# THE INSOLVENCY REVIEW

FIFTH EDITION

**Editor**
Donald S Bernstein

THE LAWREVIEWS

PUBLISHER
Gideon Roberton

SENIOR BUSINESS DEVELOPMENT MANAGER
Nick Barette

BUSINESS DEVELOPMENT MANAGERS
Thomas Lee, Joel Woods

ACCOUNT MANAGERS
Pere Aspinall, Sophie Emberson,
Laura Lynas, Jack Bagnall

PRODUCT MARKETING EXECUTIVE
Rebecca Mogridge

RESEARCHER
Arthur Hunter

EDITORIAL COORDINATOR
Gavin Jordan

HEAD OF PRODUCTION
Adam Myers

PRODUCTION EDITOR
Martin Roach

SUBEDITOR
Anna Andreoli

CHIEF EXECUTIVE OFFICER
Paul Howarth

Published in the United Kingdom
by Law Business Research Ltd, London
87 Lancaster Road, London, W11 1QQ, UK

www.TheLawReviews.co.uk



ISBN 978-1-910813-85-0

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: 0844 2480 112

# THE LAW REVIEWS

THE MERGERS AND ACQUISITIONS REVIEW

THE RESTRUCTURING REVIEW

THE PRIVATE COMPETITION ENFORCEMENT REVIEW

THE DISPUTE RESOLUTION REVIEW

THE EMPLOYMENT LAW REVIEW

THE PUBLIC COMPETITION ENFORCEMENT REVIEW

THE BANKING REGULATION REVIEW

THE INTERNATIONAL ARBITRATION REVIEW

THE MERGER CONTROL REVIEW

THE TECHNOLOGY, MEDIA AND TELECOMMUNICATIONS REVIEW

THE INWARD INVESTMENT AND INTERNATIONAL TAXATION REVIEW

THE CORPORATE GOVERNANCE REVIEW

THE CORPORATE IMMIGRATION REVIEW

THE INTERNATIONAL INVESTIGATIONS REVIEW

THE PROJECTS AND CONSTRUCTION REVIEW

THE INTERNATIONAL CAPITAL MARKETS REVIEW

THE REAL ESTATE LAW REVIEW

THE PRIVATE EQUITY REVIEW

THE ENERGY REGULATION AND MARKETS REVIEW

THE INTELLECTUAL PROPERTY REVIEW

THE ASSET MANAGEMENT REVIEW

THE PRIVATE WEALTH AND PRIVATE CLIENT REVIEW

THE MINING LAW REVIEW

THE EXECUTIVE REMUNERATION REVIEW

THE ANTI-BRIBERY AND ANTI-CORRUPTION REVIEW

THE CARTELS AND LENIENCY REVIEW

THE TAX DISPUTES AND LITIGATION REVIEW

THE LIFE SCIENCES LAW REVIEW

THE INSURANCE AND REINSURANCE LAW REVIEW

THE GOVERNMENT PROCUREMENT REVIEW

THE DOMINANCE AND MONOPOLIES REVIEW

THE AVIATION LAW REVIEW

THE FOREIGN INVESTMENT REGULATION REVIEW

THE ASSET TRACING AND RECOVERY REVIEW

THE INSOLVENCY REVIEW

THE OIL AND GAS LAW REVIEW

THE FRANCHISE LAW REVIEW

THE PRODUCT REGULATION AND LIABILITY REVIEW

THE SHIPPING LAW REVIEW

THE ACQUISITION AND LEVERAGED FINANCE REVIEW

THE PRIVACY, DATA PROTECTION AND CYBERSECURITY LAW REVIEW

THE PUBLIC–PRIVATE PARTNERSHIP LAW REVIEW

THE TRANSPORT FINANCE LAW REVIEW

THE SECURITIES LITIGATION REVIEW

THE LENDING AND SECURED FINANCE REVIEW

THE INTERNATIONAL TRADE LAW REVIEW

THE SPORTS LAW REVIEW

THE INVESTMENT TREATY ARBITRATION REVIEW

THE GAMBLING LAW REVIEW

THE INTELLECTUAL PROPERTY AND ANTITRUST REVIEW

THE REAL ESTATE M&A AND PRIVATE EQUITY REVIEW

THE SHAREHOLDER RIGHTS AND ACTIVISM REVIEW

THE ISLAMIC FINANCE AND MARKETS LAW REVIEW

THE ENVIRONMENT AND CLIMATE CHANGE LAW REVIEW

THE CONSUMER FINANCE LAW REVIEW

THE INITIAL PUBLIC OFFERINGS REVIEW

THE CLASS ACTIONS LAW REVIEW

THE TRANSFER PRICING LAW REVIEW

THE BANKING LITIGATION LAW REVIEW

THE HEALTHCARE LAW REVIEW

www.TheLawReviews.co.uk

# ACKNOWLEDGEMENTS

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

ARENDT & MEDERNACH

BAKER MCKENZIE

BERNITSAS LAW

BHARUCHA & PARTNERS

BIRD & BIRD SZEPIETOWSKI I WSPÓLNICY SP K

CLEARY GOTTLIEB

CLIFFORD CHANCE

DAVIS POLK & WARDWELL LLP

GALDINO, COELHO, MENDES ADVOGADOS

GSK STOCKMANN

MANNBENHAM ADVOCATES LIMITED

MAPLES AND CALDER

OSCÓS ABOGADOS

PHILIPPI, PRIETOCARRIZOSA, FERRERO DU & URÍA

PRAGER DREIFUSS AG

RESOR NV

ROJS, PELJHAN, PRELESNIK & PARTNERS O.P., D.O.O.

SLAUGHTER AND MAY

SRS ADVOGADOS – SOCIEDADE REBELO DE SOUSA E ASSOCIADOS, RL

WEERAWONG, CHINNAVAT AND PARTNERS LTD

WHITE & CASE

Chapter 1

# BRAZIL

*Mauro Teixeira de Faria and Rodrigo Saraiva Porto Garcia*[1]

## I INSOLVENCY LAW, POLICY AND PROCEDURE

### i Statutory framework and substantive law

#### *General*

In Brazil, several statutes discipline insolvency and liquidation proceedings. The most prominent legislative instrument is the Bankruptcy and Reorganisation Act,[2] which regulates bankruptcy, judicial reorganisation and extrajudicial reorganisation proceedings applicable to companies, whether they are limited companies, publicly traded stock corporations, private stock corporations or sole proprietorships – with the exclusion of companies controlled by the government.

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

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

Other insolvency proceedings for specific persons are distributed among different laws. Insolvency for natural persons is governed by certain provisions in the Brazilian Civil Code,[3] and the still effective provisions of the revoked Brazilian Code of Civil Procedure.[4] Liquidation proceedings for limited companies are provided by the Brazilian Civil Code, while stock corporations are liquidated in accordance to the Stock Corporations Act.[5]

---

1 Mauro Teixeira de Faria and Rodrigo Saraiva Garcia are partners at Galdino Coelho Mendes Advogados.

2 Law No. 11,101, dated 9 February 2005, known as *Lei de Recuperação de Empresas e Falências*, latest amendment Supplementary Law No. 147/2014.

3 Law No. 10,406, dated 10 January 2002, latest amendment Law No. 13,465/2017.

4 Law No. 5,869, dated 11 January 1973, mostly revoked by Law No. 13,105/2015, with the exception of the provisions regarding insolvency proceedings for natural persons, effective until specific legislation is passed.

5 Law No. 6.404, dated 15 December 1976, latest amendment Law No. 13.129/2015.

This chapter will limit its scope to address the bankruptcy and reorganisation proceedings in a more comprehensive manner, rather than approach several subjects without the necessary depth.

### *Main effects of bankruptcy and reorganisation proceedings*

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

*a* the appointment of a judicial administrator that undertakes the role of examiner and court assistant, supervising the debtor's activity and reviewing the creditor's accounts. In bankruptcy proceedings, the judicial administrator also takes possession of the company's administration and liquidates the assets;

*b* the stay of legal actions and enforcement proceedings against the debtor for 180 days, except for tax claims, actions that demand an illiquid amount and judicial proceedings concerning claims that are not affected by the debtor's bankruptcy or judicial reorganisation; and

*c* with respect to tax collection claims and claims that not affected by the debtor's bankruptcy or judicial reorganisation, the seizure of the debtor's assets or any judicial proceedings that may interfere with the debtor's possession of assets that are essential to the continuity of the business activity are suspended and subject to the bankruptcy court's assessment.

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

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

### *Creditor's claims in insolvency proceedings*

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

*a* claims held by creditors with property interests that are in the possession of the debtor, such as chattel mortgage and capital or operating leases. These claims are not affected by bankruptcy or judicial reorganisation proceedings; and

*b* claims that are secured by certain assets of the debtor's estate, such as pledges and mortgages. These claims are affected by bankruptcy and reorganisation proceedings: in bankruptcy, the creditor is entitled to satisfaction of his or her claim with the earnings from the sale of the secured asset; in judicial reorganisation, the creditor may be subject to a haircut, a deferral of payment or even the loss of the security, if approved by the creditors.

On the other hand, unsecured claims are classified as follows:

*a* claims arising from the labour legislation or resulting from work-related accidents, with the highest priority both in bankruptcy and judicial reorganisation;

*b* tax claims, administrative fines and other penalties imposed by government entities. These claims are subject to bankruptcy, but not to judicial reorganisation proceedings;

*c* claims with special and general privileges established by law;

*d* claims that have no preference or privilege whatsoever. This class of claims usually encompasses the vast majority of claims in bankruptcy or judicial reorganisation proceedings; and

*e* subordinate claims, which arise from contractual agreements or legal provisions, or are held by creditors that are shareholders, partners or administrators without an employment relationship.

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

### ii Policy

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

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

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

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

### iii Insolvency procedures

***Extrajudicial reorganisation proceedings***

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

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

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

***Judicial reorganisation proceedings***

In judicial reorganisation proceedings, the debtor remains in possession of its business, maintaining shareholders' powers and prerogatives, barring a few occasions when the bankruptcy court, its creditors and even the debtor may replace the company's management. When a company is under financial duress, it may file for judicial reorganisation hoping to stay any payments to its creditors and renegotiate its debts.

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

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

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

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

*c* the petition must also be accompanied by an updated list of creditors and employees;

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

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

The request is reviewed by the bankruptcy court and, if all legal requirements are fulfilled, the company is admitted into judicial reorganisation. A judicial administrator is appointed, but it does not hold managing powers; it works as a court examiner, reviews the list of creditors, provides an independent opinion on the debtor's accounts and is heard on almost

every subject regarding the proceedings. At the same time, legal actions and enforcement proceedings against the debtor are stayed for 180 days (as mentioned before), and there is a suspension of the statute of limitations.

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

After the company is admitted into judicial reorganisation, its management and administrators negotiate the terms of the plan of reorganisation with its principal creditors and submit the plan to discuss and vote at the creditors' general meeting, if need be. The plan is filed by the debtor before the general creditors' meeting, and the creditors may present an opposition to the plan before the vote.[6] Although the Bankruptcy and Reorganisation Act provides that only the debtor may submit a plan of reorganisation to the creditors, it is common for creditors to submit (informally) an alternative plan at the general creditors' meeting, to be reviewed, discussed and even voted by the creditors.

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

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

*b* the sale of assets, be it a partial sale of the company's assets, a lease or the sale of a complete isolated production unit;

*c* a conversion of debt to equity in the company; and

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

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

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

The approval and confirmation of the plan of reorganisation binds all creditors (whether they have approved the plan or not) and results in the novation of the impaired claims. The debtor must remain under supervision of the court and the judicial administrator for two years, after which it may request the court to terminate the judicial reorganisation proceeding,

6 The debtor must ensure that the plan is economically viable, presenting an economic and financial evaluation based on the company's assets and properties.

if all the plan's obligations, within such period, are duly satisfied. If any obligations are defaulted, the bankruptcy court may declare the debtor's bankruptcy; though recently the courts have allowed for the debtor to submit an amendment to the plan for creditor approval, before declaring the company bankrupt.

***Bankruptcy proceedings***

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

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

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

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

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

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

### iv Starting proceedings

***Judicial and extrajudicial reorganisation proceedings***

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

*a* has been in activity for at least two years prior to the filing;

*b* has not been declared bankrupt or, if it has, was discharged by a final decision of the bankruptcy court;
*c* has not been granted judicial reorganisation in the previous five years;
*d* has not been granted special judicial reorganisation (for small business entities) in the previous eight years; and
*e* has not been convicted or does not have an administrator or manager who has been convicted of any crimes provided by the Bankruptcy and Reorganisation Act.

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

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

***Bankruptcy proceedings***

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

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

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

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

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

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

### v Control of insolvency proceedings

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

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

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

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

### vi Special regimes

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

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

### vii Cross-border issues

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

Although Brazil has not yet passed an amendment to the Bankruptcy and Reorganisation Act based on the Model Law, case law has allowed for judicial reorganisation proceedings to encompass foreign companies, as long as they are part of a larger economic group with its centre of main interests in Brazil. Examples of this were the submission of foreign companies to the judicial reorganisation proceedings of OGX Group,[7] Sete Brasil Group,[8] OAS Group[9] and Oi Group,[10] all carried out by bankruptcy courts in Brazil. Even without any provision in the Bankruptcy and Reorganisation Act regarding cross-border insolvency, Brazilian courts have cooperated with foreign courts and received its assistance when needed.

## II INSOLVENCY METRICS

From 2004 to 2014, Brazilian GDP has annually grown an average of 3.72 per cent (with its peak reaching 7.5 per cent in 2010). However, after the beginning of Operation Lava Jato in early 2014, Dilma Rousseff's victory in the 2014 presidential election and the decline in market value of several commodities (especially petroleum and iron ore), Brazil entered into a deep recession, with its GDP decreasing 3.8 per cent in 2015 and plummeting another 3.6 per cent in 2016.[11]

In roughly the same time frame, the economy's base interest rate (SELIC) was raised by the Brazilian Central Bank from 7.25 per cent in 2013 to 14.25 per cent in 2015,[12] in an attempt to slow down the inflation rate (10.67 per cent in 2015).[13] Unemployment rates skyrocketed from 4.8 per cent in 2014 and reached 13.7 per cent in early 2017.[14]

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

7 OGX International GMBH and OGX Austria GMBH HSBC CTVM S/A incorporated in Austria.

8 Sete Holding GMBH, Sete International One GMBH and Sete International Two GMBH incorporated in Austria.

9 OAS Finance Limited and OAS Investments Limited incorporated in the British Virgin Islands and OAS Investments GMBH incorporated in Austria.

10 Oi Brasil Holdings Cöoperatief U.A. and Portugal Telecom International Finance BV incorporated in the Netherlands.

11 Source: databank.worldbank.org.

12 Source: www.bcb.gov.br.

13 Source: www.ibge.gov.br.

14 Source: www.ibge.gov.br.

Markets responded well and the Brazilian Stock Exchange went from 51,804 points in 13 May 2016 to 67,363 points in 11 August 2017, even though President Michel Temer was implicated in the large corruption scheme unearthed by Operation Lava Jato in 17 May 2017 (which caused the Brazilian Stock Exchange to plunge 8.8 per cent in one single day).[15] The forecast for the Brazilian GDP in 2017 is of a 0.34 per cent growth and another 2 per cent growth in 2018, and the projected inflation rate for 2017 is 3.5 per cent and 4.2 per cent for 2018. In light of this, the base interest rate should be lowered to 7.5 per cent by the end of 2017 (it is currently at 9.25 per cent).[16]

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

| Year | No. of Bankruptcy Proceedings[1] | Variation | No. of Judicial Reorganisation Proceedings[2] | Variation |
|---|---|---|---|---|
| 2005 | 2,876 | – | 110 | – |
| 2006 | 1,977 | -31.25 per cent | 252 | 129.09 per cent |
| 2007 | 1,479 | -25.19 per cent | 269 | 6.75 per cent |
| 2008 | 969 | -34.48 per cent | 312 | 15.98 per cent |
| 2009 | 908 | -6.30 per cent | 670 | 114.74 per cent |
| 2010 | 732 | -19.38 per cent | 475 | -29.09 per cent |
| 2011 | 641 | -12.43 per cent | 515 | 8.42 per cent |
| 2012 | 688 | 7.33 per cent | 757 | 46.98 per cent |
| 2013 | 746 | 8.43 per cent | 874 | 15.45 per cent |
| 2014 | 740 | -0.80 per cent | 828 | -5.26 per cent |
| 2015 | 829 | 12.03 per cent | 1287 | 55.43 per cent |
| 2016 | 721 | -13.03 per cent | 1863 | 44.76 per cent |
| 2017[3] | 396 | 15.12 per cent[4] | 685 | -25.79 per cent[5] |

1 Total number of companies declared bankrupt.
2 Total number of judicial reorganisation requests.
3 The numbers account for bankruptcy and judicial reorganisation proceedings until June 2017.
4 Calculated considering the number of companies declared bankrupt until June 2016 (344).
5 Calculated considering the number of judicial reorganisation proceedings until June 2016 (923).

Source: www.serasaexperian.com.br

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

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

15 Source: www.bmfbovespa.com.br.

16 Source: www.bcb.gov.br.

Chapter 26

# UNITED STATES

*Donald S Bernstein, Timothy Graulich and Christopher S Robertson*[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 United States Constitution grants Congress the power to enact 'uniform Laws on the subject of Bankruptcies'.[2] While over time several different bankruptcy statutes have been passed by Congress, the US bankruptcy regime is currently set forth in Title 11 of the United States Code[3] (the Bankruptcy Code), 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 composed of nine chapters.[6] Chapters 1, 3 and 5 provide the structural components that generally apply to all bankruptcy cases. Chapters 7, 9, 11, 12, 13 and 15 lay out general procedures specific to certain types of bankruptcies. Generally speaking, these specific types of bankruptcies are:

*a* trustee-administered liquidation (Chapter 7);
*b* municipality bankruptcy (Chapter 9);
*c* debtor-in-possession (DIP) managed reorganisation or liquidation (Chapter 11);
*d* family farmer and fisherman bankruptcies (Chapter 12);
*e* individual bankruptcies (Chapter 13);[7] and
*f* cross-border cases (Chapter 15).

---

1 Donald S Bernstein and Timothy Graulich are partners and Christopher S Robertson is an associate at Davis Polk & Wardwell LLP.

2 US Constitution, Article I, § 8.

3 11 U.S.C. §§ 101–1532 (2012).

4 Pub. L. No. 95-598 (1978).

5 Pub. L. No. 109-8 (2005).

6 As discussed in Section V, there is a proposal currently under consideration in Congress to add a new chapter or subchapter to the Bankruptcy Code tailored to resolving systemically important financial institutions.

7 Individuals can also seek relief under Chapters 7 and 11 of the Bankruptcy Code.

Generally speaking, with respect to plenary corporate bankruptcies, US insolvency law provides for two distinct regimes: a trustee-controlled liquidation under Chapter 7 and a DIP-controlled reorganisation or structured liquidation under Chapter 11.[8] This article focuses on Chapter 11 proceedings. Below are certain key provisions of US insolvency law:

### *The automatic stay*

One of the most important provisions of the US insolvency regime is the 'automatic stay', which is codified in Section 362 of the Bankruptcy Code. The automatic stay is a statutory injunction that applies immediately upon the commencement of a bankruptcy proceeding. Generally, the automatic stay operates to enjoin most creditors from pursuing actions or exercising remedies to recover against a debtor's property. There are limited exceptions to the automatic stay and it can be modified by a court upon a showing of cause. The automatic stay provides the breathing room necessary for the debtor or trustee to assess and assemble all of the property of the estate without creditors seeking remedies to protect their own self-interests. Accordingly, the automatic stay allows for the preservation of the debtor's assets and the maximisation of their value and for an equitable distribution of those assets to creditors.

### *Safe harbours*

One important exception to the automatic stay is that it generally does not apply to contracts that are colloquially referred to as 'financial contracts'. Specifically, the automatic stay does not apply to certain delineated counterparties' ability to offset, net, liquidate, terminate or accelerate 'securities contracts',[9] 'commodities contracts',[10] 'forward contracts',[11] 'repurchase agreements',[12] 'swap agreements',[13] or 'master netting agreements'[14] with a debtor, provided that the counterparty may be required to exercise its remedies promptly.[15] In addition, a debtor may not avoid as a fraudulent transfer a transfer to such a counterparty under one of these contracts unless the transfer is intentionally fraudulent.

### *The absolute priority rule*

Another key tenet of US insolvency law is the absolute priority rule. The absolute priority rule provides that creditors with higher priority must be paid in full before creditors of lower priority receive any distribution from the bankruptcy estate, and thereby ensures a 'fair and equitable' distribution of the debtor's property consistent with the priorities under applicable non-bankruptcy law. As a result, in the absence of consent, secured claims must be paid in full from collateral before general unsecured creditors receive any recovery. Similarly, because equity holders have the lowest priority, in the absence of consent, they cannot receive any

8 A trustee can be appointed in Chapter 11 for cause. 11 U.S.C. § 1104(a)(1).

9 11 U.S.C. § 555.

10 11 U.S.C. § 556.

11 Id.

12 11 U.S.C. § 559.

13 11 U.S.C. § 560.

14 11 U.S.C. § 561.

15 See *In re Lehman Brothers Holdings Inc*, Case No. 08-13555 (JMP) (Bankr. S.D.N.Y. 15 September 2009).

distribution until all creditors have received payment in full on account of their allowed claims. Consent to the payment of a junior class can be obtained through a vote of the senior class on a plan of reorganisation.[16]

***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;[17]

*b* avoidance of fraudulent transfers, which enables the debtor to avoid and recover transfers of property that were actually fraudulent or were made while the debtor was insolvent and for less than reasonably equivalent value;[18] 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.[19]

### ii Policy

The goal of US insolvency law is to provide maximum return to creditors (and, if possible, equity holders) of the debtor and, in that context, to reorganise rather than liquidate business debtors to preserve employment and to realise the 'going concern surplus' of reorganisation value over liquidation value. This is accomplished by reorganising a debtor corporation under the provisions of Chapter 11 of the Bankruptcy Code. However, if a reorganisation is not possible – or if it would not result in a maximisation of value for creditors – the debtor company can be liquidated either under Chapter 11 or Chapter 7 of the Bankruptcy Code. Chapter 7 transfers the control of the liquidation process from the debtor's management, who are likely to have greater familiarity with the assets and their value, to a trustee appointed by the United States Trustee[20] or elected by the debtor's creditors. Chapter 7 liquidations

16 A plan of reorganisation is approved by a class when a majority in number of the class members vote in favour of it and the class members who voted in favour hold at least two thirds of the total value of the claims in that class. 11 U.S.C. § 1126.

17 11 U.S.C. § 547.

18 11 U.S.C. §§ 544(b), 548. Under Section 548, the trustee can avoid a fraudulent transfer of an interest of the debtor in property that took place within two years before the date of the filing of the petition. Under Section 544(b), a trustee can avoid a transfer of an interest of the debtor in property under applicable state law, which can extend the look-back period beyond two years. However, a debtor might not be able to avoid and recover subsequent transfers of property received abroad by a foreign transferee from a foreign transferor. See *Securities Investor Protection Corp v. Bernard L Madoff Inv Sec LLC*, Case No. 12-00115 (S.D.N.Y. 7 July 2014).

19 11 U.S.C. § 552(a).

20 The United States Trustee Program is a component of the Department of Justice that seeks to promote the efficiency and protect the integrity of the federal bankruptcy system. The Program monitors the conduct

usually result in lower recoveries for creditors. Therefore, companies are more likely to be liquidated under Chapter 7 if there are not sufficient funds in the estate or available to the estate to run a Chapter 11 process.

### iii Insolvency procedures

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

#### *Chapter 7*

Chapter 7 is a trustee-controlled liquidation. The goal of Chapter 7 is to ensure the most efficient, expeditious and orderly liquidation of the debtor's assets to be distributed to the creditors and equity holders. Companies cannot reorganise under Chapter 7. The Chapter 7 liquidation procedure is administered by a Chapter 7 trustee either selected by the United States trustee or by an election conducted by certain creditors. The Chapter 7 trustee is responsible for realising upon all of the property of the estate and coordinating the distribution of such property or proceeds of sales of such property.

#### *Chapter 11*

Chapter 11 provides for an insolvency proceeding in which the directors and management of the debtor company remain in control (the DIP) unless a trustee is appointed for cause. Chapter 11 proceedings allow for the reorganisation of the debtor's operations and capital structure in the hope that the company will emerge from the bankruptcy process as a healthier, reorganised company. Chapter 11 gives the debtor the exclusive right to propose a plan of reorganisation for the first 120 days after commencement of the bankruptcy proceedings, and this date may be extended until 18 months after the order for relief (the petition date of a voluntary case) in the case if the debtor is making progress on a plan of reorganisation and can show cause why the court should extend the exclusivity period.[21] The plan of reorganisation provides for how the debtor's assets will be distributed among the classes of creditors and equity holders. It is also possible for a debtor to liquidate its assets through Chapter 11, which is typically a more structured liquidation than one under Chapter 7.

The culmination of a Chapter 11 proceeding is the filing of the plan of reorganisation. The Chapter 11 plan provides how creditors' claims will be treated by the estate. Under the Chapter 11 plan creditors and shareholders are divided into classes of holders sharing substantially similar claims or interests. Chapter 11 plans must meet certain standards to be confirmed. Even if a plan is accepted by the requisite vote of all impaired classes, it must be found by the court to be in 'the best interests of creditors' (providing each dissenting class member with at least what would have been recovered in a liquidation). As to a class that rejects the plan, the plan must satisfy the Bankruptcy Code's 'fair and equitable' requirement (described above).

---

of parties in interest in bankruptcy cases, oversees related administrative functions and acts to ensure compliance with applicable laws and procedures. It also identifies and helps investigate bankruptcy fraud and abuse in coordination with various law enforcement agencies. The United States trustee is distinct from the trustee appointed to administer Chapter 7 and certain Chapter 11 cases.

21 11 U.S.C. §§ 1121(b), (d)(2)(A).

The plan of reorganisation is submitted to a vote of the various creditor and shareholder classes. If at least one class that stands to receive less than their asserted claim (an 'impaired' class) votes in support of confirmation, excluding insider yes votes, the plan can be confirmed over the dissent of another impaired class. Dissenting classes can thus be 'crammed down' so long as the plan is fair and equitable and does not discriminate among similarly situated creditors. Once the plan is approved by the necessary stakeholders, a court can confirm a plan so long as certain other prerequisites of Section 1129 of the Bankruptcy Code are satisfied.

#### *Chapter 15*

Chapter 15 is the Bankruptcy Code's codification of the United Nations Commission on International Trade Law (UNCITRAL) Model Law and allows a foreign debtor, through its 'foreign representative' to commence an ancillary proceeding in the United States to support its foreign insolvency proceeding.

### iv Starting proceedings

As set forth above, the US Bankruptcy Code provides for different types of insolvency proceedings. Not all of these proceedings are available for all types of companies. Specifically, insurance companies and banking institutions cannot file for Chapter 7 or Chapter 11 bankruptcy; a railroad can be a debtor under Chapter 11 but not Chapter 7, and stockbrokers and commodity brokers can file for bankruptcy under Chapter 7 but not Chapter 11. Regardless of the type of bankruptcy case, under Section 301(a) of the Bankruptcy Code, a debtor voluntarily commences a plenary insolvency proceeding by filing a petition with the bankruptcy court.

A bankruptcy proceeding can also be commenced against a debtor company, which is known as an 'involuntary' bankruptcy case. An involuntary case is commenced upon the filing of a petition with the bankruptcy court by three or more holders[22] of non-contingent, undisputed claims, and such claims aggregate at least US$15,775 more than the value of any lien on property of the debtor securing such claims.[23] A bankruptcy court will order relief against the debtor in an involuntary case only if the debtor is generally not paying its debts as they become due, unless such debts are the subject of a *bona fide* dispute as to liability or amount,[24] or if a custodian as described in Section 303(h)(2) of the Bankruptcy Code has been appointed.

A Chapter 15 case is commenced when the foreign representative of the debtor company files a petition for recognition of the foreign proceeding with the US bankruptcy court.[25]

### v Control of insolvency proceedings

Under Chapter 7, the insolvency proceeding is controlled by a trustee who is appointed by the United States Trustee or elected by the debtor's creditors to administer the debtor's assets. The 'Chapter 7 trustee' is responsible for, among other things, 'collect[ing] and reduc[ing] to money the property of the estate for which such trustee serves, and closes such estate as

22 Only a single holder is necessary to commence an involuntary case if there are fewer than 12 overall holders of claims against the debtor.

23 11 U.S.C. §§ 303(b)(1), (2).

24 11 U.S.C. § 303(h)(1).

25 11 U.S.C. §§ 1504, 1515.

expeditiously as is compatible with the best interests of parties in interest'.[26] Although the Chapter 7 trustee can continue business operations for a short period if value is maximised by doing so, generally, once a Chapter 7 trustee has been appointed, the debtor company is expeditiously liquidated.

Chapter 11 proceedings allow for the debtor's existing management and directors to stay in place and operate the business during the bankruptcy case. For this reason, a debtor in a Chapter 11 proceeding is referred to as the 'DIP'. The board of directors' primary duties in connection with an insolvency proceeding are the same as they are outside bankruptcy[27] – to maximise the value of the company.[28] The key distinction is that when a company is insolvent, the creditors, not the shareholders, are the residual beneficiaries of the board's fiduciary duties to the corporation and are, thus, able to bring actions for breach of fiduciary duty.[29] 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.[30]

During a Chapter 7 or Chapter 11 case, the DIP or trustee may take actions that are in the ordinary course of the debtor's business without approval of the bankruptcy court. Actions after entry of the order for relief outside the ordinary course of business are subject to bankruptcy court approval.

In the United States, bankruptcy courts are courts of limited jurisdiction. This is because, unlike federal district and circuit courts, bankruptcy courts were not created under Article III of the United States Constitution. Instead, Congress created the bankruptcy courts because they were 'necessary and proper' to effectuate Congress's enumerated powers to enact bankruptcy law. For this reason, bankruptcy courts may only oversee matters that are 'core' to the bankruptcy case unless the parties knowingly and voluntarily consent to adjudication of a 'non-core' matter by the bankruptcy court. Without consent, matters that are not 'core' to the insolvency proceeding must be decided by a federal district court. Appeals of bankruptcy

26 11 U.S.C. §704(a)(1).

27 The Supreme Court has observed that 'the willingness of courts to leave debtors in possession "is premised upon an assurance that the officers and managing employees can be depended upon to carry out the fiduciary responsibilities of a trustee" '. *Commodity Futures Trading Comm'n v. Weintraub*, 471 US 343, 355 (1985), *citing Wolf v. Weinstein*, 372 US 633, 651 (1963). Officers and directors may therefore owe fiduciary duties to the estate even if their fiduciary duties to the company were limited under state law prior to the bankruptcy. *In re Houston Regional Sports Network, LP*, Case No. 13-35998 (Bankr. S.D. Tex. 12 February 2014).

28 'Even when [a] company is insolvent the board may pursue, in good faith, strategies to maximise the value of the firm.' *Trenwick America Litig Trust v. Ernst & Young*, 906 A.2d 168, 175 (Del. Ch. 2006), *aff'd*, 931 A.2d 438 (Del. 2007).

29 Marshall S Huebner and Darren S Klein, 'The Fiduciary Duties of Directors of Troubled Companies', American Bankruptcy Institute Journal, Vol. XXXIV, No. 2 (February 2015).

30 11 U.S.C. § 1104.

court decisions are generally heard, in the first instance, by the federal district court sitting in the same jurisdiction as the applicable bankruptcy court.[31] Bankruptcy court jurisdiction is the subject of much debate under a line of recent Supreme Court cases.[32]

Among other things, the bankruptcy court manages filing deadlines, hears evidence on contested issues and issues orders regarding requests for relief by the parties. Nevertheless, and despite the involvement of the court, many aspects of the bankruptcy process are negotiated by the parties outside the courtroom and the DIP or trustee is free to enter into settlement agreements, which are then subject to the approval of the bankruptcy court.[33]

### vi Special regimes

Securities broker-dealers are not eligible for relief under Chapter 11. Instead, insolvent broker-dealers may liquidate under Chapter 7 of the Bankruptcy Code,[34] but are more likely to be resolved in a proceeding under the Securities Investor Protection Act of 1970 (SIPA).[35] SIPA proceedings are liquidation proceedings, and upon commencement of the SIPA proceedings, the broker-dealer will cease to conduct business as a broker-dealer, subject to certain limited exceptions. In SIPA proceedings, a trustee (the SIPA Trustee) will take control of all property, premises, bank accounts, records, systems and other assets of the broker-dealer and displace management. The SIPA Trustee's primary duties will be to marshal assets, recover and return customer property (including through effectuating bulk account transfers to a solvent broker-dealer) and liquidate the broker-dealer.

In SIPA proceedings, the provisions of Chapters 1, 3 and 5 and Subchapters I and II of Chapter 7 of the Bankruptcy Code will also apply, to the extent consistent with SIPA, and the SIPA Trustee will generally be subject to the same duties as a trustee under Chapter 7 of the Bankruptcy Code with certain limited exceptions regarding securities that are property of the customers of the broker-dealer. If the broker-dealer is a registered futures commission merchant under the Commodity Exchange Act of 1936,[36] the SIPA Trustee will

31 The 1st, 6th, 8th, 9th, and 10th Circuits have established Bankruptcy Appellate Panels (BAPs), which are panels composed of three bankruptcy judges that are authorised to hear appeals of bankruptcy court decisions. These panels are units of the federal courts of appeals. BAP judges continue to serve as active bankruptcy judges in addition to fulfilling their BAP duties. If a BAP has been established in a given circuit, the BAP will hear an appeal of a bankruptcy court decision unless a party to the appeal elects to have it heard by the district court. Decisions of the BAP may be appealed to the appropriate circuit court of appeals. United States Courts, Bankruptcy Appellate Panels, available at www.uscourts.gov/FederalCourts/UnderstandingtheFederalCourts/CourtofAppeals/BankruptcyAppellatePanels.aspx.

32 See *Stern v. Marshall*, 546 U.S. 462 (2011) (holding that the bankruptcy court lacked constitutional authority to enter a final judgment on a debtor's tortious interference counterclaim even though the counterclaim was a 'core proceeding' under 28 U.S.C. § 157(b)(2)), *Exec. Benefits Ins. Agency v. Arkison*, 134 S. Ct. 2165 (2014) (providing that, when a 'Stern claim' is encountered, the bankruptcy court may issue proposed findings of facts and conclusions of law to be reviewed de novo by the district court), *Wellness Int'l Network, Ltd v. Sharif*, 135 S. Ct. 1932 (2015) (holding that bankruptcy judges may enter final judgment on claims that seek only to add to the bankruptcy estate and would exist outside of bankruptcy proceedings if the parties knowingly and voluntarily consent).

33 Fed. R. Bankr. P. 9019.

34 11 U.S.C. §§ 741–753.

35 Pub. L. No. 91-598 (1970), codified at 15 U.S.C. §§ 78aaa et seq.

36 Pub. L. No. 74-675 (1936), codified at 7 U.S.C § 1 et seq.

have additional obligations under the Part 190 regulations[37] 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.[38] 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.[39]

Additionally, the Dodd–Frank Wall Street Reform and Consumer Protection Act[40] established the Orderly Liquidation Authority (OLA), which provides that the FDIC may be appointed as receiver for a top-tier holding company of a failing financial institution that poses a systemic risk to financial stability in the United States. OLA sets forth the procedures that the federal government can take to cause the wind-down of financial institutions that were once considered 'too big to fail'. Pursuant to OLA, the FDIC can exercise many of the same powers it has as a bank receiver to liquidate systemically risky financial institutions. Moreover, under the Dodd-Frank Act, institutions that may be subject to OLA must provide the FDIC with resolution plans (commonly known as 'living wills'), to serve as road maps in the event the financial institution requires resolution.

State law governs all regulation of insurance companies, including the resolution of insolvent insurance companies.[41]

The Bankruptcy Code has mechanisms for dealing with the insolvency proceedings of corporate groups and there is no special regime to address these types of filings. If multiple affiliated companies in the same corporate group seek relief under the US Bankruptcy Code, they will file separate bankruptcy petitions but will often seek joint administration of the various bankruptcy proceedings, meaning that the bankruptcy cases of each member of the group will be overseen by the same judge, which provides for greater efficiency in the administration of the cases. Importantly, joint administration does not mean that the assets and liabilities of the group will be combined. Rather, corporate separateness will be observed despite the joint administration of the cases, unless there is cause to breach corporate separateness and 'substantively consolidate' the assets and liabilities of the debtor.

### vii Cross-border issues

As part of the 2005 Bankruptcy Abuse and Consumer Protection Act, the United States enacted Chapter 15 of the Bankruptcy Code, which is based on the UNCITRAL Model Law on Cross-Border Insolvency (the Model Law).[42] Chapter 15 governs how a US court should

37 17 C.F.R. Part 190.

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

39 Federal Deposit Insurance Company, 'Overview: The Resolution Handbook at a Glance', available at www.fdic.gov/about/Freedom/drr_handbook.pdf#page=10.

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

41 11 U.S.C. § 1011.

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

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[43] and the debtor's foreign representative enjoys certain powers and privileges under the Bankruptcy Code, such as the right to intervene in any court proceeding in the United States in which the foreign debtor is a party, the right to sue and be sued in the United States on the foreign debtor's behalf, the authority to operate the debtor's business and the authority to initiate avoidance actions in a case pending under another chapter of the Bankruptcy Code.

The bar for accessing plenary proceedings in the US bankruptcy courts is relatively low. A company can be eligible to commence a Chapter 11 proceeding in a US bankruptcy court so long as it is incorporated or has any property or operations in the United States. Because of the perceived debtor-friendliness of US bankruptcy courts and the courts' vast experience in restructuring large multinational companies, many multinational companies are filing for Chapter 11, even if their principal place of business, or centre of main interest, is located outside the United States. This trend has been particularly prevalent in the shipping industry. For example, the Taiwan-based TMT Group opened an office in Houston only a few days before filing for Chapter 11 protection in the United States Bankruptcy Court for the Southern District of Texas.[44]

## II INSOLVENCY METRICS

Since the global financial crisis, which saw gross domestic product adjusted for inflation (real GDP) drop 2.8 per cent from 2008 to 2009, the US economy has experienced a period of slow growth. Real GDP increased in the fourth quarter of 2016 at an average annual rate of 2.1 per cent and in the first quarter of 2017 at an average annual rate of 1.4 per cent.[45] Furthermore, reported unemployment continues to abate: the unemployment rate for June 2017 was 4.4 per cent, down from 4.9 per cent in June of the previous year and from its October 2009 high of 10 per cent.[46]

Additionally, credit has been readily available to US businesses. In 2015, US corporations issued approximately US$1.49 trillion in bonds, down from the US$1.61 trillion issued in 2015 but in line with the US$1.49 trillion issued in 2014.[47] During the

43 11 U.S.C. § 1520.

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

45 http://bea.gov/newsreleases/national/gdp/2017/pdf/gdp1q17_3rd.pdf.

46 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.

47 Federal Reserve Board, New Securities Issues, US Corporations, available at www.federalreserve.gov/econresdata/releases/corpsecure/current.htm.

first seven months of 2017, over US$1 trillion worth of bonds have been issued.[48] Average interest rates have risen slightly from their historic lows; the 10-year Treasury rate is currently around 2.27 per cent and has ranged between 2.14 per cent and 2.62 per cent in the current calendar year,[49] while in 2016, the rate ranged between 1.38 per cent and 2.60 per cent.[50] It is currently anticipated that interest rates will gradually rise in 2017 and 2018, as the Board of Governors of the Federal Reserve System (the Federal Reserve Board) continues scaling back its accommodative policy.[51]

US equity markets, however, experienced a slowdown in 2015 and 2016, caused in part, according to some commentators, by a combination of dimming global-growth expectations, rich valuations and general uncertainty regarding the Federal Reserve's near-term plans for its quantitative easing programme.[52] Specifically, US equity and equity-related proceeds totalled US$180 billion on 716 deals in 2016,[53] which represents a 21.5 per cent decrease in proceeds compared to the US$229.5 billion raised in 2015[54] and approximately 16 per cent fewer deals than the 848 in 2015.[55] US equity and equity-related proceeds in 2015 were approximately 16 per cent less than the US$258.5 billion raised in 2014[56] and 1.9 per cent less than the US$233.8 billion raised in 2013.[57] Similarly, the number of deals in 2016 was 29 per cent less than the 1,008 in 2014 and 24.6 per cent less than the 949 in 2013.[58]

US corporate default rates have fallen since the first half of 2016. Moody's measured the US speculative-grade default rate for the second quarter of 2017 at 3.2 per cent,[59] compared to default rates of 3.9 per cent[60] in the first quarter and 4.7 per cent in the second quarter of

48 Id.

49 United States Department of Treasury, Daily Yield Curve Rates, available at https://www.treasury.gov/resource-center/data-chart-center/interest-rates/Pages/TextView.aspx?data=yieldYear&year=2017.

50 United States Department of Treasury, Daily Yield Curve Rates, available at https://www.treasury.gov/resource-center/data-chart-center/interest-rates/Pages/TextView.aspx?data=yieldYear&year=2016.

51 David Harrison, 'Fed's Janet Yellen Era of Stimulative Monetary Policy is Ending', *The Wall Street Journal* (11 April 2017), available at https://www.wsj.com/articles/federal-reserve-chairwoman-janet-yellen-sees-monetary-policy-shifting-1491865770.

52 Corrie Driebusch, 'IPO Market Comes to a Standstill', *The Wall Street Journal* (30 January, 2016) available at https://www.wsj.com/articles/ipo-market-comes-to-a-standstill-1454178166.

53 Thomson Reuters, Global Equity Capital Markets Review: Full Year 2016 (last accessed 18 July 2017), available at http://share.thomsonreuters.com/general/PR/ECM_4Q_2016_E.pdf.

54 Thomson Reuters, Global Equity Capital Markets Review: Full Year 2015 (last accessed 18 July 2017), available at http://dmi.thomsonreuters.com/Content/Files/4Q2015_Global_Equity_Capital_Markets_Review.pdf.

55 Id.

56 Thomson Reuters, Global Equity Capital Markets Review: Full Year 2014 (last accessed 18 July 2017), available at http://dmi.thomsonreuters.com/Content/Files/4Q2014_Global_Equity_Capital_Markets_Review.pdf.

57 Thomson Reuters, Global Equity Capital Markets Review: Full Year 2013 (last accessed 18 July 2017), available at http://dmi.thomsonreuters.com/Content/Files/Q2013_Thomson_Reuters_Equity_Capital_Markets_Review.pdf.

58 Id.

59 Moody's Investor Services Announcement: Global speculative-grade default rate down again in Q2 2017 (13 July 2017), available at https://www.moodys.com/research/Moodys-Global-speculative-grade-default-rate-down-again-in-Q2--PR_369664.

60 Id.

2016.[61] Similarly, Moody's indicated that the leveraged loan default rate for April and May of 2017 was 2.1 per cent and 1.5 per cent respectively,[62] compared to the 2016 first quarter rate of 2.8 per cent.[63]

Although the frequency of business filings remains well below its peak its peak in 2010,[64] many businesses continue to seek bankruptcy relief owing to significant challenges in sectors of the US economy. In 2016, for example, a total of 99 public companies, with aggregate pre-petition assets of approximately US$105 billion, filed Chapter 7 or Chapter 11 bankruptcy proceedings,[65] up from the 79 such companies that filed in 2015, with aggregate pre-petition assets of approximately US$77.1 billion.[66] Many of the most significant filings in recent years have involved the energy industry – including SunEdison, Inc (US$11.5 billion in assets), Peabody Energy Corporation (US$11 billion in assets) and LINN Energy, LLC (approximately US$10 billion in assets).[67] As discussed in greater detail below, the retail industry also suffered a significant downturn in 2017 owing, some commentators say, to the inability of many 'brick-and-mortar' retailers to adapt to the rapid proliferation of e-commerce and online shopping trends.[68] The energy and retail industries have continued to produce the most significant bankruptcies in 2017.[69]

Some 157 companies commenced Chapter 15 proceedings in the 12 months ending on 31 March 2017,[70] which is a 52.4 per cent increase from the 103 Chapter 15 cases that were initiated during the 12 months ending on 31 March 2016.[71]

---

61 Moody's Investor Services Announcement: Global speculative-grade default rate continues to rise (8 March 2016), available at https://www.moodys.com/research/Moodys-Global-speculative-grad e-default-rate-continues-to-rise--PR_345304.

62 Moody's Investor Services Announcement: Global speculative-grade default rate continues to rise (9 June 2017), available at https://www.moodys.com/research/Moodys-Global-speculative-grade-default-rate-continues-downward-trend-in--PR_368021.

63 Moody's Investor Services Announcement: Global speculative-grade default rate to surpass historic average in second quarter (April 11, 2016), available at https://www.moodys.com/research/Moodys-Global-speculative-grade-default-rate-to-surpass-historical-average--PR_347054.

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

65 PRWeb, *Bankruptcy Data Releases its Q4 2016 Report of Business Bankruptcy Filings* (23 January 2017), available at www.prweb.com/releases/2017/01/prweb14001978.htm.

66 New Generation Research, Inc., 2016 Corporate Bankruptcy Recap at 5, available at http://bankruptcydata.com/public/assets/uploads/pdf/PR_011217.pdf.

67 The Turnaround Letter, Largest Bankruptcies of 2016, available at www.turnaroundletter.com/largest-bankruptcies-this-year.

68 Kim Bhasin, 'Retailers are Going Bankrupt at a Record Pace,' Bloomberg (24 April 2017, 12:00 pm), available at https://www.bloomberg.com/news/articles/2017-04-24/retailers-are-going-bankrupt-at-a-record-pace.

69 The Turnaround Letter, Largest Bankruptcies of 2017, available at www.turnaroundletter.com/largest-bankruptcies-this-year.

70 United States Courts, US Bankruptcy Courts – Business and Nonbusiness Cases Commenced, by Chapter of the Bankruptcy Code, During the 12-Month Period Ending 31 March 2017.

71 United States Courts, US Bankruptcy Courts – Business and Nonbusiness Cases Commenced, by Chapter of the Bankruptcy Code, During the 12-Month Period Ending 30 June 2016.

## III PLENARY INSOLVENCY PROCEEDINGS

### i Avaya Inc

Avaya Inc, headquartered in Santa Clara, CA, is a global provider of contact centre, unified communications and networking products and services. Avaya serves over 200,000 direct and indirect customers, including multinational enterprises, small and medium-sized businesses as well as government organisations operating in a diverse range of industries.[72]

On 9 January 2017, Avaya Inc, together with certain of its affiliates, filed for Chapter 11 bankruptcy protection in the US Bankruptcy Court for the Southern District of New York. Avaya's funded debt obligations, totalling more than US$6 billion, included:

*a* a domestic ABL credit facility of approximately US$55 million;
*b* a foreign ABL credit facility of approximately US$50 million;
*c* a secured cash flow credit facility consisting of approximately US$3.235 billion in outstanding term loans;[73]
*d* approximately US$1.299 billion outstanding in first lien notes; and
*e* approximately US$1.384 billion outstanding in second lien notes.[74]

The original plan of reorganisation submitted by Avaya in April 2017 was not supported by certain large holders of Avaya's first or second lien debt, some of whom believed that Avaya had not adequately engaged with various restructuring counterproposals submitted to it after the original plan was filed.[75] In September 2017, Avaya announced that over two-thirds of its first lien lenders had agreed to a proposal memorialised in its first amended plan support agreement.[76] Avaya's second lien noteholders continue to object to the amended plan based on alleged 'wildly disparate treatment' of the three unsecured classes of claims and the breadth of certain releases provided thereunder. As of the date of this publication, the confirmation hearing is scheduled to occur on 15 November 2017.

### ii Bonanza Creek Energy, Inc

Bonanza Creek Energy, Inc (Bonanza), headquartered in Denver, Colorado, is an independent oil and natural gas company engaged in the acquisition, exploration, development and production of oil and associated liquids-rich natural gas in the United States. Bonanza's assets and operations are concentrated primarily in northern Colorado, including in (1) the Wattenberg Field, focused on the Niobrara and Codell formations, and (2) the North Park

72 First Day Declaration of Eric Koza, Case No. 17-10089 at 2, ECF No. 22 (Bankr. S.D.N.Y 19 January 2017).

73 The pre-petition cash flow credit facility also provides for a revolving line of credit; as of the petition date, no revolving borrowings were outstanding thereunder.

74 First Day Declaration of Eric Koza, Case No. 17-10089 at 18, ECF No. 22 (Bankr. S.D.N.Y 19 January 2017).

75 'Avaya 1st Lien Group Blasts Debtors' "Catering" to PBGC, Equity Sponsors; Presses for 30-Day Exclusivity Extension for Company to Become "Honest Broker"', Reorg Research (16 May, 2017), available at https://platform.reorg-research.com/app#company/2364/intel/view/35433.

76 'Avaya PSA Executed by More Than Two-Thirds of 1L Debt', Reorg Research (12 September, 2017), available at https://platform.reorg-research.com/app#company/2364/intel/view/41728.

Basin in Jackson County, Colorado. In addition, Bonanza owns and operates oil-producing assets in southern Arkansas, including assets located in the Dorcheat Macedonia Field and the McKamie Patton Field.[77]

On 4 January 2017, Bonanza and six of affiliates filed for Chapter 11 bankruptcy protection in the US Bankruptcy Court for the District of Delaware. As of the petition date, the debtors funded debt obligations included:

*a* secured indebtedness, comprised of US$191.7 million in outstanding obligations under its reserve-based lending facility; and

*b* unsecured indebtedness comprising US$800 million in senior notes.[78]

The market forces affecting the broader oil and natural gas industry proved particularly challenging for Bonanza, which competes with a substantial number of companies that have greater resources as well as a number of sources of alternative energy and fuel.[79] Despite a series of measures taken to right size the company in light of the worsening macroeconomic environment, Bonanza ultimately sought Chapter 11 protection.

On 7 April 2017, Bonanza received court approval for a bankruptcy plan, which provided for the equitisation of approximately US$867 million of Bonanza's unsecured debt, the elimination of over US$50 million in annual cash interest and the infusion of US$200 million in new capital pursuant to a rights offering backstopped by certain of Bonanza's pre-petition creditors. The plan was accepted by 100 per cent of the ballots of all voting classes, and Bonanza emerged from bankruptcy on 28 April 2017.[80]

### iii Memorial Production Partners LP

Memorial Production Partners LP (MEMP) is an oil and gas company headquartered in Houston, Texas, primarily engaged in the acquisition, development, and production of oil and natural gas properties. MEMP's oil and natural gas assets consist primarily of producing oil and natural gas properties located in Texas, Louisiana, Wyoming, and offshore Southern California. Most of MEMP's oil and natural gas properties are located in large, mature oil and natural gas reservoirs with well-known geologic characteristics and long-lived, predictable production profiles and modest capital requirements. In addition to its interests in oil and gas reserves, a significant asset of MEMP prior to the petition date was its portfolio of in-the-money hedges, and maintaining a robust hedge portfolio has been a significant component of MEMP's business since its inception.[81]

On 16 January 16, 2017, MEMP filed for bankruptcy protection under Chapter 11 in the US Bankruptcy Court for the Southern District of Texas Houston Division. As of the petition date, the debtors funded debt obligations included:

---

77 Declaration of Scott Fenoglio, Senior Vice President and Finance and Planning and Principal Financial Officer of Bonanza Creek Energy, Inc, in support of First Day Pleadings, Case No. 17-10015 (KJC), ECF No. 16 at 5-8 (Bankr. D. Del January 2017).

78 Id. at 9–11.

79 Id. at 11–17.

80 'Bonanza Creek Achieves Plan Confirmation, Approval of Procedures for $200M Rights Offering; Debtors "Hope" to Launch Rights Offering "as Early as This Afternoon"', Reorg Research (7 April, 2017), available at https://platform.reorg-research.com/app#company/4126/intel/view/33349.

81 Declaration of Robert L Stillwell, vice president and chief financial officer of Memorial Production Partners GP LLC, in support of First Day Pleadings, Case No. 17-30262, ECF No. 17 at 4-13 (Bankr. S.D. Tex. 2017).

*a* secured indebtedness comprising US$457.4 million outstanding under their reserve-based lending facility; and

*b* senior unsecured notes totalling approximately US$1.12 billion.[82]

On the first day of the confirmation hearing, certain existing equityholders opposed the debtors' plan valuation, asserting that total enterprise value was US$1.651 billion in contrast to the US$800 million estimate provided by the debtors' financial advisers. After a series of hard-fought negotiations in which, among other things, the debtors' management team agreed to relinquish certain benefits under the management incentive plan in exchange for the support of old equity, the debtors' second amended plan was confirmed on 14 April 2017.[83] MEMP emerged from Chapter 11 on 4 May 2017, as Amplify Energy Corp. with approximately US$430 million in total debt outstanding and total liquidity of US$72 million.[84]

### iv Gymboree

The Gymboree Corporation is a speciality retailer that operates stores that sell high-quality apparel and accessories for children under the Gymboree, Gymboree outlet, Janie and Jack and Crazy 8 brands. Headquartered in San Francisco, California, the company's products and services expanded to approximately 1,300 company-operated stores[85] and outlets in the US and globally, and are available through retail stores, wholesale channels and e-commerce websites. Gymboree's operations related to its products include designing, sourcing, marketing and selling its own merchandise.[86]

On 11 June 2017, Gymboree and certain of its affiliates filed for bankruptcy protection under Chapter 11 in the US Bankruptcy Court for the Eastern District of Virginia.[87] As of the petition date, the debtors reported approximately US$755 million in total assets and US$1.36 billion in total liabilities,[88] with funded obligations that include:

*a* a senior secured asset-based revolving credit facility of US$18 million;

*b* asset-based term loan of US$47.5 million;

*c* senior secured term loan of US$788.8 million; and

*d* unsecured senior notes of US$171 million.[89]

82 Id. at 13–19.

83 'Judge Isgur Confirms Memorial Production Amended Plan Featuring Increased Equityholder Recoveries', Reorg Research (14 April, 2017), available at https://platform.reorg-research.com/app#company/4432/intel/view/33641.

84 'Memorial Production Partners Emerges from Chapter 11', Reorg Research (4 May 2017), available at https://platform.reorg-research.com/app#company/4432/intel/view/34814.

85 Subsequently reduced to approximately 970 following the closing of 350 stores in July 2017.

86 Declaration of James A. Mesterharm, Chief Restructuring Officer of The Gymboree Corporation in support of First Day Motion, Case No. 17-32986 at 1–7, 15 ECF No. 30 (Bankr. E.D. Va. 12 June 2017).

87 Id. at 2–3.

88 Voluntary petition, The Gymboree Corporation, Case No. 17-32986 at 6, ECF No. 1 (Bankr. E.D. Va. 11 June 2017)

89 Declaration of James A. Mesterharm, Chief Restructuring Officer of The Gymboree Corporation in support of First Day Motion, Case No. 17-32986 at 19, ECF No. 30 (Bankr. E.D. Va. 12 June 2017).

According to Gymboree, it declared bankruptcy because of adverse macro-trends, discussed at greater length in Section V, that are typical of the challenges facing the broader retail industry, including the general shift away from brick-and-mortar stores to online retail channels.[90]

Gymboree's restructuring plan was confirmed on 7 September 2017, on a fully consensual basis. The plan provides for a reduction of Gymboree's debt by US$1 billion, an infusion of up to US$115 million in new money and a rationalisation of the debtors' retail footprint.[91]

### v Payless

Payless is an everyday footwear retailer with a strategy of selling low-cost, high-quality, fashion-forward family footwear. Its branding relationships consists of brand licence partnerships, design partnerships, and its own exclusive brands, such as American Eagle and Brash. Headquartered in Topeka, Kansas, Payless operates in over 30 countries through its three business segments: North America, Latin America, and franchised stores. Payless carries out its business model by identifying and developing on-trend merchandise, developing strong relationships with branding partners and maintaining an overseas sourcing network that can develop and produce products at a scale and cost necessary to serve Payless' customers.[92]

On 4 April 2017, Payless and several of its affiliates filed for bankruptcy protection under Chapter 11 in the US Bankruptcy Court for the Eastern District of Missouri.[93] As of the petition date, the debtors funded debt obligations included:

*a* an asset-backed revolving credit facility of US$187 million;
*b* a first lien term loan facility of US$506 million;
*c* a second term loan facility of US$145 million; and
*d* trade claims of approximately US$240 million.[94]

The events leading to Payless's bankruptcy involved inventory over-purchases from 'antiquated systems and processes' followed by inventory flow disruptions, industry-wide declines in sales and traffic, and a shift away from brick-and-mortar stores to online retail channels, all which put pressure on Payless's liquidity and profitability.[95]

The debtors' restructuring plan was accepted by every voting class, and approved by over 99.2 per cent in amount and 96.1 per cent in number of creditors who voted on it[96] and confirmed by the bankruptcy court on 24 July 2017. Pursuant to the plan, Payless's pre-petition first lien and second lien lenders received 100 per cent of the new equity in reorganised Payless on account of their claims.[97] General unsecured classes recovered

90 Id. at 4.
91 Id.
92 Declaration of Michael Schwindle, Chief Financial Officer of Payless ShoeSource Inc. in support of First Day Pleadings, Case No. 17-42267 (659) at 4-11, ECF No. 34 (Bankr. E.D. Mo. 5 April 2017).
93 Voluntary petition, Payless ShoeSource Inc, Case No. 17-42267 (659) at 4, ECF No. 1 (Bankr. E.D. Mo. 4 April 2017)
94 Declaration of Michael Schwindle, Chief Financial Officer of Payless ShoeSource Inc in support of First Day Pleadings, Case No. 17-42267 (659) at 13-14, ECF No. 34 (Bankr. E.D. Mo. 5 April 2017).
95 Id. at 3, 18.
96 Id. at 1.
97 Fifth Amended Joint Plan of Reorganization, Payless ShoeSource Inc, Case No. 17-42267 (659) at 25, ECF No. 1507 (Bankr. E.D. Mo. 21 July 2017).

approximately 18.1 per cent to 22.1 per cent, far more than any amounts such creditors would have received in a liquidation scenario, as contended by Payless.[98] Payless emerged from Chapter 11 on 10 August 2017.

### vi Rue21

Rue21 is a specialty fashion retailer of girls' and guys' apparel and accessories. Its brands include rue21, true, etc!, ruebeauté!, Carbon, rue+, and ruebleu, each of which focus on providing quality yet affordable young adult clothing to teenagers and young adults in small and mid-size markets. Headquartered in Warrendale, Pennsylvania, the company sells its merchandise in 48 states through its online store and its 1,179 brick-and-mortar stores located in strip centres, regional malls, and outlet centres. Rue21's operations related to its products involve designing, sourcing, marketing, and selling its own merchandise.[99]

On June 11, 2017, rue21 and several of its affiliates filed for bankruptcy protection under Chapter 11 in the US Bankruptcy Court for the Western District of Pennsylvania.[100] As of the petition date, the debtors funded debt obligations included:

*a* a senior secured asset-based revolving credit facility of US$72 million;
*b* senior secured term loan of US$521 million; and
*c* unsecured senior notes of US$239 million.[101]

According to management, rue21 filed for bankruptcy because of general trends faced by the retail industry, such as a decline in in-store transactions because of online shopping, and trends more specific to rue21, such as an evolution of customer tastes.[102]

Rue21's plan reflects the restructuring support agreement that was executed by the debtors and its lenders holding 96.8 per cent of the company's secured term loan and 60.2 per cent of the company's unsecured notes.[103] The plan calls for a US$125 million exit ABL facility and US$50 million exit term facility, with the US$100 million roll-up portion of the DIP term facility exchanged for 33 per cent of the reorganised equity, pre-petition lenders to receive 63 per cent, and general unsecured creditors to receive 4 per cent.[104]

### vii Toys 'R' Us

Toys 'R' Us, Inc is a speciality retailer of toys and baby products. The company sells products in the baby, core toy, entertainment, learning and seasonal categories through its retail locations and the Internet. The company operates 1,602 stores and licensed an additional 212 stores. These stores are located in 37 countries and jurisdictions around the world under

98 Debtor's Brief in Support of Fifth Amended Joint Plan of Reorganization, Payless ShoeSource Inc., Case No. 17-42267 (659) at 3, ECF No. 1548 (Bankr. E.D. Mo. 21 July 2017).

99 Declaration of Todd M. Lenhart, Acting Chief Financial Officer of rue21, Inc. in support of First Day Motion, Case 17-22045 (GLT) at 3-5, ECF No. 8 (Bankr. W.D. Pa. 16 May 2017).

100 Voluntary petition, rue21, Inc., Case No. 17-22045 (GLT) at 4, ECF No. 1 (Bankr. W.D. Pa. 15 May 2017).

101 Declaration of Todd M. Lenhart, Acting Chief Financial Officer of rue21, Inc. in support of First Day Motion, Case 17-22045 (GLT) at 13-14, ECF No. 8 (Bankr. W.D. Pa. 16 May 2017).

102 Id. at 7.

103 Bankruptcy: Rue21 Files Reorg Plan; Disclosure Statement Hearing Set for July 10, LeveragedLoan (5 June 2017), available at www.leveragedloan.com/bankruptcy-rue21-files-reorg-plan-disclosure-statement-hearing-set-july-10/.

104 Id.

the Toys 'R' Us, Babies 'R' Us and FAO Schwarz banners. In addition, the company operates Toys 'R' Us Express stores, smaller format stores primarily open on a short-term basis during the holiday season. The company also owns and operates websites, including Toysrus.com, Babiesrus.com, eToys.com, FAO.com and toys.com, as well as other internet sites.[105]

On 18 September 2017, Toys 'R' Us filed for Chapter 11 in the US Bankruptcy Court for the Eastern District of Virginia, Richmond Division.[106]

## IV ANCILLARY INSOLVENCY PROCEEDINGS

### i Oi

Oi SA is a Brazilian telecommunications company that, along with certain of its affiliates, filed for Brazil's largest ever bankruptcy in June 2016, listing approximately 65.4 billion reais (US$19.26 billion) in outstanding debt as of the filing date. Shortly thereafter, the debtors filed a Chapter 15 petition with the US Bankruptcy Court for the Southern District of New York seeking, among other things, recognition of the Brazilian proceeding as a 'foreign main proceeding' under Chapter 15 of the Bankruptcy Code. [107] Although Oi has no sizeable assets in the United States, it has strategic commercial agreements with large US telecom carriers related to interconnection fees.[108]

In April 2017, a Dutch court ordered that two of Oi's subsidiaries enter bankruptcy and begin proceedings to liquidate and repay creditors,[109] a ruling which was affirmed on appeal by the Dutch Supreme Court in July 2017. The two subsidiaries ordered to liquidate (Oi Brasil Holdings Coöperatief UA and Portugal Telecom International Finance BV) were responsible for issuing approximately €5.8 billion (US$6.2 billion), representing most of the debtors' outstanding bond debt.[110] The Dutch case caused a split among the company's bondholders. While one group of investors formed the 'International Bondholder Committee' to press their case in the Netherlands, another group advised by Moelis & Co focused exclusively on the Brazilian case.[111]

In May 2017, certain of Oi's creditors filed a motion in the US Bankruptcy Court for the Southern District of New York pressuring the debtors to consider an alternative proposal to their current restructuring plan. Oi's plan proposed giving financial creditors 25 per cent

105 Toys 'R' Us 'About Us' (2017), available at https://m.toysrus.com/skava/static/customerservices.html?serviceType=aboutus.

106 Voluntary petition, Toys 'R' Us, Inc, Case No. 17-34666 (KLP), ECF No. 1 (Bankr. E.D. Va. 18 September 2017).

107 Rogerio Jelmayer and Luciana Magalhaes, 'Telecom Oi Files Largest Bankruptcy Request in Brazil's History', *The Wall Street Journal* (20 June, 2016) available at https://www.wsj.com/articles/telecom-oi-files-largest-bankruptcy-request-in-brazils-history-1466463734.

108 Ana Mano and Alberto Alerigi, 'Brazil Oi creditors file U.S. motion as bankruptcy negotiations continue', Thomson Reuters (23 May 2017) available at www.reuters.com/article/us-oi-restructuring/brazil-oi-creditors-file-u-s-motion-as-bankruptcy-negotiations-continue-idUSKBN18J35D.

109 'Dutch court puts two units of Brazil's Oi into bankruptcy proceedings', Thomson Reuters (19 April 2017), available at www.reuters.com/article/us-oi-sa-restructuring/dutch-court-puts-two-units-of-brazils-oi-into-bankruptcy-proceedings-idUSKBN17M0BF.

110 Id.

111 Id.

of its equity or convertible bonds callable in three years. By contrast, the competing plan put forth by the creditor group proposed a debt-for-equity swap that would give them a 95 per cent stake in the reorganised Company.[112]

Efforts to restructure Oi's debt obligations have slowed amidst political turmoil that has limited Oi's ability to negotiate with one of its largest creditors – its telecom regulator, Anatel. Although Oi could owe Anatel up to 20 billion reais (US$6.1 billion), current law forbids the agency from accepting any sort of haircut or extending the payment schedule on such indebtedness. Two pieces of legislation that would otherwise permit Anatel greater flexibility to negotiate have stalled as Brazilian political leaders scramble to address recent grafting allegations against President Michel Temer.[113]

### ii Ocean Rig

The Ocean Rig Group operates as an international offshore oil drilling contractor, owner and operator of drilling rigs. It provides drilling services for offshore oil and gas exploration, development and production, and specialised in the ultra-deepwater and harsh-environment segments of the offshore drilling industry.[114]

On 24 March 2017, Ocean Rig UDW Inc, the holding company of the Ocean Rig Group, and three of its subsidiaries (together, the Ocean Rig Debtors) filed winding-up petitions with the Grand Court of the Cayman Islands to commence provisional liquidation proceedings under Part V of the Cayman Islands Companies Law (2016 Revision) (the Cayman Proceedings) and issued summonses for the appointment of joint provisional liquidators (JPLs).[115] On 27 March 2017, the Cayman Proceedings were commenced and the JPLs appointed, and the JPLs commenced cases (the Chapter 15 Cases) under Chapter 15 of the Bankruptcy Code in the Bankruptcy Court for the Southern District of New York (the Chapter 15 Court).

On 24 August 2017, the Chapter 15 Court granted recognition of the Cayman Proceedings as foreign main proceedings.[116] The Chapter 15 Court's opinion is the latest in a body of case law analysing whether and in what circumstances a debtor may shift or migrate its centre of main interest (COMI) to a jurisdiction where an effective plenary proceeding can be commenced prior to initiating proceedings in such jurisdiction.

Until sometime in 2016, each of the Ocean Rig Debtors had its COMI in the Republic of the Marshall Islands.[117] In April 2016, Ocean Rig UDW, Inc registered as an exempted

112 Ana Mano and Alberto Alerigi, 'Brazil Oi creditors file U.S. motion as bankruptcy negotiations continue', Thomson Reuters (23 May 2017) available at www.reuters.com/article/us-oi-restructuring/brazil-oi-creditors-file-u-s-motion-as-bankruptcy-negotiations-continue-idUSKBN18J35D.

113 Fabiola Moura, 'Political Meltdown Foils Oi Exit from $19 Billion Bankruptcy', Bloomberg (10 July 2017), available at https://www.bloomberg.com/news/articles/2017-07-10/political-meltdown-foils-oi-s-exit-from-19-billion-bankruptcy.

114 Declaration of Antonios Kandylidis Pursuant to 28 U.S.C. § 1746, Case No. 17-10736, ECF No. 5 at 5 (Bankr. S.D.N.Y. 27 March 2017).

115 See *Verified Petition of Ocean Rig UDW Inc., et al. (In Provisional Liquidations) and Motion of the Joint Provisional Liquidators for (a) Recognition of the Cayman Proceedings as Foreign Main Proceedings or, in the Alternative, As Foreign Nonmain Proceedings and (b) Certain Related Relief*, Case No. 17-10736, ECF No. 2 at 3 (Bankr. S.D.N.Y. 27 March 2017).

116 Memorandum Opinion Granting Recognition of Foreign Debtors' Cayman Islands Proceedings as Foreign Main Proceedings, Case No. 17-10736 (Bankr. S.D.N.Y. 24 August 2017).

117 Id. at 3.

company limited by shares under Section 202 of the Cayman Companies Law, and thereafter the Ocean Rig Debtors took various additional steps to shift their COMI to the Cayman Islands.[118] The Ocean Rig Debtors took these actions because defaults were anticipated under the Ocean Rig Debtors' debt documents, and, while the Republic of the Marshall Islands does not have a statute or any procedures that would permit a company to restructure, the Cayman Islands does.[119] In other words, the Ocean Rig Debtors engaged in a form of forum shopping in order to locate themselves in a jurisdiction that would not compel them to liquidate.

The Chapter 15 Court first found, consistent with other recent decisions, that a court must determine a debtor's COMI as of the date of the filing of the Chapter 15 petition, without regard to the debtor's historic operational activity.[120] Despite the fact that the Ocean Rig Debtors remained registered as non-resident corporations in the Republic of the Marshall Islands, the Chapter 15 Court concluded that the debtors' efforts to migrate COMI, which were extensive, did indeed achieve their intended purpose.[121] The Chapter 15 Court then concluded that the Ocean Rig Debtors had not manipulated their COMI in bad faith, because the shift from the Republic to Marshall Islands to the Cayman Islands 'was done for legitimate reasons, motivated by the intent to maximize value for their creditors and preserve their assets'.[122]

## V TRENDS AND OTHER RECENT DEVELOPMENTS

Bankruptcy filings in the United States have increased over the past year, halting a decline since their 2009–2010 peak during the global financial crisis.[123] Companies had been buoyed by access to cheap capital because of historically low interest rates, providing relief for companies with highly leveraged balance sheets that likely would have struggled to meet their debt obligations had interests rates begun to rise.[124] However, despite the persisting low-interest rate environment, adverse market forces in a number of industries have led to a wave of bankruptcy filings.

The sections below highlight recent trends in the energy and retail sectors and also offer some detail on recent decisions and other developments that may be relevant in US bankruptcy practice in the coming years.

### i Industry downturns

#### *Energy industry downturn*

The energy industry has experienced a number of bankruptcies over the past few years despite the general availability of cheap credit, and this trend is unlikely to abate in the near future. In particular, the coal industry is likely to continue to be hit hard by the prevalence of cheaper and cleaner sources of energy, such as natural gas, increasingly stringent regulation and large unfunded pension and retirement liabilities. According to the Institute for Energy

118 Id. at 6, 13–18.

119 Id. at 11.

120 Id. at 28.

121 Id. at 32.

122 Id. at 33.

123 *The 2014 Bankruptcy Yearbook and Almanac* (see footnote 57), at 16.

124 See Jon Hilsenrath, 'Fed Keeps Rates Unchanged, Sees Eventual Rise in 2015, 2016'; see footnote 47.

Economics and Financial Analysis, the combined market capitalisation of major publicly traded US coal companies fell by over 90 per cent between April 2011 and March 2016, plummeting US$62.5 billion to US$4.59 billion.[125]

Although 2017 has also been a challenging year for the oil and gas industry, the pace of bankruptcies seems to have slowed somewhat as many companies have cycled through Chapter 11 and higher commodity prices provide some relief. The story is different for service companies, however, which have not seen much of a decrease in bankruptcy rates. Unlike E&P companies, service companies have filed at a relatively steady rate during the last two years, with no single month markedly worse than others.[126]

Despite the continued challenges facing the industry, there is growing optimism that the oil and gas industry is inching closer to a rebound. One of the most formidable obstacles in the way of an industry recovery is the low price of oil, with crude prices around US$48 a barrel. To drill profitably at this rate, oil producers must cut costs. But realising these cost savings could prove challenging, as service companies must raise prices to support taking rigs and hydraulic fracturing equipment out of storage and hiring capable professionals to operate them, driving up the break-even oil price for operators.[127] The price of oil, therefore, will continue to play a determinative role in whether the growing optimism yields material improvement, or if the next year brings more of the same for the beleaguered industry.

***Retail industry downturn***

Changing dynamics in the retail industry have created myriad operational challenges, forcing once successful retailers to file for bankruptcy protection. These market forces include consumer shift from traditional brick-and-mortar stores to online shopping sites such as Amazon, a highly competitive market, and a still tepid economy, which has impaired the earning power of middle class Americans. These dynamics have left retailers with insufficient revenue to cover high fixed costs such as leases for their stores.[128]

In March of 2016, Sports Authority sought Chapter 11 protection, ushering in a wave of retail bankruptcies. In April 2016, Vestis Retail Group, which manages Eastern Mountain Sports, Bob's stores, and Sports Chalet, also filed for protection under Chapter 11. Aeropostale, an apparel company, filed the following month.[129]

125 'Market Cap of U.S. Coal Companies Continues to Fall' (23 march 2016), available at http://ieefa.org/market-cap-u-s-coal-companies-continues-fall.

126 'E&P Bankruptcies Tapering Off in 2017', *Oil & Gas 360* (24 March 2017), available at https://www.oilandgas360.com/ep-bankruptcies-tapering-off-2017/.

127 Lynn Cook, 'Despite Optimism, Oil Firms Keep Cutting Jobs,' (22 July 2016), available at www.wsj.com/articles/despite-optimism-oil-firms-keep-cutting-jobs-1469209897.

128 At least one commentator has suggested that, in addition to the market forces driving the downturn, the mandatory 210 day limit on the time by which a debtor must assume or reject a commercial real estate lease under section 365(d)(4) of the Bankruptcy Code leaves retailer debtors with insufficient time to negotiate with their landlords and properly emerge from Chapter 11 as a standalone entity. See Lawrence C. Gottlieb, 'The Disappearance of Retail Reorganizations Under the Amended Section 365(d)(4)' available at http://business-finance-restructuring.weil.com/wp-content/uploads/2013/06/Gottlieb-Paper.pdf.

129 'So far, 2016 is a boom year for retail bankruptcies,' *PYMNTS* (5 May 2016), available at www.pymnts.com/news/risk-management/2016/chapter-11-retail-bankruptcy-debt-restructuring/.

Despite earlier optimism that the challenges facing retail might subside in 2017,[130] the industry-wide downturn has only taken a turn for the worse during the first half of the year. More than 300 retailers filed for bankruptcy protection in the first half of 2017, up 31 per cent from the same time last year. It is also estimated that more than 5,300 store closing announcements have been issued to 20 June 2017, compared to 2,056 in 2016, 5,077 in 2015 and 6,163 in 2008, at the height of the recession. These developments have led some commentators to dub 2017 the year of the 'retail apocalypse'. Although most of the retail filings this year have been for small companies, a number of well known brands have also sought bankruptcy protection, including Gymboree, rue21, and Payless Shoes.

Retailers that have so far avoided bankruptcy have not been immune to the market forces ravaging the industry and have been trimming operations accordingly. Underscoring the pressure on brick-and-mortar operations, JCPenney, Staples, Abercombie & Fitch, and Toys 'R' Us, among others, have closed several hundred stores in the past few years.[131] In September 2017, Toys 'R' Us tapped advisers Kirkland & Ellis and Lazard Ltd to assist in a potential restructuring and/or refinancing of its significant debt load.[132]

### ii Gifting

A recent trend in bankruptcy settlements over the last several years has been the increasing use of 'gifting', a consensual arrangement in which a senior creditor class gives a junior class or equity some of its share of recoveries otherwise due to it under a plan of reorganisation. The rationale underlying this practice, at first glance, seems benign, as sophisticated parties with bargaining power seemingly may opt to transfer their rights to junior parties in exchange for a more swift resolution to the bankruptcy proceedings. However, this analysis becomes more complicated when an intermediate creditor is involved and the priority regime outlined in Section 507 of the Bankruptcy Code is considered. Under Section 507, there is a hierarchy in resolving the claims of various creditors against the assets of the debtor. Viewed in this light, the intermediate creditor can object that junior creditors are receiving distributions before senior claims are paid in full, in violation of the absolute priority rule.

In 2011, the second circuit handed down a decision in *In re DBSD North America,* which limited the ability of senior creditors to gift their share of a distribution to more junior creditors. In *DBSD*, the court considered whether senior creditors' decision to gift some of its cash distribution to equity holders, bypassing junior creditors with claims of higher priority relative to the equity holders, ran afoul of the absolute priority rule.[133] The court invalidated the plan, holding that the senior creditors had no right to gift estate property in contravention of the statutorily contemplated hierarchy. The decision left unresolved the propriety of a senior creditor bypassing an intermediate creditor in gifting non-estate property to a junior

130 Treacy Reynolds, 'National Retail Federation Upgrades 2016 Economic Forecast,' National Retail Federation (26 July 2016), available at https://nrf.com/media/press-releases/national-retail-federation-upgrades-2016-economic-forecast.

131 J D Heyes, 'Retail Tsunami of bankruptcies and closings now sweeping America,' *Natural News* (24 April 2014), available at www.naturalnews.com/044840_retail_tsunami_bankruptcies_store_closings.html.

132 Jodi Xu Klein, 'Toys 'R' Us Enlists Advisers to Help Restructure Debt', Bloomberg Markets (6 September 2017), available at https://www.bloomberg.com/news/articles/2017-09-06/toys-r-us-is-said-to-enlist-advisers-to-help-restructure-debt.

133 *In re DBSD North America, Inc,* 634 F.3d 79 (2d Cir. 2011).

creditor. In a decision that limited the scope of the *DBSD* holding, the third circuit held that the holding was limited to gifting estate property. Senior creditors, however, remained free to gift non-estate property.[134]

An arrangement known as a 'structured dismissal' has become an increasingly popular technique for parties seeking to implement a gifting arrangement without running afoul of the absolute priority rule. A structured dismissal is a dismissal of a Chapter 11 case combined with additional provisions in the dismissal order, which often include mutual releases, procedures for claims reconciliation, 'gifting' of funds to junior creditors and retention of jurisdiction by the bankruptcy court. Structured dismissals are often employed in situations where the debtors have insufficient unencumbered assets to finance a confirmable Chapter 11 plan (e.g., after a sale of all or substantially all of such debtors' assets pursuant to Section 363 of the Bankruptcy Code). The Supreme Court's decision in *Czyzewski v. Jevic Holding Corp*[135] has recently made clear, however, that priority deviations implemented through non-consensual structured dismissals are not permitted.

### iii Covenants/DIP loans

Many large corporate bankruptcies involve the debtor securing post-petition debtor-in-possession financing (a DIP loan). The DIP loan provides the debtor with the cash necessary to continue its operations throughout the bankruptcy and to cover the costs of the bankruptcy. The lender extending a DIP loan to the debtor, often a pre-petition creditor of the debtor interested in protecting its pre-petition position, will place covenants in the DIP loan, setting milestones that the debtor must meet under the terms of the loan. Such milestones can include, among others, deadlines to file disclosure statement and solicit votes on a plan of reorganisation and deadlines to obtain critical relief (e.g., the filing of a motion under Section 1113 of the Bankruptcy Code seeking to modify collective bargaining agreements, deadlines to file sale procedures and sale motions, if applicable, and deadlines to obtain confirmation of a plan).

There is an inherent tension in the restrictiveness of these milestones, which can be constraining and onerous for a debtor and the need for financing. On the one hand, debtors need DIP financing, and lenders need assurances as inducement to make these loans to a bankrupt company. On the other hand, strict covenants can tie the hands of debtors and add additional complexity and expense if other creditors contest the plan supported by the DIP lenders.

The recent trends in the industry has been towards more DIP lenders insisting on more restrictive milestones in DIP covenants. However, striking the right balance on the restrictiveness of milestones in DIP loans is still an open question. For instance, in response to the trend towards more restrictive covenants, the ABI Commission to Study the Reform of Chapter 11 has recommended adding to the bankruptcy code that no milestones can require actions within 60 days of the petition date. It will be interesting to see if that proposal or others gain traction and where the market settles on this issue.

134 *In re ICL Holding Company, Inc*, No. 14-2709 (3d Cir. 2015).

135 137 S. Ct. 973, 986 (2017).

**Appendix 1**

# ABOUT THE AUTHORS

## FABRICE BAUMGARTNER

*Cleary Gottlieb*

Fabrice Baumgartner is a partner at Cleary Gottlieb. He has a broad corporate practice for large and mid-size, public and private companies. In addition to his expertise on restructuring and bankruptcy matters, his background and experience with corporate finance, mergers and acquisitions and corporate law matters generally, enable him to advise clients involved in complex reorganisations and financial restructurings. He is distinguished by *Legal 500 EMEA* for his insolvency work and by *Chambers Global* and *Chambers Europe* as a leading equity capital markets lawyer in France. He joined the firm in 1991 and became a partner in 2000. He is based in the Paris office and was resident in the New York office from 1991 to 1992 and the Hong Kong office from 1994 to 1997.

## PIERRE BEISSEL

*Arendt & Medernach*

Pierre Beissel is a partner at Arendt & Medernach and head of the firm's private equity and real estate business unit. He is a member of the corporate law, mergers and acquisitions and the private equity and real estate practices of the firm. He advises private equity firms, hedge funds and real estate funds on funds structuring and formation as well as on the structuring and financing of international buy-out transactions, joint ventures, corporate reorganisations and corporate governance matters.

He is an active member of the Luxembourg Private Equity Association and of the American Bar Association, and was president of the Luxembourg Young Bar Association in 2007 and 2008. Mr Beissel teaches corporate and commercial law at the Luxembourg School for Commerce. He is a lecturer in contractual law at the Luxembourg Bar school.

He has been a member of the Luxembourg Bar since 1999 and of the New York Bar since 2001.

Mr Beissel holds a master's degree in law, a DJCE and a DESS in business law from the Université Montpellier I, as well as a master of laws degree (LLM) from Cornell Law School. He speaks English, French, German and Luxembourgish.

## MILES BENHAM

*MannBenham Advocates Limited*

Miles Benham is the managing director of MannBenham Advocates Limited. He was admitted to the Manx Bar in 1996 and is a commissioner for oaths and a notary public.

He heads the practice's litigation and insolvency department, which deals with commercial and trust litigation, general civil litigation and insolvency-related work.

Mr Benham has considerable insolvency-related experience and has been appointed by the Isle of Man High Court to act as a liquidator. Mr Benham and his litigation colleagues also provide advice to liquidators, creditors, investors and directors in respect of all aspects of insolvency-related work.

## DONALD S BERNSTEIN

*Davis Polk & Wardwell LLP*

Donald S Bernstein, co-head of Davis Polk's insolvency and restructuring group, is recognised as one of the leading insolvency lawyers in the world. He was elected by his peers as the chair of the National Bankruptcy Conference and has been a commissioner on the American Bankruptcy Institute's Commission to Study the Reform of Chapter 11, chair and president of the International Insolvency Institute and a member of the legal advisory panel of the Financial Stability Board. Mr Bernstein's practice includes representing debtors, creditors, receivers and acquirers in corporate restructurings and insolvencies. In addition, he heads the group's multi-team representation of global financial institutions in connection with the 'living wills' required to be submitted to financial regulators pursuant to the Dodd-Frank Act.

Outside the firm, Mr Bernstein is a member of the editorial board of *Collier on Bankruptcy*, an authoritative treatise on US bankruptcy law.

## JUSTIN BHARUCHA

*Bharucha & Partners*

Justin is a founding partner at Bharucha & Partners, and his practice focuses on financing and stressed assets. He also advises on acquisitions by and from non-residents, especially in sectors where foreign investment is subject to restrictions, illustratively, real estate, defence and retail.

## SÉBASTIEN BINARD

*Arendt & Medernach*

Sébastien Binard is a partner in the private equity and real estate and corporate law, mergers and acquisitions practices of Arendt & Medernach. He specialises mainly in corporate law, corporate finance, mergers and acquisitions and transactional business law.

He advises major private equity firms and alternative fund managers on the structuring and financing of international buy-out transactions and private investments, the formation of joint venture companies and private funds, corporate reorganisations (including in relation to distressed companies), the structuring of exit strategies and corporate governance matters.

Mr Binard is also a lecturer in corporate law at the Luxembourg School for Commerce. He is a member of the legal committee and of the market intelligence committee of the Luxembourg Private Equity and Venture Capital Association (LPEA) and a member of the Business Law Commission of the Board of the Luxembourg Bar.

He was seconded to the New York office of Arendt & Medernach from 2008–2009 for 18 months, where he represented the corporate law, mergers and acquisitions practice of the firm and advised US clients on Luxembourg corporate law matters.

Mr Binard is a member of the Luxembourg Bar, and was a member of the Brussels Bar until 2013. He holds a master's degree in law from the Catholic University of Louvain and speaks English and French.

## ALEXANDRA BORRALLO

*Clifford Chance SLP*

Alexandra Borrallo is a lawyer in the litigation and dispute resolution department in the Madrid office of Clifford Chance SLP. She obtained both her law degree, and her degree in business administration, in 2008 from the Autonomous University of Madrid.

Alexandra has participated in many insolvency proceedings, working for both creditors and debtors, and has been involved in many civil and arbitration proceedings regarding financial disputes.

## PAVEL BOULATOV

*White & Case LLC*

Pavel is counsel in the Moscow office of White & Case, focusing on insolvency proceedings, litigation and international arbitration. He represents Russian and foreign companies in a wide range of insolvency proceedings, including advising on the preparation and filing of insolvency petitions and applications to register creditor's claims, resisting the registration of other creditors' claims, participating in creditors' meetings, the evaluation and sale of debtors' assets and interaction with bankruptcy managers. Pavel has significant expertise in Russian insolvency proceedings and represented creditors, debtors and administrators in large bankruptcy cases. Pavel also represents clients in disputes during insolvency proceedings and in proceedings concerning the recognition of foreign courts insolvency judgments in Russia. His clients include Russian and international banks (Bank of Cyprus, Czech Export Bank, UniCredit Bank, Credit Europe Bank, BTA Bank) and large companies and corporations (Samsung, Visteon, Eurocement and PSG International). Pavel has been included in *Best Lawyers* in Russia in the practice area of litigation and insolvency, and is a member of the INSOL International.

## JOANNA CHARTER

*Clifford Chance*

Joanna Charter is a consultant in the banking and finance group of Clifford Chance's Hong Kong office, focusing on restructuring and insolvency work. She has advised on a range of debt restructurings across Asia and across a range of industries. Major matters include advising the joint provisional liquidators of China Fishery Group Limited, the senior lenders to Mongolian Mining Corporation, and two syndicates of lenders in respect of the recovery and sale of four aircraft following the collapse of Oasis Hong Kong Airlines. In addition, Ms Charter also advises on resolution planning for financial institutions in Hong Kong. Ms Charter is a member of INSOL and currently sits on the board of the Hong Kong chapter of IWIRC.

## KAROLE CUDDIHY

*Maples and Calder*

Karole specialises in corporate insolvency and restructuring. His work includes advising all interested parties in liquidations, receiverships and examinerships, including insolvency professionals, creditors, directors, shareholders and potential investors. He has particular recent experience of successfully applying for injunctive relief on behalf of receivers. Karole also has significant experience of advocacy before the Irish courts.

## VASCO CORREIA DA SILVA

*SRS Advogados – Sociedade Rebelo de Sousa e Associados, RL*

Vasco Correia da Silva graduated from the faculty of law of Lisbon University in 1998 and has a postgraduate diploma in commercial law from the Catholic University of Portugal.

He has practised law for more than 15 years, and is a managing associate at SRS Advogados. He joined the firm in 2010.

Vasco Correia da Silva has significant experience in litigation, representing clients mainly in civil and commercial proceedings and in bankruptcy and insolvency litigation. He provides legal assistance to clients in areas such as insurance, automobile, infrastructure, shipping, energy, TMT, financial services and banking.

## MAURO TEIXEIRA DE FARIA

*Galdino, Coelho, Mendes Advogados*

Mauro Teixeira de Faria is a senior partner at Galdino, Coelho, Mendes Advogados (GCM). He graduated from the State University of Rio de Janeiro Law School and is currently a master of laws candidate at the same institution, in the research area of enterprise and economic activities. He was admitted to practise law by the Brazilian Bar Association in 2009.

Mauro has substantial experience in corporate and civil litigation, as well as reorganisation proceedings. He has been working on behalf of creditors, debtors, trustees and investors interested in acquiring distressed assets for approximately 10 years, in some of the main insolvency cases in Brazil. Mauro has also published articles, mostly involving insolvency law.

## ARABELLA DI IORIO

*Maples and Calder*

Arabella di Iorio is a partner at Maples and Calder, where she is the head of the BVI litigation and trusts practice groups. She specialises in complex international commercial litigation, including insolvency, distressed funds, shareholder issues, asset tracing, trust disputes, insurance and reinsurance, professional negligence and contractual claims. She is a fellow of the Chartered Institute of Arbitrators, has considerable arbitration and mediation experience, and is a solicitor advocate who regularly appears in court.

## ANDREAS DIMMLING

*GSK Stockmann*

Andreas is a restructuring and corporate partner in the Munich office of GSK. Since 2008, Andreas advises national and international clients on matters of restructuring and insolvency

issues, including distressed M&A, corporate restructuring, insolvency proceedings and out-of-court restructurings. Prior to working in Munich, Andreas was based in the Berlin and Heidelberg offices of GSK. Andreas gained intensive international experience through secondments in London and Barcelona and during university studies in Italy and New Zealand. Andreas holds a law degree and a business degree from the universities of Berlin and Bayreuth and undertook his legal traineeship in Berlin.

### AUDE DUPUIS

*Cleary Gottlieb*

Aude Dupuis is a senior attorney at Cleary Gottlieb. Her practice focuses both on litigation and restructuring matters. Her broad experience in these two areas enable her to advise clients involved in complex bankruptcy matters and related domestic and international disputes. She joined the firm in 2005 and became a senior attorney in 2014. She is based in the Paris office, and is a member of the Paris Bar and the New York Bar.

### SARANNA ENRAGHT-MOONY

*Maples and Calder*

Saranna practises in the commercial litigation department and specialises in insolvency and corporate recovery and restructuring. She represents insolvency and restructuring practitioners, distressed companies, directors and lending institutions. She advises and represents insolvency practitioners in all types of formal insolvency procedures. She regularly carries out security assessments, advises on enforcement options and acts in enforcement proceedings for large creditors. Saranna also advises directors on their duties in the context of a company's solvency position and represents them in respect of restriction and disqualification proceedings.

### SARAH FABER

*Baker McKenzie*

Sarah Faber is a summer law student at Baker McKenzie's Toronto office. She is currently completing her studies at Queen's University Law School.

### GAETANO IORIO FIORELLI

*Baker McKenzie*

Gaetano Iorio Fiorelli is a counsel at Baker McKenzie. His practice concentrates in the area of dispute resolution in commercial, bankruptcy/insolvency and banking and finance matters. Throughout his career, Gaetano has represented major multinational and Italian companies in major litigation and arbitration cases.

Since 2004 he has been an adjunct professor of international and European law at Luigi Bocconi University, Milan. He is author of several publications in commercial and European law matters.

## GEMMA FREEMAN

*Maples and Calder*

Gemma Freeman is an associate in the Cayman Islands office of Maples and Calder. She has a broad range of experience in commercial litigation and insolvency proceedings. She regularly advises company directors, stakeholders, trustees, liquidators and other fiduciaries on both contentious and non-contentious matters. Her areas of practice also include security enforcement and restructuring and shareholder disputes.

## ELIANA MARIA FRUNCILLO

*Baker McKenzie*

Eliana Maria Fruncillo is a junior associate at Baker McKenzie. Her practice concentrates in the area of dispute resolution in contractual and tort liability matters, bankruptcy law and insolvency procedures.

She gained intensive international experience through an internship in a law firm based in Paris and during her university studies in France, where she attended an Erasmus Programme at Université Panthéon-Assas, Paris II in 2013.

## RODRIGO SARAIVA PORTO GARCIA

*Galdino, Coelho, Mendes Advogados*

Rodrigo Saraiva Porto Garcia is a partner at Galdino, Coelho, Mendes Advogados (GCM). He graduated from the Federal University of Rio de Janeiro Law School and is currently a master of laws candidate at the state university of Rio de Janeiro, in the research area of enterprise and economic activities. He was admitted to practise law by the Brazilian Bar Association in 2013.

Rodrigo is part of the intelligence team at GCM, a team comprising partners with dedicated academic inclination, acting together with all teams at GCM in the development of strategies, case studies and legal researches in general. Rodrigo has also published several articles, mostly involving corporate and insolvency law.

## TIMOTHY GRAULICH

*Davis Polk & Wardwell LLP*

Timothy Graulich is a partner in Davis Polk's insolvency and restructuring group, and focuses on international restructurings. He has substantial experience in a broad range of domestic and international restructurings, including the representation of public and private companies, agent banks and lenders, acquirers and hedge funds in connection with pre-packaged and traditional bankruptcies, out-of-court workouts, DIP and exit financings, bankruptcy litigation and Section 363 sales. In addition to his regular insolvency matters, Mr Graulich plays a key role in the firm's representation of certain global financial institutions in connection with their Dodd-Frank resolution planning. He is a fellow of INSOL International, a frequent author, lecturer and panelist on a broad range of bankruptcy topics and a contributing author to *Collier on Bankruptcy*.

**KEITH HAN**

*Clifford Chance Asia*

Keith Han is an associate of Clifford Chance Asia in Singapore. He is currently working on some of the most recent high-profile insolvency and restructuring cases in Singapore including *OW Bunker Far East (Singapore) Pte Ltd* and *Swiber Holdings Limited* (acting for the trustees under an Islamic bond). As a former justices' law clerk and assistant registrar of the Supreme Court of Singapore, Keith has also assisted the Singapore Court of Appeal as a law clerk on several leading insolvency cases.

**DANIEL HAYEK**

*Prager Dreifuss AG*

Daniel Hayek is a member of the management committee and head of the insolvency and restructuring and the corporate and M&A teams of Prager Dreifuss. He has extensive experience in representing creditors in bankruptcy-related litigation, whether in registering or purchasing claims or in enforcing disputed claims *vis-à-vis* bankruptcy administrators and before courts. He specialises in mergers and acquisitions (mainly strategic buyers), corporate finance, takeovers, banking and finance and corporate matters.

**BLAŽ HRASTNIK**

*Rojs, Peljhan, Prelesnik & partners o.p., d.o.o.*

Blaž joined Rojs, Peljhan, Prelesnik & Partners in 2014 after working as a senior associate in a local Slovenian law firm, specialising in insolvency proceedings. During his work, Blaž completed his postgraduate studies and obtained a PhD in 2014 at the University of Ljubljana with a thesis from the field of construction law.

Blaž's fields of expertise include litigation, insolvency proceedings, construction and real estate. He has been involved in several M&A transaction projects, with subsequent refinancing, and advised clients in numerous insolvency and restructuring matters. His recent track record includes representing and advising clients in the insolvency proceedings of T-2; the completion of a residential building after the investor and construction company went bankrupt; and in resolving open issues and disputes related to the completion of the largest sports shopping complex in Slovenia between the municipality and a private partner; advising various banks in sale of their exposure with regard to bankrupt debtors or debtors in process of restructuring, and providing legal advice in Slovenia to the administrator in the proceeding of recognition of effects of one of the largest foreign insolvency proceedings in CEE region.

**IAN JOHNSON**

*Slaughter and May*

Ian Johnson has a broad restructuring, insolvency and general finance practice. He has advised on a number of high-profile corporate recovery and insolvency matters and has worked on both international and domestic restructurings and refinancings (including the restructuring and refinancing of Tata Steel, Seadrill Limited, Vestas, Vion Foods, Punch, Royal Mail, Premier Foods, Thomas Cook, General Motors, Countrywide plc and Towergate). He also advised the Irish government in connection with a wide range of issues relating to the Irish banking crisis, the Central Bank of Cyprus on aspects of the restructuring of its banking

sector and the Portuguese Ministry of Finance in connection with the recapitalisation of the Portuguese banking sector. In addition, his practice covers issues relating to the eurozone crisis, and he has advised insurance companies and banks, including central banks, on various aspects of the crisis.

### SUNTUS KIRDSINSAP

*Weerawong, Chinnavat and Partners Ltd*

Suntus Kirdsinsap is a partner in the litigation and arbitration practice group at Weerawong, Chinnavat and Partners Ltd. He has extensive expertise, particularly in relation to banking, finance, debt restructuring, bankruptcy, litigation and arbitration and has been the team leader for many of Thailand's major restructurings. Suntus also represents clients in the enforcement of CIETAC and UNCITRAL arbitration awards in Thailand.

### LUCAS P KORTMANN

*RESOR NV*

Lucas Kortmann specialises in insolvency law and restructuring, focusing on cross-border and complex matters. Recent experience includes assisting the Dutch financing company Oi Coop of the Brazilian Oi Group, representing DIP Lenders in the Chapter 11 of SFX Entertainment (which includes Dutch companies as Chapter 11 debtors), advising the Dutch administrator of the Dutch OSX vehicles and advising Goldman Sachs International on the restructuring of a multibillion-euro real estate portfolio with cross-border aspects. Mr Kortmann has recently acted as expert for the EBRD in discussions on Greek insolvency law reform. Mr Kortmann is a fellow of INSOL International.

### ELAN KRISHNA

*Clifford Chance Asia*

Elan Krishna is a senior associate at Clifford Chance Asia in Singapore. He has recently worked on some of the most high-profile insolvency and restructuring cases in Singapore, including *OW Bunker Far East (Singapore) Pte Ltd* and *Swiber Holdings Limited.* He recently completed a secondment with South Square Chambers where he was involved in significant cases, including *Re Lehman Brothers International (Europe)* and *Primeo Fund*, which arose out of the Madoff fraud.

### ALFONSO PÉREZ-BONANY LÓPEZ

*Philippi, Prietocarrizosa, Ferrero DU & Uría*

A graduate with honours from the School of Law of the University of Lima (Peru), a master's in law from Boston University (LLM in banking and financial law), and with legal studies from the University of Pennsylvania, Alfonso Pérez-Bonany López is partner at Philippi, Prietocarrizosa, Ferrero DU & Uría with substantial experience in reorganisation; liquidation and insolvency procedures; M&A and corporate finance; representing creditors and debtors in creditors' meetings; debt restructuring; insolvency and bankruptcy procedures; judicial reorganisations and liquidations; and in corporate and contractual matters. In addition, he worked as senior legal counsel at the Bankruptcy Commission of INDECOPI and lectures in bankruptcy regulation at the University of Lima (Peru).

**PRIYA MAKHIJANI**

*Bharucha & Partners*

Priya has been a member of the transaction advisory practice at Bharucha & Partners for over two years. Her special focus is on financing and stressed assets.

**ROBIN MCDONNELL**

*Maples and Calder*

Robin McDonnell specialises in insolvency and corporate recovery and restructuring, and has acted in a wide range of compulsory and voluntary liquidations, examinerships and receiverships, schemes of arrangement and bankruptcies. He acts for insolvency and restructuring practitioners, and financial institutions, and advises distressed companies, company directors, shareholders and creditors of distressed companies. Robin also has particular expertise in the area of restriction and disqualification of company directors.

**DARIA MIENTKIEWICZ**

*Bird & Bird Szepietowski i wspólnicy sp k*

Daria is an expert in dispute resolution, with extensive experience in advising companies from the pharmaceutical and medical devices sector.

Daria has been advising clients since 2008, and specialises in dispute resolution, including litigation, court administration and arbitration proceedings. She supports clients in regulatory matters, pharmaceutical law and healthcare, administrative procedure, criminal and commercial law, competition and intellectual property rights.

She has extensive experience in advising clients from the life sciences sector and conducting audits.

Prior to joining Bird & Bird, she gained her experience working for a number of leading international law firms.

Daria graduated from the Faculty of Law and Administration, and International Relations and the Faculty of Journalism and Political Science (both majors with honours) from the University of Warsaw. She is currently preparing a doctoral dissertation in the field of regulatory issues, compliance and pharmaceutical law.

She has authored numerous specialised publications, mainly in the area of pharmaceutical law, and spoken at many conferences and seminars.

**CAROLINE MORAN**

*Maples and Calder*

Caroline Moran is a partner in the Cayman Islands office of Maples and Calder. She advises on all aspects of domestic and cross-border insolvency and restructuring issues, in particular, consensual and non-consensual restructurings, liquidations and receiverships. Ms Moran advises all key stakeholders in financially distressed circumstances including banks, funds, bondholders, directors, investors and insolvency practitioners. She also has extensive commercial litigation experience in distressed funds, shareholder and financial services disputes. Ms Moran is an experienced advocate, who regularly appears in the Cayman Islands courts.

**BARTŁOMIEJ NIEWCZAS**

*Bird & Bird Szepietowski i wspólnicy sp k*

An attorney with 20 years of experience, Bartłomiej has supported some of the largest corporations on the Polish market from the construction, automotive, energy, chemicals and food & beverage industries. He has successfully led Bird & Bird's dispute resolution team since 2012. The team recently successfully defended the Polish State against a €1 billion plus claim by Cypriot investors in investment arbitration (Poland – Cyprus BIT).

Bartłomiej is known for his commitment and dedication to every case. He is particularly experienced in complex technical disputes, and is recognised as one of the best construction dispute lawyers. Bartłomiej advises clients on dispute resolution strategies and policies, represents them and leads contract negotiations, especially infrastructure contracts based on FIDIC conditions.

His experience covers representation in dozens of litigation and arbitration proceedings, as well as advice on issuing and defending claims. He also has extensive experience in cross-border bankruptcy.

In 2014, he was honoured by the British *Guide to the World's Leading Lawyers – Construction and Real Estate* in the construction category, being placed in a narrow group of eight leading Polish specialists in this area. He is a recommended lawyer for dispute resolution in *The Legal 500* 2016 and 2017 editions.

He has been a speaker in debates, conferences and panel discussions devoted to the problems of international arbitration of investment and economic development, and he is co-author of the publication *Current economic agreements – Agreement in the course of trade*, published by Verlag Dashofer.

**MICHAEL NOWINA**

*Baker McKenzie*

Michael Nowina practises in the areas of commercial law and insolvency law. He acts for unsecured creditors, secured creditors, debtors, receivers, trustees-in-bankruptcy and court-appointed officers, purchasers of distressed assets, equity investors and financiers in insolvency and restructuring proceedings. Michael has extensive experience in employment and pension law issues arising from corporate liquidations or restructurings.

**LAURA OEGERLI**

*Prager Dreifuss AG*

Laura Oegerli is a junior associate at Prager Dreifuss' Zurich office. Her main practice areas are corporate and M&A and dispute resolution. She focuses mainly on contract and corporate law matters as well as insolvency law and acts for national as well as international companies.

**DARÍO U OSCÓS CORIA**

*Oscós Abogados*

Darío U Oscós Coria is a legal counsel and practitioner specialising in insolvency, restructuring, creditor rights, litigation, arbitration, and mergers and acquisitions. He is the director, founder and senior partner at Oscós Abogados.

Mr Oscós graduated from, and was a professor at the Escuela Libre de Derecho. He studied conflict of laws as a postgraduate at Harvard University. He has a post graduate in constitutional law and *amparo* action from Instituto Mexicano del *Amparo* and Universidad Panamericana. He was the senior litigator at Santamarina & Steta SC, as well as the senior litigator and corporate lawyer at Grupo Financiero Banamex Accival.

He has also been professor of procedural law at the Universidad Iberoamericana; professor of insolvency at the Universidad Panamericana at master's degree level; and professor of arbitration at the Instituto Tecnologico Autonomo de Mexico (ITAM). He is a member of the American College of Bankruptcy, the American Law Institute (and Mexican delegate and adviser in its transnational insolvency project), the International Insolvency Institute, the International Bar Association, Insol International, Insol Europe, the National Association of US Bankruptcy Trustees, the Mexican Bar Association and the Illustrious and National Bar Association of Mexican Lawyers. He is a lecturer and author of juridical literature.

## DARÍO A OSCÓS RUEDA

*Oscós Abogados*

Darío A Oscós Rueda is a legal counsel and practitioner specialising in insolvency, restructuring, creditor rights, litigation, arbitration and mergers and acquisitions. He is partner at Oscós Abogados.

Mr Oscós Rueda graduated from Universidad Intercontinental. He has a master's degree in business law from Universidad Panamericana. He actively participated in the *Vitro* case on behalf of several creditors. He has also participated actively in the recognition and enforcement of the US bankruptcy adjudication in Mexico, the *Xacur* case and the *IFS* Case. He is author of juridical literature.

## ABSLEM OURHRIS

*RESOR NV*

Abslem Ourhris specialises in insolvency law, restructuring and related litigation. Recent experience includes representing a large British bank in the cross-border insolvency of a pharmaceutical multinational, assisting the Dutch financing company Oi Coop of the Brazilian Oi Group, advising the former majority shareholders of Yukos Oil Company OAO on the Dutch aspects of the legal battles surrounding the demise of Yukos and assisting German auto parts company ATU on the closure of its activities in the Netherlands.

## GREGA PELJHAN

*Rojs, Peljhan, Prelesnik & partners o.p., d.o.o.*

Grega is managing partner of the law firm Rojs, Peljhan, Prelesnik & Partners o.p, d.o.o. He joined the firm in 1994 and became a partner in 1999. As a partner in the law firm he specialises in banking and finance, insolvency and restructuring and commercial and corporate law. Grega has been advising many Slovene and international clients including UBS, Erste Bank, Hypo, Raiffeisen, Unicredit, EBRD, EIB, Hewlett Packard, National Instruments Corporation, Goodyear, Novartis and many others, on different finance, M&A, general corporate and commercial and insolvency law and restructuring issues, including issues related to syndicated loans, securitisations, collateralisation, close-out netting, bankruptcy remoteness and similar matters.

His recent deals in relation to insolvency and restructuring practice include advising a Slovenian bank syndicate in the bankruptcy proceedings of one of the largest Slovenian telecommunication companies, T-2; advising a creditor with the largest exposure in restructuring of one of the largest Slovenian retailers; and advising creditors in compulsory settlement of financial holding Sava. In addition, he advised a multinational bank on debt restructuring and the sale process of Kempinski Palace hotel in Portorož and the financing of the real estate project (construction of the residential building with over 100 flats). He has been representing a client in a dispute with the construction company, regarding its legal relations with future tenants, purchasers of real estate and in finding a solution how to continue with a project, after the main construction company went bankrupt.

**NATTHIDA PRANUTNORAPAL**

*Weerawong, Chinnavat and Partners Ltd*

Natthida Pranutnorapal is a senior associate in corporate and debt restructuring services at Weerawong, Chinnavat and Partners Ltd. She has extensive experience in business reorganisation, insolvency and corporate transactions. She represents clients in a wide range of industries in litigation and rehabilitation matters. She has an LLM in international business law from the University of Essex (2014), an LLM from Ramkhamhaeng University (2005) and an LLB from Thammasat University (2001).

**CHRISTOPHER S ROBERTSON**

*Davis Polk & Wardwell LLP*

Christopher S Robertson is an associate in Davis Polk's insolvency and restructuring group. His experience encompasses a wide range of restructurings, including representing debtors, creditors and lenders. In addition, Mr Robertson represents global financial institutions in connection with their Dodd-Frank resolution planning.

**JEDSARIT SAHUSSARUNGSI**

*Weerawong, Chinnavat and Partners Ltd*

Jedsarit Sahussarungsi is an associate in the litigation and arbitration practice group at Weerawong, Chinnavat and Partners Ltd. He advises international and domestic clients in civil and criminal dispute resolution. Jedsarit obtained an LLB degree (honours) from Thammasat University (2010), an LLM degree (*summa cum laude*) from Université Toulouse 1 Capitole, France (2012) and an LLM degree (merit) from University College London, UK (2016).

**NISH SHETTY**

*Clifford Chance Asia*

Nish Shetty is a partner at Clifford Chance Asia in Singapore. He has worked on many of the largest and most high-profile insolvency and restructuring cases in Singapore of the past 20 years, including *Barings*, *Asia Pulp & Paper*, *Econ Corp*, *Drydocks World* , *TT International* and *OW Bunker Far East (Singapore) Pte Ltd.* These cases represent in many instances the *locus classicus* for many aspects of insolvency law in Singapore.

Nish is a member of the board of directors of the Insolvency Practitioners Association of Singapore and was the vice-chairman of the Law Society's Insolvency Practice Committee.

He has for many years been listed in a number of directories as a leading practitioner for restructuring and insolvency work.

### PIYAPA SIRIVEERAPOJ

*Weerawong, Chinnavat and Partners Ltd*

Piyapa Siriveerapoj is an associate in the litigation and arbitration practice group at Weerawong, Chinnavat and Partners Ltd. She represents clients in a wide range of industries in litigation and rehabilitation matters. She has an LLM in international law from Toulouse Capitole University (2015) and an LLB from Thammasat University (2011).

### JOSÉ CARLOS SOARES MACHADO

*SRS Advogados – Sociedade Rebelo de Sousa e Associados, RL*

José Carlos Soares Machado graduated from the faculty of law of Lisbon University in 1976 and has practised law for more than 30 years. He has been consistently recognised as a leading civil and commercial litigation lawyer.

Since 2011, he has been a partner and head of the litigation and arbitration department at SRS Advogados, one of the most important law firms based in Lisbon.

He is a professor at the law faculty of Nova University of Lisbon and a member of the ILA International Commercial Arbitration Committee. He has also been the representative of the Minister of Justice on the Portuguese Insolvency Administrators Supervisory Committee since 2005.

José Carlos Soares Machado is a former president of Lisbon Bar Council, as well as a member of the Portuguese Bar Association National Board of Directors, and of its National Supreme Council. He is also an arbitrator at its arbitration centre.

He is the author of several published works on constitutional law, corporate law, real estate law and professional ethics.

He is a member of the Portuguese Arbitration Association and has been an arbitrator in numerous cases. He has also represented clients in numerous arbitrations before *ad hoc* and arbitration centre tribunals.

### CARLY STRATTON

*MannBenham Advocates Limited*

Carly Stratton is a director of MannBenham Advocates Limited. She was admitted to the Manx Bar in January 2008, having graduated from Durham University and completed her postgraduate diploma in legal practice at the Oxford Institute of Legal Practice.

Mrs Stratton specialises in corporate, commercial and regulatory matters, acting for many venture capitalists, equity houses and listed companies across all corporate and commercial disciplines, including acquisitions of large companies.

She is personally recommended by the *Legal 500* as 'professional, easy-to-work-with and thorough' and has co-authored the Isle of Man section of the *International Comparative Legal Guide to Gambling*.

Mrs Stratton is the legal and regulatory sub-committee chair of the Isle of Man Wealth and Funds Association (www.iomfunds.com/contacts.php).

## URH ŠUŠTAR

*Rojs, Peljhan, Prelesnik & partners o.p., d.o.o.*

Urh is an associate at Rojs, Peljhan, Prelesnik & Partners, where he practises corporate law, with a primary focus on M&A, insolvency and restructuring, and dispute resolution.

Urh graduated from University of Ljubljana (with a master's degree in commercial law, *cum laude*) in 2014. As a part of his commercial law specialisation Urh studied also at the University of Munich and at the University of Münster. Recently, Urh has been engaged in various insolvency and restructuring proceedings. Namely, he has been a member of a team advising the syndicate of banks in the bankruptcy proceedings of T-2, a bank with the single largest exposure in compulsory settlement proceedings over Sava, various banks in sale of their exposure with regard to bankrupt debtors or debtors in process of restructuring, and providing legal advice in Slovenia to the administrator in the proceeding of recognition of effects of one of the largest foreign insolvency proceedings in CEE region. Urh has also independently advised various Slovenian and foreign creditors on the matters in connection with insolvency proceedings and pertaining to litigation.

## ATHANASIA G TSENE

*Bernitsas Law*

Athanasia joined the firm in 2001 and is joint head of the banking, finance and capital markets group. At the core of Athanasia's practice is vast experience of structuring, drafting, negotiating and advising on the feasibility and implementation of international financial transactions. She advises extensively on derivatives and collateral arrangements as well as on regulatory compliance. She has been working on the legal and regulatory aspects of the development of a secondary market of non-performing loans in the portfolios of Greek systemic banks and has been advising Greek and international clients on these matters. Athanasia has significant experience in advising corporates and international and domestic credit and financial institutions on financial restructurings and insolvency proceedings. Her clients include all the major banks and financial institutions with a local presence, and she has acted in innovative and groundbreaking deals that have paved the way for future transactions in the banking sector. Prior to joining the firm she worked with the Commercial Bank of Greece.

## IÑIGO VILLORIA

*Clifford Chance SLP*

Iñigo Villoria is a partner in the Madrid office of Clifford Chance SLP. He gained his law degree from Comillas Pontifical University – ICADE (1993), and he also has a degree in business management.

He advises multinational and Spanish companies in all areas of law related to commercial litigation and arbitration. He specialises in insolvency law and financial disputes.

He leads the insolvency and restructuring group in the Madrid office, working for both creditors and debtors in insolvency proceedings, debt restructuring deals, deals for the sale and purchase of assets in insolvent companies and financial disputes regarding complex products. He is a specialist in legal defence in clawback actions and matters related to the classification of insolvency.

He is a lecturer in several insolvency law programmes and a regular contributor to specialist journals and the financial media on these matters. He is the author of several books and coordinator of the Memento Concursal.

**DAVID WELFORD**

*Maples and Calder*

David Welford is an associate in the BVI office of Maples and Calder. He is a barrister with broad experience in commercial and financial disputes, with a focus on cross-border company, trusts and insolvency matters. He has extensive advocacy experience including interim applications, injunctive relief, High Court trials and appellate work.

Appendix 2

# CONTRIBUTING LAW FIRMS' CONTACT DETAILS

**ARENDT & MEDERNACH**

41A Avenue J F Kennedy
2082 Luxembourg
Tel: +352 40 78 78 1
Fax: +352 40 78 04
pierre.beissel@arendt.com
sebastien.binard@arendt.com
www.arendt.com

**BAKER MCKENZIE**

Brookfield Place
Bay/Wellington Tower
181 Bay Street, Suite 2100
Toronto, Ontario M5J 2T3
Canada
Tel: +1 416 863 1221
Fax: +1 416 863 6275
michael.nowina@bakermckenzie.com
sarah.faber@bakermckenzie.com

Piazza Filippo Meda 3
20121 Milan
Italy
Tel: +39 02 76231 1
Fax: +39 02 76231 623
gaetano.iorio.fiorelli@bakermckenzie.com
eliana.fruncillo@bakermckenzie.com

www.bakermckenzie.com

**BERNITSAS LAW**

5 Lykavittou Street
106 72 Athens
Greece
Tel: +30 210 361 5395
Fax: +30 210 364 0805
atsene@bernitsaslaw.com
www.bernitsaslaw.com

**BHARUCHA & PARTNERS**

9, SS Ram Gulam Marg
Ballard Estate
Mumbai 400 001
India
Tel: +91 22 6132 3900
Fax: +91 22 6633 3900
justin.bharucha@bharucha.in
priya.makhijani@bharucha.in
www.bharucha.in

**BIRD & BIRD SZEPIETOWSKI I WSPÓLNICY SP K**

Ul. Skorupki 5
00-546 Warsaw
Poland
Tel: +48 22 583 79 00
Fax: +48 22 583 79 99
bartlomiej.niewczas@twobirds.com
daria.mientkiewicz@twobirds.com
www.twobirds.com/pl

**CLEARY GOTTLIEB**

12, rue de Tilsitt
75008 Paris
France
Tel: +33 1 40 74 68 00
Fax: +33 1 40 74 68 88
fbaumgartner@cgsh.com
adupuis@cgsh.com
www.clearygottlieb.com

**CLIFFORD CHANCE**

27th Floor, Jardine House
One Connaught Place
Central
Hong Kong
Tel: +852 2825 8855
Fax: +852 2825 8800
joanna.charter@cliffordchance.com

Marina Bay Financial Centre, 25th Floor,
Tower 3
12 Marina Boulevard
Singapore 018982
Tel: +65 6410 2200
Fax: +65 6410 2288
nish.shetty@cliffordchance.com
elan.krishna@cliffordchance.com
keith.han@cliffordchance.com

Paseo de la Castellana 110
28046 Madrid
Spain
Tel: +34 91 590 75 00
Fax: +34 91 590 75 75
inigo.villoria@cliffordchance.com
alexandra.borrallo@cliffordchance.com

www.cliffordchance.com

**DAVIS POLK & WARDWELL LLP**

450 Lexington Avenue
New York, NY 10017
United States
Tel: +1 212 450 4000
Fax: +1 212 701 5800
donald.bernstein@davispolk.com
timothy.graulich@davispolk.com
christopher.robertson@davispolk.com
www.davispolk.com

**GALDINO, COELHO, MENDES ADVOGADOS**

Av. Rio Branco 138, 11º andar
20040 002 Centro
Rio de Janeiro RJ
Brazil
Tel: +55 21 3195 0240
mfaria@gcm.adv.br
rgarcia@gcm.adv.br
www.gcm.adv.br

**GSK STOCKMANN**

Karl-Scharnagl-Ring 8
80539 Munich
Germany
Tel: +49 89 288 174 73
Fax: +49 89 288 174 44
andreas.dimmling@gsk.de
www.gsk.de

**MANNBENHAM ADVOCATES LIMITED**

49 Victoria Street
Douglas
IM1 2LD
Isle of Man
Tel: +44 1624 639350
Fax: +44 1624 617961
milesbenham@mannbenham.com
carlystratton@mannbenham.com
www.mannbenham.com

**MAPLES AND CALDER**

Sea Meadow House
PO Box 173
Road Town
Tortola
VG1110
British Virgin Islands
Tel: +1 284 852 3000
Fax: +1 284 852 3097
arabella.diiorio@maplesandcalder.com
david.welford@maplesandcalder.com

PO Box 309, Ugland House
South Church Street
George Town
Grand Cayman KY1-1104
Cayman Islands
Tel: +1 345 949 8066
Fax: +1 345 949 8080
caroline.moran@maplesandcalder.com
gemma.freeman@maplesandcalder.com

75 St Stephen's Green
Dublin 2
Ireland
Tel: +353 1 619 2000
Fax: +353 1 619 2001
robin.mcdonnell@maplesandcalder.com
saranna.enraght-moony@maplesandcalder.com
karole.cuddihy@maplesandcalder.com

www.maplesandcalder.com

**OSCÓS ABOGADOS**

Paseo del Río (Joaquín Gallo) No.
53 Chimalistac
Delegación Coyoacán
CP 04340, Mexico City
Mexico
Tel: +52 55 12 53 0100
Mob: + 52 1 55 54 34 05 20
Fax: +52 55 1253 0102
doscos@oscosabogados.com.mx
www.oscosabogados.com.mx

**PHILIPPI, PRIETOCARRIZOSA, FERRERO DU & URÍA**

Santa Cruz 888, 4th Floor
Miraflores
Lima 18
Peru
Tel: +51 1 513 7200
Tel: +51 1 252 9808
alfonso.perezbonany@ppulegal.com
www.ppulegal.com

**PRAGER DREIFUSS AG**

Muehlebachstrasse 6
8008 Zurich
Switzerland
Tel: +41 44 254 55 55
Fax: +41 44 254 55 99
daniel.hayek@prager-dreifuss.com
laura.oegerli@prager-dreifuss.com
wwww.prager-dreifuss.com

**RESOR NV**

Symphony Offices
Gustav Mahlerplein 27
1082 Amsterdam
Netherlands
Tel: +31 20 570 9020
Fax: +31 20 570 9021
sijmen.deranitz@resor.nl
lucas.kortmann@resor.nl
abslem.ourhris@resor.nl
www.resor.nl

**ROJS, PELJHAN, PRELESNIK & PARTNERS O.P., D.O.O.**

Tivolska cesta 48
1000 Ljubljana
Slovenia
Tel: +386 1 23 06 750
Fax: +386 1 43 25 123
peljhan@rppp.si
hrastnik@rppp.si
sustar@rppp.si
www.rppp.si

**SLAUGHTER AND MAY**

One Bunhill Row
London EC1Y 8YY
United Kingdom
Tel: +44 20 7600 1200
Fax: +44 20 7090 5000
ian.johnson@slaughterandmay.com
www.slaughterandmay.com

**SRS ADVOGADOS – SOCIEDADE REBELO DE SOUSA E ASSOCIADOS, RL**

Rua D Francisco Manuel de Melo 21
1070-085 Lisbon
Portugal
Tel: +351 21 313 2000
Fax: +351 21 313 2001
soares.machado@srslegal.pt
vasco.silva@srslegal.pt
www.srslegal.pt

**WEERAWONG, CHINNAVAT AND PARTNERS LTD**

22nd Floor, Mercury Tower
540 Ploenchit Road
Lumpini, Pathumwan
Bangkok 10330
Thailand
Tel: +66 2 264 8000
Fax: +66 2 657 2222
suntus.k@weerawongcp.com
natthida.p@weerawongcp.com
piyapa.s@weerawongcp.com
jedsarit.s@weerawongcp.com
www.weerawongcp.com

**WHITE & CASE**

White & Case LLC
4 Romanov Pereulok
125009 Moscow
Russia
Tel: +7 495 787 3000
Fax: +7 496 787 3001
pboulatov@whitecase.com
www.whitecase.com