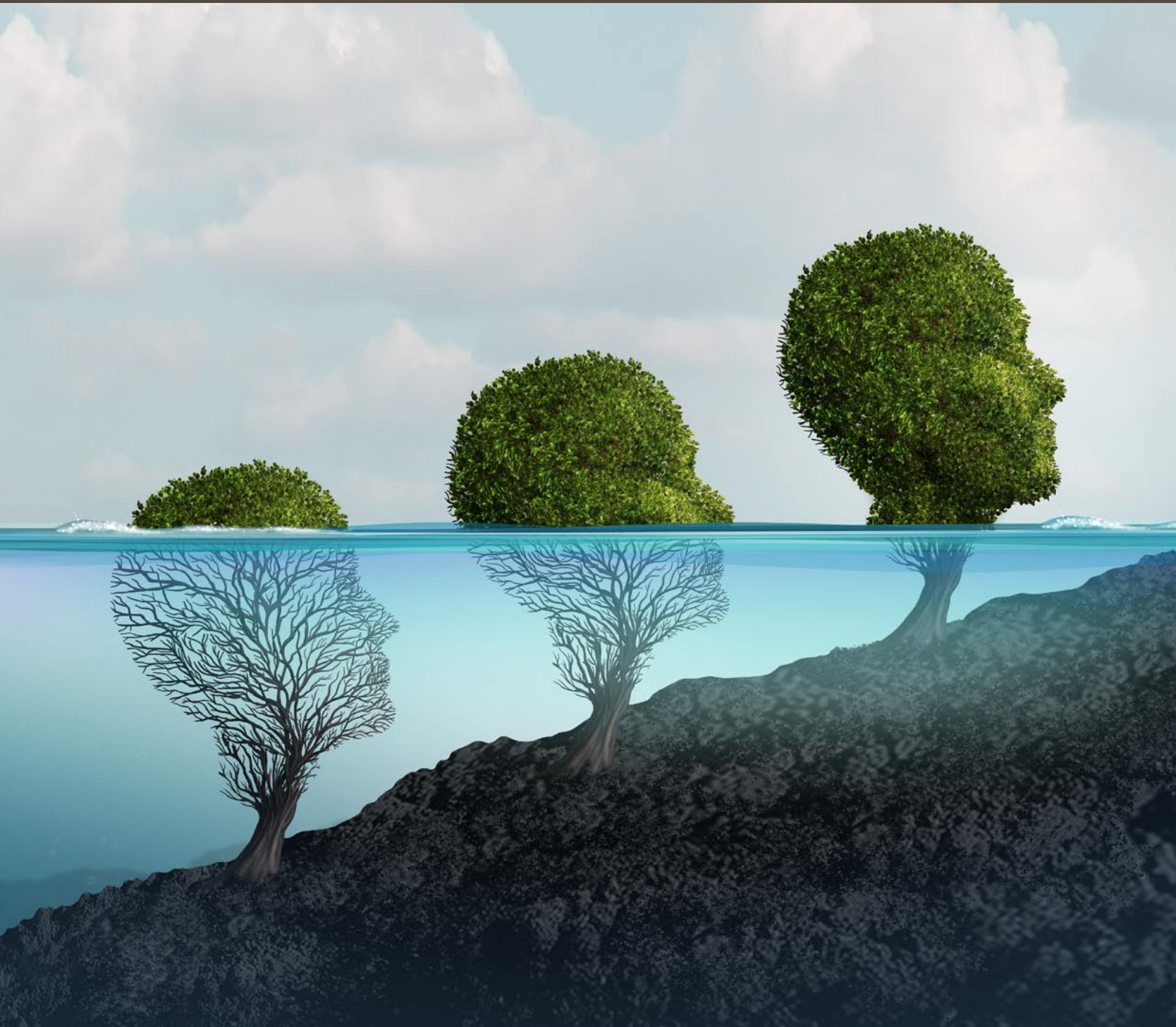


BANKRUPTCY & RESTRUCTURING

ANNUAL REVIEW 2019



FINANCIER
WORLDWIDE corporate finance intelligence

Published by
Financier Worldwide
23rd Floor, Alpha Tower
Suffolk Street, Queensway
Birmingham B1 1TT
United Kingdom

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Annual Review • June 2019

Bankruptcy & Restructuring

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BANKRUPTCY & RESTRUCTURING

JUNE 2019 • ANNUAL REVIEW

Financier Worldwide canvasses the opinions of leading professionals around the world on the latest trends in bankruptcy and restructuring.

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INTRODUCTION

The number of corporate insolvencies recorded in certain markets, such as the US and the UK, has remained consistently low in recent years. With likely delays to further interest rate rises in the US, and possibly even cuts, the status quo looks set for the foreseeable future.

Though the number of corporate insolvencies has remained relatively low, a number of notable companies have entered bankruptcy over the last 12 months, particularly in the retail sector. In the US, Payless ShoeSource, Diesel USA, Sears, Fullbeauty Brands and David's Bridal have filed for Chapter 11. In the UK, Debenhams, Patisserie Valerie, LK Bennett and many others also entered administration.

Looking ahead, there are other clouds on the horizon. The ongoing US-China tariff war will likely cause more restructuring activity, unless cooler heads prevail. In the UK, a number of measures, such as increases to minimum wage, business rates and pension contributions, will have an impact, particularly for small and medium enterprises (SMEs).

Equally, the spectre of Brexit looms large and has the potential to create cross-border insolvency challenges across the EU. For certain jurisdictions, such as Ireland for example, Brexit could hit the agri-food sector, though schemes enacted with the assistance of the European Investment Bank may be a relief for certain SMEs.



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United States ■

■ **Q. How would you describe corporate bankruptcies and insolvencies in the US over the last 12-18 months? Are you seeing more or fewer business failures in general?**

DURRER: The first days of 2019 definitely saw more insolvency activity in the US, although we are hearing anecdotally that the second quarter of 2019 has been slower. President Trump's recent pressure on the Federal Reserve to delay further rate increases or even to cut interest rates may afford troubled companies with a postponement of their day of reckoning. Nonetheless, the ongoing China-US tariff dispute should cause enough disruption in capital markets and elsewhere to force more restructuring activity. The upcoming escalation of the trade war is scheduled to occur in June 2019, so we will see what impacts it may have during the second half of 2019, unless peace breaks out.

■ **Q. In your experience, which sectors seem to be demonstrating structural weaknesses leading to more restructuring efforts?**

DURRER: Industries dominated by commodity pricing, including oil & gas, continue to show cyclic vulnerability. Retail, long suffering under the disruption caused by both Amazon and Walmart,

including grocery, due in part to Amazon's largely successful absorption of Whole Foods, continues to struggle between e-commerce and brick-and-mortar identities. Following PG&E's bankruptcy filing in late January 2019, we anticipate that there may be insolvencies by similar energy companies, particularly those susceptible to the impacts of climate change.

■ **Q. To what extent are troubled companies able to refinance and renegotiate existing debt structures in the current market?**

DURRER: Notwithstanding modest interest rate increases by the Federal Reserve, there continues to be a glut of capital available for the refinancing of debt. In addition, holders of distressed debt are somewhat compelled to participate in refinancings for companies that are not well-suited for a protracted Chapter 11 case. We expect 2019 will see just as many refinanced transactions as Chapter 11 filings for these reasons.

■ **Q. Have there been any recent legislative or regulatory developments, including high profile cases, in the US**

that will have a significant effect on bankruptcy and restructuring?

DURRER: Recent major developments include the treatment of over-secured debt by bankruptcy courts, as well as the treatment of trademark licence agreements under the Bankruptcy Code. A settlement in *MPM Silicones* in May closed a lengthy litigation arising out of an issuer's bankruptcy proceeding back in 2014, which addressed, among other issues, whether a make-whole premium is payable in the bankruptcy context, where the bankruptcy proceeding automatically accelerated the maturity date of the underlying debt obligations. In addition, the case involved the appropriate interest rate applicable to secured debt extended under a Chapter 11 plan. The bankruptcy court agreed with the debtors' proposal on the appropriate interest rate. In autumn 2017, although the Second Circuit confirmed that no make-whole premium was due, it reversed and remanded the interest rate rulings, directing the bankruptcy court to reassess evidence regarding an appropriate 'market' rate of interest. The Supreme Court declined to review these rulings. At the request of the parties, the bankruptcy court issued a short order modifying the interest rate findings,



by increasing them somewhat, in anticipation of a more lengthy written opinion explaining its rationale to follow. However, the settlement may render it unlikely that the bankruptcy court will ever issue such a written opinion. A separate Supreme Court opinion, *Mission Product Holdings Inc. v. Tempnology, LLC*, has resolved the important question of whether the rejection of a trademark licence agreement by the licensor in Chapter 11 terminates the licensee's ability to continue to exploit the trademark. In a near unanimous eight to one opinion, the Supreme Court held that rejection of a trademark licence, as with other contracts, creates a breach of the contract, but not its termination, leaving non-bankruptcy licensees with the right to continue to utilise trademarks licensed by debtors.

■ **Q. What trends are you seeing in the market's appetite to purchase troubled assets? How would you describe recent distressed M&A activity?**

DURRER: The appetite to purchase troubled assets has only increased. In terms of recent distressed M&A activity, however, the point to emphasise is that so-called 'incumbent' investors may limit a target's opportunity to maximise price. Specifically, where one encounters a target that is highly-leveraged or over-leveraged, strategic bidders may be disinclined to invest time and resources to outbid such parties. This

could explain the outcome in the Waypoint Leasing case, involving helicopters. Likewise, Toys 'R' Us failed of its own weight, although some pockets of the former global retailer did survive.

■ **Q. What trends are you seeing in cross-border or multijurisdictional insolvencies? What additional challenges do such engagements present?**

DURRER: In cross-border insolvencies, more companies are focusing their strategic planning on identifying one or possibly two 'anchor' jurisdictions rather than trying to coordinate multiple insolvencies across many borders. This not only reduces uncertainty, but also enhances efficiency and the likelihood of success. The US, UK and now Singapore continue to lead the pack in terms of jurisdictions that enjoy sophisticated commercial courts that are well-suited to enabling multinational corporations to reorganise, consistent with the timing and expectations of their key stakeholders.

■ **Q. Looking ahead, what developments do you expect to see in restructuring and bankruptcy processes in the months ahead?**



“ In cross-border insolvencies, more companies are focusing their strategic planning on identifying one or possibly two ‘anchor’ jurisdictions rather than trying to coordinate multiple insolvencies across many borders. ”

.....

DURRER: As the US became focused on politics during the lead up to the US presidential election in 2016, there was a palpable pause in financial transaction activity as many actors developed a ‘wait-and-see’ attitude toward the economy and government regulation. As of the middle of May 2019, there were over 20 Democratic Party contenders ready to take on the incumbent president. Among that field, there are tried and tested political veterans, as well as first-time presidential candidates. Finally, there is a looming threat of impeachment proceeding in the midst of a so-called constitutional crisis. When one compares 2016 to 2020, we may see a similar ‘pause’ in the lead-up to the election, which this time around will also see all 435

congressional seats in the House up for re-election. This pause in financial and transactional activity will also be felt in the restructuring arena. ■

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■ **Q. How would you describe corporate bankruptcies and insolvencies in Argentina over the last 12-18 months? Are you seeing more or fewer business failures in general?**

HERNÁNDEZ: Due to several factors, including the raising of interest rates by the US Federal Reserve, the inability of the Argentine government to perform structural changes and reduce the fiscal deficit, the increase of the Argentine government's inflation goals for 2018 and a historical drought that affected crop production, during 2018 the Argentine peso depreciated 103.83 percent against the US dollar. As a consequence, inflation for 2018 increased 47.6 percent. In an attempt to control the US dollar exchange rate and inflation, the federal government and the Argentine Central Bank adopted a series of measures, including raising interest rates in pesos to more than 70 percent and reducing the fiscal deficit. In the short term, these measures caused a contraction of Argentine economic activity and consumption. The increased cost of financing in pesos, the increase of the US dollar exchange rate and the sharp fall in consumption have caused an increase in the number of business failures over the last 12-18 months.



■ **Q. In your experience, which sectors seem to be demonstrating structural weaknesses leading to more restructuring efforts?**

HERNÁNDEZ: The main sector affected by the recession is the retail sector. The sectors demonstrating more weakness and experiencing an increase in restructurings are textile, food and home appliances. Others, like the automobile production and sale, and industrial sectors are suspending personnel or reducing their workforce. One of the measures adopted to reduce the fiscal deficit was the reduction, suspension or delay of some of the government's scheduled public works, which have also impacted the construction sector. The recession and lack of access to financing at a reasonable cost have mainly affected small- and medium-sized companies. However, toward the end of 2018 and in the first half of 2019, the crisis has begun to affect those large companies that reported losses and have been forced to suspend or reduce personnel.

■ **Q. To what extent are troubled companies able to refinance and renegotiate existing debt structures in the current market?**

HERNÁNDEZ: Most troubled companies have outstanding unsecured and secured domestic bank debt, where amortisation and interest payments are impacting debtors' finances. Though it is believed that the worst part of the crisis has passed, there is still a large degree of uncertainty being generated by the upcoming presidential election, which is due to be held in October. The elections are adversely affecting the economic recovery and the control of the US dollar exchange rate and inflation. In the majority of cases, troubled companies are selling assets or business units and renegotiating their financial debt. Where the business is feasible and the company is only hamstrung by financial debt, creditors are often open to restructuring. These types of restructuring deals are usually pursued privately, rather than through an insolvency proceeding.



■ **Q. Have there been any recent legislative or regulatory developments, including high profile cases, in Argentina that will have a significant effect on bankruptcy and restructuring?**

HERNÁNDEZ: There have not been any recent legislative or regulatory developments which have had a significant effect on bankruptcy in Argentina over the last 18 months. However, in May 2018 the Argentine Congress passed Law No. 27,440, which amended the negotiable obligations Law No. 23,576, to eliminate the requirement for unanimous approval of any fundamental changes to notes issue conditions. In general, such amendments must be adopted at a meeting of the relevant noteholders. Resolutions, other than those requiring unanimity, are adopted at extraordinary meetings convened with the presence of noteholders representing more than 60 percent of the aggregate outstanding principal amount of the notes in first call, or more than 30 percent in the second call, unless, in both cases, the issue conditions require a larger quorum, and with the affirmative vote of the absolute majority of the notes present at the meeting convened with the required quorum. Before this amendment, a restructuring of all outstanding notes could only be pursued following approval of a reorganisation or out-of-court restructuring agreement, by more than 67 percent of the principal amount, assuming the notes were the only claims subject to restructuring. Pursuant to this amendment, however, in the future debtors seeking to restructure only notes would no longer be required to file for reorganisation or out-of-court restructuring, and may achieve the restructuring through a resolution at the noteholders' meeting without the requirement

of unanimity, with the majority requirement provided in the notes conditions, which cannot be below the statutory majority requirements.

■ **Q. What trends are you seeing in the market's appetite to purchase troubled assets? How would you describe recent distressed M&A activity?**

HERNÁNDEZ: Distress generates opportunities to purchase troubled assets. However, under the current general economic circumstances, and most notably the uncertainty of the presidential elections due in October, sale conditions are adversely affecting debtors, mainly because of the reduction of their asset's purchase price. There has been some distressed M&A activity in Argentina in recent months and if economic conditions do not improve, or even worsen in the coming months, we may see an increase in distressed M&A activity.

■ **Q. What trends are you seeing in cross-border or multijurisdictional insolvencies? What additional challenges do such engagements present?**

HERNÁNDEZ: Current economic conditions are mainly affecting small- and medium-sized companies, which, in general, do not hold foreign debt. Even though larger companies began to suffer losses in 2018 and 2019, there have not yet been any cross-border or multijurisdictional insolvencies, either because they have not needed to restructure yet, or because they do not hold foreign debt. A few of the largest companies holding foreign debt have reached certain limited private restructuring agreements. If the recession deepens, the Argentine peso continues to depreciate and



“ If economic conditions do not improve in the near future, we may see more bankruptcy and insolvency activity. ”



inflation continues to rise, in the near future there may be some multijurisdictional insolvency cases

■ Q. Looking ahead, what developments do you expect to see in restructuring and bankruptcy processes in the months ahead?

HERNÁNDEZ: If economic conditions do not improve in the near future, we may see more bankruptcy and insolvency activity. A committee of judges, professionals and academics is working on certain amendments to the Argentine Bankruptcy Law, including in connection with consumer insolvency, deep financing,

insolvency of trusts and trustees and adoption of the UNCITRAL Model Law on Cross-Border Insolvency. However, proposed amendments have not yet been published and it is difficult to predict when such amendments will be proposed in a bill or when such amendments would become law. ■

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He has operated at CFO level in large and SME companies in the UK, US and Europe, and has many years experience with public and private equity-owned businesses.

His industry experience includes automotive supply and commercial vehicle manufacture, industrial systems and a variety of business to business services.

United Kingdom ■

■ **Q. How would you describe corporate bankruptcies and insolvencies in the UK over the last 12-18 months? Are you seeing more or fewer business failures in general?**

BRYAN: In absolute terms, the numbers of corporate insolvencies have remained very low, as they have for many years. However, the latest government figures for Q1 2019 do show a significant uptick, with the number of insolvencies up 6.3 percent over Q4 2018. A recent 'Red Flag Alert' report showed a 16 percent increase in businesses in significant financial distress. Insolvency statistics are at their highest numbers for five years, but those last five years have been at very low levels, by historic standards. Businesses are facing a raft of headwinds with increases to the minimum wage, increases to pension contributions and increased business rates. The Bank of England has also suggested that interest rates may rise faster than expected and credit markets are already tightening. All this, against a backdrop of Brexit, global trade wars and other geopolitical concerns, does suggest that the latest statistics could be the start of an upward trend and we will see more financial distress in the near to medium term.

■ Q. In your experience, which sectors seem to be demonstrating structural weaknesses leading to more restructuring efforts?

BRYAN: The number of insolvencies and other statistics recorded of late show that construction remains the worst hit sector with retail, accommodation and food, administrative and support services and the manufacturing sector making up the rest of the top five. The property sector is also showing signs that all the retail sector's woes are now impacting their landlords. The automotive sector is a major concern with a perfect storm on the horizon. With demand falling and the fallout from the diesel scandals already causing problems, there is the upcoming disruption of 'connected, autonomous, shared, electric vehicles'. These will undoubtedly give rise to major disruptions to the automotive industry and the slick efficiencies of lean manufacturing that underpin the supply chain.

■ Q. To what extent are troubled companies able to refinance and renegotiate existing debt structures in the current market?

BRYAN: In recent years, there has been a plentiful supply of credit at relatively low rates. Increased competition and a large number of new alternative lenders entering the market have made it easy for businesses to refinance. While there is still plenty of credit available, there are signs that the market is reaching the end of the cycle and is beginning to tighten. Coupled with the expectation that interest rates will rise, we could see the ability to refinance or renegotiate existing debt become much more difficult and many more businesses in real distress. So-called 'zombie' companies that can just pay their interest costs but cannot invest or withstand any increase to their costs have been a subject of concern for many years. They have defied all predictions and kept going, but this situation could be drawing to a close. Bank forbearance is ending as increased capital requirements bite and increases in interest rates will tip many zombie companies into distress. Consensual turnaround is, in many respects, a better option than formal insolvency processes, but many of these zombies will be too far gone and it will be a good thing for the economy and productivity that they are killed off.



■ **Q. Have there been any recent legislative or regulatory developments, including high profile cases, in the UK that will have a significant effect on bankruptcy and restructuring?**

BRYAN: With the well-publicised issues around Brexit taking up so much government time, there have been hardly any legislative or regulatory developments. Various proposals are backed-up, including new laws to establish a pre-insolvency regime, laws regarding director conduct and recent proposals for changes to airline insolvency rules. With a mass of other legislation also backed-up, it is hard to know when these matters will get parliamentary time. The other big unknown is how Brexit might impact insolvency law, and in particular, the recognition of cross-border insolvency post-Brexit. We will have to wait and see exactly how that works out.

■ **Q. What trends are you seeing in the market's appetite to purchase troubled assets? How would you describe recent distressed M&A activity?**

BRYAN: There is still a lot of money chasing distressed assets, but not many opportunities in the UK. Demand exceeds supply so prices have been pushed up and potential returns reduced. We have seen trade buyers still targeting stressed and distressed assets where they feel they have the ability to implement a turnaround, but some are getting nervous with all the geopolitical uncertainty in the background. We are still seeing distressed debt being traded. Banks sell out of potentially distressed situations earlier than they used to and trade buyers and funds are

interested in single ticket deals, if pricing can be agreed.

■ **Q. What trends are you seeing in cross-border or multijurisdictional insolvencies? What additional challenges do such engagements present?**

BRYAN: In a globalised world, cross-border work continues to be important. It is always a challenge as different jurisdictions create scope for conflicts and difficulties to arise and generally make turnarounds and restructurings much more complex, whether in a formal or consensual insolvency process. Company directors often do not realise how easily they can fall foul of such differences and would be well advised to seek competent advice at an early stage. Many countries are modernising their laws. We have even seen new laws being passed in response to an insolvency so large it threatened a country's economy: the Agrigor case in Croatia. While modernising insolvency regimes is welcome, there is generally a significant time-lag between new legislation and it settling into accepted practice. Frequently there is also a gap between what was intended and what actually happens. London and the flexibility and certainty of English law remains a big attraction for dealing with complex cross-border cases and no matter what other countries do, the common law jurisdictions of England and the US will likely retain their attractiveness.

■ **Q. Looking ahead, what developments do you expect to see in restructuring and bankruptcy processes in the months ahead?**

“ There is still a lot of money chasing distressed assets, but not many opportunities in the UK. Demand exceeds supply so prices have been pushed up and potential returns reduced. ”

.....

BRYAN: If interest rates rise, credit tightens and economic growth slows as many expect, we expect to see a big rise in distress. The insolvency profession will be very busy with those businesses that are beyond saving and for those that can be saved, real turnarounds that address the underlying business problems, rather than just restructuring the balance sheet, will become more common. It will be interesting to see how all the new alternative lenders that have entered the market cope with bad debts. Many will have little experience of them. The extensive number of covenant lite and ‘no-cov’ loans will also prove interesting. How will lenders get management to the table to discuss problems without a trigger and will management just

ignore them? Will we see an increase in work for insolvency litigation funders? There are some interesting new dynamics to be played out. How soon levels of distress will start to rise is difficult to predict. Many have thought it was going to happen some time ago, but the plentiful supply of cheap credit enabled the can to be kicked down the road. But that road does look like it is going to run out in the not too distant future. ■



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Ireland

■ **Q. How would you describe corporate bankruptcies and insolvencies in Ireland over the last 12-18 months? Are you seeing more or fewer business failures in general?**

FLANAGAN: A key driver in the Irish market continues to be the sale of distressed debt by banks under pressure to reduce their non-performing exposures (NPEs). The secondary lenders acquiring this debt tend to move quickly to resolve the portfolios they have acquired. However, we are seeing a significant decrease in the appointment of receivers to corporates. This is indicative of an increase in consensual settlements, generally involving refinancing. Numbers of creditors' voluntary liquidations have remained fairly constant, but the market perception is that many of these arise from directors tidying up 'zombie' companies that have been through a receivership, to enable them to return to business as usual. Examinership is an Irish restructuring process akin to Chapter 11 in the US, which usually involves a court sanctioned write down of debt and the injection of new capital. Numbers of examinerships are very low at present. This is indicative of consensual solutions being reached with creditors.

■ **Q. In your experience, which sectors seem to be demonstrating structural weaknesses leading to more restructuring efforts?**

FLANAGAN: Distressed debt dating from the 2008 financial crisis continues to account for a large percentage of insolvencies. In the first quarter of 2019, the sectors with the largest number of companies entering an insolvency process were services, real estate and hospitality, accounting for 42 percent, 15 percent and 13 percent respectively. Most of the insolvencies in the services sector are currently financial services firms. There is a market perception of risk in the agri-food sector associated with a possible ‘no deal’ Brexit. Consequently, a risk premium appears to be being applied to lending to this sector. There is some suggestion that this is driving acquisitions of underpriced companies in the sector.

■ **Q. To what extent are troubled companies able to refinance and renegotiate existing debt structures in the current market?**

FLANAGAN: There is a robust lending market at present, both from mainstream banks and alternative lenders once the loan-to-value (LTV) ratio is appropriate. The willingness of secondary lenders to write down debt to an appropriate level is a key enabler of such lending. Focused alternative lenders, such as Culluan Capital in relation to development and Origin Capital in relation to leisure and residential, are now active in funding borrowers refinancing such debt. While the percentage of the lending advanced by secondary lenders remains quite low, media reports indicate that their presence and growth is driving mainstream lenders to compete for new lending business. The Irish government, in cooperation with the European Investment Bank, has recently announced a scheme to enable funding for small and medium enterprises (SMEs) in the agri-food sector, in light of the perceived risk of a ‘no deal’ Brexit.

■ **Q. Have there been any recent legislative or regulatory developments, including high profile cases, in Ireland that will have a significant effect on bankruptcy and restructuring?**



FLANAGAN: The legislative regime, in relation to corporate insolvencies, has been very stable since the enactment of the Companies Act 2014. In the wake of the 2008 financial crisis, a number of technical challenges were made to various enforcement steps. Some of these challenges have given rise to a level of uncertainty, pending their final determination. As the final few such challenges have wound their way through the Court of Appeal and the Supreme Court, the position has become clear. There are no material changes, only some minor procedural changes.

■ **Q. What trends are you seeing in the market's appetite to purchase troubled assets? How would you describe recent distressed M&A activity?**

FLANAGAN: We are seeing a strong demand for assets, particularly for development land and hotels. However, it is notable that many of the hotel sales require the careful unpicking of complex tax-driven structures put in place before 2007 to enable a clean sale. Given the level of legacy debt owed by many of the companies holding such assets, it is generally more efficient to effect such sales as asset sales, and we are seeing relatively few share sale transactions in relation to distressed assets.

■ **Q. What trends are you seeing in cross-border or multijurisdictional insolvencies? What additional challenges do such engagements present?**

FLANAGAN: Most of the corporate cross-border insolvency work at present relates to Irish subsidiaries of multinational entities. This is relatively straightforward where the main insolvency proceedings are in a jurisdiction where the Recast EU Insolvency Regulation applies. However, as Ireland has not implemented the UNCITRAL Model Law on Cross-border Insolvency, it is more complex to deal with insolvencies originating in other jurisdictions. It is also challenging to navigate a path for directors of Irish subsidiaries, which enables group restructuring, for instance in a US Chapter 11 process, while complying with their duties, which are owed to the companies of which they are directors.



“ We are seeing a strong demand for assets, particularly for development land and hotels. ”

.....

■ Q. Looking ahead, what developments do you expect to see in restructuring and bankruptcy processes in the months ahead?

FLANAGAN: Brexit remains the great unknown. If there is a ‘no deal’ Brexit, particularly if followed by a Labour government in the UK, it appears inevitable that a reasonably large tranche of business will migrate from London to other EU jurisdictions. As potentially the only English speaking common law jurisdiction in the EU, we are starting to see more contracts with Irish governing law and Irish jurisdiction clauses along with English lawyers and law firms taking steps to enable them to practice in Ireland. Equally, if

there is a ‘no deal’ Brexit, the Recast Insolvency Regulation will cease to enable automatic recognition of UK insolvency proceedings in Ireland, and they will become significantly more complex. ■



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Andrea Perelló is part of Cuatrecasas's litigation and restructuring and insolvency practices. She has advised on several bankruptcy proceedings, including some of the most relevant cases on a national scale, defending the interests of both debtors and creditors. She has represented investors' interests in sales of business units within the frame of insolvency proceedings.

■ **Q. How would you describe corporate bankruptcies and insolvencies in Spain over the last 12-18 months? Are you seeing more or fewer business failures in general?**

PERELLÓ: According to the data published by the General Council of Judiciary, the number of corporate bankruptcies in Spain remained almost the same in 2018 as in the previous year. There were 4131 bankruptcy proceedings in 2018 and 4095 in 2017. The autonomous community in Catalonia saw a major increase in the number of corporate bankruptcies last year, up from 747 cases in 2017 to 970 in 2018. In Madrid, the number of bankruptcy proceedings has remained largely unchanged. In terms of sales volume, the increase in bankruptcy petitions came from those companies with a sales volume lower than €1m. There has been a general decrease in failure among companies with a turnover higher than €10m.

■ **Q. In your experience, which sectors seem to be demonstrating structural weaknesses leading to more restructuring efforts?**

PERELLÓ: The wholesale sector has experienced the most insolvencies in recent years, followed by the construction and retail sectors.

■ **Q. To what extent are troubled companies able to refinance and renegotiate existing debt structures in the current market?**

PERELLÓ: We have been aware of a clear willingness within the Spanish market, from both debtors and creditors, to seek pre-insolvency solutions. In particular, due to a sense of responsibility to all stakeholders, there has been a significant increase in the refinancing processes of companies with huge financial liabilities.

■ **Q. Have there been any recent legislative or regulatory developments, including high profile cases, in Spain that will have a significant effect on bankruptcy and restructuring?**

PERELLÓ: Early this year, the Spanish government initiated its plan to amend the Spanish Bankruptcy Act. After reviewing the Project to Amend and Recast the Spanish Bankruptcy Act, there have been three main factors driving this amendment: reorganising the current Act, introducing measures to encourage

pre-insolvency solutions such as refinancing agreements, and bringing in the seated case law.

■ **Q. What trends are you seeing in the market's appetite to purchase troubled assets? How would you describe recent distressed M&A activity?**

PERELLÓ: Spain is a leading distressed market in Europe and all players in the market expect the appetite for distressed assets to increase in the future. In particular, as traditional operations remain stable, the market has shown interest in the acquisition of litigation portfolios, together with litigation funding, which is a growing trend globally.

■ **Q. What trends are you seeing in cross-border or multijurisdictional insolvencies? What additional challenges do such engagements present?**

PERELLÓ: When refinancing involves more than one jurisdiction the process itself becomes challenging. However, in the majority of cases, processes are being guided by the leading law firms of each jurisdiction in order to help smooth the process. In fact, major transactions usually



involve interactions with several jurisdictions, as parties take advantage of the different regulations in those areas that present the most favourable terms.

■ **Q. Looking ahead, what developments do you expect to see in restructuring and bankruptcy processes in the months ahead?**

PERELLÓ: The Spanish government has initiated the path to amend the Spanish Bankruptcy Act. The amended text will be approved by the end of this year. In addition, the upcoming months may present a challenging situation regarding insolvency processes with a British element. Unless an agreement is reached between the UK and the European Union (EU), there will be major uncertainties regarding the recognition of UK resolutions in EU Member States. So far, the UK government has prepared the Insolvency (Amendment) (EU Exit) Regulations 2018, which aims to deal with the deficiencies that may appear in case of a ‘no deal’ Brexit. In particular, it attempts to solve the deviations caused by the non-application of the ‘reciprocity principle’. ■



“ The Spanish government has initiated the path to amend the Spanish Bankruptcy Act. The amended text will be approved by the end of this year. ”

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Daniel Hayek is a member of the management committee and head of the insolvency and restructuring team, as well as the corporate and M&A team, of Prager Dreifuss, one of Switzerland's leading firms for commercial law. Mr Hayek has been a partner with Prager Dreifuss since 2001. His practice focuses on all aspects of insolvency and restructuring matters, including representing creditors in bankruptcy-related litigation, registering or purchasing claims or in enforcing disputed claims before courts. His longstanding expertise includes M&A, corporate finance, takeovers, banking and finance and corporate matters also in restructuring situations.

■ **Q. How would you describe corporate bankruptcies and insolvencies in Switzerland over the last 12-18 months? Are you seeing more or fewer business failures in general?**

HAYEK: The economic situation in Switzerland is generally favourable and there have been very few sizeable bankruptcies in recent years. However, bankruptcies of small- and medium-sized enterprises reached an all-time high in 2018. In October 2018, 521 companies had to file for bankruptcy in Switzerland, a year-on-year increase of 10 percent on October 2017. While there was a general increase in insolvencies for smaller businesses in Switzerland, certain regions recorded a substantially high amount of bankruptcies compared to previous years. The cantons of Uri and Glarus showed the highest increase in bankruptcies in 2018, with 26.1 percent and 31 percent, respectively. However, there were also regions in Switzerland with encouraging numbers. In Zurich, Switzerland's most important economic centre, the number of bankruptcies decreased 6 percent in 2018 compared to 2017. Additionally, a slight decrease of 1 percent was recorded in the southwestern part of Switzerland.

■ **Q. In your experience, which sectors seem to be demonstrating structural weaknesses leading to more restructuring efforts?**

HAYEK: In recent years, the construction industry has experienced challenges due to stricter legislation for holiday residences, a general decrease in demand for new real estate and pressure on margins. The resulting downturn in sales has put the construction industry at greater risk of insolvencies. Put in numbers, the construction industry suffers 2.7 times more bankruptcies than the average industry in Switzerland. Handicrafts and the hotel and catering sectors are also industries with substantially high risks of insolvencies and where companies may require restructuring efforts. Health services, real estate, except for the construction industry, and holding companies are economically strong areas, where companies generally flourish and restructurings are seldom required.

■ **Q. To what extent are troubled companies able to refinance and renegotiate existing debt structures in the current market?**

HAYEK: Since the global financial crisis, banks in Switzerland have become stricter with regard to providing loans to companies. This trend is reinforced by the Basel III legislation which requires banks to hold more equity. Notably, it is becoming harder for small- and mid-sized companies without investment-grade-ratings to refinance and renegotiate existing debt structures in the current market. Thus, companies are looking for alternative lenders like funds, pension funds, insurance companies and family offices. These lenders are less conservative than banks and are willing to take more risk. They can often be the solution for troubled companies and can help them to meet their financing needs.

■ **Q. Have there been any recent legislative or regulatory developments, including high profile cases, in Switzerland that will have a significant effect on bankruptcy and restructuring?**

HAYEK: In Switzerland, the recognition and enforcement of foreign insolvency proceedings is dealt with in the Swiss Private International Law Act (PILA). On 1 January 2019, a revision of the PILA came into force which was designed to simplify the recognition of foreign bankruptcy



and estate proceedings in Switzerland. Under the old law, restrictive recognition requirements could sometimes delay the recognition of foreign bankruptcy decisions and in some cases even make them impossible. In particular, the revised law deletes a requirement that reciprocity is granted by the issuing country. In addition, insolvency decrees must be recognised if issued by the competent authorities at the centre of main interests. Furthermore, if there are no privileged or secured creditors or creditors of a Swiss branch, the Swiss courts can waive ancillary proceedings in favour of a foreign insolvency trustee. In conclusion, the revision took into account the increasing international interdependence of the economy and aims to improve coordination of related domestic and foreign reorganisation and bankruptcy proceedings.

■ **Q. What trends are you seeing in the market's appetite to purchase troubled assets? How would you describe recent distressed M&A activity?**

HAYEK: Due to excellent market conditions, especially in the first half of 2018, last year saw more M&A involving Swiss companies than ever before. The total transaction volume climbed to approximately CHF107.1bn, an increase of 56 percent compared to 2017. In the distressed M&A market, we are not aware of any recent substantial

transactions in Switzerland where troubled targets were fully purchased. However, alternative investment funds, in particular hedge funds, are always looking for investment opportunities in distressed companies in Switzerland. Companies are employing tactics such as purchasing shares in troubled companies and exercising their influence as shareholders, such as GAM, or by buying claims in large bankruptcies, such as Swissair, Lehman Brothers or Petroplus.

■ **Q. What trends are you seeing in cross-border or multijurisdictional insolvencies? What additional challenges do such engagements present?**

HAYEK: Since Switzerland is not a member of the EU, the EU Insolvency Regulation does not apply to cross-border insolvency proceedings in Switzerland, but is dealt with by the PILA. The different legal bases in Switzerland and the EU can make it difficult to conduct and align bankruptcy proceedings. In the recent international bankruptcy of an international oil company, the Dutch insolvency administrator applied for recognition of the Dutch insolvency decree in Switzerland, under the old PILA. Only after the Swiss Federal Tribunal overturned the decisions of the two lower courts regarding the requirement of reciprocity, could the Dutch insolvency decree finally, and almost two years

“ The restructuring market could benefit from the increased presence of non-traditional creditors, such as hedge funds with advanced knowledge of the distressed market. ”

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after the initial application, be recognised in Switzerland. The revised PILA is an important step toward the harmonisation of international insolvency law. However, foreign administrators and creditors should be aware that Switzerland's new recognition regime still differs from the EU Insolvency Regulation and the practical implementations of the revised PILA will have to be elaborated.

■ Q. Looking ahead, what developments do you expect to see in restructuring and bankruptcy processes in the months ahead?

HAYEK: We expect the new PILA to have a positive effect on the efficiency of Swiss

proceedings in cross-border insolvencies between the EU and Switzerland. Further, the restructuring market could benefit from the increased presence of non-traditional creditors, such as hedge funds with advanced knowledge of the distressed market. These investors are also able to provide liquidity to companies in trouble that may otherwise be constrained. Alternative distressed debt investors are also actively using litigation as a strategy to pursue their interests and achieve recoveries in insolvency and restructuring proceedings. We therefore expect to see more litigation in the restructuring and bankruptcy market in Switzerland where courts generally have a good reputation for their objectivity and effectiveness. ■

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Austria

■ **Q. How would you describe corporate bankruptcies and insolvencies in Austria over the last 12-18 months? Are you seeing more or fewer business failures in general?**

TRETTNAK: In 2018, the number of businesses filing for insolvency in Austria decreased slightly – there were 4980 applications for insolvency proceedings, down 1.9 percent on 2017. In total, insolvency proceedings were opened against 2985 companies and 1995 such proceedings were dismissed due to a lack of assets to cover costs. With fewer than 5000 insolvent companies in 2018, statistics show that this is the lowest number in the past 20 years. However, the slight decrease in the number of companies filing for insolvency proceedings has been relativised by the increased amount of liabilities and the number of employees affected. Statistics show that liabilities increased by 11.2 percent to a total of €200m as a result of several major insolvencies, underlining the large amount of debt outstanding in Austria at present. Moreover, the number of employees affected by the insolvency of their employer increased to 19,000, up 16.6 percent compared to 2017. In real terms, the number of people affected by insolvencies in Austria has therefore increased, rather than decreased.

■ Q. In your experience, which sectors seem to be demonstrating structural weaknesses leading to more restructuring efforts?

TRETTNAK: Historically, the Austrian construction business has been the industry with the greatest number of defaulting companies per year; however, construction businesses were pushed into second place in the insolvency statistics for 2018. The business-related services industry occupied first place in this unfavourable statistic. This is due to the fact that the business-related services sector is a very large industry, occupied by a large number of smaller companies or individuals, such as insurance brokers, real estate brokers, real estate developers and so on, which lack a healthy financial base and are therefore unable to cope with the strong competitive pressure.

■ Q. To what extent are troubled companies able to refinance and renegotiate existing debt structures in the current market?

TRETTNAK: Under the current macroeconomic circumstances, with continuously low interest

rates, and no substantial increases expected in the nearer future, it is still relatively easy to renegotiate existing debt. Certainly, this also depends, to a certain degree, on the financing banks of the debtors. In the highly practical case of so-called ‘silent insolvencies’ in Austria, out-of-court standstill agreements are being heavily renegotiated with financial lenders and among debtors and creditors. During the standstill periods, typically the lenders are in the driver’s seat and closely monitor the company’s activities and the achievement of milestones. It is quite common in Austria to look for funding in order to support distressed companies and finance restructurings. The legal framework also facilitates funding in such distressed scenarios, so that new investors and fresh money can find their way to the companies in distress. That fresh money is linked to a number of preferential rights of investors, irrespective of whether they invest on a shareholder or creditor level.

■ Q. Have there been any recent legislative or regulatory developments, including high profile cases, in Austria that will have a significant effect on bankruptcy and restructuring?



TRETTNAK: There were only minor changes introduced this year by the Civil Law and Civil Procedure Amendment Act 2019. For example, the amendment clarified that not only natural persons and legal entities, but also partnerships can be appointed as administrators in bankruptcy proceedings. The most prominent and biggest insolvency case in Austria in 2018 was that of steel and bridge construction company Waagner-Biro Group. The group had liabilities of more than €194m. The fact that a highly specialised and skilled company like Waagner-Biro had liabilities of such a magnitude was surprising. However, this was the result of two failed multi-billion euro projects: the rooftop of the new Louvre in Abu Dhabi and the construction of the Gazprom headquarters in St. Petersburg, which tore a hole in the company's balance sheet because payments were withheld by the building owners.

■ **Q. What trends are you seeing in the market's appetite to purchase troubled assets? How would you describe recent distressed M&A activity?**

TRETTNAK: Overall, the Austrian M&A market, including distressed M&A activity, has been very active. While financial, particularly PE houses, and strategic investors across all industries remain in the driver's seat, the banking and financial services sector, and the real estate industry in particular, have undergone heavy restructuring in recent times. One sector where distressed M&A is still very much active is the retail industry. This is most clearly demonstrated by the takeover of furniture retailer kika/Leiner by Austrian investor Signa Holding, which acquired the business operations of the company for a nominal fee. Less extensive in scope, but

nonetheless strongly represented in the media, was the takeover of Rosenberger Restaurant GmbH which operated restaurants along motorways throughout Austria. Rosenberger has been bought by Burger King, which continues to run the motorway restaurants. However, in view of Austria's booming economy, we have seen fewer distressed M&A deals in 2018 than we did in 2017.

■ **Q. What trends are you seeing in cross-border or multijurisdictional insolvencies? What additional challenges do such engagements present?**

TRETTNAK: The number of cross-border insolvency proceedings is constantly increasing, and due to the insolvency of NIKI, the Austrian subsidiary of AIR BERLIN in 2018, the debate around the location of the centre of main interests (COMI) is more relevant today than it has ever been. NIKI had registered offices in Vienna and additional offices in Berlin and after its German parent's collapse the local insolvency court of Berlin opened preliminary insolvency proceedings in Berlin. Shortly after, the Austrian regional court of Korneuburg opened the main insolvency proceedings in Vienna, arguing that COMI was in Austria. The event serves as a clear reminder that even after many years in existence, how to apply the concept of COMI still causes some difficulty. As a result of this uncertainty, 'forum shopping', the strategic selection of one of several possible jurisdictions with the aim of obtaining procedural or material advantages, will certainly remain an issue in multijurisdictional insolvencies over the next few years. Moreover, one of the challenges that will need to be addressed will almost certainly be the impact of Brexit on cross-border insolvencies. The extent



“ It may well be expected that increases in interest rates will have a significant and negative impact on debt repayment, and may potentially flood the Austrian market with NPL portfolios. ”

of the impact will depend on the type of Brexit delivered.

■ Q. Looking ahead, what developments do you expect to see in restructuring and bankruptcy processes in the months ahead?

TRETTNAK: The number of insolvencies depends largely on the performance of the economy and interest rates. Since the economy is not expected to deteriorate in 2019, as Austria’s economy will continue to benefit from the upturn in its eastern neighbour states, and given an interest rate hike is not likely until at least 2020, we do not expect a particular increase

in insolvencies in 2019. Yet, a further decline is not expected either. Rather, there will most likely be a stabilisation at the current number of insolvencies. However, we believe that a major challenge in Austria in the years to come will be the handling of non-performing loan (NPL) portfolios of companies across industries, as the total amount of outstanding debt has reached an all-time high in Austria, both in the private and public sector. It may well be expected that increases in interest rates will have a significant and negative impact on debt repayment, and may potentially flood the Austrian market with NPL portfolios. ■

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Cerha Hempel Spiegelgeld Hlawati Rechtsanwälte GmbH is one of Austria’s leading corporate law firms, with an integrated practice in Central and Eastern Europe. With a team of over 180 lawyers, the firm has experience and expertise in all areas of corporate and commercial law, both in Austria and Central and Eastern Europe. The firm’s focus is on supporting its clients in their corporate decision-making process. This means that it is not content with standard solutions, but instead strives to develop and provide the best possible solutions for every challenge, tailored to each client’s needs.

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Catalin Nichifor has over 18 years' experience in finance and restructuring in international business with an emphasis on Central and Eastern Europe. The majority of his experience has been in the automotive supply, real estate, oil & gas, energy and business-to-business sectors. He has been the chief financial officer of a large European subsidiary of a US automotive Tier 1 supplier and of the local subsidiary of a large real estate investment fund. He has a focus on NPL portfolio workout and divestment in CEE countries and value generation in distressed and underperforming businesses.

Romania

■ **Q. How would you describe corporate bankruptcies and insolvencies in Romania over the last 12-18 months? Are you seeing more or fewer business failures in general?**

NICHIFOR: I believe we need to totally separate restructuring and insolvencies, especially as locally, no more than 4 percent of insolvent companies are finalising a successful reorganisation. I am of the opinion that once a company files for insolvency, it will most probably end up in bankruptcy, destroying value for creditors, shareholders, employees and the community. In Romania, more than 8000 companies filed for insolvency in 2018, which was in line with the previous few years, but what is interesting is that bigger companies are becoming insolvent, producing ever more losses. Looking ahead, the volume of distressed companies and insolvencies is expected to grow.

■ **Q. In your experience, which sectors seem to be demonstrating structural weaknesses leading to more restructuring efforts?**

NICHIFOR: The retail and construction sectors are the most likely suspects, but we are also expecting to see problems for real estate developers and energy producers. Those companies that are

not able to adapt to the market reality are the ones most likely to fail, with scarce financing resources, legislative and tax changes and poor management the most common causes of problems.

■ **Q. To what extent are troubled companies able to refinance and renegotiate existing debt structures in the current market?**

NICHIFOR: Securing financing is a challenge for troubled companies in Romania. There are few alternatives which will allow companies to refinance, renegotiate and restart normal business. In practice, refinancing and renegotiations are happening only in instances of deep distress and in insolvency cases when creditors have already squeezed whatever they were able to from companies and only problematic assets are left behind.

■ **Q. Have there been any recent legislative or regulatory developments, including high profile cases, in Romania that will have a significant effect on bankruptcy and restructuring?**

NICHIFOR: There have been few non-performing loan (NPL) portfolio transactions in recent years in Romania, as the government decided to tax these transactions and artificially force the banks to push for restructurings. Turnaround professionals are looking ahead to the impact of the new European directive on preventive restructuring frameworks, second chance and measures to increase the efficiency of restructurings, which are expected to have a strong impact on distressed activities and distressed investments.

■ **Q. What trends are you seeing in the market's appetite to purchase troubled assets? How would you describe recent distressed M&A activity?**

NICHIFOR: There is a trend to switch from NPL portfolio transactions to single tickets, and these are moving well, especially if they are backed by valuable and interesting assets, mainly real estate in good locations. Local money, sourced by successful entrepreneurs, is gathered in local funds looking to acquire businesses in distress and to support successful turnarounds. Big funds are still flying around, but small tickets



and local businesses, without any real regional presence, are not appealing to the bigger players.

■ **Q. What trends are you seeing in cross-border or multijurisdictional insolvencies? What additional challenges do such engagements present?**

NICHIFOR: Brexit and difficulties in the automotive industry are the main drivers for cross-border insolvencies and distressed businesses, but Romania is often at the positive end of the chain, as Romanian businesses are often the ones saving the situation for the ‘mother’ companies, by relocating manufacturing plants, cutting costs and focusing on efficient locations in Romania. The challenge is often finding enough local professionals and a labour force able to support these companies and restructure operations. Foreign experts are usually required to contribute and manage the projects.

■ **Q. Looking ahead, what developments do you expect to see in restructuring and bankruptcy processes in the months ahead?**

NICHIFOR: The general expectation is a downturn in the economy, with real estate developers and construction and automotive companies enduring difficulties and needing to adjust for lower incomes and more expensive financing, thus eating into their margins. Attention needs to be paid to state-owned companies and the impact that their failure might have on their business partners. Alternative financing is a must, as the banks are having difficulties understanding and adapting to new businesses and innovative transactions. Turnaround professionals are increasingly being sought to provide down to earth advice and establish trust between parties. ■

“ Attention needs to be paid to state-owned companies and the impact that their failure might have on their business partners. ”

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■ **Q. How would you describe corporate bankruptcies and insolvencies in India over the last 12-18 months? Are you seeing more or fewer business failures in general?**

SHAH: In 2016, India legislated a unified insolvency resolution framework, the Insolvency & Bankruptcy Code (IBC). This was put into place against the backdrop of a decade of increasingly stressed assets. The new law has helped fast track the resolution of the insolvencies of several large stressed assets over the last 12-18 months, leading to a recovery of around \$10bn, a 43 percent recovery for financial creditors. The government and bankruptcy regulator are proactively strengthening the law and building capacity to accelerate the resolution of many bankruptcies and bring more certainty as the law matures. There have been a number of high-profile cases, including Essar Steel, Binani Cement and Bhushan Steel. The Essar Steel case was delayed by significant litigation between creditors, promoters, resolution applicants and insolvency professionals. ArcelorMittal's resolution plan was finally approved 15 months after the insolvency commencement date; it then took another five months for the appellate tribunal to reconfirm the plan. This is the largest resolution so far in India's new bankruptcy framework, with a

\$6bn recovery for financial creditors. The Binani Cement case came to a successful resolution, with a 100 percent recovery after financial and operational creditors faced a drawn out legal battle between two investors, Dalmia Cement and Ultra Tech Cement, which extended the resolution timeline by 17 months. The court set a new precedent by treating Dalmia's offer as discriminatory to operational creditors and allowing Ultra Tech to revise its bid even after the end of the last date of the offer and approval of the committee of creditors (CoC). The Bhushan Steel case was among the largest cases, though it was quickest case to be resolved. In total, the case was settled within 11 months, as Tata Steel provided a recovery of 62 percent – \$5bn – to the firm's creditors. Overall, the numbers of business failures have been declining; however, there is still a significant amount of stress in the system.

■ **Q. In your experience, which sectors seem to be demonstrating structural weaknesses leading to more restructuring efforts?**

SHAH: The sectors that have exhibited structural weakness are power, infrastructure and telecoms. These sectors, by their very nature, are capital intensive with a long gestation period and take substantial time to break even. These three sectors contributed around 29 percent of the total non-performing assets (NPAs) for the State Bank of India, the largest bank in India. Each of the power, infrastructure and telecoms industries face their own issues. In the power space, a lack of power purchase agreements, a lack of fuel supply and linkages, delayed payments to power producers by state electricity distribution companies and tariff-related issues are causing

problems. In the infrastructure sector, land acquisition problems, slow dispute resolution mechanisms with government agencies leading to large claims by infrastructure developers being unresolved and low tariffs are among the most pressing issues. In the telecoms industry, India has the lowest industry tariffs globally, which is causing most operators to suffer, the sector is highly taxed and has very significant spectrum costs. In each of these sectors there will likely be significant restructuring and distressed M&A activity going forward.

■ **Q. To what extent are troubled companies able to refinance and renegotiate existing debt structures in the current market?**

SHAH: Stressed companies are typically able to rollover their existing debts, although at higher cost, depending upon the creditworthiness of the borrower. Following the Infrastructure Leasing & Financial Services (IFL&S) and Dewan Housing Finance Corporation Limited (DHFL) crises, liquidity in the banking system has reduced significantly, resulting in a funding squeeze for certain troubled sectors, such as real estate, which, traditionally, has been funded by non-banking finance companies (NBFCs). Typically, 30-35 percent of the liabilities raised by NBFCs have been short term in nature and are funded by short tenor instruments like commercial papers (CPs), certificate of deposit, and so on. Around \$45bn of CPs, maturing in less than 90 days, will come up for renewal later in May and June. Recently, due to the downgraded ratings of various debt instruments issued by Reliance Home Finance, Reliance Commercial Finance, the credit market is wary of extending



incremental credit to the sector and trying to reduce exposure to the sector.

■ **Q. Have there been any recent legislative or regulatory developments, including high profile cases, in India that will have a significant effect on bankruptcy and restructuring?**

SHAH: There have been some significant recent court and regulatory developments. The Supreme Court has upheld the constitutional validity of the IBC and various contentious provisions relating to creditors' rights, ineligibility of delinquent promoters to participate in the resolution process, and the right of the CoC to withdraw an insolvency application. The appellate tribunal has treated principal debt and the guarantor liability as co-extensive under the Indian Contract Act, hence the creditor to the principal debtor reserves the right to recover unrecovered dues from the guarantor even after the resolution process is completed. In February 2018, the Reserve Bank of India withdrew all debt restructuring schemes and a new revised framework for stressed assets resolution was proposed to promote alternate faster resolution outside IBC. This was eventually struck down by the Supreme Court, on appeal from certain industry associations, for certain provisions being *ultra vires*. This has delayed efforts to resolve distressed assets outside the IBC. The RBI will introduce an amended framework in the near future.

■ **Q. What trends are you seeing in the market's appetite to purchase troubled assets? How would you describe recent distressed M&A activity?**

SHAH: Overall deal activity in India crossed the \$100bn mark for the first time in 2018. The uptick in activity is largely attributed to numerous factors, including increased deal activity in the stressed asset space, consolidation across sectors and a significant surge in big-ticket transactions. Distressed asset transactions in India have accounted for over 15 percent of total deal activity by value. Insolvency-led transactions have included the \$4.9bn deal for Bhushan Steel, the \$900m deal for Binani Cements, the \$700m Electrosteel Steels deal and the \$400m Monnet Ispat & Energy deal. Despite the delays to the insolvency process under the IBC, foreign and domestic players are quite optimistic about the turnaround potential of several distressed companies. While strategic investors seem to have the edge at present, private equity and hedge funds are also actively exploring various structures for acquiring distressed assets.

■ **Q. What trends are you seeing in cross-border or multijurisdictional insolvencies? What additional challenges do such engagements present?**

SHAH: In October 2018, a government committee recommended the adoption of the UNCITRAL Model Law on Cross-Border Insolvency, 1997, with certain modifications necessary to suit the Indian context. So far, India has resolved \$24bn worth of stressed assets, including some of the largest NPAs, without the cross-border insolvency framework.

“ Overall deal activity in India crossed the \$100bn mark for the first time in 2018. ”

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However, the sub-optimal, uncertain and inequitable resolution has not gone unnoticed by stakeholders with cross-border interests. Like IBC itself, the efficacy of the cross-border insolvency framework will improve with evolving jurisprudence once it has been implemented.

government has set a committee to propose a framework on insolvency law reforms, such as group insolvency, pre-packs and cross-border insolvency. ■

■ **Q. Looking ahead, what developments do you expect to see in restructuring and bankruptcy processes in the months ahead?**

SHAH: The RBI is expected to revise guidelines on stressed asset resolution in the next few months to harmonise out of court restructuring with the IBC. In addition, the

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Brett Lord is a partner in the Sydney office of EY. He has over 20 years' experience in corporate insolvency, reconstruction and advisory. He has a particular focus on the various property sectors within Australia and acts for lenders, developers and landowners in relation to individual transactions and assets, as well as portfolios. He regularly advises lenders regarding complex property transactions and restructurings. He has been involved in all forms of corporate insolvency, including investigative accountant reports, voluntary administrations, liquidations and court-appointed receiverships.

■ Q. How would you describe corporate bankruptcies and insolvencies in Australia over the last 12-18 months? Are you seeing more or fewer business failures in general?

LORD: Formal insolvency appointments have continued to decline during the year ended 30 June 2018, with a 3.5 percent reduction compared to the prior corresponding period. This also represents a 28 percent decline from peak formal insolvency appointments which occurred during the year ended 30 June 2012. Worth noting is the change in the types of appointments generally occurring. It is no great surprise that the number of receiverships is down – 14.5 percent of total appointments in 2010 to 6.2 percent in 2018. However, what is interesting to note is the almost corresponding increase in liquidation appointments, up to 78.2 percent in 2018 from 70.9 percent in 2010, confirming that secured creditors are significantly less likely to intervene in a company-led insolvency appointment.

■ Q. In your experience, which sectors seem to be demonstrating structural weaknesses leading to more restructuring efforts?

LORD: Similar themes from recent years continue to be the drivers for restructurings and insolvency over the last 12-18 months. The numbers of construction-related insolvencies continues to be significant in the Australian market, however the figures can be a little misleading as a significant number of the construction-related insolvencies are very small businesses where failure to pay by a single customer can lead directly to an insolvency appointment. Retailers continue to struggle, with a number of medium-sized retailers entering insolvency. It should be noted that the retail sector has been considered largely unattractive to secured debt providers, resulting in less debt in the retail sector than in other comparable sectors. Changes to lenders' credit policies, in addition to legislative changes around stamp duty and land tax aimed at residential apartment investors, have dramatically decreased the availability of credit, and the willingness of particularly foreign investors to continue to support this market has led to a significant

oversupply of residential apartments in selected areas of certain capital cities. The associated lull in construction activity stemming from the oversupply will no doubt drive increased pressure in the residential construction space, however the shortfall in supply of residential properties in most capital cities is forecast to return within the next two to three years.

■ Q. To what extent are troubled companies able to refinance and renegotiate existing debt structures in the current market?

LORD: Though traditional lenders have significantly tightened their lending policies, distressed companies still have access to a diverse pool of lenders with varying risk/reward appetites. Traditional lenders continue to trade their debt on the secondary market during times of borrower stress, which allows many financial restructurings to occur outside of a formal insolvency process. In recent years, we have also seen a significant increase in the presence and opportunities presented by asset-based lenders, as well as non-traditional players, from an Australian perspective, providing innovative debt solutions secured by stock or significant



items of plant and equipment. From a property perspective, the tightening of credit policies by traditional lenders has led many hedge and credit funds to step into the shoes of those traditional lenders, particularly with construction funding, which has provided significant funding opportunities for those with the domestic capability to manage this type of loan.

■ Q. Have there been any recent legislative or regulatory developments, including high profile cases, in Australia that will have a significant effect on bankruptcy and restructuring?

LORD: The introduction of ‘safe harbour’ protection from personal liability for directors from insolvent trading claims by liquidators and the effective overriding of *ipso facto* clauses in contracts, for example automatic right to terminate in an insolvency, have occurred during the last 12 months. The ‘safe harbour’ provisions have certainly added another dimension from an insolvency practitioner’s perspective, however uncertainty surrounding the ultimate application of the ‘safe harbour’ defence has potentially limited its effectiveness as directors, particularly non-executives, are still risk averse when it comes to potential insolvent trading risk. Given the ‘grandfathering’ nature of the *ipso facto* amendments, we are yet to see any practical benefit to those legislative amendments.

■ Q. What trends are you seeing in the market’s appetite to purchase troubled assets? How would you describe recent distressed M&A activity?

LORD: Despite a relatively quiet market, from an M&A perspective the opportunities afforded by distressed assets and companies are still driving activity. What we have seen in the last 12 months, however, is a decrease in the willingness of investors to back, or continue to back, continually underperforming assets. As opposed to the continued restructure and recapitalisation of certain assets, namely mining and real estate assets, we have seen an increase in the effective mothballing of these assets, driven by the lack of underlying fundamentals. For example, steady commodities prices mean that restructurings cannot rely upon price growth to make an operation viable, and from a real estate perspective, price reduction, in combination with the decrease in investors and offshore buyers and more expensive construction funding in many key residential markets results in large numbers of projects becoming unviable. These assets will stagnate until such time as the market dynamics make them attractive to market participants once more.

■ Q. What trends are you seeing in cross-border or multijurisdictional insolvencies? What additional challenges do such engagements present?

LORD: There has been little activity in this space in Australia in the last 12 months. There have been a number of informal restructurings of Australian-based assets with foreign-based lenders, or Australian-based subsidiaries of foreign multinationals, however global access to relatively cheap money has limited the amount of restructuring work in this space. While the current level of relative dormancy is expected to continue, the level of international financial interconnectedness is likely to be an issue from



“ The level of international financial interconnectedness is likely to be an issue from an Australian perspective if global markets continue to be volatile. ”

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an Australian perspective if global markets continue to be volatile.

■ Q. Looking ahead, what developments do you expect to see in restructuring and bankruptcy processes in the months ahead?

LORD: The recent Banking Royal Commission which had a focus purely on misconduct in the banking and financial services industry has left many industry participants particularly publicity shy when it comes to enforcing against borrowers. This has, and will continue to, allow for financial restructurings to occur outside of a formal insolvency scenario. Over the coming

12 months we expect to see an uptick in restructuring activity as investors' patience with underperforming assets reaches its limits, and also as opportunities to reinvest capital present themselves, which will require a recycling of existing capital to enable certain of these transactions to occur. ■

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