Market Intelligence

R&I 2022

Global interview panel led by Paul, Weiss, Rifkind, Wharton & Garrison LLP

LEXOLOGY
Getting the Deal Through

LEXOLOGY
Getting the Deal Through

Publisher
Edward Costelloe
edward.costelloe@lbresearch.com

Subscriptions
Claire Bagnall
claire.bagnall@lbresearch.com

Head of business development
Adam Sargent
adam.sargent@gettingthedealthrough.com

Business development manager
Dan Brennan
dan.brennan@gettingthedealthrough.com

Published by
Law Business Research Ltd
Meridian House, 34-35 Farringdon Street
London, EC4A 4HL, UK

Cover photo: shutterstock.com/g/IM_photo

ISBN: 978-1-83862-952-6

Printed and distributed by Encompass Print Solutions

R&I 2022

Global Trends

A partner in the restructuring department of Paul Weiss, Jacob Adlerstein has broad experience advising a variety of clients in bankruptcy cases and corporate restructurings, including debtors, official and ad hoc creditor committees and distressed investment funds. Jake's company-side representations include Hexion, Cumulus Media, Pinnacle Agriculture Holdings and AbitibiBowater, and recent creditor and private equity sponsor representations include Spanish Broadcasting System, Frontera Generation, Guitar Center, Ligado Networks, J. Crew, Jonah Energy, Cirque du Soleil, Associated Materials, GNC Holdings, PDVSA, EP Energy, American Tire Distributors, Bellatrix Exploration, Energy Future Holdings, Pacific Exploration, Dynegy and Aspect Software.

Jake is recognised by *The Legal 500* and he was named in Lawdragon's inaugural list of '500 Leading US Bankruptcy & Restructuring Lawyers'. In 2016, Jake's work in Aspect Software's Chapter 11 case was recognised by The M&A Advisor in its annual Turnaround Awards as its 'Information Technology Deal of the Year (Over $250MM)'. He regularly participates on panels sponsored by industry organisations, including Practising Law Institute.

The ongoing covid-19 pandemic, together with the measures (social distancing and otherwise) that governments took to combat it, continues to have a dramatic impact on large swaths of the global economy. Notwithstanding the impact of the pandemic, restructuring activity in 2021 essentially ground to a halt, a decline that started in late 2020. In large part fuelled by unprecedented levels of government support and stimulus, combined with easy access to liquidity in the debt and equity capital markets and the marked growth of private credit funds and related direct lending, many contributors report that their jurisdictions did not experience an uptick in actual insolvency filings in 2021, as observed by the authors of the chapters on Israel and the United States, among others.

For example, although the pandemic had a dramatic effect on Israel's economy, the contributors from that jurisdiction note that the most significant development in 2021 was the absence of the wave of corporate insolvencies that one would have otherwise expected. Similar observations were made in the United States, where the pandemic continued to cause significant disruptions, but nevertheless business failures remained at an historically low number. Among the reasons noted for this seemingly counter-intuitive trend were low interest rates, government intervention, and legislative relief. The contributors also noted the willingness of creditors to engage in consensual workouts with borrowers to stave off formal insolvency proceedings, at least temporarily. Whether this trend will continue in 2022 remains to be seen, particularly given the potential for rising interest rates in an inflationary economic environment.

The burst of legislative activity in 2020 continued into 2021, as governments moved to attempt to counteract the global market disruptions caused by the pandemic. Many of these efforts included legislation to modify insolvency regimes, at least temporarily, to facilitate access or streamline procedures. For example, as the authors of the chapter on Israel note, a temporary amendment to its insolvency statute allows companies to obtain a stay of proceedings order and protection from creditors without the need to file a formal insolvency proceeding to assist and encourage companies to reach a consensual resolution with their creditors. Similarly, the authors of the chapter on Mexico highlight proposed legislative reforms to introduce a special proceeding for unexpected events, such as a pandemic, that are currently under discussion.

Globally, companies in certain industries disproportionately affected by the pandemic continued to seek relief under applicable insolvency laws in the past year, most notably in the transportation, hospitality and real estate segments. For example, in Mexico, a creditor filed an insolvency proceeding for Interjet, a low-cost Mexican airline that at one time was one of the most important airlines in Mexico. In Israel, one of the most notable insolvency filings of the past year was by one of the

country's largest catering companies. And in the United States, a number of real estate companies filed for Chapter 11 protection, driven by the pandemic-related market disruption in the hotel and retail industries.

With global markets and liquidity at all-time highs, certain of the most notable insolvency filings in 2021 were focused on issues other than debt maturities and over-levered capital structures. For example, a number of recent high-profile insolvency filings in the United States stemmed from mass tort liabilities. Companies in the healthcare and pharmaceuticals sectors continued to use the Chapter 11 process to resolve substantial opioid-related claims through court-approved settlements, such as Purdue Pharma LP and Mallinckrodt plc, both of which filed for Chapter 11 protection in 2020 and sought to emerge from Chapter 11 in 2021. Companies in other industries facing mass tort liabilities similarly sought Chapter 11 relief, such as LTL Management, a newly created entity spun off from Johnson & Johnson to address its significant talc-related claims.

Across jurisdictions, as contributors to this volume of *Market Intelligence R&I* highlight, the extent to which any regime can be characterised as more creditor-friendly or debtor-friendly varies meaningfully. Importantly, these characterisations

> "Restructuring professionals will need to remain nimble and creative to help solve their clients' most challenging problems in the years ahead."

also remain fluid, as certain jurisdictions have evolved their approach over the years, migrating from debtor-friendly to creditor-friendly and vice versa. All of which underscores the critical importance of understanding the nuances and distinctions among the varied insolvency regimes that may be implicated by any cross-border restructuring transaction.

Finally, a common theme that transcends jurisdictional boundaries is the importance of identifying insolvency counsel with extensive experience in their field. Moreover, given the increasing complexity of today's insolvency transactions, it is essential that an insolvency counsel can field a cross-disciplinary team of specialists to protect and advance a client's interests in all facets of a restructuring transaction. If the pandemic taught us anything, it is that the future is uncertain. Restructuring professionals will need to remain nimble and creative to help solve their clients' most challenging problems in the years ahead.

Jacob Adlerstein
jadlerstein@paulweiss.com

Paul, Weiss, Rifkind, Wharton & Garrison LLP
New York
www.paulweiss.com

Austria

Markus Fellner is managing partner and head of the insolvency law and restructuring practice group. He is ranked in the top tier in this practice area, also by peers, and his impressive track record includes the representation of some of Austria's largest banks in restructuring mandates. Markus recently advised the core banks of the traditional Vorarlberg lingerie manufacturer Huber, also in connection with reorganisation proceedings initiated at the end of May 2020 with regard to individual companies of the Huber Group, and other cases such as Kremsmüller Industrieanlagen GmbH & Co KG and the Steinhoff Group. His other key areas of practice include banking and finance, corporate/M&A as well as dispute resolution.

Elisabeth Fischer-Schwarz was admitted to the Austrian Bar in 2017, and has been an attorney at law with Fellner Wratzfeld and Partners since that year. She has particular experience and knowledge in the areas of banking and finance, insolvency law and restructuring and dispute resolution. Elisabeth speaks German, English and French.

Florian Henöckl is an attorney in the insolvency and restructuring practice group at Fellner Wratzfeld and Partners. He also specialises in banking and finance, as well as corporate/M&A. He obtained a law degree from University of Graz and was admitted to the Austrian Bar in 2021.

1 In the past year, have you seen any developments or trends in the nature and volume of insolvency filings?

The first half of 2021 provided the lowest number of company bankruptcies in over 40 years. Compared with the first half of 2020, the number of company insolvencies decreased by around 45 per cent to 1,059. This decrease of company insolvencies despite the massive economic slump due to the covid-19 pandemic was caused by the measures that the Austrian government passed to combat the covid-19 crisis. Such measures included the granting of short-time work support and fixed-cost subsidies, the assumption of liabilities as well as the temporary suspension of the obligation to file for insolvency and the suspension of tax liabilities. Most of these measures have no longer been available since the third quarter of 2021.

Unlike the beginning of 2021, the fourth quarter of 2021 showed a different trend. Compared to the same time period in 2020 company insolvencies increased to a similar level as in the fourth quarter of 2019; 40 per cent of all company insolvencies in 2021 were opened in the fourth quarter. This rise in the insolvency rate – as experts since the beginning of the corona crisis have tended to predict – may lead to a new 'wave of insolvencies'.

2 Describe the one or two most notable insolvency filings in your jurisdiction in the past year.

Out-of-court restructurings, especially in the field of aviation and electromobility, have been on the rise. In 2021, there were – compared to 2019 – fewer major insolvencies such as the insolvency of EYEMAXX Real Estate AG with total liabilities of €200 million and Autobank AG with total liabilities of €120 million. Due to financial measures taken by Austrian government to prevent a 'wave of insolvencies', companies were often able to restructure their debt with creditors on an out-of-court basis.

3 Have there been any recent legislative reforms? Is there a perceived need for reform?

With the Directive on Restructuring and Insolvency (Directive (EU) 2019/1023), the European legislator enacted a framework providing an early restructuring mechanism for companies facing a likelihood of insolvency. The Austrian legislator transposed this directive into national law with the Austrian Restructuring Act, which came into force at the end of July 2021. This 'new' Austrian Restructuring Act is similar to the Austrian Business Reorganisation Act, which entered into effect in 1997, but ended up as 'dead' law.

Markus Fellner

Elisabeth Fischer-Schwarz

Florian Henöckl

"The first half of 2021 provided the lowest number of company bankruptcies in over 40 years."

Proceedings under the Austrian Restructuring Act are a hybrid of out of court and court monitored proceedings. The restructuring mechanism can be initiated at the request of the debtor in the case of a 'likelihood of insolvency', which is defined as (a) insolvency being imminent or (b) the equity ratio falling below 8 per cent and the notional debt repayment period exceeding 15 years. The purpose is to allow a debtor to avert insolvency and ensure the viability of its company.

The right to apply for the initiation of restructuring proceedings is only available to the debtor and not to third parties. The debtor retains, generally, but subject to certain restrictions, control over its assets. The key element is that the debtor – based on a restructuring plan – can gain a discharge of debt without the consent of all creditors involved.

The restructuring plan (section 27 of the Austrian Restructuring Act) must contain the proposed restructuring measures and their duration, the reduction and deferral of claims as well as any new financial support. In addition, the restructuring plan must describe the debtor's economic situation, in particular its assets, liabilities and the company. The affected creditors (including classification into creditor classes) as well as the unaffected creditors must be listed in the restructuring plan together with a factual justification for their inclusion or non-inclusion in the restructuring plan. A conditional forecast of the company's continued existence and a description of the necessary preconditions for the success of the plan must also be included.

The restructuring plan also should describe that – compared to insolvency proceedings – restructuring proceedings under the Restructuring Act are in the best interest of the creditors. To be binding on the parties the restructuring plan needs to be confirmed by the court; the discharge of debt also needs the approval of the court. The restructuring proceedings are also monitored by the court.

Around a half year after the Austrian Restructuring Act's entry into force, there are – perhaps due to the lack of publicity – no known restructuring proceedings under the Austrian Restructuring Act. According to the *Alpenländischer Kreditorenverband* (an Austrian association for the protection of creditors) no public restructuring proceedings have yet to be initiated. It cannot be precluded that the 'new' Austrian Restructuring Act will in the end share the same fate as the Austrian Business Reorganisation Act.

> "The right to apply for the initiation of restructuring proceedings is only available to the debtor and not to third parties."

4 | In the international insolvency field, have there been any legislative or case law developments in terms of coordination of cross-border cases? What jurisdictions are you most likely to have contact with?

With the Directive on Restructuring and Insolvency the European legislator – regarding the coordination of cross-border cases – also aims at providing proceedings fully compatible with the Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on cross-border insolvency proceedings, at least as far as to grant certain minimum principles of effectiveness. The Austrian legislator therefore aligned the restructuring mechanism with the Regulation (EU) 2015/848 in section 44 of the new Restructuring Act. Provided that the debtor makes the opening of restructuring proceedings public the proceedings are 'public collective proceedings' within the meaning of article 1 of the Regulation (EU) 2015/848.

Any judgment opening restructuring proceedings handed down by an Austrian court, as a court of a member state of the European Union, is recognised in all other member states of the European Union (article 19 of Regulation (EU) 2015/848). The judgment opening restructuring proceedings produces, with no further formalities, the same effects in any other member state as under the law of the state of the opening of proceedings (article 20 of Regulation (EU) 2015/848).

5 In your country, is there a particular court or jurisdiction that sees a higher concentration of insolvency filings? What is the attraction of that forum?

In principle, there is no possibility for forum shopping under Austrian law. Insolvency proceedings must be filed with the competent court at the registered office of the respective debtor. According to article 1 of the Regulation (EU) 2015/848 the courts of the member state within the territory of which the centre of the debtor's main interests (COMI) is situated have jurisdiction to open insolvency proceedings ('main insolvency proceedings'). COMI is defined as 'the place where the debtor conducts the administration of its interests on a regular basis and which is ascertainable by third parties'.

The debtor's COMI is determined at the time of filing for insolvency. Therefore, debtors can change the international jurisdiction and thus the applicable insolvency law by shifting the COMI to another EU member state in time in order to achieve easier debt relief. Insolvency proceedings – and public restructuring proceedings – opened in a member state are recognised in other member states of the European Union without further formalities as set out in article 19 and article 20 of the Regulation (EU) 2015/848.

For insolvency proceedings opened in a non-EU member state (irrespective of an international treaty or the reciprocity principle), the Austrian Insolvency Act provides for recognition of the effects of, as well as decisions rendered in such proceedings, where the centre of the main interests of the debtor is located in the respective foreign country and the insolvency proceedings are comparable to such proceedings in Austria, in particular if Austrian creditors are treated in the same manner as creditors from the state of the opening of proceedings. Recognition is denied if insolvency or composition proceedings have already been opened in Austria, or interim measures have been ordered, or recognition leads to a result that clearly conflicts with public policy.

6 Is it fair to describe your jurisdiction as either 'debtor-friendly' or 'creditor-friendly' in terms of how insolvency filings proceed?

Internationally, Austria is generally considered a creditor-friendly jurisdiction, as it does not provide for UK or US-style restructuring proceedings. However, the implementation of the Directive (EU) 2019/1023 on Restructuring and therefore

the possibility to have effective preventive restructuring measures is a step in the direction of achieving a balance between debtor and creditor-friendliness.

7 What opportunities exist for businesses wanting to purchase assets out of an insolvency, and how efficient is the process? What are the best ways to take advantage of opportunities in this area?

There are two possible ways of purchasing assets out of an insolvency, either by way of a share deal or by way of an asset deal.

In general, the insolvency administrator issues bidding conditions specifying what kind of transaction can be carried out and in what form. In practice, a share deal is particularly relevant in the case of holding companies that hold shares in subsidiaries and sell them during the insolvency of the holding company. On the other hand, if the operating company itself becomes insolvent, this normally results in an asset deal, which is subject to special conditions and can result in opportunities for the purchaser. Unlike in an asset deal with a solvent company, the employees (with the exception of the works council) must not be taken over

Photo: Shutterstock.com/ Maciej Bledowski and, in principle, there are also no liabilities transferred (an asset deal under the new Restructuring Act leads – unlike under the Insolvency Act – to a transfer of the liabilities). In practice, it is even common to partially close parts of the company so that only the 'healthy' parts of the company are sold.

The whole transaction must be already specified as accurately as possible in the bidding conditions in the interests of a fair and transparent process. If a best bidder is finally determined, if all assets or immovable assets are sold, the creditors' committee must decide on the sale and the debtor must be heard before the sale is approved by the court. Only once the court's approval decision becomes final does the purchase of assets become legally binding.

Markus Fellner
markus.fellner@fwp.at

Elisabeth Fischer-Schwarz
elisabeth.fischer-schwarz@fwp.at

Florian Henöckl
florian.henoeckl@fwp.at

Fellner Wratzfeld & Partners
Vienna
www.fwp.at

The Inside Track

What two things should a client consider when choosing counsel for a complex insolvency filing in this jurisdiction?

When selecting the right counsel for a complex restructuring or insolvency case, the following two key factors should be considered:

- Extensive legal expertise and experience, especially in the field of insolvency and restructuring law, but also in insolvency and restructuring-related fields (banking and finance, corporate/M&A, labour law), accompanied by business competence and understanding; and
- a proper law firm structure and access to an experienced partner network of national and international attorneys, auditors and tax advisers.

What are the most important factors for a client to consider and address to successfully implement a complex insolvency filing in your jurisdiction?

A successful implementation of a complex insolvency filing requires substantial preparation. The first step is to decide which kind of restructuring or insolvency proceeding fits the needs of the company: a restructuring on the basis of an out-of-court restructuring agreement, restructuring proceedings, reorganisation proceedings with/without debtor in possession or liquidation proceedings.

It is recommended to draft the key points of a reorganisation plan before the filing of the insolvency application and to present it together with the filing at the opening of the insolvency proceedings. A financing plan for the period after the opening of the insolvency proceedings helps to ensure the continuation of the business and should take into account the immediately necessary reorganisation measures, for example, closing the non-viable parts of the company. It is also necessary to convince the creditors to approve a reorganisation plan and provide financing.

What was the most noteworthy filing that you have worked on recently?

fwp advised, on an out-of-court basis, the financing banks of an aviation company and an electromobility company on the restructuring of its financings and implementation of the reorganisation measures and the takeover of parts of the business by a strategic investor. These two mandates are further examples of fwp contributing to successful restructurings by providing extensive multidisciplinary legal and business expertise and experience in an international context.

Brazil

Luiz Fernando Valente de Paiva is a partner at Pinheiro Neto Advogados, where he focuses on corporate reorganisation and bankruptcy, debt recovery and renegotiation, and litigation in general. He is a member of the National Council of Justice working group on the modernisation of insolvency proceedings and was a member of the Ministerial Committee that assisted in drafting the Brazilian Bankruptcy Law. Mr Paiva is founder and currently chairman of TMA Brasil. In 2018, he was named the best Insolvency & Restructuring lawyer in Brazil in the Lexology Client Choice awards, and Lawyer of the Year by *Best Lawyers*. He is recommended by *Chambers and Partners* (Band 1) and *The Legal 500*.

Thiago Braga Junqueira is a partner at Pinheiro Neto Advogados. He has worked in corporate restructuring and insolvency for 13 years and has extensive experience in representing debtors, equity partners, shareholders, creditors and investors in judicial and extrajudicial reorganisations, as well as in bankruptcy proceedings. He has also served as an international lawyer at Cleary Gottlieb Steen & Hamilton LLP. Thiago is recognised as a leading lawyer by *Chambers and Partners*, *The Legal 500*, *Benchmark Litigation* and *Leaders League*.

Carolina Kiyomi Iwamoto is a senior associate at Pinheiro Neto Advogados, where she focuses her practice on high-profile debt restructuring, corporate reorganisation and bankruptcy. Carolina has worked in several high-profile and cross-border cases, including the judicial reorganisations of OAS Group, OGX Group, OSX Group, PDG Group, Odebrecht and Atvos, as well as the out-of-court debt restructuring of JBS Group and Azul.

1 In the past year, have you seen any developments or trends in the nature and volume of insolvency filings?

In spite of the overall negative impact of the covid-19 pandemic, Brazilian courts registered a decrease in the number of insolvency filings during 2021 in comparison with 2020, which follows a trend seen in the comparison between 2020 and 2019 numbers. Statistics released by Serasa Experian indicate that the aggregate number of filings from January 2021 through November 2021 slightly decreased by 2 per cent for bankruptcy liquidation filings in comparison to the same period of 2020. Judicial reorganisation filings decreased by 30 per cent within the same period. The decrease applies generally to all sectors covered by the research, except for judicial reorganisation filings in the services industry.

2 Describe the one or two most notable insolvency filings in your jurisdiction in the past year.

In April 2021, Samarco Mineração SA filed for judicial reorganisation protection in what is one of the largest filings in Brazilian history and the largest filing in the mining industry with a total indebtedness exceeding 50 billion reais. Samarco is one of the largest producers of iron ore pellets, a raw material used in the fabrication of steel, and it faced significant distress following the collapse of the Fundão dam, in the City of Mariana, State of Minas Gerais, in Brazil. The Fundão Dam failure is considered the most impacting environmental accident in the country's history, and Samarco is facing a multibillion dollar set of environmental prosecutions. Samarco Mineração SA is controlled by BHP Billiton Brasil Ltda and Brazilian mining corporation Vale SA. The controlling shareholders – which are also the largest unsecured creditors of Samarco – have been supportive of Samarco's businesses and operations before and throughout the reorganisation proceedings. The reorganisation has a number of intricate legal issues, some of which will be matters of first impression to the Bankruptcy Court and parties in interest.

3 Have there been any recent legislative reforms? Is there a perceived need for reform?

The end of 2020 was marked by the long-awaited reform of Federal Law No. 11,101/2005 – the Brazilian Bankruptcy and Reorganisation Law. On 24 December 2020, the President of the Republic sanctioned Federal Law 14,112 of 2020, which overhauls the Brazilian Bankruptcy and Reorganisation Law with effect from 23 January 2021. The legislative reform introduced several and profound changes to

Luiz Fernando Valente de Paiva

Thiago Braga Junqueira

Carolina Kiyomi Iwamoto

"The end of 2020 was marked by the long-awaited reform of Federal Law No. 11,101/2005."

all three types of insolvency proceedings designed to business entities: the judicial reorganisation, the extrajudicial reorganisation and the bankruptcy liquidation. In 2021, Brazilian practitioners experienced the first cases where the provisions introduced by the legislative reform were put to the test.

The following are notable among the changes approved: the option for creditors to put forward an alternative judicial reorganisation plan; new rules on the sale of assets without succession to the debtor's obligations; rules on the approval of post-petition loans in judicial reorganisations and on priority claims if the debtor goes bankrupt; significant changes to the extrajudicial reorganisation process; changes to speed up the bankruptcy process and the debtor's return to business; the incorporation of rules on transnational insolvency proceedings; and new methods for instalment payments and restructuring of the debtor's tax liabilities, as well as new taxation schemes.

Among other things, Law 14,112 of 2020 also establishes: protection against potential transfer of liability with regard to the debtor's obligations for creditors that agree to the conversion of debt into equity; a stay period and constraints on the assets of the debtor under judicial reorganisation; conciliation and mediation measures to be taken before and during judicial reorganisation proceedings; a general meeting of creditors, including their waiver to this if alternative resolution methods have been agreed; a procedure for verifying the debtor's activities and the good standing of documents submitted, before the judicial reorganisation is granted; the option for farmers to file for judicial reorganisation; and rules on procedural and substantive consolidation. Law 14,112 also sets out that a bankruptcy decree does not reach beyond the bankrupt company itself, unless the 'manifest disregard doctrine' is applicable.

4 | In the international insolvency field, have there been any legislative or case law developments in terms of coordination of cross-border cases? What jurisdictions are you most likely to have contact with?

Law 14,112 of 2020 added significant features to the Bankruptcy and Reorganisation Law with respect to cross-border insolvency matters. It replicates, with some adjustments, the provisions of the UNCITRAL Model Law on Cross-Border Insolvency. As a result, Law 14,112 sets out some rules on access of foreign representatives to courts in Brazil, the method and requirements for recognition of foreign main and ancillary proceedings, authorisation for debtors and their representatives to act in other countries, methods of communication and cooperation between foreign authorities and representatives and the Brazilian jurisdiction, and the processing of concurrent proceedings.

"Law 14,112 of 2020 added significant features to the Bankruptcy and Reorganisation Law with respect to cross-border insolvency matters."

In our experience, transnational debtors with a centre of main interests in Brazil usually file for a judicial reorganisation in Brazil and ancillary proceedings abroad (if this feature is available). It is quite common in larger cases for the filing of a judicial reorganisation in Brazil and a US Bankruptcy Code Chapter 15 proceeding in the United States, or an additional insolvency filing in another country. Interaction and cooperation between jurisdictions is expected to be enhanced and more efficient with the new features added by Law 14,112.

5 | In your country, is there a particular court or jurisdiction that sees a higher concentration of insolvency filings? What is the attraction of that forum?

The current law establishes that insolvency filings are assigned to the court where the main place of business of the debtor is located (or the place where the debtor's branch is located, if the debtor has its main place of business abroad).

Our Bankruptcy and Reorganisation Law, however, does not contain a clear definition of the term 'main place of business', which creates room for legal uncertainty. Courts have generally developed their understanding to determine the main place of business as the centre of main interests (ie, where the debtor's core administration and decision-making processes are based). For example, in a number of cases, courts of the city of São Paulo have claimed jurisdiction over insolvency proceedings of debtors with operational activities in other locations on the basis that São Paulo is where the debtor has its administrative office and where the board's decision-making process takes place.

The State Court of São Paulo is widely known in Brazil for being a pioneer in creating first and second-level courts specifically assigned to hear insolvency and corporate matters. The judicial district of the city of São Paulo is one of the first districts to have created courts specialising in bankruptcy issues (which in Brazil are reviewed by state courts). The district of São Paulo now has three courts specialising in bankruptcy-related matters.

In October 2019, the National Council of Justice issued a recommendation to all state courts to create regional courts and special chambers to deal with insolvency cases. In regions where there are not sufficient cases to justify the creation of an insolvency lower court, state courts should create regional courts specialising in commercial issues, including bankruptcy matters. In December 2019, the State Court of São Paulo formalised the creation of regional courts specialising in corporate matters to oversee insolvency cases in other districts in the state of São Paulo, which represents an important step in the development of Brazilian insolvency practice. The São Paulo State Court of Appeals also pioneered the creation of a specialised chamber to hear appeals related to bankruptcy matters. Nowadays, São

Photo: Shutterstock.com/ Will Rodrigues

Paulo State Court has two specialised chambers to hear not only appeals related to bankruptcy issues, but also appeals related to corporate law in general.

However, São Paulo's successful experience has been followed by only a few other states throughout Brazil. The State Court of Rio de Janeiro followed the trend and, in 2021, the State Court of Minas Gerais also announced in 2022 second-level courts will be formed to specifically hear corporate matters.

6 Is it fair to describe your jurisdiction as either 'debtor-friendly' or 'creditor-friendly' in terms of how insolvency filings proceed?

The Brazilian insolvency system has traditionally been a shareholder- and debtor-friendly jurisdiction. From a creditor's perspective, this is probably one of the most relevant matters addressed in the modification of the Bankruptcy Law by Law 14,112 of 2020. Modifications introduced by Law 14,112 include creditors' ability to put forward an alternative judicial reorganisation plan if the debtor is unable to get its plan approved within the stay period (as extended, if that is the case). In the event that the debtor's judicial reorganisation plan is rejected (thus ruling out its confirmation by the courts, even by way of cramdown), the creditors holding more than half of the claims (in amount) represented at the general meeting of creditors may approve an additional 30 days for submission of an alternative plan by the creditors.

In these cases, the stay period will be extended for a further 180 days, counted from the end of the original stay period or from the date of the general meeting of creditors approving the submission of the alternative plan. To qualify for approval, the alternative plan must have written support from more than 25 per cent of all claims subject to judicial organisation or, alternatively, from more than 35 per cent of claims held by creditors represented at the former general meeting of creditors that rejected the debtor's judicial reorganisation plan. The alternative plan must meet the same formalities in place for the debtor's reorganisation plan and cannot impose on the debtor or its owners a greater burden than that otherwise ensuing from bankruptcy. The alternative plan must also provide for discharge of existing personal guarantees tendered in favour of the creditors that subscribe to or approve the alternative plan.

7 | What opportunities exist for businesses wanting to purchase assets out of an insolvency, and how efficient is the process? What are the best ways to take advantage of opportunities in this area?

Several modifications and new features introduced to the Brazilian insolvency system by Law 14,112 aim to foster a healthy, stable and competitive environment for business in insolvency proceedings.

Specifically concerning the sale and purchase of assets, the Brazilian Bankruptcy and Reorganisation Law now provides that the protection afforded to the buyer of a debtor's assets in the judicial reorganisation proceeding extends to certain cases of full sale of the debtor. Law 14,112 confirms that the 'separate production units' may encompass the debtor's assets, rights or other assets, whether tangible or intangible, taken separately or jointly, including equity interests. Law 14,112 also establishes that the sale of assets by the debtor – upon court authorisation or as provided for in the judicial or extrajudicial reorganisation plan – cannot be cancelled or voided after the legal transaction has been consummated and the debtor paid.

Protection is now also expressly extended to debt-to-equity transactions therefore addressing practical situations that were already faced by debtors and creditors in Brazilian judicial reorganisation proceedings.

In recent years, Brazilian practice has also seen a significant growth in debtor-in-possession (DIP) financing transactions, which are expected to be further encouraged by the modifications introduced by Law 14,112. The debtor may receive

"In recent years, Brazilian practice has also seen a significant growth in debtor-in-possession financing transactions."

court authorisation to enter into financing contracts secured by way of a lien or fiduciary sale of its own or third-party non-current assets and rights. If the debtor goes bankrupt, the DIP borrowings will have preference over all of the bankrupt debtor's pre- and post-petition claims (including cash repayment) except for those expenses essential to administration of the bankruptcy proceeding and labour-related claims made up of past wages due during the three months before the bankruptcy decree (up to five minimum wages per worker). If the funds have already been disbursed, the status of DIP loans and their collateral as a post-petition claim will remain unaltered even if the decision authorising the DIP loan is later reversed on appeal.

In the bankruptcy liquidation scenario, Law 14,112 gives the court-appointed trustee 60 days from appointment to put forward a detailed plan for sale of the assets with a corresponding time estimate capped at 180 days from the filing of each of the bankruptcy schedules. The proceeds may be apportioned as long as the class of recipient creditors has already had all proof of claims presented, regardless of formation of the general list of creditors. The term for discharge of the bankrupt's obligations will be three years from the bankruptcy decree if more than 25 per cent of the unsecured claims cannot be paid.

Luiz Fernando Valente de Paiva
lpaiva@pn.com.br

Thiago Braga Junqueira
tjunqueira@pn.com.br

Carolina Kiyomi Iwamoto
ciwamoto@pn.com.br

Pinheiro Neto Advogados
São Paulo
www.pinheironeto.com.br

The Inside Track

What two things should a client consider when choosing counsel for a complex insolvency filing in this jurisdiction?

Counsel to complex insolvency cases must have the ability to navigate through different areas of the law and a comprehensive understanding of client's position as a stakeholder. Complex restructuring cases often deal with insolvency matters per se but will also touch upon other areas of law, such as tax, labour, corporate (M&A) and banking issues. In addition, in Brazil, deals involving debtors in distress are often associated with existing court disputes therefore requiring counsel to balance litigation and negotiation approaches. In successful deals, counsel always factor in a comprehensive view of the client's goal in relation to other relevant stakeholders.

What are the most important factors for a client to consider and address to successfully implement a complex insolvency filing in your jurisdiction?

In Brazil, insolvency filings often when a debtor's financial and operational situation has deteriorated more than one would expect for a successful filing. Nevertheless, insolvency filings can be a great opportunity to sell or acquire assets, convert debt into equity, credit bid and invest in new resources with a higher interest rate. We encourage our clients to consider doing business within this insolvency context by gaining full knowledge of the profile of the insolvency filing (including the debtor's operational and financial situation) and mapping the main goals to be achieved in that scenario. The insolvency environment offers a variety of opportunities.

What was the most noteworthy filing that you have worked on recently?

We have been fortunate enough to be involved in pretty much all the high-profile cases filed since the Bankruptcy and Reorganisation Law was enacted in 2005. During 2021, our team has been actively involved in high-profile judicial reorganisation cases such as Samarco, Odebrecht, Oi Group and Renova Group and had led the out-of-court debt restructuring of Azul Linhas Aéreas SA. Other cases include Odebrecht Óleo e Gás, Constellation, OGX and OAS – and smaller cases in terms of indebtedness such as Usina Santa Teresinha, Saraiva and Zamin Amapá Mineração.

France

White & Case's Paris team is one of the most complete and developed in the market, with an interdisciplinary expertise and experience that is second to none.

White & Case is one of the very few international firms to offer such a high level of expertise in handling the most delicate and complex restructuring briefs and this is combined with the added value of the firm's corporate litigation expertise.

White & Case's Paris team closely follows and adapts efficiently to difficult environments and crisis situations, and is particularly known for its capacity to assist proactively to avoid foreseeable crises.

The team routinely works on complex restructurings, from negotiation and mediation to litigation and counselling. White & Case represents debtors, creditors, committees, fiduciaries and lender groups in formal bankruptcy and insolvency proceedings in courts worldwide, as well as in intricate out-of-court financial restructurings, recapitalisations and rescue financings.

The firm also represents buyers and sellers of distressed loans and claims, and in distressed merger and acquisition mandates.

Recently, the Paris team intervened in the restructurings of Vallourec, Europcar, Technicolor, Comexposium, Solocal, Arc Holdings, JJW Hotels and Resorts Group, Dream Yacht, THOM Group, Air Austral, Hertz, Swissport, Conforama, Antalis and Orchestra Premaman.

Photo: Shutterstock.com/ William Perugini

1 In the past year, have you seen any developments or trends in the nature and volume of insolvency filings?

The covid-19 outbreak in France has caused significant disruptions and slowdowns of business activity. In this uncertain economic environment, many companies with high levels of debt are in trouble and experiencing unprecedented difficulties. As a result, companies across different sectors may face a range of adverse financial consequences, with the most obvious being liquidity needs. There is also a new concern regarding the soaring price of raw materials.

To address the situation, during 2020 and 2021, the government implemented immediate measures aimed at assisting French companies throughout the current crisis. As a result of those protective measures, insolvencies reached a historically low level in France: at the end of 2021, corporate bankruptcies (for most company sizes and in most sectors) were at their lowest level compared to the pre-covid-19 figures from 2019, with a 50 per cent drop in insolvency proceedings and a 10 per cent decrease in pre-insolvency situations. While the use of the state-guaranteed loan regime has been a vital solution to remedy short-term liquidity needs for some companies, for others it is most likely only a temporary cure. Many companies will be required to call upon additional financial support to repay their debt and, above all, to cover their liquidity needs.

That being said, the current economic cycle is quite unusual. Some companies are over-leveraged, while the financial markets are in turmoil and more and more investors are attracted to the high-yield debt market. This trend offers new perspectives on both the debt and equity markets. In fact, most of the major deals in the restructuring market have involved a reorganisation of both debt and equity. Far beyond the traditional restructuring and insolvency paradigms, this crisis has highlighted the need for multidisciplinary, timely and targeted action involving a deep reshuffling of the often complex equity and debt structure.

2 Describe the one or two most notable insolvency filings in your jurisdiction in the past year.

From our point view, the most notable fillings and restructurings during the covid-19 outbreak were the following:

- *Comexposium* case: four companies of Comexposium group, one of the world's leading event organisers, initiated safeguard proceedings in September 2020, which led to the adoption of safeguard plans through imposed repayment schedules in October 2021. This case serves as an example of probably one of the last imposed safeguard plans (term-out) adopted under the law prior


Saam Golshani


Alexis Hojabr


Alice Léonard


Amélie Jungbluth

to the implementation of Ordinance No. 2021-1193 dated 15 September 2021 (see below), which has profoundly changed the French restructuring and insolvency regime, and no longer allows, among others, the term-out in safeguard proceedings (although it is still possible in reorganisation proceedings). Several instances of litigation are currently ongoing in the *Comexposium* case both in France and in the UK.

- *Vallourec* case: White & Case advised Vallourec's ad hoc group Crossholder (ie, bondholders and RCF holders) on the negotiation, delivery and implementation of a restructuring agreement backed by the majority of Vallourec's financial creditors, avoiding a free-fall safeguard of Vallourec, a world leader in premium tubular solutions for the energy markets and for demanding industrial applications. This agreement was entered into between the various stakeholders on 3 February 2021. It primarily envisaged (i) a major deleveraging of Vallourec, representing approximately €1.8 billion, which was more than half of the principal amount of its debt; and (ii) the refinancing of the residual debt and the securing of significant liquidity and operational financing. The implementation of this agreement and the completion of the financial restructuring contemplated thereby enabled the company to consolidate its balance sheet and reduce its debt and interest expenses to a suitable level that accounted for the consequences and uncertainties related to the coronavirus and oil markets crises.

3 Have there been any recent legislative reforms? Is there a perceived need for reform?

A directive was adopted by the European Union in June 2019 and a reform has been adopted in France.

European Directive No. 2016/0359 was adopted on 6 June 2019 by the European Council. It provides a common framework for the bankruptcy law of all member states. Among other things, it encourages the introduction of out-of-court proceedings, the cross-class cramdown and new-money privilege.

The French PACTE (Action Plan for Business Growth and Transformation) provides for the capacity of transposition of European Directive No. 2019/1023 adopted on 20 June 2019 by the European Council, especially the introduction of cross-class cramdown, recognition of subordination agreements and diminution of duration of proceedings. It also provides for the governmental capacity to amend security law by way of an order.

Due to the covid-19 pandemic, certain temporary measures were enacted by the French government to adapt French restructuring and insolvency laws to the

"Over the past 15 years, French insolvency law has undergone major reforms, with changes happening at a greater pace than they have during the past century."

health crisis. Notably, French Ordinance No. 2020-341 dated 27 March 2020 adapts the rules applicable to companies facing difficulties during the covid-19 outbreak (in particular, more flexibility and amendment of usual deadlines).

Likewise, the purpose of French Ordinance No. 2020-596 (dated 20 May 2020) is (i) to consolidate the provisions of Ordinance No. 2020-341 dated 27 March 2020, and (ii) to adapt the provisions of Book VI of the Commercial Code to make these more effective. French Ordinance No. 2020-1443 (dated 25 November 2020) amends previously adopted emergency rules to reflect the evolution of the health and economic crisis.

European Directive No. 2016/0359 quoted above was transposed by French Ordinance No. 2021-1193 (dated 15 September 2021) effective from 1 October 2021 with respect to preventive and insolvency proceedings (with limited exceptions) opened as of such date only and Decree No 2021-1218 of 23 September 2021 was taken for the implementation of this Ordinance.

Over the past 15 years, French insolvency law has undergone major reforms, with changes happening at a greater pace than they have during the past century. Fundamental changes have taken place in the context of a global financial crisis, giving rise to a new and more appropriate set of legal tools. The nature and extent of the reforms have necessitated careful consideration from both financial actors and practitioners. Some entirely new procedures have been introduced into law, effectively preventing difficulties from arising. The reforms have also enabled the reorganisation of difficult cases, impacting cases and major actors beyond the sole area of insolvency law (including public and listed groups).

That said, France is still perceived as a debtor-friendly jurisdiction in this matter, which remains a real incentive for creditors, particularly financial institutions, to opt for other jurisdictions or to create alternative credit protection through sophisticated (and often expensive) collateral structures (such as the Double LuxCo although this is becoming obsolete). However, creditor-friendly measures have increased in France in recent years, particularly with the transposition of European Directive No. 2016/0359, which aims to rebalance powers between the stakeholders.

Most recently, French Ordinance No. 2021-1192 (dated 15 September 2021), which reforms the law of securities, came into force on 1 January 2022, with the exception of provisions that require implementing regulations (these will enter into force on 1 January 2023 at the latest). This Ordinance intends to reinforce the effectiveness of guarantees and security interests.

4 In the international insolvency field, have there been any legislative or case law developments in terms of coordination of cross-border cases? What jurisdictions are you most likely to have contact with?

The new EU Insolvency Regulation (Regulation 2015/848), which replaced the previous EU Regulation on Insolvency Proceedings from 2000, came into force on 26 June 2017. The updated Regulation aims, in particular, to make cross-border insolvency proceedings more efficient and to establish a common framework for the benefit of all stakeholders.

The main features of the Regulation are: the extension of its application to pre-insolvency proceedings that promote the rescue of economically viable but struggling companies and give entrepreneurs a second chance; the creation of a pan-European online insolvency registers; the possibility of avoiding the opening of multiple proceedings and preventing forum shopping; the updating of the rules on secondary insolvency proceedings to, inter alia, extend to 'pre-insolvency' or 'hybrid' proceedings; amendment of the rules on information regarding creditors and the lodging of claims; and the introduction of new procedures to facilitate cross-border coordination and cooperation between multiple insolvency proceedings in different member states relating to members of the same corporate group. On 2 November

2017, an ordinance was published in France to specify the terms of the Regulation and provide for its implementation.

Regarding other jurisdictions that we have the most contact with, prior to Brexit, a flourishing restructuring business was developing in the United Kingdom as the English courts approved pleas of arrangement for companies incorporated outside England. We were therefore most likely to have contact with UK jurisdictions.

Since Brexit, the UK is, however, no longer subject to the EU Insolvency Regulation. Any insolvency proceedings opened in EU member states – including France – will therefore not be automatically recognised in the UK.

Without the benefit of the EU Insolvency Regulation, recognition of proceedings and other relief taking place in EU member states within the UK (EU to UK) could still be considered based on the UNCITRAL Model Law on Cross-Border Insolvency, which has been adopted in UK law via the Cross-Border Insolvency Regulations 2006 (CBIR). That being said, the *Gibbs* principle, under which only an English court may discharge debt arising under English law, even if that debt has first been discharged in a foreign insolvency proceeding (*Bakhshiyeva ex rel Int'l Bank of Azerbaijan v Sberbank of Russia* [2018] EWCA (Ch) 59 [158(1)] (Eng)), may give rise to challenges where debtors would seek to discharge or amend English law-governed debt through foreign proceedings. This could mean that English law debts will require a particular process under the aegis of the English court.

Moreover, the assistance provided by the UNCITRAL Model Law is much more limited for recognition of UK restructuring and insolvency proceedings within EU member states (UK to EU), as only four EU member states have adopted it (Greece, Poland, Romania and Slovenia). As a result, it will be harder for UK-based debtors to gain recognition and deal with assets located in France. The recognition of insolvency judgments made in the UK will now be subject to the exequatur process.

Based on these considerations, it seems likely that cross-border restructurings involving companies with assets and businesses in both the EU and the UK will take longer, be more costly and be more likely to involve parallel proceedings. As an interesting and recent illustration, we can notably mention Comexposium, which reflects the interactions that can occur between French and UK law. The main outstanding senior facility was governed by an English-law contract with an exclusive jurisdiction clause for English courts in the frame of French safeguard proceedings. As a result, some senior creditors under the facility documentation decided to refer to the English courts in order to force the debtor to comply with its disclosure undertakings under the terms of the English law debt agreement. Finally, the English High Court approved that request and has ruled that the provisions of the facility agreement remain valid and enforceable despite the opening of safeguard proceedings in France.

5 | In your country, is there a particular court or jurisdiction that sees a higher concentration of insolvency filings? What is the attraction of that forum?

In France, the courts that see the highest concentration of insolvency filings are the specialised insolvency courts created by Law No. 2015-990 of 6 August 2015 (for example, Bobigny, Bordeaux, Dijon, Évry, Grenoble, Lyon, Marseille, Montpellier, Nanterre, Nantes, Nice, Orléans, Paris, Poitiers, Rennes, Rouen, Toulouse and Tourcoing).

The specialised insolvency courts have jurisdiction over companies that reach certain thresholds in terms of number of employees or turnover, and that are subject to safeguard, reorganisation or liquidation proceedings. It is interesting to note that the new thresholds resulting from Ordinance No. 2021-1192 for the mandatory constitution of classes of affected parties are partly aligned with those of specialised insolvency courts. With respect to conciliation proceedings, specialised insolvency courts have jurisdiction, provided that it has been requested by the public prosecutor or where the president of the court has given his or her consent.

Specialised insolvency courts also have jurisdiction with respect to insolvency proceedings falling within the scope of European Insolvency Regulation 2015/848 when the debtor's centre of main interests is located in France or where the debtor is located outside the territorial scope of the European Insolvency Regulation but has an establishment in France.

Among those courts, Paris and Nanterre naturally remain the most active for bigger deals and cases, given the number of global actors legally incorporated in both areas.

Forum shopping is very limited in France as the territorial jurisdiction depends on the localisation of the registered office. In the case of a change of address of the registered office within six months before the opening of a proceeding, the relevant jurisdiction is the one related to the former registered office.

6 Is it fair to describe your jurisdiction as either 'debtor-friendly' or 'creditor-friendly' in terms of how insolvency filings proceed?

The founding law of the French bankruptcy regime of 1985 was quite debtor-friendly and, as a result, the French restructuring system was perceived as a debtor-friendly system for a very long time. However, a certain shift began in 2005 with, in particular, the introduction of committees and the strengthening of controllers' power.

The shift was further emphasised with Decree No. 2014-326 dated 12 March 2014, which, for example, granted creditors the right to propose a restructuring plan (when committees are constituted). More recently, the Law dated 6 August 2015 introduced a shareholder squeeze-out system under which shareholders may be forced to sell their shares if they do not consent to share capital increases required to redress the distressed business.

This shift in the French legislation has been followed by the French courts, which have favoured a number of lender-led restructurings carried out by lenders, allowing lenders or a group of lenders to take control of the debtor, outside the reach of its existing shareholders (mainly financial sponsors). Furthermore, a number of hedge funds have strengthened their focus on the French market, providing liquidity to French banks willing to sell their claims on the secondary market. In line with these changes and with a view to attract and encourage new investors, the temporary framework implemented in the context of the covid-19 health crisis introduced new measures, such as the safeguard/reorganisation privilege benefiting creditors who have made a new cash contribution to the debtor in the context of the observation period of such proceedings with the authorisation of the supervisory judge (juge-commissaire), or for the implementation of the safeguard or reorganisation plan adopted or amended by the court. In cases of subsequent insolvency proceedings, claims benefiting from this privilege shall be paid in priority (with certain exception) and shall not suffer debt write-offs or debt rescheduling without the relevant creditors' consent. This privilege has been permanently implemented through the Ordinance No. 2021-1193 dated 15 September 2021. Another key change resulting from this Ordinance is the introduction of the cross-class cramdown mechanism, whereby a continuation plan may, under certain conditions, be adopted and bind dissenting creditors notwithstanding a negative vote of one or several classes. These new rules finally adopt a more economic approach to creditors' rights and rebalance their economic power and negotiating leverage to reflect their level of securitisation. The windfall effects of out of the money creditors or even of shareholders are now restricted or may even be stopped. Finally, we could say that our jurisdiction is no more

> "These new rules finally adopt a more economic approach to creditors' rights and rebalance their economic power and negotiating leverage to reflect their level of securitisation."

shareholder-friendly but remains protective of the interests of both the debtor and the creditors to the extent that they are in the money.

7 What opportunities exist for businesses wanting to purchase assets out of an insolvency, and how efficient is the process? What are the best ways to take advantage of opportunities in this area?

Businesses wanting to purchase assets out of an insolvency can do so either under a classic sale plan or under a pre-pack sale.

A classic sale plan involves the transfer of assets, contracts and employment contracts of the debtor to a third-party purchaser without the consent of the transferred party. As the sale plan is constructed as an asset deal, debt and claims are therefore not transferred to the purchaser of the distressed business (except notably for security interests granted in favour of creditors who financed the acquisition of the secured assets).

Another advantage for companies wanting to purchase assets out of an insolvency is the sale price, which is typically very low, as the main criteria retained by French courts are the number of jobs preserved and the purchaser's ability to continue operating the business.

However, the sale plan process is interpreted as an open bidding process where there is no exclusivity to the benefit of one bidder and the courts often base their decision (and election of the final bidder and transferee) on mostly employment-driven criteria.

The pre-pack sale plan concept was introduced in France in a decree dated 12 March 2014. Pre-pack sales consist of companies appointing an ad hoc representative or a conciliator in charge of supervising a plan for the partial or total sale of the company's assets, which will then be adopted under in-court insolvency proceedings after obtaining the public prosecutor's consent and the formal (but not binding) opinion of the participating creditors. Pre-pack sales offer the option to avoid compulsory public advertising for submission of offers and can therefore provide the buyer chosen under the amicable proceeding with a certain form of exclusivity. Pre-pack sales are also faster than asset plans implemented under reorganisation proceedings.

Saam Golshani
saam.golshani@whitecase.com

Alexis Hojabr
alexis.hojabr@whitecase.com

Alice Léonard
alice.leonard@whitecase.com

Amélie Jungbluth
amelie.jungbluth@whitecase.com

White & Case LLP
Paris
www.whitecase.com

The Inside Track

What two things should a client consider when choosing counsel for a complex insolvency filing in this jurisdiction?

In the event of a complex deal, counsel needs to be creative with all the possibilities offered by French insolvency law. Therefore, the client must ensure that counsel not only knows all the tools offered by the law – including those resulting from the recent reform – and has extensive experience of domestic and cross-border insolvency matters, and also understands the business including numbers and economics. These are key to a successful sophisticated restructuring.

Furthermore, lawyers in this matter need to know the courts and preferably be familiar with all the other parties involved (judicial administrators, creditors' representatives, liquidators, financial experts, etc).

What are the most important factors for a client to consider and address to successfully implement a complex insolvency filing in your jurisdiction?

The most important factors to be considered when conducting a successful and complex insolvency filing in France are the choice of the appropriate legal counsel (and also financial advisers) and the appropriate strategy and global timeline (including the choice of the proceedings, jurisdiction, etc) sufficiently in advance and at the very early stages of financial distress or other difficulties.

What was the most noteworthy filing that you have worked on recently?

The *Comexposium* case highlights the impact of the outbreak of the covid-19 health crisis on the events industry. This case raises several unregulated law issues relating notably to the continuation of contracts during both the observation period and the execution of safeguard plans, and questions the relevance of certain legal rules such as the constitution of creditors' committees – now replaced by the classes of affected parties – that are mandatory but, however, not sanctioned if not complied with.

Ireland

William Greensmyth is based in Walkers' Ireland office where he is a partner and head of the firm's insolvency and dispute resolution group. In particular, Will advises financial institutions and private equity firms in relation to distressed loan situations, enforcement options and available remedies, and he acts for insolvency practitioners appointed as receivers, liquidators or examiners.

Aisling Marron is based in Walkers' Ireland office where she is a senior associate in the firm's insolvency & dispute resolution group. Aisling's principal practice areas are formal insolvency procedures, debt recovery and commercial litigation. In particular, Aisling advises financial institutions, private equity firms and other creditors in relation to security enforcement, strategy and remedies available in distressed loan situations.

1 In the past year, have you seen any developments or trends in the nature and volume of insolvency filings?

Throughout 2021, corporate insolvency rates remained low in Ireland due to the continued combination of government supports and creditor forbearance, both of which seek to mitigate the impact of the covid-19 pandemic. By way of illustration, a Deloitte Ireland report for the third quarter of 2021 indicated a 36 per cent decrease on corporate filings as compared to the third quarter of 2020.

For those entities that did file during 2021, the sectors most impacted were services, construction and hospitality.

The vast majority of these filings were creditor voluntary liquidations – commenced where directors have recommended to shareholders that the companies be wound up due to inability to pay debts as they fall due.

In respect of examinership, Ireland's statutory preventative (debtor-in-possession) restructuring tool for the rescue of a company or group of companies, there were very few examinership filings in 2021, particularly in comparison to 2020.

2 Describe the one or two most notable insolvency filings in your jurisdiction in the past year.

The most significant filing in Ireland in 2021 was undoubtedly the restructuring of Norwegian Air Shuttle (a Norwegian listed company) and its Irish-based asset management platform through the Irish examinership process in parallel with the reconstruction process in Norway.

The Irish High Court managed restructuring process converted some €5.2 billion of liabilities into a debt stake of some 25.4 per cent equity and facilitated the refocusing of Norwegian from an international carrier into a regional offering.

In approving the Norwegian examinership scheme, the Irish High Court delivered three written judgments that demonstrate the willingness and capacity of the Irish courts to deal with large and complex global restructuring cases.

3 Have there been any recent legislative reforms? Is there a perceived need for reform?

A new 'out-of-court' rescue process for small companies, the Small Company Administrative Rescue Process or 'SCARP', was enacted in 2021. The process seeks to borrow some features from the well-established examinership rescue process, but with one fundamental difference being the limited role of the Irish courts proposed for SCARP. The relative high cost of examinership for smaller companies

William Greensmyth

Aisling Marron

has historically been found to be a barrier for entry. Furthermore, while a facility for smaller companies to file for examinership in the lower courts was introduced a number of years ago, it did not gain much traction as the cost of the process was not sufficiently altered. With SCARP, the Irish government is seeking to provide a more affordable restructuring tool with an 'out-of-court' process.

For those who may be interested in the expected next wave of Irish non-performing loan sales, which will undoubtedly emerge in some form or another once the economy reopens, SCARP may need to be factored into any due diligence or modelling exercise given the possibility of those non-performing loans being reduced through a streamlined administrative process that incorporates cross-class cramdown.

The high level features of the legislation include the following:

- SCARP will be available to small and micro companies as already defined under Irish company law (turnover does not exceed €12 million; balance sheet total does not exceed €6 million; number of employees does not exceed 50 employees);
- it will be commenced by way of a resolution rather than by an application to court;

- an insolvency practitioner will be appointed by the company to act as a 'process advisor' to engage with its creditors and to formulate a rescue plan for the company – the company will continue to be managed by its directors;
- SCARP will have a 70 day period (the creditors of the company to vote on rescue plan within 42 days, followed by a cooling-off period for 21 days post-vote);
- recourse to court for creditor objections to rescue plan within 21 days of the vote;
- the rescue plan will be approved where one impaired class of creditors vote in favour of it – this allows for a cross-class cramdown;
- state creditors (Revenue Commissioners and Department of Social Protection) may be excludable from the process; and
- there is no automatic stay on proceedings by creditors.

Separately, in respect of Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019 on preventive restructuring framework, while many of the constituent elements of the directive are provided for within the current examinership framework, Ireland notified the European Commission of its intention to avail itself of the extension to implementation of the Directive to 17 July 2022.

4 In the international insolvency field, have there been any legislative or case law developments in terms of coordination of cross-border cases? What jurisdictions are you most likely to have contact with?

The past 24 months have seen a number of Irish commercial court decisions on schemes and examinerships that place Ireland firmly on the map for cross-border restructurings.

In the past 12 months alone, we have seen not one but four significant written judgments in relation to schemes of arrangement and examinership (Ireland's cross-class cramdown procedure).

The Norwegian Air examinership involved a Norwegian reconstruction process and a US Chapter 15 application. It also addressed the interaction between an Irish examinership and the Cape Town Convention. The *Norwegian Air* judgment adopted Australian case law (*VB Leasing v Wells Fargo*) in determining that the requirement to 'give up' possession did not extend to the actual physical redelivery of the aircraft.

5 In your country, is there a particular court or jurisdiction that sees a higher concentration of insolvency filings? What is the attraction of that forum?

Yes, the Commercial Court of the High Court of Ireland is the court most frequently used for insolvency matters.

> "It is not an exaggeration to say that Ireland has led the way from an EU member state perspective in this regard."

This Court offers a number of advantages – it is a fast-track court with a deliberately truncated timeline from entry into the Court to hearing of the matter.

It also benefits from a specialist panel of judges with a commercial approach.

6 | Is it fair to describe your jurisdiction as either 'debtor-friendly' or 'creditor-friendly' in terms of how insolvency filings proceed?

On the restructuring side, Ireland could be considered to be a debtor-friendly jurisdiction insofar as we have a tried and trusted internationally recognised debtor-in-possession rescue process known as examinership, which has the benefit of three decades of jurisprudence. It is not an exaggeration to say that Ireland has led the way from an EU member state perspective in this regard. Ireland has had a procedure that allows for cross-class cramdown for over 30 years. However, Ireland, being a common law jurisdiction, is also creditor-friendly, as it recognises and respects party autonomy. The Irish courts abide by the well-established common law rules on principles of contractual interpretation derived from the speech of Lord Hoffmann in *Investors' Compensation Scheme Ltd v. West Bromwich Building Society*.

This is vitally important for financial institutions and private equity clients dealing with counterparties in Ireland to have confidence that their agreements will be upheld. Similarly, for the most part, it is possible for creditors to enforce their security in Ireland without having to make any applications to court.

7 What opportunities exist for businesses wanting to purchase assets out of an insolvency, and how efficient is the process? What are the best ways to take advantage of opportunities in this area?

It is a feature of examinership that the examiner, the appointed insolvency practitioner, may seek expressions of interest to invest in the company. This is a well-established process, which is quite efficient, given that the examinership process is limited in time to 100 days (150 days during the covid-19 pandemic). The Irish courts have laid down principles (in both the Eircom and Ladbrokes examinerships) regarding an examiner's engagement with potential investors upholding the primacy of the examiner's commercial judgment in relation to the choice of investor, which is subject to review by the court only to the extent that it is so utterly unreasonable and absurd that no reasonable man would have done it. This provides purchasers and investors with a lot of reassurance about the process.

Where a secured creditor is disposing of secured assets via the appointment of a receiver, these assets can be sold on a pre-pack receivership basis, shortly after the appointment of the receiver. To satisfy the receiver's statutory duty to obtain the best price reasonably obtainable at the time of sale, the receiver is likely to require at least one independent valuation of the assets.

William Greensmyth
william.greensmyth @walkersglobal.com

Aisling Marron
aisling.marron@walkersglobal.com

Walkers
Dublin
www.walkersglobal.com

The Inside Track

What two things should a client consider when choosing counsel for a complex insolvency filing in this jurisdiction?

We would advise clients to drill into how much experience your chosen counsel have on complex cross-border mandates. This is particularly so where complicated issues of jurisdiction recognition have been rendered even more complex post-Brexit. Choosing lawyers with knowledge of the courts and the judges that regularly hear insolvency cases, and of working with the leading insolvency practitioners in Ireland, is also vital.

What are the most important factors for a client to consider and address to successfully implement a complex insolvency filing in your jurisdiction?

The importance of detailed pre-planning cannot be overstated. This requires the client and its advisers, both legal and financial to be fully briefed on all matters of relevance, in particular what the creditor mix is (local versus international) and what the relationship with creditors in the recent period has been.

Where there are employees who may be impacted by the insolvency filing, it is critical that a plan is put in pace to communicate with the employees and to comply with local consultation period requirements where redundancies may result.

Finally, if the insolvency filing in Ireland is one allied to several across a number of jurisdictions, we have always found that clear lines of communication between advisers in each jurisdiction greatly assists in ensuring work streams are progressed with the overall aim of the restructuring in mind.

What was the most noteworthy filing that you have worked on recently?

We acted as Irish legal and tax counsel to Hertz Global Holdings Inc, the world's largest rental car company, in relation to its successful Chapter 11 restructuring of US$19 billion of debt and return of US$1 billion of value to shareholders. Hertz has successfully emerged as a financially and operationally stronger company.

New investors provided US$5.9 billion of new equity capital and the company raised US$2.8 billion of new corporate financing) including an undrawn US$1.25 billion revolver) and successfully placed US$7 billion of new ABS financing with an all-in yield of less than 2 per cent. All creditors are being paid in full, in cash, and shareholders are receiving a mix of cash, stock and warrants.

Israel

Danit Rimon heads Tadmor Levy's insolvency and restructuring practice group. Danit has extensive experience in a wide range of corporate and finance transactions, including mergers and acquisitions, private equity investments, debt and equity financing, and collaterals. In addition, Danit specialises in all aspects of corporate recovery, insolvencies, creditor arrangements and rehabilitation of distressed companies. She regularly represents directors, trustees, lenders and other creditors of financially distressed companies and has acted in the largest corporate recovery cases in Israel.

Danit assisted the Ministry of Justice in certain issues related to the wording of the Israeli Insolvency Law and the regulations under it, and participated in meetings of the Knesset's Constitution Committees that discussed the Insolvency law. Danit frequently lectures in directors' training courses on liability of officers of insolvent companies, and at conferences hosted by the Israeli Bar Association and other institutions.

Danit has recently entered the most prestigious official list, which includes the Israeli leading lawyers and accountants in the field of corporate recovery, who can serve as trustees appointed by the courts in the most complex insolvency proceedings of corporations.

Photo: Shutterstock.com/ Wang An Qi

1 In the past year, have you seen any developments or trends in the nature and volume of insolvency filings?

The past year, like 2020, has been unpredictable due to the outbreak of covid-19. While towards the end of 2020 it seemed the health crisis might approach its final hurdle, during 2021 and due to a re-eruption of several variants, it has begun to sink in that the pandemic may stay with us for the foreseeable future.

Obviously, the continued spread of the virus and the restrictions imposed by the government on the labour market and commerce have made dramatic impacts on the economic markets.

While it was expected there would be an influx of companies entering insolvency proceedings due to financial distress the health crisis caused, whether directly or indirectly, we have not yet witnessed an outstanding increase in the number of corporate insolvency filings in Israel. While we may yet experience a noticeable increase in the number of companies filing for insolvency, it is worth noting that according to data published by the Israeli Commissioner of Insolvency and Economic Rehabilitation Proceedings, there was an approximately 40 per cent increase in insolvency filings by individuals.

There may be several reasons why we have yet to see a significant rise in the number of insolvency filings by corporations in Israel. The first possible reason is that financial lenders (banks and other financial institutions) are still demonstrating considerable flexibility and grace towards companies unable to fully meet their obligations. To date, and likely until the health crisis abates, lenders have no clear incentive to demand immediate repayment of their debts. As is customary in Israel, in many cases lenders are granted a floating charge to secure their debts. It is likely that lenders are concerned about the value of the assets being seized under the charge and the repayment they would receive from enforcing the charge, and accordingly are in no rush for immediate enforcement.

Another possible reason is that suppliers, landlords, service providers and other company stakeholders are more inclined to reach debt-repayment settlements with their clients, understanding that the alternative (ie, the collapse and liquidation of their clients' enterprises), is likely to be far worse.

However, perhaps the most important reason is that some companies, particularly those that were thriving and financially stable prior to the onset of the pandemic and veered into insolvency almost overnight, are making sincere efforts to avoid filing for insolvency. One of the main reasons companies are reluctant to initiate insolvency proceedings is that under Israeli law filing for insolvency can result in the current shareholders and management losing control over the company. Acknowledging the disadvantage of the law, the Israeli legislature has

Danit Rimon

attempted to encourage companies that have been affected by the health crisis to initiate legal procedures to settle their debts, by enacting a temporary amendment to the Israeli Insolvency and Economic Rehabilitation Law, 2018 (the Insolvency Law and the Amendment, respectively), under which a company may be granted a stay of proceedings order without the need to initiate a 'classic' insolvency proceeding, and hence without transferring management of the company to an appointed trustee. Since the Amendment came into force, the vast majority of companies have chosen to initiate proceedings under the Amendment rather than apply for classic insolvency proceedings. The Amendment will be discussed in detail below.

Due to the nature of the pandemic, which has necessitated various restrictions on trade and industry, and caused a shortage of certain products and consequently an increase in production prices, the crisis mainly affects operating companies, such as manufacturers, retailers and other companies that sell products or provide services. Naturally, the first to be directly affected are companies engaged in tourism, such as airlines, travel agencies, hotel chains and so forth. However, over the long run we may see the collapse of more companies or other sectors that have been affected by indirect consequences of the pandemic, such as an increase in the price of inputs, shipping, etc.

2 | Describe the one or two most notable insolvency filings in your jurisdiction in the past year.

One of the most notable and high-profile insolvency filings in the past year was by one of the largest catering companies in Israel. In November 2021, the company, owned by Apax Israel Fund, filed an application for stay of proceedings under the Amendment, for the purpose of reaching a debt settlement with its creditors. Its debt, as of the filing date of the application was estimated at 100 million shekels. The court rejected the application and forced the company to initiate insolvency proceedings, stating, inter alia, that its financial difficulties began long before the outbreak of covid-19 and that it consequently is not entitled to benefit from the advantages of the Amendment. Accordingly, and as the law directs, the court appointed a trustee to manage the company during the insolvency period and authorised him to publish a tender for acquiring the company.

Eventually and after no other proposals were received, the company was sold to the founder and the former owner of the company, who had sold it to Apax in 2015 at a value of 200 million shekels, for a paltry sum of 3.2 million shekels.

The case raised an interesting legal question, which is whether a significantly higher offer that was submitted after the deadline had passed should be accepted. The court ruled, in essence, that the consideration of fairness of the procedure towards the bidder who met the terms of the tender is superior to the principle of maximising creditors' repayment, and therefore rejected the late proposal.

3 | Have there been any recent legislative reforms? Is there a perceived need for reform?

On 15 September 2019, shortly before the outbreak of covid-19 and exactly six months before Israel's first general lockdown, the Insolvency Law came into force. The Insolvency Law consolidates all former legislation and case law accumulated over the decades in the area of insolvency. Until the enactment of the Insolvency Law, insolvency laws applying to both corporations and individuals were composed of various provisions found in a multitude of laws and based mainly on judgements given over the years by Israeli courts. Alongside the enactment of the Insolvency Law, the Insolvency and Economic Rehabilitation Regulation, 2019, also came into force.

> "One of the most notable and high-profile insolvency filings in the past year was by one of the largest catering companies in Israel."

The Insolvency Law only applies to insolvency proceedings initiated after it entered into effect. Insolvency proceedings initiated beforehand remain subject to the former legislation – the Companies Ordinance (New Version), 1984, the Companies Regulation (Liquidation), 1987 and the Companies Law, 1999. The Bankruptcy Ordinance (New Version), 1980, and the Bankruptcy Regulations, 1985, apply to individual proceedings initiated before September 2019.

While the Insolvency Law adopted many former laws and judgments, it also includes substantial changes. For example, for the first time, the Law imposes liability on directors and CEOs of insolvent companies if they are considered to have failed to make reasonable efforts to reduce the scope of the insolvency (corresponding to section 214 of the English Insolvency Law).

Although the Insolvency Law is largely comprehensive and constitutes a significant legislative reform in Israel, it naturally does not provide an adequate and satisfactory response for certain issues arising from the historic, economic crisis that the Israeli, and indeed the global economy, has endured just several months after its entry into force. Therefore, due to the unique financial situation we currently face and in order to help companies overcome the financial distress they encounter as a result of the global financial crisis, the legislature enacted a temporary amendment to the Insolvency Law, which is valid for one year (with possibility for its extension by an additional year). The Amendment came into force on 18 March 2021.

The Amendment allows companies to receive a stay of proceedings order and protection from creditors without a formal insolvency order, but only as part of 'soft' proceedings to approve debt settlements with creditors. This venue, prior to the Amendment, was not possible under the Insolvency Law, and a company seeking a stay of proceedings order, even as part of rehabilitation, had only one route – to apply for an insolvency order. To the extent that the court does issue an insolvency order as requested, an external trustee who conducts the company's business from thereon in is appointed over the company. Concern over losing control of their company deters many from applying for a court order. Under the Amendment, the court appoints an administrator with limited powers and the present management of the company continue to run the company.

The purpose of the amendment is to provide relief to debtors that have run into financial difficulties following the outbreak of the coronavirus, and to assist and encourage them to reach understandings with their creditors, as a substitute for initiating insolvency proceedings.

As part of the Amendment, all debtors are given the opportunity to apply for a stay of proceedings to formulate a debt settlement. This is because arrangements between debtors and creditors have many benefits, including a chance for continued economic relations with creditors in the future, and positive social motivations for debtors and shareholders in corporations, and so forth.

4 In the international insolvency field, have there been any legislative or case law developments in terms of coordination of cross-border cases? What jurisdictions are you most likely to have contact with?

Chapter 9 of the Insolvency Law deals with international insolvency proceedings. The arrangement set out in the Insolvency Law is intended to enable the efficient handling of insolvency proceedings that have international aspects. Prior to the enactment of the Insolvency Law, Israeli legislation did not regulate international aspects of insolvency law. The arrangement in the Insolvency Law regarding international insolvency proceedings is based on studies by the United Nations Commission on International Trade Law (UNCITRAL), of which Israel is a member, that developed a model for regulating international insolvency proceedings.

The Insolvency Law has regulated several issues to facilitate better coordination of cross-border cases. First, it allows a foreign officeholder to apply to the Israeli courts for an order to initiate proceedings against a debtor facing insolvency.

Second, it stipulates that the status of foreign creditors and their rights regarding the initiation of and participation in insolvency proceedings are identical to those of Israeli creditors. Third, it establishes the procedure for the recognition of foreign insolvency proceedings by the Israeli courts. The Insolvency Law stipulates that if an Israeli court recognises the foreign proceeding, it may order the suspension of the repayment of the debtor's debts and grant a stay of proceedings against it, as well as order the suspension of any transfer of rights in the debtor's assets or any charge over its assets.

Jurisdictions most likely to be involved are the US and Europe. In many cases, Israeli companies are headquartered in Europe or the US, or have other business relationships in those jurisdictions. Therefore, and in order to prevent unilateral actions being taken by foreign creditors, insolvency proceedings outside Israel are required.

Photo: Shutterstock.com/ Vitaly Sosnovskiy

> "Until the enactment of the Insolvency Law, it could be outright said that Israel was 'creditor-friendly' in terms of the way insolvency filings were managed."

5 In your country, is there a particular court or jurisdiction that sees a higher concentration of insolvency filings? What is the attraction of that forum?

The Insolvency Law states (unchanged from the previous legislation) that with respect to a corporate debtor, as opposed to an individual, the competent court for hearing the debtor's insolvency case is the district court in the jurisdiction where the corporation is registered or where its main place of business or assets are located. Therefore, any debtor or creditor interested in filing insolvency proceedings against a company must initiate the proceedings in the relevant district court under the aforesaid definition. However, it should be noted that when a secured creditor applies for the enforcement of charges and the appointment of a receiver, the competent court to hear the application is to be agreed upon by the parties in the charge note.

In Israel there are six judicial districts: North district, Haifa district, Tel Aviv district, Central district, Jerusalem district and South district.

The largest judicial district in general, and that which hears a higher concentration of insolvency filings is the Tel Aviv district, as the business centre of Israel and the base for many companies.

6 Is it fair to describe your jurisdiction as either 'debtor-friendly' or 'creditor-friendly' in terms of how insolvency filings proceed?

Until the enactment of the Insolvency Law, it could be outright said that Israel was 'creditor-friendly' in terms of the way insolvency filings were managed. There was a rather low threshold for a creditor to initiate insolvency proceedings against a debtor and a clear preference for maximising the repayment of the debts to creditors, as opposed to preserving the debtor's rights and rehabilitating their enterprise. Despite the fact that before the Insolvency Law came into force we witnessed a trend in favour of debtors and their rights, the Insolvency Law unequivocally states that debtor rehabilitation is one of the overriding principles of the new law. The name of the law itself, legislature's wording, even includes 'Economic Rehabilitation' to emphasise its importance in conducting insolvency proceedings against debtors.

As a result, there are several provisions in the Insolvency Law aimed at rehabilitating the debtor. For example, the conditions for initiating insolvency proceedings by a creditor have been refined and require a creditor applying for an insolvency order to prove the debtor is insolvent. Another example is that the Insolvency Law explicitly states that if certain conditions are met, the court must grant an order for the operation of the corporation for the sake of its economic rehabilitation (as opposed to a liquidation order).

In summary, the Insolvency Law reflects the legislature's changed approach, and in turn, that of the courts, thereby rendering the insolvency proceedings more 'debtor-friendly.'

7 What opportunities exist for businesses wanting to purchase assets out of an insolvency, and how efficient is the process? What are the best ways to take advantage of opportunities in this area?

Under the Insolvency Law, once an insolvency order is granted (either as part of a rehabilitation or liquidation process), the court appoints an impartial trustee with the authority to sell the company or its assets. In order to sell the assets of a company undergoing insolvency proceedings, the trustee will ordinarily publish an announcement via Israeli media (and, in the case of an international company, via international media) requesting proposals and will detail the procedure for submitting bids for the purchase of the debtor's assets. The trustee will also specify the deadline for submitting proposals.

Following the deadline for bid submissions, and assuming that several bids are received, the trustee will hold a bidding process between the various bidders or negotiate with each of them in an endeavour to improve and consolidate one of the offers. It should be noted that the trustee is not obligated to choose the highest bid, and may evaluate other factors such as the bidder's economic stability and the likelihood of obtaining the creditors' approval for selling the company's assets to a specific bidder.

In most cases, the sale and purchase agreements are drafted by the trustee and cannot be changed by a bidder. Of course, in complex cases, and in significant financial acquisitions, the terms may be negotiated between the parties.

Currently, when many stable companies may find themselves in distressed conditions, investors may face unique opportunities and even enjoy the advantages of insolvency procedures and purchase a company or its assets free and clear of any encumbrance.

Danit Rimon
danit.r@tadmor-levy.com

Tadmor Levy & Co
Tel Aviv
www.tadmor.com

The Inside Track

What two things should a client consider when choosing counsel for a complex insolvency filing in this jurisdiction?

The most important factors when choosing counsel are extensive knowledge and in-depth experience in the field of insolvency, for example, having represented both debtors and creditors. It is very important that the counsel has experience in the rehabilitation of companies rather than only in liquidation of companies. In light of Israel's new, comprehensive Insolvency Law, we advise engaging counsel familiar with the new legislation and able to leverage the benefits provided under the Insolvency Law and the several options it offers. We also advise engaging counsel from a leading law firm, as insolvency proceedings often raise issues from other areas of law such as labour, competition/antitrust, tax and litigation.

What are the most important factors for a client to consider and address to successfully implement a complex insolvency filing in your jurisdiction?

The success of an insolvency proceeding significantly depends on the financial situation of the debtor at the time of initiating proceedings. The earlier the company files with the court, the greater the likelihood of its rehabilitation and reaching an amicable arrangement with creditors. However, under Israeli law, in most cases the shareholders lose control over the company once an insolvency order is granted, and we recommend companies endeavour to secure voluntary creditor arrangements out of court in advance by consulting with attorneys who specialise in insolvency and corporate recovery. The sooner a company takes action and enlists the help of professionals, the higher its chances of rehabilitation are.

What was the most noteworthy filing that you have worked on recently?

In early 2021, a leading construction company in financial difficulty asked for legal advice on reaching an arrangement with creditors before one of them, unilaterally, opened insolvency proceedings against it. The controlling shareholders were in advanced negotiations with one of the largest infrastructure companies for the sale of all their company holdings. It was decided that the company would file for a 'soft' insolvency proceeding under paragraph 10 of the Insolvency Law. The court recently approved the creditors' settlement, which allowed both the company to avoid a lengthy and cumbersome procedure and the creditors to receive repayment earlier.

Mexico

Jorge de Haro González at Martinez, Algaba, de Haro y Curiel specialises in civil and commercial litigation, and has extensive experience in bankruptcy, financial and banking regulation related disputes. Throughout his career he has represented various banking and financial institutions in bankruptcy and restructuring procedures with a high degree of complexity, where Mr de Haro has advised his clients for the successful recovery of their interest. His professional practice has been recognised in several publications, in both national and foreign legal rankings.

Javier Curiel Obscura's main areas of practice include civil, commercial, administrative and constitutional litigation, insolvency, and domestic and international arbitration. He has a strong corporate background that enables him to provide sophisticated advice on complex disputes, representing clients on banking, finance, insurance, telecommunications, aviation, real estate, as well as on bankruptcy, insolvency and debt restructurings. Within the financial sector, Mr Curiel represents major banks, insurance companies and pension funds. His professional practice has been recognised in several publications, in both national and foreign legal rankings.

Alejandro Legaspi Lanz's practice focuses mainly on bankruptcy, financial, insurance and banking regulation disputes. Throughout his professional practice, he has successfully advised and represented various credit and banking institutions in the most important bankruptcy proceedings of the past few years, achieving in all those cases satisfactory results for his clients. His professional practice has been recognised in several publications, in both national and foreign legal rankings.

1 In the past year, have you seen any developments or trends in the nature and volume of insolvency filings?

According to figures published by the Federal Institute of Commercial Insolvency Specialists (IFECOM) (an auxiliary body of the Federal Judicial Council whose functions include authorisation, designation and supervision of the specialists – visitors, conciliators and receivers – appointed to aid federal judges in administrative, commercial, industrial, economic and financial matters), there were 30 insolvency proceedings filed in 2021 and admitted before federal district courts. Of these, 18 were requests submitted by debtors and 12 were insolvency petitions filed by creditors against their commercial debtors.

For insolvency proceedings filed during 2021, there was no specific trend with respect to particular business sectors, with the debtors being among producers and service providers across a range of activities.

As a result of the coronavirus outbreak, the slowdown of Mexico's economy and the decrease in investment in the private sector, many companies throughout Mexico, and around the world, are suffering severe consequences both financially and in terms of business models, in most cases resulting in restructuring agreements with creditors being sought by means of commercial insolvency proceedings.

2 Describe the one or two most notable insolvency filings in your jurisdiction in the past year.

In 2021, one of the most notable insolvency proceedings has been Altán Redes, a Mexican company responsible for designing, developing, operating and marketing the 'Red Compartida', a shared network built for carriers delivering what is described as 4.5G LTE voice and data that allows for easy migration to 5G, aiming to improve low levels of mobile phone penetration and network coverage in the country. Altán Redes filed for insolvency in 2021 and was declared commercially insolvent in November 2021.

Another notable insolvency proceeding filed in 2021 has been Interjet, a low-cost Mexican airline that once became one of the most important airlines in the aviation industry in Mexico. Interjet began to struggle financially in 2019 and stopped operations in 2020. In 2021, a creditor filed for Interjet's insolvency proceeding, but has not yet been declared as such.

"In 2021, one of the most notable insolvency proceedings has been Altán Redes."

3 Have there been any recent legislative reforms? Is there a perceived need for reform?

On 12 May 2000, the Commercial Insolvency Law was published in the Mexican Official Journal, and it entered into full force and effect the next day. This Law replaced the 1943 Law Governing Suspension of Payments and Bankruptcy and all other legal provisions superseded by the provisions of the then new Commercial Insolvency Law.

According to its preface, the Commercial Insolvency Law has the principal purpose of creating a modern regulatory framework to allow the conservation of companies undergoing a financial and economic crisis. To this end, the figure of 'conciliation' was created to make sure that the company and its creditors reach an agreement for the payment of the company's liabilities over a reasonable period. If reaching a reorganisation agreement is not feasible, the Commercial Insolvency Law establishes a procedure for the orderly liquidation of the company's assets and rights while attempting to maximise the proceeds of the sale and applying the resulting funds to the payment of the company's liabilities, following a fair order and preference regarding the differences between the creditors concerned.

The Commercial Insolvency Law maintains the federal judge as the central body and director of the commercial insolvency proceedings; however, as previously stated, the Law recognises that the judge must be aided in the performance of his or her functions by specialists in the administrative, commercial, industrial, economic and financial aspects of the case, so that the judge's efforts can be focused on strictly legal tasks. As a result, the Commercial Insolvency Law created IFECOM. According to the indications of the Commercial Insolvency Law and the general rules issued to this effect by this body, specialists are appointed by means of a random procedure.

In 2007, the Commercial Insolvency Law underwent several reforms, most importantly, the addition of a pre-packed reorganisation proceeding, whereby the company and the majority of its creditors may file for a proceeding in which a pre-agreed reorganisation agreement is accompanied by an insolvency petition. Thus, once the company has been declared commercially insolvent, the reorganisation agreement is submitted for court approval.

In a pre-packaged proceeding, the judge decides whether to declare the company commercially insolvent based on information provided by the company and the majority of its creditors, without having to perform a verification to determine the company's insolvency status. Once the commercial insolvency ruling has been issued by the judge, the insolvency procedure is conducted in the same way as any other.

> "Despite the intended efforts of the reform of the Commercial Insolvency Law, there are still cases in which the courts have illegally extended injunctive measures."

In 2014, the government adopted a major banking sector reform (the Financial Reform), which reformed the Commercial Insolvency Law, as well as other legislation. One of the main purposes of the Financial Reform was to eliminate legal gaps in the Commercial Insolvency Law that permitted the courts to interpret the legislation broadly and on a case-by-case basis.

Furthermore, the Financial Reform also introduced certain provisions regulating inter-company debts to determine whether the company is to be declared commercially insolvent or be approved for a reorganisation agreement between the company and its creditors.

Despite the intended efforts of the reform of the Commercial Insolvency Law, there are still cases in which the courts have illegally extended injunctive measures, notwithstanding if the company has not been declared commercially insolvent, allowing the merchants not to comply with their financial obligations.

On 9 August 2019, the Commercial Insolvency Law was amended to incorporate provisions that would allow majority state-owned companies to request to be declared commercially insolvent or in bankruptcy.

Members of the Chamber of Deputies are planning to propose a legislative reform to the Commercial Insolvency Law to introduce a special proceeding for fortuitous or unexpected events, such as the coronavirus outbreak. This reform is still being discussed and has not yet been formally submitted for legislative approval.

We consider that there is still a need to reform the Commercial Insolvency Law, given that there are matters not yet properly regulated, such as the application of injunctive measures or conditions that do not adjust to reflect current market practices. This lack of regulation has led to companies taking advantage of the insolvency process, to the detriment of creditors' rights.

4 In the international insolvency field, have there been any legislative or case law developments in terms of coordination of cross-border cases? What jurisdictions are you most likely to have contact with?

The Commercial Insolvency Law contemplates several provisions that regulate assistance and interaction between Mexican courts and foreign courts in connection with procedures involving insolvency brought in respect of Mexican companies with an establishment, place of business or assets abroad, and of foreign companies with an establishment, place of business or assets in Mexico.

Our interpretation of the Commercial Insolvency Law indicates two classes of foreign procedures in these types of situations: (1) a principal foreign procedure, which is defined as one brought against a company in a foreign state that has its principal place of business in that foreign state, and (2) a non-principal foreign procedure, defined as one brought against a company that has its principal place of business in Mexico but also has an establishment abroad.

The provisions of the Commercial Insolvency Law are clear and congruent in the matter of the acknowledgement of a foreign procedure in respect of a Mexican company that has an establishment abroad. In this case, there are provisions that permit the Mexican judge to work in a coordinated manner with the foreign court to have the proper measures adopted with respect to the assets that the company has and the activities that the Mexican company performs abroad.

In the case of the acknowledgement of a foreign procedure in respect of a foreign company that has an establishment in Mexico, the Commercial Insolvency Law states that the rules regarding the verification visit must be observed to determine whether the foreign company is in fact found to fall within the scope of the law to be declared commercially insolvent. If so, the Mexican judge will issue a ruling to declare the foreign company commercially insolvent, and the commercial insolvency procedure will be followed in accordance with the provisions of the Law,

provided that the effects of this declaration are limited to the foreign company's establishment in Mexico.

For a foreign procedure to be recognised by the Mexican courts, a petition must be brought before the court by the foreign representative, which is defined by the Commercial Insolvency Law as the person or body (including someone designated provisionally) empowered in the foreign procedure to manage the reorganisation or liquidation of the assets or business of the company or to act as the representative for the foreign procedure. The appearance of the foreign representative before the Mexican courts does not imply submission to the jurisdiction of the Mexican courts by the foreign representative nor of the assets and businesses of the company.

In our daily practice, we have dealt with both insolvency and bankruptcy proceedings in the bankruptcy courts in New York.

Photo: Shutterstock.com/ Aliaksei Putau

> "If a company is subject to an insolvency proceeding, the best way for an interested party to acquire a portion or all the company's assets would be at the bankruptcy stage."

5 In your country, is there a particular court or jurisdiction that sees a higher concentration of insolvency filings? What is the attraction of that forum?

The federal district judge with jurisdiction in the place where the company has its domicile is competent to preside over the commercial insolvency proceeding. The Commercial Insolvency Law indicates that, in the case of legal entities domicile should be understood to mean the corporate domicile and in the event that such a domicile is 'unreal', it shall be deemed to be the place where the entity has its main place of business.

Regarding this idea of an unreal corporate domicile, in practice we have observed that several judges have assumed competence in respect of the commercial insolvency proceeding of a company on the basis of its main place of business, irrespective of the fact that it has its corporate domicile elsewhere.

Because of the foregoing, insolvency proceedings are filed all across the country; however, according to the records published by IFECOM, the courts located in Mexico City have the highest concentration of insolvency proceedings.

6 Is it fair to describe your jurisdiction as either 'debtor-friendly' or 'creditor-friendly' in terms of how insolvency filings proceed?

The Commercial Insolvency Law establishes practically the same requirements and conditions for debtors who file their own petition as it does for creditors who demand their debtors' insolvency. This means that, regardless of how the insolvency or bankruptcy proceeding is filed, the same procedural phases have to occur for the company to be declared commercially insolvent or in a state of bankruptcy.

The exception to this rule is the pre-packaged insolvency procedure provided by the Commercial Insolvency Law, in which the insolvency court decides whether to declare the company commercially insolvent based on the information provided by the company and the majority of its creditors, without having to perform a verification.

Notwithstanding the above, and as we previously explained, we believe the Commercial Insolvency Law does not properly regulate specific circumstances, such as the application of injunctive measures, which have allowed companies to take advantage of these situations to the detriment of creditors' rights.

7 What opportunities exist for businesses wanting to purchase assets out of an insolvency, and how efficient is the process? What are the best ways to take advantage of opportunities in this area?

If a company is subject to an insolvency proceeding, the best way for an interested party to acquire a portion or all the company's assets would be at the bankruptcy stage.

To the extent that the company and its acknowledged creditors are unable to execute a reorganisation agreement during the maximum conciliatory term of one year established by the Commercial Insolvency Law or if the company or its creditors file a bankruptcy petition and this is accepted by the insolvency court, the company will be declared bankrupt.

At this point, the objective would be to sell all the assets and rights of the company and apply the resulting proceeds to the payment of the company's debts, in the order and preference established by law.

In contrast to the conciliatory stage (where the conciliator's objective is to reach a reorganisation agreement), upon declaration of a company's bankruptcy, management is handed over to a specialist, called the receiver, who is also appointed by IFECOM and whose main objective, as set out above, is to sell all the company's assets to repay its debts.

The receiver may ask the judge to authorise the sale of any asset of the estate by means of a procedure other than a public auction, when he or she deems that a higher value would be obtained in this manner.

Furthermore, under his or her responsibility, the receiver may proceed with the sale of assets of the estate, without a public auction, when the property requires immediate sale because it cannot be conserved without deteriorating, or when it is exposed to a significant fall in price, or which conservation is too costly compared to its value.

After a period of six months from the initiation of the bankruptcy stage, if the estate assets have not all been sold, any interested party may make an offer for any asset remaining, indicating the purchase price and a corresponding price guarantee. If there is no opposition deemed valid by the judge, either from the company, the acknowledged creditors or the interveners, the judge will order the receiver to hold a public auction for the sale of the property concerned, indicating this offer as the minimum reference price for the award of the property at auction.

The offer received will be considered to be a bid in the auction, and the person who submitted the offer may not improve it or make a higher bid.

Jorge de Haro González
j.deharo@mah.com.mx

Javier Curiel Obscura
j.curiel@mah.com.mx

Alejandro Legaspi Lanz
a.legaspi@mah.com.mx

Martinez, Algaba, de Haro y Curiel, SC
Mexico City
www.mah.com.mx

The Inside Track

What two things should a client consider when choosing counsel for a complex insolvency filing in this jurisdiction?

In complex insolvency proceedings, a client should take into consideration the firm's experience in the area of bankruptcies and restructurings, as well as its capacity to undertake actions in respect of any litigious aspects of the insolvency procedure. A client should also analyse the firm's infrastructure and capacity to represent it in the city where the procedure is filed. Few Mexican firms have the capability to litigate in several jurisdictions. Clients should also consider the capacity of the firm's experts to provide dispute-oriented consulting services to meet their needs.

What are the most important factors for a client to consider and address to successfully implement a complex insolvency filing in your jurisdiction?

The first thing a company should consider before filing for insolvency is whether it can convince its creditors, or the majority of them, to pre-agree the terms of the restructuring. In our experience, pre-packed reorganisation proceedings have all turned out successfully. If this is not possible, the company, with the assistance of the conciliator, has to work very closely with creditors during the proceeding to structure a reorganisation plan that is both acceptable to creditors and allows for the continued viability of the company's operations after the agreement has been signed. Requests for injunctive measures to be applied during the proceeding must be carefully assessed for their effects on the company's business activities.

What was the most noteworthy filing that you have worked on recently?

The most recent noteworthy filings we have worked on, and continue to work on, is Grupo Senda Autotransportes, SA de CV and its subsidiaries, which are leading providers of bus services in Mexico. We are working on having our client's claims and guarantees duly recognised and ranked by the Bankruptcy Court, while contesting certain illegal interim measures and negotiating a restructuring plan. This case has the additional challenge of being conducted in Monterrey, Nuevo León.

We also continue to work on the insolvency proceeding of Oro Negro, a Pemex contractor supplying rigs. This involves the multiple commercial and political interests involved in the proceeding, and the related litigation in multiple jurisdictions such as New York, Norway and Singapore.

United Arab Emirates

Sharon Lakhan is an Australian qualified lawyer and partner and Regional Head of Dispute Resolution at Global Advocacy, focusing on litigation in the UAE onshore and free zone courts.

She advises clients and oversees Global's dispute resolution team in civil and commercial litigation pertaining to insolvency, general commercial litigation and criminal law. She has particular experience in cross-border and multi-jurisdictional cases and enforcement of foreign judgements. Working closely with the firm's local litigators, she is uniquely placed to advise on matters spanning common law and civil jurisdictions in the region.

Sharon has been involved in ground-breaking cases before the UAE's free zone courts in the DIFC and ADGM, including a number of significant decisions on insolvency and jurisdiction.

Hassan Al Shaqsi, is senior partner at Global, and one of its founding members. He has over 24 years' experience practising commercial, civil and criminal litigation. Hassan acts for a range of clients and specialises in construction, labour, banking and insurance disputes. As a UAE national, he is licensed to appear before all courts of the UAE and possesses a superior knowledge of the civil and shari'ah law systems. He has specialist litigation experience in onshore bankruptcy.

Photo: Shutterstock.com/Monicami

1 In the past year, have you seen any developments or trends in the nature and volume of insolvency filings?

The bankruptcy and insolvency regime in the United Arab Emirates is still in its infancy, and, comparative to other jurisdictions, largely untested. The UAE has a unique legal landscape, with civil law being generally applicable throughout the country, but with geographically limited economic free zones of the Dubai International Financial Centre (DIFC) established in 2005 and the Abu Dhabi Global Market (ADGM) established in 2015 that have their own commercial laws largely based on common law, with courts whose procedures are modelled on those of the English courts. These free zone jurisdictions are typically referred to as 'offshore' jurisdictions, in contrast to the 'onshore' jurisdiction that applies throughout the rest of the UAE.

The DIFC and ADGM have each enacted their own insolvency laws, being the DIFC Insolvency Law 2019 (repealing and replacing the DIFC Insolvency Law No. 3 of 2009) and the ADGM Insolvency Regulations 2015 respectively.

The onshore Federal Bankruptcy Law, Federal Decree Law No. 9 of 2016 (as amended) that is applicable to corporate and merchant/sole trader insolvencies was enacted in 2016. Prior to 2016, onshore bankruptcy was governed by rather limited provisions in the UAE Civil Code, which were largely unused.

The existence of different jurisdictions and different insolvency regimes within the country has the potential to create novel challenges for the recognition and enforcement of onshore and offshore insolvency orders.

Given the relative infancy of the insolvency regimes in the UAE, it is difficult at this time to pinpoint trends in filings, particularly as it is only in the past few years that significant filings have been made under the Federal Bankruptcy Law. It is expected that the availability of the new procedures onshore will break down previous market resistance to taking bankruptcy proceedings, and the general trend is anticipated to be an increasing number of filings. Over the past few years we have seen significant filings impacting business in the healthcare, finance and retail sectors.

2 Describe the one or two most notable insolvency filings in your jurisdiction in the past year.

In 2021, an individual debtor applicant, Mr Khalifa Al Muhairi (in his capacity as a merchant, or sole trader) filed an application to open bankruptcy procedures under the Federal Bankruptcy Law and sought to join 29 related parties to that application on the basis that their assets were integrated and not easily separated. The joined parties included the UAE-based KBBO Group, which holds assets in a number of

sectors including the healthcare and food sectors, and Emirates Hospitals Group. In July 2021, the Abu Dhabi Court of First Instance granted the application and issued an order to commence bankruptcy procedures against the 30 debtors.

The Abu Dhabi Court's bankruptcy commencement order provided for, among other things, the appointment of a single trustee, and a moratorium on legal proceedings against the debtors, which is provided for in the Federal Bankruptcy Law.

Following objections filed by several of the largest creditors to the enormous task being conducted by a single expert, the Abu Dhabi Court ordered the appointment of a committee of bankruptcy trustees made up of a local UAE expert and two members of an international advisory firm who are tasked with reviewing and providing recommendations to the Court on the validity of the approximately 30 billion dirhams of creditor claims and the potential for the applicants' debts to be restructured. Ultimately, it will be for the Abu Dhabi Court, based on recommendations from the committee of trustees, to determine whether to order a restructuring of the 30 debtors or whether they should be liquidated and proceeds distributed to creditors.

A number of UAE and international financial institutions have exposure to the bankruptcies of these 30 debtors.

Notably, some of the debtor applicants have sought the recognition and enforcement of the bankruptcy commencement order, including its order implementing the statutory moratorium on legal proceedings provided for in article 162 of the Bankruptcy Law. The Dubai Courts have already enforced the moratorium by staying proceedings in a number of onshore court cases against various debtor applicants.

Some of the debtor applicants have also sought to recognise and enforce the moratorium in proceedings before the DIFC Courts, seeking to rely upon DIFC insolvency law, DIFC Court procedural rules for the enforcement of judgments issued by courts outside Dubai and the provisions of the UNCITRAL Model Law as enshrined in Schedule 4 of the DIFC Insolvency Law, as well as on common law principles of comity.

In a decision dated 4 October 2021, the DIFC Court declined to recognise and enforce the Abu Dhabi Court bankruptcy order, holding that the requirements for recognition of the bankruptcy order were not met. Specifically, the DIFC Court considered that the application had not been made by a 'foreign representative', a requirement set out in the Insolvency Law, and nor could there be a foreign representative to make the application because, at the time of the decision, the assets of the debtors had not vested in the court-appointed trustee, because the court had determined to appoint a committee of trustees but had not yet done so, because the DIFC Court considered that the bankruptcy order was not final and conclusive because the claimant in the DIFC proceedings had not participated in the Abu Dhabi Court bankruptcy proceedings.

3 Have there been any recent legislative reforms? Is there a perceived need for reform?

The UAE Federal Bankruptcy Law was amended in 2021 by way of Federal Decree Law No. 35 of 2021. The amendments relate to the liability of directors or managers in the event a company's assets are found by a court to be insufficient to settle at least 20 per cent of the company's debts.

The previous provision of the law gave the court power to make any or all of the board of directors or managers liable to pay any or all of the company's debt in those circumstances, with no qualifications save that their respective liability should be established by the Court. In 2021, in a ground-breaking decision of the Dubai Court of First Instance, the board of directors of Marka Holdings PJSC, a UAE-based retail group a company, were held personally liable to creditors for the debts of the company in the amount of 448 million dirhams. The decision has recently been

> **"In a decision dated 4 October 2021, the DIFC Court declined to recognise and enforce the Abu Dhabi Court Bankruptcy Order."**

overturned on appeal, with the Dubai Court of Appeal reversing the judgment and sending the case to the Court of First Instance. The basis for the decision was a technical point in that the directors had not been joined to the bankruptcy proceedings by the claimant and therefore the Court of Appeal considered that they had not had an opportunity to defend themselves.

The recent amendments to the Federal Bankruptcy Law, which were enacted shortly following the *Marka* decision, have clarified that managers and directors may be personally liable for a bankrupt company's debts where the company's assets do not cover 20 per cent of the debt and if the managers or directors are established to have adopted ill considered and risky commercial practices, entered third-party transactions at an undervalue or for no value without certain and commensurate benefit or paid one creditor with the intent to cause damage to other creditors. The provision now also provides for the right of a director or manager to appeal a judgment holding them personally liable for a company's debts. The directors in Marka were able to appeal against the Court of First Instance decision holding them personally liable for the company's debts because of this amendment, which coincided with the timing of their appeal.

Federal Decree 35 of 2021 also amended the penalties applicable to directors, managers and liquidators of a bankrupt company where there had been breaches such as a failure to keep proper financial records, information being withheld from a trustee or false information provided or wrongful disposal of a company's assets, etc. Under the previous version of the law, the penalty was imprisonment of not more than two years. With the recent amendment, the Court now has the option to impose a maximum fine of 100,000 dirhams instead of or in addition to a prison sentence of not more than two years.

There have been two separate legislative amendments to the ADGM Insolvency Regulations in the past 12 months. Insolvency (Amendment No. 1) Regulations 2021 related to the effect of a deed of company arrangement on the position of secured creditors and the appointment of an administrator.

The amendments provide clarity that a deed of company arrangement does not prevent a secured creditor from dealing with or realising a secured interest unless the deed of company arrangement deals with that secured interest and the secured creditor voted in favour of a resolution approving the deed of company arrangement. The amendments also provide that the appointment of an administrator may be extended by execution of deed of company arrangement for a maximum period of 12 months.

Further, a new section 253A of the Insolvency Regulations was enacted to create a specific power for the office holder of a company in administration or liquidation to assign a right of action or the proceeds of an action arising from claims in fraudulent trading, wrongful trading, transactions at an undervalue and preferences.

ADGM Insolvency (Amendment No. 2) Regulations 2021 reflect the enactment of the ADGM Uncertificated Securities Rules that will allow ADGM companies to maintain a register of issued securities in electronic form.

Both onshore and offshore jurisdictions in the UAE have demonstrated willingness to amend insolvency laws and regulations in the face of changing economic circumstances and international best practices. Cross-border recognition and enforcement is one particular area, however, that should be considered for legislative reforms.

As it currently stands, the Federal Bankruptcy Law provides no mechanism for the recognition and enforcement of foreign insolvency proceedings. A foreign office holder would need to apply for enforcement of a foreign court bankruptcy order under the UAE courts' civil procedure rules for the enforcement of a foreign judgment, the requirements for which are onerous and not always easy to establish.

On the local front, legislative reform to clarify the requirements for cooperation, recognition and enforcement between the different onshore and offshore insolvency regimes within the UAE would be welcomed to facilitate a smoother and more

structured approach to insolvency procedures to be undertaken by office holders, who many times need to act across civil law, common law and emirate-level divides to perform their function.

4 | In the international insolvency field, have there been any legislative or case law developments in terms of coordination of cross-border cases? What jurisdictions are you most likely to have contact with?

With the UAE's international commercial focus and fast-growing reputation as a financial hub, the requirement for cross-border coordination in insolvency cases is a given, and we anticipate seeing more cross-border matters cropping up as the insolvency and bankruptcy practice in the UAE expands.

To date, we have seen cross-border insolvency matters arise with recognition and enforcement of bankruptcy decisions between the DIFC Courts, the ADGM Courts and the courts of England and Wales. It is anticipated that as the insolvency and restructuring market develops in the UAE and more filings take place, there will be further jurisdictions that will become relevant, given the UAE's status as a trading and financial hub.

In 2020, the DIFC Courts recognised and enforced an administration order of the English High Court, which appointed joint administrators to NMC Health PLC. This recognition was pursuant to the UNCITRAL Model Law provisions encapsulated in the DIFC Insolvency Law.

On 16 June 2021, upon the application brought by the office holders, the English High Court of Justice issued an order to recognise the ADGM Court administration of 36 NMC group companies as foreign main proceedings in accordance with the UNCITRAL Model law on cross-border insolvency. The order further recognised the applicant joint administrators as foreign representatives.

We understand that, in May 2021, the Abu Dhabi Court recognised a foreign bankruptcy judgment from the Court of Amsterdam pursuant to the UAE's procedures for enforcement of foreign judgments and on the basis of likely reciprocity by the courts of the Netherlands.

5 In your country, is there a particular court or jurisdiction that sees a higher concentration of insolvency filings? What is the attraction of that forum?

The jurisdiction for filing an insolvency proceeding in the UAE or its free zones depends on the place of incorporation of the company. In the case of a group filing, the relevant jurisdiction for filing will be the court of the jurisdiction where the company has its headquarters.

For companies incorporated in the DIFC or the ADGM, the jurisdiction for any insolvency filing will be the court of the respective free zone.

With the DIFC and ADGM insolvency laws being modelled largely on English insolvency law and the courts being able to draw on English precedent, there is a sense that the free zone insolvency regimes offer more certainty and more sophisticated mechanisms to attempt the rescue of distressed companies or to liquidate with maximum benefit to creditors. In 2020, NMC Healthcare LTD and 35 of its group companies applied for and were granted re-domiciliation from onshore UAE jurisdictions to the ADGM, whereafter they were able to take advantage of the ADGM administration regime under the ADGM Insolvency Regulations. The process for re-domiciliation in this way is not straightforward, however, and generally a distressed company or its creditors will not have a choice about where an insolvency application is to be filed.

With the bulk of UAE companies being incorporated in onshore jurisdictions under the Federal Commercial Companies Law, the majority of insolvency filings would naturally be through the onshore court with geographical jurisdiction.

> "The jurisdiction for filing an insolvency proceeding in the UAE or its free zones depends on the place of incorporation of the company."

6 Is it fair to describe your jurisdiction as either 'debtor-friendly' or 'creditor-friendly' in terms of how insolvency filings proceed?

With insolvency and bankruptcy at such an early stage in its development, it is difficult to say whether the UAE is debtor- or creditor-friendly. Traditionally, onshore, there was a perceived reluctance within the commercial sector in the UAE for distressed businesses to apply for bankruptcy, and the restricted procedures available under relevant provisions of law until 2016 did not encourage entities to take such steps. It would be fair to say until 2016 the insolvency landscape in onshore UAE was neither debtor nor creditor friendly.

With the introduction of a more robust insolvency regime onshore, which provides for protective composition, restructuring or a declaration of bankruptcy and subsequent liquidation as a last resort, as well as detailed procedures to use such procedures, distressed companies have more incentive to take such steps.

The Federal Bankruptcy Law also allows creditors with an unpaid established debt of 100,000 dirhams or more to file an application to commence bankruptcy procedures against debtor companies. Upon the commencement of bankruptcy procedures creditors also have an opportunity to participate on a committee of creditors and to comment on proposed plans for restructuring.

To that extent, the onshore position is now both more creditor- and debtor-friendly than the position that existed prior to the enactment of the Federal Bankruptcy Law. Having said that, in practical terms, the work involved in compiling the requisite documents and information for a debtor-led bankruptcy is onerous, and the level of engagement expected by the courts of former directors and management is high. In practical terms, short time frames for completion of steps under the Federal Bankruptcy Law mean debtors, legal advisers, office holders and even creditors are often under significant pressure to ensure compliance with the law and to meet the demands of judges overseeing the bankruptcy proceedings.

7 What opportunities exist for businesses wanting to purchase assets out of an insolvency, and how efficient is the process? What are the best ways to take advantage of opportunities in this area?

In onshore insolvency proceedings, the court-appointed trustee is required to include in the draft restructuring plan (or protective composition plan if applicable) details of any offer to purchase the debtor's assets or business. This would be an appropriate time for potential purchasers to engage with the trustee for the purchase of assets. It is sensible to engage directly with the trustee because once bankruptcy proceedings are opened, the trustee's recommendation and final court approval are required to be obtained for the completion of any sale.

Alternatively, the court may direct that assets be sold by public auction to be supervised by the trustee.

Sharon Lakhan
sharon.lakhan@globaladvocates.net

Hassan Al Shaqsi
hassan.alshaqsi@globaladvocates.net

Global Advocacy and Legal Counsel
Dubai
www.globaladvocates.net

The Inside Track

What two things should a client consider when choosing counsel for a complex insolvency filing in this jurisdiction?

There will almost certainly be an interplay between onshore/offshore jurisdictions and civil law/common law. It is critical to choose a legal team familiar with onshore laws and having practical litigation experience in the onshore courts – and the common law courts, an international approach to insolvency and understanding of the nuanced roles of the onshore and free zone courts in the UAE.

The importance of selecting an experienced bilingual team cannot be underestimated. The UAE's free zone courts operate in English, and business is generally conducted in English. However, the onshore courts operate in Arabic. Important information can be lost in translation, particularly given the nuanced language concepts and the fast turnaround times required under insolvency legislation.

What are the most important factors for a client to consider and address to successfully implement a complex insolvency filing in your jurisdiction?

A client should understand, with guidance from advisers, the jurisdiction in which the insolvency filing is to be made and the consequent requirements for the filing, the procedures and powers available to the court and the role and powers that would be available to any appointed office holder, and risks to management during the insolvency process. These can differ depending on the particular insolvency regime. Armed with this understanding, clients and advisers can manage expectations and encourage buy-in from all stakeholders.

What was the most noteworthy filing that you have worked on recently?

Global Advocacy has worked on groundbreaking insolvency proceedings in both the UAE local courts and the DIFC and ADGM Courts, including the UAE's two biggest insolvencies to date.

The firm acts as UAE local counsel for the NMC Healthcare group and its joint administrators. The scope of advice involves representation in approximately 55 creditor claims in the Dubai, Abu Dhabi, Sharjah and federal UAE courts, the DIFC Courts and DIFC-LCIA arbitration, acting for the joint administrators to ratify and enforce an ADGM administration order – the first time an ADGM Court order has been enforced in the Dubai onshore courts.

United States

A partner in the restructuring department of Paul Weiss, Jacob Adlerstein has broad experience advising a variety of clients in bankruptcy cases and corporate restructurings, including debtors, official and ad hoc creditor committees and distressed investment funds. Jake's company-side representations include Hexion, Cumulus Media, Pinnacle Agriculture Holdings and AbitibiBowater, and recent creditor and private equity sponsor representations include Spanish Broadcasting System, Frontera Generation, Guitar Center, Ligado Networks, J. Crew, Jonah Energy, Cirque du Soleil, Associated Materials, GNC Holdings, PDVSA, EP Energy, American Tire Distributors, Bellatrix Exploration, Energy Future Holdings, Pacific Exploration, Dynegy and Aspect Software.

Jake is recognised by *The Legal 500* and he was named in Lawdragon's inaugural list of '500 Leading US Bankruptcy & Restructuring Lawyers'. In 2016, Jake's work in Aspect Software's Chapter 11 case was recognised by The M&A Advisor in its annual Turnaround Awards as their 'Information Technology Deal of the Year (Over $250MM)'. He regularly participates on panels sponsored by industry organisations, including Practising Law Institute.

1 In the past year, have you seen any developments or trends in the nature and volume of insolvency filings?

The frenetic pace of restructuring activity that commenced in early 2020 at the outset of the covid-19 pandemic was followed, remarkably, by an equally precipitous decline in restructuring activity starting in late 2020 and continuing throughout 2021. While the ongoing covid-19 pandemic continues to have a dramatic impact on large swaths of the global economy, unprecedented government support and stimulus, combined with easy access to liquidity in the debt and equity capital markets, has kept many companies afloat. As a result, companies that otherwise may have been forced to restructure have instead been able to raise sufficient capital to 'kick the can' down the road (eg, pursue out-of-court liquidity and/or liability management transactions), leading to a sluggish pace for Chapter 11 filings in 2021.

However, companies in certain industries disproportionately affected by the pandemic continued to seek Chapter 11 protection in the past year, most notably in the transportation, hospitality and real estate segments. Some of the larger businesses – including certain of the global airlines, cruise lines and hotel chains – were able to access the capital markets at the beginning of the pandemic and thereby sufficiently shore up their liquidity to withstand the shock. Others, such as Philippine Airlines (the largest airline group in the Philippines and the national flag carrier) and Grupo Posadas (Mexico's largest hotel operator in terms of the number of hotels and number of rooms), were forced to file for Chapter 11 protection. In addition, a number of real estate companies filed for Chapter 11 relief driven by the pandemic-related market disruption in the hotel and retail industries, including Hospitality Investors Trust (a real estate investment trust with an interest in 100 hotels located across 29 states in the US), Eagle Hospitality Trust (a real estate investment trust focused on upscale hotels) and Washington Prime Group (a market leader in the ownership, development and management of retail real estate across the US).

Companies in the healthcare and pharmaceuticals sectors also continued to use the Chapter 11 process to resolve substantial opioid-related claims through court-approved settlements, such as Purdue Pharma LP and Mallinckrodt plc, both of which filed for Chapter 11 protection in 2020 and sought to emerge from Chapter 11 in 2021. Companies in other industries facing mass tort liabilities similarly sought Chapter 11 relief, such as LTL Management, a newly created entity spun off from Johnson & Johnson to address its significant talc-related claims.

2 | Describe the one or two most notable insolvency filings in your jurisdiction in the past year.

One of the more notable and controversial bankruptcy filings this past year was of LTL Management, a subsidiary of Johnson & Johnson (J&J) that was created to manage and defend thousands of talc-related claims related primarily to J&J's baby powder products. LTL Management was formed through a transaction commonly referred to as a 'Texas Two-Step.' In recent years, a small number of companies facing potential mass tort liabilities have implemented divisive mergers under Texas law (hence the name, Texas Two-Step) or other analogous state statutes to attempt to separate their healthy business lines from these potentially crippling liabilities, effectively creating a 'GoodCo' and a 'BadCo'. The divisive merger is then often followed by a bankruptcy filing by 'BadCo'.

Using the Texas Two-Step, J&J (GoodCo) spun off LTL Management (BadCo) and purported to transfer sole responsibility for tens of thousands of talc-related claims against J&J to LTL Management. Shortly thereafter, LTL Management filed for Chapter 11 relief and sought, among other things, to establish a US$2 billion trust funded by J&J to resolve and pay current and future talc-related claims, as well as the issuance of an injunction that would permanently protect, among others, J&J, as LTL Management's ultimate parent, from further talc-related claims arising from products manufactured and/or sold by J&J.

Since the commencement of its Chapter 11 case in October, LTL Management's filing has generated substantial litigation among the company's key stakeholders. While other bankruptcy courts have to date largely avoided opining directly on the merits of the Texas merger statute and related fraudulent conveyance issues that may be implicated by the Texas Two-Step, it is unclear if that trend will continue. Whether this tool remains a viable option in the future for companies seeking to address mass tort liabilities may depend on the outcome of LTL Management's Chapter 11 case.

3 Have there been any recent legislative reforms? Is there a perceived need for reform?

In March 2020, the Coronavirus Aid, Relief, and Economic Security Act (the CARES Act) was enacted into law, which provided more than US$2 trillion of economic relief for individuals and businesses dealing with the consequences of the covid-19 pandemic. In addition to providing fiscal stimulus to the broader economy, the CARES Act included several temporary amendments to the Bankruptcy Code aimed at providing small business and individuals in financial distress with increased access to streamlined bankruptcy relief. Specifically, the CARES Act expanded the eligibility for businesses to take advantage of the small business reorganisation provisions of the Bankruptcy Code by raising the debt limit criteria from US$2.7 million to US$7.5 million.

The CARES Act also amended Chapters 7 and 13 of the Bankruptcy Code to, among other things, exclude from income the receipt of coronavirus-related relief payments and permit modification to pending Chapter 13 reorganisation plans of individuals with regular income. Unlike most prior amendments to the Bankruptcy Code, however, the CARES Act modifications are temporary and will currently expire in March 2022 absent further congressional extension (these modifications were previously extended in March 2021).

This year also saw the introduction of proposed legislation to curtail the use of non-consensual third-party releases (largely in reaction to the controversial settlements and shareholder releases approved in connection with the *Purdue Pharma* Chapter 11 case) and the use of divisive mergers, such as the Texas Two-Step, to address mass tort liabilities (largely in reaction to controversial Chapter 11 filings by several companies to address asbestos liabilities and reports, which ultimately

> "Since the commencement of its Chapter 11 case in October, LTL Management's filing has generated substantial litigation among the company's key stakeholders."

came to fruition, that Johnson & Johnson was contemplating a similar strategy to address its talc-related liability). Additional legislation has also been proposed to modify the venue provisions of the Bankruptcy Code to prevent perceived forum shopping. While none of these proposals has yet become law, market participants will be tracking each closely to determine what impact, if any, they may have on the restructuring practice in the years to come.

4 In the international insolvency field, have there been any legislative or case law developments in terms of coordination of cross-border cases? What jurisdictions are you most likely to have contact with?

While the past year has not generated any significant legislative or case law developments addressing the coordination of cross-border cases, foreign companies continue to avail themselves of the benefits and protections available under the US Bankruptcy Code, both in connection with plenary and ancillary proceedings. For example, Grupo Posadas, a hospitality company based in Mexico City that owns, leases, operates and manages hotels, resorts and villas in urban and coastal areas of Mexico and is Mexico's largest hotel operator in terms of the number of hotels and number of rooms, filed for Chapter 11 protection in the Southern District of New York in October. Grupo Posadas primarily attributed its filing to the pandemic-related dislocation. Other significant foreign filings included, among others, the Chapter 15 filings by Boart Longyear Limited, Greensill Capital (UK) and Norwegian Air. While US courts have significant experience coordinating cross-border cases with a number of foreign jurisdictions, Canada and the UK are likely the two jurisdictions that US courts most frequently engage with.

5 In your country, is there a particular court or jurisdiction that sees a higher concentration of insolvency filings? What is the attraction of that forum?

While there are bankruptcy courts in every federal judicial district in the United States, a small subset of these jurisdictions attract a significant portion of the large corporate restructuring cases. Historically, the Southern District of New York and the District of Delaware have been the two leading venues for large corporate reorganisations. Though these two jurisdictions continue to attract a significant share of corporate Chapter 11 filings, other jurisdictions have experienced a marked increase in filings in recent years, including the Southern District of Texas and the Eastern District of Virginia. While many factors are considered in assessing where a company should file for Chapter 11 protection, one of the most critical is the experience of the bankruptcy judges (and other bankruptcy participants) in a given district, and specifically their experience overseeing similar types of large corporate restructuring cases. This experience can help a company and its advisers more accurately predict potential case outcomes and thereby develop a strategy for a successful restructuring.

6 Is it fair to describe your jurisdiction as either 'debtor-friendly' or 'creditor-friendly' in terms of how insolvency filings proceed?

In my view, the US Bankruptcy Code is neither expressly 'debtor-friendly' nor 'creditor-friendly', but rather going-concern friendly. That is, it is built on the fundamental notion that a company and its stakeholders – including creditors, equity holders, suppliers, vendors and employees – are typically best served by preserving financially distressed businesses as going concerns. When a distressed company is able to reorganise and emerge as a going concern, jobs can often be saved and recoveries for the company's financial stakeholders can be maximised.

There are a number of features of the Bankruptcy Code that facilitate going-concern reorganisations, including:

Photo: Shutterstock.com/ oneinchpunch

- Automatic stay – halts all creditor collection efforts to provide a debtor with a 'breathing spell' to obtain the requisite support for a reorganisation. It centralises most disputes with the debtor into one forum for an efficient and fair management of a debtor's liabilities.
- Financing – section 364 of the Bankruptcy Code facilitates a debtor's ability to obtain financing while in bankruptcy (including on a super-senior basis), which is often necessary to allow operations to continue in the ordinary course.
- Exclusivity – unless otherwise ordered by the Bankruptcy Court, the Bankruptcy Code provides that the debtor has the exclusive right to propose a Chapter 11 plan for the first 120 days of the case; this exclusivity period can be extended for up to 18 months.
- Executory contracts and unexpired leases – the Bankruptcy Code allows a debtor to reject many types of burdensome contracts and leases. This is a powerful tool that can facilitate a debtor's operational restructuring.
- Binding dissenting creditors – the class voting provisions of the Bankruptcy Code provide for specified supermajorities to bind non-consenting members

of the class and, subject to satisfaction of the Code's 'cramdown' standards, binding a non-consenting class to a Chapter 11 plan.

7 What opportunities exist for businesses wanting to purchase assets out of an insolvency, and how efficient is the process? What are the best ways to take advantage of opportunities in this area?

Companies frequently file for Chapter 11 protection to sell all or a portion of their assets as a going-concern business under section 363 of the Bankruptcy Code. Section 363 sales allow a purchaser to acquire assets free and clear of certain liens, claims and encumbrances that would otherwise attach to such assets, which can be a very attractive feature for potential purchasers.

While not as common as asset sales under section 363 of the Bankruptcy Code, asset sales may also take place under a Chapter 11 plan. One of the key differences between the two types of sales is timing. Unlike a section 363 sale – which can often be done on relatively short notice and early in a Chapter 11 case – a sale under a Chapter 11 plan requires the negotiation, solicitation, approval and consummation of the plan itself – typically a lengthy process. In addition, approval of a Chapter 11 plan generally requires the consent of many stakeholder constituencies, whereas a section 363 sale does not require a creditor vote.

Jacob Adlerstein
jadlerstein@paulweiss.com

Paul, Weiss, Rifkind, Wharton & Garrison LLP
New York
www.paulweiss.com

The Inside Track

What two things should a client consider when choosing counsel for a complex insolvency filing in this jurisdiction?

Many factors go into identifying the right counsel for a complex insolvency matter. Experience is critical and can take a number of forms, including industry-specific experience as well as prior work representing similarly situated clients. It is also worth considering the quality of a law firm's other practice areas, including in litigation, capital markets and tax. Complex restructuring matters often require counsel to leverage resources across a wide range of practice areas, and a client should carefully consider a counsel's ability to harness a top-notch cross-disciplinary team that will protect the client's interests in all facets of the restructuring matter.

What are the most important factors for a client to consider and address to successfully implement a complex insolvency filing in your jurisdiction?

While there are many pathways to a successful restructuring transaction, the ability to quickly develop broad stakeholder consensus is one of the most important skills. Stakeholder consensus mitigates the risk that a restructuring will become mired in costly and time-consuming litigation, and opens up the opportunity to take advantage of streamlined procedures (such as a 'prepackaged' filing) that expedite the case timeline, thereby reducing cost and uncertainty. Another key factor is liquidity. The more liquidity a company has, the more time, options and leverage it typically retains in restructuring negotiations to generate stakeholder consensus.

What was the most noteworthy filing that you have worked on recently?

Aeromexico has been one of the most interesting cases. Like many other international airlines, Aeromexico was forced to file for Chapter 11 protection during the depths of the pandemic following the downturn in international travel; its revenue dried up almost entirely overnight. The situation was so dire that its ability to continue as a going concern was uncertain, and creditors faced the prospect of a dismal recovery. Fortunately, Aeromexico was able to structure a novel DIP financing facility with a unique equity conversion feature allowing the airline to raise more than US$1 billion of additional capital to bridge its liquidity. Now, nearly a year later, the company is well positioned to emerge from Chapter 11 with a sustainable and delevered balance sheet and to provide meaningful distributions to its creditors.

Venezuela

Manuel Acedo Sucre is a partner at MENPA – Mendoza, Palacios, Acedo, Borjas, Páez Pumar & Cía. He practises private law, focusing on corporate law and finances, including insolvency matters; banking and finance, debt restructuring; M&A, taxation, real estate and energy. Manuel completed graduate studies at Harvard and the Fletcher School of Law and Diplomacy and was also a professor in graduate studies on corporate and regulatory matters. Manuel is a director for several corporations and the author of articles on corporate and tax matters and of three published novels.

Luisa Acedo is a partner at MENPA – Mendoza, Palacios, Acedo, Borjas, Páez Pumar & Cía. Experienced in company law and the regulations on corporate governance and complex international structures, she advises on corporate issues, M&A and related due diligence processes, project finance, exchange controls and international sanctions (as they relate to Venezuelan law). She is a published author on company law and her work is frequently quoted in court decisions and learned articles. She is fluent in English and French.

This chapter was written with the able assistance of José Antonio Román, associate at MENPA – Mendoza, Palacios, Acedo, Borjas, Páez Pumar & Cía, with experience in public law, tax and dispute resolution.

1 In the past year, have you seen any developments or trends in the nature and volume of insolvency filings?

To understand the Venezuelan situation in general and particularly current insolvency practice, we need to focus on the general context. During 2018, the sustained economic crisis affecting Venezuela evolved into a full humanitarian emergency, with the highest inflation rate in the world. In 2021, the humanitarian emergency, aggravated by the covid-19 health crisis, continued, as did the hyperinflation process, which has continued for four consecutive years and is expected to end or abate in 2022. Furthermore, during the past few years approximately, 5.9 million Venezuelans (out of 30 million) have emigrated according to UNHCR. Oil production has plummeted, although partially recovering in late 2021, and the accumulated loss of gross domestic product over the past eight years is reported to have exceeded 74 per cent, with a further 4 per cent expected for 2021 according to projections of the United Nations Economic Commission for Latin America and the Caribbean. The country's functional reserves are at their lowest levels, and the local currency substantially depreciates on a daily basis. Regarding foreign currency exchange, since 2019 the Central Bank has let the official exchange rate soar to the level of the unofficial parallel market. A de facto dollarisation is occurring, which the monetary authorities tolerate, and this has led to a situation that is difficult to read regarding economic possibilities; however, a muted optimism permeates in some economic activities.

The Venezuelan government and state-owned companies have defaulted, and no organised restructuring negotiations are expected to occur any time soon, despite sporadic announcements that the Venezuelan finance minister is proposing to restructure the country's foreign debt. Foreign sanctions, particularly US sanctions, are also in place. These sanctions began targeting individual government officials and later evolved to apply to transactions involving the government, including state-owned companies (now blocked by the sanctions). This gravely affects oil production and commercialisation and, in practice, impedes the negotiation of new debt and dealings on equity belonging to the government of Venezuela or Venezuelan state-owned companies, among others.

From a political perspective, the government controls all public institutions, including the National Assembly (the Venezuelan parliament), which was elected in 2020, at the date set in the Constitution. However, the electoral process that took place on 6 December 2020, in a context where the main opposition parties and their political leaders had been banned by the electoral authorities, was boycotted by the opposition and has been internationally disputed. The results, in which 91 per cent of seats went to the United Socialist Party (which has been in power since 2000),

Manuel Acedo Sucre

Luisa Acedo

were rejected by the Organization of American States, Canada, the United States and most members of the European Union. The previously elected 2015 National Assembly continues to be recognised by several major democracies.

In May 2018, presidential elections had been held resulting in the re-election of the incumbent president for a further six-year term (beginning on 10 January 2019). This re-election was not recognised internationally, with very few exceptions. Instead, the United States, Canada and many countries in Latin America and Europe have recognised the then president of the National Assembly (elected in 2015) as the country's interim president since January 2019. Since then, international recognition of the interim presidency has waned, with some key exceptions, such as the United States, which ratified its backing of the interim presidency in January 2022.

From a commerce and industry perspective, the government had taken important measures to control economic activities, with a very aggressive and confrontational stance against the private sector, with further restrictions in response to the covid-19 pandemic, that worsened the economic situation. However, in the past months, there seems to be a discreet effort by the government, to open certain avenues to private investment and to cease harassing private sector actors. This effort began with the decriminalisation of exchange control violations, and is more evident in the laissez faire attitude to dollarisation and in the quiet release of price controls. However, given the government's ideological bias, it may reimpose controls at any moment, based on its political calculations.

The current economic environment has allowed many private sector actors to continue their activities, and avoid closures. Closing businesses in Venezuela is dangerous, since government officials have threatened private sector companies and individuals not only in general terms, but also and more specifically, by persecuting and outlawing conduct leading to the cessation of economic activities by privately owned companies, which have been threatened with confiscation or expropriation if they 'close their doors'.

In sum, even with the current laissez faire attitudes, Venezuelan companies face complicated economic conditions and, in some cases, it is very difficult for them to operate at a profit, or at least without losses.

Further, according to different sources (such as Consecomercio, Conindustria and Fedecamaras, private sector commercial and industrial organisations), many companies have actually stopped operating. However, we see few formal insolvency filings. We believe this is because political issues and threats affect insolvency practice in Venezuela. In analysing some examples, we find things like the following.

First, during the past few years, many companies have suffered significant capital losses because of different factors, including the foreign exchange distortions and the recent economic impact of covid-19 on commerce and services. This has meant that, under Venezuelan law, their shareholders were required to reimburse losses and capital, reduce capital stock or liquidate the company.

Second, transnational companies with a presence in Venezuela have seen significant losses abroad because of their local results, which, because of generally accepted accounting principles, are reflected in their consolidated financial statements. Accordingly, transnational corporations have had to make decisions regarding their activities in our country. Many have decided to deconsolidate their Venezuelan subsidiaries, others have decided to sell their assets or businesses in Venezuela and others still have taken the hit.

Third, both national and transnational companies find that doing business in Venezuela is fraught with difficulties and, in some cases, not even profitable. However, many continue to manufacture and sell products and services because of the political context. In some cases, in the hope that political and economic circumstances may change. Some companies have adjusted to a market that is less than 20 per cent of what it was four years ago. In other cases, even though many operations translate into losses, the alternative – closing shop – may actually be worse because it implies expropriation of assets and total loss of the investment.

"Venezuelan companies face complicated economic conditions and, in some cases, it is very difficult for them to operate at a profit, or at least without losses."

Clorox, Kimberley-Clark, Smurfit Kappa and Kellogg's took this road, and the result was the seizing of their assets by the government – a de facto expropriation – with no compensation.

In this context, filing for insolvency is probably not a good option, and that is what our practice has reflected. Rather than helping our clients file insolvency claims, we have had to advise them on how to dramatically downsize or reduce operations to a minimum without crossing the threshold where confiscation might happen. In other cases, we have helped them reimburse capital losses and deal with the financial and legal aspects of their equity insufficiencies. However, in other cases and on the other side of transactions, we have helped clients seize opportunities to buy the subsidiaries of foreign companies in Venezuela, thus relieving the head offices of targeted companies from the problems of owning their Venezuelan businesses while placing a stake in the local market, which seems to be starting to be attractive for some businesses or in preparation for change.

Yet there is another different and very important issue to consider: the insolvency of the public sector. In November 2017, we saw for the first time late payments of debt by the Bolivarian Republic of Venezuela and its state-owned company Petróleos de Venezuela, SA (PDVSA). Since then, with certain exceptions, payments have stopped in what is now considered a full default of the state, PDVSA and Elecar bonds. Up to November 2019, the exception was the PDVSA 2020 bond, which is, in theory, secured with part of Citgo's shares. But even in that case, a default occurred in November 2019, when neither the incumbent government not the interim government paid the amount due. Also, in November 2019, the interim government initiated a judicial procedure requesting that the New York courts declare the nullity of the bond and also the nullity of the corresponding guarantee over the shares. On 16 October 2020, there was a decision declaring that PDVSA 2020 bonds are 'legal, valid and enforceable'.

Further, the economic sanctions imposed by the United States have affected Venezuelan debt, including bonds, in different ways. For instance, the Venezuelan government, including its state-owned companies, have been designated 'blocked persons', and US persons (as defined in the sanctions programme) may not deal, negotiate or transact operations with them; neither may US persons deal in 'new debt' (which includes restructuring 'old debt'). In practice, this impedes an ordered restructuring. The interim president and his designated authorities are exempted from the limitations applicable to blocked persons and therefore may conceivably be instrumental in reaching agreements with bondholders, but this has not happened and the limitation regarding new debt still applies. In addition, the sanctions programme has established protections for the Venezuelan state from creditors in the execution of judicial decisions (although in the case of the PDVSA 2020 bond, the protection was due to end in January 2022, but may be extended). Creditors have been organising possible courses of action without much success. Meanwhile, it is clear that the insolvency of the public sector is a major issue and many factors – including among others an interim government, the non-recognition of the National Assembly 'elected' on 6 December 2020 and foreign sanctions – may affect the way the situation resolves itself.

2 Describe the one or two most notable insolvency filings in your jurisdiction in the past year.

In the very unconventional scenario described, there have been several cases of companies closing shop reported by industrial and commercial associations. Indeed, according to the president of Conindustria, four-fifths of all industrial companies have closed in the past 20 years, the remaining active companies operate at 23 per cent of their capacity and small businesses are on the verge of collapse.

Nonetheless, the timid economic opening by the government has meant that the possibility of collapse has receded, especially in specific sectors.

Photo: Shutterstock.com/ Alejandro Solo

Insolvency proceedings are few and not at all prominent. Indeed, neither the press nor colleagues report notable cases of insolvency proceedings (in the judicial sense of the term) in the private sector, possibly because of the very special circumstances already described. Because of the covid-19 health crisis, the Supreme Tribunal of Justice ordered the suspension of judicial activities (except for 'urgent cases', constitutional complaints and criminal courts) from 16 March 2020 to 5 October 2020, and as a result, all insolvency filings were paralysed for almost seven months. After resumption of judicial activities, the '7+7' scheme implemented by the government, by which flexible quarantine measures alternate with strict quarantine measures weekly, has slowed down the normal operation of the judiciary.

Finally, we must highlight the current default of the state and its state-owned companies regarding payments of bonds and promissory notes, which we believe will eventually lead both to very complicated negotiations involving foreign creditors, bondholders and financial institutions, and to multiple lawsuits and arbitration proceedings before foreign tribunals and arbitration venues.

3 Have there been any recent legislative reforms? Is there a perceived need for reform?

No, there have been no legislative reforms concerning insolvency in Venezuela. In fact, the Commercial Code, which regulates the insolvency regimes of bankruptcy and moratorium, has been in force since 1955. Since the origin of the rules currently in force can be traced back to the 19th century, there is need for reform. Many scholars favour an approach where the principle of continuity of the company informs the rules on the bankruptcy and moratorium procedures.

Two attempts were made to reform the rules: the first in 1966 and the second in 1988. We shall refer to the most recent one, which was led by our late partner Leopoldo Borjas, who proposed a law on bankruptcy. The draft law incorporated many changes, updating certain rules and including relevant foreign law provisions, with the idea of changing the insolvency rules to seek continuity of the business, rather than simple protection of creditors. However, neither the 1966 nor the 1988 proposals were approved, and thus the rules regulating insolvency still date back, in essence, more than 100 years.

The need for reform is also evident when one considers the effects when the very slow and formal legal procedures for insolvency in Venezuela collide with a hyperinflationary economy, where delays may mean the almost total disappearance of any remaining assets.

4 In the international insolvency field, have there been any legislative or case law developments in terms of coordination of cross-border cases? What jurisdictions are you most likely to have contact with?

We must again refer to this very unusual context that characterises the Venezuelan situation. In this context, the most likely developments to take place will involve the all-out default of Venezuela regarding payment of bonds and promissory notes, either by the central government and its instrumentalities or through its state-owned companies, PDVSA or Elecar.

We believe that eventually there will be negotiations for a debt restructuring process. However, any such negotiations will be affected by the following: the need for the approval of the National Assembly, especially in view of the perceived illegitimacy of the 'elections' held on 6 December 2020 and the persistence of the 2015 National Assembly; the perceived illegitimacy of the re-election of the incumbent president from 10 January 2019 and the recognition of the interim president by the United States and most of Europe and Latin America; and the sanctions that have been imposed by the United States, among others.

Photo: Shutterstock.com/testing

In addition, as explained earlier, international companies have dealt with losses by their Venezuelan subsidiaries in fundamentally three ways: selling the subsidiaries; deconsolidating their financial statements; or assuming the losses.

5 | In your country, is there a particular court or jurisdiction that sees a higher concentration of insolvency filings? What is the attraction of that forum?

As we explained previously, there are few proceedings regarding either the moratorium process or bankruptcy.

6 | Is it fair to describe your jurisdiction as either 'debtor-friendly' or 'creditor-friendly' in terms of how insolvency filings proceed?

In general terms, from a procedural standpoint, the Venezuelan regulations on insolvency are creditor-friendly. As we commented earlier, these rules are outdated and, strictly speaking, the main concept behind them is the protection of creditors; that is, they are designed to organise creditors and to help them recover their

"The Venezuelan legal system is characterised by a very overprotective set of rules regarding workers from the standpoints of both working relationships and social contributions."

credits from the patrimony of the debtor, as the patrimony stands at the time of bankruptcy.

However, since the rules have not been modernised, they do not reflect a broader understanding of the concept of the protection of creditors. We refer to the idea that by helping the debtor recover or continue in business creditors may have a higher chance of fully recovering their interest. As we have stated, neither do the rules reflect the principle of continuity of business, which is an even more modern approach to the protection of creditors. Regarding specific creditors, the general rules of the Commercial Code establish two types of creditors: common creditors and creditors who have privileges or are beneficiaries of security interests. In very simple terms, the latter have pre-eminence over the former. But there is an unspoken additional advantage given to a particular kind of privileged creditor: workers, who are favoured over all other creditors. The tax administration is also a privileged creditor.

The Venezuelan legal system is characterised by a very overprotective set of rules regarding workers from the standpoints of both working relationships and social contributions. Additionally, courts (not only labour ones) have a general tendency to protect workers over all other parties involved in disputes. Accordingly, courts tend to favour payment to workers over any other creditor. Yet, as stated above, this is not necessarily beneficial to the workers in the long term. Other solutions that provide continuity of business and thus allow workers to keep their jobs could actually be more useful to the workers than simply receiving severance payments in the amounts allowed by assets liquidated in the bankruptcy procedure (especially in the context of hyperinflation). Finding different approaches, such as capitalising severance payment credits or liquidating part of the pool of workers to make the company viable may be a better solution in the long run. However, as stated, our regulations require important reforms to allow a more business-oriented approach to prevail, and our judges need a better understanding of the long-term benefits for both businesses and creditors in general and workers in particular.

7 What opportunities exist for businesses wanting to purchase assets out of an insolvency, and how efficient is the process? What are the best ways to take advantage of opportunities in this area?

As stated earlier, because of the very sui generis situation regarding insolvency in Venezuela, we believe our country is a buyers' market.

Strictly speaking, buying assets out of an insolvency proceeding is complicated in Venezuela, because liquidation of assets should follow these steps: first, for real estate to be sold, the judge must approve the sale; and second, all other assets must be sold at auction (even though the judge may authorise private sales).

Despite this, buyers have great opportunities outside insolvency proceedings but within general insolvency situations – or even in situations that do not amount to insolvency but do involve accounting losses or important risks associated with political issues. As indicated, there are unconventional opportunities available for individuals and corporations with a certain degree of risk tolerance. For instance, opportunities to acquire subsidiaries of transnational corporations are an indirect way to acquire assets that could otherwise ultimately be involved in an insolvency or other risky situations. In fact, because of the economic and political situation, prices are currently low. We have seen several acquisitions in recent years in Venezuela and have worked on some very interesting ones in which our clients were the acquirers.

Manuel Acedo Sucre
macedo@menpa.com

Luisa Acedo
lacedo@menpa.com

MENPA – Mendoza, Palacios, Acedo, Borjas, Páez Pumar & Cía
Caracas
www.menpa.com

The Inside Track

What two things should a client consider when choosing counsel for a complex insolvency filing in this jurisdiction?

Obviously, extensive knowledge and practice regarding corporate finance and law are indispensable. However, two more characteristics are also necessary: first, a solid and transparent judicial practice, that is, a litigation department that is both knowledgeable and experienced in procedural law and transparent in its dealings with the judiciary. Second, a solid labour department is necessary, because workers tend to be a determining factor in insolvency proceedings because of the worker-friendly tendency of the Venezuelan legal regime and its application by the courts. Accordingly, when choosing counsel, we recommend not only extensive corporate experience, but also a trusted litigation and labour practice.

What are the most important factors for a client to consider and address to successfully implement a complex insolvency filing in your jurisdiction?

Filing for insolvency tends to be complicated in Venezuela nowadays because of non-legal issues. Political issues such as confiscation and expropriation threats suggest that it is better to deal with insolvency outside the courts, because filing may result in the shareholders losing not only their company, as a business, but also their investment. In fact, when filing for bankruptcy in a normal context, shareholders may receive assets after creditors have been satisfied; however, in the current circumstances, filing for bankruptcy may translate into de facto expropriation, where shareholders are barely compensated for their shares, if at all.

What was the most noteworthy filing that you have worked on recently?

In the present very unconventional context, as we have explained, rather than assisting our clients with insolvency claims, we have helped them to deal legally with equity insufficiencies and to acquire subsidiaries sold by transnational corporations and we have advised them in expropriation procedures and the like. Notwithstanding the current situation, some years ago, when conditions were different, we handled one of the main insolvency proceedings in Venezuela: the moratorium proceeding filed by Venepal, CA, the leading pulp and paper producer in Venezuela, which then evolved into a bankruptcy proceeding and ended, finally, in an expropriation. We acted as counsel to Venepal and its shareholders.

Lexology GTDT Market Intelligence provides a unique perspective on evolving legal and regulatory landscapes.

Led by Paul, Weiss, Rifkind, Wharton & Garrison LLP, this *R&I* volume features discussion and analysis of emerging trends and hot topics within key jurisdictions worldwide.

Market Intelligence offers readers a highly accessible take on the crucial issues of the day and an opportunity to discover more about the people behind the most significant cases and deals.

Key filings
Legislative reform
Cross-border coordination
Asset purchases

ISBN 978-1-83862-952-6