

CorporateLiveWire

BANKRUPTCY & RESTRUCTURING 2018

VIRTUAL ROUND TABLE

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Introduction & Contents

The Bankruptcy & Restructuring Roundtable 2018 features eight experts from around the world who share their practical knowledge and experience on a range of key topics. The experts discuss recent regulatory changes, identify the sectors at the highest risk of bankruptcy, outline the formal proceedings for insolvency in their jurisdiction, and share what we can learn from the recent surge of high-profile bankruptcies. Featured countries are: Poland, Romania, Ukraine, United Kingdom and the United States.



James Drakeford
Editor In Chief



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Meet The Experts



Alban Meteyer - Chiron Financial
T: +33 (1) 82 88 48 32
E: ameteyer@chironfinance.com

Mr. Meteyer is the Head of Chiron Financial's European Investment Banking team. He has extensive experience working with publicly-traded, family-owned and privately-held corporations in the United States and Europe, along with private equity firms, family offices and other investors. Before joining Chiron Financial, Alban held positions with Société Générale Corporate & Investment Banking and Total and Engie (formerly GDF Suez). He brings a facility in three languages and earned a Master of Science in Mineral and Energy Economics from the Colorado School of Mines, Master of Science in Petroleum Economics and Management from Institut Français du Pétrole, and a Master of Science in General Engineering from École Centrale Paris.



Vlad Nastase - Concilium Consulting
E: vlad.nastase@concilium.ro

Concilium Consulting is a financial services advisory firm and the best solution for your business. We provide services in Capital Advisory, Corporate Restructuring, Portfolio of NPL&SPL, Strategic advisory and M&A projects.

Concilium has an extensive expertise in turnaround management projects being an active member TMA – Romanian Chapter.

We have a team of highly seasoned professionals that assisted Concilium's clients with a 350 + Mio Euro in turnover and that are active in 8 industries.

Custom-made services, technical excellence, confidentiality and ethical behavior build the long-lasting relationships we share with our clients.



Matt Dundon - Dundon Advisers LLC
T: +1 917-838-1930
E: md@dundon.com

Matthew Dundon is founder, and one of the principals of, Dundon Advisers LLC, a New York-based adviser to institutional clients with investments or claims in US and foreign bankruptcies, or seeking or making high-yielding asset-based loans with non-conventional structures or uses of proceeds. From 2010 to 2016 he was a portfolio manager in distressed debt and opportunistic credit investing with two global hedge funds, and from 2003 to 2010 was a senior credit analyst and later head of securities research for a boutique brokerage firm. He practiced law prior to his trading career. He holds a JD from the University of Chicago Law School and a BA from the University of California at Berkeley.



Peter C. Blain - Reinhart Boerner Van Deuren SC
T: +1 414-298-8129
E: pblain@reinhartlaw.com

Peter C. Blain is a shareholder and chair of Reinhart Boerner Van Deuren SC's Bankruptcy and Creditors' Rights Department. He also served as a vice president and director of the firm from 1992 to 2005.

Mr. Blain regularly represents financial institutions, creditors, debtors, creditors' committees, trustees, and others in bankruptcy proceedings, receiverships, and workouts. Mr. Blain's professional achievements include being elected a Fellow in the American College of Bankruptcy. He has also been included in Woodward and White's Best Lawyers in America since 1987.

Mr. Blain received his undergraduate degree with honors from Wisconsin State University–Stevens Point and his law degree from Georgetown University Law Center.

Meet The Experts



Olexander Droug - Sayenko Kharenko
T: +380 44 499 6000
E: odroug@sk.ua

Olexander Droug is a partner at Sayenko Kharenko specialising in dispute resolution and restructuring with a focus on international arbitration and cross-border commercial litigation. His experience includes advising clients at all stages of complex multi-jurisdictional proceedings, as well as commercial and investment arbitration under the arbitration rules of all major international arbitration institutions, CIS-based arbitration institutions, ICSID Arbitration Rules and UNCITRAL Arbitration Rules. Mr Droug also advises clients on obtaining and implementing interim relief, including in support of arbitration proceedings and litigation, as well as on recognition and enforcement in Ukraine of arbitration awards and foreign court judgments. He also has significant experience representing both lenders and borrowers in restructurings and related disputes.



Norman Kinel - Squire Patton Boggs (US) LLP
T: +1 212 407 0130
E: norman.kinel@squirepb.com

Norman Kinel is a partner in the Restructuring & Insolvency Practice Group of Squire Patton Boggs, based in its New York City office. He is also National Chair of the firm's Creditors' Committee Practice. With more than three decades of experience as a bankruptcy practitioner, Norman has successfully represented and litigated on behalf of clients in some of the nation's largest and most intricate bankruptcy cases, involving numerous industries. Norman's clients value his responsiveness to their needs and his tenacity in pursuing dynamic strategies to protect and maximize their interests.

Norman regularly represents debtors, creditors, bondholders, trustees and committees of creditors, equity holders and retirees. He also advises clients in out-of-court default, workout, restructuring and cross—border insolvency proceedings.



Karol Tatara - Tatara & Partners
T: +48 12 634 52 92
E: kancelaria@tatara.com.pl

Karol Tatara – attorney-at-law, licensed insolvency practitioner. He graduated from the Jagiellonian University, where he completed School of American Law, organized by the Catholic University of America and the JU.

Karol Tatara specializes in prepackaged liquidation (pre-pack) [Law Firm Tatara & Partners advised in very first pre-pack procedure in Poland], out-of-court restructuring and proceedings to approve the arrangement. Karol Tatara is a lecturer of bankruptcy law for attorney-at-law's trainee programme organized by Krakow District Chamber of Attorney's –at-law, he is also a Vice-president of the Insolvency Law Committee of Allerhand Institute, a member of INSOL Europe and Pro-dean of the Polish Chamber of Insolvency Practitioners. Karol Tatara is an expert of the World Bank within Doing Business report and takes part in the legislative process.



Richard H. Golubow - Winthrop Couchot
T: +1 949 720 4135
E: rgolubow@winthropcouchot.com

Richard H. Golubow is a founding member and the managing shareholder of Winthrop Couchot Professional Corporation. Richard devotes his practice to and has extensive experience in the areas of Chapter 11 reorganizations, complex bankruptcy litigation, liquidations, out-of-court workouts, acquisitions and sales of distressed assets, Uniform Commercial Code Article 9 foreclosure sales, general assignments for the benefit of creditors, and receiverships.

Richard understands that the law is a means to accomplish his clients' business and personal objectives, not an end in itself. He listens to his clients and takes the time to learn about and understand his clients' business as well as their needs to effectively provide customized, innovative, responsive and cost-effective legal solutions. For example, Richard places great emphasis on proactively counseling clients to identify and manage cash flow and insolvency risks posed by customers, vendors, landlords, and other counterparties to all types of contracts including purchase and sales agreements, real and personal property leases, franchise and intellectual property licenses, loan agreements, guaranties and employment contracts.

Q1. Can you outline the current bankruptcy and restructuring landscape in your jurisdiction?



Karol Tatara

In Poland, after the significant reform of 2015/2016, bankruptcy and restructuring landscape provides very interesting tools for business restructuring, as well as for investment in distressed-assets.

One of the most important is pre-pack; a prepackaged liquidation (administration) which is beneficial for all interested parties – the debtor, creditors, investor as well as the economy, the judiciary and the trustee. Pre-pack allows the debtor to sell distressed assets – enterprise as a going concern, organised part of an enterprise or important assets.

During pre-pack procedure, the Court – after recognising bankruptcy petition filed together with motion to approve sell-purchase conditions – decision declares bankruptcy and approves sell-purchase conditions of the pre-pack. Procedure should be fast, however there exist couple of safeguards, in particular the possibility to appoint an interim court supervisor and appeal Court's decision – by each creditor.

There are also four new restructuring proceedings: proceeding to approve the arrangement, accelerated arrangement proceeding, arrangement proceeding and remedial proceedings. In our view, the most interesting development is the option to proceed to approve the arrangement, because of tax benefits and low court involvement – making this procedure the most expeditive.

In addition to abovementioned, there is also possibility to carry on liquidation bankruptcy in traditional manner (not the pre-pack sale), aiming to cease insolvent company's existence once all assets are liquidated, and to satisfy creditors up to possible levels (usually not in total).

Bankruptcy matters concern also subject of liability of members of the board. Failing to file bankruptcy petition within the right timeframe may be a subject to penalty and civil liability – towards creditors of the insolvent company.



Norman Kinel

A prevailing trend in U.S. Chapter 11 cases is that their duration continues to shrink, as recently reported by Fitch Ratings, one of the "big three" credit rating agencies. Fitch's 7 August 2018 report, entitled "Shrinking Length of U.S. Bankruptcies", provided many useful statistics and analyses recent and historical trends in Chapter 11 cases. According to Fitch, the median duration from the date of filing of a Chapter 11 petition to the date of confirmation of a plan of reorganisation or liquidation has been declining significantly – with four months being the median duration for the 30 U.S. cases studied with plans confirmed in 2017 and five months for the 34 cases studied with plans confirmed in 2016. In contrast, the median for the 304 cases which Fitch studied where plans were confirmed between 2003 and early 2018, was seven months. The median duration of the cases examined by Fitch for traditional Chapter 11, pre-arranged (or pre-negotiated) and prepackaged cases were 11, four and two months, respectively.

As demonstrated by those statistics, a significant reason for the expedited proceedings has been the prevalence of prepackaged plans of reorganisations which, as would be expected, take far less time to confirm. Out of 304 cases studied by Fitch with plans confirmed between 2003 and 2016, 22% were prepackaged. Among all public companies listed on the Bankruptcydata.com website with assets of \$500 million to \$10 billion whose cases were filed between January, 2003 and December 2017, the number of prepackaged cases as a percentage of all public company filings increased dramatically – from approximately six percent in 2003 to 42% in 2017. According to Fitch, "[t]he compressed timeframe is benefitting creditors, minimising employee and trade union uncertainty, and lessening disruption to operations." However, "[o]n the flipside, there is a risk that an accelerated valuation or asset sale can be rushed without being fully market tested, adversely affecting claimholders lower in the priority waterfall than the fulcrum security."

Q1. Can you outline the current bankruptcy and restructuring landscape in your jurisdiction?



Olexander Droug

The insolvency procedure in Ukraine is generally governed by the Law of Ukraine “On Restoring the Debtor’s Solvency or Declaring it Bankrupt” (the “Bankruptcy Law”).

There are two primary insolvency regimes under Ukrainian law. The first, pre-trial rehabilitation of the debtor, is intended to facilitate the restructuring of the debtor’s debts and enable the debtor to continue as a going concern.

The second, bankruptcy proceedings, provides either for the court-supervised financial rehabilitation proceedings in respect of the debtor or its liquidation depending on the decision taken by the creditors’ committee. Generally, the entire bankruptcy proceedings may take around two years, and may include the following stages:

- administration of assets;
- voluntary arrangement;
- financial rehabilitation; and
- liquidation proceedings.

A bankruptcy petition may be presented to a Ukrainian commercial court at the place of location of the debtor by any creditor (other than a fully secured creditor), the debtor itself, Ukrainian tax and certain other state agencies acting as creditors.

There is a separate insolvency (resolution) regime applicable to the Ukrainian banks, which is different to the insolvency regime established under the Bankruptcy Law.



Peter C. Blain

The current financial climate is very interesting. There is an almost unprecedented amount of capital in the market-place, particularly available from private equity groups. There is also intense competition among traditional bank lenders to grow, or at least retain, their market share. As a consequence, the aggressive competition among lenders has enabled borrowers to negotiate very favourable loan terms, with low interest rates, high leverage and few financial or other covenants. The financial crisis of a decade ago was marked by lending relationships bearing the same characteristics, which may be a worrying harbinger of what could be experienced in a future economic downturn.

Moreover, today banks are often willing to allow debtors experiencing financial distress to attempt to rehabilitate their operational deficiencies and continue as performing customers of the bank, as opposed to in previous years when they routinely prevailed upon debtors to refinance their loans with a replacement lender. This is a material change in position.

Finally, where a debtor is forced to exit a lending relationship, given the available capital and the competitive lending environment, debtors are far more likely to be sold or refinanced, rather than face the prospect of liquidation (although this is not always the case—as was evidenced by the recent liquidation of Toys “R” Us.) Troubled debtors seeking relief under the U.S. Bankruptcy Code almost never reorganise, but instead sell their assets under Bankruptcy Code section 363. Where a distress sale process is undertaken, financial buyers predominate, often bidding far more than strategic buyers are willing to pay.

“Banks are often willing to allow debtors experiencing financial distress to attempt to rehabilitate their operational deficiencies and continue as performing customers of the bank, as opposed to in previous years when they routinely prevailed upon debtors to refinance their loans with a replacement lender.”

- Peter C. Blain -

Q1. Can you outline the current bankruptcy and restructuring landscape in your jurisdiction?



Matt Dundon

US Chapter 11 continues to set the parameters for all corporate restructuring in the United States, insofar as out-of-court restructurings are almost invariably intended and designed to reproduce the anticipated result of a Chapter 11 for various stakeholders at reduced expense to the stakeholders. A key development in recent years has been a standardisation around pre-commencement agreements with lenders and bondholders, to the point that filing without such an agreement is pejoratively labelled a “free fall” bankruptcy. Although these agreements often lack the participation of all stakeholders on the commencement date – and as such often are considerably changed in the course of bankruptcy – they tend to channel cases rather forcefully. As such, this has made participation in the pre-commencement private negotiation process extremely important for lenders and bondholders who wish to influence their fates.



Alban Meteyer

Most of the restructuring transactions in the United States involve companies with broken balance sheets. Due to readily available capital provided by non-bank alternative lenders including credit funds, the companies can restructure outside of bankruptcy. Capital providers are in a hypercompetitive environment resulting in aggressive structures, pricing compression and maximum liquidity for lower middle market companies. When we raise debt or equity for a U.S. client, it is not uncommon for dozens of capital providers to express interest in the transaction.

The restructuring landscape in France is reminiscent of the U.S. marketplace in the 1990s. Lower middle market companies do not have access to bank debt and many are unaware of the restructuring options available to them. There aren't as many investment banks and turnaround advisors focused on the sector so connections are not being made to European or U.S. capital providers. Instead, companies are unnecessarily going out of business or business owners are suffering in silence with sub-optimal capital structures.



Richard H. Golubow, Esq.

The wave of bankruptcies that began during the 2008 recession in the United States peaked in September 2010. Although there has been a national trend of declining bankruptcy filings since 2011, commercial bankruptcy filings increased between 2015 and 2017 to a level on a month-to-month basis that they have not been since 2013. More recently, however, total new bankruptcy filings were down four percent in the month of September 2018 as compared to the same month in 2017, including a 31% drop in new commercial Chapter 11 cases. Specifically, commercial Chapter 11 filings fell by 12% in the first three quarters of 2018, compared to the same period in 2017, decreasing from 4,306 to 3,796. Nevertheless, the number of commercial bankruptcy filings can still be attributed to the deterioration of retail business throughout the United States, due in part to the dominance of Amazon and online shopping in general. In 2018, the uptick in retail bankruptcies continued, including those of Nine West, Claire's, Remington, Bon-Ton Stores, Brookstone, and Mattress Firm. Retail bankruptcies will continue to maintain a visible presence in the restructuring landscape.



Q2. Have there been any recent regulatory changes or interesting developments?



Karol Tatara

After the reform of 2015/2016 there were practically no important changes to legislative landscape, apart from new regulations regarding bankruptcy and restructuring of banks and financial institutions – implementing EU directives.

However, on the horizon, there are drafts of regulations significantly amending consumer bankruptcy rules, widening its scope; and – with regard to all proceedings – high digitalisation of the process. Regulations are currently under government legislative process.

The aim of the consumer bankruptcy reform is to make it easier to declare consumer bankruptcy and – what is even more important, to the bigger picture – improving the efficiency of the bankruptcy courts, which at the moment are overloaded. Digitalisation will cover all proceedings and will be part of cross-European system of insolvency registers.



Norman Kinel

Yes, the speed of U.S. Chapter 11 cases. A major driver for the increasing swiftness of cases has been the more limited use of traditional Chapter 11 reorganisation tools and objectives, such that in many instances the proceedings are commenced solely to quickly affect a balance sheet restructuring of the distressed company through the conversion of debt to equity, or for quickly selling substantially all of the assets of the company through a credit bid with a very limited post-filing marketing effort – and little else. Historically, rejection of burdensome executory contracts or leases was a significant tool utilised in the “right-sizing” of a struggling business. Today, in many cases, rejections either do not occur at all because only a balance sheet restructuring is deemed necessary, or they occur in connection with liquidating the business, rather than attempting to rehabilitate it.



Olexander Droug

One of the novelties in the Ukrainian legislation is the Law of Ukraine “On Financial Restructuring”, which provides for an out-of-court voluntary procedure of restructuring the debts and business of the debtor. There is a limited moratorium in place for the duration of the financial restructuring, as well as protection from initiation of the formal bankruptcy proceedings during this time. Both the creditors (particularly Ukrainian banks) and the debtors participating in the financial restructuring can enjoy certain tax benefits in connection with implementation of the restructuring plans approved in this procedure. The respective tax benefits are, however, limited in time and, accordingly, the Law of Ukraine “On Financial Restructuring” is itself a temporary legislative act, which will become ineffective in the autumn of 2019 (unless extended by the Ukrainian Parliament).

There is also a draft of the Code on Bankruptcy Proceedings, which is being considered by the Ukrainian Parliament. The Code (if adopted) will allow bankruptcy proceedings in respect of private individuals, and eliminate certain practical gaps in the bankruptcy legislation (in particular gaps in respect of quorum at the first creditors’ meeting). In addition, according to the draft Code, voluntary arrangement will no longer be available as part of the bankruptcy proceedings and only several court decisions would be subject to an appeal (a decision on commencement of the bankruptcy proceedings and a decision on moving the debtor into liquidation).

“There is also a draft of the Code on Bankruptcy Proceedings, which is being considered by the Ukrainian Parliament. The Code (if adopted) will allow bankruptcy proceedings in respect of private individuals, and eliminate certain practical gaps in the bankruptcy legislation (in particular gaps in respect of quorum at the first creditors’ meeting).”

- Olexander Droug -

Q2. Have there been any recent regulatory changes or interesting developments?



Peter C. Blain

A topic of significant interest to U.S. bankruptcy professionals is venue reform. Under current U.S. bankruptcy law, cases under the U.S. Bankruptcy Code may be filed in the jurisdiction of the debtor's domicile (state of organisation), where the debtor's principal place of business or principal assets are located, or where an affiliate's case is pending. Debtors organised in Delaware or New York file in those states. Debtors organised in other states routinely organise a shell affiliate in Delaware or New York, file a bankruptcy petition for the affiliate, then file a petition for the principal debtor in the District of Delaware or the Southern District of New York. This occurs even where the principal debtor, which is often extremely large, has no other significant contacts with these states.

Supporters of the existing venue rules maintain that the bankruptcy judges in these jurisdictions have built up a body of experience that enables them to handle complex Chapter 11 cases more efficiently than judges in other jurisdictions. In addition, say the supporters, because complex debtors and the major institutional creditors are usually represented by New York attorneys and financial advisors, filing cases in New York and Delaware promotes greater efficiency.

Critics of the current venue rules believe that these jurisdictions are too "debtor friendly." They also maintain that bankruptcy judges in other jurisdictions are fully competent to handle complex cases; and, most importantly, when cases are filed in Delaware or New York, active participation by employees or local creditors becomes burdensome, or may be practically foreclosed altogether.

In January 2018, Senators John Cornyn (R-TX) and Elizabeth Warren (D-MA) introduced The Bankruptcy Venue Reform Act of 2018. The bill would require companies to seek bankruptcy protection where their principal assets or their principal executive offices are located. It would also eliminate the ability to file a petition where a debtor is incorporated and restrict the ability to file where an affiliate's case is pending. The bill's sponsors stated that the purpose of the bill is to restore confidence in the integrity of the bankruptcy process by preventing companies from "shopping" for a favourable forum. Additionally, modifying the venue statute would also permit employees, whose livelihood may be at stake, to participate in the case.

Despite the fact that this bill is supported by the Commercial Law League of America, numerous state bar associations and many legal scholars, few other Senators have indicated support. This portends that bankruptcy venue reform will likely not occur in the near future.



Richard H. Golubow, Esq.

The Tax Cuts and Jobs Act (the "Act") enacted in the United States at the end of 2017 amended the Internal Revenue Code of 1986 ("IRC") and instituted changes to the treatment of individual and corporate taxpayers. For example, the Act reduced the corporate income tax rate from 35% to 21%. However, the Act also included provisions that may harm already distressed companies. From a restructuring standpoint, the most notable change under the Act involves the rules regarding net operating losses ("NOLs"), which are the losses taken in a period where a company's allowable tax deductions are greater than the company's taxable income. Prior to the Act, NOLs were allowed to be carried forward for 20 years and carried back for two years, such that a company could receive a refund of taxes paid in those prior years. Frequently, a debtor used NOLs to fund the administration of the case with the tax refund generated from carrying back NOLs. This ability to carry back NOLs traditionally served as a critical source of liquidity for companies experiencing sudden financial distress. The Act eliminated the ability to carry back NOLs generated in 2018 or later. Therefore, with one less source of liquidity, debtors will have to adjust accordingly.

Q2. Have there been any recent regulatory changes or interesting developments?



Richard H. Golubow, Esq.

Since the Act also imposed an 80% limitation on the taxable income that can be offset by new NOLs (those arising in tax years after 31 December 2017), debtors would benefit from distinguishing between new NOLs and grandfathered NOLs (those arising in tax years that began before 1 January 2018). If possible, it would be advantageous for debtors to use grandfathered NOLs to offset the 35% taxable corporate income from before 2018, as opposed to the corporate income after 2017 that is subject to the 21% corporate tax rate imposed by the Act. In sum, although the Act brought what was perceived to be much needed tax reform, certain key provisions introduced challenges for restructuring transactions.

Q3. Which sectors are at highest risk of bankruptcy in the current business landscape?



Karol Tatar

Many construction companies are at the brink of insolvency, because of the crisis on the market, which resembles the situation from around 2012, where approximately 800 construction companies went bankrupt.

Also, due to the change in consumers' habits and lifestyle, traditional (not digital) press and media should prepare for possible insolvency. People are reading (in paper form) less and less, thus publishers can face a difficult time.



Peter C. Blain

Two business sectors seem particularly at risk today: health care – particularly assisted living facilities – and commercial retail. With the ageing U.S. population, entrepreneurs are building new, state-of-the-art assisted living facilities to tap into this exploding market. Naturally, as more and more people choose to enter these new facilities, older facilities' resident populations are flattening, or even declining. Thus, the older facilities, often burdened by long-term leases or high mortgage debt, are finding it difficult to remain cash-flow positive, especially in light of the current Medicare and Medicaid reimbursement rates. Cash constraints often precipitate a deterioration in the quality of resident care, triggering scrutiny by and sanctions from state health care regulatory agencies, which only accelerates the facility's decline.

As a result, these troubled facilities become debtors in bankruptcy or state court receivership proceedings to try to transition operations to financially stronger companies, which often are competitors. Lenders to these debtors are usually forced to financially support the debtors during the period necessary to make the transition to new operators because most of the facilities are single-purpose buildings, many in remote locations, the liquidation of which would result in huge losses for the lenders.

Retail is the second sector which is severely distressed. Pressure from e-commerce concerns, such as Amazon, increased competition from discount big-box stores, such as Walmart and Costco, and long-term lease obligations in expensive shopping malls have strained the traditional retail business model to the point of breaking. Venerable department store chains such as the 120-year-old Bon Ton Holdings, which operated under the Carson's, Youngers, Bergner's, Herberger's, Elder Beerman and Boston Store names throughout the Midwest, filed for Chapter 11 in February 2018 and is already liquidated. The iconic, 157-year-old San Francisco department store Gumps sought Chapter 11 relief in August 2018, and will be liquidated by year's end. After dominating the retail toy market for 70 years, giant retailer Toys "R" Us sought Chapter 11 protection in September 2017 and has since liquidated, closing all 807 of its stores and laying off 33,000 employees. And the 132-year-old Sears, which merged with Kmart in 2005, closed hundreds of stores, sold its Craftsman brand and was seeking to sell its Kenmore brand and its Sears Home Services business in a failed attempt to raise the \$2.25bn needed to stave off a bankruptcy filing. Facing a \$134m debt payment it could not make, Sears filed Chapter 11 on 15 October 2018. This unsettling trend is expected to plague other esteemed retail chains, as well.

Q3. Which sectors are at highest risk of bankruptcy in the current business landscape?



Matt Dundon

Retail continues to be high risk due to secular changes in the way Americans shop, although many of the most stressed retailers have or are shortly expected to fail, which may reduce go-forward cases. Health care has multiple exposures due to potential changes in the payor environment and a number of vectors of civil lawsuit liability around unsafe products.



Vlad Nastase

The highest risk industry is wholesale and retail trade with 9,468 companies filing for insolvency in the last 10 years, followed by real estate construction (3,260), restaurants and other catering services (1,670), special construction works (1,566) and shipments (1,507).

Paradoxically, although Romania has benefited from consistent economic growth over the last decade – real GDP (adjusted for inflation) in 2017 being 27.4% higher than in 2007 – the number of active companies with a high risk of insolvency has also increased. Analysts came to this conclusion after applying the Altman Z-score. The share of high-risk companies (registering a Z-score <1.8) increased from 21% in 2007 to 30% in 2017, while the share of low-risk companies (registering a Z-score of 3) dropped from 33% in 2007 to only 26% in 2017. Today, only a quarter of active Romanian companies are at low risk of insolvency, while one-third is at high risk and 44% have a medium risk (with a high trend). Thus, I think the greatest risk at present in Romania is the low competitiveness of small and micro-enterprises! A higher the proportion of companies at high risk of insolvency will result in more companies defaulting in the next recession. This implicitly means more layoffs in the private sector to reduce taxes and social contributions and increase fiscal austerity.



Alban Meteyer

Sectors with high capex needs and the portions of the manufacturing economy that supply them with equipment are at the highest risk for distress. Increased capex may result in higher productivity and produce attractive returns on investment, but the investments impede free cash flow for these companies. Also, as interest rates rise, the companies will struggle under debt and high capex requirements. We saw this in the energy and agriculture sectors in the U.S. in 2015 and 2016 and are likely see it again in the oil and gas sector.

Due to the large amount of leveraged lending across many industries, highly indebted companies will need to be restructured in the near future. The resulting bankruptcies and losses will stress the economy and financial system as a result.



Richard H. Golubow, Esq.

The retail industry continues to face the greatest risk of bankruptcy. In October 2018, Steinhoff's Mattress Firm Inc., the largest U.S. mattress retailer, sought bankruptcy protection. In doing so, it joined the list of brick-and-mortar retailers who have filed for bankruptcy since the beginning of 2017. While children's retailer Gymboree Corp. and Payless Shoe Source Inc. reorganised, not all retailers have been as successful. Notably, specialty toy retailer Toys "R" Us Inc. was forced to liquidate in March 2018 after creditors declined to provide a lifeline.

After years of declining sales, Sears Holdings Corp. looks to be the next large retailer that will need to seek bankruptcy protection, which may not result in a successful restructuring, but rather, liquidation bringing an end to another iconic American retail chain. In addition to stores engaged in selling goods, restaurant bankruptcies have shown no signs of slowing down any time soon. In particular, the family dining and casual-dining sectors continue to face substantial challenges with increased labour costs and the growing popularity of online delivery platforms such as Postmates and GrubHub. In 2018, casual dining leader Applebee's made headlines when its second largest franchisee, operator of about 163 units in 15 states, filed for Chapter 11 bankruptcy protection.

Q4. What are the formal procedures for insolvency in your jurisdiction, with particular reference to (i) tests for insolvency, (ii) grounds for insolvency, and (iii) requirements following insolvency?



Karol Tatara

In Poland, insolvency is surrounded by formal proceeding, regulated by the Bankruptcy Law. The company (debtor) is insolvent when it lost the ability to fulfil its matured pecuniary liabilities. In addition, a debtor which is a legal person – or an organisational unit without legal personality upon which a separate Act confers legal capacity – shall also be insolvent if its pecuniary obligations are in excess of the value of its assets, and this state of facts persists throughout a period exceeding 24 months.

There are no formal tests for insolvency, however, such tests are frequently used in experts' opinions in proceedings with regard to board members liability towards creditors, when the bone of contention is the issue of filing bankruptcy petition in the right time.

After declaring insolvency, the debtor shall forfeit the right of administration and the freedom of enjoyment and control of the property included in the bankruptcy estate. Moreover, acts in law performed by the debtor, relating to the assets included in the bankruptcy estate, shall be invalid.



Norman Kinel

In the US, it is not necessary that a company be insolvent in order to seek bankruptcy protection – there is no solvency or insolvency test that a company must meet. Any company can enter Chapter 11 regardless of its financial condition, albeit many, if not most companies that file are in fact insolvent. The only real bar to a filing is that it must have been made in "good faith," and even that standard must only be met if a party-in-interest to the proceedings makes a formal motion to dismiss the case as having not been filed in good faith, i.e., that it was a "bad faith" filing. The most common basis for the assertion of a filing as having been made in bad faith is when it is really nothing more than a two party dispute whose only goal is to provide an advantage to the filing party without any legitimate reorganisation objective.

Where the issue of insolvency most often comes into play in a Chapter 11 proceeding is in connection with actions seeking the return of preferential transfer or fraudulent conveyances. With regard to preferences, the debtor must have been insolvent at the time the transfer was made and is presumed insolvent for the 90 days preceding the bankruptcy filing; however, this presumption may be rebutted through evidence. With regard to fraudulent conveyances, insolvency is one of several potential predicates for an action to recover a constructive, rather than an actual fraudulent conveyance. This is set forth in section 548 of the Bankruptcy Code, which provides as follow:

The trustee may avoid any transfer (including any transfer to or for the benefit of an insider under an employment contract) of an interest of the debtor in property, or any obligation (including any obligation to or for the benefit of an insider under an employment contract) incurred by the debtor, that was made or incurred on or within two years before the date of the filing of the petition, if the debtor voluntarily or involuntarily:

- (i) received less than a reasonably equivalent value in exchange for such transfer or obligation; and
- was insolvent on the date that such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation;
 - was engaged in business or a transaction, or was about to engage in business or a transaction, for which any property remaining with the debtor was an unreasonably small capital;
 - intended to incur, or believed that the debtor would incur, debts that would be beyond the debtor's ability to pay as such debts matured; or
 - made such transfer to or for the benefit of an insider, or incurred such obligation to or for the benefit of an insider, under an employment contract and not in the ordinary course of business.

Q4. What are the formal procedures for insolvency in your jurisdiction, with particular reference to (i) tests for insolvency, (ii) grounds for insolvency, and (iii) requirements following insolvency?



Olexander Droug

A creditor (an individual or a business entity) that holds an uncontested claim against the debtor may initiate bankruptcy proceedings against the debtor if the amount of the claim is not less than 300 minimum monthly salaries (currently around US\$ 40,000) and the claim remains unsatisfied by the debtor for at least three months following the receipt by a creditor of a court judgment that entered into force and commencement of the enforcement proceedings against the debtor.

The debtor is obliged to apply to the commercial court with a bankruptcy petition in the event of the following circumstances:

- (i) satisfaction of claims of one or several creditors will result in the impossibility of fulfilling the debtor's monetary obligations in full before other creditors (threat of insolvency);
- (ii) in the course of the solvent liquidation of the debtor, it becomes clear that the debtor is not in position to satisfy the creditors' claims in full.

Once bankruptcy proceedings have been commenced, the following will apply:

- any creditor may, within 30 days of the formal publication on the official website of the High Commercial Court of Ukraine of the announcement on commencement of the bankruptcy proceedings in respect of the debtor, submit an application with its claims to the debtor;
- freezing of the debtor's assets or other restrictions regarding the disposal of the debtor's assets may be applied exclusively by the court supervising the bankruptcy proceedings;
- moratorium on satisfaction of creditors' claims is introduced (i.e. preventing the creditors from enforcing their claims and security, as well as preventing the debtor from making payments to any individual creditors);
- an insolvency manager (called at the initial stage "administrator of assets") is appointed by the court. The administrator of assets shall analyse financial activity of the debtor, ensure the inventory of the debtor's assets, prepare the register of the creditors' claims indicating amount of claim and ranking of each creditor for further approval by the court etc;
- reorganisation of the debtor is allowed only under the control of the administrator of assets;
- the creditors' committee shall be formed and shall have the power to vote on moving the debtor either into the financial rehabilitation or into the liquidation; the creditors' committee shall also be entitled to agree to the terms and conditions of the financial rehabilitation plan or voluntary arrangement, as well as decide on other practical issues arising in the course of the bankruptcy proceedings.



Matt Dundon

In US voluntary cases, there are no fixed standards for commencement. A Chapter 11 corporate debtor will typically represent that it either cannot pay its currently-due obligations, or that its debts exceed its assets even if it has the ability to make currently-due obligations, but in rare cases a Chapter 11 proceeding will be commenced when neither applies and some other benefit (most often the rejection of leases and the limitation of damages therefore) is available to them under the process – and creditors will not be able to obtain dismissal even with the lack of insolvency. The court is not required to make a finding of insolvency at the commencement of a voluntary case and typically will not do so unless eligibility for Chapter 11 is contested by creditors (and, as noted, is even then not required to maintain that finding). The requirements following insolvency are to devise and propose a Plan of Reorganisation or a Plan of Liquidation which provides that all creditors and equity interest holders are treated properly under the Bankruptcy Code's priorities given their obligors, subordination (if any) and collateralisation (if any), and if necessary and appropriate to engage in any asset sale, business closure or other remedial operational or transactional activities which facilitate such Plan's maximising the overall distributable value.

Q4. What are the formal procedures for insolvency in your jurisdiction, with particular reference to (i) tests for insolvency, (ii) grounds for insolvency, and (iii) requirements following insolvency?



Matt Dundon

A balloting process ensures that impaired creditors support the final Plan, although Plans can be rendered effective over the opposition of some creditors as long as at least one class of impaired creditors supports it. A debtor which can't obtain any creditor class's support has the option (and ultimately may be required) to convert to the Chapter 7 streamlined liquidation proceeding, in which creditor balloting is not required.



Vlad Nastase

In Romania, the modalities of early restructuring were included in the legislation by Law no. 85/2014, being referred to as insolvency prevention procedures. The ad hoc mandate and preventive concord, as these procedures are not very common in practice, lead to two conclusions: either managers do not have too much information about the two procedures or there is no economic climate necessary for these measures to be implemented, or both cases cumulative. While there is unquestionable advantage in the application of these procedures, one of which is to redress the viable debtor's business without getting insolvent, by drawing up a recovery plan that includes measures that are in the advantage of the debtor, the co-debtors, the guarantors and third parties, and to the creditors who would recover their claims within a shorter timeframe than in insolvency, the business environment fails to use these procedures when faced with difficulties.



Richard H. Golubow, Esq.

The test for insolvency under the Bankruptcy Code is fairly straightforward. Pursuant to the Bankruptcy Code, a debtor other than a partnership or a municipality is deemed insolvent if the sum of its debts exceeds its property, exclusive of property that has been fraudulently transferred or that may be exempted from property of the estate under Section 522 of the Bankruptcy Code. 11 U.S.C. § 101(32)(A). A partnership is deemed insolvent if the sum of its debts exceeds the aggregate of all of the partnership's property, except for property that has been fraudulently transferred, and the sum of any excess value of each general partner's non-partnership, non-exempt property over the partner's non-partnership debts. 11 U.S.C. § 101(32)(B). With regard to municipalities, insolvency is determined to exist when the municipality is not "generally paying its debts as they become due" or is "unable to pay its debts as they come due." 11 U.S.C. § 101(32)(C).

Pursuant to Section 547(f) of the Bankruptcy Code, in the context of determining whether a pre-petition transfer to a creditor of the debtor may be avoided as a preferential transfer, there is a rebuttable presumption that a debtor has been insolvent for the 90 days that preceded the initiation of a bankruptcy case under the Bankruptcy Code. 11 U.S.C. § 547(f). In that scenario, the transferee has the burden of introducing at least some evidence to rebut the presumption of insolvency. See, *In re Koubourlis*, 869 F.2d 1319, 1322 (2d. Cir. 1989). Once a transferee has rebutted the presumption of insolvency, the trustee must prove insolvency by a preponderance of the evidence. 11 U.S.C. § 547(g); *Arrow Electronics v. Justus* (In re Kaypro), 218 F.3d 1070 (9th Cir. 2000).

"A balloting process ensures that impaired creditors support the final Plan, although Plans can be rendered effective over the opposition of some creditors as long as at least one class of impaired creditors supports it."

- Matt Dundon -

Q5. What are the main reorganisation procedures in your jurisdiction?



Karol Tatara

There are four formal restructuring proceedings, regulated under Restructuring Law, which are in fact a kind of reorganisation. These are: (i) proceeding to approve the arrangement, (ii) accelerated arrangement proceeding, (iii) arrangement proceeding, and (iv) remedial proceedings.

There is also possibility to introduce arrangement in bankruptcy, as well as partial arrangement (applicable in general within proceeding to approve the arrangement and accelerated arrangement proceeding), and liquidation of the debtor's assets within restructuring proceedings.



Peter C. Blain

Chapter 11 cases are very expensive. The bankruptcy estate is required to pay the fees of the attorneys and the financial advisors retained by the debtor, the unsecured creditors committee, any other committee appointed by the court, any fully-secured creditor, as well as the fees of any other professionals whose retention is approved by the court, such as investment bankers, examiners and auctioneers. There are numerous hearings during the course of a Chapter 11 which are often attended by all counsel retained in the case. Consequently, large, complex cases can accrue enormous administrative expenses. For example, professional expenses incurred in the mammoth Lehman Brothers Chapter 11 exceeded \$2 billion. It is not uncommon for a mid-size Chapter 11 case to accrue far in excess of \$1 million in administrative expenses. Hence, debtors and creditors are seeking faster, less costly ways to achieve the desired result, which today is usually a sale of the debtor's assets as a going concern.

A number of states, including Wisconsin, Minnesota, New Jersey and Florida, have enacted statutes providing for the appointment of a receiver or for assignments for the benefit of creditors. Proceedings commenced pursuant to these statutes often result in the court supervised sale of the debtor pursuant to a process similar to the sale process under Bankruptcy Code section 363. However, these state court proceedings are expedited and permit speedy, court-approved going concern sales at a fraction of the time and cost of a comparable Chapter 11 proceeding.

Other states, such as Illinois, have developed by practice common law assignments for the benefit of creditors, which are not court-supervised and which lack the judicial stays and court oversight provided by statutory assignments. Although less costly than a Chapter 11, sales under common law assignments result in no authorising court orders, and consequently provide less certainty to asset buyers.

Less frequently, federal receiverships are utilised. These proceedings are less expensive than a Chapter 11, but have more stringent jurisdictional requirements, and because they are in filed United States District Courts with crowded criminal and civil dockets, usually will not provide expedited relief.

Nonetheless, whether statutory or common law, receiverships or assignments for the benefit of creditors will almost always be explored as an alternative to a Chapter 11 filing. Sophisticated secured lenders routinely condition continuing to provide financing necessary to continue operations upon these remedies being seriously considered by a debtor, and utilised where possible.

The commencement of a statutory state assignment or receivership proceeding will not stay the filing of a federal bankruptcy petition. However, while bankruptcy courts have superseding jurisdiction paramount to a state court, it is not uncommon for a U.S. bankruptcy court to abstain from asserting jurisdiction, especially if the state court overseeing the assignment or receivership has taken significant actions in the case.

Q5. What are the main reorganisation procedures in your jurisdiction?



Richard H. Golubow, Esq.

The main reorganisation procedure is the filing of a case under Chapter 11 of the United States Bankruptcy Code. The process begins with the filing of a voluntary petition filed by the debtor, or an involuntary petition filed by creditors that meet certain requirements, with the bankruptcy court in the area where the debtor resides or is domiciled. Upon filing, the debtor must pay a case filing fee along with an administrative fee to the clerk of the court. The petition typically includes standard information about the debtor's identity and its intention to file a plan and request relief under certain chapters of the Bankruptcy Code. Once the petition has been filed, and particularly for a Chapter 11 reorganisation, a debtor assumes the role of "debtor in possession" under 11 U.S.C. § 1101, which means the debtor maintains possession and control of its assets over the course of the reorganisation. The next step is to file with the court a written disclosure statement and a plan of reorganisation, the former of which contains information regarding a debtor's assets, liabilities, and business affairs that must be sufficient to allow a creditor to make an informed vote about the latter. In addition, the debtor's plan must classify claims and specify how each class of claims will be treated under the plan. Once the disclosure statement is approved by the court, the debtor proceeds to send, collect, and tally ballots. The Bankruptcy Code requires the court to hold a noticed hearing on confirmation of the debtor's plan. Absent the filing of an objection by any party in interest to the proposed plan, the court proceeds to evaluate whether requirements for confirmation of a plan have been satisfied as set forth in 11 U.S.C. § 1129. Among other findings, the plan must be feasible, proposed in good faith, and the plan and plan proponent must be in compliance with the Bankruptcy Code. Finally, local bankruptcy court policies determine when a final decree closing the case shall be entered, provided the estate has been fully administered according to Federal Rule of Bankruptcy Procedure 3022.

Q6. Does your jurisdiction offer any state support for distressed businesses?



Karol Tatar

In Poland, under the Restructuring Law, state aid for distressed businesses is regulated. That proceeding is already accepted by the European Commission, thus companies complying with adequate provisions of the Restructuring Law may enjoy preferential treatment with regard to state aid.

There are also individual procedures governed by state-owned institutions, particularly with aim to prevent bankruptcy (Early Warning programme), as well as supporting companies in financial difficulties by loans or capital engagement of public agencies or SPV.



Matt Dundon

As a general matter, no. However, one may consider the contribution of the (government) Pension Benefit Guaranty Corporation to the maintenance of pension payments to be such support. Regulations permitting successors to enjoy the benefit of tax losses (i.e., embedded tax deductions) of distressed businesses might also be considered such support.



Alban Meteyer

In countries like France and Germany, there is strong state support for companies which enter bankruptcy. The government acts as the debtor-in-possession and funds payroll expenses for a pre-determined period of time. A super-priority claim is created against the bankruptcy estate which is repaid over a negotiated period of time.

Q6. Does your jurisdiction offer any state support for distressed businesses?



Richard H. Golubow, Esq.

The answer is generally no, the federal government does not offer direct financial support for distressed businesses. However, in the context of a financial crisis or natural disaster, the answer is more nuanced. For example, in February 2009, the United States Congress approved the American Recovery and Reinvestment Act (“ARRA”), which was an economic stimulus package aimed at spurring consumer spending and ending the Great Recession. Apart from cutting taxes and spending billions of dollars to extend unemployment benefits, education, and health care, the ARRA’s third category of spending was geared towards creating jobs by allocating funds to federal contracts, grants, and loans. In turn, cities like San Francisco used federal stimulus funds to give immediate aid to small-business owners through a \$25 million program that reimbursed owners for 100% of the wages for certain new hires. Although somewhat attenuated, the federal government provided support for distressed businesses during the most recent economic downturn.

In the aftermath of natural disasters the government may also provide limited support to businesses by way of a body called the Small Business Administration (“SBA”). The SBA extends financial help through its lending programs, including for disaster assistance. SBA provides low-interest disaster loans to help businesses recover from declared disasters. While the process to apply is fairly straightforward, the business must be in an affected area as stated by a disaster declaration. Just as the abovementioned stimulus package was specific to the last financial crisis, disaster assistance through the SBA is limited to small businesses impacted by specific natural disasters. Therefore, while the federal government is capable of enacting policies to support distressed business, it appears that the aid comes indirectly and in response to a narrow set of circumstances.

Q7. What are the circumstances in which a business can or cannot carry on operating during insolvency?



Karol Tatara

As a rule, under Bankruptcy Law, an insolvent company can carry on operating. However, all operations must be conducted by the trustee appointed by the Bankruptcy Court. It is also important to add, that after six months from declaring bankruptcy, when the trustee wants to carry on operating a business, he needs the Judge-Commissioner’s approval.

In practice, the decision to continue operating during insolvency depends on the trustee. On the other hand, with regard to restructuring proceedings, the decision is carried out by the debtor. It is worth noting that in such instances, the business operates under supervision of the court supervisor or receiver – appointed by the Restructuring Court.



Olexander Droug

Businesses can generally continue operating during all stages of the bankruptcy proceedings except for the liquidation stage.

At the stage of administration of assets, the management of the debtor stays in place and an insolvency manager (administrator of assets) acts alongside the management. Only if management creates obstacles for the bankruptcy proceedings, the court may replace the management with the administrator of assets. The management is restricted in entry into contracts and will need to obtain approval from the administrator of assets.

Operation of the debtor in the course of the financial rehabilitation stage and in case of voluntary arrangement shall be conducted under the terms established by the creditors and approved by the court.

At the liquidation stage, all operation of the business shall be suspended. The liquidator will replace the management and will form the liquidation estate to satisfy the claims of creditors.

Q7. What are the circumstances in which a business can or cannot carry on operating during insolvency?



Matt Dundon

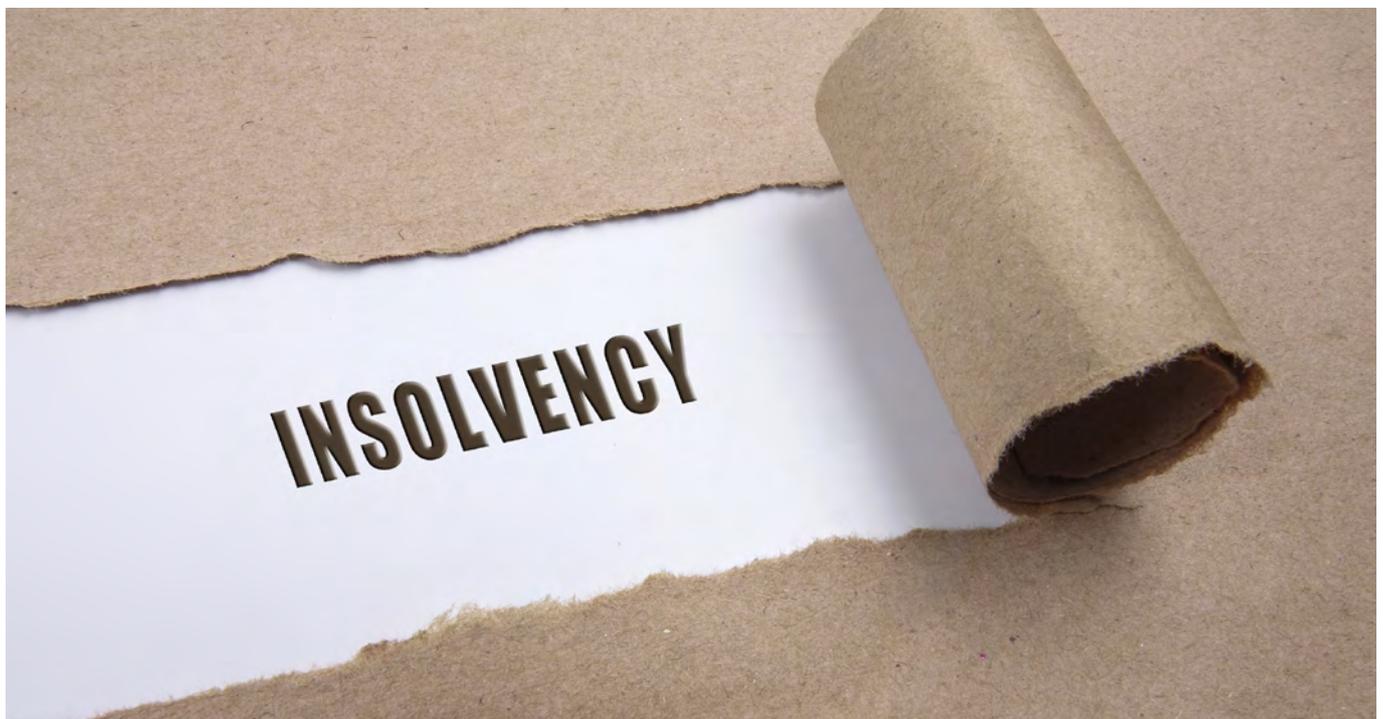
There are a very narrow set of circumstances in which a business must cease operations during US insolvency. Two of the most important are businesses that were inherently fraudulent, and even then only the fraudulent portions of its operations are required to be ceased, and business which are subject to high regulation for their operations, and which lack the post-commencement financing to comply with those regulations.



Richard H. Golubow, Esq.

In the context of a Chapter 11 bankruptcy, a business becomes a debtor in possession under 11 U.S.C. § 1108. In that capacity, the debtor maintains control and ownership of company assets and can continue its regular operations. 11 U.S.C. § 1107 places the debtor in possession in a fiduciary capacity and requires the debtor to perform duties such as accounting for property, examining and objection to claims, and filing regular reports with the court. A debtor in possession may choose to retain its existing leadership to guide it through the reorganisation process.

On the other hand, 11 U.S.C. § 1104(a) provides that the bankruptcy court is empowered to appoint a Chapter 11 trustee any time between the filing of the bankruptcy case and before confirmation of the Chapter 11 plan. A bankruptcy court may be inclined to appoint a Chapter 11 trustee when there are grounds to convert or dismiss a bankruptcy case. The Office of the United States Trustee or any party in interest may request the appointment of a Chapter 11 Trustee for cause, which includes fraud, dishonesty, incompetence, or gross mismanagement of the affairs of the debtor. If a case is converted to a case under Chapter 7 of the Bankruptcy Code, the debtor in possession also ceases to exist and a Chapter 7 Trustee is appointed to oversee the liquidation of the business. The two most basic reasons to convert a case from Chapter 11 to Chapter 7 is a debtor's inability to operate at break even if not at a profit, or the debtor's inability to satisfy the requirements for confirmation as set forth in 11 U.S.C. § 1129. As a result, a business cannot carry to operate its business during the post-filing.



Q8. Where do creditors and contributories rank on a debtor's insolvency?



Karol Tatara

Bankruptcy Law in Poland ranks claims in four categories:

The First Category:

- receivables under employment relationships attributable to the period prior to the declaration of bankruptcy, save for claims for remuneration of the bankrupt's representative or remuneration of the person performing acts connected with administration or supervision over the bankrupt's enterprise;
- receivables of farmers under agreements for providing produce from their own agricultural farms;
- dues under maintenance and alimonies and pensions by way of indemnity for causing an illness;
- incapacity to work, disability or death and pension by way of conversion of rights covered by the substance of the right to annuity into a pension for life;
- social insurance premiums within the meaning of the Act of 13 October 1998 on Social Insurance System due for the last three years before the declaration of bankruptcy, as well as receivables arisen in the course of restructuring proceedings due to actions of the receiver, or receivables arisen due to actions of the debtor taken after the opening of restructuring proceedings, which actions did not require permission of the committee of creditors or consent of the court supervisor, or which were taken with permission of the committee of creditors or consent of the court supervisor if bankruptcy was declared after examination of a simplified bankruptcy petition, as well as receivables under credits, loans, bonds, guarantees or letters of credit, or other financing provided for in the arrangement adopted in the course of restructuring proceedings and granted in connection with the performance of the said arrangement if bankruptcy was declared after examination of the bankruptcy petition filed no later than three months after the arrangement was validly set aside.

The Second Category:

- Other receivables if they are not subject to satisfaction in other categories, in particular taxes and other public tributes, and the remaining receivables under social insurance premiums;

The Third Category:

- Interest on receivables included in higher categories in the order in which the principal is subject to satisfaction, as well as judicial and administrative penalties of fine and receivables in respect of donations and legacies.

The Fourth Category:

- Receivables of shareholders under a loan or another act in law of similar effects, in particular supply of goods with deferred due date made to the bankrupt being a company in the period of five years before the declaration of bankruptcy, along with interest.

There is also preferential treatment of secured claims as well as cost of the proceedings – paid with priority over the abovementioned categories.



Norman Kinel

I often represent unsecured creditors' committees, who act as fiduciaries on behalf of all general unsecured creditors, who rank lowest in the capital stack – aside from equity, which is typically wiped out in most middle-market, large and mega-cases. Although I am not aware of any comprehensive studies on this, from my more than three decades of practice in the area, I believe that the percentage returns for unsecured creditors have declined precipitously in recent years. 25 years ago, an 80% distribution to unsecured creditors was common in many cases. Today, a less than 10% recovery seems to be the norm; often, even far less.

Q8. Where do creditors and contributories rank on a debtor's insolvency?



Norman Kinel

The primary reason for these poor recoveries is the explosion of mezzanine and other types of junior secured financing, which often means that companies entering into Chapter 11 not only have no unencumbered assets from which to pay general unsecured creditors, but even the purportedly junior secured lender is “under water.” Therefore, the primary way for general unsecured creditors to receive any meaningful recovery are through (a) what is often referred to as a “tip” from the senior lenders in return for not opposing their prearranged strategy for the reorganisation or liquidation; (b) uncovering unencumbered assets or liens which were not properly perfected or which may be avoided on some basis; or (c) identifying and pursuing viable causes of action against deep-pocket targets (or, if the claim is against an officer or director, where insurance exists which can fund a settlement or judgment).



Olexander Droug

There are six rankings of priority at the liquidation stage. All claims of the lower-ranking creditors shall be satisfied only if the claims of the higher-ranking creditors are satisfied in full.

These rankings of priority are as follows:

- Claims arising out of labour contracts, claims of the creditors under insurance agreements, claims for recovery of costs incurred in the course of the bankruptcy proceedings (including court fees and compensation of fees and expenses of the insolvency manager);
- liabilities arising from the infliction of harm to life or health of an individual; liabilities relating to mandatory pension and social security contributions; claims of individuals whose assets or funds are deposited with the debtor (in case the debtor belongs to a certain category of financial institutions, or other business entity attracting the assets or funds of individual depositors);
- local and state taxes and other mandatory payments; claims of the State Reserve Fund.
- claims of creditors not secured by a pledge (mortgage) of the debtor's assets, including claims that have arisen in the course of the assets administration stage or financial rehabilitation stage of the bankruptcy proceedings;
- claims for the repayment of the contributions to the capital of the debtor made by the debtor's employees, as well as additional fees of the insolvency manager (in case of successfully recovery of assets into the liquidation estate).
- other claims, including claims of the creditors who filed their applications after the expiration of the 30-day period following the publication of the announcement on commencement of the bankruptcy proceedings, as well as all claims for the collection of penalties and fines.

Claims of secured creditors shall be satisfied outside of the above ranking of priorities. The proceeds from the sale of the collateral (with deduction of expenses for sale and preservation of the collateral) shall be transferred exclusively to the respective secured creditor holding a security interest in such collateral. Any surplus proceeds from the realisation of the collateral will be included into the liquidation estate.



Richard H. Golubow, Esq.

Under the Bankruptcy Code, claims and equity interests are entitled to payment in a specific order. First, secured claims are entitled to the highest rank of priority. These claims are held by creditors who have liens on some collateral in a debtor's possession. Second, 11 U.S.C. § 507(a) provides a detailed order of priority unsecured claims, which for business cases include the expense of bankruptcy administration, unsecured tax claims of the government, and certain other categories. Third, nonpriority unsecured claims are paid. These are general unsecured claims that a debtor will typically categorise in its plan of reorganisation. Trade creditors, lessors, and bondholders are examples of these claimants that do not have a security interest in collateral. Finally, contributories or stockholders or “interest holders” rank low in a debtor's insolvency. Although they are generally not entitled to any recovery until all creditors recover in full, new stock in a reorganised company may be issued pursuant to a confirmed plan.

Q9. Are there any key trends or interesting strategies currently being implemented?



Karol Tatara

One of the most important goals for bankruptcy lawyers and professionals is to reverse the trend of dismissing motion to approve sale-purchase conditions within pre-pack procedures, which can be observed in the second instance courts.



Norman Kinel

One of the main differentiators in today's larger Chapter 11 cases is that in most of them debtor-in-possession ("DIP") financing is provided by a party – usually one or more hedge funds – who are already in the capital stack. True third-party DIP financing is becoming more and more of a rarity. As a result, those funds who provide the DIP financing wield tremendous influence over the proceedings and are often the drivers of very aggressive timelines for getting the company in and out of Chapter 11. The emphasis on speedy Chapter 11 cases is largely being driven by the ever increasing cost of Chapter 11 proceedings. Generally, only the largest and most well-funded debtors can afford to remain in Chapter 11 for more than several months. Even those Chapter 11 cases of large and well-funded companies will generally be resolved in six to nine months from the filing date.

Years ago many of these cases would go on for years – especially in the retail sector, where the debtor would convincingly assert that it required at least one, if not two holiday seasons in Chapter 11 in order to properly assess its performance and determine how to right-size its business. With the 2005 amendments to the Bankruptcy Code, both the time for assuming or rejecting store leases (and other executory contracts) and the exclusive period during which only the debtor can file a Chapter 11 plan were significantly shortened, so that in the retail sector in particular, Chapter 11 generally means a quick liquidation and the elimination of the brand, at least as a bricks and mortar enterprise. At best, some of these retailers will be resurrected on an e-commerce basis only. The very recent Chapter 11 filing of the iconic Sears Holding Corporation will be very telling with regard to whether even a partial reorganisation will be possible.



Olexander Droug

The recent version of the Bankruptcy Law, as well as Ukrainian court practice, established several key developments. It is now possible for a liquidator to file a claim against a shareholder, manager or other persons whose actions caused the bankruptcy of the debtor in the event that the liquidation estate does not fully cover the claims of all creditors. The Ukrainian courts have also recently confirmed a common practice where a creditor can hold both secured and unsecured claims to the same debtor in the same bankruptcy proceedings.



Peter C. Blain

In the first two decades following the 1978 enactment of the U.S. Bankruptcy Code, Chapter 11 cases generally progressed as Congress intended. Corporate debtors renegotiated the terms of their obligations with their creditors, attempting to confirm a plan of reorganisation which allowed the existing equity holders to retain their ownership interests. However, the process of negotiating and confirming a plan of reorganisation was quite expensive and time consuming, with cases often lasting a year or more.

Q9. Are there any key trends or interesting strategies currently being implemented?



Peter C. Blain

In the last two decades Chapter 11 cases have morphed into vehicles to sell companies as going concern enterprises, usually by a competitive auction process and often with sales closing within the first several months after the initial filing. This change was largely in response to lenders painfully learning that Chapter 11 cases were very expensive and often failed, resulting in the debtors' liquidation. A competitive auction sale process, on the other hand, ensured that the lender's obligations would likely be promptly repaid without substantial additional risk, and its collateral sold for a premium significantly higher than that which would be realised in a liquidation.

In the years prior to the Great Recession, lenders were aggressive in making loans, often in amounts greater, sometimes much greater, than the value of the collateral. Consequently, lenders found themselves the largest secured—and also the largest unsecured—creditor in the case. This effectively precluded a debtor from confirming a plan of reorganisation pursuant to which equity retained its ownership interest over the lender's objection. As such, lenders were able to insist upon a prompt sale process in exchange for providing the essential post-bankruptcy financing which was necessary for the debtor to continue its operations.

Today, the vast majority of Chapter 11 filings result in court-approved sales of debtors' assets out of the ordinary course of business. "True reorganisations," such as the type Congress envisioned in 1978, are extremely rare. Currently, developing bankruptcy jurisprudence involves issues relating to the sale process, credit bidding by a secured lender and the disposition of sale proceeds, rather than issues relating to the confirmation of a plan of reorganisation. It appears that this will be the case for the foreseeable future.



Vlad Nastase

Recently Government Ordinance amended the insolvency law and one of the most important changes was with respect to the State debt for equity conversion, meaning that the State that has a position of a creditor could become a shareholder in the respective company.



Richard H. Golubow, Esq.

High profile restructuring activity has been driven by large retail, oil and gas, and media bankruptcies with a heavy emphasis on pre-packaged and pre-arranged plans. Some recent trends in high-profile corporate bankruptcy cases reflected that companies were slightly more likely to seek bankruptcy protection with a pre-arranged/pre-packaged plan than they were to enter via a "free-fall" filing. Companies are frequently reorganising by providing their stock to creditors without selling off any major assets or operations, and thereby pursuing reorganising plans instead of liquidating plans.

On 10 October 2018, the Federal Reserve raised interest rates for the third time in 2018, increasing its target for the benchmark lending rate to 2.25%. In effect, interest rates are now at their highest level since shortly after Lehman Brothers filed bankruptcy in 2008. Importantly, the Federal Reserve anticipates raising rates again before the end of this year, as well as implementing three rate increases in 2019 and at least one more in 2020. Considering these anticipated increases, many businesses will need to refinance variable interest rate loans and extend maturities because they cannot afford to service their debt load.

Q10. What can we learn from recent surge in high profile bankruptcies and restructurings?



Karol Tatara

The most important lesson from well-known bankruptcies is, in our view, the role of the management and right decisions with regard to early warning symptoms of possible insolvency or threat of insolvency.



Norman Kinel

One thing that we have learned is that those Chapter 11 cases that are referred to as “free-fall” filings, i.e., where the company was essentially forced into bankruptcy, usually as a result of an unanticipated development (such as the discovery of accounting irregularities, outright fraud, an adverse judgment in significant litigation against the company, a lender unexpectedly declining to extend a prior forbearance agreement or freezing the company’s bank accounts or credit lines without notice) greatly diminishes the chances of a successful reorganisation, or, even if the company is able to reorganise, the duration of the proceeding will be much longer, with a commensurate increase in cost. Other factors that may result in a prolonged reorganisation include complex capital structures, legacy liabilities (such as union and labour issues and underfunded pension plans), or just poor timing relative to a particular industry or an economic cycle within that industry or the economy as a whole.



Vlad Nastase

Companies considered as being of ‘impact’ in the Romanian economy are the ones with over €1m in assets. These companies are generating approximately 70% of the national turnover figures. In 2017, the number of Romanian companies of impact that entered into insolvency decreased by seven percent compared to the previous year. Nevertheless, this number should not fool us as if we speak about an increase of value for these companies by 15% – from a point of assets immobilised (€1.22bn) and of over 30% if we look on the turnover figures – the picture looks slightly different. Romanian economy is an SME based economy; therefore high profile individual cases of bankruptcies and restructurings are a seldom a topic.



Richard H. Golubow, Esq.

Casual dining leader Applebee’s made headlines in May 2018 when its second largest franchisee sought bankruptcy protection in Delaware; In re: RMH Franchise Holdings, Inc. 18-11092 (Bankr. Del. 2018).

RMH Franchise Holdings, Inc. (“RMH”) is an Atlanta-based operator with about 163 units across 15 states. Dine Brands Global, the franchisor’s parent company, was at risk of losing almost 10% of its 1,900-store system. In court, Dine Brands Global earlier argued that RMH’s franchise agreement had already been effectively terminated by the time RMH filed bankruptcy. The bankruptcy court disagreed and recently issued a decision indicating it would move forward with final judgment in favour of the debtors and against Dine Brands Global. It appears that Dine Brands Global had sent a letter extending the “cure period” for RMH, which effectively allowed the franchisee to pull itself out of its financial troubles. Moreover, the letter did not repeat the threat of holding the company in default. As a result, RMH continued to maintain control over its restaurants, and could decide which of them to close for liquidation purposes.

Going forward, franchisors like Dine Brands Global may be more mindful of how and when to properly terminate franchise agreements. To start, determining what state law governs franchise agreements will be important; in RMH’s case Applebee’s was founded and headquartered in Kansas, so the standard there applied, which mandates that termination of a contract be “clear and unambiguous and convey an unmistakable purpose to rescind or forfeit the agreement.” *Warrick v. McKnab’s Estate*, 187 P.2d 502, 506 (Kan. 1947); see In re: RMH Franchise Holdings, Inc. 18-11092, Docket No. 568.

Q11. What strategies exist for successful implementation of cross-border restructuring and insolvencies?



Matt Dundon

US courts and insolvency practitioners have a robust set of tools and plenty of experience with both lead and, by way of Chapter 15, foreign COMI recognition proceedings for cross-border work with the UK, Latin American jurisdictions, and offshore business centres. However, Canada is by far the most important cross-border jurisdiction for the US given the prevalence of companies with operations in both the US and Canada, and there are standard and well-tested protocols for three varieties of cases: peer cases (with a US Chapter 11 and a Toronto plenary CCAA proceeding), Canadian-led cases (a plenary CCAA in Toronto and a Chapter 15 in the US), and US-led cases (a Chapter 11 in the US, and a “recognition” CCAA in Toronto). There are also extremely well-established connections between US and Canadian law firms, while many of the leading financial advisory and investment banking firms function on both sides of the border.



Alban Meteyer

When global companies are contemplating filing for bankruptcy, owners and management teams should retain professionals with experience in bankruptcy matters across multiple jurisdictions. This is necessary to ensure that the company is properly advised regarding the application of various cross-border insolvency laws. In addition, these professionals can provide an understanding of the cultural differences among the jurisdictions where the company does business as they related to corporate bankruptcy matters. In situations where a company's operations and creditors cross borders, the outcome of bankruptcy proceedings can be unpredictable so having the right advisors to craft a multi-jurisdictional strategy is critical for success.

Similarly, when global companies want to restructure their balance sheet out of court, they should look for capital providers which have a successful track record of cross-border situations. There are numerous credit funds, investors and private equity firms willing to recapitalise cross-border companies, up and down the market, and throughout the world.



Richard H. Golubow, Esq.

Chapter 15 of the U.S. Bankruptcy Code adopted the United Nations Commission on International Trade Law (UNCITRAL) Model Law on Cross-Border Insolvency, which addresses international insolvency proceedings concerning the same estate.

In 2018, judges from the U.S. Bankruptcy Courts of the Southern District of New York issued notable opinions that interpreted and applied Chapter 15. For example, in *B.C.I. Finances PTY. Ltd.*, 17-11266 (April 24, 2018), the court resolved whether a judgment claim for breach of fiduciary duty under Australian law followed the breaching directors who relocated to the U.S., as well as whether the claim satisfied the requirement under 11 U.S.C. §109(a) that a debtor have property in the United States before filing a petition under Chapter 15. First, the court noted that New York choice-of-law rules applied and consequently Australian substantive law was operative where the fiduciary duty claims against the insider arose from his acts in Australia, the insider was an Australian citizen, and any recovery would be distributed to foreign creditors through the pending Australian liquidation proceeding. The court determined that this claim constituted property satisfying 11 U.S.C. §109(a).

In addition, the court followed earlier Second Circuit precedent regarding fulfilment of the “property” requirement under 11 U.S.C. §109(a) through a debtor's placement of a retainer in a law firm's bank account prior to its filing of a Chapter 15 petition. See, e.g. *In re Suntech Power Holdings Co. Ltd.*, 520 B.R. 399 (Bankr. S.D.N.Y. 2014). Thus, *B.C.I. Finances PTY. Ltd.* reminds debtors that even a minimal amount of property located in the U.S. such as \$1,250 retainer deposited with a law firm can be enough for eligibility purposes in Chapter 15. Overcoming this initial hurdle is necessary for a successful implementation of a cross-border restructuring by way of Chapter 15.

Q12. Can you outline the importance of contingency planning?



Karol Tatara

Contingency planning, together with involvement of lawyers specialising in bankruptcy or restructuring issues can be a key factor when speaking about successful restructuring. Also, competent managers are very important to develop, introduce and supervise restructuring strategy.



Peter C. Blain

In my experience, contingency planning is what will likely distinguish a successful workout or insolvency proceeding from an unsuccessful one. An experienced advisor will carefully craft a detailed strategic plan to achieve the desired objective. Each step of the plan, like moves in a chess game, will be carefully thought out in advance, with each step designed to progress based on the steps that preceded it.

However, even meticulously-crafted plans rarely unfold as first conceived. Intervening events, such as an unsuccessful negotiation with an uncooperative creditor or an adverse court ruling, may necessitate a diversion from the selected path. Experienced advisors anticipate such setbacks and keep a contingent strategy close at hand which can be immediately implemented, thereby allowing the process to advance without interruption. Failure to engage in contingency planning usually results in the loss of momentum and the process stalling, jeopardising success.

Experienced crisis managers and advisors, like successful battlefield commanders, often spend more time on contingency planning at the beginning of an engagement than they spend developing the original strategy. They examine each crucial step in the process, continuously asking “what if...?” In workouts or insolvency proceedings, the route from start to a successful finish rarely matches the route initially conceived. However, with careful contingency planning, it will almost always be a route anticipated in advance of the very first step.



Vlad Nastase

It is increasingly important for contingency planning to be addressed by the companies, as it is frequently requested by the banks – in certain conditions also as per of the Early Warning System measures– as well as from the risk management system of the companies as they become more sophisticated. As some companies are exposed to international business environment and this climate is in a continuous change, in order to mitigate these risks, some of the companies are forced to consider having a contingency plan for external “turbulences” – and this comes with a cost.



Alban Meteyer

In the context of an investment banking transaction for a distressed company, contingency planning requires running dual processes with multiple capital providers while also evaluating various scenarios including a possible sale or restructuring of some, or all, of the existing business. It can also be used to assess the viability of restructuring inside or outside of bankruptcy. Companies should have a plan B in case their preferred solution falls through.

While running a process, multiple term sheets are received and several are selected for a deeper round of due diligence. Pursuing multiple scenarios allows companies to compare options such as a sale valuation or debt recapitalisation, and to select the appropriate outcome and/or capital structure for the business going forward.

Q12. Can you outline the importance of contingency planning?



**Richard H.
Golubow, Esq.**

Early planning is an essential first step. When decision makers in a company are faced with forecasts of insolvency based on factors such as an inability to timely service debt obligations, consulting with an objective financial restructuring professional should become a priority. The sooner a company acknowledges the potential for financial distress, the more likely it can make plans to avoid liquidation and instead restructure – whether in court or out of court. The automatic stay in a bankruptcy proceeding prohibits creditors from taking actions to enforce their contractual or legal rights and therefore continues to be a powerful tool for debtors. Even before arriving at the date of filing a bankruptcy petition, however, a company can work with restructuring firms to see if a pre-packaged bankruptcy negotiated in advance with creditors is feasible. This may entail demonstrating how the company has preserved or recovered value.

Subsequently, a company will have to decide whether its contingency plan involves turning to the Bankruptcy Code or to out-of-court restructuring options or assignments for the benefit of creditors under state law, as well as how long to explore said options. Inevitably, a company will have to determine whether the finality that comes with a bankruptcy proceeding is a high priority, as compared to the expense and time associated with the same. Considering the abovementioned timeline and outline may be the difference between emerging from a Chapter 11 bankruptcy and having to liquidate.



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