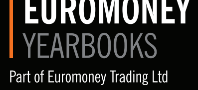
Global Insolvency & Restructuring Review 2012/13



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Contact:
Brian Bergin
Tel: 01 792 8735
brian.bergin@ie.pwc.com

Declan McDonald
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declan.mcdonald@ie.pwc.com

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Global Insolvency & Restructuring Review 2012/13

Edited by Lisa Paul

Editor: Lisa Paul

Advertising & Co-publishing Sales Managers: Grant Lee and Roger Harper

Directory Research Manager: Sophia Telfer

Advertising Administrator: Karolina Lubecka

Distribution Manager: Lisa Huxley

Marketing Manager: Els Despriet

Publisher: Adrian Hornbrook

Editorial Office: 11 North Hill, Colchester, Essex CO1 1DZ, UK
Tel: +44 1206 579591, Fax: +44 1206 560121

Website: www.euromoney-yearbooks.com

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Origination by: Trait Design Limited, Tiptree, Essex, UK

Printed by: Wyndeham Grange Limited, Brighton, W. Sussex, UK

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Foreword:
Where are we now… and where are we headed?

by Gordon Stewart, President, INSOL International and Partner, Allen & Overy LLP

Opacity

Never in my professional career have we (in the UK, in Europe, globally…) been in such a time of flux nor faced such a period of uncertainty. Economic challenges as great as have been faced in a generation (or three) confront us. Outcomes are unclear. Yet an opaque time such as this presents opportunities. It can provide the impetus and motivation – the incentive – for change.

Global trade – globalisation – is a fact. Cross-border activity has never been so great. This involves the movement of goods and services and also of ideas, from one legal jurisdiction to another. The law must not only keep up with these developments but it must facilitate them or it will fail those it seeks to serve.[1] In both my part-time job as President of INSOL International and my full-time job as head of Allen & Overy's Global Restructuring Group, I see change and the opportunity for change in the domestic insolvency and restructuring laws of jurisdictions in both emerging markets and the developed world. I also see the tantalising prospect of mankind's great achievement – what sets us apart from the rest of the animal kingdom – that of our capacity for co-operation to mutual benefit, being seen in the fields of cross-border insolvency recognition and, more dramatically, bank resolution.

Emerging markets and capacity building

There are three inter-linked areas in which emerging markets need to build capacity. They need good laws. A good terminal liquidation law, an efficient, modern rescue statute, together with a developing rescue culture. And a humane personal bankruptcy law entitling individuals and sole traders to have a second chance, hence fostering, or at a minimum not unduly penalising, entrepreneurial activity. Related to these fundamental laws are good laws of credit,[2] which encourage inward flows of capital and investment, and corporate governance laws to strike a balance between not unduly threatening directors whose companies are going through a period of financial difficulty yet checking any tendency on their part to be reckless and trade on at the expense of their creditors.

Now, new laws create rights and, with them, expectations. Expectations that the country's courts and judges will enforce those rights speedily, with efficiency and certainty. So a good route to justice is a must. If a mature and successful court system seems a long way in the distance for some jurisdictions then there are short-term fixes available, pending the ideal medium-term solution.

Perhaps for example outsourcing is a way forward: witness the widespread adoption of English law – and employment of retired judges from England and other common law countries – by the DIFC in Dubai.[3] Other countries are being helped to build on an existing ADR platform.[4] Countries with a shared culture are looking to pool their resources to create a multi-jurisdiction court of high quality.[5]

And, finally, the creation of usable insolvency laws will stimulate a demand for insolvency professionals to act as receivers, administrators, supervisors, examiners, trustees and liquidators. They are discharging significant responsibilities and also handling other people's money. If they are to obtain respect for their work, they need to be trained to a proper level, to keep up to date and to meet high ethical standards. This requires a system of qualifications and continuing education, of supervision and regulation.

But for those countries who sigh in despair at the thought of how much is involved in setting all this up, there is greater hope than ever before. INSOL International, which often works closely with the World Bank, as one of its main activities offers guidance on the range of 'best in class' options available for adoption from what has been seen to work in the developed world.[6] Ideas are crossing borders too.

New rescue laws

Countries in emerging markets need laws that encourage business rescue to enable value preservation and to save employment. And the laws need to work. Countries must be prepared to amend their laws in the light of experience. Too many jurisdictions have rescue laws on their statute books which just gather dust. It would be invidious to name them here. But on a brighter note, I will just reflect briefly on two countries at opposite ends of the scale perhaps who have, or are about to, introduce change in their rescue laws.

South Africa has not enjoyed a culture of business rescue. Corporate financial difficulty has all too often led to liquidation and break up, with the consequent loss of value to stakeholders. But South Africa has a new rescue law and a new profession of business rescue practitioners. The law is only starting to bed down and anecdotal evidence suggests many examples of misuse and of it being resorted to too late. But that is to be expected with a new law and, with guidance from South Africa's substantial body of talented professionals and from its courts, it will begin to pay dividends – with or without further legislative intervention.

Germany, on the other hand, is a developed economy with often-used rescue/insolvency laws. But as financial structures have become more complicated and creditor constituencies have splintered, these laws have been unable to deliver the deal that the majority of the in-the-money creditors wish to see implemented. So there has been a steady flow of companies which change their centre of main interests to England where schemes of arrangement, voluntary arrangements and administrations[7] are able to implement the desired restructurings.[8] Germany has reacted to this by passing a new law, updating its existing laws, with a view to address the perceived failings of, and gaps in, the old law. It came into force on March 1, 2012.

Too big to avoid a euphemism…

The demise of Lehman, and the potential collapse of a number of major deposit-taking institutions, shocked many in the worlds of politics, finance, law and accountancy – quite apart from banking. The size of the challenge of rescuing the saveable bit of a bank in the time between markets closing in the West on a Friday evening and Tokyo opening on a Monday morning appalled many. But the FSB, the IMF, the Basel Committee, the EU, the Independent Commission on Banking (in the UK) among others, have been coming to grips with the many-headed hydra that is bank insolvency. Or to give it its more comforting euphemism, bank resolution.

Living wills, bail-ins, SIFIs, resolution colleges, crisis management groups, bridge banks, are just some of the concepts and acronyms in the mix. The desideratum is for all material economies to have domestic 'strong arm' laws of a decent standard, for all relevant officials in these countries to have up-to-date blueprints of the major financial institutions (including a weekend crisis rescue plan), for those officials to have compared notes on who will do what should such a fateful weekend come to pass AND for all those countries to have introduced laws enabling cross-border co-operation to facilitate a global rescue of each major institution.

You may think that this is, to put it mildly, a tall order. Or, in the demotic, a big ask. But as President Kennedy said of going to the moon: 'Hard things make us better'.

Plain vanilla cross-border recognition

The crafting of the UNCITRAL Model Law on cross-border insolvency was a great achievement. Its adoption by, to date, some 20 countries (including the US and the UK) is a good thing. The failure by the rest of the world to adopt it is a bitter disappointment. The intra-EU recognition laws are useful as are similar arrangements of other regional groupings (North America, Scandinavia, etc). But the general failure of so many countries to provide even basic recognition of insolvency procedures of 'foreign' countries on an efficient – or, even, any – basis is to our collective discredit. Many of these countries are developed countries with mature economies fully aware of cross-border activity and its continuing growth. Something must be done.

Islamic finance

Islamic or Shari'a-compliant finance provided by major financial institutions – in recent times – is really only some 30 to 40 years old.[9] Accordingly, consideration of the implications and detail of its position in the world of cross-border rescue is still only in its comparative infancy. Much needs to be done, and quickly. Islamic finance has the fundamental difference – when compared to Western methods – of not being based on the concept of credit (of debtor and creditor) but of being based on the idea of 'trade'. The provider of finance and the recipient are engaged in a joint venture based on trade.[10] Title transfer rather than a charge securing a loan is the principal 'security'.

The World Bank has a task force looking at the whole area and this is to be applauded. Finance of an Islamic nature is increasing year on year and the quicker we all grapple with the nuances of differing methods of finance in the field of business rescue the less chance there is of misunderstandings leading to failed restructuring attempts.

Notes:

[1] Some commentators consider that the rise of Britain in the 18th and 19th centuries is owed in part to the flexibility of its laws to adapt to changing circumstance and to enable rather than hinder innovators and entrepreneurs in their activities.

[2] Or of Islamic trade-based financial activity – see below.

[3] DIFC: Dubai International Finance Centre. One recent DIFC law – Decree 57 – is an interesting mix of English and US law.

[4] The work of the World Bank in Montenegro falls into this category.

[5] Note the initiatives of the OHADA French-speaking countries of north-west Africa.

[6] Mauritius to its great credit has just introduced a whole new set of ethical rules and guidance for its insolvency practitioners.

[7] Often of the 'pre-pack' type.

[8] Germany, it should be said, is not the only continental European country whose companies have felt the need to migrate their CoMIs to England.

[9] Observation of an Islamic law professor at a recent conference in the Middle East.

[10] Using these terms in a non-technical sense.

Harmonising and modernising insolvency law: The work of the United Nations Commission on International Trade Law

by Jenny Clift, Senior Legal Officer, (Secretariat of UNCITRAL), Office of Legal Affairs, United Nations[1]

Recognising that disparities in the national laws governing international trade created potential obstacles to the flow of trade, in 1966 the General Assembly established the United Nations Commission on International Trade Law to serve as the vehicle by which the United Nations could play a more active role in reducing or removing these obstacles through modernisation and harmonisation of law.

In the early 1990s, when the Commission turned its attention to insolvency for the first time, the prevailing wisdom was that insolvency law was among the areas of law least amenable to international harmonisation or cooperation. During a discussion of the growing significance of cross-border insolvency issues at a 1992 UNCITRAL Congress, it was suggested by one commentator that: "… it is not practical to think of harmonising the bankruptcy laws of … different jurisdictions: in the evolution of international law we are simply too far away from any time when we could expect countries to have similar bankruptcy laws in an effort to stimulate international trade."[2]

For that reason, attention focused at first on providing an interface between national insolvency laws to facilitate the conduct of cross-border insolvency proceedings and encourage cooperation and coordination between the various stakeholders. The UNCITRAL Model Law on Cross-Border Insolvency was completed in 1997.[3]

Following the events of the late 1990s, the efficacy of national insolvency laws and practices became a recurring theme in a number of international forums and it was increasingly recognised that there was a serious and urgent need to strengthen national insolvency regimes, not only as a means of preventing or limiting financial crisis, but also of managing crisis through rapid and orderly workouts from excessive indebtedness. New impetus was given to the desirability of pursuing, if not substantive harmonisation, the development and adoption of global standards and norms that could inform and shape insolvency law reform. In response, UNCITRAL prepared the Legislative Guide on Insolvency Law, which was completed in 2004. The Guide sought not only to articulate the broader policy settings that should underpin modern insolvency laws, but also to identify the goals and core content of such laws. The successful completion of these two texts suggested that much had changed since 1992 and that countries could now be expected to view insolvency law as a subject for reform through modernisation and harmonisation.

The Legislative Guide focused largely on corporate debtors. Whilst acknowledging that the business of corporations, both domestically and internationally, is increasingly conducted through corporate or enterprise groups and that particular difficulties arise when two or more members of such groups become insolvent, time constraints limited the possibility of including in the Guide more than a brief introduction on the insolvency of groups.

Despite their ubiquity, both internationally and domestically, very little legislation refers specifically to enterprise groups or recognises the "enterprise group" as a legal concept, except in limited ways for very specific purposes, such as fiscal and accounting purposes. Very few, if any, states have a comprehensive regime for the treatment of groups in insolvency, with the result that each group member must be administered separately. For groups that involve a large number of members, separate administration can result in fragmented, uncoordinated treatment that pays little regard to the integrated nature of the business when the group was financially healthy. The international character of a group (and the majority of groups do operate cross-border), simply adds to the complexity. The onset of insolvency turns a cohesive international business into a set of potentially disconnected segments in different countries, subject to different insolvency laws, each embodying the particular State's choice of social, economic and financial policies, with different priorities and different sets of creditors claiming different assets under different rules.

To specifically address the insolvency treatment of groups, the Legislative Guide was supplemented in 2010 with part three, which offers some solutions for both domestic and international group insolvencies. However, facilitating the cross-border treatment of group insolvencies remains a challenge. While part three offers solutions for groups that focus on

cooperation and coordination by expanding the principles of chapter IV of the Model Law, the question of whether (and if so, how) a more comprehensive regime might be developed remains. One suggestion has been to adapt the concept of "centre of main interests" as it applies to an individual debtor to apply to an enterprise group so that all proceedings with respect to group members could be commenced in, and administered from, a single centre through one court and subject to a single governing law. Other suggestions have been to identify a coordination centre for the group, which might be determined by reference to the location of the parent of the group or to permit group members to apply for insolvency in the State in which proceedings have commenced with respect to the insolvent parent of the group. These options were considered by the UNCITRAL working group on insolvency and ultimately found to be unworkable.

Part three of the Guide notes that the significant and difficult issues raised by these suggestions "relate to the very nature of multinational enterprise groups and how they operate – how to define what constitutes an enterprise group for insolvency purposes and identify the factors that might be appropriate to determining where the group centre is located, assuming that there is only one centre for each group – as well as to questions of jurisdiction over the constituent members of the group, eligibility to commence insolvency proceedings and applicable law. Others relate to the challenge of reaching broad international agreement on these issues in order to achieve a consistently, widely applied and, possibly, binding solution that will deliver certainty and predictability to the cross-border insolvency of enterprise groups."[4]

Various means have been developed to facilitate cooperation in cross-border cases; while the Model Law provides the requisite legislative framework, it merely lists various possible forms of cooperation without providing further guidance as to how cooperation might be implemented. Faced with the daily necessity of dealing with insolvency cases and attempting to coordinate their administration in the absence of widespread adoption of facilitating national or international laws, the international insolvency community has developed various tools, including cross-border insolvency agreements (or protocols). These are designed to avoid potential procedural conflicts arising in cross-border cases and facilitate the resolution of issues that do arise by promoting cooperation between stakeholders. In 2009, UNCITRAL adopted the Practice Guide on Cross-Border Insolvency Cooperation, which compiles practice with respect to these agreements for the information of judges, insolvency practitioners and others who may encounter or seek to use these agreements in practice.

In response to requests to further expand the information available on cross-border insolvency, in particular on the use and interpretation of the Model Law, in 2011 the Commission adopted a guide for judges (The UNCITRAL Model Law on Cross-Border Insolvency: the judicial perspective). This text examines key elements of the Model Law in the light of the body of jurisprudence that has developed in the almost 15 years since its completion and describes how the process of recognition of foreign proceedings works in practice. To ensure that it remains up to date and relevant, the text will be periodically revised to reflect new developments in interpretation of the Model Law.

Serving as a key source of information on the policy settings of the Model Law, the Guide to Enactment of the Model Law is often cited by judges as a tool for its interpretation. To provide additional information and clarify a number of the concepts used by the Model Law, the Guide to Enactment is currently being revised.

Central to the revisions is the concept of "centre of main interests", which is common to both the Model Law and the EU Regulation on insolvency proceedings (albeit for slightly different purposes), but not defined in either text. In the Model Law, centre of main interests determines the effects of recognition of a foreign proceeding in terms of relief granted to assist that proceeding. Under the EU Regulation, centre of main interests determines the proper place for the commencement of insolvency proceedings and the law that will be applicable to those proceedings, with the decision on centre of main interests being made at the time of the commencement of the relevant proceeding. Under the Model Law, a request for recognition of a foreign proceeding may be made at any time after the commencement of that proceeding; in some cases it has been made several years later. Accordingly, the court considering an application for recognition under the Model Law must determine ex-post whether the foreign proceeding for which recognition is sought is taking place in a forum that is the debtor's centre of main interests or was when the proceeding commenced. The two possibilities indicate the different approaches taken by the courts, thus raising an issue for further consideration.

The interpretation of "centre of main interests" has been the subject of much judicial, academic and professional consideration and comment, often with differing views being expressed on the direction the jurisprudence seems to be taking. The purpose of

revising the Guide to Enactment is not to develop a definition of COMI, but rather to provide more information and direction on how the concept might be interpreted.

Achieving uniformity of interpretation as encouraged by article 8 of the Model Law seems a desirable goal, at least with respect to the application of the Model Law; to the extent possible, it also seems desirable as between the Model Law and the EU Regulation. To that end, the Working Group has identified a number of factors that have been used by courts in determining whether rebuttal of the presumption in favour of the debtor's COMI being the location of its registered office has been achieved. Various views have been expressed as to whether that list can be reduced to a few key factors, such as the location from which the debtor is managed and its physical operations conducted and whether a reasonable or ordinary third parties can discern or perceive where the debtor is conducting these functions, or whether a range of factors that have been found to be relevant in different fact situations should be discussed.

As a related step, more definition is also being provided in respect of the pre-conditions for recognition under the Model Law, in particular what constitutes a "foreign proceeding" for the purposes of article 2 (a). Again, this has been the subject of some consideration by courts, in some cases involving representatives from different proceedings seeking to be recognised as coming from the centre of the debtor's main interests.

Article 2 (a) includes a number of elements, each of which has been the subject of interpretation: (i) a *collective* judicial or administrative proceeding, (ii) pursuant to *a law relating to insolvency*, (iii) in which the assets and affairs of the debtor are subject to *control or supervision* by a foreign court, and (iv) for the *purpose of reorganisation or liquidation* [emphasis added]. Key issues have included whether a law providing for solvent liquidation is a law relating to insolvency; whether a receivership is a collective proceeding or meets the purpose test in (iv); whether control or supervision by an insolvency representative is sufficient for (iii); whether a proceeding which does not deal with certain classes of claim, such as those of secured creditors, would be collective; whether financial adjustment agreements or similar contractual arrangements meet the requirements of article 2 (a). These issues will be further considered at the upcoming meeting of the Working Group in New York (April 30-May 4, 2012).

A second topic currently being considered is the obligations of directors of a company in the period approaching insolvency. While international work has produced results with respect to the obligations that apply to directors of a solvent company (e.g. the OECD Principles of Corporate Governance) and to directors when formal insolvency proceedings have commenced (e.g. UNCITRAL Legislative Guide on Insolvency Law), significant divergences of approach remain with respect to the obligations of directors in the period described as the twilight zone or the vicinity of insolvency.

A business facing an actual or imminent inability to meet its obligations as they fall due needs robust management, as often there are difficult decisions and judgements to be made and it is essential that early action be taken. Financial decline typically occurs more rapidly than many parties would believe and as the financial position of an enterprise worsens, the options available for achieving a viable solution also rapidly diminish. Competent directors should understand the company's financial situation and possess all reasonably available information necessary to enable them to take appropriate steps to address that financial distress and avoid further decline. In addition to providing a predictable legal process for addressing the financial difficulties of troubled debtors and the necessary framework for the efficient reorganisation or orderly liquidation of those debtors, it has been suggested that effective insolvency laws, of the kind promoted by the UNCITRAL Legislative Guide, should also permit an examination to be made of the circumstances giving rise to insolvency of an enterprise and in particular the conduct of directors of that enterprise.

This issue has been the subject of debate for some time, both in the context of developing national approaches and exploring the possibilities of devising a harmonised rule, principally for regional application. The focus of UNCITRAL's work in this area is the obligations that could be set out in an insolvency law for enforcement retroactively once formal insolvency proceedings commence. A draft text for consideration at the next meeting of the Working Group has been prepared. It addresses the parties who would owe such obligations, when the obligations would arise, the nature of the obligations and their enforcement, including who may enforce such obligations, remedies and potential means of funding enforcement proceedings.

Since the adoption of the Model Law in 1997, UNCITRAL has worked to develop an increasingly comprehensive body of texts on insolvency and cross-border insolvency law that focuses on providing an effective enabling legislative framework for the conduct of insolvency proceedings, both domestic and cross-border, and on responding to current issues and needs through guides and information for use by

judges, insolvency professionals and other stakeholders. An assessment of whether (and what) more is needed to address the concerns arising from the most recent financial crisis may determine the shape of UNCITRAL's insolvency activities in the coming years.

Notes:

1. The views expressed in this article are those of the author and do not necessarily reflect those of the United Nations.
2. *Uniform Commercial Law in the Twenty-first Century: Proceedings of the Congress of the United Nations Commission on International Trade Law*, New York, May 18-22, 1992 (United Nations, 1995) at 158 (Intervention by Prof. Carl Felsenfeld, Fordham University, New York).
3. All UNCITRAL insolvency texts are available from http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency.html
4. UNCITRAL Legislative Guide on Insolvency Law, part three, chapter III, para. 6.

Author:
Jenny Clift, Senior Legal Officer
International Trade Law Division
(UNCITRAL Secretariat)
Office of Legal Affairs
Vienna International Centre
Wagramerstr. 5
A-1220 Vienna, Austria
Tel: +43 1 26060 4065
Fax: +43 1 26060 5813
Email: jenny.clift@uncitral.org
Website: www.uncitral.org

The importance of effective and efficient resolution of non-performing loans

by Patrick Schaefer and Mahesh Uttamchandani, World Bank Group

As Philip Wood, noted international financial law scholar and insolvency practitioner, affirms in his text, *The Law and Practice of International Finance*, insolvency law plays a fundamental role in credit-based economies as, when businesses become insolvent and loans are unable to be repaid, the cost of credit increases (or is withdrawn altogether) and overall economic activity suffers.[1] Laws and regulations which govern insolvency play a central role in promoting a healthy and dynamic climate for business by assuring that credit and assets are efficiently allocated and reallocated. While a business may generally consider the particulars of the insolvency framework only upon the arrival of financial distress, the laws and their degree of efficiency establish the *ex ante* conditions for a properly functioning credit and business environment. Such considerations are of fundamental importance for maturing credit-based and market economies in developing countries; strengthening insolvency frameworks can help to facilitate investment therein.

The fundamental importance of these frameworks has gained particular relevance in the wake of the global financial crisis which has resulted in higher rates of non-performing loans (NPLs) and a consequent rise in the rates of corporate insolvencies in many parts of the world, with particular escalation evident in Eastern Europe.[2] However, the current legislative and regulatory response among countries varies widely and often only serves to exacerbate the resolution of NPLs. In order to deal more effectively with these burdens, countries must strive to create ever more efficient debt resolution frameworks. The challenge is for countries to find ways to improve NPL resolution through legislative and regulatory reform.

The World Bank Group's Investment Advisory Services has a specific Debt Resolution and Business Exit Team to assist countries in improving their insolvency frameworks.

Non-performing loans and their economic impact

The reach of the financial crisis has been extensive and, in most of the world's regions, particularly in Central and Eastern Europe, it has generally resulted in a significant rise in NPL rates (Figure 1). Indeed, increasing NPL rates and the consequent deterioration in the quality of banks' loan portfolios have been at the center of costly banking system distress and economic crises in both developing and advanced economies.[3] A study of the Central and Eastern European countries, for example, found that the economic slowdown has led to a deterioration of NPL ratios.[4] In times of such distress and slowdown, with the concomitant rise in NPLs, financial institutions face recapitalisation needs as their balance sheets deteriorate. Banks are less willing to extend new credit or roll over debt, which, in turn, weighs on

Figure 1: Increase in non-performing loan rates

Region	2007	2008	2009	2010	2011
Africa	3.36	3.34	5.73	6.82	5.33
Middle East	2.26	2.73	3.70	4.82	4.62
Far East and Central Asia	3.56	2.90	2.79	2.68	2.72
Eastern Europe	3.54	3.84	8.04	8.29	8.23
Western Europe	2.08	2.60	4.40	5.13	4.38
North America	.76	1.49	3.43	3.18	2.87
Central and South America	4.08	4.13	5.08	3.83	3.57
OECD high income	**2.01**	**2.40**	**3.77**	**4.00**	**3.20**

Source: Bankscope; NPL Rates amongst the top 500 active lending institutions by average value of assets in the respective region.

Figure 2: Insolvency indicators across regions

Region	Time (in years)	Cost (as % of the estate)	Recovery rate
Sub-Saharan Africa	3.4	23	19.1
Middle East & North Africa	3.4	14	29.7
East Asia & Pacific	2.9	23	29.5
Eastern Europe & Central Asia	2.7	13	35.8
Latin America & Caribbean	3.3	16	30.7
South Asia	3.4	9	29.0
OECD high income	**1.7**	**9**	**68.2**

Source: Doing Business Report, 2012.

economic growth.[5] When economic growth declines significantly after structural shocks that also drive up NPL rates, bank credit contracts further.[6]

In addition to highlighting the effect of high NPL rates on overall economic health, the recent financial crisis has also underlined the need for effective insolvency frameworks in order to resolve NPLs as quickly, effectively, and efficiently as possible.[7] Nevertheless, the insolvency frameworks of many countries are often ill prepared to resolve NPLs in an optimal manner. Several key indicators bear this out, showing low rates of recovery, a high cost of resolving insolvency and protracted time periods before any eventual resolution (Figure 2).[8]

In many ways, these indicators are a reflection of a general reliance among jurisdictions on court-based proceedings to resolve insolvency, rather than availing of more efficient and cost effective out-of-court debt resolution methods. In many economies, enforcement tools are rigid with insolvency frameworks outdated. In 101 of 168 economies, for example, foreclosure and liquidation are the proceedings most commonly used, usually with no provision for a restructuring of a company's debt in a way that allows the business to continue operating – even for a business that is potentially viable.[9]

Ultimately, an effective insolvency regime should enable a distressed business and its creditors to reach an optimal outcome that preserves firm value and maximises stakeholder returns. Available IMF and World Bank data suggest, however, that hundreds of billions of dollars in business value are "destroyed" in emerging markets due to a lack of legal mechanisms that adequately resolve these cases of insolvency.[10] This negatively impacts entrepreneurship, access to credit, bank loan recovery and jobs. The challenge is to reform legislative and regulatory frameworks such that NPLs are more easily resolved, thereby reducing their pressure on balance sheets, increasing the availability of affordable credit and ameliorating their negative effects on the overall economy.

These claims are borne out by economic analyses. Evidence shows that reforms, particularly those that encourage and support speedier debt repayment and out-of-court restructurings, lead both to higher returns to creditors and to cheaper and more accessible credit. In 1999, reform of debt reorganisation in Colombia streamlined the procedure by tightening statutory deadlines and reduced the ability of debtors to protract the appeal process.[11] These reforms had the effect of improving the position of viable firms and shortened the overall duration of reorganisation from 34 to 12 months.[12] Another study, looking at the effects of Thailand's 1998 bankruptcy reform, which included the introduction of a framework for debt rehabilitation, demonstrated a decline in the level of NPLs and in the cost of resolving the insolvency.[13]

Studies have also shown that reforms which focus on reducing the time required to resolve debt recovery claims reduce the cost of credit as well as increase the aggregate supply of credit in an economy. Out of court debt recovery tribunals in India, for example, have not only increased the speed of repayments, but have also yielded to creditors a greater claim to an increased value on collateral, and led to lower interest rates on larger loans.[14] The Brazilian bankruptcy reform of 2005 which established increased creditor protection, for example, was found to have resulted in a 22% reduction in the cost of credit and a 39% increase in the aggregate level of credit.[15]

Other studies document an alternative economic effect that an effective insolvency law regime can have on entrepreneurial activity and MSME growth. The extent to which insolvency regimes are 'forgiving' appears to have a significant effect on entrepreneurship and levels of self employment across countries. Research shows that reforms that make bankruptcy regimes more 'forgiving' typically lead to an increase the supply of entrepreneurs.[16] In contrast, the absence of a debt discharge mechanism in the event of insolvency inhibits the entrepreneur from re-entering the marketplace, as 'a

broad fresh start policy encourages individuals to take risks in starting a new business venture'.[17] This is reflected in legislative movements in certain countries to relax their insolvency regimes.[18]

The work of the World Bank Group's Debt Resolution and Business Exit Team

The World Bank Group (WBG) has a strong track record of promoting and helping to implement insolvency reforms in a wide range of jurisdictions. One of the principal ways in which the World Bank Group targets its assistance more precisely in the reform of insolvency frameworks is through its Debt Resolution and Business Exit Team, which forms part of the Investment Climate Advisory Services Department in the World Bank Group. The overall goal of the Team, in line with the benefits demonstrated in the reform studies cited above, is to improve the credit environment by creating more efficient regimes for banks and businesses to recover debts. By working to reduce dependency on the courts for debt resolution, these efforts help failed businesses to "exit" the market efficiently and return assets to creditors as soon as possible, thereby increasing returns to banks and lowering rates of NPLs. This work also enables viable but financially distressed businesses to restructure and avoid the value-destructive effects of insolvency that they otherwise would have endured.

To this end, the Debt Resolution and Business Exit Team delivers both technical assistance and expertise to client governments via regional teams located in both the IFC and World Bank. Such technical assistance includes legislative review and reform, advice on improving institutional frameworks and capacity building and training of relevant stakeholders. In recent years, several of the Team's projects have sought to foster out of court debt resolution with the aim of reducing NPL rates in countries such as Bangladesh, Montenegro, Romania, and Lebanon.

The Debt Resolution and Business Exit Team also helps to produce publications as well as organise and facilitate regional conferences for knowledge sharing, staff training, and the promotion of further dialogue between public and private sector stakeholders.[19] In 2011, the Team led such a conference in Tunis, Tunisia. The event centred on insolvency frameworks in the Middle-East and North Africa Region as well as from Sub-Saharan Africa and was attended by staff and clients from the region. Judges, public officials and experts were able to share not only their experiences and questions about how recent reforms implemented amongst neighbouring countries actually functioned, but also their particular successes and challenges as well.

Another more recent conference in Vienna, Austria, organised with the collaboration of the Austrian Government, the IFC's Investment Climate Global Practice, and the World Bank Financial Sector Reform Advisory Centre, brought together public officials, international experts and financial sector representatives over the course of two days to discuss and transfer knowledge with respect to strengthening debt resolution systems in the Eastern European and Central Asian region. Because of the depth of the effects of the financial crisis in this region, the conference addressed a range of issues relevant to debt resolution in the region, such as out of court workouts, tax barriers, asset management companies, secured transactions and consumer protection, which encouraged a wide ranging dialogue from which participants could implement solutions to the current obstacles that hinder debt resolution.

The Debt Resolution and Business Exit Team also coordinates internally with regional IFC and World Bank teams through the Distressed Asset Resolution and Insolvency Thematic Group (DARIT) whose main objective is to create opportunities to increase the impact of IBRD, IFC and IMF interventions in the area of distressed asset resolution and insolvency reform. It offers an ongoing forum for its members to provide updates on ongoing activities, to facilitate knowledge and information sharing, to share lessons learned and to help identify opportunities for collaboration.

Even so, the combined efforts of the World Bank Group and the IFC's Debt Resolution and Business Exit Team in reforming insolvency legislation and practices still face a variety of challenges, as the data from Figures 1 and 2 demonstrate. The need for further intervention, whether through direct technical assistance or through fostering the sharing of knowledge and experiences amongst stakeholders, to create more efficient insolvency frameworks and healthier economies is patently clear. While working across regions and jurisdictions to resolve these important issues remains challenging, the Debt Resolution and Business Exit Team is in a strong position to structure its interventions to account for the unique political structures, legal cultures and economic and social frameworks of each country.

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The authors wish to gratefully acknowledge the invaluable assistance of Ian Dalton in the preparation of this article.

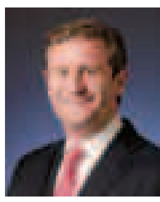
Authors:
Patrick Charles Schaefer, Private Sector Development Specialist
Debt Resolution & Business Exit
Investment Climate
Tel: +1 202 458 7533
Fax: +1 202 522 3262
Email: PSchaefer@ifc.org

Mahesh Uttamchandani, Global Product Leader
Debt Resolution & Business Exit
Investment Climate
Tel: +1 202 458 5827
Fax: +1 202 522 3262
Email: muttamchandani@worldbank.org

World Bank Group
2121 Pennsylvania Avenue NW
Washington DC 20433
US
Website: www.wbginvestmentclimate.org

Generating value creation from distressed debt assets

by Brett Wyard and Raymond Whiteman, Carlyle Strategic Partners (CSP)



The specialism of distressed-debt investing is likely to provide increasing opportunities in the years ahead. Brett Wyard and Raymond Whiteman of Carlyle Strategic Partners ("CSP"), the division within The Carlyle Group that focuses on making alpha-driven debt and equity investments in companies that are experiencing financial duress, outline the fundamentals, the principles, and some examples of the value this asset class can generate.

A funding gap

The great liquidity drought of 2007-08 exposed long-term weaknesses within many well-known companies. Even well-managed businesses with good management teams found themselves in situations that felt unimaginable just a few months prior to the crisis. Yet the level of bankruptcies and restructurings actually fell below that of the worst predictions in most industrialised countries, meaning that the distressed debt sector – despite tremendous market dislocation – sourced fewer than expected restructuring and debt for equity opportunities than many had been expecting. The recent injection of US$1.3 trillion by the European Central Bank into the financial system has prevented, or perhaps postponed, another market dislocation but has not changed the end game.

Europe's nascent recovery is being threatened by a deepening and potentially-intractable sovereign debt crisis. This means that the economic challenges, within both consumer and industrial sectors, are far from over. Indeed, a potentially-painful second phase is now underway, one that may provide distressed debt investors with far more "alpha" oriented restructuring and turnaround opportunities than those "beta" oriented debt trading opportunities of 2007-09.

Of course, many businesses have taken steps to strengthen their balance sheets – not least because they remain acutely aware of the restricted liquidity available from their traditional sources of funding, including their house banks. Nonetheless, corporate leverage remains a deep concern – not least due to a wall of approaching debt maturities due between now and 2015 with a major funding gap upon us.

This is a serious position, which more agile companies have addressed by refinancing their debt ahead of schedule – taking advantage of 'windows of opportunity' during lulls in volatility. However, this has been more challenging for SMEs to achieve and many have yet to act.

Unlike larger borrowers that have broader sources of funding through the public and institutional capital markets – SMEs have remained largely dependent on the private debt markets. Yet banks are withdrawing lending capacity at an unprecedented rate – responding to regulatory pressures such as increased capital requirements under Basel III, political pressures that require bailed-out banks to focus on their home market, or simply the post-crisis desire to strengthen their loan books. Additionally, Collateralised Loan Obligations (CLOs) – a major pre-crisis source of liquidity and buyer of syndicated bank loans – are all coming out of their investment periods and new issuance is a fraction of pre-2008 levels.

Distressed debt opportunities

All of the above suggests a growth in opportunities for US and Europe's distressed debt investors – an assertion that may draw some scepticism from market watchers who noticed that the boom in distressed debt investments of 2007-09 failed to produce an extended period of high defaults. Certainly, what could now be viewed as Phase I of the crisis (2007-09) created tremendous market dislocation without the corresponding levels of defaults and restructurings many had anticipated – including debt for equity swaps or control opportunities around failed LBOs.

Yet Phase II, which is already underway, will likely change that. Due to the formidable combination of renewed recession, heightened regulation and the onus on banks to write down assets, it seems clear distressed opportunities will grow.

Factors supporting this growth include:

- a debt maturity wall on both sides of the Atlantic – much of which may possibly fail to be refinanced;
- lower-rated new issuance has reached an all-time high (back to 2007 levels as a percentage of new issuance) – usually a two to three-year precursor to a period of higher defaults;
- ratings declines, which will lead to higher levels of forced selling by financial institutions;
- sluggish (or negative) economic growth, which will harm corporate profitability and force over-

indebted or insolvent businesses to restructure; and
- the inability of PIK toggle loans, "covenant lite" and ongoing credit amendment (or "amend to pretend") activity to do more than merely delay the inevitable.

An attractive private equity asset class

Certainly, distressed investing is an expanding asset class for private equity investors, especially with respect to companies in the middle market space which have less access to refinancing capacity than their larger counterparts.

From a regional perspective given Europe's economic pressures are more severe and its banking sector is weaker than the US, it is certainly a region for growth in distressed debt activity. North America, however, will also continue to offer significant opportunities. Also, while past activity has centred on specific sectors, the poor economic growth prospects, in particular in Europe, for 2012 and beyond should produce a more diverse spectrum of opportunities.

While the basic remit of private equity is to galvanise the performance of underperforming businesses, distressed specialists can focus on more material rescue missions. Their aim in many cases is to restructure and turn around troubled businesses that can be made fundamentally sound, with a focus on restoring value and providing these companies with a future.

This can be far different from the asset stripping or "vulture" portrayal that is usually attributed to this specialised type of investment.

Careful selection

The policy of seeking opportunities in industries only where investors can both find and add value rules out certain sectors subject to secular change, or where the business model is obsolete. For example the print industry has often presented too many challenges, as turnaround potential is also dependent on the progressive direction of the market. Indeed, initial considerations for a distressed investment opportunity must be pragmatic – focused as much on the preservation of investment capital at risk as on the potential profit.

Distressed investors need to seek out companies that, while financially distressed, remain operationally sound. So operational control – or at least an exertion of influence to secure this outcome – often needs to be a cornerstone policy for investment.

CSP investments

Stellex Aerostructures – a specialist producer of titanium and aluminium aerostructure components – and Diversified Machine, an auto parts supplier that Carlyle formed in 2005 from the assets of bankrupt predecessor UniBoring – gaining majority control in both cases, CSP rapidly achieved strong results from both companies, as well as from smaller minority-stake investments.

CSP also invested in Texas group Permian Tank & Manufacturing, a manufacturer of steel and fibreglass storage tanks. In 2009, CSP added Florida's largest bank, BankUnited, as well as another automotive company, components manufacturer Metaldyne.

European acquisition

In September 2011, CSP made its first control acquisition in Europe – a UK manufacturer called Brintons Carpets; a family-owned business since 1783, the company has a strong reputation as the producer of premium Axminster. The White House, 10 Downing Street and venues such as the newly-restored Renaissance Hotel at London's St Pancras station have Brintons carpets. In late 2010, the new Delhi airport terminal provided the company with the world's biggest single order of woven carpet (size of 24 football fields). Brintons is likely to be one of a stream of non-US investments for CSP.

CSP does not regard its North American and European operations as separate silos – demonstrated by one recent investment in a US company that was purchased from a European financial institution, buying strong US fundamentals on European technicals.

The review process

CSP follows a rigorous investment process, which begins with a detailed risk assessment – of both the company and its operating environment. In Northern Europe, CSP seeks opportunities primarily in countries which have restructuring creditor schemes of arrangement (most similar to US bankruptcy and other creditor-friendly environments). This means the UK, Ireland, Germany and the Netherlands meet their criteria.

That does not preclude investments where the insolvency regimes are less investor-friendly: such as in France, which has laws aimed at protecting employees and existing equity holders that can make restructuring more challenging. It does however mean that in these countries there are additional hurdles to jump – ones perhaps requiring a greater risk premium to make the deal attractive. In Greece, which lacks both restructuring precedents and suffers limited transparency – as well as in Portugal, Spain and Italy – the required risk premium may be even larger. CSP also looks to bypass restructuring risks in how they may structure their investments in these jurisdictions.

To give CSP greater leeway for reviving a company's fortunes, CSP aims to acquire a distressed company at a significant discount. To reflect the higher

costs prevailing in some countries, CSP would look for a greater discount to the enterprise value. The judgement made by CSP is one purely predicated on a calculation regarding its expectations of risk, opportunity and return.

Other investment criteria

A crucial decision for CSP is deciding which types of company can best provide us with the fundamental drivers of value. Thus far, our investment focus has been on industries where The Carlyle Group has deep industry experience through its +250 portfolio companies in the aerospace, automotive, consumer, defence, energy, healthcare, industrial, media, power, retail, technology, telecommunications and transportation sectors. And while several of CSP peers are often termed mega name investors, our guiding strategy is based on smaller average investment sizes – for example US$100m in the case of Metaldyne and US$55m for Brintons.

Another major consideration is exit strategy, which CSP considers before any acquisition or investment is made. While a private equity buy-out typically involves a commitment of four to 10 years, distressed investing generally tends to be for shorter periods. Two to four years is more usual; although this strategy may need reassessing should a prolonged period of global economic austerity lie ahead. Certainly, some assurance is vital from the outset that the company can be sold-on once restored to financial health.

Hands-on approach

CSP's approach to the companies where it does have control is very-much "hands-on". In certain cases this involves selecting new management teams, appointing new boards of directors or members of our team serving as directors of reorganised companies at varying degrees of equity ownership. That said, CSP brings no prejudices to any of its investments. CSP's aim is not to replace existing management but to understand where the company is weak and then seek to strengthen it. This can, just as often, result in support of the existing management team, though one perhaps needing additional operational and management support.

Distressed investing is by nature a handicapping game; essentially one in which to secure control the company's debt is typically bought ahead of an anticipated default. However, on occasions the company may avoid such an outcome – in which case we trade out of the debt at a par plus accrued or near par plus accrued basis. That said, the handicapping game is one where CSP has consistently demonstrated success, as illustrated in the case studies below.

Brintons: a UK case study

Brintons Carpets came onto CSP's radar in May 2011. CSP acquired it in the following September: a four-month process that is typical for distressed investing. Thanks to its premium products, the company thrived during the pre-credit crunch era and had made a substantial capacity-increasing investment in China. But the financial downturn had led to a negative impact on its core customer base of hotels, while also denting demand from the leisure and housing sectors.

CSP was invited to join a distressed sale process initiated by the board of directors. CSP bought from a UK commercial bank its bilateral debt facility into Brintons at a discount-to-face value. And to maintain the company's operations, CSP provided a significant capital injection. Shortly afterwards, CSP bought the majority of Brintons' assets through a "pre-pack" administration process, giving it control of the business.

CSP's action plan

Media reports of the Brintons deal were generally negative, focusing on resulting job losses and the transfer of the company's pension fund liabilities to the Pension Protection Fund. Less attention was given to the fact CSP injected new money into the business and promptly devised a plan to improve profitability, which would enable Brintons to compete more effectively for major commercial contracts in the Asia-Pacific region and the US.

CSP always looks for growth potential in its acquisitions. In the case of Brintons, this potential lies in full utilisation and the future-potential of the company's innovative high-definition carpet weave technology. Brintons has developed the world's most efficient looms, enabling shorter runs and the delivery of more complex designs. While a luxury carpet typically incorporates between eight to ten colours, this new technology makes the production of 24-colour carpets feasible with significantly improved change-over times: a process we consider a potential "game-changer" in luxury carpet manufacturing.

CSP's most immediate priority is to reduce the company's overheads by updating its operations. CSP's hands-on approach mentioned earlier – which initially came as a surprise to Brintons' management – means the investment team regularly visits the Kidderminster head office and has become deeply involved in every part of the company's sales, supply chain management and operations. Certainly, the changes being initiated should bring more favourable, if less dramatic, headlines, as the benefits emerge.

Success stories

Brintons is just one story from a successful portfolio of investments since CSP's inception. For example, success

in reviving Diversified Machine's fortunes was recognised at the end of 2011, when Carlyle won the inaugural *Teddy Forstmann Memorial Private Equity Value-Creation Award* (awarded by the *New York Times*).

Diversified Machine's turnaround story deserves merit. CSP created jobs at Diversified – increasing the workforce from around 525 employees to more than 2,200. Diversified has also completed several strategic acquisitions to boost its growth and financial prospects.

CSP's first major investment, in Stellex Aerostructures, lasted just two years. Stellex was sold at a premium to GKN in September 2006 and this achievement was recognised when Carlyle received the *Turnaround Buyout of the Year* award from *Buyouts Magazine* and the *Middle Market Turnaround of the Year* from *The Turnaround Management Association*.

There is no alchemy and no one factor that can predict success. Some assume CSP looks for strongly underlying businesses with weak management or leadership who has over-leveraged the company. This may be one route to successful acquisition. But there are also many companies that have strong management teams who CSP is keen to partner with during its ownership. For instance, CSP's 2009 acquisition of Metaldyne was an investment in what CSP believed to be a well-managed business – with an excellent management team – that was, nonetheless, suffering short-term problems arising from the motor manufacturing industry downturn and also a need to restructure its balance sheet. Revenue and earnings significantly recovered in 2010 and again in 2011.

Strategic cooperation

Looking ahead, CSP's investment strategy will continue to be based on investing in businesses which it believes can steer or be steered through temporary challenges and, once strengthened, can stand the test of the economic cycle and changing consumer and industrial needs.

Such a policy occasionally results in partnering with competitors that also may buy a portion of the target distressed company's debt. Such partnership may occur intentionally or by default, and CSP is certainly an advocate of the partnership model. In most cases motivations are aligned, and strategic expertise can be complementary – making the opportunity to pool resources to achieve greater value for investors a welcome one. In many cases, distressed investing can be a collegiate business with plenty of opportunities, so in many cases it makes good business sense to cooperate.

CSP can also partner with other groups within Carlyle as and when appropriate. Indeed, our parent's global reach and diverse industry resources is of particular value when seeking to maximise the opportunities that we now see opening up in Europe and elsewhere.

Authors:
Brett Wyard, Managing Director and Co-Head
Raymond Whiteman, Managing Director and Co-Head
Carlyle Strategic Partners
The Carlyle Group
1001 Pennsylvania Avenue, NW
Washington, DC 20004-2505
US
Tel: +1 202 347 2626
Fax: +1 202 347 1818
Email: brett.wyard@carlyle.com
raymond.whiteman@carlyle.com
Website: www.carlyle.com

IBA Section on Insolvency, Restructuring and Creditors' Rights (SIRC)

by Judith Elkin, Haynes and Boone, LLP and Co-Chair IBA-SIRC, and
David Jenny, VISCHER Ltd and Co-Chair IBA-SIRC

The global financial crisis has demonstrated that legal systems must develop the necessary tools to weather uncertain times. Insolvency laws are among the most important of these tools. Recent events show that insolvency laws must be able to address financial difficulties of both the private and public sector. Nations, local governments and financial institutions are no longer exempt from large-scale financial distress. Additionally, as nations, continents and their economies become more intertwined, insolvency laws must be able to adapt to the complications of cross-border transactions and business entities. SIRC continues in 2012 to analyse and discuss these issues at its conferences and in its publications. Additionally, by participating actively in UNCITRAL and World Bank working groups, SIRC continues to shape policy and legislative solutions to insolvency and restructuring issues globally.

SIRC provides a forum for the examination and improvement of laws and systems to manage financial distress and cope with the insolvency and restructuring of troubled enterprises in a global economy. Through our members, who are high profile insolvency practitioners in their own jurisdictions, we monitor, gather and report on international developments in cross-border insolvency matters. SIRC serves in a NGO capacity at world bodies, such as UNCITRAL and the World Bank, organisations tasked with policy-making initiatives in the insolvency and restructuring area, and provides input into domestic insolvency law reform initiatives around the globe. Through our relationships with the judiciary, SIRC provides a bridge between insolvency practitioners and judges in common and civil law systems, fostering not just understanding but cooperation where appropriate.

SIRC's Subcommittees are instrumental in achieving its objectives. The current SIRC Subcommittees and their co-chairs are:

- Enforcement of Creditors' Rights (Chris Donoho of HoganLovells and Anja Droege of BMH Avocats);
- Reorganisation and Workouts (Justin Fogarty of Heenan Blaikie and Michelle Barclay of Jorge Avendano Forsyth & Arbe Abogados);
- Insolvency Legislation and Legislative Reform and Harmonisation (Robert Van Galen of NautaDutilh and Gregor Baer from San Francisco);
- Reorganisation of Regulated Industries (John Sandrelli of Fraser Milner Casgrain and Nuno Libano Monteiro of P L M J Law Firm).

Upcoming conferences

During 2012, SIRC will organise or participate in conferences taking place in Helsinki, Sao Paolo, Dublin and Warsaw:

18th Annual Global and Restructuring Conference, Helsinki, Finland, May 20-22, 2012

The theme of SIRC's 2012 annual conference is *"Sink or Swim: Can We Survive Floating in a Sea of Red Ink."* While it will be difficult to surpass the substance and glamour of our 2011 spring conference in Paris, we are going to try. Our programme will explore several areas that have generated significant global newspaper coverage recently, as well as areas that have been the subject of a number of controversial recent judicial rulings. Intellectual property rights are governed by a host of laws outside the bankruptcy and insolvency arena, but are often a very valuable asset of insolvent companies. The sale of intellectual property in the massive cross-border *Nortel* cases generated billions of dollars. When a patent owner goes into an insolvency proceeding, the rights of licensees whose own economic viability may depend on those licensed rights, can be seriously impacted. Our first panel will explore these rights and recent conflicting court decisions in various jurisdictions. A second timely panel will explore the recent legislation in Europe and the US governing the solvency of financial institutions and how the insolvency of a financial institution is handled. A third programme will deal with the recent spate of insolvencies in the global shipping industry. And finally, with *Lehman, MF Global* and *Madoff* still garnering press coverage, our last panel will explore how assets are traced and recovered, including sometimes from the creditors themselves, in proceedings involving global companies which have become insolvent through market changes and/or fraud.

South American Regional Conference on Distressed M&A and Restructuring, Sao Paolo, Brazil, August 2012

In 2011, SIRC sponsored its inaugural regional conference on distressed M&A and restructuring in Buenos Aires, Argentina. The conference was a joint effort between SIRC and the Latin American Regional Forum. The programme, which dealt with cross-border restructurings, both formal and informal, distressed M&A strategies, the insolvency of regulated industries and the recognition of foreign proceedings, all with a particular focus on Latin America, was extremely successful. Thus, plans are underway to present a similarly Latin America-focused programme in August 2012 in Sao Paolo.

SIRC programmes at IBA Annual Conference, Dublin, Ireland, September 30 – October 5, 2012

Planning is well underway for SIRC's programmes at the IBA Annual Meeting in Dublin. Our committee chairs and their counterparts in the Employment and Industrial Relations Law Committee and in the Litigation Section are in the process of developing strong and interesting programmes focusing on international insolvency issues of global significance. These programmes will not only be timely, but cutting edge in terms of structure and format.

The Enforcement of Creditors' Rights Subcommittee is developing a programme entitled *"When the Music Stops"* discussing new developments in the liability of directors and officers in and after insolvency proceedings. There are significant differences in liability in various jurisdictions, and the confluence of these conflicting laws and conflicting duties are heightened in cases involving multi-national corporate groups involved in cross-border insolvency proceedings.

The Reorganisation and Workouts Subcommittee is working with the Employment and Industrial Relations Law Committee on a fascinating and politically sensitive topic entitled *"Blood, Sweat and Tears – Money vs Sweat Equity."* The rights of current and former employees are of global economic and political importance. The programme will discuss the competing rights of creditors and pension holder of insolvent entities, as well as the situation where the pension obligations themselves may be the cause of the company's financial distress.

The Insolvency Legislation and Legislative Reform and Harmonisation Subcommittee are working on a programme on the restructuring of corporate groups entitled *"Bridge Over Troubled Waters."* Through the use of a hypothetical multi-national corporate group insolvency, the programme will examine the success to date of UNCITRAL's ground-breaking enterprise group legislative guide annex, and provide guidance for greater future cooperation through legal instruments, rules and standards around which consensus might be forged for the benefit of the insolvent entities, their employees and their creditors.

Lastly, the Reorganisation of Regulated Industries Subcommittee, following up on its successful panel in Dubai on sovereign debt defaults and insolvencies, will be presenting a programme entitled *"Can you Foreclose on a Country?"* The panel will present a practical guide to the restructuring of sovereign entities and how creditors, such as public bondholders, can best protect their interests. In light of recent events in Europe and the US over potential sovereign debt defaults, political compromises, and the use of US Chapter 9, this programme should not be missed.

Central Eastern European Regional Conference on Opportunities and Challenges that Growing Businesses Face in Selected EU Member States – Perspectives for the Future, Warsaw, Poland, November 21-23, 2012

SIRC is pleased to be participating in a conference in Warsaw, Poland sponsored by the European Regional Forum, on the challenges and rewards of doing business in Central and Eastern Europe. Accession to the EU has played an important role in shaping the legal and business environments in new EU member states, offering both opportunities and requiring changes to operations of growing businesses in these countries. The programme, which will include one day of specialised workshops on various topics that attendees can choose to attend, as well as two days of seminar-style presentations, will explore what challenges and opportunities will prevail in the future with regard to growing business operations in the new EU member states. Programmes will discuss whether there is a risk of facing a so-called "post accession drift," as opposed to the continuation of the vigorous and positive activities that took place during the period just after accession. The conference will provide an opportunity to discuss the experiences and projections of some of the new EU member states. SIRC will be presenting programming on insolvency issues in Central and Eastern European jurisdictions. Other topics to be presented include tax, antitrust, employment law, corporate governance and M&A.

Other interesting projects

Aside from programmes, SIRC is also working on other interesting projects.

SIRC's 2012 Annual Scholarship Competition

The IBA Scholarship Programme allows each Section within the IBA Legal Practices Division to award a scholarship to allow a young lawyer to attend the Annual Conference. SIRC will be able to fund one scholar to attend the IBA Annual Conference in Dublin. The Scholarship will cover a contribution towards travel

and accommodation expenses, a waived registration fee, two years free membership in the IBA, LPD, PPID and one Committee from the awarding Section, as well as the waiver of a registration fee to either the next IBA Annual Conference or one of the Section's conferences to be held the following year.

SIRC's 2012 scholarship topic deals with finding the right balance between the rights of creditors and pension holders of insolvent entities. Each submitter should describe the balance struck in his or her jurisdiction between these competing interests and analyse critically (i) whether the interests of (future) pension holders are overprotected so that non-privileged creditors of insolvent entities are not treated fairly; (ii) whether pension holders' interests are not sufficiently protected and are junior to the rights of creditors; or (iii) whether the law and policy of his or her jurisdiction is a sound compromise. Submissions are due by Monday April 9, 2012.

IBA guide on cash pooling

SIRC, through the Herculean efforts of editor Marcel Willems (Kennedy Van der Laan), is well into the process of finalising its practical guide on cash pooling in many significant global jurisdictions. Pooling cash within a corporate group or among a number of related companies is commonplace and enables the best use of the funds available at as low a cost as possible, thus strengthening the financial position and leverage of the companies involved. One result of the current economic low tide, however, is that there are some specific caveats to observe. Not only are regulatory constraints tightening by the day, but the risk of insolvency and the resulting competing claims to pooled cash is becoming an increasingly pressing issue.

SIRC's guide will be written by leading practitioners from a wide range of countries who will provide detailed analysis on the provisions in their respective jurisdictions regarding cash pooling and insolvency. Each chapter follows the same template for ease of reference and topics featured include specific legal requirements from various perspectives, the liability of company directors, the potential for veil piercing/substantive consolidation, banking requirements, regulatory requirements and implicated tax issues.

The SIRC journal: Insolvency and Restructuring International (IRI)

The IRI is an informative substantive journal covering international insolvency and comparative law issues and key developments of concern to the global insolvency, distressed finance and turn-around communities in the insolvency fields. As IRI moves into its sixth year, the publication is accepting advertising in 2012, and with a wide global distribution, provides an opportunity for professionals to reach out to the insolvency community in an efficient way. Persons interested in advertising should contact Andrew Webster-Dunn (Andrew.webster-dunn@int-bar.org) at the IBA office.

IRI is available on a subscription basis to non-IBA members, expanding the range and reach of the journal. Non-IBA members may arrange for a subscription by contacting Katherine Brewer (katherine.brewer@int-bar.org) at the IBA office. The success of the journal is due in large measure to the imagination and dedication of its Co-Editors, Karen O'Flynn (Clayton Utz) and Jennifer Stam (Gowlings), and to the hard work of the IBA publications department. IRI encourages contributions from all sources. Persons who would like to submit articles for consideration, or with ideas for topics upon and article can be written should contact our Co-Editors.

The SIRC website – a place to visit

Please see: http://www.ibanet.org/LPD/SIRC/Inslvncy_Rstrcrng_Crdtrs_Rights/Default.aspx. The website is being coordinated by SIRC Website Officer Tomás Miguel Araya (M. & M. Bomchil) and Graham McPhie (Moon Beever).

Readers who are not yet members of the IBA and/or SIRC to join the IBA by going to www.ibanet.org/join_the_iba/join_the iba.aspx, and select "Insolvency, Restructuring and Credi-tors' Rights" as your free committee or, if you are already a member of the IBA, add the SIRC membership by adjusting your profile in the "My IBA" section of the website.

Authors:
Judith Elkin
Co-Chair IBA-SIRC
Haynes and Boone, LLP
30 Rockefeller Plaza, 26th Floor
New York, NY 10112
US
Tel: +1 212 659 4968
Fax: +1 212 884 8228
Email: judith.elkin@haynesboone.com
Website: www.haynesboone.com

David Jenny
Co-Chair IBA-SIRC
VISCHER Ltd
Aeschenvorstadt 4
P.O.Box 526
4010 Basel
Switzerland
Tel: +41 58 211 33 49
Fax: +41 58 211 33 10
Email: djenny@vischer.com
Website: www.vischer.com

Reflections on shipping and offshore restructurings

by Richard Sjøqvist, Bugge, Arentz-Hansen & Rasmussen

Traces of early debt composition procedures can be found in the Bible, Roman law and has probably achieved a level of maturity through the US Chapter 11 procedures (for those able to afford it). Many jurisdictions developed their modern bankruptcy legislation from the mid-1850s until the deep depression in the mid-1930s with subsequent sporadic amendments. Although certain jurisdictions have sought to improve their restructuring legislation, the results do not truly reflect the globalisation of the economic environment. Each jurisdiction deals with restructuring based on its cultural heritage which probably is very difficult to analyse in a legal context, with common law countries having a creditor friendly approach, while civil law countries still favour a protection of a larger group of stakeholders, leaving the Scandinavian jurisdictions somewhere in between. When dealing with shipping and offshore restructuring, these facts often explain the complexity in the task at hand as shipping and offshore companies are by their nature involved in a multitude of jurisdictions, having great flexibility in moving assets from one jurisdiction to another.

Until the mid-1960s shipping companies (offshore companies did not exist) used to be fairly small, with a relatively simple debt structure. During the last 50 years much has changed in the way the shipping industry has developed – from single ship companies to international multi-billion conglomerates. The shipping and offshore industries have become enormously capital intensive since the early 1970s. The financing arrangements have also developed and would, as before, quite often contain loan to value covenants, but as companies grow, the covenants would be more corporate style such as leverage ratio and value adjusted equity ratio covenants. The covenants would enable the lenders to re-negotiate the loan agreement or, more unpleasantly, advance their legal rights at stages where not only values drop but also when income is depleting.

Upon breach of covenants a usual pattern folds out: creditors will advance their legal rights, for then recognising that to insist upon a payment, as long as the debtor has insufficient funds, would not be possible. Even if such debtor would be able to channel funds to a particularly unpleasant creditor, the payment might not only be voidable but the creditor might also be accused of defrauding creditors with the criminal consequences this might have. Consequently, and usually somewhere along the road, the legal niceties will be forgotten, and pragmatic commercial considerations prevail.

Commercial pragmatism

Turning to commercial pragmatism, shipyards when faced with difficulties, will ask for a price increase in respect of a contract, when ship and rig owners face difficulties they run to the lenders and to shipyards (if they have something under construction), and when charterers face problems they turn to their suppliers and customers. The striking similarity will always be that debtors turn to the largest stakeholders in order to (i) have the most effect out of the negotiations, (ii) keep a closed shop in respect of the challenges, and (iii) achieve quick results.

Confronted with economic catastrophe, the debtors will have to understand whether (a) the creditors actually are willing to talk, or (b) whether an organised sale of all or a substantial part of the assets might be just as good a solution. Creditors will have to understand whether (a) the shipowner is seeking to favour its own position over the position of creditors, or (b) the shipowner is providing transparent and intelligent information in a timely fashion respecting the basic principles of international restructuring as spelt out through the INSOL principles: (i) provide time for diligence; (ii) standstill (i.e. no enforcement and freezing of positions); (iii) appropriate organisation of restructuring; (iv) exchange relevant information for evaluation; (v) proposals for resolving the financial difficulties of the debtor and, so far as practicable, arrangements between relevant creditors relating to any standstill should reflect applicable law and the relative positions of relevant creditors; (vi) confidentiality; and (vii) new money obtains some sort of priority status.

The foundation

Obviously, any restructuring discussions will have to include work such as evaluation of insolvency or enforcement options including jurisdictional planning. An analysis will usually contain the following elements:

- Do the security documents and set-off rules work?
- Will courts respect the priority of liens?
- Will the process be sufficiently expedited?
- Will the court fees and liquidator fees be reasonable?
- Can creditors enforce the security and against whom?
- Does forum change in order to get a better protection?
- Are any pre-emptive actions required?
- How to deal with the liquidity management.
- Can assets be disposed of, or taken over by the bankruptcy estate?

A good restructuring will, however, not be possible without a proper commercial understanding. To this effect, if in-house expertise is not sufficient, creditors or debtors are well advised to engage a commercial advisor. Many debtors will claim to have sufficient expertise, but it would not be unfair to say that creditors might not really agree or share the same opinion. Creditors will definitely need to possess or hire competence which enables the creditors to test the commercial viability of the business, and there is probably a difference on this point if only banks are involved (or a club of banks) who will have a fairly easy dialogue among themselves as opposed to large syndicates and bond arrangements, who will probably need the assistance of a commercial moderator. Disputes on the appointment of advisors and their remuneration are common, but often resolved. The important point being that the remuneration should be aligned with the interests of the party such advisor is representing.

Organising the work

The restructuring principles are always based on the principle of equality, however I would probably go along with the allegorical inspiration of George Orwell: "creditors should be treated equally, but some creditors more equally than others". This means that there is an acknowledgement that creditors are not necessarily equal. The normal technique is to distinguish between (i) financial creditors, secured and unsecured; (ii) related creditors (such as managers); (iii) other creditors such as charterers, owners and other material suppliers and customers; and (iv) truly trade creditors. When all parties are involved, it would seldom be possible without some sort of bankruptcy protection as trade creditors usually just stop their supply with the liquidity crisis and this will entail the whole business.

During the organisational phase, the main aim of the restructuring would thus be to identify the categories one wishes to establish in order to initiate discussions. We normally recommend discussing the classification with the largest stakeholders with an aim to get their support, making it difficult for others to object. This has a particular impact on board members' duties to not give preferential treatment to creditors, and therefore, the stakeholders approached would probably be asked to let some other creditors be paid off on a going-concern basis in order to keep a certain control over the negotiations.

One of the biggest problems is acquiring a common understanding of the creditor positions. Distinguishing fully secured creditors from unsecured creditors is not always easy. A fully secured creditor will always take the position that any problems will have to be resolved by parties who have something at stake. Managing the expectation of the creditors and shareholders in this context is a martial art not to be underestimated – and as old as any other profession: fear mongering by threatening to go for bankruptcy or initiate insolvency proceedings in order to achieve a result. One piece advice is hereby given – do not threaten, but do promise if you actually mean to do it.

The level of playing field has to be clearly set out. In some of the worst default cases which did not end up in a restructuring, the approach of a rig owner was to give priority to shareholder rights rather than creditor rights – the result? Full elimination of shareholder rights by bankruptcy. I am fairly confident that some shareholder rights would have been maintained if the rig owner had respected some of the basic restructuring principles set out herein.

The plan

It is usually during a forbearance period (or standstill period) that parties reach agreement in principle with their creditors (usually after they have used up all available funds). During the standstill period the need for working capital will materialise depending as to whom is involved in the restructuring. If the restructuring is public, the need will be immediate, if the restructuring is kept confidential, there might be some flexibility. The normal pattern during the standstill period is for the involved creditors to agree that those not involved shall be settled, such as trade creditors. Sometimes a consensual deal is not possible, in which event disclosure to such creditors who will not be paid would be essential in order to give them the opportunity to voice their opposition. This will create a "terror balance" and the gamble will be whether a non-consenting creditor who will not be paid, will actually start enforcing its creditor rights or not.

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Another important consideration is whether the plan should seek some public approbation in order to protect the parties against any liability and get the scheme protected. If the matter is sufficiently large and substantial, many debtors have taken the benefit of US Chapter 11 proceedings to at least obtain some relief and release for their conduct. The solution is not always easy, as filing a foreign company for Chapter 11 in the US not always exonorates the board of directors for their duties in the jurisdiction of incorporation.

The interim period

It is usual that any plan results in an interim period which gives the debtors a reasonable chance to survive in one way or another and it is in the creditor's interest that the debtors are able to work normally without consulting the creditors every day. The period might be for a couple of years or more. It is better for everyone involved that the owner concentrates on commercial matters. The plan will have to set out how the running of business may continue in order to recover.

Usually a payment schedule is fixed, based upon the owner's liquidity budget for the period, but with a qualification that a default will occur only if their payments are lower than a certain percentage of the budget, say 80%. Another solution is to link the payments to the vessels' earnings, on a cash sweep basis; by definition there is little or no danger of default.

The reconstruction period

After an initial period the creditors would usually like to see a restoration to normality. This might be the 'reconstruction period'. The reconstruction period is usually only decided upon at the end of the interim period, and will very often be linked to the market conditions at that time to make a realistic repayment schedule, or just simply agree on a final maturity date which might be one to two years after the interim period. At this stage the debtor has to return to normal functioning. If the debtor fails to meet the requirements of the repayment schedule, either by earnings, or by refinancing, they will be in default.

Distribution of available funds

One of the most difficult decisions involves the distribution of the available funds. There are several possible systems or combinations of systems. As a starting point, trade creditors usually have to be paid in full. Without total agreement on this point it would be extremely difficult to operate a shipping company. The distribution of the remaining funds is based upon the premise that the trade debt is fully covered.

One system of distributing surplus cash is to simulate a bankruptcy and see how much each creditor stands to lose. The income is then distributed *pro rata* to each creditor's uncovered debt. This method is very seldom used to dispose of cash from the operation of vessels, but can be used when funds come from the sale of assets.

Another system is to distribute available cash *pro rata* to the gross debt without making any deduction for the securities the different creditors may have. This system has only been used when the figures turn out to be much the same as those calculated using other systems.

The cash sweep system is probably one of the most commonly used mechanisms. The basis is that the creditor is paid what their unit is earning, the philosophy being that the creditor is entitled to withdraw the ship, and if they withdraw it, others may operate it on the market and the creditor then has access to the total earnings of the vessel. If there are several mortgage holders in one vessel, the cash sweep will be combined with the ranking of creditors on the unit.

The ranking principle has several branches: for example, that all available funds from one vessel are applied first to pay interest on the first priority, then capital instalments on the first priority, thereafter moving to the second priority. Another example would be to serve interest on all mortgages and then principle on the first lien. The latter is usually applied in situations where creditors have nothing to lose by bankrupting the company and the senior creditors would like to avoid this situation occurring.

A third version is to fix the market value of the unit and regard the debt to the extent of the market value as senior debt, to be serviced fully, reasoning that the creditor may sell the vessel at its market price and at least recoup that money: they should not be in a worse position by accepting a restructuring of the owner's total indebtedness. The debt above the market value is called junior debt and will be serviced only if there are more funds available. Non-service of the senior debt, but not of the junior debt, may be defined as a default.

The ranking principle may be applied unit by unit linked to the individual vessel's earnings. It can also be applied to the whole group by fixing the market value, and consequently the senior debt, on the total fleet; the income of the total fleet is then applied to the senior and junior debt so that good units support those with a lower earning capacity.

In some companies it may be difficult to define exactly what the earnings of one unit are. In the offshore business the value of the software can be considerable, and the unit alone cannot take the

premium for the full earning of the vessel. In such cases, we can find the cash sweep will have to be shared with unsecured creditors. The creditor in one vessel is for example receiving 90% of the vessel's earnings, while 10% is allocated to a creditors' fund for equal distribution. The reasoning behind this is that this 10% more or less should be considered the software value, which belongs to all creditors and which cannot be utilised by one creditor withdrawing his vessel.

The parties often agree to make deductions from the vessel's earnings to be used as an incentive to the management organisation to secure its full support or to organise some other incentive plan. Experience shows that to repay old debt is not sufficient incentive for any organisation, which needs something more tangible and motivating than working only for the creditors.

Another sum will often be set aside to make some payment to the unsecured creditors who are not trade creditors, such as third priority mortgage holders or financing institutions which have unrecovered debt from a previous sale of a vessel. To encourage such creditors not to put a company into bankruptcy, it is often necessary to let them have a percentage of the earnings of the group to give them something more than the zero result they would obtain in a bankruptcy.

Lengthy discussions in negotiations will occur on the structure of the owning company and creditors' control. Creditors in the standstill phase of the discussions are inclined to suggest a transfer of ownership to companies nominated by them with board representation or at least a creditor committee with the ability to restrict the operation. This type of suggestion fades during the negotiations as no one creditor is prepared to take on the burden and most creditors are reluctant to take part in active ownership of a company. No major changes will thus be made in ownership structure or operation, except perhaps in creating profit sharing expectation at some level.

Creditor agreements and bankrutpcy

Creditors' agreements are very complex and it is unfortunate that no bankruptcy regime has been able to develop a truly satisfactory system under which properly negotiated agreements earn the approval of the court. Most debtors will at some time during the negotiations question whether they should actually just file for bankruptcy proceedings, even if this will be the worst outcome for all parties, as the legislation does not protect creditor agreements in an appropriate manner. Normally they continue to operate with the understanding of the creditors not getting paid as a bankruptcy would jeopardise everything for them.

Author:
Richard Sjøqvist, Partner
Bugge, Arentz-Hansen & Rasmussen
Stranden 1 A (6th floor)
N-0250 Oslo, Norway
Tel: +47 (22) 83 02 70
Fax: +47 (22) 83 07 95
Website: www.bahr.no

International Women's Insolvency and Restructuring Confederation (IWIRC)

by Tinamarie Feil, IWIRC Director-at-Large and BMC Group, Inc.

The International Women's Insolvency and Restructuring Confederation (IWIRC) is a non-profit organisation dedicated to helping restructuring professionals advance their careers, develop leadership skills and enjoy the benefits of being part of a global networking community. For almost 20 years, IWIRC has been engaged as an international organisation connecting women worldwide and offering its members education, mentoring and opportunities for leadership involvement at both the global and local level.

A global organisation, a local network

Among a global membership of more than 1,000 attorneys, bankers, corporate-turnaround professionals, financial advisors and other restructuring practitioners, members develop a powerful network of contacts, resources, mentors and friends.

IWIRC's international board creates programmes to foster national and cross-border relationships and education. Through events and interactive tools, IWIRC offers seminars, intellectual capital, career resources, leadership opportunities and guidance for personal and professional development. In addition, IWIRC is proud to be a designated non-governmental organisation (NGO) and active participant in Working Group V (Insolvency) of the United Nation's Commission on International Trade Law (UNCITRAL). UNCITRAL proposes model laws and develops policy relating to cross-border insolvency proceedings, enhancing understanding, cooperation and efficiencies on a global basis. IWIRC's NGO participation in UNCITRAL's Working Group V (Insolvency) is alongside international financial organisations such as the International Monetary Fund and the World Bank, intergovernmental organisations, and other invited NGOs including the International Bar Association, INSOL and the International Insolvency Institute (III). Representatives of UN member states and the other groups include attorneys, judges, government officials, business executives, and professors from widely diverse cultural and political backgrounds.

IWIRC's global conferences are scheduled in conjunction with other major restructuring conferences, leveraging business development opportunities and travel budgets. Programming focuses on substantive insolvency issues as well as issues relating to its commitment to the advancement of women. Recent programmes have included "Ethical Dilemmas in Turnarounds and Restructurings" and "A Conversation with Trailblazing Women In the Insolvency Profession." The 2012 IWIRC's Annual Spring Conference and Founders' Awards will be held in Washington, DC on April 18-19, 2012. IWIRC's innovative programme will focus on the rewards of community service. On June 20-22, 2012, in Paris, France, IWIRC will sponsor the Opening Reception of III's 12th Annual Conference and will present a panel on the differing rights and role of unsecured creditors in global insolvency cases. IWIRC's Fall Conference will be held in conjunction with the National Conference of Bankruptcy Judges in San Diego, California on October 23-24, 2012.

IWIRC, through its over 30 networks worldwide, offers opportunities for its members to actively participate both at a local level, as well as be welcomed at events in other locations. Local networks organise professional, educational and social activities within their communities and regions which are structured to meet the specific needs and interests of network members. These conferences are ideal for meeting other professionals in a welcoming environment. Some of the recent local programmes have included topics such as "Build a Career Without Boundaries: The Truth About How to Succeed" and "Be Retained, Not Detained: The Ethics of Retention Issues in Bankruptcy." Pure networking events are also regularly hosted. Practitioners new to the business, or a region, can plug into professional communities quickly with IWIRC. Successful professional services practitioners understand that building a healthy referral base requires creating and nurturing healthy relationships with referral sources (other service professionals) and clients.

Expertise and achievement

As the premier advocacy group for women in restructuring, IWIRC recognises the value in recruiting and promoting women throughout their careers. Members are invited to speak, publish and present their intellectual capital at meetings, via the website,

newsletters, through mail and e-mail and other channels of communication. Professional public profiles are located in the IWIRC online directory and in the Speakers Bureau, a resource to find panelists and experts among the IWIRC membership.

Although IWIRC, as an organisation, concentrates on the insolvency and restructuring fields, the IWIRC Speakers Bureau is not so limited. Members of the Speakers Bureau have an array of talents that easily extend to other areas, including litigation, asset sales and acquisitions, alternative dispute resolution, finance and forensic accounting, professional development, mentoring, rainmaking and balancing a career, family and self.

In recognition of members and networks which have made exceptional contributions to the organisation and their clients and profession overall, the IWIRC Board of Directors established its Founders' Awards. Categories are The Melnik Award for Exceptional IWIRC Member, The Fetner Award for Outstanding International Contribution and The Ryan Award for Outstanding IWIRC Network. In 2011, IWIRC also established the Rising Star Award to recognise the achievements of women who have been in practice for less than eight years but have demonstrated exceptional skills and dedication to their profession, firms and communities. In addition, each year, IWIRC honours a woman for her recent contributions to or lifetime achievements as part of the insolvency and restructuring industry with the Woman of the Year in Restructuring ("WOYR" – pronounced like "warrior") award. She may be an attorney, judge, banker, turnaround manager, academic or other restructuring industry professional. She is actively engaged or recently retired from the restructuring industry – and from anywhere in the world. IWIRC membership is not a requirement to make a nomination, nor to be honoured. Importantly, achievements do not have to be in nationally or internationally renowned cases or result in landmark decisions, simply exceptional. IWIRC welcomes all entries.

Leadership opportunities

IWIRC offers its members the opportunity for leadership. Both local networks and the international organisation offer "fast track" leadership opportunities for those seeking to take their careers to the next level.

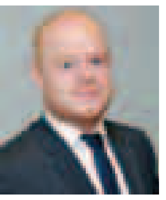
Website and contact

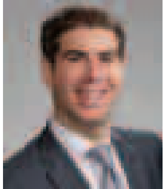
IWIRC networks are located in Asia, Australia, Europe, and North America. We welcome the development of new networks in these or new regions. Visit www.IWIRC.com for more information.

Author:
Tinamarie Feil
IWIRC Director-at-Large
BMC Group, Inc.
875 Third Avenue, Suite 501
New York, NY 10022
US
Tel +1 212 310 5922
Email: tfeil@bmcgroup.com
Website: bmcgroup.com

Shifting sands: Insolvency and restructuring law reform in the Middle East

by Christopher Hall, Anthony Pallett, Christian Adams and Adam Goldberg, Latham & Watkins LLP





The global nature of the financial crisis, liquidity constraints, declining asset values, general market uncertainty and the realisation that insolvency systems in the Middle East have not developed at the same pace as the business environment have placed insolvency and restructuring law reform firmly in the sights of the region's policy makers. This article addresses the availability of liquidity, the stress testing of existing insolvency systems, the increased focus on regional reform initiatives, the United Arab Emirates' proposed new Federal Bankruptcy Law and the key challenges to the successful implementation of any new legal and regulatory framework in the Middle East.

Liquidity crunch

The consequences of the 2008 global financial crisis and, more recently, "*The Arab Awakening*" have disrupted economic activity in almost every country in the Middle East, one of the most significant repercussions being the drying up of market liquidity and the resultant adverse impact on the ability of regional borrowers to meet their short and medium-term debt obligations. Figure 1 highlights the significant reduction in the growth of bank lending across the GCC since 2007. The average annual growth in bank lending between 2004 and 2008 was 29%, reaching a high of 38% in 2007. This rate fell to 1% in 2009 and 6% in 2010; however, growth increased to roughly 7% in 2011 and is forecast at approximately 8.6% for 2012.

The reduction in the availability of external finance, together with declining asset values, falling profitability, political and economic unrest and maturing short and medium-term debt obligations has pushed an increasing number of businesses into a position of financial uncertainty.

Stress testing existing insolvency systems

The significant increase in the number of businesses approaching the "*zone of insolvency*" has sharpened the focus on the options available to financially distressed or insolvent companies under existing bankruptcy regimes – the common theme across the Middle East has been one of limited use and understanding of formal insolvency procedures. For example, while the Federal laws of the United Arab Emirates (the "UAE") provide a formal framework for the reorganisation, liquidation and bankruptcy of insolvent companies and individuals, the regime applicable to companies remains largely untested, as the market has not yet

Figure 1: The growth of bank lending in the GCC 2003-12

Source: Reuters Knowledge

seen a major corporate entity commence insolvency proceedings under the Federal framework. Given the uncertainty surrounding the application of the region's existing legal frameworks, financially troubled corporate entities and their creditors have sought, and will likely continue to seek, consensual out-of-court reorganisations before turning to formal legal mechanisms.

World Bank statistics indicate that an average bankruptcy procedure in the MENA region takes 3.5 years to complete, costs 14.1% of the value of the business and delivers an average recovery rate of 29.9 cents on the dollar. This does not compare favourably to the OECD averages (1.7 years, 8.4% and 68.6 cents), and pales by comparison to international best practice as seen in Japan (0.6 years, 4% and 92.5 cents).[1] The statistics for the UAE (5.1 years, 30.0% and 10.2 cents) reflect the fact that the UAE's insolvency framework has not developed at the same pace as the country's development as an economic and commercial hub. Recent history has witnessed unprecedented economic growth and business expansion in the UAE; particularly in Dubai, where local businesses have evolved into global corporations with multiple sources of finance and diverse investments. Whilst there has been an evolution in the business landscape, certain aspects of the applicable legal and regulatory regime have stagnated and no longer reflect modern business needs.

The increased focus on reform initiatives

During previous financial crises in Russia, East Asia and Argentina, attention turned to the importance of insolvency systems that support the resolution of financial distress,[2] in particular, the accessibility of the relevant laws and the efficiency of the institutions implementing such laws. Recent events in the Middle East have resulted in a similar trend, as policy makers begin to acknowledge weaknesses in the existing legal frameworks and the need for reform to preserve businesses as going concerns, strengthen creditors' rights, improve the overall investment climate and strengthen market resilience.[3] There is also a growing acceptance that law reform by itself is not sufficient; while it is essential to have a robust legal framework in place, true reform requires a holistic approach, addressing the capacity and efficiency of local courts, the training of judiciary and the development of a body of experienced insolvency professionals, all of which are essential elements of effective insolvency systems (*see further discussion below*).

The recent restructurings of Dubai World and its then subsidiary Nakheel in the UAE provide high-profile examples of the value of establishing a transparent, predictable insolvency system based upon international standards recognised by global investors.

Dubai World case study

Dubai World is an international conglomerate encompassing over 200 subsidiaries operating in, amongst others, the real estate development, private equity, retail, hospitality and shipping sectors. In November 2009, Dubai World announced its intention to seek a "standstill" on its debt repayment obligations, amounting to approximately US$24bn spread amongst 95 international financial institutions. Nakheel, then a subsidiary of Dubai World, is a real estate development company that owed approximately US$23.7bn to a wide variety of creditors, including international financial institutions, public holders of Sukuk certificates and trade creditors.

The global financial crisis hit Dubai in Q4 2008, resulting in a crash in the Dubai property market that saw a 47% decrease in the valuation of real estate in the 12-month period from Q4 2008 to Q4 2009, and prompting the November 2009 "standstill" announcement. By the summer of 2011, both Dubai World and Nakheel had successfully restructured their debts on an out-of-court basis, in each case, with the consent of 100% of financial creditors, and in Nakheel's case over 90% of trade creditors. The key factor that enabled the Government of Dubai to execute one of the most complex and large-scale corporate restructurings in recent history was the creation of a bespoke insolvency system based upon international standards recognised by Dubai World's international creditors.

Decree 57: Levelling the playing field for negotiations

Dubai World is a corporation established pursuant to a decree issued by the Ruler of Dubai, and consequently has a unique legal status. Due to its status as a decree corporation, Dubai World was unable to seek to restructure its debts under the existing Federal regime applicable to ordinary companies incorporated in the UAE. As a result, when Dubai World announced its debt repayment "standstill" in November 2009, there was great uncertainty as to how a restructuring of Dubai World's debts could be implemented. The Government of Dubai responded by enacting "*Decree No. 57 of 2009 Establishing a Tribunal to Decide Disputes Related to the Settlement of the Financial Position of Dubai World and its Subsidiaries*" ("Decree 57"), which created a modern legal framework designed to enable Dubai World and its subsidiaries to restructure their debts through a judicially-supervised process.

The regime established by Decree 57 was based on international best practice and a hybrid of English law procedures and substantive restructuring tools proven to maximise value in Chapter 11 of the US Bankruptcy Code. In practice, however, although it provided formal legal procedures through which to implement a restructuring, the major contribution of Decree 57 to the extraordinary result achieved in Dubai was the provision of a "Plan B" against which to negotiate an out-of-court restructuring.

Perhaps most importantly, Decree 57 enables a company to implement a restructuring without the consent of all parties. A restructuring may be approved based on consent of a majority of creditors and equity holders in each class (i.e. binding minority objectors), or provided that specific legal standards are met, without the consent of all classes based on the consent of a majority of creditors in one impaired class (a procedure known as "cram down"). Because of this "cram down" mechanism, no creditor or class of creditors, including secured creditors, could be certain of its ability to unilaterally block a restructuring that had the support of other creditors. In this manner, by depriving individual creditors and classes of creditors of the ability to block the restructuring at their discretion, Decree 57 created a level playing field for negotiations in which no party could seek to extract "hold up value" for its consent. Having such an option provided Dubai World with leverage to reject unrealistic demands and preserve the greatest value available for all constituencies; as a result, all stakeholders were incentivised to work together towards a negotiated solution that reflected the commercial realities of the situation. While Decree 57 does not apply beyond Dubai World and its subsidiaries, and its formal procedures were never actually utilised, the region's policy makers may wish to consider the effect of "the shadow of the law" in motivating creditors to take a seat at the negotiating table.

Of course, not all distressed companies will have the benefit of a new law created to govern their restructuring, and companies in the Middle East in particular regularly face challenges arising from legal regimes that are perceived to be opaque, unpredictable and ultimately ineffective as a means to implement a commercial restructuring on a going-concern basis. Reform efforts are underway in the UAE, and elsewhere, that may provide companies with generally-applicable and more standardised options to bind dissenting parties to a restructuring, as discussed below. In the meantime, companies in the Middle East must work to overcome these challenges through creative planning among management and legal and financial advisors based on an analysis of the particular situation, the needs of the business, the terms of existing agreements and legal procedures that may be available outside of the company's home jurisdiction.

UAE bankruptcy law reform

As noted above, the international markets generally do not perceive the procedures set out in the existing UAE legal framework to be sufficient to provide companies with an opportunity to restructure and reorganise as a going concern through an efficient, transparent and open process. In early 2012, following the successful restructurings of Dubai World and Nakheel, the UAE distributed a draft new Federal insolvency and bankruptcy law that seeks to create new alternatives for companies in the UAE to implement a restructuring without the consent of all creditors. The draft law aims to facilitate corporate rehabilitation by introducing transparency and predictability via internationally recognised best practices. Some of the key features of the draft law are:

- An ability to implement a restructuring based on consent of majority of creditors without consent of all individual creditors.
- A broad moratorium or stay on action by creditors, including secured creditors.
- The opportunity for a debtor to obtain new financing with priority in payment and security over existing debts, including secured debts, subject to a court finding the interests of existing secured parties are adequately protected, based on "debtor-in-possession" or "DIP" financing under the United States Bankruptcy Code.
- The option for a debtor to terminate leases and contracts, akin to the "assumption or rejection" of contracts under the United States Bankruptcy Code.

The draft law is currently undergoing a thorough consultation process and will likely undergo further refinement before being presented to the UAE's Council of Ministers for Cabinet approval and eventual promulgation as Federal law. Based on the concepts already integrated in the draft law, its enactment will represent a dramatic step in the development of insolvency and restructuring practice in the Middle East and a leading example of the reform efforts ongoing across the region.

The need for a holistic approach to insolvency law reform

The success of any new insolvency regime will depend on a number of factors, not just the drafting of the relevant laws. In particular, it should be noted that "the principles of reform must be considered in the context of the unique political structure, legal culture, and economic and social framework of each country.

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Considering the political, economic, social and judicial differences between countries, a "one-size fits all" is neither wise nor workable in this area of law".[4] Some of the key issues to be addressed in parallel with the reform of insolvency laws are set out below:

Challenging cultural stigma and criminal implications

Businesses in all countries face negative perceptions or stigmas when they are forced to restructure, especially when a formal bankruptcy proceeding is commenced to facilitate such efforts. In some countries, such as the US, and to a lesser extent in the UK, this stigma has been eroded, as well-known companies have gone through the bankruptcy process, continuing to operate during their bankruptcy and then reorganising and becoming profitable companies once again. Companies, creditors, investors and other interested parties in the Middle East, tend to have a strong negative bias against bankruptcy, which can have a profound effect on planning a successful debt restructuring.

A procedure that authorises a company to restructure specific financial debts without the consent of all creditors and without the requirement that they "file for bankruptcy" or engage in a drawn-out court process could be an invaluable tool for companies in the Middle East to restructure debts while avoiding a perception of "criminal", "fraudulent" or "dishonest" behaviour and preserving the goodwill of their customers and the public. Whilst there is scope for effective insolvency systems to punish those guilty of behaving fraudulently, recklessly or dishonestly, there is also scope for cases of genuine business failure to be treated in a fair and respectful manner.

Building institutional and professional capacity

Court systems play a central role in any effective insolvency regime. It has been widely observed that the current court systems in most regional jurisdictions would find it challenging to oversee complex bankruptcy and reorganisation proceedings, both in terms of the infrastructure of the courts and judicial capacity. The Emirate of Dubai has taken steps to enhance its institutional capacity through, initially, the establishment of the Dubai International Financial Centre ("DIFC") Courts, and more recently the creation of a special tribunal for the restructuring of Dubai World pursuant to Dubai Decree 57. In practice, the effectiveness of the reforms efforts will be dependent on the ability of the courts and judiciary to effectively implement the laws in a certain, transparent and consistent manner. In many respects, institutional capacity building with a special focus on the role of the judiciary, the insolvency professionals and the state agencies represents a greater challenge that reforming the law itself. The region's policy makers might consider creating specialised bankruptcy courts with access to the expertise needed to decide the complex financial issues so often associated with bankruptcy cases – The World Bank's Doing Business Report confirms that recovery rates are much higher in jurisdictions that operate specialised courts.

Similarly, the role of insolvency professionals ought to be considered; insolvency professionals (sometimes referred to as trustees, nominees, administrators, liquidators etc.) play an important role in an insolvency system; however, it is essential to the efficiency and credibility of any process that such individuals have the necessary skills and experience to discharge their duties to the requisite standard. No jurisdiction, other than the DIFC, requires insolvency professionals to have received insolvency-specific training, and many jurisdictions do not regulate insolvency professionals at all.

Revision of laws relating to the creation and enforcement of asset security

The presence of an effective and transparent security regime is a key factor in determining the terms on which banks, financial institutions and other investors are willing to deploy capital in any given jurisdiction – even more so in times of financial uncertainty and low liquidity. Generally speaking, taking effective and comprehensive security in the Middle East is not a straightforward process - the registration, priority and enforcement of security interests is particularly challenging.

The region's policy makers might consider specific reform of the applicable laws, in particular: (i) the types of security interest (i.e. mortgages and fixed charges) available should be clearly distinguishable; (ii) the introduction of the "floating charge" as a means of security over groups of assets that may fluctuate with time (such as cash in a trading bank account, stock or inventory) should be considered; (iii) the priority afforded to each type of security should be unambiguous and identifiable; and (iv) while we appreciate that there are specialist registers for certain classes of asset (specifically real estate, ships and aircraft), the introduction of a mandatory central register of all security interests against companies would create more certainty for lenders and would likely have the overall effect of reducing the cost of borrowing.

Restructuring of Shari'ah compliant financings

Restructurings involving Shari'ah compliant financings raise a series of endemic issues that have not yet been specifically integrated into the region's insolvency laws or received common treatment by courts that have had occasion to consider them. In particular, there are significant questions as to: (i) whether Shari'ah compliant financings should be classified and receive treatment as a claim for debt (as opposed to equity,

which typically may not recover value unless claims are paid in full), or a type of class that is senior to equity but not considered debt in recognition of the intended characteristics of Shari'ah compliant financing; (ii) whether Shari'ah investors are entitled to vote directly in an insolvency proceeding, or whether they must vote through a trustee and have only one vote; and (iii) whether contracts with a debtor that form part of a Shari'ah financing may be subject to assumption or rejection. These and other questions should be considered as part of the reform process given the significance of Shari'ah financing in the region.

Conclusion

The fallout from the global financial crisis has proven that the Middle East is not immune from economic hardship and has highlighted the importance of effective insolvency systems in mitigating the financial impact of such crises. Insolvency systems in the Middle East are generally outdated and unworkable; there is a pressing need to address the cultural stigma and criminal implications associated with bankruptcy, to distinguish between debtors capable of being rehabilitated and those in need of efficient liquidation, to modernise laws in line with the evolving business landscape, and to improve the function and efficiency of courts and insolvency professionals. Through the evolution of the DIFC Courts, Decree 57 and its draft Federal bankruptcy law, the UAE's policy makers have set an example for the rest of the Middle East and laid down the beginnings of a roadmap for regional reform.

Notes:

[1] Statistics obtained from The World Bank / IFC report: Doing Business 2010.

[2] "*Resolution of Corporate Distress in East Asia*" – World Bank Group, Journal of Empirical Finance, 10: 199 – 216.

[3] "*The Challenges of Bankruptcy Reform*" – World Bank Policy Research Working Paper 5448.

[4] "*Corporate Rescue: An Overview of Recent Developments from Selected Countries*" – Gromek Broc K., Parry R., 2006.

Authors:
Christopher Hall, Partner
(Head of Regional Finance Practice)
Tel: +971 4 704 6333
Email: christopher.hall@lw.com

Anthony Pallett, Partner
Tel: +971 4 704 6402
Email: athony.pallett@lw.com

Christian Adams, Associate
Tel: +971 4 704 6420
Email: christian.adams@lw.com

Adam Goldberg, Associate
Tel: +1 212 906 1828
Email: adam.goldberg@lw.com

Latham & Watkins LLP
Dubai International Financial Centre
Precinct Building 1, Level 3
P.O. Box 506698, Dubai
United Arab Emirates
Telephone: +971 4 704 6300
Fax: +971 4 704 6499
Website: www.lw.com

Country Reviews

Australian restructuring in the wake of the Eurozone crisis

by Marcus Ayres, PPB Advisory

Australia's sound economic position in the pre-Lehman era is a result of strong economic growth, largely generated from our significant mineral reserves and strong demand from neighbouring fast-growth emerging economies.

Even in the post-Lehman era, when most of the industrialised world struggled to right their economies, Australia survived relatively unscathed; whether through good management, sheer luck, or a combination of the two. In fact, Australia's real GDP has surpassed pre-Lehman levels, unemployment has fallen and business and consumer confidence has remained stable. This is in stark contrast to many developed economies that are still seeking to stabilise GDP.

However, with the International Monetary Fund recently releasing a downward revision of about 75 points in growth targets for most major countries in 2012,[1] it is becoming clear that the Australian economy will start hitting troubled times. In particular, the Eurozone crisis is now exposing our structural foibles, with the significant shortage of capital at the top of the list. As a result, economic growth for Australia will come under immense pressure, which we consider will result in a marked increase in distress during 2012.

Local banks – challenging times ahead

Australia is a relatively young economy that lacks the capital base to take advantage of its endowments. Consequently, one of the pressing issues facing Australian businesses (and their lenders) is the heavy reliance on foreign-sourced debt to plug a significant capital shortage. The Australian Bureau of Statistics' September 2011 quarter statistics indicated net foreign debt liability was A$741bn – and on an increasing trend.

Given the Eurozone crisis, the jockeying for position in debt capital markets is starting to cause problems for Australian debt issuers. The market is taking a somewhat apathetic approach to Australian debt, a counter-intuitive strategy given the relative high ratings for these debt issuers.

For Australia's bankers that rank as some of the safest globally, their position is no different. Case in point was the pulling of a covered bond issue in Europe during November 2011 by the Commonwealth Bank of Australia (CBA) because costs were blowing out.

In an attempt to bolster funding, lenders are again looking domestically. In January, both the CBA and Westpac Banking Corporation raised funds, but at a significant cost (175 bps and 165 bps over the swap rate respectively).

These two debt issues highlight the dark storm clouds already over our shores. For smaller financiers with poorer credit ratings, the position will be far worse. With pricing for these financiers above these levels, debt issues will be too prohibitive, leaving them with little choice but to continue their heavy reliance on retail deposits, which already come at a significant cost.

It is also questionable whether domestic raisings are a sustainable solution to the capital shortages of Australian corporates (and their lenders). There is unlikely to be sufficient capacity in the domestic bond market to enable continued on-shore debt issues and so our lenders will inevitably need to tap foreign markets.

When we throw into the mix the high-cost of domestic debt, the strong Australian dollar, Basel II and III capital adequacy requirements and the pressure for lenders to meet analyst growth expectations, a perfect storm is developing. In order to weather this storm, we expect to see deleveraging accelerate and for lenders looking to improve collateralisation rates, loan portfolios put on the market in 2012.

Not all distressed debt is equal

Due to tight debt capital markets, we expect our lenders will be looking to secure quicker and/or alternative exit strategies to recover capital from distressed lends. For instance, we have already seen Australian lenders returning to the secondary debt market after a long hiatus.

However, whilst distressed debt sales have released much needed capital, pricing has started to ease off. When combined with a shortage of new lending

opportunities, it is unclear whether we will see Australian lenders continue to trade as actively in the market as they have in the past few years. To that end, we expect lenders will need to be more judicious in dealing with their distressed lends, perhaps tolerating a tie-up of capital whilst other alternatives are explored for some deals, and pursuing quick exits at a higher than expected haircut for others.

Nevertheless, one thing is certain; the growing cost of capital must be passed on to borrowers whilst the market adjusts. We expect this to fall largely onto mid-cap and retail borrowers given most institutional deals appear to have worked through their problems (at least for the moment). In turn, a combination of a faltering economy and rising borrowing costs will put pressure on these businesses. This may cause them to trip on covenants in the immediate future. As a result, we believe there will be a purge of mid-cap businesses entering the distressed arena throughout 2012.

Flight of foreign capital from Australia

Many syndicated deals in Australia have enjoyed the participation of foreign banks, in particular European lenders. However, with the tightening of debt markets in Europe, and a growing demand for European lenders to repatriate funds, we have seen a flight of foreign capital out of both distressed and commercially viable deals.

The flight of foreign capital creates significant problems for Australian business, primarily because the ability to plug the gap left behind by exiting banks is very hard in the current environment. Local lenders are generally unwilling to increase exposure on old deals, and are in fact rationalising exposure to certain industries. Furthermore, US and Asian lenders are not expected to step into the breach, at least for the foreseeable future.

This dynamic creates a very real opportunity for a new lender(s) to penetrate the Australian market. In particular, we think there is a real possibility that Chinese banks will look to enter the Australian market in a meaningful way, considering:

- our geographic proximity;
- the increasing trend of Chinese investment in Australian assets; and
- significant capital resources in China.

The impact Chinese lenders will have on the restructuring market is an unknown, but it is likely the workout approach will be different if management of distress by these lenders is consistent with that deployed in South-East Asia.

Are hedge funds the capital solution?

The flow of hedge fund capital into Australia is a relatively new phenomenon compared to other regions, but we are now seeing hedge funds inject significant capital into distressed deals in a more meaningful, consistent way. Major Australian corporations such as Centro, Nine Entertainment Co and Redcape Property Fund have experienced significant hedge fund investment in recent times.

With the lack of capital at the traditional end of the spectrum, hedge funds may use this market opportunity to acquire more distressed debt and capture a longer-term foothold in Australia. This in itself raises new issues for lenders and practitioners.

Whereas traditional lenders took on a more vanilla view in workout scenarios, the hedge funds are keen to explore alternative ways to maximise returns, often in ways that the traditional lenders would be unwilling to do. For instance:

- Funds are looking to acquire distressed assets 'off market'. There is therefore an opportunity for traditional lenders to achieve a discrete exit without the cost and exposure of a formal appointment. We consider this will prove critical for dealing with certain asset classes such as distressed agricultural assets.
- Funds have been more willing to look at alternatives such as debt for equity swaps, something traditional lenders have been keen to avoid for the most part (and will likely remain so). However, debt for equity may present the best 'value recovery' pathway if asset pricing deteriorates.
- We will likely see a need for more pre-pack administrations that are in vogue in various other regions, but still underutilised by many practitioners in Australia. The benefit of these 'pre-packs' is that they often offer an expeditious exit route to a lender, consequently avoiding lengthy and often value-eroding administration periods.

There is one major difference setting Australia apart from most jurisdictions which may have an impact on alternative sources of capital - our insolvent trading laws.

Australia's insolvent trading laws are quite tough, especially when compared to other financial centres such as the UK or US. In broad terms, Australian legislation places the onus on the directors to avoid trading a business whilst insolvent at all times, with strict civil and criminal repercussions if there is a breach. These laws create an added tension to large and/or complex informal restructuring assignments where the appointment of an insolvency practitioner (in a formal capacity) is best avoided.

In the context of hedge fund involvement in distressed deals, these laws add an interesting dimension. In Australia, it is more difficult for the funds to deploy their usual arsenal to the asset once they

get involved. It may therefore be the case that whilst hedge fund penetration into the Australian market will continue, it will not be at as high a run rate as with other countries given the funds may feel somewhat limited in their ability to generate returns.

Time to revisit our legislation?

Albeit the federal treasury proposed reforms to insolvent trading legislation in early 2010, there appears little short-term likelihood of any amendments to legislation. However, this issue reflects an interesting conundrum for our legislative body that pervades the issue of Australia's attractiveness to capital on a whole. If insolvent trading laws were to be relaxed, would there be an additional flow of capital into the country?

A more lenient insolvent trading legislative framework would provide additional flexibility during a restructure. Perhaps one practical alternative may be to allow an insolvency practitioner to enter a distressed company to guide it to safe harbours behind the scenes without the fear of being construed a director and liable for insolvent trading (so long as that practitioner can show the decisions made were in the best interests of creditors as a whole). Were this slight legislative change adopted, workouts of larger corporations may be more successful on the basis that skilled practitioners would be involved earlier. An added benefit might be a greater willingness of capital providers to invest in distressed deals on the basis that they have greater control over the process (by inserting a known quantity behind the scenes) whilst avoiding the ramifications of a formal appointment.

An additional hindrance to restructuring in Australia, and a significant consideration for lenders seeking to inject funds into distressed entities that are contract focussed, is the upholding of *'ipso facto'* clauses (provisions in contracts permitting termination of the agreement by one party in the event of the insolvency of the other). Unlike the US where these clauses are unenforceable, they are enforceable in Australia. Consequently, success in a formal restructuring in Australia is heavily (if not entirely) reliant on the co-operation of major suppliers and customers during the restructuring process. Unfortunately, despite a great deal of discussion locally regarding this issue, it is unlikely legislative change will occur in this space for some time.

Recalibration of asset pricing

Australian asset prices have generally not recalibrated in line with the rest of the world, largely because the economy has enjoyed strong economic growth. However, one ramification of the capital shortage is a potential downward recalibration of asset prices.

With a potentially greater emphasis on expeditious exiting by our lenders, lower recoveries on asset prices are likely. This will trickle into the market resulting in loan-to-value ratio covenant tripping. Consequently, the downward cycle could perpetuate as otherwise good lends will be forced to move to 'bad bank'. Consequently, lenders will need to set aside even more capital to meet adequacy requirements. Borrowers will then feel the added strain as lenders pass these extra costs on.

A second issue relating to asset prices is the impact of unemployment, which has generally remained low throughout the post-Lehman era. Signs are beginning to emerge that unemployment may increase in our market. If these signs prove true, we are likely to see a downward impact on residential property values. Declining residential property values will affect consumer demand, again leading to further unemployment in a self-perpetuating cycle.

Industries facing challenges in 2012

Albeit the mining sector will likely tread water in a softening environment (although we expect mining services to come under pressure), other industries, particularly on the eastern seaboard, will not fare as well. This will further exacerbate the oft-referred two-speed economy our Government and central bankers are trying to manage.

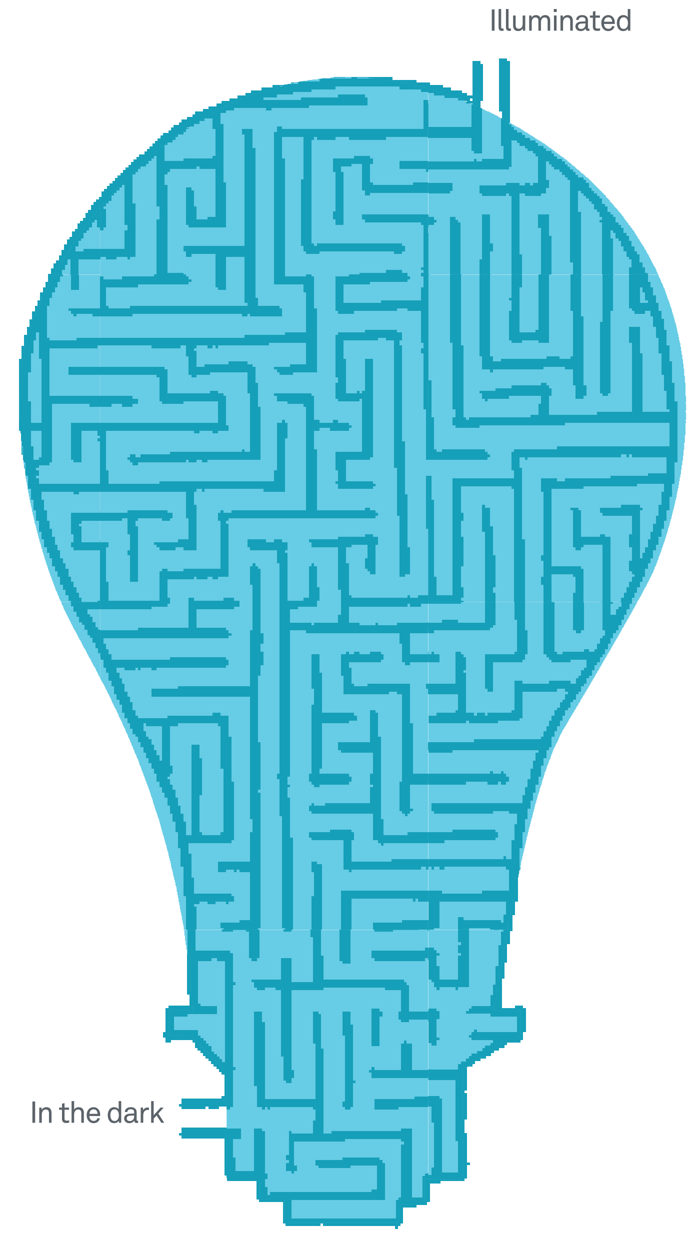
We have already seen trouble in the retail sector for some time now, and expect that the environment will only get tougher. In particular, we would expect consumer spending to continue weakening as the European crisis remains unresolved, particularly when combined with further uncertainty in our market and the recent job losses in the manufacturing and finance sectors. Retailers are also facing greater pressure from overseas internet shopping sites, which have low overheads and provide an attractive alternative given the high Australian dollar.

We anticipate that the Australian dollar is also likely to be a major cause for reduced demand in the tourism and hospitality sectors as outbound tourism is becoming more affordable for Australians, whilst inbound tourism is becoming more expensive for foreigners.

The high Australian dollar is also going to make this a tough year for our exporters, particularly in manufacturing. For instance, even though we have seen significant government support in the automotive sector, the high Australian dollar simply prices our product out of the market, the impact of which is already leading to job cuts in the industry.

Agriculture will also continue to find it tough. Holding aside weather anomalies associated with the

We see things differently



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La Nina weather pattern, the high cost of production combined with logistical challenges will continue to put pressure on the industry. Competition in the sector is also increasing internationally as investment ramps up in developing countries. As a result, Australia is quickly losing its competitive advantage.

Finally, we also expect to see significant challenges for the energy sector (both non-renewable and renewable sub sectors) which have been destabilised largely because of legislative changes.

Conclusion

Following the global financial crisis and post-Lehman era, Australia's economic story has remained steadfastly positive, less volatile and remarkably resilient to global economic shocks. This 'lucky country' has found itself in the right place at the right time, ideally positioned to weather storms brewing in its major trading partner economies.

However, great as that is, it is becoming clear that Australia is not immune or permanently sheltered from the financial crisis taking hold in other parts of the globe.

An overarching priority for Australia's financial institutions and companies is being able to access liquid, cost-efficient capital flows. When combined with the changing flow of capital into Australia because of global deleveraging and competition for credit, our healthy banking sector will likely face challenges, which will be exacerbated by stricter banking regulations and uncertainty in local consumer demand.

These challenges require an adjustment that will affect certain sectors of the economy. We also expect to see Australia's insolvency and restructuring market change in a very real and possibly permanent way in the near future.

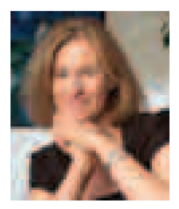
Note:

[1] IMF World Economic Outlook Update, January 24, 2012, http://www.imf.org.

Author:
Marcus Ayres, Partner
PPB Advisory
Level 46, MLC Centre
19 Martin Place
Sydney NSW 2000
Australia
Tel: +61 2 8116 3000 (general)
Tel: +61 2 8116 3295 (direct)
Fax: +61 2 8116 3111 (direct)
Email: mayres@ppbadvisory.com
Website: www.ppbadvisory.com

Back to the rescue: How the 2011 Belgian bank crisis was (mis)managed[1]

by Nora Wouters and Hendrik Bossaert, McKenna Long & Aldridge LLP



Until the beginning of the 1990s, regular banking activities were limited to receiving deposits or other repayable funds from the public and to granting credit.[2] For Belgian financial institutions such as Dexia, Fortis and KBC, this was a profit generating undertaking because Belgian citizens are known as great savers. The Second Bank Directive made it possible for credit institutions from EU Member States to undertake their activities in other EU Member States without the requirement to obtain a banking licence from the host Member State[3]: thus the European passport was born. This increased competition between credit institutions, particularly in Belgium where there was an enormous amount of deposits waiting for interesting offers. In order to survive in such a harmonised competitive European financial market, at the beginning of the millennium Belgian banks formed the view that they had to grow in size and territory and expand to investment banking in order to remain profitable. Fortis was the result of the merger of AG and Amev, ASLK, the Generale Bank and finally ABN AMRO. Dexia (the result of a merger between Gemeentekrediet and Crédit Local de France), acquired, among others, the American bond insurance company FSA and Turkish Denizbank. KBC is the result of a national merger, which saw potential in Eastern European acquisitions. In the good times these acquisitions were financed from the available excess capital of banks, which was also used for the marketing of and investment in complex financial instruments such as CDOs, which (at the fall of 2008) appeared to be one of the reasons for the financial crisis.

The first bail-out round in 2008-09 resulted in a split of Fortis into Belgian, Dutch and Luxembourg undertakings, whereby the banking activities of the Belgian undertaking became 75% owned by BNP Paris and 25% by the Belgian government. Dexia and KBC were able to survive the 2008 banking crisis thanks to a mixture of capital contributions and state guarantees.[4] At that time, it was already clear that many of the measures taken would not be sustainable in the long term.

The bigger picture: Basel III and EU Capital Adequacy Rules

Under the Basel III rules, which will be phased in at different stages, with 2019 as the end date, banks will have to hold top quality capital equal to 7% of their assets adjusted for risk. Basel III sets out 14 criteria which have to be met by own funds instruments, ensuring that these funds can be used in cases of stress. In addition, Basel III asks banks to be ready with sufficient cash in cases of stressed market conditions. A leverage ratio will be an additional method of supervision. The biggest banks will be hit with additional surcharges of up to 2.5%. In 2012, banks in the European Economic Area (*EEA*) will also have to hit a temporary 9% ratio after discounting their risky sovereign debt holdings.

In 2011, the European Commission (*EC*) released a new legislative package consisting of a proposed directive[5] and a proposed regulation.[6] The proposed regulation sets out harmonised prudential rules which institutions throughout the EEA must respect, ensuring a uniform application of Basel III in all EEA Member States, focusing on capital adequacy requirements, the necessity of liquidity buffers, reduced leverage through the introduction of a leverage ratio and counterparty credit risk. Furthermore, the proposed directive focuses on enhanced governance, enhanced supervision, and the possibility of supervisors to apply sanctions and initiatives whereby the overreliance by credit institutions on external credit ratings is decreased.

The individual case studies

1) Dexia

Despite the €6.4bn capital increase and €150bn of state guarantees in 2008, the reform plan which Dexia filed at the EC in November 2008 did not impress Competition Commissioner Neelie Kroes because the financial market still did not have enough confidence in Dexia due to its huge debts.[7] A major problem was that Dexia Crédit Local, the French branch of Dexia,

had established a system whereby local governments were financed with deposits which only came from Belgian deposits. The Belgian-French lobby machine finally managed to convince Commissioner Kroes that an accelerated write-off of these debts was not necessary. The result was that Dexia's *legacy* (including an enormous portion of obligations of several PIIGS[8] countries and interest-rate swaps) would remain in Dexia, accompanied by a sufficient amount of capital and strict monitoring. This resulted in a deadly combination: the French concern regarding local government financing remained, but the Belgian branch was further abused and the dividends payable to historical shareholders of Dexia and the bonus policy were kept in force.

The interest-rate swaps would become the trigger to the second bail-out. Dexia had boosted its profitability by relying on cheaper short-term financing in the wholesale market. It reinforced the effect by purchasing long-maturity bonds using short-term borrowings. One could easily conclude that the bank was a "hedge fund of rates": it played on the spread between long-term and short-term interest rates to generate returns. However, if the German long-term interest rate decreased, the interest-rate swaps lost their value. As a result, Dexia was forced to add cash as collateral. It appears that Dexia did not take any insurance to cover this risk. In the summer of 2011, when the debt crisis returned to the financial spotlight, this risk became heightened because investors invested heavily in German debt paper, resulting in an historical decrease of the German long-term interest rate. As a result, by the end of September, Dexia suddenly had to deposit up to €46bn, which had to be borrowed on the interbank market which became more and more difficult because of the euro crisis.

Dexia Holding was already working internally on a reorganisation plan during the summer of 2011, whereby the major shareholdings would be sold gradually and the revenues would be used to increase the capital structure of Dexia Holding, as a buffer for accrued losses which may occur when selling or writing off the legacy. On October 3, 2011 Moody's released a communication stating that the credibility perspectives of Dexia Holding would be decreased. The Belgian government, which was at that time still officially in the throes of resignation, decided that the only reasonable option would be to nationalise Dexia Bank Belgium out of Dexia Holding, and therefore offered the French government, as co-main shareholder of Dexia Holding, €4bn,[9] who undertook to pay the social liabilities related to Dexia Holding and kept 60.5% (€54bn, to be increased with interest and accompanying elements) of the state guarantees with respect to loans offered by Dexia Holding.

Therefore, the Belgian and French governments still remained responsible for Dexia Holding[10] (becoming a so called "bad bank"), which would collect the sale revenues of its subsidiaries.

The EC raised concerns that the guarantees granted by the Belgian, French and Luxembourg government might infringe state aid regulations. However, on December 21, 2011 the EC authorised, under the EU state aid rules, a temporary guarantee on the refinancing of Dexia considering that, given the systemic importance of Dexia SA, the guarantee mechanism would be necessary in order to preserve the financial stability of Belgium, France and Luxembourg.[11] In addition, three Belgian organisations filed a cancellation request at the Belgian Administrative Court (*Raad van State/Conseil d'Etat*) against the Royal Decree dated October 18, 2011 on granting a state guarantee with respect to specific loans of Dexia NV and Dexia Crédit Local SA, approving the abovementioned state guarantee, claiming that the state guarantee which might be enforced represented 15% of the Belgian GDP while the French guarantee only represented 2% of its GDP. Furthermore, the organisations claimed that it was a threat to the nation that such a guarantee could be enforced solely by the Minister of Finance.

Besides the Belgian and French governments, there were three other main shareholders of Dexia Holding: i.e. the Communal Holding, Arco and Ethias.

The Communal Holding consisted of almost all Belgian communes, provinces and regions as its shareholders. The sole main asset of the Communal Holding was a participation of 14.1% of the Dexia shares and instead of a diversification of its shareholding, the Communal Holding began to act as a hedge fund regarding its participation in Dexia Holding. Furthermore, in 2008 the Communal Holding participated in the capital increase of Dexia through a loan, whereby the new shares were used as security. However, given the fact that Dexia's share price was seriously decreased, a new state guarantee became necessary in September 2009. As a result, it became clear that it had run into serious financial difficulties when a second bail-out was required in October 2011. This resulted very quickly in a logical decision by Communal Holding to go into liquidation on December 7, 2011, in order to avoid bankruptcy.

Arco, which is a cooperative company of the Christian Democratic party's labour movement, ACW, had a participation of 13.8% in Dexia. Approximately 750,000 Arco shareholders had an average participation of €1,850. Because of Dexia's situation, three Arco cooperative companies had no other choice than to go into liquidation. However, it appeared that the contribution of Arco shareholders

would be protected by a guarantee offered by the Belgian government, which would cost approximately €1bn. Arco states that this state guarantee is granted by law[12] on the condition that a case-specific Royal Decree is approved.

The Royal Decree dated November 7, 2011 on granting a guarantee of the capital of recognised cooperative companies provided a state guarantee for three Arco cooperative companies. Critics argued that this royal decree is an infraction of the principle of equal treatment because the Arco shareholders are granted a protection which does not apply to other shareholders. The Flemish Federation of Investment Clubs and Investors filed a writ against the Belgian government in order to suspend and cancel the Arco guarantee.

Finally, the insurance company Ethias held 88 million or 5% of the Dexia shares. Under BGAAP, these shares were accounted for in Ethias' books at nominal value (different to ISFRS) and far above the real value of these shares in the light of Dexia's financial difficulties. Because of the state aid Ethias received during the 2008 financial crisis, it must sell its Dexia shares by 2012 at the actual market value which would have resulted in serious losses and eventually the withdrawal of its insurance licence. Ethias complied with the EC's requirement by passing this participation on to its parent company, Ethias Finance. In order to take over this participation which was originally booked at €280m, Ethias Finance had to undertake a bond issue, subscribed for approximately €180m by the federal and regional governments. As a result, the Belgian taxpayer again paid for the losses suffered by shareholders on the Dexia downsize.

It is unlikely that the nationalisation process undertaken by the Belgian government will be successful. Dexia Bank Belgium, which is as from March 1, 2012 renamed as Belfius, could still run into difficulties given the fact that (1) the exact amount of Dexia's holding state guarantees is currently unclear because it also refers to interests and accompanying elements; and (2) Belfius still has a substantial amount to be reimbursed by Dexia Holding. In the meantime the Belgian government would receive a remuneration from Belfius for the state guarantees they provided, but this is also a reason for rating offices to downgrade the Belgian rating. Furthermore, the presentation of the 2011 financial results (€11.6bn losses) showed that those remunerations are very unlikely to happen. In addition, Dexia Holding might need to be recapitalised. A key element in determining the success of the Dexia transformation will be the revenues from the sale of Dexia Holding subsidiaries. Some of these subsidiaries have already been sold, such as Dexia's Luxembourg subsidiary Dexia BIL (90% to Precision Capital, a Qatar investment group). Other divisions of Dexia Holding, such as its French division Dexia Crédit Local (which may be nationalised by the French national government) and Dexia Asset Management are still to be sold.

2) Fortis

After the 2008 bail-out, the banking activities of Fortis Belgium became 75% owned by the French financial group BNP Paribas and 25% by the Belgian government. Similar to the Dexia case, BNP Paribas had already used several billion euros deposited at BNP Paribas Fortis Belgium by Belgian citizens to rectify its own liquidity situation in France, which was more problematic because of the BNP Paribas exposure to Greek bonds. This cash mobilisation towards BNP Paribas has not been compensated by matching transfers to its Belgian subsidiary, BNP Paribas Fortis Belgium. This could present a problem because (1) it could become increasingly difficult for the Belgian bank division to grant credit; and (2) in a scenario where BNP Paribas would have to be dismantled, BNP Paribas Fortis Belgium would lose part of its deposits in BNP Paribas. One might raise the question as to whether all of these cash mobilisations are done at arm's length.

Fortis Insurance, having a division in Belgium and The Netherlands, was renamed as 'Ageas'. Together, BNP Paribas (11.8%), Ageas (44.7%) and the Belgian government (43.5%) have a participation in Royal Park Investments, the "bad bank" of the former Fortis Holding which was largely dismantled in 2008. The dismantling of Fortis Holding has led to several judicial claims during the last few years, in which Ageas (as successor of Fortis Holding) was involved. Ageas won a case against the Belgian-Luxembourg fund manager TreeTop concerning "Floating Rate Equity-linked Hybrid Securities" which Fortis Holding sold as perpetual bonds in order to strengthen its capital position within the group. TreeTop claimed that certain contractual clauses were invalid and that the securities should be declared null and void, resulting in the possible reimbursement at the nominal value of the securities, which was much higher than the actual market value. In a worst-case scenario, this would have cost Ageas up to €1.25bn, but in February 2011 the Brussels Commercial Court rejected TreeTop's claim.

Furthermore, a group of former Fortis Holding shareholders began proceedings against the Belgian government, claiming that the dismantling of Fortis Holding was unlawful. The Brussels Commercial Court ruled in February 2011 that Ageas and not the former shareholders were allowed to claim compensation.

3) KBC

In order to save KBC from bankruptcy, the Belgian Federal and Flemish governments each made a non-dilutive core capital contribution of €3.5bn. In addition,

an asset relief measure (a type of state guarantee) on a portfolio containing Collateralised Debt Obligations (CDOs) was granted by the Belgian Federal authorities, covering 15 CDO portfolios with an aggregate notional amount of €20bn. Given the fact that KBC received three substantial aid measures due to the financial crisis, the EC ruled that it would have to undergo in-depth restructuring in November 2009. The EC approved the strategic plan submitted by the Belgian authorities, which included a refocus on its key bancassurance business on its core markets (Belgium, Czech Republic, Hungary, Slovakia, Bulgaria), a reduction of its risk-weighted assets and a decrease of its risk profile.

As a result, KBC needed to divest or run-down a significant number of businesses, including some in Central and Eastern Europe, particularly those that were not fully in line with its core bancassurance business model on its core markets. Furthermore, it would divest a banking business (Centea) and an insurance business (Fidea) in Belgium which would stimulate competition in this core market. The reorganisation plan also included the repayment modalities of the two capital injections to the Belgian and Flemish authorities.[13]

The reorganisation plan meant that not only would KBC have to reduce its size in Belgium, it would also, as a result, have to make cutbacks of its expansion which it had predominantly reached in Eastern Europe. The dream of becoming a large European player had suddenly come to an end by the sale of Centea (to Landbouwkrediet, which consequently became one of the bigger mid-sized Belgian financial institutions), Fidea (to the American investment group JC Flowers & Co) and its private banking division, KBL epb located in Luxembourg, to Precision Capital. The sale of the Eastern European subsidiaries is currently more difficult, but on February 28, 2012 KBC announced that Banco Santander would take over Kredyt Bank, allowing KBC to gradually leave the Polish banking market. The divestment projects of Absolut Bank (Russia) and KBC Banka (Serbia) has yet to be started. The positive outlook resulted in KBC's share price increase in December 2011.

However, although at first glance it seems that KBC has come out in a better position when compared with the three major Belgian financial institutions (contrary to Fortis and Dexia it has not been nationalised and seriously dismantled), critics fear that the worst is yet to come for KBC and eventually it will have to undergo a similar bail-out as for Dexia and Fortis.

Conclusion: Back to the future

It is clear that the banking crisis has severely hit the three major Belgian financial institutions at a time of full expansion. One could argue that Dexia, Fortis and KBC are now back in the same position that they were at the millennium: a strong national presence backed by significant Belgian deposits. But as a result of the crisis, they are also carrying both known (owed to national/regional governments) and undetermined (CDOs and other toxic products) debts. The debts and the reorganisation measures taken to solve them could, for some of these credit institutions, lead to a credit shortage *vis-à-vis* their customers, but also to financial problems at national state level because defaults under the governmental guarantees and loans granted to the financial institutions could still occur. Such uncertainty on the repayment of state guarantees and loans could trigger downgrades by rating offices, emphasising the financial instability and create a waterfall impacting on the rating of the country. Furthermore, the EC's legislative proposals, which are intended to strengthen the financial institutions internally in the long term and implement the Basel III guidelines, will also in the short term force the financial institutions in the EEA to strengthen their financial status, which could bring them into even greater financial difficulties.

Notes:

1. This article has been written mainly on the basis of facts as were presented in the financial press and press releases of the relevant credit institutions.
2. General definition of a credit institution as defined by Article 1 of the First Council Directive 77/780/EEC of December 12, 1977 on the coordination of the laws, regulations and administrative provisions relating to the taking up and pursuit of the business of credit institutions (OJ L 322, 17.12.1977, p. 30–37) ("*the First Bank Directive*").
3. Second Council Directive 89/646/EEC of December 15, 1989 on the coordination of laws, regulations and administrative provisions relating to the taking up and pursuit of the business of credit institutions and amending Directive 77/780/EEC (OJ L 386, 30.12.1989, p. 1–13) ("*the Second Bank Directive*").
4. See "The European banking crisis of 2008/09 – the problems yet to come" by Hendrik Bossaert and Nora Wouters, Euromoney *Global Insolvency & Restructuring Yearbook 2010/2011*.
5. Proposal for a Directive of the European parliament and of the Council on the access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms and amending Directive 2002/87/EC of the European Parliament and of the Council on the supplementary supervision of credit institutions, insurance undertakings and investment firms in a financial conglomerate.

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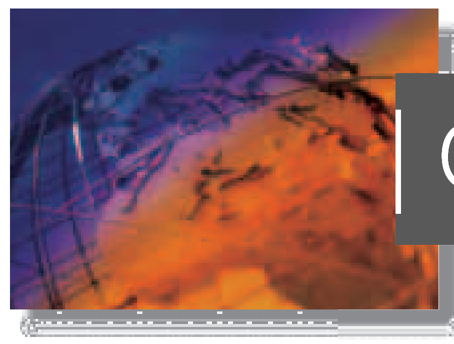

Global Experience

For further information please contact:

Nora Wouters
McKenna Long & Aldridge LLP
Avenue de Tervueren 2
B-1040 Brussels
Belgium
Email: nwouters@mckennalong.com
Tel: +32 2 278 12 11

McKenna Long & Aldridge LLP (MLA) is an international law firm with 475 attorneys and public policy advisors. The firm provides business solutions in the areas of corporate, finance, litigation, environmental, energy, climate change, government contracts, health care, intellectual property and technology, international law, public policy and regulatory affairs, and real estate.

The MLA Brussels office opened in 1990 and features a diverse group of lawyers from multiple countries, all of whom are leaders in important legal practice areas and provide counsel to clients on a wide-range of EU regulatory and business law matters.

Nora Wouters

Ms. Wouters has a wealth of experience in assisting international banks, companies and private equity clients in complex financing activities and corporate restructurings throughout Europe, securitization structures, collateral arrangements and public or private issues of financial instruments. She is appointed liquidator in Belgian companies and frequently acts as advisor to foreign restructuring and recovery specialists.

Ms. Wouters advises national governments, clearing houses, banks, investment funds, brokerage houses, and investment companies on all aspects of financial services regulation.

Ms. Wouters is a speaker at various conferences on corporate restructurings and has also written related articles. Furthermore, per the request of the DG for internal policies of the European Parliament, Ms. Wouters co-authored the note titled "*Harmonization of Insolvency Law at EU Level.*"

[6] Proposal for a Regulation of the European Parliament and of the Council on prudential requirements for credit institutions and investment firms.

[7] Press release available at: http://europa.eu/rapid/pressReleasesAction.do?reference=IP/09/399.

[8] PIIGS is an acronym for Portugal, Italy, Ireland, Greece and Spain.

[9] Instructions have been given to the Federal Participation and Investment Company by the Royal decree dated October 10, 2011.

[10] Article 2 of the Royal Decree dated October 18, 2011 on granting a state guarantee with respect to specific loans of Dexia NV and Dexia Crédit Local SA.

[11] Full press release: http://europa.eu/rapid/pressReleasesAction.do?reference=IP/11/1592&type=HTML

[12] Law dated February 22, 1998 on the organic statute of the Belgian National bank.

[13] Commission Decision on the State Aid n° C 18/2009 (ex N 360/2009) implemented by Belgium for KBC.

Authors:
Nora Wouters, Partner
Tel: +32 2 278 1215
Fax: +32 2 278 1200
Email: nwouters@mckennalong.com

Hendrik Bossaert, Associate
Tel: +32 2 278 1260
Fax: +32 2 278 1200
Email: hbossaert@mckennalong.com

McKenna Long & Aldridge LLP
2 Avenue de Tervueren
1040 Brussels, Belgium
Website: www.mckennalong.com

The close relationship between insolvency practitioners and financial regulators in the Caribbean and Bermuda

by Scott Andersen & Tim Le Cornu, KRyS Global

Historically, in the Caribbean and Bermuda offshore financial centres, there has been a close relationship between those who provide insolvency and related services (Insolvency Practitioners) and those who regulate the financial services industry (the 'Regulators'). Regulators may seek the assistance of Insolvency Practitioners in limited roles in investigating certain transactions or in much greater roles as examiners, controllers or liquidators of regulated entities.

While such a relationship may on the face of it seem unusual, the reasons that such a relationship exists arises from the specialised skills and experience that Insolvency Practitioners possess in the Caribbean and Bermuda. In many of the insolvency assignments that occur offshore, Insolvency Practitioners have to use diverse skills ranging from forensic accounting, fraud investigation, and asset identification and procurement. These same skills are those that can assist Regulators in investigating regulated entities for potential breaches of the laws and regulations or where the Regulators need to exercise their enforcement powers.

This article will focus on those situations where, based on our experiences in the Caribbean and Bermuda, Insolvency Practitioners have been brought in by the Regulators to assist them in the conduct of their duties and responsibilities in the monitoring and enforcement of the regulated financial services sector.

Off-site regulatory investigations

Regulators, in monitoring the regulated financial services sector, conduct off-site investigations of regulated entities. As the word implies, 'off-site' inspections involve work done on information outside the premises of the regulated entity (usually conducted in the offices of the Regulators) using information and documents received by the Regulators. This may include financial records, correspondence or in unusual circumstances, computer records. These may come from the regulated entity or via the gateways of regulator to regulator assistance. In certain circumstances the Regulators may receive information from the criminal authorities (via the gateways available with them), clients or other parties.

In those circumstances where the Regulators require particular skills or capabilities not readily available within their staffing, skills or resources, or where they require the added comfort that an independent investigator may provide (particularly if there is a risk of judicial review), they may seek the assistance of an Insolvency Practitioner to conduct the investigation or analysis. In these circumstances, the Regulator will retain the Insolvency Practitioner to provide certain agreed upon procedures or analysis, and provide either a formal report or financial analysis. These will then be utilised by the Regulator along with its own work and analysis, to determine what further action may or may not be required.

Examples of off-site investigations in which the firm has been involved include a review of certain transactions of a regulated entity involving allegations into inappropriate payments and activities; and a forensic review of the data on the hard drive of a computer presented to the Regulator by an employee of a financial institution.

On-site regulatory investigations

In addition to monitoring the regulated financial services sector off-site, the Regulators conduct frequent on-site inspections of regulated entities. Those on-site inspections occur at the premises of the regulated entity and can either be focused (that is, limited to certain functions or processes) or full inspections. An example of a focused inspection is one that reviews the anti-money laundering policies and procedures. Another example may be a review of corporate governance.

Similar to off-site inspections, the Regulators may require certain specialised skills or capabilities not readily available within their staffing contingent or resources. Where the retention of external expertise is deemed appropriate, the Regulator will retain the Insolvency Practitioner to act as an agent of the Regulator for the purposes of the specific area where the assistance is required. In this role the Insolvency Practitioner will conduct his work and report his findings and recommendations to the Regulators in the agent role. It is possible that the Insolvency Practitioner will also provide input on the report issued by the Regulator to the regulated entity. The Insolvency Practitioner will normally not provide any independent report or analysis, and once the report is

issued, will not have any further role in relation to monitoring and supervision of the licensee.

Situations where this firm has been involved include review of anti-money laundering policies and procedures; analysis of complex derivative and securities transactions; and an investigation into certain shareholders transactions.

Examination of the regulated entity

Most Regulators have the powers to appoint an examiner to examine the affairs or business of a licensee for the purposes of satisfying the Regulator that the laws have been or are being complied with, and that the licensee is in a sound financial position and is carrying on its business in a satisfactory manner. The examiner is required to provide a report to the Regulator as to his findings. The fees of the examiner can be borne by the licensee or the Regulator.

When Regulators exercise this power, it is usually because the scope and extent of the examination is more comprehensive than that which may arise in an on-site inspection, and also the Regulator intends on relying on the independent examination in order to assess what action is required. In conducting his work, the examiner will need certain investigative and forensic skills and resources to determine whether the licensee is in sound financial position and carrying out its business in a satisfactory manner. These are skills and experience which Insolvency Practitioners will have in the offshore world and it is often the case that Regulators will appoint Insolvency Practitioners for this role.

One of the issues that can arise is access to information. It is thus important that the Regulator is satisfied that the licensee will allow the examiner access to the information he or she requires to conduct the work that is necessary to comply with the scope of the examination. To the extent such access is not available, it is often difficult for the examiner to conduct his or her work or to provide a substantive report. Gaining access can particularly be an issue when there are allegations of fraud or misconduct, and/or where the books and records are held outside the jurisdiction and there may be a dispute as to who owns the documents or how access can be gained. In these circumstances, an examination may not be productive or beneficial and the Regulator will need to assess whether some other alternative course of action is appropriate and should be taken.

Appointment of a controller or administrator

There may be circumstances where the Regulator has to take more draconian and stronger action in regards to a regulated entity. The Regulator will consider such action normally where it has completed its own investigation, which may or may not include any of the processes mentioned above, and it feels it necessary to take certain enforcement action to protect the interests of stakeholders, particularly if there is a fear that the licensees' assets may be at risk of dissipation. In certain offshore jurisdictions this is referred to as appointing an administrator; in others it is referred to as a controller. Their role and purpose, however, is much the same.

In the Cayman Islands, the Regulator has the power to appoint an independent party, to assume control of a regulated company's business and operations when the licensee has contravened laws and regulations. Between 2008 and 2010 the Cayman Regulator appointed a controller on five separate occasions.

The decision to appoint a controller (or administrator) is not something that the Regulators take lightly and without due consideration. Such action will only be exercised where no lesser action is appropriate and it is necessary for the Regulators to protect stakeholders and reduce financial crimes by seeking to stop licensees and unauthorised persons carrying on insolvent or unlawful business, and to protect the assets of a company. The factors that the Regulator will consider prior to exercising this action is the seriousness of any breach of regulations and steps required to correct the breach; the extent of any loss, risk of loss or other adverse effect on stakeholders; the extent to which the stakeholder's assets appear to be at risk; the financial resources of the licensee; management's present and historical attitude to resolving problems; and the availability and effectiveness of alternative solutions. The Regulator has to balance the adverse impact that the appointment of a controller may have on the business of the regulated entity compared to the interests of the creditors and other stakeholders in the entity and the reputation of the jurisdiction as a whole.

Insolvency Practitioners are usually the preferred persons for the controllership role as they have the industry specific skills and experience needed to effectively discharge the duties and obligations conferred upon them as a controller. Such appointment is done through formal appointment, the Regulator instructs the appointee of the statutory powers the regulator is exercising to effect the appointment; the powers conferred upon the controller; and the basis on which it is seeking their appointment.

The powers conferred on the controller will enable him or her to assume control of the affairs of the entity, conduct the necessary investigation into the regulated entity's financial affairs and consider whether

the said entity has been acting in a manner that is in the best interests of its creditors, investors and/or other stakeholders. In order for these powers to be reinforced and to assist the controller generally to discharge its duties, the Regulator may require the controller to apply to the court seeking orders that they have all the powers of a person appointed as a receiver or manager pursuant to the bankruptcy law. Obtaining such powers will assist the controller in collecting the records and assets, particularly when they might be domiciled outside of the jurisdiction and the controller needs to apply to the Court for directions on any matter.

As mentioned above, the appointment of a controller is a serious action for the Regulator to take. In effect, the controller will assume the powers of the directors of the regulated entity. The directors remain on the board and continue with their duties and responsibilities to the creditors, investors and stakeholders, but cannot use the powers usually available to them.

In order to discharge the mandate of his appointment, a controller will immediately take steps to take possession or make copies of the books, records and other documents pertaining to the affairs of the entity to enable analysis of the financial position. In conjunction with this, he will also take steps to assume control of, and collect in, all the property or assets to which the regulated entity is entitled; and interview any person who may assist in the investigation into the company's affairs.

Because of the seriousness of the enforcement action, and the possibility that the regulatory issues or concerns can be rectified or hived off and the regulated entity could continue to operate, controllers will maintain an active and open dialogue with the Regulator, keeping them informed of the progress of their investigation, preliminary findings and any other matters which they believe should be brought to the attention of the Regulator. The Regulator will invariably receive enquiries from stakeholders seeking information pertaining to the status of the entity, therefore the active and open dialogue between the Controller and the Regulator will assist the Regulator to assess the situation and take appropriate action in the circumstances, particularly where it is possible to address the concerns to permit the entity to continue to operate and/or conduct regulated business.

The terms of the appointment require the controller to file a preliminary report with the Regulator, usually within a short period of time, setting out his findings and recommendations. In assessing his recommendations, a controller has a number of options, which include, but are not limited to: returning the control of the entity to its directors; de-registering the entity; replacing its promoter or officers; appointing an advisor or inspector to the entity; reorganising the entity; continuing the controllership; or making an application to the court for liquidation of the entity. Due to the importance of the recommendations to the Regulator and the impact they may have on the regulated entity, a controller must perform its investigation and analysis diligently to ensure that the suggested course of action is appropriate, measured and justified.

The Regulator will consider the recommendations contained in the report and decide what, if any, further action it might take, mindful of its objectives in overseeing the conduct of entities within the regulated financial services sector.

Appointment of a liquidator

If the Regulator determines that the extent of the deficiencies and/or breaches in the law are so serious that it is impractical or impossible for the regulated entity to rectify them or where the ability of the regulated entity to continue as a going concern is seriously in doubt, the Regulators may decide that winding up the entity is the appropriate course of action. In this circumstance, the controller's role will terminate on the appointment of the liquidator so that the winding up can be done without a separate and distinct duty to the Regulator. Usually the professional appointed as liquidator is the same as that appointed as controller, but that is not necessarily the case.

In certain jurisdictions the liquidator must be a licensed or authoried insolvency practitioner from the local jurisdiction. In other jurisdictions foreign insolvency practitioners may be appointed or may act jointly with a local insolvency practitioner. In our experience offshore Regulators will often look to have at least one of the persons put forward as liquidator to conduct the winding up of the regulated entity and investigation of the entity's affairs locally residing in the jurisdiction. Because a regulated entity may still have regulatory obligations even after the appointment of a liquidator, or simply because there may be information or lessons that can be learned and will assist the Regulator in the conduct of monitoring and enforcement of the regulated financial services sector, the Regulator may request that the liquidator provide it with reports or updates during the course of the liquidation.

Conclusion

Insolvency Practitioners and Regulators in the Caribbean and Bermuda offshore financial centres have always had a close relationship in the supervision and enforcement of the laws and regulations particularly in circumstances where there are allegations or concerns

of fraud or mismanagement. Insolvency Practitioners have specific expertise and experience in the areas of fraud investigation, forensic accounting and asset recovery which are important in the conduct of investigations of regulated entities and the provision of recommendations arising from such investigations and enquiries. Insolvency Practitioners can assist Regulators on off-site and on-site inspections in the provision of resources, investigatory and analytical skills in the areas of financial analysis, and understanding of anti-money laundering regulations. Further, Insolvency Practitioners can conduct more comprehensive investigations into regulated entities in roles as examiners, controllers or administrators by using the powers bestowed upon them and the resources and expertise available to them to gain access to and conducting analysis of the regulated entity's books and records and assets. Should these or any other actions determine that a regulated entity's future is in serious doubt, either due to the extent of the deficiencies and/or breaches in the law or the ability of the regulated entity to continue as a going concern, then winding up of the entity and the appointment of an Insolvency Practitioner to that role may be appropriate.

Authors:
Scott Andersen, Senior Analyst
Email: scott.andersen@krys-global.com

Tim Le Cornu, Director
Email: timothy.lecornu@krys-global.com

KRyS Global
Governors Square, Building 6, 2nd Floor
23 Lime Tree Bay Avenue
PO Box 31237, Grand Cayman, KY1-1205
Cayman Islands
Tel: +1 345 947 4700
Fax: +1 345 946 6728
Email: admin@krys-global.com
Website: www.krys-global.com

Bermuda – The Cambridge Gas in offshore restructuring and insolvency: Not fit for all purposes

by Martin Ouwehand, Appleby (Bermuda) Limited

It is very difficult for those practising in the field of cross-border insolvency and restructuring not to notice the significant moves towards international comity by various jurisdictions around the world. This is to a substantial degree influenced by the enactment of statutory frameworks for co-operation such as section 426 of the English *Insolvency Act 1986* or the UNCITRAL Model law on Cross-Border Insolvency adopted by the UK and the US. Despite these statutory routes to co-operation, the use of a court's inherent jurisdiction has remained important, particularly for offshore jurisdictions such as Bermuda which has no similar statutory basis for recognising another jurisdiction's insolvency representatives or restructuring regimes. The courts in offshore jurisdictions, by the very nature of the international business in those jurisdictions, are asked very regularly to deal with cross-border issues including the extent to which they should grant remedies for the benefit of foreign appointed insolvency representatives or make orders implementing in their own jurisdiction the court approved restructuring which has taken place in a foreign jurisdiction.

The Supreme Court of Bermuda has embraced the developing law in this respect, for the most part derived from the decision of the Privy Council in *Cambridge Gas Transportation Corpn v Official Committee of Unsecured Creditors of Navigator Holdings plc* [2007] 1 AC 508 ("*Cambridge Gas*"). *Cambridge Gas* marked a watershed in the approach of the English-based common law to international comity in cross-border insolvency; that is, that under the common law there should be a single insolvency proceeding, be it domestic or foreign, and that therefore a foreign insolvency representative must be extended recognition and assistance by the court. The purpose of recognising and assisting the foreign representative is to permit this to happen without the trouble of having to commence a parallel domestic insolvency proceeding.

On the facts of *Cambridge Gas* this meant that a plan implemented under Chapter 11 of the US Bankruptcy Code in respect of an Isle of Man company could be given effect by a Manx court, at the request of a New York court, because the company and its creditors could have entered into a compromise and arrangement under Manx law which would have achieved the same result as that under the Chapter 11 plan.

The controversy arises when it comes to how far the court can go under its inherent jurisdiction in providing assistance. It is worth bearing in mind that on the facts of *Cambridge Gas*, in reality, there was no directly equivalent mechanism for achieving in a Manx Scheme of Arrangement what had been achieved under the Chapter 11 Plan because of the need for the consent of certain shareholders who would have had to be treated, and voted as, a separate class and whose wishes could not have been crammed down by the wishes of creditors. Yet the effect of the court's order was to treat the two mechanisms as being equivalent.

The Bermuda Court has in this same vein been increasingly willing to apply the principles in *Cambridge Gas* liberally; for example, in *Re Founding Partners Global Fund Ltd (No2)* [2011] SC (Bda) 19 Com, the Bermuda Court expressed the view that its powers under Cambridge Gas were wider than applying domestic insolvency law and could extend to empowering foreign liquidators (appointed in the Cayman Islands in that case) "*to assert in Bermuda whatever claims are available under Caymanian law, provided that (a) the foreign substantive law to be applied is broadly similar to local insolvency law, and (b) the specific relief which is sought is available under local law.*"[1]

In the context of a restructuring, in *In the Matter of Contel Corporation Limited* [2011] Bda LR 12, the Bermuda court was asked on an *ex parte* application to recognise, in accordance with *Cambridge Gas*, a scheme of arrangement confirmed by a foreign court. The company concerned was listed on the Singapore Stock Exchange. It was incorporated in Bermuda but no parallel scheme was sought in Bermuda. The court approved the scheme relying on the "extremely wide" jurisdiction referred to in *Cambridge Gas*. The court appeared to be influenced by the fact that the requisite majority for approval of the scheme would

have been the same as that for a scheme under Bermuda law and that there was an "extraordinarily high level of creditor participation". The court also noted that there appeared to be no indication that the absence of a parallel scheme in Bermuda was "a deliberate attempt to avoid any consequences of Bermuda law". Further, the court took into account that the scheme involved a "simple debt for equity swap", was one often approved by the Bermuda court in cross-border schemes of arrangement, and that there was no question under Bermuda law that creditors can agree this type of compromise.

Contel has not been considered in any subsequent cases; however, it would be wrong to consider it as authority for the proposition that the Bermuda court will routinely approve schemes of arrangement made in other jurisdictions. Had there been an issue as to whether the creditors would have voted differently in a Bermuda scheme, or that there was some feature of the compromise or arrangement which meant it may not have been approved by the court if it were a Bermuda scheme, then there would be a convincing basis for the court refusing to approve it.

For this and other reasons, those seeking to restructure an insolvent debtor incorporated in an offshore jurisdiction such as Bermuda, or with liabilities governed by Bermuda law, should not simply assume that they can dispense with the need for parallel proceedings in that jurisdiction. As a matter of English law (which would almost certainly be followed by the courts in Bermuda and similar British territories), whether a contractual obligation is discharged under a foreign bankruptcy law depends on the law governing that contractual obligation.[2] Similarly, a discharge from a liability in tort would be valid only if it was discharged under the law governing the tort. As a consequence, a Bermudian law governed contract is not discharged as a result of a discharge in foreign insolvency proceedings, even though the discharge took place in that party's country of domicile.

The authority for this principle was laid down in a case in 1890 but does not appear to have been considered by the Bermuda courts.[3] It was recently considered and upheld in the English case of *Global Distressed Alpha Fund 1 Ltd Partnership v PT Backrie Investindo* [2011] EWHC 256 (Comm). The case was heard by a High Court judge who regarded himself as bound to follow *Gibbs*, a Court of Appeal decision. The case concerned a company incorporated in Indonesia which had provided a guarantee governed by English law to which the claimant, *Global*, was entitled. A debt reorganisation plan in respect of the company under Indonesian law was approved by creditors and confirmed by the Indonesian court. *Global* could not, therefore, enforce its guarantee in Indonesia and so it commenced proceedings in England. It argued that, in accordance with the principle of *Gibbs*, the guarantee could only be discharged under English law and that the Indonesian plan was not effective to do so. The court accepted that the *Gibbs* principle was open to criticism in light of *Cambridge Gas* however followed it and held that the guarantee had not been discharged. The wider consequence is that a parallel restructuring process would have had to be implemented in similar circumstances in England in order to discharge an English law governed liability.

Given its liberal approach to *Cambridge Gas*, it would be interesting to see whether the Bermudian Court would be willing to follow *Gibbs*. However if the court regards *Gibbs* as good law, then it is possible that this could affect the exercise of the court's discretion as to the nature of the order giving assistance to a foreign restructuring.

Conceptually, the order recognising the Plan in *Cambridge Gas* can at the very least be regarded as serving the practical purpose of recognising a transfer in the property of those shares at the place of incorporation where the shares in the Manx company are registered. The company in *Contel* was a Bermuda incorporated company and presumably the order must have been directed to a similar aim, that is, to recognise that the creditors bound by the scheme had swapped their debt for equity and thereby become shareholders. It is not clear from the judgment in *Contel* whether the order approving the Singapore scheme in that case was intended to have some additional effect.

No doubt the debts of the company which were governed by Singapore law would be discharged by the approval of the scheme in Singapore. This would prevent such creditors proceeding against assets of the company in that and any other jurisdiction which follows the rule in *Gibbs*. However, where the governing law of the company's debts is a different jurisdiction, there may be a question as to whether the company's liabilities were properly discharged. Such creditors may sue in their own courts to enforce their claims against a company despite the scheme of arrangement. It would be a mistake to assume therefore that the order had the same effect for all purposes as if a parallel scheme had been implemented in Bermuda; for example, a creditor from the US, with a debt governed by US law, and not within the jurisdiction of the Singapore court, could conceivably enforce its debt in Bermuda, perhaps by appointing a liquidator over the company. It could conceivably enforce its claim against assets outside of Singapore and Bermuda.

As Lawrence Collins J (as he then was) said in the

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English case of *In re Drax Holdings Ltd* [2004] 1 WLR 1049: "*In the case of a creditor's scheme, an important aspect of the international effectiveness of a scheme involving the alteration of contractual rights may be that it should be made, not only by the court in the country of incorporation, but also (as here) by the courts of the country whose law governs the contractual obligations. Otherwise dissentient creditors may disregard the scheme and enforce their claims against assets (including security for the debt) in countries outside the country of incorporation.*"

A jurisdiction outside of Bermuda and Singapore may not necessarily take the Bermuda court's approval as having the same effect as if there had been a Bermuda scheme; i.e. a discharge of liabilities governed by the company's place of incorporation. Much of this could depend on the analysis under the governing law as to what can amount to a discharge of such liability. The Bermuda court recognised as much in its decision in *Re Loral Space & Communications Ltd* [2007] Bda LR 26 where Kawaley J (as he then was) said that the court in the place of incorporation had jurisdiction to assist a US court by giving effect to a Chapter 11 Plan in general terms but that "*this should not be taken as suggesting that it may not be desirable in other cases for schemes of arrangement to be formally implemented under Bermuda law to either (a) meet the contingency that certain creditors may not be bound by the US Plan or (b) to deal in appropriate detail with unique Bermuda law issues which cannot appropriately be dealt with under the Plan.*"[4]

Similarly, when it comes to the question of whether a liquidator ought to be appointed in Bermuda over a Bermudian incorporated company, great caution ought to be exercised in assuming that this can be dispensed in favour of simply an application to the Bermuda court to recognise a foreign insolvency representative of the company; for instance, under Bermuda law as in many other jurisdictions, the fact of incorporation of a company in Bermuda means that, without a Bermuda liquidation and dissolution of such company, a creditor or shareholder may re-open the affairs of the company, long after a foreign liquidation and dissolution of such a company.

That aside, the traditional view of most common law-based jurisdictions is that the place of incorporation of a company governs the entitlement of an office-holder to collect that company's assets. It goes without saying that an order of recognition by a Bermuda court will not necessarily have any effect under the law of a third jurisdiction in which assets of the company are located. In jurisdictions which have enacted the UNCITRAL Model Law, the question of the extent of the powers to be afforded to representatives appointed in foreign insolvency proceedings is resolved by reference to the location of the insolvent debtor's Centre of Main Interest (or "COMI"). The US has enacted the Model Law in Chapter 15 of the US Bankruptcy Code. Under Article 17 of the Model Law, the foreign proceeding may be recognised as (i) a "foreign main proceeding" if it is pending in the country where the debtor has its COMI or, alternatively (ii) a "foreign non-main proceeding" if it is pending in a country where the debtor just has an "establishment". There is a presumption that the place of a debtor company's registered office (i.e., its place of incorporation) is its COMI and this confers certain statutory advantages. This is an important reason to commence insolvency proceedings in the place of incorporation, even if in parallel with other proceedings.

There are indications that this will be rewarded where that jurisdiction is an offshore one such as Bermuda. For example in the US case of *Millennium Global Emerging Credit Master Fund* (SDNY 11-13171, Gropper J, August 26, 2011) the court recognised the Bermuda appointed liquidators as being appointed in the COMI and emphasised the need to ensure that offshore representatives generally could have access to the US judicial system. The court said that there ought not to be, in effect, a presumption against recognition of offshore foreign representatives and that an offshore jurisdiction (in this case, that of Bermuda) should be granted comity by US courts because of its sophisticated, fair and impartial legal system.

For all of these reasons, those planning strategy in cross-border insolvency or restructuring are well advised to consider carefully the steps which ought to be taken in a debtor's place of incorporation, at least in jurisdictions such as Bermuda. The decision will be driven often by the desire for efficiency and understandably so. Much will depend upon the particular circumstances of the debtor, however efficiency must be balanced against the other equally key imperatives of certainty and finality. Indeed, in the right cases, and if there are well coordinated parallel proceedings, there will be no need for any such trade-off.

Appleby is a leading offshore provider of legal services and act on a wide range of significant and high-profile cases involving insolvency, commercial litigation, trusts disputes, funds disputes and insurance usually having a multi-jurisdictional component. Our litigation team is skilled in all types of commercial resolution and advocacy and is regularly instructed by the leading US and UK law firms, financial institutions, insurance companies as well as high net worth individuals. A key part of our practice relates to insolvencies and restructuring, be they domestic, international, contentious or non-contentious.

Notes:

[1] See paragraph 59 of the Judgment. There is support for this approach in the recent English High Court case of *Schmitt v Deichmann* [2012] EWHC 62 where a German administrator could rely upon English statutory provisions which did not apply to the foreign jurisdiction and had no direct equivalent in the foreign jurisdiction.

[2] Lawrence Collins (ed.) *Dicey, Morris & Collins, The Conflict of Laws* (14th edition), Rule 200.

[3] *Gibbs & Sons v Societe Industrielle et Commerciale des Metaux* (1890) LR 25 QBD 399 (CA).

[4] See paragraph 18 of the report.

Author:
Martin Ouwehand, Senior Associate
Tel: +1 441 298 3591
Email: mouwehand@applebyglobal.com

Appleby (Bermuda) Limited
Canon's Court
22 Victoria Street
PO Box HM 1179
Hamilton, HM EX
Bermuda
Tel: +1 441 295 2244
Website: www.applebyglobal.com

Corporate restructuring and insolvency: the Cyprus perspective

by Criton Tornaritis, Tornaritis Law Firm

This article aims to provide a brief introduction to the Cyprus Law of restructuring and insolvency. During the last few years the global economy has experienced one of the most severe credit crises and economic slumps. It is at such times that the law of restructuring and insolvency becomes of significant importance and its statutory provisions are thoroughly used and at the same time scrutinised.

The main players in a corporate restructuring or insolvency case are the shareholders, the directors, the trade and financial creditors, the employees and government authorities. All the above share conflicting interests, which combined with the complexity of corporate restructuring and insolvency mechanisms and the economic crisis, make the attempts to handle a corporate restructuring process and bring it to a positive final result extremely difficult and complex.

During the process of a corporate restructuring or insolvency all parties involved seek to secure as much of their interest as possible. The shareholders struggle to avoid loss of their entire investment or even assuming further liability; the creditors line up and request full recovery of their credit; directors try to avoid being held responsible through their acts for any loss incurred; and the employees wish for the company to retain their employment or at least compensate in full as per statutory provisions.

The work required by a good corporate restructuring and insolvency practitioner is to find the way to bring all these conflicting interests in line and persuade all involved to follow his plan in an effort to restructure or liquidate a company in the most effective manner, thus securing as much of the interests of all involved as possible.

Procedures available under Cyprus Law for corporate restructuring and insolvency

Under Cyprus Law the following procedures are available:

- Winding up by the court (compulsory liquidation).
- Members' voluntary liquidation.
- Creditors' voluntary liquidation.
- Receivership.
- Company arrangements and reconstructions.

Winding up by the court

Winding up by the court (compulsory liquidation) according to article 213 of the Companies Act Cap.113 (hereinafter referred to as 'the Act') may be initiated by petition presented either by the company or by any creditor or creditors (including any contingent or prospective creditor or winding up creditors), contributory or contributories, or by all or any of the above parties, together or separately, provided that specific provisions of Article 213(1) apply.

Such compulsory liquidation may be initiated under the Act when, a company takes a decision by a special resolution in a general meeting that the company should be wound up by the court; where a company has not started its operations within a year of its incorporation; where the company's operations were postponed for a whole year; in the event of public company not filing its statutory report with the registrar of companies; when a company fails to call for a statutory meeting; when the company is incapable to pay off its debts; or when the court is of the opinion that it is just and equitable that the company be wound up.

The provisions of Article 212 of the act as with the definition of when a company is considered unable to pay off its debts are:

(i) if a creditor, by assignment or otherwise, to whom the company is indebted in a sum exceeding £500.00 then due has served on the company, by leaving at the registered office of the company, a demand requiring the company to pay the sum so due and the company has for three weeks thereafter neglected to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor;

(ii) if execution or another process issued on a judgment decree or order of any court in favour of a creditor of the company is returned unsatisfied in whole or in part; or

(iii) If it is proved to the satisfaction of the court that the company is unable to pay its debts, and, in determining whether a company is unable to pay its debts, the court shall take into account that Article 214 of the Act provides for the powers of the court on hearing a petition.

On hearing a winding-up petition the court may dismiss it, or adjourn the hearing conditionally or unconditionally, or make any interim order, or any other order that it thinks fit. However, the court shall not refuse to make a winding up order on the grounds that the assets of the company have been charged or mortgaged to an amount equal or in excess of those assets, or that the company has no assets.

Where the petition is presented by members of the company as contributories on the grounds that it is just and equitable that the company should be wound up, the court shall make a winding up order if it is of opinion that:

(i) the petitioners are entitled to relief either by winding up the company or by some other means; and

(ii) in the absence of any other remedy it would be just and equitable that the company should be wound up.

However, the court may decide against the winding up order if it is also of the opinion that some other remedy is available to the petitioners and that they are acting unreasonably in seeking to have the company wound up instead of pursuing that other remedy.

Where the petition is presented on the ground of default in delivering the statutory report to the registrar or in holding the statutory meeting, the court may:

(i) instead of making a winding up order, direct that the statutory report shall be delivered or that a meeting shall be held; and

(ii) order the costs to be paid by any persons who, in the opinion of the court, are responsible for the default.

The Act further provides that at any time after the presentation of a winding-up petition, and before a winding-up order has been made, the company, or any creditor or contributory may:

(i) where any action or proceeding against the company is pending in any District Court or the Supreme Court, apply to the court in which the action or proceeding is pending for a stay of proceedings herein; and

(ii) where any other action or proceeding is pending against the company, apply to the court having jurisdiction to wind up the company to restrain further proceedings and the court to which application is so made may, as the case may be, stay or restrain the proceedings accordingly on such terms as it thinks fit (Art. 215).

In a winding up by the court, any disposition of the property of the company, including things in action, and any transfer of shares, or alteration in the status of the members of the company made after the commencement of the winding up shall, unless the court otherwise orders, be void (Art. 216).

Additionally any attachment, sequestration, distress or execution put in force against the estate or effects of the company after the commencement of the winding up shall be void to all intents (Art. 217).

The winding up of a company by the court shall be deemed to commence at the time of the presentation of the petition for the winding up except where, before the presentation of a petition for the winding up of a company by the court, a resolution has been passed by the company for voluntary winding up. In this case, the winding up of the company shall be deemed to have commenced at the time of the passing of the resolution, and unless the Court, on proof of fraud or mistake thinks fit otherwise to direct, all proceedings taken in a voluntary winding up shall be deemed to have been validly taken (Art. 218).

On the making of a winding-up-order, a copy of the order must be forwarded by the company to the registrar of companies who shall make a note relating to the company in his books (Art. 219).

When a winding up order has been made or a provisional liquidator has been appointed, no action or proceeding shall be commenced against the company except by leave of the court and subject to such terms as the court may impose (Art. 220).

An order for winding up a company shall operate in favour of all the creditors and contributories of the company as if made on the joint petition of a creditor and a contributory (Art. 221).

The role of the official receiver and registrar of companies in the winding up procedure is defined under sections 222 and 223 of the Act where it is stated that "the term official receiver" means the official receiver and registrar of companies and includes any other person appointed for the purpose by the Council of Ministers.

Further, the Act provides that the official receiver may apply to the court and request the appointment of any person to act as official receiver in a winding up case under the directions of the official receiver and registrar.

Where the court has made a winding-up order or appointed a provisional liquidator, there shall, unless the court thinks fit to order otherwise and so orders, be made out and submitted to the official receiver a statement of affairs of the company in the prescribed form, verified by affidavit. This should show the particulars of its assets, debts and liabilities; the names, residences and occupations of its creditors; the securities held by them respectively; the dates when the securities were respectively given; and such other information as may be prescribed or as the official receiver may require.

The statement of affairs shall be submitted and verified by one or more of the persons who are the directors at the relevant date and by the person who is at that date the secretary of the company. The official receiver retains the right to apply to court and seek an order requesting other persons connected with the company to submit and verify the statement.

The statement shall be submitted within 14 days from the relevant date, or within such extended time as the official receiver or the court may for special reasons appoint (Art. 224).

As soon as practicable after receipt of the statement, or in a case where the court orders that no statement shall be submitted, the official receiver shall submit a preliminary report to the court outlining:

(i) the amount of capital issued, subscribed and paid up, and the estimated amount of assets and liabilities;
(ii) if the company has failed, the cause of the failure; and
(iii) whether, in his opinion, further inquiry is desirable as to any matter relating to the promotion, formation or failure of the company or the conduct of the business thereof (Art.225).

According to the Act, the court may appoint a liquidation or liquidators for the purpose of conducting the proceeding in winding up a company.

A provisional liquidator may be appointed at any time after the presentation of a winding up petition by the court, which will have the power to limit and restrict his powers by the order appointing him (Art. 226, 227).

The official receiver, by virtue of his office, is appointed as provisional liquidator and shall continue to act as such until he or another person becomes liquidator and is capable of acting as such.

The official receiver summons separate meetings of the creditors and contributories of the company for the purpose of determining whether or not an application is to be made to the court for appointing a liquidator in the place of the official receiver.

Where a person other than the official receiver is appointed liquidator, that person shall not be capable of acting as liquidator until he has notified his appointment to the registrar of companies and given security in the prescribed manner to the satisfaction of the court. The liquidator shall give the official receiver such information and such access to and facilities for inspecting the books and documents of the company and generally such aid as may be requisite for enabling that officer to perform his duties under this law (Art. 229).

The powers of the liquidator in a winding up by the court are described in Art. 233 of the Act With the sanction either of the court or of the committee of inspection to:

(i) bring or defend any action or other legal proceeding in the name and on behalf of the company;
(ii) carry on the business of the company so far as may be necessary for the beneficial winding up thereof;
(iii) appoint an advocate to assist him in the performance of his duties;
(iv) pay any claims of creditors in full;
(v) make any compromise or arrangement with creditors or persons claiming to be creditors or having or alleging themselves to have any claim, present or future, certain or contingent, ascertained or sounding only in damages against the company, whereby the company may be rendered liable; and
(vi) compromise all calls and liabilities to calls, debts and liabilities capable of resulting in debts, and all claims, present or future, certain or contingent, ascertained or sounding only in damages, subsisting or supposed to subsist between the company and a contributory or alleged contributory or other debtor or person apprehending liability to the company, and all questions in any way relating to or affecting the assets or the winding up of the company, on such terms as may be agreed, and take any security for the discharge of any such call, debt, liability or claim and give a complete discharge in respect thereof.

The liquidator in a winding up by the court shall have the power to:

(i) sell the real and personal property in action of the company by public auction or private contract, with power to transfer the whole thereof to any person or company or to sell the same in parcels;
(ii) do all acts and to execute, in the name and on behalf of the company, all deeds, receipts and other documents, and for that purpose to use, when necessary the company's seal;
(iii) prove, rank and claim in the bankruptcy, insolvency or sequestration of any contributory for any balance against his estate, and to receive dividends in the bankruptcy, insolvency or sequestration in respect of that balance, as a separate debt due from the bankrupt or insolvent, and ratably with the other separate creditors;
(iv) draw, accept, make and indorse any bill of exchange or promissory note in the name and on behalf of the company, with the same effect with respect to the liability of the company as if the bill or note had been drawn, accepted, made or indorsed by or on behalf of the company in the course of its business;

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(v raise on the security of the assets of the company any money requisite;

(vi) take out in his official name letters of administration to any deceased contributory, and to do in his official name any other act necessary for obtaining payment of any money due from a contributory or his estate which cannot be conveniently done in the name of the company, and in all such cases the money due shall, for the purpose of enabling the liquidator to take out the letters of administration or recover the money, be deemed to be due to the liquidator himself;

(vii) appoint an agent to do any business which the liquidator is unable to do himself; and

(viii) do all such other things as may be necessary for winding up the affairs of the company and distributing its assets.

The Act provides a liquidator, in the case of a winding up by the court, extensive powers to investigating into the affairs of the company, and especially the conduct of persons involved in the company affairs.

When affairs of the company have been completely wound up, the court, if the liquidator makes an application in that regard, shall make an order that the company be dissolved from the date of the order, and the company shall be dissolved accordingly.

A copy of the order shall, within 14 days from the date thereof, be forwarded by the liquidator to the registrar of companies who shall make in his books a note of the dissolution of the Company (Art. 260).

Voluntary winding up

According to the Act (Section 261) a company may be wound up voluntarily in the following circumstances:

(i) when the period, if any, fixed for the duration of the company by the articles expires, or the event, if any, occurs, on the occurrence of which the articles provide that the company is to be dissolved, and the company in a general meeting has passed a resolution requiring the company to be wound up voluntarily;

(ii) if the company resolves by special resolution that the company be wound up voluntarily; or

(iii) if the company resolves by extraordinary resolution to the effect that it cannot, by reason of its liabilities, continue its business, and that it is advisable to wind up.

When such a resolution for voluntary winding up has been passed, then the company shall, within 14 days after the passing of the resolution, give notice of the resolution by advertisement in the official gazette.

The commencement of the voluntary winding up is deemed to be at the time of the passing of the resolution for voluntary winding up.

In the case of a voluntary winding up, the company shall, from the commencement of the winding up, cease to carry on its business, except so far as may be required for the beneficial winding up thereof, provided that the corporate state and corporate powers of the company shall, not withstanding anything to the contrary in its articles, continue until it is dissolved (Art. 264).

Any transfer of shares, not being a transfer made to or with the sanction of the liquidator, and any alteration in the status of the members of the company, made after the commencement of a voluntary winding up shall be void (Art.265).

Where a voluntary winding up is proposed, the company directors make a statutory declaration to the effect that they have made a full inquiry into the affairs of the company and that to this effect they have formed the opinion that the company will be able to pay its debts in full within such period not exceeding 12 months from the commencement of the winding up as may be specified in the declaration.

The declaration takes full effect for the purposes of the Act only if:

(i) it is made within five weeks immediately preceding the date of the passing of the resolution for winding up the company and is delivered to the registrar of companies for registration before that date; and

(ii) it embodies a statement of the company's assets and liabilities as at the latest practicable date before the making of the declaration.

Members' voluntary winding up

A members' voluntary winding up is applied in cases where an existing solvent company is no longer required by the members as it has fulfilled its purpose. This procedure will facilitate distributing any assets among the members and repaying any liabilities thereof. This procedure is used often during group reorganisations.

A company in general meeting shall appoint one or more liquidators for the purpose of winding up the affairs and distributing the assets of the company. Upon such appointment all the powers of the directors shall cease except so far as the company in general meeting or the liquidator sanctions the continuance thereof (Art. 268).

In the event that after the commencement of the voluntary winding up the liquidator is at any time of the opinion that the company will not be able to pay its debts in full within the period specified in the declaration under Article 266, he shall immediately call a creditors meeting and lay before such meeting a statement of the assets and liabilities of the company (Art.271).

The liquidator has the obligation to call such general meeting at the end of each year, and lay before the meeting an account of his acts and dealings

and of the conduct of the winding up during the preceding year (Art.272).

As soon as the affairs of the company are fully wound up the liquidator shall make an account of the winding up, showing how it has been conducted and the property of the company has been disposed of. The liquidator shall call a general meeting and lay such account before it, giving any explanation thereof.

Thereafter, the liquidator sends a copy of the account to the registrar of companies and shall also make a return of the holding of the meeting and of its date. The registrar on receiving the account and the return mentioned above shall immediately register them and on the expiration of three months from the registration of the return the company shall be deemed to be dissolved (Art. 273).

Creditors voluntary winding up

This procedure is used to facilitate the distribution of all available assets of an insolvent company to its creditors and thereafter the company ceases to exist by dissolution.

According to Article 276 the company shall cause a meeting of the creditors to be summoned for the day on which the meeting at which the resolution for voluntary winding up is to be proposed.

The directors for the company shall lay before the meeting a full statement of the position of the company's affairs together with a list of the creditors and the estimated amount of their claims, and appoint one of them to preside at the said meeting.

A meeting of the company members is also convened with the purpose of passing the winding up resolution and appointing a liquidator.

As soon as the affairs of the company are fully wound up the liquidator shall make up an account of the winding up, showing how the winding up has been conducted and the property of the company has been disposed of, and thereupon shall call a general meeting of the company and a meeting of the creditors for the purpose of laying the account before them and giving any explanation thereof (Art. 283).

The procedure then followed in the case of a members' voluntary liquidation is that of informing the registrar of companies and registering the decision in the companies file.

Receivership

After a charge over the assets of a company has been placed by a creditor, such creditor may appoint a receiver with the purpose of facilitating the sale of the company's assets, subject to the charge and discharge of debt out of the proceeds of the sale.

As soon as the receiver realises the charged asset and provider account to his appointer and the company, he is discharged. The company debtor, however, in contradiction to the winding up procedures described above, remains in existence.

Usually the document (agreement) signed between the company debtor and the creditor creating the charge includes all powers to the extent thereof and the degree of supervision of the receiver.

Company arrangements and reconstructions

According to Article 198 of the Act where a compromise or arrangement is proposed between a company and its creditors or any class of them, or between the company and its members, the court may on the application of the company, a creditor, a member, or – in the case of a company being wound up – the liquidator, order a meeting of the creditors, or the members to be summoned in such manner as the court directs.

If the majority in number represented by three-quarters in value of the creditors or members present and voting at the meeting agree to any compromise or arrangement, such compromise or arrangement shall be binding or all the creditors or members (Art. 198).

Such order shall have no effect until an office copy of the order has been delivered to the registrar of companies for registration.

Such procedure is frequently used to facilitate the financial restructuring of the company to effect mergers and reorganisation of group of companies, thus taking advantage of favourable tax treatment of reorganisation.

Upon approval of a reorganisation and restructuring scheme by the court, the whole process may be completed within weeks, thus offering a flexible and swift process.

Conclusion

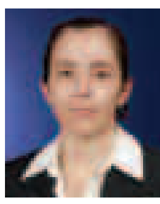
The Cyprus Companies Act covering all aspects of restructuring and insolvency law in Cyprus is a perfect translation of the corresponding UK Law provisions dating back to the 1950s.

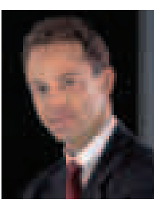
In today's economic circumstances it is more than certain that many provisions will be challenged and many issues litigated in the Cyprus court which in its turn will move the institutions involved to seek and prepare a more modern insolvency legal framework assisting the rescue of corporate debtors and helping enterprises overcome obstacles.

Author:
Criton Tornaritis, Senior Partner
Tornaritis Law Firm
16 Stasikratous Street, 6th Floor
1065, Nicosia, Cyprus
Tel: +357 (22) 456 056
Fax: +357 (22) 664 056
Email: office@tornaritislaw.com
Website: www.tornaritislaw.com

Brazil – Opportunities for restructuring in family-owned companies

by Osana Mendonça, André Schwartzman and Salvatore Milanese, KPMG Brazil





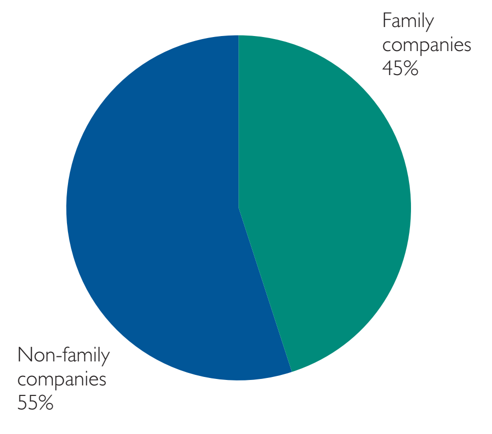
In Brazil, a large number of profitable enterprises had their inception based on a business concept which was initially nurtured in a family company. As time goes by, the one who originally conceived the business transfers the company to other family members, or, oftentimes after sudden success, the companies are sold to investment groups.

On the occasions in which the founding owner has not prepared a successor, or when the company in question has not been sold to new owners who instituted professional management, there may be a need for restructuring the business.

The restructuring of a family-owned company often has to deal with problems related to control not being clearly defined, on those occasions in which there was no preparation of a successor to the founding partner. This situation could lead to a mix-up between the legal entity's equity and the individuals' equity. These aspects can seriously impact the assertiveness and transparency of company information.

Currently, a significant number of family companies in a stress or distress situation is noticeable. In Brazil, out of the last 42 filings for judicial reorganisation which involved a significant debt amount, 45% were related to family companies (see Figure 1).

Figure 1: Judicial reorganisation comparison – family vs. non-family company



Source: KPMG Brazil

Those are companies for which the founding group developed the brand, established the operation locations, but have neither prepared the succession plan nor professionalised the management. Very often, the business started small and was not prepared for growth. It operated as a small bakery, which grew into a food factory, but without planning, control and overall management.

Therefore, despite the enterprise's good prospects, management absence or failure leads it to a stressed or distressed situation.

In distressed situations it is common for the current managers and shareholders to understand that the only solution might be the sale of the company, in part or in its totality, to an investor who injects capital. This solution may prove to be excellent, or dreadful, for both parties. This will always depend on the way in which each of the parties will conduct their analyses.

A foreign investor needs to be very well advised by law offices and consultancies which have already had experience in similar situations within the same country. The right services, both legal and financial, will ensure that the M&A process occurs in good faith and under the best possible legal protection.

Performing a careful due diligence may bring forth information which is otherwise not transparent, thus facilitating proper decision-making on the part of the investor.

Each country has its own characteristics, particularity in the legal field, but also has its own cultural traits which are normally directly reflected in the manner in which the owners interact during the course of the M&A negotiations.

In the case of stressed and distressed companies, seeking the help of advisors specialised in M&A avoids the need for solving serious future problems, such as succession processes involving tax, labour and other debts.

In Brazil, companies in situations of stress or distress, when timely advised, go through a restructuring process which may end in a judicial reorganisation process, due to the amount of debts and other factors. In this in-court proceeding, the new owner may find protection against tax and labour contingencies. Yet, for the aforementioned protection

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Salvatore Milanese
Partner
+55 11 3245-8312
smilanese@kpmg.com.br
Andre Schwartzman
Director
+55 11 3245-8258
aschwartzman@kpmg.com.br
Osana Mendonça
Director
+55 11 3245-8338
omendonca@kpmg.com.br
kpmg.com/BR

to be valid, the negotiations and the takeover of the business should take place in an orderly manner and under the authorisation of the legal proceeding.

Otherwise, the new investor may become jointly liable for tax, labour and other contingencies he or she might be unaware of. Additionally in the case of family-owned companies, usually there are strong personal loyalty ties between the employees and the original shareholders. Such ties, even when those shareholders are removed, cause the company to still operate under former orders, procedures and culture.

On the occasions in which the financial and operational restructuring in a distressed or stressed company does not occur in an orderly manner, and does not rely on professionals specialised in this type of environment, the cultural change is less likely.

For instance, a Swiss company acquired a family company in the car parts sector in Brazil. The family management team stepped down, and just one member of it remained in the board of directors. The new professional management team took over the business management and started to manage the day-to-day business. Two years after the acquisition, it was identified that the company paid an excessive amount in the purchase of tooling, and that there was the suspicion of embezzlement. It was found that there were slush funds in the company, and that, for more than 25 years, one of the company's professionals had been responsible for the slush funds, which used to be recorded in a notebook and reported to the CEO of the company, at the time it was a family company. The cash was used in payments which ensured receipt of new goods for manufacturing.

The acquisition of a family company also involves the negotiation with the various existing 'manors' that exist within the typical family-owned company. At the time of a crisis, the 'manors' may gather around the idea of selling the share control, or of a sellout. Therefore, the investor could enter the enterprise by means of the acquisition of a portion of the debt, or by means of the acquisition of equity which would entitle him or her to share control.

However, when a new investor takes over the management of the business and begins a reorganisation process of the business using leading practices and financial and operational restructuring, the family groups realise that the family business was very attractive. At this time what happens is that some 'manors' give up the sale option of the share control.

The following thought pops up: "the family's good business is priceless". The crisis arising from the existing conflicts at this stage does really impact the negotiations and the conduction of the M&A process:

- succession process vs. solving the existing financial problems;
- keeping the ownership vs. not run the risk of losing everything in a possible bankruptcy;
- hiring of family members vs. beginning a new professional career.

Starting to hold equity interest in a family company, assuming the company's management, requires advisory services from specialised firms, due to the array of conflicts which will arise, as outlined in Figure 2.

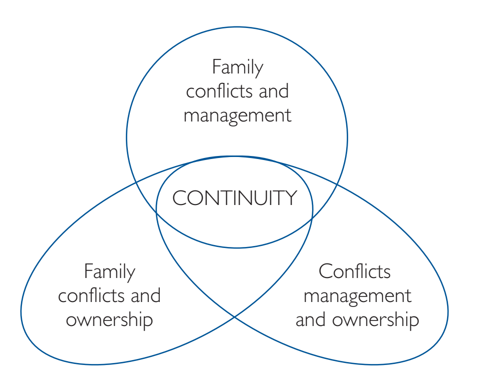
Figure 2: Family management vs. professional management

Family management	Professional management
Unconditional acceptance	Conditional acceptance
Socialist	Capitalist
Cooperative	Competitive
Emotional	Rational/logical
Equality	Merit

Source: KPMG Brazil

Good conduction in the resolution of conflicts results in the continuity of the company as a going concern, as well as in the contract entered into between the parties resulting from the M&A process. Therefore, the continuity of the company as a going concern has to be the main goal, in common with both parties (see Figure 3).

Figure 3: Continuity of the company as a common goal



Source: KPMG Brazil

Some examples of conflicts may be:

a) showing that a very trusted old employee may be replaced by a skilled professional, who works efficiently;

b) showing that the phasing-out of an unprofitable product, which has always been manufactured by the company, will result in gains;

c) keeping or not keeping all the production units, and/or the company's real estate properties;

d) performing the segregation between the company's real estate/properties and the ones which belong just to the family; and
e) keeping or not keeping employees who are family members, and payment of salary to the latter.

With few exceptions, cultural matters, equity mix-up and a succession process lacking preparation and professional management are the major points which prejudice management in a family company. On the occasions in which the succession process was not prepared, a dispute for power, which in a family-owned company is conducted in a passionate manner, arises, not taking into consideration the win-win or win-lose outcome. What is noticeable is that the ones involved in the fight for power aim at the opponent's loss, not reflecting, in a rational manner, whether this search will result in serious problems to the company, and, therefore, their own equity interest in the business company.

The good management of these matters which normally occurs during the course of the company's restructuring, when performed with focus and knowledge, will result in a strengthened company, which may enjoy sustainable growth in the future. What is the reason for this statement? The reason is that, if the company has survived all conflicts which led to the stress and distress, once it recovers from the aforementioned conflicts it will have a solid base to grow!

Authors:
Osana Mendonça, Director
Transactions & Restructuring
Tel: +55 (11) 3245 8338
Email: omendonca@kpmg.com.br

André Schwartzman, Partner
Restructuring Services
Tel: +55 (11) 3245 8258
Email: aschwartzman@kpmg.com.br

Salvatore Milanese, Partner
Restructuring Services
Tel: +55 (11) 3245 8312
Email: smilanese@kpmg.com.br

KPMG Brazil
Av. Nove de Julho, 5109 - 7º Andar
01407-905 - São Paulo, SP, Brazil
Fax: +55 (11) 3245 8310
Website: www.kpmg.com.br

Brazilian insolvency system seeks maturity

by Bruno Gutierres, Ramos, Zuanon e Manassero Advogados

By the year 2005, the bankruptcy system in Brazil, established by Decree-Law No. 7661 of 1945, still remained in force. Inspired by an outdated concept of enterprise, the bankruptcy legislation that prevailed in Brazil for 60 years was long ago obsolete and incompatible with economic order, particularly going against instruments and mechanisms that could allow the reorganisation of companies facing difficulty and also the preservation of economic activity in the bankruptcy process.

To better illustrate just how far behind Brazilian legislation was on an international level in 2005, the United States edited its first specific laws on reorganisation in the early 1930s, later grouped systematically in the Chandler Act, enacted in 1938; France has had in place legislation aimed at the rehabilitation of companies in difficulty since 1985, Law No. 85-98; Germany and Portugal edited new bankruptcy laws to also contain mechanisms for judicial recovery of business in crisis in the first half of the 1990s, respectively in 1994 and 1993; and neighbouring Argentina modernised its bankruptcy laws to allow the raising of firms in difficulty with Law No. 24,552 of 1995, a decade in advance of Brazil.

So many years of waiting in frustration with an extremely inefficient bankruptcy system hyped expectations about the new Judicial Recovery and Bankruptcy Act, No. 11101 of 2005 (LRF). Despite the relevant number of critics on several aspects of the new law, the consensus has always been that LRF represented an enormous improvement over the previous bankruptcy system and that the important task of correcting inaccuracies and filling gaps in the application on concrete cases would be up to professionals, lawyers, judges and financial advisors, among others.

The practical application for LRF soon arrived. Only three years after its entry into force, by virtue of the global financial crisis triggered in 2008, there began a great movement of applications for bankruptcy in Brazil. Many of these applications were of expressive values, especially from exporters of agricultural commodities highly indebted in foreign currency as a result of structured transactions with domestic and foreign financial agents.

What was observed in this first major test of the LRF, however, was a dialectical movement, with the predominance of inexperienced professionals trying to make the new system of insolvency the antithesis of the previous inefficient system. That is, if earlier the recovery of the a company in difficulty through the judicial system was practically impossible, after the entry into force of the new legislation a disproportionate and excessive concern prevailed among the operators of the new law to avoid breaking a company into crisis by the approval of recovery plans at any cost.

The relevant principle that a non-viable enterprise should not be kept in operation but go to liquidation was forgotten. The operators of the new law lost sight of the view that an efficient liquidation of a non-viable enterprise is the best alternative to avoid a generation of even greater losses, not only because liquidation provides a better return to creditors and society when the bad player is removed from the market, but also because the maintenance of economic activity benefits workers, business partners and consumers.

In an expressive number of cases, under the justification of avoiding the liquidation of a company in crisis, the judiciary allowed, for example, the early sale of a debtor's property given as collateral for immediate use as working capital, in clear violation of the rights of creditors and without any concern for the viability of the effective reorganisation of the enterprise in crisis.

Many other decisions contrary to the law and to the principles of the insolvency and credit rights system were made to support the recurring argument that liquidation should be avoided at any cost, sometimes causing imbalance in the complex relationship of interest that permeate the bankruptcy procedure established by the LRF. Because they felt confident that bankruptcy would be avoided at any cost, the business controllers of companies in crisis were refractory to the reorganisation proposals where they would lose control of the company, and were even against the adoption of more stringent corporate governance rules, obviously damaging the efficiency of the reorganisation process.

It is fair to recognise that, in a few cases, creditors

that are well advised and represented by specialised law firms have succeeded in the enforcement of credit rights and collaterals against companies that had unacceptable judicial recovery plans. However, in general, we can say that the outcome of the judicial recovery processes in Brazil could be much better and needs to evolve.

Consequently, just two years after the approval of a large number of recovery plans since the global economic crisis started in 2008, it is already clear that most of the judicially reorganised enterprises are unable to overcome their difficult situation. Even after the big haircuts, debt rescheduling and collateral losses imposed to the creditors, they preserved their inefficiencies, lost credibility and seriously threaten to fail, thus multiplying the losses to all stakeholders.

However, although so far the outcome of the implementation of the LRF, in general, has been disappointing, a few recent decisions and interpretations, especially from the Court of Appeals of the State of São Paulo, show a trend of development and maturation of the Judiciary.

On March 14, 2011, the chamber reserved to bankruptcy and judicial recovery of the Court of Appeals of the State of São Paulo edited its first book of precedents which, although without binding power, serve as strong guidance for the implementation of LRF within São Paulo State. Among the precedents edited, there are two that are noteworthy: number 61, which provides, "In bankruptcy, the removal or replacement of warranty will only be permitted upon express approval of the holder"; and number 62, which says, "In Recovery court, it is inadmissible to release latches with a pledge of bank receivables and, therefore, the amount received in payment guarantees should remain in an escrow account during the suspension period provided for in § 4 of Art. 6 of that Act."

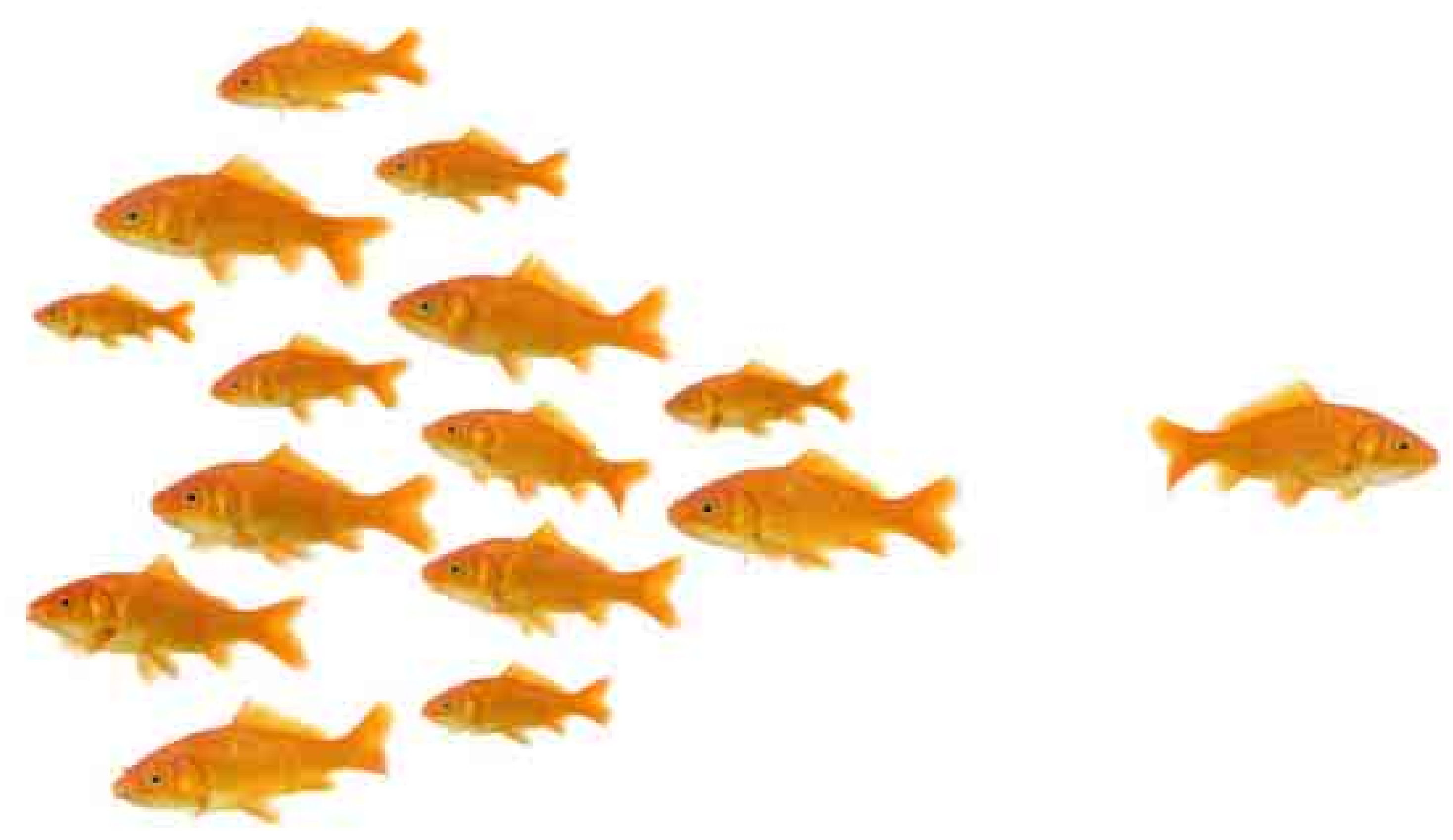
On February 28, 2012, the same specialised chamber of the Court of Appeals of the State of São Paulo, in the judgment of the interlocutory appeal number 0136362-29.2011.8.26.0000, annulled the determination of the general meeting of creditors from a judicial recovery process who had approved a plan of reorganisation, due to improper predictions, such as, lengthening of the period for repaying the debt to 18 years with a three-year grace period, unequal treatment among creditors of the same class, and also because the company showed clear signs of non-viability.

Hopefully precedents and decisions like these will get notoriety and will become increasingly frequent, especially if confirmed by the Superior Court of Justice (STJ), responsible for the final interpretation of federal law, settling controversial issues between the State Courts of Justice and Federal Regional Courts, and ensuring the application of federal law.

Although it is understandable that after 60 years of waiting for legislation that allows the effective recovery of viable enterprises initially there would be some exaggeration and inaccuracy in the application of new concepts, we believe it is already and sufficiently clear that the price paid for this disproportionate response to the previous model is very high.

A safe and efficient insolvency system is indispensable for the stability of the trade and financial system of a country, it encourages investment and the financing of productive activity, thus generating sustainable economic growth, and encouraging responsible corporate behaviour. We believe that the Superior Court of Justice is aware of this reality and will fulfill its role in the final interpretation of the LRF, which will provide relevant progress in the Brazilian bankruptcy system.

Author:
Bruno Gutierres, Partner
Ramos, Zuanon e Manassero Advogados
Rua São Tomé, 86 - cj. 111
São Paulo - SP - 04551-080
Brazil
Tel: +55 (11) 3055 2008
Fax: +55 (11) 3848 9449
Website: www.rzmadvogados.com.br



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Strategies for use of bankruptcy law by creditors in China

by Fanghua Duan, Zhongzi Law Office

The Enterprise Bankruptcy Law of the People's Republic of China (EBL) enacted on June 1, 2007, introduced a comprehensive bankruptcy regime to protect lawful rights and interests of creditors when the debtor falls into financial crisis. As the first judicial interpretation of EBL, Provisions (I) of the Supreme People's Court on Several Issues concerning the Application of EBL which came into effect on September 26, 2011, aims at enhancing the application of the EBL as well as providing creditors with a more effective and efficient mechanism to commence bankruptcy proceedings. This article focuses on practical strategies for creditors to realise their rights and interests under EBL and newly-adopted Provisions (I) of SPC in China.

To employ bankruptcy avoidance law in a bankruptcy proceeding

Overview of bankruptcy avoidance law under the EBL

By following general modern bankruptcy laws, the EBL has established a bankruptcy avoidance mechanism which covers three kinds of avoidable pre-bankruptcy transactions: avoidable fraudulent transfers and obligations, invalid fraudulent transfers and obligations, and preferences.

- Avoidable fraudulent transfers and obligations. A bankruptcy trustee is entitled to request the court to avoid the following actions taken within one year before the court accepts the bankruptcy petition in respect of the debtor's property: (1) to transfer the property of the debtor without consideration; (2) to conduct transactions at a obviously unreasonable price; (3) to provide property guaranty to unsecured debts; (4) to pay off debts undue; and (5) to abandon claims.
- Invalid fraudulent transfers and obligations. If a debtor hinders or transfer its property with actual intent to defraud any entity to which the debtor was or became indebted, or if a debtor initiatively fabricates debts or passively acknowledges unreal debts, all of the debtor's foresaid actions will be invalid, and the bankruptcy trustee may recover the property thereof obtained regardless when such transfer or obligation is incurred.
- Preferences. A bankruptcy trustee is entitled to avoid any repayment made while the debtor was insolvent to a creditor within six months before the court accepts the bankruptcy petition, except that such specific repayment benefited the property of the debtor.

Strategies for use of bankruptcy avoidance law under the EBL

On the one hand, a creditor may bear the risk that the property it obtained from the debtor may be recovered by the bankruptcy trustee after the debtor enters into a bankruptcy proceeding; on the other hand, a creditor is entitled to request the bankruptcy trustee to recover the property from other creditors which involves avoidable or invalid fraudulent transfers and obligations, or preferences.

Who can file? According to the EBL, only a bankruptcy trustee is able to file bankruptcy avoidance litigations. Creditors are not allowed to file such a suit. If a bankruptcy trustee fails to perform his duties to file such a suit, creditors are entitled to request the court to change the bankruptcy trustee thereof.

What court to file with? The bankruptcy trustee should file the bankruptcy avoidance litigation with the court which accepts the bankruptcy petition. China has a four-tier court system: trial People's Court of each county, Intermediate People's Court of each region(including several counties), High People's Court of each province, and Supreme People's Court of China. A bankruptcy petition shall be filed with and accepted by the trial or the Intermediate People's Court where the debtor is domiciled.

When should the filing occur? As for avoidable fraudulent transfers and obligations, and preferences, a two-year statute of limitation applies. A bankruptcy trustee must file a bankruptcy avoidance litigation within two years after the termination date of the bankruptcy proceeding. According to the EBL, in case of no assets to distribute, or upon conclusion of assets distribution, the bankruptcy trustee shall report to the court and request the court to terminate the procedures for bankruptcy. The court shall make a decision on whether to conclude the

procedure within 15 days of reception of such request.

To maximise creditors' interests in a corporate reorganisation

Overview of the reorganisation mechanism under the EBL

Under the EBL, aside from that a debtor may file an involuntary petition for reorganisation, a creditor or the debtor's shareholder(s) whose capital contributions comprise more than one-tenth of the registered capital of the debtor are also eligible to commence an involuntary reorganisation proceeding. The court designates a trustee for each case when deciding to accept the case. The trustee would take over the debtor, examine all claims filed by creditors and conduct all other duties under the law. The debtor or trustee should provide a reorganisation plan within six months from the date on which the court makes an order to accept the petition.

For the purpose of enabling a vote on the reorganisation plan, all claims would be classified into four classes: the claims that enjoy a security interest on the particular property; the claims of salaries, medical treatment, injury or disability allowance and pensions; basic old age insurance and medical insurance owed by the debtor to its employees; and tax claims, and other unsecured claims.

If the plan involves adjustment to the rights or interests of the stockholders, a class of stockholders should also be established. The court would convene a creditors' meeting within 30 days of receipt of the plan to take a vote on it. If more than one-half of the creditors in the same voting class, who hold at least two-thirds in the total amount of claims of the said class, present at the meeting and accept the plan, such a class would be considered to have accepted the plan. When each class accepts the plan, the plan would be confirmed by the court. When one or more classes fail to accept the plan, the debtor or the trustee may approach and negotiate with these class(es). The class may vote again to accept the plan based on the negotiated results, provided such results do not impair any other classes' interests. If the class still fails to accept the plan after negotiation, the court would confirm the plan provided it satisfies all relevant requirements.[1] The confirmed reorganisation plan binds the debtor, all creditors, as well as, all stockholders. All debts should be discharged as long as they are paid off under the confirmed plan.

Strategies to maximise creditors' interests in a corporate reorganisation

To file for reorganisation instead of bankruptcy liquidation against the debtor. According to the EBL, both a creditor and a debtor may directly file for reorganisation. Once a creditor files for bankruptcy liquidation against a debtor, the creditor will be prohibited from applying to transfer such liquidation proceeding into reorganisation, while the debtor or its shareholder(s) whose capital contributions comprise more than one-tenth of the registered capital of the debtor may, after the court accepts such liquidation application and before it declares the debtor bankrupt, apply to transfer liquidation into reorganisation. Therefore, a creditor may choose to directly file for reorganisation against the debtor once it deems it reasonably feasible for the debtor to succeed in reorganisation.

To sit on the Creditors' Committee. According to the EBL, the Creditors' Meeting may decide to establish the Creditors' Committee. Members of the Creditors' Committee shall be recognised by the court with a written decision. The Committee excises the functions and powers to supervise management and disposition of the debtor's property by the bankruptcy trustee or the debtor itself, to supervise the distribution of bankruptcy property; to propose to convene the Creditors' Meeting to make decisions and take a vote on significant issues concerning creditors' interests and rights, and to negotiate with the debtor, the equity interests holders of the debtor, and the investors who will become the new equity interest holders of the reorganised corporate, to set down the repayment ratio in the reorganisation plan. To sum up, the Creditors' Committee plays a significant role in a corporate reorganisation.

A creditor will have more control on protecting its own rights once it becomes the member or the Chairman of the Committee. However, under the EBL, all expenses incurred in the performance of the duties of the Creditors' Committee shall be born by Committee members themselves rather than being included into administrative expenses. This may intensify the incentive for creditors to free ride.

To decide a debtor's going-concern value by means of competing bids. Under the EBL, once the court accepts the reorganisation petition, a trustee should be assigned concurrently to the case to take over the debtor. After the confirmation of the plan, the new equity owners pay the price set in the plan and take over the debtor from the trustee. The reorganised debtor thereof becomes a new entity. The price which the new owners have paid is the realised value of the insolvent debtor and would be used to pay off all creditors according to the statutory priority order.

Who and how to decide such a price? How can creditors bargain for a higher price, consequently a higher repayment ratio? Under the EBL, for the purpose to cram down a plan, the "best interests of creditors test" must be satisfied, which means all

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unsecured creditors should be given no less than they would receive under a liquidation scenario. Such hypothetical liquidation only calls for appraising the liquidation value, instead of the going concern value of the debtor. Since some assets can have value only when the company remains in operation, valuing assets under the liquidation scenario tends to end up in a substantially lower amount than under ongoing business circumstances. Therefore, the threshold to satisfy the "best interests of creditors test" would be consequently compelled to be generally low. Since the EBL neither adopts the "absolute priority rule" nor provides creditors with the authority to file an alternative plan, creditors are not equipped with a powerful leverage to bargain for their payment.

Fortunately, both the court and the bankruptcy trustee prefer exposing an insolvent debtor to a market to determine its value. To hold a competing bid has been widely used in those successful reorganisation cases since 2007. Creditors may request the bankruptcy trustee to choose the bidder who pays the highest price as the new owner of the reorganised debtor, unless the thin-market effect holds back the bid.

To file bankruptcy petition against a debtor failing to pay the debt

Insufficiencies of bankruptcy filing system under the EBL

An efficient and effective filing system is vital for creditors to strategically make use of bankruptcy laws. However, the EBL contemplates an "acceptance" of the bankruptcy petition in every case including both the debtor's voluntary petition and the creditor's involuntary petition. Such acceptance generally occurs subjecting to the general criteria, equitable insolvency (generally not paying debts when they come due) and bankruptcy insolvency. Apparently, as for a voluntary petition, the debtor is able to provide financial documents as evidence that the debtor meets the criteria. Generally a creditor has no access to its debtor's financial information. Since the EBL fails to illuminate a different burden of proof for an involuntary petition, a creditor will never be certain that its application against the debtor will result in the court's "acceptance". Thus, a creditor's ability to threaten a bankruptcy filing or to use involuntary bankruptcy in a strategic way is undoubtedly restricted. After Provisions (I) of SPC, however, involuntary bankruptcy petition would never be the same.

Involuntary bankruptcy filing under Provisions (I) of SPC

Who can file? A creditor holding an unpaid due claim against the debtor. There are no limitations on the value of such a claim.

What is the burden of proof for a creditor to file? According to Provisions (I) of SPC,[2] for the purpose of commencing an involuntary bankruptcy proceeding, a creditor only needs to meet a burden of proof of all the following: (1) the debt relationship has been legally established; (2) the time limit for repayment of the debt has expired; and (3) the debtor has not fully repaid the debt. The creditor is not required to provide the court with any information about the debtor's financial situation or the reason of the debtor's failure to repay.

Will the court accept or reject a creditor's application? After receiving a creditor's bankruptcy application, the court should notify the debtor within seven days. Where the debtor fails to raise an objection to the creditor's application within the statutory time limit or the objection raised by the debtor is incorrect, the court shall decide to accept the bankruptcy application according to law. The following objections may be deemed correct by the court: (1) the liability is contingent; (2) there is a bona fide dispute as to liability or amount, or the time limit for repayment; (3) the debtor has fully repaid the debt. Therefore, when facing with an involuntary bankruptcy petition by a judgment creditor, a debtor will be forced either to pay off the debt or enter into the bankruptcy proceeding.

Notes:

1 Enterprises Bankruptcy Law, Art. 87.

2 Provisions (I) of SPC, Art.2.

Author:
Fanghua Duan, Attorney at law, Partner
Zhongzi Law Office
6th Floor, New Era Building
PingAnLi West Avenue 26
Xicheng District
Beijing100034
China
Tel: +86 10 66256417
Fax: +86 10 66091616
Email: duanfanghua@zhongzi.com.cn
Website: www.zhongzi.com.cn

New Danish insolvency regulation has not been adapted by the market. Restructuring is still based on out-of-court restructurings

by Jens Boëtius Andersen, Deloitte Restructuring Services

On April 1, 2011 changes to the Danish insolvency regulation became effective. The intention of the new rules was to reduce the number of bankruptcies and increase the number of restructurings. Now almost a year later a preliminary status of the new rules can be made. There is no evidence that the rules have been a success with respect to reducing the number of bankruptcies and furthermore the rules have only been applied to a very limited extent.

This article includes an overview of the new rules and a discussion of how restructurings are handled in Denmark. Furthermore the article includes a current overview of the economic climate in Denmark and how this may impact the need for restructurings throughout the coming years.

At the brink of 2012 it is my view that we can expect the coming year to become busy with respect to restructuring of distressed Danish businesses.

New Danish insolvency regulation

On April 1, 2011 changes to the Danish insolvency regulation became effective. The intention of the new rules was to create a modern in-court instrument to reduce the number of bankruptcies and increase the number of restructurings.

Now a year later a preliminary status of the new rules can be made: There is no evidence that the rules have been a success with respect to reducing the number of bankruptcies and, furthermore, the scheme under the new rules has only been applied in about 200 cases.

The new regulation in short

The new regulation has invented a new legislative concept/scheme: restructuring (in Danish "*Rekonstruktion*"). Along with the invention of restructuring, the former rules relating to suspension of payments and compulsory settlement have been removed since they form the basis of the restructuring.

A restructuring under Danish rules must contain either:

- a compulsory settlement;
- a sale of the business; or
- a combination of the above.

The restructuring has to be court approved. If it is not possible to approve a restructuring, or the restructuring ends for other reasons, the entity will automatically be transferred into bankruptcy by order of the court. This is of course exempt in the very rare instances in which the entity becomes solvent during the process.

Below I have included an overview of certain issues related to the new restructuring rules:

- Filing of restructuring
- The restructuring team
- The restructuring process and timing
- M&A issues
- Floating charge and restructuring
- Change of management
- Commercial contracts

Filing of restructuring

Restructuring can be filed by the debtor and, as a new thing in Danish legislation, creditors can also file for restructuring.

The fact that creditors can now file for restructuring underlines the ambition of giving the creditors improved and increased influence in the restructuring process.

Filing of restructuring starts the process and sets out a reference date, which is an important date with respect to any later claw-back actions.

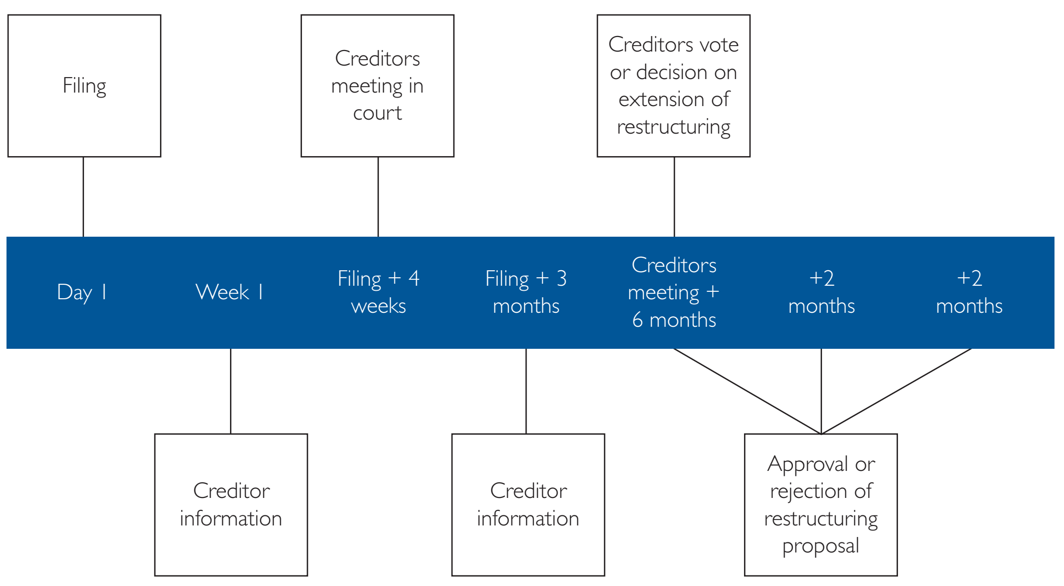
When filing it is a demand that the filing includes a proposal of the restructuring team, in which the proposed team members have declared their willingness to undertake the responsibilities and their independence of the debtor.

The restructuring team

The restructuring team is mandatorily defined as including one or more restructurers (in Danish "*Rekonstruktør*") and one financial advisor/trustee (in Danish "*Regnskabskyndig tillidsmand*"). The restructurer is often a lawyer and the financial advisor/trustee is often an accountant.

The restructuring team is proposed in the filing and is formally appointed by the court.

Figure 1: New restructuring process



The task of the restructurer is to investigate options for restructuring and/or sale of the distressed business together with the debtor/management of the business.

The task of the financial advisor/trustee is to assist the debtor and the restructurer with accounting expertise in the restructuring process. This, among others, includes valuation of pledged and unpledged assets.

The restructuring process and timing

When lawmakers designed the new scheme, the overall intentions were to increase creditor influence and increase the speed associated with in-court restructuring proceedings since the old system was criticised for being too slow and inefficient and gave opportunities to delay hopeless cases.

This has led to a restructuring process as illustrated in Figure 1.

- At the time of filing – the restructurer and the financial advisor/trustee are appointed by the court.
- Immediately after filing – any pledgees under the floating charge system must be notified that the company went into restructuring.
- During week one – all known creditors need to be informed of the restructuring.
- No later than four weeks after filing – a meeting is to be held in court during which the creditors discuss and either approve or reject a restructuring plan presented by the restructurer.
  (i) At least one week before the creditors meeting the initial restructuring plan must be sent to the creditors. If needed the restructuring plan can be changed during the meeting in order to obtain creditor approval.
- Three months after filing – the restructurer has to provide information on progress of the process to the creditors.
- At least six months after the creditors meeting – a meeting is to be held in court during which the restructurer is to present a final restructuring proposal. The creditors have to vote and either approve or reject the proposal.
  (i) If the proposal is approved, the company receives a court sanctioned restructuring.
  (ii) If the proposal is rejected, the company goes into bankruptcy.
- The vote on the final restructuring proposal can be extended two times by two months each. Extension is subject to creditor approval.
- The process can be stopped at all times, such as:

(i) If the creditors do not approve the initial restructuring plan presented on the creditors meeting after four weeks, the restructuring will end and the company will go into bankruptcy.

(ii) If the restructurer at any point does not believe that the restructuring can become successful, the restructurer is obliged to ask the court to transfer the company into bankruptcy.

M&A issues

Under the new regulation the restructurer is the person responsible for a sales process under restructuring. This of course means that the restructurer is given significant power and a responsibility to try to find a potential buyer during the process.

Completion of an M&A process must end up in a fully negotiated agreement with the buyer(s). The agreement must be unconditional for the buyer and conditional for the seller as the sale of the business or

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Contacts: Claus Hansen (Tel +45 40 15 08 67. Email clhansen@deloitte.dk) and Jens Boëtius Andersen (Tel +45 20 82 04 33. Email jensandersen@deloitte.dk)

Weidekampsgade 6, DK-2300 Copenhagen S, Tel. +45 36 10 20 30
Member of Deloitte Touche Tohmatsu

a part of it under the new regulation is regarded as a restructuring proposal that a majority of the creditors need to accept during a vote. After acceptance from the creditors the transaction is still subject to verification by the court.

The regulation has set out a few rules related to selling a business or part of it when the company is in restructuring. This among others includes the fact that a sale must be approved by the creditors by vote. As a basis for such a vote the restructurer is entitled to ensure that creditors are informed of the following:

- the sales price;
- an overview of assets, liabilities and mutually binding agreements included in the transaction;
- the identity of the buyer.

The rules do not include any restrictions or guidance on how the sales process must be designed and carried out.

The restructurer of course has to find a balance between getting the highest price possible and ensuring that the transaction will actually be completed within the timeframe accepted.

Floating charge and restructuring

In order to better understand the context of the new restructuring rules, the Danish rules related to floating charge should be taken into consideration.

Floating charge was introduced to Danish law in 2005 in order to establish new means for businesses to finance growth. The rules have been popular and banks have been very efficient in applying the tool for improving their securities. Floating charge can include the value of inventories, receivables from customers, equipment, certain vehicles, goodwill and certain other specified assets.

The downside of the floating charge instrument is that in the event of insolvency the amount of free assets available for restructuring efforts is often quite limited and the pledgee has a high degree of control over the situation.

In the event of insolvency the pledgee is liable of a security of DKr50,000 (equals €6,700) to the receivership.

It is obvious that the interests of the lenders and the borrowers are not necessarily equal and Danish law does not include any rules or duties related to lenders-liability principles. This combined with the lack of free assets often prevents efficient restructuring processes (in court as well as out of court).

Change of management

The new rules include the opportunity of changing management, if management does not cooperate loyally or jeopardise the creditors' rights during the process.

Change of management can be forced if creditors who represent at least 25% of the registered debt request to the court that the restructurer should take over the management of the business. Change of management has to be decided by the court.

Commercial contracts

Distressed companies often explore that business critical commercial contracts are terminated by the contract partners due to default in the form of delayed payment by the distressed company. Under the new rules it has become possible for the entity, if it is in restructuring, to continue such terminated agreements again.

It is further included in the new rules that contract partners are not able to terminate an agreement merely due to the fact that the company goes into restructuring. However the contract partners can ask the company in restructuring if they wish to enter into the agreement. If the distressed company enters into the agreement monetary claims following the agreement become privileged for the time after the reference date.

Furthermore it is not subject to approval from the contract partner if a business contract included in a business transfer agreement is part of a court sanctioned restructuring.

The above items have been included in Danish law in order to support the ambition of saving more businesses and jobs and in order to encourage businesses to file for restructuring "early".

Of course these tools are in breach with basic principles of regular Danish contract law and are only possible under certain conditions. One of the primary conditions is that the contract may not be terminated earlier than four weeks before the company in restructuring wishes to continue it (and before the reference date). It is also a condition that the contract partner has not acted as a consequence of the termination.

Experience from using the new regulation so far

At the end of February 2012 there had been about 200 cases under the new regulation, this included limited companies as well as physical persons.

A review of the cases shows that most of the cases are minor in size and only a few of the cases have so far ended in court sanctioned restructurings. Some cases are still in progress and a large number of the cases have stopped and entered into bankruptcy.

The number of cases indicates that a lot of distressed companies are handled out of court and

the size of the distressed companies further indicate that larger and more complex cases are also handled out of court.

Critics of the rules state that:

- the rules are too rigid and complex;
- the rules do not efficiently handle the relationship between the distressed company and the floating charge pledge; and
- the risk of ending in unnecessary bankruptcy is too high.

This view so far seems to have overcome the positive elements of the new rules.

In conclusion, Denmark has had, and still has, a tradition of restructuring businesses out of court, where it is possible to negotiate individually designed agreements between debtors and creditors.

At Deloitte it is our view that as a consequence of the new rules we will discover a larger share of out-of-court restructurings and also that the new rules will lead to more bankruptcies and not less.

The economic climate in Denmark, March 2012

Denmark as an open economy was severely hit by the global economic and financial crisis during 2008 and 2009, whereas 2010 and 2011 to some extent were better off. Now at the brink of 2012 it seems as if the Danish economy may be facing either low growth or even a recession.

Denmark has however kept a good and stable position out of the euro zone with high ratings and a strong currency, which has led to a very low interest level due to a large inflow from foreign investors.

Overview of the Danish economic climate

Denmark has an open economy and is to some extent as volatile as the development in macroeconomic figures from its most significant business partner Germany. This means that the Danish economy has balanced at the edge of low growth and recession during 2011.

Denmark is not part of the euro zone, but Denmark has chosen that the Danish currency is linked to the euro, which means that the development of the Danish kroner is closely linked to the euro development. Accordingly Denmark has to some extent been affected by the euro zone crisis from the difficulties in the Southern countries of the EU.

In spite of positive trends, such as the number of transactions via the Danish payment card "*Dankort*" which showed an all time high during December 2011, consumer spending has decreased during 2011 and the outlook measured as consumer confidence is quite pessimistic.

The relatively low consumer confidence is among others related to the fear of unemployment. Unemployment rates have of course risen during the years of crisis, but it is still at a low level compared to other European countries.

The housing market as well as the professional real estate market peaked during the good years around 2006 and 2007 and have been characterised by decreasing prices and a low number of transactions ever since.

However Denmark has also proved to be a safe harbour to investors since Denmark has kept its AAA ratings. This has led to a descending and very low level of interest rates and a strong Danish currency.

Danish government has tried to act on the low level of growth by keeping public spending at a high level, which is expected to lead to a significant budget deficit during 2012.

At an overall level Danish banks have been under pressure since 2008. A majority of banks had at that time created a funding gap. The Danish government

Figure 2: Bankruptcies in Denmark – January 1979-2011

Source: Statistics Denmark

and the banks have since then created a total of five "bank aid packages" in order to secure funding and liquidity, but also in order to ensure that any distressed banks are handled under acceptable terms in order to mitigate losses. Even though we have witnessed about 10 bankruptcies among Danish banks, there are still about 115 independent banks in the country.
Most of the 115 banks are small and regional or local and less than 20 of them have a working capital above DKr10bn (about €1.3bn). It should be noted that only a few banks have direct, but limited, exposure towards Greece.

During the last couple of years there were times during which it could be difficult for businesses as well as consumers to obtain financing. However it seems as if this, to some extent, has become less difficult during 2011 and the start of 2012.

The number of Danish bankruptcies peaked in 2010 at 6,461, and even though it showed a decreasing level during 2011, 5,468 bankruptcies is still a high level for Denmark. The development during January and February 2012 showed that the number of bankruptcies is still at a high level.

Outlook for 2012

In conclusion, it is my view that Denmark has been affected by the crisis and it is uncertain how long it will last. A number of factors will impact the ability to regain from the crisis, some relating to the overall euro zone development and others to internal Danish matters.

Public spending has been kept at a high level to support the economy, but private spending has decreased. The ability of regaining private spending is closely related to the opportunities of obtaining funding from the banks. As mentioned above the banks have been supported by five bank aid packages and we see signs that the industry is recovering.

The banks have been accused of decreased willingness to lend to businesses. We do not have a view on this, but we have noticed a number of trends in the behaviour from Danish lenders.

When we were hit by the crisis during the years of 2008 and 2009 we experienced that the best businesses to cope with the crises were those who had the best and most suitable and professional governance structure. Since then banks have tried to persuade and convince their customers to improve this element of their businesses. At Deloitte we expect that this element will become increasingly important for all businesses, no matter of the size, if they wish to maintain a good relationship with their banks.

Today banks set out higher demands towards their customers in terms of coherence between business plans, budgets, risks, sensitivities and contingency plans. Accordingly we expect that Danish banks, to a higher degree than, what has historically been the case, will demand that customers' document business plans, increase their ability and willingness to adapt to market fluctuations and set out new standards for professional governance.

Danish banks are still under pressure from volatile international markets, a large amount of loans to, among others, distressed farmers and real estate investors with high loan to value ratios. We further expect that Danish retailing and constructing companies will experience increasing difficulties during 2012. It is characteristic for these industries that lenders have floating charge or similar, which enables them to gain control of most of the business cycle. We expect that Danish lenders to a higher degree than historically will use this power to influence the conduct of daily business and encourage restructuring measures.

At Deloitte it is our view that a relatively high number of Danish businesses are distressed or nearly distressed at this time. It is further our view that a number of lenders have been reluctant to aggressively pursue these distressed businesses. We expect that a larger portion of the distressed businesses will be "handled" by the lenders during 2012 and foresee higher activity in the market for giving advice to banks and distressed businesses.

Author:
Jens Boëtius Andersen
Deloitte Restructuring Services
Weidekampsgade 6
P.O. Box 1600
0900 Copenhagen C
Denmark
Tel: +45 20 82 04 33
Email: jensandersen@deloitte.dk
Website: www.deloitte.dk

Insolvency and corporate restructuring issues in Finland: Current examples of swift restructuring proceedings

by Pekka Jaatinen and Marian Johansson, Castrén & Snellman Attorneys Ltd

In this article we present two recent insolvency cases from Finland that highlight the current trends in insolvency proceedings. In the first case, restructuring proceedings were carried out swiftly, following the provisions for the summary approval of the restructuring programme. The other case is an example of restructuring proceedings carried out in connection with the bankruptcy of a group's parent company, with the shares of the subsidiary companies sold at the same time. The summary approval procedure was also followed in this second case. We also discuss summary approval as part of pre-pack restructuring. Finally, we present trends in the number of restructuring proceedings in Finland.

Restructuring proceedings with the aim of rehabilitating a debtor's viable business are governed by the Restructuring of Enterprises Act (25.1.1993/47). The Act came into force during the economic recession that struck Finland in the early 1990s, and it was extensively revised in 2007, mainly based on the experiences gained from applying the Act to date. Section 92, regulating the summary approval of the restructuring programme, was added to the Act in 2007.

Average processing time of restructuring proceedings

The average processing time of a restructuring matter in Finland in 2010 was 11 months, starting from the filing of the application and ending with the approval of the restructuring programme by the court. However, in 45% of cases, processing lasted for over a year. The figures for processing times for 2011 have not yet been published, but there have probably been no major changes to this trend.

The district court is obligated to handle a restructuring promptly due to the nature of the matter, and thus the problem of prolonged proceedings is not caused by long processing times in the courts. However, the legal regulations concerning procedural requirements have led to a situation where restructuring programmes are often approved approximately a year, or even longer, after the filing of the application. The timetable of restructuring proceedings is also to a large degree dependant on the swift actions of the administrator, as the administrator plays a large role in determining the timetable of the proceedings. Thus, we wish to give an example of a restructuring programme that was approved only six months after the application for restructuring was submitted to the court.

Case example of the summary approval of a restructuring programme

The restructuring we handled concerned a Finnish chain of sport and leisure stores with over 20 stores situated all over Finland. The company was facing a difficult financial situation during and following the recent global economic crisis, with falling sales of sport and leisure products in Finland. The application for restructuring proceedings was filed with the district court in the beginning of July 2011. Attorney Pekka Jaatinen, one of the writers of this article, was appointed as administrator for the restructuring proceedings. The restructuring proceedings were carried out with the help of a team of several lawyers, including experts in insolvency, finance and employment law.

The financial report prepared by the administrator is the first major step in the proceedings. The report on the debtor's assets, liabilities and other undertakings and on the circumstances affecting the financial position of the debtor as well as on the expected development of that position was delivered to all creditors at the end of September 2011. After drafting the report, we had gained a comprehensive perspective on the prerequisites of a successful restructuring programme. The drafting of the restructuring programme took about two months, as the first draft restructuring programme was submitted to the district court and to the creditors in mid-November.

The amount of secured debts, which will be paid in full, was about €5m. The company's unsecured restructuring debts were just short of €20m. It was proposed that unsecured debts be cut by 80%, and the remaining 20% would be paid during the next

10 years. The programme provided for the company's right to premature payment of restructuring debts. According to the restructuring programme, the company is entitled to have the restructuring programme prematurely ended by effecting all remaining payments, pursuant to the restructuring programme, to the creditors as lump-sum payments, along with additional, percentage based payments on all original claims. This provision was important for securing wide acceptance of the programme.

The draft restructuring programme was amended based on initial comments received from creditors, before the programme was submitted to the creditors for final approval. The final version of the programme was sent for approval to all creditors in early December. The creditors reserved a period of approximately two weeks for considering whether to approve or reject the programme, as they were asked to submit their statements before Christmas 2011.

Summary approval procedure of a restructuring programme

In order to speed up restructuring proceedings for reasons of procedural economy, the administrator filed for summary approval of the draft restructuring programme in accordance with section 92 of the Finnish Restructuring of Enterprises Act. Under section 92 of the Act, the draft restructuring programme can be approved as the restructuring programme without the need to comply with the provisions of sections 72 and 74-76 of the Act, if written acceptance is received from all known creditors whose claims total at least 80% of the overall total claims of the creditors, and from each creditor whose claim is at least 5% of the overall total claims of the creditors. A written statement from the debtor is also required. The draft restructuring programme shall, however, not be approved, unless the creditors who object to it are treated lawfully, or if the draft programme otherwise departs from the provisions of the Act concerning the status of creditors, or if there is a barrier to approval referred to in the Act.

When following the conventional procedure concerning the restructuring programme, the court provides the parties to the matter with a set time period in which to submit written statements concerning the draft programme. Normally, creditors also have the right to submit objections to the claims of other creditors referred to in the draft. The administrator then needs to serve these objections on the debtor and on the creditors whose rights are affected by the objections in question. After the parties have had the opportunity to state their views on the draft restructuring programme and the court has made a decision on the consideration of unclear restructuring debts, the administrator is given the opportunity to rectify, review or supplement the draft programme within a set period, normally several weeks in length. After the court has received the final draft, it makes a decision on how the creditors are to be divided into voting groups, and which groups have the right to vote. The court then exhorts the creditors with the right to vote, and the creditors state to the court in writing within a set period whether they accept or reject the draft.

To summarise, the summary approval of the programme is carried out without giving written statements on the draft (section 72 of the Act), contesting the claims (section 74 of the Act), handling objections (section 75 of the Act) or voting on the draft (section 76 of the Act). Consequently, using summary approval speeds up the procedure by several months.

Though summary approval means that creditors are prevented from presenting claims against other creditors' claims, they are however allowed to request the rectification of errors included in their claims, and to further specify their claims. After the creditors have had the opportunity to evaluate the draft programme and give their approval or reject it, the court is presented with an account of how and when the creditors who have not accepted the draft have been informed of it and been given the opportunity to comment on it, as well as with the written statements of the creditors objecting to the draft. Thus, the court ensures that the administrator has complied with the rights of the objecting creditors, and that everybody has had the chance to review the draft.

In the case at hand, we held discussions with the main creditors of the company beforehand. Based on the initial discussions between the administrator team and all the relevant creditors, it appeared likely that the necessary consents for summary approval of the programme would be obtained. In this case, the programme was accepted by creditors whose receivables amounted to more than 80% of all the restructuring debts, and thus the necessary approvals were received. The restructuring programme was approved by the court in mid-January, only six months from the commencement of proceedings. Before approval of the restructuring programme, an agreement was made with the main financier bank for the future financing of the company. The company is now implementing the approved programme.

The support the company received from its creditors shows that the company's creditors have confidence in the future of the company. The swift restructuring was possible thanks to seamless cooperation between the administrator, the company

and its main creditors. In addition to saving time, it is noteworthy that the summary approval procedure also leads to savings of costs compared to the conventional procedure.

Rapid restructuring of a group combined with the parent company's bankruptcy and the purchase of shares

Another recent case example of the summary approval of a restructuring programme concerns a group of companies in the wind power industry. The parent company was declared bankrupt at the same time as its two subsidiaries filed for restructuring in June 2011.

In this case, the parent company's bankruptcy estate initiated a process to find a buyer for the shares of its subsidiaries. The bankruptcy estate hired investment bankers to look for buyers, while the financier of the group continued to finance the companies in restructuring, in order to enable them to continue their business operations, and thus to preserve the value of the shares. It is worth noting that financing given to a company during restructuring proceedings has seniority in case bankruptcy is filed for before the restructuring proceedings have ended.

The bid for the shares had to cover at least the amount of the new senior debt mentioned above, that part of the restructuring debt covered by the collateral, as well as an adjusted portion of unsecured restructuring debts. Hence the bidders in practice competed on the adjustment percentage. After careful inquiries and bidding, the parent company's bankruptcy estate found a buyer for the shares of its subsidiaries. The shares were sold to a foreign industrial group whose bid allowed for the maximal repayment of unsecured debts. Accordingly, the percentage deducted from unsecured debts was determined by the purchase price. The approval of the court for the restructuring programme was set as a precondition for the sale.

The draft restructuring programme was submitted to the court and to the creditors in November 2011, after the signing of the share purchase agreement. At this point, some aspects connected with competition law also needed to be handled. The restructuring programme was approved in December in accordance with the provisions on summary approval presented above. After closing the SPA, the new senior debt, the secured debts and the unsecured debts were paid as lump-sum payments. The payment to unsecured debts paid in February 2012 was over 25% of the original debt. Additional payments for unsecured debts are still contingent.

The summary approval of the restructuring programme only six months after filing was possible due to swift cooperation between the bankruptcy administrator, the restructuring administrators of the subsidiaries and the main creditors of the companies.

Summary approval as part of pre-pack restructurings

Pre-pack restructuring, an alternative way of carrying out swift restructuring which includes the summary approval of the programme, can be discussed here only in brief. The pre-pack discussed here is however, different from the pre-pack restructuring commonly used in the United States and the United Kingdom. Pre-pack here refers to the restructuring programme being already pre-drafted before filing for restructuring. In this way, restructuring is pending in the court only for a very short period of time, minimising the feelings of uncertainty experienced by the debtor company's business partners.

Pre-packed restructuring requires that the draft restructuring programme is as close to the final form as possible before filing for restructuring. The programme is usually drafted in cooperation with a legal restructuring expert, financial adviser, the company and all the major creditors, not just with the secured creditors. Before filing for restructuring, it is important to ensure that the necessary approvals required for summary approval pursuant to section 92 of the Act can be obtained.

A successful pre-pack also requires that the filing is done jointly with at least two creditors whose total claims represent at least one fifth of the debtor's known debts and who are not related to the debtor, or that these creditors declare their support for the debtor's application. In these circumstances, the aim is to avoid the time-consuming public announcements and notices concerning the initiation of restructuring. In practice, it is possible for the restructuring programme to be approved right after, or even at the same time as the court initiates the restructuring proceedings. In cases where the programme cannot be submitted at the same time, it is generally submitted quickly after, pending some brief modifications. In all respects, the approval procedure for the programme follows the requirements set forth in Section 92 of the Act.

Trends in the number of restructuring proceedings

The number of restructuring proceedings filed with courts in Finland in 2011 decreased slightly in comparison to 2010. In 2011, there were approximately 500 applications for restructuring proceedings filed with the courts. It is important to note that not all of the applications led to the initiation of restructuring proceedings, and not all initiated proceedings led to an approved restructuring programme.

When compared with the numbers for 2008 and before, there is a marked shift in the number of restructuring proceedings. When the Act came into force in February 1993, there were over 500 restructuring proceedings during that year. After that, the number of restructuring proceedings remained significantly lower until 2008. The recent global economic crisis can be seen much more clearly in the number of restructuring proceedings than in the number of bankruptcy proceedings. Between 2009 and 2011, the number of restructuring proceedings has once more peaked at around 500 applications per year. However, we must also note that the number of restructuring proceedings per year is considerably smaller than the number of bankruptcies.

The number of bankruptcies in Finland in 2011 has increased slightly from 2010. However, there has been only a very minor increase. During 2011, a total of 2,944 bankruptcy proceedings were initiated.

Statistics are not yet available for the first months of 2011. However, we expect that the number of restructuring proceedings and bankruptcies in 2012 will be approximately the same as in 2011.

Authors:
Pekka Jaatinen, Senior Partner
Marian Johansson, Associate
Castrén & Snellman Attorneys Ltd
PO Box 233
FI-00131 Helsinki
Finland
Tel: +358 (0)20 7765 765
Fax: +358 (0)20 7761 001
Email: marian.johansson@castren.fi
pekka.jaatinen@castren.fi
Website: www.castren.fi

Finland – Financial analysis and M&A transactions as part of enterprise restructuring

by Kari Niemenoja and Jonni Leporanta, Grant Thornton Finland Oy

Following economical downturn since 2009, the number of business restructuring proceedings according to the Restructuring of Enterprises Act has increased. After certain legislative renewals in 2007, more focus has been put on operational and business improvement instead of plain haircutting of debts. However, due to a number of reasons, improvement of financial and operational performance is still an underweighted aspect in the proceedings. In particular, structural elements and transactions are lacking.

The underlying ratio of the Restructuring of Enterprises Act is primarily to enable companies to vitalise and improve their distressed businesses and only secondly to cut debts, as part of the restructuring toolkit. The Restructuring of Enterprises Act provides a relatively wide spectrum of tools:

- reorganisation of the company's business, changing the legal form of the company, changes in Articles of Association, etc.;
- liquidation of funds or assets;
- reorganising or downsizing personnel;
- reorganising funding;
- cutting debts; and
- changing maturities or interests of debts

The Restructuring of Enterprises Act does not rule out sales of business or even acquisitions of new businesses. However, in practice the acquisition of new businesses takes place quite seldom, if at all. The majority of transactions have related to real estate divestments i.e. restructuring of real estate assets by sale-and-lease arrangements, etc; mainly in order to streamline balance sheets and cost structures.

In practice, only a handful of restructuring proceedings have included buy-side M&A transactions.

Underlying reasons

The creation of permanent performance improvement requires, amongst others:

- systematic, professional analysis of current status;
- deep analysis of (real) underlying reasons behind underperforming; and
- thorough strategic analysis and reasoned decisions thereof.

In our view, a significant number of proceedings have not included sufficient analyses, although positive examples also exist. This observation is partly witnessed by a relatively high number of failed restructurings; a significant portion of proceedings end up at bankruptcy before the termination of the process.

In a fast changing business environment, enterprises need to take reasoned and well-analysed actions to maintain their competitiveness. Businesses under the formal Business Reorganisation Act proceedings do not vary and are not immune to the same.

On the contrary, distressed businesses, if any, need thorough and honest analysis about real reasons.

Although often and easily stated, the underlying reasons are seldom single or one-off events by nature. More often, there are several longer-lasting factors, which simultaneously have caused the difficulties.

As an example, reasons may relate to some (or several) of the following issues:

- weaknesses at management level;
- weaknesses at R&D activities, wrong selections etc.;
- poor allocation of resources;
- weaknesses in reading and reacting to changes within business environment;
- poor analysis of megatrends, technical innovations, actions by competitors;
- underestimated or unidentified risks and/or oversized risk taking;
- lost of competitiveness; and
- insufficient tools to control the business or weaknesses to read the results.

M&A transactions as part of restructurings

In certain cases, the vitalisation of business and its competitiveness requires rapid structural reorganisation. The company might have lost its competitiveness due to consolidation amongst its competitors – leading to structural incapability to address such progress. Often the company has failed to follow increasingly accelerating technical evolution – especially in such an environment where competitors accelerate their evolution by acquisition of new innovations and techniques.

Therefore, in some cases well reasoned and analysed acquisitions might be a viable tool to speed

up the revitalisation of the business and to return its competitiveness.

The same is true for the sale of businesses or parts of it; formal restructuring proceedings should be a stopping point to analyse and consider whether some parts of the business are no longer core components or whether the business has permanently lost its competitiveness.

If that proves to be the conclusion, it is a considerable option to maximise the value by selling the business (or parts of it) before the slow death of the business.

Financial analysis

As mentioned above an in-depth professional and thorough analysis and assessment of the current distressed financial situation and underlying reasons is needed in order to achieve a successful restructuring. In order to find the right medicine you first have to make a sufficient diagnosis of the current situation.

In practice, common reasons for even fairly healthy businesses facing a distressed economic situation and related liquidity problems is often that the model of driving the business during an upturn is no longer applicable during a recession. A few examples of factors related to this are:

- low margin – high volume or capital intensive product or service models;
- the traditional way of financing net working capital;
- level of fixed costs too high during downturn;
- timing of cash in and outflows becomes more critical during recession; and
- dependence on "squeezing" customer or supplier contracts.

In connection with a corporate acquisition the aim of a financial due diligence process is to provide objective information related to possibilities and risks regarding the acquisition from an independent third party and then utilise this information further in the M&A process. In a similar manner, diligence and related analysis could be used valuably in restructurings including familiar elements but naturally with a slightly different scope. Common areas to be included in the analysis would then be:

- historical trading and current profitability;
- historical working capital and cash flow analysis;
- analysis of financing structure and net debt position;
- current profitability and future forecasts; and
- off-balance-sheet items.

Historical trading

The historical trading makes a basis for future predictions and decision making and therefore it is important to understand in detail the different elements included such as customers, products and existing cost base. Also from a restructuring programme perspective one of the key elements in analysing historical trading is to understand the normalised historical earnings adjusted for non-recurring or one-off items.

Working capital

Working capital is an area that can possibly release cash for the business, on a short-term basis without or before entering into a larger restructuring programme. This is why focus on working capital reduction often deserves a lot of attention when finding ways to improve the liquidity situation for a distressed business.

When analysing the trade working capital (debtors, stock and accounts payable) and related financing issues in order to find solutions for improvement, areas of interest often are existing payment terms for customers and suppliers, inventory turnover, DSO ratios and seasonal fluctuations in working capital.

Cash flow

Understanding cash flow is a vital part of financial analysis for a distressed business. Many restructurings have failed because liquidity runs out before the correct restructuring actions start to have an effect on the business. Also a business reporting profitable earnings can face liquidity problems if e.g. all cash is tied up as working capital or operative cash flow is not enough to cover the repayment of interest bearing debt according to existing payment plans. The cash flow analysis is thus tightly connected to the working capital analysis since the operative cash flow is basically the operating result adjusted for non cash items plus or minus change in working capital for the period measured.

Another important part of analysing cash flow and making future liquidity predictions based upon these is seasonality analysis and describing normalised cash flow that has been adjusted for non-recurring items. Factors to consider when producing the cash flow analysis include:

- cash in and out flows from existing receivables and payables;
- cash in and out flows from future sales and purchases;
- recurring monthly payments related to ordinary costs of the business such as rent, leasing, salary related and other operative costs from the current cost base;
- capex and maintenance costs; and
- amortisation of interest bearing debt and payments of interest.

Financing structure and interest bearing debt

"Over leveraged" businesses facing threatening insolvency because of the significant amount of interest bearing liabilities compared to the assets can seek to find solutions other than just cutting the existing debt. If it is possible to convert existing debt to equity financing this naturally strengthens the equity position and liquidity previously tied up for repayment and interest payments are released.

As part of the financial analysis it is important to get a detailed enough understanding of the conditions and financial obligations of existing financing and the impact on future cash flow and liquidity positions.

Off-balance-sheet items

Items outside the balance sheet can also be relevant for the financial analysis in connection with a restructuring process. Items not yet recorded in the balance sheet and contingent liabilities can have a significant impact on the financial position and future liquidity position.

Typical off-balance-sheet items to be considered are

- guarantees given;
- rent and leasing;
- environmental liabilities;
- derivative instruments;
- financial liabilities from litigation processes;
- contractual agreements; and
- financial covenants related to existing debt.

Budgets and forecasts

Forecasts and development of realistic detailed enough budgets as support for future decision making is a key element also for the financial analysis. When analysing an existing future forecast, focus should be placed on underlying assumptions concerning significant items included in the forecast.

Future forecasting is always a more or less challenging task especially in a difficult economic climate. Therefore it can be meaningful to include a sensitivity analysis taking into account the different outcome of the key elements of the forecast. The analysis can include different growth rates for future turnover, different EBITDA levels and the impact on profitability and cash flows.

Conclusion

At best, restructuring processes are successful combinations of strategic, financial and legal tasks and reorganisations. A thorough and honest analysis of the current status is also imperative to reach the desired results.

Although certain improvement in that respect have been witnessed, the weight is still too much on reorganising only the debt-side of the balance, instead of improving the permanent performance by concentrating more on the business itself. The Reorganisation of Enterprises Act gives room to bring necessary actions to the table. We hope to be witnessing positive changes in that tradition and ultimately creating permanent value to all stakeholders.

Authors:
Kari Niemenoja, Partner
Jonni Leporanta, Partner
Grant Thornton Finland Oy
Paciuksenkatu 27
FIN-00270 Helsinki
Finland
Tel: +358 (0)9 512 3330
Fax: +358 (0)9 458 0250
Email: kari.niemenoja@fi.gt.com
jonni.leporanta@fi.gt.com
Website: www.gtfinland.com

Grasping the French restructuring market

by Nadine Veldung and Laurence de Rosamel, DC Advisory Partners

With French restructuring being a young market, foreign investors often ask why they should be investing in France and whether they should apply a premium to other European countries in their investment expectations to account for the local specificities, especially with regards to French politics and the legal framework. Yet nowhere else in Europe are there as many state-governed institutions and pre-insolvency proceedings to support troubled companies, whether by accompanying management in negotiations or by providing financial means in the interest of all supportive stakeholders. French restructuring processes may appear more difficult and complex but they can also unlock significant value for the patient investor.

Compared to its English or American counterparts, the French restructuring market is fairly young, despite having tremendously evolved over the past 10 years through the emergence of a number of professionals (financial advisors, lawyers, auditors, firms specialised in operational restructuring, cost managers, etc.), the creation of new legal tools inspired by Anglo-Saxon law (safeguard, trusts, etc.) and the accumulation of case law and experience.

One objective: French business and employment preservation

In French restructurings, there is a genuine concern over the preservation of employment and business activity in the long term. There is an apprehension within the French society of losing its know-how and its SMEs, as the general public is aware that growth comes from innovation and entrepreneurship. Furthermore, a significant number of opinion leaders believe that the workers should not be sacrificed to preserve "capitalist" interest although also recognising that businesses are not supposed to be non-profit. These views are deeply rooted in French mentality and are the reasons that explain general concern in France and why the public – and hence the press – is so interested in French restructurings.

So this is how the politics start, it is always important to understand who the elected politicians in the company's region are, what the relative size of the company within the local economy is, how many people the company employs and whether the business know-how is unique on a national scale. The historical implication of the State in the handling of restructuring situations and the political will to ensure that no one is left behind have led to the creation by the French State of numerous institutions to ensure that the necessary means are deployed to assist French champions. These include accompanying bodies with the CIRI/CODEFI and the Médiation du Crédit, and financing institutions with Oséo, the FCDE and the FMEA. Finally, there is the Mandataire *ad-hoc*/ Conciliator who is usually an administrator, and who can be called into the business ahead of any insolvency procedure. France is often praised by its European peers for the way it provides for managers in need, through State services manned by civil servants coming out of the best administrative schools in the country.

The CIRI and the Médiation du Crédit only get involved upon the request of management who are facing difficulties, usually before any insolvency procedure is launched, and are acting on a strictly confidential basis. Involving the CIRI and the Médiation du Crédit bears no cost to the company. These institutions as well as the Mandataire *ad-hoc* help facilitate negotiations with the aim to reach a consensual agreement and avoid an insolvency procedure. They are also the eyes and ears of the Court, giving credibility to any negotiation occurring before the situation is brought before a judge. A proposal documented by the CIRI, and/or the Médiation du Crédit and/or the Mandataire *ad-hoc* in pre-insolvency shall stand better in Court. In examining a restructuring plan, the judge will take employment preservation into account and will try to assess whether all possible options have been considered with best efforts.

Creditors' interests can be defended

The French Safeguard was created in 2005 as a French version of the American Chapter 11. It is a fairly recent proceeding which has provided much relief over the past few years but still requires further improvement. Management is the only party which can place the company under Safeguard and call on the Court to appreciate the financial difficulties of the

Figure 1: A wide range of state-governed initiatives

		Governing bodies	Mission statement	Eligibility
Accompanying bodies	Médiateur du Crédit	Ministry of the Economy and Finance	- Support companies with financing issues - Ensure compliance of financial institutions commitments made under the French plan to support the French economy	Companies which can no longer access bank financing (refusal from banks)
Accompanying bodies	Interministerial Committee for Industrial Restructuring (CIRI)	French Treasury	- Detect and advise troubled businesses - Act as a mediator with other stakeholders - Conduct audit - Develop a new Business Plan and ensure its financing - Contact third parties to provide new money - Conduct negotiations to find a restructuring plan - Implement a rescheduling of public claims - Exceptionally lend money - Provide crisis communication advice	Companies with financial difficulties with more than 400 employees (CODEFI - Comité Départemental d'Examen des Problèmes de Financement des entreprises handles situations with less than 400 employes)
Pre-insolvency professionals	Mandataire *ad-hoc*	Appointed by the Court	- Special Mediator appointed by the President of the Commercial Court exclusively on the request of the management of the Company - Duties are set out by the Court, generally including negotiations with creditors - Lasts three months but can be renewed several times - Confidential and informal	Companies with financial difficulties which must not be in cessation of payment Out-of-Court voluntary restructuring
Pre-insolvency professionals	Conciliator	Appointed by the Court	- Conciliator appointed by the Court at the request of the debtor - Aim to promote an amicable agreement between the debtor and its main creditors and contracting partners in order to put an end to the business's difficulties	Companies which encounter an actual, or a foreseeable legal, economic or financial difficulty, and who have not been in a state of cessation of payments for more than 45 days
Funding institutions	oséo	Funded by the French State (directly and through the CDC) and banks	- Support and fund innovative SMEs - Provide technical assistance - Finance investments and working capital requirements - Guarantee bank loans and equity contributions	Innovative SMEs in all sectors excluding property management and financial activities 250 employees at most, with sales not exceeding €50m and/or total balance sheet not exceeding €43m
Funding institutions	fcde	Funded by FSI, banks and insurance companies	- Finance the recovery and development of SMEs with strong potential - Stabilise corporate governance and facilitate relations with banking partners - Invest between €2m and €15m over 5 to 7 years	Companies with strong potential identified by the Médiation du Crédit (with a turnover between €20m and €200m)
Funding institutions	fmea	Funded by FSI, PSA-Citröen and Renault	- Support the French Automotive sector - Support consolidation and innovative projects within the sector - Funds size: €650m - Maximum ticket: €60m for Tier 1 and €5m for Tier 2	Tier 1 - Large automotive OEM Tier 2 - Small automotive OEM
Funding institutions	fsi	Funded by the French State (directly and through the CDC)	- Develop a business (organic growth or build-up) - Support a transformation of a company - Strengthen the shareholding of a company - Inject equity or buyback shares - Can in special cases provide new money for development capex after a financial restructuring	Company with a strong competitive position, and whose skills, expertise or technology are important for the French industry

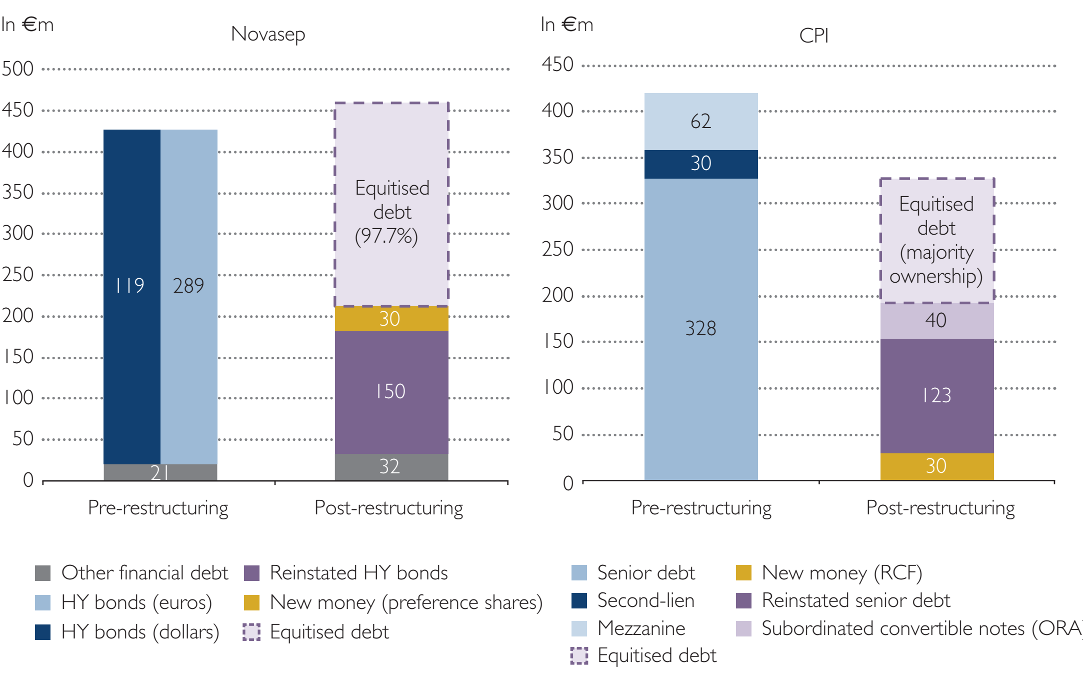
company and the necessity of the proceeding. Under Safeguard, creditors can regroup in committees which require a two-thirds voting majority hence allowing for a cram-down of dissenting lenders.

However, the French Safeguard does not provide any shareholder cram-down mechanism even when the equity value is clearly out of the money, which makes any non-consensual deal difficult and costly to implement. Shareholder cram-down is however possible in Redressement Judiciaire, but with very negative impact on the business (negative image conveyed to clients, suppliers, employees, etc.) and ultimately on creditors and with a possibility of losing the business to a third party which can table a competitive bid to the Court. Another creditor discomfort regarding the French Safeguard comes with the judge's prerogative to rule in favour of a ten-year term-out should the safeguard plan presented by the company prove unsatisfactory to the Court.

These two specificities combined are effectively lightening the burden of the out-of-the-money shareholder who has little to lose in a Safeguard proceeding (if the impact of the procedure on the course of business is limited): he cannot be ousted if he does not want to and, as a stakeholder, can stall the negotiation proceedings, thus providing means for a court-ruled arbitrary term-out. In any case, the standard term-out does not cover new money injections which are often needed. These can only be addressed in consensual discussions amongst the stakeholders and potentially new money investors.

As a matter of fact, recent cases have shown that

Figure 2: Examples of French creditor-led restructurings



creditors could take the keys in a consensual deal including new money (Novasep and its US bondholders, CPI and its European banks, etc.). If creditors, whether French or foreign, can navigate through the politics, get the necessary advice from local professionals, are ready to support the development of the business – potentially with new money provided or not by a third party – are constructive during the negotiations which may be held under the supervision of the CIRI and/or the Mandataire *ad-hoc* and/or the Médiation du Crédit, all the right dynamics are there to work towards a successful consensual deal.

Management is key in any legal proceeding

Any investor will agree that management is key, as they are the ones who run the business and who ensure that debt is being serviced and that equity value is being created. In distress cases however, management's credibility can sometimes be impacted *vis-à-vis* the company's financial stakeholders. Yet, in the eyes of the French courts, management remains the reference in terms of vision for the business and fiduciary duties to the company and its employees, and its voice will in most cases be heard and bear a heavy weight. Securing management support for a restructuring solution is even more key when the French legal framework does not really provide for an equity cram-down, and as management and shareholders' agendas become less and less aligned when the viability and future of the business is more and more at risk.

However, management must remain independent as required by its fiduciary duties to the company, but beyond this, financial stakeholders have much at risk should they try to influence the decision process of the company. This is called 'gestion de fait' – *de facto* management – under French law and can lead to legal actions against the overly hands-on stakeholder whose liability may be extended beyond the amounts invested – whether in cash to fund liabilities and/or the responsibility to reassign laid-off employees.

Having management on board in a French restructuring also facilitates the dialogue with employees, especially when a restructuring solution has to be presented to the works council for a consult. The issue here is not so much to secure its blessing – which is not required – but to ensure, via management, that the works council issues its opinion in a reasonable timeframe to avoid delaying the implementation of the restructuring solution.

France can be an attractive geography for distressed investors

In the absence of a legal shareholder cram-down mechanism outside of the Redressement Judiciaire, restructuring processes can take longer in France and sometimes be more complex. Nevertheless, bold and patient distress investors are able to unlock value in the medium to long term. In fact, beyond the additional complexity, this specificity gives a very important role to the new money provider while shifting negotiation leverage away from the fulcrum credit.

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Contacts:

France	Germany	United Kingdom	Spain
N. Veldung	G. Bieding J. Schmittat N. Schmitz	J. Trower C. O'Neill S. Ronga	M. Zulueta J. Gonzalo
+33 (0)1 42 12 49 00	+49 (0) 69 97 20 04 0	+44 (0) 20 7856 0999	+34 (0) 91 524 11 23

www.dcadvisorypartners.com

Since the beginning of the 2008 crisis, France seems to have suffered less than some of its European peers with fewer heavy restructurings. Covenant resets and now Amend-to-Extends are numerous with a huge potential need for liquidity to refinance debt issued in 2006-07, when France was one of the most active bank debt markets in Europe. As we expect more situations to come to market in the short to medium-term, with amortisations and maturities drawing near, there will clearly be a need for restructuring experts to provide advice and/or financial means. Considering that many foreign banks have exited the French market and/or have reduced their leverage finance activities abroad and with French banks also being nowadays in a much more difficult position than they used to be, the French restructuring market shall also be driven by alternative liquidity.

Authors:
Nadine Veldung, Managing Director
Tel: +33 1 42 12 49 52
Fax: +33 1 42 12 49 49
nadine.veldung@dcadvisorypartners.com

Laurence de Rosamel, Manager
Tel: +33 1 42 12 49 53
Fax: +33 1 42 12 49 49
laurence.derosamel@dcadvisorypartners.com

DC Advisory Partners
36 rue de Naples
75008 Paris
France
Tel: +33 1 42 12 49 00
Website: www.dcadvisorypartners.com

Recent developments in French restructurings

by Rod Cork and Marc Santoni, Allen & Overy LLP / SCP Santoni & Associés

2011 has been a year which has seen a number of legislative amendments which widen the practical application of sauvegarde proceedings and some key decisions issued by the French Supreme Court.

Accelerated financial safeguard

A new accelerated sauvegarde procedure (*sauvegarde financière accelérée*) (AFS) came into force on March 1, 2011. AFS is aimed at providing fast-track safeguard proceedings a view to providing greater flexibility in respect of companies which continue to be economically operational and to preserve value for stakeholders. AFS is a fast-track form of safeguard proceeding for financial restructurings (unlike standard safeguard proceedings, trade creditors are not included in an AFS) which covers financial institutions (and assimilated entities) and bondholders. Trade creditors can continue to receive payment of their debt claims, pre and post opening of AFS.

AFS can only be initiated by a solvent company that is facing legal, economic or financial difficulties, actual or anticipated, which it will not be able to overcome. A company is solvent if it can pay its debts as they fall due for payment with its available assets and having regard to any grace periods granted by its creditors.

AFS is available to a company for which conciliation proceedings (*procedure de conciliation*) have been opened, which satisfy certain criteria mentioned below and which can justify having a draft restructuring plan that ensures the viability of the company and is likely to receive sufficiently large support from its financial creditors in order to have the plan adopted within one month (extendable for one month) from the opening of AFS.

AFS criteria

The criteria fixed initially to open AFS was that the company must employ more than 150 salaried employees or have a turnover of more than €20m on the date of its request to open AFS.

These criteria have effectively meant that AFS was not available for holding companies or non-operational single purpose vehicles often used in leveraged finance and property transactions in France.

An attempt to rectify the position was made in May 2011 by the 'Warsmann' law, but certain procedural aspects of the Warsmann law were declared unconstitutional by the French Constitutional Court. Accordingly, new legislation was introduced to deal with this issue and has come into force on March 3, 2012.

Recent legislation widens the scope of eligibility for AFS to include holding companies or controlled group subsidiaries, whether consolidated or not, which hold financial debt. The new criteria will be fixed by decree by reference to the amount of debt on the balance sheet of a company and is expected to be between €10m to €20m.

Creditor AFS claims and information

The filing of a proof of claim by a creditor upon the opening of the AFS is a simplified procedure to that for traditional safeguard proceedings. The debtor company must draw up a list of creditors which have participated in the conciliation proceedings and their claims will be certified by its statutory auditors or accountants and filed with the court registrar. Recent legislation provides that the *mandataire judiciaire* will be obliged to notify the creditors appearing on this list of the details of their claims by registered letter and not, as was previously the case, by any means. The intention is to better protect the creditors.

Bondholders

Recent legislation now provides that subordination agreements among bondholders and other creditors entered into prior to the opening of safeguard or rehabilitation proceedings will be taken into account in any draft safeguard or rehabilitation plan, bringing the bondholders' position into line with the relevant provisions affecting other financial creditors.

The legislation also provides that bondholders will not vote on any draft safeguard or rehabilitation plan if the draft plan does not amend the payment modalities for them; or if it provides for the payment in cash of their bonds as soon as the court approves of the safeguard or rehabilitation plan; or as from the admission of the bondholders proofs of claim.

Publicity

Recent legislation has amended the provisions relating the discharge from the companies register of the obligatory legal inscription relating to a safeguard plan or rehabilitation plan. The legislation provides for an automatic discharge from the companies register at the expiry of a period of three or five years from the date

on which the safeguard plan or rehabilitation plan was approved by the court.

Coeur Defense

Conditions to open safeguard proceedings

In the long-running, *Coeur Defense* case, the French Supreme Court has given guidance on when sauvegarde proceedings can be opened.

In its decision of March 8, 2011, overturning the judgment of the Paris Court of Appeal, the French Supreme Court decision considered that:

- even if the safeguard procedure is aimed at facilitating the reorganisation of the company in particular to permit the continuation of its business, the opening of safeguard proceedings was not subordinated to the existence of an actual difficulty which affected its business;
- absent fraud, the opening of safeguard proceedings could not be refused on the ground that the debtor company would seek to avoid its contractual obligations once the debtor company could establish difficulties which it was not in a position to overcome; and
- the opening of safeguard proceedings could not be refused on the grounds that its shareholders would not otherwise be in a position to avoid losing the control of the debtor company.

When the matter was referred back to the Court of Appeal of Versailles, it confirmed the decision of the Paris Commercial Court of October 7, 2009 and concluded that on the facts at the date of the opening of the safeguard Hold was encountering difficulties which it could not overcome (and which could have led to its insolvency - this was at the time, but is no longer a condition to the opening of safeguard proceedings).

Centre of main interests

In the *Coeur Defense* case, the Court of Appeal of Versailles had to consider whether the Paris Commercial Court did have jurisdiction to open safeguard proceedings against Dame Luxembourg, Hold's parent company, having regard to Article 3 of the EC Insolvency Regulation 1346/2000 (the EC Insolvency Regulation) on insolvency procedures. The issue was whether the centre of main interest (COMI) of Dame Luxembourg was situated in Luxembourg or France or (possibly) the UK on the date of the opening of the safeguard proceedings. The Paris Commercial Court had concluded on the facts that Dames Luxembourg's COMI was France.

Article 3 of the EC Regulation provides that the courts of the Member State in which a debtor company has its COMI have jurisdiction to open main insolvency proceedings. Article 13 of the Regulation provides that the COMI of a debtor company should correspond to the place where it conducts the administration of its interests on a regular basis and which is verifiable by third parties. There is a rebuttable presumption that the COMI of a debtor company is the place of its registered office, but this may be rebutted on the facts by reference to criteria that are both objective and ascertainable by third parties.

In its decision of January 19, 2012 confirming the jurisdiction of the Paris Commercial Court, the Court of Appeal of Versailles found that this presumption was in fact rebutted. The Court of Appeal of Versailles found that there was a series of facts and elements which were objective and verifiable by a third party and which demonstrated that Dames Luxembourg's COMI was Paris France and not Luxembourg (or the UK).

Among the facts taken into account by the court to support COMI in France were:

- Dame Luxembourg's sole assets were the holding of 100% of the share capital of Hold, a French company whose main asset was the property at *Coeur Defense* in France;
- Dame Luxembourg had taken the decision to increase the share capital of Hold in Paris;
- Dame Luxembourg had acquired a participation in SCI Karalis (later Hold) in Paris;
- the most important legal document entered into by Dame Luxembourg vis-à-vis third parties and which was verifiable by third parties was share pledge given by Dame Luxembourg over all of its assets, the shares in Hold, to secure the loan facility made available to Hold to acquire and refinance the acquisition of *Coeur Defense*;
- as regards all acts and contractual relationships concluded in Paris, Dame Luxembourg was represented by a director of Hold; and
- the legal documents were entered into by Dame Luxembourg in Paris, governed by French law and the subject to the jurisdiction of the French courts.

Among the facts which the court did not take into account were:

- the fact that Dame Luxembourg's share capital was owned by a Luxembourg parent company, itself partially owned by a Luxembourg company having a common management;
- the existence of a loan granted by its Luxembourg parent company;
- the managers of Dame Luxembourg were domiciled in Luxembourg, London and New York at the time of filing for safeguard;
- the implication from London of a shareholder in the transactions entered into by Dame Luxembourg; and
- the use of the English language in the contractual documents to which Dame Luxembourg was a party.

ALLEN & OVERY

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CONTACTS

Allen & Overy LLP

Rod Cork – Carine Chassol – Adrian Mellor - Julien Roux
Tel +33 (0)1 40 06 54 00 – Fax +33 (0)1 40 06 54 54

Allen & Overy LLP
52 avenue Hoche
CS 90005
75379 Paris Cedex 08 – France
www.allenovery.com

Santoni & Associés

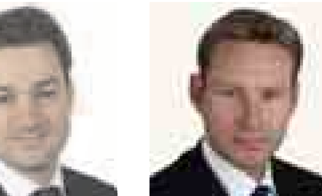
Marc Santoni – Bérangère Rivals – Lionel Lamour
Tel +33 (0)1 44 05 11 11 – Fax +33 (0)1 44 05 14 41

Santoni & Associés
15 avenue d'Eylau 75116
Paris – France
www.scp-santoni.com

Bérangère Rivals
Partner

Rod Cork
Partner

Marc Santoni
Partner



Julien Roux
Partner

Adrian Mellor
Partner

Lionel Lamour
Partner

Carine Chassol
Partner

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Technicolor

As part of the safeguard plan approved by the Nanterre Commercial Court on February 17, 2010, the holders of certain deeply subordinated instruments (TSS) saw their voting rights reduced and their rights to receive the payment of interest in the future cancelled in exchange for a small but immediate cash payment of the nominal amount of the TSS. The TSS holders brought an action to have the bondholders meeting which had voted on the safeguard plan declared null and void, to re-open the safeguard proceedings and for their exclusion from the safeguard plan.

On November 18, 2010, the Versailles Commercial Court rejected their application and confirmed the safeguard plan. On February 22, 2012, the French Supreme Court confirmed the decision of the Versailles Court of Appeal. Although the French Supreme Court noted certain irregularities as regards the TSS holders voting rights during the bondholders meeting, it also noted that these irregularities had no influence on the outcome of the vote at that meeting and accordingly the Versailles Court of Appeal had been right not to annul the bondholders' meeting. The French Supreme Court also considered that the TSS holders rights were sufficiently protected by the safeguard plan.

Petroplus

Recent legislation was introduced within the political context of closures of plants and sites in France belonging to subsidiaries of foreign groups in France, having regard to the prevailing economic and social climate marked by increasing de-industrialisation and an inability for such subsidiaries to meet their continuing environmental obligations, of which the Petroplus matter is an illustration.

The legislation enables the French courts to grant conservatory measures over assets of directors and shadow directors where an action has been brought against them in tort alleging that they have, as a result of their fault, contributed to the insolvency of a company which is subject to safeguard proceedings, rehabilitation proceedings or judicial liquidation proceedings. The works council or personnel delegates will be informed of any conservatory measures granted by the court.

In judicial liquidation proceedings, the court may also authorise the judicial transfer of certain assets which are the subject of conservatory measures. The assets concerned are those whose conservation or detention generate cost and expenses or which would be the subject of deterioration. The judge (*juge commissaire*) may authorise the use of such amounts to pay unpaid costs and expenses in the administration or liquidation if the debtor has insufficient funds available.

Conservatory measures may also be ordered by the court where an action has been brought for co-mingling (confusion des patrimoine) of assets and/or liabilities between companies or where an action has been brought alleging that the company is in fact fictitious (*fictivité*).

Belvedere

There have been a number of developments in the *Belvédère* case.

In its decision of September 13, 2011, the French Supreme Court recognised, in France, the effect of a trust and parallel debt mechanism under a note indenture governed by New York law, without requalification. This decision meant that the note trustee was entitled to file proofs of claim in French safeguard proceedings on behalf of all the noteholders.

A further development in the *Belvédère* case came on March 8, 2012 when the Nimes Court of Appeal overruled decisions of the Nimes Commercial Court made in summer 2011. By way of background the Nimes Commercial Court had extended safeguard proceeding which had been opened against SAS Moncigale (a subsidiary of Belvédère) to Belvédère itself on the grounds of co-mingling ('*confusion des patrimonies*'). The Nimes Commercial Court later converted these safeguard proceedings into rehabilitation proceedings (*administration judiciaire*), after having noted that both companies were insolvent.

On March 8, 2012, the Nimes Court of Appeal overruled the decisions of the Nimes Commercial Court and cancelled the opening of safeguard proceedings against SA Belvedere. The Nimes Court of Appeal considered that co-mingling could not be inferred either because of Belvédère's ownership of the share capital SAS Marie Brizard and Roger Internationale, which owned of SAS Moncigale, or by commonality of management among these companies. The court also noted that the following facts were not sufficient to constitute an abnormal financial relationship which characterises co-mingling:

- transactions as part of a group policy between group members to redistribute financial instruments cover;
- a new group distribution policy resulting in SAS Moncigale concentrating its business activity on production; and
- the participation of SAS Moncigale at trade fairs for the promotion of business lines/marks under which its products were distributed even though these marks did not belong to it and in the absence of any financial contribution from another group member towards this participation

Mediasucre

Judicial liquidation had been opened in France in respect of Mediasucre a French registered company. The French liquidator applied to join an Italian registered company, Rastelli, to the proceedings under the French laws of consolidation for co-mingling. The French court at first instance found that it lacked jurisdiction as Rastelli's registered office was in Italy and Rastelli did not have an establishment in France.

Following appeal, the French Court of Appeal held that it had jurisdiction to join Rastelli to the main insolvency proceedings on the basis that the effect of the consolidation for co-mingling was not to open separate insolvency proceedings in respect of Rastelli, but only to join Rastelli to the insolvency proceedings. Rastelli appealed and this led to a reference to the ECJ by the French Supreme Court.

In its decision of December 15, 2011, the ECJ held that:

- where a court of a member state which has opened main insolvency proceedings in respect of a company can, under a rule of its national law, join to those proceedings a second company whose registered office is in another member state, it can do so only when that second company has its COMI in the first member state. Therefore, the EC Insolvency Regulation has the effect of restricting the operation of substantive consolidation laws;
- the mere finding that the property of two companies has been intermingled (the existence of intermingled accounts and abnormal financial relations) is not sufficient to establish that the COMI of the company which is to be joined to the proceedings is in the member state where the first company has been placed into insolvency proceeding, because this would not necessarily be ascertainable by third parties.

In order to reverse the COMI registered office presumption, it would therefore be necessary to assess the relevant facts for the purposes of establishing, in a manner ascertainable by third parties, where the actual centre of management and supervision of the company concerned is situated.

The ECJ reached this decision on the grounds that, while under French law joining a separate legal entity to the existing insolvency proceedings did not institute new insolvency proceedings, in reality this had the same effect as opening insolvency proceedings in respect of the separate legal entity. A decision which produced the same effects as the opening of insolvency proceedings could only be taken by the courts of the Member State that have jurisdiction to open such proceedings and this was governed by the EC Insolvency Regulation.

Since Article3(1) of the EC Insolvency Regulation confers exclusive jurisdiction to open main proceedings on the courts where the debtor's COMI is located, to allow laws of substantive consolidation for co-mingling to permit another company to be joined to insolvency proceedings without considering where that company's COMI was located would circumvent the jurisdictional rules of the EC Insolvency Regulation. This would create conflicting claims to jurisdiction between courts of different Member States that the EC Insolvency Regulation was specifically intended to prevent.

Kartogroup

In refusing to invoke Article 26, the French Supreme Court took the view that, as long as there is an ability for a creditor to be heard in relation to the decision to open the insolvency proceedings in question at some point in time during the course of the insolvency proceedings, then this was sufficient for a party's fundamental right to be heard not to have been infringed.

In September 2008, the Italian court opened *concordato preventive* proceedings in respect of Kartogroup S.r.l a company incorporated under Italian law with its registered office in Italy and two of its French subsidiaries on the grounds that that the COMI of all three companies was in Italy. Accordingly, the Italian proceedings were main proceedings for the purpose of the EC Insolvency Regulation.

Following the opening of the Italian proceedings, French creditors of the French subsidiaries took conservatory measures over the French subsidiaries' assets in France. The French subsidiaries applied to the French courts for the cancellation of the interim liens on the grounds that Italian insolvency law prohibited any creditor to take such measures after the opening of a *concordato preventive* and on the ground that pursuant to Articles 16 and 17 of the EC Insolvency Regulation, the effects of the Italian proceedings were automatically recognised in France.

The French court of first instance and the French Court of Appeal ordered the cancellation of the interim liens. A French creditor appealed to the French Supreme Court on the basis that pursuant to Article 26 of the EC Insolvency Regulation, the Italian proceedings should not be recognised in France. Article 26 of the EC Insolvency Regulation provides that any Member State may refuse to recognise insolvency proceedings opened in another Member State where the effects of such recognition would be manifestly contrary to that Member State's public policy, in particular its fundamental principles or constitutional rights and liberties.

The creditor argued that the procedural rights of creditors were not guaranteed in the Italian

proceedings because a *concordato preventivo* does not allow creditors a right of appeal against the court judgment opening the proceedings, but only a right of appeal against the court judgement confirming the composition agreement. Therefore the Italian proceedings should not be recognised in France because they were manifestly contrary to French public policy and French procedural public order.

The French Supreme Court rejected the appeal on the grounds that a right of judicial recourse under Italian law did exist which allowed the French creditor to contest the jurisdiction of the Italian courts to open main proceedings in respect of the French subsidiaries. The French Supreme Court would appear to have taken the view that, so long as there is an ability for a creditor to be heard in relation to the decision to open the insolvency proceedings in question at some point in time during the course of the insolvency proceedings, then this was sufficient for the fundamental right of a party to be heard not to have been infringed.

Reform of EC regulation 1346/2000

In March 2011 the legal affairs commission organised a hearing on the harmonisation of European Insolvency proceedings. The commission published its report and recommendations on October 17, 2001 and on November 15, 2011 the commission's report was adopted by the European Parliament in full session. Among the recommendations were:

- harmonisation by way of European Directive of the conditions for the opening of insolvency proceedings, for example, the ability of opening insolvency proceedings against assets of an entity which has no legal personality, such as, a European economic interest group;
- modification of the EC Regulation, for example, in order to integrate proceedings in which the debtor retains management of the business, and to include a definition of COMI having regard to case load criteria ; and
- introduction of insolvency regulations relating to groups of companies, for example, introduction of proceedings where the group has its registered office and suspension of proceedings in other Member States.

Authors:
Rod Cork, Partner
Allen & Overy LLP
52 Avenue Hoche
75008 Paris
France
Tel: +33 1 40 06 54 00
Fax: +33 1 40 06 54 70
Email: rod.cork@allenovery.com
Website: www.allenovery.com

Marc Santoni, Partner
SCP Santoni & Associés
15 Avenue d'Eylau
75116 Paris
France
Tel: +33 1 44 05 11 11
Fax: +33 1 44 05 14 41
Email: msantoni@scp-santoni.com
Website: www.scp-santoni.com

Restructuring trends in Germany

by Joachim Englert and Leo Smith, PricewaterhouseCoopers AG

Over the course of the recent global economic crisis, the German economy has demonstrated a strength and resilience which continues to underpin much of Western Europe. This is partly due to the relatively high manufacturing base at the core of the country's industry (still probably 25% of total German GDP, while for example the UK and US are now well below 20%), but strength may also be attributed to the impact of some of the economic stimuli utilised by the German government, including:

- **the "cash for clunkers" cash scrappage scheme for older cars to encourage the purchase of new cars and the continued stimulation of the country's large automotive industry;**
- **certain other public-funded programmes to support growth and innovation like solar subsidies offered to manufacturers of photovoltaic technology (promoting both manufacturing and an overall trend in Germany towards greener power generation). Germany has established itself as one of the world's leaders in adopting solar technology and now owns between one third and half of the world's photovoltaic cells; and**
- **short-term working support, where companies have been able to retain staff, but on a more flexible basis, reducing fixed costs of participating companies and providing greater flexibility to deal with financial challenges faced in the recent difficult operating environment.**

The last measure in particular has provided the German economy with a boost, particularly as the green shoots of economic recovery have emerged. A direct result of this stimulus is that unemployment has remained low throughout the crisis. This almost certainly resulted in private consumption remaining at a fairly high (at least for German standards) level, and enabled companies to retain skill levels in their workforce. This, in turn, has allowed them to respond more quickly to the more recent uptick in activity and commensurate increases in demand. As a result, the German economy has been at an advantage compared to other Western European counterparts.

Going forward, the German economy is expected to continue to be significantly influenced by developments in global capital markets. With exports still being a major contributor to the overall success of the German economy, lower growth expectations in Western Europe or even China will have negative effects on German companies. As such it should not be expected that these unusual positive trends in German economic activity will be something to continue forever.

Trends in financial restructuring

Driven by the overall economic situation, restructuring work has thrived over the last few years. Companies of all industries and sizes have been worked through, with most of the headlines being created by large insolvency filings, including: Arcandor (Karstadt), Manroland, Honsel and also more recently, cases like Schlecker and Pfleiderer. Restructuring advisors have also been kept busy working through troubled *Mittelstand* companies, at the core of the German economy. Lately, the solar industry has returned to the public eye as it encounters the changes from new subsidy regulations, with companies like Conergy and Solon making the headlines.

The majority of the attention in the restructuring community however has been focused on the cases with a private equity background. Over the course of the last three years, the restructuring market has worked through several significant leveraged cases, with Monier, Stabilius and Bavaria Yachtbau reflecting only the beginning of this wave of cases. The trademark of these cases has been an underlying positive operational performance, but with a debt level on the balance sheet preventing a prosperous future. Therefore, restructuring advisors have needed to establish some innovative solutions to deal with problematic levels of debt in the post-Lehman era in order to successfully restructure what is, underneath the debt pile, an otherwise viable proposition.

Solutions such as:

- debt forgiveness (despite possible taxation impacts);
- debt pull-ups;
- debt to hybrid swaps; and
- internalisation of debt (with PPLs established as a new instrument for external investors, mainly senior and mezzanine lenders) have all been used successfully to establish a mechanism which, depending on the circumstances, allows lenders to recover value in an investment. Despite these innovative solutions, however, German lenders continue to hesitate to take an equity position in their investments. Instead, they have tried to gain control of restructuring processes by installing trustees (so called "double trust" given that the trustee is not only working for the party handing over the security but also for the secured lenders; examples include cases like Novem, Gienanth and even Opel) and trying to capture upside potential by agreeing on promising notes.

With a significant level of older leveraged deals still out there, the prospect of ongoing restructuring of these cases in particular seems inevitable as the "debt maturity wall" approaches – despite being smoothed due to bond issues and amend-to-extend transactions used to push maturities out into the future. Adding to this refinancing problem are the companies of the *Mittelstand*, which were probably quite happy to pick up a piece of the "standard mezzanine programme" pie a few years back, only to find now that it is very difficult to get new investors bringing money to the table at par. Even the newly opened market for the so called "*Mittelstands* Bonds" does not seem liquid enough to solve each and every case, especially given the fact there are already indications of trouble ahead in this newly established segment of the capital market.

Insolvency law – long awaited changes towards the right direction

An article like this one would be incomplete without a comment on the latest changes to the insolvency laws in Germany. Much has been said already regarding the impact of these changes which have been effective since the beginning of March 2012. From a business perspective, the ability of the lender to influence the appointment of the (temporary) insolvency administrator is significant and moves the regime more into line with the creditor friendly approach of the UK's system. Creditors will certainly also use this influence to get a more business oriented and going concern oriented administrator appointed rather the "man next on the court's list". It is hoped that this will improve the reliability and predictability of insolvency proceedings. Under the new regime, lenders will have the opportunity to form a preliminary creditors' committee and thereby enhance their influence on a proceeding.

On the other hand, the strengthening of the debtor in possession concept and the newly established "*Schutzschirm*" regime will act to move the law closer to a debtor-friendly US concept. The "*Schutzschirm*" regime, a kind of pre-insolvency proceeding which provides an automatic stay before an administrator has been appointed, will act to protect both the interests of debtors and creditors at the critical time of distress before an insolvency appointment is made. In theory, both concepts should allow for more a successful implementation of "pre-packed plans".

The new insolvency law now also allows for a more classical US Chapter 11 style debt for equity swap to take place in an insolvency proceeding, allowing a cram down of the equity holders of a company and allowing for a conversion of creditor claims to shares in the company. This was previously unavailable as a restructuring tool in the German insolvency regime, a notable omission in comparison with other jurisdictions. With the availability of these tools, the German insolvency law has been brought up to date to accommodate many of the restructuring tools and procedures which have emerged throughout Europe over the last few years.

Overall, the new law is, on paper, a significant step forward in providing a more attractive, proactive and useful tool in restructuring. For restructuring professionals, the new law provides the likelihood of ongoing involvement in cases which reach insolvency, where previously the advisors in place would have been replaced by an entirely new (and unfamiliar) team by the incumbent insolvency administrator. However, it remains to be seen whether the new law will deliver on its early promise in practice. Early cases clearly indicate that the new rules are being well accepted with Dura Tufting and Drescher being dealt with under a DIP regime and with administrators for Draftext and ADA Systemhaus being "selected" by the lenders. However, there remain several flaws to insolvency as a restructuring tool in Germany, even under the new regime. It remains to be seen whether these flaws will prevent the new law from delivering the promised benefits.

In another round of changes to the German insolvency law one might hope that, for example, a concept of a "group insolvency" such as the "substantive consolidation" concept which exists under the US Chapter 11 regime and a restructuring tool like a "Scheme of Arrangement", as we know under English law, will be implemented. Overall, only experience with real life cases will show if the changes to the law will help to remove the ongoing stigma of insolvency in

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Derik Evertz
phone: +49 69 9585-5548
derik.evertz@de.pwc.com

Joachim Englert
phone: +49 69 9585-5767
joachim.englert@de.pwc.com

Patrick Ziechmann
phone: +49 211 981-7518
patrick.ziechmann@de.pwc.com

Thomas Steinberger
phone: +49 89 5790-6443
thomas.steinberger@de.pwc.com

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Germany, where the association of a company/brand with insolvency can have devastating consequences on the company's ability to continue to trade.

Finally, the future of the over indebtedness test as a ground to file for insolvency has not yet been decided. Omitted at the end of 2013, the decision is pending as to whether the old test will be reinstated, the omission extended or the test is cancelled completely. Discussions are ongoing; however it appears clear that temporary solutions are not very helpful in trying to solve restructuring cases. A possible future change in the definition of grounds to file for insolvency has proven to be quite unhelpful where a looming over indebtedness could exist. One can only hope that either way, a final solution is found soon; many restructuring experts certainly wish that the issue of whether over indebtedness as a ground to file for insolvency will soon be put to rest.

"Bankruptcy tourism" is out; "scheme of arrangement" is in?

Over the last few years, there has been an increasing usage of the scheme of arrangement as a tool for restructuring a company's creditors, even for companies based outside of the UK. For example, in many European companies the banking syndicate includes significant lending from London branches of the major lenders, the resultant use of English law to govern the lending facilities can then be sufficient for a scheme of arrangement to be a relevant tool in restructuring the creditors of the company.

This can be an attractive proposition as the scheme of arrangement is not a formal insolvency proceeding but a successful scheme is still sanctioned by the court and therefore legally binding. In addition, due to the requirements on voting rights/proportions, it is possible to circumvent the wishes of a minority of a class of creditors where they have taken an opposing view on the restructuring. This is also especially relevant in light of the latest court decisions in Germany, where efforts to cram down bondholders using the new German "*Schuldverschreibungsgesetz*" have been blocked.

As a result of these and other benefits, several German companies have chosen the scheme as a restructuring tool including:

- Schefenacker – where a scheme was used to cram down the bond debt;
- Primacom – where a scheme involved a cram down of the senior debt; and
- other notable cases such as Telecolumbus and Rodenstock.

In summary, as long as laws or current practices prevent certain elements which the scheme of arrangement is able to provide, it will remain an attractive option to companies and their advisors who are looking for a restructuring solution.

Enforcement – not such a bad thing after all?

A tool which has become increasingly popular in recent times has been the use of formal security enforcement – mainly on shareholdings. Here the secondary debt markets allow specialists to acquire enough of a company's debt to dominate the voting rights. As the company struggles and triggers proceedings under its facility documents (such as the breaching of a banking covenant), the specialist investor is able to enforce the security of the company's debt package and generate a restructuring which allows them to take an ownership position in the company by credit bid. Typically this tool has been used where an underlying company is sound, but struggling in comparison to the scale of its debt package. The enforcement allows a restructuring of the company's debt position, removing the burden and allowing the underlying company to flourish.

Previously the use of this tool has been rare, however recent cases such as Primacom (where enforcement was enacted similar to that described above) and Walter Services (where the threat of enforcement alone was enough to force a shareholder agreement to the restructuring) have highlighted the increasing propensity of this method as a restructuring tool.

As several specialists in this area have emerged and successfully used this as a tool for restructuring and gaining an equity position in the "cleaned up" company, the restructuring industry will watch with interest to see how the tool works out for the secondary investor in the long run.

Where do we go from here?

Overall, we expect secondary trading and distressed M&A to pick up. Distressed M&A cases might come from trustees (so called *doppelnützige Treuhand*), which are still a very common instrument used by lenders to "restructure" a company. Deal flow should also be expected to come from "zombie" companies left behind by the first wave of restructurings. More regular activity in the secondary debt markets is expected to continue to increase after a period of stagnation following the global financial crisis. In cases such as Klöckner Pentaplast, Monier, Bavaria Yachtbau and Stabilus, significant trading of the debt positions has occurred suggesting that the distressed investors are regaining their appetites and looking to acquire further assets.

The key question which remains unanswered relates to the strategy of the German lenders in restructuring. Will they adapt their approach to take into account the changes and developments

mentioned above, or will they retain a more classical conservative approach? Only time will tell, however the forthcoming "maturity wall" and potential lack of liquidity for refinancing of many companies will act as a catalyst in crystallising the strategy of German lenders.

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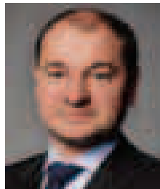
Authors:
Dr. Joachim Englert, Partner
Tel: +49 (69) 9585 5767
Fax: +49 (69) 9585 948291
Email: joachim.englert@de.pwc.com

Leo Smith, Senior Manager
Tel: +49 (69) 9585 1302
Fax: +49 (69) 9585 967510
Email: leo.alastair.smith@de.pwc.com

PricewaterhouseCoopers AG
Wirtschaftsprüfungsgesellschaft
Friedrich-Ebert-Anlage 35-37
60327 Frankfurt am Main
Germany
Website: www.pwc.de

Objective accomplished? Improving restructuring options in Germany through insolvency reform ("ESUG")

by Andreas Ziegenhagen, Salans LLP



The improvement of German insolvency law as far as corporate restructurings are concerned has been demanded for a long time now. At long last, on October 27, 2011, the German Parliament finally passed the revised draft of the "Act for the Further Facilitation of the Restructuring of Corporations (abbreviated as "ESUG" in German). This act comprises in particular the following changes that have come into effect on March 1, 2012. The new Act is intended to strengthen creditors' rights, to expand the scope of insolvency plan proceedings and also introduces a new protective shield proceeding within self-administration (i.e. as a debtor-in-possession).

Preliminary creditors' committee and selection of insolvency administrator

Until now, it has often been criticised that in Germany creditors do not have any say or participatory rights concerning the selection of the insolvency administrator, a process which was regarded as being non-transparent. The new insolvency regime will provide for a stronger influence of creditors on the choice of a competent insolvency administrator. From now on, courts must regularly appoint a preliminary creditors' committee upon receipt of a petition to commence insolvency proceedings, insofar as the debtor fulfills the minimum specifications required for a medium-sized corporation pursuant to § 267 sec. 1, 2 of the German Commercial Code (HGB).

As a response to strong criticism that the minimum thresholds contained in the original draft of the German Federal Government were too low, the respective balance-sheet totals, turnovers and numbers of employees were increased to €4,840,000 on balance sheet total, to €9,680,000 turnover and to a minimum of 50 employees on average per year. A creditors' committee will only be appointed if at least two of these three prerequisites are met. However, under certain circumstances a preliminary creditors' committee can also be appointed in the case of smaller corporations, particularly if the petition of the debtor or a creditor already contains an appointment of certain persons as potential members of the creditors' committee and if their declarations of consent are submitted simultaneously.

The preliminary creditors' committee consists of creditors having a right of segregation, large and small creditors and at least one representative of the employees. However, persons who become creditors only upon commencement of proceedings can also be members. In contrast to the opened insolvency proceeding, where third parties (i.e. non-creditors) can be members of the creditors' committee, such third parties cannot become members of the preliminary creditors' committee. The preliminary creditors' committee has the right to be directly involved in the selection of an insolvency administrator. In case all members of the preliminary creditors' committee agree on a certain insolvency administrator, the court that has to appoint the insolvency administrator may only reject the creditors' committee's proposal if the suggested person is unqualified for such a role. In this context, it is important to investigate above all else the professional independence as well as the professional competence of the nominated person.

Under ESUG, the fact that a proposed insolvency administrator was nominated by the debtor or by a creditor or has given any general advice to the debtor beforehand regarding the course of insolvency proceedings does not in itself put the professional independence of that person at risk. This, however must be thoroughly examined when assisting in the preparation of a "prepack" insolvency plan. In addition, in case the court has already appointed an administrator prior to the appointment and hearing of the preliminary creditors' committee on the basis of the urgency of the insolvency proceedings, the preliminary creditors' committee can, at its first meeting, elect another person as administrator by unanimous decision.

Requirements to debtor's application for insolvency proceedings

The lack of information from which the creditors suffered before ESUG became law has been eliminated to some considerable degree by changes in the requirements that a debtor's petition to commence

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Andreas Ziegenhagen
European Head – Reorganisation,
Restructuring & Insolvency
aziegenhagen@salans.com
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insolvency proceedings has to fulfil. Simultaneously, these new obligations of the debtor to furnish more information are supposed to help the court in the appointment of a preliminary creditors' committee as early as possible. Thus, the filing debtor has to add to its application a list of its creditors, regularly classifying the creditors into distinct classes or groups. Thus, the debtor's application has to include details concerning the amount of the debtor's payment obligations, its balance-sheet totals, its turnover exposure and the average number of its employees. The debtor is required to affirm completeness and correctness of this information.

Insolvency plan and debt-to-equity-swap

Now, under ESUG, it is finally possible, using the insolvency plan procedure, to affect the rights of the debtor's current shareholders and to convert creditors' claims into shares. Before ESUG, such a debt-to-equity-swap was only possible if the involved creditors gave their consent, making it virtually impossible to force a creditor to participate in a debt-to-equity-swap.

Additionally, now under ESUG, an insolvency plan procedure is possible even in case of a lack of funds. Furthermore, measures such as, in particular, a capital reduction and increase, the provision of assets in kind (*Leistung von Sacheinlagen*), the exclusion of subscription rights, or the payment of compensation to retiring shareholders are possible by virtue of an insolvency plan. Potential "change-of–control" termination rights are not effective when a debt-to-equity-swap has taken place pursuant to an insolvency plan. In addition, there are new limitations in force now curbing the rights to object and file an appeal against an insolvency plan, which is intended to prevent a creditor from blocking the insolvency plan and is supposed to tighten the proceedings to speed up the legally binding determination of the plan. Court driven approval proceedings shall now ensure that a confirmed insolvency plan can be executed notwithstanding a pending appeal.

Debtor in possession

Upon an application for a debtor-in-possession proceeding (*Eigenverwaltung*, self administration), separate insolvency commencement proceedings with a preliminary trustee/custodian (*Sachwalter*) have now been implemented in to German insolvency law via ESUG. Whilst in the past a court regularly ordered certain measures protecting the debtor's remaining assets from disposal during the period of the preliminary opening proceedings, the competent court shall now refrain from ordering such measures during the new commencement proceedings, i.e. the court shall not prohibit disposals by the debtor (*allgemeines Verfügungsverbot*) and shall not make such disposals subject to the approval by a preliminary insolvency administrator.

Furthermore, the German legislator has provided more flexibility in a restructuring situation by offering the possibility for a subsequent debtor in possession proceeding upon application of the creditors' assembly, if the debtor agrees. Any influence of shareholders or existing controlling bodies (supervisory board, advisory board) on the management will be limited during the debtor in possession period since the trustee/custodian (*Sachwalter*) as well as the creditors' committee is required to control the debtor's management on behalf of the creditors.

The new protective shield proceedings

In the newly implemented protective shield proceeding (*Schutzschirmverfahren*), which is based on and works similarly to the regular debtor-in-possession proceeding, the debtor has a chance to work out a restructuring plan under survey of a custodian (*Sachwalter*) within three months or less. This new protective shield proceeding will only be available if at the time of filing the motion for a protective shield proceeding, the debtor is not illiquid and the intended restructuring is not futile. These requirements need to be verified by a certificate of a tax advisor, auditor or lawyer, each experienced in insolvency law, or a person with equivalent qualifications.

The underlying debtor in possession proceeding has to be cancelled before the end of the three-month period within which the plan has to be proposed, if the intended restructuring becomes impossible, or the preliminary creditors' committee applies for its cancellation by majority decision (according to heads) or if no committee has been appointed, a creditor entitled to segregation or an unsecured insolvency creditor applies for its cancellation and circumstances are shown credibly that the debtor in possession proceeding will presumably lead to disadvantages for the creditors.

The highly criticised provision originally included in the draft Act, pursuant to which a protective shield proceeding was to be cancelled if the debtor becomes illiquid after filing of the application, was taken out shortly before the vote in parliament and has not become law. Additionally, pursuant to the revised Act, the court is now able to order, upon application of the debtor, that preferential debt can be created during the protective shield proceedings. All in all the aim is to ensure that the debtor's business can be continued as a going concern under the protective

shield proceeding and at the same time to promote incentives to debtors to file a petition for the commencement of insolvency proceedings at an early stage. The protective shield proceeding can be in particular ideal for financial restructurings in order to force minority creditors that are obstructive or unable to act (e.g. securitised mezzanine programmes, etc.) to restructure by virtue of an insolvency plan.

Result

In conclusion it can be said that the Act offers additional restructuring options for parties involved in insolvency proceedings. However, there is still a lot of room for improvement when it comes to the framework conditions for restructurings under German insolvency law. The insolvency plan should, for example, have the option to contemplate and affect third parties, regarding creditors' claims *vis-à-vis* subsidiaries, in order to allow the restructuring of a whole corporate group. In addition, the current statutory definition of over-indebtedness should apply beyond December 31, 2013 in order to avoid such over-indebtedness to become part of an over-indebtedness status as per balance sheet. Moreover, the tax conditions, in particular regarding the use of losses, should be made more restructuring-friendly.

Author:
Andreas Ziegenhagen, Managing Partner
European Head of Restructuring, Reorganisation and Insolvency Practice Group
Salans LLP
Markgrafenstraße 33
10117 Berlin
Germany
Tel: +49 30 26473 207
Fax: +49 30 26473 133
Email: aziegenhagen@salans.com
Website: www.salans.com

Rehabilitation: A new restructuring proceeding for Greece[1]

by Stathis Potamitis, Potamitisvekris

Greece got its first Bankruptcy Code in 2007. The Code was welcomed by many as a step towards a more debtor-friendly approach to insolvency with priority afforded to restructuring over liquidation. The new Code introduced a version of the French conciliation proceeding (involving a mediator and leading, in successful cases, to a voluntary restructuring agreement) and a reorganisation option as part of bankruptcy. Negotiations towards a conciliation agreement could obtain provisional protection under a moratorium order. Conciliation agreements could be filed for ratification and ratified agreements automatically provide debtors with immunity from individual enforcement actions by all other creditors for a period of four years and protection from collective actions for one year.

Bankruptcy reorganisation has hardly been used at all since it came into effect. By contrast, conciliation has been used very extensively but, in the vast number of cases, it has been used by debtors not to negotiate with their creditors towards a speedy resolution of their liquidity problems, but as a way to gain time and keep creditors at a safe distance. In practice, the proceeding has revolved around the provisional standstill order which has become disassociated from negotiations and has become an end in itself.

This has been happening while Greece has been sliding into a major recession and a debt crisis of global proportions. Perhaps for that reason, Parliament decided to get rid of conciliation in favour of a new proceeding, rehabilitation, that is far more flexible than conciliation, includes a cram-down feature, allows pre-packs as well as a quick liquidation proceeding styled "special liquidation".

While the new statute, which came into force on September 15, 2011, in many ways is an improvement over conciliation, the process of restructuring that it sets up or enables is still likely to get bogged down in court proceedings and require more time than the life expectancy of most troubled debtors. In addition, the Greek economy has been in well publicised turmoil, local banks are drained of cash, local consumption has contracted while even exports have become challenging because of the difficulties that local entities encounter in obtaining trade finance. The current extraordinary circumstances require extraordinary measures. By that measure, the new provisions seem very modest indeed. At least for the short term, it would seem that debtors relying on the newly available set of tools and solutions are more likely to fail than be reinvigorated.

Key features of rehabilitation

Qualifying debtors

Rehabilitation can be accessed by debtors that are either in a state of cessation of payments or such cessation is imminent. Enterprises that have ceased payments may still apply to enter pre-bankruptcy procedure provided that they also file a bankruptcy petition at the same time; thereafter the debtor's petition as well as any bankruptcy petitions put forward by creditors are suspended during the progress of rehabilitation and dismissed upon its ratification.

Recovery options

The revised rehabilitation proceeding provides for several ways to deal with a troubled debtor. A restructuring agreement that involves a qualifying debtor and is reached without any court involvement can then be submitted for ratification. Upon submission, the court may also provide a standstill order protecting the debtor from enforcement actions until the application hearing. The agreement in many cases will involve the sale of assets of parts of the business and has already received the moniker "pre-pack".

Another option is for a qualifying debtor to submit itself to the rehabilitation proceeding. This in turn creates several options. The debtor may seek the appointment of a mediator to push the discussions with its creditors forward, or it may seek to handle the discussions without the assistance of a court appointed expert. Creditors can be addressed as a committee or on an individual basis.

The two alternatives noted above were the only rehabilitation options that the committee drafting the law revision had proposed. At the time when the bill was brought to Parliament, a last minute addition was

introduced as a third rehabilitation option, styled "special liquidation". As the name suggests, this option concerns liquidation of assets on an expedited basis and is intended to preserve going-concern value for the debtor's business to the maximum extent possible. Unlike the first two options, it does not flow out of a negotiated settlement and does not involve the debtor's consent. In addition, unlike the first two options, "special liquidation" does not leave the debtor in possession; on the contrary, a court-appointed liquidator takes over all aspects of the debtor's management. "Special liquidation" is only available for large and medium enterprises (there are minimum quantitative criteria based on value of assets and operating revenues) and, among other conditions, it requires a showing that there is expressed interest (but not necessarily a binding commitment) to purchase the debtor's assets and confirmation that the interested party has the capability to finance such an acquisition. Certain other aspects of the proceeding make it well suited to the needs of creditors which are financial institutions.

As can be seen even from the very rough outline above, the new rehabilitation process ranges from consensual restructuring to a liquidation proceeding that is quite similar to bankruptcy (but lacks a number of its weaknesses, and is likely to replace the normal bankruptcy proceeding for the larger debtors that may constitute a viable business if relieved of their debt and where the creditors are primarily financial institutions). Because of the significant differences between the negotiated recovery and special liquidation, in the remainder of this note rehabilitation refers only to the two options that involve negotiations (i.e. excluding "special liquidation").

The opening of proceedings

A debtor deciding to submit itself to the rehabilitation proceeding (i.e. commence negotiations with its creditors), must file an application to court that gives information on the debtor and attached current financial statements. In addition, the application must be accompanied by an expert report including a list of the debtor's assets and creditors, making special mention of its secured creditors. The expert is also required to opine on the financial situation of the debtor, market conditions, the viability of the enterprise and whether the restructuring of the debtor shall adversely affect the satisfaction of the debtors collectively. For legal persons, the statute specifies that the expert must be either a banking institution or an auditor (individual or firm).

This stage of the overall rehabilitation proceeding presents various practical difficulties; for instance, the problems involved in providing any expert comfort on a debtor's viability or impact of its restructuring on the creditors prior to a workout agreement, are all too apparent. It appears that the real function of this stage is to provide a peg for the issuance of preliminary injunctions, protecting the negotiating debtor from creditors' enforcement actions.

In our view, that need could also be served by providing competent courts with the authority to provide a debtor with a standstill order for up to several months' duration upon its application and declaration that it qualifies for rehabilitation protection and intends to commence negotiations with its creditors (those requirements not being themselves an issue for the court to decide). While one may expect that facilitating the availability of such provisional relief may foster abuse (see also the following section), if the time frame is sufficiently short and there are sufficient debtor constraints introduced as a result of the grant of such order (e.g. restricting the debtor to actions in the ordinary course of business and prohibiting any disposal of core assets or grant of new security for existing debts), the provision may facilitate restructuring without exposing creditors and other stakeholders to significant risks of dissipation of assets or other similar prejudice.

Skipping the hearing for the opening of the proceeding may be considered to deprive interested parties from court access on a matter of substantial interest. This is doubtful. The crucial questions that the court is required to address at that stage (viability and impact on creditors) cannot properly be dealt with on the basis of the information then available to the court. Therefore, the benefit in terms of due process may be illusory while the cost in terms of time and use of the very limited judicial resources may be very substantial, indeed.

Provisional orders

The application to open the proceeding may be, and in fact always is, accompanied by an application to the same court for the provisional standstill order. The scope of the order is up to the judge but it usually prevents all enforcement actions against the debtor. The injunction applies to claims that arose until the application date but in special cases may range over subsequent claims as well. The judge can also provide other relief for the protection of the debtor's property for the benefit of its creditors. Issuance of the order will automatically prohibit the debtor from disposing of its real property and equipment. The judge also has been granted the discretion, where there are serious business or social reasons, to extend the standstill order to cover guarantors or other co-obligors of the debtor.

These provisional orders lie at the core of court practice since the introduction of, first, conciliation and, then, rehabilitation. Debtors who are on the verge of insolvency (and frequently beyond) have latched onto this provisional protection as a last

minute opportunity to gain some leverage over their creditors. In the past, prior to the most recent amendment of September 2011, debtors protected by the standstill order had proceeded to dispose of a substantial part of their assets and also to favour certain creditors (more crucial to business maintenance or where default created greater legal risks for managers) over the rest. There have been literally thousands of conciliation and rehabilitation applications that in their vast majority never developed into restructuring negotiations.

This perceived abuse of process led Parliament to consider various amendments to the proceeding. It was suggested that the qualification criteria were too loose (the conciliation statute spoke of severe financial difficulties as the standard of qualification). Accordingly, the new requirement has been elevated to actual or threatened ("looming") cessation of payments. This seems inappropriate as it makes recovery available only to debtors that may be too distressed to benefit from a restructuring agreement. Another change is the prohibition of the sale of real property and equipment (regrettably, a vague term) by those under the provisional order.

These changes miss the main cause of statutory malfunction, which is the excruciatingly slow pace of the Greek judicial process. An application for the opening of proceedings may take up to four months, which the decision to open may take an additional 30 to 60 days. The statutory four-month negotiation period may be extended by a new application, which will take at least one month to be heard and may also take an equal period for the decision itself. In effect, the four plus one month standstill period which the statute seems to provide on first reading is more likely to last more than twice that. A whole year of moratorium at the cost of an application seems a terrific bargain especially for those that are less likely to benefit from a restructuring. However, if the period of actual protection were to be shortened to an actual four months and additional constraints were to be imposed, as suggested in the previous section, both the frequency and the impact of abuse would probably be reduced.

Content of the agreement

The agreement may provide for any address to the causes of the debtor's financial and operational difficulties, including without limitation:

i. changes to the terms of debtor liabilities, such as extension of time, events of default, interest rate, replacement of interest payment by the right to participate in enterprise profits, conversion of debts into bonds, whether or not convertible into issuer equity, or the subordination of current creditors in favour of new creditors;
ii. debt-for-equity swap, in combination or not with a reduction of the debtor's share capital;
iii. agreements between creditors and equity holders as to creditor priority, management matters, agreements as to the transfer of stock such as rights of first refusal;
iv. write-offs or write-downs of claims;
v. partial disposition of debtor assets;
vi. the appointment of a third party to operate the debtor's business (including a lease of the business facilities and assets);
vii. the transfer of the business in whole or in parts to a third party (including a company to which creditors have contributed their claims);
viii. the suspension of individual enforcement actions against the debtor for a certain period after the agreement's ratification (for up to six months); and
ix. the appointment of a person to supervise the implementation of the terms of the ratified agreement, and the designation of its powers and authority in that capacity.

The agreement must be accompanied by a business plan which forms a part of the overall agreement.

Ratification of the agreement

The filing must include an expert opinion (issued by a bank or an auditor), certifying that the agreement has been signed by the requisite majority of creditors, that it renders the debtor viable and takes it out of cessation of payments, does not adversely affect the collective satisfaction of creditors, treats creditors of the same rank equally or whether any divergence from such equal treatment is necessary for serious business or social reason.

It should be noted that Greek law, especially since the onset of the current crisis, has given certain types of creditors significant preference over all others. In particular, employees and pension funds are entitled to have their claims satisfied in priority to all other creditors, including secured creditors. In practice, an agreement which anticipates a significant reduction in the amount of employee and pension fund claims may have great difficulty in receiving ratification.

Consequences of ratification

An agreement rendering the debtor viable, treating all creditors of the same type equally and not putting any non-consenting creditor in a worse position that it would have been in a bankruptcy liquidation of the debtor, shall be ratified and as such will bind on all creditors, whether consenting or not.

The ratification of the restructuring agreement has no impact on third-party securities, whether personal or *in rem*. The same applies to co-obligors; their liabilities are not affected by any reduction or other alteration of the liabilities of the debtor.

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LAW PARTNERSHIP

9 NEOFYTOU VAMVA STR.
10674 ATHENS,
8 PETRAKI STR.
10563 ATHENS, GREECE

T + 30 210 3380000
F + 30 210 3380020
E info@potamitisvekris.com

www.potamitisvekris.com

One consequence of the ratification that has quickly become very controversial is that it releases the debtor's manager from criminal liability for the non-payment of post-dated cheques or delay in payment of certain liabilities (taxes and social security contributions). Because of rampant evasion of taxes (especially VAT) and social security contributions and concerns over likely failures to pay salaries in a timely manner, Greek law sees such failures as criminal violations that burden management in person. During the discussion of the recovery statute, it was considered that such liability should no longer attach to management after the ratification of a restructuring plan. When, on that basis, managers in a number of cases recently sought to rely on that subsequent exoneration to avoid prosecution altogether, it was felt that the release from liability at the time of ratification was overly generous and contrary to the principle of equality before the law.

The "special liquidation" as an additional procedure

As previously noted, the "special liquidation" proceeding applies exclusively to medium and large enterprises, and can be commenced without debtor participation. In order for the creditors to seek to place a debtor under "special liquidation" it must satisfy at least two of the three following criteria: the value of its balance-sheet assets must be at least equal to €2.5m, its net turnover must be at least €5m and it must have employed in average during the relevant financial year at least 50 persons.

An application must be accompanied by a declaration of a bank or an investment services firm that there is a solvent investor interested in acquiring the debtor's asset as a whole, that there is a qualified person willing to accept appointment as "special liquidator" and that the cost of the "special liquidation" can be covered by funds that are made available for that purpose. The "special liquidator" is then required to inventory the assets of the enterprise and conduct a public auction of the whole of those assets or of parts of them that constitute operating divisions of such whole. The statute sets out the process in detail and requires that the "special liquidation" be completed and the assets sold off within 12 months (which, however, the court can extend for an additional six months).

Note:

[1] I have had the opportunity to cover much of the same ground in several recent articles; an article I co-authored with Dr. Alexandros Rokas, which has been submitted for publication in the *Journal of Business Law*, an article co-authored with Mr. Theodoros Athanassopoulos to be published by INSOL World, and, on the more specialsed matter of the uses of restructuring tools in privatisation of state-owned enterprises, "A New Approach to Privatisation: An Unexplored Option for Greece in Privatising Troubled State-Owned Enterprises", published in *International Corporate Rescue* by Chase Cambria Publishing, jointly with Steven T. Kargman. I would like to thank Alexandros, Theodoros and Steven for their guidance and insight; naturally none of them is responsible for any mistakes in this article.

Author:
Stathis Potamitis, Managing Partner
Potamitisvekris
9 Neofytou Vamva str.
10674 Athens
Greece
Tel: +30 210 33 80 001
Fax: +30 210 33 80 020
Email: stathis.potamitis@potamitisvekris.com
Website: www.potamitisvekris.com

Winding-up proceedings of financial undertakings in Iceland

by Heidar Asberg Atlason and Gunnar Thor Thorarinsson, LOGOS legal services

In the autumn of 2008, the Icelandic financial system faced severe difficulties which culminated in the country's three largest banks, Kaupthing Bank (Kaupthing), Glitnir Bank (Glitnir) and Landsbanki Islands (Landsbanki) (together referred to as the Banks), being taken over by the Icelandic Financial Supervisory Authority (FME) in October 2008. This was following the enactment of Act No 125/2008 on the Authority for Treasury Disbursements due to Unusual Financial Market Circumstances etc. (the Emergency Act) by the Icelandic Parliament.

The legal framework for the Banks and other financial institutions in Iceland is set out in Act No 161/2002 on Financial Undertakings (AFU), which implements certain EU legislation in accordance with Iceland's obligations under the Agreement on the European Economic Area (EEA). The winding-up of the Banks is governed by the AFU and Act No 21/1991 on Bankruptcy etc. (BA).

As the collapse of the country's entire financial system was unprecedented, Icelandic law was in many ways inadequate to deal with bankruptcies on such a scale. This has required the legislator to react to various issues, some of which required an urgent response. For instance, the AFU has been amended several times since October 2008. The most extensive amendment, Act No 44/2009, covers financial reorganisation, winding-up and merger of financial undertakings. Directive 2001/24/EC, on the reorganisation and winding-up of credit institutions (the Directive), has been implemented into the AFU as a part of the obligations of Iceland under its EEA obligations.

This chapter will provide a brief overview of the winding-up proceedings of the Banks and the possibility of concluding the winding-up through composition.

Winding-up proceedings

In 2009 creditors of the Banks were invited to submit proof of their claims within an announced claims filing period. Contrary to bankruptcy legislation in various other jurisdictions, claims that are not filed before a fixed deadline are cancelled according to the BA.

The affairs of the Banks are administered by Winding-up Boards (WUBs) which control the winding-up proceedings, i.e. handling the Banks' assets with the aim of maximising their value, resolving claims against the banks, making distributions and, possibly, proposing composition with creditors.

The WUBs shall endeavour to obtain as high a value as possible for the Banks' assets, for instance, by waiting if necessary for outstanding claims to mature rather than realising them at an earlier date. This includes the possibility of holding on to and supporting a significant asset rather than selling it. To this end, a WUB may disregard a resolution passed by a Creditors' Meeting that it considers contrary to this objective.

The creditors of the Banks receive regular updates on the winding-up in Creditors' Meetings. Soon after the Banks were taken over by the FME in October 2008, Informal Creditor Committees (the ICCs) were established for each of the three Banks. Although the ICCs have no official standing, they meet regularly and consult with the WUBs.

If the assets of a financial institution do not suffice for full payment, the winding-up may be completed in one of two ways, either with the approval by creditors of a composition agreement or with the Bank being put into insolvent liquidation. One of the primary aims of recent amendments to the AFU is to simplify this process and increase the likelihood of the winding-up to be completed with a composition agreement instead of the Banks being put into liquidation, which could lead to a significant deterioration of the value of the assets of the Banks.

The assets of the Banks

The assets of the Banks consist of loan portfolios and equity in various undertakings, both in Iceland and abroad. Whilst it is anticipated that the majority of the assets of Landsbanki will be consumed to settle claims of its priority creditors, it appears evident from official information presented by Kaupthing and Glitnir that

their creditors stand to receive noteworthy distributions. As a result, the WUBs of Kaupthing and Glitnir have publicly announced that they aim to conclude the winding-up by proposing a composition agreement with creditors.

Composition

A prerequisite for a composition according to the BA and the AFU is that secured claims and priority claims have been settled or at least sufficient reserves made to meet such claims. Any remaining balance can be subject to a composition agreement between creditors holding general claims (Composition Claims). A composition agreement for the Banks would be based on the BA and the AFU and entails creditors accepting a partial (*de minimis*) payment against their Composition Claims.

There are various hurdles and challenges to overcome in order to achieve composition, not least due to the vast number of creditors and the fact that the legislation did not anticipate the collapse of the nation's banking system in its entirety.

Composition proposal

According to the BA and the AFU, the WUB shall present a composition proposal, stipulating to what extent it intends to offer payment of the Composition Claims and in what form. A deviation from the principle that all creditors stand to receive equal distributions is the possibility of deciding the payment of *de minimis* claims in full.

A composition proposal, approved in a meeting (Composition Meeting) by a requisite number of votes of creditors (see Voting below) and confirmed by the courts, constitutes a legally binding agreement between the Banks and its general creditors in respect of the settlement of all of its unsecured claims.

Composition entitlements

Whilst a composition agreement can take different forms depending on the circumstances each time, the composition planning for the Banks is likely to be more complex than in regular composition agreements. Composition agreements for the Banks may comprise of cash payments (including *de minimis* payments) and issue of new shares in the Banks and loan notes (presumably both senior notes as well as convertibles). In essence, the aim would be to convey all the economic interest (after the settlement of the claims of secured and priority creditors) and full control over the Banks to its general creditors.

Control

The transfer of economic interest and control to the creditors of the Banks would eliminate agency issues (i.e. the lack of sufficient link between economic interest and control) inherent in the winding-up by allowing the creditors, in their capacity as shareholders, to implement a governance structure of their own choice. It would enhance operational flexibility and the ability to restructure the business.

However, the role of the WUBs post-composition is unclear as the AFU can be seen to anticipate that the WUBs will assert some authority while disputes are still on-going and composition entitlements have not been distributed in relation to disputed claims until these have been settled. Unless the role and scope of any authority of the WUBs post-composition is clearly defined in relation to the composition of the Banks, either through legislation or in the composition agreements, this could potentially cause tension between the board elected by the then shareholders on the one hand and the WUBs on the other hand.

Voting

Creditors holding Composition Claims are eligible to vote in relation to a composition agreement, both in person and by proxy, unless specific exemptions apply.

The voting needs to fulfil two approval thresholds:

1. a value threshold – 60% or, if higher, the same percentage of votes as the proportion of claims to be written off according to the composition agreement, where the denominator comprises the total amount of claims held by eligible votes; and
2. a headcount threshold – 70% of the creditors actually casting their votes, which gives small claims a significant influence. It is possible to significantly reduce the number of headcount votes with payment of *de minimis* claims.

More than one Composition Claim held by the same creditor will only count as one for headcount purposes. This may also apply in respect of claims held by a trustee, although this could potentially be subject to dispute. Further, headcount cannot be increased by transfer of claims and it could be argued that transfers might decrease the headcount.

Late claims

Although the BA is clear regarding the preclusive effect of failure to submit proof of claim before the deadline, the interaction between the BA and the AFU in relation to the effect of failure of creditors to submit claims in winding-up is complex and unclear. It is expected that the position of late claims in composition will be clarified in a judgment from the Icelandic Supreme Court in the first half of 2012 in the case of ALMC hf. (formerly Straumur Investment Bank) v Stapi Pension Fund.

Capital controls

Following the collapse of the Icelandic banking system in the autumn of 2008, foreign exchange transactions have been subject to capital controls, which have now been incorporated into Act No 87/1992 on Foreign Exchange, as amended with Act No 127/2011 and Act No 17/2012 from March 13, 2012 (the "currency

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Efstaleiti 5
103 Reykjavík
Iceland
5 400 300
5 400 301

42 New Broad Street
London EC2M 1 JD
England
+44 (0) 207 920 3020
+44 (0) 207 920 3099

Lautrupsgade 7, 4th floor
2100 Copenhagen
Denmark
+ 45 70 229 224
+ 45 70 274 279

logos@logos.is
www.logos.is

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rules"). The Banks will require an exemption by the Central Bank of Iceland from the currency rules in relation to the proposed composition agreements, i.e. to make any proposed payments of cash and/or any instruments, as well as facilitating its continued operations and support to its assets post composition.

Timeline

The preparation for the composition of the Banks consists of various work streams, both legal and commercial. The BA and the AFU stipulate a certain sequence of events and time limits to pass between those events. The launch of the composition proposal marks the official start of the process which is finalised with the announcement of the conclusion of the composition proposal. The formal composition procedure can last from eight weeks but up to more than 20 weeks, depending on procedural challenges, etc. However, the timeline is primarily dictated by practical and commercial issues. The WUBs are in control of the preparation although they will ensure the requisite support of the main creditors' constituencies, such as the ICCs, before presenting a composition proposal.

Trading with claims

As a general rule under Icelandic law, claims against the Banks are freely transferable. However, the Banks have adopted a specific procedure to recognise the transfer of claims. The WUBs have published their conditions for transfers, such as that both buyer and seller shall notify of the transfer, a transfer request form is completed, and a fee paid. When transfers have been completed in accordance with the procedure stipulated by the Banks, the WUBs will update their lists of claims to reflect the new ownership of claims.

If claims are transferred without regard to the procedures set by the Banks, the transfers are not registered with the WUBs and any dividends, voting rights or other entitlements of the holder is granted to the registered holder of the claim, who would then supposedly be under a contractual duty to pass those on to its counterparty, but without any rights or recourse to the relevant Bank.

It is likely that the WUBs will suspend trading with claims, i.e. stop acknowledging transfers in advance of the Composition Meeting, just as they have done before ordinary Creditor Meetings.

Litigation

The vast magnitude of the collapse of the Banks and the financial interests involved has put Icelandic legislation under intense scrutiny and instigated litigation both in Iceland and abroad.

In Iceland, one of the most important questions which has been addressed by the courts is the legitimacy of the Emergency Act, which, amongst other things, altered the order of priorities and placed depositors (including UK and Dutch "Icesave" depositors as well as wholesale depositors, such as several UK and Dutch local authorities) in a preferential status over general creditors. The Icelandic Supreme Court confirmed that the legislation was justified *inter alia* with reference to the unprecedented economic problems that Iceland faced and the need to maintain trust in that deposits would be safe and thus prevent the total collapse of the country's financial system.

The granting of preference status has led to disputes in relation to the scope and definition of deposits. The Icelandic Supreme Court has ruled that an advisory opinion should be sought from the EFTA Court to clarify the definition of money market deposits. In a separate case an advisory opinion is also being sought from the EFTA Court in relation to specific instances of an alleged inconsistency between the Directive and the AFU. European directives and other secondary legislation of the EEA are not directly applicable in Icelandic law; and nor are advisory opinions of the EFTA Court binding upon Icelandic courts. However, there is a legal requirement that Icelandic law and rules be, as applicable, interpreted in accordance with the EEA Agreement and its secondary legislation.

Further, extensive litigation has been concluded and is pending on various procedural matters.

Outside of Iceland, questions have been raised in relation to the applicability of the Icelandic winding-up proceedings in other jurisdictions and whether the Directive has been properly implemented into Icelandic law. Notable cases include a judgment by the French Court of Cassation from February 14, 2012, which revisited a ruling by the Paris Court of Appeals in relation to the legitimacy of the winding-up of Landsbanki. The Court of Cassation stayed the case pending a ruling of the European Court of Justice regarding questions in relation to whether specific provisions of the AFU and Act No 44/2009 complied with the Directive. Further, in a decision of the English High Court of Justice of England and Wales from March 16, 2011, in relation to Kaupthing, claimants were not prohibited from pursuing their claims in the English courts on the basis that, at the time the proceedings were issued, Kaupthing was not in a Directive-compliant reorganisation measure and there was no other reason to stay the proceedings. This decision was followed by the decision of the English High Court from October 18, 2011, which cast doubt on, although ultimately could not go against, the decision from March 16, 2011 that Kaupthing was not

in reorganisation compliant to the Directive. Other cases have dealt with specific questions in relation to conflicts of law issues in the context of set-off etc.

Concluding remarks

The winding-up proceedings of the Banks have raised various broad issues in relation to cross-border insolvencies and winding-up of financial institutions, as well as narrower matters, such as settlement of complicated financial instruments. Various impediments on the AFU and BA have been identified through litigation which has resulted in amendments to these statutes. Some of the issues are not only relevant to Iceland but are of direct relevance in foreign jurisdictions.

The Banks are important institutions in Iceland, despite being in winding-up. Among their single largest assets are the principal commercial Icelandic banks, Islandsbanki (95% owned by Glitnir), Arion Bank (87% owned by Kaupthing) and Landsbanki (18% owned by "old" Landsbanki). Through their ownership in the new commercial Icelandic banks, the Banks are significant stakeholders in most aspects of the Icelandic economy. Finally, it is expected that the creditors of the Banks will receive part of their dividends in Icelandic *króna* (ISK), which they will be prevented from converting into foreign currencies due to the capital controls described above.

In light of the significant financial interests vested in the Banks and the resurrection of the Icelandic financial system, the conclusion of the winding-up proceedings of the Banks through distributions to creditors and/or composition of individual Banks is of great importance to the creditors and investors. At the same time, the significance for the Icelandic economy and population cannot be underestimated.

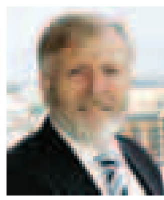
Authors:
Heidar Asberg Atlason, Partner
Email: heidar@logos.is
Gunnar Thor Thorarinsson, Senior Associate
Email: gunnar.thorarinsson@logoslegalservices.com
LOGOS legal services
Efstaleiti 5
103 Reykjavík
Iceland
Tel: +354 5 400 300
Fax: +354 5 400 301
Email: logos@logos.is

42 New Broad Street
London EC2M 1JD
UK
Tel: +44 207 920 3020
Fax: +44 207 920 3099
Email: logos@logoslegalservices.com

Lautrupsgade 7, 4th floor
2100 Copenhagen
Denmark
Tel: +45 70 229 224
Fax: +45 70 274 279
Email: logos@logoslaw.dk

Ireland – Corporate debt restructuring: Solutions in a distressed marketplace

by Billy O'Riordan and Declan McDonald, PwC Ireland



While a liquidity squeeze, an absence of buyer confidence and uncertainty generally have resulted in depressed market conditions over recent years, there are now some signs of increasing interest from foreign investors in distressed Irish trading businesses. Against this backdrop, the major Irish banks are providing significant capital and allocating internal resources to managing and restructuring their corporate loan books. Banks, and borrowers, are conscious of the need to formally restructure their debts in order to build, equip and sustain viable businesses for future growth. This article explores a number of the formal insolvency procedures available to both banks and corporate entities in restructuring corporate debt.

The two main formal insolvency procedures available to companies in restructuring their debts are receivership and examinership. While the basic remedies available through both procedures remain unchanged, variations of each procedure are emerging in an Irish context, with the principal benefit being the preservation of value for stakeholders, whether they are investors, creditors or employees.

Both insolvency procedures are governed by the Companies Acts 1963 to 2009, the Rules of the Superior Court and case law.

Pre-pack receivership

A pre-pack process is one which has been used increasingly in the UK but has not achieved the same level of notoriety in Ireland to date.

A receiver is typically appointed by a debenture holder and will take possession of the company assets subject to the debenture holder's charge. Often, the debenture will provide for the receiver to manage the company's business prior to its sale. A pre-packaged receivership is a sale of all or part of the business and assets of an insolvent company which is negotiated before enforcement, and concluded shortly after the receiver is appointed. A buyer is identified before appointment, valuations are agreed and a contract drafted to enable the assets to be sold shortly after the appointment of the receiver.

Prior to the appointment of a receiver, a number of activities are undertaken to prepare for the immediate sale of the business upon appointment, including sourcing potential purchasers, seeking offers, undertaking due diligence and negotiating the terms of the sales contract. The contract is not completed until the receiver is appointed.

The key goal of any pre-pack receivership is the preservation of goodwill. In sectors where customer confidence is fragile, trading during a traditional receivership, with all the associated uncertainty, has the potential to undermine the business, as both customers and suppliers become reluctant to maintain commercial relationships. When a pre-pack receivership works well, the goodwill of the business tends to remain relatively undamaged.

Advocates of pre-packs claim they avoid protracted insolvency periods and protect employment within companies that are viable but are carrying historic debt they cannot afford. Pre-pack administrations have become relatively commonplace in the UK, where the professional bodies in 2009 issued formal guidance to insolvency practitioners (Statement of Insolvency Practice number 16 ('SIP 16')) to improve the transparency of the process and provide creditors with greater access to information.

A pre-pack receivership is, however, likely to give rise to a number of issues:

(i) there is a perceived lack of transparency to the process;

(ii) unsecured creditors remain unrepresented through the process;

(iii) the process is exposed to the threat of an examinership application; and

(iv) there will be a stigma if the existing owner or management team is buying the business.

The receiver has specific statutory duties under section 316A of the 1963 Companies Act, which states that:

(i) the receiver must achieve the best price reasonably obtainable at the time of sale; and

(ii) the receiver must not sell by private contract a non-cash asset of a company to a person who is, or who, within three years prior to the date of appointment of the receiver, has been, an officer of the company unless the Receiver has given 14

days' notice of his intention to do so to all creditors of the company who are known to him or who have been intimated to him.

These statutory duties are the main reasons why pre-pack receiverships have not generally been arranged under Irish law. It is imperative that the receiver obtains expert legal and valuation advice to comply with his statutory duty to "obtain the best price reasonably obtainable". In a share receivership, the receiver can circumvent the second statutory duty regarding sale of a non-cash assets to a related party since the definition of a non-cash asset states that "For the purposes of this section, a non-cash asset is of the requisite value if at the time the arrangement in question is entered into its value is not less than €1,269.74, but subject to that, exceeds €63,486.90 or 10% of the amount of the company's relevant assets." Typically shares in an insolvent company are likely to have a value less than the requisite €1,269.74 value as stated in the definition as laid out in the Companies Acts.

Breach of a receiver's statutory duties may result in the receiver being held personally liable for any loss incurred. While SIP 16 does not apply in Ireland, it is arguable that its provisions may act as guidelines for receivers pursuing a pre-pack process in Ireland. These guidelines can mitigate the risks in a pre-pack receivership by ensuring that:

(i) independent valuations of all assets are performed by third-party professionals;
(ii) alternative exit and/or sale options are considered prior to concluding a sale;
(iii) efforts are taken by the Receiver and company management to consult with creditors; and
(iv) the connection between the insolvent company and the investor/purchaser is clearly understood and assessed.

Each pre-pack receivership requires the identification of an appropriate investor, negotiation and agreement of terms of sale and accelerated due diligence to implement a transaction. In an ideal scenario this process will be supported by both the secured creditor(s) and the management of the company, who are likely to have a key role in the future of the company after sale of the assets. The key issues to be considered prior to the closure of any sale include determining the status and obligations of onerous contracts, dealing with critical creditors and the Transfer of Undertakings (Protection of Employee) Regulations. Recent cases in the Irish context highlight the importance of securing the support of company management prior to the appointment of the receiver.

One of the few pre-packs in Ireland was the sale of the Superquinn supermarket chain by the receiver in a pre-pack deal. This pre-pack proved to be very effective and ensured the preservation of 2,800 jobs and the continuation of the business. In this case a special €10m supplier fund was set up as part of the sales agreement to pay certain unsecured trade creditors. The success of this pre-pack last year may pave the way for further pre-pack receiverships in Ireland in the future.

Sale of debt

The option may also exist for the bank, as the secured creditor, to sell its debt to an investor prior to the appointment of a receiver, thereby removing the secured creditor's requirement to fund the receivership period. The investor will subsequently appoint a receiver to implement the sale of the business.

Accelerated examinership

The 1990 Companies Act introduced the concept of examinership to enable insolvent companies to explore all opportunities for their survival in an inclusive process. Under this legislation, when an examiner is appointed, the company is placed under the protection of the High Court for a maximum period of 100 days while the examiner seeks to formulate a scheme of arrangement with the company's creditors.

A petition for examinership must be supported by a report of an independent accountant. The independent accountant's report contains extensive details regarding the affairs of the particular company and a statement of opinion, supported by sufficient evidence, as to whether the company and the whole or part of its undertaking would have a reasonable prospect of survival as a going concern and a statement of the conditions necessary for such survival. The report of the independent accountant is critical in any examinership petition and in recent cases the courts have scrutinised the contents of these reports.

An examinership has many advantages, including:

(i) the transparency of the process;
(ii) the statutory protection afforded to secured creditors in the process;
(iii) the automatic stay on collection efforts by other creditors; and
(iv) the binding effect of a scheme of arrangement on all creditors, once sanctioned by the court.

The number of examinerships in Ireland has decreased significantly since 2008 to just 16 examinerships in 2011. This reflects the scepticism of the courts and the reluctance by companies to apply for protection in light of the higher bar for acceptance and perhaps most critically the lack of available investment funding, which is often key to the success of the examinership process. Examinership is not an

appropriate relief in many situations, and it is possible that the process is not very popular due to its technical, legal and potentially costly nature. As a corporate restructuring option however, an accelerated form of the examinership process may emerge as a mechanism to restructure debt and attract equity investment.

With the benefit of detailed planning, the period of High Court protection can be significantly reduced. Heads of terms must be agreed with an investor and a proposed scheme of arrangement must be formulated prior to petitioning the High Court for protection. Detailed planning through this process may reduce the length of the examinership process significantly, with the possibility of the High Court hearing and the scheme of arrangement taking effect within weeks, as opposed to three months.

In any examinership the role of the company's bank(s) needs to be carefully considered. In some cases, the bank(s) will actively support an examinership as being the best way for the company to move forward. However, an examinership can also work to the significant disadvantage of the secured creditor because it will (a) have a very limited role in the process of restructuring the company's finances; (b) be prevented from taking action to collect the debt and enforcing its security during the protection period; and (c) be exposed to all expenses of the examiner having 'super-priority' over the claims of secured creditors.

Banks are likely to take a commercial and pragmatic view as to whether they should support an examinership process. Prior to 2008, the actual market value of the assets securing a bank's debt had generally not fallen below the book value of the debt, so there was little need for banks to agree to write off any portion of their debt. However, given the dramatic decline in property values in Ireland, it is likely that, in future examinerships, banks will be forced to accept write downs of their debts to the actual market value of the security held. Such write downs will of course merely reflect commercial reality. While the bank(s) may be obliged to write off a portion of the debt due from the company, any personal guarantees held in respect of the debt so written off, will remain in place, and may be called upon by the bank.

In 2011 in the High Court decision of the McInerney Group, the High Court ruled for the first time that proposals for a scheme of arrangement, entailing payment to a secured creditor of a written down sum in full satisfaction of its debt, could be approved. The written down value of the debt must reflect or be in excess of what the Court considers to be the market value of the security held. The main criterion for assessing whether the scheme is unfairly prejudicial to the interests of the secured creditor is whether the secured creditor would do better in the alternative (i.e. receivership) or any other method by which its security could be realised. In the McSweeney Dispensers Limited case at the end of 2011, an indicative proposal by the existing principal shareholder was lodged to support the petition to appoint an examiner. However an objection to the petition was lodged by the secured creditor in this instance on the basis that the existing shareholder is seeking to retain control of the company through the examinership process. In his judgement, Justice Clarke emphasised that it is the duty of the examiner to properly and fully advertise for potential investment, that the examiner is expected to pursue all realistic lines of potential investment and not just those which may come from the existing shareholders and that it is the duty of the examiner to unearth other investors willing to put up greater funding.

Ultimately, an accelerated form of examinership can only be achieved where the secured creditor(s) is supportive of the process.

Other options

In the event that new investment for a company cannot be secured, the company's bankers may be agreeable to some form of debt to equity conversion, whereby the bank converts part of its debt into equity in the company. This has been to date a relatively rare phenomenon in Ireland. Some lenders are now taking a medium-to-long term approach with cash-generating indebted businesses and are engaging in debt-for-equity swaps as a way of dealing with non-performing loans, rather than engaging in a forced sale of business assets.

Debt-for-equity swaps can offer a lifeline to struggling businesses, free up cash-flow, protect employment and allow companies to grow. From a company's perspective, such balance-sheet restructurings can have a significantly positive impact by enabling it to continue to trade and compete more effectively with a reduced debt burden. Furthermore, while the insolvency measures discussed above will realise only partial value for certain creditors, a debt-for-equity swap has the potential to create long-term appreciation in value for all stakeholders.

It will be interesting to monitor future trends in this area of corporate restructuring, as debt-for-equity swaps also have the potential to present a number of difficult issues for banks. The time and resources which must be invested in a formal procedure-based debt-for-equity restructuring can be considerable, and in

practice it may be difficult to align the competing aims of the company and the secured creditor. The degree of board involvement required by the secured creditor and ongoing shareholder oversight are other factors to be considered by the secured creditor in appraising any debt-for-equity restructuring.

Summary

Given the fact that each individual restructuring process will have direct consequences for multiple stakeholders (shareholders, directors, employees, banks and other creditors), it is important for both the secured creditor(s) and the directors of an insolvent company to source restructuring advice from experienced legal, accounting and corporate finance professionals in order to assess all available options. All parties need to adopt a proactive approach to the corporate debt restructuring process and all strategic options will need to be evaluated early in the process. This should facilitate the selection of an appropriate restructuring process and maximise value for all stakeholders.

Authors:
Billy O'Riordan, Partner
Corporate Recovery and Insolvency
Email: billy.oriordan@ie.pwc.com

Declan McDonald, Director
Corporate Restructuring and Insolvency
Email: declan.mcdonald@ie.pwc.com

PwC Ireland
One Spencer Dock, North Wall Quay
Dublin 1, Ireland
Tel: +353 (1) 792 6092
Fax: +353 (1) 792 6200
Website: www.pwc.com/ie

Italy – Settlement of over-indebtedness crises

by Prof. PierDanilo Beltrami, Ph.D., Lombardi Molinari e Associati Law Firm

Growing debt among private individuals and households as a result of increasingly resorting to consumer credit has brought about the need for the development of an appropriate legal tool to allow them to obtain some form of debt discharge in an over-indebtedness crisis, i.e. in case the debtor is objectively no longer capable to meet his/her credit commitments.

By Law Decree No 212 of December 22, 2011, subsequently enacted as Law No 3 of January 27, 2012, effective as from February 29, 2012, the Italian legislator, in acknowledging that need, introduced the possibility in the legal system to decide civil insolvency in such a way as to allow a debtor not eligible for standard insolvency procedures to overcome his/her debt crisis through a procedure having characteristics similar to those of debt restructuring arrangements under Article 182-*bis* of Royal Decree No 267 of March 16, 1942 (the "Bankruptcy Act"). In other words, following the entry into effect of the new provisions, individuals precluded from having access to statutory insolvency procedures have been allowed to submit a proposal to their creditors for an agreement based on a plan assuring contractual performance and due payment.

Not unlike the case with the insolvency procedures under the Bankruptcy Act, a debtor wishing to use the new procedure for the settlement of an over-indebtedness crisis must meet two requirements – a subjective one and an objective one.

About the first requirement, Article 7(2)(a) of Law No 3 of January 27, 2012 requires that the debtor be not eligible for any insolvency procedures currently in force. This is patently a negative definition, which embraces a number of different classes of debtors, such as natural persons, private individuals and any business entities not exceeding the size limits set forth in Article 1 of the Bankruptcy Act at the time of filing a proposal for agreement. Others who are allowed to access to the procedure are individuals engaging in intellectual professions, whose economic activity is characterised by the use of an organised whole of assets and legal relationships. Further, Article 7(2)(b) of Law No 3 of January 27, 2012 requires, in order to discourage opportunistic behaviour, that access to the procedure be precluded to debtors who resorted to it at any time in the past three years.

The objective requirement is that the debtor must be in a state of over-indebtedness. Over-indebtedness is a notion similar to insolvency, in the sense that, pursuant to Article 2 of Law No 3 of January 27, 2012, the debtor's situation is one of "persisting unbalance between his/her credit commitments and his/her assets readily liquidatable to meet them, and the debtor's definitive inability to fulfil his/her debt obligations when they fall due."

The procedure is opened by the debtor filing a proposal for a debt restructuring agreement which is intended, unlike a proposal for debt restructuring arrangements under Article 182-*bis* of the Bankruptcy Act, to be accepted by some of the creditors only at a later time. Pursuant to Article 7 of Law No 3 of January 27, 2012, the proposal for agreement must be based on a feasible plan allowing the debtor to fulfil both the obligations arising from the debt restructuring agreement and those undertaken to any creditors unwilling to enter into the agreement.

The Italian legislators have also stressed that, in the same way as in insolvency proceedings governed by the Bankruptcy Act, the plan may provide for any available forms of satisfaction of creditors and debt restructuring, including assignment of future income and, most likely, the division of creditors into classes, provided that any dissenting or outsider creditors must be paid to the fullest extent of their claims.

As for this class of dissenting and outsider creditors, it should be noted that Article 8(4) of Law No 3 of January 27, 2012 entitles the debtor to propose a payment moratorium for up to one year, provided that: (i) the plan appears to be adequate to ensure payment upon the expiry of the moratorium period; (ii) the plan is made the responsibility of a judge-appointed liquidator to be nominated by the crisis settlement panel; and (iii) the moratorium does not apply to any payments due to holders of unpledgeable claims.

The legislator has also specifically provided that,

where the debtor's assets or income are inadequate to warrant the feasibility of the plan, the proposal instrument must be executed by one or more third parties accepting to contribute sufficient revenues or assets, whether as collateral or otherwise, to secure proper performance of the agreement.

As for how an over-indebtedness settlement procedure is instigated, it should be pointed out that, much as Article 9 of Law No 3 of January 27, 2012 generally indicates the filing of the relevant proposal, a reasonable proposition is that the procedure should be initiated by a formal application being filed with the District Court of the debtor's place of residence or business.

The debtor must supplement the proposal with a document showing: (i) all creditors and the amounts due to each of them; (ii) the debtor's own assets; (iii) any acts of disposition entered into in the last five years, complete with the debtor's tax returns for the last three years; (iv) a plan feasibility certificate; and (v) a list of the necessary living expenses for the debtor and his/her dependents, following an indication of the current composition of his/her household as formally certified by the family register. If the debtor is engaging in business activities, then he/she must file his/her accounting records for the past three years, together with a declaration of conformity with the originals.

Especially noteworthy among the documents to be so produced is the list of the acts of disposition entered into by the debtor in the previous five years. This requirement was probably introduced to curb misuse of the procedure by ostensibly pauper debtors. It may, however, turn out to be needlessly burdensome, especially when considering that the unspecific reference to acts of disposition entered into in the last five years covers all and any acts of disposition involving all of the debtors' assets, whether real estate or personal property.

As noted above, the debtor has the duty to file an appropriate certificate issued by the crisis settlement panel, a body of professionals who, as indicated below, has a major role to play in the procedure, particularly because they are responsible for testing the feasibility of the proposed plan, and for certifying that the agreement is capable to secure proper payment to outsider creditors.

Once the debtor's application has been filed, the judge will, pursuant to Article 10 of Law No 3 of January 27, 2012, satisfy himself that the requisite formalities have been performed, issue a decree fixing a hearing to be held before him, and order that both the debtor's proposal and such decree be notified by the crisis settlement panel. Thereupon, unless fraudulent projects or actions are contrived to the creditors' detriment, the judge will order that no individual enforcement actions can be initiated or pursued, no writs of attachment issued nor any preferential rights acquired against or in the debtor's assets for a term not exceeding 120 days. It is fair to presume that, at this stage in the proceedings, the judge is not required to assess the feasibility of the plan, and that he has no discretion to grant or deny such term of asset protection.

In the same way as in a case of prior composition with creditors under Article 160 ff. of the Bankruptcy Act, Article 11 of Law No 3 of January 27, 2012 requires that the creditors' consent to the debtor's proposal be acknowledged by the crisis settlement panel, even though a creditor's notice of consent in the latter case is not treated as a vote, but merely as acceptance of a contractual proposal. In other words, any creditors willing to accept the debtor's proposal must deliver a duly executed acceptance notice in writing to the crisis settlement panel.

For the proposal to be formally authorised, acceptance must be notified by at least 70% of all creditors. In the legislators' silence, it is reasonable to presume that the proposal may or should be so formulated as to divide the creditors into classes with a view to encouraging acceptance.

As the provisions under scrutiny do not specify any time limit by which an agreement with creditors must have been reached, it will be the judge's responsibility to state a term in the order fixing the date of hearing pursuant to Article 10 of Law No 3 of January 27, 2012, lest the procedure should be left without a final date of completion. Obviously, the debtor's assets will no longer be afforded legal protection after the expiry of the 120-day period provided for in Article 10.

Once an agreement is timely reached between the debtor and his/her creditors, it will be the crisis settlement panel's duty, pursuant to Article 11 of Law No 3 of January 27, 2012, to transmit to each creditor a report on the acceptance notices received and the attainment of a statutory quorum, along with the text of the final agreement. After receiving such a report, dissenting creditors, if any, will have 10 days to raise additional objections and, once such term has elapsed, the crisis settlement panel will transmit the report to the judge, specifying any objections received and finally certifying the feasibility of the proposed plan.

At this stage, the judge will be responsible for establishing: (i) the attainment of the requisite quorum of consents; (ii) the grounds for objections; and (iii) the suitability of the plan to ensure full satisfaction of any outsider creditors' claims. Thereupon, the judge will decide whether to grant or deny formal approval of the project. Either decision may be appealed to the District Court of competent jurisdiction, it being understood that the judge delegated to the

procedure may not be a member of the appeal board hearing the case.

In the implementation phase following formal approval of the plan, the crisis settlement panel will have the duty, pursuant to Article 13 of Law No 3 of January 27, 2012, to decide any issues as may arise in performing the agreement, to supervise compliance with the contractual provisions, and to notify the creditors of any breaches as may be detected. In order to ensure proper performance of the agreement, the legislators thought it appropriate to threaten voidance of any payments or disposals of assets made in breach of the agreement or the plan, probably also with a view to discouraging both the debtor and any other party to the agreement from perpetrating, or assisting in the perpetration of, a breach of either the plan or the agreement.

Supervising proper performance of the agreement is not the only task assigned to the crisis settlement panel, which is a body of professionals meeting certain requirements.

As these professionals are given roles that are performed by different persons in other insolvency procedures, they have a pivotal role to play not only in the course of the procedure, but already at the time the plan and the proposal to the creditors are being prepared, since the debtor will necessarily have to turn to them for assistance.

As mentioned above, in addition to discharging advisory functions, the panel is responsible for securing and protecting third-party interests, since it is required to attest the feasibility of the plan and to certify the accuracy of the information contained in the proposal. The panel has also the duty both to collect the creditors' notices of acceptance and to acknowledge any objections to the plan. Furthermore, it is required, on behalf of the debtor, to provide for any statutory notices and public statements as the judge may order, and, after the agreement is formally authorised, it will endeavour to resolve any difficulties as may arise at the enforcement stage by ensuring proper contractual performance by the debtor and notifying the creditors of any irregularities as may be detected.

It is appropriate to stress that the efficacy of the agreement is primarily subordinated to the alternative actions for voidance and termination of contract provided for by Article 14 of Law No 3 of January 27, 2012. Specifically, the agreement may be declared null and void by the District Court of competent jurisdiction at the request of any creditor where the debtor's liabilities have fraudulently been inflated or deflated, a major proportion of his/her assets removed or dissimulated, or non-existing assets fraudulently simulated. Termination is admissible where the obligations arising from the agreement are not performed, any promised security interests are not set up, or the agreement can hardly be performed for reasons outside the debtor's control. Another ground for termination has been introduced by Article 14 of Law No 3 of January 27, 2012, pursuant to which the agreement is deemed automatically terminated where the debtor fails to make any payments due to public administrations or to any providers of mandatory pension or welfare benefits within 90 days of the relevant due dates.

By providing for the statutory settlement of over-indebtedness crises, Law No 3 of January 27, 2012 is undoubtedly commendable for setting up a procedure for the discharge of a person ineligible for bankruptcy proceedings that involves the whole of that person's creditors even when only some of them participate in the agreement.

However, to what extent the procedure under scrutiny will be welcomed is still to be seen, especially because of the apparent lack of real incentives for the creditors to enter into the proposed agreement – contrary to what occurs in the case of the debt restructuring arrangements provided for by Article 182-*bis* of the Bankruptcy Act. For it is fair to predict that the procedure so newly introduced may turn less successful than hoped for, since the benefits arising to the creditors from consenting to the debtor's proposal might prove inadequate to disincline the creditors from seeking individual enforcement actions against the debtor's present and future assets.

Author:
Prof. PierDanilo Beltrami, Ph.D., Partner
Lombardi Molinari e Associati Law Firm
Via Andegari 4/A
20121 Milan
Italy
Tel: +39 02 89622 1
Fax: +39 02 89622333
Email: info@lmlaw.it
Website: www.lmlaw.it

Via Andegari 4/A
20121 MILANO
Tel: +39 02 89 62 21- Fax: +39 02 89 62 23 33
info@lmlaw.it – www.lmlaw.it

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Luxembourg – Being a bondholder in a distressed situation: The debt equity swap route – a vessel fraught with pitfalls?

by Christel Dumont and Martine Gerber-Lemaire, OPF Partners

According to Thomson Reuters' Distressed Debt & Bankruptcy Restructuring Q1 Round-up issued in April 2012, EMEA distressed debt restructuring deal volume amounted to €11.45bn in the first quarter of 2012, marking a 57.3% decrease in activity compared to the first quarter of 2011. Financials was the leading sector with approximately 53% of total completed EMEA distressed debt restructuring deal volume.

Nevertheless, European debtors are now forced to find a more substantive cure for their capital structures than the 'extend and pretend' stopgaps that have been so prevalent in the market in the past two years. The deleveraging is present everywhere and the sole question is how deep will it be.

Creditors, therefore, are now ready to accept to replace part or all of their debt in exchange for equity ('debt equity swap'). It could be seen as the last antidote to avoid death!

Although bondholders are usually unsecured and must deal with the company and its senior lenders, they are commonly and actively involved in the discussions and negotiations of restructuring transactions. Given that bonds are considered company debts, whereas shares, although company liabilities, are equity and represent ownership in the company, bondholders cannot be considered as 'normal' company creditors as their debt is part of a collective debt and is represented by a negotiable instrument. Bondholders are linked to the fate of their debtor, usually for a long period of time, and if the company faces financial difficulties, it is unlikely that they will be reimbursed for the interests or even for the principal in the worst case scenario.

However, in distressed situations, bondholders, despite being unsecured, are not totally left without any means and their rights are quite well protected under Luxembourg law. The current wording of articles 79 to 98 of the law of August 10, 1915 on commercial companies, as amended (the 'Law') dealing with bond issuance has been designed to organise and protect the bondholders' body. Obviously, as the interests of bondholders and shareholders differ, the Law granted a wider protection to bondholders, and both the company that issued the bonds (the 'Issuer') and the general meeting of bondholders are allowed to appoint, during the term of the loan, a representative (the 'Representative') with specific powers. In case of multi bond issuance, each bondholders' body may be represented by a Representative.

The crucial role of the Representative

The Law provides that either at the time of the bond issuance by the Issuer or, at any time during the term of the loan's note, one or several Representatives may be appointed by the general meeting of bondholders.

The Law further provides for some exceptions with respect to the appointment of the Representative, i.e. neither the Issuer, nor (i) the companies holding one-tenth or more of the capital of the Issuer or in which the Issuer has a holding of one-tenth or more; (ii) the companies guaranteeing all or part of the obligations of the Issuer; or (iii) the members of the board of directors, of the management board (*directoire*), of the supervisory board, statutory auditors, external auditors, and representatives of the aforementioned companies can be appointed to this role.

These exceptions reinforce the independent status and the powers granted to the Representative.

The Law has clearly stated the powers of the Representative in case the Issuer appoints it at the time of the bond issuance, in order to protect the bondholders and maintain a certain balance between the rights and duties of the bondholders meeting and those of the Representative. In this context, the Issuer can neither limit these powers, nor extend them while appointing the Representative at the time of the bond issuance.

The main missions of the Representative will be to implement the resolutions adopted by the general meeting of bondholders, to accept on behalf of the bondholders the collateral intended to secure the Issuer's debt, and to take conservatory measures to protect the bondholders' rights.

More importantly, the Representative may be a party to legal proceedings as plaintiff or defendant acting in the name and in the interest of all the bondholders, without it being necessary for the latter to be joined to the proceedings. In this context, once a Representative is appointed, bondholders are

deprived from exercising their rights individually and individual actions that have already commenced shall terminate unless the Representative continues such actions within six months after its appointment.

In a distressed situation, an Issuer, facing an action of a bondholder, may be tempted to convene a general meeting of bondholders to have a Representative appointed in order to block such action. In practice, this can be a huge miscalculation for the Issuer, as the bondholders may agree to appoint a 'friendly' Representative who will continue the action, if such action can be useful to all bondholders. In such situation, the Issuer will still have to face the action and deal with a more organised group of bondholders and a Representative.

When a Representative is appointed by the general meeting of bondholders or after a period of six months if it has been appointed by the Issuer at the time of the bond issuance, its powers are freely determined by the general meeting of bondholders, that can either restrict or extend such powers in order to enhance the protection of the bondholders' rights.

In pre-insolvency situations, the role of the Representative is even more essential. As a matter of fact, it shall represent the bondholders in any bankruptcy, suspension of payments, composition with creditors to prevent bankruptcy, controlled management and all similar procedures, and shall declare all the claims in the name and in the interest of the bondholders and prove their existence and amount by all legal means.

The above clearly highlights that the choice of the Representative is the key stone. The general meeting of bondholders may appoint one of the bondholders as Representative, however, a third party, specialised in distressed situations and restructuring, with a good knowledge of the market in which the Issuer is active, may generally be privileged; especially in order to avoid any conflict of interest between bondholders.

Finally, it is also worthwhile to mention that the general meeting of bondholders may dismiss the Representative. The Representative may also be removed for just cause by the judge presiding over the chamber of the district court dealing with commercial matters, at the application of the company or of any bondholder. This seems like a useful crash barrier in order to protect the rights of the bondholders. In a case concerning a company's request to remove the Representative, a court decision dated February 29, 2012 ruled that as bondholders may have diverging interests from the interests of the company, the Representative should be obliged to act independently and without any conflict of interest and the existence of a just cause or not should be assessed carefully.

Despite the fact that the Representative is appointed by the bondholders meeting, the Issuer is obliged by the Law to pay its fees and to reimburse its expenses. This shall also guarantee its independency towards minority bondholders.

Powers of the bondholders meeting

The Law implemented dual powers between the Representative and the bondholders meeting (two separate organs), equivalent in certain aspects to the ones of a sole manager and the shareholders meeting in a private limited liability company.

Actually, the rules applicable to the conducting of the meetings are similar to the ones applicable to shareholders meetings and are determined by the articles of association of the Issuer, the terms and conditions of the bond issuance and the provisions of article 67 of the Law.

The Law provides that the meeting may appoint or remove the Representative and particularly resolve on the conservatory measures to be taken in the common interest, modify or waive the specific collateral granted to bondholders, but also amend the conditions of the issuance.

Notably, the general meeting of bondholders can postpone one or more interest payment dates, agree to a reduction of the interest rate or change the conditions of payment thereof, extend the amortisation period, suspend the same and consent to changes in the conditions thereof, agree to the substitution of bonds by shares of the Issuer, and agree to the substitution of bonds by shares or bonds of other companies.

However, the Law provides that decisions concerning the amendments to the interest rate, the postponement of the interest payment date, the extension of the amortisation period and the substitution of bonds by shares of the Issuer or by bonds or shares of other companies, may only be taken if the capital of the Issuer has been fully called. Finally, where the substitution of shares for bonds implies a share capital increase of the company, it may only be executed if the capital increase is resolved upon by the general meeting of shareholders no later than three months after the decision of the meeting of bondholders.

With regards to the securities, the Law provides that the meeting can, in the interest of the bondholders, amend or wave the specific collateral granted to the bondholders. The Law has reserved this power to the meeting of bondholders and not to the Representative. This provision was adopted in order to secure the rights of the bondholders towards the Issuer and the Representative, who will only have the power to accept new collateral, but will be powerless with regards to existing collateral at the time of its appointment.

To summarise the roles of each organ: all measures that could affect the financial rights of the bondholders are resolved upon by the bondholders meetings, whereas the Representative executes its decisions or is only allowed to take conservative measures.

Active role of bondholders in debt restructuring

In practice, the Representative lacks adequate power to check the Issuer's moves, as it only has the right to attend the shareholders meetings, to read the minutes of debates and to view the shareholders' register, whereas it is denied a direct access to the most important account books. These limitations reduce the Representative's capacity to perceive the company's financial distress and, consequently, to propose a preventive debt renegotiation, which must be approved by the majority of bondholders.

Nevertheless, the bondholders frequently use the sword of Damocles of suing for bankruptcy in order to bring the Issuer to the negotiating table.

Therefore, bondholders, amongst other stakeholders such as shareholders, senior lenders and creditors, are usually deeply involved in debt restructuring negotiations. As a matter of fact, in the negotiations debt equity swaps are commonly chosen as a potential solution. Consequently, although bondholders will partially lose their investment (sometimes a substantial part of this investment), they will receive equity instead of entirely losing their investment should the Issuer go bankrupt.

In practice, such debt equity swap operations are not so easily carried out and the fact that the various stakeholders in the negotiations have divergent interests clearly does not help to find a solution.

Debt equity swaps imply that all stakeholders should agree on the valuation of the Issuer, assess the amount of debt to be converted into equity, agree on the terms of this conversion and the type of equity to be issued, quantify the allocation of new equity between converting bondholders or other creditors and chose a proper mechanism to convert it, while taking into account tax and regulatory aspects. In any case, a report from an independent auditor is necessary to allow such conversion and thus guarantee the stakeholders' protection.

Meanwhile, the consent of existing shareholders will usually be required with regards to the issuance of new shares as they will face a risk of dilution which might lead them to consider carefully and reluctantly a debt equity swap. In case of a capital increase through authorised capital and in view of 'converting bonds into shares', Luxembourg legal authors have controversial points of view regarding the fact whether it could be done only by the board of directors or not.

For listed companies, regulatory requirements will have to be met, as well as disclosure requirements. Relevant thresholds might be reached while implementing the debt equity swap and clearance on regulatory obligations may be required (such as takeover bid, concerted actions, etc.).

Needless to say, this kind of restructuring is time consuming, costly, difficult to implement and in half of the cases it only reaches a deadlock.

However, the advantage of this solution consists in simultaneously reducing the Issuer's debt (and interest payments) and increasing its equity, which may boost its credibility and confidence to seek new financing in order to continue its operations.

Evidence has proven that the stumbling block of this solution has often been the lack of coordination between the bondholders, which may reduce its efficiency due to the high amount of expected negotiation costs further to breach of covenants. Lenders from the banking sectors are usually more organised as from the beginning (acting through facility agents) and therefore costs of negotiations are usually lower and the use of covenants is more efficient.

Facing the worst: do the bondholders have any rights in case of bankruptcy?

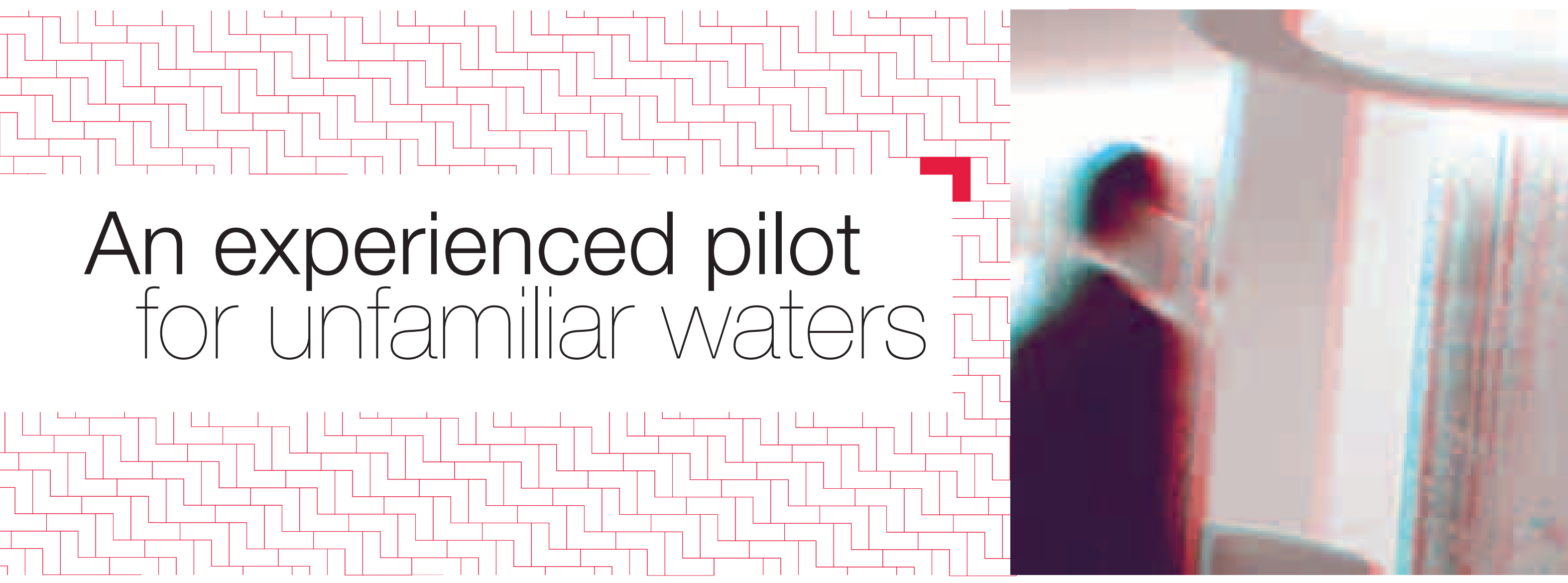
It is deemed crucial that in case of bankruptcy or of any similar proceedings, the general meeting of bondholders shall still have the right to appoint a Representative, as it has the power to represent the bondholders in the insolvency proceedings and to lodge their claims. The bondholders have more weight and powers by being represented as a bondholders' body by their Representative rather than by acting individually.

This seems to be a straight forward route as the provisions of the Law in this respect are crystal clear.

Cross-border insolvency and recognition of a Luxembourg Representative

In practice, the Issuer is rarely declared bankrupt or placed under another insolvency proceeding in Luxembourg. In fact, in Luxembourg there is no real efficient in-court restructuring tool. The procedures of suspension of payments (*sursis de paiement*) and composition with creditors (*concordat préventif de faillite*), which are used to remedy the situation of the debtor, seem to have fallen into disuse. In the past 10 years there have been no reported cases of suspension of payments or composition with creditors and only one or two controlled management proceedings (*gestion contrôlée*) are opened every year.

Under such circumstances, the Issuer commonly



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uses the provisions of the EU Regulation 1346/2000, and, in order to benefit from a friendlier location for restructuring, states that its Centre Of Main Interests is not located in Luxembourg. Should the latter occur, it might be more difficult to have the provisions of the Law enforced. Local courts or insolvency practitioners might be reluctant to accept claims lodged by the Representative and not by the bondholders individually.

In conclusion

Despite the fact that bondholders are legally protected and well organised under Luxembourg law, compared to other types of lenders, they quite often fail to achieve a successful restructuring, as most of the time the bondholders individually have divergent interests from the bondholders' body. Nevertheless, Luxembourg with its large amount of euro bonds continues to be a welcoming and secure country for bondholders.

Authors:
Christel Dumont
Partner, Restructuring & Insolvency/Real Estate
Email: cdumont@opf-partners.com

Martine Gerber-Lemaire
Partner, Restructuring & Insolvency Practice Head
Real Estate/Corporate
Email: mgerber@opf-partners.com

OPF Partners
291, Route d'Arlon
BP 603
L-2016 Luxembourg
Tel: +352 46 83 83
Fax: +352 46 84 84

Website: www.opf-partners.com

Insolvency and restructuring: The Malaysian position

by Jeyanthini Kannaperan, Shearn Delamore & Co.

In Malaysia, we continue to have separate legislation dealing with personal insolvency and corporate insolvency and this article serves to focus on the latter. In this respect, although statutes govern liquidation and other aspects of corporate insolvency, the common law continues to be an important source and guide. The applicable statutory framework in a corporate insolvency is found within the Companies Act 1965 and the Companies Winding-up Rules 1972[1] [both of which have been subject to amendment and review from time to time] and with the Bankruptcy Act 1965 and the Bankruptcy Rules 1969 applying in so far as the rights of secured/unsecured creditors and on proofs of debts.

Compulsory and voluntary winding-up

As a useful starting point,[2] the Act allows for a company to be wound up voluntarily or by the court. The most common ground upon which a company is sought to be wound up, whether by court or voluntarily by its members or creditors is that the company is unable to pay its debts. This results in a slew of issues from the impact of winding-up on the corporate identity and powers of the company to the collection of assets and discharge of liabilities and the distribution of surplus assets. The focus of the article is on the reconciliation of the *pari passu* principle with the rights of creditors to set-off.

Proof of debts

This procedure by which creditors establish their entitlement in the liquidation process is in essence the same whether the liquidation is voluntarily or compulsory. The key factor remains that the claim or liability for which the proof is lodged must be one that is legally enforceable and must exist at the time the company went into liquidation although the provision in the Act[3] provides only for all debts, present or future, certain or contingent, ascertained or sounding only in damages to be proved.

Priority of distribution of assets

The Act[4] provides for an order of priority in payment of monies available from realisation of assets, whether in compulsory or voluntary winding-up. However, a secured creditor enjoys an advantage and can realise its charge to recoup the monies outstanding by the creditor without having to wait for payment with other unsecured creditors[5] although a secured creditor is barred from claiming interest after the date of winding-up if the secured creditor fails to realise the asset within six months from the date of winding-up. In the event of a surplus, a secured creditor is required to account to the liquidator for the same and, should there be a shortfall, a secured creditor can lodge a proof for the unsatisfied balance.

The *pari passu* principle

The rule of distribution that all liabilities belonging to a higher category must be discharged before payment of liabilities belonging to lower categories, with creditors in each class having to be paid equally, remains.[6] However there are significant exceptions to this rule including where devices have been introduced to remove assets from a company's ownership (whether by reservation of title or trust devices) or where a creditor is able to establish a right of set-off.[7]

Set-off and mutual debts

Sime Diamond Leasing (M) Sdn Bhd v JB Precision Moulding Industries Sdn Bhd

Some years ago, the apex court[8] in a contest between a lessor who had leased out equipment to a company and its liquidator held that the lessor was entitled to retain deposits placed by the company as prepaid rentals and security deposits at the start of the leasing arrangement. Pursuant to the terms of the agreement the lessor did, upon a winding-up petition being presented, serve a notice to terminate the lease and retook possession of the equipment and did demand payment of the balance amounts outstanding by the company after setting-off deposits. Upon the company being wound-up, the liquidator demanded refund of the deposits claiming that the lessee was neither a preferential nor secured creditor and that the deposits which represented the assets of the company must be released to the liquidator.

The High Court and Court of Appeal had agreed

with the liquidator that upon presentation of the petition, the claim in respect of the deposits had been reduced to a right of proof and that any other method of claiming the deposits would be barred by the pari passu principle of distribution and to give the lessor the right of set-off would, in effect, give it an undue preference over the general body of creditors and was a breach of the Act.[9]

On appeal, the Federal Court summarised that there were two main issues that arose for decision, namely, whether the set-off pursuant to the agreement was a voidable preference under Sections 223 and 293 of the Act and Section 53(1) of the Bankruptcy Act and whether the set-off pursuant to the agreement was authorised by Section 41 of the Bankruptcy Act. In deciding on the two issues the Federal Court:

- held that the relevant date for the purposes of triggering undue preference restrictions was not the date on which the set-off was effected but the date of the agreement and when the lessor had received the deposits. The Court found that there was no evidence at this stage that the company was insolvent or unable to pay its debts or that the intention of the parties was to confer a preferential priority or advantage over other creditors;
- recognised that "the legislature in providing for insolvency set-off gives legitimacy to a system of accounting whereby the party successfully asserting the set off enjoys a preference over the general body of creditors in a manner similar to that enjoyed by a secured creditor";
- emphasised that Section 41 of the Bankruptcy Act is mandatory and cannot be excluded by Agreement between the parties, "upon the advent of bankruptcy or liquidation, the rights of contractual set off are displaced by statutory provisions relating to set off on insolvency";
- held that in order to qualify as a statutory set-off under Section 41 of the Bankruptcy Act the circumstances must show the existence of mutual credits, mutual debits or other mutual dealings[10] and that the debt existed at the commencement of the winding up. In this respect, the prerequisite of mutual dealings requires that the cross-demands must be between the same parties, and be held in the same capacity or right.

AIMB Marketing Sdn Bhd v Malaysian Trustees Bhd[11]

In this more recent decision, the Court of Appeal had reason to consider Section 41 of the Bankruptcy Act against the backdrop of a supermarket which had executed a debenture in favour of a lender bank and which had also been supplied goods on consignment by various suppliers. The supermarket was compulsorily wound-up and in the course of liquidation, the liquidators recovered a sum of monies (the stake monies) which the receiver and manager appointed by the debenture holder claimed as assets captured by the debenture whilst the suppliers claimed that since the supermarket had not paid for the goods supplied on consignment, the sales proceeds within the stake monies were subject to a trust in favour of the suppliers. Additionally, the supermarket had a credit balance (the account monies) in the account of another bank who asserted a set-off against the monies by reason of the loss of 20 credit authorisation terminals supplied to the supermarket whilst the receiver and manager also asserted a claimed to these account monies.

The Court of Appeal:

- in following a Singapore authority[12] on similar facts, held that in the absence of an express term in the consignment agreement creating a trust, the suppliers should have required the maintenance of a separate account by the supermarket for sale proceeds of the consigned goods. The Court took the position that the freedom provided to the supermarket to mix the sale proceeds with other monies of the supermarket was incompatible with a fiduciary relationship;
- accepted that the High Court Judge was correct to reject HSBC's claim for a set-off under Section 41 of the Bankruptcy Act because the account monies were subject to the debenture and because no mutual credit, mutual debit or mutual dealing within the principles recognised in *Sime Diamond Leasing (M) Sdn Bhd v JB Precision Moulding Industries Sdn Bhd* had been shown.
- concluded[13] that the High Court Judge that was correct in holding that the receiver and manager was entitled to both the stake monies and account monies and directed the liquidator and HSBC to pay the said monies to the receiver and manager.[14]

The conclusions reached by the Court of Appeal in so far as the account monies are surprising given that HSBC was not party to the appeal and as full arguments were not taken to support the finding that the charge credit in favour of the debenture holder prevents a statutory set-off and that no mutual credit, debit or dealing within Section 41 existed because there was no evidence of the loss sought to be set-off.

Conclusion

There continues to be room for further amendment and change to the statutory regime in Malaysia on insolvency law. Given the robust speed with which other legislation has been passed in the last few years it would be safe to assume that change in the insolvency provisions will be sooner rather than later.[15]

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Malaysia
Tel: +603 2027 2727
Fax: +603 2078 5625
Email: info@shearndelamore.com

Penang Branch Office
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Notes:

[1] The Act and Rules do in the main echo principles that stem from earlier English and Australian legislation and case law from both jurisdictions continue to be received as persuasive authority, subject to the guidelines in the Civil Law Act 1956

[2] Section 211 Companies Act 1965.

[3] Section 291(1) Companies Act 1965.

[4] Section 292 Companies Act 1965.

[5] Section 8(2) and 8(2)A of the Bankruptcy Act 1969. The Court of Appeal in *United Overseas Bank (Malaysia) Bhd v Andrew Lee Siew Ling* (2011) 6 AMR 51 accepted that this bar to further interest would only apply as against the company in liquidation and that such interest can still be claimed against guarantors and securities provided by third parties if the contracts entered into with these persons allowed for such interest to be paid.

[6] Section 264 Companies Act 1965.

[7] Section 41(1) of the Bankruptcy Act 1969 – where there have been mutual credits, debts or dealings between an insolvent company an account shall be taken of what is due from each party and only the balance of the amount shall be paid/claimed.

[8] 1998 4 MLJ 469 – dicta of Edgar Joseph FCJ.

[9] Section 293 of the Companies Act 1965 and Section 53 of the Bankruptcy Act 1969 – the stipulated transactions, including transfer of property and payments made by a company unable to pay its debts to a creditor within six months prior to the commencement of winding-up shall be void.

[10] "Dealings" – the Court accepted an Australian authority on the point [*Gye v McIntyre*] and that dealings is used in a non-technical sense and is a term of wide scope but must relate to commercial transactions.

[11] 2011 5 MLJ 210.

[12] The Singapore Court of Appeal in *Hincklay Singapore Trading Pte Ltd v Sogo Department Store (S) Pte Ltd* 2001 4 SLR 154.

[13] An application for leave to appeal to the Federal Court was unsuccessful and the decision stands.

[14] The documents placed before the High Court confirmed that the supermarket acknowledged that the terminals were lost/removed.

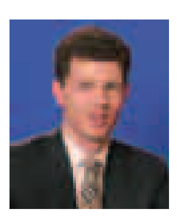
[15] The Deputy Prime Minister Tan Sri Muhyiddin Yassin did in March 2012 state that the Companies Commission of Malaysia (SSM) will introduce a more comprehensive Companies Act and that this move is among initiatives to be taken by SSM to create a more competitive and conducive business environment in the country.

Author:
Jeyanthini Kannaperan, Partner
Shearn Delamore & Co.
7th Floor, Wisma Hamzah-Kwong Hing
No 1 Leboh Ampang
50100 Kuala Lumpur
Malaysia
Tel: +603 20272849
Fax: +603 20342763
Email: jeyanthini@shearndelamore.com
Website: www.shearndelamore.com

Recent developments in Dutch restructurings

by H.F. van Druten, V.R. Vroom and A.C.P. Bobeldijk, Loyens & Loeff

The Netherlands has traditionally been a very open economy. In part due to its competitive tax climate, many international transactions have been structured via (holding) companies in the Netherlands. In recent years, the ways in which these companies have restructured their financial position have become more varied. An important part of any restructuring in the Dutch market will always be linked to the Dutch law security rights that have been put in place. There have been an increasing number of enforcement sales in the Netherlands, although case law on the matter is still scarce. Some of the larger restructurings concerning a Dutch (holding) entity in an international group, have been implemented in part via proceedings (both in and outside insolvency) in jurisdictions such as the UK, the US and France. This article provides an overview of the different types of restructurings that have recently been seen in the Dutch market. We will also describe the tax aspects attached to these types of restructuring.



International aspects

Larger restructurings typically involve group companies in different jurisdictions. Depending on the circumstances, an enforcement sale of the shares in the holding company may not always resolve the issues faced by lenders or companies. Especially in cases where different groups of lenders (such as mezzanine or subordinated lenders) have granted loans directly to companies at a lower level in the group other aspects will need to be dealt with in the restructuring. We would expect that a reduction of debt levels within the group is a key element to any restructuring, so depending on the structure of the financing other methods will need to be used by the lenders in addition to a mere enforcement of a share pledge.

In a number of cases where Dutch holding companies were acting as the main borrower under the finance documents, the restructuring was partly implemented by way of certain legal proceedings in non-Dutch jurisdictions. We will hereinafter not describe these non-Dutch processes, but we will touch upon how these proceedings may play a role in a Dutch restructuring.

US Chapter 11

In one notable Dutch restructuring concerning a Dutch holding company of an aluminium group (Almatis), US Chapter 11 proceedings were opened in respect of such Dutch holding company. One of the advantages of a US Chapter 11 proceeding over a restructuring implemented via the Netherlands is that secured creditors can be crammed down in a Chapter 11. Dutch legislation does not provide for a possibility to cram down secured or preferred creditors. To the extent enforcement of security rights does not lead to a situation in which all opposing secured creditors are forced out of the structure, a Chapter 11 can be a useful tool for the controlling senior lenders.

However, a US Chapter 11 can also be used by a Dutch borrower to stave off actions from its secured creditors due to the fact that an automatic stay applies to all actions of creditors, including secured creditors. Dutch law on the other hand only provides for very limited possibilities to stall actions from secured creditors. In a case involving a Dutch shipping group (the Marco Polo group of companies), Dutch entities were made subject to Chapter 11, whereby the aim was to be able to restructure their business and invoke protection against their secured lenders. The companies required protection against their secured creditors in order to be able to restructure their business, which protection Dutch law could not offer. The opening of Chapter 11 proceedings was possible in spite of the fact that the companies at hand did not have a material business in the US. Opposition from the secured lenders to this move by the Dutch companies was rejected by the court in the US.

An important proviso that needs to be made in respect of the use of a US Chapter 11 is that Dutch law does not recognise a US insolvency proceeding. As was shown in the Marco Polo case, this limitation does not (always) have to prevent a successful restructuring via a Chapter 11.

UK scheme of arrangement

In addition to US Chapter 11 proceedings, there has also been increasing attention to the possibilities to effect a restructuring via certain options under English law. In particular, a so-called scheme of arrangement

sanctioned by the English courts may provide opportunities for international restructurings. The English courts have assumed jurisdiction over non-UK companies in a number of cases, whereby these companies and their creditors were subject to finance documentation governed by English law. It is however still an open issue to what extent an English scheme of arrangement can be recognised and enforced in the Netherlands (or, for that matter, other European jurisdictions). Such a scheme does not fall under the scope of the European Insolvency Regulation, but it has been argued that recognition may be possible under the European Enforcement Regulation or under the Rome Convention on the choice of laws. Alternatively, parties may possibly rely on the rules of Dutch private international law in order to get the English scheme of arrangement recognised.

Dutch law features

Enforcement of security rights remains a key feature of many restructurings in the Netherlands. In addition to this, an alternative approach entails the implementation of a so called STAK structure, which we will both describe hereinafter.

Enforcement of security rights

There are three ways in which the enforcement of a Dutch law security right can take place. Secured assets can be enforced by way of (i) a public sale; (ii) a private sale with court approval; or (iii) a private sale by agreement between the pledgee and the pledgor(s). These enforcement options apply irrespective of the type of asset at stake, except that enforcement of a right of mortgage over real estate can only take place by way of a public or a court approved sale.

In practice shares are usually the most "logical" type of asset to sell off, since this will most easily maintain the going concern of the business and thus create a prospect of the highest enforcement proceeds. Since shares in a private limited liability company are mandatorily subject to transfer restrictions and in view of the fact that there is accordingly no market for this type of shares, a private enforcement sale is the most likely enforcement method. Both a court approved private sale and a private sale with the approval of the pledgor are seen in the Dutch market.

Private sale with court approval

A request for a court approved sale will have to be filed with the competent court by the pledgee. At the court hearing, to be held on a date set by the court, interested parties will be heard on the request for a private sale. Interested parties can include mezzanine lenders, other secured creditors or a person who has levied an attachment on the shares.

The court will in practice only grant approval for a private sale if (i) the pledgee has already found a buyer for the shares (although it should in theory be possible to request approval for a private sale where a specific purchaser is not yet known); (ii) the purchase price is a fair one; and (iii) it can be established that the potential buyer is creditworthy.

Valuation of the pledged assets is key in an enforcement scenario. Dutch law does not provide for rules or regulations with regard to the method of valuation and case law on the matter is still scarce. Decisive is that the court will have to be convinced that the price offered is a fair price for the shares and that (accordingly) no better price can be obtained through a public sale. In order to ascertain whether the price offered by way of the request is fair, the court may hear competitive bidders. The fairness of the price can be substantiated by independent valuations and/or fairness opinions provided to the court and a marketing exercise is also common.

Private sale by agreement

Once the debtor is in default (*verzuim*), the pledgee can agree with the pledgor to privately sell the pledged shares without the requirement for court approval. Any party with a restricted right (*beperkt recht*) or a party that has levied an attachment (*beslag*) on the shares – if any – has to consent to this method of private sale.

A pledgor considering whether to grant approval to a private sale should be convinced of the fact that the highest enforcement proceeds are obtained through a private sale. Especially where it is ascertainable at what level of debt the value of the pledged shares breaks, a private sale with consent of the pledgor is a quick and easy method to enforce a (share) pledge. However, in case there are hostile lenders opposing the enforcement sale and in cases where there is debate or uncertainty on the valuation, a pledgor will likely be hesitant to grant its approval to a transaction for fear of being held liable. In such case, the court approved sale route seems the only practical option for implementing the restructuring.

STAK structure

One of the difficulties for secured lenders in the current market is that it is not always possible to find a purchaser willing to make a bid on the secured assets. Where the financing provided to borrowers has been used to acquire a large real estate portfolio, it may be preferable in a restructuring to sell the properties on an individual basis (or in small numbers) instead of on a portfolio basis, since there are not always buyers in the market that are able or willing to acquire a large portfolio. These potential purchasers will likely have to raise debt financing in order to make a credible bid (unless the secured lenders are willing to "roll over" their loans) and clearly the debt market has not been very open in recent years.

This has led to more creative approaches to

restructuring, whereby control is taken away from the shareholder/sponsor without a full market sale of the assets taking place. Such a structure can be achieved by transferring the shares in the holding company to a Dutch foundation (which is a separate legal entity with full legal personality). This effectively leads to a split in legal and beneficial ownership to the shares. Depositary receipt in respect of the shares, representing the economic rights attached to the shares, is thereby issued to the shareholders. At the same time, control over the structure is acquired by the secured lenders and the sales process can thereafter take place in an orderly way so that a fire sale is avoided. A STAK structure is typically implemented with the cooperation of the shareholders, since the shareholders will have to transfer the shares to the foundation in return for the depositary receipts.

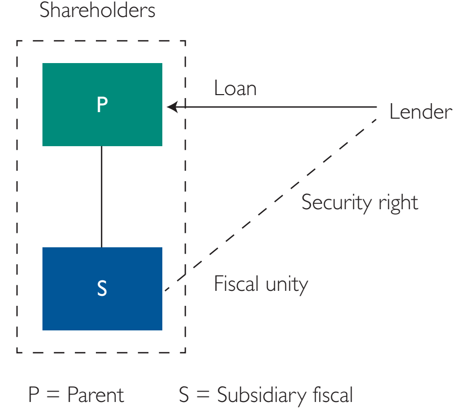
Tax aspects

As explained in the previous paragraph, the enforcement of a security right remains a key feature in many restructurings in the Netherlands. The tax aspects of such enforcement and the tax aspects of the alternative STAK structure will be described hereinafter. The tax implications of restructurings that are implemented by way of legal proceedings in non-Dutch jurisdictions (e.g. US Chapter 11 proceedings or UK scheme of arrangements) are dependent on the specific circumstances of each case. We will not describe the tax aspects of these non-Dutch processes in this article. However, as a general remark we would expect that such proceedings will lead to a reduction of debt levels within a group. We will touch base on the tax consequence of a reduction of debt by way of a waiver or a conversion (in combination with a termination of a fiscal unity) in the section 'enforcement of a security right' below.

Enforcement of a security right

The enforcement of a security right by a lender, which leads to a sale of shares, can have several tax consequences. In this respect, it will make a difference whether this enforcement sale will take place with or without approval of the shareholders. It is important to distinguish the related tax consequences in advance as these tax consequences will contribute to the decision whether the restructuring with or without the consent of the shareholders is preferred. For purposes of this article it is assumed that the company (on which shares the lender has a security right) will be part of a fiscal unity for corporate income tax purposes as a subsidiary. In most cases (part of) the financing will be attracted at the level of the parent company, i.e. the takeover holding company. This simplified structure can be seen in Figure 1.

Figure 1: Enforcement of a security right



If the lender enforces its security right and consequently sells the shares, the fiscal unity will be terminated. The tax consequences of a termination of the fiscal unity for the tax loss position, the underlying intra-group debt positions, the future waiver of the debts and conversion of debt will be analysed successively. These tax consequences will not be influenced by the fact whether the enforcement of the security rights will be made by way of a sale to a third party or by way of an acquisition of the shares by the lender.

Tax loss position

In general, taxable losses of a fiscal unity will be attributed to the parent company. Upon deconsolidation of the subsidiary from the fiscal unity, any losses incurred during the lifespan of the fiscal unity will in principle remain with the parent company regardless to which company these losses were attributable. Pre-inclusion losses of the subsidiary that are incurred before this subsidiary become part of the fiscal unity will be attributed to the subsidiary which incurred these losses. There is an important exception to this general rule. At the joint request of the parent company and the subsidiary, fiscal unity losses can also be given to the subsidiary to be excluded from the fiscal unity, insofar these losses are attributable to this subsidiary. Given the requirement that such an attribution of losses is only possible at the joint request of the parent company and the subsidiary, the subsidiary can only avail itself of this possibility if the financial restructuring will take place in consultation with the shareholders.

It was unclear for a long while at what point in time the amount of losses to be allocated to the subsidiary should be determined. The Dutch Supreme Court recently ruled that the amount of taxable losses to be allocated to the subsidiary should be determined at the moment of deconsolidation of the subsidiary from the fiscal unity. Consequently, any

taxable events at the level of the parent company after deconsolidation of the subsidiary do not influence the amount of the loss to be attributed to the subsidiary of the fiscal unity.

Intra-group debt positions

During the lifespan of the fiscal unity, intra-group receivables and loans are eliminated in the tax consolidation and are therefore disregarded for tax purposes. Intra-group receivables and loans revive upon termination of a fiscal unity. Debts on fiscal unity entities should then be set at nominal value. The corresponding receivable should in principle be valued at business value, which in most cases equals the fair market value. The existence of intra-group receivables in itself does not trigger a taxable moment in case of termination of the fiscal unity. However, if the subsidiary has a debt to the parent company and this debt will be waived in a later stage, this may have negative tax consequences (see below).

For the sake of completeness, we would like to note that there is a provision which states that if the deconsolidation takes place within the sight of a 'liquidation', external debts of the deconsolidated company (so debts to other entities than the entities that are part of the fiscal unity) should be revalued at the immediate moment prior to the deconsolidation to the business value of the debt (assuming that this amount is lower than the nominal value). With this provision, the legislator aimed at situations in which the company got bankrupt after deconsolidation. In our view, this provision can not be applicable if a company does not get bankrupt or a bankruptcy will end due to a creditor's compromise.

Taking into account the history and the wording of this provision, the application of this provision could be open for discussions with the tax authorities. The potential lower valuation of the debt and the corresponding taxable profit of this lower valuation will be triggered before termination of the fiscal unity. To the extent that this taxable profit exceeds the amount of taxable losses and, consequently, leads to taxes to be paid, this tax is due by the parent company of the fiscal unity and not by the deconsolidated subsidiary. However, the subsidiary is jointly and severally liable to all tax liabilities that have arisen during the period that this subsidiary was part of the fiscal unity. Therefore, this subsidiary can be held liable for the incurred tax liability if the parent company is not able to pay off this liability.

Waiver of debts

As described above, intra-group receivables and loans are disregarded for tax purposes during the lifespan of the fiscal unity. Therefore, a waiver of intra-group loans during the existence of the fiscal unity has no tax consequences. The analysis is different if the waiver of intra-group debts takes place after termination of the fiscal unity. A waiver does in principle result in a taxable profit at the level of the debtor. Based on a statutory provision, the profit as a result of the waiver is exempt to the extent it exceeds the sum of the existing losses. In other words, in case of a waiver the debtor does not have to pay any taxes but has to give up its taxable losses (with a maximum of the amount of the waiver).

However, if the debtor was part of a fiscal unity in the six years prevailing to the waiver, not only the taxable losses of the debtor should be taken into account but also the losses that the debtor incurred during the period that it was part of the fiscal unity. Assuming that no losses were attributed to the debtor upon termination of the fiscal unity (as these losses were offset against profits of other fiscal unity entities and/or because the parent company did not agree to attribute losses to the subsidiary), the waiver can nevertheless lead to a taxable profit at the level of the debtor.

Conversion

A conversion of a debt into equity does not result in a profit at the level of the debtor. Therefore, no corporate income tax (nor any other tax) will be due upon conversion. If the debt that will be converted into equity is owed by the parent company of the fiscal unity, the conversion will not result in a termination of the fiscal unity. However, if the debt is owed by the subsidiary, the creditor will acquire shares in the subsidiary as a consequence of the conversion. If the parent company will not continue to own at least 95% of the shares in the subsidiary as a result of the conversion (one of the requirements for a fiscal unity), the fiscal unity will be terminated. In that case, the abovementioned points of attention should be considered again.

STAK structure

As explained above, the so-called STAK structure can be used as an alternative approach in restructurings. A STAK is only subject to Dutch corporate income tax if and to the extent it carries out a business. The mere holding of the shares by a STAK is generally not considered a business. Hence, the STAK should not be subject to corporate income tax. Also, for corporate income tax purposes not the STAK but the holders of the depositary receipts in respect of the shares will be considered the owners of the shares. Although a STAK is the legal owner of the shares, the ownership for Dutch tax purposes lies with the holders of the depositary receipts. From a Dutch tax point of view, a STAK is considered a nominee.

Please note that the acquisition of shares in a company may be subject to real estate transfer tax if the assets of the company mainly consist of (Dutch)

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Contact

Amsterdam
Hendrik van Druten (corporate)
T +31 20 578 59 25
hendrik.van.druten@loyensloeff.com

Vincent Vroom (corporate)
T +31 20 578 59 84
vincent.vroom@loyensloeff.com

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real estate. The interposition of a STAK will in principle also be subject to real estate transfer tax. However, provided that certain conditions are met, real estate transfer tax can be avoided. Those conditions are aimed to ensure that the depositary receipts can be equated with the underlying shares.

Given the tax treatment of the STAK as described above, using a STAK in restructurings should in principle not have adverse tax consequences. However, an interposition of a STAK between a parent company and a subsidiary that are part of a fiscal unity could lead to a termination of the fiscal unity. For the sake of completeness, we would like to note that such interposition of a STAK does not necessarily lead to a termination of a fiscal unity if voting rights are exercised by the STAK as legal owner further to instructions by the shareholders. However, a STAK is often used in international restructurings to separate the economic rights and the voting rights and will thus in practice lead to a termination of a fiscal unity.

Conclusion

It is recommended to consider the tax consequences of the enforcement of a security right in advance if a company is part of a fiscal unity. The consequence of a termination of a fiscal unity without the approval of the shareholders is that the taxable losses of a company which are incurred during the lifespan of the fiscal unity can not be used any more by the deconsolidated company. A waiver of debts to the amount of the losses is not exempt and can therefore result in a tax liability. This undesirable effect can under certain circumstances be prevented by an efficient tax structure. If this is not possible, a restructuring in consultation with the shareholders might be preferred. A STAK structure is commonly used to separate the legal and beneficial ownership of the shares. The interposition of a STAK could in principle be achieved without adverse tax consequences. If the shares in a company that is part of a fiscal unity will be transferred to a STAK, such a transfer could lead to a termination of the fiscal unity.

Authors:
H.F. van Druten, Partner
Tel: +31 (20) 578 5925
Fax: +31 (20) 578 5843
Email: hendrik.van.druten@loyensloeff.com

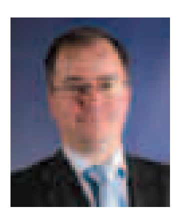
V.R. Vroom, Lawyer
Tel: +31 (20) 578 5984
Fax: +31 (20) 578 5843
Email: vincent.vroom@loyensloeff.com

A.C.P. Bobeldijk, Partner
Tel: +31 (20) 578 5415
Fax: +31 (20) 578 5160
Email: arco.bobeldijk@loyensloeff.com

Loyens & Loeff
Fred. Roeskestraat 100
1076 ED Amsterdam
The Netherlands
Website: www.loyensloeff.com

Restructuring in Portugal – the time has come!

by José Luís Silva, KPMG Portugal



The global financial crisis caused a massive increase in financial restructuring activity around the world in the recent past. Nevertheless, in Portugal, and despite the fact that the Eurozone crisis changed the global picture dramatically, there was not a significant behavioural change in the way to approach the restructuring of distressed businesses. Without any doubt there was a significant wave of financial restructurings in the last two years, with much rescheduling on the debt service plans, waiting for the underlying growth of the (global) economy to take place, and supporting the turnaround of those businesses. Unfortunately, growth is not yet taking off and, to the contrary, further market contraction impacting on consumer spend is expected, as well as a long-lasting contraction in business-to-business transactions, M&A activity and sovereign balance of trade; this can determine the absence of exogenous conditions for companies to materialise turnaround strategies.

In fact, the crisis effect seems to be different from any previous experiences. Portugal is facing a severe adjustment plan agreed with the IMF/EU, which is intended to deliver a significant reduction on the government deficit to 5.9% of GDP in 2011, 4.5% in 2012 and 3.0% in 2013. The adjustment plan to deliver is tremendous and includes (non-exhaustive):

Structural measures:

- Accelerate the privatisation programme.
- Avoid engaging in any new PPP before the completion of the review of the existing PPPs.
- Reduce operational costs by the end of 2011 and apply tighter debt ceilings to SOEs from 2012 onwards.
- Reduce management positions and administrative units by at least 15% in the central administration.
- Reduce the number of municipality offices by at least 20% per year in 2012 and 2013.
- Reorganise local government administration.
- Limit staff admissions in public administration to achieve annual decreases in 2012-14 of 1% per year in the staff of central administration and 2% in local and regional administrations.
- Banks' regulation imposing core Tier 1 capital ratio of 9% by end-2011 and 10% at the latest by end-2012 and maintain it thereafter.

2012 revenues and expenses measures:

- Improve the central administration by eliminating redundancies, increasing efficiency, reducing and eliminating services that do not represent a cost-effective use of public money.
- Reduce costs in the area of education, by rationalising the school network.
- Ensure that the aggregate public-sector wage bill as a share of GDP decreases in 2012 and 2013 (limit staff admissions, freeze wages and reduce costs of health benefits schemes for government employees).
- Control costs in health sector.
- Reduce pensions above €1,500.
- Reform unemployment insurance.
- Reduce transfers to local and regional authorities.
- Reduction of corporate tax deductions and special regimes.
- Reduction of personal income tax benefits and deductions.
- Apply personal income taxes to all types of cash social transfers and ensure convergence of personal income tax deductions applied to pensions and labour.
- Changes in property taxation to raise revenue by reducing substantially the temporary exemptions for owner-occupied dwellings.
- Raise VAT revenues.

Labour market and education measures:

- Reducing the maximum duration of unemployment insurance benefits to no more than 18 months and capping unemployment benefits at 2.5 times the social support index.
- Reducing the necessary contributory period to access unemployment insurance from 15 to 12 months.
- Reform the severance payments for new hires and align severance payment entitlements for current employees in line with the reform for new hires.
- Reform proposal aimed at introducing adjustments to the cases for fair individual dismissals contemplated in the Labour Code.

Housing market measures:

- Amend the New Urban Lease Act Law 6/2006 to ensure balanced rights and obligations of landlords and tenants, considering the socially vulnerable.
- Property taxation amendments with a view to level incentives for renting versus acquiring housing.

Despite the significant economic contraction in the short/medium term, resulting from the above measures, the effects of the current economic and financial crisis are being felt far beyond the country level, and all turbulence within Eurozone borders is making the future more uncertain. What happens in Spain, Italy and (to a certain extent) Greece will definitely be key to determine when the economic downturn may come to an end and what will be the monetary scenario going forward.

On top of the Eurozone environment, the US economy is still passing through turbulent times, while China's macroeconomic growth has slowed down as external trade has fallen due to the impact of the euro crisis and American debt crisis and even the fact that China overtook Germany as the world's largest exporter in 2010, does not bring enough confidence to accept China as the World's growth engine in the next decade.

With this background, balance-sheet restructuring will not (solely) be enough to guarantee the survival of distressed businesses/companies. Contemplating another three to five years of low or no growth should lead to a radically different approach. Lenders cannot simply accept wishful thinking business plans without any adherence to expected difficult times.

Regardless of the euro meltdown scenarios that we can possibly imagine, it will not be possible to sustain the economic turnaround without a completely new way of doing things, which will be dependent on the capacity to enforce key transformational measures.

Portugal is being supported in its adjustment plan by the IMF/EU and, likewise, other companies will need economic/financial adjustment plans to be negotiated and closely monitored. This will lead to insolvency playing a much bigger role and turnaround plans to be much more all-encompassing than the "excel business plans" we have seen in the past.

A new insolvency law is expected to be in force in the next few weeks (expected to be in force when this article is being read), which arguably will significantly facilitate the restructuring scenarios on distressed situations. Existing insolvency law (Decree Law nr. 53/2004, amended by Decree Law nrs. 200/2004; 76-A/2006; 282/2007; 116/2008; and 185/2009) experience is that, in most cases, the end is the liquidation proceedings, whilst the new Law intends to bolster companies' viability scenarios.

Expected major improvements of this new Insolvency Law are related to:

- a decrease of the notice period to request insolvency and for creditors to claim for their credits;
- the possibility of accelerating the sale of assets based on insolvency administrator's judgment;
- strengthening the power of the insolvency judge to take decisions based on its assessment of the circumstances;
- additional protection for creditors intervening on pre-insolvency restructuring agreements;
- several processes simplification and procedures softening; and
- last but not the least, the possibility of having legal enforceability for extra-court restructuring agreements, provided such agreements are signed between the debtor and a qualified majority of the creditors of the company.

Let us wait and see the merits of the new legal environment, but please do not expect too much from this new Law. Lenders, companies, shareholders, management, workers, tax authorities, courts, etc. will still be the same!

It will be critical going forward to really make a difference, that the several company's stakeholders (typically the lenders, workers, tax authorities and shareholders) can identify clearly the reasons behind the underperformance and objectively discuss the conditions for an effective turnaround, which will probably rely significantly on all parties accepting to lose something, investing more, and bearing some (extra) risks. This is only possible with a strong management and leadership driving the turnaround exercise and a close monitoring of the action plan agreed between different creditors/stakeholders.

With the recent reinforced trend for restructuring funds set up in Portugal, a real opportunity for "real restructuring exercises" is taking place. Although it has been set up on the basis of banks' distressed assets, derecognised or not (depending on the nature and scope of the transaction) from the banks' balance sheets, those restructuring funds are aimed to bring a completely new approach, with a professional/customised and informed approach to the restructuring initiatives.

While this is not an exhaustive list, we could mention a few examples of what we consider key to maximise the potential success of any restructuring exercises under the current economic environment in Portugal for a significant majority of the businesses under pressure, as follows:

Increasing the top line

Maximising the installed capacity and/or reducing waste on existing capacity, focusing on new markets (e.g.

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For more information, please contact:

José Luís Silva
Head of Restructuring
KPMG in Portugal
jlsilva@kpmg.com

kpmg.pt

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exports) or market segments (e.g. green/health growing niches), increasing the value added of company's products/services, and using new sales channels (e.g. Internet), are some of the alternatives to be carefully analysed. This assessment will be key to determining the potential for turnaround, but it should not be a theoretical exercise only. Growth perspectives are to be deeply challenged and supported by specific analysis of the customers and products alongside with market studies, as well as proper understanding of the sales process (including logistics) and comprehensive incentive sales plans.

Another option to address growth is the opportunity for consolidation that is increasingly on the table as competition struggle/collapse, which should not be seen as a cost-saving only opportunity, but must have a commercial rationale as well, with identifiable opportunities for complementary product mix, markets or clients.

In summary, it will be key to identifying specific actions to increase the top line, even with the expected economic downturn, bearing in mind that through consolidation or organic growth (volume or price), it will be almost impossible to qualify for a successful turnaround, if no specific growth areas are identified.

Cost optimisation

After having this as a top priority in the last few months, with some cost savings already delivered this will represent a real challenge for the majority of the businesses, but not an impossible mission. It will require a very detailed and systematic exercise of revisiting the full operating model of the company, as if a greenfield operation is being setup.

A typical mistake is to find savings by analysing historical cost structures and determine saving targets. This may help to find some efficiency, but will not be transformational for the company.

The "blank paper" exercise is not an easy exercise, and will probably end up with a significant mismatch on the number and qualification requirements of your personnel structure, as well as other significant surprises on the unnecessary costs being borne by the business. Significant required changes are anticipated to increase productivity. On the staff side, the most sensible one, it will be the time for open and honest communication. Undoubtedly, labour laws are key for this analysis and may represent a key constraint, but not running the exercise will not create the business case to challenge unions, workers associations or individuals.

The exercise should not be a back-office/administrative tasks' optimisation exercise only, since all production/operation should be challenged, but on those areas the expectation is that huge savings are possible, regardless of whether the company is already operating on a shared services group basis.

Cash and working capital optimisation

This is one of the tremendous potential areas for improvement on most Portuguese companies. Reducing working capital and restricting cash payments during difficult periods cannot be called 'cash and working capital management'.

Before being able to set up a proper cash management strategy, the company needs to answer questions as follows:

- Is there a cash forecasting (short/medium and long-term) procedure in place? Although not many 'yes' answers are expected, the accuracy of such forecasting exercises needs to be assessed.
- Who is responsible for the inputs and for monitoring deviations? The ones in-charge of inflows or outflows should be involved and hold accountable.
- Are your creditors (including banks) familiar with your outflows forecast and happy with its reliability and robustness?
- Have your procurement terms (cost, payment period, service level) been optimised recently?
- Do you have the inventory required by the business or the one you could not sell?
- How much do you know about your clients payment strategy/procedures and cash constrains? Can you find alternative mechanisms to increase certainty of inflow forecasts?
- Do you manage your cash or you simply look into what is available?

Cash and working capital management can be subject to improvement initiatives if key drivers are properly identified and measured over time, and given the poor (or lack off) existing cash management practices amongst Portuguese companies, significant benefits can be anticipated from specific action in this area.

Proper and enthusiastic management

Leadership is missing! If the business is facing a downturn it is probably because it is facing a lack of proper management and/or leadership, unless the crisis is all across the sector. Even in this scenario, the companies that will successfully and firstly complete the turnaround will be the ones having a robust, proactive and enthusiastic management that is able to lead a quite demanding restructuring exercise.

Engaging a Chief Restructuring Officer is strongly recommendable, not only because the type of issues, challenges and decisions require a specific expertise that typical management does not have, but because the day-to-day business requires full concentration and commitment from the management, which is

even more evident in periods of crisis. This function may also help in identifying and assessing existing management competencies, which will also be critical to implement any viability plan.

CAPEX budget

Turnaround plans can be expensive. It does not make sense to discuss a medium to long-term turnaround plan if no investment capacity is anticipated.

There are few ways to reduce the cashflow requirements, namely (but not limited to) mergers and/or divestment/sale of non-core assets/businesses, but in many cases additional financing will need to be engaged with the turnaround exercise. As referred to above there is some good news on this matter, as the new Insolvency Law in Portugal will allow new capital being invested on restructuring of distressed businesses to get protection over other creditors on an insolvency scenario, which may represent a key incentive to investors.

Adequate financial structure

As we know, Portuguese banks have been pushed by the IMF/EU bailout conditions to significantly reduce its leverage ratio, as well as to increase Tier 1 Capital, thus refinancing during 2012 will be a substantial challenge to many companies that leveraged for decades on very short-term working capital facilities (automatically renewed).

Between the lenders and the company, clarity and confidence will be key to ensuring that the company keeps trading and getting the necessary funding for its operations, but also for the lenders to understand money flow requirements and protect their investments.

The best way to achieve this target is to have a robust business plan discussed between the parties, with all sensitivities and possible 'stress tests', allowing for contingency scenarios being discussed and agreed upfront.

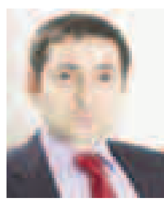
Conclusion

We are living through unpredictable times. In Europe, politicians and central banks are struggling to resolve debt crisis, and this is undermining the economic stability of the continent, pushing economies like Portugal to its limits. Even on an optimistic scenario, the challenge for Portugal is to deal with medium-term residual/no growth, and Portuguese companies will be facing tougher competition and margin decreases, lack of liquidity, and discovering that some management concepts forged in previous years are outdated. Restructuring will be the key initiative in the coming years, but bearing in mind that survivors will be those that are able to ask different questions about themselves and reinvent their business models, as there will be no second chances or time for experiments. In terms of restructuring the time has come!

Author:
José Luís Silva, Head of Restructuring
KPMG Portugal
Edifício Monumental Av. Praia da Vitória, 71 - A, 11°
1069-006 Lisbon
Portugal
Tel: +351 210 110 000
Fax: +351 210 110 121
Email: ptkpmg@kpmg.com
Website: www.kpmg.pt

Russia: Emerging playground for a savvy distressed investor

by Alexei Evgenev, Maxim Frangulov and Elena Tsaturova, Alvarez & Marsal CIS LLP



For an international player, Russia continues to be a relatively exotic place to invest. The tested legal environment, investor protections, business transparency and predictable political landscape in the North American and Western European economies, not withstanding their multiple challenges, offer the level of comfort and risk control which often outweighs the potential of higher returns in the land of opportunity called Russia. But for those willing to learn and take the risk with distressed assets, a change may be on the cards.

Over the last three years, it was restructuring, both financial and operational, where Alvarez & Marsal, as a restructuring and turnaround specialist firm, have seen the nascent rise of the use of traditional techniques which are so familiar and proven effective in the West. It is the tendency to employ true and real restructurings based on the objective view of the business cash generation potential and value, complete with operational turnaround, balance sheet recapitalisation, increased business transparency and sophistication of lenders that creates investment opportunities for both financial and strategic players. Russia is on the way to evolutionally adhere to this globally accepted restructuring approach.

Macroeconomic outlook

Russia is steadily recovering from the economic downturn in 2008–09. The GDP growth rate is estimated to be 3.7%-3.8% in 2012 and will not be materially different going forward should the crude oil prices stay at the forecasted levels.

Near term, the Russian economy will continue to heavily rely on the oil and gas revenues, although there is a hope that a concerted effort will be put to diversify the Russian economy to grow the share of non-O&G industries. Until the reliance on oil and gas diminishes, the ruble exchange rate is likely to continue to fluctuate with the oil price rather than follow the traditional purchasing power parity rule.

Managing inflation remains a priority of the Central Bank of Russia – inflation rates are projected to drop by just over 5% already in 2012. These inflation targets may sound stretchy but the record low inflation rate at 6.1% achieved in 2011 demonstrates the opposite.

Russia remains underestimated compared to other emerging market countries. Based on Troika's analytical research, Russian stocks are cheap with forecasted P/E multiple for 2012 of just 5.5 times compared to an average 8.5 times for emerging market countries.

With the economy of the size of Italy or Spain, but with one-third of GDP per capita of these countries, Russia still has a significant growth potential in the near future while currently offering a more stable economic environment compared to the peripheral Western European countries.

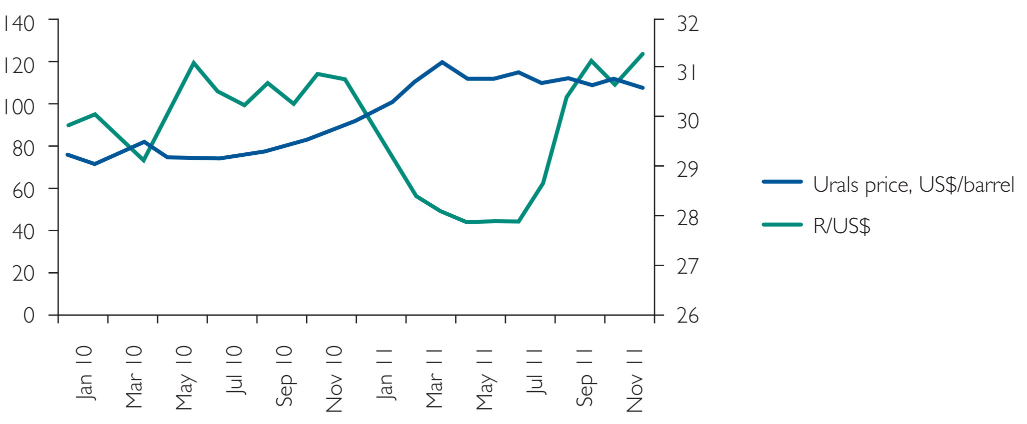
Currently in Russia there is strong political demand and promise to make Russia a more investor/business-friendly place, with more transparent business practices, legal protection of investor and business rights, and a fight against corruption. Besides, Russia's membership in the WTO will accelerate internal demand for modernisation and change by bringing new foreign entrants to the Russian market and stimulating local competition.

Figure 1: Russian economic key data

	2010	2011	2012E	2013E	2014E
GDP*	104.0	104.1	103.7	104.0	104.6
Urals*	78.2	108.0	100.0	97.0	101.0
GDP World Bank	104.0	104.0	103.8	103.5	103.5
Urals World Bank	78.2	108.7	99.0	95.5	92.7
CPI*	106.8	106.1	105.1	105.9	105.2

Note: *Russian Ministry of Economy, moderately optimistic scenario

Figure 2: Oil and gas revenues



Restructuring market outset

In 2008 Russia faced a deep, prolonged economy-wide crisis. As in prior years borrowing for growth and acquisitions proliferated against the backdrop of the booming economy and skyrocketing real estate values, all accompanied by lax lending standards and financial markets happily providing liquidity and capital, many companies entered the crisis overleveraged and suddenly unable to service the debt (various estimates put volume of non-performing loans (NPLs) at as high as 40% of the banks' corporate portfolios). It was natural that Russian constituencies, both on the creditor and debtor sides, had virtually no experience and no professionals to deal with the distress spread wide across the industries, sectors and businesses.

In 2008 approximately half of corporate lending in Russia was concentrated with the largest state-owned banks namely Sberbank (commercial), VTB (commercial) and Rosselkhozbank (Russian agricultural bank). VEB as a State policy-driven lending institution became affected by bad corporate loans and was obliged by the State to refinance Russian corporations overleveraged by foreign debts. These financial institutions were relatively unprepared to handle the volume of distressed situations in their corporate portfolios. Workout on such a scale was a new challenge, and the banks were pressed to learn fast how to deal with the massive flow of bad debts. They have chosen a number of routes, including old, good "pretend and extend" quasi-restructurings, transfer of non-performing loans (NPLs) to the newly established affiliates dedicated to troubled loan management and, on rare occasions, leveraging single external turnaround professionals usually based on the personal liaisons with individuals.

Most of these measures did not offer a sustainable long-term solution, but bought the banks' valuable time (and compliance with capital requirements) to develop internal restructuring procedures and nurture internal workout specialists. By the end of 2011 NPLs originated in 2008 have been resolved by the major banks in one way or another.

The 2008 crisis did not create a secondary market for corporate NPL portfolios. A typical large or mid-sized distressed debtor was a private Russian company with no clear legal structure or IFRS reporting which, in turn, hampered lender's attempts to put a fair price on the asset. Smaller banks held troubled corporate portfolios, small and non-diversified (usually secured by overvalued real estate), not interesting for potential buyers.

Currently, the key impediment to the development of the traditional restructuring market in Russia remains a combination of lenders' limited capacity and willingness to discount/write-off "underwater" loans and often unreasonable and unsubstantiated valuation expectations of the owners. This combination, in many cases, results in the parties defaulting to the "do nothing" option, crossing their fingers and praying for the best. Again, it is not a sustainable solution, and constituencies will have to deal with the problem sooner or later. We see that the change is in the wings. The lender's learning curve of the restructuring process is getting steeper. It is encouraging to see that the Western restructuring and turnaround techniques have started to be tested and successfully incorporated by the Russian constituencies. Sberbank, in particular, is leading the change, more frequently forces the issue with the debtors, rallying support for the proper process and result in situations with multiple lenders. The range covers major tools, such as:

- Consolidating lender position and bargaining power through syndication: GAZ, KTZ.
- Crisis and interim management: Mosmart.
- Discounting and sale to a strategic partner: Izhavto.

Another constituency to be noted is the State whose interests are expressed by the state-owned banks and governmental agents and the restructuring process related to the companies owned by the State/affected by the interests of the State is guided by the political rather than the market logic.

The only constituency parked on the sidelines of the restructuring process are unsecured bondholders. This is a large group, often international financial institutions, which bought (literally) into the stories of Russian issuers in the years before the crisis. This article is not the place to judge the stories, but it is clear that the downside protection of the bond holders has been poor. Forget about covenant-lite. The indenture documents look more like NINJA credit agreements at the height of the subprime lending bubble. So, at least for now, Russian unsecured bond issues are not a factor in restructurings.

Corporate lending and liquidity trends

In the near future Russian corporate lending (particularly for medium and large businesses) will continue to be highly concentrated with the largest four state-owned banks named above. These banks, Sberbank and VTB in particular, are expected to aggressively grow their corporate portfolios. The growth is likely to come by taking the market share from international banks and smaller commercial banks. Some of the smaller international banks are heading for the exit due to the pressures facing their parent banks, and smaller Russian commercial banks will be consolidating to address the new tightening capital requirements.

The liquidity accessibility will not be "like it is 2007." The foreign capital, either through Russian operations of the international financial institutions or through the international capital markets, is shut down or highly speculative (=super expensive) in nature. Commercial banks have limited ability to lend as they continue to clean up their corporate portfolios and watch the capital ratios. Sberbank and VTB have gained valuable workout experience from the crisis, put internal risk management processes in place and are becoming more selective in their lending practices.

Restructuring play: Pros and cons

With the slow economic recovery and the refinancing wall of the "pretend and extend" restructurings looming in 2012–13, a large pool of distressed assets is likely to come to the market. There will be options related not just to specific distressed assets, but to the whole industries.

While "new economy", i.e. enterprises created and grown in the last 10–15 years, primarily consumer goods companies, are in good shape operationally, the "old economy" businesses, especially in industrial products sector are outdated, require technology upgrade, investments in fixed assets and in adequate ERP systems. In return, these undervalued assets can open the door to the Russian market and create an interesting play in industry consolidation for strategic investors.

Attractive, high (real or potential) growth industries (e.g. retail) remain fragmented and could also provide industry consolidation benefits for both financial and strategic investors.

Additionally, there are optimistic (from a restructuring point of view) signs of the owner desire for a sustainable restructuring stemming from the fatigue of the never-ending fight to stabilise the business in the face of leverage and lender demands.

The timing remains the key though, as need for refinancing drives the price of the assets down and once this burden is overridden, the price tag will go up again. Besides, there are internal (e.g. profitability, cash generation) and external (e.g. joining WTO) pressures that force the issue of the operational improvements to realise value, improve competitiveness, get access to capital markets. These pressures are not simply leverage and creditor driven, it is a necessity recognised by the business owners as well.

Distressed investor concerns

One of the major challenges to plan and execute changes and improvements in the distressed businesses is an availability of the experienced management pool. Expat option has not proven to be very efficient and effective in the Russian environment, and a local professional, western-style management has come into existence just less than 15 years ago. Turnaround executives, with experience and successful track record of stabilising distressed businesses and driving operational change, are few and far between. The market of outsourced restructuring and turnaround professionals is still in its formation with no unified methodology and solutions standards set there yet.

Another typical area of concern for a distressed investor is proper management reporting and financial controls. Russian accounting standards, despite considerable efforts applied for convergence with IRFS, remain primarily tax-reporting driven, and usually give limited visibility of the state of the business. But the lack of management reporting is common in distressed companies. No news here: adequate reporting and financial controls are hard to come by at companies in trouble anywhere in the world, no matter how developed a country is and how many MBAs it produces. The good news is that all the tools and techniques (cash disbursement controls and cash planning, like a rolling 13-week cash flow forecast,

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working capital management, meaningful monthly budgets and operational and financial reports), an experienced distress investor is used to seeing and using, can be successfully implemented and work in Russia. We know, we have done it. In fact, in Russia where the business owners are traditionally focused on cash and cash management, it is sometimes a lesser stress on the organisation to introduce proper treasury controls than in Western companies.

While the insolvency law application is notoriously inefficient, resulting in eclectic restructuring "bed partners" and strange consensual deals, well-tested collateral enforcement tools and methods allow loan-to-own conversions of assets and businesses. Of course, the process is usually complicated by the convoluted legal structures, the legacy of frenzy deal-making activities and tax optimisation actions. Still, the complexity and the associated risks are manageable.

Conclusion

Russia is in the beginning of its journey to become a distressed investor playground, but the foundation is being laid today. For an early entry investor, the opportunity to earn the returns commensurate or in excess of the risks is here, the banks are learning to play by the rules, and experienced professionals are ready to guide you through the intricacies of the Russian environment and assist in execution.

Authors:
Alexei Evgenev, Managing Director
Maxim Frangulov, Managing Director
Elena Tsaturova, Senior Director
Alvarez & Marsal CIS LLP
Sadovnicheskaya Street 14/2
Moscow
Russia 115035
Tel: +7 495 988 7745
Email: aevgenev@alvarezandmarsal.com
mfrangulov@alvarezandmarsal.com
etsaturova@ alvarezandmarsal.com
Website: www.alvarezandmarsal.com

Review of developments in insolvency law in Singapore for 2011

by Sushil Nair, Drew & Napier LLC

The period in review has seen a slight dip in Singapore's economic performance. 2011 saw Singapore's economy grow by a mere 5%, in contrast to the 14.8% growth figure recorded in 2010. The relatively small growth percentage for 2011 is largely due to weak performances across several sectors in the fourth quarter. Against the subdued global situation and structural weaknesses in some of Singapore's major trading partners, economic activity in Singapore is likely to remain restrained in 2012, with GDP growth predicted to slow to 1%-3%, the weak manufacturing sector buffered by a resilient services sector.

Despite the global financial and economic stresses, Singapore's financial markets continued to function in an orderly manner. Domestic interest rates remained low in 2011, due in part to the policies of the US Federal Reserve. This has allowed businesses to gain greater access to credit, thereby boosting liquidity in the corporate sector and leading to an increase in corporate earnings. That said, corporate borrowing remained on the cautious side, as the deterioration of the global economy induced worry of the ability to service debt in the event of an economic downturn. Fund-raising activity in the capital markets grew, with increases in corporate debt issuances and the amounts raised by initial public listings. However, domestic financial markets are not immune to contagion shocks if the advanced economies suffer setbacks.

For the year 2011, the number of insolvency law cases was relatively low. However, a number of interesting insolvency issues were brought before the Singapore courts.

Statutory demands under Section 254(2)(a) Companies Act

Under Section 254(2)(a) of the Companies Act, a company is presumed insolvent when a statutory demand is made against the company for a sum exceeding S$10,000 and the company fails to pay the sum within three weeks. This presumption is what is usually relied upon for the filing of an application to wind up a company.

The High Court in *United Fiber System Ltd v China National Machinery & Equipment Import & Export Corp* [2011] 2 SLR 1021 clarified that a bona fide action brought to dispute a debt has the effect of suspending the running of time for payment for the purposes of Section 254(2)(a) of the Companies Act until the dispute is resolved, since the non-payment of a disputed debt cannot logically give rise to a presumption of insolvency. In that case, since the company had brought its claim against the creditor promptly after the issuance of the statutory demand, the 21 days for payment was held to only start to run from the date of the judgment that was eventually obtained against the company.

The High Court in *Pacific King Shipping Pte Ltd and another v Glory Wealth Shipping Pte Ltd* [2010] 4 SLR 413 determined that a creditor is not precluded from issuing a statutory demand under Section 254(2)(a) of the Companies Act based on a debt that is founded on an arbitral award. The High Court noted that there was no authority cited for the proposition that a party holding a foreign arbitration award is obliged to enforce the award only by way of enforcement proceedings under the International Arbitration Act and is thereby precluded from issuing a statutory demand based on a foreign arbitration award.

Resisting a winding up application

In *Denmark Skibstekniske Konsulenter A/S I Likvidation (formerly known as Knud E Hansen A/S) v Ultrapolis 3000 Investments Ltd (formerly known as Ultrapolis 3000 Theme Park Investments Ltd)* [2011] 4 SLR 997, the High Court decided, as a preliminary issue, that the standard of proof that a debtor company had to meet in order to resist a winding-up application was no more than that for resisting a summary judgment application, i.e. the debtor company need only raise triable issues. This standard of proof applied equally to all 'cross claim' and 'disputed debt' cases, regardless of whether the defence was mounted before or after the winding-up application was filed.

Effect of a winding-up order

In *Kong Swee Eng v Rolles Rudolf Jurgen Augus* [2011] 1 SLR 873, the plaintiff and the defendant entered into a sale-and-purchase agreement whereby the defendant contracted to sell shares in Golden Oriental Pte Ltd ('Golden Oriental') to the plaintiff. The plaintiff paid a deposit of S$500,000 for the shares. Thereafter, a winding-up petition was filed against Golden Oriental by a company controlled by the plaintiff. In the suit, the plaintiff claimed that she had been released from her contractual obligation to complete the sale-and-purchase agreement and was thus entitled to a refund of her deposit. The plaintiff argued, *inter alia*, that the agreement had been frustrated by the winding up of Golden Oriental, as the shares no longer existed as a result of the winding-up order. The court, referring to Australian and New Zealand authorities, held that the winding up of a company does not frustrate a contract for the sale and purchase of its shares.

Stay of proceedings and automatic discontinuance under Rules of Court

Order 21 Rule 2(6) of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) states that a cause or matter is deemed automatically discontinued if no step is taken in the proceedings for a year. In the High Court case of *LaserResearch (S) Pte Ltd v Internech Systems Pte Ltd* [2011] 1 SLR 382, the court determined that whenever an action is automatically stayed by operation of Section 299(2) of the Companies Act, which provides that after the commencement of a winding up no proceeding can be commenced or proceeded with without leave of Court, the action is excluded and is not subject to the one-year period prescribed by Order 21 rule 2(6) of the Rules of Court.

The court cautioned, however, that this does not mean that the creditor whose action is stayed by operation of Section 299(2) of the Companies Act can take an indefinite amount of time to decide whether it wants to proceed by litigation in court. If the creditor of a company in liquidation comes before the court after an unreasonably long time to seek a lift of the stay pursuant to Section 299(2) of the Companies Act, the court would have justifiable reason to refuse unless otherwise persuaded.

Schemes of arrangement

The Royal Bank of Scotland NV (formerly known as ABN Amro Bank NV) and others v TT International Ltd and another appeal [2012] SGCA 9 was a landmark decision in which the Court of Appeal recognised the importance of schemes of arrangement and clarified several issues in the law on schemes of arrangement. Under section 210 of the Companies Act, a proposal can be made to a company's creditors, at a meeting called with the Court's approval, to compromise their claims. If that proposal is accepted by 75% in value and a majority in number of each class of creditors attending the meeting, that entire class of creditors is bound by the proposal.

In the case, TT International Limited ('TT') applied for and received approval from the court, pursuant to Section 210(1) of the Companies Act, to summon a meeting of its creditors to propose a scheme. The scheme meeting was duly held and votes were cast. 84.81% in number of the scheme creditors attending in person or by proxy, representing 75.06% of the value of debts owing to the scheme creditors, voted in favour of the scheme. This barely exceeded the statutory threshold of 75% of value required for the approval of a scheme. A group of opposing creditors, dissatisfied with the result of the voting, wrote to TT seeking copies of the proofs of debt lodged by certain scheme creditors and other information regarding the other scheme creditors' claims. The High Court approved the scheme and the opposing creditors appealed against the decision of the High Court. The Court of Appeal allowed the appeal and set aside the sanction of the scheme, ordering further meetings to be called for the scheme to be put to a revote. In reaching its decision, the Court of Appeal addressed several issues in the law on schemes of arrangement:

- first, the Court of Appeal clarified and explained in detail the procedure relating to passing a scheme of arrangement under Section 210 of the Companies Act;
- second, the court addressed the issue of a scheme manager's duties, and held that a proposed scheme manager's duties to administer the approved scheme take on a fiduciary nature upon his appointment as the scheme manager;
- third, the court addressed the issue of whether scheme creditors are entitled to examine the proofs of debt submitted by other scheme creditors in respect of a proposed scheme. The court held that scheme creditors are entitled to examine the proofs of debt only if the information in the proofs of debt is relevant to the creditor's voting rights, and the creditor produces prima facie evidence of impropriety in the admission or rejection of such proofs of debt. If the scheme manager rejects a scheme creditor's request for the disclosure of other scheme creditors' proofs of debt, the requesting scheme creditor may apply to court for an order that the proofs and supporting documentation be disclosed. The court will then weigh the rights of the applicant creditors against the collective interests of the other creditors and the company;
- fourth, the court addressed the issue of when a

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scheme creditor should be notified of the chairman's decisions to admit or reject its own and other creditors' proofs of debt. The court held that it was sufficient if, before the scheme meeting took place, all the scheme creditors were presented with the full list of scheme creditors entitled to vote and the corresponding quanta of their claims that were admitted for the purpose of voting;

- fifth, the court held that a scheme creditor could appeal the chairman's decisions to admit or reject its own and other creditors' proofs of debt. However, the court would only override the professional judgment of the chairman if the chairman's judgment was affected by bad faith, a mistake as to the facts, an erroneous approach to the law or an error of principle;
- sixth, the court addressed the issue of when scheme creditors should be classified differently for voting purposes in a scheme of arrangement. The Court held that the applicable test in Singapore is that based on the dissimilarity principle. The principle states that if a creditor's position will improve or decline to such a different extent *vis-à-vis* other creditors simply because of the terms of the scheme (and not because of its own unique circumstances) assessed against the most likely scenario in the absence of scheme approval (e.g. insolvent liquidation), then it should be placed in a different voting class from the other creditors; and
- seventh, the court held that related party creditors should have their votes discounted in light of their special interests to support a proposed scheme, by virtue of their relationship to the company. The court also held that generally, the votes of wholly owned subsidiaries should be discounted to zero. However, as an exception to the general rule, wholly owned subsidiaries may instead be classed differently.

Pursuant to the Court of Appeal's directions, a further meeting was held. At the meeting, a majority in number representing 76.34% in value of the scheme creditors in the general class of unsecured creditors voted for the scheme, and all of the scheme creditors in the other class of creditors also voted in favour of the scheme. Accordingly, the Court of Appeal sanctioned the scheme, subject to certain alterations made pursuant to its powers under Section 210(4) of the Companies Act.

Definition of 'creditor' in the context of schemes of arrangement

In *SAAG Oilfield Engineering (S) Pte Ltd (formerly known as Derrick Services Singapore Pte Ltd) v Shaik Abu Bakar bin Abdul Sukol and another and another appeal* [2012] SGCA 7, the Court of Appeal affirmed that, in interpreting the term 'creditors' (which is undefined in the Companies Act) in the context of Section 210 of the Companies Act, a wide approach should be taken. This was an approval of the approach taken by the Assistant Registrar in *Pacrim Investments Pte Ltd v Tan Mui Keow Claire and another* [2010] SGHC 134, which was the first and only other time that this issue had been raised before the local courts.

The Court of Appeal held that it should be presumed, in the absence of contrary evidence, that Parliament, in enacting Section 210 of the Companies Act using wording identical to that of the various equivalent English provisions, intended the word 'creditors' in Section 210 to be given the meaning which had by then been regarded as settled in England. Thus, following *Re Midland Coal, Coke and Iron Company* [1895] 1 Ch 267, the court held that the word 'creditor' should be used in the widest sense and would include a creditor whose debt has not yet become payable and a contingent creditor, whether or not his claim is provable and even if he has yet to make a claim or is unknown, provided that the facts that may give rise to his claim already exist.

The court further held that tort claimants with unliquidated claims fell within this wide definition of 'creditor'. The court observed that tort claimants may form a substantial class of a company's creditors, and to exclude such claimants from the ambit of the term 'creditors' would render Section 210 of the Companies Act pointless. To address the issue that there is no machinery to quantify such unliquidated claims, the court held that such claimants should be permitted to vote for the amounts for which they estimate that the company is liable to them, provided such amounts appear reasonable. If there is an obvious error, the chairman of the scheme meeting may correct the figure and admit it for the corrected amount, or may reject the claim altogether.

Arbitrability of 'claw-back claims'

In *Larsen Oil and Gas Pte Ltd v Petroprod Ltd (in official liquidation in the Cayman Islands and in compulsory liquidation in Singapore)* [2011] 3 SLR 414 the Court of Appeal considered whether 'claw-back' claims, or claims to avoid undervalue or undue preference transactions, were arbitrable. The Court of Appeal drew a distinction between private remedial claims and claims that could only be made by a liquidator or judicial manager of an insolvent company, and astutely laid down three key principles:

- disputes involving an insolvent company that arise only upon the onset of the insolvency regime, such as disputes concerning transaction avoidance and wrongful trading, are non-arbitrable;
- disputes involving an insolvent company that stem

from its pre-insolvency rights and obligations are non-arbitrable when the arbitration would affect the substantive rights of other creditors; and

- disputes involving an insolvent company that stem from its pre-insolvency rights and obligations are arbitrable when the arbitration is only to resolve prior private *inter se* disputes between the company and the other party.

The court's reasoning for the distinction is that a company's pre-insolvency management is unlikely to have contemplated including avoidance claims within the scope of an arbitration agreement, since the commencement of insolvency proceedings would result in them being displaced by a liquidator or judicial manager.

Undue preference transactions

The Court of Appeal provided some useful guidance on avoiding undue preference transactions in the twin cases of *DBS Bank Ltd v Tam Chee Chong and another (judicial managers of Jurong Hi-Tech Industries Pte Ltd (under judicial management))* [2011] 4 SLR 948 and *Coöperatieve Centrale Raiffeisen-Boerenleenbank BA (trading as Rabobank International, Singapore Branch) v Jurong Technologies Industrial Corp Ltd (under judicial management)* [2011] 4 SLR 977.

The Court of Appeal affirmed that the English test of what constitutes unfair preference as laid down in *Re MC Bacon Ltd* [1990] BCLC 324 is applicable in Singapore: whether the debtor, in doing the act, was influenced by a subjective desire to prefer a specific creditor over the general body of creditors. The Court of Appeal summarised the applicable principles as follows:

- the test is not whether there is a dominant intention to prefer, but whether the debtor's decision was influenced by a desire to prefer the creditor;
- the court will look at the desire (a subjective state of mind) of the debtor to determine whether it had positively wished to improve the creditor's position in the event of its own insolvent liquidation;
- the requisite desire may be proved by direct evidence or its existence may be inferred from the existing circumstances of the case;
- it is sufficient that the desire to prefer is one of the factors which influenced the decision to enter into the transaction; it need not be the sole or decisive factor; and
- a transaction which is actuated only by proper commercial considerations will not constitute a voidable preference. A genuine belief in the existence of a proper commercial consideration may be sufficient even if, objectively, such a belief might not be sustainable.

The Court of Appeal further held that there is no need for the debtor to have knowledge of the prospect of its insolvency before it can be said to have given an unfair preference to a creditor, and that the relevant time to determine whether a debtor had the requisite desire to prefer is the time when the creditor received the preference, and not when it was promised the preference.

Author:
Sushil Nair, Co-Head, Corporate Restructuring
Drew & Napier LLC
10 Collyer Quay
#10-01 Ocean Financial Centre
Singapore 049315
Singapore
Tel: +65 6531 2411
Fax: +65 6535 4864
Email: sushil.nair@drewnapier.com
Website: www.drewnapier.com

Business recovery, restructuring and performance improvement in South Africa

by Simon Venables and Stefan Smyth, PricewaterhouseCoopers

Business recovery, restructuring and performance improvement have both had a higher profile in South Africa over the course of the last two to three years for a number of reasons ranging from the economic downturn to increased competition from globalisation, the introduction of new legislation (Consumer Protection Act, Companies Act and Protection of Personal Information Act) and due to increased investment opportunities in South Africa for new entrants wanting to use South Africa as a portal for access to Africa as a key emerging market. Accordingly 'stressed' and 'distressed' businesses have tended to be recovery focused whereas 'healthy' businesses have sought out performance improvement to ensure they are able to enhance or preserve their competitive position and profitability.

CEOs in South Africa are on the whole reporting confidence about their revenue growth opportunities but many attribute their readiness to take advantage of recovering markets as being due to being "better prepared to deal with an economy defined by volatility in global markets, weak demand in developed markets and uncertainty in emerging markets". It is interesting to note that the recession has done its fair share to develop leaner businesses as well as having done damage to less 'agile' or ' fit' companies. There also continue to be a raft of issues that are somewhat unique to South Africa (in their influence on commerce) that have and continue to be dominant issues for in all stages of the business cycle – such areas include skills shortages where this criticality in the eyes of our CEOs is at such a level that it is seen as one of the leading challenges for industry and government to resolve.

Recovery versus improvement

Whilst there are numerous labels and categorisations possible, often there are two common ways to consider the interaction between business recovery and performance improvement – the first is to presume that a business in distress is rescued or recovered (by means of a few 'life saving' interventions) and is then handed over for turnaround and performance improvement (rehabilitation) and then is nursed back to its growth trajectory. The second is to assume that business recovery is only for sick businesses and performance improvement is only for healthy businesses. The paradox is that both can be true or not and that in reality it is the situation facing any given business that is unique and which will dictate the extent to which either or both forms of interventions will assist or not.

It is, however, true to say that in the context of South Africa and the current economic climate locally that the two have recently become more polarised and often represent practices best designed for either sick or healthy businesses. However, in order to discuss both subjects effectively and efficiently in this article we have found it more useful to discuss key issues, methodologies and interventions that are common to both or exist in either specialism and most importantly to report on how they are being applied in practice.

The notion of 'recovery' is also a subjective assessment. Company boards and shareholders may have differing views on whether a closure or sale of a non-core/non-performing asset constitutes a recovery. The reality is that any intervention that allows a company to survive and thrive in part by closing or selling other assets is a recovery nonetheless if the prospect of changing nothing would have resulted in failure of the whole enterprise.

Update on restructuring in South Africa

The South African restructuring market is quite similar to that in Western Europe and North America and in many senses is becoming even more so with the introduction in May 2011 of Chapter 6 Business Rescue proceedings. This draws on international restructuring legislation including UK Administration and US Chapter 11 yet is more similar to Canadian CCAA or Australian rescue provisions given that it is neither of these is creditor nor debtor in possession based.

In under a year in it has made significant inroads

into challenging preconceptions that Chapter 6 would be a pre-liquidation status that risked substantial abuse and misuse. This is broadly thanks to a combination of factors including the quality of early judgments that are being passed down by the Courts, regulation and oversight by the newly formed Companies and Intellectual Property Commission (CIPC) and the resolve of restructuring professionals and organisations who have lobbied and joined forces to ensure that the 'bar is raised' to a suitably high standard.

Most interestingly the largest themes and issues to arise so far have centred around the challenge of raising Post Commencement Finance ("PCF") and also in determining valuations at various stages of the process (they range from fair and reasonable to estimations of liquidation value). PCF is challenging firstly in that traditional levels of Bank security requirements in South Africa often leave little room for secured PCF without substantial negotiation which often slows the much needed injection of liquidity and also due to an absence of a secondary debt market which has yet to emerge to refinance ailing businesses during the rescue process. The latter is not expected to be anything other than time driven where the maturity of the market will absorb the opportunity to create higher levels of interest and returns related to the risk of rescue capital. It may however be hampered if the release of security held by pre rescue funders and investors is not seen to be highly negotiable and common practice to be relinquished (in part). The subject of valuations is a highly involved process and is complicated by being linked to voting rights within the rescue process. The result is that value can be highly contentious given its ability to determine "cram down provisions" and also proposed compromises of creditors' claims.

Whilst Chapter 6 has brought a formal and judicial approach to recovery techniques under the protection of a Court Moratorium against creditors' claims that never existed before, it does in many instances merely require the use of business recovery techniques that have been used for many years in informal and consensual restructuring and include *inter alia* the following:

1. Fundamental changes to strategy/turnaround plans.
2. Non core asset disposal.
3. Optimised exits/managed wind downs.
4. Refinancing and recapitalisation.
5. Cost reduction vs growth strategies.

In the following sections we deal with each topic in a little more detail and explore how such interventions have evolved to assist in the turnaround, recovery and improvement in performance of companies in South Africa.

Strategy

With levels of competition such as they are, budget driven strategies will not be sufficient for the survival and growth of a business. The environment in which the company trades comprises of its internal, external positioning plus the context in which it exists – effectively the DNA of this specific business in the context of its industry. Recovery situations demand that strategy is reaffirmed or redefined, matching a company's strengths to opportunities and addressing its weaknesses against the threats that it may face.

As critical is the need to determine an implementation programme and a monitoring/tracking process to ensure that, on a milestone basis that timely progress is achieved and lasting change is effected across the organisation. From a South African perspective, particularly the changing legal landscape is a crucial consideration, given the recent promulgation of both a new Companies Act and a Consumer Protection Act plus a Protection of Personal Information law – those adopting a strategic and proactive approach will not only thrive but will be able to increase business value exponentially versus those still in 'wait and see' mode. Given also labour law, government imperatives on job creation and acute skills shortages, those with a strategic vision regarding labour in the context of their industry will be able to drive their own destiny versus competitors who will be passengers in a changing South African labour landscape.

Asset disposal

As markets and businesses evolve, many shareholders and boards find that adjustments need to be made to the footprint of the organisation. Often this can involve selling all or part of a business that no longer performs to its potential or no longer fits the strategic vision (including revised vision as above). Such disposals are commonplace, and a sign of strong management and active ownership.

Non-core assets develop in many contexts and are common in many organisations and can consist of non-performing loan portfolios, branch networks, or entire subsidiaries of financial institutions or real estate portfolios in corporate groups, or parts of conglomerate businesses that have evolved over time and now need to be rationalised and reconsidered.

There are a number of potential pitfalls and typically independent reviews can assist in determining what is core and what should be sold. This aids companies and their shareholders to challenge their business plans and generate focus. Having determined what should be changed, time and energy has to be applied to planning the separation even before any disposal action is contemplated. For corporates, this

can involve a range of HR, legal and other work stream procedures to clean up and segregate the go-forward operations from those which need to be rationalised or sold. Proper planning and execution can make a vast difference between just shedding the non core asset and realising a successful carve out and realisation of the company and/or shareholders financial, operational and strategic objectives. Disposing or shutting down non-core elements involves valuation, market sounding and positioning, as well as seeking out interested parties for whom the assets offer value.

Optimised sale or wind down

In some instances the ability to carve out or dispose of the asset in its current guise is not an option or presents an unacceptable discount over its potential future value. Invariably in such circumstances an assessment of the options will assist in informing the most effective solution. If a straight forward disposal does not yield positive returns or results in a limited or no market then options such as an optimised sale or wind down can be evaluated.

Optimised sales relate to situations where a partial turnaround or improvement can be effected in the asset or company and based on cost benefit analysis yields better returns. In such instances common business recovery techniques such as forecast reviews with sensitivity analyses will allow a buyer to see the potential for the business to recover and be viable in the long term. Examples of this are mining assets in 'care and maintenance' where the general view of the asset is that it is potentially tainted as not viable – investing in a partial turnaround may allow the mine to come out of care and maintenance and achieve a run rate of performance that may persuade buyers that management or mining practices were the cause of financial distress and the ensuing care and maintenance rather than issues around the lack of accessible mining reserves, life of mine or marginality of returns.

From a South African context the junior mining sector can often fall foul over lack of scale or sufficient skills or capital to attain the true viability that the mining asset and reserves are really capable of by significantly altering and improving business performance. Analytics and determination of key causes (rather than symptoms) of distress will assist in the evaluation of the necessary interventions to effect in order to change the proposition of the distressed asset to a viable investment opportunity.

Fixing the capital structure

The objective of any financial restructuring is to effect substantial and lasting change in a company's financial structure, or ownership or control designed to increase the value of the firm. Situations include stress-induced financial restructuring, recapitalisations, debt-equity swaps and post commencement finance. Such matters require the redesign of debt, equity and mezzanine instruments in order to resolve particular problems that cannot be solved by conventional methods.

Causes are wide and varied ranging from unsustainable debt levels incurred in leveraged buyouts through to loss of headroom and conventional debt service capacity due to suppressed levels of trading. Again South Africa has some unique attributes in this regard particularly in the arena of Black Economic Empowerment ("BEE"). The Broad-Based Black Economic Empowerment Act of 2003 defines "black people" as a generic term that includes "Africans, Coloureds and Indians". According to the Act, "broad-based black economic empowerment" – with an emphasis on "broad-based" – refers to the economic empowerment of all black people including women, workers, youth, people with disabilities and people living in rural areas. The socioeconomic strategies envisaged include increasing black ownership and management of businesses, facilitating community and worker ownership of "enterprises and productive assets", skills development, issues around equal representation in the workplace, preferential procurement, and investment in businesses that are owned by black people. In many historic transactions the buy-in of a BEE partner was often vendor financed and was potentially excessively reliant on strong cash flows for dividends. Where such cash flows have failed to materialise the result is deals can either be unwound or refinanced.

Working capital can be a silent killer in times of recession but is often neglected for a variety of reasons. Firstly, the level of analysis, time and skill required to completely understand the intricacies of all aspects of the working capital cycle can often be lacking within the company despite a detailed working understanding of the matter and secondly banking facilities designed to alleviate working capital peak pressures such as debtors finance (or factoring) can also make it exceptionally difficult in a live environment with fluctuating trading to isolate the true working capital requirement let alone determine the cause of pressure which can range from worsening debtors collections and defaults, liquidation of inventory to generate cash through to 'rolling' of creditors. Cash and liquidity can be unlocked through working capital optimisation programmes which extend from negotiation of customer terms through to supplier procurement strategies. Often companies who have survived the worst of a downturn, fail to

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Almost a year into the era of the new Companies Act for South African businesses, the early signs are that the challenges are every bit as complicated as were envisioned. Changes to Solvency & Liquidity tests, the introduction of new Business Rescue proceedings (Chapter 6) and altered provisions for Fundamental Transactions means that more than ever, the need for independent specialist advice from experienced professionals currently practicing in these areas is critical.

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Contact our experts for further advice:

Simon Venables
Director
+27 (11) 797 5660
simon.venables@za.pwc.com

Stefan Smyth
Associate Director
+27 (11) 797 4184
stefan.smyth@za.pwc.com

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recover even with potential excess demand for their services and products due to an inability to raise the required investment in working capital to harness the opportunity and suffer ongoing losses from under trading against often rigid, fixed cost bases.

Shrink to grow

Compared to other interventions this can be the hardest to evaluate the likely outcome of. The battle being that there are a myriad of moving parts attached to such strategies. Whilst shedding low profit contracts seems advantageous for gross profit one has to be clinical in determining whether variable costs are truly variable on an account by account basis and as to whether fixed costs might lose a valuable contribution by low margin accounts and economies of scale can be lost. That said it is also painfully true that by expanding a bad (low-return) business means just having more of a problem, and a measured step backward is often the best way forward. Invariably in order to make such decisions a great deal of analysis is required – companies that undertake such reviews on a serious and professional level will often reap a return on this investment and undergo a (re)discovery of their business, its true drivers of success, identify their worst vulnerabilities and will equip themselves with a real time modelling process that informs decision making at the highest level. Whilst not for the faint hearted, properly planned and executed recovery strategies have a range of highly successful public available to them to show what the prize can be.

Authors:
Simon Venables, Director
Southern African Deals Leader
Stefan Smyth, Associate Director
National Leader Business Recovery Services
PricewaterhouseCoopers
2 Eglin Road
Sunninghill
Johannesburg 2157
South Africa
Tel: +27 11 797 4000
Fax: +27 11 797 5800
Email: simon.venables@za.pwc.com
stefan.smyth@za.pwc.com
Website: www.pwc.co.za/en/deals/index.jhtml

Business rescue in South Africa

by James McKinnell and Claire van Zuylen, Bowman Gilfillan

Africa, and in particular South Africa, has been relatively sheltered from the effects of the global economic crisis. While not unscathed, the type of economic meltdowns that we are seeing in the Eurozone economies are not yet threatening South Africa. Certainly, South African banks are generally quite tightly regulated and more conservatively capitalised than banks in other jurisdictions. Moreover, local exchange control restrictions, introduced in the Apartheid era and designed to prevent the flight of capital out of the Republic of South Africa, prevented the South African investment market from material exposure to many of the toxic asset based securities that brought American and English banks to their knees.

Nonetheless, the exposure of South Africa's relatively 'open' economy to the global economy has affected South African companies and investments. In turn, this has affected creditors, including a number of foreign creditors who invested in or lent to South African companies at a time when South Africa offered more growth and return than some of the more traditional first world economies.

For many years, South Africa has been classed as a 'creditor friendly' insolvency and bankruptcy jurisdiction, certainly for secured creditors. While the processes are rightly criticised for being slow by, for example, American standards, the system gives a predictable result for secured creditors and is supported by an independent judiciary. South Africa did not have a 'business rescue' culture similar to some other jurisdictions and until recently the only form of business rescue was judicial management, which is generally regarded as ineffective in practice and was therefore not widely utilised. Restructurings took place either by means of a scheme of arrangement (similar to the English scheme of arrangement), or by way of informal out-of-court restructurings which required the support of all the creditors.

This changed when the 1973 South African Companies Act was completely overhauled and replaced by the new Companies Act of 2008 ('the Companies Act'), which came into effect on May 1, 2011. The Companies Act was introduced to modernise South African company law and bring it in line with best practice internationally, especially in relation to public companies. The Companies Act also sought to simplify administrative red tape and other procedures. One of the more revolutionary changes In the Companies Act, was the replacement of Judicial Management by a new regime of 'business rescue', in line with international trends, and in line with the mechanisms contained in Chapter 11 of the United States Bankruptcy Code, and on the administration process in English law.

Overview of business rescue

Business rescue is intended to be a quick, cost effective and substantially commercial mechanism that is largely extra-judicial, so as to limit disruptions to the company's business and reputation. The procedure is intended to last three months from commencement to the substantial implementation of the business rescue plan approved of by the creditors.

Business rescue can be commenced by an ordinary directors' resolution and statement which confirms that the company is 'financially distressed' and can be rescued. The definition of 'financial distress' is wide and encompasses not only an inability to pay debts when due (cashflow insolvency), but also balance sheet insolvency. The resolution is registered at the Companies Commission, at which point the business rescue commences. There is no prior external scrutiny by a court to establish if the company is indeed 'financially distressed' or if it is a candidate for rescue. The board can pass the resolution with no notice to shareholders, creditors, financiers or employees until after the business rescue is in effect. While this makes the system cheap and accessible to struggling companies, there is potential for abuse.

Business rescue (or 'Rescue') can also be initiated by 'interested parties' (shareholders, creditors, employees and recognised trade unions) by means of an application to court, which can also make an order for business rescue while hearing another application against the company, such as a liquidation application or an application to perfect security.

A moratorium on all claims ensues immediately as a resolution for business rescue is filed or when a

court application by an interested party is issued, or when the court makes an order during other proceedings.

An interesting provision under the new Rescue chapter is that if the board has "reasonable grounds to believe" that the company is 'financially distressed' but decides not to adopt a resolution for Business Rescue, it must deliver a written notice to all affected persons (creditors, financiers, unions, employees) setting out the reasons why the company is 'financially distressed' and why the board did not pass such a resolution. This is a naive provision, as such a notice will surely be an event of default under the company's financing arrangements, triggering a tightening of creditors' and suppliers' terms or even foreclosure. However, a failure to send the notice puts directors in the firing line of potential personal liability and criminal sanction. Lenders or investors with board representation should note this section.

The board stays in office during business rescue. If the board initiated the rescue via resolution then it appoints a business rescue practitioner (BRP) who is required to be 'independent'. The BRP is an officer of the court and owes fiduciary duties to the company – not to creditors as is the case with liquidators and judicial managers. If the Rescue is initiated by a court order, a meeting of creditors is held to appoint the BRP. Importantly, the appointment and work of the BRP is not overseen by the Master of the High Court. The BRP also does not have to put up a bond of security for the value of the company's assets unless ordered to by a court – despite having managerial control over the company. A creditor can apply to court to either set aside the Rescue, or to remove the BRP, or to order him/her to put up a bond of security. Although most of the intended Rescue process is susceptible to judicial oversight, the delays in matters being heard (generally several months) is impeding the efficient progress of many Rescues in practice. This delay is also being used by parties who are opposed to the Rescue who (cynically) bring court applications to frustrate the process. The Companies Act does empower Judges President to appoint specific judges (similar to insolvency divisions in other jurisdictions) to specialise in and expedite business rescue matters. However none have yet been appointed and this would be a most welcome development.

The BRP consults with all 'interested parties' and then prepares a business rescue plan (the 'Plan'). The Plan must follow a broad set of guidelines in that it must show the company's current financial position, the proposed Plan, and then the assumptions and guidelines on which it is based. Practitioners are given a great deal of leeway as to how the Plan is structured so as to re-organise the debts of companies as well as even to suspend or release the company from its liabilities. The Plan may contain a term-out of debts or a 'haircut' of some of the capital claims. The Plan may also provide for changes to the company's equity, for example a new issue of shares (as part of a debt – equity swap in order to reduce liability in the company). The Plan must emphasise the benefits likely to accrue to creditors should the Plan be adopted, versus the dividends that creditors are likely to receive if the company were to be liquidated.

Once the Plan is approved by the requisite majority of parties (see below), the BRP then implements the Plan. Once the Plan is 'substantially implemented' (which is determined by the BRP), the business rescue is discharged.

If the Plan is not approved, then the business rescue is either discharged or the company put into liquidation.

Voting

The Rescue chapter draws a distinction between ordinary creditors, and 'independent creditors'. 'Independent creditors' are those who are not related to the company, a director or the BRP. Employees are classed as 'independent creditors'. Creditors who are not independent would be for example, shareholders of the company voting a shareholder loan claim. The purpose behind the distinction is to avoid votes being unduly influenced by 'insiders' to the company whose interests are not necessarily aligned with those of creditors.

Most local and foreign creditors are familiar with schemes of arrangement where each class of creditor (preferent, secured and concurrent) votes separately and approvals must be obtained at each meeting. By contrast, the meeting to approve the plan in business rescue is a single meeting attended by all three classes of creditors – so a single creditor with an unsecured claim of say R10m has the same voting power as a secured creditor with a secured claim of R10m. Secured creditors are used to having separate meetings in terms of which a proposal cannot fly unless the class of secured creditors agree. Here, a large number of unsecured creditors could theoretically outvote secured creditors.

A creditor's voting interest is calculated based on the face value of its claim – regardless of whether the claim is secured or unsecured. Thus even if a concurrent claim would not give rise to a dividend in liquidation, the voting power of the creditor is based on the face value of the claim. Claims that are contractually subordinated vote at 'liquidation value' which in most cases, will be close to zero.

In the ordinary course of Rescue proceedings "a decision supported by the holders of a simple

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majority of the independent creditors voting interests voted on a matter, is the decision of the meeting on that matter". When a Plan is voted on, the Plan must be approved of by creditors as follows: 75% of creditors' voting interests, and 50% of independent creditors' voting interests. If rights of holders of securities are affected by the Plan, a separate meeting of shareholders must be convened, and 75% of the shareholders attending must approve the Plan. Thus no Plan can be approved involving variations to share rights without shareholder consent.

Deadlock on Plan – 'buy out' right

The Rescue chapter contains a significant deadlock breaking mechanism: if a Plan is voted down, a dissenting creditor can be bought out by an affected party (i.e. another creditor or a shareholder or an employee) at 'liquidation value', which in a regulated industry could be significantly less than the market value of the claim. Thus creditors have an incentive to vote in favour of a plan that proposes to give them less than what they feel they are entitled to, against the threat that if they vote against the Plan, they risk their claim being bought out at its liquidation value.

What is a creditor – bond issues

The word 'creditor' is not defined in the business rescue chapter, or in the Companies Act or Insolvency Act. At common law however, a creditor is accepted to be any person who has a right to sue in his own name for a sum of money or goods. This gives rise to an issue of interest in the context of bond issues. Depending on the drafting of the indenture, the claims of the noteholders may be held by the Global Depository, who holds the same as principal against the issuer company and not as agent or trustee of the noteholders. Thus noteholders who attempt to prove claims in the business rescue may find their claims are rejected. There is a fairly simple solution to this – most indentures provide a mechanism for the 'definitisation' of the notes, which gives the noteholders a direct claim against the issuer company, and reducing the claim of the Global Depository proportionately. This point has not yet been tested in a South African court.

Group companies

It is important to note that the Rescue chapter does not take into account the financial reality of a group of companies becoming 'financially distressed' and there is no mechanism for a 'group' business rescue. The implication is that each constituent entity in a group has to be placed into business rescue on its own merits (this is not difficult in most cases as the group companies cross-guarantee each other) and each entity has to appoint a BRP. Where there are group loans involved, and the potential for a conflict of interest between the companies, different BRPs must be appointed for each. Separate Plans for each company must also be prepared. This can substantially increase the cost and complexity in the Rescue of a group.

Cherry picking

One of the more important aspects of the Rescue regime is the so-called 'cherry-picking' provisions, which may prove controversial in practice. These permit the BRP to:

- "entirely, partially or conditionally suspend, for the duration of the business rescue proceedings, any obligation of the company" that arose under an agreement which the company is a party to and which would have fallen due during the rescue. The BRP may exercise this power without the need to seek court or creditor approval; or
- "entirely, partially or conditionally cancel" any obligation of the company that arose before Business Rescue. However, this requires court authorisation. There is little guidance as to what considerations a court must take into account when weighing up the rights of the counterparty and the needs of the company, save that the obligation must be cancelled on terms that are 'just and reasonable'. For example, if a company is locked into a lease with high escalations in comparison to market rentals, and such rentals are preventing the company from trading profitably, a court may well order that the lease be cancelled. This affects the privity of contract as contracts could be cancelled for the reason that they are commercially onerous in practice, not that they are impeachable under Insolvency law (for example, a sale at no value or a voidable preference).

If a contract has been suspended or cancelled, the other party is limited only to a claim for damages. This may well be a hollow solution – the damages claim of such party is unsecured and will also be subject to the moratorium on creditors' claims.

The 'cherry-picking' clause does not apply to employment contracts or to ISDA master contracts or exchange contracts to the extent that they already enjoy protection under SA Insolvency law.

Assets subject to security cannot be sold by the practitioner without the secured creditor's consent.

Post business rescue lending

One of the chief reasons that Chapter 11 bankruptcy has shown the measure of success that it has in the US is the availability of post-bankruptcy commencement financing – the so-called DIP financing. Most restructurings are doomed to failure without some form of post Rescue funding. A failure of judicial

management, the predecessor of business rescue, was the reluctance of South African courts to advance funding or overdraft facilities to a company in judicial management. Many of the assets of a company in distress are often financed – and if there were equity in those assets, the company would have utilised this to avoid financial difficulty. In an attempt to encourage post-commencement lending, the Rescue chapter permits a post-commencement financier to take security over unsecured assets or over already secured assets if there is equity. the provisions provide that the amounts owing to a post-commencement financier are, if the business rescue fails and the company goes into liquidation, preferent to the unsecured claims of creditors. However, financiers, looking to exploit a new market, should be mindful that any post commencement unpaid salaries owed to employees are claims that are preferent to post commencement financing – even if the post commencement financier has taken post commencement security.

Conclusion

Although the Business Rescue regime provides a needed and long awaited mechanism for the rescue of companies in South Africa, it is largely proving to be effective in situations where there is a high level of co-operation between key stakeholders. Hopefully resolve on the part of courts in interpreting the new provisions and making key decisions swiftly, and creditors and particularly banks in supporting the process will result in successful Rescues and the development of a welcome alternative to the failure and liquidation of companies.

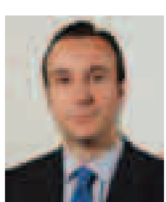
Authors:
James McKinnell, Partner
Insolvency, Bankruptcy and Restructuring
Bowman Gilfillan
SA Reserve Bank Building
60 St George's Mall, Cape Town
PO Box 248, Cape Town, 8000
South Africa
Tel: +27 (21) 480 7800
Fax: +27 (21) 480 3269
Email: j.mckinnell@bowman.co.za

Claire van Zuylen, Partner
Bowman Gilfillan
165 West Street, Sandton, Johannesburg
PO Box 785812, Sandton, 2146
South Africa
Tel: +27 (11) 669 9000
Fax: +27 (11) 669 9001
Email: c.vanzuylen@bowman.co.za

Website: www.bowman.co.za

Spain: Key new legislation introduced by the Insolvency Reform Law

by Antonio Fernández, Borja García-Alaman, Adrian Thery and Juan Verdugo, Garrigues



Distressed companies in Spain have tended to shy away from formal insolvency mechanisms, leaving them to the very last minute, when it was already too late. This was very clearly the case when the nineteenth century bankruptcy law and the "suspension of payments" law providing standstill protection from the 1920s, were in force. The introduction of more stringent provisions on directors' liability towards the end of the 20th century did nothing to reverse this inaction.

Then, in 2004, the new Spanish Insolvency Law came into force, the fruit of hard grafting in parliament. Aware of the importance of their task, groups of all political persuasions created a new insolvency framework from scratch, aimed squarely at modernising the treatment of insolvency in Spain. So intent were the lawmakers on giving insolvency proceedings the importance they deserve that they decided to create a new type of court – the Commercial Courts – tasked first and foremost with conducting insolvency proceedings (which, therefore, remained predominantly judicial in nature).

Introduction to the 2011 reform of the Spanish insolvency law

The Insolvency Law involved a significant change in mindset towards insolvency, as it was no longer defined as an equity imbalance and came to be seen as the inability to meet payments from a financial or cash flow standpoint (liquidity test). The new legislation also ushered in a varied range of effective restructuring measures to induce distressed businesses to petition for insolvency or "*concurso de acreedores*" (the Spanish name for the court proceeding opened by a judge once it has been established that the company in question is technically insolvent), and even allowed businesses to take advantage of the protection offered by this mechanism in cases of "imminent insolvency", that is, where technical insolvency does not yet exist but is likely to arise imminently, which enables companies to anticipate the problems ahead thereby making it easier for them to find a solution.

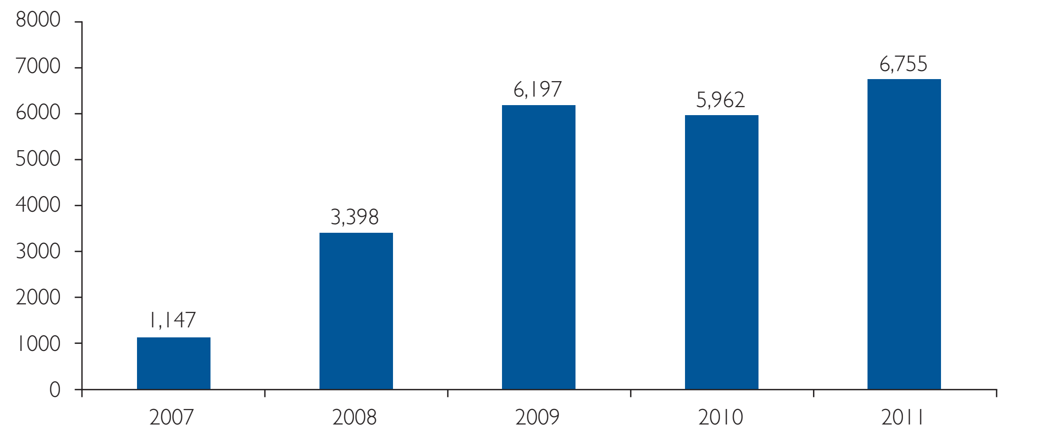
The chief restructuring measures that the Insolvency Law introduced in the Spanish legal system were: allowing the judge in the insolvency proceeding (rather than an administrative authority with political bias) to decide on the collective employment measures that the company may need to carry out; allowing the judge in the insolvency proceeding to order the termination or maintenance of specific contracts to which the company is a party, purely on the basis of the "interests of the insolvency proceeding", in other words, regardless of the existence or otherwise of material contractual breaches; allowing creditors arrangements to be proposed containing an array of measures to restructure the debtor's liabilities; and, allowing a stay on the foreclosure of security interest to try and preserve the business until a solution has been achieved in the insolvency proceeding.

Despite the enticing protection offered to businesses by the Insolvency Law, between 2004 and 2007 the number of insolvency proceedings stayed at a moderate level (around 1,000 proceedings per year), on a par with the former bankruptcy and suspension of payments proceedings. There was a yawning gap between the number of insolvency proceedings in Spain and similar proceedings in other EU countries (Spanish ratio of insolvency per 10,000 companies: 3/10,000; European average: 67/10,000). It was not that insolvency did not arise for companies in Spain, but rather that these companies were not using the formal mechanisms to the same extent as in other countries, probably prompted by a combination of two factors: the average size of companies in Spain being smaller and the stigma traditionally attached to formal insolvency mechanisms.

Since the start of the downturn in 2007, however, the number of insolvency proceedings has rocketed from 1,147 in 2007 to 6,755 in 2011, a six-fold increase in four years.

Due to the gravity of the downturn, in March 2009, just five years after the Insolvency Law came into force, the lawmakers introduced a series of technical improvements aimed mainly at encouraging refinancing arrangements, which were being used on a widespread basis.

Figure 1: Evolution of the *concurso* proceedings



On the back of the first reform in 2009, however, it also became clear that the intensity and characteristics of the downturn made it necessary to carry out a much deeper reform of the Insolvency Law to adjust to the new playing field.

A Committee of Experts was then set up with members drawn from all the circles involved. The outcome of their work, once it had been sifted through the trommel of both Houses of the Spanish Parliament, was the Insolvency Law reform enshrined in Law 38/2011, of October 10, 2011, which came into force on January 1, 2012.

The 2011 Insolvency Law reform is a very far-reaching and ambitious amendment, and has made changes to almost half of the original Law's articles, which illustrates how comprehensive it is.

We are not going to embark here and now on a detailed examination of all of the issues dealt with in the reform. What we would like to do is describe the new legislation introduced by the 2011 reform around two main trends that we think the lawmakers have tried to address: a clear move towards preinsolvency mechanisms and preservation of the business. This will give the reader an idea of the future direction of restructuring and insolvency in Spain and the new tools that will be available.

Measures to preserve the business

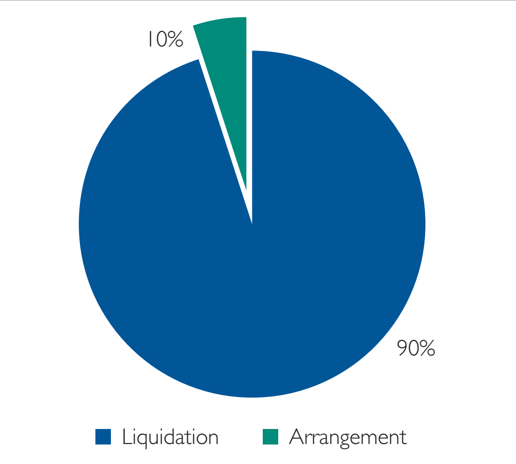
Before the 2007 downturn, when most of the companies petitioning for insolvency were already terminal and breathing their last, the majority ended up in liquidation (90%), whereas only a small number managed to turn themselves around and restructure using an arrangement with creditors (10%).

Generally speaking, liquidation led to the disappearance of the business which meant that companies only had two options: continue in business by means of an arrangement or be liquidated and say goodbye to the business.

In the financial downturn, the number of companies petitioning for insolvency has shot up and many of these companies never reach the terminal stage. This is an improvement on the two-option system hitherto in existence and has opened up a third option not used very often before: even though the company may be liquidated, its business does not disappear with it and survives by being transferred to a third party (along the same lines as *les plans de cession ou reprise* in France).

At present, the Commercial Courts in Spain are going to such great lengths to protect the survival of the debtor's business where the debtor is to be liquidated that you could be forgiven for wondering whether the fundamental aim of insolvency proceedings (to pay creditors, according to the Preamble to the Insolvency Law) has been overtaken by the aim of preserving the business. Whether this is true or not, both goals can usually coexist since preserving the business means maximising its value and minimising its employee liabilities, which therefore also improves the creditors' chances of recovery of their claims.

Figure 2: Solutions reached in insolvency proceedings



That said, the most innovative steps in the reform to encourage continuity of the business are:

(i) Measures to expedite proceedings and shorten the time limits for achieving a solution in the insolvency proceeding, either by securing advance approval of an arrangement with creditors or bringing forward the opening of the liquidation phase, which speeds up the transfer of the business to a third party. If, in either case, the company includes a proposal for an arrangement or a liquidation plan in its petition for insolvency (which will allow the proceeding to be conducted as an "abridged" proceeding, resulting in shorter time limits), a solution may be achieved in the insolvency proceeding between two and three months rather than taking at least six months as happened before the reform.

(ii) A new measure allows companies to include in their petition for insolvency a proposal for the transfer of the business to a third party, which straddles the definitions of ordinary liquidations in Spain and section 363 USC sales in the US.

Besides allowing all or part of the company or its production units to be sold in a shorter timeframe, its principal advantage lies in the fact that the purchaser has a court ruling that clears the assets and determines that the buyer will not acquire any of the seller's debts.

And the Insolvency Law reform does not stop there; where the petition for insolvency includes an initial liquidation plan, it also allows the court to order the termination of specific contracts when the company is transferred to a buyer and, more interestingly, the possible maintenance of the remaining contracts.

The insolvent company can therefore transfer assets to the buyer and maintain specific contracts which are in the interests of the transferred business.

Not only does this mean that the buyer can place the other parties to the seller's agreements under obligation to continue performing the agreements in force on the transfer date, it also makes it possible for the claims held by the parties to those agreements, insofar as they are in force, to be paid in full as post-petition claims, which encourages these parties to support the transaction and paves the way for survival of the business. Any pre-petition claims not associated with agreements entered into by the buyer rank lower and are subject to the rules of the insolvency proceeding.

In short, as a result of the reform, restructurings can now focus on the business, rather than the company, which makes it easier for the business not to disappear and to be transferred to a third party. The ranking of creditors no longer depends only on their characteristics before the insolvency order, as was previously the case and now their future strategic interest also plays a part. By adding these measures, the Spanish Insolvency Law has fostered the US concepts of critical vendor and section 363 sales, referred to above.

(iii) Another way to help the business survive is to make it easier to obtain financing, either before the insolvency proceeding (50% of the new pre-insolvency financing will be classified as a post-petition claim in the event of an insolvency proceeding and the remaining 50% will have general preferred status) or after the insolvency order (financing provided by, or after, an arrangement with creditors will be classified as a post-petition claim if the arrangement is not fulfilled and the company is subsequently liquidated).

Similarly, although not a conventional financing method, the Insolvency Law paves the way for buying and selling prepetition claims (and, therefore, for professional trading in liabilities and for the associated loan to own strategies) by removing the voting ban that these sales previously entailed, provided that the buyer is an "entity subject to financial supervision" or, in other words, is not suspected of being a fiduciary of the debtor.

(iv) With the same goal to secure the survival of the business, the reform gives very important new powers to the receiver, including to petition for liquidation if the debtor's business stops operating, to take control of the voting rights of the debtor's subsidiaries and to dispose of or encumber the debtor's assets without court authorisation in the event of urgency and necessity. Indeed, the commitment to the principle of preserving the business combined with the insolvency manager's enhanced powers is already resulting, in practice, in the appearance and authorisation of real debtor in possession (DIP) financing in Spain, with the traditional US roll-ups in favour of financing banks.

As a counterweight to the increased powers, additions have been made to the provisions on insolvency managers' liability – membership of professional associations is of paramount importance for individuals, and managers are required to have civil liability insurance to cover any damages arising from their decisions.

The lawmakers' aim with all of the above is to expedite decision-making for important but not essential decisions, by taking them away from the courts, which are no longer necessarily regarded as decision makers on all matters. Furthermore, the lawmakers no longer require the courts to oversee all agreement processes in full, which it a

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Antonio Fernández Partner
antonio.fernandez.rodriguez@garrigues.com
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clear move towards taking insolvency proceedings out of the judicial sphere and towards encouraging the preinsolvency mechanisms, discussed below.

Taking insolvency proceedings out of the judicial sphere and decisive move towards pre-insolvency mechanisms

Insolvency proceedings in Spain have traditionally been regarded with a lack of trust in private solutions: the seriousness of the situation was associated with an overriding need for court mediation between the affected parties, who were seen therefore as unable to resolve the situation (or were presumed likely to lay down the law in favour of their own interests). It is possible that the lawmakers' own perception of insolvency was at the root of the stigma attached to it among the Spanish business community.

In the 2011 reform, true pre-insolvency mechanisms made their first appearance in Spain: in what are known as *Acuerdos de Refinanciación* or Refinancing Agreements.

The reason why the lawmakers stopped blindly relying on entirely judicial proceedings to remedy insolvencies from start to finish seems to be a realisation that the involvement of the courts is, by definition, not a particularly efficient way of resolving situations which simply require a Refinancing Arrangement. Indeed, the introduction of Refinancing Agreements in the reform bill was a result of the public discussions which arose from the case of *La Seda de Barcelona*, in which a Spanish company, due to the lack of pre-insolvency mechanisms in Spain, had to apply to the English courts for a scheme of arrangement (relying on the fact that it had submitted to the law and courts of England in its syndicated financing agreement), thanks to which it was successfully able to cram down and restructure its banking liabilities.

Differences aside, the Refinancing Agreements introduced by the reform are a kind of Spanish take on schemes of arrangement in the UK and other English speaking countries.

The terms of Refinancing Agreements can be imposed on dissenting financial creditors (and only on financial creditors) provided that the following conditions are fulfilled: (i) it must be supported by 60% of the total liabilities; (ii) it must also be supported by 75% of the financial liabilities; (iii) an independent expert appointed by the Commercial Registry must have prepared a report on its viability; and (iv) it must be recorded in a public deed.

If the above requirements are met, the Refinancing Agreement must be approved by the Commercial Court in a fast-track procedure, that is, within around one or two months and there is no possibility of appeal. The dissenting creditors can only contest the court's approval of the Refinancing Agreement on the ground that the 75% majority has not been reached and/or that the terms and conditions of the agreement entail a "disproportionate sacrifice" (which would be a kind of equivalent to the concept of unfair prejudice, on the basis of which it is also possible to contest schemes of arrangement in the UK).

There are basically two limitations on Refinancing Agreements: firstly, they cannot, in principle, impose conditions over and above deferral for three years (i.e. they cannot impose release conditions or the conversion claims into equity); secondly, they cannot be imposed on secured creditors or, in the jargon, secured creditors cannot be crammed down. These limitations are in turn subject to two important clarifications: the Commercial Court with jurisdiction to approve the Refinancing Agreement may, in very exceptional circumstances, stay enforcement of the collateral of dissenting financial creditors for up to three years, and even if these creditors foreclose their collateral within the term of the Refinancing Agreement, any part of their claim over and above the value of the foreclosed collateral would be subject to the Refinancing Agreement concerned (as it would be an unsecured claim).

Despite their limitations, Refinancing Agreements will undoubtedly encourage refinancing even if only by dissuading creditors from dissenting. Furthermore, they mark a commendable step forward by lawmakers, both unprecedented and significant, towards securing private solutions to insolvencies in Spain.

We hope that the above has helped provide readers with an overview of the trends and latest new legislation on restructuring and insolvency in Spain. The reformed Insolvency Law works like a constitution by laying down a series of almost universal principles in the area of insolvency, but many issues have neither been regulated nor ruled on by the courts, leaving them open to the defying challenge of being explored.

Authors:
Antonio Fernández
Head of the Restructuring & Insolvency Department
Borja García-Alaman, Partner
Adrian Thery, Partner
Juan Verdugo, Senior Associate, Garrigues
Hermosilla, 3
28001 Madrid, Spain
Tel: +34 91 514 52 00
Fax: +34 91 399 24 08
Email: antonio.fernandez.rodriguez@garrigues.com
Website: www.garrigues.com

Share pledges and enforcement in Sweden: The battle between the pledgor and the pledgee

by Odd Swarting and Ellinor Rettig, Setterwalls

For a number of reasons share pledges have become ever more popular and required by lenders in international and domestic lending. The share pledge allows the pledgee a better position of control and very often an easier way to enforce a security than, for example, a business mortgage.

In the wake of the financial defaults following the financial crises in Europe, and the often rather aggressive enforcement by creditors of share pledges, several questions have been raised around how pledgors' and other creditors' interests are protected by compulsory law in the sale process and when determining the value of the shares through valuation.

The Swedish law on enforcement of pledges over moveable property, such as shares, is to some extent vague in this respect and lacks guiding case law, which often leads to problems of interpretation and disagreements between parties.

In light of the above, and a recent Swedish case (the 'Carnegie case') involving the valuation of redeemed shares in a financial institution, we will present our view on the Swedish law on share pledges and enforcement as we see it.

Share pledge under Swedish law

A share pledge is created through a pledge agreement between the pledgor (the debtor) and the pledgee (the creditor). A key issue in Sweden is the perfection of such a pledge. A share pledge may be noted in the share register of the pledgor. However, in order to perfect the pledge, the physical share certificate also has to be handed over to, and be in the possession of the pledgee. Under Swedish law, the passing of physical possession is the general rule for the perfection of pledges of moveable property. If the collateral is in the possession of a third party, the pledge will be perfected by notifying such third party. The principal test for the perfection of a security interest is the debtor's relinquishing of control over the pledged property.

Enforcement of share pledges

Swedish law is to some extent vague with regard to enforcement of pledges over moveable property. There is limited direct case law guidance on how to establish a proper enforcement process, and this area of law has been a subject of debate in doctrine, particularly in recent years.

It is normally agreed in the pledge agreement that the pledgee may enforce the pledge in the manner he or she finds appropriate or that the agreement describes in detail how to proceed in the event of default. If no such agreement has been reached, the pledgee must institute proceedings against the debtor in court and then make a request to the Enforcement Service Authority for enforcement. Alternatively, the pledgee may invoke a (somewhat) antiquated provision (Chapter 10 Section 2 of the Swedish Commercial Code) to the effect that the pledge is to be valued and offered for sale in accordance with extremely impractical rules. The provision mentioned is, however, not mandatory and is therefore routinely opted out of in the parties' pledge agreement.

It should be noted, however, that even if the pledgee may, according to the pledge agreement, determine how enforcement shall be conducted, the pledgee always has a fiduciary duty towards the pledgor and ultimately its other creditors. The extent of the duty is determined by the nature of the pledge, but in general none of the parties may act in such a way that the other party's position deteriorates.

For instance, the pledgee must maintain the pledged property in such a way that it is not at risk. In doctrine it has also been stated that the pledgee may be obliged to take measures if there is a threat that the pledged property may be at risk.

Furthermore, as a general rule the pledgee is probably obliged to notify the pledgor in advance that there is an intention to enforce the share pledge agreement if the debt is not paid in time, irrespective of how enforcement will be carried out. The pledgee should also normally inform the pledgor of what actions he or she may take to protect his or her right, such as the possibility to redeem the pledge and pay the pledgee's costs. There is no reasonable notice period stipulated in Swedish law, and this has to be determined on a case by case basis. Furthermore, if the shares are to be sold to a third party through auction or otherwise, potential buyers should be given a certain time to acquire sufficient knowledge about the asset in question, as this is a prerequisite for establishing a fair market value. In our opinion this is a fiduciary duty of the pledgee.

In addition to the above, a pledge agreement may not contravene article 37 of the Swedish Contracts Act, according to which a provision whereby the full value of a pledge or other security interest may be forfeited by the pledgee will be treated as null and void. The pledgor may not, according to the act, commit in advance to forfeit the potential 'overvalue' that may exist in the pledged asset after deducting the secured claim.

Under Swedish law share pledges may be enforced in different ways if so agreed, and the pledgee will generally have the possibility to acquire the shares by way of setoff (credit bid). If the value of the shares is higher than the secured debt then the 'overvalue' should be passed on to the pledgor or other potential second ranking creditors. The enforcement of the shares is very often not part of a 'public' auction process and the value is instead established through valuation. The agreement often stipulates who shall conduct the valuation, but seldom how it shall be conducted. Problems related to the enforcement and the valuation may to some extent be avoided by careful drafting of the pledge agreement, but even then certain fiduciary duties arise out of general legal principles, regardless of the wording of the agreement.

Some particularly interesting guiding principles with regard to enforcement and valuation of shares may be found in the Swedish Bankruptcy Act. In a bankruptcy (insolvent liquidation) a creditor with a pledge over moveable property normally has to give notice to the trustee of the bankruptcy estate and offer the trustee to redeem the property. However, a creditor with pledge in financial instruments (e.g shares) may arrange for the pledged property to be sold or acquired by setoff immediately without notice, provided that it is conducted in a "commercially reasonable manner", according to the Bankruptcy Act, Chapter 8 article 10. Previously, the provision stated that the sale should be conducted in accordance with the current stock exchange or market price, but the wording was altered as a result of an EC Directive on financial collateral arrangements. In our opinion the provision requires the enforcement and valuation to be conducted in a manner that achieves a reasonable and fair market value.

The Carnegie case

In a recent Swedish case known as the 'Carnegie case', issues concerning the valuation of enforced shares were examined. Although the case involved shares of a regulated financial institution which were pledged to, and later redeemed by, the Swedish Government in accordance with a specific piece of legislation, in our opinion it supports the general principle that the fair market value should be found in a valuation.

During the financial crisis in the autumn of 2008, the Swedish Government took a number of measures to stabilise the Swedish market, such as adopting a new law on state aid to credit institutions (the 'Support Act'). The aim of the law is that severe problems in banks and other lending institutions are managed in an effective way to prevent a crisis in the financial system.

The law also permits the state under certain circumstances to redeem the shares of an institution which is subject to support. Disputes concerning agreements for support under the Support Act are to be reviewed by a Review Board. Upon enforcement under the Support Act, the redemption price for the shares shall be determined to match the price which could be expected in a sale under normal conditions.

Shortly after the Support Act entered into force, Carnegie Investment Bank (CIB) received a support loan from the Swedish Central Bank. The National Debt Office (NDO) took over the loan and CIB's parent company ('the Parent') pledged all of the shares in CIB as security for the loan. Under the pledge agreement NDO had the right to enforce the pledge if CIB's licence to conduct banking activities was revoked by the Swedish Financial Supervisory Authority (SFSA).

On November 10, 2008 CIB's banking licence was revoked with immediate effect. The NDO enforced the share pledge over CIB with reference to the pledge agreement. Due to the takeover CIB regained its licence.

The share pledge agreement stipulated that if NDO enforced the share pledge other than by public auction, the shares should be valued with regard to the circumstances at the time of the takeover, and according to the principles set out in the Support Act. The preparatory works of the Support Act state regarding the redemption of shares that rules and practices which have been developed for the redemption of minority shares should be indicative. It should be the case that for companies the redemption price of the shares should be determined so that it corresponds to the price for the shares that could be expected in a sale under normal conditions. The starting point should be that the outcome for the shareholder should be the same as in a voluntary sale of the shares.

After the enforcement, the shares of CIB were valued by PwC. The valuation was based on the fact that CIB had lost its licence at the time of the takeover, and the NDO notified the Parent that the secured obligations exceeded the value of the pledged shares, for which reason there was no overvalue to report to the Parent. The Parent requested a review of the valuation, stating that the

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value should be determined on the basis that CIB had a licence to conduct banking activities at the valuation date.

It shall be noted that the issue of the disputed valuation in this case does not refer to shares which the Swedish state enforced under the rules in the Support Act, but rather a share pledge that was enforced under a share pledge agreement.

The Review Board's decision

The Parent requested that the Review Board determine the value of CIB at the time of the takeover and that the Review Board determine whether the NDO was obliged to make payment to the Parent.

The NDO argued that the valuation should be based on a liquidation perspective, while the Parent stated that it was unreasonable to base the valuation on the short time that CIB did not have a licence, and that the valuation should be based on the principle of going concern.

The Review Board's decision of October 3, 2011 essentially started from PwC's valuation, but accorded the shares a somewhat higher value. In summary, the Review Board did not find that the NDO was to make payment to the Parent.

The Review Board essentially found that the value of the shares, according to the pledge agreement, should be based on conditions at the time of the takeover relating to the highest price that an informed and financially strong buyer would, as of this time, be willing to pay for the shares.

The Review Board considered it irrelevant to the valuation that it related to a time when CIB's licence was revoked or still existed, as the essential factor was that CIB had been conducting its business in such a way that there was a risk of revocation of the licence. A company which on November 10, 2008 was interested in buying the shares in CIB had to take into account that certain business activities would need to be wound up as a result of the revocation decision or, to avoid the revocation decision, the costs needed for changes to the bank's organisation and capital situation which were acceptable for the SFSA.

Summary

A share pledge offers the pledgee a possibility to enforce the security in an effective and controlled way. The way the enforcement procedure is structured and related issues such as valuation are critical, however, and the Swedish law in this respect is not precise and is therefore subject to arguments around interpretation.

Scattered provisions in different laws such as the provision in article 37 in the Swedish Contracts Act, which prohibits agreements that state that the pledge shall be forfeited in the event of default, protect the pledgor and its creditors.

The underlying principle seems to be that the fair market value of the pledged assets has to be established at the time of enforcement.

In the recent Carnegie case the ruling body stated that the valuation should be made from what an informed and financially strong buyer would be willing to pay for the shares.

The same conclusion could also be drawn from the provisions in the Bankruptcy Act, which state that in a bankruptcy situation pledged shares may be sold immediately without the consent of the bankruptcy trustee, provided that this is done in a commercially reasonable manner. In our opinion this wording implies that a sale or valuation should be conducted in such a way that the fair market value at the time of enforcement is obtained.

Authors:
Odd Swarting, Partner
Tel: +46 (8) 5988 9046
Email: odd.swarting@setterwalls.se

Ellinor Rettig, Senior Associate
Tel: +46 (8) 5988 9106
Email: ellinor.rettig@setterwalls.se

Setterwalls
Arsenalsgatan 6
P.O. Box 1050
SE101 39 Stockholm
Sweden
Tel: +46 (8) 5988 9000
Fax: +46 (8) 5988 9090
Website: www.setterwalls.se

Translation risks and their impact upon company valuation: An overview of the Swiss public companies

by Peter Dauwalder and Dr. Michael Märki, Ernst & Young AG

With the globalisation of the economy it has become crucial to understand and adequately hedge foreign currency risks. The vital importance of foreign markets, such as Europe, the US and Asia, to Swiss corporates is demonstrated by the ongoing shift of generated revenues away from the Swiss franc towards foreign currencies. In light of the recent volatility in foreign exchange markets, this currency exposure of the Swiss corporates has become increasingly important – even after September 6, 2011 when the Swiss National Bank announced its intervention in the markets and to defend a minimal value of the euro against the Swiss franc.

Currency risk categories

Foreign exchange related risks fall into three categories, as can be seen in Figure 1.

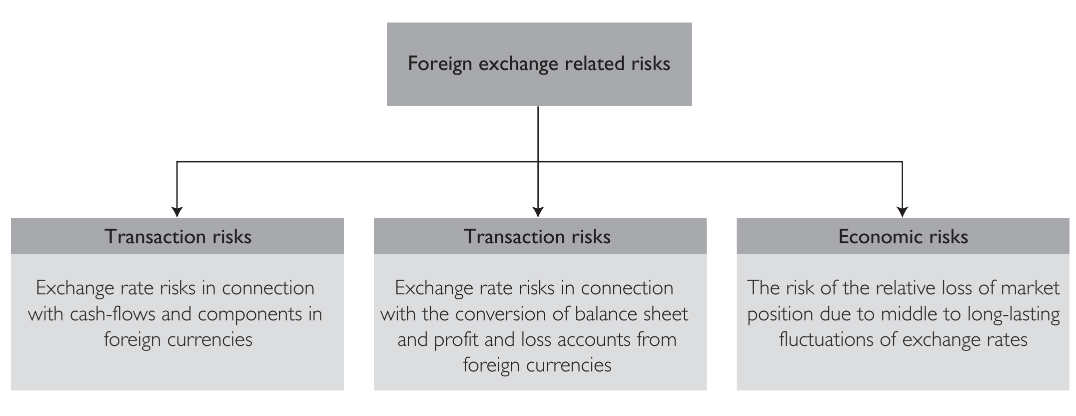
Translation risks receive less attention than transaction and economic risks, both in theory and in practice. Recent studies show that a clear majority of corporates do not hedge translation risks.[2] This raises the question of why translation risks carry less weight than transaction risks. The main reason is due to the widespread economic theory that a company's value is primarily dependent on future cash-flows. While transaction risks directly affect a company's result and the future cash-flows, the translation risk, in principle, does not impact the cash-flow, and therefore affects the company value only indirectly, if at all.

Translation risks

The translation risk is measured by the change of the exchange rate between functional and presentation currency in a year-on-year comparison (conversion difference) and is in most cases recognised as positive or negative item directly in the company's equity.[3] From a theoretical perspective this balance sheet impact is not a reference for a company's future development, or for its valuation. Translation risk would also appear to be an unsuitable basis for value-oriented management decisions since it only represents a conversion difference in book values and is therefore not an effective indicator of future cash flows.

Behavioural finance challenges this picture of a translation risk as non-critical in nature. These approaches consider that investors who estimate the future development of profits and losses tend to base their analysis upon consolidated financials. Accordingly consideration must be given to the possible influence translation effects may have on the share price and respectively on the company's value. The strength of the Swiss franc is a key theme across the current season of annual report presentations, and translation risk has become topical point of discussion. One presumes that more than a few multinational Swiss corporates will have to explain to their investors why they could keep year-on-year sales trends level in their separate market regions (i.e. when reporting in

Figure 1: Foreign exchange related risk categories[1]



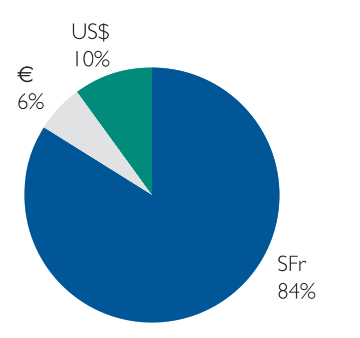
functional currencies) and yet report a decline on a consolidated level (due to translation effects). Similarly, the financing side could also be affected. Falling (consolidated) financials could lead to higher financing costs where pricing grid mechanisms are in place. In extreme cases it is conceivable that negative translation effects could lead to a breach of covenants and a tightening of credit lines.

This gives the management of translation risk a new importance. In theory translation risks can be avoided simply and cost effectively by carrying out all transactions in the same currency. In practice this convergence goal would be best achieved out if the currency of the main market region were chosen as the presentation currency.

The presentation currency of SPI companies

The majority of the listed companies in Switzerland present their annual report in the local currency – the Swiss franc.

Figure 2: Overview on presentation currencies applied by the SPI index members [4]



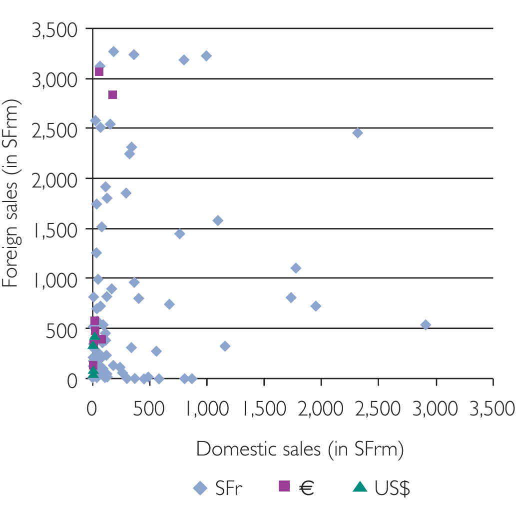
Of the current 214 Swiss Performance Index (SPI) members, only 33 companies report in a foreign currency (12 in euro and 21 in US dollar, see Figure 2). With regard to the aforementioned convergence goal, one question naturally arises: How much did the existence of translation risks influence the choice of the presentation currency in the past? If not, to what extent is there a need to follow up in this regard? In any case the aggregated sales split of the index members does not appear to support the predominant standing of the Swiss franc as presentation currency – from a translation risk perspective. Even though 84% of all SPI companies reported in Swiss franc, in 2010 only just 13% of the total turnover of the index members were generated in Switzerland.

Translation risks by SPI companies

The analysis of a company's exposure to translation risks requires the listing of all net assets and cash-flows of the parent company and its subsidiaries by their respective functional currency. Neither the SIX (Swiss Infrastructure and Exchange) nor the generally accepted accounting principles require segment reporting by currencies; hence the aforementioned translation risk analysis cannot usually be entirely fulfilled. The following analysis is based upon the IFRS accounting standards requirements for geographical segment reporting. The following assumptions have been made: The turnovers in the regions of America (Canada, North, Middle and South America) were generated in US dollars; turnovers in Europe were in euro and turnovers in Switzerland were in Swiss franc.

The chart in Figure 3 plots the turnovers of all SPI enterprises, divided into Swiss franc and foreign currencies (i.e. US dollars and euro).

Figure 3: Sales split between Switzerland and foreign countries [5]



Unsurprisingly the index members with the US dollar or the euro as representation currency generated only a minor part of their turnovers in Swiss franc. The main markets of these companies lie in America and Europe and the main trading currencies are the US dollar and the Euro respectively.

In contrast the index members which use the Swiss franc as a presentation currency showed a mixed picture. On one hand, a group of small companies near the X axis is visible, which remain nationally aligned and generate their turnovers in Switzerland despite their listing on the stock exchange. On the other hand, there is a mass of blue dots near the Y axis. These corporates really generate only a small part of their turnover in Switzerland yet they still use the Swiss franc as presentation currency. In other words these companies directly expose themselves to translation risks. It should be determined for these companies what is more important with regard to foreign exchange risk

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management – a change of the presentation currency combined with a vast reduction in translation risks or the continuity in presenting the financial statements in Swiss franc.

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Notes:

[1] Seethaler, Hass und Brunner (2007), S. 345.

[2] Bonini, Dallocchio, Raimbourg und Salvi (2011).

[3] This procedure corresponds to the Current Rate Method and is used if the functional currency corresponds to the presentation currency of the holding company. If the functional currency is not identical to the presentation currency of the holding, the financials in a foreign currency are converted by using the Temporal Method. The conversion differences, contrary to Current Rate Method, are recognised in the profit and loss statement (see also IAS 21).

[4] Data rely on Bloomberg.

[5] Several growth companies generate only marginal turnovers despite their stock market listing. For this reason, such enterprises are positioned near the crossing of both axes in the scatter plot. For a better display, the scale of maximum SFr3.5bn was chosen. This reduces the total number of analysed SPI companies from 132 to 107.

Authors:
Peter Dauwalder, Partner
Transaction Advisory Services
Email: peter.dauwalder@ch.ey.com

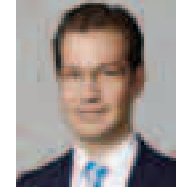
Dr. Michael Märki, Senior Manager
Transaction Advisory Services
Email: michael.maerki@ch.ey.com

Ernst & Young AG (Switzerland)
Maagplatz 1
Postfach
CH-8010 Zürich
Switzerland
Tel: +41 58 286 34 23
Fax: +41 58 286 30 04
Website: www.ey.com/ch

Pitfalls for a foreign entity in distress that maintains assets or an operation in Switzerland

by Ueli Huber and Simon Lang, Homburger

If a foreign administrator comes to Switzerland to lay his hands on assets situated here, his powers are fairly limited. He will need to apply to the competent court to obtain recognition of the foreign insolvency adjudication. Comparably, if these assets are part of a Swiss registered branch office, such a branch office is subject to separate Swiss bankruptcy proceedings. A foreign administrator will therefore not be in a position to repatriate branch assets if a branch bankruptcy has already been commenced.



Limited powers of a foreign administrator to act in Switzerland

If a foreign entity becomes subject to an insolvency proceeding, but maintains assets abroad, the question arises how these assets can be pulled into the foreign estate. Switzerland is not a member of the EU and therefore does not apply the relevant regulation on insolvency proceedings. And it has not enacted the Uncitral model law. But it provides for a proceeding by which a foreign insolvency adjudication can be recognised in Switzerland if assets are situated here, provided the prerequisites are met. Following recognition, assets in Switzerland will be available to a limited range of creditors (including secured creditors for security situated in Switzerland) in a limited bankruptcy proceeding, a so-called mini-bankruptcy. After these creditors have been fully satisfied or in the absence of such creditors, the assets (or the counter value following their sale) can be made available to the administrator of the foreign estate, provided that Swiss creditors will be treated equally in the foreign proceeding.

The purpose of the recognition process and the mini-bankruptcy over assets situated in Switzerland taking place is obvious. Swiss law wants to make sure that certain privileged creditors (which mostly are not big creditors, but smaller ones, such as employees) are not hassled by participating in foreign proceedings and that Swiss creditors who will have to participate in foreign proceedings will meet a level playing-field.

The prerequisites for recognition of a foreign insolvency adjudication contain an element that often proves to become a stumbling block for the recognition procedure: reciprocity. Reciprocity requires that Switzerland will only recognise a foreign insolvency adjudication if the country where the adjudication originates from would also recognise Swiss insolvency adjudications. There are still a number of countries which do not recognise foreign insolvency adjudications generally and therefore an insolvency adjudication originating from such a country will not be recognisable in Switzerland.

Given globalisation, this is a very unsatisfactory outcome for the foreign administrator, as the assets situated in Switzerland will remain available to individual creditors of the foreign entity that can make the race to the Swiss courthouse for an attachment, but due to a lack of recognisability of the foreign insolvency adjudication will not be available to the estate as a whole.

It comes as no surprise that, given the problems a foreign administrator may face regarding recognition, the Swiss Federal Supreme Court has had to deal with a number of cases recently where a foreign administrator tried to circumvent the hurdles of recognition and to get hold of the relevant assets using a different method.

Up until 2003 a foreign administrator was occasionally successful in repatriating funds to countries which could not get their insolvency adjudications recognised in Switzerland, but that practice has largely been stopped in recent years.

Before distilling general findings resulting from that court practice, let us have a look at some of the typical situations the Swiss courts have faced:

- A foreign administrator obtained a judgment abroad against a Swiss-based solvent debtor on facts showing fraudulent conveyance. The administrator tried to enforce that judgment against the Swiss debtor in Switzerland. The foreign administrator was denied standing lacking recognition of the foreign insolvency adjudication (which unfortunately was not an option due to lack of reciprocity).
- Similarly, a foreign administrator sued a Swiss-based solvent debtor for payment under a settlement the administrator and the debtor had reached. The settlement concerned a fraudulent transfer matter. With respect to fraudulent conveyance matters

one has to note that Swiss international insolvency law explicitly provides that the right to sue is with the Swiss administrator handling the mini-bankruptcy and that only if the Swiss administrator and the creditors admitted to the mini-bankruptcy waive the right to sue, such right will pass to the foreign administrator. So the denial should not have come as a surprise.

Further cases involved the following situations:

- A foreign administrator sued a Swiss solvent debtor in a lawsuit in Switzerland for a claim the estate argued to have. In that case, reciprocity was not an issue, but the foreign administrator hoped to be able to take a shortcut, having the foreign insolvency adjudication recognised as part of the lawsuit. That did not work, however, because the recognition of the foreign adjudication would not have had the same effects as a proper recognition; it would not have led to a mini-bankruptcy and therefore would have deprived certain creditors of their privileges.
- In several cases, a foreign administrator filed a claim to be registered in the claims schedule of an equally insolvent debtor of the foreign estate. The claim was refused because the foreign administrator had not had the foreign proceeding recognised in Switzerland.

The rationale behind these decisions, which all denied the foreign administrator access to the estate's assets in Switzerland, has been more or less the same: Within the perimeters of the proceedings provided for by Swiss international insolvency law, Switzerland permits the recognition of foreign insolvency adjudications and, provided a limited range of creditors with privileges have been satisfied, also the repatriation of excess funds to the foreign estate.

To grant a foreign administrator powers broader than to demand recognition of the foreign insolvency adjudication would permit these rules to be undermined, which in turn would deprive creditors of protection granted to them by Swiss international insolvency law.

These cases therefore make it quite clear that, as long as the foreign insolvency adjudication has not been recognised here, the possibility of the foreign administrator attracting the estate's assets in Switzerland into the estate are virtually non-existent.

It remains to be added that the Federal Supreme Court has made a fairly important statement in its most recent decision, where the foreign administrator argued that the claim was not a bankruptcy related claim and therefore his standing should not be measured against the standards of Swiss international insolvency law.

The court did not hear that argument. It clearly stated that Swiss international insolvency law would apply if the foreign administrator's act or action had for its purpose to repatriate funds of the estate situated in Switzerland. The nature, legal basis, etc. of such act or action are not relevant.

There have been many cases arguing that, if recognition is not possible due to lack of reciprocity, the foreign administrator should otherwise be given access to these assets. While the courts recognise that reciprocity may pose an issue and runs against the equal treatment of all creditors of an estate, they note two things: (i) on the one hand, this is not a problem originating in Swiss law, but in foreign law which does not recognise Swiss or, more often, foreign adjudications generally, i.e. does not respect creditor equality; and (ii) on the other hand, any circumvention of the recognition proceedings would deprive certain creditors of the protection granted to them by Swiss law.

The Federal Supreme Courts also held in a very recent case that Swiss statutory law is so clear on this aspect that the courts are not in a position to ignore the requirement of reciprocity. Foreign administrators will in the future, therefore, have to have their foreign insolvency adjudications recognised in order to attract assets of the estate situated in Switzerland and, unfortunately, they will continue to be frustrated with such efforts if the originating country does not grant reciprocity.

Finally, Switzerland has enacted new rules on the recognition of insolvency adjudications concerning foreign banks. While the prerequisites (including reciprocity) remain the same, the rules applying on banks will permit the supervisory agency Finma (who is running the process rather than a court or bankruptcy administrator) to transfer assets to the foreign administrator without a mini-bankruptcy being conducted. It is far too early, though, to evaluate what effect these rules will have, as it appears that they have not been applied in practice as yet.

Insolvency of a branch office in Switzerland and other forms of debt enforcement against assets of a foreign debtor

Two fundamental principles set the guidelines for debt enforcement procedures against Swiss assets of a foreign entity:

(i) Firstly, Swiss debt collection authorities do not generally have jurisdiction over assets located in Switzerland belonging to a foreign entity; the exception to this rule is if the foreign debtor either maintains an informal (unregistered) establishment in Switzerland or a formal branch office (i.e. an

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Contacts

Ueli Huber
ueli.huber@homburger.ch

Benedikt Maurenbrecher
benedikt.maurenbrecher@homburger.ch

Georg Naegeli
georg.naegeli@homburger.ch

Daniel Haeberli
daniel.haeberli@homburger.ch

Homburger AG
Prime Tower
Hardstrasse 201 | CH-8005 Zurich
P.O. Box 314 | CH-8037 Zurich

T +41 43 222 10 00
F +41 43 222 15 00
www.homburger.ch
lawyers@homburger.ch

establishment that is registered in a commercial register in Switzerland).

(ii) Secondly, foreign adjudications of bankruptcy do not *per se* have any effect in Switzerland. However, as described above, Switzerland provides for a mechanism to obtain recognition of foreign bankruptcy adjudications.

As a result, debt enforcement against the assets based in Switzerland of a legal entity domiciled outside of Switzerland is, in general, possible in the following three ways:

- if the foreign entity has an establishment in Switzerland, by way of debt collection against the Swiss establishment, resulting in the seizure and foreclosure of such assets;
- if the foreign entity has a branch office in Switzerland, by way of debt collection against the branch office resulting in a branch bankruptcy; and/or
- by way of recognition of foreign bankruptcy adjudications in Switzerland resulting in a mini-bankruptcy procedure limited to the assets of the foreign debtor located in Switzerland (for details on the prerequisites for such a recognition and the subsequent mini-bankruptcy procedure, see *Part I: Limited Powers of a Foreign Administrator to Act in Switzerland* above).

It is important to note that neither the Swiss Federal Act on Debt Collection and Bankruptcy (Bankruptcy Act) nor the Swiss Federal Act on Private International Law (PILA) contain provisions which would allow the application of the COMI-principle known in the EU.

Debt collection against a branch office

Under certain conditions a foreign company can register its establishment in Switzerland as a branch office. With the registration of the establishment in the commercial register, such an establishment becomes a branch office.

A creditor with a claim against a branch office can initiate debt collection proceedings against the branch office in Switzerland. In such a proceeding, the foreign debtor company owning the branch office is the named debtor. Service of documents can, however, be made directly to the branch office.

In contrast to debt collection proceedings against an unregistered establishment, debt collection proceedings against a branch office can result in the insolvency of the branch office if the debt pursued remains unpaid.

Compared to a fully-fledged bankruptcy of an entity domiciled in Switzerland, the effects of a branch bankruptcy are limited in several respects:

- Only creditors (Swiss or foreign) who have claims relating to the business of the branch office will be admitted to file claims in the branch bankruptcy.
- The branch bankruptcy encompasses the assets of the foreign debtor company belonging to the branch office. Pursuant to a minority view in doctrine a branch bankruptcy also includes other assets of the foreign debtor company situated in Switzerland. While this question has not yet been decided by the courts, we believe that it is not correct to include assets unrelated to the business of the branch office in a branch bankruptcy, mainly because creditors of the foreign debtor company not owning a debt pertaining to the branch office will not be permitted to participate in the branch bankruptcy. Excluding assets unrelated to the business of the branch office mirrors that limitation.

In comparison to the mini-bankruptcy described above the scope of the branch bankruptcy, is thus narrower, both in terms of assets and liabilities.

Competition of branch insolvency and recognition of a foreign bankruptcy adjudication

In light of the two different procedures for debt enforcement against the assets of a foreign debtor both leading to a bankruptcy like winding down, the question if and how parallel branch bankruptcy and mini-bankruptcy proceedings have to be coordinated is key.

According to the PILA, debt collection proceedings against a branch office are "permitted" until the claims schedule for creditors in the mini-bankruptcy has become final and enforceable. The law is silent on the question what "permitted" means and what its effects on a parallel branch bankruptcy are once the mini-bankruptcy has reached that stage.

The general view is that at the latest when the branch bankruptcy has been declared, it can no longer be undone. Once the branch bankruptcy has been opened, the assets of the branch office will remain separated and will be liquidated in the branch bankruptcy. If the claims schedule in the competing mini-bankruptcy would become final and enforceable at an earlier stage of the debt collection proceedings against a branch office, the latter would be collapsed into the mini-bankruptcy.

A mini-bankruptcy would also encompass assets of a branch office. However, if debt collection proceeding against a branch office were commenced and, as a result, a branch bankruptcy adjudicated after a parallel mini-bankruptcy proceeding has been initiated but before the claims schedule in the mini-bankruptcy has become final and enforceable, the assets pertaining to the business of the branch office would have to be separated from the estate of the mini-bankruptcy.

The fact that the range of creditors permitted to participate in a branch bankruptcy or in a mini-bankruptcy are not identical justify the fact that Swiss law permits two estates to be run in parallel. At the same time, this argument also explains why assets not pertaining to the business of a branch office should be excluded in a branch bankruptcy. To include such assets would be to the detriment of the creditors permitted to participate in a later mini-bankruptcy, as the estate of that proceeding would be left without any assets.

Authors:
Ueli Huber, Partner
Simon Lang, Associate
Homburger AG
Hardstrasse 201
8005 Zurich, Switzerland
Tel: +41 43 222 1000
Fax: +41 43 222 1505
Email: ueli.huber@homburger.ch
simon.lang@homburger.ch
Website: www.homburger.ch

Corporate restructuring in Thailand

by Surasak Vajasit and Pakpoom Suntornvipat, Hunton & Williams

In Thailand, the current situation on debt restructuring is different from 1997, when Thailand experienced its worst economic crisis. Nowadays, financial creditors, which are usually major creditors, seem to be uninterested in debt restructuring through the business reorganisation proceeding under Chapter 3/1 of the Bankruptcy Act; the proceeding is time consuming and while it is underway, there are uncertainties. Each financial creditor is likely to prefer out-of-court debt restructuring, which, of course, may not be easy if the debtor is in default to several creditors simultaneously.

As for debtors, they seem to prefer to go whichever way will be to their benefit as long as the creditors are supportive. Debtors' greatest desire is to turn their business around and one of the difficult tasks is how to secure their credit lines from the financial creditor while their balance sheets are negative. The present policy of each financial institution is that if a debtor files for business reorganisation, its credit lines will be ceased, which results in the debtor being put into more trouble.

In Thailand, the garment business should be the most impacted. In addition to its tough economic conditions, a huge garment factory usually employs more than 1,000 workers. Economic impact will therefore be not only on the company but also on a large number of workers. Laying off a great quantity of workers is a difficult and risky job that employers would want to avoid.

To keep the failing garment business alive, the debt restructuring may be unavoidable, but financial institutions are cautious in lending money to the garment business because it is regarded as a sunset business.

To restructure the operations, the companies may need new money either from a financial institution or an investor. Companies that have no clean assets to secure a loan will find it difficult to obtain any loan from a financial institution. Seeking a new investor may be an alternative, if the business is of interest to the new investor and a company's outstanding debt is at a manageable level.

Filing of reorganisation petition

A petition for an order to reorganise business may be filed with the court by the debtor; by one or more of the creditors who are owed, in aggregate, at least Bt10,000,000; or by certain government agencies.

To file the petition for business reorganisation, certain requirements need to be met, including: (i) the debtor must be insolvent; (ii) the debtor is indebted to one or more creditors for a definite amount of not less than Bt10,000,000, irrespective of whether such debt is due immediately or in the future; and (iii) there are reasonable grounds and prospects to reorganise the business of the debtor.

Contents of petition

The petition for business reorganisation must include details of the following matters:

- the insolvency of the debtor;
- a list and addresses of one creditor or more to whom the debtor is indebted for an amount, in aggregate, of no less than Bt10,000,000;
- reasonable grounds and prospects to rehabilitate the business of the debtor; and
- the name and qualification of the planner, including his letter of consent.

Hearing of petition and automatic stay

After the court has ordered the acceptance of the petition, the court is required to proceed with the hearing of the petition on an urgent basis but an advertisement of the hearing must be published not less than twice in at least one widely distributed newspaper at intervals of not more than seven days and a copy of the petition must be given to, among others, known creditors and the registrar of the debtor (if any) at least seven days prior to the hearing date. The hearing is to be conducted on a continual basis without postponement unless there is an event of *force majeure*. Following acceptance of the petition by the court, the debtor is protected from certain specified actions that may adversely affect its business, including (the Automatic Stay):

- commencement of civil or arbitration proceedings in respect of debt or obligation that arises before the date on which the court approves the business

reorganisation plan;
- commencement of bankruptcy proceedings;
- enforcement of judgments;
- revocation of existing licences by regulatory authorities and orders by such authorities to cease business operations;
- enforcement of security by secured creditors without court approval;
- seizure and sale of the debtor's assets; and
- suspension of electricity, water and other utility services without court approval (unless there are defaults on two successive payments).

The Automatic Stay remains in place to protect the debtor until the earlier to occur of the date on which: (i) the period of time for implementation of the business reorganisation plan expires; (ii) the business reorganisation plan is successfully implemented; (iii) the court dismisses the petition; (iv) the court revokes the business reorganisation order; (v) the court terminates the business reorganisation proceeding; or (vi) the court orders the debtor to be under absolute receivership, as the case may be.

Business reorganisation order

After the petition for business reorganisation is accepted, the court hearing will in principle be conducted on an urgent basis. Following the court hearing, the court may then issue an order for (i) dismissing the petition; (ii) business reorganisation; or (iii) business reorganisation with appointment of the planner. If the court issues an order for business reorganisation and appoints the planner nominated by the petitioner, the planner will assume temporary control over the management of the debtor's business at the date on which such order has been made.

Appointment of planner

Unless an alternative person is proposed by the debtor or by other creditors or the person proposed is not qualified to act as the planner, the court will appoint the planner nominated by the petitioner and announce such appointment in the Government Gazette. If the nominated person is not qualified or another person is nominated by the debtor or by other creditors, a meeting of creditors will be held at which a resolution will be passed to appoint the planner. The planner is responsible for the preparation of the business reorganisation plan and assumes all powers and duties of management and shareholders (other than the right to receive dividends) of the debtor.

Filing of claims

Following the appointment of the planner, every creditor whose claim had occurred before the court order for business reorganisation was issued is required to file its claim for repayment of debts with the official receiver within one month of the announcement of the planner's appointment in the Government Gazette. Any creditor who is eligible for filing such claim and fails to do so within such one-month period will lose the right to receive payment regardless of whether the business reorganisation plan succeeds, unless (i) the business reorganisation plan specifies otherwise; or (ii) the court revokes the business reorganisation order.

Business reorganisation plan

The plan for business reorganisation of the debtor will be prepared by the planner and be submitted to the official receiver (with copies for the debtor and each of the creditors who is eligible to vote) within three months of the announcement of the planner's appointment in the Government Gazette. Two extensions of one month each may be granted by the court.

At a minimum, the plan must contain the following:
- the reasons for reorganising the business of the debtor;
- details concerning the assets, liabilities and other binding obligations of the debtor at the time the court issues an order to reorganise the business of the debtor;
- principles and method for the business reorganisation:
  (i) steps in reorganising the business;
  (ii) payment of debts, extension of time for payment of debt, reduction of the debt and classification of creditors;
  (iii) reducing and increasing capital;
  (iv) creating debts and raising funds, including sources of funds and any conditions pertaining to such debt and funds;
  (v) managing and acquiring benefits from the assets of the debtor; and
  (vi) conditions regarding payment of dividends and other benefits.
- redemption of security in the case where there are secured creditors and liabilities of guarantors;
- ways to solve the problems if there is a temporary lack of liquidity while the plan is being implemented;
- action to be taken in cases in which a claim or debt is assigned or transferred;
- the name, qualifications and letter of consent of the plan administrator and their compensation;
- the appointment of the plan administrator and his release from this position;
- disclaiming assets of the debtor or rights under contracts made by the debtor where the terms are more onerous than the benefits to be derived therefrom by the debtor; and

- the time period for implementing the plan, which must not exceed five years. Two extensions of one year each may be granted.

Approval of reorganisation plan

There are two steps of approving the plan, i.e. approval by the creditors and approval by the court.

Approval by creditors

Upon receiving the plan from the planner, the official receiver must call a meeting of creditors to discuss whether to approve the plan. For the purposes of voting, the creditors are divided into various classes as follows:

(i) each secured creditor holding a secured claim in the amount of not less than 15% of all debts that may be claimed in the business reorganisation proceeding;

(ii) all other secured creditors not classified in (i) above;

(iii) unsecured creditors, which may be classified into various sub-classes according to their various interests, provided that unsecured creditors that have substantially the same or similar kinds of claim or interest are grouped into the same sub-class; and

(iv) subordinated creditors.

Approval of the plan requires a "special resolution" of:

- the meeting of each and every class of creditors; or
- the meeting of, at least, one class of creditors (excluding those deemed to have always approved the plan) and the aggregate amount of claims of creditors who cast votes in favour of the plan in the meetings of every class of creditors is not less than 50% of the total amount of claims of the creditors who attend the meetings, either in person or by proxy, and also vote on the plan.

In this context, a "special resolution" means a resolution of a majority in number of creditors whose debt is not less than 75% of the total amount of debt of creditors who attend the meeting, either in person or by proxy, and also vote on such resolution. If, however, no special resolution to approve the plan can be passed by the creditors, the official receiver will report such non-approval to the court. The court will then revoke the business reorganisation order. In the event that there is a bankruptcy suit that has been suspended during the reorganisation proceeding and the court deems it appropriate to adjudge the debtor bankrupt, the court will then dismiss the petition for business reorganisation and thereafter resume such suspended bankruptcy suit.

Approval by court

The official receiver will report to the court the resolution approving the plan by the meeting of creditors. The court will then promptly call a hearing to consider the plan. If the plan meets the requirements set out in the Bankruptcy Act, the court will approve the plan. Following court approval of the plan, a plan administrator (the plan administrator) assumes the powers and duties of the planner. However, if the court rejects the plan, the court will then revoke the business reorganisation order. In the event that there is a bankruptcy suit that has been suspended during this reorganisation proceeding and the court deems it appropriate to adjudge the debtor bankrupt, the court will then dismiss the petition and thereafter resume such suspended bankruptcy suit.

The Thai court takes the view that the Bankruptcy Act of Thailand requires that business reorganization plans be approved by the court, meaning that the Bankruptcy Act of Thailand empowers the court to play the economic role to control the business reorganisation proceeding such that the relevant persons are treated fairly and minor creditors are protected for the most benefit of the creditors and the country as a whole. The Thai court further views that the requirements under the Bankruptcy Act of Thailand are only the minimum standard and the Thai court can use its discretion to approve or disapprove business reorganisation plans.

With due respect, it is likely that the Thai court does not consider only the legal requirements under the Bankruptcy Act of Thailand but also the commercial perspectives. This creates a lot of commercial uncertainties as to how the Thai court determines what is fair and not fair.

Implementation of reorganisation plan

Following court approval of the plan, the plan will be binding on all creditors filing claims for repayment and being entitled to receive repayments under the plan. The plan must be implemented within five years although the court may extend this period twice by not more than a year on each occasion. Following the successful implementation of the plan, the court will issue an order for the termination of the business reorganisation proceeding. Thereafter, the debtor's management and the debtor's shareholders will then resume full control of the business. In the case that the plan cannot be implemented successfully and if the court deems it appropriate to adjudge the debtor bankrupt, the court will order the debtor to be under absolute receivership. However, if the court does not deem it appropriate to adjudge the debtor bankrupt, the court will order for the termination of the business reorganisation proceeding. Thereafter, the debtor's management and the debtor's shareholders will then resume full control of the business.

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Ongoing restrictions on business operations

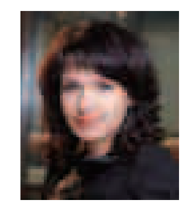
Throughout the period when the debtor is under the business reorganisation proceeding, the debtor is subject to the following restrictions that may potentially affect its business operations:

- Throughout the period of Automatic Stay, the debtor shall not dispose of, distribute, transfer, rent out, pay debt, create debt or do any act that creates encumbrances over its assets except where such act is essential for the debtor to carry on its ordinary course of business, unless otherwise ordered by the court.
- Under the business reorganisation proceeding, all power and duties of management and shareholders (other than the right to receive dividends) of the debtor are taken over by the planner (during the period of formulating the plan) and the plan administrator (during the period of implementing the plan).
- During the period when the plan is being implemented, the debtor is required to strictly comply with the plan. The plan may provide for any restriction that may potentially affect the business operations of the debtor, in which case the debtor must fully comply.

Authors:
Surasak Vajasit, Partner
Pakpoom Suntornvipat, Associate
Hunton & Williams
34th Floor Q.House Lumpini Building
1/3401-3402 South Sathorn Road
Bangkok 10120
Thailand
Tel: +66 2 645 88 00
Fax: +66 2 645 88 80
Email: surasak@hunton.com
pakpoom@hunton.com
Website: www.hunton.com

Recent developments in Ukrainian distressed debt disposal strategies

by Denis Lysenko and Yulia Kyrpa, Vasil Kisil & Partners



There has been a continued rise in the Ukrainian distressed debt market in 2011 and early 2012. The aggregate amount of overdue loans in Ukraine reached US$10.4bn (10.7% of the gross loan portfolio) by the end of 2011.

In view of relatively high costs incurred by the banks for keeping non-performing loans (NPLs) on their balance sheets, as well as the continuous pressure from the National Bank of Ukraine (NBU) to comply with the economic ratios set forth by the latter, it became hardly affordable for a number of Ukrainian banks to hold NPLs on their balance sheets, and therefore, banks continued to develop solutions for debts restructuring arrangements or workouts utilising either in-house or outsourced resources.

Distressed debt disposal methods

Depending on the priority for a distressed debt vendor, the following NPL sales methods appeared to be the most popular in Ukraine in 2011: (i) open tender, (ii) closed tender, and (iii) outright sale, each of them having its advantages and disadvantages which are considered in Figure 1.

Distressed debt disposal structures

In view of peculiarities of Ukrainian legislation, the following three basic structures are most common for the distressed debt disposal process: (i) NPLs sale to a Ukrainian factoring company; (ii) NPLs sale to a non-resident SPV; and (iii) NPLs sale to a Ukrainian venture fund.

The choice of the strategy depends on distressed debts value and the type of the investor.

Ukrainian factoring company structure

The applicable Ukrainian legislation provides for two possible options of NPLs sale – on the basis of either

Figure 1: Distressed debt disposal methods – advantages and disadvantages

Option	Advantages	Disadvantages
Open (public) tender	• Wide range of professional investors. • Potentially higher price for NPL portfolio (as compared to closed tender and outright sale) due to the competition among investors.	• Sensitive information disclosure due to advertised sale of NPLs portfolio among unlimited number of potential investors. • Longer process compared to outright sale. • Process requires significant management resources.
Closed tender	• Longer process compared to outright sale, but shorter compared to open (public) tender. • Confidentiality of the process due to limited information disclosure.	• Limited investor base (a number of companies which cooperate with the vendor). • Process requires significant management resources.
Outright sale	• Relatively fast process. • Negotiations with one counterparty only. • Confidentiality of the process due to limited information disclosure. • Customised transaction structure specifically tailored to the investor.	• One potential investor only. • NPLs purchase price is usually lower due to absence of competition. • Risk of failed negotiations.

Source: Vasil Kisil & Partners

factoring (in case of NPLs sale at a discounted value) or an assignment agreement (in case of NPLs sale at their par value). Brief characteristics of the elements of a factoring transaction are provided in Figure 2.

Until recently it has been a common practice in Ukraine to establish debt collection agencies focused on distressed debt acquisitions in the form of factoring companies, enjoying a status of financial institution governed by the Commission for Regulation of Financial Services Market (FSA).

To obtain a status of a factoring company the following requirements are to be observed:

(a) equity capital of a factoring company must constitute no less than UAH3m;

(b) established system of accounting and reporting, meeting legislative requirements, has to be in place;

(c) chief executive officer and chief accountant have to meet eligibility criteria set forth by the FSA;

(d) appropriate owned or leased premises, communication facilities, hardware and software suitable for rendering financial services must be available; and

(e) competent staff for rendering financial services must be employed by the factoring company.

In case distressed debts to be sold to the factoring company are denominated in any other currency than Ukrainian hryvnias (UAH) it would be advisable to keep the NPLs vendor as a servicer for collection of proceeds under the loan agreements, their subsequent conversion into UAH and transfer to the factoring company – to sidestep the requirement of obtaining a general NBU licence for the performance of FX transaction by the factoring company.

Functions of the vendor, as a servicer of proceeds, can be performed on the basis of the respective agency (commission) agreement entered into with a factoring company. According to the said agency (commission) agreement, the NPL vendor is entitled to act on its own behalf but in favour of the factoring company, being the NPLs acquirer, as the NBU regulations allow conversion of funds obtained from the debtors in foreign currency into UAH on the basis of the said agency (commission) agreement.

In accordance with the FSA regulations, financial institutions are obliged to create provisions under the NPLs acquired considering the price paid by the factoring company for the NPLs acquisition, interest and other payments due accrued from the date of the NPLs acquisition.

The main guidelines for creation of provisions by factoring companies, prescribed by the FSA are the following:

(a) provisions are to be created in UAH only, hence, under foreign currency denominated NPLs the calculation is to be made on the basis of the available NBU exchange rate; and

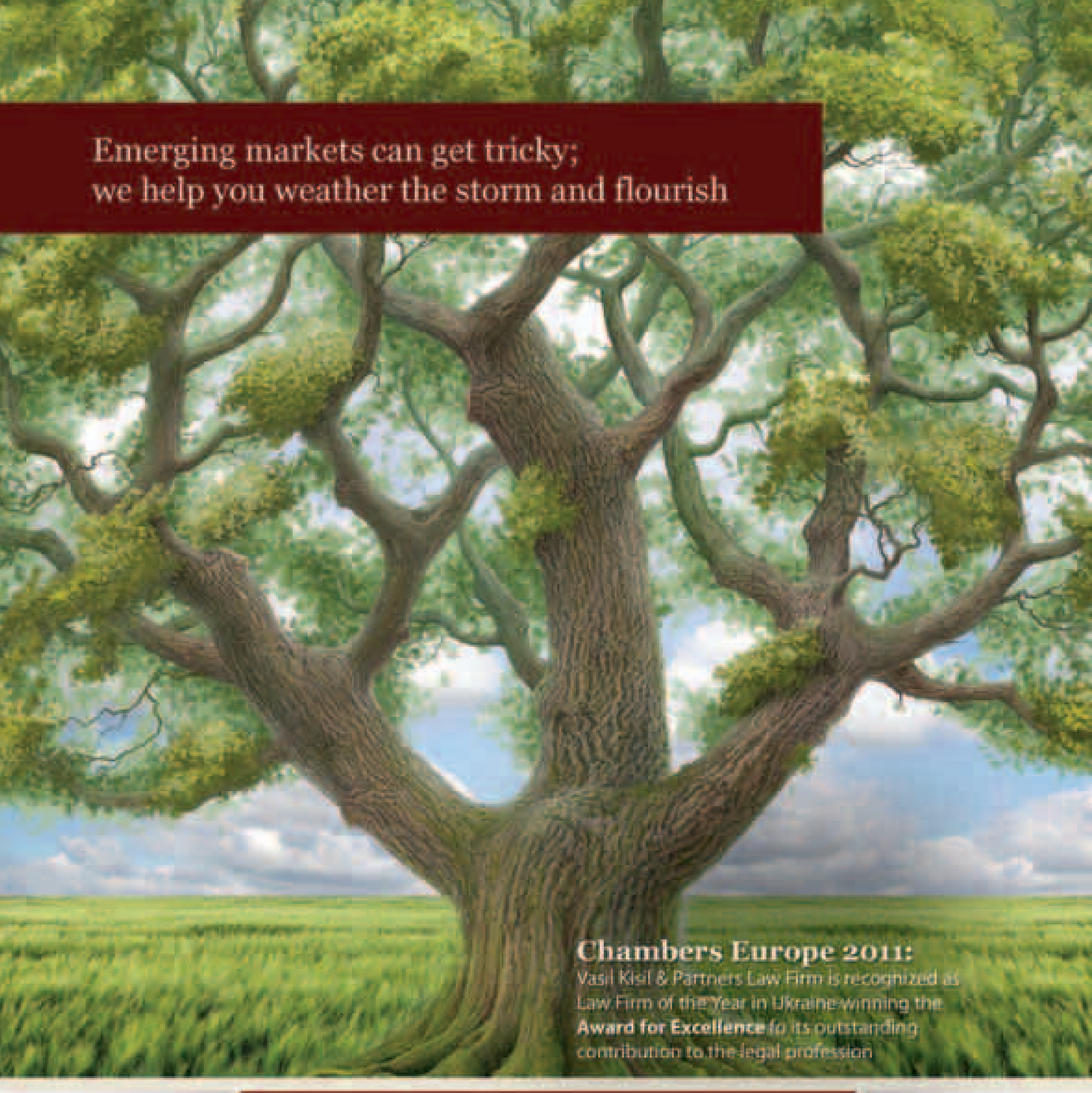
(b) provisions are to be created on a monthly basis regardless of the factoring company's financial results.

Since factoring companies are obliged to create provisions regardless of their financial results,

Figure 2: Elements of a factoring transaction

1.	Loan claims value	Discounted value of the loan to be paid by the assignee (the factor). Alternatively a commission for the services rendered by the assignee (the factor) to be paid by the assignor (i.e. so-called 'hidden discount').
2.	Acquirer of loan claims	The assignee (the factor) has to be established as a bank, or a non-banking financial institution, registered by the FSA.
3.	Consent of the debtor/ restrictions envisaged by the loan agreement	No consent of the debtor is required. Restrictions for an assignment stipulated by loan agreements (if any) are not applicable to the given case, therefore, factoring could be made even in case of the said contractual restrictions.
4.	Further (secondary) assignment	Can be performed through further factoring agreement only.

Source: Vasil Kisil & Partners



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additional equity financing may be required for this purpose at some point of their activity.

According to the FSA regulations, factoring companies are obliged to keep non loss-making activity, as well as to keep equity capital in an amount of no less than UAH3m in the course of their activity. Hence, as a result of NPL acquisition and creation of provisions, factoring companies may incur losses during the first and next years of their activity, potentially resulting in their negative equity. To deal with potential issues that may be raised by the FSA in this respect it would be advisable to prepare a profitable long-term financial plan for the factoring company prior to registration of the factoring company as a financial institution by the FSA.

It should also be noted that according to the Civil Code of Ukraine, in case net asset value of the factoring company (if established in the form of an LLC) at the end of the second or third financial year is lower than the amount of its registered capital, such factoring company would be obliged to reduce its registered capital. In case the factoring company's net asset value at the end of the second or third financial year is lower than the minimum amount of the registered capital provided for by the law, such company will be subject to liquidation.

Though the recent amendments to the Civil Code of Ukraine cancelled the minimum amount of the registered capital for LLCs, there is still a risk of filing a claim by tax authorities aimed at the company's liquidation in case of its negative net worth. As a matter of practice, Ukrainian tax authorities have not been active in filing such claims so far, and, therefore, the risk of liquidation of the factoring company under a court decision could be treated as rather remote. In the worst case scenario (i.e. in case court proceedings aimed at liquidation of the factoring company, having negative net worth, are commenced by the Ukrainian tax authorities), such company would be entitled to make further sale of NPLs and the underlying security to another legal entity prior to its liquidation.

In addition, it should be noted that the FSA has recently issued a regulation prohibiting factoring companies to acquire loans borrowed by private individuals, limiting distressed debt portfolios to be sold to factoring companies to corporate and private entrepreneur loans only. Further to the said regulations, several factoring companies have been already instructed by the FSA to stop acquiring private person loans.

From the Ukrainian tax perspective, the Ukrainian factoring company structure has the following disadvantages:

(a) the Ukrainian factoring company is subject to all applicable taxes, including corporate profit tax;

(b) the difference between the purchase price paid by the factoring company for acquiring each separate distressed debt and the proceeds collected under such debt is subject to taxation. Unfortunately, tax legislation provides for restrictions on netting losses and gains under different loans. Consequently, if factoring companies incur losses under certain loans, it is impossible by law to deduct such losses against gains obtained under other loans or against taxable profit under other transactions carried out by the factoring company.

Non-resident SPV structure

The structure of NPLs sale to a non-resident SPV would be less complicated from a regulatory perspective compared to Ukrainian factoring company structure, as the requirements with regard to non-loss making activity or positive net worth do not apply to a non-resident SPV.

Another obvious advantage of this structure is that a non-resident SPV can be established in tax favourable jurisdictions much faster and cheaper than a factoring company in Ukraine.

However, according to the NBU regulations in force, NPLs may be sold to a non-resident provided that the change of the creditor under each separate loan agreement (i.e. substitution of NPLs vendor by the non-resident SPV as the NPL acquirer) is duly registered with the NBU prior to effectuating the NPLs sale transaction. Such registration may be done solely based on the debtor's application and therefore entails direct involvement of the borrowers into the NPLs sale process, which might be a potential deal-breaker if the borrowers are not cooperative with the vendor. Moreover, non-resident investors may face serious difficulties within the course of distressed debts enforcement due to complicated provisions of Ukrainian legislation governing legal succession, as well as peculiarities of the Ukrainian court process.

Therefore, in practical terms, non-resident SPV structure is workable in a very limited number of cases.

Ukrainian venture investment fund structure

For tax purposes it might be advisable to sell a distressed debt portfolio to a Ukrainian venture investment fund, managed by an asset management company (the 'AMCo'), as the Ukrainian tax regime provides for certain tax exemptions for such funds - namely, capital gains of a unit venture investment fund are subject to taxation in the following cases only:

(a) in case of selling investment certificates (i.e.

securities evidencing an investor's right to a share stake in the fund) by an investor to third parties;

(b) in case of selling investment certificates of the venture fund to the said fund itself (e.g. in the event of repurchase of investment certificates by the venture fund in view of closing of the latter); or

(c) in case of profit distribution between investors of the fund.

Considering the above, capital gains of venture funds are not subject to corporate profit taxation, in case they are not received by investors in the process of profit distribution (as dividends), but are reinvested by the said funds.

Such unit venture funds structure, commonly utilised for efficient tax planning, allows making further sales of assets without taxation of capital gains till closing of the fund, or distribution of profit (if any) between its investors.

In the structure discussed, a venture investment fund does not enjoy the status of a legal entity and represents a contractual mutual investment vehicle (a set of assets) jointly owned by the fund's investors and managed by the AMCo.

All transactions with the venture fund's assets are carried out by the AMCo on its own behalf rather than on behalf of the fund. According to the laws of Ukraine, asset management activity, including managing venture investment fund, requires a licence from the National Securities Commission (the 'Commission'). Therefore, the AMCo is entitled to establish a venture investment fund upon obtaining such a licence from the Commission.

Although the applicable Ukrainian laws allow distressed debt acquisition by a venture fund, the Commission regulations governing such activity are very underdeveloped. As a result, there might be some issues with proper calculation of the venture fund's assets and compliance with the reporting requirements set forth by the Commission.

Moreover, the Commission is reluctant to openly endorse NPLs acquisitions by venture funds due to vague and underdeveloped regulations governing such activity, which have been utilised by professional collection agencies focused on distressed debt acquisitions in a public outcry against NPLs acquisitions by any other institutions.

At present, the Commission is in the process of developing the respective regulation to fully govern all legal aspects of distressed debt sales to joint investment institutions, including venture investment funds. The first stage of this process, which is almost finalised by the Commission, is carrying out a pilot project involving several selected venture funds, which have been allowed to invest a limited amount in distressed debt acquisition under the Commission supervision, for the purpose of testing appropriate regulatory tools and elaboration of a methodological base required for NPL purchases by joint investment institutions.

Structural considerations

As a matter of practice a much wider range of legal issues has to be taken into account for the purposes of proper planning and structuring NPLs sale/acquisition transactions, including but not limited to banking secrecy and personal data disclosure within the course of distressed debt disposal, legal due diligence of assets and limitations of vendor's liability, transfer of the underlying security to the NPLs acquirer, as well as legal succession of the investor and further NPLs enforcement proceedings.

Authors:
Denis Lysenko, Partner
Yulia Kyrpa, Counsellor
Vasil Kisil & Partners
17/52A Bogdana Khmelnytskogo St.
Kyiv 01030, Ukraine
Tel: +380 (44) 581 7777
Fax: +380 (44) 581 7770
Email: vkp@vkp.kiev.ua
Website: www.kisilandpartners.com

Directory

ALBANIA

Wolf Theiss SH.P.K
Eurocol Center, 4th Floor,
Murat Toptani Street, AL-Tirana, Albania.
Tel: +355 (4) 2274 521
Fax: +355 (4) 2274 521
Email: tirana@wolftheiss.com
Website: www.wolftheiss.com

Director
Sokol Nako

Activities: Advising international clients in all phases of restructuring projects, including advising and representing banks and material vendors in insolvency proceedings.

ANGOLA

KPMG Angola
Edifício Moncada Prestige, Rua do Assalto ao Quartel de Moncada, N° 15, 2° Andar,
Luanda, Angola.
Tel: +244 (227) 280 101
Fax: +244 (227) 280 119
Website: www.kpmg.co.ao

Head of Restructuring
José Luís Silva

ARGENTINA

Allende & Brea, S.H.
Maipu 1300, piso 10°, Buenos Aires
C1006ACT, Argentina.
Tel: +54 (11) 4318 9900
Fax: +54 (11) 4318 9999
Email: db@allendebrea.com.ar
Website: www.allendebrea.com

Partners
Dr. Diego Botana
Dr. David Gurfinkel

Activities: Participated in the most relevant cases in the global insolvency and restructuring arena in the last two years.

Deloitte
25 de Mayo 596, piso 20°, Buenos Aires
C1002ABL, Argentina.
Website: www.deloitte.com

Head of Restructuring Services LATCO
Eduardo De Bonis
Tel: +54 (11) 5129 2003
Email: edebonis@deloitte.com

Partner
Luis Dubiski
Tel: +54 (11) 5129 2003
Email: ldubiski@deloitte.com

Activities: Deloitte advises stakeholders in underperforming or distressed businesses including creditors and directors. Services include insolvency appointments, financial restructuring, turnaround and business reviews.

Estudio Alegria, Buey Fernández, Fissore y Montemerlo
Avenida Santa Fe 1621, piso 6°, Buenos Aires
C1060ABC, Argentina.
Tel: +54 (11) 4812 5500/4811 6060
Fax: +54 (11) 4812 6245
Email: info@estudioabffm.com.ar
Website: www.estudioabffm.com.ar

Founding Partner
Hector Alegria
Tel: +54 (11) 4812 5500 ext. 62
Email: halegria@estudioabffm.com.ar

Partner
Pablo Buey Fernandez
Tel: +54 (11) 4812 5500 ext. 65
Email: pbf@estudioabffm.com.ar

Activities: Bankruptcy law, debt restructurings, recapitalisations, reorganisations, pre-packaged plans (acuerdo preventivos extrajudiciales), M&A transactions; represents borrowers and issuers in lending, debt securities and other types of financing transactions.

Martelli Abogados
Sarmiento 1230, piso 9°, Buenos Aires
C1041AAZ, Argentina.
Tel: +54 (11) 4132 4132
Fax: +54 (11) 4132 4101
Email: info@martelliabogados.com

Partners
Pablo de Rosso
Hugo Martelli

Activities: Comprehensive legal services, including those needed in insolvency situations.

Standard & Poor's
Torre Alem Plaza, Avenida Leandro N Alem 855, 3rd Floor, Buenos Aires CIOOIAAD, Argentina.
Tel: +54 (11) 4891 2100
Fax: +54 (11) 4891 2102

ARUBA

AIB BANK N.V.
Wilhelminastraat 36, PO Box 1011,
Oranjestad, Aruba.
Tel: +297 582 7327
Fax: +297 582 7461
Email: info@aib-bank.com
Website: www.aib-bank.com

Managing Director
F.W. Giel

Assistant Managing Director
H.M. Koolman

Activities: Providers of investment banking services: medium and long term loans, equity participation, fund management and financial advisory services, among others.

AUSTRALIA

Allens Arthur Robinson
Level 28, Deutsche Bank Place,
Corner of Hunter and Phillip Streets,
Sydney NSW 2000, Australia.
Tel: +61 (2) 9230 4000
Fax: +61 (2) 9230 5333
Email: contactus@aar.com.au
Website: www.aar.com.au

Partners
John Warde
Tel: +61 (2) 9230 4892
Email: john.warde@aar.com.au
Michael Quinlan
Tel: +61 (2) 9230 4411
Email: michael.quinlan@aar.com.au

Activities: Its corporate insolvency and restructuring practice advises on: corporate reconstruction; workouts; receiverships; liquidations; voluntary administrations; credit recovery; and enforcement.

Allens Arthur Robinson
Riverside Centre, 123 Eagle Street,
Brisbane QLD 4000, Australia.
Tel: +61 (7) 3334 3000
Fax: +61 (7) 3334 3444
Email: contactus@aar.com.au
Website: www.aar.com.au

Partners
Michael Ilott
Tel: +61 (7) 3334 3234
Email: michael.ilott@aar.com.au
Geoff Rankin
Tel: +61 (7) 3334 3253
Email: geoff.rankin@aar.com.au
Alf Pappalardo
Tel: +61 (7) 3334 3269
Email: alf.pappalardo@aar.com.au

Activities: Its corporate insolvency and restructuring practice advises on: corporate reconstruction; workouts; receiverships; liquidations; voluntary administrations; credit recovery; and enforcement.

Allens Arthur Robinson
Level 27, 530 Collins Street,
Melbourne VIC 3000, Australia.
Tel: +61 (3) 9614 1011
Fax: +61 (3) 9614 4661
Email: contactus@aar.com.au
Website: www.aar.com.au

Partners
Clint Hinchen
Tel: +61 (3) 9613 8924
Email: clint.hinchen@aar.com.au
Tania Cini
Tel: +61 (3) 9613 8574
Email: tania.cini@aar.com.au
Matthew White
Tel: +61 (3) 9613 8561
Email: matthew.white@aar.com.au

Activities: Its corporate insolvency and restructuring practice advises on: corporate reconstruction; workouts; receiverships; liquidations; voluntary administrations; credit recovery; and enforcement.

Allens Arthur Robinson
Level 37, QV.1, 250 St Georges Terrace,
Perth WA 6000, Australia.
Tel: +61 (8) 9488 3700
Fax: +61 (8) 9488 3701
Email: contactus@aar.com.au
Website: www.aar.com.au

Partner
Philip Blaxill
Tel: +61 (9) 9488 3739
Email: philip.blaxill@aar.com.au

Activities: Its corporate insolvency and restructuring practice advises on: corporate reconstruction; workouts; receiverships; liquidations; voluntary administrations; credit recovery; and enforcement.

Arnold Bloch Leibler
Level 24, Chifley Tower, 2 Chifley Square,
Sydney NSW 2000, Australia.
Tel: +61 (2) 9226 7100
Fax: +61 (2) 9226 7120
Email: info@abl.com.au
Website: www.abl.com.au

Partner
Paul Rubenstein
Tel: +61 (2) 9226 7222
Email: prubenstein@abl.com.au

Activities: Arnold Bloch Leibler regularly acts in Australia's largest and most complex reconstruction and insolvency matters, covering numerous industries, and cross border insolvencies.

Arnold Bloch Leibler
Level 21, 333 Collins Street,
Melbourne VIC 3000, Australia.
Tel: +61 (3) 9229 9999
Fax: +61 (3) 9229 9900
Email: info@abl.com.au
Website: www.abl.com.au

Partner
Leon Zwier
Tel: +61 (3) 9229 9646
Email: lzwier@abl.com.au

Activities: Arnold Bloch Leibler regularly acts in Australia's largest and most complex reconstruction and insolvency matters, covering numerous industries, and cross border insolvencies.

Blake Dawson
Level 38, Riverside Centre, 123 Eagle Street, Brisbane QLD 4000, Australia.
Tel: +61 (7) 3259 7000
Fax: +61 (7) 3259 7111
Website: www.blakedawson.com

National Practice Head, Restructuring & Insolvency
James Marshall
Tel: +61 (2) 9258 6508
Email: james.marshall@blakedawson.com

Partner, Restructuring & Insolvency
Ray Mainsbridge
Tel: +61 (2) 9258 6049
Email: ray.mainsbridge@blakedawson.com

Activities: Corporate reconstruction and insolvency law which includes advising both lenders and debtors on formal and informal schemes of arrangement, and administrators of insolvent companies and creditors on the enforcement of securities and other rights.

Blake Dawson
Level 32, Exchange Plaza, 2 The Esplanade, Perth WA 6000, Australia.
Tel: +61 (8) 9366 8000
Fax: +61 (8) 9366 8111
Website: www.blakedawson.com

National Practice Head, Restructuring & Insolvency
James Marshall
Tel: +61 (2) 9258 6508
Email: james.marshall@blakedawson.com

Partner, Restructuring & Insolvency
Ray Mainsbridge
Tel: +61 (2) 9258 6049
Email: ray.mainsbridge@blakedawson.com

Activities: Corporate reconstruction and insolvency law which includes advising both lenders and debtors on formal and informal schemes of arrangement, and administrators of insolvent companies and creditors on the enforcement of securities and other rights.

Blake Dawson
Level 36, Grosvenor Place, 225 George Street, Sydney NSW 2000, Australia.
Tel: +61 (2) 9258 6000
Fax: +61 (2) 9258 6999
Website: www.blakedawson.com

National Practice Head, Restructuring & Insolvency
James Marshall
Tel: +61 (2) 9258 6508
Email: james.marshall@blakedawson.com

Partner, Restructuring & Insolvency
Ray Mainsbridge
Tel: +61 (2) 9258 6049
Email: ray.mainsbridge@blakedawson.com

Activities: Corporate reconstruction and insolvency law which includes advising both lenders and debtors on formal and informal schemes of arrangement, and administrators of insolvent companies and creditors on the enforcement of securities and other rights.

Blake Dawson
Level 26, 181 William Street, Melbourne VIC 3000, Australia.
Tel: +61 (3) 9679 3000
Fax: +61 (3) 9679 3111
Website: www.blakedawson.com

National Practice Head, Restructuring & Insolvency
James Marshall
Tel: +61 (2) 9258 6508
Email: james.marshall@blakedawson.com

Partner, Restructuring & Insolvency
Ross McClymont
Tel: +61 (3) 9679 3025
Email: ross.mcclymont@blakedawson.com

Activities: Corporate reconstruction and insolvency law which includes advising both lenders and debtors on formal and informal schemes of arrangement, and administrators of insolvent companies and creditors on the enforcement of securities and other rights.

Blake Dawson
Level 11, 12 Moore Street, Canberra ACT 2601, Australia.
Tel: +61 (2) 6234 4000
Fax: +61 (2) 6234 4111
Website: www.blakedawson.com

National Practice Head, Restructuring & Insolvency
James Marshall
Tel: +61 (2) 9258 6508
Email: james.marshall@blakedawson.com

Partner, Restructuring & Insolvency
Ray Mainsbridge
Tel: +61 (2) 9258 6049
Email: ray.mainsbridge@blakedawson.com

Activities: Corporate reconstruction and insolvency law which includes advising both lenders and debtors on formal and informal schemes of arrangement, and administrators of insolvent companies and creditors on the enforcement of securities and other rights.

Blake Dawson
Level 4, 151 Pirie Street, Adelaide SA 5000, Australia.
Tel: +61 (8) 8112 1000
Fax: +61 (8) 8112 1099
Website: www.blakedawson.com

National Practice Head, Restructuring & Insolvency
James Marshall
Tel: +61 (2) 9258 6508
Email: james.marshall@blakedawson.com

Partner, Restructuring & Insolvency
Ray Mainsbridge
Tel: +61 (2) 9258 6049
Email: ray.mainsbridge@blakedawson.com

Activities: Corporate reconstruction and insolvency law which includes advising both lenders and debtors on formal and informal schemes of arrangement, and administrators of insolvent companies and creditors on the enforcement of securities and other rights.

Deloitte
Grosvenor Place, 225 George Street, Sydney NSW 1217, Australia.
Website: www.deloitte.com

Head of Restructuring Services
David McCarthy
Tel: +61 (2) 9322 7086
Email: damccarthy@deloitte.com.au

Activities: Deloitte advises stakeholders in underperforming or distressed businesses including creditors and directors. Services include insolvency appointments, financial restructuring, turnaround and business reviews.

DibbsBarker
Level 23, Central Plaza Two, 66 Eagle Street, Brisbane QLD 4000, Australia.
Tel: +61 (7) 3100 5000
Fax: +61 (7) 3100 5001
Email: enquiry@dibbsbarker.com
Website: www.dibbsbarker.com

Partner
Scott Guthrie

Activities: Services include administrations, bankruptcies, corporate voluntary arrangements, company searches and status enquiries, court proceedings, credit management consultancy, debt collection, enforcement of security, liquidations, receiverships, statutory demands and insolvency petitions.

DibbsBarker
Level 6, Canberra House, 40 Marcus Clarke Street, Canberra ACT 2600, Australia.
Tel: +61 (2) 6201 7222
Fax: +61 (2) 6257 4011
Email: canberra@dibbsbarker.com
Website: www.dibbsbarker.com

Partner
John Hill

Activities: Services include administrations, bankruptcies, corporate voluntary arrangements, company searches and status enquiries, court proceedings, credit management consultancy, debt collection, enforcement of security, liquidations, receiverships, statutory demands and insolvency petitions.

DibbsBarker
Level 8, Angel Place, 123 Pitt Street, Sydney NSW 2000, Australia.
Tel: +61 (2) 8233 9500
Fax: +61 (2) 8233 9555
Email: enquiry@dibbsbarker.com
Website: www.dibbsbarker.com

Partner
Wendy Jacobs
Tel: +61 (2) 8233 9533
Email: wendy.jacobs@dibbsbarker.com

Activities: Services include administrations, bankruptcies, corporate voluntary arrangements, company searches and status enquiries, court proceedings, credit management consultancy, debt collection, enforcement of security, liquidations, receiverships, statutory demands and insolvency petitions.

Ferrier Hodgson
Level 13, Grosvenor Place, 225 George Street, Sydney NSW 2000, Australia.
Tel: +61 (2) 9286 9999
Fax: +61 (2) 9286 9888
Website: www.ferrierhodgson.com

Partner
Steven Sherman
Email: steven.sherman@fh.com.au

Activities: Independent professional services group specialising in corporate advisory, corporate recovery and forensic services. Offices in all major Australian capital cities and Asia.

Gadens Lawyers
Level 12, 77 Castlereagh Street, Sydney NSW 2000, Australia.
Tel: +61 (2) 9931 4999
Fax: +61 (2) 9931 4888
Email: info@nsw.gadens.com.au
Website: www.gadens.com.au

Contacts
Campbell Hudson
Tel: +61 (2) 9931 4957
Email: chudson@nsw.gadens.com.au
Justin Bates
Tel: +61 (2) 9931 4763
Email: jbates@nsw.gadens.com.au

Activities: Gadens Lawyers regularly advises insolvency practitioners and financiers on a range of issues including informal workouts, administration, appointments and re-documentation.

Gadens Lawyers
Level 1, 19 Gouger Street, Adelaide SA 5000, Australia.
Tel: +61 (8) 8233 0600
Fax: +61 (8) 8233 0699
Email: info@sa.gadens.com.au
Website: www.gadens.com.au

Contacts
Wendy Jones
Tel: +61 (8) 8233 0645
Email: wjones@sa.gadens.com.au
James Marsh
Tel: +61 (8) 8233 0662
Email: jmarsh@sa.gadens.com.au
Karen Thomas
Tel: +61 (8) 8233 0639
Email: kthomas@sa.gadens.com.au

Activities: Gadens Lawyers regularly advises insolvency practitioners and financiers on a range of issues including informal workouts, administration, appointments and re-documentation.

Gadens Lawyers
Level 25, Bourke Place, 600 Bourke Street, Melbourne VIC 3000, Australia.
Tel: +61 (3) 9252 2555
Fax: +61 (3) 9252 2500
Email: info@vic.gadens.com.au
Website: www.gadens.com.au

Contacts
David Reichenberg
Tel: +61 (3) 9252 2581
Email: dreichenberg@vic.gadens.com.au
Rob Hinton
Tel: +61 (3) 9252 2531
Email: rhinton@vic.gadens.com.au
Howard Chait
Tel: +61 (3) 9252 2596
Email: hchait@vic.gadens.com.au

Activities: Gadens Lawyers regularly advises insolvency practitioners and financiers on a range of issues including informal workouts, administration, appointments and re-documentation.

Gadens Lawyers
Level 7, 150 St Georges Terrace, Perth WA 6000, Australia.
Tel: +61 (8) 9323 0999
Fax: +61 (8) 9323 0900
Email: info@wa.gadens.com.au
Website: www.gadens.com.au

Contacts
Lee Christensen
Email: lchristensen@wa.gadens.com.au
James Scovell
Email: jscovell@wagadens.com.au

Activities: Gadens Lawyers regularly advises insolvency practitioners and financiers on a range of issues including informal workouts, administration, appointments and re-documentation.

Gadens Lawyers
Level 25, 240 Queen Street, Brisbane QLD 4000, Australia.
Tel: +61 (7) 3231 1666
Fax: +61 (7) 3229 5850
Email: info@qld.gadens.com.au
Website: www.gadens.com.au

Partner
Dan Pennicott
Tel: +61 (7) 3114 0102
Email: dpennicott@qld.gadens.com.au

Contact
Matthew Broderick
Tel: +61 (7) 3114 0106
Email: mbroderick@qld.gadens.com.au

Activities: Gadens Lawyers regularly advises insolvency practitioners and financiers on a range of issues including informal workouts, administration, appointments and re-documentation.

Grant Thornton
Level 2, 215 Spring Street, Melbourne VIC 3000, Australia.
Tel: +61 (3) 8663 6000
Fax: +61 (3) 8663 6333
Email: greg.keith@au.gt.com
Website: www.grantthornton.com.au

Partners
Greg Keith
Andrew Hewitt
Nick Mellos
Matt Byrnes

Activities: Specialising in both corporate and personal insolvency, Grant Thornton Melbourne can assist with formal appointments or workout scenarios.

Henry Davis York
44 Martin Place, Sydney NSW 2000, Australia.
Tel: +61 (2) 9947 6000
Fax: +61 (2) 9947 6999
Email: hdy@hdy.com.au
Website: www.hdy.com.au

Managing Partner
Sharon Cook
Tel: +61 (2) 9947 6513
Email: sharon_cook@hdy.com.au

Partner
Roger Dobson
Tel: +61 (2) 9947 6382
Email: roger_dobson@hdy.com.au

Activities: Henry Davis York, has a leading advisory role in Australia's major insolvency and restructuring deals.

Henry Davis York
Level 19, 324 Queen Street, Brisbane QLD 4000, Australia.
Tel:+ 61 (7) 3087 5000
Fax: + 61 (7) 3087 5099
Website: www.hdy.com.au

Partner
John Evans
Tel: +61 (7) 3087 5001
Email: john_evans@hdy.com.au

Contact
Leonard McCarthy
Tel: +61 (7) 2199 3087 5002
Email: leonard_mccarthy@hdy.com.au

Activities: Specialists in restructuring, insolvency and banking disputes for the Queensland market.

Johnson Winter & Slattery
Level 10, 211 Victoria Square, Adelaide SA 5000, Australia.
Tel: +61 (8) 8239 7111
Fax: +61 (8) 8239 7100
Website: www.jws.com.au

Partner
David Proudman
Email: david.proudman@jws.com.au

Activities: An insolvency practice specialising in workouts, recovery and reconstructions and acting for secured and significant unsecured creditors and insolvency practitioners.

Johnson Winter & Slattery
Level 25, 20 Bond Street, Sydney NSW 2000, Australia.
Tel: +61 (2) 8274 9555
Fax: +61 (2) 8274 9500
Website: www.jws.com.au

Partners
David Proudman
Tel: +61 (8) 8239 7118
Email: david.proudman@jws.com.au
Chris Connor
Tel: +61 (3) 8611 1309
Email: chris.conor@jws.com.au

Activities: An insolvency practice specialising in workouts, recovery and reconstructions and acting for secured and significant unsecured creditors and insolvency practitioners.

King & Wood Mallesons - Brisbane
Level 30, Waterfront Place, 1 Eagle Street, Brisbane QLD 4000, Australia.
Tel: +61 (7) 3244 8000
Fax: +61 (7) 3244 8999
Email: bris@au.kwm.com

Partner Contact
Philip Pan
Tel: +61 (7) 3244 8081
Email: philip.pan@au.kwm.com

Communications Manager
Elle Quinn
Tel: +61 (2) 9296 3730
Email: elle.quinn@au.kwm.com

Activities: Multi-disciplinary legal team advises on all aspects of insolvency, reconstruction and workouts.

King & Wood Mallesons - Canberra
Level 5, NICTA Building B, 7 London Circuit, Canberra ACT 2600, Australia.
Tel: +61 (2) 6217 6000
Fax: +61 (2) 6217 6999
Email: can@au.kwm.com

Partner Contact
John Topfer
Tel: +61 (2) 6217 6078
Email: john.topfer@au.kwm.com

Communications Manager
Elle Quinn
Tel: +61 (2) 9296 3730
Email: elle.quinn@au.kwm.com

Activities: Multi-disciplinary legal team advises on all aspects of insolvency, reconstruction and workouts.

King & Wood Mallesons - Melbourne
Level 50, Bourke Place, 600 Bourke Street, Melbourne VIC 3000, Australia.
Tel: +61 (3) 9643 4000
Fax: +61 (3) 9643 5999
Email: mel@au.kwm.com

Partner Contact
Tony Troiani
Tel: +61 (3) 9643 4286
Email: tony.troiani@au.kwm.com

Communications Manager
Elle Quinn
Tel: +61 (2) 9296 3730
Email: elle.quinn@au.kwm.com

Activities: Multi-disciplinary legal team advises on all aspects of insolvency, reconstruction and workouts.

King & Wood Mallesons - Perth
Level 10, Central Park, 152 St Georges Terrace, Perth WA 6000, Australia.
Tel: +61 (8) 9269 7000
Fax: +61 (8) 9269 7999
Email: per@au.kwm.com

Partner Contact
John Naughton
Tel: +61 (8) 9269 7100
Email: john.naughton@au.kwm.com

Communications Manager
Elle Quinn
Tel: +61 (2) 9296 3730
Email: elle.quinn@au.kwm.com

Activities: Multi-disciplinary legal team advises on all aspects of insolvency, reconstruction and workouts.

King & Wood Mallesons - Sydney
Level 61, Governor Phillip Tower, 1 Farrer Place, Sydney NSW 2000, Australia.
Tel: +61 (2) 9296 2000
Fax: +61 (2) 9296 3999
Email: syd@au.kwm.com
Website: www.kwm.com

Partner Contacts
Linda Johnson
Tel: +61 (2) 9296 2202
Email: linda.johnson@au.kwm.com

Beau Deleuil
Tel: +61 (4) 0886 7043
Email: beau.deleuil@au.kwm.com

Communications Manager
Elle Quinn
Tel: +61 (2) 9296 3730
Email: elle.quinn@au.kwm.com

Activities: Multi-disciplinary legal team advises on all aspects of insolvency, reconstruction and workouts.

KordaMentha
Level 4, 70 Pirie Street, Adelaide SA 5000, Australia.
Tel: +61 (8) 8212 6322
Fax: +61 (8) 8212 2215
Email: info@kordamentha.com
Website: www.kordamentha.com

Partners
Stephen Duncan
Chris Powell
Peter Lanthois

KordaMentha
Level 5, Chifley Tower, 2 Chifley Square, Sydney NSW 2000, Australia.
Tel: +61 (2) 8257 3000
Fax: +61 (2) 8257 3099
Email: info@kordamentha.com
Website: www.kordamentha.com

Partners
David Merryweather
David Winterbottom
Martin Madden
Richard Bennison
Janna Robertson
Scott Kershaw
Paul Mirams
Nigel Carson
John Temple-Cole
Andrew Ross

KordaMentha
Level 24, 333 Collins Street, Melbourne VIC 3000, Australia.
Tel: +61 (3) 8623 3333
Fax: +61 (3) 8623 3399
Email: info@kordamentha.com
Website: www.kordamentha.com

Principals
Mark Korda
Mark Mentha

Partners
Craig Shepard
Berrick Wilson
Leanne Chesser
Haydn Law
Andrew Malarkey
Owain Stone
Tony O'Callaghan
Bryan Webster

Activities: Independent, tier one professional services firm, specialising in corporate recovery, corporate advisory, forensic accounting and real estate services.

KordaMentha
Level 1, 150 Walker Street, Townsville, QLD 4810, Australia.
Tel: +61 (7) 4724 5455
Fax: +61 (7) 4724 5405
Email: tsv.receprion@kordamentha.com
Website: www.kordamentha.com

Partners
Bill Buckby
Gavin Nolan
Tony Miskiewicz

KordaMentha
Level 9, Corporate Centre One, 2 Corporate Court, Bundall, Gold Coast, QLD 4217, Australia.
Tel: +61 (7) 5574 1322
Fax: +61 (7) 5574 1433
Email: gc.reception@kordamentha.com
Website: www.kordamentha.com

Partner
Damian Bender

KordaMentha
Level 11, 37 St Georges Terrace, Perth WA 6000, Australia.
Tel: +61 (8) 9220 9333
Fax: +61 (8) 9220 9399
Email: info@kordamentha.com
Website: www.kordamentha.com

Partner
Cliff Rocke

KordaMentha
22 Market Street, Brisbane QLD 4000, Australia.
Tel: +61 (7) 3225 4900
Fax: +61 (7) 3225 4999
Email bne.reception@kordamentha.com
Website: www.kordamentha.com

Partners
John Park
Ginette Muller
Damian Bender
Robert Hutson
John Shanahan
Kelly Trenfield
Joanne Dunn

Norton Rose Australia
Level 18, Grosvenor Place, 225 George Street, Sydney NSW 2000, Australia; Mailing Address: GPO Box 3872 Sydney NSW 2001, Australia.
Tel: +61 (2) 9330 8000
Fax: +61 (2) 9330 8111
Website: www.nortonrose.com

Partners
John Holmes
Email: john.holmes@nortonrose.com
Chris McLeod
Email: chris.mcleod@nortonrose.com
Steven Palmer
Email: steven.palmer@nortonrose.com
David Porter
Email: david.porter@nortonrose.com
Mitchell Mathas
Email: mitchell.mathas@nortonrose.com
Peter Schmidt
Email: peter.schmidt@nortonrose.com
Damien Butler
Email: damien.butler@nortonrose.com
Andrew Bruce
Email: andrew.bruce@nortonrose.com
David Goldman
Email: david.goldman@nortonrose.com

Activities: Specialising in cross-border insolvency and restructurings. Extensive experience in the areas of financial institutions, energy, infrastructure and commodities, transport and technology.

PPB Advisory
Level 21, 181 William St, Melbourne, VIC 3000, Australia.
Tel: +61 (3) 9269 4000
Fax: +61 (3) 9269 4099
Website: www.ppbadvisory.com

CEO
Stephen Purcell

Partner
Ian Carson
Email: icarson@ppbadvisory.com

Activities: PPB Advisory is a leading professional advisory firm specialising in corporate advisory, restructuring and turnarounds, forensics, and insolvency services. The firm employs over 300 people, including 35 partners, across Australia and New Zealand.

PPB Advisory
Level 3, 167 Eagle Street, Brisbane, QLD 4000, Australia.
Tel: +61 (7) 3222 6800
Fax: +61 (7) 3222 6899
Website: www.ppbadvisory.com

CEO
Stephen Purcell

Partner
Grant Sparks
Email: gsparks@ppbadvisory.com

Activities: PPB Advisory is a leading professional advisory firm specialising in corporate advisory, restructuring and turnarounds, forensics, and insolvency services. The firm employs over 300 people, including 35 partners, across Australia and New Zealand.

PPB Advisory
Level 46, MLC Centre, 19 Martin Place, Sydney NSW 2000, Australia.
Tel: +61 (2) 8116 3000
Fax: +61 (2) 8116 3111
Website: www.ppbadvisory.com

CEO
Stephen Purcell
Tel: +61 (2) 8116 3000
Email: spurcell@ppbadvisory.com

Director of Strategy & Client Services
Ben Pollack
Tel: +61 (2) 8116 3141
Email: bpollack@ppbadvisory.com

Activities: PPB Advisory is a leading professional advisory firm specialising in corporate advisory, restructuring and turnarounds, forensics, and insolvency services. The firm employs over 300 people, including 35 partners, across Australia and New Zealand.

PPB Advisory
Level 21, 140 St Georges Terrace, Perth WA 6000, Australia.
Tel: +61 (8) 9216 7600
Fax: +61 (8) 9216 7699
Website: www.ppbadvisory.com

CEO
Stephen Purcell

Partner
Simon Theobald
Email: stheobald@ppbadvisory.com

Activities: PPB Advisory is a leading professional advisory firm specialising in corporate advisory, restructuring and turnarounds, forensics, and insolvency services. The firm employs over 300 people, including 35 partners, across Australia and New Zealand.

Sellers Muldoon Benton Pty Ltd
Level 3, 90 William Street, Melbourne VIC 3000, Australia.
Tel: +61 (3) 9600 2100
Fax: +61 (3) 9600 2400
Email: clientservice@smbvic.com.au
Website: www.smbvic.com.au

Partners
Ken Sellers
Email: ksellers@briferrier.com.au
Mathew Muldoon
Email: mmuldoon@briferrier.com.au

Activities: Bankruptcy and insolvency firm.

Skadden, Arps, Slate, Meagher & Flom
Level 13, 131 Macquarie Street, Sydney NSW 2000, Australia.
Tel: +61 (2) 9253 6000
Fax: +61 (2) 9253 6044
Website: www.skadden.com

Partner
Adrian J.S. Deitz

Activities: Worldwide practice serving corporations and their principal creditors and investors by providing value-added legal solutions in bankruptcy and restructuring situations.

Standard & Poor's
Level 27, 259 George Street, Sydney NSW 2000, Australia.
Tel: +61 (2) 9255 9888
Fax: +61 (2) 9255 9880

Standard & Poor's
Level 45, 120 Collins Street,
Melbourne VIC 3000, Australia.
Tel: +61 (3) 9631 2000
Fax: +61 (3) 9650 8106

Taylor Woodings
Level 15, 50 Pitt Street, Sydney NSW 2000, Australia.
Tel: +61 (2) 8247 8000
Fax: +61 (2) 8247 8099
Email: info@twcs.com.au
Website: www.taylorwoodings.com.au
Partners
Quentin Olde
Matt Adams
Activities: Chartered accounting and corporate services firm specialising in corporate insolvency and advisory assignments, with offices in Sydney, Perth, Melbourne and Brisbane.

Taylor Woodings
Level 6, 30 The Esplanade, Perth WA 6000, Australia.
Tel: +61 (8) 9321 8533
Fax: +61 (8) 9321 8544
Email: info@twcs.com.au
Website: www.taylorwoodings.com.au
Partners
Michael Ryan
Ian Francis
Mark Englebert
Activities: Chartered accounting and corporate services firm specialising in corporate insolvency and advisory assignments, with offices in Sydney, Perth, Melbourne and Brisbane.

Taylor Woodings
Level 19, 307 Queen Street,
Brisbane QLD 4000, Australia.
Tel: +61 (7) 3041 2900
Fax: +61 (7) 3041 2999
Email: info@twcs.com.au
Website: www.taylorwoodings.com.au
Partners
Stefan Dopking
Michael Ryan
Activities: Chartered accounting and corporate services firm specialising in corporate insolvency and advisory assignments, with offices in Sydney, Perth, Melbourne and Brisbane.

Taylor Woodings
Level 15, 600 Bourke Street,
Melbourne VIC 3000, Australia.
Tel: +61 (3) 9604 0600
Fax: +61 (3) 9604 0699
Email: info@twcs.com.au
Website: www.taylorwoodings.com.au
Partners
Ross Blakeley
Andrew Schwarz
Activities: Chartered accounting and corporate services firm specialising in corporate insolvency and advisory assignments, with offices in Sydney, Perth, Melbourne and Brisbane.

AUSTRIA

Deloitte
Renngasse 1/Freyung, A-1010 Vienna, Austria.
Website: www.deloitte.com
Head of Restructuring Services
Albert Hannack
Tel: +43 (1) 53700 2900
Email: ahannak@deloitte.at
Activities: Deloitte advises stakeholders in underperforming or distressed businesses including creditors and directors. Services include insolvency appointments, financial restructuring, turnaround and business reviews.

Dorda Brugger Jordis
Dr. Karl Lueger-Ring 10, A-1010 Vienna, Austria.
Tel: +43 (1) 53347 9542/9528
Fax: +43 (1) 53347 955042
Website: www.dbj.at
Partners
Andreas Zahradnik
Email: andreas.zahradnik@dbj.at
Tibor Varga
Email: tibor.varga@dbj.at
Activities: Advises international and domestic clients in all matters regarding insolvency law, loan restructuring and enforcement.

Graf & Pitkowitz, Rechtsanwälte GmbH, Attorneys at Law
Stadiongasse 2, A-1010 Vienna, Austria.
Tel: +43 (1) 40117 0
Fax: +43 (1) 40117 40
Email: office@gpp.at
Website: www.gpp.at
Head, Insolvency & Restructuring
Dr. Alexander Isola, MCJ
Tel: +43 (3) 16833 7770
Email: isola@gpp.at
Activities: Insolvency law, banking, accountant's liability, loan collateralisation, commercial law, corporate restructuring and corporate law.

Hauser Partners Rechtsanwälte GmbH Attorneys at Law P.C.
Seilerstatte 18-20, A-1010 Vienna, Austria.
Tel: +43 (1) 512 2900-14
Fax: +43 (1) 512 2900 30
Email: hauser@hauserpartners.com
Website: www.hauserpartners.com
Managing Partner
Wulf Gordian Hauser
Contact
Mag. Peter Blaschke
Activities: Using bankruptcy as a tool to make take-overs possible.

Preslmayr Attorneys at Law
Dr Karl Lueger-Ring 12, A-1010 Vienna, Austria.
Tel: +43 (1) 533 1695
Fax: +43 (1) 535 5686
Email: office@preslmayr.at
Website: www.preslmayr.at
Partners
Dr. Florian Gehmacher
Dr. Matthias Schmidt
Activities: Insolvency, restructuring and counselling to main creditors and court-appointed administrators in major insolvency proceedings.

Roland Berger Strategy Consultants GmbH
Freyung 3/2/10, A-1010 Vienna, Austria.
Tel: +43 (1) 53602 0
Fax: +43 (1) 53602 600
Website: www.rolandberger.com
Partner
Rupert Petry
Tel: +43 (1) 53602 100
Email: rupert_petry@at.rolandberger.com
Activities: Roland Berger Strategy Consultants is a leading global strategy consultancy. Within their restructuring practice they focus on complex operational and financial restructurings/distressed M&A as well as insolvency support.

Saxinger Chalupsky & Partners
Edisonstraße 1, A-4600 Wels, Austria
Tel: +43 (7242) 65290
Fax: +43 (7242) 65290 333
Website: www.scwp.com
Contact
Dr. Ernst Chalupsky
Email: e.chalupsky@scwp.at

Schulyok Unger & Partner Rechtsanwälte OG
Mariahilfer Straße 50, A-1070 Wien, Austria.
Tel: +43 (1) 523 6200
Fax: +43 (1) 526 7274
Website: www.sup.at
Partners
Dr. Arno Maschke
Email: maschke@sup.at
Dr. Georg Unger
Email: unger@sup.at
Activities: Corporate restructuring, extra-judicial settlements and handling of bankruptcy proceedings.

Skadden, Arps, Slate, Meagher & Flom (Europe) LLP
Schwarzenbergplatz 6, A-1030 Vienna, Austria.
Tel: +43 (1) 7107 7300
Fax: +43 (1) 7107 7303
Website: www.skadden.com
Contact
Rainer K. Wachter
Activities: Worldwide practice serving corporations and their principal creditors and investors by providing value-added legal solutions in bankruptcy and restructuring situations.

Ullmann - Geiler und Partners
Maria Theresien Strasse 17-19,
A-6020 Innsbruck, Austria.
Tel: +43 (512) 58276 0
Fax: +43 (512) 58276 06
Email: office@ullmann-geiler.at
Website: www.ullmann-geiler.at
Contact
Dr. Stefan Geiler

Wolf Theiss Rechtsanwälte
Schubertring 6, A-1010 Vienna, Austria.
Tel: +43 (1) 51510
Fax: +43 (1) 51510 25
Email: wien@wolftheiss.com
Website: www.wolftheiss.com
Directors
Bettina Knötzl
Eva Spiegel
Activities: Advising international clients in all phases of restructuring projects, including advising and representing banks and material vendors in insolvency proceedings.

BAHAMAS

Deloitte
Dehands House, 2nd Terrace West, Collins Avenue, PO Box N-7120, Nassau, Bahamas.
Tel: +1 (242) 302 4800
Fax: +1 (242) 322 3101
Website: www.deloitte.com.bs
Head of Restructuring Services
Anthony S. Kikivarakis
Tel: +1 (242) 302 4804
Email: akikivarakis@deloitte.com
Senior Manager
Tiphaney C. Russell
Email: tirussell@deloitte.com
Activities: Deloitte advises stakeholders in underperforming or distressed businesses including creditors and directors. Services include insolvency appointments, financial restructuring, turnaround and business reviews.

Ernst & Young Ltd
PO Box N-3231, Nassau, Bahamas.
Tel: +1 (242) 502 6000
Fax: +1 (242) 502 6090
Email: ernst.young@bs.ey.com
Website: www.ey.com/bs

Senior Manager, Restructuring:
Daniel Woodhouse
Tel: +1 (242) 502 6046
Email: daniel.woodhouse@bs.ey.com
Activities: Provides restructuring advice, act as office-holders in relation to financially distressed, litigation support, shareholder disputes and voluntary liquidation situations.

KRyS Global
Caves Professional Centre, Caves Village, Blake Road and West Bay Street,
PO Box SP-64064 Nassau, Bahamas.
Tel: +1 (242) 327 1447
Fax: +1 (242) 327 3288
Email: admin@krys-global.com
Website: www.krys-global.com
Managing Director
Edmund Rahming
Email: edmund.rahming@krys-global.com
Activities: KRyS Global has over 40 professionals who specialise in providing corporate recovery, fraud investigation and forensic accounting, money laundering investigations, business advisory services, consulting and regulatory compliance services.

PricewaterhouseCoopers Bahamas
Providence House, East Hill Street,
PO Box N-3910, Nassau, Bahamas.
Tel: +1 (242) 302 5300
Fax: +1 (242) 302 5350
Email: pwcbs@bs.pwc.com
Website: www.pwc.com
Partner/Co-BRS Partner
Clifford A. Johnson
Tel: +1 (242) 302 5307
Email: clifford.a.johnson@bs.pwc.com
Partner/Co-BRS Partner
Kevin D. Seymour
Tel: +1 (242) 352 8471
Email: kevin.d.seymour@bs.pwc.com
Activities: The Bahamas firm's Business Recovery Services ('BRS') department provides receivership and liquidation services, both voluntary and involuntary, and is innovative in exploring recovery options.

BAHRAIN

Roland Berger Strategy Consultants Middle East W.L.L.
Almoayyed Tower, 21st Floor,
PO Box 18259, Manama, Bahrain.
Tel: +973 (17) 567 950
Website: www.rolandberger.com
Partners
Michael Wette
Tel: +973 (17) 567 951
Email: michael_wette@ch.rolandberger.com
Dr. Tobias Plate
Tel. +973 (17) 567 976
Email: tobias_plate@ch.rolandberger.com
Activities: Roland Berger Strategy Consultants is a leading global strategy consultancy. Within their restructuring practice they focus on complex operational and financial restructurings/distressed M&A as well as insolvency support.

SNR Denton
Bahrain Financial Harbour, West Tower,
15th Floor Office 1501 - 1504, Building 1459,
Road 4626, Block 346, PO Box 5852,
Manama, Kingdom of Bahrain.
Tel: +973 (1) 710 2595
Fax: +973 (7) 709 0222
Website: www.snrdenton.com
Partner
Leigh Hall
Tel: +974 4459 8962/+965 2246 1840
Mobile: +974 3021 1567
Email: leigh.hall@snrdenton.com

BELGIUM

Deloitte
Berkenlaan 8B, B-1831 Diegem, Belgium.
Tel: +32 (2) 600 6000
Fax: +32 (2) 600 6001
Website: www.deloitte.com
Head of Restructuring Services
Hilde Wittemans
Tel: +32 (2) 600 6230
Email: hwittemans@deloitte.com
Activities: Deloitte advises stakeholders in underperforming or distressed businesses including creditors and directors. Services include insolvency appointments, financial restructuring, turnaround and business reviews.

Garrigues
Avenue D'Auderghem, 22-28,
B-1040 Brussels, Belgium.
Tel: +32 (2) 545 3700
Fax: +32 (2) 545 3799
Website: www.garrigues.com
Head of Brussels Office
José Luis Buendía
Tel: +32 (2) 545 3700
Email: jose.luis.buendia@garrigues.com
Activities: Their team of leading lawyers has decades of experience in turn-around, corporate recovery, refinancing and all types of insolvencies, including cross-border insolvency. It comprises experts with a background in law or economics, who work together in contentious and non-contentious insolvency, affecting debtors, banks or creditors for troubled companies.

Hogan Lovells International LLP
Avenue Louise 523, B-1050 Brussels, Belgium.
Tel: +32 (2) 505 0911
Fax: +32 (2) 505 0996
Email: firstname.lastname@hoganlovells.com
Website: www.hoganlovells.com

Liedekerke Wolters Waelbroeck Kirkpatrick
Boulevard de l'Empereur 3, B-1000 Brussels, Belgium.
Tel: +32 (2) 551 1515
Fax: +32 (2) 551 1414
Website: www.liedekerke.com
Managing Partner
Jan Vincent Lindemans
Tel: +32 (2) 551 1518
Email: jv.lindemans@liedekerke.com
Senior Partner
Philippe Malherbe
Tel: +32 (2) 551 1630
Email: p.malherbe@liedekerke.com
Activities: Advice and litigation on insolvency, threatened insolvency, credit and debt restructurings, rights of creditors, bankruptcy and judicial composition.

McKenna Long & Aldridge LLP
Avenue de Tervueren 2, B-1040 Brussels, Belgium.
Tel: +32 (2) 278 1211
Fax: +32 (2) 278 1200
Website: www.mckennalong.com
Partner
Nora Wouters
Tel: +32 (2) 278 1215
Email: nwouters@mckennalong.com
Activities: Specialises in cross-border corporate and finance transactions, and advises on the restructuring of international transactions, corporate reorganisations and mergers and acquisitions of regulated and non-regulated companies.

Roland Berger Strategy Consultants S.A./N.V.
Vorstlaan 100, Boulevard du Souverain,
B-1170 Brussels, Belgium.
Tel: +32 (2) 661 0314
Fax: +32 (2) 661 0311
Website: www.rolandberger.com
Partner
Eric Baart
Tel: +32 (2) 661 0325
Email: eric_baart@be.rolandberger.com
Activities: Roland Berger Strategy Consultants is a leading global strategy consultancy. Within their restructuring practice they focus on complex operational and financial restructurings/distressed M&A as well as insolvency support.

SJ Berwin LLP
Square de Meeûs 1, B-1000 Brussels, Belgium.
Tel: +32 (2) 511 5340
Fax: +32 (2) 511 5917
Email: brussels@sjberwin.com

Skadden, Arps, Slate, Meagher & Flom LLP & Affiliates
523 avenue Louise, Box 30, B-1050 Brussels, Belgium.
Tel: +32 (2) 639 0300
Fax: +32 (2) 639 0339
Website: www.skadden.com
Contact
Frederic Depoortere
Activities: Worldwide practice serving corporations and their principal creditors and investors by providing value-added legal solutions in bankruptcy and restructuring situations.

SNR Denton LLP
Avenue Louise 65, bte 11, B-1050 Brussels, Belgium.
Website: www.snrdenton.com

Taylor Wessing
Trône House, 4 Rue du Trône,
B-1000 Brussels, Belgium.
Tel: +32 (2) 289 6060
Fax: +32 (2) 289 6070
Partner
Bart De Moor
Tel: +32 (2) 289 6042
Email: b.demoor@taylorwessing.com
Activities: Bankruptcy, liquidation, administration and litigation.

White & Case LLP, Avocats-Advocaten
62 rue de la Loi Wetstraat 62,
B-1040 Brussels, Belgium.
Tel: +32 (2) 219 1620
Fax: +32 (2) 219 1626
Website: www.whitecase.com
Partner
Thierry Bosly
Tel: +32 (2) 239 2509
Email: tbosly@whitecase.com
Activities: White & Case is a global law firm with over 2000 lawyers in 26 countries. Their financial restructuring and insolvency group is a worldwide practice consisting of over 160 restructuring and insolvency lawyers. They are a globally recognised leader in complex cross-border insolvencies and workouts, and they represent clients in all aspects of restructurings, workouts and insolvencies, including both transactional and litigation matters. Recent representations include many of the world's largest restructuring cases and out-of-court workouts.

BERMUDA

Appleby (Bermuda) Limited
Canon's Court, 22 Victoria Street, PO Box HM 1179, Hamilton HM EX, Bermuda.
Tel: +1 (441) 295 2244
Fax: +1 (441) 292 8666
Contact
Kiernan Bell
Email: kbell@applebyglobal.com
Activities: Handle major insolvency and restructuring matters, liquidation of all types, and advising on creditors' rights and schemes of arrangements.

Attride-Stirling & Woloniecki
Crawford House, 50 Cedar Avenue, Hamilton, Bermuda.
Tel: +1 (441) 295 6500
Fax: +1 (441) 295 6566
Email: info@aswlaw.com
Website: www.aswlaw.com
Head of Insolvency & Corporate Rescue
Kehinde A.L. George
Senior Partner
Rod S. Attride-Stirling
Activities: Attorneys to various parties (including liquidators and creditors) in numerous major cross-border insolvencies and restructurings.

Ernst & Young Ltd
3 Bermudiana Road, Hamilton, HM11, Bermuda.
Tel: +1 (441) 295 7000
Fax: +1 (441) 295 5193
Email: ernst.young@bm.ey.com
Website: www.ey.com/bm
Partner:
Wanda Mello
Tel: +1 (441) 294 5376
Email: wanda.mello@bm.ey.com
Senior Manager, Restructuring:
Richard Hazel
Tel: +1 (441) 294 5639
Email: richard.hazel@bm.ey.com
Activities: Provides restructuring advice, act as office-holders in relation to financially distressed, litigation support, shareholder disputes and voluntary liquidation situations.

KRyS Global
Chancery Hall, 1st Floor, 52 Reid Street, Hamilton HM 12, PO Box 671, HM CX, Bermuda.
Tel: +1 (441) 292 0818
Fax: +1 (441) 292 0826
Email: admin@krys-global.com
Website: www.krys-global.com
Managing Director
Patrick McPhee
Email: patrick.mcphee@krys-global.com
Activities: KRyS Global has over 40 professionals who specialise in providing corporate recovery, fraud investigation and forensic accounting, money laundering investigations, business advisory services, consulting and regulatory compliance services.

BOSNIA & HERZEGOVINA

Wolf Theiss
Zmaja od Bosne 7, BiH-71 000 Sarajevo, Bosnia & Herzegovina.
Tel: +387 (33) 853 444
Fax: +387 (33) 853 425
Email: sarajevo@wolftheiss.com
Website: www.wolftheiss.com
Director
Miroslav Stojanovic
Activities: Advising international clients in all phases of restructuring projects, including advising and representing banks and material vendors in insolvency proceedings.

BRAZIL

Chadbourne & Parke
Av. Pres. Juscelino Kubitschek, 1726, 16°andar, São Paulo, SP 04543-000, Brazil.
Tel: +55 (11) 3372 0000
Fax: +55 (11) 3372 0009
Managing Partner
Charles Johnson
Email: cjohnson@chadbourne.com

Deloitte
Rua Alexandre Dumas 1981, São Paulo 04717-906, Brazil.
Website: www.deloitte.com
Head of Restructuring Services
Luiz Vasco
Tel: +55 (11) 5186 1777
Email: luisvasco@deloitte.com
Activities: Deloitte advises stakeholders in underperforming or distressed businesses including creditors and directors. Services include insolvency appointments, financial restructuring, turnaround and business reviews.

Felsberg, Pedretti, Mannrich e Aidar, Advogados e Consultores Legais
Avenida Almirante Barroso No. 52, 22° andar Centro, Rio de Janeiro 20031-000 RJ, Brazil.
Tel: +55 (21) 2156 7500
Fax: +55 (21) 2220 3182
Email: mail@felsberg.com.br
Website: www.felsberg.com.br
Managing Partner
Thomas Benes Felsberg
Partners
Maria da Graça de Brito Vianna Pedretti
Nelson Mannrich
Carlos Miguel Castex Aidar
Guilherme Fiorini Filho
Cláudia Haidamus Perri
Ricardo Wanderley Mano Sanches
Roberto Wilson Renault Pinto
Antonio Ivo Aidar
Paulo Sigaud Cardozo
David Leinig Meiler
Joel Luís Thomaz Bastos
Neil Montgomery
Thiago Vallandro Flores
Sergio Silva do Amaral
Ernani Guimarás
Paulo F. Bekin
Ivan Campos
Claudia Maniaci Salim
Antonio Amendola
Marcelo Cosac
Activities: Full-service law firm with significant experience in complex business transactions, such as privatisations, project finance transactions, corporate restructurings, and mergers and acquisitions, and a tradition of service.

Felsberg, Pedretti, Mannrich e Aidar, Advogados e Consultores Legais
SCN, Qd.5, BIA, Sala 1217, Torre Norte, Brasilia, DF, Brazil.
Tel: +55 (61) 3033 3390
Fax: +55 (61) 3033 2855
Email: mail@felsberg.com.br
Website: www.felsberg.com.br
Managing Partner
Thomas Benes Felsberg
Partners
Maria da Graça de Brito Vianna Pedretti
Nelson Mannrich
Carlos Miguel Castex Aidar
Guilherme Fiorini Filho
Cláudia Haidamus Perri
Ricardo Wanderley Mano Sanches
Roberto Wilson Renault Pinto
Antonio Ivo Aidar
Paulo Sigaud Cardozo
David Leinig Meiler
Joel Luís Thomaz Bastos
Neil Montgomery
Thiago Vallandro Flores
Sergio Silva do Amaral
Ernani Guimarás
Paulo F. Bekin
Ivan Campos
Claudia Maniaci Salim
Antonio Amendola
Marcelo Cosac
Activities: Full-service law firm with significant experience in complex business transactions, such as privatisations, project finance transactions, corporate restructurings, and mergers and acquisitions, and a tradition of service.

Felsberg, Pedretti, Mannrich e Aidar, Advogados e Consultores Legais
Avenida Paulista No. 1294, 2nd Floor, erqueira César, São Paulo 01310-915 SP, Brazil.
Tel: +55 (11) 3141 9100
Fax: +55 (11) 3141 9150
Email: mail@felsberg.com.br
Website: www.felsberg.com.br
Managing Partner
Thomas Benes Felsberg
Partners
Maria da Graça de Brito Vianna Pedretti
Nelson Mannrich
Carlos Miguel Castex Aidar
Guilherme Fiorini Filho
Cláudia Haidamus Perri
Ricardo Wanderley Mano Sanches
Roberto Wilson Renault Pinto
Antonio Ivo Aidar
Paulo Sigaud Cardozo
David Leinig Meiler
Joel Luís Thomaz Bastos
Neil Montgomery
Thiago Vallandro Flores
Sergio Silva do Amaral
Ernani Guimarás
Paulo F. Bekin
Ivan Campos
Claudia Maniaci Salim
Antonio Amendola
Marcelo Cosac
Activities: Full-service law firm with significant experience in complex business transactions, such as privatisations, project finance transactions, corporate restructurings, and mergers and acquisitions, and a tradition of service.

Felsberg, Pedretti, Mannrich e Aidar, Advogados e Consultores Legais
Av. José de Souza Campos, 900 Sl. 65 Cond. Trade Tower, 13092-110 Campinas, Brazil.
Tel: +55 (19) 3512 5600
Fax: +55 (19) 3512 5605
Email: mail@felsberg.com.br
Website: www.felsberg.com.br
Managing Partner
Thomas Benes Felsberg
Partners
Maria da Graça de Brito Vianna Pedretti
Nelson Mannrich
Carlos Miguel Castex Aidar
Guilherme Fiorini Filho
Cláudia Haidamus Perri
Ricardo Wanderley Mano Sanches
Roberto Wilson Renault Pinto

Antonio Ivo Aidar
Paulo Sigaud Cardozo
David Leinig Meiler
Joel Luís Thomaz Bastos
Neil Montgomery
Thiago Vallandro Flores
Sergio Silva do Amaral
Ernani Guimarás
Paulo F. Bekin
Ivan Campos
Claudia Maniaci Salim
Antonio Amendola
Marcelo Cosac

Activities: Full-service law firm with significant experience in complex business transactions, such as privatisations, project finance transactions, corporate restructurings, and mergers and acquisitions, and a tradition of service.

Gibson, Dunn & Crutcher LLP

Rua Funchal, 418, 35°andar, São Paulo, SP 04551-060, Brazil.
Tel: +55 (11) 3521 7160
Fax: +55 (11) 3521 7070
Website: www.gibsondunn.com

Co-Chairs, Business Restructuring & Reorganisation Practice Group
Craig H. Millet
Michael A. Rosenthal
David M. Feldman

Activities: Represent debtors' in bankruptcy cases and out-of-court restructurings, creditors' committees and individual creditors, bondholders, lenders, potential acquirers, insurers and trustees.

KPMG Restructuring and Administration Services LTDA

Av. Nove de Julho, 5109 7°andar, 01407-905 São Paulo, SP, Brazil.
Fax: +55 (11) 3245 8310

Partner
Salvatore Milanese
Tel: +55 (11) 3245 8312
Email: smilanese@kpmg.com.br

Directors
Andre Schwartzman
Tel: +55 (11) 3245 8258
Osana Mendonça
Tel: +55 (11) 3245 8338

Mattos Filho, Veiga Filho, Marrey Jr. e Quiroga Advogados

Alameda Joaquim Eugênio de Lima, 447, São Paulo, CEP 01403-001, Brazil.
Tel: +55 (11) 3147 7600
Fax: +55 (11) 3147 7770
Email: mattosfilho@mattosfilho.com.br
Website: www.mattosfilho.com.br

Partner
Eduardo Secchi Munhoz
Tel: +55 (11) 3147 7758
Email: emunhoz@mattosfilho.com.br

Senior Associate
Raphael Nehin Corrêa
Tel: +55 (11) 3147 2861
Email: raphael@mattosfilho.com.br

Activities: Representation of creditors and debtors in debt restructuring, reorganisation and liquidation proceedings, and of investors in the acquisition of assets and/or equity in insolvency proceedings.

PricewaterhouseCoopers Corporate Finance & Recovery Ltda

Avenida Francisco Matarazzo, 1400. Torre Torino, São Paulo CEP 05001-903, SP, Brazil.
Tel: +55 (11) 3674 2000
Fax: +55 (11) 3674 2022
Website: www.pwc.com.br

Partners
Antonio Toro
Tel: +55 (11) 3674 3666
Email: antonio.toro@br.pwc.com
Rogerio Gollo
Tel: +55 (11) 3674 2333
Email: rogerio.gollo@br.pwc.com

Activities: Financial advisor services on financial restructurings, and non-performing credits portfolio trading in Brazil.

Roland Berger Strategy Consultants Ltda.

Av. Presidente Juscelino Kubitschek 510, São Paulo, SP 04543-906, Brazil.
Tel: +55 (11) 3046 7111
Fax: +55 (11) 3046 7222
Website: www.rolandberger.com

Partner
Thomas Kunze
Email: thomas_kunze@br.rolandberger.com

Activities: Roland Berger Strategy Consultants is a leading global strategy consultancy. Within their restructuring practice they focus on complex operational and financial restructurings/distressed M&A as well as insolvency support.

RZM Advogados

Rua São Tomé, 86, Conjunto 111, Vila Olimpia, São Paulo 04551-080, Brazil.
Tel: +55 (11) 3055 2008
Fax: +55 (11) 3848 9449
Email: rzmadvogados@rzmadvogados.com.br
Website: www.rzmadvogados.com.br

Partners
Fábio Pascual Zuanon
Email: zuanon@rzmadvogados.com.br
Bruno Gutierres
Email: gutierres@rzmadvogados.com

Activities: Represents prominent financial institutions as creditor, on relevant debt restructuring transactions and insolvency and credit recovery proceedings.

Skadden, Arps, Slate, Meagher & Flom LLP & Affiliates

Avenida Brigadeiro Faria Lima, 3311-7° andar, 04538-133, São Paulo, SP, Brazil.
Tel: +55 (11) 3708 1820
Fax: +55 (11) 3708 1845
Website: www.skadden.com

Partner
Richard S. Aldrich, Jr

Activities: Worldwide practice serving corporations and their principal creditors and investors by providing value-added legal solutions in bankruptcy and restructuring situations.

Squire Sanders Ltda

Praia de Botafogo, 501 - 1° andar - parte - Torre Pão de Açucar, Centro Empresarial Mourisco, Rio de Janeiro - Cep: 22.250-040, Brazil.
Tel: +55 (21) 2586 6261
Fax: +55 (21) 2586 6001
Website: www.squiresanders.com

Restructuring & Insolvency Global Practice Group Leader
Stephen D. Lerner

Local Restructuring & Insolvency Contact
Timothy J. Smith

Activities: The restructuring & insolvency group has over 100 restructuring and insolvency lawyers who represent financial institutions, distressed companies, insolvency practitioners, creditors' committees, investors, and strategic and financial buyers of troubled companies.

Standard & Poor's

Av. Brigadeiro Faria Lima, 201, 18th Floor, Pinheiros, São Paulo CEP 05426-100, Brazil.
Tel: +55 (11) 3039 9702
Fax: +55 (11) 3039 9701

White & Case LLP

Av. Brig. Faria Lima, 2.277 4th Floor, São Paulo, SP 01452-0000, Brazil.
Tel: +55 (11) 3147 5600
Fax: +55 (11) 3147 5611
Website: www.whitecase.com

Partners
Donald E. Baker
Tel: +55 (11) 3147 5601
Email: dbaker@whitecase.com
Fernando de la Hoz
Tel: +55 (11) 3147 5608
Email: fdelahoz@whitecase.com

Activities: White & Case is a global law firm with over 2000 lawyers in 26 countries. Their financial restructuring and insolvency group is a worldwide practice consisting of over 160 restructuring and insolvency lawyers. They are a globally recognised leader in complex cross-border insolvencies and workouts, and they represent clients in all aspects of restructurings, workouts and insolvencies, including both transactional and litigation matters. Recent representations include many of the world's largest restructuring cases and out-of-court workouts.

BRITISH VIRGIN ISLANDS

Appleby

Jayla Place, Wickhams Cay 1, PO Box 3190, Road Town, Tortola, British Virgin Islands.
Tel: +1 (284) 494 4742
Fax: +1 (284) 494 7279
Email: info@applebyglobal.com

Contact
Eliot Simpson

Activities: Handle major insolvency and restructuring matters, liquidation of all types, and advising on creditors' rights and schemes of arrangements.

Deloitte

James Frett Building, Wickham's Cay 1, Road Town, Tortola, British Virgin Islands.
Website: www.deloitte.com

Head of Restructuring Services
Kerry Graziola
Tel: +1 (284) 494 2868 ext. 2010
Email: kgraziola@deloitte.com

Activities: Deloitte advises stakeholders in underperforming or distressed businesses including creditors and directors. Services include insolvency appointments, financial restructuring, turnaround and business reviews.

Ernst & Young Ltd

3rd Floor, Jayla Place, Wickhams Cay 1, Road Town, VG-1110, British Virgin Islands.
Tel: +1 (284) 852 5450
Email: ernst.young@vg.ey.com
Website: www.ey.com/vg
Senior Manager, Restructuring: Scott Clout
Tel: +1 (284) 852 5457
Email: scott.clout@vg.ey.com

Activities: Provides restructuring advice, act as office-holders in relation to financially distressed, litigation support, shareholder disputes and voluntary liquidation situations.

KRyS Global

Commerce House, 2nd Floor, 181 Main Street, Road Town, PO Box 930, Tortola VG-1110, British Virgin Islands.
Tel: +1 (284) 494 1768
Fax: +1 (284) 494 7169
Email: admin@krys-global.com
Website: www.krys-global.com

Chief Executive Officer
Kenneth Krys
Tel: +1 (345) 815 8401/ +1 (284) 852 1763
Email: kenneth.krys@krys-global.com
Managing Director
John Greenwood
Tel: +1 (284) 852 1750
Email: john.greenwood@krys-global.com
Activities: KRyS Global has over 40 professionals who specialise in providing corporate recovery, fraud investigation and forensic accounting, money laundering investigations, business advisory services, consulting and regulatory compliance services.

Walkers
171 Main Street, PO Box 72, Road Town, Tortola VG-1110, British Virgin Islands.
Tel: +1 (284) 494 2204
Fax: +1 (284) 494 5535
Email: info@walkersglobal.com
Website: www.walkersglobal.com
Partners
Jack Husbands
Sandie Corbett
Activities: Highly regarded and integrated global team delivering informed legal support across the spectrum of restructuring transactions, whether contentious or out-of-court.

BULGARIA

Studio Legale Sutti
94 "Hristo Botev" Boulevard, BG-1202 Sofia, Bulgaria.
Tel: +359 (2) 831 9586
Fax: +359 (2) 831 9584
Email: maildesk@sutti.com
Website: www.sutti.com
Resident Partner
Tzvetelina Dimitrova
Activities: International corporate recovery, advising multi-national reorganisations, corporate restructuring, creditors' rights and compliance issues.

Wolf Theiss
Rainbow Centre, 29 Atanas Dukov Street, Sofia BG-1407, Bulgaria.
Tel: +359 (2) 861 3700
Fax: +359 (2) 807 0321
Email: sofia@wolftheiss.com
Website: www.wolftheiss.com
Director
Richard Clegg
Activities: Advising international clients in all phases of restructuring projects, including advising and representing banks and material vendors in insolvency proceedings.

CANADA

Alexander Holburn Beaudin & Lang LLP
2700-700 West Georgia Street, Vancouver, BC V7Y 1B8, Canada.
Tel: +1 (604) 484 1700
Fax: +1 (604) 484 9700
Email: info@ahbl.ca
Website: www.ahbl.ca
Associate Counsel
Sharon Urquhart
Tel: +1 (604) 484 1757
Email: surquhart@ahbl.com
Managing Partner
David Garner
Tel: +1 (604) 484 1708
Email: dgarner@ahbl.ca
Activities: Represent the interests of their clients in all aspects of the insolvency and restructuring process.

Cassels Brock & Blackwell LLP
2100 Scotia Plaza, 40 King Street West, Toronto, Ontario M5H 3C2, Canada.
Tel: +1 (416) 869 5300
Fax: +1 (416) 360 8877
Website: www.casselsbrock.com
Partners
Alison Manzer
Tel: +1 (416) 869 5469
Fax: +1 (416) 350 6938
Email: amanzer@casselsbrock.com
Deborah Grieve
Tel: +1 (416) 860 5219
Fax: +1 (416) 350 6923
Email: dgrieve@casselsbrock.com
Activities: Highly regarded and internationally recognised legal advisers on all aspects of complex corporate reorganisations and restructurings, creditors' remedies and commercial litigation.

Davis LLP
1501, McGill College, Suite 1400, Montreal, Québec H3A 3M8, Canada.
Tel: +1 (514) 392 1991
Fax: +1 (514) 392 1999
Website: www.davis.ca
Partner
Hubert Sibre
Tel: +1 (514) 392 8447
Email: hsibre@davis.ca
Activities: Lexpert 2010 "Litigator to Watch" Lexpert 2009 "Rising Star". 2008 Arista Young Professional of the Year. Frequent speaker in Canada and United States.

Deloitte
Siege social de Quebec 1, Place Ville-Marie, Bureau 3000, Montreal H3B 4T9, Canada.
Website: www.deloitte.com
Head of Restructuring Services
Pierre Laporte
Tel: +1 (514) 393 7372
Email: pilaporte@deloitte.ca
Activities: Deloitte advises stakeholders in underperforming or distressed businesses including creditors and directors. Services include insolvency appointments, financial restructuring, turnaround and business reviews.

Fasken Martineau DuMoulin LLP
The Stock Exchange Tower, PO Box 242, Suite 3700, 800 Victoria Square, Montreal, Québec H4Z 1E9, Canada.
Tel: +1 (514) 397 7400
Toll Free: +1 800 361 6266
Fax: +1 (514) 397 7600
Email: montreal@fasken.com
Firm-wide Managing Partner
David Corbett
Tel: +1 (416) 868 3504
Email: dcorbett@fasken.com
Partner, Chair, Global Insolvency & Restructuring Group
John Grieve (Vancouver)
Tel: +1 (604) 631 4772
Email: jgrieve@fasken.com
Partner
Alain Riendeau (Montreal)
Tel: +1 (514) 397 7678
Email: ariendeau@fasken.com
Activities: Canadian and English insolvency and restructuring lawyers representing domestic and international businesses, institutional, secured and distressed debt lenders, creditors, directors, insolvency professionals and others.

Fasken Martineau DuMoulin LLP
3400 First Canadian Centre, 350-7th Avenue SW, Calgary, Alberta, T2P 3N9, Canada.
Tel: +1 (403) 261 5350
Toll Free: +1 (877) 336 5350
Fax: +1 (403) 261 5351
Email: calgary@fasken.com
Website: www.fasken.com
Firm-wide Managing Partner
David Corbett
Tel: +1 (416) 868 3504
Email: dcorbett@fasken.com
Partner, Chair, Global Insolvency & Restructuring Group
John Grieve (Vancouver)
Tel: +1 (604) 631 4772
Email: jgrieve@fasken.com
Partner
Frank Dearlove (Calgary)
Tel: +1 (403) 261 6163
Email: fdearlove@fasken.com
Activities: Canadian and English insolvency and restructuring lawyers representing domestic and international businesses, institutional, secured and distressed debt lenders, creditors, directors, insolvency professionals and others.

Fasken Martineau DuMoulin LLP
Suite 800, 140 Grande Allée Est, Québec City, Québec G1R 5M8, Canada.
Tel: +1 (418) 640 2000
Toll Free: +1 800 463 2827
Fax: +1 (418) 647 2455
Email: quebec@fasken.com
Website: www.fasken.com
Firm-wide Managing Partner
David Corbett
Tel: +1 (416) 868 3504
Email: dcorbett@fasken.com
Partner, Chair, Global Insolvency & Restructuring Group
John Grieve (Vancouver)
Tel: +1 (604) 631 4772
Email: jgrieve@fasken.com
Activities: Canadian and English insolvency and restructuring lawyers representing domestic and international businesses, institutional, secured and distressed debt lenders, creditors, directors, insolvency professionals and others.

Fasken Martineau DuMoulin LLP
333 Bay Street, Suite 2400, Bay Adelaide Centre, Box 20, Toronto, ON M5H 2T6, Canada.
Tel: +1 (416) 366 8381
Toll Free: +1 800 268 8424
Fax: +1 (416) 364 7813
Email: toronto@fasken.com
Firm-wide Managing Partner
David Corbett
Tel: +1 (416) 868 3504
Email: dcorbett@fasken.com
Partner, Chair, Global Insolvency & Restructuring Group
John Grieve (Vancouver)
Tel: +1 (604) 631 4772
Email: jgrieve@fasken.com
Partner
Edmond Lamek (Toronto)
Tel: +1 (416) 865 4506
Email: elamek@fasken.com
Activities: Canadian and English insolvency and restructuring lawyers representing domestic and international businesses, institutional, secured and distressed debt lenders, creditors, directors, insolvency professionals and others.

Fasken Martineau DuMoulin LLP
2900-550 Burrard Street, Vancouver, BC, V6C 0A3, Canada.
Tel: +1 (604) 631 3131
Fax: +1 (604) 631 3232
Email: vancouver@fasken.com
Website: www.fasken.com
Firm-wide Managing Partner
David Corbett
Tel: +1 (416) 868 3504
Email: dcorbett@fasken.com

Partner, Chair, Global Insolvency & Restructuring Group
John Grieve (Vancouver)
Tel: +1 (604) 631 4772
Email: jgrieve@fasken.com

Activities: Canadian and English insolvency and restructuring lawyers representing domestic and international businesses, institutional, secured and distressed debt lenders, creditors, directors, insolvency professionals and others.

Fishman Flanz Meland Paquin, SENCRL/LLP
Suite 4100, 1250 René-Lévesque Boulevard West, Montreal, Québec H3B 4W8, Canada.
Tel: +1 (514) 932 4100
Fax: +1 (514) 932 4170
Email: afishman@ffmp.ca
Website: www.ffmp.ca

Senior Partner
Avram Fishman

Contact
Mark Meland

Activities: Active in virtually all major Canadian restructurings and trans-border restructurings, reorganisations and bankruptcies. Represents financial institutions, major stakeholders and debtors.

Fraser Milner Casgrain LLP
1 Place Ville Marie, Suite 3900, Montréal, Québec H3B 4M7, Canada.
Tel: +1 (514) 878 8800
Fax: +1 (514) 866 2241
Website: www.fmc-law.com

Partners
Roger P. Simard (Montréal)
Tel: +1 (514) 878 5834
Email: roger.simard@fmc-law.com
R. Shayne Kukulowicz (Toronto)
David W. Mann (Calagary)
Alex L. MacFarlane (Toronto)
John R. Sandrelli (Vancouver)
Ray C. Rutman (Edmonton)
Philip Rimer (Ottawa)

Activities: FMC's 48 insolvency/restructuring lawyers offer fully integrated, Canada-wide representation and experience with most major Canadian insolvencies as well as cross-border issues.

Fraser Milner Casgrain LLP
2900 Manulife Place, 10180-101 Street, Edmonton, Alberta T5J 3V5, Canada.
Tel: +1 (780) 423 7100
Fax: +1 (780) 423 7276
Website: www.fmc-law.com

Partners
Ray C. Rutman (Edmonton)
Tel: +1 (780) 423 7312
Email: ray.rutman@fmc-law.com
R. Shayne Kukulowicz (Toronto)
David W. Mann (Calgary)
Alex L. MacFarlane (Toronto)
John R. Sandrelli (Vancouver)
Philip Rimer (Ottawa)
Roger P. Simard (Montréal)

Activities: FMC's 48 insolvency/ restructuring lawyers offer fully integrated, Canada-wide representation and experience with most major Canadian insolvencies as well as cross-border issues.

Fraser Milner Casgrain LLP
20th Floor, 250 West Howe Street, Vancouver, BC V6C 3R8, Canada.
Tel: +1 (604) 687 4460
Fax: +1 (604) 683 5214
Website: www.fmc-law.com

Partners
John R. Sandrelli (Vancouver)
Tel: +1 (604) 443 7132
Email: john.sandrelli@fmc-law.com
R. Shayne Kukulowicz (Toronto)
David W. Mann (Calgary)
Alex L. MacFarlane (Toronto)
Ray C. Rutman (Edmonton)
Philip Rimer (Ottawa)
Roger P. Simard (Montréal)

Activities: FMC's 48 insolvency/restructuring lawyers offer fully integrated, Canada-wide representation and experience with most major Canadian insolvencies as well as cross-border issues.

Fraser Milner Casgrain LLP
Suite 400, 77 King Street West, Toronto-Dominion Centre, Toronto, Ontario M5X 0A1, Canada.
Tel: +1 (416) 863 4511
Fax: +1 (416) 863 4592

Partners
Alex L. MacFarlane (Toronto)
Tel: +1 (416) 863 4582
Email: alex.macfarlane@fmc-law.com
R. Shayne Kukulowicz (Toronto)
David. W. Mann (Calgary)
John R. Sandrelli (Vancouver)
Ray C. Rutman (Edmonton)
Philip Rimer (Ottawa)
Roger P. Simard (Montréal)

Activities: FMC's 48 insolvency/restructuring lawyers offer fully integrated, Canada-wide representation and experience with most major Canadian insolvencies as well as cross-border issues.

Fraser Milner Casgrain LLP
99 Bank Street, Suite 1420, Ottawa, Ontario K1P 1HA, Canada.
Tel: +1 (613) 783 9600
Fax: +1 (613) 783 9690
Website: www.fmc-law.com

Partners
Philip Rimer (Ottawa)
Tel: +1 (613) 783 9634
Email: philip.rimer@fmc-law.com
R. Shayne Kukulowicz (Toronto)
David W. Mann (Calgary)
Alex L. MacFarlane (Toronto)
John R. Sandrelli (Vancouver)
Ray C. Rutman (Edmonton)
Roger P. Simard (Montréal)

Activities: FMC's 48 insolvency/restructuring lawyers offer fully integrated, Canada-wide representation and experience with most major Canadian insolvencies as well as cross-border issues.

Fraser Milner Casgrain LLP
15th Floor, Bankers Court, 850-2nd Street S.W., Calgary, Alberta T2P 0R8, Canada.
Tel: +1 (403) 268 7000
Fax: +1 (403) 268 3100
Website: www.fmc-law.com

Partners
David W. Mann (Calgary)
Tel: +1 (403) 268 7097
Email: david.mann@fmc-law.com
R. Shayne Kukulowicz (Toronto)
Alex L. MacFarlane (Toronto)
John R. Sandrelli (Vancouver)
Ray C. Rutman (Edmonton)
Philip Rimer (Ottawa)
Roger P. Simard (Montréal)

Activities: FMC's 48 insolvency/restructuring lawyers offer fully integrated, Canada-wide representation and experience with most major Canadian insolvencies as well as cross-border issues.

Goodmans LLP
Suite 3400, 333 Bay Street, Toronto, Ontario M5H 2S7, Canada.
Tel: +1 (416) 979 2211
Fax: +1 (416) 979 1234
Email: info@goodmans.ca
Website: www.goodmans.ca

Partner
Jay Carfagnini

Activities: Expertise in restructuring, financing and corporate issues. Clients include private and public corporations, Canadian and US financial institutions and international and national corporations.

Grant Thornton Alger Inc.
Suite 900, 833 - 4th Avenue SW, Calgary, AB T2P 3T5, Canada.
Tel: +1 (403) 310 8888
Fax: +1 (403) 260 2571
Email: calgary@ca.gt.com
Website: www.gt.alger.ca

Partner
Bruce Alger
Tel: +1 (403) 296 2970
Email: bruce.alger@ca.gt.com

Activities: Grant Thornton Alger Inc. specialises in corporate recovery and personal bankruptcy.

McMillan LLP
Suite 4400, 181 Bay Street, Toronto, Ontario M5J 2T3, Canada.
Tel: +1 (416) 865 7000
Fax: +1 (416) 865 7048
Email: info@mcmillan.ca
Website: www.mcmillan.ca

Chief Executive Officer
Andrew Kent
Tel: +1 (416) 865 7160
Email: andrew.kent@mcmillan.ca

Partner
Max Mendelsohn
Tel: +1 (514) 987 5042
Email: max.mendelsohn@mcmillan.ca

Chief Operating Officer
Mickey Yaksich
Tel: +1 (416) 865 7097
Email: mickey.yaksich@mcmillan.ca

Activities: Leading Canadian business law firm, committed to advancing its clients' interests through exemplary client service and thoughtful, pragmatic advice. Values-driven, the firm takes a dynamic and sophisticated approach to provide practical and creative solutions.

McMillan LLP
Suite 2700, 1000 Sherbrooke Street West, Montréal, Québec H3A 3G4, Canada.
Tel: +1 (514) 987 5000
Fax: +1 (514) 987 1213
Email: info@mcmillan.ca
Website: www.mcmillan.ca

Chief Executive Officer & Managing Partner
Andrew Kent
Tel: +1 (416) 865 7160
Email: andrew.kent@mcmillan.ca

Partner
Max Mendelsohn
Tel: +1 (514) 987 5042
Email: max.mendelsohn@mcmillan.ca

Chief Operating Officer
Mickey Yaksich
Tel: +1 (416) 865 7097
Email: mickey.yaksich@mcmillan.ca,

Activities: Leading Canadian business law firm, committed to advancing its clients' interests through exemplary client service and thoughtful, pragmatic advice. Values-driven, the firm takes a dynamic and sophisticated approach to provide practical and creative solutions.

Norton Rose Canada
Suite 2500, 1 Place Ville Marie, Montreal, Quebec H3B 1RI, Canada.
Tel: +1 (514) 847 4747
Fax: +1 (514) 286 5474
Website: www.nortonrose.com

Co-Chairs of the Group
Tony Reyes
Tel: +1 (416) 216 4825
Email: tony.reyes@nortonrose.com

Sylvain Rigaud
Tel: +1 (514) 847 4702
Email: sylvain.rigaud@nortonrose.com
Activities: Involved in most of Canada's largest and most complex restructurings and insolvencies in the past decade.

Norton Rose Canada
Suite 3800, PO Box 84, Royal Bank Plaza, South Tower, 200 Bay Street, Toronto, ON M5J 2Z4 Canada.
Tel: +1 (416) 216 4000
Fax: +1 (416) 216 3930
Website: www.nortonrose.com
Co-Chairs of the Group
Tony Reyes
Tel: +1 (416) 216 4825
Email: tony.reyes@nortonrose.com
Sylvain Rigaud
Tel: +1 (514) 847 4702
Email: sylvain.rigaud@nortonrose.com
Activities: Cross-border restructurings primarily with the US and the UK, acting for both debtors and creditors.

Skadden, Arps, Slate, Meagher & Flom LLP & Affiliates
222 Bay Street, Suite 1750, PO Box 258, Toronto, Ontario M5K 1J5, Canada.
Tel: +1 (416) 777 4700
Fax: +1 (416) 777 4747
Website: www.skadden.com
Partner
Christopher W. Morgan
Activities: Worldwide practice serving corporations and their principal creditors and investors by providing value-added legal solutions in bankruptcy and restructuring situations.

Standard & Poor's
130 King Street West, Suite 1100, Toronto ON M5X 1E5, Canada.
Tel: +1 (416) 507 2500
Fax: +1 (416) 507 2507

ThorntonGroutFinnigan LLP
Suite 3200, 100 Wellington Street West, Toronto ON M5K 1K7, Canada.
Tel: +1 (416) 304 1616
Fax: +1 (416) 304 1313
Website: www.tgf.ca
Partners
Robert Thornton
Tel: +1 (416) 304 0560
Email: rthornton@tgf.ca
D.J. Miller
Tel: +1 (416) 304 0559
Email: djmiller@tgf.ca
Activities: A speciality boutique law firm with an international and national practice in restructuring and insolvency. Its reputation and expertise is reflected in its high profile retainers.

CAYMAN ISLANDS

Appleby (Cayman) Ltd.
Clifton House, 75 Fort Street, PO Box 190, Grand Cayman KY1-1104, Cayman Islands.
Tel: +1 (345) 949 4900
Fax: +1 (345) 949 4901
Email: cayman@applebyglobal.com
Website: www.applebyglobal.com
Group Head - Litigation & Insolvency, Partner
Andrew Bolton
Tel: +1 (345) 814 2011
Email: abolton@applebyglobal.com
Activities: Handle major insolvency and restructuring matters, liquidation of all types, and advising on creditors' rights and schemes of arrangements.

Campbells
PO Box 884, George Town, Grand Cayman, KYI-1103, Cayman Islands.
Tel: +1 (345) 949 2648
Fax: +1 (345) 949 8613
Email: rmcdonough@campbells.com.ky
Website: www.campbells.com
Partners
J. Ross McDonough
Alistair Walters
Activities: Advised local and international insolvency professionals in many major multi-jurisdictional insolvency and restructuring matters.

Deloitte
One Capital Place, George Town, Grand Cayman, Lomas, Cayman Islands.
Website: www.deloitte.com
Head of Restructuring Services
Stuart Sybersma
Tel: +1 (345) 814 3337
Email: ssybersma@deloitte.com
Activities: Deloitte advises stakeholders in underperforming or distressed businesses including creditors and directors. Services include insolvency appointments, financial restructuring, turnaround and business reviews.

Ernst & Young Ltd
62 Forum Lane, Camana Bay, Box 510, Grand Cayman KY1-1106, Cayman Islands.
Tel: +1 (345) 949 8444
Fax: +1 (345) 949 8529
Email: ernst.young@ky.ey.com
Website: www.ey.com/ky
Executive Director, Restructuring:
Rob McMahon
Tel: +1 (345) 814 9008
Email: rob.mcmahon@ky.ey.com
Senior Manager, Restructuring:
Claire Loebell
Tel: +1 (345) 814 8922
Email: claire.loebell@ky.ey.com
Activities: Provides restructuring advice, act as office-holders in relation to financially distressed, litigation support, shareholder disputes and voluntary liquidation situations.

KRyS Global
Governor's Square, Building 6, 2nd Floor, 23 Lime Tree Bay Avenue, PO Box 31237, Grand Cayman KY1-1205, Cayman Islands.
Tel: +1 (345) 947 4700
Fax: +1 (345) 946 6728
Email: admin@krys-global.com
Website: www.krys-global.com
CEO
Keneth Krys
Tel: +1 (345) 815 8401/ +1 (284) 852 1763
Email: kenneth.krys@krys-global.com
Managing Director
Margot MacInnis
Email: margot.macinnis@krys-global.com
Activities: KRyS Global has over 40 professionals who specialise in providing corporate recovery, fraud investigation and forensic accounting, money laundering investigations, business advisory services, consulting and regulatory compliance services.

Turner & Roulstone
Strathvale House, 90 North Church Street, George Town, Grand Cayman;
Mailing Address: PO Box 2636, Grand Cayman KY1-1102, Cayman Islands.
Tel: +1 (345) 943 5555
Fax: +1 (345) 943 9999
Email: info@tandr.ky
Website: www.tandr.ky
Managing Partner
Alan Turner
Tel: +1 (345) 814 0700
Email: alan.turner@tandr.ky
Partner
Andrea Dunsby
Tel: +1 (345) 814 0713
Email: andrea.dunsby@tandr.ky
Activities: Advising liquidators or stakeholders in most of the major insolvencies and restructurings with Cayman Islands aspects since opening in 2003.

Walkers
Walker House, 87 Mary Street, George Town, Grand Cayman, KY1-9001 Cayman Islands.
Tel: +1 (345) 949 0100
Fax: +1 (345) 949 7886
Email: info@walkersglobal.com
Website: www.walkersglobal.com
Partners
Guy Locke
Neil Lupton
Colette Wilkins
Activities: Highly regarded and integrated global team delivering informed legal support across the spectrum of restructuring transactions, whether contentious or out-of-court.

CHANNEL ISLANDS

Appleby
13-14 Esplanade, St. Helier, Jersey JE1 1BD, Channel Islands.
Tel: +44 (1534) 888 777
Fax: +44 (1534) 888 778
Email: info@applebyglobal.com
Website: www.applebyglobal.com
Contact
Fraser Robertson
Email: frobertson@applebyglobal.com
Activities: Handle major insolvency and restructuring matters, liquidation of all types, and advising on creditors' rights and schemes of arrangements.

Appleby
1st Floor, Lefebvre Place, Lefebvre Street, St Peter Port, Guernsey GY1 2JP, Channel Islands.
Tel: +44 (1481) 755 625
Fax: +44 (1481) 728 992
Contact
Jeremy Le Tissier
Email: jletissier@applebyglobal.com
Activities: Handle major insolvency and restructuring matters, liquidation of all types, and advising on creditors' rights and schemes of arrangements.

Bedell Cristin
PO Box 75, 26 New Street, St. Helier, JE4 8PP Jersey, Channel Islands.
Tel: +44 (1534) 814 814
Fax: +44 (1534) 814 815
Email: anthony.dessain@bedellgroup.com
Website: www.bedellgroup.com
Senior Partner
Anthony Dessain
Contacts
Robert Gardner
Edward Drummond
Activities: Providing legal advice and remedies relating to bankruptcy and pursuing assets involving companies, trusts and individuals including reconstruction and assistance where appropriate and cross-border activities.

PKF (UK) LLP
Sarnia House, PO Box 296, Le Truchot, St Peter Port, GY1 4NA Guernsey, Channel Islands.
Tel: +44 (1481) 727 927
Fax: +44 (1481) 710 511
Email: admin@pkfguernsey.com
Website: www.pkfguernsey.com

Partner
Tim Cumming
Tel: +44 (1481) 727 927
Email: tim.cumming@pkfguernsey.com
Activities: Advisers on all forms of insolvency and restructuring.

PricewaterhouseCoopers
Twenty Two Colomberie, St. Helier,
JE1 4XA Jersey, Channel Islands.
Tel: +44 (1534) 838 200
Fax: +44 (1534) 838 201
Website: www.pwc.com/jg
Partner
Mark James
Tel: +44 (1534) 838 304
Email: mark.james@je.pwc.com
Manager
Owen Woolgar
Tel: +44 (1534) 838 363
Email: owen.woolgar@je.pwc.com

PricewaterhouseCoopers CI LLP
Royal Bank Place, PO Box 321,
1 Glategny Esplanade, GY1 4ND Guernsey,
Channel Islands.
Tel: +44 (1481) 752 000
Fax: +44 (1481) 752 001
Website: www.pwc.com/jg
Partner
Nick Vermeulen
Tel: +44 (1481) 752 089
Email: nick.vermeulen@gg.pwc.com
Manager
Natalie Boes
Tel: +44 (1481) 752 073
Email: natalie.boes@gg.pwc.com
Activities: PricewaterhouseCoopers CI LLP provides advice on corporate restructuring, solvent winding ups as well as formal liquidator and administrator appointments.

Walkers
PO Box 72, Walker House, 28-34 Hill Street,
St. Helier, JE4 8PN Jersey, Channel Islands.
Tel: +44 (1534) 700 700
Fax: +44 (1534) 700 800
Email: info@walkersglobal.com
Website: www.walkersglobal.com
Partner
David Steenson
Activities: Highly regarded and integrated global team delivering informed legal support across the spectrum of restructuring transactions, whether contentious or out-of-court.

PEOPLE'S REPUBLIC OF CHINA

American Appraisal China Limited
Room 502, Office Tower A, Beijing Fortune Plaza, No. 7 Dongsanhuan Zhong Road, Chaoyang District, Beijing 100020, People's Republic of China.
Tel: +86 (10) 6539 1334/6530 9088
Fax: +86 (10) 6539 1336
Email: asianmailbox@american-appraisal.com
Website: www.american-appraisal.com.cn
Vice President, Beijing Office
Kevin Leung
Activities: Provide independent valuation of entire businesses, real estate, machinery/equipment and intangible assets with global compliance capability.

American Appraisal China Limited
Room 319, C-1 High Tech Industrial Park,
Shenzhen 51805, People's Republic of China.
Tel: +86 (755) 2655 1630
Fax: +86 (755) 2655 1712
Email: asianmailbox@american-appraisal.com
Website: www.american-appraisal.com.cn
Manager, Industrial Valuation Group
Tommy Wang
Activities: Provide independent valuation of entire businesses, real estate, machinery/equipment and intangible assets with global compliance capability.

American Appraisal China Limited
Unit 3602, Bund Center,
222 Yan An Road East, Shanghai 200002,
People's Republic of China.
Tel: +86 (21) 6335 0130/0132
Fax: +86 (21) 6335 0125
Email: asianmailbox@american-appraisal.com
Website: www.american-appraisal.com.cn
Manager, Business Development
Neville Lam
Activities: Provide independent valuation of entire businesses, real estate, machinery/equipment and intangible assets with global compliance capability.

American Appraisal China Limited
Room 2303, 23/F, Citic Plaza,
233 TianHeBei Road, Guangzhou 510620,
People's Republic of China.
Tel: +86 (20) 3891 2300/2303/2223 0274
Fax: +86 (20) 3891 2878
Email: asianmailbox@american-appraisal.com
Website: www.american-appraisal.com.cn
Business Development Manager
Joe Zhou
Activities: Provide independent valuation of entire businesses, real estate, machinery/equipment and intangible assets with global compliance capability.

Bingham McCutchen LLP
China World Tower 3, 1 Jianguomenwai Avenue, 50th Floor, Beijing 100004,
People's Republic of China.
Tel: +86 (10) 6535 2888
Fax: +86 (10) 6535 2899
Email: info@bingham.com
Website: www.bingham.com
Co-Managing Partners
Brian Beglin
Tel: +86 (10) 6535 2808
Email: brian.beglin@bingham.com
Xiaowei Ye
Tel: +86 (10) 6535 2818
Email: xiaowei.ye@bingham.com
Activities: Provides extensive experience in cross border insolvency, financial restructuring and special situations investments to financial institutions, including hedge, private equity and other investment fund managers, and capital markets participants throughout the Asia-Pacific region.

Blake Dawson
Suite 3408-10, CITIC Square,
1168 Nanjing Road West, Shanghai 200041,
People's Republic of China.
Tel: +86 (21) 5100 1796
Fax: +86 (21) 5292 5161
Website: www.blakedawson.com
National Practice Head, Restructuring & Insolvency
James Marshall
Tel: +61 (2) 9258 6508
Email: james.marshall@blakedawson.com
Partner, Restructuring & Insolvency
Ray Mainsbridge
Tel: +61 (2) 9258 6049
Email: ray.mainsbridge@blakedawson.com
Activities: Corporate reconstruction and insolvency law which includes advising both lenders and debtors on formal and informal schemes of arrangement, and administrators of insolvent companies and creditors on the enforcement of securities and other rights.

Cadwalader, Wickersham & Taft LLP
2301 China Central Place Tower 2, NO.
79 Jianguo Road, Beijing 100025, China.
Tel: +86 (10) 6599 7200
Fax: +86 (10) 6599 7300
Email: cwtinfo@cwt.com
Website: www.cadwalader.com
Partners & Co-Chairmen of Financial Restructuring Dept.
Deryck A. Palmer
Email: deryck.palmer@cwt.com
John J. Rapisardi
Email: john.rapisardi@cwt.com
Activities: Representation of secured and unsecured lenders, bondholders, creditors' committees, borrowers, asset purchasers and others in restructuring transactions and reorganisation cases.

Chadbourne & Parke LLP
Room 902, Tower A Beijing Fortune Centre 7
Dongsanhuan Zhonglu, Chaoyang District,
Beijing 100020, People's Republic of China.
Tel: +86 (10) 6530 8846
Fax: +86 (10) 6530 8849
Website: www.chadbourne.com
Managing Partner
Chris Flood
Email: cflood@chadbourne.com
Activities: Chadbourne & Parke LLP offers a full range of services in cross-border bankruptcies and financial restructurings, business restructurings and insolvencies.

Clifford Chance LLP
40th Floor, Bund Centre,
222 Yan An East Road, Shanghai 200002,
People's Republic of China.
Tel: +86 (21) 2320 7288
Fax: +86 (21) 2320 7256
Website: www.cliffordchance.com
Partner
Scott Bache
Tel: +852 2826 2413
Email: scott.bache@cliffordchance.com
Activities: The global restructuring and insolvency group advises lenders, other creditors, debtors, shareholders and investors in complex financial restructurings and cross-border insolvencies.

Clifford Chance LLP
3326 China World Tower 1,
No. 1 Jianguomenwai Dajie, Beijing 100004,
People's Republic of China.
Tel: +86 (10) 6505 9018
Fax: +86 (10) 6505 9028
Website: www.cliffordchance.com
Partner
Scott Bache
Tel: +852 2826 2413
Email: scott.bache@cliffordchance.com
Activities: The global restructuring and insolvency group advises lenders, other creditors, debtors, shareholders and investors in complex financial restructurings and cross-border insolvencies.

Duan & Duan Law Firm
17th Floor, No. 88, Zun Yi Nan Road,
Shanghai 200335, People's Republic of China.
Tel: +86 (21) 6219 1103
Fax: +86 (21) 6275 2273
Email: gaojun@duanduan.com
Website: www.duanduan.com
Managing Partner
Duan Qihua (Charles Duan)

Partner
Gao Jun (Gary Gao)

Activities: Duan & Duan may help you find the gateway to China, legally, efficiently, with its professional services.

Duan & Duan Law Firm Beijing Office, China

Suites 3506, Beijing Fortune Plaza,
7 Dong San Huan Mid Road, Beijing 100020,
People's Republic of China.
Tel: +86 (10) 6533 0663
Fax: +86 (10) 6533 0660
Email: oscarchen@duanduan.com
Website: www.duanduan.com

Partner
Chen Ruojian (Oscar Chen)

Felsberg, Pedretti, Mannrich e Aidar, Advogados e Consultores Legais

5/F Standard Chartered Tower, 201 Century Avenue Lujiazui, Pudong Shanghai 200120,
People's Republic of China.
Tel: +86 (21) 6182 6801
Fax: +86 (21) 6182 6777
Email: mail@felsberg.com.br
Website: www.felsberg.com.br

Managing Partner
Thomas Benes Felsberg

Partners
Maria da Graça de Brito Vianna Pedretti
Nelson Mannrich
Carlos Miguel Castex Aidar
Guilherme Fiorini Filho
Cláudia Haidamus Perri
Ricardo Wanderley Mano Sanches
Roberto Wilson Renault Pinto
Antonio Ivo Aidar
Paulo Sigaud Cardozo
David Leinig Meiler
Joel Luís Thomaz Bastos
Neil Montgomery
Thiago Vallandro Flores
Sergio Silva do Amaral
Ernani Guimarás
Paulo F. Bekin
Ivan Campos
Claudia Maniaci Salim
Antonio Amendola
Marcelo Cosac

Activities: Full-service law firm with significant experience in complex business transactions, such as privatisations, project finance transactions, corporate restructurings, and mergers and acquisitions, and a tradition of service.

Garrigues

3205 West Gate Mall, 1038 Nanjing Xi Lu,
Shanghai 200041, People's Republic of China.
Tel: +86 (21) 5228 1122
Fax: +86 (21) 6272 6125
Website: www.garrigues.com

Head of Shanghai Office
Francisco Soler Caballero
Email:
francisco.soler.caballero@garrigues.com

Activities: Their team of leading lawyers has decades of experience in turn-around, corporate recovery, refinancing and all types of insolvencies, including cross-border insolvency. It comprises experts with a background in law or economics, who work together in contentious and non-contentious insolvency, affecting debtors, banks or creditors for troubled companies.

Hogan Lovells International LLP

11th Floor, Shanghai Kerry Centre,
1515 Nanjing West Road, Shanghai 200040,
People's Republic of China.
Tel: +86 (21) 6138 1688
Fax: +86 (21) 6279 2695
Email: firstname.lastname@hoganlovells.com
Website: www.hoganlovells.com

Hogan Lovells International LLP

31st Floor, Tower 3, China Central Place, 77 Jianguo Road, Chaoyang District, Beijing 10025, People's Republic of China.
Tel: +86 (10) 6582 9488
Fax: +86 (10) 6582 9499
Email: firstname.lastname@hoganlovells.com
Website: www.hoganlovells.com

Nixon Peabody LLP

Plaza 66, 63rd Floor, Suite 6302,
1266 Nan Jing West Road, Shanghai 200040,
People's Republic of China.
Tel: +86 (21) 6137 5500
Fax: +86 (21) 6137 5588
Website: www.nixonpeabody.com

Managing Partner:
David K. Cheng
Email: dcheng@nixonpeabody.com

O'Melveny & Myers LLP

Plaza 66, 1266 Nanjing Road West, Shanghai 200040, People's Republic of China.
Tel: +86 (21) 2307 7000
Fax: +86 (21) 2307 7300
Email: omminfo@omm.com
Website: www.omm.com

Partner
Kurt J. Berney

Activities: Offering major insolvency and restructuring capabilities. Clients include funds, major banks, insurance companies and other financial concerns, and entertainment firms.

Roland Berger Strategy Consultants (Shanghai) Ltd.

23rd Floor Shanghai Kerry Center,
1515 Nanjing West Road, Shanghai 200040,
People's Republic of China.
Tel: +86 (21) 5298 66770
Fax: +86 (21) 5298 6660
Website: www.rolandberger.com

Partner
Qi Wu
Email: qi_wu@cn.rolandberger.com

Activities: Roland Berger Strategy Consultants is a leading global strategy consultancy. Within their restructuring practice they focus on complex operational and financial restructurings/distressed M&A as well as insolvency support.

Skadden, Arps, Slate, Meagher & Flom LLP

30/F, China World Office 2, No. 1,
Jian Guo Men Wai Avenue, Beijing 100004,
People's Republic of China.
Tel: +86 (10) 6535 5500
Fax: +86 (10) 6535 5577
Website: www.skadden.com

Partner
Peter X. Huang

Activities: Worldwide practice serving corporations and their principal creditors and investors by providing value-added legal solutions in bankruptcy and restructuring situations.

Skadden, Arps, Slate, Meagher & Flom LLP

Plaza 66, Tower 1, 36th Floor,
1266 Nanjing West Road, Shanghai 200040,
People's Republic of China.
Tel: +86 (21) 6193 8200
Fax: +86 (21) 6193 8299

Partners
Gregory G. H. Miao
Ed Sheremeta

Activities: Worldwide practice serving corporations and their principal creditors and investors by providing value-added legal solutions in bankruptcy and restructuring situations.

Squire Sanders (US) LLP

Suite 1207, 12th Floor, Shanghai Kerry Centre, 1515 Nanjing Road West,
Shanghai 200040, People's Republic of China.
Tel: +86 (21) 6103 6300
Fax: +86 (21) 6103 6363
Website: www.squiresanders.com

Restructuring & Insolvency Global Practice Group Leader
Stephen D. Lerner

Local Restructuring & Insolvency Contacts
Daniel F. Roules
Weiheng Jia
Ryan Chen
Doris Chen

Activities: The restructuring & insolvency group has over 100 restructuring and insolvency lawyers who represent financial institutions, distressed companies, insolvency practitioners, creditors' committees, investors, and strategic and financial buyers of troubled companies.

Squire Sanders (US) LLP

25th Floor, North Tower, Suite 2501,
Beijing Kerry Centre, 1 Guanghua Road,
Chaoyang District, Beijing 100020,
People's Republic of China.
Tel: +86 (10) 8529 6998
Fax: +86 (10) 8529 8088
Website: www.squiresanders.com

Restructuring & Insolvency Global Practice Group Leader
Stephen D. Lerner

Local Restructuring & Insolvency Contact
Sungbo Shim

Activities: The restructuring & insolvency group has over 100 restructuring and insolvency lawyers who represent financial institutions, distressed companies, insolvency practitioners, creditors' committees, investors, and strategic and financial buyers of troubled companies.

Standard & Poor's

16/F Tower D, Beijing CITC, Suite 1601, A6 Jianguo Menwai Avenue, Chaoyang District, Beijing 100022, People's Republic of China.
Tel: +86 (10) 6569 2909
Fax: +86 (10) 6569 2910

White & Case LLP

19th Floor, Tower 1 of China Central Place,
81 Jianguo Lu, Chaoyang District, Beijing 100025, People's Republic of China.
Tel: +86 (10) 5912 9600
Fax: +86 (10) 5969 5760
Website: www.whitecase.com

Partners
Xiaoming Li
Tel: +86 (10) 5912 9601
Email: xli@whitecase.com
Steve Payne
Tel: +86 (10) 5912 9602
Email: spayne@whitecase.com
Baldwin Cheng
Tel: +86 (10) 5912 9682
Email: bcheng@whitecase.com

Activities: White & Case is a global law firm with over 2000 lawyers in 26 countries. Their financial restructuring and insolvency group is a worldwide practice consisting of over 160 restructuring and insolvency lawyers. They are a globally recognised leader in complex cross-border insolvencies and workouts, and they represent clients in all aspects of restructurings, workouts and insolvencies, including both transactional and litigation matters. Recent representations include many of the world's largest restructuring cases and out-of-court workouts.

White & Case LLP
CITIC Square, 39th Floor,
1168 West Nanjing Road, Shanghai 200041,
People's Republic of China.
Tel: +86 (21) 6132 5900
Fax: +86 (21) 6323 9252
Website: whitecase.com

Partner
John Leary
Tel: +86 (21) 6132 5910
Email: jleary@whitecase.com

Activities: White & Case is a global law firm with over 2000 lawyers in 26 countries. Their financial restructuring and insolvency group is a worldwide practice consisting of over 160 restructuring and insolvency lawyers. They are a globally recognised leader in complex cross-border insolvencies and workouts, and they represent clients in all aspects of restructurings, workouts and insolvencies, including both transactional and litigation matters. Recent representations include many of the world's largest restructuring cases and out-of-court workouts.

WongPartnership LLP Beijing Representative Office
Unit 3111 China World Office 2, 1 Jianguomenwai Avenue, Chaoyang District, Beijing 100004, People's Republic of China.
Tel: +86 (10) 6505 6900
Fax: +86 (10) 6505 6902
Email: contactus@wongpartnership.com
Website: www.wongpartnership.com.\n

Senior Partner
Alvin Yeo

Senior Counsel, Partners
Chan Hock Keng
Chou Sean Yu
Manoj Pillay Sandrasegara
Mark Choy

Activities: The practice specialises in advising corporates and financial institutions on a full range of debt restructuring and liability management issues.

WongPartnership LLP Shanghai Representative Office
Unit 5006, Raffles City Office Tower, 268 Xizang Road Central, Shanghai 200001, People's Republic of China.
Tel: +86 (21) 6340 3131
Fax: +86 (21) 6340 3315
Email: contactus@wongpartnership.com
Website: www.wongpartnership.com

Senior Partner
Alvin Yeo

Senior Counsel, Partners
Chan Hock Keng
Chou Sean Yu
Manoj Pillay Sandrasegara
Mark Choy

Activities: The practice specialises in advising corporates and financial institutions on a full range of debt restructuring and liability management issues.

Zhongzi Law Office
6th Floor, New Era Building, PingAnLi West Avenue 26, Xicheng District, Beijing 100034, People's Republic of China.
Tel: +86 (10) 6625 6456
Fax: +86 (10) 6609 1616
Email: mail@zhongzi.com.cn
Website: www.zhongzi.com.cn

Partner, Attorney at Law
Fanghua Duan
Tel: +86 (10) 6625 6417
Email: duanfanghua@zhongzi.com.cn

Activities: Representing domestic and international creditors in bankruptcy proceedings, and seeking recognition and eforcement of foreign bankruptcy orders in China.

CROATIA

Bogdanovic, Dolicki & Partners, Attorneys at Law
Miramarska 24, HR-10000 Zagreb, Croatia.
Tel: +385 (1) 600 5656
Fax: +385 (1) 600 5657
Email: odbd@odbd.hr

Partners, Attorneys at Law
Tin Dolicki
Tel: +385 (1) 600 5646
Email: tin.dolicki@odbd.hr
Edita Matic
Tel: +385 (1) 600 5628
Email: edita.matic@odbd.hr

Activities: The firm has been involved in many privatisation processes of the major state-owned companies.

Roland Berger Strategy Consultants d.o.o.
Trg bana Jelacica 5, HR-10000 Zagreb, Croatia.
Tel: +385 (1) 4804 801
Fax: +385 (1) 4804 880
Website: www.rolandberger.com

Partner
Vladimir Preveden
Tel. +385 (1) 4804 840
Email:
vladimir_preveden@at.rolandberger.com

Activities: Roland Berger Strategy Consultants is a leading global strategy consultancy. Within their restructuring practice they focus on complex operational and financial restructurings/distressed M&A as well as insolvency support.

Studio Legale Sutti
Radnicka cesta 80/VI., HR-10000 Zagreb, Croatia.
Tel: +385 (1) 481 8972
Fax: +385 (1) 481 8979
Email: maildesk@sutti.com
Website: www.sutti.com

Resident Partner
Vladimir Mamic

Activities: International corporate recovery, advising multi-national reorganisations, corporate restructuring, creditors' rights and compliance issues.

Wolf Theiss - Zagreb Branch
Eurotower, 19th Floor, Ivana Lucica 2a, HR-10000 Zagreb, Croatia.
Tel: +385 (1) 492 5400
Fax: +385 (1) 492 5450
Email: zagreb@wolftheiss.com
Website: www.wolftheiss.com

Director
Ronald Given
Email: ronald.given@wolftheiss.com

Activities: Advising international clients in all phases of restructuring projects, including advising and representing banks and material vendors in insolvency proceedings.

CYPRUS

PricewaterhouseCoopers Ltd
Julia House, 3 Themistocles Dervis Street, CY-1066 Nicosia, Cyprus.
Tel: +357 (22) 555 000
Fax: +357 (22) 555 027
Website: www.pwc.com.cy

Contacts
Constantinos Constantinou
Email:
constantinos.constantinou@cy.pwc.com
Nicolas C. Nicolaou
Email: nicolas.c.nicolaou@cy.pwc.com

Activities: Extensive practical experience supporting troubled corporates and their stakeholders.

Tornaritis Law Firm
16 Stasikratous Street, 6th Floor, Nicosia, Cyprus.
Tel: +357 (22) 456 056
Fax: +357 (22) 664 056
Email: office@tornaritislaw.com
Website: www.tornaritislaw.com

Partners
Criton Tornaritis
Tel: +357 (22) 456 056 ext. 12
Email: criton@tornaritislaw.com
Alexandros Alexandrou
Tel: +357 (22) 456 056 ext. 14
Email: alexandros@tornaritislaw.com

Activities: Tornaritis law firm has the resources to draw on to undertake international cross border assignments in Cyprus, Greece, the Balkans and the United Kingdom. Has offices and professionals based in each country to offer the following services; Disposals and acquisitions, corporate restructuring, administrations, liquidations, company voluntary arrangements, deed of arrangements, debt counselling, compromising and negotiation, debt recovery, asset racing and expert witness reporting.

CZECH REPUBLIC

Achour & Hájek
Letenská 526/2, CZ-118 00 Prague 1, Czech Republic.
Tel: +420 (2) 7000 6111
Fax: +420 (2) 7000 6122
Email: office@achourhajek.com
Website: www.achourhajek.com

Partners
Daniel Hajek
Email: daniel.hajek@achourhajek.com
Gabriel Achour
Email: gabriel.achour@achourhajek.com

Activities: Achour & Hájek is a Czech law firm that delivers high-end legal advice in all major practice areas.

Clifford Chance
Jungmannova Plaza, Jungmannova 24, CZ-110 00 Prague 1, Czech Republic.
Tel: +420 (2) 2255 5222
Fax: +420 (2) 2255 5000
Website: www.cliffordchance.com

Partner
Vlad Petrus
Email: vlad.petrus@cliffordchance.com

Activities: The global restructuring and insolvency group advises lenders, other creditors, debtors, shareholders and investors in complex financial restructurings and cross-border insolvencies.

Contar Ltd
Slepa I 97127, CZ-142 00 Prague 4, Czech Republic.
Tel: +420 (2) 4447 0678/1280
Fax: +420 (2) 4447 2639
Email: david@contar.cz

Contact
Ivan David

Deloitte
Karolinská 654/2, Prague, Czech Republic.
Website: www.deloitte.com

Head of Restructuring Services
Garret Byme
Tel: +420 (2) 4604 2339
Email: gbyme@deloittece.com

Activities: Deloitte advises stakeholders in underperforming or distressed businesses including creditors and directors. Services include insolvency appointments, financial restructuring, turnaround and business reviews.

Glatzová & Co., v.o.s.

Betlémský Palác, Husova 5,
CZ-110 00 Prague 1, Czech Republic.
Tel: +420 (2) 2440 1440
Fax: +420 (2) 2424 8701
Email: office@glatzova.com
Website: www.glatzova.com

Partner, Head of Practice Group
Dr. Martin Dancisin
Email: martin.dancisin@glatzova.com

Partner
Dr. Dana Schweigelová
Email: dana.schweigelova@glatzova.com

Activities: Restructuring and refinancing of major global groups, representation of creditors and restructuring of insolvent Czech entities.

Hogan Lovells (Prague) LLP

Slovanskỳ dum, Na Príkope 859/22,
CZ-110 00 Prague 1, Czech Republic.
Tel: +420 (2) 2141 1700
Fax: +420 (2) 2421 0004
Email: enquiry@hoganlovells.com
Website: www.hoganlovells.com

Partner
Miroslav Dubovsky

Activities: Experts advising on business restructuring and insolvency, including corporate restructuring, formal insolvencies and creditor representation.

NH Partners, advokatni kancelar, s.r.o.

Vaclavske namesti 832/19,
CZ-110 00 Prague 1, Czech Republic.
Tel: +420 (2) 7000 5410
Fax: +420 (2) 7000 5254
Email: info@nhpartners.cz
Website: www.nhpartners.cz

Partners
Mgr. Lukás Nyvlt
Email: lukas.nyvlt@nhpartners.cz
JUDr. Jakub Hájek
Email: jakub.hajek@nhpartners.cz

Activities: Advising clients on both Czech and cross-border insolvency aspects of business transactions.

Noerr

Na Porící 1079/3a, CZ-110 00 Prague 1, Czech Republic.
Tel: +420 (2) 3311 2111
Fax: +420 (2) 3311 2112
Email: info@noerr.com
Website: www.noerr.com

Contact
Silvia Sparfeld, M.A.
Email: silvia.sparfeld@noerr.com

Activities: Advising shareholders, companies, creditors and investors regarding insolvency/restructuring proceedings. Trustee for secured creditors. Advice to insolvency administrators.

PricewaterhouseCoopers Ceska republika, s.r.o.

Katerinska 40/466, CZ-120 00 Prague 2, Czech Republic.
Tel: +420 (251) 151 111
Fax: +420 (251) 156 111
Website: www.pwc.com

Partner
Petr Smutny
Tel: +420 (251) 151 215
Email: petr.smutny@cz.pwc.com

Senior Manager
Radim Base
Tel: +420 (251) 152 420
Email: radim.base@cz.pwc.com

Activities: Their turnaround and restructuring practice provides advisory to stakeholders (both lenders and debtors) in underperforming, distressed or insolvent businesses. Their services encompass independent business reviews, operational and financial restructuring, business regeneration, corporate simplification, ongoing support to insolvent companies and optimised exits including distressed M&A. Their team of professionals has been an advisor in the vast majority of the most relevant cases in the area of insolvency and restructuring. PricewaterhouseCoopers are a leading practice in the Czech Republic in this area and have direct experience with both formal and informal insolvency arrangements, as well as cross-border and COMI insolvencies.

Roland Berger Strategy Consultants GmbH

Na Porící 24, CZ-110 00 Prague 1, Czech Republic.
Tel: +420 (2) 1021 9511
Fax +420 (2) 1021 9510
Website: www.rolandberger.com

Partner
Constantin Kinsky
Tel: +420 (2) 1021 9550
Email: constantin_kinsky@cz.rolandberger.com

Principal
Roland Zsilinsky
Tel: +420 (2) 1021 9524
Email: roland_zsilinsky@cz.rolandberger.com

Activities: Roland Berger Strategy Consultants is a leading global strategy consultancy. Within their restructuring practice they focus on complex operational and financial restructurings/distressed M&A as well as insolvency support.

Squire Sanders, v.o.s., advokátní kancelář

Václavské náměstí 57/813,
CZ-110 00 Prague 1, Czech Republic.
Tel: +420 221 662 111
Fax: +420 221 662 222
Website: www.squiresanders.com

Restructuring & Insolvency Global Practice Group Leader
Stephen D. Lerner

Local Restructuring & Insolvency Contacts
Jeffrey A. McGehee
Marketa Lukesova
Karel Sturm

Activities: The restructuring & insolvency group has over 100 restructuring and insolvency lawyers who represent financial institutions, distressed companies, insolvency practitioners, creditors' committees, investors, and strategic and financial buyers of troubled companies.

White & Case, Advokátní kancelár

Na Príkope 8, CZ-110 00 Prague 1, Czech Republic.
Tel: +420 (2) 5577 1111
Fax: +420 (2) 5577 1122
Website: www.whitecase.com

Partners
David Plch
Tel: +420 (2) 5577 1298
Email: dplch@whitecase.com
Jonathan Weinberg
Tel: +420 (2) 5577 1262
Email: jweinberg@whitecase.com
Petr Kuhn
Tel: +420 (2) 5577 1236
Email: pkuhn@whitecase.com
Ivo Bárta
Tel: +420 (2) 5577 1234
Email: ibarta@whitecase.com
Jiri Tomola
Tel: +420 (2) 5577 1258
Email: jtomola@whitecase.com

Activities: White & Case is a global law firm with over 2000 lawyers in 26 countries. Their financial restructuring and insolvency group is a worldwide practice consisting of over 160 restructuring and insolvency lawyers. They are a globally recognised leader in complex cross-border insolvencies and workouts, and they represent clients in all aspects of restructurings, workouts and insolvencies, including both transactional and litigation matters. Recent representations include many of the world's largest restructuring cases and out-of-court workouts.

Wolf Theiss advokati s.r.o.

Pobrezni 12, CZ-186 00 Prague 8, Czech Republic.
Tel: +420 (2) 3476 5111
Fax: +420 (2) 3476 5110
Email: praha@wolftheiss.com
Website: www.wolftheiss.com

Director
Paul Sestak

Activities: Advising international clients in all phases of restructuring projects, including advising and representing banks and material vendors in insolvency proceedings.

DENMARK

Bech-Bruun

Langelinie Allé 43, DK-2100 Copenhagen 0, Denmark.
Tel: +45 7227 0000
Fax: +45 7227 0027
Website: www.bechbruun.com

Contacts
Ole Borch
Troels Tuxen

Activities: Through its partners leading membership in IBA, Insol and American College of Bankruptcy, Bech-Bruun is very active within the global insolvency and restructuring arena.

Bruun & Hjejle

Nørregade 21, DK-1165 Copenhagen K, Denmark.
Tel: +45 3334 5000
Fax: +45 3334 5050
Website: www.bruunhjejle.com

Co-Leaders, Partners
Claus Høeg Madsen
Email: chm@bruunhjejle.dk
Lars Skanvig
Email: lsk@bruunhjejle.dk

Senior Associates
Henrik Selchau Poulsen
Soeren Kopp

Activities: Acts as trustee in bankruptcy estates and offers legal assistance in connection with restructuring.

Deloitte

Weidekampsgade 6, PO Box 1600,
DK-0900 Copenhagen C, Denmark.
Tel: +45 3610 2030
Fax: +45 3610 2040
Website: www.deloitte.dk

Partner
Claus Hansen
Tel: +45 4015 0867
Email: clhansen@deloitte.dk

Restructuring Services
Jens Boëtius Andersen
Tel: +45 2082 0433
Email: jensandersen@deloitte.dk

LOGOS advokatanpartsselskab

Lautrupsgade 7, 4th Floor,
DK-2100 Copenhagen, Denmark.
Tel: +45 (70) 229 224
Fax: +45 (70) 274 279
Email: logos@logoslaw.dk
Website: www.logos.is

Partner
Peter Mollerup
Email: peter@logoslaw.dk

PricewaterhouseCoopers
Strandvejen 44, DK-2900 Hellerup, Denmark.
Tel: +45 3945 3945
Website: www.pwc.dk

Partner
Bent Jørgensen
Tel: +45 2960 9204
Email: bej@pwc.dk

Activities: Business Recovery Services provides a full range of turnaround, restructuring and recovery services, including 3 party reviews, refinancing, cash-flow management etc.

Ronne & Lundgren Law Firm
Tuborg Havnevej 19, DK-2900 Hellerup, Copenhagen, Denmark.
Tel: +45 3525 2535
Fax: +45 3525 2536
Email: info@rl.dk
Website: www.ronnelundgren.com

Partners
Poul Jagd Mogensen
Tel: +45 3525 2935
Email: pjm@rl.dk
Jesper Lundgren
Tel: +45 3525 2901
Email: jl@rl.dk

Activities: All types of insolvency and reorganisation work including court appointed trustee work, suspension of payment, voluntary creditors' arrangements.

DOMINICAN REPUBLIC

Squire Sanders, Peña Prieto Gamundi
Av. Pedro Henríquez Ureña No. 157, Santo Domingo, Dominican Republic.
Tel: +1 (809) 742 4900
Fax: +1 (809) 472 4999
Website: www.squiresanders.com

Restructuring & Insolvency Global Practice Group Leader
Stephen D. Lerner

Local Restructuring & Insolvency Contacts
Pedro O. Gamundi
Awilda M. Alcantara Bourdier

Activities: The restructuring & insolvency group has over 100 restructuring and insolvency lawyers who represent financial institutions, distressed companies, insolvency practitioners, creditors' committees, investors, and strategic and financial buyers of troubled companies.

EGYPT

Kosheri, Rashed and Riad Law Firm
16A Maamal El. Sokkar Street, Garden City, Cario 11451, Egypt.
Tel: +20 (2) 2795 4795
Fax: +20 (2) 2795 8521
Email: mailbox@krr-law.net
Website: www.krr-law.com

Managing Partner
Dr. Tarek F. Riad
Email: tarek.riad@krr-law.com

Senior Partner
Dr. Ahmed S. El. Kosheri
Email: ahmed.elkosheri@krr-law.com

Activities: Restructured numerous companies in the past in Egypt.

SNR Denton LLP
9 Shagaret El Dor Street, Zamalek; Mailing Address: PO Box 35, Agouza, Cairo, Egypt.
Tel: +20 (2) 2735 0574
Fax: +20 (2) 2736 7717
Website: www.snrdenton.com

Partner
J. Michael Lacey

ESTONIA

Attorney at Law Borenius
Pärnu mnt 15, Kawe Plaza, EE-10141 Tallinn, Estonia.
Tel: +372 (6) 651 888
Fax: +372 (6) 651 899
Email: borenius@borenius.ee
Website: www.borenius.ee

Managing Partner
Marti Hääl

Partner
Jaanus Mody

Activities: Advises mainly corporate clients on all aspects of law, including insolvency and business restructuring, to ensure a reliable legal platform for developing new business opportunities.

Raidla Lejins & Norcous
Roosikrantsi 2, EE-10119 Tallinn, Estonia.
Tel: +372 (6) 407 170
Fax: +372 (6) 407 171
Email: rln@rln.ee
Website: www.rln.ee

Partner, Attorney at Law
Raino Paron
Email: raino.paron@rln.ee

Marketing & Communications Manager
Kadri Lindpere
Email: kadri.lindpere@rln.ee

Activities: Corporate restructuring and insolvency. One of the largest full-service business law firms in Estonia with regional coverage across Northern Europe (RR Alliance).

FINLAND

Attorneys at law Borenius Ltd
Yrjönkatu 13 A, FIN-00120 Helsinki, Finland.
Tel: +358 (9) 615 333
Fax: +358 (9) 615 334 99
Email: info@borenius.com
Website: www.borenius.com

Director
Jyrki Tähtinen
Email: jyrki.tahtinen@borenius.com

Partner
Mika Salonen
Email: mika.salonen@borenius.com

Activities: Attorneys at law Borenius is a full service law firm with a strong track record on workouts, bankruptcies and court driven restructurings.

Castrén & Snellman, Attorneys Ltd.
Eteläesplanadi 14, PO Box 233, FIN-00131 Helsinki, Finland.
Tel: +358 (20) 776 5765
Fax: +358 (20) 776 5001
Email: communications@castren.fi
Website: www.castren.fi

Senior Partner
Pekka Jaatinen
Tel: +358 (20) 776 5401
Email: pekka.jaatinen@castren.fi

Partner
Pauliina Tenhunen
Tel: +358 (20) 776 5406
Email: pauliina.tenhunen@castren.fi

Activities: Castrén & Snellman has been involved in Finland's largest and most complex bankruptcy and restructuring proceedings that have included challenging international aspects.

Grant Thornton
Paciuksenkatu 27, FIN-00271 Helsinki, Finland.
Tel: +358 (9) 512 3330
Fax: +358 (9) 458 0250
Email: firstname.surname@fi.gt.com
Website: www.gtfinland.com

Partners
Kari Niemenoja
Tel: +358 (9) 5123 3316
Email: kari.niemenoja@fi.gt.com
Jonni Leporanta
Tel: +358 (9) 5123 3386
Email: jonni.leporanta@fi.gt.com

Activities: Financial restructuring and reorganisation advisory services, mergers & acquisitions, transaction services.

Lindfors & Co Attorneys at Law Ltd
Kluuvikatu 3, FIN-00100 Helsinki, Finland.
Tel: +358 (20) 762 2511
Fax: +358 (20) 762 2519
Email: firstname.lastname@lindforsco.com

Partner
Patrik Lindfors

Activities: Regularly advising international clients in matters relating to Finnish insolvency and restructuring proceedings, including directors' liability issues.

PricewaterhouseCoopers Oy
PO Box 1015 (Itämerentori 2), FIN-00101 Helsinki, Finland.
Tel: +358 (9) 22800
Fax: +358 (9) 657120
Email: firstname.lastname@fi.pwc.com
Website: www.pwc.com

Partner
Klaus Keravuori
Tel: +358 (9) 2280 1928
Email: klaus.keravuori@fi.pwc.com

Partner
Harri Valkonen
Tel: +385 (9) 2280 1968
Email: harri.valkonen@fi.pwc.com

Activities: Provides a wide-range of professional services within troubled businesses, business turnarounds, company restructurings, and optimised exits with a clear view of rebuilding value to stakeholders.

Roschier, Attorneys Ltd.
Keskuskatu 7 A, FIN-00100 Helsinki, Finland.
Tel: +358 (20) 506 6000
Fax: +358 (20) 506 6100
Website: www.roschier.com

Partner
Gunnar Westerlund

Contact
Jyrki Prusila

Activities: Regularly advises international and domestic clients in insolvency matters, including assets realisation and M&A restructuring, and creditors committee work.

Waselius & Wist
Eteläesplanadi 24 A, FIN-00130 Helsinki, Finland.
Tel: +358 (9) 668 9520
Fax: +358 (9) 668 95222
Email: ww@ww.fi
Website: www.ww.fi

Senior Partner
Jan Waselius
Tel: +358 (9) 668 95234
Email: jan.waselius@ww.fi

Partner
Lauri Peltola
Tel: +358 (9) 668 95281
Email: lauri.peltola@ww.fi
Activities: Waselius & Wist advises on refinancing, restructuring and recapitalisation of companies, distress asset disposals, enforcement of security arrangements and formal corporate reorganisation proceedings.

White & Case, LLP
Eleläranta 14, FIN-00130 Helsinki, Finland.
Tel: + 358 (9) 228 64319
Fax: + 358 (9) 228 64228
Website: www.whitecase.com
Partners
Risto Ojantakanen
Email: rojantakanen@whitecase.com
Tanja Törnkvist
Tel: +358 (9) 228 64351
Email: ttornkvist@whitecase.com
Activities: White & Case is a global law firm with over 2000 lawyers in 26 countries. Their financial restructuring and insolvency group is a worldwide practice consisting of over 160 restructuring and insolvency lawyers. They are a globally recognised leader in complex cross-border insolvencies and workouts, and they represent clients in all aspects of restructurings, workouts and insolvencies, including both transactional and litigation matters. Recent representations include many of the world's largest restructuring cases and out-of-court workouts.

FRANCE

AFIC
23 rue de l'Arcade, F-75008 Paris, France.
Tel: +33 (1) 47 20 99 09
Fax: +33 (1) 47 20 97 48
Email: info@afic.asso.fr
Website: www.afic.asso.fr
Managing Director
Paul Perpére
Marketing Director
Emilie Tuz
Tel: +33 (1) 47 20 69 67
Email: e.tuz@afic.asso.fr
Activities: Encourage the development of all activities related to private equity investment, from providing seed money and venture capital to funding large-scale LBO's including development capital, turnarounds and funds of funds.

Allen & Overy LLP
52 Avenue Hoche, CS 90005,
F-75379 Paris Cedex 08, France.
Tel: +33 (1) 40 06 54 00
Fax: +33 (1) 40 06 54 54
Partner
Rod Cork
Activities: Allen & Overy and French law insolvency practice Santoni & Associés have a strategic arrangement and work together on restructuring and insolvency related work in France. This arrangement covers all types of debt restructurings and workouts, corporate and fund buy-outs, refinancings, pre- and post-insolvency related procedures and distressed debt trades in France.

Butler Capital Partners
30 cours Albert 1 er, F-75008 Paris, France.
Tel: +33 (1) 45 61 55 80
Fax: +33 (1) 45 61 97 94
Email: contact@butlercapitalpartners.com
Managing Partner
Walter Butler
CFO
Karin Jacquenart-Pernod
Activities: Private equity firm investing in turnarounds in Europe.

Credit Agricole CIB
9 Quai du President Paul Doumer,
F-92920 Paris La Defense Cedex, France.
Tel: +33 (1) 41 89 00 00
Fax: +33 (1) 41 89 46 26
Website: www.ca-cib.com
CEO
Jean Yves Hocher
Head of Distressed Assets
Julian Harris
Tel: +33 (1) 41 89 03 27
Email: julian.harris@ca-cib.com
Activities: Credit Agricole CIB is an investor in all categories of distressed assets.

DC Advisory Partners
36 rue de Naples, F-75008 Paris, France.
Tel: +33 (1) 42 12 49 00
Website: www.dcadvisorypartners.com
Secrétaire Général
Frédéric Boucher
Tel: +33 (1) 42 12 49 62
Email:
frederic.boucher@dcadvisorypartners.com
Managing Director
Nadine Veldung
Tel: +33 (1) 42 12 49 67
Email:
nadine.veldung@dcadvisorypartners.com

de Drée Avocats
3 rue de Monttessuy, F-75007 Paris, France.
Tel: +33 (1) 47 05 71 67
Fax: +33 (9) 70 62 16 85
Email: pdedree@dedree-avocats.fr
Avocat
Paul de Drée
Activities: Representation of creditors, debtors, potential purchasers and directors of companies in distress in France and in cross-border matters.

Debevoise & Plimpton LLP
21 avenue George V, F-75008 Paris, France.
Tel: +33 (1) 40 73 12 12
Fax: +33 (1) 47 20 50 82
Website: www.debevoise.com
Partner
Pierre Clermontel
Of Counsel
Eryl Besse
International Counsel
Antoine d'Ornano
Activities: Represent European and US borrowers, bondholders and other lenders in a broad variety of complex international restructurings and insolvencies.

Deloitte
185 avenue Charles de Gaulle,
F-92524 Neuilly sur Seine, Cedex, France.
Website: www.deloitte.com
Head of Restructuring Services
Vincent Batlle
Tel: +33 (1) 55 61 23 87
Email: vbatlle@deloitte.fr
Activities: Deloitte advises stakeholders in underperforming or distressed businesses including creditors and directors. Services include insolvency appointments, financial restructuring, turnaround and business reviews.

EXAFI
79 avenue de Villiers, F-75017 Paris, France.
Tel: +33 (1) 56 79 19 19
Fax: +33 (1) 56 79 19 10
Email: thierry.duval@exafi.com
Website: www.exafi.com
Managers, Chartered Accountants, Legal Auditors
Thierry Duval
Carine Guyetant
Activities: Chartered accountants specialised in advice for restructuring insolvent companies. Financial analyst for insolvency courts, trustees, attorneys and lawyers. Forensic accounting.

Fasken Martineau DuMoulin LLP
32 avenue de l'Opéra, F-75002 Paris, France.
Tel: +33 (1) 44 94 96 98
Fax: +33 (1) 44 94 96 99
Firm-wide Managing Partner
David Corbett
Tel: +1 (416) 868 3504
Email: dcorbett@fasken.com
Partner, Chair, Global Insolvency & Restructuring Group
John Grieve (Vancouver)
Tel: +1 (604) 631 4772
Email: jgrieve@fasken.com
Partner
Sylvain Beaumont (Paris)
Tel: +33 (1) 44 94 96 98
Email: sbeaumont@fasken.com
Activities: Canadian and English insolvency and restructuring lawyers representing domestic and international businesses, institutional, secured and distressed debt lenders, creditors, directors, insolvency professionals and others.

Financiere D'Antin
19 rue d'Antin, F-75002 Paris, France.
Tel: +33 (1) 42 66 65 65
Fax: +33 (1) 97 21 13 730
Email: aline@finantin.com
President:
Aline Corbin-Pajolec
Email: aline@finantin.com
Activities: M&A adviser, either companies under insolvency laws or in bonis.

Gibson, Dunn & Crutcher LLP
166 rue du faubourg Saint-Honoré,
F-75008 Paris, France.
Tel: +33 (1) 56 43 13 00
Fax: +33 (1) 56 43 13 33
Website: www.gibsondunn.com
Co-Chairs, Business Restructuring & Reorganisation Practice Group
Craig H. Millet
Michael A. Rosenthal
David M. Feldman
Activities: Represent debtors' in bankruptcy cases and out-of-court restructurings, creditors' committees and individual creditors, bondholders, lenders, potential acquirers, insurers and trustees.

Gordon Brothers International LLC
68 rue du Faubourg Saint Honoré,
F-75008 Paris, France.
Tel: +33 (1) 53 43 64 63
Fax: +33 (1) 53 43 63 00
Email: jscribe@gordonbrothers.de
Business Development Director
Jérôme Scribe

Hoche Societe Avocats
106 Rue La Boétie, F-75008 Paris, France.
Tel: +33 (1) 53 93 22 00
Fax: +33 (1) 53 93 21 00
Website: www.hocheavocats.com
Partners
Catherine Ottaway
Email: ottaway@hocheavocats.com
Jean-Luc Blein
Email: blein@hocheavocats.com
Activities: Commercial and Business (M&A, private equity), tax, labour law, IP/IT, commercial litigation, arbitration, ADR.

Hogan Lovells (Paris) LLP
6 Avenue Kléber, F-75116 Paris, France.
Tel: +33 (1) 53 67 47 47
Fax: +33 (1) 53 67 47 48
Email: enquiry@hoganlovells.com
Website: www.hoganlovells.com

Partners
Richard Jadot
Richel Quéfé

Activities: Experts advising on business restructuring and insolvency, including corporate restructuring, formal insolvencies and creditor representation.

JeantetAssociés AARPI
87 Avenue Kléber, F-75116 Paris, France.
Tel: +33 (1) 45 05 80 08
Fax: +33 (1) 47 04 20 41
Email: info@jeantet.fr
Website: www.jeantet.fr

Managing Partners
Philippe Portier
Email: pportier@jeantet.fr
Yvon Dréano
Email: ydreano@jeantet.fr

Communication & Marketing
Cecile Staub

Activities: Handles all legal issues arising in connection with bankruptcy proceedings, including international bankruptcy, plans for transfers, restructurings, continuation and recovery procedures.

Kramer Levin Naftalis & Frankel LLP
47 Avenue Hoche, F-75008 Paris, France.
Tel: +33 (1) 44 09 46 00
Fax: +33 (1) 44 09 46 01
Email: amarquardt@kramerlevin.com
Website: www.kramerlevin.com

Contact
Alexander Marquardt

Activities: Advising and representing investors, lenders and borrowers, private equity providers and 'vulture funds', defending lenders' and controlling shareholders' liability suits.

Latham & Watkins
53 Quai d'Orsay, F-75007 Paris, France.
Tel: +33 (1) 40 62 20 00
Fax: +33 (1) 40 62 20 62
Website: www.lw.com

Partner
Hervé Diogo Amengual

Contacts
John Houghton
Tel: +44 (20) 7670 1000
Jan Baker
Tel: +1 (212) 906 1200
Mitchell Seider
Tel: +1 (212) 906 1200
Peter Gilhuly
Tel: +1 (213) 485 1234

Activities: Global law firm with more than 2000 lawyers in 31 offices worldwide, including over 500 lawyers throughout Europe. Offers a full range of services in insolvency, workouts and restructurings and is acknowledged as a leading bankruptcy lender law firm.

Morgan Lewis & Bockius
68 rue du Faubourg Saint-Honoré,
F-75008 Paris, France.
Tel: +33 (1) 53 30 44 46
Fax: +33 (1) 53 30 43 01
Email: rmontfort@morganlewis.com

Partners
Roland P. Montfort
Jean Leygonie

Activities: Cross-border aspects, claims filing, corporate, out-of-court settlements, safeguard problems, securities, distressed M&A, managers' liability, with all the necessary support practices.

Nixon Peabody International LLP
32, rue de Monceau, F-75008 Paris, France.
Tel: +33 (1) 70 72 36 00
Fax: +33 (1) 70 72 36 01
Website: www.nixonpeabody.com

Managing Partner:
Douglas S. Glucroft
Email: dglucroft@nixonpeabody.com

PricewaterhouseCoopers Corporate Finance
63 rue de Villiers, F-92208 Neuilly-sur-Seine, France.
Tel: +33 (1) 56 57 58 59
Fax: +33 (1) 56 57 85 51
Website: www.pwc.com

Partners
JMC "Chuck" Evans
Tel: +33 (1) 56 57 85 23
Email: chuck.mc.evans@fr.pwc.com
Olivier Marion
Tel: +33 (1) 56 57 86 85
Email: olivier.marion@fr.pwc.com

Activities: 20 dedicated multi-lingual work-out and insolvency professionals. Financial and operational diagnostics, restructuring advice, distressed M&A and optimised exit services.

Roland Berger Strategy Consultants
11, rue de Prony, F-75017 Paris, France.
Tel: +33 (1) 53 67 03 20
Fax: +33 (1) 53 67 03 75
Website: www.rolandberger.com

Partner
Emmanuel Bonnaud
Tel. +33 (1) 53 67 09 83
Email:
emmanuel_bonnaud@fr.rolandberger.com

Senior Manager
Georges de Thieulloy
Tel: +33 (1) 53 67 09 00
Email:
georges_dethieulloy@fr.rolandberger.com

Activities: Roland Berger Strategy Consultants is a leading global strategy consultancy. Within their restructuring practice they focus on complex operational and financial restructurings/distressed M&A as well as insolvency support.

Schultze & Braun GmbH Rechtsanwaltsgesellschaft
3, quai Kléber, Tour Sébastopol,
F-67000 Strasbourg, France.
Tel: +33 (3) 88 23 70 53
Fax +33 (3) 88 23 71 21
Website: www.schubra.fr

Attorney at Law in Germany and France, Certified Specialist in International Law (France)
Patrick Ehret

Attorney at Law in Germany and France
Ellen Delzant

Activities: Corporate recovery & insolvency; cross-border insolvency, corporate finance; international law; litigation (commercial); distressed M&A, European community law, insolvency & bankruptcy.

Shearman & Sterling LLP
114, avenue des Champs-Elysées,
F-75008 Paris, France.
Tel: +33 (1) 53 89 70 00
Fax: +33 (1) 53 89 70 70
Website: www.shearman.com

Partner
Pierre-Nicolas Ferrand
Email: pferrand@shearman.com

Activities: Acts for debtors and creditors in bankruptcy and pre-bankruptcy matters, including workouts and complex restructuring transactions for both domestic and international clients.

Simmons & Simmons LLP Paris
5 Boulevard de la Madeleine,
F-75001 Paris, France.
Tel: +33 (1) 53 29 16 29
Fax: +33 (1) 53 29 16 30
Website: www.simmons-simmons.com

Of Counsel
Jean-Yves Marquet
Tel: +33 (1) 53 29 16 03
Email: jean-yves.marquet@simmons-simmons.com

Avocat à la Cour
Christian Pascoet
Tel: +33 (1) 53 29 16 07
Email:
christian.pascoet@simmons-simmons.com

Activities: Ongoing advice to creditors (financial institutions, debtors, equity funds and others) in national & cross-border insolvencies & corporate crises.

SJ Berwin LLP
64 avenue Kléber, F-75116 Paris, France.
Tel: +33 (1) 44 34 63 46
Fax: +33 (1) 44 34 63 47
Email: paris@sjberwin.com

Partner, Restructuring & Insolvency
Nicholas Theys

Skadden, Arps, Slate, Meagher & Flom LLP & Affiliates
68 rue du Faubourg Saint-Honoré,
F-75008 Paris, France.
Tel: +33 (1) 55 27 11 00
Fax: +33 (1) 55 27 21 99
Website: www.skadden.com

Partner
Pierre Servan-Schreiber

Activities: Worldwide practice serving corporations and their principal creditors and investors by providing value-added legal solutions in bankruptcy and restructuring situations.

SNR Denton LLP
112 Avenue Kleber, F-75116 Paris, France.
Tel: +33 (1) 53 05 16 00
Fax: +33 (1) 53 05 97 27
Website: www.snrdenton.com

Chief Administrative Officer - Paris
Fruman Jacobson
Tel: +33 (1) 53 05 16 94

Squire Sanders
4 Avenue Velasquez, F-75008 Paris, France.
Tel: +33 (1) 5383 7400
Fax: +33 (1) 5383 7401
Website: www.squiresanders.com

Restructuring & Insolvency Global Practice Group Leader
Stephen D. Lerner

Local Restructuring & Insolvency Contacts
Antoine Adeline
Alexandre Le Ninivin
Christopher Wilde
Marie-Aimee Peyron
Marine Verger

Activities: The restructuring & insolvency group has over 100 restructuring and insolvency lawyers who represent financial institutions, distressed companies, insolvency practitioners, creditors' committees, investors, and strategic and financial buyers of troubled companies.

Standard & Poor's
40 rue de Courcelles, F-75008, France.
Tel: +33 (1) 44 20 66 50
Fax: +33 (1) 44 20 66 51

Taj - Member of Deloitte Touche Tohmatsu Limited
181 Avenue Charles de Gaulle,
F-92524 Neuilly-sur-Seine, Cedex, France.
Tel: +33 (1) 40 88 22 50
Fax: +33 (1) 40 88 22 17
Email: frcontacttaj@taj.fr
Website: www.taj.fr

Partner
Stéphanie Chatelon
Tel: +33 (1) 55 61 65 22
Email: schatelon@taj.fr

Marketing & Communications Director
Pascale Ponroy
Tel: +33 (1) 40 88 85 72
Email: pponroy@taj.fr

Activities: Provide recovery services for companies in financial distress, assists managers and acquirers with decision-making when companies come into financial or economical difficulties.

Vatier et Associes
12 rue d'Astorg, F-75008 Paris, France.
Tel: +33 (1) 53 43 15 55
Fax: +33 (1) 53 43 15 78
Email: contact@vatier-associes.com

Contact
Ludovic Gayral

Weil, Gotshal and Manges LLP
2, rue de la Baume, F-75008 Paris, France.
Tel: +33 (1) 44 21 97 97
Fax: +33 (1) 42 89 57 90
Website: www.weil.com

Partners
Philippe Druon
Jean-Dominique Daudier de Cassini

Activities: International law firm with focus on restructuring matters. Ranked in Band 1 in France by chambers for its restructuring practice.

White & Case LLP Avocats au Barreau de Paris
Toque Générale: J002, 19, Place Vendôme,
F-75001 Paris, France.
Tel: +33 (1) 55 04 15 15
Fax: +33 (1) 55 04 15 16
Website: www.whitecase.com

Partners
Philippe Metais
Tel: +33 (1) 55 04 15 82
Email: pmetais@whitecase.com
Francois Leloup
Tel: +33 (1) 55 04 15 17
Email:fleloup@whitecase.com
Vincent Morin
Tel: +33 (1) 55 04 15 60
Email:vmorin@whitecase.com
Gilles Peigney
Tel: +33 (1) 55 04 15 65
Email: gpeigney@whitecase.com
Raphael Richard
Tel: +33 (1) 55 04 15 38
Email: rrichard@whitecase.com

Counsel
Alexandre Jaurett
Tel: +33 (1) 55 04 58 28
Email: ajaurett@whitecase.com

Activities: White & Case is a global law firm with over 2000 lawyers in 26 countries. Their financial restructuring and insolvency group is a worldwide practice consisting of over 160 restructuring and insolvency lawyers. They are a globally recognised leader in complex cross-border insolvencies and workouts, and they represent clients in all aspects of restructurings, workouts and insolvencies, including both transactional and litigation matters. Recent representations include many of the world's largest restructuring cases and out-of-court workouts.

Willkie Farr & Gallagher LLP
21-23 rue de la Ville l'Evêque,
F-75008 Paris, France.
Tel: +33 (1) 53 43 45 00
Fax: +33 (1) 40 06 96 06
Website: www.willkie.com

Partners
Alexandra Bigot
Email: abigot@willkie.com
Maurice Lantourne
Email: mlantourne@willkie.com

Activities: Advice given to companies facing difficulties under amicable/judicial proceedings, especially distressed LBOs. Acquisition/sale of under-performing companies/assets for trade buyers or distressed funds. Cross-border operations with various offices in Europe and in the US.

GERMANY

Altium Capital AG
Possart Straße 13, D-81679 Munich,
Germany.
Tel: +49 (89) 41312 0
Fax: +49 (89) 41312 513
Email: info@altiumcapital.de
Website: www.altiumcapital.com

Director
Dr. Georg Schultze

Activities: European investment banking group operating through a network of 14 owned and affiliated offices. Provides a full range of investment banking services, including restructuring advisory services.

Bayerische Landesbank
Brienner Strasse 20, D-80333 Munich,
Germany.
Tel: +49 (89) 2171 01
Fax: +49 (89) 2171 23578
Email: kontakt@bayernlb.de
Website: www.bayernlb.de

Managing Director
Christian Seide
Tel: +49 (89) 2171 22201
Email: christian.seide@bayernlb.de

Director
Thomas Fehrenback
Tel: +49 (89) 2171 22684
Email: thomas.fehrenback@bayer

BGP Blersch Goetsch Partner Rechtsanwälte Steuerberater
Taunusstrasse 7 A, D-65183 Wiesbaden,
Germany; Mailing Address: PO Box 1840,
D-65008 Wiesbaden, Germany.
Tel: +49 (611) 1808 9200
Fax: +49 (611) 1808 9289
Email: mail@bgp-partner.de
Website: www.bgp-partner.de

Partners
Dr. Jürgen Blersch
Hans W. Goetsch

Activities: Specialises in insolvency proceedings including advice and representation of creditors; restructuring and redevelopment; corporate law and tax law.

Bingham McCutchen LLP
OpernTurm, D-60306 Frankfurt/Main,
Germany.
Tel: +49 (69) 677766 0
Fax: +49 (69) 677766 100
Email: info@bingham.com
Website: www.bingham.com

Partner
Jan D. Bayer

Activities: Represent bondholder and noteholder committees in bond, CMBS and sovereign debt restructurings and advise lenders and investors in single-credit restructurings and workouts.

Brinkmann & Partner
Sechslingspforte 2, D-22087 Hamburg,
Germany.
Tel: +49 (40) 226677
Fax: +49 (40) 22667 888
Email: b.brinkmann@brinkmann-partner.de
Website: www.brinkmann-partner.de

Lawyer
Dr. Tobias Brinkmann

Lawyer, Tax Consultant
Dr. Christoph Morgen

Activities: With 33 German office locations, Brinkmann & Partner specialise in insolvency administration and restructuring with a strong corporate and tax law practice.

Clifford Chance
Mainzer Landstrasse 46,
D-60325 Frankfurt am Main, Germany.
Tel: +49 (69) 7199 01
Fax: +49 (69) 7199 4000
Website: www.cliffordchance.com

Partners
Heinz-Günter Gondert
Tel: +49 (69) 7199 1711
Email:
heinz-guenter.gondert@cliffordchance.com
Michael Weller
Tel: +49 (69) 7199 3230
Email: michael.weller@cliffordchance.com
Stefan Sax
Tel: +49 (69) 7199 1549
Email: stefan.sax@cliffordchance.com

Activities: The global restructuring and insolvency group advises lenders, other creditors, debtors, shareholders and investors in complex financial restructurings and cross-border insolvencies.

Corporate Restructuring Association Germany (BRSI Bundesvereinigung Restrukturierung, Sanierung und Interim Management e.V)
Willibaldstrasse 31, D-80689 Munich,
Germany.
Tel: +49 (89) 59 99 96 96
Fax: +49 (89) 59 99 96 97
Email: mail@brsi.de
Website: www.brsi.de

Chairman of the Board
Eugen M. Angster
Email: angster@brsi.de

Deputy Chairman of the Board
Dr. Werner Pöhlmann
Email: poehlmann@brsi.de

Activities: An open, interdisciplinary and neutral platform, dedicated to facilitate the communication between all parties involved in company reorganisation and turnaround, with over 500 active members.

Debevoise & Plimpton LLP
Taubenstrasse 7-9,
D-60313 Frankfurt am Main, Germany.
Tel: +49 (69) 2097 5000
Fax: +49 (69) 2097 5555
Website: www.debevoise.com

Partner
Thomas Schürrle

Activities: Represent European borrowers, and European and US lenders in international restructurings and insolvencies.

Deloitte
Schwannstr. 6, D-40476 Düsseldorf, Germany.
Website: www.deloitte.com

Head of Restructuring Services
Jochen Wentzler
Tel: +49 (211) 8772 2381
Email: jwentzler@deloitte.de

Activities: Deloitte advises stakeholders in underperforming or distressed businesses including creditors and directors. Services include insolvency appointments, financial restructuring, turnaround and business reviews.

Deutsche Bank AG
Zur Hubermühle 19, D-65520 Bad Camberg, Germany.
Tel: +49 (64) 3490 2457
Email: mo@easytools.de

Attorney
Manfred Obermüller

Activities: Insolvency law.

Dr. Beck & Partner GbR
Eichendorffstr. 1, D-90491 Nürnberg, Germany.
Tel: +49 (911) 951285 0
Fax: +49 (911) 951285 10
Email: advo@ra-dr-beck.de
Website: www.ra-dr-beck.de

Managing Partner
Dr. Siegfried Beck

Contact
Joachim Exner

Activities: Focus on insolvency proceedings and on all legal issues concerning restructuring or insolvency.

Dr. Hemmerling
Simrockallee 2, D-53173 Bonn, Germany.
Tel: +49 (228) 30898 0
Fax: +49 (228) 30898 22
Email: bonn@kanzlei-hemmerling.de
Website: www.kanzlei-hemmerling.de

Contact
Barbara Brenner

Activities: Creditors' rights, secured transactions, conflict of laws.

Dr. Pannen Rechtsanwälte
Neuer Wall 25, D-20354 Hamburg, Germany
Tel: +49 (40) 320 8570
Fax: +49 (40) 320857 140
Email: info@drpannen.de
Website: www.drpannen.de

CEO
Dr. Klaus Pannen

Activities: Represent troubled companies, creditors' committees, lenders and investors in complex restructuring matters, with a recognised expertise in cross-border insolvencies.

DSM DI Stefano Moyse, Avocats à la Cour, Rechtsanwälte
Niedenau 13-19, D-60325 Frankfurt am Main, Germany.
Tel: +49 (69) 719190 0
Fax: +49 (69) 719190 219
Email: contact@dsmlegal.com
Website: www.dsmlegal.com

Partner
Mario Di Stefano
Email: mdistefano@dmslegal.com

Activities: Corporate structuring, real estate, litigation, banking & finance.

European Resolution Capital Partners Ltd
Rothenbaumchassee 197,
D-20149 Hamburg, Germany.
Tel: +49 (40) 180 390 240
Email: anja.hahn@eurescap.com

Felsberg, Pedretti, Mannrich e Aidar, Advogados e Consultores Legais
Kaiserswerther Str. 199, D-40474, Düsseldorf, Germany.
Tel: +49 (211) 687 857 78
Fax: +49 (211) 687 857 79
Email: mail@felsberg.com.br
Website: www.felsberg.com.br

Managing Partner
Thomas Benes Felsberg

Partners
Maria da Graça de Brito Vianna Pedretti
Nelson Mannrich
Carlos Miguel Castex Aidar
Guilherme Fiorini Filho
Cláudia Haidamus Perri
Ricardo Wanderley Mano Sanches
Roberto Wilson Renault Pinto
Antonio Ivo Aidar
Paulo Sigaud Cardozo
David Leinig Meiler
Joel Luís Thomaz Bastos
Neil Montgomery
Thiago Vallandro Flores
Sergio Silva do Amaral
Ernani Guimarás
Paulo F. Bekin
Ivan Campos
Claudia Maniaci Salim
Antonio Amendola
Marcelo Cosac

Activities: Full-service law firm with significant experience in complex business transactions, such as privatisations, project finance transactions, corporate restructurings, and mergers and acquisitions, and a tradition of service.

Gibson, Dunn & Crutcher LLP
Widenmayerstrasse 10,
D-80538 Munich, Germany.
Tel: +49 (89) 189 330
Fax: +49 (89) 189 333 33
Website: www.gibsondunn.com

Co-Chairs, Business Restructuring & Reorganisation Practice Group
Craig H. Millet
Michael A. Rosenthal
David M. Feldman

Activities: Represent debtors' in bankruptcy cases and out-of-court restructurings, creditors' committees and individual creditors, bondholders, lenders, potential acquirers, insurers and trustees.

Goetzpartners Corporate Finance
Prinzregentenstrasse 56, D-80538 Munich, Germany.
Tel: +49 (89) 290 725 0
Fax: +49 (89) 290 725 200
Email: info@goetzpartners.com
Website: www.goetzpartners.com

Managing Director
Dr. Gernot Wunderle

Activities: Provides M&A and corporate finance services as well as turnaround consulting in the restructuring area.

Gordon Brothers International LLC
Neue Rothofstrasse 19,
D-60313 Frankfurt, Germany.
Website: www.gordonbrotherseurope.com

Contacts
Martin Herrmann
Tel: +49 (69) 9203 96381
Email:
m.herrmann@gordonbrotherseurope.com
Marco Moser
Tel: +49 (69) 9203 96382
Email: m.moser@gordonbrotherseurope.com

Gordon Brothers International LLC
Neumarkt Galerie, Richmodstrasse 6,
D-50667 Köln, Germany.
Tel: +49 (221) 9204 2402
Fax: +49 (221) 9204 2350
Email: jscribe@gordonbrotherseurope.com
Website: www.gordonbrotherseurope.com

Business Development Director
Jérôme Scribe

Activities: Due diligence, disposition, clearance, investment & financing for retail assets.

Görg Partnerschaft von Rechtsanwälten
Sachsenring 81, D-50677 Cologne, Germany.
Tel: +49 (221) 33660 0
Fax: +49 (221) 33660 80
Email: cologne@goerg.de
Website: www.goerg.de

Senior Partner
Dr. Klaus Hubert Görg

Partner
Hans Gerd H. Jauch

Activities: A full service law firm with five offices in Germany advising debtors/creditors in restructuring/insolvencies nationally and internationally.

Grant Thornton GmbH Wirtschaftsprüfungsgesellschaft
Domstraße 15, D-20095 Hamburg, Germany.
Tel: +49 (40) 415 22 140
Fax: +49 (40) 415 22 112
Email: hamburg@grantthornton.de
Website: www.grantthornton.de

Managing Partner
Dr. Kai Bartels
Tel: +49 (40) 415 22 495
Email: k.bartels@ham.grantthornton.de

Partner
Dr. Joachim Dannenbaum
Tel: +49 (40) 415 22 841
Email: j.dannenbaum@ham.grantthornton.de

Activities: Preparation of independent business reviews (IBR), restructuring opinions (IDW S 6), interim management, distressed M&A, asset valuation, advising on reporting systems.

Grub Brugger & Partner
Reinsburgstraße 27, D-70178 Stuttgart, Germany.
Tel: +49 (711) 96689 0
Fax: +49 (711) 9668 919
Email: stuttgart@grub-brugger.de
Website: www.grub-brugger.de

Lawyers
Dr. Volker Grub
Dr. Wolfgang Bilgery
Dr. Philipp Grub
Martin Mucha

Activities: Specialised in insolvencies, particularly in the administration of insolvencies, sale and purchase of companies, reorganisation of companies as well as legal advice regarding all questions relating to the insolvency law.

HERMANN Rechtsanwälte Wirtschaftsprüfer Steuerberater
Bleichstrasse 2-4, D-60313 Frankfurt am Main, Germany.
Tel: +49 (69) 913092 0
Fax: +49 (69) 913092 30
Email: frankfurt@hermann-law.com
Website: www.hermann-law.com

Contacts
Ottmar Hermann
Rainer M. Bähr
Daniel F. Fritz

Activities: Regular activities as court appointed administrators or advisors in various cross-border insolvency and restructuring cases, including insolvent groups of companies (e.g. Woolworth Germany, Wilhelm Karmann GmbH).

Hogan Lovells International LLP
Karl-Scharnagl-Ring 5, D-80539 Munich, Germany.
Tel: +49 (89) 29012 0
Fax: +49 (89) 29012 222
Email: enquiry@hoganlovells.com
Website: www.hoganlovells.com

Partners
Detlef Hass
Heiko Tschauner
Christian Herweg

Activities: Experts advising on business restructuring and insolvency, including corporate restructuring, formal insolvencies and creditor representation.

Hogan Lovells International LLP

Alstertor 21, D-20095 Hamburg, Germany.
Tel: +49 (40) 419 93 0
Fax: +49 (40) 419 93 200
Email: firstname.lastname@hoganlovells.com
Website: www.hoganlovells.com

Hogan Lovells International LLP

Untermainanlage 1, D-60329 Frankfurt am Main, Germany.
Tel: +49 (69) 96236 0
Fax: +49 (69) 9623 6100
Email: enquiry@hoganlovells.com
Website: www.hoganlovells.com

Partner
Katlen Blöcker

Activities: Experts advising on business restructuring and insolvency, including corporate restructuring, formal insolvencies and creditor representation.

Hogan Lovells International LLP

Kennedydamm 17, D-40476 Düsseldorf, Germany.
Tel: +49 (211) 1368 0
Fax: +49 (211) 1368 100
Email: firstname.lastname@hoganlovells.com
Website: www.hoganlovells.com

ifb Institute for Financial Consulting GmbH

Im Alten Garten 5, D-63322 Roedermark, Germany.
Tel: +49 6074 62370
Fax: +49 6074 62372
Email: info@ifb-consult.com

Contact
Prof. Dr. Giersberg

Activities: Restructuring, pre-insolvency consulting, interim management, financing.

Interim International GmbH-turnaround management, management for special situations

Willibaldstrasse 31, D-80689 Munich, Germany.
Tel: +49 (89) 54 45 96 0
Fax: +49 (89) 54 45 96 66
Website: www.interiminternational.de

Director
Eugen Angster
Email: angster@interiminternational.de

Activities: Turnaround management and strategies, interim management, operative and financial restructuring in leadership positions.

Interim International Human Resources GmbH & Co. KG

Willibaldstrasse 31, D-80689 Munich, Germany.
Tel: +49 (89) 54 45 96 0
Fax: +49 (89) 54 45 96 66
Website: www.iin-flex.de

Director
Filip Pejic
Email: pejic@iin-flex.de

Activities: Executive search, human resources consulting, expert search, interim search, consulting boutique specialised in providing and identifying personnel for turnaround and restructuring cases.

IsoPart GmbH

Hammer Dorfstrasse 39, D-40221 Düsseldorf, Germany.
Tel: +49 (211) 239229 0
Fax: +49 (211) 239229 11
Email: isopart@isopart.com
Website: www.isopart.com

Contacts
Oliver Oechsle
Stefan Feinendegen

Activities: Seasoned hands-on turnaround professionals for insolvency situations with complex strategic and financial challenges. No legal/tax consulting. Funding available.

Latham & Watkins LLP

Reuterweg 20, D-60323 Frankfurt am Main, Germany.
Tel: +49 (69) 6062 6000
Fax: +49 (69) 6062 6060
Website: www.lw.com

Partners
Philipp von Randow
Volker Schaefer

Contacts
John Houghton
Tel: +44 (20) 7670 1000
Jan Baker
Tel: +1 (212) 906 1200
Mitchell Seider
Tel: +1 (212) 906 1200
Peter Gilhuly
Tel: +1 (213) 485 1234

Activities: Global law firm with more than 2000 lawyers in 31 offices worldwide, including over 500 lawyers throughout Europe. Offers a full range of services in insolvency, workouts and restructurings and is acknowledged as a leading bankruptcy lender law firm.

Latham & Watkins LLP

Warburgstraße 50, D-20354 Hamburg, Germany.
Tel: +49 (40) 4140 30
Fax: +49 (40) 4140 3130
Website: www.lw.com

Partners
Frank Grell
Nikolaus Lorenz

Contacts
John Houghton
Tel: +44 (20) 7710 1000
Jan Baker
Tel: +1 (212) 906 1200
Mitchell Seider
Tel: +1 (212) 906 1200
Peter Gilhuly
Tel: +1 (213) 485 1234

Activities: Global law firm with more than 2000 lawyers in 31 offices worldwide, including over 500 lawyers throughout Europe. Offers a full range of services in insolvency, workouts and restructurings and is acknowledged as a leading bankruptcy lender law firm.

McDermott Will & Emery Rechtsanwälte Steuerberater LLP

Nymphenburger Straße 3, D-80335 Munich, Germany.
Tel: +49 (89) 12712 0
Fax: +49 (89) 1271 2111
Email: info-munich@mwe.com
Website: www.mwe.com

Partner
Dr. Uwe Goetker

Head of Office
Dr. Dirk Pohl

Activities: Providing advice in international corporate and restructuring matters.

McDermott Will & Emery Rechtsanwälte Steuerberater LLP

Stadttor 1, D-40219 Düsseldorf, Germany.
Tel: +49 (211) 30211 0
Fax: +49 (211) 3021 1555
Email: info-duesseldorf@mwe.com
Website: www.mwe.com

Partner
Dr. Uwe Goetker

Head of Office
Konstantin Günther

Activities: Providing advice in international corporate and restructuring matters.

Mueller-Heydenreich Beutler & Kollegen

Schwanthalerstrasse 32, D-80336 Munich, Germany.
Tel: +49 (89) 54511 0
Fax: +49 (89) 5451 1444
Email: info@mhbk.de
Website: www.mhbk.de

Contacts
Axel Bierbach
Oliver Scharte

Activities: Sales and liquidations of various international companies and subsidiaries of German based insolvent companies.

Noerr

Börsenstraße 1, D-60313 Frankfurt am Main, Germany.
Tel: +49 (69) 971 4770
Fax: +49 (69) 9714 77100
Email: info@noerr.com
Website: www.noerr.com

Contacts
Dr. Thomas Hoffmann
Email: thomas.hoffmann@noerr.com
Eckhard Martin, LL.M.
Email: eckhard.martin@noerr.com

Activities: Advising shareholders, companies, creditors and investors regarding German and cross-border insolvency/restructuring proceedings. Trustee for secured creditors. Advice to insolvency administrators.

Noerr

Paul-Schwarze-Straße 2, D-01097 Dresden, Germany.
Tel: +49 (351) 816 600
Fax: +49 (351) 816 6081
Email: info@noerr.com
Website: www.noerr.com

Contact
Jens Gehlich
Email: jens.gehlich@noerr.com

Activities: Advising shareholders, companies, creditors and investors regarding German and cross-border insolvency/restructuring proceedings. Trustee for secured creditors. Advice to insolvency administrators.

Noerr

Brienner Straße 28, D-80333 Munich, Germany.
Tel: +49 (89) 28628 0
Fax: +49 (89) 280110
Email: info@noerr.com
Website: www.noerr.com

Contact
Dr. Christoph Schotte
Email: christoph.schotte@noerr.com

Activities: Advising shareholders, companies, creditors and investors regarding German and cross-border insolvency/restructuring proceedings. Trustee for secured creditors. Advice to insolvency administrators.

Noerr

Speditionstraße 1, D-40221 Düsseldorf, Germany.
Tel: +49 (211) 499 860
Fax: +49 (211) 4998 6100
Email: info@noerr.com
Website: www.noerr.com

Contact
Dr. Stefan Blum
Email: stefan.blum@noerr.com

Activities: Advising shareholders, companies, creditors and investors regarding German and cross-border insolvency/ restructuring proceedings. Trustee for secured creditors. Advice to insolvency administrators.

Noerr
Charlottenstraße 57, D-10117 Berlin, Germany.
Tel: +49 (30) 20 94 2000
Fax: +49 (30) 20 94 2094
Email: info@noerr.com
Website: www.noerr.com
Contact
Prof. Dr. Christian Pleister
Email: christian.pleister@noerr.com
Activities: Advising shareholders, companies, creditors and investors regarding German and cross-border insolvency/restructuring proceedings. Trustee for secured creditors. Advice to insolvency administrators.

PricewaterhouseCoopers AG WPG
Friedrich-Ebert-Anlage 35-37, D-60327 Frankfurt am Main, Germany.
Tel: +49 (69) 9585 2532
Fax: +49 (69) 9585 949816
Email: derik.evertz@de.pwc.com
Website: www.pwc.com
Leader, Germany, Business Recovery Services
Dr. Derik Evertz
Activities: Specialist in multi-jurisdictional business of financial restructuring and use of different bankruptcy protection laws.

RAe Dr Heckelmann & Koerbitz
Promenadeplatz 9, D-80333 Munich, Germany.
Tel: +49 (89) 2421 6730
Fax: +49 (89) 2421 6745
Email: info@hkm-law.de
Website: www.hkm-law.de
Lawyer
Alfred Koerbitz
Tel: +49 (89) 2421 6737
Email: koerbitz@hkm-law.de
Activities: Trustee and administrator.

Roland Berger Strategy Consultants GmbH
Alt Moabit 101b, D-10559 Berlin, Germany.
Tel: +49 (30) 39927 50
Fax: +49 (30) 39927 3303
Website: www.rolandberger.com
Partners
Bernd Brunke
Tel: +49 (30) 39927 3527
Email: bernd_brunke@de.rolandberger.com
Timo Kamp
Tel: +49 (30) 39927 3493
Email: timo_kamp@de.rolandberger.com
Uwe Johnen
Tel: +49 (30) 39927 3520
Email: uwe_johnen@de.rolandberger.com
Activities: Roland Berger Strategy Consultants is a leading global strategy consultancy. Within their restructuring practice they focus on complex operational and financial restructurings/distressed M&A as well as insolvency support.

Roland Berger Strategy Consultants GmbH
Karl-Arnold-Platz 1, D-40474 Düsseldorf, Germany.
Tel: +49 (211) 4389 0
Fax: +49 (211) 4389 2140
Website: www.rolandberger.com
Partners
Max Falckenberg
Tel: +49 (211) 4389 2301
Email:
max_falckenberg@de.rolandberger.com
Nils von Kuhlwein
Tel: +49 (211) 4389 2122
Email:
nils_von_kuhlwein@de.rolandberger.com
Activities: Roland Berger Strategy Consultants is a leading global strategy consultancy. Within their restructuring practice they focus on complex operational and financial restructurings/distressed M&A as well as insolvency support.

Roland Berger Strategy Consultants GmbH
OpernTurm, Bockenheimer Landstraße 2-8, 60306 Frankfurt, Germany.
Tel: +49 (69) 299 2460
Fax: +49 (69) 299 246502
Website: www.rolandberger.com
Partners
Timo Kamp
Email: timo_kamp@de.rolandberger.com
Jochen Schönfelder
Email:
jochen_schoenfelder@de.rolandberger.com
Activities: Roland Berger Strategy Consultants is a leading global strategy consultancy. Within their restructuring practice they focus on complex operational and financial restructurings/distressed M&A as well as insolvency support.

Roland Berger Strategy Consultants GmbH
Hanseatic Trade Center, Am Sandtorkai 41, D-20457 Hamburg, Germany.
Tel: +49 (40) 3763140
Fax: +49 (40) 37631 4102
Website: www.rolandberger.com
Partners
Max Falckenberg
Email:
max_falckenberg@de.rolandberger.com
Jan-Hendrik Többe
Tel: +49 (40) 37631 4306
Email:
jan-hendrik_toebbe@de.rolandberger.com
Activities: Roland Berger Strategy Consultants is a leading global strategy consultancy. Within their restructuring practice they focus on complex operational and financial restructurings/distressed M&A as well as insolvency support.

Roland Berger Strategy Consultants GmbH
Highlight Towers, Mies-van-der-Rohe-Str. 6, D-80807 Munich, Germany.
Tel: +49 (89) 9230 0
Fax: +49 (89) 9230 8202
Website: www.rolandberger.com
Partner
Uwe Johnen, Tel. +49 (89) 9230 8182
Email: uwe_johnen@de.rolandberger.com
Activities: Roland Berger Strategy Consultants is a leading global strategy consultancy. Within their restructuring practice they focus on complex operational and financial restructurings/distressed M&A as well as insolvency support.

RSW Runkel Schneider Weber
Friedrich-Ebert-Straße 146, D-42117 Wuppertal, Germany.
Tel: +49 (202) 302071
Fax: +49 (202) 314708
Email: wuppertal@rsw-anwaelte.de
Website: www.rsw-anwaelte.de
Contacts
Norbert Weber
Activities: German insolvency pratitioner. Member of INSOL Europe. Provides legal advice concerning business rescue, recovery and renewal in Germany and cross-border joint ventures.Subscribing member of R3.

Salans LLP
Markgrafenstraße 33, D-10117 Berlin, Germany.
Tel: +49 (30) 26473 0
Fax: +49 (30) 26473 133
Website: www.salans.com
Managing Partner
Andreas Ziegenhagen
Tel: +49 (30) 26473 207
Email: aziegenhagen@salans.com
Partner
Dr. Dietmar Schulz
Tel: +49 (69) 45001 2380
Email: dschulz@salans.com
Activities: Salans has an extensive and diverse restructuring practice that handles all facets of international restructuring projects of all sizes.

Schultze & Braun GmbH Rechtsanwaltsgesellschaft Wirtschaftsprüfungsgesellschaft
Eisenbahnstrafle 19-23, D-77855 Achern, Germany.
Tel: +49 (0) 78 41/708-0
Fax: +49 (0) 78 41/708-301
Email: mail@schubra.de
Website: www.schubra.eu
Attorney at Law in Germany, Certified Specialist in Insolvency Law, Chartered Accountant:
Dr. Eberhard Braun
Tel: +49 (0) 78 41/708-211
Head of International Business Recovery, Cross-Border Restructuring & Insolvencies:
Dr. Annerose Tashiro, Atty
Tel: +49 (0) 78 41/708-235
Activities: Corporate recovery & insolvency; cross-border insolvency, corporate finance; international law; litigation (commercial); distressed M&A, European community law, insolvency & bankruptcy.

Simmons & Simmons LLP
MesseTurm, Friedrich-Ebert-Anlage 49, D-60308 Frankfurt am Main, Germany.
Tel: +49 (69) 907454-32
Fax: +49 (69) 90745 454
Email: regina.rath@simmons-simmons.com
Website: www.simmons-simmons.com
Counsel
Regina Rath
Partner
Dr. Hans-Hermann Aldenhoff
Activities: Advising creditors, in particular financial institutions, as well as debtors, shareholders and investors in national and cross-border insolvencies and corporate crises; insolvency litigation.

SJ Berwin LLP
Kurfürstendamm 63, D-10707 Berlin, Germany.
Tel: +49 (30) 8871 7150
Fax: +49 (30) 8871 7166
Email: berlin@sjberwin.com

SJ Berwin LLP
Karolinen Karree, Karlstraße 12, D-80333 Munich, Germany.
Tel: +49 (89) 89081 0
Fax: +49 (89) 89081 100
Email: munich@sjberwin.com

SJ Berwin LLP
Atrium am Opernplatz, Bockeheimer Anlage 46, D-60322 Frankfurt am Main, Germany.
Tel: +49 (69) 5050 3250 0
Fax: +49 (69) 5050 32499
Email: frankfurt@sjberwin.com

Skadden, Arps, Slate, Meagher & Flom LLP & Affiliates
An der Welle 3, D-60322 Frankfurt am Main, Germany.
Tel: +49 (69) 74220 0
Fax: +49 (69) 7422 0300
Website: www.skadden.com
Partner
Hilary S. Foulkes

Activities: Worldwide practice serving corporations and their principal creditors and investors by providing value-added legal solutions in bankruptcy and restructuring situations.

Skadden, Arps, Slate, Meagher & Flom LLP & Affiliates

Karl-Scharnagl-Ring 7, D-80539 Munich, Germany.
Tel: +49 (89) 2444 950
Fax: +49 (89) 2444 95300
Website: www.skadden.com

Partner
Walter R. Henle

Activities: Worldwide practice serving corporations and their principal creditors and investors by providing value-added legal solutions in bankruptcy and restructuring situations.

Squire Sanders (UK) LLP

Unter den Linden 14, D-10117 Berlin, Germany.
Tel: +49 (30) 7261 68 000
Fax: +49 (30) 7261 68 01
Website: www.squiresanders.com

Restructuring & Insolvency Global Practice Group Leader
Stephen D. Lerner

Local Restructuring & Insolvency Contacts
Dr. Frank H. Walter-von Gierke
Markus Schmucker
Siemer Kruempelmann

Activities: The restructuring & insolvency group has over 100 restructuring and insolvency lawyers who represent financial institutions, distressed companies, insolvency practitioners, creditors' committees, investors, and strategic and financial buyers of troubled companies.

Squire Sanders (US) LLP

Rechtsanwälte, Steuerberater Taunusanlage 17, D-60325 Frankfurt am Main, Germany.
Tel: +49 (69) 17392 400
Fax: +49 (69) 17392 401
Website: www.squiresanders.com

Restructuring & Insolvency Global Practice Group Leader
Stephen D. Lerner

Local Restructuring & Insolvency Contacts
Andreas Fillmann
Andreas Lehmann
Jöerg Uhlmann

Activities: The restructuring & insolvency group has over 100 restructuring and insolvency lawyers who represent financial institutions, distressed companies, insolvency practitioners, creditors' committees, investors, and strategic and financial buyers of troubled companies.

Standard & Poor's

Main Tower, Neue Mainzer Strasse 52, D-60311 Frankfurt, Germany.
Tel: +49 (69) 3399 90
Fax: +49 (69) 3399 9119

Thierhoff Müller & Partner

Dittrichring 18-20, D-04109 Leipzig, Germany.
Tel: +49 (341) 1493 0
Fax: +49 (341) 1493 111
Email: michael.thierhoff@tmpartner.de
Website: www.tmpartner.de

Partner, CA
Michael Thierhoff

Partner, Lawyer
Renate Müller

Activities: Reorganisations and turnaround, workouts, comprehensive advice in insolvency proceedings, insolvency law, liquidations, court appointed administrators and bond restructurings.

Thierhoff Müller & Partner

Taunusanlage 17, D-60325 Frankfurt am Main, Germany.
Tel: +49 (69) 979953 0
Fax: +49 (69) 979953 99
Email: gerret.hoeher@tmpartner.de
Website: www.tmpartner.de

Partner, Lawyer
Gerret Höher

Activities: Reorganisations and turnaround, workouts, comprehensive advice in insolvency proceedings, insolvency law, liquidations, court appointed administrators and bond restructurings.

Weil, Gotshal & Manges LLP

Taunusanlage 1 (Skyper), D-60329 Frankfurt am Main, Germany.
Tel: +49 (69) 2165 9600
Fax: +49 (69) 2165 9699
Email: weil.frankfurt@weil.com
Website: www.weil.com

Managing Partner
Gerhard Schmidt

Marketing Manager
Martina Boehmfeldt

Activities: Their global restructuring practice encompasses cross-border restructurings, distressed M&A transactions and chapter 11 reorganisations for domestic and international clients of all industries.

Wellensiek Partner Rechtsanwälte

Blumenstrasse 17, D-69115 Heidelberg, Germany.
Tel: +49 (6221) 9118 0
Fax: +49 (6221) 9118 77
Email: info@wellensiek.de
Website: www.wellensiek.de

Rechtsanwalt - Steuerberater - CPA (USA)
Dr. Christof Schiller
Tel: +49 (6221) 9118 86
Email: christof.schiller@wellensiek.de

Rechtsanwalt
Dr. Werner Schreiber
Tel: +49 (6221) 9118 832
Email: werner.schreiber@wellensiek.de

Activities: Insolvency administration, cross-border insolvencies, evaluation of NPL portfolios, workout of NPL portfolios, distressed M&A, out-of-court restructuring, officers liability.

White & Case LLP

Graf-Adolf-Platz 15, D-40213 Düsseldorf, Germany.
Tel: +49 (211) 491 950
Fax: +49 (211) 491 95100
Website: www.whitecase.com

Partner
Dr. Biner Bähr
Tel: +49 (0) 211 540680 164
Email: bbaehr@whitecase.com
George J. Degenhardt
Tel: +49 (0) 211 49195 278
Email: jdegenhardt@whitecase.com
Dr. Jan-Philipp Hoos
Tel: +49 (0) 211 540680 188
Email: jhoos@whitecase.com
Andreas Kleinschmidt
Tel: +49 (211) 540680 186
Email: akleinschmidt@whitecase.com

Activities: White & Case is a global law firm with over 2000 lawyers in 26 countries. Their financial restructuring and insolvency group is a worldwide practice consisting of over 160 restructuring and insolvency lawyers. They are a globally recognised leader in complex cross-border insolvencies and workouts, and they represent clients in all aspects of restructurings, workouts and insolvencies, including both transactional and litigation matters. Recent representations include many of the world's largest restructuring cases and out-of-court workouts.

White & Case LLP

Maximilianstrasse 35, D-80539 Munich, Germany.
Tel: +49 (89) 20604 3500
Fax: +49 (89) 20604 3510
Website: www.whitecase.com

Partners
Dr. Carlos Mack
Email: cmack@whitecase.com
Leïla Röder
Tel: +49 (89) 206043 770
Email: lroeder@whitecase.com

Activities: White & Case is a global law firm with over 2000 lawyers in 26 countries. Their financial restructuring and insolvency group is a worldwide practice consisting of over 160 restructuring and insolvency lawyers. They are a globally recognised leader in complex cross-border insolvencies and workouts, and they represent clients in all aspects of restructurings, workouts and insolvencies, including both transactional and litigation matters. Recent representations include many of the world's largest restructuring cases and out-of-court workouts.

White & Case LLP

Bockenheimer Landstrasse 20, D-60323 Frankfurt am Main, Germany.
Tel: +49 (69) 29994 0
Fax: +49 (69) 29994 1444
Website: www.whitecase.com

Partners
Dr. Dennis Heuer
Tel: +49 (69) 29994 1576
Email: dheuer@whitecase.com
Dr. Tom Oliver Schorling
Tel: +49 (69) 29994 1525
Email: tschorling@whitecase.com
Julia Müller
Tel: +49 (69) 29994 1337
Email: jmueller@whitecase.com

Activities: White & Case is a global law firm with over 2000 lawyers in 26 countries. Their financial restructuring and insolvency group is a worldwide practice consisting of over 160 restructuring and insolvency lawyers. They are a globally recognised leader in complex cross-border insolvencies and workouts, and they represent clients in all aspects of restructurings, workouts and insolvencies, including both transactional and litigation matters. Recent representations include many of the world's largest restructuring cases and out-of-court workouts.

White & Case LLP

Kurfürstendamm 32, D-10719 Berlin, Germany.
Tel: +49 (30) 8809 110
Fax: +49 (30) 8809 11297
Website: www.whitecase.com

Partners
Dr. Christoph Schulte-Kaubrügger
Tel: +49 (30) 8809 13523
Email: cschulte-kaubruegger@whitecase.com
Dr. Philipp Hackländer
Tel: +49 (30) 8809 13323
Email: phacklaender@whitecase.com
Dr. Markus Wischemeyer
Tel: +49 (231) 58960 159
Email: mwischemeyer@whitecase.com

Activities: White & Case is a global law firm with over 2000 lawyers in 26 countries. Their financial restructuring and insolvency group is a worldwide practice consisting of over 160 restructuring and insolvency lawyers. They are a globally recognised leader in complex cross-border insolvencies and workouts, and they represent clients in all aspects of restructurings, workouts and insolvencies, including both transactional and litigation matters. Recent representations include many of the world's largest restructuring cases and out-of-court workouts.

White & Case LLP
Jungfernstieg 51 (Prien-Haus),
D-20354 Hamburg, Germany.
Tel: +49 (40) 35005 0
Fax: +49 (40) 3500 5111
Website: www.whitecase.com

Partners
Dr. Sven-Holger Undritz
Tel: +49 (49) 35005 191
Email: shundritz@whitecase.com
Bettina Schmudde
Tel: +49 (40) 808136 182
Email: bschmudde@whitecase.com
Sylvia Fiebig
Tel: +49 (40) 808136 329
Email: sfiebig@whitecase.com
Dr. Ellen Meyer-Sommer
Tel: +49 (40) 808136 357
Email: emeyer-sommer@whitecase.com
Stephanie Pidun
Tel: +49 (40) 808136 198
Email: spidun@whitecase.com

Counsel
Dr. Henning Mordhorst
Tel: +49 (40) 880 913 750
Email: hmordhorst@whitecase.com

Activities: White & Case is a global law firm with over 2000 lawyers in 26 countries. Their financial restructuring and insolvency group is a worldwide practice consisting of over 160 restructuring and insolvency lawyers. They are a globally recognised leader in complex cross-border insolvencies and workouts, and they represent clients in all aspects of restructurings, workouts and insolvencies, including both transactional and litigation matters. Recent representations include many of the world's largest restructuring cases and out-of-court workouts.

GHANA

Hesse & Hesse
PO Box 0514, Osu-Accra, Ghana.
Tel: +233 (21) 778215
Fax: +233 (21) 761197
Email: info@hesselawfirm.com
Website: www.hesselawfirm.com

Managing Partner
David A. Hesse

Senior Associate
Emmanuel E. Annan

Activities: Providing legal advice to corporate bodies going through insolvency and assisting creditors of such insolvent bodies.

PricewaterhouseCoopers (Ghana) Limited
No. 12 Airport City, Una Home, 3rd Floor, PO Box CT 42, Cantonments, Accra Ghana.
Tel: +233 (21) 761 500
Fax: +233 (21) 761 544
Email: pwc.ghana@gh.pwc.com
Website: pwc.com/gh

Country Senior Partner
Felix Addo
Tel: +233 (302) 761 614
Email: felix.addo@gh.pwc.com

Partner
Wyczynsky Ashiagbor
Tel: +233 (302) 761 465
Email: vish.ashiagbor@gh.pwc.com

Activities: PwC advises various stakeholders in underperforming or distressed businesses across Africa. Services include insolvency appointments (receiverships and liquidation), independent business reviews, restructuring and business turnaround.

GIBRALTAR

PricewaterhouseCoopers Limited
10th Floor, International Commercial Centre, Casemates Square, Gibraltar.
Tel: +350 2007 3520
Fax: +352 2004 8267
Email: pwc.gib@gi.pwc.com
Website: www.pwc.gi

Partner
Edgar C. Lavarello
Email: edgar.c.lavarello@gi.pwc.com

Senior Manager
Charles A. Bottaro
Email: charles.a.bottaro@gi.pwc.com

Activities: Members' voluntary liquidations, creditors' insolvent liquidations, compulsory (court appointment) liquidations, receiverships, personal insolvency and general restructuring work.

GREECE

Bazinas Law Firm
11 Alopekis Street, GR-106 75 Athens, Greece.
Tel: +30 (210) 725 4800
Fax: +30 (210) 725 4835
Email: info@bazinas.com
Website: www.bazinas.com

Senior Partner
George B. Bazinas
Email: gbazinas@bazinas.com

Activities: Domestic and cross-border insolvency and recognition; complex domestic and international litigation; company and commercial law; banking and finance; securities litigation; economic and corporate crime.

Deloitte
3a Fragkoklissias & Granikou str., GR-151 25 Athens, Greece.
Website: www.deloitte.com

Head of Restructuring Services
Dimitris Koutsopoulos
Tel: +30 (210) 678 1200
Email: dkoutsopoulos@deloitte.gr

Activities: Deloitte advises stakeholders in underperforming or distressed businesses including creditors and directors. Services include insolvency appointments, financial restructuring, turnaround and business reviews.

Moratis Passas
15 Voukourestiou Street, GR-106 71 Athens, Greece.
Tel: +30 (210) 361 8797
Fax: +30 (210) 363 6516
Email: office@morpas.gr

Managing Partner
D.S. Passas

Senior Partner
G.J. Moratis

Activities: Advising creditors as well as debtors. Enforcement on insolvent debtors assets. Particular specialisation in shipping insolvencies.

Potamitisvekris
9 Neofytou Vamva Street, GR-106 74 Athens, Greece.
Tel: +30 (210) 338 0000
Fax: +30 (210) 338 0020
Email: info@potamitisvekris.com
Website: www.potamitisvekris.com

Partners
Stathis Potamitis
Tel: +30 (210) 338 0001
Email: stathis.potamitis@potamitisvekris.com
George Bersis
Tel: +30 (210) 338 0003
Email: george.bersis@potamitisvekris.com

Activities: Potamitisvekris has taken a leadership role in promoting restructuring in the greek market, making use of revamps and legal proceedings.

HONG KONG

Allen & Overy
9th Floor, Three Exchange Square, Central, Hong Kong.
Tel: +852 2974 7000
Fax: +852 2974 6999
Website: www.allenovery.com

Partners
David Kidd
Tel: +852 2974 7183
Vicki Liu
Tel: +852 2974 7027

Activities: Head of Asian restructuring practice. Acts for banks, funds and borrowers in all aspects of distressed debt and other assets.

American Appraisal China Limited
1506, Dah Sing Financial Centre,
108 Gloucester Road, Wanchai, Hong Kong.
Tel: +852 2511 5200
Fax: +852 2511 9626
Email: asianmailbox@american-appraisal.com
Website: www.american-appraisal.com.hk

President & Managing Director
Patrick Wu

Principal, Business Development
William Poon

Activities: Provide independent valuation of entire businesses, real estate, machinery/equipment and intangible assets with global compliance capability.

Appleby
2206-19 Jardine House, 1 Connaught Place, Central, Hong Kong.
Tel: +852 2523 8123
Fax: +852 2524 5548
Email: hkinfo@applebyglobal.com

Managing Partner
Frances Woo
Email: fwoo@applebyglobal.com

Activities: Handle major insolvency and restructuring matters, liquidation of all types, and advising on creditors' rights and schemes of arrangements.

Asia Debt Management HK Ltd
1008 ICBC Tower, 3 Garden Road, Central, Hong Kong.
Tel: +852 2536 4567
Website: www.admcap.com

General Counsel
Alexander Shaik
Email: as@admcap.com

Activities: Their funds invest in companies experiencing financial and operational problems including banktrupcy, liquidation, receivership and court protection default of various payment obligations.

Bingham McCutchen LLP
Suites 4901-4904, One Exchange Square,
8 Connaught Place, Central Hong Kong, Hong Kong.
Tel: +852 3182 1700
Fax: +852 3182 1799
Email: info@bingham.com
Website: www.bingham.com

Partners
F. Mark Fucci
Naomi Moore

Activities: Provides extensive experience in cross border insolvency, financial restructuring and special situations investments to financial institutions, including hedge, private equity and other investment fund managers, and capital markets participants throughout the Asia-Pacific region.

BMC Group
22/F Nexxus Building, 41 Connaught Road
Central, Central, Hong Kong.
Tel: +852 8009 30643
Website: www.bmcgroup.com
Activities: Restructuring, class action, litigation, M&A, and investor communications. Superior technology, expertise and greatest cost efficiencies in data and claims management.

Clifford Chance
28th Floor, Jardine House,
One Connaught Place, Hong Kong.
Tel: +852 2825 8888
Fax: +852 2825 8800
Website: www.cliffordchance.com
Restructuring & Insolvency, Partners
Scott Bache
Tel: +852 2826 2413
Email: scott.bache@cliffordchance.com
Nicholas Dunstone
Tel: +852 2825 8909
Email: nicholas.dunstone@cliffordchance.com
Partner
Donna Wacker
Tel: +852 2826 3478
Email: donna.wacker@cliffordchance.com
Activities: The global restructuring and insolvency group advises lenders, other creditors, debtors, shareholders and investors in complex financial restructurings and cross-border insolvencies.

Deacons
5th Floor, Alexandra House, 18 Chater Road,
Central, Hong Kong.
Tel: +852 2825 9211
Fax: +852 2810 0431
Email: hongkong@deacons.com.hk
Website: www.deacons.com.hk
Head of Finance & Insolvency Department
Simon Deane
Tel: +852 2825 9209
Email: simon.deane@deacons.com.hk
Partner, Finance & Insolvency Department
Philip Gilligan
Tel: +852 2825 9716
Email: philip.gilligan@deacons.com.hk
Activities: Advises on all aspects of insolvency, restructuring and rescue to a wide range of clients, including leading banks and accountancy firms.

Deloitte
32/F One Pacific Place, 88 Queensway,
Hong Kong.
Tel: +852 2852 1600
Fax: +852 2541 1911
Website: www.deloitte.com
Head of Restructuring Services
Joseph Lo
Tel: +852 2852 1647
Email: derlai@deloitte.com.hk
Activities: Deloitte advises stakeholders in underperforming or distressed businesses including creditors and directors. Services include insolvency appointments, financial restructuring, turnaround and business reviews.

Duan & Duan Law Firm Hong Kong Office, China
Suites 3416-3418, Jardine House,
1 Connaught Place, Central, Hong Kong.
Tel: +852 2973 0668
Fax: +852 2525 0183
Email: jasonju@duanduan.com
Website: www.duanduan.com
Attorney-at-law
Ju Xiaolin (Jason Ju)

Ferrier Hodgson Limited
14/F Hong Kong Club Building,
3A Chater Road, Central, Hong Kong.
Tel: +852 2820 5600
Fax: +852 2521 7632
Email: fh@fh.com.hk
Website: www.fh.com.hk
Executive Directors
Rod Sutton
Activities: Provider of restructure and turnaround, financial advisory, forensics and corporate recovery services in the Asia Pacific region.

Hogan Lovells
11/F, One Pacific Place, 88 Queensway,
Hong Kong.
Tel: +852 2219 0888
Fax: +852 2219 0222
Email: enquiry@hoganlovells.com
Website: www.hoganlovells.com
Partners
Neil McDonald
Allan Leung
Activities: Experts advising on business restructuring and insolvency, including corporate restructuring, formal insolvencies and creditor representation.

Latham & Watkins LLP
41st Floor, One Exchange Square,
8 Connaught Place, Central, Hong Kong.
Tel: +852 2522 7886
Fax: +852 2522 7006
Website: www.lw.com
Partner
Joe Bevash
Contacts
John Houghton
Tel: +44 (20) 7670 1000
Jan Baker
Tel: +1 (212) 906 1200
Mitchell Seider
Tel: +1 (212) 906 1200
Peter Gilhuly
Tel: +1 (213) 485 1234
Activities: Global law firm with more than 2000 lawyers in 31 offices worldwide, including over 500 lawyers throughout Europe. Offers a full range of services in insolvency, workouts and restructurings and is acknowledged as a leading bankruptcy lender law firm.

Lynchpin Bondholder Management
56-58 Wellington Street, Wellington Plaza
402,Central, Hong Kong.
Website: www.lynchpinbm.com
Managing Director
Elizabeth Wilson
Tel: +850 2526 5404
Email: ewilson@lynchpinbm.com
Vice President
Ken Abela
Tel: +850 2526 5406
Email: kabela@lynchpinbm.com
Activities: Bankholder identification; tender, consent and exchange agent, tabulation agent, fiscal agent, settlement services.

Mayer Brown JSM
16-19 Floors, Prince's Building,
10 Chater Road, Central, Hong Kong.
Tel: +852 2843 2211
Fax: +852 2845 9121
Email: hongkong@mayerbrownjsm.com
Website: www.mayerbrownjsm.com
Partners
Steven Miller
Tel: +66 (2) 108 8565
Email: steven.miller@mayerbrownjsm.com
John Marsden
Tel: +852 2843 2584
Email: john.marsden@mayerbrownjsm.com

Activities: The highly-regarded team across our Asian offices has acted in the most complex restructuring and insolvency cases in the region.

Minter Ellison
15th Floor, Hutchison House,
10 Harcourt Road, Central, Hong Kong.
Tel: +852 2841 6888
Fax: +852 2810 0235
Website: www.minterellison.com
Head of Insolvency & Restructuring Practice
Anthony Hill
Email: anthony.hill@minterellison.com
Activities: Total legal advisory service for Hong Kong and Asia-Pacific multi-jurisdictional insolvencies and restructures, including security enforcement and asset tracing.

Nixon Peabody LLP
50th Floor, Bank of China Tower,
1 Garden Road, Central, Hong Kong.
Tel: +852 9307 3900
Fax: +852 2521 0220
Website: www.nixonpeabody.com
Contact:
David Cheng
Email: dcheng@nixonpeabody.com

O'Melveny & Myers LLP
AIA Central, 1 Connaught Road Central,
Hong Kong.
Tel: +852 3512 2300
Fax: +852 2522 1760
Email: omminfo@omm.com
Website: www.omm.com
Partner
Yi Zhang
Activities: Offering major insolvency and restructuring capabilities. Clients include funds, major banks, insurance companies and other financial concerns, and entertainment firms.

PricewaterhouseCoopers Hong Kong/China
22nd Floor, Prince's Building,
10 Chater Road, Central, Hong Kong.
Tel: +852 2289 8888
Fax: +852 2869 6311
Website:
www.pwchk.com/home/eng/brs-index.html
Partners
Ted Osborn
Tel: +852 2289 2299
Email: t.osborn@hk.pwc.com
Victor Jong
Tel: +86 (21) 2323 3650
Email: victor.yk.jong@cn.pwc.com
Anthony Boswell
Tel: +852 2289 2455
Email: anthony.boswell@hk.pwc.com
Activities: Over 70 specialists in China involved in business reviews, distressed M&A, NPL advisory and formal insolvency and receivership appointments.

Roland Berger Strategy Consultants Hong Kong Ltd.
19/F, Two International Finance Centre,
8 Finance Street, Hong Kong.
Tel: +852 2251 8823
Fax: +852 2251 1818
Website: www.rolandberger.com
Partner
Qi Wu
Tel: +86 (10) 844000 88608
Email: qi_wu@cn.rolandberger.com
Activities: Roland Berger Strategy Consultants is a leading global strategy consultancy. Within their restructuring practice they focus on complex operational and financial restructurings/distressed M&A as well as insolvency support.

Simmons & Simmons
13th Floor, One Pacific Place, 88 Queensway, Hong Kong.
Tel: +852 2868 1131
Fax: +852 2810 5040
Email:
richard.mckeown@simmons-simmons.com
Website: www.simmons-simmons.com

Partners
Richard McKeown
Robert Lewington

Activities: All aspects of rescues, reconstructions, receiverships, administration, liquidations and international insolvencies.

SJ Berwin LLP
3205 Lippo Centre, Tower Two,
89 Queensway, Hong Kong.
Tel: +852 2186 3000
Fax: +852 2186 3088
Email: east.asia@sjberwin.com

Skadden, Arps, Slate, Meagher & Flom
42/F, Edinburgh Tower, The Landmark,
15 Queen's Road Central, Hong Kong.
Tel: +852 3740 4700
Fax: +852 3740 4727
Website: www.skadden.com

Partners
Alan G. Schiffman
Edward Lam
Jonathan B. Stone
Alec P. Tracy

Activities: Worldwide practice serving corporations and their principal creditors and investors by providing value-added legal solutions in bankruptcy and restructuring situations.

SNR Denton HK LLP in association with Brandt Chan & Partners
Suite 3201, Jardine House,
1 Connaught Place, Central, Hong Kong.
Tel: +852 2523 1819
Fax: +852 2868 0069
Website: www.snrdenton.com

Standard & Poor's
Suite 3003, The Landmark, Edinburgh Tower,
15 Queens Road Central, Hong Kong.
Tel: +852 2533 3500
Fax: +852 2533 3566

Tanner De Witt
1806 Tower Two, Lippo Centre,
89 Queensway, Hong Kong.
Tel: +852 2573 5000
Fax: +852 2802 3553
Email: general@tannerdewitt.com
Website: www.tannerdewitt.com

Partners
Ian De Witt
Email: iandewitt@tannerdewitt.com
Robin Darton
Email: robindarton@tannerdewitt.com

Activities: Tanner De Witt acts for insolvency practitioners, creditors, directors, shareholders, companies and individuals facing cash flow difficulties.

Walkers
15th Floor, Alexandra House,
18 Chater Road, Central, Hong Kong.
Tel: +852 2284 4566
Fax: +852 2284 4560
Email: info@walkersglobal.com
Website: www.walkersglobal.com

Partner
Fraser Hern

Activities: Highly regarded and integrated global team delivering informed legal support across the spectrum of restructuring transactions, whether contentious or out-of-court.

White & Case
9th Floor Central Tower, 28 Queen's Road Central, Hong Kong.
Tel: +852 2822 8700
Fax: +852 2845 9070
Website: www.whitecase.com

Partners
John Hartley
Tel: +852 2822 0409
Email: jhartley@whitecase.com
John Shum
Tel: +852 2822 8748
Email: jshum@whitecase.com
Anna-Marie Slot
Tel: +852 2822 8752
Email: aslot@whitecase.com

Activities: White & Case is a global law firm with over 2000 lawyers in 26 countries. Their financial restructuring and insolvency group is a worldwide practice consisting of over 160 restructuring and insolvency lawyers. They are a globally recognised leader in complex cross-border insolvencies and workouts, and they represent clients in all aspects of restructurings, workouts and insolvencies, including both transactional and litigation matters. Recent representations include many of the world's largest restructuring cases and out-of-court workouts.

HUNGARY

Chamber of Hungarian Auditors
Szinyei M. u. 8, H-1063 Budapest, Hungary.
Tel: +36 (1) 473 4500
Fax: +36 (1) 473 4510
Email: mkvk@mkvk.hu
Website: www.mkvk.hu

President
Dr. Janos Lukacs
Tel: +36 (1) 473 4500
Email: mkvk@mkvk.hu

Contact
Bernadett Molnár
Tel: +36 (1) 473 4521
Email: international@mkvk.hu

Activities: Self-governed public body of auditors. National organisation with 5514 members. Gives opinion on acts, develops rules, regulations, professional training, auditors' education, exchange of information, maintains register, member of international organisations (FEE, IFAC).

Deloitte
Dozsa Gyorgy ut 84/C, Budapest, Hungary.
Website: www.deloitte.com

Head of Restructuring Services
Brad Quayle
Tel: +36 (1) 428 6867
Email: brquayle@deloittece.com

Activities: Deloitte advises stakeholders in underperforming or distressed businesses including creditors and directors. Services include insolvency appointments, financial restructuring, turnaround and business reviews.

Faludi Wolf Theiss
Kálvin tér 12-13, Kálvin Center, 4th floor,
H-1085 Budapest, Hungary.
Tel: +36 (1) 4848 800
Fax: +36 (1) 4848 825
Email: budapest@wolftheiss.com
Website: www.wolftheiss.com

Director
Zoltán Faludi
Email: zoltan.faludi@wolftheiss.com

Activities: Advising international clients in all phases of restructuring projects, including advising and representing banks and material vendors in insolvency proceedings.

Noerr
Fö utca 14-18, H-1011 Budapest, Hungary.
Tel: +36 (1) 1224 0900
Fax: +36 (1) 1224 0495
Email: info@noerr.com
Website: www.noerr.com

Contact
Dr. Zoltán Nádasdy
Email: zoltan.nadasdy@noerr.com

Activities: Advising shareholders, companies, creditors and investors regarding insolvency/restructuring proceedings. Trustee for secured creditors. Advice to insolvency administrators.

Oppenheim
Oppenheim Law Office, Karolyi Mihaly u. 12,
H-1053 Budapest, Hungary.
Tel: +36 (1) 486 2200
Fax: +36 (1) 486 2201
Email: office@oppenheim.hu
Website: www.oppenheim.hu

Patners
Dr. Mihaly Barcza
Tel: +36 (1) 486 2271
Email: mihaly.barcza@oppenheim.hu
Dr. József Bulcsú Fenyvesi
Tel: +36 (1) 486 2275
Email: jozsef.fenyvesi@oppenheim.hu

Activities: A group of dynamic and innovative lawyers providing advice on all areas of Hungarian business law.

PricewaterhouseCoopers
Wesselényi utca 16, Budapest,
H-1077 Hungary.
Tel: +36 (1) 461 9100
Fax: +36 (1) 461 9101
Email: info@hu.pwc.com
Website: www.pwc.hu

CEO
George Johnstone
Tel: +36 (1) 461 9696
Email: george.johnstone@hu.pwc.com

Partner, Advisory
Miklós Fekete
Tel: +36 (1) 461 9242
Email: miklos.fekete@hu.pwc.com

Activities: Assist clients to successfully develop and perform outstanding restructurings. The business recovery Services include – amongst others – development and management the full-scope restructuring process from independant business reviews through distressed M&A, strategic advisory, and turnaround management.

Radnóczy & Mészáros Nörr Stiefenhofer Lutz
Fö utca 14-18, H-1011 Budapest, Hungary.
Tel: +36 (6) 1224 0900
Fax: +36 (6) 1224 0495
Email: info@noerr.com
Website: www.noerr.com

Office Manager
Dr. Alexander Birnstiel
Email: alexander.birnstiel@noerr.com

Activities: Advising shareholders, companies, creditors and investors regarding insolvency/restructuring proceedings. Trustee for secured creditors. Advice to insolvency administrators.

Réczicza White & Case LLP
Andrássy ut 11, H-1061 Budapest, Hungary.
Tel: +36 (1) 488 5200
Fax: +36 (1) 488 5299
Website: www.whitecase.com

Partners
Istvan Reczicza
Email: ireczicza@whitecase.com
Gergely Horváth
Tel: +36 (1) 488 5258
Email: ghorvath@whitecase.com

Activities: White & Case is a global law firm with over 2000 lawyers in 26 countries. Their financial restructuring and insolvency group is a worldwide practice consisting of over 160 restructuring and insolvency lawyers. They are a globally recognised leader in complex cross-border insolvencies and workouts, and they represent clients in all aspects of restructurings, workouts and insolvencies, including both transactional and litigation matters. Recent representations include many of the world's largest restructuring cases and out-of-court workouts.

Roland Berger Strategy Consultants Kft.

Sas utca 10-12, H-1051 Budapest, Hungary.
Tel: +36 (1) 301 7070
Fax: +36 (1) 353 2434
Website: www.rolandberger.hu

Prinicipal
Frigyes Schannen
Tel: +36 (1) 301 7077
Email:
frigyes_schannen@hu.rolandberger.com

Activities: Roland Berger Strategy Consultants is a leading global strategy consultancy. Within their restructuring practice they focus on complex operational and financial restructurings/distressed M&A as well as insolvency support.

Squire Sanders (US) LLP

Roosevelt Irodaház Széchenyi István tér 7-8, Budapest H-1051, Hungary.
Tel: +36 (1) 428 7111
Fax: +36 (1) 428 7100
Website: www.squiresanders.com

Restructuring & Insolvency Global Practice Group Leader
Stephen D. Lerner

Local Restructuring & Insolvency Contacts
Csaba Vari
Artur Tamasi
Nora Szigeti

Activities: The restructuring & insolvency group has over 100 restructuring and insolvency lawyers who represent financial institutions, distressed companies, insolvency practitioners, creditors' committees, investors, and strategic and financial buyers of troubled companies.

Szecskay Attorneys at Law

Kossuth tér 16-17, H-1055 Budapest, Hungary.
Tel: +36 (1) 472 3000
Fax: +36 (1) 472 3001
Email: info@szecskay.com
Website: www.szecskay.com

Managing Partner
Dr. András Szecskay

Attorneys at Law
Dr. Judit Budai
Dr. Hedi Bozsonyik

Activities: Advised several companies in their merger, de-merger and winding up, as well as companies and creditors in connection with liquidation proceedings.

Weil, Gotshal & Manges

Szabadság tér 7, Bank Center, 8th Floor, H-1054 Budapest, Hungary.
Tel: +36 (1) 301 8900
Fax: +36 (1) 301 8901
Website: www.weil.com

Managing Partner
David Dederick
Email: david.dederick@weil.com

Partner, Head of Banking & Finance Capital Markets Practices
Konrád Siegler
Email: konrad.siegler@weil.com

Activities: Advise on all aspects of bankruptcy and restructuring matters, including creditor and debtor representations, distressed transactions and litigation matters.

ICELAND

LOGOS Legal Services

Efstaleiti 5, IS-103 Reykjavik, Iceland.
Tel: +354 5 400 300
Fax: +354 5 400 301
Email: logos@logos.is
Website: www.logos.is

Managing Partner
Gunnar Sturluson

INDIA

Deloitte

Maker Tower 'E' Wing, 4th Floor, Cuffe Parade, Mumbai, 400 005 India.
Website: www.deloitte.com

Head of Restructuring Services
Deepak Netto
Tel: +91 (22) 6622 0506
Email: dnetto@deloitte.com

Activities: Deloitte advises stakeholders in underperforming or distressed businesses including creditors and directors. Services include insolvency appointments, financial restructuring, turnaround and business reviews.

Standard & Poor's

CRISIL House, Cts Number 15 D, Central Avenue, 8th Floor, Hiranandani Business Park, Powai Mumbai 400076, India.
Tel: +91 (22) 3342 3000
Fax: +91 (22) 3342 8088

Standard & Poor's

W. 101 Sunrise Chambers, 22 Ulsoor Road, Bangalore 560 042, India.
Tel: +91 (80) 2558 0899
Fax: +91 (80) 2559 4801

Syndicate Bank

International Division, Maker Tower-F, 2nd Floor, Cuffe Parade, Colaba, Mumbai 400005, India.
Tel: +91 (22) 2215 4648
Fax: +91 (22) 2218 1622
Email: idmumbai@syndicatebank.co.in
Website: www.syndicatebank.co.in

General Manager
P. M. Vasantharajan
Tel: +91 (22) 2218 1276
Email: pmvasantharajan@syndicatebank.co.in

Deputy General Manager
V. Ganesan
Tel: +91 (22) 2215 1480
Email: vganesan@syndicatebank.co.in

Activities: Commercial banking activities such as trade finance, treasury operations, dealing in cross currency, derivatives and securities.

INDONESIA

Blake Dawson, in association with Oentoeng, Suria & Partners

Level 37, Equity Tower, Sudirman Central Business District, Jalan Jenderal Sudirman Kav. 52-53, Jakarta Selatan 12190, Indonesia.
Tel: +62 (21) 2996 9200
Fax: +62 (21) 2903 5360
Website: www.blakedawson.com

National Practice Head, Restructuring & Insolvency
James Marshall
Tel: +61 (2) 9258 6508
Email: james.marshall@blakedawson.com

Partner, Restructuring & Insolvency
Ray Mainsbridge
Tel: +61 (2) 9258 6049
Email: ray.mainsbridge@blakedawson.com

Activities: Corporate reconstruction and insolvency law which includes advising both lenders and debtors on formal and informal schemes of arrangement, and administrators of insolvent companies and creditors on the enforcement of securities and other rights.

Deloitte

The Plaza Office Tower, 32nd Floor, Jl. M. H. Thamrin Kav 28-30, Jakarta 10350, Indonesia.
Website: www.deloitte.com

Head of Restructuring Services
Claudia Lauw Lie Hoeng
Tel: +62 (21) 299 23100 ext. 33999
Email: clauw@deloitte.com

Activities: Deloitte advises stakeholders in underperforming or distressed businesses including creditors and directors. Services include insolvency appointments, financial restructuring, turnaround and business reviews.

PT Ferrier Hodgson

World Trade Center, Jalan Jenderal Sudirman Kav. 29-31, Jakarta 12920, Indonesia.
Tel: +62 (21) 521 1658
Fax: +62 (21) 521 1659
Email: fh-indonesia@ferrierhodgson.co.id
Website: www.ferrierhodgson.com

Director
Robert Jolly

Activities: Providers of restructure and turnaround, corporate advisory, capital rising, financial due diligence and forensic accounting services in Asia Pacific.

IRELAND

A&L Goodbody

International Financial Services Centre, North Wall Quay, Dublin 1, Ireland.
Tel: +353 (1) 649 2000
Fax: +353 (1) 649 2649
Website: www.algoodbody.com

Partners
David Baxter
Email: dbaxter@algoodbody.com
Mark Traynor
Email: mtraynor@algoodbody.com

Activities: An experienced corporate recovery and insolvency team with a wide-ranging client base from domestic and international financial institutions to insolvency practitioners.

Arthur Cox

Earlsfort Centre, Earlsfort Terrace, Dublin 2, Ireland.
Tel: +353 (1) 618 0000
Fax: +353 (1) 618 0618
Email: mail@arthurcox.com
Website: www.arthurcox.com

Partner and Head of Corporate Recovery & Insolvency Group
William Day
Tel: +353 (1) 618 0509
Email: william.day@arthurcox.com

Partner
Brendan Cooney
Tel: +353 (1) 618 0576

Activities: Leading Irish insolvency practice advising on liquidations, examinerships, receiverships, restructurings. Arthur Cox acts for insolvency practitioners, banks, NAMA debtors, currently advising EIRCOM.

Baker Tilly Ryan Glennon
Trinity House, Charleston Road,
Ranelagh, Dublin 6, Ireland.
Tel: +353 (1) 496 5388
Email: info@bakertillyrg.ie
Website: www.bakertillyrg.ie

Managing Partner
John Glennon
Tel: +353 (1) 499 5221
Email: jglennon@bakertilyrg.ie

Consulting Partner
George Maloney
Tel: +353 (1) 499 5208
Email: gmaloney@bakertillyrg.ie

Activities: Providers of corporate financial, insolvency and corporate restructuring services and acts as corporate advisors to clients in both public and private sectors.

Deloitte
30 Earlsfort Terrace, Dublin 2, Ireland.
Website: www.deloitte.com

Head of Restructuring Services
David Carson
Tel: +353 (1) 417 2513
Email: dcarson@deloitte.ie

Activities: Deloitte advises stakeholders in underperforming or distressed businesses including creditors and directors. Services include insolvency appointments, financial restructuring, turnaround and business reviews.

Eugene F. Collins Solicitors
Temple Chambers, 3 Burlington Road,
Dublin 4, Ireland.
Tel: +353 (1) 202 6400
Fax: +353 (1) 667 5200
Email: dsmith@efc.ie
Website: www.efc.ie

Head of Corporate Recovery
Doug Smith

Partner, Corporate Recovery
Barry O'Neill

Activities: Bankruptcy, company restructuring and schemes of arrangement, court liquidation, creditor's meetings, examinerships and protection order, receiverships, voluntary liquidations.

Eversheds
One Earlsfort Centre, Earlsfort Terrace,
Dublin 2, Ireland.
Tel: +353 (1) 664 4200
Fax: +353 (1) 664 4300
Email: info@eversheds.ie
Website: www.eversheds.ie

Partner, Insolvency & Restructuring
Norman Fitzgerald
Tel: +353 (1) 664 4239
Email: normanfitzgerald@eversheds.ie

Partner
Neil O'Mahony
Tel: +353 (1) 664 4292
Email: neilomahony@eversheds.ie

Contact
Ray Lambe
Tel: +353 (1) 664 4263
Email: raymondlambe@eversheds.ie

Activities: Act for accounting professionals, banks, equity investors, creditors and businesses in restructuring and insolvency processes including liquidations, receiverships and examinerships.

Friel Stafford
44 Fitzwilliam Place, Dublin 2, Ireland.
Tel: +353 (1) 661 4066
Fax: +353 (1) 661 4145
Email: jim.stafford@frielstafford.ie
Website: www.frielstafford.ie

Managing Partner
Jim Stafford

Contact
Tom Murray
Email: tom.murray@frielstafford.ie

Activities: Provides expert advice and services to overseas practitioners undertaking restructuring work in Ireland.

Grant Thornton
24-26 Quay, Dublin 2, Ireland.
Tel: +353 (1) 6805 805
Fax: +353 (1) 6805 806
Email: info@grantthornton.ie
Website: www.grantthornton.ie

Managing Director
Paul Raleigh

Head of Specialist Advisory Services
Paul McCann
Email: paul.mccann@grantthornton.ie

Activities: A leading provider of insolvency and corporate recovery solutions, with one of the largest dedicated Recovery & Reorganisation teams in Ireland.

Holohan Solicitors
Suite 319, The Capel Building,
St. Mary's Abbey, Dublin 7, Ireland.
Tel: +353 (1) 872 7120
Fax: +353 (1) 430 0911
Website: www.holohanlaw.com

Principal
Bill Holohan
Email: bill@billholohan.ie

Partner
John Lane
Email: john@billholohan.ie

Senior Associates
Amy Shine
Email: amy@billholohan.ie
Niamh Muldoon
Email: niamh@billholohan.ie

Activities: Niche firm providing legal services by way of assistance/ representation. Co-Authors "Bankruptcy Law & Practice in Ireland" & "Insolvency Law"'.

Holohan Solicitors
Water-View House, 16 Sundays Well Road,
Cork, Ireland.
Tel: +353 (1) 430 0374
Fax: +353 (1) 430 0911
Website: www.holohanlaw.com

Principal
Bill Holohan
Email: bill@billholohan.ie

Partner
John Lane
Email: john@billholohan.ie

Senior Associates
Amy Shine
Email: amy@billholohan.ie
Niamh Muldoon
Email: niamh@billholohan.ie

Activities: Niche firm providing legal services by way of assistance/representation. Co-Authors "Bankruptcy Law & Practice in Ireland" & "Insolvency Law".

Kavanagh Fennell
Simmonscourt House, Simmonscourt Road,
Ballsbridge, Dublin 4, Ireland.
Tel: +353 (1) 206 0800
Fax: +353 (1) 206 0801
Email: info@kavanaghfennell.ie
Website: www.kavanaghfennell.ie

Senior Partner
Tom Kavanagh

Partners
Ken Fennell
David Van Dessel

Activities: Corporate recovery, insolvency and business advisory services.

Mason Hayes+Curran
South Bank House, Barrow Street,
Dublin 4, Ireland.
Tel: +353 (1) 614 5000
Fax: +353 (1) 614 5001
Website: www.mhc.ie

Partners
Maurice Phelan
Declan Black
Tel: +353 (1) 614 5017
Email: dblack@mhc.ie

Senior Associate
Judith Riordan
Tel: +353 (1) 614 5201
Email: jriordan@mhc.ie

Activities: Irish law firm with wide experience of advising foreign and Irish clients on all aspects of Irish insolvency law.

Matheson Ormsby Prentice, Solicitors
70 Sir John Rogerson's Quay,
Dublin 2, Ireland.
Tel: +353 (1) 232 2000
Fax: +353 (1) 232 3333
Email: mop@mop.ie
Website: www.mop.ie

Mananging Partner
Liam Quirke
Email: liam.quirke@mop.ie

Partners
Roderic Ensor
Email: rod.ensor@mop.ie
Tony O'Grady

Activities: Advises its national and international clients on corporate restructuring and insolvency issues and has extensive cross-border insolvency experience. Acting for NAMA in relation to the examinership of the McInerney Group, various banks in relation to a number of receiverships and examinerships including Pierse Construction and Linen Supply. Also advised Deloitte, PWC, KPMG and Ernst & Young in various liquidations and receiverships.

McCann FitzGerald
Riverside One, Sir John Rogerson's Quay,
Dublin 2, Ireland.
Tel: +353 (1) 829 0000
Fax: +353 (1) 829 0010
Email: inquiries@mccannfitzgerald.ie
Website: www.mccannfitzgerald.ie

Head of Restructuring
Jane Marshall
Tel: +353 (1) 607 1309
Email: jane.marshall@mccannfitzgerald.ie

Partner
Michael Murphy
Tel: +353 (1) 611 9142
Email: michael.murphy@mccannfitzgerald.ie

Activities: Specialise in insolvency issues, restructuring and corporate rescue, advising companies with overseas interests, receivers, liquidators, examiners, creditors and financial institutions.

PricewaterhouseCoopers
One Spencer Dock, North Wall Quay,
Dublin 1, Ireland.
Tel: +353 (1) 792 6000
Website: www.pwc.com.ie

Partner
Billy O'Riordan
Tel: +353 (1) 792 8592
Email: billy.oriordan@ie.pwc.com

Director
Declan McDonald
Tel: +353 (1) 792 6092
Email: declan.mcdonald@ie.pwc.com

Activities: Leading practice providing corporate recovery and insolvency services. Extensive experience in all aspects of business restructuring and distressed corporates.

WhitneyMoore, Solicitors
Wilton Park House, Wilton Place,
Dublin 2, Ireland.
Tel: +353 (1) 611 0000
Fax: +353 (1) 611 0090
Email: ecomms@whitneymoore.ie
Website: www.whitneymoore.ie

Managing Partner
Stephen Walker
Email: stephen.walker@whitneymoore.ie

Head of Insolvency
Frank O'Reilly
Email: frank.oreilly@whitneymoore.ie

Activities: Acting for liquidators, receivers, examiners, banks and creditors in insolvency, security and related matters.

ISLE OF MAN

Appleby (Isle of Man) LLC.
33-37 Athol Street, Douglas,
IM1 1LB, Isle of Man.
Tel +44 (1624) 647 647
Fax +44 (1624) 620 992
Email: iom@applebyglobal.com

Contact
Sean Dowling
Email: sdowling@applebyglobal.com

Activities: Handle major insolvency and restructuring matters, liquidation of all types, and advising on creditors' rights and schemes of arrangements.

PKF (UK) LLP
PO Box 16, Analyst House, 20-26 Peel Rd,
Douglas, IM99 1AP, Isle of Man.
Tel: +44 (1624) 652 000
Fax: +44 (1624) 652 001
Email: mail@pkfiom.com
Website: www.pkfiom.com

Partner
Paul Seaward
Tel: +44 (1624) 673 811
Email: paul.seaward@pkfiom.com

Activities: Advisers on all forms of insolvency and restructuring.

ISRAEL

Caspi & Co
33 Yavetz Street, Tel Aviv 65258, Israel.
Tel: +972 (3) 796 1220
Fax: +972 (3) 796 1320
Email: office@caspilaw.com
Website: www.caspilaw.com

Partner
Norman Menachem Feder
Email: nmf@caspilaw.com

Herzog Fox & Neeman
Asia House, 4 Weizmann Street,
Tel Aviv 64239, Israel.
Tel: +972 (3) 692 2020
Fax: +972 (3) 696 6464
Email: hfn@hfn.co.il
Website: www.hfn.co.il

Senior Partners
Ehud Sol
Amir Seraya

Contact
Asher Dovev

Activities: The bankruptcy, insolvency and reorganisation department provides advice to a broad spectrum of businesses and industries on a full range of corporate restructuring issues and insolvency proceedings.

Standard & Poor's
12 Abba Hillel Silver Street, Ramat Gat,
Tel Aviv 52506, Israel.
Tel: +972 (3) 753 9701
Fax: +972 (3) 753 9710

Yaacov Salomon, Lipschütz & Co
64 Hameginim Avenue, Haifa 33264, Israel.
Tel: +972 (4) 814 0500
Fax: +972 (4) 855 7038
Email: david-goldenblatt@ysl-law.com
Website: www.ysl-law.com

Partners
David Goldenblatt
Jacov Rivanovitch

Contact
Moshe Lipschütz

Activities: Handles all insolvency matters for Israel's second largest bank and many other insolvency and restructuring matters.

Yaacov Salomon, Lipschütz & Co.
7 Abba Hillel Silver Street,
PO Box 3424 Ramat-Gan 52522, Israel.
Tel: +972 (3) 575 7712
Fax: +972 (3) 575 7725
Email: office-tel-aviv@ysl-law.com

Partner
Raanan Rawitz
Email: raananr@ysl-law.com

Contact
Hanoch Morgenstern
Email: hanochm@ysl-law.com

Activities: Handles all insolvency matters for Israel's second largest bank and many other insolvency and restructuring matters.

ITALY

Bonelli Erede Pappalardo Studio Legale
Via Barozzi 1, I-20122 Milan, Italy.
Tel: +39 (02) 771 131
Fax: +39 (02) 7711 3260
Website: www.beplex.com

Partners
Andrea De Tomas
Email: andrea.detomas@beplex.com
Giovanni Domenichini
Tel: +39 (010) 846 2322
Email: giovanni.domenichini@beplex.com

Activities: Restructuring of distressed companies, advising creditors or debtors on insolvency proceedings and on a wide range of in court and out of court restructurings.

Clifford Chance Studio Legale Associato
Via Sistina, 4, I-00187 Rome, Italy.
Tel: +39 (06) 422 911
Fax: +39 (06) 42291 200
Website: www.cliffordchance.com

Counsel
Carlo Giampaolino
Email: carlo.giampaolino@cliffordchance.it

Activities: The global restructuring and insolvency group advises lenders, other creditors, debtors, shareholders and investors in complex financial restructurings and cross-border insolvencies.

Deloitte
Via Tortona 25, I-20144 Milan, Italy.
Website: www.deloitte.com

Head of Restructuring Services
Massimo Capuani
Tel: +39 (02) 8332 5015
Email: mcapuani@deloitte.it

Activities: Deloitte advises stakeholders in underperforming or distressed businesses including creditors and directors. Services include insolvency appointments, financial restructuring, turnaround and business reviews.

Eidos Partners
Via S. Spirito 14, I-20121 Milan, Italy.
Tel: +39 (02) 8597 9211
Fax: +39 (02) 8597 9222
Email: info@eidospartners.com
Website: www.eidospartners.com

Contacts
Simone Dragone
Marco Clerici

Activities: Italian advisory firm, leader in advising companies and creditors on Europe's most complex transactions.

Goffredo Caverni
Via del Castello No. 5, Pugnano I-56017 San Giuliano Terme, Pisa, Italy.
Tel: +39 (050) 533 076
Fax: +39 (050) 533 384
Email: goffredocaverni@alice.it

Contacts
Goffredo Caverni
Nicole Chauvet

Activities: Bankruptcy officer and chartered accountant.

Hogan Lovells Studio Legale
Via Santa Maria alla Porta 2,
I-20123 Milan, Italy.
Tel: +39 (02) 720 2521
Fax: +39 (02) 7202 5252
Email: enquiry@hoganlovells.com
Website: www.hoganlovells.com

Partner
Antonio Di Pasquale

Activities: Experts advising on business restructuring and insolvency, including corporate restructuring, formal insolvencies and creditor representation.

Hogan Lovells Studio Legale
Piazza Venezia 11, I-00187 Rome, Italy.
Tel: +39 (06) 675 8231
Fax: +39 (06) 6758 2323
Email: firstname.lastname@hoganlovells.com
Website: www.hoganlovells.com

KPMG Advisory S.p.A.
Via Vittor Pisani, 27, I-20124 Milan, Italy.
Tel: +39 (02) 6763 2682
Fax: +39 (02) 6764 3864

Partner
Federico Bonanni
Tel: +39 (34) 8308 0714
Email: fbonanni@kpmg.it

Activities: Leading financial and industrial advisor for banks and corporates in the restructuring process.

Latham & Watkins LLP
Corso Matteotti 22, I-20121 Milan, Italy.
Tel: +39 (02) 3046 2000
Fax: +39 (02) 3046 2001
Website: www.lw.com

Partners
Andrea Novarese
Maria Cristina Storchi
Riccardo Agostinelli

Contacts
John Houghton
Tel: +44 (20) 7710 1000
Mitchell Seider
Tel: +1 (212) 906 1200
Jan Baker
Tel: +1 (212) 906 1200
Peter Gilhuly
Tel: +1 (213) 485 1234

Activities: Global law firm with more than 2000 lawyers in 31 offices worldwide, including over 500 lawyers throughout Europe. Offers a full range of services in insolvency, workouts and restructurings and is acknowledged as a leading bankruptcy lender law firm.

Lombardi Molinari e Associati Studio Legale

Via Andegari 4/A, I-20121 Milan, Italy.
Tel: +39 (02) 896 221
Fax: +39 (02) 8962 2333
Email: info@lmlaw.it
Website: www.lmlaw.it

President & Co-Managing Partner
Giuseppe Lombardi
Email: g.lombardi@lmlaw.it

Co-Managing Partner
Ugo Molinari
Email: u.molinari@lmlaw.it

Activities: Lombardi Molinari e Associati is an independent law firm providing legal advice mainly in the areas of corporate and commercial law, advising on litigation and arbitration as well as on corporate and financial transactions.

Pirola Pennuto Zei & Associati

Viale Castro Pretorio 122,
I-00185 Rome, Italy.
Tel: +39 (06) 570 281
Fax: +39 (06) 570 282 739
Website: www.pirolapennutozei.it

Head of Insolvency
Giorgio Cherubini
Tel: +39 (06) 570 282 656
Email: giorgio.cherubini@studiopirola.com

Managing Partner
Massimo Cremona
Tel: +39 (02) 669 951

Activities: Legal counsel to companies in financial difficulties; representation of creditors in bankruptcy proceedings; legal assistance in composition with creditors and rescue plans.

Roland Berger Strategy Consultants S.r.l.

Via Sirtori 32, I-20129 Milan, Italy.
Tel: +39 (02) 295 011
Fax: +39 (02) 2952 4837
Website: www.rolandberger.com

Partner
Roberto Crapelli
Tel: +39 (02) 295 01235
Email: roberto_crapelli@it.rolandberger.com

Principal
Andrea Marinoni
Tel. +39 (02) 295 01296
Email: andrea_marinoni@it.rolandberger.com

Activities: Roland Berger Strategy Consultants is a leading global strategy consultancy. Within their restructuring practice they focus on complex operational and financial restructurings/distressed M&A as well as insolvency support.

Simmons & Simmons

Corso Vittorio Emanuele 1,
I-20122 Milan, Italy.
Tel: +39 (02) 725 051
Fax: +39 (02) 7250 5505
Website: www.simmons-simmons.com

Partner
Fabrizio Dotti
Tel: +39 (02) 7250 5518
Email: fabrizio.dotti@simmons-simmons.com

Lawyer
Francesco Maruffi
Tel: +39 (02) 7250 5566
Email:
francesco.maruffi@simmons-simmons.com

Activities: All aspects of court and out-of-court restructurings, also in relation to international insolvencies.

Simmons & Simmons

Via di San Basilio 72, I-00187 Rome, Italy.
Tel: +39 (06) 809 551
Fax: +39 (06) 8095 5955
Website: www.simmons-simmons.com

Partner
Cristina Pagni
Email: cristina.pagni@simmons-simmons.com

Contact
David Maria Santoro
Email:
davidmaria.santoro@simmons-simmons.com

Activities: All aspects of court and out-of-court restructurings, also in relation to international insolvencies.

SJ Berwin LLP

Corso Matteotti 3, I-20121 Milan, Italy.
Tel: +39 (02) 3657 5701
Fax: +39 (02) 3657 5757
Email: milan@sjberwin.com

Standard & Poor's

Vicolo San Giovanni sul Muro 1/3/5,
I-20121 Milan, Italy.
Tel: +39 (02) 7211 1201
Fax: +39 (02) 7211 1222

Studio Corno - Avvocati

Via Mameli 11, I-20851 Lissone, Milan, Italy.
Tel: +39 (039) 245 6792
Fax: +39 (039) 245 8018
Email: legale@studiocorno.it
Website: www.studiocorno.it

Advocats
Giorgio Corno
Email: giorgio.corno@studiocorno.it
Roberta Bonari
Email: roberta.bonari@studiocorno.it
MarioPalma Busnelli
Email: mariopalma.busnelli@studiocorno.it
Stefanie Caltebiano
Email: stefanie.caltebiano@studiocorno.it

Activities: Advice to national and international debtors and creditors in insolvency proceedings and restructuring.

Studio Gerini

Corso Monforte No. 38, I-20122 Milan, Italy.
Tel: +39 (02) 796 619/814
Fax: +39 (02) 794 787
Email: segreteria@studiogerini.it

Contacts
Paolo Gerini
Marzio Valerio

Activities: Cooperation with the official receiver of the bankruptcy of an Italian-based international off-shore oil-piping and shipping company.

Studio Legale Biamonti

9, Lungotevere Michelangelo,
I-00192 Rome, Italy.
Tel: +39 (06) 326 9651
Fax: +39 (06) 326 96543
Email: studiobiamonti@studiobiamonti.it
Website: www.studiobiamonti.it

Senior Partner
Luigi Biamonti

Partner
Andrea Lo Gaglio

Studio Legale Delfino e Associati Willkie Farr and Gallagher LLP

Via M. Barozzi 2, I-20121 Milan, Italy.
Tel: +39 (02) 763 631
Fax: +39 (02) 763 63636
Email: mdelfino@willkie.com
Website: www.willkie.com

Partner
Maurizio Delfino

Activities: Corporate restructuring, mergers and acquisitions, public securities offerings, private equity and venture capital, private placement and bank lending.

Studio Legale Delfino e Associati Willkie Farr and Gallagher LLP

Via di Ripetta 142, I-00186 Rome, Italy.
Tel: +39 (06) 686 361
Fax: +39 (06) 686 36363
Email: mdelfino@willkie.com
Website: www.willkie.com

Partner
Maurizio Delfino

Activities: Corporate restructuring, mergers and acquisitions, public securities offerings, private equity and venture capital, private placement and bank lending.

Studio Legale Sutti

Via Montenapoleone 8, I-20121 Milan, Italy.
Tel: +39 (02) 762 041
Fax: +39 (02) 7620 4805
Email: maildesk@sutti.com
Website: www.sutti.com

Partner
Robertó Spelta

Contact
Livia Oguio

Activities: International corporate recovery, advising multi-national reorganisations, corporate restructuring, debt restructuring, creditors' rights and compliance issues.

Todtman, Nachamie, Spizz & Johns, P.C.

Via Giuseppe Mazzini, 20, I-20123 Milan, Italy.
Tel: +39 (02) 876 242
Fax: +39 (02) 7005 09944
Email: info@tnsj-law.com
Website: www.tnsj-law.com

Co-Chairman of Corporate, Restructuring, Bankruptcy & Creditors' Rights
Barton Nachamie
Tel: +1 (212) 754 9400 ext. 413
Email: bnachamie@tnsj-law.com

Partner
Janice B. Grubin
Tel: +1 (212) 754 9400 ext. 423
Email: jgrubin@tnsj-law.com

Activities: The firm is a general practice business law firm. Its global footprint is facilitated through its active participation in L.A.W. a worldwide organisation with over 100 member law firms.

JAPAN

Abe, Ikubo & Katayama

Fukuoka Building, 2-8-7 Yaesu, Chuo-ku,
Tokyo 104-0028, Japan.
Tel: +81 (3) 3273 2600
Fax: +81 (3) 3273 2033
Email: katayama@aiklaw.co.jp

Senior Partner
Eiji Katayama

Contacts
Masahiro Otsuki
Emiko Maki

Activities: Practical experience in cross-border insolvency.

Atsumi & Partners

Fukoku Seimei Building, 2-2 Uchisaiwaicho
2-chome, Chiyoda-ku, Tokyo 100-0011, Japan.
Tel: +81 (3) 5501 2111
Fax: +81 (3) 5501 2211
Email: info@aplaw.jp
Website: www.aplaw.jp

Managing Partner
Hiroo Atsumi

Vice Managing Partners
Setsuko Yufu
Hiroki Mori

Contact
Bonni L. Dixon

Activities: Works closely with clients in various insolvency cases and restructuring transactions.

Bingham McCutchen Murase, Sakai Mimura Aizawa - Foreign Law Joint Enterprise

4-3-13 Toranomon, 4th Floor, Minato-ku,
Tokyo 105-0001, Japan.
Tel: +81 (3) 6721 3111
Fax: +81 (3) 6721 3112
Website: www.bingham.com/tokyo

Managing Partner
Hideyuki Sakai

Partner
Mitsue Aizawa
Tel: +81 (3) 6721 3132
Email: mitsue.aizawa@bingham.com

Activities: The Tokyo office is the preeminent law firm in handling major cross-border and domestic restructurings related to Japan. Global financial institutions and corporations use them for representation in the most difficult and complex transactions.

Blake Dawson

Tokyo Ginko Kyokai Building, 15th Floor,
1-3-1 Marunouchi, Chiyoda-ku,
Tokyo 100-0005, Japan.
Tel: +81 (3) 5293 8228
Website: www.blakedawson.com

National Practice Head, Insolvency & Restructuring
James Marshall
Tel: +61 (2) 9258 6508
Email: james.marshall@blakedawson.com

Partner
Ray Mainsbridge
Tel: +61 (2) 9258 6049
Email: ray.mainsbridge@blakedawson.com

Activities: Corporate reconstruction and insolvency law which includes advising both lenders and debtors on formal and informal schemes of arrangement, and administrators of insolvent companies and creditors on the enforcement of securities and other rights.

BMC Group

6th Floor, Tokyo Building, 1-2-10 Nihombashi,
Chou-ku, Tokyo, Japan.
Tel: +81 (3) 4588 6706
Website: www.bmcgroup.com

Activities: Restructuring, class action, litigation, M&A, and investor communications. Superior technology, expertise and greatest cost efficiencies in data and claims management.

Clifford Chance

7th Floor, Akasaka Tameike Tower, 2-17-7
Akasaka, Minato-ku, Tokyo 107-0052, Japan.
Tel: +81 (3) 5561 6600
Fax: +81 (3) 5561 6699
Website: www.cliffordchance.com

Partners
Peter Kilner
Tel: +81 (3) 5616 6619
Email: peter.kilner@cliffordchance.com
Masayuki Okamoto
Email:
masayuki.okamoto@cliffordchance.com

Counsel
Yemi Tepe
Tel: +81 (3) 5561 6626
Email: yemi.tepe@cliffordchance.com

Activities: The global restructuring and insolvency group advises lenders, other creditors, debtors, shareholders and investors in complex financial restructurings and cross-border insolvencies.

Deloitte

Shin Tokyo Building, 3-3-1 Marunouchi
Chiyoda-ku, Tokyo 100-0005, Japan.
Website: www.deloitte.com

Head of Restructuring Services
Tsutomu Kishi
Tel: +81 (3) 6213 1122
Email: tsutomu.kishi@tohmatsu.co.jp

Activities: Deloitte advises stakeholders in underperforming or distressed businesses including creditors and directors. Services include insolvency appointments, financial restructuring, turnaround and business reviews.

Hashidate Law Office

7th Floor, The Imperial Hotel Tower,
1-1 Uchisaiwai-cho 1-chome, Chiyoda-ku,
Tokyo 100-0011, Japan.
Tel: +81 (3) 3504 3800
Fax: +81 (3) 3504 1009
Website: www.hashidatelaw.com

Managing Partner
Kenji Hashidate
Email: kenjihashidate@hashidatelaw.com

Partner
Kouhei Yabuta

Activities: Performing restructuring transactions involving new investors; acting as a liquidator of insolvent companies; acting for existing investors in recovery.

Hogan Lovells Horitsu Jimusho

15th Floor, Daido Seimei, Kasumigaseki
Building, 1-4-2 Kasumigaseki, Chiyoda-ku,
Tokyo 100-0013, Japan.
Tel: +81 (3) 5157 8200
Fax: +81 (3) 5157 8210
Email: firstname.lastname@hoganlovells.com
Website: www.hoganlovells.com

Kamano Sogo Law Offices

NBF Hibiya Building, 1-1-7 Uchisaiwaicho,
Chiyoda-ku, Tokyo 100-0011, Japan.
Tel: +81 (3) 3539 1371
Fax: +81 (3) 3539 1372
Email: hkamano@kamanosogo.jp

Partners
Hiroyuki Kamano
Yoshikazu Ishihara

Activities: A partner of the firm has supervised the civil rehabilitation case of Movie Television Co. which has engaged in the global movie distribution business.

KPMG ASPAC Restructuring

Marunouchi Trust Tower N. 10F, 8-1
Marunouchi 1 chome, Chiyoda-ku,
Tokyo 100-0005, Japan.
Tel: +81 (3) 5218 6700
Fax: +81 (3) 5218 6799
Email: fasmktg@jp.kpmg.com
Website: www.kpmg.or.jp/english/index.html

Chairman
Masahiko Chino
Tel: +81 (3) 5218 6788
Email: masahiko.chino@jp.kpmg.com

Deputy Chairman
Edward Middleton
Tel: +852 3121 9833
Email: edward.middleton@kpmg.com.hk

Mori Hamada & Matsumoto

Marunouchi Park Building, 2-6-1 Marunouchi,
Chiyoda-ku Tokyo 100-8222, Japan.
Tel: +81 (3) 6212 8330
Fax: +81 (3) 6212 8230
Email: mhm_info@mhmjapan.com
Website: www.mhmjapan.com

Partner
Mugi Sekido
Tel: +81 (3) 5223 7759
Email: mugi.sekido@mhmjapan.com

Senior Associate
Kana Manabe
Tel: +81 (3) 5220 1829
Email: kana.manabe@mhmjapan.com

Activities: The firm acts extensively in all types of Japenese bankruptcy and reorganisation proceedings, including the Japanese aspects of multi-jurisdictional proceedings.

Nagashima Ohno & Tsunematsu

Kioicho Building 3-12, Kioicho, Chiyoda-ku,
Tokyo 102-0094, Japan.
Tel: +81 (3) 3288 7000
Fax: +81 (3) 5213 7800
Email: info@noandt.com
Website: www.noandt.com

Chairman
Hisashi Hara

Managing Partner
Kenichi Fujinawa

Partner in charge of PR
Yuko Tamai

Nishimura & Asahi

Ark Mori Building, 1-12-32 Akasaka,
Minato-ku, Tokyo, 107-6029 Japan.
Tel: +81 (3) 5562 8500
Fax: +81 (3) 5561 9711-9714
Email: info@jurists.co.jp
Website: www.jurists.co.jp

Managing Partner
Masaki Hosaka

Activities: One of Japan's premier full service law firms covering all aspects of domestic and international corporate activity.

Roland Berger Ltd.

ARK Mori Building, 23rd Floor, 1-12-32
Akasaka, Minato-ku, Tokyo 107-6023 Japan.
Tel: +81 (3) 3587 6660
Fax: +81 (3) 3587 6670
Website: www.rolandberger.com

Partner
Takashi Hirai
Tel: +81 (3) 3587 6687
Email: takashi_hirai@jp.rolandberger.com

Activities: Roland Berger Strategy Consultants is a leading global strategy consultancy. Within their restructuring practice they focus on complex operational and financial restructurings/distressed M&A as well as insolvency support.

Skadden, Arps, Slate, Meagher & Flom LLP & Affiliates

Izumi Garden Tower, 21st Floor, 1-6-1
Roppongi, Minato-ku, Tokyo 106-6021, Japan.
Tel: +81 (3) 3568 2600
Fax: +81 (3) 3568 2626
Website: www.skadden.com

Partners
Michael J. Mies
Mitsuhiro Kamiya

Activities: Worldwide practice serving corporations and their principal creditors and investors by providing value-added legal solutions in bankruptcy and restructuring situations.

Standard & Poor's

28F, Marunouchi Kitaguchi Building,
1-6-5 Marunouchi, Chiyoda-ku,
Toyko 100-0005, Japan.
Tel: +81 (3) 4550 8000
Fax: +81 (3) 4550 8200

Studio Legale Sutti

2-17-13 Asagaya-Kita, Suginami-ku,
Tokyo 166-0001, Japan.
Tel: +81 (3) 3310 0693
Fax: +81 (3) 3310 0740
Email: maildesk@sutti.com
Website: www.sutti.com

Responsible for Tokyo Office
Masako Nishina

Activities: International corporate recovery, advises multi-national reorganisations, corporate restructuring, creditor's rights and compliance issues.

Tokyo Office of Yoon & Yang LLC
9F, 904 Toranomonhousou Building,
1-20-3 Nishi-Shinbashi, Minato-ku,
Tokyo 105-0003, Japan.
Tel: +81 (3) 5501 2550
Fax: +81 (3) 5501 2080
Email: idpark@yonyang.com
Website: www.hwawoo.jp

White & Case LLP, White & Case Law Offices (Registered Association)
Marunouchi Trust Tower Main, 26th Floor,
1-8-3 Marunouchi, Chiyoda-ku,
Tokyo 100-0005, Japan.
Tel: +81 (3) 6384 3300
Fax: +81 (3) 3211 5252
Website: www.whitecase.com

Partners
Toshio Dokei
Tel: +81 (3) 6384 3231
Email: tdokei@whitecase.com
Gerald Fujii
Tel: +81 (3) 6384 3158
Email: gfujii@whitecase.com
Tadao Horibe
Tel: +81 (3) 6384 3300
Email: thoribe@whitecase.com
Tetsuya Morimoto
Tel: +81 (3) 6384 3175
Email: tmorimoto@whitecase.com
Koichiro Ohashi
Tel: +81 (3) 6384 3151
Email: kohashi@whitecase.com
Yuji Ogiwara
Tel: +81 (3) 6384 3156
Email: yogiwara@whitecase.com
Shimon Takagi
Tel: +81 (3) 6384 3182
Email: stakagi@whitecase.com

Counsel
Mika Suzuki
Tel: +81 (3) 6384 3154
Email: msuzuki@whitecase.com

Activities: White & Case is a global law firm with over 2000 lawyers in 26 countries. Their financial restructuring and insolvency group is a worldwide practice consisting of over 160 restructuring and insolvency lawyers. They are a globally recognised leader in complex cross-border insolvencies and workouts, and they represent clients in all aspects of restructurings, workouts and insolvencies, including both transactional and litigation matters. Recent representations include many of the world's largest restructuring cases and out-of-court workouts.

KAZAKHSTAN

Chadbourne & Parke LLP
Dostyk Business Center, 43 Dostyk Avenue,
Fourth Floor, 050010 Almaty, Kazakhstan.
Tel: +7 (727) 258 5088
Fax: +7 (727) 258 8084
Email: almaty@chadbourne.com
Website: www.chadbourne.com

Managing Partner
Kenneth E. Mack
Email: kmack@chadbourne.com

Activities: Chadbourne & Parke LLP offers a full range of services in cross-border bankruptcies and financial restructurings, business restructurings and insolvencies.

SNR Denton
Ken Dala Business Centre 8th Floor,
38 Dostyk Avenue Almaty 050010,
Republic of Kazakhstan.
Tel: +7 (727) 258 1950
Fax: +7 (727) 258 1905
Website: www.snrdenton.com

White & Case Kazakhstan LLP
Dostyk Avenue 117/6, 050059 Almaty,
Kazakhstan.
Tel: +7 (727) 250 7491
Fax: +7 (727) 250 7493
Website: www.whitecase.com

Partner
Maxim Telemtayev
Email: mtelemtayev@whitecase.com

Activities: White & Case is a global law firm with over 2000 lawyers in 26 countries. Their financial restructuring and insolvency group is a worldwide practice consisting of over 160 restructuring and insolvency lawyers. They are a globally recognised leader in complex cross-border insolvencies and workouts, and they represent clients in all aspects of restructurings, workouts and insolvencies, including both transactional and litigation matters. Recent representations include many of the world's largest restructuring cases and out-of-court workouts.

KENYA

Deloitte
Deloitte Place, Waiyaki Way, Muthangari,
PO Box 40092, Nairobi, GPO 00100, Kenya.
Website: www.deloitte.com

Head of Restructuring Services East Africa
Harveen Gadhoke
Tel: +254 (20) 423 0000
Email: hgadhoke@deloitte.com

Activities: Deloitte advises stakeholders in underperforming or distressed businesses including creditors and directors. Services include insolvency appointments, financial restructuring, turnaround and business reviews.

KUWAIT

International Legal Group in association with SNR Denton & Co.
Al Tijaria Tower, Floor 12, Al Sour Street,
Block 3, Al Murgab, Kuwait City, State of Kuwait.
Tel: +965 2246 1840
Website: www.snrdenton.com

Partner
Stuart Cavet

LATVIA

Attorneys at Law Borenius
Lacplesa 20A, LV-1011 Riga, Latvia.
Tel: +371 (67) 201 800
Fax: +371 (67) 201 801
Email: advokati@borenius.lv
Website: www.borenius.lv

Partners
Lauris Liepa
Tel: +371 (67) 201 811
Email: lauris.liepa@borenius.lv
Gatis Flinters
Tel: +371 (67) 201 817
Email: gatis.flinters@borenius.lv

Activities: Legal advice on all issues of insolvency and restructuring, including preventive analysis, voluntary debt restructuring and formal corporate restructuring and bankruptcy proceedings.

LITHUANIA

Attorneys at Law Borenius
J. Jasinskio Str. 16 A, 8th Floor, Vilnius,
LT-01112 Lithuania.
Tel: +370 (5) 264 9555
Fax: +370 (5) 260 8327
Website: www.borenius.lt

Managing Partner
Daivis Svirinas
Tel: +370 (5) 251 4268
Email: daivis.svirinas@borenius.lt

Partner
Zygimantas Pacevicius
Tel: +370 (5) 251 4272
Email: zygimantas.pacevicius@borenius.lt

Activities: Provide legal advice on all issues of M&A and corporte, IP & IT, real estate & construction, dispute resolution.

LUXEMBOURG

Bonn & Schmitt
22-24, rives de Clausen, L-2165 Luxembourg.
Tel: +352 27855
Fax: +352 27855 855
Email: mail@bonnschmitt.net
Website: www.bonnschmitt.net

Partner
L. Noguera
Tel: +352 27855 855

Manager, Communication & Administration
Liz Lentz
Email: llentz@bonnschmitt.net

Activities: Bankruptcy and insolvency comprises one of Bonn & Schmitt's core practice areas. Regularly provides comprehensive advice on all bankruptcy and insolvency issues to national and foreign clients, involved in several major international bank liquidation proceedings.

Deloitte
560, rue de Neudorf, L-2220 Luxembourg.
Website: www.deloitte.com

Head of Restructuring Services
Michael JJ. Martin
Tel: +352 451 452 449
Email: michamartin@deloitte.lu

Activities: Deloitte advises stakeholders in underperforming or distressed businesses including creditors and directors. Services include insolvency appointments, financial restructuring, turnaround and business reviews.

DSM Avocats à la Cour
2a Boulevard Joseph II, PO Box 2648,
L-1026 Luxembourg.
Tel: +352 2625 621
Fax: +352 2625 622
Email: contact@dmslegal.com
Website: www.dmslegal.com

Partners
Mario Di Stefano
Email: mdistefano@dmslegal.com
François Moyse
Email: fmoyse@dsmlegal.com
Jérome Bach
Email: jbach@dsmlegal.com
Alban Colson
Email: acolson@dsmlegal.com

Activities: Corporate structuring, real estate, litigation, banking & finance.

Etude Pierre Feltgen
12-14 boulevard d'Avranches,
L-1018 Luxembourg.
Tel: +352 2664 841
Fax: +352 2664 8485
Email: info@feltgen.lu

Activities: Regularly acts as receiver or liquidator and also counsels creditors.

OPF Partners
291 Route d'Arlon, PO Box 603,
L-2016 Luxembourg.
Tel: +352 468383
Fax: +352 468 484
Email: info@opf-partners.com
Website: www.opf-partners.com
Managing Partner
Frédéric Feyten
Email: ffeyten@opf-partners.com
Partner, Head of Restructuring & Insolvency
Martine Gerber-Lemaire
Email: mgerber@opf-partners.com
Activities: The firm undergoes a broad range of activities with respect to restructuring & insolvency including bankruptcy proceedings and liquidations.

PricewaterhouseCoopers S.a.r.l.
400 route d'Esch, PO Box 1443,
L-1014 Luxembourg.
Tel: +352 4948 481
Fax: +352 4948 482 900
Email: jean-françois.kroonen@lu.pwc.com
Website: www.pwc.com
Partner
Jean-François Kroonen
Activities: Extensive practical experience supporting troubled corporates and their stakeholders.

MALAYSIA

Deloitte
Level 19, Uptown 1, 1Jalan,
5521/58 Kuala Lumpur, Malaysia.
Website: www.deloitte.com
Head of Restructuring Services
Kum Choon Mak
Tel: +60 (3) 7723 6522
Email: mak@deloitte.com
Activities: Deloitte advises stakeholders in underperforming or distressed businesses including creditors and directors. Services include insolvency appointments, financial restructuring, turnaround and business reviews.

Ferrier Hodgson MH SDN BHD
22-M, Monteiro and Heng Chambers,
Jalan Tun Sambanthan 3, 50470 Kuala Lumpur, Malaysia.
Tel: +60 (3) 2273 6227
Fax: +60 (3) 2273 7503
Email: ferrier@fhmh.com.my
Website: www.fh.com.au
Partners
Heng Ji Keng
Michael Joseph Monteiro
Andrew Heng
Activities: Provider of corporate restructuring and turnaround, financial due diligence, forensic accounting and insolvency management services.

Kadir, Andri & Partners
8th Floor, Menara Safuan, 80 Jalan Ampang,
50450 Kuala Lumpur, Malaysia.
Tel: +60 (3) 2078 2888
Fax: +60 (3) 2078 8431
Email: partner@kaaplaw.com
Website: www.kaaplaw.com
Partners
Julian Mahmud Hashim
Email: jhashim@kaaplaw.com
Mak Lin Kum
Email: lkmak@kaaplaw.com
Activities: Advising including making court applications in relation to corporate and debt restructurings, schemes of arrangements, receiverships, liquidations and other related matters.

Messrs Jeff Leong, Poon & Wong
B-11-8, Level 11, Megan Avenue II, Jalan Yap Kwan Seng, 50450 Kuala Lumpur, Malaysia.
Tel: +60 (3) 2166 3225
Fax: +60 (3) 2166 3227
Email: jlpw@jlpw.com.my
Website: www.jlpw.com
Senior Partners
Jeff Leong
Email: jeff.leong@jlpw.com.my
Kenny Poon
Email: kenny.poon@jlpw.com.my
Activities: Corporate rescues of PN17 companies; acting for white knights; advising liquidators and receivers; takeovers; debt restructurings and schemes of arrangements; corporate restructuring and re-listing in Bursa Malaysia Securities Berhad (Kuala Lumpur Stock Exchange); sale and disposal of distressed assets and companies; conducting legal due diligence exercises; investigation audits and compliance.

PricewaterhouseCoopers Advisory Services Sdn. Bhd.
Level 10, 1 Sentral, Jalan Travers,
Kuala Lumpur Sentral, PO Box 10192,
50706 Kuala Lumpur, Malaysia.
Tel: +60 (3) 2173 1188
Fax: +60 (3) 2173 1288
Website: www.pwc.com.my
Partners
San Peen Lim
Tel: +60 (3) 2173 1233
Email: san.peen.lim@my.pwc.com
Chui Sum Lee
Tel: +60 (3) 2173 1388
Email: chui.sum.lee@my.pwc.com
Activities: Specialising in distressed debt advisory, their professionals assist creditor financial institutions and debtor companies to resolve their non-performing loans. They offer a whole suite of services from recovery formulation, to planning and execution. They carry out independent business reviews, debt restructuring, cash flow monitoring, NPL sale and acts as receivers and liquidators.

Shearn Delamore & Co.
7th Floor, Wisma Hamzah-Kwong Hing,
No. 1 Leboh Ampang, 50100 Kuala Lumpur, Malaysia.
Tel: +60 (3) 2027 2727
Fax: +60 (3) 2034 2763
Partner
Rabindra Nathan
Tel: +60 (3) 2027 2812
Email: rabindra@shearndelamore.com
Activities: Act for local and foreign financial institutions in all types of banking and corporate insolvency litigation and advisory work. Also advise on insolvency related aspects of derivatives transactions.

Standard & Poor's
17-7, The Boulevard, Mid Valley City,
Lingkaran Syed Putra, 59200 Kuala Lumpur, Malaysia.
Tel: +60 (3) 2284 8668
Fax: +60 (3) 2283 6896

MAURITIUS

Appleby
9th Floor, Medine Mews, La Chaussée Street,
Port Louis, Mauritius.
Tel: +230 203 4300
Fax: +230 210 8792
Email: info@applebyglobal.com
Website: www.appleby.com
Contact
Malcolm Moller
Email: mmoller@applebyglobal.com
Activities: Handle major insolvency and restructuring matters, liquidation of all types, and advising on creditors' rights and schemes of arrangements.

MEXICO

Chadbourne & Parke, S.C.
Paseo de Tamarindos, No. 400-B Piso 22,
Col. Bosques de las Lomas,
05120 Mexico D.F., Mexico.
Tel: +52 (55) 3000 0600
Fax: +52 (55) 3000 0698
Website: www.chadbourne.com
Managing Partner
Boris Otto
Tel: +52 (55) 3000 0601
Email: botto@chadbourne.com
Activities: Chadbourne & Parke S.C. offers a full range of services in cross-border bankruptcies and financial restructurings, business restructurings and insolvencies.

Deloitte Mexico
Paseo De la Reforma 505, Piso 28,
Distrito Federal, Mexico.
Website: www.deloitte.com
Head of Restructuring Services
Gerado Ortiz Avila
Tel: +52 (55) 5080 6955
Email: geortiz@deloittemx.com
Activities: Deloitte advises stakeholders in underperforming or distressed businesses including creditors and directors. Services include insolvency appointments, financial restructuring, turnaround and business reviews.

Gardere Wynne Sewell LLP
Torre Esmeralda II, Blvd. Manuel A. Camacho
No. 36-1802, Lomas de Chapultepec, Mexico,
D.F. 11000, Mexico.
Tel: +52 (55) 5284 8540
Fax: +52 (55) 5284 8569
Website: www.gardere.com

Heather & Heather S.C.
Torre Arcos, Piso 10, Paseo de los Tamarindos #400B, Bosque de las Lomas
05120, México, D.F, Mexico.
Tel: +52 (55) 2167 9690
Website: www.heather.com.mx
Founder & Partner
Thomas S. Heather
Mobile: +52 (155) 2737 6039
Email: theather@heather.com.mx
Partners
Andrew P. Heather
Email: aheather@heather.com.mx
Thomas E. Heather
Email: eheather@heather.com.mx
Senior Associates
Mariana Campos Clasing
Email: mcampos@heather.com.mx
Alejandra de la Mora
Email: adelamora@heather.com.mx
Associates
Ignacio Diaque
Email: idiaque@heather.com.mx
Pierre Said Nader
Email: psaid@heather.com.mx
Junior Associates
Jaime Ostos Rincon Gallardo
Email: jostos@heather.com.mx
Jorge Cervantes
Email: jcervantes@heather.com.mx

Activities: Led by Thomas S. Heather, they have had a recognised practice in Mexico for over 35 years and have been singled out as leading performers in banking, corporate governance, mergers and acquisitions, cross-border restructurings and insolvency law. Their practice is recognised as an emerging leader in innovative solutions in dispute resolution and arbitration. Their broad network with firms in Mexico and abroad allows them to serve their clients with a practical and effective approach to closing transactions, size and complexity notwithstanding.

Oscos Abogados

Joaquin Gallo (antes Paseo del Rio) 53, Chimalistac, Coyoacán 04340, Mexico.
Tel: +52 (55) 5550 2829
Fax: +52 (55) 5550 2829
Website: www.oscosabogados.com.mx

General Director, Partner
Dario Oscós
Email: doscos@oscosabogados.com.mx

Partner
Gerardo Oscós
Email: goscos@oscosabogados.com.mx

Activities: Cross-border insolvency. Reorganisation and liquidation. Workout settlements. Out-of-court prepackages. Insolvency mediation. Insolvency Arbitration. Oscos Abogados Law firm represents financial institutions, creditors as well as debtors.

Standard & Poor's

Prolongacion Paseo de la Reforma #1015, Col. Sante Fe, Mexico City 01376, Mexico.
Tel: +52 (55) 5081 4400
Fax: +52 (55) 5081 4401

White & Case S.C.

Batallón de San Patricio 111, piso 28, Valle Oriente, 66269 Garza García, N.L., Mexico.
Tel: +52 (81) 8218 8020
Fax: +52 (81) 8218 8021

Partner
Eugenio Sepúlveda
Tel: +52 (81) 8218 8023
Email: esepulveda@whitecase.com

Activities: White & Case is a global law firm with over 2000 lawyers in 26 countries. Their financial restructuring and insolvency group is a worldwide practice consisting of over 160 restructuring and insolvency lawyers. They are a globally recognised leader in complex cross-border insolvencies and workouts, and they represent clients in all aspects of restructurings, workouts and insolvencies, including both transactional and litigation matters. Recent representations include many of the world's largest restructuring cases and out-of-court workouts.

White & Case S.C.

Torre Del Bosque PH, Boulevard Manuel Avila Camacho #24, Colonia Lomas de Chapultepec, 11000 Mexico, D.F., Mexico.
Tel: +52 (55) 5540 9600
Fax: +52 (55) 5540 9699
Website: www.whitecase.com

Partners
Vicente Corta
Tel: +52 (55) 5540 9602
Email: vcorta@whitecase.com
Alberto Sepulveda Cosio
Tel: +52 (55) 5540 9606
Email: asepulveda-cosio@whitecase.com
Iker Arriola
Tel: +52 (55) 5540 9625
Email: iarriola@whitecase.com
Juan Antonio Martin
Tel: +52 (55) 5540 9618
Email: jmartin@whitecase.com
Rodrigo Orozco-Waters
Tel: +52 (55) 5540 9650
Email: rorozco@whitecase.com
Eugenio Bernal
Tel: +52 (55) 5540 9629
Email: ebernal@whitecase.com
Iván Libenson
Tel: +52 (55) 5540 9663
Email: ilibenson@whitecase.com

Activities: White & Case is a global law firm with over 2000 lawyers in 26 countries. Their financial restructuring and insolvency group is a worldwide practice consisting of over 160 restructuring and insolvency lawyers. They are a globally recognised leader in complex cross-border insolvencies and workouts, and they represent clients in all aspects of restructurings, workouts and insolvencies, including both transactional and litigation matters. Recent representations include many of the world's largest restructuring cases and out-of-court workouts.

MOROCCO

Garrigues

14, Boulevard Pasteur, 9000 Tánger, Morocco.
Tel: +212 (39) 379 050
Fax: +212 (39) 379 069
Website: www.www.garrigues.com

Contact
Jose Ignacio García
Email: jose.ignacio.garcia@garrigues.com

Activities: Their team of leading lawyers has decades of experience in turn-around, corporate recovery, refinancing and all types of insolvencies, including cross-border insolvency. It comprises experts with a background in law or economics, who work together in contentious and non-contentious insolvency, affecting debtors, banks or creditors for troubled companies.

Garrigues

3, Boulevard Massira Al Khadra, 20100 Casablanca, Morocco.
Tel: +212 (22) 777 240
Fax: +212 (22) 777 259
Website: www.garrigues.com

Head of Casablanca Office
José Ignacio García
Email: jose.ignacio.garcia@garrigues.com

Activities: Their team of leading lawyers has decades of experience in turn-around, corporate recovery, refinancing and all types of insolvencies, including cross-border insolvency. It comprises experts with a background in law or economics, who work together in contentious and non-contentious insolvency, affecting debtors, banks or creditors for troubled companies.

Roland Berger Strategy Consultants SARL/A.U.

Angle Bd Roudani & Rue Jean Jaurès, 20000 Casablanca, Morocco.
Tel: +212 (52) 901 1355
Fax: +212 (52) 901 1353
Website: www.rolandberger.com

Partner
Laurent Benarousse
Tel: +212 (52) 901 1354
Email:
laurent_benarousse@ma.rolandberger.com

Activities: Roland Berger Strategy Consultants is a leading global strategy consultancy. Within their restructuring practice they focus on complex operational and financial restructurings/distressed M&A as well as insolvency support.

NETHERLANDS

AKD

Orlyplein 10, NL-1043 DP Amsterdam;
Mailing Address: PO Box 59280, NL-1040 KG Amsterdam, The Netherlands.
Tel: +31 (88) 253 5000
Fax: +31 (88) 253 5150
Email: info@akd.nl
Website: www.akd.nl

Partner
Barend W.J.M. de Roy van Zuidewijn
Email: bderoyvanzuidewijn@akd.nl

Activities: Trustee in the insolvencies of TST Groep, Internoc Holding N.V. and CEG Group, working as monitoring counsel/attorney in D&O liability claims for Chubb Insurance Company of Europe S.A. and AIG Europe Netherlands N.V.

AKD

Bijster 1, NL-4817 HX Breda;
Mailing Address: PO Box 4714, NL-4803 ES Breda, The Netherlands.
Tel: +31 (88) 253 5000
Fax: +31 (88) 253 6001
Email: info@akd.nl
Website: www.akd.nl

Partner
Ed C.M. Wagemakers
Email: ewagemakers@akd.nl

AKD

Wilhelminkade 1, NL-3072 AD Rotterdam;
Mailing Address: PO Box 4302, NL-3006 AH Rotterdam, The Netherlands.
Tel: +31 (88) 253 5000
Fax: +31 (88) 253 5400
Email: info@akd.nl
Website: www.akd.nl

Partner
Paul J. Peters
Email: paupeters@akd.nl

Bierman Advocaten

Lingedijk 58, NL-4002 XL Tiel, The Netherlands.
Tel: +31 (34) 467 7188
Fax: +31 (34) 467 7190
Email: info@bierman.nl
Website: www.bierman.nl

Contacts
C.G. Klomp
Email: klomp@bierman.nl
J.M.A.J. Thielen

Activities: The restructuring and insolvency practice acts not only in receiverships but also assists clients in recovery operations, liquidations, reorganisations and debt restructuring. Regarding these issues, the team also specialises in corporate banking and finance and employment.

Bosselaar & Strengers

Maliebaan 29-33, NL-3581 CC Utrecht, The Netherlands.
Tel: +31 (30) 234 7265
Fax: +31 (30) 234 7282
Email: j.maduro@bs-advocaten.nl
Website: www.bs-advocaten.nl

Senior Trustee, Attorney Bankruptcies & Restructuring
Janina V. Maduro

Activities: Regularly appointed by Dutch Courts to be trustee in bankruptcies. The firm represents creditors and managers in bankruptcy and restructuring cases.

CMS Derks Star Busmann

Newtonlaan 203, NL-3584 BH Utrecht, The Netherlands.
Tel: +31 (30) 212 1111
Fax: +31 (30) 212 1333
Email: ultrecht@cms-dsb.com
Website: www.cms-dsb.com

Attorney-at-Law
Head of Practice Group
Jan Willem (J.W.) Bouman
Tel: +31 (20) 212 1285
Email: janwillem.bouman@cms-dsb.com
Attorney-at-Law
Marcel (J.L.M.) Groenewegen
Tel: +31 (20) 301 6410
Email: marcel.groenewegen@cms-dsb.com
Activities: Corporate restructuring advice, enforcement of security rights, appointment as administrator and trustee in bankruptcy, assisting and advising financial institutions in insolvency related issues.

De Brauw Blackstone Westbroek
PO Box 75084, NL-1070 AB Amsterdam,
The Netherlands.
Tel: +31 (20) 577 1771
Fax: +31 (20) 577 1775
Email: amsterdam@debrauw.com
Website: www.debrauw.com
Contacts
Ruud Hermans
Email: ruud.hermans@debrauw.com
Jan Willem de Boer
Email: janwillem.deboer@debrauw.com
Berto Winters
Email: berto.winters@debrauw.com
Activities: Focused on advising and assisting banks, (multinational) companies and management on insolvency and restructuring related issues and advising (court appointed) liquidators or trustees. Often involved in international and multi-jurisdictional cases.

Deloitte
Orlyplein 10, NL-1043 DP Amsterdam,
The Netherlands
Website: www.deloitte.com
Head of Restructuring Services
Oscar Snijders
Tel: +31 (88) 288 3277
Email: osnijders@deloittece.nl
Activities: Deloitte advises stakeholders in underperforming or distressed businesses including creditors and directors. Services include insolvency appointments, financial restructuring, turnaround and business reviews.

Hogan Lovells International LLP
Keizersgracht 555, NL-1017 DR Amsterdam;
Mailing Address: Postbus 545, NL-1000 AM
Amsterdam, The Netherlands.
Tel: +31 (20) 553 3600
Fax: +31 (20) 553 3777
Email: firstname.lastname@hoganlovells.com
Website: www.hoganlovells.com
Partner
Ken Breken
Activities: Experts advising on business restructuring and insolvency, including corporate restructuring, formal insolvencies and creditor representation.

Houthoff Buruma
Weena 355, NL-3013 AL Rotterdam;
Mailing Address: PO Box 1507,
NL-3000 BM Rotterdam, The Netherlands.
Tel: +31 (10) 217 2000
Fax: +31 (10) 217 2700
Website: www.houthoff.com

Houthoff Buruma n.v
Gustav Mahlerplein 50, NL-1082 AM
Amsterdam; Mailing Address: PO Box 75505,
NL-1070 AM Amsteradm, The Netherlands.
Tel: +31 (20) 605 6387
Fax: +31 (20) 605 6708
Website: www.houthoff.com
Partner, Insolvency & Restructuring
Rutger J. Schimmelpenninck
Email: r.schimmelpenninck@houthoff.com
Activities: Involved in larger, and especially internationally structured, insolvencies and corporate, financial restructurings.

IBFD
PO Box 20237, NL-1000 HE Amsterdam,
The Netherlands.
Tel: +31 (20) 554 0100
Fax: +31 (20) 622 8658
Email: info@ibfd.org
Website: www.ibfd.org
Sales Manager
Jeroen van Meerten
Tel: +31 (20) 554 0179
Email: j.vanmeerten@ibfd.org
Head, International Tax Academy
Arcotia Hatsidimitris
Tel: +31 (20) 554 0160
Email: a.hatsidimitris@ibfd.org
Activities: IBFD provides independent, impartial information, training, research, and government consultancy in the specialist area of cross-border taxation.

JPR Advocaten
Postbus 348, NL-7000 AH Doetinchem,
The Netherlands.
Tel: +31 (31) 437 2311
Fax: +31 (31) 433 2147
Website: www.jpr.nl
Contact
A.M.T. Weersink
Email: weersink@jpr.nl
Activities: A firm of 55 lawyers.

JPR Advocaten
Postbus 2121, NL-7500 CC Enschede,
The Netherlands.
Tel: +31 (53) 433 1133
Fax: +31 (53) 433 0381
Website: www.jpr.nl
Contact
J.T. Stekelenburg
Email: stekelenburg@jpr.nl
Activities: A firm of 55 lawyers.

JPR Advocaten
Postbus 623, NL-7400 AP Deventer,
The Netherlands.
Tel: +31 (57) 061 4000
Fax: +31 (57) 061 8244
Website: www.jpr.nl
Contact
A.A.M. Spliet
Email: spliet@jpr.nl
Activities: A firm of 55 lawyers.

Loyens & Loeff N.V.
Fred. Roeskestraat 100, NL-1076 ED
Amsterdam; Mailing Address: PO Box 71170,
NL-1008 BD Amsterdam, The Netherlands.
Tel: +31 (20) 578 5785
Fax: +31 (20) 578 5810
Website: www.loyensloeff.com
Lawyers
Hendrik Van Druten
Tel: +31 (20) 578 5925
Email: hendrik.van.druten@loyensloeff.com
Vincent Vroom
Tel: +31 (20) 578 5984
Email: vincent.vroom@loyensloeff.com
Activities: (International) insolvency, turnaround and corporate recovery work. Specialised in litigation and advice for commercial banks, major creditors and lenders, liquidators and management.

PricewaterhouseCoopers
201 De Entree, NL-1101 HG Amsterdam,
The Netherlands.
Tel: +31 (20) 568 6607
Fax: +31 (20) 568 4915
Website: www.pwc.com/nl/brs
Activities: Extensive practical experience supporting troubled corporates and their stakeholders.

RESOR
Symphony Building, Gustav Mahlerplein 27,
NL-1082 MS Amsterdam, The Netherlands.
Tel: +31 (20) 570 9020
Fax: +31 (20) 570 9021
Email: info@resor.nl
Website: www.resor.nl
Lawyers/Owners
Prof. J. J. van Hees
Tel: +31 (20) 570 9024
Email: jako.vanhees@resor.nl
N.W A. Tollenaar
Tel: +31 (20) 570 9022
Email: nico.tollenaar@resor.nl
Activities: Implementing financial restructurings, assisting and advising all typical stakeholders in the insolvency arena, advising lenders in multi-creditor, multi jurisdictional workouts, distressed M&A, special expertise on cross-border matters.

Roland Berger Strategy Consultants B.V.
World Trade Center, Strawinskylaan 581,
NL-1077 XX Amsterdam, The Netherlands.
Tel: +31 (20) 796 0600
Fax: +31 (20) 796 0699
Website: www.rolandberger.com
Partner
Rene Seyger
Tel: +31 (20) 796 0620
Email: rene_seyger@nl.rolandberger.com
Activities: Roland Berger Strategy Consultants is a leading global strategy consultancy. Within their restructuring practice they focus on complex operational and financial restructurings/distressed M&A as well as insolvency support.

Simmons & Simmons
Claude Debussylaan 247,
NL-1082 MC Amsterdam, The Netherlands.
Tel: +31 (20) 722 2500
Fax: +31 (20) 722 2599
Website: www.simmons-simmons.com
Partners
Gerhard Gispen
Tel: +31 (20) 722 2324
Email:
gerhard.gispen@simmons-simmons.com
Christiaan Zijderveld
Tel: +31 (20) 722 2368
Email:
christiaan.zijderveld@simmons-simmons.com
Activities: Multi bank rescue, debt and equity restructurings, reorganisations, security enforcement, debt recovery, insolvency litigation, advice and litigation regarding D&O liability.

Stibbe
2001 Strawinskylaan, NL-1077 ZZ
Amsterdam; Mailing Address: PO Box 75640,
NL-1070 AP Amsterdam, The Netherlands.
Tel: +31 (20) 546 0606
Fax: +31 (20) 546 0123
Email: info@stibbe.nl
Website: www.stibbe.com
Contact
Karen Harmsen
Email: karen.harmsen@stibbe.com
Tel: +31 (20) 546 0159
Activities: A national and international insolvency and restructuring practice, advising, litigation and acting as trustee/administrator.

Udink & De Jong
Alexanderstraat 2, NL-2514 JL Den Haag,
The Netherlands.
Tel: +31 (70) 311 0711
Fax: +31 (70) 311 0722
Email: info@udink.nl
Website: www.udink.nl
Contact
M.C. Udink
Email: m.udink@udink.nl
Activities: Legal advisors, liquidators.

Van Doorne N.V.
Jachthavenweg 121, NL-1081 KM Amsterdam, The Netherlands.
Tel: +31 (20) 678 9123
Fax: +31 (20) 678 9589
Email: schaink@vandoorne.com
Website: www.vandoorne.com

Contacts
Paul R.W. Schaink
Harmke Willems

Activities: Acts as administrators or receivers, appointed by courts. Also deals in reorganisation and debt restructuring e.g Habitat, Versatel, UPC, Song Networks, TXU.

NEW ZEALAND

Bell Gully
Vero Centre, 48 Shortland Street, PO Box 4199, Auckland, New Zealand.
Tel: +64 (9) 916 8800
Fax: +64 (9) 916 8801
Email: info@bellgully.com
Website: www.bellgully.com

Chairman
Roger Partridge

Partner (Insolvency Practice Leader)
Murray Tingey
Email: murray.tingey@bellgully.com

Activities: Leader in insolvency, corporate restructuring, receivership and liquidation law in New Zealand.

Deloitte
Level 8, Deloitte House, 8 Nelson Street, Auckland, New Zealand.
Website: www.deloitte.com

Head of Restructuring Services
Rodney Pardington
Tel: +64 (9) 303 0705; 76 ext. 6705
Email: rpardington@deloitte.co.nz

Activities: Deloitte advises stakeholders in underperforming or distressed businesses including creditors and directors. Services include insolvency appointments, financial restructuring, turnaround and business reviews.

KordaMentha
Level 16, Tower Centre, 45 Queen Street, Auckland 1010, New Zealand.
Tel: +64 (9) 307 7865
Fax: +64 (9) 377 7794
Email: nz@kordamentha.com
Website: www.kordamentha.com

Partners
Michael Stiassny
Brendon Gibson
Grant Graham

McDonald Vague
Level 4, 143 Nelson St., Auckland, Mailing Address: PO Box 6092, Wellesley Street Post Office, Auckland, New Zealand.
Tel: +64 (9) 303 0506
Fax: +64 (9) 303 0508
Email: insol@mvp.co.nz
Website: www.mvp.co.nz

Partners
Roy Horrocks
Tel: +64 (9) 306 3332
Email: rhorrocks@mvp.co.nz
Peri M. Finnigan
Tel: +64 (9) 303 9519
Email: pfinnigan@mvp.co.nz
Boris Van Delden
Tony Maginness

Activities: Liquidations, receiverships, solvent liquidations, company compromises, part 5 proposals, alternatives to bankruptcy, voluntary administration, crisis management, restructuring.

PPB Advisory
Level 11, DLA Phillips, Fox Tower, National Bank Centre, 205-209 Queen Street, Auckland, New Zealand.
Tel: +64 (9) 304 1300
Fax: +64 (9) 304 1311
Website: www.ppbadvisory.com

CEO
Stephen Purcell

Partner
David Webb
Email: dwebb@ppbadvisory.com

Activities: PPB Advisory is a leading professional advisory firm specialising in corporate advisory, restructuring and turnarounds, forensics, and insolvency services. The firm employs over 300 people, including 35 partners, across Australia and New Zealand.

NIGERIA

Abdulai, Taiwo & Co.
Goodwill House, 278 Ikorodu Road, PO Box 536, YABA, Lagos, Nigeria.
Tel: +234 (1) 2790737
Fax: +234 (1) 2790739
Email: law@abdulaitaiwo.com
Website: www.abdulaitaiwo.com

Managing Partner
Ladi Taiwo

Partner
Akin Osinbajo

Kenna Partners
Plot 8, Block 16, Ogunyemi Road, Off Palace Road, Oniru, PO Box 73002 Victoria Island, Lagos, Nigeria.
Tel: +234 (1) 8445051/2
Email: oadesanya@kennapartners.com
Website: www.kennapartners.com

Principal Partner
Fabian Ajogwu, SAN

Associate
Oyinkan Adesanya

Activities: Debt restructuring advice, legal transactions, LBOs, due diligence.

NORWAY

BA-HR
Stranden 1A, N-0250 Oslo; Mailing Address: PO Box 1524 Vika, N-0117 Oslo, Norway.
Tel: +47 2283 0270
Fax: +47 2283 0271
Email: pose@bahr.no
Website: www.bahr.no

Partners
Richard Sjøqvist
Email: ric@bahr.no
Anders Gullåsen
Email: ang@bahr.no

Deloitte
Karenslyst alle 20, N-0213 Oslo, Norway.
Website: www.deloitte.com

Head of Restructuring Services
Andreas Enger
Tel: +47 2327 9534
Email: aenger@deloitte.no

Activities: Deloitte advises stakeholders in underperforming or distressed businesses including creditors and directors. Services include insolvency appointments, financial restructuring, turnaround and business reviews.

Simonsen Fýyen Advokatfirma DA
PO Box 6641, St. Olavs Pl., N-0129 Oslo, Norway.
Tel: +47 2195 5500
Fax: +47 2195 5501
Email: post@simonsenlaw.no
Website: www.simonsenlaw.no

Partner
Claus R. Flinder

Wikborg Rein
Pb 1513 Vika, N-0117 Oslo, Norway.

Partners
Leif Petter Madsen
Marius Gisvold

Activities: Wikborg Rein's Restructuring Group assists banks, borrowers, management and creditors in achieving arrangements that provide a sound basis for continued operations.

OMAN

S & A Law Firm
First Floor Al Fannar Building, Building No. 569, Way No. 3009, Shatti Al Qurum, PO Box 3552, Ruwi PC 112, Sultanate of Oman.
Tel: +968 2460 7568
Fax: +968 2457 3097
Website: www.snrdenton.com

Partner
Abdelrahman Elnafie

SNR Denton & Co, Oman Branch
Second Floor Al Fannar Building, Shatti Al Qurum, PO Box 3552, Ruwi PC 112, Sultanate of Oman.
Tel: +968 2457 3000
Fax: +968 2457 3097
Website: www.snrdenton.com

Partner
David Courtney-Hatcher

PAPUA NEW GUINEA

Blake Dawson
Mogoru Moto Building, Champion Parade, Port Moresby, Papua New Guinea.
Tel: +675 309 2000
Fax: +675 309 2099
Website: www.blakedawson.com

National Practice Head, Restructuring & Insolvency
James Marshall
Tel: +61 (2) 9258 6508
Email: james.marshall@blakedawson.com

Partner, Restructuring & Insolvency
Ray Mainsbridge
Tel: +61 (2) 9258 6049
Email: ray.mainsbridge@blakedawson.com

Activities: Corporate reconstruction and insolvency law which includes advising both lenders and debtors on formal and informal schemes of arrangement, and administrators of insolvent companies and creditors on the enforcement of securities and other rights.

Gadens Lawyers
Pacific Place, Cnr Musgrave Street & Champion Parade, Port Moresby, Papua New Guinea.
Tel: +675 321 1033
Fax: +675 321 1885
Email: gadenspng@gadens.com.pg
Website: www.gadens.com.au

Contact
Jason Brooks
Tel: +675 7689 3801
Fax: +675 321 1885
Email: jbrooks@gadens.com.pg

Activities: Gadens Lawyers regularly advises insolvency practitioners and financiers on a range of issues including informal workouts, administration, appointments and re-documentation.

Posman Kua Aisi, Lawyers

PO Box 228, Port Moresby,
Papua New Guinea.
Tel: +675 320 0127
Fax: +675 320 0361
Email: posman.kua@posman.com

Partner
Rio Fiocco

Activities: Company liquidations and receivership-legal advice in Papua New Guinea.

POLAND

Chadbourne & Parke

Radzikowski, Szubielska i Wspólnicy sp.k., ul. Emilii Plater 53, 00-113 Warsaw, Poland.
Tel: +48 (22) 520 5000
Fax: +48 (22) 520 5001
Email: warsaw@chadbourne.com
Website: www.chadbourne.com

Managing Partner
Wlodzimierz Radzikowski
Email: wradzikowski@chadbourne.com

Activities: Chadbourne & Parke offers a full range of services in cross-border bankruptcies and financial restructurings, business restructurings and insolvencies.

Garrigues Polska

Warsaw Financial Center- Emilii Plater, 53, 00-113 Warsaw, Poland.
Tel: +48 (22) 540 6100/463 6100
Fax: +48 (22) 540 6101/463 6101
Website: www.garrigues.com

Head of Garrigues Polska
Carlos Rapallo
Email: carlos.rapallo@garrigues.com

Activities: Their team of leading lawyers has decades of experience in turn-around, corporate recovery, refinancing and all types of insolvencies, including cross-border insolvency. It comprises experts with a background in law or economics, who work together in contentious and non-contentious insolvency, affecting debtors, banks or creditors for troubled companies.

Hogan Lovells (Warszawa) LLP

ul. Nowogrodzka 50, 00 695 Warsaw, Poland.
Tel: +48 (22) 529 2900
Fax: +48 (22) 529 2901
Email: enquiry@hoganlovells.com
Website: www.hoganlovells.com

Partner
Marek Wroniak

Activities: Experts advising on business restructuring and insolvency, including corporate restructuring, formal insolvencies and creditor representation.

Noerr

Al. Armii Ludowej 26, 00-609 Warsaw, Poland.
Tel: +48 (22) 579 3060
Fax: +48 (22) 579 3070
Email: info@noerr.com
Website:www.noerr.com

Contact
Dr. Jacek Bak
Email: jacek.bak@noerr.com

Activities: Advising shareholders, companies, creditors and investors regarding insolvency/restructuring proceedings. Trustee for secured creditors. Advice to insolvency administrators.

Roland Berger Strategy Consultants Sp.z.o.o.

Plac Pilsudskiego 3, 00-078 Warsaw, Poland.
Tel: +48 (22) 323 7460
Fax: +48 (22) 323 7470
Website: www.rolandberger.com

Partner
Krzysztof Badowski
Tel: +48 (22) 323 7414
Email:
krzysztof_badowski@pl.rolandberger.com

Activities: Roland Berger Strategy Consultants is a leading global strategy consultancy. Within their restructuring practice they focus on complex operational and financial restructurings/distressed M&A as well as insolvency support.

Salans

Rondo ONZ 1, 00-124 Warsaw, Poland.
Tel: +48 (22) 242 5252
Fax: +48 (22) 242 5242
Email: warsaw@salans.com
Website: www.salans.com

Partner
Anna Maria Pukszto
Tel: +48 (22) 242 5699
Email: apukszto@salans.com

Managing Partner
Tomasz Dabrowski
Tel: +48 (22) 242 5601
Email: tdabrowski@salans.com

Activities: Offer full range of legal services in the fields of corporate restructuring, bankruptcy and workout matters as well as insolvency disputes representing lenders, debtors, and institutional and individual creditors.

Squire Sanders Święcicki Krześniak sp.k.

Rondo ONZ 1, 00-124 Warsaw, Poland.
Tel: +48 (22) 395 5500
Fax: +48 (22) 395 5501
Website: www.squiresanders.com

Restructuring & Insolvency Global Practice Group Leader
Stephen D. Lerner

Local Restructuring & Insolvency Contact
Maciej Szwedowski

Activities: The restructuring & insolvency group has over 100 restructuring and insolvency lawyers who represent financial institutions, distressed companies, insolvency practitioners, creditors' committees, investors, and strategic and financial buyers of troubled companies.

White & Case W. Danilowicz, W. Jurcewicz i Wspólnicy - Kancelaria Prawna sp.k.

Marszalkowska 142, 00-061 Warsaw, Poland.
Tel: +48 (22) 505 0100
Fax: +48 (22) 505 0400
Website: www.whitecase.com

Partner
Piotr Galuszynski
Tel: +48 (22) 505 0183
Email: pgaluszynski@whitecase.com

Activities: White & Case is a global law firm with over 2000 lawyers in 26 countries. Their financial restructuring and insolvency group is a worldwide practice consisting of over 160 restructuring and insolvency lawyers. They are a globally recognised leader in complex cross-border insolvencies and workouts, and they represent clients in all aspects of restructurings, workouts and insolvencies, including both transactional and litigation matters. Recent representations include many of the world's largest restructuring cases and out-of-court workouts.

PORTUGAL

Dein Advogados

Rua Castilho 1, 5° Esq,
P-1250-066 Lisbon, Portugal.
Tel: +351 (21) 388 4095
Fax: +351 (21) 388 1955
Email: dein@dein.pt
Website: www.dein.pt

Contact
Cristina Dein

Activities: Cross-border insolvencies involving companies and private persons, restructuring, advice and representation of creditors and insolvency administrators.

Deloitte

Edifício Atrium Saldanha, Praça Duque de Saldanha 1, piso 7°, P-1050-094 Lisboa, Portugal.
Website: www.deloitte.com

Head of Restructuring Services
Joaquim Paulo
Tel: +351 (21) 042 2502
Email: jpaulo@deloitte.pt

Activities: Deloitte advises stakeholders in underperforming or distressed businesses including creditors and directors. Services include insolvency appointments, financial restructuring, turnaround and business reviews.

Garrigues Portugal, S.L.

Avenida da Boavista, 3523, Ed. Aviz, 2ª,
P-4100-139 Oporto, Portugal.
Tel: +351 (22) 615 8860
Fax: +351 (22) 615 8888
Website: www.garrigues.com

Head of Oporto Office
Miguel Reis
Email: miguel.c.reis@garrigues.com

Activities: Their team of leading lawyers has decades of experience in turn-around, corporate recovery, refinancing and all types of insolvencies, including cross-border insolvency. It comprises experts with a background in law or economics, who work together in contentious and non-contentious insolvency, affecting debtors, banks or creditors for troubled companies.

Garrigues Portugal, S.L.

Avenida Engenheiro Duarte Pacheco
Amoreiras, Torre 1, piso 15°,
P-1070-101 Lisboa, Portugal.
Tel: +351 (21) 382 1200
Fax: +351 (21) 382 1290
Website: www.garrigues.com

Head of Portugal Office
Isabel Martínez de Salas
Email: isabel.martinez.de.salas@garrigues.com

Activities: Their team of leading lawyers has decades of experience in turn-around, corporate recovery, refinancing and all types of insolvencies, including cross-border insolvency. It comprises experts with a background in law or economics, who work together in contentious and non-contentious insolvency, affecting debtors, banks or creditors for troubled companies.

KPMG Portugal

Edifício Monumental Av. Praia da Vitória, 71 - A, 11°, P-1069-006 Lisbon, Portugal
Tel: +351 (210) 110 000
Fax: +351 (210) 110 121
Website: www.kpmg.pt

Head of Restructuring
José Luís Silva

Macedo Vitorino & Associados
Rua de Alecrim 26-E 1200-018,
Lisbon, Portugal.
Tel: +351 (21) 324 1900
Fax: +351 (21) 324 1929
Email: mva@macedovitorino.com
Website: www.macedovitorino.com

Senior Partners
António de Macedo Vitorino
Tel: +351 (21) 324 1911
Email: avitorino@macedovitorino.com
João de Macedo Vitorino
Tel: +351 (21) 324 1910
Email: jvitorino@macedovitorino.com

Activities: MVA has expertise in defending the rights of secured and unsecured creditors in debt recovery proceedings arising from complex insolvency procedures. MVA also acts for troubled companies and investors in restructurings.

PricewaterhouseCoopers - Assessoria de Gestão, Lda
Palácio Sottomayor - Rua Sousa Martins,
1, 2°, P-1069-316 Lisbon, Portugal.
Tel: +351 (21) 359 9000
Fax: +351 (21) 359 9999
Website: www.pwc.com/pt

Partners
Vijay Chopra
Tel: +351 (21) 359 9142
Email: vijay.chopra@pt.pwc.com
Patrique Fernandes
Tel: +351 (21) 359 9142
Email: patrique.fernandes@pt.pwc.com

Activities: PwC provides advice to businesses in distress and to their creditors, including independent business reviews, restructuring plans and insolvency consulting.

Roland Berger Consultores de Estratégia, Lda.
Rua Castilho 165, 2nd Floor,
P-1070-050 Lisbon, Portugal.
Tel: +351 (21) 356 7600
Fax: +351 (21) 352 4360
Website: www.rolandberger.com

Partner
Antonio Bernardo
Tel: +351 (21) 356 7601
Email:
antonio_bernardo@pt.rolandberger.com

Activities: Roland Berger Strategy Consultants is a leading global strategy consultancy. Within their restructuring practice they focus on complex operational and financial restructurings/distressed M&A as well as insolvency support.

Vieira de Almeida & Associados
Avenida Duarte Pacheco 26, P-1070-110
Lisbon, Portugal.
Tel: +351 (21) 311 3400
Fax: +351 (21) 311 3406
Email: lisboa@vda.pt
Website: www.vda.pt

Partner
Frederico Gonçalves Pereira

Media Relations
Rita Proença Varáo

Activities: Litigation and arbitration, corporate crime.

QATAR

SNR Denton
Floor 15, Al Fardan Office Tower,
61 Al Funduq Street, West Bay,
P.O. Box 64057, Doha, State of Qatar.
Tel: +974 4459 8960
Fax: +974 4459 8961
Website: www.snrdenton.com

Partner
Leigh Hall
Tel: +974 4459 8962

WongPartnership LLP Licensed by the QFCA
Office 12-20, Amwal Tower, West Bay,
PO Box No. 15397, Doha, Qatar
Tel: +974 491 2332
Fax: +974 491 2339
Email: contactus@wongpartnership.com
Website: www.wongpartnership.com

Senior Partner
Alvin Yeo

Senior Counsel, Partners
Chou Sean Yu
Manoj Pillay Sandrasegara
Mark Choy

Activities: The Practice specialises in advising corporates and financial institutions on a full range of debt restructuring and liability management issues.

ROMANIA

Alpha Bank Romania
Calea Dorobanti, Nr. 237B, Bucharest,
Sector 1, Romania.
Tel: +40 (21) 209 2100
Fax: +40 (21) 231 6570
Email: pr@alphabank.ro
Website: www.alphabank.ro

Executive President
Sergiu Oprescu
Tel: +40 (21) 455 7001

First Executive Vice President
Stere Farmache
Tel: +40 (21) 455 7006

Activities: Universal bank, offering products and services for individuals and companies.

Noerr
Str. General Constantin, Budisteanu nr. 28 C,
sector 1, 010775 Bucharest, Romania.
Tel: +40 (21) 312 5888
Fax: +40 (21) 312 5889
Email: info@noerr.com
Website: www.noerr.com

Contact
Prof. Dr. Jörg Menzer
Email: joerg.menzer@noerr.com

Activities: Advising shareholders, companies, creditors and investors regarding insolvency/restructuring proceedings. Trustee for secured creditors. Advice to insolvency administrators.

Roland Berger Strategy Consultants SRL
Str. Dr. Burghelea Nr. 5,
024031 Bucharest, Romania.
Tel: +40 (21) 306 0500
Fax: +40 (21) 306 0510
Website: www.rolandberger.com

Partner
Codrut Pascu
Email: codrut_pascu@ro.rolandberger.com

Activities: Roland Berger Strategy Consultants is a leading global strategy consultancy. Within their restructuring practice they focus on complex operational and financial restructurings/distressed M&A as well as insolvency support.

Studio Legale Sutti
Bd. Unirii 2, Bl. 8A, Apt. 25, Sector 4,
751012 Bucharest, Romania.
Tel: +40 (21) 337 0730
Fax: +40 (21) 337 3171
Email: maildesk@sutti.com
Website: www.sutti.com

Resident Partner
Hugo Vitzman

Activities: International corporate recovery, advising multi-national reorganisations, corporate restructuring, creditors' rights and compliance issues.

White & Case, Pachiu SCA
Nicolae Filipescu Street 45,
020961 Bucharest, Romania.
Tel: +40 (31) 224 8400
Fax: +40 (31) 224 8401
Website: www.whitecase.com

Executive Partner
Delia Pachiu
Tel: +40 (31) 224 8411
Email: dpachiu@whitecase.com

Activities: White & Case is a global law firm with over 2000 lawyers in 26 countries. Their financial restructuring and insolvency group is a worldwide practice consisting of over 160 restructuring and insolvency lawyers. They are a globally recognised leader in complex cross-border insolvencies and workouts, and they represent clients in all aspects of restructurings, workouts and insolvencies, including both transactional and litigation matters. Recent representations include many of the world's largest restructuring cases and out-of-court workouts.

Wolf Theiss si asociatii SCA
Bucharest Corporate Center, 58-60.
Gheorghe Polizu Str. Floor 12-13, Sector 1,
011062 Bucharest, Romania
Tel: +40 (21) 308 8100
Fax: +40 (21) 308 8125
Email: bucuresti@wolftheiss.com
Website: www.wolftheiss.com

Director
Bryan Jardine

Activities: Advising international clients in all phases of restructuring projects, including advising and representing banks and material vendors in insolvency proceedings.

RUSSIA

Alvarez & Marsal CIS, LLP
Sadovnicheskaya ul. 14/2, Moscow 115035,
Russian Federation.
Tel: +7 (495) 988 7745
Email: nkozmina@alvarezandmarsal.com
Website: www.alvarezandmarsal.com

Managing Directors
Maxim Frangulov
Email: mfrangulov@alvarezandmarsal.com
Alexei Evgenev
Email: aevgenev@alvarezandmarsal.com

Activities: Leading global crisis and interim management firm.

Chadbourne & Parke LLP
Riverside Towers 52/5 Kosmodamianskaya
Naberezhnaya, Moscow 115054, Russian
Federation.
Tel: +7 (495) 974 2424
Fax: +7 (495) 974 2425
Email: moscow@chadbourne.com
Website: www.chadbourne.com

Managing Partner
Jennifer Handz
Email: jhandz@chadbourne.com

Activities: Chadbourne & Parke LLP offers a full range of services in cross-border bankruptcies and financial restructurings, business restructurings and insolvencies.

Clifford Chance CIS Limited
Ul. Gasheka, 6, 125047 Moscow,
Russian Federation.
Tel: +7 (495) 258 5050
Fax: +7 (495) 258 5051
Website: www.cliffordchance.com

Partners
Jan ter Haar
Tel: +7 (495) 725 6446
Email: jan.terhaar@cliffordchance.com
Logan Wright
Tel: +7 (495) 725 6430
Email: logan.wright@cliffordchance.com
Victoria Bortkevicha
Tel: +7 (495) 725 6406
Email:
victoria.bortkevicha@cliffordchance.com
Activities: The global restructuring and insolvency group advises lenders, other creditors, debtors, shareholders and investors in complex financial restructurings and cross-border insolvencies.

Dewey & LeBoeuf LLP
Legend Business Center, Tsvetnoy Bulvar, 2, 127051 Moscow, Russian Federation.
Tel: +7 (495) 212 2500
Fax: +7 (495) 212 2400
Email: moscow@dl.com
Website: www.dl.com
Managing Partner
Brian Zimbler
Activities: Legal advice in insolvency, workout and restructuring projects of all types in Russia and CIS.

Hogan Lovells (CIS)
Voznesensky Pereulok 22, 5th Floor, Usadba Center, 125009 Moscow, Russian Federation.
Tel: +7 (495) 933 3000
Fax: +7 (495) 933 3001
Email: enquiry@hoganlovells.com
Website: www.hoganlovells.com
Partners
Oxana Balayan
Michael Pugh
Activities: Experts advising on business restructuring and insolvency, including corporate restructuring, formal insolvencies and creditor representation.

KPMG LIMITED
10 Presnenskaya Naberezhnaya, Moscow 123317, Russian Federation.
Tel: +7 (495) 937 4477
Fax: +7 (495) 937 4499
Website: www.kpmg.ru
Head of Advisory
Tony Thompson
Tel: +7 (495) 937 4403
Email: tthompson@kpmg.ru
Partner, Transactions & Restructuring
Stephen Miller
Tel: +7 (495) 937 4448
Email: stephenmiller@kpmg.ru
Activities: Full range of financial restructuring advisory services, for stressed and distressed situations, both creditor and company side.

Noerr
1-ya Brestskaya Street 29, 125047 Moscow, Russian Federation.
Tel: +7 (495) 799 5696
Fax: +7 (495) 799 5697
Email: info@noerr.com
Website: www.noerr.com
Contact
Björn Paulsen
Email: bjoern.paulsen@noerr.com
Activities: Advising shareholders, companies, creditors and investors regarding insolvency/restructuring proceedings. Trustee for secured creditors. Advice to insolvency administrators.

Roland Berger Strategy Consultants GmbH
7 Gasheka Street, Structure 1, Ducat Place II, 123056 Moscow, Russian Federation.
Tel: +7 (495) 287 9246
Fax: +7 (495) 287 9247
Website: www.rolandberger.com
Partner
Dr. Uwe Kumm
Email: uwe_kumm@ru.rolandberger.com
Activities: Roland Berger Strategy Consultants is a leading global strategy consultancy. Within their restructuring practice they focus on complex operational and financial restructurings/distressed M&A as well as insolvency support.

Skadden, Arps, Slate, Meagher & Flom LLP & Affiliates
Ducat Place III, Gasheka Street 6, 125047 Moscow, Russian Federation.
Tel: +7 (495) 797 4600
Fax: +7 (495) 797 4601
Website: www.skadden.com
Partners
Bruce M. Buck
Pranav L. Trivedi
Linda Davies
Alexey V. Kiyashto
Dmitri V. Kovalenko
Activities: Worldwide practice serving corporations and their principal creditors and investors by providing value-added legal solutions in bankruptcy and restructuring situations.

SNR Denton
Bolshaya Dmitrovka 7/5, Building 2, Moscow 125009, Russian Federation.
Tel: +7 (495) 916 9636
Fax: +7 (495) 916 9637
Website: www.snrdenton.com
Partners
Alexander Barmin
Tel: +7 (495) 229 2333
Email: alexander.barmin@snrdenton.com
Doran Doeh
Tel: +7 (495) 229 2333
Mob: +7 (903) 968 0358
Email: doran.doeh@snrdenton.com
Myles Mantle
Email: myles.mantle@snrdenton.com
Anna Otkina
Tel: +7 (495) 229 2333
Email: anna.otkina@snrdenton.com

Squire Sanders Moscow LLC
4, bld. 2 Romanov pereulok, 125009, Moscow, Russian Federation.
Tel: +7 (495) 258 5250
Fax: +7 (495) 258 5251
Website: www.squiresanders.com
Restructuring & Insolvency Global Practice Group Leader
Stephen D. Lerner
Local Restructuring & Insolvency Contacts
Sergey A. Treshchev
Patrick J. Brooks
Alexander N. Akhmetbekov
Nikita Beylin
Activities: The restructuring & insolvency group has over 100 restructuring and insolvency lawyers who represent financial institutions, distressed companies, insolvency practitioners, creditors' committees, investors, and strategic and financial buyers of troubled companies.

Standard & Poor's
4/7 Vozdvizhenka Street, Building 2, 7th Floor, 125009 Moscow, Russian Federation.
Tel: +7 (495) 783 4000
Fax: +7 (495) 783 4001

White & Case LLC
Romanov Pereulok 4, 125009 Moscow, Russia.
Tel: +7 (495) 787 3000
Fax: +7 (495) 787 3001
Website: www.whitecase.com
Partners
Maya Melnikas
Tel: +7 (495) 787 3017
Email: mmelnikas@whitecase.com
Eric Michailov
Tel: +7 (495) 787 3018
Email: emichailov@whitecase.com
Irina Nesvetova
Tel: +7 (495) 787 3012
Email: inesvetova@whitecase.com
Igor Ostapets
Tel: +7 (495) 787 3019
Email: iostapets@whitecase.com
Hermann Schmitt
Tel: +7 (495) 787 3005
Email: hschmitt@whitecase.com
Thomas McDonald
Tel: +7 (495) 787 3033
Email: thomas.mcdonald@whitecase.com
Counsel
Alexey Barnashov
Tel: +7 (495) 787 3007
Email: abarnashov@whitecase.com
Activities: White & Case is a global law firm with over 2000 lawyers in 26 countries. Their financial restructuring and insolvency group is a worldwide practice consisting of over 160 restructuring and insolvency lawyers. They are a globally recognised leader in complex cross-border insolvencies and workouts, and they represent clients in all aspects of restructurings, workouts and insolvencies, including both transactional and litigation matters. Recent representations include many of the world's largest restructuring cases and out-of-court workouts.

SAUDI ARABIA

EK Partners & Al-Enezee Legal Counsel
Jazeera Compound Unit #4; Mailing Address: PO Box 27483, Riyadh, Kingdom of Saudi Arabia.
Tel: +966 (1) 276 7372
Fax: +966 (1) 276 6960
Website: www.squiresanders.com
Restructuring & Insolvency Global Practice Group Leader
Stephen D. Lerner
Local Restructuring & Insolvency Contacts
Kevin T. Connor
Ziad G. El-Khoury
Activities: The restructuring & insolvency group has over 100 restructuring and insolvency lawyers who represent financial institutions, distressed companies, insolvency practitioners, creditors' committees, investors, and strategic and financial buyers of troubled companies.

The Law Firm of Wael A. Alissa in association with SNR Denton & Co
Tatweer Towers, Tower 1, Level 8, King Fahad Road, Opp - The Ministry of Municipality & Rural Affairs, PO Box: 59490, Riyadh 11525, Kingdom of Saudi Arabia.
Tel: +966 (1) 200 8678
Fax: +966 (1) 200 8679
Website: www.snrdenton.com
Partner
Amgad T. Husein

SERBIA

Studio Legale Sutti
Tadeusa Koscuska, 8, 11000 Belgrade, Serbia.
Tel: +381 (11) 303 1227
Fax: +381 (11) 303 1229
Email: belgrade@sutti.com
Website: www.sutti.com

Resident Partner
Nenad Milovanovic

Contact
Mirko Jovanovic

Activities: International corporate recovery, advising multi-national reorganisations, corporate restructuring, creditors' rights and compliance issues.

Wolf Theiss D.O.O
PC Ušce, Bulevar Mihajla Pupina 6,
11070 Novi Beograd, Serbia.
Tel: +381 (11) 3302 900
Fax: +381 (11) 3302 925
Email: beograd@wolftheiss.com
Website: www.wolftheiss.com

Director
Miroslav Stojanovic

Activities: Advising international clients in all phases of restructuring projects, including advising and representing banks and material vendors in insolvency proceedings.

SINGAPORE

Blake Dawson
Unit #14-00, Level 14, ASO Building,
NO.8 Robinson Road, Singapore 048544.
Tel: +65 6438 7886
Fax: +65 6438 7885
Website: www.blakedawson.com

National Practice Head, Restructuring & Insolvency
James Marshall
Tel: +61 (2) 9258 6508
Email: james.marshall@blakedawson.com

Partner
Ray Mainsbridge
Tel: +61 (2) 9258 6049
Email: ray.mainsbridge@blakedawson.com

Activities: Corporate reconstruction and insolvency law which includes advising both lenders and debtors on formal and informal schemes of arrangement, and administrators of insolvent companies and creditors on the enforcement of securities and other rights.

Clifford Chance
19th Floor, One George Street,
Singapore 049145.
Tel: +65 6416 8000
Fax: +65 6535 6855
Website: www.cliffordchance.com

Partners
Nish Shetty
Tel: +65 6410 2285
Email: nish.shetty@cliffordchance.com
Andrew Brereton
Tel: +65 6410 2279
Email: andrew.brereton@cliffordchance.com

Activities: The global restructuring and insolvency group advises lenders, other creditors, debtors, shareholders and investors in complex financial restructurings and cross-border insolvencies.

Deloitte
6 Shenton Way, #32-00, DBS Building Tower Two, Singapore.
Website: www.deloitte.com

Head of Restructuring Services
Chee Chong Tam
Tel: +65 6216 3268
Email: ctam@deloitte.com

Activities: Deloitte advises stakeholders in underperforming or distressed businesses including creditors and directors. Services include insolvency appointments, financial restructuring, turnaround and business reviews.

Drew & Napier LLC
10 Collyer Quay, #10-01 Ocean Financial Centre, Singapore 049315.
Tel: +65 6535 0733
Fax: +65 6535 4864
Website: www.drewnapier.com

Director, Co Head of Restructuring
Sushil Nair
Tel: +65 6531 2410
Email: sushil.nair@drewnapier.com

Director
Julian Kwek
Tel: +65 6531 2451
Email: julian.kwek@drewnapier.com

Activities: The restructuring team is focused on the regional and internatioanl market, particularly in Indonesia, China and Singapore.

Hogan Lovells Lee & Lee
50 Collyer Quay, #10-01 OUE Bayfront,
Singapore 049321.
Tel: +65 6538 0900
Fax: +65 6538 7077
Email: enquiry@hoganlovells.com
Website: www.hoganlovells.com

Activities: Experts advising on business restructuring and insolvency, including corporate restructuring, formal insolvencies and creditor representation.

KordaMentha
30 Robinson Road, Robinson Towers #12-01,
Singapore 048546 .
Tel: +65 6593 9333
Fax: +65 6593 9399
Email: sing.info@kordamentha.com
Website: www.kordamentha.com

Partners
Ban Chuan Neo
Cameron Duncan
Matthew Fleming

Latham & Watkins LLP
#42-02 Republic Plaza, 9 Raffles Place,
Singapore 048619.
Tel: +65 6536 1161
Fax: +65 6536 1171
Website: www.lw.com

Partners
David Miles
Joe Bevash
Clarinda Tjia-Dharmadi

Contacts
John Houghton
Tel: +44 (20) 7670 1000
Jan Baker
Tel: +1 (212) 906 1200
Mitchell Seider
Tel: +1 (212) 906 1200
Peter Gilhuly
Tel: +1 (213) 485 1234

Activities: Global law firm with more than 2000 lawyers in 31 offices worldwide, including over 500 lawyers throughout Europe. Offers a full range of services in insolvency, workouts and restructurings and is acknowledged as a leading bankruptcy lender law firm.

Nishimura & Asahi
80 Robinson Road, #10-01A,
Singapore 068898.
Tel: +65 6420 6395
Email: singapore@juristsoverseas.com

Roland Berger Strategy Consultants Pte. Ltd.
One Raffles Quay, North Tower, #25-00,
Singapore 048583.
Tel: +65 6622 5478
Fax: +65 6622 5761
Website: www.rolandberger.com

Partner
Thomas Klotz
Tel: +65 8571 7558
Email: thomas_klotz@sg.rolandberger.com

Activities: Roland Berger Strategy Consultants is a leading global strategy consultancy. Within their restructuring practice they focus on complex operational and financial restructurings/distressed M&A as well as insolvency support.

Shook Lin & Bok LLP
#18-00 AIA Tower, 1 Robinson Road,
Singapore 048542.
Tel: +65 6535 1944
Fax: +65 6535 8577
Email: slb@shooklin.com
Website: www.shooklin.com

Senior Partner
Sarjit Singh Gill, S.C

Activities: Involved with receiverships, judicial management, schemes of arrangement and restructurings, both domestic and cross-border.

Skadden, Arps, Slate, Meagher & Flom
6 Battery Road, Suite 23-02,
Singapore 049909.
Tel: +65 6434 2900
Fax: +65 6434 2988
Website: www.skadden.com

Partner
Rajeev P. Duggal

Activities: Worldwide practice serving corporations and their principal creditors and investors by providing value-added legal solutions in bankruptcy and restructuring situations.

SNR Denton
Marsh & McLennan Centre, 18 Cross Street,
#07-06/07, Singapore 048423.
Tel: +65 6532 1024
Fax: +65 6532 1165
Website: www.snrdenton.com

Partner
Matthew Cox

Stamford Law Corporation
10 Collyer Quay, #27-00, Ocean Financial Centre, Singapore 049315.
Tel: +65 6389 3000
Fax: +65 6389 3099
Website: www.stamfordlaw.com.sg

Directors
Tan Chuan Thye
Email: chuanthye.tan@stamfordlaw.com.sg
Susan Kong
Email: susan.kong@stamfordlaw.com.sg
Lean Min-tze
Email: mintze.lean@stamfordlaw.com.sg
Daniel Lim
Email: daniel.lim@stamfordlaw.com.sg

Activities: Acting in many high profile insolvency/ restructuring of companies (examples include APP, CAO, Lehman, Mira and Jaya), as counsel for companies, creditors or insolvency professionals.

Standard & Poor's
30 Cecil Street, Prudential Tower,
17th Floor, Singapore 049712.
Tel: +65 6438 2881
Fax: +65 6438 2320

White & Case Pte. Ltd.
50 Raffles Place, #30-00, Singapore Land Tower, Singapore 048623.
Tel: +65 6225 6000
Fax: +65 6225 6009
Website: www.whitecase.com

Partners
Kate Allchurch
Tel: +65 6347 1325
Email: kallchurch@whitecase.com
Guan Feng Chen
Tel: +65 6347 1327
Email: gchen@whitecase.com
Jamie Thomas
Tel: +65 6347 1381
Email: jamiethomas@whitecase.com

Activities: White & Case is a global law firm with over 2000 lawyers in 26 countries. Their financial restructuring and insolvency group is a worldwide practice consisting of over 160 restructuring and insolvency lawyers. They are a globally recognised leader in complex cross-border insolvencies and workouts, and they represent clients in all aspects of restructurings, workouts and insolvencies, including both transactional and litigation matters. Recent representations include many of the world's largest restructuring cases and out-of-court workouts.

WongPartnership LLP
63 Market Street, #02-01, Singapore 048942.
Tel: +65 6416 8000
Fax: +65 6532 5722
Email: contactus@wongpartnership.com
Website: www.wongpartnership.com.\n

Senior Partner
Alvin Yeo

Senior Counsel, Partners
Chou Sean Yu
Manoj Pillay Sandrasegara
Mark Choy

Activities: The Practice specialises in advising corporates and financial institutions on a full range of debt restructuring and liability management issues.

SLOVAK REPUBLIC

Glatzová & Co., v.o.s.
Apollo Business Center, Prievozská 4/B, SK-821 09 Bratislava, Slovak Republic.
Tel: +421 (2) 3211 3038
Fax: +421 (2) 3214 4148
Email: office.sk@glatzova.com
Website: www.glatzova.com

Partner, Head of Practice Group
Dr. Martin Dancisin
Email: martin.dancisin@glatzova.com

Associate
Lucia Regecová
Email: lucia.regecova@glatzova.com

Activities: Restructuring and refinancing of major global groups, representation of creditors and restructuring of insolvent Slovak entities.

Noerr
AC Diplomat, Palisády 29/A, SK-811 06 Bratislava, Slovak Republic.
Tel: +421 (2) 5910 1010
Fax: +421 (2) 5910 1011
Email: info@noerr.com
Website: www.noerr.com

Contact
Pavol Rak
Email: pavol.rak@noerr.com

Activities: Advising shareholders, companies, creditors and investors regarding insolvency/restructuring proceedings. Trustee for secured creditors. Advice to insolvency administrators.

Squire Sanders s.r.o.
Zochova 5, SK-811 03 Bratislava, Slovak Republic.
Tel: +421 (2) 5930 3411
Fax: +421 (2) 5930 3415
Website: www.squiresanders.com

Restructuring & Insolvency Global Practice Group Leader
Stephen D. Lerner

Local Restructuring & Insolvency Contact
Julian Juhasz

Activities: The restructuring & insolvency group has over 100 restructuring and insolvency lawyers who represent financial institutions, distressed companies, insolvency practitioners, creditors' committees, investors, and strategic and financial buyers of troubled companies.

White & Case s.r.o
Hlavné námestie 5, SK-811 01 Bratislava, Slovak Republic.
Tel: +421 (2) 5441 5100
Fax: +421 (2) 5441 6100
Website: www.whitecase.com

Partners
Marek Staron
Tel: +421 (2) 5920 6312
Email: mstaron@whitecase.com
Silvia Belovicova
Tel: +421 (2) 5920 6317
Email: sbelovicova@whitecase.com

Activities: White & Case is a global law firm with over 2000 lawyers in 26 countries. Their financial restructuring and insolvency group is a worldwide practice consisting of over 160 restructuring and insolvency lawyers. They are a globally recognised leader in complex cross-border insolvencies and workouts, and they represent clients in all aspects of restructurings, workouts and insolvencies, including both transactional and litigation matters. Recent representations include many of the world's largest restructuring cases and out-of-court workouts.

Wolf Theiss
Laurinská 3, SK-811 01 Bratislava, Slovak Republic.
Tel: +421 (2) 5910 1240
Fax: +421 (2) 5910 1249
Email: bratislava@wolftheiss.com
Website: www.wolftheiss.com

Directors
Lubos Frolkovic
Erik Steger

Activities: Advising international clients in all phases of restructuring projects, including advising and representing banks and material vendors in insolvency proceedings.

SLOVENIA

Wolf Theiss d.o.o.
Tivolska 30, SI-1000 Ljubljana, Slovenia.
Tel: +386 (1) 438 0000
Fax: +386 (1) 438 0025
Email: ljubljana@wolftheiss.com
Website: www.wolftheiss.com

Director
Dr. Markus Bruckmüller

Activities: Advising international clients in all phases of restructuring projects, including advising and representing banks and material vendors in insolvency proceedings.

SOUTH AFRICA

Berrangé Incorporated
Suite 1, The Mews, Redlands Estate, 1 George Macfarlane Lane, Pietermaritzburg, Kwazulu-Natal, South Africa.
Tel: +27 (3) 3345 5331
Fax: +27 (3) 3345 5824
Email: attorney@b-inc.co.za

Directors
Pierre de Villiers Berrangé
Eugene Nel
Ginette Chubb

Activities: Boutique legal practice specialising in liquidation and bankruptcy proceedings and restructuring throughout Southern Africa. Experience in cross-border insolvencies in the US, Canada, UK, Singapore and Malaysia.

Bowman Gilfillan
SA Reserve Bank Building, 60 St. George's Mall, Cape Town, South Africa.
Tel: +27 (21) 480 7800
Fax: +27 (21) 480 1688
Email: info@bowman.co.za
Website: www.bowman.co.za

Partner
Adam Harris
Tel: +27 (21) 480 7837
Email: a.harris@bowman.co.za

Activities: Advising local and multinational lenders and corporations on all aspects of bankruptcy and restructuring, particularly RSA's new business rescue regime.

Cassim Trust / Cassim Inc.
333 Muckleneuk Street, Nieuw Muckleneuk, Pretoria, South Africa.
Tel: +27 (12) 460 7700
Fax: +27 (12) 460 2323
Email: admin@cassimlaw.co.za
Website: www.cassimlaw.co.za

Director
Zaheer Cassim
Email: cassim@cassimlaw.co.za

Activities: Corporate rescue and recovery including administration of insolvent estates and related services.

Dewey & LeBoeuf (Pty) Limited
11th Floor, The Forum Building, 2 Maude Street, Sandton 2196, Johannesburg, South Africa.
Tel: +27 (11) 911 4300
Fax: +27 (11) 784 2855
Website: www.dl.com

Directors:
Scott Brodsky
Email: sbrodsky@dl.com
Wildu du Plessis
Email:wduplessis@dl.com

Activities: A leader in the practice of law; 26 offices in 15 countries, an extraordinary breadth of practice and extensive industry experience.

KAAP VAAL Trust (Pty) Ltd
74 Siemert Road, Doornfontein, Johannesburg, Gauteng, South Africa.
Tel: +27 (11) 402 3170
Fax: +27 (11) 402 6920

Managing Director
C.F. de Wet
Email: cf@kaapvaal.co.za

Financial Director
G.L.S. de Wet

Activities: Insolvencies, liquidations, restructuring, debt collection, deceased estates, offers of compromise with creditors, drawing of trusts and wills, curator bonis estates.

Knowles Husain Lindsay Inc
4th Floor, The Forum, 2 Maude Street,
Sandton, South Africa.
Tel: +27 (11) 669 6000
Fax: +27 (11) 669 6299
Email: ivl@khl.co.za

Directors
Ian V. Lindsay
Mohamed J. Husain

Activities: Insolvency related litigation, schemes of arrangement, business rescue and insolvency enquiries.

PwC
2 Eglin Road, Sunninghill, Johannesburg 2157, South Africa.
Tel: +27 (11) 797 4000
Fax: +27 (11) 797 5800
Website: www.pwc.com/za/transactions

National Product Leader-Business Recovery Services
Stefan Smyth
Tel: +27 (11) 797 4184
Email: stefan.smyth@za.pwc.com

Business Recovery Services
Sharon Taylor
Tel: +27 (11) 797 4795
Email: sharon.taylor@za.pwc.com

Activities: Professional advisors to stakeholders in distressed businesses - specialising in independent reviews, debt advisory, financial restructuring and Chapter 6 business rescues.

RMG-Vhalemba Trust CC
8th Floor, Sandton City Office Tower,
Cor Rivonia & Fifth Streets, Sandton 2146,
South Africa.
Tel: +27 (11) 883 2559
Fax: +27 (11) 883 8143
Email: reuben@rmgtrust.co.za

Chairman
R. Miller

CEO
J. Muthanyi

Activities: Liquidators, trustees and judicial managers; financial consultants - CA (SA); business recovery and turnaround experts.

Sandars Wilson Attorneys
Second Floor, West Tower, Nelson Mandela Square, Maude Street, Sandton,
2194 Johannesburg, South Africa.
Tel: +27 (86) 110 0099
Fax: +27 (11) 881 5468
Email: info@insolvency.co.za
Website: www.insolvency.co.za

Contact
John Sandars Wilson

Activities: Law firm specialising in insolvency; can accept appointments as liquidator, trustee, curator; also involved in restructuring, rescue, mergers and acquisitions.

Shirish Kalian Attorneys
44 Dudley Road, Corner Bolton Road, Rosebank, Johannesburg, 2196; Mailing Address: PO Box 2749, Parklands 2121, Guateng, South Africa.
Tel: +27 (11) 447 4600
Fax: +27 (11) 447 0317
Email: shirish@44dudley.co.za

Director
Shirish Kalian
Email: shirish@44dudley.co.za

Activities: The firm's expertise is in the fields of general and commercial litigation, corporate, corporate law and insolvency law.

Shrosbree Trustees
11 Bird Street, Central, Port Elizabeth 6001, South Africa.
Tel: +27 (41) 585 7738
Fax: +27 (41) 585 7768
Email: shrosliq@iafrica.com

Managing Member
Gary Shrosbree

Activities: Administration of estates, judicial managements and winding-ups, specialising in insolvency administrations and asset recoveries.

St. Adens International
609 Walker Street, Muckleneuk,
Pretoria 0002, South Africa.
Tel: +27 (12) 344 4315
Fax: +27 (12) 344 4318
Email: stadens@stadens.co.za
Website: www.stadens.co.za

Director
Mari Haywood

Managing Director
Corne van Staden

Activities: Major business entails sequestrations; liquidations; cross-border insolvencies; curatorships; deceased estates; divorce settlements; insolvency enquiries; judicial management; pension and provident fund liquidations; Section 311 arrangements and compromises.

Standard & Poor's
Unit 4, 1 Melrose Boulevard, Melrose Arch,
Johannesburg 11111, South Africa.
Tel: +27 (11) 2141 990
Fax: +27 (11) 2141 98

Strauss Trustees CC
PO Box 202, Joubertina 6410, South Africa.
Tel: +27 (42) 273 2007
Fax: +27 (86) 655 9111
Email: nardus@workmail.co.za

Member
N. Ferreira
Email: nardus@workmail.com.za

Activities: Insolvency practitioners and judicial managers in the Eastern Cape area.

The Association of Insolvency Practitioners of Southern Africa
PO Box 10527, Johannesburg 2000,
South Africa.
Tel: +27 (11) 447 3877
Fax: +0866 916 987
Email: aipsaadmin@icon.co.za
Website: www.aipsa.co.za

Administration Office
Joy Glanville-Pellow

Activities: A voluntary association formed in 1986. Main objective: uphold, improve standards of professionalism and qualifications of practitioners in South Africa.

Van Rooyen-Fisher Trustees
Ground floor, Bank Forum Building,
337 Bronkhorstreet, Brooklyn, South Africa.
Tel: +27 (12) 346 7430
Fax: +27 (12) 346 7433
Email: info@vrftrustees.co.za

Chief Executive
Jacques Fisher
Email: jacques@vrftrustees.co.za

Activities: Administration of liquidated, sequestrated and deceased estates.

White & Case LLP
The Reserve, 54 Melville Road, Illovo,
Johannesburg, 2196, PO Box 784440,
Sandton 2146, South Africa.
Tel: +27 (11) 341 4000
Fax: +27 (11) 341 1900
Website: www.whitecase.com

Partner
Steve Raney
Tel: +27 (11) 341 4012
Email: sraney@whitecase.com
Joshua Parbhu
Tel: +27 (11) 341 4015
Email: jparbhu@whitecase.com

Activities: White & Case is a global law firm with over 2000 lawyers in 26 countries. Their financial restructuring and insolvency group is a worldwide practice consisting of over 160 restructuring and insolvency lawyers. They are a globally recognised leader in complex cross-border insolvencies and workouts, and they represent clients in all aspects of restructurings, workouts and insolvencies, including both transactional and litigation matters. Recent representations include many of the world's largest restructuring cases and out-of-court workouts.

Zeena Insolvency Practitioners P/L
512 Bastille Boulevard, Zwavelpoort,
South Africa.
Tel: +27 (12) 687 4131
Fax: +27 (12) 687 1418
Email: msymes@zeena.co.za

Managing Director
Maryna Symes
Tel: +27 0828215155

Activities: New company whose directors have dealt with insolvencies and liquidations since 1987 and have a vast understanding and knowledge in the local and international markets.

SOUTH KOREA

BMC Group
1328 Ho Shindongafastel 939, Inkye-Dong,
Paldal-Gu, Suwon-City, Gyeonggi-Do, Korea.
Tel: +82 (31) 235 9580
Fax: +82 (31) 236 9580
Website: www.bmcgroup.com

Activities: Restructuring, class action, litigation, M&A, and investor communications. Superior technology, expertise and greatest cost efficiencies in data and claims management.

Deloitte
6th Floors, Tae Young Building, 252-5,
Kongdeok-Dong, Mapo-Gu, Seoul 121-020,
Korea.
Website: www.deloitte.com

Head of Restructuring Services
Young Soon Chang
Tel: +82 (2) 6676 2010
Email: yschang@deloitte.com

Activities: Deloitte advises stakeholders in underperforming or distressed businesses including creditors and directors. Services include insolvency appointments, financial restructuring, turnaround and business reviews.

Kim & Chang
Seyang Building, 223 Naeja-dong,
Jongno-gu, Seoul 110-720, Korea.
Tel: +82 (2) 3703 1114/1108
Fax: +82 (2) 3703 1590
Email: lawkim@kimchang.com
Website: www.kimchang.com

Partner
Jin Yeong Chung

Contact
Do Young Kim

Activities: Extensive experience in representing and counselling debtors, creditors and other parties-in-interest in connection with Korean insolvency proceedings and restructurings.

Lee & Ko
18th Floor, Hanjin Main Building, 118,
Namdaemunno 2-ga, Seoul 100-770, Korea.
Tel: +82 (2) 772 4000
Fax: +82 (2) 772 4001/2
Email: mail@leeko.com
Website: www.leeko.com

Representative Attorney
Byung Jae Kim
Tel: +82 (2) 2191 3103
Email: kbj@leeko.com

Partner Attorney
Tae Soo Jung
Tel: +82 (2) 772 4387
Email: tsj@leeko.com

Activities: Experience with the many cross-border insolvency cases related to Korean companies.

Standard & Poor's
Seian Building, 2nd Floor, 116 Shinmunro 1-ga, Jongno-gu, Seoul 110-700, Korea.
Tel: +82 (2) 2022 2300
Fax: +82 (2) 2022 2345

Yoon & Yang LLC
19, 22, 23, 34 Floors, ASEM Tower, 159-1 Samsung-Dong, Gangnam-Gu, Seoul 135-798 Korea.
Tel: +82 (2) 6003 7000
Fax: +82 (2) 6003 7800
Website: www.yoonyang.com

Managing Partner
Hoil Yoon
Tel: +82 (2) 6003 7501
Email: yoon.hoil@yoonyang.com

Activities: Acts as counsel for interested parties such as creditors (or creditors' committees), debtors, trustees, shareholders, acquirers and financiers.

SPAIN

Deloitte
Torre Picasso, Plaza Pablo Ruiz Picasso 1, E-28020 Madrid, Spain.
Website: www.deloitte.com

Head of Restructuring Services
Enrique Dominguez
Tel: +34 (91) 514 5000 ext. 1070
Email: edominguez@deloitte.es

Activities: Deloitte advises stakeholders in underperforming or distressed businesses including creditors and directors. Services include insolvency appointments, financial restructuring, turnaround and business reviews.

DLA Piper Spain
Paseo de la Castellana, 35 Planta 2. E-28046 Madrid, Spain.
Tel: +34 (91) 319 1212
Fax: +34 (91) 788 7399
Website: www.dlapiper.com

Partners
Luis Martin
Tel: +34 (91) 790 1689
Email: luis.martin@dlapiper.com
Javier Diaz-Galvez
Tel: +34 (91) 788 7358
Email: javier.diaz-galvez@dlapiper.com

Garrigues
Hermosilla 3, Madrid, Spain.
Tel: +34 (91) 514 5200
Fax: +34 (91) 399 3779
Website: www.garrigues.com

Restructuring & Insolvency Head Partner
Antonio Fernández
Tel: +34 (91) 514 5455
Email:
antonio.fernandez.rodriguez@garrigues.com

Activities: Their team of leading lawyers has decades of experience in turn-around, corporate recovery, refinancing and all types of insolvencies, including cross-border insolvency. It comprises experts with a background in law or economics, who work together in contentious and non-contentious insolvency, affecting debtors, banks or creditors for troubled companies.

Gómez-Acebo & Pombo Abogados, S.L.P.
Paseo de la Castellana 216, E-28046 Madrid, Spain.
Tel: +34 (91) 582 9100
Fax: +34 (91) 582 9114
Email: info@gomezacebo-pombo.com
Website: www.gomezacebo-pombo.com

Contact
Jose Maria Alvarez-Arjona
Email: jmalvarez@gomezacebo-pombo.com
Tel: +34 (91) 582 9278

Activities: Extensive experience in financial crisis related legal advice, conducting and providing legal assistance on insolvency, bankruptcy, winding-up and receivership proceedings, acting as counsel to financial institutions, senior secured lenders and to debtors on representing acquirers and sellers of companies and assets in acquisitions and divestitures of insolvent and other highly leveraged companies and turn-around transactions.

Hogan Lovells International LLP
Paseo de la Castellana 51, Planta 6ª, E-28046 Madrid, Spain.
Tel: +34 (91) 349 8200
Fax: +34 (91) 349 8201
Email: enquiry@hoganlovells.com
Website: www.hoganlovells.com

Partner
José Luis Huerta

Activities: Experts advising on business restructuring and insolvency, including corporate restructuring, formal insolvencies and creditor representation.

Insolvency Services in Spain, S.L.
Galeon 4, Portal A, Bajo A, E-28042 Madrid, Spain.
Tel: +34 (650) 169 954
Fax: +34 (91) 320 3920
Website: www.insolvencyservicesinspain.com

Managing Partner
George Lumby
Email: georgelumby@insolservices.com

Activities: Provision of insolvency services to insolvency practitioners not resident in Spain in relation to assets or companies in Spain. Appointments in Spain as insolvency administrator or liquidator.

KPMG
Edificio Torre Europa, Paseo de la Castellana 95, E-28046 Madrid, Spain.
Tel: +34 (9) 1456 3400
Fax: +34 (9) 1555 0132
Website: www.kpmg.es

Head of Restructuring, KPMG in Spain
Angel Martin
Tel: +34 (9) 1456 3525
Email: restructuring@kpmg.es

Head of Advisory, KPMG in Spain
Hilario Albarracin
Tel: +34 (9) 1456 3484
Email: advisory@kpmg.es

Activities: KPMG's restructuring professionals can provide an opportunity for stressed and distressed businesses to stabilise and implement a process of strategic, operational and financial change. The aim is to turn around the performance of a business and to help generate outstanding and lasting value for the stakeholders.

Latham & Watkins LLP
María de Molina 6, 4th Floor, E-28006 Madrid, Spain.
Tel: +34 (91) 791 5000
Fax: +34 (902) 882 228
Website: www.lw.com

Partners
Paco Iso
Xavier Pujol

Contacts
John Houghton
Tel: +44 (20) 7710 1000
Mitchell Seider
Tel: +1 (212) 906 1200
Jan Baker
Tel: +1 (212) 906 1200
Peter Gilhuly
Tel: +1 (213) 485 1234

Activities: Global law firm with more than 2000 lawyers in 31 offices worldwide, including over 500 lawyers throughout Europe. Offers a full range of services in insolvency, workouts and restructurings and is acknowledged as a leading bankruptcy lender law firm.

PEREZ-LLORCA
Alcalá 61, E-28014 Madrid, Spain.
Tel: +34 (91) 436 0420
Fax: +34 (91) 436 0430
Email: ppl@perezllorca.com
Website: www.perezllorca.com

Senior Partner
Pedro Pérez-Llorca
Tel: +34 (91) 436 0425

Partner of the Litigation & Arbitration Area
Felix J. Montero
Tel: +34 (91) 426 3138
Email: fmontero@perezllorca.com

Activities: Advice on all aspects of insolvency and restructuring to all legal entities, including assistance with corporate, litigation, tax and labour issues.

PEREZ-LLORCA
Diputación, 260 piso 4°, E-08007 Barcelona, Spain.
Tel: +34 (93) 481 3075
Fax: +34 (93) 481 3076
Email: pll@perezllorca.com
Website: www.perezllorca.com

Partner Responsible for the Barcelona office
Gerard Serra
Email: gserra@perezllorca.com

Partner of the Litigation & Arbitration Area
Eduardo Villellas
Email: evillellas@perezllorca.com

Activities: Advice on all aspects of Insolvency and restructuring to all legal entities, including assistance with corporate, litigation, tax and labour issues.

PricewaterhouseCoopers Asesores de Negocios, S.L.
Paseo de la Castellana, 259 B, E-28046 Madrid, Spain.
Tel: +34 (9) 1568 4373
Fax: +34 (9) 1568 4203
Website: www.pwc.es

Partner, BRS Responsible
Enrique Bujidos
Email: enrique.bujidos@es.pwc.com

Director
Francisco Garcia
Tel: +34 (9) 1658 4055
Email:
francisco_jose.garcia.oliva@es.pwc.com

Activities: BRS team advises debtors, creditors, and other stakeholders in all forms of restructurings and insolvency matters.\n\n

Roland Berger Strategy Consultants S.A.
Paseo de la Castellana 140, 3rd Floor, E-28046 Madrid, Spain.
Tel: +34 (91) 564 7361
Fax: +34 (91) 564 7275
Website: www.rolandberger.com

Partner
Christoph Beseler
Tel: +34 (91) 590 3141
Email:
christoph_beseler@es.rolandberger.com

Activities: Roland Berger Strategy Consultants is a leading global strategy consultancy. Within their restructuring practice they focus on complex operational and financial restructurings/distressed M&A as well as insolvency support.

Sca Legal, S.L.P.
José Abascal 55, E-28003 Madrid, Spain.
Tel: +34 (91) 781 5040
Fax: +34 (91) 781 5041
Email: madrid@sca-legal.com
Website: www.sca-legal.com
Partner
Pedro Moreira
Email: pedro.moreira@sca-legal.com
Contact
Marcos Arbeloa
Email: arbeloa@sca-legal.com
Activities: Represents creditors and debtors on in and out-of-court financial restructurings, focuses on the main issues arising out of corporate insolvencies.

Simmons & Simmons LLP
Calle Miguel Angel, 11-5ª Planta,
E-28010 Madrid, Spain.
Tel: +34 (91) 426 2640
Fax: +34 (91) 578 2157
Website: www.simmons-simmons.com
Country Head (Spain)
Andres Mochales
Tel: +34 (91) 426 2402
Email:
andres.mochales@simmons-simmons.com
Of Counsel
Ricardo Orive
Tel: +34 (91) 426 2402
Email: ricardo.orive@simmons-simmons.com
Activities: Advice to creditors or debtors in restructuring operations and insolvency situations (national or international) and judicial proceedings, including employment matters.

SJ Berwin LLP
C/Claudio Coello, 37, 1° planta,
E-28001 Madrid, Spain.
Tel: +34 (91) 426 0050
Fax: +34 (91) 426 0066
Email: madrid@sjberwin.com

Squire Sanders (UK) LLP
Plaza Marques de Salamanca 3-4,
E-28006 Madrid, Spain.
Tel: +34 91 426 4840
Fax: +34 (91) 435 9815
Website: www.squiresanders.com
Restructuring & Insolvency Global Practice Group Leader
Stephen D. Lerner
Local Restructuring & Insolvency Contacts
Fernando Gonzalez, Jesus Carrasco, Silvia Ara, Paula Casado, Ignacio Triguero, Ignacio Gurpegui
Activities: The restructuring & insolvency group has over 100 restructuring and insolvency lawyers who represent financial institutions, distressed companies, insolvency practitioners, creditors' committees, investors, and strategic and financial buyers of troubled companies.

Standard & Poor's
No. 5 Calle Marques de Villamejor,
E-28006 Madrid, Spain.
Tel: +34 (91) 389 6969
Fax: +34 (91) 389 6949

SWEDEN

Advokatfirman Vinge
PO Box 11025, Nordstadstorget 6,
SE-40421 Gothenburg, Sweden.
Tel: +46 (10) 614 1000
Fax: +46 (10) 614 1700
Website: www.vinge.com
Managing Partner
Olof Jisland
Partner
Morgan Hallén
Activities: Full range of commercial law, including insolvency services: restructuring and reorganisations, liquidations, mergers and aquisitions, litigation.

Advokatfirman Vinge
Box 4255, Ostergatan 30,
SE-20313 Malmo, Sweden.
Tel: +46 (40) 664 5500
Fax: +46 (40) 664 5501
Website: www.vinge.com
Managing Partner
Rikard Azelius
Partner
Erik Gabrielson
Activities: Full range of commercial law, including insolvency services: restructuring and reorganisations, liquidations, mergers and aquisitions, litigation.

Advokatfirman Vinge
PO Box 1703, Smålandsgatan 20,
SE-111 87 Stockholm, Sweden.
Tel: +46 (8) 614 3000
Fax: +46 (8) 614 3190
Website: www.vinge.com
Partners
Bo Adrianzon
Robert Wikholm
Contact
Fabian Ekeblad
Activities: Full range of commercial law, including insolvency services: restructuring and reorganisations, liquidations, mergers and aquisitions, litigation.

European Resolution Capital Partners Ltd
Hovslagargatan 5, SE-111 48 Stockholm, Sweden.
Tel: +46 (8) 5000 1360
Email: mariana.raymond@eurescap.com

Gärde Wesslau Advokatbyrå
PO Box 1422, SE-251 14 Helsingborg, Sweden.
Tel: +46 (42) 453 7900
Fax: +46 (42) 141 055
Email: skane@garde.se
Website: www.garde.se
Partner
Peter Thörnwall
Tel: +46 (42) 453 7901
Email: peter.thornwall@garde.se
Activities: Receivership, reconstruction and liquidation proceedings.

Grant Thornton
Sveavagen 20, Box 7623,
SE-103 94 Stockholm, Sweden.
Partner
Par Ekengren

KPMG AB
Tegelbacken 4A, PO Box 16106,
SE-103 23 Stockholm, Sweden.
Tel: +46 (8) 723 9100
Fax: +46 (8) 105 258
Email: info@kpmg.se
Website: www.kpmg.se
Managing Partner
Helene Willberg
Email: helene.willberg@kpmg.se
Director, Restructuring
Björn Dahl
Tel: +46 (8) 723 9386
Email: bjorn.dahl@kpmg.se
Activities: KPMG AB provides financial and operational restructuring to its clients throughout the economic cycle; through stress, distress, reorganisation and growth.

PwC Corporate Finance Business Recovery Service
Torsgatan 21, SE-113 97 Stockholm, Sweden.
Tel: +46 (7) 0929 3132
Fax: +46 (10) 214 3132
Email: per.storbacka@se.pwc.com
Partner
Per Storbacka
Activities: Extensive practical experience supporting troubled corporates and their stakeholders.

Roland Berger Strategy Consultants
Sveavägen 13-15, Hus 2, 16 tr.,
SE-111 57 Stockholm, Sweden.
Tel: +46 (8) 410 438 00
Fax: +46 (8) 410 438 01
Website: www.rolandberger.com
Partner
Jan Beckeman
Tel: +46 (8) 410 438 91
Email: jan_beckeman@se.rolandberger.com
Activities: Roland Berger Strategy Consultants is a leading global strategy consultancy. Within their restructuring practice they focus on complex operational and financial restructurings/distressed M&A as well as insolvency support.

Setterwalls
Arsenalsgatan 6, PO Box 1050,
SE-101 39 Stockholm, Sweden.
Tel: +46 (8) 5988 9000
Fax: +46 (8) 5988 9090
Email: stockholm@setterwalls.se
Website: www.setterwalls.se
Executive Partner
Joakim Edoff
Tel: +46 (3) 1701 1733
Email: joakim.edoff@setterwalls.se
Partners
Thomas Ehrner
Tel: +46 (8) 5988 9005
Email: thomas.ehrner@setterwalls.se
Odd Swarting
Tel: +46 (8) 5988 9046
Email: odd.swarting@setterwalls.se
Marketing Director
Marie Öhrström
Tel: +46 (8) 5988 9115
Email: moh@setterwalls.se
Activities: Have solid experience and a national and international expertise within the field - insolvency prevention, business restructuring, composition, liquidation and bankruptcy.

Standard & Poor's
Master Samuelsgaten 6, PO Box 1753,
SE-111 87 Stockholm, Sweden.
Tel: +46 (8) 440 5900
Fax: +46 (8) 440 5901

Swedbank AB (publ)
SE-105 34 Stockholm, Sweden.
Tel: +46 (8) 5859 3457
Senior Advisor
Erik Selander
Email: erik.selander@swedbank.com
Contact
Marie-Anne Ehrngren

White & Case Advokat AB
Biblioteksgatan 12, Box 5573,
SE-114 85 Stockholm, Sweden.
Tel: +46 (8) 5063 2300
Fax: +46 (8) 611 2122
Website: www.whitecase.com

Partner
Magnus Wennerhorn
Tel:+46 (8) 5063 2370
Email: magnus.wennerhorn@whitecase.com

Activities: White & Case is a global law firm with over 2000 lawyers in 26 countries. Their financial restructuring and insolvency group is a worldwide practice consisting of over 160 restructuring and insolvency lawyers. They are a globally recognised leader in complex cross-border insolvencies and workouts, and they represent clients in all aspects of restructurings, workouts and insolvencies, including both transactional and litigation matters. Recent representations include many of the world's largest restructuring cases and out-of-court workouts.

Wistrand
Regeringsgatan 65, PO Box 7543,
SE-103 93 Stockholm, Sweden.
Tel: +46 (8) 5072 0000
Fax: +46 (8) 5073 0000
Email: sthlm@wistrand.se
Website: www.wistrand.se

Partners
Margareta Andersson
Email: margareta.andersson@wistrand.se
Christian Bergqvist
Tel: +46 (8) 5072 0081
Email: christian.bergqvist@wistrand.se
Lars-Olof Svensson
Tel: +46 (8) 5072 0011
Email: lars-olof.svensson@wistrand.se

Activities: Wistrand has a long experience of working with insolvency issues and has handled some of the highest profile insolvencies in Sweden.

Wistrand
Lilla Bommen 1, PO Box 11920,
SE-404 39 Gothenburg, Sweden.
Tel: +46 (31) 771 2100
Fax: +46 (31) 771 2150
Email: gbg@wistrand.se
Website: www.wistrand.se

Partners
Margareta Andersson
Tel: +46 (31) 771 2112
Email: margareta.andersson@wistrand.se
Jörgen Wistrand
Tel: +46 (31) 771 2172
Email: jorgen.wistrand@wistrand.se

Activities: Wistrand has a long experience of working with insolvency issues and has handled some of the highest profile insolvencies in Sweden.

SWITZERLAND

Appleby
Talstrasse 37, CH-8001 Zurich, Switzerland.
Tel: +41 (44) 213 6230
Fax: +41 (44) 213 6234
Email: zurich@applebyglobal.com
Website: www.applebyglobal.com

Managing Partner
Jonathan Vanderkar
Email: jvanderkar@applebyglobal.com

Activities: Handle major insolvency and restructuring matters, liquidation of all types, and advising on creditors' rights and schemes of arrangements.

Bloch & Partner in association with SNR Denton
Bahnhofstrasse 3, CH-6340 Baar/Zug,
Zurich, Switzerland.
Tel: +41 (44) 914 4343
Fax: +41 (44) 914 4300
Website: www.snrdenton.com

Managing Partner
Robert Schlup

BridgeLink AG
Centralbahnstrasse 7, PO Box,
CH-4002 Basle, Switzerland.
Tel: +41 (61) 206 9090
Fax: +41 (61) 206 9093
Email: info@bridgelink.ch
Website: www.bridgelink.ch

Partners
Remo Richli
Paul-Andre Wenger

Activities: Mergers and acquisitions, MBO, MBI, equity financing, businesses successions, pre and post-merger advice. Full service: law, tax, finance. Regions: Western Europe and US.

Buhlmann & Fritschi Lawyers
Talacker 42, CH-8001 Zurich, Switzerland.
Tel: +41 (1) 212 2740
Fax: +41 (1) 212 2766
Email: eugen.fritschi@b-law.ch
Website: www.b-law.ch

Contact
Eugen Fritschi

Activities: Cross-border insolvency procedure.

Bürgi Nägeli Lawyers
Grossmünsterplatz 9, CH-8001 Zurich,
Switzerland.
Tel: +41 (44) 268 4000
Fax: +41 (44) 268 4005
Email: info@bnlawyers.ch
Website: www.bnlawyers.ch

Lawyer, Notary and Private Receiver
Urs Bürgi

Activities: Regularly advises in insolvency and creditors' rights, debt recovery, company reorganisation, probate proceedings, litigation, arbitration.

DeptCollectionAgency
Qualifida AG, Grossmünsterplatz 6,
CH-8001 Zurich, Switzerland.
Tel: +41 (44) 268 9904
Fax: +41 (44) 268 9909

Director
Rosemarie Hug-Schneider

Activities: Regularly advises in insolvency and creditors' rights, debt collecting recovery, company reorganisation, probate proceedings.

Ernst & Young AG
Maagplatz 1, CH-8010 Zurich, Switzerland.
Tel: +41 (58) 286 4734
Fax: +41 (58) 286 3025
Email: peter.dauwalder@ch.ey.com
Website: www.ey.com/ch/tas

Senior Manager
Michael Märki
Tel: +41 (58) 286 3423
Email: michael.maerki@ch.ey.com

Partner
Peter Dauwalder
Email: peter.dauwalder@ch.ey.com

Activities: Support of creditors, debtors, liquidators, banks and judges; contingency planning, investigation, due diligence, valuation, M&A, legal, tax, working capital improvement.

Homburger
Prime Tower, Hardstrasse 201,
CH-8005 Zurich, Switzerland.
Tel: +41 (43) 222 1000
Fax: +41 (43) 222 1500
Email: lawyers@homburger.ch
Website: www.homburger.ch

Partners
Ueli Huber
Tel: +41 (43) 222 1504
Email: ueli.huber@homburger.ch
Benedikt Maurenbrecher
Tel: +41 (43) 222 1514
Email:
benedikt.maurenbrecher@homburger.ch
Georg Naegeli
Tel: +41 (43) 222 1717
Email: georg.naegeli@homburger.ch
Daniel Haeberli
Tel: +41 (43) 222 1633
Email: daniel.haeberli@homburger.ch

Activities: Restructurings, refinancings; insolvency related corporate, corporate finance and commercial advice; insolvency and restructuring proceedings, coordination between domestic and foreign proceedings.

Kellerhals Attorneys at law
Hirschgässlein 11, CH-4010 Basel,
Switzerland.
Tel: +41 (58) 200 3000
Fax: +41 (58) 200 3011
Email: info@kellerhals.ch
Website: www.kellerhals.ch

Contact
Prof. Dr. Daniel Staehelin
Email: daniel.staehelin@kellerhals.ch

Activities: Corporate restructuring, representation of creditors and debtors in national and international bankruptcy and composition proceedings, litigation, debt collection.

KPMG
Badenerstrasse 172, CH-8026 Zurich,
Switzerland.
Website: www.kpmg.ch

Lenz & Staehelin
Bleicherweg 58, CH-8027 Zurich,
Switzerland.
Tel: +41 (58) 450 8000
Fax: +41 (58) 450 8001
Email: tanja.luginbuhl@lenzstaehelin.com
Website: www.lenzstaehelin.com

Partner
Tanja Luginbühl

Activities: Restructurings (corporate and debt) of companies in financial distress, representing creditors in Swiss insolvency proceedings, insolvency related litigation.

Lenz & Staehelin
30 route de Chêne, PO Box 615,
CH-1211 Geneva 17, Switzerland.
Tel: +41 (58) 450 7000
Fax: +41 (58) 450 7001
Email: daniel.tunik@lenzstaehelin.com
Website: www.lenzstaehelin.com

Partner
Daniel Tunik

Activities: Representation of creditors of distressed companies in bankruptcy courts; advice on restructurings and reorganisation plans.

PricewaterhouseCoopers Limited.
Birchstrasse 160, PO Box CH-8050 Zurich,
Switzerland.
Tel: +41 (58) 792 1568
Fax: +41 (58) 792 4410
Email: reto.brunner@ch.pwc.com
Website: www.pwc.ch/brs

Director
Reto Brunner

Activities: Extensive practical experience supporting troubled corporates and their stakeholders, including financial restructuring, operational turnaround, contingency, planning, optimised exit services, working capital management/ and cost reduction.

Roland Berger AG Strategy Consultants
Holbeinstraße 22, CH-8008 Zurich, Switzerland.
Tel: +41 (44) 336 8600
Fax: +41 (44) 336 8709
Website: www.rolandberger.com

Partners
Joost Geginat
Tel: +41 (44) 336 8620
Email: joost_geginat@ch.rolandberger.com
Beatrix Morath
Tel: +41 (44) 384 8630
Email: beatrix_morath@ch.rolandberger.com

Activities: Roland Berger Strategy Consultants is a leading global strategy consultancy. Within their restructuring practice they focus on complex operational and financial restructurings/distressed M&A as well as insolvency support.

Transliq AG
Schwanengasse 5/7, CH-3001 Bern, Switzerland.
Tel: +41 (31) 326 3050
Fax: +41 (31) 312 8424
Email: info@transliq.ch
Website: www.transliq.ch

Attorney at Law
Kurt Stöckli

Chartered Accountant
Urs Stöckli

Activities: Bankruptcy proceedings, compositions with creditors, ordinary composition agreements, composition agreement with assignment of assets, liquidations.

Walder Wyss Ltd
Seefeldstrasse 123, PO Box 1236, CH-8034 Zurich, Switzerland.
Tel: +41 (44) 498 9898
Fax: +41 (44) 498 9899
Email: reception@walderwyss.com
Website: www.walderwyss.com

Partners
Christoph Stäubli
Tel: +41 (44) 498 9530
Email: christoph.staeubli@walderwyss.com
Ueli Sommer
Tel: +41 (44) 498 9516
Email: ueli.sommer@walderwyss.com

Activities: Restructuring and insolvency team regularly advises on distressed business situations; representing stakeholders - frequently so in an international context - in corporate restructurings and insolvency proceedings and conduct enforcement and bankruptcy related litigations.

TAIWAN

Lee and Li, Attorneys-at-Law
7F, No. 201 Tun Hua N. Road, Taipei 105, Taiwan.
Tel: +886 (2) 2715 3300
Fax: +886 (2) 2713 3966
Website: www.leeandli.com

Partner
C.T. Chang
Email: ctchang@leeandli.com

Activities: Represented clients in dealing with insolvency cases and participated in insolvency related projects led by the government agencies.

Standard & Poor's
49F Taipei 101 Tower, No 7, Xinyi Road, Section 5, Taipei 11049, Taiwan.
Tel: +866 (2) 8722 5800
Fax: +866 (2) 8722 5869

THAILAND

Clifford Chance (Thailand) Ltd
21st Floor, Sindhorn Building Tower 3, 130-132 Wireless Road, Pathumwan, Bangkok 10330, Thailand.
Tel: +66 (2) 401 8800
Fax: +66 (2) 401 8801
Website: www.cliffordchance.com

Managing Partner
Fergus Evans
Tel: +66 (2) 401 8810
Email: fergus.evans@cliffordchance.com

Counsel
Joseph Tisuthiwongse
Tel: +66 (2) 401 8814
Email:
joseph.tisuthiwongse@cliffordchance.com

Activities: The global restructuring and insolvency group advises lenders, other creditors, debtors, shareholders and investors in complex financial restructurings and cross-border insolvencies.

Deloitte
Level 25, 26 & 28, Rajanakarn Building, 183 South Sathorn Road, Yannawa, Sathorn, Bangkok 10120, Thailand.
Website: www.deloitte.com

Head of Restructuring Services
Thavee Thaveesangsakulthai
Tel: +66 (2) 676 5700 ext. 7013
Email: thaveesangsakulthai@deloitte.com

Activities: Deloitte advises stakeholders in underperforming or distressed businesses including creditors and directors. Services include insolvency appointments, financial restructuring, turnaround and business reviews.

Hunton & Williams (Thailand) Limited
34th Floor Q.House Lumpini Building, 1 South Sathorn Road, Thungmahamek, Sathorn, Bangkok 10120, Thailand.
Tel: +66 (2) 645 8800
Fax: +66 (2) 645 8880
Website: www.hunton.com

Managing Partner
Edward B. Koehler
Email: ekoehler@hunton.com

Partner
Surasak Vajasit
Tel: +66 (2) 645 8866
Email: surasak@hunton.com

Activities: Practice focuses on insolvency, restructuring, corporate and financing transactions involving a number of high profile project financings and public issues.

Mayer Brown JSM
98, Sathorn Square Office Tower, 9th Floor, Unit 903-4, North Sthorn Road, Silom, Bangrak, Bangkok 10500, Thailand.
Tel: +66 (2) 108 8555
Fax: +66 (2) 108 1555
Email: bangkok@mayerbrownjsm.com
Website: www.mayerbrownjsm.com

Partners
Steven Miller
Tel: +66 (2) 108 8565
Email: steven.miller@mayerbrownjsm.com
Maythawee Sarathai
Tel: +66 (2) 108 8564
Email: maythawee.sarathai@
mayerbrownjsm.com

Activities: The highly-regarded team across our Asian offices has acted in the most complex restructuring and insolvency cases in the region.

TURKEY

Çakmak Avukatlık Bürosu
Piyade Sokak No. 18/9, TR-06550 Çankaya, Ankara, Turkey.
Tel: +90 (312) 442 4680
Fax: +90 (312) 442 4690
Website: www.cakmak.av.tr

Partners
Mesut Çakmak
Email: m.cakmak@cakmak.av.tr
Zeynep Çakmak
Email: z.cakmak@cakmak.av.tr
Sebnem Önder
Email: s.onder@cakmak.av.tr
Mehtap Yildirim Öztürk
Email: m.yildirim@cakmak.av.tr
Tugba Bayman
Email: t.bayman@cakmak.av.tr
Ahmet Dogan
Email: a.dogan@cakmak.av.tr

Activities: Çakmak Avukatlık Bürosu represents clients in all aspects of restructurings, workouts and insolvencies, including both transactional and litigation matters. Çakmak Avukatlık Bürosu is the relationship firm of White & Case LLP in Ankara, Turkey.

Hergüner Bilgen Özeke Attorney Partnership
Suleyman Seba Caddesi, Siraevler 55, Akaretler TR-34357 Besiktas, Istanbul, Turkey.
Tel: +90 (212) 310 1800
Fax: +90 (212) 310 1899
Email: info@herguner.av.tr
Website: www.herguner.av.tr

Contacts
Ümit Hergüner
Ayse Bilgen
Kayra Üçer
Yasemin Yildirim
Tel: +90 (212) 310 1887
Email: yyildirim@herguner.av.tr
Chad Nagle
Email: cnagle@herguner.av.tr

Activities: Advises companies as well as Turkish, foreign multinational financial institutions regarding debt and financial restructuring issues, dispute settlement, reorganisation and bankruptcy procedures.

Roland Berger Strateji Danixmalik Ltd. Sti
Insirah Cad. Mektep Sok. No. 1, Bebek - 34342 Besiktas, Istanbul, Turkey.
Tel: +90 (212) 358 6400
Fax: +90 (212) 358 6402
Website: www.rolandberger.com

Partner
Erkut Uludag
Email: erkut_uludag@tr.rolandberger.com

Activities: Roland Berger Strategy Consultants is a leading global strategy consultancy. Within their restructuring practice they focus on complex operational and financial restructurings/distressed M&A as well as insolvency support.

White & Case Müsavirlik Limited Sirketi
Büyükdere Caddesi No: 100 Kat 28/109, TR-34394 Esentepe-Istanbul, Turkey.
Tel: +90 (212) 275 7533
Fax: +90 (212) 275 7543
Website: www.whitecase.com

Partners
Asli Basgoz
Tel: +90 (212) 275 7533
Email: abasgoz@whitecase.com
Meltem Akol
Tel: + 90 (212) 355 1334
Email: makol@akol.av.tr
Activities: White & Case is a global law firm with over 2000 lawyers in 26 countries. Their financial restructuring and insolvency group is a worldwide practice consisting of over 160 restructuring and insolvency lawyers. They are a globally recognised leader in complex cross-border insolvencies and workouts, and they represent clients in all aspects of restructurings, workouts and insolvencies, including both transactional and litigation matters. Recent representations include many of the world's largest restructuring cases and out-of-court workouts.

UKRAINE

Chadbourne & Parke LLP
25B Sahaydachnoho Street,
04070 Kiev, Ukraine.
Tel: +380 (44) 461 7575
Fax: +380 (44) 461 7576
Email: kyiv@chadbourne.com
Website: www.chadbourne.com
Managing Partner
Jaroslawa Z. Johnson
Email: jzjohnson@chadbourne.com
Activities: Chadbourne & Parke LLP offers a full range of services in cross-border bankruptcies and financial restructurings, business restructurings and insolvencies.

MAYGER, Development & Consulting in Ukraine
29A, of .46, Shevchenko avenue,
65058 Odessa, Ukraine.
Tel: +38 (48) 234 3333
Fax: +38 (48) 234 3333
Email: office@mayger.org
Website: www.mayger.org
President & Founder
Dr. Nickolay Mayger
Email: CEO@mayger.org
Activities: Key service: business & investment projects development. Services: legal, marketing research, merger & acquisition, investment placement in Ukraine, business adviser, due dilligence, GR, project management, construction management, facility management, business management, strategic consulting, asset management, complex support of foreign companies in Ukraine.

Noerr
Vul. Khreschatyk, 7/11, 01001 Kiev, Ukraine.
Tel: +380 (44) 495 3080
Fax: +380 (44) 495 3090
Email: info@noerr.com
Website: www.noerr.com
Contact
Dr. Mansur Pour Rafsendjani
Email: mpr@noerr.com
Activities: Advising shareholders, companies, creditors and investors regarding insolvency/restructuring proceedings. Trustee for secured creditors. Advice to insolvency administrators.

Roland Berger Strategy Consultants TOV
ul. Shelkovichnaya 42/44, 01601 Kiev, Ukraine.
Tel: +380 (44) 494 0865
Fax: +380 (44) 494 0864
Website: www.rolandberger.com
Partner
Dr. Thomas Winkelmann
Email:
thomas_winkelmann@ua.rolandberger.com
Activities: Roland Berger Strategy Consultants is a leading global strategy consultancy. Within their restructuring practice they focus on complex operational and financial restructurings/distressed M&A as well as insolvency support.

Vasil Kisil & Partners
17/52A Bogdana Khmelnytskogo St.,
Kiev 01030 Ukraine.
Tel: +380 (44) 581 7777
Fax: +380 (44) 581 7770
Email: vkp@vkp.kiev.ua
Website: www.kisilandpartners.com
Partners
Denis Lysenko
Tel: +380 (50) 332 6431
Email: lysenko@vkp.kiev.ua
Yaroslav Teklyuk
Tel: +380 (50) 355 2496
Email: tekliuk@vkp.kiev.ua
Activities: Legal/tax advice in debt/corporate restructuring, insolvency, debt collection/litigation, distressed M&A, regulatory approvals (NBU, SEC, Antimonopoly Committee, Financial Services Markets Commission).

Wolf Theiss LLC
11 Mykhaillvska Street,
UA - 01001 Kiev, Ukraine.
Tel: +380 (44) 3777 500
Fax: +380 (44) 3777 501
Email: kiev@wolftheiss.com
Director
Taras Dumych
Activities: Advising international clients in all phases of restructuring projects, including advising and representing banks and material vendors in insolvency proceedings.

UNITED ARAB EMIRATES

Allen & Overy LLP
Level 2, The Gate Village Building GV08,
DIFC, PO Box 506678, Dubai, UAE.
Tel: +971 (4) 426 7100
Fax: +971 (4) 426 7199
Website: www.allenovery.com
Partners
Christian Saunders
Andrew Schoorlemmer
Activities: Their recent high profile matters include Dubai World, Algosaibi, The Investment Dar, EFAD.

Chadbourne & Parke LLC
City Tower 1, Sheikh Zayed Road,
P.O. Box 23927, Dubai, UAE.
Tel: +971 (4) 331 6123
Fax: +971 (4) 331 0844
Email: dubai@chadbourne.com
Website: www.chadbourne.com.
Managing Partner
Daniel J. Greenwald III
Email: dgreenwald@chadbourne.com
Activities: Chadbourne & Parke offers a full range of services in cross-border bankruptcies and financial restructurings, business restructurings and insolvencies.

Clifford Chance LLP
3rd Floor, The Exchange Building,
Dubai International Financial Centre,
PO Box 9380, Dubai, UAE.
Tel: +971 (4) 362 0444
Fax: +971 (4) 362 0445
Website: www.cliffordchance.com
Managing Partner
Graham Lovett
Tel: +971 (4) 362 0625
Email: graham.lovett@cliffordchance.com
Partners
Peter Avery
Tel: +971 (4) 362 0682
Email: peter.avery@cliffordchance.com
Robin Abraham
Tel: +971 (4) 362 0609
Email: robin.abraham@cliffordchance.com
Activities: The global restructuring and insolvency group advises lenders, other creditors, debtors, shareholders and investors in complex financial restructurings and cross-border insolvencies.

Deloitte Corporate Finance Limited
DIFC, Al Fattan Currency House,
level 5, Dubai, UAE.
Website: www.deloitte.com
Head of Restructuring Services
David Stark
Tel: +971 (4) 506 4739
Email: dastark@deloitte.com
Activities: Deloitte advises stakeholders in underperforming or distressed businesses including creditors and directors. Services include insolvency appointments, financial restructuring, turnaround and business reviews.

KPMG UAE
Emirates Tower, Sheikh Zayed Road,
Dubai, UAE.
Tel: +971 (4) 403 0300
Fax: +971 (4) 683 3056
Partner, Head of Restructuring for the Lower Gulf
David Burlison

Latham & Watkins LLP
Dubai International Financial Centre,
Precinct Building 1, Level 3 PO Box 506698
Dubai, UAE.
Tel: +971 (4) 704 6300
Fax: +971 (4) 704 6499
Email: webmaster@lw.com
Website: www.lw.com
Partner & Head of Regional Finance Practice
Christopher Hall
Tel: +971 (4) 704 6333
Email: christopher.hall@lw.com
Partner
Anthony Pallett
Tel: +971 (4) 704 6402
Email: anthony.pallett@lw.com
Activities: Latham's global restructuring team represents corporations, banks, creditors' committees and other financial institutions in workouts, restructurings and bankruptcy cases ranging from single asset debtors to large multi-national corporate insolvencies.

Safwan Moubaydeen Law Firm in association with SNR Denton & Co
Emmar Towers, Building B-12th Floor, Zahran Street, PO Box 926442, Amman 11190,
Jordan, UAE.
Tel: +962 (6) 577 7400
Fax: +962 (6) 577 7401
Website: www.snrdenton.com
Partner
Safwan Moubaydeen

SJ Berwin LLP
Suite 303, Park Place, Sheikh Zayed Road,
Dubai, UAE.
Tel: +971 (4) 328 9900
Fax: +971 (4) 328 9911
Email: dubai@sjberwin.com

SNR Denton
Suite 1204, Al Ghaith Tower, Hamdan Street, Abu Dhabi, UAE.
Tel: +971 (2) 626 6180
Fax: +971 (2) 626 6175
Website: www.snrdenton.com

Partners
Paul Jarvis
Udayan Mukherjee
David Risbridger
Andrew Ward

SNR Denton
26th Floor, API World Tower, Sheikh Zayed Road, PO Box 1756, Dubai, UAE.
Tel: +971 (4) 331 0220
Fax: +971 (4) 331 0201
Website: www.snrdenton.com

Partner
Michael Kerr

Standard & Poor's
DIFC, Lower Currency House, Level 2, PO Box 506650, Dubai, UAE.
Tel: +971 (4) 372 7100
Fax: +971 (4) 372 7111

White & Case LLP
16th Floor, C1 Tower, Six Towers Complex, Bainuna Street, Abu Dhabi, UAE.
Tel: +971 (2) 4950 100
Fax: +971 (2) 4950 150
Website: www.whitecase.com

Partners
Doug Peel
Tel: +971 (2) 4950 120
Email: dpeel@whitecase.com
Margaret Cole
Tel: +971 (2) 4950 130
Email: mcole@whitecase.com
Shibeer Ahmed
Tel: +971 (2) 4950 139
Email: shibeer.ahmed@whitecase.com

Activities: White & Case is a global law firm with over 2000 lawyers in 26 countries. Their financial restructuring and insolvency group is a worldwide practice consisting of over 160 restructuring and insolvency lawyers. They are a globally recognised leader in complex cross-border insolvencies and workouts, and they represent clients in all aspects of restructurings, workouts and insolvencies, including both transactional and litigation matters. Recent representations include many of the world's largest restructuring cases and out-of-court workouts.

WongPartnership LLP Abu Dhabi Branch
Al Bateen Towers, C3 Penthouse Unit 11-01(P1), P.O. Box No. 37883, Abu Dhabi, UAE.
Tel: +971 (2) 651 0800
Fax: +971 (2) 635 9706
Email: contactus@wongpartnership.com
Website: www.wongpartnership.com

Senior Partner
Alvin Yeo

Senior Counsel, Partners
Chou Sean Yu
Manoj Pillay Sandrasegara
Mark Choy

Activities: The practice specialises in advising corporates and financial institutions on a full range of debt restructuring and liability management issues.

UNITED KINGDOM

Addleshaw Goddard
Milton Gate, 60 Chiswell Street, London EC1Y 4AG, UK.
Tel: +44 (20) 7606 8855
Fax: +44 (20) 7606 4390
Website: www.addleshawgoddard.com

Partners
John Joyce
Email: john.joyce@addleshawgoddard.com
Graham Briggs
Email: graham.briggs@addleshawgoddard.com

Activities: All aspects of legal advice concerning corporate restructuring and insolvency.

Alvarez & Marsal
First Floor, One Finsbury Circus, London EC2M 7EB, UK.
Tel: +44 (20) 7715 5200
Fax: +44 (20) 7715 5201
Website: www.alvarezandmarsal.com

SBU Head & Managing Director
Antonio M. Alvarez III
Tel: +44 (20) 7715 5210
Email: talvarezIII@alvarezandmarsal.com

Activities: Founded in 1983, Alvarez & Marsal is the leading independent global professional services firm, specialising in turnaround management, performance improvement and business advisory services.

American Appraisal (UK) Ltd
Aldermary House, 10-15 Queen Street, London EC4N 1TX, UK.
Tel: +44 (20) 7329 1776
Fax: +44 (20) 7248 1453
Email: igough@american-appraisal.com
Website: www.american-appraisal.com

Managing Director
Ian Gough

Activities: International valuation consultancy. Independent valuers of property, plant and machinery, intellectual property and total businesses. Over 50 offices worldwide.

Appleby
1st Floor, 3 Copthall Avenue, London EC2R 7BH, UK.
Tel: +44 (20) 7283 6061
Fax: +44 (20) 7469 0540
Email: london@applebyglobal.com

Contact
Warren Cabral
Email: wcabral@applebyglobal.com

Activities: Handle major insolvency and restructuring matters, liquidation of all types, and advising on creditors' rights and schemes of arrangements.

Awaci
225 Fincheley Road, London, NW3 6LP, UK.
Tel: +44 (20) 7433 3424
Email: mj@awaci.co.uk

Contact
Marc Jackson

Bank of America Business Capital
5 Canada Square, Canary Wharf, London E14 5AQ, UK.
Tel: +44 (20) 7174 5809
Fax: +44 (20) 7174 6427

Activities: Financing company. Asset based lending.

BDO LLP
55 Baker Street, London W1U 7EU, UK.
Tel: +44 (20) 7486 5888
Fax: +44 (20) 7935 3944
Email: info@bdo.co.uk
Website: www.bdo.co.uk

Partner, Head of UK Business Restructuring
Shay Bannon
Tel: +44 (20) 7893 2209
Email: shay.bannon@bdo.co.uk

Partner, Head of London Business Restructuring
Mark Shaw
Tel: +44 (20) 7893 3246
Email: mark.shaw@bdo.co.uk

Activities: BDO LLP provides pragmatic and robust restructuring advisory, insolvency and creditor services to a broad range of stakeholders.

Bingham McCutchen (London) LLP
41 Lothbury, London EC2R 7HF, UK.
Tel: +44 (20) 7661 5300
Fax: +44 (20) 7661 5400
Email: info@bingham.com
Website: www.bingham.com

Co-Head, Financial Restructuring
James Roome

Head, London Finance
Barry Russell

Activities: Represent the world's largest insurance companies, pension funds, investment banks, hedge funds, distressed debt investors, international agencies, governments and multinational corporate groups.

Bird & Bird LLP
15 Fetter Lane, London EC4A 1JP, UK.
Tel: +44 (20) 7415 6000
Fax: +44 (20) 7415 6111
Email: brett.israel@twobirds.com
Website: www.twobirds.com

Partner & Joint Head of International Corporate Restructuring and Insolvency
Brett Israel

Activities: The international corporate restructuring and insolvency group is active across the firm's network of offices especially in Europe, on both formal work and restructuring initiatives for a range of insolvency practitioners, lenders, corporate clients and other stakeholders.

BMC Group Limited
1st Floor, No. 1 Poultry, London EC2R 8JR, UK.
Tel: +44 (20) 7551 5171
Fax: +44 (20) 7000 1215
Email: info@bmcgroup.com
Website: www.bmcgroup.com

President
Tinamarie Feil
Tel: +1 (212) 310 5922
Email: tfeil@bmcgroup.com

Managing Director SmartRoom
Brandon Farley
Tel: +1 (404) 915 0438
Email: bfarley@bmcgroup.com

Activities: Restructuring, class action, litigation, M&A, and investor communications. Superior technology, expertise and greatest cost efficiencies in data and claims management.

Bondlens Limited
The Old Granary, Ash Hill, Ruckinge, Kent TN26 2PE, UK.
Tel: +44 (1233) 732 711
Fax: +44 (1233) 732 689
Email: enq@bondlens.co.uk
Website: www.bondlens.co.uk

Chairman & CEO
B.G. Stroud
Email: enq@bondlens.co.uk

Managing Director
George Grammer

Activities: Mergers and Acquisitions in three industries: (i) communication (recruitment, advertising, PR); (ii) engineering; (iii) electronics.

Bonelli Erede Pappalardo LLP
30 Cannon Street, London EC4M 6XH, UK.
Tel: +44 (20) 7653 6888
Fax: +44 (20) 7248 9228
Website: www.beplex.com

Partners
Andrea De Tomas
Tel: +44 (20) 7653 6861
Email: andrea.detomas@beplex.com
Giovanni Domenichini
Tel: +39 (010) 846 2322
Email: giovanni.domenichini@beplex.com

Activities: Restructuring of distressed companies, advising creditors and debtors on insolvency proceedings and on a wide range of in court and out of court restructurings.

Brown Rudnick LLP
8 Clifford Street, London W1S 2LQ, UK.
Tel: +44 (20) 7851 6000
Fax: +44 (20) 7851 6100
Website: www.brownrudnick.com

Partners
Louise Verrill
Tel: +44 (20) 7851 6072
Email: lverrill@brownrudnick.com
Peter Declercq
Tel: +44 (20) 7851 6065
Email: pdeclercq@brownrudnick.com
Patrick Elliot
Tel: +44 (20) 7851 6053
Email: pelliot@brownrudnick.com

Activities: Brown Rudnick's Bankruptcy & corporate restructuring group is globally recognised for its representation of high-yield investors and funds both individually and as members of ad hoc and official committees, in many of the largest and most complex European insolvency and refinancing matters. The Group's recent representative work includes LyondellBassell and Lehman Brothers, as well as significant involvement in Eurozone bank restructurings, having advised creditors in Northern Rock, Bradford & Bingley, Commerzbank, WestLB, Santander, and most recently, Anglo Irish, Allied Irish Bank and Bank of Ireland.

BTG Mesirow Financial Consulting
32 Cornhill, London EC3V 3BT, UK.
Tel: +44 (20) 7398 3801
Fax: +44 (20) 7398 3799
Email: ukconsulting@btgmfc.com
Website: www.btgmfc.com

Chairman
David Wilton
Email: dwilton@btgmfc.com

Contact
Nigel Atkinson
Email: natkinson@btgmfc.com

Activities: Cross-border restructuring, valuation, litigation support and insolvency with a reach across over 100 countries.

Cadwalader, Wickersham & Taft LLP
Dashwood House, 69 Old Broad Street, London EC2M 1QS, UK.
Tel: +44 (20) 7170 8700
Fax: +44 (20) 7170 8600
Email: info@cwt-uk.com
Website: www.cadwalader.com

Partners & Co-Chairs of Financial Restructuring Dept.
Deryck A. Palmer
Email: deryck.palmer@cwt.com
John J. Rapisardi
Email: john.rapisardi@cwt.com

Activities: Representation of secured and unsecured lenders, bondholders, creditors' committees, borrowers, asset purchasers and others in restructuring transactions and reorganisation cases.

Carrick Read Insolvency
Norwich House, Savile Street, Hull HU1 3ES, UK.
Tel: +44 (1482) 211 160
Fax: +44 (1482) 585 798
Email: cgarwood@cri-hull.co.uk
Website: www.carrick-read.co.uk

Partners
Christopher Garwood
Email: cgarwood@cri-hull.co.uk
David Beresford
Email: dberesford@cri-hull.co.uk

Activities: Solicitors and insolvency practitioners dealing with all types of corporate and personal insolvency.

Carter Backer Winter LLP
Enterprise House, 21 Buckle Street, London E1 8NN, UK.
Tel: +44 (20) 7309 3800
Fax: +44 (20) 7309 3801
Email: john.alexander@cbw.co.uk
Website: www.cbw.co.uk

Partners
John Alexander
Robin Davis
John Dickinson

Director
Carl Bowles

Activities: Advise and assist clients on the recovery and insolvency processes within the UK.

Chadbourne & Parke (London) LLP
Regis House, 45 King William Street, London EC4R 9AN, UK.
Tel: +44 (20) 7337 8000
Fax: +44 (20) 7337 8001
Email: london@chadbourne.com
Website: www.chadbourne.com

Managing Partner
Claude S. Serfilippi
Tel: +44 (20) 7337 8030
Email: cserfilippi@chadbourne.com

Activities: Chadbourne & Parke LLP offers a full range of services in cross-border bankruptcies and financial restructurings, business restructurings and insolvencies.

Charles Russell LLP
5 Fleet Place, London EC4M 7RD, UK.
Tel: +44 (20) 7203 5000
Fax: +44 (20) 7203 5399
Email: enquiry@charlesrussell.co.uk
Website: www.charlesrussell.co.uk

Partner
James Hyne

Activities: Established and respected insolvency practice with wide range of clients and experience. Offices in London, Guilford, Cambridge, Cheltenham, Oxford, Bahrain and Geneva.

Charles Russell LLP
Compass House, Lypiatt Road, Cheltenham, Gloucestershire GL50 2QJ, UK.
Tel: +44 (1242) 221 122
Fax: +44 (1242) 584 700
Email: enquiry@charlesrussell.co.uk
Website: www.charlesrussell.co.uk

Partners
Richard Norton
Patrick Gearon

Activities: Established and respected insolvency practice with a wide range of clients and experience. Offices in Cheltenham, London, Guilford, Oxford, Geneva and Bahrain.

ClearDebt Limited
Nelson House, Park Road, Timperley, Altringham, Cheshire WA14 5BZ, UK.
Tel: +44 (161) 969 2030
Fax: +44 (161) 969 2207
Email: enq@cleardebt.co.uk
Website: www.cleardebt.co.uk

Contact
David Mond
Email: david.mond@cleardebt.co.uk

Activities: IVA's, bankruptcies, debt management.

Clifford Chance LLP
10 Upper Bank Street, London E14 5JJ, UK.
Tel: +44 (20) 7006 1000
Fax: +44 (20) 7006 5555
Website: www.cliffordchance.com

Partner
Mark Hyde
Tel: +44 (20) 7006 1616
Email: mark.hyde@cliffordchance.com

Activities: The global restructuring and insolvency group advises lenders, other creditors, debtors, shareholders and investors in complex financial restructurings and cross-border insolvencies.

Cripps Harries Hall LLP
Wallside House, 12 Mount Ephraim Road, Tunbridge Wells, Kent TN1 1EG, UK.
Tel: +44 (1892) 515 121
Fax: +44 (1892) 544 878
Email: reception@crippslaw.com
Website: www.crippslaw.com

Partners
Chris Langridge
Tel: +44 (1892) 506 090
Email: chris.langridge@crippslaw.com
Peter Ashford
Tel: +44 (1892) 506 113
Email: peter.ashford@crippslaw.com

Activities: Offers a full range of insolvency and restructuring services to insolvency practitioners, banks and other clients.

Debevoise & Plimpton LLP
Tower 42, Old Broad Street, London EC2N 1HQ, UK.
Tel: +44 (20) 7786 9000
Fax: +44 (20) 7588 4180
Website: www.debevoise.com

Partners
Katherine Ashton
Peter Hockless
Colin Bogie

Activities: Represent European and US borrowers, bondholders and other lenders in a broad variety of complex international restructurings and insolvencies.

Deloitte
Athene Place, 66 Shoe Lane, London EC4A 3BQ, UK.
Tel: +44 (20) 7936 3000
Fax: +44 (20) 7583 1198
Website: www.deloitte.com

National Head of Restructuring Services
Neville Kahn
Tel: +44 (20) 7007 3017
Email: nkhan@deloitte.co.uk

Global Head of Restructuring Services
Andrew Grimstone
Tel: +44 (20) 7007 2998
Email: agrimstone@deloitte.co.uk

Partner
Nick Edwards
Tel: +44 (20) 7007 3013
Email: nedwards@deloitte.co.uk

Activities: Deloitte advises stakeholders in underperforming or distressed businesses including creditors and directors. Services include insolvency appointments, financial restructuring, turnaround and business reviews.

Dundas & Wilson CS LLP
Northwest Wing, Bush House, Aldwych, London WC2B 4EZ, UK.
Tel: +44 (20) 7240 2401
Fax: +44 (20) 7240 2448
Website: www.dundas-wilson.com

Partner
John Verrill
Contact
David Gibson
Activities: Dundas & Wilson is a national law firm with 83 partners and 376 fee earners based across offices in Edinburgh, London and Glasgow.

Dundas & Wilson CS LLP
Saltire Court, 20 Castle Terrace,
Edinburgh EH1 2EN, UK.
Tel: +44 (131) 228 8000
Fax: +44 (131) 228 8888
Website: www.dundas-wilson.com
Partner
Claire Massie
Activities: Dundas & Wilson is a national law firm with 83 partners and 376 fee earners based across offices in Edinburgh, London and Glasgow.

Dundas & Wilson CS LLP
191 West George Street,
Glasgow G2 2LD, Scotland.
Tel: +44 (141) 222 2200
Fax: +44 (141) 222 2201
Website: www.dundas-wilson.com
Partner
Claire Massie
Activities: Dundas & Wilson is a national law firm with 83 partners and 376 fee earners based across offices in Edinburgh, London and Glasgow.

Edwards Wildman Palmer UK LLP
Dashwood, 69 Old Broad Street,
London EQM 1QS, UK.
Tel: +44 (20) 7583 4055
Fax: +44 (20) 7353 7377
Website: www.edwardswildman.com
Partners
Jon Yorke
David Kendall
Counsel
Peter Fidler
Activities: Has a strong presence in insolvency work and is particularly known for its international and insurance insolvency practices.

Epiq Systems LTD
11 Old Jewry, 4th Floor,
London EC2R 8DU, UK.
Tel: + 44 (20) 7367 9191
Fax: + 44 (20) 7796 4272
Email: info@epiqsystems.co.uk
Website: www.epiqsystems.co.uk
International Managing Director
Greg Wildisen
Executive Vice President
James Katchadurian
Tel: + +44 (20) 7367 9173
Email: jkatchadurian@epiqsystems.com
Activities: Epiq Systems is a leading provider of solutions for the legal industry. Epiq has successfully manged the largest and most complex matters in history, including: Lehman Brothers, Icelandic Banks, Enron Corporation, Worldcom and Global Crossing.

European Resolution Capital Partners Ltd
Epworth House, 25 City Road,
London EC1Y 1AR, UK.
Tel: +44 (20) 3318 2662
Email: Info@eurescap.com

F A Simms & Partners LTD
Insol House, 39 Station Road, Lutterworth,
Leicestershire LE17 4AP, UK.
Tel: +44 (1455) 555 444
Fax: +44 (1455) 552 572
Email: info@fasimms.com
Website: www.fasimms.com
Chairman
Frank Arthur Simms
Managing Director
Richard Frank Simms
Activities: Business recovery and insolvency practitioners. As a highly innovative and technically orientated company, have an excellent reputation for commercial solutions.

Fasken Martineau DuMoulin LLP
17 Hanover Square,
London W1S 1HU, Mayfair, UK.
Tel: +44 (20) 7917 8500
Fax: +44 (20) 7917 8555
Email: london@fasken.co.uk
Website: www.fasken.com
Firm-wide Managing Partner
David Corbett
Tel: +1 (416) 868 3504
Email: dcorbett@fasken.com
Partner, Chair, Global Insolvency & Restructuring Group
John Grieve (Vancouver)
Tel: +1 (604) 631 4772
Email: jgrieve@fasken.com
Partner
Robert Paydon (London)
Tel: +44 (20) 7817 8570
Email: rpaydon@fasken.com
Activities: Canadian and English insolvency and restructuring lawyers representing domestic and international businesses, institutional, secured and distressed debt lenders, creditors, directors, insolvency professionals and others.

Garrigues
20 Abchurch Lane, London EC4N 7BB, UK.
Tel: +44 (20) 7398 5820
Fax: +44 (20) 7398 5839
Website: www.garrigues.com
Head of London Office
Ignacio Corbera
Email: ignacio.corbera@garrigues.com
Activities: Their team of leading lawyers has decades of experience in turn-around, corporate recovery, refinancing and all types of insolvencies, including cross-border insolvency. It comprises experts with a background in law or economics, who work together in contentious and non-contentious insolvency, affecting debtors, banks or creditors for troubled companies.

Gibson, Dunn & Crutcher LLP
Telephone House, 2-4 Temple Avenue,
London EC4Y 0HB, UK.
Tel: +44 (20) 7071 4000
Fax: +44 (20) 7071 4244
Website: www.gibsondunn.com
Co-Chairs, Business Restructuring & Reorganisation Practice Group
Craig H. Millet
Michael A. Rosenthal
David M. Feldman
Activities: Represent debtors' in bankruptcy cases and out-of-court restructurings, creditors' committees and individual creditors, bondholders, lenders, potential acquirers, insurers and trustees.

Goddards Chartered Accountants
8 The High Street, West Molesey,
Surrey, KT8 2NA, UK.
Tel: +44 (20) 8941 2187
Fax: +44 (20) 8783 0554
Email: info@gandco.co.uk
Website: www.goddardsaccountants.biz
Directors
Prakash Gungah
Email: prakash@gandco.co.uk
Kevin Goddard
Partners
Derek Williamson
Email derek@gandco.co.uk;
J. Mistry
Activities: Chartered accountants involved in company restructuring and refinancing.

Goddards Chartered Accountants
The Business Centre, 758 Great Cambridge Road, Enfield, Middlesex, EN1 3PN, UK.
Tel: +44 (20) 8941 2187
Fax: +44 (20) 8783 0554
Email: info@gandco.co.uk
Website: www.goddardsaccountants.biz
Partners
O.P. Gungah
Tel: +44 (20) 8941 2187
Email: prakash@gandco.co.uk
J. Mistry
Tel: +44 (20) 8443 7049

Goddards Chartered Accountants
c/o SRFM Paramount, Softech House, London Road, Albourne, Hassocks BN6 9BN, UK.
Tel: +44 (20) 8941 2187
Fax: +44 (20) 8783 0554
Email: info@gandco.co.uk
Website: www.goddardsaccountants.biz
Director
Derek Williamson
Partner
O.P. Gungah
Email: prakash@gandco.co.uk
Kevin Goddard
Email: kevin@gandco.co.uk
Manager
Stuart Rabor
Activities: A pro active firm of accountants involved in international project funding.

Grant Thornton UK LLP
30 Finsbury Square, London EC2P 2YU, UK.
Tel: +44 (20) 7383 5100
Fax: +44 (20) 7383 4715
Email: recoveryenquiries@gtuk.com
Website: www.grant-thornton.co.uk
Head of Client Services, Recovery and Reorganisation
Mark Byers
Activities: Recognised UK insolvency and turnaround practice with a track record of high profile cases.

Harney Westwood & Riegels LLP
3rd Floor, 7 Lugate Broadway,
London EC4V 6DX, UK.
Contact
Leonard A. Birmingham
Email: leonard.birmingham@harneys.com

Herbert Smith LLP
Exchange House, Primrose Street,
London EC2A 2HS, UK.
Tel: +44 (20) 7374 8000
Fax: +44 (20) 7374 0888
Website: www.herbertsmith.com
Partners, Finance Division
Laurence Elliott
Stephen Gale
Kevin Pullen
Activities: Deal with all aspects of corporate recovery, insolvency and restructuring, both domestic and cross-border.

Hodgsons Chartered Accountants
Nelson House, Park Road, Timperley,
Altrincham, Cheshire WA14 5BZ, UK.
Tel: +44 (161) 969 2023
Fax: +44 (161) 969 2024
Email: dmond@hodgsons.co.uk
Website: www.hodgsons.co.uk
Senior Partner
David Mond
Manager
Matthew Bannon
Activities: Independent turnaround management and business recovery specialist in the northwest of England.

Hogan Lovells International LLP
Atlantic House, Holborn Viaduct,
London EC1A 2FG, UK.
Tel: +44 (20) 7296 2000
Fax: +44 (20) 7296 2001
Email: enquiry@hoganlovells.com
Website: www.hoganlovells.com

Partners
Joe Bannister
Jeremy Cole
Laurence Crowley
Stephen Foster
Deborah Gregory
Paul McLoughlin
Alexander Wood
Geoffrey Yeowart
Cary Kochberg
Hugh Lyons
Crispin Rapinet.
Michael Roberts
Tom Astle

Activities: Experts advising on business restructuring and insolvency, including corporate restructuring, formal insolvencies and creditor representation.

INSOL Europe
PO Box 7149, Clifton,
Nottingham NG11 6WD, UK.
Tel: +44 (115) 878 0584
Fax: +44 (115) 878 0584
Website: www.insol-europe.org

Director of Administration
Caroline Taylor
Email: carolinetaylor@insol-europe.org

Activities: European insolvency practitioners association.

INSOL International
6-7 Queen Street, London EC4N 1SP, UK.
Tel: +44 (20) 7248 3333
Fax: +44 (20) 7248 3384
Email: jelena@insol.ision.co.uk
Website: www.insol.org

Executive Director
Claire Broughton

Membership Manager
Dorothy Williams

Activities: INSOL International is a world-wide federation of national associations of accountants and lawyers who specialise in insolvency, restructuring and turnaround. Currently 40 Member Associations world-wide with over 9,000 professionals participating as members of INSOL International.

Kirkland & Ellis International LLP
30 St Mary Axe, London EC3A 8AF, UK.
Tel: +44 (20) 7469 2000
Fax: +44 (20) 7469 2001
Email: norley@kirkland.com
Website: www.kirkland.com

Partner
Lyndon Norley

Activities: Head of European Practice. Advises debtors, creditors and other stakeholders in all restructuring processes, especially multi-jurisdictional cases.

Latham & Watkins
99 Bishopsgate, London EC2M 3XF, UK.
Tel: +44 (20) 7710 1000
Fax: +44 (20) 7374 4460
Website: www.lw.com

Partners
James Chesterman
John Houghton
Christopher Hall
Holly Neavill

Contacts
Jan Baker
Tel: +1 (212) 906 1200
Mitchell Seider
Tel: +1 (212) 906 1200
Peter Gilhuly
Tel: +1 (213) 485 1234

Activities: Global law firm with more than 2000 lawyers in 31 offices worldwide, including over 500 lawyers throughout Europe. Offers a full range of services in insolvency, workouts and restructurings and is acknowledged as a leading bankruptcy lender law firm.

Linklaters
One Silk Street, London EC2Y 8HQ, UK.
Tel: +44 (20) 7456 2000
Fax: +44 (20) 7456 2222
Email: enquiries@linklaters.com
Website: www.linklaters.com

Partner, Head of Banking
Gideon Moore

Partner, Head of Restructuring & Insolvency Group
Tony Bugg

Activities: Debt rescheduling; debt and equity restructuring; rescue operations; planning, initiation and conducting of formal insolvency procedures; asset and debt recovery and investigation.

LOGOS Legal Services
42 New Broad Street,
London EC2M 1JD, UK.
Tel: +44 (20) 7920 3020
Fax: +44 (20) 7920 3099
Email: logos@logoslegalservices.com
Website: www.logos.is

Partner
Gudmundur J. Oddsson
Email: gudmundur.oddsson@
logoslegalservices.com

Matheson Ormsby Prentice, Solicitors
16th Floor, Heron Tower, 110 Bishopsgate,
London EC2N 4AY, UK.
Tel: +44 (20) 7614 5670
Fax: +44 (20) 7614 5690
Email: london@mop.ie
Website: www.mop.ie

Mayer Brown International LLP
201 Bishopsgate, London EC2M 3AF, UK.
Tel: +44 (20) 3130 3000
Fax: +44 (20) 3130 3001
Email: asheridan@mayerbrown.com
Website: www.mayerbrown.com

McDermott, Will & Emery
110 Bishopsgate, London EC2N 4AY,
DX42619 Cheapside, UK.
Tel: +44 (20) 7577 6900
Fax: +44 (20) 7577 6950

Partner
Richard Mitchell

Activities: Commonly act for debtors, creditors and investors in complex restructuring situations in Europe, the US and elsewhere.

Minter Ellison
10 Dominion Street, London EC2M 2EE, UK.
Tel: +44 (20) 7448 4800
Fax: +44 (20) 7448 4848
Email: info@minterellison.com
Website: www.minterellison.com

Managing Partner
Michael Whalley

Contact
Michael Wallin

Activities: Coordinating a total legal advisory service for Asia-Pacific multi-jurisdictional insolvencies and restructures, including security enforcement and asset tracing.

Moore Stephens LLP
150 Aldersgate Street,
London EC1A 4A3, UK.
Tel: +44 (20) 7334 9191
Fax: +44 (20) 7651 1822
Email: phillip.sykes@moorestephens.com
Website: www.moorestephens.co.uk

Head of Corporate Advisory Services
Phillip Sykes

Corporate Advisory Partners
Jeremy Willmont
David Rolph

Activities: Professional activities include corporate restructuring/reorganisation, lender and other business reviews, creditors' committee advice, formal insolvency appointments and court receivership.

Nabarro LLP
Lacon House, Theobald's Road, London
WC1X 8RW, UK.
Tel: +44 (20) 7524 6000
Fax: +44 (20) 7524 6524
Website: www.nabarro.com

Partner/Head of Restructuring & Insolvency
Patricia Godfrey
Tel: +44 (20) 7524 6444
Email: p.godfrey@nabarro.com

Activities: Formal cross-border insolvency using European insolvency regulation and informal restructuring across a variety of jurisdictions.

Nixon Peabody International LLP
1 Ropemaker Street, 15th Floor,
London EC2Y 9HT, UK.
Tel: +44 (20) 7653 9760
Fax: +44 (20) 7248 6557
Website: www.nixonpeabody.com

Contact:
Roland Diniz
Email: rdiniz@nixonpeabody.com

Noerr
Tower 42, 25 Old Broad Street,
London EC2N 1HQ, UK.
Tel: +44 (20) 7562 4330
Fax: +44 (20) 7562 4341
Email: info@noerr.com
Website: www.noerr.com

Partner
Hans Radau
Tel: +44 (20) 7562 4335
Email: hans.radau@noerr.com

Contact
Isabel Schneider
Tel: +44 (20) 7562 4338
Email: isabel.schneider@noerr.com

Activities: Advising shareholders, companies, creditors and investors regarding insolvency/restructuring proceedings. Trustee for secured creditors. Advice to insolvency administrators.

Norton Folgate FG Plc
50a St Andrew Street,
Hertfordshire SG14 1JA, UK.
Tel: +44 (1992) 537 735
Fax: +44 (1992) 537 735
Email: robertkeep@nortonfolgate.co.uk
Website: www.nortonfolgate.co.uk

Managing Director
Robert Keep

Activities: Structured asset and corporate finance advisers and arrangers for M&A, pre pack, rescue, recovery and restructure applications. Expert witness service. City of London office.

Norton Rose LLP
3 More London Riverside,
London, SE1 2AQ, UK.
Tel: +44 (20) 7283 6000
Fax: +44 (20) 7283 6500
Website: www.nortonrose.com

Partners
Hamish Anderson
Email: hamish.anderson@nortonrose.com
James Stonebridge
Email: james.stonebridge@nortonrose.com
Richard Calnan
Email: richard.calnan@nortonrose.com
Radford Goodman
Email: radford.goodman@nortonrose
Activities: Specialising in cross-border insolvency and restructurings. Extensive experience in the areas of financial institutions, energy, infrastructure and commodities, technology and transport.

Oriel Collections Ltd
Cheltenham House, Clarence Street, Cheltenham, Gloucestershire GL50 3JR, UK.
Tel: +44 (845) 226 1816
Fax: +44 (845) 226 1817
Email: info@orielcollections.co.uk
Website: www.orielcollections.co.uk
Managing Director
Adrian Stalley
Tel: +44 (1242) 694 502
Activities: Accredited members of CSA providing collection of debt, the purchase of books or instalment debts. Providers of finance to administrators.

Oriel Securities Limited
150 Cheapside, London EC2V 6ET, UK.
Tel: +44 (20) 7110 7600
Fax: +44 (20) 7110 7611
Website: www.orielsecurities.com
Partner
Michael Berry
Tel: +44 (20) 7710 7606
Email: michael.berry@orielsecurities.com
Partner
Jacco Brouwer
Tel: +44 (20) 7710 7605
Email: jacco.brouwer@orielsecurities.com
Activities: Oriel's debt advisory and restructuring team provides specialist debt advisory service to companies, shareholders and debt providers.

Paqua Accountants
Spirit House, 8 High Street, West Molesey, Surrey KT8 2NA, UK.
Tel: +44 (20) 8941 2187
Fax: +44 (20) 8783 0554
Email: info@paqua.org.uk
Website: www.paqua.org.uk
Director
Derek Williamson
Manager
Prakash Gungah
Activities: Reviewing and restructuring businesses to enable them to ride the economic storm.

PKF (UK) LLP
78 Carlton Place, Glasgow G5 9TH, UK.
Tel: +44 (141) 429 5900
Fax: +44 (141) 429 5901
Email: info.glasgow@uk.pkf.com
Website: www.pkf.co.uk
Partners
Anne Buchanan
Tel: +44 (141) 418 1119
Email: anne.buchanan@uk.pkf.com
Bryan Jackson
Tel: +44 (141) 418 1119
Email: bryan.jackson@uk.pkf.com
Activities: Advisers on all forms of insolvency and restructuring.

PKF (UK) LLP
Pannell House, 159 Charles Street, Leicester LE1 1LD, UK.
Tel: +44 (116) 250 4400
Fax: +44 (116) 285 4651
Email: info.leicester@uk.pkf.com
Website: www.pkf.co.uk
Partner
Brian Hamblin
Tel: +44 (20) 7065 0188
Email: Brian.hamblin@uk.pkf.com
Activities: Advisers on all forms of insolvency and restructuring.

PKF (UK) LLP
Pannell House, Park Street, Guildford, Surrey GU1 4HN, UK.
Tel: +44 (1483) 564 646
Fax: +44 (1483) 408 101
Email: info.guildford@uk.pkf.com
Website: www.pkf.co.uk
Partner
James Money
Tel: +44 (20) 7065 0733
Email: james.money@uk.pkf.com
Activities: Advisers on all forms of insolvency and restructuring.

PKF (UK) LLP
Cedar House, 105 Carrow Road, Norwich, Norfolk NR1 1HP, UK.
Tel: +44 (1603) 615 914
Fax: +44 (1603) 661 626
Email: info.norwich@uk.pkf.com
Website: www.pkf.co.uk
Partners
David Merrygold
Tel: +44 (1473) 320 742
Email: david.merrygold@uk.pkf.com
Matthew Howard
Tel: +44 (1603) 615 914
Email: matthew.howard@uk.pkf.com
Activities: Advisers on all forms of insolvency and restructuring.

PKF (UK) LLP
8th Floor, Helmont House, Churchill Way, Cardiff CF10 2HE, UK.
Tel: +44 (29) 2064 6200
Fax: +44 (29) 2064 6201
Email: info.cardiff@uk.pkf.com
Website: www.pkf.co.uk
Partner
Brian Hamblin
Tel: +44 (20) 7065 0188
Email: brian.hamblin@uk.pkf.com
Activities: Advisers on all forms of insolvency and restructuring.

PKF (UK) LLP
City Point, 65 Haymarket Terrace, Edinburgh EH12 5HD, UK.
Tel: +44 (131) 347 0347
Fax: +44 (131) 347 0330
Email: info.edinburgh@uk.pkf.com
Website: www.pkf.co.uk
Partners
Anne Buchanan
Tel: +44 (141) 418 1119
Email: anne.buchanan@uk.pkf.com
Bryan Jackson
Tel: +44 (141) 418 1119
Email: bryan.jackson@uk.pkf.com
Activities: Advisers on all forms of insolvency and restructuring.

PKF (UK) LLP
16 The Havens, Ransomes Europark, Ipswich, Suffolk IP3 9SJ UK.
Tel: +44 (1473) 320 700
Fax: +44 (1473) 320 800
Partners
David Merrygold
Tel: +44 (1473) 320 742
Email: david.merrygold@uk.pkf.com
Matt Howard
Tel: +44 (1493) 382 547
Email: matt.howard@uk.pkf.com
Activities: Advisers on all forms of insolvency and restructuring.

PKF (UK) LLP
Farringdon Place, 20 Farringdon Road, London EC1M 3AP, UK.
Tel: +44 (20) 7065 0000
Fax: +44 (20) 7065 0650
Email: info.london@uk.pkf.com
Website: www.pkf.co.uk
Partners
Steve Holgate
Tel: +44 (20) 7065 0348
Email: steve.holgate@uk.pkf.com
Trevor Birch
Tel: +44 (20) 7065 0225
Email: trevor.birch@uk.pkf.com
James Money
Tel: +44 (20) 7065 0733
Email: james.money@uk.pkf.com
Jim Stewart-Koster
Tel: +44 (20) 7065 0125
Email: jim.stewart-koster@uk.pkf.com
Activities: Advisers on all forms of insolvency and restructuring.

PKF (UK) LLP
2nd Floor, Fountain Precinct, Balm Green, Sheffield S1 2JA, UK.
Tel: +44 (114) 276 7991
Fax: +44 (114) 223 1717
Email: info.sheffield@uk.pkf.com
Website: www.pkf.co.uk
Partners
Ian Schofield
Tel: +44 (113) 228 4114
Email: ian.schofield@uk.pkf.com
Charles Escott
Tel: +44 (113) 228 4122
Email: charles.escott@uk.pkf.com
Activities: Advisers on all forms of insolvency and restructuring.

PKF (UK) LLP
3 Hardman Street, Spinningfields, Manchester, M3 3HF, UK
Tel: +44 (161) 832 5481
Fax: +44 (161) 832 3849
Email: info.manchester@uk.pkf.com
Website: www.pkf.co.uk
Partners
Kerry Bailey
Tel: +44 (161) 819 3315
Email: kerry.bailey@uk.pkf.com
Matthew Gibson
Tel: +44 (161) 819 3314
Email: matthew.gibson@uk.pkf.com
Activities: Advisers on all forms of insolvency and restructuring.

PKF (UK) LLP
Regent House, Clinton Avenue, Nottingham NG5 1AZ, UK.
Tel: +44 (115) 960 8171
Fax: +44 (115) 960 3665
Email: info.nottingham@uk.pkf.com
Website: www.pkf.co.uk
Partner
Brian Hamblin
Tel: +44 (20) 7065 0188
Email: brian.hamblin@uk.pkf.com
Activities: Advisers on all forms of insolvency and restructuring.

PKF (UK) LLP
New Guild House, 45 Great Charles St., Queensway, Birmingham B3 2LX, UK.
Tel: +44 (121) 212 2222
Fax: +44 (121) 212 2300
Email: info.birmingham@uk.pkf.com
Website: www.pkf.co.uk
Partner
Ian Gould
Tel: +44 (121) 609 3234
Email: ian.gould@uk.pkf.com
Activities: Advisers on all forms of insolvency and restructuring.

PKF (UK) LLP
2nd Floor, 1 Redcliff Street,
Bristol BS1 6NP, UK.
Tel: +44 (117) 910 0700
Fax: +44 (117) 910 0769
Email: info.bristol@uk.pkf.com
Website: www.pkf.co.uk

Partner
Brian Hamblin
Tel: +44 (20) 7065 0188
Email: Brian.hamblin@uk.pkf.com

Activities: Advisers on all forms of insolvency and restructuring.

PKF (UK) LLP
5 Temple Square, Temple Street,
Liverpool L2 5RH, UK.
Tel: +44 (151) 237 4500
Fax: +44 (151) 237 4545
Email: info.liverpool@uk.pkf.com
Website: www.pkf.co.uk

Partner
Jon Newell
Tel: +44 (151) 237 4535
Email: jon.newell@uk.pkf.com

Activities: Advisers on all forms of insolvency and restructuring.

PKF (UK) LLP
Pannell House, 6 Queen Street,
Leeds, LS1 2TW, UK
Tel: +44 (113) 228 0000
Fax: +44 (113) 228 4242
Email: info.leeds@uk.pkf.com
Website: www.pkf.co.uk

Partners
Ian Schofield
Tel: +44 (113) 228 4114
Email: ian.schofield@uk.pkf.com
Charles Escott
Tel: +44 (113) 228 4122
Email: charles.escott@uk.pkf.com

Activities: Advisers on all forms of insolvency and restructuring.

Roland Berger Strategy Consultants Ltd
6th Floor, 55 Baker Street,
London W1U 8EW, UK.
Tel: +44 (20) 3075 1100
Fax: +44 (20) 7224 4110
Website: www.rolandberger.com

Partner
Klaus Kremers
Tel: +44 (20) 3075 1117
Email: klaus_kremers@gb.rolandberger.com

Activities: Roland Berger Strategy Consultants is a leading global strategy consultancy. Within their restructuring practice they focus on complex operational and financial restructurings/distressed M&A as well as insolvency support.

Ropes & Gray LLP
5 New Street Square, London EC4A 3BF, UK.
Tel: +44 (20) 3122 1100
Fax: +44 (20) 3122 1101

Bankruptcy & Business Restructuring
Tony Horspool
Tel: +44 (20) 3122 1135

Partner
James Douglas
Tel: +44 (20) 3122 1130

Activities: Representation of insolvent companies, financiers, acquirers, high yield bondholder committees, debtors and creditors of multinational companies.

Schultze & Braun LLP
33 Throgmorton Street,
London EC2N 2BR, UK.
Tel: +44 (20) 7156 5029
Fax +44 (20) 7156 5223
Website: www.schubra.eu

Contacts
Dr. Annerose Tashiro
Frank Tschentscher

Activities: Corporate recovery & insolvency; cross-border insolvency, corporate finance; international law; litigation (commercial); distressed M&A, European community law, insolvency & bankruptcy.

Simmons & Simmons LLP
CityPoint, One Ropemaker Street,
London EC2Y 9SS, UK.
Tel: +44 (20) 7628 2020
Fax: +44 (20) 7628 2070
Website: www.simmons-simmons.com

Group Head, Partner
Peter Manning
Tel: +44 (20) 7825 4337
Email:
peter.manning@simmons-simmons.com

Partner
Alan Gar
Tel: +44 (20) 7825 3868
Email: alan.gar@simmons-simmons.com

Activities: Acting for all constituent parties in international and domestic restructuring and insolvency; including debtors, secured creditors, note trustees, noteholders, regulators.

SJ Berwin LLP
10 Queen Street Place,
London EC4R 1BE, UK.
Tel: +44 (20) 7111 2222
Fax: +44 (20) 7111 2000
Email: london@sjberwin.com
Website: www.sjberwin.com

Partners, Restructuring & Insolvency
Jeremy Goldring
Mike Woollard

Activities: Corporate rescue and reconstructions, turnarounds and re-financing; administrative and LPA receiverships; administrations and liquidations; company voluntary arrangements; directors' duties; solvent reconstructions.

Skadden, Arps, Slate, Meagher & Flom (UK) LLP
40 Bank Street, Canary Wharf,
London E14 5DS, UK.
Tel: +44 (20) 7519 7000
Fax: +44 (20) 7519 7070
Website: www.skadden.com

Partner
Chris Mallon

Activities: Worldwide practice serving corporations and their principal creditors and investors by providing value-added legal solutions in bankruptcy and restructuring situations.

SNR Denton
The Pinnacle, 170 Midsummer Boulevard,
Milton Keynes MK9 1FE, UK.
Tel: +44 (1908) 690 260
Fax: +44 (1908) 668 535
Website: www.snrdenton.com

SNR Denton UK LLP
One Fleet Place, London EC4M 7WS, UK.
Tel: +44 (20) 7246 7000
Fax: +44 (20) 7246 7777
Website: www.snrdenton.com

Partners
Nigel Barnett
Tel: +44 (20) 7320 5530
Email: nigel.barnett@snrdenton.com
Rachel Anthony
Tel: +44 (20) 7320 5525
Email: rachel.anthony@snrdenton.com

Activities: Legal advice with regard to all aspects of insolvency and restructuring.

Squire Sanders (UK) LLP
7 Devonshire Square,
London EC2M 4YH, UK.
Tel: +44 (20) 7655 1000
Fax: +44 (20) 7655 1001
Website: www.squiresanders.com

Restructuring & Insolvency Global Practice Group Leader
Stephen D. Lerner

Co-Chairs Cross-Border Restructuring Practice
Thomas J. Salerno
Graeme D. Levy
Susan M. Kelly

Activities: The restructuring & insolvency group has over 100 restructuring and insolvency lawyers who represent financial institutions, distressed companies, insolvency practitioners, creditors' committees, investors, and strategic and financial buyers of troubled companies.

Squire Sanders (UK) LLP
Rutland House, 148 Edmund Street,
Birmingham B3 2JR, UK.
Tel: +44 (121) 222 3000
Fax: +44 (121) 222 3001
Website: www.squiresanders.com

Restructuring & Insolvency Global Practice Group Leader
Stephen D. Lerner

Co-Chairs Cross-Border Restructuring Practice
Thomas J. Salerno
Graeme D. Levy
Susan M. Kelly

Activities: The restructuring & insolvency group has over 100 restructuring and insolvency lawyers who represent financial institutions, distressed companies, insolvency practitioners, creditors' committees, investors, and strategic and financial buyers of troubled companies.

Squire Sanders (UK) LLP
2 Park Lane, Leeds LS3 1ES, UK.
Tel: +44 (113) 284 7000
Fax: +44 (113) 284 7001
Website: www.squiresanders.com

Restructuring Insolvency Global Practice Group Leader
Stephen D. Lerner

Co-Chairs Cross Border Restructuring Practice
Thomas J. Salerno
Graeme D. Levy
Susan M. Kelly

Activities: The restructuring & insolvency group has over 100 restructuring and insolvency lawyers who represent financial institutions, distressed companies, insolvency practitioners, creditors' committees, investors, and strategic and financial buyers of troubled companies.

Squire Sanders (UK) LLP
Trinity Court, 16 John Dalton Street,
Manchester M60 8HS, UK.
Tel: +44 (161) 830 5000
Fax: +44 (161) 830 5001
Website: www.squiresanders.com

Restructuring Insolvency Global Practice Group Leader
Stephen D. Lerner

Co-Chairs Cross Border Restructuring Practice
Thomas J. Salerno
Graeme D. Levy
Susan M. Kelly

Activities: The restructuring & insolvency group has over 100 restructuring and insolvency lawyers who represent financial institutions, distressed companies, insolvency practitioners, creditors' committees, investors, and strategic and financial buyers of troubled companies.

Standard & Poor's
20 Canada Square, Canary Wharf,
London E14 5LH, UK.
Tel: +44 (20) 7176 3800
Fax: +44 (20) 7176 3690

Ratings Services Media Contact
Matthew McAdam
Tel: +44 (20) 7176 3541

Stikeman Elliott LLP
Dauntsey House, 4B Frederick's Place,
London EC2R 8AB, UK.
Tel: +44 (20) 7367 0150
Fax: +44 (20) 7367 0160
Email: infolondon@stikeman.com
Website: www.stikeman.com

Contacts
Derek Linfield
Jeffrey Keey

Activities: Recognised as a leader in business restructurings, reorganisations and insolvencies. Involved in many high-profile cases including Air Canada's historic restructuring.

Studio Legale Sutti
19 Princess Street, London W1B 2LW, UK.
Tel: +44 (20) 7409 1384
Fax: +44 (20) 7493 3395
Email: maildesk@sutti.com
Website: www.sutti.com

Partners
Livia Oglio
Roberto Spelta

Activities: International corporate recovery, advising multi-national reorganisations, corporate restructing, creditor's rights and compliance issues.

The Blackstone Group International Partners LLP
40 Berkeley Square, London W1J 5AL, UK.
Tel: +44 (20) 7451 4000
Fax: +44 (20) 7451 4001
Website: www.blackstone.com

Senior Managing Director, Head of European Restructuring Advisory
Martin Gudgeon
Email: gudgeon@blackstone.com

Activities: Blackstone's restructuring advisory group is a leading advisor to companies and creditors in distressed situations. Examples include: Northern Rock, Eurotunnel, Delta, GM, Punch Taverns and the Ukraine.

The P&A Partnership
93 Queen Street, Sheffield S1 1WF, UK.
Tel: +44 (114) 275 5033
Fax: +44 (114) 276 8556
Email: epost@thepandapartnership.com
Website: www.pagroupplc.com

Managing Partner
Jeremy Priestley
Email:
jeremypriestley@thepandapartnership.com

Senior Partner
John Russell
Email: johnrussell@thepandapartnership.com

Activities: The largest independent business rescue and insolvency practice covering the whole of the UK. This 8 partner firm has offices in Sheffield, Leeds, London and Glasgow.

Tods Murray LLP
33 Bothwell Street, Glasgow G2 6NL, UK.
Tel: +44 (141) 275 4771
Fax: +44 (141) 275 4781
Email: maildesk@todsmurray.com
Website: www.todsmurray.com

Partner
Hamish Patrick
Tel: +44 (131) 656 2290
Email: hamish.patrick@todsmurray.com

Activities: Specialist knowledge of the problems of debt and insolvency and advice on administration and receivership, asset and business sales, restructuring and consolidation, formal proceedings and TUPE.

Tods Murray LLP
Edinburgh Quay, 133 Fountainbridge,
Edinburgh EH3 9AG, UK.
Tel: +44 (131) 656 2000
Fax: +44 (131) 656 2020
Email: maildesk@todsmurray.com
Website: www.todsmurray.com

Partner
Hamish Patrick
Tel: +44 (131) 656 2290
Email: hamish.patrick@todsmurray.com

Activities: Specialist knowledge of the problems of debt and insolvency and advice on administration and receivership, asset and business sales, restructuring and consolidation, formal proceedings and TUPE.

Travers Smith LLP
10 Snow Hill, London EC1A 2AL, UK.
Tel: +44 (20) 7295 3000
Fax: +44 (20) 7295 3500
Email: jeremy.walsh@traversmith.com
Website: www.traverssmith.com

Partners
Jeremy Walsh
Peter Hughes

Activities: Full range of legal advice needed to effect a successful restructuring or turnaround. Also advise on insolvency options and procedures.

White & Case LLP
5 Old Broad Street, London EC2N 1DW, UK.
Tel: +44 (20) 7532 1000
Fax: +44 (20) 7532 1001
Website: www.whitecase.com

Partners
Stephen Phillips
Tel: +44 (20) 7532 1221
Email: stephenphillips@whitecase.com
Mark Glengarry
Tel: +44 (20) 7532 1235
Email: mglengarry@whitecase.com
John Higham QC
Tel: +44 (20) 7532 1803
Email: jhigham@whitecase.com
John Reynolds
Tel: +44 (20) 7532 1802
Email: johnreynolds@whitecase.com
Christian Pilkington
Tel: +44 (20) 7532 1208
Email: cpilkington@whitecase.com

Activities: White & Case is a global law firm with over 2000 lawyers in 26 countries. Their financial restructuring and insolvency group is a worldwide practice consisting of over 160 restructuring and insolvency lawyers. They are a globally recognised leader in complex cross-border insolvencies and workouts, and they represent clients in all aspects of restructurings, workouts and insolvencies, including both transactional and litigation matters. Recent representations include many of the world's largest restructuring cases and out-of-court workouts.

Wilder Coe
233-237 Old Marylebone Road,
London NW1 5QT, UK.
Tel: +44 (20) 7724 2345
Fax: +44 (20) 7724 6070
Email: normanc@wildercoe.co.uk
Website: www.wildercoe.co.uk

Partner
Norman Cowan

Activities: Wilder Coe Business Recovery provides practical solutions to financially distressed businesses by seeking constructive procedures to challenging difficulties.

Zolfo Cooper
10 Fleet Place, London EC4M 7RB, UK.
Tel: +44 (20) 7332 5000
Fax: +44 (20) 7332 5001
Email: enquiries@zolfocooper.eu
Website: www.zolfocooper.com

Europe Contact
Simon Freakley
Email: sfreakley@zolfocooper.eu

US Contact
Joff A. Mitchell
Tel: +1 (212) 561 4000
Email: jmitchell@zolfocooper.com

Activities: Independent corporate advisory and restructuring practice with over 400 dedicated professional staff located worldwide.

UNITED STATES OF AMERICA

Akin Gump Strauss Hauer & Feld LLP
One Bryant Park, New York, NY 10036, US.
Tel: +1 (212) 872 1000
Fax: +1 (212) 872 1002
Website: www.akingump.com

Partners
Daniel Golden
Email: dgolden@akingump.com
Fred Hodara

AlixPartners, LLP
40 West 57th Street, Suite 2800,
New York, NY 10019, US.
Tel: +1 (212) 490 2500
Fax: +1 (212) 490 1344
Website: www.alixpartners.com

Directors
Peter Fitzsimmons
Lisa Donahue

Activities: Corporate turnaround, restructuring advisory, and litigation consulting services. Claims and estate management and E-Discovery. 14 offices globally.

Alston & Bird LLP
Bank of America Plaza,
101 South Tryon Street, Suite 4000,
Charlotte, NC 28280-4000, US.
Tel: +1 (707) 444 1000
Fax: +1 (704) 444 1111
Website: www.alston.com

Partners
J. William Boone
Email: bill.boone@alston.com
Jason Watson
Email: jason.watson@alston.com

Activities: Full service law firm representing foreign creditors, trustees and administrators in US and international proceedings.

Alston & Bird LLP
3201 Beechleaf Court, Suite 600, Raleigh,
NC 27604-1062, US.
Tel: +1 (919) 862 2200
Fax: +1 (919) 862 2260
Website: www.alston.com

Partners
J. William Boone
Email: bill.boone@alston.com
Jason Watson
Email: jason.watson@alston.com

Activities: Full service law firm representing foreign creditors, trustees and administrators in US and international proceedings.

Alston & Bird LLP

1201 West Peachtree Street, Atlanta, Georgia 30309 3424, US.
Tel: +1 (404) 881 7000
Fax: +1 (404) 253 8494
Email: bill.boone@alston.com

Partners
J. William Boone
Jason Watson

Activities: Full service law firm representing foreign creditors, trustees and administrators in US and international proceedings.

Alston & Bird LLP

90 Park Avenue, New York, NY 10016-1387, US.
Tel: +1 (212) 210 9400
Fax: +1 (212) 210 9444
Website: www.alston.com

Partners
J. William Boone
Email: bill.boone@alston.com
Jason Watson
Marty Bunin
John Weiss

Activities: Full service law firm representing foreign creditors, trustees and administrators in US and international proceedings.

Alston & Bird LLP

950 F Street NW, Washington, DC 20004-1404, US.
Tel: +1 (202) 756 3300
Fax: +1 (202) 756 3333
Website: www.alston.com

Partners
J. William Boone
Email: bill.boone@alston.com
Jason Watson
Email: jason.watson@alston.com

Activities: Full service law firm representing foreign creditors, trustees and administrators in US and international proceedings.

Alvarez & Marsal

600 Lexington Avenue, 6th Floor, New York, NY 10022, US.
Tel: +1 (212) 759 4433
Fax: +1 (212) 759 5532
Website: www.alvarezandmarsal.com

Co-Chief Executive Officer & Managing Director
Tony Alvarez II / Bryan P. Marsal

Chief Marketing Officer
Rebecca Baker
Tel: +1 (212) 759 4433
Email: rbaker@alvarezandmarsal.com

Activities: Founded in 1983, Alvarez & Marsal is the leading independent global professional services firm, specialising in turnaround management, performance improvement and business advisory services.

American Bankruptcy Institute

44 Canal Center Plaza Suite 404, Alexandria, VA 22031, US.
Tel: +1 (703) 739 0800
Fax: +1 (703) 739 1060
Website: www.abiworld.org
www.globalinsolvency.org

Executive Director
Samuel J. Gerdano

Marketing Coordinator
Anne Marie Corkran

Activities: Multi-disciplinary organisation devoted to education and research on insolvency, with over 13,000 members.

Andrews Kurth LLP

600 Travis Street, Suite 4200, Houston, TX 77002, US.
Tel: +1 (713) 220 4200
Fax: +1 (713) 238 7273
Website: www.andrewskurth.com

Partner
W. Roberts Taylor, Jr
Tel: +1 (713) 220 4436
Email: robtaylor@akllp.com

Activities: Represent debtors, creditors, special committees and other entities in all aspects of the global insolvency and restructuring market.

Baker & McKenzie

1114 Avenue of the Americas, New York, NY 10036, US.
Tel: +1 (212) 891 3565
Fax: +1 (212) 759 9133
Website: www.bakernet.com

Partner, Head of New York Creditors' Rights/Financial Restructuring/Bankruptcy
Joseph Samet
Email: joseph.samet@bakernet.com

Activities: The firm's creditors' rights/restructuring/bankruptcy group provides a broad range of services to all parties in interest in workouts, restructurings, chapter 11 reorganisations and bankruptcy matters throughout the US and internationally. They have significant experience in complex international insolvency matters, including cases ancillary to foreign proceedings under chapter 15. They provide insolvency advice in securitisation deals, structuring transactions, and matters regarding troubled insurers and banks. They are involved in related negotiations and litigation.

Baker, Donelson, Bearman, Caldwell & Berkowitz, PC

420 20th Street North, 1600 Wells Fargo Tower, Birmingham, Al 35203, US.
Tel: +1 (205) 244 3837
Fax: +1 (205) 488 3837
Email: rbarnes@bakerdonelson.com
Website: www.bakerdonelson.com

Staff Attorney
Rhenda Barnes

Activities: IWIRC Program Coordinator AL Chapter.

Ballard Spahr LLP

919 North Market Street, 11th Floor, Wilmington, DE 19801, US.
Tel: +1 (302) 252 4465
Fax: +1 (302) 252 4466
Email: daluzt@ballardspahr.com
Website: www.ballardspahr.com

Partner
Tobey M. Daluz
Tel: +1 (302) 252 4440
Email: daluzt@ballardspahr.com

Activities: Corporate restructuring, workouts, general bankruptcy litigation. Representation of debtors, secured and unsecured creditors, insurers and official committees in Chapter 11 bankruptcy cases.

Bates Law Firm, LLC

170 Mitchell Street, SW, Atlanta, Georgia 30303, US.
Tel: +1 (404) 526 8861
Fax: +1 (404) 526 8855
Email: info@bateslawfirmllc.com
Website: www.bateslawfirmllc.com

Managing Attorney
Shatorree Bates

Office Manager
Grindlyn Williams

Activities: Represents debtors and creditors in the Atlanta Division of the Northern District of Georgia Bankruptcy Court.

BBK

400 Galleria Officentre, Suite 400, Southfield, MI 48034, US.
Tel: +1 (248) 356 0800
Fax: +1 (248) 356 5441
Email: info@e-bbk.com
Website: www.e-bbk.com

President & CEO
William G. Diehl

Mananging Director
Philip Goy

BBK

901 Dove Street, Suite 220, Newport Beach, CA 92660, US.
Tel: +1 (949) 269 4158
Fax: +1 (213) 908 1125

Bilzin Sumberg Baena Price and Axelrod

1450 Brickell Avenue, 23rd Floor, Miami, FL 33131-3456, US.
Tel: +1 (305) 374 7580
Fax: +1 (305) 374 7590
Email: info@bilzin.com
Website: www.bilzin.com

Managing Partner
John C. Sumberg
Tel: +1 (305) 350 2364
Email: jsumberg@bilzin.com

Partner-Restructuring & Bankruptcy
Mindy A. Mora
Tel: +1 (305) 350 2414
Email: mmora@bilzin.com

Activities: Bilzin Sumberg's restructuring and bankruptcy group is a national player in complex in-court and out-of-court reorganisation, restructuring, workouts and assignments for the benefit of creditors.

Bingham McCutchen LLP

One Federal Street, Boston, MA 02110-1726, US.
Tel: +1 (617) 951 8000
Fax: +1 (617) 951 8736
Email: info@bingham.com
Website: www.bingham.com

Chairs of Financial Restructuring Group
Michael J. Reilly
James Roome
Jeffrey S. Sabin

Financial Services Area Chairs
Roger P. Joseph
Edwin E. Smith
Neal E. Sullivan

Activities: Represent institutional investors and lenders in a number of the world's most complex and high-profile financings and restructurings.

Bingham McCutchen LLP

399 Park Avenue, New York, NY 10022-4689, US.
Tel: +1 (212) 705 7000
Fax: +1 (212) 752 5378
Email: info@bingham.com
Website: www.bingham.com

Co-Chairs of Financial Restructuring Group
Michael J. Reilly
James Roome
Jeffrey S. Sabin

Financial Services Area Chairs
Roger P. Joseph
Edwin E. Smith
Neal E. Sullivan

Activities: Represent institutional investors and lenders in a number of the world's most complex and high-prifile financings and restructurings.

BMC Group

708 Broadway, Suite 101, Kanasa City, MO 64105, US.
Tel: +1 (816) 472 4262
Fax: +1 (816) 472 4321
Website: www.bmcgroup.com

Director
Terri Marshall
Email: tmarshall@bmcgroup.com

Activities: Restructuring, class action, litigation, M&A, and investor communications. Superior technology, expertise and greatest cost efficiencies in data and claims management.

BMC Group
875 Third Avenue, 5th Floor,
New York, NY 10022, US.
Tel: +1 (212) 310 5900
Fax: +1 (212) 644 4552
Email: info@bmcgroup.com
Website: www.bmcgroup.com

President
Tinamarie Feil
Tel: +1 (212) 310 5922
Email: tfeil@bmcgroup.com

Activities: Restructuring, class action, litigation, M&A, and investor communications. Superior technology, expertise and greatest cost efficiencies in data and claims management.

BMC Group
300 N. Continental Blvd., Suite 570,
El Segundo, CA 90245, US.
Tel: +1 (310) 321 5555
Fax: +1 (310) 640 8071
Website: www.bmcgroup.com

CEO
Sean Allen
Email: sallen@bmcgroup.com

EVP
Jeff Kalina
Email: jkalina@bmcgroup.com

Activities: Restructuring, class action, litigation, M&A, and investor communications. Superior technology, expertise and greatest cost efficiencies in data and claims management.

BMC Group
18675 Lake Drive East, Chanhassen,
MN 55317, US.
Tel: +1 (952) 404 5700
Fax: +1 (952) 404 5750
Website: www.bmcgroup.com

Activities: Restructuring, class action, litigation, M&A, and investor communications. Superior technology, expertise and greatest cost efficiencies in data and claims management.

BMC Group
600 Superior Avenue East, Suite 1300,
Cleveland, OH 44114, US.
Tel: +1 (216) 522 1932
Fax: +1 (866) 574 7672
Website: www.bmcgroup.com

Director
Julia Osborne
Email: josborne@bmcgroup.com

Activities: Restructuring, class action, litigation, M&A, and investor communications. Superior technology, expertise and greatest cost efficiencies in data and claims management.

BMC Group
500 North Dearborn Street, Suite 800,
Chicago, IL 60654, US.
Tel: +1 (312) 423 1400
Fax: +1 (312) 681 6188
Website: www.bmcgroup.com

Director
Lynne Long
Email: llong@bmcgroup.com

Contact
Josh Berman
Email: jberman@bmcgroup.com

Activities: Restructuring, class action, litigation, M&A, and investor communications. Superior technology, expertise and greatest cost efficiencies in data and claims management.

BMC Group
600 1st Avenue, Suite 300, Seattle,
WA 98104, US.
Tel: +1 (206) 516 3300
Website: www.bmcgroup.com

Director
Tinamarie Feil
Tel: +1 (206) 499 2169
Email: tfeil@bmcgroup.com

Activities: Restructuring, class action, litigation, M&A, and investor communications. Superior technology, expertise and greatest cost efficiencies in data and claims management.

Bond, Schoeneck & King, PLLC
350 Linden Oaks, Suite 310,
Rochester, NY 14625, US.
Tel: +1 (585) 362 4700
Fax: +1 (585) 362 4701
Website: www.bsk.com

Attorneys:
Ingrid Palermo
Tel: +1 (585) 362 4719
Email: ipalermo@bsk.com
Sara Temes
Tel: +1 (315) 218 8327
Email: stemes@bsk.com

Activities: Represents multi-national corporations in restructuring and insolvency proceedings in North America and the Caribbean.

BTG Mesirow Financial Consulting, LLC
666 Third Avenue, 21st Floor,
New York, NY 10017, US.
Tel: +1 (877) 505 8059
Fax: +1 (212) 682 5015
Email: usconsulting@btgmfc.com
Website: www.btgmfc.com

Senior Managing Directors
Melissa Kibler Knoll
Tel: +1 (312) 595 8500
Email: mknoll@btgmfc.com
Kristin Winford
Tel: +1 (212) 808 8333
Email: kwinford@btgmfc.com

Activities: BTG Mesirow Financial Consulting is an international firm that addresses cross-border cases requiring broad market-based expertise, solutions and service.

Burr and Forman, LLP
200 South Orange Street, Suite 800,
Orlando, FL 32801, US.
Tel: +1 (407) 540 6600
Fax: +1 (407) 540 6601
Website: www.burr.com.

Partner:
Denise D. Dell-Powell
Tel: +1 (407) 540 6607
Email: ddpowell@burr.com

Activities: Counsels and represents international clients in both debtor and creditor cases involving bankruptcy, restructuring and workouts, transactions and commercial litigation.

Burr and Forman, LLP
171 17th Street, NW, Suite 110,
Atlanta, GA 30363, US.
Tel: +1 (404) 815 3000
Fax: +1 (404) 817 3244
Website: www.burr.com

Associate:
Kelly E. Waits
Tel: +1 (404) 685 4306
Email: kwaits@burr.com

Activities: Counsels and represents international clients in both debtor and creditor cases involving bankruptcy, restructuring and workouts, transactions and commercial litigation.

Burr and Forman, LLP
RSA Tower, 11th North Water Street,
Suite 2220, Mobile, AL 36602, US.
Tel: +1 (251) 344 5151
Fax: +1 (251) 344 9696
Website: www.burr.com

Associates:
Bess M. Parrish Creswell
Tel: +1 (251) 345 8245
Email: bcreswell@burr.com
Kasee Sparks Heisterhagen
Tel: +1 (251) 345 8244
Email: kheisterhagen@burr.com

Activities: Counsels and represents international clients in both debtor and creditor cases involving bankruptcy, restructuring and workouts, transactions and commercial litigation.

Burr and Forman, LLP
420 North 20th Street, Suite 3400,
Birmingham, AL 35203, US.
Tel: +1 (205) 251 3000
Fax: +1 (205) 458 5100
Website: www.burr.com

Associate:
Amanda M. Beckett
Tel: +1 (205) 458 5271
Email: abeckett@burr.com

Partners
Cathleen Moore
Tel: +1 (205) 458 5184
Email: cmoore@burr.com
Janine L. Smith
Tel: +1 (205) 458 5412
Email: jsmith@burr.com

Associate:
Andrea L. Weed
Tel: +1 (205) 458 5431
Email: aweed@burr.com

Activities: Counsels and represents international clients in both debtor and creditor cases involving bankruptcy, restructuring and workouts, transactions and commercial litigation.

Cadwalader, Wickersham & Taft LLP
227 West Trade Street, Charlotte,
NC 28202, US.
Tel: +1 (704) 348 5100
Fax: +1 (704) 348 5200
Email: cwtinfo@cwt.com
Website: www.cadwalader.com

Partners & Co-Chairs of Financial Restructuring Dept.
Deryck A. Palmer
Email: deryck.palmer@cwt.com
John J. Rapisardi
Email: john.rapisardi@cwt.com

Activities: Representation of secured and unsecured lenders, bondholders, creditors' committees, borrowers, asset purchasers and others in restructuring transactions and reorganisation cases.

Cadwalader, Wickersham & Taft LLP
One World Financial Center,
New York, NY 10281, US.
Tel: +1 (212) 504 6000
Fax: +1 (212) 504 6666
Email: cwtinfo@cwt.com
Website: www.cadwalader.com

Partners & Co-Chairs of Financial Restructuring Dept.
Deryck A. Palmer
Email: deryck.palmer@cwt.com
John J. Rapisardi
Email: john.rapisardi@cwt.com

Activities: Representation of secured and unsecured lenders, bondholders, creditors' committees, borrowers, asset purchasers and others in restructuring transactions and reorganisation cases.

Cadwalader, Wickersham & Taft LLP
700 Sixth Street, N.W. Washington,
DC 20001, US.
Tel: +1 (202) 862 2200
Fax: +1 (202) 862 2400
Email: cwtinfo@cwt.com
Website: www.cadwalader.com

Partners & Co-Chairs of Financial Restructuring Dept.
Deryck A. Palmer
Email: deryck.palmer@cwt.com
John J. Rapisardi
Email: john.rapisardi@cwt.com

Activities: Representation of secured and unsecured lenders, bondholders, creditors' committees, borrowers, asset purchasers and others in restructuring transactions and reorganisation cases.

Chadbourne & Parke LLP
350 South Grand Avenue, 32 Floor,
Los Angeles, CA 90071, US.
Tel: +1 (213) 892 1000
Fax: +1 (213) 892 2045
Email: losangeles@chadbourne.com
Website: www.chadbourne.com

Managing Partner
Edward W. Zaelke
Tel: +1 (213) 892 2012
Email: ezaelke@chadbourne.com

Activities: Chadbourne & Parke LLP offers a full range of services in cross-border bankruptcies and financial restructurings, business restructurings and insolvencies.

Chadbourne & Parke LLP
30 Rockefeller Plaza, New York,
NY 10112, US.
Tel: +1 (212) 408 5100
Fax: +1 (212) 541 5369
Email: newyork@chadbourne.com
Website: www.chadbourne.com

Managing Partner
Andrew A. Giaccia
Tel: +1 (212) 408 5365
Email: agiaccia@chadbourne.com

Activities: Chadbourne & Parke LLP offers a full range of services in cross-border bankruptcies and financial restructurings, business restructurings and insolvencies.

Chadbourne & Parke LLP
1200 New Hampshire Avenue,
NW, Washington, DC 20036, US.
Tel: +1 (202) 974 5600
Fax: +1 (202) 974 5602
Email: washington@chadbourne.com
Website: www.chadbourne.com

Managing Partner
Mary A. Lopatto
Tel: +1 (202) 974 5652
Email: mlopatto@chadbourne.com

Activities: Chadbourne & Parke LLP offers a full range of services in cross-border bankruptcies and financial restructurings, business restructurings and insolvencies.

Curran Tomko Tarski LLP
2001 Bryan Street, Suite 2000,
Dallas, TX 75201, US.
Tel: +1 (214) 270 1400
Fax: +1 (214) 270 1401
Website: www.cttlegal.com

Chief Executive:
G. Michael Curran

Attorney:
Sara Wahl
Tel: +1 (214) 270 2407
Email: swahl@cttlegal.com

Activities: Represents lenders and debtors in out of court and in bankruptcy court restructurings.

Cymry Communication
PO Box 4731, Whittier, California 90607, US.
Tel: +1 (562) 692 5717
Fax: +1 (562) 692 0397
Website: www.cymry.biz

Chief Executive Officer
Gwyn Myers Ph.D.
Email: gwyn@cymry.biz

Activities: Business advisory firm that specialises in in executing turnaround and restructuring; improving financial and operating results; and delivering strategic objectives.

Debevoise & Plimpton LLP
919 Third Avenue, New York, NY 10022, US.
Tel: +1 (212) 909 6000
Fax: +1 (212) 909 6836
Website: www.debevoise.com

Partners
Steven R. Gross
Richard F. Hahn

Activities: Regularly represents debtors, creditors, investors and other parties in workouts and insolvency proceedings in both the US and internationally.

Deloitte
200 Berkeley Street, Boston, Massachusetts
02116, US.
Website: www.deloitte.com

Head of Restructuring Services
Sheila T. Smith
Tel: +1 (617) 437 3854
Email: sheismith@deloitte.com

Activities: Deloitte advises stakeholders in underperforming or distressed businesses including creditors and directors. Services include insolvency appointments, financial restructuring, turnaround and business reviews.

DLA Piper
203 North LaSalle Street, Suite 1900,
Chicago, IL 60601, US.
Tel: +1 (312) 368 4000
Fax: +1 (312) 236 7516
Email: info@dlapiper.com
Website: www.dlapiper.com

Global Co-Chairman
Anthony Angel
Francis B. Burch, Jr.
Tel: +1 (410) 580 4040
Email: frank.burch@dlapiper.com

Partner
Kim Newmarch
Tel: +1 (312) 368 3434
Email: kim.newmarch@dlapiper.com

Activities: DLA Piper's global restructuring group is one of the largest of its kind in the world with 200 dedicated restructuring lawyers across the Americas, Asia Pacific, Europe and the Middle East.

DLA Piper LLP (US)
90 South Seventh Street, Minneapolis,
Minnesota, 55402-4168, US.
Tel: +1 (612) 524 3000
Fax: +1 (612) 524 3001

Partner
Alan Kildow
Email: alan.kildow@dlapiper.com

Duan & Duan Law Firm Seattle Office, Washington, US
2 Union Square, 41th Floor,
Seattle, WA 98101, US.
Tel: +1 (206) 628 6776
Fax: +1 (206) 628 6611
Email: charles@duanduan.com
Website: www.duanduan.com

Managing Partner
Duan Qihua (Charles Duan)

Dykema Gossett, PLLC
400 Renaissance Center, Detroit,
Michigan 48243, US.
Tel: +1 (313) 568 6800
Fax: +1 (313) 568 6893
Website: www.dykema.com

Chairman & CEO
Peter M. Kellett
Tel: +1 (313) 568 6668
Email: pkellett@dykema.com

Co-Leader of Bankruptcy Practice
Sheryl L. Toby
Tel: +1 (248) 203 0522
Email: stoby@dykema.com

Activities: Represents clients in a range of industries including, automotive, manufacturing, retail, healthcare, real estate and financial institutions.

Eckert Seamans Cherin & Mellott, LLC
Two Liberty Place, 50 South 16th Street,
22nd Floor, Philadelphia, PA 19102, US.
Tel: +1 (215) 851 8400
Fax: +1 (215) 851 8383
Email: info@eckertseamans.com
Website: www.eckertseamans.com

Member in Charge
Albert Bixler
Tel: +1 (215) 851 8412
Email: abixler@eckertseamans.com

Bankruptcy Attorney
Kitt Turner
Tel: +1 (215) 851 8431
Email: kturner@eckertseamans.com

Activities: Eckert Seamans regularly represents clients in restructurings and liquidations occurring outside of formal bankruptcy proceedings.

Epiq Systems
757 Third Avenue, New York, NY 10017, US.
Tel: +1 (646) 282 2500
Fax: +1 (646) 282 2501
Email: ir@epiqsystems.com
Website: www.epiqsystems.com

Managing Director
Lorenzo Mendizabal
Tel: +1 (646) 282 2556
Email: lmendizabal@epiqsystems.com

Executive Vice President
James Katchadurian
Tel: +1 (646) 282 2549
Email: jkatchadurian@epiqsystems.com

Activities: The recognised leader in bankruptcy claims management/ administration, balloting, call centre, disbursements, eDisclosure and related consulting services.

Felsberg, Pedretti, Mannrich e Aidar, Advogados e Consultores Legais
1725 I Street, N.W., Suite 300,
Washington, DC 20006, US.
Tel: +1 (202) 331 2492
Fax: +1 (202) 331 2493
Email: mail@felsberg.com.br
Website: www.felsberg.com.br

Managing Partner
Thomas Benes Felsberg

Partners
Maria da Graça de Brito Vianna Pedretti
Nelson Mannrich
Carlos Miguel Castex Aidar
Guilherme Fiorini Filho
Cláudia Haidamus Perri
Ricardo Wanderley Mano Sanches
Roberto Wilson Renault Pinto
Antonio Ivo Aidar
Paulo Sigaud Cardozo
David Leinig Meiler
Joel Luís Thomaz Bastos

Neil Montgomery
Thiago Vallandro Flores
Sergio Silva do Amaral
Ernani Guimarás
Paulo F. Bekin
Ivan Campos
Claudia Maniaci Salim
Antonio Amendola
Marcelo Cosac
Eduardo Turkienicz
Alfredo Zucca Neto

Activities: Full-service law firm with significant experience in complex business transactions, such as privatisations, project finance transactions, corporate restructurings, and mergers and acquisitions, and a tradition of service.

Felsberg, Pedretti, Mannrich e Aidar, Advogados e Consultores Legais

405 Lexington Avenue, 26th Floor,
New York, NY 10174, US
Tel: +1 (212) 907 6440
Fax: +1 (212) 268 8005
Email: mail@felsberg.com.br
Website: www.felsberg.com.br

Managing Partner
Thomas Benes Felsberg

Partners
Maria da Graça de Brito Vianna Pedretti
Nelson Mannrich
Carlos Miguel Castex Aidar
Guilherme Fiorini Filho
Cláudia Haidamus Perri
Ricardo Wanderley Mano Sanches
Roberto Wilson Renault Pinto
Antonio Ivo Aidar
Paulo Sigaud Cardozo
David Leinig Meiler
Joel Luís Thomaz Bastos
Neil Montgomery
Thiago Vallandro Flores
Sergio Silva do Amaral
Ernani Guimarás
Paulo F. Bekin
Ivan Campos
Claudia Maniaci Salim
Antonio Amendola
Marcelo Cosac

Activities: Full-service law firm with significant experience in complex business transactions, such as privatisations, project finance transactions, corporate restructurings, and mergers and acquisitions, and a tradition of service.

Foley & Lardner LLP

402 West Broadway, Suite 2100,
San Diego, CA 92101, US.
Tel: +1 (619) 685 4651
Fax: +1 (619) 234 3510
Email: vavilaplana@foley.com

Contact
Victor A. Vilaplana

Activities: Have handled a number of Section 305 ancillary cases involving Canadian, Mexican and Middle East debtors. In addition, also have "full" chapter 11 cases with one coordinated via protocols with cases in other national jurisdictions.

Fulbright & Jaworski LLP

600 Congress Avenue, Suite 2400, Austin,
TX 78701-2978, US.
Tel: +1 (512) 474 5201
Fax: +1 (512) 536 4598
Website: www.fulbright.com

Chair of Executive Committee
Steven B. Pfeiffer
Tel: +1 (202) 662 0200
Email: spfeiffer@fulbright.com

Partner
Berry D. Spears
Tel: +1 (512) 536 5246
Email: bspears@fulbright.com

Activities: Represented liquidators, trustees, receivers, creditors' committees, debtors, and secured and unsecured creditors in insolvency matters in over 60 countries.

Fulbright & Jaworski LLP

1301 McKinney, Suite 5100, Houston,
Texas 77010-3095, US.
Tel: +1 (713) 651 5151
Fax: +1 (713) 651 5246
Email: info@fulbright.com
Website: www.fulbright.com

Chair of Executive Committee
Steven B. Pfeiffer
Tel: +1 (202) 662 0200
Email: spfeiffer@fulbright.com

Partner
Berry D. Spears
Tel: +1 (713) 651 5201
Email: bspears@fulbright.com

Activities: Represented liquidators, trustees, receivers, creditors' committees, debtors, and secured and unsecured creditors in insolvency matters in over 60 countries.

Fulbright & Jaworski LLP

300 Convent Street, Suite 2200,
San Antonio, TX 78205-3792, US.
Tel: +1 (210) 224 5575
Fax: +1 (210) 270 7205
Website: www.fulbright.com

Chair of Executive Committee
Steven B. Pfeiffer
Tel: +1 (202) 662 0200
Email: spfeiffer@fulbright.com

Partner
Michael M. Parker
Tel: +1 (210) 270 7162
Email: mparker@fulbright.com

Activities: Represented liquidators, trustees, receivers, creditors' committees, debtors, and secured and unsecured creditors in insolvency matters in over 60 countries.

Fulbright & Jaworski LLP

Market Square, 801 Pennsylvania Avenue,
N.W, Washington, DC 20004-2623, US.
Tel: +1 (202) 662 0200
Fax: +1 (202) 662 4643
Website: www.fulbright.com

Chair of Executive Committee
Steven B. Pfeiffer
Email: spfeiffer@fulbright.com

Partner
Larry G. Franceski
Tel: +1 (202) 662 4518
Email: lfranceski@fulbright.com

Activities: Represented liquidators, trustees, receivers, creditors' committees, debtors, and secured and unsecured creditors in insolvency matters in over 60 countries.

Fulbright & Jaworski LLP

666 Fifth Avenue, New York,
NY 10103-3198, US.
Tel: +1 (212) 318 3302
Fax: +1 (212) 752 5958
Website: www.fulbright.com

Chair of Executive Committee
Steven B. Pfeiffer
Tel: +1 (202) 662 0200
Email: spfeiffer@fulbright.com

Partner
David L. Barrack
Email: dbarrack@fulbright.com

Activities: Represented liquidators, trustees, receivers, creditors' committees, debtors, and secured and unsecured creditors in insolvency matters in over 60 countries.

Fulbright & Jaworski LLP

2200 Ross Avenue, Suite 2800,
Dallas, TX 75201-2784, US.
Tel: +1 (214) 855 8000
Fax: +1(214) 855 8200
Website: www.fulbright.com

Chair of Executive Committee
Steven B. Pfeiffer
Tel: +1 (202) 662 0200
Email: spfeiffer@fulbright.com

Partner
Louis R. Strubeck, Jr.
Tel: +1 (214) 855 8040
Email: lstrubeck@fulbright.com

Activities: Represented liquidators, trustees, receivers, creditors' committees, debtors, and secured and unsecured creditors in insolvency matters in over 60 countries.

Fulbright & Jaworski LLP

555 South Flower Street, Forty-First Floor,
Los Angeles, CA 90071, US
Tel: +1 (213) 892 9200
Fax: +1 (213) 892 9494
Website: www.fulbright.com

Chair of Executive Committee
Steven B. Pfeiffer
Tel: +1 (202) 662 0200
Email: spfeiffer@fulbright.com

Partner
Robert E. Darby
Tel: +1 (213) 892 9232
Email: rdarby@fulbright.com

Activities: Represented liquidators, trustees, receivers, creditors' committees, debtors, and secured and unsecured creditors in insolvency matters in over 60 countries.

Gardere Wynne Sewell LLP

Wells Fargo Plaza, Suite 3400, 1000 Louisiana,
Houston, Texas 77002-5011, US.
Tel: +1 (713) 276 5500
Fax: +1 (713) 276 5555
Website: www.gardere.com

Gardere Wynne Sewell LLP

Thanksgiving Tower, Suite 3000,
1601 Elm Street, Dallas, Texas 75201, US.
Tel: +1 (214) 999 3000
Fax: +1 (214) 999 4667
Website: www.gardere.com

Partner
Holland N. O'Neil
Tel: +1 (214) 999 4961
Email: honeil@gardere.com

Gardere Wynne Sewell LLP

One American Center, Suite 3000,
600 Congress Avenue, Austin,
Texas 78701-2978, US.
Tel: +1 (512) 542 7000
Fax: +1 (512) 542 7100
Website: www.gardere.com

Garrigues New York

780 Third Avenue, 40th Floor,
New York, NY 10017, US.
Tel: +1 (212) 751 9233
Fax: +1 (212) 355 3594
Website: www.garrigues.com

Director, Head of New York Office
Ferran Escayola
Email: ferran.escayola@garrigues.com

Activities: Their team of leading lawyers has decades of experience in turn-around, corporate recovery, refinancing and all types of insolvencies, including cross-border insolvency. It comprises experts with a background in law or economics, who work together in contentious and non-contentious insolvency, affecting debtors, banks or creditors for troubled companies.

Gibbons P.C.

One Gateway Center, Newark, NJ 07102, US.
Tel: +1 (973) 596 4500
Fax: +1 (973) 596 0545
Website: www.gibbonslaw.com

Chairman & Managing Director
Patrick C. Dunican Jr.
Tel: +1 (973) 596 4745
Email: pdunican@gibbonslaw.com

Chair, Financial Restructuring & Creditors' Rights Department
Karen A. Giannelli
Tel: +1 (973) 596 4505
Email: kgiannelli@gibbonslaw.com

Activities: Debtor, creditor, fiduciary representations in bankruptcy proceedings, pre-bankruptcy "workout"/insolvency counseling attachments replevins foreclosure actions.

Gibbons P.C.
50 West State Street, 11th Floor, Suite 1104,
Trenton, NJ 08608, US.
Tel: +1 (609) 394 5300
Fax: +1 (609) 394 5301
Website: www.gibbonslaw.com

Chairman & Managing Director
Patrick C. Dunican Jr.
Tel: +1 (973) 596 4745
Email: pdunican@gibbonslaw.com

Chair, Financial Restructuring & Creditors' Rights Department
Karen A. Giannelli
Tel: +1 (973) 596 4505
Email: kgiannelli@gibbonslaw.com

Activities: Debtor, creditor, fiduciary representations in bankruptcy proceedings, pre-bankruptcy "workout"/insolvency counseling attachments replevins foreclosure actions.

Gibbons P.C.
1000 N. West Street, Suite 1200,
Wilmington, DE 19801, US.
Tel: +1 (302) 295 4875
Fax: +1 (302) 295 4876
Website: www.gibbonslaw.com

Chairman & Managing Director
Patrick C. Dunican Jr.
Tel: +1 (973) 596 4745
Email: pdunican@gibbonslaw.com

Chair, Financial Restructuring & Creditors' Rights Department
Karen A. Giannelli
Tel: +1 (973) 596 4505
Email: kgiannelli@gibbonslaw.com

Activities: Debtor, creditor, fiduciary representations in bankruptcy proceedings, pre-bankruptcy "workout"/insolvency counseling attachments replevins foreclosure actions.

Gibbons P.C.
One Pennsylvania Plaza,
37th Floor, New York, NY 10119, US.
Tel: +1 (212) 613 2000
Fax: +1 (212) 290 2018
Website: www.gibbonslaw.com

Chairman & Managing Director
Patrick C. Dunican Jr.
Tel: +1 (973) 596 4745
Email: pdunican@gibbonslaw.com

Chair, Financial Restructuring & Creditors' Rights Department
Karen A. Giannelli
Tel: +1 (973) 596 4505
Email: kgiannelli@gibbonslaw.com

Activities: Debtor, creditor, fiduciary representations in bankruptcy proceedings, pre-bankruptcy "workout" insolvency counseling attachments replevins foreclosure actions.

Gibbons P.C.
1700 Two Logan Square, 18th & Arch Streets,
Philadelphia, PA 19103, US.
Tel: +1 (215) 665 0400
Fax: +1 (215) 636 0366
Website: www.gibbonslaw.com

Chairman & Managing Director
Patrick C. Dunican Jr.
Tel: +1 (973) 596 4745
Email: pdunican@gibbonslaw.com

Chair, Financial Restructuring & Creditors' Rights Department
Karen A. Giannelli
Tel: +1 (973) 596 4505
Email: kgiannelli@gibbonslaw.com

Activities: Debtor, creditor, fiduciary representations in bankruptcy proceedings, pre-bankruptcy "workout"/insolvency counseling attachments replevins foreclosure actions.

Gibson, Dunn & Crutcher LLP
3161 Michelson Drive, Irvine,
California 92612, US.
Tel: +1 (949) 451 3800
Fax: +1 (949) 451 4220
Website: www.gibsondunn.com

Co-Chairs, Business Restructuring & Reorganisation Practice Group
Craig H. Millet
Michael A. Rosenthal
David M. Feldman

Activities: Represent debtors' in bankruptcy cases and out-of-court restructurings, creditors' committees and individual creditors, bondholders, lenders, potential acquirers, insurers and trustees.

Gibson, Dunn & Crutcher LLP
2100 McKinney Avenue, Suite 1100,
Dallas, Texas 75201, US.
Tel: +1 (214) 698 3100
Fax: +1 (214) 571 2900
Website: www.gibsondunn.com

Co-Chairs, Business Restructuring & Reorganisation Practice Group
Craig H. Millet
Michael A. Rosenthal
David M. Feldman

Activities: Represent debtors' in bankruptcy cases and out-of-court restructurings, creditors' committees and individual creditors, bondholders, lenders, potential acquirers, insurers and trustees.

Gibson, Dunn & Crutcher LLP
555 Mission Street, Suite 3000,
San Francisco, California 94105, US.
Tel: +1 (415) 393 8200
Fax: +1 (415) 398 8306
Website: www.gibsondunn.com

Co-Chairs, Business Restructuring & Reorganisation Practice Group
Craig H. Millet
Michael A. Rosenthal
David M. Feldman

Activities: Represent debtors' in bankruptcy cases and out-of-court restructurings, creditors' committees and individual creditors, bondholders, lenders, potential acquirers, insurers and trustees.

Gibson, Dunn & Crutcher LLP
1881 Page Mill Road, Palo Alto,
California 94304, US.
Tel: +1 (650) 849 5300
Fax: +1 (650) 849 5333
Website: www.gibsondunn.com

Co-Chairs, Business Restructuring & Reorganisation Practice Group
Craig H. Millet
Michael A. Rosenthal
David M. Feldman

Activities: Represent debtors' in bankruptcy cases and out-of-court restructurings, creditors' committees and individual creditors, bondholders, lenders, potential acquirers, insurers and trustees.

Gibson, Dunn & Crutcher LLP
333 South Grand Avenue,
Los Angeles, California 90071, US.
Tel: +1 (213) 229 7000
Fax: +1 (213) 229 7520
Website: www.gibsondunn.com

Co-Chairs, Business Restructuring & Reorganisation Practice Group
Craig H. Millet
Michael A. Rosenthal
David M. Feldman

Activities: Represent debtors' in bankruptcy cases and out-of-court restructurings, creditors' committees and individual creditors, bondholders, lenders, potential acquirers, insurers and trustees.

Gibson, Dunn & Crutcher LLP
200 Park Avenue, New York, NY 10166, US.
Tel: +1 (212) 351 4000
Fax: +1 (212) 351 4035
Website: www.gibsondunn.com

Co-Chairs, Business Restructuring & Reorganisation Practice Group
Craig H. Millet
Michael A. Rosenthal
David M. Feldman

Activities: Represent debtors' in bankruptcy cases and out-of-court restructurings, creditors' committees and individual creditors, bondholders, lenders, potential acquirers, insurers and trustees.

Gibson, Dunn & Crutcher LLP
2029 Century Park East, Suite 4000,
Los Angeles, California 90067, US.
Tel: +1 (310) 552 8500
Fax: +1 (310) 551 8741
Website: www.gibsondunn.com

Co-Chairs, Business Restructuring & Reorganisation Practice Group
Craig H. Millet
Michael A. Rosenthal
David M. Feldman

Activities: Represent debtors' in bankruptcy cases and out-of-court restructurings, creditors' committees and individual creditors, bondholders, lenders, potential acquirers, insurers and trustees.

Goodwin Procter LLP
Exchange Place, Boston, MA 02109, US.
Tel: +1 (617) 570 1000
Fax: +1 (617) 523 1231
Website: www.goodwinprocter.com

Partner, Insolvency & Business Reorganisation
Daniel M. Glosband

Activities: Expert group for UNCITRAL model law on cross-border insolvency and legislative guide on insolvency law. Significant cross-border case experience. Drafted new chapter 15 of US Bankruptcy Code, cross-border and other ancillary cases.

Greenberg Traurig, LLP
Metlife Building, 200 Park Avenue,
New York, NY 10166, US.
Tel: +1 (212) 801 9200
Fax: +1 (212) 801 6400
Email: info@gtlaw.com
Website: www.gtlaw.com

Business Reorganisation & Financial Restructuring Co-Chairs
Keith J. Shapiro
Mark D. Bloom
Bruce R. Zirinsky

Activities: Experienced with multi-national companies in international loan restructurings, bankruptcies and insolvencies, including simultaneous cross-border proceedings in multiple jurisdictions and with representing non-US creditors, liquidators and custodians in complex US-based insolvency cases.

Haynes and Boone, LLP
30 Rockefeller Plaza, 26th Floor,
New York, NY 10112, US.
Tel: +1 (212) 659 4968
Fax: +1 (212) 884 8228
Website: www.haynesboone.com

Partner
Judith Elkin
Mobile: +1 (917) 671 8062
Email: judith.elkin@haynesboone.com

Haynes and Boone, LLP
2323 Victory Avenue, Dallas, Texas 75219, US.
Tel: +1 (214) 651 5612
Fax: +1 (214) 200 0649
Email: robin.phelan@haynesboone.com
Website: www.haynesboone.com

Partner
Robin E. Phelan

Activities: Represents debtors, creditors, acquirors and other interested parties in major restructurings and insolvency matters.

Hodgson Russ LLP
1540 Broadway, 24th Floor,
New York, NY 10036, US.
Tel: +1 (646) 218 7658
Fax: +1 (212) 972 1677
Email: www.hodgsonruss.com

Partner
Heidi Sorvino, Esq

Hogan Lovells US LLP
Columbia Square, 555 Thirteenth Street,
NW, Washington, DC 20004, US.
Tel: +1 (202) 637 5600
Fax: +1 (202) 637 5910
Email: enquiry@hoganlovells.com
Website: www.hoganlovells.com

Partners
Craig H. Ulman
Stephen J. Zempolich
Edward C. Dolan

Activities: Experts advising on business restructuring and insolvency, including corporate restructuring, formal insolvencies and creditor representations.

Hogan Lovells US LLP
875 Third Avenue, New York, NY 10022, US.
Tel: +1 (212) 918 3000
Fax: +1 (212) 918 3100
Email: enquiry@hoganlovells.com
Website: www.hoganlovells.com

Partners
Robin Keller
Chris Donoho III
Ira Greene
Scott Golden

Activities: Experts advising on business restructuring and insolvency, including corporate restructuring, formal insolvencies and creditor representation.

Holland & Knight LLP
100 North Tampa Street, Suite 4100,
Tampa, Florida 33602, US.
Tel: +1 (813) 227 8500
Fax: +1 (813) 229 0134
Website: www.hklaw.com

Partner & Chair, Creditors Rights Team
Leonard H. Gilbert
Email: leonard.gilbert@hklaw.com

Activities: The full service law firm has been engaged in a variety of national and international insolvency and restructuring projects for both lenders and borrowers in various parts of the world.

Jenner & Block
353 N. Clark Street, Chicago, IL 60643, US.
Tel: +1 (312) 222 9350
Fax: +1 (312) 527 0484
Website: www.jenner.com

Managing Partner:
Susan Levy
Tel: +1 (312) 923 2772
Email: slevy@jenner.com

Partner & Chair of the Firm's Bankruptcy, Workout and Corporate Organisation Practice:
Dan Murray
Tel: +1 (312) 923 2953
Email: dmurray@jenner.com

Activities: Jenner & Block represents companies in bankruptcy proceedings, out-of-court restructurings, debt for equity exchanges, internal reorganisations and distressed asset purchases/sales.

Jenner & Block
1099 New York Avenue, NW, Suite 900,
Washington, DC 20001, US.
Tel: +1 (202) 639 6000
Fax: +1 (202) 639 6066
Website: www.jenner.com

Activities: Jenner & Block represents companies in bankruptcy proceedings, out-of-court restructurings, debt for equity exchanges, internal reorganisations and distressed asset purchases/sales.

Jenner & Block
633 West 5th Street, Suite 3600,
Los Angeles, CA 90071, US.
Tel: +1 (213) 239 5100
Fax: +1 (213) 239 5199
Website: www.jenner.com

Activities: Jenner & Block represents companies in bankruptcy proceedings, out-of-court restructurings, debt for equity exchanges, internal reorganisations and distressed asset purchases/sales.

Jenner & Block
919 Third Avenue, 37th Floor,
New York, NY 10022, US.
Tel: +1 (212) 891 1600
Fax: +1 (212) 891 1699
Website: www.jenner.com

Activities: Jenner & Block represents companies in bankruptcy proceedings, out-of-court restructurings, debt for equity exchanges, internal reorganisations and distressed asset purchases/sales.

Kaye Scholer LLP
3 First National Plaza, Suite 4100, 70 West
Madison Street, Chicago, IL 60602-4231, US.
Tel: +1 (312) 583 2310
Fax: +1 (312) 583 2510
Email: msolow@kayescholer.com
Website: www.kayescholer.com

Managing Partner
Michael B. Solow

Partner
D. Tyler Nurnberg
Tel: +1 (312) 583 2313

Activities: Kaye Scholer full service international insolvency and restructuring group specialising in all facets of debtor, creditor, fiduciary and asset acquiror representations.

Kaye Scholer LLP
1999 Avenue of the Stars, Suite 1700,
Los Angeles, CA 90067-6048, US.
Tel: +1 (310) 788 1000
Fax: +1 (310) 788 1200
Website: www.kayescholer.com

Partner, Business Reorganisation
Marc S. Cohen

Counsel, Business Reorganisation
Ashleigh A. Danker

Kaye Scholer LLP
425 Park Avenue, New York,
NY 10022-3598, US.
Tel: +1 (212) 836 8000
Fax: +1 (212) 836 8689
Website: www.kayescholer.com

Chairman/Managing Partner
Michael B. Solow
Tel: +1 (212) 836 7240
Email: msolow@kayescholer.com

COO
Jeff Hunter
Tel: +1 (212) 836 8050
Email: jeffrey.hunter@kayescholer.com

Partner
Mark Liscio
Tel: + (212) 836 7550

Activities: Kaye Scholer full service international insolvency and restructuring group specialising in all facets of debtor, creditor, fiduciary and asset acquiror representations.

King & Spalding LLP
1100 Louisiana Avenue, Suite 4000,
Houston, Texas 77002, US.
Tel: +1 (713) 751 3200
Fax: +1 (713) 751 3290
Website: www.kslaw.com

Partners
Henry J. Kaim
Tel: +1 (713) 751 3225
Email: hkaim@kslaw.com
Mark Wege
Tel: +1 (713) 751 3246
Email: mwege@kslaw.com

Activities: Representation of debtors, creditors and parties in interest in workouts, restructurings, bankruptcies, insolvencies, distressed mergers and acquisitions, and related litigation.

King & Spalding LLP
1185 Avenue of the Americas,
New York, NY 10036, US.
Tel: +1 (212) 556 2100
Fax: +1 (212) 556 2222
Website: www.kslaw.com

Partners
Arthur J. Steinberg
Tel: +1 (212) 556 2158
Email: asteinberg@kslaw.com
Michael C. Rupe
Tel: +1 (212) 556 2135
Email: mrupe@kslaw.com

Activities: Representation of debtors, creditors and parties in interest in workouts, restructurings, bankruptcies, insolvencies, distressed mergers and acquisitions, and related litigation.

King & Spalding LLP
1180 Peachtree Street, Atlanta,
Georgia 30309, US.
Tel: +1 (404) 572 4600
Fax: +1 (404) 572 5100
Website: www.kslaw.com

Partners
James A. Pardo, Jr
Tel: +1 (404) 572 4794
Email: jpardo@kslaw.com
Mark M. Maloney
Tel: +1 (404) 572 4857
Email: mmaloney@kslaw.com

Activities: Representation of debtors, creditors and parties in interest in workouts, restructurings, bankruptcies, insolvencies, distressed mergers and acquisitions, and related litigation.

Latham & Watkins LLP
Sears Tower, Suite 5800, 233 South Wacker
Drive, Chicago, IL 60606, US.
Tel: +1 (312) 876 7700
Fax: +1 (312) 993 9767
Website: www.lw.com

Partners
Josef S. Athanas
Richard Levy
David S. Heller

Contacts
John Houghton
Tel: +44 (20) 7710 1000
Mitchell Seider
Tel: +1 (212) 906 1200
Jan Baker
Tel: +1 (212) 906 1200
Peter Gilhuly
Tel: +1 (213) 485 1234

Activities: Global law firm with more than 2000 lawyers in 31 offices worldwide, including over 500 lawyers throughout Europe. Offers a full range of services in insolvency, workouts and restructurings and is acknowledged as a leading bankruptcy lender law firm.

Latham & Watkins LLP
355 South Grand Avenue,
Los Angeles, CA 90071-1560, US.
Tel: +1 (213) 485 1234
Fax: +1 (213) 891 8763
Website: www.lw.com
Partners
Peter M. Gilhuly
Robert A. Klyman
Gregory O. Lunt
Contacts
John Houghton
Tel: +44 (20) 7710 1000
Jan Baker
Tel: +1 (212) 906 1200
Mitchell Seider
Tel: +1 (212) 906 1200
Activities: Global law firm with more than 2000 lawyers in 31 offices worldwide, including over 500 lawyers throughout Europe. Offers a full range of services in insolvency, workouts and restructurings and is acknowledged as a leading bankruptcy lender law firm.

Latham & Watkins LLP
885 Third Avenue, Suite 1000,
New York, NY 10022, US.
Tel: +1 (212) 906 1200
Fax: +1 (212) 751 4864
Website: www.lw.com
Partners
Mark A. Broude
Christopher R. Plaut
Robert J. Rosenberg
Mitchell Seider
Jan Baker
Contacts
John Houghton
Tel: +44 (20) 7710 1000
Peter Gilhuly
Tel: +1 (213) 485 1234
Activities: Global law firm with more than 2000 lawyers in 31 offices worldwide, including over 500 lawyers throughout Europe. Offers a full range of services in insolvency, workouts and restructurings and is acknowledged as a leading bankruptcy lender law firm.

Matheson Ormsby Prentice, Solicitors
530 Lytton Avenue, Palo Alto,
CA 94301, US.
Tel: +1 (650) 617 335
Fax: +1 (650) 617 325
Email: paloalto@mop.ie
Website: www.mop.ie

Matheson Ormsby Prentice, Solicitors
245 Park Avenue, New York, NY 10167, US.
Tel: +1 (212) 792 4141
Fax: +1 (212) 792 4131
Email: newyork@mop.ie
Website: www.mop.ie

Mayer Brown LLP
1675 Broadway, New York,
NY 10019-5820, US.
Tel: +1 (212) 506 2500
Fax: +1 (212) 262 1910
Email: msegarra@mayerbrown.com
Website: www.mayerbrown.com
Partner:
Brian Trust
Tel: +1 (212) 506 2570
Email: btrust@mayerbrown.com

Activities: One of the leading global practices providing comprehensive restructuring and insolvency assistance to clients around the world.

Milbank, Tweed, Hadley & McCloy LLP
601 South Figueroa Street, 30th Floor,
Los Angeles, CA 90017, US.
Tel: +1 (213) 892 4000
Fax: +1 (213) 629 5063
Website: www.milbank.com
Mananging Partner
Kenneth J. Baronsky
Tel: +1 (213) 892 4333
Email: kbaronsky@milbank.com
Partner, Financial Restructuring Group
Robert Jay Moore
Tel: +1 (213) 892 4501
Email: rmoore@milbank.com
Activities: Extensive experience in representing debtors, bondholders' and creditors' committees, and acquirors in US, cross-border and foreign matters of major significance.

Milbank, Tweed, Hadley & McCloy LLP
601 South Figueroa Street, 30th Floor,
Los Angeles, CA 90017, US.
Tel: +1 (213) 892 4000
Fax: +1 (213) 629 5063
Website: www.milbank.com
Managing Partner
Kenneth J. Baronsky
Tel: +1 (213) 892 4333
Email: kbaronsky@milbank.com
Partner, Financial Restructuring Group
Robert Jay Moore
Tel: +1 (213) 892 4501
Email: rmoore@milbank.com
Activities: Extensive experience in representing debtors, bondholders' and creditors' committees, and acquirors in US, cross-border and foreign matters of major significance.

MorrisAnderson
55 W. Monroe, Suite 2500,
Chicago, IL 60603, US.
Tel: +1 (312) 254 0880
Fax: +1 (312) 727 0180
Email: info@morrisanderson.com
Website: www.morrisanderson.com
CEO
Daniel F. Dooley
Tel: +1 (312) 254 0888
Email: ddooley@morrisanderson.com
Marketing Director
Amanda Hansen
Tel: +1 (312) 254 0956
Email: ahansen@morrisanderson.com
Activities: Independent assessment, strategic restructuring planning & implementation, exit strategies: refinance, sales of compnay, wind-down, interim management, trustee/receiverships, financial advisory.

Morrison & Foerster LLP
1290 Avenue of the Americas,
New York, NY 10104-0050, US.
Tel: +1 (212) 468 8000
Fax: +1 (212) 468 7900
Website: www.mofo.com
Co-Chairs of the Bankruptcy & Restructuring Practice Group
Larren M. Nashelsky
Tel: +1 (212) 506 7365
Email: lnashelsky@mofo.com
Gary S. Lee
Tel: +1 (212) 468 8042
Email: glee@mofo.com
Activities: Cross border insolvencies, financail institution restructurings, creditors' committees, debtors, distressed real estate, secured lenders, distressed debt and insolvencies involving intellectual property.

Nixon Peabody LLP
437 Madison Avenue, New York,
NY 10022, US.
Tel: +1 (212) 940 3000
Fax: +1 (212) 940 3111
Website: www.nixonpeabody.com
Managing Partner:
Arthur J. Rosner
Email: arosner@nixonpeabody.com

Nixon Peabody LLP
100 Summer Street, Boston, MA 02110, US.
Tel: +1 (617) 345 1000
Fax: +1 (617) 345 1300
Website: www.nixonpeabody.com
Partner, Global Finance Group:
Amanda Darwin
Tel: +1 (617) 345 1042
Email: adarwin@nixonpeabody.com

Nixon Peabody LLP
Gas Company Tower, 555 West Fifth Street,
Los Angeles, CA 90013, US.
Tel: +1 (213) 629 6000
Fax: +1 (213) 629 6001
Website: www.nixonpeabody.com
Managing Partner:
Richard Jones
Email: rjones@nixonpeabody.com

Nixon Peabody LLP
One Embarcadero Center, Suite 1800,
San Francisco, CA 94111, US.
Tel: +1 (415) 984 8200
Fax: +1 (415) 984 8300
Website: www.nixonpeabody.com
Managing Partner:
Paul E. Schrier
Email: pschrier@nixonpeabody.com

Nixon Peabody LLP
677 Broadway, 10th Floor, Albany,
NY 12207, US.
Tel: +1 (518) 427 2650
Fax: +1 (518) 427 2666
Website: www.nixonpeabody.com
Managing Partner:
Andrew C. Rose
Email: acrose@nixonpeabody.com

O'Melveny & Myers LLP
400 South Hope Street, Los Angeles,
CA 90071-2899, US.
Tel: +1 (213) 430 6000
Fax: +1 (213) 430 6407
Email: omminfo@omm.com
Website: www.omm.com
Partner
Carla Christofferson
Activities: Offering major insolvency and restructuring capabilities. Clients include funds, major banks, insurance companies and other financial concerns, and entertainment firms.

O'Melveny & Myers LLP
Two Embarcadero Center, San Francisco,
CA 94111-3823, US.
Tel: +1 (415) 984 8700
Fax: +1 (415) 984 8701
Email: omminfo@omm.com
Website: www.omm.com
Partner
Michael Tubach
Activities: Offering major insolvency and restructuring capabilities. Clients include funds, major banks, insurance companies and other financial concerns, and entertainment firms.

O'Melveny & Myers LLP
Times Square Tower, 7 Times Square,
New York, NY 10036, US.
Tel: +1 (212) 326 2000
Fax: +1 (212) 326 2061
Email: omminfo@omm.com
Website: www.omm.com

Partner
Jeffrey Kohn

Activities: Offering major insolvency and restructuring capabilities. Clients include funds, major banks, insurance companies and other financial concerns, and entertainment firms.

O'Melveny & Myers LLP

610 Newport Center Drive,
Newport Beach, CA 92660, US.
Tel: +1 (949) 823 6900
Fax: +1 (949) 823 6994
Email: omminfo@omm.com
Website: www.omm.com

Partner
Brett J. Williamson

Activities: Offering major insolvency and restructuring capabilities. Clients include funds, major banks, insurance companies and other financial concerns, and entertainment firms.

Otterbourg, Steindler, Houston & Rosen, P.C.

230 Park Avenue, New York, NY 10169, US.
Tel: +1 (212) 661 9100
Fax: +1 (212) 682 6104
Website: www.oshr.com

Chairman
Daniel Wallen, Esq.
Email: dwallen@oshr.com

Partner
Melanie L. Cyganowski
Tel: +1 (212) 905 3677
Email: mcyganowski@oshr.com

Activities: Cross-border and complex US insolvencies, including expertise in Chapter 15; transnational restructurings and representation of foreign banks; and mediation.

Perella Weinberg Partners L.P.

767 Fifth Avenue, New York, NY 10153 US.
Tel: +1 (212) 287 3200
Fax: +1 (646) 786 4086
Website: www.pwpartners.com

Partner
Michael A. Kramer
Tel: +1 (212) 287 3388
Email: mkramer@pwpartners.com

Activities: Practice includes representation of debtors, creditors and acquirers both in court and out-of-court, in the US, Europe and Latin America.

Potter Anderson & Corroon LLP

1313 N. Market Street, PO Box 951,
Wilmington, DE 19899-0951, US.
Tel: +1 (302) 984 6020
Fax: +1 (302) 658 1192
Email: defirm@potteranderson.com
Website: www.potteranderson.com

Chairman
Donald J. Wolfe Jr.
Tel: +1 (302) 984 6011
Email: dwolfe@potteranderson.com

Chair, Bankruptcy & Corporate Restructuring Practice
Laurie Selber Silverstein
Tel: +1 (302) 984 6033
Email: lsilverstein@potteranderson.com

Activities: Representing debtors, official and unofficial committees, financial institutuions, shareholders and acquirers of assets in bankruptcy proceedings, related litigation and restructuring.

Republic Business Credit, LLC

350 S Northwest Highway, Suite 331,
Park Ridge, IL 60068, US.
Tel: +1 (866) 722 4987
Fax: +1 (504) 262 8699
Email: info@republicbc.com
Website: www.republicbc.com

CEO
Allen E. Frederic, Jr.
Tel: +1 (504) 262 8600
Email: afrederic@republicbc.com

SVP, Regional Sales Manager
Brian Albach
Tel: +1 (847) 850 0975
Email: balbach@republicbc.com

Activities: Receivables purchase lines of credit and factoring up to US$5m facilities.

Republic Business Credit, LLC

2911 Turtle Creek Boulevard, Suite 300,
Dallas, TX 75219, US.
Tel: +1 (866) 722 4987
Fax: +1 (504) 262 8699
Email: info@republicbc.com
Website: www.republicbc.com

CEO
Allen E. Frederic, Jr.
Tel: +1 (504) 262 8600
Email: afrederic@republicbc.com

SVP, Regional Sales Manager
Elizabeth Hastings
Tel: +1 (214) 390 2304
Email: ehastings@republicbc.com

Activities: Receivables purchase lines of credit and factoring up to US$5m facilities.

Republic Business Credit, LLC

25 Cross Creek Lane, Mountain Brook,
AL 35213, US.
Tel: +1 (866) 722 4987
Fax: +1 (504) 262 8699
Email: info@republicbc.com
Website: www.republicbc.com

CEO
Allen E. Frederic, Jr.
Tel: +1 (504) 262 8600
Email: afrederic@republicbc.com

Director of Strategic Alliances
J. Mike Battle
Tel: +1 (205) 879 7679
Email: jmbattle@republicbc.com

Activities: Receivables purchase lines of credit and factoring up to US$5m facilities.

Republic Business Credit, LLC

201 St. Charles Avenue, Suite 2409,
New Orleans, LA 70170, US.
Tel: +1 (866) 722 4987
Fax: +1 (504) 262 8699
Email: info@republicbc.com
Website: www.republicbc.com

CEO
Allen E. Frederic, Jr.
Tel: +1 (504) 262 8600
Email: afrederic@republicbc.com

VP, Sales
Leigh Guglielmo
Tel: +1 (504) 262 8622
Email: lguglielmo@republicbc.com

Activities: Receivables purchase lines or credit and factoring facilities for restructuring businesses including DIP funding up to $5 Million facilities.

Roland Berger Strategy Consultants LLC

2401 West Big Beaver Road, Suite 500,
Troy, MI 48084, US.
Tel: +1 (248) 729 5000
Fax: +1 (248) 649 1794
Website: www.rolandberger.com

Partner
Jürgen Reers
Tel: +1 (248) 729 5115
Email: juergen_reers@us.rolandberger.com

Activities: Roland Berger Strategy Consultants is a leading global strategy consultancy. Within their restructuring practice they focus on complex operational and financial restructurings/distressed M&A as well as insolvency support.

Ropes & Gray LLP

Prudential Tower, 800 Boylston Street,
Boston, MA 02199-3600, US.
Tel: +1 (617) 951 7000
Fax: +1 (617) 951 7050
Website: www.ropesgray.com

Bankruptcy & Business Restructuring
Mark I. Bane
Tel: +1 (212) 841 8808
Email: mark.bane@ropesgray.com
Alyson Allen
Tel: +1 (617) 951 7483
Email: alyson.allen@ropesgray.com

Partners
Steve Hoort
Tel: +1 (617) 951 7470
Email: steven.hoort@ropesgray.com
James M. Wilton
Tel: +1 (617) 951 7474
Email: james.wilton@ropesgray.com
Ross Martin
Tel: +1 (617) 951 7266
Email: ross.martin@ropesgray.com
Steve Moeller-Sally
Tel: +1 (617) 951 7012
Email: ssally@ropesgray.com

Activities: Representation of insolvent companies, financiers, acquirers, high yield bondholder committees, debtors and creditors of multinational companies.

Ropes & Gray LLP

1211 Avenue of the Americas,
New York, NY 10036-8700, US.
Tel: +1 (212) 596 9000
Fax: +1 (212) 596 9090
Website: www.ropesgray.com

Bankruptcy & Business Restructuring
Mark I. Bane
Tel: +1 (212) 841 8808
Email: mark.bane@ropesgray.com
Alyson Allen
Tel: +1 (617) 951 7483
Email: alyson.allen@ropesgray.com

Partners
Keith H. Wofford
Tel: +1 (212) 841 8816
Email: keith.wofford@ropesgray.com
Mark Somerstein
Tel: +1 (212) 841 8814
Email: mark.somerstein@ropesgray.com
Ross Martin
Tel: +1 (617) 951 7266
Email: ross.martin@ropesgray.com
Steve Moeller-Sally
Tel: +1 (617) 951 7012
Email: ssally@ropesgray.com
Anne Pak
Tel: +1 (212) 841 5740
Email: anne.pak@ropesgray.com
David S. Elkind
Tel: +1 (212) 841 0608
Email: david.elkind@ropesgray.com

Activities: Representation of insolvent companies, financiers, acquirers, high yield bondholder committees, debtors and creditors of multinational companies.

Shearman & Sterling LLP

599 Lexington Avenue,
New York, NY 10022, US.
Tel: +1 (212) 848 4000
Fax: +1 (646) 848 7179
Website: www.shearman.com

Director
Douglas P. Bartner
Tel: +1 (212) 848 8190
Email: dbartner@shearman.com

Contact
James L. Garrity, Jr,
Tel: +1 (212) 848 4879
Email: jgarrity@shearman.com

Activities: Representation of debtors, creditors and acquirors in chapter 11 bankruptcies, out-of-court restructurings and cross-border insolvency proceedings.

Sierra Trading Co.
2045 Palisades Drive, Fullerton,
California 92831, US.
Tel: +1 (714) 992 2150
Fax: +1 (714) 992 4395
Email: rfquis@aol.com
Website: www.mnawizards.com
CEO
Richard F. Quis
Activities: Financial advisors able to successfully position and execute the sale of underperforming or distressed companies.

Skadden, Arps, Slate, Meagher & Flom LLP & Affiliates
155 North Wacker Drive,
Chicago, IL 60606, US.
Tel: +1 (312) 407 0700
Fax: +1 (312) 407 0411
Website: www.skadden.com
Director
George N. Panagakis
Activities: Worldwide practice serving corporations and their principal creditors and investors by providing value-added legal solutions in bankruptcy and restructuring situations.

Skadden, Arps, Slate, Meagher & Flom LLP & Affiliates
1440 New York Avenue, NW,
Washington, DC 20005, US.
Tel: +1 (202) 371 7000
Fax: +1 (202) 393 5760
Website: www.skadden.com
Partner
Clifford (Mike) M. Naeve
Activities: Worldwide practice serving corporations and their principal creditors and investors by providing value-added legal solutions in bankruptcy and restructuring situations.

Skadden, Arps, Slate, Meagher & Flom LLP & Affiliates
1000 Louisiana Street, Suite 6800,
Houston, TX 77002, US.
Tel: +1 (713) 655 5100
Fax: +1 (713) 655 5200
Website: www.skadden.com
Partner
John C. Ale
Activities: Worldwide practice serving corporations and their principal creditors and investors by providing value-added legal solutions in bankruptcy and restructuring situations.

Skadden, Arps, Slate, Meagher & Flom LLP & Affiliates
525 University Avenue, Palo Alto,
California 94301, US.
Tel: +1 (650) 470 4500
Fax: +1 (650) 470 4570
Website: www.skadden.com
Partner
Kenton J. King
Activities: Worldwide practice serving corporations and their principal creditors and investors by providing value-added legal solutions in bankruptcy and restructuring situations.

Skadden, Arps, Slate, Meagher & Flom LLP & Affiliates
300 South Grand Avenue, Suite 3400,
Los Angeles, California 90071, US.
Tel: +1 (213) 687 5000
Fax: +1 (213) 687 5600
Website: www.skadden.com
Partner
Van C. Durrer, II
Associate, Corporate Restructuring
Kimberly Jaimez
Tel: +1 (213) 687 5322
Email: kimberly jaimez@skadden.com
Activities: Worldwide practice serving corporations and their principal creditors and investors by providing value-added legal solutions in bankruptcy and restructuring situations.

Skadden, Arps, Slate, Meagher & Flom LLP & Affiliates
One Rodney Square, PO Box 636,
Wilmington, Delaware 19899, US.
Tel: +1 (302) 651 3000
Fax: +1 (302) 651 3001
Website: www.skadden.com
Partner
Anthony W. Clark
Activities: Worldwide practice serving corporations and their principal creditors and investors by providing value-added legal solutions in bankruptcy and restructuring situations.

Skadden, Arps, Slate, Meagher & Flom LLP & Affiliates
4 Times Square, New York, NY 10036, US.
Tel: +1 (212) 735 3000
Fax: +1 (212) 735 2000
Website: www.skadden.com
Partner
Jay M. Goffman
Activities: Worldwide practice serving corporations and their principal creditors and investors by providing value-added legal solutions in bankruptcy and restructuring situations.

Skadden, Arps, Slate, Meagher & Flom LLP & Affiliates
One Beacon Street, Boston, MA 02108, US.
Tel: +1 (617) 573 4800
Fax: +1 (617) 573 4822
Website: www.skadden.com
Partner
Margaret A. Brown
Activities: Worldwide practice serving corporations and their principal creditors and investors by providing value-added legal solutions in bankruptcy and restructuring situations.

SNR Denton
One Metropolitan Square, 211 N. Broadway,
Suite 3000, St. Louis, MO 63102-2741, US.
Tel: +1 (314) 241 1800
Fax: +1 (314) 259 5959
Website: www.snrdenton.com
Partner
Jennifer A. Marler
Tel: +1 (314) 259 5874

SNR Denton
2121 North California Boulevard, Suite 800,
Walnut Creek, CA 94596-7342, US.
Tel: +1 (925) 949 2600
Fax: +1 (925) 949 2610
Website: www.snrdenton.com

SNR Denton
1111 Brickell Avenue, 11th Floor,
Miami, FL 33131-3122, US.
Tel: +1 (786) 777 7005
Fax: +1 (202) 408 6399
Website: www.snrdenton.com

SNR Denton
233 South Wacker Drive, Suite 7800,
Chicago, IL 60606-6404, US.
Tel: +1 (312) 876 8000
Fax: +1 (312) 876 7934
Website: www.snrdenton.com
Partner
Mary G. Wilson
Tel: +1 (312) 876 8936.\n

SNR Denton
4520 Main Street, Suite 1100,
Kansas City, MO 64111-7700, US.
Tel: +1 (816) 460 2400
Fax: +1 (816) 531 7545
Website: www.snrdenton.com
Partner
John L. Snyder
Tel: +1 (816) 460 2668

SNR Denton
2000 McKinney Avenue, Suite 1900,
Dallas, TX 75201-1858, US.
Tel: +1 (214) 259 0900
Fax: +1 (214) 259 0910
Website: www.snrdenton.com
Partner
Mike Moore
Tel: +1 (214) 259 0902

SNR Denton
601 S. Figueroa Street, Suite 2500,
Los Angeles, CA 90017, US.
Tel: +1 (213) 623 9300
Fax: +1 (213) 623 9924
Website: www.snrdenton.com
Partner
Darry A. Sragow
Tel: +1 (213) 892 2925

SNR Denton
101 Federal Street, Suite 2750,
Boston, MA 02110-1873, US.
Tel: +1 (617) 235 6800
Fax: +1 (617) 235 6899
Website: www.snrdenton.com

SNR Denton
1221 Avenue of the Americas,
New York, NY 10020-1089, US.
Tel: +1 (212) 768 6700
Fax: +1 (212) 768 6800
Website: www.snrdenton.com
Partner
Jeffrey J. Murphy
Tel: +1 (212) 768 6899.\n

SNR Denton
1530 Page Mill Rd., Suite 200,
Palo Alto, CA 94304-1125, US.
Tel: +1 (650) 798 0300
Fax: +1 (650) 798 0310
Website: www.snrdenton.com
Partner
Tarek N. Fahmi
Tel: +1 (650) 798 0320.\n

SNR Denton
101 JFK Parkway, Short Hills,
NJ 07078-2708, US.
Tel: +1 (973) 912 7100
Fax: +1 (973) 912 7199
Website: www.snrdenton.com
Partners
Victor H. Boyajian
Tel: +1 (212) 768 5349; +1 (973) 912 7171
Email: victor.boyajian@snrdenton.com
Robert W. Cockren
Tel: +1 (973) 912 7101

SNR Denton
525 Market Street, 26th Floor,
San Francisco, CA 94105-2708, US.
Tel: +1 (415) 882 5000
Fax: +1 (415) 882 0300
Website: www.snrdenton.com
Partner
Sonia R. Martin
Tel: +1 (415) 882 2476

SNR Denton
1301 K Street, NW, Suite 600, East Tower,
Washington, DC 20005-3364, US.
Tel: +1 (202) 408 6400
Fax: +1 (202) 408 6399
Website: www.snrdenton.com

Partner
Frederick D. McClure
Tel: +1 (202) 408 3235
Email: fred.mcclure@snrdenton.com

SNR Denton
2398 E. Camelback Road, Suite 1100,
Phoenix, AZ 85016-9016, US.
Tel: +1 (602) 508 3900
Fax: +1 (602) 508 3914
Website: www.snrdenton.com

Partner
Meghan Cocci
Tel: +1 (602) 508 3903

Squire Sanders (US) LLP
221 E. Fourth Street, Suite 2900,
Cincinnati, Ohio 45202, US.
Tel: +1 (513) 361 1200
Fax: +1 (513) 361 1201
Website: www.squiresanders.com

Restructuring Insolvency Global Practice Group Leader
Stephen D. Lerner

Co-Chairs Cross Border Restructuring Practice
Thomas J. Salerno
Graeme D. Levy
Susan M. Kelly

Activities: The restructuring & insolvency group has over 100 restructuring and insolvency lawyers who represent financial institutions, distressed companies, insolvency practitioners, creditors' committees, investors, and strategic and financial buyers of troubled companies.

Squire Sanders (US) LLP
1 E. Washington St., Suite 2700,
Phoenix, AZ 85004, US.
Tel: +1 (602) 528 4000
Fax: +1 (602) 253 8129
Website: www.ssd.com

Restructuring Insolvency Global Practice Group Leader
Stephen D. Lerner

Co-Chairs Cross Border Restructuring Practice
Thomas J. Salerno
Graeme D. Levy
Susan M. Kelly

Activities: The restructuring & insolvency group has over 100 restructuring and insolvency lawyers who represent financial institutions, distressed companies, insolvency practitioners, creditors' committees, investors, and strategic and financial buyers of troubled companies.

Squire Sanders (US) LLP
30 Rockefeller Plaza, 23rd Floor,
New York, NY 10112, US.
Tel: +1 (212) 872 9800
Fax: +1 (212) 872 9815
Website: www.squiresanders.com

Restructuring Insolvency Global Practice Group Leader
Stephen D. Lerner

Co-Chairs Cross Border Restructuring Practice
Thomas J. Salerno
Graeme D. Levy
Susan M. Kelly

Activities: The restructuring & insolvency group has over 100 restructuring and insolvency lawyers who represent financial institutions, distressed companies, insolvency practitioners, creditors' committees, investors, and strategic and financial buyers of troubled companies.

Squire Sanders (US) LLP
One Tampa City Center, 201 N. Franklin Street, Suite 2100, Tampa, Florida 33602, US.
Tel: +1 (813) 202 1300
Fax: +1 (813) 202 1313
Website: www.squiresanders.com

Restructuring Insolvency Global Practice Group Leader
Stephen D. Lerner

Co-Chairs Cross Border Restructuring Practice
Thomas J. Salerno
Graeme D. Levy
Susan M. Kelly

Activities: The restructuring & insolvency group has over 100 restructuring and insolvency lawyers who represent financial institutions, distressed companies, insolvency practitioners, creditors' committees, investors, and strategic and financial buyers of troubled companies.

Squire Sanders (US) LLP
4900 Key Tower, 127 Public Square,
Cleveland, OH 44114, US.
Tel: +1 (216) 479 8500
Fax: +1 (216) 479 8780
Website: www.squiresanders.com

Restructuring Insolvency Global Practice Group Leader
Stephen D. Lerner

Co-Chairs Cross Border Restructuring Practice
Thomas J. Salerno
Graeme D. Levy
Susan M. Kelly

Activities: The restructuring & insolvency group has over 100 restructuring and insolvency lawyers who represent financial institutions, distressed companies, insolvency practitioners, creditors' committees, investors, and strategic and financial buyers of troubled companies.

Squire Sanders (US) LLP
8000 Towers Crescent Drive, 14th Floor,
Tysons Corner, Virginia 22182, US.
Tel: +1 (703) 720 7800
Fax: +1 (703) 720 7801
Website: www.squiresanders.com

Restructuring Insolvency Global Practice Group Leader
Stephen D. Lerner

Co-Chairs Cross Border Restructuring Practice
Thomas J. Salerno
Graeme D. Levy
Susan M. Kelly

Activities: The restructuring & insolvency group has over 100 restructuring and insolvency lawyers who represent financial institutions, distressed companies, insolvency practitioners, creditors' committees, investors, and strategic and financial buyers of troubled companies.

Squire Sanders (US) LLP
2000 Huntington Center, 41 South High Street, Columbus, OH 43215, US.
Tel: +1 (614) 365 2700
Fax: +1 (614) 365 2499
Website: www.squiresanders.com

Restructuring Insolvency Global Practice Group Leader
Stephen D. Lerner

Co-Chairs Cross Border Restructuring Practice
Thomas J. Salerno
Graeme D. Levy
Susan M. Kelly

Activities: The restructuring & insolvency group has over 100 restructuring and insolvency lawyers who represent financial institutions, distressed companies, insolvency practitioners, creditors' committees, investors, and strategic and financial buyers of troubled companies.

Standard & Poor's
225 Franklin Street, 15th Floor,
Boston, MA 02110, US.
Tel: +1 (617) 530 8300
Fax: +1 (617) 530 8334

Standard & Poor's
Steuart Tower, Suite 1500,
San Francisco, CA 94105, US.
Tel: +1 (415) 371 5000
Fax: +1 (415) 371 5090

Standard & Poor's
Lincoln Plaza, 500 North Akard Street,
Suite 3200, Dallas TX 75201, US.
Tel: +1 (214) 871 1400
Fax: +1 (214) 871 1409

Standard & Poor's
One Prudential Plaza, 130 East Randolph Street, Chicago IL 60601, US.
Tel: +1 (312) 233 7000
Fax: +1 (312) 233 7051

Standard & Poor's
55 Water Street, New York, NY 10041, US.
Tel: +1 (212) 438 1000
Fax: +1 (212) 438 2000

Standard & Poor's
401 East Market Street,
Charlottesville, Virginia 22902, US.
Tel: +1 (434) 977 1450
Fax: +1 (434) 979 9962

Standard & Poor's
7400 South Alton Court, Centennial,
Colorado 80112-2394, US.
Fax: +1 (303) 721 4846

Strauss & Troy
The Federal Reserve Building, 150 East Fourth Street, Cincinnati, OH 45202, US.
Tel: +1 (513) 621 2120
Fax: +1 (513) 241 8259
Website: www.strausstroy.com

President
James C. Heldman
Tel: +1 (513) 629 9421
Email: jgheldman@strausstroy.com

Or Counsel
Philomena S. Ashdown
Tel: +1 (513) 629 9456
Email: psashdown@strausstroy.com

Activities: Represent lenders, borrowers, receivers, trustees and inventors in debt restructuring, purchase, sale of debt, distressed assets, enforce, defend delinquent debt, foreclosure.

Stroock & Stroock & Lavan LLP
180 Maiden Lane, New York, NY 10038, US.
Tel: +1 (212) 806 5400
Fax: +1 (212) 806 6006
Email: webmaster@stroock.com
Website: www.stroock.com

Partner & Co-Chair, Financial Restructuring Practice
Lawrence M. Handelsman
Tel: +1 (212) 806 5426
Email: lhandelsman@stroock.com
Lewis Kruger

Activities: Represent debtors, creditors, investors and purchasers with in and out-of-court restructurings in the US and abroad.

The Abernathy MacGregor Group
707 Wilshire Boulevard, Suite 3950,
Los Angeles, CA 90017, US.
Tel: +1 (213) 630 6550
Fax: +1 (213) 489 3443
Website: www.abmac.com

Vice Chairman
Ian D. Campbell
Email: idc@abmac.com

Senior Counselor
Rivian Bell
Email: rlb@abmac.com.

The Rosner Law Group LLC

824 Market Street, Suite 810,
Wilmington, DE 19801, US.
Tel: +1 (302) 777 1111
Website: www.teamrosner.com

Director
Frederick B. Rosner
Tel: +1 (302) 319 6300
Email: rosner@teamrosner.com

Attorney
Julia B. Klein
Tel: +1 (302) 319 6306
Email: klein@teamrosner.com

Activities: Representation of debtors, creditor committees and institutional creditors, landlords, plaintiffs and defendants in avoidance actions.

Todtman, Nachamie, Spizz & Johns, P.C.

425 Park Avenue, Fifth Floor,
New York, NY 10022, US.
Tel: +1 (212) 754 9400
Fax: +1 (212) 754 6262
Email: info@tnsj-law.com
Website: www.tnsj-law.com

Co-Chairman of Corporate, Restructuring, Bankruptcy & Creditors' Rights
Barton Nachamie
Tel: +1 (212) 754 9400 ext. 413
Email: bnachamie@tnsj-law.com

Partner
Janice B. Grubin
Tel: +1 (212) 754 9400 ext. 423
Email: jgrubin@tnsj-law.com

Activities: The firm is a general practice business law firm. Its global footprint is facilitated through its active participation in L.A.W. a worldwide organisation with over 100 member law firms.

Vinson & Elkins LLP

Trammell Crow Center, 2001 Ross Avenue,
Suite 3700, Dallas, TX 75201-2975, US.
Tel: +1 (214) 220 7700
Fax: +1 (214) 220 7716
Website: www.velaw.com

Chairman
Mark Kelly
Tel: +1 (713) 758 4592
Email: mkelly@velaw.com

Managing Partner
Scott Wulfe
Tel: +1 (713) 758 2750
Email: swulfe@velaw.com

Partners
Valinda Wolfert
Tel: +1 (214) 220 7843
Email: vwolfert@velaw.com
Tonya Ramsey
Tel: +1 (214) 220 7750
Email: tramsey@velaw.com

Counsel
Michaela Crocker
Tel: +1 (214) 220 7787
Email: mcrocker@velaw.com

Associates
Angela Degeyter
Tel: +1 (214) 220 7763
Email: adegeyter@velaw.com
Becky Petereit
Tel: +1 (214) 220 7802
Email: rpetereit@velaw.com

Activities: The restructuring and reorganisation lawyers handle matters including cross-border insolvencies and matters under Chapter 15 of the US Bankruptcy Code.

Wachtell, Lipton, Rosen & Katz

51 West 52nd Street,
New York, NY 10019, US.
Tel: +1 (212) 403 1000
Fax: +1 (212) 403 2000
Website: www.wlrk.com

Co-Chairmen of the Executive Committee
Edward Herlihy
Email: edherlihy@wlrk.com
Daniel Neff
Email: daneff@wlrk.com

Activities: Wachtell Lipton represents bankhedge funds, private equity funds and creditors and acquirors in national/multinational bankruptcy cases and out-of-court restructurings.

White & Case LLP

200 South Biscayne Boulevard, Suite 4900,
Miami, FL 33131-2352, US.
Tel: +1 (305) 371 2700
Fax: +1 (305) 358 5744
Website: www.whitecase.com

Global Practice Head & Partner
Thomas E Lauria
Tel: +1 (305) 995 5282
Email: tlauria@whitecase.com

Partners
John K. Cunningham
Tel: +1 (305) 995 5252
Email: jcunningham@whitecase.com
Michael Shepherd
Tel: +1 (305) 925 4790
Email: mshepherd@whitecase.com

Counsel
Frank L. Eaton
Tel: +1 (305) 995 5298
Email: featon@whitecase.com

Activities: White & Case is a global law firm with over 2000 lawyers in 26 countries. Their financial restructuring and insolvency group is a worldwide practice consisting of over 160 restructuring and insolvency lawyers. They are a globally recognised leader in complex cross-border insolvencies and workouts, and they represent clients in all aspects of restructurings, workouts and insolvencies, including both transactional and litigation matters. Recent representations include many of the world's largest restructuring cases and out-of-court workouts.

White & Case LLP

701 Thirteenth Street, NW,
Washington, DC 20005-3807, US.
Tel: +1 (202) 626 3600
Fax: +1 (202) 639 9355
Website: www.whitecase.com

Partner
Frank Vasquez
Tel: +1 (202) 626 3603
Email: fvasquez@whitecase.com

Activities: White & Case is a global law firm with over 2000 lawyers in 26 countries. Their financial restructuring and insolvency group is a worldwide practice consisting of over 160 restructuring and insolvency lawyers. They are a globally recognised leader in complex cross-border insolvencies and workouts, and they represent clients in all aspects of restructurings, workouts and insolvencies, including both transactional and litigation matters. Recent representations include many of the world's largest restructuring cases and out-of-court workouts.

White & Case LLP

633 West Fifth Street, Suite 1900,
Los Angeles, CA 90071-2007, US.
Tel: +1 (213) 620 7700
Fax: +1 (213) 452 2329
Website: www.whitecase.com

Partners
Craig H. Averch
Tel: +1 (213) 620 7704
Email: caverch@whitecase.com
Roberto J. Kampfner
Tel: +1 (213) 620 7729
Email: rkampfner@whitecase.com

Activities: White & Case is a global law firm with over 2000 lawyers in 26 countries. Their financial restructuring and insolvency group is a worldwide practice consisting of over 160 restructuring and insolvency lawyers. They are a globally recognised leader in complex cross-border insolvencies and workouts, and they represent clients in all aspects of restructurings, workouts and insolvencies, including both transactional and litigation matters. Recent representations include many of the world's largest restructuring cases and out-of-court workouts.

White & Case LLP

1155 Avenue of the Americas,
New York, NY 10036-2787, US.
Tel: +1 (212) 819 8200
Fax: +1 (212) 354 8113
Website: www.whitecase.com

Global Practice Head & Partner
Thomas E Lauria
Tel: +1 (212) 819 2637
Email: tlauria@whitecase.com

Partners
Gerard H. Uzzi
Tel: +1 (212) 819 8479
Email: guzzi@whitecase.com
John K. Cunningham
Tel: +1 (212) 819 8388
Email: jcunningham@whitecase.com
Alan Gover
Tel: +1 (212) 819 8595
Email: agover@whitecase.com
Scott Greissman
Tel: +1 (212) 819 8567
Email: sgreissman@whitecase.com
Evan C. Hollander
Tel: +1 (212) 819 8660
Email: ehollander@whitecase.com
Christopher Shore
Tel: +1 (212) 819 8394
Email: cshore@whitecase.com
Abraham L. Zylberberg
Tel: +1 (212) 819 8500
Email: azylberberg@whitecase.com

Counsel
Andrew Ambruoso
Tel: +1 (212) 819 8967
Email: andrew.ambruoso@whitecase.com

Activities: White & Case is a global law firm with over 2000 lawyers in 26 countries. Their financial restructuring and insolvency group is a worldwide practice consisting of over 160 restructuring and insolvency lawyers. They are a globally recognised leader in complex cross-border insolvencies and workouts, and they represent clients in all aspects of restructurings, workouts and insolvencies, including both transactional and litigation matters. Recent representations include many of the world's largest restructuring cases and out-of-court workouts.

Wiggin and Dana LLP

CityPlace I, 185 Asylum Street,
Hartford, CT 06103, US.
Tel: +1 (860) 297 3700
Fax: +1 (860) 525 9380
Website: www.wiggin.com

Of Counsel
Sharyn B. Zuch
Tel: +1 (860) 297 3715
Email: szuch@wiggin.com

Activities: Bankruptcy, creditors' rights and commercial colections, foreclosures, restructuring and workouts.

Wiley Rein LLP

1776 K Street NW, Washington,
DC 20006, US.
Tel: +1 (202) 719 7000
Fax: +1 (202) 719 7049
Website: www.wileyrein.com

Partner
Valerie P. Morrison
Tel: +1 (703) 905 2826
Email: vmorrison@wileyrein.com

Of Counsel
Rebecca L. Saitta
Tel: +1 (703) 905 2831
Email: rsaitta@wileyrein.com

Attorney at Law
Lauren Friend McKelvey
Tel: +1 (703) 905 2838
Email: lmckelvey@wileyrein.com

Activities: Represents clients in all aspects of United States bankruptcy law, including chapter 11 reorganisation. Advises clients on international insolvency issues.

Wiley Rein LLP

7925 Jones Branch Drive, Suite 6200,
McLean, Virginia 22102, US.
Tel: +1 (703) 905 2800
Fax: +1 (703) 905 2820
Website: www.wileyrein.com

Partner
Valerie P. Morrison
Tel: +1 (703) 905 2826
Email: vmorrison@wileyrein.com

Of Counsel
Rebecca L. Saitta
Tel: +1 (703) 905 2831
Email: rsaitta@wileyrein.com

Attorney at Law
Lauren Friend McKelvey
Tel: +1 (703) 905 2838
Email: lmckelvey@wileyrein.com

Activities: Represents clients in all aspects of United States bankruptcy law, including chapter 11 reorganisation. Advises clients on international insolvency issues.

Willkie Farr & Gallagher LLP

787 Seventh Avenue, New York,
NY 10019, US.
Tel: +1 (212) 728 8000
Fax: +1 (212) 728 8111
Website: www.willkie.com

Contacts
Matthew A. Feldman
Tel: +1 (212) 728 8651
Email: mfeldman@willkie.com
Marc Abrams
Tel: +1 (212) 728 8200
Email: mabrams@willkie.com

Activities: Involved in some of the most complex bankruptcy cases, including Adelphia Communications, Delphi Corporation, NEGT, Conseco Finance Corp., and XO Communications.

Wilmer Cutler Pickering Hale and Dorr LLP

60 State Street, Boston,
MA 02109, US.
Tel: +1 (617) 526 6000
Fax: +1 (617) 526 5000
Website: www.wilmerhale.com

Chair, Bankruptcy & Financial Restructuring Practice Group
John Sigel

Vice Chairs, Bankruptcy & Financial Restructuring Practice Group
Andrew Goldman
Philip Anker

Activities: The bankruptcy and financial restructuring law practice focuses on bankruptcy proceedings, litigation, financial restructuring and commercial transactions; representing debtors, committees and individual creditors in reorganisation and workout matters; advising buyers and sellers of distressed assets and debt; and structuring and closing a variety of debt transactions for lenders and borrowers.

Wilmer Cutler Pickering Hale and Dorr LLP

399 Park Avenue, New York, NY 10022, US.
Tel: +1 (212) 230 8800
Fax: +1 (212) 230 8888
Website: www.wilmerhale.com

Chair, Bankruptcy & Financial Restructuring Practice Group
John Sigel

Vice Chairs, Bankruptcy & Financial Restructuring Practice Group
Andrew Goldman
Philip Anker

Activities: The bankruptcy and financial restructuring law practice focuses on bankruptcy proceedings, litigation, financial restructuring and commercial transactions; representing debtors, committees and individual creditors in reorganisation and workout matters; advising buyers and sellers of distressed assets and debt; and structuring and closing a variety of debt transactions for lenders and borrowers.

Wilmer Cutler Pickering Hale and Dorr LLP

1875 Pennsylvania Avenue, NW,
Washington, DC 20006, US.
Tel: +1 (202) 663 6000
Fax: +1 (202) 663 6363
Website: www.wilmerhale.com

Chair, Bankruptcy & Financial Restructuring Practice Group
John Sigel

Vice Chairs, Bankruptcy & Financial Restructuring Practice Group
Andrew Goldman
Philip Anker

Activities: The bankruptcy and financial restructuring law practice focuses on bankruptcy proceedings, litigation, financial restructuring and commercial transactions; representing debtors, committees and individual creditors in reorganisation and workout matters; advising buyers and sellers of distressed assets and debt; and structuring and closing a variety of debt transactions for lenders and borrowers.

UZBEKISTAN

SNR Denton

90 Acad. Vosit Vokhidov St.,
Yakkasarayskiy District, Tashkent 100031,
Republic of Uzbekistan.
Tel: +998 (71) 120 6946
Fax: +998 (71) 120 6185
Website: www.snrdenton.com

Partner
Marla Valdez
Tel: +7 (727) 258 1950

Managing Associate
Mouborak Kambarova
Mobile: +998 (90) 188 9663

Tashkent Office of Yoon & Yang LLC

Amir Timur Street 107-8, Tashkent 100084,
Republic of Uzbekistan.
Tel: +998 (71) 238 9032
Fax: +998 (71) 238 9031
Email: hck@yoonyang.com
Website: www.yoonyang.com

VIETNAM

YKVN Lawyers

Suite 301 International Centre,
17 Ngo Quyen Street, Hanoi, Vietnam.
Tel: +84 (4) 393 45410
Fax: +84 (4) 393 45412
Email: hanoi.office@ykvn-law.com
Website: www.ykvn-law.com

Director
Truong Nhat Quang
Email: quang.truong@ykvn-law.com

Activities: Active in providing legal advice on insolvency and restructuring matters. Has advised major corporations on numerous restructuring of their businesses in Vietnam.

ZAMBIA

PricewaterhouseCoopers

PricewaterhouseCoopers Place, Stand No
2374, Thabo Mbeki Road, Lusaka, Zambia.
Tel: +260 (211) 256471/2
Fax: +260 (211) 256474
Website: www.pwc.com/zm

Director/Partner
Nitesh Patel
Email: nitesh.patel@zm.pwc.com

Activities: PwC advises various stakeholders in underperforming or distressed businesses across Africa. Services include insolvency appointments (receiverships and liquidations), independent business reviews, restructuring and business turnaround.

Contributors

Allen & Overy LLP
52 Avenue Hoche
75008 Paris
France
Tel: +33 1 40 06 54 00
Fax: +33 1 40 06 54 70
Website: www.allenovery.com

Allen & Overy LLP
One Bishops Square
London E1 6AD
UK
Tel: +44 20 088 0000
Fax: +44 20 088 4937
Website: www.allenovery.com

Alvarez and Marsal
Sadovnicheskaya ul., d. 14/2
Moscow 155035
Russia
Tel: +7 985 988 7745
Website: www.alvarezandmarsal.com

Appleby Bermuda
Canon's Court
22 Victoria Street
PO Box HM 1179
Hamilton HM EX
Bermuda
Tel: +1 441 298 3205 ext. 6157
Fax: +1 441 298 3460
Website: www.applebyglobal.com

BA-HR
Stranden 1 A
0117 Oslo
Norway
Tel: +47 22 83 02 70
Fax: +47 22 83 07 95
Website: www.bahr.no/en

Bowman Gilfillan
60 St George's Mall
SA Reserve Bank Building
Cape Town
South Africa
Tel: +27 (0)21 480 7800
Fax: +27 (0)21 424 1688
Website: www.bowman.co.za

Castrén & Snellman Attorneys Ltd.
PO Box 233
00131 Helsinki
Finland
Tel: +358 20 7765 765
Fax: +358 20 7765 001
Website: www.castren.fi

DC Advisory Partners
36 rue de Naples
75008 Paris
France
Tel: +33 1 42 12 49 00
Website: www.dcadvisorypartners.com

Deloitte Restructuring Services
Weidekampsgade 6
2300 Copenhagen
Denmark
Tel: +45 36 10 20 30
Fax: +45 36 10 20 40
Website: www.deloitte.dk

Drew & Napier LLC
10 Collyer Quay
#10-01 Ocean Financial Centre
Singapore 049315
Singapore
Tel: +65 6531 2410
Fax: +65 6533 4864
Website: www.drewnapier.com

Ernst & Young AG
Maagplatz 1
P.O. Box
CH-8010 Zurich
Switzerland
Tel: +41 58 286 34 23
Fax: +41 58 286 30 04
Website: www.ey.com/ch

Garrigues
Hermosilla, 3
28001 Madrid
Spain
Tel: +34 91 514 52 00
Fax: +34 91 399
Website: www.garrigues.com

Contributors

Grant Thornton Finland Oy
Paciuksenkatu 27
FIN-00270 Helsinki
Finland
Tel: +358 (0) 9 512 3330
Fax: +358 (0) 9 458 0250
Website: www.gtfinland.com

Homburger AG
Prime Tower
Hardstrasse 201
8006 Zurich
Switzerland
Tel: +41 43 222 1000
Fax: +41 43 222 1500
Website: www.homburger.ch

Hunton & Williams (Thailand) Limited
34th Floor Q.House Lumpini Building
1 South Sathorn Road
Thungmahamek
Sathorn
Bangkok 10120
Thailand
Tel: +66 2 645 88 00
Fax: +66 2 645 88 80
Website: www.hunton.com

INSOL International
6-7 Queen Street
London EC4N 1SP
UK
Tel: +44 20 7248 3333
Website: www.insol.org

International Bar Association
Section on Insolvency, Restructuring and Creditors' Rights
4th Floor, 10 St Bride Street
London EC4A 4AD
UK
Tel: +44 20 7842 0090
Fax: +44 20 7842 0091
Website: www.ibanet.org

International Trade Law Division (UNCITRAL Secretariat), Office of Legal Affairs, United Nations
Vienna International Centre
Wagramerstr. 5
A-1220 Vienna
Austria
Tel: +43 1 26060 4065
Fax: +43 1 20606 5813
Website: www.uncitral.org

International Women's Insolvency and Restructuring Confederation (IWIRC)
PMB 130
10332 Main Street
Fairfax, VA 22030-2410
US
Tel: +1 703 449 1316
Fax: +1 703 802 0207
Website: www.iwirc.org

KPMG Brazil
Av. Nove de Julho, 5109 - 7 andar
01407-905 - São Paulo, SP
Brazil
Tel: +55 (11) 3245 8338
Fax: +55 (11) 3245 8310
Website: www.kpmg.com.br

KPMG Portugal
Edifício Monumental Av. Praia da Vitória, 71 – A, 11°
1069-006 Lisbon
Portugal
Tel: +351 210 110 000
Fax: +351 210 110 121
Website: www.kpmg.pt

KRyS Global
Governors Square
Building 6, 2nd Floor
23 Lime Tree Bay Avenue, PO Box 31237
Grand Cayman KY1-1205
Cayman Islands
Tel: +1 345 947 4700
Fax: +1 345 946 6728
Website: www.KRyS-Global.com

Contributors

Latham & Watkins LLP
Dubai International Financial Centre
Building 1, Level 3
PO Box 506698
Tel: +971 4 704 6300
Fax: +971 4 704 6499
Website: www.lw.com

Logos legal services
Efstaleiti 5
103 Reykjavík
Iceland
Tel: +354 5 400 300
Fax: +354 5 400 301

42 New Broad Street
London EC2M 1JD
UK
Tel: +44 20 7920 3020
Fax: +44 20 7920 3099

Lautrupsgade 7, 4th floor
2100 Copenhagen
Denmark
Tel: +45 70 229 224
Fax: +45 70 274 279
Website: www.logos.is

Lombardi Molinari e Associati
Via Andegari 4/A
20121 Milan
Italy
Tel: +39 02 896 221
Fax: +39 02 8962 2333
Website: www.lmlaw.it

Loyens & Loeff N.V.
Frederik Roeskestraat 100
1076 ED Amsterdam
The Netherlands
Tel: +31 20 578 5925
Fax: +31 20 578 5843
Website: www.loyensloeff.com

McKenna Long & Aldridge LLP
Avenue de Tervueren 2
B-1040 Brussels
Belgium
Tel: +32 2 278 12 11
Fax: +32 2 278 12 00
Website: www.mckennalong.com

OPF Partners
291, Route d' Arlon
BP 603
L-2016 Luxembourg
Tel: +352 46 83 83
Fax: +352 46 84 84
Website: www.opf-partners.com

Potamitisvekris
9 Neofytou Vamva str.
10674 Athens
Greece
Tel: +30 210 33 80 000
Fax: +30 210 33 80 020
Website: www.potamitisvekris.com

PPB Advisory
Level 46, MLC Centre
19 Martin Place
Sydney, NSW 2000
Australia
Tel: +61 2 8116 3000
Fax: +61 2 8116 3111
Website: www.ppbadvisory.com

PricewaterhouseCoopers
Friedrich-Ebert-Anlage 35-37
60327 Frankfurt
Germany
Tel: +49 (0) 69 9585 0
Website: www.pwc.de

PricewaterhouseCoopers
2 Eglin Road
Sunninghill
Johannesburg 2157
South Africa
Tel: +27 11 797 4000
Fax: +27 11 797 5800
Website: www.pwc.co.za/en/deals/index.jhtml

PwC Ireland
One Spencer Dock
North Wall Quay
Dublin 1
Ireland
Tel: +353 1 792 6000
Fax: +353 1 792 6200
Website: www.pwc.com/ie

RZM Advogados
Rua São Tomé, 86 - cj. 111
São Paulo - SP - 04551-080
Brazil
Tel: +55 (11) 3055 2008
Fax: +55 (11) 3848 9449
Website: www.rzmadvogados.com.br

Salans LLP
Markgrafenstraße 33
10117 Berlin
Germany
Tel: +49 30 264 73 0
Fax: +49 30 264 73 133
Website: www.salans.com

Setterwalls Advokatbyrå
Arsenalsgatan 6
PO Box 1050
SE-101 39 Stockholm
Sweden
Tel: +46 8 5988 9000
Fax: +46 8 5988 9090
Website: www.setterwalls.se

SCP Santoni & Associés
15 Avenue d'Eylau
75116 Paris
France
Tel: +33 1 44 05 11 11
Fax: +33 1 44 05 14 41
Website: www.scp-santoni.com

Shearn Delamore & Co.
7th Floor, Wisma Hamzah-Kwong Hing
No 1 Leboh Ampang
50100 Kuala Lumpur
Malaysia
Tel: +603 2027 2727
Fax: +603 2078 5625
Website: www.shearndelamore.com

The Carlyle Group
Lansdowne House
57 Berkeley Square
London W1J 6ER
UK
Tel: +44 (0)20 7894 1200
Fax: +44 (0)20 7894 1600
Website: www.carlyle.com

Tornaritis Law Firm
Stasikratous 16, 6th Floor
1065, Nicosia
Cyprus
Tel: +357 2245 6056
Fax: +357 2266 4056
Website: www.tornaritislaw.com

Vasil Kisil & Partners
17/52A Bogdana Khmelnytskogo St.
Kyiv 01030
Ukraine
Tel: +38 044 581 7777
Fax: +38 044 581 7770
Website: www.kisilandpartners.com

World Bank Group
2121 Pennsylvania Ave NW
Washington, DC 20433
US
Tel: +1 202 458 5827
Fax: +1 202 522 3262
Website: www.wbginvestmentclimate.org

Zhongzi Law Office
6th Floor, New Era Building
PingAnLi West Avenue 26
Xicheng District
Beijing 100034
China
Tel: +86 10 6625 6417
Fax: +86 10 6609 1616
Website: www.zhongzi.com.cn

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