



Distressed Companies

How to help financially distressed businesses

In the following pages, 20 IR Global members discuss the challenges and opportunities that the Distressed Companies environment presents us from across the globe. They share their expert opinion on the spike in insolvencies, the trends, opportunities and what restructuring tools are available worldwide.

Read the full publication via www.irglobal.com/news/e-publications

IR Global – Going Beyond Expectations

IR Global was founded in 2010 and has since grown to become the **largest practice area exclusive network of advisors in the world**. This incredible success story has seen the network awarded Band 1 status by Chamber & Partners, featured in Legal 500 and in publications such as The Financial Times, Lawyer 360 and Practical Law, among many others.

The group's founding philosophy is based on bringing the best of the advisory community into a sharing economy; a system that is ethical, sustainable and provides significant added value to the client.

Businesses today require more than just a traditional lawyer or accountant. IR Global is at the forefront of this transition, with members providing strategic support and working closely alongside management teams to help realise their vision. We believe the archaic 'professional service firm' model is dying due to it being insular, expensive and slow. In IR Global, forward-thinking clients now have a credible alternative, which is open, cost effective and flexible.

Our Founding Philosophies

- **Multi-Disciplinary**

We work alongside legal, accountancy, financial, corporate finance, transaction support and business intelligence firms, ensuring we can offer complete solutions tailored to the client's requirements.

- **Niche Expertise**

In today's marketplace, both local knowledge and specific practice area/sector expertise is needed. We select just one firm, per jurisdiction, per practice area, ensuring the very best experts are on hand to assist.

- **Vetting Process**

Criteria is based on both the quality of the firm and the character of the individuals within it. It's key that all of our members share a common vision towards mutual success.

- **Personal Contact**

The best relationships are built on trust and we take great efforts to bring our members together via regular events and networking activities. The friendships formed are highly valuable to the members and ensure client referrals are handled with great care.

- **Co-Operative Leadership**

In contrast to authoritarian or directive leadership, our group puts teamwork and self-organisation in the centre. The group has steering committees for 12 practice area and regional working groups that focus on network development, quality controls and increasing client value.

- **Ethical Approach**

It is our responsibility to utilise our business network and influence to instigate positive social change. IR Global founded Sinchi, a non-profit that focuses on the preservation of indigenous culture and knowledge and works with different indigenous communities/tribes around the world.

- **Strategic Partners**

Strength comes via our extended network. If we feel a client's need is better handled by someone else, we are able to call on the assistance of our partners. First priority is to always ensure the client has the right representation whether that be with a member of IR Global or someone else.



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FOREWORD

Riders on the rescue culture: how to help breathe life into distressed business

If the UK is any indication of how distressed businesses will cope with the post pandemic world, then companies across the globe could be in for a rough ride in the next few years.

In the first quarter of 2022, the UK recorded its highest insolvency levels for more than 60 years. The surge in business closures as a result of the Covid-19 pandemic witnessed some 5,000 business insolvencies, more than double the number during the first quarter of 2021, according to the Insolvency Service. The number of insolvencies was driven by a rise in voluntary liquidations, which increased by an annual rate of 117% to about 4,300.

Meanwhile, in Q1 some 137,000 UK businesses closed, which was a 23% increase on the same period for 2021 (these companies had ceased trading rather than become insolvent), according to the Office for National Statistics.

The reasons for what's being termed the "perfect storm" in business closures and insolvencies in the UK is the ending of government support measures, soaring energy costs because of the war in Ukraine, supply chain disruption and a sharp decline in consumer confidence.

"In Q1 some 137,000 UK businesses closed, which was a 23% increase on the same period for 2021"

Rise in distressed businesses globally

To a more or lesser degree, distressed businesses globally are set to rise significantly this year as governments in every jurisdiction withdraw support measures that have helped businesses stay afloat during the pandemic. According to research by trade credit insurer Euler Hermes, worldwide business insolvencies are expected to jump 15% year-on-year.

In the US, the number of bankruptcies filed in March this year increased 33.5% compared to the previous month, according to legal research firm Epiq. But the overall number of cases was still lower compared to previous years. The first quarter of 2022 brought a 17% decline in new filings compared with the same period in 2021. In the US, companies are largely being kept afloat by a federal cash injection.

The news for distressed companies is generally less favourable for Europe. In Spain and Italy, for example, insolvencies are predicted to increase above 2019-levels in 2022, while Switzerland, Sweden and Portugal will probably experience a rebound in business insolvencies in 2022.

Meanwhile, in France and Germany large government

support packages and extensions have kept insolvencies low. In France, for instance, business is now back to normal in the commercial courts. In the first quarter of this year, according to figures from Altares Dun & Brandstreet, almost 10,000 businesses were facing insolvency. This number was up by 35% compared to the same period in 2021, but still below the levels in 2018-19, when the first three months saw around 14,000 companies defaulting.

Chapter 11 in the US and beyond

With such diversity in the numbers of distressed business and insolvencies in the different jurisdictions, it's understandable that there should also be a wide range of solutions to help distressed businesses.

Professional advisors in different jurisdictions cite the local version of the US' Chapter 11 (if a version indeed exists locally) as a means of helping distressed businesses stave off closure or insolvency. Briefly, Chapter 11 refers to the chapter of the US Bankruptcy that sets out the procedure for a company's reorganisation proceedings under US bankruptcy law. Broadly, when the petition is filed an automatic stay comes into effect that prevents any enforcement action or the start or continuation of other legal proceedings against the debtor. This technically extends worldwide. Once the debtor has entered Chapter 11 proceedings, it is given an exclusive period of 120 days to file a plan of reorganisation with the court.

In Italy, the local version of Chapter 11 is called the "arrangement with creditors" and in France similar procedures have been established with the "Redressement Judiciaire".

In all cases, the goal is always to keep the business active and allow the entrepreneur to give value to their assets and satisfy creditors without falling into liquidation.

In Italy, the greatest opportunity for companies in distress is to use the resolutions contained in the code of the business crisis. This provides for contacting the OCC (organizations for the settlement of the business crisis), which recognizes the use of the agreement through which entrepreneurial activity does not cease despite the sale of assets, along with a debt restructuring plan in which the intervention of the OCC and the court is required.

In Belgium, meanwhile, distressed businesses rely on the procedure of judicial reorganisation and as a result there is a period of protection offered to companies, which can apply for a judicial reorganisation. The business will then be aided further under the assistance of the court, which is when assets will be sold on the public market under the responsibility of the Commercial Court. Distressed companies are given the possibility of making silent plans with their assets transferred to other market players, for example competitors to pay the companies' creditors. This is under the surveillance of a commercial court appointed trustee.

In Mexico, distressed businesses rely on the local US



equivalent of Chapter 11 where for the debtor it's "business as usual", interest is suspended (except for secured creditors), and broad liberty is given to the debtor to negotiate the reorganisation plan with its creditors. Mexico has adopted the UNCITRAL Model Law on Cross-Border Insolvency, which facilitates the use of Chapter 11 as a tool that crosses jurisdictions.

Last but not least, Australia's equivalent of the Chapter 11 bankruptcy process is known as Voluntary Administration (VA). This is a process where a company that is insolvent or likely to become insolvent is placed under the control of an independent insolvency practitioner (administrator) who takes over management of the company. The appointment of an administrator starts a moratorium period where unsecured creditors are prevented from taking further legal action against the company. Unlike liquidation, a VA does not necessitate a distressed sale and provides additional options for the company and creditors.

The above information gives you a flavour of what to expect in the following publication on distressed companies. Here IR Global members talk about the issues involving distressed businesses in their jurisdiction. They give an overview of the post pandemic business climate and then expand on their version of Chapter 11 and how distressed businesses are helped in their jurisdiction. Finally, they give invaluable tips to business people on how to avoid bankruptcy and what to do if their business is in crisis.

Editor

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QUESTION ONE

With a recent spike in insolvencies across the globe, do you believe the numbers of distressed companies will increase in the coming year? How will your firm be assisting?

The arrival of COVID-19 saw a wave of stimulatory policies unleashed on the Australian economy. These ranged from the JobKeeper program, various tax incentives, early superannuation access for affected persons, and insolvency moratoriums. These measures have largely since expired, but some of the temporary changes to insolvency laws have been permanently implemented, including increases to the minimum thresholds for bankruptcy and winding up applications.

Perhaps one of the most significant relieves for businesses was the cessation of debt recovery action by the Australian Taxation Office (ATO). Historically, the ATO is the largest agitator of winding up applications in Australia, and the start of COVID-19 saw the ATO's recovery action cease effectively overnight. This has provided significant breathing room for struggling Australian businesses. The ATO has slowly been recommencing its engagement with tax debtors, with further escalation expected in the coming months.

Whilst there has long been talk of an insolvency tsunami, this has not yet happened. With the cessation of various stimulatory policies and imminent interest rate rises, we anticipate there will be an increase in insolvencies over the next 6-12 months and thereafter.

Significant pressure is already being felt in certain industries; the construction industry being a prime example. The widespread use of fixed-price construction contracts, coupled with increasing materials costs due to supply chain issues and rampant labour cost increases, has led to an increase in insolvencies, including the collapse of some high-profile construction companies. It is difficult to see these issues ceasing in the short-term.

As a firm that practices primarily in the areas of restructuring, insolvency and commercial litigation, JCL can assist businesses in financial distress or any persons that may otherwise be affected by insolvency.

QUESTION TWO

Why is Chapter 11 an attractive restructuring tool for international companies and your clients?

Australia's equivalent of the Chapter 11 bankruptcy process is known as Voluntary Administration (VA). VA is a process where a company that is insolvent or likely to become insolvent is placed under the control of an independent insolvency practitioner (administrator) who takes over management of the company. The appointment of an administrator starts a moratorium period where unsecured creditors are prevented from taking further legal action against the company.

Following their appointment, the administrator investigates the company's affairs. This typically involves working with the directors and employees to determine whether the underlying business is viable. Administrators are required to report their findings to creditors and may make certain recommendations.

Unlike liquidation, a VA does not necessitate a distressed sale and provides additional options for the company and creditors. In particular, a company in VA may propose a deed



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As JCL's Managing Partner with more than 30 years' experience, Jim leads the firm's strategic direction, which has always focused on effective and efficient problem resolution. He is a recognised leader in commercial litigation and insolvency law and has garnered a widely respected reputation within Queensland's legal community.

The firm was established because Jim is passionate about achieving positive outcomes for clients and providing real value for money. Since JCL's inception, Jim has consistently adopted a pragmatic, direct and confident approach to skilfully navigate his clients through complex legal matters, with unwavering commercial results.

Jim's impressive career has seen him serve as the Queensland State Chair of the Insolvency and Reconstruction Committee of the Business Law Section of the Law Council of Australia, Queensland State Chair of the Insolvency and Reconstruction Committee of the Queensland Law Society and the National Chair of the Insolvency and Reconstruction Committee of the Business Law Section of the Council of Australia.

of company arrangement (known as a DOCA).

The purpose of a DOCA is to establish a new working relationship between the company and its creditors. A DOCA will typically see pre-administration liabilities quarantined and dealt with under the DOCA's terms (with DOCA compliance overseen by the administrator), whilst allowing control of the company to return to the directors to continue trading. A key advantage of a DOCA is it will typically provide creditors with a better return than if the company was simply liquidated.

A high-profile example of a successful VA is the 2020

As special counsel at JCL, Mitchell has extensive experience handling complex litigation matters. Approachable and pragmatic, he is known for delivering practical and commercially sound legal advice, whilst prioritising cost-effective outcomes that are tailored to the client's individual objectives and needs.

With over 10 years' experience, he has garnered a strong track record of producing positive outcomes for clients, who have included directors, liquidators, trustees, business owners, body corporates and individuals.

With his previous experience in tax and commercial matters and a master's degree in commercial law, Mitchell has a deep understanding of the commercial issues facing his clients. This gives him an edge when dealing with your commercial litigation, bankruptcy and insolvency issues.

Mitchell enjoys assisting clients through difficult situations and resolving disputes as efficiently and commercially as possible.

James Conomos Lawyers was established by James Conomos in July 1992 as a boutique legal firm offering specialist expertise in commercial litigation and insolvency. The firm came into being because James is passionate about achieving positive outcomes for clients and providing real value for money.

Since then, James has pursued his desire to help younger lawyers learn the art of law and problem solving. Through his mentoring, James has shaped a team of capable and ambitious lawyers who will adeptly solve your legal problems within a realistic time frame.

Based in modern offices in the heart of Brisbane's central business hub, our team has now grown to a total of 15 staff. Expertly guided by Director James Conomos, you can rely on us to tackle any commercial issue you throw our way.

restructure and sale of Virgin Australia to Bain Capital. This sale has kept the airline afloat and Bain is reportedly looking to take Virgin public in 2023. Whilst undoubtedly there were disappointed parties, the restructure demonstrates that a successful DOCA can be in the public interest and yield a positive outcome for the majority of stakeholders.

TOP TIPS

On restructuring processes for distressed companies – and the potential opportunities for businesses

- ✓ Seek advice early. The sooner proactive steps are taken, the more options may be available and the greater prospect of a successful restructure taking place.
- ✓ There still appears to remain a general willingness amongst creditors to adopt a greater level of commerciality, thereby increasing the prospect of a successful restructure. However, that willingness is likely to decrease as time goes on.
- ✓ With the expected increase in insolvencies, opportunities will continue to present themselves for the acquiring of distressed businesses or their assets. Typically, such opportunities are only available for relatively short timeframes, so it is necessary for any interested parties to be actively monitoring any opportunities.

QUESTION THREE

What are the trends and opportunities regarding distressed businesses in your jurisdiction? What advice are you giving clients to take advantage of the distressed environment?

Our recommendations to clients have not materially changed despite the current economic environment. We continue to recommend that businesses in financial distress be proactive and seek legal advice at the earliest opportunity.

The sooner advice is sought, the greater likelihood additional and more favourable restructuring options may be available. Where advice is sought too late, attractive options can be lost or their effectiveness greatly reduced.

That said, we consider that the prospect of successfully restructuring is presently greater than what we have previously encountered, aided undoubtedly by the lingering economic uncertainty. In our experience, the receptiveness of third parties to negotiating and reaching commercial compromises is at an all-time high. We expect this willingness will decrease over time as the economy recovers.

On this basis, the only real change to our usual recommendations is that clients who are experiencing or are expecting to encounter financial difficulties should consider restructuring promptly, as it remains a prime opportunity to do so.

For those in a position to acquire distressed businesses and assets, the increasing insolvency activity will give rise to opportunities. However, critically, where sales are by administrators and liquidators, the sale process will typically be short. It is, therefore, necessary to act quickly.

QUESTION ONE

With a recent spike in insolvencies across the globe, do you believe the numbers of distressed companies will increase in the coming year? How will your firm be assisting?

Since Covid-19 and its aftermath there has been a rise in the number of insolvencies in Belgium. The ending of government subsidies for businesses, the rise of inflation and interest rates are one explanation. The other is the war in Ukraine and energy crisis, which has resulted in spiralling prices that have been fatal for consumer confidence in the economy.

In terms of receiverships (there were very few bankruptcies during 2020-2021 because it was prohibited to start a bankruptcy claim in Belgium against a company that was closed due to the effects of coronavirus), we are now seeing an increase in the number of bankruptcies from the second half of February 2022. Moreover, we expect more bankruptcies in 2022 since all moratoria have ended by government and all grace periods for payment of social and tax debts will also end after an initial period of 2 years from the start of the pandemic by March 2022. We now see a trend in which struggling companies that survived the past two years are having payment problems and are difficult to rescue via the existing corporate rescue statutes. Most of those companies have gone illiquid, with no further cash reserves and government is no longer willing to support them after the previous euro36 billion cash injection. If the interest rates and inflation are not reduced we predict a rising number of bankruptcies as more companies use their cash flow reserves and become more illiquid.

QUESTION TWO

Why is Chapter 11 an attractive restructuring tool for international companies and your clients?

In Belgium, companies can rely on the procedure of judicial reorganisation (the former "WCO") and as a result of its suspension there is a period of protection offered. They can apply for a judicial reorganisation. The company then will be assisted further under the assistance of the court in which their assets will be sold to the public market under the responsibility of the Commercial Court. Distressed companies were given the possibility of making silent plans with their assets transferred to other market players, for example competitors to pay the companies' creditors. This is under the surveillance by a commercial court appointed trustee.

We see a trend for the maximisation of company assets in insolvency situations. Recently, in the "Heiploeg case" the European Court of Justice ruled that a prepack (which is a sale of a company's assets before the bankruptcy is opened under control of a Court) is not to be prohibited if the objective is to maximise the sale of the assets of that company and ensure business continuity (including the transfer of workers). This recent trend shows that legislators and courts are aware that is important for the protection of value in liquidation situations that a "silent sale" of assets can be prepared under continuity with the maximisation of a distressed company's assets.



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Philippe Termote is an experienced Partner with a demonstrated history of working in the legal industry, specialising in company and insolvency law. He is skilled in litigation and negotiation and has a general Master in Law, European law, Corporate law and Insolvency law. Elsewhere, Philippe has a Master Class in Fraud auditing from Universiteit Antwerpen and a Master in Corporate Finance from KU Leuven. A highly entrepreneurial professional, he is co-founder of Lige (now Agio Legal), and is active as a business sparring partner for entrepreneurs.

Philippe is a committee member of IR Global, a Legal 500 rewarded international network of Lawyers. As the only Belgian member of the network specialising in Insolvency Law he has extensive experience of cross-border insolvency cases. As a committee member of the Insolvency Team, he is responsible for the management of the network that only selects members on their merits.



Agio is a team of specialist lawyers across different practice areas. Entrepreneurs benefit more from a legal partner who is interested in your growth and success. Together we look at your goals and along the way we get to know your business.

We understand your needs and sense of urgency. We love to delve into cases. Our team consists of lawyers who know the law inside out and know exactly which arguments work during a negotiation or in court. The combination of academic knowledge and practical legal mindset ensured successful results.

We listen to your story and speak in clear, comprehensible language. We provide you with advice that will help you make sustainable decisions for your company. Your business is our business. With our expertise, we create an environment in which clients can exceed their expectations. In short, Agio is your management-team-member-with-legal-creativity, taking your business to the next level.

"The pandemic wasn't bad news for everyone. Companies that had invested in technology fared better and in some cases business boomed, such as the pharmaceutical sector. Elsewhere, many firms in all sectors

were quick to adopt new technology models for business operations, which included the use of mobile meeting apps, file sharing and using online apps and channels for sales, service delivery and marketing."

TOP TIPS

On restructuring processes for distressed companies – and the potential opportunities for businesses

For the moment, it's getting busy in bankruptcy, but we see difficult Chapter 11-like reorganisation files since these distressed companies have no more cash reserves in a rising inflationary market. We expect that when interest rates rise more companies could become distressed and that it will get busier from the bankruptcy professionals point of view.

We already assist more companies with filing bankruptcies than we did at the beginning of 2022 and we receive a lot of questions from interested buyers of distressed companies to assist them with transactions, buying distressed companies from Chapter 11-like procedures or bankruptcies. We expect this trend to continue and increase in 2022. The prepack possibility to buy assets before bankruptcy kicks in can be a great opportunity for entrepreneurs and funds, particularly in a cross border situation.

We at Agio Legal are experienced in all these scenarios, understanding the changing markets and trends.

QUESTION THREE

What are the trends and opportunities regarding distressed businesses in your jurisdiction? What advice are you giving clients to take advantage of the distressed environment?

The pandemic wasn't bad news for everyone. Companies that had invested in technology fared better and in some cases business boomed, such as the pharmaceutical sector. Elsewhere, many firms in all sectors were quick to adopt new technology models for business operations, which included the use of mobile meeting apps, file sharing and using online apps and channels for sales, service delivery and marketing. The office real estate sector changed for good with the sudden rise in homeworking. We also see a rise in cross-border M&As, funds buying assets and showing interest in buying assets from distressed companies for who the prepack (see above) can be an ideal transaction tool.

QUESTION ONE

With a recent spike in insolvencies across the globe, do you believe the numbers of distressed companies will increase in the coming year? How will your firm be assisting?

Given the aftermath of the pressure put on many businesses by the Covid-19 pandemic together with the continued rise in interest rates, we expect the number of distressed companies to increase in the coming year across certain sectors. For businesses which may have been struggling prior to the pandemic, the initial government subsidies and certain tax relief may have buoyed them for a period, but with those measurements being rolled back, we expect that some will struggle to survive. This is particularly the case for smaller retail businesses which may also be experiencing significant supply chain challenges and those entities in the hospitality industry which have been hit very hard by the pandemic restrictions limiting travel.

Our firm will continue to assist with all aspects of this. We note an increase in M&A work as a result of pressures present in the market and expect this to continue. Furthermore, we provide advice to our corporate clients regarding refinancing, which is increasing given the rise of interest rates and depressed market conditions existing in some segments of the economy, and we also are on hand to guide our clients through recovery or restructuring efforts. Additionally, we provide assistance to both clients and insolvency practitioners on all aspects of liquidations and winding up.

QUESTION TWO

Why is Chapter 11 an attractive restructuring tool for international companies and your clients?

Bermuda has a well-established track record as a jurisdiction with courts that are familiar with and provide support to Chapter 11 filings. Chapter 11 is a helpful vehicle to provide a second (or sometimes third or more) life to companies. It can provide them a safe harbour when creditors are circling and avoid key assets being picked up by such creditors. An example of this within the Bermuda law context is Seadrill Limited which has gone through Chapter 11 proceedings twice and with added the support and protect of the Bermuda courts.

Our firm is experienced with providing our clients with practical advice on how best to navigate key steps towards filing in support of Chapter 11 in Bermuda. This includes experience with having schemes of arrangement sanctioned by the court and advising on all aspects of the lead up to and beyond the scheme approval process.

QUESTION THREE

What are the trends and opportunities regarding distressed businesses in your jurisdiction? What advice are you giving clients to take advantage of the distressed environment?

In terms of trends, we are consistently seeing an increase in M&A activity, asset sales (and purchase), cash pool arrangements and the like being deployed by clients. This includes continued



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Jennifer A Haworth JP is Head of the Dispute Resolution team and a member of the Employment & Immigration team at MJM Limited. She has an extensive level of experience in civil and commercial matters including security enforcement, banking, receiverships, insolvency, property related disputes, employment/immigration, judicial review and public law.

Jennifer was called to the Bar of England & Wales in 2005 and the Bermuda Bar in 2006. Her practice includes acting for both local and international clients with advisory work as well as appearing in mediations, arbitrations, employment tribunals, the Human Rights Commission and all levels of the courts, including the Court of Appeal in Bermuda.

She is a skilled negotiator (having completed the Negotiation and Leadership Course at Harvard Law School's Program on Negotiation) and uses a practical approach to achieve the best results for her clients. Jennifer is an Associate Member of the Chartered Institute of Arbitrators and a member of the

consolidation of market share across a number of sectors, where financially healthy players are merging together to increase the marginalization of their minority competitors, or cash rich businesses are picking off their poorer rivals who can no longer compete in tough market conditions. On the lending side, given that financial institutions are being more conservative and not lending on the same terms and to the same degree that parties were used to before, it seems that only the established players tend to be able to secure new financing on acceptable terms, which further tightens the screw on underperforming businesses.

This environment represents a real opportunity for cash buyers. With pressure increasing from interest rates rising and other factors, sellers are often highly motivated by a

Restructuring and Insolvency Specialist Association of Bermuda and INSOL International.

Jennifer is also a seasoned public speaker, a speaking coach and regularly presents to clients and various industry sectors on recent legal developments. She also writes on legal issues regularly for well known publishers.

MJM Limited is one of Bermuda's leading law firms with a broad ranging practice and a reputation for excellence in our core practice areas of corporate & finance, dispute resolution, employment & immigration, private client and property.

The firm is regularly retained by leading international law firms and offers practical, common sense advice based on an in-depth knowledge of the legal, regulatory and commercial environment in Bermuda. Each practice area is led by a Director who is recognised as a leading practitioner in their respective field. We offer a collaborative approach across our teams which enables us to offer comprehensive and thorough service to our clients.

MJM and its attorneys are regularly ranked in international guides of legal practitioners in Bermuda, including Chambers Global – The World's Leading Lawyers, IFLR1000 and The Legal 500.

The MJM Group also offers corporate administration and trust services through its affiliate, Quorum Limited, which is licensed by the Bermuda Monetary Authority to conduct such business. We therefore provide our clients will a full range of services.

lack of options and time. This means that, for those can take advantage, there are opportunities for lower than expected price points and, in some instances, deals can be negotiated where there is little payment upfront, with financing to occur over time generated from future profits.

Typically, our firm's work in this space has an international focus, relating to Bermuda companies which are part of a wider group of entities. We have a strong M&A practice to support the increase in activity and have a tremendous amount of experience advising clients on both the sale and purchase of assets or shares.

We are also seeing an increase in foreign investment in Bermuda. There is limited capital available locally and.

TOP TIPS

On restructuring processes for distressed companies – and the potential opportunities for businesses

- ✓ We strongly suggest that distressed companies seek legal advice at an early stage so that certain pitfalls can be avoided.
- ✓ We encourage distressed companies to maintain an ongoing dialogue with their creditors and their lender regarding their ability (or not) to maintain payments.
- ✓ Distressed companies should consider their options to manage their risk, including whether to divest under-performing parts of the business, whether refinancing of their obligations is possible, if restructuring or a scheme of arrangement may afford them valuable time or whether there is a party that might be willing to acquire the company at an acceptable price.
- ✓ Any parties considering foreign investment in Bermuda are encouraged to seek advice to understand the legal, regulatory and commercial environment in Bermuda.
- ✓ Foreign investors should consider a local partner and also prepare a business plan setting out their investment proposals, development of local staff and justification for non-Bermudian ownership, which will play an important part in the regulatory review of a section 114(b) licence application.

“There are limits on ownership by non-Bermudians, with the “60/40 rule.”

Therefore, in many instances, the investment comes in the form of partnerships with existing local businesses. There are limits on ownership by non-Bermudians, with the “60/40 rule” in place (60% control at board and shareholder level), but there are opportunities for non-Bermudian investment by way of an application for a Section 114(b) licence (which allows majority foreign ownership) which can be given at the Minister of Finance's discretion having regard to a number of public interest type factors.

In terms of foreign investment into Bermuda, we have seen examples of this in the hospitality and tourism market, which was one of the hardest hit by the Covid-19 pandemic. This foreign investment has involved three different scenarios: equity investment, acquisition and loan finance. Our firm has experience with each of these scenarios and can guide any such foreign investor through the key regulatory, legal and commercial steps.

QUESTION ONE

With a recent spike in insolvencies across the globe, do you believe the numbers of distressed companies will increase in the coming year? How will your firm be assisting?

In volatile times, both challenges and opportunities abound. For business operating on the margins, vulnerabilities are quickly unmasked. However, companies that have wisely mitigated their exposure through prudent planning during times of abundance, opportunities to leverage that strength through acquisition and partnership can be found. Our firm is committed to assisting our clients navigate these waters and in particular support their efforts to leverage the strength of their intellectual property and intellectual capital.

In Canada, we expect that the increase in distressed companies arose in part from the pandemic, but will continue predominantly as a result of the increase in interest rates (borrowing costs), massive increase in inflation and, most importantly, significant supply chain issues. Further, companies have to contend with a historic rise in online shopping coupled with shipping logistics in the world's second largest country; this alone had the ability to stress companies beyond their breaking point. One thing many of these companies that are susceptible to distress have in common is that they were more likely to be operating on the margin prior to 2020 and, after significant governmental support has been withdrawn, can no longer operate in a significantly different economic environment.

On the other hand, we have observed a strengthening of our clients who rely on intellectual property and innovation to become more agile and interested in expanding into different markets. These clients are increasingly looking to acquire from their less flexible competitors who have not been able to "figure it out", but may have intangible assets that our clients can leverage better than them. As a result, distressed companies, whether they know they are distressed or not, are now a rich source of intangible assets that may be licensed or acquired out right with the newly enhanced protections of the Canadian restructuring, bankruptcy and insolvency legislative framework discussed herein.

QUESTION TWO

Why is Chapter 11 an attractive restructuring tool for international companies and your clients?

Canadian companies highly leveraged in intangible assets and intellectual property often include assets in other jurisdictions, all of which are managed globally. However, what determines the availability of bankruptcy proceedings in a given jurisdiction relate to the jurisdiction of the debtors and the distressed company's assets. Canadian companies have a variety of statutory options to address its insolvency issues: restructuring under the Companies' Creditors Arrangement Act, proposal under the Bankruptcy and Insolvency Act, or a plan of reorganization under the Canada Business Corporations Act, or the equivalent provincial legislation such as the Ontario Business Corporations Act. In the US context, where there are US debtors, distressed Canadian companies may also seek protection under the US' Chapter 11 scheme.

From an intellectual property perspective, both the US and Canadian statutory structures make some important provisions for the intellectual property license agreements. In 2019, the



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Elizabeth regularly advises corporations on in-depth intangible asset management including licensing, contract, and transactional work with particular emphasis on assisting SMEs to achieve their long-term legal strategy, to leverage their intellectual capital and assist in the overall growth and development of their company.

In her litigation practice, Elizabeth represents clients in matters before the Federal Court, Federal Court of Appeal, Ontario Superior Court and Ontario Court of Appeal. With extensive experience in the management of complex litigation – pharma, SAS, wireless communications, mining – she represents clients in traditional IP litigation matters, as well as disputes relating to misleading advertising, grey-goods/anti-counterfeit, and commercial litigation. Clients regularly rely on her to coordinate their intellectual capital management and

enforcement strategies in crucial jurisdictions around the world.

Elizabeth gained significant experience in the intellectual property litigation group of a major national firm and continued her practice at the nation's top-ranked litigation boutique before founding Dipchand LLP. Her practice focused on pharmaceutical and biotech patent litigation, drug & biologics regulatory law.

Dipchand LLP is a boutique Toronto law firm focused on Intellectual Property, Corporate Law, Franchise Law and Litigation.

We work with ventures – from cutting-edge start-ups to established enterprises – to achieve their goals by providing practical and business-oriented legal advice.

Our value as trusted advisors is measured by the calibre of our legal advice, quality of service, and the stellar reputation that we have carefully cultivated and strive to maintain. If your business' cornerstone is its intellectual capital, we are your legal partners.

Our eyes are on your legals, so yours can be on business. At Dipchand LLP, we are committed to building strong, long-lasting relationships with clients and their advisors looking for practical and strategic counsel to navigate their ventures through the ever-changing legal landscape.

enforce an exclusive use, so long as the licensee abides by its obligations. Thus, a subsequent acquirer of the IP rights may also get a licensee in the deal as well.

QUESTION THREE

What are the trends and opportunities regarding distressed businesses in your jurisdiction? What advice are you giving clients to take advantage of the distressed environment?

Intellectual Property assets, such as a registered patents and trademarks, are properly considered in the context of restructuring, reorganization, liquidation and bankruptcy

TOP TIPS

On restructuring processes for distressed companies – and the potential opportunities for businesses

Intellectual Capital Identification & Inventory. Ensure your processes support IP generation and address matters such as identification and tracking of existing intangible assets, documentation and reporting processes, tracking and auditing access to important information. Ensure key employees regularly disseminate their knowledge around the company. Work closely with your IP counsel to register and protect the key intellectual capital in order to maximize its value.

Intellectual Capital Audit & Valuation. Prioritise an actively managed strategy to monitor, track, audit, and otherwise exert control over critical information and intangible assets, thereby increasing their value. Incorporate intangible valuation considerations in your financial and accounting processes.

Technological & Competitor Intelligence. Be mindful of competitors in your space and keep track of the technology that is valuable to you and others. Be ready for a time where you need to rely on your assets to derive value for your company or leverage your strength to acquire or develop assets of others down the road.

of distressed companies. For those in a stronger position, companies looking for opportunities may look to the intangible assets and IP portfolios of distressed companies as a way to provide more breadth to their development programs, freedom to operate in the market or even expansion into other jurisdictions.

Intellectual capital and intangible assets – and their potentially untapped value – can be strategically leveraged by companies on either side of the distress equation. We advise companies looking to shore up or take stock of their capital and assets to turn their minds to not only their registered IP portfolios (eg. patents and trademarks), but also the unregistered rights such as contracts, relationships, know-how, technology, and brand assets.

Contracts and relationships (eg. key agreements, exclusivity arrangements) may have particularly significant value in distressed situations and bear some further consideration. Despite restrictions against assignment, these assets may be a new key resource for a company looking for new opportunities or a source of capital for a distressed company. Under the US Bankruptcy Code and subject to approval, where a contract restricts or prohibits assignment, a debtor will generally have the right to assign the contract; such assignment is not predicated on curing defaults or assignee assurances of future performance. In Canada, a non-consensual assignment will require all defaults pre-filing to be cured. Further, the Court will have some consideration of the assignee's abilities in respect of future performance.

QUESTION ONE

With a recent spike in insolvencies across the globe, do you believe the numbers of distressed companies will increase in the coming year? How will your firm be assisting?

We believe that as we emerge from the Covid-19 pandemic to an uncertain future, the numbers of distressed companies and insolvencies will increase in the coming year due to:

- The rise in inflation and cost of living generally, in particular in the area of health care and construction where we have seen disproportionate increases in health insurance premiums, constructions costs and property prices.
- The ending of government subsidies for businesses and the ending of "Pension Holidays" permitted by governments during the pandemic.
- The rises in interest rates which show no signs of abating and which will affect the ability to raise credit. It is worth noting that the Federal Reserve's recent increase in rates by 0.50% which was intended to control the worst inflation America has seen in 40 years is the largest single hike since May 2000.
- The continuing worldwide supply chain problems caused by the blockage of the Suez Canal and extreme climate events and which have now been exacerbated by the continuing lockdowns in China and Russian invasion of Ukraine.
- The willingness of lenders to forbear on defaulting loans coming to an end.
- The continuing pandemic uncertainty due to the Delta and Omicron variants.

Apart from addressing the importance of cash flow controls and focusing on restructuring when possible, our firm will be able to assist distressed companies by offering sound legal advice from lawyers who have significant experience in insolvency and restructuring work in the Cayman Islands as may be seen from our website at <http://www.rc.com.ky>

QUESTION TWO

Why is Chapter 11 an attractive restructuring tool for international companies and your clients?

The main reasons for Chapter 11 being an attractive restructuring tool for international companies may be summarised as follows:

- It is straightforward for a foreign entity to become a Chapter 11 debtor as it only needs minimal U.S. ties to qualify for relief under its bankruptcy laws. [Section 109 Bankruptcy Code provides that "only a person that resides or has a domicile, a place of business, or property in the U.S., or a municipality may be a debtor."]
- A debtor has the benefit of the "automatic stay", which provides an injunction against actions against the debtor on a purportedly worldwide basis. This gives the debtor respite to focus on the restructuring.
- Management remains in control of the company and the debtor continues to control its assets and run its operations as a debtor in possession (DIP), except in extraordinary circumstances, such as fraud or mismanagement of the debtor.
- Debtors filing Chapter 11 can tap into sophisticated capital markets in the US for DIP financing whilst the company is



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Cherry Bridges is a Barrister-at-Law and Attorney-at-Law and the Partner in charge of the Litigation Department at Ritch & Conolly. Cherry was educated in England but has lived in Malaysia, Sarawak, Hong Kong and the Cayman Islands.

Upon completion of her Law Degree and Bar Finals, she was called to the Bar of England and Wales in 1982 and completed her pupillage at 1 Essex Court, Temple, London and at Temple Chambers, Hong Kong.

She was called to the Bar of Hong Kong in 1983 and worked as a Barrister-at-Law in private practice at Temple Chambers, Hong Kong from 1983 to 1986 before she relocated to the Cayman Islands and was admitted as an attorney-at-law in the Cayman Islands in 1987.

She has 34 years experience acting in a wide range of civil commercial litigation with particular expertise in litigation relating to trusts, insurance, commercial disputes, tracing actions, enforcement of judgments, companies and liquidations of banks, hedge funds and private companies.

in bankruptcy and to fund the debtor's eventual exit from bankruptcy.

- In restructuring and the approval of a plan, a debtor is required to obtain approval from two-thirds of the creditors in a voting class – this threshold is lower than other common law jurisdictions where debtors are required to meet a 75 per cent threshold.
- Debtors are able to commence 'avoidance' actions that allow the debtor to unwind certain transfers made to or for the benefit of non-debtor parties prior to the bankruptcy filing.
- If the debtor is not going to continue operating its business, Chapter 11 permits a debtor to sell its assets free and clear of any existing liens on such assets in an expedited fashion.



She has acted in numerous and significant cross border matters for clients from all over the world, including the United States of America, Canada, Mexico, the Dominican Republic, Uruguay, the United Kingdom, France, Germany, Switzerland, Spain, Russia, Norway, Hong Kong and Singapore.

Ritch & Conolly was established in 1983 and undertakes a wide range of legal services for domestic and international clients. The firm has a respected international commercial litigation practice with extensive experience in cross-border litigation in trusts, corporate disputes, insolvency and asset recovery, enforcement of foreign judgments and conflicts of law.

Other areas of our litigation practice include banking, commercial fraud, anti-money laundering, contract, negligence, construction, administrative and public law, shipping, property, employment and arbitration.

We also undertake extensive non-contentious work including company, insurance, banking, real estate development and structuring, conveyancing, wills and estates, licensing, immigration and trademarks.

The firm has established links with other law firms and institutions worldwide. The Senior Partner, Mr. David Ritch, is highly regarded in the region, having served on numerous Government statutory boards over the years as Chairman and is currently a director of CIBC First Caribbean International Bank and the Chairman of the Board of Directors of Caribbean Utilities Company, Ltd., the sole provider of electricity on Grand Cayman.

In summary Chapter 11 provides a cross border platform for a coordinated global reorganisation process with the aim of maximising the value of assets.

QUESTION THREE

What are the trends and opportunities regarding distressed businesses in your jurisdiction? What advice are you giving clients to take advantage of the distressed environment?

TOP TIPS

On restructuring processes for distressed companies – and the potential opportunities for businesses

- ✓ Take advantage of the restructuring process afforded by the Companies (Amendment) Act, 2021 when it comes into force and consider cross border issues from a tax and legal and costs perspective e.g. is the Cayman restructuring option is preferable to Chapter 11 having regard to the circumstances of the intended restructuring?
- ✓ Adopt a strategy which is fair to stakeholders and investors and consider getting a fairness report by an independent expert.
- ✓ Do proper due diligence perhaps using data analytics tools and experts to accelerate due diligence and plan for contingencies.
- ✓ Interact and communicate succinctly and openly with all relevant parties at all times.

The most significant trend in the Cayman Islands which will give rise to more opportunities for companies to be restructured instead simply being put into liquidation is the introduction of the Companies (Amendment) Act, 2021¹ which facilitates the efficient restructuring of distressed companies for the benefit of their stakeholders. i.e. a formal restructuring procedure for companies outside the traditional winding up process but under the supervision of a "restructuring officer" and the Grand Court of the Cayman Islands.

A company may petition the Court for the appointment of a restructuring officer on the grounds that it is or is likely to become unable to pay its debts and intends to present a compromise or arrangement to its creditors – a restructuring. Key points to note are:

- It will no longer be necessary for a winding up petition to be presented in order to facilitate a court-supervised restructuring.
- An automatic stay will take effect upon the presentation of the Restructuring Petition which will prevent the continuation or commencement of any proceedings against the company without leave of the Court.
- The requirements for the appointment of a restructuring officer are otherwise the same as those for the appointment of a provisional liquidator and his/her powers are flexible and will be defined by the terms of the appointment order.
- There are protections in place to preserve and protect the rights of creditors e.g. a requirement for an inter partes hearing and a contributory or creditor may apply to the Court for the variation or a discharge of an order appointing the restructuring officers and secured creditors can enforce their security without the leave of the Court or reference to the restructuring officer and creditors may still present a winding up petition in respect of the Company, with leave of the Court.

¹ It is anticipated to come into force in the summer of 2022.

QUESTION ONE

With a recent spike in insolvencies across the globe, do you believe the numbers of distressed companies will increase in the coming year? How will your firm be assisting?

We believe this scenario will persist in the short term not only because of the measures adopted by the government but also because of the global supply crisis we are currently facing, the international conflict between Russia and Ukraine and the devaluation of the Colombian Peso.

In the case of Colombia, the legal framework for insolvency changed due to Covid-19. The general provisions and proceedings regulated in the Law 1116/2006 were amended (with temporarily effects) in early 2020 via an extraordinary regulation (Decreto Legislativo 560/2020). This special regulation incorporates, among other measures, two (2) new 'recovery' mechanisms (named NEAR and PRE) in which the debtor has the main role as opposite to the general proceedings in which the insolvency judge has that role as in 2006 act. Another extraordinary regulation (Decreto Legislativo 772/2020) introduced special expedited procedures for small business, introducing what it called abbreviated reorganization and abbreviated liquidation.

The most important characteristic of the above-mentioned regulations is time. The duration for the new proceedings is intended to be significantly shorter than the general one. As a matter of fact, the NEAR is lasting 3 to 5 months compared to the 36 months that an ordinary reorganization usually takes.

According to figures provided by the Superintendency of Companies (the competent authority on insolvency or bankruptcy), the new measures saw up to 671 insolvency applications in the first three months of their validity, a figure that has experienced a substantial growth, closing in December of 2021 with up to 1.761 new applications. Therefore, it is expected that during 2022, the tendency on the growing number of companies that make use of these measures will remain, considering also that these regulations will remain on force until December 31 of 2022.

From our firm, we have an extensive and profound experience (more than 40 years) in advising and representing companies within the different insolvency mechanisms. Our legal advice covers all steps of the process, from the decision-making process on the best suitable solution for our clients (debtor and creditors) to the execution of the debt restructuring agreements.

QUESTION TWO

Why is Chapter 11 an attractive restructuring tool for international companies and your clients?

As previously mentioned, in our national legal system, companies rely on the traditional recovery mechanisms found in Law 1116 of 2006 and its regulatory decrees (reorganization, validation of out-of-court reorganization agreement and judicial liquidation).

These regulations incorporate cross-border insolvency measures, whose main objective is the cooperation between countries, the insurance of the debtor's assets and the protection of the interests of creditors. Regulations that are in place incorporate the UNCITRAL's Model Law of Cross-Border Insolvency (1997). Subsequently, cooperation and coordination are allowed between countries that, although they don't have



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David graduated from Law at the Externado de Colombia University where he also specialized in Business Law. He earned a Master in Legal Counsel (MAJ) at the Instituto de Empresa de Madrid (Spain) and an LLM in Commercial Law at the Glasgow and Strathclyde Universities (UK).

David is an Undergraduate and Postgraduate Professor of Commercial and Insolvency Law at the Externado de Colombia University. He is also the head of E-Mercatoria, the journal of the Department of Commercial Law of the same university. In addition, he has served as Ancillary Justice at the Supreme Court of Justice of Colombia and Coordinator of the Insolvency Group at the Superintendence of Companies.

For more than 20 years, David has been widely recognized as one of the leading

bankruptcy attorneys in Colombia. He has played a pivotal role in the largest and most complex restructurings and this significant track record has made him a go-to lawyer for clients involved in the toughest and most challenging of bankruptcies.

Our firm provides legal services to companies and individuals around the country, operating under the highest professional standards. Our services cover all legal matters and include representation in all proceedings and negotiations related to Commercial Law (national and international), Insolvency Law, Banking Law, and Capital Markets regulation. We provide services to a diverse group of clients, including financial institutions and national and multinational corporations.

Our lawyers are reliable professionals with vast experience, not only in their practice areas but also as academics. We are always keen to provide the best legal services and efficient legal solutions to our clients. We work hand in hand with other law firms (national and international) and with professionals on areas related to our practice (accounting, finance) to provide the best possible services to our clients. No matter the extent of our client's needs, our experience and commitment is a guarantee to their satisfaction.

Practice áreas: Business & Commercial law, Banking & Finance, Insolvency / Bankruptcy, Litigation and Administrative & Public law.

also transcended the national sphere, with striking cases such as those of Aerovías del Continente Americano S.A. (AVIANCA) and Interbolsa S.A.

QUESTION THREE

What are the trends and opportunities regarding distressed businesses in your jurisdiction? What advice are you giving clients to take advantage of the distressed environment?

In order to tackle the crisis provoked by Covid-19 the national government, as well as introducing regulations to expedite the restructuring process (already mentioned), has incorporated

TOP TIPS

On restructuring processes for distressed companies – and the potential opportunities for businesses

- ✓ Get legal counsel. Colombian Law allows debtors and creditors to participate on insolvency proceedings without a legal practitioner/ insolvency expert. However, only with the right advisors will the parties be able to get the most out of insolvency proceedings. As a debtor, get to know your options; not all recovery proceedings are suitable for every debtor; there are 5 different proceedings, and you need an expert by your side to choose the appropriate one.
- ✓ Keep your accounting and other business papers up to date and duly organized.
- ✓ Maintain an extensive dialogue with the different creditors and especially the financial entities, which allows the creation of trust in the face of a reorganization agreement.
- ✓ Work for the structuring of realistic and objective agreements that allow a cash flow of the company, and thus the satisfaction of the interests of the creditors.
- ✓ Ensure the maximization of the value of the company's assets and its core business so that the company is attractive to the needs of third-party investors.

several measures meant to ease distressed businesses. Among them are measures that are intended to provide support from the government to allow banks to renegotiate distressed businesses, debt within certain conditions, reduce the tax debt of such businesses and provide economic support to cover salaries and other worker's benefits. More recently, because of the global supply crisis, measures were introduced to reduce tariffs on the import of specific goods and reduce logistics costs.

All the measures have translated into attractive mechanisms for companies to face any issues, since they offer them a greater range of action and negotiation during insolvency proceedings, the conclusion of reorganization agreements in the short term, as well as a wide range of rescue and flexible mechanisms and tax benefits. It should be noted that the new 'recovery' mechanisms (NEAR and PRE) are presented as emergency tools that companies can access and, if not successful, still leave the door open to access the traditional processes of Law 1116 of 2006. This gives distressed businesses a wide margin of time to seek the best possible solution to their needs.

Consequently, today the national insolvency regime has been nurtured and strengthened by the new legal and monetary mechanisms that were adopted to overcome the economic crisis of companies because of the pandemic.

QUESTION ONE

With a recent spike in insolvencies across the globe, do you believe the numbers of distressed companies will increase in the coming year? How will your firm be assisting?

If economic activity has faced a sudden and brutal downturn as a result of the Covid-19 epidemic, the level of insolvencies has reached an historically low level throughout France and in all sectors of activity in 2020 and 2021.

32,184 insolvency proceedings were opened in 2020, 19,818 fewer than in 2019 (-38%).

The fall in the number of insolvency proceedings is due to several factors:

- **The implementation of public aid**, including loans guaranteed by the French State (known as "PGE" in French), the deferral of charges, the solidarity fund, partial activity – which have all helped to maintain the cash flow of companies.
- **Adaptations of the distressed company law** to face the economic consequences of Covid-19 through the adoption of several ordinances.
- **The behaviour of public creditors** (social organisations and tax authorities) which have temporarily suspended the summons of their debtors to open insolvency proceedings.

While the expected wave of bankruptcies has been contained, the number of insolvency proceedings opened increased in the first quarter of 2022 and gradually returned to pre-crisis levels, although much lower than those of 2019 and 2018.

To face the resumption of a more sustained rate of insolvencies, Ravet & Associés has developed a recognised expertise in restructuring to assist distressed businesses.

The firm acts both in the context of pre-insolvency proceedings in order to resolve businesses difficulties and in insolvency proceedings, which allow the judicial treatment of these difficulties under the aegis of the court, by assisting and advising debtors.

Ravet & Associés is also building a new service for company directors who are experiencing difficulties in repaying their "PGE".

The firm offers to assist them by setting up a pre-insolvency proceeding, "la conciliation", which will allow them to restructure their PGE and therefore to facilitate its repayment through amicable negotiations with the bank.

QUESTION TWO

Why is Chapter 11 an attractive restructuring tool for international companies and your clients?

French law offers numerous tools for dealing with difficulties encountered by a company.

These solutions are set out in the "Livre VI" of the French Commercial Code named « DIFFICULTIES FACED BY BUSINESSES », which offers two main categories of procedures:

Amicable procedures: the ad hoc mandate and conciliation proceedings. They intervene upstream, at the beginning of the difficulties encountered by a company, in order to avoid bankruptcy as much as possible.

Their aim: finding an agreement on a confidential basis with the main creditors to resolve the difficulties, without involving all the creditors of the company, through the appointment of a



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Admitted to the Paris Bar in 1989, Yves-Marie Ravet has a passion for entrepreneurial adventure and a keen sense of negotiation. He founded his firm in 1991 and has more than 30 years of experience working with companies and their managers.

More recently Yves-Marie founded "Fiduciaire de l'Orangerie" in 2017, a special expertise of Ravet & Associés.

He assists managers at all stages of the company's life and advises and litigates in corporate law, contract law, civil, banking and commercial litigation, as

well as in more complex external growth operations (mergers and acquisitions, joint ventures) or restructurings. He acts in all aspects of insolvency proceedings, management of relations with creditors and debt restructuring.

Since 1991, Ravet & Associés has been assisting a number of businesses, French, foreign banks and organisations, both private and institutional, as well as private individuals, managers, shareholders and entrepreneurs, in France and abroad. The firm has recognised expertise and skills, both as counsel and in litigation, in the key areas of business law: financing, structuring and restructuring of activity, assets and debts, in and out of bankruptcy proceedings, mergers/acquisitions, contract law and criminal business law.

Ravet & Associés has extensive knowledge of the banking and finance sectors. The firm has acquired skills at the forefront of legal and financial innovation: digitalisation and automation of legal activities (LegalTech). It supports institutional clients in their compliance efforts in conjunction with the regulatory authorities.

mediator by the President of the Court.

They have the advantage of confidentiality, flexibility, and consensual negotiation with the creditors.

Collective proceedings: these are procedures allowing the judicial treatment of difficulties met by a company which involve the referral to the court and the appointment of professionals to support the company and monitor the procedure.

They are not confidential and are much more restrictive for the debtor and its creditors.

- **Safeguard proceedings:** benefits companies facing difficulties that they are unable to overcome alone. The company director is not relieved, and the objective is to draw up a plan to safeguard its business
- **Receivership proceedings:** benefits a business that can no longer pay its accrued liabilities with its quick assets (a state of cessation of payments). The manager of the business can be relieved from office and the objective is to draw up a continuation plan or the assignment plan of the business
- **Liquidation proceedings:** benefits companies in a state

of cessation of payments and whose recovery is clearly impossible. The company's manager is relinquished. The aim is to liquidate the company's assets. The business may also be subject to an assignment plan.

QUESTION THREE

What are the trends and opportunities regarding distressed businesses in your jurisdiction? What advice are you giving clients to take advantage of the distressed environment?

As mentioned above, business insolvencies in the first quarter of 2022 have increased by almost 35% compared to the first quarter of 2021.

Between January 1st and March 31, 2022, 9,972 insolvency proceedings were opened in France, including 7,564 liquidation

TOP TIPS

On restructuring processes for distressed companies – and the potential opportunities for businesses

- ✓ **For distressed businesses:**
 - Anticipate difficulties: do not hesitate to seek the benefit of a pre-insolvency proceeding and do not delay restructuring
 - Surround yourself with legal and accounting professionals for support
 - Regarding the Covid-19 crisis and the new and recent context of the Ukrainian conflict, know how to be agile in the functioning of your company and do not hesitate to question your economic model.

- ✓ **For potential buyers of distressed businesses:**
 - Be aware of the specific context of business takeovers before the court: become familiar with the particular environment of distressed businesses
 - Be reactive
 - Be attentive to the determination of the appropriate price for the takeover of the company
 - Be accompanied by legal and accounting professionals to understand the scope of the takeover project, to structure the financial and legal arrangements to be put in place and to negotiate with the various parties involved.

proceedings. The sectors most affected were trade, restoration, and personal services.

This increase in insolvencies, and particularly liquidation proceedings, is explained by the end of the numerous state aids and the start of repayment of the "PGE".

The Ukrainian conflict is also impacting the cash flow of companies. The rise in the price of raw materials and energy, supply difficulties and inflation greatly amplify the risk of insolvencies for businesses already weakened by the covid crisis.

Nevertheless, the French government has recently set up a new "PGE" which aims to support companies economically affected by the war in Ukraine.

On the debtors' side, the watchword is therefore anticipation. The earlier the company's difficulties are dealt with, the more likely its business will continue.

Business managers are therefore strongly advised not to hesitate to place themselves under the protection of amicable proceedings, whether it is under an ad hoc mandate or a conciliation proceeding, as soon as difficulties arise or when they are only foreseeable. Businesses will thus benefit from the ideal framework for renegotiating their debts, and in particular for rescheduling their "PGE".

QUESTION ONE

With a recent spike in insolvencies across the globe, do you believe the numbers of distressed companies will increase in the coming year? How will your firm be assisting?

In 2021, global insolvencies were still declining (- 6 percent) (In Germany it was - 5 percent (= 15,000 cases)). However, the expected average loss amount of insolvent German companies more than doubled in the first half of the year compared to the same period last year. And another piece of bad news: For 2022, an increase of +9 percent is expected for Germany.

In 2022, global insolvencies are expected to slowly rise again – albeit still coming from a very low level due to the extensive state support measures.

The government support measures have achieved their goal of preventing as many insolvencies as possible. In Western Europe, the measures have prevented every second bankruptcy, in the US every third. There are still no signs of a trend reversal for 2021. The extension of numerous programmes had kept insolvencies at a low level in 2021. What happens next depends largely on how governments act in the coming months. Global insolvency activity is not expected to gradually return to normal until 2023.

For Germany, a slight increase is expected again for the first time in 2022.

Compared to the rest of the world, Germany is still in a good position: in 2021, a further decline of 5 percent in insolvencies to around 15,000 cases is expected: Similar numbers of cases last occurred in 1992 (10,920) and 1993 (15,582). Before the pandemic, there were 18,749 cases in 2019; in 2020, these then fell by 16 per cent to 15,840 cases in the wake of government aid programmes. However, this is not an all-clear for German companies, as the expected average losses per insolvency for the affected companies had doubled, from an average of EUR 1.8 million in 2020 to EUR 4.3 million in 2021.

QUESTION TWO

Why is Chapter 11 an attractive restructuring tool for international companies and your clients?

The German Chapter 11 is called "Insolvenzplanverfahren" (insolvency plan procedures). This insolvency plan procedure enables companies to reorganise themselves in insolvency. The insolvency plan represents a settlement that must be approved by the majority of creditors.

The plan procedure pursues the goal of restoring the company's earning power, preserving jobs and avoiding the closure of the company.

In insolvency proceedings, creditors often receive a higher payout quota, which is usually paid out within a few months of the opening of proceedings. In standard insolvency, the payout often only takes place after years.

In insolvency proceedings, the debtor has the opportunity to remain the owner of the company and thus preserve his professional or economic future.

In order to carry out insolvency plan proceedings, a number of points must first be examined, e.g. whether the company has a chance on the economic market, i.e. how worthy the company is of restructuring. Can lasting profitability be created by changing costs and do the creditors have an interest in the



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Urs Breitsprecher is the captain of Reef's colourful crew. A specialist in commercial, corporate and tax law, he embarked on a legal career through his interest in economic interactions between law and business and a strong sense of justice. Urs has a Diploma in European Law, a Bachelor of Law from University College London and certification as an M&A Advisor round off his wide-ranging international qualifications and make him the ideal advisor and guide for companies worldwide.

With some two decades of experience in handling complex M&A transactions and his dual qualification as a German lawyer and English solicitor, he specialises in cross-border business activities. He also has extensive expertise in corporate and group restructurings and the resulting tax consequences, as well as insolvency matters and contract drafting. His numerous qualifications and years

of experience make Urs a confident and assertive negotiator who is a pleasure to have on one's side.

restructuring of the company. Furthermore, it must be ensured that there are sufficient financial resources to cover the costs of the proceedings and court costs, but also enough financial resources to be able to make the creditors an offer that at least corresponds to the quota payment of regular insolvency proceedings.

The advantage of an insolvency plan procedure is that the ailing company achieves a debt cut, but also receives other insolvency law tools, such as an easement to terminate continuing obligations (all continuing obligations can be terminated after the opening of insolvency with a notice period of 3 months. This makes it easier to restructure subsidiaries so that not too much money has to be invested in the ailing company.

of experience make Urs a confident and assertive negotiator who is a pleasure to have on one's side.

Reef is an association of independent advisors in business law and taxation. Like a real Reef, we also offer a diverse as well as sustainable living or working space for different types of advisors, but all of them have one thing in common: they strive for transparency, innovation and the highest quality to find the best individual solution for the client.

With Reef – Rechtsanwälte, Law Tax & Legal – we represent a new concept in legal practice and are committed to providing comprehensive legal advice at the highest level, so that our clients achieve their goals without worries and on a direct course. Values such as honesty, integrity and team spirit are particularly important to us.

The home port of our team of business lawyers is Düsseldorf. We are highly qualified, experienced and motivated – the perfect crew to help you succeed while maintaining high standards of professional and social responsibility. We combine our extensive experience from handling numerous demanding national and international mandates with a relaxed, client-oriented and value-driven atmosphere in a modern boutique practice.

QUESTION THREE

What are the trends and opportunities regarding distressed businesses in your jurisdiction? What advice are you giving clients to take advantage of the distressed environment?

The takeover of a company in crisis offers up great opportunities for competitors and investors alike. However, such a distressed M&A transaction entails considerable risks: financing and legal structuring are complex, due diligence for companies in crisis is time-consuming. At the same time, it offers the opportunity of a quick and attractively priced market entry in Germany, as well as internationally.

Companies in financial difficulties can avoid various

TOP TIPS

On restructuring processes for distressed companies – and the potential opportunities for businesses

- ✔ It is imperative to have the figures very up-to-date and to have good liquidity planning.
- ✔ Do your homework and be prepared. Have a good bad debt management to provide you with sufficient liquidity
- ✔ Take specialised advisors. In a crisis there are many pitfalls and it's easy to become personally liable.
- ✔ The seller may be liable to the buyer; if the seller is not revelling all circumstances of the crisis without request of the buyer (OLG München, judgement 03.12.2020 – 23 U 5742/19).
- ✔ On the buy-side, it's even more important to have specialised advisors, to make sure you get what you want and know what you get.

disadvantages through distressed M&A. On the sales side, there is an opportunity to avoid bankruptcies, dissolutions and damage to the company's image, as well as to preserve jobs. Such transactions can also create a solid basis for strategic realignments or far-reaching restructuring measures. The latter can be a benefit for both sides. Target companies are more willing to tackle changes due to the difficult situation and a better understanding of their necessity.

On the buying side, the opportunities are monetary and strategic. Buyers benefit from lower prices, quick access to a new market, first-time entry into a new segment or inorganic growth. Companies with liquid assets and a strong balance sheet can buy competitors out of the market. Sometimes companies are only up for sale because of the crisis.

Another way out of the crisis can be the participation of a new shareholder. This can be done, for example, by way of a capital increase through the issue of new shares (§§ 55 ff. GmbHG) or through the sale of existing shares for a small (symbolic) purchase price and the simultaneous obligation of the investor to make additional payments into the company's capital reserve (§ 272 (2) no. 4 HGB). In addition, limited repurchase or call options can be agreed to allow more flexibility for both parties, especially in the "adjustment phase". Even if the (old) shareholders thus give up part of their profit and control rights, this may be a fair price for averting the threat of insolvency and over-indebtedness and thus the insolvency of the company. The preservation of the company's reputation and customer base as well as the increase in creditworthiness for further bank financing leave the former shareholders in a better position in spite of dilution than in the case of the - otherwise often unavoidable - alternative of liquidation.

So a crisis is always a chance for the target and the buyer/ investor.

QUESTION ONE

With a recent spike in insolvencies across the globe, do you believe the numbers of distressed companies will increase in the coming year? How will your firm be assisting?

The number of distressed companies will increase as consumer behaviours and psychologies change, leading to an evolution of market compositions and driving out businesses that fail to adapt to new platforms. Rising inflation and interest rates will also increase costs for businesses that are heavily in debt, making them even more vulnerable.

Industries such as travel, leisure and hospitality have been hit particularly hard by Covid-19. Although some have been supported by governments, others have been considered too small to be noticed. Many of those have already ceased operations while many more are on the brink. Even those that have received support may experience difficulties as support is withdrawn.

It will take time for surviving businesses to regain their momentum. For those with viable business models, it's unlikely that shareholders, banks and governments will easily give up on them. We anticipate the weaker players will be forced out of the market, fuelling the growth of the remaining players. They too will need to undergo significant changes to adapt and thrive in the new economic environment.

Struggling companies should quickly turn to professional advisers for help. Rapid intervention may turnaround the business. Even those in a stronger position will benefit from independent, professional advice on how to restructure and improve their business in the new era. For creditors, paying close attention to debtor risk profiles is important. Where signs of distress appear, creditors should proactively seek assistance from professional advisers and not hope that the debtor will address the issue themselves.

Perun Consultants specialises in helping turnaround distressed companies and finding strategic partners and investors to support them. We assist lenders to maximise recoveries of distressed loans by acting as receivers or as liquidators to deal with an orderly wind down of distressed businesses and distribute the realised assets.

QUESTION TWO

Why is Chapter 11 an attractive restructuring tool for international companies and your clients?

Hong Kong doesn't have a tailor-made statutory corporate rescue mechanism. The only solution to bind dissenting creditors is a scheme of arrangement (SoA). A company, with assistance from its advisers, prepares and presents a turnaround plan to its creditors. If that plan is approved by each class of voting creditors and is sanctioned by the court, the restructuring via an SoA can be implemented.

However, the SoA mechanism doesn't provide a moratorium leading up to the implementation of the scheme. Given that the process takes at least several months, the company is exposed to the risk of individual creditor actions.

The usual solution to the moratorium problem is to conduct a corporate rescue within a provisional liquidation (PL). A PL creates a moratorium as actions against the company can't be commenced or continued without leave of the court. Unfortunately, the Hong Kong Court of Appeal has ruled that a PL can't be



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Gwynn Hopkins, managing director of Perun Consultants, has worked as an insolvency practitioner and forensic accountant on a range of local and cross-border engagements.

He has a proven track record in the liquidation and restructuring of international financial services companies, particularly those involving complex litigation or with contentious matters to resolve. Having led teams for many years as a partner in the Caribbean and Hong Kong, Gwynn has a thorough understanding of both the onshore and offshore aspects of appointments.

In addition, Gwynn has extensive experience in forensic accounting assignments including asset-tracing and recovery engagements, due diligence investigations, and the preparation of loss of profits and asset valuation reports. Gwynn also takes roles such as acting as a consultant or an appointed independent director or trustee to assist distressed entities.

Gwynn has been recognised by Who's Who Legal: Consulting Experts in



both forensic accounting and quantum of damages, where he is described as having "a mind like a steel trap according to respondents, who have the utmost confidence in his views on valuation issues and methodologies".

Perun Consultants is a boutique firm with offices in Hong Kong and Singapore specialising in providing high quality services in forensic accounting, corporate advisory, restructuring, turnaround and liquidation appointments.

Our team has extensive experience in managing hundreds of turnaround, restructuring, insolvency and distressed debt appointments of all types and sizes, with case work undertaken throughout the world, and we can deploy teams on short notice to deliver high-quality outcomes. We have experienced professionals on hand who specialise in working with stakeholders to provide practical corporate restructuring advice.

We undertake valuations of businesses and asset tracing and recovery engagements. Our professionals are frequently appointed as independent forensic accounting experts to provide evidence on valuations, quantum of loss or damage, and reconstruction of accounting records and underlying transactions. Drawing on our team's extensive managerial experience, we provide directorship and interim management services, including in contentious circumstances, and our performance improvement offering helps businesses improve the efficiency and effectiveness of key business operations.

QUESTION THREE

What are the trends and opportunities regarding distressed businesses in your jurisdiction? What advice are you giving clients to take advantage of the distressed environment?

We're finding that the current climate is opening up new opportunities, such as mergers with, or the acquisition of, competitors, as well as investing into new business lines. Another opportunity arising from distressed businesses is the chance to buy assets at discounted prices: hotels and

TOP TIPS

On restructuring processes for distressed companies – and the potential opportunities for businesses

Tips on the restructuring processes:

- ✔ Engage an independent financial advisor to review and determine the feasibility of business plans and restructuring proposals and assist with their execution to turnaround the businesses.
- ✔ Lenders should be proactive in taking steps to protect their position when dealing with distressed companies. This can help maximise recovery.
- ✔ Distressed businesses should proactively seek assistance. Doing this at an early stage before missing debt repayments will significantly improve the prospects of rescuing the business including obtaining creditors' support.

Tips for investors:

- ✔ Set clear objectives, internal rate of return and budgets.
- ✔ Create a list of the desired assets and/or shortlist the distressed businesses with valuable, ready-for-sale assets. For example: properties, machinery, and land.
- ✔ Reach out to the distressed assets market via professional firms specialising in insolvency or specialist investment funds.
- ✔ Engage professional advisers to conduct due diligence on targets.

commercial properties are of particular interest at the moment. And we're also seeing more forward and backward integration that is streamlining logistics chains.

But whether buying or investing, a thorough due diligence process by experienced professionals is essential. This helps to identify aspects of the asset not readily apparent and serves to provide valuable insights to assist in pre-acquisition negotiations and safeguard the buyer or investor's interests post-acquisition.

We expect that sectors that could be of interest to distressed investors are those which are capital intensive/asset heavy or require high level of liquidity to fund working capital requirements, such as infrastructure, energy and resources, and manufacturing/distribution businesses (due to supply chain disruptions).

Clients are also looking to increase their lifelines by tapping into alternative debt sources, which increases opportunities for specialised distressed investment funds to curate debt packages that could be more appealing compared to the larger players.

¹ It is outside the scope and space of this article to address this in more detail.

QUESTION ONE

With a recent spike in insolvencies across the globe, do you believe the numbers of distressed companies will increase in the coming year? How will your firm be assisting?

The reasons for the recent spike in insolvencies across the globe can be attributed mainly to force majeure factors in addition to the disruption being caused by the new economic models and the geo-political factors. The most obvious reasons are mentioned below:

Covid-19 and its aftermath: Covid caught the world unaware and is a perfect example of force majeure, where no one seems to be at fault, but everyone seems to be struggling. It had a domino effect, and the impact has been seen across jurisdictions. While Covid relief by the government has not contributed much to the distressed companies, still the insolvencies and legal relief against distressed companies was held back for more than a year. At present, the Indian law is following the process as has been defined without any exceptions related to Covid-19 and it is business as usual. A specific provision though debars initiating insolvencies due to covid related defaults but the pain in the system has been running deeper much prior.

The ending of government subsidies for businesses: Countries like India had a tough call to take, as direct relief to Indian companies in terms of cash transfer or direct subsidies was not available. Still India is on a new growth spiral and many new subsidies are available now and the demand from the consumer base will continue to grow. Our firm has a specialized subsidy practice for various schemes on the federal as well as state level and we intend serving our clients accordingly.

The rise of inflation and interest rates: Reserve Bank of India (RBI) in India has been forced to raise the Repo rates to tame inflation and squeeze some liquidity from the system. We expect at least 3-4 such tightening cycles that would raise the cost of funds to grow in India and it should make overseas borrowings more attractive to distressed companies in the short & medium term.

QUESTION TWO

Why is Chapter 11 an attractive restructuring tool for international companies and your clients?

Chapter 11 is a process that belongs to the US system of law. Indian law does not have a specific provision that directly corresponds to Chapter 11, but the peculiar feature of Indian Insolvency law is that a Corporate Insolvency Resolution process (CIRP) necessarily precedes the Liquidation of a company, and a Resolution Professional is appointed at the beginning to explore all possible options of a Resolution of the distressed asset.

Here, Indian law empowers the Resolution professional to take the operations/company over and all powers of the board vests in the hands of such Resolution Professionals who operate under the supervision of the creditors (primarily the financial creditors, called Committee of Creditors) and is ideally given 180 days (extendable to 270/330 days) to explore the resolution through interactions with the potential Resolution Applicants (the suitors/investors) throwing opportunities for takeovers with a clean slate devoid of any baggage.



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Gautam Khurana is an advocate licensed to practice in India for more than 25 years and registered with the Bar Council of India. He is the founder and managing partner of India Law Offices & has worked extensively in cross-border work with clients and advisors from over 60 countries worldwide. He has been active in corporate law, cross-border trade, insolvency and bankruptcy & dispute resolution, and helping companies grow internationally over the last 15 years. He brings a wealth of information and experience of working in major markets such as India, over 20 countries in the EU, USA, China, Iran and other central Asian countries.

He has worked with companies wishing to enter the Indian market on one hand and Indian companies that wish to enter international markets. The services cover the entire lifecycle of a business starting from incorporation to assistance with fund raising, finding JV partners to liquidation, and continues to help make acquisitions or divestments of businesses. He is currently on the board of Warwick Legal Network as well as many Indian and International corporates. He is also a member on the Delhi Council of Confederation of Indian Industry & the Federation of Indian Chambers of Commerce & Industry.

Sanjeev Ahuja, Senior Partner at India Law Offices, is a hard-core strategist at heart, endorsed further by his exposure and experience spanning more than 25 years across industries including Consulting, Infrastructure, FMCG, Automobiles and Textiles.

Sanjeev's focus has been on Corporate Insolvency Strategy, Bankruptcy, Mediation and Arbitration, Public Advocacy, Joint Ventures, Mergers & Acquisitions, Corporate Restructuring, and related litigation. Through his career, Sanjeev has been associated with some big organizations including Suzuki Maruti, Apollo Tyres, Ernst & Young, Arvind Mills to name a few. He has been involved with successful resolutions under IBC of corporate debtors in infrastructure, waste management as well as automotive space, including some without any haircut for the lenders. He has also been associated with Chase India – a Public Advocacy Firm having advised companies like BMW, Coca Cola and Bla Bla Car on Public Advocacy and Strategic Issues with the Government of India.

Sanjeev has worked extensively with start-ups and SMEs to advise them on revival, growth and relationship management. Sanjeev has also been involved in debt resolution and recovery of some Government organizations like STC and PEC as an Independent Member having been appointed by the Ministry of Commerce.

India Law Offices LLP (ILO) is full service 60-member strong law firm headquartered in New Delhi, with other service offices at Mumbai, Bangalore, Chennai, Hyderabad & Goa. The firm's strategy and vision has been to bring the highest level of legal service to Indian clients. We specialize in Corporate & Commercial Law, Dispute Resolution, M&A, Tax, Immigration, Inheritance matters & Private Client practice. Further we have built up a powerful Insolvency & Bankruptcy practice, Mediation, Environment Law & Real Estate practice in past few years. We provide legal services in more than 70 cities in India and 134+ countries worldwide.

ILO has made a mark in assisting clients both in India and outside the country to set up and sustain business in India in the least troublesome and seamless manner. Our team has given exemplary service to our clients and that shows in the repertoire of testimonials and trust that has been given by our clients to the ILO team. The firm has been recognized by many leading law rating institutions all over the world including FORBES India, World Bank, IFLR 1000, India Business Law Journal & Asialaw.

Our law firm has been advising various stakeholders in such insolvency processes and these include bankers, other lenders, promoters and customers and vendors of the distressed company itself. We also interact with the Resolution Professionals and support them in their resolution attempt.

Though the law (IBC 2016) remains a work in progress, the stakeholders are kept aware of the application of the current provisions for their benefit including suggestions for a quicker exit from unsustainable business operations or just to cut the dead weight, whether it is through a normal Liquidation or a Voluntary Liquidation process.

QUESTION THREE

What are the trends and opportunities regarding distressed businesses in your jurisdiction? What advice are you giving clients to take advantage of the distressed environment?

Our firm is in the fore front of advocacy for a large section of SME/MSME and assist them through a due diligence of their financials and their business models to keep them relevant in the dynamic environment.

The rise in cross border M&As: 1.3 billion consumer base and a 3 trillion economy are ripe for action in the corporate world. IBC and Covid together is churning out the options by the day. The domino effect of defaults by big companies leading to bankruptcies in the smaller segment has caught many unaware, but has thrown options for M&As. Many target companies with operations are stuck due to the paucity of funds but with good underlying assets someone sitting on cash is spoilt for choice. Aggregators can have a field day.

Funds buying assets: Assets have been picked up by many funds in the interim and aggregation is the name of the game for now, where these assets would be turned around with the changing times.

Companies selling assets to survive: Many non-core assets are being put on the block. Goodwill is being encashed and cash burns are being avoided. The mindset and the relationships in the credit industry is already seeing a paradigm shift when debtors in possession have given way to creditors.

Guidance and assistance on the IBC law by our firm has been valuable for clients and has included:

- How to apply the law to one's advantage by seeking a moratorium against adverse legal proceedings,
- Seeking a Pre-Pack arrangements for debt restructuring as provided in law,
- Seeking haircuts to get rid of unsustainable debt and getting approved the new resolution plans from the lenders under the CIRP as provided in IBC.

QUESTION ONE

With a recent spike in insolvencies across the globe, do you believe the numbers of distressed companies will increase in the coming year? How will your firm be assisting?

The emergency caused by Covid-19 has caused an economic crisis that has overwhelmed companies, which face the suspension of activities, with a consequent paralysis of all economic movements. Only a small number of companies managed to seize new opportunities deriving from the conversion of plants for the production of "essential" products (personal protective equipment) or from the adoption of new business initiatives and/or to benefit from operating in sectors on which Covid-19 did not produce significant impacts.

The number of companies in difficulty could still increase in the year ahead, with the cutting of state subsidies and specific economic measures, given the temperament of the restrictive measures previously adopted, and without prejudice to the obligations to which companies are bound regarding a fiscal profile.

It is clear that this is already leading to an increase in inflation (especially as regards the raw materials sector) and interest rates.

In consideration of this, the best advice that can be given to a company today in order to implement the profitability of its business are the following:

- Ability to innovate: evolve its offer on the market and coherently adapt its operating model;
- Geographic expansion: look at foreign markets to grow and diversify
- Strengthening of equity: if company liquidity allows businesses to support themselves to manage the operational and upcoming cash needs, a primary instrument to help will be offering equity.
- To make this objective concrete companies will certainly have to focus on reducing their exposure to third parties, with debt consolidation and implementation of capitalization strategies, also through extraordinary corporate transactions and more structural interventions (e.g. strategic alliances, M&A).

QUESTION TWO

Why is Chapter 11 an attractive restructuring tool for international companies and your clients?

Chapter 11 of the US Bankruptcy Code is a method of resolving the corporate crisis that provides for a corporate reorganization plan in which the creditors are to be satisfied and at the same time to keep the business activities without the bankruptcy envisaged by the Chapter 7.

During the procedure, the debtors retain possession of the assets and at the same time the creditors cannot attack them. The procedure provides for a plan to be presented to satisfy the creditors, even partially, or to divide the creditors into classes.

The proposed plan will then have to be approved by the majority of creditors and also approved by the court, which will assess even if no rules have been violated and that the debtor has maintained good faith and in case of opposition it will have to be assessed whether the proposed plan for the creditors would be satisfied.

Chapter 11 is used under different names all over the world. In Italy, for example, it is called the "arrangement with creditors"



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Alessio Masala is a qualified lawyer and member of the Bar Association of Rome and has practiced both criminal and insolvency law.

In 2019, he co-founded FIAP, the Italian Heavy Athletics Federation of which he is currently President and for which he oversees relations with the highest Italian sports bodies. In 2020, he became DPO (Data Protection Officer) with the passing of the enabling Eipass exam and since then he has been managing relations with the Privacy Guarantor for SMEs.

Alberto has been a member of the Bar Association of Messina since 2014.

Having always been involved in civil law and contracts, with particular interest in commercial and corporate law at big law firms in the sector, in 2015 he attended the Master in Corporate Law and the Master Course in Intellectual Property Law,

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Competition and Communications at the Luiss Guido Carli University in Rome.

Alberto has experience in commercial law, in an extrajudicial context, dealing with the drafting and review of contracts, and in a judicial context (so-called litigation), dealing with the drafting of court documents and managing litigation.

We use our knowledge and experience to provide practical legal assistance and open, accessible support our clients rely on for their businesses' success.

We specialize in corporate and commercial law and we have been working at an international level for more than 20 years. We defend the interests of our clients at each stage of a company's life cycle – from setting-up to expansion abroad – through focused and dedicated legal advice.

Our corporate law professionals include specialists in joint ventures and mergers and acquisitions who manage transactions around the world. We also execute reliable due diligence reviews as well as manage regulatory and compliance matters for our M&A clients, ensuring deals close in a timely manner with our clients' interests always secured.

If you want to do business abroad, you need more than just a good knowledge of the market. You need to know the legislation in the country of destination to protect your investments and avoid mistakes that could derail the entire operation.

This is why we have chosen to join IR Global. This membership enables us to offer a high-quality service at a lower cost compared to traditional law firms.

and in France similar procedures have been established with the "Redressement Judiciaire".

In all cases, the goal is always to keep the business active and allow the entrepreneur to give value to their assets and satisfy creditors without falling into liquidation

How then to improve the efficiency and value of corporate assets to achieve better creditors' satisfaction?

Through an evaluation of these 3 points:

- Preparation of quality and performance standards;
- Analysis of assets and their functioning;
- Identification of weak assets and correction or elimination of the same.

For example, this system will be particularly useful in IT

companies in which the functioning of the machines will be analyzed in search of the less performing ones to start a modernization process that increases their value in case of sale.

QUESTION THREE

What are the trends and opportunities regarding distressed businesses in your jurisdiction? What advice are you giving clients to take advantage of the distressed environment?

In Italy, the greatest opportunity for companies in crisis is to

TOP TIPS

On restructuring processes for distressed companies – and the potential opportunities for businesses

- ✓ Ability to innovate: evolve its offer on the market and coherently adapt its operating model;
- ✓ Geographic expansion: aiming at foreign markets to grow and diversify;
- ✓ Strengthening of the equity component: if the company liquidity allows companies to support themselves to manage the operational and upcoming cash needs, it is evident that the primary instrument can only be the equity component;
- ✓ Digitization and investment in technological supports;
- ✓ Customer analysis to understand the reasons for their purchase;
- ✓ Updating and streamlining of the sales process aimed at: reduce the average time of each negotiation; anticipate all objections; stand out from the competition; cross-sell or up-sell; favor the loyalty process; stimulate word of mouth.

exploit the resolutions contained in the code of the business crisis. This provides for the possibility of contacting the OCC (organizations for the settlement of the business crisis), which recognizes certain types of entrepreneurs, the possibility of liquidating the debtor's assets and of selling the assets and ceasing the business activity. It also recognizes the use of the minor agreement through which the entrepreneurial activity does not cease despite the sales of assets, along with a debt restructuring plan in which the intervention of the OCC and the court is required.

The current distressed business climate delivers some fundamental lessons: the need for international coordination for the definition and implementation of measures to combat the crisis is undoubtedly clear. International collaboration is also essential to mitigate the risks deriving from geopolitical tensions at a global level, accentuated by the Covid-19 crisis, the UK's exit from the EU and the current conflict in Ukraine.

In this sense, the company mergers and incorporations will be significant. It must be clear to entrepreneurs that "palliative" interventions (non-repayable contributions or subsidized finance) are not the solution to ensure the solidity of the company in the "new normal" post Covid-19 era.

It will be necessary to acknowledge that, especially for small and medium-sized enterprises, capital strengthening will be necessary through structural interventions. This can take place, if not through capital increases, then with aggregation actions that allow you to enhance your corporate interest, transforming it into a shareholding in companies larger in size.

QUESTION ONE

With a recent spike in insolvencies across the globe, do you believe the numbers of distressed companies will increase in the coming year? How will your firm be assisting?

We are still weighing the economic impact of the Covid-19 pandemic. Lockdowns are over, but the economy was heavily damaged. With no government subsidies at all and the inflation rates skyrocketing, a wave of insolvencies is now expected.

Luckily, since March 2022 Mexico has two specialist bankruptcy courts nationwide. Having bankruptcy courts means a better performance in handling bankruptcy cases.

“Mexico has adopted the UNCITRAL Model Law on Cross- Border Insolvency, which facilitates the use of Chapter 11 as a tool that crosses jurisdictions.”

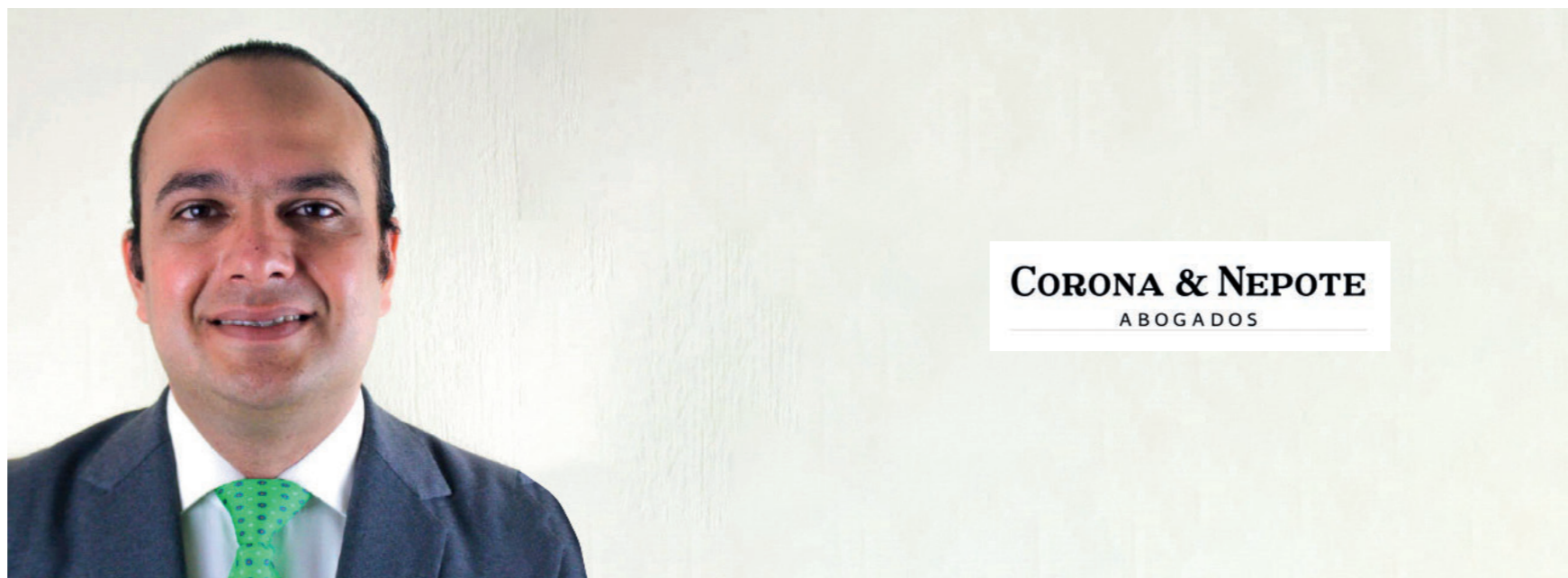
QUESTION TWO

Why is Chapter 11 an attractive restructuring tool for international companies and your clients?

We recommend our clients always try to avoid bankruptcy. However, when there is no other alternative, a reorganization through bankruptcy (Chapter 11) has several benefits for the debtor. First and foremost, the debtor remains in possession and is “business as usual.” Executions stay, interest is suspended (except for secured creditors), and broad liberty is given to the debtor to negotiate the reorganisation plan with its creditors.

Mexico has adopted the UNCITRAL Model Law on Cross-Border Insolvency, which facilitates the use of Chapter 11 as a tool that crosses jurisdictions. Since 2000, there have been four cross-border insolvency cases where Mexico has recognized foreign bankruptcy proceedings and successfully coordinated the global reorganisation process.

When the reorganization is not achieved, the liquidation process is also an attractive tool since the law tends to always maximize the value of the assets and favors the firm’s sale as a going concern.



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Born in Guadalajara, Jalisco, Mr Rodriguez-Nepote received a Law Degree from the Universidad Panamericana Campus Guadalajara. He is the founding partner of Corona & Nepote, a law firm located in Mexico City and Guadalajara.

Mr. Rodriguez-Nepote has represented clients in matters of civil, commercial, and Amparo litigation, litigating before Federal and Local Courts since 2005.

His practice has specialized in contentious matters of Bankruptcy, Civil and Commercial Litigation, and Commercial Arbitration.

He is the author of “Recognition and enforcement of a foreign plan of reorganisation in Mexico”, “The reorganization plan under the Bankruptcy Law”, “Bankruptcy Law in Mexico”, and “CROSS-BORDER INSOLVENCY: Recognition of foreign proceeding under the Mexican Bankruptcy Law”, available free for download at <https://works.bepress.com/francisco-rodriqueznepote/>

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CORONA & NEPOTE
 ABOGADOS

Corona & Nepote is a law firm specializing in civil-commercial litigation, arbitration and bankruptcy.

Among our clients are multinational companies, financial institutions, family offices, local companies and individuals.

We work together with other national and international law firms whose clients need a solution in cases of our expertise.

Corona & Nepote Abogados is appointed the exclusive IR Global member for Insolvency in Mexico. IR Global is a multi-disciplinary professional services network that provides legal, accountancy, and financial advice to companies and individuals around the world.

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TOP TIPS

On restructuring processes for distressed companies – and the potential opportunities for businesses

- ✓ An out-of-bankruptcy workout is always the first choice for debtors and creditors.
- ✓ Having your corporate and accounting records in place is always a step in the right direction to achieve a successful closure in a bankruptcy proceeding.
- ✓ Getting to yes: always be open to change and the creditors’ recommendations to get the vote to approve the reorganisation plan.
- ✓ Make a dream team: get your accountants and financial advisors together with your lawyer to work together and draft a feasible and approvable reorganization plan.

QUESTION THREE

What are the trends and opportunities regarding distressed businesses in your jurisdiction? What advice are you giving clients to take advantage of the distressed environment?

Distressed companies met with a barrier for getting financing and fresh cash to continue their operations. However, a Debtor-in-Possession (DIP) financing is a useful tool to permit a debtor to get fresh cash and a creditor to lend money at a substantial interest rate, prioritizing ahead of other creditors.

The Insolvency Institute (IFECOM) has a link on its web page where debtors’ bankrupt assets are listed to get the best purchaser at very competitive prices.

Finally, the 2014 amendment of the Bankruptcy Law permits debtors to sell assets that are not linked with the firm’s operation, letting them survive a distress situation.

QUESTION ONE

With a recent spike in insolvencies across the globe, do you believe the numbers of distressed companies will increase in the coming year? How will your firm be assisting?

Evidently, businesses have suffered unavoidable setbacks post-Covid. This is reinforced by the loss of key personnel, inflation, exchange rates and the continuous hike in overhead costs of running a company. Concomitantly, there is likely to be a surge in the number of distressed companies across the globe and Nigeria in particular, as the indexes depict an enabling environment for the spike to thrive.

Regardless of the difficulties envisaged by the above situation, we are able to assist already distressed companies or likely to be distressed companies to:

- properly channel their resources by providing premium advisory services to guide in any present or anticipated acquisition, merger, takeover, any scheme of arrangement and compromise, or any form of formal or informal buyout;
- provide a working strategy to actualise contractual obligations;
- identify viable business interests and opportunities through our high network of clients and contacts;
- advise on the best strategy, approach, or transactional structure to adopt in the face of any perceived winding up petition or compulsory liquidation of assets that may arise from the inability to pay its debts due to overwhelming circumstances.

QUESTION TWO

Why is Chapter 11 an attractive restructuring tool for international companies and your clients?

Contrary to what is obtainable under Chapter 11 of the United States' Bankruptcy Code, where the Bankruptcy Protection window is open to a debtor company to explore a coordinated global re-organisation of its business while maintaining control of its business operations and guaranteeing access to financing through the capital market without recourse to the prevalent insolvency tools for business restructuring, asset disposal and liquidation, the Bankruptcy Act¹ in Nigeria does not have similar provisions for companies having a liquidity crisis. By virtue of Section 108 of the said Bankruptcy Act, a Receiving Order cannot be made by the Court in a Bankruptcy Proceeding against an association or Company duly registered under the Companies and Allied Matters Act, 2020.²

In practice, therefore, companies seeking to restructure and reorganise are guided by the Insolvency provisions of CAMA 2020 and other sector-based regulations. Unlike the repealed CAMA 2004, which encouraged the liquidation and termination of the life of distressed companies where it is shown by a creditor that the company is unable to pay its debts ranging from #2000, CAMA 2020 is an improvement on the Insolvency Law in Nigeria, and provides for a more sustainable business rescue strategy in line with global best practices by its introduction of the following:

- Appointment of an Administrator to administer the affairs of the Company pursuant to an administrative order of Court which pauses winding up petitions if made by a liquidator of the Company.³



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Ajibola Edwards is a Partner in Adeniji Kazeem & Co where he oversees the Commercial and Government Relations Department of the Firm. Over the years Ajibola Edwards has advised both Nigerian and International clients on projects in construction, technology, and oil and gas including early production systems for extraction of gas and oil, and is currently acting as transaction adviser for a Nigerian Company providing technology services in the UK, as well as a major equipment manufacturer looking at the Nigerian market.

Ajibola Edwards is also a Strategic Advisor to several Nigerian, International and Multinational businesses and is a Fellow of The Institute of Credit Administration.

- Company Voluntary Arrangements: The Company enters a debt repayment arrangement with its creditors by restructuring the payment period of existing credits.⁴
- Increase in the threshold of debts for which a company may be declared insolvent or unable to pay its debts from #2,000 to #200,000.⁵

With these, potentially viable businesses are given a better opportunity to thrive and recover from their temporary ailments and maximise assets.



Adeniji Kazeem & Co. is a leading Law Firm in Nigeria in corporate and commercial law, with offices in Lagos, Abuja. The firm provides a wide range of legal services to government and private bodies alike in several areas of law spanning litigation and dispute resolution, real estate, secured credit contracts and investment structuring, tax and information technology and telecommunication advisory services, amongst other areas.

Adeniji Kazeem & Co. was established in 1996 and comprises 19 Lawyers assisted by several support staff.

We have significant competency in providing legal advisory and support services to financial institutions, asset managers etc. in the areas of secured credit, mortgage creation and asset divestment, due diligence, counseling on compliance matters, litigation, and assisting clients to formulate and implement policy and procedures to ensure compliance with evolving regulations, amongst others.

We are also poised to provide our clients with other specialist services that they may require. Our resources assure that we can synthesise the diversity within our firm and deliver unparalleled value to you. We adhere strictly to the rules of our profession governing conflict of interest and will not accept an engagement where an unacceptable level of conflict might arise.

QUESTION THREE

What are the trends and opportunities regarding distressed businesses in your jurisdiction? What advice are you giving clients to take advantage of the distressed environment?

Cross-border M&As have significantly gained a footing in Nigeria within the last couple of years as a tool for improving the viability of distressed companies with the primary focus being on acquisition. M&As are global corporate restructuring mechanisms geared at maximising profitability. Foreign companies are constantly taking advantage of M&As to partake in Nigeria's rapidly developing economy.

Whilst the primary legislation for M&As in Nigeria remains the Federal Competition and Consumer Protection Act 2019⁶, and the Federal Competition and Consumer Protection

“An example of a successful cross-border merger taking advantage of a distressed Nigerian Company is Mwendo Holdings BV (South Africa)’s acquisition of a Nigerian Company in the Entertainment sector, Blue Lake Ventures Ltd for US\$182 Million.”

Commission Merger Review Guidelines, the CAMA 2020 also serves as secondary legislation being the legal framework guiding companies and their operations in Nigeria. Other relevant legislations are the Investment and Securities Act (2017), the Rules and Regulations of the Securities and Exchange Commission (SEC), the Nigerian Stock Exchange Rulebook, and the Companies Regulations 2021.

A company may explore any of the following restructuring processes in Nigeria:

- Arrangement and Compromise
- Takeover
- Mergers and Acquisitions
- Management Buyout

With the prevalent number of distressed companies, opportunities abound for businesses eyeing distressed companies with the following benefits:

- expansion and diversification
- breaking into the Nigerian market by utilizing existing clientele through M&A
- use of existing business structure and facilities.

An example of a successful cross-border merger taking advantage of a distressed Nigerian Company is Mwendo Holdings BV (South Africa)’s acquisition of a Nigerian Company in the Entertainment sector, Blue Lake Ventures Ltd for US\$182 Million.

Thus, distressed companies should desist from activating the “sell it off” approach and dissipating their assets for a lesser value upon experiencing financial setbacks as the alternatives enumerated above could be employed in pulling them out of their financial quagmire.

¹ Bankruptcy Act Cap B2 LFN 2004

² CAMA 2020

³ Section 443(1) CAMA 2020

⁴ Section 717 CAMA 2020

⁵ Section 572 CAMA 2020

⁶ It established the Federal Competition and Consumer Protection Commission with its oversight and approval functions and the Competition and Consumer Protection Tribunal.

QUESTION ONE

With a recent spike in insolvencies across the globe, do you believe the numbers of distressed companies will increase in the coming year? How will your firm be assisting?

Due to the global economic crisis driven by recession and inflation, it's only to be expected that the number of insolvency cases should increase in the coming years. However, to prevent bankruptcies leading to the permanent liquidation of businesses, governments worldwide should consider granting more public aid to businesses, to provide changes to their restructuring laws to enable debtors a fresh start.

In Poland, the number of bankruptcy cases have dropped because the Polish government introduced in June 2020 the anti-shields regulation during the pandemic. This was a significant relief to enterprises during that time. The effective period of the anti-shields legislation was then extended until the end of November 2021 and then from December 2021, and the main assumptions will be implemented into the Polish restructuring law.

The present rise of inflation/recession could cause a new wave of bankruptcies and this may also result in the depletion of funds from direct public aid for businesses as governments will be overstressed because of a significant bulk of subsidies already provided at the peak of Covid-19.

In Poland, the recent increase of tax burden on economic activities that already occurred at the beginning of 2022 may also increase the number of bankruptcy cases here. Tax increases for businesses was part of a new government programme, the so-called "Polish order", and this regulation may lead to an undue hardship not allowing entities threatened with bankruptcy to come out from financial burden and begin anew. A reconsideration of the terms of this recent regulation of the "Polish order" would be highly appreciated and needed in the light of the current economic crisis.

QUESTION TWO

Why is Chapter 11 an attractive restructuring tool for international companies and your clients?

Chapter 11 of the Bankruptcy Act in the U.S. subject to reorganization proceedings is certainly a very important approach to the problem of the debtors. This approach is in general to postpone the time of the debts and to reduce some of them to levels that make the repayment possible.

This basic concept of restructuring a debtor's finances may be found in other jurisdictions. In Poland, a new restructuring law came into effect in 2016 and is based on the debtor's protection over the protection of the creditor's interests and implemented EU law into the Polish legal system (the so-called "second chance directive").

The new Polish restructuring law also has similarities with reorganisation proceedings under Chapter 11. After the proceedings have been opened, the restructuring plan will be prepared that must provide a means for its execution. In short, the plan will deal with all aspects of the organisation of the debtor, its property and its debts. Some debts will be paid in full, some will be paid partially over an extended period of time and others may not be paid at all. Confirmation of the plan by the court makes it binding on the debtor and creditors and any security holders.



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Dr Robert Lewandowski studied mathematics and German philology at the University of Warsaw (Master of Art) and law at the University of Mainz, Germany. He later joined the list of German lawyers at the Frankfurt am Main Bar Association in Germany and the list of Polish legal advisers at the District Chamber of Legal Advisers in Warsaw. He holds a PhD degree in law from the University in Mainz. For over 20 years, Robert has specialised in corporate law, with a focus on private mergers and acquisitions, cross-border work, general corporate advice and litigation, with experience firstly in legal firms in Germany and then the United Kingdom.

His expertise covers personal data protection and cyber security law and he also works for companies as their data protection officer. He has written more than 100 articles and 15 books and commentaries on Polish and International law published

When it comes to cross-border reconstruction cases involving companies having branches/subsidiaries in many jurisdictions, then it would be important to coordinate the cooperation between the trustees handling the assets and obligations of the debtor in each jurisdiction, and to agree on joint restructuring plan taking into account specific national regulations in an attempt to extricate the debtor's business from its financial difficulties in all jurisdictions and help the business to survive. Working together with all trustees from different jurisdictions and the debtor concerning the administration of global reorganisation proceedings will also be in the interests of the creditors within a global plan. For example, cross-border mergers and consolidations may be proposed to maximise the value of the debtor's assets and enable the debtor to satisfy obligations to creditors to the fullest extent possible.



internationally. He wrote the first ever book on the subject of "Polish Commercial Law: An Introduction" in 2007 in English, with the second edition of this book published in 2019. Robert is currently working on his postdoctoral thesis on the subject of partnership law concerning the acquisition of own ownership interests.

DLP Dr. Lewandowski & Partners (DLP) is an established legal firm in the heart of Warsaw, offering a comprehensive range of services and legal advice fully tailored to our Polish and international clients.

We specialise in helping foreign clients enter the Polish business sector and offer our expertise regarding the setting up of entities, acquisition of enterprises and providing their market valuation, representing clients in commercial litigation cases before Polish state and arbitration courts, and enforcing (cross-border) judgments. Our multilingual staff provides services in Polish, English, German and Russian.

We provided advice for the City of Warsaw for the UEFA EURO 2012 competition, as well as the construction of the National Stadion PGE in Warsaw and Deepwater Container Terminal (DCT) in Gdańsk. DLP is a member of IsFiN with its seat in Brussels (Belgium). This is a platform of emerging markets advisors, which allow DLP to provide its services on a worldwide level. DLP is also a member of DIRO network with its office in Hamburg (Germany).

QUESTION THREE

What are the trends and opportunities regarding distressed businesses in your jurisdiction? What advice are you giving clients to take advantage of the distressed environment?

If the debtor's restructuring involves the sale of the debtor's enterprise then the provision of the Polish bankruptcy law with regard to the so-called "pre-pack" may apply. As a result, the debtor or any of the creditors may apply to the court for an approval of the terms and conditions of the sale of the debtor's enterprise or its organised part to a given buyer.

The motion for the approval of the terms and conditions of the sale shall be accompanied by a proof of the payment of the

TOP TIPS

On restructuring processes for distressed companies – and the potential opportunities for businesses

- ✓ Identify strengths and weaknesses in the present organisational structure of your company.
- ✓ Elaborate a debt restructuring plan and communicate and discuss terms of this plan with your creditors.
- ✓ Implement your company restructure along with necessary adjustments and corrections making your plan successful.

“The present rise of inflation/recession could cause a new wave of bankruptcies and this may also result in the depletion of funds from direct public aid for businesses as governments will be overstressed because of a significant bulk of subsidies already provided at the peak of Covid-19.”

tender guarantee to the amount of one tenth of the offered price and an estimate of the value of the enterprise or its organised part to be established by an independent expert enrolled onto the list of court experts. The court accepts the motion for approval of terms and conditions of the sale if the purchase price is higher than the amount possible to achieve within bankruptcy proceedings, less the costs of the proceedings and other liabilities of the insolvency estate that would have been incurred within such liquidation. To that end, "pre-pack" is a common method to purchase distressed entities in Poland at an attractive price.

QUESTION ONE

With a recent spike in insolvencies across the globe, do you believe the numbers of distressed companies will increase in the coming year? How will your firm be assisting?

The numbers of companies facing distressed situations is likely to increase in the coming year. Government subsidies meant to help businesses over the covid period are ending or have ended. In addition, the moratoriums periods on commencing legal proceedings and winding up companies have also ended.

For companies facing cash flow issues, we assist by working with insolvency/restructuring practitioners to come up with options to turn around the company. We help such companies navigate the court process to achieve a successful restructuring. We assist in obtaining the necessary moratoriums to give the company breathing space, and obtaining the necessary court sanctions for any scheme of arrangement to restructure the company's debts. We also advise on the legal aspects of restructuring strategies to best protect the company as it carries out its restructuring.

For potential investors, we advise on how to protect themselves from the risks associated with purchasing assets from or investing in companies that are in a distressed situation. We also advise investors on how best to protect themselves in any potential restructuring of the distressed target company.

For creditors, we assist in optimising the recovery of bad debts. We assist in the negotiations where a distressed debtor seeks to restructure its debts. We also advise on alternative options such as appointing receivers or judicial managers, or even placing distressed companies in liquidation. We further assist insolvency practitioners in either carrying out judicial managements or liquidations of companies, and the attendant legal applications, including claims that the liquidator may make on behalf of the company against any persons who may be responsible for the company's insolvency.

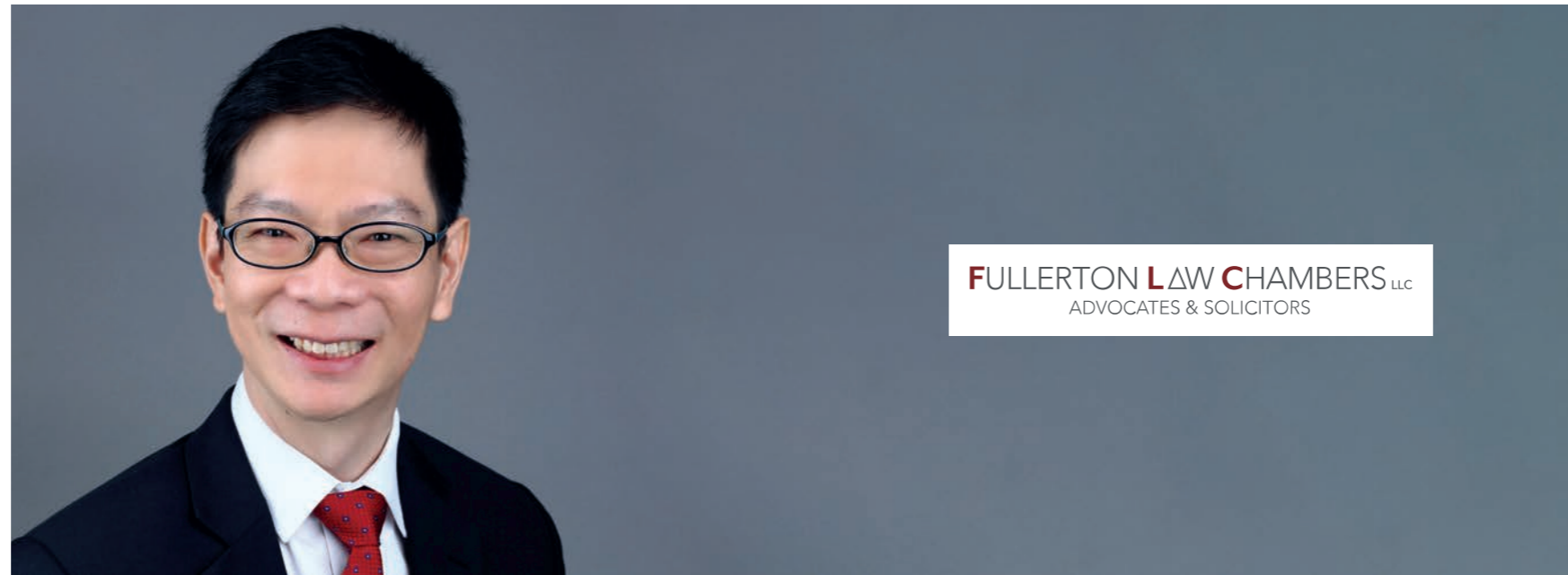
“There has already been a flurry of M&A activity in 2021, and it is expected that as distressed companies sell assets to survive, there will be an uptick in such activity.”

QUESTION TWO

Why is Chapter 11 an attractive restructuring tool for international companies and your clients?

A debtor in possession restructuring such as Chapter 11 allows a company to undergo a global reorganisation process, which allows both the company and its creditors to achieve beneficial outcomes to both sides.

Singapore has a similar regime known as a scheme of



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Wei Chern is a Singapore qualified lawyer with more than 19 years of experience. He specialises in insolvency and restructuring, and commercial and corporate disputes. Most recently, Wei Chern acted for the Judicial Managers of Hyflux Ltd, one of the largest listed companies on the Singapore Stock Exchange. The insolvency of Hyflux Ltd is one of the largest and most complex insolvencies in Singapore to-date.

Wei Chern's practice also covers securities-related and banking litigation. He also advises on employment law and trust matters.

Wei Chern frequently represents clients in the High Court and the Court of

arrangement. The scheme of arrangement is a restructuring that is sanctioned by the Singapore courts, and includes many Chapter 11 elements. For example, a company that intends to restructure its debts using a scheme of arrangement can apply to the Singapore court for an automatic moratorium pending the presentation of the scheme of arrangement to its creditors. The Singapore court can also order a cross-class cramdown of a scheme of arrangement that is approved by the majority of its creditors.

Singapore schemes of arrangement go beyond Chapter 11 in certain aspects. For example, the moratorium for a scheme of arrangement can be extended to key subsidiaries if it is necessary for the success of the scheme of arrangement.

Singapore schemes of arrangement can provide for rescue financing to be given priority over a distressed company's existing debts. This encourages investors to provide financing for distressed companies, knowing that they have a measure of protection.

Singapore schemes of arrangement are internationally

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Appeal of Singapore. He also acts for clients in international arbitrations.

Wei Chern is a Fellow of the Insolvency Practitioners Association of Singapore. He is also a Fellow of the Chartered Institute of Arbitrators and the Singapore Institute of Arbitrators.

Fullerton Law Chambers LLC is a Singapore-based law firm providing premier dispute resolution services.

Our directors have practised in various prominent and respected law firms, both local and international, prior to the establishment of Fullerton Law Chambers LLC. We have been repeatedly endorsed by various international legal publications for our expertise in litigation and international arbitration. These include The Legal 500, Asialaw Leading Lawyers and Benchmark Litigation Asia-Pacific.

Our firm's primary strength is in corporate and commercial dispute resolution. We advise and act for blue chip corporate clients, and provide a complete suite of dispute resolution services. We also advise and act for high net-worth individuals and families to address their legal concerns and needs.

recognised. For example, the English Courts have recognised Singapore schemes of arrangement as a foreign main insolvency proceeding. Singapore has also adopted the UNCITRAL Model Law on Cross-Border Insolvency, which allows a company to carry out a Singapore scheme of arrangement in parallel with a Chapter 11 reorganisation.

Singapore scheme of arrangements are therefore a useful tool for restructuring companies along with Chapter 11.

QUESTION THREE

What are the trends and opportunities regarding distressed businesses in your jurisdiction? What advice are you giving clients to take advantage of the distressed environment?

TOP TIPS

On restructuring processes for distressed companies – and the potential opportunities for businesses

Where a company is in a distressed situation, it helps to bring on board restructuring advisors and legal advisors early so that a restructuring plan can be implemented quickly. This gives creditors more confidence and gives the company breathing space to carry out the restructuring. Starting early also means that there are more assets and cash to maximise the chances of success of any restructuring.

Investors should ensure that they conduct the necessary due diligence and have necessary legal advice when acquiring assets from distressed companies or investing in them. Distressed companies are close to or already insolvent, which brings a host of legal complications.

Creditors should scrutinise any scheme of arrangement that is put forward carefully, and work with legal counsel to weight the pros and cons of any restructuring proposal. If the proposal is not favourable, creditors can consider other alternatives such as receivership, judicial management or liquidation.

Singapore's new insolvency laws came into effect in 2020, making it easier to restructure distressed companies.

The Singapore Insolvency, Restructuring and Dissolution Act, which is Singapore's omnibus insolvency legislation, has introduced Chapter 11-style mechanisms into Singapore's restructuring landscape to facilitate restructurings of distressed companies. In addition, Singapore has also adopted the UNCITRAL Model Law on Cross-Border Insolvency.

In addition, Singapore is also where many Asian and South-east Asian Companies are headquartered. Singapore acts as a hub for M&A activity for companies operating in China, India and the entire South-East Asian region.

Singapore is well placed as a venue in which wish to carry out cross-border restructurings of distressed companies.

There has already been a flurry of M&A activity in 2021, and it is expected that as distressed companies sell assets to survive, there will be an uptick in such activity going forward. In addition, companies with good fundamentals but which are facing cash flow issues will also be looking to raise funds from investors to tide themselves through this period.

Investors looking to acquire assets from distressed companies or investing in distressed companies should look carefully at the assets being acquired or the financial state of the distressed companies that are being invested in. Local law firms and insolvency practitioners can help to navigate local laws and regulations especially because distressed companies are usually close to or already insolvent. In such situations, a potential investor or purchaser must be careful to ensure that it is adequately protected when entering such transactions.

QUESTION ONE

With a recent spike in insolvencies across the globe, do you believe the numbers of distressed companies will increase in the coming year? How will your firm be assisting?

The number of insolvencies in Switzerland in the year 2021 has only slightly increased but, still, remained on a stable level compared to earlier years. However, as the so-called Covid bridge credit facilities, in total CHF 16.9 billion, are becoming repayable in 2028, there is a potential of a future spike in insolvencies. So far, over a third of the total Covid-bridge credits have been repaid: a reassuring figure. We see a pronounced increase of insolvencies in very small and small enterprises in certain sectors (restaurants, small construction companies etc.), which might rather be a sectorial consolidation phenomenon than a crisis signal.

After a contraction of the GDP in 2020 (-2.2%), Switzerland's economy has emerged very strongly from the pandemic tremors since 2021 and in our client base the order books and sales pipelines are solidly filled. The GDB growth in 2021 (3.7%) has exceeded pre-pandemic levels and the unemployment rate is on a (critically?) low level of 2.7%. However, Switzerland being an isolated economy with no primary resources except waterpower electricity, all sectors are plagued by the effects of dependencies on unreliable supply chains. Our clients, the most prominent SMU in Switzerland, rightly have a concern about the effects of stuttering supply chains on their free cash flow which, by consequence, might lead to a domino effect on the liquidity of down- and upstream partners.

Our firm assist our clients not only with providing legal navigation aids in such a dynamic liquidity and supply chain environment, but also – in partnership with strong external partners – in building up corporate governance and financial planning instruments for strengthening equity and, thus, resilience. Contract drafting has changed fundamentally as the negotiation of appropriate force majeure clauses and the inclusion of effects of global crisis has become a prime concern in long-term relations.

QUESTION TWO

Why is Chapter 11 an attractive restructuring tool for international companies and your clients?

Swiss law does not know international bankruptcies – bankruptcy proceedings are still looked at from a domestic perspective only. Foreign bankruptcy decrees may be recognized in Switzerland but foreign bankruptcy proceedings do not automatically affect and include domestic entities, and vice versa. Taking the large number of principal structures into consideration with a purpose of e.g., central cash management, and transfer pricing concepts of international groups into considerations which often build on Swiss entities, this principle might lead to disruptions particularly in unplanned foreign Chapter 11 proceedings. The earlier a cross border co-ordination starts, the better.

However, the good news is that in the year 2014 Switzerland has introduced a new restructuring legislation which is very close to the principles and ideas of Chapter 11. Even though it is not a tool which 'crosses jurisdictions', if used properly and with the required financial planning support, it still is a very capable



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As a business lawyer and internationally experienced industrial executive, Balthasar Wicki's experience in mastering phases of growth, crisis and change is based equally on his practical management experience and his specialized expertise. Entrepreneurs and companies appreciate his broad-based business approach, his ability to understand complex economic contexts, his willingness to take responsibility and his high availability.

After being admitted to the bar in 1993, Balthasar Wicki worked for a major industrial group as Corporate Legal Counsel and then took on senior market development functions in India, China and Southeast Asia for various major industrial companies. Back from Asia in 2003, Balthasar Wicki was responsible for the successful repositioning of a large Swiss NGO/NPO and subsequently, now as CEO and co-investor, led a global industrial company in the private equity environment through an existential crisis. Since 2008, Balthasar Wicki has been

practicing corporate and commercial law again.

Balthasar Wicki advises a large number of domestic and foreign SMEs, entrepreneurs and investors on corporate law issues and structuring matters, primarily in the technology environment, but also in traditional industrial sectors. In addition, he leads significant restructuring and estate planning mandates, also in the international group environment, and repeatedly takes on complex negotiation mandates.

Balthasar Wicki was listed in Who's Who Legal 2016 as one of the leading experts in Switzerland in the field of "Insolvency & Restructuring". In addition, IR Global has named Balthasar Wicki as their exclusive advisor in the field of Corporate Law in Switzerland.

Wicki Partners' lawyers are experts in banking and financial markets law, restructuring and corporate law and M&A, litigation and mediation and general business law advice.

The ownership strategy and the choice of the corporate form or the structure of a group of companies have a significant influence on subsequent financing, investment opportunities, the continuation and development of business. We support our clients in choosing the best and tailor-made option for them and their business. We are well equipped in supporting companies in crisis with needs to restructure or reorganize, as we have many years of experience in the restructuring field.

if properly orchestrated and approved by the court, may not be challenged even after an eventual oldco which remains after such transactions, goes bankrupt and old creditors still may face a loss of their claims.

QUESTION THREE

What are the trends and opportunities regarding distressed businesses in your jurisdiction? What advice are you giving clients to take advantage of the distressed environment?

instrument for orchestrating an international restructuring process in alignment with foreign actors. Restructuring and crisis-management cases being one of the pillars of our advisory work, we have broad practical experience in the application of the new restructuring law in all kinds of industries across Switzerland. The courts are ready to listen to economic arguments if the main principles of restructuring law (e.g., protection of creditors' and employees' interests, domestic control over domestic assets, assuring the liquidity of ongoing operations, control of operations by a court-appointed administrator etc.) are secured.

Swiss restructuring and mergers and acquisitions law provides modern, streamlined and effective tools and instruments for all sorts of restructuring transactions (spin-offs, ring fencing transaction, etc.), with the big advantage that such transactions,

TOP TIPS

On restructuring processes for distressed companies – and the potential opportunities for businesses

Switch on your forward-looking radar, track the liquidity blips and plan your manoeuvres! We still notice a tendency to maintain linear planning processes in a more and more disrupted, non-linear world. Increasing agility and streamlining decision making processes will be key in the future.

Si vis pacem para bellum! Organize and orchestrate your crisis team while you are still in deep water. Like a large ship which approaches shallower water onboard the pilot while being far off the coast. Even acting as a crisis advisor we prefer to be able to start understanding a client's business early enough. Advisors are able to provide much more effective support if onboarded very early.

Learn from nature: be broadly rooted! Avoid corporate structures where domestic entities may only survive based on intragroup business or (even worse) intragroup funding. Ideally, corporate structures are built on a network of international subsidiaries with a strong basic cash-flow which originates from the local market itself. Such an organic group structure allows subsidiaries to survive (and potentially be sold) even if other parts of the structure are in distress. Of course, such thoughts have direct impacts on trademark/IP- and cash-management concepts and will lead to decentralization.

The international alignment of corporate tax structures and of financial markets supervisory regulations might possibly have led to a decrease in the building up of new inter-group structures with Switzerland in the centre. Switzerland is still a very attractive jurisdiction due to its lean public administration, liberal employment law regime and still very low corporate taxes. But the consistent application of OECD transfer-pricing rules even in Switzerland has led to certain corrections.

Switzerland is an economy mainly based on 'brain assets' – and, therefore, in our daily practice, we do not see an increase in pure asset-buying transaction. The continuation of operations and maintaining stability of key employees in a very challenging employment market requires more long-term strategies.

Cash management and cash planning has become key. On the eve of a reversal of interest rates and based on own equity regulations, banks are tightening equity backing rules. So, liquidating non-essential assets and achieving a flexible, scalable costs structure, while still maintaining stability of key resources, seems to be a main concern of our clients and leads to respective transactional activities.

One trend we see in the market is that distressed Swiss businesses are increasingly thinking more openly and are also considering cross-border M&A as a restructuring measure.

QUESTION ONE

With a recent spike in insolvencies across the globe, do you believe the numbers of distressed companies will increase in the coming year? How will your firm be assisting?

We believe that in the short term most companies will face insolvency because of the sudden and abrupt slowing down of financial transactions, mainly caused by the Covid-19 pandemic; however, in the mid-to-long term, a great number of these companies will be able to recover thanks to the rapid intervention of governments worldwide that provided much needed economic assistance and support.

Nevertheless, it is important to understand that this recovery will not be as quick as everyone wishes and expects because of the massive effort required to coordinate international markets in such a way that companies are left in the same financial position as they were before pandemic.

For this reason, the vast majority of businesses will be left either slightly worst or in a very precarious situation; added to this, governments are now pulling back the financial aid to small and mid-sized businesses because of the heavy economic burden it represents for countries, which in turn will leave them more vulnerable and unstable enterprises at risk of insolvency.

This unfortunate albeit necessary withdrawal of government aid is comprehensible, since the pandemic has not only affected individual businesses and corporations, it has affected the entire global economy. This means that countries must now focus on restoring the supply routes that keep the wheels of industry turning, rather than keeping the individual industries themselves afloat.

With this new legal paradigm in mind, our best course of action to help our clients maintain their financial stability and actually emerge out of the pandemic stronger than before is to seek protection under the bankruptcy and insolvency procedures as per the UAE Federal Law N. 9 of 2016 (Bankruptcy Law) and the Federal Law N.19 of 2019 (Insolvency Law).

QUESTION TWO

Why is Chapter 11 an attractive restructuring tool for international companies and your clients?

Chapter 11 of Title 11 of the United States Code is a powerful legal tool for companies in financial trouble, mainly because it allows insolvent businesses a temporary respite from their financial obligations to their creditors; through this mechanism, the debtor can begin a process known as "restructuring", in which, the debts and commitments of the company are temporarily rescinded or postponed in order to give them the opportunity to re-establish their financial position and regain their lost capital.

The UAE Bankruptcy Law and Insolvency Law have many common elements with the U.S. Chapter 11, which represents not only an attractive prospect but an immensely useful resource for the domestic and global market economy that we live in today. Thanks to the safe and proven method for resettling financial disputes without disrupting the regular flow of international trade that has been so affected by the pandemic, from our clients' perspective, who are mostly transnational companies that operate in the UAE and have



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Thomas Paoletti graduated in law from the University of Rome (La Sapienza) in 1994 after having prepared his final dissertation in comparative law at Yale Law School (Connecticut, USA) as a visiting scholar. He began his practice at Studio Legale Paoletti in Rome (Italy) as a trainee lawyer for two years prior to taking the bar exam.

He became a partner of Studio Legale Paoletti in 1997 and is registered with the Bar Council of Rome.

In his 20 years of legal practice, Thomas Paoletti has assisted clients in both domestic litigation cases and international cases including the United Kingdom, United Arab Emirates and Oman.

He has acquired specific expertise in the Gulf States, assisting companies in

terms of overseas investment and internationalization in the Middle East, offering legal support throughout the planning stage and specialist assistance in the establishment and running of the overseas business.

In 2014 he founded the Paoletti Legal Consultant, and he is currently the owner and the managing partner.

We specialize in corporate and commercial law and we have been working at an international level for more than 20 years. We defend the interests of our clients at each stage of a company's life cycle – from setting-up to expansion abroad – through focused and dedicated legal advice.

Our corporate law professionals include specialists in joint ventures and mergers and acquisitions who manage transactions around the world. We also execute reliable due diligence reviews as well as manage regulatory and compliance matters for our M&A clients, ensuring deals close in a timely manner with our clients' interests always secured.

If you want to do business abroad, you need more than just a good knowledge of the market. You need to know the legislation in the country of destination in order to protect your investments and avoid mistakes that could derail the entire operation.

Only those who work in the country of destination can offer the experience and the expertise necessary to operate successfully in a foreign country.

very strong ties to U.S. companies, it also represents an opportunity to coordinate with their creditors across international boundaries in order to reach a settlement that benefits them both, without the need to involve Conflict of Laws or International Common Law courts like those at the DIFC.

QUESTION THREE

What are the trends and opportunities regarding distressed businesses in your jurisdiction? What advice are you giving clients to take advantage of the distressed environment?

The current economic instability caused by the pandemic is unique in many respects because it happened at a time in world history when companies have become transnational giant corporations. As a result their finances are not confined to one single country or market, but are rather distributed around the globe, making insolvency and full financial collapse far more difficult than it once was. We believe that for this reason, in modern times, when a company wishes to acquire or merge with a competitor or simply another company, it is sometimes a complex process requiring multiple smaller acquisitions of individual assets.

In the economic climate of the post-Covid-19 world, we advise our clients to use this as an opportunity to grow and expand by acquiring assets from companies at risk of insolvency that can no longer afford to sustain said

TOP TIPS

On restructuring processes for distressed companies – and the potential opportunities for businesses

Suppose our client's goal is to simply protect their personal finances from the detrimental consequences of bankruptcy. In that case, we advise proceeding through an insolvent liquidation of assets, described in the UAE Bankruptcy Law, which will allow the company to be dissolved and sold to use the money as payment to the creditors.

In most cases, we advise developing a restructuring plan and presenting it to the creditors in order to get a restructuring judgement from the court under the Bankruptcy Law.

In the case that our client has assets in the United Arab Emirates, our best recommendation would be to attempt a global settlement with the creditors before seeking protection under the UAE Bankruptcy Law and Insolvency Law.

“Chapter 11 of Title 11 of the United States Code is a powerful legal tool for companies in financial trouble, mainly because it allows insolvent businesses a temporary respite from their financial obligations”

resources. In this way, our clients will augment their financial base while at the same time discharging the acquired companies of their "extra weight" that no longer serves them.

In the United Arab Emirates, there are several mechanisms that are designed to help distressed businesses achieve their restructuring and reorganization goals. However, the most important tool that we recommend to our clients regarding this particular issue is the special jurisdiction of the Common Law courts of the Dubai International Financial Centre and the Abu Dhabi Global Market; the reason for this is that these jurisdictions are perfectly adapted to help companies reach amicable settlements, which is the best option when you want to initiate a friendly M&A.

QUESTION ONE

With a recent spike in insolvencies across the globe, do you believe the numbers of distressed companies will increase in the coming year? How will your firm be assisting?

Over the last couple of years, with the onslaught of Covid-19, we have seen an influx of businesses facing significant financial and economic challenges. The various Covid-related mandates implemented in an attempt to help quell the pandemic, ultimately became the reason businesses that may have been otherwise lucrative and thriving, became completely insolvent. We do believe that this pattern will accelerate for the next few years as the country attempts to regroup and adjust to the new normal of businesses in the era of Covid-19. The lingering effects of the economic slowdown caused by the pandemic, inflation, higher interest rates, less government support in the form of government-backed subsidies specifically for businesses, political instability, and worldwide supply chain breakdowns will negatively impact many businesses.

SP&H has extensive experience assisting businesses in distress that have needed to shed assets or borrow to raise capital for operations. Assets for sale can be real property, equipment, inventory, intellectual property (IP) like brand names, trademarks, inventions, recipes, and customer lists. All these will need to be valued to maximize their prices but also to protect against fraudulent and preferred conveyance claims by creditors if the companies file bankruptcy later. Sometimes companies sell the assets but lease or license them back right away. The sale-lease-back typically raises a large amount of cash up front and enables the company to continue using the assets for operations. SP&H will provide expert opinions on the fair market rental and royalty rates the company should be pay back to the buyers. This, again, to stave off charges of self-dealing or fraudulent intent.

Some companies prefer to keep their IPs but will license them out to other potential users. Here, our extensive experience in determining fair royalty rates will be essential in assuring that the transactions are legitimate and are not part of a scheme to defraud creditors.

“Due to the pandemic, we have seen an increase in businesses facing financial and economic challenges both in California and the United States overall.”

QUESTION TWO

Why is Chapter 11 an attractive restructuring tool for international companies and your clients?

Even though Chapter 11 is the most complex form of bankruptcy proceeding, it is one of the more attractive and available reorganization tools for foreign companies.



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Mr. Nevin Sanli is the President and Co-Founder of Sanli Pastore & Hill, Inc. He is responsible for the overall management of the firm, including client engagements, litigation support, expert witness testimony, strategic planning, and relationship management. Mr. Sanli, an accredited Senior Appraiser, and Business Valuation Discipline, has been a financial consultant for 30 years specializing in business valuation, forensic economics and accounting, damage calculations, compensation studies, economic and financial research, statistical and investment analysis and mergers and acquisitions. He has valued more than 3,000 businesses over the span of his career and has testified over 70 times in trial and over 200 times in deposition since 1992.

Mr. Sanli is an active participant as both an instructor and a student in continuing

education classes on advanced topics of business valuation, finance, mergers and acquisitions, and eminent domain. He has presented speeches to numerous public and private associations, including bar associations, universities and accounting societies.

Sanli Pastore & Hill, Inc.'s principals and senior professionals have over 150 years' combined experience with offices in Los Angeles, Sacramento, San Diego, Chicago, Lagos, and Brussels. Our team is sought-after for special situations requiring expert financial opinions in high-stakes circumstances.

Partners of the firm have been named as expert witnesses in more than 1,200 court proceedings in both transactions and disputes and have provided over 4,000 financial opinions and testimony for shareholder buy-outs/disputes and company reorganizations, marital dissolution and contentious divorces, intellectual property litigation, mergers and acquisitions, fairness and solvency situations, and other advisory services. Each year, SP&H works on over 150 matters, which include forensic accounting and litigation support matters, valuations of business brands, economic and forensic damages/lost profits calculations, business succession and planning for large estates, patents and intellectual property for businesses ranging from start-ups to Fortune 500 companies, Forbes 400 members, U.S. government agencies, and foreign governments.

Requirements for foreign companies seeking Chapter 11 protection are easy to meet. It is required that the foreign company verify and confirm it is incorporated in the U.S. and has assets or operations in the U.S. as well. Often to meet the criteria, a foreign company will open an office in the U.S. just days before filing for Chapter 11 protection.

The most powerful benefits offered to foreign companies seeking Chapter 11 protection are the automatic stay, debtor in possession status, and rejection of outstanding contracts which may not be possible outside the Chapter 11 context. Often, non-U.S. jurisdictions offer only insolvency procedures. This may explain why large European companies often file for U.S. Chapter 11 protection, continue operations as a "debtor-in-possession," and restructure billions in debt.

The U.S. process aids in coordinating the worldwide reorganization process. It can stay foreclosure actions overseas,

discharge foreign lease obligations and other debts.

Once cleared of its crippling baggage, the company can then maximize the value of its operations by selling assets, licensing intellectual property, sell and lease-back real property and equipment, and outsource activities to more efficient or experienced providers. SP&H assists its foreign clients in such matters by identifying and executing the required valuations and conflict checks for these transactions. As indicated previously, this process would be to assure that all transfers are performed at arms-length and with third parties.

A key part of the U.S. Chapter 11 process is the proposed reorganization plan in which the creditors often participate. It is a back and forth between the business and its creditors to maximize all the parties' outcomes.

Under the U.S. Bankruptcy Code, Chapter 11 debtors' ability to accept (maintain and perform) or reject (cancel) certain pre-

TOP TIPS

On restructuring processes for distressed companies – and the potential opportunities for businesses

- ✓ Consider all alternatives carefully and strategize accordingly.
- ✓ Compile a trusted and valued team of advisors to assist the with development and implementation of a clear and concise plan of action.
- ✓ Be realistic in what your current situation is and what the viable options are.
- ✓ Strategize accordingly and leverage your position wisely. Know your market.

filing contracts and leases until a Chapter 11 plan is confirmed is perhaps the most powerful tool that many other jurisdictions do not offer.

QUESTION THREE

What are the trends and opportunities regarding distressed businesses in your jurisdiction? What advice are you giving clients to take advantage of the distressed environment?

Due to the pandemic, over the last couple of years we have seen an increase in businesses facing financial and economic challenges both in California and the United States overall. We believe this trend will continue for another couple of years or so. Many businesses will need to hire restructuring experts, valuation firms, bankruptcy attorneys, investment bankers, accountants, and other advisors to navigate through the Chapter 11 process. All these new costs must then be included in the reorganization plan.

Businesses in distress are vulnerable and competitors, and others in the eco-system, will try to recruit their best people, go after their clients, and amplify the chatter about their demise.

This will create additional pressure on the distressed business and will accelerate the downward spiral ultimately ending in complete destruction. Vulture buyers will circle around seeking to buy assets at significant discounts to fair market values. This will include intellectual property, machinery and equipment, inventory, and other properties. Opportunities will abound. Sometimes, when synergies can be realized, a financially healthy competitor will merge with the struggling business.

Private equity firms are also looking for struggling businesses and can sometimes pay relatively higher prices if revenues are still substantial (over \$50 million) and there are brands, IP and other assets that can be exploited better without the liabilities.

Likewise, international buyers across all markets and industries will see fresh opportunities in these lame ducks. Their appetite is quite understandable because they are looking at expanding their presence in the U.S. but also bringing U.S. brands and products in some of their existing markets.

QUESTION ONE

With a recent spike in insolvencies across the globe, do you believe the numbers of distressed companies will increase in the coming year? How will your firm be assisting?

We believe the volume and severity of distressed companies will steadily increase throughout 2022 and there will be a marked climb in numbers as we hit the second and third quarter of 2023. The continued supply chain issues that the worldwide economy is experiencing coupled with current inflationary pressures will almost certainly have a depressive effect on small and middle market companies which will result in a continued upward trend of business insolvencies for the foreseeable future.

For the companies in this class that made it through Covid-19, many survived only in a much weaker and diminished state and are therefore more vulnerable to the above referenced inflation and market conditions. They will require significant financial and operational restructuring to thrive in the post Covid-19 marketplace. As we move through this period of termination of government subsidies, companies are scrambling for capital to further weather the storm. These companies are faced with significantly higher cost of capital than before the pandemic and the rise of inflation to historic levels is driving interest rates, costs of debt financing and costs of capital to new levels.

Increased insolvencies will follow. Many companies will not transition, will fall victim and as a result will end up in liquidation. We expect significantly higher business liquidation scenarios along with the attendant selling of assets by these failing companies, their secured creditors and/or liquidating trustees or fiduciaries.

QUESTION TWO

Why is Chapter 11 an attractive restructuring tool for international companies and your clients?

The Chapter 11 reorganization mechanism in the United States Bankruptcy Code, (the "Code") coupled Chapter 15 of the Code adopted the model law devised by the United Nations Commission on International Trade Law to provide an effective tool for dealing with insolvency proceedings when the debtors, assets, creditors, or other parties are located in more than one country. Because the goal of adopting Chapter 15 was to promote the uniform treatment of cross-border insolvency cases, the U.S. Bankruptcy Courts interpret its provisions in coordination with other countries that have adopted the model law.

When a US Bankruptcy Court recognizes a foreign insolvency proceeding, it will issue an automatic stay prohibiting collection action against the debtor entity. A foreign representative generally will also be authorized to conduct the day-to-day operations of the debtor's business and seek additional relief in other state and/or federal court.

Chapter 15 allows foreign creditors to participate in U.S. bankruptcy cases and prohibits any discrimination against those creditors.

When a full bankruptcy case has been initiated by a foreign representative and a foreign main proceeding is pending in another country, the U.S. Bankruptcy Court's jurisdiction is generally limited to the debtor's U.S. assets. This promotes international cooperation by allowing foreign entities to protect their rights in the U.S. while not excessively interfering in a



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We have developed our practice over the past three decades focusing primarily on commercial and complex business litigation and bankruptcy insolvency litigation. We regularly assist business entities of all sizes, private equity, governmental units and agencies and multinational business conglomerates, throughout the United States and Western Europe.

With extensive experience in all facets of cross-border insolvencies and litigation, we are regularly engaged by clients to provide counsel on a wide range of commercial & complex business disputes including cross border insolvency issues, with particular emphasis on United States/Western Europe jurisdictions.

Over the years we have cultivated extensive knowledge and expertise in the complex business litigation arena as lead counsel on various matters spanning,

foreign country's affairs.

The global nature of the commercial, financial, real estate and other markets presents a compelling need for attorneys and other professionals with an understanding of cross border bankruptcy law. International insolvency laws present a complex landscape within which bankruptcy practitioners must navigate through conflicting bankruptcy regimes, class priorities, foreign substantive law, principles of comity and an array of other foreign bankruptcy and non-bankruptcy legal issues. Whether engaged by U.S. or foreign clients, Curran Antonelli's expertise in this area has proved indispensable to bankruptcy trustees and creditors seeking to recover assets, initiate investigations or otherwise protect their interests in U.S. or foreign insolvency and bankruptcy proceedings.

business torts, commercial disputes, veil piercings, corporate officer and director liability, successor liability, fraudulent conveyance and transfer litigation and constructive trust litigation, and all matters of bankruptcy & insolvency litigation. We have experience counselling clients on distressed M&A transactions, corporate governance issues and complex business restructurings. We also have significant experience representing financial institutions in workouts and foreclosures of aircraft, yachts, commercial vessels and related international equipment and have recovered and repossessed same in various jurisdictions throughout the United States.

With offices in Austin, Boston, Fort Lauderdale, Fort Myers, London, New York, Stamford and Tampa, Curran Antonelli has navigated a broad range of commercial litigation cases, including cross border insolvency, institutional creditors' rights, bet the company litigation, and have earned a winning track record throughout the United States.

With our innovative and aggressive approach to complex litigation challenges, we consistently and effectively deliver unparalleled value to our clients. Our experienced and dedicated lawyers are well known for their innovative strategies, litigation expertise, and unfailing delivery of the exceptional results our clients seek. Our reputation for reliable counsel and consistent results is what continually drives clients back to Curran Antonelli for all their litigation, business, and corporate legal needs.

QUESTION THREE

What are the trends and opportunities regarding distressed businesses in your jurisdiction? What advice are you giving clients to take advantage of the distressed environment?

Regarding litigation matters involving distressed businesses, there has been an increasingly prevalence of litigation funding or non-recourse funding in the insolvency space. More and more litigants, both on the borrower/obligor side as well as the lender/creditor side, are taking advantage of the additional fire

TOP TIPS

On restructuring processes for distressed companies – and the potential opportunities for businesses

- ✔ Businesses seeking a successful reorganization need to focus on their exit strategy, and funding thereof, up front before they commence the process. Bootstrap plans, those where the business relies solely on the generation of profits for their restructuring funds, will be increasingly difficult to achieve in this market of high interest rates and low margins due to inflation.
- ✔ The market for asset acquisitions from bankruptcy sales of assets or through investment, or take out financing/investment, will increase significantly during the expected upcoming business bankruptcy surge.
- ✔ Although it is often tempting to hold capital "on the sidelines" awaiting a buy in position at the bottom of the market, historically it has been the investors that fund the right company, not just the least expensive company, that are in the final analysis the most successful in the distressed company investment game.
- ✔ With increased business insolvency volume comes increased insolvency litigation. Maximize your recovery potential with the involvement of litigation funding and spread the downside risk of spiraling litigation costs at the same time. Under the right circumstances, litigation funding can be a very effective tool.

power that a litigation funding partner can bring to bear on a drawn out, expensive litigation campaign.

In the debtor/borrower space, small to medium size businesses are taking advantage of a new provision of the Bankruptcy Code. The Small Business Reorganization act of 2019 added Subchapter V under Chapter 11 of the United States Bankruptcy Code to give businesses a faster, less burdensome and less expensive option for reorganization. The new Subchapter V provides for continuity of company management and ownership structure, a shortened plan filing and confirmation procedure (90 days for filing) and the elimination of the requirement of a Disclosure Statement in most cases. This provision eliminates a disclosure process that has been likened to the prospectus issuance procedure in non-bankruptcy scenarios. Other provisions of the new Subchapter are the elimination of the Creditors Committee, the possibility of the plan of reorganization obtaining approval without creditor support and approval, and a specialized Trustee appointed to assist the parties in negotiating a swift implementation of a reorganization plan.

This new Subchapter is particularly helpful to businesses, if they qualify, to jumpstart their post Covid-19 recovery/reorganization in an efficient, cost effective and less intrusive manner than the traditional Chapter 11 reorganization process.

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