



# AMERICAS RESTRUCTURING REVIEW 2024

*The Americas Restructuring Review* is one of GRR's popular regional reviews series. It delivers insight and thought leadership from 36 pre-eminent regional names. This edition covers Bermuda, the British Virgin Islands, the Cayman Islands, Chile, the Dominican Republic, the European Union, Mexico and the United States and has several chapters on different approaches to debtor-in-possession finance and the expanding role, in restructuring, of private equity and hedge funds.

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

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# Introduction

**Richard J Cooper and Lisa M Schweitzer**

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Despite many predictions that the covid-19 pandemic would spark a wave of pandemic-related bankruptcies in 2021 and 2022, such a wave never fully materialised. Many companies managed through the pandemic, likely due in part, at least, to robust pandemic-era government programmes, creditors' forbearance and low-cost liquidity.

But as pandemic-era aid has waned, the tides have changed. The war in Ukraine continues to impact the cost of energy, metal and other commodities in Europe in particular, other ongoing geopolitical conflicts continue to create instability in the global economy, the widespread and persistent rise in inflation and the corresponding rise in interest rates has continued to put significant stress on companies that are highly leveraged, hold floating-rate debt, or need to raise new financing, and tightening financial conditions have made liquidity more difficult to come by. In addition, many companies have engaged in liability management transactions that have provided additional short-term liquidity, but not all have been able to avoid a subsequent bankruptcy filing.

Under these conditions, the past year has seen a significant increase in corporate bankruptcy filings. The financial sectors in particular faced distress with the failure of Silicon Valley Bank earlier this year, and many companies and individuals have been impacted by the wave of bankruptcy filings among cryptocurrency companies. Additionally, many companies in the healthcare and tech space have failed in the past year, unable to bring their new products successfully to market or to do so profitably. Other consumer businesses also continue to experience distress.

In the face of these various economic challenges, however, insolvency regimes and restructuring professionals continue to evolve to meet the changing needs of distressed companies and to craft creative solutions to novel issues arising in restructuring cases. This volume includes chapters written by experienced bankruptcy practitioners discussing insolvency regimes around the world. These chapters include, among other things, comparative analyses of different jurisdictions, an overview of new developments in domestic bankruptcy legislation, and noteworthy trends and developments in restructuring proceedings. These chapters 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 chapters throughout this volume, domestic insolvency regimes continue to advance and modernise to meet the evolving needs of distressed companies. Increasing flexibility and promoting reorganisation, where possible, are the common themes among these changes, as jurisdictions recognise a benefit to providing restructuring companies with more ability to customise their proceedings to better suit their needs and preserving businesses where feasible to do so. The Mexico chapter, for example, outlines how the Concurso law allows for companies to use interim injunctions as tool that they can tailor to address their operational needs during a restructuring. Similarly, the Cayman Islands chapter discusses several discrete changes to the Cayman Islands' restructuring regime – including allowing for the appointment of a dedicated restructuring officer and providing companies the ability to present their own petition for the appointment of restructuring officers – that mark incremental improvements to and allow flexibility in the restructuring process. European Union (EU) member states have also implemented changes geared towards improving restructuring proceedings. As the chapter 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 (the Directive), which incorporates certain mechanisms of Chapter 11 to facilitate the needs of companies seeking to restructure.

Many of the modifications adopted by insolvency regimes in recent years also recognise the need to balance the at times divergent interests of both distressed companies and their stakeholders, implementing changes that provide increased protections and benefits for both. The Chile chapter, for instance, discusses the recent changes that Chile adopted to its restructuring regime, effective August 2023, which seek to provide better protections to both distressed companies and their stakeholders. To the benefit of debtors, the changes extend the automatic stay from 30 to 60 business days as a matter of default, and allow the debtor to seek to further extend the stay by up to 60 additional days with a certain level of creditor support. On the other hand, the changes allow creditors that the debtor may not identify as such and that did not file a proof of claim in the restructuring proceedings to file a motion requesting that the reorganisation plan apply to them once approved.

Even absent the formal adoption of changes to a jurisdiction's restructuring regime, practitioners and professionals working in the restructuring space move regimes forward by implementing creative solutions within the confines



of existing law. Practitioners are, after all, in a position to see trends and legal gaps as they develop through their practice, and they must be attuned and responsive to the evolving needs of their clients. The Bermuda chapter provides an example: the authors note that while Bermuda's Companies Act 1981 does not provide for expedited reorganisation proceedings, as a matter of practice, professionals may informally negotiate a pre-packaged arrangement with a liquidator prior to his or her appointment. Practitioners are often implementing practical, work-around solutions of this sort to best serve their clients' needs.

While changes and advancements to insolvency regimes are often signs of progress, implementing new rules in practice is not without its difficulties. Restructuring courts can disagree as to how to properly apply new legislation, leading to gaps or conflicts in case law and confusion among restructuring companies, a problem discussed generally in the Dominican Republic chapter. Specialised courts provide one remedy to addressing this issue. Indeed, in the Dominican Republic chapter, the authors note that specialised restructuring courts have leveraged their jurisdictional authority and have created precedents to create a more stable and consistent foundation of case law.

### **Restructuring regimes continue to adapt to address the unique and complex issues presented in cross-border insolvencies**

As companies continue to expand their global reach, insolvency proceedings implicating the laws of multiple jurisdictions or involving parallel proceedings become increasingly common. 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' chapter 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 to maintain consistency with the EU's restructuring regime.

Despite the many ways in which insolvency regimes have become increasingly more consistent and cooperative across jurisdictions, tensions between the laws of different jurisdictions in which a company seeking to restructure operates or holds assets remain an issue for corporations seeking a global restructuring resolution that implicates the laws of multiple different jurisdictions. The *Gibbs* rule, a judicial 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 tensions 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 to restructure in a particular jurisdiction outside of England, but have obligations governed by English law. Among other complications, the *Gibbs* rule may require these entities to initiate parallel proceedings in multiple jurisdictions to effectively discharge all of its obligations. The chapter titled 'The



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 chapter 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 United States 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 complicate or jeopardise a company's restructuring efforts.

## Recent trends in restructuring cases

The chapters in this volume also highlight jurisdiction-specific practice and market trends that are impacting the landscape of corporate restructurings in those jurisdictions. Some chapters highlight in particular the role that practitioners and lenders in the restructuring space play in influencing such trends through their creative problem-solving. As discussed in the chapter titled 'Investment Fund Activity in US Debt Restructurings', for example, the increasing involvement of investment funds in US restructurings has led to an increase in fast, out-of-court 'liability management' restructurings and pre-packaged Chapter 11 cases. The increasing use of debtor-in-possession (DIP) financing structured in a non-traditional fashion, discussed in the chapter titled 'Recent Developments in DIP Financing for International and Domestic Debtors', is but another example. The chapter 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. The 'Investment Fund Activity in US Debt Restructurings' chapter does the same, highlighting 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. Similarly, the 'Capital Solutions Financings: Yield Driving Structure' chapter discusses the increasingly common and important role that credit solution transactions play in providing financing solutions to distressed companies. Other chapters focus on debtor-side trends.



The British Virgin Islands chapter, 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 chapters, however, is the tendency of insolvency regimes, restructuring practitioners, lenders, and debtors to adapt to meet the evolving needs of restructuring companies. As the number of companies initiating insolvency proceedings and seeking to restructure increases in the face of economic turbulence, the current climate is likely to continue demanding flexibility and adaptability from the insolvency world. Insolvency professionals, courts, debtors and lenders seem equipped to rise to the occasion.



**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 represented 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 others, Rich's matters include representation of LATAM Airlines as debtors, Apollo Capital as DIP lender (and various creditors) to Grupo Aeroméxico, in their respective restructurings under Chapter 11, ad hoc creditor committees in the Chapter 11 proceedings of Stoneway Capital and the DIP lenders and ad hoc creditor committee in Alphacredit, and 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**

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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.



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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.

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