The International Insolvency Review

Editor
Donald S Bernstein

Law Business Research

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EDITOR'S PREFACE

The International Insolvency Review differs from the typical global review of insolvency law. It focuses on current economic conditions and case developments on the ground in key jurisdictions instead of merely on the basic principles of local insolvency law.

The number of commercial insolvencies commenced worldwide has steadily fallen from its peak in 2009 and, while the continued struggles of the eurozone have caused many companies to seek insolvency relief in the past 12 months, this downward trend in new failures has continued in most jurisdictions during the first half of 2013. The ebb of commercial insolvencies seems, however, to be a reflection of historically low prevailing interest rates and strong refinancing markets rather than the robustness of any economic recovery. There continues to be a global environment of sluggish growth, heightened regulation and steep unemployment, and the ability of companies to avoid insolvency may be nothing more than 'kicking the can down the road'. Illustrative of the fragility of the global recovery – what some are calling the 'new normal' – is the fact that the mere suggestion by the US Federal Reserve of a possible slowdown in its bond-buying programme could cause capital to rush out of emerging economies, leaving currency crises in its wake. The outlook is nothing if not uncertain.

This book is intended to serve as a practical guide for the insolvency practitioner, judge, student or scholar as he or she navigates the current international insolvency landscape. As the chapters of this book indicate, there are a wide variety of approaches to the fundamental problem of what to do with an insolvent business. The reader will notice local differences in the treatment of the matters that lie at the heart of any insolvency system, such as: Can an insolvent debtor reorganise or liquidate? Will the court appoint a trustee or administrator, or leave the debtor in possession? Which claims have priority? Do foreign creditors have the same procedural and substantive rights as local creditors? Will secured creditors be stayed from proceeding against the debtor or its property? What type of pre-failure transactions can be avoided?

When confronted with such an assortment of systems, one must ask whether the international markets are hindered by the myriad of substantive differences among the world's insolvency regimes. It must be the case that, because markets are global, a single set of global rules for insolvency would obviously be the most efficient system. Yet, it is impractical to think that this universalist ideal can be achieved anytime soon: local commercial cultures, differences in due process expectations and practice, and local vested interests make it difficult to see how there could be global legal symmetry in the realm of insolvency, despite the globalisation of markets.

Modified universalism, which would allow the law of the centre of main interests to apply except where the local jurisdiction has a compelling interest in applying local law, seems to have won the hearts and minds of many scholars and legislatures as the next best option to pure universalism. Still, the contours of this approach – being etched daily in countries that have adopted legislation based on UNCITRAL's Model Law on Cross-Border Insolvency – are far from settled, and how they are defined is likely to differ from country to country. So, even if modified universalism eventually prevails, a clear understanding of other nations' insolvency law and practices will continue to be essential for the insolvency practitioner to be effective in a flattened, globalised world.

I would like to thank each of the contributors to this book for their incredible effort in making *The International Insolvency Review* a reality. As each of the authors knows, this book was a difficult undertaking because of the up-to-the-minute coverage of major developments we seek to provide. With the publication of this volume, we should take satisfaction in the fruits of our collective efforts, and wish each other happy reading as we better educate ourselves to continue our dialogue regarding how to improve the international insolvency system.

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New York
October 2013

Chapter 1

RECOGNITION AND COMITY IN CROSS-BORDER INSOLVENCY PROCEEDINGS

Donald S Bernstein, Timothy Graulich, Damon P Meyer and Robert Stewart[1]

I THE 'UNIVERSALIST' TREND IN CROSS-BORDER INSOLVENCY

A court presiding over a multi-jurisdictional insolvency case is faced with a dilemma: should the court apply its own laws and rules as if the case had no international aspects, or defer to the laws and rules of another jurisdiction that has a greater connection to the debtor and its affairs (for example, where the company is incorporated, where its executive offices are located or where its assets are centred)? Put another way, should a 'territorialist' approach apply, where the country applies its own insolvency rules to administer assets within its territory (and potentially purports to bind creditors and assets everywhere), or should a 'universalist' approach be used, allowing the insolvency proceedings and rules of another jurisdiction govern where the 'other' jurisdiction is the focal point of the debtor's affairs (however that may be defined). This issue must, to a greater or lesser degree, be confronted in every cross-border insolvency case.

How this issue is resolved is highly important because the choice of the 'insolvency jurisdiction' and the governing insolvency law has a very large impact on how the bankruptcy proceedings are administered and on their substantive outcome. The provisions of the insolvency laws of different jurisdictions differ in a number of respects. For example: Will the debtor be liquidated or reorganised? Will the debtor remain 'in possession' or will a trustee, receiver or administrator be appointed to manage the debtor's affairs? Whose interests does the controlling person ultimately represent: secured creditors, unsecured creditors or the debtor's 'estate'? What activities in the insolvency case must be approved by the court, and what notice and opportunity to be heard is provided, especially to creditors located in other countries? Which creditors have special priorities? Can creditors with the right to seize assets under applicable non-bankruptcy

1 Donald S Bernstein and Timothy Graulich are partners, Damon P Meyer is a senior associate and Robert Stewart is an associate at Davis Polk & Wardwell LLP.

law (for example, secured creditors) be stopped from doing so? What rules govern the avoidance of pre-bankruptcy transfers and who benefits from avoidance? Who gets to decide whether a distribution scheme is equitable and what are the criteria for that determination?

The significance of these questions for the procedural and substantive treatment of stakeholders is obvious.

There are two basic schools of thought on these issues: universalism and territorialism. The universalists believe that cross-border insolvencies should be governed by the laws of a single country.[2] The use of a single set of rules to govern insolvency administration comports with the idea of 'market symmetry' – that since markets extend across borders, the same legal rules should apply in a consistent manner from one jurisdiction to the next. If legal rules governing cross-border insolvencies mirror the borderless nature of markets, cross-border insolvencies will be resolved more efficiently and more predictably.[3]

Territorialists, on the other hand, dispute both the feasibility and the purported benefit of such a unified approach.[4] They question whether it is fair to assume that local creditors would expect foreign bankruptcy rules to apply to their counterparties. They also question whether, in the event of a complex cross-border enterprise, it is possible for third parties to reliably predict the jurisdiction whose law would purportedly be applied; they also suggest that, even if the parties' expectations could be known and even if a single 'home' jurisdiction could be clearly identified, the 'grab rule' would be replaced by 'forum shopping' to take advantage of local rules that favour one party over another. In

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2 See, e.g., Jay Lawrence Westbrook, 'Theory and Pragmatism in Global Insolvencies: Choice of Laws and Choice of Forum', 65 *Am. Bankr. L.J.* 457, 461 (1991) (under the universalist principle, 'all of the debts of the enterprise would be administered through one central proceeding in the "home country"'); Andrew T Guzman, 'International Bankruptcy: In Defense of Universalism', 98 *Mich. L. Rev*. 2177, 2203 (2000) (arguing that universalism is a 'better framework for reorganizations' because of the centralisation of assets in a single court); Todd Kraft and Allison Aranson, 'Transnational Bankruptcies: The Section 304 and Beyond', 1993 *Colum. Bus. L. Rev*. 329, 336 (1993) ('One proceeding [held in a country with great interest in the debtor or the property] minimizes administrative costs and maximizes judicial efficiency').

3 See, e.g., Jay Lawrence Westbrook, 'A Global Solution to Multinational Default', 98 *Mich. L. Rev*. 2276, 2288 (2000) ('Because bankruptcy is a market-symmetrical law, a global market requires a global bankruptcy law'); John A E Pottow, 'Procedural Incrementalism: A Model for International Bankruptcy', 45 *VA. J. Int'l L*. 936, 946 (2005) (arguing that a territorialist insolvency system would 'undermine the market-symmetric and orderly disposition of a debtor's assets').

4 See, e.g., Lynn M. LoPucki, 'Cooperation in International Bankruptcy: A Post-Universalist Approach', 84 *Cornell L. Rev*. 696, 709 (1999) ('The problems with universalism are overwhelming'); Lynn M LoPucki, 'Universalism Unravels', 79 *Am. Bankr. L.J.* 143, 148 (2005) ('Universalists have tried to ignore the uncomfortable fact that someone must be given the power to decide what country's court – and thus what country's law – will control').

other words, debtors would reincorporate, move their headquarters or move their assets – indeed, they might be required to do so by their creditors – to assure application of a particular set of 'home court' rules. Viewed this way, a universalist approach seems at once inefficient, unpredictable and naïve.

The problems with universalism are further confounded by the fact that there can be a mismatch of choice-of-law rules in the relevant jurisdictions. For example, in a particular case, there might be a territorial approach in one country and a universal approach in another. Or there might be two universalist countries that apply different definitions of the 'home' jurisdiction, and reach conflicting conclusions.

As the number of cross-border insolvencies has increased in recent years, the urgency of these questions has grown, and there is no question that the universalist approach has been in the ascendency, culminating in the adoption in not fewer than 19 – 20, counting the British Virgin Islands – countries of laws based on the UNCITRAL Model Law on Cross-Border Insolvency (the Model Law),[5] which generally endorses recognition of a 'main' insolvency proceeding in a single country by the courts in other jurisdictions, where local 'non-main' proceedings may be brought.

Prior to the enactment of local laws based on the Model Law, cross-border insolvency issues were in most countries addressed solely based on principles of 'comity'. Comity is a set of general principles governing when the courts and legal rules of a particular country pay deference to legal rules or proceedings of another country. Over 100 years of jurisprudence have left a scattered trail applying these principles in landmark cases in the insolvency field, and when the US Bankruptcy Code was enacted in 1978, principles of comity were enshrined in Section 304, which, prior to the enactment of the US version of the Model Law (Chapter 15 of the Bankruptcy Code), governed cases ancillary to foreign proceedings in the United States.[6]

Comity was famously applied in a pathbreaking cross-border bankruptcy commenced in 1991, that of the Maxwell Communications empire, in which plenary insolvency proceedings were commenced in both the United States and the United

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5 United Nations Commission on International Trade Law (UNCITRAL) Model Law on Cross-Border Insolvency, 30 May 1997, available at www.uncitral.org/pdf/english/texts/insolven/insolvency-e.pdf.

6 Section 304(c) of the Bankruptcy Code included six factors for determining whether relief should be granted to a foreign representative who filed a petition for an ancillary proceeding in the bankruptcy court:

a just treatment of all holders of claims against or interests in such estate;

b protection of claim holders in the United States against prejudice and inconvenience in the processing of claims in such foreign proceeding;

c prevention of preferential or fraudulent dispositions of property of such estate;

d distribution of proceeds of such estate substantially in accordance with the order prescribed by this title;

e comity; and

f if appropriate, the provision of an opportunity for a fresh start for, the individual that such foreign proceeding concerns.

Kingdom. The parties and the courts in that case devised highly pragmatic, though makeshift, solutions to the conflicts between the two jurisdictions, highlighting the need for cross-border cooperation among courts and insolvency administrators and, ultimately, for predictable legal rules for insolvencies in a cross-border context. Judge Tina Brozman and Lord Hoffmann, the judges in the United States and the United Kingdom, respectively, and the parties (an examiner in the United States and the accounting firm administering the company's UK assets) exhibited an extraordinary level of cooperation and deference, setting off a 'universalist' trend that presaged legal developments in the cross-border insolvency field since that time.[7]

The universalist trend initiated by Maxwell led to a series of judicial colloquia involving judges and lawyers from all over the world and, ultimately, to the multi-year negotiation of the Model Law at the United Nations headquarters in New York and Vienna. The Model Law was promulgated by UNCITRAL in 1997 and, since that time, there has been a proliferation of new laws addressing cross-border insolvencies patterned on the Model Law.[8] Simultaneously, in 2002, the European Regulation on Insolvency Proceedings (the EU Regulation) was enacted, providing for recognition of cross-border proceedings based on the idea of a 'centre of main interests' (COMI) for insolvency cases within the European Union.[9]

Nevertheless, despite this flurry of apparent universalist sentiment around the world, it remains a stark fact that insolvency laws and policies, and the treatment of stakeholders, differ materially from jurisdiction to jurisdiction and, in practice, courts continue to struggle with the idea of allowing local insolvency principles and procedures to be overridden by a foreign jurisdiction's law. This is especially true where a foreign jurisdiction is, rightly or wrongly, perceived to have a less well-developed, reliable or predictable legal infrastructure, or less protective due-process rules.

So, despite an increasingly common set of principles that purport to allow the courts of one jurisdiction to defer to the insolvency proceedings and rules of another,

7 Richard Gitlin, examiner appointed by Judge Brozman, and Mark Homan of Price Waterhouse, the UK administrator, entered into a protocol, approved by both courts, to govern the administration of the cases and, on one of the major issues in the case involving what avoidance rules should apply to certain transfers, the UK courts ultimately deferred to Judge Brozman to decide the choice of law issue, and Judge Brozman concluded that UK law, not US law, should apply.

8 The Model Law was designed to assist countries 'equip their insolvency laws with a modern, harmonized and fair framework to address more effectively instances of cross-border insolvency.' Guide to Enactment of the UNCITRAL Model Law on Cross-Border Insolvency, 1997 XXVIII UNCITRAL Y.B. pt. 3, 2, U.N. Doc. A/CN.9/442 at Paragraph 1. Examples of countries that have recently revised their cross-border insolvency laws include Australia (Cross-Border Insolvency Act 2008 (No. 24, 2008)), Greece (Law 3858/2010, SG A' 102/2010), Mauritius (Insolvency Act 2009, Act No. 3 Government, Gazette No. 44 of 23 May 2009) Slovenia (the Insolvency Act of Slovenia, Law No. 6413/2007) and Uganda (Insolvency Act, No. 14 of 2011).

9 Council Regulation (EC) No. 1346/2000.

in practice, as can be seen from some recent decisions, the universalist ideal remains elusive. While the new laws are universalist in spirit (and in many cases so are the courts' decisions), there is significant room for judicial discretion to decline to apply foreign insolvency rules, even where the COMI of the debtor – its 'home' jurisdiction – is clearly elsewhere.

II TREATMENT OF FOREIGN INSOLVENCIES BY THE US COURTS

i Chapter 15

Chapter 15 of the Bankruptcy Code, which is based on the Model Law, governs how a US court is to treat a plenary foreign insolvency proceeding where no plenary proceedings have been commenced in the United States. The enactment of Chapter 15 was lauded as a long-awaited embrace of universalism that would provide a degree of certainty to cross-border bankruptcies that had not been enjoyed under the formerly applicable Section 304.[10] Echoing the Model Law, the stated purpose of Chapter 15 is to promote 'cooperation' between courts and to provide 'greater legal certainty' in multi-jurisdictional cases.[11] Of course, while Chapter 15 has many universalist components, its deference to a foreign proceeding is not unbounded. Chapter 15 embodies a 'modified universalist' approach, which means that it contains avenues through which local law can apply where the local jurisdiction has a strong interest in applying it.

Recognition of a foreign proceeding

Generally, Chapter 15 provides a mechanism for a debtor with a case pending in a foreign jurisdiction to commence an ancillary proceeding in the United States. The foreign case must satisfy Chapter 15's definition of a 'foreign proceeding', which is a 'collective judicial or administrative proceeding in a foreign country, including an interim proceeding, under a law relating to insolvency or adjustment of debt in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation'.[12] Courts have typically interpreted this requirement in a manner that is accommodative of the many different types of insolvency proceedings that exist abroad. For example, the Bankruptcy Court in *Avanzit*[13] held that a Spanish proceeding in which a repayment plan had already been approved and court control had been reduced was still eligible for recognition under Chapter 15.

An ancillary case is commenced when a representative of the foreign proceeding files a petition for recognition of the foreign proceeding pursuant to Sections 1515 to

10 See, e.g., Jay Westbrook, 'Chapter 15 at Last', 79 *Am. Bankr. L.J.* 713, 716 (2005). Section 304 of the Bankruptcy Code, discussed in footnote 6, *supra*, established a set of procedures by which a foreign representative could obtain ancillary relief in the United States, and was repealed upon the enactment of Chapter 15 in 2005.

11 11 USC, Section 1501(a).

12 11 USC, Section 101(23).

13 *In re Oversight and Control Com'n of Avanzit, SA*, 385 B.R. 525 (Bankr. S.D.N.Y. 2008).

1517 of the Bankruptcy Code. Ordinarily, this process presents neither a significant procedural nor substantive hurdle; Section 1515 simply requires a foreign representative to file a petition for recognition, and Section 1517 mandates that a court 'shall' enter an order recognising the foreign proceeding if it is either a foreign main or non-main proceeding,[14] the foreign representative is a person or body, and the petition satisfies the basic requirements of Section 1515.

Recent cases suggest that if there is one aspect of Chapter 15 that has remained the most steadfast in its commitment to the cross-border cooperation in the insolvency field, it is the Chapter's generous accessibility.[15] For example, the Bankruptcy Court for the Southern District of New York recently held that a foreign debtor does not need to conduct business, own property or have any creditors in the United States to commence a Chapter 15 case.[16] Additionally, the Fifth Circuit permitted a debtor to access Chapter 15 even though the proposed foreign representatives were not appointed by a court and did not have the power to file a plan of reorganissation.[17] These cases confirm the notion that, in furtherance of Chapter 15's primary role as a mechanism to coordinate foreign proceedings with US courts, practitioners can expect court to not be overly territorial or restrictive of entry into its domain.

Recognition of a foreign proceeding as the 'main' proceeding

Initial recognition of a foreign insolvency proceeding and of a foreign representative provides critical procedural access for the foreign representative to the US courts and the powers conferred by Chapter 15. Certain of these powers, however, are only available to the foreign representative upon the determination that a recognised foreign proceeding is a 'foreign main proceeding'.

Under Chapter 15, a foreign proceeding will be recognised as a foreign main proceeding 'if it is pending in a country where the debtor has the center of its main interests'.[18] A debtor has the burden of proof to establish its COMI, otherwise, Section

14 Chapter 15 treats foreign main proceedings differently from foreign non-main proceedings. Section 1517 defines a main proceeding as one that is 'pending in the country where the debtor has the center of its main interests', and a non-main proceeding as one where 'the debtor has an establishment within the meaning of Section 1502 in the foreign country where the proceeding is pending'.

15 Access, though an essential first step, is not, however, the *sine qua non* of universalism. That instead depends on the determination of a foreign proceeding as being the 'main' proceeding, which triggers levels of deference, cooperation and support of the foreign proceeding, reflecting the universalist spirit of the Model Law.

16 *In re Petition of Katherine Elizabeth Barnet and William John Fletcher, as Liquidators of Octaviar Administration Pty Ltd*, Case No. 12-13443 (SCC) (Bankr. S.D.N.Y. Nov. 28, 2012) [ECF No. 47]. On 21 February 2013, the decision to grant recognition to the Australian proceeding was certified for direct appeal to the Second Circuit.

17 *In re Vitro SAB de CV*, 701 F.3d 1031 (5th Cir. 2012), cert. denied, 133 S. Ct. 1862 (2013) (*In re Vitro*).

18 11 USC, Section 1517(b)(1).

1516(c) of the Bankruptcy Code presumes that the debtor's COMI is the location of its registered office.[19] Courts typically use the following six factors to determine whether a certain jurisdiction is the debtor's COMI:

a the location of the debtor's headquarters;
b the location of those who actually manage the debtor (which conceivably could be the headquarters of a holding company);
c the location of the majority of the debtor's creditors or a majority of the creditors who would be affected by the case;
d the location of the debtor's primary assets;
e the jurisdiction whose law would apply to most disputes; and
f the expectations of third parties with regard to the location of the debtor's COMI.[20]

Earlier this year, the Second Circuit had the opportunity to address the issue of COMI under Chapter 15 for the first time.[21] In the Second Circuit's review of *Fairfield Sentry*, the court addressed two questions with regard to the COMI analysis: (1) what is the relevant time period at which the debtor's COMI should be determined and (2) what are the relevant factors that a court may consider when determining a debtor's COMI.[22]

With respect to the first question, the Second Circuit held that a debtor's COMI should be determined at the time that the Chapter 15 petition is filed.[23] The court indicated, however, that a court also 'may look to the period between the commencement of the foreign insolvency proceeding and the filing of the Chapter 15 petition to ensure that a debtor has not manipulated its COMI in bad faith'.[24]

With respect to the second question, the Second Circuit affirmed that the foregoing factors can inform the COMI inquiry, but made it clear that the governing principle is that the debtor's COMI 'should correspond to the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties'.[25] Consequently, these are non-exclusive and consideration of them is 'neither required nor dispositive'.[26]

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19 See *In re British American Isle of Venice (BVI) Ltd*, 441 B.R. 713 (Bankr. S.D. Fla. 2010) (citing *In re British Am Ins Co,* 425 B.R. 884, 908 (Bankr. S.D. Fla. 2010) and *In re Tri-Continental Exch Ltd*, 349 B.R. 627, 635 (Bankr. E.D. Cal. 2006)); *In re Bear Stearns High-Grade Structured Credit Strategies Master Fund Ltd (Bear Stearns I)*, 374 B.R. 122, 128 (Bankr. S.D.N.Y. 2007), aff'd, 389 B.R. 325 (S.D.N.Y. 2008).

20 See, e.g., *In re British Am Ins Co*, 425 B.R. at 909; *In re Bear Stearns High-Grade Structured Credit Strategies Master Fund Ltd (Bear Stearns II)*, 389 B.R. 325, 336 (S.D.N.Y. 2008) (citing *In re SPhinX Ltd*, 351 B.R. 103, 117 (S.D.N.Y. 2006)).

21 *In re Fairfield Sentry Ltd*, 714 F.3d 127 (2013).

22 Id. at 133.

23 Id. at 137.

24 Id. at 137.

25 Id. at 138 (citations omitted).

26 Id. at 137.

ii Effects of recognition of a foreign main proceeding

Upon recognition of a foreign main proceeding, Section 1520 describes certain immediate and automatic consequences. For example, the automatic stay applies to the debtor and the property of the debtor that is within the territorial jurisdiction of the United States,[27] Section 1520(a)(2) provides that 'sections 363, 549, and 552 apply to a transfer of an interest of the debtor in property that is within the territorial jurisdiction of the United States to the same extent that the sections would apply to property of an estate',[28] and a foreign representative is permitted to operate the debtor's business and exercise the rights and powers of a trustee as if the foreign representative were a US debtor.[29] Recent decisions suggest that different court may take somewhat different approaches to the degree of deference afforded to recognised foreign insolvency proceedings.

Application of Section 363 to foreign court orders

Elpida Memory Inc (Elpida) filed bankruptcy proceedings in Japan on 27 February 2012. Soon thereafter, the company sought and obtained recognition of such proceedings as a foreign main proceeding under Chapter 15 in the United States Bankruptcy Court for the District of Delaware. The foreign representative requested approval to sell or license certain patents pursuant to Section 363. Although the Japanese bankruptcy court had already approved the transaction, the US Bankruptcy Court held that the foreign representative still had to satisfy the requirements of Section 363 of the Bankruptcy Code with respect to the US assets that were being transferred. The US Bankruptcy Court reasoned that the plain meaning of Section 1520(a) clearly introduces Section 363 into the ancillary proceedings with respect to a transfer of US property in a Chapter 15 case 'to the same extent' that Section 363 would apply to a transfer of estate property in a proceeding under other chapters of the Bankruptcy Code.[30]

Turning to the legislative history of Chapter 15, the court in *Elpida* determined that the drafters of the Model Law had contemplated that a court presiding over an ancillary case would effectively review such transactions *de novo* pursuant to local (US) law.[31] In so doing, the court noted that the word 'comity' only appears twice within the text of Chapter 15 and indicated that comity 'is not the end all be all of the statute. To require this Court to defer in all instances to a foreign court decision would gut section 1520'.[32] Consequently, the court determined that it was required to review the sale of the

27 11 USC, Section 1520(a)(1).

28 Section 1502(8) directs that '"within the territorial jurisdiction of the United States", when used with reference to property of a debtor, refers to tangible property located within the territory of the United States and intangible property deemed under applicable nonbankruptcy law to be located within that territory, including any property subject to attachment or garnishment that may properly be seized or garnished by an action in a Federal or State court in the United States'.

29 11 USC, Section 1520(a)(3).

30 *In re Elpida Memory Inc*, 2012 Bankr. LEXIS 5367, 57 Bankr. Ct. Dec. 74 (Bankr. D. Del. 2012).

31 Id. at 22.

32 Id. at 27.

assets located in the US pursuant to the well-established business judgement standard for Section 363 sales, which required the development of an evidentiary record.[33]

Less than two months after the *Elpida* decision, Judge Lifland in the Southern District of New York analysed Section 1520(a)(2) with a greater emphasis on the primacy of comity under Chapter 15. The court in *Fairfield Sentry*[34] declined to review a transfer of property pursuant to Section 363 on the grounds that the transfer did not implicate Section 1520(a)(2) because the property was not within the territorial jurisdiction of the United States. In contrast to *Elpida*, the court in *Fairfield Sentry* stressed the importance of comity to a cross-border insolvency regime and took note of the deliberate and clearly recognisable effort that the drafters of the Model Law exerted in order to establish comity as the Model Law's governing concept. Although the *situs* of the property was the dispositive issue in *Fairfield Sentry*, it is undeniable that Judge Lifland's sensitivity to the critical importance of comity in cross-border insolvencies (reminiscent of the decision of Judge Brozman in *Maxwell*) and the related view that, for reasons of comity, Chapter 15 in most circumstances mandates cooperation with foreign main proceedings, influenced the court's determination that the property should not be viewed as located in the United States.

Elpida and *Fairfield Sentry* appear to be somewhat at odds philosophically, even if the results are not contradictory. At the end of the day, however, the *Elpida* Bankruptcy Court approved all the transactions that implicated Elpida's US assets and granted recognition of Elpida's plan of reorganisation.[35] Thus, the apparent difference in approach between the *Elpida* court and the *Fairfield Sentry* court may have been based more on circumstance (as alluded to by Judge Lifland) than on a philosophical difference between the judges.[36]

Additional relief available under Chapter 15

Not all relief available under Chapter 15 is mandatory. Both Sections 1507 and 1521 describe discretionary relief that a court may grant at the request of a foreign representative. Section 1521 permits a court to grant 'any appropriate relief' at the request of a foreign representative, including certain types of relief specified in a non-exclusive list.[37] This

33 The court eventually approved the transactions pursuant to Section 363 under the relatively deferential business judgement standard.

34 *In re Fairfield Sentry Ltd*, 484 B.R. 615 (Bankr. S.D.N.Y. 2013).

35 *In re Elpida Memory Inc*, Case No. 12-10947 (CSS) (Bankr. D. Del. 16 January 2013) [ECF No. 360]; *In re Elpida Memory Inc*, Case No. 12-10947 (CSS) (Bankr. D. Del. 25 June 2013) [ECF No. 446].

36 During Elpida's Chapter 15 case, the order recognising *Elpida*'s foreign main proceeding was amended to place more stringent requirements on the foreign representatives than mandated by Chapter 15. *In re Elpida Memory Inc*, Case No. 12-10947 (CSS) (Bankr. D. Del. 18 September 2012) [ECF No. 138].

37 Among other things, a court may stay the commencement of actions against a debtor's assets to the extent they have not been stayed under Section 1520(a); suspend the right to transfer, encumber or otherwise dispose of the debtor's assets to the extent this right has not been suspended under Section 1520(a); entrust administration of all or part of the debtor's assets

section affords foreign representatives a very broad power to step into the shoes of a US debtor. Notably, the court is even permitted to 'entrust' the foreign representative with the administration or realisation of the debtor's assets in the United States.[38] Section 1522, however, requires that any relief available under Section 1521 is subject to the condition that 'the interests of the creditors and other interested entities, including the debtor, are sufficiently protected'.[39] The statute does not define what amount of protection is 'sufficient', but there is no indication that the protection has to be identical to US law. The relationship between Sections 1521 and 1522 embodies the objective of Chapter 15: in furtherance of the principle of comity, US courts should defer to the foreign representative as long as US creditors are sufficiently protected.

Section 1521 is not the only avenue through which a foreign representative may seek discretionary relief. Although oddly placed, Section 1507 contains a more general grant of power. Through Section 1507, a court may provide unspecified 'additional assistance' to a foreign representative. When determining whether to grant such additional assistance, the courts are directed to consider the same factors delineated by former Section 304, which demonstrates that Chapter 15 allows relief at least as broad as Section 304.[40] In Section 1507, however, comity is specifically mentioned in the introductory text of the section, and is thereby understood to be the concept that governs whether a court grants additional assistance, rather than a mere factor to consider.[41] The elevation of comity to the principle governing whether to grant additional assistance could be interpreted to indicate that Section 1507 is somewhat broader than Section 304.

The relationship between Sections 1521 and 1507, as well as the relationships between these sections and the territorialist limitations built into Chapter 15, has never been entirely clear. The text of Chapter 15 does not adequately inform, for example, whether Section 1507 simply describes the factors that may be considered by the court to justify granting discretionary relief contemplated by Section 1521, or whether it establishes a wholly independent avenue for a foreign representative to request 'additional' assistance, free of any restrictions placed on the scope of relief under Section 1521. Does the '[s]ubject to the specific limitations stated elsewhere in this chapter' language in Section 1507 mean 'additional assistance' under that section is subject to 'sufficient

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within the territorial jurisdiction of the United States to the foreign representative or another person; or grant certain additional relief that may be available to a trustee.

38 11 USC, Section 1521(a)(5).

39 11 USC, Section 1522.

40 See footnote 6, *supra*.

41 See Paul L Lee, 'Ancillary Proceedings Under Section 304 and Proposed Chapter 15 of the Bankruptcy Code', 76 *Am. Bank. L.J.* 115, 194 (2002) (The House Report explains the formatting of Section 1507 as follows: 'Although the case law construing section 304 makes it clear that comity is the central consideration, its physical placement as one of six factors in subsection (c) of section 304 is misleading, since those factors are essentially elements of the grounds for granting comity. Therefore, in subsection (2) of this section, comity is raised to the introductory language to make it clear that it is the central concept to be addressed' (citing H.R. Rep. 107-3, pt. 1, at 80 (2001))).

protection' of the interests of creditors and the debtor, as required in Section 1522, or only to the overall limitation, applicable to all of Chapter 15 and contained in Section 1506, that 'nothing in this chapter prevents the court from refusing to take an action governed by this chapter if the action would be manifestly contrary to the public policy of the United States'?[42]

Even if general limitations (such as manifest public policy and protecting the interests of creditors and the debtor) apply to Section 1507, does the reference to allowing 'additional assistance' based on considerations of comity in Section 1507 support a universalist interpretation of other provisions of Chapter 15, such as Section 1520, suggesting that deference be afforded to foreign main proceedings (whether under the rubric of additional assistance or otherwise) if considerations of comity support such deference?

These questions have to some extent been raised in an important recent case regarding the enforcement of a reorganisation plan approved in a foreign proceeding. *In Vitro*,[43] the Fifth Circuit attempted to provide clarity to the relationship between Sections 1507 and 1521, and the effect of the limitations contained in Sections 1506 and 1522, by developing a new hierarchical approach to analysing requests for relief under Chapter 15. Essentially, a court should first consider whether the relief is available under the more specific statutory provisions (in Section 1521) before considering whether the relief may be granted under the more general statutory provisions (in Section 1507).[44] The Fifth Circuit instructed that relief granted under Section 1507 should be scrutinised more rigorously, since such relief goes beyond that which was previously available under Section 304.[45]

Interestingly, the *Vitro* court only considered the principle of comity within the four corners of Section 1507, even though it acknowledged that 'comity is the rule under Chapter 15, not the exception'.[46] Similar to the textual interpretation of the *Elpida* court, this reading is derived from the fact that Section 1521 is devoid of a textual reference to comity. Since relief under Section 1507 is subject to heightened scrutiny, it is possible that the Fifth Circuit's hierarchical approach, when coupled with a textual reading of Chapter 15, could derogate the principle of comity in the analysis of whether to grant discretionary relief.

On the other hand, when the court considers Section 1521's allowance of 'any appropriate relief', it recognises that such relief includes the relief previously available under former Section 304, where considerations of comity clearly came into play. It will be interesting to see whether courts reading Chapter 15 in light of *Vitro* will restrict themselves to a consideration of comity only within the confines of Section 1507, or if courts will follow *Vitro*'s hierarchical ordering of Chapter 15's sections, but take into account considerations of comity as they would have under Section 304.

42 11 USC, Section 1506.

43 *In re Vitro*.

44 Id. at 1054.

45 Id. at 1057 (citations omitted).

46 Id. at 1064.

III RECENT TREATMENT OF FOREIGN INSOLVENCIES IN OTHER JURISDICTIONS

i United Kingdom

The United States is not the only jurisdiction that is grappling with the appropriate role of comity in multinational insolvencies. The *Rubin* case,[47] a decision last year from the Supreme Court of the United Kingdom (the UK Supreme Court), indicates that there has been some retrenchment on the issue of universalism in the English courts. It remains to be seen whether the tide of universalism will continue to ebb in the United Kingdom, but, as a practical matter, it will now be harder to get certain types of foreign bankruptcy court judgments enforced under English law.

An understanding of the *Rubin* decision requires some background. At common law, the judgments of foreign courts are classified as either *in personam* or *in rem* and are enforceable under English law only to the extent that the foreign court properly asserted its jurisdiction.[48] A number of recent English law cases grapple with the question of whether the rule at common law is equally applicable to the judgment of a foreign court in an insolvency proceeding or whether, giving regard to the principles of universalism and comity, English courts have wider authority with respect to these orders. In *Rubin*, the UK Supreme Court concluded that, at present, foreign insolvency orders deserve no special treatment.

For many years, it seemed universalism was firmly established under English law. A recent testament to this trend was the *Cambridge Gas* case,[49] in which the Privy Council held that bankruptcy judgments were *per se* different from ordinary judgments in civil suits because the purpose of a bankruptcy order is to collectively enforce the rights of creditors rather than to establish those rights either *in rem* or *in personam*. The majority decision of the UK Supreme Court in the *Rubin* case, however, expressly rejected the holding of Cambridge Gas. It now appears that, under English law, the traditional common law rules with respect to recognition and enforcement of foreign judgments will apply to orders made in foreign insolvency proceedings, at least where affirmative relief (such as money damages) is sought from a UK resident.

ii Canada

Canada has generally been willing to grant comity to US bankruptcy proceedings, and recent cases suggest that this trend continues unabated. In *LightSquared*,[50] the Ontario Superior Court of Justice developed a three-part test for determining a debtor's COMI under Part IV of the Companies' Creditors Arrangement Act (CCAA), which is Canada's version of the Model Law. Previously, Canadian courts considered up to 10 factors when

47 *Rubin v. Eurofinance SA* [2012] UKSC 46 (24 October 2012).

48 Dicey, Morris and Collins, *The Conflict of Laws* (15th edn, 2012).

49 *Cambridge Gas Transportation Corp v. Official Committee of Unsecured Creditors of Navigator Holdings plc* [2006] UKPC 26 (16 May 2006).

50 *Re LightSquared LP*, 2012 ONSC 2994.

designating foreign proceedings as main or non-main.[51] While other factors may still be considered, the simplification of the analysis to a focus on three primary factors is a welcome clarification regarding the appropriate application of the COMI concept, at least under Canadian law.

Canada also displayed its universalist inclinations in the *Hartford Computer* case,[52] where the Ontario Superior Court of Justice declined to find that an order of a US Bankruptcy Court violated Canadian public policy even though it contravened ordinary Canadian bankruptcy law. The court observed that Section 49 of the CCAA authorises a court to make any order that it considers appropriate when recognising an order of a foreign court, provided that the Canadian court is satisfied that the order is necessary for the protection of the debtor or its creditors. The court acknowledged that Section 61(2) of the CCAA permits a court to refuse to recognise the orders of a foreign court where doing so would be contrary to public policy. The court held, however, that the public policy exception 'should be interpreted restrictively' and that the order of the US Bankruptcy Court did not raise significant public policy issues, especially since it would treat Canadian unsecured creditors no less favourably than US unsecured creditors.[53] In an homage to comity and universalism, the court emphasised that it was a 'significant factor' that the order was granted by the US court in a foreign main proceeding.[54]

iii Singapore

Earlier this year, a peculiar set of circumstances afforded the Singapore High Court the opportunity to express its enthusiasm for universalism in a decision with a sternly territorial outcome. In *Beluga Chartering*,[55] the court determined that Singapore judges have the common-law discretion to 'disapply' statutory obligations where doing so would advance the objectives of international cooperation and a unified distribution of assets, as long as the interests of justice and Singapore public policy are served. Although the court declined to 'disapply' certain statutory provisions in this case because of the severe prejudice doing so would cause local creditors, *Beluga Chartering* indicates a sincere willingness on behalf of Singapore courts to support a unified global distribution under more appropriate circumstances.[56]

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51 See *Re Massachusetts Elephant & Castle Group Inc* 2011 ONSC 4201.

52 *Re Hartford Computer Hardware Inc*, 2012 ONSC 964.

53 Id. at Paragraph 9, 18.

54 Id. at Paragraph 14.

55 *Beluga Chartering GmbH v. Beluga Projects (Singapore) Pte Ltd* [2013] SGHC 60 (Singapore High Court, 12 March 2013).

56 Interestingly, although the Singapore court was influenced by universalist decisions out of the United Kingdom, the court did not discuss *Rubin*'s direct rebuke of Lord Hoffman's advocacy for the common law development of universalism. Since *Rubin* is still being digested, it is unclear whether Lord Hoffmann's analysis will continue to be persuasive or whether courts will narrowly construe the holding of *Rubin*. Additionally, practitioners should remain cognisant of the fact that *Beluga Chartering* may be relevant only in the short term, as there have been recent proposals to overhaul the Singapore insolvency regime.

iv Hong Kong

The Hong Kong High Court recently developed a test for determining when a Hong Kong court will exercise its discretionary jurisdiction to wind up a foreign company pursuant to Section 327 of the Hong Kong Companies Ordinance.[57] Generally, the following three requirements must be satisfied, although in some circumstances the strength of some of the factors may outweigh the need for each of the three requirements to be satisfied:

a there must be a 'sufficient connection' with Hong Kong (in the context of insolvency there is commonly the presence of assets, but this is not essential);

b there must be a 'reasonable possibility that the winding-up order would benefit those applying for it'; and

c the court must be able to exercise jurisdiction over one or more persons interested in the distribution of the company's assets.[58]

v South Africa

South Africa was an early adopter of the Model Law in 2000 when the South African parliament passed the Cross-Border Insolvency Act, which took effect in 2003. Despite South Africa's purported adoption of the Model Law, however, its Cross-Border Insolvency Act provides that the act only applies with respect to foreign jurisdictions that have been designated by the Minister of Justice.[59] Since no countries have yet been designated, South Africa effectively has no cross-border insolvency statute. Given that a party seeking recognition of a foreign insolvency order in South Africa must rely on common law, it is worth noting that in late 2012, a South African court expeditiously recognised a US Chapter 11 proceeding and enforced the US automatic stay with respect to assets in South Africa.[60] South Africa appears willing to grant comity to foreign insolvency proceedings, even if its version of the Model Law is not fully effective.

IV AN ISSUE AT A CROSSROADS

The role of comity in a cross-border insolvency proceeding remains unsettled in many jurisdictions, including in the United States. In the United States, decisions continue to surprise despite Chapter 15's promise of 'greater legal certainty'. Meanwhile, some non-US jurisdictions appear committed to universalism, but in others the concept is more difficult.

Although universalism continues to be the prevailing trend in cross-border insolvency, it no longer seems quite as 'universal' as it was once hoped to be.

57 *In re Pioneer Iron & Steel Group Company Ltd* (6 March 2013, HCCW 322/2010).

58 *Pioneer Iron* at Paragraph 27.

59 Cross-Border Insolvency Act 42 of 2000 (as amended), Section 2(2).

60 A copy of the South African order is available through the US proceeding. See *In re Overseas Shipholding Group Inc*, Case No. 12-20000 (PJW) (Bankr. D. Del. 7 December 2012).

Chapter 11

FRANCE

Hélène Bourbouloux and Arnaud Pérès[1]

I INSOLVENCY LAW, POLICY AND PROCEDURE

i Statutory framework and substantive law

French insolvency law provides for six restructuring and (pre-)insolvency proceedings, which can be classified into two sub-groups: two court-assisted proceedings (the *mandat ad hoc* and conciliation proceedings) and four court-controlled proceedings (the judicial reorganisation, judicial liquidation, *sauvegarde* and accelerated financial *sauvegarde* proceedings (AFS)).

The two court-assisted proceedings (the *mandat ad hoc* and conciliation proceedings) are both informal, amicable proceedings where no creditor can be forced into a restructuring agreement and where the management still runs the business. Negotiations thus remain governed by contractual law for the duration of the proceeding, which implies obtaining the consent of each and every stakeholder involved in the restructuring process (e.g., the debtor, financial creditors and shareholders). Furthermore, only the debtor can decide to enter into these kinds of non-compulsory proceedings.

These proceedings are conducted under the supervision of a court-appointed practitioner[2] (*mandataire ad hoc* or conciliator) to help the debtor reach an agreement with its creditors in particular by reducing or rescheduling its indebtedness.

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2 Most of the time, court-appointed practitioners are French judicial administrators, who are independent restructuring and insolvency practitioners. To ensure their independence, these professionals are dedicated exclusively to the assistance or representation of debtors subject to pre-insolvency or insolvency proceedings. In this respect, judicial administrators are members of a regulated profession requiring a specific degree and appropriate qualifications. Presidents

Both are confidential proceedings. The conciliation proceeding can, however, become public if the debtor seeks the approval of the commercial court,[3] so that new money provided to the distressed debtor benefits from a legal privilege in case of future insolvency proceedings.[4] Although the conciliation becomes public, the terms and conditions of the conciliation agreement remain confidential and can only be disclosed to its signatory parties.

Such pre-insolvency proceedings are increasingly implemented to restructure distressed leveraged buyouts (LBOs) or distressed loans or to secure share capital reorganisations and spin-off transactions.

All four court-controlled proceedings are public and share the following common features:

a All pre-filing claims (with very few exceptions) are automatically stayed.

b All creditors (except employees) must file proof of their claim within two months after the opening judgment has been published. The period is extended to four months for creditors located outside France.

c Debts arising after the commencement of the proceedings will be given priority over debts incurred prior to their commencement (other than certain employment claims and, as noted above, claims of creditors who provided new money as part of a previous conciliation proceeding).[5]

d In judicial reorganisation and judicial liquidation proceedings, certain types of transactions may be set aside by the court (fraudulent conveyances) if they were entered into by the debtor during a hardening period before a judgment opening a judicial reorganisation or a judicial liquidation. This period runs from the date on which the company is deemed insolvent; such date is fixed by the court and may predate the judgment commencing the relevant insolvency proceedings by up to 18 months.

However, the court-controlled proceedings vary in terms of involvement of the court-appointed conciliator in running the business. The *sauvegarde* and AFS are debtor-in-possession proceedings. In a judicial reorganisation proceeding, the court has discretion to decide whether to set aside the managers. The role of management is particularly reduced in a judicial liquidation proceeding because the debtor generally ceases to

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of commercial courts can nonetheless appoint lawyers or other restructuring practitioners as *mandataires judiciaires* provided they comply with rules of independence under French law. The legitimacy of the *mandataire ad hoc* or conciliator derives from his or her independence. Creditors, sponsors and investors accept these practitioners' requests and recommendations as a consequence of their independent point of view, which enables them to find the most balanced position among opposite interests.

3 After approval, the court decision is public and filed with the commercial registry where any third party can access it.

4 This privilege is useful mainly in liquidation proceedings.

5 Provided such debts are incurred for the purposes of the proceedings or in consideration of services provided to the debtor.

conduct any business. Nevertheless, the court can decide that the business will continue under the supervision of a court-appointed liquidator who is in charge of liquidating the debtor's assets to pay its creditors.

Further, the *sauvegarde* and AFS, introduced in 2005 and 2010 respectively, can only be opened as long as the debtor remains solvent (i.e., when the debtor is still able to pay its debts as they fall due out of its available assets (taking into account any waiver or moratorium its creditors may have consented to)), whereas only the other two court-controlled proceedings (the judicial reorganisation and judicial liquidation) are available to insolvent debtors.

In practice, most restructuring cases are first handled via some of those court-assisted proceedings, then implemented through a court-controlled proceeding, typically through a *sauvegarde*.

ii Policy

Although the current reform may change this perspective (see Section V, *infra*), French insolvency legislation is generally seen as favouring the debtor and the continuation of a business over the payment of creditors. French law explicitly sets the preservation of the business and the safeguard of employment as the primary goal of a restructuring over the payment of the creditors. The payment of the creditors becomes the primary goal of the court only in a judicial liquidation, where all prospects to pursue the business have vanished.

French law also heavily favours voluntary arrangements reached in *mandat ad hoc* and conciliation proceedings. It is often held that the harsh treatment of creditors in court-controlled proceedings acts as a strong incentive for them to reach a voluntary arrangement. These informal court-assisted proceedings play a key role in most restructuring situations.

Another feature of French insolvency law is the very favourable treatment of the debtor's employees in insolvency, who are granted first-rank privilege over all the assets for the payment of their wage claims. In practice, employees' claims are also paid up front by a quasi-public collective body, the Wage Guarantee Scheme (AGS), which will then benefit from the employees' first-rank privilege.

iii Insolvency procedures

Mandat ad hoc proceedings

Mandat ad hoc proceedings are straightforward and very flexible. It does not take more than a few days to obtain a court order appointing a *mandataire ad hoc*, playing the role of an ombudsman, in charge of facilitating and supervising discussions between the debtor and its main creditors. There is no statutory time limit within which the *mandataire ad hoc* must complete his or her tasks. The task of the *mandataire ad hoc* is set by the President of the Commercial Court according to the debtor's needs.

Conciliation proceedings

A debtor facing 'legal, economic or financial difficulties' may request the appointment of a conciliator to assist it in reaching an agreement with its main creditors and contractual partners provided it has not been insolvent for more than 45 days. At the end of the process, if an agreement has been found, it may be either acknowledged by the President of the Commercial Court or approved by the Commercial Court. Acknowledgment gives the agreement the legal force of an enforceable court decision. Approval of the agreement allows new financing provided to the distressed debtor (new money) to be granted a legal privilege in case of future liquidation. The court cannot appoint the conciliator for longer than four months, extendable by up to one month at the conciliator's request.

Sauvegarde proceedings

The *sauvegarde* proceeding was introduced in 2005 and was (in part) modelled on the US Chapter 11 proceedings. The debtor may not apply for *sauvegarde* if it is insolvent. *Sauvegarde* proceedings are public.

One of the main features of the *sauvegarde* proceedings is the creation of two creditors' committees (one consisting of credit institutions and other creditors holding bank debt and the other of the main trade creditors) and, where applicable, a bondholders' committee (comprising all holders of all bonds issued by the company), to which the debtor submits proposals to reach agreement on a recovery plan. Those creditors whose repayment terms are not affected by the plan or for which the draft plan provides for full repayment in cash upon approval of the plan are not permitted to take part in the vote. The plan submitted to the committees may include debt reschedulings, debt write-offs and debt-for-equity swaps and may also provide for a partial sale of the business. In addition to the approval of the committees at a two-thirds majority, debt-to-equity swaps require the approval of shareholders.

Provided that the plan is approved by the committees and – for debt-to-equity swaps – the shareholders, and that creditors' interests are adequately preserved, the court approves the plan, which becomes binding also on dissenting committee members.

If the plan is not approved by the creditors' committees, the court can only impose a rescheduling of debt repayments over a maximum period of 10 years, but cannot impose a write-off of claim.

AFS

The AFS proceeding is a special kind of *sauvegarde* proceeding for financial restructuring available only to relatively large companies, exceeding certain thresholds regarding their workforce, turnover or balance sheet,[6] which have first been through a conciliation proceeding and failed to reach a unanimous restructuring agreement with their financial creditors. The court will open an AFS proceeding if the outcome of the conciliation suggests that the restructuring plan negotiated during the conciliation has sufficient support from the debtor's financial creditors such that it is reasonably likely to be adopted within two months. Trade creditors are not affected by the AFS proceeding

6 AFS proceedings are only available to solvent debtors with at least (1) 150 employees, (2) €20 million of turnover or (3) a balance sheet of €25 million (or a balance sheet of €10 million if it controls a company with at least 150 employees or €20 million of turnover or a balance sheet of €25 million). The thresholds were modified to allow holding companies to qualify.

(no automatic stay of trade payables). Only financial creditors (credit institutions and bondholders) are asked to vote on the plan.

This proceeding therefore enables a company that has failed to reach a unanimous restructuring agreement with its creditors under a conciliation proceeding to successfully restructure its financial debt, thereby overriding the refusal of a minority of financial creditors.

Judicial reorganisation proceedings

Judicial reorganisation proceedings apply to insolvent debtors (i.e., that cannot pay their due debts out of their available assets). Most of the rules applicable to *sauvegarde* proceedings also apply to judicial reorganisation proceedings: pre-filing claims are automatically stayed, the reorganisation plan must be adopted by the creditors' committees and can provide for reschedulings, debt write-offs and debt-for-equity swaps, and the partial sale of the business.

The court may also order a total or partial sale of the business at the request of the court-appointed administrator.

Judicial liquidation

The aim of these proceedings is to liquidate a company by selling its business when there is no prospect of recovery, as a whole or per branch of activity, or each of its assets individually.

Liquidation proceedings last until no more proceeds can be expected from the sale of the company's business or assets. After two years (from the judgment ordering liquidation), any creditor can request that the court order the liquidator to close the liquidation. There is a simplified form of liquidation proceedings available for small businesses, whichs last for a maximum of one year.

iv Starting proceedings

Pre-insolvency proceedings (*mandats ad hoc* and conciliation proceedings), *sauvegarde* and AFS proceedings may only be started by the debtor. Judicial reorganisations and judicial liquidations may be initiated by the debtors themselves, creditors or the state prosecutor. The debtor is required to petition for insolvency proceedings within 45 days of becoming insolvent unless it has initiated a conciliation proceeding within the same period. If it does not, directors and, as the case may be, *de facto* managers, may be subject to personal liability.

Only few persons may appeal the opening of an insolvency proceeding: the debtor, a creditor that is party to the proceeding, the state prosecutor and the workers' council with respect to judicial liquidations. The appeal must be filed within 10 days of the judgment being notified to the parties. Third parties (including creditors that were not party to the proceeding) may also contest a judgment opening an insolvency proceeding or approving a conciliation agreement through third-party proceedings within 10 days of the opening judgment being published.

v Control of insolvency proceedings

For the role of the courts in connection with French insolvency proceedings, please refer to Section I.iii, *supra*.

vi Special regimes

Banks

The general insolvency regime described above applies generally to the vast majority of the companies, with slight adjustments made to account for regulated entities such as insurance companies. However, France very recently adopted new banking legislation[7] introducing an enhanced supervisory framework, including, critically, bail-in and other resolution powers in advance of the implementation of the European recovery and resolution draft directive (RRD).[8] The French banking regulator[9] is given very broad resolution tools with respect to failing banks,[10] including:

a bail-in (i.e., the power to cancel or write-off shareholders' equity and then cancel, write-off or convert subordinated debt into equity, in accordance with their seniority);[11]
b the power to transfer all or part of the bank's assets and activities;
c the power to force a bank to issue new equity; and
d the power to terminate the contracts of executives or appoint a temporary administrator.

In cases determined by the French regulator, at its sole discretion, to be presenting urgent risks, it may adopt resolution measures unilaterally, without affording a hearing to interested parties.

Corporate groups

The French insolvency regime does not yet include specific rules tailored for corporate groups. Therefore, a separate insolvency proceeding must be opened with respect to each distressed company of the group and conflicts of jurisdiction (even within France among different local courts) may arise as a result. Practitioners have attempted to avoid such conflicts and centralise all proceedings of the group companies using concepts such as 'centre of main interests' (COMI)[12] (stemming from the EC Regulation No. 1346/2000 of 29 May 2000 on insolvency proceedings (the EU Insolvency Regulation) – see Section

7 Law No. 2013-672 on the separation and regulation of banking activities dated 26 July 2013.

8 Draft of the legislative proposal for a directive providing for the establishment of an EU-wide framework for the recovery and resolution of credit institutions and investments firms published by the Council of the European Union on 28 June 2013.

9 The ACPR (Autorité de Contrôle Prudentiel et de Résolution).

10 Failing banks are defined as those that, currently or in the near future (1) no longer comply with regulatory capital requirements, (2) are not able to make payments that are, or will be imminently, due, or (3) require extraordinary public financial support.

11 As yet, senior debt is not subject to this bail-in power, contrary to the provisions of the RRD.

12 A company's COMI is rebuttably presumed to be the place of its registered office.

I.vii, *infra*) or 'merger of the assets and liabilities'.[13] None of these concepts are, however, ideal for the (albeit common) situation where a corporate group is affected by financial difficulties.

vii Cross-border issues

Recognition of foreign insolvency proceedings differs largely depending on whether the debtor has its COMI located within the European Union (except Denmark).

In a case where the debtor's COMI is located in the EU, the EU Insolvency Regulation allows insolvency proceedings carried out in EU Member States to be automatically recognised in France. Alternatively, if a debtor's COMI is in France, the main proceeding can be commenced before the French courts and will be automatically recognised throughout the EU. The EU Insolvency Regulation also provides that secondary proceedings can subsequently be commenced to liquidate an establishment's assets located in another EU Member State.

The recognition and enforcement in France of insolvency proceedings commenced in another country (outside the EU) requires an enforcement procedure (*exequatur*) during which, although the merits will not be reviewed, the French court will verify certain conditions pertaining to the jurisdiction of the foreign court in accordance with French rules of international conflicts of jurisdiction, compliance with French international public policy, absence of fraud, and absence of conflict with a French judgment (or a foreign judgment that has become effective in France). France has not adopted the UNCITRAL Model Law on Cross-Border Insolvency, as the United States has done through Chapter 15 of the federal Bankruptcy Code. Although such adoption would greatly simplify this burdensome process, it is apparently not included in the currently comtemplated reform of the French bankruptcy regime (see Section V, *infra*).

II INSOLVENCY METRICS

With an unemployment rate of 9.9 per cent in 2012 and no growth (GDP in 2012/2013 is about flat),[14] France has been severely affected by the economic downturn of 2008.

In 2012, 61,278 insolvency proceedings were opened in France, compared with 59,614 in 2011 (i.e., an increase of 9.7 per cent following a small decrease of insolvency

13 A 'merger of the assets and liabilities' entails the extension of an insolvency proceeding to an affiliate and is characterised when the following applies to companies in the group: commingling of the accounts, abnormal financial flows and/or interference in the affiliate's activities and management.

14 Sources: Employment and labour markets: Key tables from OECD, dated 16 July 2013; OECD Economic Outlook No. 93 – June 2013, http://stats.oecd.org/index.aspx?DataSetCode=EO93_FLASHFILE_EO93.

proceedings in 2010 and 2011).[15] For several years, mainly the construction, real estate, retail and B2B industries were affected by insolvency proceedings.[16]

These official figures are unfortunately not representative of the restructuring market in France, first, because they do not include confidential amicable court-assisted proceedings (*mandats ad hoc* and conciliations), although these are more commonly used than public court-controlled proceedings in France in the case of large restructurings.[17] Second, the bulk of the 60,000 insolvency proceedings opened in France each year concerns extremely small businesses, mostly with no or very few employees: in 2012, 92 per cent of insolvency proceedings concerned companies with less than 10 employees.[18] At the other end of the spectrum, only 195 companies in insolvency in 2012 (representing 0.4 per cent) had more than 100 employees.[19] Similarly, companies with a turnover exceeding €15 million accounted for 0.3 per cent of insolvency proceedings in 2012, while companies with a turnover under €1.5 million represented 37.8 per cent.[20] Also, the number of insolvency proceedings must be compared with the number of new companies created in France – about 550,000 in 2012,[21] about 10 times the number of bankruptcies.

When looking at statistics, commentators note that 95 per cent of the insolvency proceedings opened in France lead to a liquidation,[22] to conclude that the legal framework is inefficient. A closer examination, however, reveals that nearly half of the jobs of businesses in insolvency are saved.[23]

15 Source: 2012 report '*Défaillances et sauvegardes d'entreprises en France*' published by Altares dated 17 January 2013, available at www.altares.fr/index.php/publications/etudes-altares/defaillances-dentreprises.

16 Source: Altares report op. cit.

17 The rare statistics available suggest that nearly 10,000 court-assisted proceedings were opened between 2006 and 2011 (Source: '*La prevention des difficultés des entreprises par le mandat ad hoc et la conciliation devant les juridictions commerciales de 2006 à 2011*', M Guillonneau, J-P Haehl and B Munoz-Perez). But this number is not a fair reflection of the economic, financial and social significance of the businesses that used such court-assisted proceedings. In the absence of nationwide statistics on this subject, the figures of Hélène Bourbouloux – a single professional judicial administrator – speak for themselves: since the end of 2008, nearly 40 court-assisted proceedings have been handled, concerning about 110,000 employees, and debts amounting to €20 billion, with the consolidated turnover reaching €21 billion.

18 Source: Altares report op. cit. This figure includes the insolvency proceedings of companies with fewer than 10 employees or where the number of employees is unknown.

19 Source: Altares report op. cit.

20 Source: Altares report op. cit.

21 The exact figure is 549,976. Source: Key figures of business creation in 2012, published by the governmental agency for business creation (APCE) and available online at http://media.apce.com/file/07/5/chiffres-cles_2012.60075.pdf.

22 This figure has dropped to 85.6 per cent in 2012. Source: 2012 statistics of French commercial courts prepared by the Conférence Générale des Juges Consulaires de France in May 2013.

23 Over the 12-month period leading to 31 March 2012, approximately 58 per cent of jobs were saved. For further detail please refer to '*Les chiffres trompeurs: halte aux idées reçues! La boîte à outils*

III PLENARY INSOLVENCY PROCEEDINGS

A number of ailing LBOs have fuelled the restructuring market in recent years, in the aftermath of the private equity bubble in 2006. In most cases, LBO restructuring cases are lender-led and are handled through informal (court-assisted but not court-controlled) proceedings.

i Saur

Saur is the third-largest water services company in France (after Veolia and Suez Environnement). Its 13,000 employees generated revenues of €1.7 billion in 2012 with 10,000 municipalities and 18 million end-consumers in France and worldwide.

Saur breached a financial covenant when it faced a 10 per cent drop in its operating profit in the first half of 2012. The group petitioned the President of the Commercial Court to appoint a conciliator to help negotiate with its lenders and shareholders under a (confidential) pre-insolvency conciliation proceeding. The key features of the restructuring plan that was negotiated under the aegis of the conciliator involve:

a lenders taking over Saur, with former shareholders[24] being written off entirely;

b a write-off of more than 50 per cent of senior debt and a full write-off of junior debt (total debt halved down to €900 million with an additional €150 million tranche that can be fully written off in the event of subsequent difficulties);

c new money financing of €200 million.

Interestingly, although the restructuring was fairly drastic, it was not necessary to resort to a *sauvegarde* to proceed to a court-enforced cramdown of dissenting creditors, since the lender-led restructuring agreement negotiated under conciliation was eventually approved by the court, so that the new money financing could be afforded a legal privilege in the event of a future liquidation. As noted above, whenever possible, the parties in France tend to avoid court-controlled proceedings such as a *sauvegarde* or judicial reorganisation, to avoid the public 'stigma' linked to bankruptcy and reduce the disruption to the debtor's business.

ii Hejenion

In March 2013 the restructuring of Hejenion (the holding company of Soflog-Telis, a packaging and logistics business) was the first time the new AFS proceeding was implemented in France.[25]

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du livre VI est performante', Hélène Bourbouloux, *Bulletin Joly Entreprises en difficulté,* No. 4, July–August 2012.

24 Séché Environnement (a French player in environmental projects and waste management), the French sovereign investment fund FSI and private equity funds Axa PE and Cube Infrastructure.

25 The purpose of the AFS is to limit the disruption to the debtor's business (no automatic stay of trade payables and quicker implementation). Commentators greeted the AFS warmly when it was introduced in 2010, but it was not used in practice until 2013 because the initial version of

This AFS proceeding is intended to enforce a financial restructuring through a cramdown of dissenting creditors, after an informal conciliation proceeding, if the plan is eventually likely to be supported by a qualified majority of creditors. In the *Hejenion* case, the holdout creditor does not appear to have actually objected to the proposed restructuring plan (based, for example, on its own assessment of the viability of the business or the extent to which its own position is affected by the plan), but rather abstained from supporting the plan for unrelated reasons (e.g., to comply with its global management policy or not to weaken its position in future negotiations). Similarly, hedged creditors having bought a protection under a credit default swap (CDS) usually refrain from approving any negotiated restructuring, to avoid jeopardising their positions under the CDS.[26]

The *Hejenion* case was also reasonably quick, considering that the restructuring plan was approved by the court within a month of the opening of the proceeding.

While the AFS is a useful tool, it remains scarcely used because the conditions posed by the law remain too stringent.[27] Further reform allowing a more widespread use of this new proceeding would be welcome.

iii Consolis

An interesting feature of the Consolis restructuring is its cross-border nature; French court-assisted conciliation proceedings allowed a restructuring of an entire international group, including with respect to non-French subsidiaries of the group. Consolis is the European leader in pre-cast concrete elements, operating mainly in the construction and public services sectors such as civil engineering. The group operates in 25 different jurisdictions in the EU and elsewhere, including Russia, Egypt, Tunisia and Indonesia. Following an LBO and an initial restructuring in 2011, Consolis was owned by the financial sponsor LBO France (85 per cent of the equity) and its management (15 per cent). Faced with the economic downturn, as well as the consequences of the political turmoil in North Africa, Consolis could no longer comply with its financial covenants as from the second quarter of 2012.

Consolis and 23 of its subsidiaries, including 18 non-French companies, filed for a French court-assisted proceeding (*mandat ad hoc* followed by a conciliation). This was an unexpected way to go about a cross-border restructuring, as these informal proceedings do not fall within the scope of the EU Insolvency Regulation, and thus cannot benefit

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the law imposed very strict (and poorly drafted) conditions, such that holding companies were in fact not eligible to AFS; see Section I.ii, *supra* for further details.

26 Because a hedged creditor is compensated only upon the occurrence of a 'credit event', it usually prefers to remain passive and not to approve any restructuring of the debtor so as to not to be seen, in any way, as participating to the characterisation of the 'credit event' triggering the unwinding of the CDS. For further information on this topic, please refer to '*Quelle réforme du droit des faillites?*' by A Pérès, C Perchet, J Loget and H Schlumberger published in *Banque & Droit* No. HS-2013-2, October 2013, pp. 22 et seq. and '*Les procedures collectives à l'épreuve des contrats de swap*' by G Foillard p. 51.

27 See footnote 6.

from the automatic recognition of proceedings within the EU that is otherwise afforded under the EU Regulation.[28]

iv Cœur Défense

Cœur Défense, named after the largest office towers in Europe, located in La Défense near Paris, was one of the incidental victims of Lehman Brothers' demise in September 2008. It is also one of the most famous (or infamous, depending on one's point of view) restructuring cases in France in recent years, attracting considerable attention from practitioners and scholars.

In June 2007, a Lehman Brothers investment funds bought the Cœur Défense towers for €2.1 billion through a special purpose vehicle called Heart Of La Défense (HOLD) incorporated in France, itself held by a Luxembourg entity named Dame Luxembourg. A €1.6 billion loan to finance the acquisition was refinanced through a securitisation structure and secured through (1) a mortgage on the assets (the towers), (2) an assignment (by way of *bordereau Dailly*[29]) of the rental income and (3) a pledge of HOLD shares. Under the terms of the loan, HOLD was required to hedge its interest rate exposure and Lehman was then chosen as the swap counterparty. When the bank collapsed, the borrower was compelled to find a better rated swap counterparty, which proved impossible given the market conditions (as one recalls, there was hardly a market at all for several weeks).

To prevent an imminent event of default under the loan (for failure to maintain a suitable hedging protection), HOLD and its shareholder filed for *sauvegarde* in France. Various important legal issues were at stake here, including whether and under what

28 On a European level, the *mandat ad hoc* and conciliation proceedings are not regarded as insolvency proceedings in the sense of the EU Insolvency Regulation since they do not entail any partial or total divestment of the debtor or the appointment of a liquidator. The *mandat ad hoc* and conciliation are thus governed jointly by Regulation 44/2001 of 22 December 2000 on jurisdiction and enforcement of judgments in civil and commercial matters and, on an international scale, by the relevant rules of international private law. In France, these rules are set out in Article R600-2 of the French Commercial Code, pursuant to which the competent court to hear the amicable preventive proceedings is the court having jurisdiction over the physical location of the debtor's registered office (and absent a registered office in France, the court of the debtor's COMI). French law also recognises the principle of proper administration of justice based on which several pre-insolvency proceedings may be combined under the aegis of a single court whenever several companies that are parties to a single set of contracts encounter the same difficulties in their negotiations with their joint creditors.

These various rules, when combined, allow for cross-border *mandat ad hoc* or conciliation proceedings, but the process is cumbersome. Therefore, many insolvency practitioners, along with legal scholars, are calling for the straightforward recognition of such French amicable pre-insolvency proceedings under the EU Insolvency Regulation; see Section I.vii, *supra*, for further information on the EU Insolvency Regulation.

29 Under French law, a professional or a company can transfer its receivables to a bank via a simplified mechanism known as a *bordereau Dailly* or *cession Dailly*.

conditions a Luxembourg entity could be eligible for *sauvegarde* in France and also if a mere holding company (holding buildings – hardly a 'business' in the usual sense) was eligible for *sauvegarde*.

Both questions were much debated, gave rise to a long (several years) and complex judicial battle between the debtor or sponsor and the senior creditors. Ultimately, the French Supreme Court ruled that the answer to each question was positive: first, the determination that the Luxembourg shareholder was eligible for *sauvegarde* in France was made on the basis that, according to the court, its COMI within the meaning of the EU Insolvency Regulation was in France. On the second question, the court merely stated that the law did not provide as a condition that the debtor should also qualify as a 'business' or an 'enterprise'.

In the United States, assuming Cœur Défense would have been eligible to the protection of Chapter 11, the secured creditors would have been entitled to foreclose on their mortgage or pledge and become the new owners of the assets. This outcome contrasts with French insolvency law, pursuant to which a creditor takeover requires the shareholders' approval in *sauvegarde* proceedings (see Section V, *infra*, for further details). Cœur Défense's sponsor was not written off.

v Petroplus

Petroplus, a Swiss oil group, previously listed in Zurich, was an important independent player in Europe. It operated a refinery in Petit-Couronne near Rouen in France. The group was badly hit by the economic downturn in 2009 and margins collapsed in the refining industry. The banks accelerated certain loans early in 2012 and the group decided to close some of its plants, including the one located at Petit-Couronne. Over 500 employees were affected and pickets occupied the plant. The case was widely publicised, hitting the headlines in the press, to a point where it became the centre of political debate in France (the government saw in it a topical example of the country's industrial decline that it was determined to stop). One particular piece of information was the focus of great media attention, namely that the Petroplus group had proceeded with cash transfers (withdrawals from the French entity's bank account) shortly before bankruptcy. Whether these cash transfers were actually legal was irrelevant in the row that ensued, and the government felt compelled to change the law to 'further protect the assets' of a debtor in bankruptcy.

vi Belvédère

The Belvédère restructuring is another interminable judicial saga that started in 2008 and went on for more than five years, under the close watch of commentators. Belvédère is an alcohol and spirits business that owns Sobieski, a popular Polish vodka brand, and Marie Brizard Liqueurs. There is a lot to say on this case as it illustrates some of the most blatant shortcomings in the way certain restructuring cases are conducted in the current legal framework in France: proceedings are generally too long and unpredictable.

In five years, with virtually no respite, Belvédère first moved into *sauvegarde*, then out of *sauvegarde*, then fell into a juducial reorganisation. There were about 15 court decisions in France, the United Kingdom and Poland – although all three countries are under the same umbrella of the EU Insolvency Regulation – and, in France itself, there were conflicting decisions from various local courts, several other decisions at the appeal and Supreme Court levels.

In March 2013 eventually, the court-approved restructuring plan provided that creditors would take over 87 per cent of the equity (through a debt-to-equity swap for approximately €500 million). Former shareholders, which include actor Bruce Willis, would be diluted to hold together the remaining 13 per cent. In a US Chapter 11 proceeding, Belvédère's shareholders would probably have been written off entirely from the outset.

Belvédère illustrates the vulnerability of insolvent companies towards competitors: the debt-to-equity swap is expected to allow rival Stock Spirits, which makes Polish Orzel vodka, to take over 38 per cent of Belvédère's equity (with voting rights limited to 19.9 per cent) through investment fund Oaktree Capital Management, Belvédère's main creditor.

IV ANCILLARY INSOLVENCY PROCEEDINGS

No recent ancillary insolvency proceedings have been of relevance in France.

V TRENDS

In the context of an increasing number of insolvency proceedings consequent to the economic downturn in France, current practice shows a new trend towards the takeover of debtor companies by their creditors. After a first occurrence in the restructuring of CPI Group in 2009, Europe's leading monochrome book printer, 'lender-led restructuring' has grown following the 2008[30] and 2010[31] reforms. Lender-led restructuring is particularly relevant for overindebted LBO holdings (see the description of the Saur restructuring in Section III, *supra*, or the recent successful restructuring of Terreal through a conciliation proceeding). Even if LBO valuation and debt have been more reasonable in recent LBO deals, many LBO credit facilities will soon become due. The move toward creditor takeover of debtor companies will likely continue to grow, at least to the extent permitted by French law.

In this respect, a forthcoming reform of French bankruptcies is expected. We have called for a greater predictability of bankruptcy outcomes in line with the initially agreed order of priority.[32] The shareholders, who benefit from the creation of value (through dividends, capital gains following transfers, etc.), should bear the losses in

30 Order No. 2008-1345 dated 18 December 2008.

31 Law No. 2010-1249 on the banking and finance regulation dated 22 October 2010.

32 If the agreed order of priority is not complied with in bankruptcies, the outcome of a restructuring becomes impossible to predict. This uncertainty increases the cost of distressed debtors' credit, or even worse can prevent distressed companies from accessing new financing. For further information, please refer to '*Quelle réforme du droit des faillites?*' by A Pérès, C Perchet, J Loget and H Schlumberger published in *Banque & Droit* No. HS-2013-2, October 2013, pp. 22 et seq.

priority, before the creditors. Currently, this principle, albeit simple, only applies in judicial liquidations. On the contrary, creditor takeover requires shareholder approval in *sauvegarde* proceedings.

At the European level, a proposal for a regulation of the European Parliament and of the Council amending the EU Insolvency Regulation is currently being discussed.[33] The following three modifications are particularly relevant.

In addition to the codification of the previous case law on the definition of the COMI, the proposal requires that the court verifies its jurisdiction *ex officio* and states the basis of its jurisdiction in its decision. Besides, the proposal grants foreign creditors the right to challenge the decision opening the proceeding. Those changes aim at limiting 'forum shopping' induced by an artificial definition of the COMI.

Also, secondary proceedings are no longer necessarily winding-up proceedings. When a secondary proceeding is opened because the debtor subject to a main proceeding has an establishment in another EU Member State, the jurisdiction can choose between all the proceedings offered by local law, including restructuration or reorganisation, in order to avoid unfortunate interferences with the principal proceeding.

Finally, the proposal attempts to better take into account corporate groups by requiring cooperation between insolvency practitioners and courts; further, insolvency practitioners are granted the right either to request a stay of the EU proceedings opened with respect to any other member of the group or to propose a rescue plan for members of the group under insolvency proceedings.

33 Proposal for a Regulation of the European Parliament and of the Council amending the EU Insolvency Regulation. Please see Section I.vii, *supra*, for further information on the EU Insolvency Regulation.

Chapter 26

UNITED STATES

Donald S Bernstein, Timothy Graulich, Damon P Meyer and Rustin M Brown[1]

I INSOLVENCY LAW, POLICY AND PROCEDURE

i 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 US Constitution bestows on Congress the power to enact 'uniform Laws on the subject of Bankruptcies'.[2] While there have been several different bankruptcy statutes passed by Congress, the US bankruptcy regime is currently set out in Title 11 of the United States Code (the Bankruptcy Code),[3] which codified the Bankruptcy Reform Act of 1978[4] and subsequent amendments. The most recent significant amendment to the Bankruptcy Code was the 2005 Bankruptcy Abuse and Consumer Protection Act.[5]

The Bankruptcy Code is broken into nine chapters. Chapters 1, 3 and 5 provide the structural components that generally apply to all bankruptcy cases. Chapters 7, 9, 11, 12, 13 and 15 lay out general procedures specific to certain types of bankruptcies. Generally speaking, these specific types of bankruptcies are:

a trustee administered liquidation (Chapter 7);
b municipality bankruptcy (Chapter 9);
c debtor-in-possession (DIP) managed reorganisation or liquidation (Chapter 11);
d family farmer and fisherman bankruptcies (Chapter 12);

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2 US Constitution, Article I, Section 8.
3 11 USC, Sections 101-1532 (2012).
4 Pub. L. No. 95-598 (1978).
5 Pub. L. No. 109-8 (2005).

e individual bankruptcies (Chapter 13);[6] and
f cross-border cases (Chapter 15).

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.[7] This chapter focuses on Chapter 11 proceedings. The following are certain key provisions of US insolvency law.

Automatic stays

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 the automatic stay can be modified by a court order 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',[8] 'commodities contracts',[9] 'forward contracts',[10] 'repurchase agreements',[11] 'swap agreements',[12] or 'master netting agreements'[13] with a debtor. 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 United States insolvency law is the absolute priority rule. The absolute priority rule provides that creditors with higher priority must be paid in full

6 Individuals can also seek relief under Chapter 11 of the Bankruptcy Code.
7 A trustee can be appointed in Chapter 11 for cause; 11 USC, Section 1104(a)(1).
8 11 USC, Section 555.
9 11 USC, Section 556.
10 Id.
11 11 USC, Section 559.
12 11 USC, Section 560.
13 11 USC, Section 561.

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, absent consent, they cannot receive any 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.[14]

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:

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;[15]

b avoidance of fraudulent transfers, which enables the debtor to avoid and recover transfers of property that are actually fraudulent or are made while the debtor was insolvent and for less than reasonably equivalent value;[16] and

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.[17]

The 'safe harbour' provisions, described above, also apply to avoidance actions with respect to transfers made in connection with 'financial contracts'.

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

14 A plan of reorganisation is approved by a class when a majority in number of the class members vote in favor 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 USC, Section 1126.

15 11 USC, Section 547.

16 11 USC, Sections 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.

17 11 USC, Section 552(a).

to liquidate business debtors in order to preserve employment and to realise the 'going concern surplus' of reorganisation value over liquidation value. Generally, this is accomplished by reorganising the 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 likely have greater familiarity with the assets and their value, to a trustee appointed by the United States Trustee or elected by the debtor's creditors. Chapter 7 liquidations usually result in lower recoveries for creditors. Therefore, companies are more likely to be liquidated under Chapter 7 if there are not sufficient funds in the estate or available to the estate to run a Chapter 11 process.

iii Insolvency procedures

As discussed above, the Bankruptcy Code provides for two main types of insolvency proceedings available to businesses with assets in the United States: Chapter 7 and Chapter 11.

Chapter 7

Chapter 7 is a trustee-controlled liquidation. The goal of Chapter 7 is to ensure the most efficient 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 (an arm of the United States Department of Justice) 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 a insolvency proceeding controlled by the directors and management of the debtor company (the 'debtor in possession') unless a trustee is appointed for cause. Chapter 11 proceedings allow for the reorganisation of the debtor's operations and capital structure in the hopes 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, which date may be extended for an additional 90 days after the order for relief 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. The plan of reorganisation provides for how the debtor's assets will be distributed amongst the classes of creditors and equity holders. It is also possible for a debtor to liquidate its assets through Chapter 11. If a debtor does liquidate, it is typically a more structured liquidation than through 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 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).

In order to be confirmed, 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 its asserted claim – an impaired class – votes in support of confirmation, the plan can still be confirmed over the dissent of another impaired class. Dissenting classes can thus be 'crammed down' as 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 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 out 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 railway 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 filling a petition with the bankruptcy court.

A bankruptcy proceeding can also be commenced against a debtor company, which is known as an involuntary bankruptcy case. An involuntary case is commenced upon the filing of a petition with the bankruptcy court by three or more holders (one if there are fewer than 12 holders of claims against the debtor) of non-contigent, undisputed claims, and such claims total at least $14,425 more than the value of any lien on property of the debtor securing such claims.[18]

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.[19]

18 11 USC, Sections 303(b)(1), (2).

19 11 USC, Sections 1504, 1515.

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, *inter alia*, 'collect[ing] and reduc[ing] to money the property of the estate for which such trustee serves, and closes such estate as expeditiously as is compatible with the best interests of parties in interest'.[20] Although the Chapter 7 trustee can continue business operations for a short period of time 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 duty in connection with an insolvency proceeding is the same as it is outside of bankruptcy – to maximise the value of the company.[21] The key distinction is that when a company is insolvent, the creditors, not the shareholders, are the indirect beneficiaries of the board's fiduciary duties to the corporation and are, thus, able to bring actions for breach of fiduciary duty.[22] 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.[23]

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 outside of 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 power to enact bankruptcy law. For this reason, bankruptcy courts may only oversee matters that are 'core' to the bankruptcy case.[24] Matters that are not core to the insolvency proceeding must be decided by a federal district court.

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20 11 USC, Section 704(a)(1).

21 'Even when [a] company is insolvent the board may pursue, in good faith, strategies to maximize the value of the firm', *Trenwick America Litigation Trust v. Ernst & Young*, 906 A.2d 168, 175 (Del. Ch. 2006).

22 Marshall Huebner and Hugh McCullough, 'The Fiduciary Duties of Directors of Troubled U.S. Companies: Emerging Clarity', in *ICLG to: Corporate Recovery and Insolvency 2008* 6, 7 (Global Legal Group Ltd, 2008).

23 11 USC, Section 1104.

24 Core proceedings include:

a matters concerning the administration of the estate;

b allowance or disallowance of claims against the estate or exemptions of property of the estate […];

c counterclaims by the estate against a person filing claims against the estate;

d orders in respect to obtaining credit;

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 of the courtroom and the DIP or trustee is free to enter into settlement agreements, which are then subject to the approval of the bankruptcy court.

vi Special regimes

Securities broker-dealers are not eligible for relief under Chapter 11. Instead, insolvent broker-dealers may liquidate under Chapter 7 of the Bankruptcy Code,[25] but are more likely to be resolved in a proceeding under the Securities Investor Protection Act of 1970 (SIPA).[26] SIPA proceedings are liquidation proceedings, and upon commencement of the SIPA proceedings, the broker-dealer will cease 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

e proceedings to determine, avoid, or recover preferences;

f motions to terminate, annul, or modify the automatic stays;

g proceedings to determine, avoid, or recover fraudulent conveyances;

h determination as to the dischargeability of particular debts;

i objection to discharges;

j determination of the validity, extent, or priority of liens;

k confirmation of plans;

l orders approving the use or lease of property, including the use of cash collateral;

m orders approving the sale of property other than property resulting from claims brought by the estate against persons who have not filed claims against the estate;

n other proceedings affecting the liquidation of the assets of the estate or the adjustment of the debtor-creditor or the equity security holder relationship, except personal injury tort or wrongful death claims; and

o recognition of foreign proceedings and other matters under Chapter 15 of Title 11.

24 USC, Section157. The scope of the bankruptcy court's jurisdiction is, however, a subject under active review in light of the decision of the United States Supreme Court in *Stern v. Marshall*, 564 U.S. __, 131 S. Ct. 2594 (2011), in which the Supreme Court held that a 28 USC, Section 157(b)(2)(C) was unconstitutional and thus, non-Article III bankruptcy judges do not have authority to enter a final judgment on a debtor's compulsory state law counterclaim in an adversary proceeding brought by a creditor, even if the creditor has filed a proof of claim against the debtor's bankruptcy estate.

25 11 USC, Sections 741–753.

26 Pub. L. No. 91-598 (1970), codified at 15 USC, Sections 78aaa et seq.

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,[27] the SIPA Trustee will have additional obligations under the Part 190 regulations[28] 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.[29] 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.[30]

Additionally, the Dodd-Frank Wall Street Reform and Consumer Protection Act[31] 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 the US. The OLA sets out 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 in order to liquidate systemically risky financial institutions. Moreover, under the Dodd-Frank Act, institutions that may be subject to the OLA must provide the FDIC with resolution plans (commonly known as 'living wills'), to serve as roadmaps in the event the financial institution requires resolution.

State law governs all regulation of insurance companies, including the resolution of insolvent insurance companies.[32]

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,

27 Pub. L. No. 74-675 (1936), codified at 7 USC, Section 1 et seq.

28 17 C.F.R. Part 190.

29 Pub. L. No. 81-797 (1950).

30 Federal Deposit Insurance Company, Overview: The Resolution Handbook at a Glance, available at www.fdic.gov/bank/historical/reshandbook/overview.pdf.

31 Pub. L. 111-203 (2010).

32 11 USC, Section 1011.

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.[33] Chapter 15 governs how a US court should 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[34] 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 conditions for accessing plenary proceedings in the US bankruptcy courts are relatively low. A company can be eligible to commence a Chapter 11 proceeding in a US bankruptcy court as long as it is incorporated or has any property or operations in the United States. Because of the US bankruptcy courts' vast experience in restructuring large multinational companies, many multinational companies are filing for Chapter 11, even if their principal places 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, in one recent case, 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.[35]

II INSOLVENCY METRICS

In the United States the current period is one of slow growth. Since the global financial crisis, which saw GDP adjusted for inflation (real GDP) drop 2.8 per cent from 2008–

33 United Nations Commission on International Trade Law (UNCITRAL), UNCITRAL Model Law on Cross-Border Insolvency, 30 May 1997, available at www.uncitral.org/pdf/english/texts/insolven/insolvency-e.pdf.

34 11 USC, Section 1520.

35 *In re TMT Procurement Corp*, No. 13-33763 (MI) (Bankr. S.D. Tex. 20 June 2013). There are limits to a foreign-based company's ability to seek Chapter 11 protection. See *In re Yukos Oil Co*, 321 B.R. 396,410-411 (Bankr. S.D. Tex. 2005) (bankruptcy court declines to exercise jurisdiction over Chapter 11 case of a Russian oil company seeking to use the automatic stay to prevent a foreclosure sale by the Russian government).

2009, the economy has begun a recovery. From 2010 to 2011 real GDP in the United States increased 1.8 per cent and further increased 2.8 per cent from 2011–2012.[36] Furthermore, unemployment continues to abate: the unemployment rate for July 2013 was 7.4 per cent, down from 8.2 per cent in July of the previous year and from its October 2009 high of 10 per cent.[37]

Additionally, credit is readily available to US businesses. In 2012, US corporations issued over $1.24 trillion in bonds, up from $909 billion in 2011, an increase of 36 per cent.[38] In the first six months of 2013, over $510 billion worth of bonds have been issued.[39] Average interest rates have remained near historic lows, around 2 per cent for the 10-year Treasury Note. In the past year, however, daily yield curve rates have fallen as low as 1.55 per cent and risen as high as 2.88 per cent.[40] It was anticipated that interest rates would rise toward the end of 2013 as the Board of Governors of the Federal Reserve System (the Federal Reserve Board) considered tapering off its quantitative easing policy.[41] In a September news conference, however, the Federal Reserve Board announced that it would continue its $85 billion-a-month bond buying programme.[42]

In 2012, equity issuances increased 26 per cent to $248 billion from $196 billion in 2011. The number of issuances increased approximately 17 per cent from 690 issuances in 2011 to 808 issuances in 2012.[43]

In 2013, the US corporate default rates remain fairly low. Moody's measured the US speculative-grade default rate for the quarter ending 30 June 2013 at 2.9 per cent, down from 3.3 per cent for the same period in 2012.[44] Similarly, Moody's indicated that the leveraged loan default rate for the second quarter of 2013 was 2.3 per cent, down

36 United States Department of Commerce, Bureau of Economic Analysis, Selected NIPA Tables, Table 1.1.1, available at www.bea.gov/national/index.htm#gdp.

37 United States Department of Labor, Bureau of Labor Statistics, 'Labor Force Statistics from the Current Population Survey', available at http://data.bls.gov/timeseries/LNS14000000.

38 Federal Reserve Board, 'New Securities Issues, U.S. Corporations', available at www.federalreserve.gov/econresdata/releases/corpsecure/current.htm.

39 Id.

40 United States Department of Treasury, 'Daily Yield Curve Rates', available at www.treasury.gov/resource-center/data-chart-center/interest-rates/Pages/TextView.aspx?data=yieldYear&year=2013.

41 Jon Hilsenrath and Victoria McGrane, 'Fed Stays the Course on Easy Money', *The Wall Street Journal* (19 September 2013), http://online.wsj.com/article/SB10001424127887324492604579083243936441418.html.

42 Id.

43 Thomson Reuters, 'US Equity-Related Offerings' (last accessed 12 June 2013).

44 Moody's Investor Services, Announcement: 'Moody's: Global Speculative-Grade Default Rate Rises to 2.8 per cent in the Second Quarter', available at https://www.moodys.com/research/Moodys-Global-Speculative-Grade-Default-Rate-Rises-to-28-in--PR_277571.

from 2.6 per cent in 2012.[45] The low default rates are attributed by some to the 'amend and extend' phenomenon, which has pushed out the 'maturity wall' until at least 2017.[46]

As a result of the improvement in the US economy, the availability of cheap debt and the relaxation of credit covenants, fewer businesses are seeking bankruptcy relief. Specifically, 32,670 businesses filed Chapter 7 or Chapter 11 bankruptcies in the 12 months to 30 June 2013,[47] which is a reduction from 40,181 business filings in the 12 months ended 30 June 2012.[48] The frequency of bankruptcy filings has steadily subsided since the peak of 54,443 fillings in the 12 months to 30 June 2010.[49]

In the first half of 2013, 55.31 per cent of the companies that filed for bankruptcy had annual revenues less than $500,000. In contrast, only 2.41 per cent of companies that filed in for bankruptcy in early 2013 had revenues greater than $20 million.

Although in both 2012 and 2013 the incidence of bankruptcy filings was generally distributed across industries, most of the significant bankruptcy cases involved energy, shipping and publishing and media companies.

Sixty-five companies commenced Chapter 15 proceedings in the 12 months to 30 June 2013.[50] This number is significantly lower than the 118 Chapter 15 proceedings in both the 12 months to 30 June 2012[51] and the 12 months to 30 June 2011.[52]

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45 Id.

46 Moody's Investor Services, Announcement: 'Moody's: Speculative-Grade Maturity Wall Pushed to 2017; More Debt Held by Low-Rated Companies', available at https://www.moodys.com/research/Moodys-Speculative-Grade-Maturity-Wall-Pushed-to-2017-More-Debt--PR_265573.

47 'United States Courts, US Bankruptcy Courts—Business and Nonbusiness Cases Commenced, by Chapter of the Bankruptcy Code, During the 12-Month Period Ending June 30, 2012', available at www.uscourts.gov/uscourts/Statistics/BankruptcyStatistics/BankruptcyFilings/2013/0613_f2.pdf.

48 'United States Courts, U.S. Bankruptcy Courts—Business and Nonbusiness Cases Commenced, by Chapter of the Bankruptcy Code, During the 12-Month Period Ending June 30, 2012', available at www.uscourts.gov/uscourts/Statistics/BankruptcyStatistics/BankruptcyFilings/2012/0612_f2.pdf.

49 'United States Courts, U.S. Bankruptcy Courts—Business and Nonbusiness Cases Commenced, by Chapter of the Bankruptcy Code, During the 12-Month Period Ending June 30, 2012', available at www.uscourts.gov/uscourts/Statistics/BankruptcyStatistics/BankruptcyFilings/2010/0610_f2.pdf.

50 United States Courts, *supra* note 29.

51 United States Courts, *supra* note 30.

52 'United States Courts, US Bankruptcy Courts—Business and Nonbusiness Cases Commenced, by Chapter of the Bankruptcy Code, During the 12-Month Period Ending June 30, 2011', available at www.uscourts.gov/uscourts/Statistics/BankruptcyStatistics/BankruptcyFilings/2011/0611_f2.pdf.

III PLENARY INSOLVENCY PROCEEDINGS

i Edison Mission Energy

Edison Mission Energy (Edison Mission) filed for reorganisation under Chapter 11 bankruptcy on 17 December 2012 after it was deconsolidated from its parent company, Edison International. Edison Mission operates deregulated coal, natural gas and wind energy electric generation facilities and its revenues are driven primarily by its coal-producing subsidiaries. Therefore, the increase in availability of cheap natural gas coupled with huge environmental regulatory costs associated with coal production resulted in a sharp drop in Edison Mission's earnings. In November 2012, the company was unable to make the interest payments on its $3.7 billion of unsecured notes.

Edison Mission's primary debts include:

a $3.7 billion in senior unsecured notes;

b $345 million in certificate obligations; and

c $1.367 billion in intercompany notes issued by EME to Midwest Generation LLC.

The *Edison Mission* case is noteworthy because it was originally proposed as a pre-arranged restructuring agreement with its parent and its noteholders that would have provided 100 per cent of the equity in Edison Mission to the noteholders in exchange for the retirement of a portion of the notes. Typically, 'pre-arranged' Chapter 11 cases are quick proceedings used to implement a debt restructuring, the terms of which were agreed to among the debtor and representatives of its major constituencies prior to the commencement of the bankruptcy proceeding. Unlike a 'pre-packaged' bankruptcy, where votes on a pre-agreed plan of reorganisation are solicited prior to bankruptcy, in a 'pre-arranged' case, the plan is agreed among key stakeholder representatives prior to bankruptcy, but votes on the plan are not solicited until after the commencement of the Chapter 11 proceedings. Edison Mission, however, has yet to file or solicit votes on a plan of reorganisation. Instead, Edison Mission has moved for and was granted authorisation from the court to retain an investment banker to investigate whether a sale of its assets would be more beneficial than the exchange of its debt for equity. The noteholder representatives subsequently voted to terminate the prepetition restructuring agreement. The official committee of unsecured creditors is also seeking to sue Edison International for transactions that the committee claims stripped the value out of Edison Mission. As a result of these issues, Edison Mission's bankruptcy case is likely to continue for months, if not years.

ii Patriot Coal[53]

Patriot Coal Corporation and 98 of its direct and indirect subsidiaries (collectively, Patriot) commenced Chapter 11 bankruptcy proceedings in July of 2012. The company is a major producer of metallurgical and thermal coal. Patriot was formed in 2007 as part of a spin-off from Peabody Coal, whereby Patriot assumed $600 million in pension

53 Davis Polk & Wardwell LLP is serving as counsel to Patriot in these proceedings.

liabilities from Peabody. Causes for Patriot's financial distress are wide-ranging, and include decreased demand for coal due to the increasing popularity of alternative fuel sources and falling prices of natural gas, cancellation of future orders, burdensome environmental regulations, and onerous pension and health benefits owed to former and current employees of Patriot. Patriot entered bankruptcy with a book value of $3.6 billion in assets against $3.1 billion in liabilities.

Patriot's primary debts include:

a $307 million in letters of credit and $15 million in direct borrowing associated with its credit facility;

b $51.8 million in letters of credit under an accounts receivable securitisation programme;

c $250 million in unsecured notes;

d $200 million in unsecured convertible notes; and

e $1.6 billion (approximately) in liabilities under the National Bituminous Coal Wage Agreement of 2011, under the Black Lung Act, and from retiree health benefits.

The major participants in the insolvency proceedings have been the United Mine Workers Association (UMWA), a union of which 41 per cent of Patriot's employees are members, and two hedge funds that hold a significant portion of Patriot's senior bonds. Because of Patriot's substantial pension obligations, a key to a successful reorganisation was its ability to reject and restructure its agreements with the UMWA. Under Sections 1113 and 1114 of the Bankruptcy Code, companies have the ability to reject collective bargaining agreements or retiree health-care benefits in bankruptcy, but the burden of doing so is significantly higher than with other types of contracts. Following months of negotiations with the UMWA, on 29 May 2013 the bankruptcy court overseeing the Patriot bankruptcy ruled that the balance of equities favoured rejection of the collective bargaining agreement and termination of Patriot's obligation to provide retiree benefits. Patriot and UMWA subsequently settled on a new collective bargaining agreement and an agreement with respect to retiree benefits with significant cost savings for Patriot. The recent resolution of this issue and other major issues in the *Patriot* case should pave the way for Patriot's successful emergence from bankruptcy.

Another significant issue in the *Patriot* case was the ruling as to the appropriate venue for the insolvency proceedings. Patriot filed for bankruptcy in the US Bankruptcy Court for the Southern District of New York, with the appropriate venue being based on two new subsidiaries incorporated in New York. The UMWA sought to transfer the case to West Virginia, the location of the majority of the company's operations. The Southern District of New York bankruptcy judge found that neither option best served the interest of convenience of the parties, and transferred the cases to the Eastern District of Missouri, where Patriot is headquartered.[54]

54 A more complete discussion regarding venue will be discussed in the trends section of this chapter.

iii Cengage

Cengage Learning Inc and three of its affiliates (collectively, Cengage) filed for Chapter 11 bankruptcy in the Eastern District of New York on 2 July 2013. Cengage is a publisher of textbooks and other educational material. Cengage incurred almost $5.6 billion in new debt financing when its private equity owners purchased the company in a 2007 leveraged buyout. A significant decrease in demand for traditional hard-copy textbooks made it impossible for Cengage to service its debt.

Cengage's primary debts include:

a $3.896 billion in outstanding principal under its first-lien credit agreement;
b $725 million in first-lien notes;
c $710 million in second-lien notes;
d $327.7 million in unsecured notes;
e $132 million in subordinated notes; and
f $66.2 million in payment-in-kind notes.

The major participants in the Cengage insolvency proceedings include its private equity owner, who purchased a significant amount of Cengage's debt prior to Cengage filing for bankruptcy, the first-lien credit agreement agent, an *ad hoc* group of first-lien credit agreement lenders, trustees for the first-lien and second-lien noteholders, and the committee for unsecured creditors. The case is still in its early stages as parties seek to resolve numerous intercreditor issues.

iv Residential Capital

Residential Capital, LLC (ResCap) is a residential mortgage loan originator and servicer. As such, ResCap was greatly affected by the crash of the US housing market beginning in 2007 and the resulting tightening of the capital markets. ResCap was also party to numerous litigations for improper loan origination practices and charging excessive interest rates. ResCap entered bankruptcy with a book value of $15.7 billion in assets and $15.3 billion in debt.

ResCap's primary debts include:

a $747 million senior secured credit facility, secured by substantially all of the debtors' assets;
b $380 million secured loan agreement, secured by some of debtors' assets;
c $152 million mortgage servicing rights facility;
d $40.3 million for funding of certain Fannie Mae servicing advances;
e $250 million repurchase facility, secured by assets being sold pursuant to the repo agreement;
f $2.1 billion in junior secured notes, secured by second priority liens on the same assets as the senior secured credit facility;
g $673.3 million in US dollar-denominated unsecured notes;
h $131.2 million in euro-denominated unsecured notes; and
i $167.7 million in sterling-denominated unsecured notes.

ResCap is a wholly owned subsidiary of Ally Financial Inc (Ally), the successor to General Motor's former lending arm, GMAC. During the financial crisis, the United States

Treasury Department provided GMAC with $17.2 billion and became the 73.8 per cent majority owner of the company. ResCap has created huge losses for Ally. Therefore, unsurprisingly, Ally is a major participant in the ResCap bankruptcy case. In addition to being the parent of ResCap, Ally is also one of ResCap's largest creditors. Furthermore, Ally attempted to be the stalking horse bidder for ResCap's legacy loan portfolio, which was ultimately purchased by Berkshire Hathaway for $1.5 billion.

The most significant aspect of the ResCap bankruptcy was the appointment of an examiner in the case who was tasked with evaluating whether Ally's proposed settlement contribution to the ResCap estate was sufficient to justify Ally's release from liability arising from numerous intercompany transactions that affected the potential value of ResCap's estate. Following months of investigation, the examiner released a detailed report discussing all potential claims the ResCap estate may have and their likelihood of success. The report led to negotiations with Ally regarding its spin-off of ResCap, which resulted in Ally agreeing to a $2.1 billion dollar settlement with ResCap's creditors.

With the Ally settlement, ResCap is on a clearer path to exit from bankruptcy. The expected course of the bankruptcy is to organise an orderly sale of substantially all of ResCap's assets in order to pay its creditors. The two main sources of payments to creditors will be the proceeds derived from the sale of ResCap's assets and the Ally settlement.[55]

v Excel Maritime

In July 2013 Excel Maritime Carriers Ltd (Excel) joined the ranks of global shipping enterprises to file for bankruptcy. As a result of oversupply in the shipping industry and a loss in the value of its ships, the Greece-based and Liberia-incorporated company was unable to cover its debts and filed for Chapter 11 relief in the United States premised on its ownership of certain assets located in the United States. The company sought bankruptcy protection to confirm a pre-arranged plan to restructure its $771 million secured credit facility.

Excel's chairman, Gabriel Panayotides, is centre stage in the bankruptcy proceedings because of a side agreement with the senior lenders to transfer 60 per cent of the equity the lenders will receive under the plan to an entity affiliated with Panayotides's family. The agreement has been challenged by convertible noteholders who assert the proposed plan and side agreement flies in the face of the absolute priority rule of Chapter 11, by providing a recovery to equity holders ahead of the convertible noteholders. If the plan is approved, Excel's secured creditors stand to recover 77 per cent of their pre-petition claims, while the convertible noteholders are expected to recover only 3 per cent of their $150 million claim, and even that recovery may be in jeopardy.[56]

While Excel expected a quick exit from bankruptcy in the fourth quarter of 2013, the company's emergence is likely going to be held up by significant litigation

55 *In re Residential Capital LLC*, No. 12-12020 (MG) (Bankr. S.D.N.Y 23 August 2013) [Docket No. 4819], at 44.

56 *In re Excel Maritime Carriers Ltd*, No. 13-23060 (RDD) (Bankr. S.D.N.Y. 15 July 2013) [Docket No. 87], at 33.

and the unwillingness of the unsecured creditors' committee to support the plan in its current form. Currently, parties are using mediation to help resolve the committee's objections to the proposed plan. The mediator for the case is Southern District of New York bankruptcy judge James M Peck.

vi AMR Corporation

AMR Corporation (AMR) and its 20 direct and indirect subsidiaries filed for bankruptcy on 29 November 2011. AMR is the parent of American Airlines Inc. AMR has stated that its failure was the result of the airline's inability to compete on costs with its rival airlines because those other airlines had already shed debts and employee costs during their previous Chapter 11 bankruptcy proceedings.[57] At the time AMR filed its petition, the company reported a book value of $24.7 billion in assets and $29.5 billion in liabilities.

AMR's primary debts include:

a $4.6 billion in variable and fixed rate indebtedness secured by AMR's aircraft;
b $2 billion in enhanced equipment trust certificates due through 2021 (rates from 5.1 per cent–12 per cent at 30 September 2011);
c $1.6 billion in 6 per cent–8.5 per cent special facility revenue bonds due 2036;
d $1 billion in 7.5 per cent senior secured notes due 2016; and
e $1 billion pursuant to an Advance Purchase Miles Agreement with Citibank, NA.

The AMR insolvency proceedings made headlines in 2013 because of the antitrust scrutiny the United States Department of Justice (DoJ) placed on the proposed merger between AMR and US Airways, Inc that was the core of AMR's plan of reorganisation. Although both Delta Air Lines and United Airlines were able to receive approval of blockbuster mergers as part of their Chapter 11 cases, the DoJ is actively fighting AMR's similar plan because of the perceived anti-competitive effects that could result from such supermerger in an already heavily consolidated airline industry.[58] The DoJ filed its complaint to enjoin the proposed merger on the eve of AMR's plan confirmation hearing. The US bankruptcy judge confirmed the plan despite the pending antitrust litigation. The plan, however, cannot become effective until and unless the merger is approved.

vii WR Grace &Company

WR Grace & Company (Grace) has the dubious honour of being one of the longest-standing Chapter 11 proceedings in United States history. Grace and 61 of its affiliates filed for bankruptcy protection in 2001 in the wake of an avalanche of asbestos claims related to its mining activities dating back to the 1960s. The uncertainty of the liability

57 *In re AMR Corp*, No. 11-15463 (SHL) (Bankr. S.D.N.Y. 29 November 2011) [Docket No. 4], at Paragraph 20.

58 Sara Forden, David McLaughlin & Mary Schlangenstein, 'AMR-US Airways Deal Opposed by U.S. in Antitrust Suit', *Bloomberg* (13 August 2013, 5:15 PM), www.bloomberg.com/news/2013-08-13/amr-us-airways-deal-blocked-by-u-s-in-antitrust-suit.html; *In re United States v. US Airways* Group Inc, No. 13-01236 (D.D.C. 13 August 2013) [Docket No. 1].

that would result from the lawsuits – greater than $7 billion by some estimates – pushed Grace into bankruptcy, even though the company was otherwise healthy.[59]

Asbestos-related bankruptcies were quite common between 1982 and 2002 and the Bankruptcy Code provides for special treatment of such cases. Specifically, Section 524(g) of the Bankruptcy Code allows for the debtor to channel all claims and future demands for payments based on asbestos-related causes of action into a trust that will pay all claims and future demands. The trust must own or have a right to own, subject to certain contingencies, a majority of the voting shares of the debtor in order to satisfy the asbestos claims.

In February 2009 Grace, the Official Committee of Asbestos Personal Injury Claimants, the Representative for Future Asbestos Personal Injury Claimants and the Official Committee of Equity Security Holders filed a joint plan of reorganisation. The joint plan was not confirmed, however, until 31 January 2011, because of the time needed to conduct hearings and negotiate plan modifications to address 43 objections to the plan.

The *Grace* case is somewhat unique because Grace has actually thrived under the protection of bankruptcy and is set to exit bankruptcy paying all of its lenders in full and all of its shareholders' equity will be retained.[60] As a result of this rare outcome, certain of Grace's bank lenders have appealed the confirmation of the plan all the way to the Third Circuit Court of Appeals. The lenders assert that because Grace's shareholders retain all of their equity upon Grace's emergence from bankruptcy, the absolute priority rule entitles the lenders to receive the default rate of interest pursuant to their respective credit agreements. The difference between the interest that the lenders will receive under the plan as proposed and what they claim they are owed currently exceeds $200 million and grows by the day. The outcome of the default interest issue could determine whether Grace can emerge from bankruptcy in 2014.

IV ANCILLARY INSOLVENCY PROCEEDINGS

i Elpida Memory[61]

Elpida Memory, Inc (Elpida), a Japanese manufacturer of dynamic random access memory integrated circuits, filed bankruptcy proceedings in Japan on 27 February 2012. Elpida had $5.5 billion in liabilities on the filing date. One month later, the company sought and obtained recognition of such proceedings as a foreign main proceeding under Chapter 15 of the Bankruptcy Code in the United States Bankruptcy Court for the District of Delaware. The foreign representative requested approval in the US proceedings to sell or license certain patents pursuant to Section 363 of the

59 Ernest Scheyder and Nick Brown, 'Analysis: Why Bankrupt W.R. Grace Is Thriving', *Reuters* (16 June 2013); W.R. Grace & Co. –Conn., 'Financial Reorganization', available at www.grace.com/about/reorganization.aspx.

60 W.R. Grace & Co., Quarterly Report (Form 10-Q) (2 August 2013).

61 Davis Polk & Wardwell LLP is serving as counsel for the foreign representatives of Elpida in its Chapter 15 proceedings.

Bankruptcy Code. Although the Japanese bankruptcy court had already approved the transaction, the US Bankruptcy Court held that the foreign representative still had to satisfy the requirements of Section 363 of the Bankruptcy Code with respect to the US assets that were being transferred. The US Bankruptcy Court reasoned that the plain meaning of Section 1520(a) of the Bankruptcy Code clearly introduces Section 363 into the ancillary proceedings with respect to a transfer of US property in a Chapter 15 case 'to the same extent' that Section 363 would apply to a transfer of estate property in a proceeding under other chapters of the Bankruptcy Code.[62] After reviewing the proposed transaction under Section 363, the US Bankruptcy Court authorised the sale and ultimately recognised Elpida's reorganisation plan and approved Micron Technologies Inc's acquisition of Elpida.

ii Fairfield Sentry

Fairfield Sentry, Ltd is a British Virgin Islands registered feeder fund that invested more than $7 billion with Bernard L Madoff Investment Securities LLC. The fund suffered huge losses as a result of the Madoff Ponzi scheme. On 21 July 2009 the Eastern Caribbean Supreme Court in the High Court of Justice, British Virgin Islands (the BVI Court) granted an order to wind up Fairfield Sentry. The US Bankruptcy Court for the Southern District of New York granted recognition of the BVI Court's liquidation proceeding as a foreign main proceeding under Chapter 15. The BVI Court-appointed liquidator serves as the foreign representative for Fairfield Sentry in the Chapter 15 proceedings. Notably, the foreign representative sought to invalidate the debtor's sale of Fairfield Sentry's claim against the Madoff trustee to another investor, when the claim dramatically rose in value. The US Bankruptcy Court denied the foreign representative's request for relief under Section 363 to undo the trade that had been approved by the BVI Court. The US Bankruptcy Court ruled that the claim sold by Fairfield Sentry was not an interest in property of the debtor located in the territorial United States and thus, approval of the sale under Section 363 was not required in order for the sale to be consummated.

iii Vitro

In 2012 Vitro SAB de CV, the leading manufacturer of glass in Mexico, sought to have its Mexican *concurso* plan of reorganisation enforced in the United States pursuant to Sections 105(a), 1507 and 1521 of the Bankruptcy Code. The plan, which was confirmed by a Mexican court, provided for the discharge of Vitro's obligations under a note held by US investors and the non-consensual release of the noteholders' claims against Vitro's non-debtor subsidiaries that had provided guarantees. The noteholders objected to the plan on several grounds, including the fact that the Mexican court allowed insiders to vote on the plan and that the plan provided for equity holders to receive a distribution while the noteholders' claims were extinguished. A US bankruptcy court denied recognition of the *concurso* plan, citing Section 1506 of the Bankruptcy Code, which allows courts to

62 *In re Elpida Memory Inc*, 2012 Bankr. LEXIS 5367, 57 Bankr. Ct. Dec. 74 (Bankr. D. Del. 2012).

deny relief granted by a foreign court that is against United States public policy. Vitro's foreign representatives appealed the case to the Fifth Circuit Court of Appeals.

The Fifth Circuit affirmed the lower court's decision, finding that the bankruptcy court did not abuse its discretion, but the Fifth Circuit did not address Section 1506's public policy exception. Instead, the Fifth Circuit focused directly on Sections 1521 and 1507 of the Bankruptcy Code. First, the court found that the granting of a third-party release of non-debtor subsidiary obligors was not specifically allowed by Chapter 15. The Fifth Circuit, noting that 'comity is the rule, not the exception under Chapter 15, determined that the Mexican plan could theoretically be recognised under Section 1507 of the Bankruptcy Code, which was enacted to provide for relief not otherwise available in the United States; however, the Fifth Circuit found that Vitro did not provide evidence of the extraordinary circumstances necessary to justify the release of non-debtor subsidiaries under US law.

V TRENDS

Bankruptcy filings in the United States have seen a steep decline over the past several years. Companies have been buoyed by cheap access to capital due to historically low interest rates as a result of the Federal Reserve's quantitative easing measures. The Federal Reserve Board's decision to continue its quantitative easing provides relief for companies with highly leveraged balance sheets that likely would have struggled to meet their debt obligations had interests rates begun to rise. Continued low interest rates should continue to allow distressed companies to refinance their debts and postpone the need to commence bankruptcy proceedings.

Energy is one of the industries that is most at risk in the upcoming year. In particular, the coal industry will continue to be hit hard by the prevalence of cheaper and cleaner sources of energy, such as natural gas. The coal industry has already been hampered by decreasing revenues, increasing regulation and large unfunded pension and retirement liabilities. Added to this, the federal government is preparing to launch new emission standards that will take a further toll on the beleaguered industry.

i Pre-arranged plans, pre-packaged plans and 363 sales

As stated earlier, reorganisation of a debtor under Chapter 11 is often the best way of achieving the goal of providing the maximum return to creditors through the bankruptcy process. That said, a complete restructuring under Chapter 11 can be a time-consuming and costly process for a struggling debtor and an extended stay in bankruptcy can be fatal for a debtor that does not have sufficient liquidity to pay professionals' fees and maintain operations through a multi-year Chapter 11 process.

For these reasons, the past several years have seen an increase in the number of Chapter 11 bankruptcies that are pre-arranged or pre-packaged. 'Pre-arranged' is a loose term to describe a Chapter 11 case where certain creditors or other interested parties have worked with the debtor prior to the filing of the case to negotiate an agreed upon course for the company's reorganisation. Often these parties will enter into formal agreements with the debtor pursuant to which they agree to take or not take certain actions in furtherance of planned reorganisation. A 'pre-packaged' Chapter 11 is one in which votes for the company's Chapter 11 plan are solicited prior to the Chapter 11 filing and the company enters Chapter 11 with a clear and predetermined course for its reorganisation. In 2012, 14 publicly traded companies filed pre-arranged or pre-packaged Chapter 11 cases, double the number that filed in 2011.[63] Of that group, 11 emerged from bankruptcy in less than six months.[64] For example, Houghton Mifflin Harcourt Publishing Co's pre-packaged plan of reorganisation was confirmed and became effective just over one month after the date of commencement of its Chapter 11 proceedings.

There has also been an increase in the number of Chapter 11 proceedings used to effect sales of substantially all of a debtor's assets free and clear of any liens, claims or encumbrances. Such 'Section 363 sales' (named after the applicable provision of the Bankruptcy Code) can be used to effectuate sales of valuable assets or profitable business units for the benefit of the debtor's creditors. While such sales are an integral part of the Chapter 11 process, increasingly, they have been used early in cases to sell significant portions (or all) of a debtor's assets and, as a result, have been met with criticism because it can be argued that they enable a debtor to chart a course for its Chapter 11 case free of the creditor protections associated with voting on and confirming a Chapter 11 plan of reorganisation. At the same time, however, these sales can allow a debtor to efficiently realise value for depreciating assets. Recently, for example, Eastman Kodak conducted two significant 363 sales, including the sale of its digital imaging patent portfolio, between the company's January 2012 filing and its August 2013 Chapter 11 plan confirmation.

ii Venue

Bankruptcy venue was a popular issue in 2011, with the Bankruptcy Venue Reform Act of 2011 being introduced in Congress. The bill sought to make it more difficult for a debtor to assert that its chosen venue is proper based solely on its jurisdiction of incorporation or the jurisdiction of incorporation for an affiliate debtor that files first. The bill sought to curtail the number of bankruptcies filed in the popular jurisdictions of New York and Delaware, particularly for companies that do not have significant operations in those jurisdictions. The Bankruptcy Venue Reform of 2011 caused a stir in the bankruptcy community, but did not make it out of the House Judiciary Committee's Subcommittee on Courts, Commercial and Administrative Law.

Venue may reappear as a focal point in 2014. A potential driver of the venue issue could be the effect of the US government's sequestration, which has resulted in reduced staff in the bankruptcy courts and mandatory 5 p.m. closures of federal courthouses. The reduced staff and inability to hold bankruptcy hearings through the night could put additional strain on the already heavily burdened bankruptcy courts in New York and Delaware. The courts may also see the *Patriot Coal* case as a model for deciding whether to transfer venue away from the magnet jurisdictions.

63 New Generation Research, Inc, *The 2013 Bankruptcy Yearbook and Almanac* (Kerry A Mastroianni ed, 2013).

64 Id.

iii Mediation

Another effect of the increased strain on the US judiciary could be the rise of mediation in bankruptcy cases as an antidote to costly and time-consuming traditional litigation. Mediation has been utilised, or at least contemplated, in complex Chapter 11 cases such as *ResCap*, *Tribune*, *Excel Maritime*, *Nortel* and *Cengage*. Mediation has sometimes proven to be an effective method of creating consensus around a plan of reorganisation from multiple parties, which cannot as easily be achieved in the binary and adversarial litigation system.

Mediators are also playing a central role in bankruptcies filed under other chapters of the Bankruptcy Code. Several US bankruptcy courts have created mediation programmes to provide for mortgage modification in Chapter 13 individual debtor cases. Further, mediators have been tapped to enable the discussions between creditors and the local government official in the major Chapter 9 municipal bankruptcies of Detroit, Michigan and Stockton, California. Mediation will likely play a larger role in Chapter 11 bankruptcies in the years ahead.

Appendix 1

ABOUT THE AUTHORS

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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 is a Commissioner on the American Bankruptcy Institute's Commission to Study the Reform of Chapter 11, a director 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 of the firm, Mr Bernstein is a member of the editorial board of *Collier on Bankruptcy*, the treatise on US bankruptcy law.

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Hélène Bourbouloux is a French judicial administrator (independent restructuring and insolvency practitioner appointed by the Commercial Court). She is a partner at FHB with extensive experience in the restructuring field and has handled more than 2,000 matters (*mandat*s *ad hoc*, conciliations, *sauvegardes*, reorganisations, insolvency proceedings, amicable liquidations and provisional receiverships).

Ms Bourbouloux is a prominent practitioner in restructuring and is listed as a leading judicial administrator, as well as a frequent author and speaker on restructuring and reorganisation matters, notably speaking at the 2012 and 2013 International Insolvency Institute conferences. She is a member of the ARE (Association pour le retournement des entreprises), the International Insolvency Institute and INSOL International.

Since 2012 she has also been a member of the board of the Guarantee Fund for Judicial Administrators and Receivers, and from 2008 to 2011 she was a member of the board of the National Council of Judicial Administrators and Receivers.

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He is listed as a leading lawyer in several legal industry publications, and is a frequent author and speaker on restructurings, corporate governance, mergers and acquisitions and capital markets matters. He is a guest lecturer at Sorbonne University in the master of advanced studies in restructuring and at Panthéon-Assas University in the master of advanced studies in corporate and tax law, as well as a guest lecturer to public prosecutors at the French National School for the Judiciary.

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