EDUCATIONAL MATERIALS

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AMERICAN BANKRUPTCY INSTITUTE

2020 International Insolvency Forum

One Year into COVID-19: What Are the Implications for Restructurings Around the Globe in 2021?

Presented by INSOL

Ronald J. Silverman, Moderator
Hogan Lovells | New York, USA

Nastascha Harduth
Werksmans | Johannesburg, South Africa

Noel McCoy
Norton Rose Fulbright | Sydney, Australia

Catherine Bridge Zoller
European Bank for Reconstruction & Development | Brussels, Belgium

2020

COVID-19

Nastascha Harduth
18 November 2020

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COVID-19 – RESHAPING AFRICA'S FUTURE

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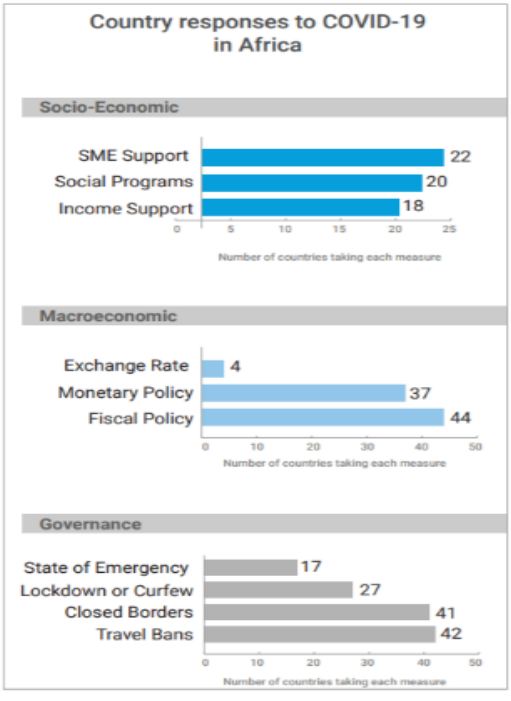
> There is no argument that the local economic and social spheres as well as global spheres have been challenged and some sectors have been drastically dismantled (Malpass D, World Bank president's remarks to the Development Committee 2020).

> Out of 54 African countries, more than half have put in place measures to respond to the Covid-19 pandemic



Source: UNDP[9]

COVID-19 – RESHAPING AFRICA'S FUTURE

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According to a UN Policy Brief of 20 May 2020:

> The expected consequences of the COVID-19 pandemic are dire

CHART 3. ILLUSTRATED CONSEQUENCES OF COVID-19 IN AFRICA

	First Order Effects	Second Order Effects	Third Order Effects
Economic	• GDP drops • Trade Balance worsens • Job and livelihood losses • Wealth depletion • Increased health and related spending	• Domestic supply chains collapse • Economic activity stalls • Increased non-formal activity	• Recession • Debt crisis • Financial distress
Social	• Loss of lives • Social spending reduced • Disproportionate impact on vulnerable groups • Social services disrupted	• Widespread deprivation • Social disaffection • Breakdown in social services	• Increased inequalities • Human development • losses • Vulnerable groups victimized • Societal unrest
Political	• Politicized responses	• Erosion of trust • Politicization of law enforcement	• Political unrest • Political violence

COVID-19 – RESHAPING AFRICA'S FUTURE

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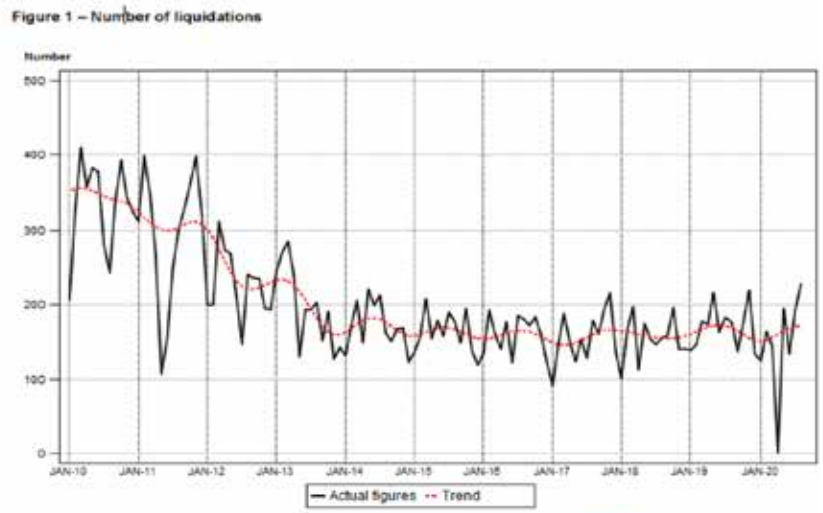
According to STATS SA statistical release of August 2020:

> A year-on-year increase in liquidations of 29,5% was recorded in August 2020 in South Africa, but has levelled out over a 10 year period



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COVID-19 – RESHAPING AFRICA'S FUTURE

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But Africans are resilient. According to a UN Policy Brief of 20 May 2020:

> African countries have largely taken a middle of-the-road approach to prevention, maintaining some level of economic activity.

> With digitalisation already transforming Africa's economies in important ways, most African countries have also actively employed digital technologies to shift to cashless transactions, for example, through the use of mobile money in East Africa, which has helped reduce the risk of the spread.

> South Africa is using cell phones for contact tracing, as opportunities for telehealth also open up.

> In addition, African civil society actors and the private sector are forming unprecedented partnerships to fight the disease.

> Tech volunteers from the Ethiopian diaspora are working with the government to develop tools for contact tracing, information campaigns and data collection. In Ethiopia and Senegal, tech start-ups are using 3D printing to develop face shields and ventilator valves.

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COVID-19 – IN AFRICA HOPE SPRINGS ETERNAL

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Alan Witherden, Business Development Director at Ocorian reported in Business Media Mags SA Mining that:

> From Africa's handling of the COVID-19 crisis and the shape of things to come, in the short to medium term the continent will be teeming with investment opportunities to grab.

> Technology-enabled sectors as pillars of resilience COVID-19 has been a strong revealer of the power of technology to support local and regional value chains, enabling the cost-effective delivery of a host of services to consumers confined in their homes.

> Specifically relevant in these times have been the digital education initiatives deployed in many countries, in the likes of Kenya's Eneza Education in partnership with telco giant Safaricom. In a post-COVID era, more online education platforms can help programmes and curricula achieve scale, reaching out to larger student populations at a lower cost, without the traditional brick-and-mortar investments.

> The same is true for digital meeting platforms

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COVID-19 – IN AFRICA HOPE SPRINGS ETERNAL

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> Undoubtedly one of Africa's most resilient sectors to the current crisis, the financial technology industry (fintech), with its mobile-enabled payment platforms, has been providential in ensuring that large volumes of transactions could still be processed, supporting vital economic activity from isolated farmers, small enterprises and self-employed individuals. Before the pandemic, fintech was already thriving in Africa. According to WeeTracker, in 2019, fintech attracted more than 50% of the $1.34-billion raised by African start-ups.

> A strong African manufacturing industry is also a pre-requisite to the success of the impending African Continental Free Trade Area (AfCFTA). The protocol on the trading of goods within this unified market of 1.2 billion consumers was slated to commence on 1 July 2020. As a lever of trade and economic recovery, the AfCFTA implementation agenda is expected to receive priority attention from African governments after the pandemic.

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POST COVID-19 –THE EVOLUTION

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In Africa and the World, there are several industries that will continue to thrive post-COVID19

> Online meeting platforms (Skype, Zoom, Teams, Google Hangouts, Blue Jeans, … this list grows and grows)

> E-learning platforms (for Adults and Kids)

> Experiences

> Entertainment streaming services

> Online shopping

> Remote medical services

> Eco friendly technologies

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POST COVID-19 – THE EVOLUTION

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Regarding Eco friendly technologies

> The food and beverage industry is highly dependent on the packaging materials by using different types of plastics. The demand for biodegradable paper & plastic packaging market is growing.

> Data Bridge Market Research reported on 9 November 2020 that the Middle East and Africa biodegradable paper and plastic packaging market is projected to register a substantial compound annual growth rate in the forecast period of 2019 to 2026.

> And even in sectors hardest hit, those companies with strong management have used the pandemic to grow their market share. E.g. FlySafair in South Africa

POST COVID-19 – POSITIVE SENTIMENTS WORLDWIDE

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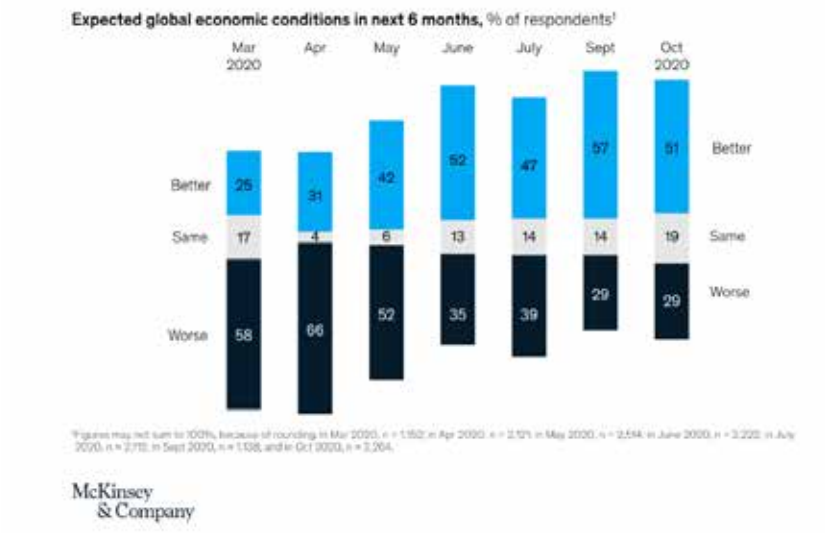
McKinsey & Co GLOBAL SURVEY – 29 October 2020:

> Outlooks on the economy and company prospects have remained more positive than negative



POST COVID-19 – POSITIVE SENTIMENTS WORLDWIDE

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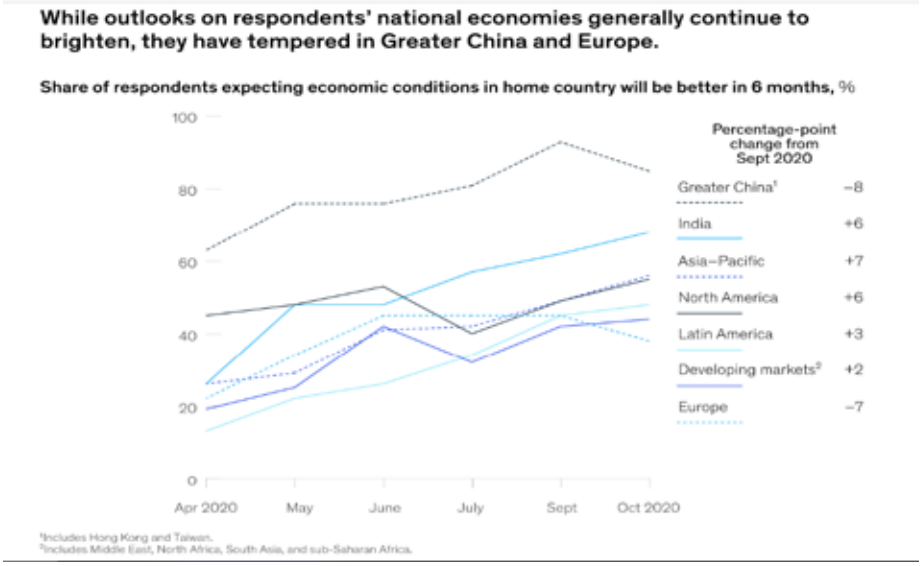
> Outlooks continue to brighten in all but two regions, namely Greater China, but where positive sentiments are still more common than in any other region, and Europe.



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POST COVID-19 – POSITIVE SENTIMENTS WORLDWIDE

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> A majority of respondents (57 percent) expect the global growth rate to increase over the next six months

> The 55 percent of respondents expecting their companies' profits to increase in the coming months, and 56 percent predict that customer demand will increase.

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COVID-19 – THIS TOO SHALL PASS

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Emerging Market Perspectives on Restructuring

ABI International Insolvency Forum

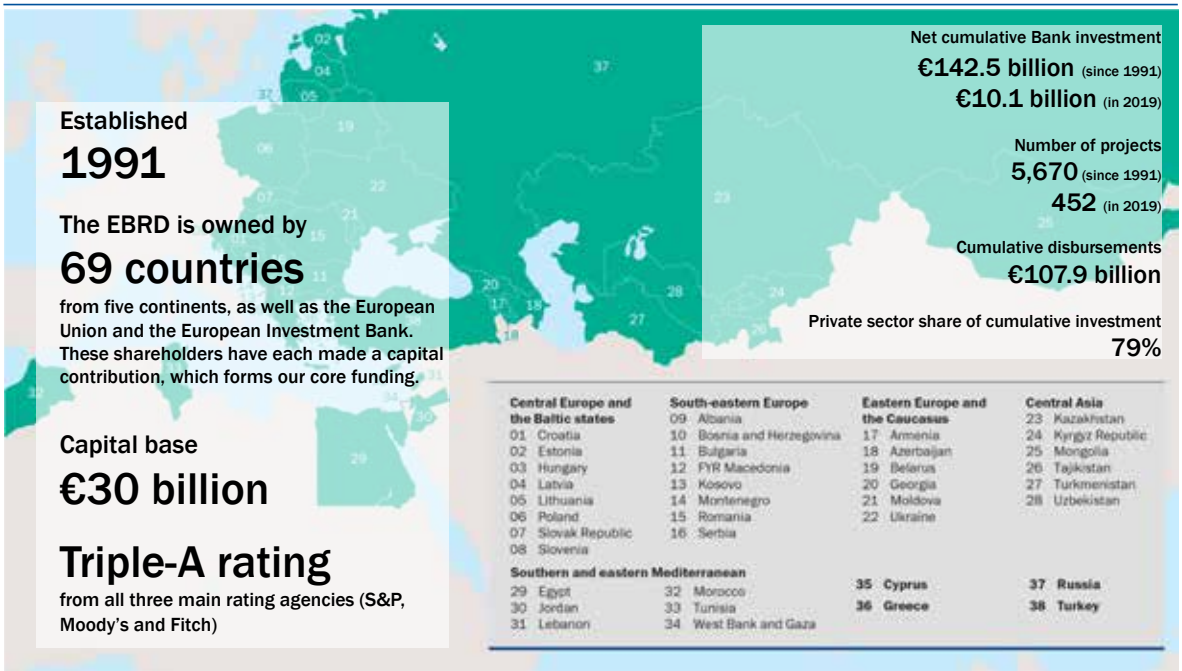
Catherine Bridge Zoller
EBRD Senior Counsel

18 November 2020

European Bank
for Reconstruction and Development

EBRD Overview
Where we invest

European Bank
for Reconstruction and Development



Main Themes

European Bank
for Reconstruction and Development

1. IFI Covid-19 Financial Support
2. National Covid-19 Emergency Measures
3. Emerging Market Restructuring Issues
4. General European Policy Trends in Restructuring

Impact of Covid-19 on Emerging Markets

European Bank
for Reconstruction and Development

- *"the COVID-19 global recession will be the deepest since the end of World War II, with the largest fraction of economies experiencing declines in per capita output since 1870."* (June 2020 Global Economic Prospects, World Bank). The report predicts a 5.2 % contraction in global GDP in 2020 and moderate growth of global GDP of 4.2% in 2021
- *"developing countries are set to see a USD 700 billion drop in external private finance in 2020 and a gap of USD 1 trillion in public spending on coronavirus recovery measures compared to what is being spent in advanced economies"* (November 2020, OECD's latest Global Outlook on Financing for Sustainable Development)

Impact of Covid-19 on Emerging Markets
Pressure points

European Bank
for Reconstruction and Development

- ✓ Pressure on health care systems
- ✓ Loss of trade: World Trade Organization October forecasts 9.2% decline in the volume of world merchandise trade for 2020, followed by a 7.2% rise in 2021
- ✓ Foreign direct investment flows expected to fall more than 30% in 2020 (OECD May 2020)
- ✓ Exporters of energy and industrial commodities particularly hit
- ✓ Unprecedented collapse in oil demand and crash in oil prices and tourism
- ✓ Vulnerability of emerging markets to strengthened US dollar

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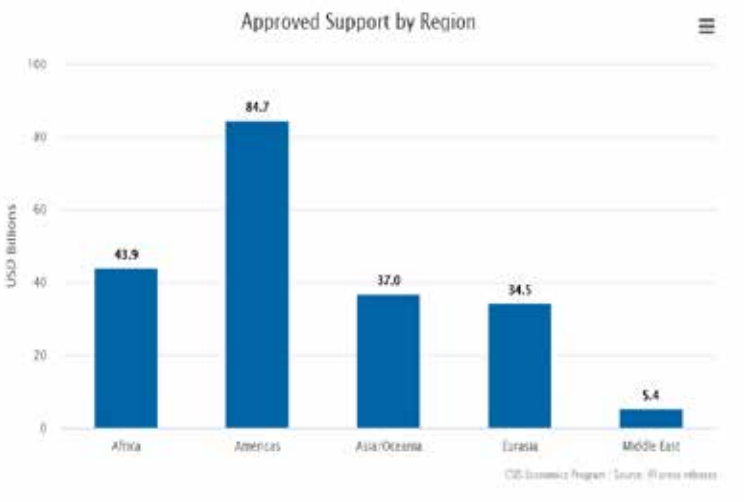
IFI Covid-19 Financial Support
Overview

European Bank
for Reconstruction and Development

What has been done so far?

- As of October 2020, IFIs have approved an estimated $206.3 billion in Covid-19-related support since January 2020 (Source: CCIS think tank)
- Support likely to continue in 2021



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EBRD Covid-19 Support

European Bank
for Reconstruction and Development

The EBRD's Covid-19 Solidarity Package

- Support worth €21 billion up until end of 2021. The programme includes:
  - ✓ Resilience Framework providing finance to meet the short-term liquidity and working capital needs of existing clients. Financing available under the Framework of up to €4 billion
  - ✓ Expanded financing under the Trade Facilitation Programme (TFP) to promote foreign trade to, from and within the EBRD regions, including guarantees and trade-related cash advances.
  - ✓ Fast track restructuring for distressed clients
  - ✓ New Vital Infrastructure Support Programme to ensure continuation of key public infrastructure e.g. waste collection, transport, water utilities despite Covid-19 loss of revenues

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National Covid-19 Emergency Measures

European Bank
for Reconstruction and Development

- Emergency measures in the field of insolvency aimed at protecting businesses
- There have been broadly two main legislative approaches by national governments to the Covid-19 crisis:
  - i. **use of "blanket" emergency standstill legislation** either to suspend execution, enforcement and insolvency proceedings e.g. Turkey or commercial loan repayments e.g. Hungary and Serbia in a number of emerging markets in the EBRD regions
  - ii. **more targeted temporary insolvency law amendments** in mature markets e.g. Germany, UK, Australia and some emerging markets e.g. Russia and recently Ukraine (UK also introduced long-term insolvency reforms)
- **De facto standstill** in countries where courts closed
- **Political pressure** on banks to restructure or show forbearance

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Covid-19 Emergency Measures
Impact on restructuring

European Bank
for Reconstruction and Development

What next?

- 2020 too early to assess…
- For developed markets, wave of insolvency filings is expected when the emergency measures expire and government funding dries up
- Businesses have accumulated high levels of debt as a result of state emergency / guaranteed loans and fall in revenues
- Covid-19 crisis has highlighted the need for better formal and informal restructuring tools in emerging markets
- SMEs are particularly vulnerable because of their small operating margins and lack of reserves to withstand the downturn in business activity

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Typical Restructuring Issues in EBRD Regions
Out of court workouts

European Bank
for Reconstruction and Development

- **Fragmentation of lending** (high levels of bilateral loans) that complicates any restructuring
- **Lack of trust** and culture of out of court workouts
- **Uncertain legal status of subordination agreements**: intercreditor agreements are mainly used in syndicated loan transactions involving foreign lenders and governed by foreign law but uncertainties relating to their validity and enforceability (e.g. Bosnia and Herzegovina, Georgia, Greece, North Macedonia, Serbia).
- **Uncertain security agent structures**: not expressly permitted or provided for by law in certain jurisdictions (e.g., Belarus, Estonia, Georgia, Latvia, Moldova, Turkey).

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Typical Restructuring Issues in EBRD Regions
Formal Procedures

European Bank
for Reconstruction and Development

Formal restructuring framework

- Many countries lack effective and time-efficient reorganisation-type procedures
- Insolvency/ bankruptcy is a synonym for liquidation: high level of stigma attached to entering into formal procedures

Position of secured creditors

- Weak creditor rights generally
- In some jurisdictions secured creditors are able to enforce their security, despite commencement of a restructuring procedure
- Reluctance of some legislators to affect secured rights within formal restructuring procedure e.g. secured creditor claims cannot be compromised as part of a majority creditor-approved restructuring plan

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Typical Restructuring Issues in EBRD Regions
Formal Procedures

European Bank
for Reconstruction and Development

New financing

- Essential component of any restructuring
- Lack of certainty on subordination and unsuccessful track record of formal restructuring procedures discourages new financing
- Many jurisdictions fail to regulate (in detail) the priority of new financing and provision of security for new money e.g. Turkey or restrict priority over secured creditors e.g. Latvia
- In some countries, new financing is subject to the approval of insolvency creditors or a creditors' committee, e.g. Moldova

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General Policy Trends
United Kingdom

European Bank
for Reconstruction and Development

New Corporate Insolvency and Governance Act (26 June 2020)

- New standalone moratorium without need for insolvency procedure (subject to significant carve outs for financial services contracts)
- Moratorium initially granted for 20 business days (extendable)
- Debtor-in-possession and limited role of "monitor"
- Extension of protection of supplies to all supplies of goods and services, subject to certain exceptions
- Cross-class cram-down of dissenting classes of creditors if:
  - A: *dissenting class not worse off* than in most likely relevant alternative scenario
  - B: *plan agreed by class that would receive payment* or with genuine economic interest in relevant alternative scenario

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General Policy Trends
United Kingdom

European Bank
for Reconstruction and Development

Restructuring of Virgin Atlantic

- First restructuring case which used the new restructuring plan under the Corporate Insolvency and Governance Act
- The new restructuring plan was chosen as it offers more flexibility than a scheme of arrangement, e.g. single majority threshold (75% by value in each class) and cross-class cram-down
- Involved four classes of creditors, including trade creditor class, subject to certain excluded creditors
- No cross-class cram-down needed – classes 1 (RCF), 2 (Lessors) and 3 (Connected Party) approved by 100% and class 4 (Trade Creditors) by 99.24% in value
- Next day recognition of Restructuring Plan as foreign main proceeding under US Chapter 15

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General Policy Trends
European Union

European Bank
for Reconstruction and Development

Directive (EU) 2019/1023 on preventive restructuring – key concepts

- *Link between out-of-court and court-overseen financial restructuring*, as part of an overall supportive financial restructuring framework
- *Flexible, wide-ranging and time-limited moratorium* (max 12 months) capable of review and termination by the court and covering secured, as well as unsecured, creditors
- *Protection of essential contracts* necessary for day-to-day operations
- *Invalidity of contractual ipso facto clauses*
- *Ability to determine classes of creditors on case by case basis* (minimum secured and unsecured)

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General Policy Trends
European Union

European Bank
for Reconstruction and Development

Directive (EU) 2019/1023 on preventive restructuring – key concepts

- *Protection of new financing*, including a minimum protection from potential avoidance actions in liquidation
- *Cross-class cram down* enabling one class of creditors, subject to certain conditions, to impose a restructuring plan on other dissenting classes of creditors
- *Directors' obligations* to consider the interests of different stakeholders, including creditors during a restructuring and to take steps to avoid insolvency

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General Policy Trends
European Union

European Bank
for Reconstruction and Development

EU Preventive Restructuring Directive	Chapter 11 Reorganisation
Debtor-in-possession (but likely supervised)	Debtor-in-possession (subject to appointment of trustee)
Limited court involvement (theoretically)	Fully court-supervised
Moratorium on all types of creditors	Moratorium on all types of creditors
Cross-class cram-down with either Absolute Priority Rule or Relative Priority Rule	Cross-class cram-down with Absolute Priority Rule
Concept of affected creditors	Concept of impaired/ unimpaired creditors

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General Policy Trends
European Union

European Bank
for Reconstruction and Development

Impact of the EU Preventive Restructuring Directive

- EU Member States have to implement the Directive on Preventive Restructuring Frameworks by July 2021
- Most have not enacted legislation yet, with exceptions e.g. Netherlands
- Importance of the Directive for countries that follow *EU acquis*
- Directive a useful benchmark for other EBRD economies of operations

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EBRD 2020-2021 Insolvency Assessment

European Bank
for Reconstruction and Development

- Covid-19 crisis: an opportunity for significant reform?
- EBRD Assessment of insolvency laws aims at identifying gaps and weaknesses in reorganisation procedures.
- The Assessment will provide an up-to-date map of restructuring frameworks across the EBRD regions in Europe, Asia and Africa.
- Results of the assessment and a report summarising its findings will be made publicly available online in Q1 2021.
- In partnership with the International Development Law Organization (IDLO), INSOL Europe, and INSOL International and in cooperation with the European Commission.
- www.ebrd-restructuring.com

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Further information on EBRD's Legal Transition Programme

European Bank
for Reconstruction and Development

For all further enquiries, please contact:

Catherine Bridge Zoller
Senior Counsel
Legal Transition Team
Tel: + 44 20 7338 6670
Email: BridgeC@ebrd.com

EBRD, One Exchange Square
London, EC2A 2JN
United Kingdom
www.ebrd.com

Visit www.ebrd-restructuring.com
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One Year into COVID-19: What Are the Implications for Restructurings Around the Globe in 2021?

Noel McCoy

Norton Rose Fulbright Australia
19 November 2020

APAC – key themes

Expiration of temporary support + insolvency law reform

Behavioural changes

Deglobalisation

Low interest rates

Broader policy responses

APAC – insolvency law reform

Temporary business support

- Emergency measures across APAC of temporary nature
- Moratoria on enforcement, initiation of restructuring or insolvency proceedings, director liability
- Fiscal support for businesses to replace lost revenue

Expiry of suport: debt cliff

- Measures due to expire in 2021
- Debt deferrals leading to big debt balloons
- 'Switch off' of fiscal support leading to major cash shortfalls

Increased insolvency

- Singapore and Australia anticipating significant SME fallout and passed/passing SME insolvency reforms
- Not uniform, sector dependent
- Impact of SME failure on broader economy

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APAC – insolvency law reform

- SME Focus:
  - Insolvency, Restructuring and Dissolution (Amendment) Bill 2020 (Singapore)
  - Corporations Amendment (Corporate Insolvency Reforms) Bill 2020 (Australia)
  - Other jurisdictions?

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APAC – changed behaviour

Retail	Transport
• Shift to online shopping accelerated • Foot traffic down in urban centres/CBDs	• Reduced demand for air travel, public transport for medium to long term
Hospitality	**Property**
• Structural shift toward home dining and technology enabled delivery	• WFH → Reduced demand for office space

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APAC – Deglobalisation

- Increased protectionism with restrictions on trade, investment and technology transfers
- Supply chain security and diversification – shift away from China
- China heightened assertiveness and "dual circulation strategy":
  - Hong Kong
  - Taiwan
  - Australia

"China imposed an 80% tariff on imports of Australian barley and restrictions on imports of Australian beef. More recently shipments of Australian lobsters have been subject to delays. Aussie wine has been formally threatened with higher tariffs. The Chinese authorities are reportedly discouraging firms from buying Australian coal, cotton and timber. There are fears that more Australian goods will soon feel the squeeze."

The Economist, 14 November 2020

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APAC – sector in focus: coal market

- Pre-COVID-19 disruption: shift to renewables, ESG, protectionism
- Onset of COVID-19: price drop following decline in energy consumption and steel production → reduced coal production
- Recovery depends on recoveries in economies of major importers – China, India, Japan
- Foreign trade relations and protectionist policies

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APAC - interest rate environment

Country	Official rate
Australia	0.1 %
China	3.85%
India	4.0 %
Indonesia	6.5 %
Japan	-0.1 %
New Zealand	0.25%
South Korea	0.5 %

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APAC - interest rate environment

- Monetary policy stimulus → persistent low interest rates for near and medium term
- Higher yields → higher risk, increased appetite for investment in distressed debt and special situations
- Major financial institutions:
  - Increased enforcement appetite
  - Increased debt trading as an exit strategy
- Distressed investing activity still somewhat subdued

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Broader policy responses

- Flattening the curve v defeating the virus
- Economic v health goals
- Vaccine?
- The "Great Reset"?

"A Better Economy Is Possible. But We Need to Reimagine Capitalism to Do It"

Klaus Schwab, founder and executive chairman of the World Economic Forum

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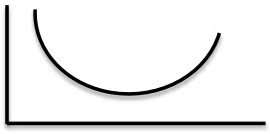
Economic outlook – what will happen?

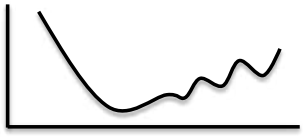
1 U-Shaped Recovery

Lag between decline & recovery



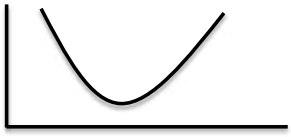
2 W-Shaped Recovery

A slow & staggered recovery



3 V-Shaped Recovery

A steep decline, quick recovery



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AMERICAN BANKRUPTCY INSTITUTE

2020 International Insolvency Forum

Arbitration for Cross-Border Insolvency

Presented by the International Committee of the American College of Bankruptcy

Hon. Paul Heath QC, Moderator
Former Judge of the High Court of New Zealand | Auckland, New Zealand

Corinne Ball
Jones Day | New York, USA

Prof. Stephan Madaus
Martin Luther University Halle-Wittenberg | Halle, Germany

Prof. Troy A. McKenzie
New York University School of Law | New York, USA

2020

CLEARY GOTTLIEB

Troubled Non-U.S. Airlines Landing in Chapter 11:
The Inside Story —
Select Topics in US Cases and Recent Airline Cases

Lisa Schweitzer

November 12, 2020

clearygottlieb.com

Chapter 11 Background

Overview

Chapter 11 has gained a strong foothold as a pathway for foreign companies to reorganize, whether or not they have substantial operations in the United States.

Chapter 11 can be a highly effective both for fully prepackaged debt restructurings and also for corporations that want to undertake a broader restructuring or where a final deal has not been reached.

The typical goal in Chapter 11 is for the debtor to emerge from bankruptcy as a going concern, but the debtor also can sell its assets or otherwise liquidate under Chapter 11 if necessary.

A Chapter 11 case is commenced by the filing of a "petition," which is a simple form that is completed and signed by the debtor company.

— The petition must be approved by the board of directors or other authorized parties pursuant to the company's applicable governance procedures.

Not all entities in a corporate group have to file for relief if a specific affiliate files, and a company does not need to be insolvent to file as long as it is experiencing financial distress.

A Chapter 11 case is culminated through confirmation (*i.e.*, approval) of chapter 11 plan of reorganization by a bankruptcy court following acceptance by the requisite creditors.

Commencement of a Chapter 11 Case

Eligibility and Jurisdiction

To be eligible for bankruptcy, a company is not required to be insolvent, but the company must be experiencing "financial distress."

The jurisdictional requirements for access to Chapter 11 are relatively low compared to certain other jurisdictions, and such minimum requirements are frequently satisfied by having some property in the United States.

- Debtors do not need not have operations in the United States to file for Chapter 11.
- A debtor's property in the United States does not have to be substantial and does not necessarily need to relate directly to the company's operations.

NOTE

Even where jurisdiction is proper, a case may be dismissed when a court finds that it has been filed in bad faith or if the ties to the U.S. are so remote that the company cannot effectively reorganize under the U.S. laws (although these are high hurdles to prove)

Commencement of a Chapter 11 Case

Operations, Financing of a Debtor-in-Possession

The company's management generally stays in control of operations and oversight of the company's assets (*i.e.*, no trustee is appointed), absent fraud or gross mismanagement

The debtor has a general duty to preserve and maximize the value of the estate for the benefit of its creditors and stakeholders, and the company's fiduciary duty run to its stakeholders generally.

The debtor may operate in the ordinary course of business without court approval but may not use, sell, or lease property of the estate outside of ordinary course of business (including entering into sale transactions or material contracts), without notice and court approval.

- May sell assets "free and clear" of liens / interests if certain requirements are met (*e.g.*, liens attach to proceeds of sale) and court approval is obtained.

The debtors' use of cash collateral and incurrence of post-petition financing requires court approval.

- DIP lenders can be granted a superpriority lien ("priming lien") that ranks above existing liens if secured parties are given adequate protection (*e.g.*, equity cushion) or consent to superpriority lien.

Debtor in Possession (DIP) Financing

DIP financing is any financing provided to a debtor-in-possession during Chapter 11, where the pre-bankruptcy lenders are not required to continue to extend credit to the debtor in bankruptcy.

The key features of DIP financing include:

— The grant of a superpriority lien and claim, as well as administrative priority status;
— Budgets itemizing the use of proceeds, and restrictions on variances and using proceeds in manner adverse to DIP lender;
— The inclusion of case milestones tied to the general restructuring plan (*i.e.*, sale or plan milestones);
— Possible roll-ups of pre-filing debt (effectively converting pre-petition debt into DIP financing);
— Mandatory repayment provisions upon any refinancing or emergence from bankruptcy;
— If the DIP lender is an existing lender, debtor stipulations on the validity of pre-petition debt and liens, plus a limited period to challenge pre-petition debt and liens; and
— An advance waiver of automatic stay to foreclose upon event of default.

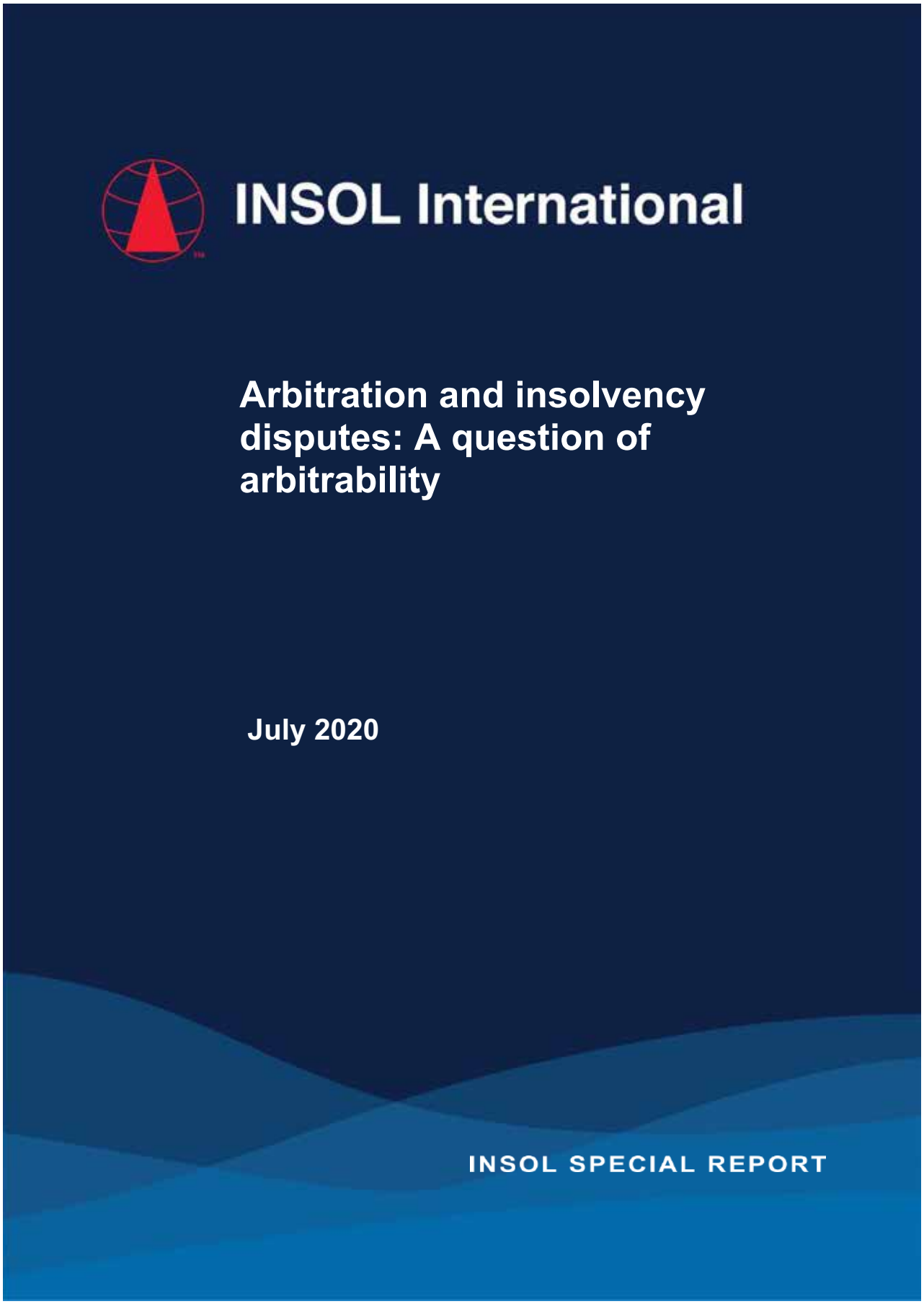
The DIP lender can obtain a "priming lien" over already-pledged collateral.

— Must show that the financing is not available on any other more favorable terms.
— Existing secured lenders that are primed must either consent or be given adequate protection.

The DIP financing is may be approved on an interim basis early in the case, and then on a final basis around 20-25 days after the filing of the case.

Comparison of Recent Airline DIP Financings

	Aeromexico	LATAM	Avianca
Total	$1 billion	$2.45 billion	$1.989 billion ($1.216 billion new money/$773mm roll-up)
Tranches	— Tranche 1: $200mm — Tranche 2: $800mm	— Tranche A: $1.3 billion — Tranche B: Up to $750mm (uncommitted) — Tranche C: $1.15 billion	— Tranche A: $1.289 billion ($900mm new money/$389mm roll-up) — Tranche B: $700mm ($316mm new money/$384mm roll-up)
Carve-out	$15mm	$20mm	
Pricing	— Tranche 1 DIP Facility: Adjusted LIBOR + 8.0% or ABR + 6.0% payable in cash. — Tranche 2 DIP Facility: Adjusted LIBOR + 12.5% or ABR + 11.0% payable in cash or Adjusted LIBOR + 14.5% or ABR + 13.0% payable in kind. — Default Interest:+ 2%	— Tranche A: LIBOR + 9.75%/8.75% (Eurodollar/ABR Borrowing) if paid in cash, or LIBOR + 11%/10% (Eurodollar/ABR Borrowing) if paid in kind. — Tranche C: 14.5% — Default Interest:+ 2%	— Tranche A: L+ 1,000 –1,050bps cash / L+ 1,150 –1,200bps PIK, 0.5% floor (payable in cash or in-kind at Borrower's election), 98 OID w/ back-end fee of 0.75%. — Tranche B: 14.50%
Additional Fees	— DIP Lender Advisor Fee -1.50% — Upfront Fee -1% — Unused Commitment Fee: • Tranche 1 -4.50% • Tranche 2 -8% — Commitment Termination Fee -2% — Break Fee -$12mm — Exit Fee: • Tranche 1 -0.75% • Tranche 2 -5%(10%if participating in equity conversion)	— Back-end Fees: • Tranche A -0.75% • Tranche C -2.50% — Undrawn Commitment Fee: • Tranche A -0.50% • Tranche C -0.50% — Extension Fee: 0.50% — Yield Enhancement Fee: 2.0% — BreakFee -$9.75mm (for Tranche A)	— Tranche A Undrawn Fees: • 0-30 days: 50bps • 31-60 days: 33% of drawn spread • 61 –120 days: 50% of drawn spread • 120 days+: 100% of drawn spread
Equity Conversion	— Equity conversion available at the lenders' option for Tranche 2.		— Equity conversion available at the debtors' option for Tranche B.


INSOL International
Arbitration and insolvency disputes: A question of arbitrability
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Arbitration and insolvency disputes: A question of arbitrability

INSOL International, 6-7 Queen Street, London, EC4N 1SP
Tel: +44 (0) 20 7248 3333 Fax: +44 (0) 20 7248 3384

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Acknowledgement

Until recently it was commonly accepted that insolvency disputes fell outside the scope of arbitration. However, recent authorities suggest a more liberal approach to arbitration, albeit one where the boundary between those disputes that are or are not arbitrable, is somewhat blurred. A number of authorities suggest the line is determined by reference to whether a dispute involves “core” or “pure” insolvency issues, although the question may be asked what exactly the terms “core” or “pure” mean in this context? The purpose of this report is to consider these issues in order to distinguish those insolvency related disputes that are arbitrable from those that are not.

In doing so, this report considers issues such as the concept of “arbitrability” and the methodology employed in determining whether or not a dispute is arbitrable; public policy considerations relevant to the question of arbitrability; the identification of changes in perception of public policy considerations in New Zealand; the manner in which courts in various jurisdictions have determined whether particular insolvency disputes are capable of being determined by arbitration; a discussion of the different types of insolvency disputes in order to evaluate whether each should properly be characterised as arbitrable or not; a case study to assess whether the existence or otherwise of a debt can be resolved by arbitration; and, finally, a summary to draw together the principles that can be extracted from the authorities to which the authors refer.

INSOL International sincerely thanks the Hon Paul Heath QC and Dr Anna Kirk for this thought-provoking and interesting Special Report on arbitration and insolvency.

July 2020

Arbitration and insolvency disputes: A question of arbitrability[*]

By Hon Paul Heath QC, Bankside Chambers (Auckland and Singapore) and South Square (London) and Dr Anna Kirk, Bankside Chambers (Auckland and Singapore)[**]

1. The issues

In the not so distant past, it was commonly accepted that insolvency disputes fell outside the scope of arbitration. Recent authority suggests a more liberal approach, albeit one where the boundary between those disputes that are or are not arbitrable is somewhat blurred. A number of authorities suggest the line is determined by reference to whether a dispute involves "core" or "pure" insolvency issues.[1] But, what exactly do the terms "core" or "pure" mean in this context? The purpose of this report is to consider these issues so as to distinguish those insolvency related disputes that are arbitrable from those that are not.

There is a tension between the public policy goals that drive the dispute resolution process of arbitration (on the one hand) and those that drive the resolution of contested insolvency proceedings (on the other), over which a national court will usually have a supervisory jurisdiction. The nature of the conflict was explained by the Court of Appeal of Singapore in *Larsen Oil & Gas Pte Ltd v Petroprod Ltd (in official liquidation in the Cayman Islands and in compulsory liquidation in Singapore)*[2] (Larsen Oil). Delivering the judgment of the Court, Rajah JA said:

> "1. Arbitration and insolvency processes embody, to an extent, contrasting legal policies. On the one hand, arbitration embodies the principles of party autonomy and the decentralisation of private dispute resolution. On the other hand, the insolvency process is a collective statutory proceeding that involves the public centralisation of disputes so as to achieve economic

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[*] The views expressed in this Special Report are those of the authors and do not necessarily represent the views of INSOL International or any of its affiliates.

[**] The Hon Paul Heath QC is a retired Judge of the High Court of New Zealand, now of Bankside Chambers, Auckland and Singapore and an Associate at South Square, London. Dr Anna Kirk is of Bankside Chambers, Auckland and Singapore. The authors wish to express their thanks to a number of colleagues who provided helpful comments on earlier drafts. While it is invidious to single out particular assistance, we acknowledge, in particular, comments from Hon Sir Alastair Norris QC (retired Judge of the Chancery Division of the High Court of England and Wales, London), Hon Frank Newbould QC (retired Judge of the Superior Court of Ontario and Associate, South Square, London), and Matthew Crawford (Barrister, Mills Lane Chambers, Auckland). We also acknowledge assistance from Michael Greenop (formerly of Bankside Chambers, Auckland, but now at Quinn Emanuel Urquhart & Sullivan LLP in London) for his contribution in reviewing, proof reading and checking citations for the paper. The views expressed in this article are those of the authors alone and any errors remain their responsibility.

[1] V Lazic, *Insolvency Proceedings and Commercial Arbitration* (Kluwer Law International, The Hague-London-Boston, 1998) at 263, para 3.2.2.2. In a recent article, Professor Stephan Madaus separated the concepts of "core" and "pure" insolvency disputes into those which an insolvency representative could settle and were arbitrable ("core") and those arising from insolvency legislation that could only be addressed by a court ("pure"): see S Madaus, "The (Underdeveloped) Use of Arbitration in International Insolvency Proceedings" *J Int Arbitr* (2020) 37(4) 449 at 458. In referring to a division between "core" and "non-core" bankruptcy functions, Madaus cited *Re US Lines Inc v American Steamship Owners Mutual Protection & Indemnity Association Inc* 197 F 3d 631, 640 (2nd Cir 1999).

[2] *Larsen Oil & Gas Pte Ltd v Petroprod Ltd (in official liquidation in the Cayman Islands and in compulsory liquidation in Singapore)* [2011] SGCA 21.

> efficiency and optimal returns for creditors. The appeal before us raised an interesting and novel point of law relating to the interfacing of these two policies where private proceedings could have wider public consequences. To what extent ought claims involving an insolvent company be permitted to be resolved through the arbitral process? . . ."

Because the question of arbitrability will be determined in the context of the law governing the arbitration itself, we use New Zealand law as our touchstone. In considering what insolvency-related disputes are capable of being determined by arbitration, we analyse the issues under the following headings:

(a) First, we consider the concept of "arbitrability", both from an international and domestic perspective. In doing so, we discuss the methodology employed in many common law jurisdictions to determine whether or not a dispute is arbitrable.

(b) Second, we discuss public policy considerations relevant to the question of arbitrability.

(c) Third, we identify changes in perception of public policy considerations in New Zealand, having regard to legislation enacted over the last 30 years. These changes have both reduced the involvement of the courts in insolvency proceedings and encouraged the use of arbitration to resolve commercial disputes.

(d) Fourth, we consider the way in which courts in various jurisdictions have determined whether particular insolvency disputes are capable of being determined by arbitration.

(e) Fifth, we discuss different types of insolvency disputes to evaluate whether each should properly be characterised as arbitrable or not.

(f) Sixth, we undertake a case study, dealing with the question of arbitrability in the context of the proof of claim procedure used in liquidation proceedings in New Zealand (and many other common law countries), to assess whether the existence or otherwise of the debt can be resolved by arbitration.

(g) Seventh, we endeavour to draw together the principles to be extracted from the authorities to which we refer.

We have not specifically addressed the question of arbitration in the context of cross-border disputes, to which the UNCITRAL Model Law on Cross-Border Insolvency, in the various guises in which it has been enacted, applies. Nevertheless, our analysis is relevant to such disputes because the question of governing law will need to be determined in each case, and application of that law will inform whether a particular cross border dispute is arbitrable. For a recent and important contribution to this topic from an international perspective, we refer readers to Madaus' article, "The (Underdeveloped) Use of Arbitration in International Insolvency Proceedings".[3]

[3] S Madaus "The (Underdeveloped) Use of Arbitration in International Insolvency Proceedings", *J Int Arbitr* (2020) 37(4) 449.

2. Glossary

We set out and define the generic terms we shall use in discussing the way in which arbitration may be used to meet the needs of various insolvency systems.

We use the term "insolvency process" to mean "a collective judicial or administrative proceeding relating to the bankruptcy, liquidation, receivership, judicial management, statutory management, or voluntary administration of a debtor, or the reorganisation of the debtor's affairs, under which the assets and affairs of the debtor are administered, or the assets of the debtor are or will be realised, for the benefit of secured or unsecured creditors".[4]

We use the term "insolvency representative" to identify a person appointed to administer any of the insolvency processes to which we have referred. That is a shorthand expression, intended to include a person appointed on an interim or final basis, who is authorised (among other things) to administer the reorganisation or liquidation of the debtor's assets or affairs.[5]

We use the term "liquidation" in the sense in which it is used in New Zealand.[6] Liquidation is a collective insolvency regime designed to realise the assets of a company that cannot pay its debts as they fall due and to distribute the proceeds of sale among its creditors, on a *pari passu* basis and in accordance with statutory priorities.[7] The most common ways in which a company may be put into liquidation in New Zealand are by special resolution of its shareholders, a resolution of its board of directors (on the occurrence of a particular event specified in the company's constitution), or by order of the High Court.[8] An order putting a company into liquidation is synonymous with the term "winding up order" in many other common law jurisdictions.

Some of the jurisdictions to which we refer draw a distinction between a proceeding in which liquidation is sought by a shareholder on the "just and equitable" ground and those in which liquidation may be sought as one of a suite of remedies available to a minority shareholder who alleges unfairly prejudicial or oppressive conduct on the part of the majority shareholder.[9] We refer to the former as "just and equitable" proceedings and to the latter as "minority oppression" proceedings.

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4 This definition is the same as that given to the term "New Zealand insolvency proceeding" in the Insolvency (Cross-border) Act 2006, Sch 1, art 2(i). It is adapted from the UNCITRAL Model Law on Cross-Border Insolvency (1997).

5 This definition is an adaptation of the meaning given to the term "foreign representative," in the Insolvency (Cross-border) Act 2006, Sch 1, art 2(h), which identifies the insolvency representatives by the name used in each of the statutes under which the particular regime is commenced.

6 Companies Act 1993, Part 16. To provide context we shall, on occasion, refer also to the voluntary administration regime which is used as a corporate rehabilitation process: see Companies Act 1993, Pt 15A.

7 *Idem*, Sch 7.

8 *Idem*, s 241(2)(a) to (c).

9 In particular, we refer to the Cayman Islands (*Familymart China Holding Co Ltd v Ting Chuan (Cayman Islands) Holding Corporation*, Court of Appeal of the Cayman Islands, CICA Civil Appeal Nos 7 and 8 of 2019, 23 April 2020) and Singapore (*Tomolugen Holdings Ltd v Silica Investors Ltd* [2015] SGCA 57 (CA)).

3. Arbitrability

3.1 The concept

"Arbitrability" refers to whether a dispute is capable of resolution by arbitration. It has two component parts: (i) whether a particular type of dispute may be referred to arbitration; and (ii) whether a dispute falls within the scope of an arbitration agreement. Although the second is something that will need to be addressed in all cases where arbitrability (or jurisdiction) is in issue, it is the first with which we are primarily concerned.

Whether a particular type of dispute is considered arbitrable is a matter of policy for each State and, even among States with similar legal traditions, trends in arbitrability vary. The doctrine of arbitrability rests on the premise that parties should be free to choose to resolve disputes between them by arbitration if they so wish, while recognising that it may be inappropriate to resolve certain issues, including those involving public rights, collective rights, or the exercise of governmental authority, by private arbitration. Arbitrability will be determined by reference to the law governing the arbitration.

Application of the doctrine of arbitrability is complex. While arbitration has its origins in contractual (commercial) disputes, it is not limited to that sphere. The Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (the New York Convention)[10] affirms the rights of parties to arbitrate disputes "whether contractual or not".[11]

It has long been accepted that claims in tort and equity may be arbitrated. Nowadays, the pool of claims considered arbitrable in many States has further expanded to include, for example, disputes relating to competition law, intellectual property, corruption, fraud, corporate governance issues and trusts.[12] Traditionally, these topics were not considered to be arbitrable in many jurisdictions, as they were seen to incorporate public rights and / or third-party interests.

It is now evident that the "outer limits" of arbitrability are far less clear. One eminent text went so far as to suggest that it "would be wrong … to draw … any general rule that criminal, admiralty, family or company matters cannot be referred to arbitration".[13] This expansion of the availability of arbitration reflects the modern approach to arbitrability. Courts have moved away from broad exclusions towards a more nuanced approach where arbitrability is assessed by reference to the specific dispute at hand.[14]

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10 Set out as Sch 3 to the Arbitration Act 1996.

11 New York Convention, art I(3).

12 For example, in New Zealand certain disputes between trustees and beneficiaries are now capable of arbitration under the Trusts Act 2019, with appropriate court-based protections provided for beneficiaries who are not of full age or are otherwise incompetent to make their own decisions. See also the discussion under para 4 below.

13 M J Mustill and S C Boyd, *The Law and Practice of Commercial Arbitration in England* (2nd ed, Butterworths, 1999) at 149–150, cited by the Court of Appeal of Singapore in *Tomolugen Holdings Ltd v Silica Investors Ltd* [2016] 1 SLR 373 (SGCA) at para 71.

14 For example, the US bankruptcy courts had previously considered all disputes before them non-arbitrable, but they now approach arbitrability by examining the dispute before them to determine whether "core" insolvency issues are at play (see N Blackaby *et al*, *Redfern and Hunter on International Arbitration* (6th ed, OUP) at 117); see also M Conaglen "The Enforceability of Arbitration Clauses in Trusts" 74(3) *Cambridge Law Journal* 450 at 452.

Few (if any) arbitration statutes provide a list of arbitrable or non-arbitrable disputes. Section 10 of the Arbitration Act 1996 (New Zealand) defines those disputes which may be resolved by arbitration as follows:

> "**10 Arbitrability of disputes**
>
> (1) Any dispute which the parties have agreed to submit to arbitration under an arbitration agreement may be determined by arbitration *unless the arbitration agreement is contrary to public policy or, under any other law, such a dispute is not capable of determination by arbitration*.
>
> (2) The fact that an enactment confers jurisdiction in respect of any matter on the High Court or the District Court but does not refer to the determination of that matter by arbitration does not, of itself, indicate that a dispute about that matter is not capable of determination by arbitration." (Emphasis added)

The authors of the leading New Zealand text, *Williams & Kawharu on Arbitration*, characterise section 10 as "a public policy limitation on party autonomy."[15] While there are a few New Zealand statutes that expressly limit arbitration,[16] there are no provisions in any relevant insolvency law in force in New Zealand that expressly exclude any particular type of dispute from being arbitrated.

3.2 Approach to determining arbitrability in insolvency disputes

In *Tomolugen Holdings Ltd v Silica Investments Ltd (Tomolugen),*[17] (a minority oppression case) the Court of Appeal of Singapore considered two ways in which it could approach the question of whether any given dispute fell within the scope of an arbitration clause; namely, at a high level of abstraction or on a more granular basis. Delivering the judgment of the Court of Appeal, Menon, CJ said:[18]

> "111. … A cogent argument can be made that the parties could not have intended that a dispute over the management of a company with many shareholders, each of whom might potentially be affected, should fall within the ambit of an arbitration clause contained in a share sale agreement between just two shareholders. On the other hand, if a more granular approach is adopted, there is a compelling case that at least some of the four allegations made by Silica Investors in the Suit fall within the scope of the arbitration clause in the Share Sale Agreement. …"

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15 D A R Williams and A Kahwaru, *Williams & Kawharu on Arbitration* (2nd ed, LexisNexis, 2017) at para 7.2.1. Some caution is required if it is anticipated that enforcement will take place in another jurisdiction. Article V(1)(a) of the New York Convention enables a court in a country in which recognition and enforcement of an award is sought to refuse to grant those remedies where the arbitration "agreement is not valid under the law to which the parties have subjected it".

16 For example, Arbitration Act 1996, s 11 (consumer arbitration agreements) and Employment Relations Act 2000, s 155 (employment disputes, to the extent that the provisions of the Arbitration Act 1996 do not apply; s 155(2)(a)).

17 *Tomolugen Holdings Ltd v Silica Investors Ltd* [2016] 1 SLR 373 (SGCA).

18 *Idem*, at para 111.

The nature of the approach taken will have a bearing on the way in which a national court decides whether to grant a stay of court proceedings, pending arbitration. In each case, the starting point is the language of the particular arbitration statute in issue. Although Singapore has adopted the UNCITRAL Model Law on Commercial Arbitration (the Arbitration Model Law), section 6 of its International Arbitration Act addresses the question whether a stay of court proceedings should be granted by reference to a slightly different, more nuanced, test. Unlike article 8(1) of the Arbitration Model Law where a stay must be granted unless the court were to find that the "arbitration agreement is null and void, inoperative or incapable of being performed," section 6 of the International Arbitration Act allows the court to stay proceedings so far as they relate to a particular "matter" which is subject to the agreement, even though other "matters" may be excluded. This promotes a more granular approach to the question of whether a stay should be ordered.

Contrary to the first instance Judge's view in *Tomolugen,* the Court of Appeal considered that section 6(2) of the International Arbitration Act militated against taking an excessively broad view of what constitutes a "matter", or treating it as a synonym for the court proceedings as a whole. The Court focussed on the requirement of section 6(2) for the court to stay court proceedings "so far as [they] relate to [the] matter", as opposed to the language of article 8 of the Arbitration Model Law which speaks solely of "an action … brought in a matter which is the subject of an arbitration agreement". Menon, CJ stated:[19]

> 113. … In our judgment, when the court considers whether any "matter" is covered by an arbitration clause, it should undertake a practical and common-sense inquiry in relation to any reasonably substantial issue that is not merely peripherally or tangentially connected to the dispute in the court proceedings. The court should not characterise the matter(s) in either an overly broad or an unduly narrow and pedantic manner. In most cases, the matter would encompass the claims made in the proceedings. But, that is not an absolute or inflexible rule.

We suggest that, whatever may be the position with regard to any conflict that might exist between the provisions set out in article 8 of the Arbitration Model Law and section 6 of the (Singapore) International Arbitration Act, the methodology to be employed should be the same. The first step is to establish whether the matters in issue fall within the scope of the particular arbitration clause on which an applicant for a stay seeks to rely. That will, generally, be determined by reference to the underlying controversy between the parties; in other words, was it one that they "as rational business [people] were likely to have intended as arising out of the relationship into which they had entered and to be determined by the same tribunal"?[20] Once that has been decided, the next question will be whether, as a matter of domestic law governing the arbitration, any court proceeding should be stayed to enable the dispute to be resolved in the parties' forum of choice. That inquiry will include an assessment of whether

[19] *Idem*, at para 113. Three reasons were stated for taking this view: see paras 114 to 122.

[20] *Premium Nafta Products Ltd v Fili Shipping Co Ltd* [2008] 1 Lloyd's Rep 254 (HL) at para 13, per Lord Hoffmann, cited with approval in both *Larsen Oil & Gas Pte Ltd v Petroprod Ltd (in official liquidation in the Cayman Islands and in compulsory liquidation in Singapore)* [2011] SGCA 21 (at para 13) and *Tomolugen Holdings Ltd v Silica Investors Ltd* [2016] 1 SLR 373 (SGCA) (at para 124).

the arbitration agreement is "null and void, inoperative or incapable of being performed" on grounds of non-arbitrability.[21]

4. Public policy and arbitrability

For the purposes of section 10 of the Arbitration Act 1996 (New Zealand),[22] public policy is the touchstone of arbitrability. It is relevant to arbitration in two distinct ways: (i) public policy may render a dispute non-arbitrable, or (ii) it may act as a fetter on the enforceability of an award.

On applications to the High Court of New Zealand (the High Court) to set aside or to refuse enforcement of an award, the concept of "public policy" is interpreted narrowly. In *Amaltal Corporation Ltd v Maruha (NZ) Corporation Ltd*,[23] the Court of Appeal of New Zealand (the Court of Appeal) held that the court's role was limited to considering whether a complaint against an award raised a "fundamental principle of law and justice", adding that an award would not be enforced if its recognition would damage the integrity of the domestic court system. This approach was applied by a Full Court of the High Court, in *Downer-Hill Joint Venture v Government of Fiji*.[24] As both *Amaltal* and *Downer-Hill* suggest, for the public policy exception to enforcement to apply, there must be some element of illegality, or enforcement of the award must involve clear injury to the public good or abuse of the integrity of the court's processes and powers.

While the dual concepts of "public policy" in respect of arbitrability (on the one hand) and enforcement of awards (on the other) are not perfectly aligned, they are each of relevance in determining whether any particular type of insolvency dispute can be resolved by arbitration. In our view, limitations on arbitrability as a result of public policy should be interpreted narrowly, just as they are at the enforcement stage. This is consistent with the general trend to broaden the scope of disputes considered arbitrable.[25]

A dispute does not become non-arbitrable simply because it has a public interest element or arises from statutory rights. Disputes in many areas of law have a considerable public interest element, but are nonetheless recognised as arbitrable. These include disputes involving competition law, intellectual property and allegations of bribery, corruption and fraud. Statutory rights are also capable of being the subject of arbitral claims, for example claims under the Fair Trading Act 1986 (New Zealand).[26] In any given case, an assessment must be made as to whether a specific public interest consideration arises that outweighs other public policy factors which favour arbitration.

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21 Those words are taken from art 8(1) of the Arbitration Model Law which has been adopted in New Zealand: Arbitration Act 1996, Sch 1, art 8.
22 See para 03.1 above.
23 *Amaltal Corporation Ltd v Maruha (NZ) Corporation Ltd* [2004] 2 NZLR 614 (CA).
24 *Downer-Hill Joint Venture v Government of Fiji* [2005] 1 NZLR 554 (CA).
25 See para 3.1 above.
26 See *Danone Asia Pacific Holdings Limited et al v Fonterra Co-operative Group Limited* [2014] NZHC 1681, at paras 78 to 80.

5. Public policy: Arbitration and insolvency

5.1 Changes in perception

Over the last 30 years or so, there have been changes to both arbitration and company law in New Zealand which have had the effect of increasing the use of arbitration in commercial disputes and lessening the role of the court in both arbitration and insolvency proceedings. We consider that these changes have had an impact on the potential availability of arbitration as a means of resolving insolvency-related disputes.

Recognising that public policy considerations may be viewed differently in States in which courts play a greater role in supervising an insolvency process, we illustrate the relevance of particular public policy factors in the context of the New Zealand legislation. To do so, we use the New Zealand liquidation procedure as an example of a relevant insolvency process.

5.2 Arbitration

A significant change in attitude and approach to arbitration in New Zealand was signalled when the Arbitration Act 1996 (the Act) was passed. The new Act had been recommended by the Law Commission in a report issued in 1991.[27] The 1996 Act is based on the Arbitration Model Law, which had been promulgated in June 1985 by the United Nations Commission on International Trade Law.

In a statement of purposes, set out in section 5 of the Act, the use of arbitration as an agreed method of resolving commercial and other disputes was expressly encouraged, as was the need to promote consistency between international and domestic arbitral regimes operating in New Zealand.[28] The Act reflects a pro-arbitration policy. Since the statute was enacted, Parliament has expressly extended the ability to arbitrate disputes to those involving trusts, an area that had not previously been regarded, for public policy reasons, as arbitrable.[29] This is a reflection of the New Zealand Parliament's desire for the courts to take a less paternalistic approach to the resolution of disputes by arbitration.[30]

To emphasise Parliament's approval of a more expansive approach to the use of arbitration, the Act refines and clarifies the limits of judicial review of the arbitral process and arbitral awards in a manner consistent with the Arbitration Model Law.[31] The powers of the courts were reduced, with a concomitant increase in power conferred on an arbitral tribunal.

Four underlying principles can be distilled from the specific provisions of the Act (particularly, section 5) and Schedule 1, which incorporates the Arbitration Model Law provisions concerning: (i) party autonomy; (ii) equality of treatment; (iii) reduced involvement of the courts; and (iv) increased powers for the arbitral tribunal.[32] Underlying these principles are protections built into the Act, whereby

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27 *Arbitration* (NZLC R 20, 1991).
28 Arbitration Act 1996, s 5(a) and (b).
29 Trusts Act 2019, ss 142 to 148. See also M Conaglen, "The Enforceability of Arbitration Clauses in Trusts", 74(3) *Cambridge Law Journal* 450 at 450.
30 See D A R Williams and A Kawharu, *Williams & Kawharu on Arbitration*, (2nd ed, LexisNexis, 2017) at paras 7.2.5 and 7.2.6.
31 Arbitration Act 1996, s 5(c) and (d).
32 *Pathak v Tourism Transport Ltd* [2002] 3 NZLR 681 (HC), at [24].

arbitrators are bound by the principles of natural justice and impartiality.[33] Similarly, arbitrators must provide each party with a full opportunity to present its case.[34]

In summary, in 1996 Parliament provided greater powers for an arbitral tribunal to resolve disputes than had been the case under the earlier Arbitration Act 1908. It also reduced the ability of the High Court to intervene in the arbitration process. A recent illustration of the primacy given to arbitration over curial proceedings is found in *Zurich Australian Insurance Ltd v Cognition Education Ltd,*[35] in which the Supreme Court of New Zealand held that court proceedings in which summary judgment had been sought should be stayed to enable the underlying dispute to be resolved by arbitration;[36] in other words, as long as there is a genuine defence raised on a plausible narrative, the court proceeding will be stayed.[37] The New Zealand courts are yet to decide whether the same approach would be taken in cases where disputes are raised in response to a statutory demand where failure to pay may result in the issue of liquidation proceedings.

5.3 Insolvency

Around the same time that the New Zealand Parliament was giving enhanced powers to arbitral tribunals, the role of the High Court in relation to liquidation proceedings was diminishing. Enactment of the Companies Act 1993 (the 1993 Act) also followed a report issued by the Law Commission, in 1989, two years before its report on arbitration.[38] When the Companies Act 1955 (the 1955 Act) was replaced by the 1993 Act, a different approach to court supervision of liquidation proceedings was taken.

Under the 1955 Act, following earlier English models, three categories of liquidation existed: (i) a members' voluntary winding up; (ii) a creditors' voluntary winding up; and (iii) a winding up by the court.[39] The 1993 Act discarded those three regimes and replaced them with a single liquidation process that could be commenced by resolution of shareholders or directors, or by court appointment.[40] The Law Commission expressly intended to reduce the role of the High Court in liquidations (based on what it termed a "major criticism … that a liquidator must refer matters to the Court frequently") and to treat all types of liquidations in the same way.[41] Instead, the High Court was given broad powers of supervision over liquidators, for the purpose of safeguarding the interests of parties who might be adversely affected by the liquidation process.[42]

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33 An award can be set aside on public policy grounds if there were a failure to comply with the rules of natural justice: Arbitration Act 1996, Sch 1, arts 34(2)(b)(ii) and (6)(b).
34 *Idem*, Sch 1, art 18.
35 *Zurich Australian Insurance Ltd v Cognition Education Ltd* [2015] 1 NZLR 383 (SC).
36 *Idem*, at paras 36, 38 and 39, adopting what was said by Lord Mustill in *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* [1993] AC 334 (HL) at 355–357.
37 See generally: *AnAn Group (Singapore) Pte Ltd v VTB Bank (Public Joint Stock Company)* [2020] SGCA 33 (7 April 2020); *BW Umuroa Pte Ltd v Tamarind Resources Pte Ltd* [2020] SGHC 71 (6 March 2020); *Lasmos Ltd v Southwest Pacific Bauxite (HK) Ltd* [2018] HKCFI 426 (2 March 2018); and *But Ka Chon v Interactive Brokers LLC* [2019] HKCA 873 (2 August 2019).
38 *Company Law Reform and Restatement* (NZLC R 9, 1989).
39 Generally, see *Re Roslea Path Ltd (in liq)* [2013] 1 NZLR 207 (HC) at para 22.
40 *Idem*, at para 33.
41 *Company Law Reform and Restatement* (NZLC R 9, 1989), at paras 642, 644 and 645.
42 Companies Act 1993, s 284(1). See also *Re Roslea Path Ltd (in liq)* [2013] 1 NZLR 207 (HC), at para 127 and *ANZ National Bank Ltd v Sheahan and Lock* [2013] 1 NZLR 674 (HC) at paras 136 to 139.

In describing the "principal duty of a liquidator", the 1993 Act requires the insolvency representative to protect, realise and distribute assets of the company in accordance with statutory priorities, "in a reasonable and efficient manner".[43] That composite expression emphasises both the autonomy given to a liquidator to decide how best to fulfil his or her principal duty and the desirability of avoiding complex litigation by the exercise of a significant degree of commercial judgment by a liquidator.

A good illustration of the liberalisation of liquidators' powers under the 1993 Act can be found in the different approaches taken to the ability of liquidators to initiate legal proceedings, or for others to bring or continue such proceedings against the company in liquidation:

(a) Section 226 of the 1955 Act provided that "no action or proceeding shall be proceeded with or commenced against the company" in liquidation without leave of the court and on such terms as may be imposed by it. Section 240(1)(a) of the same Act empowered a liquidator, with the sanction of either the court or a Committee of Inspection, "to bring or defend any action or other legal proceeding in the name and on behalf of the company".

(b) In contrast, section 248(1)(c)(i) of the 1993 Act allows a person to "commence or continue legal proceedings against the company or in relation to its property" as long as the liquidator agrees, or the court gives permission. Under clause (a) of Schedule 6, a liquidator is authorised, without any need for sanction, to "commence, continue, discontinue, and defend legal proceedings".

The importance of these changes lies in the stay of claims that comes into force after a company has been put into liquidation.[44] The effect of the change is to allow liquidators to agree to proceedings being brought or continued against the company without court involvement, or to issue or continue proceedings in the name of the company themselves. The change exemplifies the shift in policy to provide greater autonomy to liquidators in resolving claims, to enable distributions to be made as quickly as possible.[45]

The purpose and effect of the moratorium that exists once liquidation intervenes was explained by the Court of Appeal of England and Wales, in *Cook v Mortgage Debenture Ltd.*[46] David Richards LJ, with whom Lord Dyson MR and McCombe LJ agreed, said:[47]

> "[12] In the case of liquidation and bankruptcy, the purpose of these provisions is essentially twofold. First, given that the property of the company or individual stands under the statute to be realised and distributed, subject to any existing interests, among the creditors on a *pari passu* basis, the moratorium prevents any creditor from obtaining priority and thereby undermining the *pari passu* basis of distribution. Second, given that both a liquidation and bankruptcy contain provisions for the

43 Companies Act 1993, s 253.
44 *Idem*, s 248(1)(c)(i).
45 See discussion above.
46 *Cook v Mortgage Debenture Ltd* [2016] 3 All ER 957 (CA).
47 *Idem*, at para 12. See also, in a New Zealand context, *Maxim Group Ltd v Jones Publishing Ltd* HC Auckland CIV-2008-404-8179 17 December 200, Randerson J, at paras 38 to 46.

> adjudication of claims by persons claiming to be creditors, the moratorium protects those procedures and prevents unnecessary and potentially expensive litigation. In circumstances where the potential liability of the company or bankrupt is best determined in ordinary legal proceedings, as for example is often the case with a personal injuries claim, the court will give permission for proceedings to be commenced or continued, but usually on terms that no judgment against the company or individual can be enforced against the assets of the estate."

Sections 226 and 240(1)(a) of the 1955 Act each used the terms "action or proceeding" or "action or legal proceeding" disjunctively. Both section 248(1)(c)(i) and clause (a) of Schedule 6 to the 1993 Act,[48] use the expression "legal proceedings" only. The next question is whether arbitration falls within the ambit of the term "legal proceedings".

Although there is no express reference to arbitration in any of the four provisions to which we have referred, it seems clear that an arbitration falls within the concept of "legal proceedings". Historically, the term "action" has been used to refer to a proceeding in a court. The use of the terms "legal proceeding" and "action" disjunctively in the 1955 Act suggest that (at least) any form of binding and final determination will fall within the scope of the term "legal proceeding".[49] That view finds support in the judgment of the High Court of England and Wales, in *Hudson v Gambling Commission* (*Re Frankice (Golders Green) Ltd).*[50] Norris J held that the term "legal proceedings" included arbitration:[51]

> "It is unnecessary to go through each of the decisions to analyse the relevant reasoning and indeed time does not permit. But the following description will suffice. First, it is clear that legal process and legal proceedings are not confined to claims by creditors against the company; they include claims against the company by third parties, see: *Biosource Technologies v Axis Genetics* [2000] 1 BCLC 286. Second, it is plain that the legal process and legal proceedings are not confined to civil proceedings. Criminal proceedings are also caught by the moratorium, see: *Rhondda Waste* [2001] Ch 57, where a prosecution for breach of environmental regulations was permitted against the company, though the court plainly held that the criminal proceedings were caught by the moratorium. *Thirdly, it is plain that the relevant legal process or legal*

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48 Schedule 6 comprises a non-exhaustive list of powers that may be exercised by a liquidator. See Companies Act 1993, s 260(2).

49 In *Bresco Electrical Services Ltd (in liq) v Michael J Lonsdale (Electrical) Ltd* [2020] UKSC 25, the Supreme Court of the United Kingdom confirmed that the principle applied equally to construction adjudications, which do not result in a final determination of a dispute: see, in particular, paras 41 (per Lord Briggs, for the Court).

50 *Hudson v Gambling Commission* (*Re Frankice (Golders Green) Ltd)* [2010] EWHC 1229 (Ch) at para 38. See also, *Philpott v Lycée Francais Charles de Gaulle School* [2015] EWHC 1065 (Ch), in which Judge Purle QC held that, despite the issue arising before him in the context of a proof of debt regime requiring the taking of an account, an arbitration clause in the pre-existing contract continued to be binding, though any arbitral proceedings that were commenced would be "vulnerable to an application for a stay". He added (at para 5) that: "It is clear that arbitration proceedings are legal proceedings or process for this purpose …."

51 *Hudson v Gambling Commission* (*Re Frankice (Golders Green) Ltd)* [2010] EWHC 1229 (Ch) at para 38.

> *proceedings are not confined to proceedings before a court of law. It covers proceedings before tribunals, before arbitrators and before statutory adjudicators*." (Emphasis added)

Any residual doubt about the availability of arbitration in a post-liquidation environment was removed by the Supreme Court of the United Kingdom in *Bresco Electrical Services Ltd (in liq) v Michael J Lonsdale (Electrical) Ltd*[52] (*Bresco*). Delivering the unanimous judgment of the Court, Lord Briggs said:[53]

> "33. Where there are real disputes between the company and third parties (who may be creditors or debtors) the insolvency code is inherently flexible as to the best means for their resolution. *A disputed pending claim (in court proceedings or in arbitration) against the company (as at the cut-off date) may be allowed to continue by the liquidator or by the court supervising the insolvency process, as the best means of resolving the dispute*: see *Cosco Bulk Carrier Co Ltd v Armada Shipping SA* [2011] EWHC 216 (Ch); [2011] 2 All ER (Comm) 481, para 58. *New proceedings may be authorised for the same purpose.* The liquidator may take the initiative by seeking the directions of the court in relation to particular disputes or to legal issues common to a number of disputed claims, and for that purpose join interested parties or representatives of interested classes. Within those proceedings the court has almost unlimited procedural flexibility, as the numerous matters referred to court by the administrators of the top Lehman company in London (Lehman Brothers International (Europe)) demonstrated. Furthermore there is no rule that, merely because there exists set-off between cross-claims, and the need to take an account, disputes about all the claims and cross-claims need to be adjudicated upon in a single proceeding. Again, the Lehman litigation contains numerous examples of the separate resolution, in successive proceedings, of different issues between the same parties within the Lehman group, concerning their mutual dealings." (Emphasis added)

5.4 Summary on public policy

Subject to the need to assess arbitrability in the context of any given insolvency dispute, the relevant New Zealand public policy trends identifiable from our analysis are:

(a) encouragement of arbitration, with limited judicial intervention in the arbitral process;

(b) a broadening of powers given to arbitrators to determine disputes in line with international best practice;

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[52] In *Bresco Electrical Services Ltd (in liq) v Michael J Lonsdale (Electrical) Ltd* [2020] UKSC 25.

[53] *Idem*, at para 33. Although Lord Briggs did not give any express reference to the resolution procedures used in Lehman Brothers International (Europe), an example is *Re Lehman Brothers International (Europe) (in administration)* [2018] EWHC 1980 (Ch), per Hildyard J, approving a scheme of arrangement containing an adjudication procedure to resolve claims.

(c) a broadening of arbitration to encompass areas traditionally thought to fall within the exclusive jurisdiction of the courts;

(d) a reduction of the role of the court in the liquidation process;

(e) liberalisation of the powers of liquidators to bring or continue claims in the name of the company, or to permit claims to be brought against it; and

(f) the ability, when questions of arbitrability arise, for an arbitrator to determine the extent of his or her own jurisdiction.[54]

While relevant public policy factors may differ, depending upon what governing law is applicable, we suggest that the trends to which we have referred are consistent with the view that insolvency-related disputes are arbitrable, except for those that are considered "core" or "pure".

6. What are "core" or "pure" insolvency disputes?

In this section, we survey authorities from a number of jurisdictions[55] in an endeavour to identify those types of insolvency-related disputes that should be excluded from resolution by arbitration. With the qualification that such issues will be considered under applicable law, to reflect what has been said in cases and texts, we will refer to these as "core" or "pure" insolvency disputes.

6.1 Public policy propositions

In *WDR Delaware Corporation v Hydrox Holdings Pty Ltd*[56] (Hydrox), Foster J, sitting in the Federal Court of Australia, endeavoured to capture a number of policy reasons for holding that a liquidation order was not arbitrable. By reference to counsel's submissions, Foster J set out the following propositions:[57]

(a) A liquidation order affects the legal status of a person, having serious consequences for the future of the company in question and those who have been charged with its management. (The status proposition.)

(b) A liquidation order affects a number of third parties. For example, it creates restrictions on the disposition of property, restricts the company's freedom to act in litigation and impacts on rights of the company's creditors to obtain payment of their due debts in full. (The third party rights proposition.)

(c) The creation and dissolution of an artificial legal entity "such as a company" is a matter uniquely the subject of governmental authority. (The legal entity proposition.)

(d) There is a public interest in ensuring that procedural steps by which a company is put into liquidation are governed by the court's processes and determined transparently, in the public domain. (The transparency proposition.)

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54 Arbitration Act 1996, Sch 1, art 16.
55 We have omitted the United States of America from this survey because of the prescriptive nature of the US Bankruptcy Code.
56 *WDR Delaware Corporation v Hydrox Holdings Pty Ltd* [2016] FCA 1164.
57 *Idem*, at para 131.

These propositions form a sound policy basis for the exclusion of arbitration in relation to liquidation or winding up orders. It is uncontroversial for the reasons set out in *Hydrox* that liquidation orders fall within the exclusive jurisdiction of the courts. In our view, the status proposition is uncontroversial, and the legal entity proposition adds little, if anything, material to it.

From a policy perspective, the remaining two propositions, third party rights and transparency, are often cited to support the view that insolvency disputes more generally are not arbitrable.

The third party rights proposition has its roots in the collective nature of an insolvency process.[58] Collective proceedings will generally be less amenable to arbitration due to the inherent limitations of the consent-based nature of an arbitrator's jurisdiction. Some commentators have suggested that the non-arbitrability of insolvency disputes is not so much a public policy issue, but stems simply from the incompatibility of insolvency's collective nature with the contractual nature of arbitration.[59]

While it is true to say that a third party's interests may be adversely affected by an arbitral ruling, this is of itself not a bar to arbitration. For example, if a liquidator were to allow a related party claim as a debt provable in the liquidation, that would adversely affect the amount of any distribution payable to other creditors. This would affect the *interests* of other creditors, but not their underlying right to distribution *pari passu.* The same result would have occurred if a duly constituted arbitral tribunal had made an award in the same sum the day before liquidation intervened. A deeper analysis is required to determine whether the arbitration process might curtail a *right* granted to a third party under insolvency legislation and, if so, whether that is a sufficient factor, of itself, to oust the availability (in any given case) of arbitration to resolve an insolvency-related dispute.

Similarly, the interests of some creditors might be affected adversely if the liquidator were to make a claim that a payment had been made in circumstances allowing him or her to set aside an antecedent transaction. That would require repayment from the creditor against whom the claim is brought but enhancement of the pool of assets available to all creditors. While, as we suggest later, such a preference claim could not be arbitrated under a pre-existing arbitration agreement, there seems no reason in principle why an *ad hoc* agreement could not be entered into between the liquidator and the creditor against which the preference claim was made to resolve that issue. Rarely, if ever, would another party be joined in High Court proceedings to a preference claim of that type. A liquidator would have power to settle such a proceeding.[60] There is no intrinsic public interest attached to such a claim. In those

[58] *Larsen Oil & Gas Pte Ltd v Petroprod Ltd (in official liquidation in the Cayman Islands and in compulsory liquidation in Singapore)* [2011] SGCA 21, at para 1.

[59] S Brekoulakis, "On Arbitrability: Persisting Misconceptions and New Areas of Concern" in L Mistelis, and S Brekoulakis, *Arbitrability: International and Comparative Perspectives* (The Hague, Kluwer Law International, 2009) at p 32. See also A L Gropper, "The Arbitration of Cross-Border Insolvencies", 86 *Am Bankruptcy Law J*, 201 at pp 228-229.

[60] Companies Act 1993, Sch 6, Cls (e) and (f). Madaus postulates that arbitrability of insolvency disputes should turn on a "settlement capacity test", whereby if a dispute were capable of settlement by the parties, it is capable of arbitration: see S Madaus, "The (Underdeveloped) Use of Arbitration in International Insolvency Proceedings", *J Int Arbitr* (2020) 37(4) 449, at 453.

circumstances, why would "public policy … demand that an agreement to resolve the dispute by arbitration … not be given effect"?[61]

The transparency proposition raises questions of public interest. Allsop J, delivering the principal judgment of the Full Court of the Federal Court of Australia in *Comandate Marine Corp v Pan Australia Shipping Pty Ltd*[62] said, in discussing the arbitrability of disputes involving such things as intellectual property, competition, and insolvency disputes, in the context of an admiralty issue:[63]

> "… the common element to the notion of non-arbitrability was that there was a sufficient element of legitimate public interest in these subject matters making the enforceable private resolution of disputes concerning them outside the national court system inappropriate."

As to transparency of the process, the debate is not limited to the question whether a dispute should be resolved in a public or private forum. Privacy and confidentiality are central but not immutable concepts of arbitration. Parties are able to waive both privacy and confidentiality, either generally or in relation to certain groups.[64] Transparency has been a focus of recent arbitral reform, with some organisations now seeking to publish arbitral awards.[65] Therefore, if the private nature of arbitration were the only concern, this objection could be overcome relatively easily by the liquidator insisting that any *ad hoc* arbitration take place in the public domain or, at least, by requiring the award to be available for inspection by any creditor.[66]

6.2 Claims arising post-insolvency

Two recent decisions, one in Singapore and the other in England and Wales, have discussed aspects of the third party rights and transparency propositions. They are *Larsen Oil*[67] (2011) and *Nori Holding Ltd v Public Joint-Stock Co "Bank Otkritie Financial Corporation"*[68] (*Nori Holding*) (2018). We contrast their approaches to the arbitrability of insolvency-related disputes.

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61 D A R Williams and A Kawharu, *Williams & Kawharu on Arbitration*, (2nd ed, LexisNexis, 2017), at para 7.2.1. Some caution is required if it is anticipated that enforcement will take place in another jurisdiction. Article V(1)(a) of the New York Convention enables a court in a country in which recognition and enforcement of an award is sought to refuse to grant those remedies where the arbitration "agreement is not valid under the law to which the parties have subjected it".

62 *Comandate Marine Corp v Pan Australia Shipping Pty Ltd* [2006] FCAFC 192.

63 At para 200, with whom, on this point, Finn and Finkelstein JJ appear to have agreed. See also, more generally, M Conaglen, "The Enforceability of Arbitration Clauses in Trusts", 74(3) *Cambridge Law Journal* 450, at 451 to 465.

64 See also Arbitration Act 1996 (NZ), ss 14 to 141, in relation to the arbitral tribunal's or a court's jurisdiction to make confidential information in an arbitration public.

65 The International Chamber of Commerce (ICC) now publishes arbitral awards by default (although parties can object to publication). Investment treaty awards are also usually publicly available – see, eg, https://icsid.worldbank.org and https://www.italaw.com. Reform of investment treaty arbitration, including greater transparency, is currently being considered by UNCITRAL Working Group III (Arbitration). In 2014, UNCITRAL released its "Rules on Transparency in Treaty-based Investor-State Arbitration".

66 In New Zealand, there is also an ability for any party to apply to the arbitral tribunal for an order allowing aspects of the proceeding and / or the award to be published publicly. Arbitration Act 1996, s 14D.

67 *Larsen Oil & Gas Pte Ltd v Petroprod Ltd (in official liquidation in the Cayman Islands and in compulsory liquidation in Singapore)* [2011] SGCA 21.

68 *Nori Holding Ltd v Public Joint-Stock Co "Bank Otkritie Financial Corporation"* [2018] EWHC 1343 (Comm).

Larsen Oil involved a company called Petroprod Ltd, which had been incorporated in the Cayman Islands but carried on business in Singapore. Petroprod was placed in official liquidation by order of the Grand Court of the Cayman Islands and later in compulsory liquidation by the High Court of Singapore. Proceedings were issued by the Singapore liquidators against Larsen Oil in an attempt to avoid payments made by Petroprod to Larsen Oil and four of its subsidiaries on the grounds that they amounted to unfair preferences, transactions at an undervalue, or made with an intent to defraud a creditor of the subsidiary companies. The unfair preferences and transactions at undervalue proceedings (the unfair transaction proceedings), while brought in the name of the company, were pursued under statutory provisions that granted liquidators the right to challenge such payments. In other words, they were proceedings that could not have been brought by the company before the insolvency process intervened. The separate claim that alleged that, before liquidation intervened, Petroprod had engaged in transactions designed to defraud certain parties (the constructive fraud claim) was brought under the (Singapore) Conveyancing and Law of Property Act. That was a claim that could have been brought by the company before a liquidation order was made.

Larsen Oil filed a summons in the High Court of Singapore in which it applied for a stay of proceedings brought by the liquidators of Petroprod on the grounds that the disputes could only be resolved through arbitration. The parties had entered into a contract that contained a clause requiring disputes between Petroprod and Larsen Oil to be determined by arbitration in Singapore. The stay was sought under section 6(2) of the International Arbitration Act (Singapore), pursuant to which courts must stay proceedings that should properly be determined by arbitration.

The question for the Court was whether Petroprod's claims fell within the scope of the pre-existing arbitration clause and, if so, whether a stay should be refused because the disputes were not arbitrable. The Court of Appeal of Singapore held that:

(a) because the unfair transaction claims were brought under powers that could be exercised only after the intervention of liquidation, they were not capable of being arbitrated under a pre-existing arbitration agreement between Petroprod and Larsen Oil;[69] and

(b) while the constructive fraud claim could have been brought in the name of the company before liquidation, it was "intimately intertwined with insolvency, since it is entirely contingent on the insolvent status of the debtor", meaning that the claim was not arbitrable.[70]

The Singaporean Court drew a distinction "between disputes involving an insolvent company that stem from its pre-insolvency rights and obligations and those that arose only upon the onset of insolvency due to the operation of an insolvency regime".[71] The Court took the view that the statutory purposes of an insolvency regime, "to recoup for the benefit of the company's creditors losses caused by the misfeasance and / or malfeasance of its former management", might be compromised if remedies designed to achieve that goal were not

[69] *Larsen Oil & Gas Pte Ltd v Petroprod Ltd (in official liquidation in the Cayman Islands and in compulsory liquidation in Singapore)* [2011] SGCA 21, at para 59.
[70] *Idem*, at paras 56 and 58.
[71] *Idem*, at para 45.

required to be addressed through court procedures.[72] For the Singaporean Court of Appeal, Rajah JA said:

> "46. We, therefore, are of the opinion that the insolvency regime's objective of facilitating claims by a company's creditors against the company and its pre-insolvency management overrides the freedom of the company's pre-insolvency management to choose the forum where such disputes are to be heard. The courts should treat disputes arising from the operation of the statutory provisions of the insolvency regime *per se* as non-arbitrable even if the parties expressly included them within the scope of the arbitration agreement."

In reaching that decision, the Court of Appeal made a number of relevant observations on the scope of arbitration in the context of insolvency disputes. We paraphrase what was said by the Court:

(a) Compelling parties to arbitrate inevitably deprives them of a fundamental right of access to the courts which can only be justified if they had previously consented to waiving their right to judicial remedies by substituting arbitration as their agreed method of dispute resolution. The Court was concerned that, if the arbitration clause were used, the company's pre-insolvency management may be able to dictate improperly the forum in which post-liquidation creditors' claims against them might be brought.[73]

(b) It is a well-established principle that a company cannot contract with some of its creditors for the non-application of certain insolvency rules, such as the "highly specialised form of dispute resolution in respect of claims brought against an insolvent party [by submitting] … a proof of debt to the liquidator." The Court said that "arguably" any agreement to arbitrate such a dispute would run foul of the principle that a creditor could not contract out of the proof of debt process.[74] However, implicitly emphasising its use of the term "arguably," the Court went on to articulate an opposing point of view; namely, that the proof of debt process is not undermined by arbitration as it is "merely a substituted means of enforcing debts against the company, and does not create new rights in the creditors or destroy old ones".[75]

(c) Pre-existing arbitration agreements should not be enforced by the court against a liquidator "where the agreement affects the substantive rights of other creditors" and "[undermines] the policy aims of the insolvency regime". The importance of explaining why a particular right might be affected adversely is emphasised by the Court's approval of an earlier decision, in which the High Court of Singapore had held that a pre-bankruptcy agreement between a debtor and its creditor on service of process for court proceedings did not amount to an arrangement that undermined public interest considerations.[76] Importantly, the point is consistent with the notion

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72 *Ibid*.
73 *Idem*, at para 46.
74 *Idem*, at para 49.
75 *Idem*, at para 51.
76 *Idem*, at para 50, citing *Re Rasmachayana Sulistyo (alias Chang Whe Ming), ex parte, The Hongkong and Shanghai Banking Corp Ltd and other appeals* [2005] 1 SLR(R) 483, at para 20.

that an arbitral award should not affect the substantive rights of anyone who did not have an opportunity to be heard.

Nori Holding was decided seven years after *Larsen Oil* and tends to take a more proactive approach to the availability of arbitration to resolve insolvency-related disputes. In that case, a successful application for an anti-suit injunction was brought by Nori Holding to restrain the pursuit of court proceedings in Russia, said to have been brought in breach of an arbitration agreement. Bank Otkritie, a Russian bank, had advanced moneys to companies related to Nori Holding under three loan agreements governed by Russian law and providing for the jurisdiction of the Moscow Arbitrazh Court. The loans were secured by pledge agreements that were governed by the law of Cyprus and which contained an arbitration clause requiring any dispute to be resolved under the rules of the London Court of International Arbitration (LCIA). Ultimately, Bank Otkritie was put into an insolvency process in Russia and the insolvency representative brought proceedings alleging that the transactions amounted to a fraud. Nori Holding referred that dispute to LCIA arbitration and sought a stay of the Russian proceedings, on the grounds that the arbitration agreement covered the type of insolvency-related claim that the insolvency representative had brought.

In determining the anti-suit injunction application, Males J considered whether *Larsen Oil* should be applied as a matter of English law. In doing so, he focussed primarily on the unfair transaction proceedings with which *Larsen Oil* had dealt. As previously indicated, the Court of Appeal of Singapore had held that such a claim, brought at the behest of a liquidator, could not fall within the scope of a pre-existing arbitration clause.[77] Males J also considered what had been said in *Larsen Oil* about policy reasons militating against giving effect to arbitration agreements between the insolvent company and contractual counterparties.[78]

Males J responded to the points made in *Larsen Oil* as follows:

(a) The arbitration clause in the pledge agreements was expressed "in wide and general terms", with no "express exclusion of disputes of any kind". There was no "good reason to imply a limitation to the effect that the clause does not extend to a claim in insolvency proceedings to avoid a transaction as being [one] at an undervalue". As a result, there was no justification to limit the scope of the arbitration clause to exclude, as a matter of construction, unfair transaction proceedings.[79]

(b) In assessing whether an insolvency claim under Russian law was arbitrable, it was necessary to focus on the substance of the dispute, rather than its form. The particular dispute before the Judge was factual in nature and turned on whether specific transactions constituted "a fraud … on the Bank to replace valuable secured loans with worthless bonds". As such a claim could be brought on a number of legal bases, it was the nature of the claim, rather than the process used to bring it, that should determine whether it was arbitrable.[80]

77 *Idem*, at para 52.
78 See the discussion above.
79 *Nori Holding Ltd v Public Joint-Stock Co "Bank Otkritie Financial Corporation"* [2018] EWHC 1343 (Comm), at paras 60 and 61.
80 *Idem*, at paras 62 and 63.

(c) The particular proceeding brought by the insolvency representative of the Bank did not seek to change the status of the Bank. Nor was it one that "would affect the position of third parties in such a manner as to take the case beyond the consensually derived jurisdiction of the arbitrators".[81]

(d) There was no justification for excluding arbitration as an appropriate method of dispute resolution on the grounds that parties would be deprived of an "inalienable" right to go to court. The law no longer regards arbitration "as intrinsically better or worse than litigation". As Males J observed, it is just different, having both advantages and disadvantages." Parties should be held to their agreement to arbitrate.[82]

We endeavour to summarise the views expressed in *Larsen Oil* and *Nori Holding* in the context of the propositions set out in *Hydrox*.[83] We do so by treating the status and legal entity propositions as equivalents:

(a) As to the transparency proposition, different views were expressed about the "fundamental right of access to the courts":

(i) In *Larsen Oil*, the Singaporean Court's concern was to provide a disincentive for management of a company to insist on using their forum of choice on a claim brought by a liquidator (albeit in the name of the company) when the insolvency representative was not a party to the pre-existing arbitration agreement and the claim was based on rights that could not have been exercised by the company prior to liquidation. Under the Singaporean legislation, while the claim was one that could not have been brought in the name of the company before liquidation, it was pursued, after intervention of an insolvency process, in the name of the company, rather than the liquidator.

(ii) In *Nori Holding*, the Court was anxious to make the point that, provided there was otherwise a right to have a dispute with an insolvency representative determined by arbitration, the mere fact that it would not be held in a public forum, namely a court of law, was not sufficient to deny arbitrability. *Nori Holding* regards the question of arbitrability as turning on the scope of the arbitration clause and rejects the notion that arbitration should not be used because of transparency concerns. As the court observed, the law no longer regards arbitration "as intrinsically better or worse than litigation".

(b) In *Nori Holding*, the Court considered application of the arbitration agreement in the context of the underlying rights of the parties, rather than the procedure under which the claim was brought. Because a claim based on a transaction at an undervalue could have been brought before the insolvency process intervened, the pre-existing arbitration agreement was held to be enforceable. The reason why *Larsen Oil* took a contrary view was because the unfair preferences claim could not have been brought, in any form, prior to liquidation. The approaches taken in the two cases are compatible, if viewed in that context.

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81 *Idem*, at para 64.

82 *Idem*, at paras 65 and 66, with reference to Scrutton LJ's well known dictum in *Czarnikow v Roth Schmidt & Co* [1922] 2 KB 478 (CA) at 488, that the days had "long gone" when arbitration was regarded as an unacceptable "Alsatia … where the King's writ does not run".

83 *WDR Delaware Corporation v Hydrox Holdings Pty Ltd* [2016] FCA 1164.

(c) *Larsen Oil* held that a company cannot contract with some of its creditors for the non-application of certain insolvency rules. An example given was the proof of debt regime, something we shall discuss in detail later.[84] While we do not necessarily agree with the sweeping nature of that proposition, there may be some types of disputes that relate to distributions to creditors to which the principle may apply; for example, the fundamental rule of *pari passu* distribution.[85]

6.3 Minority oppression and just and equitable proceedings

A number of the authorities deal with minority oppression proceedings. Section 174 of the 1993 Act is the relevant New Zealand provision. Materially, it takes the same form as similar provisions in other common law jurisdictions.

We take, as our starting point, a decision of the Court of Appeal of England and Wales, in *Fulham Football Club (1987) Ltd v Richards*[86] (*Fulham Football Club*). Although the proceeding had the potential to lead to an order putting a company into liquidation, it was held to be capable of arbitration, but with the caveat that an arbitral tribunal would not be able to make a liquidation order. This is an example of the application of the status / legal entity propositions. As with most minority oppression proceedings, alternative orders were sought that the applicant's shares be acquired at a fair value by the majority or (in effect, as a remedy of last resort) that the company be put into liquidation on just and equitable grounds.

In *Fulham Football Club* it was held that an arbitral tribunal exercising jurisdiction under a governing document was entitled to determine underlying facts or law, but had no power to make a liquidation order which would result in a change of status for the company. Delivering the principal judgment of the Court of Appeal, Patten, LJ said:[87]

> "83. … I … [prefer] the view that disputes of this kind which do not involve the making of any winding-up order are capable of being arbitrated. … I also take the view, as Austin J did in the *ACD Tridon* case, that the same probably goes for a similar dispute which is used to ground a petition … to wind up the company on just and equitable grounds. In those cases, the arbitration agreement would operate as an agreement not to present a winding-up petition unless and until the underlying dispute had been determined in the arbitration. The agreement could not arrogate to the

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84 We discuss arbitrability, in the context of the proof of debt regime, at para 8 below.

85 As a matter of New Zealand law, while a creditor may waive priority by subordinating its claim to others, it is not possible to contract out of the priority distribution regime created by statute. See *Attorney-General v McMillan & Lockwood Ltd* [1991] 1 NZLR 53 (CA) at paras 61 to 62 (Richardson and Bisson JJ, Williamson J dissenting). The current waterfall is set out in the Companies Act 1993, Sch 7.

86 *Fulham Football Club (1987) Ltd v Richards*, [2012] 1 All ER 414 (CA).

87 *Idem*, at para 83. In *Anzen Ltd v Hermes One Ltd* [2016] UKPC 1 (British Virgin Islands) at para 7, the Privy Council followed *Fulham Football Club* and stated that "it is … common ground that an arbitrator could determine disputes regarding underlying issues of fact or law relevant to the subsequent pursuit in Court of [winding up] orders". This approach is not dissimilar to that applied in admiralty law where *in personam* claims may be arbitrated but *in rem* claims that affect questions of status must be determined by a competent court exercising admiralty jurisdiction – see *Raukura Moana Fisheries Ltd v The Ship "Irina Zahrkikh"* [2001] 2 NZLR 801 (HC) at paras 65 and 95, per Young J.

> arbitrator the question of whether a winding-up order should be made. That would remain a matter for the court in any subsequent proceeding. But the arbitrator could, I think legitimately, decide whether the complaint of unfair prejudice was made out and whether it would be appropriate for winding-up proceedings to take place or whether the complainant should be limited to some lesser remedy. It would only be in circumstances where the arbitrator concluded that winding up proceedings would be justified that a shareholder would then be entitled to present a petition [on the just and equitable ground] …" (Footnotes omitted)

Longmore LJ agreed generally with the approach taken by Patten LJ. His Lordship took the view that there was no public interest that would prevent the question whether a company's affairs were or had been conducted in a manner unfairly prejudicial to the interests of its members from being subjected to arbitration.[88] Longmore LJ emphasised that the inability of an arbitrator to grant a particular order (in that case one putting a company into liquidation) was "just an incident of the agreement which the parties have made as to the method by which their disputes are to be resolved" and did not give rise to any public policy factor preventing resolution of the dispute by arbitration.[89] The third Judge, Rix LJ, took the view that there was no reason "why the autonomy of the parties … (subject to such safeguards as are necessary in the public interest) should not apply to the choice of arbitration" in relation to the particular dispute.[90]

A number of common law jurisdictions have adopted the approach articulated in *Fulham Football Club*. Examples can be found in Australia,[91] Canada,[92] Singapore[93] and Hong Kong.[94] In those jurisdictions, liquidation is seen as a remedy of last resort in minority oppression proceedings. However, the Cayman Islands has taken a different path, seemingly because of the lack of a specific statutory provision that enables a minority oppression proceeding to be brought. Such a claim can only be made through just and equitable proceedings, in which liquidation is sought as the primary remedy. The different approaches can best be illustrated by reference to the Singaporean case of *Tomolugen* and the Cayman case of *Familymart China Holding Co Ltd v Ting Chuan (Cayman Islands) Holding Corporation*[95] (*Familymart China*). We discuss each in some detail to explain both the analytical approach taken and the respective outcomes.

In *Tomolugen*, Silica Investors Ltd made an application alleging that the affairs of Auzminerals Resource Group Ltd had been conducted in an unfairly prejudicial or oppressive manner. Tomolugen was the majority shareholder of Auzminerals and the primary defendant in the litigation. The remaining

88 *Idem*, at paras 98 and 99.
89 *Idem*, at para 103.
90 *Idem*, at para 107.
91 *WDR Delamere Corporation v Hydrox Holdings Pty Ltd* [2016] FCA 1164; *ACD Tridon Inc v Tridon Australia Pty Ltd* [2002] NSWSC 896; and *Paul Brazis v Emelio Rosati* [2014] VSC 385.
92 *ABOP LLC v Qtrade Canada Inc* (2007) 284 DLR (4th) 171 (SC, BC).
93 *Tomolugen Holdings Ltd v Silica Investors Ltd* [2016] 1 SLR 373 (SGCA), at paras 84 to 88. In a different context, see also *A Best Floor Sanding Pty Ltd v Skyer Australia Pty Ltd* [1999] VSC 170, at paras 13 and 18.
94 *Quiksilver Greater China Ltd v Quiksilver Glorious Sun JV Ltd* [2014] 4 HKLRD 759.
95 Court of Appeal of the Cayman Islands 23 April 2020, Rix, Martin and Moses JJA.

defendants were shareholders or current or former directors of Lionsgate Holdings Pte Ltd, another minority shareholder in Auzminerals and the second defendant. Lionsgate applied for a stay of the court proceedings on the grounds that the dispute fell within the scope of the arbitration clause in a share sale agreement between Lionsgate and Silica. The other defendants were not parties to that agreement. It was necessary for the court to determine whether a stay should be ordered and, if so, on what terms. The stays were sought both under the Singaporean arbitration statute and the case management jurisdiction of the High Court. The Court dismissed all stay applications. Lionsgate and three other defendants appealed. In addition to the question of arbitrability of the minority oppression proceedings, the Court of Appeal was also obliged to consider whether to allow an arbitration to proceed in which all defendants in the proceeding were not parties to the arbitration agreement.

In the Court of Appeal, Menon CJ, by reference to the Singaporean equivalent of section 10 of the Arbitration Act 1996 (New Zealand),[96] said that "the essential criterion of non-arbitrability is whether the subject matter of the dispute is of such a nature as to make it contrary to public policy for that dispute to be resolved by arbitration".[97]

The Singaporean Court of Appeal held that:[98]

(a) there would ordinarily be a presumption of arbitrability, as long as a dispute fell within the scope of an arbitration clause; and

(b) the presumption of arbitrability may be rebutted if it could be established that Parliament intended to preclude a particular type of dispute from being arbitrated (as evidenced by either the text or the legislative history of the statute in question) or it would be contrary to the public policy considerations involved in that type of dispute to permit it to be resolved by arbitration.

Silica had requested wide-ranging relief, including (as an alternative) an order that Auzminerals be placed in liquidation. Menon CJ drew a distinction between a minority oppression claim and one involving "the liquidation of an insolvent company or avoidance claims that arise upon insolvency because the former *generally* does not engage the public policy considerations involved in the latter two situations" (original emphasis).[99]
Menon CJ considered that Silica's claim that Auzminerals' affairs had been conducted in an oppressive manner was essentially about "protecting the commercial expectations of the parties" and did not involve any wider public interest.[100] It was, in essence, a claim designed to uphold the commercial agreement between the shareholders. The fact that Silica had requested liquidation as one potential remedy did not change the nature of the underlying claim. The Chief Justice pointed out that the parties intended that the arbitrator resolve the underlying commercial disagreement, as opposed to granting the particular relief that may be appropriate.[101] He said that this approach sought to

[96] See discussion above.
[97] *Tomolugen Holdings Ltd v Silica Investors Ltd* [2016] 1 SLR 373 (SGCA), at para 75.
[98] *Idem*, at para 76.
[99] *Idem*, at para 84. A similar view was expressed by Males J in *Nori Holding Ltd v Public Joint-Stock Co "Bank Otkritie Financial Corporation"* [2018] EWHC 1343 (Comm), at paras 62 and 63.
[100] *Idem*, at para 88.
[101] *Idem*, at para 102.

strike a balance between, on the one hand, upholding the agreement of the parties as to how their disputes are to be resolved and, on the other, recognising that there are jurisdictional limitations on the powers that are conferred on an arbitral tribunal. The Court was "satisfied that an arbitral tribunal's inability to grant certain reliefs which may be sought would not in itself render the subject matter of the dispute non-arbitrable".[102]

In *Tomolugen*, stays were ordered on terms that prevented the claims against non-parties to the arbitration agreement from continuing until such time as the arbitration had been concluded.[103] The claims that fell outside the scope of the arbitration agreement were stayed as part of the court's general case management discretion. A similar approach is taken in England and Wales and New Zealand, though a higher threshold is required to demonstrate the need for a stay of claims brought by non-parties to the arbitration agreement.[104] *Tomolugen* preferred a lower test.[105]

The New Zealand approach was explained, by the High Court, in *Danone Asia Pacific Holdings Pte Ltd v Fonterra Co-operative Group Ltd*[106] (*Danone*). In that case, Venning J concluded that "even where the parties to the proceeding are not both parties to the arbitration … the court retains jurisdiction to stay the proceedings" either under a specific provision in the High Court Rules or its inherent jurisdiction; "including for reasons of sensible case management".[107] In *Danone,* the proceedings were stayed on terms that (in effect) required the timely pursuit of the arbitration proceeding in Singapore.[108] In making that order, Venning J emphasised that the case management discretion should only be exercised in "rare and compelling circumstances," in which there "must be a real risk of unfairness or oppression to the defendant if the proceedings were allowed to continue".[109]

Familymart China illustrates the Cayman approach and highlights the way in which questions of arbitrability will turn on the terms of local legislation. *Familymart China* distinguished the approach taken in *Fulham Football Club* on the basis of Cayman law. Cayman law does not include a discrete minority oppression provision of the type considered in *Tomolugen* and *Fulham Football Club.* Instead, a shareholder seeking relief in such circumstances must bring a winding up petition on the just and equitable ground, for which the primary remedy is liquidation.

The distinction between the processes available to shareholders in the Cayman Islands and other jurisdictions was explained in an earlier judgment of the Cayman Court of Appeal, *Tianrui (International) Holding Co Ltd v China*

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[102] *Idem*, at para 103.

[103] The Court of Appeal of the Cayman Islands in *Familymart China Holding Co Ltd v Ting Chuan (Cayman Islands) Holding Corporation*, Court of Appeal of the Cayman Islands, CICA Civil Appeal Nos 7 and 8 of 2019, 23 April 2020, did not accept that approach was appropriate.

[104] See discussion below.

[105] *Tomolugen Holdings Ltd v Silica Investors Ltd* [2016] 1 SLR 373 (SGCA), at para 187.

[106] *Danone Asia Pacific Holdings Pte Ltd v Fonterra Co-operative Group Ltd* [2014] NZHC 1681. Although an appeal to the Court of Appeal was brought, the Court did not offer any opinion on jurisdiction: *Danone Asia Pacific Holdings Pte Ltd v Fonterra Co-operative Group Ltd* [2014] NZCA 536.

[107] *Danone Asia Pacific Holdings Pte Ltd v Fonterra Co-operative Group Ltd*, [2014] NZHC 1681 at para 54.

[108] *Idem*, at para 99. That was done by reserving leave to apply to lift the stay if there was any delay in prosecuting the arbitral proceedings.

[109] *Idem*, at para 55, applying what was said by Lord Bingham MR in *Reichhold Norway ASA v Goldman Sachs International* [2000] 2 All ER 679 (CA), at 186.

Shanshui Cement Group Ltd[110] (*Tianrui*). Martin JA, for the Court, noted that the only mechanism for complaining of unfairly prejudicial or oppressive conduct in the Cayman Islands was to bring a winding up petition based on the just and equitable ground. The *Tianrui* Court accepted that, if grounds were made out in other jurisdictions for a minority oppression claim to succeed, the orders that the court could make were similar to those which could be made in the Cayman Islands. In doing so, Martin JA adopted the view expressed by Chadwick P, in an earlier Cayman appellate decision, *Asia Pacific Ltd v ARC Capital LLC*.[111] The President in that case said that "the gateway to an order under [the Cayman provision] is that the Court is satisfied that [but for that order] it would be 'just and equitable' to wind up the company."[112]

Consequently, when a "buy-out" order is made in the Cayman Islands, the "threshold" issue that the court must determine is whether or not it would be just and equitable to wind up the company. The court does not "dismiss" the winding up petition. If it were to do so, it would have no jurisdiction to make an order requiring one shareholder to buy-out the other. Instead, having held that the grounds for a winding up order have been made out, the court imposes an order that is an appropriate "alternative" to liquidation.

Familymart China considered whether it was possible to isolate underlying factual issues that might be determined by arbitration. Delivering the judgment of the Court of Appeal, Moses JA put the point in this way:[113]

> "69. … The authorities on which the rival contentions focussed all start with the proposition that only the court can decide whether it is just and equitable to make a winding up order. The issue of arbitrability comes down to the question whether the underlying disputes are themselves susceptible to arbitration and should, in accordance with the [shareholders' agreement] be submitted to arbitration before the Court exercises its jurisdiction to decide whether it is just and equitable to make a winding up order, …"

The Court of Appeal held that the underlying factual issues all went to whether or not it was just and equitable to wind up the company. This was the first issue to be determined by the Court and, consequently, a dispute of this nature (including the underlying factual issues) was not arbitrable.
In giving his judgment, Moses JA discussed *Fulham Football Club,* as well as other authorities that had taken a similar approach;[114] for example, *Re Cybernaut Growth Fund LP,*[115] *SPhinX Group of Companies (in official*

[110] *Tianrui (International) Holding Co Ltd v China Shanshui Cement Group Ltd* (Court of Appeal of the Cayman Islands 5 April 2019, Martin, Newman and Moses JJA).
[111] *Asia Pacific Ltd v ARC Capital LLC* 2015 (1) CILR 299.
[112] *Idem*, at para 38.
[113] *Familymart China Holding Co Ltd v Ting Chuan (Cayman Islands) Holding Corporation* (Court of Appeal of the Cayman Islands 23 April 2020), at para 69.
[114] In particular, *Salford Estates (No 2) Ltd v Altomart Ltd (No 2)* [2015] Ch 589 (CA), at paras 34, 35 and 37, per Sir Terence Etherton C.
[115] *Re Cybernaut Growth Fund LP* 2014 (2) CILR 413 (Grand Court).

liquidation),[116] *Quiksilver Greater China Ltd v Quiksilver Glorious Sun JV Ltd (Quiksilver)*[117] and *Hydrox*.[118]

Quiksilver is a case in which arbitration was allowed even though no minority oppression proceeding was brought. It too concerned a just and equitable proceeding. Nevertheless, Harris J, in the Court of First Instance of Hong Kong, concluded that litigation could be stayed to allow arbitration to proceed because those interested in the petitions were limited to the two shareholders who were parties to the arbitration agreement. He considered that the underlying issues should be resolved by arbitration with the court considering whether or not to make a liquidation order based on the findings of fact made by the arbitrator.[119] This was the same approach that was subsequently taken in *Tomolugen*.

Having traversed those authorities in *Familymart China,* Moses JA concluded by saying that "the cases which have followed and developed *Fulham* [Football Club] have all depended upon the Court's ability to identify discrete, substantive issues which do not invoke the exclusive jurisdiction of the court."[120] The Court of Appeal distinguished that situation from the one pertaining in the Cayman Islands. It concluded that "where the underlying issues are central and inextricably connected to determination of the statutory question whether the company should be wound up on just and equitable grounds, the possibility of hiving off those issues becomes more difficult."[121]

6.4 Canada

Briefly, we touch on the position in Canada. We do so to highlight the flexible approach taken to the availability of arbitration to resolve insolvency-related disputes that might otherwise be addressed only through a court proceeding. By way of illustration, we refer to *Luscar Ltd v Smoky River Coal Ltd*[122] (*Smoky River*) in which the Court of Appeal of Alberta considered whether the first instance court was entitled to establish a procedure to resolve a dispute between the parties as part of its supervisory role under the Companies' Creditors Arrangement Act 1985 (CCAA), a Federal statute. The alternative was to stay the court proceeding, pending resolution of the dispute by an arbitrator appointed in British Columbia, in accordance with its Commercial Arbitration Act.

The position in Canada is complicated by the fact that the insolvency legislation is Federal in nature, while arbitration statutes are enacted by the Provinces. Federal legislation prevails over Provincial legislation where conflict exists.[123] On the particular facts of *Smoky River*, the Court of Appeal of Alberta took the view that it was more appropriate for the dispute to be resolved within the insolvency

[116] *Re Sphinx Group of Companies (in official liquidation)* (Court of Appeal of the Cayman Islands, CICA 6 of 2015, 2 February 2016), Mottley, Morrison and Field JJA.
[117] *Quiksilver Greater China Ltd v Quiksilver Glorious Sun JV Ltd* [2014] 4 HKLRD 759, at para 15 and 19 to 23.
[118] *WDR Delamere Corporation v Hydrox Holdings Pty Ltd* [2016] FCA 1164, at paras 161, 162 and 164.
[119] *Quiksilver Greater China Ltd v Quiksilver Glorious Sun JV Ltd* [2014] 4 HKLRD 759, at paras 19 and 22.
[120] *Familymart China Holding Co Ltd v Ting Chuan (Cayman Islands) Holding Corporation* (Court of Appeal of the Cayman Islands 23 April 2020), at para 109.
[121] *Ibid*.
[122] *Luscar Ltd v Smoky River Coal Ltd* [1999] ABCA 179.
[123] *Idem*, at para 75.

proceeding but did not exclude the possibility that, in different circumstances, it may be more appropriate for arbitration to be used.[124]

In *Smoky River,* the first instance judge had considered a number of matters in refusing to permit the arbitration. Among these were his view that the arbitration would compromise the CCAA process; that the effect of his order would not be to preclude or postpone the resolution of the dispute but to expedite it; that an expedited resolution of the dispute was critical to the CCAA proceedings given its possible impact on a plan of arrangement; and that it was desirable for Smoky's officers to focus on the re-organisation. The Court of Appeal agreed that these were all legitimate matters to consider.[125]

Delivering the judgment of the Court of Appeal, Hunt J observed that the judicial discretion was intended to "produce a result appropriate to the circumstances". She considered that the discretion should be exercised in a manner designed to give effect to the purpose of the CCAA and not to "seriously ... impair the ability of the debtor company to continue in business during the compromise or arrangement negotiating period."[126]

6.5 Summary

The cases above highlight certain trends in policy and approach by the courts to the arbitrability of insolvency-related disputes:

(a) It is uncontroversial that the granting of winding up or liquidation orders falls exclusively within the jurisdiction of the courts. There are strong policy reasons underpinning this position including the collective (or public) nature of liquidation and the change of status that takes place as a result of liquidation (for example, *Hydrox*);

(b) Claims that involve commercial issues between private parties are arbitrable in cases where liquidation is not the primary remedy. The policy rationale is that such disputes are essentially commercial in nature and do not engage the rights of third parties (for example, *Tomolugen* and *Fulham Football Club*);

(c) It is necessary to determine whether the claim in issue is one that the company could have brought before it entered an insolvency process or one that could only be initiated by an insolvency representative after that process had begun. A different approach to arbitrability may be taken, depending upon the outcome of that analysis (compare *Larsen Oil and Nori Holding).* While we tend to the view that claims that arise after the intervention of an insolvency process cannot be caught by a pre-existing arbitration agreement, we acknowledge that the authorities are not consistent on this point;

(d) The fact that an arbitral tribunal is not able to grant the full range of remedies available to a court (including liquidation), does not affect the arbitrability of the subject matter (for example, *Tomolugen* and *Fulham Football Club*);

[124] *Idem*, at para 67.
[125] *Idem*, at paras 69 and 70.
[126] *Idem*, at para 68, citing *Quintette Coal* (1991) 7 CBR (3d) 165 (SC, BC), at 312.

(e) Issues that engage collective rights or affect the substantive rights of creditors will generally not be arbitrable (for example, *Larsen Oil*). However, not all disputes in a post-insolvency environment engage such rights;

(f) While some jurisdictions allow arbitration to be used to decide the underlying factual controversies in both minority oppression and just and equitable proceedings (for example, *Tomolugen* and *Quiksilver*), that approach does not command unanimous support (for example, *Familymart China*). We observe that, while *Familymart China's* departure from the approach taken in *Tomolugen* and *Quiksilver* can be justified on the Court's interpretation of the relevant Cayman legislation, there would seem no reason in principle why the underlying factual claims that precede a decision to put a company into liquidation on the just and equitable ground could not be resolved by arbitration, in the same way that they would if arising in a minority oppression proceeding; and

(g) An issue by issue or "granular" approach may mean that some issues are arbitrable while others are not. For case management reasons, a court may choose to stay all matters before the court until those that are arbitrable have been determined by an arbitral tribunal (for example, *Tomolugen*).

From the cases it can be seen that "core" or "pure" insolvency disputes are those that directly affect third party rights (that is, creditors' rights) or that change the status of or company. Other insolvency-related disputes remain essentially commercial disputes without engaging the rights of others outside of those directly involved in the dispute.

7. Categories of insolvency disputes

Having reviewed the various approaches to arbitration and insolvency disputes by courts in different jurisdictions, we set out below four different categories of proceedings (all of which require some form of qualification) that, *prima facie*, are amendable to resolution by arbitration. They are:

(a) claims that fall within an existing arbitration clause in respect of which an arbitration has been commenced before the intervention of an insolvency process;

(b) claims that fall within an existing arbitration clause and that arise before the commencement of the insolvency process, but in respect of which no arbitral proceeding had been commenced before insolvency intervened;

(c) claims that the insolvency representative may bring in the name of the company under an existing arbitration agreement, whether they arise before or after insolvency; and

(d) claims that an insolvency representative may bring in his or her own name pursuant to powers conferred as a direct result of the intervention of insolvency.

We develop each of those categories in turn, using the New Zealand liquidation process to explain our views:

(a) A party that commenced an arbitration against a company before the intervention of the insolvency regime will require consent from the High Court or the liquidator to continue that proceeding. The need for consent means that, generally, a liquidator will be able to resolve most money claims under the discrete proof of claim procedure. However, complex claims may still require resolution through contested proceedings.[127] Such claims may fall within an existing arbitration agreement and are generally commercial in nature. There is no good policy reason to prevent arbitration from being used for that purpose. That has been confirmed recently by the Supreme Court of the United Kingdom, in *Bresco*.[128]

(b) Arbitral proceedings that a party may wish to commence against a company in liquidation pursuant to an arbitration clause may not be commenced after the intervention of the insolvency regime without the consent of the High Court or the liquidator.[129] Provided that consent is given, there is no public policy reason why arbitration should not proceed. So long as the arbitration agreement attaches to a commercial claim that could have been made against the company before liquidation intervened, public rights cannot be implicated in such a way as to prevent the dispute from being arbitrated. For example, a claim could be brought to resolve a complex claim in the liquidation.[130]

(c) Claims that a liquidator may wish to bring in the name of the company that are of a character that fall within the pre-existing arbitration agreement can be brought by him or her, without leave of the court.[131] Enforcing an arbitration clause, if a liquidator believes it is in the company's best interest, poses no threat to public policy issues. Indeed, it does no more than to invoke the pre-existing mode of dispute resolution that has been agreed between the parties.

(d) A liquidator may initiate a claim in his or her own name, in respect of a right that accrues after liquidation has intervened. In our view, that type of claim can only be arbitrated under an *ad hoc* arbitration agreement, provided the claim is otherwise arbitrable.

In our view, the types of claims to which we have referred do not affect the rights of other creditors and therefore are not "core" or "pure" insolvency disputes. All that can be said is that a claim that may be of public interest is being shielded from the glare of publicity through the privacy and confidentiality attaching to the arbitral process. However, such concepts are not sacrosanct in arbitration. Save for the limited circumstances in which we suggest the transparency proposition may put a limited prohibition on the use of arbitration, there are other ways in which this particular concern can be addressed. For example, there are specific provisions in the Arbitration Act 1996 (New Zealand) that could be used to enable public disclosure in appropriate circumstances if required.[132] In an *ad hoc* arbitration, there is no reason why an insolvency representative of any type could not insist (for example) on an arbitration award being made available to all

[127] See *Cook v Mortgage Debenture* Ltd [2016] 3 All ER 957 (CA), at para 12, set out above.
[128] *Bresco Electrical Services Ltd (in liq) v Michael J Lonsdale (Electrical) Ltd* [2020] UKSC 25, at para 33.
[129] Companies Act 1993, s 248(1)(c)(i). See also *Cook v Mortgage Debenture* Ltd [2016] 3 All ER 957 (CA).
[130] *Ibid*.
[131] Companies Act 1993, Sch 6, cl (a).
[132] Arbitration Act 1996, ss 14A to 14E.

creditors as a condition of agreeing to arbitrate the dispute. As noted previously, some arbitral institutions now default to publication of an award.

There is an issue with claims that the liquidator may choose to pursue in his or her own name or in the name of the company, for example directors' claims. In such cases, we consider that the answer will turn on whether the claim pursued by the liquidator is a new cause of action created as a result of the insolvency, or simply an extension of the pre-existing cause of action available to the company.[133]

Under present New Zealand law, section 301 of the 1993 Act, by which a liquidator can bring a claim against a director, is considered not to create a new cause of action, but to provide a mechanism though which existing claims at common law and equity can be determined.[134] Consequently, even if a liquidator brings the claim under this section in his or her own name, he or she is pursuing a claim that could have been initiated by the company before liquidation intervened. Therefore, there can be no public policy reason to reject arbitration as a chosen mode of dispute resolution under an *ad hoc* agreement.

Another area of difficulty involves unfair preference claims of the type with which *Larsen Oil* dealt. Under New Zealand law, these claims are brought in the name of the liquidator, rather than the company, and can be used to challenge transactions within a stipulated time that have the effect of preferring one creditor over others, the avoidance of security documents in certain circumstances, and recovery from someone who has acquired company property at an undervalue.[135]

There is no reason in principle why claims brought in the name of the liquidator cannot be the subject of an *ad hoc* arbitration agreement. In such cases, the liquidator is entering into an arrangement freely. Generally speaking, other creditors would not be joined to proceedings of that type, if brought in court. A separate issue arises if domestic legislation requires such a claim to be brought in the name of the company. In cases where the proceeding is brought by a liquidator, it is pursued by someone who was not party to an arbitration agreement but, if the claim were brought in the name of the company, the position is arguably different.[136]

8. Case study: The proof of debt regime for liquidations

We have chosen the proof of debt regime as a means of exploring whether arbitration of disputed claims should be regarded as "pure" or "core" and, therefore, not amenable to arbitration.[137]

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[133] Compare *Arataki Properties Ltd v Craig* [1986] 2 NZLR 294 (CA) with *Re Maney and Sons De Luxe Service Station Ltd* [1969] NZLR 116 (CA).

[134] *Benton v Priore* [2003] 1 NZLR 564 (HC) at paras 40 to 46.

[135] Companies Act 1993, ss 291 to 298.

[136] See the discussion on this point (and cases involving causes of action available before liquidation intervened) in *Larsen Oil and Gas Pte Ltd v Petroprod Ltd (in official liquidation in the Cayman Islands and in compulsory liquidation in Singapore)* [2011] SGCA 21, at paras 45 to 51 and compare with *Nori Holding Ltd v Public Joint-Stock Co "Bank Otkritie Financial Corporation"* [2018] EWHC 1343 (Comm), at paras 60 to 64.

[137] In New Zealand, creditors are required to provide "proofs of claim" but we use the term "debt" as it is common to many other jurisdictions.

The question whether it is appropriate for a liquidator to arbitrate disputes arising out of proofs of debt is somewhat vexed. A claim by a putative creditor, if commenced before intervention of an insolvency process, might be caught by a pre-existing arbitration agreement. Yet, most statutes creating insolvency processes will mandate a specific procedure by which the insolvency representative decides whether the claim is justified. That regime typically provides rights for affected parties to seek review of an insolvency representative's decision in a court of competent jurisdiction. Using the New Zealand liquidation regime as an example, any creditor, shareholder or director of a company in liquidation may ask the High Court to confirm, reverse or modify a decision of the liquidator to admit or reject a proof of debt.[138]

The possibility of arbitrating proof of debt claims was discussed by Lazic in her book, *Insolvency Proceedings and Commercial Arbitration*.[139] She concluded that the question of arbitrability fell for determination in the context of the particular insolvency regime in issue. In surveying different claim regimes operating in the United States of America, the Netherlands and France, Lazic wrote:

> "… Pure bankruptcy issues, in particular those employing a special procedure provided by national insolvency laws, such as the verification, inventarization, collection and distribution of assets, are generally not to be decided by an arbitrator, but by the competent national courts having jurisdiction over bankruptcy. These are only examples. It is difficult to define the essence of pure bankruptcy issues.
>
> The extent of jurisdiction of bankruptcy courts may limit the domain of arbitration (arbitrability). This is of particular importance with respect to claims of ordinary, non-secured creditors against the debtor for payment from the estate, which have to be filed for verification or estimation in the bankruptcy proceedings. In the context of verification disputes – disputes when the claim is contested in bankruptcy proceedings – *vis attractiva concursus* has its strongest expression, and is then likely to limit arbitrability."

The proof of debt regime established under the 1993 Act (like that used in other jurisdictions) is designed to provide an efficient and effective mechanism for a liquidator to consider all competing claims and to determine the quantum of each, on the basis that the creditor must prove its claim.[140] Any challenge to a liquidator's decision to reject a proof of claim must be brought under the supervisory jurisdiction conferred by section 284(1)(b) of the 1993 Act to "confirm, reverse, or modify an act or decision of the liquidator". Leave is required for a putative creditor to challenge a decision to reject a proof of debt.

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138 Companies Act 1993, s 284(1)(b). The section also refers to any "other entitled person" but it is unnecessary, for the purposes of this paper, to explain who such persons are.

139 V Lazic, *Insolvency Proceedings and Commercial Arbitration* (Kluwer Law International, The Hague - London - Boston, 1998).

140 When what is now the Companies Act 1993 was proposed by the Law Commission, a major premise of the amendments made in relation to liquidations was based on the need for simplification of the law. As a result, it is unlikely that the courts would regard application of the more prescriptive rules contained in the Insolvency Act 2006 as overriding the more streamlined processes for which the Act and the Companies Act 1993 Liquidation Regulations 1994 provide: generally, see Company Law Reform and Restatement (NZLC R 9 1989) at para 642.

That is because of the Court's reluctance to interfere with the good faith exercise of a liquidator's discretionary powers and to avoid undermining his duty to carry out functions in an efficient manner.[141]

That approach is reinforced by section 256 of the 1993 Act which expressly forbids a liquidator from providing records of the liquidation (including proofs of debt and supporting documents) to a creditor or shareholder without permission of the High Court. *Harnish v Whittfield*[142] was a case in which a shareholder sought leave to access liquidation records in relation to a proof of claim lodged by a creditor, in circumstances where admission of the proof may have prevented a distribution to the shareholder. Associate Judge Smith said:[143]

> "[117] I think the main issue on prejudice to the liquidation must relate to the liquidator's right to control the manner in which creditors' claims are assessed, including controlling the flow of information to individual creditors to ensure that the claims are all properly examined, and that all creditors are treated fairly."

In common with similar regimes, section 304 of the 1993 Act requires an unsecured creditor to lodge a claim in the liquidation which contains full particulars of the claim and identifies any documents that evidence or substantiate it, and requires the liquidator (as soon as practicable) either to "admit or reject a claim in whole or in part" or to reconsider his decision later, if necessary.[144] The liquidator is entitled to require production of any document to which the claimant refers.[145] If the claim were rejected, in whole or in part, the liquidator "must forthwith give notice in writing of the rejection to the creditor".[146]

There are a number of reasons why a liquidator may reject a proof of debt. He may take the view that there is insufficient evidence to establish the claim. If a claim were rejected on that basis, the usual remedy would be for the claimant to seek leave to review the liquidator's decision in the High Court.[147] Alternatively, the liquidator may contend that there is a debt owing by the claimant to the company in liquidation which, when applied by way of set-off, extinguishes the creditor's claim. Resolution of this type of dispute is likely to be more complex, as section 310 of the 1993 Act requires, "an account [to] be taken of what is due from the one party to the other in respect of those credits, debts or dealings".[148] A third example is where a liquidator takes the view that a judgment has been improperly obtained by the claimant and is not prepared to admit the claim, notwithstanding the existence of a court judgment.[149]

A liquidator plays a quasi-judicial role in determining whether to admit or reject a proof of debt. In deciding whether the claim should be admitted, the liquidator's duty is to examine every proof and the grounds of debt and to determine whether the amount claimed is "justly and truly" owing by the company in

[141] *Re Northern Crest Investments Ltd (in liq)* HC Auckland CIV-2010-404-7741, 20 December 2011 at paras [7] and [8].
[142] *Harnish v Whittfield* [2018] NZHC 2791 (Associate Judge Smith).
[143] *Idem*, at para 117.
[144] Companies Act 1993, s 304(1) and (3).
[145] *Idem*, s 304(2).
[146] *Idem*, s 304(4).
[147] *Idem*, s 284(b).
[148] *Idem*, s 310(1)(a).
[149] Generally, see *Re Van Laun (ex parte Chatterton)* [1907] 2 KB 27 (CA).

liquidation.[150] Yet, if there were a challenge to his decision, the liquidator's role is as an advocate defending his decision before the court.

The broad nature of the liquidator's obligations was discussed by the Court of Appeal of England and Wales in *Re Van Laun (ex parte Chatterton)*.[151] The Court dealt with the ability of a liquidator (or a trustee in bankruptcy in that case) to "go behind" a judgment of a court to determine the amount "justly" due. Delivering the principal judgment, Sir Herbert Cozens-Hardy MR adopted what had been said by Bigham J at first instance:[152]

> "The trustee's right and duty when examining a proof for the purpose of admitting or rejecting it is to require some satisfactory evidence that the debt on which the proof is founded is a real debt. No judgment recovered against the bankrupt, no covenant given by or Account stated with him, can deprive the trustee of this right. He is entitled to go behind such forms to get at the truth, and the estoppel to which the bankrupt may have subjected himself will not prevail against him. In the present case the trustee desires to satisfy himself that the claims for costs represent a real indebtedness. He can only do this by seeing and examining the bills. When he sees them it may be he will think them fair and reasonable, and, if so, he will probably admit the proof. But until Mr Chatterton furnishes him with the means of forming an opinion, I think the trustee cannot do otherwise than reject the proof."

In *Re Menastar Finance Ltd*,[153] Etherton J made some observations on the scope of a liquidator's ability to look behind a judgment of a court in order to examine the validity of a creditor's proof of debt. He said:

> "[48] It is equally well established that the court (and the liquidator or trustee in bankruptcy) will not, as a matter of course, look behind every judgment debt and consider afresh the validity of the debt. In *Re Flatau, ex p Scotch Whisky Distillers Ltd* (1888) 22 QBD 83 at 85, Lord Esher MR said:
>
> 'It is not necessary now to repeat that, when an issue has been determined in any other court, if evidence is brought before the Court of Bankruptcy of circumstances tending to shew that there has been fraud, or collusion, or miscarriage of justice, the Court of Bankruptcy has power to go behind the judgment and to inquire into the validity of the debt. But that the Court of Bankruptcy is bound in every case as a matter of

[150] *Re Van Laun (ex parte Chatterton)* [1907] 2 KB 27 (CA), at para 29, per Sir Herbert Cozens-Hardy MR, with whom Vaughan Williams and Buckley LJJ agreed.
[151] *Ibid*. The first instance judgment is reported at [1907] 1 KB 155 (ChD). This approach has been adopted in many cases; more recent examples are *Re Minastar Finance Ltd (in liq)* [2003] 1 BCLC 338 (ChD) at paras 43 to 49. (Etherton J) and *Re Shruth Ltd* [2006] 1 BCLC 294 at paras 31–34 (Gloster J).
[152] [1907] 1 KB 155 (ChD) at pp 162–163.
[153] *Re Minastar Finance Ltd (in liq)* [2003] 1 BCLC 338 (ChD).

> course to go behind a judgment is a preposterous proposition.'
>
> [49] There has been some debate before me as to the circumstances, outside fraud and collusion, in which the court will (and a liquidator or trustee in bankruptcy should) go behind a judgment in order to examine the validity of the creditor's proof. In *Re Flatau,* as has been seen from the passage I have quoted, Lord Esher MR referred to circumstances in which there has been a 'miscarriage of justice'. In the earlier case of *Ex p Lennox, Re Lennox* (1885) 16 QBD 315 at 323 Lord Esher MR said that the court is bound to look into the alleged debt 'upon a sufficient case being shewn'. In *Re Van Laun, ex p Chatterton* [1907] 2 KB 23 at 31, Buckley LJ, drawing the two statements of Lord Esher MR together, said:
>
> 'If there be a judgment it is not necessary to shew fraud or collusion. It is sufficient, in the language of Lord Esher, to shew miscarriage of justice, that is to say, that for some good reason there ought not to have been a judgment.'"

The problem in classifying the nature of the proof of debt regime was well articulated in *Larsen Oil*.[154] The Court of Appeal of Singapore described the proof of debt regime as a "highly specialised form of dispute resolution in respect of claims brought against an insolvent party,"[155] noting that parties could not "contract out" of the application of insolvency rules. It saw an agreement to arbitrate as potentially infringing upon this principle. However, the Court also acknowledged a contrary argument; namely, that the proof of debt process cannot be undermined by the use of arbitration as it is "merely a substitute means of enforcing debts against the company, and does not create new rights in the creditors or destroy old ones".[156]

The former approach was adopted in *Salford Estates (No 2) Ltd v Altomart Ltd (No 2)*,[157] in which Sir Terence Etherton C held there was no basis for staying a petition brought on the grounds that the company was unable to pay its debts because "there can be no reference to arbitration of any of the debts because the making of a winding up order brings into effect the statutory scheme for proofs of debt which supersedes any arbitration agreement".[158] However, the second was applied recently by the Supreme Court of the United Kingdom, in *Bresco.*[159] In *Bresco,* Lord Briggs, by reference to claims arising in a scheme of arrangement, referred also to the possibility that directions of the court could be sought to enable particular disputes or legal issues common to a number of disputed claims to be referred for alternative dispute resolution; in context, we

[154] *Larsen Oil & Gas Pte Ltd v Petroprod Ltd (in official liquidation in the Cayman Islands and in compulsory liquidation in Singapore)* [2011] SGCA 21, at paras 49 and 51.
[155] *Idem*, at para 49.
[156] *Idem*, at para 51.
[157] *Salford Estates (No 2) Ltd v Altomart Ltd (No 2)* [2015] Ch 589 (ChD).
[158] *Idem*, at para 34.
[159] *Bresco Electrical Services Ltd (in liq) v Michael J Lonsdale (Electrical) Ltd* [2020] UKSC 25, at paras 33 and 34.

take that to include arbitration. By applying to the court, it was possible for interested parties or representatives of interested classes to be appointed, if necessary.

In summarising our views on public policy considerations, we acknowledged that issues involving "public" or "collective" rights might not be suitable for resolution by arbitration. By reference to *Tomolugen*, we agree that matters which "so pervasively involve 'public' rights and concerns, or interests of third parties, which are the subjects of uniquely governmental authority" are of a type that "agreements to resolve … by "private" arbitration should not be given effect".[160]

The unusual nature of the proof of debt regime has led us to the view that there are some aspects of the proof of debt process that are amenable to arbitration, but others that are not. Using liquidation to illustrate our views, we consider that a distinction should be drawn between cases in which a liquidator:

(a) relies on defences or cross-claims that would have been available to the company prior to the intervention of the insolvency process; and

(b) exercises powers conferred on him by legislation, common law or equity which would not have been available to the company prior to the intervention of an insolvency process. A simple rationale for excluding this type of case from arbitration is that it is inappropriate for arbitrators to be deciding whether a judgment of a court was lawfully made.

In our view, the first of those categories are arbitrable claims. However, those in the second category may properly be regarded as being "core" insolvency functions in nature and therefore not arbitrable. The distinction we have drawn finds support in a joint judgment given by Brennan and Dawson JJ (with whom Toohey J agreed on this point) in *Tanning Research Laboratories Inc v O'Brien*[161] (*Tanning*), a decision of the High Court of Australia.

In *Tanning,* a company in liquidation had, prior to liquidation, been party to an international arbitration agreement in respect of which an arbitrator had already given an award. The judgment is instructive because it supports the notion that a liquidator may use an arbitration agreement in force prior to liquidation to enable outstanding disputes to be resolved. Some discussion of the facts of the case is necessary.

Hawaiian Tropic Pty Ltd (Hawaiian Tropic) was a company that had been incorporated in New South Wales. Tanning Research Laboratories Inc (Tanning) was a corporation established in Florida. In 1975, the two companies entered into an agreement for the distribution of goods developed by Tanning. The agreement contained an arbitration clause to resolve any disputes that arose.

In 1981, Hawaiian Tropic was wound up by order of the Supreme Court of New South Wales. A liquidator was appointed. At some point after the liquidator was appointed, Tanning purported, unilaterally, to revoke the agreement. The liquidator issued instructions for proceedings to be commenced in a Circuit

[160] *Tomolugen Holdings Ltd v Silica Investors Ltd* [2016] 1 SLR 373 (CA), at para 71. See also *WDR Delaware Corporation v Hydrox Holdings Pty Ltd* [2016] FCA 1164, at para 131.

[161] *Tanning Research Laboratories Inc v O'Brien* (1990) 91 ALR 180 (HCA), at paras 184 to 185 (Brennan and Dawson JJ) and at para 195 (Toohey J). Although Deane and Gaudron JJ dissented, they did not take issue with this statement of principle.

Court in Florida seeking a declaratory judgment reinstating Hawaiian Tropic's rights under the licence and awarding damages in its favour. The Florida Court ordered the issue to be settled by arbitration, in accordance with the arbitration clause. An award was made on 8 January 1985, by the appointed arbitrators. On 6 May 1985, the award was given effect by the Circuit Court.

In consequence of the arbitration and order of the Florida Court, the liquidator gave notice rejecting Tanning's proof of claim. The liquidator pointed out that Tanning had elected not to pursue any cross-claim in the original arbitration proceeding. Tanning applied to reverse the liquidator's decision. The Supreme Court of New South Wales allowed Tanning to claim in an amount not pursued in the arbitration, but the Court of Appeal of New South Wales reversed that decision. Instead, it stayed Tanning's application to reverse the liquidator's decision and required determination of the amount in issue to be conducted by arbitration, under the arbitration agreement.

By a majority, the High Court of Australia upheld the Court of Appeal's decision. Giving the principal judgment, Brennan and Dawson JJ provided a lucid description of the differences that arise when a liquidator rejects a proof of debt based on a defence that could have been raised by the company prior to liquidation and those which are reliant on powers given independently to the liquidator. Their Honours said:[162]

> "A liquidator who defends his rejection of a proof of debt on the ground that, under the general law, the liability to which the proof relates is not enforceable against the company takes his stand on a ground which is available to the company. A liquidator who resists a claim made by a creditor against the assets available for distribution on the ground that there is no liability under the general law thus stands in the same position vis-à-vis the creditor as does the company. If the creditor and the company are bound by an international arbitration agreement applicable to the claim, there is no reason why the claim should not be determined as between the creditor and the liquidator in the same way as it would have been determined had no winding up been commenced. To exclude from the scope of an international arbitration agreement binding on a company matters between the other party to that agreement and the company's liquidator would give such agreements an uncertain operation and would jeopardise orderly arrangements: … *But it is otherwise if the liquidator supports his rejection of a proof of debt in reliance on a ground which allows him, and him alone, to go behind the judgment, account stated, covenant or estoppel on which the company's liability is founded*. The entitlement of a liquidator to go behind a judgment, account stated, covenant or estoppel is unaffected, either substantially or procedurally, by the existence of an international arbitration agreement binding on the company. To stay proceedings which involve only matters outside the scope of an international arbitration agreement would be to frustrate the provisions for winding up." (Emphasis added)

[162] *Tanning Research Laboratories Inc v O'Brien* (1990) 91 ALR 180 (HCA), at paras 186–187.

The distinction is reinforced by the way in which set-off claims may be addressed. There is high authority for the proposition that rights of set-off in an insolvency process can be determined through arbitration, in contrast to the proof of claim procedure. This issue was discussed by the House of Lords in *Stein v Blake*.[163] The relevant insolvency rule is that where there have been mutual dealings between the company in liquidation and a creditor proving or claiming to prove for a debt in the liquidation, an account must be taken of what is due from the company and the creditor to each other and the sums due from one must be set-off against those due from the other.[164] Only if there were a balance owed to the creditor can that debt be proved in the liquidation.[165]

In conceptual terms, the ability for a creditor to prove only for a net balance, or to pay a net balance to the liquidator, only arises after claims and cross claims have been determined. For the purpose of ascertaining the balance, the separate claims of the company and the purported creditor are treated as if they continue to exist, so that a proceeding may be issued to determine who is owed what sum of money. It is no more than a commercial dispute between the company and the creditor and therefore is capable of being resolved by arbitration.

Farley v Housing & Commercial Developments Ltd[166] implicitly acknowledged that arbitration was an acceptable means of determining the net balance. In that case, Neill J answered, in the affirmative, an arbitrator's special consultative case in which the question whether the respective claims ceased to have a separate existence as choses in action and were replaced by a balance of account.[167] The Judge's approach was approved by the Court of Appeal and House of Lords respectively, in *Re Kaupthing Singer & Friedlander Ltd (in administration)*[168] and *Stein v Blake*.[169]

The outcome of our analysis is that if a liquidator were not satisfied that a claimant has proved a debt, the putative creditor is entitled either to seek leave to review the liquidator's decision or to seek leave of the High Court to bring or continue a proceeding designed to determine the amount payable.[170] If the claim fell within the scope of an arbitration agreement, permission could be sought to bring or continue an arbitral proceeding.[171]

However, the position is different when a liquidator exercises a power to look behind a judgment debt and finds that there is good reason why it should not be applied. In such a case, the liquidator is acting for the benefit of the creditors as a whole and is empowered to disregard the estoppel that would otherwise arise

[163] *Stein v Blake* [1996] 1 AC 243 (HL).
[164] Companies Act 1993, s 310.
[165] *Stein v Blake* [1996] 1 AC 243 (HL), was concerned with s 323 of the Insolvency Act 1986 (UK) in force in England and Wales at the relevant time. That section is materially similar to s 310(1) of the Companies Act 1993. See also, *Bresco Electrical Services Ltd (in liq) v Michael J Lonsdale (Electrical) Ltd* [2020] UKSC 25, at paras 31 to 34.
[166] *Farley v Housing & Commercial Developments Ltd* [1984] BCLC 442.
[167] *Idem*, at 447.
[168] *Re Kaupthing Singer & Friedlander Ltd (in administration)* [2010] EWCA Civ 518 (CA), at para 33, per Etherton LJ.
[169] *Stein v Blake* [1996] 1 AC 243 (HL), at 255 per Lord Hoffmann, delivering the principal speech with whom Lord Keith of Kinkel, Lord Ackner, Lord Lloyd of Berwick and Lord Nicholls of Birkenhead, agreed.
[170] For example, see *Cook v Mortgage Debenture Ltd* [2016] 3 All ER 957 (CA), at para 12 (and dealt with above).
[171] See discussion above.

through the court judgment.[172] In undertaking that task, the liquidator is exercising the historical jurisdiction of a Court of Bankruptcy to go behind the judgment. As the liquidator, in effect, is acting as the court's delegate, it is appropriate that a court of competent jurisdiction rule on whether his or her decision is appropriate. On that view, resolution of a challenge to rejection of a proof of debt on that ground involves a core insolvency function, rather than the mere assessment of an amount payable which can be resolved, if necessary, by ordinary court proceedings or arbitration. As previously indicated, it is inappropriate for an arbitrator to rule on the validity of a court judgment.

9. Conclusions

Our survey of the authorities has revealed a similar pattern among the common law jurisdictions that we have considered. Arbitration of insolvency-related disputes is now widely accepted. The remaining differences in approach seem to stem from the nature of the starting point taken for the purpose of analysis. Using New Zealand law for the purpose of determining arbitrability, we express our conclusions below.

First, it is accepted that an arbitral tribunal (irrespective of the breadth of its remedial jurisdiction under the applicable law) cannot make an order putting a company into liquidation. Nor could it make any other form of order that purports to commence a collective insolvency regime. This bar is justified by both the status[173] and third party rights[174] propositions. The making of an order commencing a collective insolvency process is a core insolvency function that is reserved for the courts.

Second, disputes arising between a company in an insolvency process and others who claim to have provable claims, will (provided they come within the scope of a pre-existing arbitration clause between the parties) be amendable to resolution by arbitration where they cannot be determined summarily under a proof of debt regime. This approach is justified by the parties' consensual agreement, made before an insolvency process intervened, to determine disputes by arbitration. Such a dispute could also be subject to an *ad hoc* arbitration agreement post-insolvency. The underlying dispute being resolved is essentially commercial and does not engage third party rights or wider public interest elements. This method of dispute resolution can be employed in complex cases.

Third, a claim that could only be brought in the name of an insolvency representative, as a result of powers conferred after the insolvency process intervened, is unlikely to be amenable to arbitration under a pre-existing arbitration agreement because the insolvency representative is not a party to that agreement; this is a privity of contract issue. Two issues arise in cases in which the claim could be brought by the liquidator in the name of the company. First, it will be necessary to determine whether the particular dispute falls within the ambit of even a widely drawn arbitration clause; this inquiry involves the scope of the arbitration agreement. The second question is whether there is any person who would have a right to be heard but who is not a party to the arbitration agreement; this engages the third party rights proposition. In

[172] *Tanning Research Laboratories Inc v O'Brien* (1990) 91 ALR 180 (HCA), at 186 to 187, set out above.
[173] See discussion above.
[174] See discussion above.

addressing the question whether a pre-existing arbitration agreement would be enforceable, it is likely that a New Zealand court would need to consider whether the approach taken in *Larsen Oil* or *Nori Holding* ought to be preferred, or whether on the particular facts those two cases can be reconciled.

Fourth, we consider that claims that arise after insolvency intervenes may generally be the subject of an *ad hoc* arbitration, in which the insolvency representative must agree the terms on which the arbitration proceeds. However, exceptions to that general proposition may exist. For example, an *ad hoc* arbitration may not be appropriate in cases in which it is necessary for third parties to be heard (engaging the third party rights proposition) or those where the liquidator is exercising the historical jurisdiction of a Court of Bankruptcy in reviewing a proof of debt based on a judgment.

Fifth, in minority oppression cases, determination of the underlying questions of fact concerning the controversy between the parties are arbitrable. In such cases, an arbitral tribunal may award any appropriate remedy short of liquidation. If no minority oppression proceeding were brought but the shareholder relied solely on a just and equitable proceeding in which liquidation is the only remedy, it is likely that a New Zealand court would regard such a proceeding as non-arbitrable.[175]

Sixth, it is open for insolvency representatives to enter into *ad hoc* arbitration agreements to resolve disputes that do not directly engage third party rights; at least to the extent that they would have been similarly affected had an arbitral award been given the day before the insolvency process began. However, the insolvency representative will not be entitled to arbitrate disputes about the admissibility of proofs of debt in cases where he is relying on statutory, common law or equitable principles not available to the insolvent entity before insolvency intervened.[176]

We emphasise that public policy in individual States is likely to guide the circumstances in which the transparency proposition applies. A degree of consistency on this topic may emerge if insolvency representatives (in *ad hoc* arbitrations) were to insist on any award being published to creditors of the insolvent entity or other relevant stakeholders. The advantages of flexibility of process, choice of an agreed arbitrator with expertise in the subject matter of the dispute and speed of process would remain as factors that could weigh in favour of arbitration, even if an award were published more widely than the parties.

[175] For a discussion of New Zealand law in relation to the liquidation of a company on the just and equitable ground, see *Jenkins v Supscaf Ltd* [2006] 3 NZLR 264 (HC). It is possible that New Zealand may take the Cayman approach in cases where a just and equitable proceeding has been issued. That is because, contrary to the position in some other countries (compare *Tomolugen* at paras 83 and 84), there is a requirement to advertise a just and equitable proceeding, even if brought by a shareholder on grounds of deadlock or impropriety by others involved in the company: see, in particular, rr 31.3 (by reference to s 241(2)(c) of the 1993 Act, which applies to all applications to the Court to liquidate a company), 31.9, 31.18, 31.24(4) and 31.19 of the High Court Rules (NZ).

[176] See above for a comparison between the two statements.

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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	:	Chapter 11
LATAM Airlines Group S.A., *et al*.,	:	Case No. 20-11254 (JLG)
Debtors.[1]	:	Jointly Administered
	:	Related Docket No. 413

ORDER PURSUANT TO 11 U.S.C. §§ 105(a) APPROVING CROSS-BORDER COURT-TO-COURT COMMUNICATIONS PROTOCOL

Upon the motion, dated June 30, 2020 (the "Motion"),[2] of LATAM Airlines Group S.A., and its affiliated debtors, as debtors and debtors in possession in the above-captioned cases (the "Debtors"), for entry of an order, as more fully described in the Motion, pursuant to section 105(a) of title 11 of the United State Code (the "Bankruptcy Code"), and consistent with General Order M-511 (*Procedural Guidelines for Coordination and Cooperation Between Courts in Cross-Border Insolvency Matters*) and General Order M-532 (*Adoption of Judicial Insolvency Network Modalities of Court-to-Court Communication*), approving that certain cross-border

[1] The Debtors in these Chapter 11 Cases, along with the last four digits of each Debtor's tax identification number (as applicable), are: LATAM Airlines Group S.A. (59-2605885); Lan Cargo S.A. (98-0058786); Transporte Aéreo S.A. (96-9512807); Inversiones Lan S.A. (96-5758100); Technical Training LATAM S.A. (96-847880K); LATAM Travel Chile II S.A. (76-2628945); Lan Pax Group S.A. (96-9696800); Fast Air Almacenes de Carga S.A. (96-6315202); Línea Aérea Carguera de Colombia S.A. (26-4065780); Aerovías de Integración Regional S.A. (98-0640393); LATAM Finance Ltd. (N/A); LATAM Airlines Ecuador S.A. (98-0383677); Professional Airline Cargo Services, LLC (35-2639894); Cargo Handling Airport Services, LLC (30-1133972); Maintenance Service Experts, LLC (30-1130248); Lan Cargo Repair Station LLC (83-0460010); Prime Airport Services Inc. (59-1934486); Professional Airline Maintenance Services LLC (37-1910216); Connecta Corporation (20-5157324); Peuco Finance Ltd. (N/A); Latam Airlines Perú S.A. (52-2195500); Inversiones Aéreas S.A. (N/A); Holdco Colombia II SpA (76-9310053); Holdco Colombia I SpA (76-9336885); Holdco Ecuador S.A. (76-3884082); Lan Cargo Inversiones S.A. (96-9696908); Lan Cargo Overseas Ltd. (85-7752959); Mas Investment Ltd. (85-7753009); Professional Airlines Services Inc. (65-0623014). For the purpose of these Chapter 11 Cases, the service address for the Debtors is: 6500 NW 22nd Street Miami, FL 33131.

[2] Capitalized terms used but not defined herein shall have the meaning ascribed to them in the Motion.

court-to-court communications protocol attached hereto as Exhibit A (the "Protocol"); and upon consideration of the First Day Declaration; and adequate notice of the Motion having been given as set forth in the Motion; and it appearing that no other or further notice is necessary; and the Court having jurisdiction to consider the Motion and the relief requested therein pursuant to 28 U.S.C. §§ 157 and 1334; and approval of the Protocol having been sought from the Cayman Court, the Chilean Court and the Colombian Court; and the Court having determined that the legal and factual bases set forth in the Motion establish just cause for the relief requested in the Motion, and that such relief is in the best interests of the Debtors, their estates, their creditors and the parties in interest; and upon the record in these proceedings; and after due deliberation;

IT IS HEREBY ORDERED THAT:

1. The Motion is GRANTED.

2. The Protocol is approved in all respects, subject to approval of the same by the Cayman Court, Chilean Court and Colombian Court, as it may be amended or supplemented by further order of this Court, obtained after a notice and a hearing. For the avoidance of doubt, no additional proceedings shall be subject to the Protocol absent further order of this Court.

3. Nothing herein shall prejudice the rights of any party in interest to apply for modifications to the Protocol as warranted to facilitate the administration of the Debtors' Chapter 11 Cases in conjunction with the respective proceedings before the Cayman Court, the Chilean Court, and the Colombian Court.

4. Notwithstanding any provision in the Federal Rules of Bankruptcy Procedure to the contrary, (i) the terms of this Order shall be immediately effective and enforceable upon its entry, (ii) the Debtors are not subject to any stay in the implementation, enforcement or realization of the relief granted in this Order, and (iii) the foreign representatives of these

Chapter 11 Cases and the Debtors may, in their discretion and without further delay, take any action and perform any act authorized under this Order.

5. For the avoidance of doubt, the Protocol is procedural in nature and shall not constitute a limitation on or waiver by the Court of any powers, responsibilities, or authority, or a substantive determination of any matter in controversy before the Court, or a waiver by any of the parties in interest of these Chapter 11 Cases of any of their substantive rights and claims, except to the extent specifically provided for in the Protocol, as permitted by applicable law.

6. For the avoidance of doubt, to the extent that there are any inconsistencies relating to the Protocol and other matters set forth herein as between this order and the orders the Cayman Court, Chilean Court and/or Colombian Court, the terms and provisions of this Order shall control over matters arising in or relating to the Chapter 11 cases and proceedings before this Court.

7. The Court retains jurisdiction with respect to all matters arising from or related to the implementation of this Order.

Dated: September 1, 2020
New York, New York

/s/ *James L. Garrity, Jr.*
HONORABLE JAMES L. GARRITY JR.
UNITED STATES BANKRUPTCY JUDGE

Exhibit A

Cross-Border Protocol

CROSS-BORDER COURT-TO-COURT COMMUNICATIONS PROTOCOL

This cross-border court-to-court communications protocol (the "Protocol") shall govern the conduct of all parties in interest in the Proceedings (as such term is defined herein).

The Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases (the "Guidelines") attached as Schedule A hereto, shall be incorporated by reference and form part of this Protocol. The Modalities of Court-to-Court Communication (the "Modalities of Communication") attached as Schedule B hereto, shall be incorporated by reference and form part of this Protocol. Where there is any discrepancy between the Protocol and the Guidelines and/or Modalities of Communication, this Protocol shall prevail.

A. Background

1. LATAM Airlines Group S.A. ("LATAM Parent") and certain of its affiliates (collectively, the "U.S. Debtors"),[1] have commenced reorganization proceedings (the "Chapter 11 Cases") under chapter 11 of the United States Bankruptcy Code, 11 U.S.C. § 101 *et seq*. (the "Bankruptcy Code"), in the United States Bankruptcy Court for the Southern District of New York (the "U.S. Court"), and such cases have been consolidated (for procedural purposes only) under Case No. 20-11254 (JLG). The U.S. Debtors are continuing in possession of their respective properties and are operating and managing their businesses, as debtors in possession,

[1] The Debtors in these Chapter 11 Cases, along with the last four digits of each Debtor's tax identification number are: LATAM Airlines Group S.A. (59-2605885); Lan Cargo S.A. (98-0058786); Transporte Aéreo S.A. (96-9512807); Inversiones Lan S.A. (96-5758100); Technical Training LATAM S.A. (96-847880K); LATAM Travel Chile II S.A. (76-2628945); Lan Pax Group S.A. (96-9696800); Fast Air Almacenes de Carga S.A. (96-6315202); Línea Aérea Carguera de Colombia S.A. (26-4065780); Aerovías de Integración Regional S.A. (98-0640393); LATAM Finance Ltd. (N/A); LATAM Airlines Ecuador S.A. (98-0383677); Professional Airline Cargo Services, LLC (35-2639894); Cargo Handling Airport Services, LLC (30-1133972); Maintenance Service Experts, LLC (30-1130248); Lan Cargo Repair Station LLC (83-0460010); Prime Airport Services Inc. (59-1934486); Professional Airline Maintenance Services LLC (37-1910216); Connecta Corporation (20-5157324); Peuco Finance Ltd. (N/A); Latam Airlines Perú S.A. (52-2195500); Inversiones Aéreas S.A. (N/A); Holdco Colombia II SpA (76-9310053); Holdco Colombia I SpA (76-9336885); Holdco Ecuador S.A. (76-3884082); Lan Cargo Inversiones S.A. (96-9696908); Lan Cargo Overseas Ltd. (85-7752959); Mas Investment Ltd. (85-7753009); Professional Airlines Services Inc. (65-0623014).

pursuant to sections 1107 and 1108 of the Bankruptcy Code. On June 5, 2020, the United States Trustee for Region 2 appointed an official committee of unsecured creditors (the "UCC"). No trustee or examiner has been appointed in the Chapter 11 Cases.

2. On May 28, 2020, the Bankruptcy Court entered the *Order Authorizing Debtor LATAM Airlines Group S.A. to Act as the Foreign Representative of the Debtors*, ECF No. 52, permitting LATAM Parent to act as the foreign representative to the Debtors in foreign proceedings (when acting as foreign representative LATAM Parent will also be referred to as the "Foreign Representative") and requesting that the 2nd Civil Court of Santiago, Chile (the "Chilean Court"), the Superintendencia de Sociedades in Colombia (the "Colombian Court"), and any other additional courts grant recognition to the Chapter 11 Cases.

3. On June 4, 2020, the Chilean Court issued an order recognizing these Chapter 11 Cases under the Chilean Insolvency and Reorganization Law (the "Chilean Proceedings"), which domesticated the UNCITRAL Model Law on Cross-Border Insolvency. On June 19, 2020, the Superintendente de Insolvencia y Reemprendimiento (the "Superintendent"), a branch of the Chilean state responsible for transparency and promoting the public's interest in reorganization proceedings, submitted a letter to the Chilean Court requesting the establishment of a coordination and cooperation protocol between the Chilean Court and the Bankruptcy Court. The Superintendent's filing stated that such a protocol would allow for efficient coordination between the core foreign bankruptcy proceedings in the United States and the recognition proceedings in Chile.

4. On June 12, 2020 the Colombian Court issued an order recognizing these Chapter 11 Cases under the Colombian Insolvency and Reorganization Law (the "Colombian Proceedings"), which domesticated the UNCITRAL Model Law on Cross-Border Insolvency.

5. On May 27, 2020 the Grand Court of the Cayman Islands (the "Cayman Court"), Financial Services Division issued orders appointing Kris Beighton and Jeffrey Stower as joint provisional liquidators (the "JPLs") for two of the debtors, LATAM Finance Limited and Peuco Finance Limited. (the "Cayman Debtors") under the Companies Law (2020 Revision) of the Cayman Islands (the "Cayman Proceedings") (the "Cayman Orders"). The Debtors contemplate that these will be conducted as "light touch" proceedings and serve to implement and effectuate orders of this Court under the supervision of the JPLs and in accordance with Cayman Islands law. The Cayman Orders expressly provide for the JPLs to enter into such protocols and agreements with LATAM, as they may deem appropriate, under the Bankruptcy Code and any other like proceedings for the winding up, restructuring and/or reorganization of the Cayman Debtors and other companies within LATAM, subject to the approval of the Cayman Court and this Court.

6. For convenience, (a) the Chapter 11 Cases, the Chilean Proceedings, the Colombian Proceedings, and the Cayman Proceedings shall be referred to herein collectively as the "Proceedings," and (b) the U.S. Court, Chilean Court, the Colombian Court, and the Cayman Court shall be referred to herein collectively as the "Courts", and each individually as a "Court."

B. The Protocol

7. Notwithstanding anything to the contrary in the exhibits, in these Proceedings, "Parallel Proceedings" shall exclusively mean the Chapter 11 Cases, the Chilean Proceedings, the Colombian Proceedings and the Cayman Proceedings and shall not have any other meaning. As it is used in the Protocol, the term Parallel Proceedings is not to be considered synonymous with the term concurrent proceedings as used in Chapter V of the Model Law on Cross-Border Insolvency adopted by the United Nations Commission on International Trade Law. The

Protocol shall not apply to or contemplate any additional proceedings absent further order of each of the Courts.

8. As set forth in the Guidelines and Modalities of Communication, the Courts may, to the extent permitted by practice and procedure, and with the prior consent of each Court, engage in Court-to-Court communications and conduct joint videoconference hearings or joint teleconference hearings with respect to any matter related to the administration of the Proceedings if necessary to facilitate the proper and efficient administration of the Proceedings. The Debtors and the Foreign Representative will arrange for a translator for any such hearing. For the avoidance of doubt, during Court-to-Court communications, a Court shall not disclose any document or information filed under seal in that Court with any other Court.

9. If the Courts agree that a joint videoconference hearing or joint teleconference hearing is necessary or appropriate, the party submitting any notice, submission or application that are or become the subject of the joint hearing of the Courts (the "Pleadings") shall provide a copy of the pleadings to all of the following parties via email:

a. counsel to the Debtors, Cleary Gottlieb Steen & Hamilton LLP, One Liberty Plaza, New York, NY 10006, Attn: Richard J. Cooper, Esq., Lisa M. Schweitzer, Esq., and Luke A. Barefoot, Esq. (email: rcooper@cgsh.com, lschweitzer@cgsh.com, and lbarefoot@cgsh.com);

b. the United States Trustee, 201 Varick Street, Room 1006, New York, New York 10014, Attn: Brian Masumoto, Esq. and Serene Nakano, Esq. (email: brian.masumoto@usdoj.gov and serene.nakano@usdoj.gov);

c. counsel to the UCC, Dechert LLP, Three Bryant Park, 1095 Avenue of the Americas, New York, New York, 10036-6797 Attn: Allan Brilliant, Esq. and Craig Druehl, Esq. (email: allan.brilliant@dechert.com and craig.druehl@dechert.com)

d. the JPLs, KPMG, P.O. Box 493, SIX Cricket Square, Grand Cayman, KY1-1106, Cayman Islands Attn: Kris Beighton and Jeffrey Stower (email: krisbeighton@kpmg.ky and jstower@kpmg.ky);

e. the Superintendencia de Insolvencia y Reemprendimiento (Superir), Amunátegui 228, Santiago, Chile. Attn: Eduardo Cáceres and Rocío Vergara (email: ecaceres@superir.gob.cl and rvergara@superir.gob.cl);

f. counsel to the Foreign Representative, Claro & Cia., Apoquindo 3721, piso 13, Las Condes, Santiago. Attn. José María Eyzaguirre and Nicolás Luco (email: jmeyzaguirre@claro.cl and nluco@claro.cl);

g. counsel to the Foreign Representative, Brigard Urrutia, Calle 70 Bis No. 4 – 41, Bogota, Colombia. Attn. Carlos Lázaro Umaña Trujillo, Jaime Elías Robledo Vásquez, and Paola Guerrero Yemail (emails: cumana@bu.com.co, jrobledo@bu.com.co, and pguerrero@bu.com.co); and

h. Any other person or entity with respect to specific matters who has been reasonably requested to participate by any of the foregoing parties.

For the avoidance of doubt, Pleadings filed under seal with any Court shall not be provided to any party mentioned in this paragraph, except as required under the orders of the Court in which the Pleading was filed.

10. The Foreign Representative, the Debtors and JPLs shall issue written reports to the Courts (i) at such time as they consider it to be appropriate to inform the Courts on the progress of the restructuring or developments in any of the Proceedings, or (ii) as otherwise directed by any of the Courts (the "Reports"). Such Reports shall be accompanied by a professional translation of any documents attached that are not in the language in which the relevant Court conducts its business.

11. Any Report submitted to any of the Courts shall be concurrently submitted to any other Court and by email to the U.S. Trustee, the UCC and the Superintendent (collectively, the "Notice Parties", and each individually as a "Notice Party"). Copies of any Report shall be filed with the Courts (together with translations where required), subject to appropriate redactions. For the avoidance of doubt, any Report filed under seal with any Court shall not be concurrently submitted to the other Courts or Notice Parties, except as required under the orders of the Court

in which the Report was filed subject to substantially identical confidentiality restriction as entered by the Court that directed sealing of the relevant documents.

12. At the request of any Court, the Debtors and the JPLs shall make themselves available to respond to inquiries of the Courts regarding the content of any Report (each a "Chambers Conference"). The Debtors for the Chapter 11 Cases, the Foreign Representative for the Chilean Proceedings and the Colombian Proceedings, and the JPLs for the Cayman Proceedings shall promptly give notice by email to the Notice Parties of any Chambers Conference. Counsel to the Notice Parties shall be entitled to appear at any such Chambers Conference.

13. For the avoidance of doubt, each Court shall have sole and exclusive jurisdiction over any estate representative or any professional retained by or with the approval of such Court. Nothing in this protocol shall require any estate representative or professional retained to take any action that violates any provision of law or professional rule to which they are subject.

14. Each Court shall have sole and exclusive jurisdiction over the conduct of proceedings in such Court and the hearing and determination of matters arising in such proceedings.

15. All documents filed on behalf of the Debtors in relation to any application for approval of this Protocol will be served on the Notice Parties.

16. Except as expressly set forth herein, nothing in this Protocol shall affect or prejudice the rights of the Debtors or Notice Parties to take any action in or in connection with the Proceedings.

17. This Protocol shall be deemed effective upon its approval by the U.S. Court, the Chilean Court, the Colombian Court, and the Cayman Court. This Protocol shall have no

binding or enforceable legal effect until approved by the U.S. Court, the Chilean Court, the Colombian Court, and the Cayman Court. This Protocol may not be amended except with prior notice to the Debtors and Notice Parties, as well as, the approval of the U.S. Court, the Chilean Court, the Colombian Court, and the Cayman Court.

Schedule A

GUIDELINES FOR COMMUNICATION AND COOPERATION BETWEEN COURTS IN CROSS-BORDER INSOLVENCY MATTERS[1]

INTRODUCTION

A. The overarching objective of these Guidelines is to improve in the interests of all stakeholders the efficiency and effectiveness of cross-border proceedings relating to insolvency or adjustment of debt opened in more than one jurisdiction ("Parallel Proceedings") by enhancing coordination and cooperation among courts under whose supervision such proceedings are being conducted. These Guidelines represent best practice for dealing with Parallel Proceedings.

B. In all Parallel Proceedings, these Guidelines should be considered at the earliest practicable opportunity.

C. In particular, these Guidelines aim to promote:

(i) the efficient and timely coordination and administration of Parallel Proceedings;

(ii) the administration of Parallel Proceedings with a view to ensuring relevant stakeholders' interests are respected;

(iii) the identification, preservation, and maximization of the value of the debtor's assets, including the debtor's business;

(iv) the management of the debtor's estate in ways that are proportionate to the amount of money involved, the nature of the case, the complexity of the issues, the number of creditors, and the number of jurisdictions involved in Parallel Proceedings;

(v) the sharing of information in order to reduce costs; and

(vi) the avoidance or minimization of litigation, costs, and inconvenience to the parties[2] in Parallel Proceedings.

D. These Guidelines should be implemented in each jurisdiction in such manner as the jurisdiction deems fit.[3]

E. These Guidelines are not intended to be exhaustive and in each case consideration ought to be given to the special requirements in that case.

F. Courts should consider in all cases involving Parallel Proceedings whether and how to implement these Guidelines. Courts should encourage and where necessary direct, if they have the power to do so, the parties to make the necessary applications to the court to facilitate such

[1] These Guidelines are distilled in large part from the ALI/ABA/III Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases.
[2] The term "parties" when used in these Guidelines shall be interpreted broadly.
[3] Possible means for the implementation of these Guidelines include practice directions and commercial guides.

implementation by a protocol or order derived from these Guidelines, and encourage them to act so as to promote the objectives and aims of these Guidelines wherever possible.

ADOPTION AND INTERPRETATION

Guideline 1: In furtherance of paragraph F above, the courts should encourage administrators in Parallel Proceedings to cooperate in all aspects of the case, including the necessity of notifying the courts at the earliest practicable opportunity of issues present and potential that may (a) affect those proceedings; and (b) benefit from communication and coordination between the courts. For the purpose of these Guidelines, "administrator" includes a liquidator, trustee, judicial manager, administrator in administration proceedings, debtor-in-possession in a reorganization or scheme of arrangement, or any fiduciary of the estate or person appointed by the court.

Guideline 2: Where a court intends to apply these Guidelines (whether in whole or in part and with or without modification) in particular Parallel Proceedings, it will need to do so by a protocol or an order[4], following an application by the parties or pursuant to a direction of the court if the court has the power to do so.

Guideline 3: Such protocol or order should promote the efficient and timely administration of Parallel Proceedings. It should address the coordination of requests for court approvals of related decisions and actions when required and communication with creditors and other parties. To the extent possible, it should also provide for timesaving procedures to avoid unnecessary and costly court hearings and other proceedings.

Guideline 4: These Guidelines when implemented are not intended to:

(i) interfere with or derogate from the jurisdiction or the exercise of jurisdiction by a court in any proceedings including its authority or supervision over an administrator in those proceedings;

(ii) interfere with or derogate from the rules or ethical principles by which an administrator is bound according to any applicable law and professional rules;

(iii) prevent a court from refusing to take an action that would be manifestly contrary to the public policy of the jurisdiction or which would not sufficiently protect the interests of the creditors and other interested entities, including the debtor; or

(iv) confer or change jurisdiction, alter substantive rights, interfere with any function or duty arising out of any applicable law, or encroach upon any applicable law.

Guideline 5: For the avoidance of doubt, a protocol or order under these Guidelines is procedural in nature. It should not constitute a limitation on or waiver by the court of any powers, responsibilities, or authority or a substantive determination of any matter in controversy before the court or before the

[4] In the normal case, the parties will agree on a protocol derived from these Guidelines and obtain the approval of each court in which the protocol is to apply. Pending such approval, or in Parallel Proceedings where there is no protocol, administrators and other parties are expected to comply with these Guidelines.

other court or a waiver by any of the parties of any of their substantive rights and claims, except to the extent specifically provided in such protocol or order as permitted by applicable law.

Guideline 6: In the interpretation of these Guidelines or any protocol or order approved under these Guidelines, due regard shall be given to their international origin and to the need to promote good faith and uniformity in their application.

COMMUNICATION BETWEEN COURTS[5]

Guideline 7: A court may receive communications from a foreign court and may respond directly to them. Such communications may occur for the purpose of the orderly making of submissions and rendering of decisions by the courts, and to coordinate and resolve any procedural, administrative or preliminary matters relating to any joint hearing where Annex A is applicable. Such communications may take place through the following methods or such other method as may be agreed by the two courts in a specific case:

(i) Sending or transmitting copies of formal orders, judgments, opinions, reasons for decision, endorsements, transcripts of proceedings or other documents directly to the other court and providing advance notice to counsel for affected parties in such manner as the court considers appropriate.

(ii) Directing counsel to transmit or deliver copies of documents, pleadings, affidavits, briefs or other documents that are filed or to be filed with the court to the other court, or other appropriate person, in such fashion as may be appropriate and providing advance notice to counsel for affected parties in such manner as the court considers appropriate.

(iii) Participating in two-way communications with the other court, including by telephone, video conference call, or other electronic means, in which case Guideline 8 should be considered.

Guideline 8: In the event of communications between courts, other than on procedural matters, unless otherwise directed by any court involved in the communications whether on an *ex parte* basis or otherwise, or permitted by a protocol or order, the following shall apply:

(i) In the normal case, parties may be present.

(ii) If the parties are entitled to be present, advance notice of the communications shall be given to all parties in accordance with the rules of procedure applicable in each of the courts to be involved in the communications, and the communications between the courts shall be recorded and may be transcribed. A written transcript may be prepared from a recording of the communications that, with the approval of each court involved in the communications, may be treated as the official transcript of the communications.

(iii) Copies of any recording of the communications, of any transcript of the communications prepared pursuant to any direction of any court involved in

[5] Communications between administrators are also expected under and to be consistent with these Guidelines.

the communications, and of any official transcript prepared from a recording may be filed as part of the record in the proceedings and made available to the parties and subject to such directions as to confidentiality as any court may consider appropriate.

(iv) The time and place for communications between the courts shall be as directed by the courts. Personnel other than judges in each court may communicate with each other to establish appropriate arrangements for the communications without the presence of the parties.

Guideline 9: A court may direct that notice of its proceedings be given to parties in proceedings in another jurisdiction. All notices, applications, motions, and other materials served for purposes of the proceedings before the court may be ordered to be provided to such other parties by making such materials available electronically in a publicly accessible system or by facsimile transmission, certified or registered mail or delivery by courier, or in such other manner as may be directed by the court in accordance with the procedures applicable in the court.

APPEARANCE IN COURT

Guideline 10: A court may authorize a party, or an appropriate person, to appear before and be heard by a foreign court, subject to approval of the foreign court to such appearance.

Guideline 11: If permitted by its law and otherwise appropriate, a court may authorize a party to a foreign proceeding, or an appropriate person, to appear and be heard on a specific matter by it without thereby becoming subject to its jurisdiction for any purpose other than the specific matter on which the party is appearing.

CONSEQUENTIAL PROVISIONS

Guideline 12: A court shall, except on proper objection on valid grounds and then only to the extent of such objection, recognize and accept as authentic the provisions of statutes, statutory or administrative regulations, and rules of court of general application applicable to the proceedings in other jurisdictions without further proof. For the avoidance of doubt, such recognition and acceptance does not constitute recognition or acceptance of their legal effect or implications.

Guideline 13: A court shall, except upon proper objection on valid grounds and then only to the extent of such objection, accept that orders made in the proceedings in other jurisdictions were duly and properly made or entered on their respective dates and accept that such orders require no further proof for purposes of the proceedings before it, subject to its law and all such proper reservations as in the opinion of the court are appropriate regarding proceedings by way of appeal or review that are actually pending in respect of any such orders. Notice of any amendments, modifications, extensions, or appellate decisions with respect to such orders shall be made to the other court(s) involved in Parallel Proceedings, as soon as it is practicable to do so.

Guideline 14: A protocol or order made by a court under these Guidelines is subject to such amendments, modifications, and extensions as may be considered appropriate by the court consistent with these Guidelines, and to reflect the changes and developments from time to time in any Parallel Proceedings. Notice of such amendments, modifications, or extensions shall be made to the other court(s) involved in Parallel Proceedings, as soon as it is practicable to do so.

ANNEX A (JOINT HEARINGS)

Annex A to these Guidelines relates to guidelines on the conduct of joint hearings. Annex A shall be applicable to, and shall form a part of these Guidelines, with respect to courts that may signify their assent to Annex A from time to time. Parties are encouraged to address the matters set out in Annex A in a protocol or order.

ANNEX A: JOINT HEARINGS

A court may conduct a joint hearing with another court. In connection with any such joint hearing, the following shall apply, or where relevant, be considered for inclusion in a protocol or order:

(i) The implementation of this Annex shall not divest nor diminish any court's respective independent jurisdiction over the subject matter of proceedings. By implementing this Annex, neither a court nor any party shall be deemed to have approved or engaged in any infringement on the sovereignty of the other jurisdiction.

(ii) Each court shall have sole and exclusive jurisdiction and power over the conduct of its own proceedings and the hearing and determination of matters arising in its proceedings.

(iii) Each court should be able simultaneously to hear the proceedings in the other court. Consideration should be given as to how to provide the best audio-visual access possible.

(iv) Consideration should be given to coordination of the process and format for submissions and evidence filed or to be filed in each court.

(v) A court may make an order permitting foreign counsel or any party in another jurisdiction to appear and be heard by it. If such an order is made, consideration needs to be given as to whether foreign counsel or any party would be submitting to the jurisdiction of the relevant court and/or its professional regulations.

(vi) A court should be entitled to communicate with the other court in advance of a joint hearing, with or without counsel being present, to establish the procedures for the orderly making of submissions and rendering of decisions by the courts, and to coordinate and resolve any procedural, administrative or preliminary matters relating to the joint hearing.

(vii) A court, subsequent to the joint hearing, should be entitled to communicate with the other court, with or without counsel present, for the purpose of determining outstanding issues. Consideration should be given as to whether the issues include procedural and/or substantive matters. Consideration should also be given as to whether some or all of such communications should be recorded and preserved.

Schedule B

MODALITIES OF COURT-TO-COURT COMMUNICATION

Scope and definitions

1. These Modalities apply to direct communications (written or oral) between courts in specific cases of cross border proceedings relating to insolvency or adjustment of debt opened in more than one jurisdiction ("Parallel Proceedings"). Nothing in this document precludes indirect means of communication between courts, (e.g., through the parties or by exchange of transcripts, etc.) This document is subject to any applicable law.

2. These Modalities govern only the mechanics of communication between courts in Parallel Proceedings. For the principles of communications (e.g., that court-to-court communications should not interfere with or take away from the jurisdiction or the exercise of jurisdiction by a court in any proceedings, etc.), reference may be made to General Order M-511: *Guidelines for Communication and Cooperation between Courts in Cross-Border Insolvency Matters* (the "Guidelines").

3. These Modalities contemplate contact being initiated by an "Initiating Judge" (defined below). The parties before such judge may request him or her to initiate such contact, or the Initiating Judge may seek it on his or her own initiative.

4. In this document:
    a. "Initiating Judge" refer to the judge initiating communication in the first instance;
    b. "Receiving Judge" refers to the judge receiving communication in the first instance;
    c. "Facilitator" refers to the person(s) designated by the court where the Initiating Judge sits or the court where the Receiving Judge sits (as the case may be) to initiate or receive communications on behalf of the Initiating Judge or the Receiving Judge in relation to the Parallel Proceedings. The Facilitator shall be the Clerk of the Court, and in the Clerk of Court's absence, the Chief Deputy Clerk.

Designation of Facilitator

5. The Receiving Judge will supervise the initial steps in the communication process after being informed of the request by the Facilitator.

6. The Court will prominently publish the contact details of the Facilitator on its website.

7. The language in which initial communications may be made is English. The Court will prominently so state and decide the technology available to facilitate communication between or among courts (e.g. and disclose telephonic and/or video conference capabilities, any secure channel email capacity, etc.) on its website.

Initiating communication

8. To initiate communication in the first instance, the Initiating Judge may require the parties over whom he or she exercises jurisdiction to obtain the identity and contact details of the Facilitator of the other court in the Parallel Proceedings, unless the information is already known to the Initiating Judge.

9. The first contact with the Receiving Judge should be in writing, including by email, from the Facilitator of the Initiating Judge's court to the Facilitator of the Receiving Judge's court, and contain the following:
    a. the name and contact details of the Facilitator of the Initiating Judge's court;
    b. the name and title of the Initiating Judge as well as contact details of the Initiating Judge if the Receiving Judge wishes to contact the Initiating Judge directly and such contact is acceptable to the Initiating Judge;
    c. the reference number and title of the case filed before the Initiating Judge and the reference number and title (if known; otherwise, some other unique identifier) of the case filed before the Receiving Judge in the Parallel Proceedings;
    d. the nature of the case (with the due regard to confidentiality concerns);
    e. whether the parties before the Initiating Judge have consented to the communication taking place (if there is any order of court, direction or protocol

for court -to-court communication for the case approved by the Initiating Judge, this information should also be provided);

f. if appropriate, the proposed date and time for the communication requested (with due regard to time differences); and

g. the specific issue(s) on which communication is sought by the Initiating Judge.

Arrangements for communication

10. The Facilitator of the Initiating Judge's court and the Facilitator of the Receiving Judge's may communicate fully with each other to establish appropriate arrangements for the communication without the necessity for participation of counsel or the parties unless otherwise ordered by one of the courts.

11. The time, method and language of communication should be to the satisfaction of the Initiating Judge and the Receiving Judge, with due regard given to the need for efficient management of the Parallel Proceedings.

12. Where translation or interpretation services are required, appropriate arrangements shall be made, as agreed by the courts. Where written communication is provided through translation, the communication in its original form should also be provided.

13. Where it is necessary for confidential information to be communicated, a secure means of communication should be employed where possible.

Communication between the Initiating Judge and the Receiving Judge

14. After the arrangements for communication have been made, discussion of the specific issue(s) on which communication was sought by the Initiating Judge and subsequent communications in relation thereto should, as far as possible, be carried out between the Initiating Judge and the Receiving Judge in accordance with any protocol or order for

communication and cooperation in Parallel Proceedings[1].

15. If the Receiving Judge wishes to by-pass the use of a Facilitator, and the Initiating Judge has indicated that he or she is amenable, the judges may communicate with each other about the arrangements for the communication without the necessity for the participation of counsel or the parties.

16. Nothing in this document should limit the discretion of the Initiating Judge to contact the Receiving Judge directly in exceptional circumstances.

[1] See Guideline 2 of the *Guidelines for Communication and Cooperation Between Courts in Cross-Border Insolvency Matters.*

AMERICAN BANKRUPTCY INSTITUTE

2020 International Insolvency Forum

Keynote with Dr. Eliza Filby

2020

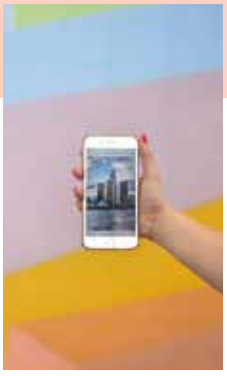
Dr Eliza Filby

THE FUTURE OF WORK AND MANAGING A MULTI-GENERATIONAL WORKFORCE

GENERATIONS EXPERT // HISTORIAN OF CONTEMPORARY VALUES

BABY BOOMERS
1942 - 1965

GENERATION X
1966 - 1980

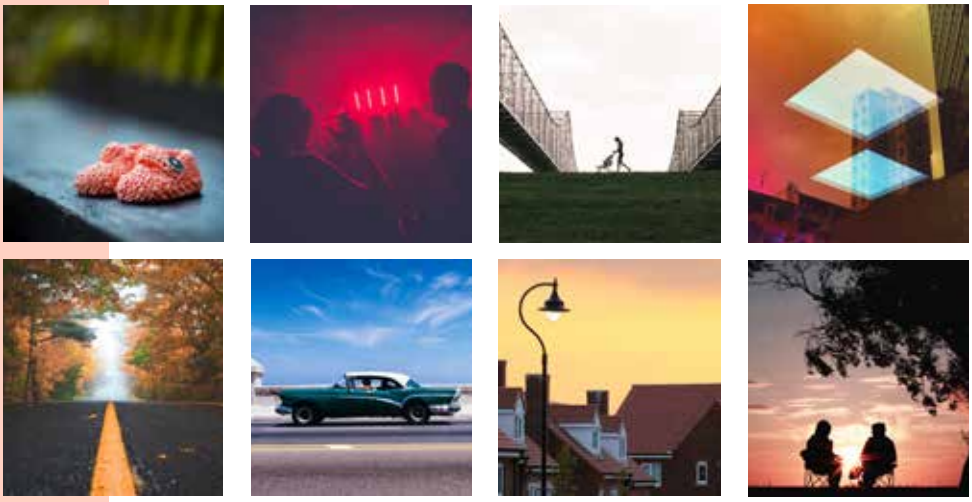


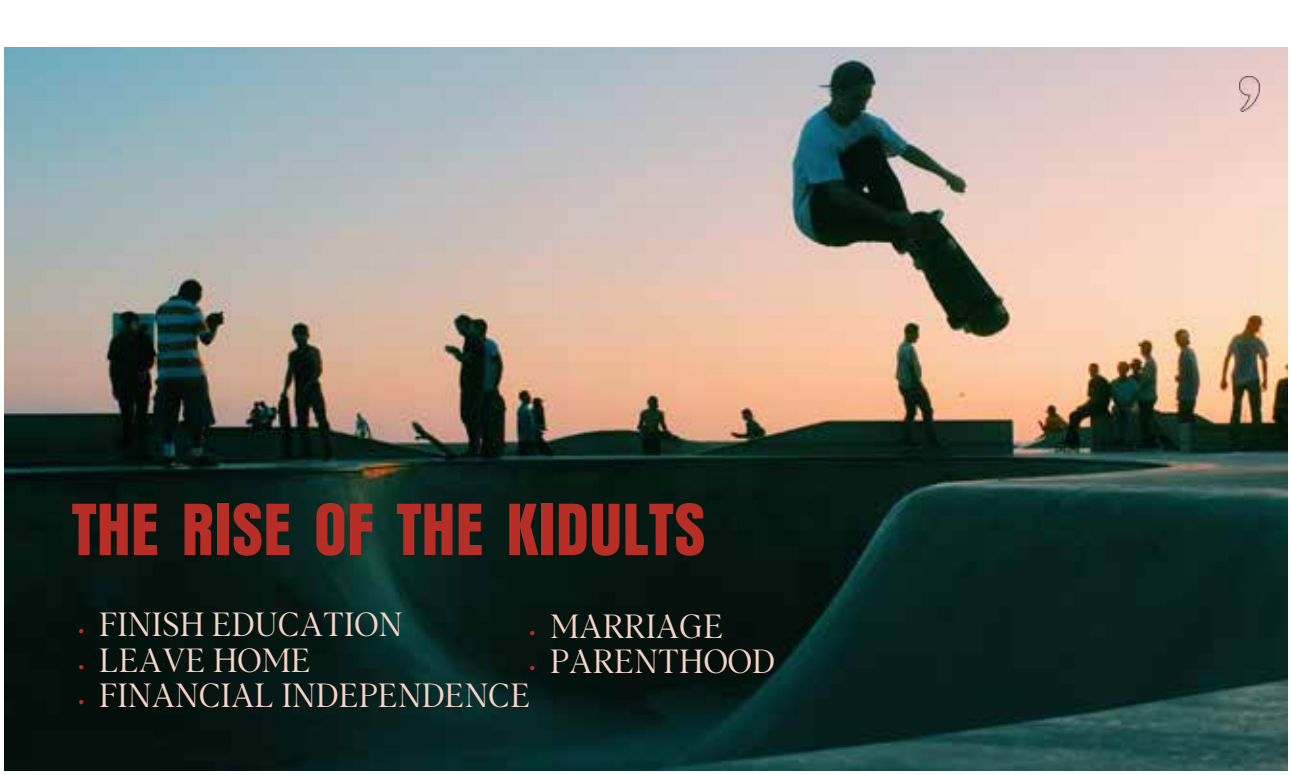
MILLENNIALS
1981 - 1996

GENERATION Z
1997 - 2010

THE NEW 21st CENTURY LIFECYCLE

FROM 3-STAGE LIFE TO MULTI-STAGE JOURNEY





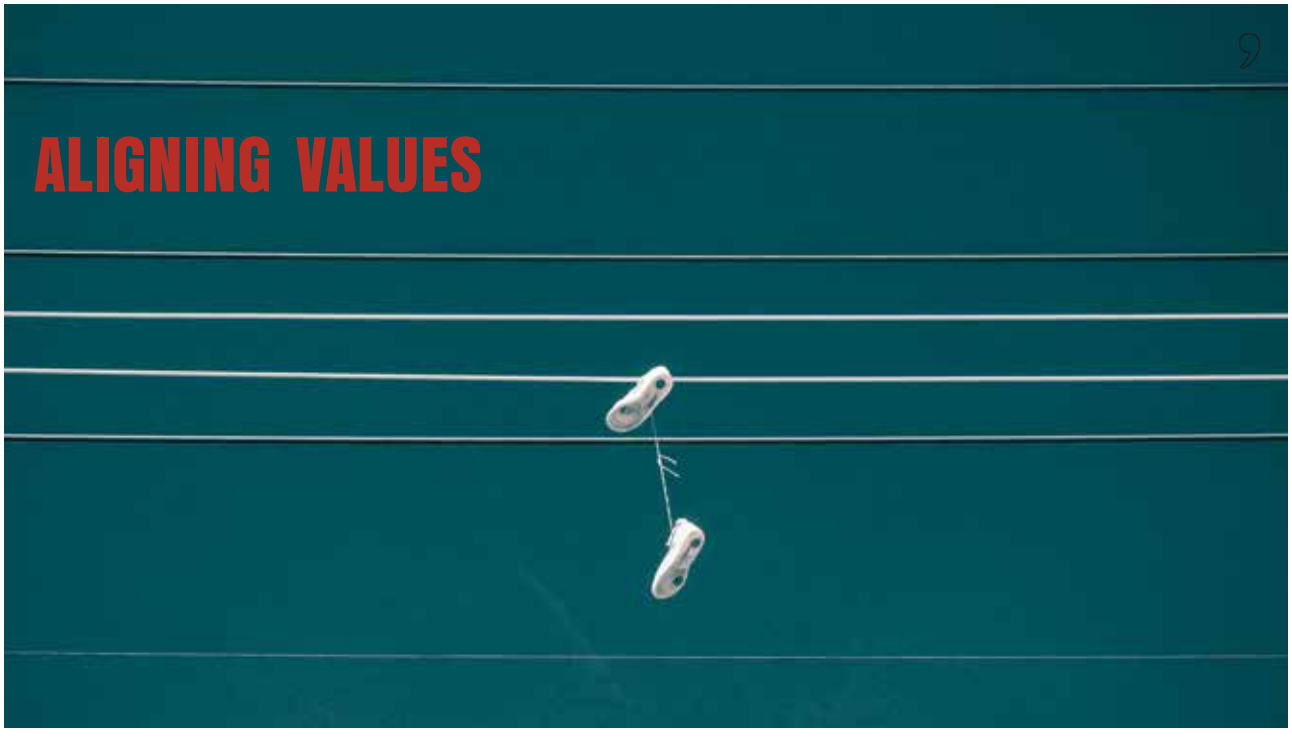
WHAT WILL BE THE LEGACY OF COVID-19 ON THE WORKPLACE?

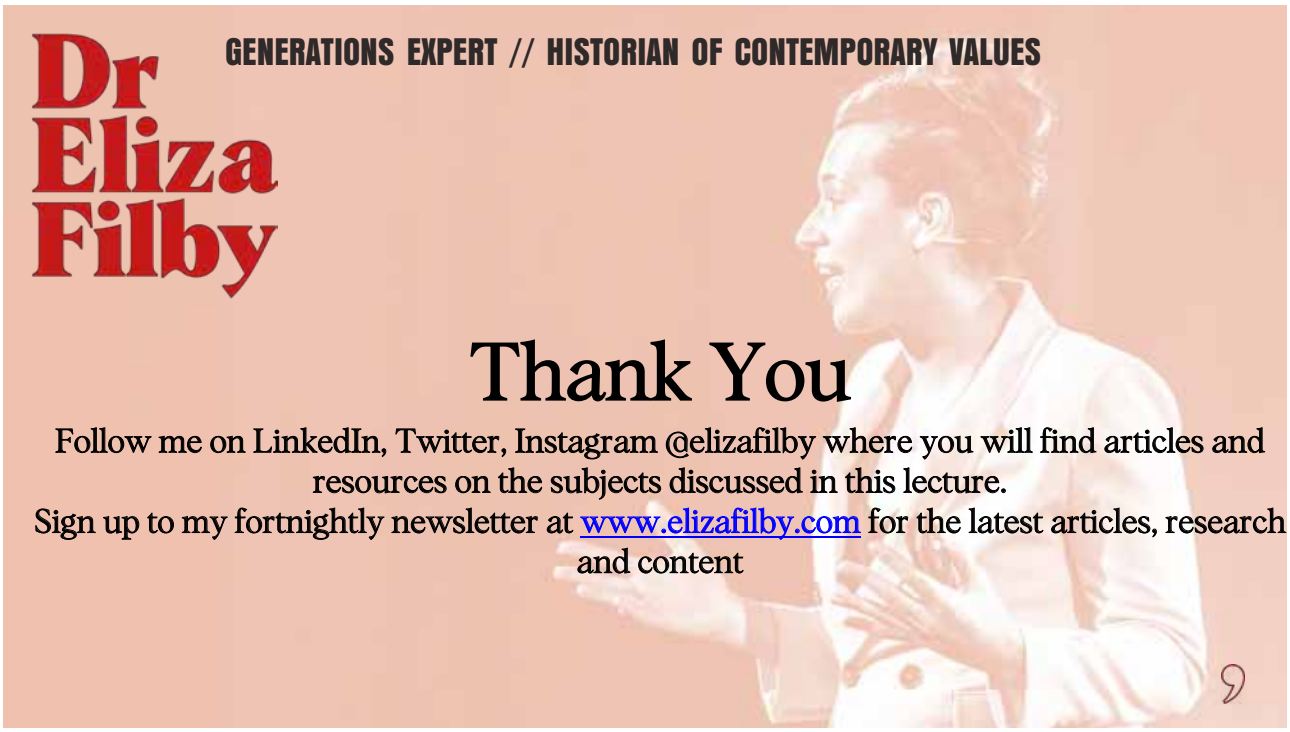
CAREER-LONG LEARNING

CARING RESPONSIBILITIES

MULTI-STAGE CAREERS


RIGHT TO BE HEARD,
OBLIGED TO LISTEN


ALIGNING VALUES


Dr
Eliza
Filby
GENERATIONS EXPERT // HISTORIAN OF CONTEMPORARY VALUES
Thank You
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Sequor Law | Miami, USA

Aimee Prieto
Prieto Cabrera & Asociados | Santo Domingo, Dominican Republic

Rosa Rojas Vértiz C.
Rojas Vértiz | Mexico City, Mexico

2020

Follow The Money:
Bankruptcy as a Tool to Fight Fraud and Recover

Aimée Prieto
Prieto Cabrera & Asociados
Dominican Republic

Nyana Abreu Miller
Sequor Law
Florida

Pamela Goldbaum
Lathrop & Blanco
Chile

Susana Hidvegi
Chief Judge of the Business Bankruptcy Court
Colombia

Rosa Rojas Vertiz
Rojas Vertiz
Mexico

Marlyn Narkis
MDU Legal
Panama

IWIRC
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In re Apollo Hotels

For decades, Apollo Hotels, was one the most luxurious hotel groups of the world, built in the most desirable locations within a country valued in over US$1 Billion Dollars. Investors from all over the world had invested in the Apollo Hotels. Large sums were capitalized to undergo deep renovations in the Hotels in Latin America. Then the Covid-19 pandemic came and the company, incorporated and with its headquarters in the U.S. went into liquidation (Chapter 7).

Debtor

Apollo Hotels has subsidiaries in Colombia, Mexico and Chile.

The subsidiaries own and operate hotels in their respective jurisdictions.

The trustee's initial investigation

A trustee is appointed in the U.S. The trustee's review of the company's records reveals that the subsidiary's hotels have been transferred to third parties shortly before bankruptcy. The trustee suspects that these transfers were made without fair market consideration and to recently incorporated companies, possibly controlled by insiders.

The trustee has discovered that the buyers of the hotels are all controlled by a Panamanian company.

At the same time, Apollo's main shareholder purchased a lavish new home for his family and newspaper reports say that he purchased a significant stake in an oil and gas company.

United States - Discovery Tools

- Rule 2004 of the Federal Rules of Bankruptcy Procedure: permits a party in interest, including the trustee, to obtain documents and testimony relating to "acts conduct, or property or to the liabilities and financial condition of the debtor, or to any matter which may affect the administration of the debtor's estate"
- Nationwide jurisdiction
- The subsidiaries are property of the debtor
- Subpoenas to those involved in the sale of the subsidiaries
- How does the trustee discover whether the shareholder improperly siphoned off money from the debtor for use in his recent purchase of assets

United States - Substantive Consolidation.

Test for substantive consolidation requires a showing

(1) that there is substantial identity between entities to be consolidated; and

(2) that consolidation is necessary to avoid some harm or to realize some benefit;

once this prima facie showing is made, burden then shifts to objecting party to show it relied on the separateness of one of the entities in extending credit, or that it will be prejudiced by the consolidation.

Mexico

Apollo has a Mexican subsidiary with hotels in many cities of Mexico, including Mexico City and Cancun, which apparently were transferred to third parties shortly before the Chapter 7 was filed in the U.S.

The trustee is looking for legal advice for the recovery of assets in Mexico and determining the advantages of pursuing recognition of the foreign insolvency proceeding or starting one in Mexico.

Mexico

Mexican Insolvency law provides for a clawback action:
•Ordinary look back period: 270 days
•Transactions with insiders: term doubles
•May go back up to 3 years

Unwinds transactions at undervalue or for no consideration
Presumption of fraudulent conveyance if made with insiders

Mexico

Clawback action is under Mexican insolvency law (concurso mercantil)

To declare the Mx subsidiary in *concurso mercantil:*

a) 35% of debts overdue for at least 30 days, or
b) Lack of liquidity to cover at least 80% of its debt

A foreign judgment on a clawback action on the hotels located in Mexico would not be enforceable in Mexico (real estate)

Mexico

Recognition of foreign insolvency proceeding ("Interim measures"):
•Stay on enforcement or execution proceedings
•The appointment of an administrator of the assets
•Request information and evidence regarding the assets, business, rights and liabilities of the subsidiary

Upon recognition the foreign representative would have standing to:
•Intervene in local proceedings involving the Mexican subsidiary
•Initiate clawback actions / forbid transfer of assets
•Make petitions concerning protection, realization or distribution of assets

Mexico

2 possible issues with recognition of a foreign proceeding:

1) If Mx debtor has an establishment in Mexico, recognition of the foreign proceeding is conditioned to a Mexican insolvency proceeding of the Mexican debtor (may be challenged)

1) Main / ancillary foreign proceeding (Main insolvency proceeding takes place where debtors have their COMI)

Colombia

The trustee is now determining the actions in Colombia. Apollo subsidiaries have hotels in the beautiful beaches of Cartagena and in the Colombian Amazon rainforest.

Is recognizing the foreign proceeding the best way to proceed? What other options are available for the trustee?

Colombia

1. Recognition of the Chapter 7 in Colombia

- Law 1116 incorporated the UNCITRAL cross-border insolvency model law in 2006.
- Section 108 of Law 1116 - upon recognition, the foreign representative may file claw-back actions “according to the rules set forth in this law” [Section 74 of Law 1116]

Colombia

2. No Recognition of the Chapter 7 in Colombia

2.1. Claw-back in the U.S. and exequatur (homologation)

- U.S. judgment issued in the Chapter 7
- Exequatur (homologation) in Colombia
  - Before the Supreme Court of Justice
  - Limitation: *In rem* rights in Colombia

Colombia

2. No Recognition of the Chapter 7 in Colombia

2.2. Civil Claw-Back Action - Section 2491 of the Civil Code

- Transaction over the debtor's assets
- Debtor's estate is insufficient to pay all creditors (eventus damni)
- Fraud (consilium fraudis)

Colombia

3. Local insolvency proceeding under Law 1116 (recognition or no recognition)

3.1. Must fulfill the requirements (insolvency or imminent insolvency)

3.2. File an article 74 claw-back action.

- The act affected the bankruptcy estate or altered the priority payment order
- The bankruptcy estate is insufficient to pay all the claims
- The act took place during the applicable preferential period [18 months]
- Burden to prove good faith

Chile

Apollo Hotels in Chile are located in the Patagonia in a prime location within the glacial fjords, which is a great success and very profitable business.

The trustee is seeking for legal advice in Chile to determine how to proceed.

Should the U.S. proceeding being recognized in Chile?
Should a local proceeding be initiated? Which one?
How are the credits going to be collected?
Precautionary measures
Claw-back actions

Panama: Following the money

The trustee in the U.S. has requested information about the shareholders and the final beneficiaries of the Panamanian company.

Is it possible to pierce the corporate veil? What are the elements that must be proven?

AMERICAN BANKRUPTCY INSTITUTE

2020 International Insolvency Forum

Emerging from the COVID-19 Disruption: The Need for a National Emergency Restructuring Entity

Presented by the International Insolvency Institute (III)

CONCURRENT SESSION

Donald S. Bernstein, Moderator
Davis Polk & Wardwell LLP | New York, USA

Shin Abe
Kasumigaseki International Law Office (KILO) | Tokyo, Japan

Thomas Felsberg
Felsberg Advogados | Sao Paulo, Brazil

Richard Gitlin
Gitlin & Company, LLC | Delray Beach, Fla., USA

2020

EMERGING FROM THE COVID-19 DISRUPTION: FUNDING & RECAPITALISING VIABLE BUSINESSES DURING THE CRISIS

The need for a National Emergency Restructuring Entity (**ERE**)

Outline of Presentation

1. Introduction of International Insolvency Institute
2. Outline of IMF's three phase approach to addressing the COVID-19 disruption
3. Why consider introducing an ERE?
4. Relevant considerations in establishing an ERE
5. Key considerations for successful implementation of ERE
6. SME specific considerations for ERE
7. A focus on Brazil

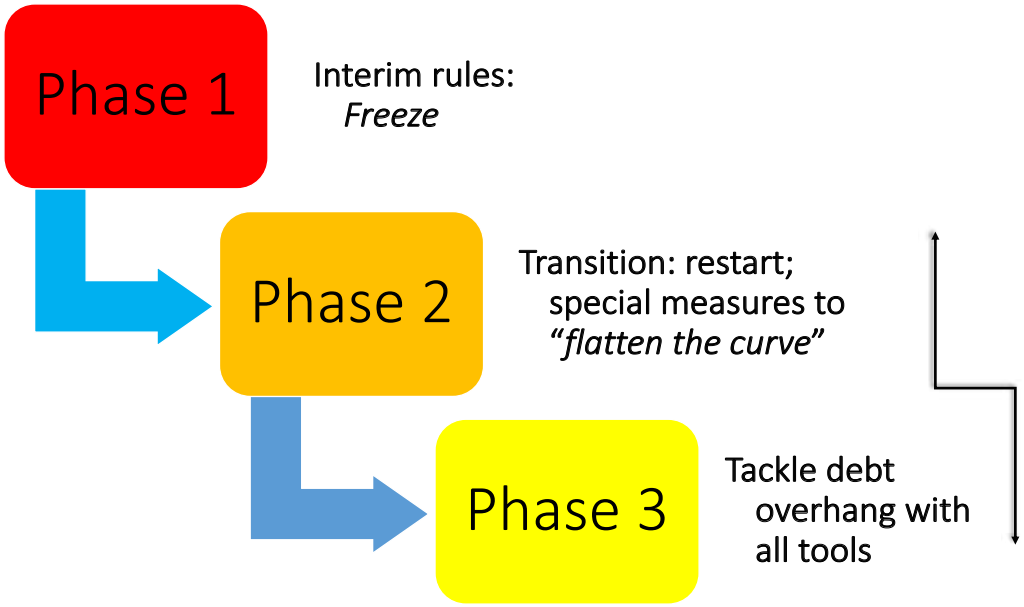
Appendix A – The Japanese Experience

International Insolvency Institute

- The International Insolvency Institute (III) is:
  - An invitation only membership of the world's most senior, experienced and respected practitioners, academics, judges and financial industry professionals
  - Awarded special consultative status to United Nations Agencies
  - Continually studying, analyzing and providing solutions to insolvency and restructuring problems
  - Dedicated to improving international cooperation and advising on international best practice in the insolvency field

16/11/20 3

IMF Framework for Insolvency Measures in the COVID-19 crisis



The IMF Framework (cont)

- First phase – Interim/emergency measures
  - Prevent social disruption
  - Breathing space for debtors – fiscal and financial support measures
  - Limited insolvency activity

- Second phase – Transition
  - Withdrawal of "first phase" emergency measures
  - Prevent overload of the court system
  - Evaluation and planning stage
  - Evaluate
    - Is system "fit for purpose" to address pandemic induced debt overhang?
    - Is there sufficient institutional capacity?
    - Is there a triage process that is "fit for purpose"?
    - Is there sufficient access to liquidity and capital for viable enterprises
  - Then plan and implement any necessary measures. For example:
    - Insolvency law reform to implement best practice (eg SME insolvency)
    - Bolster institutional capacity
    - Establish emergency restructuring entity

The IMF Framework (cont)

- Third phase – Fighting debt overhang
  - Insolvency law now fit for purpose. For example:
    - Efficient triage process
    - Effective process to rehabilitate viable enterprises
    - Swift liquidation of unviable enterprises
  - Institutional framework ready to facilitate recovery. For example:
    - Judicial capacity enhanced
    - Emergency restructuring entity (ERE) operational and funded

The IMF Framework – Key takeaways for EREs

- Evaluate NOW whether likely to be shortage of liquidity and capital available to enable viable enterprises to re-emerge and prosper
- Evaluate NOW whether ERE is needed
- If so, take steps NOW to establish and fund ERE
- If ERE considered necessary, it must be ready when "Phase 1" emergency measures are withdrawn

Why consider introducing an ERE?

- Two policy imperatives
  - Ensuring **viable** businesses can re-emerge and grow
  - Building an economy for the future, not recreating the past
- Addressing Covid-19 headwinds
  - Stabilisation strategy will not be sufficient
  - Rent, debt service and other obligations have continued to accrue; revenues have been substantially reduced/eliminated
  - As a consequence, many enterprises' capital has been depleted/eliminated
  - In a Covid/post-Covid world, capital and/or liquidity will be essential requirements for success in enterprises re-emerging /growing

cont/…

Why consider introducing an ERE? (cont)

- Addressing Covid-19 headwinds (cont)
  - Capital and liquidity are required for prudent lending/investment into large, medium and small enterprises that could not otherwise access it
  - Investment required in tandem with restructuring and insolvency processes that serve to address existing debt overhang
  - For some countries, courts may lack capacity or specialisation, or legal framework may not be sufficiently robust or efficient to accommodate recapitalisation or liquidity support
  - Private sector will likely not have sufficient capital to invest, or their risk intolerance may make pricing unviable. Banks and other financiers and investors bring a different frame of reference to the issue. Their focus is on their own balance sheets, not the policy imperatives identified above, and may decline to lend/invest or limit their investment.

Relevant considerations in establishing ERE

- Different approaches for large, medium and small enterprises
- Sector-specific focus (eg aviation) will support government policy
- Critical issue will be manner of identification of enterprises with sustainable business plans, capable of profitable future
- Must be guided by clear government economic policies
  - Support essential industries
  - Support SME sector as lifeblood of most economies
  - Build economy of the future
- Enable only viable business to re-emerge and prosper/employ
  - Assessment of viability will be challenging
- Identify commercially sensible ways to lend, or invest in capital structure, and (ultimately) obtain return of the invested capital

Key considerations for successful implementation of ERE

- ERE must have internal operating/investing criteria
  - Criteria for funding/investment request to be evaluated
  - Conditions for finance to be provided
  - Criteria for assessment of capital to be advanced/invested, and manner of investment
  - Funding non-viable businesses could damage ability of viable businesses to compete, and is a misallocation of scarce capital
- ERE must have qualified restructuring professionals on staff
  - Evaluation of applications against criteria requires expertise; particularly in assessment of the viability of business plan to ensure future success, the amount of the investment, the manner of investment, and the means for repayment
  - Ongoing review of investment, and securing return of investment
  - Acting expeditiously requires expertise for decision making and absence of bureaucracy

Key considerations for successful implementation of ERE (cont)

- For smaller enterprises
  - Provide SME with access to restructuring professionals
  - Provide “template” solutions where applicable (eg cafes)
  - Simpler, more streamlined interaction. Formal processes only as last resort.
  - Use of structured ADR (eg mediation) to build stakeholder consensus
    - Main creditors likely to be banks and government
- For large enterprises
  - Must work in tandem with a formal restructuring process to ensure success. Eg US auto industry in 2009/2010, where government appointed taskforce sanctioned capital investment conditional on implementation of restructuring plan through formal bankruptcy proceedings

Key considerations for successful implementation of ERE (cont)

- Enterprise (large or small) must:
  - Demonstrate existence of viable business plan and restructuring plan
  - Specify the amount of funding requested
  - Specify the uses to which the funding will be deployed
  - Demonstrate that if funding provided, enterprise will most likely be viable and sustainable
  - Identify the manner and timing of return of funding to the ERE
- Sunset date for ERE important – ERE is temporary, and the pathway to return/disposal of all investments must be identified
- ERE must have ability to expedite regulatory approvals and address other impediments to swift action

SME-specific considerations for ERE

- Localised solution important
- Must be efficient and inexpensive
- Access to restructuring professionals to assist SME in identifying business plan and restructuring plan
- Triage essential – must ensure only viable SMEs are supported
- Preparation of template plans helpful, as is a streamlined administrative process (instead of a court process) to implement debt restructuring
- Use of ADR processes such as mediation to build consensus among key stakeholders

A Focus on Brazil

- An ERE could be established as a new government-controlled entity, or just as effectively by the establishment of funds by the Brazilian National Development Bank, funded by several players, as suggested below. Our recommendation is that the BNDES create three new funds (Funds).
- The Funds would target respectively large, mid-sized and small companies.
- The Funds would be managed professionally, as stand-alone funds, in order to be able to act with the expedition required by the current crisis.

A Focus on Brazil (cont)

- Resources for the Funds could be contributed by the BNDES, Banco do Brasil, Caixa Econômica Federal and the three large Brazilian privately held retail banks, namely Bradesco, Itau and Santander, and also with resources raised in the capital markets, possibly with the assistance of the Federal and the Bank Guarantee Funds. Participation of multilateral institutions such as the IDB or IFC should be encouraged.
- III members could act as advisers to the investment committees of the Funds if so requested.

A Focus on Brazil (cont)

- The Funds would determine initially which companies are viable and deserve to receive investment and/or financing (i.e. the triage). Co-financing should be encouraged, with the participation of stakeholders.
- Focus would be on restructuring activities, not to benefit equity holders (other than in SME sector), although if equity holders are valuable to the activity either by providing funds, expertise and/or relationships, they could participate in the rescue.

A Focus on Brazil (cont)

- Insolvent small companies should be liquidated speedily when necessary and the assets should be used to satisfy creditors to the extent possible. Financing should only be provided to allow worthy entrepreneurs to rescue their companies or have a second chance to start over where a viable business case is demonstrated.
- Insolvency filings should be avoided to the extent possible, except if free and clear sales of businesses and assets are required.

A Focus on Brazil (cont)

- Mediation should be used whenever necessary.
- Consider whether funds disbursed should prime all other guarantees encumbering future cash flows.
- The vibrant Brazilian stock market could be a valuable alternative, especially for the large companies.

Appendix A – The Japanese Experience

ERE in Japan

1. REVIC
2. SME Revitalization Support Councils
3. INCJ
4. Japan Finance Corporation

Appendix A – The Japanese Experience

1. REVIC -Successor of IRCJ

Scope: large and medium sized companies

IRCJ (2003-2007)

ETIC (2009-2013)

REVIC (2013-Present)

Appendix A – The Japanese Experience

1. REVIC

Key Features:

- Funded both by the Japanese government and by Japanese financial institutions.
- Financially distressed companies referred to REVIC by their main banks.
- Inject capital to restructure the distressed companies.
- Support debtor company in drawing up the restructuring plan.
- Establish funds specialized in supporting regional rehabilitating companies with other reginal banks.

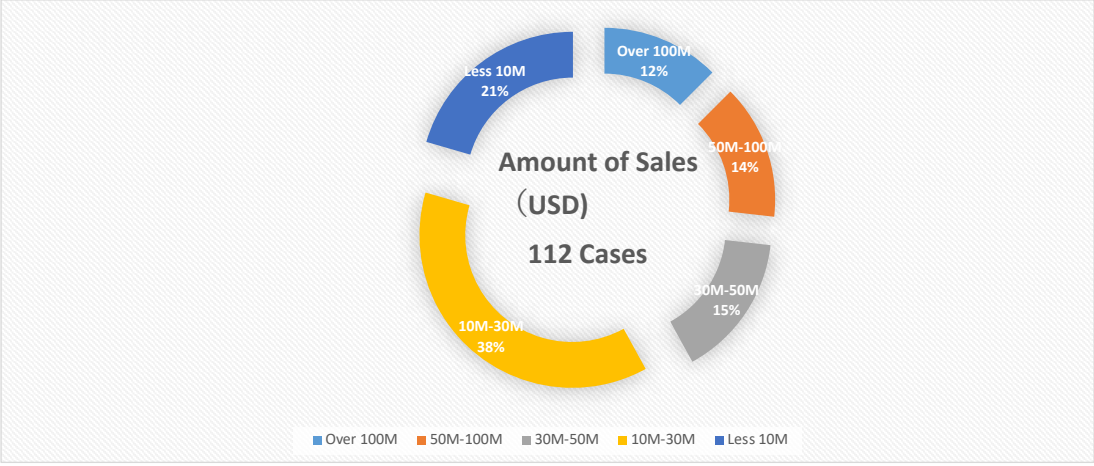
Appendix A – The Japanese Experience

1. REVIC

Key Features (con't):

- Retain various professionals including financial experts, tax accountants, certified public accountants, lawyers and restructuring consultants.
- Deploy restructuring professionals:
  1) to the debtor companies (hands on) or
  2) to regional banks which lack experience in restructuring distressed companies.

Appendix A – The Japanese Experience



Appendix A – The Japanese Experience

2. SME Revitalization Support Councils

Scope: Small and medium sized companies

- Located in every prefecture of Japan.
- Formed to support business rehabilitation (e.g. drawing up business rehabilitation plan, negotiating with banks)
- Under the supervision of the Small and Medium Enterprise Agency of Japan.
- Experts retained by these councils include tax accountants, certified public accountants, lawyers and business turnaround consultants
- No capital injection but coordinate with banks to finance the distressed companies.

Appendix A – The Japanese Experience

2. SME Revitalization Support Councils

Measures for Covid-19

➡ New scheme entitled "Covid-19 Special Rescheduling"

- ➢ Making "tentative cash flow plan" for 1 (one) year term
- ➢ Requesting banks to lend money to the distressed company
- ➢ SME RSC support the company to negotiate with the banks
- ➢ Expecting to make rehabilitation plan after Covid-19 (late 2021)

Appendix A – The Japanese Experience

2. SME Revitalization Support Councils

(Data)

✓ Total number of advised distressed companies is 46,083 until 30 March 2020.

- 15,672 of the above companies completed making rehabilitation plan and confirmed by financial creditors.

- Over 70% of the above plans includes reschedule plan without hair cut (debt forgiveness).

Appendix A – The Japanese Experience

2. SME Revitalization Support Councils

(Data con't)

✓ Total number of advised companies under "Covid-19 Special Reschedule" is 2754 until 30 September 2020.

- 52% of the companies are between USD 1 M and USD 5M regarding amount of sales.

Appendix A – The Japanese Experience

3. INCJ

Scope: Very large, blue chip companies

- Funded by the government
- Mandate to continue with investment activities for "Value Up" initiatives such as overseeing additional investments and milestone investments

  → In reality also involved in restructuring distressed companies

Appendix A – The Japanese Experience

3. INCJ

Between 2011 and 2020 (July)

- The number of the cases in which INCJ injected capital for restructuring is 12 of 144 cases (8%).
- The amount of capital injected for restructuring is 7.8 billion USD (58%) of all the cases (13.5 billion USD).

Appendix A – The Japanese Experience

4. Japan Finance Corporation

Scope: small and medium size companies

- Public corporation wholly owned by the Japanese government
- Unique features

Special subordinated loan for companies suffered by Covid-19

✓ Loans are treated as investment on its balance sheet

→ Easy for debtors to borrow new money

→ Total amount of the loan between March and September 2020 is USD 100 billion

Appendix A – The Japanese Experience

4. Japan Finance Corporation

Unique features (con't)

✓Need to pay interest monthly but pay back principal at the end of the term (balloon type)

✓Support to draw up rehabilitation plan; monitor the plan (like a consultant)

→ Reason of consulting function by the JFC is to keep the loan alive (not to fall into NPL)

International Insolvency Institute
www.iiiglobal.org

Reform of the Law on Judicial Reorganizations

For many diverse reasons and in many different areas, the year 2020 will certainly be remembered as historic. And in the field of corporate insolvency, it will be no different. The deep economic recession caused by the Covid-19 pandemic has posed serious challenges to companies and the already fragile Brazilian economy and, more than ever, has highlighted the need for reform in our bankruptcy legislation.

It was in this context that, over the course of the year, the initiative to reform Law No. 11,101/2005 gained traction, under the leadership of Deputy Hugo Leal. After some to and fro, the bill was approved by the Chamber in August, and is currently being considered in the Senate under No. 4,429/2020, where it is expected to be voted on very soon.

But what should we expect from a reform of insolvency legislation in the current scenario? The expectation is that more than simply changing certain legal provisions, there will be an acceleration of the cultural evolution in dealing with insolvency in our country.

One of the ideas that motivates the current reform is that of expansion: expanding the options and paths available for debtors, creditors, and investors to protect their interests. Experience shows that, although apparently antagonistic, the interests of these different players are intertwined, and can - and should - undoubtedly coexist.

The key to this harmonious coexistence is found in another idea, that of efficiency. Improving the efficiency of procedures and reducing the degree of litigation is perhaps the best way to protect the interests of everyone involved. The winner is the national economy itself, formed by the interaction between creditors and debtors and all those who benefit or depend on the existence of the company - of all companies. More than simply protecting them, one must keep in mind the protection of the business phenomenon.

In view of this scenario, the Bill proposes new and valuable instruments to modernize and increase the efficiency of insolvency proceedings, such as the possibility of replacing lengthy face-to-face meetings with virtual procedures, or the possibility for the judge to end judicial reorganization as soon as the plan is approved, eliminating the costly (and in most cases useless) two-year inspection period imposed by current legislation. Mention should also be made of stimulating mediation and conciliation, valuable instruments to reduce conflicts and save time and money - scarce resources in the context of insolvency proceedings, as well as the correction of some of the distortions that permeate tax legislation. One of its more positive features is the enactment of the Uncitral Model Law for Cross Border Insolvencies.

Liquidation in bankruptcy, so neglected these days, is one of the main beneficiaries in terms of efficiency. The quick liquidation of assets and the return of the entrepreneur to activities (a fresh start) were included as express objectives of the legislation, with the presentation of an organized liquidation plan and the consummation of all sales within a period not exceeding 180 days after the declaration of bankruptcy, a period that today can take decades. There is also a provision for the immediate termination of the bankrupt's obligations along with the closure of the bankruptcy, dispensing with the current and unreasonable minimum period of five years after the closure of the bankruptcy, allowing the return of the entrepreneur to entrepreneurship.

The Bill also greatly expands the restructuring and investment options available, especially through the creation of concrete rules for the granting of credit to companies in recovery - the so-called DIP

loans- and the foreseeable possibility of selling the company, already with the debt properly restructured, for an apt investor interested in pursuing such activities. Also noteworthy is the guarantee that any assets disposed of by judicial authorization will give the buyer the assurance that he will not be liable for debts and contingencies of the recovering company - a guarantee that is currently extended only to the so-called "UPIs"(isolated productive units).

However, not everything is rosy, and there are parts of the reform that have been the subject of controversy. The broad powers granted to the Tax Authorities (including that of filing for the debtor's bankruptcy if tax obligations are not settled), the expansion of judicial interference during negotiations and the possibility of imposing a plan prepared exclusively by creditors represent paradigm shifts, the latter being very favorably viewed by foreign investors, represent paradigm shifts. In any case, practice will certainly take care of trimming the rough edges, just as it did with the original law in 2005.

A very important part of any efficient economic system is knowing how to deal with its own shortcomings, and we hope that the current reform of Law No. 11,101 constitutes an important step in this direction.

Thomas Felsberg, Felsberg Advogados (thomasfelsberg@felsberg.com.br)
November 2020

AMERICAN BANKRUPTCY INSTITUTE

2020 International Insolvency Forum

The New Europe: The Reality of Working Together

Presented by TMA Europe

Enrica Maria Ghia, Moderator
Studio Legale Ghia | Milan, Italy

Rashmi Dubé
Future Thinking Now | London

Teresa C. Kohl
SSG Capital Advisors, LLC | West Conshohocken, PA, USA

Andrea Metz
Luther Law Firm | Frankfurt, Germany

Raj Verma
Author's Point | New Delhi, India

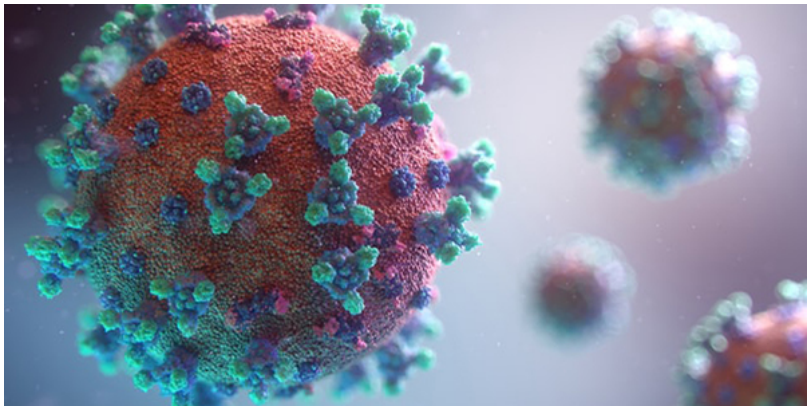
CONCURRENT SESSION

2020

The New Europe - The Reality of Working Together

TMA Europe

2019
December
An outbreak of a disease caused by a novel coronavirus is reported in Wuhan, China



And our lives changed once and for all…

Member states agreed that our citizens' health is the first priority, and that measures should be based on science and medical advice.

Measures need to be proportional so that they do not have excessive consequences for our societies as a whole.

Charles Michel,
President of the European Council

2020
28 January: **EU Council presidency activates IPCR in information sharing mode**
7 February: **EU health ministers hold informal high-level video conference**
13 February: **Extraordinary Health Council adopts conclusions on COVID-19**
27 February: **Competitiveness ministers look at impact of COVID-19 on EU industry**
4 March: **Eurogroup discusses impact of COVID-19 on the economy**
12 March: **Education ministers discuss implications of COVID-19 on education/training**
16 March: **G7 leaders coordinate to address global crisis**
18 March: **EU member states join forces to keep priority traffic moving**
19 March: **EU ministers discuss social and employment consequences of COVID-19**
23 March: **Finance ministers agree to ease EU fiscal rules in COVID-19 fallout**
30 March: **EU adopts slot waiver to help airlines**

8 April: **Council gives go-ahead to further use of cohesion resources. Development ministers agree to launch €20 billion global response package**

9 April
Eurogroup puts forward €500 billion support package

14 April: **EU makes additional €3.1 billion available to tackle COVID-19 crisis**

15 April: **Presidents Michel and von der Leyen present a roadmap to phase out containment measures**

22 April: **Council adopts measures to flexible use of structural funds in COVID-19 crisis**

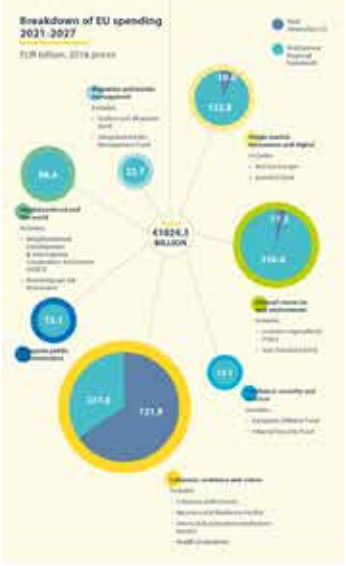
23 April: **EU leaders to work on a recovery fund**

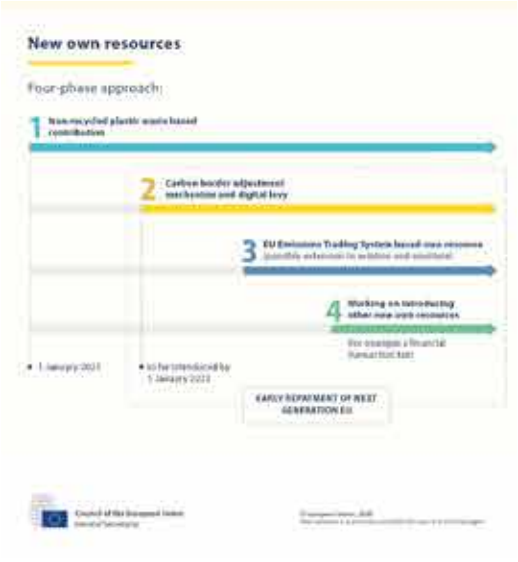
July 21st, 2020

To help repair the economic and social damage caused by the coronavirus pandemic, the European Commission, the European Parliament and EU leaders have agreed on a recovery plan that will lead the way out of the crisis and lay the foundations for a modern and more sustainable Europe.

Euro 1.824,3 billion

VIRTUAL
AMERICAN BANKRUPTCY INSTITUTE
INTERNATIONAL INSOLVENCY FORUM
NOVEMBER 18-20, 2020





October, 9th, 2020

EU ambassadors agreed the Council's position on the **Recovery and Resilience Facility (RRF)**, a new tool providing member states, with financial support to step up **public investments and reforms** in the aftermath of the COVID-19 crisis.

The **€672.5 billion facility** is at the heart of the EU's extraordinary recovery effort. Next Generation EU (NGEU): the €750 billion plan agreed by EU leaders in July 2020.

The RRF will help member states address the economic and social impact of the COVID-19 pandemic whilst ensuring that their economies undertake the **green and digital transitions**, becoming more **sustainable and resilient**.

In order to receive support from the Recovery and Resilience Facility, member states must prepare **national recovery and resilience plans** setting out their reform and investment agendas until 2026.

WHERE ARE WE NOW?

AMERICAN BANKRUPTCY INSTITUTE

2020 International Insolvency Forum

Troubled Non-U.S. Airlines Landing in Chapter 11: The Inside Story

Presented by the American Bankruptcy Institute (ABI)

Albert J. Togut, Moderator
Togut, Segal & Segal LLP | New York, USA

Hon. Shelley C. Chapman
U.S. Bankruptcy Court (S.D.N.Y.) | New York, USA

Timothy R. Coleman
PJT Partners | New York, USA

Timothy Graulich
Davis Polk & Wardwell LLP | New York, USA

William K. Harrington
Office of the U.S. Trustee | New York, USA

Lisa M. Schweitzer
Cleary, Gottlieb, Steen & Hamilton LLP | New York, USA

2020

Selected Issues in Chapter 11 Cases of Foreign Airlines

November 12, 2020

Davis Polk

Davis Polk & Wardwell LLP

Automatic Stay

The "automatic stay" is one of the main pillars of the Bankruptcy Code

- The automatic stay stops most creditor action in connection with prepetition claims and goes into effect automatically upon filing
  - Other entities cannot bring or continue new legal proceedings against the debtor, setoff prepetition debt or take actions against property of the estate (including property of the estate located outside the United States)
  - Violations of the automatic stay are punishable by sanctions for contempt
- The automatic stay applies extraterritorially; however, the practical effect of the stay will depend on local law recognition and whether a creditor is subject to jurisdiction in the United States
  - A debtor may chose to file a recognition proceeding in the local jurisdiction and request the local court to impose a stay under Article 19 of the UNCITRAL Model Law (provisional relief) or Article 21 (relief upon recognition)
  - If a creditor has a nexus to the U.S. or has submitted to the U.S. court's jurisdiction, the debtor can file a motion with the Bankruptcy Court for contempt for actions taken outside of the U.S.
- As a general rule, the automatic stay only applies to the debtor itself and not its directors, officers or shareholders

First Day Relief Generally

Chapter 11 is a balance between maintaining business as usual and providing a debtor with meaningful protections to reorganize

- When a debtor files for bankruptcy, it is prohibited from paying prepetition debt absent court authority
- So that a debtor can continue to honor its obligations to customers, vendors and employees, it will often file "first day" motions seeking relief under the "necessity of payment" doctrine
  - This doctrine "recognizes the existence of the judicial power to authorize a debtor in a reorganization case to pay prepetition claims where such payment is essential to the continued operation of the debtor." *In re Ionosphere Clubs, Inc.*, 98 B.R. 174, 176 (Bankr. S.D.N.Y. 1989).
  - The Bankruptcy Rules also provide that courts can issue orders granting "a motion to use, sell, lease, or otherwise incur an obligation regarding property of the estate, including a motion to pay all or part of a claim that arose before the filing of the petition" within 21 days of filing a petition
- Typical first day motions include authority to pay prepetition wages, taxes and trade debt to critical suppliers

First Day Relief for Airlines

Airline debtors typically seek a suite of relief to ensure regular flight operations and minimize the impact of the filing on the customer experience

- Critical and foreign vendors motion
  - Airlines may not be able to easily switch to an alternative vendor if a current vendor threatens to cease doing business unless its prepetition invoices are paid. So, a debtor will seek authority to make payments to these vendors up to a cap negotiated with the key parties in interest.
  - A debtor may also seek relief to pay foreign vendors—even if they are not critical—to avoid the risk of a proceeding in the foreign jurisdiction (especially without a local recognition proceeding)

- Employee Wages
  - It is common practice in domestic cases for a debtor to seek relief on the first day to seek authority to pay any outstanding prepetition wages
  - For non-U.S. debtors, the employee wages motion is of increased importance because wage claims in other jurisdictions may have constitutional or other local law protection

First Day Relief for Airlines (cont.)

- Taxes
  - It also common practice in domestic cases for a debtor to seek relief to pay certain taxes and other governmental assessments and fees, especially taxes and fees that would otherwise have a statutory priority or are collected on behalf of a governmental entity and are arguably trust property
  - Because a foreign government is unlikely to submit to the bankruptcy court's jurisdiction, this relief is particularly important for a non-U.S. debtor, especially operating in a regulated industry like an airline, to avoid adverse action in the local jurisdiction

- Orders confirming the statutory protections of the Bankruptcy Code
  - While the fundamental protections of the Bankruptcy Code, like the automatic stay, are self-executing, debtors will often seek an order from the court confirming these protections
  - A debtor is then able to provide its creditors, particularly those unfamiliar with the U.S. bankruptcy process, with an unambiguous court order confirming these protections

First Day Relief for Airlines (cont.)

- Critical airline contracts motion
  - Airlines are parties to various contracts with each other, known as interline agreements, that facilitate coordination among airlines so that passengers can fly on a single ticket, even when flying on different airlines. Airline debtors will seek to continue to honor their obligations under these contracts at the outset of the case.
  - Airlines will also seek to continue to honor their obligations under alliance agreements and industry-wide cooperation agreements

- Customer programs motion
  - Through this motion, a debtor seeks authority to continue honoring its prepetition obligations to customers. For airlines, this includes everything from honoring tickets purchased prepetition for postpetition flights to allowing frequent flier programs to continue to operate in the ordinary course so that customers can continue to earn and redeem points.

CLEARY GOTTLIEB

Troubled Non-U.S. Airlines Landing in Chapter 11:
The Inside Story —
Select Topics in US Cases and Recent Airline Cases

Lisa Schweitzer

November 12, 2020

clearygottlieb.com

Chapter 11 Background

Overview

Chapter 11 has gained a strong foothold as a pathway for foreign companies to reorganize, whether or not they have substantial operations in the United States.

Chapter 11 can be a highly effective both for fully prepackaged debt restructurings and also for corporations that want to undertake a broader restructuring or where a final deal has not been reached.

The typical goal in Chapter 11 is for the debtor to emerge from bankruptcy as a going concern, but the debtor also can sell its assets or otherwise liquidate under Chapter 11 if necessary.

A Chapter 11 case is commenced by the filing of a "petition," which is a simple form that is completed and signed by the debtor company.

— The petition must be approved by the board of directors or other authorized parties pursuant to the company's applicable governance procedures.

Not all entities in a corporate group have to file for relief if a specific affiliate files, and a company does not need to be insolvent to file as long as it is experiencing financial distress.

A Chapter 11 case is culminated through confirmation (*i.e.*, approval) of chapter 11 plan of reorganization by a bankruptcy court following acceptance by the requisite creditors.

Commencement of a Chapter 11 Case

Eligibility and Jurisdiction

To be eligible for bankruptcy, a company is not required to be insolvent, but the company must be experiencing "financial distress."

The jurisdictional requirements for access to Chapter 11 are relatively low compared to certain other jurisdictions, and such minimum requirements are frequently satisfied by having some property in the United States.

— Debtors do not need not have operations in the United States to file for Chapter 11.

— A debtor's property in the United States does not have to be substantial and does not necessarily need to relate directly to the company's operations.

NOTE

Even where jurisdiction is proper, a case may be dismissed when a court finds that it has been filed in bad faith or if the ties to the U.S. are so remote that the company cannot effectively reorganize under the U.S. laws (although these are high hurdles to prove)

Commencement of a Chapter 11 Case

Operations, Financing of a Debtor-in-Possession

The company's management generally stays in control of operations and oversight of the company's assets (*i.e.*, no trustee is appointed), absent fraud or gross mismanagement

The debtor has a general duty to preserve and maximize the value of the estate for the benefit of its creditors and stakeholders, and the company's fiduciary duty run to its stakeholders generally.

The debtor may operate in the ordinary course of business without court approval but may not use, sell, or lease property of the estate outside of ordinary course of business (including entering into sale transactions or material contracts), without notice and court approval.

— May sell assets "free and clear" of liens / interests if certain requirements are met (*e.g.*, liens attach to proceeds of sale) and court approval is obtained.

The debtors' use of cash collateral and incurrence of post-petition financing requires court approval.

— DIP lenders can be granted a superpriority lien ("priming lien") that ranks above existing liens if secured parties are given adequate protection (*e.g.*, equity cushion) or consent to superpriority lien.

Debtor in Possession (DIP) Financing

DIP financing is any financing provided to a debtor-in-possession during Chapter 11, where the pre-bankruptcy lenders are not required to continue to extend credit to the debtor in bankruptcy.

The key features of DIP financing include:

— The grant of a superpriority lien and claim, as well as administrative priority status;
— Budgets itemizing the use of proceeds, and restrictions on variances and using proceeds in manner adverse to DIP lender;
— The inclusion of case milestones tied to the general restructuring plan (*i.e.*, sale or plan milestones);
— Possible roll-ups of pre-filing debt (effectively converting pre-petition debt into DIP financing);
— Mandatory repayment provisions upon any refinancing or emergence from bankruptcy;
— If the DIP lender is an existing lender, debtor stipulations on the validity of pre-petition debt and liens, plus a limited period to challenge pre-petition debt and liens; and
— An advance waiver of automatic stay to foreclose upon event of default.

The DIP lender can obtain a "priming lien" over already-pledged collateral.

— Must show that the financing is not available on any other more favorable terms.
— Existing secured lenders that are primed must either consent or be given adequate protection.

The DIP financing is may be approved on an interim basis early in the case, and then on a final basis around 20-25 days after the filing of the case.

Comparison of Recent Airline DIP Financings

	Aeromexico	LATAM	Avianca
Total	$1 billion	$2.45 billion	$1.989 billion ($1.216 billion new money/$773mm roll-up)
Tranches	— Tranche 1: $200mm — Tranche 2: $800mm	— Tranche A: $1.3 billion — Tranche B: Up to $750mm (uncommitted) — Tranche C: $1.15 billion	— Tranche A: $1.289 billion ($900mm new money/$389mm roll-up) — Tranche B: $700mm ($316mm new money/$384mm roll-up)
Carve-out	$15mm	$20mm	
Pricing	— Tranche 1 DIP Facility: Adjusted LIBOR + 8.0% or ABR + 6.0% payable in cash. — Tranche 2 DIP Facility: Adjusted LIBOR + 12.5% or ABR + 11.0% payable in cash or Adjusted LIBOR + 14.5% or ABR + 13.0% payable in kind. — Default Interest:+ 2%	— Tranche A: LIBOR + 9.75%/8.75% (Eurodollar/ABR Borrowing) if paid in cash, or LIBOR + 11%/10% (Eurodollar/ABR Borrowing) if paid in kind. — Tranche C: 14.5% — Default Interest:+ 2%	— Tranche A: L+ 1,000 –1,050bps cash / L+ 1,150 –1,200bps PIK, 0.5% floor (payable in cash or in-kind at Borrower's election), 98 OID w/ back-end fee of 0.75%. — Tranche B: 14.50%
Additional Fees	— DIP Lender Advisor Fee -1.50% — Upfront Fee -1% — Unused Commitment Fee: • Tranche 1 -4.50% • Tranche 2 -8% — Commitment Termination Fee -2% — Break Fee -$12mm — Exit Fee: • Tranche 1 -0.75% • Tranche 2 -5%(10%if participating in equity conversion)	— Back-end Fees: • Tranche A -0.75% • Tranche C -2.50% — Undrawn Commitment Fee: • Tranche A -0.50% • Tranche C -0.50% — Extension Fee: 0.50% — Yield Enhancement Fee: 2.0% — BreakFee -$9.75mm (for Tranche A)	— Tranche A Undrawn Fees: • 0-30 days: 50bps • 31-60 days: 33% of drawn spread • 61 –120 days: 50% of drawn spread • 120 days+: 100% of drawn spread
Equity Conversion	— Equity conversion available at the lenders' option for Tranche 2.		— Equity conversion available at the debtors' option for Tranche B.

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	:	Chapter 11
LATAM Airlines Group S.A., *et al*.,	:	Case No. 20-11254 (JLG)
Debtors.[1]	:	Jointly Administered
	:	Related Docket No. 413

ORDER PURSUANT TO 11 U.S.C. §§ 105(a) APPROVING CROSS-BORDER COURT-TO-COURT COMMUNICATIONS PROTOCOL

Upon the motion, dated June 30, 2020 (the "Motion"),[2] of LATAM Airlines Group S.A., and its affiliated debtors, as debtors and debtors in possession in the above-captioned cases (the "Debtors"), for entry of an order, as more fully described in the Motion, pursuant to section 105(a) of title 11 of the United State Code (the "Bankruptcy Code"), and consistent with General Order M-511 (*Procedural Guidelines for Coordination and Cooperation Between Courts in Cross-Border Insolvency Matters*) and General Order M-532 (*Adoption of Judicial Insolvency Network Modalities of Court-to-Court Communication*), approving that certain cross-border

[1] The Debtors in these Chapter 11 Cases, along with the last four digits of each Debtor's tax identification number (as applicable), are: LATAM Airlines Group S.A. (59-2605885); Lan Cargo S.A. (98-0058786); Transporte Aéreo S.A. (96-9512807); Inversiones Lan S.A. (96-5758100); Technical Training LATAM S.A. (96-847880K); LATAM Travel Chile II S.A. (76-2628945); Lan Pax Group S.A. (96-9696800); Fast Air Almacenes de Carga S.A. (96-6315202); Línea Aérea Carguera de Colombia S.A. (26-4065780); Aerovías de Integración Regional S.A. (98-0640393); LATAM Finance Ltd. (N/A); LATAM Airlines Ecuador S.A. (98-0383677); Professional Airline Cargo Services, LLC (35-2639894); Cargo Handling Airport Services, LLC (30-1133972); Maintenance Service Experts, LLC (30-1130248); Lan Cargo Repair Station LLC (83-0460010); Prime Airport Services Inc. (59-1934486); Professional Airline Maintenance Services LLC (37-1910216); Connecta Corporation (20-5157324); Peuco Finance Ltd. (N/A); Latam Airlines Perú S.A. (52-2195500); Inversiones Aéreas S.A. (N/A); Holdco Colombia II SpA (76-9310053); Holdco Colombia I SpA (76-9336885); Holdco Ecuador S.A. (76-3884082); Lan Cargo Inversiones S.A. (96-9696908); Lan Cargo Overseas Ltd. (85-7752959); Mas Investment Ltd. (85-7753009); Professional Airlines Services Inc. (65-0623014). For the purpose of these Chapter 11 Cases, the service address for the Debtors is: 6500 NW 22nd Street Miami, FL 33131.

[2] Capitalized terms used but not defined herein shall have the meaning ascribed to them in the Motion.

court-to-court communications protocol attached hereto as Exhibit A (the "Protocol"); and upon consideration of the First Day Declaration; and adequate notice of the Motion having been given as set forth in the Motion; and it appearing that no other or further notice is necessary; and the Court having jurisdiction to consider the Motion and the relief requested therein pursuant to 28 U.S.C. §§ 157 and 1334; and approval of the Protocol having been sought from the Cayman Court, the Chilean Court and the Colombian Court; and the Court having determined that the legal and factual bases set forth in the Motion establish just cause for the relief requested in the Motion, and that such relief is in the best interests of the Debtors, their estates, their creditors and the parties in interest; and upon the record in these proceedings; and after due deliberation;

IT IS HEREBY ORDERED THAT:

1. The Motion is GRANTED.

2. The Protocol is approved in all respects, subject to approval of the same by the Cayman Court, Chilean Court and Colombian Court, as it may be amended or supplemented by further order of this Court, obtained after a notice and a hearing. For the avoidance of doubt, no additional proceedings shall be subject to the Protocol absent further order of this Court.

3. Nothing herein shall prejudice the rights of any party in interest to apply for modifications to the Protocol as warranted to facilitate the administration of the Debtors' Chapter 11 Cases in conjunction with the respective proceedings before the Cayman Court, the Chilean Court, and the Colombian Court.

4. Notwithstanding any provision in the Federal Rules of Bankruptcy Procedure to the contrary, (i) the terms of this Order shall be immediately effective and enforceable upon its entry, (ii) the Debtors are not subject to any stay in the implementation, enforcement or realization of the relief granted in this Order, and (iii) the foreign representatives of these

Chapter 11 Cases and the Debtors may, in their discretion and without further delay, take any action and perform any act authorized under this Order.

5. For the avoidance of doubt, the Protocol is procedural in nature and shall not constitute a limitation on or waiver by the Court of any powers, responsibilities, or authority, or a substantive determination of any matter in controversy before the Court, or a waiver by any of the parties in interest of these Chapter 11 Cases of any of their substantive rights and claims, except to the extent specifically provided for in the Protocol, as permitted by applicable law.

6. For the avoidance of doubt, to the extent that there are any inconsistencies relating to the Protocol and other matters set forth herein as between this order and the orders the Cayman Court, Chilean Court and/or Colombian Court, the terms and provisions of this Order shall control over matters arising in or relating to the Chapter 11 cases and proceedings before this Court.

7. The Court retains jurisdiction with respect to all matters arising from or related to the implementation of this Order.

Dated: September 1, 2020
New York, New York

/s/ *James L. Garrity, Jr.*
HONORABLE JAMES L. GARRITY JR.
UNITED STATES BANKRUPTCY JUDGE

Exhibit A

Cross-Border Protocol

CROSS-BORDER COURT-TO-COURT COMMUNICATIONS PROTOCOL

This cross-border court-to-court communications protocol (the "Protocol") shall govern the conduct of all parties in interest in the Proceedings (as such term is defined herein).

The Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases (the "Guidelines") attached as Schedule A hereto, shall be incorporated by reference and form part of this Protocol. The Modalities of Court-to-Court Communication (the "Modalities of Communication") attached as Schedule B hereto, shall be incorporated by reference and form part of this Protocol. Where there is any discrepancy between the Protocol and the Guidelines and/or Modalities of Communication, this Protocol shall prevail.

A. Background

1. LATAM Airlines Group S.A. ("LATAM Parent") and certain of its affiliates (collectively, the "U.S. Debtors"),[1] have commenced reorganization proceedings (the "Chapter 11 Cases") under chapter 11 of the United States Bankruptcy Code, 11 U.S.C. § 101 *et seq*. (the "Bankruptcy Code"), in the United States Bankruptcy Court for the Southern District of New York (the "U.S. Court"), and such cases have been consolidated (for procedural purposes only) under Case No. 20-11254 (JLG). The U.S. Debtors are continuing in possession of their respective properties and are operating and managing their businesses, as debtors in possession,

[1] The Debtors in these Chapter 11 Cases, along with the last four digits of each Debtor's tax identification number are: LATAM Airlines Group S.A. (59-2605885); Lan Cargo S.A. (98-0058786); Transporte Aéreo S.A. (96-9512807); Inversiones Lan S.A. (96-5758100); Technical Training LATAM S.A. (96-847880K); LATAM Travel Chile II S.A. (76-2628945); Lan Pax Group S.A. (96-9696800); Fast Air Almacenes de Carga S.A. (96-6315202); Línea Aérea Carguera de Colombia S.A. (26-4065780); Aerovías de Integración Regional S.A. (98-0640393); LATAM Finance Ltd. (N/A); LATAM Airlines Ecuador S.A. (98-0383677); Professional Airline Cargo Services, LLC (35-2639894); Cargo Handling Airport Services, LLC (30-1133972); Maintenance Service Experts, LLC (30-1130248); Lan Cargo Repair Station LLC (83-0460010); Prime Airport Services Inc. (59-1934486); Professional Airline Maintenance Services LLC (37-1910216); Connecta Corporation (20-5157324); Peuco Finance Ltd. (N/A); Latam Airlines Perú S.A. (52-2195500); Inversiones Aéreas S.A. (N/A); Holdco Colombia II SpA (76-9310053); Holdco Colombia I SpA (76-9336885); Holdco Ecuador S.A. (76-3884082); Lan Cargo Inversiones S.A. (96-9696908); Lan Cargo Overseas Ltd. (85-7752959); Mas Investment Ltd. (85-7753009); Professional Airlines Services Inc. (65-0623014).

pursuant to sections 1107 and 1108 of the Bankruptcy Code. On June 5, 2020, the United States Trustee for Region 2 appointed an official committee of unsecured creditors (the "UCC"). No trustee or examiner has been appointed in the Chapter 11 Cases.

2. On May 28, 2020, the Bankruptcy Court entered the *Order Authorizing Debtor LATAM Airlines Group S.A. to Act as the Foreign Representative of the Debtors*, ECF No. 52, permitting LATAM Parent to act as the foreign representative to the Debtors in foreign proceedings (when acting as foreign representative LATAM Parent will also be referred to as the "Foreign Representative") and requesting that the 2nd Civil Court of Santiago, Chile (the "Chilean Court"), the Superintendencia de Sociedades in Colombia (the "Colombian Court"), and any other additional courts grant recognition to the Chapter 11 Cases.

3. On June 4, 2020, the Chilean Court issued an order recognizing these Chapter 11 Cases under the Chilean Insolvency and Reorganization Law (the "Chilean Proceedings"), which domesticated the UNCITRAL Model Law on Cross-Border Insolvency. On June 19, 2020, the Superintendente de Insolvencia y Reemprendimiento (the "Superintendent"), a branch of the Chilean state responsible for transparency and promoting the public's interest in reorganization proceedings, submitted a letter to the Chilean Court requesting the establishment of a coordination and cooperation protocol between the Chilean Court and the Bankruptcy Court. The Superintendent's filing stated that such a protocol would allow for efficient coordination between the core foreign bankruptcy proceedings in the United States and the recognition proceedings in Chile.

4. On June 12, 2020 the Colombian Court issued an order recognizing these Chapter 11 Cases under the Colombian Insolvency and Reorganization Law (the "Colombian Proceedings"), which domesticated the UNCITRAL Model Law on Cross-Border Insolvency.

5. On May 27, 2020 the Grand Court of the Cayman Islands (the "Cayman Court"), Financial Services Division issued orders appointing Kris Beighton and Jeffrey Stower as joint provisional liquidators (the "JPLs") for two of the debtors, LATAM Finance Limited and Peuco Finance Limited. (the "Cayman Debtors") under the Companies Law (2020 Revision) of the Cayman Islands (the "Cayman Proceedings") (the "Cayman Orders"). The Debtors contemplate that these will be conducted as "light touch" proceedings and serve to implement and effectuate orders of this Court under the supervision of the JPLs and in accordance with Cayman Islands law. The Cayman Orders expressly provide for the JPLs to enter into such protocols and agreements with LATAM, as they may deem appropriate, under the Bankruptcy Code and any other like proceedings for the winding up, restructuring and/or reorganization of the Cayman Debtors and other companies within LATAM, subject to the approval of the Cayman Court and this Court.

6. For convenience, (a) the Chapter 11 Cases, the Chilean Proceedings, the Colombian Proceedings, and the Cayman Proceedings shall be referred to herein collectively as the "Proceedings," and (b) the U.S. Court, Chilean Court, the Colombian Court, and the Cayman Court shall be referred to herein collectively as the "Courts", and each individually as a "Court."

B. The Protocol

7. Notwithstanding anything to the contrary in the exhibits, in these Proceedings, "Parallel Proceedings" shall exclusively mean the Chapter 11 Cases, the Chilean Proceedings, the Colombian Proceedings and the Cayman Proceedings and shall not have any other meaning. As it is used in the Protocol, the term Parallel Proceedings is not to be considered synonymous with the term concurrent proceedings as used in Chapter V of the Model Law on Cross-Border Insolvency adopted by the United Nations Commission on International Trade Law. The

Protocol shall not apply to or contemplate any additional proceedings absent further order of each of the Courts.

8. As set forth in the Guidelines and Modalities of Communication, the Courts may, to the extent permitted by practice and procedure, and with the prior consent of each Court, engage in Court-to-Court communications and conduct joint videoconference hearings or joint teleconference hearings with respect to any matter related to the administration of the Proceedings if necessary to facilitate the proper and efficient administration of the Proceedings. The Debtors and the Foreign Representative will arrange for a translator for any such hearing. For the avoidance of doubt, during Court-to-Court communications, a Court shall not disclose any document or information filed under seal in that Court with any other Court.

9. If the Courts agree that a joint videoconference hearing or joint teleconference hearing is necessary or appropriate, the party submitting any notice, submission or application that are or become the subject of the joint hearing of the Courts (the "Pleadings") shall provide a copy of the pleadings to all of the following parties via email:

a. counsel to the Debtors, Cleary Gottlieb Steen & Hamilton LLP, One Liberty Plaza, New York, NY 10006, Attn: Richard J. Cooper, Esq., Lisa M. Schweitzer, Esq., and Luke A. Barefoot, Esq. (email: rcooper@cgsh.com, lschweitzer@cgsh.com, and lbarefoot@cgsh.com);

b. the United States Trustee, 201 Varick Street, Room 1006, New York, New York 10014, Attn: Brian Masumoto, Esq. and Serene Nakano, Esq. (email: brian.masumoto@usdoj.gov and serene.nakano@usdoj.gov);

c. counsel to the UCC, Dechert LLP, Three Bryant Park, 1095 Avenue of the Americas, New York, New York, 10036-6797 Attn: Allan Brilliant, Esq. and Craig Druehl, Esq. (email: allan.brilliant@dechert.com and craig.druehl@dechert.com)

d. the JPLs, KPMG, P.O. Box 493, SIX Cricket Square, Grand Cayman, KY1-1106, Cayman Islands Attn: Kris Beighton and Jeffrey Stower (email: krisbeighton@kpmg.ky and jstower@kpmg.ky);

e. the Superintendencia de Insolvencia y Reemprendimiento (Superir), Amunátegui 228, Santiago, Chile. Attn: Eduardo Cáceres and Rocío Vergara (email: ecaceres@superir.gob.cl and rvergara@superir.gob.cl);

f. counsel to the Foreign Representative, Claro & Cia., Apoquindo 3721, piso 13, Las Condes, Santiago. Attn. José María Eyzaguirre and Nicolás Luco (email: jmeyzaguirre@claro.cl and nluco@claro.cl);

g. counsel to the Foreign Representative, Brigard Urrutia, Calle 70 Bis No. 4 – 41, Bogota, Colombia. Attn. Carlos Lázaro Umaña Trujillo, Jaime Elías Robledo Vásquez, and Paola Guerrero Yemail (emails: cumana@bu.com.co, jrobledo@bu.com.co, and pguerrero@bu.com.co); and

h. Any other person or entity with respect to specific matters who has been reasonably requested to participate by any of the foregoing parties.

For the avoidance of doubt, Pleadings filed under seal with any Court shall not be provided to any party mentioned in this paragraph, except as required under the orders of the Court in which the Pleading was filed.

10. The Foreign Representative, the Debtors and JPLs shall issue written reports to the Courts (i) at such time as they consider it to be appropriate to inform the Courts on the progress of the restructuring or developments in any of the Proceedings, or (ii) as otherwise directed by any of the Courts (the "Reports"). Such Reports shall be accompanied by a professional translation of any documents attached that are not in the language in which the relevant Court conducts its business.

11. Any Report submitted to any of the Courts shall be concurrently submitted to any other Court and by email to the U.S. Trustee, the UCC and the Superintendent (collectively, the "Notice Parties", and each individually as a "Notice Party"). Copies of any Report shall be filed with the Courts (together with translations where required), subject to appropriate redactions. For the avoidance of doubt, any Report filed under seal with any Court shall not be concurrently submitted to the other Courts or Notice Parties, except as required under the orders of the Court

in which the Report was filed subject to substantially identical confidentiality restriction as entered by the Court that directed sealing of the relevant documents.

12. At the request of any Court, the Debtors and the JPLs shall make themselves available to respond to inquiries of the Courts regarding the content of any Report (each a "Chambers Conference"). The Debtors for the Chapter 11 Cases, the Foreign Representative for the Chilean Proceedings and the Colombian Proceedings, and the JPLs for the Cayman Proceedings shall promptly give notice by email to the Notice Parties of any Chambers Conference. Counsel to the Notice Parties shall be entitled to appear at any such Chambers Conference.

13. For the avoidance of doubt, each Court shall have sole and exclusive jurisdiction over any estate representative or any professional retained by or with the approval of such Court. Nothing in this protocol shall require any estate representative or professional retained to take any action that violates any provision of law or professional rule to which they are subject.

14. Each Court shall have sole and exclusive jurisdiction over the conduct of proceedings in such Court and the hearing and determination of matters arising in such proceedings.

15. All documents filed on behalf of the Debtors in relation to any application for approval of this Protocol will be served on the Notice Parties.

16. Except as expressly set forth herein, nothing in this Protocol shall affect or prejudice the rights of the Debtors or Notice Parties to take any action in or in connection with the Proceedings.

17. This Protocol shall be deemed effective upon its approval by the U.S. Court, the Chilean Court, the Colombian Court, and the Cayman Court. This Protocol shall have no

binding or enforceable legal effect until approved by the U.S. Court, the Chilean Court, the Colombian Court, and the Cayman Court. This Protocol may not be amended except with prior notice to the Debtors and Notice Parties, as well as, the approval of the U.S. Court, the Chilean Court, the Colombian Court, and the Cayman Court.

Schedule A

GUIDELINES FOR COMMUNICATION AND COOPERATION BETWEEN COURTS IN CROSS-BORDER INSOLVENCY MATTERS[1]

INTRODUCTION

A. The overarching objective of these Guidelines is to improve in the interests of all stakeholders the efficiency and effectiveness of cross-border proceedings relating to insolvency or adjustment of debt opened in more than one jurisdiction ("Parallel Proceedings") by enhancing coordination and cooperation among courts under whose supervision such proceedings are being conducted. These Guidelines represent best practice for dealing with Parallel Proceedings.

B. In all Parallel Proceedings, these Guidelines should be considered at the earliest practicable opportunity.

C. In particular, these Guidelines aim to promote:

(i) the efficient and timely coordination and administration of Parallel Proceedings;

(ii) the administration of Parallel Proceedings with a view to ensuring relevant stakeholders' interests are respected;

(iii) the identification, preservation, and maximization of the value of the debtor's assets, including the debtor's business;

(iv) the management of the debtor's estate in ways that are proportionate to the amount of money involved, the nature of the case, the complexity of the issues, the number of creditors, and the number of jurisdictions involved in Parallel Proceedings;

(v) the sharing of information in order to reduce costs; and

(vi) the avoidance or minimization of litigation, costs, and inconvenience to the parties[2] in Parallel Proceedings.

D. These Guidelines should be implemented in each jurisdiction in such manner as the jurisdiction deems fit.[3]

E. These Guidelines are not intended to be exhaustive and in each case consideration ought to be given to the special requirements in that case.

F. Courts should consider in all cases involving Parallel Proceedings whether and how to implement these Guidelines. Courts should encourage and where necessary direct, if they have the power to do so, the parties to make the necessary applications to the court to facilitate such

[1] These Guidelines are distilled in large part from the ALI/ABA/III Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases.
[2] The term "parties" when used in these Guidelines shall be interpreted broadly.
[3] Possible means for the implementation of these Guidelines include practice directions and commercial guides.

implementation by a protocol or order derived from these Guidelines, and encourage them to act so as to promote the objectives and aims of these Guidelines wherever possible.

ADOPTION AND INTERPRETATION

Guideline 1: In furtherance of paragraph F above, the courts should encourage administrators in Parallel Proceedings to cooperate in all aspects of the case, including the necessity of notifying the courts at the earliest practicable opportunity of issues present and potential that may (a) affect those proceedings; and (b) benefit from communication and coordination between the courts. For the purpose of these Guidelines, "administrator" includes a liquidator, trustee, judicial manager, administrator in administration proceedings, debtor-in-possession in a reorganization or scheme of arrangement, or any fiduciary of the estate or person appointed by the court.

Guideline 2: Where a court intends to apply these Guidelines (whether in whole or in part and with or without modification) in particular Parallel Proceedings, it will need to do so by a protocol or an order[4], following an application by the parties or pursuant to a direction of the court if the court has the power to do so.

Guideline 3: Such protocol or order should promote the efficient and timely administration of Parallel Proceedings. It should address the coordination of requests for court approvals of related decisions and actions when required and communication with creditors and other parties. To the extent possible, it should also provide for timesaving procedures to avoid unnecessary and costly court hearings and other proceedings.

Guideline 4: These Guidelines when implemented are not intended to:

(i) interfere with or derogate from the jurisdiction or the exercise of jurisdiction by a court in any proceedings including its authority or supervision over an administrator in those proceedings;

(ii) interfere with or derogate from the rules or ethical principles by which an administrator is bound according to any applicable law and professional rules;

(iii) prevent a court from refusing to take an action that would be manifestly contrary to the public policy of the jurisdiction or which would not sufficiently protect the interests of the creditors and other interested entities, including the debtor; or

(iv) confer or change jurisdiction, alter substantive rights, interfere with any function or duty arising out of any applicable law, or encroach upon any applicable law.

Guideline 5: For the avoidance of doubt, a protocol or order under these Guidelines is procedural in nature. It should not constitute a limitation on or waiver by the court of any powers, responsibilities, or authority or a substantive determination of any matter in controversy before the court or before the

[4] In the normal case, the parties will agree on a protocol derived from these Guidelines and obtain the approval of each court in which the protocol is to apply. Pending such approval, or in Parallel Proceedings where there is no protocol, administrators and other parties are expected to comply with these Guidelines.

other court or a waiver by any of the parties of any of their substantive rights and claims, except to the extent specifically provided in such protocol or order as permitted by applicable law.

Guideline 6: In the interpretation of these Guidelines or any protocol or order approved under these Guidelines, due regard shall be given to their international origin and to the need to promote good faith and uniformity in their application.

COMMUNICATION BETWEEN COURTS[5]

Guideline 7: A court may receive communications from a foreign court and may respond directly to them. Such communications may occur for the purpose of the orderly making of submissions and rendering of decisions by the courts, and to coordinate and resolve any procedural, administrative or preliminary matters relating to any joint hearing where Annex A is applicable. Such communications may take place through the following methods or such other method as may be agreed by the two courts in a specific case:

(i) Sending or transmitting copies of formal orders, judgments, opinions, reasons for decision, endorsements, transcripts of proceedings or other documents directly to the other court and providing advance notice to counsel for affected parties in such manner as the court considers appropriate.

(ii) Directing counsel to transmit or deliver copies of documents, pleadings, affidavits, briefs or other documents that are filed or to be filed with the court to the other court, or other appropriate person, in such fashion as may be appropriate and providing advance notice to counsel for affected parties in such manner as the court considers appropriate.

(iii) Participating in two-way communications with the other court, including by telephone, video conference call, or other electronic means, in which case Guideline 8 should be considered.

Guideline 8: In the event of communications between courts, other than on procedural matters, unless otherwise directed by any court involved in the communications whether on an *ex parte* basis or otherwise, or permitted by a protocol or order, the following shall apply:

(i) In the normal case, parties may be present.

(ii) If the parties are entitled to be present, advance notice of the communications shall be given to all parties in accordance with the rules of procedure applicable in each of the courts to be involved in the communications, and the communications between the courts shall be recorded and may be transcribed. A written transcript may be prepared from a recording of the communications that, with the approval of each court involved in the communications, may be treated as the official transcript of the communications.

(iii) Copies of any recording of the communications, of any transcript of the communications prepared pursuant to any direction of any court involved in

[5] Communications between administrators are also expected under and to be consistent with these Guidelines.

the communications, and of any official transcript prepared from a recording may be filed as part of the record in the proceedings and made available to the parties and subject to such directions as to confidentiality as any court may consider appropriate.

(iv) The time and place for communications between the courts shall be as directed by the courts. Personnel other than judges in each court may communicate with each other to establish appropriate arrangements for the communications without the presence of the parties.

Guideline 9: A court may direct that notice of its proceedings be given to parties in proceedings in another jurisdiction. All notices, applications, motions, and other materials served for purposes of the proceedings before the court may be ordered to be provided to such other parties by making such materials available electronically in a publicly accessible system or by facsimile transmission, certified or registered mail or delivery by courier, or in such other manner as may be directed by the court in accordance with the procedures applicable in the court.

APPEARANCE IN COURT

Guideline 10: A court may authorize a party, or an appropriate person, to appear before and be heard by a foreign court, subject to approval of the foreign court to such appearance.

Guideline 11: If permitted by its law and otherwise appropriate, a court may authorize a party to a foreign proceeding, or an appropriate person, to appear and be heard on a specific matter by it without thereby becoming subject to its jurisdiction for any purpose other than the specific matter on which the party is appearing.

CONSEQUENTIAL PROVISIONS

Guideline 12: A court shall, except on proper objection on valid grounds and then only to the extent of such objection, recognize and accept as authentic the provisions of statutes, statutory or administrative regulations, and rules of court of general application applicable to the proceedings in other jurisdictions without further proof. For the avoidance of doubt, such recognition and acceptance does not constitute recognition or acceptance of their legal effect or implications.

Guideline 13: A court shall, except upon proper objection on valid grounds and then only to the extent of such objection, accept that orders made in the proceedings in other jurisdictions were duly and properly made or entered on their respective dates and accept that such orders require no further proof for purposes of the proceedings before it, subject to its law and all such proper reservations as in the opinion of the court are appropriate regarding proceedings by way of appeal or review that are actually pending in respect of any such orders. Notice of any amendments, modifications, extensions, or appellate decisions with respect to such orders shall be made to the other court(s) involved in Parallel Proceedings, as soon as it is practicable to do so.

Guideline 14: A protocol or order made by a court under these Guidelines is subject to such amendments, modifications, and extensions as may be considered appropriate by the court consistent with these Guidelines, and to reflect the changes and developments from time to time in any Parallel Proceedings. Notice of such amendments, modifications, or extensions shall be made to the other court(s) involved in Parallel Proceedings, as soon as it is practicable to do so.

ANNEX A (JOINT HEARINGS)

Annex A to these Guidelines relates to guidelines on the conduct of joint hearings. Annex A shall be applicable to, and shall form a part of these Guidelines, with respect to courts that may signify their assent to Annex A from time to time. Parties are encouraged to address the matters set out in Annex A in a protocol or order.

ANNEX A: JOINT HEARINGS

A court may conduct a joint hearing with another court. In connection with any such joint hearing, the following shall apply, or where relevant, be considered for inclusion in a protocol or order:

(i) The implementation of this Annex shall not divest nor diminish any court's respective independent jurisdiction over the subject matter of proceedings. By implementing this Annex, neither a court nor any party shall be deemed to have approved or engaged in any infringement on the sovereignty of the other jurisdiction.

(ii) Each court shall have sole and exclusive jurisdiction and power over the conduct of its own proceedings and the hearing and determination of matters arising in its proceedings.

(iii) Each court should be able simultaneously to hear the proceedings in the other court. Consideration should be given as to how to provide the best audio-visual access possible.

(iv) Consideration should be given to coordination of the process and format for submissions and evidence filed or to be filed in each court.

(v) A court may make an order permitting foreign counsel or any party in another jurisdiction to appear and be heard by it. If such an order is made, consideration needs to be given as to whether foreign counsel or any party would be submitting to the jurisdiction of the relevant court and/or its professional regulations.

(vi) A court should be entitled to communicate with the other court in advance of a joint hearing, with or without counsel being present, to establish the procedures for the orderly making of submissions and rendering of decisions by the courts, and to coordinate and resolve any procedural, administrative or preliminary matters relating to the joint hearing.

(vii) A court, subsequent to the joint hearing, should be entitled to communicate with the other court, with or without counsel present, for the purpose of determining outstanding issues. Consideration should be given as to whether the issues include procedural and/or substantive matters. Consideration should also be given as to whether some or all of such communications should be recorded and preserved.

Schedule B

MODALITIES OF COURT-TO-COURT COMMUNICATION

Scope and definitions

1. These Modalities apply to direct communications (written or oral) between courts in specific cases of cross border proceedings relating to insolvency or adjustment of debt opened in more than one jurisdiction ("Parallel Proceedings"). Nothing in this document precludes indirect means of communication between courts, (e.g., through the parties or by exchange of transcripts, etc.) This document is subject to any applicable law.

2. These Modalities govern only the mechanics of communication between courts in Parallel Proceedings. For the principles of communications (e.g., that court-to-court communications should not interfere with or take away from the jurisdiction or the exercise of jurisdiction by a court in any proceedings, etc.), reference may be made to General Order M-511: *Guidelines for Communication and Cooperation between Courts in Cross-Border Insolvency Matters* (the "Guidelines").

3. These Modalities contemplate contact being initiated by an "Initiating Judge" (defined below). The parties before such judge may request him or her to initiate such contact, or the Initiating Judge may seek it on his or her own initiative.

4. In this document:
    a. "Initiating Judge" refer to the judge initiating communication in the first instance;
    b. "Receiving Judge" refers to the judge receiving communication in the first instance;
    c. "Facilitator" refers to the person(s) designated by the court where the Initiating Judge sits or the court where the Receiving Judge sits (as the case may be) to initiate or receive communications on behalf of the Initiating Judge or the Receiving Judge in relation to the Parallel Proceedings. The Facilitator shall be the Clerk of the Court, and in the Clerk of Court's absence, the Chief Deputy Clerk.

Designation of Facilitator

5. The Receiving Judge will supervise the initial steps in the communication process after being informed of the request by the Facilitator.

6. The Court will prominently publish the contact details of the Facilitator on its website.

7. The language in which initial communications may be made is English. The Court will prominently so state and decide the technology available to facilitate communication between or among courts (e.g. and disclose telephonic and/or video conference capabilities, any secure channel email capacity, etc.) on its website.

Initiating communication

8. To initiate communication in the first instance, the Initiating Judge may require the parties over whom he or she exercises jurisdiction to obtain the identity and contact details of the Facilitator of the other court in the Parallel Proceedings, unless the information is already known to the Initiating Judge.

9. The first contact with the Receiving Judge should be in writing, including by email, from the Facilitator of the Initiating Judge's court to the Facilitator of the Receiving Judge's court, and contain the following:
    a. the name and contact details of the Facilitator of the Initiating Judge's court;
    b. the name and title of the Initiating Judge as well as contact details of the Initiating Judge if the Receiving Judge wishes to contact the Initiating Judge directly and such contact is acceptable to the Initiating Judge;
    c. the reference number and title of the case filed before the Initiating Judge and the reference number and title (if known; otherwise, some other unique identifier) of the case filed before the Receiving Judge in the Parallel Proceedings;
    d. the nature of the case (with the due regard to confidentiality concerns);
    e. whether the parties before the Initiating Judge have consented to the communication taking place (if there is any order of court, direction or protocol

for court -to-court communication for the case approved by the Initiating Judge, this information should also be provided);

f. if appropriate, the proposed date and time for the communication requested (with due regard to time differences); and

g. the specific issue(s) on which communication is sought by the Initiating Judge.

Arrangements for communication

10. The Facilitator of the Initiating Judge's court and the Facilitator of the Receiving Judge's may communicate fully with each other to establish appropriate arrangements for the communication without the necessity for participation of counsel or the parties unless otherwise ordered by one of the courts.

11. The time, method and language of communication should be to the satisfaction of the Initiating Judge and the Receiving Judge, with due regard given to the need for efficient management of the Parallel Proceedings.

12. Where translation or interpretation services are required, appropriate arrangements shall be made, as agreed by the courts. Where written communication is provided through translation, the communication in its original form should also be provided.

13. Where it is necessary for confidential information to be communicated, a secure means of communication should be employed where possible.

Communication between the Initiating Judge and the Receiving Judge

14. After the arrangements for communication have been made, discussion of the specific issue(s) on which communication was sought by the Initiating Judge and subsequent communications in relation thereto should, as far as possible, be carried out between the Initiating Judge and the Receiving Judge in accordance with any protocol or order for

communication and cooperation in Parallel Proceedings[1].

15. If the Receiving Judge wishes to by-pass the use of a Facilitator, and the Initiating Judge has indicated that he or she is amenable, the judges may communicate with each other about the arrangements for the communication without the necessity for the participation of counsel or the parties.

16. Nothing in this document should limit the discretion of the Initiating Judge to contact the Receiving Judge directly in exceptional circumstances.

[1] See Guideline 2 of the *Guidelines for Communication and Cooperation Between Courts in Cross-Border Insolvency Matters.*

AMERICAN BANKRUPTCY INSTITUTE

2020 International Insolvency Forum

Addressing COVID: Local Reactions to a Global Pandemic

Rafael X. Zahralddin-Aravena, Moderator
Elliott Greenleaf, P.C. | Wilmington, Del., USA

Adam D. Crane
HSM Chambers | Cayman Islands

Ian De Witt
Tanner De Witt | Hong Kong

Alexandre Le Ninivin
Oxynomia Avocats | Paris, France

Dr. Wenli Li
Federal Reserve Bank of Philadelphia | Philadelphia, Pa., USA

Ricardo Reveco
/Carey | Santiago, Chile

2020

Addressing COVID:
Local Reactions to a Global Pandemic

Friday, November 20, 2020
9:30-10:45 a.m. EST

Rafael X. Zahralddin-Aravena
Moderator
Elliott Greenleaf, P.C. | Wilmington, DE, USA

Adam Crane
HSM Chambers | Cayman Islands

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Oxynomia Avocats | Paris, France

Dr. Wenli Li
Federal Reserve Bank of Philadelphia | Philadelphia, PA, USA

Ricardo Reveco
/Carey | Santiago, Chile

https://globalinsolvency.com/covid19

To highlight individual measures undertaken by the various countries in a comparative format, over 30 ABI International Committee members worked individually and together to create a comprehensive schematic summarizing the macro- and micro-economic efforts in response to COVID-19.

The countries featured include Canada, Cayman Islands, Chile, France, Germany, Channel Islands (Guernsey), Channel Islands (Jersey), Hong Kong, India, Italy, Mexico, Netherlands, Russia, Singapore, Spain, the United Kingdom, and the United States. Summaries of the measures from other countries are forthcoming and will be posted to this page.

If you are interested in contributing to the project, either by helping to update the report on an existing jurisdiction or reporting on another jurisdiction, please contact:

Rafael X. Zahralddin of Elliott Greenleaf P.C.: ***rxza@elliottgreenleaf.com***
R. Adam Swick of Reid Collins & Tsai LLP: ***aswick@rctlegal.com***
Olya Antle of Cooley LLP: ***oantle@cooley.com***

Addressing COVID-19: Responses from the Federal Reserve

Wenli Li

November 20, 2020

Prepared for the 2020 International Insolvency Forum. The views expressed here are my own. They don't reflect those of the Federal Reserve Bank of Philadelphia or the Federal Reserve System.

FEDERAL RESERVE BANK
OF PHILADELPHIA

The Mandates of the Fed

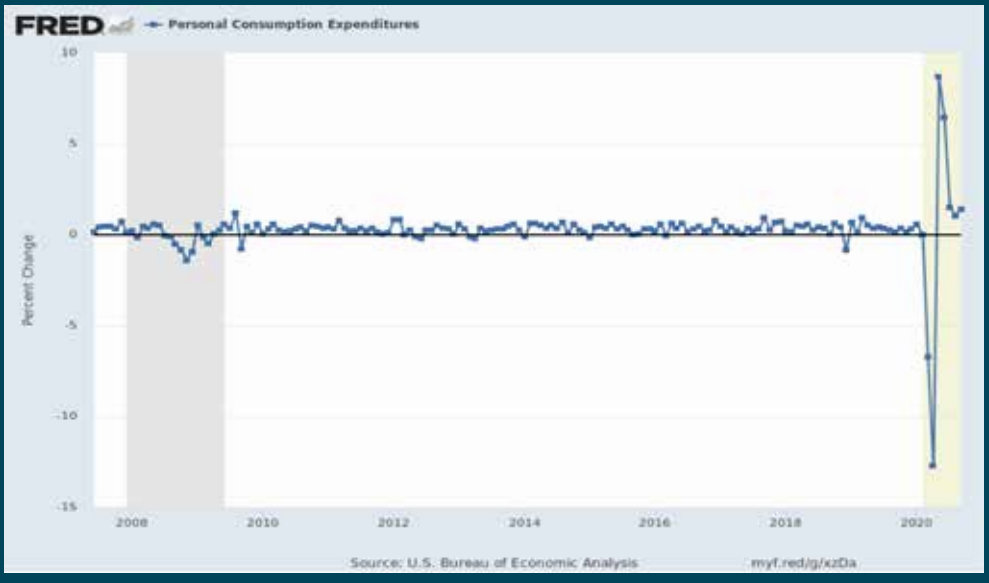
"The Federal Reserve's response to this extraordinary period has been guided by our mandate to promote maximum employment and stable prices for the American people, along with our responsibilities to promote stability of the financial system."

—Jerome H. Powell, Chair of the Board of Governors of the Federal Reserve System (https://www.federalreserve.gov/monetarypolicy/2020-06-mpr-summary.htm)

A Few Words About the COVID-19 and its Economic Impact

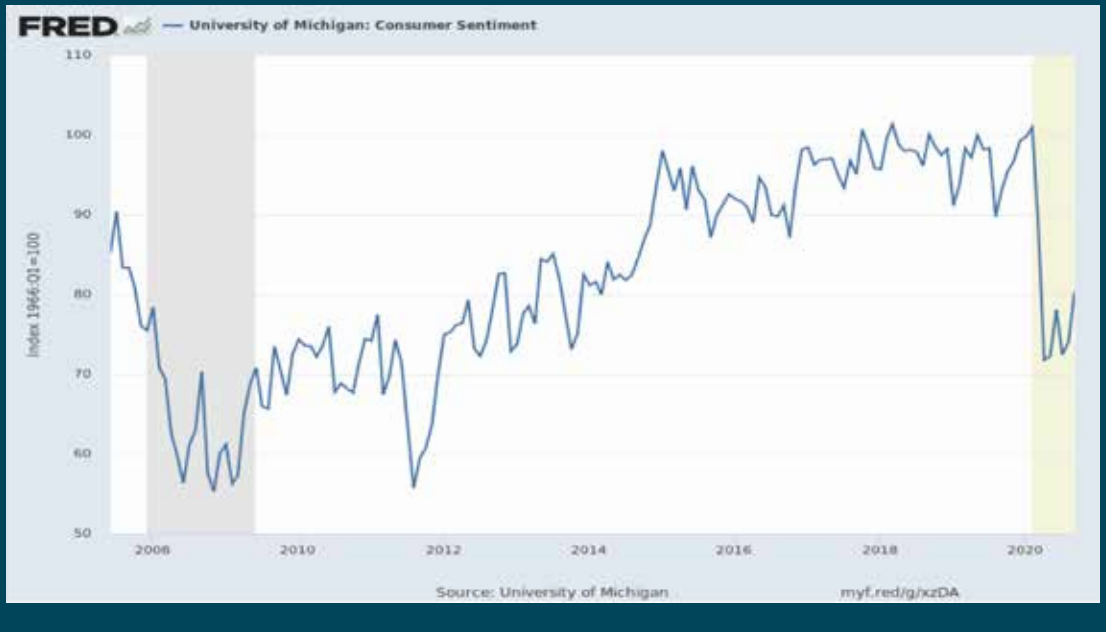
- This time is indeed different: global health crisis, nonfinancial
  - 2007-2009 mortgage crisis
- But economic and financial impact shares many similarities
  - Spending, investment shrink
  - Financial market freeze

How Did the Economy Look Like? Consumption Plunged

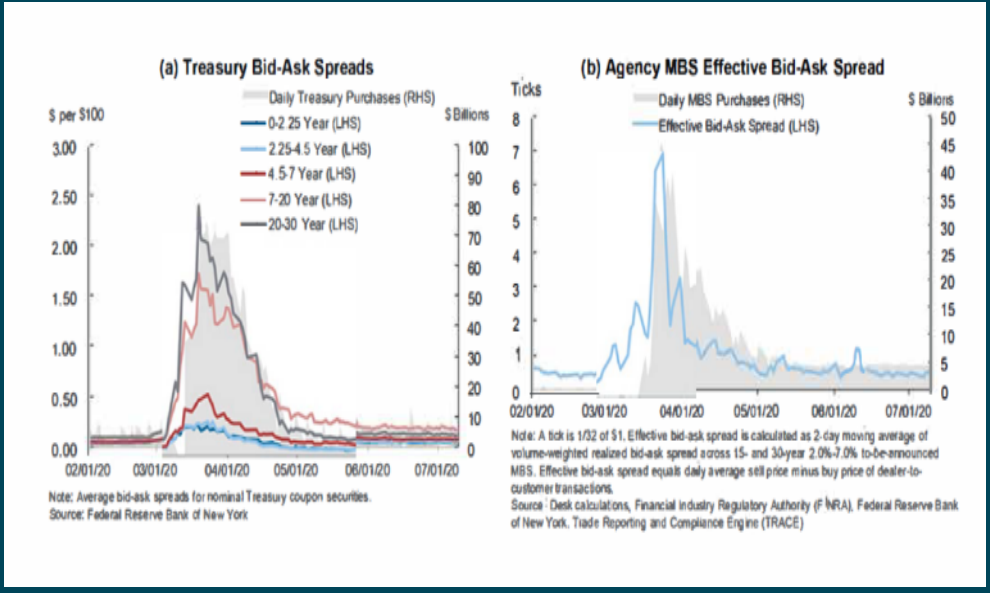


How Did the Economy Look Like? Unemployment Surged

How Did the Economy Look Like? Consumers Got Very Nervous Very Quickly

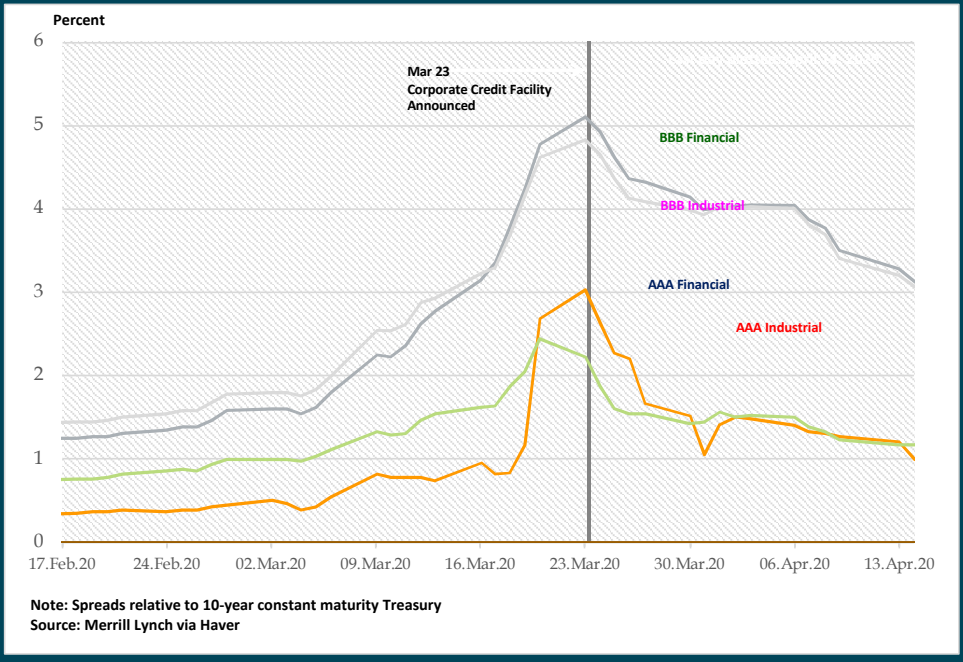


How Did the Economy Look Like?
Pressures in the Treasury and Agency MBS Market



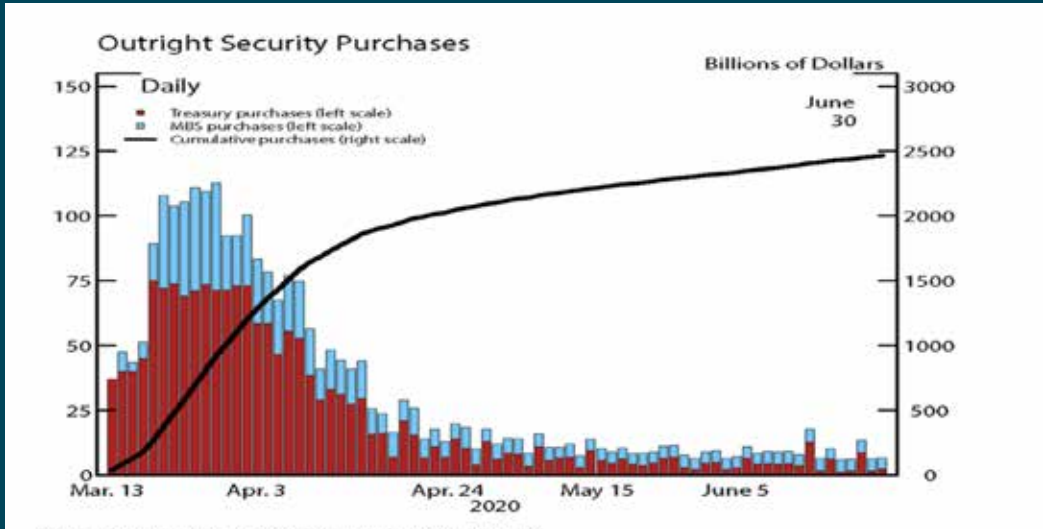
14

How Did the Economy Look Like? Pressures Also in the Corporate Bond Market



What Has the Fed Done? Dropped Policy Rate to Near Zero

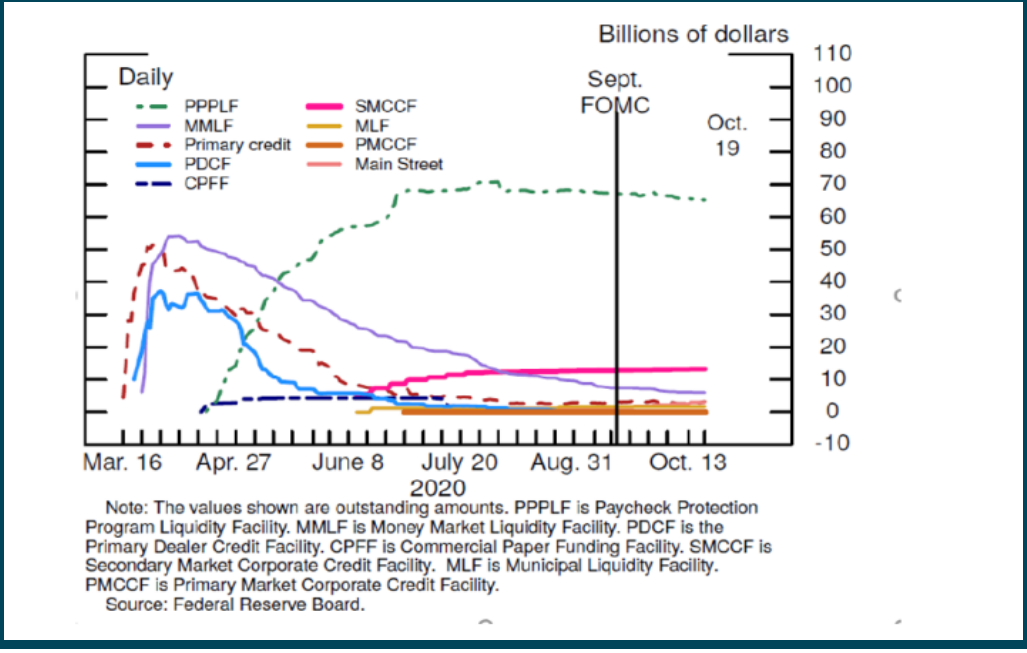
What Has the Fed Done? Asset Purchase (used in the Great Recession)



Note: Cumulative purchases are from March 13.

Source: Federal Reserve Bank of New York.
(Treasury securities purchase amounts (red bars):
https://www.newyorkfed.org/markets/domestic-market-operations/monetary-policy-implementation/treasury-securities/treasury-securities-operational-details#monthly-details. MBS purchase amounts (blue bars):
https://www.newyorkfed.org/markets/ambs/ambs_schedule accessed week of June 30, 2020.

What Has the Fed Done? Lending Facilities (most will expire at the end of 2020)

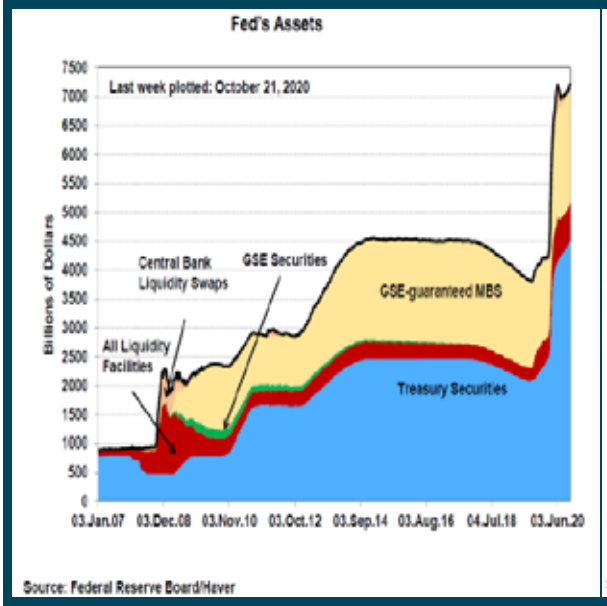


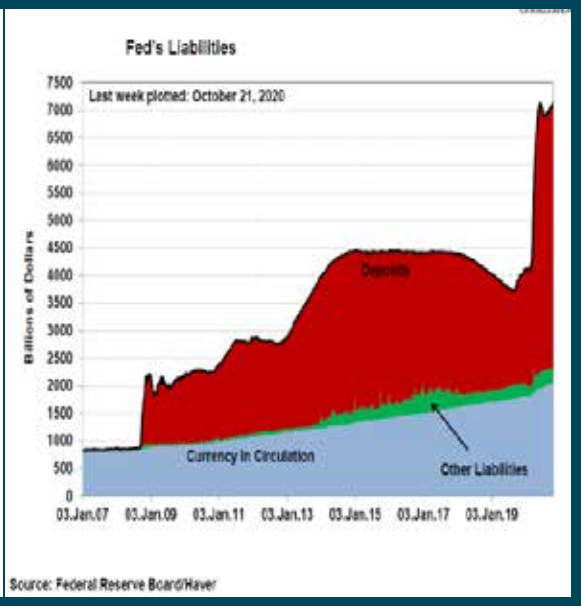
Note: The values shown are outstanding amounts. PPPLF is Paycheck Protection Program Liquidity Facility. MMLF is Money Market Liquidity Facility. PDCF is the Primary Dealer Credit Facility. CPFF is Commercial Paper Funding Facility. SMCCF is Secondary Market Corporate Credit Facility. MLF is Municipal Liquidity Facility. PMCCF is Primary Market Corporate Credit Facility.
Source: Federal Reserve Board.

On the International Stage

- Central Bank Swap Line (expire March 2021)
  - The Fed has standing foreign exchange swap lines among major central banks. The Fed swaps dollars for the foreign currency of the partner central bank, to be repaid (with interest) at a fixed exchange rate at maturity, eliminating currency risk.
- FIMA Repo Facility (expire March 2021)
  - Fed loans made to foreign central banks and monetary authorities, collateralized by Treasury securities. Structured as repurchase agreements with essentially no credit risk. Loans lessen the need for foreign authorities to sell their Treasury securities outright, thereby helping to avoid disruptions in Treasury markets and upward pressure on Treasury yields.

Fed's Balance Sheet





Usage of Fed Lending Facilities

Usage in Federal Reserve emergency credit ("13(3)") programs

Program / facility	Capacity (billions $)	Current balance (billions $, 4 Nov 2020)	% of stated capacity
Commercial Paper Funding Facility *	not stated	$0	N/A
Primary Dealer Credit Facility	not stated	$0	N/A
Money Market Mutual Fund Liquidity Facility	not stated	$6	N/A
Term Asset-Backed Securities Loan Facility	up to $100 billion	$4	3.7%
Corporate Credit facilities	up to $750 billion	$14	1.8%
Main Street loan facilities	up to $600 billion	$4	0.7%
Paycheck Protection Program Liquidity Facility	$659 billion (PPP)	$62	9.3%
Municipal Liquidity Facility	up to $500 billion	$2	0.3%
Totals	$2,609 **	$90	3.2% **

*Items in blue are similar to analogous programs used to provide support during the 2008–2009 financial crisis. ** Total capacity and percent of stated capacity for the subset of facilities with a stated capacity.

Thank you for joining us!

AMERICAN BANKRUPTCY INSTITUTE

2020 International Insolvency Forum

Cross-Border Communication: Getting the Message Across

Francesco Spizzirri, Moderator
Audax Law | Toronto, Canada

Kenneth Kraft
Dentons Canada LLP | Toronto, Canada

Mark A. Russell
KSG Attorneys-at-Law | Cayman Islands

Deborah D. Williamson
Dykema Gossett PLLC | San Antonio, Texas, USA

2020

Cross-Border Communication

Getting the Message Across

Panelists

Deborah D. Williamson – USA
Kenneth D. Kraft – Canada
Mark A. Russell – Cayman Islands
Frank Spizzirri, CS - Moderator

Introduction and Overview

A Brief History of Cross-Border Communication

In the US, Canada, and Cayman Islands

Introduction and Overview

The Participants

- Courts and Judicial Officers
- Lawyers, Trustees and other Participants (Accountants, Financial Advisors, Appraisors)
- Creditors (Secured, Unsecured, "Other")
- Creditors Committees
- Foreign Representatives

Introduction and Overview

Language

- Different Languages, Different Dialects
- The same word meaning different things
  - e.g. "Bankruptcy", "Trustee", "Lienholder"
- Different Words meaning the same thing
  - e.g. "Guaranty," vs. "Guarantee"
- Same Words, different spelling
  - e.g. "Appraisors" vs. "Appraisers"
- Common Law vs. Civil Law

Procedural Sources

United States

- Federal Statute – 11 U.S.C. § 101 *et seq.*
- Federal Rules of Bankruptcy Procedure
- Federal Rules of Civil Procedure
- Federal Rules of Evidence
- Local Rules (by Federal District)
  - Hearings, live testimony, proffers, cross-examination of witnesses, who may be compelled to testify, etc.
- Local Procedures (generally by Judge)

Choosing A Process

USA – Chapter 15 vs. Other Options

- What relief do you need? Is the relief substantive or procedural?
- How will you exit?
- Are you selling assets?
- Who are you worried about?
  - Creditors, New Money/DIP loan
- What assistance do you need from each court?
  - Investigations, Challenging Transactions.(Preferences, Fraudulent Conveyances)

Procedural Sources

Canada

- Federal statutes
  - BIA, CCAA, WURA
- Provincial Courts, Provincial Rules
  - Rules of Civil Procedure and Evidentiary Rules and Practices Vary Province by Province
- Court Specific Procedures
  - Practice Directions and Specialized Courts

Choosing A Process

Canada – Ch. XIII (BIA), Part IV (CCAA), Other Options

What relief do you need? Is the relief substantive or procedural?

- How will you exit?
- Are you selling assets?
- Who are you worried about?
  - Creditors, New Money/DIP loan
- What assistance do you need from each court?
  - Investigations, Challenging Transactions. (Preferences, Fraudulent Conveyances, Transfers at Under Value)

Procedural Sources

Cayman Islands

- Companies Law (2020 Revision)
- Companies Winding Up Rules 2018
- Common law , including the duty to assist foreign insolvency courts
- Grand Court Practice Directions

Choosing A Process

Cayman Islands – Local Proceeding, Statutory Recognition or Common Law Recognition?

- What relief do you need? Is the relief substantive or procedural?
- How will you exit?
- Are you selling assets?
- Who are you worried about?
  - Creditors, New Money/DIP loan, Recognition in other jurisdictions, Gibbs Rule issues
- What assistance do you need from each court?
  - Investigations, control of assets, challenging transactions

Communications Vary Depending on Participants

- Communications between Courts
  - With or without Counsel
- Communications between Counsel
- Communications between Counsel and Client

Communications between Courts

- "this is the way we always do it in …"
- Don't expect rubber stamp, particularly on substantive issues
  - DIP financing
  - Payments or disbursements to creditors
  - Ongoing Suppliers – Not all jurisdictions have concept of administrative priority

Communications between Courts

Protocols

- When do you need one?
- Are there standard protocols in a particular jurisdiction?
  - Houston - https://www.txs.uscourts.gov/sites/txs/files/general-orders/In%20Re%20Guidelines%20for%20Communication%20and%20Cooperation%20Between%20Courts%20n%20Cross-Border%20Insolvency%20Matters.pdf
  - New York - https://www.nysb.uscourts.gov/sites/default/files/m511.pdf
  - Ontario - https://www.ontariocourts.ca/scj/practice/practice-directions/toronto/commercial/#Part_XXVI_Protocol_Concerning_Court-to-Court_Communications_in_Cross_Border_Cases
- Guidelines are guidelines and parties are expected to agree on a protocol and obtain approval of a protocol from each court

Communications between Courts

Joint Hearings

- Standard provisions
  - Court should be entitled to communicate without or without counsel to:
    - establish procedures
    - to coordinate and resolve and procedural, administrative or preliminary matters
    - To determine outstanding issues, post hearing
- Foreign counsel might be permitted to appear
- Simultaneous presentations of evidence
- Retention by each court of sole and exclusive jurisdiction and power over the conduct of its own proceedings and determination of matters arising in its proceeding

Communications between Counsel

- Retaining Local Counsel
- Attornment
- Admission/Appearance of Foreign Counsel
- Clarifying Respective Roles
- Conflicts and Waivers
- Settlement Discussions/Privileged Communications/Pre-Hearing Discussions
- Judicial Preferences (written and unwritten)

Communications With Clients

- Education
  - Similarities and Differences between Regimes
- Managing Expectations, Concerns and Risks
  - Cross-Border Proceedings Run Differently than Solely Domestic Proceedings
  - Priorities Differences between Countries
  - Directors and Management
    - understanding personal exposure to potential claims (i.e. wages), civil/criminal/quasi-criminal penalties, etc.

The Last Slide

Questions?

Thank you for attending.

Stay Safe.

Contact Information

Frank Spizzirri
Audax Law | Toronto, Canada
frank.spizzirri@audaxlaw.com

Mark A. Russell
KSG Attorneys-at-Law | Cayman Islands
markrussell@ksglaw.ky

Ken Kraft
Dentons Canada LLP | Toronto, Canada
kenneth.kraft@dentons.com

Deborah D. Williamson
Dykema Gossett PLLC | San Antonio, Tx, USA
dwilliamson@dykema.com

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Faculty Biographies

2020

Shin Abe is the founder of Kasumigaseki International Law Office (KILO) in Tokyo and is one of Japan's leading specialists in Japanese and international corporate restructuring and insolvency law. He also well-versed in domestic corporate/commercial transactions and disputes including domestic and international arbitration. Mr. Abe has contributed to numerous publications and spoken at various seminars and events on the topics of insolvency, arbitration/mediation and other topical subjects. He is a visiting law professor both at Chuo Law School and at Kokushikan University (Department of Law). Mr. Abe is a former chair of the Insolvency Committee of the International Pacific Bar Association, and a board member of the International Insolvency Institute, Japanese Association for Business Recovery (affiliation of INSOL) and the Japanese Association of Turnaround Professionals.

Marlyn Narkis Assis is a partner with MDU Legal in Panama. Her practice focuses on providing legal advice and support to local and international companies in all stages of the business, including the preparation of corporate documents and other matters related to the daily legal needs of companies, such as negotiating contracts, obtaining permits, licenses or other administrative procedures with the Panamanian authorities. She also assists clients with the legal aspects of real estate transactions and development and acts as a lawyer for a banking institution, overseeing its due diligence procedures. Ms. Assis previously was a corporate attorney with Mizrachi, Davarro & Urriola, where she specialized in corporate, commercial, real estate, trademark, immigration, health law and public procurement law. She has represented clients in legal matters related to the public procurement sector, including the preparation of public offers, legal assistance during the bidding process, the claim and defense of the client's interests before the corresponding instances, legal support in the review and negotiation of government contracts, advice on the drafting and review of construction contracts, and legal support during the development of projects, including their relationship with contractors and public institutions. Ms. Assis has been recognized as a leading attorney in the area of transaction law by *Chambers Global* and *Chambers Latin America*. She received her Bachelor of Law and Political Science *cum laude* in 2006 and her Faculty of Law and Political Sciences from the Universidad Santa María La Antigua, Republic of Panama.

Corinne Ball is a partner with Jones Day in New York and has nearly 40 years of experience in business finance and restructuring, with a focus on complex corporate reorganizations and distressed acquisitions, both court-supervised and extra judicial, including matters involving multijurisdictional and cross-border enterprises. She co-leads the New York Office's Business Restructuring & Reorganization Practice and leads the firm's European Distress Investing and Alternative Capital Initiatives. Ms. Ball worked extensively on the City of Detroit restructuring and led a team of attorneys representing Chrysler LLC in connection with its successful chapter 11 reorganization, which won the *Investment Dealers' Digest* Deal of the Year award for 2009. She also led a team of attorneys in the successful restructuring of FGIC and the sale of its portfolio to MBIA, as well as Dana Corp., which emerged from bankruptcy in 2008, and has orchestrated many other complex reorganizations involving companies such as Oncor, Oi, OSX, US Manufacturing, Metaldyne, Axcelis Technologies, Kaiser Aluminum, Tarragon and The Williams Communications Companies. In addition, she has counseled lenders and bondholders in the ABFS, Comdisco, Excite@Home, Exide SA, GST Communications, the Houston Sport's Authority and Jefferson County, European Wind Farms (Breeze) and the National Portuguese Railway, Loy Yang B, VARIG Airlines and Worldcom restructurings, among others. Ms. Ball has advised on loans, acquisitions and workouts involving professional sports franchises, including the Charlotte Bobcats, the Detroit Redwings, the Minnesota Wild, the New Jersey Devils and the Phoenix Coyotes. She also leads the firm's distressed M&A efforts and is the featured "Dis-

tress M&A" columnist for the *New York Law Journal*. Ms. Ball won the Turnaround Management Association's "International Turnaround Company of the Year" award, and was named "Dealmaker of the Year" by *The American Lawyer* and one of "Most Influential Lawyer of the Decade in Bankruptcy & Restructuring" by *The National Law Journal*. She has served as director for the American College of Bankruptcy and ABI, and she is a member of the International Institute on Insolvency. Ms. Ball received her B.A. *cum laude* and Phi Beta Kappa in 1975 from Williams College and her J.D. in 1978 with honors from George Washington University.

Donald S. Bernstein is a partner with Davis Polk & Wardwell LLP in New York and chairs the firm's Insolvency and Restructuring Practice Group. His practice includes representing debtors, creditors, liquidators, receivers and acquirers in major corporate restructurings and insolvency proceedings, as well as advising financial institutions regarding resolution planning and the credit risks involved in derivatives, securities transactions, and other domestic and international financial transactions. Mr. Bernstein has served as president of the International Insolvency Institute, chair of the National Bankruptcy Conference, a commissioner on the ABI Commission to Study the Reform of Chapter 11, a director of the American College of Bankruptcy, treasurer and a member of the Executive Committee of The Association of the Bar of the City of New York, and chair of City Bar Association's Committee on Bankruptcy and Corporate Reorganization and of the TriBar Opinion Committee. He is also on the board of editors of *Collier on Bankruptcy* and serves as editor of the *Insolvency Review*. Mr. Bernstein has served as a member of the Official U.S. Delegation to the United Nations Commission on International Trade Law and has been a member of the Legal Advisory Panel of the Financial Stability Board. He graduated from Princeton University and received his J.D. from the University of Chicago Law School.

William (Bill) A. Brandt, Jr. is the founder and executive chairman of Development Specialists, Inc. in New York and has been involved in thousands of insolvency and restructuring cases over his long career. He has often advised members of Congress on insolvency policy and was the principal author of the amendment to the Bankruptcy Code which permits the election of trustees in chapter 11 cases. Mr. Brandt served on ABI's Commission for the Reform of Chapter 11, and in 2015 he completed serving his third and final consecutive term as chair of the Illinois Finance Authority, having first been appointed by the governor in 2008 and confirmed unanimously by the Illinois Senate that same year, then subsequently reappointed as chair in 2010 and 2012. Mr. Brandt has written for a number of publications spanning a broad spectrum of thought, including *Maclean's*, *Canada's Weekly Newsmagazine*, *Corporate Board Member* and *Urban Land*. He is a frequent commentator on topics of corporate restructuring, bankruptcy, municipal insolvency and related public policy issues, and regularly appears on a host of both cable and broadcast outlets. Mr. Brandt was a member of the National Advisory Council for the Institute of Governmental Studies at the University of California at Berkeley from 2006-18, serving as chair for the last two years. He was a member of the Board of Trustees of Loyola University Chicago from 2007-16, and is a member of the board of directors of New York-based The Honorable Tina Brozman Foundation for Ovarian Cancer Research (Tina's Wish). Mr. Brandt received his B.A. from St. Louis University and his M.A. from the University of Chicago, where he also completed further post-graduate work toward a doctoral degree.

Hon. Shelley C. Chapman was sworn in as a U.S. Bankruptcy Judge for the Southern District of New York in New York on March 5, 2010. Previously, she was a partner in the Business Reorgani-

zation and Restructuring Department of Willkie Farr & Gallagher LLP, where she represented both creditors and debtors in major business reorganizations and restructurings as Willkie's first female partner. She served on the firm's Professional Personnel Committee and Pro Bono Committee, and founded its Women's Professional Development Committee. Prior to joining Willkie Farr & Gallagher LLP in 2001, Judge Chapman was a partner at Sidley & Austin. She currently presides over the *Lehman Brothers* chapter 11 and SIPA proceedings, and has presided over many other chapter 11 mega-cases and chapter 15 cross-border proceedings, including *Boston Generating*, *Innkeepers*, *Ambac*, *LightSquared*, *Sbarro*, *NII Holdings*, *Sabine Oil & Gas*, *Cumulus Media*, *Toisa* and *Nine West*. From 2001-07, Judge Chapman served on the board of directors of HerJustice (formerly inMotion), a nonprofit organization that provides *pro bono* legal services to indigent women and children in New York City, primarily in the areas of matrimonial, family and immigration law. She served as board chair from 2004-07, overseeing a broad expansion of the services provided throughout the five boroughs of the city. Prior to her appointment, she also served on the executive committee of the UJA-Federation of New York's Bankruptcy and Reorganization Group and on the Advisory Board of ABI's New York City Bankruptcy Conference. Judge Chapman is a Conferee of the National Bankruptcy Conference, a Fellow of the American College of Bankruptcy and a member of the International Insolvency Institute, for which she serves as a member of its executive committee and as a vice president. She is a member of ABI and served on an advisory committee of ABI's Commission to Study the Reform of Chapter 11, and served as judicial co-chair of ABI's New York City Bankruptcy Conference. In April 2015, Judge Chapman was appointed by the Chief Justice of the U.S. to serve as chair of the Federal Judicial Center's Bankruptcy Judge Education Advisory Committee, and she acts as a mentor judge for the Federal Judicial Center's Orientation Program for Newly Appointed Bankruptcy Judges. In July 2016, she became a member of the FDIC's Systemic Resolution Advisory Committee. She also serves on the editorial board of *Collier on Bankruptcy* as a contributing author and on the Second Circuit Civic Education Committee. She is a frequent lecturer on a variety of U.S. bankruptcy and international insolvency topics at conferences around the country and internationally. Judge Chapman received her J.D. *cum laude* from Harvard Law School, where she served as an editor of the *Harvard Civil Rights-Civil Liberties Law Review*.

Timothy R. Coleman is a partner and global chairman of the Restructuring and Special Situations Group at PJT Partners, a public spinoff from The Blackstone Group, in New York. Prior to the spinoff, he worked for 23 years at Blackstone serving as a senior managing director and head of its Restructuring & Reorganization Group. Mr. Coleman has worked on a variety of restructuring and special-situation assignments for companies, municipalities, creditor groups, special committees of corporate boards, corporate parents of troubled companies and acquirers of distressed assets. He received the Leadership Award from the *Turnaround Atlas Awards* (2017), was given the Turnaround Leadership Award from the *M&A Advisor* (2014), was inducted into the Turnaround Restructuring and Distressed Investing Industry Hall of Fame by the Turnaround Management Association (2013), and was named Global Investment Banker of the Year by the *Turnaround Atlas Awards* (2011). Mr. Coleman's most notable public assignments include Arch Coal, AMBAC, AT&T (AT&T Canada, Alestra, AT&T Broadband and Excite@Home), Bear Stearns Asset Management, Cable & Wireless Holdings, C-BASS, Delta Air Lines, Delta (Re: Pinnacle Airlines), Energy XXI, Financial Guaranty Insurance Company, FLAG Telecom, Ford Motor Co., Genco, Greece, Guangdong Enterprises, Halcon, Harvey Gulf, Kaupthing (Iceland), Los Angeles Dodgers, MBIA (Re: BofA, Detroit, Puerto Rico and Rescap), Mirant Corp., Mohegan Sun, Quad/Graphics (Re: Vertis), R.H. Macy & Co., Roust Trading (Re: CEDC), State of Kansas, Travelport, The Weinstein Co., Williams Communications,

Xerox Corp. and XL Capital. He has actively supported a number of nonprofit organizations, currently serving as a member of The Future Project board of directors, the board of leaders of the Marshall School of Business at the University of Southern California, the Yale-New Haven Children's Hospital Council and the Tina's Wish board of directors. Mr. Coleman has been a frequent guest lecturer at Columbia University and NYU Stern Business Schools. He received his B.A. from the University of California at Santa Barbara and his M.B.A. from the University of Southern California.

Adam D. Crane is a senior associate with HSM Chambers in George Town, Grand Cayman, Cayman Islands, where his practice focuses primarily on commercial litigation, insolvency, restructuring and asset-recovery matters. He acts for clients on complex cross-border litigation and insolvency matters, including acting for the Joint Official Liquidators of two feeder funds of the Platinum Partners Value Arbitrage Fund, and acting for the Joint Official Liquidators of various Cayman Islands funds formed by Bahraini Awal Bank BSC (the "AwalCos"). The AwalCos are defendants in the $9.2 billion *AHAB v Saad* litigation, which is currently under appeal following the longest trial litigated in the Grand Court of the Cayman Islands. Prior to joining HSM Chambers, Mr. Crane was a partner and chair of the Insolvency and Financial Recovery Group at a Canadian law firm, where he advised creditors, debtors, insolvency practitioners and other stakeholders in commercial litigation matters, receiverships, bankruptcies and restructuring proceedings under the CCAA and Bankruptcy and Insolvency Act. He was admitted to the Nova Scotia Barristers' Society (Canada) in 2011 and admitted as a Cayman Islands attorney-at-law in 2018. Mr. Crane is a member of ABI (for which he is Special Projects Leader with ABI's Commercial Fraud Committee), the International Insolvency Institute (for which he was been selected to its NextGen Leadership Program in 2020 as a future expert in international insolvency) INSOL, Turnaround Management Association, and the Recovery and Insolvency Specialists Association (Cayman Islands). He was recognized by *Benchmark Litigation* as a Future Star (2018) and was named to the its 40 & Under Hot List in 2017 and 2018. Mr. Crane received his J.D. in 2010 from the Schulich School of Law at Dalhousie University and is a graduate of the Intensive Trial Advocacy Workshop (Osgoode Hall Law School, 2015).

Ian De Witt is partner and co-head of Restructuring and Insolvency for Tanner De Witt in Hong Kong, where he practices in the areas of insolvency and restructuring, litigation and dispute-resolution, mediation and hospitality, and liquor licensing. Throughout his career, he has focused on commercial litigation and insolvency matters, including debt-recovery, asset-tracing and the enforcement of judgments, pre-emptive actions such as injunctions, court-appointed receivers, and the appointment of provisional liquidators. He acts and advises in a variety of insolvency cases for liquidators, receivers, creditors and directors. Mr. De Witt has also advised and acted for directors, employees and companies in respect of investigations, regulatory matters and prosecutions carried out by the police, the Independent Commission Against Corruption (ICAC), the Commercial Crime Bureau (CCB), the Securities and Futures Commission (SFC) and the Confederation of Insurance Brokers (CIB) Disciplinary Committee. Additionally, he has advised and acted in a wide range of commercial and contractual disputes, professional negligence claims, partnership and shareholder disputes. Mr. De Witt is also an accredited mediator of the Hong Kong International Arbitration Centre and sits on the Insolvency Committee for the Law Society, technical and editorial committee of the Restructuring and Insolvency Faculty of Hong Kong Institute of Certified Public Accountants. He is consistently ranked as a "Leading Lawyer" for restructuring and lnsolvency in Hong Kong by various industry publications, including *Chambers and Partners Global* from 2014-18 and *Asia Pacific Legal 500* 2014-18 editions. Previously, after qualifying as a solicitor in England and Wales in 1989, Mr. De

Witt joined and became a partner in a prominent London law firm, where he worked for many years before coming to Hong Kong in 1996. He obtained an honours degree in law in London.

Hon. Robert D. Drain is a U.S. Bankruptcy Judge for the Southern District of New York in White Plains. Since his appointment, he has presided over such chapter 11 cases as *Loral*, *RCN*, *Cornerstone*, *Refco*, *Allegiance Telecom*, *Delphi*, *Coudert Brothers*, *Frontier Airlines*, *Star Tribune*, *Reader's Digest*, *A&P*, *Hostess Brands*, *Christian Brothers* and *Momentive*. He also has presided over the ancillary or plenary cases of *Corporacion Durango*, *Satellites Mexicanas*, *Parmalat S.p.A.* and its affiliated U.S. debtors, *Varig S.A.*, *Yukos* (II), *SphinX*, *Galvex Steel*, *TBS Shipping*, *Excel Maritime*, *Nautilus*, *Landsbanki Islands*, *Roust* and *Ultrapetrol*. He also has served as the court-appointed mediator in a number of chapter 11 cases, including *New Page*, *Cengage*, *Quicksilver*, *LightSquared*, *Molycorp* and *Breitburn Energy*. Prior to his appointment to the bench in May 2002, Judge Drain was a partner in the bankruptcy department of Paul, Weiss, Rifkind, Wharton & Garrison, where he represented debtors, trustees, secured and unsecured creditors, official and unofficial creditors' committees, and buyers of distressed businesses and distressed debt in chapter 11 cases, out-of-court restructurings and bankruptcy-related litigation. He was also actively involved in several transnational insolvency matters. Judge Drain is a Fellow of the American College of Bankruptcy and a member and board member of ABI, a member of the International Insolvency Institute, a member and Secretary of the National Conference of Bankruptcy Judges and a founding member and chair of the Judicial Insolvency Network. He also is the current chair of the Bankruptcy Judges Advisory Group established through the Administrative Office of the U.S. Courts, and was appointed to the FDIC's Systemic Resolution Advisory Committee through May 1, 2021. Judge Drain was an adjunct professor for several years at St. John's University School of Law's LL.M. in Bankruptcy Program and currently is an adjunct professor at Pace University School of Law. He has lectured and written on numerous bankruptcy-related topics and is the author of the novel *The Great Work in the United States of America*. He received his B.A. *cum laude* from Yale University and his J.D. from Columbia University School of Law, where he was a Harlan Fiske Stone Scholar for three years.

Rashmi Dubé is a business lawyer with Future Thinking Now in London. She is a qualified lawyer in the U.K. (England and Wales), as well as a mediator ADRg and a partner at Gunner Cooke llp. She previously was an award-winning solicitor, mediator and the managing director of Legatus Law in London, which provides legal advice to protect companies, their directors and stakeholders. She supports directors with contracts, disputes, partnership agreements, business law advice, shareholders' issues, construction disputes, turnaround and insolvency. Ms. Dubé wrote *Making a Splash - A Personal Guide to Networking* and is a renowned speaker and commentator, regularly addressing different audiences on different subjects and writing a weekly column for *The Yorkshire Post*. She has been involved in the turnaround industry for a number of years, winning the Corporate International Global Award – Business Turnaround Lawyer of the Year in 2014 and 2016. After leaving the corporate world, which included her working as a solicitor at Irwin Mitchell, she launched Legatus Law in 2013. Ms. Dubé has been featured in *The Telegraph*, BBC, *Law Society Gazette*, *Elite Business Magazine* and *London Economics*. She co-chaired the TMA Europe Conference in London in June 2017, which saw delegates from around the world — including the USA, Canada, Hong Kong, Germany and the U.K. — come together to discuss the future of Europe.

Thomas Felsberg is the founding partner of Felsberg Advogados in Sao Paulo, Brazil, and a global reference in the area of insolvency and debt restructuring. Recognized by publications such as *Latin Lawyer*, *Chambers and Partners*, *The Legal 500* and *Leaders League* as one of Brazil's leading insolvency lawyers, Mr. Felsberg was a member of the committees responsible for the drafting of the current Business Restructuring and Insolvency Law in Brazil. He is the first Latin American lawyer to receive the *Global Restructuring Review*'s Lifetime Achievement Award, for his work in restructuring and insolvency with respect to Brazilian and foreign companies, in June 2019. The author of an extensive list of books and articles in Portuguese and English, Mr. Felsberg has actively participated as a speaker and panelist at congresses and conferences throughout the world.

Adam J. Gallagher is a partner in with global restructuring and insolvency team of Freshfields Bruckhaus & Deringer LLP in London, and is English and New York qualified. He has more than 20 years' experience in the market, having worked extensively on numerous restructurings, distressed refinancings and intercreditor agreement disputes. Mr. Gallagher has experience of representing all parts of the capital structure, including borrowers, directors, shareholders/sponsors, bank and bond lenders, and distressed investors, as well as liquidators, receivers and administrators, often with a significant cross-border component. He also has experience in restructuring situations involving large pension deficits. Mr. Gallagher is a member of the International Insolvency Institute, ABI, the Institute for Turnaround (IFT), Hong Kong ICPA, Asia Transformation & Turnaround and the New York Bar Association. Mr. Gallagher is frequently published in relation to restructuring and insolvency matters and is a contributing editor of the *ABI Journal*'s European Update column. He has been awarded Legal Advisor of the Year by the IFT and included in the "Hot 100' by *The Lawyer*, and he is recommended by *Legal 500* and *Chambers UK and Europe*.

Enrica Maria Ghia is a managing partner with Studio Legale Ghia in Milan, Italy, and is an expert in company law, business law, insolvency law and banking law. Since 2008, she has also been involved in turnaround and insolvency proceedings. Ms. Ghia is a legal counselor of several Italian banking institutions and a legal consultant of several companies based in Italy or abroad that are active in different industries, both in and out of court. In November 2017, Ms. Ghia incorporated JurisNet s.t.a. S.r.l., a limited liability corporate of lawyers with eight shareholders and more than 100 affiliates all over Italy, and in December 2017, she took part in the interest of Camera Nazionale della Moda to the constitution of CNMI Fashion Trust to support young emerging stylists with mentorship and financing activities. CNMI Fashion Trust is part of a wider program founded by the British Fashion Council to develop social project in the Luxury Industry in accordance to the new trends of corporate social responsibility. In April 2018, the company won the first price as 2018 Digital Professional recognized by the Politecnico di Milano Digital Observatory. Also in 2018, she incorporated JurisTech S.r.l., a legal tech start-up company, to develop a collaboration suite for lawyers named JurisPlatform. Ms. Ghia is a member of UNCITRAL – UN Commission for the International Trade, named by the Ministry of the Foreigner Affairs for the Group of experts V on cross-border insolvency. She also is founding member and chairman of TMA Italia – Turnaround Management Association, a member of INSOL Europe and ABI, a founding member of the International Insolvency Institute and a Fellow of European Association of Turnaround Professionals. Ms. Ghia received her law degree from the Università degli Studi di Roma 'La Sapienza' in 1992 and her LL.M. in insolvency from Europacollege in 1995.

Richard Gitlin is chairman of Gitlin & Company, LLC in Delray Beach, Fla., and was a co-founder of ABI, having served as its president from 1987-92. He also was a founder and served as chair of the American College of Bankruptcy from 1995-97. Mr. Gitlin was president of INSOL from 1991-93 and served for many years as a member of the board of the III.

Pamela Goldbaum is a partner at Lathrop & Blanco in Las Condes, Chile, and has practiced law for 25 years, covering the entire life cycle of a business, from incorporating a company to its termination. In matters of insolvency and restructuring, she has represented creditors and debtors in processes of varying complexity, both in Chile and abroad, and has coordinated recognition and asset-recovery proceedings in many jurisdictions. Ms. Goldbaum has advised both national and foreign companies on investment and tax planning, as well as dealing with corporate issues. She previously was with Carey and Company, the biggest law firm in Chile, where she practiced corporate law focused on foreign clients. Later, she served as legal and tax manager for PricewaterhouseCoopers, covering diverse clients located in the south of Chile that included fishing, forest, textile and services industries. From 2016-18, Ms. Goldbaum was legal advisor for Sequor Law, a U.S. law firm appointed as attorneys by Carlos Parada Abate, trustee and liquidator of Onix Capital S.A. and Alberto Chang Rajii (Chile) in the biggest Ponzi scheme and liquidation proceedings in Chilean history. She first served as an assistant professor of Constitutional Law, Tax Law and Economic Law at the University of Chile and subsequently as an associate professor at the Catholic University of Concepción. She is also a licensed realtor in Florida. Ms. Goldbaum received her law degree from the University of Chile, graduating as one of the top five students in her class, and she received a post graduate degree in finance as well as numerous post-graduate degrees in tax law.

Debra I. Grassgreen is a senior partner in Pachulski Stang Ziehl & Jones LLP's San Francisco office and heads the firm's international insolvency practice. She is president of the International Insolvency Institute (the first woman to be elected to that position) and is widely regarded as a leading expert on cross border restructuring matters. Ms. Grassgreen has experience representing debtors, trustees and creditors' committees in large and complex chapter 11 cases nationwide and internationally. She also has participated in the United Nations working group (UNCITRAL) developing a uniform international insolvency law and materials to assist countries in the adoption and implementation of insolvency legislation for over 10 years. Ms. Grassgreen is listed in *Who's Who Legal: Thought Leaders — Global Elite* 2019, one of only seven U.S.-based lawyers listed for Restructuring and Insolvency, and has been named by the *Daily Journal* as one of the top 100 women lawyers in California for several years. She is a Fellow in the American College of Bankruptcy and has been listed in *The Best Lawyers in America* every year since 2001 for her work in both Bankruptcy and Creditor/Debtor Rights/Insolvency and Reorganization Law and Litigation - Bankruptcy. Ms. Grassgreen holds an AV-Preeminent peer rating by Martindale-Hubbell and is ranked among Bankruptcy/Restructuring attorneys by *Chambers USA*. Every year since 2010, she has been named a "Northern California Super Lawyer" by *San Francisco Magazine*. She was also listed by *Lawdragon* as one of the 2020 "*Lawdragon* 500 Leading Global Restructuring & Insolvency Lawyers." Ms. Grassgreen is a graduate of the University of Florida, where she also received her J.D., and is admitted to practice in Florida and California.

Timothy Graulich is a partner in Davis Polk & Wardwell LLP's Insolvency and Restructuring Group in New York. He has experience in a broad range of domestic and international restructurings, includ-

ing the representation of public and private companies, agent banks and lenders, acquirers and hedge funds in connection with pre-packaged and traditional bankruptcies, out-of-court workouts, DIP and exit financings, bankruptcy litigation and § 363 sales. In addition to his regular insolvency matters, he plays a key role in the firm's representation of certain global financial institutions in connection with its Dodd-Frank resolution planning. Mr. Graulich has received a number of honors, including being named as one of *Turnarounds & Workouts*' "Outstanding Restructuring Lawyers" and recognition in *Chambers*. He also is a frequent author, lecturer and panelist on a broad range of bankruptcy topics. Mr. Graulich is admitted to practice in New York and New Jersey, and before the U.S. Supreme Court, the U.S. Courts of Appeals for the Second, Third and Fifth Circuits, and the U.S. District Courts for the District of New Jersey and the Eastern, Western and Southern Districts of New York. He received his B.A. *summa cum laude* in philosophy and political science from St. John's University in 1991 and his J.D. and LL.M. in bankruptcy from St. John's University School of Law, where he was a St. Thomas More Scholar and a member of the *ABI Law Review*.

Nastascha Harduth is a director of Werksmans's Insolvency, Business Rescue and Restructuring practice in Johannesburg, South Africa. Her legal practice focuses on insolvency, business rescue and restructuring matters, but she also has wide-ranging experience in dispute-resolution and commercial litigation, as well as corporate debt recoveries. Ms. Harduth often advises on the duties and responsibilities of directors, the risk of incurring personal liability, and how to mitigate it. Her experience includes cross-border experience in the U.S., Mauritius, Seychelles, Zambia, Botswana and Lesotho. Ms. Harduth regularly writes for various publications and contributes to the media. She is a member of the South African Restructuring and Insolvency Practitioners Association (SARIPA) and a Fellow of INSOL International.

William K. Harrington is the U.S. Trustee for Regions 1 and 2 in New York, appointed to Region 1 on Nov. 8, 2010, and Region 2 on Nov. 26, 2013. Prior to his appointment, he was the Assistant U.S. Trustee for the District of Delaware and practiced bankruptcy and reorganization law at Duane Morris LLP. Mr. Harrington is a member of the Boston, Delaware State and American Bar Associations, ABI and the Delaware Bankruptcy American Inn of Court. He received his undergraduate degree from the University of Pennsylvania and his J.D. from Villanova University School of Law.

Hon. Paul Heath QC is a former Judge of the High Court of New Zealand in Auckland, appointed in 2002, and an associate at South Square in London. He was admitted to the New Zealand Bar in 1978, practised as a partner of a firm of barristers and solicitors until 1996, and was appointed Queen's Counsel in 1998. Between 1997 and 2002, Judge Heath was a member of the New Zealand Law Commission, an independent statutory law reform agency, and was responsible for work that led to New Zealand's adoption of the UNCITRAL Model Law on Cross-Border Insolvency and improvements to the Arbitration Act 1996 (NZ). He also sat as an ad hoc Judge of the Court of Appeal of New Zealand between 2003 and 2017. Since retiring as a High Court Judge in April 2018, Judge Heath has returned to practise at Bankside Chambers in Auckland, primarily as a commercial arbitrator. Bankside also has a presence at Maxwell Chambers in Singapore. Judge Heath was inducted as a Fellow of the American College of Bankruptcy in 2000. At the time, he was only the 19th non-American to be elected as a Fellow. He is co-consulting editor of the leading New Zealand text, *Heath & Whale on Insolvency*. In 2018, Judge Heath was engaged by the Justice Select Committee of the New Zealand

Parliament as an independent adviser on its Arbitration Amendment Bill 2018. In June 2019, he was admitted as a member of P.R.I.M.E Finance's Panel of Experts for dispute resolution.

Hon. Susana Hidvegi took office as the Superintendent of Bankruptcy Proceedings in Colombia (Chief Judge of the Business Bankruptcy Court of the entire country of Colombia) in December 2018. She is the delegate to represent the Republic of Colombia at the United Nations Commission on International Trade Law, Working Group V (Insolvency Law). As Superintendent of Bankruptcy Proceedings, she participated in the drafting process of the reforms to the bankruptcy regime to address the effects of the COVID-19 crisis. As a result, the Government of Colombia issued Decrees 560 and 772 in April and June 2020. These rules provided for the creation of a pre-judicial bankruptcy proceeding, the incorporation of artificial intelligence tools to bankruptcy cases, and the creation of a simplified insolvency regime for small enterprises. Prior to becoming a judge, Judge Hidvegi developed a specialty in business bankruptcy for 12 years with the law firm Brigard Urrutia (the largest law firm in Colombia), where she was a director and headed its bankruptcy practice. She also clerked for the International Court of Arbitration of the International Chamber of Commerce in Paris, and worked as international associate at Dechert LLP in New York. Judge Hidvegi has been a professor of bankruptcy law in several postgraduate programs at Universidad del Rosario, Universidad Javeriana, Universidad de los Andes, Universidad Sergio Arboleda and Universidad del Norte. She also has participated in more than 20 national and international conferences as a lecturer and panelist on insolvency, and has published several papers and articles on bankruptcy law. Judge Hidvegi was recently honored as a member of the 2020 class of ABI's "40 under 40." She is a member of Colegio de Abogados Rosaristas, Instituto Iberoamericano de Derecho Concursal (IIDC), International Women's Insolvency & Restructuring Confederation (IWRC) and INSOL. Judge Hidvegi obtained her law degree with a specialization in finance law from Universidad del Rosario, and she pursued an LL.M. in Business and Bankruptcy Law at the University of California, Los Angeles.

Hon. Barbara J. Houser is the Chief U.S. Bankruptcy Judge for the Northern District of Texas in Dallas and ABI's President. She previously was with Locke, Purnell, Boren, Laney & Neely in Dallas and became a shareholder there in 1985. In 1988, she joined Sheinfeld, Maley & Kay, P.C. as the shareholder-in-charge of the Dallas office and remained there until she was sworn in as a U.S. Bankruptcy Judge in 2000. While at Sheinfeld, Judge Houser led the firm's representation of clients in a variety of significant national chapter 11 cases. She lectures and publishes frequently, is a past chairman of the Dallas Bar Association's Committee on Bankruptcy and Corporate Reorganization, is a member of the Dallas, Texas and American Bar Associations, and is a Fellow of the Texas and American Bar Foundations. Judge Houser served as a contributing author to *Collier on Bankruptcy* for many years and taught creditors' rights as a visiting professor at the SMU Dedman School of Law. She was elected a Fellow of the American College of Bankruptcy in 1994, and in 1996, she was elected a conferee of the National Bankruptcy Conference. In 1998, the *National Law Journal* named Judge Houser as one of the 50 most influential women lawyers in America. After becoming a bankruptcy judge, she joined the National Conference of Bankruptcy Judges and served as its president from 2009-10. She received the Distinguished Alumni Award for Judicial Service from the SMU Dedman School of Law in February, 2011, the William L. Norton Jr., Judicial Excellence Award in October 2014, and the Distinguished Service Award from the Alliance of Bankruptcy Inns of the American Inns of Court in October 2016. Judge Houser currently serves as a member of the executive board of the SMU Dedman School of Law, and in March 2017, Chief Justice John Roberts appointed her to serve as a member of the board of directors of the Federal Judicial Center, the education and

research arm of the Third Branch. In June 2017, she was appointed to serve as the leader of a five-federal-judge mediation team in the Title III proceedings under PROMESA for the Commonwealth of Puerto Rico and four related governmental instrumentalities. Judge Houser received her undergraduate degree with high distinction from the University of Nebraska and her J.D. from Southern Methodist University Law School, where she was editor of its law review.

Teresa C. Kohl is a managing director for SSG Capital Advisors, LLC in West Conshohocken, Pa., and is responsible for originating and leading investment banking transactions, as well as managing SSG's litigation advisory practice. She has completed more than 100 restructuring matters, including refinancing and sale transactions for middle-market companies in bankruptcy proceedings and out-of-court workouts. Prior to her transition to investment banking, Ms. Kohl led financial and operational restructuring engagements for boutique advisory firms. Her past clients include publicly traded, privately held, private-equity sponsored and family-owned companies in the health care, retail, manufacturing, building products and financial services industries. Ms. Kohl is a frequent speaker on financial and operational restructuring issues, bankruptcy, and special-situation transactions. She serves on ABI's Board of Directors and on the board and in leadership positions of the Turnaround Management Association (TMA Global), where she was the first woman to lead TMA's largest global chapter (New York City) as president and co-founded TMA Global's Network of Women. Ms. Kohl is a member of the Association for Corporate Growth, the Association of Insolvency and Restructuring Advisors, INSOL International and the International Women's Insolvency and Restructuring Confederation. She has received awards, including the TMA Global's Outstanding Individual Contribution Award (2017) and the M&A Advisor's Distressed M&A Dealmaker of the Year Award (2019). In addition, she was named a U.S.A. Top Women Dealmaker by the Global M&A Network (2019). Ms. Kohl received her B.S. from Villanova University School of Business.

Kenneth Kraft is a partner in the Toronto office of Dentons Canada LLP and leads its restructuring, insolvency and bankruptcy group. He also work closely with the firm's banking and financial services law and litigation groups. Mr. Kraft focuses his practice on insolvency and finance, both secured and unsecured. Acting for lenders as well as borrowers, his expertise encompasses receiverships, informal workouts and all manner of restructurings under the Companies' Creditors Arrangement Act and the Bankruptcy and Insolvency Act. He has been involved in numerous Canada/U.S. cross-border filings, including Elephant & Castle, Talon Systems Inc., Nortel, Cogent Fibre, MTZ Zinc and Strata Energy, as well as proceedings in England, France, Australia and Israel. Mr. Kraft has been listed as a leading lawyer in restructuring and insolvency in editions of *Chambers Global: The World's Leading Lawyers for Business*. In 2009, he was one of just two Canadian lawyers nominated for the BTI Client Service All-Star Team for Law Firms, which honors superior client service delivered to corporate counsel at Fortune 1000 and other large companies. In 2011, he was recognized for his expertise in Insolvency & Restructuring Law in *Corporate INTL Magazine's* "50 Best Lawyers in Canada." He's also been recognized for several years now in *The Best Lawyers in Canada* as one of Canada's leading lawyers in the area of Insolvency and Financial Restructuring Law. Mr. Kraft received his LL.B. in 1989 from York University, Osgoode Hall Law School and his LL.M. in 1996 from the London School of Economics and Political Science.

Alexandre Le Ninivin is a partner with Oxynomia Avocats in Paris. His experience covers all aspects of restructuring, both financial and operational, preventive procedures (ad hoc mandates and concilia-

tion) and advising distressed companies (safeguarding procedures, receivership and liquidation). Mr. Le Ninivin is active in purely domestic and cross-border cases, with a particular interest in European and international insolvency issues, such as U.S. chapters 11 and 15. He is regularly appointed by French or foreign groups and investors to present takeover offers in court, and he has advised international and French clients on their respective rights and obligations for more than 17 years, being part of some of the largest insolvency case of the last decade. Mr. Le Ninivin works closely with a network of firms and advisors around the world on the implementation of complex multijurisdictional restructurings, and both their strategic and commercial implications. He is also a litigator, and his field of expertise covers negotiations, pre-litigation, litigation, expert reports, mediation, arbitration and the enforcement of court decisions in France and internationally. Mr. Le Ninivin is a founder of the Turnaround Management Association's French Chapter. He received his education from the Panthéon-Sorbonne University, DEA, de Droit des affaires et de l'économie, and The University of Nantes, Maîtrise, en Droit.

Dr. Wenli Li is a senior economic advisor and economist at the Federal Reserve Bank of Philadelphia. She conducts research on consumer finance, financial intermediation and macroeconomics in general. Dr. Li has studied the causes and consequences of consumer default and bankruptcy filing. Her current research focuses on housing, demographic changes and economic growth. Dr. Li has published extensively in top academic journals and has taught short-term courses at Princeton University. Dr. Li received her B.S. in MIS from Tsinghua University and her Ph.D. in economics from the University of Minnesota.

Prof. Stephan Madaus is a professor of law at Martin Luther University Halle-Wittenberg in Halle, Germany, and has been there since April 2014, where he was the head of its law school from 2016-18. He teaches property law (including secured transactions), insolvency and civil procedure law, and contract and tort law. Prof. Madaus is currently co-chairing the Academic Committee of the International Insolvency Institute and is a founding member of the Conference of European Restructuring and Insolvency Law (CERIL). His research interests are in dealing with debt burdens and consequently focus on insolvency and restructuring law, with a special focus on the comparative analysis of relevant regulatory approaches in jurisdictions worldwide, as well as on the "soft law" of international organizations. Together with Prof. Bob Wessels (Leiden University), he headed the European Law Institute's Project on Rescue of Business in Insolvency Law from 2013-17. He was a member of the research team that evaluated the 2012 insolvency law reform (ESUG) for the German Ministry of Justice in 2017-18. As a member of an international research team, he helped to develop the "Modular Approach for MSME Insolvencies" (OUP 2018).

Noel McCoy is a specialist restructuring and insolvency partner based in Norton Rose Fulbright's Sydney office. Since 2001, he has worked in contentious and noncontentious financial restructuring, reorganization and insolvency matters. He also services financial services and government clients. A Fellow of INSOL International, Mr. McCoy has helped lead some of Australia's most significant cross-border restructuring and insolvency engagements, including in conducting the first appellate decision in Australia under the UNCITRAL Model Law on Cross Border Insolvency. He currently advises and represents a variety of Australian government agencies where restructuring and insolvency issues arise in their service delivery and policy administration functions. He also has worked inside government as a senior legal policy adviser.

Prof. Troy A. McKenzie is professor of law at New York University School of Law in New York, and his scholarly interests include bankruptcy, civil procedure and the federal courts. His research explores litigation and the institutions that shape it, with a particular focus on complex litigation that is resolved through the class action, bankruptcy and other forms of aggregation. From 2015-17, Prof. McKenzie took a leave of absence from NYU to serve as deputy assistant attorney general in the Office of Legal Counsel at the U.S. Department of Justice. From 2011-15, he served as assistant reporter to the Advisory Committee on Bankruptcy Rules of the Judicial Conference of the United States. He is a member of the National Bankruptcy Conference and the Council of the American Law Institute. Before his academic career, Prof. McKenzie was a litigation associate in the New York office of Debevoise & Plimpton. After receiving his law degree from NYU, he clerked for Hon. Pierre N. Leval of the U.S. Court of Appeals for the Second Circuit and for Justice John Paul Stevens of the U.S. Supreme Court. Prof. McKenzie holds an undergraduate degree in chemical engineering from Princeton University.

Andrea Metz is a partner at Luther Rechtsanwaltsgesellschaft in Frankfurt, Germany, and has more than 20 years of experience in national and international corporate and restructuring/insolvency law. She is also head of Luther's French Desk and is very familiar with the French market. Ms. Metz has been involved in numerous M&A transactions, many of them in the distressed sector, and provides advice to investors, management and shareholders of companies, creditors and insolvency administrators on a regular basis. She is a speaker and moderator at many national and international conferences. From 1999-2000, she worked at the New York office of Luther's associated law firm, Donahue & Partners. Ms. Metz studied law in Mainz and Dijon, France from 1987-92 and completed her LL.M. at the London School of Economics before joining musical production company Stella AG in Hamburg, where she was legal counsel responsible for corporate law, M&A and intellectual property.

Nyana Miller is an attorney at Sequor Law in Miami, where she focuses her practice on international asset recovery and financial fraud. She has worked on cases brought under chapter 15 of the U.S. Bankruptcy Code on behalf of foreign officeholders of bankrupt Latin American companies and financial institutions where insiders misappropriated hundreds of millions of dollars' worth of assets into or through the U.S. Ms. Miller has represented individuals, corporations, receivers and trustees in applications for assistance in obtaining evidence under 28 U.S.C § 1782, in litigation and in judgment enforcement proceedings. Prior to joining Sequor Law, she worked on commercial, financial and real estate transactions at an international law firm. In that position, she represented bank syndicates in financial transactions for various purposes, including working capital, international trade and acquisitions. Ms. Miller has been listed as a 2020 Florida Rising Star in *Super Lawyers*, is the 2020 International Women's Insolvency and Restructuring Confederation (IWIRC) Regional Director for Latin America, has been listed as a *Latinvex* Top 50 Rising Legal Star for Latin America, and received an honorable mention as Best Individual Oralist at the Willem C. Vis International Commercial Arbitration Moot Court. Ms. Miller received her B.A. with honors from the University of Kansas and her J.D. *summa cum laude* from the University of Miami School of Law.

Dr. Aimee Prieto, CFE is a partner with and founder of Prieto Cabrera & Asociados in Santo Domingo, a leading firm in asset-recovery, real estate law and business in the Dominican Republic. She has more than 18 years of experience in asset-recovery, asset investigations, real estate transactions, business and litigation management, and supervision. Dr. Prieto is the Dominican Republic's

exclusive representative for FraudNet, the fraud-prevention network of the International Chamber of Commerce (ICC) Commercial Crime Services. FraudNet is the world's leading asset recovery legal network and has an ample cross-border collaboration among its members. Prieto Cabrera & Asociados serves as local counsel and contractor to the recovery of assets acquired through fraudulent acts committed in the U.S. and invested in the Dominican Republic and other countries of Latin America. Dr. Prieto has provided legal assistance on business organization and corporate transactions, real estate transactions (including acquisitions, sales, leases, condominiums, fractional ownerships, liens, mortgages, loans, foreclosures, negotiations, closings, etc.), litigation, foreign investment, intellectual property, contractual documents review, draft and advice, and technology, privacy and data protection. She has experience in business law and in the government, and previously was advisor to the Dominican Republic's Presidential Office of Information and Communication Technologies. She also formerly worked at a major full-service law firm in its Business, Corporate and Intellectual Property Departments.

Amy Alcoke Quackenboss is the deputy executive director and general counsel of the American Bankruptcy Institute in Alexandria, Va. Prior to joining ABI, she practiced law at Hunton & Williams LLP, where she focused her practice on bankruptcy litigation and restructuring. Ms. Quackenboss has significant experience representing lenders, secured and unsecured creditors, indenture trustees, creditors' committees, and acquirers of assets in chapter 11 bankruptcies. In 2002, she was honored with the H. Sol Clark award by the State Bar of Georgia for her commitment to pro bono work. Ms. Quackenboss received her B.A. from Miami University of Ohio and her J.D. from Washington & Lee School of Law, and upon graduation clerked for a U.S. magistrate judge in the Southern District of West Virginia.

Ricardo Reveco is partner with /Carey in Santiago, Chile, and co-head of the firm's Litigation and Insolvency, Bankruptcy and Restructuring group. His practice focuses principally on civil and commercial litigation, arbitration, bankruptcy and insolvency. Mr. Reveco is also admitted to practice law in New York and is a professor at the Universidad de Chile. He graduated from the Universidad de Chile and received his LL.M. from Duke University.

Mark A. Russell is the head of Insolvency at KSG Attorneys at Law in the Cayman Islands, where he practices in the areas of insolvency, restructuring, fraud and commercial litigation. He was admitted to practice as a Cayman Islands attorney in 2016 after almost seven years of practice with a major Atlantic Canadian law firm. Mr. Russell joined KSG in October 2018 and regularly advises and acts for liquidators, creditors, shareholders and other stakeholders in cross-border and local insolvency, restructuring and litigation matters. He has appeared before the Grand Court of the Cayman Islands and the Cayman Islands Court of Appeal. He also works closely with onshore advisers and has provided expert evidence on Cayman law to U.S. bankruptcy courts. Mr. Russell has broad and varied industry experience, with special expertise in banking, financial services, energy, oil and gas, mining, fisheries, marine, transportation and telecommunications. He has presented and spoken at various conferences and seminars on insolvency law, fraud, personal property security law and the international law of the sea. In addition, he was an instructor for the Commercial Insolvency component of the Newfoundland and Labrador Bar Admissions Course from 2011-15. Mr. Russell received his B.B.A. in 2005 from Memorial University of Newfoundland, his LL.B. in 2008 from the University

of Western Ontario, and his Master of Laws with distinction with a specialization in international business law through the University of London (University College London and Queen Mary).

Lisa M. Schweitzer is a senior bankruptcy and restructuring partner in Cleary Gottlieb Steen & Hamilton LLP's New York office, where her practice focuses on financial restructuring, bankruptcy and commercial litigation, including cross-border matters. She has experience advising corporate debtors, individual creditors and strategic investors in both U.S. chapter 11 proceedings and restructurings in other jurisdictions in North America, Europe and Asia. Ms. Schweitzer has served as lead counsel in some of the world's most high-profile bankruptcy matters across North America, Europe and Asia, advising corporate debtors, creditors and counterparties in U.S. chapter 11 proceedings as well as in restructurings and risk-mitigation advice. She has advised many companies and creditors in various bankruptcy cases, and she has been providing strategic advice to several Fortune 100 U.S. and multinational companies on liquidity and restructuring advice arising from the COVID pandemic. She also continues to advise several leading financing institutions, including UBS and Credit Suisse, in matters relating to their resolution plans. Ms. Schweitzer has advised clients in some of the most high-profile bankruptcy matters in North America, and her work repeatedly has been recognized by the business and legal press, including *Chambers Global*, *Chambers USA*, *The Legal 500 U.S.*, *IFLR 1000: The Guide to the World's Leading Financial Law Firms*, *The International Who's Who of Business Lawyers* and *The International Who's Who of Insolvency & Restructuring Lawyers*. She also was honored as one of the "Top 250 Women in Litigation" by *Benchmark Litigation* and as a "Dealmaker of the Year" and "Dealmaker in the Spotlight" by *The American Lawyer*. Ms. Schweitzer received her B.A. *magna cum laude* and Phi Beta Kappa from the University of Pennsylvania and her J.D. *magna cum laude* from New York University School of Law, where she was elected to the Order of the Coif.

E. Patrick Shea is a partner with Gowling WLG in Toronto, where he practices commercial law with a focus on commercial insolvency. He is a certified specialist in bankruptcy and insolvency law and has acted for a variety of clients in large corporate restructurings and insolvency matters across many industries. He is also one of less than a dozen lawyers to be certified by the Law Society of Upper Canada as a specialist in bankruptcy and insolvency law, and in 2015 was awarded the Law Society Medal, the highest award that the Law Society of Upper Canada can confer on a member. Mr. Shea has acted for a variety of clients in large corporate restructuring and insolvency matters in the entertainment, retail, automotive, airline, food and beverage, pharmaceutical and other industrial sectors. He has also acted as an outside advisor/consultant to the Canadian and Jamaican governments on the reform of their insolvency legislation. A former chair of the Canadian Bar Association's Insolvency Section, Mr. Shea currently sits as a member of the Canadian Bar Association's Legislation and Law Reform Committee and the National Sections' Council. He is also vice-chair of the Ontario Bar Association's Insolvency Section. Mr. Shea has served as a reserve officer and pilot/instructor with the Canadian Forces, and has been awarded the Queen Elizabeth II Diamond Jubilee Medal and the Canadian Minister of Veterans Affairs Commendation. In 2013, he was inducted as a member of the Most Venerable Order of the Hospital of Saint John of Jerusalem by the Governor General on behalf of Her Majesty Queen Elizabeth II. Mr. Shea sits on the board of a number of nonprofit companies and is a governor and vice-chair of the Air Cadet League of Canada, Ontario Provincial Committee, the Canadian Government's partner in the Royal Canadian Air Cadet program. He received his B.A. with distinction from Carleton University and his LL.N. *cum laude* from the University of Ottawa.

Ronald J. Silverman is co-head of Hogan Lovells' U.S. Business Restructuring and Insolvency practice group in New York. He represents banks and financial institutions, hedge and private-equity funds, and other sophisticated investors involved in restructurings, rescue financings, distressed M&A and insolvencies. Mr. Silverman has a broad background in international restructurings, having completed restructurings in dozens of countries across the globe. He has led some of the most significant chapter 15 cases in connection with cross-border restructurings, and wrote a chapter 15 primer for a leading treatise. He recently advised the Republic of Ecuador on its restructuring of over US$19 bn in debt necessitated by the economic fallout from COVID-19. Mr. Silverman's range of experience is diverse but includes comprehensive knowledge of restructurings involving the mining, power, renewable energy, and oil and gas sectors. He is particularly involved in restructurings across Latin America and Asia, and he led the landmark ABI Beijing Insolvency & Restructuring Symposium in Beijing in 2015. Mr. Silverman is a former vice president of International Affairs for ABI and serves on the board of directors of INSOL International. Previously, he served on the adjunct faculty at the University of Connecticut School of Law, and he taught a seminar on international insolvency while maintaining his private practice. Mr. Silverman received his B.A. with honors from Trinity College in 1988 and his J.D. from the University of Connecticut School of Law in 1991.

Francesco Spizzirri is counsel at AUDAXlaw in Toronto. He was previously a partner in the Canadian Financial Restructuring and Recovery Practice Group of Baker & McKenzie, where his practice focused on all aspects of corporate restructurings, distressed acquisitions and refinancings, bankruptcy, equipment and asset-based lending, debtor-in-possession financing, debtor and creditor rights, D&O liability, risk management, collections and forensic investigations. Mr. Spizzirri authored ABI's *Insolvency Law in Canada: A Primer for Practitioners*. He received his B.A. with distinction from the University of Toronto, his LL.B. *cum laude* from the University of Ottawa Law School and his LL.M. in tax law from Osgoode Hall Law School.

Dr. Annerose Tashiro is head of Schultze & Braun GmbH's Cross-Border Restructurings and Insolvencies group in Achern, Germany, and advises in corporate recovery situations. She has acted domestically and internationally for many companies involved in debt restructuring and turnarounds, as well as for officeholders on several high-profile German insolvencies. She also assists financial and trade creditors in international insolvency proceedings and restructuring scenarios. Dr. Tashiro's recent reorganization mandates include advice for officeholders of a refinery group, a gas pipeline project company and renewable energy companies, and advice to an international banking consortium regarding a construction PPP, financial creditors in bank insolvencies, restructuring of a machinery company and investor consulting for supported MBO and for the purchase of a software company. She also has significant experience in representing officeholders in international fraud insolvency cases, and German banks frequently ask for her help when creating and pursuing collateral on foreign assets. Dr. Tashiro served as the joint chief editor of turnaround magazine *Eurofenix* from 2009-17 and is a board member of IWIRC, as well as a member of INSOL. She is also ABI's Vice President-International Affairs, listed in *Who's Who Legal* – Thought Leaders – Global Elite for 2019 and Restructuring & Insolvency Lawyer of the Year for 2017, and a member of the German-Japanese Association of Lawyers, German-Japanese Business Council, Japanese Association for Turnaround Professionals and the International Insolvency Institute (III). Dr. Tashiro is a frequent speaker and lecturer on insolvency law. She received her Ph.D. from the University of Düsseldorf and Keio University in Tokyo.

James C. Tecce is a partner in the New York office of Quinn Emanuel Urquhart & Sullivan, LLP and has 25 years of experience representing both creditors and debtors in some of the nation's largest and most complex chapter 11 cases and in complex commercial litigation more generally, including litigation involving financial institutions and lending arrangements. He has litigated a wide range of contested matters in bankruptcy courts, such as DIP financing, exclusivity and confirmation contests. He also has prosecuted and defended against appeals from bankruptcy court decisions before the district courts and the circuit courts of appeals. Mr. Tecce has been ranked among the leading New York Bankruptcy Restructuring lawyers in *Chambers USA* and in *The Best Lawyers in America*. Previously, he was with Milbank, Tweed, Hadley & McCloy LLP and clerked for Hon. Anthony J. Scirica of the U.S. Court of Appeals for the Third Circuit and Hon. John R. Padova of the U.S. District Court for the Eastern District of Pennsylvania. Mr. Tecce received his B.S. in economics from the University of Pennsylvania, Wharton School of Business in 1992, his J.D. from Dickinson School of Law in 1995, where he was on the *Dickinson Law Review* and the Woolsack Honor Society, and his LL.M. in taxation in 1998 from Villanova University School of Law.

Albert J. Togut is the senior member of Togut, Segal & Segal, LLP in New York, where he pioneered the use of conflicts counsel in mega-cases, and co-chaired ABI's Commission to Study the Reform of Chapter 11. Throughout his 45 years of practice, he has been counsel to the debtor or official committee, or principal owner, in some of the largest and highest profile chapter 11 cases, including Latam Airlines, McClatchy Newspapers, Pacific Drilling, Westinghouse, American Airlines, Kodak, Lehman Brothers Aurora, General Motors, Chrysler Automotive, Enron, Toisa Shipping, Dewey & LeBeouf, Relativity Media, Avaya, Nautilus, Ambac Financial, Sun Edison, Aeropostale, A&P, Delphi Automotive, Collins & Aikman, St. Vincent's Hospitals, Charter Communications, Loehman's, Frontier Airlines, Tower Automotive, Winn-Dixie, Ames Department Stores, Loew's Cineplex, SK Global and Daewoo International (America) Corp. He also was lead counsel to the European Operations of Westinghouse, Lehman Brothers Aurora mortgage origination company, Rockefeller Center Properties, and Olympia & York Tower B Company, better known as the World Financial Center. Since 1981, Mr. Togut has been an active member of the trustee panel maintained by the Department of Justice in the Southern District of New York and has served as trustee in bankruptcy in several thousand bankruptcy cases under chapters 11 and 7. He is a Fellow of the American College of Bankruptcy, a Fellow of the International Insolvency institute, co-chair of ABI's Commission to Study the reform of Chapter 11, and a former ABI director and chair of its New York City Bankruptcy Conference. He also served on the ABI's fee-study commission, which provided the most comprehensive, independent look at professional fees in chapter 11 cases to date. Mr. Togut was twice a member of the Committee on Bankruptcy and Reorganization of the Association of the Bar of the City of New York, a member of the International Bar Association, and a past president of the Bankruptcy Lawyers Bar Association of New York. He received his B.S. from New York University in 1971 and his J.D. from St. John's University School of Law in 1974.

Raj Verma is the owner of Author's Point in New Delhi, India, which creates, edits, designs, prints and publishes books. He has nearly 20 years of experience in the fields of publishing, sales, marketing, book promotion and distribution. Mr. Verna has worked in different media houses and was a member of the core team of Times Group Books, the publishing arm of Times of India.

Rosa Rojas Vértiz C. is an independent legal consultant in insolvency, debt restructuring and corporate finance in Mexico City. She is a legal professional and combines her practice in corporate law firms with many years of experience in the Supreme Court of Justice of Mexico. Ms. Vértiz's expertise is primarily in business, finance and insolvency law. She also has experience in corporate legal counseling with litigation in commercial and constitutional challenge proceedings. Ms. Vértiz received her law degree from Escuela Libre de Derecho and her LL.M. in commercial and corporate law from The London School of Economics and Political Science.

Ian G. Williams is a partner with Williams Consulting International in London ans specializes in restructuring. He previously was a director with RSM Restructuring Advisory LLP and was with Baker Tilly Restructuring & Recovery LLP in London, where he focused on leading and expanding the firm's offerings to international clients. Mr. Williams has been admitted *pro hac vice* to the Bars of New Jersey, New York and Florida. He is a former ABI Vice President-International Affairs and represents ABI on the board of INSOL International. In addition, he has contributed to various standard texts and journals in the U.K. and the U.S. Mr. Williams has advised directors of companies in financial difficulties, primarily with regard to wrongful trading, misfeasance actions and director disqualification (including guiding them through such key issues as whether they should continue to trade and what steps should be taken), as well as a broad range of clients dealing with parties in financial difficulties or in formal insolvency. Mr. Williams is a former partner with SGH Martineau LLP in London and was head of the business recovery and insolvency group at a major regional law firm in Nottingham, England. He also has litigation experience in the Channel Islands, Irish Republic, the Isle of Man and Gibraltar.

Deborah D. Williamson is a member of Dykema Cox Smith in San Antonio and has practiced insolvency and restructuring law for over 30 years. She is regularly called on by clients in a variety of industries for her bankruptcy experience and advice regarding counterparty risk. She also serves as one of the 19 members of ABI's Commission to Study the Reform of Chapter 11. In 2011, Ms. Williamson received ABI's Lifetime Achievement Award. She travels frequently around Texas, the U.S. and the world to address colleagues and clients regarding bankruptcy issues, and has been involved in representing parties in oil and gas restructurings and bankruptcies for more than 30 years. Ms. Williamson authored *When Gushers Go Dry: The Essentials of Oil and Gas Bankruptcy, Second Edition* (ABI 2016) and *Bankruptcy Litigation Manual: What Civil Litigators Need to Know* (ABI 2007). She is recognized as a leader in her field by *Chambers USA* and has been selected by *Texas Super Lawyers* as one of the "Top 100 Lawyers," one of the "Top 50 Women Lawyers in Texas" and one of the "Top 50 Lawyers in Central Texas" since the honor's inception. Named one of *The Best Lawyers in America* for over two decades, she was recently included for a second time in *Texas Lawyer's Go-To Guide* (published every five years) as one of the top five bankruptcy attorneys in the state of Texas. Ms. Williamson co-chaired the Bankruptcy and Insolvency Litigation Committee of the Litigation Section of the American Bar Association. Previously, she served as managing director of Cox Smith prior to its merger with Dykema, and was responsible for the firm's business and client service strategies. She is currently a member of Dykema's executive board. Ms. Williamson is admitted to practice before the U.S. Supreme Court, the U.S. Courts of Appeals for the Fifth and Second Circuits, and the U.S. District Courts for the Northern, Southern, Western and Eastern Districts of Texas. She is Board Certified in Business Bankruptcy Law by both the Texas Board of Legal Specialization and the American Board of Certification. Ms. Williamson received her B.A. in political science with honors

from the University of Texas at El Paso in 1977 and her J.D. *cum laude* from the University of Houston Law Center in 1981.

Rafael X. Zahralddin-Aravena is a lawyer with Elliott Greenleaf in Wilmington, Del., and has more than 25 years of experience advising businesses in corporate and commercial litigation, insolvency, distressed M&A, compliance, corporate formation, corporate governance, commercial transactions, cyber law, regulatory actions and cross-border issues. In 2007, he founded the firm's Wilmington office, which specializes in business law and litigation in all federal and state courts. Mr. Zahralddin-Aravena represents clients in all aspects of bankruptcy and restructuring and has experience in international commercial law issues, including cross-border insolvency. He has represented dozens of creditors' committees and individual creditors, particularly trade creditors, in some of the largest bankruptcies filed in the U.S., including in key jurisdictions such as the Southern District of New York and the District of Delaware. Mr. Zahralddin-Aravena is an extensive writer and lecturer, and he is co-editor of the American Bar Association's *Reorganizing Failing Businesses* (3rd Ed. 2017). He was a tenure-track associate professor at Chapman University School of Law, where he taught international commercial and trade law and, prior to that, a Senior Writing Fellow at Georgetown University Law Center. He also clerked for Hon. Samuel L. Bufford of the U.S. Bankruptcy Court for the Central District of California. Mr. Zahralddin-Aravena has recently been recognized as a Top 50 Latino Lawyer by *Latino Leaders Magazine*, as a *Philadelphia Inquirer* Legal Influencer for bankruptcy law, by Martindale-Hubbell as an AV-Preeminent lawyer, as a Fellow of the American Bar Foundation, and as a *Pennsylvania Super Lawyer* for Debtor and Creditor Rights. Mr. Zahralddin-Aravena received his B.S. in architecture from the University of Virginia and his J.D. from Widener University School of Law, where he served as an articles editor for its law review and was published as a law student. In addition, he received his LL.M in international and comparative law from Georgetown University Law Center.

Catherine Bridge Zoller is a senior counsel for restructuring and insolvency in the European Bank for Reconstruction and Development's Legal Transition Team in Brussels, Belgium, which aims to promote an investor-friendly, transparent and predictable legal environment in the EBRD's countries of operations. Since joining the bank in 2012, she has led the EBRD's insolvency and restructuring legal reform work and has initiated a number of EBRD projects spanning from insolvency law reform to institutional and regulatory capacity building. She has also helped develop strategies for nonperforming loan resolution in Central, Eastern and South-Eastern Europe (CESEE) both as part of the Vienna Initiative 2 platform and outside the CEE in countries such as Kazakhstan, Mongolia, Turkey and Ukraine. In 2020, Ms. Zoller launched a major insolvency law assessment on restructuring tools across the 38 economies where the EBRD invests in response to the COVID-19 crisis, in partnership with the International Law Development Organization, INSOL Europe, INSOL International and UNCITRAL and in cooperation with the European Commission (www.ebrd-restructuring.com). Prior to joining the EBRD, she was a senior associate in the Restructuring and Insolvency department of Clifford Chance LLP, worked in the firm's London, Milan and Munich offices, and was seconded to Dubai, where she contributed to the reform of United Arab Emirates bankruptcy law. A U.K. and Canadian national, Ms. Zoller is a qualified solicitor in England ancd Wales and a graduate of Oxford University. She is fluent in French, German and Italian.