



ICLG

The International Comparative Legal Guide to:

Corporate Recovery & Insolvency 2018

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A practical cross-border insight into corporate recovery and insolvency work

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1 Overview

1.1 Where would you place your jurisdiction on the spectrum of debtor to creditor-friendly jurisdictions?

The United States can most accurately be described as reorganisation-friendly. On the one hand, the United States could be considered debtor-friendly as compared to some regimes in that management is typically permitted to retain operating control of the business, there is a very broad stay of creditor enforcement actions, debtors have exclusive authority to propose a plan of reorganisation at the outset of a case, and debtors are given powers, such as the option to reject unprofitable contracts, that they are not afforded outside of a formal insolvency proceeding. On the other hand, the United States could also be considered creditor-friendly as compared to some jurisdictions in that the process is designed to be public and transparent, creditors are given a voice in the restructuring process, and creditors are afforded significant protection by the Bankruptcy Code.

1.2 Does the legislative framework in your jurisdiction allow for informal work-outs, as well as formal restructuring and insolvency proceedings, and to what extent are each of these used in practice?

While informal out-of-court restructurings are commonplace and are typically implemented by contract by and among the relevant parties, there is no specific legislative framework to sanction such work-out procedures. The relevant statute, the Bankruptcy Code, provides for formal court-supervised proceedings, although the Bankruptcy Code has several provisions which encourage pre-petition restructuring negotiations.

2 Key Issues to Consider When the Company is in Financial Difficulties

2.1 What duties and potential liabilities should the directors/managers have regard to when managing a company in financial difficulties? Is there a specific point at which a company must enter a restructuring or insolvency process?

Directors are not personally liable for continuing to trade while the company is in financial distress.

The fiduciary duties of a company's directors are defined by the law of the state of the company's incorporation. The primary duties of

directors are those of care and loyalty. The duty of care requires a director to discharge duties with the care an ordinarily prudent person in a like position would exercise under similar circumstances. The duty of loyalty requires directors to act in the best interests of the corporation; it prohibits self-dealing and the usurpation of corporate opportunities by directors. Ordinarily, decision-making by directors is protected by the business judgment rule, even when a company is insolvent. Civil liability may arise if the directors fail to adhere to their duties of loyalty or care.

In general, when a company becomes insolvent, the directors must exercise their fiduciary duty in the best interests of the corporation, taking into account the interests of, among others, creditors. Upon insolvency, creditors may under certain circumstances bring derivative claims on behalf of the corporation against directors. Causes of action for breach of fiduciary duty, fraud and fraudulent conveyance may be appropriate to challenge the wrongful actions of directors of insolvent corporations.

In addition, directors may be criminally or civilly liable under federal and state laws for failure to comply with certain disclosure obligations or for insider trading, or for the company's failure to pay certain taxes and wages, among other things.

2.2 Which other stakeholders may influence the company's situation? Are there any restrictions on the action that they can take against the company? For example, are there any special rules or regimes which apply to particular types of unsecured creditor (such as landlords, employees or creditors with retention of title arrangements) applicable to the laws of your jurisdiction?

While in financial difficulty, but prior to a bankruptcy filing, a company's creditors, contract counterparties, employees, and interested acquirers, among others, may all attempt to influence the company's situation within the bounds of whatever contractual agreements may exist and applicable law. For this reason, and to make any potential insolvency process smoother, a company in financial distress will oftentimes seek to engage its stakeholders in restructuring discussions prior to beginning an insolvency process.

The Bankruptcy Code also prescribes special rules for certain categories of creditors. For example, certain types of prepetition claims (such as domestic support obligations, employee wages up to \$12,850 per individual and certain tax obligations) are entitled to priority over other general unsecured claims. Additionally, while claims incurred after the petition date are often entitled to administrative priority status and are payable upon consummation of the plan, the debtor also must timely perform post-petition

obligations arising under commercial real property leases. The debtor must also assume any unexpired commercial leases by no later than 120 days after the petition date (subject to extension), otherwise such leases are deemed rejected.

2.3 In what circumstances are transactions entered into by a company in financial difficulties at risk of challenge? What remedies are available?

Transactions entered into by an entity in financial distress may be attacked as an actual or constructive fraudulent transfer or as a preference under the Bankruptcy Code and/or state law.

Under the Bankruptcy Code, a transfer may be avoided as fraudulent if it occurred within two years before the bankruptcy filing, and the debtor made the transfer with actual intent to defraud creditors, regardless of whether the debtor was insolvent. In addition, a trustee (or debtor in possession) may recover a transfer as constructively fraudulent that occurred within two years before the bankruptcy filing if the debtor received less than reasonably equivalent value in exchange for such transfer, and (i) was insolvent, (ii) was engaged in business for which the debtor was insufficiently capitalised, (iii) intended or believed it would incur debts beyond its ability to repay, or (iv) made such transfer to, or for the benefit of, an insider under an employment contract and not in the ordinary course. Bankruptcy trustees (or debtors in possession) can also invoke state fraudulent transfer laws, which may have longer reach-back periods, to recover transfers for the benefit of the estate.

A transfer of an interest of the debtor in property made on account of an antecedent debt, while the debtor was insolvent and within the 90 days prior to a bankruptcy filing (or within one year before the bankruptcy filing if the transferee was an insider) that enables the creditor to receive more than it would have received in a liquidation, can be avoided as a preference. There is a rebuttable presumption that a debtor is insolvent during the 90 days before the bankruptcy filing.

Transactions determined to be preferential or constructively fraudulent can be avoided or reversed so as to return the parties to their original positions. This can be effectuated through the recovery of payments or unwinding of entire transactions.

3 Restructuring Options

3.1 Is it possible to implement an informal work-out in your jurisdiction?

While out-of-court restructurings are commonplace and are typically implemented by contract by and among the relevant parties, there is no procedure by which a court will sanction such work-outs. To receive the sanction of a court, a case must be filed under the Bankruptcy Code.

3.2 What formal rescue procedures are available in your jurisdiction to restructure the liabilities of distressed companies? Are debt-for-equity swaps and pre-packaged sales possible? To what extent can creditors and/or shareholders block such procedures or threaten action (including enforcement of security) to seek an advantage? Do your procedures allow you to cram-down dissenting stakeholders?

Chapter 11 is the primary procedure by which companies restructure; although it may also be used for the purposes of an orderly liquidation. Chapter 15 provides the procedure for recognition of

a foreign insolvency or restructuring proceeding and for conducting an ancillary proceeding in the United States. Ancillary proceedings are those in aid of a “foreign proceeding” administered by a foreign representative and designed to foster cooperation between US and foreign courts.

Debt-for-equity swaps are possible both in-court and out-of-court. Depending on the terms of the debt-for-equity swap, existing equity may be substantially diluted or, if the valuation supports it, eliminated altogether.

“Pre-packaged” sales may be achieved either by means of (i) a pre-packaged chapter 11 plan, which the Bankruptcy Code is designed to facilitate, or (ii) a sale under section 363 of the Bankruptcy Code which has been negotiated by the parties and documented prior to the chapter 11 petition being filed.

The filing of a bankruptcy petition automatically operates as a stay that enjoins secured and unsecured creditors from taking most actions against the debtor or property of the estate absent further order of the court. The stay of actions against the debtor’s property continues until such property is no longer property of the estate or the case is closed or dismissed.

A chapter 11 restructuring aims to foster cooperation between management (which may include significant shareholders) and the Company’s creditors to agree on a value-maximising path forward for the Company. Shareholders and creditors alike are welcome to propose transactions that could lead to the Company’s emergence from bankruptcy; however, only the company has the right to propose a plan of reorganisation and solicit its acceptance for at least the first 120 days following the date of the filing; such time period is often extended beyond 120 days by the court but may not be extended beyond 18 months following the date of the filing.

Secured creditors have certain special rights, however. A secured creditor may be entitled to adequate protection in the form of cash payments, replacement liens or the “indubitable equivalent” of the value of its collateral to the extent such value is depreciating as a result of the stay or the debtor’s use of such collateral. If secured creditors are oversecured, they have the right to receive post-petition interest generally at the applicable contract rate. Secured creditors may also be well-positioned to provide debtor-in-possession financing, which may provide the secured creditor greater influence over the reorganisation process. Secured creditors generally are also afforded the right to credit bid in a sale of their collateral.

Cramdown

In a chapter 11 case, a dissenting class of creditors or interests may be crammed down if (i) at least one class of impaired claims has voted to accept the plan, and (ii) the plan (a) does not discriminate unfairly, and (b) is “fair and equitable”.

It is generally understood that a plan does not unfairly discriminate if the dissenting class receives relatively equal value under the plan as compared to similarly situated classes.

It is generally understood that a plan does not unfairly discriminate if the dissenting class receives relatively equal value under the plan as compared to similarly situated classes.

A plan is fair and equitable if it complies with the absolute priority rule. With respect to secured creditors, members of the class must: (i) retain their liens and receive deferred payments with a value equal to the allowed amount of their secured claims, valued as of the effective date of the plan; (ii) receive the proceeds from the sale of their collateral, if such property is to be sold, including the right to a credit bid at any such sale; or (iii) receive the “indubitable equivalent” of their secured claims.

A plan is fair and equitable with respect to unsecured creditors if the members of the class receive property of a value equal to the

allowed amount of their unsecured claims, or if such class is not paid in full, no junior class will receive any estate property under the plan.

3.3 What are the criteria for entry into each restructuring procedure?

Insolvency is not a prerequisite for chapter 11 relief. A company may file a voluntary case under chapter 11 if the company has a domicile, place of business or property in the United States.

An involuntary case may be commenced under chapter 11 by three or more creditors that hold non-contingent, undisputed claims against the company. The creditors (or an indenture trustee representing them) must hold claims that aggregate \$15,775 more than the value of any collateral securing the creditors' claims. If there are fewer than 12 creditors, a single creditor may file the petition. If the case is not timely controverted, the court will order relief. However, if the petition is controverted, the creditors must establish that the debtor is generally not paying its debts as they come due unless such debts are disputed, or that a custodian was appointed within 120 days of the petition date. Involuntary petitions filed in bad faith may result in damages awarded against the petitioning creditor(s).

3.4 Who manages each process? Is there any court involvement?

Under chapter 11, management retains control, remains "in possession", and continues to run the daily business operations of the debtor company, subject to oversight by the company's board of directors. A chief restructuring officer or similar professional often is added to the management team. Transactions which are not in the ordinary course of business require bankruptcy court approval. Official and unofficial committees generally consult with the debtor concerning the administration of the estate, may investigate conduct, assets and liabilities of the debtor and participate in the formulation of a plan. A chapter 11 trustee may be appointed where there has been gross mismanagement or fraud.

The court closely supervises proceedings under chapter 11.

3.5 What impact does each restructuring procedure have on existing contracts? Are the parties obliged to perform outstanding obligations? Will termination and set-off provisions be upheld?

A chapter 11 debtor may assume or reject most executory contracts or unexpired leases, subject to the court's approval. Subject to time limits applicable to commercial real estate leases, the debtor may assume or reject a contract or lease at any time before confirmation of a plan, but the court may order the debtor to act within a shorter time. In most cases, the counterparty to the contract must continue to perform until the debtor assumes or rejects the contract; a contract term that provides for termination upon a bankruptcy filing is typically unenforceable under the Bankruptcy Code, though there are exceptions.

If a debtor chooses to assume the contract or lease, it will be bound by the contract's terms. The debtor may not assume such contract or lease unless it: (i) cures or provides adequate assurance that it will cure any default; (ii) compensates, or provides adequate assurance that it will compensate, the counterparty for any actual pecuniary losses resulting from the default; and (iii) provides adequate assurance of future performance under the contract or lease. However, a debtor does not have to cure a default that arises because of a provision in the contract conditioned on the insolvency of the

debtor. The debtor may not assume a contract where applicable law excuses the counterparty to the contract from accepting performance from, or rendering performance to, an entity other than the debtor, such as a personal services contract.

A debtor may reject a contract where it determines that performance of the contract would be unduly burdensome. Rejection of an executory contract or unexpired lease constitutes a breach and generally gives rise to a general unsecured claim for damages.

If a contract or lease has been assumed, the debtor usually may assign it, notwithstanding a provision in the contract that prohibits or conditions such an assignment.

The Bankruptcy Code generally preserves a creditor's non-bankruptcy set off rights. A claim for set off is treated as a secured claim and a creditor seeking to exercise such right must first obtain relief from the automatic stay. However, creditors that possess set off rights under certain types of repurchase agreements and other specified financial contracts may exercise such rights without violating the stay.

3.6 How is each restructuring process funded? Is any protection given to rescue financing?

A trustee or debtor in possession may use free cash in the ordinary course of business without notice or a hearing, unless the court orders otherwise. The debtor may not use encumbered cash unless each entity with an interest in the cash collateral consents or the court authorises such use upon a finding of adequate protection.

A trustee or debtor in possession may also obtain unsecured financing in the ordinary course of business that will be allowed as an administrative priority expense to pay the actual and necessary costs of preserving the estate, including the payment of wages and salaries after the commencement of the case, as well as taxes.

If the trustee or debtor in possession is unable to obtain unsecured financing that would be allowed as an administrative priority expense, the Bankruptcy Code contains a framework for permitting other types of debtor-in-possession financing, including: (i) unsecured financing allowed as a "superpriority" expense with priority over all other administrative priority expenses; (ii) financing secured by unencumbered estate property; (iii) financing secured by a junior lien on previously encumbered estate property; and (iv) financing secured by an equal or priming lien on previously encumbered property (so long as the trustee or debtor in possession is unable to obtain financing otherwise and each holder of a lien on such property is adequately protected).

4 Insolvency Procedures

4.1 What is/are the key insolvency procedure(s) available to wind up a company?

Chapter 7 provides the procedure for liquidation of a company. As noted above, although chapter 11 is the primary procedure by which companies restructure, it may also be used for the purposes of an orderly liquidation.

4.2 On what grounds can a company be placed into each winding up procedure?

Insolvency is not a prerequisite for chapter 7 or chapter 11 relief. A company may file a voluntary case under chapter 7 or chapter 11 if the company has a domicile, place of business or property in the United States.

The grounds for commencing an involuntary case under chapter 7 are the same as the grounds for commencing an involuntary case under chapter 11. See question 3.3 for further detail.

4.3 Who manages each winding up process? Is there any court involvement?

In chapter 7, a trustee is appointed to marshal the assets of the company, reduce them to cash and pay creditors. Officers and directors are displaced. Courts closely supervise the chapter 7 process. As discussed in question 3.4, management generally remains in possession during a chapter 11 case, even if the company is liquidated during such case.

4.4 How are the creditors and/or shareholders able to influence each winding up process? Are there any restrictions on the action that they can take (including the enforcement of security)?

Secured creditors are prevented from enforcing their security in the same manner in chapter 7 as they are in chapter 11. See question 3.2 for further detail. Unsecured creditor interests are most often represented by an official committee. While shareholders have standing to be heard, they generally have less influence in a chapter 7 case because the company is set to be liquidated by the trustee rather than restructured.

4.5 What impact does each winding up procedure have on existing contracts? Are the parties obliged to perform outstanding obligations? Will termination and set-off provisions be upheld?

A chapter 7 trustee or chapter 11 debtor may assume or reject most executory contracts or unexpired leases, subject to the court's approval. See question 3.5 for further detail.

In chapter 7, the trustee must assume a contract or lease within 60 days of the order for relief or it will be deemed rejected, unless an extension of time is granted by the court within such 60-day period.

4.6 What is the ranking of claims in each procedure, including the costs of the procedure?

Claims of secured creditors are entitled to priority with respect to their interests in collateral and are secured only to the extent of such interests. If a creditor is undersecured to some extent, such portion is treated as a general unsecured claim.

The Bankruptcy Code confers priority on various categories of claims. All claims in a higher priority must be paid in full before claims with a lower priority may be paid. First priority is reserved for unsecured claims for certain domestic support obligations (if the debtor is an individual). Second priority is conferred on claims for expenses incurred in connection with the administration of the estate. Administrative priority expenses include wages and salaries for employees for post-petition services rendered and compensation for professionals retained in the case, including a chapter 7 trustee. Lower priority categories include claims for certain pre-petition wages and employee benefit plan contributions and pre-petition tax claims, among others. General unsecured claims generally rank equally with each other.

4.7 Is it possible for the company to be revived in the future?

While the company as an entity is typically dissolved after its assets

are liquidated, assets of the company, such as the brand name or business model, may be acquired for use in a new venture.

5 Tax

5.1 What are the tax risks which might apply to a restructuring or insolvency procedure?

The bankruptcy process does not, in itself, impose additional tax risks on the debtor. Day-to-day tax liability is incurred during the pendency of a bankruptcy case and claims for such liability are generally paid as administrative expenses. While cancellation of indebtedness typically gives rise to taxable income under United States tax law, debt cancelled in a chapter 11 or chapter 7 case is not included as taxable income.

6 Employees

6.1 What is the effect of each restructuring or insolvency procedure on employees?

In chapter 11, the company may continue to employ its workers and to pay their salaries and wages in the ordinary course of business. To the extent the company owes pre-petition salaries and wages, claims therefor will be entitled to priority status but only to the extent of \$12,850 for each individual earned within 180 days before the bankruptcy filing.

The Bankruptcy Code restricts payments to "insiders". Before a company incurs an obligation to retain such a person, the court must determine, among other things, that the obligation is essential because such person has received a job offer at the same or greater rate of compensation and that the obligation incurred is not greater than 10 times the amount of an obligation incurred to non-management employees. A severance payment to an "insider" officer or director may not be allowed or paid unless the payment is part of a programme generally applicable to all full-time employees and the amount of the payment is not greater than 10 times the mean amount of severance pay provided to non-management employees.

A chapter 7 trustee will likely terminate most employees. They will hold administrative priority claims for post-petition labour and lower priority claims for any pre-bankruptcy filing wages owing to the extent described above.

7 Cross-Border Issues

7.1 Can companies incorporated elsewhere use restructuring procedures or enter into insolvency proceedings in your jurisdiction?

A company may file a voluntary case under chapter 7 or chapter 11 if the company has a domicile, place of business or property in the United States. Such company may also commence a chapter 15 case in the United State for recognition of a judicial or administrative proceeding in a foreign country.

7.2 Is there scope for a restructuring or insolvency process commenced elsewhere to be recognised in your jurisdiction?

Yes. Chapter 15 cases are commenced by a foreign representative

filing a petition for recognition of a foreign proceeding in a US bankruptcy court. A foreign proceeding is a collective judicial or administrative proceeding in a foreign country in which the assets and affairs of a debtor are subject to control or supervision by a foreign court for the purposes of reorganisation or liquidation. In chapter 15, the foreign representative may use such proceedings to request assistance from the US court for such relief as entry of a stay to protect property located in the United States.

A bankruptcy court will recognise the foreign proceeding if: (i) the foreign proceeding qualifies as a “foreign main proceeding” (a foreign proceeding pending in the country where the debtor has the centre of its main interests) or “foreign non-main proceeding” (a foreign proceeding pending in a country where the debtor conducts non-transitory operations); (ii) the foreign representative applying for recognition is a person or body authorised to administer the reorganisation or liquidation of the debtor; and (iii) the petition is accompanied by sufficient evidence of the commencement of the foreign proceeding and of the appointment of the foreign representative.

Once the court has entered a recognition order concerning a foreign main proceeding, several provisions of the Bankruptcy Code take effect automatically, including the automatic stay and provisions governing the use, sale or lease of property of the debtor in the US, and other relief may be available upon request to the court. While such relief is not automatically available with respect to a foreign non-main proceeding, the court has discretion to grant similar relief.

7.3 Do companies incorporated in your jurisdiction restructure or enter into insolvency proceedings in other jurisdictions? Is this common practice?

It would be unusual for a company incorporated in the US to enter into plenary insolvency proceedings in other jurisdictions, although this has occurred from time to time.

8 Groups

8.1 How are groups of companies treated on the insolvency of one or more members? Is there scope for co-operation between officeholders?

Each member of a group of companies is treated as a separate entity by the Bankruptcy Code. The insolvency of one group member has no formal legal effect on other group members; each entity

must file its own case under the Bankruptcy Code. In practice, however, group members usually file cases at the same time, in the same court, and are often represented by the same professional advisors. In addition, their cases generally are jointly administered for procedural purposes.

There is scope for court supervised cooperation between groups of companies and their officeholders. In fact, it is typical for the first day of a bankruptcy case to be devoted to motions designed to maintain the “*status quo*” during the pendency of the case or cases; courts often grant motions to continue a group cash management system, group shared services agreements and other inter-group arrangements during these so-called “first-day hearings”.

9 Reform

9.1 Have there been any proposals or developments in your jurisdiction regarding the use of technology or reducing the involvement of the courts in the laws of your jurisdiction, which are intended to make insolvency processes more streamlined and efficient?

Bankruptcy courts encourage and sometimes require the use of electronic filing systems for filing proofs of claim and other pleadings to streamline the administrative process. Additionally, pre-packaged, pre-negotiated, and pre-arranged cases – whereby the key constituents negotiate the terms of (and, with respect to pre-packaged cases, vote on) the restructuring plan prior to the bankruptcy filing – are becoming increasingly popular. By conducting negotiations and voting on the restructuring plan prior to the petition date, the debtor can reduce its time in bankruptcy.

9.2 Are there any other governmental proposals for reform of the corporate rescue and insolvency regime in your jurisdiction?

There are currently no official legislative proposals for reform of the corporate rescue and insolvency regime. The American Bankruptcy Institute (the “ABI”), a private group comprised of insolvency practitioners and market participants, released a proposal for the comprehensive reform of chapter 11 in 2014 that aimed to update the more than 35-year-old regime to fit modern market needs and practices. While the ABI proposal has sparked conversation and debate by and among practitioners and observers, it has not spurred legislative action.

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A partner in the Bankruptcy and Corporate Reorganization Department, Elizabeth McColm specialises in the areas of corporate restructurings and bankruptcy. She has been involved in major domestic and cross-border restructurings and bankruptcies representing debtors, creditors and acquirers of assets. Her recent engagements include representing: (i) Bon-Ton Stores in connection with its restructuring efforts; (ii) Noranda Aluminum in its chapter 11 case; (iii) *ad hoc* debtholder groups in the Pacific Drilling, Armstrong Energy, Ultra Petroleum and SquareTwo chapter 11 cases and Oro Negro restructuring; (iii) the Official Committee of Unsecured Creditors of Quicksilver Resources; (iv) Oaktree in the Excel Maritime and TMT Procurement chapter 11 cases; and (v) agents for two lending syndicates in the Genco Shipping and Trading Limited chapter 11 case. *The Legal 500* recognised that Elizabeth "has an art for handling difficult personalities to reach consensus" and *IFLR1000* recognised her as a "Leading Lawyer" in restructuring and insolvency.

Paul | Weiss

Diversity of experience, senior-level attention and seamless delivery of multidisciplinary services are the foundations of the Paul, Weiss Bankruptcy & Corporate Reorganization Department.

We possess a thorough knowledge of every aspect of bankruptcy law, coupled with perspectives earned from representing every type of client. Our domestic and cross-border representations include debtors, official and unofficial committees of creditors and shareholders, secured and unsecured creditors and equity sponsors in chapter 11 cases, corporate reorganisations and workouts, non-bankruptcy insolvency proceedings and litigations and transactions involving financially distressed companies. We also represent purchasers of the assets, debt and securities of distressed companies.

Our Bankruptcy Department fields large, multidisciplinary teams that leverage the resources of our firm as a whole. By drawing on the expertise of our Corporate, Finance, Securities, Tax, Litigation, Employee Benefits, Real Estate and Environmental Departments, we are able to tailor our efforts to the specific business challenges that our clients face.

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