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Restructuring & Insolvency 2019

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Freshfields Bruckhaus Deringer

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Twelfth edition

Getting the Deal Through is delighted to publish the twelfth edition of *Restructuring & Insolvency*, which is available in print, as an e-book and online at www.gettingthedealthrough.com.

Getting the Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique **Getting the Deal Through** format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on China, Japan and Korea.

Getting the Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.gettingthedealthrough.com.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, Catherine Balmond and Katharina Crinson of Freshfields Bruckhaus Deringer, for their continued assistance with this volume.

GETTING THE
DEAL THROUGH

London
November 2018

Global overview

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September 2018 marks 10 years since Lehman's collapse and the last global recession (in the UK it would seem that the long saga of the Lehman insolvency will be coming closer to an end with the scheme of arrangement having been sanctioned by the court in June 2018, bringing to a close nearly a decade's worth of disputes and litigation). Despite some prophecies of doom, 2018 did not herald the start of the next recession, indeed financing continued to be readily available and the distressed markets were benign. Looking into the crystal ball, commentators are divided – some say the current loose financing has echoes of 2007/08. However, the majority expects the global economy to continue with reasonable macro growth, but with some sectors and regions suffering. So, what did 2018 bring and what can we expect going forward?

Economic activity has been and remains relatively strong – driven by trade growth, easy monetary policies, and overall more positive consumer sentiment. However, risks – in the form of high household debt, increasing uncertainties because of geopolitical events, rising protectionist rhetoric, and a move away from a multilateral trading order – could derail the current growth story. As in every year, the end of 2017 and the start of 2018 also saw some large companies facing insolvency or significant restructuring. At the time of writing, Nobel's shareholders have approved the restructuring plan that sees much of the company's equity being passed to its lenders. Steinhoff, too, is in the midst of a restructuring process. Interestingly (and as further stated below) both companies either contemplated (Nobel) or are seeking to use (Steinhoff) an English restructuring process. In Nobel's case, the company reportedly implemented a COMI shift to effect a restructuring via a UK administration should shareholders vote against the deal – in Steinhoff, the COMI is changed from Austria to the UK to make use of a company voluntary arrangement (CVA).

In this year's Global overview, we summarise some of the recent developments in the markets and legal regimes, and we try to peer into the future regarding what that might bring.

Interest rates

In 2018, interest rates have continued rising both in the US and, for the first time in more than 10 years, in the UK. It was only a small rise in the UK, from 0.25 to 0.75 per cent, but still it is the first time that the rate has been raised since July 2007. Some say that rising interest rates might tip some 'zombie companies' over the edge. However, there is no evidence of that thus far, and it seems unlikely if increases remain so small and well spread out, particularly in the context of abundant covenant lite debt instruments.

The year of the CVA

In the UK, 2018 was the year of the high street restructuring, with a stark rise in company voluntary arrangements (a tool currently predominantly used by retailers to cut the spend on commercial rent). The culmination of online growth, Brexit uncertainty (impacting on staff costs, especially an issue for the casual dining sector), higher business rates, and a softening in overall consumer spending meant that the retail and casual dining sectors had to take a long hard look at what could be done to reduce their costs. Many looked to the CVA for an answer. For some companies, this may very well be true – but, sadly, for others the CVA was only a sticking plaster and the company ended up in an insolvency process regardless – such is the story of Toys 'R' Us and House of Fraser (although the latter succeeded in selling most of its business to a third-party buyer, thereby preserving jobs and the underlying business).

The CVA is now also being rolled out beyond compromising leases. In Steinhoff, perhaps the largest Europe restructuring at present, one part of the group is shifting COMI from Austria to use a UK CVA to restructure its unsecured debt. If successful, perhaps it will herald the true arrival of the CVA on the international restructuring stage (sadly just in time for the UK to lose the benefit of the EU Insolvency Regulation – considered further below). You can read more about what exactly a CVA is in the England chapter of this book.

Cov lite or loose financings

The trend of 'cov lite or loose' incurrence-only financings has continued and means that most sizeable new finance structures have no meaningful triggers until maturity or they run out of cash. Interestingly, European loans now mimic high yield bonds' cov lite terms. With this, financings have seen a marked shift towards loans away from high yield, though both remain strong. From the companies' and sponsors' viewpoint, this absence of triggers gives them breathing space to fashion a recovery. However, from the creditors' perspective, it can mean that they don't get a seat at the table until it is too late. Be that as it may, it has certainly resulted in fewer active distressed situations this year as, until liquidity runs out or maturity beckons, underperforming structures can limp on.

Supply chain

The collapse of Carillion, a major UK multinational construction and facilities management group that entered into compulsory liquidation in January 2018, highlighted the dangers of supply chain insolvency. In relation to banks and financial institutions, there is a sophisticated regime for companies that are considered to be 'too big to fail'. In other sectors and industries, this is not the case and ordinary insolvency rules will apply. With ever larger conglomerates (but ones that are not so systemic that a government will intervene directly to ensure a bail-out), this topic will be with us for some time. Indeed, taking a look at the UK insolvency statistics, recently construction was the second largest industry grouping for companies entering into insolvency. Many companies will be looking at the Carillion situation and examining their own supply chain and how they can protect themselves.

New (and changing) US trade and sanction measures

By the time this is published, whatever we write on this topic will be long out of date! That said, the change in the US to the accepted norm of fostering international trade in priority to almost everything else continues to drive volatility. For example, at the time of writing, the Turkish lira has fallen by over 40 per cent against the US dollar, which it seems must drive restructurings in at least some Turkish sectors. As to wider impacts around the globe, again that seems like 'when and where, not if'.

Brexit

Finally, this introduction cannot avoid a mention of Brexit. Article 50 has been triggered and the UK is scheduled to leave the EU on 29 March 2019. And yet, there remains significant uncertainty about how the process and exit will play out – and still more uncertainty about what happens post-Brexit. You can read more about this in the England &

Wales chapter of this book, although events may overtake the writing of this piece! At the time of writing, and as March 2019 comes ever closer, companies and individuals are preparing themselves for a 'no deal' Brexit, which seems to be no-one's preferred outcome.

The law and its enforcement

Globally, the most significant legislative changes this year have been in Singapore. Those are intended to make the Singaporean regime much more attractive for restructurings. The changes are 'good on paper' and Singapore seems committed to making them work in practice. It will be interesting to see if Singapore can become the regional restructuring hub that is its goal.

India passed its new bankruptcy regime in 2016 (the Insolvency and Bankruptcy Code). In July 2017, the Reserve Bank of India instructed the banks to put 12 of the country's biggest distressed companies into bankruptcy (the 'Dirty Dozen'). At the time of writing, only one of these cases has played out as success – when Bhushan Steel announced in May 2018 that it was being sold to Tata Steel in a billion-dollar deal. Part of this is down to 'teething issues' with who is (dis)qualified from bidding. The Indian legislators are showing a commendable desire and ability to amend the regime in light of how things work out on the ground. So, while it remains a nascent regime, there are strong grounds to believe that, in due course, the Indian regime will be a significant success.

EU Legislation

In Europe, the rather ponderous juggernaut that is the EU legislation procedure is moving towards introducing the directive on preventive restructuring frameworks, second chance and measures to increase the efficiency of restructuring, insolvency and discharge procedures (part of the EU's 2015 Capital Markets Union Action Plan). This proposed Directive is a very well thought through and powerful piece of draft legislation. If implemented and followed, it would transform the EU's restructuring regimes, making them far more restructuring-friendly. The proposal does not prescribe a single European restructuring regime, but sets 'minimum standards' that all member states' insolvency laws must meet. While progress is slow, there are indications that a resolution on the entire text of the draft directive (or at least some parts of it) will be reached by early 2019 and ahead of the European Parliament elections in May 2019. It is hoped that this process will accelerate and not be delayed in the corridors of Brussels.

In individual European countries, the main interest is in the long promised 'Dutch Scheme'. After a long hiatus, this Dutch reform is making headway. There are indications that the regime may be in place before the end of 2019. It promises to be a very powerful restructuring regime (partly finalised with one eye on the proposed Directive). We look forward to it being finally rolled out into the Dutch courts. Also, the UK government has proposed some fundamental changes to the UK regime, including – for the first time – cross-class cram down. This is discussed in the relevant chapter; however, as no draft legislation has been produced yet and with the challenges on parliamentary time of Brexit, it is unclear when these proposals will be implemented.

Conclusion

While a quieter year for restructurings and with a benign near term, there remain both interesting restructurings and many positive developments in legal regimes. Accordingly, this publication has never been more important as an excellent way to keep track of the changing legislation around the world. We hope that you enjoy reading and using it.

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