




AMERICAS RESTRUCTURING REVIEW 2023

*The Americas Restructuring Review is one of GRR's popular regional reviews series. It delivers insight and thought leadership from 43 pre-eminent regional names. This edition covers Bermuda, Brazil, the British Virgin Islands, the Cayman Islands, the wider Caribbean, Chile, the Dominican Republic, the European Union, Mexico and the United States and tackles topics such as trends in DIP financing and *Gibbs*.*

**Edited by Richard J Cooper
and Lisa M Schweitzer**

Visit globalrestructuringreview.com
Follow [@GRRalerts](https://twitter.com/GRRalerts) on Twitter
Find us on [LinkedIn](https://www.linkedin.com/company/globalrestructuringreview)

Contents

 While reading, click this icon to jump back to the Contents at any time

<u>Introduction</u>	1
Richard J Cooper and Lisa M Schweitzer <i>Cleary Gottlieb Steen & Hamilton LLP</i>	
<u>Bermuda</u>	8
John Wasty, John Riihiluoma, Lalita Vaswani and James Batten <i>Appleby</i>	
<u>Brazil</u>	23
Renato G R Maggio, Renata Oliveira, Camilo T Gerosa Gomes and Karina Ferraz Deorio <i>Machado Meyer Advogados</i>	
<u>British Virgin Islands</u>	36
Peter Ferrer <i>Harneys</i>	
<u>Corporate Insolvency and Restructuring in the Wider Commonwealth Caribbean</u>	45
Stuart Cullen and Benjamin Drakes <i>Dentons</i>	
<u>Cayman Islands</u>	58
Mark Goodman and Katie Logan <i>Campbells</i>	
<u>Chile</u>	68
Gianfranco Lotito <i>Cuatrecasas SpA</i>	
<u>Dominican Republic</u>	80
Fabio Guzmán Saladín and Pamela Benzán Arbaje <i>Guzmán Ariza</i>	
<u>The EU Adaption of Important Chapter 11 Provisions</u>	92
Ken Baird, Mark Liscio, Michael Broeders, Marvin Knapp, Samantha Braunstein, Katharina Crinson, Laurent Mabilat, Ana López and Silvia Angós <i>Freshfields Bruckhaus Deringer</i>	
<u>Mexico: The Pandemic Aftermath</u>	111
Juan Carlos Machorro, Carlos Olvera and Ricardo Orea <i>Santamarina y Steta</i>	

<u>Mexico: Interim Injunctions in Bankruptcy Proceedings</u>	126
Diego Sierra and Jessika Rocha <i>Von Wobeser y Sierra</i>	
<u>Recent Developments in DIP Financing for International and Domestic Debtors</u>	142
Richard J Cooper, Lisa M Schweitzer, Jessica A Metzger and Richard C Minott <i>Cleary Gottlieb Steen & Hamilton LLP</i>	
<u>Implications of the Rule in Gibbs on the Effectiveness of Schemes of Arrangement to Compromise US Law-governed Debt</u>	161
Gregg Galardi, Daniel Anderson, Matthew Czyzyk, Janice Ng, Natalie Blanc and Emily Ma <i>Ropes & Gray LLP</i>	
<u>Investment Fund Activity in US Debt Restructurings</u>	170
Elizabeth McColm, Brian Bolin and Grace Hotz <i>Paul, Weiss, Rifkind, Wharton & Garrison LLP</i>	

The information provided in this publication is general and may not apply in a specific situation. Legal advice should always be sought before taking any legal action based on the information provided. This information is not intended to create, nor does receipt of it constitute, a lawyer-client relationship. The publishers and authors accept no responsibility for any acts or omissions contained herein. Although the information provided is accurate as at December 2022, be advised that this is a developing area.

Preface

Welcome to *The Americas Restructuring Review 2023*, one of Global Restructuring Review's annual, yearbook-style reports.

Global Restructuring Review, for any new visitors, is the online home for international restructuring specialists everywhere, telling them all they need to know about everything that matters in their chosen professional niche.

Throughout the year, the GRR editorial team writes daily news about cross-border developments, surveys and longer reads; organises the liveliest events (under our GRR Live banner); and curates a series of innovative tools and know-how products, such as our GRR recognitions dataset. In addition, assisted by external contributors, we publish a set of comprehensive regional reviews that delve deeper into developments than the exigencies of journalism allow.

The Americas Restructuring Review, which you are reading, is one such review. As its name suggests, it delivers insight and thought leadership from 43 pre-eminent practitioners from both American continents.

At 188 pages and 13 chapters, it's part retrospective, part primer, part crystal ball. All contributors are vetted for their standing and knowledge before being invited to take part and their contributions are all supported by abundant footnotes and relevant statistics.

This edition covers Bermuda, Brazil, the British Virgin Islands, the Cayman Islands, the wider Caribbean, Chile, the Dominican Republic, the European Union, Mexico and the United States.

As always with these annual reviews, a close read yields many gems. With interest rates and inflation around the world soaring, and the pandemic still looming large in the immediate past, that's especially true; this book has seldom been so timely. Among the nuggets mentally filed away by this reader:

- Bermuda is experiencing a race to the courthouse, post-pandemic;
- Brazilian football clubs now have their own bespoke insolvency law;
- the Cayman Islands has used *Luckin Coffee* wisely – as inspiration for sensible changes (see the excellent case study on p. 59);
- Mexico now has specialist bankruptcy courts; and
- Chile is on the point of another insolvency reform (the last one was in 2014).

There is also a fantastic series of chapters on developments in the United States and the European Union, including on a topic we haven't covered previously in this review: navigating the *Gibbs* rule.

Plus much, much more. We hope you enjoy *The Americas Restructuring Review*. If you have any suggestions for future editions, or want to take part in this annual project, my colleagues and I would love to hear from you. Please write to insight@globalrestructuringreview.com.

My thanks to all of our authors, and to Richard J Cooper and GRR editorial board member Lisa M Schweitzer, this review's editors, for steering us so well.

David Samuels

Publisher, Global Restructuring Review

December 2022



Introduction

Richard J Cooper and Lisa M Schweitzer

Cleary Gottlieb Steen & Hamilton LLP

Over two years after the onset of the covid-19 pandemic, the world economy has largely weathered or accounted for the effects of the pandemic on the macro-economy and specific businesses; however, both individual companies and the larger economy continue to plan for and react to various factors contributing to the world economy. Various positive trends exist in the global economy as pandemic-related pressures begin to recede: the economy has experienced recovery following pandemic-related slowdowns; the workforce is largely returning to in-office settings, making use of long-empty real estate spaces and increasing spending as people leave their homes; and certain industries that suffered most profoundly during the pandemic, such as the service industry, have reversed negative trends. Looking back, many companies appear to have managed through the pandemic – in part due to significant government aid programmes – such that the wave of pandemic-related corporate bankruptcy filings that many practitioners predicted never fully arose. However, those same rescue programmes, coupled with improving business economics, have led to inflationary pressures that are now causing governments to adopt policies to tap the brakes on their local economies. Lingering and long-term effects from the pandemic, ongoing geopolitical conflicts and shifting economic trends also continue to create instability in the global economy. The war in Ukraine and the related global political response has impacted, among others, the energy and food sectors in Europe in particular, with secondary global effects. Labour shortages and lingering supply-chain disruptions also have contributed to pressure on the price of consumer goods. Rising inflation rates are similarly putting pressure on individuals and on companies that hold floating-rate debt or that need to raise new financing.

In addition to these more global trends, specific industries continue to struggle to manage the residual effects of the pandemic: the travel industry has largely recovered but still faces periodic unplanned disruptions, for example, and although retail companies largely survived the pandemic, supply-chain disruptions and changing consumer habits continue to place stress on the industry. The article titled 'Mexico: The Pandemic Aftermath' notes that Mexico's banking and financial sector, as well as the air transportation industry – which saw its flag carrier airline Aeromèxico seek restructuring relief under Chapter



11 in the United States during the pandemic – have yet to fully recover. Similar lingering issues continue to percolate in other countries as well.

As policies put in place to aid struggling companies during the height of the pandemic begin to lapse, industries still experiencing pandemic-related insolvency risk may struggle to remain profitable. The Bermuda article discusses, for example, that for pragmatic reasons many creditors in Bermuda granted forbearance to debtors that were unable to repay their debts during the pandemic. As such creditors begin to pursue formal enforcement remedies again, companies that have yet to fully recover from the pandemic's effects may face significant insolvency risk. The confluence of these various global and industry-specific economic stressors puts pressure on corporations trying to remain profitable, and companies will continue to turn to restructuring solutions to alleviate this pressure.

This volume includes articles by experienced bankruptcy practitioners discussing insolvency regimes around the world. These articles include, among other things, comparative analyses of different jurisdictions, an overview of new developments in domestic bankruptcy legislation, and noteworthy new jurisprudential developments. These articles also include insights into trends in the restructuring space that may continue in the coming year as the global economy navigates the long-term effects of the pandemic and evolving geopolitical developments.

Insolvency regimes continue to advance and modernise to better meet the needs of companies pursuing restructuring solutions

As discussed in various articles throughout this volume, domestic insolvency regimes continue to advance and modernise to meet the evolving needs of distressed companies. Experienced and specialised courts that are sensitive to the complexities of large corporate restructurings, efficient procedures that reduce restructuring costs and the ability to reach a global resolution are increasingly important for companies seeking to effectuate a successful restructuring. Legislatures in many jurisdictions have started to implement changes in these areas, which tend to be aimed at improving the overall success of corporate restructuring efforts. The article titled 'Mexico: Interim Injunctions in Bankruptcy Proceedings,' for example, highlights Mexico's recent establishment of the First and Second District Courts in Bankruptcy Matters, which are specialised bankruptcy courts that have jurisdiction to hear all insolvency proceedings. Such specialised courts may be more sensitive than a generalist court to the financial and administrative issues that can arise in a complex corporate restructuring, increasing the likelihood of a successful restructuring. Indeed, in the Dominican Republic article, the authors note that



restructuring courts have developed judge-made law to fill certain voids in the Dominican Republic's insolvency regime and provide more predictability to restructuring proceedings. Likewise, the Cayman Islands article discusses the recent addition of rules allowing for, among other things, the appointment of a dedicated restructuring officer and imposition of a stay without first requiring a company to present a winding up petition to the Cayman Islands' restructuring regime. Although these changes, as the authors note, are unlikely to be revolutionary to the Cayman Islands' insolvency regime, they will likely improve upon the current regime and benefit companies seeking a restructuring solution in particular. EU member states have also implemented changes geared towards improving restructuring proceedings. As the article titled 'The EU Adaption of Important Chapter 11 Provisions' notes, EU member states have been updating their respective insolvency regimes in compliance with the EU's July 2019 Directive on Insolvency, Restructuring, and Second Chance, which incorporates certain mechanisms of Chapter 11 to facilitate the needs of companies seeking to restructure. Likewise, the Brazil article highlights the major innovations provided for in the 2020 amendment to the Brazilian Bankruptcy Law, which are aimed at facilitating more efficient and effective restructuring proceedings, such as additional protection for providers of debtor-in-possession and exit financing, the ability for creditors to propose a competing plan of reorganisation when a debtor is unable to garner sufficient support for their plan, and mechanisms to expedite reorganisation proceedings.

Even with many positive changes to many insolvency regimes, however, there is always room for improvement because of ever-changing economic conditions and corporate needs. The Chile article exemplifies this in its discussion of a 2014 change to Chile's insolvency laws. Although the 2014 law has improved many features of Chile's restructuring process, the Chilean Congress is currently considering a bill to further improve upon it.

Cross-border insolvencies involving companies with a global presence continue to present unique and complex issues

As the article titled 'Corporate Insolvency and Restructuring in the Wider Commonwealth Caribbean' highlights, different jurisdictions, even within the same region, can and often do take fundamentally different approaches to their insolvency regimes. Advancements in domestic insolvency regimes often have the benefit of creating more cohesion and consistency in insolvency legislation across jurisdictions, which can be beneficial in complex, cross-border corporate restructurings. In the case of the recent updates to insolvency regimes of EU member states, for example, 'The EU Adaption of Important Chapter 11 Provisions' article notes that the UK, despite having formally left the EU, still largely modelled the 2020 changes to its restructuring laws on the EU's Directive in order to maintain consistency with the EU's restructuring regime. The British



Virgin Islands article likewise notes that the British Virgin Islands, in recent years, adopted the practice of appointing provisional liquidators in support of a restructuring plan, a practice already in place in other offshore jurisdictions such as the Cayman Islands and Bermuda.

Despite the many ways in which recent revisions to domestic insolvency regimes have created more consistency across jurisdictions, tensions between the laws in different jurisdictions remain an issue for corporations seeking a global restructuring resolution that implicates the laws of multiple different jurisdictions. The *Gibbs* rule, a judge-made doctrine in the UK providing that contracts and obligations can only be discharged pursuant to the laws governing that contract or obligation, has highlighted these tension in recent years. The rule, in effect, means that a debtor's obligations governed by English law can generally only be extinguished through an English proceeding, which may create unwanted complications for entities that wish seek to restructure in a particular jurisdiction outside of England, but have obligations governed by English law. Among other complications, the *Gibbs* rule may require such entities to initiate parallel proceedings in multiple jurisdictions to effectively discharge all of its obligations. The article titled 'Implications of the Rule in Gibbs on the Effectiveness of Schemes of Arrangement to Compromise US Law-governed Debt' illustrates another such complication. Hong Kong also applies the *Gibbs* rule, and, as the article discusses, a Hong Kong court in the *In Re Rare Earth* case recently posited that it could refuse to recognise an offshore scheme of arrangement designed to compromise debt governed by US law on the ground that the United States would not recognise the discharge of the debt as a matter of law through the scheme of arrangement and Chapter 15 recognition. A United States Bankruptcy Court subsequently made clear that the Hong Kong court's reasoning misinterpreted United States law in *In re Modern Land*, but the case nonetheless demonstrates how the potential tensions between the regimes in various jurisdictions may jeopardise a company's restructuring efforts.

Specific practice developments and market trends

Many of the articles in this volume also highlight specific practice and market trends that are impacting the landscape of corporate restructurings in various jurisdictions. Some of the trends discussed in this volume illustrate the ways in which practitioners and lenders operating in the restructuring space are leveraging creative solutions to meet the evolving needs of companies seeking to restructure. The increasing use of debtor-in-possession (DIP) financing structured in a non-traditional fashion, discussed in the article titled 'Recent Developments in DIP Financing for International and Domestic Debtors', is but one example. The article discusses the increasing use of 'roll-ups', whereby a DIP lenders' pre-petition debt may be repaid by the proceeds of the DIP financing or rolled into DIP obligations, and equity conversions, whereby DIP



obligations remaining at the end of the debtor's Chapter 11 case convert into equity of the reorganised company rather than requiring repayment in full. These DIP structures may be particularly attractive to restructuring companies experiencing liquidity issues in the aftermath of the pandemic, for example, and provide practitioners with a wider variety of tools to use in addressing a restructuring company's need for post-petition funding. Similarly, the 'Investment Fund Activity in US Debt Restructurings' article highlights the increasingly prominent role that private equity and hedge funds are playing in Chapter 11 restructurings in the United States, particularly during periods of economic crises when more traditional lenders may be unwilling to invest in distressed companies, and the creative investment strategies employed by such funds. Investment funds' flexible approach to lending allows them to respond quickly to economic fluctuations and adapt to meet the needs of restructuring companies as they change in response. Other articles focus on debtor-side trends. The British Virgin Islands article, for example, discusses the increasing use of schemes of arrangement and light-touch provisional liquidations following legislative changes adopted several years ago that allow for the appointment of provisional liquidators.

This volume provides an informative and interesting overview of recent developments in insolvency regimes across jurisdictions, current practice and market trends, and the present economic challenges facing companies, practitioners and lenders. A common theme emerging from these articles, however, is the tendency of insolvency regimes, restructuring practitioners, lenders and debtors to adapt to meet the evolving needs of restructuring companies. The current economic climate is likely to continue demanding flexibility and adaptability from the insolvency world, which seems equipped and inclined to continue rising to the challenge.

**Richard J Cooper**

Cleary Gottlieb Steen & Hamilton LLP

Richard Cooper's practice focuses on domestic and international restructurings. He has advised clients involved in some of the most prominent and noteworthy restructurings in the United States and Latin America over the past two decades.

Rich is recognised as one of the leading restructuring lawyers in the United States and the 'go-to' person for cross-border restructurings. Rich was part of the Cleary team that represented the US Treasury in its financial assistance programme to US air carriers, and the Canadian government in connection with its financial assistance efforts to large public and private companies.



He is representing Garuda Airlines, the state-owned Indonesian airline, in its restructuring process and has represented the governments of Puerto Rico, Mexico, Lebanon, Indonesia and Colombia in restructuring and liability management matters.

Among other ongoing matters, Rich is currently representing LATAM Airlines as debtors, as well as advising Apollo Capital as DIP lender (and various creditors) to Grupo Aeroméxico, in their respective restructurings under Chapter 11. He also is representing ad hoc creditor committees in the Chapter 11 proceedings of Stoneway Capital and the DIP lenders and ad hoc creditor committee in Alphacredit, and is representing Grupo Posados, one of the region's largest hotel and resort companies, in its pre-packaged Chapter 11 proceeding.

He received a JD from Columbia Law School, an MSc from the University of London, and a BA from Duke University.



Lisa M Schweitzer

Cleary Gottlieb Steen & Hamilton LLP

Lisa Schweitzer's practice focuses on financial restructuring, bankruptcy and commercial litigation, including cross-border matters.

Lisa has served as lead counsel in some of the world's most high-profile bankruptcy matters, advising corporate debtors, creditors, strategic investors and counterparties in US Chapter 11 proceedings as well as in restructurings and risk mitigation advice. Lisa regularly advises parties in financings, sales, and in-court and out-of-court restructurings, as well as multibillion-dollar litigation disputes.

Lisa's recent representations include LATAM Airlines in its voluntary reorganisation and Chapter 11 restructuring of over US\$7 billion of debt; Vale in its heavily contested litigation of recognition of BSGR's Guernsey administration through a Chapter 15 proceeding; FullBeauty Brands in its acquisition of Ascena's branded e-commerce business; Total SA as a major contract counterparty in the McDermott bankruptcy; and strategic lenders, creditors and acquirers in various retail cases.

Lisa has also provided strategic advice to several Fortune 100 US and multinational companies on liquidity and restructuring advice arising from the covid-19 pandemic as well as several leading financing institutions in matters relating to their resolution plans.



Lisa received a JD from New York University School of Law and a BA, *magna cum laude*, from the University of Pennsylvania.

CLEARY GOTTLIB

Cleary Gottlieb's global restructuring and bankruptcy practice remains at the forefront of the most complex restructurings, consistently delivering sophisticated, effective and imaginative advice to clients globally.

Offering seamless access to each of our offices in the United States, Europe, Latin America, the Middle East and Asia, we are particularly qualified to manage transnational restructurings, combining cross-border experience with an appreciation of local sensibilities. The deep ties that we have formed globally allow our lawyers to understand both the legal and cultural landscapes of highly complex, multijurisdictional restructurings. Clients appreciate the rigour of our approach, with our lawyers using outside-the-box thinking to structure creative solutions.

We continue to play central roles in the highest-profile Chapter 11 proceedings within the United States and the largest private restructurings outside the United States. Our precedent-setting sovereign practice represents numerous governments in their debt renegotiations and liability management transactions, advising clients such as Argentina, Barbados, Greece, Iceland, Iraq, Lebanon, Puerto Rico and Uruguay. Moreover, with our top-ranked corporate practices, we provide invaluable strategic and transactional advice to both buyers and sellers, including some of the world's leading financial institutions, private equity firms, hedge funds and public and private corporate acquirers. If matters get contentious, clients rely on our substantial experience in litigating insolvency-related matters before courts throughout the United States and Europe.

One Liberty Plaza
New York
NY 10006
United States
Tel: +1 212 225 2000

[Richard J Cooper](mailto:rcooper@cgsh.com)
rcooper@cgsh.com

[Lisa M Schweitzer](mailto:lschweitzer@cgsh.com)
lschweitzer@cgsh.com

www.clearygottlieb.com
