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This is the fifth 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 in geographically diverse locales who have contributed to this book, many of whom participated with their colleagues in this year’s meetings of Insol International (in Sydney) and the International Insolvency Institute (in London). Their contributions reflect diverse viewpoints and approaches, which in turn reflect the diversity of their respective national commercial cultures and laws. Importantly, their views also reflect the slow but steady convergence of those cultures and laws over the last 30 years that promises to continue well into the future.

The preface to this fifth edition affords the opportunity to highlight recent positive developments in cross-border insolvency, many of which highlight this convergence. For example, in March of this year, the parliament of Singapore enacted sweeping reforms to the country’s corporate insolvency laws that are intended to transform Singapore into a regional insolvency hub for cross-border reorganisations.¹ The drafters of the new regime incorporated a number of core features similar to those of US chapter 11, including a worldwide automatic stay, super-priority rescue financing, ‘cram-down’ provisions that allow schemes of arrangement to be approved notwithstanding that a class of creditors has not approved the scheme, and provisions for pre-packaged restructurings.² In addition, Singapore became the most recent nation to enact legislation based on the UNCITRAL Model Law on Cross-Border Insolvency (the Model Law).³ Singapore’s statutory framework and substantive law is the subject of Chapter 21 of this volume.

European Union Member States are also moving towards adopting coherent restructuring frameworks that incorporate core restructuring principles. At present, several Member States do not allow for companies to restructure their debts before they are actually insolvent or place very strict or expensive conditions on access to restructuring proceedings. Even among Member States that do allow for pre-insolvency restructuring, rules regarding the existence or extent of a stay of enforcement proceedings, class formation and voting, protections for new financing, and other key aspects of restructuring law differ to such a

degree that the European Commission has concluded that ‘it is virtually impossible to have a restructuring plan for a cross-border group of companies with subsidiaries in more than two Member States.’

On 22 November 2016, the European Commission published a Proposal for a Directive 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) aimed at, among other things, instituting restructuring frameworks across Member States and harmonising key aspects of European restructuring law. The Proposed Pre-Insolvency Directive is not a model law. Rather, Title II of the Proposed Pre-Insolvency Directive delineates a set of common, core elements and minimum standards for preventive restructuring procedures that would enable debtors in financial difficulty to avoid insolvency and liquidation. These elements include leaving the debtor in possession of its assets and affairs in most instances, imposition of an automatic stay of individual enforcement actions, provision of minimum mandatory information to creditors, separate class voting on restructuring plans by differently situated creditors, cramdown and cram-up provisions where a plan is not supported by all classes of creditors, rules and standards regarding valuation methodologies, minimum protections for new financing necessary to implement a restructuring plan, and obligations for the Member States to impose specific duties on directors in the vicinity of insolvency that would incentivise them to pursue early restructuring when the business is viable. If the Proposed Pre-Insolvency Directive is adopted, Member States would have two years to adopt laws, regulations and administrative provisions necessary to comply with the provisions outlined above.

Not every encouraging initiative has been legislative in nature. Even though many countries have adopted legal regimes based on the UNCITRAL Model Law on Cross-Border Insolvency and have enacted other legislation aimed at international cooperation, cross-border coordination is often quite difficult given international differences in procedural and substantive law. Many judges have found it useful to employ protocols for court-to-court cooperation in particular cases. These protocols have helped judges and parties in interest coordinate complex restructurings of multinational corporations while adhering to their respective ethical obligations. In October 2016, judges from certain key commercial jurisdictions – New York, Delaware, England, Canada (Ontario), the British Virgin Islands, the Cayman Islands, Singapore, Australia, and Hong Kong (as an observer) – gathered to draft a new protocol, the Guidelines for Communication and Cooperation Between Courts in Cross-Border Insolvency Matters (the Guidelines), with the intention that each judge’s court would consider the new protocol as a standard for future cases. The Guidelines have

5 Id.
6 The Proposed Pre-Insolvency Directive also includes, among other things, provisions relating to discharge of debts for over-indebted entrepreneurs (Title III) and measures to increase the efficiency of restructuring, insolvency and discharge procedures (Title IV).
been formally adopted in a several of these jurisdictions, and it is hoped that more countries will adopt the Guidelines moving forward. The Guidelines are based on a set of guidelines published by the American Law Institute and the International Insolvency Institute in 2004, yet differ in several important ways. Most notably, the Guidelines are more explicit in allowing *ex parte* communications between judges. The Guidelines also offer flexibility to judges presiding over joint hearings, especially with respect to the offering of evidence, crossappearances by counsel, and post-hearing discussions, and offer flexibility as to how a court should communicate with foreign insolvency administrators. Significant adoption of the Guidelines should allow more judges to coordinate procedures, hold hearings, and even decide cases together. The resulting increased coordination among courts could boost the efficiency of administering cross-border cases and reach better and speedier outcomes for debtors and creditors.

It remains to be seen how these statutes and guidelines will be implemented in practice. For example, while the Singapore law contains an ‘absolute priority rule’ concept, it 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. Accordingly, shareholders appear to possess an effective veto over any restructuring plan under which creditors would receive either existing shares in the debtor from existing shareholders or new shares in the debtor in exchange for extinguishing existing debt claims. The Singapore Ministry of Law believes that ‘this type of *de facto* shareholder veto is not uncommon’ and that shareholders are in any event unlikely to possess a veto because they cannot receive any property if an impaired class of creditors objects to the compromise or arrangement. Of course, the threat of an effective veto may allow shareholders to extract a recovery on a ‘consensual’ basis notwithstanding the absolute priority rule.

While the Proposed Pre-Insolvency Directive requires that classes of creditors and equity holders be subject to a cross-class cram-down mechanism (provided that the restricting plan complies with the absolute priority rule), even if the Directive becomes effective in its current form, it may not fully implement the absolute priority rule in all instances. While the Directive incorporates some elements of US Chapter 11, it does not provide the debtor’s creditors with the opportunity to solicit votes on a competing restructuring plan and valuation estimate. This omission may be inherent in the ‘pre-insolvency’ nature of the Directive, but it sacrifices the discipline imposed on a Chapter 11 debtor by the ability of creditors to propose their own reorganisation plan after the debtor’s exclusive right to file a plan expires. Whether a restructuring plan complies with the absolute priority rule depends on, among other things, the valuation of the enterprise at the time it is restructured, and the absence of the opportunity to propose an alternative creditor plan could undermine the ability of creditors to challenge a debtor’s self-serving valuation estimate.

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
October 2017
I INSOLVENCY LAW, POLICY AND PROCEDURE

i 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.

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1 Mauro Teixeira de Faria and Rodrigo Saraiva Garcia are partners at Galdino Coelho Mendes 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 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 the 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:

- **claims arising from the labour legislation or resulting from work-related accidents**, with the highest priority both in bankruptcy and judicial reorganisation;
- **tax claims, administrative fines and other penalties imposed by government entities.** These claims are subject to bankruptcy, but not to judicial reorganisation proceedings;
- **claims with special and general privileges established by law**;
- **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
- **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. Wherever 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 eventual opposition, the bankruptcy court must validate the plan, when 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 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 with the provisions of the judicial plan of reorganisation and may suffer a haircut, have lower interest rates and longer payment schedules.

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 an updated 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 principal 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 submit (informally) an alternative plan at the general creditors' meeting, to be reviewed, discussed and even voted by the creditors.

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, at least one-third of its creditors approved the plan.

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 years, after which it may request the court to terminate the judicial reorganisation proceeding,

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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.
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 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;
b has not been declared bankrupt or, if it has, was discharged by a final decision of the bankruptcy court;
c has not been granted judicial reorganisation in the previous five years;
d has not been granted special judicial reorganisation (for small business entities) in the previous eight years; and
e has not been convicted or 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):

a 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;
b the company’s articles of incorporation, with the indication of its shareholders, their addresses and a list of their assets;
c a list of the company’s assets and properties, alongside its estimated value and the necessary documents to prove ownership;
d 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;
e an updated list of creditors; and
f 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:

a without relevant reason, the company defaulted on an obligation corresponding to more than 40 minimum wages at the time of the request;
b 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
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,7 Sete Brasil Group,8 OAS Group9 and Oi Group,10 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 2015,12 in an attempt to slow down the inflation rate (10.67 per cent in 2015).13 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.
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 67,363 points in 11 August 2017, 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 forecast for the Brazilian GDP in 2017 is of a 0.34 per cent growth and another 2 per cent growth in 2018, and the projected inflation rate for 2017 is 3.5 per cent and 4.2 per cent for 2018. In light of this, the base interest rate should be lowered to 7.5 per cent by the end of 2017 (it is currently at 9.25 per cent).

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 1,863 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 Proceedings¹</th>
<th>Variation</th>
<th>No. of Judicial Reorganisation Proceedings²</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>1287</td>
<td>55.43 per cent</td>
</tr>
<tr>
<td>2016</td>
<td>721</td>
<td>-13.03 per cent</td>
<td>1863</td>
<td>44.76 per cent</td>
</tr>
<tr>
<td>2017</td>
<td>396</td>
<td>15.12 per cent¹</td>
<td>685</td>
<td>-25.79 per cent¹</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 2017.
⁴ Calculated considering the number of companies declared bankrupt until June 2016 (344).
⁵ Calculated considering the number of judicial reorganisation proceedings until June 2016 (923).

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, it is possible to notice another gradual increase, 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.

In the last year, from June 2016 to June 2017, 1,104 small businesses, 451 mid-sized companies and 238 large companies have filed for judicial reorganisation. In the same

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¹ Source: www.bmfbovespa.com.br.
² Source: www.bcb.gov.br.
time frame, 580 small businesses, 184 mid-sized companies and 63 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.

III PLENARY INSOLVENCY PROCEEDINGS

i Oi Group

Oi Group is the largest Brazilian telecommunications company. Several things 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 (ANATEL).

In parallel with the judicial reorganisation procedure in Brazil, the Dutch Court of Appeals has declared the bankruptcy of both Netherlands-based companies.

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 million reais, which makes it the largest reorganisation proceeding in Brazilian history. There is also a substantial number of creditors, more than 90,000. Currently, Oi, its main creditors and the government, represented by ANATEL, are discussing the plan of judicial reorganisation and all viable alternatives.

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 in order 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. Leader’s extrajudicial reorganisation embraces more than 300 suppliers and, although challenging, the company has obtained the approval of more than 90 per cent of its creditors. Currently, Leader awaits the bankruptcy court’s decision to grant extrajudicial 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, in order 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 currently one of the largest and most significant extrajudicial reorganisation cases, considering its total debt and the participation of important creditors, including BNDES. Currently, Triunfo awaits the bankruptcy court’s decision to grant extrajudicial reorganisation.

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, Oi Brasil Holdings Coöperatief UA (FinCo) and Portugal Telecom International Finance BV (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, 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 case is still unfolding and may have important repercussions in Oi’s recovery.
V  TRENDS

One of the many proposals to boost economic growth being studied at the Ministry of Finance is an amendment to the Bankruptcy and Reorganisation Act. To this end, a working group was put together with several respected scholars and tasked with the objective of updating the current legislation. The first draft of the bill presents a few changes worth mentioning:

- the Bankruptcy and Reorganisation Act would be applicable to economic agents in general, not restricted to persons that undertake business activities;
- the company would be able to file for judicial or extrajudicial reorganisation if it is not currently declared bankrupt, without the need to fulfil any other requirements, such as, but not limited to, having been granted judicial reorganisation in the past five years;
- 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 presented to Congress (where it will probably be changed) and passed into law.

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 impact that judicial reorganisation and bankruptcy proceedings has on a company’s reputation.
I INSOLVENCY LAW, POLICY AND PROCEDURE

i Statutory framework and substantive law

British Virgin Islands (BVI) law is a mixture of statute and common law. The principal statute governing corporate and personal insolvency in the BVI is the Insolvency Act 2003 (the Act), which is supported by the regulations set out in the Insolvency Rules 2005 (the Rules).

The fundamental principle underlying BVI insolvency law, which closely follows English law in many respects, is the pari passu treatment of creditors. Accordingly, subject to contractual arrangements to the contrary, and to a very small category of preferential creditors (which rarely amounts to anything in practice), unsecured creditors share equally in the assets of an insolvent company available for distribution. The Act specifically recognises and protects the rights of secured creditors to enforce their security, and secured creditors do not compete with unsecured creditors in respect of the secured element of their claim. The commencement of BVI insolvency proceedings does not affect the ability of a secured creditor to enforce its security in accordance with its terms.

The Act provides for a range of transactional avoidance provisions designed to give effect to the pari passu principle, including the avoidance of preferential payments to creditors and transactions at an undervalue. The Act also provides remedies for fraudulent and insolvent trading.

ii Policy

The policy issues underlying the treatment of insolvent companies in the BVI are those applicable to a major offshore financial centre. BVI companies are widely used as holding companies for investment vehicles and for structuring purposes, and the BVI legal environment is, therefore, creditor-friendly and predictable.

As such, while there are procedures available – principally by way of a scheme of arrangement – whereby debt and company restructurings can be promoted, the BVI currently has no specific rehabilitation procedure equivalent to Chapter 11 in the United States or administration in England and Wales. There is an administration process set out in the Act, but it has never been brought into force and its status is currently under review.

iii Insolvency procedures

The principal insolvency procedure for insolvent BVI companies is liquidation, which is described in more detail below.

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1 Arabella di Iorio is a partner and David Welford is an associate at Maples and Calder.
One of the remedies of a secured creditor is to appoint a receiver or administrative receiver to deal with the secured assets. Those remedies have statutory recognition under the Act. Receivers are regularly appointed over the assets of BVI companies by the holders of security over those assets. Because a BVI company’s assets are typically outside the BVI, such receivers are predominantly appointed in the jurisdictions in which those assets are located, whether pursuant to the provisions of security governed by BVI law or pursuant to the provisions of local law. The Act imposes only a minimal layer of administrative burden in the BVI for receivers appointed abroad, which is essentially limited to giving notice of the appointment to the company in the BVI and the Registrar of Companies.

A procedure called a creditors’ arrangement can also, in theory, be used to reorganise and compromise a company’s debts. In practice, however, this is little used because it does not provide for a moratorium on creditors’ claims while it is implemented.

Liquidation is overwhelmingly the most common insolvency procedure, and is, therefore, the focus of this chapter. Liquidation involves the appointment of one or more liquidators for the purposes of collecting in and realising the company’s assets, and distributing the proceeds of the assets to those entitled to them in the order of priority prescribed by the Act.

iv Starting proceedings
An insolvent liquidation can be initiated out of court by resolution of the shareholders of the company, or it can be commenced by application to the court by a creditor, the company itself, the shareholders, the supervisor of a creditors’ arrangement, the Financial Services Commission or the Attorney General.

When an application is made to court for the appointment of a liquidator, notice of the hearing must be published in the jurisdictions in which the company did business, with the aim of bringing the hearing to the notice of the company’s creditors. Those creditors are entitled to appear and be heard on the application to court. Generally speaking, if an unpaid, undisputed creditor applies for the appointment of a liquidator on the grounds that the company is insolvent, the court will ordinarily exercise its discretion in favour of appointing a liquidator; however, if the majority of creditors oppose the appointment of a liquidator for good reason, the court may (but will not be bound to) have regard to their views.

v Control of insolvency proceedings
Plenary insolvency proceedings in the BVI are controlled by the company’s liquidator. The liquidator’s powers derive from the Act. In a court-appointed liquidation they will also be subject to the terms of the order appointing the liquidators. Typically, if the liquidator in a court-commenced liquidation wants to exercise significant powers such as the sale of assets and the bringing of legal proceedings, he or she will require the court’s sanction to do so on an application made specifically for that purpose.

Except where the order appointing the liquidator specifically requires the liquidator to seek sanctions, the court’s involvement with the liquidation will otherwise be relatively limited. The liquidator is entitled – and indeed expected – to use his or her skill and professional judgement and to run the liquidation using his or her own discretion. It should be noted in this regard that the BVI has a licensing regime for insolvency practitioners, operated by the Financial Services Commission, and only a BVI-licensed insolvency practitioner (and occasionally a similarly qualified foreign appointee who takes the appointment jointly with a BVI licensee) can be appointed as the liquidator of an insolvent BVI company.
Nevertheless, the court has overall control over the liquidation. Liquidators are entitled to – and frequently do – ask the court for directions about difficult questions or as to whether to pursue particular courses of action arising in a liquidation, even if they do not need formal sanction to exercise particular powers. Creditors and those with a legitimate interest in the liquidation are also entitled to apply to court for assistance, for example, if they are dissatisfied with a decision of the liquidator or the liquidator rejects their claim. A liquidation with significant numbers of creditors will often have a formal creditors’ committee, which will provide a sounding board for the liquidator.

Liquidators’ fees are generally approved either by the creditors’ committee (if there is one) or the court (if not). In the event that there is a single creditor funding the liquidation directly, such that the liquidators’ fees are not taken from the assets of the company, court practice is usually to leave the approval of those fees to the creditor in question.

Once a liquidator of a BVI company is appointed, the directors’ powers effectively cease, but the directors are required to assist the liquidator and can be ordered to provide information and deliver up assets or records in their hands to the liquidator.

vi Special regimes

Other than some modifications of the provisions of the Act for insurance companies, and provisions enshrining the effectiveness of netting arrangements in financial contracts, there are no special regimes applicable to different types or groups of BVI companies.

vii Cross-border issues

Part XIX of the Act gives the court power to make orders in aid of foreign insolvency proceedings in certain designated countries. The court’s powers under this part of the Act are broad; for example, the court may restrain proceedings against the debtor or its property, require a person to deliver up property of the debtor to the foreign representative, or facilitate the coordination of BVI insolvency proceedings with foreign proceedings.

In exercising these powers the court can apply the laws of the BVI or of the foreign proceeding, but the court must take into account, inter alia, the just treatment of all persons claiming in the foreign proceeding, the protection of persons in the BVI who have a claim against the debtor, and the need for distributions in the foreign proceedings to be substantially in accordance with the order of distributions in a BVI insolvency.

Part XVIII of the Act contains provisions based on the United Nations Commission on International Trade Law (UNCITRAL) Model Law on Cross-Border Insolvency, but that part of the Act has never been brought into force and is currently under review. The subject of recognition of foreign insolvency representatives at common law and its relationship with statutory insolvency provisions has been a hot topic in the BVI in recent years – as it has in England and other offshore jurisdictions, notably the Cayman Islands, Bermuda and the Isle of Man – particularly in light of the Privy Council and English Supreme Court decisions in *Cambridge Gas Transportation Corp v. Official Committee of Unsecured Creditors of Navigator Holdings Plc and ors*² and *Rubin v. Eurofinance*³.

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² [2007] 1 AC 508.
³ [2013] 1AC 236.
In the BVI, the question of whether common law recognition is available alongside the statutory provisions in the Act was thought to have been settled in 2010 in *Picard v. Bernard L Madoff Investment Securities LLC*; when Irving Picard (the trustee for the liquidation of BLMIS) sought recognition as a foreign representative under Part XIX of the Act.

The Commercial Court refused Mr Picard’s application on the principal ground that it was not possible for a foreign representative to obtain recognition at large and that foreign representatives are confined to the granting of specific discretionary relief. In reaching this conclusion, the Court considered the interplay of Parts XVIII and XIX of the Act. Part XVIII contains cross-border insolvency provisions that essentially adopt the UNCITRAL Model Law on insolvency. However, as stated above, Part XVIII is not in force. Part XIX on the other hand contains provisions allowing for foreign representatives in insolvency proceedings from a specified list of countries (each a ‘relevant foreign country’) to seek orders in aid of those proceedings from the BVI courts.

The BVI Commercial Court decided that Part XVIII (although not in force) and Part XIX together were a complete code for the recognition of foreign insolvency appointees, such that no common law basis for recognition survived. As a consequence, only a foreign representative from a relevant foreign country could seek the assistance of the BVI court, and that assistance would be limited to the relief available under Part XIX.

However, in *In the matter of C (a bankrupt)* the Commercial Court was invited to reconsider its decision in *Picard* on the application of Hong Kong trustees in bankruptcy (Hong Kong being a relevant foreign country). The trustees applied for recognition at common law of the bankruptcy proceedings and their standing as trustees. They asked that by way of assistance upon such recognition, they be granted the powers that they would have had if they had been appointed as bankruptcy trustees under the Act. Alternatively, they sought declarations that they were the validly appointed Hong Kong trustees of the bankrupt’s estate and entitled to deal with the bankrupt’s estate in the BVI. They also sought disclosure orders against various registered agents of BVI companies said to be owned by the bankrupt.

The applicants argued that *Picard* had been wrongly decided and that common law recognition was still in principle available for all foreign insolvency appointees, and had not been legislated away; and that the common law allowed the court to provide a foreign appointee with the statutory remedies that would be available on a domestic insolvency.

The judge considered the historic line of English and Privy Council authorities culminating in *Schmitt v. Deichman*, as well as the Cayman Islands Grand Court decision in *Picard v. Primeo Fund* and disagreed with the applicants’ arguments other than in one important respect.

The judge followed his decision in *Picard* and confirmed that the common law approach to recognition and assistance does not generally survive in the BVI in parallel with the Insolvency Act. However, he found that Section 470 of the Act (found in Part XIX) preserves the common law principle of recognition and assistance for a foreign representative from a relevant foreign country, alongside the statutory provisions of Part XIX.

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4 BVIHCV 0140 of 2010.
5 BVIHCV 0080 of 2013.
6 [2013] Chapter 61.
7 (Unreported, 14 January 2013).
As to the trustees’ second argument, the judge found that ‘what the Court does when recognizing foreign proceedings at common law is to deploy its own powers in aid of the foreign proceedings. It does not invest the foreign office holder with powers of his own’, and that ‘the Court has no jurisdiction to confer upon a stranger powers which a statute confers only upon individuals accepting specified appointments under the statute’.

In making these findings, the judge expressly departed from Schmitt v. Deichman and he also disagreed with the decision of Jones J in Picard v. Primeo Fund to the extent that Jones J’s decision went beyond the ambit of the types of common law assistance delineated in Rubin.

The Privy Council decisions in Singularis Holdings v. PricewaterhouseCoopers and PricewaterhouseCoopers v. Saad Investments Company Limited (both 2014) may also impact the ability of foreign office holders to obtain assistance from the BVI courts, and some writers have suggested that the views expressed by the court in Re C may need to be revisited as a result, at least insofar as the decisions may allow foreign office holders from non-designated countries to apply to court for orders compelling the production of documents and information.

In May 2017, the BVI adopted the Judicial Network guidelines for communication and cooperation between courts in cross-border insolvency matters. These guidelines have also been adopted by a number of other jurisdictions including England and Wales, Singapore, Bermuda and Delaware.

II INSOLVENCY METRICS

Because of the BVI’s very small local economy and its status as an offshore financial centre, the status of the real economy as it affects corporate insolvency in the jurisdiction very much matches the state of the wider world economy and of the markets that use BVI companies. There are no publicly available statistics recording the numbers of insolvent liquidations of BVI companies.

III PLENARY INSOLVENCY PROCEEDINGS

The following is a round-up of some of the most interesting and legally or commercially significant ongoing liquidations and decisions from the BVI courts during the past 12 months.

i Fairfield funds

The liquidations of the three Fairfield funds (Sentry, Sigma and Lambda) continue to be the most high-profile in the BVI and to generate interesting new law. Together with the Kingate funds (which are also BVI funds in liquidation), the Fairfield funds were fully invested with Bernard L Madoff Investment Securities LLC (BLMIS) and lost all or substantially all of their net asset value (NAV) as a result of Madoff’s fraud.

There are many notable aspects to the Fairfield liquidations. The principal area in which there have been developments in the last 12 months is in the context of an application under Section 273 of the Act made by a group of investors seeking to restrain the liquidators from pursuing claims in the United States Bankruptcy Court for the Southern District of New York designed to clawback pre-liquidation redemption payments from investors who redeemed out of the funds before Madoff’s fraud was discovered (the US Proceedings).
The liquidators began their BVI clawback litigation in 2009, with the majority of the claims being issued by Fairfield Sentry (Sentry). Preliminary issues were quickly identified, in an attempt by redeeming investors to minimise the time and expense of a full trial against every redeemer. The preliminary issues are commonly referred to as the ‘Article 11 defence’ and the ‘Good Consideration defence’. The first turns on a provision in Sentry’s articles of association to the effect that a certificate as to the NAV per share or as to the subscription price or redemption price given by the directors in good faith ‘shall be binding on all parties’. This provision, submitted by the redeemers, meant that the NAV could not be altered when the Madoff fraud came to light. The second, Good Consideration, was a defence to Sentry’s unjust enrichment claim, on the basis that the redemption proceeds were owed to the redeemers under a valid contractual obligation, so that a payment made under an alleged mistake (here, as to the funds’ NAV) could not be recovered unless the mistake was such as to avoid the entire contract. The two defences had been considered separately in the courts below, where both at first instance and on appeal the courts found in favour of Sentry on Article 11, and in favour of the redeemers on Good Consideration.

The Privy Council took the view that the two issues were inextricably linked and had to be considered together, ultimately finding for the redeemers on all issues. This victory for the redeemers should now be the end of the clawback claims in the BVI. The effect of the decision on the more than US$6 billion claimed from redeemers in the US Proceedings has yet to be fully determined and was the subject of the most recent round of BVI litigation.

The US Proceedings had been stayed pending the outcome of the BVI proceedings. Following the Privy Council’s decision, a group of redeemers (US Redeemers) applied to the BVI court seeking to prevent the continuation of the US Proceedings, and sought the following relief: that any permission given to the liquidators to pursue the US proceedings should be discharged and reversed; and injunctions restraining the liquidators from pursuing the US Proceedings. The application was brought under Section 273 of the Act, which provides: ‘A person aggrieved by an act, omission or decision of an office holder may apply to the Court and the Court may confirm, reverse or modify the act, omission or decision of the office holder.’

The application was dismissed on a number of grounds, including that: though the US Redeemers were defendants in the US Proceedings this did not give them the requisite legitimate interest upon which the court could act to grant the relief sought; under the relevant high-threshold test, the US Redeemers had failed to show that the liquidators’ actions were unreasonable or outside the bounds of their discretion; and the US Redeemers had alternative recourse before the US courts. The judgment on the application provides a useful exposition of the BVI court’s supervisory jurisdiction over the conduct of BVI liquidators, in particular highlighting the limited circumstances where the court should be willing to substitute its judgment for that of its office holders. An appeal of this decision has been heard by the Eastern Caribbean Court of Appeal, and judgment is awaited with interest.

ii Procedure for recognition of foreign representatives

On appeal, it was decided that a foreign trustee in bankruptcy seeking recognition need not have served the bankrupt with the recognition application. Although the relevant procedural rules were silent on the point, the proper approach in seeking to determine any requirements was to look to the purpose of the recognition application, which in the circumstances was to assist a foreign court and, therefore, did not require service upon the bankrupt individual.
IV  ANCILLARY IN SOLVENCY PROCEEDINGS

Ancillary insolvency proceedings in the BVI for foreign-registered companies are relatively unusual. The principal reason for this is that foreign-registered companies will rarely have assets or directors in the BVI. If they do, those assets are likely to be in the form of shares in BVI companies, and the assets of those companies themselves will almost invariably be outside the BVI and there may very well be a formal insolvency of the BVI company in the structure in any event.

As described in Section I.vii, the Act provides scope for the BVI court to provide assistance to appointees in foreign insolvency proceedings from certain designated countries, and recent authority has demonstrated that the common law route to recognition of foreign insolvency proceedings remains for those designated countries. This recent decision is likely to increase the number of applications for assistance and recognition from insolvency representatives in those countries. As part of its ongoing review of the Act, it is thought likely that the BVI government will consider whether the list of designated countries to which assistance can be given in insolvency proceedings should be expanded.

V  TRENDS

The forthcoming 12 months may bring interesting developments in BVI insolvency law. The government continues to review the Act particularly in the evolving area of cross-border insolvency, and the practical impact of the adoption of the Judicial Network guidelines will become clearer as are they are implemented in live matters.
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, both in the context of an operating receivership and a liquidating one. 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 stay of proceedings beyond what is available under the BIA. Like the BIA, the CCAA also

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1 Michael Nowina is a partner and Sarah Faber is a summer law student at Baker & McKenzie LLP (Canada).
2 RSC 1985, c B-3.
3 RSC 1985, c C-36.
4 RSC 1985, c W-11.
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 is less frequently invoked because it applies primarily to financial institutions.

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. 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 individuals or business entities, 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 restructuring regimes under each of the BIA, CCAA and WURA are designed to keep debtors in financial difficulty operating and protected from creditor recovery actions, 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 blocks 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. Generally, 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, if sought. 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, in particular, the significant drop in
the price of oil. The Canadian consumer insolvency rate has trended higher over the past
several decades, and appears high compared to some other developed countries. 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.5

review_canada_insolvency_laws-eng.pdf.
The total number of insolvencies for the 12-month period ending 31 May 2017 decreased by 0.7 per cent compared with the 12-month period ending 31 May 2016. For the 12-month period ending 31 May 2017, 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 31 May 2017 decreased by 8.2 per cent compared with the 12-month period ending 31 May 2016. The two sectors that experienced the largest decrease in the number of insolvencies were retail trade; and accommodation and food services. Transportation and warehousing; and mining and oil and gas extraction experienced the largest increase in insolvencies.

The total number of domestic CCAA filings in the 12-month period ending in the first quarter of 2017 increased by 1.9 per cent compared with the 12-month period ending the first quarter of 2016. The mining and oil and gas extraction sector had the largest increase in the number of filed CCAA proceedings, which collectively increased by 53.3 per cent in the 12-month period ending in the first quarter of 2017 compared with the 12-month period ending in the first quarter of 2016.

III PLENARY INSOLVENCY PROCEEDINGS

i US Steel Canada (Re)

In US Steel Canada (Re), the steel producer US Steel Canada was under CCAA protection. After a loss before the judge supervising the CCAA proceeding, the former unionised employees argued on appeal that the doctrine of equitable subordination should be applied to the C$2.2 billion in inter-company debt claims filed by the US parent. The Ontario Court of Appeal held that while the CCAA gives courts broad and flexible powers, they are not limitless and it does not give express or implied authority to apply the doctrine of equitable subordination. The decision emphasised that the purpose of the CCAA is to facilitate compromises and arrangements between debtors and creditors and that the CCAA did not provide an ‘at-large equitable jurisdiction to reorder priorities or to grant remedies as between creditors’.

Equitable subordination is a well-known American doctrine that permits a court to determine that a secured creditor is not entitled to the benefit of its normal priority position

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7 Ibid.
8 The number of business insolvencies per 1,000 businesses operating in Canada.
9 See footnote 5.
10 Ibid.
11 See footnote 6.
12 Ibid.
13 Ibid.
15 Ibid.
16 2016 ONCA 662.
in an insolvency. Typically, the doctrine is applied in cases where a creditor exercises control over the debtor and there is evidence that transactions were not conducted at arm’s length. Some consider it to be a tool for a US bankruptcy court to ensure that a debtor’s assets are distributed fairly. Previously, the Supreme Court of Canada had declined to consider whether equitable subordination was available under Canadian law stating that it was a question ‘for another day’. However, the Supreme Court of Canada granted leave to appeal on 9 March 2017, from the Ontario Court of Appeal’s ruling that there was no jurisdiction to grant equitable subordination under the CCAA. In granting this leave application, the Supreme Court appears to agree that it is time for a conclusive answer to the question about the applicability of the equitable subordination remedy under Canadian law. The appeal hearing is scheduled for 9 November 2017, and will be watched closely by Canadian insolvency practitioners.

ii Pacific Exploration & Production Corp (Re)

Pacific Exploration & Production Corp (P&E) (now known as Frontera Energy) is a Canadian public company and a leading explorer and producer of crude oil and natural gas in Central and South America. In early 2016, P&E was heavily in debt because of an aggressive acquisition strategy, which had been exacerbated by the drop in oil prices. A Canadian investment firm tabled a restructuring blueprint, in which it would acquire the bulk of P&E’s US$5.4 billion of debt, and then convert it to equity holdings in the company. This restructuring would allow P&E to carry on as a going concern, while substantially reducing its debt burden and interest payments. The plan of compromise and arrangement received the approving votes of an overwhelming majority of P&E’s creditors, as well as the support of the monitor, which had been appointed under the CCAA. Because the plan had the support of creditors, and was compliant with the formal requirements of the CCAA, the only question to be decided by the Ontario court was whether it was ‘fair and reasonable’. The court approved the plan, finding it to be ‘a reasonable and fair balancing of the interests of all parties in light of the other commercial alternatives available’. In making this assessment, the court was guided by the objectives of the CCAA, which are ‘to enable compromises to be made for the common benefit of the creditors and of the company, particularly to keep a company in financial difficulties alive and out of the hands of liquidators’.

In approving the plan, the court also sanctioned releases in favour of third parties. Third party releases in the context of plans of arrangement will generally be approved where the releases are rationally tied to the resolution of the debtor’s claims and will benefit creditors generally, in light of the following factors:

a if the parties to be released from claims are necessary to the restructuring plan;
b the claims released are rationally connected to the purpose of the restructuring plan and necessary for it to succeed;
c the restructuring plan would fail without the releases;
d the third parties being released contributed in a tangible and realistic way to the restructuring plan;
e the releases benefit the debtors as well as the creditors generally;
f the creditors who voted on the restructuring plan had knowledge of the nature and effect of the releases; and
g the releases are fair and reasonable and not overly broad.
The court was satisfied that these factors were present, and approved the plan in its entirety. The Canadian decision was significant because of the coordination that was required with other jurisdictions to implement the restructuring. To facilitate the restructuring, P&E also sought Chapter 15 bankruptcy protection in the US and an ancillary insolvency proceeding was launched in Colombia. Once the restructuring plan was approved by the Ontario court, it had to be recognised by both those foreign courts before it could be implemented.

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.

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 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 has been sought by the AER, but it is unclear whether it will be granted. If it stands, this decision 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 Nortel Networks

Nortel Networks was a global leader in the networking and communications industries, based in Canada and with operations on every continent. Nortel commenced formal insolvency proceedings in Canada, the US and the UK in 2009 as a result of deteriorating market conditions, weakening customer commitments and financial reporting difficulties. The initial

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17 2016 ABQB 278.
19 2017 ABCA 124, at paragraph 81.
intent of Nortel was to downsize and carry on those portions of its telecommunications business that it thought could be profitable. However, that plan quickly evaporated and Nortel decided to liquidate its assets.

In *Re Nortel Networks Corporation*, the Ontario Court of Appeal dismissed a motion for leave to appeal from the trial decision stemming from a joint hearing before the Ontario Superior Court of Justice and the United States Bankruptcy Court. Both the US and Canadian courts ruled in separate decisions rendered at the same time that the distribution of proceeds from the sale of business lines and intellectual property should be distributed equitably on a modified *pro rata* basis. This decision is now under appeal in the US. However, in Canada, leave is required to appeal under the CCAA and Ontario’s Court of Appeal found no reason to interfere with the *pro rata* allocation method and determined that this allocation did not constitute a ‘substantive consolidation’. Ultimately, the court was not convinced that the trial court had made any errors or that the appeal involved issues of broad importance.

**IV ANCILLARY INSOLVENCY PROCEEDINGS**

**i Payless Holdings Inc LLC**

In *Payless Holdings Inc LLC (Re)*, Payless Canada’s US parent corporation was in the process of reorganising under Chapter 11 of the US Bankruptcy Code, and sought to have its initial order recognised and enforced in Canada. The Ontario court recognised the foreign main proceeding, but held back on the accompanying order for interim relief. Under the US parent’s plan, Payless Canada would be brought in as a guarantor, and its assets employed as collateral for the indebtedness of the US parent company. Although Payless Canada was not itself insolvent, this arrangement would jeopardise its ability to pay its own obligations, including trade creditors, employees and landlords. While the plan contained protections for trade creditors and employees, there was no provision for the landlords, who argued in court that granting the application would be unfair. The court agreed: ‘By providing the guarantee and the security, combined with the absence of a charge or other mechanism to protect the position of the landlords, the position of the landlords could be detrimentally affected.’ An interim relief arrangement, like the one proposed would only be acceptable in a CCAA proceeding if arrangements were made to ensure that all affected creditor groups of the Payless Canada were protected to the extent that they could be no worse off if the foreign bankruptcy order were recognised. Although the reorganisation proposal contemplated the continued operation of all Payless stores in Canada, there was no assurance that it would be successful. All things considered, the court found that it should not be the landlords who are put at risk in this situation.

**ii Brookstone Co**

In *Brookstone Co (Re)*, Brookstone was a speciality retailer carrying on business through retail stores in the US, and serving Canadian customers by way of online, telephone, and mail orders. An action had been commenced in Ontario against Brookstone by an individual

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20 2015 ONSC 2987.
21 2016 ONCA 332.
22 2017 ONSC 2321.
23 Ibid., at paragraph 41.
24 2016 ONSC 6762.
plaintiff who claimed that she had suffered injuries as a result of a product purchased from Brookstone. While the action was ongoing, Brookstone commenced reorganisation proceedings under Chapter 11. The US court issued an order establishing a claims process and bar date for the determination of pre-filing claims. More than two years after Brookstone's plan of reorganisation was approved in the US, Brookstone brought an application to have it recognised and enforced in Ontario, which would have barred all ‘claims’ as defined in the plan of reorganisation, including the individual plaintiff's Ontario action.

Brookstone framed its application as a question of whether or not the court should recognise the US orders as a matter of comity. In rejecting the application, the court held that the real issue was whether CCAA could be applied in the circumstances or whether Brookstone should be required to seek enforcement of the US orders by way of an application or motion in the plaintiff’s existing Ontario action. The court held that it would not be fair in the particular circumstances to the plaintiff or to other potential claimants to grant the general enforcement of the US orders. Rather, the decision should only be made when ‘the court will be able to assess the equities and any other considerations in favour of any of the parties against whom enforcement of the order is sought on a party-by-party basis’.

The court denied the application on the basis that it would be unfair to the individual plaintiff and other potential claimants to apply the CCAA in these circumstances, but also held that Brookstone could seek to have the US orders recognised in the plaintiff's action. Brookstone could have sought recognition of the US restructuring orders concurrently with the US restructuring and the decision to wait more than two years was undoubtedly a significant factor for the judge in this case.

V TRENDS

i Commercial insolvencies

Generally speaking, commercial insolvencies in Canada have been stable, increasing only slightly year on year. The economy as a whole remains strong and the manufacturing sector has rebounded in central Canada after years of decline. Two sectors that have been worst hit in the last year are the resource sector and the transportation and warehousing sectors.

Resource sector insolvencies have risen dramatically over the past three years, with the decline in commodity prices, in particular the steep decline in the price of oil. This has had a significant impact on the Canadian economy as a whole, and in particular in the provinces of Alberta and British Columbia in western Canada. Businesses associated with the resources sector, in areas of transportation and warehousing have seen a corresponding negative effect. Although the retail and accommodations sectors have recovered somewhat in the past year, they remain vulnerable in those specific regions of western Canada.

Retailers continue to reduce physical locations and consolidate operations in an attempt to cut costs and facilitate customer demand for more and better online services. The garment industry has been particularly affected, and a number of clothiers have recently either downsized and restructured their operations or have gone into bankruptcy liquidation. The changing retail market has also lead to 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 economy remains strong and the unemployment rate is at a decade-low. The only outlier is western Canada where the decline in the oil and gas sector has driven up unemployment rates and individual bankruptcy rates. It is expected that unemployment rates in this region will rise before stabilising.
I  INSOLVENCY LAW, POLICY AND PROCEDURE

i  Statutory framework and substantive law

The Cayman Islands is an overseas territory of the United Kingdom and the legal system is an English-style common law system, which comprises statute law and binding case precedents.\(^2\)

The principal statute governing corporate insolvencies and restructurings is the Companies Law (2016 Revision) (as amended) (the Companies Law). This is supplemented and supported by the regulations set out in the Companies Winding Up Rules (2008 Revision) (as amended) (CWR).

The fundamental principle underlying Cayman Islands insolvency law is the *pari passu* treatment of unsecured creditors. Generally,\(^3\) unsecured creditors share equally in those assets of an insolvent company that are available for distribution.

The Companies Law provides for a range of avoidance or clawback provisions designed to give effect to the *pari passu* principle and protect company property, including the ability to avoid preferential payments to creditors.\(^4\)

ii  Policy

The Cayman Islands is a leading jurisdiction for the formation of investment funds (hedge and private equity funds), structured finance vehicles and Cayman Islands companies, partnerships and trusts. The Cayman Islands legal system is creditor and investor-friendly and has a strong court system, including a separate division within the Grand Court to hear commercial disputes. The Cayman Islands also has a stable political and economic environment, in addition to an established professional infrastructure that is known for its responsiveness and efficiency.

The Cayman Islands is a tax-neutral jurisdiction. Each investor in a Cayman Islands fund or company is responsible for paying tax in his or her home country, a process the Cayman Islands government assists with by cooperating with tax authorities from other nations and promoting transparent banking. Such structures, however, do not impose material costs in the Cayman Islands on investors at the company or fund level.

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1 Caroline Moran is a partner and Gemma Freeman is an associate at Maples and Calder.
2 English case law is highly persuasive in the Cayman Islands in the absence of any Cayman Islands authority. Decisions of other Commonwealth jurisdictions are also persuasive.
3 Certain amounts due to employees, bank depositors (in the case of the insolvency of a licensed bank) and the Cayman Islands government have preferential status. Contractual rights of set-off and netting of claims are also respected.
4 Section 145 of the Companies Law.
Key policy considerations for assisting the Cayman Islands’ financial services industry include the protection of creditors’ rights and certainty as to the enforceability of contractual rights on insolvency. By way of example, the Companies Law specifically recognises and protects the rights of secured creditors to enforce their security in accordance with its terms, despite the debtor’s insolvency, and secured creditors can realise their security outside any Cayman Islands insolvency process commenced in relation to the debtor.

In addition, the Companies Law specifically recognises that bilateral and multilateral arrangements regarding set-off or netting between a company and any person or persons are enforceable on the company’s insolvency, and that non-petition covenants given by creditors will be enforceable.

### iii Insolvency procedures

The insolvency and rescue procedures available under Cayman Islands law are:

- **a** liquidation under the supervision of the court;
- **b** official liquidation;
- **c** provisional liquidation for the purpose of restructuring; and
- **d** schemes of arrangement.

#### Liquidation under the supervision of the court

Cayman Islands companies may only be wound up outside a court process if they are solvent. Accordingly, where the shareholders of an insolvent company pass a resolution to wind up the company, the liquidators must apply to bring the liquidation under the supervision of the court.

The process is typically as follows:

- **a** The shareholders pass resolutions requiring the company to be wound up voluntarily and appointing liquidators.
- **b** If the liquidators are unable to obtain declarations of solvency within 28 days from each of the company’s directors that the company will be able to pay its debts in full within 12 months, the liquidators must apply to the court for a supervision order.
- **c** Liquidators appointed by the court pursuant to a supervision order must be independent and meet certain professional requirements.

Once a supervision order is made, the liquidators are considered to be official liquidators and are officers of the court. The liquidation then proceeds in the same manner as an official liquidation.

#### Official liquidation

This is a court process commenced by filing a petition seeking to wind up the company and appoint liquidators. A winding-up petition may be made by the company itself, a creditor (including a contingent or prospective creditor) or a shareholder of the company.

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5 Section 140(2) of the Companies Law.
6 Section 95(2) of the Companies Law.
7 Solvent, voluntary liquidations are beyond the scope of this chapter.
8 Section 124 of the Companies Law.
9 Insolvency Practitioner Regulations 2008 (as amended).
10 Section 94 of the Companies Law.
The Cayman Islands Monetary Authority (the financial services regulator), can apply for winding-up orders against companies not duly licensed or registered, or for certain other regulatory reasons.

A company can only file a winding-up petition provided that the directors of the company have obtained a shareholder resolution authorising them to do so, or are duly authorised to do so in the company’s articles of association.

A creditor will normally seek a winding-up order on the basis that the company is unable to pay its debts; this is a cash-flow test of insolvency. Where a creditor has made a statutory demand for payment that remains unsatisfied after 21 days, the company is deemed unable to pay its debts.

A shareholder will normally seek a winding-up order on the basis that it is just and equitable for the company to be wound up. There is no legislation in the Cayman Islands dealing with minority oppression or unfair prejudice, therefore dissatisfied shareholders often use the winding-up regime to obtain relief. In general, a shareholder cannot bring a winding-up petition on the grounds of insolvency because it will have no remaining economic interest in the company.

The hearing of the petition will usually occur at least six to eight weeks after filing. This period can be longer depending on the complexity of the case and the evidence to be exchanged. A provisional liquidator can be appointed to protect company property and maintain the status quo pending the hearing.

At the hearing of the petition, any party with an economic interest in the company can attend and be heard. The company can oppose a creditor’s petition on the basis that the debt is disputed or that the creditor has more appropriate remedies available to it and by demonstrating solvency.

When a winding-up order is made, proceedings may not be commenced or continued against the company except with the express permission of the court. Dispositions of property, transfers of shares and alterations in the status of shareholders between the date of the filing of the petition and the date of the winding-up order are void unless the court orders otherwise.

On the appointment of official liquidators, the powers of the directors cease. However, the directors are required to assist the liquidator and can be ordered to provide information and deliver up assets or records in their hands to the liquidator.

Official liquidators are responsible for realising and distributing the assets of the company to the unsecured creditors. The court plays an active supervisory role and the majority of substantive tasks, including the sale of assets, engaging in litigation, compromising claims

11 *Re Emmadart* [1979] 1 All ER 599 recently affirmed in *China Shanshui Cement Group* [2015] (2) CILR 255.
12 Section 94(2) of the Companies Law and *China Shanshui Cement Group* [2015] (2) CILR 255.
13 Cayman Islands law contains no ‘balance sheet test’ for these purposes but the company’s general financial position may be relevant to the question of whether it is just and equitable to wind up a company.
14 Section 93(a) of the Companies Law.
15 Section 104(2) of the Companies Law.
16 Section 97 of the Companies Law.
17 Section 99 of the Companies Law.
and the sanction of the remuneration and expense of the liquidators require express court approval. Liquidators and stakeholders can also apply to the court for directions in respect of difficult issues that may arise.

When the liquidation process is complete, and the company’s assets have been distributed, the court will order the dissolution of the company. The length of the liquidation will depend on the complexity of the issues and the time it takes to realise and distribute all the assets.

**Provisional liquidation for restructuring purposes**

Section 104(3) of the Companies Law allows a company to present a winding-up petition and make an application to the court to appoint provisional liquidators where: the company is or is likely to become unable to pay its debts; and the company intends to restructure. This provision is often used in support of foreign restructuring proceedings, such as Chapter 11 in the United States.

The process is commenced by the company filing a winding-up petition coupled with an application for the appointment of provisional liquidators. The court will normally require that creditors be put on notice of the application and will hear the application as urgently as the circumstances require.

If the court appoints provisional liquidators it will adjourn the final hearing of the winding-up petition. If the restructuring is successful, then the winding-up petition will be withdrawn. If not, the court will likely appoint official liquidators to wind up the company.

On appointment of provisional liquidators, no proceedings may be commenced or continued against the company without leave of the court. This gives the company time to implement a restructuring without being at risk of litigation from creditors.

The powers of the provisional liquidators are set out in the court order appointing them. The court can tailor the provisional liquidators’ powers to suit the circumstances of the relevant case. Provisional liquidators will often be given the power to implement a scheme of arrangement to restructure the company and compromise creditor claims (see below).

The court order appointing the provisional liquidators can also set out a division of powers between the provisional liquidators and the company’s directors and take into account any parallel foreign insolvency proceedings. The court will usually put in place a cross-border protocol with the foreign court in those circumstances to ensure the efficient administration of the restructuring.

**Schemes of arrangement**

A scheme of arrangement is a court-sanctioned arrangement between a company and its members or creditors (or classes thereof). A scheme can be used to restructure a company by varying or cramming down the rights of stakeholders. A scheme can be carried out within a provisional or official liquidation. A company can also seek to carry out a scheme outside a liquidation process, but, in those circumstances, it will not have the benefit of the automatic stay from unsecured claims.

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18 Section 110(2) of the Companies Law.
19 As discussed above, this moratorium does not affect secured creditor rights.
20 Section 86 of the Companies Law.
The scheme process involves a meeting of each of the relevant classes of stakeholder whose rights are to be subject to the scheme. Those meetings are convened by the court. The scheme must be approved by over 50 per cent by number and over 75 per cent by value of those attending and voting at each meeting and then sanctioned by the court.

If the necessary majorities are obtained, and the court approves the scheme, then its terms become binding on all the members of the relevant classes, regardless of whether they voted to support the scheme.

The process is commenced by the company filing a petition for approval of the scheme, together with an application to convene the meetings of stakeholders (court meeting).

At the first hearing, the court is asked to convene the court meeting and give directions as to the timeline and information to be sent to stakeholders. Stakeholders must be given all information reasonably necessary to allow them to make an informed decision in relation to the merits of the proposed scheme.

If the necessary majorities are obtained at the court meeting then the scheme can proceed to the sanction hearing.

At the sanction hearing, the court will be keen to ensure that the prescribed procedure has been followed; however, once the requisite majorities are achieved at the meetings, the court will usually consider that the members are the best judge of their own commercial interests and, provided there has been due process, will sanction the scheme.

In the absence of any complications, from the date on which the papers are first filed with the court to the date on which the scheme is sanctioned, the process takes approximately six to eight weeks.

iv Special regimes

Other than some modifications of the provisions of the CWR for deposit-taking banks, there are no special regimes applicable to different types or groups of Cayman Islands companies.

v Cross-border issues

The majority of companies incorporated in the Cayman Islands conduct their business and hold their assets outside the jurisdiction. To protect a company’s assets and the interests of its creditors, insolvency proceedings may be necessary not just in the Cayman Islands, but also in the jurisdictions where the company carries on business or holds significant assets.

Accordingly, the court is keen to facilitate cooperation in cross-border insolvency proceedings to ensure the efficient administration of the estate. Cross-border cooperation is expressly endorsed in the Companies Law and the CWR both in respect of Cayman Islands companies who may be the subject of a parallel foreign proceeding and in respect of foreign companies that may need the assistance of the insolvency regime in the Cayman Islands.

In the context of a Cayman Islands company that is in a parallel foreign insolvency proceeding, the CWR makes it the duty of an official liquidator to consider whether he or she should enter into an international protocol with any foreign officeholder.

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21 Order 21.
The court also has jurisdiction to appoint foreign practitioners jointly with Cayman insolvency practitioners as official liquidators. In practice, this is a highly effective method of ensuring that a cooperative and unified approach is adopted in multi-jurisdictional insolvencies.

The court also has statutory powers to give assistance to foreign officeholders of foreign entities pursuant to the Companies Law, and the Foreign Bankruptcy Proceedings (International Co-operation) Rules 2008. The court can make orders recognising the right of a foreign officeholder to act in the Cayman Islands on behalf of the foreign company and can make limited ancillary orders in support of the foreign proceedings, for example, granting a stay of proceedings or requiring any person in possession of information relating to the foreign company to be examined by, and produce documents to, the foreign officeholder.

II INSOLVENCY METRICS

Because of the very small local economy of the Cayman Islands, and its position as an international financial centre, the status of the economy as it affects corporate insolvency in the jurisdiction very much reflects the wider world economy. Many of the winding-up proceedings filed in 2016 were as a result of the challenges in the energy sector or the Chinese economy. There have also been some notable restructuring proceedings relating to companies impacted by the depressed energy sector, including CHC Group Ltd, a provisional liquidation proceeding in aid of a Chapter 11 where approximately US$25 million worth of debt was restructured; Mongolian Mining Corporation, a provisional liquidation with joint Hong Kong and Cayman Islands schemes of arrangement where more than US$760 million of debt was restructured, and Ocean Rig UDW Inc, a provisional liquidation proceeding coupled with four interlinked Cayman Islands schemes of arrangement to restructure approximately US$4 billion worth of debt.

During the 2016 calendar year, 44 winding-up petitions were filed (down from 55 in 2015). There were 35 petitions on the grounds of insolvency, including 15 supervision petitions, and 23 of these companies were wound up. There were seven petitions on just and equitable grounds.

III PLENARY INSOLVENCY PROCEEDINGS

The following is a summary of some of the most significant decisions from the Grand Court, the Cayman Islands Court of Appeal (CICA) and the Privy Council over the past 12 months.

i Pearson (as liquidator of Herald) v. Primeo Fund [2017] UKPCC 19

In Pearson v. Primeo Fund (in official liquidation), the Privy Council has confirmed that: (1) where redeemable shares have been redeemed in accordance with the articles of association; but (2) the redemption proceeds are unpaid on the date that liquidation proceedings are commenced, the redeemed investors are creditors of the company, ranking behind unsecured creditors but ahead of shareholders in the liquidation waterfall. Herald was a Madoff feeder fund with broadly standard constitutional documents for an open-ended mutual fund.

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22 Section 108(1) of the Companies Law.
23 Part XVII, Section 242.
Primeo was a shareholder of Herald and had submitted redemption requests that had matured for a ‘redemption day’ on 1 December 2008. After that date, but before Primeo was paid, the Madoff fraud was uncovered. Herald suspended redemptions on 12 December 2008 and subsequently went into official liquidation. Primeo made a claim in the liquidation for NAV as at 1 December 2008. As is common, Herald’s articles were to the effect that shares are redeemed on the ‘redemption day’ and the shareholder had no further rights after that point (other than to receive payment). Herald, however, contended that Primeo had not been redeemed and was actually still a shareholder because redemption in Section 37(7)(a) of the Companies Law (which deals with the redemption and purchase of a company’s shares where a company is being wound up) had a different meaning than in the company’s articles. Herald argued that ‘redemption’ in Section 37 ‘must be understood as embracing a whole process including payment of proceeds’. This was rejected by the Privy Council. The Privy Council rejected Herald’s argument that ‘redemption’ has a special meaning in Section 37 and that ‘payment is, as a matter of general principle, clearly not an inherent element of the redemption or repurchase by the company of its own shares’. This decision is a strong judicial endorsement of the primacy of a fund’s constitutional documents when determining the status and rights of redeemers and the importance of certainty when it comes to the position of redeemers.

ii In the Matter of CHC Group Ltd (Unreported, Grand Court, 17 January 2017)

In CHC Group Ltd, the Grand Court (McMillan J) confirmed that where a creditor has filed a winding-up petition in respect of a company, that company’s directors may apply for the appointment of restructuring joint provisional liquidators even without a shareholder resolution or authorisation in the company’s articles of association. In reaching his decision, McMillan J ruled that the decisions of In re China Milk Products Group Ltd (where it was held that directors of an insolvent company would be allowed present winding-up petitions without shareholder approval) and In re China Shanshui Group Limited (that conversely held that directors of a company do not have standing to present a winding-up petition nor apply for the appointment of joint provisional liquidators unless expressly authorised to do so by the company’s articles of association) had no bearing on the situation where there was an extant separate creditor winding-up petition and where there is an application by the company through its directors for the appointment of joint provisional liquidators.

iii In the Matter of Primeo Fund (in liquidation) (CICA, 18 November 2016)

The CICA in Primeo Fund held that the statutory powers of investigation available to a Cayman Islands liquidator pursuant to Sections 103 and 138 of the Companies Law cannot be utilised in order to obtain discovery of documents for the purpose of litigation. Defendants to an action commenced in the name of the company by Cayman Islands liquidators applied to the court for an order that the liquidators be compelled to utilise their statutory powers of investigation to obtain documents from the Bank of Austria (a prior service provider to Primeo). It was alleged that the Bank of Austria was in the possession of documents belonging to Primeo that would assist their defence. Effectively the defendants were seeking third party discovery via the liquidators’ statutory powers of investigation. The liquidators’ view was that the documents sought from the Bank of Austria were not necessary for any aspect of the conduct of the liquidation. Accordingly, the liquidators’ standpoint was that it was not appropriate to use their statutory powers of investigation in this manner. The CICA agreed. The CICA held that the statutory powers of investigation can only be exercised for
their statutory purpose – namely to allow liquidators to exercise their statutory functions in relation to the company that is being wound up. These statutory purposes do not include giving a liquidator litigant or a defendant to an action commenced by a liquidator a special advantage over an ordinary litigant or defendant. The liquidators’ statutory powers are not available for the benefit of a party to an action to enforce for its benefit where the purpose of the liquidation will not be served.

iv  **Skandinaviska Enskilda Banken AB v. Conway and Walker (CICA, 18 November 2016)**

The CICA held that certain redemption payments made shortly before the collapse of Weavering Macro Fixed Income Fund (the Fund) constituted voidable preferences that had to be repaid. The Fund collapsed in 2009 after it was revealed as a fraud perpetrated by its investment manager. The liquidators subsequently issued recovery actions, including against the appellant (SEB), which had received over US$8 million in redemption payments in late 2008 and early 2009. The liquidators claimed that such payments constituted voidable preferences under Section 145(1) of the Companies Law. The Grand Court agreed and on 5 January 2016 ordered SEB to repay the US$8 million to the estate with interest. The Grand Court decision was appealed. One of SEB’s defences was that the Fund was not insolvent at the time it made certain of the redemption payments to SEB during December 2008. As the Fund was permitted to make redemption payments up to 30 days after 1 December 2008, SEB argued that the redemption debts only became payable at the end of the period, such that the Fund was not insolvent on a strict cash-flow basis before the end of the period. The CICA held that the cash-flow test of insolvenency applicable as a matter of Cayman Islands law is not strictly confined to consideration of debts that are immediately due and payable, but also permits consideration of debts that will become due in the reasonably near future. SEB’s other major defence was that the Fund did not have the requisite dominant intention to prefer SEB when making the redemption payments. The CICA confirmed that the court could draw the inference of an intention to prefer from all the facts of the case, provided that it could be inferred from the evidence that the principal or dominant intention of the party making the payment was to give one or more creditors a preference over the other creditors. However, the CICA rejected the submission that an intention to prefer must carry a ‘taint of dishonesty’. In this case, the CICA held that the Fund’s policy of paying 25 per cent of all December redemptions initially and the balance later was designed to allow certain creditors to be paid before others and, when combined with the fact that the Fund had no prospect of paying the January and February 2009 redeemers, this was sufficient to justify the inference of a dominant intention to prefer. This case is being appealed to the Privy Council and is a test case for 24 further similar cases with respect to the Fund.

v  **In the matter of Caledonian Securities Limited (in Official Liquidation) (Unreported, Grand Court, 5 May 2016)**

In **Caledonian Securities**, the Grand Court (Chief Justice Smellie) provides instructive guidance to liquidators appointed over trust companies or companies holding trust assets by confirming that liquidators are entitled to be paid by recourse to trust assets where there are no (or a shortfall of) estate assets. Liquidators were appointed to Caledonian Securities Ltd (CSL), a provider of custodial services in respect of assets held on trust for numerous customers. The contractual arrangements between CSL and its customers varied across the board and so a substantial amount of work was carried out (and cost incurred) by the
liquidators analysing the positions of individual customers to ensure the return of assets to customers. The Grand Court had previously made an order for the creation of a cash reserve account into which each customer contributed 1 per cent of the value of his or her trust assets. The liquidators sought directions from the Grand Court as to the manner in which the liquidators were authorised to apply the reserve sum (which constituted trust assets) towards payment of costs incurred in the liquidation of CSL. The Chief Justice found that the Court has an inherent equitable jurisdiction to permit liquidators to recover their fees and expenses qua liquidators from trust assets held on behalf of customers where there were no, or a shortfall of, estate assets. This was on the basis that liquidators, as officers of the court and ‘not mere officious inter-meddlers’, were not expected to undertake work that was necessarily required and that had added value to the customers’ assets at their own expense.

IV ANCILLARY INSOLVENCY PROCEEDINGS

The court has jurisdiction to wind up or appoint provisional liquidators to any foreign company that has property located in the Cayman Islands, is carrying on business in the Cayman Islands or is the general partner of a limited partnership or is a registered foreign company under Part IX of the Companies Law. As previously described, the court also has jurisdiction to make ancillary orders in support of foreign proceedings under Part XVII of the Companies Law and at common law.

Ancillary insolvency proceedings in the Cayman Islands for foreign companies are, however, unusual. The principal reason for this is that foreign companies will rarely have assets or directors in the Cayman Islands. If they do, those assets are likely to be in the form of shares in Cayman Islands companies, and the assets of those companies themselves will almost invariably be outside the Cayman Islands; and in the case of a group insolvency, there may very well be a formal insolvency of the Cayman Islands company in the structure in any event.

V TRENDS

For as long as the global economy remains volatile, complex liquidations and restructurings with cross-border elements can be expected to continue to come before the Cayman Islands courts. It is also expected that work will continue to come out of China and the oil and gas sector.

The courts continue to stress the importance of certainty of investors’ rights both in relation to statutory clawback actions and contractual agreements.

24 Section 91 of the Companies Law.
I INSOLVENCY LAW, POLICY AND PROCEDURE

i Statutory framework and substantive law

The legislative framework underpinning UK insolvency law\(^2\) is principally provided by the Insolvency Act 1986 (IA 1986) and the Insolvency Rules 2016 (IR 2016),\(^3\) 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,\(^4\) 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). 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 possible that transitional arrangements may preserve some or all of it for a longer period), and is, therefore, still discussed in detail in this chapter. The implications for the cross-border insolvency framework are discussed further in Section V.iv.

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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

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5 References to 'EU Member State' in the remainder of this chapter should be taken to mean an EU Member State other than Denmark.

6 See Section V.v for an overview of the changes.

7 Main and secondary proceedings for the purposes of the Recast ECIR must be 'collective insolvency proceedings' and are listed in Annex A to the ECIR. Those relevant to corporate insolvencies in the UK are: winding up by or subject to the supervision of the court; creditors' voluntary liquidation (with confirmation by the court); administration (including out-of-court appointments) and voluntary arrangements.

8 Under the Recast ECIR, the presumption does not arise if the registered office has been moved to another Member State in the three-month period before the request for the opening of insolvency proceedings.

9 Under the Original ECIR, such secondary proceedings had to be winding-up proceedings, and were listed in Annex B. The Recast ECIR has removed this restriction.

10 Broadly defined as a floating charge over the whole or substantially the whole of the company's property.
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 most recent government initiative was a consultation launched in May 2016 on options for the reform of the corporate insolvency framework, which put forward further 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)\(^{11}\) 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),\(^{12}\) 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.

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11 See Sections 220 to 221 of the IA 1986, which allow for the winding up of foreign companies as unregistered companies.

12 It is not possible to appoint an administrative receiver in respect of a company incorporated outside the UK.
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 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. 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.

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

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

consent). This has proved to be a useful, if at times controversial, restructuring tool and, in one notable case, has been used by a foreign company, with court approval, after migrating its COMI to England\(^\text{15}\) (see Section I.vii). The court held that the industry guidance on the use of pre-packs provided by SIP 16\(^\text{16}\) 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.\(^\text{17}\) 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.\(^\text{18}\)

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 an European Economic Area state other than the UK.\(^\text{19}\) 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.\(^\text{20}\) 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.

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15 Hemis Telecommunications (Luxembourg) II SCA [2009] EWHC 3199 (Ch).

16 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.

17 A pre-pack administration can also be combined with a scheme, as seen in the IMO Carwash and McCarthy & Stone restructurings.

18 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.

19 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 Dallbold 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.

20 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 requests. 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.

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.

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21 The CVA becomes effective immediately after the resolution to approve it has been passed (for which 14 days’ notice is required).

22 A CVA is not specifically listed as a winding-up proceeding for the purposes of Annex B to the Original ECIR. Arguably though, if it is not effected within a liquidation or administration, it can be proposed as a means of terminating secondary proceedings for the purposes of the Original ECIR on the basis that it amounts to a ‘composition’ (see Article 34). The Original ECIR provides that closure in this way requires the consent of the liquidator in the main proceedings but, in the absence of such consent, it may become final if the financial interests of the creditors in the main proceedings are not affected by the measure proposed. The scope of secondary proceedings under the Recast ECIR is no longer limited to winding-up proceedings.

23 Note that the English courts’ jurisdiction to sanction a scheme hinges on their jurisdiction to wind up the scheme company in question (the criteria for which is discussed earlier in this Section).

24 The court has, however, stayed proceedings for summary judgment in a case where steps to implement a scheme were well advanced and it had a reasonable prospect of success: *Re Vietnam Shipbuilding Industry Group & Ors* [2013] EWHC (Comm) 1146.

25 For example, the scheme proposed by DTEK Finance Plc in April 2016, which provided the group with a moratorium in which to negotiate a restructuring.
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.

26 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).

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

28 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 prior to making a scheme application.

29 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.30

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30 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

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31 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.

32 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.

33 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 their professional conduct.35

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

35 An official receiver (appointed in a compulsory liquidation) is not subject to such a regime. He 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.

Banks and analogous bodies may be placed into administration 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.36 More recently, a special administration regime and certain other resolution tools were introduced for investment banks.37 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), which came into force on 1 January 2015.38 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.39 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.

Special regimes also exist for insurance companies,40 postal services, water or sewerage companies, certain railway companies, air traffic control companies, London Underground

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36 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.

37 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).

38 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.

39 Section 17 of and Schedule 2 to the Financial Services (Banking Reform) Act 2013.

public-private partnership companies, building societies, bodies licensed under the Energy Act 2004, and operators of systemically important interbank payment systems and securities settlement systems.41

There are no special insolvency rules in English law relating to corporate groups. Instead, each company is treated as a separate legal entity.42 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,43 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)44 or by postponing the opening of secondary proceedings until a global sale has been completed.45 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.

41 The Financial Services (Banking Reform) Act 2013.
42 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.
43 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.
The group coordination provisions broadly received the endorsement of UNCITRAL, which has itself produced a framework for legislation in relation to the insolvency of enterprise groups. 46 Another initiative encouraged by UNCITRAL is the use of cross-border protocols to facilitate cooperation between courts and practitioners. 47 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. 48

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, 49 for example, the English court found that a company incorporated in the Isle of Man but with its COMI in Denmark 50 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

46 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.
47 See the UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation (adopted 1 July 2009).
48 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.
49 Re Arena Corporation Ltd [2003] All ER (D) 277.
50 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.
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.

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, regardless of whether that country has enacted the Model Law. 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.

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 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, 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), 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, where a Luxembourg entity moved its COMI to England three months before entering administration, is

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

52 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.


55 An early example of ‘good’ forum shopping can be seen in the Schefenacher 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.

56 Hellas Telecommunications (Luxembourg) II SCA [2009] EWHC 3199 (Ch).
significant for its consideration of what is required to effect a successful migration. The court heard that, at the same time as moving its head office, the company also informed 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 EC 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 more recent 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.

57 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.
58 As discussed in Section V.v, 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.
60 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.
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 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

The UK economy continues to be affected by uncertainty following the vote to leave the EU, and the ongoing lack of clarity over the form that exit might take. UK gross domestic product (GDP) was estimated to have increased by 0.2 per cent in the first quarter of 2017, the slowest rate of growth since the first quarter of 2016. The slowdown was mainly driven by a slower rate of growth in the services sector. Growth in several important consumer-facing industries fell, such as retail sales and accommodation, and household spending slowed, in part because of rising prices. Growth in construction and manufacturing was also slow, but business services and finance continued to grow strongly.\(^61\) The preliminary estimate for the second quarter shows GDP growth rising slightly to 0.3 per cent, driven by the services sector, which grew by 0.5 per cent compared with 0.1 per cent in the first quarter. Construction and manufacturing exerted the largest downward pulls, following two quarters of growth.\(^62\)

The July average of independent forecasts for GDP growth (as compiled by HM Treasury) was 1.6 per cent for 2017, decreasing to 1.4 per cent for 2018.\(^63\) The labour market statistics for March to May 2017 indicated that the unemployment rate was 4.5 per cent, down from 4.9 per cent for a year earlier, and the lowest it has been since 1975. In similar vein, the employment rate was 74.9 per cent, the highest since comparable records began in 1971.\(^64\)

The 12-month inflation rate was 2.6 per cent in June 2017, down from 2.7 per cent in the year to April 2017. This is the first fall in the rate since April 2016, although it remains higher than in previous years, and had been previously increasing steadily following a period of relatively low inflation in 2015. The fall in the rate was mainly caused by a decrease in the prices for motor fuels and certain recreational and cultural goods and services.\(^65\) It remains to be seen whether the drop, which took many commentators by surprise, is an anomaly or the start of a trend. The minutes of the Bank of England (BoE)’s Monetary Policy Committee (MPC) meeting from June 2017 (before the latest inflation figures were available) note that last year’s sterling depreciation has affected the prices of consumer goods and services, pushing

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61 ONS release, ‘Second estimate of GDP: Jan to Mar 2017’, 28 April 2017. The figures are estimates and are subject to revision. The ONS Quarterly National Accounts: Jan to Mar 2017, which include the third estimate of quarterly GDP note that GDP and its components are little changed from the second estimate.

62 ONS release, ‘Gross domestic product, preliminary estimate: Apr to June 2017’, 26 July 2017. The figures are estimates and are subject to revision.


consumer price index inflation above the 2 per cent inflation target. The MPC believes that it could rise above 3 per cent by the autumn, and is likely to remain above the target for an extended period as sterling’s depreciation continues to feed through.66

The MPC also noted the marked decline in GDP growth in the first quarter, and that it remains to be seen how persistent the slow-down in consumption will prove to be: there have been signs of the housing market slowing in recent months, and new car registrations have fallen sharply, but consumer confidence has remained relatively resilient, employment has continued to rise and export indicators have strengthened. The MPC was clear in its view 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. It highlighted the evolution of inflationary pressures, as well as the persistence of weaker consumption and the degree to which it is offset by other components of demand, as the key factors in judging the appropriate direction of monetary policy. Five of the MPC’s members thought that the current policy stance remained appropriate and that the bank rate should remain at its historic low of 0.25 per cent, whereas as three members thought it should be increased by 25 basis points. All members agreed that any increases would be gradual and limited in extent. While the outcome is that the rate remains unchanged at present, it suggests that the MPC is closer to tightening policy than at its previous meeting in May 2017 (when it voted 7-1 to maintain the rate), and indeed than at any time since 2011.67 This may suggest that a rate rise is more likely in the short to medium term, although most economists still think that it is some distance off.68

The BoE reports that household credit conditions were little changed in the first quarter of 2017, although the availability of unsecured credit decreased slightly, mainly because of tighter credit scoring criteria. Lenders expect this trend to continue.69 Lending to businesses has continued to grow, although the pace has moderated recently. The reduction in the growth rate was initially spread across the major industrial sectors and broad based across business sizes, but the most recent fall seems to have been among larger businesses. There was mixed evidence on business’ demand for credit in the first quarter, but it appears likely that decreased demand has contributed to the slowing growth rate. Lenders noted that reduced capital investment was having a knock-on effect on demand for credit. Major UK lenders also indicated that demand for lending has exceeded expectations following the vote to leave the EU. On the credit supply side, a range of indicators and intelligence suggests that the cost of credit has remained broadly unchanged in recent months. Loan performance has remained strong and the write-off rate on banks’ corporate lending was little changed in the year to quarter four 2016.70

It is estimated that 3,967 companies entered insolvency in the first quarter of 2017. The number of companies entering insolvency rose by 5.3 per cent compared to the same quarter in 2016, and, adjusting to exclude anomalous data, 4.5 per cent compared to the previous quarter (the adjustment was made because 1,796 connected personal service companies
entered CVLs in the fourth quarter of 2016. This was a one-off event driven by changes to claimable expense rules. Excluding these companies from the data gives a more accurate picture of the underlying trends.\textsuperscript{71} The main driver of the increase was a rise in the number of companies entering CVLs, up 5.4 per cent on the same quarter in 2016, and 5.5 per cent on the adjusted data for the previous quarter. Compulsory liquidations also increased slightly, up 2.8 per cent on the same quarter in 2016 and 3.3 per cent on the previous quarter.\textsuperscript{72} The number of companies entering administration rose slightly, but broadly speaking has been on a fairly stable trend since 2014, and the number of CVAs decreased slightly, but again continues to follow a relatively stable trend.\textsuperscript{73}

Taking a longer view, in the 12 months ending first quarter 2017, the estimated liquidation rate was 0.47 per cent of all active registered companies. This is up slightly from the 12-month period ending in the previous quarter and the same quarter in 2016, but the increase is largely explained by the one-off increase in CVLs in the fourth quarter of 2016. Until the third quarter of 2016, there had been a downward trend since 2011.\textsuperscript{74}

In the 12 months ending fourth quarter 2016, the highest number of new company insolvencies was in the administrative and support services sector (3,220, up 91.6 per cent from the 12 months ending third quarter 2016), but this large rise was primarily caused by the personal service companies that entered liquidation in the fourth quarter of 2016. The second highest number of new company insolvencies was in the construction sector (2,554, an increase of 4.5 per cent compared to the 12 months ending third quarter 2016). The third highest number was in the wholesale and retail trade (including repair of vehicles) sector (2,060, an increase of 0.4 per cent compared to the 12 months ending third quarter 2016). These three sectors accounted for 47 per cent of all company insolvencies.\textsuperscript{75} As the personal service company insolvencies are understood to be a one-off event, the latter two figures may be a more useful indication of underlying trends.

\section*{III PLENARY INSOLVENCY PROCEEDINGS}

There have been a small number of high-profile insolvencies in the UK during the past 12 months, but most large companies have been able to refinance themselves successfully or agree amendments to their finance arrangements without the need for the protection of an insolvency process.

\subsection*{i Jaeger}

In April 2017, British high street fashion retailer Jaeger announced that the Jaeger Company’s Shops Limited, Jaeger London Limited, Jaeger Holdings Limited and the Jaeger Company

\begin{itemize}
\item \textsuperscript{71} If they are not excluded, total company insolvencies in the first quarter of 2017 show a decrease of 29.1 per cent from the fourth quarter of 2016.
\item \textsuperscript{72} Insolvency Service, ‘Insolvency Statistics – January to March 2017’, 28 April 2016, p. 3. The latest quarter’s statistics are estimated.
\item \textsuperscript{73} Ibid., p. 3 and p. 9.
\item \textsuperscript{74} Ibid., p. 8.
\item \textsuperscript{75} Ibid., p. 10. These are the latest statistics available – the quarter lag allows time for more complete data to be collected.
\end{itemize}
England & Wales

Limited (the Companies) were entering administration. Jaeger was founded over 100 years ago, and its business had grown to include 46 stores, 63 concessions and an online presence, but had struggled with challenging conditions, falling customer numbers and sales.

The Companies engaged in a short marketing process for the business in 2015, but it did not result in a sale. Subsequently, the group’s ultimate parent company injected further funding, which was used to close underperforming stores, refurbish existing stores and roll out new ones, continue IT and website development and fund working capital. However, despite these attempts to turn around the business, trading conditions remained challenging and sales continued to decline. The group was dependent on its ultimate parent company for working capital funds, and the directors acknowledged that there was no certainty that the support would continue in the foreseeable future. An accelerated sales process for the whole business was, therefore, commenced in February 2017, and contingency planning undertaken in case it was not possible to achieve a sale.

The sales process did not generate a viable offer for the whole business, so an offer was accepted under which the purchaser acquired the loan notes and security held by the parent company, along with the intellectual property held by the Companies. The directors concluded that the offer to purchase the IP represented the best offer in the sales process because it reduced the group’s secured debt and enabled it to explore alternative funding arrangements with the purchaser. The IP was sold on 30 March 2017, and the purchasers granted the Companies a licence to use the Jaeger brand while it assessed their financial position and worked with the directors to develop plans for the group.

However, the directors did not succeed in agreeing terms for the provision of new funding, without which they concluded the Companies would be unable to meet their liabilities as they fell due. In consequence, administrators were appointed to the Companies on 10 April 2017.

The administrators concluded that it was not possible to achieve the first objective of administration – rescuing the Companies as a going concern – because of their significant funding requirements, which would have rendered it impossible, among other things, for them to continue to trade during a rescue process. The administrators are, therefore, pursuing the second objective – that of achieving a better result for the Companies’ creditors as a whole than would be likely if they were wound up (without first being in administration). To this end, they have been continuing to trade the business while trying to find a viable purchaser for the Companies’ remaining assets. As the Companies no longer own the IP, the administrators required consent of the purchaser to continue to trade. They were granted a licence to trade, which is not transferable in the absence of consent. In light of the non-transferable licence and the failure of the earlier sales process to generate a viable offer for the whole business, the administrators concluded that a further formal marketing campaign for the whole business would not generate any additional viable offers.

Sales generated within the first weeks of post-administration trading were profitable and exceeded initial expectations. Ongoing terms were agreed with key suppliers to ensure that the business has sufficient stock during the trading period. The administrators also entered into negotiations to try to agree more favourable rental terms for the course of the administrations. Following unsuccessful negotiations with some landlords, seven stores were closed. Some redundancies have already been made. The administrators have also received and are evaluating a number of retention of title claims from suppliers.
The administrators’ initial assessment was that there would be a distribution to preferential creditors and a dividend to the unsecured creditors of the Jaeger Company’s Shops Limited by virtue of the prescribed part, but that funds were unlikely to be available to permit a dividend to the preferential and unsecured creditors of Jaeger London Limited and the unsecured creditors of the Jaeger Company Limited and Jaeger Holdings Limited.

Press reports have indicated that the purchaser of the Jaeger IP is the Edinburgh Woollen Mill group, which had previously purchased the Austin Reed brand after it entered administration in 2016. Reports also suggest that some of Jaeger’s suppliers are considering the possibility of legal action over the sale of the brand name before administration.

ii Premier Oil

Premier Oil plc, an international oil and gas exploration and production company, has entered into schemes of arrangement in order to restructure its US$4 billion of debt, after more than a year of detailed negotiations with key lender representatives. Premier Oil has a complex debt structure that involves senior bank debt, US private placement notes, Schuldschein loans, retail notes and a convertible bond. The restructuring will put the Premier Oil group’s finances on a more sustainable footing.

Because of the nature of its business, Premier Oil’s financial performance is heavily dependent on oil prices. The prices for crude oil and related products have been low since late 2014, and prices have remained volatile since. This has affected Premier Oil’s revenues and cash flow and the value of its underlying assets. Premier Oil has undertaken several cost-saving initiatives, including optimising work programmes, reducing discretionary spend, sharing services with other operators and re-negotiating supplier contracts, which have led to significant savings in operating costs and capital commitments in 2015 and 2016. The Premier Oil group has also historically benefited from hedging arrangements, which cover 43 per cent of its budgeted 2017 oil entitlement production, and this has provided some protection from the impact of the low oil prices.

However, there has also been an increase in the leverage of the Premier Oil group, with the result that a number of its financial covenants were in danger of being breached. From June 2016 until February 2017, Premier Oil had to obtain a new deferral from creditors in respect of such financial covenants each month. Premier Oil also entered into a number of supplemental agreements in order to allow the group to enter into discussions with its creditors on the terms of the restructuring.

On 15 March 2016, Premier Oil convened a meeting with its bank lenders to give notice of its financial difficulties, including its potential inability to comply with its financial covenants, and its requirement for continued access to its loan facilities. From November 2016, Premier Oil also entered into negotiations with an ad hoc committee of bondholders regarding amendments proposed to the bonds as part of the restructuring.

By February 2017, Premier Oil had agreed terms of the restructuring with its bank lenders, and on 9 March 2017 it announced that 87 per cent of its bank lenders had entered

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76 Certain claims of some unsecured creditors have preferential status, for instance some employee claims.

77 The prescribed part is a capped percentage of the value of the company’s property subject to floating charges that is set aside for unsecured creditors and paid before realisations are distributed to the floating charge holder.


into a lock-up agreement. It also agreed key terms with the ad hoc committee of bondholders in March 2017, and on 25 April 2017 it announced that more than 75 per cent of bondholders had entered into a lock-up agreement.

The key terms of the restructuring involve preserving Premier Oil’s debt facilities, resetting financial covenants, and extending maturities to 2021. The restructuring will also provide Premier Oil’s creditors with improved creditor economics (by way of better interest rates or margins, for example), increased guarantor coverage and new security, as well as new covenants aimed at deleveraging Premier Oil and its group.

The restructuring is being implemented via schemes of arrangement in Scotland, but has been coordinated from London and is heavily based on English legal principles and expertise as most of the facility documents are English-law governed. The schemes of arrangement were launched on 15 May 2017, and at the scheme meetings on 26 June 2017 creditors voted overwhelmingly in favour of the schemes. The restructuring completed on 28 July 2017.

iii DTEK Finance Plc (DTEK Finance)

As discussed in Section V.iii, schemes of arrangement remain a popular restructuring tool for foreign companies and groups with a cross-European presence.

The DTEK group of companies is the largest privately owned energy business in Ukraine, responsible for the supply of electrical power and heat to a significant proportion of domestic and industrial end-users in Ukraine. The civil disturbances and political instability, the country’s strained relations with Russia, and the devaluation of the Ukrainian currency as against the US dollar, the euro and the rouble, have, among other factors, left the liquidity position of the group severely constrained. As described in the third edition of this book, DTEK Finance BV, a company within the group incorporated in the Netherlands, previously made use of a scheme of arrangement in 2015 to extend the maturity of its high-yield bonds. The governing law and jurisdiction clauses of the indenture relating to the bonds had been from New York to English law to help ensure that it had sufficient connection to the jurisdiction.

DTEK Finance Plc, another group company incorporated in England, had in issue two series of Notes, one due to mature in March 2018 and one in April 2018. In April 2016, it used a scheme of arrangement to impose a standstill period to give it time to negotiate a restructuring of the notes. That restructuring was implemented by a second scheme, sanctioned in December 2016,80 under which the notes were cancelled and exchanged for new notes with the maturity date extended to 2024, with the addition of some extra guarantees and protections.

The most recent scheme is of interest as an example of the way in which the court continues to consider the application of the Judgments Regulation to schemes. As discussed in Section I.vii, the court has generally avoided reaching a firm conclusion as to whether schemes fall within its ambit, but, while acknowledging that there remains scope for debate, proceeding on the basis that they do. However, deciding how its provisions apply in the context of a scheme is not always straightforward. Chapter II of the Judgments Regulation concerns jurisdiction. Article 4 sets out the general rule, which is that a person should be sued in the Member State where he is domiciled. In general, it is assumed that, if the Judgments Regulation in fact applies to schemes, the creditors should be treated by analogy.

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80 In the Matter of DTEK Finance Plc [2016] EWHC 3563 (Ch) (21 December 2016).
as defendants. Thus the Judgments Regulation analysis is still extremely important in a case like this, where the company is incorporated in England, if (among other things) there are creditors domiciled in other Member States.

In that context, Article 8 provides an exception to the general rule in Article 4, to the effect that a person domiciled in a Member State may also be sued, if he is one of multiple defendants, in the courts for the place that any one of them is domiciled, provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings. Article 8 is one of a number of potential avenues by which the court may get comfortable that it has jurisdiction over the scheme creditors and is able to sanction a scheme of arrangement. The approach to the ‘expediency’ proviso is still evolving and was considered in some detail in this instance.

The judge noted that there had been something of a ‘division of view’ among the judiciary on how to decide whether the proviso is engaged when considering the domicile of creditors in a scheme of arrangement. He was sceptical of the view expressed by some judges that Article 8 requires a consideration of the number and value of the creditors domiciled in the jurisdiction, instead focusing on the idea that ‘expediency’ requires an assessment of the significance of the risk of an irreconcilable judgment in the court of another Member State. He was persuaded that the very risk of an irreconcilable judgment elsewhere satisfied the proviso requirement that it be expedient to hear the claims together. In this instance, he noted that there were three noteholder companies and three individuals domiciled in England and Wales, but made clear that he believed that one noteholder would be enough to open the gateway to the Article 8 proviso.

He also noted that it would have been reasonable for noteholders to expect their rights to be adjusted in this jurisdiction as the notes were issued by an English company (or New York, as the notes were New York-law governed, but not in the courts of the various Member States where other creditors were domiciled), and that 108 noteholders, holding 83 per cent of the notes, had entered into lock-up agreements to support the scheme. He was satisfied on the evidence that the scheme would be recognised in New York, the Netherlands, Cyprus, Switzerland and the Ukraine.

iv  Lehman Brothers International (Europe)

The UK courts continue to consider a range of issues arising from the Lehman Brothers International (Europe) (LBIE) administration. The surplus monies available for distribution after payment of ordinary unsecured claims have given rise to a number of novel and difficult legal questions about entitlement and the order of priority, which have been examined in the Waterfall cases.

These issues were first considered in what has become known as the Waterfall I application, which was brought by the administrators of three companies within the Lehman group (LB Holdings Intermediate 2 Ltd, Lehman Brothers Holdings Inc and Lehman Brothers Limited). The Waterfall I case deals with the general principles regarding the priority of post-administration interest and the existence or otherwise of foreign currency claims as non-provable debts.

On 17 May 2017, the UK Supreme Court handed down judgment in Waterfall I. Its findings were as follows:

81 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.
a the claims of LB Holdings Intermediate 2 Ltd under certain subordinated debt agreements are provable but rank to be paid, on the proper construction of those agreements, after the payment in full of statutory interest and non-provable liabilities (upholding the Court of Appeal decision);

b currency conversion claims (for the difference between the sterling value of the debt at the administration date and the sterling value of that debt when paid) do not rank as non-provable claims (reversing the Court of Appeal decision);

c statutory interest accruing but not paid during an administration cannot be claimed in a subsequent liquidation (reversing the Court of Appeal decision);

d the liability of a company’s members to contribute to the company’s assets extends to non-provable liabilities (upholding the Court of Appeal decision), but not to statutory interest (reversing the Court of Appeal decision);

e a company in administration cannot prove in the insolvencies of its contributories for the amount of the contingent liability to contribute, nor can it set off the contingent liability to contribute against the contributories’ claims as creditors (reversing Court of Appeal decision); and

f the contributory rule, which prevents a person from recovering in a liquidation as a creditor until it has fully discharged its liability as a contributory, can be applied in administration (reversing the Court of Appeal decision), so long as it can be effected in a way that is practical and accords with the existing legislative provisions and principles; the administrators should be able to calculate an appropriate amount to retain when making a distribution that would be kept safe and ready to pay out, if appropriate, when final accounts are drawn up, or handed over to a subsequent liquidator.

The details regarding how these claims might be calculated are examined in the Waterfall II decisions. The Waterfall II, Part A judgment resolves 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, while the Part B judgment considers the construction and effect of certain post-administration contracts, specifically claim resolution agreements and claim determination deeds, and the Part C judgment considers 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.

The decisions of the High Court in Waterfall II, Parts A and B were appealed and heard by the Court of Appeal in April 2017. Judgment has not yet been handed down, and a further hearing has been scheduled to consider arguments arising out of the Supreme Court judgment in Waterfall I. The administrators think that the judgment may be handed down in the autumn. The High Court handed down judgment in Waterfall II, Part C in October 2016. The administrators have appealed this decision. The hearing is scheduled for July 2018, but may be brought forward following the elimination of some of the issues under dispute.

The administrators also applied to court on 25 April 2016 (the Waterfall III application) seeking guidance as to the scope of any contribution claims LBIE may make against its members and related issues. The administrators have been working towards a settlement of these proceedings. The Supreme Court Waterfall I decision concerning the ability of a company in administration to prove in the insolvency of its contributories is highly relevant.
to this application, and the administrators announced on 12 July 2017 that an agreement in principle has been reached on the commercial terms of a revised settlement agreement that takes into account the Supreme Court decision.

Notwithstanding the unusual circumstances of the Waterfall cases, which have led to the examination of several obscure and technical areas of law, the decision should prove helpful when considering questions that arise in solvent liquidations. It also sounds a warning to those wishing to include a company with unlimited liability in a corporate structure.

IV ANCILLARY INSOLVENCY PROCEEDINGS

i  Ronelp Marine Ltd and Ors v. STX Offshore Shipbuilding Co Ltd & Ors

STX Offshore & Shipbuilding Co Ltd (STX) is a Korean shipbuilding company. In May 2016, its directors petitioned for the commencement of Korean rehabilitation proceedings (a rescue proceeding), which the Korean court granted in June 2016. The rehabilitation proceedings were recognised as foreign main proceedings under the CBIR.

Under the CBIR, an automatic stay arises when recognition is granted. The court is also able to grant certain types of discretionary relief, and when the foreign main proceeding is a restructuring procedure rather than a liquidating one, it has become its practice to grant a wider stay, equivalent to that arising under an English administration, as happened in this instance. This case provided useful guidance on the factors that will be taken into account when the English court is considering an application to lift this type of stay.

In January 2015, five Liberian companies (the claimants) had commenced proceedings against STX in the English court. The claim arose out of certain performance bonds under which STX had guaranteed the obligations of its wholly owned Chinese subsidiary under a series of shipbuilding contracts. The subsidiary had entered into a Chinese insolvency process before the ships were built. The claimants’ claim against the subsidiary was rejected by the Chinese office holder, and so the claimants had turned to STX as guarantor. However, STX did not acknowledge liability, and raised various points in its defence, including illegality. The claim was reasonably well advanced by the time CBIR recognition and the accompanying stay were granted. The claimants successfully applied to have the stay lifted so that they could continue the claim.

The court noted that a stay should only be lifted to allow an unsecured monetary claim to be continued in exceptional circumstances. However, the claim involved a complex point of English law, illegality, which was in some respects in a state of flux. The application of the law to the facts involved such exceptional uncertainty that the court considered it would be difficult for the Korean rehabilitation court to have to consider the point on the basis of expert evidence alone.

It was also a factor of significant weight that the guarantee claim proceedings were well advanced, and all parties had expended considerable sums in preparation for trial. The court noted that the nearer the outcome of the proceedings, the greater the weight to be attached to this factor.

The court was satisfied that lifting the stay would not constitute an interference with the Korean rehabilitation proceedings. The Korean court would ultimately decide itself whether to adopt or ignore the English court’s adjudication, but resolving a complex issue of English

82  [2016] EWHC 2228 (Ch), 7 September 2016.
law would assist rather than impede the Korean process. It concluded that the factors in this case were sufficiently exceptional, and that allowing the English proceedings to continue would on balance be in the interests of the claimants, as well as the other creditors of STX.

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. It is not yet clear what will happen if negotiations are not concluded within that period: it is possible that the UK will leave without concluding a deal; alternatively an extension could be granted by mutual consent, which might be accompanied by transitional arrangements, possibly preserving elements of the status quo while negotiations continue.

To add to the uncertainty, in April 2017, Mrs May called a snap general election for 8 June. Her Conservative Party was governing with a slim majority of 17 seats, and Mrs May hoped to secure a larger majority ahead of the start of the Brexit negotiations. However, contrary to widespread initial expectations, the Conservative Party in fact lost seats, and while it remained the largest party, it did not secure an outright majority. At the time of writing, it remains in power as a minority government, supported by a ‘confidence and supply’ arrangement with the Northern Irish Democratic Unionist Party (DUP), under which the DUP has agreed to back the government in key parliamentary votes.

A number of different exit models have been floated in outline. Before the general election, Mrs May had indicated that she favoured a ‘hard’ Brexit arrangement, under which, broadly speaking, the UK would give up full access to the single market and the customs union and take full control over immigration policy. She had also indicated that she would be willing to allow the UK to leave without a deal in place if necessary. However, not all members of the Conservative government were in agreement with this position. Some commentators thought that an increased majority might strengthen the hand of those within the Conservative Party in favour of a ‘soft’ Brexit arrangement (under which the UK would seek to retain a closer relationship with the EU, for instance by keeping single market and customs union membership and retaining the ‘passporting’ rights that allow financial firms to operate across the EU), and in any event many expected to see a more detailed negotiating position emerging after the election one way or the other. However, the largely unexpected outcome, and the resulting hung parliament, have added further uncertainty, with some arguing that it represents a rejection by the public of the hard Brexit proposal and a mandate for a ‘softer’ position, and others questioning whether the DUP support will prove robust enough in practice or whether a further general election will be called. The one thing that is clear is that the uncertainty surrounding the process is going to continue for some time to come.

ii Insolvency activity
Market reactions to the Brexit process and the political uncertainty have been mixed. As discussed in Section II, sterling has depreciated markedly since the referendum. The sharp drop has helped exporters, and benefited some companies, particularly FTSE 100 companies, that earn much of their revenues overseas, but it has also increased the price of imports and had a knock-on effect on the spending power of consumers. The weak pound may
continue to drive inflation higher, and it may prove difficult to rein in inflation without further depressing growth. It remains to be seen how persistent and severe the slowdown in GDP growth and household consumption will be, and whether it will have a knock-on effect on consumer confidence. Wage growth remains subdued, despite the robust employment statistics, which may also have an effect on consumers’ ability and willingness to spend.

The markets have at times reacted badly to political uncertainty, but not always so – for instance, the unexpected hung parliament did not have as much of a negative effect on the pound as some predicted, with some participants taking comfort from the belief that it might produce a softer Brexit.83

Overall, there is a broad consensus among economists and market commentators that there will be a necessary real adjustment as the UK economy adapts following exit from the EU, but it is too early to assess how severe that adjustment will be, and how gradually it will take place. It is also too early to say how much volatility we will see as the negotiations progress. Whether and when these drivers translate into increased insolvency activity will depend on a number of factors, including the progress and outcome of exit negotiations, the levels of market volatility, and also external factors such as the performance of the EU and global markets.

In the immediate aftermath of the referendum, there were fears that the retail sector might be significantly affected by a decline in consumer confidence and spending power. While consumer confidence has remained more resilient than many commentators expected, there have been some examples of financial distress (see Section III.i), primarily in certain parts of the middle market. While these failures seem to have been driven primarily by problems going back a number of years rather than the prevailing economic climate alone, the retail environment remains challenging, and the potential confluence of ongoing cost pressures and heavy competition, in particular from online outlets, with an increased decline in consumer confidence and spending power means that the sector remains vulnerable and we may see further business failures.

The problems in the oil and gas sectors look set to continue in the coming year. Prices remain low, and some companies that initially entered into ‘amend and extend’ arrangements when prices first fell may need to undergo more fundamental restructurings. The low-price environment has led to a reduction in offshore capital expenditure, which continues to have an effect on other sectors: conditions in the shipping and offshore sector remain difficult, for instance. Performance began to decline in 2015, and while it bottomed out in 2016, it has not yet recovered. In addition to the low oil price environment and the reduction in off-shore capex expenditure, issues such as overcapacity and poor investor returns have exacerbated the problems in some parts of the sector. Shipping sector restructurings are often particularly challenging, and involve navigating complex corporate and capital structures, with many different types of creditors. On the other hand, commodity prices have rallied to some extent, which has relieved some of the pressure on the mining sector; whether the rally continues remains to be seen. It continues to be difficult to generalise about sector trends with accuracy and some market commentators highlight other sectors such as healthcare and construction, although within these sectors there remain a number of companies that are continuing to perform well.

Some sectors are likely to be particularly focused on the Brexit negotiations and the UK government’s domestic plans regarding certain regulations and subsidies that are likely to

fall away following the UK’s departure from the EU. Agriculture is one such sector, which is currently heavily dependent on EU subsidies. Banks and financial service companies, whose business models rely on the EU ‘passporting’ system, will also continue to watch the progress of negotiations closely, and contingency planning for the various exit scenarios is likely to become more detailed as negotiations progress.

iii Practical trends and legislative developments

When it comes to restructuring, 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 in response to the EU harmonisation directive (see Section V.v), 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 to medium 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 (and, where they are introduced in response to the directive, 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 government may seek to agree an 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 Section I.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 EC 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. 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).

In the short term, we would not expect there to be any change to the existing framework during the two-year negotiating period. It is possible that it might stay in place for an extended period if the negotiating period is extended or transitional provisions are put in place while a more detailed agreement is concluded. It is far 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

Modernisation of IR 1986

On 6 April 2017, the IR 2016 came into force, replacing the Insolvency Rules 1986 in their entirety (with the exception of some limited transitional and savings provisions, and exemptions for certain special regimes). The Insolvency Rules are often described as the procedural framework for the IA 1986, but they do also contain some provisions of substantive law (while the IA 1986 contains some procedural requirements). The new rules were introduced with three stated aims:

a. to consolidate the rules (28 amending instruments were made while the IR 1986 were in force);

b. to restructure the IR 1986 and update the language (including gender-neutral drafting); and

c. to reflect changes made to the IA 1986 by the Deregulation Act 2015 and the Small Business, Enterprise and Employment Act 2015 (in particular amendments enabling modern methods of communication and decision-making to be used in place of paper communications and physical meetings).

The length and breadth of the Insolvency Rules means that engaging with the changes has been a substantial task for practitioners. Although a lot of the changes are quite technical
and administrative in nature – for instance the IR 1986 contained prescribed forms for use in many scenarios, whereas the IR 2016 only lists the content requirements – many of them affect day-to-day practice, and the familiarisation process will take some time. At the same time, the High Court in London has introduced an electronic filing service for court documents, use of which has been compulsory for insolvency filings since 25 April 2017. In general, the new system is quite straightforward, but as with any new system some unexpected questions have arisen, and practitioners have been engaging with the courts to ensure that the requirements of IR 2016 are capable of being satisfied in the context of e-filing.

**ECIR**

At the European level, the final text of the Recast ECIR was published in the Official Journal of the EU on 5 June 2015 and entered into force on 25 June 2015. Most of its provisions have applied since 26 June 2017.

Key amendments included:

a) revising the definition of insolvency proceedings to include hybrid and pre-insolvency proceedings;

b) clarifying the jurisdiction rules and improving the procedural framework for determining jurisdiction, including by the addition of new language in relation to the determination of COMI;

c) enabling 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;

d) abolishing the requirement that such proceedings must be winding-up proceedings;

e) extending the cooperation requirements by obliging courts of the main and secondary proceedings to cooperate between themselves and by obliging liquidators and courts to cooperate with each other;

f) including a new concept of ‘group coordination proceedings’ to facilitate the insolvency or restructuring of multinational groups of companies subject to collective insolvency procedures that fall within the Recast ECIR (but maintaining the entity-by-entity approach); and

g) requiring EU Member States to publish court decisions in cross-border insolvency cases in publicly accessible interconnected electronic registers (these provisions are not yet in force).

Amendments have been made to IA 1986 and IR 2016 where necessary to ensure that the provisions of the Recast Regulation dovetail with domestic legislation.

**Draft harmonisation directive**

In November 2016, the EU Commission published a draft ‘harmonisation directive’ that sets out a framework for partial harmonisation of restructuring and insolvency frameworks across Europe. As currently drafted, each Member State would have two years from the time the directive entered into force to ensure that it has a ‘preventive restructuring framework’ in place meeting the criteria laid out in the directive. Member States would have some discretion

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84 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.
as to how they brought their regimes in line with the Directive, and, as this is only a partial harmonisation drive, some matters remain outside its scope. Broadly speaking, compliant regimes would give viable companies in financial distress access to a restructuring framework that gives them the opportunity to avoid insolvency and emerge on a more sustainable footing, incorporating the following elements:

\[ \begin{align*}
\text{a} & \quad \text{a moratorium to protect companies that are in the process of negotiating a restructuring plan with their creditors;} \\
\text{b} & \quad \text{limitations on the circumstances in which counterparties can rely on ‘ipso facto’ clauses to terminate a contract solely because the company enters restructuring negotiations or seeks a moratorium;} \\
\text{c} & \quad \text{a debtor-in-possession procedure, which does not always require the appointment of an insolvency practitioner;} \\
\text{d} & \quad \text{class-based voting rights for all creditors who would be affected by the restructuring plan;} \\
\text{e} & \quad \text{cross-class cramdown if the restructuring plan meets certain criteria; and} \\
\text{f} & \quad \text{adequate protection for new and interim financing.}
\end{align*} \]

The draft directive needs to be approved by the European Council and Parliament. Various stakeholders have already suggested amendments, some of which may be reflected in the draft. The approval process is likely to take some time.

\section{Future domestic legislative agenda}

The UK may have left the EU before compliance with the requirements of the final version of the harmonisation directive becomes mandatory. It is not yet clear what approach the government will adopt if the UK is not required to comply with its requirements. It has so far taken some steps to seek stakeholders’ views on the draft directive, and it may be that it decides to adopt voluntarily certain elements of the proposals to ensure that the UK regime stays competitive.

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, which foreshadowed some of the key elements of the preventive restructuring framework envisaged by the draft harmonisation directive:

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

It remains to be seen whether the government will bring forth legislation based on these proposals. It had indicated that it was considering the responses to the consultation and
would announce next steps, but that was before the general election was called, and a further update is awaited. It is possible that the government will evaluate the responses alongside the draft Harmonisation Directive, as the objectives of the Directive and the consultation are aligned in some key respects. If implemented broadly as set out in the consultation, the measures would represent the most significant reforms to the domestic insolvency framework since the Enterprise Act 2002, and the same is likely to be true if measures were to be adopted enacting the key elements of the draft Harmonisation Directive as it is currently drafted.
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

1 Fabrice Baumgartner is a partner, and Aude Dupuis a senior attorney, at Cleary Gottlieb in Paris.

2 Transfers of assets without consideration, contracts that are significantly unbalanced, payments of debts that are not due, etc.
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 (homologué) 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 (sauvegarde) – with two variations: accelerated safeguard (sauvegarde accélérée) and financial accelerated safeguard (sauvegarde financière accélérée), judicial reorganisation proceedings (redressement judiciaire) and judicial liquidation proceedings (liquidation judiciaire). 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 Autorité de contrôle prudentiel et de resolution (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 situation has improved compared to previous years in terms of main economic and social indicators:

- in July, 2017, the French national statistics institute (INSEE) released its forecasts for economic growth which should reach 0.5 per cent in the third quarter of 2017, as was the case for the previous two quarters of the year;
- in May, 2017, the business climate reached its highest level since 2011, and, as a consequence, investments on the part of French companies has increased by 3 per cent compared to the previous year;
- the French household investment level has also improved, reaching a peak since 2006, owing to, among other factors, the low level of interest rates boosting the housing market. However, household consumption remains low. This can be explained in part by an increase in inflation;
- as regards the level of employment, the situation is more complex. France has created many new jobs, the most on record since 2007, but the unemployment rate is still high (around 10 per cent) while the active population continues to grow; and
- on the other hand, the external drivers of economic growth remain insufficient, such as the trade deficit which is stagnating at a high level, slowing down economic recovery, though less so than last year with an increase of 3.1 per cent in exports during the second quarter of 2017.

Another sign of the improving economic climate can be found in the number of insolvency proceedings opened in France in 2016, which decreased by 8.3 per cent compared to 2015, dropping from 63,008 to 57,844. As for 2017, the second quarter of this year shows a decrease of 7.8 per cent in company failures compared to the previous year, confirming the trend.

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 (29.9 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 100 employees only represent a handful of the total, with only 135 insolvency proceedings opened in France in 2016; and
- the construction market, traditionally representing one quarter of all company failures, specifically benefited from this trend with a decrease in the opening of insolvency proceedings of 12.7 per cent compared to 2015. On the other hand, the number of insolvency proceedings in the agricultural sector is constantly increasing.
III PLENARY INSOLVENCY PROCEEDINGS

Some of the most significant insolvency proceedings commenced in France during the past 12 months are described below:

i Altis Semiconductor

Altis is a French company operating in the semiconductor industry. The company had been struggling with financial difficulties for a long time when the commercial court of Paris opened judicial reorganisation proceedings in August 2016. The company had been bought in 2010 from IBM and Infineon and was already in a poor financial state then. Between 2010 and 2013, it accumulated approximately €176 million in losses and only escaped judicial liquidation thanks to a deal concluded with the company’s creditors, shareholders and public institutions.

The company’s distress is linked to its commercial dependence on its main client GlobalFoundries, whose orders continue to decrease, as well as its lack of diversification.

Out-of-court negotiations took place before the cessation of payments with a potential buyer called X-FAB, a German group of semiconductor foundries, which eventually withdrew its offer owing to deteriorated relations with the seller.

During the judicial reorganisation proceedings, three potential buyers submitted offers to the court to purchase the business. Two of them were Chinese, including SMIC, one of the industry leaders, and the last one was X-FAB.

The court selected X-FAB’s offer for several reasons: first, the offer was valued at €18.5 million, including a transfer price of €9.2 million, making it the best offer in financial terms. X-FAB also committed to investing €100 million in the French business over 10 years, including €60 million in four years. X-FAB’s offer was also the best one in terms of employment, with a commitment to take over the 1,000 employees of the company and to maintain the employment level above 800 employees for five years, and it had the support of the employees. The offer was firm, whereas SMIC’s offer contained a condition precedent relating to the authorisation of its board of directors, which could not be obtained immediately. Finally, the offer included the transfer of new technologies, which could allow for a diversification in Altis’ clients base.

ii Tati

Tati is a French clothing brand founded in 1948 that built its success on the sale of large volumes of low-priced clothes without intermediaries and regardless of the clothing season. The brand was a pioneer in this strategy in France but suffered a great deal from the arrival of other brands with the same strategy, such as H&M, that were more fashionable and offered new collections more regularly.

Upon the death of the founder, his youngest son took over the business but failed in his attempt to diversify Tati’s offer, which contributed to blurring the brand’s image and position on the market. In 2003, the company went through judicial liquidation proceedings, and the business was bought in 2004 for €14.5 million by the hard-discount group Vetura, partly held by Eram. The Tati business was then totally bought by Eram, another clothing group specialising in the shoe market. The group invested a considerable amount of money in the business in an effort to improve its quality and brand image, but sales remained insufficient. Eram tried to sell the company in 2014, without success.
In 2017, after Tati had lost approximately €50 million during the year 2016, Eram again initiated negotiations with potential buyers under conciliation proceedings commenced by decision of the president of the commercial court, with a view to selling the Tati business under a pre-packaged sale plan. Pre-packaged sale plans consist of confidential negotiations with potential buyers taking place in pre-insolvency proceedings (mandat ad hoc or conciliation) before the debtor files for insolvency, followed by accelerated insolvency proceedings. Their impact on the debtor's business is therefore limited. They have been made possible by a recent change in French law allowing the mediator appointed in mandat ad hoc or conciliation proceedings to organise the sale of all or part of the business in subsequent insolvency proceedings.

Seven offers were submitted during the conciliation proceedings, six of them involving the sale of assets, and thus the opening of subsequent insolvency proceedings, and only one involving the sale of the company owning the Tati brand. The company then filed for insolvency, and, as a result, the commercial court commenced judicial reorganisation proceedings on 4 May 2017.

In the end, only two offers remained, one from Gifi, a retail group specialising in the low-cost decorating business, and the other from a consortium of five of the original potential buyers. Competition for the takeover of the Tati business resulted in the potential buyers improving their respective offers twice and lead to a favourable outcome for the employees, whereby 1428 out of 1750 jobs were able to be saved. The court eventually selected Gifi's offer, which was more advantageous both in financial terms (Gifi committed to investing €80 million in the business) and in terms of employment.

iii GM&S

GM&S is an industrial company specialising in the supply of spare automobile parts and located in a French region suffering from deindustrialisation and unemployment. Owing to the progressive decrease in orders from its two main clients, French car manufacturers PSA and Renault, the company's turnover fell from €40 million in 2010 to €20 million in 2016, and it was forced to file for insolvency. The commercial court of Poitiers opened judicial reorganisation proceedings in December 2016. These were the third reorganisation proceedings that the company had undergone in 15 years. In June 2017, the court converted the proceedings into judicial liquidation proceedings owing to the lack of any prospect of recovery. The court authorised the continuation of business for 30 days.

This case has been widely covered by the French media, as GM&S is the second-largest private job provider of the region with 277 employees, and became very political, drawing the involvement of the French Ministry of Economy, which attempted to contact more than 50 potential buyers for the business. In the end, only GMD, a company specialising in metal processing, presented an offer, which provided for the takeover of 120 employees out of 277. This offer was made possible because the French state, PSA and Renault committed to investing €15 million in the business, and PSA and Renault committed to placing orders over five years for amounts of €12 million and €10 million, respectively.

GMD’s offer was approved by the commercial court on 31 July 2017.
iv  Sequana

Sequana is the holding company of a group specialising in the paper industry, with two main subsidiaries: Antalis, a European leader in the distribution of paper, packaging solutions and visual communication materials with 5,600 employees, and ArjoWiggins, a global leader in the production of technical and creative paper with 2,800 employees.

The group is suffering from a decrease in paper production business owing to the overcapacity of the paper industry in Europe. Its turnover decreased by 7 per cent between 2015 and 2016, and its indebtedness stands at €315 million. In addition, in February 2017, a British court issued a judgment under which Sequana was ordered to pay €135 million to British American Tobacco (BAT) in relation to the payment of a dividend to Sequana by a subsidiary that was purchased from BAT in the 1990s. Sequana filed an appeal, which stayed the enforcement of the judgment, but for the payment of a €6.7 million advance on BAT’s legal costs.

Sequana also chose to request the commencement of safeguard proceedings from the commercial court of Nanterre, with a view to implementing a reorganisation plan involving the sale of the security branch of ArjoWiggins and the initial public offering of Antalis, and a rescheduling of its indebtedness, including BAT’s potential claims.

Safeguard proceedings were opened by the commercial court on 15 February 2017 with respect to Sequana. Its subsidiaries Antalis and ArjoWiggins were not included in the proceedings.

BAT filed an appeal against that judgment, claiming that the safeguard proceedings were commenced in breach of its rights, because they were only intended to avoid the payment by Sequana of the €6.7 million advance on BAT’s legal costs. The commercial court dismissed BAT’s appeal.

The safeguard plan providing for the initial public offering of Antalis, the sale of ArjoWiggins’ banknote paper production plant to Oberthur for a total amount of €30 million and a rescheduling of Sequana’s indebtedness over 10 years was approved by the court on 12 June 2017.

v  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.

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 €65.25 million, benefiting 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 insolvency filing of the main company involved in that business, the commercial court of Paris commenced reorganisation proceedings on 12 June 2017. The court is expected to decide whether it will approve the sale plan for Cofigeo and Arterris in September 2017. It has authorised the debtor to lease its business to those potential buyers in the meantime.

vi  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 noteholders 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 acknowledged 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. To date, the safeguard proceedings, as well as the US proceedings, are still ongoing.

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 continue to decrease during the coming year, as economic growth is expected to continue to strengthen to about 1.5 per cent in 2018, boosted by investment and consumption. In addition, domestic demand should be supported by rising confidence, cuts in social contributions and business taxes planned by the new government and continued favourable financing conditions.

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 2012.2 2017 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 to other European and non-European insolvency legislation and the tools for restructuring insolvent companies through an in-court proceeding have been successfully amended.3

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1 Andreas Dimmling is a local partner at GSK Stockmann. The author would like to thank Franziska Poxleitner, law trainee, for her very valuable contribution to this publication.

2 An English version of the GIA is available at www.gesetze-im-internet.de/englisch_inso/.

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 – fulfilling certain requirements – 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.

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

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4 Sections 49 to 51 of the GIA.
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 preliminary stage by consent of the PIA or during the general insolvency proceedings by the 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.

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.

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5 Section 38 of the GIA.
6 Section 39 of the GIA.
7 Sections 53 to 55 of the GIA.
8 Section 129 et seq. of the GIA.
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 2017.9

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. Before the reform, there was an assumption that under certain circumstances the insolvent estate had acted in bad faith and the creditor knew about this bad faith when carrying out the transaction. In particular, when the contract parties had agreed on an instalment plan for payments, 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 fulfil 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. For contractual performances towards employees of the insolvent estate (in particular wages) an extended time period of 30 days applies.

ii 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 (up to 5 per cent, though only 2 per cent in 2015) 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.

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.

9 An English version of the GIA is available at www.gesetze-im-internet.de/englisch_inso/.
**Liquidation**

See Section I.i. A general corporate insolvency proceeding over a German company typically lasts for a time period of three to four years.

**Self-administration and insolvency plan**

Although these features have been in place since 1999, they are rarely used in practice, with rates of approximately 1 per cent of all corporate insolvencies until 2012. ¹⁰

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

- the company applies for self-administration in its petition for insolvency proceedings;
- there are no circumstances that lead to the conclusion that self-administration will be detrimental to creditors.

If a preliminary creditors’ committee supports the petition for self-administration by unanimous vote, the insolvency court must grant self-administration proceedings.

Instead of a PIA or 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 (also called protective shield proceedings and, according to the law, ‘the preparation of a restructuring’). 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 and has become popular in prominent insolvency cases (such as Entertainment Distribution Company, involving a producer of CDs and DVDs) 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

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¹⁰ Between 1999 and 2007 only in 0.5 per cent of all corporate insolvencies an insolvency plan was put in place; the same applies to self-management, although rates with regard to self-management increased between 2008 and 2012: Beck/Depré, *Praxis der Insolvenz*, p.1421, 1509; *Münchener Kommentar*, InsO, 3rd ed. 2014, Vor Sections 217–269, No. 64; Schultze&Braun Insolvenzplan-Index 1999–2012: www.schubra.de/de/veroeffentlichungen/insolvenzstatistiken/Insolvenzplanindex1999bis2012.pdf.
at some stage and is transformed into general insolvency proceedings (this happens with approximately one-third of proceedings that start in self-administration). Usually, however, self-administration is combined with an insolvency plan and for the umbrella protection an insolvency plan is mandatory.

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.

Self-administration proceedings (in particular umbrella-protection proceedings combined with an insolvency plan) can be completed very swiftly compared to general proceedings. There have been cases where the proceedings ended four to six months after filing for umbrella protection.

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, Regulation 1346/2000/EC 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. The most popular example was BenQ in 2007.

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, such procedure is not very common.

12 Section 217 of the GIA.
13 It should be noted that this EU Regulation will be replaced by EU Regulation 2015/848 as of 26 June 2017.
The possibility of ancillary insolvency proceedings in Germany has not prevented trends for forum shopping, particularly within the EU. This is especially related to forum shopping to the UK in order to use a scheme of arrangement as an out-of-court restructuring instrument allowing for a cramdown of dissenting creditors – a concept that does not exist in Germany. However, since 2012 German insolvency experts have been of the opinion that the insolvency instruments introduced by the insolvency law (ESUG) reform have made forum shopping less attractive, taking into account the tremendous costs sometimes involved.

iv Starting proceedings

Essentially, the management of a company is obliged to file for insolvency in case of illiquidity or over-indebtedness. The criterium of over-indebtedness is not met on a pure balance sheet 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. BaFin also has the power to take measures for stabilisation of these banks if it is needed to stabilise the financial market.

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. Under these laws, national and European institutions have specific rights to restructure or liquidate important banks outside of general insolvency 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.

So far, when several companies that together form a corporate group file for insolvency, the insolvency court of each individual company has power to appoint an individual IA. When group companies have different registered company seats, this leads to competences of different local courts, and completely different measures could be taken by such courts.

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. Another variation is the application of a coordination procedure, which includes the choice of a coordination administrator out of one of the IAs when more than one IAs were appointed. The main task of the coordination administrator is the coordination of the individual proceedings and, therefore, the development of a coordination plan as a group insolvency plan that serves to achieve an overall settlement of all creditors of the group companies.

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.

The new rules have not been tested in practice yet.

vii Cross-border issues

See Section I.iii.

German insolvency courts acknowledge foreign insolvency proceedings under EU Regulation No. 1346/2000 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

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14 For example, Sections 16, 77b, 78, 88 and 88a of the Insurance Supervision Act, and Section 16 of the Insurance Contract Act.
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 (1.9 GDP growth in 2016) and cheap terms of financing. The unemployment rate is the lowest it has been for 25 years, and many regions of Germany profit from full employment.

21,700 companies filed for insolvency in 2016 (almost 1,500 lower than in 2015), which is the lowest rate of insolvencies in more than 20 years. In the first half of 2017, 10,300 corporations became insolvent, a decrease of 5.9 per cent compared to the same period last year. It is remarkable that most of the insolvent corporations are very small companies. Almost 50 per cent of insolvent companies have an annual turnover of less than €250,000. Eighty-two per cent of insolvent companies employed less than five people, whereas most of them might have even been single-person companies. In 2016, there were fewer than 90 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 service sector (of 7.5 per cent), although this sector continues to have the most insolvencies (55.3 per cent of all corporate insolvencies). In contrast, the construction sector has the highest insolvency quota in comparison with the number of companies (85 out of 10,000). This is followed by commercial enterprises (72 out of 10,000), service industries (63 out of 10,000) and the manufacturing sector (36 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 72 to 67 insolvencies out of 10,000 companies in 2016.

III PLENARY INSOLVENCY PROCEEDINGS

Since mid-2016 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.

16 5.5 per cent of the workforce in June 2017, equalling 2.47 million individuals.
17 The total number of insolvent cases in Germany was 123,800 in 2016. Thus, more than 80 per cent are individual bankruptcy proceedings or similar cases.
i  **Steilmann SE**
Steilmann SE, a listed company from Bochum, is an apparel company producing womenswear, menswear and accessories, predominantly in the value segment of the market. The company, which was founded in 1958, was operating in 18 countries and had a work force of 7,000 employees of which 1,700 were based in Germany.

As a result of growing market pressure in the fashion sector and change of customers’ shopping preferences, the company accumulated losses. Several restructuring programmes were implemented over the past 10 years but none were successful.

In March 2016, only five months after going public and being listed on the Frankfurt Stock Exchange, Steilmann SE had to file for insolvency after negotiations with potential investors failed.\(^{18}\)

Assets and some subsidiary companies of Steilmann SE have been sold by the IA Frank Kebekus, but many subsidiaries with branches and shops were closed permanently.\(^{19}\)

Steilmann is a prominent example of the difficulties the retail sector, and in particular traditional apparel companies that concentrate on high-street shops, are currently facing (see Section V.iii).

ii  **Rudolf Wöhrl AG**
Another fashion company, which filed for insolvency in the end of 2016, is Rudolf Wöhrl AG. The traditional German fashion house existed for more than 80 years and had 1,900 employees in about 30 stores around Germany.\(^{20}\) During the restructuring process, the management decided in consultation with the restructuring adviser to close four of the 34 stores. But the good news was that the company could keep 30 stores and 95 per cent of its employees. In March 2017, Christian Greiner, the grandson of the founder Rudolf Wöhrl, took over Wöhrl AG, so the company remains in the hands of the family.\(^{21}\)

iii  **Rickmers Holding AG**
Another industry in turmoil is the shipping industry. 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. Because of this cancellation at the very last minute, some of the bondholders did not hear of the short-term change of plans and arrived at the conference in Hamburg for nothing.\(^{22}\)

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


\(^{20}\) https://www.woehrl.de/unternehmen/fakten-und-historie.html.


bigger ships that they did not need any more afterwards.23 Another competitor of Rickmers, the global shipping player Hanjin from Korea, experienced the same in 2015 and became insolvent.

The management board of Rickmers Holding AG strives for restructuring in self-administration, which means that the executive board remains capable of acting and will manage the holding company. The company will be advised by restructuring expert Dr Christoph Morgen, who is now a member of the executive board and chief insolvency officer. Furthermore, lawyer Dr Jens-Sören Schröder has been appointed as a temporary trustee by the Hamburg Insolvency Court. For the moment, business and shipping operations will be continued and subsidiaries are not affected.24 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.

iv Kronenbrot GmbH

Also one of the largest bakeries in Germany, Kronenbrot GmbH, had to file insolvency last year. The company employs about 1,300 staff around Cologne in Germany and supplies products including breads, cakes and pastry products to bakery store chains including Oebel and food retailers such as Lidl and Aldi. As reasons for the insolvency, the company itself stated the price increase of raw materials like flour and high competitive pressure because of other firms.

In the beginning of 2017, the company was luckily saved from closure as a result of being sold to an investor for an undisclosed sum. For a three-year job and location guarantee, the employees waived part of their wage and made an important contribution for the restructuring of the company.25

v Air Berlin PLC & Co. Luftverkehrs KG

The most spectacular insolvency case in the last 12 months, is undoubtedly the case of Air Berlin. Air Berlin is the second biggest airline in Germany after Lufthansa and the seventh biggest airline in Europe. Air Berlin was founded by the US pilot Kim Lundgren in 1978 and started with some charter flights in and out of Berlin to holiday destinations such as Mallorca. After the fall of the Berlin Wall, the former baggage-handler Joachim Hunold invested in Air Berlin and made it into the biggest holiday airline in Germany. Air Berlin took over several other airlines and became the predominant competitor to Lufthansa also for business flights in Germany.

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. In 2016, Air Berlin had a deficit of almost €800 million. Air Berlin was not able to offer charter flights to international holiday destinations and business flights within Europe at the same quality level. Also, Etihad apparently was more interested in a German supply channel for its Etihad flight network than in a successful

independent German player. 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.

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 preliminary insolvency custodian and approved Air Berlin’s application for self-administration. The insolvency expert Mr Frank Kebekus 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 shall safeguard continuation of the flights until November 2017. Several other airlines are interested in taking over some or all flight slots and assets of Air Berlin. It seems that Lufthansa had been in negotiations with Air Berlin for some time before the insolvency started, and, therefore, Lufthansa could be the most valuable bidder. The creditors’ committee of Air Berlin shall make a first decision in September 2017.26

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.27

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 low level.

However, trends can be observed in other sectors.

i Tax relief of the restructuring profit

A new 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 very rapidly in order to reduce the turmoil.

27 BGH NZI 2014, 969.
First, a directive was given to all local tax administrations to provide assistance in the processing of the respective issues in the meantime and to continue the proven and tested practice as far as possible under the ruling.

A few months later, the German parliament adopted a new law that – in principal – continues the practice of the tax authorities of the past before the court ruling by grounding it on some new rules, which the court ruling claimed missing. The new law passed the parliament procedure in June 2017.

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. For this interim period, restructuring proceedings can rely on the administration directive; however, still many questions are not answered, and tax relief of restructuring profits remains one of the major topics in insolvency law circles. Each individual case needs special attention, and restructuring cases are currently delayed and need more 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.28 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 201529 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.30 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 becomes binding for all Member States,31 so a reaction from the German government can be expected in this time frame.

iii Retail sector turmoil

Steilmann SE and the Rudolf Wöhrl group are not the only companies in the retail sector suffering from recent fundamental changes concerning customers’ preferences, sale channels and city developments over the years. A wave of bankruptcies happened to the fashion industry in the last year. Some 10 fashion companies are featured in the top 50 German

corporate insolvencies in 2016, and more than 11,000 jobs are or were at stake.³² Further insolvencies in this sector occurred, *inter alia*, for SinnLeffers, Zero Clothing, Promod, Dress for Less and American Apparel Germany in 2016, which operated several retail shops in German cities.³³ In addition, other companies such as Gerry Weber, Tom Tailor and Hugo Boss had to close stores and lay off part of their workforce.³⁴

One reason for the crisis of the clothing retail sector is the change of consumer behaviour as people tend to spend less money on specific retail fashion chains. Furthermore, there is high competitive pressure in the clothing retail industry, and a lot of companies dominate the market with products from the low-price segment, such as Primark.

Also, a lot of companies in the medium-price segment ignored the online shopping trend and cannot survive through high-street shops alone.

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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

A new bankruptcy code was enacted by Law 3588/2007 (effective as of 10 July 2007) (the Bankruptcy Code), amending and replacing older provisions on insolvency (both in connection with winding up and rehabilitation). The Bankruptcy Code amended and replaced older provisions. Law 3858/2010 effected certain amendments to the Bankruptcy Code with a focus on a conciliation agreement (or settlement agreement) and the restructuring plan (the Intermediate Amendments). The Intermediate Amendments relating to conciliation agreements did not prove successful in practice. Law 4013/2011 (effective as of 15 September 2011) replaced Chapter 6 of the Bankruptcy Code resulting in the conciliation agreement being replaced by the rehabilitation agreement, and further introduced a new proceeding, special liquidation (the New Provisions). Law 4336/2015 (effective as of 19 August 2015) amended and replaced several provisions of the Bankruptcy Code with respect to the rehabilitation agreement and special liquidation and also with respect to the ranking of creditors, while Law 4446/2016 and 4472/2017 (enacted in 2016 and 2017 respectively) introduced new amendments, which (among others) supplemented the existing provisions of the Bankruptcy Code in connection with bankruptcy of small businesses and further abrogated (with effect from 22 December 2016) special liquidation (all such amendments are referred to as, the Latest Amendments).

The Bankruptcy Code, the Intermediate Amendments, the New Provisions and the Latest Amendments each include transitory provisions concerning insolvency proceedings opened before the entry into force of the Bankruptcy Code, the Intermediate Amendments, the New Provisions or the Latest Amendments respectively. The Greek chapter in this publication is limited to the insolvency proceedings currently available under the Bankruptcy Code, as amended and in force following its amendment by the Latest Amendments.

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:

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1 Athanasia G Tsene is a partner at Bernitsas Law.
the settlement of debts of small businesses and professionals, in each case for business loans; and

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 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 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 the Greek chapter of this publication.

**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: (1) 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); (2) claims with a special privilege (which include those of secured creditors); and (3) unsecured claims.

The opening of insolvency proceedings does not affect the priority ranking of validly created security (claims of item (2) 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.
**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:

- 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;
- any payment of debts that are not yet due and payable;
- any repayment of due and payable debts not made by payment in cash or in the pre-agreed manner; and
- 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 (with the exception only of mortgages, pre-notations of mortgage and pledges created in favour of banks to secure credit and loan agreements or already existing obligations).

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:

- 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
- 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;

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.

ii 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, 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 proceedings initially available under the Bankruptcy Code (before the enactment of the Intermediate Amendments, the New Provisions and the Latest Amendments) have often been used by debtors as a means of delaying creditors and not in a genuine effort to rehabilitate their failing businesses.

Therefore, creditors (especially banks) have so far tended to prefer to consider 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 of the Bankruptcy Code after the entry into force of the New Provisions and the Latest Amendments:

- 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; (2) the net turnover based on the latest financial statements does not exceed €200,000; and (3) 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)) following the appointment of a mediator; the aim is to achieve a rehabilitation agreement between a debtor (where there is evidence of the actual or foreseeable inability of the debtor to pay its debts as they fall due) and its creditors;

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

- d special liquidation under the new Article 106(ια) of the Bankruptcy Code, which, however, is not available from 22 December 2016.

Bankruptcy and special liquidation are liquidation proceedings; note, however, that special liquidation is primarily intended to transfer the 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 liquidation was not initially available under the Bankruptcy Code (it was introduced at a later stage), and the provisions on special liquidation were very recently amended and finally abrogated by the Latest Amendments; actual completion of special liquidation proceedings depends on the time required in each case for the preparation by the liquidator of the assets inventory. However, the rehabilitation agreement, restructuring plan and special liquidation 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 includes provisions 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. 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 agreement proceedings (Articles 99–106 of the Bankruptcy Code) are collective pre-insolvency proceedings and are available on the application of the debtor, provided that 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 the debtor will become insolvent unless rehabilitated. 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.

The Bankruptcy Code (as amended by the Latest Amendments) enables the parties to reach a private rehabilitation agreement without the prior opening of formal rehabilitation proceedings; the rehabilitation agreement can then be ratified by the court provided certain criteria are met.

The application must be supported by an expert report (otherwise the application is inadmissible) on the debtor’s financial condition (including a list of the debtor’s assets and creditors, secured and unsecured), restructuring prospects and whether the debtor’s restructuring may inflict detriment on creditors’ collective recoveries. This is intended to protect creditors against an abuse of the process where the debtor is not reasonably capable
of being restructured: the expert report must confirm that the creditors’ recoveries would not be higher if they enforced their security (if any) or the debtor was subject to bankruptcy proceedings. Eligible experts are banking institutions, certified auditors and auditing firms.

There is no general obligation for the debtor to inform third parties of an application for a rehabilitation agreement.

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 amendments of the financial terms of the creditors’ claims, the conversion of debt into equity, intercreditor arrangements (including by designation of new or different classes of senior and subordinated debt), a reduction of the amount of the creditors’ claims, a sale of assets of the debtor, 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, a stay of individual creditor enforcement for a specified period following ratification of the agreement (such a stay is not binding on dissenting creditors beyond three months), the appointment of a person to monitor compliance with the terms of the rehabilitation agreement or additional payments to be made by the debtor 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 cancelling the rehabilitation agreement. It may also include conditions precedent with respect to all or any of its terms, in which case there must be a long-stop date within which any such condition precedent must be satisfied (but not later than six 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. The Latest Amendments provide for court protection seeking to remedy unreasonable delays or objections on the part of the shareholders of the insolvent debtor by appointing a special representative authorised to exercise their voting rights, to efficiently enable the debtor and the creditors to implement a restructuring scheme, namely when the debtor’s net asset position is negative.

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:

- it is likely that the debtor will remain viable following the ratification of the rehabilitation agreement;
- the rehabilitation agreement is not likely to be detrimental to creditors’ collective recoveries;
- 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;
- 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
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: (1) the agreement includes an explicit statement by the contracting creditors that they agree to the content of the business plan accompanying the rehabilitation agreement; (2) 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 (3) 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.

**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. 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; this is the case for the majority of bankruptcy proceedings. Otherwise, the exit route is by way of a rehabilitation agreement (if so requested by the debtor upon filing for bankruptcy) or by way of a restructuring plan. Alternatively, the bankruptcy proceedings may terminate with a declaration of reorganisation of the debtor (if the debtor is able to pay its pre-bankruptcy debts in full). The proceedings will also lapse after a period of 10 years from the date of the bankruptcy declaration or the final approval of a restructuring plan, and in any case after a period of 15 years from the declaration of bankruptcy or the final approval and 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 liquidation

Special liquidation in operation, regulated by Article 106(ia) of the Bankruptcy Code as amended by the Latest Amendments (effective from 19 August 2015), was available until 22 December 2016 to debtors with a proven inability to pay their due monetary obligations in a general and permanent manner (cessation of payments), on application of the debtor or of creditors representing at least 20 per cent of creditors’ claims. The hearing date is set within 20 days of submission of the application, and the judgment of the court must be issued within one month of the hearing.

The application for the opening of special liquidation proceedings is published with the General Commercial Registry, which is available to the public for inspection, and (if submitted by creditors) must be notified to the debtor. The application may be supported or opposed by creditors (in case of opposition, by creditors representing at least 60 per cent of creditors’ claims, including at least 40 per cent of secured claims). The court judgment placing a debtor into special liquidation and appointing a liquidator is non-appealable, subject only to opposition by third parties that did not participate at the hearing because they were not duly invited. A court judgment rejecting an application for the placement of the debtor into special liquidation is subject to appeal within 30 days of publication of the judgment and the hearing of the appeal must take place within two months of filing of the appeal.

Following placement into special liquidation, the liquidator must promptly draw an inventory of the debtor’s assets and prepare a tender offer document in order to invite interested parties to submit binding offers at a cash price payable upon signing of the transfer agreement. The debtor’s assets must be sold within 12 months of the preparation by the liquidator of the inventory report; this period may be extended by the court for a further six-month period. If these deadlines are not met, the special liquidation proceedings are automatically terminated and, if at that time a bankruptcy application is pending, it is examined by the court.

v Control of insolvency proceedings

All insolvency proceedings under the Bankruptcy Code are opened by court judgment (with the exception of the possibility of reaching a rehabilitation agreement, which is 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.

With the exception of bankruptcy and special liquidation, creditors cannot commence any other type of insolvency proceedings in respect of a debtor, but they can participate in the proceedings by lodging their claims, supporting (or opposing) various steps of the proceedings (where permitted under the Bankruptcy Code) and also participating 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 or other creditors, 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.

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.

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 (IMF, EC and ECB). 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.3 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;4,5 the recapitalisation of the Greek systemic banks was successfully completed within 2015.

Within the context of the ESM Financial Assistance Facility Agreement specific deliverables are 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 Latest Amendments were introduced as part of these deliverables. The second review of the ESM Financial Assistance Facility Agreement was recently concluded, and there remains to be seen whether there will be a debt relief for the Hellenic Republic, in order for the public debt to become sustainable.

GDP remained flat in the last three years, with a positive development in the first quarter of 2017 (+0.4 per cent), combined with an increase of investment cost (+13.6 per cent after +15.2 per cent in the first quarter of 2016) and positive growth of household consumption: (+1.7 per cent, against -0.7 per cent in the first quarter of 2016). 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 last two years, supported by ongoing fiscal consolidation. However, the remaining (though relaxed) capital controls, the volume of non-performing loans and the limited access to financing continue to hold back investment, while poverty and inequality remain among the highest in the euro area.6

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3 Ibid.
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 18 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 4336/2015 (which, among others, includes the Latest Amendments and amendments to Law 3869/2010 on over-indebted individual debtors) was 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.

Law 4335/2015 was also enacted as a prior action; it amends the Code of Civil Procedure (with a view to expediting court and enforcement proceedings) and, as discussed in Section I.vii, also transposes the BRRD into Greek law.

The implementation of the BRRD by virtue of Law 4335/2015 is material for the purposes of the recapitalisation of the Greek banks (expected to be completed by the end of 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.

A most significant change introduced by the Latest Amendments concerns insolvency practitioners. The functions of a bankruptcy officer, mediator, representative of creditors or liquidator (as the case may be under the Bankruptcy Code, depending on the type of proceedings) will be carried on by an individual or legal entity registered in a special register and qualified to act as insolvency practitioner. A presidential decree is expected to be issued on recommendation of the Minister of Justice providing for the necessary formal and substantive qualifications of insolvency practitioners, their appointment and termination of appointment, their powers and duties and their supervision and liability.
Chapter 9

HONG KONG

Joanna Charter

I INSOLVENCY LAW, POLICY AND PROCEDURE

i Statutory framework and substantive law

On 3 March 2014, the rewrite of Hong Kong company law culminated with the coming into effect of the new Companies Ordinance. Corporate insolvency in Hong Kong was outside the remit of this initial rewrite phase, and so remains primarily governed by the remaining provisions of the old companies ordinance, renamed the Companies (Winding Up and Miscellaneous Provisions) Ordinance (CWUMPO), and amended by the Companies (Winding Up and Miscellaneous Provisions) Amendment Ordinance (Amendment Ordinance), which came into effect on 13 February 2017. The changes to the CWUMPO effected by the Amendment Ordinance are discussed further in Section I.ii.

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.

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.

ii Policy

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

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1 Joanna Charter is a consultant at Clifford Chance. Joanna would like to acknowledge the original author of this Chapter, Mr Mark Hyde, with whom Joanna co-authored the second, third and fourth editions of this text.

2 The operation of certain provisions (including those relating to clawback of remuneration, loss-absorbing capacity, the requirement for contractual bail-in and the suspension of termination rights) will come into force when further secondary rules are made and/or on a date to be appointed by the Secretary for Financial Services and the Treasury.
demise of the corporate entity and likely present severe difficulties in saving the underlying business. Looked at from the perspective of the debtor company, a fairly entrepreneurial spirit is prevalent in Hong Kong and the lack of any real and effective sanction, when compared with other jurisdictions, against directors for allowing a company to continue to trade when in ‘the twilight zone’ does little to focus the minds of directors of troubled companies.

The Amendment Ordinance focused on reforms to the existing legislative framework, the main thrust being the enhancement of protection for creditors, combined with improvements to efficiency and accountability.

The key changes implemented when the Amendment Ordinance came into force are:

\(a\) clarifications around the role and powers of a provisional liquidator as well as increasing the level of supervision that can be exercised by the courts;

\(b\) closer examination of persons that can be appointed (and disqualified from being appointed) as liquidators, including statutory disclosure of relevant relationships and a prohibition on acting where conflicts of interest exist, as well as provisions setting out the basis for remuneration and tenure of office of liquidators. However, the role of liquidator is still not a regulated insolvency profession in Hong Kong;

\(c\) modernisation of the mechanics by which a committee of inspection (COI) can operate alongside a liquidator, to encourage participation of creditors and contributories;

\(d\) modernisation of the law on voidable transactions, including the introduction of stand-alone provisions on unfair preferences and ‘transactions at an undervalue’ and the extension of the vulnerability period for a floating charge created in favour of an associated person to two years prior to the commencement of the winding up; and

\(e\) new provisions for civil liability of directors and members in connection with a redemption or buy-back of shares out of capital where such redemption or buy-back took place in the year before the commencement of the winding up.

The Amendment Ordinance did not, however, introduce either a corporate rescue or insolvent trading regime.

The introduction of 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. A further consultation in 2009 built on the previous work, and there have been no significant changes to the method of corporate rescue first suggested, which is to be known as ‘provisional supervision’. The process would be 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) starting automatically on the entry of the company into provisional supervision and the appointment of an independent person (the provisional supervisor) to take temporary control of the company and consider options for rescuing it. The stated aim is that provisional supervision would mainly take effect through out-of-court arrangements, saving time and money.

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 such company.

The stated intention \(^3\) was that an amendment bill introducing corporate rescue and insolvent trading would be introduced to the Legislative Council in 2017 or 2018; to date, no

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such bill has been announced. A body of representatives from across the insolvency industry in Hong Kong has been formed with the aim of seeking further amendments in the area of cross-border insolvency proceedings, to develop the scheme of arrangement regime with automatic stay provisions and to permit the provisional liquidation regime to function as a restructuring tool. Whether these further amendments can (or should) be introduced as part of an amendment bill dealing with corporate rescue and insolvency trading remains to be seen.

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.

Liquidation

Liquidation is also referred to as ‘winding up’, of which there are two types:

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 provisional liquidator (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. 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, but a stay on proceedings against the company arises on the making of a winding-up order and on the appointment of a PL.4

4 Section 186 of the CWUMPO.
In *Re: Keview Technology (BVI) Ltd* the Court of First Instance considered the power of the court to legitimately expand the role of a PL to implement a corporate rescue plan that was supported by the creditors. The power of the court to vary an order appointing a PL was restated. It was held that the court would need to determine whether the context was conducive to an expansion of the PL’s powers on a case-by-case basis, but the arguments put forward by the official receiver that current legislation did not permit PLs to act as ‘provisional supervisors’ were rejected. The court considered English case law and precedent such as *Re English and American Insurance Co Ltd*, where the option of appointing a PL following the presentation of a winding-up petition had been utilised to combat the difficulties where administration was not at the time available to certain entities (for example, insurance companies).

In *Re: Legend International Resorts Ltd (Court of Appeal)*, the narrow circumstances in which *Re Keview* might be applied to permit a PL to undertake a supervisory role were demonstrated. 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 had 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 extra powers being given to the PL. 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.

While the scope of *Re Legend* remains uncertain, in the recent case of *Re China Solar Energy Holdings Ltd* the court (at first instance) took the view that there was nothing wrong in principle with the practice of including powers of restructuring as a standard order when appointing a PL. An alternative approach was adopted in *Z-Obee Holdings Ltd* where the Hong Kong winding-up petition of a company incorporated in Bermuda was stayed and the Hong Kong-appointed PLs dismissed in order to allow the appointment of provisional liquidators with a specific restructuring power (as allowed under the Bermudian legislation) in Bermuda. Once appointed, the Bermudian provisional liquidators were subsequently granted recognition in Hong Kong.

**Ancillary proceedings**

Local procedures 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.

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6 *Re Highfield Commodities Ltd* [1985] 1 WLR 149 applied.
7 [1994] 1 BCLC 549.
9 *Re Keview, Re Luen Cheong Tai International Holdings Ltd* [2002] 3 HKLRD 610 considered.
12 HCMP 663/2017.
13 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.14 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. Responsibility for leading the meeting of creditors is initially placed on the chairman (usually a director of the company), who will be responsible for the admission and rejection of creditors’ claims for voting purposes. Creditors must be provided with a ‘statement of affairs’, which, inter alia, particularises the assets, debts and liabilities of the company, the names of its creditors and the details of any security held by any creditor.15

The chairman 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.16 The usual practice in Hong Kong is for two liquidators to be appointed who will act jointly and severally. A 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 submitted 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,17 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;18
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.

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14 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.
15 Section 241(3A) of the CWUMPO particularises all the information required to be presented in a statement of affairs.
16 Section 242 of the CWUMPO.
17 Under Section 177(1)(f) of the CWUMPO.
18 The Amendment Ordinance has introduced a prescribed form of statutory demand.
A total of 458 winding-up petitions were submitted to the Hong Kong High Court in 2016, and 265 had been submitted up to 31 August 2017.¹⁹

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. 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:

- **a** the company;
- **b** any creditor or creditors;
- **c** a contributory or contributories;
- **d** the official receiver in respect of a company that is being wound up voluntarily;
- **e** the Registrar of Companies;
- **f** 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);
- **g** the SFC can petition in the public interest in respect of listed companies ²⁰ and leveraged foreign exchange traders; and
- **h** 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 PL (unless one has been previously appointed). The PL must then call 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.

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¹⁹ 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.

²⁰ 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.
**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.

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. 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. 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. 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.

**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; the order may be rescinded should further assets of the company come to light;

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);

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; and

d conversion of a compulsory liquidation into a CVL: This concept is unusual, and it has rarely been used.

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21 Such a power exists under Section 255(1) of the CWUMPO in respect of a CVL.
22 Section 244(1) of the CWUMPO; in the absence of the COI, the creditors may fix the remuneration of a liquidation.
23 Section 251(1)(a) of, and Schedule 25 to, the CWUMPO.
24 *Re Luen Lick Water Drainage Works Ltd*, CFI HCCW 209 [2002].
25 Sections 243(1) and 243(1A) of the CWUMPO.
26 Power of the court exists under Section 227F of the CWUMPO.
27 Power of the court exists under Section 227A of the CWUMPO.
28 Power of the court exists under Section 209 of the CWUMPO.
29 Power of the court exists under Section 209A of the CWUMPO.
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. 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.

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.

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 and to exercise its powers in support of a foreign resolution process.

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30 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.
31 Power to remove a liquidator exists under Section 252 of the CWUMPO (CVL) and Section 196(1) of the CWUMPO (court winding up).
vii Cross-border issues

Hong Kong has not enacted the United Nations Commission on International Trade Law Model Law on Insolvency and consequently there is no statutory process for the formal recognition of foreign proceedings. However, cross-border insolvency issues often arise in Hong Kong as a practical consequence of the fact that a number of companies that conduct their business in Hong Kong (and through Hong Kong into mainland China) are incorporated in such jurisdictions as the Cayman Islands and the British Virgin Islands. As a consequence, there may often be the need – where such a company enters a formal insolvency process in its place of incorporation – for there to be a parallel insolvency process in Hong Kong. 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 Hong Kong court will examine closely the need for such proceedings. In *Re Pioneer Iron and Steel Company Limited*\(^{32}\) 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*,\(^{33}\) were satisfied:

- 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.*\(^{34}\) 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.

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33 [2012] 6 HKC 246.
34 [2014] HKCU 900.
The three-part test set out above was affirmed by the Court of Final Appeal in the long-running *Yung Kee Holdings* 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.

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 has 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.

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 extent to which the type of order

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35 *Kam Leung Sui Kwan v. Kam Kwan Lai and Ors* (FACV No. 4 of 2015).
36 Similar, for example, to Section 426 of England’s Insolvency Act 1986.
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 which 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.\(^{40}\) In *BJB Career Education Co Ltd*,\(^{41}\) 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 *Re Pacific Andes Enterprises (BVI) Ltd*.\(^{42}\)

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.

### II INSOLVENCY METRICS

There continues to be a distinct lack of significant formal liquidation processes in Hong Kong.

The Hong Kong economy remains reasonably buoyant and there are, as a consequence, limited defaults on debt obligations.

### III PLENARY INSOLVENCY PROCEEDINGS

i **China Fishery Group Limited**\(^{43}\)

China Fishery Group Limited (CFG) is part of an integrated seafood conglomerate, known as the Pacific Andes Group (PAG). Reports put PAG as being the world’s 12th largest seafood company. Incorporated in the Cayman Islands but with its main operations based in Hong Kong and listed in Singapore, CFG’s main value comes from shareholdings it holds in certain Peruvian subsidiaries; these subsidiaries in turn have the largest anchovy catch quota in Peru. PAG has a reported debt burden of US$1.7 billion, with the China Fishery part of the structure responsible for approximately US$750 million of that amount. The China Fishery debt is comprised of a mix of bank and bond debt including a US$650 million club facility (the Club Facility), US$300 million senior unsecured notes due in 2019 and certain other unsecured trade facilities.

In 2014 and 2015, the El Niño weather pattern had an unfavourable effect on the anchovy stock in Peru. CFG began to face liquidity issues and in the autumn of 2015 missed a payment due on the Club Facility. On 25 November 2015, HSBC, one of the lenders under

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\(^{40}\) 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.

\(^{41}\) [2017] 1 HKLRD 113.

\(^{42}\) HCMP 3560/2016, [2017] HKEC 146.

\(^{43}\) Substantially all of the information in this section is taken from Debtwire, Legal Analysis, China Fishery Group, 11 August 2016, available at www.debtwire.com/intelligence/view/2283375.
the Club Facility, petitioned in Hong Kong on an *ex parte* basis for the winding up of, and appointment of, joint provisional liquidators (JPLs) to, both CFG and its Samoan subsidiary China Fisheries International Limited, and the Hong Kong court appointed the JPLs to both companies in Hong Kong. On 27 November 2015, HSBC filed a parallel petition in the Cayman Islands in respect of both companies, and the same JPLs were appointed by the Cayman Islands court.

In late December 2015, a deed of undertaking was entered into between CFG’s ultimate parent company, Pacific Andes International Holdings Limited, and the majority of the lenders under the Club Facility in favour of the Hong Kong court. In exchange for these undertakings, the majority of the lenders under the Club Facility agreed to support the removal of the JPLs and the dismissal of both the Hong Kong and the Cayman Island winding-up proceedings.

On 5 January 2016, the Hong Kong court removed the JPLs. Following the entry into a further deed of undertaking on 20 January 2016 in favour of HSBC and certain providers of trade finance (which included undertakings that a sale of the Peruvian operations would be concluded by 15 July 2016 and the repayment in full of the Club Facility and certain other facilities would be completed by 20 July 2016), the Cayman Islands proceedings were dismissed and the JPLs removed. By a consent order dated 29 January 2016, the Hong Kong winding-up proceedings were dismissed.

A sale of the Peruvian business did not complete by the deadline set out in the two deeds of undertaking. On 30 June 2016, CFG and certain of its non-Peruvian subsidiaries filed for Chapter 11 protection in the USA. At the same time, creditors ‘friendly’ to PAG commenced proceedings against the two key Peruvian subsidiaries in Peru, which in turn filed for Chapter 15 recognition of the Peruvian proceedings. The commencement of the Chapter 11 proceedings saw the founding family of PAG pitched against the lenders under the Club Facility (with an increasing level of support from lenders elsewhere in the China Fishery group and to PAG), with differing views on the form a restructuring should take. Meanwhile, the British Virgin Islands’ court accepted the commencement of winding-up proceedings in respect of, and the appointment of provisional liquidators to, a number of further CFG subsidiaries. In mid-August 2017, the US bankruptcy judge approved the sale procedures proposed by the bankruptcy trustee for a sale of the Peruvian operations: with no reserve price set, the market waits to see what price can be achieved.

**ii  Winsway Enterprises Holdings Limited (now E-Commodities Holdings Limited)**

Winsway is a Chinese coking coal trader and logistics services provider, focused on providing coal for China’s steelmakers. Incorporated in the British Virgin Islands, with operations in China and Hong Kong, and listed in Hong Kong, the company had been increasingly suffering because of the declining demand for Chinese steel. With the company’s chief executive describing its existing business as ‘unsustainable’, Winsway proposed to refocus on logistics and supply chain solutions.

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Hong Kong

Winsway had a debt pile that included both onshore secured and unsecured bank borrowings, and offshore US$500 million bonds due in 2016 (the Notes). In the face of declining demand for coking coal, in April 2015 Winsway missed a semi-annual coupon payment on the Notes. Having agreed a standstill with a substantial portion of noteholders, Winsway negotiated a restructuring that saw the holders of the Notes receive a combination of cash (raised through a further rights issue) and contingent value rights, plus a consent fee. The restructuring was effected by way of parallel schemes of arrangement in Hong Kong (sanctioned by the Hong Kong court on 17 May 2016) and the British Virgin Islands (sanctioned by the British Virgin Islands court on 2 June 2016). Because the Notes were governed by New York law, recognition of the Hong Kong and British Virgin Islands proceedings was sought under Chapter 15 of the Bankruptcy Code and obtained on 17 July 2016. Reports suggested that the total scheme recovery rate would be between 15.4 per cent and 18.6 per cent (increasing to 17.9 per cent and 21.1 per cent if the consent fee was also taken into consideration).

On 16 August 2016, Winsway announced that the Winsway group was expected to record a consolidated profit for the first half of 2016, which it attributed in part to the successful completion of the rights issue and the restructuring of the Notes. Winsway announced further net profits for the second half of 2016 and the first half of 2017.

iii Kaisa Group Holdings Limited

Kaisa is a China-based property development, property investment and property management company. Following a government block on presales in 2014, Kaisa defaulted on an offshore loan in early 2015, resulting in further blocks on presales by other onshore creditors. With total offshore debt of approximately US$2.6 billion (comprised of both bank debt and notes), the offshore bondholders realised that a restructuring would be preferable to an onshore bankruptcy. After protracted negotiations, a deal was hammered out with the offshore bondholders and implemented through parallel schemes of arrangement in Hong Kong (being the place where Kaisa carried out the majority of its business activity) and the Cayman Islands (being Kaisa’s place of incorporation) in June 2016. The schemes received overwhelming support from creditors holding about 99.9 per cent in value of the offshore debt and became effective in mid-July 2016. Because the offshore bonds were governed by New York law, recognition of the Hong Kong and British Virgin Islands proceedings was sought under Chapter 15 of the US Bankruptcy Code and obtained on 14 July 2016. The restructuring enabled Kaisa to swap its existing US$2.6 billion of offshore loans and notes into a combination of straight bonds, mandatorily exchangeable bonds and contingent value rights, certain of which it had redeemed by the end of the summer of 2017.

iv Mongolian Mining Corporation (MMC)

MMC is a Cayman Islands-incorporated company, listed in Hong Kong. Through its subsidiaries, MMC mines and sells coal, predominantly to the Chinese market for use in the manufacture of steel. MMC had a total debt stack of around US$765 million, including a syndicated loan, offshore bonds and a subordinated promissory note. As was the case with many other coking coal miners selling to the same market, from 2015 onwards MMC experienced increasing financial pressure resulting from the decline in Chinese steel production. In January 2016, MMC announced that it had begun work on a restructuring of its offshore bonds, but pressures continued to mount, and in March 2016 MMC missed an interest payment on its syndicated loan, cross-defaulting the bonds. Negotiations with and between MMC, the ad hoc committee of bondholders and the bank lenders grew increasingly fractious, and a deal could not be reached between the various parties. On 7 July 2016, MMC petitioned for its own winding up in the Cayman Islands, seeking the appointment of provisional liquidators for the purpose of effecting a restructuring of its debts. Negotiations continued until in early November 2016 MMC announced that it had reached agreement on the terms of a restructuring with the ad hoc committee of bondholders, the bank lenders and the holders of its subordinated promissory note. The restructuring duly took place through a simultaneous restructuring of the bond, syndicated loan and promissory note, using parallel schemes of arrangement in the Cayman Islands and Hong Kong to restructure the bonds and a consensual restructuring of the syndicated loan and the promissory note. Because the bonds were governed by New York law, recognition of the Cayman Islands scheme of arrangement was also sought and obtained under Chapter 15 of the US Bankruptcy Code. Taking effect on 4 May 2017, the restructuring enabled MMC to swap its existing syndicated loan, bonds and promissory note into a combination of a new syndicated loan, bonds, perpetual notes and shares. On 10 August 2017, MMC announced that it expected to record a consolidated profit for the first half of 2017.50

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.

I INSOLVENCY LAW, POLICY AND PROCEDURE

i Statutory framework and substantive law

The extant legal framework pertaining to bankruptcy and insolvency in India comprises several statutes.

The World Bank report on Doing Business ranks India as 136 out of 189 countries on resolving insolvency.² 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 cents per dollar.

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 months the Insolvency Code has been brought into effect.

Individuals and partnership firms

The Insolvency Code deals with insolvency for individuals and partnerships³.

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

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1 Justin Bharucha is a partner and Priya Makhijani is an associate 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,\(^4\) of entities other than those engaged in the financial and securities markets\(^5\) (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 (RBI)**

The RBI has prescribed certain mechanisms for debt restructuring and recovery.

The Banking Regulation (Amendment) Ordinance, 2017 of 5 May 2017 (the Ordinance) empowers the central government to authorise the 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\(^6\) 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 which the account will be referred for resolution under the Insolvency Code.

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\(^4\) I.e., 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’.

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, *inter alia*, on the ground that it violated Article 14 of the Constitution of India 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.

**Corporate debt restructuring**

Corporate debt restructuring (CDR) facilitates the restructuring of debt of viable corporate entities.

**Joint lenders’ forum**

The joint lenders’ forum (JLF) allows lenders to resolve the stress in the account with the intention of arriving at an early and feasible solution to preserve the economic value of the underlying assets including the lenders’ loans. Options include restructuring of the account if it is *prima facie* viable and the borrower is not a wilful defaulter, and recovery if the restructuring procedure does not appear feasible.

**Strategic debt restructuring**

Strategic debt restructuring applies where a consortium of lenders believe that an outstanding account can be revived by a change in the ownership and management of the borrower company. The JLF may convert all or part of the outstanding loan amount into equity of the borrower and change management.

**Rehabilitation of sick micro and small enterprises**

The RBI Guidelines for Rehabilitation of Sick Micro and Small Enterprises (RBI Guidelines) provide for the early detection of incipient sickness and prescribes the procedure for resolution of distress.

**Sustainable structuring of stressed assets**

The RBI has also recently promulgated a scheme for sustainable structuring of stressed assets (S4A Scheme), which mandates that the JLF engage the services of credible professional agencies to formulate a resolution plan that may involve: the current promoters of the borrower continuing in control; or the current promoters being replaced either by the JLF or third parties, including professionals, approved by the JLF.

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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.
ii Policy

Refreshingly, policy on insolvency is well developed in India but, not unusually, 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 Li, 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 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.

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8 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.

9 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 any lease or hire purchase contract that is deemed as a finance or capital lease under the Indian Accounting Standards or such other accounting standards as may be prescribed; (5) receivables sold or discounted other than any receivables sold on non-recourse basis; (6) any amount raised under any other transaction, including any forward sale or purchase agreement, having the commercial effect of a borrowing; (7) any derivative transaction entered into in connection with protection against or benefit from fluctuation in any rate or price and for calculating the value of any derivative transaction, only the market value of such transaction shall be taken into account; (8) any counter-indemnity obligation in respect of a guarantee, indemnity, bond, documentary letter of credit or any other instrument issued by a bank or financial institution; and (9) the amount of any liability in respect of any of the guarantee or indemnity for any of the items referred to in (1) to (8) above. The different rights of operational and financial creditors are set out at Annexure I (Rights of Operation and Financial Creditors).
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:

a. 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;

b. transferring, encumbering, alienating or disposing the debtor’s assets or legal rights or interest therein; and

c. institution of any suits or continuation pending suits or proceedings; and

d. an interim insolvency professional takes charge of the company.

The interim insolvency professional manages the company and, *inter alia*, constitutes a committee of creditors and formulates an information memorandum as to the prospects of the company. A resolution plan is drafted based on the information memorandum and must provide for, *inter alia*, repayment of debts and management of the company. The resolution plan, if then to be approved by 75 per cent of creditors, 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.

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10 In terms of Section 7 of the Insolvency Code.

11 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.


13 In terms of Section 8 of the Insolvency Code.

14 The scope and meaning of the term ‘dispute’ has been subject to litigation. See ‘Existence of dispute’.

15 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.

16 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.

17 A creditor’s vote is determined *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 *pro rata* share is calculated based on this classification.
Settlement by parties subsequent to admission of application

The Supreme Court recently 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 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.

It follows that a settlement may be possible after insolvency resolution has commenced but only if all persons concerned are party to the settlement and that settlement is permitted by the Supreme Court.

Emerging issues

Although jurisprudence under the Insolvency Code is nascent, two 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.

Existence of a dispute

The Insolvency Code 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 informing the operational debtor of the existence of a dispute in relation to the underlying debt for which the demand notice has been served.

Further to the notification of the relevant provisions of the Insolvency Code, there have 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.

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

19 In terms of Section 9 of the Insolvency Code.
20 In terms of Section 8(2) of the Insolvency Code.
absence of formal court of arbitration proceedings in respect of the same.\textsuperscript{22} 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.\textsuperscript{23}

While the position is in flux and the principles are evolving, genuine disputes raised in a timely manner and not merely to obstruct the insolvency resolution process have been upheld as disputes for the purpose of Section 8 of the Insolvency Code. Clearly, the institution of formal dispute resolution would only bolster that analysis, but, at present, there is scope to say that institution of formal dispute resolution is not essential for an issue to be classified as a dispute for the purpose of Section 8 of the Insolvency Code provided that there is genuine dispute which has been timely raised.

Of course, as the issue is evolving this position will be clear in the near term.

\textit{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.\textsuperscript{24} 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}.\textsuperscript{25}

However, the same bench, on a different occasion,\textsuperscript{26} held that a moratorium, if granted, would extend to personal properties of the promoters and directors of the corporate 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.

\textit{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:\textsuperscript{27}

\begin{itemize}
  \item costs relating to the insolvency resolution process and liquidation;
\end{itemize}

\begin{footnotes}
\item[22] Kirloskar Software Ltd v. Mobilox 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 Shivam Construction Company v. Ambience Pvt Ltd; Philips India limited v. Goodwill Hospital & Research Centre Limited; PK Ores v. Tractors India Private Limited; MGL Global Steel Pvt Ltd v. Eris Projects India Ltd.
\item[23] Annapurna Infrastructure Pvt Ltd & Ors v. Soril Infra Resources Ltd.
\item[24] Alpha and Omega Diagnostics (India) Ltd v. Asset Reconstruction Company of India Ltd.
\item[25] Sandria D’Souza and others v. Elektrans Shipping.
\item[26] Leo Duct Engineers & Consultants.
\item[27] Section 53 of the Insolvency Code.
\end{footnotes}
India

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;
e amounts owed to the government and debts due to a secured creditor for unpaid amounts post the enforcement of security interest;
f preference shareholders; and
g equity shareholders.

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.

In order 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.28

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 low29 and, effectively, the remedy may be availed of only by those at the bottom of the pyramid.30

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28 Section 52 of the Insolvency Code.
29 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.
30 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 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 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 National Company Law Appellate Tribunal (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;\(^3^1\) 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.\(^3^2\) However, this does not include assets of a foreign subsidiary of the corporate debtor.\(^3^3\)

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31 Sections 234 and 235 of the Insolvency Code.
32 Section 18 of the Insolvency Code.
33 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 30 June 2017 estimates that the gross NPAs of scheduled commercial banks in India increased by 0.4 per cent from 9.2 per cent in September 2016 to 9.6 per cent in March 2017 and that this ratio will increase to 10.2 per cent by March 2018. The telecommunication industry was identified as having the largest debt with negative profitability at the end of March 2017 with power, construction and iron and steel industries also identified as suffering from high leverage and interest burden.

According to a press release dated 12 May 2015 by CRISIL Limited (CRISIL), one of the leading credit rating agencies in India, the NPAs in the banking sector amount to approximately 4,000 billion rupees. CRISIL, in a report released in March 2016, has forecast that additional large exposure corporate accounts amounting to approximately 2,100 billion rupees may slip into the NPA category by March 2017. 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 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 1956,34 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 government in exploring other alternatives such as extradition and mutual legal assistance. Presently, extradition proceedings are being heard by an English court, and 4 December 2017 has been set as the final hearing date, with press reports suggesting that a verdict can be expected at the latest by February 2018.

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 implementation of 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

34 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.
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>Initiation of Corporate Insolvency Resolution Process</td>
<td></td>
<td></td>
</tr>
<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.</td>
<td>May file an application on occurrence of default.</td>
</tr>
<tr>
<td>2.</td>
<td>Default may only be with respect to debt owed to the applicant.</td>
<td>Default includes a default in respect of debt owed not only to the applicant but any other financial creditor.</td>
</tr>
<tr>
<td>3.</td>
<td>It is optional for operational creditors to propose a resolution professional in the application.</td>
<td>It is mandatory for financial creditors to propose a resolution professional in the application.</td>
</tr>
</tbody>
</table>

Committee of Creditors

| Meetings of Committee of Creditors |
| 4. | Operational creditors are not entitled to be a part of the committee of creditors. | Financial creditors constitute the committee of creditors. |
| 5. | 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. | All financial creditors have the right to be notified by the resolution professional before any meeting of the committee of creditors. |
| 6. | 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. | All financial creditors are entitled to attend the meetings of the committee of creditors. |

Voting Rights

| Submission of Financial Information to the Information Utility |
| 7. | Operational creditors are not entitled to vote at the meetings of committee of creditors. | Financial creditors are allowed to vote in proportion to the debt owed to each financial creditor at the meetings of committee of creditors. |
| 8. | It is optional for operational creditors to submit financial information to the information utility. | It is mandatory for financial creditors to submit financial information to the information utility. |

Punishment for False Information

| 9. | Imprisonment for a term ranging between 1 and 5 years or fine ranging between 100,000 and 10 million rupees. | Fine ranging between 100,000 and 10 million rupees. |

1. See Section 9(1) of the Insolvency and Bankruptcy Code, 2016.
2. See Section 7(1) 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.
10. See Section 24(3)(a) of the Insolvency and Bankruptcy Code, 2016.
15. See Section 215(3) of the Insolvency and Bankruptcy Code, 2016.
17. See Section 76 of the Insolvency and Bankruptcy Code, 2016.

35 Measured in terms of stressed and non-performing assets on lenders’ portfolios.
IRELAND

Robin McDonnell, Saranna Enraght-Moony and Karole Cuddihy

I INSOLVENCY LAW, POLICY AND PROCEDURE

i Statutory framework and substantive law

Ireland is a sovereign state in Europe and a member of the European Union since 1973. The legal system in Ireland is a combination of statute and common law in which a large emphasis is placed on precedent.

The principal statutes governing insolvency law in Ireland are as follows:

a the Companies Acts 2014, which came into operation on 1 June 2015, consolidating and replacing the Companies Acts 1963 to 2013;
b Regulation (EU) 2015/848 of the European Parliament and of the Council (applicable when a debtor has its centre of main interests (COMI) in an EU Member State) (the Recast Regulation);²
c the National Asset Management Agency Act 2009 (relevant from the perspective of statutory receivers appointed by the National Asset Management Agency); and
d the Irish Bank Resolution Corporation Act 2013 (which introduced the concept of Special Liquidation) (the IBRC Act).

ii Policy

Remedies in the area of insolvency and bankruptcy involved enforcement of security, realisation of a debtor’s assets and the penalisation of resisting debtors. In recent years, however, there has been a subtle shift towards a ‘rescue culture’ in respect of certain companies. This has been motivated by a desire to achieve value for all stakeholders.

For those businesses that are in difficulty but can demonstrate that they have a reasonable prospect of survival³ examinership remains an attractive model for formal corporate restructuring and recovery. Examinership is a rehabilitative procedure that, broadly speaking, is a hybrid of Chapter 11 in the United States and administration in England and Wales. It can be thought as a debtor-in-possession model.

Many businesses in Ireland borrowed significantly from 2000 to 2008, and much of that borrowing was used to fund property acquisitions. From 2008 onwards, there was a

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1 Robin McDonnell is a partner and Saranna Enraght-Moony and Karole Cuddihy are associates at Maples and Calder.
2 Regulation 2015/848 (the Recast Regulation) was adopted by the European Parliament on 20 May 2015. The Recast Regulation repeals and replaces EU Insolvency Regulation 1346/2000 (the Insolvency Regulation) and applies to insolvency proceedings commenced after 26 June 2017. The Insolvency Regulation continues to apply to proceedings commenced before that time.
3 This is a threshold enshrined in Section 509(2) of the Companies Act 2014.
prevailing policy of enforcement by the lending institutions in respect of businesses and individuals who have breached covenants in their agreements. The lending institutions enforced in two ways: by the appointment of receivers to secured property or by issuing proceedings in the Irish courts to obtain judgments against defaulting debtors (or both). Over the past few years, large tranches of distressed loans and associated security have been purchased by venture capital and private equity funds. Even as the Irish economy has recovered, a significant amount of this distressed debt remains.

### iii Insolvency procedures

The formal insolvency and rescue procedures available in Ireland to wind up or rescue companies are:

- **a** creditors’ voluntary liquidation;
- **b** compulsory or court liquidation;
- **c** examinership; and
- **d** statutory scheme of arrangement.

Receivership is a distinct enforcement remedy available to secured creditors only and does not involve the commencement of insolvency proceedings. The Companies Acts recognise and protect the rights of secured creditors to enforce their security in accordance with its terms, and secured creditors can, as a general rule, enforce or realise their security outside an Irish winding-up process.4

#### Creditors’ voluntary liquidation

To commence a creditors’ voluntary liquidation (CVL), the company, acting through its members (in general meeting), resolves that it cannot, because of its liabilities, continue in business and that it should be wound up voluntarily.5

The members’ meeting at which the winding-up resolution is passed must be held on the same day or the day before a meeting of the company’s creditors.6 The winding up commences once the members’ resolution has been passed and, thereafter, the company must cease to carry on its business except insofar as is necessary to facilitate the liquidation.

The creditors almost entirely control the CVL process, although any interested party can apply to the Irish High Court (the High Court) for directions to determine any question arising during the course of the winding up.7

Once appointed, the function of the liquidator is to realise all of the assets of the company and to distribute the proceeds of sale of those assets to creditors in accordance with the priorities prescribed by the Companies Acts and the Rules of the Superior Courts.

The liquidator conducts the liquidation independently and reports on the conduct of the liquidation to meetings of the members and creditors at the end of each year. The liquidator is also obliged to submit a report to the Office of the Director of Corporate Enforcement following his investigation into the affairs of the company.8

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4 Section 440 of the Companies Act 2014 provides that holders of floating charges are subordinate to the claims of preferential creditors set out in Section 621 of the same Act.
5 Section 590 of the Companies Act 2014.
6 Section 587 of the Companies Act 2014.
7 Section 631 of the Companies Act 2014.
8 Section 682 of the Companies Act 2014.
Compulsory liquidation

A High Court or compulsory liquidation is commenced by the presentation of a petition for the winding up of a company, which can be presented by:

- the company itself;\(^9\)
- a creditor of the company;\(^10\)
- a member or contributory of the company;\(^11\)
- the Director of Corporate Enforcement;\(^12\) or
- the Registrar of Companies.\(^13\)

A court-appointed liquidator is subject to the supervision of the High Court. The liquidator is an officer of the court and must conduct the liquidation in accordance with the provisions of the Rules of the Superior Courts and, in particular, the Companies Act 2014. Formerly, many of a court-appointed liquidator’s powers were exercisable only with the sanction of the High Court. The Companies Act 2014 has changed the position in this regard to one where the requirement is to notify creditors of the exercise of certain powers. There will also be a greater role for committees of inspection in court liquidations. In addition, it remains open to the liquidator to seek directions from the court in an appropriate manner as to the carrying out of his or her functions.

Where the company in question is insolvent, it is typically a creditor who applies to have it wound up compulsorily on the grounds that the company is unable to pay its debts as they fall due for payment. It may, however, also be the company’s members or the company itself that presents a petition before the court.

The powers of the directors will cease once an order has been made to wind up the company, but the liquidator may request their assistance and any necessary information from them. The shareholders retain their residual powers and have a proprietary interest in the liquidation of the company.

When the liquidator has carried out all of his functions, he or she is required to apply to the High Court for final orders that will include an order discharging him or her as liquidator. Discharge occurs only once the liquidator has made all required payments pursuant to the final orders.

The High Court may, if satisfied that the urgency of the situation warrants it, appoint a provisional liquidator pending the hearing of the winding-up petition, for the purpose of continuing the company’s business or preserving its assets or where an immediate investigation into the affairs of the company is necessary.\(^14\)

Transaction avoidance in creditors’ voluntary liquidations and compulsory liquidations

A transfer of property by an insolvent company to a creditor within six months of the commencement of the winding up of that company, if made with a view to giving such creditor a preference over other creditors, may be deemed an ‘unfair preference’ and, therefore,

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9 Section 569 of the Companies Act 2014.
10 Ibid.
11 Section 599 of the Companies Act 2014 and Section 569 of the Companies Act 2014.
12 Section 761 of the Companies Act 2014.
13 Section 569 of the Companies Act 2014.
14 Section 573 of the Companies Act 2014.
The relevant provision is only applicable if, at the time of the transfer, the company was unable to pay its debts as they fell due. Essentially, for the transaction to amount to an unfair preference, the company must positively intend to improve the position of the beneficiary creditor in the event of the company’s liquidation. Case law in this area indicates that it must have been the ‘dominant intention’ of the company to prefer the creditor in question.

Where the preferential transaction is made in favour of a ‘connected person’, the transaction will be invalidated where made within two years of the commencement of the winding up; a ‘connected person’ includes a related company. In addition, unless the contrary is shown, the preferential transaction in favour of a connected person is deemed to have been made with a view to giving such person a preference over other creditors, and to be an unfair preference. Consequently, the burden of proof is on the connected person to show that the transaction was not fraudulent.

Further, where property of a company has been improperly transferred, the High Court may order the return of the property to the company on the application of a liquidator, creditor or contributory of the company. To apply for such an order, it must be shown to the satisfaction of the court that the effect of such disposal was to perpetrate a fraud on the company, its creditors or members. Unlike the unfair preference provision, there is no operative time limit for the making of the fraudulent disposition. There is also no requirement that, at the time of the disposition, the company was unable to pay its debts as they fell due – all that is required is a disposal of property where the effect of such disposal is to perpetrate a fraud on the company, its creditors or members.

A floating charge on the undertaking or property of a company created in the 12 months before the commencement of its winding up may be rendered invalid (except to the extent of monies actually advanced or paid, or the actual price or value of the goods or services sold or supplied to the company at the time of or subsequent to the creation of, and in consideration for, the charge) unless it is proved that the company was solvent immediately after the creation of the charge. Where the floating charge is created in favour of a ‘connected person’, the period of 12 months is extended to two years.

Where a company is being wound up by the High Court, any disposition of the property of the company (including things in action) and any transfer of shares or alteration in the status of the members of the company, made after the commencement of the winding up, shall, unless the court otherwise orders, be void.

In certain circumstances, a liquidator may be entitled to disclaim onerous covenants, unprofitable contracts or any other property that is unsaleable or not readily saleable. The liquidator must apply to the High Court within 12 months of the commencement of the winding up, seeking the court’s leave to disclaim. Any person suffering loss or damage as a result of a disclaimer will be deemed a creditor of the company in the amount of such loss or damage and may prove for that amount as a debt in the winding up.

15 Section 604 of the Companies Act 2014.
16 Section 220 of the Companies Act 2014.
17 Section 443 of the Companies Act 2014.
18 Section 597 of the Companies Act 2014.
19 Section 615 of the Companies Act 2014.
Examinership

The examinership procedure is the most common form of formal corporate reorganisation under Irish law. Examinership is a remedial process whereby an insolvent company is placed under the protection of the High Court (or, in certain limited circumstances) to enable a court-appointed examiner to investigate the company’s affairs and report to the court on the prospects of the company’s survival. If the company is deemed capable of being rescued, the court may sanction proposals for a scheme of arrangement formulated by the examiner. A scheme usually involves the part-payment of the company’s creditors. The overall aim is the survival of the business of the company and the preservation of employment.

A petition for the appointment of an examiner may be presented to the court by:

a. the company;
b. the directors of the company;
c. a creditor (including a contingent or prospective creditor) of the company; or
d. shareholders holding at least one-tenth of the shares carrying the power to vote at general meetings at the time of presentation of the petition.

The effect of presenting a petition for the appointment of an examiner is that for 70 days from the date of presentation of the petition (which may be extended by a further 30 days) the company shall be deemed to be under the protection of the High Court. This means that creditors are prevented from taking the type of action that they would normally be entitled to take (e.g., enforcing security or issuing proceedings against the company).

The court shall not confirm the examiner’s proposals:

a. unless they have been approved by at least one class of creditors whose interests would be impaired by the implementation of the proposals;
b. if the sole or primary purpose of the proposals is the avoidance of tax; and
c. unless the court is satisfied that the proposals are fair and equitable and not unfairly prejudicial to any interested party.

An examiner does not have an executive role in the company to which he or she is appointed and does not enjoy the same powers as a liquidator (unless he or she applies to court for one or more of such powers). The powers of the directors survive both the presentation of a petition and the appointment of an examiner. As such, the directors remain responsible for the day-to-day management of the company.

If the examiner’s proposals are confirmed by the High Court, they become binding on all members and creditors with effect from such date as the Court may fix. If, during the course of the examinership, the examiner comes to the view that he or she cannot formulate proposals for a scheme of arrangement, he or she will immediately inform the Court, which will invariably end the examinership and place the company into compulsory liquidation.

Statutory scheme of arrangement

A scheme of arrangement is a statutory procedure provided for under Irish law whereby a company puts forward compromise proposals to its members and creditors. The members

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20 Section 509 of the Companies Act 2014.
21 Section 510 of the Companies Act 2014.
22 Section 541(7) of the Companies Act 2014.
and creditors then meet and vote on the scheme. At each class meeting, the scheme must be approved by a majority in number representing 75 per cent in value of the creditors voting whether in person or by proxy at the meeting. Provided the statutory voting majorities are obtained, the company can seek the sanction of the High Court to make the scheme binding on all parties.

The High Court will only confirm a scheme if it is satisfied that:

a. sufficient steps have been taken to identify and notify all interested parties;
b. the statutory provisions and procedures and all directions of the court have been complied with;
c. the classes of members and creditors were properly constituted;
d. the prescribed majorities at each meeting acted bona fide and no issue of coercion arises; and

e. the compromise or arrangement is ‘fair and equitable’ such that an intelligent and honest person, a member of the class concerned, acting in respect of his or her interest, might reasonably approve.

The scheme becomes effective once the High Court order sanctioning the scheme is filed in the Irish Companies Registration Office. The scheme of arrangement process is seldom used in Ireland. Perhaps the principal reason for companies favouring the examinership process is the immediate and extensive protection that is afforded once an examinership petition is presented. In addition, examinership has a lower voting threshold for creditor class approval (i.e., a simple majority in number and value). It should also be noted that in an examinership, it is sufficient (in order for proposals for a scheme of arrangement to put before the court for approval) that the proposals have been approved by one class of creditors.

A statutory scheme of arrangement has the advantage that the directors can control the process to a greater extent than in an examinership. The Companies Act 2014 streamlined the scheme of arrangement process, such that the number of court appearances has been reduced from as many as three under the old regime to now possibly only one. The intention behind this streamlining was to reduce the cost and to increase the attractiveness of the scheme of arrangement procedure.

iv Special regimes

Special liquidation of Irish Bank Resolution Corporation

The Irish government enacted the IBRC Act, in February 2013, to secure and stabilise the assets of one of the most distressed Irish banks, Irish Bank Resolution Corporation (IBRC) (formerly known as Anglo Irish Bank Corporation Limited). The IBRC Act provides for the winding up of IBRC within a novel regime known as a ‘special liquidation’.

Joint special liquidators were appointed to liquidate IBRC. Portfolios of assets including the mortgage book of IBRC have been identified by the special liquidators who will oversee a process of independent valuation and the sale of such assets to third parties. The proceeds of these sales will be used to repay creditors in accordance with the priorities prescribed by the Companies Acts.

The Special Liquidation Order (the Order) made by the Minister for Finance to commence the special liquidation provides:

a. for an immediate stay on all proceedings against IBRC;
b. that no further actions or proceedings can be issued against IBRC without the consent of the High Court;
that no action or proceedings for the winding up of IBRC or the appointment of a
liquidator or an examiner can be taken, issued, continued or commenced;
for the removal of any liquidator or examiner appointed prior to the Order; and
that it constitutes notice of termination of employment for each employee with
immediate effect.

The appointment of a receiver pursuant to a debenture or charge created by IBRC does not
constitute proceedings for the purposes of the Order.

The special liquidators have the same duties and powers as a liquidator in a compulsory
liquidation, except that they are appointed by the Minister for Finance and are obliged to
comply with the instructions given to them by the Minister and act in the interests of the
Irish taxpayer.

Administration of insurance companies

The Insurance (No. 2) Act 1983, as amended, introduced a procedure designed to manage
insurance companies that are insolvent, and only applies to non-life insurance companies.
This Act provides for the appointment of an administrator to take over the management of
an insurer with a view to re-establishing the business on a sound financial footing where it
can also comply with the regulatory requirements. The procedure is not restricted by any
timescale and is supported by funding from the Insurance Compensation Fund, which
ensures that all creditors are paid in full.

Cross-border issues

Both the original Insolvency Regulation, and its successor the Recast Regulation, apply to
a company that has its COMI in an EU Member State. Under these Regulations, ‘main’
insolvency proceedings may only be opened in Ireland in respect of a company (including a
foreign-registered company) having its COMI in Ireland.

In Ireland, the insolvency proceedings that could have been opened for the purposes of
the Insolvency Regulation included compulsory liquidations, creditors’ voluntary liquidations
(with confirmation of the High Court) and examinerships. The Recast Regulation extends
the scope of the regime to include pre-insolvency rescue proceedings and certain interim and
debtor-in-possession proceedings.

A foreign company incorporated and having its COMI in a country, which is not
subject to the provisions of the Recast Regulation, may be wound up by the High Court even
if it has not carried on business in Ireland and has no assets in the jurisdiction, provided that:

- a sufficiently close connection can be established between the company’s business and
  Ireland;
- there is a reasonable possibility that a winding-up order will benefit those applying for
  it; and
- the High Court can exercise jurisdiction over one or more persons interested in the
distribution of the company’s assets.

No such foreign company may be wound up voluntarily in Ireland.

24 PMPA Insurance plc and Quinn Insurance are two insurance companies that have gone into administration
under the Insurance (No. 2) Act 1983.
The Insolvency Regulation was introduced to improve the efficiency and effectiveness of insolvency proceedings that have cross EU-border effects by harmonising the provisions in each Member State concerning jurisdiction, recognition and applicable law. This approach has largely been repeated in the new Recast Regulation. However, a number of important new provisions have also been advanced.

The Recast Regulation, like the Insolvency Regulation, provides for the automatic recognition of judgments of other Member States opening insolvency proceedings unless it would be manifestly contrary to public policy, as a matter of Irish law, to give recognition to such a judgment. Where main proceedings have been initiated in one Member State, they shall produce the same effects in any other Member State. Furthermore, the effects of these proceedings may not be challenged by any other Member State.

The Recast Regulation also provides for the recognition and enforceability of insolvency judgments across Member States. A liquidator in main proceedings and a liquidator in secondary proceedings are bound to cooperate with each other and to share information with each other.

However, the Recast Regulation goes significantly further than its predecessor in a number of important respects. The Recast Regulation has now introduced greater safeguards to prevent abusive forum shopping. It provides for a formal group coordination procedure where insolvency officers have been appointed in different Member States to companies in a group, and it also improves transparency by requiring Member States to provide databases of insolvency and restructuring proceedings that have been opened pursuant to the Regulation.

II INSOLVENCY METRICS

After experiencing unprecedented levels of growth since the mid-1990s, Ireland entered a recession in 2008 amid the global economic downturn. Ireland began to emerge from the downturn in 2013, and overall economic indicators show that the modest recovery which was observed during 2014 continued, at a markedly increase pace during 2015. This strong performance has continued throughout 2016 and into 2017.

Unsurprisingly, during the recession the level of activity in the insolvency sector grew significantly. This can be seen in the fact that corporate insolvencies for 2012 totalled 1,684, a 117 per cent increase on the 2008 total.

In 2013, the total number of corporate insolvencies fell to 1,365, which represented a 19 per cent drop from the total number in the previous year. The reduction was largely attributable to a significant reduction in the number of creditors’ voluntary liquidations. The downward trend continued during 2014–2016. The figures to hand for the first six months of 2017 show continued reductions in the total number of corporate insolvencies.

25 Article 19 of the Recast Regulation.
26 Article 20 of the Recast Regulation.
27 Article 32 of the Recast Regulation.
28 Article 43 of the Recast Regulation.
29 Article 4 of the Recast Regulation.
30 Chapter V of the Recast Regulation.
31 Article 24 of the Recast Regulation.
32 All insolvency statistics have been sourced from www.insolvencyjournal.ie.
The decline in the number of creditors’ voluntary liquidations looks set to continue, but the number of receiverships remains steady, which may be attributable to an increase in enforcement of security by loan purchasers.

<table>
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<tr>
<th>Year</th>
<th>Receiverships</th>
<th>Examinerships</th>
<th>Creditors voluntary liquidations</th>
<th>Compulsory liquidations</th>
<th>Total</th>
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<td>62</td>
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<td>2017 (January to June inclusive)</td>
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<td>14</td>
<td>268</td>
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III PLENARY INSOLVENCY PROCEEDINGS

The following is a brief summary of some of the most legally significant decisions in insolvency cases in the past 12 months.

i English v. Promontoria (Aran) Limited

This case concerned a challenge by a borrower who sought to undermine the position of a loan purchaser.

The High Court (Murphy J) initially placed a stay on the appointment of a receiver, on the basis that the secured creditor (who had purchased the distressed debt from the original lender) had not put forward sufficient evidence to establish its legal entitlement to effect the appointment.

It was not in dispute that the bank was entitled to assign the debt; the issue was whether Promontoria had proved that it was the assignee of the debt.

Promontoria exhibited the relevant portions of each deed and the entirety of the deed of conveyance and assignment. It also revealed the identities of those who executed and affixed the company seal to the deeds as well as the relevant powers of attorney. The High Court (Murphy J) found that Promontoria had provided *prima facie* proof of the transfer. It then fell to the plaintiff to seek to rebut this.

The plaintiff, Mr English, did not put forward affidavit evidence. Rather, he advanced a number of legal arguments to the effect that: (1) the evidence given as to the assignment was insufficient; and (2) the intended assignment was flawed.

It was argued that Promontoria had not proved that proper notice of assignment had been given to the debtor, as required by Section 28(6) of the Supreme Court of Judicature (Ireland) Act 1887. The Court rejected this argument and held that proper notice had been given.

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It was also argued that a director who executed the instrument of appointment of the receiver was in breach of Section 142 of the Companies Act 2014, which limits the number of directorships that a person may hold to 25. No evidence was produced as to any breach of this rule. Evidence was produced that the director in question enjoyed an exemption in this regard.

Murphy J stated that the plaintiff could only validly raise such issues if he had an entitlement to challenge the efficacy of the deeds by virtue of being a party to them. Murphy J held that the plaintiff was merely entitled to be shown that Promontoria had validly acquired the interests of Ulster Bank Ireland Limited. Murphy J found that the plaintiff had failed to validly challenge the deeds and this amounted to an acceptance of their validity, if only by inference.

Notably, Murphy J also held that the deeds were not hearsay, but rather constituted real evidence of transactions between parties.

As a result, Promontoria succeeded in having the stay on the receiver's appointment lifted.

ii  **Independent Trustee Company Limited v. Registrar of Companies**

In this case, the appellant (ITC) challenged a practice whereby the Irish Registrar of Companies (or Companies Registration Office (CRO)) gave the status of ‘Receivership’ on the register of companies to a company that has had a receiver appointed over some but not all of its assets. ITC argued that the relevant provisions of the Companies Act 1963 (the 1963 Act), did not apply where a company had no beneficial interest in the property and sought declarations to that effect.

The High Court (Hunt J) held that any interest in the property is susceptible to the provisions of Section 99(1) of the 1963 Act (the requirement to register a charge over property of a company with the CRO) and further held that Section 107(1) (the requirement to notify the CRO of the receiver's appointment) applied to the appointment of the receivers over the property in question. The High Court also held that Section 317(1) (the requirement that upon the appointment of a receiver, that fact is to be expressly stated on all company documentation) applied, notwithstanding that the appellant was only the legal owner of the property and held the property on trust for the unit-holders of the sub-fund.

Hunt J held that the CRO’s use of a single ‘Receivership’ label was justified, because the CRO had on its website an explanatory note alerting persons inspecting the Register of the various possibilities regarding ownership of assets, together with an invitation to review the Form E8, which clearly noted that the receiver had been appointed over some only of ITC’s assets. Hunt J accepted that the criticisms made by ITC of the application of a single ‘Receivership’ label were well-founded, but he considered that the refinement introduced by the explanatory note amounted to a sufficient explanation to meet the criticism.

On appeal, the Court of Appeal (in a judgment given by Finlay Geoghegan J) accepted that the CRO has a statutory power and duty to organise the information on the electronic register in a clear, organised and accessible manner. This includes a power to create a summary of statutorily mandated notifications, including the appointment of a receiver. Finlay Geoghegan J held that this power cannot be exercised in a manner that implies that the appointment of a receiver to property of a company causes a change or a pending inevitable change in the status of the company.

The Court of Appeal held that changing of the ‘status’ of a company on the CRO’s register to a ‘Receivership’ label is potentially misleading, is *ultra vires* the powers of the
registrar under the Companies Act and is ‘unclear and apt to mislead’. The ‘Receivership’ label gave the misleading impression ‘that there has been or will inevitably shortly be a change in the corporate status of the appellant’. Finlay Geoghegan J disagreed with the High Court’s view that the explanatory note on the CRO’s website was sufficient to correct the otherwise misleading impression.

In respect of the construction of Sections 99, 107(1) and 317(1) of the 1963 Act, Finlay Geoghegan J found that firstly, the ordinary meaning of the phrase ‘receiver of the property of the company’ included (as set out in Section 323(a) of the 1963 Act) a receiver ‘of part only of that property’. It follows that even if the deed of charge was confined to a legal interest in property (in fact it was not so confined), then Section 99 of the 1963 act would have applied to the charge.

Finlay Geoghegan J rejected the argument that the phrase ‘the property of a company’ (in Section 107 of the 1963 Act) should be construed as applying only to assets that would be available for distribution to creditors on insolvency, namely assets beneficially owned by the chargor.

In passing, Finlay Geoghegan J stated that Section 317 of the 1963 Act did not necessarily require a company to adopt the common practice of including the phrase ‘In Receivership’ on the company’s letter head. The obligation is only to include a statement that a ‘receiver has been appointed’. Finlay Geoghegan J said that a statement could be included specifying the property over which the receiver has been appointed.

The Court of Appeal held therefore held that the CRO was not permitted to change the status of the applicant from ‘Normal’ to ‘Receivership’.

iii In re Regan Development Limited

Regan Development Limited (RDL) operated the Regency Hotel, which incorporated a convenience store and a restaurant in Swords, County Dublin. McGettigan Limited (McGettigan) owned and operated a licensed premises in Dublin 7, together with four retail units in Bray, County Wicklow. McGettigan was a guarantor of the liabilities of RDL, and would otherwise have been solvent.

Neil Hughes was appointed as interim examiner of RDL and McGettigan as a related company. The petition was opposed by OCM EmRu Debco DAC (OCM), which was owed approximately €25 million by the companies and was the largest secured creditor.

OCM had appointed Anne O'Dwyer of Duff and Phelps as receiver of RDL. At the hearing of the examinership petition, it was ordered, pursuant to Section 522 of the Companies Act 2014 that the receiver would cease to act pending further order.

OCM opposed the petition on two grounds. First, it argued that there was a material omission from the petition and the verifying affidavit. Second, it was argued that the petition had been presented for an improper purpose.

OCM alleged that full disclosure was not made in relation to meetings and conversations had between Mr McGettigan and the receiver. On 20 January 2017, three days prior to the presentation of the petition, Mr McGettigan and the receiver met, and he was described as being hostile and aggressive towards the receiver. It was alleged that Mr McGettigan threatened to remove the IT facilities that operated the hotel booking system. Mr McGettigan did not deny the making of this threat. However, he stated that he did not

34 In re Regan Development Limited [2017] IEHC 156.
deem it necessary to mention it in the verifying affidavit or at the hearing, because he did not carry out the threat. Baker J rejected the suggestion that the threat was not material and held that it should have been disclosed.

Section 518 of the Companies Act 2014 provides that the court may decline to hear a petition where the petitioner has failed to disclose any material information or has in any way failed to exercise utmost good faith. In Re Wogans Drogheda Ltd (No. 3) (unreported, High Court, Costello J, 9 February, 1993), Costello J said ‘this is because (a) of necessity the Court must depend to a considerable extent on the truth of what it is told by the company and (b) because of the potential injustice involved in the making of a protection order when the proper course is to wind up the company’. Baker J noted that not all non-disclosure is fatal, and in that regard she followed the decision of Costello J in Re Bookfinders Limited (In Interim Examinership) [2015] IEHC 769, where it was held that dismissing the petition would ‘be disproportionate to the gravity of the offence. It would have the result of imperilling the employment of 49 people who were in no way responsible for the offending behaviour’. Baker J held that the non-disclosure was not of an extent or nature that would warrant the petition to be dismissed.

The alleged improper purpose was that the petition had been presented in order for the McGettigan family to maintain control of the companies via a ‘statutory standstill’, which would enable the company to negotiate a debt swap. The receiver, on affidavit, swore that the intention was for the company to trade while in receivership. As such, job losses were not an immediate factor for the Court’s consideration. In his verifying affidavit, Mr McGettigan said that any examiner might have to invite proposals from other unconnected parties, which OCM argued amounted to the McGettigan family attempting to maintain control of the company. OCM relied on the dicta of Clarke J in Re Traffic Group Limited [2008] 3 IR 253, in which it was noted that the principal purpose of the legislation is to enable the continuation of enterprise for the benefit of the economy and to allow as many jobs as possible to be maintained. OCM further cited the dicta of Clarke J in Re McSweeney Developments Limited [2011] IEHC 494, who observed that ‘the examinership regime does not have the purpose the saving of shareholders from their unsuccessful investments’.

In considering the application, Baker J looked at the practical and legal differences between a trading receivership and an examinership. Baker J noted that in a trading receivership ‘the bank concerned will remain able to make decisions based only on its own interests and to the exclusion of the interests of other creditors’. Baker J noted that ‘the preservation of jobs is not the only function of the examinership process’ and ‘equally legitimate is a concern to improve and strengthen the enterprise of a company with a view to improving its standing and business for the benefit of the economy’. Baker J went on to state that there is nothing wrong, in principle, with a scheme of arrangement that has the effect of debt being refinanced, so long as this does not unfairly prejudice a creditor or a class of creditors.

In light of the foregoing, Baker J found that the petitioners should succeed and have the companies placed into examinership.
This judgment addressed two key issues: first, whether a charge over certain lands executed in favour of the notice party (Cascade) in 2004 was valid; and secondly, whether that charge, if valid, enjoyed priority even though it was registered in the Land Registry later in time than a judgment mortgage registered against those lands in favour of Larianov as of 9 January 2012.

The background to this case was that, in 2002, Larianov had entered into a loan agreement with the defendant, Leo Prendergast and Sons (Engineering) Limited (Prendergast). The directors of Prendergast indicated to Larianov that Prendergast was holding the title deeds of the land in trust to enable Larianov to have the proposed mortgage secured as a first legal charge over the lands. However, no such mortgage was ever executed. Larianov argued that this letter amounted to an agreement sufficient to create an equitable charge over the lands.

In April 2011, Larianov obtained judgment against Prendergast in the sum of €438,876, plus costs. On 9 January 2012, the Property Registration Authority (which controls the Land Registry) registered a judgment mortgage as a burden on the lands. On 11 January 2012, the Registrar of Companies issued a certificate of registration of the judgment mortgage as a charge on the lands.

Between 2004 and 2006, Cascade provided Prendergast with three loans amounting to an aggregate of €1.3 million. On 24 March 2004, Prendergast executed a deed of mortgage and charge. The mortgage deed was registered as a charge over the lands in the CRO on 1 April 2004 although it was not registered in the Land Registry as a burden on the lands until 30 August 2012.

In respect of the first issue for decision, Larianov pointed to three features of the notice party's mortgage deed, which it said rendered it invalid and hence ineligible for priority over Larianov's judgment mortgage. First, the mortgage deed incorrectly described Cascade's registered office as being in Jersey. Second, the mortgage deed contained a recital stating that Cascade was 'a bank named in the third schedule to the Central Bank Act 1942', whereas Cascade was not a bank. Third, the deed was not executed by or on behalf of Cascade.

Keane J found that no company with the same name as Cascade had ever been registered in Jersey and that Cascade was not a licensed bank. Keane J took the view that accordingly there can have been no intention on the part of Prendergast to enter into a mortgage deed with another company. Therefore, the court was satisfied that these were clear errors and it was clear in each case what the correction should be.

Keane J went on to state that, even if he were not satisfied that it was appropriate to construe the mortgage deed subject to the necessary corrections, Larianov could not succeed in its argument, as the errors identified were immaterial to the validity of the deed. There was no suggestion that the errors created any doubt or confusion as to the identity of Cascade.

In relation to the argument that the deed was not executed by or on behalf of Cascade, Keane J cited the English case of Eagle Star Insurance Ltd v. Green [2001] EWCA Civ 1389, in which the Court of Appeal of England and Wales found that a mortgage deed is not a contract and by implication there is no infirmity in a mortgage deed, simply because it has not been signed by the mortgagee.

In addressing the second key issue Keane J was faced with an apparent contradiction in the legislation as between the Land and Conveyance Law Reform Act 2009 (the 2009 Act) and the Registration of Title Act 1964 (the 1964 Act). Section 117, subsection 3 of the 2009 Act provides that a registered mortgage that was not registered in the Land Registry shall be treated as if it were registered in the Land Registry as from the date of registration in the CRO.
Act provides ‘[t]he judgment mortgage is subject to any right or incumbrance affecting the judgment debtors land, whether registered or not, at the time of registration’. Section 74 of the 1964 Act provides that burdens that are registered as affecting the same land, and which if unregistered would rank in priority according to the date of creation shall rank according to the order in which they are entered on the register and rank in priority to any other burden affecting the land, not being a burden to which, though not registered, the land is subject under Section 74 of the 1964 Act.

Keane J held that any possible tension between those provisions is resolved by applying the maxim of interpretation ‘generalia specialibus non derogant’, namely that the general does not derogate from the specific, or that provisions of more universal application do not prevail over, or detract from, those of specific application to the same subject matter. Applying this maxim of interpretation, Keane J found that the general rules relating to priority under Section 74 of the 1964 Act do not apply to judgment mortgages as judgment mortgages are specifically dealt with separately under Section 117 of the 2009 Act. As Section 117 of the 2009 Act provides that a judgment mortgage is subject to rights and incumbrances even those which are not registered, the charge held by Casade was held to have priority. This was dependent on Keane J’s finding that Cascade’s legal mortgage deed was an existing right or incumbrance affecting the lands.

IV ANCILLARY INSOLVENCY PROCEEDINGS

The Recast Regulation provides that the courts of a Member State other than that in which the debtor’s COMI is located may only open insolvency proceedings where the debtor has an ‘establishment’ in that Member State.36 While the definition of establishment has been slightly altered by the Recast Regulation, this will still require a business with substance and ‘boots on the ground’. Such proceedings are known as ‘territorial’ proceedings (or, if opened following the opening of main proceedings, ‘secondary’ proceedings). Territorial proceedings may be opened prior to the opening of main proceedings, in which case they are not restricted to winding-up proceedings, but only if:

a. main proceedings cannot be opened because of conditions laid down by the law of the Member State where the debtor’s COMI is situated; or
b. where the opening of territorial proceedings is requested by a creditor whose domicile, habitual residence or registered office is in the Member State within the territory of which the debtor’s establishment is situated.37

The Insolvency Regulation has not, to date, been invoked often in the Irish courts. A significant decision of the Irish courts concerning the Insolvency Regulation took place in 2014, with the notable appointment of a provisional liquidator (subsequently confirmed as official liquidator) to McArthur Group Limited in secondary proceedings.

V TRENDS

It is clear that the overall number of corporate insolvencies in the first half of 2017 represents a reduction on the position in 2016, and a continuation of the drop from the peak of 2012.

36 Article 3(2) of the Recast Regulation.
37 Article 3(4) of the Recast Regulation.
Ireland

There does not appear to be any fall-off in the number of examinerships or court liquidations. In 2016, the number of receiverships increased as compared to 2015, and it appears likely that 2017 will see the 2015 figure surpassed again. This indicates that enforcement of distressed secured debt continues to be a significant feature, at least as regards the number of insolvent entities, as opposed to the quantum of debt involved. As we approach and pass a decade from the severe recession that began in 2007 or 2008 – analysts differ as to the precise start date – it is apparent that the working out of the economic consequences is not over.

In last year’s chapter, we noted that Ireland was responsible for €24 billion in loan sales in 2015 out of a total of €108 billion.38 Figures for 2016 indicate39 there were loan sales worth €149 billion in the European countries analysed (broadly speaking, the EU, Russia and Turkey), of which €12 billion related to Ireland. There were 275 deals, of which 17 related to Ireland. To have 6 per cent of the deals and 8 per cent of the quantum of debt traded in Ireland, which account 2 per cent of EU GDP, indicates that Ireland is contributing to the debt sale market at an elevated level, but the decline from 2015 is evident. The figures for the first half of 2017 indicate that 72 deals took place worth a total of €69 billion, but that only one of these deals took place in Ireland (with a value of €250 million). It is beyond the scope of this chapter to speculate on the reasons for this downward trend, but it has been argued that the effects of the UK’s Brexit referendum and the 2016 Finance Bill’s ending of tax deductibility for investors in loans secured on Irish property were contributing factors.40

Based on the foregoing, our view is that while loan purchasers will remain active players in the Irish insolvency and restructuring market into 2018, the cycle of deleveraging appears to be, if not drawing to a close, then tapering off.

As regards other aspects of the restructuring market, while we have seen several ‘loan-to-own’ transactions and ‘pre-pack’ receiverships, both types of deal have been relatively uncommon in Ireland to date.

The Brexit referendum has caused speculation as to the effect on Ireland as an alternative EU location for investment and indeed also for restructurings. More broadly, while Irish 10-year bonds dropped to record lows of less than 0.4 per cent in the autumn of 2016, by early 2017 the rate was over 1.2 per cent, and at the time of writing this chapter (early August 2017), the bonds have returned to where they stood immediately prior to the UK referendum (i.e., approximately 0.8 per cent). Much will depend on the final outcome of the UK’s exit negotiations with the EU, which will likely not be known until 2019 at the earliest.

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38 The updated figure for 2015 reported in the source used in this paragraph is €104 billion. The Irish figure remains at €24 billion.
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:

- the Fraudulent Assignments Act 1736;
- the Preferential Payments Act 1908;
- the Preferential Payments and Other Acts (Financial Adjustments) Act 1973;
- the Companies Act 1931–2004; and
- the Companies Act 2006.

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’.

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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.

iii Insolvency procedures

There are a variety of options open in respect of an insolvent company on the Isle of Man:

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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.
it can be wound up either voluntarily by its creditors\textsuperscript{7} or by the court\textsuperscript{8} or subject to the supervision of the court;\textsuperscript{9}

b it can appoint a receiver by way of application to the court\textsuperscript{10} 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.\textsuperscript{11}

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\textsuperscript{12} 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.\textsuperscript{13} 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’.\textsuperscript{14} A liquidator has power\textsuperscript{15} 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.

\textsuperscript{7} Section 214 of the Companies Act 1931.
\textsuperscript{8} Ibid, Section 162.
\textsuperscript{9} Ibid, Section 243.
\textsuperscript{10} Section 42 of the High Court Act 1991.
\textsuperscript{11} Sections 152 and 184(1)(e) of the Companies Act 1931.
\textsuperscript{13} See \textit{Siskina v. Distos Compania} [1979] AC 210. For the case law on the persuasive nature of certain English or other foreign judgments in the Isle of Man, see \textit{Frankland v. R} (PC) 1987–89 MLR 65.
\textsuperscript{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 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. The following parties may commence an application to wind up an Isle of Man company:

- the company;
- the Isle of Man Treasury (in respect of public companies in limited circumstances);
- any creditor or creditors (including contingent or prospective creditors);
- any contributory or contributories; and
- 10 or more policyholders in the case of an insurance company.

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). 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 prima facie case for winding up and provide security for costs.

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.

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. The only limitation on the court’s

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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.\textsuperscript{24}

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.

\textbf{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, \textit{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.

\textbf{vi Special regimes}

There are no special insolvency rules.

\textbf{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.

\begin{itemize}
  \item [23] Section 166 of the Companies Act 1931.
  \item [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.
  \item [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.
  \item [27] Section 189 of the Companies Act 1931.
\end{itemize}
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 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.
29 Interdevelco Limited v. Waste2energy Group Holdings plc, 10 October 2012, Deemster Doyle.
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*,\(^\text{33}\) 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,\(^\text{34}\) 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

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\(^\text{33}\) 2014 MLR 563.

\(^\text{34}\) *Revenue and Customs Comrs v. Rochdale Drinks Distributors Ltd* [2012] 1 BCLC 748, *Re SED Essex Ltd* [2013] EWHC 1583 (Ch).
Isle of Man

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*, 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 Isle of Man Financial Services Authority (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, another liquidator, 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

38 Paragraph 54.
doubt, place significant weight on the views of the FSA but those views are not determinative as to who should be appointed liquidator. 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 which 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.’

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 …

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’.
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’. 42

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’. 43

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. 44

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. (1) in cases where a winding up order is made, from the date when the company is completely wound up;
2. (2) in cases where the company is in creditors’ voluntary liquidation, from the date of the completion of the liquidation; and
3. (3) in respect of companies struck off the register without being wound up, from the date of dissolution. 45

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42 See paragraph 79 CHP 2016/73.
43 See paragraph 80 79 CHP 2016/73.
44 See Paragraph 82 79 CHP 2016/73.
45 See Paragraph 104 79 CHP 2016/73
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.²

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.

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1 Gaetano Iorio Fiorelli is a counsel and Eliana Maria Fruncillo is a junior 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.

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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:

- 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;
- 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
- the division of creditors into classes based on criteria (legal position, economic interests, etc.).

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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).  

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.

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.

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;

\[c\] 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.

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\(^8\) 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 Piccinnini, 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.

**vii Cross-border issues**

Italian Courts may recognise the existence of foreign insolvency proceedings or an order of a foreign Bankruptcy Court, provided that the following principles are satisfied:

*a* the foreign court has international jurisdiction over the case; and

*b* such foreign proceedings or orders do not produce effects which are contrary to Italian public policy (*ordre public*).

Article 3, paragraph 1, of the Council Regulation (EC) No. 1346 of 29 May 2000 (the EC Bankruptcy Regulation) provides that the court of the Member State 'within the territory of which the centre of the debtor's main interests is situated' is competent to commence the main insolvency proceedings. 'Centre' refers to, in the case of a company or legal entity, the place of its registered office.

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12 See footnote 10.
13 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 26 of the EC 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 26 of the EC 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.
As set forth in Article 3, paragraph 2, the courts of a Member State in which the debtor has a permanent establishment can initiate secondary insolvency proceedings against a debtor whose centre of main interests is within another member state. In such an event, the effects of the secondary proceedings are limited to the assets situated in the territory of the first member state and aimed at the liquidation of the insolvent company.

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 the EC Bankruptcy Regulation, but anyway introduces some important changes. The aforementioned ‘centre of the debtor’s main interests’ pursuant to Article 3 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.

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.14

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.

II INSOLVENCY METRICS

In the first three months of 2017, the number of Italian companies’ closures continued to decrease, also thanks to a persistent downward trend in bankruptcies and other insolvency procedures.

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14 Italian Supreme Court, judgment No. 12,031 of 19 December 1990.
In general, about 19,000 companies closed between January and March, 5.1 per cent fewer than in the first quarter of 2016. This is the lowest number since 2009. In more detail, about 3,000 companies were declared bankrupt in the first quarter, well below the 3,700 of 2016 (a 17 per cent decrease). Also the number of the other insolvency procedures kept decreasing in the first quarter of 2017 – with 394 cases recorded, (i.e., 26 per cent fewer than 2016) – because in particular of a big reduction of the applications for the composition with creditors procedure (only 165 companies applied for this procedure, i.e., 43 per cent fewer than a year ago).\footnote{Official data are available on: https://know.cerved.com/en/study-and-analysis/monitor-bankruptcies-insolvency-proceedings-and-business-closures-1q2017.}

### III PLENARY INSOLVENCY PROCEEDINGS

Here 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.

**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.

**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.

**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  **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.

v  **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

In February 2017, the House of Representatives approved a delegated law bill on the basis of the works of the Rordorf Committee, with the purpose of granting the government the power to thoroughly reform the Italian Bankruptcy Law, also through a rationalisation of the legislative picture.

The bill is currently being examined by the competent committee of the Senate. The reform would 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 specialised judge is 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.
Chapter 14

LUXEMBOURG

Pierre Beissel and Sébastien Binard

I INSOLVENCY LAW, POLICY AND PROCEDURE

i Statutory framework and substantive law

Insolvency proceedings in Luxembourg are governed by the following legislation.

General insolvency regime

a the Law of 14 April 1886 on composition with creditors, as amended;

b the Grand Ducal Regulation of 24 May 1935 on controlled management;

c the Code of Commerce, which deals more specifically with stays of payments and bankruptcy proceedings; and


Main special insolvency regimes

a 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.

b Insurance and reinsurance companies and pension funds: Law of 6 December 1991 on the insurance sector, as amended.


d Regulated securitisation entities: Law of 22 March 2004 on securitisation, as amended.

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1 Pierre Beissel and Sébastien Binard are partners at Arendt & Medernach. The authors wish to thank Ouday Al Barazi for his 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.

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 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. A significant number of insolvencies (which in 2012 and 2013 exceeded 1,000 per year but amounted to 873 and 983 in 2015 and 2016, respectively), and the general

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3 Article 203 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 such 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 Kunsch and Luxembourg Court of Appeal, 10 February 1982, Pas. 25, 301.
9 Source: Paperjam, 5 January 2017.
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’.10 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’.11

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 (see Section V.iii, for further details on this draft legislation).

Finally, the period from 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.12

### 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.

#### 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.

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10 Luxembourg 2009 governmental programme, p. 108.
11 Draft bill on business preservation and modernisation of insolvency law No. 6539, p. 1.
12 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).
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.

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.

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

13 Article 593 of the Code of Commerce.
15 Article 442 of the Code of Commerce.
16 Courts most often set the hardening period to six months, unless positive evidence is brought that payments ceased at a later time.
17 Article 34 et seq. of Council Regulation (EC) No. 848/2015 on insolvency proceedings.
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.\textsuperscript{18} 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.\textsuperscript{19}

\textbf{iv Starting proceedings\textsuperscript{20}}

\textit{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.\textsuperscript{21} Case law considers that the debtor must also act in good faith when making the request for an order of controlled management.\textsuperscript{22}

\textit{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.\textsuperscript{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.\textsuperscript{24} Most bankruptcy decisions are taken upon petition of creditors, which, in 90 per cent of cases, are public authorities.\textsuperscript{25}

Companies that meet the bankruptcy criteria set out above must file for bankruptcy within one month of the cessation of payments.\textsuperscript{26} 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, \textit{inter alia}, manage the affairs of the company in bankruptcy and represent the interests of the creditors of the company, generally.

\begin{footnotes}
\item[19] Ibid.
\item[20] 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.
\item[21] Article 1 of the Grand Ducal Regulation of 24 May 1935 on controlled management.
\item[22] See Luxembourg Court of Appeal, 17 February 1982, \textit{Reding et Kunsch} and Luxembourg Court of Appeal, 10 February 1982, Pas. 25, 301.
\item[23] Article 437 of the Code of Commerce.
\item[24] Article 442 of the Code of Commerce.
\item[25] Draft bill on business preservation and modernisation of insolvency law, No. 6539, p. 5.
\item[26] Article 440 of the Code of Commerce.
\end{footnotes}
Control of insolvency proceedings

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 moveable 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 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.

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.

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27 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.

28 In the alternative scenario, a bankruptcy order would usually be made shortly thereafter.

29 Article 477 of the Code of Commerce.
No special insolvency rules apply to corporate groups.  

**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:

- 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

- 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.

**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 a 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), as well as the terms of such a stay. The court will also appoint 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

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30 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.

31 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 or debt recovery professionals) and support PFS (pursuing an activity related to a financial sector activity (e.g., domiciliation agent or IT operator for the financial sector).

32 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.
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 liquidations 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.34

**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.35

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. 1346/2000,36 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 on 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.\textsuperscript{37} It applies to insolvency proceedings opened after 26 June 2017.

The main issues addressed by the Insolvency Regulation (recast) are essentially:

\begin{itemize}
    \item[a] the extension of the scope of the regulation to ‘pre-insolvency’ and ‘hybrid’ proceedings;
    \item[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;
    \item[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;
    \item[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
    \item[e] strict cooperation obligations bearing on courts and insolvency practitioners involved in the insolvency of a corporate group.
\end{itemize}

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.\textsuperscript{38} 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.

\section*{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.

\subsection*{i General economic climate}

According to the International Monetary Fund, the projected GDP growth of Luxembourg for 2017 and 2018 is estimated to be 3.7 per cent and 3.5 per cent, respectively.\textsuperscript{39} This is fairly consistent with the average GDP growth of 3.6 per cent per year known during the period from 1995 to 2016.\textsuperscript{40}

\textsuperscript{38} 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.
\textsuperscript{39} International Monetary Fund, ‘World Economic Outlook, April 2017: Gaining Momentum!’, April 2017, p. 46.
\textsuperscript{40} Statec, Note de conjoncture, 30 May 2017.
The unemployment rate was estimated to fall at under 6 per cent for 2017 and 2018. The balance of the public finances should go from a positive balance of 1.6 per cent of GDP in 2016 to approximately 0.7 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 and, to some lesser extent, the steel industry may be seen as a weakness.

Inflation will likely grow to 1.7 per cent in 2018.

The total net assets of undertakings for collective investment were estimated at €3,860.32 billion in February 2017, a large increase compared to 2016 (€3,395.40 billion in March 2016).

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, but rose to 983 bankruptcies in 2016.

III PLENARY 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 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

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41 Ibid.
42 Source: Coface.
44 Draft bill on business preservation and modernisation of insolvency law No. 6539, p. 4.
45 Creditreform Luxembourg report on Luxembourg bankruptcies, January 2015 and December 2015.
46 Landsbanki Luxembourg SA, Glitnir Luxembourg SA and Kaupthing Bank Luxembourg SA and Lehman Brothers (Luxembourg) SA.
47 Luxalpha SICAV, Luxembourg Investment Fund SICAV and Herald (Lux) SICAV.
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.48

In April 2017, the assets at bank for ESI were €22,439,688.89 and US$136,363,958.50, with RF’s cash being €138,830,549.24. Furthermore, the number of claims against ESI was in excess of 1,240, representing approximately €4.9 billion, while this figure exceeded 1,440 in respect of RF, corresponding to more than €3.7 billion. Concerning RF, the sale of certain assets was commenced, 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.49

**ii 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.50

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.51 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. Such survival was sustainable thanks to the support of the main shareholder, BIP Investment Partners SA (BIP).

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

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51 Ibid.
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.\(^{52}\)

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.\(^ {53}\) Nevertheless, TLPO’s activity was first taken over by Novotech through its Luxembourg subsidiary Luxnetwork SA.\(^ {54}\)

iii 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 AAML 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 AAML committed a management error by investing without a gain perspective and with full knowledge of that fact, and thus should be held severally liable.\(^ {55}\)

iv Excell Life International SA

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.

52 Alexandra Parachini, La place financière luxembourgeoise a évité une crise majeure, Le Quotidien, 17 November 2016.
55 Véronique Poujol, La Bâloise relance les hostilités, Paperjam, 6 May 2016.
According to the judgment, 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.57

The district court of Luxembourg also decided, in a judgment dated 15 July 2013,58 to grant a first dividend of 75 per cent of any realised assets59 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 result in denying investors the benefit of a special privilege of insurance creditors on the assets of funds in which they are indirectly invested.

IV ANCILLARY INSOLVENCY PROCEEDINGS

It appears that no secondary insolvency proceedings were initiated in Luxembourg during the period of review.60 The only apparent case relates to a German company called Schuring Beton GmbH, which had a Luxembourg branch with nine employees. After Schuring Beton 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.61

57 Source: d’Land.
59 Estimated at €24,605,546 as of 15 July 2013.
60 Based on an oral exchange with a clerk of the bankruptcy chamber of the Luxembourg district court.
V TRENDS

i Predicted level of insolvency activity in the coming year

The first results for 2017 are positive and show a 14 per cent decrease in the number of insolvencies compared to the same period last year. In total, 457 companies went bankrupt during the first semester.

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.62

Cases of criminal liability opened against directors (or members of the relevant management body) have remained low in recent years.63

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, the Luxembourg government recently filed the Draft Bill, 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.64

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 a ‘social’ aspect.

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

62 The reader will find additional information on these issues under Sections II and V.iii.
63 Rapport des juridictions judiciaires, 2009 and 2012.
64 Luxembourg 2009 governmental programme, p. 108.
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.\textsuperscript{65} 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.\textsuperscript{66}

\textsuperscript{65} Yann Payen, Nouveautés législatives attendues pour 2016 en droit des sociétés luxembourgeois, Legitech, February 2016.

\textsuperscript{66} 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 concursode mercantil (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
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

**Expedit**ed **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

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² The FICORCA (Foreign Exchange Risk Coverage Trust Fund) programme was instigated in 1982, and the FOBAPROA and UCABE programmes in 1995.
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 bankruptcy (liquidation). A trustee is appointed for liquidation.

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 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.

In order 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 – wages (the highest priority);
b) creditors (administration costs and fees of the insolvency estate) whose claims are secured by assets of the estate;
c) claims for burial costs when death of the debtor occurs before the insolvency proceeding;
d) claims for costs of sickness that caused the death of the debtor when the death occurs after the commencement of insolvency proceeding;
e) secured creditors with mortgage or pledge;
f) claims holding a special privilege in law;
g) tax credits;
h) fund for challenged claims and tax credits that have not been determined;
i) unsecured creditors (common creditors);
j) subordinated creditors; and
k) 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.

In order 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
c 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), supra, 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.

iv 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.

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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 insolvency proceeding may be commenced by a foreign representative. If the debtor has an establishment in Mexico, a full insolvency proceeding must be pursued. 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 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.

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,

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4 Labour credits are claims by employees and may include unpaid wages and employment indemnity.
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.

vii Cross-border issues

Mexico has incorporated the UNCITRAL Model Law on Cross-Border Insolvency (the 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.

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.

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:

a) 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;
b) main foreign proceedings: foreign proceedings pursued in the jurisdiction where the debtor’s centre of main interests (COMI) is located;
c) no main foreign proceedings: foreign proceedings pursued in the jurisdiction where the debtor has an establishment as described below;
d) 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;
e) foreign court: a judicial authority or other body with jurisdiction over the control or supervision of foreign proceedings; and
f) 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:

\[a\] assistance is sought in Mexico by a foreign court or a foreign representative in connection with foreign proceedings;
\[b\] assistance is sought in a foreign country in connection with a case under Mexican insolvency law;
\[c\] both foreign proceedings and a case under Mexican insolvency law with the same debtor are concurrently pending (parallel proceedings); or
\[d\] 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. In recent years, the level of GDP growth has slowed, and by the end of 2017 GDP may only be up by 1.9 per cent, which falls short of the level of growth that was expected. 2017 inflation is 6.3 per cent and the international reserves of the central bank, Banxico, were US$173,370 million dollars as of 15 September 2017. The Chinese and global GDP have decreased in recent years, and the global fall in oil prices, stronger US dollar and China’s 10 August 2015 yuan devaluation have generally affected exchange rates throughout the world, especially those of undeveloped countries including Mexico, where the annual depreciation of the peso has been 14.13 per cent. In January 2017, the new US administration announced its priority to renegotiate the North America Free Trade Agreement. Investors in Mexico, Canada and the US are watching these negotiations being conducted by their state representatives closely. Uncertainty regarding the content of the discussions and timeline for implementation of the future ‘rules of the game’ may impact foreign direct investment flows in 2017.\(^5\)

Foreign investment (2016) worth US$11,368 billion was withdrawn from Mexican public debt. Mexico’s investment ranking has increased by 28 per cent under the current

administration with a positive tendency. The public deficit has increased to levels that are still sustainable but must be prevented from increasing further. The state of the country’s capital markets following global capital markets has also suffered an impact, lowering most stock prices. A new stock exchange house was created, namely Bolsa Institucional de Valores BIVA, to make a more flexible, stronger and open competition with the current Mexican Stock Exchange. The markets are very volatile. Financial forecasts are uncertain, even in the short term. It is expected that the US Federal Reserve will increase interest rates again, and, given the world’s financial distress, inflation grows as 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 approved and are being 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 2017 to 2020, 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, once implemented, will have unpredictable effects in the EU and on a global scale. Trump’s administration could roll back globalisation, destabilise the financial system, weaken US public finances and threaten trust in the US dollar. 2018 brings the scenario of presidential elections as well as major federal congress elections in Mexico that may have distressing effects on the economy and growth.

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 reorganisation plan approved within an insolvency proceeding. Most of these enterprises have been in the process of recovering.

In the first half of 2017, the economy was generally weak, which is expected to continue in the second half of 2017. 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 had have to shut down. By contrast, the tourism industry in Mexico has grown significantly (8.9 per cent), with the number of foreign visitors at 34.96 million people in 2016.

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 aggravation of financial distress.

In August 2017, ICA, Ingenieros Civiles y Asociados, a major Mexican construction company worldwide, with a 65,151 million pesos debt until last March, filed for concurso mercantil. It is expected that ICA may execute some special construction contracts and be reduced in size to one-third. It is expected that ICA will be able to reach a reorganisation plan with its creditors in a timely manner.

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.

Oceanografía, 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.

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.\(^6\) Since the enactment of the LCM (May 2000 until 15 May 2017), the statistics show 680 filings to have been prosecuted, 57 per cent voluntary (390) and 43 per cent involuntary (290). The number of terminated insolvency proceedings was 414.\(^7\)

Many feel that the LCM has still 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 and 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.\(^8\) 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 insolvency proceedings. Tax claims do not join the *concurso mercantil*.

### III PLENARY 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 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.\(^9\)

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6 There are no statistics whatsoever regarding consumers’ and non-traders’ insolvency (civil insolvencies).


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.

In order 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 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. The decision was appealed and the Court of Appeals confirmed it (Second Unitary Court Fourth Circuit, appeal dockets 5/2012 and 45/2012). An amparo action (constitutional action – further appeal) was filed by dissenting 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 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 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 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.

10 Fourth District Court in Civil and Labour Matters in the city of Monterrey, Nuevo Leon, docket 38/2010 Vitro Sociedad Anonima Bursatil de CV.
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 the 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\(^\text{12}\) and the *IFS Financial Corporation (Interamericas)* case,\(^\text{13}\) 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.\(^\text{14}\) The *IFS* case has also led to case law

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\(^{14}\) The most significant of these precedents, which may be found in the Semanario Judicial de la Federación, are the following:

1. *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.

2. *Amparo in revisión* 282/2003, *amparo in revisión* 283/2003 and *amparo in revisión* 289/2003 of 5 September 2003, regarding a foreign bankruptcy proceeding and the recognition and declaration 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.

3. *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.


5. *Amparo in revisión* 361/2004 of 27 October 2006. International treaties only bind the states that are a party to the treaty.
jurisprudence regarding the interpretation and enforcement of the Insolvency Model Law worldwide. These cases have proved the effectiveness in general of cross-border insolvency cooperation under the Insolvency Model Law regime.

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.

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.
Chapter 16

NETHERLANDS

Lucas P Kortmann and Abslem Ourhri

I 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.

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1 Lucas P Kortmann is a partner and Abslem Ourhri 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 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.

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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. Where foreign main proceedings have been opened under the Recast EIR, secondary
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.

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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

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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.\textsuperscript{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.

\textbf{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.

\section{INSOLVENCY METRICS}

Like most of Europe, the real economy in the Netherlands has been in crisis for a number of years. In past years however, the Dutch economy has been showing signs of sustained improvement. According to recent press releases of the CBS in July 2017\textsuperscript{15} the Dutch economy showed 13 consecutive quarters of economic improvement since July 2013.\textsuperscript{16} 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 restaurant sector (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). The only industry that endured a 1 per cent decrease of its production volume is the agricultural sector, as a result of measures taken by the European Union against manure disposal in order to reduce the quantity of phosphate. As the economy picked up, the number of bankruptcies in April 2017 dropped to the lowest point in over nine years: according to statistics published by the CBS, 1,794 businesses and institutions (excluding one-man-businesses) were declared bankrupt in the first half-year of 2017 (i.e., 25 per cent down from the same period in 2016. The decreasing numbers of bankruptcies applies to all economic sectors.

\textsuperscript{14} Dutch Supreme Court, 13 September 2013 (ECLI:NL:HR:2013:BZ5668) also known as the Yukos case.
\textsuperscript{15} For the CBS’s recent news updates, see www.cbs.nl/en-GB/menu/home/default.htm.
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 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. 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

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17 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), Drukkerij Dijkman (June 2013), Pelican Tijdschriften (March 2013), Marlies Dekkers (August 2013).
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 undertaking 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 the last 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 (€18 billion). 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 were 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 remain in the Brazilian RJ, within which the Oi Group still strives to come to a restructuring of the Oi Group.

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 others because of a large fraud investigation into the activities of Imtech Germany and the eastern Europe 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 financers 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 financers 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, Pfeiderer 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 company is subject to both Brazilian and Dutch proceedings. It is currently not clear whether the Dutch proceedings are 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 company filed to open suspension of payments proceedings indicates that the company aims 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.\(^\text{18}\) 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.

Currently, a number of legislative proposals to amend the Dutch insolvency law are being prepared.\(^\text{19}\) The topics being dealt with in these proposals include:

\(\text{a} \quad\text{a statutory basis for a Dutch law pre-pack or silent administrator;}\)

\(^{18}\) For example, the NEF Telecom case (\textit{Re NEF Telecom Co BV} [2012] EWHC 2944 (Comm)), \textit{Van Gansewinkel} (\textit{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.

\(^{19}\) As set out in the latest letter from the Minister of Security and Justice dated 4 July 2016.
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 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 during a period of three years before the insolvency. A third bill concerning the strengthening of the fraud alert duties of the receivers is pending 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 questions to Parliament about the impact of this case on the draft bill to create a legal basis for the pre-packs. Parliament has yet to respond to this question. The status of this draft bill, therefore, remains uncertain.

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.

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20 The draft bill replaces an earlier similar draft bill named the ‘Continuity of Undertakings II’, which was introduced on 14 August 2014.
Chapter 17

PERU

Alfonso Pérez-Bonany López

I INSOLVENCY LAW, POLICY AND PROCEDURE

i Statutory framework and substantive law

Insolvency regulation has been an active part of commercial and corporate life in the Peruvian market for the past 30 years, and it appears that its role will grow larger in the near future. Peru’s regulation does not use the words ‘bankruptcy’ or ‘bankrupted’ to describe the debtor part of an insolvency procedure. Instead, the regulation speaks of a concordato, which for general terms we will call an ‘insolvent’.

Peru’s insolvency regulation took a 180-degree turn in 1991 when regulation was passed in order to transfer the competence of the insolvency procedures from the judiciary to the state-owned Antitrust, Unfair Competition, Intellectual Property Protection, Consumer Protection, Dumping, Standards and Elimination of Bureaucratic Barriers Agency (INDECOPI). Despite the fact that it is difficult to find a bulletproof decision from the government towards regulation and supervision matters, most specialised lawyers and the industry in general agreed that this decision was the correct one. Since 1991 Peru has evolved commercially and internationally, so vigorous insolvency regulation was required. Therefore, and after much consideration, in 2002 Congress passed the current Law No. 27809 (the Bankruptcy Law).

The most important innovations of such regulation include:

a the exclusion of the procedimiento simplificado (a proceeding that was part of the former insolvency regulation, which added very little to the system);
b recognition that a successful insolvency law is not measured by the number of restructured or liquidated companies (a common mistake of the former regulations) but by the manner in which the creditors’ rights are protected, mostly by giving them the tools to decide the best way to recover the debt;
c new and detailed requirements for the authority (INDECOPI) to analyse related-creditor claims that may affect the procedure regarding non-related creditor claims;
d limitations for individuals to be debtors under the insolvency law (individuals must demonstrate that at least 50 per cent of the outstanding debt emerged from an economic activity and not from other sources);

1 Alfonso Pérez-Bonany López is a partner at Philippi, Prietocarrizosa, Ferrero DU & Uría.
2 ‘The word ‘bankruptcy’ is a compound of the words ‘bank’ – meaning ‘bench’ – and ‘rupta’ (Latin) – meaning ‘to break or be broken’. The image of a broken bench was intentional and literal: creditors, faced with merchants unable to pay debts, literally would break the bench on which the merchants did business. Subsequent to this symbolic gesture, the debtors’ property would be seized and sold.’ Bankruptcy: Problems, Cases and Materials (2003). Walter W Miller Jr.
Peru

- new conditions for corporations to be part of an insolvency procedure as debtors;
- a new ranking of claims;
- expeditious measures within the reorganisation procedure to be achieved by the creditors’ meeting (if such measures are not met, INDECOPI will declare the debtor’s liquidation);
- new conditions for the creditors to obtain recognition of the unpaid debt by the authority; and
- rules to prevent fraudulent conveyances.

However, the ultimate goal of the Bankruptcy Law in Peru has not changed: voluntary or involuntary petitions for bankruptcy relief can be presented before INDECOPI in order to treat financial crises of corporations. Once the authority agrees to the application, all creditors of such debtor have to present their proof of claims to INDECOPI in order to demonstrate the veracity of the debt, its amount and ranking for procedural aspects. All creditors with a claim validated by INDECOPI are allowed to participate in the creditors’ meeting, which will essentially evaluate the future of the debtor and the best manner to recover the debt (creditors will elect to restructure the company if they select the future value of the estate, and will consider liquidation if the present value is a better option).

Depending of the course of action taken from the options mentioned before, the creditors’ meeting should approve a reorganisation plan or a liquidation plan, appoint the new debtor’s representatives and approve the way in which the debt is to be paid.

In addition, the administrative jurisdiction of insolvency procedures has not changed. The branch of INDECOPI located in the debtor’s domicile is the competent agency for the procedure. The most important decisions are approved by the bankruptcy commission of INDECOPI in the first administrative instance. These include admission of an insolvency procedure, recognition of a creditor’s claim and validation of agreements entered into at a creditors’ meeting. Almost every decision taken by the bankruptcy commission can be challenged by the debtor, a creditor or a third party with a valid interest before the court of appeals of INDECOPI (second and final administrative instance). Decisions from the court of appeals of INDECOPI can only be challenged before the judiciary.

Policy

The Bankruptcy Law states that the main objective of said regulation is the restoration of credit throughout the regulation of several procedures in order to promote an efficient assignation of resources and maximise the situation of a stressed company. Peruvian regulation does not promote the reorganisation or liquidation of any company, but recognises that only the creditors should envision the best option for recovering the debt. Therefore, insolvency regulation will be considered as virtuous if it allows a negotiation between the creditors and the debtor for approval of reorganisation or, if not possible, liquidation with little transactional cost.

Despite the fact that negotiation is key in an insolvency procedure so that creditors can identify where a stressed company has more (present or future) value, there is no provision that obligates the creditors to decide on either way, meaning that after such negotiation a creditor can vote to liquidate a company even, for instance, if future value (restructuring) is the right choice. This is true regardless of the kind of insolvency procedure, since regulation assumes that creditors know what is in their best interest, so they do not have to explain their choice to the debtor or the regulator.
The Bankruptcy Law is neutral regarding the final destination of the debtor under the procedure; this decision is left to the creditors. However, today there are far more provisions in the Law than in previous regulations, which allows INDECOPI to declare the liquidation of the debtor, for reasons including:

- if the creditors’ meeting does not approve the debtor’s destination (reorganisation or liquidation) in a 45-day window from the installation of such committee;
- if the creditors’ meeting does not approve the reorganisation plan in a 60-day window from the moment the debtor is placed under a reorganisation procedure;
- if the debtor defaults the terms and conditions (mainly payment terms) of a reorganisation plan duly approved by the creditors’ meeting; and
- if the creditors’ meeting does not approve the liquidation plan in a 60-day window from the moment the debtor is placed under a liquidation procedure.

The rationale of these amendments is straightforward: before the current regulation it was common to identify debtors with no reorganisation or liquidation plan in place, and given the lack of interest from its creditors the company was placed in a legal ‘limbo’. The provisions above are aimed at accelerating the insolvency procedures, assuming that the lack of interest from the creditors in restructuring a company is synonymous with desiring its liquidation.

Therefore, despite the neutral situation of the Bankruptcy Law towards reorganisation with regard to liquidation, the regulation involves procedural elements that the debtor needs to be careful to avoid, otherwise the Bankruptcy Commission will declare the liquidation of the debtor and prevent any chance to bid for the future value of the insolvent.

### Insolvency procedures

The Bankruptcy Law only regulates two types of insolvency proceedings. On one side, the ‘ordinary bankruptcy proceeding’ (commonly known as the insolvency procedure, similar to the Chapter 11 and Chapter 7 proceedings under the US Bankruptcy Code) is commenced with the intention of reverting the debtor’s poor financial condition or allowing its liquidation under reduced transactional costs. With this procedure, creditors will gather in a creditors’ meeting to:

- restructure the debtor’s business by refinancing outstanding debts, subordinating payment of certain unsecured debts and replacing the administration; or
- liquidate the debtor’s assets and use the proceeds to pay off outstanding claims, on the basis of a legal priority.

This procedure can be initiated by the debtor (a voluntarily procedure) or by a debtor’s creditors (an involuntary procedure).

The second type of insolvency procedure available in Peru is the ‘preventive bankruptcy procedure’, which aims only to restructure the company. This procedure can only be initiated by the debtor.

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3 Such choice of law is patent in the very name of the Bankruptcy Commission of INDECOPI in charge of the insolvency procedures. At first, the commission was named the Corporation Restructuring Commission – at that time the law promoted the debtor’s restructuring. The commission’s name was then changed to the Exit-From-The-Market Commission, supported by regulation that promoted the debtor’s liquidation. The current titles of the commission and regulation (the Bankruptcy Commission and the Bankruptcy Law, respectively) try to support the neutral idea of the authority and the law.
The ordinary proceeding is governed by a restructuring plan or a liquidation plan to be approved by the creditors’ meeting. The preventive proceeding is governed only by a refinancing agreement, since there is no chance to liquidate the assets under this scheme.

As can be inferred, a company may not be subject to both insolvency procedures, since the objectives of such paths consistently differ from one to another. To that end, the Bankruptcy Law created ‘equity bands’ to which the debtor must comply depending on its financial situation. These bands reserve the preventive bankruptcy procedure only to debtors with some sort of financial stress, and the ordinary bankruptcy procedure only to companies in the most difficult financial situation.

Finally, recent regulation in Peru created a special insolvency procedure applicable only to soccer teams domiciled in Peru. This law was subject to severe criticism since the current Bankruptcy Law applies to all companies domiciled in Peru, including sports companies. However, this new regulation stated that for a limited period of time – already concluded – any soccer team may apply for a special bankruptcy procedure with only the intention of reorganising its financial situation and approving a plan that reschedules all outstanding debt. This regulation forbids the liquidation of soccer teams. Needless to say, almost every soccer team in Peru was in very bad shape and they applied for this special procedure. To date, all soccer teams but one⁴ have successfully approved a reorganisation plan and rescheduled their debt. The Tax Administration and Labour were the creditors with the biggest representation at their creditors’ meeting.

Regardless of the method, publication of the bankruptcy procedure against a debtor has two effects:

1. the automatic stay of the debtor’s estate, which involves a suspension of all the debtor’s outstanding obligations incurred to date (the suspension will be effective until the creditors’ meeting approves the reorganisation plan with the new payment schedule for the claims, or the liquidation plan); and
2. the cessation of any creditor action aimed to foreclose the debtor’s property.

Peru’s regulation does not contain fixed-term deadlines for restructuring a debtor. On the contrary, the regulation provides that the reorganisation procedure shall last as long as the reorganisation plan is in force. Therefore, restructuring shall last until all creditors with any debt generated before the beginning of the bankruptcy have fully recovered their credit, pursuant to the terms indicated in the plan. Similarly, a liquidation procedure does not have a fixed-term deadline since it will last as long as it takes for the trustee appointed by the creditors’ meeting to complete the liquidation. Based on prior experience, a successful reorganisation may last between 15 and 20 years, and a liquidation procedure may take between two and four years.

Ancillary procedures

The Peruvian insolvency regulator (INDECOPI) does not automatically recognise the validity of resolutions or judgments from other jurisdictions. On the contrary, Peruvian law requires that a separate filing be made in Peruvian courts (exequatur) in order to be

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⁴ Currently, the only soccer team with no plan approved is Universtario de Deportes, mainly because the two most important creditors at its creditors’ meeting have not yet agreed with the payment terms.
valid in Peru. Since by law all debtors with their principal domicile located in Peru can only commence insolvency proceedings before INDECOPI (i.e., in Peru), the exequatur is commonly reserved for non-domiciled companies with assets located in Peru.

iv Starting proceedings

Ordinary bankruptcy procedure

Any debtor can file a voluntarily petition under the ordinary bankruptcy procedure as long as it meets at least one of the following standards: more than one-third of the debtor’s total liabilities are due and unpaid for more than 30 calendar days; or the debtor has accumulated losses in an amount exceeding one-third of its paid-in-capital. In addition, any creditor can file an involuntarily petition against its debtor as long as it holds outstanding credits for more than 30 calendar days and in excess of 50 tax units.5

Commencement of a bankruptcy proceeding is subject to compliance with the filing of documentation and information, as well as payment of an administrative fee. Creditors have no obligation to file an involuntarily petition with respect to a particular debtor; however, failure to commence such procedure could increase the creditor’s risk of collection.

Preventive bankruptcy procedure

As mentioned before, the Bankruptcy Law created ‘equity bands’ for debtors to be part of insolvency procedures in order to prevent them being part of more than one process. Therefore, and considering the ‘preventive’ object of this proceeding, any debtor can file a voluntarily petition under the preventive bankruptcy procedure as long as such debtor is not under any condition that may allow it to enter voluntarily into the ordinary bankruptcy procedure. This means that the debtor needs to meet both of the following standards: less than one-third of the debtor’s total liabilities are due and unpaid for more than 30 calendar days; and the debtor has accumulated losses in an amount under one-third of its paid-in-capital. No involuntarily petition is possible under this proceeding.

The Bankruptcy Law eliminated the procedimiento simplificado (simplified procedure), which was an additional bankruptcy proceeding very similar to the preventive one (no involuntarily petition was possible). The only goal of this procedure was for the creditors’ meeting to approve a reorganisation plan. Our experience demonstrated very little use of this procedure, as well as its lack of helpfulness; on the contrary, debtors used it to ‘jump’ among the available procedures, preventing proper actions from their creditors. This moral-hazard issue was solved by the equity bands currently in place.

When presenting their proof of claim before INDECOPI with the unpaid credit, creditors must request that the authority ranks their credit within the legal category. Labour credits rank first. According to this priority, employees and former employees of the debtor recover their credits before any other creditor. Alimony debts rank second in priority. Secured claims rank third as long as the security interest over the debtor’s assets was constituted before commencement of the insolvency proceeding. Tax claims rank fourth. Unsecured claims are disbursed only if all the preceding claims have been fully recovered, constituting the fifth priority. Creditors who did not file their claims before the Bankruptcy Commission are entitled to payment with the remains of the estate, if any.

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5 Approximately US$60,000.
Such ranking is not applicable when reorganisation is agreed by the creditors’ meeting, where payment is made according to the terms agreed in the plan, except for the labour claims (from the annual proceeds obtained by the debtor under a reorganisation plan, at least 30 per cent must be served to pay the labour credits). However, the priority mentioned above fully applies in a liquidation procedure.

In addition to the priority order to be requested by the creditors when requesting certification of the debt before INDECOPI, creditors must inform whether there is any unusual relation in place with their debtor, other than the pure commercial one. This is particularly important in order to prevent fraudulent credits being integrated into the procedure, damaging other creditors’ rights in the meeting and their possibility to recover the debt. The most important causes to declare this relation between a creditor and debtor are:

- family ties between both parties, or between one of the parties and the shareholder, partner or associate of the other;
- marriage between the parties;
- a labour relation, current or past, which implies the execution of a directorial or managerial position;
- property of the debtor or creditor in any business of the counterparty; and
- integration of an economic group.

When any of the above situations are declared by the parties, or inferred by the authority, INDECOPI puts in place a special protocol requesting several additional documents from the parties (tax, financial, banking, accounting and notarial) in order to validate the existence of the debt. If there is no justification after the analysis, the claim is rejected.

On the other hand, every bankruptcy procedure has rules to prevent fraudulent conveyance of the debtor’s assets. In general terms, fraudulent conveyances can be categorised in one of the following:

- the court may declare as fraudulent, and, therefore, unopposable to the creditors’ meeting, any transference, security interest, lien, act or contract entered by the debtor that:
  - is not referred to in its normal course of business;
  - harms its financial condition; and
  - has been agreed or entered in the term of one year before commencement of the insolvency procedure; and

- the court may declare as fraudulent, and therefore unopposable to the creditors’ meeting, any of the following entered into from commencement of the bankruptcy procedure and the moment the new administrator (under a reorganisation) or trustee (under a liquidation) is appointed by the creditors’ meeting:
  - anticipated payment of undue obligations;
  - payment of obligations not accomplished according to the terms and conditions agreed by the parties;
  - contracts not related to the ordinary course of business;
  - offset of obligations between the debtor and creditor;
  - liens or security interests agreed by the debtor towards its assets; and
  - mergers, spin-offs, or similar.

These are the only provisions from the Bankruptcy Law that require action from the judiciary, as in Peru administrative agencies do not have the jurisdiction to declare contracts invalid.
v  Control of insolvency proceedings

In Peru the only authority for bankruptcy matters is the Bankruptcy Commission of INDECOPI, an administrative agency entrusted to supervise the legality of the proceedings. INDECOPI has discretional powers to revise the legality of the agreements entered by the creditors’ meetings, including the reorganisation plan, the liquidation plan, and the designation of an administrator or trustee. However, INDECOPI does not need to confirm or validate every single aspect of the procedure; on the contrary, the regulator will only issue an opinion in the event that a legal standard is threatened, or by responding to a petition filed by a party.

vi  Special regimes

In general, the Bankruptcy Law is mandatory to all companies domiciled in Peru. However, such regulation does not apply to state-owned companies, financial institutions, pension funds and insurance companies. On the contrary, these companies – except from state-owned ones – are part of the financial system and subject to the Financial System Law, with a special regulator (the Superintendency of Banks, Insurance Companies and Pension Funds (SBS)). This regulation has special rules to deal with the liquidation of a bank (payment of depositors), pension funds (transference of pension funds to another company) and insurance companies (related to the insurance holders with the company).

There are no special insolvency rules related to corporate groups in Peru.

vii  Cross-border issues

Peru’s bankruptcy regulation does not contain any provision related to the recognition of judgments issued overseas in connection with a local insolvency procedure. Pursuant to Peru’s Civil Code, recognition by Peruvian courts of foreign judgments can only be upheld because of the reciprocity principle, on account of which Peruvian courts will only recognise resolutions issued in a certain country if the judicial authorities from such country recognise and support Peruvian decisions. To obtain such recognition the interested party must initiate a summary judicial procedure called *exequatur* in order to provide validity to the resolution issued abroad. Insolvency judgments issued overseas are commonly related to incorporating an asset located abroad to the debtor’s estate.

II  INSOLVENCY METRICS

After more than 10 years of economic growth, the Peruvian economy started to decelerate in 2013, mainly because of the international problems of China and the depression in the market value of several commodities, including mining products. Yet Peru’s economy is not in recession; Peru’s GDP has increased by approximately 2.5 per cent on a yearly basis for the past three consecutive years. This may be seen as good news considering the growth of Peru’s neighbours, but is not as compelling when compared with the 7.5 per cent increase of 2008.

The government has consistently tried to speed up the economy with several legal measures intended to eliminate economic barriers for business, and inviting foreign investors to Peru. Fortunately, capital markets are safe, along with the solid financial system administered by Peru’s Central Bank, and unemployment rates are low. We believe that the economy will remain stable and steady, especially after the 2016 general elections where Pedro Pablo Kuczynski was declared President of Peru.
Below is a chart with the number of insolvency procedures commenced in Peru since 1993. The Peruvian economy collapsed between 1998 and 2001, which generated a significant increase in companies subject to bankruptcy relief. Such numbers decreased from 2004, as the economy stabilised:

<table>
<thead>
<tr>
<th>Year</th>
<th>Number of bankruptcy procedures commenced in Peru</th>
<th>Year</th>
<th>Number of bankruptcy procedures commenced in Peru</th>
</tr>
</thead>
<tbody>
<tr>
<td>1993</td>
<td>90</td>
<td>2005</td>
<td>133</td>
</tr>
<tr>
<td>1994</td>
<td>128</td>
<td>2006</td>
<td>441</td>
</tr>
<tr>
<td>1995</td>
<td>133</td>
<td>2007</td>
<td>379</td>
</tr>
<tr>
<td>1996</td>
<td>170</td>
<td>2008</td>
<td>376</td>
</tr>
<tr>
<td>1997</td>
<td>344</td>
<td>2009</td>
<td>418</td>
</tr>
<tr>
<td>1998</td>
<td>766</td>
<td>2010</td>
<td>294</td>
</tr>
<tr>
<td>1999</td>
<td>824</td>
<td>2011</td>
<td>511</td>
</tr>
<tr>
<td>2000</td>
<td>1698</td>
<td>2012</td>
<td>363</td>
</tr>
<tr>
<td>2001</td>
<td>1635</td>
<td>2013</td>
<td>414</td>
</tr>
<tr>
<td>2002</td>
<td>926</td>
<td>2014</td>
<td>423</td>
</tr>
<tr>
<td>2003</td>
<td>505</td>
<td>2015</td>
<td>520</td>
</tr>
<tr>
<td>2004</td>
<td>59</td>
<td>2016</td>
<td>551</td>
</tr>
</tbody>
</table>

According to INDECOPI, 97 per cent of the creditors’ meetings held in the past three years approved the debtor’s liquidation as the most efficient manner to recover their investments. It is not common that a debtor-in-possession fully reorganises and emerges from a reorganisation procedure, especially if it has considerable liabilities. Therefore, in Peru liquidation is the most common culmination of the insolvency procedures. There are several factors that explain this, such as a lack of confidence in reorganisation plans; extended overview of insolvency procedures as means to evade obligations; and the generalised creditor’s desire to recover a small portion of the debt (present value) in a relatively small period of time through liquidation rather than the possibility of obtaining a greater portion of their credit (future value) by reorganisation.

### III PLENARY INSOLVENCY PROCEEDINGS

In 1999, Andina de Radiodifusión SAC – one of the most important television networks in Peru – presented a voluntarily petition for bankruptcy relief in order to reorganise its financial situation. The procedure was very complex given the vast number of creditors (more than 1,200), the extent of the debt (US$500 million) and the poor condition of its revenues. Andina de Radiodifusión managed to end its bankruptcy procedure in 2012 after several negotiations with its creditors, securing a mid-term loan for working capital needs. The reorganisation plan included a most novel method to end the process – several creditors agreed to novate their credits and transform them into new undue obligations, which entitled the company to exclude those liabilities from the procedure.

Another important bankruptcy procedure was Pesquera San Antonio SA. In 2001, Pesquera San Antonio was forced by a group of banks to enter into insolvency after the debtor

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6 Source: www.indecopi.gob.pe.
7 According to Peru's Civil Code, a novation occurs when one obligation is replaced by another.
had defaulted on several loan facilities. The company was one of the biggest fishing companies in Peru and it suffered within the then-severe situation of the fishing industry. Every bank in Peru was part of the creditors’ committee that approved a reorganisation plan, granting a mid-term loan of US$250 million as working capital. However, the company never fully recovered from its severe losses, and two years later the creditors approved its liquidation.

Finally, Doe Run Peru SRL – the most important mining refinery in Peru – entered into an insolvency procedure in 2012 after a syndicate of banks suspended a US$75 million working-capital facility because of several defaults from the company. The procedure is still under progress under INDECOPI and is rather unusual: Doe Run Peru is the only company in the city of La Oroya (Junín), so its liquidation created a social conflict with all personnel who depend on it. In addition, the company has many fines imposed by the government regarding alleged infractions to environmental legislation. Both issues (social and environmental) have prevented any interested company from tendering for the company within the liquidation procedure as an ongoing organisation.

IV TRENDS

We anticipate that insolvency activities will significantly increase in Peru as a result of the current situation of the Peruvian economy.

In addition, recent regulation passed in Peru amended the current Bankruptcy Law in order to speed up the liquidation procedures and, more importantly, closely supervise administrators and trustees recorded by INDECOPI to manage and administer the debtor’s company (in reorganisation or liquidation modes, respectively). This is because the judiciary has discovered significant fraudulent activities involving transference of bankrupted real estate and monies not directed to the creditors.
Chapter 18

POLAND

Bartłomiej Niewczas and Daria Mientkiewicz

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:

- introducing four new restructuring proceedings (arrangement approval proceedings, accelerated arrangement proceedings, arrangement proceedings, remedial proceedings);
- changing the definition of debtor insolvency, and threatened with insolvency;
- clarification of bankruptcy prerequisites;
- introduction of pre-packaged liquidation;
- the increased role of the Council of Creditors;
- changes to claims categories and list of claims;
- changes to the cost of proceedings catalogue.

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1 Bartłomiej Niewczas is a counsel and Daria Mientkiewicz an associate at Bird & Bird Szepietowski i wspólncy sp. k.
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 due 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

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9 Article 5 of the Restructuring Law.
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 (*nadzorca układu*), 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 (*nadzorca sądowy*). 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 (tymczasowy nadzorca sądowy) 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 (zarządca) 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 which 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.

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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:

- entrepreneurs;
- both limited liability companies and joint stock companies that are not engaged in business activity;
- partners in partnerships liable for the partnership’s obligations without limits to their property; and
- 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.

**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,\(^{12}\) 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.

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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:

a the state treasury and local government units;

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b domestic banks;
c Bank Gospodarstwa Krajowego;
d branches of foreign banks;
e cooperative savings and credit unions;
f investment firms;\(^\text{14}\)
g insurance and reinsurance companies;
h investment funds;
i financial institutions;\(^\text{15}\)
j financial holding companies;\(^\text{16}\)
k mixed financial holding companies;\(^\text{17}\)
l mixed activity holding companies;\(^\text{18}\)
m parent financial holding companies in a Member State of the European Union;\(^\text{19}\)
n EU parent financial holding companies;\(^\text{20}\)
o parent mixed financial holding company in a Member State of the European Union;\(^\text{21}\)
and
p EU parent mixed financial holding company.\(^\text{22}\)

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:
a the state treasury;
b local government units;
c independent public healthcare institutions;
d institutions and legal persons established by an act of law;\(^\text{23}\)

\(^{14}\) 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).
\(^{15}\) 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.
\(^{16}\) Under Article 4(1)(20) of Regulation No. 575/2013 with the registered office in a Member State of the European Union.
\(^{17}\) Under Article 4(1)(21) of Regulation No. 575/2013 with the registered office in a Member State of the European Union.
\(^{18}\) Under Article 4(1)(22) of Regulation No. 575/2013 with the registered office in a Member State of the European Union.
\(^{19}\) Under Article 4(1)(30) of Regulation No. 575/2013.
\(^{21}\) Under Article 4(1)(32) of Regulation No. 575/2013.
\(^{22}\) Under Article 4(1)(33) of Regulation No. 575/2013.
\(^{23}\) Unless otherwise provided for in that act, and established by execution of an obligation imposed by an act of law.
natural persons running a farmstead who do not conduct any other business or professional activities;
higher education institutions; and
investment funds.

Under Polish Law, special bankruptcy regimes exist for respective entities. The Bankruptcy Law recognises separate bankruptcy proceedings in the following circumstances:
when instituted after the death of an insolvent debtor;
against developers;
against banks and credit unions;
with respect to mortgage banks;
with respect to credit institutions, foreign banks and domestic banks operating internationally;
with respect to insurance and reinsurance undertakings;
with respect to bond issuers; and
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 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

Bankruptcy statistics for 2016 in Poland differ. According to PWC Poland, in 2016, 530 companies were declared bankrupt in Poland, and the total number of bankruptcy and restructuring proceedings amounted to 760. In 2016, a total of 204 companies took part in the newly introduced proceedings (after the court’s decision to open them). An arrangement bankruptcy was declared towards 26 other companies (which was the result of examining applications submitted before 2016). The total number of bankruptcy proceedings in 2016 was 530. This means that 30 per cent of all proceedings opened in 2016 were restructuring proceedings.

In the context of restructuring proceedings in 2016, accelerated arrangement proceedings and remedial proceedings were most commonly opened.

Until 1 January 2016, bankruptcy proceedings were conducted mainly in the formula resulting in the liquidation of the debtor’s assets (84 per cent of the proceedings opened between 2011 and 2015), and only a small part of the proceedings concerned systemic bankruptcy (15.8 per cent), which provided hope for restructuring of enterprises and continued business operations.

According to World Bank data, the average recovery rate of creditors in insolvency proceedings for all EU countries is 65 per cent, while the world average is 42 per cent. Pursuant to the World Bank data dated June 2016, the average recovery rate of creditors in insolvency proceedings in Poland was just over 60 per cent.

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 2017 of 3.8 per cent, and an increase in the net turnover rate of companies to 4.4 per cent, it may be forecast that about 550 companies will fall this year, which is about 8.8 per cent lower than in 2016. At the same time, the level of restructuring of entities will continue to grow (to approximately 275–325 per year). In 2017, bankruptcy
and restructuring proceedings will start in the range of 825–875 entities. This would increase total bankruptcy and restructuring at 2.9 per cent – 9.1 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.

KUKE announces the following trends:

a the number of companies declared bankrupt over the past 12 months has stabilised, while the number of companies that have started restructuring proceedings over the past year has increased; and

b the level of insolvency and restructuring proceedings commencement in the construction industry have slowed down.
Chapter 19

PORTUGAL

José Carlos Soares Machado and Vasco Correia da Silva

I INSOLVENCY LAW, POLICY AND PROCEDURE

i Statutory framework and substantive law

Portuguese Insolvency and Recovery Code

Insolvency proceedings in Portugal are mainly regulated by the Portuguese Insolvency and Recovery Code (CIRE). The CIRE was approved by Decree-Law No. 53/2004 and was amended most recently by Decree-Law No. 79/2017.

Pursuant to the CIRE, a company is insolvent when it is unable to pay its debts that have fallen due or when its liabilities are clearly greater than its assets, according to the relevant accounting standards.

A company must file for its insolvency within 30 days of the date it becomes aware of its insolvency or of the date on which it should be aware of its insolvency. When the debtor is the owner of a company, Portuguese law presumes that awareness of the insolvency occurs three months after the general failure to meet debts regarding taxes and social security payment and contributions; debts arising from an employment contract or from the breach or termination of such contract; or rentals for any type of hire, including financial leases; or instalments of the purchase price or loan repayments secured by a mortgage on the debtor’s business premises, head office or residence.

Moreover, the debtor's insolvency can also be requested by those who are liable for its debts, by any creditor or by the Public Prosecutor if certain events indicative of an insolvency happen.

The court within the territory of which the debtor’s head office or centre of main interest is situated has jurisdiction to open the insolvency proceeding, which begin with the filing of a written petition by one of the above-mentioned entities.

The petition must indicate the facts on which it is based. The contents of the petition will depend on who is the petitioner; the debtor or someone else. The debtor may acknowledge its insolvency. In this event, it can file a petition with the court, which must declare the debtor’s insolvency immediately. If the petition is filed by a creditor, the petitioner must allege and prove the source, nature and amount of its credit or its liability for the debts of the insolvent and disclose any known facts related to the debtor’s assets and liabilities.

The court decides on the admissibility of the petition. Furthermore, at the insolvency petitioner’s request, the court may adopt interim measures whenever it is necessary to protect
the debtor’s assets until the insolvency is declared. For instance, the court may name an interim administrator for the company with powers to manage the company or to assist in the management.

When the creditor’s petition is considered to be well-founded and unless the debtor cannot be located, the court will notify the debtor to file its opposition within 10 days. If the opposition is not filed, the facts on which the petition is based shall be accepted and the insolvency declared.

The opposition must include a list of the debtor’s five major creditors. The debtor has the burden of proving its solvency. If the debtor opposes the petition or cannot be located, the court shall schedule a hearing, notifying the petitioner and the debtor and its directors to personally attend the hearing or to be represented by someone else with powers to act on their behalf. In the event the debtor does not attend the hearing, the facts on which the petition is based shall be accepted and the insolvency declared. When the petitioner is a creditor, in the event it does not attend the hearing, the court closes the insolvency proceeding. After the hearing, the court gives its decision on the insolvency of the debtor.2

The court’s decision can be challenged by means of an application to the lower court or by means of an appeal to a higher court. The application must indicate additional facts or proofs that were not previously presented and that, if presented, would impose a different decision on the debtor’s insolvency. The appeal shall indicate why the court’s decision should have been different in light of the facts that were proved.

Among other things, the court’s decision nominates an insolvency administrator, establishes a deadline for filing the credits claims and schedules a creditors’ general meeting. This decision has several effects on the debtor and its directors,3 on the pending proceedings,4 on its debts,5 on the agreements not yet fulfilled6 and on any acts prejudicial to the debtor’s assets.7 Further, the debtor’s assets at the date of declaration of insolvency are seized, as well as any assets and rights obtained by the debtor while the insolvency proceeding is pending.

2 The insolvency proceeding cannot be subject to suspension, unless another insolvency petition was previously filed.
3 Generally, the debtor and its directors lose their powers to manage and dispose of the debtor’s assets.
4 For instance, the pending enforcement proceedings filed by the creditors against the debtor or other proceedings affecting the debtor’s assets are suspended, unless these proceedings were also filed against others debtors (aside from the debtor that was declared insolvent). In this event, the proceedings shall continue but only against the other debtors.
5 Usually, with the declaration of insolvency all debts of the insolvent fall due.
6 As a rule, the agreements not yet fulfilled by any party are suspended until the insolvency administrator decides whether or not the insolvent will comply with them. There are special provisions for several agreements, for instance: sale of goods agreements with a retention of title clause; promissory sales agreements; sales agreement where the goods have not been delivered; lease agreements; forward transactions; mandate agreements; long-term service agreements; powers of attorney; and current account agreements.
7 Any acts that are prejudicial to the debtor’s assets and that were carried out in bad faith within the two years prior to the declaration of insolvency can be set aside. For this purpose, all acts that reduce, make it more difficult or impossible, jeopardise or delay payment to the creditors are considered prejudicial to the debtor’s assets. There are certain acts that are presumed to be prejudicial to the debtor’s assets. There are also certain acts that are presumed to have been carried out in bad faith, namely those carried out by, or with benefit to, a person specially related to the debtor in the two years prior to the initiation of insolvency proceedings. In this context, bad faith is understood to arise from: (1) the knowledge of the debtor’s insolvency; (2) the knowledge of the damage caused by the act; (3) the knowledge of the debtor’s imminent
Within the period set out in the court’s decision, all creditors, including those whose credit has already been recognised by a court decision, must file a credit claim. This claim must indicate the source of the credit, date on which the credit is due, the amount, contractual and legal interest, any conditions, nature of the credit and connected guarantees. Fifteen days after the deadline for filing the claims, the insolvency administrator must present a list of credits including those that have been recognised and those that have not. This list can be challenged within 10 days of its publication. If there are no challenges, the court must immediately deliver its decision on the credits recognised and their priority. If a challenge is filed, any creditor is allowed to respond. Afterwards, the creditors’ committee has 10 days to deliver its opinion on the oppositions filed by the creditor. Subsequently, the court must schedule an attempt at conciliation and a hearing and finally deliver its decision on the credits and their order of priority.

Portuguese law establishes four classes of credits: secured; preferential; subordinated; and non-secured. Secured credits are those with security over seized assets up to the value of such assets. Preferential credits are those with a right to be preferentially paid up to the value of the assets over which such preference exists. Pursuant to the Civil Code, some preferential credits (special preference credits) take priority over all others, including secured credits. Other preferential credits (general preference credits) only take priority over non-secured credits. Subordinated credits are those that will be settled only after the non-secured creditors have been paid in full. The subordinated credits are listed in the CIRE.

In any event, the credits related to the insolvency proceeding, namely court fees or the remuneration of the insolvency administrator, take priority over all other credits.

As previously mentioned, the court’s decision schedules a creditors’ general meeting, which all creditors can attend. The creditors have a number of votes in proportion to the amount of their credits: (1) if they were previously recognised by a court decision, (2) if they were previously claimed or (3) if they are claimed during the creditors’ general meeting when the deadline for filing the credits’ claim has not yet ended and the insolvency administrator or the other creditors do not oppose to the credit’s recognition. Subordinated credits can only vote to approve or reject a recovery plan. Generally, the decisions of the creditors’ general meeting are taken by a majority of the votes, without taking into account the abstentions.

The first creditors’ general meeting is convened to: assess the report of the insolvency administrator produced following to the declaration of insolvency; decide whether the debtor's establishment or establishments must remain open or be closed down; and decide whether the insolvency administrator must prepare an insolvency plan and, therefore, suspend the liquidation and distribution of the assets, or continue with the liquidation and distribution of the assets. In any event, the referred suspension ceases and the insolvency administrator must continue the liquidation and distribution of the assets if the insolvency plan is not submitted within the 60 days following the meeting or if that plan is not approved.
The insolvency administrator (if the creditors’ general meetings so decide), the debtor, another person liable for its debts or a group of creditors representing one-fifth of the total amount of the non-subordinated credits recognised can prepare and submit an insolvency plan for the approval of the creditor’s general meetings. The insolvency plan can set out how the payment of the debts will be made, or how to liquidate the debtor’s assets, or how to restructure or recover the debtor. The content of the insolvency plan can be agreed with the creditors, but the insolvency plan shall treat all creditors equally, unless a difference in treatment is justified. The insolvency plan shall forecast the measures necessary to achieve the goals agreed by the creditors’ general meetings to liquidate the debtor’s assets or to restructure or recover the debtor — and include the details necessary for its approval by the creditors and by the court. The necessary quorum for approval of the recovery plan is two-thirds of the votes issued at the creditors’ general meeting, provided that at least half of the votes issued are not subordinated and that one-third of the total amount of credits with voting rights are represented at the meeting.

Finally, it is important to note that the CIRE sets out a proceeding to punish any fraudulent behaviour by the insolvent or its directors, when their conduct caused or aggravated the insolvency.

Other legislative instruments

EU Regulation No. 2015/848 on Insolvency Proceedings is also an important instrument in Portuguese insolvency law. This Regulation applies to cross-border insolvency proceedings in the EU and it aims to improve the efficiency and effectiveness of these proceedings and avoid forum shopping that affects the proper functioning of the internal market.

Regarding Portuguese legislation related to hybrid procedures meant to encourage the recovery of companies that are struggling with severe financial difficulties, there are two types of procedure that should be highlighted: (1) ‘special revitalisation proceedings’; and (2) ‘proceedings to approve extrajudicial agreements’. These proceedings were adopted by Law No. 16/2012. Recently, a special proceeding to approve a payment agreement was introduced by Decree-Law No. 79/2017, and it is intended for natural persons that are at imminent risk of insolvency. A new ‘extrajudicial procedure for company recovery’ is under discussion at the moment and should be approved soon.

Policy

An Economic Adjustment Programme was negotiated in May 2011 between the Portuguese authorities and officials from the European Commission, the European Central Bank and the International Monetary Fund. These parties signed a memorandum of understanding that, inter alia, listed the need to amend the CIRE ‘to better facilitate effective rescue of viable firms’. The CIRE states that the purpose of insolvency proceedings is to satisfy the creditors by means of an insolvency plan, namely to recover the company when this recovery is possible, or by means of the liquidation and distribution of the debtor’s assets. However, there was a tendency to liquidate the debtor’s assets instead of achieving a restructuring of the company. Subsequently, several amendments of the insolvency law were adopted with the intention of changing this tendency. However, the liquidation of a company continues to be

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the most common option, mostly because the debtor or its directors fail to commence with
the insolvency proceedings at an early stage, thus jeopardising the chances of restructuring
the company in financial difficulties. In addition, creditors are frequently not willing to take
on more risk.

Since that date, relaunching the economy has been one of the main objectives of the
government, namely through the improvement of conditions for private investment. More
recently, the Ministry of Justice has been taking a series of measures aimed at simplifying
the procedures for company restructuring, perfecting and improving the efficiency of the
revitalisation and insolvency procedure. With this goal in mind, the CIRE was amended
by Decree-Law No. 79/2017, which also adopted the new rules of EU Regulation No.
2015/848. This amendment introduced changes in the legal regime of the special revitalisation
proceedings, so as to make them more transparent and credible, as well as in several rules
of the insolvency proceedings (namely, rules regarding the intervention of the creditors
general assembly, the deadline to request that the culpability of the insolvent be examined,
the nomination of the insolvency administrator, the judgment verifying and ranking credits
and the liquidation phase). Finally, it provided for full electronic access to the insolvency
proceedings.

iii Insolvency procedures

Procedures to wind up or rescue the companies

Portuguese law sets out judicial and hybrid procedures to recover a company and a judicial
procedure to liquidate a company.

As concerns the recovery of the company, there are different procedures the applicability
of which depends on the seriousness of the financial situation of the company. If the company
is in a pre-insolvency situation and its recovery is still conceivable the CIRE (pursuant to Law
No. 16/2012) sets out two alternatives to the insolvency proceeding: special revitalisation
proceedings and proceedings to approve extrajudicial agreements. Special revitalisation
proceedings allow a company that is in a difficult financial situation or that is at imminent
risk of insolvent to negotiate with all its creditors and prepare a recovery plan without
having to be declared insolvent. These proceedings are only available to companies, but there
are equivalent procedures for natural persons in imminent risk of insolvent, referred to as
a special proceeding to approve a payment agreement. Proceedings to approve extrajudicial
agreements allow a company that is in a difficult financial situation or that is at imminent
risk of insolvent to submit a prearranged plan signed by the debtor and its creditors for the
court’s approval. If the company is already insolvent, the recovery of the company will have
to take place in an insolvency proceeding and depends on the approval of a recovery plan by
the creditors’ general meeting and the court.

Besides the recovery of the company, the insolvency law establishes a liquidation
procedure for insolvent companies. When a company is declared insolvent, the Portuguese
creditors can vote the company’s liquidation. The decision to liquidate is taken in the
creditors’ general meeting. After the company’s liquidation by the insolvency administrator,
the product of the sale of assets is distributed according to the priority of the credits and the
insolvency closed.

Ancillary proceedings

Portuguese insolvency law allows for ancillary proceedings when the main proceeding
is pending in another EU Member State and under the rules established in Regulation
No. 2015/848 and in the CIRE. Under Regulation No. 2015/848, the effects of an ancillary proceeding are limited to the extent of the insolvent’s assets that are located in the territory of that EU Member State. In short, when the insolvent has its head office or centre of main interests in another EU Member State the ancillary proceeding only covers assets located in Portugal.

**Time frames**
According to the most recent official statistics on insolvency proceedings in Portugal,\(^\text{10}\) the approximate time frame of a proceeding has been decreasing since 2007. In the first trimester of 2017 the average time frame between the commencement of the proceeding in court and the declaration of insolvency was two months. The average time taken for the subsequent stages of proceedings up to a full conclusion is 43 months.

**iv  Starting proceedings**

**Who may commence plenary proceedings and how**
The plenary insolvency proceedings commence with the submission of a written petition requesting the declaration of insolvency. A petition can be filed by: the debtor; those who are liable for its debts; the creditors; or the public prosecutor.

**How concerned parties may oppose**
If the declaration of insolvency is requested by the debtor itself the insolvency will be immediately declared. Otherwise, the court will notify the debtor to file its opposition; if it does not do so, the facts on which the petition is based shall be accepted and the insolvency declared.

**Who may commence ancillary proceedings and how**
Pursuant to EU Regulation No. 2015/848, the opening of secondary proceedings may be requested by: the practitioner in the main insolvency proceedings; any person empowered under the national law of that Member State to request the opening of secondary insolvency proceedings.

**v  Control of insolvency proceedings**
Insolvency proceedings are controlled by the court from beginning to end. Although the CIRE and its amendments reduced the extent of the courts’ intervention, the courts still have power to control the insolvency proceedings.

The court’s main interventions are the declaration of insolvency, the ratification of the insolvency plan and the decisions concerning the recognition of credits and their order of priority.

**vi  Special regimes**
There are several entities excluded from the insolvency regime adopted in the CIRE whenever their specific regime is not compatible, namely: (1) legal persons of public law and

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\(^{10}\) Available at: www.dgpj.mj.pt/sections/siej_pt/destaques4485/estatisticas-trimestrais/downloadFile/file/Insolv%C3%Aancias_trimestral_20170726.pdf?nocache=1501431584.41.
state-owned companies; and (2) insurance companies, credit institutions, finance companies, investment undertakings that provide services involving the holding of funds or securities for third parties and collective investment undertakings.

For instance, the insolvency regime of the credit institutions and finance companies is regulated by Decree-Law No. 199/2006 of 25 October, recently reviewed by Decree-Law No. 31-A/2012 of 10 February.

vii Cross-border issues

As to cross-border issues, the rules of EU Regulation No. 2015/848 apply in Portugal. The provisions of this EU Regulation apply only to insolvency proceedings initiated after 26 June 2017. The main purpose of the new EU Regulation is to prevent forum shopping, avoiding incentives for parties to transfer assets or judicial proceedings from one Member State to another, seeking to obtain a more favourable legal position to the detriment of the general body of creditors.

II INSOLVENCY METRICS

Portugal was one of the EU Member States that suffered the most from the world economic crisis that began in 2008. Despite that fact, the country was able to complete the bailout funding programme in May 2014. After a strong performance in the second half of 2016, Portugal’s economic growth is set to rise further in 2017. The labour market is also expected to improve, with unemployment falling from 16.3 per cent in 2013 to 11.2 per cent in 2016 and to 9.1 per cent in July 2017.11 After decreasing to 2 per cent of the GDP in 2016, the general government deficit is set to remain below 2 per cent in 2017.

In August 2014, and after a loss of €3.6 billion, the Portuguese Central Bank intervened in Banco Espírito Santo, Portugal’s largest listed lender by assets, splitting it into a new surviving good bank (Novo Banco) and a run-off bad bank. The healthy business was transferred to the new bank as part of a €4.9 billion rescue plan. This, however, had a negative effect on the availability of credit for companies and families.

According to the most recent statistics,12 dated from the first trimester of 2017, the number of insolvencies declared by Portuguese courts decreased in 2013 for the first time since 2007, in a homologous comparison.13 This means that the impact of the crisis appears to have slowed down and that confidence and investment are returning.

According to the same source, 10.9 per cent of insolvency proceedings had a value of €50,000 or higher and 44.7 per cent of insolvency proceedings had a value of between €1,000 and €49,999. This means that a large majority of this type of proceeding concerns small companies.

In the same period, the most affected industry was the wholesale, retail and vehicle repair industry, which accounted for 26.4 per cent of all companies that were declared insolvent. This sector of the economy was followed by the construction industry, which accounted for 14.1 per cent of all insolvent companies.

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11 Available at: www.ine.pt/xportal/xmain?xpId=INE&xpgId=INE_destaques&DESTAQUESdest_boui=281091786&DESTAQUESmodo=2.
III PLENARY INSOLVENCY PROCEEDINGS

Within the scope of Portuguese case law, it is possible to single out several recent and significant proceedings, all featuring different substantive and procedural characteristics. It is important to note that, in this brief reference to significant proceedings, the proceedings were selected considering not only their a particular economic significance, but also their specific characteristics and the degree of media exposure.

i Soares da Costa – revitalisation proceeding

Sociedade Soares da Costa, SA (SSC) is one of the largest companies in the construction industry and public works sector operating in Portugal, as well as in Angola and Mozambique. In the face of a difficult economic situation, SSC initiated a special revitalisation proceeding in August 2016. On that date, several public protests had already erupted, as the company owned five months’ wages to the majority of its 550 workers in Portugal and up to eight months to those in Angola and Mozambique.

The total amount of credits claimed in the revitalisation proceeding was €1.4 billion, of which the provisional judicial administrator recognised about €711 million. A total of about 1700 creditors intervened in the proceeding.

The revitalisation plan presented by the company in early 2017 proposed a substantial haircut on its debt: in the case of debt to credit institutions, the haircut ranged from 20 per cent, when the credit was granted in AOA or MZN, to 60 per cent of the debt, when the credit was granted in euros. The payment of the remaining debt would be made over a period of 18 years. The company further managed to secure financing for its restructuring in the amount of €45 million, to be granted by Banco Millennium Atlântico, SA.

This plan was voted by 98 per cent of the creditors (an unusually high percentage of voters) and was approved by a close 51.08 per cent of favourable votes. It is worth noting that its biggest creditor, the Portuguese publicly owned bank Caixa Geral de Depósitos, voted against the approval of the plan.

However, this plan did not obtain the required judicial homologation. In a judgment issued on May 2017, the Commerce Court of Vila Nova de Gaia decided not to approve the revitalisation plan that had been voted favourably by the majority of creditors owing to what it considered to be unequal treatment between the creditors that would receive in euros and those that would receive in Angolan kwanzas or Mozambican meticais. In fact, Article 194 of CIRE enshrines the principle of equality of creditors, applicable both to insolvencies and to special revitalisation proceedings, requiring that a plan treats all creditors in an equal manner, unless a different treatment is justified by objective reasons. As seen above, the revitalisation plan of SSC provided for a higher haircut for that part of the debt that would be repaid in Angolan kwanzas or Mozambican meticais. The company had argued that the different percentages were justified so as to account for the devaluation of those currencies (the Angolan kwanza and Mozambican metical) and that it did not amounted to a substantially

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14 The information concerning the proceedings that are described in this chapter, results from interviews with parties that are directly involved in the proceeding. As such, the information hereby provided does not dismiss a further consultation of the judicial proceedings in court.

15 Case No. 6628/16.0T8VNG, Commerce Court of Vila Nova de Gaia.
different treatment. However, the court considered otherwise, and it refused to homologate the plan, recommending that SSC initiated new proceedings so as to present a plan where these inequalities were corrected.

In June 2017, SSC initiated a new special revitalisation proceeding, and it declared the reformulation of the plan. This proceeding is still in its early stage.

Throughout this period, although in serious difficulty, SSC has been able to continue its operation, reducing costs and attempting to increase its efficiency.

ii Banco Espírito Santo insolvency

Banco Espírito Santo, SA (BES) had been the subject of a resolution by the Bank of Portugal in August 2014, which saw the transfer of almost all assets, liabilities, off-balance sheet and assets under management to a new bank – the Novo Banco, SA.

BES (the bad bank) retained a residual set of assets (loans on GES group entities and branches with complex situations) and liabilities (a series of senior bonds, liabilities to related entities, subordinated bonds and contingent liabilities).

In July 2016 the European Central Bank revoked BES’ authority to carry out the exercise of banking activity. According to the applicable law, this fact implies that the bank be placed into liquidation.

Although the power to revoke the authorisation of credit institutions is with the European Central Bank, the settlement system for Portuguese credit institutions continues to be governed by the provisions of Decree-Law No. 199/2006. Accordingly, that withdrawal of the authorisation produces the effects of a declaration of insolvency and the liquidation of BES will be governed both by the provisions of the referred Decree-Law No. 199/2006 and by CIRE (the bulk of legislation applicable to the liquidation of credit institutions in Portugal).

Within the sphere of its competence, the Bank of Portugal has applied to the Court of Commerce of Lisbon for the judicial settlement of BES and proposed the appointment of a liquidation commission, which was approved following the order to proceed with the liquidation.

The judicial proceeding of BES is presently at the stage of lodgement of credit claims.

iii Urbanos Grupo, SGPS, SA

Urbanos group operates mainly in the logistics and transport sectors, being one of the biggest groups to operate in this market in Portugal. However, in 2016 Urbanos Grupo SGPS, SA had a recognised debt of about €44 million. As a consequence, five companies of the group initiated special revitalisation proceedings simultaneously in that same year. Following negotiations with the creditors, the revitalisation plans were approved by the creditors of these companies, and the documents were taken up to court – to the different judges in the five proceedings – for judicial homologation.

The courts decided to homologate only one of the five plans, and delivered different judgments for each of the cases.

A first point worth noting relates to the proposal, inserted in the approved plan, for the release of the personal guarantees from the shareholders of Urbanos Grupo, SGPS. These
shareholders are third parties to the proceedings, as they are neither debtors nor creditors of the company facing a revitalisation proceeding. The court took the view that this provision was invalid. The termination of the personal guarantees from third parties is outside the scope of the revitalisation proceedings, which takes place only between the debtor and its creditors.

However, the court further considered that this provision would be admissible, by application of the principle of contractual freedom, in case the plan had been unanimously approved, with the agreement of all interested parties. Given that such unanimity was not verified, the judge proposed as a solution that the particular clause providing for this termination was declared void and excluded from the plan, which could then be homologated.

However, in its further reasoning the court found two other reasons that prevented the homologation of the plan. First, it considered that the principle of equality of creditors was violated in a relevant manner, as the creditors from the real estate investment funds were not provided with any objective reasons for the treatment conferred to its credits, unlike all other groups of creditors with non-subordinated claims. Indeed, the plan contained no reasoning as to why the real estate investment funds would be paid in the same manner as the bank creditors – a grace period of 24 months followed by 96 monthly instalments – but without benefiting from the payment of interest; or as to why their payments would not start earlier, as those of the suppliers. This differentiation in treatment was considered as disadvantageous and, lacking a proper justification, was considered to be a reason to deny homologation.

Second, the debtors had declared in the plan that the subordinated credits would be paid in the end, and without a haircut, given that a cut in these credits would negatively impact the share capital and activity of the company. The judge did not follow this argument, taking the understanding that it is not admissible to provide for a pardon of around 60 per cent (on average) of the non-subordinated part of the debt and, simultaneously, do not provide for any pardon for the subordinated part of the debt.

### IV TRENDS

According to the data available on the website of the Ministry of Justice, the number of insolvency proceedings in the first trimester of 2017 was slightly lower than the number of insolvency proceedings in the same period in 2016.

The introduction of legislative changes in June 2017 (which impacts the regulation of insolvency instruments, particularly affecting the regulation of special revitalisation proceedings, for which access requirements are made more demanding) might cause a decrease of the number of proceedings initiated. Furthermore, the novelty of the legislative changes will undoubtedly require a few months of adaptation for economic agents, while there are doubts about the scope of some of the new provisions, problems of practical application and questions of transitional application are discussed.
Chapter 20

RUSSIA

Pavel Boulatov

I INSOLVENCY LAW, POLICY AND PROCEDURE

i 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 two categories: claims that arose prior to the start of insolvency proceedings and are subject to registration in the register of creditors’ claims; and post-commencement claims that arose after the start of insolvency proceedings.

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 subject to registration 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 decides on the matter of their registration. The hearings at which the court decides 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

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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.9

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.10 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.11 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 of the debtor’s creditors that are subject to registration in the register of creditors:12

a claims of compensation for damage to health or loss of life;
b employees’ salaries, severance payments and royalties (with certain exceptions for the top management’s claims);
c all other claims (including taxes and other mandatory payments); and
d claims for contractual and any other penalties, and any lost profits by creditors.

The Insolvency Law provides that lower priority claims against a debtor could not be satisfied earlier than the higher priority claims. In case the debtor's assets are insufficient to satisfy claims of one priority, the claims of this priority will be paid 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 are not repaid from the proceeds of sale of pledged assets in insolvency. 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.13

9 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 decided 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).
10 Same objections as set out in Article V of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.
11 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.
12 For specific types of enterprises the ranking may differ. See Section I.vi.
13 This does not apply to collateral provided by third parties.
With a few exceptions, 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.

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 an opportunity to challenge certain transactions of the debtor.15

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;16

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;17 and
c transactions leading to preferential treatment of certain creditors.18

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.19

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

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14 The exceptions include the following: if a transaction is declared invalid as undue preference after the register was closed, but before a payment to all creditors of the relevant priority was made, the creditor’s claims may be registered and satisfied according to the relevant priority (Article 61.6(4) of the Insolvency Law); and 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 an 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.

15 Article 61.9(1) of the Insolvency Law.

16 Article 61.2(1) of the Insolvency Law.

17 Article 61.2(2) of the Insolvency Law.

18 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.

19 Article 61.7 of the Insolvency Law.
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.20 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.21 Based on this interpretation, the Supreme Commercial Court Presidium declared that the transfer of 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.22

20 Article 61.4(2) of the Insolvency Law.
21 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)).
22 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.
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 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.

Among other measures with a view to the creditors’ protection, the Insolvency Law provides for:

a) the liability of the debtor’s management for the unpaid creditors’ claims if their actions led to insolvency; and

b) 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.

According to the World Bank Group ‘Doing Business 2016’ research Russia has improved its insolvency legislation following the introduction of amendments aimed at accelerating the liquidation procedure and protecting the rights of the creditors with the secured claims.

Russia improved its insolvency legislation following introduction of amendments aimed at strengthening liability of controlling persons of insolvent companies including non-operating ones. According to the amendments, 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 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


24 See: www.doingbusiness.org.
administrators who are usually selected by creditors as discussed in Section I.v. Recent amendments to the law gave creditors additional rights 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. The amendments also aim at making the procedure for appropriation of unsold assets of the debtor faster and more transparent.

iii 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 preserve its property, analyse its financial position, prepare a register of creditors’ claims and hold 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. It should be noted that 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 decisions. 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.

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

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25 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.

26 Article 51 of the Insolvency Law.

27 Article 69 of the Insolvency Law. In this case the shareholders will select a new director according to the general procedure.

28 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.

29 Article 64 of the Insolvency Law.
Russia

stayed upon a creditor’s petition. In addition, upon commencement of the supervision no contractual interest and penalties shall accrue on any claims subject to registration (both 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 14 June 2016 the rate is 10.5 per cent per annum.30

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.31 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.32

**Financial rehabilitation**

Financial rehabilitation is an insolvency procedure that is applied to a debtor with a view to restore its solvency and to discharge its debts in accordance with an approved debt repayment schedule.33 Financial rehabilitation lasts for no more than two years.34

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 be presented at the first creditors’ meeting or, under certain circumstances,35 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

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30 The refinance rate is published at www.cbr.ru/.
31 Article 72(1) and 72(2) of the Insolvency Law.
32 Article 73 of the Insolvency Law.
33 Article 80(3) of the Insolvency Law.
34 Article 80(6) of the Insolvency Law.
35 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.
36 Articles 77, 78 and 80 of the Insolvency Law.
37 Articles 82 and 83 of the Insolvency Law.
38 Article 81 of the Insolvency Law.
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 with a view to restore its solvency. As a rule, external management is introduced by a court 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 commercial 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

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. 44

**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. 45

The insolvency administrator replaces the director general of the debtor. 46 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

39 Article 88(6) of the Insolvency Law.  
40 Article 93 of the Insolvency Law.  
41 Article 92(2) of the Insolvency Law.  
42 Article 99 of the Insolvency Law.  
43 Article 109 of the Insolvency Law.  
44 Article 119(6) and 119(7) of the Insolvency Law.  
45 Article 124(2) of the Insolvency Law.  
46 Articles 127 and 129 of the Insolvency Law.
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.

Based on the results of receivership, the commercial court will decide 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.47

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.48 Any amicable settlement is subject to approval 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.49 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.

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.50 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).51

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.52 In certain instances (e.g., where the

47 Article 149 of the Insolvency Law.
48 Article 156 of the Insolvency Law.
49 Articles 150–167 of the Insolvency Law.
50 Article 164(2) of the Insolvency Law.
51 Article 166(1) of the Insolvency Law.
52 Article 8 of the Insolvency Law.
debtor's funds or assets are insufficient to discharge all of its debts), the debtor must file for insolvency.\textsuperscript{53} The debtor is required to publish a notice of its intention to file an insolvency petition 15 days in advance.\textsuperscript{54}

**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.\textsuperscript{55} 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.\textsuperscript{56}

The court will consider the merits of the insolvency petition for a period of between 15 and 30 days.\textsuperscript{57} Upon the petitioner's request, the court may introduce injunctive measures available under the procedural rules.\textsuperscript{58} 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.\textsuperscript{59} 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.\textsuperscript{60}

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.\textsuperscript{61}

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\textsuperscript{53} Article 9 of the Insolvency Law.

\textsuperscript{54} Article 37(4) of the Insolvency Law.

\textsuperscript{55} 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. 306-3C16-3611 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. 305-3C16-18717 dated 27 March 2017).

\textsuperscript{56} Articles 3(2) and 6(2) of the Insolvency Law.

\textsuperscript{57} Article 42(6) of the Insolvency Law.

\textsuperscript{58} Article 42(7) of the Insolvency Law.

\textsuperscript{59} Article 7 of the Resolution of the SCC Plenum, No. 35 dated 22 June 2012.

\textsuperscript{60} Article 12 of the Resolution of the SCC Plenum, No. 35 dated 22 June 2012.

\textsuperscript{61} Article 11 of the Resolution of the SCC Plenum, No. 35 dated 22 June 2012.
The court should not accept a withdrawal of an insolvency application 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.62

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’ meetings63 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:64

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 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;65
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.66 If the debtor files for insolvency, it does not select the insolvency administrator.

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62 Ibid.
63 Article 15(4) of the Insolvency Law.
64 Articles 10(5), 12(1), 20.3(1), 69.9(1), 71(2) and 139 of the Insolvency Law.
65 The insolvency administrator generally includes claims to the register upon a court decision. The exceptions include employees’ claims.
66 Articles 65(1) and 45 of the Insolvency Law.
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.67 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).68 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)69 to enter into a settlement agreement and its conditions.70 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.71 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).72

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.73 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.74 Nonetheless, the secured creditors have the right of veto with respect to certain matters (e.g., settlement agreement,75 sale of pledge or mortgage).76 Further, according to the amendments to the Insolvency Law, secured creditors have voting rights on the matters of nomination of insolvency administrators and their removal.77

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’ committee78 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.79

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67 Article 37(5) of the Insolvency Law. The Ministry of Economic Development has not approved the procedure for selection of insolvency administrators.
68 Article 12(2) of the Insolvency Law.
69 Article 12 of the Insolvency Law.
70 Ibid.
71 Article 139(1.1) of the Insolvency Law.
72 Article 12(2) of the Insolvency Law.
73 Article 18.1(3) of the Insolvency Law.
74 Article 12(1) of the Insolvency Law.
75 Article 150(2) of the Insolvency Law.
76 Article 138(4) of the Insolvency Law.
77 Article 12(1) of the Insolvency Law.
78 Article 17(1) of the Insolvency Law.
79 Article 17(4) of the Insolvency Law.
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).

vi Special regimes

Individuals and certain entities are excluded from the general insolvency regime (discussed further below).

For individuals, the special insolvency regime applies materially differs. The following groups of legal entities are treated differently from the general insolvency regime:

a legal entities that may not be declared insolvent;
b legal entities that are subject to the general regime (however, specific rules apply); and
c financial institutions that are subject to a special insolvency regime that is materially different from the general regime.

A high-level analysis of the specific regulation is given below.

**Legal entities that may not be declared insolvent**

The following legal entities cannot be declared insolvent according to Russian law:

a state-owned enterprises established for special purposes;
b public law legal entities (non-commercial legal entities established by the state to exercise public functions);
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 that are subject to special insolvency rules**

The Insolvency Law establishes specific regulations on insolvency 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);
b agricultural enterprises (i.e., companies that receive more than 50 per cent of their profit from agricultural business).

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80 Article 65(1) of the Russian Civil Code.
81 'Kazennoe predpriatie' in Russian.
82 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).
83 Article 168 of the Insolvency Law.
84 Article 169 of the Insolvency Law.
85 Article 177 of the Insolvency Law.
There are no special insolvency rules relating to corporate groups. However, the Supreme Court has rendered a number of decisions on this matter. In two cases the Supreme Court decided that inter-group loans were sham transactions aimed to conceal contributions to share capital, and, thus the claims of the creditors affiliated with the debtors should not be registered as ordinary creditors’ claims and have the same priority. In another case it decided that if a party affiliated with the debtor makes a payment of the debtor’s debts, it is presumed that it did this as a gift, and, thus, the creditor’s claims are not transferred to this affiliated party by virtue of law. The Supreme Court also decided that if the borrower, the surety and the mortgagor are affiliated parties, it is presumed that they gave mutual security to the creditor. Therefore, if the surety or the mortgagor performs the borrower’s obligations, the creditor’s claim against other sureties and mortgagors does not transfer to this person by virtue of law. Each of the co-sureties and co-mortgagors responds for its own share in the mutual debt. If a surety or a mortgagor made a payment to the creditor in an amount exceeding its share, it receives the creditor’s claims for the relevant amount against the borrower only, and it acquires new recourse claims against other sureties and mortgagors. However, such affiliated party cannot use its claims to detriment the creditor, and it cannot enforce its claims until the creditor receives the full payment. Thus, these recourse claims are subordinated to the original creditor’s claims.

The most important differences in the insolvency regime include:

- An increased insolvency test: an agricultural enterprise may be declared insolvent if the amount of outstanding claims exceeds 500,000 roubles, a strategic enterprise or a natural monopoly may be declared insolvent if the amount of creditors’ claims exceeds 1 million roubles, and the claims are overdue for more than six months;
- Competent state or municipal authorities participating in the insolvency proceedings of town-forming enterprises, strategic enterprises, natural monopolies and developers.

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86 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).
87 Article 201.1 of the Insolvency Law.
88 Article 201.16 of the Insolvency Law.
90 Rulings of the Supreme Court No. 306-ЭС16-17647(1) and No. 306-ЭС16-17647(7) dated 30 March 2017.
91 Rulings of the Supreme Court No. 306-ЭС16-17647(2) and 306-ЭС16-17647(6) dated 30 March 2017.
92 Article 177 of the Insolvency Law.
93 Article 190(3) of the Insolvency Law.
94 Article 197(2) of the Insolvency Law.
95 Article 170 of the Insolvency Law.
96 Article 192 of the Insolvency Law.
97 Article 198 of the Insolvency Law.
98 Article 201.2 of the Insolvency Law.
the competent state or municipal authorities’ ability to request the court to take measures aimed at restoration of solvency of a town-forming enterprise\(^9\) or a strategic enterprise,\(^{100}\) 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); and

e the special procedures, which apply to the sale of assets of town-forming,\(^{101}\) agricultural,\(^{102}\) strategic enterprises\(^{103}\) and natural monopolies. They are as follows:\(^{104}\)

- the debtor’s assets necessary for its activities are first sold together as a single lot;
- certain persons may have pre-emptive rights to acquire the debtor’s assets; and
- 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.

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.\(^{105}\) 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.

**Legal entities that are subject to special insolvency regime**

Regulation of insolvency of the financial institutions materially differs from the general insolvency regime. The financial institutions include:\(^{106}\)

- credit institutions;
- insurance companies;
- professional participants of securities markets;
- private pension funds including pension funds that are engaged in mandatory pension insurance (there is special regulation of insolvency);
- management companies of investment funds, mutual investment funds and private pension funds;
- clearing houses;
- market operators;
- consumer credit cooperatives; and
- microfinance institutions.

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\(^9\) Articles 171–174 of the Insolvency Law.

\(^{100}\) Articles 191, 194 and 195 of the Insolvency Law.

\(^{101}\) Articles 175 and 176 of the Insolvency Law.

\(^{102}\) Article 179 of the Insolvency Law.

\(^{103}\) Article 195 and 196 of the Insolvency Law.

\(^{104}\) Article 201 of the Insolvency Law.

\(^{105}\) Article 201.4 and 201.15-2 of the Insolvency Law.

\(^{106}\) Article 180 of the Insolvency Law.
Insolvency of credit institutions, such as banks, is governed by very detailed rules. In general, if a credit institution faces financial difficulties, the Central Bank may decide, before withdrawing its banking licence, to use financial rehabilitation measures, including an appointment of temporary administration headed by an official of the Central Bank. If the Central Bank appoints temporary administration, it may limit or suspend the powers of the management of the credit institution. The temporary administration performs 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 use of 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 request the Central Bank to introduce a moratorium on making any 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 controlling persons or the chief accountant of the credit institution liable.

If the Central Bank decides to revoke the banking licence for whatever reason related or unrelated to insolvency, the bank must be liquidated and accordingly it must 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 insolvency.

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 perform the obligations.

If 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. In any event, if the credit institution meets the insolvency criteria at the date of revocation of the banking licence, the Central Bank must file for insolvency in five days after the publication of information about the revocation of the banking licence, or in five business days after the temporary administration informs the Central Bank about it.

If the court finds that the insolvency petition has merit, the credit institution is declared insolvent and receivership procedure is introduced. If the credit institution had a licence to engage deposits from individuals, the state corporation Deposit Insurance Agency (DIA) would act as the insolvency administrator.

There are special rules regulating post-commencement claims of credit institutions, registration of creditors’ claims, challenge of transactions and liability of directors. There
is also detailed regulation of some specific issues relevant to the financial markets such as
subordinated loans, completion of relations under financial contracts and clearing relations,
etc.

There are specific distributional priorities:

\(a\)  
First priority claims: The claims of compensation for damage to health or loss of life;
claims of individuals 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;

\(b\)  
Second priority claims: employees’ salaries, severance payments, royalties (with a
number of specific exceptions); and

\(c\)  
Third priority claims: all other claims.\(^{117}\)

Secured creditors do not have any priority over first and second priority claims.

Even though the regulation of insolvency of other financial institutions is similar to the
insolvency of credit institutions, they differ in some respects.

The Insolvency Law provides a number of measures aimed at restoring the solvency of
financial institutions that may be approved by the Central Bank.\(^{118}\)

In certain events, 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.\(^{119}\)
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 already discussed in this subsection. There are limitations
on performing certain transactions; however, there is no general moratorium on payment to
creditors.

There is a separate insolvency test for financial institutions.\(^{120}\) 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.\(^{121}\) However, some courts decide that such claims must be undisputed.\(^{122}\) In
addition to creditors and the debtor itself, temporary administration and the Central Bank
may file for insolvency.\(^{123}\)

\(^{117}\) Article 189.92 of the Insolvency Law.
\(^{118}\) Articles 180(4) and 183.1 of the Insolvency Law.
\(^{119}\) For example, if the financial institutions repeatedly during one month fails to make a payment in ten 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.
\(^{120}\) Article 183.16 of the Insolvency Law.
\(^{121}\) Article 184.2 of the Insolvency Law.
\(^{122}\) For example, Resolution of the Ninth Commercial Appellate Court No.09AP-58561/2015 dated
3 February 2016.
\(^{123}\) Article 173.19 of the Insolvency Law.
Only the supervision procedure and receivership are applied to financial institutions. If temporary administration was appointed, the supervision does not apply. It does not apply to pension funds engaged in mandatory pension insurance either. According to the amendments to the Insolvency Law, it does not apply to insurance companies. 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.

The Central Bank nominates an insolvency administrator, and there are special requirements applicable to him or her. In the case of an insolvency of a pension fund, which is engaged in mandatory pension insurance or an insurance company, the 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 decides on the matter of their registration. 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.

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.

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

124 Article 183.17 of the Insolvency Law.
125 Article 187.6 of the Insolvency Law.
126 Article 184.4 (3) of the Insolvency Law (as amended by Federal Law No. 222-ФЗ dated 23 June 2016, effective as of 21 December 2016).
127 Articles 183.19 and 183.25 of the Insolvency Law.
128 Article 187.8 of the Insolvency Law.
129 Article 184.4-1 of the Insolvency Law introduced by Federal Law No. 222-ФЗ dated 23 June 2016.
130 Article 183.26 of the Insolvency Law.
131 Article 185.3 of the Insolvency Law.
132 Article 185.6 of the Insolvency Law.
133 Article 186.5 of the Insolvency Law.
134 Article 187.10 of the Insolvency Law.
135 Article 184.7 of the Insolvency Law.
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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.

**Insolvency of individuals**

On 1 October 2015, long expected provisions regarding insolvency of individuals (consumer insolvency) became effective. Now an individual may be declared insolvent whether he or she is engaged in commercial activities or not.

A creditor may file for insolvency of an individual if the amount of his or her debt exceeds 500,000 roubles and is overdue for more than three months. 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).

In general, the following insolvency procedures may apply: 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. 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. The debtor or the creditors may work out a debt restructuring plan providing for repayment of debts for no more than three years. 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.

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. The aim of this procedure is to have the debtor’s assets sold and the creditor’s claims repaid.

Certain assets of an individual do not constitute a part of the insolvency estate. Such assets include the only residential premises of the individual and land plots on which the

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136 Article 184.10 of the Insolvency Law.
137 Article 186.7 of the Insolvency Law.
138 Article 187.11 of the Insolvency Law.
139 Article 213.3(2) of the Insolvency Law.
140 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.
141 Article 213.2 of the Insolvency Law.
142 Article 213.6 of the Insolvency Law.
143 Article 213.11 of the Insolvency Law.
144 Article 213.14(2) of the Insolvency Law.
145 Article 213.17(4) of the Insolvency Law.
146 Article 213.24 of the Insolvency Law.
147 Article 213.25 (3) of the Insolvency Law, Article 446 of the Civil Procedure Code.
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. 148

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. 149

In the end of the sale of assets, the court is to decide on the discharge of the debtor from unsettled claims. 150 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 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. 151 Upon completion of insolvency proceedings the court issues enforcement orders and the creditors may enforce their claims via the general enforcement procedure.

vii 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 exclusive jurisdiction of the Russian courts. 152

Foreign citizens residing in Russia may be declared insolvent in Russia, as well as Russian citizens residing abroad. 153 These proceedings will be treated as plenary insolvency proceedings. In practice, Russian courts permitted insolvency of German and Uzbek citizens residing in Russia. The courts decided 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 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. 154

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148 100 minimum salary rates set by the Russian government, which is 7,500 roubles as of 1 July 2016.
149 Article 213.27 of the Insolvency Law.
150 Article 213.28 of the Insolvency Law.
151 Article 213.28 (3, 5 and 6) of the Insolvency Law.
152 Articles 38 and Article 248(1.5) of the Commercial Procedure Code.
153 Clause 5 of the Resolution of the Plenary Session of the SC No. 45 dated 13 October 2015.
154 Resolution of the Eighth Commercial Appellate Court No. 08AP-5602/2017 dated 5 June 2017; Resolution of Commercial Court for the Moscow circuit No. F05-8738/2016 dated 8 July 2016; Resolution of the Second Commercial Appellate Court No. 02AP-398082017 dated 22 June 2017.
However, there is no publicly available information about a case where a foreign legal entity has been declared insolvent in Russia. Although insolvency of foreign legal entities is not expressly prohibited by Russian law, it is unlikely to be possible because the Insolvency Law is targeted at Russian legal entities.

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. 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. Non-final court decisions and preliminary orders (such as orders to appoint a temporary administrator as an interim measure) are not subject to recognition and enforcement. However, powers of the temporary 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. There is, however, contradictory court practice on this matter.

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 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

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156 Article 245.1 of the Commercial Procedure Code.

157 Clause 33 of Resolution of the Plenary Session of the SCC No. 55 dated 12 October 2006.


159 Ruling of Federal Commercial Court for the Moscow Circuit No. КГ-А41/5232-09-ж dated 9 September 2009.

160 Ruling of the SCC No. 2860/10 dated 4 May 2010.
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.\textsuperscript{161}

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.\textsuperscript{162}

II INSOLVENCY METRICS

Currently, the Russian economy is in the period of recovery. According to Fitch Ratings, Russia implemented a coherent and credible policy response to the sharp fall in oil prices.\textsuperscript{163}

According to a report prepared by the Ministry of Economic Development of the Russian Federation, in 2017 the economy was recovering. In May 2017, the increase of the GDP was 3.5 per cent as compared to the relevant period of the previous year; in June 2017 the GDP increased by 2.9 per cent. The increase in the second quarter of 2017 was 2.7 per cent as compared to the relevant period of the previous year.\textsuperscript{164}

The Federal Service of State Statistics reported that the index of industrial production increased by 2 per cent in the first six months of 2017 as compared to the relevant period of the previous year. The production of natural resources increased by 3.1 per cent, and manufacturing increased by 1.2 per cent.\textsuperscript{165}

The economic situation is different in various sectors of economy. According to the Ministry of Economic Development, the most productive sectors were engineering (with an increase of 2.8 per cent in the first half of 2017), chemical industry (with an increase of 7.2 per cent in the first half of 2017) and production of charred coal and oil products (with an increase of 0.4 per cent in the first half of 2017).\textsuperscript{166}

The increase in the engineering industry was because of the increase in production of cars and machinery (by 29.9 per cent in June 2017 as compared to June 2016). This can be explained by government support to the car-building industry. The increase in the automobile industry is explained by an increase in the production of cars (by 16.9 per cent in

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\textsuperscript{161} 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.

\textsuperscript{162} The court dismissed a claim against a Dutch debtor on the grounds that the creditor has already had its claims registered in course of the foreign insolvency proceedings. Ruling of the SCC No. 14334/07 dated 11 March 2008.

\textsuperscript{163} https://www.fitchratings.com/site/pr/1021502.


\textsuperscript{165} See footnote 163, pp. 6-7.

\textsuperscript{166} See footnote 166, pp. 3-4.
June 2017 as compared to June 2016), buses (by 32.1 per cent in June 2017 as compared to June 2016) and trucks (by 9.4 per cent in June 2017 as compared to June 2016). Metallurgic production decreased by 4.9 per cent during the first six months of 2017.167

The chemical industry increased, especially because of the demand for mineral and chemical fertilisers, ammonia, charred coal and oil products. There was a decrease of production in the food manufacturing industry by 2.5 per cent in June 2017 as compared to June 2016, with a slight general increase by 0.6 in the first half of 2017.168 Consumer goods manufacturing increased by 6.3 per cent during the first six months of 2017.169

The export of goods increased in the first six months of 2017 by 29.2 per cent, and imports increased by 27.4 per cent.170

Real salaries increased in the first six months of 2017 by 2.7 per cent.171 Real income, however, decreased by 1.4 per cent.172 Retail turnover decreased by 0.5 per cent during the first six months of 2017.173

The unemployment rate in June 2017 calculated under the ILO standards remained equal to 5.4 per cent of the labour power.174

The Central Bank reports that in the first half of 2017, credit availability terms remained harsh. Banks slightly softened non-price lending terms but maintained high requirements of financial stability of borrowers. However, interest rates continued to decrease. The main factors that influenced credit policy were competition between banks, decrease of the key interest rate, and decrease in cost of funds at the internal market.175

The data released by the Supreme Court show that in 67,744 new insolvency petitions were filed, including 26,299 petitions filed by debtors, 36,595 petitions filed by private creditors and 4,850 petitions filed by tax authorities. Those include 28,911 petitions to declare individuals insolvent.

In 11,008 cases, the courts introduced the supervision. In 14,127 cases, after the completion of the supervision, the courts declared the debtors insolvent and introduced the receivership. In 10,225 cases, the receivership was completed, and in 15,392 cases the proceedings were terminated. The courts introduced 365 external management procedures and financial rehabilitations in 41 cases. In 2016, there was no case that was terminated as a result of repayment of debts in 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 12 cases only. In most cases (208), 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.

167 See footnote 163, p. 10.
168 See footnote 166.
169 See footnote 163.
170 See footnote 163, p. 16.
171 See footnote 166, p. 6.
172 See footnote 166.
173 See footnote 166.
174 See footnote 166, p. 8.
In 2016, the courts received 18,979 applications to declare transactions invalid, 1,286 requests to remove insolvency administrators and 2,882 applications to hold debtors' controlling persons liable.

According to statistics published by the Centre of Macro-Economic Planning for the second quarter of 2017, the number of insolvencies increased by 2.8 per cent as compared to the first quarter of 2017 and by 5.4 per cent as compared to the second quarter of 2016. Such increase concerned almost all industries. This is also apparently because of a significant increase in number of insolvencies of individuals. As to the volume of business, 90 per cent of insolvencies concern companies with yearly revenues less than 400 million roubles, 6 per cent concern medium companies (yearly revenues of 401 million to 1 billion roubles), and 4 per cent relate to companies with revenues exceeding 1 billion roubles. More than 25 per cent of insolvencies concern companies that operated for less than five years.

Most insolvent companies used to operate in construction and commercial services. There is a material increase in the number of insolvencies in electric energy and metallurgy industries that suffered from the crisis most, as well as the machinery and food production. The number of insolvencies is also high in the retail, agriculture and transport sectors.

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

#### i Mr Oleg Mikheev and Mrs Tatyana Mikheeva

Oleg Mikheev was the beneficial owner of Diamant, a Volgograd-based group of companies, engaged in development, construction, commercial real estate, hotel, restaurant and retail business. He was also a beneficial owner of Volgoprombank before its merger to Promsvyazbank in 2010. In 2007 and 2011, he was elected as a member of the Russian parliament (the Duma) being a member and the head of the Volgograd branch of the Spravedlivaya Rossiya (Fair Russia) political party. Mrs Tatyana Mikheeva is Mr Oleg Mikheev’s wife.

Mr Mikheev’s businesses got into financial difficulties and owed substantial amounts to a number of banks including Promsvyazbank, BTA Bank, Otkrytie, Moskommertz Bank, AMT Bank and Renaissance Credit. The loans were secured by personal suretyship of Mr Mikheev and his wife; some of the loan agreements were concluded directly with them. The amount of creditors’ claims against Mr Mikheev is approximately 9.5 billion roubles.

In October 2015, creditors allegedly related to Mr Mikheev filed for his and his wife’s insolvency. It is reported in the media that Mr Mikheev filed for bankruptcy to have his debts written off. Mr Mikheev and Mrs Mikheeva were declared insolvent in December 2015; however, the insolvency proceedings are still ongoing because registration of creditors’ claims and sale of the debtors’ assets is not complete.

To receive more control over insolvency and to reduce the share of independent creditors, persons related to Mr Mikheev tried to have their claims registered in the course of his insolvency proceedings. The courts satisfied these applications because there were no formal grounds to refuse. Finally, the matter of inter-group debts came up to the Supreme Court of the Russian Federation. This made the Supreme Court develop a number of...
approaches discussed in Section I.vi. Namely, the Supreme Court decided that the courts may refuse registration of claims of related parties, if such claims may be qualified as gifts or sham transactions.

ii Mr Poymanov

Mr Sergey Poymanov was a beneficial owner of one of the largest European producers of crushed granite stone OJSC ‘Pavlovskgranit’.

In 2008, CJSC Pavlovskgranit-Invest received a loan from Sberbank to buy out 48 per cent of shares in OJSC Pavlovskgranit in favour of Mr Poymanov. The loan was secured by pledge of the shares in OJSC Pavlovskgranit and suretyship of Mr Poymanov. The borrower failed to repay the loan to Sberbank, and it levied execution on the pledged shares.

On 2 October 2015, a Sberbank successor filed an application to declare Mr Poymanov insolvent with the Moscow Region Commercial Court. The court satisfied it and introduced the restructuring of debts on 8 February 2016. On 27 July 2016, the court started the sale of assets.

Mr Poymanov’s assets include claims against Sberbank Capital, Mr Herman Gref (the president of Sberbank) and a number of other respondents for US$750 million damages allegedly caused by unlawful appropriation of the shares in OJSC Pavlovskgranit and corporate raiding.

Mr Poymanov assigned these claims to a US company PPF Management. PPF Management further filed a claim against Sberbank Capital and other respondents with a New York court to recover the damages.

The receiver of Mr Poymanov filed an application to declare the assignment of the claims to PPF Management invalid with the Moscow Region Commercial Court. The court satisfied this application on 31 July 2017. The court decided that this transaction caused damage to the creditors’ rights.

The receiver also filed an application with a court in New York to recognise his powers as a foreign insolvency administrator. On 31 July 2017, the Bankruptcy Court for the Southern District of New York recognised the Russian insolvency proceedings as foreign main proceedings under Chapter 15 of the US Bankruptcy Code, concluding that a retainer deposited with the debtor’s attorneys in the US was sufficient property within the United States to establish jurisdiction over a debtor under section 109(a) of the Code and the Russian insolvency proceedings were not ‘manifestly contrary to public policy of the United States’.

This is likely to impair the proceedings for recovery of damages because PPF Management no longer possesses the claims.

iii Tatfondbank

As of 1 October 2016, Tatfondbank was the 43rd largest Russian bank by way of assets. It was one of the largest banks of Republic of Tatarstan, and the Republic of Tatarstan held 41.68 per cent of its shares. It was serving approximately 20,000 legal entities and 500,000 individual clients.

In 2014, international rating agency Standard & Poor’s assigned to Tatfondbank long-term and short-term credit ratings of B/B and a national scale rating of A-; the outlook was stable.

However, on 15 December 2016, the Central Bank appointed temporary administration in Tatfondbank on the grounds that the bank failed to make a payment to its creditors. On 3 March 2017, the Central Bank withdrew the Tatfondbank’s banking licence.
According to the analysis made by the Central Bank and the Deposit Insurance Agency, the amount of obligations of the bank exceeded the value of its assets by approximately 118 billion roubles.

These events happened because the management of the bank did not accurately estimate loan risks, and, as a result, its assets were of low quality and were overestimated. The bank also failed to comply with a number of regulations of the Central Bank, including those related to sufficiency of assets.

For these reasons, the Central Bank decided that the financial rehabilitation of the bank was not possible and filed for insolvency. On 11 April 2017, Tatfondbank was declared insolvent and the receivership procedure was introduced. The Deposit Insurance Agency was appointed as the receiver.177

According to the Deposit Insurance Agency, the amount of the claims filed against the bank is 537 billion roubles and the amount of the registered claims is 134.7 billion roubles. More than half of the claims are claims of small creditors. The bank has more than 11,000 individual creditors with claims exceeding 70 billion roubles.

The Deposit Insurance Agency filed claims for recovery of debts of the bank for 3.8 billion roubles and filed applications to challenge transactions worth 10 billion roubles.

iv TsentrObuv

JSC Trading House TsentrObuv was one of the biggest Russian retailers of shoes existing since 1992. As of June 2014, it had more than 1500 stores in 300 towns and its turnover was 34.1 billion roubles.

It was expanding aggressively, made material borrowings and was preparing for IPO. However, it appeared not to be ready to the financial crisis and decrease of profits of consumers. According to publicly available accounting documents, by the end of 2014 its obligations exceeded 25.5 billion roubles, and in 2015 it faced approximately 500 claims for 5.9 billion roubles, and in 2016, 135 claims for 438 million roubles. Finally, the company became unable to service its debts. The management tried to negotiate restructuring; however, this was unsuccessful.

In October 2015, creditors filed a number of insolvency applications, and on 29 March 2016 the supervision stage of insolvency commenced. On 14 March 2017, TsentrObuv was declared insolvent and the receivership stage commenced. The amount of registered claims is 23.5 billion roubles.

The inventory of assets is ongoing. Once it is complete the company’s assets will be sold, and the proceeds will be distributed between its creditors.

A criminal investigation was initiated in respect to one of the shareholders of TsentrObuv. He is suspected of intentional failure to repay the loans.

v Razgulay Agricultural Holding

Razgulay Group was one of the largest agricultural holdings dealing with sugar, agricultural and grain production. It had 12 elevators, 10 sugar plants, six milling plants, a milk factory and other factories. The holding controlled over 300,000 hectares of agricultural land and 10 per cent of the Russian market of sugar.

177 Case No. A65-5821/2017 considered by the Commercial Court for the Republic of Tatarstan.
In 2006, the company raised US$144 million as a result of IPO. It also issued bonds. However, in 2009 it was in default on the bonds for 8 billion roubles. One of the largest creditors of Razgulay was Vneshekonombank (VEB) with claims of approximately 34 billion roubles. In 2009 VEB received 19.97 per cent of shares in Razgulay.

In 2015, VEB assigned the claims against Razgulay and shares in Razgulay to Rusagro Group, another major producer of sugar. As a result, Rusagro became the owner of 32 per cent of shares in Razgulay.

In 2016, Rusagro decided to enforce its claims and have the assets of Razgulay sold. In 2016, assets for 15 billion roubles were sold. Rusagro acquired some of the assets, including three sugar plants and 90,000 hectares of agricultural land.

Finally, in June 2016 Rusagro filed for insolvency of Razgulay. On 28 October 2016, the Moscow Commercial Court satisfied the insolvency application and introduced the supervision stage of insolvency. On 24 April 2017, the company was declared insolvent and the receivership stage commenced. Rusagro is the major creditor of Razgulay. As of June 2017, its claims for 2.5 billion roubles were registered. At the day of writing, the receivership stage and sale of the debtor’s assets is ongoing.

vi Marine Gardens
Marine Gardens was a company to build a seaquarium in Moscow.

In 2004 it entered into a long-term lease of a 4 hectare land plot in the west of Moscow. The project involved construction of 215,000 square meters of a seaquarium, hotel, apartments and office buildings.

According to the business media, a beneficial owner of the company was Mr Mukhtar Ablyazov, ex-beneficial owner of Kazakh BTA Bank. The construction of the seaquarium was suspended in 2008 while a criminal investigation in respect to Mr Ablyazov related to alleged fraudulent withdrawal of assets of BTA Bank was pending.

In August 2015, the federal tax inspectorate filed for insolvency of the company. Further, BTA Bank filed an insolvency application as well. The supervision stage was introduced on 19 April 2016. On 11 October 2016, the company was declared insolvent and the receivership stage commenced. BTA Bank was the major creditor with claims of 8.2 billion roubles arising out of a loan agreement.

Finally, BTA Bank and Marine Gardens reached a settlement. On 20 July 2017, the court terminated the insolvency proceedings and approved a settlement agreement. Pursuant to its conditions, claims of minor creditors must be repaid by 1 September 2017. Claims of BTA Bank and another major creditor (with claims of 300 million roubles) must be repaid by 1 July 2022. The parties agreed that no interest will accrue on these amounts. The creditors also waived their claims for penalties and moratorium interest for the period of insolvency. There are no other conditions of settlement approved by the court and no restructuring plan.

There may be some confidential restructuring agreement. According to information published in the media, the company plans to raise additional investment of 12 billion roubles and to complete the construction.

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.

The new developments in the law include increasing liability and the number of cases where beneficial owners of the debtor are held liable for the debtor’s debts.

In almost every significant insolvency there are disputes related to registration of claims of creditors related to 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 is litigation over voidable transfers or fraudulent transfers.

Another trend is strengthening protection of the interests of tax authorities in the course of an insolvency. The legislator gave tax authorities additional time to file their claims for registration in the course of receivership and introduced certain limitations to challenge payments of taxes as preference transactions. Courts tend to interpret the law in a way to give priority to tax claims over other creditors’ claims if there is an uncertainty in this respect.178

As for insolvency of financial institutions, the Central Bank exercises its control functions very actively, and there have been a large number of cases where the Central Bank withdrew banking licences and filed for insolvency of credit institutions.

Long-discussed and expected legislation developments relate to financial rehabilitation proceedings. The government of the Russian Federation developed a draft law on restructuring proceedings and introduced it to the Duma. According to the draft, the debtor or a creditor is able to file for debt restructuring. If the court satisfies this application, the creditors and the debtors would have four months to develop a restructuring plan. The plan should provide for repayment of debts during the four years after its approval by the court or during up to eight years if the creditors approve it. The restructuring plan may provide for different options for management of the debtor: 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. It is unclear to what extent and when the Duma will approve this draft law; however, it may be considered on an expedited basis because the government introduced it.

178 For example, the Supreme Court decided that the claims related to ongoing business activities of the debtor fall in the lowest priority of post-commencement claims rather than to the third priority (utilities and maintenance). Thus, such claims do not have priority over post-commencement tax claims. The claims for payment for utilities include only costs necessary to maintain the debtor’s assets and keep them secure until they are sold (clause 8 of the Review of case law on issues related to participation of tax authorities in insolvency cases, approved by the Presidium of the Supreme Court on 20 December 2016). The courts also decided that the claims for income tax and pension insurance claims have the same priority as employees’ claims for salary (which are of higher priority than ordinary creditors’ claims (including tax claims) (clauses 8 and 14 of the Review of case law approved by the Presidium of the Supreme Court on 20 December 2016).
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.

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.

1 Nish Shetty is a partner, and Elan Krishna and Keith Han are associates, at Clifford Chance Asia.
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), 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

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2 Section 247, Companies Act.
3 Section 297(1), Companies Act.
4 Section 294(1), Companies Act.
Provisional liquidation

A provisional liquidator will be appointed by the High Court (the Court) pending determination of the winding-up application 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.

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).

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.

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:

- the survival of the company, or the whole or part of its undertaking as a going concern;
- the approval under Sections 210 or 211I of the Companies Act of a compromise or scheme of arrangement; or
- a more advantageous realisation of the company’s assets than would be effected on a winding up.

The judicial manager has the power to manage the business and property of the company. In addition, during the period for which a judicial management order is in force:

- the company cannot be wound up;
- no receiver and manager of the whole of the company’s property can be appointed;
- there is a moratorium on legal proceedings against the company; and
- no security can be enforced against the company’s property except with the consent of the judicial manager or with leave of the court.

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5 Section 267, Companies Act.
6 Section 267, Companies Act.
7 Section 269, Companies Act.
8 Section 227A, Companies Act.
9 Section 227B, Companies Act.
10 Section 227G, Companies Act.
11 Section 227D, Companies Act.
An interim judicial manager may be appointed by the court pending determination of the judicial management application if: the applicant can demonstrate a *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.

**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’. 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.

**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.

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:

a. 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; or

b. 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.

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.

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12 Section 4(10), Civil Law Act.
13 Section 210, Companies Act.
14 Section 210(3AB), Companies Act.
15 Sections 211H(2) and 211H(3), Companies Act.
16 Section 211H(4)(a), Companies Act.
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. A company is deemed to be unable to pay its debts when:

- 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, or
- 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.

Generally, a winding-up application can be presented to the Court by: the company; the company’s directors; or the company’s creditors. 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.

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.

**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).

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.

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17 Section 254(1)(e), Companies Act.
18 Section 254 (2)(a), Companies Act.
19 Section 254 (2)(b), Companies Act.
20 Section 253(1), Companies Act.
21 Section 255(2), Companies Act.
22 Section 258, Companies Act.
23 Sections 296 to 298, Companies Act.
24 The statutory declaration is made by the company’s directors.
25 Section 293, Companies Act.
26 Section 255(1), Companies Act.
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.27 The directors must also prepare a statement of affairs.28 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.29

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.30

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.31

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.32

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.33 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.34

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.

27 Sections 293(1) and 293(3), Companies Act.
28 Section 293(2), Companies Act.
29 Section 294(1), Companies Act.
30 Section 295, Companies Act.
31 Section 227A, Companies Act.
32 Section 227D(4), Companies Act.
33 Section 227B(5), Companies Act.
34 Section 227C, Companies Act.
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. 35

**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). 36 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. 37 An automatic 30-day stay of all proceedings against the company arises upon the filing of an application for such moratorium under Section 210(10) of the Companies Act. 38 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, 39 a brief description of the intended scheme of arrangement 40 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. 41 A creditor may apply to the Court to vary or terminate the moratorium, especially if the applicant company has not filed the information required. 42

A moratorium 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) 43 and applies to acts taking place in Singapore or elsewhere as long as the creditor is in Singapore or within the jurisdiction of the Court. 44

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.

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35 Order 30, Rule 2, Singapore Rules of Court.
36 Sections 210(1) and 210(2), Companies Act.
37 Section 210(10), Companies Act.
38 Sections 211B(8) and 211B(13), Companies Act.
39 Section 211B(4), Companies Act.
40 Section 211B(4), Companies Act.
41 Section 211B(2)(b), Companies Act.
42 Sections 211B(10), 211B(11), and 211B(4), Companies Act.
43 Section 211C(1), Companies Act.
44 Section 211B(5), Companies Act.
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.45 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.46

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.47

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.48

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.49 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.50

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.51 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.52

45 Section 272(1)(a), Companies Act.
46 Sections 294(2) and 297(4), Companies Act.
47 Section 265(1), Companies Act.
48 Section 275, Companies Act.
49 Section 227G(2), Companies Act.
50 Section 227J, Companies Act.
51 Section 227M, Companies Act.
52 Section 227N, Companies Act.
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.\textsuperscript{53}

**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.\textsuperscript{54}

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.\textsuperscript{55}

**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.\textsuperscript{56}

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.\textsuperscript{57}

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

\textsuperscript{53} Section 227I, Companies Act.

\textsuperscript{54} Section 218(3), Companies Act.

\textsuperscript{55} Section 227(2), Companies Act.

\textsuperscript{56} Sections 211E(9) and 227HA(10), Companies Act.

\textsuperscript{57} Sections 211E(1) and 227HA(1), Companies Act.
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’.

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 2015.58

III PLENARY INSOLVENCY PROCEEDINGS

In February 2017, the Court in Parakou Shipping Pte Ltd (in liquidation) v. Liu Cheng Chan [2017] SGHC 15 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

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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.

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.
Chapter 22

SLOVENIA

Grega Peljhan, Blaž Hrastnik and Urh Šuštar

I INSOLVENCY LAW, POLICY AND PROCEDURE

i Statutory framework and substantive law

The consequences and effects of insolvency and general rules of insolvency proceedings are governed by the Insolvency Act (Financial Operations, Insolvency Proceedings and Compulsory Winding-up Act) (the Insolvency Act), which sets forth the fundamental legal framework of insolvency proceedings in Slovenia. Apart from the Insolvency Act, several acts regulate sector-specific insolvency regimes in case of insolvency of a bank, an insurance company, a payment system, a broker dealer or a clearing company and an investment fund manager.

Pursuant to the Insolvency Act, the first phase of the proceedings are preliminary insolvency proceedings that are initiated with the filing of a motion for initiation of the procedure. Such motion can generally be filed by the insolvent debtor, an unlimitedly liable shareholder of the debtor, a creditor (who demonstrates its claim against the insolvent debtor with payment of which the insolvent debtor is in default for more than two months) or, in some cases, the Public Guarantee, Maintenance and Disability Fund. The proposing party has to demonstrate that the prerequisites for commencement of insolvency proceedings have been met. The main prerequisite, as set forth by the Insolvency Act, is that the debtor is actually insolvent. Insolvency is a situation in which the debtor: is not able to settle all its liabilities within a longer period of time, which fall due within such a period of time (continuous cash-flow insolvency); or becomes long-term balance-sheet insolvent.

The initiation of insolvency proceedings gives rise to certain legal consequences for the insolvent debtor and its creditors, which somewhat vary as to the type of insolvency that was initiated.

Both in a compulsory settlement and bankruptcy proceeding there are various rules as to how the claims are effected by official initiation of the proceeding, for example, generally (with certain limitations) there is automatic set-off of claims of individual creditors against the insolvent debtor and counterclaims of the insolvent debtor against such individual creditors; non-monetary claims are converted to monetary claims; conversion of claims with occasional duties into lump-sum claims; conversion of claims expressed in foreign currency to claims expressed in euros; change of the interest rate in the bankruptcy proceeding, etc.

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In regard to the creditors’ claims, the Insolvency Act also provides for distributional priorities to the benefit of the debtors with certain types of claim or certain debtors. First, the Insolvency Act recognises secured claims, which are secured with the right to separate settlement from sale of certain assets, and secondly, unsecured claims, which are repaid from the general bankruptcy estate (which is not subject to the right of a separate settlement). Certain unsecured claims, however, are assigned a priority repayment right. The Insolvency Act recognises eight classes of unsecured priority claims, all of which are related either to employee claims or taxes and other duties or restructuring loans, which are backed by a state guarantee.

**Clawback actions**

The right of creditors to challenge the legal acts of their debtors under general civil law rules is, upon the commencement of bankruptcy proceedings, replaced by their right to challenge legal acts of the insolvent debtor in accordance with the provisions of the Insolvency Act.

Pursuant to the Insolvency Act, all legal acts and actions of the insolvent party (the same also applies to omissions), including, for example, conclusion of agreements, payments, deliveries made to the other party, etc., concluded or performed in the ‘suspect period’ of 12 months preceding the filing of the petition for commencement of bankruptcy proceedings until commencement of such proceedings may be challenged in bankruptcy proceedings by other creditors or the bankruptcy administrator. The right to challenge those acts is subject to a statute of limitations and has to be exercised within six months after the commencement of bankruptcy proceedings (with some exceptions).

The bankruptcy administrator or other creditors may challenge any legal act or action of the debtor that it concluded or performed in the suspect period if (the same applies mutatis mutandis for omissions) it resulted either in reducing the net value of the assets of the insolvent debtor so that, as a consequence, other creditors’ claims may be satisfied in a proportionally smaller share; and the person to the benefit of which the act was performed, was aware or should have been aware of the debtor’s insolvency.

If the legal act of the insolvent debtor is successfully challenged, the person to the benefit of which the voidable legal act was performed is obliged to return what it received on the basis of such act or, if this is not possible, the value of what it received.

**Liability of the management**

The Insolvency Act, among other things, prescribes obligations of the company and its management and supervisory board in the event of insolvency (and also prescribes very strict deadlines for each action to be performed). Failure to comply with such duties generally leads to joint and several liability of the members of the management towards the creditors for any damages arising as a result of breach of their obligations provided for in the Insolvency Act.

**ii Policy**

The Insolvency Act, particularly after the 2013 and 2016 amendments, provides for precautionary restructuring, as well as for compulsory settlement, and encourages greater

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4 Applies also to the members of the supervisory board.
restructuring and deleveraging, compared to the winding up of an insolvent debtor. However, in spite of the fact that the legislator has provided sufficient options to avoid bankruptcy, the implementation of such options is, in practice, often complicated for several reasons, including lengthy and inefficient proceedings and a lack of judicial capacity owing to the high number of insolvency cases as a result of the financial crisis of 2009.

iii Insolvency procedures

Generally speaking, there are two types of insolvency proceeding provided for in the Insolvency Act with regard to an insolvent company. The first is the bankruptcy proceeding, the purpose of which is typically management and sale of assets of the bankrupt debtor, division of proceeds (bankruptcy estate) to ordinary, priority and secured creditors of the insolvent company, payment of costs of the proceeding and finally winding up of the company. The bankruptcy administrator is appointed by the court and acts as manager and legal representative of the bankrupt debtor. A creditors’ committee may be appointed to supervise the bankruptcy proceeding, which is also supervised by the court, all to the extent provided for in the Insolvency Act.

The other form of insolvency proceeding is compulsory settlement proceeding. The main difference is that compulsory settlement is a way to restructure the debt of the company without termination of the company as a legal entity. In compulsory settlement, a compulsory settlement administrator is appointed by the court (in case of creditors’ proposal for compulsory settlement the administrator may be appointed based on their proposal), but he or she does not take a role of manager of the company (the previous management of the company typically retains their role as management; however, their powers and the general business operations of the insolvent company are limited).

Apart from the two above-mentioned types of insolvency procedure, the Insolvency Act, since 2013, also provides for a procedure of precautionary restructuring. Such proceeding is intended for situations where it is likely that the debtor shall (in a period of one year) become insolvent.

Bankruptcy procedure

The main difference between bankruptcy and compulsory settlement proceedings is that the bankruptcy proceeding finishes with termination of the company as the legal entity. In general, the main activities within the bankruptcy proceeding are:

a preliminary proceedings: where the court decides if the formal prerequisites for initiation of the proceeding are met and officially initiates bankruptcy;

b registration and verification of claims, which may, in practice, take a few months. Each creditor may register its claim (and rights to separate settlement and separation rights) in the bankruptcy proceeding within three months after a notice on commencement of the proceeding is published. The consequence of non-registration or incorrect registration of claims and the rights to separate settlement is usually loss of claims and separation rights;

c management and sale of the assets of the bankruptcy debtor: the assets are sold in accordance with specific rules of the Insolvency Act; and

d distribution of the bankruptcy estate: the estate is divided in different phases in accordance with specific rules of the Insolvency Act.
Compulsory settlement

Generally, the high-level outline of the compulsory settlement procedure is in phases of preliminary procedure and registration and verification of claims similar to the bankruptcy. After the final list of recognised claims is issued it is followed by:

a  a process with an objection against the conducting of compulsory settlement if either the administrator or any of the creditors file an objection that the prerequisites for compulsory settlement proceeding are not fulfilled. If the court agrees with the objection against the compulsory settlement and finds that the substantial prerequisites are not fulfilled, the court may commence bankruptcy proceedings against the insolvent debtor; and

b  a process of voting for or against compulsory settlement and confirmation of compulsory settlement by the court (if there is no founded objection filed against compulsory settlement and if (in a typical compulsory settlement proceeding) at least 60 per cent of the all votes are cast for the confirmation of compulsory settlement). If compulsory settlement is not confirmed, bankruptcy proceedings should be commenced.

As a rule (in case of a compulsory settlement proceeding concerning a small, medium-sized or large enterprise), two different types of compulsory settlement proposals may be made. First, restructuring of ordinary claims (haircut or deferral of maturity of ordinary claims or both), while secured claims remain unaffected. In this case, a haircut or prolongation of maturity of all ordinary claims (both financial and non-financial claims) may be proposed or, alternatively, this may be limited to financial ordinary claims (i.e., financial claims are affected in such a case, while other ordinary claims remain unaffected). If a secured claim is not paid in whole from the value of the collateral, the compulsory settlement applies to the unpaid amount of the claim. Secondly, restructuring of secured claims (in addition to restructuring of ordinary claims). As a rule, the position of secured creditors in a compulsory settlement is stronger than the position of ordinary creditors. For secured claims (to the extent that such claims are actually secured) a haircut or reduction of the amount of the principal may not be proposed, but only prolongation of maturity and reduction of interest. If restructuring of secured claims is proposed, the compulsory settlement has to be voted for by sufficient majority of both ordinary and of secured creditors.

Simplified compulsory settlement

The simplified compulsory settlement is intended for smaller (micro) companies and private entrepreneurs because the normal compulsory settlement would otherwise be too expensive for them. In case they could not afford to carry out the normal compulsory settlement, they would be forced into the bankruptcy proceeding. The simplified compulsory settlement is cheaper, as in this proceeding, a compulsory settlement administrator is not nominated, nor is an auditor or appraiser. Other main characteristics of this procedure include that registration of the claims of the creditors is not needed, therefore the claims are not tested (so there is no list of registered claims) and that a creditors’ committee is not formed. Otherwise, the provisions of the normal compulsory settlement apply mutatis mutandis.

Precautionary restructuring

The 2013 amendment of the Insolvency Act established a new pre-insolvency form of proceeding (i.e., a procedure of pre-emptive restructuring). Such proceeding is intended for a situation where it is likely that the debtor shall, in a period of one year, become insolvent.
The motion for initiation of such a preventive restructuring proceeding can be filed only by the debtor itself and has to include a list of all financial claims against the debtor and the auditor's report encompassing a review of the basic list of financial claims, in which the auditor has given its audit opinion without reservation, and a notarised statement of consent of creditors having at least 30 per cent of ordinary claims that they submit before proceedings commence. The effect of commencement of the proceeding is a 'standstill' for secured and unsecured financial claims.

If an agreement between the debtor and creditors having three-quarters of unsecured financial claims and (if the proposal applies to secured claims) secured creditors having three-quarters of secured financial claims is reached, the court should issue a resolution on confirmation of the agreement. This agreement has effect for all the creditors who consented to the conclusion of the agreement and for other creditors with unsecured financial claims (haircut or postponing of maturity or both) or for those with secured financial claims (change of interest rate or postponing of maturity or both).

Slovenian law also recognises secondary insolvency proceedings, which will be described in more detail in Section VI.vii.

iv Starting proceedings
The motion for initiation of the bankruptcy proceeding is typically filed either by the debtor or the creditor. The creditor has to prove with a degree of probability its claim vis-à-vis the debtor (against which it is proposed that bankruptcy proceedings should be commenced) and that the debtor has been in default (delay of payment) of that claim for more than two months.

Alternatively, the compulsory settlement procedure can generally be initiated only on the motion of the debtor or personally liable shareholder. However, the compulsory settlement for small, medium and large companies (but not micro companies) can be initiated upon motion of the creditors, which jointly have one-fifth of all financial claims. Such creditors are, for example, banks, which have all the necessary information and infrastructure, and can prepare an adequate restructuring plan later on.

The simplified compulsory settlement is initiated upon motion of a debtor or a personally liable shareholder of the debtor and the precautionary restructuring upon the motion of a debtor.

v Control of insolvency proceedings
The final decision-making in insolvency proceedings is conferred upon the competent district court, more precisely, a district court judge. The court supervises the process and gives consent to all major decisions of the insolvency administrator (and in some cases also creditors). The Higher Court in Ljubljana has the exclusive appellate jurisdiction for the territory of Slovenia.

The compulsory settlement procedure is supervised and the bankruptcy procedure is managed by the administrator who is, as a rule, named by the court. The administrator's role is managing the estate or performing other roles, predominantly aimed at safeguarding and executing creditors' interests.

In the compulsory settlement procedure, the administrator supervises the business activities of the debtor. The insolvent debtor has to grant the administrator access to all the information necessary for effective supervision and enable inspection of all documentation and business records. On the other hand, in the bankruptcy procedure, the administrator
manages the business of the insolvent debtor and represents the insolvent debtor, if necessary. Its functions include all necessary acts in connection with testing of claims, clawback and damages actions, all acts required for realisation of the bankruptcy estate and other acts and transitions, as may be required from time to time.

vi Special regimes

Slovenian law provides for several sector-specific insolvency regimes, namely in case of insolvency of a bank, an insurance company, a payment system, a broker dealer or a clearing company and an investment fund manager. The specifics of such insolvency proceedings are governed by sector-specific legislation and not by the Insolvency Act. However, there are very few cases of special sector-specific insolvency procedures in Slovenia and there is essentially no established practice.

vii Cross-border issues

Secondary insolvency proceedings in Slovenia are to be distinguished with regards to the country of plenary insolvency proceedings. Namely, if the plenary insolvency proceedings are pending in an EU Member State, the secondary insolvency proceedings are governed by EU law, and if the plenary insolvency proceedings are pending in a third country, the secondary insolvency proceedings are governed by the Insolvency Act.

II INSOLVENCY METRICS

In the first quarter of 2017, GDP growth continued as a result of a notable strengthening of exports. GDP growth was 2.5 per cent in first quarter of 2017, which is 5.3 per cent higher than in the same period of 2016. The GDP growth can be attributed mainly to the growth in exports, boosted by rising foreign demand and a competitive tradable sector. The labour market situation continues to improve compared to the years 2014 and 2015. The number of registered unemployed continues to decline, namely from 102,289 people in mid-2016 to 79,000 people in mid-2017.

The decline in domestic non-banking sector loans, which has been a trend for a few years, is slowing predominantly because of the increased borrowing of the corporate sector abroad. In 2016, company performance improved significantly for the third consecutive year, and the indebtedness and overindebtedness of the corporate sector declined further. In addition, the corporate sector has undergone intense deleveraging since 2013. The ability of companies to repay their debts has improved significantly in the last three years.

In the first half of 2017, 678 bankruptcy procedures, 31 settlement procedures and 114 compulsory settlements and voluntary winding-up procedures were commenced. The number of opened insolvency procedures has risen in comparison with the first half of 2016; however, their complexity and social impact continue to decline (as there are few insolvency procedures over large or mid-sized undertakings).

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III PLENARY INSOLVENCY PROCEEDINGS

1 T–2

T–2 d.o.o. is one of the leading Slovenian telecommunication companies with the third-largest market share in the Slovenian market of broadband internet services, IP telephony and IP TV. T–2 underwent a compulsory settlement proceeding that was initiated in January 2011 because the company was overindebted and, therefore, insolvent. As a consequence, a compulsory settlement procedure was commenced and also concluded in 2012. The restructuring plan of T–2 envisaged haircut of the unsecured creditors’ claims to 44 per cent and deferment of their payment to the year 2021 (with no fixed payment schedule). The restructuring plan also explicitly indicated that the company had to promptly service the debt to the secured creditors (also those with pledges on the telecommunication network of the debtor) until the sale of the network by the end of 2014. Furthermore, the restructuring plan envisaged business restructuring with fixed milestones in the business plan that included measurable objective goals, like the number of clients, market shares, etc., as well as financial goals. Since a part of the financial plan was also prompt service of the secured claims until the sale of the pledged property, the debtor had to generate enough income to meet the financial goals as well.

During the compulsory settlement, a (minor) debt-to-equity swap was executed, and a second debt-to-equity swap was performed in 2012, when the claims in the amount of €17.7 million were converted. The result of the debt-to-equity swap was that the former shareholders lost their shares and new shareholders entered into the shareholder structure of T–2.

After the compulsory settlement, T–2 failed to service the outstanding debt (loans) of the secured creditors and also failed to achieve both the financial and non-financial goals provided for in the restructuring plan. The secured creditors (four commercial banks) consequently induced pressure on T–2 in order to force the company to promptly service the financial debt (in the amount of approximately €107 million); however, the debtor argued that the generated income of the company cannot serve as source for payment of the secured creditors. Under T–2’s views the only source for their repayment can be the proceeds from the pledged property, while the unsecured part of their claims can be repaid as unsecured claims (i.e., until 2021).

In early 2013 the banks first attempted a civil execution proceeding against the debtor; however, since T–2 filed an objection against the decision of the court (that is still pending), the civil execution procedure was, in principle, blocked. Furthermore, the debtor filed a lawsuit against the bank, in which it had been claiming that the established security interest was null and void.

In mid-2014, the secured creditors filed a motion to initiate bankruptcy proceedings against T–2 because of continuous insolvency. The motion was, inter alia, based on refutable assumptions on the debtor’s insolvency that were introduced with the amendment of the Insolvency Act in 2013. On 16 September 2014, the District Court in Ljubljana initiated

7 IP telephony (17.5 per cent), mobile communications (2.8 per cent), broadband internet services (18.4 per cent) and IP TV (33.9 per cent).
8 The decision of the Maribor District Court, No. St 29/2011 of 13 January 2011.
10 The restructuring plan is publicly available at www.ajpes.si/eObjave/objave.asp?s=51&id=878989.
bankruptcy proceedings against T–2 because of permanent illiquidity. T–2 and its shareholders filed appeals against the first instance court decision and on 29 October 2014 the Higher Court in Ljubljana reversed this decision and remanded the case. The reasoning of the court was that, in this case, the secured creditors could only be paid from the collected collateral, not from the generated income. On 22 June 2015, the District Court in Ljubljana rejected the motion to initiate bankruptcy proceedings against T–2 (with the same reasoning that arose from the second instance court decision).

The creditors filed an appeal and on 7 August 2015 the Higher Court in Ljubljana initiated bankruptcy proceedings against T–2 on the grounds of continuous insolvency. The court based its decision on the new refutable assumptions of insolvency introduced with the amendment of the Insolvency Act in 2013. The court explained that the debtor should fulfil its obligations to the secured creditors until the collateral is collected and that failure to do so could constitute a reason for bankruptcy. The court also established that the debtor had failed to meet its obligations from the restructuring plan in the compulsory settlement, which also constitutes a reason for bankruptcy.

One of the shareholders of T–2 subsequently filed a constitutional appeal against the decision of the Higher Court in Ljubljana. The Constitutional Court first suspended the bankruptcy proceeding until the decision of the court. On 5 November 2015, the Constitutional Court reversed the decision of the Higher Court in Ljubljana on initiation of bankruptcy on the grounds that the shareholders of T–2 were deprived of their right to be heard in the proceeding, since an appeal of the creditors was not served to them and they were therefore unable to file a reply.

The District Court in Ljubljana and the Higher Court in Ljubljana then followed the reasoning of the Constitutional Court, served an appeal of the creditors to the shareholders for reply and upon receipt of the replies, the Higher Court in Ljubljana on 4 March 2016 reinitiated the bankruptcy proceeding against T–2 with essentially the same reasoning as the last time. This decision was appealed on the merit by the state prosecutor; however, the Supreme Court of the Republic of Slovenia on 11 August 2016 confirmed the decision of the Higher Court in Ljubljana of 4 March 2016. The shareholders of T–2 again filed a constitutional appeal against the decision of the Higher Court in Ljubljana of 4 March 2016 and the Supreme Court of the Republic of Slovenia of 11 August 2016, and the Constitutional Court again suspended the bankruptcy proceeding until it has made a final decision.

The Constitutional Court delivered its ruling on 22 March 2017 and reversed the decision of the Higher Court in Ljubljana and of the Supreme Court of the Republic of Slovenia. The Constitutional Court decided that the decisions of the Higher Court in Ljubljana and of the Supreme Court were arbitrary and violated the constitutionally guaranteed equal protection of rights. In its views the secured creditors whose secured claims were not affected by a

11 The decision of the Ljubljana District Court, No. St 2340/2014 of 16 September 2014.
14 The decision of the Higher Court in Ljubljana no. Cst 456/2015 of 5 August 2015.
17 The decision of the Higher Court in Ljubljana, No. III Cpg 1756/2015 (St 2340/2014) of 4 March 2016.
18 The decision of the Supreme Court of the Republic of Slovenia, No. III Ips 75/2016 of 11 August 2016.
19 The decision of the Constitutional Court, No. Up-280/16-9, Up-350/16-7 of 10 May 2016.
20 Article 22 Slovenian Constitution.
compulsory settlement cannot request commencement of bankruptcy of the debtor on the ground that the debtor is in default with repayment of such secured claims before the security is enforced. The reasoning of the court is that the secured creditors could only be paid from the collected collateral, not from the generated income.

This decision of the Constitutional Court is perceived as highly controversial among the insolvency and restructuring specialists as it enables debtors that are obligated to fulfill their obligations from a compulsory settlement to completely disregard the secured creditors whose secured claims were not affected. Such creditors may subsequently demand repayment only from the collateral and cannot commence an enforcement procedure on the remainder of the debtor’s assets or request commencement of bankruptcy. The Constitutional Court de facto created a safe haven for the insolvent debtors to procrastinate the commencement of bankruptcy regardless of actual prospects of them becoming solvent after execution of the measures from a compulsory settlement. As this decision is controversial among the practitioners and the legal experts, it is yet to be seen what is its real impact for the future restructuring practice in Slovenia.

ii GREP

GREP d.o.o. - v stečaju (GREP) is a project company established as a joint venture of two major construction companies for the purposes of public private partnership with the Municipality of Ljubljana for the construction of a national stadium, a sports hall and a large shopping mall in Stožice, Ljubljana. The stadium and shopping mall represented the public part of the public private partnership, and the shopping mall represented the private part, whereby GREP was obligated to build the stadium and sports hall in exchange for the right to build a shopping mall.

GREP successfully completed the construction works of the majority of the public part of the project in 2012; however, it failed to construct the shopping mall because of over-indebtedness and inability to attract new financing. Therefore, in October 2014 the court commenced a simplified compulsory settlement; however, GREP failed to obtain sufficient consent of the creditors for the proposed financial restructuring. Consequently, in September 2016 the court commenced the bankruptcy procedure upon a request of the largest creditor, Rastoder, d.o.o., Ljubljana (Rastoder), who purchased financial claims on secondary market. The total indebtedness of GREP on the day of commencement of the bankruptcy procedure amounted to over €450 million, whereby the claims of Rastoder amounted to €114.6 million. The Rastoder’s claims are secured by a right of a separate settlement on the real estate forming the shopping mall Stožice. The bankruptcy administrator attempted an auction sale of this real estate for the starting price of €20.9 million; however, the auction was not successful as there were no bidders. The bankruptcy administrator proposed a second auction sale with a starting price of €18 million; however, Rastoder, as a creditor with the best ranking right of separate settlement over these assets, opposed to such auction. Instead Rastoder proposed to take over the real estate forming the shopping mall Stožice as the assets that could not be sold for a price of €15 million (as determined by Rastoder’s appraiser). The claim of Rastoder would then be considered reduced for that amount. The bankruptcy administrator agreed to such proposal; however, the transaction is still subject to the consent of the bankruptcy court. If the transaction is successfully completed, Rastoder will acquire the assets without actually generating any cash flow, which is a very rare case in Slovenian bankruptcy proceedings.
iii Kolosej Kinematografi

KOLOSEJ kinematografi d.o.o. - v stečaju (Kolosej) is a Slovenian cinema operator company that used to operate a few cinema complexes in various Slovenian cities. In 2012, Kolosej was taken over by its manager Sergej Racman who lead the management buyout, and in 2012 the cinema business was transferred to a friendly company KOLOSEJ zabavni centri, d.o.o. Kolosej became insolvent in 2014 and filed a request for a compulsory settlement. The compulsory settlement proceeding was opened with the decision of the district court in Ljubljana on 6 January 2015, and the final list of tested claims was prepared on 28 July 2016. The list was confirmed with a decision on recognition of claims and among others comprised claims of friendly companies KOLOSEJ zabavni centri, d.o.o., Onisac d.o.o. and KD finančna družba d.d., all of which represent claims arising from the suretyships for the obligations of Kolosej. Such claims arise conditionally if and up to the amount each of the creditors actually pays the debt of Kolosej. The Insolvency Act stipulates that when voting on adoption of proposed compulsory settlement, the creditors with the conditional claims vote with factor 0.5. However, these claims were erroneously recognised as non-conditional; thus, the friendly creditors KOLOSEJ zabavni centri, d.o.o., Onisac d.o.o. and KD finančna družba d.d. all voted with the factor 1.0. Their votes were crucial for the adoption of the proposed compulsory settlement that was very much to the detriment of the creditors, and consequently the compulsory settlement was confirmed on 28 July 2016. This decision was appealed by some creditors, and on 14 October 2016 the Higher Court in Ljubljana corrected the erroneous voting factor to 0.5, reversed the decision on compulsory settlement and commenced bankruptcy over Kolosej.

The decision of the Higher Court in Ljubljana of 14 October 2016 was challenged in front of the Constitutional Court, which set aside the decision ruling that any claim that is recognised on the final list of tested and confirmed with a decision on recognition of claims becomes final cannot be subsequently altered because of res judicata effects. The Higher Court in Ljubljana on 10 July 2017 delivered a new decision with due consideration given to the ruling of the Constitutional Court. The Higher Court in Ljubljana ruled that fact that the claims of friendly creditors were recognised unconditionally in fact multiplied the debtor’s debt. Namely, the unconditional debt owed to the banks was now multiplied as the debtor owed the same amount also to each of the guarantors. Such conclusion is not sustainable and just, therefore, the Higher Court in Ljubljana again ruled that the decision to correct the factor was correct. The court further held that Sergej Racman as the actual beneficial owner abused its procedural rights as he circumvented the voting prohibition that applies to the creditors that are interpersonally connected with the debtor or the debtor’s shareholders. Namely, just before the scheduled voting Sergej Racman was the director of Kolosej’s shareholders and also of the friendly creditor Onisac d.o.o. However, before the voting on compulsory settlement, Sergej Racman (acting through the Onisac shareholder that is 100 per cent owned by him) recalled himself as the director of the creditor Onisac d.o.o. and appointed his elderly father as the director. With this Sergej Racman enabled the creditor Onisac d.o.o. to vote on the compulsory settlement, which enabled for the compulsory settlement to be confirmed. The Higher Court in Ljubljana, however, held that this replacement of the director represented an abuse of procedural rights that was evidently contrary to the principle of good faith and that the votes of Onisac d.o.o. should be disregarded. Consequently, the proposed compulsory settlement was considered refused because of lack of support of the creditors.
The Higher Court in Ljubljana on 10 July 2017, therefore, ruled that the compulsory settlement was deemed not confirmed and commenced bankruptcy over Kolosej. The decision is especially interesting as the court based its decision predominantly on abuse of procedural rights and disregarded actions that were contrary to good faith.

**iv  Agrokor and Mercator**

AGROKOR d.d. (Agrokor) is the largest privately owned company in Croatia and one of the leading companies in south-east Europe. Agrokor is mainly active in consumer retail sector though Croatian Konzum d.d. and Slovenian Mercator d.d.; however, it also comprises many (over 70) other companies active on various levels of the supply chain. In spring 2017, Agrokor was threatened with insolvency. As the conglomerate is deemed of systemic importance for Croatia, the Croatian parliament adopted a special *ad hoc* Act ‘Lex Agrokor’ governing the restructuring process. The Zagreb Commercial Court on 10 April 2017 issued a decision to initiate the procedure for extraordinary administration over Agrokor and some of its affiliated or subsidiary companies in Croatia in accordance with Lex Agrokor.

The extraordinary administration procedure over Agorkor was recognised also in Slovenia as of 14 July 2017. The recognition bears the legal consequence that the creditors are prevented from enforcing their claims with a seizure of Agrokor’s assets in Slovenia. That mainly applies to Agrokor’s approximately 70 per cent share in Mercator d.d.

As Mercator d.d. is one of the most valuable of Agrokor’s assets and is also deemed a company of a systemic importance for the Republic of Slovenia, the decision was challenged by Sberbank d.d. (Slovenia), Sberbank of Russia and also the Republic of Slovenia. The grounds for opposition are mostly based on alleged violation of public policy because of uncertain legal consequences and the *ad hoc* nature of Lex Agrokor. The court has yet to decide on these oppositions.

**v  Merkur**

Merkur, d.d. (Merkur) was the largest wholesale dealer and specialised retailer in Slovenia with a dominant market position.

In 2010, the company became insolvent owing to the global financial crisis that resulted in a drop in sales. Furthermore, the company was forced to increase its financial debt to an unsustainable level and experienced a negative impact from the takeover of the company by the management. Consequently, Merkur became overindebted and, thus, insolvent. In 2011, it went through a compulsory settlement, where a 40 per cent haircut of the non-secured claims was imposed as a major measure of restructuring.

This first compulsory settlement plan should have rescued Merkur, but it proved to be insufficient, and the company continued to struggle. Thus, by the end of 2013, the second compulsory settlement procedure had been initiated. In the course of this second compulsory settlement procedure the profitable businesses of the insolvent debtor had been carved out into two independent companies, namely, Merkur Nepremičnine d.d., which took over the debtor’s real estate, and Merkur Trgovina d.d., which continued with the debtor’s retail business. The owners of the newly established companies are the financial creditors of Merkur, who thereby achieved higher repayment of their financial claims. After these carveouts, the court opened a bankruptcy procedure against Merkur (the insolvent debtor), during the course of which other creditors shall be proportionally repaid from the remainder of the bankruptcy estate. In July 2017 the carved-out company Merkur Nepremičnine d.d. was
sold to a New York-based HPS Investment Partners for €28,560,000. The transaction is still pending regulatory approvals from the bankruptcy court and the competition protection agency.

IV ANCILLARY INSOLVENCY PROCEEDINGS

i Alpine Bau GmbH Podružnica Celje

There is currently only one pending ancillary bankruptcy proceeding in Slovenia, which involves the Slovenian branch office of the primary insolvency proceeding against the construction company Alpine Bau GmbH in Austria. The bankruptcy proceeding was initiated in 2013 and is still pending. Since this ancillary proceeding is thus far the only ancillary proceeding in Slovenia, the case law regarding ancillary proceedings in Slovenia has not yet been properly developed.

V TRENDS

The trend of rising insolvency activity from the previous years is likely to reduce or at least stagnate during the coming year. Namely, the Slovenian economy is predicted to grow further in the coming year as private consumption is predicted to rise because of private investments. The predicted growth rate for 2017 is 3.6 per cent. Considering the macroeconomic background and forecasts, stagnation of the insolvency proceedings is expected.

In the past few years the market of non-performing loans has been revived, particularly because of increased activity of the BAMC in this field in relation to domestic loans, followed by increased activity in the trade of non-performing loans of commercial banks to foreign entities.

The legislator’s proactive approach, which resulted in six changes to the Insolvency Act from 2009 to 2013, was suspended, and therefore the legislator enabled the court practice to develop. The most recent changes to the Insolvency Act in 2016, inter alia, excluded small enterprises from participating in the simplified compulsory settlement; extended the possibility for the creditors to initiate compulsory settlement proceedings against their debtor even if the debtor is a small enterprise; and extended a time period in which a clawback action can be brought in a bankruptcy proceeding (from six to 12 months after the initiation of the proceeding). It is expected that the most recent amendment of the Insolvency Act will result in an increased number of clawback lawsuits in bankruptcy proceedings and an increase in the number of compulsory settlements are also expected. In addition, this recent amendment clearly shows the tendency of the legislator to regard bankruptcy as the least favourable option and restructuring of an insolvent debtor as the most preferable, the latter being a principal focus of the Insolvency Act.

21 ZFPPIP-P-G.
22 This amendment was introduced to prevent financial holding companies from misusing the simplified compulsory settlement.
23 Amended Article 277(1) of Insolvency Act.
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).
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.\(^2\) 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.\(^3\)

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.

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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.
ii 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.

iii 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) is 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 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). There has been an increase in the number of companies declared insolvent and whose insolvency is terminated in the same court resolution (because of the lack of assets to face post-insolvency credits such as the court receivers’ fees). Geographically, the Mediterranean and central Spain have been the most active areas for insolvencies since 2009. Barcelona, Madrid and Valencia account for more than 50 per cent of total insolvency proceedings published during the first semester of 2017.

Real estate and construction have traditionally been the sectors with most insolvency proceedings. Although they did seem to be maturing in terms of insolvency, insolvency proceedings in the real estate sector have increased again during the first semester of 2017. The commercial and tourism sectors have also suffered an increase in the number of insolvency proceedings that were declared.

4 According to the information provided by the National Statistics Institute.
Spain

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 2017, 2,409 insolvency proceedings were declared, that is, the number of insolvency proceedings has increased by 4 per cent with respect to 2016. 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 in 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 that 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 this last July; thus, and the time this book went to press, the parties were waiting for the court to render a decision on the same.

More recently, in March a number of companies from Grupo Isolux filed the four-month moratorium in order to try to reach an agreement with its financing creditors. However, such an agreement was not reached, and the companies were declared insolvent by means of a court ruling dated 12 July 2017.
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, has been 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, five 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 are trying to reach an agreement with the Spanish state in order to avoid future litigation 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. However, owing to the absence of an agreement between the government and the state licensed sector, and the liquidation of the Spanish toll road companies that have been declared insolvent, the role of SEITTSA is being questioned by state institutions, such as the Court of Audit.

iv Tourism

The touristic sector is still suffering the consequences of the economic crisis, and its dependence on seasonal revenues. Moreover, the general concern regarding terrorism will certainly have an impact on the tourism sector.

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 Fagor, the Spanish company that makes electrical housewear, applied for the four-month moratorium on 1 July 2017. Fagor will now need to reach an agreement with its financial creditors to avoid insolvency.

b Asociación de Usuarios de Servicios Bancarios (Ausbanc) has also been declared insolvent. This platform that was used by consumers to file claims against financial entities based on mis-selling of financial products was previously investigated for blackmailing financial entities.

c Zed Worldwide, SA, Spanish subsidiary of Group Zed, which is a technological company that operates worldwide, has been declared insolvent because of its inability to face its financial obligations. Its sole director is under criminal investigation.
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 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 Abengoa). However, political uncertainty may lead to the slowdown of such recovery, partly because foreign investors may be reluctant to invest in Spain.

The fate of toll road companies will depend on the will of the Spanish government to reach an agreement with the main creditors of the toll roads.

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.
Chapter 24

SWITZERLAND

Daniel Hayek and Laura Oegerli

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. 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 (Konkursverfahren), 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 (Nachlassverfahren), 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.

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 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. 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, 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.

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.

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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.
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 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 judgement. If this negative Kollokationsklage 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:
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

b 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.

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7 Notable examples of composition proceedings with assignment of the assets are *SAirGroup AG*, *Swissair Schweizerische Luftverkehr AG*, *Petroplus Marketing AG* and *Unifina Holding*.

8 The liquidation may take several years. This may affect the assets of the estate as negative interests may incur, thereby reducing the creditor’s returns. Therefore, settlements have become even more important for creditors. See an example of such a settlement in Section III.

9 Members of the board may be held liable if they fail to act accordingly under Article 754, paragraph 1 SCO.
Ancillary insolvency proceedings
Recognition of foreign insolvency proceedings and foreign arrangements with creditors are dealt with in the PILA.\(^{10}\)

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:
- it has either fully enforced its claims in debt-collection proceedings and remains in possession of a claim against the debtor; or
- 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.

\(^{10}\) See Section I.vii.
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.

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

11 See Section I.iii.
Switzerland

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 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.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.

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 PILA¹³ and the foreign state conversely recognises Swiss bankruptcy proceedings (principle of reciprocity).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

¹² See Section I.vii.
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.
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 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 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}

\textbf{viii \ Selected additional topics}

\textbf{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 (\textit{Anfechtungsklagen}).

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:

a. gifts or gratuitous acts of the debtor, pursuant to Article 286 DEBA (\textit{Schenkungsanfechtung}). 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{16}

b. certain acts by an over-indebted debtor, pursuant to Article 287 DEBA (\textit{Überschuldungsanfechtung}). 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{17} and

c. 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

\begin{itemize}
\item \textsuperscript{15} Swiss law provides for more flexible rules on the recognition of foreign bankruptcy decrees on banks and other financial institutions.
\item \textsuperscript{16} 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).
\item \textsuperscript{17} 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.
\end{itemize}
the initiation of bankruptcy proceedings or five years prior to the notification of the
debt 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.18

**Liability claims**
The SCO holds that the board of directors has the duty to safeguard the interests of the
company in good faith.19 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),20 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
directors may abstain from notifying the court, where immediate restructuring measures
are available.21 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.22

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.

**II INSOLVENCY METRICS**

Switzerland’s GDP growth amounted to 0.3 per cent in the first quarter of 2017. This growth
is mainly attributable to the manufacturing industries and the health and services sector.
The growth percentile was slightly lower than expected, largely because of poor growth
performance in the services sector. The Swiss federal government’s expert group on economic

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18 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).
19 The SCO describes the board of director’s general duty of care and loyalty in Article 717.
20 Such restructuring measures may for example be a capital increase, cutting the capital combined with an
immediate increase (Kapitalschnitt) or a rescue merger.
21 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 timeframe.
22 Decision of the Swiss Supreme Court of 2 October 1990, BGE 116 II 533.
forecasts expects a GDP growth of 1.4 per cent for 2017 (revised downwards from 1.6 per cent) and a growth of 1.9 per cent for 2018. The expert group mainly puts forward the expected growth of domestic demand and foreign trade as reasons for the continuous rise.\footnote{Press release of the State Secretariat for Economic Affairs dated 20 June 2017 containing the economic forecasts of the Swiss Federal Government’s expert group summer 2017, also for the figures stated in the below paragraph.}

The rate of unemployment decreased from 3.3 per cent in 2016 to 3.2 per cent in the first quarter of 2017. The rate of unemployment is predicted to remain stable at 3.2 per cent in 2017 to drop to 3.1 per cent in 2018.

The Swiss National Bank predicts an inflation rate of 0.3 per cent for 2017. For 2018 and 2019, the expected rates have been revised downwards from 0.4 per cent to 0.3 per cent and from 1.1 per cent to 1.0 per cent, respectively. 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.\footnote{Press release of the Swiss National Bank, dated 15 June 2017 containing a monetary policy assessment.}

Statistics on insolvency activity are not yet available for 2017. In 2016, 12,927 bankruptcy proceedings were opened, which equals a decrease of 0.7 per cent since 2015. However, bankruptcies of entities registered in the register of commerce have increased by 0.2 per cent. The losses resulting from concluding bankruptcy proceedings have declined in 2016 by 11.4 per cent since 2015, equalling in losses of 2,555,536,000 Swiss francs in 2016.\footnote{Press release of the Federal Statistical Office, dated 30 March 2017 containing figures on insolvency proceedings in the year 2016.} 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 twelve 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:

- 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.

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 2,358,783,548.45 Swiss francs 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.26 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 18.8 per cent – 22.9 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. Ten dividend payments, with a total dividend of over 60 per cent for third class creditors, have been paid out to creditors by 12 July 2017.

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 insolvent 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.

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26 BGer 4A_410/2011.
V TRENDS

On 24 May 2017, the Swiss Federal Council adopted the dispatch on the modernisation of the international bankruptcy law, governed by the PILA, to the Swiss parliament.

Currently, Swiss law only provides for recognition of proceedings that were opened at the seat of the debtor.27 Further, the foreign state must grant reciprocal rights to Switzerland. As outlined above, after every recognition of a foreign bankruptcy decree, a local ancillary proceeding is automatically opened, in which the assets located in Switzerland are separately liquidated to the benefit of Swiss creditors of secured or privileged claims. These proceedings are widely seen to be costly and burdensome. The numerous requirements, especially the proof of reciprocity, delay the recognition of foreign bankruptcy proceedings or even make their recognition impossible. In the absence of recognition of the bankruptcy proceedings, individual debt enforcement proceedings remain possible. Consequently, individual creditors can access the debtor’s assets, disadvantaging other creditors. Further, the lack in coordination on connected domestic and foreign proceedings can lead to inefficiencies. The Swiss Federal Council also noted that the mandatory requirement of ancillary proceedings fails the purpose of the PILA provisions in cases without privileged or secured claims.28

The new draft PILA therefore proposes five important amendments:

a the reciprocity requirement will be deleted;
b insolvency decrees issued at the COMI can be recognised in Switzerland;
c Swiss courts can waive ancillary proceedings in favour of a foreign insolvency trustee where there are no privileged or secured creditors or creditors of a Swiss branch.29
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 draft of the amended PILA is now subject to a vote in the Swiss federal assembly.30 If adopted, entry into force is expected for 2018.

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27 Regulation 2015/848 of 20 May 2015 on insolvency proceedings, which was adopted by the European Parliament and the European Council, does not apply to Switzerland. This regulation gives jurisdiction to open insolvency proceedings to the courts located at the debtor’s centre of main interests (COMI). As outlined, Switzerland only recognises insolvency proceedings opened at the seat of the debtor.
29 The list of protected creditors in the PILA is thus extended to comprise creditors of a Swiss branch of a foreign entity, additionally to secured and privileged first and second class creditors.
30 Owing to the technical nature, it is rather unlikely that the PILA revision will be subject to a referendum.
THAILAND

Suntus Kirdsinsap, Natthida Pranutnorapal, Piyapa Siriveerapoj and Jedsarit Sahussarungsi

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.

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1 Suntus Kirdsinsap is a partner, Natthida Pranutnorapal is a senior associate, Piyapa Siriveerapoj and Jedsarit Sahussarungsi are associates at Weerawong, Chinnavat and Partners Ltd.
2 Section 7 of the BA.
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.

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.
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.

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.

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7 Section 61 of the BA.
8 Sections 113 and 114 of the BA.
9 Section 115 of the BA.
**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.

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 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.\(^\text{10}\)

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.\(^\text{11}\) 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

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\(^{10}\) Section 90/3 of the BA.

\(^{11}\) Sections 90/6 and 90/10 of the BA.
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 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 received a request for enforcement of security (subject to the extension of timeframe 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.

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12 Section 90/17 of the BA.
13 Section 90/24 of the BA.
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 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. 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.

Phase three

With regard to the reorganisation plan, a creditors’ meeting must be held to discuss and approve the plan. 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 present at the meeting, in person or by proxy, 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, 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:

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;

b. secured creditors not classified under item (a) will be classed as a group;

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

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.

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14 Section 90/25 of the BA.
15 Section 90/46 of the BA.
16 Section 90/42 bis of the BA.
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:\(^{19}\)

\(a\) 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.

\(b\) Debtor’s executive: the debtor’s executive will again have the authority to manage the debtor’s business operations and assets.

\(c\) Debtor’s shareholders: the debtor’s shareholders will resume their legal rights.

\(d\) 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

17 Section 90/63 paragraph 2 of the BA.
18 Section 90/70 of the BA.
19 Section 90/75 of the BA.
Thailand

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 has, however, recently amended the BA by adding new provisions that are in line with the UNCITRAL’S Model Law on cross-border insolvency, including access of foreign creditors and foreign representatives, 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.
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 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:

a at least 2 million baht in the case of an individual;

b at least 3 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; or
at least 3 million baht but less than 10 million baht in the case of a private limited company.\textsuperscript{20}

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.\textsuperscript{21}

\textbf{ii} \hspace{1em} \textbf{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 moveables. Pledges can be created over moveable 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);
- \(c\) moveable 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

\textsuperscript{20} Section 90/92 of the BA.

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).
I 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:

- trustee-administered liquidation (Chapter 7);
- municipality bankruptcy (Chapter 9);
- debtor-in-possession (DIP) managed reorganisation or liquidation (Chapter 11);
- family farmer and fisherman bankruptcies (Chapter 12);
- individual bankruptcies (Chapter 13); and
- cross-border cases (Chapter 15).

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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 article 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

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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 \textit{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 \textit{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 \textit{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 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 by the United States Trustee\textsuperscript{20} or elected by the debtor’s creditors. Chapter 7 liquidations

\begin{itemize}
  \item \textsuperscript{16} 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 \textsuperscript{17} 11 U.S.C. § 547.
  \item \textsuperscript{18} 11 U.S.C. §§ 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 \textit{Securities Investor Protection Corp v. Bernard L Madoff Inv Sec LLC}, Case No. 12-00115 (S.D.N.Y. 7 July 2014).
  \item \textsuperscript{19} 11 U.S.C. § 552(a).
  \item \textsuperscript{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
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 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 holders22 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.23 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,24 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.25

v 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

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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.
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

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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.\(^{31}\) Bankruptcy court jurisdiction is
the subject of much debate under a line of recent Supreme Court cases.\(^{32}\)

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.\(^ {33}\)

\section*{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,\(^ {34}\) but are more
likely to be resolved in a proceeding under the Securities Investor Protection Act of 1970
(SIPA).\(^ {35}\) 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,\(^ {36}\) 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

\(^{32}\) 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 facts and conclusions of law to be reviewed de novo by the district court),
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).


\(^{34}\) 11 U.S.C. §§ 741–753.


\(^{36}\) 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 fourth quarter of 2016 at an average annual rate of 2.1 per cent and in the first quarter of 2017 at an average annual rate of 1.4 per cent. Furthermore, reported unemployment continues to abate: the unemployment rate for June 2017 was 4.4 per cent, down from 4.9 per cent in June of the previous year and from its October 2009 high of 10 per cent.

Additionally, credit has been readily available to US businesses. In 2015, US corporations issued approximately US$1.49 trillion in bonds, down from the US$1.61 trillion issued in 2014 but in line with the US$1.49 trillion issued in 2014. During the
first seven months of 2017, over US$1 trillion worth of bonds have been issued.\textsuperscript{48} Average interest rates have risen slightly from their historic lows; the 10-year Treasury rate is currently around 2.27 per cent and has ranged between 2.14 per cent and 2.62 per cent in the current calendar year,\textsuperscript{49} while in 2016, the rate ranged between 1.38 per cent and 2.60 per cent.\textsuperscript{50} It is currently anticipated that interest rates will gradually rise in 2017 and 2018, as the Board of Governors of the Federal Reserve System (the Federal Reserve Board) continues scaling back its accommodative policy.\textsuperscript{51}

US equity markets, however, experienced a slowdown in 2015 and 2016, caused in part, according to some commentators, by a combination of dimming global-growth expectations, rich valuations and general uncertainty regarding the Federal Reserve’s near-term plans for its quantitative easing programme.\textsuperscript{52} Specifically, US equity and equity-related proceeds totalled US$180 billion on 716 deals in 2016,\textsuperscript{53} which represents a 21.5 per cent decrease in proceeds compared to the US$229.5 billion raised in 2015\textsuperscript{54} and approximately 16 per cent fewer deals than the 848 in 2015.\textsuperscript{55} US equity and equity-related proceeds in 2015 were approximately 16 per cent less than the US$258.5 billion raised in 2014\textsuperscript{56} and 1.9 per cent less than the US$233.8 billion raised in 2013.\textsuperscript{57} Similarly, the number of deals in 2016 was 29 per cent less than the 1,008 in 2014 and 24.6 per cent less than the 949 in 2013.\textsuperscript{58}

US corporate default rates have fallen since the first half of 2016. Moody’s measured the US speculative-grade default rate for the second quarter of 2017 at 3.2 per cent,\textsuperscript{59} compared to default rates of 3.9 per cent\textsuperscript{60} in the first quarter and 4.7 per cent in the second quarter of

\textsuperscript{48} Id.
\textsuperscript{55} Id.
\textsuperscript{58} Id.
\textsuperscript{60} Id.
Similarly, Moody’s indicated that the leveraged loan default rate for April and May of 2017 was 2.1 per cent and 1.5 per cent respectively, compared to the 2016 first quarter rate of 2.8 per cent.

Although the frequency of business filings remains well below its peak in 2010, many businesses continue to seek bankruptcy relief owing to significant challenges in sectors of the US economy. In 2016, for example, a total of 99 public companies, with aggregate pre-petition assets of approximately US$105 billion, filed Chapter 7 or Chapter 11 bankruptcy proceedings, up from the 79 such companies that filed in 2015, with aggregate pre-petition assets of approximately US$77.1 billion. Many of the most significant filings in recent years have involved the energy industry – including SunEdison, Inc (US$11.5 billion in assets), Peabody Energy Corporation (US$11 billion in assets) and LINN Energy, LLC (approximately US$10 billion in assets). As discussed in greater detail below, the retail industry also suffered a significant downturn in 2017 owing, some commentators say, to the inability of many ‘brick-and-mortar’ retailers to adapt to the rapid proliferation of e-commerce and online shopping trends. The energy and retail industries have continued to produce the most significant bankruptcies in 2017.

Some 157 companies commenced Chapter 15 proceedings in the 12 months ending on 31 March 2017, which is a 52.4 per cent increase from the 103 Chapter 15 cases that were initiated during the 12 months ending on 31 March 2016.
III PLENARY INSOLVENCY PROCEEDINGS

i Avaya Inc

Avaya Inc, headquartered in Santa Clara, CA, is a global provider of contact centre, unified communications and networking products and services. Avaya serves over 200,000 direct and indirect customers, including multinational enterprises, small and medium-sized businesses as well as government organisations operating in a diverse range of industries.72

On 9 January 2017, Avaya Inc, together with certain of its affiliates, filed for Chapter 11 bankruptcy protection in the US Bankruptcy Court for the Southern District of New York. Avaya's funded debt obligations, totalling more than US$6 billion, included:

- a domestic ABL credit facility of approximately US$55 million;
- a foreign ABL credit facility of approximately US$50 million;
- a secured cash flow credit facility consisting of approximately US$3.235 billion in outstanding term loans;73
- approximately US$1.299 billion outstanding in first lien notes; and
- approximately US$1.384 billion outstanding in second lien notes.74

The original plan of reorganisation submitted by Avaya in April 2017 was not supported by certain large holders of Avaya's first or second lien debt, some of whom believed that Avaya had not adequately engaged with various restructuring counterproposals submitted to it after the original plan was filed.75 In September 2017, Avaya announced that over two-thirds of its first lien lenders had agreed to a proposal memorialised in its first amended plan support agreement.76 Avaya's second lien noteholders continue to object to the amended plan based on alleged 'wildly disparate treatment' of the three unsecured classes of claims and the breadth of certain releases provided thereunder. As of the date of this publication, the confirmation hearing is scheduled to occur on 15 November 2017.

ii Bonanza Creek Energy, Inc

Bonanza Creek Energy, Inc (Bonanza), headquartered in Denver, Colorado, is an independent oil and natural gas company engaged in the acquisition, exploration, development and production of oil and associated liquids-rich natural gas in the United States. Bonanza's assets and operations are concentrated primarily in northern Colorado, including in (1) the Wattenberg Field, focused on the Niobrara and Codell formations, and (2) the North Park

73 The pre-petition cash flow credit facility also provides for a revolving line of credit; as of the petition date, no revolving borrowings were outstanding thereunder.
Basin in Jackson County, Colorado. In addition, Bonanza owns and operates oil-producing assets in southern Arkansas, including assets located in the Dorcheat Macedonia Field and the McKamie Patton Field.\(^77\)

On 4 January 2017, Bonanza and six of affiliates filed for Chapter 11 bankruptcy protection in the US Bankruptcy Court for the District of Delaware. As of the petition date, the debtors funded debt obligations included:

\begin{itemize}
  \item [a] secured indebtedness, comprised of US$191.7 million in outstanding obligations under its reserve-based lending facility; and
  \item [b] unsecured indebtedness comprising US$800 million in senior notes.\(^78\)
\end{itemize}

The market forces affecting the broader oil and natural gas industry proved particularly challenging for Bonanza, which competes with a substantial number of companies that have greater resources as well as a number of sources of alternative energy and fuel.\(^79\) Despite a series of measures taken to right size the company in light of the worsening macroeconomic environment, Bonanza ultimately sought Chapter 11 protection.

On 7 April 2017, Bonanza received court approval for a bankruptcy plan, which provided for the equitisation of approximately US$867 million of Bonanza's unsecured debt, the elimination of over US$50 million in annual cash interest and the infusion of US$200 million in new capital pursuant to a rights offering backstopped by certain of Bonanza’s pre-petition creditors. The plan was accepted by 100 per cent of the ballots of all voting classes, and Bonanza emerged from bankruptcy on 28 April 2017.\(^80\)

iii Memorial Production Partners LP

Memorial Production Partners LP (MEMP) is an oil and gas company headquartered in Houston, Texas, primarily engaged in the acquisition, development, and production of oil and natural gas properties. MEMP’s oil and natural gas assets consist primarily of producing oil and natural gas properties located in Texas, Louisiana, Wyoming, and offshore Southern California. Most of MEMP’s oil and natural gas properties are located in large, mature oil and natural gas reservoirs with well-known geologic characteristics and long-lived, predictable production profiles and modest capital requirements. In addition to its interests in oil and gas reserves, a significant asset of MEMP prior to the petition date was its portfolio of in-the-money hedges, and maintaining a robust hedge portfolio has been a significant component of MEMP’s business since its inception.\(^81\)

On 16 January 2017, MEMP filed for bankruptcy protection under Chapter 11 in the US Bankruptcy Court for the Southern District of Texas Houston Division. As of the petition date, the debtors funded debt obligations included:

\(^77\) Declaration of Scott Fenoglio, Senior Vice President and Finance and Planning and Principal Financial Officer of Bonanza Creek Energy, Inc, in support of First Day Pleadings, Case No. 17-10015 (KJC), ECF No. 16 at 5-8 (Bankr. D. Del January 2017).

\(^78\) Id. at 9–11.

\(^79\) Id. at 11–17.

\(^80\) ‘Bonanza Creek Achieves Plan Confirmation, Approval of Procedures for $200M Rights Offering; Debtors “Hope” to Launch Rights Offering “as Early as This Afternoon”’, Reorg Research (7 April, 2017), available at https://platform.reorg-research.com/app#company/4126/intel/view/33349.

\(^81\) Declaration of Robert L Stillwell, vice president and chief financial officer of Memorial Production Partners GP LLC, in support of First Day Pleadings, Case No. 17-30262, ECF No. 17 at 4-13 (Bankr. S.D. Tex. 2017).
a secured indebtedness comprising US$457.4 million outstanding under their reserve-based lending facility; and
b senior unsecured notes totalling approximately US$1.12 billion.\textsuperscript{82}

On the first day of the confirmation hearing, certain existing equityholders opposed the debtors’ plan valuation, asserting that total enterprise value was US$1.651 billion in contrast to the US$800 million estimate provided by the debtors’ financial advisers. After a series of hard-fought negotiations in which, among other things, the debtors’ management team agreed to relinquish certain benefits under the management incentive plan in exchange for the support of old equity, the debtors’ second amended plan was confirmed on 14 April 2017.\textsuperscript{83} MEMP emerged from Chapter 11 on 4 May 2017, as Amplify Energy Corp. with approximately US$430 million in total debt outstanding and total liquidity of US$72 million.\textsuperscript{84}

\textbf{iv} Gymboree

The Gymboree Corporation is a speciality retailer that operates stores that sell high-quality apparel and accessories for children under the Gymboree, Gymboree outlet, Janie and Jack and Crazy 8 brands. Headquartered in San Francisco, California, the company’s products and services expanded to approximately 1,300 company-operated stores\textsuperscript{85} and outlets in the US and globally, and are available through retail stores, wholesale channels and e-commerce websites. Gymboree’s operations related to its products include designing, sourcing, marketing and selling its own merchandise.\textsuperscript{86}

On 11 June 2017, Gymboree and certain of its affiliates filed for bankruptcy protection under Chapter 11 in the US Bankruptcy Court for the Eastern District of Virginia.\textsuperscript{87} As of the petition date, the debtors reported approximately US$755 million in total assets and US$1.36 billion in total liabilities,\textsuperscript{88} with funded obligations that include:

\begin{itemize}
  \item[a] a senior secured asset-based revolving credit facility of US$18 million;
  \item[b] asset-based term loan of US$47.5 million;
  \item[c] senior secured term loan of US$788.8 million; and
  \item[d] unsecured senior notes of US$171 million.\textsuperscript{89}
\end{itemize}

\begin{footnotesize}
\begin{itemize}
  \item[82] Id. at 13–19.
  \item[85] Subsequently reduced to approximately 970 following the closing of 350 stores in July 2017.
  \item[86] Declaration of James A. Mesterharm, Chief Restructuring Officer of The Gymboree Corporation in support of First Day Motion, Case No. 17-32986 at 1–7, 15 ECF No. 30 (Bankr. E.D. Va. 12 June 2017).
  \item[87] Id. at 2–3.
  \item[88] Voluntary petition, The Gymboree Corporation, Case No. 17-32986 at 6, ECF No. 1 (Bankr. E.D. Va. 11 June 2017)
  \item[89] Declaration of James A. Mesterharm, Chief Restructuring Officer of The Gymboree Corporation in support of First Day Motion, Case No. 17-32986 at 19, ECF No. 30 (Bankr. E.D. Va. 12 June 2017).
\end{itemize}
\end{footnotesize}
According to Gymboree, it declared bankruptcy because of adverse macro-trends, discussed at greater length in Section V, that are typical of the challenges facing the broader retail industry, including the general shift away from brick-and-mortar stores to online retail channels.\(^{90}\)

Gymboree’s restructuring plan was confirmed on 7 September 2017, on a fully consensual basis. The plan provides for a reduction of Gymboree’s debt by US$1 billion, an infusion of up to US$115 million in new money and a rationalisation of the debtors’ retail footprint.\(^{91}\)

\textbf{v Payless}

Payless is an everyday footwear retailer with a strategy of selling low-cost, high-quality, fashion-forward family footwear. Its branding relationships consists of brand licence partnerships, design partnerships, and its own exclusive brands, such as American Eagle and Brash. Headquartered in Topeka, Kansas, Payless operates in over 30 countries through its three business segments: North America, Latin America, and franchised stores. Payless carries out its business model by identifying and developing on-trend merchandise, developing strong relationships with branding partners and maintaining an overseas sourcing network that can develop and produce products at a scale and cost necessary to serve Payless’s customers.\(^{92}\)

On 4 April 2017, Payless and several of its affiliates filed for bankruptcy protection under Chapter 11 in the US Bankruptcy Court for the Eastern District of Missouri.\(^{93}\) As of the petition date, the debtors funded debt obligations included:
\begin{itemize}
  \item [a] an asset-backed revolving credit facility of US$187 million;
  \item [b] a first lien term loan facility of US$506 million;
  \item [c] a second term loan facility of US$145 million; and
  \item [d] trade claims of approximately US$240 million.\(^{94}\)
\end{itemize}

The events leading to Payless’s bankruptcy involved inventory over-purchases from ‘antiquated systems and processes’ followed by inventory flow disruptions, industry-wide declines in sales and traffic, and a shift away from brick-and-mortar stores to online retail channels, all which put pressure on Payless’s liquidity and profitability.\(^{95}\)

The debtors’ restructuring plan was accepted by every voting class, and approved by over 99.2 per cent in amount and 96.1 per cent in number of creditors who voted on it\(^{96}\) and confirmed by the bankruptcy court on 24 July 2017. Pursuant to the plan, Payless’s pre-petition first lien and second lien lenders received 100 per cent of the new equity in reorganised Payless on account of their claims.\(^{97}\) General unsecured classes recovered

\(^{90}\) Id. at 4.

\(^{91}\) Id.

\(^{92}\) Declaration of Michael Schwindle, Chief Financial Officer of Payless ShoeSource Inc. in support of First Day Pleadings, Case No. 17-42267 (659) at 4-11, ECF No. 34 (Bankr. E.D. Mo. 5 April 2017).

\(^{93}\) Voluntary petition, Payless ShoeSource Inc, Case No. 17-42267 (659) at 4, ECF No. 1 (Bankr. E.D. Mo. 4 April 2017).

\(^{94}\) Declaration of Michael Schwindle, Chief Financial Officer of Payless ShoeSource Inc in support of First Day Pleadings, Case No. 17-42267 (659) at 13-14, ECF No. 34 (Bankr. E.D. Mo. 4 April 2017).

\(^{95}\) Id. at 3, 18.

\(^{96}\) Id. at 1.

\(^{97}\) Fifth Amended Joint Plan of Reorganization, Payless ShoeSource Inc, Case No. 17-42267 (659) at 25, ECF No. 1507 (Bankr. E.D. Mo. 21 July 2017).
approximately 18.1 per cent to 22.1 per cent, far more than any amounts such creditors would have received in a liquidation scenario, as contended by Payless.98 Payless emerged from Chapter 11 on 10 August 2017.

vi Rue21

Rue21 is a specialty fashion retailer of girls’ and guys’ apparel and accessories. Its brands include rue21, true, etc!, ruebeauté!, Carbon, rue+, and ruebleu, each of which focus on providing quality yet affordable young adult clothing to teenagers and young adults in small and mid-size markets. Headquartered in Warrendale, Pennsylvania, the company sells its merchandise in 48 states through its online store and its 1,179 brick-and-mortar stores located in strip centres, regional malls, and outlet centres. Rue21’s operations related to its products involve designing, sourcing, marketing, and selling its own merchandise.99

On June 11, 2017, rue21 and several of its affiliates filed for bankruptcy protection under Chapter 11 in the US Bankruptcy Court for the Western District of Pennsylvania.100 As of the petition date, the debtors funded debt obligations included:

a senior secured asset-based revolving credit facility of US$72 million;
b senior secured term loan of US$521 million; and
c unsecured senior notes of US$239 million.101

According to management, rue21 filed for bankruptcy because of general trends faced by the retail industry, such as a decline in in-store transactions because of online shopping, and trends more specific to rue21, such as an evolution of customer tastes.102 Rue21’s plan reflects the restructuring support agreement that was executed by the debtors and its lenders holding 96.8 per cent of the company’s secured term loan and 60.2 per cent of the company’s unsecured notes.103 The plan calls for a US$125 million exit ABL facility and US$50 million exit term facility, with the US$100 million roll-up portion of the DIP term facility exchanged for 33 per cent of the reorganised equity, pre-petition lenders to receive 63 per cent, and general unsecured creditors to receive 4 per cent.104

vii Toys ‘R’ Us

Toys ‘R’ Us, Inc is a specialty retailer of toys and baby products. The company sells products in the baby, core toy, entertainment, learning and seasonal categories through its retail locations and the Internet. The company operates 1,602 stores and licensed an additional 212 stores. These stores are located in 37 countries and jurisdictions around the world under

99 Declaration of Todd M. Lenhart, Acting Chief Financial Officer of rue21, Inc. in support of First Day Motion, Case 17-22045 (GLT) at 3-5, ECF No. 8 (Bankr. W.D. Pa. 16 May 2017).
101 Declaration of Todd M. Lenhart, Acting Chief Financial Officer of rue21, Inc. in support of First Day Motion, Case 17-22045 (GLT) at 13-14, ECF No. 8 (Bankr. W.D. Pa. 16 May 2017).
102 Id. at 7.
104 Id.
the Toys ‘R’ Us, Babies ‘R’ Us and FAO Schwarz banners. In addition, the company operates Toys ‘R’ Us Express stores, smaller format stores primarily open on a short-term basis during the holiday season. The company also owns and operates websites, including Toysrus.com, Babiesrus.com, eToys.com, FAO.com and toys.com, as well as other internet sites.\(^{105}\)

On 18 September 2017, Toys ‘R’ Us filed for Chapter 11 in the US Bankruptcy Court for the Eastern District of Virginia, Richmond Division.\(^{106}\)

IV ANCILLARY INSOLVENCY PROCEEDINGS

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.\(^{107}\) Although Oi has no sizeable assets in the United States, it has strategic commercial agreements with large US telecom carriers related to interconnection fees.\(^{108}\)

In April 2017, a Dutch court ordered that two of Oi’s subsidiaries enter bankruptcy and begin proceedings to liquidate and repay creditors,\(^{109}\) a ruling which was affirmed on appeal by the Dutch Supreme Court in July 2017. The two subsidiaries ordered to liquidate (Oi Brasil Holdings Coöperatief UA and Portugal Telecom International Finance BV) were responsible for issuing approximately €5.8 billion (US$6.2 billion), representing most of the debtors’ outstanding bond debt.\(^{110}\) 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.\(^{111}\)

In May 2017, certain of Oi’s creditors filed a motion in the US Bankruptcy Court for the Southern District of New York pressuring the debtors to consider an alternative proposal to their current restructuring plan. Oi’s plan proposed giving financial creditors 25 per cent

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\(^{106}\) Voluntary petition, Toys ‘R’ Us, Inc, Case No. 17-34666 (KLP), ECF No. 1 (Bankr. E.D. Va. 18 September 2017).


\(^{110}\) Id.

\(^{111}\) Id.
of its equity or convertible bonds callable in three years. By contrast, the competing plan put forth by the creditor group proposed a debt-for-equity swap that would give them a 95 per cent stake in the reorganised Company.112

Efforts to restructure Oi’s debt obligations have slowed amidst political turmoil that has limited Oi’s ability to negotiate with one of its largest creditors – its telecom regulator, Anatel. Although Oi could owe Anatel up to 20 billion reais (US$6.1 billion), current law forbids the agency from accepting any sort of haircut or extending the payment schedule on such indebtedness. Two pieces of legislation that would otherwise permit Anatel greater flexibility to negotiate have stalled as Brazilian political leaders scramble to address recent grafting allegations against President Michel Temer.113

ii Ocean Rig
The Ocean Rig Group operates as an international offshore oil drilling contractor, owner and operator of drilling rigs. It provides drilling services for offshore oil and gas exploration, development and production, and specialised in the ultra-deepwater and harsh-environment segments of the offshore drilling industry.114

On 24 March 2017, Ocean Rig UDW Inc, the holding company of the Ocean Rig Group, and three of its subsidiaries (together, the Ocean Rig Debtors) filed winding-up petitions with the Grand Court of the Cayman Islands to commence provisional liquidation proceedings under Part V of the Cayman Islands Companies Law (2016 Revision) (the Cayman Proceedings) and issued summonses for the appointment of joint provisional liquidators (JPLs).115 On 27 March 2017, the Cayman Proceedings were commenced and the JPLs appointed, and the JPLs commenced cases (the Chapter 15 Cases) under Chapter 15 of the Bankruptcy Code in the Bankruptcy Court for the Southern District of New York (the Chapter 15 Court).

On 24 August 2017, the Chapter 15 Court granted recognition of the Cayman Proceedings as foreign main proceedings.116 The Chapter 15 Court’s opinion is the latest in a body of case law analysing whether and in what circumstances a debtor may shift or migrate its centre of main interest (COMI) to a jurisdiction where an effective plenary proceeding can be commenced prior to initiating proceedings in such jurisdiction.

Until sometime in 2016, each of the Ocean Rig Debtors had its COMI in the Republic of the Marshall Islands.117 In April 2016, Ocean Rig UDW, Inc registered as an exempted

115 See Verified Petition of Ocean Rig UDW Inc., et al. (In Provisional Liquidations) and Motion of the Joint Provisional Liquidators for (a) Recognition of the Cayman Proceedings as Foreign Main Proceedings or, in the Alternative, As Foreign Nonmain Proceedings and (b) Certain Related Relief, Case No. 17-10736, ECF No. 2 at 3 (Bankr. S.D.N.Y. 27 March 2017).
117 Id. at 3.
company limited by shares under Section 202 of the Cayman Companies Law, and thereafter the Ocean Rig Debtors took various additional steps to shift their COMI to the Cayman Islands. The Ocean Rig Debtors took these actions because defaults were anticipated under the Ocean Rig Debtors’ debt documents, and, while the Republic of the Marshall Islands does not have a statute or any procedures that would permit a company to restructure, the Cayman Islands does. In other words, the Ocean Rig Debtors engaged in a form of forum shopping in order to locate themselves in a jurisdiction that would not compel them to liquidate.

The Chapter 15 Court first found, consistent with other recent decisions, that a court must determine a debtor’s COMI as of the date of the filing of the Chapter 15 petition, without regard to the debtor’s historic operational activity. Despite the fact that the Ocean Rig Debtors remained registered as non-resident corporations in the Republic of the Marshall Islands, the Chapter 15 Court concluded that the debtors’ efforts to migrate COMI, which were extensive, did indeed achieve their intended purpose. The Chapter 15 Court then concluded that the Ocean Rig Debtors had not manipulated their COMI in bad faith, because the shift from the Republic to Marshall Islands to the Cayman Islands ‘was done for legitimate reasons, motivated by the intent to maximize value for their creditors and preserve their assets’.

V TRENDS AND OTHER RECENT DEVELOPMENTS

Bankruptcy filings in the United States have increased over the past year, halting a decline since their 2009–2010 peak during the global financial crisis. Companies had been buoyed by access to cheap capital because of historically low interest rates, providing relief for companies with highly leveraged balance sheets that likely would have struggled to meet their debt obligations had interest rates begun to rise. However, despite the persisting low-interest rate environment, adverse market forces in a number of industries have led to a wave of bankruptcy filings.

The sections below highlight recent trends in the energy and retail sectors and also 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 number of bankruptcies over the past few years despite the general availability of cheap credit, and this trend is unlikely to abate in the near future. In particular, the coal industry is likely to continue to be hit hard by the prevalence of cheaper and cleaner sources of energy, such as natural gas, increasingly stringent regulation and large unfunded pension and retirement liabilities. According to the Institute for Energy

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118 Id. at 6, 13–18.
119 Id. at 11.
120 Id. at 28.
121 Id. at 32.
122 Id. at 33.
123 The 2014 Bankruptcy Yearbook and Almanac (see footnote 57), at 16.
Economics and Financial Analysis, the combined market capitalisation of major publicly traded US coal companies fell by over 90 per cent between April 2011 and March 2016, plummeting US$62.5 billion to US$4.59 billion.\textsuperscript{125}

Although 2017 has also been a challenging year for the oil and gas industry, the pace of bankruptcies seems to have slowed somewhat as many companies have cycled through Chapter 11 and higher commodity prices provide some relief. The story is different for service companies, however, which have not seen much of a decrease in bankruptcy rates. Unlike E&P companies, service companies have filed at a relatively steady rate during the last two years, with no single month markedly worse than others.\textsuperscript{126}

Despite the continued challenges facing the industry, there is growing optimism that the oil and gas industry is inching closer to a rebound. One of the most formidable obstacles in the way of an industry recovery is the low price of oil, with crude prices around US$48 a barrel. To drill profitably at this rate, 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.\textsuperscript{127} The price of oil, therefore, will continue to play a determinative role in whether the growing optimism yields material improvement, or if the next year brings more of the same for the beleaguered industry.

**Retail industry downturn**

Changing dynamics in the retail industry have created myriad operational challenges, forcing once successful retailers to file for bankruptcy protection. These market forces include consumer shift from traditional brick-and-mortar stores to online shopping sites such as Amazon, a highly competitive market, and a still tepid economy, which has impaired the earning power of middle class Americans. These dynamics have left retailers with insufficient revenue to cover high fixed costs such as leases for their stores.\textsuperscript{128}

In March of 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.\textsuperscript{129}

\begin{itemize}
\item \textsuperscript{125} 'Market Cap of U.S. Coal Companies Continues to Fall' (23 march 2016), available at http://ieefa.org/market-cap-u-s-coal-companies-continues-fall.
\item \textsuperscript{127} Lynn Cook, ‘Despite Optimism, Oil Firms Keep Cutting Jobs,’ (22 July 2016), available at www.wsj.com/articles/despite-optimism-oil-firms-keep-cutting-jobs-1469209897.
\item \textsuperscript{128} 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 standalone 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.
\item \textsuperscript{129} 'So far, 2016 is a boom year for retail bankruptcies,' PYMNTS (5 May 2016), available at www.pymnts.com/news/risk-management/2016/chapter-11-retail-bankruptcy-debt-restructuring/.
\end{itemize}
Despite earlier optimism that the challenges facing retail might subside in 2017, the industry-wide downturn has only taken a turn for the worse during the first half of the year. More than 300 retailers filed for bankruptcy protection in the first half of 2017, up 31 per cent from the same time last year. It is also estimated that more than 5,300 store closing announcements have been issued to 20 June 2017, compared to 2,056 in 2016, 5,077 in 2015 and 6,163 in 2008, at the height of the recession. These developments have led some commentators to dub 2017 the year of the ‘retail apocalypse’. Although most of the retail filings this year have been for small companies, a number of well known brands have also sought bankruptcy protection, including Gymboree, rue21, and Payless Shoes.

Retailers that have so far avoided bankruptcy have not been immune to the market forces ravaging the industry and have been trimming operations accordingly. Underscoring the pressure on brick-and-mortar operations, JCPenney, Staples, Abercombie & Fitch, and Toys ‘R’ Us, among others, have closed several hundred stores in the past few years. In September 2017, Toys ‘R’ Us tapped advisers Kirkland & Ellis and Lazard Ltd to assist in a potential restructuring and/or refinancing of its significant debt load.

ii 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

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133 In re DBSD North America, Inc, 634 F.3d 79 (2d Cir. 2011).
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.134

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 Corp135 has recently made clear, however, that priority deviations implemented through non-consensual structured dismissals are not permitted.

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 trends in the industry has been towards more DIP lenders insisting on more restrictive milestones in DIP covenants. 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.

134 In re ICL Holding Company, Inc, No. 14-2709 (3d Cir. 2015).
Appendix 1

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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 _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 at Arendt & Medernach and head of the firm’s private equity and real estate business unit. He is a member of the corporate law, mergers and acquisitions and the private equity and real estate practices of the firm. 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 was president of the Luxembourg Young Bar Association in 2007 and 2008. Mr 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.

Mr Beissel holds a master’s degree in law, a DJCE and a DESS in business law from the Université Montpellier I, as well as a master of laws degree (LLM) from Cornell Law School. He speaks 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, co-head 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.

Mr 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.
He was seconded to the New York office of Arendt & Medernach from 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.

Mr Binard is a member of the Luxembourg Bar, and was a member of the Brussels Bar until 2013. He holds a master’s degree in law from the Catholic University of Louvain and speaks English and French.

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.

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, Ms Charter also advises on resolution planning for financial institutions in Hong Kong. Ms Charter is a member of INSOL and currently sits on the board of the Hong Kong chapter of IWIRC.
KAROLE CUDDIHY  
*Maples and Calder*

Karole specialises in corporate insolvency and restructuring. His work includes advising all interested parties in liquidations, receiverships and examinerships, including insolvency professionals, creditors, directors, shareholders and potential investors. He has particular recent experience of successfully applying for injunctive relief on behalf of receivers. Karole also has significant experience of advocacy before the Irish courts.

VASCO CORREIA DA SILVA  
*SRS Advogados – Sociedade Rebelo de Sousa e Associados, RL*

Vasco Correia da Silva graduated from the faculty of law of Lisbon University in 1998 and has a postgraduate diploma in commercial law from the Catholic University of Portugal.

He has practised law for more than 15 years, and is a managing associate at SRS Advogados. He joined the firm in 2010.

Vasco Correia da Silva has significant experience in litigation, representing clients mainly in civil and commercial proceedings and in bankruptcy and insolvency litigation. He provides legal assistance to clients in areas such as insurance, automobile, infrastructure, shipping, energy, TMT, financial services and banking.

MAURO TEIXEIRA DE FARIA  
*Galdino, Coelho, Mendes Advogados*

Mauro Teixeira de Faria is a senior partner at Galdino, Coelho, Mendes Advogados (GCM). He graduated from the State University of Rio de Janeiro Law School and is currently a master of laws candidate at the same institution, in the research area of enterprise 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 creditors, debtors, trustees and investors interested in acquiring distressed assets for approximately 10 years, in some of the main insolvency cases in Brazil. Mauro has also published articles, mostly involving insolvency law.

ARABELLA DI IORIO  
*Maples and Calder*

Arabella di Iorio is a partner at Maples and Calder, where she is the head of the BVI litigation and trusts practice groups. She specialises in complex international commercial litigation, including insolvency, distressed funds, shareholder issues, asset tracing, trust disputes, insurance and reinsurance, professional negligence and contractual claims. She is a fellow of the Chartered Institute of Arbitrators, has considerable arbitration and mediation experience, and is a solicitor advocate who regularly appears in court.

ANDREAS DIMMLING  
*GSK Stockmann*

Andreas is a restructuring and corporate partner in the Munich office of GSK. Since 2008, Andreas advises 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.

SARANNA ENRAGHT-MOONY
Maples and Calder

Saranna practises in the commercial litigation department and specialises in insolvency and corporate recovery and restructuring. She represents insolvency and restructuring practitioners, distressed companies, directors and lending institutions. She advises and represents insolvency practitioners in all types of formal insolvency procedures. She regularly carries out security assessments, advises on enforcement options and acts in enforcement proceedings for large creditors. Saranna also advises directors on their duties in the context of a company’s solvency position and represents them in respect of restriction and disqualification proceedings.

SARAH FABER
Baker McKenzie

Sarah Faber is a summer law student at Baker McKenzie’s Toronto office. She is currently completing her studies at Queen’s University Law School.

GAETANO IORIO FIORELLI
Baker McKenzie

Gaetano Iorio Fiorelli is a counsel at Baker McKenzie. His practice concentrates in 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.
GEMMA FREEMAN
Maples and Calder

Gemma Freeman is an associate in the Cayman Islands office of Maples and Calder. She has a broad range of experience in commercial litigation and insolvency proceedings. She regularly advises company directors, stakeholders, trustees, liquidators and other fiduciaries on both contentious and non-contentious matters. Her areas of practice also include security enforcement and restructuring and shareholder disputes.

ELIANA MARIA FRUNCILLO
Baker McKenzie

Eliana Maria Fruncillo is a junior 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, Mendes Advogados

Rodrigo Saraiva Porto Garcia is a partner at Galdino, Coelho, Mendes Advogados (GCM). He graduated from the Federal University of Rio de Janeiro Law School and is currently a master of laws candidate at the state university of Rio de Janeiro, in the research area of enterprise and economic activities. He was admitted to practise law by the Brazilian Bar Association in 2013.

Rodrigo is part of the intelligence team at GCM, a team comprising partners with dedicated academic inclination, acting together with all teams at GCM in the development of strategies, case studies and legal researches in general. Rodrigo has also published several articles, mostly involving corporate and insolvency law.

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 panelist on a broad range of bankruptcy topics and a contributing author to *Collier on Bankruptcy*. 
KEITH HAN
*Clifford Chance Asia*

Keith Han is an 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 *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 the corporate and M&A teams of Prager Dreifuss. He has extensive experience in representing creditors in bankruptcy-related litigation, whether in registering or purchasing claims or in enforcing disputed claims *vis-à-vis* bankruptcy administrators and before courts. He specialises in mergers and acquisitions (mainly strategic buyers), corporate finance, takeovers, banking and finance and corporate matters.

BLAŽ HRASTNIK
*Rojs, Peljhan, Prelesnik & partners o.p., d.o.o.*

Blaž joined Rojs, Peljhan, Prelesnik & Partners in 2014 after working as a senior associate in a local Slovenian law firm, specialising in insolvency proceedings. During his work, Blaž completed his postgraduate studies and obtained a PhD in 2014 at the University of Ljubljana with a thesis from the field of construction law.

Blaž’s fields of expertise include litigation, insolvency proceedings, construction and real estate. He has been involved in several M&A transaction projects, with subsequent refinancing, and advised clients in numerous insolvency and restructuring matters. His recent track record includes representing and advising clients in the insolvency proceedings of T-2; the completion of a residential building after the investor and construction company went bankrupt; and in resolving open issues and disputes related to the completion of the largest sports shopping complex in Slovenia between the municipality and a private partner; advising various banks in sale of their exposure with regard to bankrupt debtors or debtors in process of restructuring, and providing legal advice in Slovenia to the administrator in the proceeding of recognition of effects of one of the largest foreign insolvency proceedings in CEE region.

IAN JOHNSON
*Slaughter and May*

Ian Johnson has a broad restructuring, insolvency and general finance practice. He has advised on a number of high-profile corporate recovery and insolvency matters and has worked on both international and domestic restructurings and refinancings (including the restructuring and refinancing of Tata Steel, Seadrill Limited, Vestas, Vion Foods, Punch, Royal Mail, Premier Foods, Thomas Cook, General Motors, Countrywide plc and Towergate). 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 partner in the litigation and arbitration practice group at Weerawong, Chinnavat and Partners Ltd. He has extensive expertise, particularly in relation to banking, finance, debt restructuring, bankruptcy, litigation and arbitration and has been the team leader for many of Thailand’s major restructurings. Suntus also represents clients in the enforcement of CIETAC and UNCITRAL arbitration awards in Thailand.

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 has recently 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 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 International (Europe) and Primeo Fund, which arose out of the Madoff fraud.

ALFONSO PÉREZ-BONANY LÓPEZ

Philippi, Prietocarrizosa, Ferrero DU & Uría

A graduate with honours from the School of Law of the University of Lima (Peru), a master’s in law from Boston University (LLM in banking and financial law), and with legal studies from the University of Pennsylvania, Alfonso Pérez-Bonany López is partner at Philippi, Prietocarrizosa, Ferrero DU & Uría with substantial experience in reorganisation; liquidation and insolvency procedures; M&A and corporate finance; representing creditors and debtors in creditors’ meetings; debt restructuring; insolvency and bankruptcy procedures; judicial reorganisations and liquidations; and in corporate and contractual matters. In addition, he worked as senior legal counsel at the Bankruptcy Commission of INDECOPI and lectures in bankruptcy regulation at the University of Lima (Peru).
PRIYA MAKHIJANI

Bharucha & Partners

Priya has been a member of the transaction advisory practice at Bharucha & Partners for over two years. Her special focus is on financing and stressed assets.

ROBIN MCDONNELL

Maples and Calder

Robin McDonnell specialises in insolvency and corporate recovery and restructuring, and has acted in a wide range of compulsory and voluntary liquidations, examinerships and receiverships, schemes of arrangement and bankruptcies. He acts for insolvency and restructuring practitioners, and financial institutions, and advises distressed companies, company directors, shareholders and creditors of distressed companies. Robin also has particular expertise in the area of restriction and disqualification of company directors.

DARIA MIENTKIEWICZ

Bird & Bird Szepietowski i wspólnicy sp k

Daria is an expert in dispute resolution, with extensive experience in advising companies from the pharmaceutical and medical devices sector.

Daria has been advising clients since 2008, and specialises in dispute resolution, including litigation, court administration and arbitration proceedings. She supports clients in regulatory matters, pharmaceutical law and healthcare, administrative procedure, criminal and commercial law, competition and intellectual property rights.

She has extensive experience in advising clients from the life sciences sector and conducting audits.

Prior to joining Bird & Bird, she gained her experience working for a number of leading international law firms.

Daria graduated from the Faculty of Law and Administration, and International Relations and the Faculty of Journalism and Political Science (both majors with honours) from the University of Warsaw. She is currently preparing a doctoral dissertation in the field of regulatory issues, compliance and pharmaceutical law.

She has authored numerous specialised publications, mainly in the area of pharmaceutical law, and spoken at many conferences and seminars.

CAROLINE MORAN

Maples and Calder

Caroline Moran is a partner in the Cayman Islands office of Maples and Calder. She advises on all aspects of domestic and cross-border insolvency and restructuring issues, in particular, consensual and non-consensual restructurings, liquidations and receiverships. Ms Moran advises all key stakeholders in financially distressed circumstances including banks, funds, bondholders, directors, investors and insolvency practitioners. She also has extensive commercial litigation experience in distressed funds, shareholder and financial services disputes. Ms Moran is an experienced advocate, who regularly appears in the Cayman Islands courts.
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 & 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 the 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 post graduate 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 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.

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.

GREGA PELJHAN

Roj, Peljhan, Prelesnik & partners o.p., d.o.o.

Grega is managing partner of the law firm Rojs, Peljhan, Prelesnik & Partners o.p., d.o.o. He joined the firm in 1994 and became a partner in 1999. As a partner in the law firm he specialises in banking and finance, insolvency and restructuring and commercial and corporate law. Grega has been advising many Slovene and international clients including UBS, Erste Bank, Hypo, Raiffeisen, Unicredit, EBRD, EIB, Hewlett Packard, National Instruments Corporation, Goodyear, Novartis and many others, on different finance, M&A, general corporate and commercial and insolvency law and restructuring issues, including issues related to syndicated loans, securitisations, collateralisation, close-out netting, bankruptcy remoteness and similar matters.
His recent deals in relation to insolvency and restructuring practice include advising a Slovenian bank syndicate in the bankruptcy proceedings of one of the largest Slovenian telecommunication companies, T-2; advising a creditor with the largest exposure in restructuring of one of the largest Slovenian retailers; and advising creditors in compulsory settlement of financial holding Sava. In addition, he advised a multinational bank on debt restructuring and the sale process of Kempinski Palace hotel in Portorož and the financing of the real estate project (construction of the residential building with over 100 flats). He has been representing a client in a dispute with the construction company, regarding its legal relations with future tenants, purchasers of real estate and in finding a solution how to continue with a project, after the main construction company went bankrupt.

**NATTHIDA PRANUTNORAPAL**
*Weerawong, Chinnavat and Partners Ltd*

Nattida Pranutnorapal is a senior associate in corporate and debt restructuring services at Weerawong, Chinnavat and Partners Ltd. She has extensive experience in business reorganisation, insolvency and corporate transactions. She represents clients in a wide range of industries in litigation and rehabilitation matters. She has an LLM in international business law from the University of Essex (2014), an LLM from Ramkhamhaeng University (2005) and an LLB from Thammasat University (2001).

**CHRISTOPHER S ROBERTSON**
*Davis Polk & Wardwell LLP*

Christopher S Robertson is an associate in Davis Polk’s insolvency and restructuring group. His experience encompasses a wide range of restructurings, including representing debtors, creditors and lenders. In addition, Mr Robertson represents global financial institutions in connection with their Dodd-Frank resolution planning.

**JEDSARIT SAHUSSARUNGSI**
*Weerawong, Chinnavat and Partners Ltd*

Jedsarit Sahussarungsi is an associate in the litigation and arbitration practice group at Weerawong, Chinnavat and Partners Ltd. He advises international and domestic clients in civil and criminal dispute resolution. Jedsarit obtained an LLB degree (honours) from Thammasat University (2010), an LLM degree (*summa cum laude*) from Université Toulouse 1 Capitole, France (2012) and an LLM degree (merit) from University College London, UK (2016).

**NISH SHETTY**
*Clifford Chance Asia*

Nish Shetty is a partner at Clifford Chance Asia in Singapore. 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 and OW Bunker Far East (Singapore) Pte Ltd. 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**  
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Piyapa Siriveerapoj is an associate in the litigation and arbitration practice group at Weerawong, Chinnavat and Partners Ltd. She represents clients in a wide range of industries in litigation and rehabilitation matters. She has an LLM in international law from Toulouse Capitole University (2015) and an LLB from Thammasat University (2011).

**JOSÉ CARLOS SOARES MACHADO**  
*SRS Advogados – Sociedade Rebelo de Sousa e Associados, RL*

José Carlos Soares Machado graduated from the faculty of law of Lisbon University in 1976 and has practised law for more than 30 years. He has been consistently recognised as a leading civil and commercial litigation lawyer.

Since 2011, he has been a partner and head of the litigation and arbitration department at SRS Advogados, one of the most important law firms based in Lisbon.

He is a professor at the law faculty of Nova University of Lisbon and a member of the ILA International Commercial Arbitration Committee. He has also been the representative of the Minister of Justice on the Portuguese Insolvency Administrators Supervisory Committee since 2005.

José Carlos Soares Machado is a former president of Lisbon Bar Council, as well as a member of the Portuguese Bar Association National Board of Directors, and of its National Supreme Council. He is also an arbitrator at its arbitration centre.

He is the author of several published works on constitutional law, corporate law, real estate law and professional ethics.

He is a member of the Portuguese Arbitration Association and has been an arbitrator in numerous cases. He has also represented clients in numerous arbitrations before *ad hoc* and arbitration centre tribunals.

**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, including acquisitions of large companies.

She is personally recommended by the *Legal 500* as ‘professional, easy-to-work-with and thorough’ and has co-authored the Isle of Man section of the *International Comparative Legal Guide to Gambling*.

Mrs Stratton is the legal and regulatory sub-committee chair of the Isle of Man Wealth and Funds Association (www.iomfunds.com/contacts.php).
URH ŠUŠTAR

*Rojs, Peljhan, Prelesnik & partners o.p., d.o.o.*

Urh is an associate at Rojs, Peljhan, Prelesnik & Partners, where he practises corporate law, with a primary focus on M&A, insolvency and restructuring, and dispute resolution.

Urh graduated from University of Ljubljana (with a master’s degree in commercial law, *cum laude*) in 2014. As a part of his commercial law specialisation Urh studied also at the University of Munich and at the University of Münster. Recently, Urh has been engaged in various insolvency and restructuring proceedings. Namely, he has been a member of a team advising the syndicate of banks in the bankruptcy proceedings of T-2, a bank with the single largest exposure in compulsory settlement proceedings over Sava, various banks in the sale of their exposure with regard to bankrupt debtors or debtors in process of restructuring, and providing legal advice in Slovenia to the administrator in the proceeding of recognition of effects of one of the largest foreign insolvency proceedings in CEE region. Urh has also independently advised various Slovenian and foreign creditors on the matters in connection with insolvency proceedings and pertaining to litigation.

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.

DAVID WELFORD

*Maples and Calder*

David Welford is an associate in the BVI office of Maples and Calder. He is a barrister with broad experience in commercial and financial disputes, with a focus on cross-border company, trusts and insolvency matters. He has extensive advocacy experience including interim applications, injunctive relief, High Court trials and appellate work.
Appendix 2

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