GETTING THE DEAL THROUGH

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United States

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1 Legislation

What legislation is applicable to insolvencies and reorganisations? What criteria are applied in your country to determine if a debtor is insolvent?

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. Two primary tests for insolvency exist under US law, however insolvency is not required to file a voluntary petition under the Bankruptcy Code: (i) equitable insolvency, generally defined as a debtor's inability to pay debts as they become due in the usual course of business; and (ii) 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.

2 Courts

What courts are involved in the insolvency process? Are there restrictions on the matters that the courts may deal with?

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 US Supreme Court has ruled that bankruptcy courts lack the constitutional authority to enter a final judgment on a state law counterclaim that is not resolved in the process of ruling on a creditor's proof of claim. As narrowly interpreted, the ruling means that, absent the parties' consent, a bankruptcy court cannot enter a final judgment on some counterclaims asserted by the estate against a creditor who files a proof of claim, but that the bankruptcy court's exercise of jurisdiction is otherwise unaffected. Courts interpreting the ruling more broadly conclude that bankruptcy courts lack constitutional authority to enter a final judgment on a much wider range of claims, including fraudulent transfer claims. Jurisprudence interpreting the US Supreme Court opinion continues to develop, and a split of authority exists among the federal circuit courts of appeal on whether a party can waive its objection to the bankruptcy court's authority to enter a final judgment on non-core claims. On 24 June 2013, the US Supreme Court granted a petition for a writ of certiorari in the case that found a waiver permissible, and it will likely render a decision finally deciding the issue during its next term.

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 that judicial district. 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.

3 Excluded entities and excluded assets

What entities are excluded from customary insolvency proceedings and what legislation applies to them? What assets are excluded from insolvency proceedings or are 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 prepetition 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.

4 Protection for large financial institutions

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 (Dodd-Frank Act) in 2010. The Dodd-Frank Act, inter alia: (i) 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; (ii) 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 (iii) 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 (FDIC) 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.

5 Secured lending and credit (immoveables)

What principal types of security are taken on immoveable (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.

6 Secured lending and credit (moveables)

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

The security interest constitutes the principal security device taken on moveable 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.

7 Unsecured credit

What remedies are available to unsecured creditors? Are the processes difficult or time-consuming? Are pre-judgment attachments available? Do any special procedures apply to foreign creditors?

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, except for the enforcement of arbitration awards involving foreign creditors, which generally proceed under federal law.

8 Voluntary liquidations

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 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.

9 Involuntary liquidations

What are the requirements for creditors placing a debtor into involuntary liquidation and what are the effects?

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$15,325 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 such 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.

10 Voluntary reorganisations

What are the requirements for a debtor commencing a formal financial 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 to no more than 18 months, after which other interested parties may file their own plans.

11 Involuntary reorganisations

What are the requirements for creditors commencing an involuntary reorganisation and what are the effects?

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

12 Mandatory commencement of insolvency proceedings

Are companies required to commence insolvency proceedings in particular circumstances? If proceedings are not commenced, what liabilities can result?

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.

13 Doing business in reorganisations

Under what conditions can the debtor carry on business during a reorganisation? What conditions apply to the use or sale of the assets of the business? 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. As discussed in question 17 below, sections 363 and 365 govern the sale of assets outside the debtor's ordinary course of business.

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.

14 Stays of proceedings and moratoria

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 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.

15 Post-filing credit

May a debtor in a liquidation or reorganisation obtain secured or unsecured loans or credit? What priority is 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. Priming liens are rare since debtors usually cannot provide pre-petition secured lenders with adequate protection due to 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.

16 Set-off and netting

To what extent are creditors able to 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 prepetition 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 (so-called '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.

17 Sale of assets

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? In practice, does your system allow for 'stalking horse' bids in sale procedures and does your system permit credit bidding in sales?

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 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. 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. In May 2012, the US Supreme Court resolved a split of authority among the lower courts and held 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.

18 Intellectual property assets in insolvencies

May an IP licensor or owner terminate the debtor's right to use it when an insolvency case is opened? To what extent may an insolvency administrator continue to use IP rights granted under an agreement with the debtor? May an insolvency representative terminate a debtor's agreement with a licensor or owner and continue to use the IP for the benefit of the estate?

The automatic stay prevents an IP licensor from terminating the debtor's right to use the 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.

19 Rejection and disclaimer of contracts in reorganisations

Can a debtor undergoing a 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?

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 fail to pay or reject 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 from continued performance.

20 Arbitration processes in insolvency cases

How frequently is arbitration used in insolvency proceedings? What limitations are there on the availability of arbitration in insolvency cases? Will the court allow arbitration proceedings to continue after an insolvency case is opened? Can disputes that arise in an insolvency case after the case is opened be arbitrated with the consent of the parties? Can the court direct the parties to such disputes to submit them to arbitration?

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, 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 (eg, *Lehman Brothers Holdings Inc*) not infrequently employ court-approved alternative dispute resolution procedures tailored to address the specific exigencies of the case.

21 Successful reorganisations

What features are mandatory in a reorganisation plan? How are creditors classified for purposes of a 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 such 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 such 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 'cram down'. Cram down requires, along with the requirements above, that the plan does not 'discriminate unfairly' and 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. Such releases are permitted only in unusual circumstances, if at all. At a minimum, third-party releases must be necessary and fair. 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.

22 Expedited reorganisations

Do procedures exist for expedited 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. 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.

23 Unsuccessful reorganisations

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 confirmation requirements described in question 21. 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.

24 Insolvency processes

During an insolvency case, what notices are given to creditors? What meetings are held? How are meetings 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 insolvency administrators' reporting obligations? May creditors pursue the estate's remedies against third parties?

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 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. Without court approval, creditors and official committees cannot initiate an action against a third party on account of a claim that is property of the debtor's estate or that belongs to the debtor.

25 Enforcement of estate's rights

If the insolvency administrator 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?

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.

26 Creditor representation

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.

27 Insolvency of corporate groups

In insolvency 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? May assets be transferred from an administration in your country to an administration in another country?

A court may consolidate the cases of two or more affiliated debtors pending in the same court for administrative purposes and almost always does so. Courts have the power to combine the assets and liabilities of companies into one pool for distribution purposes under the equitable doctrine of substantive consolidation. A proponent of substantive consolidation must generally show some form of substantial identity between the entities to be consolidated and that consolidation is necessary to avoid some harm or to realise some benefit. Courts view substantive consolidation as an extraordinary remedy that should be used sparingly if an objection is lodged. 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.

28 Claims and appeals

How is a creditor's claim submitted and what are the time limits? How are claims disallowed and how does a creditor appeal? Are there provisions on the transfer of claims? Must transfers be disclosed and are there any restrictions on transferred claims? Can claims for contingent or unliquidated amounts be recognised? 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. 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 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, 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.

29 Modifying creditors' rights

May the court change the rank 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. As noted above, a court may 'substantively consolidate' estates. By pooling the assets of, and claims against, two or more entities, substantive consolidation may eliminate any structural priority between the claimants of the consolidated entities. Finally, at least some courts have held that they also have the power to disallow claims on equitable grounds in 'rare' cases.

30 Priority claims

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.

31 Employment-related liabilities in restructurings

What employee claims arise where employees are terminated during a restructuring or liquidation? What are the procedures for termination?

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 is terminated before or during a bankruptcy case, and applicable contract and labour law determines the amount of his 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. As discussed further in question 32 below, 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.

32 Pension claims

What remedies exist for pension-related claims against employers in insolvency 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.

33 Liabilities that survive insolvency proceedings

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.

34 Distributions

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.

35 Transactions that may be annulled

What transactions can be annulled or set aside in liquidations and reorganisations and what are the grounds? What is the result of a transaction being annulled?

Preferential, fraudulent and post-petition transfers made without necessary court authorisation may be avoided. Broadly, a preferential transfer is one made within 90 days of 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.

36 Proceedings to annul transactions

Does your country use the concept of a 'suspect period' in determining whether to annul a transaction by an insolvent debtor? May voidable transactions be attacked by creditors or only by a liquidator or trustee? May they be attacked in a reorganisation or a suspension of payments or only in a liquidation?

Transfers made within the time frames specified in question 35 may be avoided. Only a debtor-in-possession or a trustee has standing to pursue an avoidance action, unless the court expressly grants creditors or a committee derivative standing to do so. Avoidance actions are available in reorganisations and liquidations.

37 Directors and officers

Are corporate officers and directors liable for their corporation's obligations? Are they liable for pre-bankruptcy actions by their companies? Can they be subject to sanctions for other reasons?

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 their business. Mere insolvency, or operating a company while insolvent, however, does not give rise to liability.

38 Groups of companies

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 (i) indirect operator liability, where a parent exercises direct and pervasive control over its subsidiary, (ii) common ownership, (iii) agency, and (iv) 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: (i) dominion and control by one corporation over another, (ii) improper conduct or purpose and (iii) 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

Update and trends

Commercial bankruptcy filings have continued to decline, with no paradigm-changing case law or unexpected developments marking the year. Analysis of extended maturity dates and default rates suggests that 'pretend and extend' or 'amend and extend' debt restructurings continue to proliferate, with institutional lenders pressuring borrowers to avoid bankruptcy and to pursue out-of-court restructuring options. This may alleviate immediate liquidity pressures, but some fear that such practices may keep companies artificially afloat, negatively affecting their ultimate ability to restructure by limiting future access to capital and other options. Pre-packaged and pre-negotiated chapter 11 filings, as well as bankruptcy sales, continue to prevail.

Though municipal bankruptcies are rare, local governments across the United States face serious fiscal challenges and budget deficits. In July 2013, with an estimated US$18 billion in debt and unfunded liabilities, Detroit, Michigan filed the largest municipal bankruptcy in US history. The case will test the effectiveness of chapter 9 as a strategy for restructuring public pension and other employee-related benefits in the face of decreasing tax revenues and increased financing costs, and may provide a road map for other similarly situated public entities. Perhaps anticipating repercussions from such filings, Congress introduced the No Bailouts for State and Local Governments Act [HR 3002] in August, a bill that would prohibit use of federal funds to pay state and local government obligations, and would also prohibit the Federal Reserve from financially assisting state and local governments. The bill is unlikely to pass, but reflects growing concern about public financial instability.

In a similar vein, government oversight and regulation have also increased, reflecting public demand for action and accountability following the 2008 financial crisis. Congress enacted the Dodd-Frank Wall Street Reform and Consumer Protection Act to address institutions deemed 'too big to fail' and to reduce systemic financial risk. Dodd-Frank required, inter alia, the largest financial institutions to submit 'living wills' to federal regulators detailing their plans for unwinding in the event of another economic crisis. The US Department of Justice and state attorneys general have pursued large financial institutions via civil suits in connection with perceived wrongdoing arising from their financial practices, and the US Trustee Program (USTP) took an active role in some of the cases relating to mortgage servicing irregularities, reviewing thousands of foreclosure-related documents filed by mortgage servicers in bankruptcy court. Some industry observers believe this increased investigatory role reflects a shift by the USTP towards a more proactive oversight function in bankruptcy cases. For example, in response to the substantial fees awarded to professionals in cases such as *Lehman Brothers* and *Madoff* and amid allegations that some judicial venues were too generous with fee awards, the USTP recently promulgated new guidelines for payment of attorneys' fees in bankruptcy. The guidelines require law firms to, inter alia, submit extensive information relating to their billing practices, rates and fees, and also require them to file detailed budgets early in the case. The guidelines, which will apply to large cases filed on and after 1 November 2013, have been criticised as exceeding the USTP's authority and the Bankruptcy Code itself. Whether the USTP will continue to increase its role in other areas of bankruptcy practice, such as venue selection, remains to be seen. Congressional efforts to limit venue options for chapter 11 filings have to date proven unsuccessful.

Despite the relative calm in US commercial filings, important bankruptcy decisions have been issued during the past year. Courts continue to debate treatment of make-whole claims, but appear to be trending towards upholding their validity in bankruptcy if expressly permitted under the governing contracts. Make-whole provisions are common in loan agreements and indentures. They function to protect lenders if a borrower repays its debt early. In bankruptcy, a court will first determine whether the right to payment of a make-whole amount is valid under state law contract principles. If so, the court will then analyse whether the claim remains enforceable under applicable bankruptcy principles. The most common issues affecting these claims in bankruptcy are whether: (i) automatic acceleration upon default triggers entitlement to the make-whole amount, (ii) the make-whole amount constitutes an unenforceable penalty under state law or (iii) the claim is one for unenforceable unmatured post-petition interest. On 12 September 2013, the Court of Appeals for the Second Circuit, an influential appellate court with respect to bankruptcy matters, affirmed the bankruptcy court's ruling in the *American Airlines* chapter 11 cases that a lender had no right to a US$200 million make-whole payment where the underlying indenture clearly stated that the payment was not due following acceleration, including in the event of automatic acceleration triggered by the debtor's bankruptcy filing. As a result, the court authorised the debtor to incur new debt to repay the accelerated defaulted debt without having to pay the make-whole amount. In contrast, two recent bankruptcy court decisions upheld the validity of make-whole amounts based on the plain language of the governing agreements. In *School Specialties Inc*, the Delaware bankruptcy allowed a US$23 million make-whole claim due on a US$70 million loan, ruling that it was not an unenforceable penalty under state law. The court followed the majority view that the make-whole payment was a form of liquidated damages rather than unmatured post-petition interest unenforceable in bankruptcy. The Oklahoma bankruptcy court in *GMX Resources Inc* reached a similar conclusion.

Of particular note to private equity firms, the Court of Appeals for the First Circuit recently held that private equity fund advisers engaged in a 'trade or business' for purposes of establishing controlled group liability under federal pension law. Federal pension law (ERISA) provides that all members of a 'controlled group' are jointly and severally liable for, inter alia, defined benefit plan termination and withdrawal claims. A two-part test exists for determining membership in a 'controlled group': (i) is the entity at issue a 'trade or business' and (ii) is it under common control with one or more other entities? In the *Sun Capital Partners* case, a multi-employer pension fund sought to render two private equity funds liable for termination and withdrawal liability claims against their bankrupt portfolio company. The appellate court concluded that at least one of the two private equity funds that operated the portfolio company through layers of fund-related entities was not merely a 'passive' investor, but sufficiently operated and managed the company to satisfy the 'trade or business' aspect of the two-part control group test. The court remanded the matter to the trial court for a determination of whether the funds satisfy the 'common control' leg of the test, but the decision is the first appellate-level case to find that a private equity fund may be a 'trade or business' – the first leg of the test that might render them (and potentially, other portfolio companies) liable for pension claims.

International and cross-border filings remain high. The chapter 11 case of the Greek shipping concern, *Excel Maritime Carriers Ltd*, may signal a greater willingness by non-US-based multinational enterprises to avail themselves of chapter 11 and US bankruptcy law to effect restructurings that may not be feasible outside the United States. Several significant appellate-level decisions issued in chapter 15 cases. First, the Court of Appeals for the Fifth Circuit held in the *Vitro* chapter 15 case that a *concurso* confirmed under Mexican law could not be enforced in the US to extinguish bondholder guarantee claims against US-incorporated non-debtor subsidiaries because such provisions were unenforceable under US bankruptcy law as interpreted in the Fifth Circuit. Notably, the court refused to find the *concurso* unenforceable under chapter 15 on the grounds that it violated US public policy generally. Second, the Court of Appeals for the Second Circuit made two rulings regarding the COMI determination in chapter 15 recognition proceedings: (i) the date of the filing of the chapter 15 petition constitutes the appropriate time for making the COMI determination, and (ii) the court may consider a broad range of factors when locating a foreign debtor's COMI, including any activities in which the foreign debtor or its administrators engaged resulting from the foreign proceeding itself.

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).

39 Insider claims

Are there any restrictions on claims by insiders or non-arm's length creditors against their corporations in insolvency proceedings taken by those corporations?

In bankruptcy, a party may be an 'insider' if the party either (i) 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 (ii) 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 purposes of determining whether an 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.

40 Creditors' enforcement

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 UCC 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.

41 Corporate procedures

Are there corporate procedures for the liquidation or 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.

42 Conclusion of case

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 and 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.

43 International cases

What recognition or relief is available concerning an insolvency proceeding in another country? How are foreign creditors dealt with in liquidations and reorganisations? 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? 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 estate 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.

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 principals 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.

44 Cross-border cooperation

Does your country's system allow 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?

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.

US courts have in some instances refused to recognise foreign proceedings, and have more recently, refused to grant a foreign representative's requested relief where such relief was held manifestly contrary to US public policy.

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 the centre of its main interests (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, courts have held ineligible for recognition a foreign proceeding that is neither a main nor non-main proceeding. For example, in *In re Bear Stearns High-Grade Structured Credit Strategies Master Fund Ltd*, 374 BR 122 (Bankr SDNY 2007), aff'd 389 BR 325 (SDNY 2008), the bankruptcy court concluded that two Cayman Islands exempted limited liability companies, whose investment manager, back-office operations, books and records, and assets were all in the US, did not have a COMI or establishment in the Cayman Islands where their foreign proceeding was pending. As a result, the bankruptcy court denied recognition to the foreign proceeding because it was ineligible for relief as main or non-main under chapter 15. Similarly, in *In re Ran*, 607 F.3d 1017 (5th Cir 2010), the US Court of Appeals for the Fifth Circuit affirmed the lower court rulings denying recognition of a foreign bankruptcy proceeding involving an individual debtor where the debtor's habitual residence was in the US, and the only tie to the foreign proceeding was the pending foreign proceeding itself. The court concluded that the debtor's presumptive COMI was in the US, and that the administration of the foreign proceeding by itself was insufficient to create an establishment of the debtor in that country within the meaning of chapter 15.

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 exception should be construed narrowly and only invoked under exceptional circumstances concerning matters of fundamental importance for the US. Two factors generally govern application of the 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. Despite the limited scope of the 'public policy' exception, a few courts have invoked the exception as grounds for denying a foreign representative's relief 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 estate 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 approving a restructuring plan extinguished the guaranty obligations of the foreign debtor's non-debtor subsidiaries.

45 Cross-border insolvency protocols and joint court hearings

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.

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