Restructuring & Insolvency 2021

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Getting The Deal Through

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Lexology Getting The Deal Through is delighted to publish the 14th edition of *Restructuring & Insolvency*, which is available in print and online at www.lexology.com/gtdt.

Lexology 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 Lexology 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 Ireland and Taiwan.

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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.

Lexology 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 assistance with this volume.

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Getting The Deal Through

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United States

Alan W Kornberg and Claudia R Tobler

Paul Weiss

GENERAL

Legislation

1 What main legislation is applicable to insolvencies and reorganisations?

Title 11 of the United States Code (the Bankruptcy Code) governs insolvencies and reorganisations in the United States. A federal statute, the Bankruptcy Code pre-empts state laws governing insolvency and restructuring of debtor-creditor relationships.

Excluded entities and excluded assets

2 What entities are excluded from customary insolvency or reorganisation proceedings and what legislation applies to them? What assets are excluded or exempt from claims of creditors?

A debtor must have a domicile, residence, place of business or property in the United States to be eligible for relief under the Bankruptcy Code. Eligible debtors include corporations, partnerships, limited liability companies, other business organisations and individuals. Specialised provisions apply to municipalities, railways, stockbrokers, commodity brokers, clearing banks, family farmers and fishermen. Domestic insurance companies, most domestic banks, similar financial institutions and small business investment companies licensed by the Small Business Administration are excluded. State regulators have jurisdiction over insolvent insurance companies and state-chartered financial institutions. Federal regulators have jurisdiction over federally chartered financial institutions.

The commencement of a bankruptcy case other than with respect to a municipality or an ancillary proceeding under Chapter 15 creates an estate comprising all legal or equitable interests of the debtor in property as of the commencement of the case, wherever located. The Bankruptcy Code's definition of property of the estate is very broad and includes all types of property, including tangible and intangible property, as well as causes of action. Notwithstanding the breadth of the bankruptcy estate, an individual debtor may exempt certain property from its scope, thereby excluding it from his or her insolvency proceedings and rendering it immune from the claims of most pre-petition creditors. The Bankruptcy Code prescribes minimum federal exemptions with respect to statutorily delineated items. However, a state may opt out of the federal exemptions and require individual debtors to look to the state's exemption law. State law exemptions vary. The federal exemptions are illustrative of property typically exempt under state law, and include, subject to a monetary cap that varies depending on the category of property, among others, an interest in the debtor's homestead, a motor vehicle, personal jewellery, household goods and furnishings, and tools of trade. Property exempted under either the federal or state system remains subject to certain types of claims, including non-dischargeable taxes, non-dischargeable alimony, maintenance or support obligations and unavoidable liens.

Public enterprises

3 What procedures are followed in the insolvency of a government-owned enterprise? What remedies do creditors of insolvent public enterprises have?

Chapter 9 of the Bankruptcy Code governs municipal bankruptcies. An entity may only be a debtor under Chapter 9 of the Bankruptcy Code if this entity:

- is a municipality;
- is specifically authorised in its capacity as a municipality or by name to be a debtor under such chapter by state law, or by a governmental officer or organisation empowered by state law to authorise such entity to be a debtor under such chapter;
- is insolvent;
- desires to effect a plan to adjust its debts;
- has obtained the agreement of creditors holding at least a majority in amount of the claims of each class that such entity intends to impair under a plan in a case under such chapter;
- has negotiated in good faith with creditors and has failed to obtain the agreement of creditors holding at least a majority in amount of the claims of each class that this entity intends to impair under a plan in a case under this chapter;
- is unable to negotiate with creditors because this negotiation is impracticable; or
- reasonably believes that a creditor may attempt to obtain a transfer that is avoidable as a preferential transfer under section 547 of the Bankruptcy Code.

Assuming a municipality is eligible for Chapter 9 protection, the case proceeds like a Chapter 11 reorganisation case. The municipal debtor may assume or reject executory contracts, and attempts to negotiate a restructuring plan with its stakeholders. However, the standards for confirming a Chapter 9 plan and other aspects of a Chapter 9 case differ significantly from those applicable in a corporate restructuring under Chapter 11 of the Bankruptcy Code. The differences reflect congressional concern about maintaining the proper balance between the sovereign integrity of the state, on the one hand, versus the federal constitutional power to enact uniform laws on bankruptcy on the other. Creditors have many of the same remedies as they do in a traditional bankruptcy case. General unsecured obligations are subject to impairment and restructuring, with special provisions applicable in Chapter 9 to certain types of obligations, such as special revenue bonds. Creditors must file proofs of claim, and while an official committee of unsecured creditors is not automatically appointed, the United States Trustee has the authority to appoint committees of creditors holding similar claims to represent these interests during the case. In the end, seeking dismissal of the Chapter 9 case, if successful, serves as a creditor's strongest remedy.

Protection for large financial institutions

4 Has your country enacted legislation to deal with the financial difficulties of institutions that are considered 'too big to fail'?

In response to the 2008 financial crisis, Congress enacted the Dodd-Frank Wall Street Reform and Consumer Protection Act (the Dodd-Frank Act) in 2010. The Dodd-Frank Act, inter alia: established a new independent agency, the Consumer Financial Protection Bureau, to protect consumers from abusive practices relating to mortgages, credit cards and other financial products; established the Financial Stability Oversight Council, made up of federal financial regulators and other financial participants, charged with identifying and responding to emerging systemic risks in the financial system; and implemented legislation to manage 'too big to fail' financial institutions during times of financial stress. The regulatory reform includes creation of an orderly liquidation mechanism that allows the Federal Deposit Insurance Corporation to unwind failing systemically significant financial institutions (SIFIs) outside of bankruptcy. In addition, SIFIs must create 'living wills' detailing how the SIFI would plan for a rapid and orderly shutdown should the enterprise face financial failure. The Volcker Rule, also promulgated under the Dodd-Frank Act, imposes a number of trading restrictions on financial institutions in an effort to separate the investment banking, private equity and proprietary trading sections of a financial institution from its retail and consumer lending arms. The expansive Dodd-Frank Act legislates numerous other areas of the financial system in an effort to lower and more effectively manage systemic financial risk. In May 2018, the Economic Growth, Regulatory Relief, and Consumer Protection Act (S2155) was enacted. Among other things, the Act relieves banks with less than US$250 billion in assets from some of the Dodd-Frank Act's strictest post-financial crisis regulatory requirements. Other acts to loosen the Dodd-Frank Act's regulatory effect have been considered or pursued by the Trump administration and Congress since then, including in June 2020, modifications to the Volcker rule's prohibition on banking entities investing in or sponsoring hedge funds or private equity funds.

Courts and appeals

5 What courts are involved? What are the rights of appeal from court orders? Does an appellant have an automatic right of appeal or must it obtain permission? Is there a requirement to post security to proceed with an appeal?

Bankruptcy courts preside over insolvencies and reorganisations conducted under the Bankruptcy Code. They are units of the federal district courts and have limited jurisdiction. They may only enter final orders and judgments in certain 'core' matters, that is, those that invoke a substantive right under the Bankruptcy Code or that, by their nature, could only arise in bankruptcy. In non-core matters, in the absence of the parties' consent, the bankruptcy court may only submit proposed findings of fact and conclusions of law to the district court for de novo review. A non-core matter is one that does not depend on bankruptcy law for its existence and that could proceed in a non-bankruptcy forum. The federal district court in the district in which the bankruptcy court sits hears appeals from bankruptcy court decisions, although direct appeals to the federal circuit court of appeals may be taken in certain instances. With the parties' consent, a bankruptcy appellate panel (BAP) may also hear appeals from a bankruptcy court order if one has been established in the relevant judicial circuit. Panels of three bankruptcy court judges comprise BAPs. In contrast, a single district court judge typically hears appeals to the district court. Appeals to the federal circuit courts of appeal and, ultimately, the United States Supreme Court, provide additional levels of appellate review.

A party may appeal a final order of the bankruptcy court as of right, and may appeal an interlocutory (or non-final order) with leave of the court. A decision is final if it ends the litigation on the merits, and leaves nothing for the court to do but execute the judgment. An interlocutory order only decides some discrete matter pertaining to the case, and requires additional steps for full adjudication. District courts generally adopt a flexible approach to the concept of finality in the bankruptcy context, recognising that, unlike a traditional civil case, a bankruptcy case may give rise to numerous discrete disputes that could be finally adjudicated for the purpose of an appeal.

Appeals of interlocutory orders require the filing of a motion for leave to appeal in addition to the filing of a notice of appeal. District courts may review an interlocutory order if: the order involves a controlling question of law as to which there is substantial ground for difference of opinion; and immediate appeal from the order may materially advance the ultimate termination of the litigation or advance the bankruptcy proceedings.

However, granting leave to file interlocutory appeals in bankruptcy cases is the exception, not the rule; interlocutory appeals are disfavoured because of the disruptive effect such appeals generally have on the bankruptcy process and a debtor's restructuring efforts. Federal circuit courts of appeal, in contrast to district courts, generally only have jurisdiction over final orders. Appeals of bankruptcy matters to the US Supreme Court also do not proceed as of right, and are granted in the court's discretion. An appellant does not need to post security or a bond to proceed with an appeal unless the appellant seeks a stay of the order of the bankruptcy judge pending appeal. Posting security in the form of a bond protects the prevailing party against any loss that might result from a stay of the order. In determining whether a bond should be required, a court will focus on whether the bond is necessary to protect against any reduction in value of the subject property pending appeal, and to secure the prevailing party against any loss that might be sustained as a result of an ineffectual appeal. Courts have the discretion to grant a stay pending appeal without requiring the appellant to post a bond. Because a bond is meant to protect the non-moving party from the potential harm of a stay, courts consider a number of factors when sizing the amount of the bond in bankruptcy cases. Where a movant seeks to stay an appeal of a court order confirming a Chapter 11 plan, for example, the potential harm caused by the stay may be the diminishing value of the entire Chapter 11 estate occasioned by the stay. In such cases, the potential harm could be substantial, and courts have required bonds over US$1 billion. As a practical matter, this effectively denies the stay of the order, as few parties have the funds (or appetite to risk) such amounts.

TYPES OF LIQUIDATION AND REORGANISATION PROCESSES

Voluntary liquidations

6 What are the requirements for a debtor commencing a voluntary liquidation case and what are the effects?

Chapter 7 governs liquidation and is commenced by filing a petition in the bankruptcy court in the judicial district where the company is incorporated or has its principal place of business or assets or, in the case of an individual, where he or she has a domicile or residence. Filing the Chapter 7 petition immediately triggers the automatic stay and enjoins most creditor enforcement actions. It also creates the bankruptcy estate. A trustee is appointed, who typically displaces the company's management and who may operate the debtor's business for a limited period if doing so is in the best interests of the estate and consistent with its orderly liquidation. In the case of an individual debtor, the trustee will oversee and administer the case, and will liquidate the debtor's non-exempt assets. Companies and individuals may also seek to liquidate under Chapter 11.

Voluntary reorganisations

7 What are the requirements for a debtor commencing a voluntary reorganisation and what are the effects?

Any eligible debtor who proceeds in good faith may commence a Chapter 11 case by filing a petition and paying a filing fee. A debtor need not be insolvent, either on a cash-flow or balance-sheet basis. The filing of a Chapter 11 petition immediately triggers the automatic stay and creates the Chapter 11 estate. A Chapter 11 debtor typically continues to operate its business as a 'debtor-in-possession'. It enjoys the exclusive right to propose a Chapter 11 plan for the first 120 days of the case, which exclusive right may be extended for cause to no more than 18 months, after which other interested parties may file their own plans.

Successful reorganisations

8 How are creditors classified for purposes of a reorganisation plan and how is the plan approved? Can a reorganisation plan release non-debtor parties from liability and, if so, in what circumstances?

Confirmation of a plan requires, among other things, that the Chapter 11 plan:

- be proposed in good faith and not by any means forbidden by law;
- designate all claims and interests into classes (such that all claims or interests in a particular class must be substantially similar);
- specify the treatment of each class of claims or interests and state whether such classes are impaired or unimpaired;
- include, if at least one class of claims is impaired by the plan, at least one accepting class of impaired claims (determined without including any acceptances by insiders);
- provide adequate means for the plan's implementation;
- be 'feasible' (ie, not likely to be followed by the need for liquidation or another financial reorganisation); and
- with respect to each impaired class of claims or interests, provide that each holder of a claim or interest in such class either has voted to accept the plan or will receive or retain under the plan on account of such claim or interest, property of a value as of the effective date of the plan that is not less than the amount that such holder would receive or retain if the debtor were liquidated under Chapter 7 of the Bankruptcy Code.

Known as the 'best interests of creditors test', this last requirement ensures that creditors and interest holders who do not vote in favour of the plan receive at least as much under the plan as they would receive if the debtor were liquidated under Chapter 7. Unimpaired classes are classes whose claims are reinstated or paid in full as if the bankruptcy had not occurred. They are deemed to have accepted the plan and are not entitled to vote on the plan. Conversely, classes that receive no distribution under the plan, likewise, are not entitled to vote because they are deemed to have rejected the plan.

Holders of impaired claims or interests may vote to accept or reject a plan. A class of claims is deemed to accept a plan if that plan has been accepted by creditors that hold at least two-thirds in amount and more than half in number of the allowed claims of the class held by creditors that have voted. A class of interest holders accepts a Chapter 11 plan if holders of in excess of two-thirds of the number of shares actually voting accept the plan. If an impaired class rejects a plan, the plan may be confirmed only through 'cramdown'. Cramdown requires, in addition to the requirements above, that the plan does not 'discriminate unfairly'; and it must be 'fair and equitable' with respect to each impaired, non-accepting class. To avoid unfair discrimination, a plan must classify similarly situated claims together and treat them similarly. The 'fair and equitable' standard strives to respect the existing priorities of claims and interests (the 'absolute priority rule') so that senior claims in dissenting classes must be satisfied in full before junior claims or interests can receive or retain any property under the plan.

While debtors may in appropriate circumstances release others, courts remain divided over whether a plan may include releases by creditors and other parties in interest in favour of non-debtors. These releases are permitted only in unusual circumstances, if at all. At a minimum, third-party releases must be necessary and fair. 'Deemed releases,' that is, releases granted automatically by a plan based on a creditor's unimpairment or failure to elect not to grant a release, remain controversial and some district courts have held these releases exceed a bankruptcy court's jurisdiction. A plan may, however, contain releases and exculpations in favour of the debtor's officers, directors, advisers and other professionals, as well as statutory committees and their advisers, and in appropriate instances other key stakeholders who provided substantial consideration to the reorganisation (including lenders) and their advisers, for acts and omissions made in connection with or arising from the Chapter 11 case itself.

Involuntary liquidations

9 What are the requirements for creditors placing a debtor into involuntary liquidation and what are the effects? Once the proceeding is opened, are there material differences to proceedings opened voluntarily?

Creditors may file an involuntary Chapter 7 liquidation against any debtor that would be eligible to file a voluntary case that is not paying its debts, other than farmers, railways and not-for-profit corporations. In general, at least three creditors holding in aggregate unsecured claims of US$16,750 that are not contingent as to liability or in dispute as to liability or amount, must sign the involuntary petition. If contested, the court may not order relief unless the debtor is generally not paying its debts as they become due (unless these debts are the subject of a bona fide dispute as to liability or amount), or the debtor turned its assets over to a custodian for liquidation in the 120 days before the date of the filing of the petition. Balance sheet insolvency is not grounds for involuntary relief. The filing of an involuntary petition triggers the automatic stay. The debtor may continue to operate its business during the 'gap' period while an involuntary petition is contested, although the court may appoint an interim trustee for cause. If the court grants an involuntary petition, the case proceeds in the same manner as a voluntary Chapter 7 case and a trustee is appointed. The debtor may convert an involuntary Chapter 7 case to a voluntary Chapter 11 case to maintain control of the bankruptcy process.

Involuntary reorganisations

10 What are the requirements for creditors commencing an involuntary reorganisation and what are the effects? Once the proceeding is opened, are there any material differences to proceedings opened voluntarily?

Creditors must meet the same requirements applicable to an involuntary Chapter 7 case to obtain involuntary Chapter 11 relief. If the court grants the involuntary Chapter 11 petition, the case proceeds like any other Chapter 11 case.

Expedited reorganisations

11 Do procedures exist for expedited reorganisations (eg, 'prepackaged' reorganisations)?

The Bankruptcy Code specifically authorises expedited reorganisations and permits prepackaged plans that a debtor negotiates and in respect of which it solicits votes prior to filing for Chapter 11 relief. Courts have confirmed prepackaged Chapter 11 cases within one day after filing for bankruptcy, although such accelerated timing is the exception, not the norm. A debtor may also file a 'pre-arranged' Chapter 11 case in which it negotiates pre-Chapter 11 the terms of its reorganisation with major creditor constituencies but does not solicit votes in favour of a plan until after the Chapter 11 filing.

Unsuccessful reorganisations

12 | How is a proposed reorganisation defeated and what is the effect of a reorganisation plan not being approved? What if the debtor fails to perform a plan?

A Chapter 11 plan must meet the required confirmation requirements. Failure to confirm a Chapter 11 plan provides grounds for dismissal or conversion of the case to a liquidation under Chapter 7. A court may also permit the filing of an alternative plan. Material default under a confirmed plan or inability to substantially consummate a confirmed plan constitute grounds for dismissal or conversion to liquidation under Chapter 7. The court may give a plan proponent the opportunity to cure a default under a confirmed plan. A debtor may also modify a plan after its confirmation and before its substantial consummation if the modified plan meets the requirements for confirmation.

Corporate procedures

13 | Are there corporate procedures for the dissolution of a corporation? How do such processes contrast with bankruptcy proceedings?

A corporation may dissolve or liquidate under state law. Modern corporate statutes generally provide that directors of dissolved corporations may distribute assets to shareholders only after discharging or making reasonable provision for the payment of creditors. Unlike bankruptcy, state law dissolution provides little court supervision and lacks the benefit of an automatic stay. State law procedures are also not subject to oversight by the US trustee or official creditors' committees and no collective enforcement action exists. Under state law, directors and officers may be personally liable for unlawful distributions or the failure to adequately provide for claims, including unknown and contingent claims. In contrast, the bankruptcy process provides a centralised and judicially supervised forum for winding up a company's affairs. While more formal than state dissolution processes, bankruptcy provides greater transparency to stakeholders and ensures a greater degree of immunity for officers and directors acting on behalf of the company.

Conclusion of case

14 | How are liquidation and reorganisation cases formally concluded?

In a Chapter 7 case, after all available assets have been sold and proceeds distributed to creditors, the trustee files a final report and account and certifies that the estate has been fully administered after which the court discharges the trustee and enters an order closing the case. A Chapter 11 debtor emerges from bankruptcy protection when its confirmed plan becomes effective, at which time it can resume operating without court oversight. Most Chapter 11 plans become effective upon their substantial consummation; that is, when:

- all or substantially all of the property proposed by the plan to be transferred has been transferred;
- the debtor or its successor has assumed management of all or substantially all of the property the plan addresses; and
- distributions under the plan have commenced.

After the Chapter 11 estate is fully administered, the court enters a final decree closing the case.

INSOLVENCY TESTS AND FILING REQUIREMENTS

Conditions for insolvency

15 | What is the test to determine if a debtor is insolvent?

Two primary tests for insolvency exist under US law: equitable insolvency, generally defined as a debtor's inability to pay debts as they become due in the usual course of business; and balance-sheet insolvency, generally defined as a financial state in which the amount of the debtor's liabilities exceeds the value of its assets. The Bankruptcy Code adopts the balance-sheet test for insolvency and defines 'insolvent' as a financial condition such that the sum of the debtor's debts is greater than all of the debtor's property at a fair valuation. The Bankruptcy Code uses the term in various provisions, including with respect to the fixing of statutory liens, reclamation rights, avoiding powers (eg, fraudulent and preferential transfers) and set-offs. Bankruptcy courts have generally adopted a flexible approach to insolvency analysis. They value companies that can continue day-to-day operations on a going concern or market price basis, and may rely on a combination of valuation methodologies. Exceptions exist to the use of the balance-sheet insolvency test with respect to involuntary bankruptcy petitions and a municipality's eligibility for bankruptcy relief: in those cases, the Bankruptcy Code employs a variant of the equitable insolvency standard and only permits relief if the debtor is generally not paying its debts as they become due unless such debts are the subject of a bona fide dispute as to liability or amount. A debtor need not be insolvent to file for bankruptcy relief.

Mandatory filing

16 | Must companies commence insolvency proceedings in particular circumstances?

US law imposes no absolute obligation on a company's board to commence insolvency proceedings. The board of an insolvent company may in good faith pursue strategies to maximise the value of the company that do not involve commencement of insolvency proceedings.

DIRECTORS AND OFFICERS

Directors' liability – failure to commence proceedings and trading while insolvent

17 | If proceedings are not commenced, what liability can result for directors and officers? What are the consequences for directors and officers if a company carries on business while insolvent?

When a company is actually insolvent, the directors' fiduciary duties to the corporation under many states' laws expand to include the interests of creditors, as well as of shareholders. But no other consequences exist if a company carries on business while insolvent, assuming it does so in good faith and in accordance with applicable law. Courts generally view creditors in these circumstances as having sufficient protections through their contractual arrangements with the company, or fraudulent conveyance law and the implied covenant of good faith and fair dealing, such that additional layers of protection are considered unnecessary.

Directors' liability – other sources of liability

18 Apart from failure to file for proceedings, are corporate officers and directors personally liable for their corporation's obligations? Are they liable for corporate pre-insolvency or pre-reorganisation actions? Can they be subject to sanctions for other reasons?

US law imposes no obligation to file a company for bankruptcy relief when the company is insolvent. Accordingly, corporate officers and directors are not personally liable for 'failure to file for proceedings'. If officers and directors comply with corporate law formalities, they are generally not liable for the debts and liabilities of the corporations they serve. Liability may arise on a corporate veil piercing theory. An officer or director who is a 'control person' may also be liable for certain state and federal payroll taxes that were not withheld and paid over to taxing authorities. Similarly, corporate directors and officers do not have personal liability for pre-bankruptcy actions unless they are found to have breached their fiduciary duties. Generally, no fiduciary obligations to creditors exist. Creditor rights are governed by contract, statute and case law concerning debtor-creditor relationships. Upon insolvency (or near insolvency), the directors' and officers' fiduciary obligations to the corporation may expand to take into account the interests of creditors who, upon insolvency, become the residual risk-bearers in the enterprise; however, state law is not necessarily consistent or fully developed with respect to such matters. As in all situations, directors and officers may be criminally prosecuted for fraud, securities law violations and other crimes related to the conduct of the business. Mere insolvency, or operating a company while insolvent, however, does not give rise to liability.

Directors' liability – defences

19 What defences are available to directors and officers in the context of an insolvency or reorganisation?

A director or officer enjoys the same corporate law defences in the context of an insolvency or reorganisation as they do outside of this context. These include the protections of the business judgment rule as informed by the duty of care and duty of loyalty under applicable non-bankruptcy corporate law. While no insolvency or reorganisation specific protections exist, substantially all transactions outside the ordinary course of business pursued during an in-court proceeding are subject to court approval and stakeholder scrutiny. As a practical matter, officers and directors therefore benefit from the protections of a court order approving these transactions, which typically include findings that the transaction was entered into in good faith and is in the best interests of the debtor and its estate. Moreover, as noted above, a plan may contain releases and exculpations in favour of the debtor's officers and directors for acts and omissions made in connection with or arising from the Chapter 11 case itself.

Shift in directors' duties

20 Do the duties that directors owe to the corporation shift to the creditors when an insolvency or reorganisation proceeding is likely? When?

Upon insolvency (or near insolvency), the directors' and officers' fiduciary obligations to the corporation may expand to take into account the interests of creditors who, upon insolvency, become the residual risk-bearers in the enterprise; however, state law is not necessarily consistent or fully developed with respect to such matters. The Supreme Court of Delaware, for example, has ruled that directors of a solvent Delaware corporation operating in the 'zone of insolvency' must continue to discharge their fiduciary duties to the corporation and its shareholders, not its creditors. Accordingly, in Delaware, the actual point of insolvency determines when the directors' duties may shift to include creditor interests.

Directors' powers after proceedings commence

21 What powers can directors and officers exercise after liquidation or reorganisation proceedings are commenced by, or against, their corporation?

In general, directors and officers continue to exercise their normal powers in the ordinary course after the commencement of a Chapter 11 case and a bankruptcy court will not interfere in the corporate governance of the debtor absent a showing of 'clear abuse'. Thus, the Bankruptcy Code leaves state corporate governance law largely untouched and bankruptcy courts generally do not take sides in corporate governance disputes. The primary exception is the power to order the appointment of a Chapter 11 trustee. Section 1104 of the Bankruptcy Code authorises a bankruptcy court to appoint a Chapter 11 trustee 'for cause' or 'if such appointment is in the interests of the creditors, any equity security holders, and other interests of the estate'. Courts consider a number of factors when determining whether to appoint a trustee, and doing so does not necessarily require a finding of fault. These factors include, among others: the trustworthiness of the debtor; the debtor-in-possession's past and present performance and prospects for the debtor's rehabilitation; the confidence – or lack thereof – of the business community and of creditors in present management; and the benefits derived by the appointment of a trustee, balanced against the cost of appointment. The appointment of a Chapter 11 trustee, however, remains the exception rather than the rule.

In contrast, in a Chapter 7 case, an independent trustee is appointed who displaces management. The board typically resigns. The Chapter 7 trustee's primary purpose is to collect, liquidate and distribute estate property as expeditiously as is compatible with the best interests of the parties. In rare instances, a Chapter 7 trustee may continue to operate the debtor's business for the purpose of maximising its liquidation value.

MATTERS ARISING IN A LIQUIDATION OR REORGANISATION

Stays of proceedings and moratoria

22 What prohibitions against the continuation of legal proceedings or the enforcement of claims by creditors apply in liquidations and reorganisations? In what circumstances may creditors obtain relief from such prohibitions?

The filing of a bankruptcy petition (other than a petition for ancillary relief under Chapter 15) triggers an automatic stay and no formal court order need be obtained. The automatic stay is broad in scope and applies to almost all types of creditor actions against the debtor or property of its estate. The limited statutory exceptions to the stay include criminal proceedings against the debtor, enforcement of a governmental unit's police or regulatory powers, a non-debtor party's right to close out most securities and financial contracts, and certain other actions taken by specified parties. A court may, upon a creditor's request and after notice and a hearing, grant relief from the automatic stay: 'for cause, including the lack of adequate protection of an interest in property' held by such creditor; or with respect to an action against property of the estate, if the debtor does not have any equity in such property (ie, the claims against such property exceed its value) and such property is not necessary for the debtor's effective reorganisation.

Doing business

23 When can the debtor carry on business during a liquidation or reorganisation? Is any special treatment given to creditors who supply goods or services after the filing? What are the roles of the creditors and the court in supervising the debtor's business activities?

No specific conditions apply to a debtor's ordinary course operation of its business during a reorganisation and it may do so without notice to creditors or court order. The debtor-in-possession, however, becomes an officer of the court and has a fiduciary duty to protect and preserve the assets of the estate and to administer them in the best interests of its creditors. Creditors who supply goods or services post-petition are usually paid on a current basis and, if not, have an administrative expense claim that usually entitles them to a full recovery as a condition to the debtor's emergence from Chapter 11.

One or more official and, often, unofficial committees and the US trustee monitor the debtor's activities during reorganisation. The court may also appoint a trustee for cause, including fraud, dishonesty, incompetence or gross mismanagement and, in certain cases, an examiner may be appointed to investigate specified matters. The court generally does not insert itself into the day-to-day management of the debtor's affairs and when court approval is required, generally defers to the debtor's business judgment. A debtor must obtain court approval for transactions not in the ordinary course; use of a secured lender's cash collateral (in the absence of its consent); compromises and settlements; and debtor-in-possession financing. The court must also approve the debtor's retention and payment of professionals.

Post-filing credit

24 May a debtor in a liquidation or reorganisation obtain secured or unsecured loans or credit? What priority is or can be given to such loans or credit?

Section 364 of the Bankruptcy Code governs post-petition financing. A debtor-in-possession may obtain post-petition unsecured credit in the ordinary course of its business without court approval. Other financing requires court approval. The court may authorise unsecured post-petition credit as an administrative expense. It may also grant the lender a 'super priority' claim that has priority over all other administrative priority and general unsecured claims, other than the payment of administrative expenses in a superseding Chapter 7 case. A debtor-in-possession may also obtain secured credit and the court may authorise a lien that is junior, senior or equal to an existing lien on the debtor's assets. Liens that are senior or equal to existing liens may be granted if the debtor demonstrates that it is unable to obtain credit otherwise, and adequate protection of the existing lienholder's interests exists. Non-consensual priming liens are rare, as debtors usually cannot provide pre-petition secured lenders with adequate protection because of a lack of unencumbered cash flow and assets. Trustees in Chapter 7 cases may also obtain credit if authorised to operate the debtor's business.

Sale of assets

25 In reorganisations and liquidations, what provisions apply to the sale of specific assets out of the ordinary course of business and to the sale of the entire business of the debtor? Does the purchaser acquire the assets 'free and clear' of claims or do some liabilities pass with the assets?

Sections 363 and 365 of the Bankruptcy Code govern the sale of assets outside the ordinary course of business (including the sale of some or all of the debtor's business), and assumption and assignment of leases and executory contracts. A debtor must support such a proposed sale or use of property with an articulated business reason. This business judgment standard is flexible, and courts consider all salient factors pertaining to the proceeding and proposed sale when determining whether a proffered business justification satisfies the standard with respect to any particular transaction. A debtor may also sell assets or its business pursuant to a Chapter 11 plan. A purchaser typically acquires the assets free and clear of any claim or interest. Future claims, that is, claims where the injury has not yet manifested itself (typically based on product liability or similar tortious conduct), present the principal exception to this general rule and may give rise to successor liability.

Negotiating sale of assets

26 Does your system allow for 'stalking horse' bids in sale procedures and does your system permit credit bidding in sales?

The Bankruptcy Code permits private asset sales as well as auctions. Auctions typically take place outside the courtroom pursuant to judicially approved sales procedures. Auctions often include a sale agreement that sets the floor for other bids – a 'stalking horse bid'. The court approves the terms of the stalking horse bid, including any break-up fee or other buyer protections.

Unless the court for cause orders otherwise, the Bankruptcy Code in general permits a secured creditor to bid up to the full amount of its claim to purchase a debtor's assets during a bankruptcy case and the practice is common. The Bankruptcy Code does not define 'cause'. Courts interpret the term flexibly and apply it on a case-by-case basis. Little case law exists addressing what constitutes 'cause' to deny a secured creditor's right to credit bid. Rulings suggest that a court will only limit a secured creditor's right to credit bid where the creditor's lien is not fully perfected, collusion exists, or allowing the original credit bid would chill the bidding process and suppress the sale price. Absent collusion or lack of good faith, the fact that the credit bidder is an assignee of the original secured creditor should not affect the assignee's right to credit bid, and the practice is common. The US Supreme Court has definitively ruled that a secured creditor has an absolute right to credit bid when a debtor sells a secured creditor's collateral under a Chapter 11 plan, rather than pursuant to section 363 of the Bankruptcy Code during the pendency of the case.

Rejection and disclaimer of contracts

27 Can a debtor undergoing a liquidation or reorganisation reject or disclaim an unfavourable contract? Are there contracts that may not be rejected? What procedure is followed to reject a contract and what is the effect of rejection on the other party? What happens if a debtor breaches the contract after the insolvency case is opened?

Upon notice and a hearing, a debtor may reject almost any pre-petition executory contract or lease other than a collective bargaining agreement, which it may only reject or modify in compliance with section 1113 of the Bankruptcy Code. A debtor may also not unilaterally reject or fail to pay retiree insurance benefits; these may only be modified or rejected in compliance with section 1114 of the Bankruptcy Code. The rejection of a contract is deemed a pre-petition breach that gives rise to an unsecured claim for damages. Rejection of the contract relieves the debtor and non-debtor party to the contract of continued performance. Where a debtor's obligations stem from pre-petition contractual liability, even a post-petition breach will be treated as a pre-petition liability if the debtor elects to reject the agreement. When a debtor elects to assume a contract, it is required to cure any defaults including amounts owed on account of post-petition breaches. Where a debtor-in-possession elects to continue to receive benefits from the non-debtor contract counterparty to an executory contract pending a decision to assume or reject the contract, the debtor-in-possession is obligated to pay for the reasonable value of those services. Thus, claims of contract counterparties who are induced to supply goods or services to a debtor-in-possession pursuant to a contract that has not been rejected are afforded administrative priority to the extent that the consideration supporting the claim was supplied during the reorganisation.

Intellectual property assets

28 May an IP licensor or owner terminate the debtor's right to use the IP when a liquidation or reorganisation is opened? To what extent may IP rights granted under an agreement with the debtor continue to be used?

The automatic stay prevents an IP licensor from terminating the debtor's right to use the licensed intellectual property. Courts usually treat IP licences as executory contracts and a debtor may continue using the IP during its Chapter 11 case if it pays royalties and otherwise complies with the licence. A debtor's ability to assume an IP licence and continue using it after exiting from bankruptcy, or selling the IP licence to a third party, may generate controversy and depends on the nature of the licence under non-bankruptcy law. Section 365(n) of the Bankruptcy Code protects a licensee's right to use intellectual property where the debtor is the IP licensor. Prior to rejecting an IP licence, the debtor must perform the contract, provide the licensee with the IP and otherwise not interfere with the licensee's contractual rights. A licensee may elect to retain its rights under the IP licence, as such rights existed immediately before the commencement of the bankruptcy case, notwithstanding the debtor's rejection of the IP licence if it makes royalty payments and waives any set-off and administrative claims arising under the licence.

Personal data

29 Where personal information or customer data collected by a company in liquidation or reorganisation is valuable, are there any restrictions in your country on the use of that information or its transfer to a purchaser?

The Bankruptcy Code restricts the ability to sell or lease estate assets if the assets include 'personally identifiable information' about nondebtor individuals, and if the debtor, in connection with offering a product or service, has in effect on the petition date a policy that prohibits transfer of such information. Personally identifiable information is broadly defined to mean information provided by an individual to a debtor in connection with obtaining a product or a service from the debtor primarily for consumer use. It includes a person's name, address, contact information, social security number, birth date and the like. In such circumstances, personally identifiable information may only be sold or leased if the sale is consistent with the debtor's policy, or if, after the appointment of a consumer privacy ombudsman, the court gives due consideration to the facts, circumstances, and conditions of the sale or lease and no violation of applicable non-bankruptcy law would ensue. The court directs the US trustee to appoint a consumer privacy ombudsman if a transaction requires doing so. The consumer privacy ombudsman is a disinterested person compensated by the debtor's estate who assists the court in its consideration of the facts and circumstances of the proposed sale or lease. Relevant information that the ombudsman may present to the court for consideration includes the impact of the transaction on the potential loss of consumer privacy, and the related potential harm and cost.

Arbitration processes

30 How frequently is arbitration used in liquidation or reorganisation proceedings? Are there certain types of disputes that may not be arbitrated? Can disputes that arise after the liquidation or reorganisation case is opened be arbitrated with the consent of the parties?

Federal law and courts strongly favour the use of alternative dispute resolution, and arbitration procedures are employed in bankruptcy cases, although mediation is more commonly used. A court has the discretion to deny arbitration over a core matter integral to the bankruptcy case. The automatic stay enjoins arbitrations commenced prior to the bankruptcy filing from continuing against a debtor, although courts may grant relief from the stay to permit the proceeding to continue and often do so. Disputes that arise in an insolvency case after it is filed, most commonly relating to claims adjudication and avoidance proceedings, may also be subject to arbitration or mediation and bankruptcy courts have the authority to direct parties to submit to such procedures. Large, complex Chapter 11 cases often employ court-approved alternative dispute resolution procedures tailored to address the specific exigencies of the case. No types of insolvency disputes exist that are categorically exempt from arbitration and mediation. Indeed, bankruptcy courts may appoint a mediator to facilitate confirmation of a reorganisation plan. In some cases, a party may waive its right to arbitration if, for example, it engages in protracted litigation that prejudices the opposing party. Waiver of arbitration, however, is not lightly inferred and remains the exception rather than the rule.

CREDITOR REMEDIES

Creditors' enforcement

31 Are there processes by which some or all of the assets of a business may be seized outside of court proceedings? How are these processes carried out?

Article 9 of the Uniform Commercial Code permits a secured party to repossess collateral by self-help when it can be done without breach of the peace. Disposition of the collateral may be by public or private sale. Every aspect of the disposition must be commercially reasonable. In practice, court proceedings are usually commenced to obtain judicial approval of the repossession and disposition of substantial assets.

Unsecured credit

32 What remedies are available to unsecured creditors? Are the processes difficult or time-consuming? Are pre-judgment attachments available?

An unsecured creditor generally has no special rights to any of the debtor's property until it obtains and enforces a judgment; commencement of a lawsuit to collect on the debt remains a creditor's principal remedy. A debt collection action may be a streamlined proceeding that gives rise to a judgment in a few months. The suit's complexity typically determines its length. Pre-judgment remedies (writs of attachment, garnishment and replevin) exist. Special procedures generally do not apply to foreign creditors of US debtors, except for the enforcement of arbitration awards involving foreign creditors against US debtors, which generally proceed under federal law.

CREDITOR INVOLVEMENT AND PROVING CLAIMS

Creditor participation

33 During the liquidation or reorganisation, what notices are given to creditors? What meetings are held and how are they called? What information regarding the administration of the estate, its assets and the claims against it is available to creditors or creditors' committees? What are the liquidator's reporting obligations?

Creditors receive notice of most significant aspects of a liquidation or reorganisation case, including:
- case commencement;
- the bar date for filing claims;
- dates for the meeting of creditors;
- any proposed sale, use or lease of property outside of the ordinary course of business;
- the deadline to vote on a plan; and
- fee applications of professionals.

Shortly after a case is filed, the US trustee convenes a meeting of creditors at which they may examine the debtor. On motion of any party in interest, the court may also order the examination of any entity, including the debtor. Numerous reporting obligations exist. A debtor (or trustee) must file operating and financial reports that disclose the debtor's business and financial performance while in bankruptcy. A debtor also has a duty to keep records of receipts and disposition of assets, and in a Chapter 11 case, report financial information concerning entities in which the debtor holds a controlling interest.

Creditor representation

34 What committees can be formed (or representative counsel appointed) and what powers or responsibilities do they have? How are they selected and appointed? May they retain advisers and how are their expenses funded?

In Chapter 11 cases, the US trustee must appoint a committee of creditors holding unsecured claims and may appoint additional committees (eg, to represent equity holders, mass tort claimants or employees). Five to seven creditors, selected from the debtor's 20 largest creditors and who have indicated a willingness to serve, usually comprise a statutory committee. Statutory creditors' committees serve as fiduciaries for unsecured creditors generally and perform an oversight function. They may investigate the debtor's acts, conduct, assets, liabilities, financial condition, business operations and any other matter relevant to the case or to the formulation of a plan. Subject to court approval, a creditors' committee may retain attorneys, financial advisers and other professionals. The debtor pays their approved fees and expenses. Unofficial (or ad hoc) committees, including committees of secured (or undersecured) lenders, equity holders, noteholders and trade creditors, may also play an important role in reorganisations. Ad hoc committees are self-appointed and self-regulated. Like other interested parties, they have standing to be heard on most issues in a case, may file motions, and may otherwise appear before the court and participate in the restructuring process. Ad hoc committees routinely retain attorneys and financial advisers. The debtor may be required to pay an ad hoc committee's professional fees and expenses if the court finds that the committee made a 'substantial contribution' to the case, or if a Chapter 11 plan so provides, although the latter is subject to some debate.

Enforcement of estate's rights

35 If the liquidator has no assets to pursue a claim, may the creditors pursue the estate's remedies? If so, to whom do the fruits of the remedies belong? Can they be assigned to a third party?

The court may grant a creditor or, more often, a creditors' committee, derivative standing to pursue actions on behalf of the debtor or its estate, but litigation proceeds generally inure to the benefit of the estate. Alternatively, the trustee may retain an attorney on a contingency fee basis under which the attorney receives a fixed percentage of any recovery, with the excess reverting to the debtor's estate. With court approval, a debtor's secured lenders or others may fund the debtor's prosecution of a valuable estate claim for the benefit of the estate generally.

Claims

36 How is a creditor's claim submitted and what are the time limits? How are claims disallowed and how does a creditor appeal? Can claims for contingent or unliquidated amounts be recognised? Are there provisions on the transfer of claims and must transfers be disclosed? How are the amounts of such claims determined?

A debtor lists all known claims in its schedules of assets and liabilities and classifies them as 'disputed', 'unliquidated' or 'contingent' where appropriate. A Chapter 11 debtor usually obtains a court order setting a bar date by which creditors must file proofs of claim; however, if the claim is scheduled in the proper amount and not as disputed, unliquidated or contingent, no proof of claim need be filed in a Chapter 11 case. In Chapter 7 cases, a claim is timely if it is filed no later than 90 days after the first date set for the section 341 creditors' meeting, unless the case is a 'no asset' case in which the claim deadlines may be deferred. Creditors may object to a debtor's characterisation of their claim, and a debtor may object to a creditor's proof of claim. Parties adjudicate a claim dispute before the court. Non-bankruptcy law determines its validity, although the Bankruptcy Code governs the allowance of the claim in bankruptcy and sometimes trumps non-bankruptcy law rights; for example, by disallowing an unsecured creditor's claim for interest accruing post-petition and limiting a landlord's lease rejection damages to a percentage of remaining lease payments. Bankruptcy court orders disallowing a claim may be appealed. In addition, a court may for cause reconsider a claim that has been allowed or disallowed. The Bankruptcy Code defines 'claims' broadly and, as a result, claims for contingent or unliquidated amounts can be recognised and discharged. Courts must estimate contingent or unliquidated claims for the purpose of allowance if the fixing or liquidating of the claim would unduly delay the administration of the case. The goal of estimation is to reach a reasonable valuation of the claim as of the date of the bankruptcy filing. The court may estimate contingent or unliquidated claims under whatever method it finds best suited to the particular exigencies of the case, but in determining the amount of the claim, is generally bound by the applicable non-bankruptcy substantive law governing the claim (eg, claims based on alleged breach of contract are estimated under accepted contract law principles). An active and well-developed claims market exists. In the absence of a court order to the contrary, parties may freely transfer bankruptcy claims and the applicable rules have essentially rendered the sale of claims a private transaction between buyer and seller mostly free from court interference. For claims not based on publicly traded securities, the Federal Rules of Bankruptcy Procedure require a transferee to file evidence of the transfer of a claim, typically in the form of an assignment of claim. Any objection to the transfer must be filed within 21 days of the mailing of the notice to the transferor. In the absence of an objection, the transfer is valid. A claim acquired at a discount is enforced for its full face value, and not the discounted purchase price, if the claim is otherwise valid. An exception to this rule is bond debt acquired with an original issue discount, a portion of which may be treated as unmatured post-petition interest. The Bankruptcy Code disallows claims for unmatured post-petition interest unless the creditor claiming the interest is a secured creditor the value of whose security exceeds its claims, or the estates are solvent and can pay unsecured claims in full.

Set-off and netting

37 To what extent may creditors exercise rights of set-off or netting in a liquidation or in a reorganisation? Can creditors be deprived of the right of set-off either temporarily or permanently?

The Bankruptcy Code generally honours a creditor's set-off right of mutual pre-petition debts and treats it like a secured claim. Courts have interpreted the Bankruptcy Code's 'mutual debt' requirement, however, as requiring a mutuality of parties, thereby rendering ineffective in bankruptcy agreements to set off amounts owed to affiliates of a counterparty ('triangular set-offs' or cross-affiliate netting), even though such agreements are enforceable under non-bankruptcy contract law. Except for set-offs arising from certain securities transactions, a creditor must obtain relief from the automatic stay prior to setting off. The Bankruptcy Code does not recognise a set-off if the creditor asserting the right acquired the claim against the debtor from another creditor either after the debtor's bankruptcy filing or within 90 days of the filing while the debtor was insolvent. Set-offs are also barred if the creditor became indebted to the debtor for the purpose of obtaining the set-off, and the creditor incurred the debt within 90 days of the debtor's filing while the debtor was insolvent. Limits also exist on recovery of certain preferential set-offs taken within the 90 days immediately preceding the debtor's filing of its bankruptcy case.

Modifying creditors' rights

38 May the court change the rank (priority) of a creditor's claim? If so, what are the grounds for doing so and how frequently does this occur?

The court may change the treatment of creditors' claims through equitable subordination, recharacterisation and substantive consolidation. Equitable subordination lowers the priority of a creditor's claim by subordinating it to similarly situated claims upon a showing of wrongful conduct by the claim holder that damaged other creditors. Recharacterisation involves the allowance of a claim based on its economic substance rather than form. A court may recharacterise a debt claim as an equity interest if the purported claim lacks the usual attributes of indebtedness and otherwise functions like equity. A court may 'substantively consolidate' estates. By pooling the assets of, and claims against, two or more entities, substantive consolidation may eliminate differences in relative recoveries or structural priority between the claimants of affiliated entities. Finally, at least some courts have held that they also have the power to disallow claims on equitable grounds in 'rare' cases.

Priority claims

39 Apart from employee-related claims, what are the major privileged and priority claims in liquidations and reorganisations? Which have priority over secured creditors?

The major non-employee related unsecured claims entitled to priority in both liquidations and reorganisations are:
- expenses of administering the debtor's estate, along with judicial fees and costs;
- the value of any goods received by the debtor within 20 days before the filing of the case, which goods have been sold to the debtor in the ordinary course of the debtor's business;
- claims arising during the 'involuntary gap period' from the time an involuntary petition is filed to the time the court enters an order granting the requested relief;
- subject to a statutory cap, claims for certain kinds of consumer deposits;
- claims for taxes and customs duties and related liabilities assessed within a certain pre-petition time frame; and
- claims for depository institution capital-maintenance commitments.

Apart from priming liens approved in connection with debtor-in-possession financing, only claims relating to the debtor's preservation or disposition of a secured creditor's collateral, to the extent of any benefit to the secured creditor, are entitled to priority over a secured creditor's lien.

Employment-related liabilities

40 What employee claims arise where employees' contracts are terminated during a restructuring or liquidation? What are the procedures for termination? (Are employee claims as a whole increased where large numbers of employees' contracts are terminated or where the business ceases operations?)

In general, applicable non-bankruptcy law determines the existence of any employee claims, regardless of whether the employee is terminated before or during a reorganisation or liquidation case, and no special bankruptcy procedures exist. For example, an employee may have a claim for unpaid severance if he or she is terminated before or during a bankruptcy case, and applicable contract and labour law determines the amount of his or her claim although the Bankruptcy Code imposes a one-year cap on damages arising from rejection of an employment contract. Similarly, non-bankruptcy labour law, including the federal WARN Act, may impose damages or fines on a company for terminating large numbers of employees without adequate notice, and bankruptcy recognises such claims. Whether a particular mass lay-off triggers any such claim depends on the facts and circumstances of the particular case, as well as on the applicable labour statutes (which vary from state to state). Subject to a statutory cap, the Bankruptcy Code affords priority in payment to an employee's pre-petition claims for wages, salaries and commissions (including holiday, severance and sick leave) earned by an individual within 180 days of a bankruptcy filing. In addition, employee wages earned post-petition, or claims that arise post-petition, are generally considered administrative expenses and entitled to payment in full to the extent earned or accrued post-petition. Special provisions exist for terminating collective bargaining agreements and qualified registered employee pension plans and for modifying certain retiree benefits. Very generally, a debtor may not unilaterally amend or terminate such obligations unless, among other things, it can demonstrate that the modification or termination is necessary to permit the debtor's reorganisation.

Pension claims

41 What remedies exist for pension-related claims against employers in insolvency or reorganisation proceedings and what priorities attach to such claims?

Most private-sector pension plans are governed by federal statute, the Employee Retirement Income Security Act (ERISA). ERISA requires, inter alia, certain minimum funding levels for qualified registered employee pension plans. The Pension Benefit Guaranty Corporation (PBGC) is the federal agency responsible for enforcing ERISA and for managing the mandatory government insurance programme that protects covered pensions. Under ERISA, a bankruptcy court may only approve a debtor's termination of an ERISA-covered plan if, absent such termination, the debtor will be unable to pay all of its debts pursuant to a plan of reorganisation and will be unable to continue in business outside the Chapter 11 reorganisation process. In addition, section 1113 of the Bankruptcy Code provides the exclusive means by which a Chapter 11 debtor can assume, reject or modify a collective bargaining agreement, including any additional pension-related obligations such an agreement may impose.

If a debtor terminates an ERISA-governed pension plan in bankruptcy, the PBGC may participate as a creditor holding claims for both the amount of any underfunding as well as any unpaid contributions. Outside of bankruptcy, a statutory lien arises in favour of the PBGC for unpaid mandatory plan contributions and underfunding. In bankruptcy, the automatic stay precludes imposition of these liens and the PBGC's claims for withdrawal liability or unpaid pension plan contributions are therefore generally considered pre-petition unsecured claims and afforded no special treatment. Some courts, however, have afforded administrative expense treatment to the portion of the PBGC's underfunding or withdrawal liability claims that are attributable to the employees' post-petition labour. Unpaid pension contributions incurred post-petition but prior to plan termination may also be treated as administrative expense priority claims, although the law remains unsettled on this issue. Finally, section 507(a)(5) of the Bankruptcy Code grants priority to claims up to a limited statutory cap for pre-petition contributions to employee benefit plans.

Unlike private-sector pensions, public pensions (ie, those sponsored by states or municipalities) are governed by state and local law, not ERISA. Many states treat public pension benefits as constitutionally protected, which severely limits the public employer's ability to reduce or modify public pension benefits both inside and outside of bankruptcy. A municipality eligible to file for bankruptcy under Chapter 9 of the Bankruptcy Code, however, may have some ability to modify its pension obligations through the leverage gained by imposition of the automatic stay and the ability to assume and reject executory contracts, although the effectiveness of Chapter 9 for these purposes remains largely untested.

Environmental problems and liabilities

42 | Where there are environmental problems, who is responsible for controlling the environmental problem and for remediating the damage caused? Are any of these liabilities imposed on the insolvency administrator personally, secured or unsecured creditors, the debtor's officers and directors, or on third parties?

A debtor in bankruptcy must comply with all applicable environmental laws and regulations – and the exercise of the government's police power through such laws and regulations – while operating during and after bankruptcy. This means that a company that owns environmentally contaminated property cannot use bankruptcy to cleanse itself of its obligations related thereto. It must remediate the property in accordance with applicable laws, regulations, consent decrees, judgments and similar requirements. Likewise, bankruptcy does not empower an owner-operator of contaminated property to escape owner-operator liability after emerging from bankruptcy. The extent to which environmental obligations otherwise can be discharged in bankruptcy remains hotly contested and has generated inconsistent and often conflicting case law. While no clear lines can be drawn, as a very general matter, claims by the government and potentially responsible third parties to recover the cost of remediation work on sites formerly owned by the debtor, and fines and penalties for pre-filing violations of regulatory requirements are the environmental obligations most susceptible to discharge in bankruptcy. Environmental obligations associated with properties owned during and after bankruptcy, in most cases, cannot be discharged. Whether such claims travel with the assets, or can be asserted against successor entities or third parties, depends on the facts of the individual case and the outcome remains uncertain. In general, however, absent criminal conduct, the debtor's officers and directors are not held personally liable for environmental remediation claims.

Liabilities that survive insolvency or reorganisation proceedings

43 | Do any liabilities of a debtor survive an insolvency or a reorganisation?

Confirmation of a Chapter 11 reorganisation plan generally discharges a business debtor of all its pre-petition debts to creditors. However, a plan that provides for the liquidation of all, or substantially all, of the property of the estate when the debtor does not engage in business after consummation of the plan, does not result in a discharge. A business debtor likewise does not receive a discharge in a Chapter 7 case. Upon completion of a Chapter 7 or liquidating Chapter 11 case, however, only a corporate shell remains against which claims could be satisfied. Bankruptcy discharges most debts of individual debtors with certain statutory exceptions.

A debtor may also be unable to discharge responsibility for environmental contamination obligations through the bankruptcy process. The question turns on whether a particular environmental clean-up obligation constitutes a 'claim' as defined by the Bankruptcy Code, or alternatively, a form of injunctive relief that cannot be reduced to a 'right to payment'. Environmental liability that constitutes a 'claim' (eg, a regulatory fine or claim for reimbursement) may be discharged, but other types of remedial obligations (eg, where a debtor must take action to ameliorate ongoing pollution regardless of cost to the debtor) may not. The distinction often proves unclear and courts have struggled with the conflicting aims of US bankruptcy and environmental laws in this area, resulting in inconsistent case law. Recent decisions suggest a trend towards favouring environmental over bankruptcy goals, with some courts concluding that where the government brings an action for injunctive relief against a company under an environmental protection statute that does not authorise any form of monetary relief, the obligation with respect to such injunctive relief is not a 'claim', and the company therefore cannot discharge its remediation obligations through bankruptcy.

Distributions

44 | How and when are distributions made to creditors in liquidations and reorganisations?

A Chapter 11 plan specifies the time and manner of distributions. A Chapter 7 trustee generally does not make distributions until he or she has liquidated estate assets, including completion of litigation. Interim distributions may be made if sufficient liquid assets exist. Payment on account of administrative or priority claims, like wage claims or fully secured claims, may be made during the pendency of the case with court approval.

SECURITY

Secured lending and credit (immovables)

45 | What principal types of security are taken on immovable (real) property?

The mortgage constitutes the principal form of security device for real property and may extend to rents, proceeds and fixtures. Other real property security devices exist under state laws, including the deed of trust and land sale contract.

Secured lending and credit (movables)

46 What principal types of security are taken on movable (personal) property?

The security interest constitutes the principal security device taken on movable property. Article 9 of the Uniform Commercial Code (UCC), enacted in all states, governs the creation and perfection of security interests in most goods. Other provisions of the UCC apply to security interests in intangible property. State certificates of title statute govern security devices in vehicles. Federal law governs the creation and perfection of security interests in most intellectual property and in aircraft and vessels.

CLAWBACK AND RELATED-PARTY TRANSACTIONS

Transactions that may be annulled

47 What transactions can be annulled or set aside in liquidations and reorganisations and what are the grounds? Who can attack such transactions?

Preferential, fraudulent and post-petition transfers made without necessary court authorisation may be avoided. Broadly, a preferential transfer is one made within 90 days before the commencement of the case (or one year if to insiders) on account of antecedent debt that results in the recipient receiving a greater recovery than it would have received if the transfer had not been made and the debtor were liquidated in a Chapter 7 case. In general, a fraudulent transfer is: any transfer of the debtor's property, or any obligation incurred by the debtor, that was made with the 'actual intent to hinder, delay, or defraud' present and future creditors; or any transfer made or obligation incurred for less than reasonably equivalent value while the debtor was insolvent, thereby rendered insolvent, had unreasonably small capital to operate its business, intended or believed that it would incur debts beyond its ability to pay as they matured, or made to an insider if certain other circumstances exist.

The Bankruptcy Code's fraudulent transfer provision has a two-year reach-back period, but the Code also permits use of longer reach-back periods available under state law, which typically range from four to six years. The Bankruptcy Code permits the recovery of the property transferred, or its value. The Code also disallows any claim by a transferee against the estate unless the transferee disgorges any avoided transfer for which the court finds it liable. If the transferee returns the avoided transfer, it receives a pre-petition general unsecured claim as compensation.

Equitable subordination

48 Are there any restrictions on claims by related parties or non-arm's length creditors (including shareholders) against corporations in insolvency or reorganisation proceedings?

In bankruptcy, a party may be an 'insider' if the party either meets the statutory definition of insider (which includes, in the case of a company, 20 per cent voting equity holders, the debtor's directors, officers, general partner, persons in control, an affiliate or insider of an affiliate as if such affiliate were the debtor, managing agents, and relatives of same); or has such a close relationship with or control over the debtor so as to render transactions with the debtor not at arm's length. Claims by insiders are not per se invalid; however, because transactions with insiders are by their nature not arm's-length transactions, and accordingly, give rise to the fear that insiders might receive more favourable treatment or superior terms at the expense of general creditors, courts subject insider claims and transactions to heightened scrutiny. Insider claims are thus more likely to be recharacterised as equity or equitably subordinated and courts factor the insider nature of a claim into the equitable subordination and recharacterisation analysis. Similarly, rather than relying on the business judgment standard, courts subject sales to and transactions with insiders to heightened scrutiny when determining whether the transaction is fair to a debtor and its stakeholders. In some cases involving insider sales, a court may appoint an independent examiner to vet the process. Along with having their claims and transactions subject to heightened scrutiny, insider votes are not counted for the purpose of determining whether at least one impaired class of claims has voted to accept a Chapter 11 reorganisation plan. Finally, the look-back period for insiders during which transfers may be subject to avoidance as preferential is longer than for non-insider creditors, and transfers or obligations incurred to or for the benefit of an insider may be avoided as constructively fraudulent if the debtor received less than reasonably equivalent value in exchange and made the transfer or incurred the obligation under an employment contract and not in the ordinary course of business, regardless of the debtor's solvency at the time. Under some state fraudulent transfer laws that include good faith as an element of a non-avoidable transfer, courts have held that transfers to insiders during the suspect period per se lack good faith, and accordingly, can be avoided as constructively fraudulent if the other elements of the statute are also satisfied.

GROUPS OF COMPANIES

Groups of companies

49 In which circumstances can a parent or affiliated corporation be responsible for the liabilities of subsidiaries or affiliates?

In general, absent a contractual agreement to the contrary (eg, a guarantee), a parent or affiliated corporation is not responsible for the liabilities of its subsidiaries or affiliates. Exceptions exist under certain statutes, which impose direct liability on parent companies for the actions of their subsidiaries on principles of indirect operator liability, where a parent exercises direct and pervasive control over its subsidiary, common ownership, agency and veil piercing. These statutes include federal environmental, pension, labour and anti-foreign corrupt practices laws, inter alia. In addition, US common law recognises exceptions to the default rule of limited corporate liability under various equitable theories known as 'alter ego', 'piercing the corporate veil' or 'single business enterprise'. While the exact standards for these equitable remedies vary, in general, a court may ignore the separateness of corporate entities and impose liability on parent or affiliated corporations within the same enterprise group when three factors exist: dominion and control by one corporation over another, improper conduct or purpose and harm or loss caused by the misuse of the corporate form.

Common fact patterns for invoking these principles include the use of a corporate entity to defraud creditors, evade existing obligations, circumvent a statute or perpetuate illegal acts. Finally, commercial tort principles may expose corporate group members to extra-contractual claims arising from otherwise entity-specific contracts (eg, a lender seeks to hold a controlling parent liable for the false and misleading statements of its subsidiary borrower).

Combining parent and subsidiary proceedings

50 In proceedings involving a corporate group, are the proceedings by the parent and its subsidiaries combined for administrative purposes? May the assets and liabilities of the companies be pooled for distribution purposes?

A court routinely administers the bankruptcy cases of affiliated corporate debtors jointly. However, absent substantive consolidation, the court cannot distribute group company assets pro rata without regard to the assets and liabilities of the individual corporate entities involved. In practice, when formulating distributions to stakeholders under a jointly administered Chapter 11 plan, financial advisers model the distributive value allocable to each legal entity within a corporate group based on the assets and liabilities of each entity.

INTERNATIONAL CASES

Recognition of foreign judgments

51 Are foreign judgments or orders recognised, and in what circumstances? Is your country a signatory to a treaty on international insolvency or on the recognition of foreign judgments?

Most foreign judgments, other than those involving foreign penal and revenue laws, enjoy a strong presumption of validity in US courts. Their recognition depends primarily on principles of comity as well as state law, typically common law or the Uniform Foreign Money Judgments Recognition Act where enacted. The US is not a signatory to a treaty specifically addressing international insolvency or the recognition of foreign judgments.

UNCITRAL Model Law

52 Has the UNCITRAL Model Law on Cross-Border Insolvency been adopted or is it under consideration in your country?

Congress adopted the UNCITRAL Model Law on Cross-Border Insolvency, with some modifications, as Chapter 15 of the Bankruptcy Code in 2005. Chapter 15 enables a foreign representative of a foreign entity to obtain US bankruptcy court recognition of the foreign proceedings and thereby access a panoply of relief with respect to the foreign debtor's assets and operations in the US, including the imposition of the automatic stay, administering the foreign debtor's US assets, and operating the foreign debtor's US business. Foreign creditors have the same rights regarding the commencement of, and participation in, a bankruptcy case as domestic creditors.

Foreign creditors

53 How are foreign creditors dealt with in liquidations and reorganisations?

Foreign creditors generally have the same rights regarding the commencement of, and participation in, a bankruptcy case as do domestic creditors.

Cross-border transfers of assets under administration

54 May assets be transferred from an administration in your country to an administration of the same company or another group company in another country?

In cases involving jointly administered corporate groups, the court may in appropriate circumstances authorise the use of cash and other assets by non-debtor affiliates (including those located outside the United States), typically with the secured creditors' consent. In addition, Chapter 15 of the Bankruptcy Code authorises the court, upon recognition of a foreign proceeding, to entrust the administration or realisation of all or part of the debtor's assets within the territorial jurisdiction of the United States to a foreign representative. The court may also entrust the distribution of all or part of the debtor's assets located in the United States to the foreign representative for administration in the foreign proceeding, provided that the court is satisfied that the interests of creditors in the United States are sufficiently protected.

COMI

55 What test is used in your jurisdiction to determine the COMI (centre of main interests) of a debtor company or group of companies? Is there a test for, or any experience with, determining the COMI of a corporate group of companies in your jurisdiction?

The Bankruptcy Code does not define 'centre of main interests' for the purpose of recognising foreign proceedings in a Chapter 15 case. Bankruptcy courts have accordingly developed the following factors to consider when making a COMI determination:

- the location of the debtor's headquarters;
- the location of those who actually manage the debtor (which conceivably could be the headquarters of a holding company);
- the location of the majority of the debtor's creditors or a majority of the creditors who would be affected by the case;
- the jurisdiction whose law would apply to most disputes; and
- the expectations of third parties with regard to the debtor's COMI.

Chapter 15 also does not specifically address corporate groups. In the US, some bankruptcy courts rely on a corporate group's 'nerve centre' when determining the subsidiary's COMI in the context of multinational corporate group insolvencies. The term 'nerve centre' derives from the US federal courts' description of the factors that determine where a corporation has its 'principal place of business' for the purpose of diversity jurisdiction under US law. Under that test, where a corporation is engaged in far-flung and varied activities that are carried on in different states, its principal place of business is the nerve centre from which it radiates out to its constituent parts and from which its officers direct, control and coordinate all activities without regard to locale, in the furtherance of the corporate objective. The test applied is thus that place where the corporation has an 'office from which its business was directed and controlled' – the place where 'all of its business was under the supreme direction and control of its officers'. The 'nerve centre' approach has not been universally adopted by bankruptcy courts nationwide, however, and the law concerning determination of a corporate group's COMI for Chapter 15 purposes continues to evolve.

Cross-border cooperation

56 Does your country's system provide for recognition of foreign insolvency proceedings and for cooperation between domestic and foreign courts and domestic and foreign insolvency administrators in cross-border insolvencies and restructurings? Have courts in your country refused to recognise foreign proceedings or to cooperate with foreign courts and, if so, on what grounds?

Chapter 15 of the Bankruptcy Code directs the bankruptcy court and the trustee, or other person, including an examiner, to 'cooperate to the maximum extent possible' with a foreign court or foreign representative. In addition, the bankruptcy court or trustee may communicate directly with, or request information or assistance from, a foreign court or foreign representative. Chapter 15 of the Bankruptcy Code lists forms of cooperation that may occur between the US court or trustee and the foreign court, including the appointment of a person or body to act at the direction of the court, communication of information by any appropriate method, coordination of the administration and supervision of the foreign debtor's assets and affairs, approval or implementation of agreements concerning the coordination of proceedings and coordination of concurrent proceedings involving the same debtor.

Chapter 15 requires a bankruptcy court to enter an order recognising a foreign proceeding if three conditions are met. First, the entity applying for recognition must be a 'foreign representative' within the meaning of the statute. Second, certain procedural requirements must be satisfied. Finally, the foreign proceeding must be either a foreign main proceeding (that is, a foreign proceeding pending in the country where the debtor has its COMI), or a foreign non-main proceeding (that is, a foreign proceeding, other than a foreign main proceeding, pending in a country where the debtor has an establishment). While recognition is routinely granted in the overwhelming majority of Chapter 15 cases, US courts have refused to recognise a foreign proceeding that is neither a main nor non-main proceeding.

Upon recognition, Chapter 15 mandates US courts to grant comity or cooperation to the foreign representative unless doing so would be manifestly contrary to US public policy. The public policy exception is construed narrowly and only invoked under exceptional circumstances concerning matters of fundamental importance for the US. Two factors generally govern application of the public policy exception: the procedural fairness of the foreign proceeding; and whether an action taken in the Chapter 15 case would frustrate a US court's ability to administer the Chapter 15 case or impinge severely a US constitutional or statutory right. Very few courts have invoked the public policy exception as grounds for denying relief to a foreign representative in a Chapter 15 case. Specifically, courts have refused to apply foreign law as contrary to US public policy where the foreign law, unlike US law, allowed the debtor to terminate a licensee's right to use the debtor's patents; the foreign law permitted the administrator of the foreign entity to intercept the debtor's personal postal and electronic mail, a practice banned under US law and that might result in criminal liability; and the foreign law approved a restructuring plan that extinguished the guaranty obligations of the foreign debtor's non-debtor subsidiaries.

Cross-border insolvency protocols and joint court hearings

57 In cross-border cases, have the courts in your country entered into cross-border insolvency protocols or other arrangements to coordinate proceedings with courts in other countries? Have courts in your country communicated or held joint hearings with courts in other countries in cross-border cases? If so, with which other countries?

Bankruptcy courts routinely enter orders approving protocols for managing cross-border insolvency proceedings. US courts have a long history of communicating with courts in foreign countries and have done so with courts in countries including Brazil, Burundi, Canada, Israel, Switzerland and the United Kingdom. Indeed, some bankrtupcy courts (including the United States Bankruptcy Court for the District of Delaware and the United States Bankruptcy Court for the Southern District of New York) have adopted specific guidelines, or best practices (including procedures for joint hearings), to formalise and standardise many of the provisions courts typically approve in cross-border protocols.

Winding-up of foreign companies

58 What is the extent of your courts' powers to order the winding-up of foreign companies doing business in your jurisdiction?

A foreign entity or individual domiciled abroad but owning property or doing business in the United States is eligible to be a debtor under section 109(a) of the Bankruptcy Code. Cases that have construed the 'property' requirement have found the eligibility requirement satisfied by even a minimal amount of property located in the United States. Courts have applied this analysis to both voluntary and involuntary bankruptcy proceedings involving foreign entities. Chapter 15 of the Bankruptcy Code also authorises a foreign representative of a foreign proceeding to obtain court relief to wind-up assets or businesses of a foreign debtor located in the United States. Thus, few formal barriers exist to a court exercising jurisdiction over a bankruptcy case involving a foreign entity.

Notwithstanding these broad eligibility standards, a court has the authority to dismiss a case that is not properly brought in the United States. Section 305(a) of the Bankruptcy Code authorises a court to dismiss or suspend all proceedings in a bankruptcy case if 'the interests of creditors and the debtor would be better served by such dismissal or suspension'. Section 305(b) of the Bankruptcy Code similarly permits dismissal or suspension of a case if 'the purposes of chapter 15 . . . would be best served by such dismissal or suspension'. In addition, the common law doctrine of forum non conveniens (which permits a court to decline to exercise jurisdiction where the convenience of the parties and the court and the interests of justice warrant that the case be heard in a different forum) and principles of comity also permit dismissal in appropriate circumstances.

Lastly, bankruptcy courts typically defer to applicable corporate law procedures under applicable non-bankruptcy law (eg, state or non-US corporate law) for formal dissolution or winding-up of a business entity as a matter of corporate law.

UPDATE AND TRENDS

Trends and reforms

59 Are there any emerging trends or hot topics in the law of insolvency and restructuring? Is there any new or pending legislation affecting domestic bankruptcy procedures, international bankruptcy cooperation or recognition of foreign judgments and orders?

It is difficult to overstate the impact of the covid-19 pandemic on the US economy and the restructuring industry this past year. As of August 2020, US bankruptcies hit their highest levels in 10 years, with more than 424 companies filing in 2020 alone. Though the energy and consumer discretionary sectors led the surge early on, no industry was spared entirely. Retail filings initially outstripped other sectors, with Pier 1 Imports, Art Van Furniture, Modell's Sporting Goods, True Religion, Sabon, J.Crew, Neiman Marcus, JC Penney, GNC Holdings, Lord & Taylor LLC and Old Time Pottery seeking bankruptcy relief. Restaurant filings soon outpaced retail chain filings, however, with bankruptcies by FoodFirst Global, Too Jay's, Barfly Ventures, CFRA and Chuck E Cheese owner CEC Entertainment. A record number of oil and gas companies also sought Chapter 11 protection, with aggregate Chapter 11 liabilities in Q2 for the sector totalling close to $30 billion. The restructuring fallout from the covid-19 pandemic shows no immediate signs of abatement, and the collateral damage from the pandemic is expected to keep sending shockwaves throughout the US economy well into 2021 and beyond.

Restructuring legal developments proceeded more modestly during the past year. Bankruptcy courts have considered whether mandatory government shutdown orders from covid-19 trigger force majeure clauses and, in at least one instance, have found that they do. Bankruptcy courts have also interpreted certain provisions of the Bankruptcy Code in such a way as to support corporate debtors impacted by covid-19, in some cases suspending liquidation proceedings indefinitely or permitting companies to benefit from bankruptcy protection with no clear exit strategy in an effort to mitigate the impact of covid-19 on restructuring prospects.

There have been non-covid-19-related developments as well. Notably, the US Court of Appeals for the Second Circuit has continued its expansive interpretation of the 'safe harbour' of section 546 of the Bankruptcy Code. The safe harbour protects from avoidance as fraudulent or preferential transfers certain covered transfers made by, to or for the benefit of covered financial parties. In 2018, the US Supreme Court rejected the use of the safe harbour to protect transfers that were merely made 'through' covered financial institutions (*Merit Mgmt Grp LP v FTI Consulting, Inc*, 138 S.Ct. 883 (2018)). The Supreme Court's decision potentially ended the practice of using covered financial institutions as intermediaries to safe harbour transactions that otherwise might have been susceptible to avoidance as constructively fraudulent transfers. In 2019, interpreting statutory language that the Supreme Court did not address in *Merit*, the Second Circuit ruled that a debtor may itself qualify as a covered financial institution if it was a customer of an otherwise covered financial institution, even one that acted as an intermediary (*In re Tribune Co Fraudulent Conveyance Litig*, 946 F.3d 66 (2d Cir. 2019)). Following *Tribune*, the US Bankruptcy Court for the Southern District of New York also recently held that intentional fraudulent transfer claims, if brought under state law, could be protected by the safe harbour because federal bankruptcy law pre-empts state law for these purposes.

No significant legislation affecting the Bankruptcy Code has been enacted during the past year, other than temporary covid-19-specific relief.

Coronavirus

60 What emergency legislation, relief programmes and other initiatives specific to your practice area has your state implemented to address the pandemic? Have any existing government programmes, laws or regulations been amended to address these concerns?

In March 2020, Congress enacted a $2.2 trillion economic stimulus bill known as The Coronavirus Aid, Relief and Economic Security Act (the CARES Act) to provide families, individuals and businesses with assistance during the coronavirus pandemic. The CARES Act includes several provisions that temporarily amend the Bankruptcy Code. Most significantly, the CARES Act increases the debt limit eligibility for small businesses from US$2.7 million to US$7.5 million, which expands the number of businesses that can take advantage of the small business reorganisation chapter of the Bankruptcy Code. The CARES Act also amended Chapter 7 and Chapter 13 of the Bankruptcy Code to assist individual consumer debtors by, among other things, excluding from income government coronavirus-related relief payments; permitting modifications to consumer payment plans in pending Chapter 13 cases; and deferring student loan payments for six months, without penalty to the borrower, on federally owned student loans. The CARES Act amendments are temporary and will expire in March 2021 absent Congressional extension.

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Quick reference tables

These tables are for quick reference only. They are not intended to provide exhaustive procedural guidelines, nor to be treated as a substitute for specific advice. The information in each table has been supplied by the authors of the chapter.

United States	
Applicable insolvency law, reorganisations: liquidations	Title 11 of the United States Code (Chapter 7 governs liquidations; Chapter 11 governs reorganisations).
Customary kinds of security devices on immovables	The real estate mortgage. Alternative forms include the land sale contract and deed of trust.
Customary kinds of security devices on movables	Security interests created under and enforced by article 9 of the UCC. Special security devices exist for certain intangible property, equipment such as automobiles, aeroplanes, etc, and intellectual property.
Stays of proceedings in reorganisations/liquidations	The filing of a bankruptcy petition immediately triggers an automatic stay that enjoins most creditor enforcement action against the debtor and its property.
Duties of the insolvency administrator	The trustee or debtor-in-possession is an officer of the court and has a fiduciary duty to protect and preserve assets of the estate, and to administer such assets in the best interests of creditors.
Set-off and post-filing credit	Bankruptcy generally does not affect set-off rights existing under non-bankruptcy law, but relief from stay must be obtained. Unsecured and secured post-petition credit may be obtained with court approval.
Creditor claims and appeals	Creditors generally file proofs of claim. Disputes are litigated in the bankruptcy court (or other court of competent jurisdiction) and may be appealed.
Priority claims	Expenses of administrating the estate and other specified claims such as wages, pension benefits, and certain taxes enjoy priority.
Major kinds of voidable transactions	Fraudulent and preferential transfers may be avoided.
Operating and financing during reorganisations	The debtor-in-possession may operate its business in the ordinary course. Court approval must be obtained for transactions outside the ordinary course of business.
International cooperation and communication	Chapter 15 of the Bankruptcy Code codifies the UNCITRAL Model Law on Cross-Border Insolvency, with some modifications. Chapter 15 enables a foreign representative of a foreign entity to obtain US bankruptcy court recognition of a foreign proceeding and thereby access a panoply of relief with respect to the foreign debtor's assets and operations in the US, including the imposition of the automatic stay, administration of the foreign debtor's US assets and operation of the foreign debtor's US business. The statute authorises and encourages communication between and among US and non-US courts.
Liabilities of directors and officers	Corporate directors and officers generally have no personal liability unless they have breached their fiduciary duties. Such duties expand to include the interests of creditors upon or near insolvency.
Pending legislation	Congress enacted HR 3311, the Small Business Reorganization Act of 2019, which is expected to become effective in February 2020. The Act attempts to streamline the bankruptcy process for small business debtors.

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