

Heads-Up: Alan Kornberg at Paul Weiss in New York

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Alan Kornberg, co-head of Paul Weiss' restructuring group in New York, speaks to GRR about a transitional era in international restructurings as countries around the world migrate to Chapter 11-like regimes, how rescue loans are being used as a gateway to distressed investments and why SPACs might not be the panacea that everyone originally thought.

Despite having led Paul Weiss' restructuring practice for over 30 years, Kornberg says he never set out to be a bankruptcy lawyer but fell into it serendipitously.

He tells GRR he initially resisted when a friend at law school encouraged him to clerk for a bankruptcy judge. But he eventually ended up working for **Judge John Galgay** in the Southern District of New York, who was presiding over one of the biggest cases in the country at the time: the collapse of retail giant WT Grant.

Kornberg says WT Grant was that era's Walmart and the fact it went bankrupt was shocking. "What I thought was going to be a very narrow and arcane specialty, proved to be quite different," he says. "Every day in court, there were different issues." From employee and labour issues to significant real estate disputes and all kinds of litigation, Kornberg says the case touched on practically every major subject area and he witnessed a constant stream of negotiations.

"I came away from that experience thinking it was a great practice," he says. "I wasn't sure whether I wanted something transactional or litigation oriented, and it was both."

After deciding he wanted to become a bankruptcy lawyer after all, Kornberg joined Milbank Tweed Hadley & McCloy, which was one of the few big firms that had an established bankruptcy practice at the time. During his early years at the firm he was exposed to the huge international Chapter 11 bankruptcy of US flag carrier shipping company United States Lines. He says the case was a transformational experience for him as the first big cross-border case he had ever worked on.

Kornberg made partner and eventually moved to Paul Weiss in February 1990 to launch its restructuring group. Since then, he has continued to work on some of the largest cross-border cases around the world, advising huge debtor companies, key creditors and distressed investors.

How are things different now from when you were starting out?

When I started most of the bankruptcy work was done by boutique firms. Virtually all of those have since been absorbed into major firms, so there's been a real change in the professionals and the firms involved. The large restructurings these days involve so much sophisticated lawyering in every area, whether it's securities law, or finance law, or M&A.

Another thing is that in my early days the creditors were generally the banks and the insurance companies. The banks had a huge role in restructurings. But with the secondary markets and the proliferation of investment funds that focus on distress, the funds have become the key players. That's made for a profoundly different environment.

Which of the cases you have dealt with over the years stand out as being particularly complex?

We represented French oilfield services company CGG in a very cutting-edge restructuring in 2018. It marked the first or possibly second time a major French company underwent safeguard proceedings in France at the same time as 14 or 15 subsidiaries went through Chapter 11 in the US. It's one thing to harmonise a scheme with a Chapter 11 or Chapter 15 case, it's a completely different thing with a French

proceeding. That was an interesting and very challenging assignment because the French restructuring laws are so completely different and so shareholder-favoured.

When I was a very young lawyer, I worked on the Chapter 11 case of United States Lines. It went bankrupt in 1986 while its ships were positioned all over the world. They were being seized everywhere, from South Africa to England. That was the first really big cross-border case I worked on and paved the way for me to work on a lot of other shipping company cases over the years. So that was a kind of a transformative experience.

In another unique cross-border case, I was US counsel to the winding up board of Glitner, one of the Icelandic banks that failed during the global financial crisis. That also gave me exposure to a completely different kind of insolvency regime.

What kind of kind of work is keeping you busy at the moment?

2020 was our busiest year ever and that came in two directions: from companies and portfolio companies of private equity sponsors that were in crisis because of the pandemic, and from clients that saw a great opportunity to invest and lend.

2020 was really stressful because of the demands on the group. But so much private capital flowed into the system and the capital markets were incredibly generous – and that was on top of all the government support. The pandemic has been far less about classic restructurings and more about liability management and financing transactions. The sectors that are still very busy are energy, retail, real estate, healthcare, hospitality and certain kinds of financial companies. We're also seeing a lot of resolutions of mass torts in Chapter 11s, whether it's opioid or sex abuse or asbestos claims that have brought down companies.

Having a diverse practice has been great for us because we have a fair amount to do even at a time when classic restructurings are slow. We work on all sides: for companies and private equity sponsors that have troubled portfolio companies, for fulcrum creditors, and for lots of major players in the distressed investing world. I've also acted for several governmental entities, including the principal regulator of California's gas and electric utilities, including PG&E.

What do you make of the muted distressed investment activity at the moment?

It's a very tough market for distressed investors. I have some clients that have left the field because they haven't really seen much opportunity, and the opportunities they have seen are so competitive.

An interesting trend we're seeing is that the gateway to distressed investments now is through funds making rescue loans or sponsoring liability management transactions, knowing it could lead to a restructuring where they will have the fulcrum position.

There have been few large Ch11s in the last couple of years given the amount of capital flowing around. Do you expect that to change this year?

It's going to change but I don't know about the timing. The amount of debt incurred post-pandemic has been jaw dropping, and a lot of it was from private sources who are not bashful about restructurings.

We're also in an inflationary mode, and small and medium size companies in particular are going to have to refinance all the debt – but it's not clear to me that they're going to be able to do it. I don't know when that's going to happen but it's coming down the line. We've been cautiously adding high quality resources at all levels to make sure we are prepared.

2020 was supposedly “the year of the SPAC” and there was a significant increase in activity in the first quarter of last year before regulatory intervention. Have you seen SPACs used to restructure distressed companies?

One of the partners in my group has worked on one. It's very challenging to have a restructuring come together with a SPAC. There were a lot of balls up in the air, but it happened. There is a huge time constraint and a challenge in coordinating the requirements of a restructuring and a SPAC at the same time – it's not easy.

I'm not an expert but I think SPACs are the flavour du jour and there are definitely those in Washington, and particularly at the SEC, that believe there has to be closer regulation. So maybe they're not going to be the panacea that everybody originally thought.

In which jurisdictions can you see value over the next few years?

I'm not really sure what the markets have to offer in various places but there's been a huge shift in European restructuring law – given the EU directive on preventive restructuring frameworks and new laws across Europe and in the UK.

Brits have always complained about the cost of Chapter 11 and said it is much more litigious than the English scheme. But the new restructuring plan has introduced a cross-class cram down mechanism and the UK may see the same kind of litigation that arises in the US. There are so many evidentiary issues up for grabs. I think this is a moment of real transition as the European countries migrate towards something more Chapter 11-like.

US Law was considered outrageously company friendly when I started my career. The reason for that came in the aftermath of the Great Depression, where a lot of scholarly thought was given to what might be a better solution in the future. The conclusion was that saving viable businesses should be the objective because it saves jobs, it saves tax revenues and it creates more value for creditors than liquidations in the long run.

Even though it was perceived as company friendly and anti-creditor, that was what shaped American bankruptcy law and that was anathema in Europe, where creditors dominated. The migration to Chapter 11-like regimes around the world has been a big change in the international scene in recent years.

Even China passed its law after studying virtually every restructuring regime out there, and a lot of it is inspired by Chapter 11. Germany's new law is also more like Chapter 11, as is the Netherlands' new regime.

Are there any other changes that you can see impacting restructurings in the next few years?

There's been a trend recently of creditor-on-creditor violence, where creditors, through liability management or other transactions, try to get into senior positions over those that are in the same class. That has generated a lot of litigation and a lot of controversy, but it is a tactic that's been employed in many situations, including in the contentious case of the satellite company Intelsat, where Paul Weiss is acting for an ad hoc creditor group.

What challenges are restructuring practices likely to face in the future?

I think the most important challenge is making sure we have the right people. Clients are understandably very demanding, and you want people that not only have the intellectual firepower but also the commercial savviness.

We're very fortunate because we have such a strong group at all levels. We've also been really lucky in retaining the associates. The lawyers coming out of law school these days are older and have had more life experiences generally than my generation of graduates. They're incredibly sophisticated and enormously talented.

Why do you think those coming out of law school are generally older?

I serve on the board of a law school and I know that many law schools are focused on older students who have been out in the world and are not necessarily coming directly from college. There has been a shift over the years and I think that's a great thing. They're more mature and have a clear sense of what they want to achieve.

I fell into bankruptcy practice serendipitously and, if you'd asked me at age 16 what I wanted to do, I wouldn't have had a clue.

What skills do you think are required to be successful leading a cross-border practice?

Sometimes you learn the most from mistakes made by others. Some lawyers approach cross-border matters wanting to control everything as the alpha counsel. But there is

so much to learn, particularly when you're working on a matter in a country for the first time. It is important to listen to the experts – you have to be guided by that input even if it doesn't make a whole lot of sense to you. Working well with other people has been a wonderful aspect of working on cross-border deals around the world. The ability to get along and work constructively with foreign experts is key.

You have to be good at building a strong team. Many practices are dominated by one or two personalities and I think one of our real successes is that we have built a very strong group of lawyers from top to bottom. It's important to be able to spot and attract capable people, and then create a work environment where they want to stay.

Many firms have practice groups with a revolving door. That's not been our experience at all, because we have great people but we also like working with each other. We also have a very diverse group of people in terms of life experiences, family backgrounds, lifestyles and interests. I've been thinking about this a lot lately and I think that's been a very important aspect of what makes the group successful.

Do you have bankruptcy lawyers located outside of New York?

Aside from Washington, all our restructuring lawyers are based in New York. We have had some restructuring lawyers in London from time to time but not senior ones.

It's a very deliberate strategy to not compete with local lawyers in other jurisdictions. If the goal is to get the absolute best representation for your clients, you want the very best people in each jurisdiction. Unless we were to go on a wild lateral hiring streak, we're not going to be able to compete with the Slaughter and Mays or Freshfields of the world. When we have a cross-border matter, our strategy is to find the very best counsel in the jurisdiction, partner with them, and coordinate to deliver the best results possible.

What do you do to wind down outside of the office?

In normal times, because we live in New York, there are endless things to do. To live in this great city and not participate is just tragic. The first thing we went to after the lockdowns was a performance for a dozen guests at the studio of a renowned modern dance company and it was amazing. I've since been to a concert and one opera.

I've also been heavily involved in the non-profit world, where I sit on several boards. The non-profits required a lot of help during the pandemic because many had to deal with huge impacts on their revenues.