CorporateLiveWire

BANKRUPTCY & RESTRUCTURING 2022

VIRTUAL ROUND TABLE

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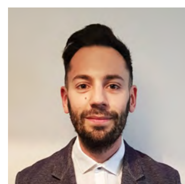
Introduction & Contents

In this roundtable our chosen experts explore the reasons why bankruptcy plummeted following the emergence of COVID-19 and explain why they believe filings will surge once again in 2022. They also identify the most 'at risk' sectors, discuss recent trends and outline recent regulatory changes. Other highlighted topics include discussions on restructuring plans, contingency plans and opportunities and challenges for investors/creditors. Featured jurisdictions are: Australia, Ireland, Japan, New Zealand, and USA.



James Drakeford
Editor In Chief

6 Q1. Globally, bankruptcy numbers have plummeted since the emergence of COVID-19. What are the main factors driving this decline?

9 Q2. What impact will the withdrawal of financial aid from governments around the world have on distressed businesses?

11 Q3. Which sectors are currently at highest risk of bankruptcy?

13 Q4. How else has the COVID-19 pandemic impacted the bankruptcy and restructuring landscape in your jurisdiction?

16 Q5. Are you noticing any new trends in bankruptcy litigation? Have there been any interesting case studies?

18 Q6. Have there been any other recent regulatory changes or interesting developments?

20 Q7. What challenges and opportunities exist for investors/creditors in terms of (i) acquisition financing, (ii) distressed acquisitions, and (iii) credit bidding?

21 Q8. Who should be the driving force behind the implementation of a restructuring plan and how are the specific roles determined?

23 Q9. What strategies exist for successful implementation of cross-border restructuring and insolvencies?

25 Q10. How important is it to have a contingency plan in place?

26 Q11. What key trends do you expect to see over the coming year and in an ideal world what would you like to see implemented or changed?

Meet The Experts

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For 25 years James was a Partner of Ferrier Hodgson and in 2017 was appointed National Chairman of Partners. In 2019, Ferrier Hodgson merged with KPMG Australia.
James is the Leader of KPMG Australia's National Restructuring Practice, is a member of KPMG' Australia's Board and sits on the KPMG Global Restructuring Executive.
James has deep experience across many sectors with particular knowledge of retail and consumer brands. James advises businesses facing organisational change or seeking financial restructuring advice.

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Norman Kinel is a partner in the Squire Patton Boggs Restructuring & Insolvency Practice group based in New York City and National Chair of the firm's Creditors' Committee Practice. With more than three decades of experience as a restructuring 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 bankruptcy asset sales and mergers and acquisitions, cross-border insolvency proceedings and out-of-court work-outs and restructurings.

Norman is listed on the Register of Mediators for the United States Bankruptcy Courts for the Southern and Eastern Districts of New York and the District of Delaware, and was a court-approved mediator in the Lehman Brothers cases.

Representative Chapter 11 Engagements:

Committees: BJ Services, CFRA Holdings, LBI Media, Optima Specialty Steel, Midstates Petroleum, Constellation Enterprises, Santa Fe Gold Corporation, Adelphia Communications, Coldwater Creek, 360networks (USA), Tavern on the Green, Coastal Electric Construction, KidsPeace Corporation, DTI Holdings, This End Up Furniture, Lone Star Industries, Inc. and the Singer Corporation.

Debtors: Hartshorne Mining Group, Daytop Village, The 1031 Tax Group, Robotic Vision Systems, Federal Mogul, Rocky Mountain Helicopters, Mulberry Phosphates and Andover Togs.

Honors and Achievements:

- *Super Lawyers* – recognized numerous times as one of the top bankruptcy attorneys in New York City.
- Global M&A Network's Turnaround Atlas Awards for:
  - *2020 U.S.A Restructuring Law Firm of the of the Year* – Middle Markets.
  - *Media Restructuring of the Year (2020)* – LBI Media.
  - *Chapter 11 Restructuring of the Year ($500 million to $1 billion) (2018)* – Optima Specialty Steel.
  - *Energy Restructuring of the Year (over $1 billion) (2016)* – Midstates Petroleum.
  - *Industrials Restructuring of the Year (2016)* – Constellation Enterprises.

Meet The Experts

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Richard H. Golubow is a founder and the managing partner of Winthrop Golubow Hollander, LLP, a financial restructuring, insolvency and bankruptcy law firm located in Newport Beach, California. Mr. Golubow has extensive experience in the areas of bankruptcy, out-of-court workouts, distressed asset sales, UCC foreclosure sales, and general assignments. His diverse client base includes representation of debtors, creditors, creditor committees, trustees, assignees for the benefit of creditors, and asset purchasers in a wide range of industries. Mr. Golubow has been retained and designated as a bankruptcy law expert on several occasions.

Mr. Golubow has been honoured as the recipient of financial restructuring awards by several leading financial publications and organisations, including a perennial selection as "AV Preeminent" (5 out of 5) Peer Rating, Martindale-Hubbell's highest peer recognition, Best Lawyers in America® in the fields of Bankruptcy and Creditor Debtor Rights/Insolvency and Reorganization Law, a 2017 M&A Advisor "Deal of the Year" Award, and a perennial selection as a Southern California "Super Lawyer", including a 2017, 2018, and 2019 "Top 50 Orange County Super Lawyer." The awards collectively recognise success and excellence, expertise, service, achievement and innovation as chosen by industry peers.

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David specialises in corporate restructuring and insolvency matters. He regularly acts for international and local corporates on complex schemes of arrangement. He also regularly acts for insolvency office-holders (Examiners, Receivers and Liquidators), financial institutions, directors and shareholders and is experienced in both contentious and non-contentious corporate recovery and turnaround matters. Prior to joining our Restructuring and Insolvency team in December 2014, David spent a number of years working with the insolvency and restructuring team of Minter Ellison, a top-tier Australian-based commercial law firm.

<u>More recent work includes:</u>

- DEPFA ACS Bank DAC ("DEPFA") – advised DEPFA on the successful use of an Irish scheme of arrangement to implement the redemption in full of nine Asset Covered Securities (which had a combined original issuance value of approximately €1.7 billion) prior to their stated maturity dates.
- Norwegian Air Examinership – advised AerCap, BOC Aviation Limited, Engine Lease Finance Corporation Limited, Export-Import Bank of the United States, FPG Amentum, Goshawk, M&T Aviation Finance (Ireland) Limited and SMBC Aviation Capital Limited, in the Norwegian Air Examinership. The examinership was used to implement a significant fleet reduction and restructuring of US$5 billion of debt.
- Nordic Aviation Capital DAC on its landmark Irish scheme of arrangement which implemented a standstill across 89 different financing arrangements with a total debt of approximately US$6 billion.
- KPMG as administrators to the insurance company CBL Insurance DAC.
- Assured Guaranty Group in its capacity as guarantor of over US$500 million of notes issued by Ballantyne Re in an Irish scheme of arrangement proposed by Ballantyne Re which sought to restructure US$1.6 billion of its senior debt.
- Asia Pulp and Paper in using an Irish scheme of arrangement under Part 11 of the Companies Act 2014 to restructure US$1 billion of debt.

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Selwyn D. Whitehead Esq. [JD, LLM Tax Law, LLM IP Law, California Bar Bankruptcy Law Certified Specialist] is a San Francisco Bay Area bankruptcy and tax attorney whose practice focuses on helping her clients manage their wealth through effective estate and tax planning and/or manage their debt through debt restructuring or bankruptcy. Selwyn also helps her clients facing foreclosure and represents clients with emotionally and financially "taxing" issues before the Franchise Tax Board, the IRS and the U.S. Tax Court.

Selwyn also produces and hosts her weekly talk show, SELWYN'S LAW, which discusses the law as related to consumer and small business finance airing Saturday mornings at 10:00 AM on the Christian Radio Station KFAX, located at AM 1100, whose broadcast footprint includes the San Francisco Bay Area and nationwide on the Internet. And beginning in April 2020, Selwyn expanded the reach of SELWYN'S LAW when her show was picked up by World-Wide Christian Radio, WWCR, which rebroadcasts her shows world-wide over short-wave on Friday afternoons.

Prior to going into private practice, Selwyn managed a group of attorneys and paraprofessionals in Fireman's Fund Insurance Company's Claims Department, where she was responsible for auditing the claims and case handling practices, performance, fees, and expenses of outside defence counsel.

Before joining Fireman's Fund, Selwyn spent the preceding 17 years as a financial services industry consumer advocate. She held leadership positions at the Law Offices of Public Advocates and The Greenlining Coalition, focusing on banking and insurance public policy issues; was a consumer representative to the California Automobile Assigned Risk Plan, the California automobile insurer of last result; and, founded the non-profit Economic Empowerment Foundation, whose mission was to educate urban center dwellers, small business owners, and women about their rights and responsibilities as financial services industry consumers, while advocating on their behalf before regulatory and governmental bodies, including the Untied States Congress the California Legislature and the National Association of Insurance Commissions.

Selwyn is an accomplished attorney with extensive operations management, advocacy, and regulatory affairs expertise used to challenge and shape public policy, including in the insurance and banking industries.

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Shinichiro Abe is one of Japan's leading specialists in Japanese and international corporate restructuring and insolvency law. He is highly respected as an advisor for transactions (including M&A) and structures requiring insolvency protection and solutions. Shinichiro has also contributed to numerous publications and spoken at various seminars and events. Shinichiro is a visiting professor at Chuo Law School.

Shinichiro has establish his law firm since 2016.

Shinichiro is a member of various kinds of professional affiliations. Below are list of affiliations where he is one of board members; Chair of Insolvency committee of International Pacific Bar Association; Board Member of the International Insolvency Institute: Board member of Japanese Association for Business Recovery (affiliation of Insol); Board Member of the Japanese Association of Turnaround Professionals.

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Christopher Howard is a leader in English law restructuring and finance who has broad knowledge working across jurisdictions. Chris leads our European restructuring practice and he advises international corporations, investment and commercial banks and financial sponsors on corporate restructurings and financings throughout Europe, the Middle East and the United States. Mr. Howard joined Sullivan & Cromwell in 2013 as partner.

Q1. Globally, bankruptcy numbers have plummeted since the emergence of COVID-19. What are the main factors driving this decline?

Richard Golubow

Golubow: Surprisingly, despite the economic impact of COVID-19, mandatory closings and strict limitations placed on businesses to operate, and general fear by the public in terms of the economy, the number of bankruptcy filings in the United States has fallen due to government interventions that kept people afloat during the COVID-19 pandemic and allowed companies to raise cash through debt.

No less than six pieces of legislation in the form of loans and grants were enacted to help the United States cope with the economic impact of COVID-19. The legislation included programmes such as the Paycheck Protection Program (PPP), and Economic Injury Disaster Loans (EIDL). A PPP loan is a federally backed low-interest loan provided to incentivise small businesses to maintain their payroll during the crisis. These loans are forgiven if used for certain expenses and if employment and compensation levels are maintained. EIDL loans are small, lower interest loans with options for principal and interest deferment. Small businesses that apply for such loans were also eligible for Emergency Economic Injury Advance Grants, which were advances of up to $10,000 that do not need to be repaid. Those loans and grants can be used for operating expenses such as payroll costs, pay for sick leave, and debt-service costs. Taken together, those COVID-19 relief bills are projected to cost a total of $5.3 trillion — $968 billion of which has been targeted to small businesses, though total available funding for various loan programmes exceeds the net cost associated with the programme, as businesses are expected to repay a portion of their loans.

Norman Kinel

Kinel: In 2020, commercial chapter 11 bankruptcy filings climbed to their highest levels in years as a result of COVID-19. According to data prepared by Epiq for the American Bankruptcy Institute, year-on-year commercial chapter 11 filings increased 29% in 2020, with 7,128 filings—the most since 2012. In 2021, however, both consumer and business bankruptcy filings declined precipitously. As a result of the on-going recovery from the pandemic, only 43 large company bankruptcies were filed in the first half of 2021, compared to 89 during the same period in 2020.

The pandemic accelerated filings by some companies that were already suffering financial distress, particularly in the retail, energy, travel and hospitality sectors. But the unprecedented amount of financial support that governments injected into the economy—including the Coronavirus Aid, Relief, and Economic Security (CARES) Act—as well as forgivable business loans, near-zero interests rates, increased and extended unemployment benefits and eviction and foreclosure moratoriums, all led to the decline.

In addition, globally, relaxed insolvency procedures were either implemented formally, or on an ad hoc basis, such that it became clear to both borrowers and lenders that the landscape had shifted in favour of borrowers and that courts would be sympathetic to their predicament at least until the severity and duration of the pandemic became clearer. Lenders were reluctant to enforce remedies and realise losses when asset values and the overall viability of various businesses were so uncertain due to the pandemic. This has been especially the case in sectors such as commercial real estate, travel, leisure and aviation, where foreclosing and taking control of troubled companies' assets was not very appealing to lenders.

Also contributing to the decline was the tremendous amount of capital markets activity and the soaring stock market. In addition, leveraged loan default rates have dipped to a nine-year low, while retail and institutional investors have been competing to inject money into businesses, rather than sitting on their vast "dry powder." This has also facilitated the ability of many companies to refinance or issue new debt at very favourable rates, thereby staving off the need for restructurings or bankruptcy filings.

David O'Dea

O'Dea: COVID-19 and the imposition of strict lockdown measures throughout Ireland for most of 2020 and 2021 have resulted in remarkably low corporate insolvency rates in Ireland. For example, the corporate insolvency rates for 2020 were the same as 2019 and the rates recorded as of 30 September 2021 are 36% lower than the same period in 2020.

There are two main factors driving this decline:
the Irish government has deployed a broad range of financial support measures for struggling companies and employees; and
there has been a general reluctance amongst lenders, landlords and trade creditors to take any enforcement action against struggling companies.
However, the Irish governmental supports are in the process of being phased out and will be removed by Q1-2022. In addition, as the economy has now fully reopened, the general forbearance and goodwill displayed by creditors towards struggling companies is expected to dissipate. As a result, it is expected that, by the end of Q1-2022, corporate insolvencies will significantly increase as the true economic impact of the lockdown measures over the last 18 months becomes apparent.

Selwyn D. Whitehead Esq

Whitehead: Government actions, including both direct and indirect cash infusions into otherwise distressed businesses, have been a main factor in the sharp decline in the number of bankruptcies during the COVID-19 pandemic. These fiscal stimulus programmes undertaken by legislative bodies around the world have been designed with the goal of keeping the global economy afloat by attempting to stabilise even the most poorly capitalised and/or poorly managed distressed businesses that in the absence of COVID-19 would in all likelihood have had to seek the protection of the bankruptcy courts in order to attempt to reorganise or liquidate in an orderly fashion. As a result of these fiscal stimulus programmes, businesses, individuals, and family units, with no other options to maintain their economic viability during the pandemic than to file for bankruptcy have become few and far between.

For example, in the U.S. at the federal level, Congress passed and the past two sitting Presidents signed off on the American Rescue Plan Act and the CARES Act. These two Acts contained a series of laws that at least temporarily implemented programmes that: (i) instituted nationwide residential tenant eviction and residential and commercial property foreclosure moratoria; (ii) provided direct government payments to employers to be uses for overhead, including employee salaries that in most instances could be totally forgiven, (iii) provided direct stimulus payments to taxpayers so they could continue to purchase goods and services; (iv) provided indirect payments to workers who became unemployed due to the pandemic by providing supplemental funding to the states to provide supplemental unemployment benefits; and, (v) instituted a nationwide student loan forbearance programme.

Drilling down to the state level, California, where I live, implemented the California Rent Forgiveness Program that is available to all eligible Californian residential tenants no matter where they live in the state as long as they meets the household income requirements can take advantage of this state-run programme that offers to pay 100% of the back rent accrued during the pandemic as well as unpaid water and electricity bills. California's $7.2bn fund for its rent forgiveness programme is separate and distinct from the $47bn Federal Emergency Rental Relief Program that has failed to get most of its funding out the door. I also point out that even though California's eviction moratorium ended on 30 September 2021, giving landlords the legal right to recommence evictions for non-payment of rent, a completed application for the California Rent Forgiveness Program may likely provide a complete defence in housing court.

Drilling even further down to the city and county level, some California cities and counties, such as the City of Oakland and the County of Fresno still have in place eviction moratoria even though the California legislature and Governor allowed its state-wide eviction moratorium to lapse on 30 September 2021.

Q1. Globally, bankruptcy numbers have plummeted since the emergence of COVID-19. What are the main factors driving this decline?

Selwyn D. Whitehead Esq

As such, for the City of Oakland, I found the following statement from the City's Housing & Community Development Department on its website concerning Governor Newsome's 25 June 2021 Eviction Moratorium Extension through and to 30 September 2021 as related to the City of Oakland: *"… The aforementioned September 30th state extension end date has no impact on the City of Oakland. Oakland's moratorium on evictions and rent increases will last until Oakland City Council terminates the Local Emergency..."*

And as for the City of Fresno, its website states in pertinent part, *"[t]he statewide residential eviction moratorium — which protects renters who have been financially affected by COVID-19 from eviction if they are unable to pay their rent in full — is set to end Sept. 30. However, in March 2020, Fresno City Council adopted an ordinance that established a local eviction moratorium for residential and commercial renters. That moratorium will be in effect as long as the local declaration of emergency remains in place. This means that the local eviction moratorium for nonpayment of rent in the city of Fresno will continue past Oct. 1."*

In sum, the advent of governmental cash infusions paid either directly to businesses, including landlords, or indirectly to these businesses' employees and/or tenants and/or to the general consuming public in order for it to continue to purchase goods and services to keep these otherwise distressed business afloat is the reason there has been a dramatic downshift in the number of business bankruptcies during the pandemic.

James Stewart

Stewart: Businesses have been incredibly resilient to the disruptions caused by COVID-19. While the level of disruption has varied between industries, there are three common factors that we have seen contribute to the lower levels of corporate bankruptcies over the past 18 months.

The first is the unprecedented levels of stimulus injected into economies by governments coupled with other government relief measures, such as a standstill on delinquent tax collection through most of 2020. These measures have provided businesses with the ability to either manage through the disruption or to hibernate until their markets return to normal.

The second factor is the willingness of lenders to support their debtors experiencing heightened levels of distress. Lenders forcing a restructure on a business impacted by COVID-19 are likely to experience lower returns than a similar restructure taking place after markets have returned to normal. Lenders have generally been pragmatic throughout the past 18 months to not crystalise losses at the depth of the market.

The third common factor is the abundance of capital available to be invested. We have seen both debt and equity investors moving into riskier assets seeking better returns than is currently available in non-distressed assets. This has allowed many distressed businesses to shore up their balance sheets to get though the pandemic.

In addition to the above common factors, we have also seen some sector specific examples where businesses have benefitted due to COVID-19. As people have been forced to spend more time at home, we have seen consumption redirected from travel and hospitality industries, into homeware and furniture retailing and into the home building and renovation industries. This redirection has resulted in many retailers being in a considerably stronger financial position than they were 18 months ago.

Shinichiro Abe

Abe: As discussed in further detail in response to the fourth question below, in Japan, financial support from the government and financial institutions, such as special loans responding to the economic effects of the pandemic, has helped to underpin Japanese business during a critical time thereby staving off bankruptcies. On the other hand, bankruptcies related to the pandemic are gradually increasing in the wholesale and retail sales industries, which do not receive government benefits.

Christopher Howard

Howard: QE, cheap debt, M&A, relaxation of Basle III, and legal changes.

Q2. What impact will the withdrawal of financial aid from governments around the world have on distressed businesses?

Richard Golubow

Golubow: Government intervention and support programmes have provided artificial liquidity to businesses. The downward trend in bankruptcy filings is not expected to continue as governmental support programmes continue to dwindle and businesses deplete their reserve funds and ability to "weather the storm." The expectation is that many companies that have otherwise been shielded from the full economic fallout of COVID-19 will face other notable headwinds, including a potential rise in interest rates to ward off inflation, supply chain pressures, rising costs and labour shortages. One or more of these factors can lead to financial distress and the need to pursue financial restructuring in the form of increased asset disposals, merger and acquisition and debt restructuring. Such financial restructuring will likely result in a spike in bankruptcy filings to the extent that the restructurings cannot be accomplished through an out-of-court restructuring.

Norman Kinel

Kinel: As government support measures are withdrawn and the longer-term business impacts from the pandemic are more capable of assessment, chapter 11 filings will likely rise. Although many businesses survived the massive disruption — probably more than could have been imagined — the "new normal" of remote working arrangements and supply chain shortages have yet to be fully absorbed. Significant adjustments may need to be made to business plans, with some companies needing to right-size their balance sheets and adjust their post-pandemic business models. An upward trend in filings could also be triggered as a result of expected increases in interest rates and the effect of the recent significant increase in inflation, which will likely accelerate increases in interest rates.

Many companies that otherwise might have required restructuring or a bankruptcy filing dodged those bullets because their lenders elected not to enforce their remedies — understanding that this was a global phenomenon and not the fault of their borrowers. Lenders were also left in the position of not being able to obtain reliable valuations of their borrowers' businesses and were hesitant to lock in losses. Instead, they preferred to attempt to assess the timing, scope and extent of the recovery. In commercial real estate, for example, resorting to foreclosure against a delinquent borrower's property would have left a lender stuck with an illiquid asset with an uncertain future. Once a clearer picture emerges of what a post-pandemic business looks like, lenders will be able to better gauge the risks of enforcing their rights and are likely to take action which could lead to more restructuring activity and chapter 11 filings.

Q2. What impact will the withdrawal of financial aid from governments around the world have on distressed businesses?

Selwyn D. Whitehead Esq

Whitehead: In addition to the fiscal-policy-based cash infusions used by legislative bodies to stimulate their economies, as discussed above, central banks throughout the world have also used monetary-policy-based tools to stimulate their economies. Here in the U.S. these tools used by our Federal Reserve Bank include: (i) monitoring and cutting interest rates to and through the subtending banks to the ultimate business customer; (ii) increasing the number and kinds of lending facilities through which it can lend money, such as the Main Street Lending Program; (iii) enhancing its ability to buy U.S. Treasuries and mortgage-backed securities; and (iv) an overall accommodative regulatory policy with the goal of increasing liquidly in financial markets and increase the amount of money that is availability to businesses in general, and marginally profitable business (i.e. distressed business in particular).

Unfortunately, unless these distressed businesses have been able to undertake remedial rehabilitative measures, such as obtaining additional capital while the government has enhanced the amount of money available for this purpose and/or otherwise restructuring their debt and/or discharging their indebtedness through the dissolution of the entity and/or the assignment of its assets for the benefit of its creditor on their own out of court during the pandemic; when the cash infusion and other economic stimuli provided by governments are withdrawn, these businesses are destined to fail and will then likely have to seek the protection of the bankruptcy courts to resolve their debtor/creditor issues.

James Stewart

Stewart: Our expectation, and recent experience, is that the withdrawal of financial aid will not have any immediate impacts on distressed businesses. The liquidity in the market and approach of key financial stakeholders continues to provide distressed businesses with time to consider their options and explore different recapitalisation or restructure options.

Over time we expect to see a rising level of bankruptcies and restructures as liquidity slowly dissipates and stakeholder attitudes harden to reflect more typical market conditions. We expect this will happen gradually throughout 2022.

There is a possibility of a sharper increase in bankruptcies for small and medium sized enterprises once delinquent tax collection activities resume. These businesses have relied more heavily on non-payment of debts than larger or publicly listed businesses. Additionally, these small and medium size enterprises generally cannot attract new capital as easily as large businesses.

Shinichiro Abe

Abe: The service sector, which has been particularly protected by government benefits, may not need additional financial aid from the government as the flow of people returns to normal, improving their business conditions. On the other hand, the pandemic loans from government-affiliated banks are due for repayment in the very near future, making it necessary for recipients of such loans to consider action plans for repayment. At this stage, a company that is in financial difficulty may consider a rehabilitation plan with its creditors, which may include rescheduling or hair cut (debt forgiveness). Fortunately, in Japan, there are currently governmental organisations that assist in the restructuring of distressed companies, such as the SME Business Support Council. With the support of these governmental agencies, distressed companies will be considering whether to restructure or liquidate.

Q3. Which sectors are currently at highest risk of bankruptcy?

Richard Golubow

Golubow: Several rounds of COVID-19 pandemic government aid relief programmes padded incomes with direct payments to households and enhanced unemployment benefits. Many of the far-reaching protections, including eviction moratoriums and expanded unemployment benefits, provisions affecting student loans, food stamps and more have or are scheduled to expire in the coming months. As a result, consumers will be forced to curtail discretionary spending as these unprecedented programmes that financially supported millions of Americans go away.

The sectors most affected and those likely to remain at the highest risk of bankruptcy include consumer discretionary companies that sell nonessential products and services that consumers may avoid without any major consequences to their wellbeing. The consumer discretionary sector is broadly defined to include automobiles, and auto components, consumer durables and apparel (household durables, leisure products, textiles, apparel and luxury goods), consumer services (hotels, restaurants, and leisure, and diversified consumer services) and retailing (distributors, internet and direct marketing retail, multiline retail and specialty retail).

Norman Kinel

Kinel: First and foremost, commercial real estate and REITS. Real estate firms accounted for four of the nine mega bankruptcies with over $1 billion in assets in the first half of the year, including Knotel, Le Jeune Villas Developments, EHT US1 and Corp. Group Banking. Five of the nine largest corporate bankruptcies were filed by real estate investors, with the second and third largest bankruptcies by assets during the period being two REITs—Washington Prime and Hospitality Investors Trust.

Relatedly, malls continue to be under stress, as well as restaurants and fitness chains. With the recent emergence of the Omicron variant and potentially others, any consumer-facing retail business remains at risk. Renewed concern regarding the severity of the pandemic could also significantly impact the travel, leisure and hospitality industries. Global supply chain issues may also put many companies at risk, including suppliers to the automotive and related industries.

David O'Dea

O'Dea: While there is generally a more positive outlook for Irish based aircraft lessors, the debt raised and the highly leveraged balance sheets of lessors will need to be re-paid at some stage. It is expected that many small and/or mid-market lessors that do not have access to the capital markets will need to restructure their debts as a result of impending debt covenant breaches and repayment obligations.

Unsurprisingly, the other sectors that are facing the greatest risk of insolvency in Ireland are the retail/real estate sector and travel and leisure sector. While commercial landlords have been hesitant about pursuing tenants through the courts, many retail tenants continue to build up substantial arrears. The question is whether a consensual arrangement can be reached between landlords and tenants. If not, both landlords and tenants will be forced to consider their financial positions and restructuring options. Successive lockdowns have also hit the travel and leisure sector hard. Although the leisure travel sector is rebounding well, the business travel sector remains in difficulty. Both sectors are facing significant difficulties as a result of staff shortages.

More generally, there is expected to be 're-balancing of the books' in terms of corporate insolvency rates. It is anticipated that companies that would or ought to have collapsed regardless of the COVID-19 pandemic will start to enter a process once government supports are phased out in the coming months. In addition, inflation and increased supply chain costs (from wages to oil, and more recently energy costs) are further burdens on struggling businesses that could accelerate an increase in corporate insolvencies over the coming months.

Q3. Which sectors are currently at highest risk of bankruptcy?

Selwyn D. Whitehead Esq

Whitehead: On the business side, even after the pandemic subsides because so many businesses have discovered that their employees are just as efficient and effective when working remotely as they were when they came into the office; commercial real estate venture holding substantial portfolios of office space will likely face the highest risk of bankruptcy. In addition, even though there are high hopes for a resurgence of in-store vs. online purchases this holiday season; because the virus keeps mutating and causing new lock-down mandates, until the world reaches herd immunity allowing retail spaces to stay open, commercial real estate ventures holding substantial portfolios of retail space will also face a high risk of bankruptcy. And finally, until we reach the point where we don't see an uptick in COVID-19 cases and deaths 30 to 45 days after a holiday in which millions of people have travelled, commercial real estate ventures holding substantial portfolios of hospitality space, including hotels, will also face a high risk of bankruptcy.

On the consumer side, there is likely to be a huge increase in filings by low to moderate income individuals and families, as the remedial programmes put in place, such as the eviction and foreclosure moratoria and the student loan forbearance programmes geared towards these financial services industry consumers, were and remain measures generally that deferred payment rather than eliminating the debt. That means that unless these consumers have access to the funds needed to bring their debts current when these programmes sunset, they face a very high risk of collection actions by their creditors which will ultimately lead them to bankruptcy court.

James Stewart

Stewart: Viticulture and certain agriculture subsectors (e.g. seafood) that historically exported large volumes of produce have been caught up in geopolitical issues and are experiencing higher levels of distress. This has created revenue and margin pressures, with domestic and alternative export markets unable to absorb surplus production volumes. It is expected these broader market constraints will continue for the foreseeable future placing on-going pressure on operating models.

Civil aviation and tour operators have managed to weather the storm of both international and domestic border restrictions and are starting to see a rebound as the warmer months in the southern hemisphere coincide with border openings.

Sectors that experienced stress pre-COVID such as healthcare and retail have shown a strong turnaround, albeit with a degree of separation between those who have pivoted to a post-COVID economy. We expect some of these sectors to face headwinds once the 'new normal' economy commences from 2022.

Shinichiro Abe

Abe: In general, industries with a high risk of bankruptcy are those that are susceptible to reduced human flow, such as the lodging, restaurant, and entertainment industries. However, based on the results of a survey conducted by Teikoku Databank, Ltd. (Teikoku Databank) and other sources, it is clear that many companies in the manufacturing, wholesale, and retail industries have also experienced a decline in revenue.

Specifically, by industry, the manufacturing sector had the highest percentage of companies with declining revenues, reaching 71.5%. The wholesale (65.6%) and retail (63.2%) industries were the next highest. Looking at the average sales growth rate for each industry, 27 among 43 industries showed a yearly decline. The largest decline rate was in the lodgings industry, which saw a 28.5% drop, and a 48.9pt decrease compared to that of previous year. This was followed by "Restaurants" (down 17.4%) and "Entertainment" (down 16.3%). The government's requests of businesses to shorten business hours and of the general public to refrain from going out due to the spread of the COVID-19 have directly resulted in a significant impact on corporate performance.

Q3. Which sectors are currently at highest risk of bankruptcy?

Christopher Howard

Howard: Travel and tourism, airlines, and hospitality.

Q4. How else has the COVID-19 pandemic impacted the bankruptcy and restructuring landscape in your jurisdiction?

Richard Golubow

Golubow: The government's response to the pandemic and the Federal Reserve's ultra-loose monetary policy upended predictions that the pandemic would trigger a tsunami of bankruptcy filings. Companies that might otherwise need bankruptcy protection or financial restructuring have been able to use the artificial liquidity from government programmes to stay afloat, which also substantially reduced the need to seek financing from the private lending sector. This resulted in private credit funds, flush with cash to compete more intensely to lend money. Private lenders continue to focus on yield that is projected to be higher than if these funds were deployed into other markets and investments. Since these lenders can only cut their rates so much, it's easier for these lenders to compete by offering looser loan covenants also known as "covenant-lite" loans. When economic growth eventually slows and companies begin to struggle, private lenders could find themselves with fewer levers for fixing their loans after giving up key loan covenant safeguards that protect them in tougher times.

Norman Kinel

Kinel: Among the companies hardest hit by COVID-19 were brick-and-mortar retailers, who were already experiencing a years-long downturn for a variety of reasons, with e-commerce frequently being the most referenced negative disrupter. Many of these companies who were already in chapter 11, or needed to file, sought unprecedented relief from the courts to address this once-in-a-lifetime event. Several courts — including those presiding over the chapter 11 cases of large retailers Modell's Sporting Goods, Logan's Roadhouse, Pier 1 Imports Inc. and Forever 21— formally authorised the mothballing of their chapter 11 cases and/or authorised those debtors to disregard the Bankruptcy Code's requirement that a chapter 11 debtor remain current on its post-petition rent obligations, notwithstanding the objections of landlords and various other creditors. These debtors were able to persuade the courts that a temporary pause in the proceedings would prevent complete value destruction. Once the economy began to rebound, these emergency measures were mostly not sought or granted by the courts, with chapter 11 practice largely reverting to pre-pandemic practice.

As a result of the pandemic, many proposals to streamline the chapter 11 process were floated, although none were enacted, with the exception of the raising of the cap on companies who could file under the Small Business Reorganization Act (the "SBRA"), which created a new Subchapter V of the Bankruptcy Code. The goal of the SBRA, which fortuitously took effect in February 2020 — just shortly before the effects of the pandemic were felt — is to make chapter 11 reorganisation viable for small businesses by striking a balance between chapter 7 and chapter 11 bankruptcies. The SBRA is intended to speed up the plan process, reduce the costs of the process for debtors, and provide a faster return to creditors. Under the law as originally passed, to be eligible for Subchapter V, a debtor (whether an entity or an individual) had to be engaged in commercial activity, and its total debts—secured and unsecured—had to be less than $2,725,625, with at least half of those debts having arisen from business activity. However, in March 2020, in response to the COVID-19 pandemic, Congress passed the CARES Act, which raised the Subchapter V debt ceiling for one year to $7,500,000.

Q4. How else has the COVID-19 pandemic impacted the bankruptcy and restructuring landscape in your jurisdiction?

Norman Kinel

Although the higher debt ceiling was scheduled to expire on 27 March 2021, it was subsequently extended through March 2022. Subchapter V has proven popular, with more than 1,400 cases filed in its first year, with approximately a third of those cases only eligible as a result of the higher debt limits. The American Bankruptcy Institute has reported that Subchapter V cases are experiencing higher plan-confirmation rates, speedier plan confirmation, more consensual plans, and improved cost-effectiveness than if those cases had been filed as a traditional chapter 11's.

With respect to larger businesses, we have seen an increase in the number of pre-packaged and pre-negotiated filings and a decrease in the number of free-fall bankruptcies. This is widely believed attributable to the continuing escalating costs associated with a chapter 11 filings. Remarkably, we have now seen a number of so-called "pre-packs" being confirmed in days or weeks and a few in less than 24 hours in certain jurisdictions where the courts have been willing to accept the argument that ample notice has been if certain pre-filing procedures have been followed. However, the permissibility of such "overnight" chapter 11 plan confirmations has not yet been tested in the appellate courts.

David O'Dea

O'Dea: Ireland is a global hub for aviation leasing. Over half of the world's leased aircraft and engines are owned by Irish companies and there are more than US$140 billion of assets under the management of Irish-based lessors. In light of the significant impact that the COVID-19 crisis has had on the aviation sector, there has been some significant cross border restructuring mandates in Ireland over the last 18 months in the aviation sector. We advised and played a central role in each of those mandates:

- we acted for Nordic Aviation Capital, the world's largest regional aircraft lessor, in using an Irish scheme of arrangement (which is very similar to an English scheme of arrangement) to implement a standstill across 89 different financing arrangements with a total debt of approximately US$6 billion, and which were governed by a mixture of New York, English and German law. U.S. Chapter 15 recognition was granted for the scheme;
- we acted for AerCap, BOC Aviation Limited, Export-Import Bank of the United States, Engine Lease Finance Corporation Limited, FPG Amentum, SMBC Aviation Capital Limited, M&T Aviation Finance (Ireland) Limited and Goshawk in the Norwegian Air Examinership. Examinership is a debtor in possession corporate rescue mechanism which has been available in Ireland since 1990 and is very similar to the U.S. Chapter 11 procedure. This Examinership was used to implement a significant fleet reduction and restructuring of US$5 billion of debt. U.S. Chapter 15 recognition was granted for lease and contract repudiation orders granted by the Irish Commercial Court;
- we acted for Nordic Aviation Capital, the main aircraft leasing company in the City Jet Examinership. This process was successfully used to slim down the airline and reduce running cost; and
- we are currently acting for the joint liquidators of Stobart Air.

In more recent times there has been an increasingly positive outlook for the aviation sector, at least for aircraft lessors. There has been a rebound in regional and domestic travel, global passenger traffic is expected to reach pre-pandemic levels by 2024 and bond investors have shown a huge appetite to invest in aircraft lessors. Airlines have also had to take on large sums of debt. As a result of these increased debt levels, it is expected that airlines will need to curtail capital expenditure on purchasing aircraft. This is good news for aircraft lessors as the percentage of leased aircraft and sale and leaseback transactions will only increase. There has also been increased M&A activity among aircraft lessors which is expected to continue into 2021 and 2022. We recently acted for AerCap in its US$30 billion acquisition of GECAS.

Selwyn D. Whitehead Esq

Whitehead: Because the filings have reduced so dramatically over the last 18 to 24 months, courts have cut back on the number and availability of hearing dates needed to shepherd cases through to their ultimate conclusions. Likewise the various classes of trustees have reduced their legal and support staff to economise during the downturn. Finally, many solo practitioners have left the practice area in order to make a living. All sound business decision I'm sure. However, my concern is that if and when bankruptcy cases increase – as they are predicted to in a very rapid fashion when the fiscal and monetary policies of governments conclude –the rapid uptick of cases may swamp the courts, trustees and experienced practitioners, leading to problems of quality of service to the debtors and other parties of interest. I am especially concerned about the lack of time that practitioners will take to determine the property type of bankruptcy best suited to black women, who are projected to be the largest cohort of future filers, and who historically have received poorest quality of service, such that they end up filing multiple cases to get the same or lessor results than those obtained by caucasian filers.

James Stewart

Stewart: The Australian Government's response to COVID-19 included a range of temporary measures and permanent changes to the restructuring mechanisms available.

The first response was a range of temporary measures aimed at reducing the number of bankruptcies and restructures. These measures included providing directors with automatic relief from personal liability for debts incurred when a company was insolvent. Additionally, the period required after a payment demand was issued by creditor before court action could be commenced was increased from 21 days to six months. These measures provided strong incentives for both debtors and creditors to not commence bankruptcy or restructure processes.

The permanent measures were two new regimes. The first was a simplified liquidation process for businesses looking to close. The second was a new restructuring regime that could only be accessed by small business. The new small business restructuring regime is a debtor-in-possession regime with creditors asked to vote on a plan of compromise. The process is supervised by an insolvency practitioner. Since their introduction, both regimes have had limited success and uptake.

Shinichiro Abe

Abe: According to TOKYO SHOKO RESEARCH, LTD., the number of corporate bankruptcies (total liabilities of 10 million yen or more) in 2020 (January-December) was 7,773 (down 7.2% from the previous year), with total liabilities of 1.22 trillion yen (down 14.2%). The number of cases has been lower than that of the same month of the previous year for six consecutive months since July 2020. It is also the first time in 30 years that the annual number of bankruptcies has fallen below 8,000. In terms of total liabilities, in 5,925 of the cases (representing 76.2% of the total), the liabilities were less than 100 million yen, indicating that bankruptcies were mainly small-scale. The total number of COVID-19-related bankruptcies has reached 792.

The overall trend is that the number of bankruptcies is decreasing due to funding support from the government and financial institutions such as special loans for the emergence of COVID-19.

Q5. Are you noticing any new trends in bankruptcy litigation? Have there been any interesting case studies?

Norman Kinel

Kinel: The most significant trend from my perspective as a bankruptcy litigator is court hearings, depositions and mediations being conducted over Zoom or similar virtual platforms. I was recently involved in a large bankruptcy case pending in Texas where over the course of four months there were approximately 20 separate hearings, including multiple evidentiary hearings. Pre-COVID, I would have had to travel from New York to Texas for many, if not all of these hearings. While not having to endure the wear and tear of travel was welcome, the manner in which many of those hearings were conducted — particularly the dynamics of in-person advocacy — notably changed.

While in-person hearings always require proper decorum on the part of counsel and a significant degree of control of the proceedings by the presiding judge, remote hearings can become somewhat stilted as a result of their virtual nature, particularly in cases where there are multiple counsel representing multiple parties. During many of these virtual hearings, each counsel is called upon to speak in a pre-determined order and often cannot speak again, or rebut an adversaries' arguments, until their next turn at the virtual podium. It is also difficult to maintain eye contact with the judge on a screen with numerous faces appearing simultaneously and the inevitable technical glitches which often leads to distraction.

Part of zealous and effective advocacy is the ability to quickly react to comments made by other parties — even at times by politely interrupting — while having to wait your turn can result in a loss of spontaneity or the stifling of lively and effective debate. On occasion, by the time you are able to speak again, the arguments you may have wished to rebut may have either effectively become moot or were made too far in the past to timely or sensibly address.

Selwyn D. Whitehead Esq

Whitehead: While not limited strictly to bankruptcy cases, my review of some recent cases determining what is and is not required as a reasonable accommodation for an employee with health issues under the Americans with Disabilities Act ("ADA") has led me to prognosticate that there will likely be an increase in the number ADA cases filed that will effect businesses across the board, but will compound what may be an already precarious situation for businesses in financial distress.

As more and more distressed business attempt to rehabilitate themselves by reopening and bringing their entire workforce back into the office on a full time basis; after nearly two years of remote only or some type of hybrid partly in the office and partly remote arrangements, a number of employees will want to continue to work remotely and will ask for an accommodation under the ADA because either they have contracted COVID-19 during the pandemic and therefore claim they continue to suffer from its long-term effects (i.e., they claim to have "long-term-covid-condition"), or even if they have not contracted COVID-19, they claim to suffer some other chronic health issues that may make them more susceptible to COVID-19 if forced to come back to the office with co-workers who may or may not be carriers of the disease.

According to a survey conducted by Bloomberg Law in 2019, prior to the onset of the pandemic, employers won 70% of the cases where employees were denied a remote work accommodation under the ADA due to their illness or chronic condition even where the employee "showed that working from home would have been easier, but an employee's preference [because] an employee's preference isn't a required accommodation under federal and state disability law, the U.S. Court of Appeals for the Either Circuit ruled."[1]

However, during the pandemic a substantial majority of businesses have found that through the use of technology their employees have been productive even when working remotely, such that remote work has now become a tool to keep employees who would otherwise quit. So, the question soon to be before the courts is this: How can employers claim that remote work is detrimental to an effective work environment and necessary for productivity when employees arrear to have met their productivity goals while working from home?

1. *See Work at Home Gets Skeptical Eye From Courts as Disability Issue, Bloomberg Law, February 21, 2019; Brunckhorst v. City of Oak Park Heights, 914 F.3d 1177, 2019 AD Cases 34630 (8th Cir. 2019); see also, EEOC v. Ford Motor Company, Docket No. 12-02484 (6th Cir. Nov 13, 2012).*

James Stewart

Stewart: A recent case study is the first joint sitting of the Federal Court of Australia (FCA) and High Court of New Zealand (HCNZ) to deliberate on the distribution of assets from the liquidation of a stockbroking business in both Australia and New Zealand. The relevant companies were Halifax Investment Services Pty Ltd (In Liquidation) and Halifax New Zealand Limited (In Liquidation).

This is the first time any Australian or New Zealand court has sat jointly with a court from another country. The joint hearing and parallel judgments provide a precedent for cross-border cooperation between courts in jurisdictions around the globe. These cases illustrate the extent to which judges from different jurisdictions are capable of facilitating concurrent insolvent administrations to achieve fair and efficient outcomes for the benefit of creditors and other stakeholders alike.

The FCA noted the exercise of jurisdiction in New Zealand may be affected by a lack of recognition by the HCNZ, and the FCA could request that the NZHC hear the proposed New Zealand proceedings concurrently with the Australian proceedings, at least to the extent that any pooling order made will require recognition in New Zealand.

The FCA also expressed the view that this was a "classic candidate" for cross-border co-operation between courts to facilitate the fair and efficient administration of the winding up of Halifax Australia (and Halifax NZ).

Each Court delivered separate judgments after deliberating together about the principal issues before each of the Courts for resolution.

Shinichiro Abe

Abe: In 2020, the spread of COVID-19 tended to impact companies that were already in financial difficulty prior to the pandemic. On the other hand, in recent years, distressed businesses, such as restaurants, have gone bankrupt due to the accumulated effects of the decline in sales caused by the economic effects of the pandemic. In fact, according to the report of TOKYO SHOKO RESEARCH, LTD. as above, 816 COVID-19-related bankruptcies occurred in the first half of the fiscal year 2021 (April-September), compared to 495 in the same period of the previous year, and the number of bankruptcies caused by the COVID-19 itself is on the rise.

The situation can be illustrated by the insolvency of BELBE, Ltd. (BELBE), a well-known manufacturer and seller of bread and confectionaries with 28 stores in around Tokyo area. The company posted annual sales of about 2.56 billion yen for its financial year ended June 2020. However, due to the spread of COVID-19, stores located in commercial facilities and station buildings throughout Tokyo were forced to close or shorten their opening hours, resulting in a significant drop in sales. BELBE's situation was compounded by the recent sharp rise in the cost of raw materials. On 8 November 2021, BELBE abruptly closed all of its stores and it was reported that BELBE will file for bankruptcy shortly.

Christopher Howard

Howard: Yes, we led the challenge on Virgin Active. We will see more contested valuation challenges. I can speak for hours about this.

Q6. Have there been any other recent regulatory changes or interesting developments?

Richard Golubow

Golubow: In September 2019, Purdue Pharma — the maker of OxyContin and a company controlled by the infamous billionaire Sackler family — filed for bankruptcy to protect itself from approximately 2,600 lawsuits for its role in fuelling the U.S. overdose crisis through the alleged misbranding and reckless marketing of their flagship product, painkiller OxyContin.

The Purdue Pharma Chapter 11 bankruptcy plan was confirmed in September 2021. The Department of Justice and several states filed appeals, which remain pending.

Under the Chapter 11 plan, the Sacklers gave up their ownership in Purdue Pharma and will contribute $4.5 billion over the next several years into a fund that will be used to satisfy claims and help fund opioid abatement efforts. In exchange for that contribution, the plan provides for non-consensual third-party releases from all opioid claimants of their claims against the Sacklers for their role in pushing the sale of OxyContin. The plan terms are extremely controversial, with opponents of these third-party releases saying it allowed the Sacklers — who didn't file for bankruptcy — to take advantage of the bankruptcy system and essentially buy their way out of liability that may well be limitless, given the impact of the opioid epidemic on the nation.

The practice of obtaining non-consensual third-party releases in chapter 11 plans led to the introduction of federal legislation entitled the Nondebtor Release Prohibition Act of 2021. If passed, the legislation will prohibit the use of non-consensual, non-debtor releases that have helped the Sackler family, and others like them escape personal accountability for their actions by shielding themselves through a bankruptcy proceeding of another corporation or entity. The legislation would also prohibit another abuse of the bankruptcy system, corporations' use of so-called "divisional mergers" to move their liabilities into underfunded shell companies that then declare bankruptcy. In October 2021, Johnson & Johnson used this loophole in an attempt to shield itself from liability to the tens of thousands of people who contracted cancer after using the company's talc-based products.

Norman Kinel

Kinel: Yes, there have been several developments, including a proposed statutory change relating to "venue reform." Venue for bankruptcy cases is governed by 28 U.S.C § 1408, which provides that corporations may file in the district (a) in which their "domicile, residence, principal place of business in the United States, or principal assets in the United States" have been located during a majority of the prior 180 days, or (b) in any district where an affiliate, general partner or partnership has filed. Because of the different bases for venue, a company may have multiple choices where to file its chapter 11 case. For instance, if the company is incorporated in Delaware, like many U.S. companies are, venue in Delaware is permitted even if the company is headquartered in another state and otherwise has no connection to or assets located in Delaware. Alternatively, if the company has an affiliated debtor incorporated or located in a state, the company can file in its affiliate's venue, even if the affiliate is insignificant in size or importance. All of this optionality may lead to "forum shopping"— meaning a company is strategically able to choose where to file its bankruptcy case, based on factors such as favourable case law in the district, the particular judges (and at times the fact that there is only one judge) in the district, or the procedures employed in the district for complex cases.

Previous efforts by those who believe there is a need to reform the bankruptcy venue statute have failed. However, on 28 June 2021, the "Bankruptcy Venue Reform Act of 2021" (H.R. 4193) was introduced in the U.S. House of Representatives and on 23 September 2021, a substantively identical version of the House bill — the "Bankruptcy Venue Reform Act of 2021" was introduced in the U.S. Senate. The new bills would require a debtor to file where its headquarters or principal assets are located, severely limit the ability to use affiliates to establish venue and require a debtor to establish by "clear and convincing evidence" that venue in the selected jurisdiction is proper. For reform advocates, however, the chances appear quite slim for any movement on or passage of the current bills, as they are likely to run into strong resistance, as have prior reform efforts. Moreover, even if passed by the House and Senate, President Biden, a former Senator from Delaware — a state which has long been a major beneficiary of the current venue rules — has in the past been a strong proponent of the present venue statute.

David O'Dea

O'Dea: The Companies (Rescue Process for Small and Micro Companies) Act 2021 was signed into law in Ireland on 22 July 2021. The Act provides for a new administrative rescue process for small or micro sized companies only, which is called the "Small Company Administrative Rescue Process" or "SCARP".

Small and micro sized companies make up approximately 98% of the registered companies in Ireland. During the height of the COVID-19 pandemic in 2020, there was a realisation that this sector of the economy would require ready access to a suitable corporate rescue mechanism once the financial supports being provided by the Irish government were lifted. While Examinership has been successfully used in Ireland since 1990 as a flexible corporate rescue mechanism, it is a court led process which involves incurring legal and financial advisory costs. As a result, it has mainly been used by large corporates and groups while small and micro sized companies have tended to avoid, or have simply been unable to avail of, the procedure because of the costs involved.

In that context, while SCARP adopts the key principles of Examinership, it is mainly an administrative process which seeks to remove the role of the court and associated costs involved as much as possible. The company can voluntarily decide to enter into the process by appointing what is called a 'process advisor'. That process advisor is tasked with devising a rescue plan for the company, which will likely involve a write-down of debt. The process advisor has 49 days from the date of their appointment to put this rescue plan to the company's creditors and members for them to consider and vote on. If at least one impaired class of creditors vote in favour of the rescue plan and no objection is lodged with the court within 21 days of the vote, the plan is binding on all creditors, including those creditors that voted against the plan. If an objection is lodged within that 21 day period, the plan will need to be formally sanctioned by the court, as is the case in any Examinership. While SCARP has been signed into law in Ireland, the process will only commence and be available to small and micro sized businesses in the coming weeks. It remains to be seen whether SCARP will become a viable corporate rescue option for these businesses in managing the fall-out from the COVID-19 pandemic.

Finally, the Companies (Miscellaneous Provisions) (COVID-19) Act 2020 introduced a number of interim measures to address the impact of COVID-19 on Irish companies. One of those measures is that an Examinership Court protection period can be extended from 100 to 150 days where, inter alia, exceptional circumstances exist in relation to the company. These interim measures are due to last until 31 December 2021, but it is possible that they may be extended.

James Stewart

Stewart: In addition to the new simplified liquidation and small business restructuring regimes, the Australian Government has commenced consultation on a range of topics relating to how bankruptcy and restructuring occurs in Australia.

The Government has consulted on potential changes to the Creditors Scheme of Arrangement regime, with the focus being on introducing an automatic moratorium on creditor rights. The proposal appears to be influenced by attempts to provide companies with more debtor-in-possession restructuring options, such as the US Chapter 11 regime. The proposal also takes elements of the scheme of arrangement regimes used in Singapore and the United Kingdom, which are slightly more debtor friendly than the Australian equivalents. The general response from the restructuring industry is the proposal will result in limited additional use of the regime, mainly due to the small number of candidates within the Australian market.

Q6. Have there been any other recent regulatory changes or interesting developments?

James Stewart

An independent consultation on the 'Safe Harbour' laws has also commenced. Safe Harbour provides relief to directors from personal liability for a company's debts which were incurred while the company was insolvent. Australia has tough insolvent trading laws relative to many other jurisdictions and the Safe Harbour laws attempt to lessen that burden and provide directors with more time to restructure a business. The review may result in the criteria for accessing the Safe Harbour laws being relaxed, providing more opportunity for directors to manage distressed situations.

The most recent consultation commenced by the Australian Government relates to the interaction of the bankruptcy and restructuring laws with Trusts and Corporate Trustees. Trusts are a very common feature within Australian corporate structures, particularly for privately held businesses. The trust structures provide taxation and asset protection advantages to the trust beneficiaries. The consultation is seeking feedback on how trusts and in particular corporate trustees, should be treated in bankruptcy and restructuring scenarios. At present, the legislation does not properly deal with the treatment of trusts, meaning a raft of court orders is often required to deal with bankrupt corporate trustees.

Shinichiro Abe

Abe: On 19 November 2021, the Japanese government decided to implement new economic measures to cope with the prolonged damage caused by the pandemic, including the largest post-war fiscal spending of about 55.7 trillion yen and a project size of about 78.9 trillion yen.
The economic measures include measures to stimulate demand for businesses related to the tourism industry, such as the passenger transportation industry, the food and beverage industry, souvenir industry, hotel industry, and the like by issuing travel coupons for the purpose of increasing consumption of travel, food, and beverage, participation in events, as well as support for cancellation costs of events that have been postponed or cancelled due to COVID-19 related restrictions.

Also, in connection with these economic measures, the government has clearly stated that, in preparation for the growing need for support of business restructuring and revitalisation, the government will promote support for management improvement, business revitalisation, and business transformation of small and medium-sized enterprises, etc., through the cooperation of and collaboration with regional banks and the SME Business Support Council, in addition to business restructuring subsidies.

Q7. What challenges and opportunities exist for investors/creditors in terms of (i) acquisition financing, (ii) distressed acquisitions, and (iii) credit bidding?

James Stewart

Stewart: The challenges for investors in obtaining acquisition financing are presently reducing in the Australian market due to the abundance of capital available and the slow maturity of the private credit and non-bank lender industry. Historically, Australian business lending has been dominated by the retail banks, who still command the bulk of the market. However, new lenders and alternative credit funds have been emerging to service segments of the business market that the retail banks are unwilling to lend to due to the risk profile.

In relation to distressed acquisitions, the biggest challenge in the current market is the lack of opportunities impacted by the relatively low level of distressed businesses (well below 2019 levels) and the additional liquidity available in the market. The increased competition has resulted in distressed acquisitions now being priced above where distressed investors would expect to pay. The opposite side to this however is there are more opportunities for lenders to exit distressed businesses with smaller discounts on their debts.

Australia has also had limited opportunities for credit bidding. A key challenge to credit bidding is the dominance of the Australian retail banks on the lending landscape. Unsurprisingly, the retail banks are unable to credit bid for equity. However, they are often unwilling to sell their debts to investors who would then use the position to credit bid, except where they are already a minority lender in a syndicated loan.

The key issue for retail banks is the perceived reputational issues of selling debts to investors who then force a restructure to take equity. As the private credit and non-bank lender market in Australia matures, we expect there will be more opportunities for investors to take advantage of credit bidding strategies.

Shinichiro Abe

Abe: We can expect to see many opportunities for investors to buy distressed companies and claims after the Japanese government discontinues its support for SMEs which suffered during pandemic. The challenges for investors may be to find appropriate distressed companies inside the Japan market. Investors may find some amongst the companies that default and file for a legal insolvency procedure. Another strategy would be to buy a large amount of the non-preforming loans of the insolvent company to become a major creditor and thereby gain bargaining power with respect to a rehabilitation plan of the debtor company. In such a case, a creditor may be able to negotiate for the rehabilitation plan to include conditions for that creditor's purchase of all or a part of the debtor company. Creditors tend be the first choice of debtors when choosing a friendly company to merge with or sell its business to.

Q8. Who should be the driving force behind the implementation of a restructuring plan and how are the specific roles determined?

Richard Golubow

Golubow: Especially during COVID-19, the chances of a manageable turnaround based on improved economic conditions is extremely dire and debtors must seek to proactively take measures before it is too late – a key aspect is to implement a restructuring plan before an in-court bankruptcy filing is necessary. A restructuring plan for a business is a complex matter riddled with extensive legal, financial and operational issues and considerations. As such, debtors should reach out to their in-house counsel or to experienced corporate restructuring counsel that are experts in distressed financial situations to begin discussing their options. While experienced financial restructuring counsel will guide debtors through myriad legal issues, equally important is to engage financial advisers to assist with the following:

- Updating financial projections to evaluate cash flow in worst, likely and best-case scenarios, with an emphasis on hoarding cash.
- Creating alternative business plans based upon the updated financial projections.
- Assessing cash availability from current streams of revenue, existing loans and lines of credit.
- Assessing unencumbered assets that could be used as collateral to borrow additional funds.
- Summarising employee wage and benefit requirements and available assistance programmes.
- Implementing cost reduction plans to achieve or maintain positive cash flow.

Such steps require experienced financial restructuring counsel teaming up with experienced financial advisers skilled in distressed debt situations. Thus, it will take a team approach that begins with an understanding that a plan is needed, the obtainment of restructuring counsel, and restructuring counsel's teamwork with skilled financial advisers.

Q8. Who should be the driving force behind the implementation of a restructuring plan and how are the specific roles determined?

David O'Dea

O'Dea: In our experience, the success or failure of implementing a restructuring plan for a company or group is subject to there being a proper corporate governance structure within that company or group. It is critical to have a clear and proper distribution of rights and responsibilities within the organisation and that there are robust personnel at the executive level, in particular at the CEO, CFO and Head of Legal positions. It is often the case that these executives have the key relationships with the critical stakeholders of the business. Those key executives, together with the directors of the company, have to be the main driving force behind any restructuring plan in order for it to succeed.

James Stewart

Stewart: The specific circumstances of each situation will generally determine which group is the driving force behind a restructuring plan. A key factor for determining this is the capital structure and in particular the classes and types of creditors.

In circumstances where creditors are seeking to use the restructuring opportunity to take an equity position, it is common to see a creditor group as the driving force behind the restructuring plan. This is even more likely in circumstances where the value break is below the equity level, leaving the current shareholders with little or no economic interest in the outcome of the restructuring plan.

In relation to publicly listed companies, sophisticated boards will generally engage early with creditors to negotiate a restructuring plan, rather than waiting for creditors to drive the agenda. The approach for privately held companies managed by funds is like publicly listed companies, with sophisticated investment managers seeking to drive any necessary restructuring.

This differs to privately held businesses which are owner-operated and often family-controlled. In these circumstances, our experience has been that creditors need to drive the restructuring agenda, as management and directors are more focused on shareholder interests, rather than the interests of the debtor company.

Shinichiro Abe

Abe: Lawyers, accountants, consultants (including FAS), and various support organisations are considered to be the main players in business restructuring. Generally, in the initial stages of a distressed company's turnaround, the main focus is business support by creditors, such as financial institutions. If the company cannot recover at this stage, lawyers and other specialists may become involved in helping the company execute an out of court workout and/or legal insolvency procedures, in which more in-depth restructuring measures, such as rescheduling or hair cut will be planned.

Christopher Howard

Howard: Shrink wrap the entire process in terms of your timetable, give no information, dispense with information, create a huge information asymmetry, dispense with an M&A process, create a relevant alternative that is largely fictitious and hope that you get a judge that waves it all through. I am being facetious but you get my drift. I have really strong views on this.

Q9. What strategies exist for successful implementation of cross-border restructuring and insolvencies?

David O'Dea

O'Dea: The Irish corporate and debt restructuring alternatives are:

- Examinership: which provides Court protection and is analogous in many ways to U.S. Chapter 11;
- Part 9 Scheme of Arrangement: which is similar in all significant ways to the current English scheme of arrangement; and
- Part 11 Scheme of Arrangement: which is available to corporates that are about to be, or are in the course of being, wound-up.

1. Examinership

Examinership has been available in Ireland since 1990. It is a proven corporate rescue mechanism for ailing companies. It can and has been utilised by companies as a form of pre-packaged restructuring tool which can restructure and shed burdensome debt. Similar to the debtor-in-possession concept under US Chapter 11, the appointment of an examiner does not displace the company's board of directors and management. The company and its management continue to operate during the Court protection period, which lasts up to 100 days (or 150 days in exceptional circumstances).

Once the Examiner has formulated a restructuring plan, it has to be approved by the creditors of the company at meetings convened by the Examiner and then by the Court.

Some of the key advantages of Examinership are that: (i) there is an automatic moratorium on any creditor enforcement against the company or its assets throughout the Examinership period; (ii) there is a low creditor approval threshold whereby only a simple majority in number and value of one impaired class of creditors must vote in favour of the scheme; and (iii) cross class cram down is available.

Crucially, Examinership facilitates cross border restructuring as follows:

- it is a specified insolvency process under Regulation (EU) 2015/848 on insolvency proceedings (recast) (the "Recast Insolvency Regulation"). As a result, the appointment of an Examiner and any proposals under a scheme of arrangement for the company that have been confirmed by the Irish Court are, subject to limited exceptions, automatically recognised and binding through-out the EU. In addition, Examinership is generally a recognised process in the United States under the US Chapter 15 recognition process; and
- Examinership can also be extended to any related company to the company in Examinership so long as, amongst other things, that company has a 'sufficient connection' to Ireland.

2. Companies Act Schemes of Arrangement

There are two options available to a company under the Companies Act in order to formulate and propose a scheme of arrangement with its creditors:

- a scheme of arrangement under sections 449 to 455 of Part 9 of the Companies Act ("Part 9 Scheme of Arrangement"); and
- a scheme of arrangement under section 676 of Part 11 of the Companies Act ("Part 11 Scheme of Arrangement").

The Part 9 Scheme of Arrangement provisions are largely identical to the English scheme of arrangement provisions. Pursuant to this procedure, a restructure proposal is submitted to a class or classes of creditors. In order for such a proposal to be approved by the requisite class or classes of creditors, the statutory majority required is a "majority in number representing at least 75% in value of the creditors or class of creditors" who are present and voting. In the event that the requisite majority is achieved, the proposed scheme of arrangement can be binding on the minority.

Q9. What strategies exist for successful implementation of cross-border restructuring and insolvencies?

David O'Dea

The Part 11 Scheme of Arrangement provisions provide that an arrangement may be entered into by a company that is about to be, or is in the course of being, wound up. Such an arrangement is entered into between the company and its creditors and requires the consent of the members of the company, and the consent of 75% in number and value of all creditors of the company. There is no requirement for a meeting of creditors to be held and creditors are not divided into classes. The permission of the court is not required to initiate this procedure or indeed to sanction it, provided that the requisite majority of members and creditors assent. Once the arrangement has obtained the relevant support, it will be binding on the company, all of its creditors and any liquidator (if the scheme of arrangement is promoted by a liquidator). Any creditor who wishes to appeal against the arrangement has three weeks from the date of completion of the arrangement to make an application to the Irish High Court. The court may then amend, vary or confirm the arrangement, as it thinks just.

Importantly, both a Part 9 Scheme of Arrangement and a Part 11 Scheme of Arrangement facilitate cross border restructuring as:

- a Part 9 Scheme of Arrangement is ultimately sanctioned by the Irish High Court. As a result, it is generally accepted that it is a court order for the purposes of Regulation (EU) 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) ("Recast Judgments Regulation") and will be automatically recognisable and enforceable throughout the EU. In addition, it is possible that a Part 9 Scheme of Arrangement would be recognised in the United States under the US Chapter 15 recognition process; and
- a Part 11 Scheme of Arrangement, where promoted by a liquidator of a company under a creditors' voluntary liquidation process and where that process is sanctioned by the court, would be a recognised process for the purposes of the Recast Insolvency Regulation. Again, it is possible that a Part 11 Scheme of Arrangement would be recognised in the United States under the US Chapter 15 recognition process.

Shinichiro Abe

Abe: Implementation requires many factors to be considered. An initial key step is to assemble a team of appropriate restructuring experts who can respond quickly. Particularly in cross-border restructuring, it is important to collaborate with expert teams in other countries. Another key action item is for the expert team to examine the project in detail and prepare an appropriate restructuring plan. In particular, depending on the characteristics and importance of the group companies in each country, the question of whether to restructure or transfer the business will be an issue for consideration. In such cases, a careful analysis of each country's legal system, particularly tax and labour issues, should be conducted in advance to avoid confusion. It is also key to obtain provisional protection for the debtor company so that it can proceed to prepare and initiate the various procedures for restructuring plan. During this provisional period, the debtor will not accept the collection of claims from any creditor. On the other hand, it is essential to secure cash needed for the day-to-day business, especially if a supplier has refused payment by accounts receivable. In Japanese practice, securing DIP finance and support from sponsors are essential for this purpose.

Christopher Howard

Howard: Many and they are varied. Chapter 11 has a real function. WHOA looks useful. Examinership. They all have merits.

Q10. How important is it to have a contingency plan in place?

Richard Golubow

Golubow: During these times, it is essential for any business to have a well thought out contingency plan in place. Simply, the key for any debtor is to be proactive in preserving value and preventing harm (or additional harm if they have already been impacted). Easier said than done but two key necessities include: (i) creating a plan based on how sweeping restrictions on both goods and people impact your business. This includes addressing continued workforce and supply chain disruptions; and (ii) creating a plan for all financial obstacles that have occurred and will likely continue to occur. Such a financial plan includes understanding how financial relationships will/are change/ing in every way from the costs of maintaining employee health to missed targets with business partners, creditors, vendors, etc. Intimately related to the above, is the importance of reassessing one's capital structure and actively engaging with creditors. Now is not the time to be passive. It is imperative that debtors understand their contracts and agreements with creditors and actively work with them to mitigate all potential damages – often through renegotiation.

David O'Dea

O'Dea: It is very important to have a contingency plan in place, particularly from a directors' duties perspective. Depending on the circumstances, if 'Plan A' doesn't work and the company simply free falls into a disorganised liquidation without adequate provisions or without having the ability or means to explore other potential restructuring options, the directors could be criticised and potentially sanctioned by a subsequently appointed liquidator. In addition, by having and communicating a viable 'Plan B' to stakeholders, this can improve the negotiating position of the company and increase the likelihood of achieving a consensual deal.

James Stewart

Stewart: Ensuring contingency plans are in place, for both debtors and creditors, is often a major determinant in the outcome of a restructuring process. We often see debtor companies pursuing one transaction or option to help resolve a distressed situation, without having a contingency plan. The strategies pursued usually have a high degree of uncertainty and with common options being a sale of a business unit, raising new equity or refinancing debt.

If there is no backup option and the strategy being pursued fails, it generally results in a more rapid decline. This is due to the debtor company's management losing credibility with the other stakeholders. Often, there is also a breakdown in trust between management and lenders. A contingency plan in this scenario demonstrates to the stakeholders that management is prepared and capable of still resolving the situation. If there is no contingency plan, it is usually a strong sign that lenders need to start acting.

Creditors also need to have contingency plans in place. This may include being prepared to enforce any rights they have under their lending agreements, or being prepared to take a secondary exit, such as through a debt sale. Lenders that are caught in a rapidly deteriorating situation without a contingency plan risk taking a much larger loss than if they had prepared a contingency plan.

"We often see debtor companies pursuing one transaction or option to help resolve a distressed situation, without having a contingency plan. The strategies pursued usually have a high degree of uncertainty and with common options being a sale of a business unit, raising new equity or refinancing debt."
- James Stewart -

Q10. How important is it to have a contingency plan in place?

Shinichiro Abe

Abe: Currently, Japanese SMEs survive on government subsidies and low-interest loans. At this stage, it is important to plan and implement an initial strategy for survival as a contingency plan. In particular, securing and stabilising cash flow will be important as a short-term strategy. If the company can secure cash flow, problems in production, sales, or employment of employees can be staved off.

In the manufacturing industry, in particular, the risk of supply chain disruptions is something to be aware of and to be dealt with. Considering that many companies were severely affected by supply chain disruptions during the pandemic, the risk of supply chain disruptions should be managed. On the other hand, if the "just-in-time" method is changed without adequate planning, and inventory is carried, the risk of excess inventory will arise, which may lead to increased costs and reduced competitiveness. Therefore, it is necessary to take into consideration the supply chain mechanism of the distressed company, calculate the impact of disruptions, and consider well-balanced measures such as decentralisation of the supply chain and securing the supply chain through various routes.

Christopher Howard

Howard: Irrelevant if you are undertaking a restructuring plan. This is a contrarian view but I can defend it!

Q11. What key trends do you expect to see over the coming year and in an ideal world what would you like to see implemented or changed?

Richard Golubow

Golubow: Although I expect both Chapter 11 and Chapter 7 filings to rise over the coming year, I also expect there to be a significant rise in the implementation of alternative restructuring methods and strategies. Once thriving and successful businesses often believe that it is in-court bankruptcy or normal business as usual. However, there are multiple alternative methods to restructuring a business that will be further explored in the coming year.

Over the past year, we have already seen multiple businesses avoid filing for bankruptcy by implementing out of court restructuring strategies. The most basic example and strategy that has increasingly been successful is for a business to simply call their creditors, landlords, investors, etc. to seek discounts or adjustments to their existing debt. Creditors and landlords often want to avoid bankruptcy as much as a struggling business and they often have great incentive to renegotiate agreements to avoid being taken into a tenant or borrower's bankruptcy case. Thus, not only can experienced restructuring counsel help during a bankruptcy filing, they are also well equipped to assist in debt renegotiations and help keep a business from having to file a bankruptcy case.

The other in-court trend which I expect to grow over the next year is the usage of Subchapter V Chapter 11 bankruptcies. On 19 February 2020, the Small Business Reorganization Act of 2019, known as Subchapter V (11 U.S.C. §§ 1181-1195), became effective, which significantly amended the Bankruptcy Code pertaining to small business debtors. Originally, Subchapter V applied to small business debtors with no more than $2,725,625 in debt. However, in response to the COVID-19 pandemic, the Coronavirus Aid, Relief and Economic Security Act (CARES Act) which provided payment assistance loans, eviction relief, and hundreds of additional relief benefits, to individuals and small and large businesses alike, expanded Subchapter V eligibility for an initial period of one year and further extended by an additional one year by increasing the cap approximately three times to $7,500,000 in aggregate secured and unsecured non-contingent and liquidated debt. Thus, Subchapter V, and the debt ceiling adjustment provided by the CARES Act, have vastly benefited and provided easier access to Chapter 11 for small business debtors.

Like any new law or policy there are kinks that must be worked out and resolved. For example, unless modified by new Subchapter V rules, how is a debtor expected to file a confirmable plan in 90 days if a bar date for government creditors is 180 days after a bankruptcy filing? There are many aspects of Subchapter V that allow small and medium sized debtors access to Chapter 11 that otherwise would not likely be able to utilise the Chapter 11 process. As such, ideally Subchapter V will continue, but also be re-evaluated as case law uncovers inconsistencies within the Bankruptcy Code, and recognition that the heightened interim debt threshold of $7,500,000 should be made permanent, if not increased, to ensure that this new body of law becomes a staple in Chapter 11 practice long after COVID-19.

Selwyn D. Whitehead Esq

Whitehead: Because a substantial portion of cases being filed are by black women, in an ideal world there would be more female bankruptcy judges who are black and/or other persons of colour, more panel and standing trustees along with their legal and support staff who are female and Black and/or other persons of colour and more practitioners who are female and black and/or other persons of colour. I also anticipate a substantial increase in filings in 2022, generally.

Shinichiro Abe

Abe: In response to supply chain disruptions caused by the pandemic, governments are expected to seek to secure domestic production bases for important materials such as semiconductors. However, the advantage of international trade maximises the overall productivity through the international division of labour, as represented by "the principle of comparative advantage". Therefore, securing the domestic production base and decentralising and duplicating the supply chain may pose the dilemma of reducing benefits of trade.

On this point, while governments may secure domestic production bases and decentralise and duplicate supply chains as described above in the short term, now, in the long term, even in the event of a contingency where a new type of infectious disease emerges, it is desirable to adopt trade and distribution rules among both countries and companies, which can prevent the spread of a new infectious disease and maintain the supply chain.

"In the manufacturing industry, in particular, the risk of supply chain disruptions is something to be aware of and to be dealt with. Considering that many companies were severely affected by supply chain disruptions during the pandemic, the risk of supply chain disruptions should be managed."
- Shinichiro Abe -

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