

BANKRUPTCY & RESTRUCTURING

ANNUAL REVIEW 2017



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Bankruptcy & Restructuring

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BANKRUPTCY & RESTRUCTURING

JUNE 2017 • ANNUAL REVIEW

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

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A stylized illustration of a man in a dark suit, white shirt, and orange tie, running towards the right. The background is a light green gradient with horizontal bands of slightly different shades.

INTRODUCTION

Though numbers are down from the global financial crisis, corporate bankruptcies and restructurings are still occurring in certain sectors. The retail, energy and global shipping sectors, to name just a few, have experienced a difficult period over the last 12 to 18 months, and this uncertainty is set to continue. The retail industry in particular has been at the mercy of shifting consumer habits and reduced spending and has so far struggled to respond. As online retailers continue to spread into new jurisdictions and new areas of the market, brick and mortar retailers will remain under pressure.

Meanwhile, the development of local and multijurisdictional insolvency regimes has continued at pace. The Insolvency Law Reform Bill in Australia, the new European Insolvency Rules expected in mid-2017, and the Supreme Court case of *Czyzewski v. Jevic Holding Corp.* in the US will all impact the corporate bankruptcy scene in different ways.

While the financial uncertainty permeating many industries has created chaos for some, the outlook appears strong for investors keen to pursue distressed assets. Indeed, distressed funds and private equity firms are showing sustained interest in this area. For would-be acquirers, the importance of due diligence processes cannot be underestimated. Pension liabilities remain an important facet of any distressed asset, as evidenced by the collapse of a number of UK firms over the last 12 months.



UNITED STATES

BARRY CHATZ

ARNSTEIN & LEHR LLP

Q HOW WOULD YOU DESCRIBE CORPORATE BANKRUPTCIES AND INSOLVENCIES IN YOUR REGION OVER THE LAST 12-18 MONTHS? ARE YOU SEEING MORE OR FEWER BUSINESS FAILURES IN GENERAL?

CHATZ: Overall, the national climate with respect to bankruptcies over the last 12 to 18 months reflects a material increase in retail failures, as well as all aspects of the energy sector. With far less notoriety, we have seen further stress occurring in the food sector, including failures of grocery stores, as well as suppliers relating thereto. We understand that statistics show business bankruptcies declining, but in these specific industries, we are at or nearing 'great recession' numbers. I think a reason for the statistical decline in bankruptcies is that only the mid-market and large businesses are electing to file. The small businesses, rather than seeking a reorganisation alternative, are just closing their doors with their principals either retiring or moving on to attempt to find general employment in their respective fields.

Q IN YOUR EXPERIENCE, WHICH SECTORS SEEM TO BE DEMONSTRATING STRUCTURAL WEAKNESSES LEADING TO MORE RESTRUCTURING EFFORTS?

CHATZ: Unquestionably, the answer is retail in 2017. Whether it is an indication of the underlying weakness in the overall economy, changes in consumer habits or the inefficiencies of traditional retailers, this year has affected retailers both big and small, and nobody is safe. From the traditional retailers, like Payless Shoes, or individual boutiques, every retailer is feeling the pressures affecting the retail industry. The energy sector continues to show fundamental weaknesses from the hits it has taken over the past year and the change in administration has further put the status of the entire industry in flux. There also remains a continued stress in non-apartment related real estate and general business failures in all sectors given lack of demand in high rents or other attendant occupancy costs.



**Q TO WHAT EXTENT ARE
TROUBLED COMPANIES
ABLE TO REFINANCE AND
RENEGOTIATE EXISTING
DEBT STRUCTURES IN THE
CURRENT MARKET?**

CHATZ: We continue to see companies that have strong positive cash flows obtain refinancing within the current market. Renegotiation with existing lenders, post-technical default, has become increasingly less likely. The better path, given multiple sources of funding within the market place, has been to refinance. This is particularly true in the middle market when the borrower can show positive cash flows or, at least, break even cash flows with positive projections. Refinance has been a continued opportunity for troubled companies.

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**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?**

CHATZ: The recent Supreme Court case of *Czyzewski et al. v. Jevic Holding Corp. et al.* is the strongest and most important case of recent vintage and it will have a significant effect on bankruptcy and restructuring. In *Jevic*, the Supreme Court clarified, without question, that any court-approved structured dismissal must comply with the bankruptcy code's priority structure. Structured dismissals have been utilised to avoid claims of workers, unions and other priority claimants to the betterment of unsecured trade creditors and potentially insiders, thereby keeping funds away from those parties to pursue out-of-court litigation. This ability to self-prioritise creditors is no longer available and may either lead to the filing of fewer bankruptcy cases or assurance of more fundamental fairness in the bankruptcy process.

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Q WHAT TRENDS ARE YOU SEEING IN THE MARKET'S APPETITE TO PURCHASE TROUBLED ASSETS? HOW WOULD YOU DESCRIBE RECENT DISTRESSED M&A ACTIVITY?

CHATZ: There continues to be a number of buyers within this economy looking to purchase assets that may be deemed to be troubled. Recent activity has reflected strong interest in many sectors not, however, including retail. History has shown that many of the 'troubled' asset purchasers are looking for 'deals' and, therefore, are loathe to implement when there is a true available marketplace of interested buyers within a business sector. Other times, those 'troubled asset investors' refused to pay more than liquidation value, making the sale process a waste of time for secured lenders and ultimately facilitating liquidation, rather than a sale process. The answer to the question is – it depends whether troubled assets achieve fair value in the marketplace, depending upon who the purchasers are and what the market is for the assets.

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Q WHAT TRENDS ARE YOU SEEING IN CROSS-BORDER OR MULTIJURISDICTIONAL INSOLVENCIES? WHAT ADDITIONAL CHALLENGES DO SUCH ENGAGEMENTS PRESENT?

CHATZ: Since Chapter 15 was codified more than 10 years ago, the inherent issues in applying the new law have, for all intents and purposes, been worked out by the bankruptcy courts. Obviously certain jurisdictions have greater exposure to Chapter 15 cases and are better attuned to the critical issues in determining whether to grant such protection to the foreign entity. Similarly, the sophistication of the bankruptcy practice over the past several decades has essentially eliminated many of the difficulties multijurisdictional insolvencies used to create. Judges, practitioners and financial advisers have all been in cases throughout the country, in all different capacities, and nearly every Chapter 11 case of any reasonable size touches other jurisdictions in some material manner. This 'globalisation' of insolvency, whether internationally or domestically, is becoming more of a norm, making it a regular part of the practice.

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“Nearly every Chapter 11 case of any reasonable size touches other jurisdictions in some material manner.”

Q LOOKING AHEAD, WHAT DEVELOPMENTS DO YOU EXPECT TO SEE IN RESTRUCTURING AND BANKRUPTCY PROCESSES IN THE MONTHS AHEAD?

CHATZ: We are concerned about the downturn in the retail economy and the recent downturn in auto sales. Suppliers of auto parts, as well as suppliers to retailers, may be the next failures we see and may be reminiscent of recent times when Chrysler and GM failed. The supply chain and interconnectivity of commerce makes this nearly inevitable. Potential continued dislocation and failure will undoubtedly affect commercial real estate at the same time that many CMBS loans are coming due. Empty units and the inability to repurpose sub-par retail centres may lead to significant dislocation in markets and failure of enterprises which own these assets. As more retailers file for bankruptcy and close their doors, the effects are going to be felt not only by the suppliers to those retailers, but also the landlords, cities and economies supporting the void left behind.

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BRAZIL

LUCIANA FARIA NOGUEIRA
TOZZINIFREIRE ADVOGADOS

Q HOW WOULD YOU DESCRIBE CORPORATE BANKRUPTCIES AND INSOLVENCIES IN YOUR REGION OVER THE LAST 12-18 MONTHS? ARE YOU SEEING MORE OR FEWER BUSINESS FAILURES IN GENERAL?

NOGUEIRA: In the last 12 to 18 months, there has been a significant increase in the number of corporate bankruptcies and insolvency proceedings in Brazil, especially regarding judicial reorganisation – the most common insolvency proceeding in the country. During 2016, there was a 44.8 percent year-on-year increase in the number of requests for judicial reorganisation. The main reasons for the increase are the political and economic crisis in Brazil, the negative financial effects of Operação Lava Jato and the evolution of the applicability of the Brazilian Bankruptcy and Restructuring Law – which was enacted in 2005 and has matured enough to provide specific solutions for each sector of the economy, allowing creditors recovery.

Q IN YOUR EXPERIENCE, WHICH SECTORS SEEM TO BE DEMONSTRATING STRUCTURAL WEAKNESSES LEADING TO MORE RESTRUCTURING EFFORTS?

NOGUEIRA: The political and economic crisis in Brazil is widespread, affecting several sectors of the Brazilian economy and many types of companies. However, some were more affected in the past few months, such as companies in the infrastructure and construction and regulated sectors. As a consequence of Operação Lava Jato, in the construction sector, big companies involved in infrastructure projects with the government requested judicial reorganisation; other relevant companies focused on real estate projects also requested judicial reorganisation, due to the economic crisis. Also, regulated sectors, such as electric power and telecommunication, have suffered with structural weaknesses, leading to more restructuring efforts, with the initiation of judicial reorganisation.



Q TO WHAT EXTENT ARE TROUBLED COMPANIES ABLE TO REFINANCE AND RENEGOTIATE EXISTING DEBT STRUCTURES IN THE CURRENT MARKET?

NOGUEIRA: Companies under judicial reorganisation proceedings may freely negotiate and refinance their debts, within a judicial reorganisation plan that must be approved by the majority of creditors. Reorganisation plans commonly make provision for grace periods, haircuts and rescheduling of payments. Also, they may negotiate financing with any creditors or third parties, as well as give assets as collateral upon court and creditors' authorisation. However, if a company is forced into liquidation proceedings, it is not possible to renegotiate debts, since the debtor is removed from its activities and the existing assets are attached and sold by a judicial administrator to pay the creditors according to a legal preference order.

Q HAVE THERE BEEN ANY RECENT LEGISLATIVE OR REGULATORY DEVELOPMENTS, INCLUDING HIGH PROFILE CASES, IN BRAZIL THAT WILL HAVE A SIGNIFICANT EFFECT ON BANKRUPTCY AND RESTRUCTURING?

NOGUEIRA: There are several studies and legislative bills discussing alterations to the current Brazilian Bankruptcy and Restructuring Law, which was enacted in 2005, which intend to adjust some details of the insolvency proceedings to case law and market needs – but which maintain the structure as it is. Some speculate that the changes will be effective until the end of 2017, but there is no guarantee. Also, in the electric power and telecommunication regulated sectors, some specific laws have been enacted or may be enacted soon to improve the legislation of the sectors, but which may also cause some impact in insolvency proceedings, such as the intervention of the government in companies under judicial reorganisation.



Q WHAT TRENDS ARE YOU SEEING IN THE MARKET'S APPETITE TO PURCHASE TROUBLED ASSETS? HOW WOULD YOU DESCRIBE RECENT DISTRESSED M&A ACTIVITY?

NOGUEIRA: The judicial sale of branches or individual going concerns belonging to the debtor company is currently one of the most common ways for distressed M&A investors to acquire the assets of a company under judicial reorganisation. This can also be an effective method of restructuring for debtor companies, due to the evolution of case law on this matter. Once the judicial sale is completed in accordance with the law, the relevant branch or going concern will, in principle, be free and clear of any liens and encumbrances and the purchaser will not succeed the debtor with respect to any indebtedness. As a consequence, unlike a regular M&A, creditors will not be able to claim any amount from the purchasers of branches or going concerns and the corresponding assets will not be attached to satisfy their creditors. This usually attracts the investor toward distressed M&A with Brazilian companies under judicial reorganisation.

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Q WHAT TRENDS ARE YOU SEEING IN CROSS-BORDER OR MULTIJURISDICTIONAL INSOLVENCIES? WHAT ADDITIONAL CHALLENGES DO SUCH ENGAGEMENTS PRESENT?

NOGUEIRA: Insolvency proceedings in Brazil, especially judicial reorganisation proceedings, usually involve cross-border or multijurisdictional issues, since most relevant companies under reorganisation in Brazil have subsidiaries or assets in other countries and also have international bondholder creditors. However, the Brazilian Bankruptcy and Restructuring Law does not contain any specific rules dealing with cross-border or multijurisdictional insolvencies or provisions regarding the recognition of other countries' statutory processes, unlike Chapter 15 of the US Bankruptcy Code, for example. As a result, any effects and consequences of possible ancillary or parallel proceedings in foreign jurisdictions will have to be dealt with on a case-by-case basis, subject to applicable conflicts of law provisions in cross-border matters. In addition, Brazil has not adopted the UNCITRAL Model Law or any other treaty related to EC regulation regarding insolvency proceedings, which is seen as a big challenge.

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“In the coming months we expect to see major companies in the infrastructure and regulated sectors initiate judicial restructuring proceedings.”

Q LOOKING AHEAD, WHAT DEVELOPMENTS DO YOU EXPECT TO SEE IN RESTRUCTURING AND BANKRUPTCY PROCESSES IN THE MONTHS AHEAD?

NOGUEIRA: In the coming months, still as a consequence of Operação Lava Jato and the Brazilian political and economic crisis, we expect to see major companies in the infrastructure and regulated sectors initiate judicial restructuring proceedings. The distressed M&A market is also likely to increase, with an impact on the country's development.

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Luciana Faria Nogueira

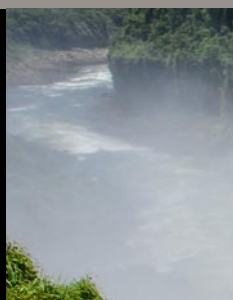
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Luciana Faria Nogueira works in the restructuring and insolvency practice group, advising creditors to negotiate and reschedule their credits, and assists investors and asset acquirers to implement related operations. Her experience also encompasses pre-litigation and litigation spheres in a wide range of corporate matters, such as antitrust, corporate and banking and finance fields. Ms Faria Nogueira is recommended in Latin Lawyer 250 and the Legal 500 international legal guides. She also participated in judicial restructurings awarded by Latin Lawyer Deal of the Year in 2010, 2012 and 2015.



ARGENTINA

FERNANDO HERNÁNDEZ
MARVAL, O'FARRELL & MAIRAL

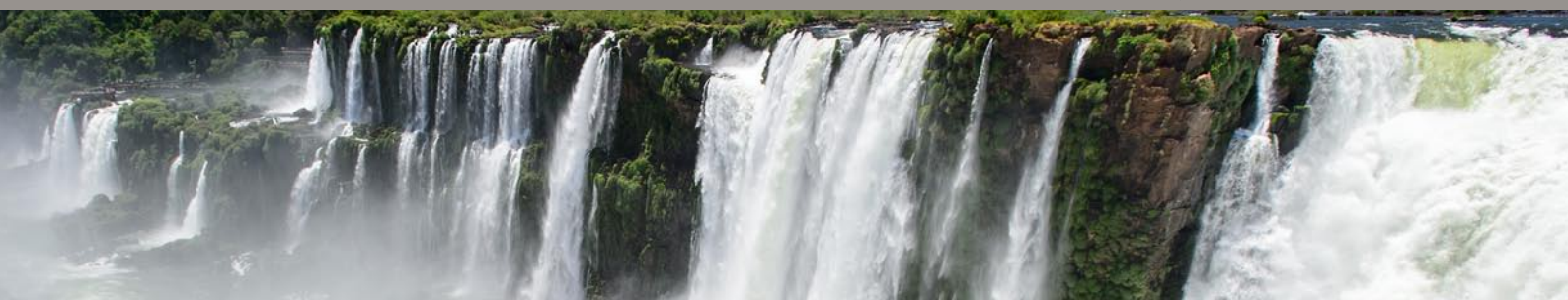


Q HOW WOULD YOU DESCRIBE CORPORATE BANKRUPTCIES AND INSOLVENCIES IN YOUR REGION OVER THE LAST 12-18 MONTHS? ARE YOU SEEING MORE OR FEWER BUSINESS FAILURES IN GENERAL?

HERNÁNDEZ: By the end of 2015, the Argentine economy was suffering a crisis caused by, among other things, high inflation, foreign exchange increasing restrictions, including the split of the foreign exchange market, with the peso strongly and artificially appreciated against the US dollar in a restrictive official foreign exchange market and a blue market with spreads of more than 50 percent with respect to the official market, public utility tariffs frozen for more than 12 years and a record fiscal deficit. As a consequence, the number of bankruptcies increased again during the fourth quarter of 2015 compared to the same period in 2014. However, after the change in the federal government in October 2015 and the adoption of several structural measures, the trend of the Argentine economy has begun to change slowly and business failures have started to decline accordingly.

Q IN YOUR EXPERIENCE, WHICH SECTORS SEEM TO BE DEMONSTRATING STRUCTURAL WEAKNESSES LEADING TO MORE RESTRUCTURING EFFORTS?

HERNÁNDEZ: One of the sectors demonstrating the most structural weakness is construction, even though the number of failures and closings of businesses in the construction industry has continued to decline – from more than 3000 in 2014, to about 1900 in 2015, then around 500 during the last 12 months. The federal government intends to implement an ambitious federal programme of public infrastructure, which, if implemented, will help improve the development of the industry. In addition, a general reduction in consumer spending, along with other factors, like the increase of the public utility tariffs, the loss of foreign exchange competitiveness and the Brazilian economic crisis, are also affecting mid to small-size businesses in the textile, chemical and metallurgic industries, among others. For similar reasons, the dairy industry, which has been highly affected by the consumer spending reduction and decline of exports of about 60 percent in some cases, is also facing alarming operational and economic difficulties.



Q TO WHAT EXTENT ARE TROUBLED COMPANIES ABLE TO REFINANCE AND RENEGOTIATE EXISTING DEBT STRUCTURES IN THE CURRENT MARKET?

HERNÁNDEZ: There have been few large restructurings in Argentina during the past few years, only a small number under the widely used out-of-court restructuring agreement – similar to US pre-packaged agreements – and others under private restructuring. In general, those restructurings have been successful. However, in Argentina, there is no developed debtor-in-possession financing, and, therefore, companies in insolvency proceedings are generally not able to obtain financing from financial entities. Their only source of financing during insolvency proceedings is usually their creditors and suppliers. There are, however, a few cases where the crisis is operational in nature, caused by increased costs and declining sales, and where the solution is an operational restructuring – involving reduction of personnel, spin off or sale of business units – rather than a financial restructuring alone. In those cases, where the failure of the company may have a relevant social impact, the government has assisted with financial aid to avoid company failure and contribute to company equity or business sale or restructuring.

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 been no recent substantial legislative or regulatory developments which have significantly affected bankruptcy and restructuring. One of the last substantial developments, which continues to have a widespread application among Argentine courts, is the so called 'third way'. In Argentine reorganisation proceedings, debtors must formulate, file and obtain the requisite majority approval of their reorganisation proposals within a period of 90 to 120 days, known as the 'exclusivity period'. If at the expiration of the 'exclusivity period' the debtor has not obtained approval of the reorganisation plan, the courts must open a bidding process for the sale of the debtor's equity and filing of new competitive reorganisation plans by the bidders. Under those circumstances, whereby the courts found that upon an adjustment the debtor's reorganisation plan could be successful, instead of following



“Today’s largest insolvency cases involve more debtors with operational crises, rather than financial.”

the statutory bidding process, the courts have extended the ‘exclusivity period’ beyond the statutory terms granting the debtor additional chances to obtain the approval of its reorganisation plan.

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: During the last few months there have been a few large insolvency and restructuring cases in Argentina. These cases have different features from the cases in the 2001 Argentine financial crisis. During the financial crisis, the largest cases involved debtors with high financial indebtedness, mainly in the form of debt securities trading in international markets. Much of the distressed M&A activity during that time was implemented through the trading of those debt securities in the market to control the restructuring processes. Today’s largest insolvency cases involve more debtors with operational crises, rather than financial, that cannot be resolved by a financial restructuring alone and in some cases have already been adjudicated bankrupt. In those cases with more social impact, the government has granted financial aid and contributed to the sale of the debtor’s equity or assets in order to keep the businesses running and avoid massive dismissals of employees. In this regard, there has been appetite in the market for the purchase of these debtors’ equity or assets.

Q WHAT TRENDS ARE YOU SEEING IN CROSS-BORDER OR MULTI-JURISDICTIONAL INSOLVENCIES? WHAT ADDITIONAL CHALLENGES DO SUCH ENGAGEMENTS PRESENT?

HERNÁNDEZ: Most of the cross-border financings in Argentina – including banking loans and debt securities – are subject to the laws of the state of New York and the jurisdiction of the New York courts. Argentina has not yet adopted the Model Law on Cross-Border Insolvency of the United Nations Committee on International Trade Law (UNCITRAL), and the debate on its adoption is not currently on the agenda. However, Argentina recently had a wide and vast experience successfully restructuring large amounts of foreign debt, where the Argentine Bankruptcy Law proved to be effective in the process. In this regard, the Argentine restructuring tools, the out-of-court restructuring agreement and reorganisation proceedings, have both been widely recognised and received protection under former Section 304 and current Chapter 15 of the US Bankruptcy Code.



**Q LOOKING AHEAD,
WHAT DEVELOPMENTS
DO YOU EXPECT TO SEE
IN RESTRUCTURING AND
BANKRUPTCY PROCESSES IN
THE MONTHS AHEAD?**

HERNÁNDEZ: Argentina is emerging from a deep crisis. But, even though it is not easy, this time the country intends to address the structural problems that have led the Argentine economy into cyclical crises and finally achieve sustainable growth. If the result of the October mid-term elections consolidates the possibility of continuing to pursue the pending, required structural changes, then direct investment in Argentina and the Argentine economy would, generally, improve more quickly. To the extent those structural problems are adequately addressed, the commencement of the federal infrastructure programme and the consolidation of some structural changes already made are expected to consolidate economic growth that would continue reducing the number of insolvency proceedings in the near future. And, with the recent large and vast corporate restructuring experience of Argentina shown to be successful, we do not expect to see material developments or changes in restructuring and bankruptcy processes in the months ahead.



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Fernando Hernández joined Marval, O'Farrell & Mairal in 2002, becoming partner in 2011 and head of the insolvency and restructuring department in 2016. He received his law degree from the Buenos Aires University School of Law in 1994 and obtained an LLM at Columbia University School of Law in 2001. He specialises in debt restructuring and insolvency and has over 15 years experience in cross-border debt restructurings, corporate finance, banking and capital markets. Since 2002, he has been involved in some of the major corporate debt restructurings in Argentina and acquired extensive experience in cross-border private restructurings and insolvency proceedings.



UNITED KINGDOM

DAVID BRYAN
MANSELL & TILLEY LLP

Q HOW WOULD YOU DESCRIBE CORPORATE BANKRUPTCIES AND INSOLVENCIES IN YOUR REGION OVER THE LAST 12-18 MONTHS? ARE YOU SEEING MORE OR FEWER BUSINESS FAILURES IN GENERAL?

BRYAN: The last 12 months have seen considerable political upheaval, with Brexit and now a surprise general election in the UK. The latest figures from the UK Insolvency Service show a small rise in underlying company insolvencies in Q1 2017. But they are still much lower than before the financial crisis. Administrations and CVAs, the main formal restructuring processes in the UK, have been at a stable rate since 2014. Already low interest rates were further reduced after Brexit in 2016 and show no signs of increasing in the near term. It remains a benign environment and we do not expect to see any great change in the number of business failures.

Q IN YOUR EXPERIENCE, WHICH SECTORS SEEM TO BE DEMONSTRATING STRUCTURAL WEAKNESSES LEADING TO MORE RESTRUCTURING EFFORTS?

BRYAN: The latest figures show that construction continues to be the sector worst hit. This is followed by wholesale and retail, accommodation and food, administrative and support services and manufacturing. Structural reasons differ, but several threads do emerge. Many small businesses supplying large customers, tight margins, vulnerability to exchange rates and commodity prices, as well as high fixed costs and technical disruption are the most common characteristics of sectors with high levels of business distress. The effect of the depreciation of sterling, post-Brexit, has not yet fully worked its way through supply chains so there could be further pressures to come.



Q TO WHAT EXTENT ARE TROUBLED COMPANIES ABLE TO REFINANCE AND RENEGOTIATE EXISTING DEBT STRUCTURES IN THE CURRENT MARKET?

BRYAN: There remains plenty of capital looking for a home, so refinancing is always an option. Incumbent debt providers know that and so renegotiations can take place against that background, making it a buyer's market. The rise of alternative capital providers continues apace and more innovation will undoubtedly follow. However, there are some regulatory constraints emerging. The regulators have expressed concerns about some lending and the UK will likely align itself with the US Securities and Exchange Commission (SEC) and the European Central Bank (ECB), which have signalled a ceiling of six times EBITDA for bank debt before they may intervene. Interestingly, this does not apply to non-bank lenders so may be a spur for lending by funds with an appetite for higher levels of leverage.

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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: Recent changes in the law have been largely related to how insolvency processes are conducted. These are largely procedural and have faced some criticism from the insolvency profession. The biggest question is how Brexit will impact insolvency legislation and whether cross-border recognition of laws will continue. Will the UK remain one of the go to places to restructure businesses? The legislation which will repeal EU legislation makes no mention of insolvency. Beyond that, the push for a new pre-insolvency regime was progressing prior to the election being called. Lastly, there have been some high-profile cases related to pension schemes.

.....



“Distressed funds and PE houses are looking for deals but it remains difficult to find the right assets at the right price.”

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: The appetite for distressed assets is still there, with demand exceeding supply. Distressed funds and PE houses are looking for deals but it remains difficult to find the right assets at the right price. Perhaps the biggest issue surrounding the purchase of distressed assets in the last year or so has been where large defined benefit pension schemes are involved. The BHS case has been very high profile and another recent issue regarding the Bernard Mathews business has resulted in accusations that buyers have deliberately structured deals to leave the taxpayer picking up the liabilities of underfunded pension schemes. It has been an easy target for politicians and the press with calls for legislative change.

Q WHAT TRENDS ARE YOU SEEING IN CROSS-BORDER OR MULTIJURISDICTIONAL INSOLVENCIES? WHAT ADDITIONAL CHALLENGES DO SUCH ENGAGEMENTS PRESENT?

BRYAN: Cross-border work is always a challenge. A filing by one subsidiary in a complex group can precipitate a domino effect through inter-company accounts and bring the group down. Brexit has also thrown the issue of cross-border recognition of insolvency laws and schemes of arrangement into question and we have no idea how this will turn out. Will we still have the same tools to work with in two years time? Recently, the German courts overturned tax rules that allowed no taxable gain on debt forgiven. This was unexpected, and stopped several cross-border restructurings in their tracks. The government is proposing legislation to correct this but it illustrates how complex and unpredictable cross-border restructurings can be.



Q LOOKING AHEAD,
WHAT DEVELOPMENTS
DO YOU EXPECT TO SEE
IN RESTRUCTURING AND
BANKRUPTCY PROCESSES IN
THE MONTHS AHEAD?

BRYAN: With so many surprises in the last 12 months it really is hard to predict future developments. Although the UK general election was unexpected it looks like Mrs May will win so there will be no major change of political thinking. The recent trend toward recognising other countries' insolvency laws has been a move in the right direction and it is hard to see why it should be thrown out. I also think it likely that the proposed UK pre-insolvency regime will come about as it is seen in government as being good for the UK. It is also highly likely that some regulation relating to pension schemes in distressed M&A transactions will be introduced soon. The UK is in uncharted waters and it will be interesting to see how it all works out.



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FRANCE

OLIVIER MARION
PWC



Q HOW WOULD YOU DESCRIBE CORPORATE BANKRUPTCIES AND INSOLVENCIES IN YOUR REGION OVER THE LAST 12-18 MONTHS? ARE YOU SEEING MORE OR FEWER BUSINESS FAILURES IN GENERAL?

MARION: France has experienced a progressive recovery in its economy over the past 12 to 18 months, with an expected 1.6 percent GDP growth for 2016. Last year, the number of failures and bankruptcies decreased by 7 percent compared to the year before – close to 59,000 companies – and 2017 should see a comparable trend. That said, several industry sectors continue to suffer. While we see fewer leveraged buyout (LBO) structures in distress, more corporate groups are currently suffering, and the financing structures put in place on new LBO transactions, rather aggressive in essence, may well prepare new waves of restructuring transactions over the coming years.

Q IN YOUR EXPERIENCE, WHICH SECTORS SEEM TO BE DEMONSTRATING STRUCTURAL WEAKNESSES LEADING TO MORE RESTRUCTURING EFFORTS?

MARION: Oil & gas is a sector where we continue to see significant difficulties, given the dramatic repeated drop in exploration & production investments since 2015, which continues in 2017. Visibility on recovery remains limited today. Shipping is also under the spotlight. While the low raw material, metal and energy prices have overall benefited companies' operating cost structure in 2016, those doing business in these sectors have faced significant drops in revenues, resulting in increased pressure on their results and liquidity. The French agro-business is one of these sectors. And the retail sector in France continues to be depressed, with retail chains such as Vivarte, Tati and others going through significant restructuring efforts.



Q TO WHAT EXTENT ARE TROUBLED COMPANIES ABLE TO REFINANCE AND RENEGOTIATE EXISTING DEBT STRUCTURES IN THE CURRENT MARKET?

MARION: Significant liquidity remains available on the market through alternative sources of finance, such as debt funds, hedge funds and Euro Private Placement. This diversity, and the related competition it creates, favours access to liquidity, including for companies in stressed situations. Lenders remain, however, prudent to finance such companies in stressed or restructuring situations. They clearly need to see management's ability to define and implement a successful turnaround plan, and also request a certain level of control when financing the company – through financial covenants, as well as through the ability to go along the lines of debt to equity swap schemes in the event of underperformance. And money remains expensive for those companies in weak positions.

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Q HAVE THERE BEEN ANY RECENT LEGISLATIVE OR REGULATORY DEVELOPMENTS, INCLUDING HIGH PROFILE CASES, IN FRANCE THAT WILL HAVE A SIGNIFICANT EFFECT ON BANKRUPTCY AND RESTRUCTURING?

MARION: Recent laws in France, including Loi Macron and Loi El Khomri, aim at making social restructuring more flexible, while favouring discussions between stakeholders in such situations. The aim of these new laws is to facilitate social restructuring when such step is required, based on acceptable terms to support the lay-off plans, such as indemnities and job search support. They also ensure that best efforts are made to implement alternative options when possible, for example, the sale of a company or a manufacturing site. This incremental flexibility is expected to favour investment in France, including investment coming from foreign shareholders. Indeed, and until now, the French economy may have suffered from a reputation deficit in terms of capacity to adjust an organisation to the actual and forecast activity level. We are also currently awaiting the new European Insolvency Rules, expected mid-2017, which are designed to ease the restructuring of pan-European groups through improved cross-border cooperation.

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“While French economic trends look positive overall, we see certain industry sectors continuing to suffer.”

Q WHAT TRENDS ARE YOU SEEING IN THE MARKET’S APPETITE TO PURCHASE TROUBLED ASSETS? HOW WOULD YOU DESCRIBE RECENT DISTRESSED M&A ACTIVITY?

MARION: Distressed M&A remains active in France, with a substantial number of situations, including assets of overall good quality in difficult situations, requiring new money to implement and finance turnaround plans. Those situations clearly offer interesting opportunities to investors ready to take the risk. As a result, France remains attractive to investors, and we have seen a significant portion of foreign investments to address such situations over the past two years. These investments have been made, among others, by debt providers ready to take an equity stake when required, such as Apollo and Monarch through their investment in the aerospace group, Latecoere.

Q WHAT TRENDS ARE YOU SEEING IN CROSS-BORDER OR MULTIJURISDICTIONAL INSOLVENCIES? WHAT ADDITIONAL CHALLENGES DO SUCH ENGAGEMENTS PRESENT?

MARION: Lenders pools are more and more diversified, with an increasing portion of hedge funds, subsequent to the purchase of debt from commercial banks on the secondary market. This makes discussions around restructuring schemes more complex given the different points of view across the table. As such, negotiations organised with the support of financial advisers and a mandataire ad hoc are key to take these different points of view into account and get to the design and implementation of a common solution to address the situation at stake. Such different lender profiles also offer new alternative solutions, with, among others, lenders in capacity to bring new money and take equity stakes when required.



**Q LOOKING AHEAD,
WHAT DEVELOPMENTS
DO YOU EXPECT TO SEE
IN RESTRUCTURING AND
BANKRUPTCY PROCESSES IN
THE MONTHS AHEAD?**

MARION: With the presidential elections now behind us in France, and the legislative elections soon to come, we may expect certain high-profile situations, artificially kept alive over recent months, will reappear over the coming months. While French economic trends look positive overall, we see certain industry sectors continuing to suffer, namely, retail, shipping, oil services, agro-industry and commodities. We also expect certain overleveraged LBOs will require restructuring steps. This will represent opportunities for investors willing to consider such special situations, including the need for consolidation in certain industry sectors.

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Olivier Marion is the partner responsible for leading Business Recovery Services (BRS) within PwC France. This group of 45 experienced professionals is dedicated to assisting companies, their creditors and shareholders during periods of financial difficulty, including insolvency, with the objective of identifying and implementing a restructuring scheme suitable to all parties. BRS also assists clients with investment opportunities among companies in difficulty. Mr Marion graduated from EDHEC Business School, is a chartered accountant in France and is treasurer of the French Restructuring Association (ARE).



GERMANY

FLORIAN RIESER
KPMG



Q HOW WOULD YOU DESCRIBE CORPORATE BANKRUPTCIES AND INSOLVENCIES IN YOUR REGION OVER THE LAST 12-18 MONTHS? ARE YOU SEEING MORE OR FEWER BUSINESS FAILURES IN GENERAL?

RIESER: In the last 18 months, the restructuring and insolvency market in Germany has remained very quiet. The German economy was marked by strong and steady growth throughout 2016, with GDP increasing by 1.9 percent. In 2016, Germany's trade surplus achieved a new record of €252.9bn, overtaking China as the world's largest trade surplus. Coupled with low interest rates, Germany's strong economic situation is resulting in a further decrease in the number of insolvencies in Germany. In 2016, German local courts reported 21,518 business insolvencies, which is a decline of 6.9 percent compared to 2015. As such, the total number of insolvencies fell below the pre-crisis average and Euler Hermes is expecting business failures to stabilise at about 23,000 cases in 2017, putting an end to a seven-year downward trend.

Q IN YOUR EXPERIENCE, WHICH SECTORS SEEM TO BE DEMONSTRATING STRUCTURAL WEAKNESSES LEADING TO MORE RESTRUCTURING EFFORTS?

RIESER: The container shipping industry is facing its biggest crisis and is unlikely to reach calmer waters in the near future. Many of the major shipping companies are suffering losses. Experts are anticipating the crisis situation in the global shipping industry to worsen with more insolvencies to follow, as overcapacity problems persist. German public banks, which are highly invested in shipping, are also under pressure. Of the \$400bn in maritime loans issued by large banks, German banks own about a quarter. Further increases in risk provisions will become necessary and, moreover, the European Central Bank has announced that monitoring shipping loans will be one of its priorities in 2017. Furthermore, the German fashion industry has been under pressure for years and is still considered highly risky in terms of default. Supply in the German textile industry is 30 to 40 percent higher than demand and the traditional retailers are facing threatening competition from big retail chains. Steel companies remain under intense pressure from



Chinese rivals, which are flooding the market with cheap steel while demand in their home market is falling, and as most of China's steel companies are backed by the government, Chinese plants are even able to operate at a loss.

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Q TO WHAT EXTENT ARE TROUBLED COMPANIES ABLE TO REFINANCE AND RENEGOTIATE EXISTING DEBT STRUCTURES IN THE CURRENT MARKET?

RIESER: The current financing environment is still very favourable for companies even if they are in stress or distress. Banks are willing to support restructuring processes with additional funding to existing borrowers. The existing low interest rate level makes it nearly impossible for banks to generate sufficient interest income. Supporting existing borrowers in difficult situations gives banks the opportunity to derive additional income from one-off-fees, such as stand still, waiver and settlement fees.

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Q HAVE THERE BEEN ANY RECENT LEGISLATIVE OR REGULATORY DEVELOPMENTS, INCLUDING HIGH PROFILE CASES, IN GERMANY THAT WILL HAVE A SIGNIFICANT EFFECT ON BANKRUPTCY AND RESTRUCTURING?

RIESER: On 22 November 2016, the European Commission presented draft legislation designed to harmonise restructuring legal frameworks across EU member states, and to promote early restructuring efforts to support economic growth and protect jobs. Early restructuring will no longer have to involve all creditors, but may only involve some of them, for example, financial creditors. As a result, when restructuring German companies, one will no longer have to resort to instruments of foreign law to be successful, such as making use of the English law 'scheme of arrangement'. On 5 April 2017, an amendment to the German Insolvency Code – 'Insolvenzordnung' – came into force, which led to various changes to the avoidance rules and clawback laws in German insolvency



proceedings. Those major changes affect the right of an insolvency administrator to challenge transactions for wilful disadvantage, and as such, reduce transaction risks due to long clawback deadlines.

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Q WHAT TRENDS ARE YOU SEEING IN THE MARKET'S APPETITE TO PURCHASE TROUBLED ASSETS? HOW WOULD YOU DESCRIBE RECENT DISTRESSED M&A ACTIVITY?

RIESER: The appetite for troubled assets has certainly increased in recent years. Many market players expect a further short-term increase in distressed M&A cases and companies could face difficulties at the beginning of a potential interest rate turnaround. In 2016, the majority of transactions took place in a distressed situation but before insolvency occurred. The transfer of the business as part of an asset deal was the most common constellation. Over the next 12 months, I do expect players to continue to focus on transactions in the pre-insolvency state. Banks identify restructuring cases at an earlier stage and encourage distressed transactions, especially as the sale of an individual business unit can help avoid insolvency. Sectors that are expected to see an increase in M&A activity include automotive, consumer goods and the steel industry. In the M&A market, the competition from abroad rose and is expected to rise further, especially in China.

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Q WHAT TRENDS ARE YOU SEEING IN CROSS-BORDER OR MULTIJURISDICTIONAL INSOLVENCIES? WHAT ADDITIONAL CHALLENGES DO SUCH ENGAGEMENTS PRESENT?

RIESER: Today, more businesses than ever before are spread across national borders, raising capital and financing in financial hubs and conducting operations in growth markets. Just as goods and services are transferred transnationally cross-border, there are increasingly international legal issues in insolvency proceedings. In the case of insolvency, multinational company groups are confronted with big challenges. If single entities within the group fail, discrete insolvency proceedings have to be commenced in multiple jurisdictions. If the corporate group is highly integrated, the unravelling of the complex web of interlocking interests and cross-shareholdings, to determine the assets and liabilities of the particular entity within the group, can often be tricky and mindboggling.

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“Expect the focus on pure financial restructurings to further shift towards full scope turnaround programmes.”

Q LOOKING AHEAD,
WHAT DEVELOPMENTS
DO YOU EXPECT TO SEE
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BANKRUPTCY PROCESSES IN
THE MONTHS AHEAD?

RIESER: The activity level seen in the German restructuring market in the first months of 2017 remained relatively low, as it has been in recent years. I am expecting only a very slight upturn in the restructuring and insolvency market due to disruptions of business models through technological change. Furthermore, political uncertainty and growing political and economic disintegration could cast a shadow on Germany's economic outlook. Moreover, I expect the focus on pure financial restructurings to further shift towards full scope turnaround programmes. Faced with today's global economic uncertainty and the challenges from fast-changing technological standards, together with the increased importance of digitalisation, it will become more important for companies to identify key sector dynamics and emerging product-market opportunities, while at the same time developing a competitive business model that is based on firm financial and operational performance.



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Florian Rieser, a restructuring partner at KPMG, has extensive experience in financial restructuring, including divestment strategies and handling of selling businesses in the course of the restructuring process, as well as financial analysis of companies and setting up corporate plans or validating them. He has a strong focus on refinancing situations in stressed and distressed situations. As a German Certified Public Accountant he is a specialist in restructuring concepts according to the standard IDW S6. Furthermore, Mr Rieser is KPMG's representative at the 'IDW Fachausschuss für Sanierung und Insolvenz'.



AUSTRIA

EWALD KAGER
GRANT THORNTON



Q HOW WOULD YOU DESCRIBE CORPORATE BANKRUPTCIES AND INSOLVENCIES IN YOUR REGION OVER THE LAST 12-18 MONTHS? ARE YOU SEEING MORE OR FEWER BUSINESS FAILURES IN GENERAL?

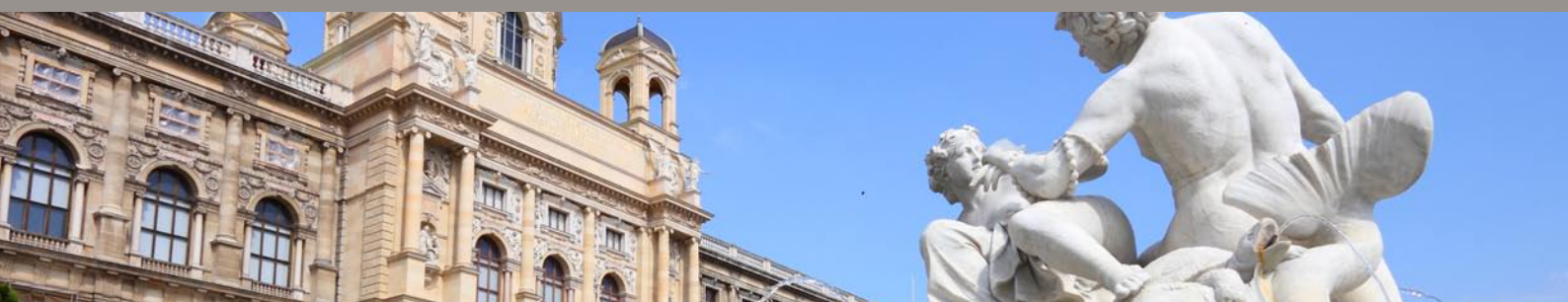
KAGER: In 2016, insolvency cases among corporates increased by 3.76 percent to 5463 cases, based on publicly available sources. But this is only half the picture. A dramatic increase of 11 percent has been recorded where such proceedings have been rejected due to a lack of insolvency assets. If such proceedings are rejected, due to a lack of assets at the moment of the insolvency, this means that the company did not even have €3500 available, the amount required to open insolvency proceedings in Austria. Another interesting fact is that insolvencies usually peak in the second half of the year.

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Q IN YOUR EXPERIENCE, WHICH SECTORS SEEM TO BE DEMONSTRATING STRUCTURAL WEAKNESSES LEADING TO MORE RESTRUCTURING EFFORTS?

KAGER: Historically, the construction sector has been the industry where the most insolvencies have occurred, followed by the trading sector and the catering and food service industry. Currently, the catering and food service industry is facing additional pressures, partly stemming from legislative changes in other areas, which has increased cost pressures on companies.

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Q TO WHAT EXTENT ARE TROUBLED COMPANIES ABLE TO REFINANCE AND RENEGOTIATE EXISTING DEBT STRUCTURES IN THE CURRENT MARKET?

KAGER: This largely depends on the banks which are financing companies. It is not uncommon for a silent insolvency to occur in Austria. This means that no formal insolvency procedures are started, but a standstill is negotiated between the company affected and the banks financing them. During this standstill period, usually initiated by the banks, the company is required to provide a plan which proves that the company will be able to restructure and turn itself around. Other creditors are contacted and consulted during this period. During this phase it is also decided if and when an 'all lenders meeting' should be scheduled. If a standstill period is provided for by the bank, three key elements will be agreed; first, the start date of the standstill period; second, the duration of the standstill period; and third, milestones during the standstill period. Another critical element is usually a specific going concern forecast, which must be established by the company.

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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?

KAGER: Some key aspects of the Austrian insolvency law will be overhauled by EU regulation 2015/848 and respective adjustments to the Austrian insolvency legislation, which come into effect in June 2017. One of the key aspects of the law is to try to increase efficiency in cross-border insolvency proceeding. In the case of multinational corporate groups and respective insolvencies of such entities, the new law tries to increase cooperation, communication and coordination between the different parties of an insolvency case. So far, the insolvency law in Austria has not contained any specific regulation for multinational groups. Since the last major 'tax reform' in 2015, the real estate capital gains tax has been increased from 25 percent to 30 percent, while tax deductions out of inflation were abolished, increasing the tax burden significantly.

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“In general, we expect the distressed M&A market to continue to play a more significant part in the Austrian M&A market going forward.”

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Q WHAT TRENDS ARE YOU SEEING IN THE MARKET’S APPETITE TO PURCHASE TROUBLED ASSETS? HOW WOULD YOU DESCRIBE RECENT DISTRESSED M&A ACTIVITY?

KAGER: In general, the Austrian M&A market has been on the rise. Since 2013, distressed M&A has become a more significant part of the Austrian M&A market, with buyouts of companies or parts of companies from insolvency proceedings becoming more frequent. In this area, the retail sector was hit particularly hard in the past. In general, strategic investors remain the key driver in the Austrian M&A market; one of the major activities here is restructuring competitors. There are three sectors which are key strategic drivers of dealmaking; the real estate sector, the industrial sector and the technology sector. Out of 182 transactions in 2016, 62 were classified as inbound transactions. The sale of troubled assets from Austrian bad banks, such as HETA Asset Resolution – the remnants of Hypo Alpe Adria, which was dissolved in 2014 – will remain one of the major areas of distressed M&A activity in Austria.

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Q WHAT TRENDS ARE YOU SEEING IN CROSS-BORDER OR MULTIJURISDICTIONAL INSOLVENCIES? WHAT ADDITIONAL CHALLENGES DO SUCH ENGAGEMENTS PRESENT?

KAGER: The biggest Austrian insolvency in 2016 was also a cross-border insolvency case. The two companies accounted for a significant share of the total liabilities. Legislation regarding cross-border insolvencies is currently being overhauled, and how this will effectively play out will be one of the additional challenges ahead. Further detailed knowledge of the local laws and regulations also presents an additional challenge.

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**Q LOOKING AHEAD,
WHAT DEVELOPMENTS
DO YOU EXPECT TO SEE
IN RESTRUCTURING AND
BANKRUPTCY PROCESSES IN
THE MONTHS AHEAD?**

KAGER: A detailed outlook remains difficult but we expect that the restructuring market in Austria will remain robust. Austrian banks are highly active in the CEE area. While they have been actively cleaning up their financial statements in recent years, opportunities for restructuring and distressed debt remain high. In general, we expect the distressed M&A market to continue to play a more significant part in the Austrian M&A market going forward.



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ITALY

FRANCESCO IODICE

CLEARY GOTTlieb STEEN & HAMILTON LLP



Q HOW WOULD YOU DESCRIBE CORPORATE BANKRUPTCIES AND INSOLVENCIES IN YOUR REGION OVER THE LAST 12-18 MONTHS? ARE YOU SEEING MORE OR FEWER BUSINESS FAILURES IN GENERAL?

IODICE: According to a recent survey by CERVED, during 2016 bankruptcy liquidation proceedings decreased by 8.5 percent and other insolvency and restructuring proceedings decreased by over 35 percent. Such results are partly due to a moderate improvement in the Italian economy, which is back to a mild rate of growth after various years of recession. The improvement is also partly the result of reforms of Italian bankruptcy laws, which have sought to tighten certain requirements for distressed debtors to accede to a judicial composition with creditors and thereby prevent cases of abuse, where debtors filed for such proceedings for the exclusive purpose of benefitting from a stay over enforcement actions against their assets, without genuinely pursuing a restructuring of their business capable of offering an actual recovery to their creditors.

Q IN YOUR EXPERIENCE, WHICH SECTORS SEEM TO BE DEMONSTRATING STRUCTURAL WEAKNESSES LEADING TO MORE RESTRUCTURING EFFORTS?

IODICE: We have seen various cases concerning the construction industry. This seems to be mainly the result of a very weak housing market, in turn affected by a significant contraction in credit-supply to families and firms due to tighter lending conditions. Among others, the boating industry has been hit hard, and the shipping industry continues to struggle. More recently, the banking sector has experienced considerable difficulties, mostly due to the increasing amount of non-performing loans (NPLs) in their accounts. The proportion of NPLs on Italian banks' balance sheets can be seen as a product of the lack of growth seen in the Italian economy over the past few years, during which an increasing number of borrowers defaulted on their loans or entered into bankruptcy or restructuring proceedings.

Q TO WHAT EXTENT ARE TROUBLED COMPANIES ABLE TO REFINANCE AND

IODICE: The Italian legal framework is not particularly friendly when it comes to refinancing or restructuring loans granted to distressed debtors. In particular, a restructuring entailing a rescheduling or a write-off – possibly coupled with a debt-equity swap – affecting only financial indebtedness



RENEGOTIATE EXISTING DEBT STRUCTURES IN THE CURRENT MARKET?

would typically occur pursuant to out-of-court recovery plans whose feasibility is to be certified by an independent expert, or in the context of a court-ratified restructuring agreement, which affords lenders involved in the process protection against claw-back actions and certain bankruptcy related crimes. If the financial and economic conditions of the debtor require a deeper restructuring affecting claims of other non-financial creditors, the debtor would likely file for a judicial composition with creditors and therein attempt to reorganise its business and restructure its debt in a more orderly fashion, although subject to careful scrutiny by the court and a judicial commissioner.

Q HAVE THERE BEEN ANY RECENT LEGISLATIVE OR REGULATORY DEVELOPMENTS, INCLUDING HIGH PROFILE CASES, IN ITALY THAT WILL HAVE A SIGNIFICANT EFFECT ON BANKRUPTCY AND RESTRUCTURING?

IODICE: Between 2005 and 2015, Italian bankruptcy laws have been subject to a continuous reforming and modernisation effort, largely inspired by the US bankruptcy legal framework. While these reforms have certainly contributed to improving the overall system and have introduced restructuring tools previously unavailable to debtors whose business and financial conditions showed actual room for recovery, the overall result is still not entirely satisfactory and additional and more comprehensive reforms are currently being discussed. Among the most recent reforms is the introduction of a special form of court-ratified restructuring agreement which has been partly inspired by the English schemes of arrangement. In the past, such agreements required creditors holding at least 60 percent of the overall liabilities agreed to their terms, which would bind only participating creditors, while non-participating creditors were to be paid within 120 days of maturity. This often resulted in lenders holding a small portion of debt being granted a de facto veto on the restructuring. In order to address this issue, in 2015 such restructuring agreements were partly reformed so as to allow debtors, whose financial indebtedness represents at least 50 percent of their overall liabilities, to restructure their debt with the consent of lenders holding at least 75 percent thereof and thereby, subject to the court ratification, extend the



“At the beginning of 2016, the Italian government approved a bill setting forth the guidelines for a comprehensive reform of the bankruptcy code.”

binding effects of the agreement to dissenting or non-participating lenders. Judicial compositions with creditors (*concordato preventivo*) have also been reformed through the introduction of minimum recovery thresholds; the ability of creditors to file a competing plan; and auctions on the debtor's assets when the plan is based on a prior offer of a third-party investor.

Q WHAT TRENDS ARE YOU SEEING IN THE MARKET'S APPETITE TO PURCHASE TROUBLED ASSETS? HOW WOULD YOU DESCRIBE RECENT DISTRESSED M&A ACTIVITY?

IODICE: The recent reforms have sought to open up the market of distressed M&A by introducing competition among potential investors intending to acquire assets of distressed debtors, particularly in the context of judicial compositions with creditors. In particular, prior to the 2015 reform a debtor filing for *concordato* proceedings, was entitled to file a plan on an exclusive basis. The reform has allowed creditors holding at least 10 percent of the overall liabilities to present an alternative plan to the debtors – unless the latter secures certain recovery thresholds. The choice between the plans is left to a creditor vote. Likewise, under the 2015 reform, when debtors submit a *concordato* plan envisaging the sale of their business or assets to a third-party, pursuant to a binding offer, courts are required to launch a competing bid process with a view to identifying potential bidders willing to improve the initial offer and thereby increase creditors' recovery.

Q WHAT TRENDS ARE YOU SEEING IN CROSS-BORDER OR MULTIJURISDICTIONAL INSOLVENCIES? WHAT ADDITIONAL CHALLENGES DO SUCH ENGAGEMENTS PRESENT?

IODICE: Cross-border insolvencies continue to present significant obstacles in attempting a global restructuring when transnational elements characterise the situation, particularly when the distressed debtor belongs in a multijurisdictional group of entities, or its assets are located in more than one country. Meaningful improvements are expected to come from a recent reform in the EU regulation on insolvency proceedings, due to enter into force in June 2017. Such regulation not only sets forth new and clearer conflict of laws provisions seeking to identify the applicable laws for insolvency proceedings across the EU, but also seeks to enable a more efficient coordination and cooperation between courts and 'insolvency practitioners' and related proceedings, as well as extend the application of the regulation to restructuring and pre-insolvency proceedings.



**Q LOOKING AHEAD,
WHAT DEVELOPMENTS
DO YOU EXPECT TO SEE
IN RESTRUCTURING AND
BANKRUPTCY PROCESSES IN
THE MONTHS AHEAD?**

IODICE: Important developments are expected both in Italy and in the EU. At the beginning of 2016, the Italian government approved a bill setting forth the guidelines for a comprehensive reform of the bankruptcy code, including to address the 2014 EU Commission recommendation on insolvency and restructuring proceedings. The bill is currently under discussion in parliament and, if approved, it will bring significant changes to the existing framework, including the introduction of 'alert procedures' with a view to ensuring that a situation of distress is addressed at an early stage. Such procedures would require certain corporate bodies or creditors to solicit the debtor's management to act promptly to resolve the crisis and would entail the involvement of private 'crisis composition organisations', which would be entrusted with the task of advising on, and facilitating, the restructuring. The proposed reform, among other things, would also introduce a set of rules addressing the insolvency or the restructuring of groups.

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GREECE

THANASSIS PANOPOULOS
PWC GREECE

Q HOW WOULD YOU DESCRIBE CORPORATE BANKRUPTCIES AND INSOLVENCIES IN YOUR REGION OVER THE LAST 12-18 MONTHS? ARE YOU SEEING MORE OR FEWER BUSINESS FAILURES IN GENERAL?

PANOPOULOS: After eight years of recession in Greece, the number of corporate insolvencies declined over the last two years. The number of recorded corporate insolvencies reached high levels during 2011 to 2014, a period characterised by dramatic economic contraction, political uncertainty, high interest rates and negative growth. Although market conditions remain difficult, we notice that recent legislative and regulatory developments have given troubled companies other options, such as rehabilitation, administration and out of court settlements. Furthermore, restored financial stability in the banking system enhanced lenders' ability to support restructuring instead of bankruptcy solutions. As a result, we expect that the number of businesses filing for bankruptcy will continue its downward trend in the months ahead, as both distressed entities and lenders will take advantage of new legislation and pursue the implementation of alternative restructuring options.

Q IN YOUR EXPERIENCE, WHICH SECTORS SEEM TO BE DEMONSTRATING STRUCTURAL WEAKNESSES LEADING TO MORE RESTRUCTURING EFFORTS?

PANOPOULOS: The prolonged recession period has adversely affected Greek GDP, with the reduction in real GDP amounting to 23 percent from 2009 until 2016, unemployment rising to 24 percent in 2016 from 10 percent in 2009, disposable income, and, ultimately, domestic demand and consumption. Also, the imposition of capital controls in 2015 worsened liquidity and impeded economic activity. As a result, all market sectors have seen a significant deterioration of their performance, metrics and liquidity. In addition, most Greek companies are highly leveraged whereas more and more of them are facing difficulties on servicing their debt liabilities. The picture is getting worse when it comes to capital intensive sectors where investments have been undertaken to meet the demand of the post-crisis period. Considering current conditions, construction, infrastructure, real estate – commercial or residential, industrial manufacturing and retail related



sectors could be identified as the ones in need of more restructuring actions, either in the form of financial or operational restructuring or through consolidation in the market.

Q TO WHAT EXTENT ARE TROUBLED COMPANIES ABLE TO REFINANCE AND RENEGOTIATE EXISTING DEBT STRUCTURES IN THE CURRENT MARKET?

PANOPOULOS: Greek companies, particularly in the sections mentioned earlier, suffer from high leverage and low liquidity which highlights the need for radical and aggressive restructuring. However, the crisis impaired the banking system's capital and liquidity, which, in turn, impeded lenders' decisions concerning the aggressive refinancing and restructuring of troubled companies' existing debt. They need to see viable turnaround plans including *inter alia* the restructuring in the business' operating model or even the sector in order to proceed with restructuring, while some debtors are resistant to such changes. Yet, debt re-profiling is a more frequent option, with many such cases having been completed in the past. In addition, the high number of cases managed by the banks, the lack of common platform and policies among lenders, as well as conflicts of interest between them, are difficulties that troubled companies usually face in a restructuring. Nevertheless, we expect that changes in the regulatory framework, the targets set by European Central Bank for non-performing loans (NPLs) and the recent launch of a secondary market for NPLs servicing, will facilitate the restructuring of distressed companies.

Q HAVE THERE BEEN ANY RECENT LEGISLATIVE OR REGULATORY DEVELOPMENTS, INCLUDING HIGH PROFILE CASES, IN

PANOPOULOS: During the past couple of years there have been significant amendments made to bankruptcy and restructuring legislation. These were aimed at simplifying pre-insolvency restructuring proceedings, streamlining ordinary bankruptcy proceedings and setting the framework for the out-of-court workout of NPLs. More specifically, Law 4446/2016 simplified the pre-pack rehabilitation procedures. In



**GREECE THAT WILL HAVE
A SIGNIFICANT EFFECT
ON BANKRUPTCY AND
RESTRUCTURING?**

In addition, it enhanced the 'Special Administration Procedure' and brought some post-bankruptcy changes related to the liquidation process. The Out-of-Court Workout Law 4469/2017, which has very recently been voted for and approved by the Greek parliament, aims to provide a platform where a quick and effective debt restructuring of large and smaller debtors is achieved. Also, the completion of a number of high-profile restructuring cases, such as the successful rehabilitation of the largest retailer in Greece, could pave the way for further restructurings in the near future.

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**Q WHAT TRENDS ARE YOU
SEEING IN THE MARKET'S
APPETITE TO PURCHASE
TROUBLED ASSETS? HOW
WOULD YOU DESCRIBE
RECENT DISTRESSED M&A
ACTIVITY?**

PANOPOULOS: There seems to be a strong appetite for troubled assets, especially from international investors which have easier access to finance. However, this appetite has not been converted into transactions. This is mainly attributed to the expectation gap regarding the transaction consideration that exists between investors and sellers, the lack of a secondary market for NPLs, the prolonged uncertainty in the political environment and the time required to complete a transaction. We expect M&A activity for distressed assets to pick up in the next 24 months following the banks' efforts to offload part of their non-performing loans to servicing providers – which just started getting licences from the Bank of Greece, resulting in the emergence of a secondary market for non practicing entities (NPE) – and the aggressive targets set by the European Central Bank.

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**Q WHAT TRENDS ARE YOU
SEEING IN CROSS-BORDER
OR MULTIJURISDICTIONAL
INSOLVENCIES? WHAT
ADDITIONAL CHALLENGES
DO SUCH ENGAGEMENTS
PRESENT?**

PANOPOULOS: Multijurisdictional insolvencies have historically been proven to be quite complex due to the different legislative frameworks across participating countries. When it comes to cross-border insolvencies, it is important that all lenders have a common understanding in relation to crucial terms such as 'secured creditors', 'preferred creditors' or 'rules for the allocation of liquidation proceeds'. Greece has historically seen very few cases of cross-border insolvencies. In the cases of multijurisdictional restructurings where the main focus is the Greek assets, international assets are usually sold first in order



“The Out-of-Court Workout Law 4469/2017 aims to provide a platform where a quick and effective debt restructuring of large and smaller debtors is achieved.”

to facilitate and accelerate the restructuring process. What could be a challenge in the event of Greece's engagement in such cases, are the constant changes in Greek legislation which are difficult for overseas creditors to stay up-to-date with.

Q LOOKING AHEAD, WHAT DEVELOPMENTS DO YOU EXPECT TO SEE IN RESTRUCTURING AND BANKRUPTCY PROCESSES IN THE MONTHS AHEAD?

PANOPOULOS: Developments which will augment restructuring and M&A activity in the future include: the ongoing legislative improvements, especially the out-of-court workout process recently enacted by parliament; the implementation of actions by lenders to meet the targets set by the European Central Bank, the European Bank for Reconstruction and Development's (EBRD) decision to support the resurgence of the private sector's investments; the successful precedence in a few high-profile restructurings; and the anticipated increase in the number of non-financial institution platforms licensed by the Bank of Greece.



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CHINA & HONG KONG

GEORGIA CHOW
GRANT THORNTON



Q HOW WOULD YOU DESCRIBE CORPORATE BANKRUPTCIES AND INSOLVENCIES IN YOUR REGION OVER THE LAST 12-18 MONTHS? ARE YOU SEEING MORE OR FEWER BUSINESS FAILURES IN GENERAL?

CHOW: The rate of compulsory liquidations in Hong Kong has remained relatively consistent in recent years, with 90 firms wound up in 2015, 91 in 2016 and the rate for Q1 2017 – 22 – showing a similar trend likely for 2017. It is worth noting that these figures are down from a high of 115 in 2009, following the global financial crisis. However, these statistics only cover Hong Kong registered companies. Over the last 12 to 18 months there have been a number of complex and larger multijurisdictional matters, typically involving offshore entities with Hong Kong or Chinese operations. In addition, given the practical difficulties of undertaking formal insolvency procedures in China, informal restructurings are more common. This makes tracking insolvency statistics more difficult. We have, however, noted an increase in market activity in China. Tightening liquidity in the bond market and the depreciation of the RMB against the dollar has led to difficulties for heavily leveraged companies, particularly those with high levels of dollar debt, but onshore RMB denoted sources of revenue. It is clear that while the Peoples' Bank of China (PBOC) is trying to take steps to reduce leverage in the market, these steps are being taken slowly and in a piecemeal manner in an effort to avoid any significant negative shocks to the capital markets. As such, we expect to see a low but consistent flow of corporate failures over the coming period as the PBOC continues to tighten access to finance.



Q IN YOUR EXPERIENCE, WHICH SECTORS SEEM TO BE DEMONSTRATING STRUCTURAL WEAKNESSES LEADING TO MORE RESTRUCTURING EFFORTS?

CHOW: Within Hong Kong we have seen distress and failures in the retail and manufacturing space, as well as the more high profile areas of shipping, oil & gas. The ongoing overcapacity issues in the shipping and shipbuilding sectors has been evident in Korea, but China's stated aim of consolidation in the shipbuilding sector has seen a number of smaller shipyards close. On the other hand, China's move to produce military naval vessels at home – it recently completed its first domestically produced aircraft carrier – presents opportunities for growth among the larger shipbuilders. In the oil & gas market, Singapore has seen the most activity with high profile cases including Swiber Holdings, Swissco and Ezra Holdings. Recently, there has been an increase in 'short seller' attacks against listed Hong Kong companies, primarily with Chinese operations. These have been spread across a variety of industries. Interestingly, some of the attacks appear to focus on certain Chinese regions, with several companies with operations in Shandong province being targeted by short seller reports. The nature of the Chinese market, with high levels of cross guarantees and significant involvement from local government, means that investors can get jittery about contagion spreading.

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Q TO WHAT EXTENT ARE TROUBLED COMPANIES ABLE TO REFINANCE AND RENEGOTIATE EXISTING DEBT STRUCTURES IN THE CURRENT MARKET?

CHOW: As is typical, banks and financiers will look to exit distressed companies where possible and there remains the view among most parties that the outcomes in an informal restructuring are generally better than through a formal insolvency process. Therefore, it is possible for companies to obtain support to continue where they present a workable restructuring plan. In scenarios where companies are unrealistic about their prospects, and where they seek to protect their equity value to the detriment of creditors or where there is suspicion of fraud or wrongdoing, financiers are more likely to withdraw support



and seek to input independent insolvency practitioners to run the company. The region, however, is diverse, and the attitude of funders will also depend upon the jurisdiction of the borrower and the certainty of the outcome from alternative strategies. For example, if creditors are unable to rely on the courts in an enforcement scenario, creditors are more likely to be receptive to a consensual restructuring.

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Q HAVE THERE BEEN ANY RECENT LEGISLATIVE OR REGULATORY DEVELOPMENTS, INCLUDING HIGH PROFILE CASES, IN CHINA & HONG KONG THAT WILL HAVE A SIGNIFICANT EFFECT ON BANKRUPTCY AND RESTRUCTURING?

CHOW: There has recently been a landmark recognition order in the High Court of Hong Kong for the Centaur Litigation SPC case, which provided recognition in Hong Kong to the Cayman Island appointed liquidators. This case was important as it set out the criteria on which the Court would provide recognition and also removes the need for costly parallel proceedings in most cases.

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Q WHAT TRENDS ARE YOU SEEING IN THE MARKET'S APPETITE TO PURCHASE TROUBLED ASSETS? HOW WOULD YOU DESCRIBE RECENT DISTRESSED M&A ACTIVITY?

CHOW: Distressed M&A is still very active in Asia, from non-performing loans (NPLs) to traditional distressed assets. However, buyers are more careful with certain jurisdictions and are most likely to continue to trade with the jurisdictions with which they are familiar.

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Q WHAT TRENDS ARE YOU SEEING IN CROSS-BORDER OR MULTI-JURISDICTIONAL INSOLVENCIES? WHAT ADDITIONAL CHALLENGES DO SUCH ENGAGEMENTS PRESENT?

CHOW: Hong Kong and China are closely linked and it is becoming increasingly uncommon to see a standalone insolvency work without the involvement of another jurisdiction. Indeed, capital flows are such that historically funds invested offshore end up in Chinese entities. These funds invested by Chinese or overseas investors via Cayman or British Virgin Islands vehicles have to be unravelled when the Chinese entity defaults. This is a continuing trend.

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“Hong Kong and China are closely linked and it is becoming increasingly uncommon to see a standalone insolvency work without the involvement of another jurisdiction.”

Q LOOKING AHEAD, WHAT DEVELOPMENTS DO YOU EXPECT TO SEE IN RESTRUCTURING AND BANKRUPTCY PROCESSES IN THE MONTHS AHEAD?

CHOW: Regionally, we have recently seen Singapore seeking to develop a regional insolvency sector model shadowing the US Chapter 11 regime, while Hong Kong, the other major restructuring centre in the region, has been looking to update its existing legislation. Notwithstanding these changes, we will likely continue to see creditors pursuing consensual workouts in preference to insolvency across Asia and using insolvency as a contingency.



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AUSTRALIA

PETER GOTHARD
FERRIER HODGSON



Q HOW WOULD YOU DESCRIBE CORPORATE BANKRUPTCIES AND INSOLVENCIES IN YOUR REGION OVER THE LAST 12-18 MONTHS? ARE YOU SEEING MORE OR FEWER BUSINESS FAILURES IN GENERAL?

GOTHARD: The number of formal appointments continues to decline; the December 2016 quarter was down 27.3 percent on the same period in 2015. The last 12 months has, however, seen the appointment of administrators to Arrium Ltd – an international mining and steel manufacturer – which was the largest corporate insolvency since the Global Financial Crisis (GFC). Given the ongoing low interest rate environment, secured lenders continue to take a relatively passive approach to the majority of troubled borrowers and we have seen lower levels of large institutional files reaching formal insolvency.

Q IN YOUR EXPERIENCE, WHICH SECTORS SEEM TO BE DEMONSTRATING STRUCTURAL WEAKNESSES LEADING TO MORE RESTRUCTURING EFFORTS?

GOTHARD: We have seen significant distress in Australian retail, particularly in the clothing, footwear and consumer electronics sectors. With the stagnation in discretionary consumer spending, the continuing consolidation of the sector and the imminent arrival of global players, such as Amazon, we expect to see further restructuring and turnaround activity in this sector during the remainder of 2017 and beyond. An area of potential distress is that of the residential housing market, given the expected cooling of the house price boom that the majority of Australia has experienced over the past five years. In order to address supply issues, large amounts of residential apartment blocks have been constructed, with particular areas of concern being inner city locations in Brisbane, Perth, Melbourne and, to a lesser extent, Sydney. Related industries, such as the building and construction sector, would obviously be impacted by any downturn. The distress in the mining and mining services sectors, which has been prevalent over the past two to three years, has declined as a result of the stabilisation of key commodity prices and significant cost cutting programmes introduced across the industry. There is also activity in the vocational education and energy sectors, mainly as a result of changes to government policy.



Q TO WHAT EXTENT ARE TROUBLED COMPANIES ABLE TO REFINANCE AND RENEGOTIATE EXISTING DEBT STRUCTURES IN THE CURRENT MARKET?

GOTHARD: Companies continue to have access to large amounts of capital from both domestic and international lenders, as well as private equity and distressed debt funds. We have recently seen innovative solutions applied to complex distressed situations in the Australian market, such as the Emeco merger and recapitalisation which saw three large mining services entities complete a three-way merger via a scheme of arrangement. The scheme involved a number of international bondholders and distressed debt funds, and saw the restructuring of approximately A\$680m of debt which involved a debt for equity swap, rights offering, two acquisitions and a full refinancing.

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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?

GOTHARD: The Insolvency Law Reform Bill represents one of the biggest changes to the Australian corporate insolvency landscape in the past 20 years. The proposed reforms are currently in a consultation period, with the most significant proposals being discussed including the introduction of a 'safe harbour' to shelter directors from personal liability for insolvent trading, provided the director has engaged a restructuring adviser to assist with its financial difficulties; and the nullification of 'ipso facto' clauses in contracts, such as automatic right of termination, where the company is in the process of implementing a financial restructuring. While these amendments are yet to be finalised, the introduction of these measures will help the Australian business environment further its move toward a restructuring and turnaround culture.

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Q WHAT TRENDS ARE YOU SEEING IN THE MARKET'S APPETITE TO PURCHASE TROUBLED ASSETS? HOW WOULD YOU DESCRIBE RECENT DISTRESSED M&A ACTIVITY?

GOTHARD: There continues to be a significant appetite for troubled assets from distressed debt funds, with local major banks willing to sell out of situations at the right price. Over the past 12 months we have seen funds buying into senior debt and bond tranches in a number of high profile situations, such as Slater & Gordon and McAleese Transport. These transactions often involve a plan to deleverage the balance sheet and take a significant equity stake in the business with the process being facilitated via a scheme of arrangement or formal insolvency process.

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Q WHAT TRENDS ARE YOU SEEING IN CROSS-BORDER OR MULTIJURISDICTIONAL INSOLVENCIES? WHAT ADDITIONAL CHALLENGES DO SUCH ENGAGEMENTS PRESENT?

GOTHARD: We continue to see the work out of Australian based ASX listed mining companies which have invested in global assets. The key challenge in these types of engagements is to quickly assess the local restructuring and insolvency landscape, to understand and evaluate which jurisdiction will offer the most suitable environment and procedure to realise value for stakeholders. An example of this type of situation is the recent restructuring of Boart Longyear, which is predominantly a US based drilling company, which took advantage of Australia's scheme of arrangement regime to complete a comprehensive financial restructuring of its business.

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“There continues to be a significant appetite for troubled assets from distressed debt funds, with local major banks willing to sell out of situations at the right price.”

Q LOOKING AHEAD, WHAT DEVELOPMENTS DO YOU EXPECT TO SEE IN RESTRUCTURING AND BANKRUPTCY PROCESSES IN THE MONTHS AHEAD?

GOTHARD: The Australian restructuring market is forecast to remain relatively quiet for the next 12 months and beyond as interest rates continue at historically low levels. With the introduction of the Insolvency Law Reform Bill we expect to see the continuation of a general move toward a restructuring and turnaround culture approach facilitated by the proposed safe harbour and ipso-facto clause amendments.

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Peter Gothard has over 25 years experience specialising in insolvency and restructuring in Australia, the US and Asia. He has been involved in a number of formal and informal restructuring assignments involving complex business structures and syndicated lending facilities in Australia, the United States, South East Asia and Japan. He has completed assignments in a wide range of industries including refining and petrochemicals, cement, renewable energy, finance/securities, structured finance and leasing, transportation, steel, textiles, agriculture, hotels, telecommunications, manufacturing and information technology.



NIGERIA

EMMANUEL EKPENYONG

FRED-YOUNG & EVANS LP



Q HOW WOULD YOU DESCRIBE CORPORATE BANKRUPTCIES AND INSOLVENCIES IN YOUR REGION OVER THE LAST 12-18 MONTHS? ARE YOU SEEING MORE OR FEWER BUSINESS FAILURES IN GENERAL?

EKPENYONG: Over the past 18 months, the business climate in Nigeria has endured a number of difficulties, including inconsistent power supply, high interest rates, high infrastructure and banking charges, bad roads, scarcity of foreign exchange and a high cost of energy, which has led to high cost of production and reduced competitiveness. Consequently, the operations of many companies have been shut down and winding up proceedings are on the increase. In order to survive, many companies have reduced production by close to 50 percent, made employees redundant and have slashed remuneration for remaining workers. In 2016, the banks faced enormous challenges as a result of the recession, falling crude oil prices and shortages in foreign currency. Banks struggled with declining operating profitability, fast asset quality deterioration, restrained credit growth, poor liquidity and weakened capitalisation. In 2017, the Central Bank of Nigeria (CBN) introduced policies to stabilise the banks and reduce the backlog of trade and finance obligations to international banks. Nevertheless, slow economic growth and lower risk potential have continued to subdue credit growth.

Q IN YOUR EXPERIENCE, WHICH SECTORS SEEM TO BE DEMONSTRATING STRUCTURAL WEAKNESSES LEADING TO MORE RESTRUCTURING EFFORTS?

EKPENYONG: The CBN said that the manufacturing sector saw a major decline between January and November 2016, as evidenced in the Purchasing Managers Index (PMI), which indicates the health of the manufacturing sector. During this period, a prominent manufacturing company, Erisco Food Limited, shut down its processing plant in Lagos and sacked close to 1500 workers, moving its operation to China. DAG Motorcycles Industries Nigeria Limited had to cut production by 45 percent and terminated the employment of many of its workers. The CEO of May and Baker Nigeria Plc stated that the short supply of foreign exchange for importing raw materials affected the company's operation in 2016 and that manufacturers which were still doing business would be forced to close down if the forex challenges linger till 2017. Even



though the new CBN exchange system and monetary controls in 2017 have, to a large extent, depreciated the value of the dollar to the naira.

Q TO WHAT EXTENT ARE TROUBLED COMPANIES ABLE TO REFINANCE AND RENEGOTIATE EXISTING DEBT STRUCTURES IN THE CURRENT MARKET?

EKPENYONG: Nigerian telecommunication firm Etisalat was about to be taken over by banks as a result of missed financial obligations by the firm. Etisalat entered into talks with the banks to negotiate the terms of payment. It was reported that the loan, with interest, stood at over 377bn naira. The firm's excuse for the missed payment was the recession, currency devaluation and dollar shortages. Though the firm negotiated with the banks to restructure the debts for easy payment of its financial obligations, the banks insisted on appointing a receiver for the firm. The banks said that the aggressive attempt to recover the loan was as a result of Assets Management Corporation of Nigeria's (AMCON) demand for immediate cut down of the rate of non-performing loans. It took the intervention of the Nigerian Communication Commission (NCC) and CBN to stop insolvency proceedings against the firm.

Q HAVE THERE BEEN ANY RECENT LEGISLATIVE OR REGULATORY DEVELOPMENTS, INCLUDING HIGH PROFILE CASES, IN NIGERIA THAT WILL HAVE A SIGNIFICANT EFFECT ON BANKRUPTCY AND RESTRUCTURING?

EKPENYONG: The new Bankruptcy & Insolvency (Repeal and Re-enactment) Act 2016 and bankruptcy rules regulate bankruptcy proceedings in Nigeria. A foreign creditor can institute an action in court in its name, or in the name of its attorney against a debtor for debt recovery in the same manner as a local creditor, so long as the debtor or its assets are within its jurisdiction or the underlying contract giving rise to the debt was performed within the jurisdiction of the court. The processes and remedies available to a local creditor are also applicable to a foreign creditor. Section 238 of the new Bankruptcy and Insolvency Act provides that where there is a bankruptcy or insolvency, a reorganisation order made against a debtor in a foreign proceeding, a certified copy of the order is in the absence of contrary evidence, proof that the debtor is insolvent and appointment of a foreign representative



“AMCON has the mandate to purchase non-performing and toxic assets from banks for the purpose of recovering bad loans.”

has been made. In such an instance, upon an application from the foreign representative, a Nigerian court may limit the property in which the authority of the Nigerian trustee would extend. On application by a foreign representative to a Nigerian court, in respect of a foreign proceeding commenced for the purposes of effecting a composition, an extension of time or a scheme of arrangement, the court may grant a stay of proceeding against the debtor.

Q WHAT TRENDS ARE YOU SEEING IN THE MARKET'S APPETITE TO PURCHASE TROUBLED ASSETS? HOW WOULD YOU DESCRIBE RECENT DISTRESSED M&A ACTIVITY?

EKPENYONG: AMCON has the mandate to purchase non-performing and toxic assets from banks for the purpose of recovering bad loans. But AMCON was unable to remove the toxic assets of Skye Bank. Skye Bank's toxic assets were worth over 500bn naira in 2016 and this made CBN take over the bank. Due to the over 5.1 trillion toxic assets acquired from the banking industry between 2010 and 2012, which have not been relieved, AMCON cannot assume new liabilities by acquiring Skye Bank's toxic assets. It is feared that the situation will become worse if the economic situation does not improve before the end of 2017 as CBN will have to manage the liquidity situation of banks and prevent Skye Bank problems from snowballing into industrial toxic assets of over 3 trillion naira. Indeed, the recession and drop in oil prices has slowed down M&A activities. Nevertheless, it has forced Nigerians and Nigerian businesses to look inwards. The large consumer class presents a huge opportunity for increased M&A activities in the near future.

Q WHAT TRENDS ARE YOU SEEING IN CROSS-BORDER OR MULTIJURISDICTIONAL INSOLVENCIES? WHAT ADDITIONAL CHALLENGES DO SUCH ENGAGEMENTS PRESENT?

EKPENYONG: Foreign companies intending to carry on business in Nigeria are required to take all necessary steps to obtain incorporation as a separate entity in Nigeria for that purpose. Therefore, foreign companies operating in Nigeria are not treated differently from local companies, so far as they are registered in Nigeria as required by the Companies and Allied Matters Act (CAMA). The extent of the court's power to wind up foreign companies registered in Nigeria is not different from that of local companies. The main challenge is that Nigeria has not entered into cross-border insolvency protocols or other arrangements



to coordinate insolvency proceedings with courts in other countries. Nigerian courts do not communicate or hold joint hearings with courts in other countries in cross-border insolvency cases.

**Q LOOKING AHEAD,
WHAT DEVELOPMENTS
DO YOU EXPECT TO SEE
IN RESTRUCTURING AND
BANKRUPTCY PROCESSES IN
THE MONTHS AHEAD?**

EKPENYONG: There has been increased foreign interest in the healthcare sector, real estate and construction, telecommunication and financial sectors. The privatisation of the power sector has increased the attention of foreign power firms and investors. Increased funding of the agriculture and manufacturing sector, as well as the proposed sale of federal government assets, gives renewed hope and provides veritable grounds for M&A activities. Section 10 of the Foreign Judgment (Reciprocal Enforcement) Act, Cap F35, Laws of the Federation of Nigeria, 2004 provides for a judgment creditor to register foreign monetary judgments and orders in Nigeria within 12 months from the date in which the judgment was delivered by the foreign court.



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