of Specialists in Bankruptcy Proceedings (IFECOM), the trustee's office created under the LCM. IFECOM's statistics relate only to commercial insolvency.\(^5\) Since the enactment of the LCM (May 2000 until 15 May 2018), the statistics show 717 filings to have been prosecuted, 57 per cent voluntary (410) and 43 per cent involuntary (307). The number of terminated insolvency proceedings was 435.\(^6\)

Many feel that the LCM has proved so inadequate that debtors and creditors strive to avoid having to involve themselves with it, and opt to settle out of court instead or face long and costly litigation. There is a tradition in Mexico of out-of-court settlement of insolvency cases, closure of businesses, hide and convey assets, runaway and long and costly litigation because the nationwide aversion to taking insolvency actions through the courts is a symptom of a serious lack of faith in the Mexican insolvency system.\(^7\) The 2014 amendments to the LCM are still being tested, and begin to show that this phobia may be overcome rather than allowed to worsen. Labour claims (super-priority) by constitutional provision do not join the *concurso mercantil*.

### III PLENAiry INSOLVENCY PROCEEDINGS

Vitro's *concurso mercantil* has been the most representative case that led to the highest number of amendments made to the LCM as of January 2014. *Mutatis mutandis*, Vitro had a major impact on the *Altos Hornos de Mexico* case, which led the abrogation of the former Bankruptcy and Suspension of Payments Act and the enactment of the LCM. Vitro SAB is a Mexican holding that conducts international operations through many subsidiaries, including in the

---

5. There are no statistics whatsoever regarding consumers’ and non-traders’ insolvency (civil insolvencies).


United States, and whose manufacturing facilities and distribution centres extend throughout the Americas and Europe. It has annual net sales approaching US$2 billion, maintains a workforce of about 17,000 (mostly concentrated in Mexico) and exports its products to more than 50 countries.8

In early 2009, Vitro failed to pay US$293 million in derivative contracts as well as interest payments on bonds maturing in 2012, 2013 and 2017, triggering a default on approximately US$1.5 billion in debt held by banks and unrelated bondholders around the world. Subsequently, Vitro filed for voluntary bankruptcy in mid-December of 2010 hoping to gain court approval for a restructuring plan.

To gain majority support for such restructuring plan, which would be much more favourable to shareholders than creditors, Vitro created, post-default, US$1.9 billion of intra-company loans from various subsidiaries, an amount greater than their obligations to the company’s \textit{bona fide} creditors. The company’s intention was to enable the subsidiary creditors that had lent virtual money to the holding company to cast votes in support of Vitro’s restructuring plan, thereby imposing a majority in the reorganisation plan on dissenting creditors. Moreover, its affiliates had also entered into a lock-up agreement with the holding company that required them to vote in favour of a restructuring that would release them from payment guarantees they had extended to outside creditors.

Despite strong opposition from genuine creditors, Vitro’s intercompany debts were recognised as unsecured claims by the Monterrey District Court.9 The decision was appealed and the Court of Appeals confirmed it (Second Unitary Court Fourth Circuit, appeal dockets 5/2012 and 45/2012). An \textit{amparo} action (constitutional action – further appeal) was filed by dissident genuine creditors, but was not ultimately necessary as a settlement was reached between Vitro and the genuine opposing creditors. Being pending without stay, first an appeal and then an \textit{amparo} action challenging the intercompany allowed claims judgment and the reorganisation plan was submitted for court approval. The reorganisation plan was objected to by dissenting genuine creditors for a number of violations, including release of third-party guarantors’ obligations, lack of complete and correct information thereto and the intercompany debt casting. The plan was imposed using the casting votes of the intercompany debt held by Vitro’s subsidiaries. The district court approved the reorganisation plan. This court approval was challenged by an appeal, which was not decided because the parties reached a subsequent settlement.

It was very likely that an \textit{amparo} action would have revoked the order of the district court recognising the intercompany debt subordination, and the reorganisation plan was only approved by a majority based on these allowed intercompany claims.

Upon adjudication of the insolvency proceeding, Vitro sought its recognition under the US Chapter 15 as a non-main proceeding, and such recognition was granted. The approval of the Monterrey court of the reorganisation plan was at the time subject to a pending decision by the Mexican court of appeals, when Vitro also sought recognition before the US Bankruptcy Court, which the district court rejected. Vitro appealed before the Fifth

---


9 Fourth District Court in Civil and Labour Matters in the city of Monterrey, Nuevo Leon, docket 38/2010 \textit{Vitro Sociedad Anonima Bursatil de CV}.  © 2018 Law Business Research Ltd
Circuit Court of Appeals, which, in turn, confirmed the original rejection of recognition of the reorganisation plan. The court of appeals determined, in essence, that the reorganisation plan was contrary to US public policy since the plan extinguished third-party obligations without their having been adjudicated on in any insolvency proceeding whatsoever.

The Vitro insolvency case highlighted many of the deficiencies and possible abuses of the LCM and may be underlined as the most notable insolvency case in recent years, owing to the serious cross-border insolvency dispute between the Mexican and US courts on intercompany debt issues as to recognition of and voting rights of intercompany debt for approval reorganisation plan and enforcement thereto. The Vitro case by itself has led to most of the new amendments to the LCM discussed in Section V.

The bankruptcy in Mexico of Mexicana de Aviación (2014), one of the biggest airline companies, led to a number of 2014 LCM amendments, notably that the conciliation phase of a concurso mercantil under no circumstances may last more than a non-extendable period of time of 365 calendar days. If a reorganisation plan is not reached in a timely manner, the proceedings turn automatically by law into liquidation in bankruptcy.

IV  ANCILLARY INSOLVENCY PROCEEDINGS

There is no record as to the commencement of ancillary (or non-main) insolvency proceedings in Mexico during the past 12 months. Two prior ancillary insolvency proceedings, the Xacur case and the IFS Financial Corporation (Interamericas) case, were US bankruptcy adjudications, main proceedings, which were recognised in Mexico under Chapter 12 as non-main proceedings. Recognition was granted based upon the estate assets located in Mexico, as the debtors lack establishment thereunder. These cases have both been fully enforced in Mexico. The Xacur case has established several precedents in Mexican jurisprudence, regarding the UNCITRAL Model Law on Cross-Border Insolvency, which is also applicable worldwide in foreign jurisdictions. The IFS case has also led to case law jurisprudence regarding the interpretation and enforcement of the Insolvency Model Law worldwide. These cases have proved the effectiveness in general of cross-border insolvency

13 The most significant of these precedents, which may be found in the Semanario Judicial de la Federación, are the following:

a Direct amparo 98/2003, Direct amparo 97/2003 and Direct amparo 96/2003 of 13 March 2003, regarding a foreign bankruptcy proceeding and the recognition and declaration of international cooperation. A judgment that recognises and grants international cooperation may be revoked;

cooperation under the Insolvency Model Law regime. There is the case of Perforadora Oro Negro, SRL de CV; and Integradora de Servicios Petroleros Oro Negro, SAPI de CV concurso mercantil, which as main proceedings have been recognised in US Chapter 15.

V TRENDS

i New legislation

As expected, in order to improve the domestic economy, important amendments of more than 34 financial laws, including the commercial insolvency regulations, were enacted by federal congress and published in the Daily Gazette of the Federation, dated 10 January 2014.

Amendments have taken some of the experiences of the 2008–2009 financial crisis, as well as domestic experience, to equip the country to better face and overcome situations of systemic financial distress.

The amendments, in essence, aim to greatly increase credit availability and make it cheaper, especially for small and medium-sized business. Amendments provide legal tools for the efficient and prompt enforcement of the financial regulators’ powers, and optimise estate asset liquidation and distributions and creditors’ collection rights in a swift and efficient manner.

These legislative amendments are made in the context of several major structural amendments already approved in Congress and in effect, concerning labour, education, finance, gas, oil and energy, communications and tax.

The most important amendments to the LCM, as enacted on 10 January 2014, include the mandatory protection of creditors’ rights in addition to the preservation of enterprises and the estate, and equipping the LCM with the legal tools it previously lacked that are necessary to conduct orderly, effective and efficient insolvency proceedings.

ii LCM

After 17 years in effect, the experience of the LCM showed that Mexico was in urgent need of a 21st-century insolvency system. The legislator recognised this situation and made major amendments to the LCM.

The amendments implemented are not all of those that were originally proposed or expected, but at least they aim to improve the commercial insolvency regime. Many of the amendments were forced through by high-profile cases that exposed the LCM’s weaknesses, deficiencies and openness to abuse; notably the Vitro and Mexicana Airlines cases, which have given rise to most of the amendments. They also adopt some of the tools used in the financial crisis of 2008–2009 to assist in overcoming situations of domestic and cross-border financial distress.

of international cooperation. Indirect amparo may not be allowed against an order that decides a revocation remedy, derived from a decision entered in a judgment enforcement that recognises it, since it is not the last decision in this stage;

c Amparo in revisión 1588/2005 of 26 October 2005, regarding a commercial insolvency. Chapter 12 of the LCM is constitutional because it grants equal treatment to foreign and domestic creditors;

d Amparo in revisión 361/2004 of 27 October 2006, regarding the LCM. Standards for the recognition of foreign proceedings in Mexico; and

e Amparo in revisión 361/2004 of 27 October 2006. International treaties only bind the states that are a party to the treaty.
The amendments being implemented are mainly aimed at protecting creditors and the bankruptcy estate, and making the entire insolvency process more transparent. Such amendments concern, *inter alia*, filing of petitions when insolvency is imminent; involuntary bankruptcy; post-financing; provisions for managers and directors’ liability; joint petitions for groups of companies; subordination debt as a new claim ranking; limited allowance of voting on reorganisation plans of intercompany debt, as subordination debt; full access to information and documents related to the reorganisation plan, voidance actions and clawback period; insolvency damages claim; the strictness of the deadline for the conciliation phase; criminal and the treatment of fraudulent transactions performed by related parties.

Experience still shows that very few insolvency cases are brought as formal insolvency proceedings (a total of 717 filed cases in 18 years of the LCM in force), which make clear the need of a deep and structural new system or at least a major change. The new system should encompass automatic stay as immediate bankruptcy protection, without the standard of being insolvent, discharge, join labour and tax creditors to a unitary universal insolvency proceeding, among other issues that go beyond the scope of this chapter.
INSOLVENCY LAW, POLICY AND PROCEDURE

i Statutory framework and substantive law

Dutch bankruptcy law for corporations is mainly laid down in the Dutch Bankruptcy Act 1893 (DBA). The DBA contains both rules of procedural law as well as substantive law, including provisions on fraudulent preference, the right to set off claims and the right of retention of a creditor.2

Other statutes also contain provisions relating to insolvency law matters such as directors’ liability and on the position of secured creditors in the Civil Code,3 the preferred creditor position of the tax authorities in the Collection of State Taxes Act, and criminal law issues in the Criminal Code.4 Furthermore, specific regulations applicable to financial institutions are laid down in the Act on Financial Supervision (AFS).


ii Policy

The DBA provides for both rescue and liquidation proceedings. Dutch law does, however, not have a mechanism to cram down dissenting creditors outside of insolvency proceedings (a draft bill to introduce a cramdown procedure in the Netherlands is pending). Therefore, business rescues are mainly done through a going concern sale of the company. In actual insolvency proceedings, the focus would lie more on liquidation than rescue.

In the past 10 to 15 years, a gradual shift has been made towards rescuing businesses through formal insolvency proceedings. Furthermore, the past years have seen a tendency for companies to use pre-packaged insolvency restructurings to rescue businesses.

---

1 Lucas P Kortmann is a partner and Abslem Ourhris is an associate at RESOR NV.
2 Articles 42 to 49, 53 to 54 and 60 of the DBA.
3 In particular, Articles 2:138 to 140 and 2:248 to 2:250 on directors’ liability and Article 3:277 et seq. on rights in rem.
4 Such as Articles 340 to 345 relating to fraudulent trading.
Insolvency procedures

Insolvency procedures can be commenced in the Netherlands if the Dutch court has jurisdiction, based on the fact that (1) it has its centre of main interest (COMI) in the Netherlands or if the COMI is located in a non-Member State; (2) the company has (had) its corporate seat or place of business in the Netherlands, or (3) has an establishment in the Netherlands. Whether a company has its COMI or an establishment in the Netherlands is a matter of fact.

Pursuant to Dutch law two types of insolvency proceedings exist under the DBA: restructuring proceedings involving suspension of payments (moratorium) and liquidation proceedings being bankruptcy.

Suspension of payments

Suspension of payments can be used to restructure debts due to non-preferred, non-secured creditors that are subject to the suspension of payments (ordinary creditors). Preferred and secured creditors fall outside the scope of suspension of payments. If the composition plan is accepted by the (required majority of) ordinary creditors and confirmed by the court, the suspension of payments proceedings are terminated and the debtor emerges from the insolvency proceedings.

The contents of the composition plan can be flexible (debt-to-equity swaps are allowed). Dutch law does not differentiate between classes of ordinary creditors (and secured creditors cannot be bound by a composition plan). Nonetheless, different treatment of different ordinary creditors has been accepted in practice to a certain extent.

The thresholds for adoption of the composition plan are (1) a simple majority of creditors (2) representing at least 50 per cent of the claims recognised and admitted. Even if the composition plan does not reach the required thresholds, a plan may be deemed approved by the court if three-quarters of the recognised and admitted creditors voted in favour, but the plan was rejected because one or more creditors voted against who, in the circumstances, could not reasonably have voted in such a way.

In a suspension of payments, payments to ordinary creditors (other than through the plan) can only be made pro rata. Ordinary creditors are prohibited from taking recourse against assets of the debtor. Existing seizures are suspended (and cancelled once suspension of payments or ratification of a composition plan becomes final). A suspension of payments does not suspend or affect pending court proceedings, nor does it prevent the commencement of new ones.

A suspension of payments has no effect in favour of guarantors and other co-debtors of the debtor.

During the suspension of payments the court can impose a temporary stay, which also binds preferred and secured creditors.

The right of set-off is not adversely affected by the suspension of payments proceedings – if anything, the possibilities for set-off are increased.

5 Note that Denmark is not a party to the Recast EIR.
6 Articles 214 to 283 of the DBA.
Suspension of payments does not alter the validity or the contents of an agreement to which the debtor is a party, but the administrator is not obliged to perform executory contracts. The counterparty can request that the administrator and the debtor declare within a reasonable period of time whether they will perform the agreement.

**Bankruptcy**

Bankruptcy can be considered a general statutory seizure of the assets of the debtor followed by liquidation thereof. Although bankruptcy is a liquidation proceeding, it is also used to restructure businesses.

In principle, all creditors have an equal right to be paid out on a pro rata basis. An exception applies to preferred creditors (such as tax authorities), secured creditors and creditors with a subordinated claim. Dutch law does not contain a principle of statutory subordination of shareholder loans.

Secured creditors may foreclose on their collateral as if no bankruptcy exists, but a temporary stay can affect the right of secured creditors to foreclose on their collateral. The receiver is entitled to set a reasonable period of time during which a secured creditor must foreclose on its collateral.

Lawsuits pending against the debtor are automatically suspended, and claims are to be filed in the bankruptcy. If the claim is challenged, the lawsuit is continued. Since the bankrupt debtor has lost its right to administer and dispose of its assets, lawsuits can only be conducted by the receiver.

Bankruptcy alters neither the validity nor the contents of an agreement to which the debtor is a party; however, the receiver is not obliged to perform the contract. The counterparty may request that the receiver declare in writing whether he or she will perform the agreement within a reasonable period of time. If not, the receiver loses his or her right to claim performance. In practice, this will result in the counterpart filing a claim for damages as a result of the receiver not performing the contract. Only in respect of certain specific types of agreements, including employment agreements, lease agreements, hire purchase agreements and future trades does the DBA provide for termination provisions.

The law provides for clawback action by the bankruptcy receiver, invalidating voluntary acts performed by the debtor prior to insolvency proceedings, in situations where such acts were detrimental to the joint creditors and the counterparty knew or ought to have known about such detriment. In certain circumstances, even obligatory acts of the debtor can be challenged.

The right to set off claims remains valid in bankruptcy and the possibilities for set-off are increased.

Bankruptcy proceedings can last as long as several years, depending on the kind and size of the bankruptcy and usually end with the dissolution of the company.

**Ancillary proceedings – international context**

When Dutch main insolvency proceedings have been opened, the insolvency administrator, as well as creditors, can apply for the opening of secondary proceedings in other EU Member States.\(^7\) Where foreign main proceedings have been opened under the Recast EIR, secondary

---

\(^7\) Article 1-212 of the DBA.

\(^8\) Article 34 of the Recast EIR.
proceedings may be opened in the Netherlands if an establishment exists. Under the Recast EIR, secondary proceedings can be liquidation proceedings (i.e., leading to bankruptcy) or rescue proceedings. The Recast EIR provides rules for coordination between insolvency proceedings relating to different companies forming part of a group of companies (such as rules on cooperation between the actors involved in those proceedings and rules on coordination of group insolvencies such as the possibility to appoint a group coordinator).9

iv Starting proceedings

Suspension of payments

The company (i.e., its directors) can file for suspension of payments if it foresees that it will not be able to continue to pay its debts as and when they become due, but foresees that restructuring (instead of liquidation) as a going concern, if need be after a composition with creditors, is possible in the future. This is a liquidity test. Dutch law does not provide for a formal balance-sheet test as grounds for the opening of insolvency proceedings.

No shareholder approval is required, unless the articles of association provide otherwise. An application for suspension of payments cannot be made by a creditor or a third party.

Upon request, the court will immediately grant a provisional suspension of payments and appoint an administrator (usually a lawyer, specialising in insolvency law) and usually a member of the court as supervisory judge. The provisional suspension of payments may only be converted into a definitive suspension of payments if a meeting of creditors has taken place (to vote thereon).

No other stakeholders, such as creditors or shareholders, are heard prior to the court granting the provisional suspension of payments.

If, in the course of a suspension of payments, the administrator does not foresee that all claims will be settled, or dealt with through a composition plan, he or she must file for termination of the suspension of payments; creditors may equally request for termination of the suspension of payments. The court can (and generally will) open bankruptcy proceedings when terminating the suspension of payments. Thus, once the company has filed for suspension of payments, there is a risk that an administrator will file for bankruptcy against the directors' intentions.

When a request for suspension of payments and a prior third-party request for bankruptcy are pending concurrently, the request for suspension of payments will be heard first.

Bankruptcy

If a debtor has ceased to pay its debts as they fall due, it will be declared bankrupt by the court, either on its own request or on the request of one or more creditors. To have ceased to pay its debts, there must be at least two creditors, one of whom has a claim that is due and payable and which the debtor cannot pay or refuses to pay. If the petitioner is the company, the directors need shareholder approval to file. If the petitioner is a creditor, the petition must contain prima facie evidence of the petitioner's claim against the debtor. Again, the test for bankruptcy is also a liquidity test. Dutch law does not provide for a formal balance-sheet test for the opening of insolvency proceedings.

9 Chapter V of the Recast EIR.
If the bankruptcy request is filed by a creditor, the court will hear the debtor before deciding on the request. Usually, such hearing takes place within two to three weeks of filing of the petition, and the decision is taken within a week of the hearing. If the debtor objects to the filing, the court may adjourn the hearing, for example, to see whether the filing creditor and the debtor can find an alternative solution.

If the debtor files voluntarily, it is at the court’s discretion whether it wants to hear the debtor before deciding on the request. In principle, creditors and other stakeholders are not invited to be heard prior to deciding on a voluntary filing. A decision on a voluntary filing (albeit including hearing the debtor) will usually be taken within a few days or at most one week of filing.

Upon declaring bankruptcy, the court will appoint one or more receivers (usually lawyers, specialising in insolvency law) as well as a supervisory judge.

Appeals to the Court of Appeal and subsequently to the Dutch Supreme Court can be lodged by the debtor, by the creditors, or interested parties against a judgment declaring or refusing to declare the bankruptcy of the debtor.

All suspension of payments and bankruptcies are published in the register of the District Court where they were ordered, in a central public register that is accessible on the internet and in the Government Gazette.

v Control of insolvency proceedings

Suspension of payments

Dutch insolvency law does not provide for debtor-in-possession procedure. During suspension of payments, the managing board of the debtor is only entitled to administer and dispose of the company’s assets with the consent or cooperation of the administrator and vice versa. However, only the debtor is entitled to propose a composition plan to its creditors, giving the debtor control over the contents of the composition plan.

The supervisory judge in a suspension of payments has a purely advisory role.

Bankruptcy

In bankruptcy, the debtor loses the right to dispose of its assets and such power is vested in the receiver, albeit certain actions require the approval of the supervisory judge.

The supervision of the supervisory judge entails – inter alia – that in a number of actions (e.g., a private sale of assets of the bankrupt estate or the (temporary) continuation of the business of the debtor) consent of the supervisory judge is required. In addition, each creditor (as well as the debtor itself) may file a petition with the supervisory judge to object to any act by the receiver or to request an order that the receiver perform or refrain from performing an act.

While the directors of a bankrupt company keep their corporate authorities, they can no longer control, administer or dispose of the assets of the bankrupt company. An important duty of the board of directors is to provide the receiver with necessary information and the administration of the company.

10 http://insolventies.rechtspraak.nl.
Dutch law does not grant a right to creditors to appoint or replace an administrator or receiver. This decision is conferred on the supervisory judge and replacement is subject to the administrator not fulfilling his or her task properly. Creditors may request that the supervisory judge do so, but this is rare.

vi Special regimes

The DBA contains specific provisions for the bankruptcy of credit institutions and insurance companies. Furthermore, the AFS contains specific provisions on emergency rescue proceedings for financial institutions.

On 13 June 2012, the Intervention Act has been incorporated in the AFS. The Intervention Act allows the Dutch Central Bank and the Dutch Minister of Finance to intervene in situations where major financial institutions are in financial difficulties. The Intervention Act relies on the 'no-creditor-worse-off' principle in the event of transfer of part of the assets or liabilities.

The Intervention Act gives the Dutch Central Bank powers that relate to the sale of the shares in the problem institution, its deposits (with funding from the deposit guarantee scheme) or its assets or liabilities to a private party, including splitting up into a good bank and a bad bank.

Furthermore, if there is a serious and immediate threat to the stability of the financial system as a result of the situation of the problem institution, the Minister of Finance has the power to intervene in the internal powers of the financial institution or expropriate the assets of, or shares in, that financial institution. The Minister of Finance exercised this power in February 2013, with the expropriation of SNS (see Section III).

If insolvency proceedings are initiated in the Netherlands with regard to several companies within one group, the courts may appoint one administrator for different entities; however, if the interests of the different entities do not coincide, the courts can appoint separate administrators. In that case, each administrator will have to primarily act in the interest of the creditors of his or her estate. Substantive consolidation is not recognised under Dutch insolvency law.

vii Cross-border issues

The Netherlands has not adopted the UNCITRAL Model Law.

Dutch private international law applies the principle of territoriality, meaning that foreign insolvency proceedings (outside the EU) will not automatically be recognised in principle. A general seizure of assets pursuant to foreign insolvency proceedings does not affect the assets of the (insolvent) debtor located in the Netherlands and the consequences of such foreign insolvency cannot be invoked in the Netherlands to the extent that this means that the creditors could no longer take recourse from the assets located in the Netherlands.

It is, however, generally accepted and confirmed in case law that foreign insolvency law rules relating to the authority of a foreign administrator to represent the insolvent debtor and to dispose of its assets are in principle recognised, provided that the foreign insolvency

---

11 Article 212g–212nn of the DBA.
12 Article 213–213kk of the DBA.
13 Article 3:159ai–3:257 of the AFS.
proceedings have not been opened in a manner contrary to Dutch public policy. The Supreme Court has confirmed this principle in relation to the authority of the Russian insolvency administrator of Yukos Oil to dispose of the shares in Yukos Finance BV.\(^\text{14}\)

In practice, Dutch courts are generally open to assisting foreign courts, provided that such assistance is not contrary to rules of public policy.

With regard to issues such as forum shopping, the Dutch courts tend to take a critical approach; international principles of COMI and establishment are given due consideration when hearing a request for opening of insolvency proceedings.

**European insolvency regulation**

Foreign insolvency proceedings within the EU are recognised pursuant to the Recast EIR. Thus, insolvency proceedings opened in the other EU Member States (except Denmark) are automatically recognised in the Netherlands in accordance with the Recast EIR.

### II INSOLVENCY METRICS

The Dutch economy has been showing signs of sustained improvement. According to the CBS the size Dutch economy grew by 2.9 per cent in 2017.\(^\text{15}\) This is the strongest growth in a decade. As the first estimate indicates, the size of the Dutch economy increased rapidly by 2.5 per cent in 2017. The increase is mainly because of higher exports volumes, rising investments, more consumption and the global economic upswing. The GDP is forecast to continue to grow more steadily in the following years (2.1 per cent in 2018 and 1.9 per cent in 2019). Almost all sectors report growth, especially the commercial services sector (3.5 per cent), the construction industry (4 per cent) and the hotel and catering business (5 per cent). The sectors owe their growth mainly to factors such as the improvement of the housing market, the increase of consumer and producer confidence, further recovery of purchasing power and overall economic expansion. The labour market is also improving quickly: the unemployment rate dropped from 6 per cent in 2016 to 5 per cent in 2017 (and is expected to decrease to 4.4 per cent in 2019). As the economy picked up, the number of bankruptcies in 2017 continued to decline. The total number of businesses and institutions (excluding one-man businesses) filing for bankruptcy in 2017 was 3,290. This is the lowest annual figure since 2001.

### III PLENARY INSOLVENCY PROCEEDINGS

i Pre-packs – silent administrators

Possibly the most significant development in the past years in Dutch insolvency proceedings was the increasing use of ‘pre-packs’ (i.e., pre-packaged insolvency restructurings) and the use of silent administrators (and recognition of the added value thereof across the Dutch legal profession).

Although it currently has no formal basis in Dutch statute (though a draft bill has been submitted to the parliament), the courts have been willing to hear a debtor’s request for (and in rare cases, even upon a formal application by a creditor) and to appoint (informally) a

\(^{14}\) Dutch Supreme Court, 13 September 2013 (ECLI:NL:HR:2013:BZ5668) also known as the *Yukos* case.

silent insolvency administrator prior to the opening of formal procedures. This allows for the
debtor and the silent administrator to try to restructure outside of formal proceedings. If this
is not feasible, it allows for a sale or restructuring of the debtor’s business to be pre-arranged
with the assistance of such informal administrator and under supervision of an (informal)
supervisory judge. This increases the chances of a successful restructuring in formal insolvency
proceedings.

In past years, all types of business ranging from retail; fashion and flower export;
healthcare or hospitals; and media and entertainment have made use of the involvement of
(silent) administrators prior to the bankruptcy to restructure the business.\footnote{Early examples are Schoenenreus BV (January 2013), DEPT BV (December 2012), Opinion Test en Taste BV (October 2012), Van Straten Bouw BV (October 2012), Harense Smid BV (July 2013), Ruwaard van Putten Ziekenhuis (June 2013), Weijmans Media Groep BV (May 2013), Het Groene Kruis (June 2013), Moes Bouw BV (August 2012), Prime Champ Productions BV (April 2013), Ciccolella (February 2013), Drukerij Dijkman (June 2013), Pelican Tijdschriften (March 2013), Marlies Dekkers (August 2013).} Furthermore,
a diversity of courts and administrators were involved, meaning that the use of silent
administrators and ‘pre-packs’ has developed throughout the Netherlands.

Most cases that made use of this tool concerned operational businesses (many of whom
have suffered as a result of the economic crisis) that were in need of (considerable) debt
reduction, but that in principle were viable businesses. The successful restructurings were
mostly done in cooperation with the secured creditors (mostly senior bank debt) and the
debtor.

After a rather positive start, with a lot of success stories, Dutch pre-pack practice has faced
growing criticism over the past three years. Critics mainly claim that the bidding process lacks
transparency and that pre-packs are misused to shed jobs (owing to non-applicability of the
rules on transfer of undertaking). This has led to judgment of the ECJ dated 22 June 2017 in
the Estro case described below. The negative publicity as well as the ECJ Estro ruling described
below resulted in reluctance of courts to facilitate pre-packs and silent administrations.

**Estro Groep BV**

Estro Groep BV et al. (Estro), the largest Dutch childcare operator, was declared bankrupt
on 5 July 2014. Of 380 locations and roughly 3,600 employees, 130 locations were closed
and the employment of roughly 1,000 employees was terminated. By means of a pre-packed
bankruptcy sale, and immediately upon the opening of the formal bankruptcy proceedings,
the viable parts of the underlying business of Estro were transferred as a going concern to
Smallsteps BV, in order to continue the business in a smaller form. The owner of Smallsteps
BV is the same as for Estro, being HIG Capital. This pre-packed bankruptcy sale is one of
many recent transactions and restructurings that have taken place by means of a pre-pack.
Nonetheless, and possibly since the bankruptcy of Estro caused a lot of employees to lose
their jobs, the case has received a lot of press attention and criticism.

In February 2015, trade union Abvakabo FNV initiated legal proceedings against
Estro/Smallsteps for abuse of bankruptcy proceedings (merely) for the termination of the
employment of roughly 1,000 employees. The trade union motivates its claim on the basis
that the (European) rules of transfer of undertakings should apply in this case, despite the fact
that in principle, the rules of transfer of undertaking do not apply in a Dutch bankruptcy.
Council Directive 2001/23/EC relating to the safeguarding of employee rights in the event of
transfers of (a part of) undertakings provides that the requirement to assume all employment
contracts does not apply where the transferor is the subject of bankruptcy proceedings or any analogous insolvency proceedings which have been instituted with a view to the liquidation of the assets of the transferor. Based on that Directive, Dutch law stipulates that rules of transfer of undertaking do not apply in case of a transfer of undertaking by a transferor in bankruptcy. The trade union asserts that the Estro case was not a proper bankruptcy and a subsequent sale of a viable part of an otherwise bankrupt enterprise. Instead, the actions of Estro should be considered a proper transfer of an undertaking to which the regular rules of transfer of undertakings should apply, which rules were circumvented through an abuse of Dutch bankruptcy law. On 24 February 2016, the court in first instance asked for a preliminary ruling from the ECJ on whether a pre-pack sale has to be considered a transfer of undertaking. On 22 June 2017, the ECJ delivered its judgment. The ECJ ruled that the protection of workers guaranteed by Directive 2001/23/EC applies in a situation, such as in the main proceedings, in which the transfer of an undertaking in the context of a ‘pre-pack’ prepared before the declaration of insolvency and put into effect immediately after the declaration of insolvency. The exact consequences and legal implications of this ruling for future pre-packs and pre-packs that were carried out in the past remain unclear. As a result of this ruling, Dutch courts have become more reluctant to facilitate pre-packs without a clear legal basis (for which a draft bill is still pending).

ii Oi Group

The Oi Group is one of the world’s largest integrated telecommunications service providers, with its operations primarily located in Brazil. Oi’s shares are listed on the Sao Paulo and New York Stock Exchange. Oi Group has two main financing companies incorporated in the Netherlands.

Owing to a combination of factors, the financial situation of the Oi Group had declined over recent years.

The largest debts of the Oi Group stem from loans and bonds. The total debt of the Oi Group was reported to be approximately 65 billion reais. Around April 2016, Oi Group entered into negotiations with its creditors (including the noteholders of the Dutch SPVs) in order to reach an agreement on an out-of-court restructuring.

As the Oi Group was unable to reach such an agreement, the Oi Group filed for in-court restructuring proceedings in Brazil (recuperação judicial (RJ)) for certain entities of the Oi Group, including the two Dutch companies, being the first Dutch entities to be subjected to Brazilian insolvency proceedings. This filing is considered the largest reorganisation petition in Brazil’s history. In June 2016, the Brazilian court opened the RJ proceedings for certain entities in the Oi Group, including the two Dutch companies. Since Brazilian insolvency proceedings are not automatically recognised in the Netherlands, one of the Dutch companies, Oi Coop, was subjected to Dutch suspension of payment proceedings, and the composition plan offered and the creditors’ meeting set to vote on such plan have been aligned with the Brazilian RJ, meaning that the Brazilian and Dutch insolvency proceedings are aimed to run concurrently and in cooperation. Also, the suspension of payments proceedings was preceded by a silent administration period, to allow the administrator and the court to be informed of the contemplated alignment of the Brazilian and Dutch proceedings, which was a new purpose to use silent administration in Dutch insolvency practice (rather than for the purposes of a pre-packed sale). On 19 April 2017, the suspension of payments granted to the two Dutch companies were converted into bankruptcy proceedings by the Amsterdam Court of Appeal at the request of a group of bondholders. The two Dutch companies also
remained in the Brazilian RJ within which the Oi Group still strived to come a restructuring of the Oi Group. On 19 and 20 December 2017, Oi Group creditors voted in favour of a restructuring plan (the RJ Plan) in the Brazilian RJ proceedings. As mentioned above, Dutch private international law applies the principle of territoriality, meaning that foreign insolvency proceedings (outside the EU) will not automatically be recognised in principle. Therefore, in order to ensure that all material aspects of the RJ Plan are given binding effect in the Netherlands, as part of the Dutch bankruptcy proceedings the Dutch entities offered a composition plan to their creditors that ‘mirrors’ the RJ Plan. The creditors of the Dutch companies voted in favour of these Dutch composition plan on 1 June 2018 and subsequently the court approved the plan on 11 June 2017. As the Dutch composition plans have now become final and binding, the Dutch bankruptcy of the Dutch companies has ended successfully as the companies emerged from bankruptcy.

iii OSX Group

OSX Group, a Brazilian shipbuilding and oil services company, is part of what used to be one of the largest companies in South America. In July 2014 and April 2015, insolvency proceedings were opened for several Dutch special purpose vehicles of the OSX Group. The OSX Group is headed by the Brazilian parent company OSX Brazil. OSX Brazil was a sister company of OGX. The latter was established in 2007, after wells of oil and gas had been discovered on the coast of Brazil. OGX had the ambitious plan of exploiting these new-found wells. OSX was established as a shipbuilding and oil services company in 2010. OGX and OSX Brazil entered into a strategic alliance on the basis of which OSX would supply OGX with equipment for gas and oil extraction. OSX stored its most important assets, such as vessels, offshore oil-production ships and drilling packaging units, in special purpose vehicles (mainly in the Dutch entities). The Brazilian wells turned out to be far less bountiful than OGX had forecast. This led to OGX being in financial distress and eventually to the insolvency of OGX in Brazil. Subsequently, OSX faced financial problems because of to the fact that its main customer was the insolvent OGX. This led to the recent opening of insolvency proceedings for the Brazilian parent company of the OSX Group in November 2013. This in turn led to the downfall of the Dutch special purpose vehicles, which in turn led to insolvency proceedings being opened for the Dutch OSX vehicles in July 2014 and April 2015. At the time of the insolvency, the vessels and drilling units were still under construction. Currently, several cases are pending between the bankrupt OSX entities and companies hired to build the vessels and drilling units, whereas these companies levied attachments prior to insolvency and are exercising rights of retention with regard to said equipment. Because of the fact that the vessels and drilling units are located in different countries (among others, Brazil, Norway and Singapore), a number of cross-border issues have arisen in the winding up of the Dutch OSX entities. Furthermore, discussions with financing parties are taking place, giving rise to (inter alia) complex cross-border security enforcement issues.

iv OW Bunker

The originally Danish OW Bunker was one of world’s largest independent traders and suppliers of marine fuel. OW Bunker’s business model was, broadly speaking, buying oil in order to sell it for a higher price at a later stage. In March 2014, the company listed on the NASDAQ OMX Copenhagen exchange after one of the biggest initial public offerings in Danish history. On the first day of trading, share prices went up about 20 per cent, and the company was worth nearly US$1 billion. The Danish mother company had two wholly
owned subsidiaries located in the Netherlands, namely the Dutch OW Bunker (Netherlands) BV and the Rotterdam Branch of the Swiss OW Global Trading. Employees of the Dutch entity, OW Bunker (Netherlands) BV, were responsible for purchasing oil in the regions of Amsterdam, Rotterdam and Antwerp. In 2014, the turnover of this entity was more than US$850 million. The Dutch entities were entirely dependent on the Danish parent company for the financing of their daily work. The parent company was financed by a consortium of banks, which money was lent on by the parent company to its subsidiaries. The OW Group found itself in major financial problems in mid-2014. Three main causes for these problems were identified. First, the drop in oil prices in the third quarter of 2014. Second, a fraud had been discovered in a Singapore-based subsidiary, said fraud resulting in a loss of US$125 million. The third cause was a risk management loss on the basis of which OW Bunker’s risk management exposure was around US$150 million. The main assets of the insolvent Dutch OW Bunker (Netherlands) were the oil bunkers present in Antwerp and Rotterdam and oil present in tanks of ships chartered by OW Bunker (Netherlands) when the business came to a standstill. The trustees of OW Bunker (Netherlands) have agreed on an amicable settlement with ING Bank, which claimed to have a right of pledge over these oil bunkers. Furthermore, OW Bunker (Netherlands) had considerable unpaid invoices, which were subject to a right of pledge from ING Bank. ING Bank is in the process of collecting these invoices. The trustees of OW Bunker (Netherlands) are currently in discussions with ING Bank and other bankruptcy trustees of other bankrupt OW Bunker entities on the apportionment of a possible surplus.

v Bankruptcies in the non-food retail industry

The past years have been tough for companies within the non-food retail sector. Many well-known players within the non-food retail sector have gone bankrupt. Examples include retail chains of bike and car accessories (Halfords, 102 locations and over 530 employees), women’s clothing shops (Etam Groep, 200 locations and around 2,000 employees), shoe stores (Schoenenreus, 206 locations and 1,500 employees), jewellery (Siebel, 36 locations and 170 employees) fashion houses (Mexx, 315 locations throughout Europe and 1,500 employees in 50 countries and McGregor) and sports stores (Unlimited Sports Group, which owned Perry Sport and Aktie Sport with a total of 2,300 employees). On 5 January 2016, one of the largest Dutch department store groups, V&D (63 locations in the Netherlands and over 10,000 employees) was declared bankrupt. There are three main causes for this trend. The fierce competition from online shopping can be pointed out as the first reason for said trend. Many of these companies had a traditional sales model with its main focus on sales from physical shops, rather than sales via the internet. The second reason is that these companies still suffered from the impact of the relatively low consumer trust. The third reason is the high premises costs these companies often pay. Most of these companies have been renting premises against high market prices that date from before the economic crisis. These high running costs (combined with the low sales) often pose a threat to the continuity of the business. Whereas Dutch law does not yet provide for a mechanism to cram down creditors outside insolvency proceedings, these companies had to go through formal bankruptcy proceedings to try to restructure their businesses. Most notably, V&D was unable to even be restructured or partially sold during the bankruptcy (with the exception of the La Place food and restaurant division), resulting in the piecemeal liquidation of assets and loss of all jobs.
Imtech Group

Imtech Group was one of the largest European technical service providers in the fields of electrical engineering, machine construction and automation. At the time of its bankruptcy, Imtech Group had approximately 22,000 employees in 14 countries and in seven divisions. Imtech Group realised an annual profit of approximately €4 billion in 2014. The shares of The Royal Imtech NV, the principal holding company of the Imtech Group, are listed on Euronext Amsterdam. Imtech was declared bankrupt in August 2015. The bankruptcy of Imtech was preceded by a silent administration (pre-pack), which was subsequently followed by formal suspension of payment proceedings. Imtech’s bankruptcy is considered one of the largest bankruptcies in Dutch history.

In the years leading up to the bankruptcy of Imtech, the group had suffered financially, among other things, because of a large fraud investigation into the activities of Imtech Germany and the eastern European division. In December 2012, an analyst of ABN AMRO published a critical report on Imtech Germany expressing concerns regarding Imtech Germany and whether Imtech Group would run into problems with bank covenants in the short term. In February 2013, possible irregularities with projects in Imtech’s Germany and Poland branches were reported and in June 2013, Imtech Group reported that investigations had shown (among others) that the primary cause for the substantial losses suffered by Imtech Group were fraudulent actions in Germany and Poland. This resulted in a write-off of €370 million on projects carried out by Imtech Germany and Poland.

In July 2015, Imtech Group then published a trading update, which showed that Imtech Group was negotiating an amendment to the financing arrangements with its financiers in order to cover a liquidity shortage of €75 million (in addition to an existing facility of €700 million). These negotiations did not have a positive outcome for Imtech Group as a result of which Imtech Germany was forced to file for its own bankruptcy. Shortly thereafter, Royal Imtech NV and some of its Dutch subsidiaries were also declared bankrupt after Imtech Group failed to reach an agreement with its financiers in the silent administration (pre-pack) and the subsequent formal suspension of payment proceedings that preceded the bankruptcy. After the bankruptcy of Royal Imtech NV and some of its Dutch subsidiaries, the appointed bankruptcy administrators were able to rapidly sell the activities of Imtech Group. On 11 August 2016, the bankruptcy administrators reported that all parts of Imtech were sold. Currently, the bankruptcy administrators are investigating whether there are other actions to be taken prior to finalising the bankruptcy, such as whether there are grounds to bring directors liability claims, clawback actions and other actions (as is common in Dutch insolvency proceedings).

IV ANCILLARY INSOLVENCY PROCEEDINGS

As the Netherlands has not adopted the Model Law, the concept of ancillary proceedings does not apply in the Netherlands.

There have, however, been a number of cases where insolvency proceedings were opened in the Netherlands as main proceedings over a Dutch finances company. Such proceedings are, to a certain extent, ancillary to foreign insolvency proceedings. Several foreign groups use Dutch corporates as finance vehicles to extract funds from the market by means of issuing bonds, the proceeds of which are subsequently on-lent to the group. In the past, several of these groups have faced financial difficulties and sought to restructure outside or through formal insolvency proceedings. If, and to the extent, an out-of-court restructuring failed for...
the group, this inevitably led to the insolvency of the Dutch finance company. High-profile cases include Oi Group, Petroplus International BV, Pfleiderer Finance BV and Global PVQ Netherlands BV, the finance vehicle of the German Q-cells. These finance companies hold major claims in the insolvency of their group companies, and their major creditors often include bondholders or other financial creditors.

Since the only asset of the Dutch company is usually the inter-company claim against the insolvent group members, it is in the immediate interests of the creditors of the Dutch insolvent companies that the insolvencies of the foreign group companies are successfully conducted. Furthermore, as major creditors, the Dutch companies may have a large influence on the conduct of such foreign proceedings. Thus, these Dutch insolvency proceedings can play an important role in these pending foreign insolvency proceedings.

In case of the Oi Group, the Dutch companies were subject to both Brazilian and Dutch proceedings. It is currently not clear whether the Dutch proceedings were ancillary or main proceedings compared to the Brazilian proceedings, since both courts have assumed jurisdiction to open main proceedings, and as there is no treaty in place and since the Netherlands has not adopted the Model Law, there is no formal necessity to establish which proceedings are the main proceedings. However, the petition that the Dutch companies filed to open suspension of payments proceedings indicated that the companies aimed to have the Dutch proceedings assist the successful restructuring of Oi Group in the Brazilian proceedings.

V TRENDS

A major development in larger restructuring cases, which started in 2012 and 2013 and can be expected to continue, is the use of English-law schemes of arrangement to restructure Dutch corporate entities.17 Thus far, the recognition of such scheme by the Dutch courts has not yet been tested, but across Europe a number of large restructurings have now successfully taken place in that manner.

Financial difficulties can be expected, inter alia, in retail, healthcare (particularly in home care) and the shipping industry. There will likely be an increasing amount of private equity, hedge funds and other financing parties (also including pension funds and insurance companies) buying into (traditional) bank debt, which will include ‘loan-to-own’ activity (as has been seen in some recent consensual restructuring cases).

There is not likely to be any change in the attitude of bankruptcy receivers litigating over directors’ liability. In such economically difficult times, however, more companies may try to use bankruptcy as a means of cutting the costs of distressed businesses – consequently, the number of fraud cases could also increase. The government has indicated that one of its immediate focal points is to improve the system to prevent and punish bankruptcy fraud.

---

17 For example, the NEF Telecom case (Re NEF Telecom Co BV [2012] EWHC 2944 (Comm)), Van Gansewinkel (Re Van Gansewinkel [2015] EWHC 2151 (Ch); [2015] WLR (D) 326) and other cases are currently pending, involving Dutch corporates. The scheme of arrangement of Van Gansewinkel, a large Dutch waste management company, was sanctioned in July 2015. The group consisted of five Dutch companies and one Belgian company, headed by the Dutch Van Gansewinkel Groep BV.
Currently, a number of legislative proposals to amend the Dutch insolvency law are being prepared. The topics being dealt with in these proposals include:

- A statutory basis for a Dutch law pre-pack or silent administrator;
- The introduction of a cramdown mechanism outside formal insolvency proceedings, similar to a scheme of arrangements;
- Prevention against fraudulent use of bankruptcy proceedings by directors;
- Improving the position of the insolvency administrator or receiver; and
- Modernising Dutch bankruptcy proceedings.

In November 2012, the Minister of Justice launched a legislative programme named the Recalibrating Insolvency Law. The programme aims to improve Dutch insolvency law by way of three main focuses: insolvency fraud; the ability to restructure companies; and modernising Dutch bankruptcy law. Below the status of the first and second areas of focus of the legislative programme are discussed.

With regard to insolvency fraud, two bills entered into force on 1 July 2016. The first bill increases the possibility to use criminal law in cases of insolvency fraud (among others, the rules on fraudulent bankruptcy are simplified and penalties for failing to comply with information duties are increased). The second bill concerns the disqualification of directors for five years if they manifestly improperly performed their tasks over a period of three years before the insolvency. A third bill concerning the strengthening of the fraud alert duties of the receivers entered into force on 1 July 2017.

On 22 October 2013, the Dutch government introduced the first draft bill regarding the second focus of the aforementioned programme, the draft Bill on Continuity of Undertakings I. This draft bill aims to regulate the pre-pack without stripping away its advantages, still granting restructuring practitioners sufficient leeway to apply the pre-pack to very different cases. The draft bill regarding the pre-pack was adopted by Parliament in July 2016 and sent to the Dutch Upper House subsequently. The Dutch Upper House is only entitled to approve or reject bills. After the opinion of the attorney-general to the ECJ in the aforementioned Estro case, the Dutch Upper House asked Parliament questions about the impact of this case on the draft bill to create a legal basis for the pre-packs. In a letter of 11 April 2018, Parliament responded that, despite the Estro case, there is still a need for a Dutch pre-pack and, therefore, it requested the Dutch Upper House to resume the debate on the bill.

On 5 September 2017, a draft bill named the ‘Act on the confirmation of a private restructuring plan in order to prevent bankruptcy’ was presented. This draft bill introduces a statutory framework for a pre-insolvency restructuring similar to the UK scheme of arrangements. Although the exact timing for implementation of these and other proposals remains uncertain, the draft bills show a clear trend in the Netherlands towards a more rescue-friendly environment and a more competitive formal insolvency law regime within Europe.

18 As set out in the latest letter from the Minister of Security and Justice dated 4 July 2016.
19 The draft bill replaces an earlier similar draft bill named the ‘continuity of undertakings II’, which was introduced on 14 August 2014.
Chapter 18

POLAND

Bartłomiej Niewczas and Patrycja Piotrowska

I INSOLVENCY LAW, POLICY AND PROCEDURE

i Statutory framework and substantive law

Since 1 January 2016, insolvency in Poland has been regulated by the texts of the Bankruptcy Law of 28 February 2003 (until 1 January 2016 known as the Bankruptcy and Reorganisation Law) and the Restructuring Law of 15 May 2015 (which is an entirely new legal act published in the Journal of Laws dated 14 July 2015, item 978).

These two Acts regulate the situation of companies that are struggling with insolvency – both at an early stage (the threat of liquidity loss), and at its very advanced stage (bankruptcy). Both Acts together provide a comprehensive set of rules of conduct used in cases of insolvency or threat of insolvency of the debtor, and introduce substantial reform to Polish insolvency law.

The main assumption for the amendment of the Bankruptcy and Reorganisation Law was the adjustment of Polish law to internationally applied and accepted practices, and, thus, to provide companies with access to procedures providing both effective restructuring of liabilities and the tools to protect creditors.

The key changes, apart from separating restructuring and reorganisation procedures from insolvency proceedings, include, inter alia:

a introducing four new restructuring proceedings (arrangement approval proceedings, accelerated arrangement proceedings, arrangement proceedings, remedial proceedings);2

b changing the definition of debtor insolvency, and threatened with insolvency;3

c clarification of bankruptcy prerequisites;4

d introduction of pre-packaged liquidation;5

e the increased role of the Council of Creditors;6

f changes to claims categories and list of claims;7

g changes to the cost of proceedings catalogue;8 and

1 Bartłomiej Niewczas is a counsel and Patrycja Piotrowska is an associate at Bird & Bird Szepietowski i wspólnicy sp k. The authors would like to thank Daria Mientkeiwicz, a former associate at the firm, for her contribution to this chapter.

2 Articles 210–323 of the Restructuring Law.

3 Article 11 of the Bankruptcy Law.

4 Articles 11–13 of the Bankruptcy Law.

5 Articles 56a–56h of the Bankruptcy Law.

6 Articles 201–213 of the Bankruptcy Law.

7 Articles 239–245a, Article 342 of the Bankruptcy Law.

8 Articles 230 and 343 of the Bankruptcy Law.
Respective provisions concerning insolvency law matters are contained in other legal acts, such as the Civil Code (provisions concerning the creditor’s protection in the event of the debtor’s insolvency), the Penal Code (regulations on crimes involving thwarting the satisfaction of the creditor) and the Commercial Companies Code (provisions governing the liability of board members), which also underwent changes owing to the introduced reform of Polish insolvency law.

ii Policy

In recent years, there has been a clear trend indicating primarily a change in attitudes towards businesses that have fallen into insolvency.

The legislator considered that the preferred form of resolving insolvency problems was restructuring, the purpose of which is to conclude an arrangement with creditors, and consequently the survival of the business on the market.

For these reasons, the need to change existing insolvency regulations has become obvious. The source of the chronicity and ineffectiveness of insolvency proceedings was recognised in the regulations in force up to 1 January 2016.

At the heart of changes to the Bankruptcy Law, as well as the introduction of the new Restructuring Law, is the idea of the regulator that liquidation of the debtor’s property should be the last resort.

Therefore, bankruptcy proceedings should be implemented only when it is obvious that it is the only path for creditors to recover at least part of the amounts due. As long as there are perspectives on reaching an agreement with creditors through debt restructuring, the preferred form of the regulator is arrangement.

According to the legislator, restructuring is beneficial owing to its twofold action: it allows the debtor to repair its business and creditors to collect their receivables, while at the same time benefiting the economy, primarily by maintaining employment.

Currently it is not yet possible to make a comprehensive assessment of the effects of introducing the new provisions of law owing to the short time since their entry into force. However, the first experience confirms that the overall goal of the new legislation has been achieved. This is reflected in the data derived from the court and Economic Monitor according to which there was a decrease in insolvency in 2016.

iii Insolvency procedures

Restructuring proceedings

General overview

Polish insolvency law envisages four separate procedures for concluding an arrangement with creditors – ranging from the less formalised, conducted to a large extent outside the court, to profound legal and factual restructuring carried out by the trustee under strict supervision of the restructuring court.

In general, both commencing restructuring proceedings and preparing arrangement proposals, laying down the methods of restructuring the debtor’s liabilities, are on the
debtor’s side. Nevertheless, after the restructuring proceedings commence, alternative arrangement proposals may also be submitted by the court supervisor, administrator, sole creditor, creditors’ group or the council of creditors.

The restructuring court refuses to open restructuring proceedings if the effect of such proceedings would be detrimental to creditors, or when the decision on the declaration of bankruptcy is final and binding.

Arrangement may provide a wide range of restructuring methods, including, inter alia, spreading repayment of the debt into instalments, postponement of payment deadlines, conversion of receivables into shares and last but not least a liquidation plan.

Each restructuring proceeding requires obtaining the restructuring court’s approval for the arrangement accepted by the respective majority of the creditors. The court is entitled to reject the arrangement approval if the arrangement violates the law, it is obvious that the arrangement will not be performed or is detrimental to the creditors voting against the arrangement and submitting their reservations.

**Arrangement approval proceedings (Articles 210–226 of the Restructuring Law)**

This is the most informal restructuring procedure, which is available to debtors who are able to reach an agreement with the majority of their creditors without court involvement. The procedure is the simplest and least formalised of the restructuring proceedings. There is no establishment of a list of creditors. The main prerequisite for this procedure is that the sum of disputed claims does not exceed 15 per cent of the total claims.

This procedure involves the debtor’s continued management of their business, but subject to the appointment a licensed supervisor, who acts as supervisor of the arrangement.

The debtor determines the arrangement date immediately after the arrangement supervisor starts performing their function.

This procedure does not include a creditors’ meeting for voting. The debtor presents the proposed restructuring plan to the creditors and collects their votes in writing (with the assistance of the licensed supervisor). Subject to obtaining the required majority of approving votes, the debtor submits an application to the court for approval of the agreement. This submission is required to be made within three months of the voting date.

**Accelerated arrangement proceedings (Articles 227–264 of the Restructuring Law)**

The procedure is available, if the sum of disputed claims does not exceed 15 per cent of the total claims. In comparison to the arrangement proceedings, this procedure is simplified, mainly in the terms of the procedure of determining the claims carrying the voting rights. Within this procedure, all enforcement proceedings regarding the claims to be covered by the arrangement are suspended by law. From the opening of the proceedings, the debtor is not allowed to perform its pecuniary and non-pecuniary obligations to be covered by the arrangement (except for labour claims, claims secured *in rem* and interest accrued since the opening of proceedings). The procedure consists of management of the debtor’s estate (arrangement estate) by the debtor, subject that this management is supervised by the court supervisor. However, in some cases, the court may not agree to the debtor’s self-administration, and appoint an administrator. The court’s involvement in this procedure is much greater than in the arrangement approval proceedings. The restructuring court examines the debtor’s application for opening the accelerated arrangement proceedings (not longer than one week from filing the application), and issues a decision to open the accelerated arrangement proceedings, or to refuse such (the latter the debtor may appeal).
Arrangement proceedings (Articles 265–282 of the Restructuring Law)

The procedure applies only if the sum of disputed claims exceeds 15 per cent of the total claims.

This procedure is also commenced upon filing the debtor’s application before the restructuring court for opening arrangement proceedings. The application should be accompanied with copies of the arrangement proposals.

This procedure involves an interim period (from filing the debtor’s application until the procedure commences), within which the restructuring court is entitled to appoint a temporary court supervisor in order to secure the debtor’s estate. In certain cases, the court may not agree to the debtor’s self-administration, and appoint an administrator to take over the debtor’s assets management.

Analogous to the accelerated arrangement proceedings, this procedure also assumes that all enforcement proceedings regarding the claims to be covered by the arrangement are suspended by law.

The main difference between this and accelerated arrangement proceedings is that, owing to the higher percentage of the disputed claims, more than 15 per cent of the total claims, the allowance of claims is more formalised, and consequently much longer. According to the assumptions, arrangement proceedings should be completed in approximately 10 months.

Remedial proceedings (Articles 283–323 of the Restructuring Law)

This is the most formalised of the restructuring procedures, but it ensures the broadest range of restructuring options, as well as the widest range of protecting the debtor’s assets against creditors. This procedure is commenced upon the debtor’s application filed to the restructuring court. As in the case of arrangement proceedings, the court may require the debtor’s advance payment to cover the procedure’s expenses.

This procedure involves the mandatory appointment of the administrator (zarządca) to take over the full management of the debtor’s assets (remedial estate), unless the debtor’s management is necessary for successful restructuring, and ensures proper management.

All enforcement proceedings regarding the claims to be covered by the arrangement are suspended by law. Remedial proceedings enable the debtor to carry out remedial actions and conclude the arrangement after the table of claims has been prepared and approved. Remedial actions include legal and business acts that aim to improve the debtor’s economic situation, and restore the debtor’s capacity to perform his or her obligations, while protecting him or her against debt enforcement proceedings.

Bankruptcy proceedings

Pursuant to the regulations of Polish law, the only available insolvency proceeding is the procedure that stipulates the debtor’s assets liquidation. However, even in this far-reaching procedure, it is possible for the debtor to enter into arrangement with creditors.

Pre-packaged liquidation (Articles 56a–56h of the Bankruptcy Law)

This procedure envisages the possibility of filing an application with the court for the court’s approval of the terms of the sale of the debtor’s enterprise or its substantial part, together with the petition for bankruptcy. The application must specify at least the price and the purchaser, and be accompanied by a description and valuation of the asset prepared by an expert.
The court may accept or reject the application for approval of terms of sale in the bankruptcy order. The decision to accept the application may be contested by each of the creditors within one week from the date of its publication.

The sale agreement on terms specified in the court’s order must be concluded not later than within 30 days of the date the decision becomes final, unless the terms and conditions of the agreement accepted by the court provide for a different time limit. Funds from such sales are used up in bankruptcy, and are distributed among creditors appropriately. Such a quick sale is intended to increase the chances of survival of the debtor enterprise.

**Main and ancillary proceedings**

The Polish Bankruptcy Law provides for ancillary (non-main) insolvency proceedings in Poland, where the main proceedings are pending before a foreign court. Polish courts have exclusive jurisdiction over bankruptcy cases if the principal place of the debtor’s business is located in Poland. Ancillary bankruptcy proceedings in Poland occur when the Polish courts have no exclusive jurisdiction (i.e., if the principal place of the debtor’s business is not located in Poland). Polish courts are competent if the debtor is engaged in an economic activity, or has its place of residence or registered office or assets, in Poland. If Polish courts have exclusive jurisdiction, bankruptcy proceedings are considered to be main bankruptcy proceedings. In other cases, bankruptcy proceedings are considered to be secondary.

If a ruling to initiate foreign main bankruptcy proceedings has been recognised, bankruptcy proceedings initiated in Poland are always secondary bankruptcy proceedings.

**iv Starting proceedings**

**Restructuring proceedings**

The preconditions for commencing restructuring proceedings are insolvency or the risk of the debtor’s insolvency and restructuring capacity. The restructuring capacity is granted to the following categories of entities:

- **a** entrepreneurs;
- **b** both limited liability companies and joint stock companies that are not engaged in business activity;
- **c** partners in partnerships liable for the partnership’s obligations without limits to their property; and
- **d** partners in a professional partnership.

Restructuring proceedings may be initiated only by an insolvent debtor, or a debtor at risk of insolvency. Restructuring proceedings, unlike bankruptcy proceedings, are conducted only at the debtor’s request. Unless the Restructuring Law provides otherwise, restructuring proceedings are instituted on the basis of the debtor’s restructuring application construed as an application for the opening of the restructuring proceedings, and an application for the approval of the arrangement adopted in the arrangement approval proceedings.

---

10 Articles 379 and 382 of the Bankruptcy Law.

11 Within the meaning of the Act of 23 April 1964 – The Civil Code (J L of 2016 items 380 and 585).
Bankruptcy proceedings

The main prerequisite for opening bankruptcy proceedings is the debtor's insolvency. A debtor is considered insolvent if it is no longer able to pay its debts as they fall due, which means that the delay in the payment of debts exceeds three months. A debtor who is a legal person, or an organisational unit without legal personality that is granted legal capacity by a separate act of law, is also considered insolvent when their debts exceed the value of the assets, and this state of affairs persists for a period longer than 24 months.

Bankruptcy can be announced against specific entities (bankruptcy capacity), namely:

a. entrepreneurs, unless otherwise provided for in the Bankruptcy Law;
b. limited liability companies and joint-stock companies not engaged in economic activities;
c. partners of commercial partnerships bearing unlimited liability for the partnership debts with all of their assets; and

d. partners of a professional partnership.

The regulation states that a petition to declare bankruptcy may be filed by the debtor or any of their personal creditors.

According to the amended Polish regulations, a petition to declare bankruptcy should be submitted to the court competent for the main centre of the debtor's business. In the case of organisational units, it is presumed that the main centre of the debtor's business is its registered office, and in respect of natural persons the place of business or, if such person does not conduct business, the place of his or her habitual residence.

Currently, bankruptcy proceedings are largely identical to liquidation bankruptcy, which was known in the legal situation before 1 January 2016.

Concurrent applications for restructuring and bankruptcy

Pursuant to the Bankruptcy Law, a company may not be declared bankrupt in the period from the commencement of restructuring proceedings to their termination or final discontinuance.

In the case of filing a restructuring application and a bankruptcy application at the same time, the restructuring application should have the priority, and be examined first.

Control of insolvency proceedings

Insolvency proceedings are conducted by the respective courts – restructuring courts in the case of restructuring proceedings, and the bankruptcy court in relation to bankruptcy proceedings. Both courts are special units of the district court. Bankruptcy courts are established institutions, while the restructuring courts were introduced on 1 January 2016.

Control of restructuring proceedings

Restructuring court

Restructuring proceedings always take place under court supervision. The role of the court depends on the type of restructuring proceedings, and varies from agreement approval in the arrangement approval proceedings, to active participation of the court in the process of repairing the company in remedial proceedings.

---

The restructuring court is made up of one judge. After the opening of restructuring proceedings, judicial acts in the proceedings are performed by the judge-commissioner, with the exception of such acts that are subject to the court that has jurisdiction.

**The judge-commissioner**

The judge-commissioner directs the course of restructuring proceedings, supervises the actions of the court supervisor and administrator, designates actions that the court supervisor or administrator are not permitted to perform without his or her permission or without the permission of the creditors’ committee, as well as admonishes them for any misconduct they have committed. The judge-commissioner, in the scope of his or her acts, has the rights and duties of the court and presiding judge.

The judge-commissioner remains in office until the end of the proceedings, or until a decision to discontinue the proceedings becomes valid.

**Control of bankruptcy proceedings**

Cases involving a declaration of bankruptcy are heard by a bankruptcy court consisting of a panel of three professional judges. A bankruptcy court is a district court.

**Board of directors’ duties**

Board of directors’ duties in connection to insolvency proceedings are regulated in the Bankruptcy Law, as well as in the Commercial Companies Code of 15 September 2000. As a rule, pursuant to the Bankruptcy Law, a debtor is obliged to file a petition for bankruptcy with the court no later than within 30 days of the day when the grounds to declare bankruptcy occurred. In the event the debtor is a legal person or an organisational unit without legal personality that is granted legal capacity by a separate act of law, this obligation rests on each person who is authorised to represent the debtor and manage its affairs. These persons are responsible for any damage caused as a result of their failure to file a petition within the established time limit, unless they are not at fault. Additionally, under the provisions of the Commercial Companies Code, any person who fails to file a bankruptcy petition of the commercial company, despite the occurrence of circumstances that give grounds for bankruptcy of the company or partnership under legal regulations, is liable to a fine, penalty of restriction of freedom or imprisonment of up to one year.

**vi Special regimes**

**Restructuring proceedings**

The provisions of the Restructuring Law do not apply to the following entities:

- the state treasury and local government units;
- domestic banks;
- Bank Gospodarstwa Krajowego;
- branches of foreign banks;
- cooperative savings and credit unions;
- investment firms;

---

14 Referred to in Article 2(14) of the Act on the Bank Guarantee Fund of 10 June 2016, the Deposit Guarantee Scheme and Mandatory Restructuring (J L item 996).
insurance and reinsurance companies;
investment funds;
financial institutions;\textsuperscript{15}
financial holding companies;\textsuperscript{16}
mixed financial holding companies;\textsuperscript{17}
mixed activity holding companies;\textsuperscript{18}
parent financial holding companies in a Member State of the European Union;\textsuperscript{19}
EU parent financial holding companies;\textsuperscript{20}
parent mixed financial holding company in a Member State of the European Union;\textsuperscript{21}
and
EU parent mixed financial holding company.\textsuperscript{22}

The Restructuring Law has introduced a separate restructuring regime for developers and bond issuers.

**Bankruptcy proceedings**

Pursuant to the Bankruptcy Law, the following entities may not be declared bankrupt:

- the state treasury;
- local government units;
- independent public healthcare institutions;
- institutions and legal persons established by an act of law;\textsuperscript{23}
- natural persons running a farmstead who do not conduct any other business or professional activities;
- higher education institutions; and
- investment funds.

\textsuperscript{15} Under Article 4(1)(26) of the Regulation of the European Parliament and of the Council (EU) No. 575/2013 of 26 June 2013 on prudential requirements for credit institutions and investment firms, amending Regulation (EU) No. 648/2012 (O J of EU L 176 of 27 June 2013, p. 1) with the registered office in a Member State of the European Union, if they are subsidiary undertakings within the meaning of Article 4(1)(16) of Regulation No. 575/2013 in relation to the credit institution referred to in Article 4(1)(16) of Regulation No. 575/2013, the entity referred to in subsections 3–9, and/or investment firm are supervised on a consolidated basis in accordance with Articles 6–17 of Regulation No. 575/2013.

\textsuperscript{16} Under Article 4(1)(20) of Regulation No. 575/2013 with the registered office in a Member State of the European Union.

\textsuperscript{17} Under Article 4(1)(21) of Regulation No. 575/2013 with the registered office in a Member State of the European Union.

\textsuperscript{18} Under Article 4(1)(22) of Regulation No. 575/2013 with the registered office in a Member State of the European Union.

\textsuperscript{19} Under Article 4(1)(30) of Regulation No. 575/2013.

\textsuperscript{20} Under Article 4(1)(31) of Regulation No. 575/2013.

\textsuperscript{21} Under Article 4(1)(32) of Regulation No. 575/2013.

\textsuperscript{22} Under Article 4(1)(33) of Regulation No. 575/2013.

\textsuperscript{23} Unless otherwise provided for in that act, and established by execution of an obligation imposed by an act of law.
Under Polish Law, special bankruptcy regimes exist for respective entities. The Bankruptcy Law recognises separate bankruptcy proceedings in the following circumstances:

- **a** when instituted after the death of an insolvent debtor;
- **b** against developers;
- **c** against banks and credit unions;
- **d** with respect to mortgage banks;
- **e** with respect to credit institutions, foreign banks and domestic banks operating internationally;
- **f** with respect to insurance and reinsurance undertakings;
- **g** with respect to bond issuers; and
- **h** with respect to natural persons not engaged in economic activities.

The above-mentioned special bankruptcy regimes are described in detail in the provisions of the Bankruptcy Law. The main differences from the standard procedure concern, *inter alia*, entities authorised to file a petition for bankruptcy, the order of satisfaction of claims and the composition of the adjudicating court.

**vii Central Register of Restructuring and Bankruptcy**

Under the provisions of Regulation (EU) 2015/848 of the European Parliament and of the Council of 25 May 2015 regarding bankruptcy proceedings, from 26 June 2018 Poland is obliged to create and maintain the register of restructuring and bankruptcy proceedings. Member States have committed to keep in their territory at least one register in which information on insolvency and restructuring proceedings is to be published (Article 24 (1) of the Regulation). According to the Restructuring Law of 15 May 2015, from 1 February 2018 the Central Register of Restructuring and Bankruptcy kept by the Ministry of Justice in electronic version was to operate in Poland. However, following the expiry of the deadline the Central Register has still not yet been established. Currently, the Polish Parliament has been working on the draft Act on Central Register of Debtors, which will probably replace the provisions regarding the Central Register of Restructuring and Bankruptcy not yet introduced (Article 5 of the Restructuring Law). The Central Register of Debtors will disclose information about the entities to which restructuring or bankruptcy proceedings have been carried out, information about entities which were subject to ineffective enforcement proceedings, and information on natural persons who are still recovering from maintenance for a period of more than six months. It is expected that the Act will enter into force on 1 February 2019.

**viii Cross-border issues**

The respective provisions in this scope are provided in the Restructuring Law and the Bankruptcy Law.

In general, the above-mentioned provisions apply only if an international agreement to which the Republic of Poland is a signatory, or the law of an international organisation of which the Republic Poland is a member, provides otherwise. In practice, in the absence of international agreements on insolvency proceedings for which Poland would be a party,
its meaning is reduced to the priority of EU law. The acts of EU law that apply prior to the above-mentioned provisions are Regulation No. 1346/2000 (applied by 25 June 2017) and Regulation No. 2015/848 (applied from 26 June 2017).

National jurisdiction is regulated in Article 342 of the Restructuring Law and Article 382 of the Bankruptcy Law. In both types of insolvency proceedings (restructuring and bankruptcy), Polish courts have exclusive jurisdiction if the main centre of the debtor’s interests is in Poland. Moreover, Polish courts also have jurisdiction if the debtor conducts his or her business activity in Poland, or has a place of residence or registered office or property there. Consequently, if the Polish court’s jurisdiction is exclusive, the restructuring or bankruptcy proceedings have the nature of the main proceedings. In other cases, the restructuring or bankruptcy proceedings have the nature of secondary proceedings.

In this context, the content of the resolution of the Supreme Court of 20 January 2010 issued under the signature III CZP 115/09 deserves special attention. Although this resolution was issued on the basis of the legal status before 1 January 2016, it remains current in terms of determining the group of entities authorised to institute secondary bankruptcy proceedings in Poland. Pursuant to this resolution, the group of entities authorised to initiate secondary insolvency proceedings before a Polish court is defined in Article 407 of the Bankruptcy and Reorganisation Law (currently Article 407 of the Bankruptcy Law), and not in Article 20 of the Bankruptcy and Reorganisation Law (currently Article 20 of the Bankruptcy Law). There is no doubt that, under the principle of lex specialis derogat generali, in the scope of secondary insolvency proceedings, Article 407 prevails over Article 20 of the Bankruptcy and Reorganisation Law (currently the Bankruptcy Law).

II INSOLVENCY METRICS

According to the Coface 2017 Annual Report, the number of bankruptcies and restructuring of Polish companies amounted to 885, which constitutes 16 per cent more than in 2016 (as per 28 December 2017). Among the types of proceedings, the most were declared bankrupt (537, which constitute 61 per cent).

Restructuring proceedings introduced at the beginning of 2016 together with the new bankruptcy law are increasingly used. Their participation in all proceedings is growing – in 2017 it amounted to 39 per cent, while in 2016 it was 27 per cent. Among restructuring proceedings, the most commenced was accelerated arrangement proceedings (209), and the least arrangement approval proceedings (11). A significant increase was recorded in the case of remedial proceedings – their number increased by as much as two-thirds compared with the previous year. The most (250 bankruptcies and restructuring) was recorded in production (11 per cent more than in 2016).

Based on the Central Economic Information Centre’s data, up to 30 June 2018, 147,055 announcements related to ongoing bankruptcy proceedings were published, including 3,259 regarding consumer bankruptcy, 314 company bankruptcies, and 234 were announcements about the commencement of restructuring proceedings.

III PLENARY INSOLVENCY PROCEEDINGS

Details of insolvency cases as well as the court insolvency registers are not available for public disclosure. Partial information on pending insolvency proceedings can be found at: www.portal-bankrut.pl.
IV  ANCILLARY INSOLVENCY PROCEEDINGS

See Section III.

V  TRENDS

According to KUKE (Export Credit Insurance Corporation), assuming an increase in economic growth in 2018 of 4.4 per cent, and an increase in the net turnover rate of companies to 4.6 per cent, it may be forecast that about 598 companies will fall this year, which is about 2.6 per cent higher than in 2017. At the same time, the level of restructuring of entities will continue to grow (to approximately 400 per year). In 2018, bankruptcy and restructuring proceedings will finish in the range of 1,000 entities. This would increase total bankruptcy and restructuring at 9.8 per cent. The increase in the number of entities subjected to remedial proceedings, while decreasing the level of bankruptcy, will be the decisive factor for this growth.
I INSOLVENCY LAW, POLICY AND PROCEDURE

Statutory framework and substantive law

The principal statute governing insolvency of legal entities and individuals in Russia is Federal Law No. 127-FZ on Insolvency (Bankruptcy) dated 26 October 2002 as amended (the Insolvency Law). The Insolvency Law contains a detailed description of insolvency proceedings, insolvency criteria and the regulation of activities of insolvency administrators.

Apart from the Insolvency Law, other laws regulate financial rehabilitation and insolvency issues. For example, the Commercial Procedure Code contains rules on administration of the insolvency cases by commercial courts. The Federal Law on Bank and Banking Activities and the Federal Law on the Central Bank of the Russian Federation govern the financial rehabilitation procedures applicable to banks and some matters related to their insolvency. The Federal Law on Self-Regulated Organisations and the Federal Law on Non-Commercial Organisations are both applicable to the activities of self-regulated organisations of insolvency administrators.

The Supreme Court of Russia and the Supreme Commercial Court of Russia (which merged with the Supreme Court in 2014) have issued various interpretations and clarifications. These interpretations and clarifications concern, inter alia, such issues as the payment of interest in the course of insolvency, challenging transactions of the insolvent party, appointment and dismissal of insolvency administrators, liability of owners of the insolvent entity and procedural issues. The lower courts generally follow the legal precedent of the Supreme Court and the Supreme Commercial Court.

Under the Insolvency Law the Russian state commercial courts administer all insolvency proceedings. The powers of the court are described in Section V.

This chapter discusses the general regulation of the insolvency procedure and priorities applicable to legal entities. For specific types of legal entities and individuals the regulation may differ, as discussed in Section I.vi.

1 Pavel Boulatov is counsel at White & Case LLC. The author would like to thank Daria Scheglova for her assistance with this chapter.
3 Articles 32 and 33 of the Insolvency Law. In Russian ‘arbitrazhnie sudi’, which are in fact state commercial courts and should not be confused with arbitration courts because of consonance.
Russian insolvency law sets distributional priorities among the claims of the creditors of an insolvent party. All claims to the insolvent party are divided into three categories: post-commencement claims that arise after the start of insolvency proceedings; claims that arose prior to the start of insolvency proceedings and must be registered in the register of creditors’ claims; and claims that may not be registered in the register of creditors’ claims because they were filed late.

Post-commencement claims include claims for court expenses relating to the insolvency of the debtor, fees and expenses of an insolvency administrator, taxes and utilities and maintenance payments necessary for the debtor’s activities. These claims are to be paid when they become due and ahead of the registered claims with the insolvent’s funds. The general purpose for giving priority to such claims is to keep the debtor operating during the course of the insolvency proceedings. There is a separate priority for post-commencement claims that applies if the debtor does not have enough funds to make payment of all post-commencement claims.4

Claims that must be registered in the register of creditors include monetary claims and claims for specific performance that may be evaluated, such as claims for performance of works or services.5 These claims may be satisfied only in the course of the insolvency proceedings after they are registered in the register of creditors. This is discussed in greater detail below.

With a few exceptions,6 these claims are registered after the court rules on the matter of their registration. The hearings at which the court rules whether to register creditors’ claims are separate trials within the insolvency proceedings. All registered creditors, creditors that filed applications for registration of their claims, the insolvency administrator and representatives of the debtor have a right to attend these hearings and contest, or support, the creditors’ claims under consideration.7

If the claims are not confirmed by the previous court decision, the court must consider the applications and the objections of other creditors and the administrator on their merits. This is a similar process to the consideration of claims for collection of debt out of an insolvency case. The ruling of the court on the registration of the claims is immediately enforceable and may be appealed.8 A pending appeal does not suspend the registration of the claims unless the appellate court issues a separate order to that effect upon the request of the appellant.

If the claims have already been reviewed and confirmed by a court in the earlier ordinary proceedings, the court is bound by the relevant court decision and cannot reconsider it. In

---

4 Article 134(2) of the Insolvency Law provides five ranges of priority of the post-commencement claims:
   a claims for court expenses and for fees and expenses of an insolvency administrator;
   b employees’ claims arising after start of insolvency;
   c claims for fees for services of contractors involved by the insolvency administrator for purposes of insolvency proceedings (e.g., evaluators, experts, auditors);
   d claims for payments for utilities and maintenance of the insolvent; and
e other post-commencement claims.
5 Non-monetary claims, such as proprietary claims and claims for specific performance must be registered at the receivership stage.
6 For example, claims of employees for payment of salary which are registered by the insolvency administrator without a court decision.
7 Article 71(2) of the Insolvency Law.
8 Article 71(5) of the Insolvency Law.
such a case, however, other creditors or the insolvency administrator have a right to appeal the initial court decision. Such appeals must be filed in the relevant court proceedings rather than in the insolvency proceedings.\footnote{Section 24 of the Guidance on Certain Procedural Issues Related to Insolvency Proceedings adopted by the Plenum of the SCC on 22 June 2012, No. 35. The Supreme Court ruled that a creditor may also file an application to reconsider the judgment in view of new facts (Ruling of the Supreme Court No. 305-ЭС16-7085 dated 3 October 2016).}

If the claims are confirmed by an arbitration award or foreign judgment that has not been recognised and enforced in separate proceedings, the court may consider only those limited objections relating to the grounds on which the arbitral award or foreign judgment may be denied recognition in Russia.\footnote{Same objections as set out in Article V of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.} For instance, the creditors may object to registration of the claims confirmed by an arbitration award on the grounds that the claim is fraudulent or artificial and its registration would violate public policy and other creditors’ rights.\footnote{Resolution of the SCC Presidium dated 2 February 2013 No. 12751/12. Resolutions are decisions on specific cases. In the resolutions the SCC Presidium used to express its legal positions on specific matters. The courts follow these interpretations of law.} If the court finds one of these objections well-grounded, it may fully reconsider the creditor’s claim on the merits.

Other claims, such as claims for declaratory relief and claims to request the debtor to return assets belonging to the creditor (e.g., leased assets), may be considered and granted in separate proceedings rather than in the course of the insolvency case.

The Insolvency Law sets out the following general order of priority for satisfying the claims in the register of creditors:\footnote{For specific types of enterprises the ranking may differ. See Section I.vi.}

\begin{itemize}
  \item[a] claims of compensation for damage to health or loss of life;
  \item[b] employees’ salaries, severance payments and royalties (with certain exceptions for the top management’s claims);
  \item[c] all other claims (including taxes and other mandatory payments); and
  \item[d] claims for contractual and any other penalties, and any lost profits by creditors.
\end{itemize}

The Insolvency Law provides that lower priority claims against a debtor could not be satisfied earlier than the higher priority claims. If the debtor’s assets are insufficient to satisfy claims of one priority, the claims of this priority will be paid \emph{pro rata}.

As a general rule, secured claims against a debtor are included into the third priority claims. However, the Insolvency Law stipulates a special order of payment for the secured claims. Secured creditors get 70 per cent (80 per cent if the secured claim arose out of a loan agreement with a credit institution) of all proceeds of sale of the pledged assets to compensate for the principal debt and any accrued interest. Contractual penalties do not have priority over other creditors’ claims with respect to principal debt, but they have priority over other creditors’ claims with respect to penalties.\footnote{Ruling of the Supreme Court of the Russian Federation No. 301-ЭС16-17271 dated 30 March 2017.} If there are no claims of the first and second priority, the secured creditor may get up to 90 per cent of all proceeds of sale of the pledged
assets (or 95 per cent for claims out of a loan agreement with a credit institution). If the proceeds of the sale of the collateral are insufficient to pay out the secured claim, the balance of the claim will be paid in the same priority as an unsecured claim.14

With a number of exceptions,15 claims filed after the register of creditors’ claims is closed (i.e., two months after the publication of the judgment to declare the debtor insolvent and to open the receivership procedure (see Section I.iii)) would fall to the lowest priority and would only be satisfied after all registered creditors’ claims. Claims of other creditors may also fall to the lowest priority, for example, claims of creditors arising out of consequences of a transaction aimed at the fraudulent transfer of assets or claims of creditors that aimed to receive undue preference.16

As a special remedy, the Insolvency Law provides the insolvency administrator (at the receivership stage) and major creditors of the debtor (those owning 10 per cent or more of the common value of the debt of the insolvent) with a right to challenge certain transactions of the debtor.17

The following transactions may be challenged in court:

a transactions for unequal consideration (including if transaction price or other terms deviate materially from those of similar transactions to the detriment of the insolvent) – if entered into within one year prior to the registration of the insolvency application by the court or after this date;18

b transactions aimed at violating creditors’ rights and interests, provided that the other party was aware of such intent by the insolvent entity – if made within three years prior to the registration of the insolvency application by the court or after this date;19 and

c transactions leading to preferential treatment of certain creditors.20

14 This does not apply to collateral provided by third parties.
15 Despite the strict rule that claims filed late fall to the lowest priority, case law developed a number of ad hoc exceptions, such as where application of the strict rule is manifestly unjust or where the claims became due and payable after the time period for filing claims for registration expired. For example, if a bank makes a payment to a beneficiary under a bank guarantee after the register of creditors of the principal had been closed, the bank may file its redress claims for registration in the register of creditors of the principal within two months from the date they became due. In this case, these claims would not fall to the lowest priority (Ruling of the SC No. 307-ЭС14-100 dated 24 September 2014). Tax inspectorates also have additional six months after the date the register is closed to file their claims if the decision to collect taxes enters into force after the date the register is closed. The time period for filing claims for compensation of damage a controlling person caused a legal entity starts running from the date when the limitation period to hold the controlling person liable started running (i.e., from the date the claimant became aware of the grounds to hold the controlling person liable).
16 Accordingly, creditors’s against the surety may fall to the lowest priority if their claims against the principal debtor arise out of a void transaction and will only be satisfied after all other registered creditors’ claims (Ruling of the SC No. 303-ЭС16-6738 dated 8 September 2016).
17 Article 61.9(1) of the Insolvency Law.
18 Article 61.2(1) of the Insolvency Law.
19 Article 61.2(2) of the Insolvency Law.
20 Article 61.3 of the Insolvency Law. This category includes, among others, transactions intended to secure previously existing obligations of the debtor or a third party to a particular creditor; transactions that have resulted, or may result in, a change in the order of priorities for satisfying creditors’ claims; transactions that have resulted, or may result in, the satisfaction of unmatured claims of some creditors while there are unsatisfied matured claims of others; and transactions that have resulted in a particular creditor enjoying more preference than it would enjoy if the statutory order of priorities applied.
The court may refuse to declare a transaction invalid if the value of the property acquired by
the debtor under the transaction in question exceeds the value of the property that may be
returned to the insolvency estate upon such invalidation or if the transaction counterparty
returns everything to the insolvency estate.21

The court will not deem a transaction of a debtor invalid as a transaction providing
unequal consideration (item (a) above) or a transaction leading to preferential treatment of
certain creditors (item (c) above) upon a relevant application, if this transaction has been
made in the course of usual business of the debtor and the value of this transaction is less than
1 per cent of the assets of the debtor.22 This rule does not apply to transactions of a debtor
that were aimed at violating the creditors’ rights and interests (item (b) above).

Article 61.6 of the Insolvency Law provides consequences of the invalidity of a
transaction of a debtor. All assets transferred by the debtor to its counterparty under the
invalid transaction must be returned to the debtor’s estate. If the restitution of the debtors’
assets is not possible, the counterparty under the invalid transaction is obliged to pay to the
debtor the market price of the assets at the moment of the transaction and damages incurred
owing to the change of the market price of the assets (if any). Claims of the counterparty
under the invalidated transaction connected with the invalidation are to be satisfied in two
ways depending on the basis of invalidation.

Claims of a counterparty under an invalid transaction arising in connection with its
invalidation will be registered as third-priority claims if this transaction was invalidated
because of provision of unequal consideration (item (a) above) or because of the preferential
treatment of the creditor (item (c) above) that was not aware of the signs of insolvency of
the debtor. If the transaction was invalidated because of the violation of other creditors’
rights and interests (item (b) above) or because of the preferential treatment of the creditor
(item (c) above) that was aware of the signs of insolvency of the debtor, the claims arising in
connection with invalidation of the transaction will be paid after the third-priority claims
(lowest priority).

In addition to the special grounds set by the Insolvency Law, fraudulent transfers may
violate the rules of Articles 10 and 168 of the Civil Code, which prohibit abuse of rights and
exercise of the civil law rights aimed at evading the law for an illegitimate purpose, as well as
other intentional exercise of the civil law rights in bad faith.

The Russian courts interpret the concept of abuse of rights very widely and treat as such
any exercise of rights in bad faith, including transactions aimed at dissipation of the debtor’s
assets to make them unavailable to creditors, including gifts or sales below value.23 Based on
this interpretation, the Supreme Commercial Court Presidium declared that the transfer of

21 Article 61.7 of the Insolvency Law.
22 Article 61.4(2) of the Insolvency Law.
23 The Plenary Session of the SCC declared that a transaction of a debtor concluded before or after
commencement of insolvency proceedings aimed at breach of creditors’ rights, for example, to decrease
the value of the insolvency estate by dissipation of the debtor’s assets below value to third parties may be
declared invalid on the grounds of Article 10 of the Civil Code on request of the insolvency administrator
or a creditor (Clause 10 of the Resolution of the Plenary Session of the SCC No. 32 dated 30 April 2009
on certain issues related to challenge of transactions on grounds set by the Federal Law on insolvency
(bankruptcy)).
assets by a debtor to a company providing asset management services null and void under Articles 10 and 168 of the Civil Code because the purpose of the transfer was to conceal assets from creditors.  

ii Policy

Insolvency legislation and insolvency proceedings in Russia have a tendency to liquidate the failing business rather than to restore the debtor’s solvency. Accordingly, the receivership is the most used insolvency procedure as opposed to financial rehabilitation and external management aimed at supporting and restoring the debtor’s business (see Section III).

One of the reasons for this emphasis on receivership is that creditors are granted a wide discretion as to the choice of the insolvency procedure to be applied on the debtor. In practice, the financial rehabilitation procedures are usually introduced only at the creditors’ initiative. Thus, in most cases the main aim of the insolvency proceedings is the sale of the debtor’s assets and the settlement of the creditors’ claims.

According to the statistics of the Judicial Department of the Supreme Court, in 2017, the financial rehabilitation proceedings were introduced in 0.2 per cent of cases and the debt was repaid in none of them; in 2016, the financial rehabilitation proceedings were introduced in 0.28 per cent of cases and the debt was repaid approximately in 2 per cent of such cases; in 2015, the financial rehabilitation proceedings were introduced in 0.23 per cent of cases and the debt was repaid in none of them; in 2014, financial rehabilitation proceedings were introduced in 0.14 per cent of cases and the debt was repaid approximately in 18 per cent of such cases.

For the purpose of the creditors’ protection, among other measures the Insolvency Law provides for:

- the liability of the debtor’s management for the unpaid creditors’ claims if their actions led to insolvency; and
- the creditors’ right to challenge the debtor’s transactions with respect to fraudulent transfers, undue preferences, transactions at low value and other transactions that aim at causing damage to creditors.

Creditors may also use Russian insolvency proceedings to hold beneficial owners and other controlling persons of the debtor liable for the debts of a subsidiary. For example, creditors may seek to hold controlling persons liable for the company’s debts without pursuing a full insolvency procedure. The creditors may file for insolvency, refuse to finance the insolvency proceedings and after the court terminates the insolvency proceedings – file an application

24 Clause 10 of the Information Letter of the SCC Presidium No. 127 dated 25 November 2008 ‘Review of practice of application by courts of Article 10 of the Civil Code of the Russian Federation’. The informational letters issued by the SCC Presidium summarises court practice and contained guidelines to lower commercial courts. Russian commercial courts usually follow the guidelines set out in the informational letters. Formally, however, there is no provision of Russian law, which stipulates that the informational letters of the SCC Presidium are mandatory.

The SCC gave the same interpretation to Articles 10 and 168 of the Civil Code when considering particular cases. See Resolutions of the Presidium of the SCC No. 6526/2010 dated 2 November 2010 and No. 15756/07 dated 20 May 2008.

to hold controlling persons liable. Creditors of non-operating companies excluded from the state register of legal entities pursuant to an administrative procedure may also file an application with the court to hold controlling persons liable.

Another particularity of insolvency proceedings in Russia is that they are frequently used to enforce a judgment debt regardless of the debtor's actual solvency. The reason for that is that the insolvency legislation provides creditors with more control over the procedure of sale of the debtor's assets and includes tools to recover assets including clawback actions, unlike the general enforcement procedure. Further, the general enforcement procedure is run by the state bailiffs who not infrequently act slowly and inefficiently, unlike the insolvency administrators who are usually selected by creditors as discussed in Section I.v. Creditors have wide discretion to decide on the procedure of sale or appropriation of assets and to make it more flexible and respond to their needs. Namely, they may decide to sell the assets in one lot and, if unsold, have them sold piecemeal.

### Insolvency procedures

The Insolvency Law provides that the following procedures may be applied in the course of the insolvency proceedings: supervision; financial rehabilitation; external management; receivership; and amicable settlement.

Each of these types of insolvency procedures are further explained below. The particularities of the insolvency procedures applied to insolvency of individuals and certain types of legal entities are described in Section I.vi.

#### Supervision

Supervision is an insolvency procedure applied to a debtor with a view to preserving its property, analysing its financial position, preparing a register of creditors' claims and holding the first meeting of creditors. As a general rule, the supervision is the first, and mandatory, stage of insolvency proceedings.  

Supervision should be completed within seven months of the submission of the insolvency petition. The duration of insolvency procedures mentioned here and below is for indicative purposes only, and the court may exceed the time limits if necessary and appropriate.

When the court orders the commencement of the supervision procedure, it will appoint an insolvency administrator. The debtor's management will remain in office and continue to perform its functions (although the insolvency administrator is authorised to petition for the replacement of current debtor's management in court). Once supervision has commenced, the debtor's management is prohibited from making certain types of transactions and

---

26 In some cases the supervision does not apply and the court commences receivership if it finds that the insolvency application has merit. For example, this happens if the debtor commences voluntary liquidation before the insolvency proceedings or if the debtor is missing at their place of location and no longer operates.

27 Article 51 of the Insolvency Law.

28 Article 69 of the Insolvency Law. In this case the shareholders will select a new director according to the general procedure.
decisions.\textsuperscript{29} Other matters, such as alienation of assets valued at more than 5 per cent of the balance sheet, granting or receiving loans, issuing guarantees and sureties and assignments of rights, require prior written consent from the insolvency administrator.\textsuperscript{30}

Once the supervision has commenced, the creditors’ claims for payment other than post-commencement claims may only be filed against the debtor pursuant to the procedures outlined in the Insolvency Law. Enforcement proceedings that have already commenced are stayed (with some exceptions). Court proceedings for recovering funds from the debtor are stayed upon a creditor’s petition. In addition, upon commencement of the supervision no contractual interest and penalties shall accrue on any claims that can be registered irrespective of whether they are already registered or not. Rather, a ‘moratorium interest’ shall accrue on the principal debt at the Russian Central Bank’s refinance rate applicable at the date the supervision is introduced. As of 26 March 2018, the rate is 7.25 per cent per annum.\textsuperscript{31}

The insolvency administrator must convene the first creditors’ meeting no later than 10 days before the end of the supervision. Only those creditors that presented their claims within 30 days of the date of making the publication on the commencement of supervision, and were registered in the debtor’s register of claims, have the right to take part in the first meeting of creditors.\textsuperscript{32} Although missing the aforementioned 30-day deadline will preclude a creditor from participating in the first creditors’ meeting, it will not preclude the creditor from submitting their claims to the register of creditors’ claims at a later stage.

The creditors at the first creditors’ meeting are authorised to decide which procedure (financial rehabilitation, external management, or receivership) should be applied. The court is to take the final decision on this matter, though.\textsuperscript{33}

\textit{Financial rehabilitation}

Financial rehabilitation is an insolvency procedure that is applied to a debtor for the purpose of restoring its solvency and to discharging its debts in accordance with an approved debt repayment schedule.\textsuperscript{34} Financial rehabilitation lasts for no more than two years.\textsuperscript{35}

Financial rehabilitation may only commence once a petition of the debtor’s shareholders or any third party interested in the restoration of the debtor’s solvency is submitted. The petition must be accompanied by a debt repayment schedule and financial rehabilitation plan, as well as an appropriate security for performance, such as a pledge, a suretyship or a bank guarantee provided by a relevant shareholder or a third party. The petition may either

\textsuperscript{29} Including, among others, reorganisation and liquidation of the debtor, establishing or acquiring equity interests in other legal entities, the creation of branches and representative offices, making dividend payments and issuing securities.
\textsuperscript{30} Article 64 of the Insolvency Law.
\textsuperscript{31} The refinance rate is published at www.cbr.ru/.
\textsuperscript{32} Article 72(1) and 72(2) of the Insolvency Law.
\textsuperscript{33} Article 73 of the Insolvency Law.
\textsuperscript{34} Article 80(3) of the Insolvency Law.
\textsuperscript{35} Article 80(6) of the Insolvency Law.
be presented at the first creditors’ meeting or, under certain circumstances, directly with the court, which may decide to commence financial rehabilitation in the absence of, or contrary to, a decision of the first creditors’ meeting.36

As with supervision, the management retains control of the debtor but its powers are restricted. The court must appoint an insolvency administrator who will maintain the register of claims, convene the creditors’ meetings and supervise the implementation of the debt repayment schedule and the financial rehabilitation plan.37

The consequences of commencing financial rehabilitation are generally similar to those of supervision, where certain actions by the debtor are prohibited, and where other actions require the consent of the administrative manager or of the creditors’ meeting.38

Based on the results of financial rehabilitation, the court will decide either to terminate insolvency proceedings (if the debts have been discharged), or commence external management (if the debtor may still become solvent) or receivership.39

External management

External management is an insolvency procedure applied to a debtor for the purpose of restoring its solvency. As a rule, the court introduces external management on the basis of a decision taken at the creditors’ meeting. External management is usually limited to an initial period of up to 18 months and can be extended by a further six months.40 The aggregate term of external management together with financial rehabilitation cannot exceed two years.41

Upon commencement of external management, the court must appoint an insolvency administrator. The insolvency administrator takes over the management of the debtor’s business, may dispose of the debtor’s property (subject to decision taken at the creditors’ meeting in certain cases, e.g., the alienation of assets valued at more than 10 per cent of the balance sheet value of all assets) and may refuse to perform certain transactions concluded by the debtor if such transactions impede the restoration of the debtor’s solvency or their performance would cause loss to the debtor. The insolvency administrator maintains the register of claims, recovers funds due to the debtor, and develops and implements an external management plan that is approved by a decision taken at the creditors’ meeting and contains measures necessary to restore the debtor’s solvency.42

The measures for restoring the debtor’s solvency may include restructuring the debtor’s business, disposing of part of the debtor’s estate, assigning the debtor’s claims, discharging the debtor’s obligations by its shareholders, issuing additional shares to increase the debtor’s capital, selling the debtor’s entire business or substituting the debtor’s assets.43

36 If the amount of security exceeds for more than 20 per cent the amount of creditors’ registered claims, and the schedule provides for first payments to be made to creditors not later than one month after its approval, and complete repayment to creditors within a year. Article 75(2) of the Insolvency Law.
37 Articles 77, 78 and 80 of the Insolvency Law
38 Articles 82 and 83 of the Insolvency Law.
39 Article 81 of the Insolvency Law.
40 Article 88(6) of the Insolvency Law.
41 Article 93 of the Insolvency Law.
42 Article 92(2) of the Insolvency Law.
43 Article 99 of the Insolvency Law.
44 Article 109 of the Insolvency Law.
Based on the results of external management, the commercial court will either terminate insolvency proceedings (if the debts have been discharged), order settlement with the creditors according to the register of claims (if the debtor’s solvency has been restored) or commence receivership.45

**Receivership**

The court introduces receivership by the judgment to declare the debtor insolvent. The aim of receivership is to satisfy the creditors’ claims according to the priorities established by law. Receivership lasts for up to six months and may be extended for a further six months.46

The insolvency administrator replaces the director general of the debtor.47 The insolvency administrator takes inventory of the debtor’s assets and takes measures for their protection, appoints an appraiser to value the debtor’s estate, arranges for sale of the debtor’s assets, recovers funds due to the debtor, searches for and returns any of the debtor’s assets that are in the possession of third parties, informs the debtor’s employees of their prospective dismissal, maintains the register of claims and makes payment to the creditors according to the register.

Pursuant to the Insolvency Law, all of the debtor’s assets must be included in the insolvency estate. Recently, the courts have ruled that such assets include bitcoins and required the insolvent debtor to disclose to the receiver the access details to his or her bitcoin wallet.48

Based on the results of receivership, the commercial court will rule either to terminate insolvency proceedings (if the debts have been discharged by the debtor’s shareholders) or to complete receivership. The receivership is deemed completed when the liquidation of the debtor is registered with the Unified State Register of Legal Entities.49

**Amicable settlement**

The debtor and its creditors may agree on an amicable settlement at any stage of the insolvency proceedings. Third parties may also participate and accept certain rights and obligations according to an amicable settlement. Creditors may take a decision on amicable settlement at a creditors’ meeting. This decision is taken by a simple majority of unsecured creditors’ votes in existence, provided that all the secured creditors vote for the amicable settlement. A settlement agreement may provide for a discount on claims of a creditor, lower applicable interest rate or settlement of claims by way of transfer of assets (rather than monetary funds) only if the relevant creditor agrees.50 Any amicable settlement must be approved by the court. The court may withhold approval for a number of reasons, including a failure to make full payment of claims of the first and second priority, a breach of third parties’ rights or breach of the rights of creditors who voted against the settlement or did not agree to it.51 An amicable settlement is not binding on any creditors whose claims were not registered as of the date it was concluded and who did not participate in it for this reason.

---

45 Article 119(6) and 119(7) of the Insolvency Law.
46 Article 124(2) of the Insolvency Law.
47 Articles 127 and 129 of the Insolvency Law.
49 Article 149 of the Insolvency Law.
50 Article 156 of the Insolvency Law.
51 Articles 150–167 of the Insolvency Law.
If the debtor fails to comply with the amicable settlement, the creditor may either request the court to issue an enforcement order and request the bailiffs to enforce it, or the creditor (or several creditors) may request the court to terminate the amicable settlement, provided that its (their) claims exceed 25 per cent of all the registered creditors’ claims at the time of approval of the amicable settlement, and the breach of the amicable settlement is material.\(^{52}\) If the court finds that an application to terminate the amicable settlement has merit, it would terminate the amicable settlement for all creditors, and would reopen the insolvency proceedings. The court would introduce the insolvency procedure in the course of which the amicable settlement was approved. The creditors who participated in the amicable settlement may file their claims for registration in the course of the new insolvency in the amount set by the amicable settlement (to the extent the claims remain unpaid).\(^{53}\)

iv Starting proceedings

Commencement of insolvency proceedings by the debtor

The debtor may file for insolvency if it anticipates such owing to the circumstances in which it will not be able to discharge its debts on time.\(^{54}\) In certain instances (e.g., where the debtor’s funds or assets are insufficient to discharge all of its debts), the debtor must file for insolvency.\(^{55}\) The debtor is required to publish a notice of its intention to file an insolvency petition 15 days in advance.\(^{56}\)

Commencement of insolvency proceedings by creditors or employees

Creditors, current or former employees (if salary or severance payments to them are in arrears) or a tax authority may also file for the debtor’s insolvency by submitting a petition to the court at the place of the debtor’s location. Creditors must confirm their claims with a judgment or an arbitral award enforceable in Russia, save for creditors whose claims arise out of banking operations (such as providing loans, mortgages and guarantees) that are allowed to initiate insolvency proceedings after giving a public notice of their intention to file an insolvency petition in advance.\(^{57}\) The tax authorities may also file for insolvency of a debtor without prior receipt of a court judgment. Insolvency proceedings will only be initiated if the debtor’s liabilities are at least 300,000 roubles and are overdue for three months.\(^{58}\) A creditor is also required to publish a notice of its intention to file an insolvency petition 15 days in advance.\(^{59}\)

---

52 Article 164(2) of the Insolvency Law.
53 Article 166(1) of the Insolvency Law.
54 Article 8 of the Insolvency Law.
55 Article 9 of the Insolvency Law.
56 Article 7(2.1) of the Insolvency Law (as amended by Federal Law No. 218 FZ dated 29 July 2017).
57 Article 7 of the Insolvency Law. The Supreme Court interpreted this rule as giving right to any person whose claims arise out of banking operations (as defined in Article 5 of Federal Law No. 395-1 dated 2 December 1990 on Banks and Banking Activities) to file for insolvency of its debtors using the simplified procedure. This may apply to persons who acquired claims from the banks (Ruling No. 306-ЭС16-3611 dated 12 October 2016). The banks, however, cannot use the simplified procedure if their claims do not arise out of banking operations (for example, claims related to lease or construction agreements) (Ruling No. 305-ЭС16-18717 dated 27 March 2017).
58 Articles 3(2) and 6(2) of the Insolvency Law.
59 Article 7(2.1) of the Insolvency Law (as amended by Federal Law No. 218 FZ dated 29 July 2017).
The court will consider the merits of the insolvency petition for a period of between 15 and 30 days. Upon the petitioner's request, the court may introduce injunctive measures available under the procedural rules. If the court finds that the petition has merit, it will issue an order to begin the first stage of the insolvency proceedings: supervision.

Special requirements apply to the commencement of insolvency proceedings of certain types of legal entities and individuals. They are described in Section I.vi.

If two or more insolvency petitions are filed in relation to the same debtor, the court will accept the second one and all subsequent applications as applications to participate in the insolvency proceedings. If the petitioner (including the debtor) reaches settlement with the debtor or withdraws its insolvency petition before the court considers it on the merits, or if the court finds that the application has no merit, the court will consider the next application filed. If no other insolvency applications are filed, the court will terminate the proceedings.

Following the withdrawal of an insolvency petition, the creditor cannot file another insolvency petition based on the same claim. It can, however, register this claim if the insolvency procedure is introduced upon another creditor's or the debtor's petition.

The court should not accept a withdrawal of an insolvency petition after the supervision stage is introduced. However, the court can terminate the insolvency proceedings following the withdrawal of all creditors' claims after the term for filing them has expired.

To prevent insolvency, the debtor has to settle the creditor's claims before the court considers the insolvency petition on the merits and demonstrate to the court that the criteria for introducing supervision are not met.

v Control of insolvency proceedings

The court, the insolvency administrator and the creditors (generally through the creditors’ committee or the creditors’ meeting) control the insolvency proceedings.

The court’s discretion and powers to control the insolvency proceedings are wide. The court takes the final decision on which insolvency procedures would apply, on the matter of removal of the insolvency administrator, the registration of creditors’ claims, declaring transactions of the debtor invalid and resolving any differences between the insolvency administrator and the creditors (such as related to valuation and sale of assets). Any decisions taken by the insolvency administrator, the creditors’ meetings and creditors’ committee may be challenged in court by the parties to the insolvency proceedings.

The insolvency administrator’s powers vary depending on the stage of the insolvency proceedings. In general, their functions include the following:

a to control the debtor’s business, assets, accounting and other documents and related information;

b to request information regarding the debtor’s activities and operations from third parties;

c to control the debtor’s business, assets, accounting and other documents and related information.

d to request information regarding the debtor’s activities and operations from third parties.

60 Article 42(6) of the Insolvency Law.
61 Article 42(7) of the Insolvency Law.
62 Article 7 of the Resolution of the SCC Plenum, No. 35 dated 22 June 2012.
63 Article 12 of the Resolution of the SCC Plenum, No. 35 dated 22 June 2012.
64 Article 11 of the Resolution of the SCC Plenum, No. 35 dated 22 June 2012.
65 ibid.
66 Article 15(4) of the Insolvency Law.
67 Articles 10(5), 12(1), 20.3(1), 69.9(1), 71(2) and 139 of the Insolvency Law.
to contest or agree with creditors’ applications for registration of claims;
d to hold the register of creditors’ claims and distribute the proceeds of sale of assets;\textsuperscript{68}
e to arrange for the sale of assets. For this purpose the insolvency administrator is empowered to make the inventory of assets, prepare draft conditions of sale, select the valuer and auction organiser;
f to challenge the debtor’s transactions;
g to prepare and file applications to hold the debtor’s controlling persons liable for their actions; and
h to call creditors’ meetings and arrange them.

Further, as discussed in Section I.iii, at the external management and receivership the insolvency administrator replaces the debtor’s management.

Given these wide powers, the character and the fidelity of the insolvency administrator are important for proper conduct of the insolvency proceedings.

For the supervision, the creditor who filed for insolvency selects a candidate insolvency administrator or the self-regulated organisation to nominate a candidate as an insolvency administrator.\textsuperscript{69} If the debtor files for insolvency, it does not select the insolvency administrator. In this case, the court selects a self-regulated organisation that nominates a candidate insolvency administrator, until the Ministry of Economic Development approves a procedure for selection of insolvency administrators. The court approves the candidate administrator if he or she meets all the criteria required by law.\textsuperscript{70} The creditors at their meeting may decide to change the insolvency administrator and to select another insolvency administrator for further insolvency procedures (such as financial rehabilitation, external management and receivership).\textsuperscript{71} Apart from that, the creditors cannot decide to remove an insolvency administrator at any stage at their discretion in the absence of any misconduct on the part of the insolvency administrator. If the insolvency administrator breaches the law, the creditors may request the court to hold him or her liable and to remove him or her and nominate another insolvency administrator.

The creditors’ meeting is a primary body through which the creditors exercise control over the insolvency proceedings. At such meetings the creditors may decide upon the strategy of the proceedings (e.g., to choose the insolvency procedures to be applied for)\textsuperscript{72} to enter into a settlement agreement and its conditions.\textsuperscript{73} It is through this body that the creditors control the insolvency administrator. For instance, the sale of the debtor’s non-encumbered assets by the administrator should be approved by a decision passed at the creditors’ meeting.\textsuperscript{74} At the meetings the creditors are also empowered to nominate the administrator or request the court to remove the current administrator (provided that they have breached the law).\textsuperscript{75}

\textsuperscript{68} The insolvency administrator generally includes claims to the register upon a court decision. The exceptions include employees’ claims.
\textsuperscript{69} Articles 65(1) and 45 of the Insolvency Law.
\textsuperscript{70} Article 37(5) of the Insolvency Law. The Ministry of Economic Development has not approved the procedure for selection of insolvency administrators.
\textsuperscript{71} Article 12(2) of the Insolvency Law.
\textsuperscript{72} Article 12 of the Insolvency Law.
\textsuperscript{73} ibid.
\textsuperscript{74} Article 139(1.1) of the Insolvency Law.
\textsuperscript{75} Article 12(2) of the Insolvency Law.
The rights of creditors to control the proceedings depend on their status since the secured creditors’ voting rights are limited to voting at the supervision and the financial rehabilitation or external management if they decide not to enforce the collateral in the course of these insolvency procedures.\textsuperscript{76} However, generally secured creditors have very limited voting rights at the receivership unless they prefer to waive their secured rights and register their claims as non-secured.\textsuperscript{77} Nonetheless, the secured creditors have the right of veto with respect to certain matters (e.g., settlement agreement,\textsuperscript{78} sale of pledge or mortgage).\textsuperscript{79} Further, secured creditors have voting rights on the matters of nomination of insolvency administrators and their removal.\textsuperscript{80}

The role of the creditors’ committee is to streamline control of the creditors over the actions of the insolvency administrator. The creditors’ meeting may also delegate certain powers to the creditors’ committee\textsuperscript{81} such as to request information on the debtor’s financial situation and the status of the receivership from the insolvency administrator; to challenge the administrator’s actions in court and to approve conditions for a sale of assets.\textsuperscript{82}

The managerial bodies of the debtor may also exercise certain functions in the course of the insolvency (depending on the stage of the insolvency proceedings as discussed in Section I.iii).

\textbf{vi Special regimes}

Individuals and certain entities are excluded from the general insolvency regime (discussed further below).

For individuals, the special insolvency regime applies. The following groups of legal entities are treated differently from the general insolvency regime:

\begin{itemize}
  \item[a] legal entities that may not be declared insolvent;
  \item[b] legal entities to which special rules apply within the framework of the general regime; and
  \item[c] financial institutions whose insolvency procedure is governed a special regime that materially differs from the general regime.
\end{itemize}

A high-level overview of the specific regulation is given below.

\textbf{Legal entities that may not be declared insolvent}

The following legal entities cannot be declared insolvent\textsuperscript{83} according to Russian law:

\begin{itemize}
  \item[a] state-owned enterprises established for special purposes;\textsuperscript{84}
\end{itemize}

\begin{footnotesize}
\begin{itemize}
  \item[76] Article 18.1(3) of the Insolvency Law.
  \item[77] Article 12(1) of the Insolvency Law.
  \item[78] Article 150(2) of the Insolvency Law.
  \item[79] Article 138(4) of the Insolvency Law.
  \item[80] Article 12(1) of the Insolvency Law.
  \item[81] Article 17(1) of the Insolvency Law.
  \item[82] Article 17(4) of the Insolvency Law.
  \item[83] Article 65(1) of the Russian Civil Code.
  \item[84] ‘Kazennoe predpriatie’ in Russian.
\end{itemize}
\end{footnotesize}
b public law legal entities (non-commercial legal entities established by the state to exercise public functions);\textsuperscript{85}

c political parties;

d religious organisations;

e state corporations or state companies if the federal law according to which the relevant entity was established does not permit insolvency; and

f funds, if the federal law according to which the relevant fund was established prohibits insolvency.

The same applies to international organisations with headquarters in Russia that are exempt from Russian domestic regulation and governed by public international law.

**Legal entities to which special insolvency rules apply**

The Insolvency Law establishes specific regulations on insolvency\textsuperscript{86} of the following types of debtors:

a town-forming enterprises (i.e., enterprises that employ more than 25 per cent of the working population of the relevant community);\textsuperscript{87}

b agricultural enterprises (i.e., companies that receive more than 50 per cent of their profit from agricultural business);\textsuperscript{88}

c strategic enterprises and enterprises important for state security;\textsuperscript{89}

d natural monopolies;

e developers dealing with construction of residential buildings;\textsuperscript{90} and

f clearing participants that are professionals in the securities markets and financial institutions participating in clearing.\textsuperscript{91}

There are no special insolvency rules relating to corporate groups. However, the courts continue developing case law in this area. For example, courts classified inter-group loans as contributions to the debtor’s charter capital, and ruled that such claims must not be registered as ordinary creditors’ claims and satisfied in the course of an insolvency.\textsuperscript{92}

\textsuperscript{85} Article 65 of the Civil Code as amended by Federal Law No. 236 FZ dated 3 July 2016 on public law companies in the Russian Federation and amendments to certain legal acts of the Russian Federation (will become effective on 2 October 2016)

\textsuperscript{86} Article 168 of the Insolvency Law.

\textsuperscript{87} Article 169 of the Insolvency Law.

\textsuperscript{88} Article 177 of the Insolvency Law.

\textsuperscript{89} Article 190 of the Insolvency Law. A list of strategic enterprises is established by the Decree of the Government of the Russian Federation No. 1226-p dated 20 August 2009 (as amended).

\textsuperscript{90} Article 201.1 of the Insolvency Law.

\textsuperscript{91} Article 201.16 of the Insolvency Law.


© 2018 Law Business Research Ltd
The Supreme Court also ruled that it is possible to challenge the following types of transactions in the course of the debtor’s insolvency on the grounds set by the Insolvency Law: (1) transactions aimed at the disposal of the assets of a subsidiary of the debtor;\(^93\) (2) fraudulent dilution of shares in a subsidiary of the debtor aimed at causing damage to the creditors.\(^94\)

The most important differences in the insolvency regime include:

\(a\)

an increased insolvency test: an agricultural enterprise may be declared insolvent if the amount of outstanding claims exceeds 500,000 roubles,\(^95\) a strategic enterprise\(^96\) or a natural monopoly\(^97\) may be declared insolvent if the amount of creditors’ claims exceeds 1 million roubles, and the claims are overdue for more than six months;

\(b\)

competent state or municipal authorities participating in the insolvency proceedings of town-forming enterprises,\(^98\) strategic enterprises,\(^99\) natural monopolies\(^100\) and developers;\(^101\)

\(c\)

the competent state or municipal authorities’ ability to request the court to take measures aimed at restoration of solvency of a town-forming enterprise\(^102\) or a strategic enterprise,\(^103\) give a guarantee of repayment of debts of the relevant enterprise and request the court to introduce external management procedure;

\(d\)

the special requirements to insolvency administrators (e.g., concerning matters relating to state secrets, experience in certain areas (e.g., in construction)); and

\(e\)

the special procedures, which apply to the sale of assets of town-forming,\(^104\) agricultural,\(^105\) strategic enterprises\(^106\) and natural monopolies. They are as follows:\(^107\)

\(\cdot\) the debtor’s assets necessary for its activities are first sold together as a single lot;
\(\cdot\) certain persons may have pre-emptive rights to acquire the debtor’s assets; and
\(\cdot\) the special requirements applicable to the buyer (e.g., a licence to engage into certain activities) or to its activities after acquisition of the assets (such as preservation of jobs at the town-forming enterprise, continuation of activities of the natural monopoly, etc.), which may be in place; and

\(f\)

special regime applicable to specific assets. For example, client assets held by brokers in a special brokerage account or trade account are not included in the broker’s insolvency estate; the insolvency administrator cannot dispose of funds the debtor deposited on an escrow account but the insolvency administrator may still challenge the escrow agreement or transfer of the funds to the escrow agent in insolvency.

\(^93\) Ruling of the Supreme Court No. 305-ЭС17-17342 dated 12 March 2018.
\(^94\) Ruling of the Supreme Court No. 305-ЭС17-12763(1,2) dated 18 December 2017.
\(^95\) Article 177 of the Insolvency Law.
\(^96\) Article 190(3) of the Insolvency Law.
\(^97\) Article 197(2) of the Insolvency Law.
\(^98\) Article 170 of the Insolvency Law.
\(^99\) Article 192 of the Insolvency Law.
\(^100\) Article 198 of the Insolvency Law.
\(^101\) Article 201.2 of the Insolvency Law.
\(^102\) Articles 171–174 of the Insolvency Law.
\(^103\) Articles 191, 194 and 195 of the Insolvency Law.
\(^104\) Articles 175 and 176 of the Insolvency Law.
\(^105\) Article 179 of the Insolvency Law.
\(^106\) Article 195 and 196 of the Insolvency Law.
\(^107\) Article 201 of the Insolvency Law.
There is special detailed regulation of insolvency of developers aimed at completing the construction of the residential premises and the transfer of the residential premises to the persons who have acquired them.\(^{108}\) For this reason there is a separate register of the claims of these persons whose claims have priority with respect to the premises they have acquired and their other unpaid claims are of higher priority than other creditors’ claims. There are detailed provisions on the transfer of the unfinished construction to a building society set by the creditors who acquired premises from the debtor.

There is a new mechanism for rehabilitation of development companies engaged in construction of residential buildings. Public company Fund for protection of interests of individual buyers of residential premises was established. Development companies must deposit 1.2 per cent of the value of every contract with an individual to this fund. Receivers of development companies must be accredited with the Fund. The Fund may finance completion of construction of the residential building.\(^{109}\)

**Legal entities whose insolvency procedure is governed by the special regime**

Regulation of insolvency of the financial institutions materially differs from the general insolvency regime. The financial institutions include:

\(\begin{align*}
\text{a} & \quad \text{credit institutions;} \\
\text{b} & \quad \text{insurance companies;} \\
\text{c} & \quad \text{professional participants of securities markets;} \\
\text{d} & \quad \text{private pension funds including pension funds that are engaged in mandatory pension insurance (there is special regulation of insolvency);} \\
\text{e} & \quad \text{management companies of investment funds, mutual investment funds and private pension funds;} \\
\text{f} & \quad \text{clearing houses;} \\
\text{g} & \quad \text{market operators;} \\
\text{h} & \quad \text{consumer credit cooperatives; and} \\
\text{i} & \quad \text{microfinance institutions.}\(^{110}\)
\end{align*}\)

The Insolvency Law provides a number of special measures aimed at restoring the solvency of financial institutions that may be approved by the Central Bank.\(^{111}\)

The Central Bank may appoint a temporary administration of a financial institution for three to six months with a possibility of a three-month extension.\(^{112}\) The temporary administration consists of an insolvency administrator and other members selected by the Central Bank. Its functions and powers are similar to the powers of temporary administration of a credit institution discussed below. There are limitations on performing certain transactions; however, there is no general moratorium on payment to creditors.

\(^{108}\) Article 201.4 and 201.15-2 of the Insolvency Law.
\(^{110}\) Article 180 of the Insolvency Law.
\(^{111}\) Articles 180(4) and 183.1 of the Insolvency Law.
\(^{112}\) For example, if the financial institutions repeatedly during one month fails to make a payment in 10 days when due, or fails to make a mandatory payment (such as taxes) in ten days when due, or does not have enough funds to make a payment when due. Articles 183.2 and 183.5 of the Insolvency Law.
There is a separate insolvency test for financial institutions.\(^{113}\) A financial institution may be declared insolvent if it has failed to perform claims confirmed by a court judgment for longer than 14 days irrespective of the amount of the claim or if it did not become solvent after temporary administration. There are special requirements applicable to claims against an insurance company based on insurance contracts, and claims do not have to be confirmed by a court judgment.\(^{114}\) However, some courts decide that such claims must be undisputed.\(^{115}\) In addition to creditors and the debtor itself, temporary administration and the Central Bank may file for insolvency.\(^{116}\)

As a general rule, only supervision procedure and receivership are applied to financial institutions. However, the supervision procedure is not applicable to the pension funds engaged in mandatory pension insurance,\(^{117}\) the insurance companies or once the temporary administration in the financial institution is appointed.\(^{118}\) If the court finds that an insolvency petition filed by a creditor of an insurance company has merit, the insolvency proceedings will be suspended until the Central Bank or the temporary administration files for insolvency of the insurance company.\(^{119}\)

The Central Bank nominates an insolvency administrator, and there are special requirements applicable to him or her.\(^{120}\) In the case of an insolvency of a pension fund, which is engaged in mandatory pension insurance\(^{121}\) or an insurance company,\(^{122}\) the State Corporation Deposit Insurance Agency (DIA) acts as the insolvency administrator.

There is a special procedure for the registration of the creditors’ claims. The insolvency administrator includes the creditors’ claims to the register unless there are objections to such registration. If there are objections, the court considers whether the claims have merit and rules on the matter of their registration.\(^{123}\) If the number of creditors of a professional participant of securities markets, a management company or a clearing house exceeds 100, the insolvency administrator is obliged to engage a professional registrar.\(^{124}\)

Assets belonging to clients of a professional participant of securities markets, a management company or a clearing house held on special accounts are not included to the insolvency estate. The insolvency administrator transfers the relevant assets to the clients if they were duly paid for the services of the debtor.\(^{125}\)

\(^{113}\) Article 183.16 of the Insolvency Law.
\(^{114}\) Article 184.2 of the Insolvency Law.
\(^{115}\) For example, Resolution of the Ninth Commercial Appellate Court No. 09ЭС-58561/2015 dated 3 February 2016.
\(^{116}\) Article 173.19 of the Insolvency Law.
\(^{117}\) Article 187.6 of the Insolvency Law.
\(^{118}\) Article 183.17 of the Insolvency Law.
\(^{119}\) Article 184.4(3) of the Insolvency Law (as amended by Federal Law No. 222-ЭС dated 23 June 2016, effective as of 21 December 2016).
\(^{120}\) Articles 183.19 and 183.25 of the Insolvency Law.
\(^{121}\) Article 187.8 of the Insolvency Law.
\(^{122}\) Article 184.4-1 of the Insolvency Law introduced by Federal Law No. 222-ЭС dated 23 June 2016.
\(^{123}\) Article 183.26 of the Insolvency Law.
\(^{124}\) Article 185.3 of the Insolvency Law.
\(^{125}\) Article 185.6 of the Insolvency Law.
Special rules regulate sale of assets belonging to pension funds. Assets aimed at securing pension reserves are not included in the insolvency estate and there is a special regulation regarding their use for payment of compensation to the depositors. In certain cases, obligations to make payment of pensions may be transferred to another pension fund.

The Insolvency Law contains specific rules regulating the sale of assets of an insurance company that include the insurance portfolio and the assets aimed to cover insurance reserves. They may be sold in one lot to another insurance company that has the necessary licences and assets to cover them.

There are also specific distributional priorities that depend on the type of insurance (e.g., claims related to old age and survivors insurance are of the first priority while other claims are of lower priority). As to the pension funds, the distributional priorities depend on whether the pension payments are already due; there are specific priorities applicable in course of insolvency of pension funds that are engaged in mandatory pension insurance.

The insolvency of credit institutions, such as banks, is governed by very detailed special rules, which differ from the rules regulating the insolvency of other financial institutions.

In general, if a credit institution faces financial difficulties, the Central Bank may decide, before revoking that credit institution's banking licence, to use financial rehabilitation measures, including an appointment of temporary administration headed by a representative of the Central Bank. If the Central Bank appoints temporary administration, it may limit or suspend the powers of the credit institution's management. The temporary administration performs an analysis of the debtor's financial situation to make a decision on whether there are grounds to revoke the banking licence or use rehabilitation measures; it controls the assets by the credit institution and gives consent to some of the transactions by the management of the debtor. If the Central Bank decides to suspend the powers of the debtor's management, the temporary administration assumes its functions. It may ask the Central Bank to introduce a moratorium on payments by the credit institution. The temporary administration may file applications with the court to challenge transactions of the credit institution or to hold the credit institution's controlling persons or chief financial officer liable.

If the Central Bank decides to revoke the banking licence for whatever reason related or unrelated to insolvency, the credit institution must be liquidated. Accordingly, it must

---

126 Article 186.5 of the Insolvency Law.
127 Article 187.10 of the Insolvency Law.
128 Article 184.7 of the Insolvency Law.
129 Article 184.10 of the Insolvency Law.
130 Article 186.7 of the Insolvency Law.
131 Article 187.11 of the Insolvency Law.
132 Grounds to use financial rehabilitation measures are set by Article 189.10 of the Insolvency Law and include, inter alia, failure to meet criteria of liquidity or sufficiency of its assets, failure to make a payment when due, etc.
133 Article 189.9 of the Insolvency Law.
134 Article 189.30 of the Insolvency Law.
135 Article 189.31 of the Insolvency Law.
136 The Central Bank may revoke the banking licence in events unrelated to insolvency, such as giving false information while receiving the licence, materially wrong accounting statements and breach of money laundering legislation, etc. See Article 20 of the Law on Banks.
appoint temporary administration that generally acts until the date the credit institution is declared insolvent or until a liquidator is appointed if there is no need for first declaring insolvency.\textsuperscript{137}

A credit institution may be declared insolvent if it fails to perform its obligations within 14 days of them becoming due or if its assets are not sufficient to fulfill its financial obligations.\textsuperscript{138}

The credit institution or a creditor may file an application to declare the credit institution insolvent only after the Central Bank decides to revoke the banking licence.\textsuperscript{139} In any event, if the credit institution meets the insolvent criteria at the date of revocation of the banking licence, the Central Bank must file for insolvency within five days of publication of the revocation of the banking licence, or within five business days of the temporary administration informing the Central Bank about it.\textsuperscript{140}

If the court finds that the insolvency petition has merit, the credit institution is declared insolvent and the receivership procedure is commenced. If the credit institution had a licence to engage deposits from individuals, the DIA would act as the insolvency administrator.\textsuperscript{141}

There are special rules regulating post-commencement claims of credit institutions, registration of creditors’ claims, challenge of transactions and directors’ liability. There is also detailed regulation concerning specific issues relevant to financial markets such as subordinated loans, completion of relations under financial contracts and clearing relations, etc.

There are specific distributional priorities:

\begin{itemize}
\item[a] first priority claims: The claims for the compensation for damage to health or loss of life; individuals’ claims arising from deposit agreements and bank account agreements (except for claims of individuals engaged in commercial activities related to accounts used for such commercial activities); claims of the DIA that it has received as a result of subrogation upon payments of the insurance compensation made to individual depositors; and claims of the Central Bank for amounts it has paid to individuals as a compensation for their claims;
\item[b] second priority claims: employees’ salaries, severance payments, royalties (with a number of specific exceptions); and
\item[c] third priority claims: all other claims.\textsuperscript{142}
\end{itemize}

Secured creditors do not have any priority over first and second priority claims.

Amendments to the law introduced new resolution mechanisms applicable to major banks, insurance companies and construction companies.

The Central Bank established the Fund for Consolidation of the Bank Sector. The Central Bank is the 100 per cent shareholder of the Management Company of this fund (the Management Company). The Management Company may decide to finance the resolution of major banks. The Management Company becomes the controlling shareholder of the distressed bank. If the bank has negative net assets, the bank’s shareholders must transfer

\begin{itemize}
\item[137] Article 189.43 of the Insolvency Law.
\item[138] Article 189.8 of the Insolvency Law.
\item[139] Article 189.61 of the Insolvency Law.
\item[140] Article 189.61 of the Insolvency Law.
\item[141] Article 189.77 of the Insolvency Law.
\item[142] Article 189.92 of the Insolvency Law.
\end{itemize}
their shares to the Management Company for 1 rouble. The Management Company finances resolution procedures by way of contributions to the bank's charter capital (from the loans it receives from the Central Bank) and acts as the bank's crisis manager. After resolution measures are complete, the Management Company must sell its shares in the bank on the market.143

Pursuant to recent amendments to the Insolvency Law, a similar Fund for consolidation of the insurance sector was established. The Management Company manages this fund. The Management Company is authorised to manage resolution procedures of insurance companies similar to those applicable to banks and finance them from the Fund for Consolidation of the Insurance Sector.144

**Insolvency of individuals**

A creditor may file for insolvency of an individual if the amount of his or her debt exceeds 500,000 roubles145 and is overdue for more than three months.146 The individual is obliged to file for insolvency if a payment to a creditor makes it impossible to pay other creditors and the amount due exceeds 500,000 roubles. The debtor has a right to file for insolvency if it is manifestly unable to pay its debts on time or the amount of its debts exceeds the value of its assets (there is no minimum threshold).147

In general, the following insolvency procedures may apply:148 restructuring of debts; a sale of assets; and a settlement agreement.

If the court finds that the insolvency petition has merit, it introduces, as a general rule, the procedure of debt restructuring and appoints an insolvency administrator.149 In the course of this procedure, the insolvency administrator analyses the financial situation, a moratorium on the payment of debts is introduced, no interest and penalties accrue on any claims (except for post-commencement claims). The debtor cannot enter into any transactions for a value exceeding 50,000 roubles without the consent from the insolvency administrator.150 The debtor or the creditors may work out a debt restructuring plan providing for repayment of debts for no more than three years.151 The court approves this plan if it meets the criteria set by the Insolvency Law, it is realistic and does not breach third parties' rights. In certain cases, the court may approve the debt restructuring plan without the consent of the debtor or the creditors.152

If there is no basis for the approval of a debt restructuring plan, the court declares the debtor insolvent and commences the procedure of sale of assets.153 The aim of this procedure is to have the debtor’s assets sold and the creditor’s claims repaid.

144 Amendments introduced by Federal Law No. 87-FZ dated 23 April 2018.
145 In 2017 RUB/USD exchange rate fluctuated from 56 to 60 roubles to 1 dollar.
146 Article 213.3(2) of the Insolvency Law.
147 Article 213(4) of the Insolvency Law, clauses 8–10 of the Resolution of the Plenary Session of the SC, No. 45 dated 13 October 2015.
148 Article 213.2 of the Insolvency Law.
149 Article 213.6 of the Insolvency Law.
150 Article 213.11 of the Insolvency Law.
151 Article 213.14(2) of the Insolvency Law.
152 Article 213.17(4) of the Insolvency Law.
153 Article 213.24 of the Insolvency Law.
Certain assets of an individual do not constitute a part of the insolvency estate.\textsuperscript{154} Such assets include the only residential premises of the individual and land plots on which the premises are situated (provided that the land plots are not mortgaged) and the equipment necessary for the debtor to conduct his or her professional activities worth not more than 750,000 roubles.\textsuperscript{155}

The distributional priorities applicable in the course of insolvency of individuals differ from the general priorities. The major difference is that the claims of the first priority include alimony claims and that a secured creditor gets 80 per cent of the proceeds of sale of the pledged assets and in addition may receive up to 10 per cent of the secured claims if they are not used for payment of court fees and expenses of the insolvency administrator.\textsuperscript{156}

In the end of the sale of assets, the court is to rule on the discharge of the debtor from unsettled claims.\textsuperscript{157} The court will not release the debtor from obligations if it acted unlawfully or in bad faith while undertaking or performing its obligations, which serve as a ground for the creditor’s claims. For instance, the court will not issue a discharge order if it finds that the debtor intentionally gave false information to the insolvency administrator or the court in the course of the insolvency proceedings. If this became known after the insolvency proceedings are complete, the decision to release the debtor from its obligations may be set aside.

In any event the debtor cannot be released from certain types of debts including post-commencement claims, claims for compensation of harm to life or health, claims for payment of salary, alimony claims and claims to hold the debtor liable for his or her actions as a director of a legal entity or for damage caused as an insolvency administrator.\textsuperscript{158} Upon completion of insolvency proceedings the court issues enforcement orders and the creditors may enforce their claims via the general enforcement procedure.

\section*{Cross-border issues}

Russian insolvency law does not contain detailed regulation of cross-border issues. Insolvency of legal entities registered in Russia is subject to the exclusive jurisdiction of the Russian courts.\textsuperscript{159}

Foreign citizens residing in Russia may be declared insolvent in Russia, as well as Russian citizens residing abroad.\textsuperscript{160} These proceedings will be treated as plenary insolvency proceedings. In practice, Russian courts permitted insolvency of German, Chinese and Uzbek citizens residing in Russia. The courts ruled that foreign citizens may be declared insolvent in Russia if: (1) their centre of main interests is in Russia, (2) it is in accordance with the

\begin{flushleft}
\footnotesize
\textsuperscript{154} Article 213.25(3) of the Insolvency Law, Article 446 of the Civil Procedure Code.
\textsuperscript{155} 100 minimum salary rates set by the Russian government, which is 7,500 roubles as of 1 July 2016.
\textsuperscript{156} Article 213.27 of the Insolvency Law.
\textsuperscript{157} Article 213.28 of the Insolvency Law.
\textsuperscript{158} Article 213.28 (3, 5 and 6) of the Insolvency Law.
\textsuperscript{159} Articles 38 and 248(1.5) of the Commercial Procedure Code.
\textsuperscript{160} Clause 5 of the Resolution of the Plenary Session of the SC No. 45 dated 13 October 2015.
\end{flushleft}
principle of effective jurisdiction; and (3) the case is closely connected to Russia, for example if the creditor, the debtor and its assets are in Russia, or if the debtor is a registered individual entrepreneur in Russia.161

However, there is no publicly available information about a case where a foreign legal entity has been declared insolvent in Russia. A Russian court terminated the insolvency proceedings concerning a Cypriot company which had a representative office in Russia on the grounds of lack of jurisdiction. The court also ruled that Russian Insolvency Law does not apply to foreign companies because their insolvency is governed by foreign lex personalis.162

The Insolvency Law does not regulate non-main or ancillary proceedings in Russia with respect to a foreign person.

However, a final judgment of a foreign court to declare the debtor insolvent and to appoint an insolvency administrator may be recognised and enforced on the grounds of an international agreement, or absent such agreement, on the grounds of international comity and reciprocity.163 If the judgment does not require enforcement, it may be recognised without any special procedure. Interested parties may file objections against the recognition with a Russian court within one month of learning about the judgment.164 Non-final court decisions and preliminary orders (such as orders to appoint a temporary administrator as an interim measure) may not be recognized and enforced.165 However, powers of the temporary


162 According to Resolution of Commercial Court for the Moscow circuit No. A40-15873/17 dated 15 November 2017, Russian Insolvency Law does not apply to foreign companies.


165 Clause 33 of Resolution of the Plenary Session of the SCC No. 55 dated 12 October 2006.
administrator of a foreign entity or individual to act in Russia may arguably be recognised as a part of *lex personalis* or *lex concursus* of the foreign person.\(^{166}\) There is, however, contradictory court practice on this matter.\(^{167}\)

If the judgment of a foreign court to declare a debtor insolvent and to appoint an insolvency administrator is recognised in Russia, the foreign insolvency administrator may exercise his or her powers to seize assets located in Russia, vote with shares in Russian legal entities, request interim measures in support of foreign court proceedings\(^ {168}\) and file applications with the Russian courts to declare transactions of the debtor invalid provided that he or she does not exceed his or her powers granted by foreign *lex concursus*. While making requests to declare transactions invalid, the insolvency administrator may either refer to the grounds set by Russian law (Articles 10 and 168 of the Russian Civil Code discussed in Section I.i (abuse of right)) or foreign insolvency law. The Russian courts have allowed the claimants to seek the declaration of the invalidity of the transactions made by the debtors in violation of foreign insolvency law applicable to the transactions.\(^ {169}\)

If a foreign person is declared insolvent and the judgment is recognised in Russia, the Russian court may dismiss proceedings against the foreign debtor on procedural grounds.\(^ {170}\)

If the claims of a creditor filed for registration in the course of Russian insolvency proceedings are governed by foreign substantive law (for example, the law of the contract, or law governing statutory interest), the Russian courts must apply the foreign law.\(^ {171}\)

**II INSOLVENCY METRICS**

Currently, the Russian economy continues its recovery. In 2018, several rating agencies raised Russia’s credit rating. Fitch Ratings reaffirmed the country’s investment grade level with a positive outlook: ‘The Positive Outlook reflects continued progress in strengthening the economic policy framework underpinned by a more flexible exchange rate, a strong

---


168 Ruling of the SCC No. 2860/10 dated 4 May 2010.

169 Resolution of the Presidium of the SCC No. 10508/13 dated 12 November 2013, Ruling of the SCC No. VAS-11777/13 dated 17 March 2014. The Twenty First Commercial Appellate Court has considered this matter (resolution No 21AP-864/2016 dated 12 August 2016). One of the creditors of an insolvent Ukrainian company filed a claim with the Commercial Court of the Crimea Republic to declare invalid disposal of lease rights to a land plot located in Crimea by the insolvent company. The court of the first instance satisfied the claim. It recognised the Ukrainian insolvency without a special procedure and referred to Ukrainian rules of insolvency law. The appellate court set this ruling aside and declared the transaction valid. The reason was that the insolvency of the debtor did not *per se* lead to invalidity of the transaction. The time period for filing a cassation appeal has not expired at the time of writing.

170 The court dismissed a claim against a Dutch debtor on the grounds that the creditor has already had its claims registered in the course of the foreign insolvency proceedings. Ruling of the SCC No. 14334/07 dated 11 March 2008.

commitment to inflation-targeting and a prudent fiscal strategy. This policy mix is contributing to improved macroeconomic stability and, together with robust external and fiscal balance sheets, increases the economy’s resilience to shocks.¹⁷²

According to a report prepared by the Ministry of Economic Development of the Russian Federation, in April 2018, the increase of the GDP was 1.7 per cent as compared to the relevant period of the previous year; in May 2018 the GDP increased by 2.1 per cent.¹⁷³ The growth in industrial production in April and May (3.9 per cent and 3.7 per cent, respectively) was determined by the positive dynamics in manufacturing industry.¹⁷⁴

In 2018–2020, the economy is forecast to grow by between 1.5 and 1.8 per cent.¹⁷⁵ The Federal Service of State Statistics reported that the index of industrial production increased by 3.7 per cent in May 2018 as compared to the relevant period of the previous year. The production of natural resources increased by 1.3 per cent, and manufacturing increased by 5.4 per cent.¹⁷⁶

The economic situation differs across various sectors of economy. The growth of retail sales amounted to 2.4 per cent in May, after 2.7 per cent in April. The retail sales are supported by the growth of real disposable income and a growth of unsecured consumer credit.

The unemployment rate in April 2018 dropped to 4.75 per cent of the labour force. In May 2018 it remained at the same level excluding seasonal variability.¹⁷⁷

The data released by the Supreme Court in 2017 shows that 79,358 new insolvency petitions were filed, including 27,376 petitions filed by debtors, 32,138 petitions filed by private creditors and 6,939 petitions filed by tax authorities. Those include 34,174 petitions to declare individuals insolvent.

In 11,725 cases, the courts introduced the supervision. In 8,690 cases, after the completion of the supervision, the courts declared the debtors insolvent and introduced the receivership. In 9,788 cases, the receivership was completed, and in 1,992 cases the proceedings were terminated. The courts introduced 334 external management procedures and financial rehabilitations in 29 cases. In 2017, there was no case that was terminated as a result of repayment of debts in the course of financial rehabilitation. In most cases, the courts introduced a receivership stage after the expiration of the term of the financial rehabilitation or terminated the proceedings upon approval of a settlement agreement. The claims were fully repaid after the external management procedures in 13 cases only. In

¹⁷² https://www.fitchratings.com/site/pr/1029591.
most cases (299), debtors were declared insolvent and receivership was introduced and the receivership procedure was terminated after sale of the debtors’ assets, and the debtors were liquidated following it.

In 2017, the courts received 25,205 applications to declare transactions invalid, 1,534 requests to remove insolvency administrators and 2,251 applications to hold debtors’ controlling persons liable.

According to statistics published by the Centre of Macro-Economic Planning for the fourth quarter of 2017, the number of insolvencies increased by 3 per cent as compared to the third quarter of 2017 and by 13.2 per cent as compared to the fourth quarter of 2016. In November and December 2017, the level of bankruptcies exceeded the peak value of March 2015 by almost 5 per cent. The increase concerned most industries, in particular, construction and development, retail and business services, transport, electric energy and communications. Most insolvent companies used to operate in construction and business services. Twelve trade companies are on the list of the top twenty largest insolvent companies in the fourth quarter of 2017. At the same time, reduction in the number of insolvent companies was noted in the metal, food, and agriculture industries.

As discussed Section I.vii, Russian law does not permit non-main proceedings in respect of foreign debtors. There are no publicly available statistics as to requests for ancillary proceedings (i.e., requests for interim measures to declare transactions invalid or other).

### III PLENARY INSOLVENCY PROCEEDINGS

**1 Oktcritie Bank**

Public Company Bank Oktcritie Financial Corporation is one of the largest private Russian banks. It was established in 1993 and is on the list of 11 systemically important credit institutions in Russia. By the end of 2015, the amount of its assets was 3,363 billion roubles.

Oktcritie assisted a number of large distressed companies, including the resolution procedures of Trust Bank, a large Russian bank, and three pension funds, which had also suffered losses. It also became the controlling shareholder of Rosgosstrakh insurance company, one of the largest Russian insurance companies, which was in significant financial difficulties. Allegedly, the problems of these companies were the cause of the financial difficulties of Oktcritie. The recession and growing amount of bad loans are also likely to have contributed to the difficulties. Oktcritie experienced massive deposit outflows, which accelerated after it was downgraded in the ratings. As a result, the deficit in its capital was 300 billion roubles.

Shareholders of Oktcritie asked for the Central Bank’s support and a decision was made to use the new mechanism of resolution involving the Fund for consolidation of the bank sector. Oktcritie was the first bank to test the new mechanism.

In August 2017, the Central Bank decided to commence the resolution procedure and appointed temporary administration. The temporary administration analysed the bank’s
situation, its business and prospects for resolution. The Central Bank published information about measures to be taken, including a contribution to the charter capital of Otkritie from the Fund of consolidation of the banking sector.181

Three months later the Central Bank decided to appoint the Management Company of the Fund for consolidation of the bank sector as the temporary administrator. It replaced the management of the bank. The Management Company estimated that the bank had negative net assets, and decreased the charter capital to 1 rouble. It also terminated subordinated loans and withdrew funds from personal accounts of the bank’s management and previous shareholders. No bail-in of claims of ordinary creditors took place.

The Central Bank injected 456 billion roubles into the capital of the bank and became a holder of 99.999999999 per cent of its shares. It also appointed the bank’s new management. In December 2017, the Central Bank terminated the temporary administration of the bank on the ground that the resolution was complete.

The bank’s new management is considering restructuring the bank’s business, including the transfer of bad assets to a special subsidiary bank that will deal with them, a merger of three pension funds (subsidiaries of Otkritie), the transfer of assets unrelated to banking activities (such as insurance business, pension funds, etc.) to a specialised company. The Central Bank must further sell its shares in Otkritie. However, it may be difficult to find an investor, and the sale may take some time. The Central Bank applied the same resolution measures to two other large banks: Binbank and Promsvyazbank.

ii Yugra Bank

Yugra Bank was the country’s 33rd-largest lender by assets. It served major Russian companies such as Rosneft and Rosatom and attracted deposits from individuals by offering them high interest rates.

In July 2017, the Central Bank revoked Yugra’s banking licence. The publicly announced reason was that the bank did not meet requirements concerning the operation of a bank. It attracted deposits from individuals and invested them in bad assets, for example, granted loans to companies under control of bank’s the beneficial owners. The bank did not make the necessary reserves for such loans. The Central Bank appointed temporary administration.

The insolvency of Yugra is a rare case of the shareholders of the bank having tried to challenge the decision of the Central Bank to revoke the banking licence. They argued that the bank met applicable regulations and the decision of the Central Bank was groundless. The court, however, ruled in favour of the Central Bank.

The Central Bank filed an application to declare the bank insolvent. The next hearing is scheduled for 9 August 2018.

DIA made payments to at least 200,200 individual depositors in an amount of at least 163.96 billion roubles. It was the largest amount ever paid to depositors of an insolvent Russian bank.

iii Tractor Plants

The Tractor Plants Corporate Group is one of the largest Russian groups in the business of research and development and production of machinery. The group has more than 20 companies in 10 regions of Russia including research and development companies,

engineering companies, a foundry plant, a motor production plant, tractor plants, trade and service centres, etc. It produces agricultural machines, construction equipment, military machines and other machinery. The group employs more than 20,000 people.

The group received a syndicated loan from a number of banks, including Vneshekonombank. The group faced financial difficulties and failed to service its debt. Its debts gradually increased. According to publicly available information, the total amount of Vneshekonombank’s claims is approximately 68.5 billion roubles, the total estimated amount of creditors’ claims is 89 billion roubles. The banks proposed restructuring the loans but they failed to reach an agreement. According to Vneshekonombank, the reason is a refusal of the shareholders to apply the bail-in mechanism to inter-group debts.

Vneshekonombank filed petitions for the insolvency of a number of companies in the group.

In November 2017, the Commercial Court for Chuvashia Region commenced the supervision stage of the insolvency of the group’s parent company. Currently, the supervision stage of insolvency is ongoing. The creditors and the debtor have unsuccessfully tried to reach a settlement. On 13 July 2018, the creditors decided to ask the court to declare the debtor insolvent and to commence the receivership stage. The court is likely to agree and declare the debtor insolvent.

iv Nastyusha Grain Company

Nastyusha Grain Company was one of the largest producers of bread in the Moscow Region. It possessed 250,000 hectares of agricultural lands, 23 elevators and enterprises to store grain, flour production plants and bread bakery plants. According to publications in the media, its beneficial owners unlawfully disposed of the company’s assets. They granted loans to affiliated companies without intention to repay them. As a result, the company became unable to make payments to its creditors.

At the end of August 2017, the Moscow Commercial Court commenced the supervision stage of the insolvency. On 21 February 2018, Nastyusha was declared insolvent and the receivership stage of insolvency commenced.

According to publicly available information, major creditors of Nastyusha are Russian and foreign banks, including Rosselkhozbank (claims for 4.9 billion roubles); AO Reverta (ex. Parex Banka) (claims for 2.95 billion roubles); ЭС FORTEBANK (claims for 787 million roubles); ABN AMRO Bank N.V. (claims for 725 million roubles); AKB Finprombank (claims for 411 million roubles); and AKB Peresvet (claims pending). Other major creditors include JSC Investment Fund of Kazakhstan (claims for 11 billion roubles); LLC AAA Consortium (claims for 4.9 billion roubles). The total amount of claims is approximately 36 billion roubles.

A party affiliated to the debtor (JSC Moscow Bread Factory) filed a claim for 18 billion roubles for registration in the course of the insolvency. The court of the first instance dismissed it on the ground that there was no evidence that the loans were made.

The receiver pursues the recovery of Nastyusha’s assets from third parties. It filed applications to declare a number of the debtor’s transactions invalid. The court granted some of them while others are pending at the time of writing.
Vim-Avia

Vim Avia Airlines was one of the top-10 Russian airlines. It was founded in 2002 and operated 20 aircraft mostly performing charter passenger flights. In September 2017, it terminated flights on the grounds that it lacked operating cash and had material debts to creditors. Within one month, the Russian Aviation Service suspended the airline’s flight licence.

A number of applications to declare the company insolvent were filed, including applications from the Federal Tax Service (with claims of 250.9 million roubles); employees (total amount of estimated debt to them is 700 million roubles); banks, travel agencies, etc. In February 2018, the Moscow Commercial Court granted the insolvency petition and commenced the supervision stage of the insolvency. The total amount of creditors’ claims in the insolvency is approximately 16.9 billion roubles.

IV ANCILLARY INSOLVENCY PROCEEDINGS

Russian law does not permit non-main proceedings as discussed in Section I.vii. There is no information regarding ancillary proceedings for foreign-registered companies.

V TRENDS

Russian insolvency proceedings generally aim for liquidation of the debtor and enforcement of pledges. Unsecured creditors rarely get any significant amounts from the process.

There are no effective general rehabilitation mechanisms. Long-discussed and expected legislation developments related to financial rehabilitation proceedings have not been adopted. The government of the Russian Federation developed a draft law on restructuring proceedings and introduced it to the Duma in August 2017.182 It is unclear to what extent and when the Duma will consider this draft law.

In the absence of effective regulation concerning rehabilitation, the legislator has founded ad hoc solutions for companies that are too big to fail, are important for the economy, or whose insolvency would otherwise have negative social effects (such as the insolvency of large construction groups dealing with construction of residential premises). The state created the funds to finance the resolution of major companies in return for their shares. The state further acts as crisis manager and seeks to restructure the business of the companies to make them profitable. Such mechanisms are available for large banks, insurance companies, and construction companies. The Central Bank has already applied this mechanism to three major Russian banks at the time of this writing.

At the same time, the Central Bank exercises its control functions very actively, and there have been a large number of cases where the Central Bank revoked the banking licences of less important banks and filed for their insolvency.

---

182 According to the draft, the debtor or a creditor is able to file for debt restructuring. If the court grants this application, the creditors and the debtors will have four months to develop a restructuring plan. The plan should provide for the repayment of all debts within the four years of its approval by the court or within up to eight years if the creditors approve it. The restructuring plan may provide for different options for the debtor’s management: its shareholders may still appoint the directors, or a court-appointed insolvency administrator may replace them, in addition to the appointment of two directors, one selected by the shareholders, and the other by the creditors.
Trends in court practice include increasing liability and the number of cases where beneficial owners of the debtor are held liable for the debtor’s debts. In the absence of regulation of inter-group insolvencies, courts attempt to fill the lacuna and develop case law on this matter to prevent the registration of artificial inter-group claims and the dilution of the assets of the debtor’s subsidiaries. In almost every significant insolvency case there are disputes on registration of claims of creditors affiliated with the debtor including non-existent or fraudulent claims. Sometimes such claims are confirmed by court judgments or arbitral awards, and the insolvency administrators or other creditors have to object to such claims in order not to lose control over insolvency proceedings. In many cases there are disputes over voidable transfers or fraudulent transfers.
Chapter 20

SINGAPORE

Nish Shetty, Elan Krishna and Keith Han

I INSOLVENCY LAW, POLICY AND PROCEDURE

i Statutory framework and substantive law

Corporate insolvency in Singapore is primarily governed by the Companies Act, which is supplemented by the Companies (Winding-Up) Rules and the Companies Regulations. Certain provisions of the Bankruptcy Act also apply to corporate insolvency in Singapore and the Bankruptcy Rules are also relevant.

Apart from the general corporate insolvency provisions, Singapore has also provided for industry-specific insolvency or winding-up rules for certain industries, including the banking industry. These rules will apply to the relevant industry in addition to the insolvency provisions under general company law.

Singapore insolvency law and practice is substantially based on insolvency law and practice in the United Kingdom and Australia. Singapore’s insolvency laws have undergone substantial reformation following the Ministry of Law’s appointment in December 2010 of the Insolvency Law Review Committee (ILRC) to review Singapore’s existing personal bankruptcy and corporate insolvency regime and to provide recommendations in relation to a new omnibus Insolvency Act. It is anticipated that the new omnibus Insolvency Act (which will consolidate the provisions of the Bankruptcy Act and the corporate insolvency provisions in the Companies Act into one statute) will come into effect later in 2018.

In May 2017, the Companies Act was amended to implement significant changes to Singapore’s insolvency regime with the stated objective of attracting more foreign debtors to restructure their debts in Singapore, thereby positioning Singapore as an international centre for debt restructuring. The scope of existing insolvency and pre-insolvency processes have not only been widened and enhanced; familiar features from leading insolvency regimes worldwide, such as the United States Title 11 debtor-in-possession regime, have also been adapted and incorporated.

ii Policy

The Companies Act provides for a range of insolvency and reorganisation options for companies in distress, namely liquidation, judicial management and receivership, as well as schemes of arrangement between companies and their creditors and shareholders.

In October 2013, the ILRC issued a report (the ILRC Report), endorsing the enactment of a new Insolvency Act and setting out various recommendations on the provisions of the
new Insolvency Act. The recommendations by the ILRC included proposals to enhance the existing insolvency and reorganisation mechanisms as well as the management of cross-border insolvency issues.

Subsequently, the Committee to Strengthen Singapore as an International Centre for Debt Restructuring (DRC) was established and issued its recommendations on 20 April 2016. Both the ILRC’s and the DRC’s recommendations were eventually broadly accepted by the Singapore government, culminating in some of the more significant amendments to the Companies Act in May 2017, which include:

a amendments to jurisdictional requirements to give foreign companies increased access to the debt restructuring regime in Singapore;
b enhanced moratoriums that will be granted by the Singapore courts in support of restructurings and can be expressed to have in personam worldwide effect and be extended to related entities of a debtor company;
c improving features of the existing judicial management and scheme of arrangement regimes in Singapore;
d the introduction of provisions to govern the granting of super-priority to debtor-in-possession lenders who provide much needed rescue financing during the restructuring process; and
e the adoption of the UNCITRAL Model Law on Cross-Border Insolvency.

iii Insolvency procedures

Liquidation

Liquidation is also referred to as ‘winding up’. There are two types of winding up currently provided for under Singapore law: compulsory winding up (or winding up by the court) and voluntary winding up (consisting of creditors’ voluntary winding up or members’ voluntary winding up).²

The objective of compulsory winding up is to realise a company’s assets and distribute them to creditors in order of priority. Any company can be compulsorily wound up, regardless of whether it is registered in Singapore, provided that it has some connection with Singapore and meets the relevant criteria under the Companies Act. For example, a foreign company may be wound up under the amended Companies Act if the creditor can demonstrate that the company’s centre of main interests is in Singapore or that the company has substantial assets in Singapore.

On the other hand, the objective of a creditors’ voluntary winding up is to wind up a company without reference to the courts. Any company registered in Singapore can be wound up in this way. In a creditors’ voluntary winding up, the creditors have the right to nominate the liquidator. If the creditors do not nominate a liquidator, the liquidator will be nominated by the company.³

The objective of a members’ voluntary winding up is to wind up a company when its shareholders no longer wish it to continue in business (usually in a ‘deadlock’ scenario),

---

² Section 247, Companies Act.
³ Section 297(1), Companies Act.
to pay all the company's creditors in full and to distribute any surplus to the shareholders. Members' voluntary winding up can only be effected when the company is solvent. The company has the right to appoint the liquidator in a members' voluntary winding up.4

There were 254 compulsory winding-up petitions filed in 2017 (compared to 280 in 2016) and 168 companies wound up in 2017 (compared to 187 in 2016).5 Between January and April 2018, a total of 79 compulsory winding-up petitions were filed and 65 companies were wound up.6

**Provisional liquidation**

A provisional liquidator will be appointed by the High Court (the Court) pending determination of the winding-up application7 if the applicant can demonstrate a *prima facie* case for the granting of a winding-up order and the Court is satisfied in the circumstances of the case that a provisional liquidator should be appointed.

The provisional liquidator is obliged to preserve the status quo so as to protect the company's assets. A provisional liquidator's powers are prescribed by the court order appointing him or her.8

Upon the making of a winding-up order or the appointment of a provisional liquidator, all the property of the company vests in the liquidator (or the provisional liquidator as the case may be).9

**Judicial management**

A company or its creditors may apply to the Court for an order that the company be placed under judicial management if: the company is or is likely to become unable to pay its debts; and there is a reasonable probability of rehabilitating the company or of preserving all or part of its business as a going concern or that otherwise the interests of creditors would be better served than by resorting to a winding up.10

Any company, including foreign companies, can be placed under judicial management provided that the Court is satisfied that the company is or is likely to become unable to pay its debts, and it considers that the making of the judicial management order would be likely to achieve one or more of the following purposes:

a the survival of the company, or the whole or part of its undertaking as a going concern;
b the approval under Sections 210 or 211I of the Companies Act of a compromise or scheme of arrangement; or
c a more advantageous realisation of the company's assets than would be effected on a winding up.11

---

4 Section 294(1), Companies Act.
5 Ministry of Law, Insolvency Office, 'Graphical Statistics for Corporate Insolvency – Companies in Compulsory Liquidation', as of April 2018.
7 Section 267, Companies Act.
8 Section 267, Companies Act.
9 Section 269, Companies Act.
10 Section 227A, Companies Act.
11 Section 227B, Companies Act.
The judicial manager has the power to manage the business and property of the company.\textsuperscript{12} In addition, during the period for which a judicial management order is in force:
\begin{align*}
a & \text{ the company cannot be wound up; } \\
b & \text{ no receiver and manager of the whole of the company’s property can be appointed; } \\
c & \text{ there is a moratorium on legal proceedings against the company; and } \\
d & \text{ no security can be enforced against the company’s property except with the consent of the judicial manager or with leave of the court.}\textsuperscript{13}
\end{align*}

An interim judicial manager may be appointed by the court pending determination of the judicial management application if: the applicant can demonstrate a \textit{prima facie} case for the granting of a judicial management order; and the Court is satisfied in the circumstances of the case that an interim judicial manager should be appointed.

Judicial management has become less popular as a corporate rescue mechanism in recent years, as creditors are often wary of replacing a company’s management with individuals who are not necessarily as familiar with the business.

\textbf{Receivership}

The Court may order the appointment of a receiver or a receiver and manager in ‘all cases in which it appears to the Court to be just and convenient’.\textsuperscript{14} The Court has relatively wide discretion to make such appointments and usually does so where there is genuine concern that the company’s assets are in jeopardy and may be dissipated to the detriment of the debenture holders.

Often, a secured creditor may also enforce its security rights against the debtor company by appointing a receiver, or a receiver and manager. The receiver’s primary duty is to realise the assets for the benefit of the secured creditors that appointed him or her, or in the case of the receiver and manager, to manage and realise the assets that come within the ambit of his or her appointment.

\textbf{Schemes of arrangement}

A scheme of arrangement is often used as a means of corporate rescue. A scheme of arrangement is a binding arrangement between the company and its creditors or shareholders, which may among other things, seek to compromise the company’s debts and liabilities.\textsuperscript{15} A scheme of arrangement is binding on all creditors or class of creditors or shareholders, or class of shareholders, as the case may be, if:
\begin{align*}
a & \text{ a majority in number representing three-quarters in value of those creditors or class of creditors or shareholders or class of shareholders agrees to the scheme of arrangement and if the Court approves the scheme of arrangement;}\textsuperscript{16}
\end{align*}

\textsuperscript{12} Section 227G, Companies Act.
\textsuperscript{13} Section 227D, Companies Act.
\textsuperscript{14} Section 4(10), Civil Law Act.
\textsuperscript{15} Section 210, Companies Act.
\textsuperscript{16} Section 210(3AB), Companies Act.
A majority in number and representing three-quarters in value of the creditors meant to be bound by the scheme of arrangement have agreed to the scheme of arrangement, and the Court is satisfied that the compromise does not discriminate unfairly between two or more classes of creditors, and is fair and equitable to each dissenting class.\(^\text{17}\)

A scheme of arrangement will not be fair and equitable to a dissenting class if, among other reasons, a creditor in the class that has dissented to the scheme would receive an amount that is lower than what that creditor is estimated by the Court to receive in the most likely scenario if the scheme of arrangement does not pass.\(^\text{18}\)

iv Starting proceedings

Liquidation

Compulsory winding up

An application may be presented to the Court for an order that a company be wound up compulsorily if it is unable to pay its debts.\(^\text{19}\) A company is deemed to be unable to pay its debts when:

\(a\) it is served with a statutory demand for a sum in excess of S$10,000 and it is unable to within 21 days of the date of service of the statutory demand, pay the sum or to secure or compound the sum to the reasonable satisfaction of the creditor;\(^\text{20}\) or

\(b\) it is unable to pay its debts if execution or other process issued on a judgment in favour of a creditor of the debtor company is returned unsatisfied in whole or in part.\(^\text{21}\)

Generally, a winding-up application can be presented to the Court by: the company; the company's directors; or the company's creditors.\(^\text{22}\) The winding-up application may provide for a private liquidator or the Official Receiver to be appointed as a liquidator of the company. Winding up is deemed to have commenced when the winding-up application is made.\(^\text{23}\)

After the winding-up application is made, the company, any creditor or contributory may apply to the Court to stay any further proceedings in any pending actions against the company.\(^\text{24}\)

Creditors' voluntary winding up

A company's directors can begin the procedure to wind up the company voluntarily if they believe that there is no real prospect of the company paying its debts. The directors must convene an extraordinary general meeting (EGM) of shareholders, where the shareholders must pass a special resolution for winding up by at least 75 per cent of votes cast. A creditors' meeting is held within one day of this resolution to appoint a liquidator (and possibly a committee of inspection).\(^\text{25}\)

\(^{17}\) Sections 211H(2) and 211H(3), Companies Act.
\(^{18}\) Section 211H(4)(a), Companies Act.
\(^{19}\) Section 254(1)(e), Companies Act.
\(^{20}\) Section 254 (2)(a), Companies Act.
\(^{21}\) Section 254 (2)(b), Companies Act.
\(^{22}\) Section 253(1), Companies Act.
\(^{23}\) Section 255(2), Companies Act.
\(^{24}\) Section 258, Companies Act.
\(^{25}\) Sections 296 to 298, Companies Act.
A statutory declaration of the company’s inability to carry on business by reason of its liabilities and a statement of affairs pertaining to the company must be filed with the Accounting and Corporate Regulatory Authority (ACRA) within seven days of the appointment of the liquidator. Within one month of the date of the statutory declaration, an EGM of the company’s shareholders and a meeting of the company’s creditors must be convened. Voluntary winding up is deemed to have commenced when the resolution for voluntary winding up is passed or on the date of the making of the statutory declaration in the situation where a provisional liquidator is appointed.

Members’ voluntary winding up

The company’s directors must make a statutory declaration of solvency within the five weeks before the EGM of the company’s shareholders is convened to consider and – if they think fit – to pass the special resolution to wind up the company. The directors must also prepare a statement of affairs. The EGM is convened (with at least 21 days’ notice). At this meeting, the shareholders must pass a special resolution to resolve to wind up the company voluntarily and appoint a liquidator.

In the event the liquidator in a members’ voluntary winding up forms the view that the company is unable to make payment of its liabilities as originally envisaged in the statutory declaration of solvency, the members’ voluntary winding up can no longer proceed as such. The liquidator may then summon a meeting of the company’s creditors and lay before them the company’s statement of assets and liabilities. At this meeting, the creditors will also have the option to appoint some other person to act as liquidator. Thereafter, the winding up shall proceed in the form of a creditors’ voluntary winding up.

Judicial management

The application for a judicial management order may be made by the company, a creditor (or creditors jointly) including a contingent or prospective creditor, or a director of the company if authorised by a resolution of the members or of the board of directors.

There is an automatic moratorium on all proceedings against the company starting from the time the application for judicial management is made until the Court makes a determination on the application. The moratorium is wide-ranging and restrains, among others, the passing of a resolution for winding up of the company and enforcement actions against any charge or security held over the company’s property, except with the judicial manager’s consent or leave of the Court.

Following the May 2017 amendments to the Companies Act, the Court may also grant the application despite the opposition of a person who is appointed or is entitled to appoint a receiver and manager under the terms of any debenture, unless the prejudice that would
be caused to such person if the order was made would be disproportionately greater than the prejudice that would be caused to unsecured creditors of the company if the application is dismissed.\textsuperscript{35} This represents an alteration of the prior absolute veto right of a person entitled to appoint a receiver and manager of the whole (or substantially the whole) or a company’s property. In the event the Court grants the judicial management order, judicial management is deemed to have commenced from the time the application for judicial management is made.\textsuperscript{36}

**Receivership**

Holders of debentures that contain an express power to appoint a receiver or a receiver and manager can make such an appointment privately. The powers of the receiver or receiver and manager are prescribed by the terms of the debenture.

Where the debentures do not provide for the appointment of a private receiver or receiver and manager, the holders of such debentures may make an application for the Court to appoint a receiver.\textsuperscript{37}

**Scheme of arrangement**

An application to the Court for approval of a scheme of arrangement may be made by the company, any creditor or member of the company or the liquidator of the company (where the company is being wound up).\textsuperscript{38} The application is made by way of originating summons supported by an affidavit.

The company may apply for a moratorium to restrain or stay proceedings against the company where it is proposing a scheme of arrangement.\textsuperscript{39} An automatic 30-day stay of all proceedings against the company arises upon the filing of an application for such moratorium under Section 211B of the Companies Act.\textsuperscript{40} The moratorium may also restrain the appointment of a receiver or receiver and manager. The company applying for the moratorium is required to provide evidence of support from creditors,\textsuperscript{41} a brief description of the intended scheme of arrangement\textsuperscript{42} and sufficient information relating to the company’s financial affairs, which will place the creditors in a better position to assess the feasibility of any proposed scheme of arrangement. The company is also required to provide the Court with an undertaking that it will make the application for the scheme of arrangement as soon as practicable.\textsuperscript{43} A creditor may apply to the Court to vary or terminate the moratorium, especially if the applicant company has not filed the information required.\textsuperscript{44}

A moratorium granted under Section 211C can be granted on the application of a subject company’s ‘related company’ (i.e., the subject company’s subsidiary, holding company, or ultimate holding company) where, among other things, the ‘related company’

\textsuperscript{35} Section 227B(5), Companies Act.
\textsuperscript{36} Section 227C, Companies Act.
\textsuperscript{37} Order 30, Rule 2, Singapore Rules of Court.
\textsuperscript{38} Sections 210(1) and 210(2), Companies Act.
\textsuperscript{39} Section 210(10), Companies Act and Section 211B, Companies Act.
\textsuperscript{40} Sections 211B(8) and 211B(13), Companies Act.
\textsuperscript{41} Section 211B(4), Companies Act.
\textsuperscript{42} Section 211B(4), Companies Act.
\textsuperscript{43} Section 211B(2)(b), Companies Act.
\textsuperscript{44} Sections 211B(10), 211B(11), and 211B(4), Companies Act.
plays a necessary and integral role in the compromise or arrangement relied on by the subject company to make the moratorium application.45 The court may extend the moratorium to acts taking place in Singapore or elsewhere as long as the creditor is in Singapore or within the jurisdiction of the Court.46 In contrast, moratoriums granted under Section 210(10) cannot have extraterritorial effect.47 The Court appears to have adopted an expansive view of the scheme jurisdiction, recently deciding in Re Empire Capital [2018] SGHC 36 that where one company has guaranteed a debt owed by a second company, a scheme of arrangement in respect of the guarantor’s debts can validly compromise the debts of the primary obligor if there is a sufficient nexus or connection between the debts.48 In this case, the guarantor and the primary obligor were part of the same corporate group, and the debts owed by each entity were found to constitute ‘part of the same structure or web of rights and liabilities’ to support the indebtedness of the group companies.49 The decision may be significant for group restructurings as it facilitates the use of a scheme of arrangement in respect of one group company to compromise related debts (particularly, corporate guarantees) owed by other group companies.

A scheme of arrangement that has been approved by the Court may only be amended by way of an order of court. A scheme of arrangement approved by the Court will need to be lodged with the ACRA before it becomes binding.

v Control of insolvency proceedings

The Singapore courts have assigned certain judges with the requisite expertise as docketed insolvency judges to hear insolvency and restructuring related applications, including on an urgent basis. Generally, the various insolvency procedures will be administered by the respective insolvency professionals appointed. However, the Court does retain a certain degree of oversight.

Liquidation

Upon the making of a winding-up order by the Court, the liquidator may only carry on the business of the company so far as is necessary for the beneficial winding up of the company for a period of four weeks after the date of the winding-up order. Thereafter, the liquidator can only do so with the leave of the Court or the committee of inspection.50 The powers of the company’s directors also effectively cease when the winding-up order is made by the Court.

In the case of voluntary winding-up, upon the appointment of a liquidator, all the powers of the company’s directors cease except to the extent approved by the liquidator or by the members of the company with the consent of the liquidator in the case of a members’ voluntary winding up or the committee of inspection in the case of a creditors’ voluntary winding up.51

45 Section 211C(1), Companies Act.
46 Section 211B(5), Companies Act.
47 Pacific Andes Resources Development Ltd and other matters [2016] SGHC 210 at [16]–[17].
48 Re Empire Capital [2018] SGHC 36, [65].
49 Re Empire Capital [2018] SGHC 36, [73].
50 Section 272(1)(a), Companies Act.
51 Sections 294(2) and 297(4), Companies Act.
The liquidator is regarded as an officer of the Court and is, therefore, expected to discharge his or her duties accordingly. All private liquidators are subject to the supervision of the Official Receiver. The Official Receiver may take cognisance of the conduct of a liquidator to determine whether the liquidator has faithfully performed his or her duties and observed all the requirements imposed on him or her by law in relation to the performance of his or her duties. In the event any complaint is made against a liquidator, the Official Receiver shall make inquiries into the complaint and take the appropriate action.52

The liquidator in a compulsory winding up is required to seek the Court’s leave to be released from his or her office as liquidator.53

**Judicial management**

Upon appointment, a judicial manager steps into the shoes of the company’s directors and is deemed to be the company’s agent with the ability to exercise the powers of the company’s officers.54 The judicial manager is also regarded as an officer of the Court and is therefore expected to discharge his or her duties accordingly. A judicial manager may be removed at any time by the Court and he or she is required to seek the Court’s leave to be released from his or her office as judicial manager.55

A judicial manager is obliged to table a statement of his or her proposals to achieve one or more of the purposes stated in the judicial management order (Statement of Proposals) for the company’s creditors. The Statement of Proposals must be sent to the Registrar of the ACRA as well as all creditors of the company.56 Thereafter, the judicial manager is obliged to summon a meeting of all the company’s creditors to consider and vote on the Statement of Proposals. The judicial manager is required to report to the Court the proceedings of the creditors’ meeting and the results of the voting on the Statement of Proposals.57

A judicial manager may be held personally liable for any contracts entered into by him or her on behalf of the company, or for any contracts previously entered into by the company and which he or she had adopted.58

**Receivership**

A receiver or manager (regardless of whether he or she is appointed privately or by the Court), may apply to the Court to seek directions for any matter connected to the performance of his or her functions.59

Any creditor, contributory or liquidator of a company may also apply to the Court to examine the conduct of a receiver or manager who appears to have misapplied, retained or become liable or accountable for any money or property of the company; the same applies if the receiver or manager appears to have committed any misfeasance or breach of trust or duty in respect of the company.60

---

52 Section 265(1), Companies Act.
53 Section 275, Companies Act.
54 Section 227G(2), Companies Act.
55 Section 227J, Companies Act.
56 Section 227M, Companies Act.
57 Section 227N, Companies Act.
58 Section 227I, Companies Act.
59 Section 218(3), Companies Act.
60 Section 227(2), Companies Act.
Scheme of arrangement
The Court has the power to supervise scheme meetings and it is open to the scheme manager to apply to the Court for directions and other ancillary orders as may be appropriate.

vi Special regimes
Singapore has enacted additional industry-specific legislative provisions for insolvency. Examples include the resolution regime for a bank licensed under the Banking Act as set out in the Monetary Authority of Singapore Act and the resolution regime for insurance companies as set out in the Insurance Act.

vii Rescue financing
The May 2017 Companies Act amendments have introduced provisions on ‘rescue financing’, which refers to any financing that is either necessary (1) for the survival of the company as a going concern, or (2) to achieve a more advantageous realisation of the assets of the company than on a winding-up of the company.61

The new amendments empower the Court to grant one of four levels of priority over other secured and unsecured debts, that is, for the rescue financing to: (1) be treated as part of the costs and expenses of the winding up; (2) have super-priority over preferential debts; (3) be secured by a security interest on property not otherwise subject to any security interest or that is subordinate to existing security, or (4) be secured by a security interest, on property subject to an existing security interest, of the same or a higher priority than the existing security interest.62

The availability of an order for priority for rescue financing depends on the level of priority sought, whether the company has made a scheme application or moratorium application, or both, or whether there is a judicial management order in force. In particular, in order for the rescue financier to be granted the priority levels as per (2) to (4) above, it must be shown that the company is unable to obtain the rescue financing from other persons unless the rescue financier is accorded that particular level of priority. Further, in order for an existing secured interest to be overridden (i.e., level (4) above), the Court must be satisfied that the existing secured creditor is ‘adequately protected’.

In its first decision on whether to grant ‘super priority’ for debts arising from rescue financing following the May 2017 Companies Act amendments, the Court in Re: Attilan Group Ltd [2017] SGHC 283 declined to grant priority status to funds to be advanced to the Attilan Group. It held that the applicant must first demonstrate that it has expended reasonable efforts to seek out non-priority sources of financing, before seeking super priority rescue financing – which would otherwise disrupt the expected priority of existing creditors.63 The Court would not look favourably upon bare assertions by the applicant that such alternative sources of financing would be futile because of its weak financial position.64 While

61 Sections 211E(9) and 227HA(10), Companies Act.
62 Sections 211E(1) and 227HA(1), Companies Act.
63 Re: Attilan Group Ltd [2017] SGHC 283 at [61] and [72]–[72].
64 Re: Attilan Group Ltd [2017] SGHC 283 at [74].
the applicant did not have to strictly prove that it would be unable to obtain rescue financing if the application were denied, this would be a factor in the exercise of the court's discretion to grant super priority.65

viii Cross-border issues

Pursuant to the new Section 354B(1) of the Companies Act, the UNCITRAL Model Law on Cross-Border Insolvency (the Model Law) will have force of law in Singapore and will facilitate the resolution of cross-border insolvencies by (among other things):

a streamlining and clarifying the process for recognition in Singapore of foreign insolvency proceedings;
b facilitating access by foreign insolvency representatives to the Singapore Court, as well as the granting of relief in Singapore to assist foreign proceedings; and
c promoting cooperation and coordination between courts of different jurisdictions and insolvency administrators.

Together with the abolition of the ring-fencing rule in respect of foreign companies under Part XI, the introduction of the Model Law is a marked departure from the traditionally territorial conception of cross-border insolvency and is emblematic of the shift towards the principle of modified universalism that was embraced by the Court in Re Opti-Medix Ltd (in liquidation) and another matter [2016] SGHC 108 as the golden thread running through cross-border insolvency law, which requires courts to, as far as is consistent with justice and public policy, cooperate with the courts in the country of the principal liquidation to ensure that all the company’s assets are distributed to its creditors under a single system of distribution.

The adoption of the Model Law also provides clarity in respect of the recognition of foreign insolvency proceedings and coheres neatly with pre-Model Law decisions such as Re Taisoo Suk (as foreign representative of Hanjin Shipping Co Ltd) [2016] 5 SLR 787, where the inherent jurisdiction of the court was invoked as a basis for recognition of foreign winding-up proceedings.

II INSOLVENCY METRICS

There were 187 companies in compulsory liquidation in 2016. This was a slight decrease compared with the 189 companies that were compulsorily liquidated in 2015.66

III PLENARY INSOLVENCY PROCEEDINGS

In January 2018, the Court of Appeal in Parakou Investment Holdings Pte Ltd and anor v. Parakou Shipping Pte Ltd (in liquidation) and other appeals [2018] 1 SLR 271 (Parakou) confirmed that a director who procured a company to enter into undue preference transactions under Section 329 of the Companies Act read with Sections 99 and 100(1)(b)
of the Bankruptcy Act could be in breach of his or her duties and that an order could be made against such a director personally to pay a sum equal in value to the undue preference transactions.

In reaching its conclusion, the Court (per Chua Lee Ming J) affirmed the position that had been previously adopted by the Court (per Steven Chong J) in *Living the Link Pte Ltd (in creditors’ voluntary liquidation) and others v. Tan Lay Tin Tina and Ors* [2016] 3 SLR 621 and reiterated the importance of ensuring that the courts must be slow in allowing a liquidator to employ the claim against the director as a means of circumventing the strict statutory criteria for an undue preference laid down by Parliament in the Bankruptcy Act. Notably, the Court also observed that the mere fact that the transactions fell outside the statutory clawback period could not excuse the directors concerned from being held liable for breach of their duties.

The Court of Appeal in *Parakou* confirmed that such personal claims against the directors could be pursued concurrently with and/or independently of a statutory clawback claim.67 However, the Court of Appeal emphasised that the burden of proof in respect of such personal claims lies on the party asserting a breach of directorial duties.68 In contrast, parties bringing a statutory clawback claim may be able to rely on certain statutory presumptions.69

## IV TRENDS

As stated above, in order to position Singapore to meet the anticipated increase in demand for insolvency and restructuring services in the Asia-Pacific region, the DRC was appointed by the Ministry of Law in May 2015 to build on the work of the ILRC and recommend initiatives and legal reforms to cement Singapore’s status as a leading centre from which to coordinate a multi-jurisdictional restructuring.

Key recommendations by the DRC in its 20 April 2016 report have been implemented through the most recent round of amendments to the Companies Act, which came into operation on 23 May 2017.

Notably, several of the key changes to the existing insolvency framework were adapted, with appropriate modification, from jurisdictions that possess more mature and highly developed insolvency processes. In light of the current economic climate, it is anticipated that more companies (including foreign companies) will avail themselves of the new features under the enhanced insolvency regime.

67 *Parakou* at [110].
68 *Parakou* at [110].
69 For example, see sections 99(5) and 100(3) of the Bankruptcy Act (Cap. 20) read with section 329 of the Companies Act.
Chapter 21

SPAIN

Iñigo Villoria and Alexandra Borrallo

I. INSOLVENCY LAW, POLICY AND PROCEDURE

i. Statutory framework and substantive law


Insolvency law encompasses all regulations applicable to court insolvency proceedings as opposed to out-of-court liquidations, which only apply when the debtor is still able to meet all its liabilities.

The main features of Spanish insolvency law are the classification of debts, the challenge of prior transactions, the general effects of the insolvency on debts and bilateral agreements, and the liability regime.

Classification of debts

Secured claims represent attachments on assets (subject to in rem security) and entail separate proceedings, subject to certain restrictions to commence enforcement proceedings (or to continue such proceedings if they have already been commenced). When the secured asset is necessary for the debtor’s activities, enforcement by the creditor may be subject to a delay of up to a year from the declaration of insolvency.

These creditors are not subject to the arrangement (see further below), except if they vote in favour of it or certain qualified majorities are met. In the event of liquidation, they will collect payment against the secured assets.

Claims benefiting from general priority include the claims of public authorities (generally, for half their amount), certain labour claims and the claims of the creditor initiating the insolvency proceedings (up to 50 per cent of its claim and 50 per cent of the fresh money received by the company in protected refinancing agreements).

---

1 Iñigo Villoria is a partner and Alexandra Borrallo is a lawyer at Clifford Chance SLP.
The holders of general privileges are not affected by the arrangement (if they do not consent) unless certain qualified majorities are met and, in the event of liquidation, they will be the first to collect payment.

‘Ordinary claims’ is the residual category; it includes trade creditors and lenders, when not secured or subordinated.

Subordinated claims are classified by virtue of an agreement or pursuant to law, including debt held by related entities. Subordinated creditors may not vote on arrangements and have very limited chances of recovery. When subordination arises from a special relationship, the creditor will also lose any security over assets belonging to the debtor.

There will be other claims that are not subject to the insolvency proceedings and that are, therefore, neither acknowledged nor classified. These include claims accrued after the insolvency proceedings to continue the business, 50 per cent of the fresh money received by means of protected refinancing agreements (100 per cent if fresh money is received before October 2016), as well as other claims prescribed by law, even if accrued earlier (i.e., salaries accruing during the 30 days before the insolvency proceedings were initiated).

**Prior transactions: clawback**

Under the SIL, there are no prior transactions that automatically become void as a result of the initiation of the insolvency proceedings.

The court receivers may, however, challenge those transactions that could be considered as having been detrimental to the debtor’s interests, provided they have taken place within two years of the declaration of insolvency.

Damage exists, in any event, in the case of gifts and prepayment of obligations that are due after the declaration of insolvency, if unsecured. Damage is also deemed to exist in the case of security created to protect already existing obligations and transactions with related entities; however, the defendant may prove otherwise.

Any transactions that can be considered as transactions in the ‘ordinary course of business’ are not subject to challenge.

To avoid the risk of a challenge, debtor and creditors (by a three-fifths majority) may subject a refinancing agreement to the provisions of Article 71 bis of the SIL. The possibility also exists to apply the terms of such an extension to the dissenting financial lenders if certain conditions are met.

The rescission of intra-group guarantees is a complex matter. Most courts, applying the individual concept of ‘company’ as a basis have reached the conclusion that guarantees granted through third-party debt are transactions that are cost-free and, as such, rescindable. Minority case law has considered that the granting of a guarantee through the debt of a company in the group is not a cost-free transaction, with the effect that the insolvency receivers would have to provide evidence of the damage.

---

2 Shareholders owning at least 10 per cent of the share capital (5 per cent if a listed company) or group companies.

3 Additional Provision 4 of the SIL.
Effects on debts: interest and set-off

Following the initiation of insolvency proceedings, interest no longer accrues, with the exception of secured debt (if the proceeds allow it to be settled). Interest already accrued is considered a subordinated debt.

Set-off is applicable provided that the legal requirements have been met before the company was declared insolvent; set-off will no longer be possible after insolvency proceedings are initiated.

Hedge agreements are subject to specific regulations (allowing close-out netting and enforcement of collateral).

Effects on bilateral agreements

The declaration of insolvency does not, per se, allow the parties to terminate a bilateral agreement, notwithstanding what may have been agreed between the parties.

As a general rule, the declaration of insolvency does not alter the general contractual rules on termination, but under the SIL, the judge may decide to remedy an eventual default of the insolvent party by reinstating an agreement, with the effect that any outstanding amounts and further payments under the agreement will be post-insolvency claims. If the court deems it appropriate for the interests of the insolvent party, it is entitled to terminate the agreement, with compensation for damages.

There are specific rules for employment agreements, mainly affecting collective dismissals, which are dealt with by the insolvency judge.

Directors’ liability

Under Spanish company law (in the absence of an insolvency scenario), directors are liable for damages and for debts, under certain circumstances.

Aside from the insolvency proceedings, a criminal claim may be filed against the directors of the company. In general, criminal liability would not arise as a result of financial distress unless the directors had committed criminal offences in such a context, such as unfair or fraudulent management or false accounting.

In the event of insolvency, as a general rule, incidental proceedings may be initiated to investigate the reasons leading to the insolvency, which may conclude declaring the insolvency as negligent or fortuitous. Negligent insolvency may be based either upon a causal analysis (directors having caused or aggravated the insolvency fraudulently or through gross negligence) or upon certain presumptions, set out by law. In this regard, the status of the accounts and compliance with legal duties (including the duty to apply for insolvency) is essential.

If the insolvency is deemed negligent, the directors or third parties (as accomplices) may be liable for damages covering any losses caused to creditors as a result of their actions. In a case of negligent insolvency leading to liquidation, the directors of the company may also be liable for outstanding company debts – the judge enjoys a wide discretion. The scope of this provision is pending clarification by the courts.

Shareholders may also be held liable when the insolvency is deemed negligent due to their unreasonable refusal to accept a debt-for-equity swap with lenders and this refusal leads to the failure of the refinancing negotiation.
Policy

Although the SIL was thought to be a step forward in the development of the Spanish insolvency system, in practice it has not been useful as a restructuring tool. Recourse to the insolvency process is usually triggered by the directors’ fear of facing liability if they unduly postpone the insolvency filing when the company is already in financial distress; however, they should try to avoid this by all means, as it is understood in the market that a company that is declared insolvent very rarely survives.

One of the reasons for this negative view of restructuring is that companies usually reach the insolvency stage when the financial position has already deteriorated too far. In this context, lenders are generally unwilling to face further risk, so the debtor’s ability to keep on trading becomes subject to its own ability to generate cash.

In addition, while the SIL tried to find a reasonable balance between the different interests involved, in practice, courts and receivers tend to be very debtor-friendly (in particular, when dealing with insolvency clawback claims). This introduces uncertainty as regards the lenders’ positions, making them unwilling to expose themselves further. This was the main reason that the legislator introduced a ‘clawback shield’ in 2009 for certain refinancing agreements, and introduced certain incentives in 2011 for refinancing, such as priority ranking for fresh money or cramdown for dissenting creditors within refinancing agreements.

Still, liquidation is the most likely outcome of insolvency (occurring in more than 90 per cent of cases). In cases of liquidation, recovery is difficult; in most insolvency proceedings usually only post-insolvency debts are settled, as the proceeds of the secured assets are generally not enough to meet the secured obligations. Privileged creditors are usually paid in part, and ordinary creditors are rarely paid a substantial proportion of their debts.

Insolvency procedures

A debtor (or in the case of a company, its directors) is legally obliged to file for insolvency when it becomes insolvent (i.e., when it fails to meet its current outstanding obligations on a regular basis). This obligation must be fulfilled within two months of the time the debtor became or should have become aware of the insolvency situation. Failure to comply with this obligation triggers the assumption that the directors have acted negligently (see further below).

A debtor is entitled to apply for insolvency proceedings when it expects that it will shortly become insolvent. In this sense, insolvency proceedings are available as a type of legal protection that the debtor may request to avoid the attachment of its assets by its creditors.

As a general rule, insolvency proceedings are not compatible with other enforcement proceedings or injunctions.

The debtor is also allowed an extra four-month moratorium upon application to the court (Article 5 bis of the SIL), during which it is allowed to continue to do business normally and keep negotiating with its creditors to reach an agreement that will avoid definite insolvency. Insolvency application by creditors is prevented and enforcement of credits against assets necessary for the business is banned.

Although it is difficult to indicate an average time, the insolvency process will rarely last less than 18 months. Liquidation can take longer when there are significant assets to be sold.
iv Starting proceedings

Insolvency proceedings are formally initiated when the court declares insolvency, following an application filed either by the debtor or by its creditors. In the first case, they are classified as ‘voluntary insolvency proceedings’; in the second case, as ‘necessary insolvency proceedings’.

Application

The application for insolvency proceedings may be filed either by the debtor (in the case of a company, the managing body, not the shareholders) or by its creditors.

When the debtor files the application, it must include several documents (inter alia, a power of attorney, an explanation of the situation of the company and a list of its assets and liabilities).

When a creditor files the application, it must provide evidence of its debt, as well as of the insolvency situation. If the application is dismissed, the creditor has to pay the corresponding legal costs and fees (and eventually, damages caused). If accepted, the creditor who initiated the process has a priority ranking amounting to 50 per cent of its unsecured debt.

Declaration of insolvency

When the debtor files an application, the judge will issue a decision by virtue of which the insolvency proceedings will be initiated – this may take on average two to four weeks. If the court considers that the application does not comply with the legal requirements, the debtor must remedy the deficiency within the time frame specified by the court.

For creditor applications, the debtor must be heard by the court before any declaration of insolvency is made (unless the application is based on an unsatisfied judgment).

The initial court decision will determine the identity of the receiver appointed by the court and the scope of the restrictions imposed on the debtor.

v Control of insolvency proceedings

The general rule is that, in the event of voluntary insolvency proceedings, the court receiver supervises the company’s activities, authorising (or refusing to authorise) any payment or transaction. In compulsory insolvency proceedings, the debtor will cease to manage its estate and the court receiver will take control of the company, being in charge of all further decisions.

First stage (determination of assets and liabilities)

The objective of the first stage of the insolvency proceedings is to determine the assets and liabilities of the debtor, leading to the preparation by the court receiver of an inventory and list of creditors.

The insolvency order contains an express request for creditors to give notice of their claims within a month of the insolvency declaration appearing in the Official Gazette. Creditors must then send their statement of claim directly to the court receiver (by email), and original documents are no longer required.

Based on the documentation provided by the creditors and held by the debtor, the court receiver will draw up a list of acknowledged creditors and classify them according to
the categories used (privileged, ordinary and subordinated). The court receiver is obliged to inform the creditors of their classification before submitting the report to the court, so that they have the chance to make allegations.

Additionally, creditors and debtor may challenge any details on the list of creditors by appealing before the insolvency judge.

Second stage: arrangement or liquidation

The second stage leads either to an arrangement between the debtor and its creditors, or to the liquidation of the debtor’s assets.

As an exception, in certain cases the debtor may propose an advanced arrangement in the course of the first stage of the proceedings. Liquidation may be requested at any time during the proceedings.

An arrangement may be entered into between the debtor and the majority of the creditors, involving a delay in payment or a partial cancellation of debts. It is not effective until the court gives its approval. The court may refuse to do so when there has been a breach of the law or when the parties have shown that the debtor will not be able to fulfil the arrangement.

The arrangement may be imposed on creditors with a general priority, and on secured creditors if certain majorities are met within categories. For this purpose the SIL divides secured creditors and creditors with a general priority into four categories:

- employees;
- public authority creditors;
- financial creditors (regardless of whether they are supervised by a regulatory body such as the Bank of Spain); and
- any other creditors – mainly commercial creditors.

Although upon approval of the arrangement most of the effects of the insolvency proceedings cease, strictly speaking the proceedings do not terminate until the terms of the arrangement are completely fulfilled.

In the case of liquidation, the debtor ceases to manage its assets (in the case of a company, its directors would cease to act). The court receiver liquidates the debtor’s assets by selling them to distribute the money obtained among the creditors according to the priority rules established by the SIL.

vi Special regimes

The same insolvency proceedings apply to both people and entities (excluding public administrations, which cannot become insolvent). These proceedings may lead either to the restructuring of the business or to the liquidation of the debtor’s assets.

The SIL is based on the assumption that a company’s insolvency does not always imply the insolvency of other companies within the group; however, certain rules try to coordinate the various proceedings being carried out in relation to companies pertaining to the same group.

Financial institutions and insurance companies are subject to specific regulations, in two senses: when insolvency is declared, certain special conditions apply (e.g., regarding the appointment of the insolvency receivers), and they can be subject to intervention by the Bank of Spain to avoid the insolvency process. In practice, only one financial entity has reached the insolvency stage in Spain.
vii Cross-border issues

From 26 June 2017, the new Regulation 2015/848, of the European Parliament and of the Council, of 20 May 2015, on insolvency proceedings (recast) has been applicable to all the EU countries except for Denmark. This means that this new regulation shall be applicable to all those insolvency proceedings that are initiated in an EU country (except for Denmark), when the centre of main interests (COMI) of the debtor is located in such countries.

Aside from new information duties between the countries (e.g., such countries must create an insolvency registry), the most relevant aspects of this regulation are as follows:

The type of proceedings to which this regulation applies has increased, and pre-insolvency proceedings are now included. With regards to Spain, Regulation 2015/848 includes homologation proceedings, extrajudicial payment proceedings, or anticipated arrangement proposals.

The determination on the judicial competence to declare the principal insolvency proceeding is explained in more detail. In this sense, the definition of COMI is now foreseen under an article (not under an introductory statement), and includes a series of presumptions to determine where it is located (in the case of companies, where its main centre is located, and in the case of people, where he or she usually lives).

A new chapter on the insolvency of companies that belong to the same group has been included. Regulation 2015/848 pretends to ensure more cooperation and coordination between the insolvency receivers, courts, etc., in charge of each proceeding, and has even included a new proceeding called ‘group coordination proceeding’, which is voluntary and enables the insolvency proceedings of group companies to be processed jointly.

II INSOLVENCY METRICS

Since 2013, the pace of the contraction in Spanish economic activity has eased significantly, and the rate of GDP has increased steadily since then.

The level of unemployment in Spain has also decreased since 2013. Focusing on insolvency proceedings, 9,937 proceedings were started in 2013; 6.5 per cent more than in 2012. The number of insolvency proceedings that started in 2014 decreased to 7,074, and to 4,916 in 2015. During 2016, the number of insolvency proceedings that were initiated decreased to 4,060, which is significantly lower than the number of insolvency proceedings that were initiated in other European jurisdictions (e.g., in France nearly 58,000 proceedings were initiated). This number kept decreasing in 2017 to 3,943 proceedings in total. Geographically, most of the proceedings are declared in the Mediterranean area (66 per cent), although it must be noted that the number of insolvency proceedings declared in Madrid has increased by 16 per cent.

Real estate and construction have traditionally been the sectors with most insolvency proceedings. Insolvency proceedings in the real estate sector decreased from 603 in 2016 to 568 at the end of 2017. However, the number of insolvency proceedings declared in the sanitary, agricultural, transport and clothing sectors.

The general economic situation and, in particular, the situation in the Spanish financial system have been the common causes underlying the increase in insolvency proceedings in recent years. Refinancing has been complicated, not only for companies struggling with weak
accounts, but also for financial institutions facing severe credit restrictions. This is gradually changing, with the financial system enjoying more liquidity and refinancing agreements being more common these days.

III PLENARY INSOLVENCY PROCEEDINGS

In the first semester of 2018, the number of insolvency proceedings declared in Madrid and Barcelona has increased. Although the vast majority of insolvency proceedings declared in the past 12 months in Spain correspond to small or medium-sized companies, some large companies have been declared insolvent or have requested a four-month moratorium (Article 5 bis of the SIL), and most of the major proceedings are still ongoing:

i Financial sector

The most relevant insolvency proceedings declared in 2015 in the financial sector was initiated voluntarily by Banco de Madrid, as a result of the state intervention of BPA, its Andorran mother company. Banco de Madrid requested that liquidation commence within said insolvency proceedings.

The insolvency of said Spanish bank was declared on 25 March 2015 in Madrid, following intervention by the Bank of Spain. In July 2016, the court receivers requested the judge to authorise the initiation of the payment proceeding to creditors.

The proceeding is currently at the liquidation phase.

ii Engineering and renewable energy

In November 2015 Abengoa applied for a pre-insolvency proceeding (Article 5 bis of the SIL).

The company had been struggling for the past year because of its inability to face its financial debt, which amounts to €20.2 billion.

In March 2016, Abengoa signed a refinancing agreement based on a standstill of seven months to allow the company have extra time to reach a definitive restructuring plan. Given that this agreement was approved by more than 75 per cent of its creditors, Abengoa did not have to file for insolvency, thus avoiding what would have been the biggest insolvency proceeding in Spanish history.

However, the ruling that approved the said refinancing agreement was challenged by a number of dissenting creditors. The hearing on this case was held in July 2017. Commercial Court No. 2 from Seville rendered a court resolution on September 2017 partially upholding the claim filed by a series of creditors who believed that the refinancing agreement implied a disproportionate sacrifice.

On 12 July 2017, Isolux was declared insolvent.

iii Spanish toll road sector

In 2013 and 2014, multiple companies in the Spanish toll road sector filed for insolvency. TP Ferro, a company licensed by the Spanish state to build and exploit the high-speed railway between Spain and France, was the last company in the Spanish toll road sector to have filed for insolvency on 17 July 2015, with liabilities over €500 million. TP Ferro is currently undergoing the liquidation phase of the proceeding.

Ultimately the grounds for these insolvencies are: the decision of the Supreme Court to substantially increase the compensation owed to the owners of the land expropriated during
the construction period; and the volume of traffic being lower than expected. As of today, seven out of eight toll road companies are already in liquidation because of the impossibility of reaching an agreement with creditors, and the lack of viability of the companies in light of the insignificant volume of traffic.

The total liabilities of the insolvent companies within the toll roads sector currently amount to more than €5 billion, according to the construction syndicate. Most of the debt in these proceedings has been acquired by funds that will litigate over the quantum that the Spanish government will have to pay to the toll road companies because of the liquidation of the companies.

Spain is dealing with these companies through a state company, SEITTSA, in a similar manner to that used with the ‘bad banks’ in 2011.

iv Tourism
The tourism sector is still suffering the consequences of the economic crisis, and its dependence on seasonal revenues. The tour operator Aqua Travel was declared insolvent in 2017.

v Other relevant insolvency proceedings
The insolvency (or pre-insolvency) of the following companies has also been widely disclosed by Spanish media, either because of their relevance to the Spanish economy or because of the social impact:

a Desguaces La Torre has been declared insolvent in 2018. Its debt before the Spanish tax authorities amounts to around €21.9 million;
b Factoo, a company that acted as intermediary between entrepreneurs and Social Security and the Spanish tax authorities, has been declared insolvent in 2018. The case has caused such impact that creditors affected by it asked the European Parliament to create a contribution system based on the real income earned by entrepreneurs; and
c Toys ‘R’ Us was declared insolvent in 2018.

IV ANCILLARY INSOLVENCY PROCEEDINGS
There is no information regarding relevant ancillary insolvency proceedings pending before the Spanish commercial courts.

V TRENDS
The latest reforms of the SIL have resulted in an increase in the number of applications for insolvency proceedings, both from people and companies, as it is considered a better alternative to corporate liquidation and mortgage foreclosure proceedings. These reforms have also resulted in the shortening of their duration, and the number of proceedings that end in liquidation.

It is expected that, as the Spanish economy continues to recover (there has been a slight increase in consumer expenditure), the number of insolvency proceedings to be declared in the coming months will be fewer than in previous months. This decrease may be reinforced by the tendency to reach refinancing agreements (such as Grupo Prisa). However, political uncertainty may lead to the slowdown of such recovery, partly because foreign investors may be reluctant to invest in Spain.
The levels of activity in the distressed loan market have continued to increase, with transactions involving the acquisition of debt held by insolvent companies at a discount, and management of third parties’ debt. Although traditionally in these cases the purchaser would not hold voting rights in the event of a creditors’ arrangement if it is not a financial institution, an amendment of the SIL removed this provision, clearly with the aim of encouraging the liquidity injection in the Spanish market by foreign investors. This is the case of the Spanish toll roads; thus, the outcome of these proceedings will have an impact on the view international markets have on Spain.
I INSOLVENCY LAW, POLICY AND PROCEDURE

i Statutory framework and substantive law
Swiss restructuring and insolvency proceedings are mainly governed by the Swiss Debt Enforcement and Bankruptcy Law (DEBA), which entered into force in 1892.\(^2\) A number of other laws and ordinances further regulate special aspects of restructuring and insolvency proceedings, such as specific provisions according to the nature of the debtor (e.g., financial institutions).

The recognition of foreign restructuring and insolvency proceedings is governed by the Swiss Private International Law (PILA), which entered into force in 1989.

The DEBA provides for two main types of insolvency proceedings against corporate debtors:

\(a\) bankruptcy proceedings pursuant to Article 197 et seq. DEBA, aimed at the full liquidation of the debtor’s assets and the debtor’s dissolution by realising the entire estate and distributing the proceeds proportionately to all creditors; and

\(b\) composition proceedings pursuant to Article 293 et seq. DEBA, aimed at enabling the debtor to reach a restructuring agreement with its creditors.

The Swiss Code of Obligations (SCO) entered into force in 1912 and provides for in-court and out-of-court measures supporting the restructuring of a financially distressed debtor, for example, by way of the corporate law moratorium for over-indebted companies pursuant to Article 725a SCO. Further, the SCO requires immediate implementation of restructuring measures, when a company’s financial statement shows that half of the share capital and statutory reserves are no longer covered by the company’s assets pursuant to Article 725, Paragraph 1 SCO.\(^3\)

ii Policy
The collapse of Switzerland’s national airline Swissair in 2001 sparked a public debate over the need to amend Swiss insolvency laws. It was widely criticised that the DEBA failed to deal effectively with the restructuring of financially distressed companies and with insolvencies

---

1 Daniel Hayek is a partner and a member of the management committee and Laura Oegerli is a junior associate at Prager Dreifuss AG.
2 The latest DEBA revision entered into force in January 2014.
3 Failing to implement such measures promptly may open up the directors to liability suits according to Article 754, Paragraph 1 SCO, see Section I.viii.
of large group companies, resulting in the vast majority of restructuring processes ending in liquidation rather than in survival of the companies. Subsequently, the DEBA provisions were discussed in Parliament, and the revised DEBA entered into force on 1 January 2014. The primary objective of the revision was to promote the restructuring of companies over liquidation.

Inspired by the US Bankruptcy Code’s Chapter 11 procedure, the revised DEBA facilitates companies’ access to protection under a moratorium for mere restructuring purposes. The rules governing the moratorium thus create incentives to apply for a provisional moratorium in a timely manner. Companies shall have enough time to take restructuring measures without the public being aware of their financial difficulties. Changes in employment law in relation to business takeovers should further facilitate the process. In addition, the provisions on terminating long-term agreements were revised. Since 2014, the debtor can extraordinarily terminate long-term agreements other than employment agreements in composition proceedings.4 Thus, debtors can now free themselves from long-term commitments, which may jeopardise the financial stability of the entire company. However, a turnaround from restructurings increasingly leading to company survivals under the revised DEBA remains to be seen.

iii Insolvency procedures

Bankruptcy proceedings

Once a debtor is declared bankrupt by the competent court,5 all of the debtor’s creditors take part in the bankruptcy proceedings.

The aim of the proceedings is to satisfy all of the creditors in proportion to their claims against the debtor. This requires the full liquidation of the debtor’s estate, including all assets and liabilities. During the bankruptcy proceedings, the debtor remains the beneficial owner of its estate until the estate is realised. However, the debtor loses the right to dispose over its assets. This right is transferred to the bankruptcy estate, which exercises it through the bankruptcy administration.

In a first step, the bankruptcy office prepares an inventory listing all of the debtor’s assets. Where the inventory reveals that the proceeds from the assets will cover the costs of bankruptcy proceedings, the bankruptcy office will commence ordinary bankruptcy proceedings. Otherwise, the bankruptcy office will initiate summary proceedings, which generally do not entail creditor’s meetings.6

Subsequently, the bankruptcy office publicly announces the opening of bankruptcy proceedings against the debtor and summons the creditors to file their claims within one month, whereby the filing deadline is extended for foreign creditors.

The first creditor’s meeting is to be held within 20 days of the public announcement of the bankruptcy proceedings against the debtor. It decides on organisational issues, such

---

4 The right to termination by the debtor exists only during the moratorium and only if refraining from terminating the long-term agreement would make the restructuring aim impossible and the liquidator has consented to the termination.

5 In Switzerland, insolvencies are handled by insolvency courts, which are in most cantons a special section at the district court. Therefore, district court judges, in certain cantons single judges, may have to deal with complex finance-based insolvency litigation without having the same level of expertise as commercial courts.

6 The below remarks on Swiss bankruptcy proceedings relate to ordinary bankruptcy proceedings.
as appointing either the public bankruptcy office or a private bankruptcy administrator as the administrator of the estate. It further decides on urgent administrative actions, for example, on the continuation of the debtor's business activities. The first creditor's meeting may elect a creditor's committee. Among other things, the creditor's committee is generally in charge of supervising the bankruptcy administrator, deciding on the continuation of business operations as well as authorising the continuation of court proceedings and the conclusion of settlement agreements. The meeting has a quorum with at least 25 per cent of the known creditors being present or at least 50 per cent of the creditors being present where there are four or fewer known creditors. Decisions in the first creditor's meetings are taken by absolute majority of the represented votes.

The bankruptcy administrator administers the bankruptcy estate's assets and decides on the admission of filed bankruptcy claims in the schedule of claims, as well as the extent and the class in which the claims are admitted. The schedule of claims is open for inspection at the bankruptcy office and can be contested by way of a statement of claim within 20 days before the competent court. Creditors may contest either that their claims were rejected, that their claims were not admitted in the filed amount or that their claims rank in the wrong class of claims. A distinct feature of Swiss insolvency proceedings is that a creditor may also contest the admittance (regarding admitted amount or class of claim) of another creditor's claim, which – if successful – results in a negative declaratory judgment. If this negative collocation suit action is successful, the amount by which the defendant's share of the bankruptcy estate is reduced is used to satisfy the claimant's full claim, including legal fees. Any surplus is distributed among the creditors according to the rectified schedule of claims.

The second creditor's meeting is entrusted with further reaching competences than the first creditor's meeting, in particular, the decision on the realisation of the debtor's assets. The bankruptcy administrator realises the assets by way of public auction, private sale or assignment of claims to a creditor.

The proceeds resulting from the realisation of the debtor's estate are then used to satisfy the bankruptcy claims. The distribution of the proceeds to the creditors follows the principle of equal treatment. However, certain creditor claims are privileged and are satisfied prior to other claims.

Claims of pledgees are satisfied before all other three claim classes under the DEBA. Where the proceeds exceed the claims of the pledgees, the surplus is used to cover claims that are not asset-backed. These unsecured claims are divided into three creditor classes. The creditors in a subsequent class will only be satisfied if and to the extent the creditors of the previous class have received full coverage of their claims. If the proceeds from the realised assets do not fully suffice to cover all claims in one class, the proceeds are distributed to the creditors on a pro rata basis according to the amounts of the claims (the bankruptcy dividends). The first class of creditors mainly comprises claims arising from employment relationships with the debtor, accrued within the six months prior to the opening of the bankruptcy proceedings. The second class of claims encompasses claims from social security, health and unemployment institutions. All other types of claims against the debtor accrued before the opening of the bankruptcy proceedings fall into the third creditor class.

After the distribution of the bankruptcy estate among the creditors, the bankruptcy administration files a concluding report to the bankruptcy court. If the bankruptcy court finds the bankruptcy proceedings to have been fully completed, it declares the bankruptcy proceedings closed.
Bankruptcy proceedings necessarily lead to the dissolution of a bankrupt corporation. During the proceedings, ‘in liquidation’ is added to the company name in the register of commerce. Upon conclusion of the bankruptcy proceedings, the company is deleted from the register of commerce, whereby it seizes to legally exist.

**Composition proceedings**

Composition proceedings aim at protecting a debtor from bankruptcy proceedings and alleviating financial distress. At the end of the composition proceedings, the debtor should reach a composition agreement with its creditors, which either provides for a genuine restructuring of the debtor (Prozentvergleich, Dividendenvergleich) or for the (partial) realisation of the debtor’s assets outside of bankruptcy proceedings (Nachlassvertrag mit Vermögensabtretung, Liquidationsvergleich). Both of these types of composition agreements can be achieved either by assistance of a court or extrajudicially.

Out-of-court composition agreements are based on private transactions, which the debtor concludes with each creditor individually. By way of contrast, judicial composition agreements are the result of proceedings regulated by law, by which the debtor can settle its debts with the approval of a majority of its creditors with judicial assistance. Such an agreement then has a binding effect towards all of the debtor’s creditors.

Composition proceedings begin with the provisorische Nachlassstundung, a provisional composition moratorium, pursuant to Article 293a et seq. DEBA, a period of up to four months granted by the composition judge upon request of the debtor, a creditor or upon transfer from a bankruptcy court where the debtor or a creditor submitted a proposal for a composition agreement. The composition court appoints a composition administrator to assess the prospects of restructuring or approval of the composition agreement. If such prospects exist, the composition court will grant a definitive composition moratorium (definitive Nachlassstundung) of an additional four to six months, pursuant to Article 294 et seq. DEBA. In particularly complex cases, the moratorium may be extended to up to 24 months. In the absence of such prospects, the composition court will open bankruptcy proceedings ex officio.

Upon granting of the definitive composition moratorium, the court appoints a composition administrator (Sachwalter). In contrast to bankruptcy proceedings, the right to dispose over the debtor’s assets remains – with some limitations – with the debtor. The debtor’s daily business runs under supervision of the court appointed composition administrator. The composition court will appoint a creditor’s committee when necessary. The disposal of certain assets by the debtor may require the approval of the composition judge or the creditor’s committee, respectively.

The provisional and the definitive composition moratorium protect the debtor from further financial distress, insofar that no enforcement proceedings may be initiated or continued during the moratoriums.

There are two principal types of judicial composition agreements:

a) the dividend agreement pursuant to Article 314 et seq. DEBA, which aims at payment of a certain percentile of the claims and at a waiver of the residual amounts. This allows the debtor to eventually resume his or her business operations and regain the right to fully dispose of its assets; and
the agreement with assignment of the assets to the creditors pursuant to Article 317 et seq. DEBA, whereby the debtor assigns its assets fully or partially to the creditors, and a court-appointed and creditor-elected liquidator realises the assets. As opposed to bankruptcy proceedings, composition proceedings allow for more flexibility in realising the assets. The proceeds of the realisation are distributed among the creditors proportionally to their filed claim amounts and in accordance with the hierarchy of claim classes set out by the DEBA. To this end, the appointed administrator prepares a schedule of claims that can be contested by creditors as in bankruptcy proceedings. In case of assignment of all of the debtor’s assets to its creditors, the composition agreement leads to the dissolution and liquidation of the debtor.

Both types of judicial composition agreements require approval by a majority of the creditors and the composition court.

The revised DEBA is focused on facilitating access to restructuring procedures by, *inter alia*, granting longer moratorium time periods (four instead of previously two months) and allowing a distressed company to sell parts of its business to generate funds with the approval of the composition judge or the creditor’s committee.

**Corporate law moratorium**

The corporate law moratorium is an additional measure provided for in the SCO in Article 725a SCO, which aims at enabling a distressed debtor to restructure.

The board of directors of a company is legally obliged to request the opening of bankruptcy proceedings when the financial statement shows that creditor’s claims are no longer covered by the debtor’s assets, neither on a going-concern nor on a liquidation-value basis and the corporation is, therefore, over-indebted, pursuant to Article 725, Paragraph 2 SCO. The court may stay the opening of the bankruptcy proceedings if there are prospects of restructuring and may order measures to preserve the company’s assets. To this end, the court can appoint an administrative receiver and define his or her duties. A corporate law moratorium is only published publicly, where publication is necessary to protect third-party interests.

It is notable that the SCO provides for an exception to the board of director’s duty to notify the court in case of over-indebtedness: where certain creditors subordinate their claims to those of all other company creditors to the extent of the capital deficit, the board is exempt from its obligation to notify the court.

**Ancillary insolvency proceedings**

Recognition of foreign insolvency proceedings and foreign arrangements with creditors are dealt with in the PILA.
iv Starting proceedings

Bankruptcy proceedings

The right to request the opening of the bankruptcy proceedings is asserted to several parties, while the right to officially open bankruptcy proceedings is reserved for the bankruptcy court itself.

A creditor may file such a request if:

a it has either fully enforced its claims in debt-collection proceedings and remains in possession of a claim against the debtor; or

b other reasons justify the immediate opening of bankruptcy proceedings against a debtor (i.e., without prior debt-collection proceedings), such as fraudulent behaviour or cessation of payments by the debtor.

The debtor itself has the right to request the opening of bankruptcy proceedings if it is insolvent and there are no prospects of reaching a private settlement of debts. The board of directors is legally obliged to request the opening of bankruptcy proceedings against the over-indebted company.

Lastly, bankruptcy proceedings can also be opened ex officio by courts, for example, in cases of organisational deficiencies of companies. In the event that a composition agreement cannot be agreed upon by creditors, the composition court will itself open the bankruptcy proceedings.

Composition proceedings

Composition proceedings are often initiated by the debtor itself by supplying the court with financial statements, profit and loss statements and a provisional restructuring plan. Composition proceedings can temporarily protect the debtor from further debt enforcement proceedings being initiated against it and can enable it to restructure its business. Certain creditors may also request composition proceedings.

Both the debtor and the creditors may always request composition proceedings in ongoing bankruptcy proceedings and even the bankruptcy court may stay ongoing bankruptcy proceedings if there are sufficient indications for a successful conclusion of a composition agreement.

Corporate law moratorium

The bankruptcy court may stay bankruptcy proceedings against an over-indebted corporation upon request of the board of directors or of a creditor, when prospects of a successful restructuring exist.

v Control of insolvency proceedings

Bankruptcy proceedings

As stated above, the debtor loses the right to dispose over its assets once bankruptcy proceedings have been opened against it. This right is assumed by the bankruptcy administrator, namely either a state administrator or an elected private administrator. The bankruptcy administration is legally obliged to preserve and realise the bankruptcy estate. Certain important rights...
remain with the creditors, such as appointing and confirming the bankruptcy administration and deciding on how to realise the estate’s assets. Additionally, the creditors may appoint a creditor’s committee at the first creditor’s meeting.¹¹

**Composition proceedings**

The composition court will appoint a provisional composition administrator for the provisional composition moratorium period and a definitive composition administrator, once the definitive composition moratorium has been granted. The administrator is entrusted with several tasks by the DEBA, including overseeing the debtor’s daily business and drafting a composition agreement. The composition court can appoint a creditor’s committee, which supervises the administrator. The right to dispose of the debtor’s assets and conduct daily business generally remains with the debtor. Creditors have few controlling rights in composition proceedings. Their main right is the approval of the composition agreement by double majority. In composition proceedings with assignment of assets, the creditors can further determine the liquidators as well as the number and the members of the creditor’s committee.

**Corporate law moratorium**

A court may stay bankruptcy proceedings against an over-indebted company, in the event of prospects of restructuring, pursuant to Article 725a SCO. The court will take measures to preserve the debtor’s assets while the right to dispose of assets remains with the debtor. The SCO gives the court much discretion on how to achieve this. It may appoint an administrative receiver and deprive the board of directors of its power of disposal or make the board’s resolutions conditional on the consent of the administrative receiver. Creditors have no specific rights in a corporate law moratorium; they may not even be aware of an ongoing moratorium, as public notification is not always necessary.

**vi Special regimes**

Swiss law provides for special bankruptcy and restructuring rules for specific debtors. The most notable special regime deals with the insolvency of banks, security dealers and mortgage bond institutions.

The regime is governed by the Swiss Federal Banking Act of 1934 and the Ordinance of the Swiss Financial Market Supervisory Authority on the Insolvency of Banks and Securities Dealers of 2012. The competent authorities for managing the proceedings are not state courts, but the Financial Market Supervisory Authority (FINMA) itself. The privileged second class claims are further expanded to bank deposits with the bankrupt bank in the maximum amount of 100,000 Swiss francs, as opposed to including only social security claims in ordinary bankruptcy proceedings. The aforementioned legal provisions in the Insolvency of Banks and Securities Dealers provide for a completely autonomous restructuring procedure vis-à-vis the procedure set out in the DEBA. Notably, FINMA has the authority to transfer assets located in Switzerland to a foreign bankruptcy estate when bankruptcy proceedings

¹¹ See Section I.iii.
have been opened against a foreign bank or other financial institution, without opening Swiss ancillary proceedings. This stands in contrast to the ordinary treatment of foreign bankruptcy proceedings in Switzerland, which are further outlined below.\textsuperscript{12}

Compared to creditor’s rights in ordinary bankruptcy proceedings, creditors have limited rights in proceedings governed by FINMA. In particular, they have limited rights to appeal the bankruptcy administrator’s actions: creditors can only appeal acts related to the realisation of assets. A creditor intending to appeal any other acts may file a notification to the Federal Banking Commission (FBC). The FBC then decides on whether it will examine the appealed act or not. Further, the creditors’ rights to inspect the liquidator’s files are limited by the banking secrecy. This right may further be restricted to specific stages of the proceedings, or it may be limited or refused where opposing interests take precedence. Further, any information gathered by way of file inspection may solely be used to preserve these creditors’ rights.

There are no provisions in Swiss law that specifically govern insolvent group companies.

\textbf{vii Cross-border issues}

The recognition of foreign insolvency proceedings in Switzerland is regulated by PILA, as the Council Regulation (EC) No. 2015/848 of 20 May 2015 does not apply to insolvency proceedings in Switzerland and Switzerland has not adopted legislation based on the UNCITRAL Model Law on Cross-Border Insolvency.

Where bankruptcy proceedings were opened abroad, these foreign proceedings are recognised in Switzerland on condition that the PILA requirements are met. These requirements are: the foreign bankruptcy must have been declared by the competent court at the seat of the debtor and must be enforceable in the issuing country, there are no general grounds for refusal according to the PILA\textsuperscript{13} and the foreign state conversely recognises Swiss bankruptcy proceedings (principle of reciprocity).\textsuperscript{14}

Upon meeting these requirements, a foreign insolvency administrator is not entitled to file claims against a Switzerland-domiciled debtor before Swiss courts. Rather, Swiss authorities conduct separate Swiss proceedings and appoint a local liquidator for the purpose of liquidating the assets (ancillary proceedings, Minikonkurs). This means that in effect, a foreign bankruptcy decree triggers Swiss bankruptcy proceedings. However, as opposed to Swiss bankruptcy proceedings, which include the debtor’s assets located abroad, these ancillary proceedings relate only to assets located in Switzerland. Further, not all of the debtor’s creditors participate in the ancillary proceedings; participation is restricted to creditors with pledge-secured claims and creditors with privileged (first and second class) unsecured claims domiciled in Switzerland.

Once the claims of said creditors are fully satisfied and a surplus remains, this surplus can be distributed to the foreign insolvency administration or to the entitled bankruptcy

\textsuperscript{12} See Section I.vii.

\textsuperscript{13} Foreign bankruptcy decrees that are in apparent breach of the Swiss ordre public or that are not in accordance with basic Swiss procedural principles will not be recognised according to Article 27 PILA.

\textsuperscript{14} The principle of reciprocity was further defined by the Swiss Supreme Court in the ruling BGE 141 III 222 of March 2015, stating that the term ‘reciprocity’ shall be interpreted broadly, not strictly, namely reciprocity is given where the foreign country recognises the effects of bankruptcies abroad in a similar – not a strictly identical – way. Consequently, the Supreme Court ruled that the Netherlands grant reciprocity in the meaning of Article 166 Paragraph 1. lit. c PILA.
creditors directly. This distribution requires the recognition of the foreign schedule of claims by the same Swiss court, which recognised the foreign bankruptcy proceedings. The foreign schedule of claims will be recognised when Switzerland-domiciled creditors have been appropriately considered in the schedule of claims. The PILA provides for distribution among Swiss third-class creditors, when the recognition of the foreign schedule of claims is not granted by the Swiss court.\textsuperscript{15}

A revised version of the PILA aimed at remediying costly and burdensome recognition proceedings of foreign insolvency proceedings is expected to enter into force shortly.\textsuperscript{16}

viii  Selected additional topics

Clawback actions

The success of insolvency proceedings largely depends on the amount of assets that can be brought into the estate, and if the estate can be adequately secured. There is always a risk of the debtor diminishing its assets. The DEBA deals with this risk extensively and provides for legal remedies either to secure the estate or to repatriate assets belonging to the estate, for example by way of clawback actions.

Only acts committed by the debtor prior to the opening of bankruptcy proceedings can be subject to clawback actions. The bankruptcy administrator or the composition liquidator are entitled to bring forward clawback actions against the contractual party of the debtor or the debtor itself in the name of the bankruptcy estate within two years of opening of the bankruptcy proceedings or within two years of the confirmation of the composition agreement respectively. A creditor may only bring such a claim in its own name after assignment of this right from the bankruptcy estate.

The DEBA provides for three types of clawback actions, namely in relation to:

da  gifts or gratuitous acts of the debtor, pursuant to Article 286 DEBA. Any gifts, gratuitous acts or dispositions by the debtor for which it did not receive adequate compensation are voidable, if they were made within one year prior to the commencement of bankruptcy proceedings or one year prior to the notification of the debt moratorium against said debtor;\textsuperscript{17}

db  certain acts by an over-indebted debtor, pursuant to Article 287 DEBA. The granting of collateral for existing obligations, to which the debtor was not obligated, the settlement of monetary debt by unusual means and the payment of undue debt is voidable, if carried out by an over-indebted debtor within one year prior to the opening of bankruptcy proceedings or one year prior to the notification of the debt moratorium against such debtor;\textsuperscript{18} and
dc  acts by a debtor with the intent of disadvantaging creditors, pursuant to Article 288 DEBA (\textit{Absichtsanfechtung}). All acts carried out by a debtor within five years prior to the initiation of bankruptcy proceedings or five years prior to the notification of the

\textsuperscript{15} Swiss law provides for more flexible rules on the recognition of foreign bankruptcy decrees on banks and other financial institutions.

\textsuperscript{16} cf. Section V.

\textsuperscript{17} The burden of proof that there is no disproportion between performance and consideration lies with the related party of a debtor or the group company (Article 286, Paragraph 3 DEBA).

\textsuperscript{18} Actions are not possible where the beneficiary can prove that it did not know the debtor was over-indebted and was not required to have such knowledge.
debtor moratorium are voidable, if carried out with the intent to harm its creditors or to favour certain creditors to the detriment of the remaining creditors and if such intent was apparent or should have been apparent to the contracting party.\textsuperscript{19}

\textbf{Liability claims}

The SCO holds that the board of directors has the duty to safeguard the interests of the company in good faith.\textsuperscript{20} Specifically, the SCO lists two duties of the board of directors to ensure the continuity of a company in a difficult financial situation.

First, the board of directors must convene a general meeting without delay and propose financial restructuring measures, where the last annual balance sheet shows that half of the share capital and the legal reserves are no longer covered (capital loss),\textsuperscript{21} pursuant to Article 725, Paragraph 1 SCO.

Second, an interim balance sheet must be drawn up where there is good cause to suspect over-indebtedness. If the interim balance sheet shows that claims of the company’s creditors are not covered, whether the assets are appraised at going concern or liquidation values (over-indebtedness), the board of directors must notify the court unless certain company creditors subordinated their claims to the extent of the capital deficit, pursuant to Article 725, Paragraph 2 SCO. Further, the Swiss Supreme Court stated that the board of directors may abstain from notifying the court, where immediate restructuring measures are available.\textsuperscript{22} The chances of restructuring must be tangible (meaning highly likely) and delaying the notification of the court may not endanger the financial situation of company creditors.\textsuperscript{23}

Where members of the board of directors fail to comply with any of these legal obligations, they may become personally liable to the company, the creditors or the shareholders, where an intentional or negligent breach of duty led to a financial damage of any of these parties.

\section{II INSOLVENCY METRICS}

Switzerland’s GDP growth amounted to 0.6 per cent in the first quarter of 2018. This growth is mainly attributable to growth in trade and business-related services. Thus, quarterly growth is noticeably above average for the second quarter in a row. The Swiss federal government’s expert group on economic forecasts expects a GDP growth of 2.4 per cent for 2018 and a

\textsuperscript{19} The burden of proof generally lies with the plaintiff. However, the burden of proof is reversed where the beneficiary is a related party or a group company, which must then prove that it was not in a position to recognise the debtor’s intent to harm (Article 288, Paragraph 2 DEBA).

\textsuperscript{20} The SCO describes the board of director’s general duty of care and loyalty in Article 717.

\textsuperscript{21} Such restructuring measures may for example be a capital increase, cutting the capital combined with an immediate increase (\textit{Kapitalschnitt}) or a rescue merger.

\textsuperscript{22} Contrary to restructuring measures in connection with a capital loss, restructuring measures in connection with over-indebtedness must be available immediately, as the board of director must notify the court within a short time frame.

\textsuperscript{23} Decision of the Swiss Supreme Court of 2 October 1990, BGE 116 II 533.
growth of 2 per cent for 2019. The expert group mainly puts forward a rise in demand for Swiss products owing to the robust global and favourable exchange rate trends as a reason for the continuing GDP growth.24

The Swiss National Bank predicts an inflation rate of 0.6 per cent for 2018. For 2018, the expected rate has been revised downwards from 1.1 per cent to 0.9 per cent. The Swiss National Bank further predicts an inflation rate of 1.9 per cent for 2020. This prognosis is based on the assumption that the three-month LIBOR will remain unchanged at -0.75 per cent during the entire forecast horizon.25

Statistics on insolvency activity are not yet available for 2018. In 2017, 13,257 bankruptcy proceedings were opened, which equals a decrease of 2.6 per cent since 2016. This is the highest number of commenced bankruptcy proceedings since 2008. Nonetheless, the losses resulting from concluding bankruptcy proceedings have declined in 2017 by 33.5 per cent since 2015, equalling in losses of approximately 1.7 billion Swiss francs in 2017.26 The strength of the Swiss franc has specifically hit the retail sector and the tourism industry. Companies in these structures have recently had to undergo more restructurings in order to cut down on their costs and secure a profitable continuation of their businesses. Further, the oil price has remained at a historic low and put the commodity sector under financial stress for some time. This has affected both companies engaging in exploration and companies higher up in the production chain. However, most of the commodities traders such as Glencore, who were viewed to be endangered at the beginning of 2016, were able to successfully restore their balance sheets.

III PLENARY INSOLVENCY PROCEEDINGS

In the past 12 months, no new landmark bankruptcy or restructuring cases were opened of which we are aware. However, ongoing cases, which have been portrayed in this Review in previous editions, have proceeded. The most high-profile bankruptcy and restructuring cases being:

a The oil refining company Petroplus Holdings (PHAG) headquartered in Zug, Switzerland, was the parent company of the Petroplus group, which operated refineries in several European countries. Petroplus Marketing AG (PMAG) occupied a central position within the Petroplus group as it was responsible for acquiring the required crude oil and having it processed by the refineries in order to eventually sell the products directly or through local marketing companies. Insolvency proceedings were commenced with regard to numerous Petroplus group companies in late January 2012, including PHAG and PMAG, after failing to secure up to a US$2 billion revolving credit facility line (RCF). PMAG requested composition proceedings with assignment of assets while PHAG entered into bankruptcy proceedings. Since the lenders under the RCF were satisfied in full, the bondholders became the most important group of the Petroplus entity asserting claims based on bonds of approximately US$1.75 billion

against the issuer and guarantors. They further asserted claims based on an assigned security against PMAG. The PMAG liquidators dismissed these claims contesting the validity of relative subordination in favour of the bondholders. The issue of relative subordination against PMAG was settled with the security agent of the bondholders and several Petroplus group entities involved. This settlement became effective in March 2016, shortly after the global settlement between the RCF banks and Petroplus group companies became effective. The RCF global settlement provided for the payment of US$211 million from the RCF banks’ security agent to PMAG. In February 2018, two settlements between (1) PMAG, the English group company Petroplus Refining & Marketing Ltd (PRML), PRML’s Swiss ancillary bankruptcy estate and the PRML liquidators and between (2) PMAG, the English group company, Petroplus Refining Teesside Ltd (PRTL), PRTL’s Swiss ancillary bankruptcy estate, the PRTL liquidators and Deutsche Bank Trust Company Americas as Security Trustee for Petroplus bond creditors entered into force. The settlements concluded ongoing actions to contest the PMAG schedule of claims instigated by PRML and PRTL, which were aimed at achieving the admittance of an additional third-class claim amount of the PRML ancillary bankruptcy estate of CHF 131 million and to relegate a 23.8 million Swiss francs claim of the PRTL ancillary bankruptcy estate from the subordinated claims to the normal-third class claims. The settlements took into account the risks of all parties involved and permitted a far-reaching validation of PMAG’s schedule of claims, which led to the distribution of a further interim payment to third-class creditors of PMAG.

The holding company of Swissair, SAirGroup AG, and its subsidiary companies have been in composition proceedings since 2001. The liquidation proceedings have further advanced in 2016, as the intra-company claims (Flightlease AG, SAirLines AG and Swissair AG) have been settled and a property belonging to SAirGroup was sold, generating 72 million Swiss francs for the bankruptcy estate. By settling the intra-group claims, only one action to contest of the schedule of claims of SAirGroup remains pending. This action of CHF 2,358,783,548.45 by the Belgian airline Sabena in liquidation against SAirGroup is currently pending before the second instance court. SAirGroup further asserted claims based on director’s liability under corporate law against several corporate bodies of SAirGroup (members of the board, CEO, CFO). The composition liquidator argued, in particular, that these bodies transferred shares in possession of SAirGroup to the subsidiary SAirLines, without receiving adequate compensation for the transactions. In 2012, the Swiss Federal Supreme Court rejected the claims, as SAirGroup could not prove over-indebtedness of SAirGroup and SAirLines. Further director’s liability claims of the group companies remain pending before several Swiss courts. Five advance payments on bankruptcy dividends have been made and the expected bankruptcy dividend amounts to 23 per cent according to the liquidator.

Lehman Brothers Finance SA, the Swiss Lehman Brothers entity, was declared bankrupt in 2008. The bankruptcy proceeding is governed by the special regime for insolvent banks as outlined above. Currently, only two objections against the schedule of claims of Lehman Brothers Finance SA are still pending before the competent Swiss courts. Twelve dividend payments, with a total dividend of over 61 per cent for third-class creditors, have been paid out to creditors by 30 June 2018.

27 BGer 4A_410/2011.
IV ANCILLARY INSOLVENCY PROCEEDINGS

Official statistics on ancillary insolvency proceedings in Switzerland are not published. To our knowledge, within the past few years, several foreign insolvency administrators of Petroplus group companies requested Swiss ancillary bankruptcy proceedings to be opened, including Petroplus International BV in liquidation and Petroplus Finance 2 Ltd in liquidation. Swiss ancillary proceedings allow the foreign group companies to assert and enforce their claims against the Swiss Petroplus companies.

V TRENDS

Under the current version of the PILA, the procedure for obtaining recognition of foreign insolvency proceedings is burdensome and cost-intensive, inter alia, owing to the reciprocity requirement, the fact that the recognition of foreign proceedings automatically leads to Swiss ancillary proceedings and the fact that assets of a foreign debtor in Switzerland are only distributed to the foreign bankruptcy estate after all secured and privileged claims of Swiss-domiciled creditors have been satisfied.28

In an attempt to remedy these issues, in particular to avoid unnecessary ancillary proceedings in cases where there are no secured or privileged creditors in Switzerland, the Swiss Federal Council adopted the dispatch on a revision of the PILA with regard to the recognition of international bankruptcy decrees and foreign composition agreements on 24 May 2017.

The new PILA includes five important amendments:

a the reciprocity requirement will be deleted, thus considerably facilitating the recognition of foreign bankruptcy decrees as additional costs triggered by required legal opinions of foreign counsel on the reciprocal nature of a certain jurisdiction become unnecessary;

b insolvency decrees shall be recognised if issued by the competent authorities at the ‘centre of main interests’ (COMI);29

c if there are no privileged or secured creditors or creditors of a Swiss branch, and if the claims of non-privileged and unsecured creditors in Switzerland are adequately taken into account in foreign proceedings and these creditors were granted their right to be heard, Swiss courts can waive ancillary proceedings in favour of a foreign insolvency trustee upon the request made by the foreign bankruptcy administration;

d Swiss authorities can cooperate with foreign bankruptcy authorities on related matters; and

e creditors of non-secured and non-privileged claims of a Swiss branch of a foreign insolvent entity can be listed in the schedule of claims in the ancillary bankruptcy.

The revised provisions of the PILA were subject to an optional referendum, of which the deadline expired on 5 July 2018. The Swiss Federal Council is now expected to determine the date of entry into force of the revised PILA shortly; the date is likely to be set to late 2018 or early 2019.

---

28 See Section I.vii for further details.
29 The definition of a COMI in the revised PILA matches the EU Insolvency Regulation’s (EU 2015/848) definition of COMI.
I INSOLVENCY LAW, POLICY AND PROCEDURE

i Statutory framework and substantive law

Broadly speaking, the Thai legal system follows the pattern of civil law countries in continental Europe with no concept of binding precedential authority. However, in practice, precedents shall be treated as guidance on how a court would interpret the law.

In relation to bankruptcy and reorganisation in Thailand, these processes are governed by the Bankruptcy Act BE 2483 (1940), as amended (the BA). The BA has been amended several times since its inception; for example, in 1998, after the Asian Financial Crisis, an amendment of the BA introduced the concept of corporate reorganisation into Thai law, and in 1999, the BA was amended by ironing out several difficulties that were being encountered by corporations undergoing reorganisation.

In 1999, a specialist Bankruptcy Court (the Court) was established by the Act on the Establishment of and Procedure for the Bankruptcy Court BE 2542. Currently, the Central Bankruptcy Court, Regional Bankruptcy Court and Supreme Court in the Bankruptcy Division are specialised courts that have separate jurisdictions to adjudicate cases relating to bankruptcy and business reorganisation, and have the power to regulate their own procedures.

It is important to note that the bankruptcy and reorganisation processes can be applied to both private and public companies. However, with respect to individual persons, whereas the bankruptcy process can be applied to an individual person, the reorganisation process applies only to individual persons who are categorised under the BA as a small and medium-sized enterprise (SME).

ii Starting proceedings and control of insolvency proceedings

Bankruptcy

The BA shall govern any insolvent debtor if the debtor is (or has been within the previous year) domiciled or engaged in business in Thailand at the time that a bankruptcy petition is filed against that debtor. The BA provides for all the properties of a bankrupt debtor located within Thailand. It should be mentioned that foreign bankruptcy proceedings have no effect on the property of a debtor in Thailand.

When a creditor believes that a debtor is insolvent with the debt to such creditor or to another creditor in the amount of not less than 2 million baht (in the case of a corporate...
debtor) or in the amount of not less than 1 million baht (in the case of an individual debtor),
even if such debt that is a liquidated amount is due immediately or will become due in the
future, the creditor may file a bankruptcy petition against the debtor.3

The petitioning creditor should normally be an unsecured creditor. However, a secured
creditor may file a bankruptcy petition against a corporate debtor only when the creditor
is able to enforce payment against the property of the debtor other than the security and
the creditor states in the petition that, if the debtor becomes bankrupt, the security will be
surrendered for the benefit of all creditors, or, after assessing the security against the amount
of debt owed to the creditor, the value of the security is not sufficient to cover the debt in an
amount of not less than 2 million baht (in the case of a corporate debtor) or in the amount
of not less than 1 million baht (in the case of an individual debtor).4

Generally, in the petition, the petitioner has to prove that the debtor is insolvent. In
particular, the BA provides a number of assumptions of facts that can be used to consider
the debtor as being insolvent, for example, the debtor transfers his or her assets or creates
any right over such assets that, if the debtor were a bankrupt, would be deemed as an act of
preference, whether such act is carried out within or outside Thailand; or the debtor transfers
his or her asset to other persons for the benefit of all creditors, whether such act is done within
or outside Thailand. These examples are only presumptions that the debtor is entitled to
rebut by proving that he or she is solvent. In practice, debtors would have to prove that they
have assets of a value that exceeds their liabilities by referring to their audited accounts (even
if such assets were not liquid and their debts could not be paid when they fell due). However,
in 2008, there was a case in relation to bankruptcy and reorganisation involving one of the
largest petrochemical industry companies in Thailand in which the debtor failed to oppose
such presumption. In short, the Thai Petrochemical Industry Public Company Limited (TPI)
was the debtor that failed to oppose its bankruptcy and reorganisation on the basis of its
audited balance sheet, even though it showed that its assets exceeded its liabilities. The Court
ruled that TPI was insolvent because its assets, when valued independently, without taking
into account the value recorded in its audited account, were worth less than its liabilities, and
because TPI had failed to rebut the presumption of insolvency.

In the hearing of a bankruptcy petition, if the Court is not satisfied with the fact that
the debtor is insolvent under the conditions of the BA (as discussed above), the debtor has
the opportunity to prove that he or she has the capacity to pay the debt in full. If the debtor
is successful, the Court will dismiss the petition.5

Even during the dissolution of a debtor that is a registered partnership, limited
partnership, limited company or any other types of legal entity, the liquidator of that legal
entity can also submit a petition to the Court requesting that the legal entity be declared
bankrupt provided that its assets are insufficient to cover the debts, even when the investment
contributions and its shares are fully paid up.6 However, under Thai bankruptcy proceedings,
there is no scheme of voluntary bankruptcy for individual debtors.

In the event that the Court grants a receivership order for liquidation, the control of the
debtor's assets will be passed to a government official known as the official receiver, who must
call a creditors' meeting to discuss any proposal for composition of the debts by the debtor.

3  Section 9 of the BA.
4  Section 10 of the BA.
5  Section 14 of the BA.
6  Section 88 of the BA and Section 1266 of the Civil and Commercial Code.
The creditors can pass a special resolution, which can be passed by the majority of creditors holding at least three-quarters of the total debt and attending and voting in person or by proxy accepting the debtor’s proposal for the composition of debts. However, if no proposal is put forward or the debtor’s proposal is rejected, the Court must adjudge and declare the debtor bankrupt, and the official receiver is empowered to solely manage the property of the bankrupt for distribution among all creditors.7

After a bankruptcy order is made, the pursuit of any claims the creditor may have against the debtor would be passed to the official receiver exclusively.

In the event that a debtor is adjudicated bankrupt, the official receiver is responsible for collecting the assets of the debtor.

The BA also, in certain circumstances, allows the Court to protect the debtor’s property. That is to say, the official receiver is entitled to clawback the debtor’s assets by filing a motion to the Court for an order to cancel any fraudulent acts of the debtor. If the fraudulent acts arose within the time period of one year before the application for adjudication of bankruptcy and thereafter, or were gratuitous acts or resulted in the debtor receiving compensation of less than a reasonable amount, it shall be presumed that the debtor and the person enriched thereby knew that such act would be to the prejudice of the creditors.8 In addition, upon the filing of a motion by the official receiver, the Court is empowered to cancel any transfer of assets or any act done or permitted to be done by the debtor during the three months prior to an application for adjudication of bankruptcy and thereafter, and with an intention to give undue preference to a creditor.9

In addition to the duty of asset collection, the official receiver is also permitted to sell the debtor’s assets (either on a going-concern or piecemeal basis) by way of public auction or by other means, as approved by the creditor’s committee (if appointed). Nonetheless, the debtor’s property that is attached by the official receiver after the granting of a temporary or absolute receivership order (if applicable) cannot be sold until the Court adjudicates the debtor bankrupt. In the enforcement process, a creditor shall file his or her claim with the official receiver within the two months following the date of publication of the order of absolute receivership in accordance with Section 91 of the BA.

However, if the creditor is a foreign creditor domiciled outside Thailand, according to Section 178 of the BA, he or she can claim for repayment of debts in the bankruptcy action upon compliance with the following conditions:

a. prove that the creditors in Thailand are similarly entitled to claim for payment of debts in bankruptcy actions under the laws and before the courts of the countries of which the foreign creditor is national; and
b. report the amount of the assets or distribution that he or she has received or is entitled to receive from the same debtor’s assets located outside Thailand, if any. If so, he or she must agree to deliver the assets in order to be added to the debtor’s assets in Thailand.

Business reorganisation

Under Thai law, apart from the insolvency proceeding, there is also a reorganisation process that allows a company to reorganise under a court process available to rescue a company from falling into insolvency under the BA and to help creditors be fairly paid.

7 Section 61 of the BA.
8 Sections 113 and 114 of the BA.
9 Section 115 of the BA.
The process of approval of reorganisation proceedings can be roughly divided into four phases, as set out below.

**Phase one**
When the debtor is insolvent or unable to make repayment of debts that became due, and indebted to one creditor or more for a definite amount of not less than 10 million baht, whether such debt is due promptly or in due course, if there are reasonable grounds and prospects to reorganise the business of the debtor, the person under the BA, including creditor, debtor or government agency, may file a petition for business reorganisation with the Court.10

The petition for business reorganisation should clearly express to the Court that the debtor is insolvent and indebted to the creditor for a total of not less 10 million baht and there are reasonable grounds with a positive prospect to expect that the business of the debtor can be reorganised.11 Despite this, the debtor is not subject to absolute receivership or dissolution.

The Court shall issue an order for business reorganisation or dismiss the petition for business reorganisation. When deciding whether to issue an order for reorganisation of the debtor’s business, the Court will take into account the facts according to the substantive tests of a reorganisation proceeding. If there are reasonable grounds for reorganising the business, and the petitioner has filed the petition in good faith, the Court will issue the order for business reorganisation. Otherwise, the Court will dismiss the petition.

In the procedure of reorganisation, if a reorganisation petition is accepted by the Court, there is an automatic moratorium or an automatic stay preventing, *inter alia*, the creditors from pursuing claims against the debtor and restricting the creditor’s right to enforce security. In particular, an action shall not be taken against the debtor in a civil case in respect of the assets of the debtor, nor shall a dispute in which the debtor may become liable or incur damage be submitted to arbitration for decision if the obligation arises before the day on which the Court approves the business reorganisation plan (the reorganisation plan). In addition, no action shall be taken against the debtor in a bankruptcy case. If an action has previously been submitted to arbitration to be decided on, the Court will suspend the arbitral proceeding.

Nonetheless, despite the automatic stay and the conditions attached therewith, the debtor is allowed to continue its normal business operation during the reorganisation pursuant to Section 90/12(9) of the BA. However, the powers and duties of the debtor’s executives in managing the business and assets shall cease once the Court has ordered business reorganisation and the Court shall appoint any person or the debtor’s former executives to be an interim executive until the plan preparer is appointed. The debtor’s assets cannot be sold except in the normal course of business; however, such sale of assets can be otherwise approved by the Court. The debtor is allowed to make payment to creditors who supply goods or services according to the normal and current terms and conditions of any agreements. Any claims arising after the Court’s reorganisation order will not be subject to reorganisation proceedings and, if the debtor has incurred such obligations in the normal course of business and as required for the continuation of its operation, the debtor can pay such claims.

Furthermore, there is no legal provision governing the termination of contracts during a reorganisation proceeding. Consequently, these matters are governed by the terms of the

---

10 Section 90/3 of the BA.
11 Sections 90/6 and 90/10 of the BA.
agreement between the parties. In regard to the enforcement process, the BA also provides that no judgment creditor shall carry out the execution of a judgment over the assets of the debtor if the obligation pursuant to the said judgment had arisen before the day on which the Court approves the reorganisation plan. In the case of the execution of a judgment that has previously been made, the Court will suspend execution of the judgment unless otherwise ordered by the Court at which the petition is filed or the execution of the judgment is fully carried out before the executing officer is aware of the petition having been filed. No secured creditor shall enforce payment of debt against the asset that is the security unless otherwise approved by the Court or after a year following the date on which the Court accepted the reorganisation petition (subject to the extension of time frame by the Court in accordance with the BA). In any case, a creditor shall not seize or sell the debtor’s assets.

Phase two

In the second phase, the plan preparer (who will produce the reorganisation plan for the reorganisation process of the debtor) shall be appointed. The Court may appoint the person nominated by the petitioner to be the plan preparer. However, if the Court finds that the person nominated by the petitioner is not suitable to be the plan preparer, or the debtor or objecting creditor nominates another person, the Court will issue an order to the official receiver to call a creditors’ meeting in order to consider which person should be elected as the plan preparer.

In the creditors’ meeting, if the debtor has not suggested a plan preparer, a resolution electing a person for this role will be passed by the creditors whose debts constitute the majority amount and who cast their votes on the resolution. However, where the debtor has proposed a plan preparer, then such person will prepare the reorganisation plan, unless the creditors whose debts account for not less than two-thirds of the total debts have cast their votes on a resolution deciding that another person will be appointed.

The plan preparer can also be elected during the creditors’ meeting and will be appointed providing that the Court approves such election. If the Court disapproves of the appointment it will order the official receiver to call a second creditors’ meeting in order to elect a different plan preparer, who is nominated by the creditors or the debtor.

If the second creditors’ meeting is unable to elect the plan preparer, the official receiver must call a third creditors’ meeting to decide on the appointment, unless the Court exercises its discretion to cancel the business reorganisation order.

If the second creditors’ meeting successfully elects the plan preparer, the Court will appoint that person, unless the Court deems it appropriate not to appoint the said person as the plan preparer or the meeting is unable to resolve the election, the Court shall cancel the order of business reorganisation. The power and duties of the plan preparer shall commence on the day the Court gives such order and the power and duties of the official receiver shall cease.

In this regard, the creditors must submit an application for repayment of debt to the official receiver within one month after the order of appointment of the plan preparer is published. A foreign creditor is also required to submit the application without the need to prove to the Court that the creditors in Thailand are similarly entitled to claim for repayment of debts in bankruptcy actions under the laws and before the Court of the countries of which

12 Section 90/17 of the BA.
13 Section 90/24 of the BA.
the foreign creditors are nationals. If the creditors do not file an application within the time limit, such creditors shall forfeit their rights to receive payment. The plan preparer (where appointed) will then produce the reorganisation plan and manage the debtor's business and assets to disburse the debtor's debts within the scope set out by the reorganisation plan, with the exception of the rights to receive dividend.\footnote{Section 90/25 of the BA.} However, the plan preparer shall not distribute, transfer, pay debt or create debt over the debtor's asset unless such act is essential for the debtor's normal course of business or the Court ordered the approval of such act.

The plan preparer shall submit the reorganisation plan to the official receiver within three months after his or her appointment is announced. Despite this requirement, the plan preparer can request a maximum of two extensions and each extension shall not exceed one month. In practice, the plan preparer has a total of five months to prepare the reorganisation plan.

\textit{Phase three}

With regard to the reorganisation plan, a creditors' meeting must be held to discuss and approve the plan.\footnote{Section 90/46 of the BA.} It must be approved by (1) in the case of a meeting of every group of creditors, a majority of the creditors' meeting with an amount of debts of not less than two-thirds of the total debts of the creditors being present at the meeting, in person or by proxy, and casting their votes, or (2) in the case of a meeting of at least one group of creditors, a majority of the creditors' meeting with an amount of debt of not less than two-thirds of the creditors present in the meeting, in person or by proxy, and casting their votes, and, when counting the total amount of debts owed to all creditors who approved the plan, such amount must not be less than 50 per cent of the total debts owed.

If the creditors do not pass a resolution to accept the reorganisation plan, do not pass any resolution or the creditors do not attend the meeting, the Court will cancel the business reorganisation order.

The reorganisation plan must include the classification of the creditors, which is decided as follows:\footnote{Section 90/42 \textit{bis} of the BA.}

\begin{itemize}
\item[(a)] each secured creditor with a secured debt of 15 per cent or more of the total indebtedness will each be classed as a group;
\item[(b)] secured creditors not classified under item a will be classed as a group;
\item[(c)] unsecured creditors can be classified into several groups (however, unsecured creditors whose claims or interest are identical or similar in material aspects can be the same group); and
\item[(d)] creditors who by law or by contract have the right to receive repayment, only after the other creditors have received repayment in full, will comprise one group.
\end{itemize}

\textit{Phase four}

If the creditors have passed a resolution accepting the reorganisation plan, the Court will consider it and will issue an order approving the reorganisation plan if it contains all the required items according to the law. It is important to stress that under the reorganisation plan, the rights of the creditors within the same group are treated equally, and the proposals
for repayment of debt under such plan must be in accordance with the sequence stipulated by the law regarding the distribution of assets in a bankruptcy case (except where those creditors have given their consent for another arrangement). Further, when the reorganisation plan has been successfully implemented, the creditors must receive debt repayments in amounts that are not less than the amount the creditors would have received if the Court had adjudged the debtor as bankrupt.

If the Court has approved the reorganisation plan, the Court shall notify the plan administrator who is responsible for implementing the plan as soon as possible. Once the plan administrator learns of the order, the rights and duties of the plan preparer shall be passed to the plan administrator; this must be done within five years, but the creditors or the debtor can request a maximum of two extensions, and each extension shall not exceed one year.\(^{17}\)

In the event that the debtor's executive, the plan administrator, or the interim plan administrator or official receiver, believe that the reorganisation of the business has been successfully completed under the reorganisation plan, he or she shall promptly inform the Court and ask it to order the termination of the business reorganisation. If the Court agrees that the business reorganisation has been successfully completed, the termination will take place without delay.\(^{18}\)

When the business reorganisation is terminated, the debtor, the creditors and other parties will be affected as follows:\(^{19}\)

- **Debtor and creditors:** the debtor can continue its business as normal and will be free from all debts that occurred prior to the court-ordered business reorganisation, except for debts owed to eligible creditors who have applied for repayment in the business reorganisation.

- **Debtor's executive:** the debtor's executive will again have the authority to manage the debtor's business operations and assets.

- **Debtor's shareholders:** the debtor's shareholders will resume their legal rights.

- **Debtor's employees and trading partners:** although there are no specific provisions concerning how the debtor's employees and trading partners will be affected by the termination of the business reorganisation, since the reorganisation procedure will not cause the debtor's business to cease to operate, the debtor's employees and trading partners will not be affected by the initiation or termination of the reorganisation procedure.

### iii Cross-border issues

While Thailand is not a party to any international treaty on insolvency or recognition of foreign judgments, it is generally accepted that a foreign judgment may form part of the evidence in a case brought in Thailand on the same subject matter, and shall be considered as the 'best evidence' for the judgment. Foreign judgments should be final and conclusive, not contrary to Thai public policy and given by a court of competent jurisdiction.

The Legal Execution Department under the Ministry of Justice, however, amended the BA by adding new provisions that are in line with the UNCITRAL Model Law on Cross-Border Insolvency, including access of foreign creditors and foreign representatives,\

---

\(^{17}\) Section 90/63 Paragraph 2 of the BA.

\(^{18}\) Section 90/70 of the BA.

\(^{19}\) Section 90/75 of the BA.
recognition of foreign proceedings and relief, cooperation and direction communication and concurrent proceedings. This new legislation will enhance the capacity to enforce debtor’s assets as a means of addressing cross-border issues.

II INSOLVENCY METRICS

Thailand is viewed as a mildly pro-creditor jurisdiction in respect of its bankruptcy regime. In practice, this means that security can be taken and will be recognised, and can be enforced within a reasonable period, taking into account all statutory requirements and procedures that may need to be complied with.

However, it can be difficult to enforce security, and there are significant delays in enforcement. In addition, the reorganisation process may have debtor bias or possible bias against foreign creditors. Much can depend on the facts of the case.

III PLENARY INSOLVENCY PROCEEDINGS

The number of liquidation cases has significantly increased since the BA was amended in 1998. It seems that the Bankruptcy Court and insolvency proceedings are increasingly inspiring confidence. Although the Court has handled mainly small and medium-sized companies, in recent times, there have been more applications for business reorganisation submitted by major companies. The following examples illustrate reputable Thai companies that are currently undergoing insolvency proceedings.

i Sahaviriya Steel Industries Public Company Limited

Sahaviriya Steel Industries Public Company Limited (SSI TH), one of South East Asia’s largest flat-steel manufacturers, is undergoing a complex 60 billion baht restructuring. SSI TH is required to enter into the business reorganisation because the major creditors of SSI UK demand it be jointly liable for the obligations of SSI UK under loan conditions as a guarantor. This obligation amounts to approximately 28 billion baht.

The business reorganisation of SSI TH is significant because:

a it is critical for the company to resume operations to help stabilise the steel industry in South East Asia;

b outstanding debts from creditors are significant in term of lenders’ overall debt;

c the relevant banks are required by law to have full reserve for such debt; and

d the legal work involving the reorganisation plan is complex, based on the financing structure between the company and the financial institutions, its trade creditors and also the progress of the administration proceedings in the UK.

ii Saha Farms Company Limited

The reorganisation case involving Saha Farms Company Limited and its affiliate Golden Line Business Company Limited was the largest ongoing debt restructuring process filed with the Bankruptcy Court in 2014–2015 (in terms of the debt value and the number of creditors).

Saha Farms is a significant player in Thailand’s agro-market. It is also one of the country’s leading poultry producers and ranks as the biggest Thai exporter of frozen products, with a 22 per cent market share of total exports in this sector. Saha Farms and its affiliates were
Thailand

responsible for approximately 30,000 employees, although such number has been reduced by around 50 per cent. The value of the creditors’ debts for Saha Farms and Golden Line is estimated at more than 35 billion baht.

The business reorganisation of Saha Farms and Golden Line is also significant on a number of different levels.

As a major consumer of one of Thailand’s main agricultural products and as a key employer for agri-related workers, like SSI TH, it is critical for the group to resume operations to help stabilise the agricultural industry in Thailand and overseas markets.

Outstanding debts from creditors, including Krung Thai Bank (in addition to new credit lines) amount to more than 35 billion baht. As such, it is significant in terms of lenders’ overall debts and capitalisation guidelines.

The legal work involved in reaching approval of the reorganisation plan is based on the structuring requirements of various credit facilities, the aims of diverse creditors, and the fact that the debtors comprise two separate entities.

The total number of creditors to be advised and aligned regarding the reorganisation petition exceeds 8,000. This was one of the largest constituencies of this type in Thailand’s history.

IV TRENDS

i The amendment of the BA for the reorganisation of SMEs

In the past, only private companies and public limited companies were able to submit requests for business reorganisation. With the intent of helping potential SMEs that may have faced financial liquidity problems, the government has pushed forward a new reorganisation process to facilitate SMEs and prevent them from falling into bankruptcy. In this regard, Thailand introduced new amended legislation for the BA, which came into force on 25 May 2016 (the Amendment). This Amendment allows SMEs to enter into a form of business reorganisation that is less time-consuming than the normal reorganisation process.

A debtor who is allowed to be placed under business reorganisation according to the Amendment must meet the required conditions, which are that the debtor should conduct an SME in accordance with the laws in relation to the promotion of SMEs, and it should be registered with the Office of SMEs Promotions or another government agency in order to conduct such a business.

A petition for business reorganisation may be filed with the Court if the debtor is insolvent and owes to at least one or more creditors the following amounts depending upon the type of debtor:

\[
\begin{align*}
  a & \text{ at least } 2 \text{ million baht in the case of an individual;} \\
  b & \text{ at least } 3 \text{ million baht in the case of a limited partnership, registered partnership, non-registered partnership, group of persons or other juristic person specified in the ministerial regulation;} \\
  c & \text{ at least } 3 \text{ million baht but less than } 10 \text{ million baht in the case of a private limited company.}^{20}
\end{align*}
\]

---

20 Section 90/92 of the BA.
Thailand

With regard to the Amendment, Thailand is the third country in Asia (after Japan and South Korea) that has undertaken a revision of its law to enable the business reorganisation of SMEs. This will enhance national competitiveness and may affect the World Bank’s evaluation of ease of doing business in Thailand in future.21

ii New security under Thai law

Thailand’s Business Security Act (the Act) came into force on 2 July 2016. It makes significant changes to the regime for creating security in Thailand by, among other things, expanding the types of assets that Thai entities can use as security for their financing. This will provide Thai SMEs greater opportunities to access financing and thereby develop their businesses. It is worth nothing that a creditor that accepts a security under the Act is also regarded as a secured creditor under the BA. Under the Thai Civil and Commercial Code, only two types of security interest, mortgage and pledge, can be created. Mortgages can only be created for certain types of assets such as real estate, registered machinery and certain other specific movables. Pledges can be created over movable property but to be perfected the property has to be delivered to and retained by the creditor: as soon as the property is not in the possession of the creditor the pledge ceases to be effective. It is, therefore, not practical to create security over inventory, raw materials or stock in trade, and there are also doubts over the ability to create a pledge over a bank account. There is also no concept of a security over a fluctuating body of assets like the common law floating charge that enables a business to be sold as a going concern.

The Act creates a new method of creating security: the business security agreement. Security may be created over the following assets under a business security agreement:

\( a \) a business;
\( b \) a right of claim (which includes a right to receive performance of obligations and any other rights, but excludes a right represented by a written instrument);
\( c \) movable property used in a business such as machinery or inventory;
\( d \) immovable property used in a business;
\( e \) intellectual property; and
\( f \) other assets to be prescribed by ministerial regulation.

Future assets can also be granted as security under the business security agreement.

Under such an agreement, security is created by a security provider in favour of a security receiver to secure the performance of the underlying debts (the security provider’s or a third party’s). The security provider can be either an individual or a legal entity (juristic person), while the security receiver must be a financial institution or any other person to be prescribed in a ministerial regulation.

In the case of a business security agreement that creates security over a business, a security enforcer must also be appointed, who will enforce the security created by the business security agreement in the event of a default. A security enforcer must be licensed and registered with the Business Security Registration Office of the Department of Business Development and be qualified, as specified in the Act (i.e., they must have knowledge and experience in law, accounting or business).

---

Insolvency Law, Policy and Procedure

Statutory framework and substantive law

Although individual states in the United States have laws that govern the relationship between debtors and their creditors, insolvency law in the United States is primarily dictated by federal law because Article 1, Section 8 of the United States Constitution grants Congress the power to enact ‘uniform Laws on the subject of Bankruptcies’. While over time several different bankruptcy statutes have been passed by Congress, the US bankruptcy regime is currently set forth in Title 11 of the United States Code (the Bankruptcy Code), which codified the Bankruptcy Reform Act of 1978 and subsequent amendments. The most recent significant amendment to the Bankruptcy Code was the 2005 Bankruptcy Abuse and Consumer Protection Act.

The Bankruptcy Code is composed of nine chapters. Chapters 1, 3 and 5 provide the structural components that generally apply to all bankruptcy cases. Chapters 7, 9, 11, 12, 13 and 15 lay out general procedures specific to certain types of bankruptcies. Generally speaking, these specific types of bankruptcies are:

a. trustee-administered liquidation (Chapter 7);
b. municipality bankruptcy (Chapter 9);
c. debtor-in-possession (DIP) managed reorganisation or liquidation (Chapter 11);
d. family farmer and fisherman bankruptcies (Chapter 12);
e. individual bankruptcies (Chapter 13); and
f. cross-border cases (Chapter 15).

1 Donald S Bernstein and Timothy Graulich are partners and Christopher S Robertson is an associate at Davis Polk & Wardwell LLP.
6 As discussed in Section V, there is a proposal currently under consideration in Congress to add a new chapter or subchapter to the Bankruptcy Code tailored to resolving systemically important financial institutions.
7 Individuals can also seek relief under Chapters 7 and 11 of the Bankruptcy Code.
Generally speaking, with respect to plenary corporate bankruptcies, US insolvency law provides for two distinct regimes: a trustee-controlled liquidation under Chapter 7 and a DIP-controlled reorganisation or structured liquidation under Chapter 11.8 This chapter focuses on Chapter 11 proceedings. Below are certain key provisions of US insolvency law:

The automatic stay

One of the most important provisions of the US insolvency regime is the ‘automatic stay’, which is codified in Section 362 of the Bankruptcy Code. The automatic stay is a statutory injunction that applies immediately upon the commencement of a bankruptcy proceeding. Generally, the automatic stay operates to enjoin most creditors from pursuing actions or exercising remedies to recover against a debtor’s property. There are limited exceptions to the automatic stay and it can be modified by a court upon a showing of cause. The automatic stay provides the breathing room necessary for the debtor or trustee to assess and assemble all of the property of the estate without creditors seeking remedies to protect their own self-interests. Accordingly, the automatic stay allows for the preservation of the debtor’s assets and the maximisation of their value and for an equitable distribution of those assets to creditors.

Safe harbours

One important exception to the automatic stay is that it generally does not apply to contracts that are colloquially referred to as ‘financial contracts’. Specifically, the automatic stay does not apply to certain delineated counterparties’ ability to offset, net, liquidate, terminate or accelerate ‘securities contracts’,9 ‘commodities contracts’,10 ‘forward contracts’,11 ‘repurchase agreements’,12 ‘swap agreements’,13 or ‘master netting agreements’14 with a debtor, provided that the counterparty may be required to exercise its remedies promptly.15 In addition, a debtor may not avoid as a fraudulent transfer a transfer to such a counterparty under one of these contracts unless the transfer is intentionally fraudulent.

The absolute priority rule

Another key tenet of US insolvency law is the absolute priority rule. The absolute priority rule provides that creditors with higher priority must be paid in full before creditors of lower priority receive any distribution from the bankruptcy estate, and thereby ensures a ‘fair and equitable’ distribution of the debtor’s property consistent with the priorities under applicable non-bankruptcy law. As a result, in the absence of consent, secured claims must be paid in full from collateral before general unsecured creditors receive any recovery. Similarly, because equity holders have the lowest priority, in the absence of consent, they cannot receive any

8 A trustee can be appointed in Chapter 11 for cause. 11 U.S.C. § 1104(a)(1).
11 id.
15 See In re Lehman Brothers Holdings Inc., Case No. 08-13555 (JMP) (Bankr. S.D.N.Y. 15 September 2009).
distribution until all creditors have received payment in full on account of their allowed claims. Consent to the payment of a junior class can be obtained through a vote of the senior class on a plan of reorganisation.\textsuperscript{16}

\textbf{Avoidance actions}

The Bankruptcy Code also provides a number of procedures that allow the debtor or trustee to avoid a pre-bankruptcy transfer of property from the bankruptcy estate. This allows the debtor to maximise the value of the bankruptcy estate and prevent a depletion of the estate prior to the commencement of the bankruptcy proceeding that may favour certain creditors over others. These protections are found in Chapter 5 of the Bankruptcy Code. The most commonly used of these actions are:

\begin{itemize}
  \item[a] avoidance of preferential transfers, which enables an insolvent debtor, subject to certain defences, to avoid and recover payments based on antecedent debt made to creditors within the 90 days prior to the debtor’s filing for bankruptcy – up to one year for payments made to insiders of the debtor;\textsuperscript{17}
  \item[b] avoidance of fraudulent transfers, which enables the debtor to avoid and recover transfers of property that were actually fraudulent or were made while the debtor was insolvent and for less than reasonably equivalent value;\textsuperscript{18} and
  \item[c] avoidance of unperfected security interests, which enables a debtor to avoid liens on property if such liens were not perfected under applicable non-bankruptcy law prior to the commencement of the bankruptcy case.\textsuperscript{19}
\end{itemize}

\textbf{ii} \hspace{1em} \textbf{Policy}

The goal of US insolvency law is to provide maximum return to creditors (and, if possible, equity holders) of the debtor and, in that context, to reorganise rather than liquidate business debtors to preserve employment and to realise the ‘going concern surplus’ of reorganisation value over liquidation value. This is accomplished by reorganising a debtor corporation under the provisions of Chapter 11 of the Bankruptcy Code. However, if a reorganisation is not possible – or if it would not result in a maximisation of value for creditors – the debtor company can be liquidated either under Chapter 11 or Chapter 7 of the Bankruptcy Code. Chapter 7 transfers the control of the liquidation process from the debtor’s management, who are likely to have greater familiarity with the assets and their value, to a trustee appointed

\begin{itemize}
  \item[A plan of reorganisation is approved by a class when a majority in number of the class members vote in favour of it and the class members who voted in favour hold at least two-thirds of the total value of the claims in that class. 11 U.S.C. § 1126.]
  \item[11 U.S.C. § 547.]
  \item[11 U.S.C. 11 544(b), 548. Under Section 548, the trustee can avoid a fraudulent transfer of an interest of the debtor in property that took place within two years before the date of the filing of the petition. Under Section 544(b), a trustee can avoid a transfer of an interest of the debtor in property under applicable state law, which can extend the look-back period beyond two years. However, a debtor might not be able to avoid and recover subsequent transfers of property received abroad by a foreign transferee from a foreign transferor. See Securities Investor Protection Corp v. Bernard L Madoff Inv Sec LLC, Case No. 12-00115 (S.D.N.Y. 7 July 2014).]
  \item[11 U.S.C. § 552(a).]
\end{itemize}
by the United States Trustee or elected by the debtor’s creditors. Chapter 7 liquidations usually result in lower recoveries for creditors. Therefore, companies are more likely to be liquidated under Chapter 7 if there are not sufficient funds in the estate or available to the estate to run a Chapter 11 process.

iii Insolvency procedures

As discussed above, the Bankruptcy Code provides for two main types of insolvency proceedings available to businesses with assets in the United States: Chapter 7 and Chapter 11.

Chapter 7

Chapter 7 is a trustee-controlled liquidation. The goal of Chapter 7 is to ensure the most efficient, expeditious and orderly liquidation of the debtor’s assets to be distributed to the creditors and equity holders. Companies cannot reorganise under Chapter 7. The Chapter 7 liquidation procedure is administered by a Chapter 7 trustee either selected by the United States trustee or by an election conducted by certain creditors. The Chapter 7 trustee is responsible for realising upon all of the property of the estate and coordinating the distribution of such property or proceeds of sales of such property.

Chapter 11

Chapter 11 provides for an insolvency proceeding in which the directors and management of the debtor company remain in control (the DIP) unless a trustee is appointed for cause. Chapter 11 proceedings allow for the reorganisation of the debtor’s operations and capital structure in the hope that the company will emerge from the bankruptcy process as a healthier, reorganised company. Chapter 11 gives the debtor the exclusive right to propose a plan of reorganisation for the first 120 days after commencement of the bankruptcy proceedings, and this date may be extended until 18 months after the order for relief (the petition date of a voluntary case) in the case if the debtor is making progress on a plan of reorganisation and can show cause why the court should extend the exclusivity period.21 The plan of reorganisation provides for how the debtor’s assets will be distributed among the classes of creditors and equity holders. It is also possible for a debtor to liquidate its assets through Chapter 11, which is typically a more structured liquidation than one under Chapter 7.

The culmination of a Chapter 11 proceeding is the filing of the plan of reorganisation. The Chapter 11 plan provides how creditors’ claims will be treated by the estate. Under the Chapter 11 plan creditors and shareholders are divided into classes of holders sharing substantially similar claims or interests. Chapter 11 plans must meet certain standards to be confirmed. Even if a plan is accepted by the requisite vote of all impaired classes, it must be found by the court to be in ‘the best interests of creditors’ (providing each dissenting class

---

20 The United States Trustee Program is a component of the Department of Justice that seeks to promote the efficiency and protect the integrity of the federal bankruptcy system. The Program monitors the conduct of parties in interest in bankruptcy cases, oversees related administrative functions and acts to ensure compliance with applicable laws and procedures. It also identifies and helps investigate bankruptcy fraud and abuse in coordination with various law enforcement agencies. The United States trustee is distinct from the trustee appointed to administer Chapter 7 and certain Chapter 11 cases.

member with at least what would have been recovered in a liquidation). As to a class that rejects the plan, the plan must satisfy the Bankruptcy Code’s ‘fair and equitable’ requirement (described above).

The plan of reorganisation is submitted to a vote of the various creditor and shareholder classes. If at least one class that stands to receive less than their asserted claim (an ‘impaired’ class) votes in support of confirmation, excluding insider yes votes, the plan can be confirmed over the dissent of another impaired class. Dissenting classes can thus be ‘crammed down’ so long as the plan is fair and equitable and does not discriminate among similarly situated creditors. Once the plan is approved by the necessary stakeholders, a court can confirm a plan so long as certain other prerequisites of Section 1129 of the Bankruptcy Code are satisfied.

**Chapter 15**

Chapter 15 is the Bankruptcy Code’s codification of the United Nations Commission on International Trade Law (UNCITRAL) Model Law and allows a foreign debtor, through its ‘foreign representative’ to commence an ancillary proceeding in the United States to support its foreign insolvency proceeding.

**iv Starting proceedings**

As set forth above, the US Bankruptcy Code provides for different types of insolvency proceedings. Not all of these proceedings are available for all types of companies. Specifically, insurance companies and banking institutions cannot file for Chapter 7 or Chapter 11 bankruptcy; a railroad can be a debtor under Chapter 11 but not Chapter 7, and stockbrokers and commodity brokers can file for bankruptcy under Chapter 7 but not Chapter 11. Regardless of the type of bankruptcy case, under Section 301(a) of the Bankruptcy Code, a debtor voluntarily commences a plenary insolvency proceeding by filing a petition with the bankruptcy court.

A bankruptcy proceeding can also be commenced against a debtor company, which is known as an ‘involuntary’ bankruptcy case. An involuntary case is commenced upon the filing of a petition with the bankruptcy court by three or more holders of non-contingent, undisputed claims, and such claims aggregate at least US$15,775 more than the value of any lien on property of the debtor securing such claims. A bankruptcy court will order relief against the debtor in an involuntary case only if the debtor is generally not paying its debts as they become due, unless such debts are the subject of a bona fide dispute as to liability or amount, or if a custodian as described in Section 303(h)(2) of the Bankruptcy Code has been appointed.

A Chapter 15 case is commenced when the foreign representative of the debtor company files a petition for recognition of the foreign proceeding with the US bankruptcy court.

---

22 Only a single holder is necessary to commence an involuntary case if there are fewer than 12 overall holders of claims against the debtor.


Control of insolvency proceedings

Under Chapter 7, the insolvency proceeding is controlled by a trustee who is appointed by the United States Trustee or elected by the debtor's creditors to administer the debtor's assets. The ‘Chapter 7 trustee’ is responsible for, among other things, ‘collect[ing] and reduc[ing] to money the property of the estate for which such trustee serves, and closes such estate as expeditiously as is compatible with the best interests of parties in interest’.

Although the Chapter 7 trustee can continue business operations for a short period if value is maximised by doing so, generally, once a Chapter 7 trustee has been appointed, the debtor company is expeditiously liquidated.

Chapter 11 proceedings allow for the debtor's existing management and directors to stay in place and operate the business during the bankruptcy case. For this reason, a debtor in a Chapter 11 proceeding is referred to as the 'DIP'. The board of directors' primary duties in connection with an insolvency proceeding are the same as they are outside bankruptcy – to maximise the value of the company. The key distinction is that when a company is insolvent, the creditors, not the shareholders, are the residual beneficiaries of the board's fiduciary duties to the corporation and are, thus, able to bring actions for breach of fiduciary duty. If it is in the best interests of the estate and its creditors, a trustee may be appointed to replace the DIP and administer a Chapter 11 case.

During a Chapter 7 or Chapter 11 case, the DIP or trustee may take actions that are in the ordinary course of the debtor's business without approval of the bankruptcy court. Actions after entry of the order for relief outside the ordinary course of business are subject to bankruptcy court approval.

In the United States, bankruptcy courts are courts of limited jurisdiction. This is because, unlike federal district and circuit courts, bankruptcy courts were not created under Article III of the United States Constitution. Instead, Congress created the bankruptcy courts because they were ‘necessary and proper’ to effectuate Congress's enumerated powers to enact bankruptcy law. For this reason, bankruptcy courts may only oversee matters that are ‘core’ to the bankruptcy case unless the parties knowingly and voluntarily consent to adjudication of a ‘non-core’ matter by the bankruptcy court. Without consent, matters that are not ‘core’ to the insolvency proceeding must be decided by a federal district court. Appeals of bankruptcy

---

27 The Supreme Court has observed that ‘the willingness of courts to leave debtors in possession’ is premised upon an assurance that the officers and managing employees can be depended upon to carry out the fiduciary responsibilities of a trustee. Commodity Futures Trading Comm’n v. Weintraub, 471 US 343, 355 (1985), citing Wolf v. Weinstein, 372 US 633, 651 (1963). Officers and directors may therefore owe fiduciary duties to the estate even if their fiduciary duties to the company were limited under state law prior to the bankruptcy. In re Houston Regional Sports Network, LP, Case No. 13-35998 (Bankr. S.D. Tex. 12 February 2014).
28 ‘Even when [a] company is insolvent the board may pursue, in good faith, strategies to maximise the value of the firm.’ Trenwick America Litig Trust v. Ernst & Young, 906 A.2d 168, 175 (Del. Ch. 2006), aff’d, 931 A.2d 438 (Del. 2007).
court decisions are generally heard, in the first instance, by the federal district court sitting in the same jurisdiction as the applicable bankruptcy court. Bankruptcy court jurisdiction is the subject of much debate under a line of recent Supreme Court cases.

Among other things, the bankruptcy court manages filing deadlines, hears evidence on contested issues and issues orders regarding requests for relief by the parties. Nevertheless, and despite the involvement of the court, many aspects of the bankruptcy process are negotiated by the parties outside the courtroom and the DIP or trustee is free to enter into settlement agreements, which are then subject to the approval of the bankruptcy court.

vi Special regimes

Securities broker-dealers are not eligible for relief under Chapter 11. Instead, insolvent broker-dealers may liquidate under Chapter 7 of the Bankruptcy Code, but are more likely to be resolved in a proceeding under the Securities Investor Protection Act of 1970 (SIPA). SIPA proceedings are liquidation proceedings, and upon commencement of the SIPA proceedings, the broker-dealer will cease to conduct business as a broker-dealer, subject to certain limited exceptions. In SIPA proceedings, a trustee (the SIPA Trustee) will take control of all property, premises, bank accounts, records, systems and other assets of the broker-dealer and displace management. The SIPA Trustee’s primary duties will be to marshal assets, recover and return customer property (including through effectuating bulk account transfers to a solvent broker-dealer) and liquidate the broker-dealer.

In SIPA proceedings, the provisions of Chapters 1, 3 and 5 and Subchapters I and II of Chapter 7 of the Bankruptcy Code will also apply, to the extent consistent with SIPA, and the SIPA Trustee will generally be subject to the same duties as a trustee under Chapter 7 of the Bankruptcy Code with certain limited exceptions regarding securities that are property of the customers of the broker-dealer. If the broker-dealer is a registered futures commission merchant under the Commodity Exchange Act of 1936, the SIPA Trustee will

31 The 1st, 6th, 8th, 9th, and 10th circuits have established Bankruptcy Appellate Panels (BAPs), which are panels composed of three bankruptcy judges that are authorised to hear appeals of bankruptcy court decisions. These panels are units of the federal courts of appeals. BAP judges continue to serve as active bankruptcy judges in addition to fulfilling their BAP duties. If a BAP has been established in a given circuit, the BAP will hear an appeal of a bankruptcy court decision unless a party to the appeal elects to have it heard by the district court. Decisions of the BAP may be appealed to the appropriate circuit court of appeals. United States Courts, Bankruptcy Appellate Panels, available at www.uscourts.gov/FederalCourts/UnderstandingtheFederalCourts/CourtofAppeals/BankruptcyAppellatePanels.aspx.

32 See Stern v. Marshall, 546 U.S. 462 (2011) (holding that the bankruptcy court lacked constitutional authority to enter a final judgment on a debtor’s tortious interference counterclaim even though the counterclaim was a ‘core proceeding’ under 28 U.S.C. § 157(b)(2)), Exec. Benefits Ins. Agency v. Arkison, 134 S. Ct. 2165 (2014) (providing that, when a ‘Stern claim’ is encountered, the bankruptcy court may issue proposed findings of fact and conclusions of law to be reviewed de novo by the district court), Wellness Int’l Network, Ltd v. Sharif, 135 S. Ct. 1932 (2015) (holding that bankruptcy judges may enter final judgment on claims that seek only to add to the bankruptcy estate and would exist outside of bankruptcy proceedings if the parties knowingly and voluntarily consent).


36 Pub. L. No. 74-675 (1936), codified at 7 U.S.C § 1 et seq.
have additional obligations under the Part 190 regulations promulgated by the Commodity Futures Trading Commission, with respect to any commodity customer accounts that have not been transferred to another futures commission merchant prior to the filing date.

Although bank holding companies can file for Chapter 11 relief, their subsidiary depository institutions are not eligible for relief under the Bankruptcy Code, and are typically resolved by the Federal Deposit Insurance Corporation (FDIC) under the Federal Deposit Insurance Act. The FDIC has the authority to market a failed depository institution for sale to another depository institution, or the FDIC can insert itself as a receiver, close the bank and liquidate its assets to pay off creditors. The powers of the FDIC as receiver are very similar to those of a trustee in bankruptcy.

Additionally, the Dodd–Frank Wall Street Reform and Consumer Protection Act established the Orderly Liquidation Authority (OLA), which provides that the FDIC may be appointed as receiver for a top-tier holding company of a failing financial institution that poses a systemic risk to financial stability in the United States. OLA sets forth the procedures that the federal government can take to cause the wind-down of financial institutions that were once considered ‘too big to fail’. Pursuant to OLA, the FDIC can exercise many of the same powers it has as a bank receiver to liquidate systemically risky financial institutions. Moreover, under the Dodd–Frank Act, institutions that may be subject to OLA must provide the FDIC with resolution plans (commonly known as ‘living wills’), to serve as road maps in the event the financial institution requires resolution.

State law governs all regulation of insurance companies, including the resolution of insolvent insurance companies.

The Bankruptcy Code has mechanisms for dealing with the insolvency proceedings of corporate groups and there is no special regime to address these types of filings. If multiple affiliated companies in the same corporate group seek relief under the US Bankruptcy Code, they will file separate bankruptcy petitions but will often seek joint administration of the various bankruptcy proceedings, meaning that the bankruptcy cases of each member of the group will be overseen by the same judge, which provides for greater efficiency in the administration of the cases. Importantly, joint administration does not mean that the assets and liabilities of the group will be combined. Rather, corporate separateness will be observed despite the joint administration of the cases, unless there is cause to breach corporate separateness and ‘substantively consolidate’ the assets and liabilities of the debtor.

### vii Cross-border issues

As part of the 2005 Bankruptcy Abuse and Consumer Protection Act, the United States enacted Chapter 15 of the Bankruptcy Code, which is based on the UNCITRAL Model Law on Cross-Border Insolvency (the Model Law). Chapter 15 governs how a US court should

---

37 17 C.F.R. Part 190.
treat a foreign insolvency proceeding when no plenary proceedings have been commenced in the United States and provides a mechanism for the cooperation between the US court and the foreign court overseeing a debtor’s plenary insolvency proceeding. Generally, Chapter 15 allows for the commencement of an ancillary proceeding upon recognition of the debtor’s foreign proceeding. Once the foreign proceeding is recognised by the US bankruptcy court, the automatic stay applies to the debtor and the property of the debtor that is within the territorial jurisdiction of the United States and the debtor’s foreign representative enjoys certain powers and privileges under the Bankruptcy Code, such as the right to intervene in any court proceeding in the United States in which the foreign debtor is a party, the right to sue and be sued in the United States on the foreign debtor’s behalf, the authority to operate the debtor’s business and the authority to initiate avoidance actions in a case pending under another chapter of the Bankruptcy Code.

The bar for accessing plenary proceedings in the US bankruptcy courts is relatively low. A company can be eligible to commence a Chapter 11 proceeding in a US bankruptcy court so long as it is incorporated or has any property or operations in the United States. Because of the perceived debtor-friendliness of US bankruptcy courts and the courts’ vast experience in restructuring large multinational companies, many multinational companies are filing for Chapter 11, even if their principal place of business, or centre of main interest, is located outside the United States. This trend has been particularly prevalent in the shipping industry. For example, the Taiwan-based TMT Group opened an office in Houston only a few days before filing for Chapter 11 protection in the United States Bankruptcy Court for the Southern District of Texas.

II INSOLVENCY METRICS

Since the global financial crisis, which saw gross domestic product adjusted for inflation (real GDP) drop 2.8 per cent from 2008 to 2009, the US economy has experienced a period of slow growth. Real GDP increased in the first quarter of 2018 at an average annual rate of 2.2 per cent and is estimated to have increased at an average annual rate of 4.1 per cent in the second quarter of 2018. Furthermore, reported unemployment continues to abate: the unemployment rate for July 2018 was 3.9 per cent, down from 4.3 per cent in July of the previous year and from its October 2009 high of 10 per cent.

Additionally, credit has been readily available to US businesses. In 2017, US corporations issued almost US$1.81 trillion in bonds, exceeding the US$1.49 trillion issued

44 In re TMT Procurement Corp., No. 13-33763 (MI) (Bankr. S.D. Tex. 20 June 2013). There are limits to a foreign-based company’s ability to seek Chapter 11 protection. See In re Yukos Oil Co, 321 B.R. 396,410-411 (Bankr. S.D. Tex. 2005) (bankruptcy court declines to exercise jurisdiction over Chapter 11 case of a Russian oil company seeking to use the automatic stay to prevent a foreclosure sale by the Russian government).
in 2016 and the US$1.61 trillion issued in 2015.\textsuperscript{47} Through the first five months of 2018, over US$700 billion worth of bonds had been issued.\textsuperscript{48} Average interest rates have risen slightly from their historic lows; the 10-year Treasury rate is currently around 2.98 per cent\textsuperscript{49} and has ranged between 2.44 per cent and 3.11 per cent in the current calendar year;\textsuperscript{50} while in 2017, the rate ranged between 2.05 per cent and 2.62 per cent.\textsuperscript{51}

US equity markets also experienced an uptick in 2016 and 2017. Specifically, US equity and equity-related proceeds totalled US$204.3 billion on 905 deals in 2017,\textsuperscript{52} which represents a 13 per cent increase in proceeds compared to the US$180.8 billion raised in 2016\textsuperscript{53} and approximately 25.9 per cent more deals than the 719 in 2016.\textsuperscript{54} US equity and equity-related proceeds in 2016 were approximately 21.5 per cent less than the US$229.5 billion raised in 2015\textsuperscript{55} and 30.2 per cent less than the US$258.1 billion raised in 2014.\textsuperscript{56} Similarly, the number of deals in 2017 was 6.2 per cent greater than the 852 in 2015\textsuperscript{57} and 10.4 per cent less than the 10.10 in 2014.\textsuperscript{58}

US corporate default rates have fluctuated since 2017. Moody’s measured the US speculative-grade default rate in May 2018 at 3.7 per cent,\textsuperscript{59} compared to default rates of 3.9 per cent\textsuperscript{60} in the first quarter and 3.4 per cent in the end of 2017.\textsuperscript{61} Moody’s indicated
that the leveraged loan default rate has been rising; the rate for the first quarter of 2018 was 2.6 per cent, compared with the 2017 fourth quarter rate of 2.4 per cent and 2017 first quarter rate of 2.2 per cent.62

The frequency of business filings remains well below its peak in 2010,63 and although many businesses continue to seek bankruptcy relief due to significant challenges in sectors of the US economy, 2017 marked a significant decrease in filings as compared to recent years. In 2017, a total of 71 public companies filed Chapter 7 or Chapter 11 bankruptcy proceedings, representing a 28 per cent decrease from 99 public companies in 2016.64 Aggregate prepetition assets totalled approximately US$107 billion in 2017, up from 2016’s aggregate prepetition assets of approximately US$105 billion; this increase was driven largely by two particularly large filings – Seadrill Limited (SDRL) (US$21.7 billion in assets) and Walter Investment Management Corp. (WAC) (US$16.8 billion in assets).65 The oil and gas/energy/mining sector was a key industry represented in public company bankruptcies in 2017 (30 per cent of filings).66 As discussed in greater detail below, the retail industry also suffered a significant downturn in 2017.67 The energy/oil and gas and retail industries have continued to produce many of the most significant bankruptcies in the early part of 2018, including FirstEnergy Solutions Corp. (US$5.5 billion in assets), Claire’s Stores, Inc (US$2 billion in assets), EV Energy Partners, LP (US$1.6 billion in assets), and Bon-Ton Stores, Inc (US$1.5 billion in assets).68

Sixty-four companies commenced Chapter 15 proceedings in the 12 months ending on 30 June 2018,69 compared with the 138 Chapter 15 Cases that were initiated during the 12 months ending on 30 June 2017.70

III PLENA Ry INSOLVENCY PROCEEDINGS

i Toys ‘R’ Us, Inc

Toys ‘R’ Us, Inc was the leading chain of toy stores, with 1,600 stores throughout 49 states and 38 countries. It operated under numerous brand names, including Toys ‘R’ Us, Babies

---

65 id.
66 id.
67 See footnotes 275-[292] and accompanying text.
‘R’ Us, Toys ‘R’ Us Outlet, and Toys ‘R’ Us Express, and it had an online presence for both its ‘Toys’ and ‘Babies’ brands. Toys ‘R’ Us claimed, perhaps accurately, to be one of the most recognisable brands in the world.71

Toys ‘R’ Us, Inc and affiliates filed for Chapter 11 in the Eastern District of Virginia on 18 September 2017. As of the petition date, the debtors had US$5.265 billion in funded debt, in part the result of a leveraged buyout in 2005. At a high level, the debtors’ funded debt fell into three categories: (1) financing for the debtors’ US operations, with sub-facilities for Canadian operations, (2) financing for the debtors’ international operations and (3) financing for certain standalone US entities.72 These obligations included the following.

**US operations**

- A secured ABL credit facility with approximately US$1.305 billion in borrowings (including a US$280 million FILO tranche) and US$91 million of letters of credit outstanding as of the petition date; and
- approximately US$1.182 billion in various tranches of secured term loans.

**International operations**

- Various European and Japanese revolving and term loan facilities with approximately US$707 million of loans outstanding in the aggregate; and
- approximately US$583 million of Taj Senior Notes.

**Standalone US entities**

- Approximately US$22 million in unsecured notes co-issued by Toys ‘R’ Us, Inc and Toys ‘R’ Us-Delaware, Inc, not guaranteed by any other debtors;
- approximately US$208 million in unsecured notes issued by Toys ‘R’ Us, Inc, not guaranteed by any other debtors;
- approximately US$70 million in Giraffe Junior Holdings, LLC secured mezzanine loans; and
- approximately US$1.366 billion of borrowings by the debtors’ two real estate holding companies.73

In connection with its restructuring efforts, Toys ‘R’ Us obtained approximately US$3.1 billion in DIP financing, the proceeds of which were to be used for, among other purposes, administering the Chapter 11 cases and paying vendors in the ordinary course.74 Pointing to ‘well below worst case’ holiday sales and the ‘stark reality’ that the company would run out of cash in the US by May 2018, Toys ‘R’ Us sought approval to liquidate all

---

72 id. at 10–11.
73 id. at 11–12.
74 id. at 6.
735 of its US stores,\textsuperscript{75} which was granted by the Bankruptcy Court on 22 March 2018.\textsuperscript{76} On 17 July 2018, in connection with the wind-down process, Toys ‘R’ Us filed a motion to approve a comprehensive settlement agreement, providing for payment in full of Toys’ ABL/ FILO and Term DIP Facilities as well as recoveries for administrative claimants through an administrative claims distribution pool and the distribution of the remaining assets to primarily the prepetition secured lenders.\textsuperscript{77} On 7 August 2018, the comprehensive settlement agreement was approved by the court.\textsuperscript{78}

Where possible, the Toys ‘R’ Us debtors are pursuing sale transactions for stand-alone business units as going concerns. For example, on 1 June 2018, Toys ‘R’ Us (Canada) Ltd and Babies ‘R’ Us (Canada) announced the closing of its previously announced sale to Fairfax Financial Holdings Limited.\textsuperscript{79}

\section*{Claire’s Stores, Inc}

Claire’s Stores, Inc is a leading speciality retailer, providing girls aged three to 35 with jewellery, accessories, and beauty products under two brand names, Claire’s and Icing. It is also the world’s leading ear piercer (boasting at the time of filing that it had pierced more than 100 million ears). With over 7,500 locations in 45 different countries, including company-owned stores, franchises and concessions, Claire’s continued to emphasise the strength of its operations upon filing.\textsuperscript{80} Claire’s and certain US affiliates voluntarily filed for Chapter 11 on 19 March 2018 in the United States Bankruptcy Court for the District of Delaware.\textsuperscript{81} As of the petition date, the debtors’ funded debt obligations (not including approximately US$245 million in non-debtor obligations) included:

\begin{itemize}
  \item[a] a prepetition ABL credit facility with approximately US$71 million of borrowings and US$4 million of letters of credit outstanding as of the petition date;
  \item[b] a prepetition LC facility of approximately US$1.3 million;
\end{itemize}


\textsuperscript{77} Debtors’ Motion for Entry of an Order (I) Approving (A) the Settlement Agreement, (B) Opt-Out Procedures Applicable to the Settlement Agreement, and (C) a Substantial Contribution Claim Under Section 503(b)(3)(D) of the Bankruptcy Code; and (II) Granting Related Relief, Case No. 17-34665 (KLP), ECF No. 3814 (Bankr. E.D. Va. 17 July 2018).

\textsuperscript{78} Order (I) Approving (A) the Settlement Agreement, (B) Opt-Out Procedures Applicable to the Settlement Agreement, and (C) a Substantial Contribution Claim Under 503(b)(3)(D) of the Bankruptcy Code; and (II) Granting Related Relief, Case No. 17-34665, ECF No. 4083 (Bankr. E.D. Va. 8 Aug. 2018).

\textsuperscript{79} ‘Canada’s Toy Store is Here to Play, Here to Stay: Sale of Toys “R” Us and Babies “R” Us (Canada) to Fairfax Financial Holdings Limited is Complete’, Newswire (1 June 2018), available at https://www.newswire.ca/news-releases/canadas-toy-store-is-here-to-play-here-to-stay-sale-of-toys-r-us-and-babies-r-us-canada-to-fairfax-financial-holdings-limited-is-complete-684257391.html


\textsuperscript{81} ‘Claire’s to Implement Balance Sheet Restructuring Supported by Holders of Substantial Majority of Company’s Funded Debt’, Reorg Research (19 Mar. 2018), available at https://platform.reorg-research.com/app#company/1912/wires/view/5aad7ec36bfe099932c8b4964.
c a senior secured term loan of approximately US$32 million;
d approximately US$1.335 billion in first lien notes;
e approximately US$222 million in second lien notes; and
f approximately US$217 million in senior unsecured notes. 82

The debtors’ stated goal at the outset of the Chapter 11 cases was to effectuate a pre-negotiated balance sheet restructuring as contemplated under the restructuring support agreement entered into prepetition with an ad hoc group of first lien creditors and the company’s equity sponsor, Apollo. 83 The RSA parties agreed to provide or backstop up to US$575 million of new capital (up to US$250 million of convertible preferred equity, a US$250 million first lien term loan and a US$75 million asset-based lending facility) upon emergence. 84 The debtors’ proposed plan has been contested from the beginning by Oaktree Capital Management, which is the largest holder of second lien notes. Oaktree’s 12 July 2018 objection to the debtors’ disclosure statement (which was overruled on 20 July 2018) 85 contains a preview of issues that it is likely to raise in connection with confirmation. For instance, Oaktree criticised the debtors’ ‘artificially depressed view of value’ and accused the debtors of ‘attempting to charge ahead on a blazingly quick timeline dictated by their insider RSA’ with the intent to ‘foreclose the recognition of hundreds of millions of dollars of existing estate value and upside’. 86 Oaktree has stated that it has submitted a partially committed all-cash offer that would ‘award [] cash payments to each class of creditors in an amount that exceeds their recoveries under the RSA Plan’ and that the proposal will be fully committed by 31 August. 87 Oaktree is also seeking standing avoid certain transfers of Claire’s intellectual property to non-debtor affiliates in connection with a 2016 refinancing transaction and related royalty payments and future payment obligations. 88

iii GenOn Energy, Inc

GenOn Energy, Inc is one of the 10 largest wholesale power generation companies in the US, operating through a multitude of direct and indirect subsidiaries (61 of which are debtors in GenOn’s Chapter 11 cases). Its revenue-generating activities include committing to making

---

83 id. at 6.
84 id.
87 Oaktree Capital Management, L.P.’s (A) Objection to Motion of Debtors Pursuant to 11 U.S.C. § 1121(d) for Entry of an Order (I) Extending Their Exclusivity Periods and (II) Granting Related Relief and (B) Cross-Motion to Amend the Scheduling Order and Solicitation Order if Exclusivity Expires, Case No. 18-10584, ECF No. 732 (Bankr. D. Del. 3 Aug. 2018).
power production capacity available in the future, selling power that has been produced, and providing related services. GenOn in its current iteration is a result of two separate large-scale mergers – the 2010 merger between wholesale power generation companies RRI Energy, Inc and Mirant Corporation (resulting in RRI taking the name GenOn), and NRG Energy, Inc’s US$5.989 billion acquisition of GenOn in 2012.

GenOn filed for Chapter 11 on 14 June 2017 with the goals of delevering its balance sheet by over US$1 billion and transitioning into a standalone power generation company in order to thrive in the current market. At the time of filing, GenOn had about US$885 million in cash on hand and faced maturation of US$1.755 billion in unsecured notes over a four-year period. As of the petition date, the debtors’ funded debt obligations included:

- an intercompany secured revolver with approximately US$125 million in cash borrowings and US$143 million of letters of credit outstanding as of the petition date;
- an aggregate amount of approximately US$1.830 billion of three series of unsecured notes issued by GenOn Energy, Inc; and
- an aggregate amount of approximately US$695 million of two series of senior unsecured notes in GenOn Americas Generation.

The debtors were party to an RSA supported by the key equity holder, NRG Energy, Inc, and over 90 per cent of the debtor’s funded debt. The RSA also provided that non-funded debt general unsecured creditors would be paid in full. Despite the apparent strength of this initial position, the Plan has required six amendments, notably regarding a proposed settlement with the owner-lessee counterparties to 11 near-identical sale-leaseback agreements with GenOn Mid-Atlantic LLC’s (GenMA) regarding two power plants in Maryland. The owner-lessees asserted claims of as much as US$620 million against the Chapter 11 estate on the basis that GenOn and NRG had improperly siphoned cash out of GenMA that should have been used to maintain GenMA’s financial health. A settlement was eventually reached following a bench ruling in a complicated claims estimation trial held in November, in which the bankruptcy court estimated the owner-lessee’s claims at US$0 while also seeming to invite them to challenge the plan at confirmation. The plan was confirmed in December 2017, with the company expected to emerge from Chapter 11 in mid to late 2018. Most recently,

90 id. at 6.
91 id. at 4.
92 id.
93 id. at 11.
96 ‘Judge Jones Confirms GenOn Plan, Emergence Set to Occur in Mid-2018; Certain Certificate Holders Do Not Yet Support GenMA Settlement’, Reorg Research (12 December 2017), available at https://platform.reorg-research.com/app#company/4119/intel?q=estimation&caseId=0&startDate=&endDate=&sectorIds=0&keyStoriesOnly=0.
the plan incorporated on 4 April 2018 a mediated settlement agreement designed to resolve the ongoing dispute by providing for the purchase or redemption of outstanding lessor notes from the GenMA owner lessors.97

iv First Energy Solutions Corp

FirstEnergy Solutions Corp (FES) is an Akron, Ohio-based subsidiary of parent public utility holding company FirstEnergy Corp. (FE Corp). FES, its subsidiaries, and FirstEnergy Nuclear Operating Company (the debtors in this case) own or operate multiple fossil and nuclear power generating facilities and provide supporting services for other facilities across Pennsylvania and Ohio.98

The debtors voluntarily filed for Chapter 11 with the US Bankruptcy Court in the Northern District of Ohio on 31 March 2018. FES cited significant debt obligations and lease payments, increased operational costs, reduced revenues resulting in part from a rapid expansion in natural gas supply and a resulting drop in energy prices, and obligations under certain long-term executory power purchase agreements as factors that contributed to the bankruptcy filing.99 As of the petition date, the debtors’ funded debt obligations included the following.

**FES**

- A secured revolving credit facility provided by FE Corp of approximately US$700 million;
- approximately US$695 million in unsecured notes; and
- a credit facility with Allegheny Energy Supply Company, LLC with approximately US$102 million of loans outstanding.

**First Energy Generation, LLC (FG)**

- Approximately US$328 million in secured fixed-rate pollution control revenue notes (PCNs);
- approximately US$677 million in unsecured PCNs; and
- approximately US$769 million outstanding on a sale-leaseback transaction related to a coal plant.

**FirstEnergy Nuclear Generation, LLC (NG)**

- Approximately US$285 million in secured PCNs;
- approximately US$842 million in unsecured PCNs; and
- approximately US$240,000 of outstanding debt on an aircraft leasing loan, owed by FE Aircraft Leasing Corp to FES.100

---

97 Notice of Filing of Sixth Amended Plan Supplement, Case No. 17-33695, ECF No. 1555 at 3–4 (Bankr. S.D. Tex. 4 April 2018).

98 Declaration of Donald R. Schneider in Support of Chapter 11 Petitions and First Day Motions, Case No. 18-50757, ECF No. 55 at 6 (Bankr. N.D. Ohio 1 April 2018).

99 id. at 6–7.

100 id. at 29–21.
One notable legal dispute in the FES bankruptcy related to the treatment of nine Federal Energy Regulatory Commission (FERC)-regulated ‘bundled’ long-term power purchase agreements (PPAs). The day after the petition date, FES and FG commenced an adversary proceeding against FERC, seeking both a declaratory judgment that the bankruptcy court may permit the rejection of the PPAs, as well as related injunctive relief. Pursuant to the PPAs, FES purchased capacity, power, related services and renewable energy credits needed to meet various state regulatory requirements from various wind and solar generating facilities. The PPAs were negotiated between 2003 and 2011. Subsequently, many renewable energy credit requirements were relaxed, the supply of credits increased, and energy prices declined dramatically, which resulted in the PPAs being well above market. By the debtors’ estimate, performing on the PPAs would cause the debtors to lose US$765 million over their respective remaining terms on an undiscounted basis, and more than US$475 million on a net present value basis.

Whether the debtors may reject the FERC-regulated PPAs is a question of first impression in the Sixth Circuit. FERC has jurisdiction over the rates, terms and conditions for transmitting or selling wholesale electric energy. In the Calpine case, the Bankruptcy Court for the Southern District of New York held that a proposed rejection of a FERC-regulated contract for the sale of electric power, where the rationale for rejection was that the rate set by FERC was off market, would be tantamount to ‘the unilateral termination of a regulatory obligation’ and therefore constituted an unlawful collateral attack on the filed rate. FERC and several intervenors argued that the FES court should follow Calpine.

On 31 July 2018, the Bankruptcy Court ruled that FES may reject the PPAs (to the extent the debtors had not reached agreement with the counterparties) as a proper exercise of its business judgment. The objecting parties reserved their appellate rights with respect to FERC’s jurisdiction over the debtors’ request to reject these contracts.

FES recently cleared a major hurdle on its path to confirmation. On 31 July 2018, the debtors announced that they had reached a definitive settlement that defines and quantifies all of non-debtor parent FE Corp’s obligations with respect to FES and co-debtor FirstEnergy Nuclear Operating Company and that includes the FES unsecured creditors’ committee. A settlement that FES reached with two other key creditor groups in April 2018 will be amended to incorporate this agreement in principle. The amended settlement remains subject to execution of definitive agreements, various board approvals, and the approval of the Bankruptcy Court.

102 id. at 2–3.
104 id. at 38.
106 id.
iHeartMedia, Inc

iHeartMedia, Inc is a media, entertainment and data company largely known for its 849 radio stations but also engaged in numerous consumer-focused platforms, including social media, live concerts and events, and independent media representation, among others.\(^{108}\)

iHeartMedia, Inc, along with 38 direct and indirect subsidiaries, filed for bankruptcy in the US Bankruptcy Court for the Southern District of Texas, Houston Division on 15 March 2018. The company had been acquired in a leveraged buyout in 2007 that contributed to the debtors’ US$16 billion in funded debt, and both the 2008 financial crisis and industry-specific issues contributed to declining cash flows and limited growth. The restructuring was framed as a balance sheet reorganisation, designed to set up the business for long-term success.\(^{109}\) As of the petition date, iHeartMedia, Inc was the borrower/issuer of the following amounts:

- an ABL facility with approximately US$371 million of outstanding borrowings;
- a term loan facility with two tranches of loans in an aggregate amount of approximately US$6.3 billion;
- approximately US$6.752 billion in priority guarantee notes (PGNs);
- approximately US$2.235 billion in senior unsecured notes; and
- approximately US$532 million in three series of senior unsecured ‘legacy’ notes.\(^{110}\)

Certain of iHeartMedia’s subsidiaries guaranteed each of the obligations listed above except for the legacy notes, which were not guaranteed by any subsidiaries of iHeartMedia.

Although the debtors went into their first-day hearing with a restructuring support agreement in place with at least 67 per cent of the aggregate outstanding principal amount of term loan, PGN and junior debt claims, a group of approximately US$190 million of legacy noteholders opposed the agreement from the outset.\(^{111}\) These noteholders allege entitlement to liens on certain assets under ‘equal and ratable’ provisions in the legacy notes indentures.\(^{112}\)

Shortly after the petition date, Wilmington Savings Fund Society (WSFS), as indenture trustee for the legacy notes, filed an adversary complaint against debtors alleging violations of the legacy notes indenture ‘by not granting ‘equal and ratable’ mortgages’.\(^{113}\) This has yet to be fully adjudicated.\(^{114}\)

Under the debtors’ proposed plan, the iHeart business would be separated from the businesses of non-debtor subsidiary Clear Channel Outdoor Holdings, Inc, which is currently

---

108 Declaration of Brian Coleman, Senior Vice President and Treasurer of iHeartMedia, Inc., in Support of Chapter 11 Petitions and First Day Motions, Case No. 18-31274, ECF No. 25 at 1–2 (Bankr. S.D. Tex. 15 March 2018).
109 id. at 1–3.
110 id. at 20–21.
111 id. at 6.
112 id at 35.
114 ‘UPDATE 4: iHeart, Senior Creditors, 14% Notes Trustee Stipulate to Abeyance of Claims, Counterclaims Pending Adjudication of WSFS Adversary,’ Reorg Research (10 July 2018), available at https://platform.reorg-research.com/app#company/2897/intel?q=wsfs&caseId=0&startDate= &endDate=&sectorIds=0&keyStoriesOnly=0.
89.5 per cent owned by the debtors (the other 10.5 per cent is publicly traded). iHeart would emerge substantially delevered, with US$5.75 billion of new debt, including new term loans, new secured notes and new unsecured notes, plus a new ABL facility.\(^{115}\)

On 9 July, the official committee of unsecured creditors filed a motion to gain standing to prosecute at least 12 causes of action against debtors amounting to potentially ‘billions of dollars’ in avoidance claims against various term loans and priority guarantee notes.\(^{116}\) WSFS joined the UCC motion, given its ‘unique role’ as the largest unsecured creditor not party to the RSA.\(^{117}\) The parties have agreed to hold this motion in abeyance for the time being.\(^{118}\)

vi Remington Outdoor Company, Inc

Remington Outdoor Company, Inc is one of the oldest and largest firearms, ammunition and related products manufacturers, serving commercial consumers, military and law enforcement worldwide. Remington points to its category-defining brands, a broad portfolio, diverse distribution channels, and customer-focused management, sales and marketing strategies in explaining its leading market positions in military and law enforcement sales.\(^{119}\)

Debtors filed for Chapter 11 in the US Bankruptcy Court for the District of Delaware on 25 March 2018 as a result of a combination of overproduction and unexpected declines in sales, causing the company difficulty maintaining borrowing capacity. As of the petition date, the debtors’ funded debt obligations included:

a. an ABL facility with approximately US$114.5 million of borrowings as of the petition date;
b. a term loan facility of approximately US$550.5 million;
c. approximately US$226 million in outstanding third lien notes;
d. approximately US$20 million in outstanding notes from an intercompany note purchase agreement between debtors FGI Opco and Remington Outdoor Company, Inc (ROC);
e. a secured promissory note of approximately US$12.5 million; and
f. approximately US$55 million in outstanding claims owed to vendors, suppliers and service providers.\(^{120}\)

---

\(^{115}\) Amended Joint Chapter 11 Plan of Reorganization of iHeartMedia, Inc. and its Debtor Affiliates Pursuant to Chapter 11 of the Bankruptcy Code, Case No. 18-31274, ECF No. 1213 (Bankr. S.D. Tex. 5 Aug. 2018).

\(^{116}\) ‘iHeart UCC Says Current Plan is “Unconfirmable,” Seeks Standing to Prosecute ‘Potentially’ ‘Billions of Dollars’ of Avoidance Claims Against Term Loans, PGNs,’ Reorg Research (10 July 2018), available at https://platform.reorg-research.com/app#company/2897/intel?q=fraudulent+transfer&caseId=0&startDate=&endDate=&sectorIds=0&keyStoriesOnly=0.


\(^{118}\) ‘iHeart Judge Abates UCC’s Standing Motion on Consensual Basis; UCC Willing to Hold Standing Motion “In Suspense” for Time Being’, Reorg Research (8 August 2018), available at https://platform.beta.reorg-research.com/v3#/items/intel/?keyword=iheart&smartFilter=0.


\(^{120}\) id. at 6–12.
The debtors filed with a ‘straddle’ prepackaged plan of reorganisation and an RSA. Per the RSA, the ABL facility lenders had agreed to provide debtors with DIP financing of up to US$193 million to satisfy some of the ABL facility obligations. Debtor ROC and certain other lenders also agreed to provide DIP financing of up to US$145 million, which was approved by the bankruptcy court in April 2018. On 4 May 2018, Remington’s plan of reorganisation was confirmed by the bankruptcy court and on 15 May 2018, Remington emerged from bankruptcy. On the effective date of the plan, the prepetition term loan lenders received 82.5 per cent of the equity interests in the reorganised company, the DIP term loans were replaced with loans under the term loan exit facility, and general unsecured creditors were satisfied in full.

vii Takata Corporation

The debtors in Takata’s US Chapter 11 proceedings are Takata Americas, TK Holdings, Inc (TKH), and certain North American affiliates and subsidiaries thereof; they are each direct or indirect subsidiaries of Japanese automotive safety component manufacturer Takata Corporation (TKJP). A recent scandal both marred the company’s reputation and drove it to the point of insolvency. Some of the company’s airbag inflators began exploding upon deployment, spurring the largest automotive recall in the history of the US (60 million recalled, plus 64 million outside the US).

TKJP and two of its Japanese subsidiaries commenced civil rehabilitation proceedings in Japan on 25 June 2017, and the US debtors sought Chapter 11 protection on the same date. As of the petition date, the debtors had no outstanding funded debt obligations. However, TKJP’s funded debt obligations included approximately US$320 million in principal amount of bank debt; and approximately US$269 million in outstanding unsecured bonds.

In addition, TKJP entered into a plea agreement with the US Department of Justice that obligated it to pay a US$25 million criminal fine and US$975 million of restitution payments to certain victims. The plea agreement permitted TKJP to seek reimbursement or contribution from its affiliates and subsidiaries, including the debtors.

Upon filing, the debtors were attempting to finalise a sale of substantially all of Takata’s global operations to Key Safety Systems, Inc (KSS) for US$1.588 billion, which would allow Takata to pay the balance of the restitution payments and resolve the restructuring quickly. The purpose of the restructuring was primarily to provide breathing room to Takata while it finalised the terms of this global transaction.

After the debtors amended their Chapter 11 plan in order to gain support from the OEMs, UCC, tort claimants’ committee, future claims representative and the Attorneys

---

121 ‘Update 1: Remington Receives Uncontested Second Day Relief Including Final DIP Approval’, Reorg Research (April 16, 2018), available at https://platform.reorg-research.com/app#company/5228/intel?q=&caseId=0&startYear=0&endYear=0&sectorIds=0&keyStoriesOnly=1.

122 ‘Remington Prepack Plan Goes Effective’, Reorg Research (17 May 2018), available at https://platform.reorg-research.com/app#company/5228/intel?q=&caseId=0&startYear=0&endYear=0&sectorIds=0&keyStoriesOnly=1.


124 id. at 4–5.

125 id. at 26.

126 id. at 8.

127 id. at 12.
General Multistate Working Group, Judge Shannon confirmed the KSS sale and commended the debtors on ‘a remarkable case’ in February 2018. Debtors had similarly resolved objections filed by the US Trustee and the United States on behalf of the IRS, among others. The court overruled outstanding objections submitted by a number of governments, namely pertaining to the subordination of their civil penalty claims, which Judge Shannon had earlier ruled would be susceptible to discharge per a confirmed plan, and to various consumer protection and whistle-blower claims. The plan became effective on 11 April 2018.

IV ANCILLARY INSOLVENCY PROCEEDINGS

i Oi

Oi SA is a Brazilian telecommunications company that, along with certain of its affiliates, filed for Brazil’s largest ever bankruptcy in June 2016, listing approximately 65.4 billion reais (US$19.26 billion) in outstanding debt as of the filing date. Shortly thereafter, the debtors filed a Chapter 15 petition with the US Bankruptcy Court for the Southern District of New York seeking, among other things, recognition of the Brazilian proceeding as a ‘foreign main proceeding’ under Chapter 15 of the Bankruptcy Code, which was granted on 22 July 2016. Although Oi has no sizeable assets in the United States, it has strategic commercial agreements with large US telecom carriers related to interconnection fees.

In April 2017, a Dutch court ordered that two of Oi’s subsidiaries enter bankruptcy and begin proceedings to liquidate and repay creditors, a ruling affirmed on appeal by the Dutch Supreme Court in July 2017. The two subsidiaries ordered to liquidate (Oi Brasil Holdings Coöperatief UA (Oi Coop) and Portugal Telecom International Finance BV (PTIF)) were responsible for issuing approximately €5.8 billion (US$6.2 billion) of bonds, which represented most of the debtors’ outstanding bond debt. The Dutch case caused a split among the company’s bondholders. While one group of investors formed the ‘International Bondholder Committee’ to press their case in the Netherlands, another group advised by Moelis & Co focused exclusively on the Brazilian case.

128 ‘Takata Achieves Confirmation for KSS Sale Plan; Judge Commends “Remarkable” Case,’ Reorg Research (February 16, 2018), available at https://platform.reorg-research.com/app#company/4924/intel?q=&caseId=0&startDate=&endDate=&sectorIds=0&keyStoriesOnly=1.
129 ‘Takata Debtors’ Plan of Reorganization Goes Effective’, Reorg Research (11 April 2018), available at https://platform.reorg-research.com/app#company/4924/intel?q=&caseId=0&startDate=&endDate=&sectorIds=0&keyStoriesOnly=1.
131 Order Granting Recognition of Foreign Main Proceeding and Certain Related Relief, Case No. 16-11791, ECF No. 38 (Bankr. S.D.N.Y. 22 July 2016).
134 id.
135 id.
In July 2017, Oi Coop sought Chapter 15 recognition of its Dutch restructuring proceedings while revoking the previously granted Chapter 15 recognition of its Brazilian proceedings, arguing that Oi Coop’s center of main interests was not in fact Brazil (as previously held by the US court in granting Chapter 15 recognition), but the Netherlands. While the motion was filed by the Insolvency Trustee of Oi Coop, it was supported by Aurelius Capital Management, LP and other members of the International Bondholder Committee. After trial, the Bankruptcy Court of the Southern District of New York denied the motion to grant Chapter 15 recognition to Oi Coop’s Dutch proceedings in a lengthy opinion. Under the two-prong test of 1517(d) (which as a preliminary matter was determined to be the proper legal standard of review) the Court determined that the bases for granting Chapter 15 recognition of the Brazilian proceedings was not lacking, and those bases for recognition had not ceased to exist. The equities also weighed against granting Chapter 15 recognition of Oi Coop’s Dutch proceedings, as the Court found that Aurelius was seeking to ‘weaponize’ Oi Coop to ‘double dip’ and recover both on the notes directly, as well as recovering against Oi based on its guarantees (the Brazilian judicial recovery plan involved substantive consolidation of the Oi debtors, which eliminated intercompany claims and the opportunity to ‘double dip’). Judge Lane found ‘the strategy pursued by Aurelius in these cases [to be] a troubling one that the Court refuses to countenance’. On 14 March 2018, a motion for reconsideration was denied.

The judicial recovery plan, after approval by a majority of Oi’s creditors on 19 and 20 December, was approved by the Brazilian court on 8 January 2018. Dutch law composition plans for Oi Coop and PTIF were confirmed by the Court of Amsterdam; the terms of these plans mirror the terms of the Brazilian judicial recovery plan in order to give effect to the judicial recovery plan in other territories like the Netherlands and the United Kingdom. The confirmed judicial recovery plan was granted full force and effect and comity in the United States on 15 June 2018 to permit the issuance of US securities as required under the plan, among other reasons. On 31 July 2018, Oi announced that it had completed its restructuring and implemented the terms and conditions of the judicial recovery plan.

137 id.
138 id. at 175–76.
139 id. at 176.
140 id. at 200.
141 id. at 235–36.


Platinum Partners Value Arbitrage Fund LP

Platinum Partners LP (Platinum) was a hedge fund manager whose funds specialised in asset-based loans to troubled companies, combined with other traditional investment strategies. Platinum’s two primary funds averaged annual returns of 17 per cent from 2003–2015 and 13.4 per cent from 2005–2015. In May 2016, a cofounder of Platinum was arrested for bribing a union official in exchange for the union investing in Platinum funds (these charges were only the beginning of Platinum’s legal troubles). Shortly thereafter, Platinum indicated that it would likely return the assets of its Value Arbitrage fund to investors and hired a third party purportedly to ensure an orderly and fair liquidation.

In August 2016, with Platinum failing to honor redemption requests, Platinum Partners Value Arbitrage Fund L.P. (the Master Fund) and one of the Master Fund’s feeder funds, Platinum Partners Value Arbitrage Fund (International) Limited (the International Fund) were placed into liquidation by the Grand Court of the Cayman Islands. On 18 October 2016, the liquidators of the Master Fund and the International Fund sought Chapter 15 recognition for the Cayman liquidations as the foreign main proceedings, which was granted on 22 November 2016. The order granting this recognition included broad language granting the Cayman liquidators the authority to conduct discovery and ‘upon written request, obtain[ ] turnover of any and all documents . . . that are property of, concern or were made or issued on behalf of the Funds . . . .’ An additional feeder fund, Platinum Partners Value Arbitrage Fund Ltd (the Intermediate Fund) was placed into liquidation, consolidated with other Platinum proceedings and was granted Chapter 15 recognition in October 2017. Each of the Master Fund, International Fund and Intermediate Fund (collectively, the Funds) are organised under the laws of the Cayman Islands.

---

149 id.
154 id.
CohnReznick LLP (CohnReznick) provided auditing services to the funds in 2014 and 2015 (though it did not complete its audit in 2015). The Cayman liquidators requested documents related to CohnReznick’s work with the funds, relying on their rights under Cayman law to investigate the dealings and affairs of the debtors as well as their rights under the Chapter 15 recognition order. CohnReznick did not fully comply with the request and, after procedural posturing, the liquidators filed a motion to compel CohnReznick to comply with a document production subpoena and produce the requested documents. In granting the motion, the bankruptcy court discussed the broad authority (within reason) for foreign representatives to take discovery concerning the affairs of a foreign debtor, as well as the specific discovery authority under Sections 1521(a)(4) and (7). While the question of whether the requested discovery was permissible under Cayman law was not certain, the court noted that Cayman law did not prohibit the discovery.

CohnReznick filed a motion for a stay pending appeal of the bankruptcy court’s order, which was denied. The Southern District of New York, in denying the appeal, noted that the order authorising discovery was ‘comfortably within’ the ‘broad authority’ under Chapter 15 of the Bankruptcy Code (and in particular was within the authority of Sections 1521(a)(4) and (7)). The court also noted, ‘Chapter 15 expresses a strong preference for providing assistance to foreign representatives in appropriate circumstances. That congressional preference is not to be lightly disturbed.’

**V TRENDS AND OTHER RECENT DEVELOPMENTS**

While bankruptcy filings in the United States increased in 2015 and 2016 following a steady decline from their 2009–2010 peak, 2017 saw a 28 per cent decline in public company bankruptcy filings year-over-year from 2016. While certain observers believe that 2018...
will see an increase in the number of bankruptcy filings and certain industries, notably retail, have already shown an uptick in filings, other indicators suggest that the number of bankruptcy filings may decline further.

The sections below highlight recent trends in the energy and retail sectors, and offer some detail on recent decisions and other developments that may be relevant in US bankruptcy practice in the coming years.

**i  Industry downturns**

**Energy industry downturn**

The energy industry has experienced a high number of bankruptcies over the past few years despite the general availability of cheap credit. According to a report from Haynes and Boone LLP, from the beginning of 2015 through 31 March 2018, oilfield services companies and 144 oil and gas producers filed for bankruptcy. In 2017, the pace of oil and gas bankruptcies slowed as many companies have cycled through Chapter 11 and higher commodity prices provided some relief. E&P bankruptcy filings decreased by 67 per cent year-over-year in 2017.

Despite the continued challenges facing the industry, there is growing optimism that the energy industry is rebounding. One of the determinative factors that could facilitate (or hinder) an industry recovery is the price of oil. To drill profitably at low oil prices, oil producers must cut costs. But realising these cost savings could prove challenging, as service companies must raise prices to support taking rigs and hydraulic fracturing equipment out of storage and hiring capable professionals to operate them, driving up the break-even oil price for operators. For these and other reasons, the price of oil will continue to play a determinative role in whether the growing optimism yields continued material improvement. As of August 2018, oil was trading at around US$70 a barrel, a substantial rebound from the

---

165 id.; Kumar Kanthan, et al., ‘Moody’s: Retail Corporate Defaults Hit All-Time High in First Quarter 2018’, Moody’s (10 April 2018) available at https://www.moodys.com/research/Moody’s-Retail-corporate-default-s-hit-all-time-high-in-first--PR_382085 (‘Despite the recent uptick in the US, Moody’s expects the global speculative-grade default rate to decline to 1.8% at the end of 2018 before falling to 1.4 per cent a year from now.’).


167 See note 70–71 and accompanying text.


169 See note 261.


171 Source: Bloomberg Finance LP.
2016 prices that were a primary driver of the recent wave of energy bankruptcies (with prices dipping below US$30). Furthermore, one of the largest and most complex bankruptcies in history, In re: Energy Future Holdings Corp. et al., finally went effective in March 2018.

Despite the improved market environment, there remains plenty of bankruptcy activity in the energy industry. Recent notable energy bankruptcies include Ascent Resources Marcellus Holdings, LLC, Cobalt International Energy Inc, FirstEnergy Solutions Corp, EV Energy Partners LP, EXCO Resources Inc, Expro Holdings US Inc and Fieldwood Energy LLC. Furthermore, while the rate of bankruptcy filings in the energy industry has recently decreased, there is evidence that the amount of debt restructured by such bankruptcies may actually be increasing, suggesting that larger, more complex energy companies remain at substantial risk. For instance, the aggregate debt of E&P bankruptcy debtors in the first quarter of 2018 not only almost equalled the aggregate debt of E&P bankruptcy debtors in FY 2017, but it also exceeded the aggregate debt of E&P bankruptcy debtors at the nadir of oil prices in the first quarter of 2016.

Retail industry downturn

While the energy industry has shown signs of life, the retail industry finds itself squarely in the midst of the ‘retail apocalypse’ (or, perhaps more charitably, the ‘retail pandemic’). Retailers accounted for one-third of all corporate defaults in the first quarter of 2018, and notable retailers filing for bankruptcy in 2018 (all on or before 1 May) include A’GACI, LLC, Claire’s Stores, Inc, Gibson Brands, Inc, Kiko USA, Inc, Nine West Holdings, Inc, Remington Outdoor Company, Inc, Southeastern Grocers, LLC, and The Bon-Ton.

---


176 Case No. 18-50757 (Bankr. N.D. Oh.; filed 31 March 2018).

177 Case No. 18-10814 (Bankr. D. Del.; filed 2 April 2018).


181 See note 261.


185 Case No. 18-10584 (Bankr. D. Del.; filed 19 March 2018).

186 Case No. 18-11025 (Bankr. D. Del.; filed 1 May 2018).


188 Case No. 18-10947 (Bankr. S.D.N.Y.; filed 6 April 2018).


190 Case No. 18-10700 (Bankr. D. Del.; filed 27 March 2018).

© 2018 Law Business Research Ltd
Stores, Inc,191 The Walking Company Holdings, Inc192 and Tops Holding II Corporation.193 More of the same is expected through the remainder of 2018 and the retail industry is expected to easily exceed the number of debt defaults seen in 2017.194 Furthermore, certain high-profile retail Chapter 11 filings have been unable to reorganise as going concerns and have been wound down or liquidated.195

While bankruptcies in the retail space in 2017 and early 2018 have been occurring with striking frequency, the trend has been developing for some time. In March 2016, Sports Authority sought Chapter 11 protection, ushering in a wave of retail bankruptcies. In April 2016, Vestis Retail Group, which manages Eastern Mountain Sports, Bob’s Stores, and Sports Chalet, also filed for protection under Chapter 11. Aeropostale, an apparel company, filed the following month.196 In 2017 the downturn continued; a number of well-known brands sought bankruptcy protection in 2017, including Gymboree, rue21, Payless Shoes and Toys ‘R’ Us. Underscoring the pressure on brick-and-mortar operations, JCPenney, Staples and Abercrombie & Fitch, among others, have closed several hundred stores in the past few years.197 Retail store locations closed in the first half of 2018 at an even faster rate than they did in 2017.198

Dynamics in the retail industry have created myriad operational challenges for retailers, despite the overall health of the economy. Recent market headwinds for retailers include a shift from traditional brick-and-mortar stores to online shopping sites (most notably, but not exclusively, Amazon), a highly competitive market with an oversaturation of malls and a shift in consumer spending from goods to travelling and dining.199 These dynamics have left retailers with insufficient revenue to cover high fixed costs such as leases for their stores,200 in addition to the costs of servicing excessive amounts of debt.201

---

192 Case No. 18-10475 (Bankr. D. Del.; filed 6 March 2018).
198 See Linnane, note 287.
200 At least one commentator has suggested that, in addition to the market forces driving the downturn, the mandatory 210-day limit on the time by which a debtor must assume or reject a commercial real estate lease under Section 365(d)(4) of the Bankruptcy Code leaves retailer debtors with insufficient time to negotiate with their landlords and properly emerge from Chapter 11 as a stand-alone entity. See Lawrence C. Gottlieb, ‘The Disappearance of Retail Reorganizations Under the Amended Section 365(d)(4)’, available at http://business-finance-restructuring.weil.com/wp-content/uploads/2013/06/Gottlieb-Paper.pdf.
201 See Linnane, note 287.
Gifting

A recent trend in bankruptcy settlements over the last several years has been the increasing use of ‘gifting’, a consensual arrangement in which a senior creditor class gives a junior class or equity some of its share of recoveries otherwise due to it under a plan of reorganisation. The rationale underlying this practice, at first glance, seems benign, as sophisticated parties with bargaining power seemingly may opt to transfer their rights to junior parties in exchange for a more swift resolution to the bankruptcy proceedings. However, this analysis becomes more complicated when an intermediate creditor is involved and the priority regime outlined in Section 507 of the Bankruptcy Code is considered. Under Section 507, there is a hierarchy in resolving the claims of various creditors against the assets of the debtor. Viewed in this light, the intermediate creditor can object that junior creditors are receiving distributions before senior claims are paid in full, in violation of the absolute priority rule.

In 2011, the second circuit handed down a decision in *In re DBSD North America*, which limited the ability of senior creditors to gift their share of a distribution to more junior creditors. In DBSD, the court considered whether senior creditors’ decision to gift some of its cash distribution to equity holders, bypassing junior creditors with claims of higher priority relative to the equity holders, ran afoul of the absolute priority rule. The court invalidated the plan, holding that the senior creditors had no right to gift estate property in contravention of the statutorily contemplated hierarchy. The decision left unresolved the propriety of a senior creditor bypassing an intermediate creditor in gifting non-estate property to a junior creditor. In a decision that limited the scope of the DBSD holding, the third circuit held that the holding was limited to gifting estate property. Senior creditors, however, remained free to gift non-estate property.

An arrangement known as a ‘structured dismissal’ has become an increasingly popular technique for parties seeking to implement a gifting arrangement without running afoul of the absolute priority rule. A structured dismissal is a dismissal of a Chapter 11 case combined with additional provisions in the dismissal order, which often include mutual releases, procedures for claims reconciliation, ‘gifting’ of funds to junior creditors and retention of jurisdiction by the bankruptcy court. Structured dismissals are often employed in situations where the debtors have insufficient unencumbered assets to finance a confirmable Chapter 11 plan (e.g., after a sale of all or substantially all of such debtors’ assets pursuant to Section 363 of the Bankruptcy Code). The Supreme Court’s decision in *Czyzewski v. Jevic Holding Corp* has recently made clear, however, that priority deviations implemented through non-consensual structured dismissals are not permitted. Commentators and courts are still grappling with the ultimate scope of *Jevic*, while certain courts have interpreted *Jevic* broadly to deny

---

202 *In re DBSD North America, Inc*, 634 F.3d 79 (2d Cir. 2011).
204 137 S. Ct. 973, 986 (2017).
priority-skipping distributions that are not tied to ‘a significant Code-related objective’; other courts have read Jevic narrowly and approved priority-skipping distributions in connection with a Chapter 11 plan or a settlement.

### iii Covenants/DIP loans

Many large corporate bankruptcies involve the debtor securing post-petition debtor-in-possession financing (a DIP loan). The DIP loan provides the debtor with the cash necessary to continue its operations throughout the bankruptcy and to cover the costs of the bankruptcy. The lender extending a DIP loan to the debtor, often a pre-petition creditor of the debtor interested in protecting its pre-petition position, will place covenants in the DIP loan, setting milestones that the debtor must meet under the terms of the loan. Such milestones can include, among others, deadlines to file disclosure statement and solicit votes on a plan of reorganisation and deadlines to obtain critical relief (e.g., the filing of a motion under Section 1113 of the Bankruptcy Code seeking to modify collective bargaining agreements, deadlines to file sale procedures and sale motions, if applicable, and deadlines to obtain confirmation of a plan).

There is an inherent tension in the restrictiveness of these milestones, which can be constraining and onerous for a debtor and the need for financing. On the one hand, debtors need DIP financing, and lenders need assurances as inducement to make these loans to a bankrupt company. On the other hand, strict covenants can tie the hands of debtors and add additional complexity and expense if other creditors contest the plan supported by the DIP lenders.

The recent trend in the industry has been towards more DIP lenders insisting on more restrictive milestones in DIP covenants (though there have been recent exceptions to this trend, notably Toys ‘R’ Us). However, striking the right balance on the restrictiveness of milestones in DIP loans is still an open question. For instance, in response to the trend towards more restrictive covenants, the ABI Commission to Study the Reform of Chapter 11 has recommended adding to the bankruptcy code that no milestones can require actions within 60 days of the petition date. It will be interesting to see if that proposal or others gain traction and where the market settles on this issue.

---

206 In re Fryar, 570 B.R. 602, 610 (Bankr. E.D. Tenn. 2017); see also In re Pioneer Health Svcs., Inc., 570 B.R. 228, 235 (Bankr. S.D. Miss. 2017) (requiring a ‘significant offsetting bankruptcy related justification’ to justify critical vendor payments, citing Jevic).


ABOUT THE AUTHORS

SCOTT BACHE
Clifford Chance
Scott Bache is a finance partner based in our Hong Kong office. Scott specialises in advising financial institutions, hedge funds, private equity funds, financial advisers and turnaround professionals on the full spectrum of restructuring matters, including corporate restructuring, distressed mergers and acquisitions and special situations investing. He also advises clients on a broad range of insolvency issues, security enforcement and general banking litigation.

FABRICE BAUMGARTNER
Cleary Gottlieb
Fabrice Baumgartner is a partner at Cleary Gottlieb. He has a broad corporate practice for large and mid-size, public and private companies. In addition to his expertise on restructuring and bankruptcy matters, his background and experience with corporate finance, mergers and acquisitions and corporate law matters generally, enable him to advise clients involved in complex reorganisations and financial restructurings. He is distinguished by The Legal 500 EMEA for his insolvency work and by Chambers Global and Chambers Europe as a leading equity capital markets lawyer in France. He joined the firm in 1991 and became a partner in 2000. He is based in the Paris office and was resident in the New York office from 1991 to 1992 and the Hong Kong office from 1994 to 1997.

PIERRE BEISSEL
Arendt & Medernach
Pierre Beissel is a partner and a member of both the corporate law, mergers and acquisitions and the private equity and real estate practices of Arendt & Medernach. He advises private equity firms, hedge funds and real estate funds on funds structuring and formation as well as on the structuring and financing of international buy-out transactions, joint ventures, corporate reorganisations and corporate governance matters.

He is an active member of the Luxembourg Private Equity Association and of the American Bar Association, and he was president of the Luxembourg Young Bar Association in 2007/2008.

Pierre Beissel teaches corporate and commercial law at the Luxembourg School for Commerce. He is a lecturer in contractual law at the Luxembourg Bar school.
He has been a member of the Luxembourg Bar since 1999 and of the New York Bar since 2001.

Pierre Beissel holds a master’s degree in law, a diplôme de juriste conseil d’entreprise (DJCE) and a diplôme d’études supérieures spécialisées in business law (DESS droit des affaires) from the Université Montpellier I (France), as well as a master of laws degree (LLM) from Cornell Law School (US).

He is proficient in English, French, German and Luxembourgish.

MILES BENHAM
MannBenham Advocates Limited

Miles Benham is the managing director of MannBenham Advocates Limited. He was admitted to the Manx Bar in 1996 and is a commissioner for oaths and a notary public.

He heads the practice’s litigation and insolvency department, which deals with commercial and trust litigation, general civil litigation, and insolvency-related work.

Mr Benham has considerable insolvency-related experience and has been appointed by the Isle of Man High Court to act as a liquidator. Mr Benham and his litigation colleagues also provide advice to liquidators, creditors, investors and directors in respect of all aspects of insolvency-related work.

DONALD S BERNSTEIN
Davis Polk & Wardwell LLP

Donald S Bernstein, chair of Davis Polk’s insolvency and restructuring group, is recognised as one of the leading insolvency lawyers in the world. He was elected by his peers as the chair of the National Bankruptcy Conference and has been a commissioner on the American Bankruptcy Institute’s Commission to Study the Reform of Chapter 11, chair and president of the International Insolvency Institute and a member of the legal advisory panel of the Financial Stability Board. Mr Bernstein’s practice includes representing debtors, creditors, receivers and acquirers in corporate restructurings and insolvencies. In addition, he heads the group’s multi-team representation of global financial institutions in connection with the ‘living wills’ required to be submitted to financial regulators pursuant to the Dodd–Frank Act.

Outside the firm, Mr Bernstein is a member of the editorial board of Collier on Bankruptcy, an authoritative treatise on US bankruptcy law.

JUSTIN BHARUCHA
Bharucha & Partners

Justin is a founding partner at Bharucha & Partners, and his practice focuses on financing and stressed assets. He also advises on acquisitions by and from non-residents, especially in sectors where foreign investment is subject to restrictions, illustratively, real estate, defence and retail.
SÉBASTIEN BINARD
Arendt & Medernach

Sébastien Binard is a partner in the private equity and real estate and corporate law, mergers and acquisitions practices of Arendt & Medernach. He specialises mainly in corporate law, corporate finance, mergers and acquisitions and transactional business law.

He advises major private equity firms and alternative fund managers on the structuring and financing of international buy-out transactions and private investments, the formation of joint venture companies and private funds, corporate reorganisations (including in relation to distressed companies), the structuring of exit strategies and corporate governance matters.

Sébastien Binard is also a lecturer in corporate law at the Luxembourg School for Commerce. He is a member of the legal committee and of the market intelligence committee of the Luxembourg Private Equity and Venture Capital Association (LPEA) and a member of the Business Law Commission of the Board of the Luxembourg Bar (Conseil de l’Ordre).

He was seconded to the New York office of Arendt & Medernach in 2008–2009 for 18 months, where he represented the corporate law, mergers and acquisitions practice of the firm and advised US clients on Luxembourg corporate law matters.

Sébastien Binard is a member of the Luxembourg Bar and was a member of the Brussels Bar (Belgium) until 2013. He holds a master’s degree in law from the Université Catholique de Louvain (Belgium).

He is proficient in English and French.

DIÁNA BORROSS-VARGA
Faludi Wolf Theiss Attorneys at Law

Diána Boross-Varga is an associate in the banking and finance practice group. Prior to joining Wolf Theiss in 2013, she worked at Noerr & Partner and also gained experience at Luther’s Budapest and Berlin office. In the areas of banking and finance and insolvency and enforcement proceedings, she has valuable experience in advising clients concerning financing and refinancing transactions, capital market transactions, loan transfer, enforcement of security interests, as well as financial regulatory issues. Diána completed her legal studies at the University of Szeged and gained her LLM at the University of Potsdam in economic law. At the University of Szeged she has also gained her special translator qualification in the German language.

ALEXANDRA BORRALLO
Clifford Chance SLP

Alexandra Borrallo is a lawyer in the litigation and dispute resolution department in the Madrid office of Clifford Chance SLP. She obtained both her law degree, and her degree in business administration, in 2008 from the Autonomous University of Madrid.

Alexandra has participated in many insolvency proceedings, working for both creditors and debtors, and has been involved in many civil and arbitration proceedings regarding financial disputes.
PAVEL BOULATOV
*White & Case LLC*

Pavel is counsel in the Moscow office of White & Case, focusing on insolvency proceedings, litigation and international arbitration. He represents Russian and foreign companies in a wide range of insolvency proceedings, including advising on the preparation and filing of insolvency petitions and applications to register creditor’s claims, resisting the registration of other creditors’ claims, participating in creditors’ meetings, the evaluation and sale of debtors’ assets and interaction with bankruptcy managers. Pavel has significant expertise in Russian insolvency proceedings and represented creditors, debtors and administrators in large bankruptcy cases. Pavel also represents clients in disputes during insolvency proceedings and in proceedings concerning the recognition of foreign courts insolvency judgments in Russia. His clients include Russian and international banks (Bank of Cyprus, Czech Export Bank, UniCredit Bank, Credit Europe Bank, BTA Bank) and large companies and corporations (Samsung, Visteon, Eurocement and PSG International). Pavel has been included in Best Lawyers in Russia in the practice area of litigation and insolvency, and is a member of the INSOL International.

PETER BOWDEN
*Gilbert + Tobin*

Peter Bowden is a partner in Gilbert + Tobin’s restructuring and insolvency group. Mr Bowden specialises in front-end restructuring and insolvency. He has significant experience advising hedge funds, banks, special situations groups, investment banks, insolvency practitioners, creditors and debtors on restructuring, insolvency, workouts, banking and distressed debt transactions in a range of industries, including mining, mining services, property, construction, agriculture and manufacturing.

Mr Bowden is admitted to practise in both Australia and the UK. He also gained significant international experience while working in Tokyo for a leading global law firm during 2008 and 2009. Prior to joining Gilbert + Tobin, he was a partner at a global law firm where he focused on front-end restructuring, insolvency and distressed debt.

Mr Bowden is listed in Best Lawyers in 2017 and 2018 in insolvency and reorganisation law. He was also named as a rising star in Doyle’s Guide in 2015 in insolvency and reconstruction. Mr Bowden is a member of the Australian Restructuring Insolvency and Turnaround Association and the Turnaround Management Association (TMA) and is on the VIC TMA Committee.

Recently, Mr Bowden has worked on a number of prominent restructuring and insolvency matters, including Toys R Us, Norske Skog, Mirabela Nickel, Nexus Energy, Arrium, LM First Mortgage Income Fund, Acquire Learning, Banksia Secured Investments, Timbercorp and Eastmark/One Denison.

JOANNA CHARTER
*Clifford Chance*

Joanna Charter is a consultant in the banking and finance group of Clifford Chance’s Hong Kong office, focusing on restructuring and insolvency work. She has advised on a range of debt restructurings across Asia and across a range of industries. Major matters include
advising the joint provisional liquidators of China Fishery Group Limited, the senior lenders to Mongolian Mining Corporation, and two syndicates of lenders in respect of the recovery and sale of four aircraft following the collapse of Oasis Hong Kong Airlines. In addition, Joanna also advises on resolution planning for financial institutions in Hong Kong. Joanna is a member of INSOL and currently sits on the board of the Hong Kong chapter of IWIRC.

ROBERT CHILD

Clifford Chance

Robert Child is a senior associate in the Hong Kong banking and finance team specialising in restructuring and insolvency. He trained with Clifford Chance in London and Hong Kong and spent five years working in the European restructuring and insolvency team in London before joining the Hong Kong practice in February 2016. Robert is qualified in both England and Wales and Hong Kong.

MAURO TEIXEIRA DE FARIA

Galdino & Coelho Advogados

Mauro Teixeira de Faria is a partner at Galdino & Coelho Advogados (GC). He graduated from the State University of Rio de Janeiro (UERJ) Law School and is currently a master of laws candidate at the same institution, in the research area of Corporate and Economic activities. He was admitted to practise law by the Brazilian Bar Association in 2009.

Mauro has substantial experience in corporate and civil litigation, as well as reorganisation proceedings. He has been working on behalf of debtors, creditors and investors interested in acquiring distressed assets. Mauro has also published articles, mostly involving insolvency law.

ANDREAS DIMMLING

GSK Stockmann

Andreas is a restructuring and corporate partner in the Munich office of GSK. Since 2008, Andreas has advised national and international clients on matters of restructuring and insolvency issues, including distressed M&A, corporate restructuring, insolvency proceedings and out-of-court restructurings. Prior to working in Munich, Andreas was based in the Berlin and Heidelberg offices of GSK. Andreas gained intensive international experience through secondments in London and Barcelona and during university studies in Italy and New Zealand. Andreas holds a law degree and a business degree from the universities of Berlin and Bayreuth and undertook his legal traineeship in Berlin.

AUDE DUPUIS

Cleary Gottlieb

Aude Dupuis is a senior attorney at Cleary Gottlieb. Her practice focuses both on litigation and restructuring matters. Her broad experience in these two areas enable her to advise clients involved in complex bankruptcy matters and related domestic and international disputes.
She joined the firm in 2005 and became a senior attorney in 2014. She is based in the Paris office, and is a member of the Paris Bar and the New York Bar.

**DOMINIC EMMETT**

*Gilbert + Tobin*

Dominic Emmett heads the restructuring and insolvency group at Gilbert + Tobin and brings nearly 30 years of significant local and international experience.

Mr Emmett specialises in non-contentious restructuring and insolvency work for banks and financial institutions, as well as special situation groups and distressed debt funds. His expertise includes preparing and negotiating standstill and forbearance arrangements; debt restructuring and schemes of arrangement; structured administration and receivership sales; and advice to directors, receivers, administrators and liquidators. Over the past 12 months, he has led the Gilbert + Tobin team working at the heart of Australia’s major restructurings: Bis Industries, Slater and Gordon, Ten Network, Toys R Us, Norske Skog, Emeco, Boart Longyear, Arrium and Paladin.

Mr Emmett has been consistently ranked as one of Australia’s elite restructuring and insolvency lawyers in all major legal directories for restructuring and insolvency. *Chambers Asia-Pacific 2018* recognises him as a star individual for restructuring insolvency. *Who’s Who Legal 2018* recognises Mr Emmett as the leading restructuring and insolvency lawyer in the world (excluding the US and Europe). *The Finance Monthly Fintech Awards 2018* recognised him as Banking and Finance – Lawyer of the Year – Australia, and *The Legal 500 Asia Pacific 2018* ranks him as a leading Lawyer for restructuring and insolvency among many others.

**SARAH FABER**

*Baker McKenzie*

Sarah Faber is a student at law at Baker McKenzie’s Toronto office. She recently completed her studies at Queen’s University Law School.

**ZOLTÁN FALUDI**

*Faludi Wolf Theiss Attorneys at Law*

Zoltán Faludi is the managing partner of the Budapest office of Wolf Theiss. He has over 20 years of experience as an attorney with a focus on energy, project finance as well as on arbitration and dispute resolution. He regularly advises clients on legal issues, including acquisitions, project finance and credit facility agreements, banking regulatory and security matters. Zoltán has experience in conducting out-of-court settlement discussions, facilitating and moderating negotiations between parties upon joint appointment of and mandate by the disputing parties. Cases where he is acting as an arbitrator include energy project development, financing, commercial and energy commodity trading related disputes. His strong industry knowledge is perceived as an added expert value to the professional handling of arbitration cases. He is the ex-chairman of the former Energy Arbitration Court in Hungary. Zoltán is regularly invited to speak at various local and international events, focusing on market related questions.
GAETANO IORIO FIORELLI
Baker McKenzie
Gaetano Iorio Fiorelli is an of counsel at Baker McKenzie. His practice concentrates on the area of dispute resolution in commercial, bankruptcy/insolvency and banking and finance matters. Throughout his career, Gaetano has represented major multinational and Italian companies in major litigation and arbitration cases.

Since 2004 he has been an adjunct professor of international and European law at Luigi Bocconi University, Milan. He is author of several publications in commercial and European law matters.

ELIANA MARIA FRUNCILLO
Baker McKenzie
Eliana Maria Fruncillo is an associate at Baker McKenzie. Her practice concentrates in the area of dispute resolution in contractual and tort liability matters, bankruptcy law and insolvency procedures.

She gained intensive international experience through an internship in a law firm based in Paris and during her university studies in France, where she attended an Erasmus Programme at Université Panthéon-Assas, Paris II in 2013.

RODRIGO SARAIVA PORTO GARCIA
Galdino & Coelho Advogados
Rodrigo Saraiva Porto Garcia is a partner at Galdino & Coelho Advogados (GC). He graduated from the Federal University of Rio de Janeiro (UFF) Law School and is currently a master of laws candidate at the State University of Rio de Janeiro (UERJ), in the research area of corporate and economic activities. He was admitted to practise law by the Brazilian Bar Association in 2013.

Rodrigo is part of the strategy and research team at GC, a team comprising partners with dedicated academic inclination, acting together with all teams at GC in the development of strategies, case studies and legal researches in general. Rodrigo has also published several articles, mostly involving corporate and insolvency law.

GOTTFRIED GASSNER
BINDER GRÖSSWANG Attorneys at Law
Gottfried Gassner is an attorney-at-law and partner at BINDER GRÖSSWANG Attorneys at Law in Vienna. He specialises in the areas insolvency and restructuring as well as corporate/ M&A focusing on cross-border matters. Recent restructuring experience includes advising the international Co-ordinating Committee in the restructuring of Steinhoff-Group.

In addition, Gottfried is publications officer of the Insolvency Section of the International Bar Association (IBA), co-editor of Insolvency and Restructuring International, the Journal of the IBA insolvency section, author of numerous publications regarding insolvency and corporate law, member of INSOL International and ReT urn – centre for restructuring, reorganisations and turnarounds – and a lecturer in the areas of insolvency and corporate law (among others, lecturer at the Danube University Krems).
TIMOTHY GRAULICH
Davis Polk & Wardwell LLP

Timothy Graulich is a partner in Davis Polk’s insolvency and restructuring group, and focuses on international restructurings. He has substantial experience in a broad range of domestic and international restructurings, including the representation of public and private companies, agent banks and lenders, acquirers and hedge funds in connection with pre-packaged and traditional bankruptcies, out-of-court workouts, DIP and exit financings, bankruptcy litigation and Section 363 sales. In addition to his regular insolvency matters, Mr Graulich plays a key role in the firm’s representation of certain global financial institutions in connection with their Dodd–Frank resolution planning. He is a fellow of INSOL International, a frequent author, lecturer and panellist on a broad range of bankruptcy topics and a contributing author to Collier on Bankruptcy.

KEITH HAN
Clifford Chance Asia

Keith Han is a senior associate of Clifford Chance Asia in Singapore. He is currently working on some of the most recent high-profile insolvency and restructuring cases in Singapore, including Hyflux Ltd (acting for KfW IPEX-Bank GmbH), EMAS Offshore Ltd (acting for DVB Bank), OW Bunker Far East (Singapore) Pte Ltd and Swiber Holdings Limited (acting for the trustees under an Islamic bond). As a former justices’ law clerk and assistant registrar of the Supreme Court of Singapore, Keith has also assisted the Singapore Court of Appeal as a law clerk on several leading insolvency cases.

DANIEL HAYEK
Prager Dreifuss AG

Daniel Hayek is a member of the management committee and head of the insolvency and restructuring and banking and finance teams of Prager Dreifuss. He has extensive experience in representing creditors in bankruptcy proceedings, whether in registering claims or in enforcing disputed claims vis-à-vis bankruptcy administrators, also before courts. He also specialises in banking and finance as well as corporate matters.

IAN JOHNSON
Slaughter and May

Ian Johnson has a broad restructuring, insolvency and general finance practice. He frequently advises on high-profile corporate recovery and insolvency matters and has worked on both international and domestic restructurings and refinancings (including the restructuring and refinancing of Seadrill Limited, Tata Steel, Danaos Corporation, Vion Foods, Punch, Premier Foods, General Motors, Countrywide plc, Towergate, as well as in relation to the liquidation of Carillion). He also advised the Irish government in connection with a wide range of issues relating to the Irish banking crisis, the Central Bank of Cyprus on aspects of the restructuring of its banking sector and the Portuguese Ministry of Finance in connection with the recapitalisation of the Portuguese banking sector. In addition, his practice covers...
issues relating to the eurozone crisis, and he has advised insurance companies and banks, including central banks, on various aspects of the crisis.

SUNTUS KIRDSINSAP
Weerawong, Chinnavat and Partners Ltd
Suntus Kirdsinsap is a senior counsel in the litigation and arbitration practice group. He is a leader in his field, with over 30 years’ experience advising and representing clients, including major corporations, banks, financial and securities companies. He has extensive expertise in banking, finance, debt restructuring, bankruptcy, insolvency, litigation and arbitration and has been the team leader for many of Thailand’s major corporate restructurings. Suntus also represents clients in the enforcement of arbitration awards. Suntus obtained an LLB degree from Thammasat University and is a Thai Barrister-at-Law.

THANAWAN KIRDSINSAP
Weerawong, Chinnavat and Partners Ltd
Thanawan Kirdsinsap is an associate in the litigation and arbitration group at Weerawong, Chinnavat and Partners Ltd. He advises clients on domestic and international disputes in a wide range of industries. Thanawan has an LLB degree from Thammasat University and an LLM degree from London School of Economics and Political Science, UK.

LUCAS P KORTMANN
RESOR NV
Lucas Kortmann specialises in insolvency law and restructuring, focusing on cross-border and complex matters. Recent experience includes assisting the Dutch financing company Oi Coop of the Brazilian Oi Group, representing DIP Lenders in the Chapter 11 of SFX Entertainment (which includes Dutch companies as Chapter 11 debtors), advising the Dutch administrator of the Dutch OSX vehicles and advising Goldman Sachs International on the restructuring of a multibillion-euro real estate portfolio with cross-border aspects. Mr Kortmann acted as expert for the EBRD in discussions on Greek insolvency law reform. Mr Kortmann is a fellow of INSOL International.

ELAN KRISHNA
Clifford Chance Asia
Elan Krishna is a senior associate at Clifford Chance Asia in Singapore. He has recently worked on some of the most high-profile insolvency and restructuring cases in Singapore, including Hyflux Ltd (acting for KfW IPEX-Bank GmbH), EMAS Offshore Ltd (acting for DVB Bank), OW Bunker Far East (Singapore) Pte Ltd and Swiber Holdings Limited. He recently completed a secondment with South Square Chambers where he was involved in significant cases, including Re Lehman Brothers.
ENIKŐ LUKÁCS
Faludi Wolf Theiss Attorneys at Law

Enikő Lukács is an associate in the litigation and dispute resolution practice group. She graduated from the Pázmány Péter Catholic University. During her studies she participated in the National Competition of Hungarian Universities (OTDK) with her thesis on international tax matters. Enikő joined Wolf Theiss as a legal intern in 2012 and became an associate over the years. She advises national and international clients in a wide range of civil procedures in various industries. Enikő has valuable experience in the preparation, negotiation and full handling of litigation, arbitration, insolvency and enforcement proceedings. Enikő regularly deals with restructuring, security enforcement, as well as representation of creditors. Her areas of interest are cross-border insolvency-related and restructuring issues. She usually attends arbitration events, including conferences organised by the Young Arbitrators Forum of the ICC.

JULIE MURPHY-O’CONNOR
Matheson

Julie is a partner in Matheson. She has over 20 years’ experience in contentious corporate restructuring and insolvency and financial services litigation, non-contentious restructurings and liquidations, as well as high stake complex commercial court corporate disputes. Her clients include financial institutions, insolvency practitioners and investment funds.

Julie has held a ministerial appointment to the board of semi-state company, Coillte, since 2013, and has recently been reappointed upon the expiry of her initial five-year term (the company having undergone an extensive and successful restructuring during this period). She was on the council of the Irish Society of Insolvency Practitioners from 2011–2014, acting as secretary and as chair of its Educational Sub-Committee during that period. Julie is also a member of INSOL Europe and the American Bankruptcy Institute. She is co-author of the Commercial Litigation Association of Ireland’s Practitioner’s Guide to the Commercial Court in Ireland and of the Law Society of Ireland’s Insolvency Law Text Book.

BARTŁOMIEJ NIEWCZAS
Bird & Bird Szepietowski i wspólnicy sp k

An attorney with 20 years of experience, Bartłomiej has supported some of the largest corporations on the Polish market from the construction, automotive, energy, chemicals and food and beverage industries. He has successfully led Bird & Bird’s dispute resolution team since 2012. The team recently successfully defended the Polish State against a €1 billion plus claim by Cypriot investors in investment arbitration (Poland–Cyprus BIT).

Bartłomiej is known for his commitment and dedication to every case. He is particularly experienced in complex technical disputes, and is recognised as one of the best construction dispute lawyers. Bartłomiej advises clients on dispute resolution strategies and policies, represents them and leads contract negotiations, especially infrastructure contracts based on FIDIC conditions.

His experience covers representation in dozens of litigation and arbitration proceedings, as well as advice on issuing and defending claims. He also has extensive experience in cross-border bankruptcy.
In 2014, he was honoured by *British Guide to the World’s Leading Lawyers – Construction and Real Estate* in the construction category, being placed in a narrow group of eight leading Polish specialists in this area. He is a recommended lawyer for dispute resolution in *The Legal 500* 2016 and 2017 editions.

He has been a speaker in debates, conferences and panel discussions devoted to the problems of international arbitration of investment and economic development, and he is co-author of the publication *Current economic agreements – Agreement in the course of trade*, published by Verlag Dashofer.

**MICHAEL NOWINA**

*Baker McKenzie*

Michael Nowina practises in the areas of commercial law and insolvency law. He acts for unsecured creditors, secured creditors, debtors, receivers, trustees-in-bankruptcy and court-appointed officers, purchasers of distressed assets, equity investors and financiers in insolvency and restructuring proceedings. Michael has extensive experience in employment and pension law issues arising from corporate liquidations or restructurings.

**LAURA OEGERLI**

*Prager Dreifuss AG*

Laura Oegerli is a junior associate at Prager Dreifuss’ Zurich office. Her main practice areas are corporate and M&A and dispute resolution. She focuses mainly on contract and corporate law matters as well as insolvency law and acts for national as well as international companies.

**DARÍO U OSCÓS CORIA**

*Oscós Abogados*

Darío U Oscós Coria is a legal counsel and practitioner specialising in insolvency, restructuring, creditor rights, litigation, arbitration, and mergers and acquisitions. He is the director, founder and senior partner at Oscós Abogados.

Mr Oscós graduated from, and was a professor at, the Escuela Libre de Derecho. He studied conflict of laws as a postgraduate at Harvard University. He has a postgraduate in constitutional law and *amparo* action from Instituto Mexicano del Amparo and Universidad Panamericana. He was the senior litigator at Santamarina & Steta SC, as well as the senior litigator and corporate lawyer at Grupo Financiero Banamex Accival.

He is an International Insolvency Institute delegate before Working Group V, Insolvency of UNCITRAL, United Nations Commission of International Trade Law.

He has also been professor of procedural law at the Universidad Iberoamericana; professor of insolvency at the Universidad Panamericana at master’s degree level; and professor of arbitration at the Instituto Tecnologico Autonomo de Mexico (ITAM). He is a member of the American College of Bankruptcy, the American Law Institute (and Mexican delegate and adviser in its transnational insolvency project), the International Insolvency Institute, the International Bar Association, Insol International, Insol Europe, the National Association of US Bankruptcy Trustees, the Mexican Bar Association and the Illustrious and National Bar Association of Mexican Lawyers. He is a lecturer and author of juridical literature.
DARÍO A OSCÓS RUEDA  
*Oscós Abogados*

Darío A Oscós Rueda is a legal counsel and practitioner specialising in insolvency, restructuring, creditor rights, litigation, arbitration and mergers and acquisitions. He is partner at Oscós Abogados.

Mr Oscós Rueda graduated from Universidad Intercontinental. He has a master’s degree in business law from Universidad Panamericana. He actively participated in the Vitro case on behalf of several creditors. He has also participated actively in the recognition and enforcement of the US bankruptcy adjudication in Mexico, the *Xacur* case and the *IFS* Case. He is author of juridical literature.

Mr Oscós Rueda is a member of the International Insolvency Institute Next Gen. Oscós Abogados and Oscós partners have been awarded as best law firm and best lawyers from international and domestic organisations.

Oscós Abogados has made case law on cross-border matters under the UNCITRAL Cross-Border Insolvency Law.

ABSLEM OURHRIS  
*RESOR NV*

Abslem Ourhris specialises in insolvency law, restructuring and related litigation. Recent experience includes representing a large British bank in the cross-border insolvency of a pharmaceutical multinational, assisting the Dutch financing company Oi Coop of the Brazilian Oi Group, advising the former majority shareholders of Yukos Oil Company OAO on the Dutch aspects of the legal battles surrounding the demise of Yukos and assisting German auto parts company ATU on the closure of its activities in the Netherlands.

PATRYCJA PIOTROWSKA  
*Bird & Bird Szepietowski i wspólncy sp k*

Patrycja has been advising clients since 2012. She specialises in dispute resolution, including litigation and administrative court proceedings, arbitration, conciliation and mediation, and also advises clients on commercial transactions and conducting negotiations.

Her professional experience includes litigation in the fields of construction, infrastructure, unfair competition and insolvency and restructuring proceedings.

She was involved in several complex proceedings, including construction disputes based under UNCITRAL Rules, high-value litigation concerning unfair competition and stealing of trade secrets, as well as employment disputes regarding unfair dismissals.

Patrycja graduated from the Faculty of Law at Cardinal Stefan Wyszyński University in Warsaw and completed postgraduate studies regarding Investment and Construction Process at Lazarski University in Warsaw.

She is a member of the Warsaw Bar Association.
NATTHIDA PRANUTNORAPAL

Weerawong, Chinnavat and Partners Ltd

Natthida Pranutnorapal is a senior associate in the litigation and arbitration practice group at Weerawong, Chinnavat and Partners Ltd. She has extensive experience in corporate transactions, business reorganisation and insolvency. She is the author of several publications on restructuring and insolvency in Thailand. Natthida obtained an LLB from Thammasat University and an LLM degree (Merit) (International Business Law) from the University of Essex, UK. She is a Thai barrister-at-law and a Notarial Services Attorney.

CHRISTOPHER S ROBERTSON

Davis Polk & Wardwell LLP

Christopher S Robertson is a senior associate in Davis Polk’s insolvency and restructuring group. He regularly represents hedge funds, banks, creditors, companies and other strategic parties in a wide range of corporate restructurings, including in connection with prepackaged and traditional bankruptcies, out-of-court workouts, DIP financings and Section 363 sales.

NISH SHETTY

Clifford Chance Asia

Nish Shetty is a partner at Clifford Chance Asia in Singapore and heads Clifford Chance’s litigation and dispute resolution practice in Asia. He has worked on many of the largest and most high-profile insolvency and restructuring cases in Singapore of the past 20 years, including Barings, Asia Pulp & Paper, Econ Corp, Drydocks World, TT International, OW Bunker Far East (Singapore) Pte Ltd, Hyflux and EMAS. These cases represent in many instances the locus classicus for many aspects of insolvency law in Singapore.

Nish is a member of the board of directors of the Insolvency Practitioners Association of Singapore and was the vice-chairman of the Law Society’s Insolvency Practice Committee. He has for many years been listed in a number of directories as a leading practitioner for restructuring and insolvency work.

PIYAPA SIRIVEERAPOJ

Weerawong, Chinnavat and Partners Ltd

Piyapa Siriveerapoj is an associate in the litigation and arbitration practice group at Weerawong, Chinnavat and Partners Ltd. She advises clients on dispute resolution, and has experience in foreign direct investment. Prior to joining the firm, Piyapa worked at the World Trade Organization and World Intellectually Property Organization, Switzerland and as Trade Officer at the Department of Intellectual Property, Ministry of Commerce. Piyapa has an LLB degree from Thammasat University and an LLM (Honours) degree from Toulouse Capitole University, France.
CARLY STRATTON
MannBenham Advocates Limited
Carly Stratton is a director of MannBenham Advocates Limited. She was admitted to the Manx Bar in January 2008, having graduated from Durham University and completed her postgraduate Diploma in Legal Practice at the Oxford Institute of Legal Practice.

Mrs Stratton specialises in corporate, commercial and regulatory matters, acting for many venture capitalists, equity houses and listed companies across all corporate and commercial disciplines.

Mrs Stratton is the Chair of the Isle of Man Wealth and Funds Association (http://www.iomfunds.com/contacts.php) and is personally recommended by The Legal 500 as ‘very efficient’ ‘professional, easy-to-work-with and thorough’ and provides ‘advice in a friendly and professional manner – responses are timely, with considerable knowledge of Manx corporate law backed up with commercial acumen’.

Mrs Stratton has co-authored the Isle of Man section of the International Comparative Legal Guide to Gambling.

ATHANASIA G TSENE
Bernitsas Law
Athanasia joined the firm in 2001 and is joint head of the banking, finance and capital markets group. At the core of Athanasia’s practice is vast experience of structuring, drafting, negotiating and advising on the feasibility and implementation of international financial transactions. She advises extensively on derivatives and collateral arrangements as well as on regulatory compliance. She has been working on the legal and regulatory aspects of the development of a secondary market of non-performing loans in the portfolios of Greek systemic banks and has been advising Greek and international clients on these matters. Athanasia has significant experience in advising corporates and international and domestic credit and financial institutions on financial restructurings and insolvency proceedings. Her clients include all the major banks and financial institutions with a local presence, and she has acted in innovative and groundbreaking deals that have paved the way for future transactions in the banking sector. Prior to joining the firm she worked with the Commercial Bank of Greece.

IÑIGO VILLORIA
Clifford Chance SLP
Iñigo Villoria is a partner in the Madrid office of Clifford Chance SLP. He gained his law degree from Comillas Pontifical University – ICADE (1993), and he also has a degree in business management.

He advises multinational and Spanish companies in all areas of law related to commercial litigation and arbitration. He specialises in insolvency law and financial disputes.

He leads the insolvency and restructuring group in the Madrid office, working for both creditors and debtors in insolvency proceedings, debt restructuring deals, deals for the sale and purchase of assets in insolvent companies and financial disputes regarding complex products. He is a specialist in legal defence in clawback actions and matters related to the classification of insolvency.
He is a lecturer in several insolvency law programmes and a regular contributor to specialist journals and the financial media on these matters. He is the author of several books and coordinator of the Memento Concursal.

GEORG WABL

BINDER GRÖSSWANG Attorneys at Law

Georg Wabl is an attorney-at-law at BINDER GRÖSSWANG Attorneys at Law in Vienna. He specialises in the areas insolvency and restructuring as well as corporate/M&A focusing on cross-border matters. He joined the firm in 2017 after having completed an LLM programme with a focus on financial and corporate restructuring in London (QMUL). Recent restructuring experience includes a senior role in advising the international Co-ordinating Committee in the restructuring of Steinhoff-Group.

Georg is author of several publications regarding corporate and insolvency law and a member of the IBA and ReTurn – centre for restructuring, reorganisations and turnarounds.
Appendix 2

CONTRIBUTING LAW FIRMS’ CONTACT DETAILS

ARENDT & MEDERNACH
41A, avenue J F Kennedy
L-2082 Luxembourg
pierre.beissel@arendt.com
sebastien.binard@arendt.com
Tel: (352) 40 78 78 792 (Pierre Beissel)
Tel: (352) 40 78 78 285 (Sébastien Binard)
Fax: (352) 40 78 04 604 (Pierre Beissel)
Fax: (352) 40 78 04 736 (Sébastien Binard)
www.arendt.com

BERNITSAS LAW
5 Lykavittou Street
106 72 Athens
Greece
Tel: +30 210 361 5395
Fax: +30 210 364 0805
atsene@bernitsaslaw.com
www.bernitsaslaw.com

BAKER MCKENZIE
Brookfield Place
Bay/Wellington Tower
181 Bay Street, Suite 2100
Toronto, Ontario M5J 2T3
Canada
Tel: +1 416 863 1221
Fax: +1 416 863 6275
michael.nowina@bakermckenzie.com
sarah.faber@bakermckenzie.com
Piazza Filippo Meda 3
20121 Milan
Italy
Tel: +39 02 76231 1
Fax: +39 02 76231 623
gaetano.iorio.fiorelli@bakermckenzie.com
eliana.fruncillo@bakermckenzie.com
www.bakermckenzie.com

BINDER GRÖSSWANG ATTORNEYS AT LAW
Sterngasse 13
A-1010 Vienna
Austria
Tel: +43 1 534 80
Fax: +43 1 534 808
gassner@bindergroesswang.at
wabl@bindergroesswang.at
www.bindergroesswang.at

BHARUCHA & PARTNERS
9, SS Ram Gulam Marg
Ballard Estate
Mumbai 400 001
India
Tel: +91 22 6132 3900
Fax: +91 22 6633 3900
justin.bharucha@bharucha.in
www.bharucha.in
Contributing Law Firms’ Contact Details

BIRD & BIRD SZEPETOWSKI I WSPÓLNICY SP K
Ks I J Skorupki 5
00-546 Warsaw
Poland
Tel: +48 22 583 79 00
Fax: +48 22 583 79 99
bartlomiej.niewczas@twobirds.com
patrycja.piotrowska@twobirds.com
www.twobirds.com

CLEARY GOTTLIEB
12, rue de Tilsitt
75008 Paris
France
Tel: +33 1 40 74 68 00
Fax: +33 1 40 74 68 88
fbaumgartner@cgsh.com
adupuis@cgsh.com
www.clearygottlieb.com

CLIFFORD CHANCE
27th Floor, Jardine House
One Connaught Place
Central
Hong Kong
Tel: +852 2825 8888
Fax: +852 2825 8800
scott.bache@cliffordchance.com
joanna.charter@cliffordchance.com
robert.child@cliffordchance.com

Marina Bay Financial Centre, 25th Floor,
Tower 3
12 Marina Boulevard
Singapore 018982
Tel: +65 6410 2200
Fax: +65 6410 2288
nish.shetty@cliffordchance.com
elan.krishna@cliffordchance.com
keith.han@cliffordchance.com

DAVIS POLK & WARDWELL LLP
450 Lexington Avenue
New York, NY 10017
United States
Tel: +1 212 450 4000
Fax: +1 212 701 5800
donald.bernstein@davispolk.com
timothy.graulich@davispolk.com
christopher.robertson@davispolk.com
www.davispolk.com

FALUDI WOLF THEISS
ATTORNEYS-AT-LAW
H-1085 Budapest
Kálvin tér 12-13
Hungary
Tel: +36 1 4848 800
Fax: +36 1 4848 825
zoltan.faludi@wolftheiss.com
eniko.lukacs@wolftheiss.com
diana.boross-varga@wolftheiss.com
www.wolftheiss.com

GALDINO & COELHO
ADVOGADOS
Av. Rio Branco 138, 11º andar
20040 002 Centro
Rio de Janeiro RJ
Brazil
Tel: +55 21 3195 0240
mfaria@gc.com.br
rgarcia@gc.com.br
www.gc.com.br

© 2018 Law Business Research Ltd
GILBERT + TOBIN
Level 35
Tower Two, International Towers
Sydney
200 Barangaroo Avenue
Sydney NSW 2000
Australia
Tel: +61 2 9263 4000
Fax: +61 2 9263 4111
demmett@gtlaw.com.au
pbowden@gtlaw.com.au
www.gtlaw.com.au

OSCÓS ABOGADOS
Paseo del Río No. 53 Chimalistac
Delegación Coyoacán
CP 04340, Mexico City
Mexico
Tel: +52 55 12 53 0100
Mob: +52 1 55 54 34 05 20
Fax: +52 55 1253 0102
docos@oscosabogados.com.mx
darioaor@oscosabogados.com.mx
www.oscosabogados.com.mx

GSK STOCKMANN
Karl-Scharnagl-Ring 8
80539 Munich
Germany
Tel: +49 89 288 174 73
Fax: +49 89 288 174 44
andreas.dimmling@gsk.de
www.gsk.de

PRAGER DREIFUSS AG
Mühlebachstrasse 6
8008 Zürich
Switzerland
Tel: +41 44 254 55 55
Fax: +41 44 254 55 99
www.prager-dreifuss.com

MANNBENHAM ADVOCATES LIMITED
49 Victoria Street
Douglas
IM1 2LD
Isle of Man
Tel: +44 1624 639350
Fax: +44 1624 617961
milesbenham@mannbenham.com
carlystratton@mannbenham.com
www.mannbenham.com

RESOR NV
Symphony Offices
Gustav Mahlerplein 27
1082 Amsterdam
Netherlands
Tel: +31 20 570 9020
Fax: +31 20 570 9021
sijmen.deranitz@resor.nl
www.resor.nl

MATHESON
70 Sir John Rogerson’s Quay
Dublin 2
D02 R296
Ireland
Tel: +353 1 232000
Fax: +353 1 232 3333
julie.murphy-oconnor@matheson.com
www.matheson.com

SLAUGHTER AND MAY
One Bunhill Row
London EC1Y 8YY
United Kingdom
Tel: +44 20 7600 1200
Fax: +44 20 7090 5000
ian.johnson@slaughterandmay.com
www.slaughterandmay.com
WEERAWONG, CHINNAVAT AND PARTNERS LTD
22nd Floor, Mercury Tower
540 Ploenchit Road
Lumpini, Pathumwan
Bangkok 10330
Thailand
Tel: +66 2 264 8000
Fax: +66 2 657 2222
suntus.k@weerawongcp.com
natthida.p@weerawongcp.com
plyapa.s@weerawongcp.com
thanawan.k@weerawongcp.com
www.weerawongcp.com

WHITE & CASE
White & Case LLC
4 Romanov Pereulok
125009 Moscow
Russia
Tel: +7 495 787 3000
Fax: +7 496 787 3001
pboulatov@whitecase.com
www.whitecase.com