CLEARY GOTTLIEB

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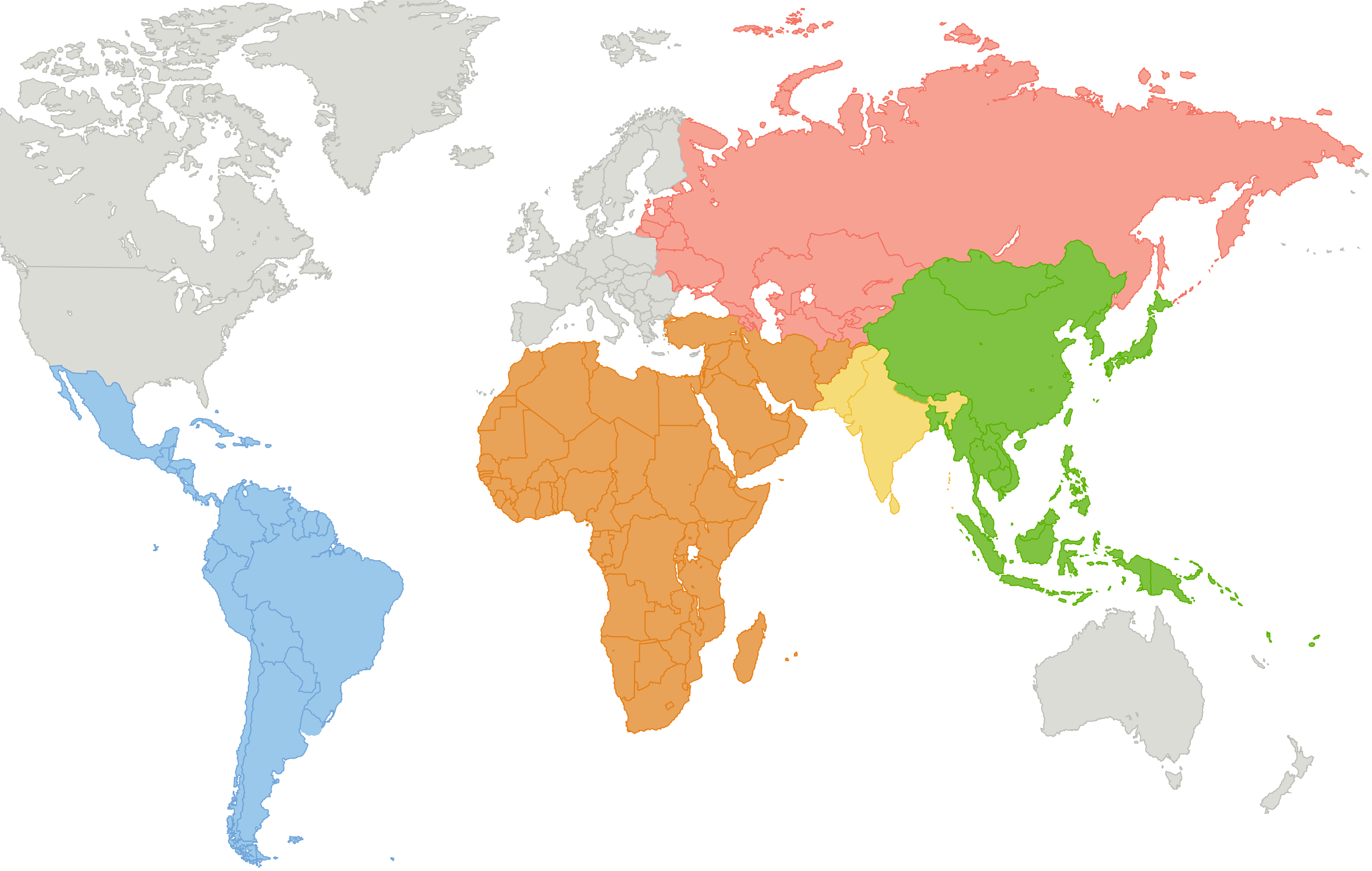

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Letter from the Editors

Welcome to the inaugural issue of the *Emerging Markets Restructuring Journal*. The *Emerging Markets Restructuring Journal* is the first publication to focus solely on emerging markets restructuring law and practice and was founded by partners and associates of Cleary Gottlieb that wished to gather cutting-edge research while developing practices and analyses of new laws from emerging markets around the globe.

Many of the jurisdictions that will be covered by this journal differ in language, culture and legal background. However, as the articles in our inaugural issue show, many emerging markets jurisdictions have rapidly evolving institutional and legal frameworks in common. This common feature requires an approach by financial and legal advisors that accounts for both laws written in the books as well as the practical realities on the ground.

With that in mind, our inaugural issue has articles that address the timing of restructurings in Latin America, the results of the Brazilian bankruptcy law, the use of English law-techniques to restructure companies in Russia, the CIS and Nigeria, a look at how distressed situations are addressed in Kazakhstan and analyses of bankruptcy laws in Pakistan and Russia. We have also included briefer notes on current developments ranging from cross-border restructurings in Asia to reforms to the UAE and Indian insolvency framework to an analysis of recent cases involving Chapter 15 of the U.S. bankruptcy code. We hope you find these articles interesting and useful to your practice, and we encourage your comments, questions and, of course, submissions for our second issue.

Polina Lyadnova *and* **Adam Brenneman**

LatAm Restructurings: The Mañana Complex

By MARCELO MESSER and AUBREY ZOTT

Restructuring professionals are fond of saying that all restructurings are different and that you can't generalize from one to another. While it is undoubtedly true that every case features its own peculiarities and develops in unpredictable ways, there is one theme that cuts across virtually every restructuring process: they start way too late.

Advisors are accustomed to analyzing companies that are nearly certain to require a balance sheet restructuring in the foreseeable future, only to find them deferring the decision to embark on such a process as much as possible. Whether it is motivated by hope that the business will turn around, delusions that the capital markets will bail them out or simply the all-too-human tendency to postpone difficult choices as much as possible, companies almost invariably act (or fail to act) so as to delay the inevitable until the very last minute. At that point, their ability to control the outcome of their restructuring process is greatly compromised as cash balances have declined, vendors are demanding shorter terms and banks have restricted access to credit. We can think of only one case in recent history—American Airlines—where the debtor read the writing on the wall and did something decisive about it well in advance when it still had ample liquidity to shape its destiny.

For those of us who work frequently on Latin American restructurings, it often seems like the tendency to postpone the day of reckoning is taken to an even greater extreme. Whereas a U.S. debtor might wait until three months in advance of a major debt maturity before preparing for a restructuring process, its counterpart in Latin America might wait until three weeks before it runs out of cash prior to making the same decision.

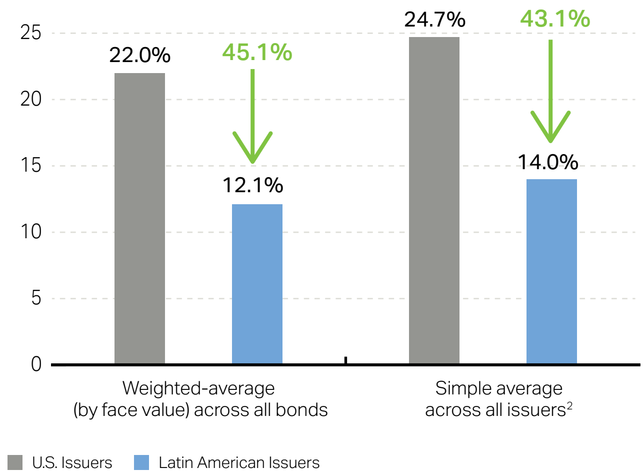
We gathered some empirical data to determine whether there is any merit to the anecdotal evidence of our professional experience. In particular, we hypothesized that if Latin American companies generally wait longer than U.S. companies to launch restructuring processes, their credit profiles are likely to be significantly weaker at such time, and creditor recoveries are likely to be lower. Although it is impossible to use publicly-available data to determine precisely when a company made

the decision to restructure, we used the Chapter 11 petition date (or its Latin American equivalent) as a proxy, under the theory that debtors who take longer to launch restructuring processes are likely to file insolvency proceedings later as well. In addition, to estimate creditor recoveries, we reviewed the bond prices of such companies as of the close of business on the first trading day after their bankruptcy filing, as bond prices should generally correlate with expected bondholder recoveries if bond markets are efficient. We focused our analysis on unsecured bonds only, as there were not enough secured bonds issued by Latin American firms in the sample set for a meaningful comparison.

Whereas a U.S. debtor might wait until three months in advance of a major debt maturity before preparing for a restructuring process, its counterpart in Latin America might wait until three weeks before it runs out of cash prior to making the same decision.

The results, for companies that filed insolvency proceedings over the past two years and had at least $200 million of liabilities as of their petition date, are shown below:

Average price of unsecured bonds as of bankruptcy petition date[1]



Source for bond pricing: ***Bloomberg***

1. Reflects all bankruptcy filings from August 1, 2013 to September 30, 2015 in which the company had at least US$200 million of liabilities as of the petition date. Sample set includes (a) 20 U.S. companies and 49 U.S. unsecured bonds, with an average face value of $399.0 million and (b) 9 Latin American companies and 20 Latin American unsecured bonds, with an average face value of $480.8 million.
2. Calculated by taking the weighted average bond price for each issuer (weighted by face value) and then taking the simple average across all issuers.

As expected, the data shows that, at the time they filed insolvency proceedings, unsecured bond prices of Latin American issuers were dramatically lower—by over 40%, on average—than those of U.S. issuers. The outcome is essentially the same regardless of whether one looks at the weighted average across all bonds (weighted by face value) or the simple average across all issuers (45.1% vs. 43.1%, respectively). Additionally, five of the 20 U.S. issuers in the sample set had unsecured bond prices of 25 cents on the dollar or higher as of the petition date, whereas none of the Latin American issuers had prices at such levels.

The results of our empirical analysis may also be driven by factors other than the timing of when Latin American companies launch restructuring processes. In particular, the relatively lower prices on the petition date of Latin American bonds vs. U.S. bonds may, in part, reflect the differences in insolvency regimes referred to above. Precisely because the reorganization process in Latin America tends to favor debtors and shareholders more so than in the U.S., filing for bankruptcy in Latin America might have

There are multiple reasons why a Latin American company may take longer than a U.S. company to launch its restructuring process:

Family Ownership
Latin American companies are more likely to be family-owned enterprises, with much of the family's net worth (and employment opportunities for relatives) tied up in the business, and might therefore be particularly reluctant to commence a process that could lead to the transfer of equity and/or control to creditors.

Reputation
The stigma of bankruptcy is stronger in Latin American countries than in the U.S., leading to greater reputational consequences for Latin American managers and shareholders (especially in the case of family-owned firms).

Debtor-friendly Legislation
Insolvency regimes in Latin America are generally more debtor- and shareholder-friendly than Chapter 11. Therefore, managers and owners of Latin American firms might be more willing to wait and take their chances in a proceeding rather than try to make concessions out of court.

a more negative effect on expected bondholder recoveries than in the U.S. Additional empirical research is necessary to determine the relative impact of the various factors driving the observed results.

The lesson for bondholders is clear: when investing in Latin American unsecured bonds, bondholders should focus on factors that may cause the issuer to defer restructuring negotiations.

Regardless of the underlying cause, however, the lesson for bondholders is clear: when investing in Latin American unsecured bonds, bondholders should focus on factors that may cause the issuer to defer restructuring negotiations if their credit quality deteriorates, such as the nature of the share-holder base and the "creditor-friendliness" of the insolvency regime in that company's jurisdiction. In addition, bondholders should pay particular attention to financial maintenance covenants, both when buying bonds in the secondary market and when negotiating indenture terms in a primary issuance. If things eventually go south for the issuer, such covenants can force the company to engage in negotiations with bondholders much earlier than they would otherwise, thereby enhancing bondholders' recovery prospects. Without such "early warning triggers" in place, bondholders will probably only hear from the company regarding its restructuring plans *mañana*—and by that time it will almost certainly be too late. ■

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The statements in this article are solely those of the authors and do not necessarily reflect the views of Rothschild Inc. or any other person.

DEALNEWS / MEXICO

Mexican Homebuilders Emerging from Bankruptcy

By **SEBASTIAN VILLAVECES** *(svillaveces@cgsh.com)*

When the Mexican homebuilder industry was falling apart in the summer of 2013 J.P. Morgan Mexico's president, Eduardo Cepeda, told The Economist that "private-debt workouts would be a sign of maturity in Mexico's financial system." By the end of 2015 two of the three leading homebuilders, **Corporación Geo** and **Desarrolladora Homex**, had already emerged from bankruptcy after testing the then recently amended Mexican *Ley de Concursos Mercantiles*, and the third, **Urbi Desarrollos Urbanos**, had received approval from its shareholders to its proposed restructuring plan. The three cases are examples of successful use of pre-packaged proceedings that resulted from private agreements with creditors.

	GEO	HOMEX	URBI
Filing Date	March 20, 2014	April 30, 2014	December 2, 2014
Re-listing Date	December 16, 2015	October 23, 2015	N/A
Plan's Court Approval	June 29, 2015	July 9, 2015	N/A
Restructuring Consideration	Debt for equity + Warrants	Debt for equity + Options	Debt for equity
Number of filing parties	Geo + 15 subsidiaries	Homex + 11 subsidiaries	Urbi + 15 subsidiaries

Cleary Gottlieb represented Corporación GEO in the restructuring of approximately $4.5 billion of its bank and bond debt. GEO was the first homebuilder to reach the pre-pack filing milestone, in the spring of 2014. GEO's reorganization was one of the largest debt-for-equity restructurings in Mexico's history, whereby the creditors and new investors received a majority of equity and control of the company, and the first Mexican restructuring to contemplate debtor-in-possession financing and/or asset sales to keep operations going while the *concurso mercantil* proceeding was pending. Particular challenges were encountered in light of the short life of the amendments to the *Ley de Concursos Mercantiles* that became effective in January 2014.

GEO and several of its stakeholders engaged in restructuring negotiations that began in April 2013. The successful process allowed GEO and 16 of its subsidiaries to file with the support of major banking institutions in Mexico (including HSBC, Banorte, BBVA Bancomer, Banamex, Inbursa and Santander) and of a group of bondholders that was comprised of major financial and investments institutions in the U.S., the UK and Latin America such as Ashmore, Luxor and TCW, which in the aggregate represented approximately 38.5% of GEO's $700 million of high-yield unsecured bonds.

The *concurso mercantil* proceeding was completed on June 29, 2015 when a court approved the pre-packaged plan. Since early November 2015, the restructuring consideration comprised of equity and warrants has been made available to existing creditors of GEO.

GEO was able to re-list its shares for trading on the Mexican Stock Exchange on December 16, 2015, after successfully completing a new equity raise in the amount of MX$3.5 billion, of which roughly MX$1.8 billion were expected to be on the Company's balance sheet after paying transaction costs and certain operating, tax and labor liabilities.

GEO RESTRUCTURING

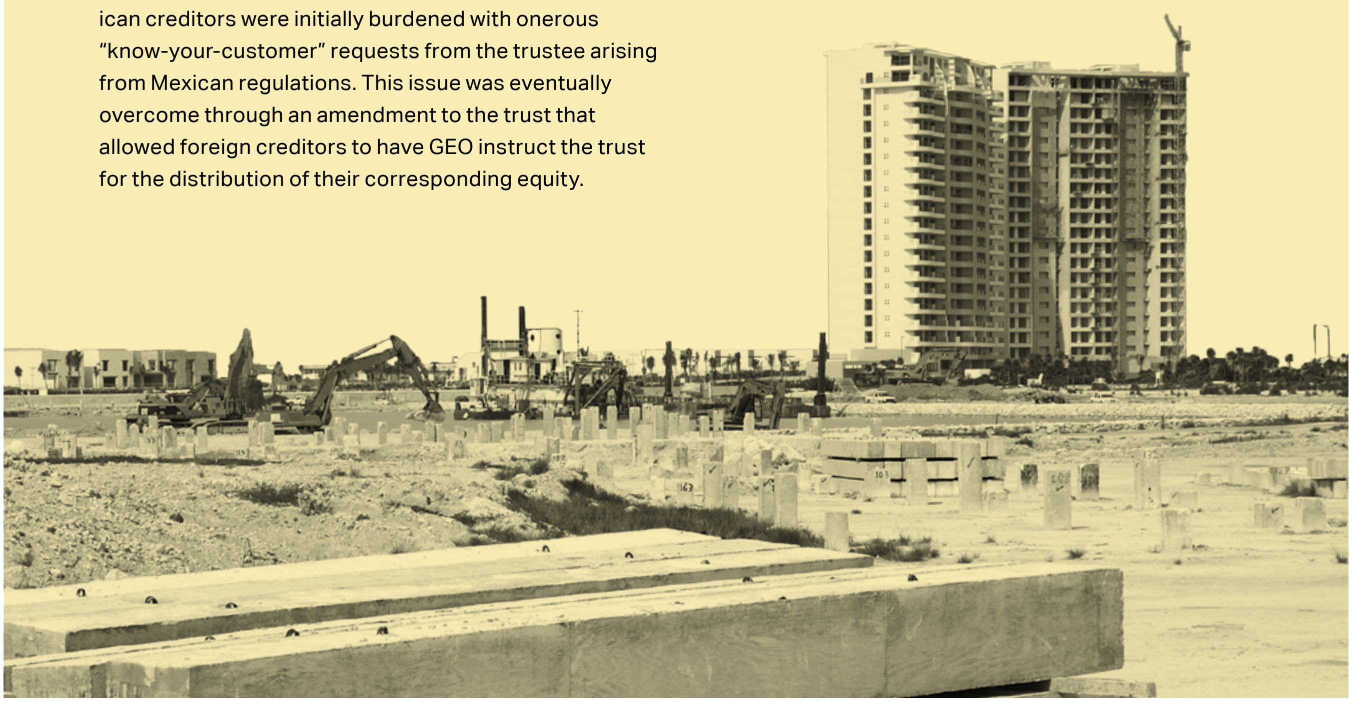
Closing technical challenges

Equity v. Warrants. The varying nature of the securities that were agreed in the plan to be distributed to unsecured creditors (equity vs. warrants) required a split approach in terms of mechanics. While the equity was made available to creditors, in Mexico, through INDEVAL, warrants are being delivered in physical form to their beneficiaries.

DTC and INDEVAL. For GEO's international bonds, certain mechanics had to be developed to facilitate the distribution process to bondholders because their notes were held through DTC while the equity is held through INDEVAL, which requires the establishment of Mexican brokerage intermediation accounts to directly hold the new securities. The adopted mechanics also envisage the distribution of the restructuring consideration to take place before the discharge of the old bonds in DTC.

Delivering Equity. To navigate legal and regulatory constraints, the delivery of the equity portion of the restructuring consideration was structured through a special-purpose trust established by GEO. Although an effective vehicle, particularly considering that the restructuring consideration will be available to recognized creditors on a continuous basis, GEO's non-Mexican creditors were initially burdened with onerous "know-your-customer" requests from the trustee arising from Mexican regulations. This issue was eventually overcome through an amendment to the trust that allowed foreign creditors to have GEO instruct the trust for the distribution of their corresponding equity.

Re-Listing of Shares. The achievement of the restructuring that culminated in the re-listing of GEO's shares in the Mexican Stock Exchange required the coordination and layering of a number of work-streams. Concurrently with the distribution of the restructuring consideration to recognized creditors, GEO carried out a shareholders meeting to approve, among others, the capital increase that preceded the new money equity raise and consummated such equity raise. All of the above while cash-constrained, under close strict scrutiny of stakeholders and regulators, and while navigating issues to comply with Mexican and U.S. securities laws.



Ten Years of the Brazilian Bankruptcy Law: Some Lessons Learned and Some Wishes for Improvement

By **GIULIANO COLOMBO** *and* **THIAGO BRAGA JUNQUEIRA**[1]

The Brazilian Bankruptcy Law—Law No. 11,101 of 2005 ("BBL")—has just celebrated its 10th anniversary.[2] It replaced the outdated bankruptcy law that had been in force since 1945. The BBL promoted a major overhaul of the Brazilian corporate insolvency system. It ultimately shifted from a liquidation-oriented and outdated legislation to embrace modern principles of corporate restructuring designed to rescue distressed but viable businesses.

Indeed, the BBL has provided distressed companies with the opportunities and tools to restructure their obligations and operations and continue as a going concern through the use of rehabilitation and reorganization procedures, which include (a) in-court, or judicial reorganization (*recuperação judicial)*; or (b) out-of-court reorganization/prepackaged reorganization (*recuperação extrajudicial*). If restructuring and rehabilitation is not feasible, then the business is promptly and efficiently discontinued through a bankruptcy liquidation process (*falência*).

The judicial reorganization ("Judicial Reorganization") is a court-supervised procedure somewhat inspired by and analogous to a Chapter 11 case under the U.S. Bankruptcy Code. It is a tool essentially designed to promote effective restructuring and reorganization of viable companies in financial distress.

In short, while protected against enforcement and other actions for a certain period (i.e., a stay period), the debtor is entitled to submit, negotiate and eventually have a plan of reorganization ("Plan of Reorganization") approved by its creditors,[3] through which it can generally adjust its operations and reprofile its debt (and perhaps its equity structure).[4]

Upon approval and confirmation of the Plan of Reorganization, pre-petition claims[5] are generally discharged and the debtor can thus enjoy a fresh start. As a rule, the debtor itself and related management remains at the helm of the debtor's activities during the life of the Judicial Reorganization proceeding (*debtor in possession*). A court-appointed trustee is designated to supervise the process, without any management powers.

The out-of-court reorganization or prepackaged reorganization ("Extrajudicial Reorganization") is also a court-supervised procedure designed to promote corporate restructuring. Similar to prepackaged arrangements in other jurisdictions, the main goal of the prepackaged reorganization is to obtain expedited confirmation of a plan of reorganization ("Prepackaged Plan") that has been previously negotiated and accepted by requisite majorities involving certain classes or groups of creditors that are impaired by the Prepackaged Plan and which will share in similar payment conditions under the Prepackaged Plan.

When compared to a full-blown Judicial Reorganization proceeding, the Extrajudicial Reorganization is a fast-track procedure that tends to be more effective because it minimizes transaction costs and time spent in court, and also reduces uncertainty when a Prepackaged Plan has been previously negotiated and approved. In practice, however, it is used far less than Judicial Reorganization.

Finally, the bankruptcy liquidation ("Bankruptcy Liquidation") of a corporate debtor, whether filed for by third parties (involuntary bankruptcy) or by the debtor itself (voluntary bankruptcy), is usually prompted by an acknowledgment that the debtor's business is no longer viable.

Under this proceeding, all of a debtor's assets are scheduled by a court-appointed trustee. Assets are liquidated and the proceeds serve to repay the existing liabilities pursuant to a certain ranking of priorities. Upon decree of bankruptcy liquidation, the management is removed and the liquidation process is conducted by the court-appointed trustee.

After payment of (a) statutory priority liquidation labor claims; (b) claims for restitution; and (c) administrative expenses (bankruptcy estate expenses and post-petition claims, if applicable), the proceeds from sale of the debtor's assets are distributed to pre-petition creditors in the following priority-distribution order: (i) labor related claims (capped at 150 minimum wages per employee) and claims originating from occupational accidents; (ii) secured claims up to the value of the collateral; (iii) tax liabilities; (iv) special privilege claims; (v) general privilege claims; (vi) unsecured claims; (vii) contractual fines and penalties; and (viii) subordinated claims.

Some Lessons Learned

The BBL represents an undisputed step ahead when compared to the previous bankruptcy legislation. Indeed, the current tools have allowed many debtors to successfully restructure their obligations and continue as a going concern, while preserving creditors' interests and fostering investments and asset sales (free and clear of prior liens).

Notwithstanding the notable improvements, the 10 years of practice have revealed some of the BBL's challenges and weaknesses in promoting effective corporate restructuring. For example, equity continues to play a critical part and drive the restructuring process even when there is no equity value. Often in conflict with the best interests of the debtor, there are various cases where equity will use the restructuring proceedings to force haircuts on disorganized creditors and retain equity value for no or unfair consideration.

Moreover, the lack of specific rules governing substantive consolidation has also created distorted outcomes in complex cases involving various companies in the same economic group.[6] In some of these cases, structural seniority was disregarded and claims and liabilities were mingled, to the detriment of senior creditors. Further, the BBL is silent in respect of the use of the absolute priority rule in reorganization proceedings, which has also created distorted outcomes in some instances.

Practice also reveals that the typical Brazilian debtor tends to seek restructuring proceedings very late, when its liquidity position is already very dire. Additionally, while the BBL contemplates rules governing DIP financing and the sale of assets free and clear of debtors' liabilities, it is clear from experience that the BBL requires some improvements to facilitate and expand the use of these transactions and techniques, which are needed by most companies in reorganization to minimally stabilize working capital to levels that would permit the continuation of its business.

Some Wishes for Improvement

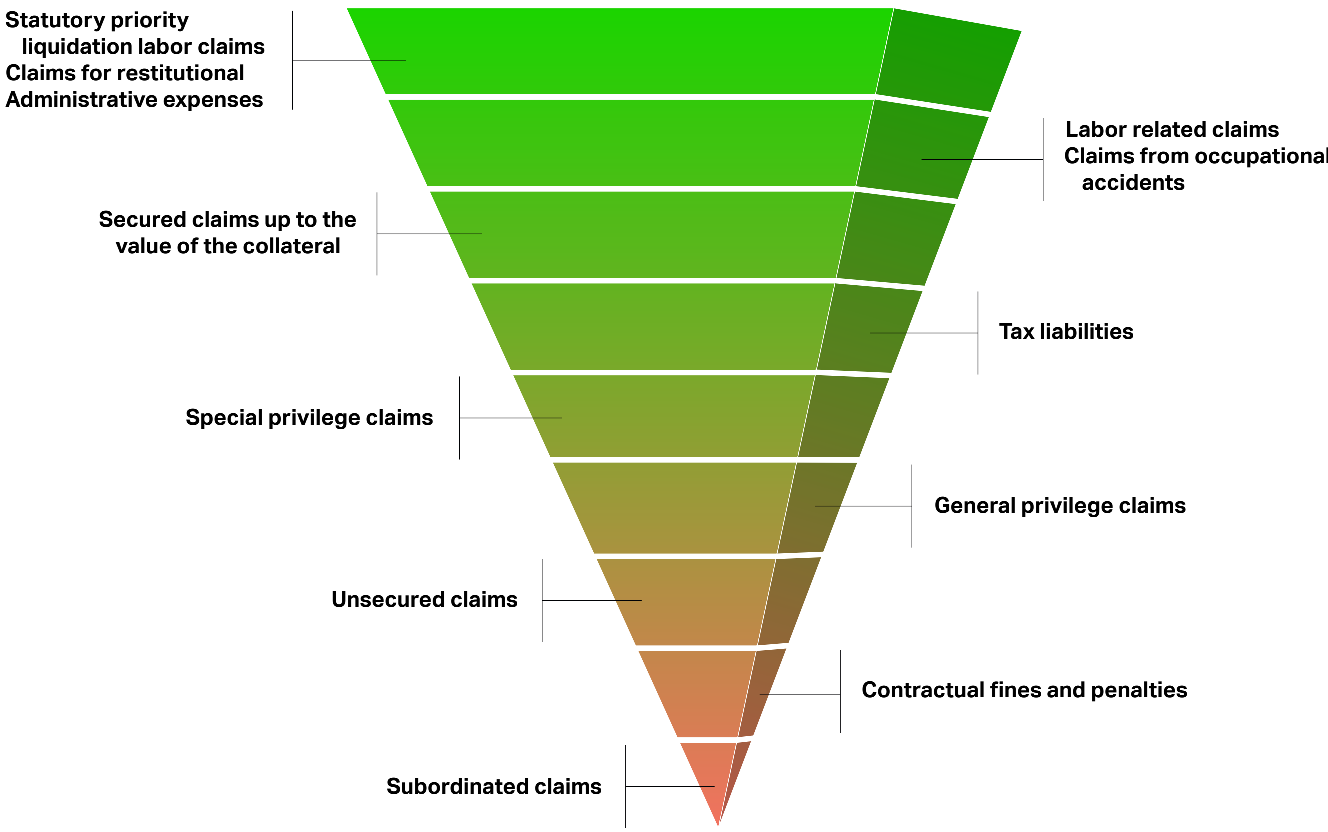
Accordingly, as with any other bankruptcy legislation, there are certain aspects calling for change. Some reforms are critical to make the whole process more effective and balanced among the stakeholders involved, thus setting a higher standard in legal certainty for debtors, creditors, distressed investors and financiers alike. Below we briefly outline some wishes for improvement of the BBL in certain key areas we consider important in achieving more fair, balanced, transparent and efficient restructuring proceedings.[7]

Balance of forces in Judicial Reorganization—Alternative-Competing Plan of Reorganization

The BBL does not envisage an involuntary filing for Judicial Reorganization. Indeed, a going-concern reorganization can take place only on the debtor's initiative. Moreover, once under Judicial Reorganization, a debtor's management and equity retain control of the company. More specifically, it is generally established that a Plan of Reorganization is put to vote only with the debtor's consent. As a result, the debtor and its respective shareholders play a very central role in a reorganization process, notably where creditors are still very concerned and unclear about the real prospects for credit recovery in Bankruptcy Liquidation proceedings.

Indeed, while rejection of the Plan of Reorganization typically leads to conversion of the Judicial Reorganization into Bankruptcy Liquidation, with the consequent detrimental effects for the debtor and its shareholders,[8] the general feeling among creditors is that there is limited or no recovery value

Brazil — Recovery Waterfall

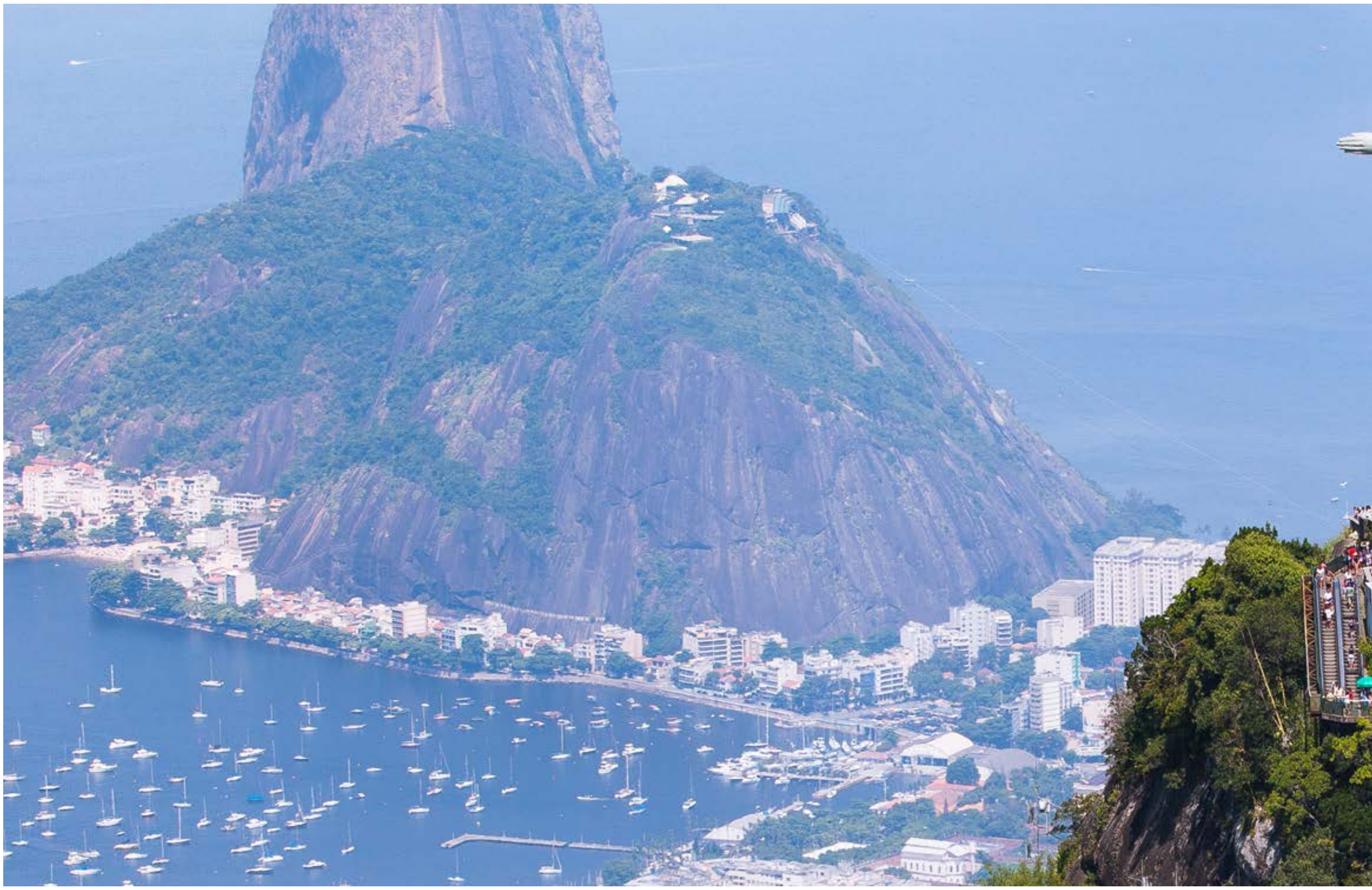


under a potentially time-consuming, costly and bureaucratic Bankruptcy Liquidation process. Therefore, in practice, creditors tend to approve a questionable and sub-optimal Plan of Reorganization rather than vote for its rejection which would relegate them to coping with the downsides of Bankruptcy Liquidation.

Aware of those circumstances, is not uncommon for debtors to be uncooperative and restrict as much as possible creditors' access to minimum information necessary to assess whether the proposed restructuring is effectively the best and most equitable alternative. In addition, the BBL lacks effective instruments to compel debtors to provide creditors with timely and useful information on its business plan, liquidity and other strategic data to appropriately evaluate a proposed Plan of Reorganization.

The scenario is thus devoid of decent options for creditors to fight for purportedly better restructuring conditions. This could be sorted out by giving the majority of creditors (or alternatively a super-majority) additional rights and instruments to impose their will on the debtor in circumstances where the debtor fails to timely file and/or approve a Plan of Reorganization that is fair and equitable. To that end, the possibility of an alternative-competing plan proposed and submitted by creditors regardless of a debtor's consent—as in other jurisdictions—would be instrumental, including in minimizing the abuses of equity holders in effectively controlling the restructuring process. This alternative-competing plan would be binding on the debtor and shareholders, regardless of their will and consent, once it was approved by its respective creditors.

This should ultimately further a balance of forces under Judicial Reorganization. Besides, it would also encourage the debtor's entities to share their internal information in a more efficient and constructive manner with creditors and other stakeholders and submit a Plan of Reorganization that is much closer to the best alternative that can be offered by the debtor in order to keep control of the process, thus making Judicial Reorganization an even more transparent and likely effective process.



DIP Financing—An absolute senior administrative expense priority in case of Bankruptcy Liquidation

DIP financings are generally regarded as post-petition obligations of the debtor for being disbursed in the debtor's benefit after the filing for Judicial Reorganization. Therefore, DIP financing enjoys senior treatment in case of Bankruptcy Liquidation. Such credit facilities should precede any pre-petition obligation of the debtor in the waterfall priority of payments.

However, DIP loans may still rank junior to certain of a debtor's other obligations. More specifically, pre-petition creditors holding collateral in the form of a fiduciary lien may liquidate their claims prior to repayment of the DIP loans. Upon occurrence of a default (even post-petition), a creditor secured by a fiduciary lien is generally authorized to foreclose on the respective encumbered asset.

In particular, in a Bankruptcy Liquidation scenario such creditor is entitled to seek restitution of the respective assets and amortize its claim with the proceeds from the sale of its collateral (the asset encumbered to the respective creditor).[9] In this scenario, a pre-petition creditor could recover on its claims before a DIP lender, as the respective asset would not be scheduled and consequently not available to satisfy existing obligations of the bankrupt debtor's estate. Further, the DIP loan is also junior to some other statutory administrative post-petition obligations of the Debtor, including fees of court-appointed trustees and ordinary expenses for running the estate.

The DIP lender is often the creditor that runs the greatest risk, financing the distressed debtor when the situation is most uncertain. Securing new money is key to successful restructurings, ideally on an unsecured basis from the debtor's perspective.

Therefore, the BBL should clearly provide for super-seniority and priority of DIP loans, even on an unsecured basis, notably in the case of Bankruptcy Liquidation of the financed debtor. In some circumstances, the BBL should also empower the Bankruptcy Court to prime liens for the benefit of the DIP lender. This would be a useful measure to foster and facilitate the financing of distressed companies, an essential tool for successful restructurings.

Some reforms are critical to make the whole process more effective and balanced among the stakeholders involved, thus setting a higher standard in legal certainty for debtors, creditors, distressed investors and financiers alike

Asset Sale – Free and Clear - Further flexibility
The sale of assets under the prior insolvency regime[10] was risky and challenging. It was relatively common to see the acquirer of an asset being later liable for the debtor's obligations. Naturally, almost no sale transactions were implemented.

Fortunately, the BBL has changed this scenario by establishing that the acquirer of a debtor's *Isolated Business Unit* ("IBU") would not be held liable for any of the seller's existing liabilities. This new legal framework, which has been consistently confirmed by court precedents, has fostered numerous successful transactions during the last decade under Judicial Reorganization cases.[11] Notwithstanding the success over the last 10 years, practice has shown that a few improvements are still necessary to make the process even more efficient and effective.

First, the BBL failed to define the actual extent of an IBU. This stirred up discussions on whether an IBU should (or should not) encompass all or a substantial part of debtor's assets and whether remaining in operation with a residual business would be crucial to qualifying as an IBU. In addition, the IBU concept in the BBL is also unclear about the kind of assets that could make up an IBU. Naturally, this brings a certain degree of uncertainty when considering that, if assets are found not to comprise an IBU, the acquirer may be accountable for the debtor's existing obligations.

Accordingly, many of these discussions and uncertainties would be eliminated if the BBL would state that an IBU may consist of any subset of the debtor's assets and even comprise all or a substantial portion of the debtor's business. The size of an IBU vis-à-vis the debtor's activities (and whether such debtor remains in business) should not prevent a deal from being considered free and clear, given the underlying principle of the BBL to preserve the going-concern and operations of certain assets, even in the hands of other investors or shareholders.

Second, a strict reading of the BBL may lead to the interpretation that the sale of an IBU—and respective competitive process—should be contemplated in the respective Plan of Reorganization. In other words, a transaction analogous to a 363 sale under the U.S. Bankruptcy Code—i.e., consummated prior to the filing or approval and confirmation of a Plan of Reorganization—would not qualify to be free and clear. While we strongly disagree with such strict view and interpretation, it is beyond doubt that most companies that file for Judicial Reorganization crave cash (or will soon after filing). Experience shows that time is of the essence when dealing with liquidity shortages.

As a Plan of Reorganization is usually approved only around six months after the filing for Judicial Reorganization, to avoid any sort of academic discussions and uncertainties that could compromise (as it has been the case) strategic deals from happening, it would be a welcome adjustment in the BBL to clearly stipulate that an IBU may be sold free and clear of a debtor's obligations at any time during the life of the Judicial Reorganization, even before deliberation on the Plan of Reorganization. Of course, this sale transaction should also involve a competitive, court-supervised process that includes creditors' participation.

Conclusion

During the past 10 years, the BBL has proved to be an effective instrument for distressed companies to overcome their financial crises. The BBL is also praiseworthy for its other mechanisms that allow creditors to preserve their rights in an insolvency scenario, while also enabling investors to participate in and implement successful transactions within the reorganization process. But a few changes are still necessary.

It is likely that the next few years in Brazil will be marked by a credit shortage and limited access to capital markets for local companies. The consequences of the present political and economic crisis are still unknown, but several local companies will certainly have to look to existing insolvency regimes and tools for protection. The BBL and its characteristics will be put to test again. All things considered, the time is ripe for improvements to make the legal framework even more balanced, effective and predictable to cope with the challenges ahead. ■

1. Giuliano Colombo and Thiago Braga Junqueira are, respectively, a partner and senior associate in the Corporate Reorganization and Insolvency Practice of Pinheiro Neto Advogados, in Brazil. The opinions expressed herein are those of the authors and not of Pinheiro Neto Advogados.
2. The BBL was enacted in February, 2005. Generally, the Plan of Reorganization is considered approved by the favorable vote of a majority of claims (i.e., dollar amount) and/or creditors (i.e., head count) present at a general meeting of creditors (a "GMC") called and convened to deliberate and vote on the plan, and the plan must be approved by each impaired class of creditors (i.e., labor, secured, small companies or unsecured/general class). Under the labor and small companies' classes, the plan is generally approved by the favorable vote of the majority of creditors in attendance of the GMC, and need not also be approved by the majority of claims. The BBL also provides for cram down rules to confirm a contested Plan of Reorganization, provided that certain requirements are met.
3. As a rule, the Plan of Reorganization must contemplate all means that will be employed by the debtor to reorganize and restructure its business. The BBL provides enough flexibility to accommodate any deal the parties in interest might find suits their needs (including the sale of part of the business to third-party investors free and clear). Normally, the Plan of Reorganization stipulates a scale-down of the pre-petition debt load with the consent of requisite majorities of creditors.
4. Generally, all claims against the debtor on the date of filing for judicial reorganization, even if not due, are governed by the Judicial Reorganization procedure. The BBL, however, provides some safe harbors for certain claims, including those secured by fiduciary lien and those originated from a forward foreign currency agreement (ACC).
5. An example of such distorted outcomes is Rede Energia S.A.'s (and affiliates') Judicial Reorganization (Case No. 0035245-15.2013.8.26.0100, underway before the 2nd Bankruptcy Court of São Paulo).
6. This paper does not intend to be exhaustive of all points the authors would consider to merit the reform of the BBL.
7. Upon decree of Bankruptcy Liquidation, the debtor and its shareholders are no longer entitled to remain in control. Indeed, the management will be removed, shareholders will have limited rights, and a court-appointed trustee will manage the company's activities (if it continues to do business) and take control over existing assets.
8. Naturally, a DIP loan may also contemplate collateral in the form of a fiduciary lien. In this case, the DIP lender would also be entitled to take over the encumbered asset and not be affected by Bankruptcy Liquidation.
9. Decree-Law 7,661 of 1945.
10. In fact, such provision of BBL has also been challenged before the Federal Supreme Court which has ultimately affirmed its constitutionality (Direct Unconstitutionality Action # 3.934). Moreover, Varig S.A. (case records # 2005.001.072887-7; 1st Business Lower Court of Rio de Janeiro), Supermecado Gimenes S.A. (case records # 597.01.2008.014658-6; 3rd Civil Lower Court of Sertãozinho) and Lácteos Brasil S.A. (case records # 0015595-79.2013.8.26.0100; 1st Bankruptcy Lower Court of São Paulo), among others, are examples of successful transactions involving the sale of IBUs.

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▼ **Thiago Braga Junqueira** is a senior associate in the Corporate Reorganization and Insolvency Practice of Pinheiro Neto Advogados, in Brazil. Thiago has an LL.M degree from Insper in Banking and Financial Markets and a J.D. degree from Pontifícia Universidade Católica de São Paulo. He is a member of TMA-Brasil, INSOL and Brazilian Institute of Corporate Restructuring Studies (IBR). Thiago is also a member of the NextGen Leadership Program of the International Insolvency Institute.

DEALNEWS / BRAZIL

OGX: Debt-For-Equity Exchange
Through ADR Program for Prepetition Bondholders

by **ALICIA LOBEIRAS** *(alobeiras@cgsh.com)*

OGX Petróleo e Gás S.A. is one of the most recent examples of an in-court restructuring where prepetition bond debt was converted into equity pursuant to a plan of reorganization. OGX is a company engaged in large-scale onshore and offshore exploration and production of oil and gas. Partially as a result of a large-scale exploratory campaign that did not meet OGX's projections between 2009 and 2012, leading to lower-than-expected revenues, the company found itself unable to meet its debt payment obligations, particularly with respect to approximately $3.6 billion in U.S. dollar-denominated bond debt. The company, together with several affiliates, filed for reorganization in Brazilian court, requesting *recuperação judicial* on October 30, 2013. OGX's plan of reorganization was approved by creditors and confirmed by the Brazilian bankruptcy court in June 2014.

A key facet of the plan was the distribution of equity to creditors in order to extinguish their debt claims. In order to facilitate this, the Company, together with creditors' counsel, decided to issue the equity to holders of international bonds through American Depositary Receipts ("ADRs"). The common shares underlying the ADRs were exempt from registration pursuant to Section 3(a)(10) of the Securities Act of 1933. Section 3(a)(10) exempts from registration securities issued pursuant to a judicial order deeming the issuance both procedurally and substantively fair. In OGX, this judicial order was issued by the Brazilian court overseeing the *recuperação judicial* proceeding.

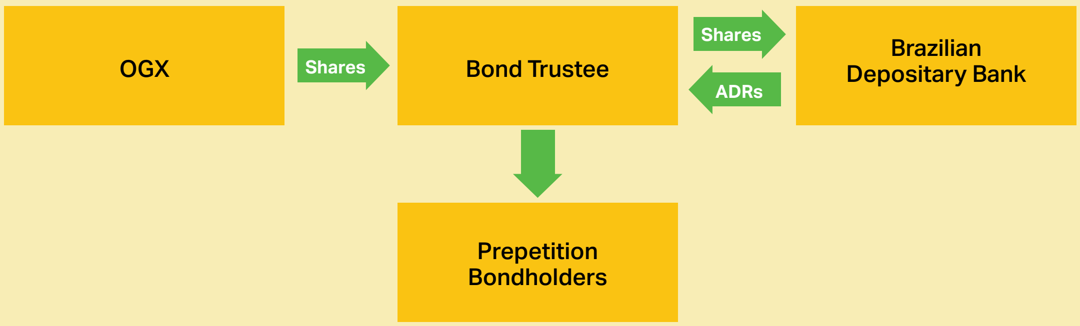
OGX – KEY FACTS

Filing Date	October 30, 2013
Plan's Court Approval	June 26, 2014
Date of Distribution to Holders	December 28, 2015
Recognized Bondholder Claims	US$3.6 billion
Restructuring Consideration	Debt for equity - 57,274,891 ADRs, each representing 1 common share
Number of filing parties	OGX + 3 affiliates

In the case of OGX, an ADR program made sense because it facilitated easy distribution to bondholders by allowing a distribution to be made through DTC instead of through a Brazilian clearing system. The process in Brazil for foreign investors in Brazilian securities can be inconvenient and burdensome, and is particularly problematic when dealing with a large number of holders, many of whom are not familiar with the process. Since holders receiving ADRs do not directly hold any Brazilian securities, the ADR program eliminates the need for individual holders to go through a Central Bank process. The local Brazilian custodian for the ADR program would hold the Brazilian securities and satisfy the applicable registration requirements under Brazilian securities law.

Continued

Furthermore, since the prepetition bonds were held through global notes through DTC, the ADR program also simplified the distribution process by using the same process that is typically used to make regular principal and interest payments through DTC. The trustee, which was the entity that received shares on behalf of the prepetition bondholders pursuant to the plan, deposited the Brazilian common shares with the local Brazilian custodian for the ADR program. The depositary bank for the ADR program then issued the ADRs in the United States back to the trustee, and the trustee distributed the ADRs to bondholders in a record date distribution through DTC.



The ADRs were delivered and registered by OGX in the name of the trustee on October 16, 2014, at which point OGX's obligations under the Plan were fulfilled. The ADRs were delivered by the trustee to the prepetition bondholders on December 28, 2015.

Cleary Gottlieb Steen & Hamilton LLP represented the bondholders as U.S. Counsel. **Pinheiro Neto Advogados** represented the bondholders as Brazilian counsel. **Rothschild** served as restructuring advisor for the bondholders. **Mattos Filho, Veiga Filho, Marrey Jr. e Quiroga Advogados** served as Brazilian counsel for OGX. **Angra Partners** served as restructuring advisor for OGX.

Untying the Gordian Knot: Restructuring Russian and CIS Companies Using English Law Schemes of Arrangement

By **POLINA LYADNOVA** *and* **SUI-JIM HO**

SINCE THE START OF THE 2008 FINANCIAL CRISIS, there has been an upsurge in the use of English law schemes of arrangement in cross-border debt restructurings by businesses located in Russia and its neighbouring countries. The scheme's key advantage is that it can provide companies with a way to implement a restructuring solution at a lower approval threshold than may otherwise apply pursuant to the terms of the underlying debt documents. Coupled with the English court's increasing willingness to sanction schemes for foreign companies, it is no surprise that schemes are emerging as the favoured tool of choice for those engaged in complex cross-border restructurings. This article provides an overview on how schemes may be used as a debt restructuring tool, particularly by businesses in Russia and other countries located in the Commonwealth of Independent States (CIS).

Scheme seduction

The attraction of an English law creditor scheme lies in its elegant simplicity: as long as a scheme receives the support of the statutory majority of creditors and is sanctioned by the English court, the scheme will be binding on all creditors, whether they voted for or against it.

There are two prongs to the statutory threshold. First, a majority in number (that is, headcount) of each class of creditors and/or shareholders represented at the meeting must have voted in favour of the scheme. Second, at least 75% in value of the class of creditors and/or shareholders represented at the meeting must have voted in favour of the scheme. These statutory majorities may be lower than those provided for in the underlying debt documents. For example, in a typical English law facility agreement based on the Loan Market Association form, changes to key financial terms may not be made unless the consent of all lenders is obtained. The use of a scheme can therefore counteract dissident creditor minorities who could otherwise frustrate a restructuring that is widely supported by other creditors.

The availability of a scheme to foreign companies is appealing as there may be limited tools under the local law which could be used to facilitate the amendment of a financial contract. In the context of a Russian borrower for example, the basic principle of the Russian Civil Code is that agreements must be kept: the debtor must perform its obligations in compliance with the terms of an agreement. Amendments can generally be made only with the consent of all parties. There is no Russian law equivalent to an English law scheme of arrangement. The closest approximation to a scheme is Article 451 of the Russian Civil Code which provides that a party can ask the Russian court to amend a contract, but only if such amendment is required due to a material change of circumstances. The Article 451 procedure is limited in two material ways: it is available only in relation to contracts governed by Russian law and the bar set for what constitutes a material change of circumstances is very high.

Therefore, Russian debtors may need to look beyond the four walls of their domestic legal system for a more flexible restructuring tool. The fact that, as a general matter, Russian courts should recognise amendments made to an English law contract pursuant to a scheme of arrangement makes the scheme route a very intriguing prospect.

Another important aspect of a scheme is that it is not a formal insolvency procedure. After all, the statutory provisions relating to schemes are found in the UK corporate legislation rather than the insolvency legislation and schemes are used in other circumstances not related to insolvency, including takeovers and solvent reorganisations. This makes their use more palatable to companies, directors and sponsors who may wish to avoid any perceived insolvency-related stigma.

Creditor democracy

Any form of democracy, including creditor democracy, could very easily degenerate into a form of "tyranny of the majority" in the absence of appropriate safeguards. The role of the English court in the scheme process helps mitigate some of these concerns. Procedurally, two court hearings need to be held.

The first court hearing is held to convene the creditor meeting. Issues of class composition are considered in the first hearing. It is the responsibility of the scheme company to formulate the class or classes of creditors for the purposes of convening meetings to consider and, if thought fit, approve the proposed scheme. Meetings must be properly constituted so that each meeting consists of creditors whose "rights [against the scheme company] are not so dissimilar as to make it impossible for them to consult together with a view to their common interest."

The second hearing is held to sanction the scheme after the holding of the creditor meeting. Any issues concerning the fairness of the scheme are typically dealt with in the sanction hearing. The sanction hearing is not a rubber-stamp exercise as the court has full discretion whether to sanction the scheme. The judge would look at various factors to ensure that there is "no blot on the scheme". This means that the judge would need to be satisfied that, among other things, the statutory requirements are met, the creditors were put into the appropriate voting classes and each class was fairly represented at the creditors' meeting, the majority was acting *bona fide* in the interest of the class and there is no inherent unfairness in the scheme.

The judge would also need to consider whether the scheme is one that an intelligent and honest man as a member of the class and acting in respect of his interest might reasonably approve. This does not mean that the court has to conclude that the scheme was the only scheme or the best scheme which could have been agreed, but simply one that could reasonably be approved by the class of creditors.

The scheme's key advantage is that it can provide companies with a way to implement a restructuring solution at a lower approval threshold that may otherwise apply pursuant to the terms of the underlying documents.

Overall, the cases have shown that the courts have been generally slow to refuse to sanction a scheme which has the support of the statutory majorities; in fact, the more creditors support the scheme, the more reasonable the scheme would appear, and the less likely the judge would second-guess the decision of the majority who supported the scheme.

A corollary of the court's reluctance to refuse to sanction a scheme is the gradual erosion of a hold-out creditor's ability to block a proposed scheme. This is a welcome development as this reduces the likelihood that a maverick minority could derail a restructuring or extract any preferential treatment from a company in distress to the detriment of not only the company but also the supportive creditor majority.

As the scheme route becomes a more well-trodden path, there is no reason why a carefully conceived and conducted scheme could not withstand the scrutiny of the courts.

No stay, no problem

Outside of the scheme process, hold-out creditors could still disrupt the proceeding by pursuing parallel litigation in order to destabilise the restructuring negotiations. One of the key factors distinguishing an English law scheme from a US Chapter 11 procedure is that there is no statutory moratorium on creditor action pending the completion of the scheme process.

Whilst this is true, English courts have proved to be pragmatic in such circumstances and have been prepared to use their broad case management powers to impose a *de facto* moratorium on creditor proceedings whilst the scheme process is still ongoing. Under the English Civil Procedure Rules, an English court has the power "to stay the whole or part of any proceedings or judgment either generally or until a specified date or event". Although the courts have stressed that there must be special circumstances to grant a stay, thereby denying a creditor the immediate fruits of a judgment, the courts have accepted that a scheme of arrangement may amount to such special circumstances if there is a reasonable prospect of the scheme going ahead.

In addition, it is now common practice for a scheme company to request that scheme creditors sign up to a lock-up agreement where they will agree in advance to vote in favour of the scheme. The consenting creditors will also agree in the lock-up agreement not to take any enforcement action whilst the scheme process is ongoing. If a sufficient number of creditors provide their consent, this would prevent actions requiring the consent of a prescribed majority of lenders from being taken, thereby limiting the actions that the holdouts may take without the consent of the other lenders. For example, if the loan may be accelerated only with the consent of two-thirds of the lenders, but 60% of the lenders have entered into a lock-up agreement, then the remaining holdout creditors would not be able to accelerate the debt as they only comprise 40% of the lenders.

"Sufficient connection"

The jurisdiction of the English court to sanction a scheme in respect of a foreign company depends on whether the company has "sufficient connection" with England. One way to establish connection is by moving the scheme company's "centre of main interests" (COMI) to England. This may include carrying out all the company's functions from its sole office in London, arranging for the day-to-day management of the company to be conducted by a London-based company, holding meetings of the board of directors in London and holding its cash in a London-based bank account. Whilst having an English COMI used to be the way to establish a connection, recent case law shows that this is no longer a prerequisite: if English law is the governing law of the relevant debt documents, this alone is sufficient to create a link.

English courts have been proved to be pragmatic and have been prepared to use their broad case management powers to impose a de facto moratorium on creditor proceedings whilst the scheme process is still ongoing.

Conclusion

A purely voluntary debt restructuring is often messy, frequently time-consuming and invariably open to exploitation by opportunistic creditors. In the absence of a contractual framework which allows for the imposition of the will of the majority, even the most ruthful creditors would be at the mercy of their most ruthless brethren. The alternative to a successful workout is likely to be liquidation, which would be equally devastating for both the borrower and its creditors. The English law scheme of arrangement has come of age and is now a credible weapon in the restructuring armoury. Given the English court's increasing readiness to accept jurisdiction and their pragmatism in sanctioning arrangements approved by the statutory majority of creditors, a scheme may offer a solution where none is in sight.

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Sui-Jim Ho is an associate at Cleary Gottlieb Steen & Hamilton LLP based in the firm's London office. Mr. Ho graduated with first class honours from The London School of Economics and Political Science (LSE) with a law degree. Mr. Ho's practice areas include finance, capital markets and restructuring in Europe, the Middle East and Africa. He has experience advising on a broad range of debt/equity capital markets products, bank lending including acquisition finance, debt restructurings and insolvency, financial regulations and sovereign debt management.

CASE STUDY #1

Gallery Media

The first Russian business to implement a debt restructuring by way of an English law scheme of arrangement in the immediate aftermath of the 2008 financial crisis was Gallery Media, one of the largest outdoor advertising groups in Russia and Ukraine. The group suffered substantial losses as a result of the fall in advertising spend by companies generally in the wake of the economic downturn. Between 2008 and 2009, the turnover of the group more than halved, with Gallery reporting a net loss for 2009. By June 2009, Gallery Media defaulted under its high yield bonds and needed to implement a debt restructuring.

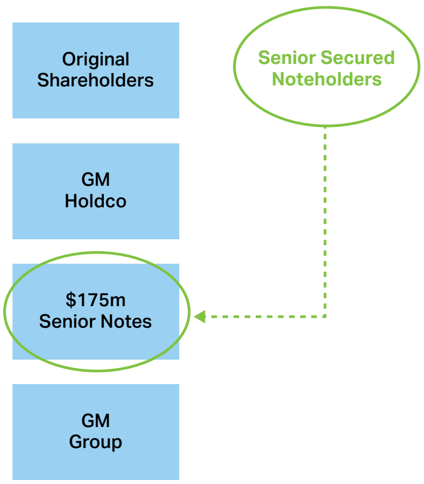
The debt-for-equity swap implemented through two schemes by Gallery Media illustrates the inherent flexibility of schemes as a restructuring tool. Schemes can extend to any agreement which the court is satisfied will amount to a "compromise" or an "arrangement" between a company and its relevant classes of creditors and/or shareholders. The statutory terms "compromise" and "arrangement" have been interpreted broadly by the English courts and practitioners continue to push the boundaries for new situations where schemes may be used. So long as there is some degree of commercial give-and-take, it would appear that schemes can be used in such circumstances. Since the credit crunch, schemes have been deployed in a myriad of restructurings ranging from a simple "amend-and-extend" scheme (e.g., extension of maturity date and resetting of covenants) to more complicated restructurings involving debt-for-equity swaps, such as Gallery Media. In October 2015, the scheme process was used to restructure two series of eurobonds issued by Russian Standard Finance S.A. to fund related loans to Russian Standard Bank, marking the first time an English scheme of arrangement has been used to implement a restructuring to address capital adequacy issues for a Russian bank.

The Gallery Media schemes included as a condition precedent a fcorporate restructuring that involved the incorporation of a new corporate group that will issue new notes in exchange for the existing notes. The noteholders exchanged US$161.5 million face value of existing notes for US$95.0 million of new notes plus a 68% shareholding in the new corporate group. A further 2% of the equity in the new corporate group was allocated to a third party who assisted the negotiating process in the lead-up to the restructuring. The original owners Baring Vostok Private Equity and Anatoly Mostovoy (founder and CEO of Gallery Media) injected US$5.0 million cash in return for 30% of the equity in the new corporate group and US$10.0 million of new notes. The debt-for-equity swap implemented through two schemes was approved by more than 80% of noteholders and sanctioned by the English courts in May 2010. Through the schemes, Gallery Media was able to reduce the group's total debt from US$342.2 million to US$100.3 million.

Following the 2008 financial crisis, Russian advertising company Gallery Media restructured its financial liabilities by implementing two schemes of arrangement in the English courts and a corporate restructuring of its existing group. The schemes were approved by the scheme creditors on 18 May 2010 and sanctioned by the court at a fairness hearing held on 26 May 2010.

Before

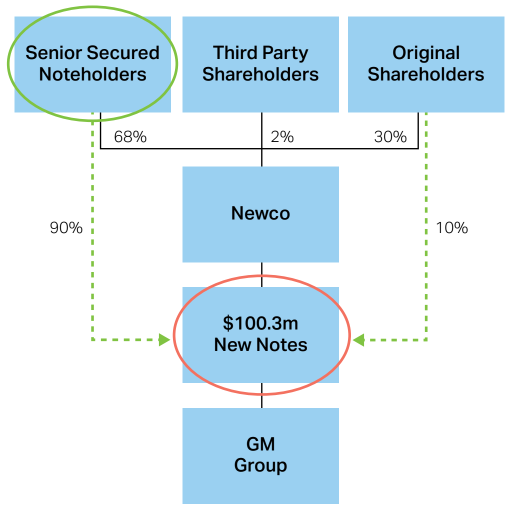
SIMPLIFIED CORPORATE STRUCTURE



Total debt: $342.2m.

After

SIMPLIFIED CORPORATE STRUCTURE



Total debt: $100.3m.

— The original shareholders invested an additional $5m in newco in return for 30% of the equity in newco and approximately 10% of the new notes.

— Third-party holders of old notes received 68% of the equity in newco and approximately 90% of the new notes.

— 2% of the equity in newco was allocated to a third party who assisted in the restructuring.

CASE STUDY #2

Rusal

As a result of the continuing volatility and uncertainty in the financial and commodities markets, Rusal, one of the world's largest aluminium producers, restructured its US$4.75 billion and US$400 million aluminium pre-export finance term facilities by proposing parallel schemes of arrangement in England and Jersey, the largest-ever schemes of arrangement proposed by a group with its main operations in Russia and the CIS. The main purposes of the amendments to the PXF facilities were to revise the amortisation schedules by introducing a grace period for principal repayments, deferring the final maturity dates and resetting the financial covenants. This is an example of an "amend-and-extend" scheme.

The existence of certain dissenting creditors means that the group was unable to pass the relevant proposal using the contractual route, which required all lenders' consent. Rusal therefore proposed parallel and inter-conditional schemes of arrangement in England (being the governing law of the PXF facilities) and Jersey (being the jurisdiction of incorporation of Rusal), which would only require the approval of a majority in number holding 75% by value of the lenders.

Rusal announced its intention to pursue schemes of arrangement in July 2014 and the first court hearings took place shortly thereafter. After almost a year-long negotiation and the commencement of the parallel schemes process, a consensual deal was eventually agreed and the amendments came into effect in August 2014. The Rusal case study demonstrates a useful practice point. Typically, the preparation of a scheme is done in parallel with the negotiation process in connection with the restructuring. In many cases, the prospect—or, less euphemistically, the threat—of a scheme will help deliver the necessary consent to effect the restructuring and therefore the need for a scheme will usually fall away. However, if the consensual negotiation breaks down, a scheme is useful as a potent fall-back strategy.

In 2014, Rusal proposed parallel schemes of arrangement in England and Jersey to restructure two of its pre-export finance term facilities. This was an "amend and extend" scheme where the principal amounts payable remained unchanged. The main purposes of this restructuring were to revise the amortisation schedules, to defer the final maturity dates and to reset the financial covenants under the pre-export finance facilities.

Terms	Terms of the Scheme
Principal amount	Unchanged
Group structure	Unchanged
Amortisation schedule	Two-year grace period for principal repayments
Final maturity dates	The maturity dates for a substantial portion of the loans were pushed out by two years
Financial covenants	Financial covenants were reset to provide greater headroom for the group
Margin	Margins were increased
Security	Additional security were provided
Other arrangements	Additional cash sweep and cash pooling arrangements were provided

CASE STUDY #3

DTEK

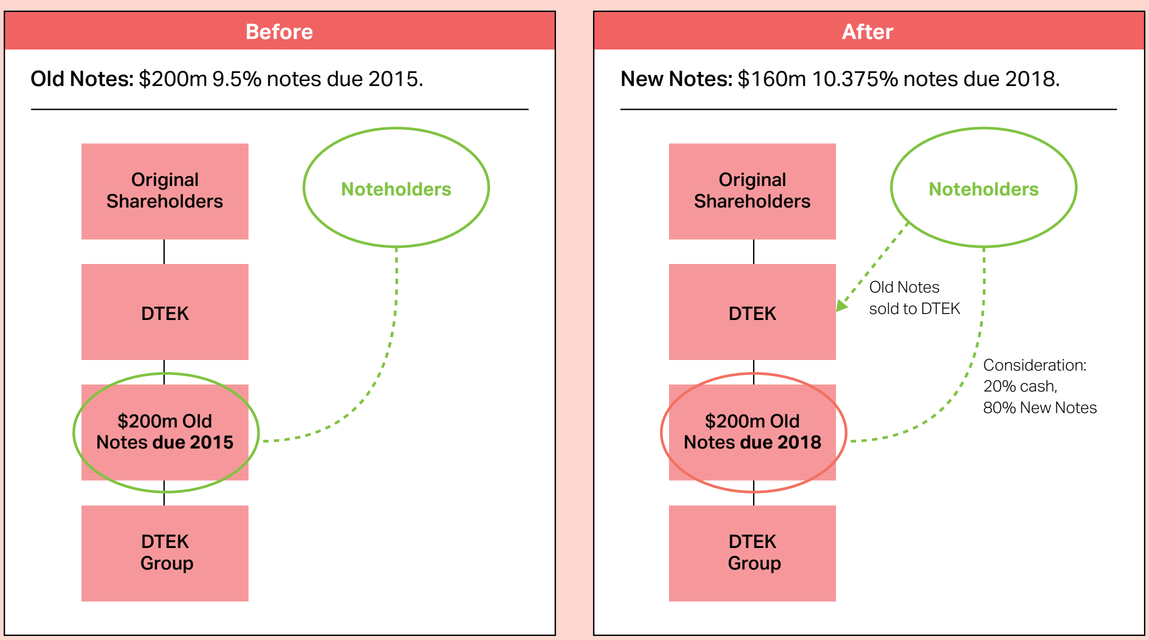
Earlier this year, a scheme was proposed by DTEK, the largest privately owned Ukrainian energy business. The unrest in Ukraine has led to a disruption of its operations and generally poor market conditions which in turn adversely affected DTEK's business. The substantial devaluation of the Ukrainian hryvnia against the US dollar and euro has created significant financial problems for the group with main revenue stream in hryvnia.

The scheme proposed by DTEK in April 2015 is relatively straightforward. The existing notes were to be acquired by DTEK in exchange for new notes with a later maturity date at an exchange ratio of 80% of the original par value and a cash consideration of 20% of such par value. This scheme was notable as it involved what were originally New York law-governed high yield bonds. As part of a consent solicitation process, the governing law of the bonds was changed from New York law to English law.

What is notable in the DTEK case is that the judge confirmed that, despite DTEK moving its COMI to England as a prudential measure, the fact that the notes are now governed by English law is alone sufficient to fulfil the "sufficient connection" test in order to confer on the English court jurisdiction to approve the scheme.

The DTEK case also shows that an English law scheme may be used to circumvent the requirements for unanimity or the 90% consent requirement in a typical high yield bond. Even if the governing law for a debt instrument is New York law (which is very often the case for high yield bonds), DTEK shows that this does not necessarily mean that a US Chapter 11 procedure is the only restructuring route for the debtor company. Given the lower stigma attached to a scheme and the lower cost compared to a full-blown Chapter 11 procedure, issuers of high yield bonds may see an English law scheme as an appealing alternative.

In April 2015, DTEK implemented a scheme of arrangement in the English courts to exchange its $200m notes due 2015 for cash (20%) and new notes due 2018 (80%).



The Scheme of Arrangement: A Viable Option for Nigerian Companies in a Downturn?

By **DIPO OKURIBIDO**

In Nigeria, large corporate bankruptcies are a rarity, and available literature on the subject tends to deal more with theory and provisions of existing law than with actual precedents and examples of lenders seeking liquidation, or to otherwise enforce security. Reasons abound for this situation, but perhaps the most striking of these is the fact that existing corporate insolvency legislation generally focuses on the actual liquidation of the insolvent company, as opposed to establishing buffers or moratoriums to create opportunities for its turnaround or rescue.

The result of the limited insolvency regime is that Nigerian companies simply do not surrender to bankruptcy proceedings until there is clearly and absolutely no hope of survival. Up to that point, in the gap between limping and dying, the tool of choice has been the Scheme of Arrangement.

The Nigerian Scheme of Arrangement

The Nigerian Scheme of Arrangement is loosely based on the UK Scheme of Arrangement. Similarly with its source material, the Scheme of Arrangement provisions under Nigerian law establish a process for a Nigerian company to enter into a compromise or arrangement with its creditors or shareholders (or any class of either of them).

Under the rules contained in the Principal Companies Legislation[1] (and supplemented in recent iterations of the Securities and Exchange Commission Rules and Regulations[2]), a public company would need to file an application for the proposed scheme with the Nigerian Securities and Exchange Commission ("**SEC**") and, following the SEC's approval of the scheme, would then need to make an application to the Federal

High Court ("**FHC**") to convene a court ordered meeting of the shareholders or creditors at which the scheme of arrangement or compromise will be proposed. Notice of the court ordered meeting is to be dispatched to all shareholders/creditors and to be published in newspapers with national circulation within Nigeria. There is no quorum requirement for the meeting however, in the case of a listed company (in line with additional rules introduced in 2014), any director or controlling shareholder who is interested in the transaction will be required to abstain from voting at the meeting.

To the extent that the scheme is approved by holders of up to seventy five percent (75%) in value of the shares or debt of the company *present and voting at the court ordered meeting*, then a report will be made back to the FHC for a court sanction (to the extent that the FHC is satisfied as to the fairness of the scheme)[3] and once the court sanction is obtained and filed at the Corporate Affairs Commission (i.e. the Nigerian Companies Registry), the scheme will be effective and binding on all shareholders or creditors as the case may be.

The process can normally be concluded within three (3) to six (6) months, depending on the complexity of the proposed scheme and the time required for the review by the Nigerian SEC. The CAMA also permits the Nigerian SEC to appoint one or more inspectors (if deemed necessary) to investigate the fairness of the scheme and to make a written report to the FHC.

As with the UK Companies Act, the language of the CAMA with respect to Schemes of Arrangement is relatively wide. As a result of this broad language, the manageable approval threshold (i.e. not 75% in value of **all** shareholders/creditors but only those voting in person or by proxy) and, the fact that schemes bind **all** shareholders/creditors not just those who consent to them, scheme of arrangements tend to be employed to achieve a wide range of objectives.

The most common use of schemes in relation to troubled companies in Nigeria is for the reorganization of the share capital of a company and the injection of additional capital to resuscitate the business. In these scenarios, rather than simply increasing the share capital of the company further, particularly where some of the existing capital is already lost, existing shareholders of the company will be required to surrender a portion of their shareholding or such pre-determined portion of their shareholding will be cancelled. Thereafter, new shares would be issued to a strategic investor who is willing to finance the company's recovery.

This structure was employed in relation to Starcomms Plc. in 2013 and, prior to that, for the rescue of several commercial banks (including Finbank Plc., which is discussed below) following the declaration by the Central Bank of Nigeria in 2009 that such banks were in a grave situation.

While schemes are particularly popular for the capital injection form of rescue in Nigeria, there are no restrictions within the existing legal provisions to suggest that such schemes cannot be similarly used to alter creditor rights and or secure debt moratorium. Indeed, based on current law, schemes do offer some other benefits, which make them a useful tool for

NIGERIAN SCHEMES OF ARRANGEMENT
CASE STUDY #1

Starcomms Plc.

In 2012, it was reported that Starcomms Plc. had incurred unsustainably high levels of debt and was facing a severe liquidity crisis. There were serious doubts as to the company's continued status as a going concern. The dire situation had made securing further debt impossible and there was no likelihood of success of a public offering or rights issue.

A pool of investors led by Capcom Limited and including the Asset Management Corporation of Nigeria ("AMCON") agreed to inject further capital into the company through a scheme, which would involve the reorganization of the company's capital to a manageable structure. Under the scheme, the capital of the company was restructured such that existing shareholders retained one share for every 100 shares held and the issued share capital of the company was restructured from 6.9 billion shares to 69 million shares. Fractional shares resulting from the restructuring were acquired by the company for cash and the nominal value of the surrendered shares was transferred to the capital redemption reserve account. This paved the way for the company to issue an additional 662 million shares in consideration for the new capital injection. The effect was the dilution of the existing shareholder base to 9.5%.

The result of the limited insolvency regime is that Nigerian companies simply do not surrender to bankruptcy proceedings until there is clearly and absolutely no hope of survival.

NIGERIAN SCHEMES OF ARRANGEMENT CASE STUDY #2

Finbank Plc.

In 2009, Finbank was among several banks deemed by the Central Bank of Nigeria to be in a "grave situation" with sub-par capital adequacy and liquidity ratios. By June 30, 2011, its shareholders funds were negative N107 billion and the bank was technically insolvent, continuing as a going concern mainly by virtue of regulatory forbearances and guarantees.

To save the bank, an agreement was reached with AMCON and First City Monument Bank Plc. ("FCMB") whereby a scheme of arrangement would facilitate the injection of additional capital and ultimately the sale of the bank to FCMB, with which it subsequently merged.

Finbank Plc.'s Scheme of Arrangement
by Asset Management Corporation of Nigeria ("AMCON") and First City Monument Bank Plc. ("FCMB")

PRE-SCHEME CAPITAL STRUCTURE	SCHEME OF ARRANGEMENT	POST-SCHEME (PRO FORMA)
Deposits	All Equity shares cancelled	**Deposits**
Creditors/Bondholders	Finbank equity holders receive one share of FCMB (or cash equivalent) for every 60 shares of Finbank	**Creditors/Bondholders**
Equity (HoldCo) Valued at –107 Billion Naira as of June 30, 2011	AMCON receives 4.2 billion new shares in exchange for capital infusion	**Equity (HoldCo)** Majority owned by AMCON FCMB purchased AMCON's position after the scheme of arrangement[1]

[1] Finbank was subsquently merged into First City Monument Bank Plc.

corporate restructuring. Perhaps the most notable of these benefits relates to the tax implications. The current view of the Federal Inland Revenue Service appears to be that, irrespective of the underlying transactions undertaken through a scheme of arrangement, the scheme is tax neutral and does not give rise to any new tax liabilities or extinguish any existing tax benefits. This means that assets transfers that might otherwise give rise to capital gains tax or withholding tax can be executed under a scheme of arrangement in order to avoid such taxes. Also, because schemes derive their effectiveness from a court sanction, parties generally accept them as particularly binding and feel less inclined to renege from the sanctioned commitments. These are all features of a scheme, which would be particularly useful in relation to a compromise or arrangement involving some variation of lenders' rights.

Presently however, such variations of creditor rights and or moratoriums tend to be secured through informal and semi-formal agreements rather than through the use of Schemes of Arrangements. This is probably not unconnected with the fact that the Nigerian corporate bond market is still relatively green and the main lenders to most big corporations are a handful of financial institutions with which bilateral talks can generally be had and from whom concessions can easily be sought informally.

As the Nigerian corporate bond market further develops and the lenders to corporations expand beyond just commercial banks and similar institutions to include a wider range of investors, including many who do not have other relations with the borrower to worry about, informal deals are likely to become increasingly difficult to negotiate. The use of schemes in this regard is thus likely to grow. ■

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1. The Companies and Allied Matters Act, Cap C20 Laws of the Federation of Nigeria 2004 ("**CAMA**")
2. Rules 440 – 444 of the Rules and Regulations of the Securities and Exchange Commission (External Restructuring Rules)
3. In practice, the FHC will not normally raise any issues with the fairness of the scheme unless petitions in this regard have been submitted by affected parties.

Rehabilitation in Kazakhstan: A Renewed Path for Businesses in Trouble

By **JOEL BENJAMIN, ADLET YERKINBAYEV, KAIRAT BAIZAKOV** *and* **MAKSIM GREKOV**

IN 2014, KAZAKHSTAN ADOPTED A NEW BANKRUPTCY LAW[1], which included a rehabilitation procedure (i.e. a procedure which allows a company to restructure its debts with court protection). The Government has long been trying to provide insolvency proceedings as an alternative to straightforward bankruptcy. Rehabilitation has existed since 1997; however, until 2012, it was vaguely described as a procedure to be conducted, mainly, by a rehabilitation manager under the supervision of an authorized state body with limited involvement from creditors and courts. In 2012, the amendments to the then-current bankruptcy law introduced rehabilitation in its substantially current form—with court hearings on whether to start rehabilitation, a separate court approval of a rehabilitation plan, greater creditor control over all stages of the procedure, the right to keep pre-rehabilitation management and other novelties. The 2014 bankruptcy law, among other things, introduced a number of rules applicable to all insolvency procedures—including rehabilitation—and included enhanced responsibility of management and shareholders for wrongdoings, limitation of rights of affiliated creditors, a separate priority line for penalties and indemnities, etc.

In 2014-2015, a significant oil price downturn resulted in a devaluation of the Tenge, Kazakhstan's currency, against the US Dollar (more than 2.5 times) and a decrease in the growth rate of Kazakhstan's economy, which is expected to be at 1.2% in 2015, relative to 4.3% in 2014.[2] In August 2015, the National Bank of Kazakhstan stopped supporting the Tenge and started targeting inflation. Small and mid-size companies in the oil and gas sector and companies in other sectors having substantial hard currency indebtedness were mostly hit. We have seen such companies use rehabilitation proceedings in an attempt to cure their financial affairs and avoid bankruptcy. Although up-to-date data is not available yet, there were 22 court decisions on rehabilitation in 2014 and ten court decisions on rehabilitation within only the first two months of 2015.[3]

What is Rehabilitation?

In Kazakhstan, bankruptcy results in the liquidation of a company; the rehabilitation procedure, however, is intended to enable debtors to pay their debts and avoid liquidation on the basis of a rehabilitation plan approved by the creditors

and ratified by court. Both bankruptcy and rehabilitation are initiated through a judicial procedure.

Only commercial entities and entities that do not benefit from state support measures may be brought under rehabilitation. There are also specific provisions for rehabilitation of natural monopolies and entities having a dominant position in the market as well as certain other companies, however, such provisions are not the subject of this article.

Rehabilitation Benefits

First, rehabilitation protects the debtor from claims of creditors for the period of rehabilitation. This enables the debtor to approach all creditors at once and negotiate a comprehensive restructuring.

Second, the rehabilitation plan may provide for the extension and/or straight discounting of monetary obligations of the debtor. The plan may also provide for debt or equity investments from third parties (including the creditors) and other measures. Rehabilitation may last for up to five years, with a possible extension for up to six months.

Third, normally, upon approval of the rehabilitation plan, the court appoints a rehabilitation manager who undertakes day-to-day management of the debtor. However, if the debtor so requests and the creditors approve, the court may allow the company's officers to perform the management functions of the rehabilitation manager.

Rehabilitation Test

From the text of the law and court practice,[4] in order for a debtor to commence rehabilitation it must prove two facts to the court:

— its insolvency and/or inability to fulfill financial obligations coming due within the next 12 months; *and*

— its ability to restore its solvency.

A debtor is considered *insolvent* if any of the following conditions is met:

— certain payment obligations[5] are not fulfilled within three months after their due date, provided their amount is not less than 100 times the monthly calculation index (MCI) (one MCI is equal to KZT 2,121 or, as of 21 January, 2015, around US$5.50); or

— tax obligations of the debtor are not fulfilled within four months after their due date, provided their amount is not less than 150 MCI; or

— obligations to other creditors are not fulfilled within three months after their due date, provided their amount is not less than 1,000 MCI.

Generally, the court looks at the assets and liabilities of the debtor, including immediately available cash, fixed assets, assets that are pledged and/or under arrest, outstanding court and arbitral decisions, contingent liabilities (whether financial or otherwise) when considering whether the debtor is truly insolvent and indeed meets the criteria listed above or whether it is not able to pay its debts within the next 12 months.

Establishing the "ability to restore its solvency" could be more complex, as neither the law nor existing practice give sufficient guidance on what exactly this means and how such ability can be proven.

Continued ▶

Rehabilitation Timeline and Protection

There are four key dates in rehabilitation:

Initiation of rehabilitation proceedings

The date when the court has accepted an application for rehabilitation (whether from the debtor or from a debtor's creditor). From that date:

Debtor may not undertake operations outside ordinary business activity without the approval of a temporary manager/administrator.

Execution of outstanding court or arbitral decisions is postponed and no execution may be levied on the debtor's assets.

All claims of creditors may be filed only as part of rehabilitation procedure.

Shares in the debtor may not be alienated.

Court Decision to start rehabilitation

If the court considers the conditions required for the rehabilitation test to have been met, it issues a decision commencing the rehabilitation.

Once such decision is issued, penalties and interest on any outstanding debt stop to accrue.

The court appoints a temporary administrator (a qualified individual registered with state authorities as eligible to act as such) to form a register of creditors.

The register must be compiled within 2 months

Claims by the creditors must be brought to the attention of the temporary administrator within 1 month from the date of public announcement of rehabilitation.

Approval of a rehabilitation plan

Within 3 months of the court decision commencing the rehabilitation, a rehabilitation plan must be developed and approved by the creditors' meeting.

At the meeting all creditors included in the list of creditors except for creditors that are affiliated with the debtor (including direct and indirect holders of 10% or more of the debtor's shares) may vote on a "**one tenge – one vote**" basis.

Upon the court's approval of the rehabilitation plan, the rehabilitation starts and the plan becomes binding on the debtor and its creditors. By the same decision the court approves the duration of the rehabilitation and appoints a rehabilitation manager (a qualified individual registered with state authorities as eligible to act as such) to run the debtor.

If the debtor so requests and the creditors approve, the court may allow the company's officers and shareholders to continue performing day-to-day management of the debtor during the rehabilitation.

Termination of rehabilitation

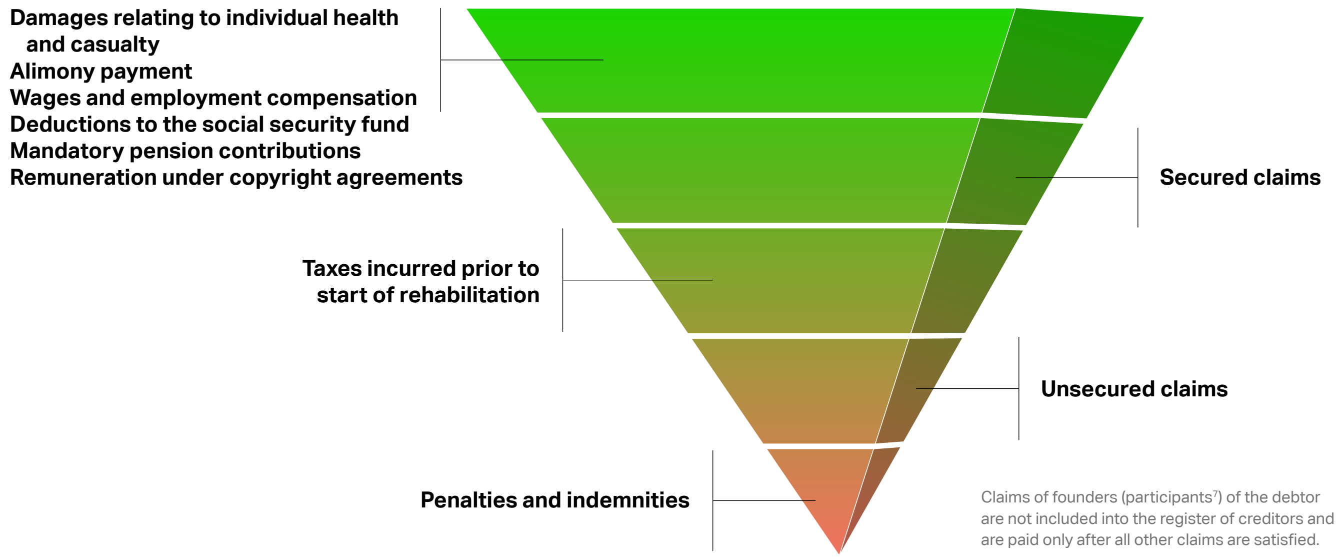
On the basis of a decision of the creditors' meeting, the rehabilitation manager applies to the court to terminate the rehabilitation by reason of either achieving the purpose (to restore solvency) or an inability to achieve the purpose.

Shareholders and/or creditors may also apply for termination in case of wrong-doing by the debtor (non-fulfilment of payment terms of the plan for more than 3 months or other damage to the interests of shareholders or creditors).

In case the rehabilitation manager applies for termination of rehabilitation because it has achieved its purpose, the court terminates the rehabilitation and the debtor is restored as a solvent entity with no limitations.

In all other cases, upon termination of the rehabilitation, the court simultaneously initiates bankruptcy proceedings.

Waterfall Structure in Rehabilitation



Treatment of Creditors

Below are several considerations relevant to the treatment of creditors during a rehabilitation process.

Claims Subject to Restructuring
The claims included into the register of creditors[6] and, thereafter, included into the rehabilitation plan are paid not in accordance with their contractual terms, but rather in accordance with the terms of the plan.

The law provides for five levels of priority of payments during rehabilitation. Claims of a given level are paid after full satisfaction of the claims of the preceding level.

Ahead of and outside of the rehabilitation payments—administrative and court expenses and taxes incurred in tax periods after the start of rehabilitation;

Claims outside restructuring
Once the rehabilitation plan is approved, the debtor should first make, among other things, certain payments, such as alimony payments and damage to the health of an individual, salaries and salary related taxes and claims that "became due" (note our comment in the Section Claims Outside Restructuring below) after the approval.

Making a claim
Only monetary liabilities that (i) are known at the moment of bringing a claim and (ii) are actually claimed may be included into the register of creditors. For example, if there is a service contract, which was partially fulfilled, only indebtedness for the services already delivered may be included into the register. By way of additional example, a creditor having a claim has a choice whether to submit such claim to the temporary administrator or not. In the latter case the claim will not be included into the register and will unlikely be paid during the rehabilitation as there is a moratorium on enforcement of claims. However, if a claim is not included in the register and, thus, the rehabilitation, then, subject to the statute of limitations and any other specific terms of the claim, such claim can be brought after the completion of rehabilitation.

Acceleration
There is substantial ambiguity on the treatment of liabilities with different maturities, for example, repayment of loans in installments or repayment of trade indebtedness that are not matured during rehabilitation. As for bank loans, most of them provide for automatic acceleration in the event of insolvency or substantial deterioration of a financial state of a debtor. It may sound logical that debts not having similar automatic acceleration provisions should be treated differently. Market practice, however, ignores contractual schedules of payments and allows a creditor to demand the debtor to include the whole outstanding amount into the register of creditors (provided that the amounts are known at the moment of registering the claim) even if such schedule is longer than the term of rehabilitation.

Operational and Legal Challenges

Rehabilitation is not a straightforward process, and a debtor may face significant pitfalls on the way to an effective rehabilitation. The main problems appear to be inconsistent court practice and a lack of developed legislation. Below are examples of some issues we have seen in rehabilitation practice.

- **Establishing insolvency**: From a plain reading of the law, establishing the debtor's insolvency/inability to pay its debts on the basis of the criteria listed above should not be difficult. However, Section 14 of the Supreme Court's Normative Resolution No. 5, dated 2 October, 2015 (the "SC Resolution") says that a debtor may not have as the purpose for rehabilitation to delay the performance of its obligations. Neither the law nor practice contain specific criteria for establishing such a purpose, which leaves the matter to the discretion of the court. Thus, there is a risk that a court may refuse to commence rehabilitation if it believes that a debtor's purpose is to simply delay payment of its obligations.
- **Establishing ability to restore solvency**: As mentioned above, there is insufficient guidance on what the "ability to restore solvency" means and how such ability can be proven. The SC Resolution requires the debtor to prove that there is a number of interrelated specific measures aimed to restore financial health and based on mutual consent between the debtor and the creditors. To that effect, a court may require the debtor to submit during hearings on whether to start rehabilitation evidence of financial support of shareholders (if any), contracts with customers, list of specific measures to decrease expenses, prospected financial flows, discount levels, etc. However, it is likely that the debtor may only get clarity on most of such issues during the course of development and approval of the rehabilitation plan, i.e. after the decision to start rehabilitation.
- **Consent of the creditors**: Similarly, it is not clear at what stage the debtor should secure the consent of its creditors to the rehabilitation. The law provides that the creditors approve the rehabilitation plan, which is prepared and approved only after the rehabilitation starts. The SC Resolution, however, effectively requires the debtor to secure creditors' support for rehabilitation at an earlier stage, during the court hearings. It may be difficult for the debtor to convince creditors to support rehabilitation at the stage of court proceedings (in practice, even before the start of the proceedings) when the debtor may only be able to present creditors a satisfactory level of plan details only later in the process.
- **Claims outside restructuring**: As mentioned above, claims of creditors that "became due" after the approval of the plan should be satisfied in full in accordance with their contractual terms. According to one interpretation, "become due" means the claims under the contracts entered into after the approval of the plan. According to another interpretation, though, it may include claims based on the contracts entered into before the approval of the plan that became payable after the approval of the plan. We believe the former interpretation is correct because it is more consistent with treatment of financial claims (see above). However, the courts may take a different view.
- **Limitless "Haircut"**: The law sets no limit on the amount of the "haircut" that may be applied to claims included into the rehabilitation plan and, when applying haircuts, does not distinguish between various classes of creditors (secured/tax claims/unsecured/affiliated). Some creditors may prefer to pursue claims against the debtor in court on an individual basis in anticipation that the return will be higher compared to what they will receive in the event of a rehabilitation involving a significant discount for creditors.
- **Monetary liabilities only**: As a conceptual matter, the law does not provide for a possibility to restructure non-monetary liabilities, for example, to postpone an obligation to deliver goods or services produced by the debtor. This also substantially limits the applicability of the law.

Conclusion

The new rehabilitation legislation represents a significant development in the legislation. We see an increasing number of companies pursuing this route to restore financial health. However, we also see the need for further legislative changes to simplify and better describe each state of the rehabilitation process, including rights of creditors, the debtor and its shareholders. ■

1. Law on Rehabilitation and Bankruptcy dated 7 March 2014 No. 176-V (as amended, the "**Law on Rehabilitation and Bankruptcy**").
2. http://www.ebrd.com/where-we-are/kazakhstan/overview.html
3. http://kgd.gov.kz/sites/default/files/Reabilibankrotstvo/info/2_ob._o_prim._reab._pr_6.xlsx.
4. Article 5.3 of the Law on Rehabilitation and Bankruptcy.
5. This includes obligations to pay damages to the life and health of an individual, alimony payments, wages, employment compensation, deductions to the social security fund, mandatory pension contributions, or remuneration under copyright agreements.
6. Only monetary liabilities are subject to inclusion into the register of creditors and are subject to restructuring. For example, an obligation to deliver goods or services by a certain date may not be included into the register as opposed to a claim for reimbursement of damages for non-delivered goods/services.
7. The law uses the term 'participants' which, strictly speaking, relate only to equity holders in a limited liability partnership and do not relate to equity holders in a joint stock company. For information, limited liability partnerships and joint stock companies are two most popular forms of commercial entities in Kazakhstan. We are of the view that the intention of law was to cover both participants and shareholders; however, we cannot exclude other interpretations.

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LEGISLATION WATCH / MIDDLE EAST

U.A.E. Set to Welcome New Insolvency Regime

By **LAWALE LADAPO** *(lladapo@cgsh.com) and* **MARIAM AL-ALAMI** *(malalami@cgsh.com)*

The Council of Ministers of the United Arab Emirates (U.A.E) approved a draft federal insolvency law in July 2015. Although there are still some regulatory hurdles (the approval and ratification of the Federal National Council and Supreme Council and approval by the U.A.E. President), the approval by the Council of Ministers is a significant step towards the introduction of long awaited comprehensive insolvency law reform in the U.A.E.

The absence of a consolidated regime for resolving failing businesses in the U.A.E has long been viewed as a significant disincentive to doing business in the U.A.E. The existing insolvency regime, which is broadly spread across three pieces of legislation (the Civil Code, the Commercial Transactions Law and the Commercial Companies Law), provides a formal court-supervised process for settling creditor claims and for liquidation. However, these laws have been thought to be unclear and inconsistent and have been largely untested. Distressed U.A.E. companies have historically opted for private restructurings and negotiations instead of a court-supervised process. Liquidation is also the default option under the court led process, where the company is unable to agree a restructuring with its creditors. One additional challenge worth noting in the U.A.E. is the rather broad potential criminal consequences for directors and managers in an insolvency scenario, which again discourages businesses from restructuring through a court-supervised process.

The objective of the new draft insolvency law is to regulate accumulated debts, ease the restructuring of companies, support troubled businesses, mitigate bankruptcy risk and ensure a safe and attractive business environment for the U.A.E. The new draft law is yet to be made publicly available, but key features of the new law are expected to include, suspending actions by creditors and making provision for interim funding during the insolvency process, decriminalizing the issuance of bounced cheques and introducing an insolvency procedure where two-thirds of the creditors can approve a restructuring proposal. The draft law has been making its way through the legislative process for several years now.

It suffices to note that companies incorporated in the free trade zones that are self-legislating financial centers—the Dubai International Financial Center (DIFC) and the Abu Dhabi Global Market (ADGM)—have their own insolvency laws which are generally well developed and such companies are not subject to the federal insolvency laws of the U.A.E.

Options for Corporate Restructuring in Pakistan

By ALTAF QURESHI

PAKISTAN'S CORPORATE INSOLVENCY FRAMEWORK has its conceptual roots in English law and is governed by the Companies Ordinance, 1984 (the "**Ordinance**"). The primary objective of the relevant legal provisions is to protect the interest of creditors, balanced against shareholders, through a transparent winding up process.

Investors, sponsors and similar interested third parties are primarily concerned with understanding a Pakistani court's approach to winding up a company, for fear that this process may be outside of their control or does not offer commercial opportunities relating to distressed enterprises. The following article summarizes the main options available for corporate restructuring in Pakistan.

Winding Up

Under section 297 of the Ordinance, a company incorporated in Pakistan may be wound up either by a court, voluntarily through a petition, or by a combination of the two, in each case through a process supervised by the High Court, which is appealable to the Supreme Court in Pakistan.

There are five High Courts in Pakistan, one for each of the four provinces and an additional one for the federal capital Islamabad.

The grounds on which a company in Pakistan may be wound up include, among others, the company being unable to pay its debts (which may include contingent and prospective liabilities). The purpose of winding up proceedings is essentially for the court to determine the solvency of a Pakistani company in the face of all its creditors as a class. Therefore, the ground of "inability to pay debts" is based on the lack of available company assets to do so, rather than a mere unwillingness to pay.[1]

While the Ordinance lays out the procedure and grounds for a corporate insolvency, general principles of insolvency, obtained from bankruptcy laws for individuals in Pakistan, are deemed to apply to corporate entities pursuant to section 404 of the Ordinance. The Ordinance also provides procedures for winding up a foreign company that "goes into liquidation in the country of its incorporation" and that has an established place of business in Pakistan.

The court's powers for adjudicating the merits of a winding up petition are outlined in section 314 of the Ordinance. Such powers are broad enough to enable the dismissal of frivolous petitions and to regulate the conduct and affairs of the company, with the purpose of preventing prejudice against certain shareholders and creditors of the company. Different shareholders and creditors may be categorized into different classes if sufficient justification exists to connect them (e.g. a class of preferential shareholders). A winding up petition may therefore be denied by the court on the grounds that it is prejudicial to a particular class of shareholders or creditors.

The court also has the ability to provide alternative relief when it is justified and a genuine insolvency situation does not exist. For example, when the underlying motive for filing a winding up petition is not insolvency-related but rather related to a creditor wanting to take an unfair advantage over other creditors (when the company itself is not insolvent) or to apply pressure on the company to pay a debt that is genuinely contested, the court would seek to recognise those underlying motives and deny the winding up petition using its powers under section 314 of the Ordinance.[2]

As in English law, in the interim period before a winding up order is passed, a provisional manager may be appointed for the company. In cases where a winding up order is entered, an official liquidator is appointed in order to conclude the winding up and dissolution of a company. The liquidator, through the powers granted by section 333 of the Ordinance, aims to achieve the maximum recovery and realization of value from the assets of the company for the petitioners, the creditors whose debts have been recognized by the official liquidator and the registered shareholders.

Reorganisation

Pakistani insolvency law also affords opportunities for corporate reorganization. In terms of the legal approach, a distinction is made between companies, where restructuring is approved by the courts versus banks or non-banking financial institutions, where the Securities and Exchange Commission of Pakistan and the State Bank of Pakistan, respectively, must approve any restructuring proposal.

In the case of a company restructuring, a proposed "scheme of arrangement," in accordance with section 284 of the Ordinance, is filed with the court either in the context of a winding up proceeding or outside of a winding up proceeding (for example, in the case of a merger or acquisition where both companies are going concerns).

If a scheme of arrangement is to be filed during a winding up proceeding, an application would first be submitted for an interim injunction under section 319 of the Ordinance, which injunction the court may grant upon "proof to the satisfaction...that all proceedings in relation to the winding up ought to be stayed."

Following the grant of the interim injunction, the court must be presented with a "compromise or arrangement" among the company, its creditors, shareholders and the official liquidator (if any). Upon receipt of the scheme of arrangement, the court will consider if the scheme is *bona fide* and workable, although a court would not generally refuse to sanction a scheme that is unanimously agreed to among the relevant parties. The court leaves the merits of the scheme to be decided by a meeting, which it orders to be convened, among the creditors and the shareholders to consider the proposed scheme of arrangement. The court retains discretion to sanction the scheme (following the decision of the meeting) to ensure that the procedure was accurately followed and that the meeting was convened in a *bona fide* manner that is fair and reasonable to all interests.

Both draft bills sought to introduce a Chapter-11 style regime in Pakistan but also took inspiration from Mexico's insolvency law to better account for the context of a developing country.

During a meeting of the creditors and shareholders, a scheme of arrangement must be approved by a majority in number "representing three-fourths in value of the creditors or class of creditors or members, as the case may be, present and voting either in person or, where proxies are allowed, by proxy...". In practice, this means that the voting pool for the scheme will entirely consist of those creditors or shareholders (or their proxies) who are *present* and *vote* at the meeting. Each shareholder would ultimately receive one vote per share while a creditor would receive votes corresponding with the value of their debt. The majority vote for the scheme is achieved once 75% of the value of the creditors and votes of shareholders, who are present at the meeting, have voted in favour of the scheme.

In the case of *Dewan Salman Fibre Limited vs. Dhan Fibres Limited* (PLD 2001 Lahore), the court recognised, in the context of a voluntary winding up, that the informed view of the majority to a compromise falls within the realm of "corporate and commercial wisdom" which the court does not have the necessary expertise but would act as an umpire. Similarly in *Nova Leathers (Private) Limited vs The Registrar, Joint Stock Companies* (PLD 2001 Karachi), where a scheme of arrangement had proposed a merger, the court recognised that the objective of the merger was to achieve economies of scale and to carry on the business in a more economically efficient manner.

Restructuring Loan Agreements

The corporate insolvency framework described above should be distinguished from the framework for restructuring loan agreements, including loan agreements entered into pursuant to Loan Market Association documentation, which are recognised in Pakistan. Loan agreements in Pakistan are governed by principles of contract law, which provides parties with the freedom to contract (within statutory boundaries, if any) and choose their proposed restructuring arrangements for the relevant debt obligation. In this regard, Pakistan's approach to restructuring facility agreements and bond issuances is similar to the practice under English law; however, Pakistani law additionally permits the restructuring of contractual debt obligations through a scheme of arrangement filed with the court. This latter approach is particularly useful in the event that not all parties to a contractual debt obligation agree to a proposed restructuring and prevent the execution of amendment agreements.

Recent Developments

Recognizing the need for more detailed and commercially appealing restructuring and corporate rehabilitation legislation, the Securities and Exchange Commission of Pakistan has undertaken an extensive review and consultation process to amend the corporate insolvency laws in Pakistan as a first step in bringing about the necessary changes to Pakistan's insolvency legal and regulatory landscape.

In this regard, there had been some initial successes when the restructuring of bank portfolios of non-performing assets was addressed by the adoption of the Corporate and Industrial Restructuring Corporation Ordinance of 2000 and the Non-performing Assets and Rehabilitation of Industrial Undertakings (Legal Proceedings) Ordinance of 2000. The combined pieces of legislation established a fast track method at the High Court for the acquisition, restructuring or disposition of non-performing loans and other assets of banks in the public interest. Consequently, a statutory framework enabling distressed debt investments had been in place in Pakistan; however, both ordinances have now expired and are no longer in effect.

More recent efforts by the Securities and Exchange Commission of Pakistan to reach industry and stakeholder consensus for restructuring legislation reform led to the Corporate Rehabilitation Bill of 2011 and, subsequently, the Corporate Restructuring Companies Bill of 2015. Both draft bills sought to introduce a Chapter-11 style regime in Pakistan but also took inspiration from Mexico's insolvency law to better account for the context of a developing country. Pakistani regulators have a long history of studying other jurisdictions for market development and reform; however, the use of Mexican insolvency laws in itself demonstrates an evolution in such market studies, where previously advanced markets were reviewed, but where such legal transplants may not have provided the expected benefits. While these corporate restructuring bills have not been passed, it continues to be the stated and official aim of the Securities and Exchange Commission of Pakistan to introduce legislative reforms to Pakistan's corporate insolvency laws. It remains unclear what the timeline for adopting such reforms will be and what the eventual bill would contain.

In the meantime, avenues for corporate or debt restructuring of a distressed company exist through the filing of schemes of arrangement before a court. Such schemes may be used in the context of winding up petitions or in the absence of any insolvency proceedings relating to the relevant company. In the context of contractual debt obligations, such as Loan Market Association loan documentation, restructuring in Pakistan is handled as it is under English law, through appropriate structural or contractual amendments, but may also involve schemes of arrangement in the event that minority creditors are entrenched and preventing the restructuring. ■

1. Examples of other grounds under which a company in Pakistan may be wound up are for carrying on unlawful or fraudulent activities; for carrying on business in a manner oppressive to any of its shareholders (including minority); or if it is "just and equitable" to do so. This last ground is seen as a question of fact and depends on the circumstances of each case and therefore cannot be summarised as a general rule.
2. In *Khursheed Ismail vs. Unichem Corporation (Private) Limited* (1996 CLC 1863), the petitioner shareholders alleged irregular increase of capital and issuance of new shares in the respondent company. The courts held in this case, alongside a series of cases, that there are three broad categories of cases where there exists "just and equitable" grounds for winding up a company. The first is the exclusion of a director from management; the second is where there is a complete state of deadlock and third is when there is a justifiable lack of confidence in the management of the company. However, in each case, the court seeks to find a balance with the interests of shareholders. The courts have rejected arguments in the past relating to dishonest directors or directors that have entered into *ultra vires* transactions, as being insufficient bases to argue for just and equitable winding up of a company.
3. In the case of Integrated Technologies & Systems Limited vs. Interconnect Pakistan (Private) Limited (2001 CLC 2019), the petitioner was a BVI incorporated company that held shares in the respondent company, which the petitioner sought to wind up alleging that the respondent company had acted unlawfully and in a manner that was oppressive to its interests as a shareholder (as they were being excluded from the affairs of the company and company funds were being diverted). The court passed a winding up order in this case but had it suspended until the sooner of a fixed date or when an agreement is met between the petitioner and another large shareholder for a buy-out of shares in the respondent company. The court allowed the parties to agree to a price among themselves for their shares (subject to a minimum) and restricted the respondent company from raising finance or debt during this period.
4. The reason for such an order was to enable the respondent company to continue functioning as a viable entity. This was due to the fact that the company was fully operational and had undertaken substantial projects which were being executed using significant sums, by way of direct foreign investment, and that consequently an immediate winding up order was likely to prejudice the shareholders, creditors and interested third parties.

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LEGISLATION WATCH / INDIA

Recent Insolvency and Proposed Bankruptcy Law Reforms in India

By **SHREYA LAL DAMODARAN** *(sdamodaran@cgsh.com)*

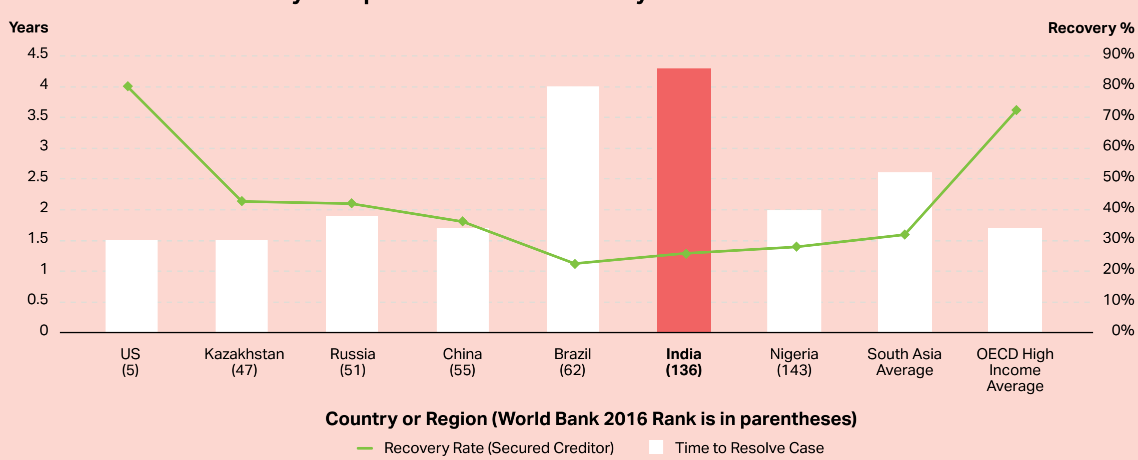
In early November 2015, the Government of India-appointed committee called "The Bankruptcy Law Reforms Committee" ("BLR Committee") released a draft Insolvency and Bankruptcy Bill, 2015 (the "Draft Bill"). The proposed reform, which covers both corporate and personal insolvencies, suggests sweeping changes in existing laws in India with a view to bringing about an effective insolvency and bankruptcy regime.

In his Budget Speech 2015-16, Indian Finance Minister Shri Arun Jaitley had identified bankruptcy law reform as a key priority for improving the ease of doing business in India. This was in the backdrop of the criticism around India's current insolvency regime, which is believed to have pulled down India's ranking in the World Bank's Doing Business report, the most recent of which ranks India 136 out of the 189 economies for resolving insolvencies.

As the BLR Committee noted, the current bankruptcy laws in India are highly fragmented. Powers of a creditor and a debtor under insolvency are provided for under different statutes. It is also problematic that these different laws are implemented in different judicial fora and at times, there is lack of clarity as to which forum has jurisdiction. Moreover, the fora entrusted with adjudicating on matters relating to insolvency and bankruptcy may not have sufficient business or financial expertise, information or bandwidth to handle these matters. This leads to delays and extensions in arriving at an outcome and increases the vulnerability to appeals of the outcome. The Committee noted that, according to the World Bank report, the average time to resolve insolvency in 2014 was four years in India, compared to 0.8 years in Singapore and one year in London.

More recently, while presenting the Indian General Budget 2016-17 on February 29, 2016, the Union Finance Minister Shri Arun Jaitley announced that a comprehensive "Code on Resolution of Financial Firms" will also be proposed as a Bill to deal with the void that exists with regard to bankruptcy situations in financial firms such as banks, insurance companies and other financial sector entities. Together with the Draft Bill, such proposed legislation should fill a major systemic vacuum in the area of bankruptcy laws in India.

Insolvency Comparison – 2016: Recovery Rates & Years to Revolve Case



Source: World Bank, Doing Business Database, 2016 rankings (end of 2015 data), available at: http://doingbusiness.org/rankings.

Key Reforms Proposed In Draft Bill

Consolidation of the existing laws relating to insolvency of companies, limited liability entities (including limited liability partnerships), unlimited liability partnerships and individuals which are presently scattered in a number of legislations, into a single legislation.

Establishment of an **Insolvency Regulator** to exercise regulatory oversight over insolvency professionals, insolvency professional agencies and informational utilities.

An **Adjudicating Authority** will have the jurisdiction to hear and dispose of cases by or against the debtor.

- In the case of individuals and unlimited liability partnership firms, the Adjudicating Authority will be the Debt Recovery Tribunal. Appeals from the orders of this tribunal will lie to the Debt Recovery Appellate Tribunal.
- The National Company Law Tribunal shall be the Adjudicating Authority with jurisdiction over companies and limited liability entities.
- Appeals from the order of this tribunal will lie to the National Company Law Appellate Tribunal and this body will also be the appellate authority to hear appeals arising out of the orders passed by the Insolvency Regulator in respect of insolvency professionals or information utilities.

Regulation of insolvency professionals and insolvency professional agencies. Under the Insolvency Regulator's oversight, these agencies will develop professional standards, codes of ethics and exercise a disciplinary role over errant members, leading to the development of a competitive industry for insolvency professionals.

Involvement of information utilities which would collect, collate, authenticate and disseminate financial information from listed companies and financial and operational creditors of companies. An individual insolvency database is also proposed to be set up with the goal of providing information on insolvency status of individuals.

Revamp the revival/re-organisation regime applicable to financially distressed companies and limited liability entities; and the insolvency related liquidation regime applicable to companies and limited liability entities. Introduction of a clear, coherent and speedy process for early identification of financial distress and revival of the companies and limited liability entities if the underlying business is found to be viable.

New swift process and timeline of **180 days for dealing with applications for insolvency** resolution. This can be extended for 90 days by the Adjudicating Authority only in exceptional cases. During the insolvency resolution period, the management of the debtor is placed in the hands of an interim resolution professional/resolution professional.

An insolvency resolution plan prepared by the resolution professional has to be approved by **75%** of recognised claims of the financial creditors. Once the plan is approved, it would require sanction of the Adjudicating Authority. If an insolvency resolution plan is rejected, the Adjudicating Authority will make an order for the liquidation.

New fast track insolvency resolution process which may be applicable to certain categories of entities. In such a case, the insolvency resolution process has to be completed within a period of 90 days from the trigger date. However, on request from the resolution professional based on the resolution passed by the committee of creditors, a one-time extension of 45 days can be granted by the Adjudicating Authority. The order of priorities (waterfall) in which the proceeds from the realisation of the assets of the entity are to be distributed to its creditors is also envisaged.

New insolvency regime for individuals and unlimited liability partnerships. As a precursor to a bankruptcy process, the Draft Bill envisages two distinct processes under this part, namely, "Fresh Start" and "Insolvency Resolution".

- In the Fresh Start process, indigent individuals with income and assets lesser than specified thresholds shall be eligible to apply for a discharge from their "qualifying debts". The resolution professional will investigate and prepare a final list of all qualifying debts within 180 days from the date of application. On the expiry of this period, the Adjudicating Authority will pass an order on discharging of the debtor from the qualifying debts and accord an opportunity to the debtor to start fresh, financially.
- In the Insolvency Resolution Process, the creditors and the debtor will engage in negotiations to arrive at an agreeable repayment plan for composition of the debts and affairs of the debtor, supervised by a resolution professional. The bankruptcy of an individual can be initiated only after the failure of the resolution process. The bankruptcy trustee is responsible for administration of the estate of the bankrupt and for distribution of the proceeds on the basis of the priority.

New transition provision during which the Central Government of India will exercise all the powers of the Insolvency Regulator until the time the Insolvency Regulator is established. This transition provision will enable quick starting of the process on the ground without waiting for the proposed institutional structure to develop.

1. Main sources: The draft Insolvency and Bankruptcy Bill, 2015 and the Summary of the Recommendations of the Bankruptcy Law Reforms Committee released by the Press Information Bureau, Government of India.

Recent Amendments to the Bankruptcy Regulations in Russia

By **POLINA LYADNOVA**, **VICTORIA KARPOVA** *and* **ALEXANDER GOLOVKIN**

Russian legislation related to insolvency and restructuring has advanced over the past year with developments generally aimed at making the process more creditor friendly.[1] The key amendments (the "**Amendments**") to Federal Law No. 127-FZ "On Insolvency (Bankruptcy)" dated October 26, 2002, as amended (the "**Bankruptcy Law**") discussed in this article relate to the (i) initiation of bankruptcy proceedings, (ii) new notification duty of debtor's chief executive officer, (iii) additional rights of secured creditors and (iv) rules on challenging transactions in bankruptcy proceedings. The Amendments were introduced to the Bankruptcy Law in December 2014 and June 2015.[2]

Initiation of Bankruptcy Proceedings

General Developments

Prior to the Amendments, bankruptcy proceedings could be initiated only by the debtor itself and, if certain requirements were met, by its creditors or authorized governmental bodies (such as the Federal Tax Service or the Pension Fund of the Russian Federation). Such requirements generally included the need to obtain a resolution of a Russian state court, which became effective, or an arbitral award confirming claims against the indebted company prior to launching insolvency proceedings.[3] The minimum claims required to be held by creditors that wished to commence proceedings was quite low and normally would not have posed a practical limit on the creditors' ability to act—the total amount of claims must have exceeded RUB 100,000 (approx. USD 1,350), and RUB 500,000 (approx. USD 6,760) if the indebted company is a strategic enterprise[4] or a natural monopoly.[5]

Amendments' changes to requirements for initiating bankruptcy proceedings:

1. The list of creditors entitled to launch the bankruptcy proceedings was expanded and current and former employees of the company in question became entitled to submit an application for bankruptcy of their employer in case of non-payment of wages or severance payments, as well as apply to court to hold "controlling persons"[6] of the debtor liable.
2. A bankruptcy application based on an arbitral award may be submitted only if a state court's resolution to issue an enforcement order with respect to such arbitral award has become effective.[7]
3. The total amount of claims must now exceed **RUB 300,000** (approx. USD 4,050). In case of strategic enterprises and natural monopolies, this threshold is **RUB 1 million** (approx. USD 13,525).

Simplified Procedure for Allowing Credit Institutions to Initiate Bankruptcy Proceedings With Respect to Their Debtors

Another important development introduced by the Amendments was designed to simplify initiation of involuntary bankruptcy proceedings by credit institutions. Credit institutions are now placed in a privileged position and allowed to submit a bankruptcy application with respect to debtors even in the absence of a prior court decision confirming the indebtedness if there are signs of a debtor's insolvency, which means that the debtor's payment obligations are overdue for more than three months (the "**insolvency indicators**"). Prior to submission of a bankruptcy application, a credit institution is required to publish a notice in the Unified Federal Register of Information on Events with respect to Legal Entities regarding its intention to apply for a debtor's bankruptcy at least 15 days prior to such application. Some Russian banks have already started taking advantage of the simplified procedure:

Date	Filing Bank	Debtor
April 2015	Sberbank	SU-155 (construction company)
July 2015	Bank of Moscow	
October 2015	Sberbank and Alfa-Bank	Transaero (airline company)
November 2015	VTB Bank	

There is some debate over whether this new rule applies not only to Russian but also to foreign credit institutions. Uncertainty still remains as the courts have reached conflicting conclusions to date. In particular, in a recent case,[8] a court held that the Bank of Cyprus as a foreign credit institution was entitled to use the simplified procedure for bankruptcy initiation. However, subsequently, in another case involving the Bank of Cyprus,[9] the same court overruled this conclusion on the basis that the Bank of Cyprus did not have a license issued by the Central Bank of the Russian Federation to perform banking activities specified in the Federal Law No. 395-1 "On Banks and Banking Activities" dated December 2, 1990, as amended, and, thus, did not qualify to use the simplified procedure. It is currently unclear when this uncertainty will be resolved by courts.

New Notification Duty of a Chief Executive Officer

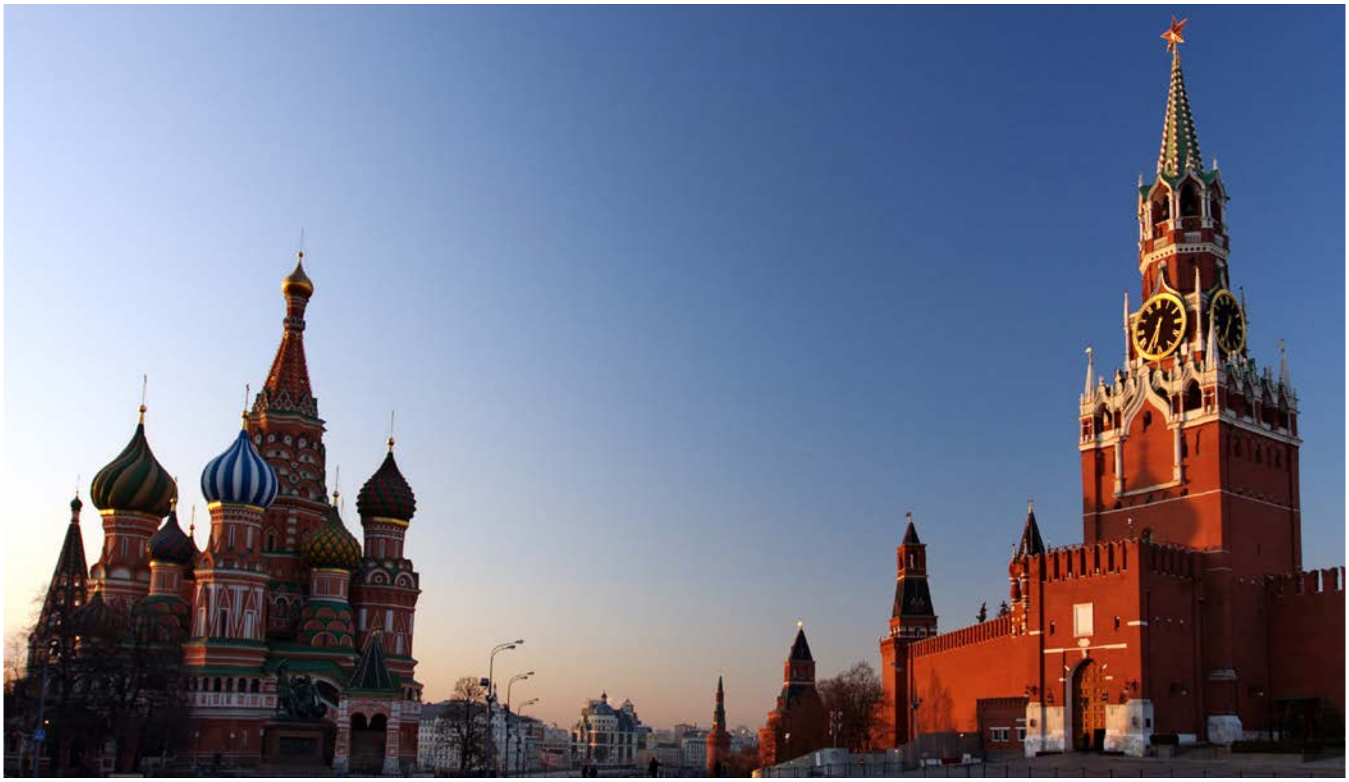
Prior to the Amendments, the Bankruptcy Law established a number of duties of a debtor's chief executive officer in connection with the debtor's insolvency, including, among others, the following: (i) to apply for voluntary bankruptcy within one month of it becoming evident that (a) the satisfaction of claims of one more creditors will result in the company's inability to perform its payment obligations to other creditors in full, (b) the enforcement of claims against the company's assets will create significant difficulties or make it impossible for the company to continue operations, (c) the company ceases to pay any part of its debts due to insufficiency of funds or has insufficient assets to satisfy its monetary liabilities or (d) in certain other circumstances determined in the Bankruptcy Law, (ii) to provide documents and information requested by a creditors' committee and/or interim manager, (iii) if a supervision procedure[10] is introduced, to propose convening of a general shareholders' or participants' meeting of the debtor and (iv) to notify employees and shareholders or participants of the debtor about the initiation of a supervision procedure. The Bankruptcy Law also provided that a chief executive officer of a debtor is required to compensate damages caused by his non-compliance with requirements of the Bankruptcy Law. In addition, a chief executive officer bore subsidiary liability with respect to the debtor's obligations if he failed to apply for voluntary bankruptcy as required by the Bankruptcy Law. The chief executive officer could also bear administrative or criminal liability for certain violations related to bankruptcy, such as concealing the debtor's property, premeditated or fraudulent bankruptcy.

The Amendments introduced a new requirement for a chief executive officer to notify debtors' shareholders or participants, its board of directors, internal audit committee and the auditor about the insolvency indicators within ten days after the chief executive officer has learned or should have learned about the debtor meeting the insolvency tests. Non-compliance with this duty may result in an administrative fine of up to RUB 50,000 (approx. USD 675) or up to two years of disqualification.

New Rights of Secured Creditors

Creditors whose claims are secured with a pledge over the debtor's property ("**secured creditors**") have a special status in the bankruptcy proceedings. Under the Bankruptcy Law, secured creditors have a first priority right to 70 percent, and 80 percent if a claim is based on a credit facility agreement, of the proceeds of sale of their collateral. If the claims of a secured creditor are not discharged with this first priority distribution, they shall be generally satisfied together with claims of all other unsecured creditors.

At the same time, secured creditors have been always restricted in their rights with respect to decision-making and participation in creditors' meetings. Prior to the Amendments, a secured creditor was entitled to attend creditors' meetings but its voting



rights were very limited. In particular, a secured creditor was entitled to vote only in the course of the following stages of the bankruptcy proceedings: (i) financial rehabilitation and external management, but in each case only if a court refused to satisfy a motion to enforce the pledge in the course of the respective stage of the bankruptcy proceedings, and (ii) supervision.

The Amendments granted additional rights to secured creditors with a view to further protect their interests in bankruptcy proceedings.

In particular, the list of issues on which secured creditors are entitled to vote has been expanded to include, among others, the right to vote on (i) the appointment and dismissal of bankruptcy administrator, who may become an instrumental figure in the sale process, and (ii) the termination of the liquidation stage of bankruptcy proceedings and the transfer to external management.

Moreover, secured creditors have now become entitled to (i) establish the starting sale price of secured property at an auction, (ii) determine procedure and conditions at an auction and (iii) determine the procedure and conditions for safekeeping of the secured property. The Amendments also specify that if the secured property is being sold together with other non-pledged assets of the debtor, the procedure for and conditions of such sale may not be established without the secured creditor's written consent.

Challenging Transactions in Bankruptcy Proceedings

In addition to general grounds for invalidation of transactions set forth in the Civil Code of the Russian Federation, the Bankruptcy Law provides for certain specific grounds for challenging transactions entered into by a debtor within a certain period prior to commencement of the bankruptcy proceedings. In particular, under the Bankruptcy Law the following transactions can be challenged: (i) suspicious transactions, which are transactions with unequal consideration or aimed to prejudice creditors' rights, and (ii) preferential transactions, which result in an unfair preferential satisfaction of claims of one or more creditors under certain circumstances. A suspicious transaction can be challenged if it was performed within one year before acceptance of a bankruptcy application by the court or after such acceptance. If a suspicious transaction was aimed to and resulted in impairment of creditors' rights and another party to the transaction was aware of such aim, the reach-back period for such transaction is three years. A preferential transaction can be challenged if it was performed within one month before acceptance of a bankruptcy application by the court or after such acceptance. If a preferential transaction was aimed to secure debtor's obligations owed to a certain creditor and resulted in a change in priority for the satisfaction of creditors' claims or if the creditor knew of the debtor's inability to pay or insufficiency of its assets, the reach-back period for such transaction is six months.

Prior to the Amendments, the above transactions could be challenged only by an external administrator or liquidator at his own discretion or based on a resolution at the creditors' meeting. If the transaction was not challenged within the term provided for in such resolution, an authorized representative of the creditors' meeting was allowed to challenge the transaction.

The Amendments extended the list of persons entitled to challenge the debtor's transactions during the external management and liquidation stages of bankruptcy proceedings, which now also includes creditors whose claims exceed ten percent of all claims included in the register of creditors' claims (not including claims of creditor that is a party to the challenged transaction, as well as claims of such creditor's affiliates).

In addition, the Amendments specified that rules related to challenging the transactions in bankruptcy proceedings also apply to (i) challenging agreements or orders providing for salary increases, payment of bonuses and other payments in accordance with labor laws of the Russian Federation and (ii) challenging the amounts of such payments.

Conclusion

While the Amendments represent a significant step forward in enhancing protection of creditors' rights in bankruptcy proceedings, which have been growing in number in light of the financial crisis in Russia, we are yet to see how the Amendments will be applied in practice. ■

1. Controlling person of a debtor is a person, who has or during the past two years had the right to direct debtor's activities. In particular, members of the liquidation committee, a person which was entitled to enter into transactions on the debtor's behalf, a controlling shareholder and general director can be determined to be controlling persons of the debtor.
2. This rule had been applied in court practice before in accordance with the Resolution of the Plenum of the Supreme Arbitrazh Court No. 60 dated July 23, 2009.
3. See Resolution of the 10th Arbitrazh Appellate Court in case No. A41-14262/15 dated June 2, 2015.
4. See Resolution of the 10th Arbitrazh Appellate Court in case No. A41-15150/15 dated August 11, 2015. This Resolution was reversed by the Arbitrazh Court of Moscow District on October 13, 2015, and the case was reconsidered by the court of first instance on February 26, 2016.

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CROSS-BORDER PROCEEDINGS

Chapter 15 News

By **LEV BREYDO** *(lbreydo@cgsh.com)*

Southern District of Florida declines to dismiss related entities from Petroforte Chapter 15 proceedings.

On March 27, 2014, the Court granted recognition of the main proceeding in Brazil with respect to Petroforte Brasileiro de Petroleo LTDA, which had once been Brazil's third largest gasoline and ethanol distributor. The recognition extended to both Petroforte and Related Entities, including Katia Rabello and Securinvest Holdings, S.A., counterparties to an ill-fated lease-back transaction, which the Brazilian Court "determined to be fraudulent and in large part responsible for the insolvency of Petroforte." In Brazil, the Trustee can pierce the corporate veil of third parties and bring their assets into the estate if it can demonstrate an intent to defraud creditors with respect to the third parties' transactions with the debtor. Rabello and Securinvest moved to dismiss the claims against them on the basis that extending the Petroforte case to them would be "manifestly contrary" to U.S. public policy, per 11 U.S.C. §1506. In its December 22, 2015 decision, the Court denied the motion to dismiss because although Rabello and Securinvest were brought into the case under "procedures different" from the Bankruptcy Code—namely, the Trustee's veil-piercing powers—such procedures were not contrary to U.S. public policy.

Through this decision, the Court helped clarify public policy considerations in extending a case to non-debtor entities.

Delaware District Court clarifies criteria for bankruptcy court recognition of a foreign proceeding facilitated by a foreign government.

On December 18, 2013, the Delaware Bankruptcy Court granted recognition of the foreign main proceeding of The Irish Bank Resolution Corporation (IBRC), the successor entity to the Anglo Irish Bank Corporation, which was nationalized following the 2008 global financial crisis. On January 29, 2014, some of IBRC's U.S. creditors appealed the recognition of the foreign main proceeding; in its August 4, 2015 decision, the Court rejected the Creditors' three lines of reasoning. First, the Creditors contended that IBRC was ineligible for Chapter 15 because it excludes foreign banks with a branch or agency in the U.S. However, the Court found no evidence that IBRC had a U.S. branch or agency at the time of filing – and specified that the filing date was the relevant assessment period. Second, the Court found that, despite the Creditors' contention, IBRC's **Irish** proceeding was a "foreign main proceeding." Finally, the Creditors argued that recognizing the Irish proceeding would be contrary to U.S. public policy because such proceeding incorporates provisions that discriminate against U.S. creditors for the benefit of the Irish government. However, the Court agreed with IBRC that the contested provisions in fact "parallel provisions in laws adopted by the United States in response to the global financial crisis."

Through this decision, the District Court helped clarify the considerations for Chapter 15 recognition of a government-facilitated foreign proceeding.

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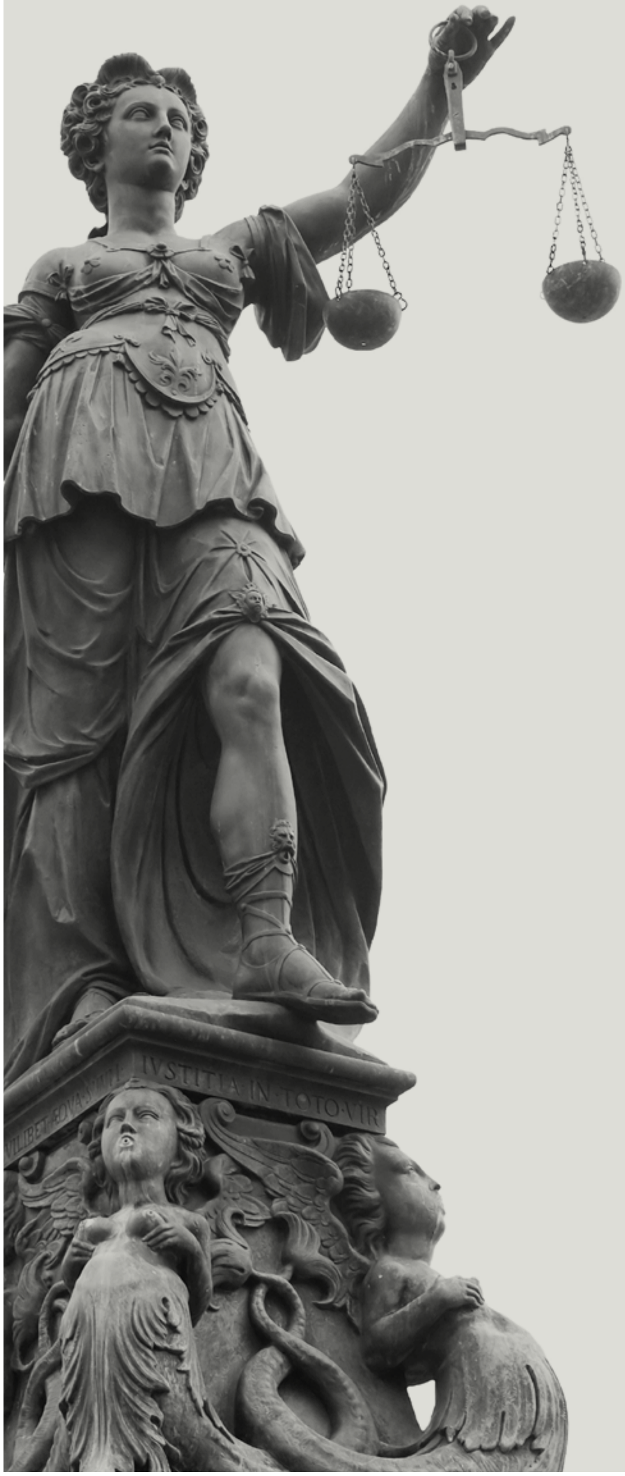

SDNY Bankruptcy Court holds that §363 sale of U.S.-based assets during main proceeding must be approved by U.S. Court.

Fairfield Sentry Limited, a British Virgin Island-based investment fund heavily exposed to Bernard L. Madoff Investment Securities, was placed into liquidation in July 2009 in the BVI. In June 2010, Fairfield's Chapter 15 petition seeking recognition of the BVI proceeding as the main foreign proceeding was granted. In December 2010, Fairfield sold its core asset—a Securities Investor Protection Act (SIPA) claim—through an auction process in the BVI to Farnum Place, LLC. Shortly after the sale, an unrelated third-party settlement significantly increased the value of the SIPA claim. Consequently—and despite the BVI court approving the sale—Fairfield's foreign representative sought to have the U.S. Bankruptcy Court disapprove the sale per §363(b) and §1520(a)(2) of the Bankruptcy Code. The Court held that Fairfield's foreign representative "demonstrated a sound business reason for seeking disapproval"—namely, the material increase in the claim's value due to an exogenous event—and thus disapproved the sale of Fairfield's SIPA claim.

This decision, along with expressing a broad interpretation of standing requirements, also helps solidify the primacy of U.S. Bankruptcy Court review of bankruptcy sales conducted during a main foreign proceeding.

DEAL NEWS / MULTI-JURISDICTION

Sale of Peruvian assets to save China Fishery Group from liquidation

By **ALESSANDRO NOLET** *(anolet@cgsh.com)*

After an eventful two months, China Fishery Group Limited (the "Company")—a Hong Kong-based global integrated fishing company with operations in Peruvian, Russian and African waters—appears to have reached an agreement with its principal bank creditors, which will allow it to avoid the risk of complex cross-border winding-up and liquidation proceedings.

In November 2015, following a failure by the Company to repay a US$ 31 million principal installment under its US$ 650 million club loan facility, HSBC Holdings Plc filed an application with the High Court of Hong Kong seeking the appointment of provisional liquidators to the Company and petitioning for the Company's winding up. On November 25, the Court appointed three KPMG employees as Provisional Liquidators of the Company and set a hearing for the winding-up petition in January 2016. Similar filings were also made by HSBC with the Grand Court of Cayman Islands and the Court's decision was expected to be issued before the end of January 2016.

However, on January 25, 2016, Pacific Andes International Holdings Limited (PAIH) announced that on January 20, the Company (and other China Fisheries group members) entered into a deed of undertaking with their principal bank lenders (led by HSBC and Bank of America) which provides for the removal and termination of provisional liquidators in the Cayman Islands and Hong Kong. In particular, under the settlement, HSBC has agreed to apply to both the High Court of Hong Kong and the Grand Court of Cayman Islands for the dismissal of winding-up applications, in addition to terminating any appeal proceedings. It is understood that both applications have already been lodged.

KEY TERMS OF DEAL WITH CREDITORS

- Sale of the China Fisheries group's Peruvian business (the "Sale Process").
- Engagement of Grant Thornton to undertake an independent accounting review of the China Fisheries group.
- Appointment of Mr. Paul Brough as chief restructuring officer (CRO) with the power, among other things, to approve all material actions relating to the Sale Process.
- Replacement of two existing board members (Mr. Ng Joo Siang and Mr. Chan Tak Hei).
- Payment to KPMG of an amount of US$ 3.1 million on account of outstanding fees, costs and expenses.
- Repayment in full of all amounts owed to each of the China Fisheries group's bank lenders and bondholders under the relevant debt instruments.

According to certain recent news reports, **the China Fisheries group is rumored to have received offers for its Peruvian business of up to US$ 1.7 billion from two potential buyers**. It is believed that such a deal would significantly improve the recovery prospects for the Company and enable it to satisfy all of its outstanding loans and notes (which amount, in aggregate, to just under **US$ 870 million**).

In the meantime, CFG Peru Investments Pte. Ltd. (a wholly owned indirect subsidiary of the Company) has also filed an application with the High Court of Singapore seeking the appointment of judicial managers. The hearing has been set for March 21, 2016. It is unknown if these proceedings fall within the scope of the deed of undertaking described above.

Selected Accolades for Cleary Gottlieb

Restructuring Team of the Year
International Financial Law Review, 2015 – 2016

Restructuring Deal of the Year
Corporación GEO; Tonon Bioenergia

International Financial Law Review, 2016

Restructuring Deal of the Year
Overseas Shipholding Group's successful restructuring and exit from Chapter 11 bankruptcy protection

International Financial Law Review, 2015

Highly Commended Firm for Restructuring
OGX's Restructuring and American Roads' Restructuring

Financial Times, 2014

Bankruptcy Practice Group of the Year
Law360, 2014

Successful Restructuring of 2014
Overseas Shipholding Group's Emergence from Bankruptcy

Turnarounds & Workouts, 2014

Mega Company Transaction of the Year
SuperMedia's prepackaged Chapter 11

Turnaround Management Association, 2013

Top Restructuring of the Year
American Roads' prepackaged bankruptcy

Turnarounds & Workouts, 2013

> "This team has been at the forefront of emerging markets work since its inception and has benefited from long-standing relationships in these markets."

Chambers Europe, 2013

Europe Restructuring Deal of the Year
Seat Pagine Gialle's debt restructuring

International Financial Law Review, 2012

Best Corporate Liability Management Deal of the Year
CEMEX

LatinFinance, 2012

Restructuring Deal of the Year
Comerci

LatinFinance, 2012

Global Finance Deal of the Year: Grand Prize
Greece's €206 billion private sector debt restructuring

The American Lawyer, 2012

Global Markets Deal of the Year
Greece's €206 billion private sector debt restructuring

Euromoney, 2012

EMEA Restructuring of the Year
Truvo

International Financing Review, 2012

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