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BANKRUPTCY & RESTRUCTURING 2017

VIRTUAL ROUND TABLE

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Introduction & Contents

The Bankruptcy & Restructuring Roundtable features eight experts from around the world. Highlighted topics include a focus on key industries facing bankruptcy & restructuring challenges such as oil and gas, the impact of ecommerce on the retail sector, and a discussion on recent case studies such as Toys R Us and Monarch Airlines. Featured countries are: Australia, Brazil, India, South Africa and the United States.

James Drakeford
Editor In Chief

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MEET THE EXPERTS

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After 10 years of accounting, auditing, M&A transaction advisory and other consulting for Big Four Certified Public Accounting firm PricewaterhouseCoopers, Jim spent 20 years as a member of several boards of directors and in various financial and executive positions, including president and CEO, COO, CFO, secretary-treasurer, chief accounting officer, and corporate controller.

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Concilium Consulting is a financial services advisory firm and the best solution for your business.

We provide services in Capital Advisory, Corporate Restructuring, Portfolio of NPL&SPL, Strategic advisory and M&A projects.

Concilium has an extensive expertise in turnaround management projects being an active member TMA – Romanian Chapter. We have a team of highly seasoned professionals that assisted Concilium's clients with a 350 + Mio Euro in turnover and that are active in 8 industries. Custom-made services, technical excellence, confidentiality and ethical behavior build the long-lasting relationships we share with our clients.

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Camisha L. Simmons is the managing member and founder of Simmons Legal PLLC, a law firm dedicated to assisting creditors and other parties in protecting their interests in the event of an insolvency, bankruptcy, restructuring, litigation and/or financing transaction.

She founded the firm after practicing in New York and Dallas for close to 8 years as an attorney for the global law firms of Weil, Gotshal & Manges LLP, DLA Piper and Norton Rose Fulbright. From 2006-2007, Ms. Simmons was a law clerk to the Honorable Mary F. Walrath, Judge of the United States Bankruptcy Court, District of Delaware.

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Thomas Felsberg acted as Brazilian consultant to the World Bank in the area of insolvency and credit rights, having contributed, together with the IMF, to the 'Global Insolvency Law Database' (GILD) and 'Reports on the Observance of Standards and Codes' (ROSC) projects. He is recognized by publications such as 'Latin Lawyer', 'Legal 500" and 'Chambers' as Brazil's leading insolvency lawyer. He formed part of the committees responsible for development of the current bankruptcy and company restructuring law and is again part of a government selected group to remodel the Brazilian Insolvency Law. In addition to his work relating to insolvency and debt restructuring, Thomas Felsberg plays an important role as an arbiter with important arbitration chambers both in Brazil and overseas, whilst he is a member of the 'the Arbitration Chamber of the Legal Council of the Federação das Indústrias do Estado de São Paulo' ('São Paulo State Federation of Industries / FIESP), of the Arbitration Chamber of the São Paulo Stock Exchange, a director of the 'Centro de Estudos das Sociedade de Advogados' ('Attorneys' Society Study Center' / 'CESA'), and is President of the Columbia University Club of Brazil.

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An insolvency lawyer of international repute, social commentator, thought leader and creative innovator, Sumant is a multi-faceted person with accomplishments in diverse spheres. A policy lawyer of global eminence, Sumant presently heads the insolvency practice of Kesar Dass B & Associates, India's leading law firm.

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Wessel Jacobs is the founder and CEO of Jacobs Capital (Pty) Ltd, a South African-based private equity and business advisory firm with a proven reputation for business rescue. Since its establishment in 2002, the company has acquired and invested in a number of assets. With some of these investments being in a state of distress, effective strategic turnaround strategies have been required.

Wessel specialises in company restructuring, management development and performance enhancement, and introduces international best practice and processes management to ensure streamlined restructuring and business survival. He is an expert in implementing turnaround strategies and leading successful mergers and acquisitions. His strategies result in increased output, reduced waste, raised efficiency and improved financial performance in both performing and under-performing companies around the world.

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

Langhorne: As a leading financial centre Singapore has seen an increase in the number of cross border restructurings since the financial crisis of 2008–2009. Accordingly, there has been a concerted effort by the Singapore government to enhance Singapore's debt restructuring framework and improve its capability to deal with cross-border insolvencies and restructurings.

This culminated in the bankruptcy and restructuring landscape being radically overhauled by the passing into legislation of the Singapore Companies Act (Amendment) Act 2017 (the "Amendment Act"), which amended the insolvency and restructuring related provisions in the existing Singapore Companies Act (the "Act") by adding a number of concepts taken from the US Bankruptcy Code.

The Amendment Act, which became effective on 23 May 2017, led to a number of improvements to the existing regime including increased accessibility to Singapore's corporate rescue and restructuring framework for foreign companies, US Chapter 11 style rescue / DIP financing, enhanced moratoriums with extra territorial effect, expanded disclosure requirements, cram down provisions, pre-pack restructurings and the adoption of UNCITRAL Model Law.

These changes are a clear indication of Singapore's commitment to becoming a regional hub for international debt restructurings. We expect that these changes will increase the number of debt restructurings being conducted out of Singapore, particularly in light of the rising number of defaults both across the region and locally in the oil and gas, shipping and offshore marine sectors, as well as others.

Felsberg: Brazil is emerging from the deepest recession in its recent history. The GNP shrunk almost 8% in 2015 and 2016 and is expected to grow less than 1% in 2017. The forecast for 2018 is a 3% growth. The recession affected the best and the brightest, especially the companies which had foreign currency exposure and were hit by the currency devaluation. Some of the largest companies in the country were affected by the Car Wash operation and similar corruption schemes.

Although in sheer numbers the filings for bankruptcy were comparatively less than in other markets, the values involved is certainly impressive and unprecedented for Brazilian standards. Oi, a large telecom company, has a $20bn debt to restructure; Sete Brazil, a lessor of oil drilling rigs, $6bn; Odebrecht Óleo e Gás, the oil and gas arm of a large conglomerate, $5bn; PDG, the largest real estate company, $2bn. Not only insolvency filings are making headlines, though; the workouts of companies of several industrial sectors, including corporate groups such as Odebrecht and JBS, are generating news every day. The outlook of the business community has finally become more optimistic and therefore many restructuring negotiations which had stalled are resuming positively.

In any event, the unprecedented recession has highlighted many deficiencies of the Brazilian insolvency statute (Law 11,101/2005) and related case law. To remedy the situation, the Ministry of Finance convened in December 2016 a work group composed of over 20 specialists to discuss and draft amendments to the current legislation. The work group has representatives from the major involved governmental agencies and ministries, as well as judges, attorneys and law and economy professors.
As one of the members of the group, I tried my best

to convey practical aspects which I felt relevant to the reform, following my years of experience dealing with insolvency matters daily. In addition to that, I recommended, along with other members of the International Insolvency Institute, the incorporation of the UNCITRAL Model Law on Cross-Border Insolvency.

Other groups – such as Federation of Industries of the State of São Paulo (FIESP), the Brazilian chapter of the Turnaround Management Association (TMA), the Brazilian Federation of Banks (FEBRABAN), and the Federal Revenue – also made substantive contributions to the draft.

The resulting bill is now expected to be submitted to Congress before the end of the year. Practitioners expect substantive improvements in the legislation, which will bring it closer to international standards set by the World Bank and by entities of the United Nations system such as the IMF and UNCITRAL. Although there is concern that the reform may fall short of the initial expectations, especially in relation to the tax treatment of distressed businesses and the claims which may be affected by restructurings, the resulting bill is set to speed up court proceedings, preserve going concern value, improve the recovery of creditors, and encourage investment in distressed assets.

Golubow: In 2017, we are seeing the number of both commercial and consumer bankruptcy filings in the United States remain stable for the first since 2010. Between 2010 and 2016, bankruptcy filings in the United States decreased on a yearly basis and by 2016 had reached the lowest yearly total of bankruptcy filings since 2006. After increasing significantly from the beginning of the recession in the United States in 2008 through a peak in March of 2010, commercial filings in particular decreased sharply for the next five and a half years until November 2015. For the past two years, however, commercial bankruptcy filings have increased and are now at a level on a month-to-month basis that they have not been since 2013. Starting in December of 2016, the number of consumer bankruptcies filed in the United States also began to experience an uptick, and as of March 2017, the total number of bankruptcy filings in the United States is at its highest since March 2015. Much of the increase in commercial bankruptcy filings can be attributed to the deterioration of retail business throughout the Unites States, due in part to the rise in popularity of online shopping. Through H1-2017, more than 300 retail businesses of all sizes, from small individual stores to large national chains, have sought bankruptcy protection in 2017, an increase of 31% from the first half of 2016. At this point there is no indication that increases in retail bankruptcies will subside any time soon. Retail bankruptcies will likely remain a significant feature of the restructuring landscape for the foreseeable future.

Simmons: Except for certain distressed industry sectors, such as retail and oil and gas, U.S. bankruptcies and restructurings have tapered. However, leveraged loans, loans made to companies with pre-existing significant amounts of debt, have increased in the U.S. by 53% in 2017. Moreover, a large number of these leveraged loans are covenant-lite. Covenant-lite loans are riskier given they lack certain protections for investors, such as the ability to demand more frequent and detailed financial reporting should the borrower's operations appear distressed or its debt level increases. Should the economy suffer a glitch, causing debt-laden companies to fail to meet their debt service, we may see increased bankruptcies and restructurings in the near term. An economic recession and/or financial market correction may be on the horizon.

Jacobs: The South African economy has been in a low-growth trajectory for several years, with two successive quarters of negative growth at the end of 2016 and the beginning of 2017 which placed the country in a technical recession. A widespread drought, weak international commodity prices, political uncertainty, credit rating downgrades, high levels of unemployment and labour unrest, and weak consumer spending all contributed to the country's financial woes.

Since then South Africa has emerged from recession with 1% year-on-year growth, but business confidence is still at record lows. Many businesses struggle to grow revenues and profits. This has created constraints in working capital and cashflow, putting pressure on financial commitments to banks and trade creditors.

Under these conditions, the threat of business insolvencies is high. Business restructuring is therefore likely to face a growing demand.

Batra: In May 2016, the Indian Parliament passed the Insolvency and Bankruptcy Code 2016 (Code) to provide a comprehensive consolidated framework for corporate insolvency and bankruptcy of individuals and partnership firms. The Code was made mainly operational from 1 December 2016. The Code introduced significant legal and structural changes in the insolvency regime moving from the "debtor in possession" regime to a "creditor in control" regime, making it a creditor friendly legislation. The Code is based on the United Kingdom's administration procedure, although a few provisions have been customised for India. The law also establishes a new discipline of insolvency professional who perform crucial functions in the corporate insolvency process, including management of the debtor's enterprise as a going concern.

The Code has designated National Company Law Tribunal (NCLT) as adjudicating authority to provide an oversight of insolvency cases. The role of court has been reduced. A new regulator – the Insolvency and Bankruptcy Board of India (Board) has also been established by the Code. Strict time lines have been provided for resolution and liquidation, shorter even than what is provided under English law.

Bryan: In the UK we have various formal processes for corporate bankruptcy. Ahead of a full Insolvency Administration, Creditors Voluntary Arrangements (CVA's) are a useful tool for companies such as retailers shedding unprofitable stores. However, too many companies go into Administration too quickly where a licensed Insolvency Practitioner (IP) takes over the running of the company from the directors. He has three statutory objectives in order of preference. Firstly, to achieve a sale of the company as a going concern, secondly to achieve a better result for all the creditors than would be likely if the company were wound up and lastly to realise property to make a distribution to one or more secured creditors. The IP can pursue only one of the objectives if the previous ones are not possible.

In practice the second option is the most common and most Administrations result in the assets and goodwill being sold. IP's will rarely trade a business for any significant amount of time so a quick sale, with limited due diligence and no meaningful warranties at what might be termed a "fire sale price" is the normal outcome. It is a quick and efficient way of effectively re-cycling assets but is inherently value destructive.

Consensual restructurings are the main alternative. Normally this will start with the necessary steps for an operational turnaround of the business to rectify the problems that caused distress in the first place. An agreement with the various creditors and other stakeholders will then be negotiated to achieve the right capital structure for the revived business going forward. There is no statutory legal framework for this approach and there is always the risk that a hostile creditor could tip the company into formal insolvency. But good turnaround professionals can navigate this and the result should be the preservation of value and a better result for all stakeholders.

Davidson: Except for certain specific industry niches mostly affected by severe business disruptions, U.S. companies have experienced relatively few bankruptcies and restructuring of distressed situations beyond the last five years. Possibly the most adversely affected has been the brick-and-mortar retail industry. More than 25 high profile retail chain bankruptcies have occurred during 2017 alone as the industry continues to face an imbalance in supply and demand, much attributable to digital commerce.

Much of this retail sector has been leveraged with high debt levels that have constrained retailers operationally. Several of the largest chains, many private equity-backed, have had their balance sheets laden with heavy debt such that the interest and debt service requirements have pushed the limits of lender covenants. Simultaneously, combined with flat or declining sales because of reduced foot traffic, many of these retail chains have also been cash flow strained in their ability to strengthen operationally and to react strategically. Reinvestment in renovation, rebranding, rechannelling, and remodelling expenditures has been inhibited because of declining free cash flows – hampering the ability of these retailers to compete and survive. New and growing competitors include powerful online players such as Amazon in multiple retail niches, as well as new foreign discount retailers, big-box warehouse clubs, and supercentre retailers. Toys "R" Us, Wet Seal, Payless, Gymboree, Macy's, Kohl's, Nordstrom, GNC, and J.C. Penney are only a few of the bankrupt or distressed companies adversely impacted by this retail industry disruption and strong headwinds hitting brick-and-mortar shops.

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

Langhorne: Singapore has recently implemented a number of changes through the Amendment Act. Many of these borrow heavily from concepts in the US Bankruptcy Code. These changes are summarised below.

Chapter 11 Style – rescue financing/ DIP financing: Singapore courts are able now to grant new rescue financing a "super-priority" over existing claims and security where the financing is necessary for the survival of the debtor or to achieve a more advantageous realisation of the assets of a debtor.

Enhanced moratoriums with extra territorial effect: there is now an automatic 30 day moratorium which arises upon the filing of an application for a moratorium for both schemes of arrangement and judicial management. The moratorium is expressly stated to have worldwide effect, to the extent Singapore can assert jurisdiction over the relevant creditor. The courts have also been empowered to grant moratoriums on the application of a debtor's subsidiary, holding company or ultimate holding company.

Schemes of arrangement:

- a clear framework for the continuous disclosure of information throughout the restructuring process from the debtor to its creditors has been implemented;
- "cram down" provisions have been enacted that allow for the courts to approve a scheme of arrangement notwithstanding that there are certain dissenting classes of creditors. Although there are strict thresholds to satisfy, this is a fairly radical change given that schemes of arrangement around the world to not typically allow for this;
- "pre-packs". The courts can now approve pre-negotiated restructuring arrangements agreed to between the company and its creditors without the need for court approval to convene creditor meetings, the holding of various meetings and the subsequent court hearing to sanction the scheme.

Judicial management:

- foreign debtors can now be placed under judicial management (a process similar to administration in the UK or voluntary administration in Australia) in Singapore;
- the threshold for juridical management has been lowered from a debtor that "is or will be unable to pay its debts" to one that "is or is likely to become" unable to pay its debts;
- parties with the ability to appoint a receiver who object to the appointment of a judicial manager are obliged to demonstrate that the appointment of a judicial manager would cause disproportionately greater prejudice than the prejudice to the unsecured creditors if a judicial management was denied.

Cross- border restructuring:

- Singapore has now formally enacted the UNCITRAL Model Law on Cross Border Insolvency;
- As a result there is a codified framework for determining when judicial and other assistance can be provided to foreign office holders and when recognition should be granted to foreign insolvency proceedings; and
- the ring-fencing rule (which required that all Singapore debts has to be repaid before assets or funds could be remitted outside of Singapore) has been abolished, although it will continue to apply for specific classes of financial institutions.

Felsberg: The most recent changes to the Brazilian Bankruptcy Law happened in 2014, and, among other things, included a set of rules to protect small business companies both as insolvent companies and as creditors in other insolvency proceedings.

Currently, however, there is a working group assembled by the Brazilian Ministry of Treasury to discuss a major reform to the Brazilian Bankruptcy Law. This working group is comprised by many renowned economists and legal bankruptcy professionals, including professors, judges and lawyers. The working group already drafted a proposed bill to amend the Brazilian Bankruptcy Law, which shall be sent to Congress for discussion and voting on the next few weeks.

Some of the changes that are being proposed by the bill are: (i) allowing non-corporate entities to benefit from court-supervised reorganisation proceeding; (ii) permitting electronic voting system; (iii) a better regulation of unimpaired credits such as chattel mortgages (iv) a major reduction of the timeframe of the liquidation procedure; and (v) the adoption of cross-border insolvency rules based on the UNCITRAL model law.

Golubow: There have been a number of recent decisions that will likely reverberate through and alter the restructuring landscape. In *Czyzewski v. Jevic Holding Corp.* (In re Jevic Holding Corp., 137 S.Ct. 973 (2017), the United States Supreme Court held that a bankruptcy court may not approve a structured dismissal of a Chapter 11 case if the structured dismissal provides for distributions to creditors that would violate the absolute priority rule. In brief, the absolute priority rule mandates that, in order to be "fair and equitable" a Chapter 11 plan must provide for each class of a debtor's creditors to be paid in full before any holder of a junior claim receives payment under the plan. As a result of the Supreme Court's decision, it is likely that more potential debtors will turn from seeking structured dismissals under Chapter 11 of the Bankruptcy Code and will instead pursue liquidation under Chapter 7 of the Bankruptcy Code or, in the alternative, pursue liquidation outside of the bankruptcy context entirely. In another interesting recent decision, *Marblegate Asset Management, LLC v. Education Management Finance Corp., 846 F.3d 1* (2d Cir. 2017), the Second Circuit overturned a decision of the District Court for the Southern District of New York in which the District Court found that an out-of-court restructuring violated the Trust Indenture Act because the restructuring negatively affected noteholders' practical ability to obtain payment and was effected without obtaining unanimous consent of all noteholders. In overturning the District Court's decision, the Second Circuit held that the Trust Indenture Act only prohibits debt restructurings that modify core payment terms without obtaining unanimous noteholder consent and does not prohibit debt restructurings that do not modify such core payment terms, even if restructuring is effected without unanimous consent of noteholders. The Second Circuit's decision has resolved some uncertainty regarding the effectiveness of out-of-court restructuring and, as a result, has increased its attractiveness as a restructuring option.

Berkovich: One interesting development was a recent decision from the Second Circuit Court of Appeals (an influential court that has jurisdiction over New York federal courts, among others) called *Marblegate Asset Management LLC v. Education Management Corp.* that made it easier for parties to engage in out-of-court restructurings. That decision reversed a lower court decision a few years ago in a case caused some concern over the viability of certain out-of-court restructurings. The lower court had held that Section 316(b) of the U.S. Trust Indenture Act of 1939 (the "TIA") prohibited a variety of indenture amendments that fell short of changes to interest or principal without the consent of all affected noteholders—in that case an out-of-court restructuring involving an asset transfer and elimination of a parent guaranty. Recently, companies and investors who could benefit from out-of-court restructurings breathed a sigh of relief when the Second Circuit held that the TIA's proscription on non-consensual amendments applied only to an indenture's core payment. In other words, so long as the transaction in question does not amend terms such as the amount of principal and interest and maturity date, it will not violate Section 316(b). The restructuring community in the U.S. views this as a positive development, because it enables companies to achieve consensual out-of-court restructurings more easily rather than having to file a formal insolvency proceeding or consummate the restructuring with "holdout" noteholders who refuse to consent and get to keep a more valuable instrument.

Jacobs: There are many reasons why businesses fail, but in many cases a business is only experiencing a temporary setback. A business rescue programme and some breathing space could lead to recovery. It is easier to rescue a business than to create a new one, and allowing businesses to survive helps create a strong economy.

The introduction of business rescue proceedings in terms of Chapter 6 of the Companies Act No 71 of 2008 was therefore welcomed. It provided an alternative to the traditional insolvency proceedings by introducing measures to facilitate the re-organisation and restructuring of struggling businesses. It allows a business to survive as a solvent entity, or at the very least result in better returns for creditors or shareholders than they would receive in liquidation proceedings.

Unfortunately the legislation is badly drafted and extremely vague. The process is also not effectively or efficiently regulated. We are forced to rely on interpretations provided by case law, which is not always consistent. Another problem in case law is that specific facts and circumstances in our projects do not fit squarely into the facts of the judgment that we have to rely on.

We have also witnessed abuse and mismanagement of the business rescue process which has resulted in businesses closing their doors when they in fact had the potential to survive.
But despite the many regulatory, drafting and interpretation glitches in the legislature, it is a step in the right direction.

Batra: The Code completed nine months in September. Incidentally, 270 are also the utmost number of days provided under the IBC for completion of insolvency resolution process. The Indian government deployed unprecedented will for effective roll out of the IBC – a feat well accomplished. The Insolvency and Bankruptcy Board of India imparted the imperative thrust to provide it momentum and the NCLT rose to the occasion with its decisions majorly aligning with the IBC objectives. Other stakeholders responded with zeal soon overcoming the initial scepticism. The mood around IBC turned positive and optimism hangs in the air!

Podolski: From an Australian perspective, there have been several recent developments in the bankruptcy regulatory landscape. The Insolvency Law Reform Bill was passed in 2015, assented in February 2016, and came into effect in March and September of 2017 for each of the two respective tranches. Two additional exciting reforms were also passed through the Senate in 2017, namely the introduction of an insolvent trading 'safe harbour', and a restriction on the enforcement of ipso facto rights. Both reforms currently await royal assent.

The 'safe harbour' bill protects directors from insolvent trading liability, if they proactively take restructure actions outside of formal insolvency. This is a very welcome change, providing some flexibility around otherwise very punitive insolvency laws in Australia, allowing boards to attempt to turn companies around prior to invoking formal measures. This addresses the often-mentioned problem that the previous regulatory landscape pushed some companies into formal insolvency administrations prematurely.

The ipso facto bill will impose an automatic stay of enforcement of ipso facto rights in the event of a company entering into a scheme of arrangement, or voluntary administration. The changes are intended to give companies the ability to trade during a formal restructure, and increase the chances for a successful turnaround. The stay will not apply to liquidation, and would only be in effect while the administration or scheme of arrangement is ongoing. With the ipso facto reforms expected to take effect by mid-2018, there is still some debate around several practicalities of this change – including whether the stay should remain in place permanently, as is the case in some other countries.

As the new changes get implemented, discussions surrounding operational and business management governance practices I suspect will intensify. Particularly around the changes stemming from the 'safe harbour' bill. This has already been given focus by industry bodies in Australia such as the AICD and TMA, but will no doubt drive a conversation around tighter interlock between corporate governance practices and internal business management practices.

Bryan: The broad insolvency framework of the UK has been in place since the Insolvency Act 1986 was enacted so has been around a long time. Recent legislation has seen changes to the procedural side of insolvency regulation to allow such matters as electronic voting by creditors and to generally bring the process of running an insolvency up to modern standards.

The government has consulted on proposals for a pre-insolvency regime which would aid the consensual turnaround process but with Brexit this appears to have been delayed due to resource pressures on government employees and a lack of parliamentary time.

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

Langhorne: The formal procedures for insolvency in Singapore are voluntary and compulsory liquidation, which is overseen by the High Court of Singapore.

(i) Test for insolvency

A company will be insolvent where it is either unable to pay its debts as they fall due or if its liabilities exceed its assets. Under the Act a company will be deemed to be insolvent where:

- Creditor has served a demand on the company for a debt exceeding SG$10,000 and the company has failed to pay the amount within three weeks or to secure or compound for it to the reasonable satisfaction of the creditor;
- if an execution or judgment against the company is unsatisfied; or
- if it is proved to the satisfaction of the Court that it is unable to pay its debts, taking into account the company's contingent and prospective liabilities as they fall due.

(ii) Grounds for insolvency

Where a company is voluntarily wound up a special resolution must have been passed by its members. Where a company is compulsorily wound up court approval is required.

(iii) Requirements following insolvency

For a voluntary winding up, the company must, within seven days of passing the special resolution lodge a copy with the registrar and publish a copy of the resolution in the Singapore newspapers within 10 days. The directors of the company may also make a statement that they are of the view that the company will be able to pay its debts in full within a period not exceeding 12 months. If such a statement is made then the shareholders can appoint the liquidator. If the directors do not make such a statement then they must call a meeting of creditors to appoint the liquidator.

From the commencement of both voluntary and compulsory windings-up, the appointed liquidator or official receivers take control of the company and its assets. No action against the company may be commenced or continued without the leave of the Court. Additionally, after commencement of the winding up, any transfer of shares, disposition of property including things in action, or alteration in the status of the members of the company, except with the court's sanction, is void.

Felsberg: Brazilian Bankruptcy Law provides three formal insolvency procedures that can be adopted by insolvent companies:

Falência (Liquidation in Bankruptcy) – This procedure is similar to a U.S. Chapter 7 Liquidation, and consists basically in the liquidation of the bankrupt company, sale of its assets and distribution of the results among the creditors. The Bankruptcy Liquidation can be requested by the debtor itself or by its creditors, provided that some specific conditions are met (most usually related to the amount of the indebtedness or with the practice of fraudulent acts by the debtor). After the decree of liquidation, the debtor loses control over its assets, which are transferred to the administration of a Bankruptcy Trustee appointed by the court.

Recuperação Judicial (Judicial Reorganisation) – This court supervised proceeding shares many similarities with the U.S. Chapter 11 Reorganization, and its goal is to allow the debtor to negotiate with its creditors a plan of reorganisation that will provide for the reduction of its debt burden allow for the turnaround of its business. The Judicial Reorganization procedure can be commenced by the debtor only, and, although the debtor remains in control of its own assets and business (debtor-in-possession), the Bankruptcy Court will appoint a trustee to oversee the activities and help to identify the claims subject to the reorganisation. There are no material requirements or tests for a Judicial Reorganisation, although in some cases the Bankruptcy Court conducts a previous assessment to determine whether the debtor will be able to recover or not. If the plan is approved by the creditors (divided in four classes), the Bankruptcy Court will confirm it, and any breach of the reorganisation plan within two years of the court confirmation may result in the automatic liquidation of the debtor.

"Recuperação Extrajudicial" (Extrajudicial Reorganisation) – This proceeding is largely based on the U.S. Pre-Packaged Chapter 11 Reorganization. In the Extrajudicial Reorganisation, the debtor negotiates a reorganisation plan with its creditors out-of-court, and then goes to court only for confirmation. The Extrajudicial Reorganisation plan does not need to contemplate all the creditors, and the debtor is free to choose one or more groups of creditors (e.g., bondholders, banks, secured creditors, etc.) that will be impaired by the plan. The Extrajudicial Reorganisation procedure is meant to be simpler than the Judicial Reorganisation, it is a more adequate vehicle when the indebtedness is concentrated in a few creditors when turnaround can be achieved by restructuring only a part of the debt. However, it requires the approval of three-fifths of the impaired group or groups of creditors.

Golubow: The test for insolvency under the Bankruptcy Code is fairly straightforward. Pursuant to the Bankruptcy Code, a debtor other than a partnership or a municipality is deemed insolvent if the sum of its debts exceeds its property, exclusive of property that has been fraudulently transferred or that may be exempted from property of the estate under Section 522 of the Bankruptcy Code. 11 U.S.C. § 101(32)(A). A partnership is deemed insolvent if the sum of its debts exceeds the aggregate of all of the partnership's property, except for property that has been fraudulently transferred, and the sum of any excess value of each general partner's non-partnership, non-exempt property over the partner's non-partnership debts. 11 U.S.C. § 101(32)(B). With regard to municipalities, insolvency is determined to exist when the municipality is not "generally paying its debts as they become due" or is "unable to pay its debts as they come due." 11 U.S.C. § 101(32)(C). Pursuant to Section 547(f) of the Bankruptcy Code, in the context of determining whether a pre-petition transfer to a creditor of the debtor may be avoided as a preferential transfer, there is a rebuttable presumption that a debtor has been insolvent for the 90 days that preceded the initiation of a bankruptcy case under the Bankruptcy Code. 11 U.S.C. § 547(f). In that scenario, the transferee has the burden of introducing at least some evidence to rebut the presumption of insolvency. See, In re *Koubourlis*, 869 F.2d 1319, 1322 (2d. Cir. 1989). Once a transferee has rebutted the presumption of insolvency, the trustee must prove insolvency by a preponderance of the evidence. 11 U.S.C. § 547(g); *Arrow Electronics v. Justus* (In re Kaypro), 218 F.3d 1070 (9th Cir. 2000).

Batra: A corporate insolvency resolution process can be initiated in respect of a company that has committed a default. A default would have occurred when the debtor fails to pay all or any part or instalment of the amount of debt that has become due and payable. The "debt" has been defined under the Code as a liability or obligation in respect of a claim, which is due from any person and includes financial debt and operational debt.

While a financial creditor is required to present a record of default before the NCLT for initiation of a corporate insolvency resolution process, an operational creditor must issue a statutory notice to the corporate debtor in the manner provided in the Code.

The Code defines "debt" as a liability or obligation in respect of a claim, which is due from any person and includes a financial debt and operational debt. A "claim" means (a) a right to payment, whether or not such right is reduced to judgment, fixed, disputed, undisputed, legal, equitable, secured, or unsecured; (b) right to remedy for breach of contract under any law for the time being in force, if such breach gives rise to a right to payment, whether or not such right is reduced to judgment, fixed, matured, unmatured, disputed, undisputed, secured or unsecured.

The corresponding obligation of the debtor to pay may arise out of a financial debtor or an operational debt. Broadly stating, "financial debt" means a debt along with interest, if any, which is disbursed against the consideration for the time value of money.

An "operational debt" means a claim in respect of the provision of goods or services including employment or a debt in respect of the repayment of dues arising under any law for the time being in force and payable to the Central Government, any State Government or any local authority.
The process for initiating corporate insolvency resolution may be initiated by a financial creditor, an operational creditor, or the corporate debtor. The Code does not discriminate between a foreign and Indian creditor either – a foreign creditor can initiate the process.

The NCLT must decide whether to accept an application within 14 days. Where the NCLT admits an application for commencement of corporate resolution process, it shall pass an order granting a moratorium – appointing an insolvency professional as interim resolution professional – and cause a public announcement of the initiation of corporate insolvency resolution process to be made and call for the submission of claims.

Nastase: Prior to opening the insolvency procedure the companies may choose to enter into an "Ad-Hoc Concordat". If that fails or if it's an option that was not considered, than the insolvency procedure may be opened, either at debtor request as a protection mechanism or at a creditors request (having a minimum claim of 40,000 RON – equivalent of approx.€10,000). The insolvency may be opened in a simplified procedure – direct to bankruptcy or general procedure having three phases: observation (max one year) reorganisation (three years with a possibility to be extended for one additional year) and bankruptcy (in case the reorganisation fails or the Reorganisation Plan submitted is not approved by the Creditors/ Court).

Bryan: I talked about the requirements following insolvency earlier. The broad test for insolvency is liquidity, a company's ability to pay its debts as they become due. It is not a hard and fast line and has to be judged on the circumstances as known at the time. Directors can be held liable if they allow an insolvent company to trade on and make the position of the creditors worse.

However, if there is a reasonable prospect that the company can avoid insolvency, e.g. if it is in negotiations with its lenders, then the directors are quite entitled to continue trading whilst that reasonable prospect exists and arguably should if it is likely to be of benefit to creditors. The courts have taken a pragmatic view on this and will not judge directors with the benefit of hindsight. Their conduct is judged on what they knew or could reasonably have known at the time, the so called "business defence". It is therefore very important in a near insolvency situation for directors to document what they knew and the rationale for decisions at the time.

Davidson: It is important to evaluate whether a company is operating in the zone of insolvency such that the fiduciary duties of the Company's officers and directors may have been extended beyond those to the Company's shareholders alone. Legal issues relating to the rights of creditors, the business judgment rule, and director and corporate management responsibilities are primarily legal considerations that are based on financial measures. From a financial and board advisory perspective the following financial analyses are pertinent.

Insolvency tests fall primarily into two categories as follow:

α. **Balance Sheet** (legal insolvency), whereby:
ι. Fair value of the Company's assets is ex-

ceeded by its liabilities; and/or

ιι. The amount of debt is relatively high in relation to equity, i.e., capital is unreasonably small for the size of the Company.

β. **Cash Flow** (equitable insolvency) relating to:

ι. Inability of the Company to pay debts as they become due

ιι. Capital adequacy and concern of equity for protection of creditors

In the U.S., directors and officers of an insolvent corporation owe a duty of care to both its creditors and shareholders. Typically, a business is considered insolvent when it is unable to pay its debts as they become due. Accordingly, a business could be deemed insolvent if it has net equity on its balance sheet, but is facing a liquidity crisis where it cannot pay its bills as they become due. A business is also considered insolvent if the amount of its liabilities exceeds the value of its assets.

The point is that as management and the board deal within the zone of insolvency, and/or evaluate options, it's important to be aware that duties may be owed to creditors, and not just to shareholders of the business. Decisions that are inconsistent with duties to creditors may subject management and the board to liability, especially when scrutinised by a creditors' committee, an individual creditor, or a bankruptcy trustee.

The problem for officers and directors within the zone of Insolvency is how to simultaneously carry out fiduciary duties to both creditors and shareholders. For example, if the Company were to receive an offer from a competitor to pay off all the Company's debts, but leaves nothing on the table for the shareholders, the board may be in a conundrum as to whether to accept or reject the offer. Also, the question arises with the difficult decision of whether to file a bankruptcy, or hold off to attempt an out-of-court restructuring of the business. In the end, if an out-of-court restructuring plan fails, and if during that delay, the business incurs even more debt, the directors and officers may be called upon to justify their decisions to delay the filing.

4. What is the process for asset recovery in your jurisdiction?

Felsberg: Brazilian procedural law provides several different ways by which a creditor can collect its claims or recover its assets against the debtor. The decision of which procedure to adopt is guided, mainly, by two factors: (i) the documentation held by the creditor and (ii) the type of guarantee received by it.

For the collection of unsecured claims or claims that are secured by a personal guarantee, the creditor has three options. If the contract being enforced against the debtor or its guarantor qualifies as an "enforceable title", the creditor may file an enforcement action (*ação de execução*) to attach the debtor's and/or the guarantor's assets directly. If on the other hand the contract does not qualify as "enforceable", the creditor may file a regular collection lawsuit against the debtor and/or the guarantor to first obtain an enforceable judicial decision, and only then proceed to enforce it. Also, if there is written proof of the debt (although not an "enforceable title"), the creditor may file an *ação monitória* against the debtor and or its guarantor, which, if contested by the creditor becomes an ordinary collection law suit or if the defendant does not appear or if it appears and recognises the claim, becomes an enforcement law suit. Example of enforceable titles are checks, promissory notes, any written instrument recognising the debt signed by the debtor and two witnesses, etc.

For the collection of secured claims, in addition to the three procedures described above, new options are available to the creditor. If the claim is secured by a regular pledge or mortgage, the creditor may opt to foreclose the collateral directly by filing an enforcement action. If, however, the claim is secured by a fiduciary guarantee – in which title to collateral is passed to creditor, then the foreclosure of the asset may be effected even out-of-court. This is especially the case if the collateral is a real estate property or if the creditor is already in the possession of the collateral, as is common with receivables.

If the debtor is undergoing an insolvency procedure, the creditors (except for fiduciary creditors) may not enforce their claims directly against the debtor, but rather need to prove their claims before the bankruptcy court, to be paid *pari passu* with all the other creditors. Also, according to prevailing case law, the Bankruptcy Court must previously approve any request for seizure of assets of the insolvent debtor, even if such request is made by an unimpaired creditor.

Golubow: The two primary ways for the bankruptcy estate to recover assets under the Bankruptcy Code are the avoidance of preferential transfers, pursuant to Section 547 of the Bankruptcy Code, and the avoidance of fraudulent transfers, pursuant to Sections 544(b) and 548 of the Bankruptcy Code. The purpose of the Bankruptcy Code's preferential transfer provisions is to avoid pre-bankruptcy transfers to a creditor of the debtor that would have allowed such creditor to receive more than it would have upon the liquidation of the debtor. Section 547 of the Bankruptcy Code permits a trustee of the debtor's bankruptcy estate to set aside and recover transfers (i) that were made prior to the initiation of the bankruptcy; (ii) that were made for the benefit of a creditor of the debtor; (iii) that were made to pay an antecedent debt, i.e., a debt that arose prior to the preferential payment; (iv) that were made while the debtor was insolvent; (v) that were made within 90 days of the filing of the bankruptcy or one year of the

filing of the bankruptcy if the creditor is an "insider" of the debtor, as defined in the Bankruptcy Code; and (vi) that would allow the creditor to recover more than such creditor would receive upon the liquidation of the creditor. 11 U.S.C. § 547.

Pre-bankruptcy transfers of a debtor's property may also be recovered by the bankruptcy estate pursuant to applicable state fraudulent transfer laws, which a bankruptcy trustee may pursue pursuant to Section 544(b) of the Bankruptcy Code or directly, pursuant to Section 548 of the Bankruptcy Code. Under the Bankruptcy Code, certain transfers of a debtor's property than were made within two years of the initiation of the bankruptcy case can be avoided if (i) the debtor made a transfer with the intent to hinder, delay, or defraud another creditor of the debtor or (ii) the debtor received less than a "reasonably equivalent value" for a transfer and (a) the debtor was insolvent at the time of the transfer or was made insolvent as a result of the transfer, (b) the debtor was conducting business for which it did not have adequate capital, (c) the debtor had incurred or intended to incur debts that were beyond the ability of the debtor to repay, or (d) the transfer was made to or for the benefit of an insider of the debtor. 11 U.S.C. §548(a).

Jacobs: There are a number of options available to recover assets from an entity. In our experience the most effective is to ensure that proper security is obtained through the registration of a combined special and general notarial bond. A special notarial bond lists specific moveable assets, with identifiable features such as serial numbers. A general bond refers to any remaining moveables in the business and the operation of the business, including any goodwill, intellectual property, machinery, fixtures, vehicles, cash and access to bank accounts, as well as servers. The bond is registered in the deeds office.

In the event of a default, an attorney can bring an application to court to perfect a bond within a few days. An interim order is issued that authorises the sheriff of the court to take into possession the moveable assets listed, as well as all raw materials, shares, goodwill, licenses and loan accounts, and to operate the business in order to maintain goodwill. Within a relatively short time, the matter is finalised in court with a return date where the debtor is given a chance to object to the order obtained. If there is no objection, the order is made final. Usually by this stage the matter has been settled.

Practically, this is most effective manner of recovery because the original court order is obtained on an urgent basis without notice to the debtor. This means that directors or shareholders of the debtor do not have the chance to move or hide any assets. It also means that the sheriff arrives at the business premises of the debtor unexpectedly and takes over his business, potentially ejecting the directors from the premises if necessary. The sheriff can sell goods, place orders, dispatch goods and run the business until the matter is in court again. Depriving a director of control of his business is usually an effective way to convince a debtor to settle and allow you to recover the asset, whether that asset is in the form of a loan or moveable property.

This is an extreme and aggressive remedy, so although it is very effective, it should be used with caution, and only in default of large asset recoveries.

Batra: A creditor can recover asset on which it has charge by (i) enforcing security interest under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI Act) without intervention of court; or by enforcing a recovery certificate obtained under the provisions of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993; or in a liquidation process, by staying outside the liquidation process.

Nastase: An asset can be taken into creditors possession against the claim value (depending on the value of the claim: in total, partially or with additional cash involved), following certain rules, within the framework of the judicial procedure that the asset is part of (foreclosure or insolvency).

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

Felsberg: Sugar and ethanol, real estate, construction, oil and gas, retail, power generation, transmission and distribution, and auto parts are among the sectors which have been suffering more in the current business landscape. Also, all companies which have a significant foreign currency exposure are at risk, if such exposure is not properly hedged. The banking industry is however very solid, except for some small and medium financial institutions. Agribusiness is booming, but, in addition to sugar and ethanol, highly indebted companies of this sector are facing difficulties. The high interest rate still prevalent in Brazil is certainly a complicating factor, as well as the unresolved political crisis.

Golubow: Industries that are currently facing the greatest risk of bankruptcy include both retail and oil and gas. With regard to the retail sector, there have been more than 300 retail bankruptcies through H1-2017, which represents an increase of 31% from the first six months of 2016. The primary catalyst for the recent boom in retail bankruptcies is the rise in popularity of online shopping. Excluding fuel and car sales, online retail represented nearly 12% of the total amount of retail revenue in the United States in 2016. In the face of this rising tide of online retail, the inherent costs of maintaining brick and mortar stores, such as leases and utilities, have become prohibitive for both small, single location retailers and national chains. To further add to the pressure, as of December 2016, the retail sector as a whole carried $38.9 billion in outstanding debt. The future for this sector looks dimmer still as consumer habits continue to evolve away from the mall and toward the computer screen.

Although distress in the retail sector has overtaken the headlines, the oil and gas sector continues to be fraught, driven in part by the downturn in the oil market that occurred over the past few years. Since 2015, more than 100 oil and gas companies have entered bankruptcy in the United States, with an average of nearly five oil and gas bankruptcies per month for 2015 and 2016. Still there are indications that the industry has begun to stabilise. For instance, through July of 2017 there were 33 bankruptcies filed by oil field service companies in 2017, as opposed to 46 bankruptcies that were filed during the same time period in 2016. Although the number of bankruptcies in oil and gas may be decreasing, the size of cases has increased. For instance, the two largest energy bankruptcy filings since 2015 both occurred in 2017, with deep-water drilling contractor Ocean Rig USW listing debts in its March 2017 bankruptcy filing of nearly $3.7 billion and geophysical services provider CGG (US) Holding Inc. listing debts in its June 2017 bankruptcy filing of $3.4 billion.

Berkovich: Not surprisingly, retail remains at high risk, as we saw with the recent bankruptcies of Toys R Us and Aeorpostale. According Standard & Poors, the percentage of U.S. retailers with high-risk CCC ratings has doubled this year. As of early October, 18% of U.S. retail ratings are in the high-risk range, and approximately 21% of retail and restaurant companies are considered currently distressed.

In addition, the healthcare industry continues to face risks associated with the possible dismantling of the Affordable Care Act (commonly known as “Obamacare”), as well as related executive orders that may be signed that will refuse to continue certain related subsidies. The uncertainty over the future of healthcare law in the United States only exacerbates the problem, as companies cannot prepare sufficiently without knowing what the future holds.

The nursing home industry, which has seen a high number of bankruptcies in recent years, also faces similar pressures that may lead to additional restructurings. The nursing home industry relies heavily on Medicaid and Medicare, and those reimbursement rates are stagnating.

Simmons: The retail industry is at the highest risk of distress and/or insolvency. Over 20 retailers have filed for bankruptcy protection in 2017. Retailers with primarily brick and mortar stores are struggling to evolve and compete in the online shopping e-commerce space. Notably, many retailers have lost business to online retailer Amazon.com Inc.

On 19 September 2017, Toys“R”Us, Inc. and certain of its U.S. subsidiaries and its Canadian subsidiary voluntarily filed for relief under Chapter 11 of the U.S. Bankruptcy Code. Additionally, given the cross border nature of the restructuring, Toys“R”Us, Inc.’s Canadian subsidiary voluntarily commenced parallel restructuring proceedings under the Companies’ Creditors Arrangement Act (“CCAA”) in Canada. The retailer’s operations outside of the U.S. and Canada are not part of the Chapter 11 reorganisation bankruptcy filing in the U.S. and CCAA restructuring proceedings. The retailer, which has approximately 1,600 stores and 64,000 employees, is restructuring approximately US $5 billion in debt.

Other notable retailers that have filed for bankruptcy protection in the U.S. include footwear maker Aerosoles, Rue21, RadioShack and Payless Shoe Source Inc.

A second industry to watch is the oil and gas industry. Due to a global oversupply of crude oil and gas as a result of increased production in the U.S. and abroad, the price of oil and gas suffered significant declines in the past three years. Though the price is beginning to rebound, it is still over 50% less than its July 2014 price. Hundreds of North American oil and gas companies have filed for bankruptcy protection in the last three years.

The Organization of the Petroleum Exporting Countries (OPEC) and other non-OPEC producing countries have recently agreed to reduce production of oil in order to reduce the supply glut and raise the price. Even though OPEC and certain non-OPEC producing countries have cut back production, the price is still volatile given the U.S. has not decreased its production of oil.

Oil and gas companies that are highly leveraged with debt and/or have low profit margins may face distress in the volatile and slow to rebound oil and gas market.

Jacobs: Sectors such as manufacturing and mining face the highest risk in our current economic landscape because they rely on resources such as labour and energy. The lack of available skills, shortage of training opportunities and strained employer/employee relationships contribute greatly to this risk. In addition, the South African market – being small – has much lower volume demands. This makes it difficult for these sectors to be globally competitive when faced with high-volume automated competition. The continued shortage of energy, and the steep increase in energy costs, collectively extend this cost curve in South Africa and prevent competitive output. These factors further lead to a lack of investor confidence in these sectors which then affects other investor confidence in the design, automation and skills development sectors.

Batra: Power, steel and real estate sector are the most vulnerable.

Nastase: As per the official 2016 numbers, out of the 8053 insolvent companies, the top 10 sectors are as follows: retail (1391); wholesale and distribution (1335), constructions (1263), hotels & restaurants (687), other services provided mainly to enterprises (558), transportation (538), agriculture (355), manufacture of textile products, clothing and footwear (323), manufacture of wood and wooden products (246), food and beverage industry (206).

Bryan: The most recent insolvency statistics for the UK to 30 June 2017 shows company insolvencies remaining very low. The usual sectors took the top three spots; construction, retail/wholesale and accommodation/food services. Between them they accounted for 47% of all corporate insolvencies. Construction has always suffered from payment problems impacting sub-contractors who are often quite small businesses. Retailing has all the disruptive problems of the internet and fickle consumers. Accommodation and food service businesses need careful management and it is easy to fall out of favour as tastes change and new fads come along.

Looking forward I don't see these sectors moving off the top of the list any time soon. The one that I think may start to appear soon is automotive. The industry has enjoyed record sales in most of Europe and North America for a long time plus fast-growing markets in China and developing countries. Sales are falling in many markets which along with Brexit uncertainty could start to impact the supply chain as most operate on modest margins with high fixed costs.

Davidson: In addition to the brick-and-mortar retail chain and the healthcare sectors discussed above, the oil and gas services industry remain a continuing risk. The number of oil and gas bankruptcies that have occurred over the last couple of years have been many. Yet, distressed companies in the oil and gas extraction space still plague the industry as it struggles with an oil oversupply that has driven down prices from $120/barrel in June 2014 to just over $50 currently. The supply is expected to grow as the US has shifted from a previously significant importer to an exporter of over one million barrels per day. Few anticipate any significant increase in oil prices over the near-term as most forecasts remain flat or with declining demand. In fact, many predict prices returning below $40 per barrel, and some even predict a shocking long-term decline to $10 per barrel. At least one large oil and gas bank

noted for loaning to the shale and tar sands extraction space has curtailed further lending to this niche. Many warn that Chapter 22s will occur in another soon-to-be-expected round of bankruptcy filings.

The healthcare industry, particularly the hospital segment, has also experienced disruption of which much is believed attributable to the so-called Obamacare. The Affordable Care Act has resulted in less than affordable care for many as both consumers and companies have experienced dramatically increased premiums and deductibles. The multitude of specialty medical clinics at lower cost and greater patient convenience have negatively affected hospitals, particularly those that are smaller and in rural areas. Already in 2017, several healthcare industry related bankruptcies have occurred that include Unilife Corporation, Bostwick Laboratories, Halt Medical, 21st Century Oncology, and Adeptus Health. Other distressed include Concordia International, Pernix Therapeutics, and HCR Manorcare.

Finally, experts believe the auto related industry may be next. The recent GST Autoleather bankruptcy suggests that a decline in vehicle production coupled with other factors such as concerns with high risk auto loans and declining demand attributable to the inevitable ride sharing are already having negative effects on this industry.

6. Have there been any recent notable bankruptcies or restructurings? Are there any lessons to be learned from these case studies?

Golubow: Retail bankruptcies have been the lead story recently in the United States, with more than 300 retail bankruptcies through the first six months of 2017 alone. Toys R Us is the latest retailer to experience difficulties amid the shifting business landscape. The venerable toy outlet filed for bankruptcy in September 2017 amid mounting debt and pressure from wary suppliers. For now, the company intends to keep open its 1,600 store locations and operate as usual, with no changes to organisation structure or payroll. A lofty expectation since many of the recent retail bankruptcies have resulted in pursuit of sales promotions and increased digital efforts to lure shoppers while shutting down brick-and-mortar locations and substantially reducing workforce.

In March of 2016, Sports Authority, a national retailer of sports equipment that had nearly 500 stores nationwide, sought bankruptcy protection with a plan to reorganise that included the closing of its less profitable stores. Issues soon arose, however, concerning the ownership of Sports Authority's inventory and the rights of vendors to inventory that such vendors supplied to the debtor inventory on consignment. Both the debtor and the vendors claimed ownership of the inventory and this conflict led to insurmountable disagreements over the direction of liquidation sales contemplated as part of the debtor's restructuring, which in turn contributed significantly to the debtor abandoning its planned restructuring in favour of straight liquidation. In another matter related to the Sports Authority case, one of the debtor's vendors brought a malpractice suit against their attorney for failure to advise the creditor to file a UCC-1 statement to perfect their rights in the debtor's consignment inventory. The vendor's failure to file the UCC-1 statement caused the vendor to abandon its ownership rights in the inventory and any sale proceeds resulting from its sale. Going forward, the conflicts related to the status of consignment inventory in a bankruptcy, as illustrated in the Sports Authority bankruptcy, will likely lead to vendors reconsider their consignment relationships with retail businesses.

Berkovich: Takata, the global auto supplier of seatbelts, airbags, and steering wheels, recently filed a chapter 11 case in the United States, due to mounting liabilities resulting from its airbag products, which are subject to the largest automatic recall in U.S. history. The U.S. subsidiaries are subject to over 100 lawsuits, ranging from class action economic loss to personal injury to state attorney general actions. The Japanese parent company, which filed parallel insolvency proceedings in Japan, as well as ancillary (chapter 15) proceedings in the United States, is also party to a criminal plea agreement with the U.S. Department of Justice that requires the payment of $850 million in restitution payments by the end of February 2018. The company filed insolvency proceedings in June 2017 close to a deal with another auto supplier, Key Safety, to sell substantially all of its assets through a chapter 11 plan in the United States, a business transfer under the Japanese Civil Rehabilitation Act, and out-of-court restructurings and asset sales in Europe and China. The combination of a truly global business and restructuring, mass tort liabilities, regulatory issues, and a criminal plea agreement make this a case to watch.

The restructuring of Puerto Rico, which involves $123 billion in liabilities, is being watched by most distressed and restructuring professionals in the United States.

The island, which is an unincorporated U.S. territory, not a state, is ineligible to file for bankruptcy under chapter 9 of the Bankruptcy Code, which applies only to mainland U.S. municipalities (such as the city of Detroit, which restructured its debts under chapter 9 a few years ago). Instead, the case is being restructured through "PROMESA", a law enacted by Congress in 2016 to deal with the Puerto Rico debt issues. The law created an oversight board responsible for Puerto Rico's restructuring and offers quasi-bankruptcy protections, which the board sought as of 3 May 2017. Other interesting cases are Toys R Us, which I mentioned earlier, an iconic toy company with over $7.9 billion in liabilities that filed in September 2017.

Paragon Offshore is an example of a successful restructuring of one of the many companies to file in the last few years due to the unexpected and significant decline in oil prices starting in late 2014. It exited chapter 11 through a plan of reorganisation this summer eliminating approximately $2.3 billion of secured and unsecured debt.

Simmons: Many recent oil and gas bankruptcies have moved at a fast-pace. A number of oil and gas companies have entered bankruptcy with chapter 11 reorganisation plans already negotiated and developed.

On 12 September 2017, Seadrill Limited and 85 of its affiliates filed for chapter 11 bankruptcy protection in the U.S. Seadrill is a leading offshore drilling company for the oil and gas industry. The company has over 4,780 employees and operates in 22 countries worldwide, including the United States, Europe, Asia, the Middle East, Africa, and North and South America. The company is headquartered in Hamilton, Bermuda. It maintains offices in the United States, the United Kingdom, Dubai, Norway, Mexico, and Brazil.

Seadrill began restructuring negotiations with key creditor constituencies long before it commenced its chapter 11 bankruptcy case. At the time of its bankruptcy filing, Seadrill had a prenegotiated restructuring plan. On the bankruptcy petition date, the restructuring plan, evidenced by a restructuring support agreement, was supported by the majority of Seadrill's bank creditors, 40% of unsecured bondholders, and 24% of Seadrill equity holders.

Seadrill's capital restructuring plan is, in part, designed to keep in place relationships with key stakeholders to ensure the company's continuity. The company aims to preserve Seadrill's valuable relationships with its lenders and largest shareholder.

As part of its restructuring plan, some of the lenders' debt will be exchanged for equity. Yet other debt will be restructured by the extending of the maturity date of the debt. Seadrill's largest shareholder will have the opportunity to provide capital in order to maintain an equity stake in the reorganised company.

Seadrill plans to move through bankruptcy rather quickly. The company is expected to emerge from bankruptcy in six or seven months.

The key takeaway from the Seadrill bankruptcy and other recent bankruptcies, many of them oil and gas restructurings, is that debtors and lenders alike prefer to spend less time in bankruptcy. Additionally, in industries dependent on commodities prices, such as oil and gas, lenders are willing to either take an equity stake in the company or extend the maturity date of their debt. This is so because the price of oil and gas commodities tend to increase in the long-run. Therefore, lenders simply prefer to wait until the market improves so they may realise a return on their investment.

Jacobs: The restructuring of Masonite Africa Limited to Evowood Pty (Ltd) is the most notable turnaround achieved by Jacobs Capital Pty (Ltd).

Masonite Africa Limited was a listed entity that was acquired by Jacobs Capital and Blackbird Capital after being placed in business rescue. As a first step, the forestry assets were sold and the proceeds used to inject much-needed capital into the hardboard producing mill in Estcourt in Kwa Zulu Natal.

The name was changed to Evowood Pty (Ltd) to create a new business with a new business strategy and focus.

But despite more than R100 million investment in the first six months, the restructuring was dealt a serious blow when organised labour – representing around 450 of the 700 employees – reneged on an agreement and embarked on an illegal strike for several weeks. This effectively brought the business to its knees. Shareholders decided to liquidate the business as losses seemed beyond recovery.

However, an executive management team led by CEO Louis Marais, with members of the Jacobs Capital turnaround team, agreed to test a new downsized model. This plan was supported by shareholders, on condition of some challenging risk-mitigating constraints.

The outcomes have been very positive. Over the past few months the production and sales targets continue to be met and exceeded. The business operates at break-even and has recently even become profitable.

About 70% of the model has been effectively implemented to date. Around 400 people have been re-employed by the company and a potential disastrous blow to the town and community of Estcourt has been avoided.

The business continues to grow from this base. More people are being employed, while shareholders and investors are already raising capital to increase capacity.

An aggressive marketing plan has educated consumers on the benefits of hardboard over substitute products and greatly increased demand.

A primary lesson learned during this process was clearly to define the model, and then create a plan to implement this business model. A clear and transparent communication strategy should run concurrently with this implementation plan to ensure the support of all stakeholders. It is vital to have the desire and confidence to succeed in the face of severe obstacles. The implementation team requires trust and support to use their respective skills, despite setbacks which at times might seem disastrous. An important aspect was to stay focused on the goal and not be distracted by challenges.

Batra: Recently, the RBI pushed into insolvency 12 major non-performing assets comprising nearly 25% of the total non-performing assets in the books of the Indian banks. Whether these big cases should have been brought under IBC so early in the life span of IBC is debated by some. I however, feel that it offers an opportunity to the stakeholders to set the bar really high in terms of implementation of IBC and stakeholder behaviour. These cases also offer opportunity to set standards, benchmark and good precedents in various areas of IBC implementation. The most encouraging part is that the advisors involved in these cases have handled these cases with great maturity.

Bryan: British Home Stores (BHS) went into formal Administration in 2016 after its owner sold it a year earlier for just £1 to a speculative buyer. At the time of the sale the enormous deficit in its defined benefit pension scheme threatened the viability of the business. It was a large retail chain with some 11,000 employees. Controversy and allegations of asset stripping abound. The pension scheme was left with a huge deficit of approaching £500 million on a buy-out basis. Under political pressure its original owner eventually agreed to pay over £300 million back into the scheme to save his reputation. The speculative buyer that bought it for £1 is under investigation and likely to appear in court soon for excessive management and other charges. To some extent it was a victim of the disruption in retail but it is just one of many businesses with defined benefit schemes struggling in the current low interest environment. BHS failed to adapt to the changes in retail while successive owners took large sums of money out, albeit prior to the escalation in the pension deficit. Until interest rates increase, pension deficits will continue to loom large in UK restructuring.

Monarch Airlines went into insolvency very recently. It had focused on the very competitive low-cost market, pitching itself head to head against much larger businesses such as Ryanair and EasyJet. It arguably should have looked at a different strategy sooner, maybe being an early entrant to the low cost long-haul market like Norwegian. Interestingly the insolvency was triggered by the UK airline regulator withdrawing Monarch's license. It is interesting to compare that to the US where airlines in Chapter 11 can continue flying while they restructure. There will undoubtedly also be some controversy over the ownership and structure. Allegations are already surfacing that the private equity owner structured the purchase in such a way that they won't lose much in the insolvency whilst others are left with big losses. The new owner allegedly did something similar in a previous corporate collapse recently. Whilst it is reasonable for a distressed turnaround investor to minimise risk in a turnaround situation, expect vigorous scrutiny of management and other charges which can discredit otherwise laudable objectives.

Lastly, Carillion is a large construction company which is struggling with a large debt burden after announcing huge losses arising from certain problem contracts. The company has not entered an insolvency process and efforts are being made to plan and negotiate a con-

sensual turnaround. It seems there is a viable business and hopefully it can be restructured to secure its future and that of its employees and numerous sub-contractors. An interesting twist is the appointment of a "Chief Transition Manager" rather than a "Chief Restructuring Officer", a term that has become synonymous with creditor "haircuts".

Davidson: As discussed, high profile brick-and-mortar retail chain bankruptcies and restructurings over the last couple of years, particularly 2017 alone, have dominated all other industries. The recent Toys "R" Us Chapter 11 filing just before the Christmas season (rather than after) when it would be flush with cash surprised many. It has been widely reported that the $5 billion debt laden balance sheet may have been the primary contributing factor. This private equity owned retailer, like many others, will require a significant deleveraging. A hard lesson learned – this huge debt overhang much from earlier years has created crushing debt service requirements. This in turn, an unbalanced capital structure, has resulted in insufficient free cash flows necessary to support investments in store remodels, repositioning of stores, new store development, and other required operational and strategic initiatives necessary to adapt and remain competitive.

Further, unlike strategic options available in past years, strategic consolidation possibilities are slim to none. The brick-and-mortar retail industry faces the same issues throughout – declining profitability and free cash flows, gross margin compression resulting reduced consumer foot traffic combined with stiff and deepening –competition and challenges arising from the online channel, foreign entrants, big-box warehouse clubs, supercentres, not to mention mandated minimum wage increases and fringe, e.g., overtime and healthcare benefits, regulatory restrictions at the federal, state, and local levels.

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

Langhorne: The Amendment Act has brought about a number of positive changes to Singapore's debt restructuring framework and it is clear that companies are seeking to take advantage of the additional options provided under the Act by incorporating them into their restructuring plans and strategies. In particular, the provisions of the Act which allow for rescue financing and enhanced moratoriums. However, there is still uncertainty as to how the new provisions will be interpreted and applied by the courts.

In the recent case of *Re Attilan Group Ltd [2017] SGHC 283* the court declined to grant priority rescue funding status to funds advanced to the Attilan Group. This was because the court was not satisfied that the company had taken reasonable steps to secure financing on a normal basis before seeking priority rescue finance. The court reiterated that while this was not a condition for the grant of super priory under the Act, it was one of the factors considered when the court exercises its discretion to grant priority status.

Felsberg: There are currently many interesting trends that are being implemented in and out of court. One of such trends is the increasing use of mediation to settle disputes between creditors and insolvent companies. Such instrument, adopted in a pioneer way in the Inepar case some years ago, is now also being proposed by Oi in its judicial reorganisation, both for settling small claims and claims held by the regulatory agency of the sector (ANATEL). The use of mediation reduces litigation while relieving the already heavy burden currently imposed on Brazilian courts.

Another trend is the possibility of finalising a court supervised reorganisation procedure upon confirmation of the plan, without waiting for the two-year monitoring system, required by the Insolvency Law. Lately, some courts have been recognising the possibility of early termination of the judicial proceeding, without such "probation" period, as long as the creditors agree by allowing such a provision to be included in the reorganisation plan.

There is also the growing recognition of the jurisdiction of the Bankruptcy Courts, especially in reorganisation proceedings, to release funds of the debtor which were given as collateral or deposited with creditors or retained by them to guarantee certain claims. The tendency of the courts, including the Superior Court of Justice, is to recognise that the collective insolvency procedure and the maintenance of the company as a going concern take precedence over individual collection of claims – which leads to the recognition that the Bankruptcy Courts have jurisdiction to rule over all the assets of the debtor, including assets that were collateralised to other creditors. This is especially important because it solidifies the recognition of the importance of equality among creditors and the social benefits of the preservation of businesses.

Finally, reference could be made to the growing complexity of reorganisation plans throughout Brazil. The reorganisation plans are no longer simple schemes of payment, but rather include many complex financial instruments and operations, like perpetual debentures, debt-to-equity conversion, among others. This is a clear sign of the maturity of the Brazilian insolvency framework, which we hope will intensify in the years to come.

Golubow: One key factor that will continue to govern strategies going forward is the uncertainty of the times. While interest rates in the United States remain historically low, even a slight uptick in the rates may lead to an increase of businesses seeking bankruptcy protection in lieu of out-of-court restructuring. On the other hand, government policies and how they play out, both domestically and abroad, are contributing to economic uncertainty in the United States that may act to limit restructuring activity. Domestically, there is great uncertainty surrounding the shape of healthcare, tax policy, and trade going forward and such uncertainty will likely affect companies throughout the spectrum of sectors. Internationally, the fallout from Brexit and how it will play out over the next several years is still anticipated and may also contribute to a general hesitancy to proceed with restructuring, as opposed to sitting tight and letting the situation play out.

Berkovich: Over the years, we have seen an even greater trend toward "prepackaged" or "prearranged/prenegotiated" bankruptcies. In a traditional chapter 11 restructuring, a debtor petitions for chapter 11 protection without restructuring arrangements in place with its stakeholders. It uses the bankruptcy, especially the "breathing room" afforded by the automatic stay, to stabilise its business and negotiate a restructuring plan with its major creditors. In contrast, a growing trend in chapter 11 filings is a "prepackaged" bankruptcy case, which is filed by a company after it has already negotiated and solicited creditor votes on a plan of reorganisation. The benefit of such an approach is the significantly reduced timeline for completing the chapter 11 case, as well as significantly reduced risk and costs. It is a good approach for a company with a sound business that just needs a balance sheet fix. It is usually less appropriate for a company that wants to take advantage of the operational tools of chapter 11 or impair creditors beyond bank debt and bond debt holders. A prearranged or prenegotiated case is a hybrid case where the debtor negotiates the chapter 11 plan (or a plan term sheet) with large creditor groups prior to filing a petition, but solicits votes on the plan after filing the petition.

Simmons: Recent U.S. bankruptcies reveal that debtors and creditors alike prefer to move through the bankruptcy process rather quickly. For instance, retailer rue21 emerged from bankruptcy in four months. Rue21 filed for voluntary chapter 11 reorganisation on 15 May 2017. The company's restructuring plan was approved by the bankruptcy court on 11 September 2017. Payless Shoe Source Inc. filed for chapter 11 bankruptcy protection in April 2017 and emerged from bankruptcy four months later in August 2017.

One strategy used to effectuate a fast-track bankruptcy process is to negotiate with key creditors to develop a plan of reorganisation before a company commences a bankruptcy proceeding in court.

Usually the debtor company and creditors agree to a prepackaged or prearranged/prenegotiated restructuring plan.

In a prepackaged chapter 11 case, a company negotiates and develops a chapter 11 reorganisation plan with certain of its key creditors before the bankruptcy filing and solicits acceptances for the plan before the filing. Only after receiving the required number of votes in favour of the plan does the company file for chapter 11 protection in U.S. bankruptcy court. Contemporaneously with the filing of the bankruptcy petition, the company files the plan and asks the bankruptcy court to confirm the plan and approve the related disclosure statement and solicitation of votes procedures.

In a prenegotiated bankruptcy case, a company negotiates a chapter 11 plan with certain key creditors prior to the chapter 11 bankruptcy filing. The company may draft a restructuring support agreement to memorialise its agreement with key stakeholders. The company, however, does not solicit votes from creditors before filing for bankruptcy protection. The company instead typically files the reorganisation plan and related disclosure statement with the filing of its bankruptcy petition or shortly thereafter. After commencing bankruptcy proceedings in court, the company also seeks bankruptcy court approval of the disclosure statement, and, after approval, solicits acceptances of the chapter 11 plan. After the voting process, the company requests that the bankruptcy court confirm the plan.

Many oil and gas companies that have filed for bankruptcy protection have filed bankruptcy with a prepackaged or pre-arranged plan of reorganisation in place. This has allowed these oil and gas companies to quickly emerge from bankruptcy in six to nine months. Offshore driller Seadrill, which filed a pre-arranged/pre-packaged plan of reorganisation on the day it commenced proceedings in bankruptcy court, is expected to emerge from bankruptcy in six or seven months.

Batra: While the IBC's sprint so far has been without any alarming snags, the gigantic NPL cases pushed by the Reserve Bank of India (RBI) into insolvency and other sizeable accounts lined up for filing have hurled many legal and practical challenges at the resolution professionals (RP), legal experts and lenders. It is too early to comment on any emerging trends or strategies. Suffice to state that the stakeholders have responded very enthusiastically to the Code and are determined to make it a success.

Nastase: Most recently companies and banks as creditors are more open into discussing and implementing turnaround management projects – in or outside of the legal procedures.

Bryan: The trend towards consensual turnarounds and restructuring continues with formal insolvency processes seen as being value destructive. They have their place and are clearly necessary in cases where the business is no longer operationally viable. But whereas once they were the default position for a distressed business they are no longer seen as a universal panacea. Insolvency is now often being used in a narrowly targeted part of a larger consensual solution. This can be useful when there are specific problems which can't otherwise be overcome.

Whilst filing for insolvency can be made too early when otherwise a consensual solution would preserve more value, generally once in insolvency the UK's insolvency laws have been seen to be both flexible and predictable and this has resulted in many restructurings of non-UK companies being carried out under English law, particularly when it is the governing law of lender agreements providing "sufficient connection" to UK. This has also been very effective outside of formal insolvency with Schemes of Arrangement. These are a very useful tool for cramming down dissenting creditors and are a part

of English Company Law, not insolvency law. The trend for companies to "come to London" to restructure has forced change in other European countries insolvency laws to facilitate cram down. Use of Schemes of Arrangement is now predominantly by non-EU companies.

In some cases, EU companies have moved their Centre of Main Interest (COMI) to London to restructure in what is a more flexible jurisdiction. This has given rise to so called forum shopping. The rules and Court interpretation have been tightened to stop some of the previous more spurious claims. Also, EU and local laws have changed in response. Properly used it is a process assisting value preservation and accordingly worthy. It is interesting to note that the US is beginning to recognise the idea on an international basis even though it is something not defined in US law. In a recent case a COMI shift from a country with no insolvency laws to one with flexible laws was sanctioned by the US Court as it benefited creditors as a whole.

The last thing I would comment on is the rise of Alternative Finance. From small beginnings it has begun to take off. Everything from challenger banks to crowdfunding, peer to peer lending and internet based invoice discount platforms. The amount of choice has proliferated and this has certainly created options to take unhappy lenders out and replace them as part of a restructuring without necessarily having to enter a formal insolvency process.

Davidson: The 2016 Aeropostale save out of bankruptcy may represent a potential new strategy for other store front retailers, particularly those operating in malls or multiple locations with the same landlord. It's not yet clear if the Aeropostale rescue represents a trend to be imitated by other retail chains in the struggling sector. However, it provides a viable blueprint particularly for landlords, but also other creditors and that allow these retailers to continue operating following bankruptcy.

The Aeropostale situation provided an incentive for such major landlords as General Growth and Simon Property Group to help save the retailer, since so many stores operated out of their malls. In similar distressed and bankrupt situations in which landlord and other creditor concentration exists, these landlords and vendors may able to work collaboratively to minimise their own losses and create overall higher value than in an otherwise potential brick-and-mortar retailer liquidation.

After all, since 2014, most bankrupt retail chains that include high profile retailers such as Sports Authority, American Apparel, and The Limited, were shuttered during the bankruptcy process. Now, landlords, vendors, and other creditors, have another option of recovering short and long-term value rather than minimal, if no recovery is available via liquidation.

8. What does Brexit mean for the insolvency and restructuring market?

Golubow: Both the United Kingdom and the United States, in Chapter 15 of the Bankruptcy Code, have adopted the UNCITRAL Model Law on Cross Border Insolvency, which is intended to encourage the recognition of foreign proceedings and cooperation between jurisdictions. Brexit will not affect the applicability of the Model Law to the United Kingdom or the United States. Instead, the impact of Brexit on the United States' insolvency and restructuring market will be felt primarily in the uncertainty that it has instilled in the both the United States and global markets. Although trade with the United Kingdom comprises only approximately 0.5% of the United States' GDP, the fallout from Brexit may have a profound impact on the United States. For example, the United States is the single largest investor in the United Kingdom, employing more than one million people, and uses Britain as an entryway to the EU. Brexit may threaten such investments, while diminishing the attractiveness of Britain as an investment for American business going forward. Similarly, Britain's investments in the United States, which account for up to two million jobs, may also be threatened. This is admittedly speculative forecasting but illustrates that Brexit's primary impact on the United States, whether on the insolvency and restructuring markets or in a broader sense, will be indirect and due to the effect that it has on the United States' economy.

Batra: It does not impact India directly. But India hopes to offer an attractive market for restructuring in Asia.

Bryan: It is not possible to say as we don't know what Brexit will look like yet. A "hard Brexit" disrupting established supply chains in pan European businesses will cause a period of industry readjustment which could increase the need for restructuring. A "softer Brexit" will have less effect although uncertainty is always a harbinger of difficulty for marginal businesses. Currently EU insolvency law and company law is not in the least harmonised. However, a system of mutual recognition exists and in insolvency and restructuring it broadly works. If Brexit caused the UK to be outside that system of recognition then that would be a backward step for London professionals. It doesn't seem to be in anybody's interests for that to happen but where politics are involved anything is possible.

London's popularity as a restructuring hub hasn't always pleased other EU countries and we may therefore get some backlash. But the experience, flexibility and pragmatism of UK courts will be hard to replicate. Perhaps of more concern is the rise of other jurisdictions in other parts of the world seeking to become a restructuring hub. Singapore in particular is pushing very hard and having some success as it tries to become the go to restructuring hub for Asia.

9. With business increasingly conducted on a continental or global level, more insolvencies than ever have a cross border element. In your experience what are the main challenges and solutions surrounding cross border insolvencies?

Langhorne: In cross border insolvencies the main challenges that arise relate to ensuring the effective, timely and cost efficient enforcement of creditors rights against assets located in different jurisdictions. Issues tend to stem from the fact that there can be significant differences between the insolvency rules in different jurisdictions. This is prevalent in Singapore which is surrounded by countries such as India, Indonesia, Malaysia, Vietnam etc., each with different systems of law and different insolvency and restructuring regimes. This in turn requires co-ordination with local counsel in a number of different countries and can involve concurrent proceedings in multiple jurisdictions.

Singapore has sought to address this issue by enacting the Model Law. Prior to the Model Law being adopted the courts in Singapore had taken an ad hoc approach to each application to recognise foreign insolvency proceedings. In some cases applications were recognised after a single hearing, whereas in other cases recognition occurred after a number of hearings and only on the basis that the applicant give a number of onerous undertakings to the court. It was also not always clear what factors the courts would consider when granting recognition. This lack of clarity and predictability leads to uncertainty for insolvency practitioners.

The enactment of the Model Law, albeit with slight modifications in its application, means that there is now a clear and internationally recognised framework for resolving cross-border insolvencies. A key benefit of the Model Law is that recognition has become a largely formalistic process, with applications generally being recognised where they made by an appointed foreign representative supported by the relevant documents set out in the Act. A further benefit of the Model Law is that it has been adopted in many key jurisdictions including the United States, the United Kingdom, Australia, Canada, New Zealand, Japan and South Korea. However, a material limitation of relying on the Model Law is that it has not been adopted by many of the jurisdictions surrounding Singapore such as Indonesia, Malaysia and Hong Kong. Further, there is still uncertainty as to how the model law will be applied because there is limited Singapore law jurisprudence on the new provisions.

Felsberg: The main challenge is that there are no specific provisions on cross-border insolvencies in Brazil. A foreign proceeding must necessarily be granted exequatur by the Superior Court of Justice for it to be recognised in Brazil, and the Brazilian courts have a history of denying recognition to foreign insolvency proceedings. This challenge will be overcome if Brazil adopts the UNCITRAL Model Law on Cross Border Insolvency, as proposed in the draft legislation. Even after the Model Law is adopted, there will be challenges, as courts, insolvency administrators and attorneys, with a few exceptions in the largest cities, are not used to dealing with cross border issues.

Golubow: It is true that many industries – including significantly oil and gas – are global in scope and, therefore, have a cross border element. One significant challenge that occurs in this context is the possibility of insolvency estates with assets that are located in multiple insolvency jurisdictions. Such debtors must determine whether to pursue bankruptcy protection under the United States Bankruptcy Code, which allows for the debtor to continue running its business during the pendency of the reorganisation as a debtor-in-possession and is typically debtor-friendly or to go forward under another jurisdiction's insolvency system, which may not offer the same protections as the American system. In order to gain bankruptcy protection under the Bankruptcy Code of the United States, a prospective debtor would need to satisfy venue and jurisdictional requirements. If they are unable, such debtors may be subject to a less debtor-friendly insolvency system.

The UNCITRAL Model Law on Cross Border Insolvency, upon which Chapter 15 of the Bankruptcy Code is modelled, addresses such issues by setting up a system which attempts to harmonise multiple insolvency proceedings concerning the same insolvency estate. Under Chapter 15, a foreign entity is granted access to the United States court system to pursue three types of insolvency proceedings: (i) a primary bankruptcy proceeding, in which the bankruptcy will go forward under the jurisdiction of the United States bankruptcy courts; (ii) an ancillary proceeding to an insolvency proceeding in a foreign jurisdiction, dealing exclusively with specific assets or issues under the jurisdiction of the United States; or (iii) a proceeding to stay or dismiss a proceeding in the United States that may conflict with a foreign proceeding. Both Chapter 15 and other iterations of the Model Law, such as the European Community Regulation on Insolvency Proceedings, have established a test for determining under which jurisdiction an entity's primary insolvency action should proceed: the location of an entity's "centre of main interest." Although "centre of main interest" is not defined in the Bankruptcy Code, United States case law recognises the applicability of multiple factors in determining whether primary jurisdiction over an international entity is appropriate, including the location of the entity's registered headquarters, the location of the entity's management, the location of the entity's assets, the location of the entity's creditors, and the source of the laws which would apply to the principal issues of the insolvency.

Berkovich: Cross border cases provide unique challenges of having to deal with different insolvency laws to be able to capture the inherent additional value of keeping a global company together. Takata, which I mentioned above, is a good example of that, where the purchaser is seeking to buy the entire global company. Both the company and purchaser have to navigate through two separate plenary insolvency proceedings in different countries, as well as trying to keep the subsidiaries in other jurisdictions out of potentially disruptive insolvency proceedings. The key to success is being extremely coordinated with advisors for all regions.

Another interesting issue relates to a foreign company with U.S. assets or creditors seeking to use chapter 15 of the U.S. Bankruptcy Code as an ancillary proceeding to recognise the foreign insolvency proceeding in the company's home jurisdiction. One of the challenges in the chapter 15 context is that creditors may object to recognition on the basis that granting comity is "manifestly contrary" to the public policy of the United States. The public policy exception is in conflict with the overall chapter 15 goal of increasing international cooperation. While U.S. courts generally find that such public policies must be restricted to matters of fundamental importance, the courts have been reluctant to identify U.S. public policies as such in any explicit manner. Thankfully, for companies seeking chapter 15 recognition, the public policy conception has been narrowly construed, but the lack of clear guidance on the issue creates risk for foreign companies.

U.S. courts also face the challenge of insolvency proceedings filed by identical or overlapping sets of debtors in multiple foreign jurisdictions, both seeking recognition under chapter 15 in the U.S. as the foreign main proceeding. The comity analysis becomes more difficult in those cases, because in essence the U.S. bankruptcy court is asked to decide not the usual question of whether a foreign jurisdiction has fundamentally fair insolvency laws, but which case should be recognised as the foreign main proceeding.

Simmons: There are a number of challenges surrounding cross border restructurings. Companies with global operations have assets and creditors spread across many jurisdictions. For example, global offshore driller Seadrill, which filed for bankruptcy protection in the U.S., maintains 421 bank accounts with 27 different banks, in 24 different jurisdictions and with 25 different currencies.

U.S. bankruptcy law requires that a debtor's funds be insured or guaranteed by the United States or by a department, agency or instrumentality of the United States or backed by the full faith and credit of the United States. Alternatively, a debtor's funds may also be deposited in an entity that has posted a bond in favour of the United States or has deposited securities with the Federal Reserve Bank in an account maintained by the United States Trustee. The United States Trustee is a watchdog ensuring U.S. law is enforced. A U.S. bankruptcy court may only waive these depository requirements upon a showing of "cause." Therefore, Seadrill, must satisfy the U.S. bankruptcy court that there is sufficient cause for the company to hold funds in foreign bank accounts to ensure avoidance of a disruption in its cash management system.

Also, as noted in the Seadrill bankruptcy, dealing with foreign suppliers and foreign creditors may pose a challenge. This is because some foreign suppliers have very limited connection to the United States. These suppliers, thus, may be beyond the jurisdiction of the U.S. bankruptcy court and therefore may disregard the automatic stay. Seeking to enforce the automatic stay in foreign jurisdictions may prove costly and time consuming. Seadrill has sought to solve this issue by seeking an order from the U.S. bankruptcy court allowing Seadrill to pay all prepetition claims of foreign suppliers to avoid disruption in its global operations.

Batra: The missing piece in the Code is the cross border insolvency framework. It was widely expected that India would adopt the UNCITRAL Model Law on Cross Border Insolvency or provide for an alternate framework to deal with cross border insolvency issues as part of the Code. While considering the Insolvency and Bankruptcy Code Bill 2015, the Joint Parliamentary Committee also expressed the need to address the cross border insolvency issues. Two provisions were included in the Code to deal with cross border issues: Section 234 to provide for agreements with foreign countries and Section 235 to provide for letters of request to a country outside India in certain cases.

The two provisions in the Insolvency and Bankruptcy Code 2016 (Code) to deal with cross border issues, that is, Section 234 to provide for agreements with foreign countries and Section 235 to provide for letter of request to a country outside India in certain cases do not provide the adequate framework to deal with cross border insolvency issues.

Stakeholders do not see these provisions as being adequate to administer cross border insolvency issues. Most sophisticated economies have well developed cross border insolvency laws. To provide a fair, efficient, transparent, and predictable mechanism to deal with cross border issues, it is necessary to address the key tenets of cross border insolvency – access, recognition, relief, and co-operation by way of a comprehensive legislative and regulatory framework.

For investors and companies alike, it is important to know what is going to happen when things go wrong from a financial perspective in a particular country. In cross border insolvency situations the need for transparency and predictability is even more compelling. In those situations, a company or investor needs to understand not only the relevant substantive laws and rules in the country they are investing and how they apply in practice, but also if and how these relevant substantive laws and rules of country are recognised in other relevant countries.

Recognising the need for a law to deal with cross border insolvency issues, a Cross Border Insolvency and Bankruptcy Bill 2017 (CBIB) is currently under consideration by the government.

Nastase: One option and recommendation to be considered by any creditor involved in cross border insolvency would be to have alongside the judicial administrator a team of experienced consultants with relevant local experience in each of the involved jurisdictions.

Bryan: I'm not an insolvency practitioner nor a lawyer so can't speak in depth of formal insolvencies. However, with my partners we cut our teeth on the cross border restructurings of the early 2000's which were heavily influenced by US professionals in London versed in Chapter 11 and giving viable businesses a "second chance". We were part of a US based boutique. Our first instinct was to keep businesses out of insolvency processes. In doing so we were always mindful of the insolvency triggers and directors' liabilities and responsibilities in each jurisdiction as we looked to initiate an operational turnaround and negotiate a consensual restructuring. Modern multi-national groups are complex structures with inter-company trading and often a financing and tax structure overlaid in numerous tax haven jurisdictions. Just one company filing can cause a large balance to become a bad debt or supply problem which in turn causes another insolvency trigger and then a viscous spiral bringing the whole group down.

We have to manage that globally and make sure all group companies are on the right side of local insolvency filing laws, operate as a group rather than local interest and understand the consequences of non-compliance. In parallel we would be looking for any processes and tools anywhere that could facilitate group value preservation. More and more countries are introducing so called pre-insolvency regimes which allow moratoriums, cram downs and other useful ways of giving a distressed company some breathing space and the chance for a turnaround plan to be prepared. Cross border restructuring is a skill set learned through experience. Having an effective network of local practitioners and knowledge of coordinating the process is essential to success.

10. Can you detail the different debt restructuring options and processes?

Langhorne: 1. Schemes of Arrangement

A scheme of arrangement ("SA") is an agreement between the company and its creditors to restructure the company's debts and vary the creditors' rights to assist the company to continue as a going concern and fulfil its debt obligations. For a SA to be implemented, assuming the "pre pack" path now provided for in the Amendment Act is not chosen, an application needs to be made to the High Court for an order summoning a meeting of the relevant creditors or stakeholders to consider the proposed agreement. An automatic 30 day moratorium can also be obtained to protect the company from any enforcement actions being taken. The SA must then be approved by the court and a majority in number representing three-fourths in value of the creditors or class of creditors, or members or class of members at the meeting. However, the court has the power to vary the majority in number requirement and cram down on dissenting classes of creditors. Alternately, as noted, the court can now approve the SA in the absence of a creditor meeting if it is satisfied that the company has provided sufficient information about the SA to the creditors and the scheme would have been approved if the meeting had been held.

2. Judicial Management

Upon the application of a company or its creditors the court may appoint a judicial manager where it is shown that the company is or is likely to become unable to pay its debts and one or more of the purposes outlined in the act will be achieved by the appointment (such as the survival of the company or whole or part of its business as a going concern or a more advantageous realisation of the company's assets than through a winding up order). If the court grants an order for judicial management, then the judicial manager will take control of the business and property of the company for a period of 180 days subject to any further extensions granted by the court. An automatic 30 day moratorium can also be obtained.

3. Receivership

A receiver may be appointed pursuant to a contractual right under a debt instrument. This can be done without applying to the court and is generally the fastest way for a secured creditor to realise their security. The powers of the receiver and the effect on the company's board of directors will depend on the agreed scope of the receivership.

Felsberg: There are two basic methods for debt restructuring: private workouts and formal bankruptcy proceedings. In private workouts, the company may enter into an agreement with its principal creditors outside of a bankruptcy process to negotiate a reduction of interest payments and/or an extension of loan maturities. Haircuts are rarely granted in workouts. Workouts generally involve lower costs and are faster than formal bankruptcy proceedings. However, there are several factors that influence the relative use of workouts in Brazil.

First, workouts require the consent of all participants, creating the danger of creditor holdouts, in contrast to the less restrictive voting rules in formal bankruptcy proceedings. While in a judicial reorganisation proceeding the plan must be approved by a majority of creditors in each class (a majority of creditors in labour and small

companies classes and a majority in number and amount in unsecured and secured classes), in an expedited reorganisation proceeding the plan must be approved by 60% of all claims in each class affected by the plan.

Second, formal bankruptcy proceedings grant an automatic stay of all claims against the debtor for a period of a 180 days (which is frequently extended), preventing a "run" on the company's assets by the creditors. Third, formal bankruptcy proceedings grant incentives for debtor-in-possession lenders, who must be paid with priority to all pre-filing creditors.

For more details regarding the formal insolvency proceedings available in Brazil, please refer to question three.

Golubow: There are a number of restructuring options available to a distressed company, each with its own advantages and disadvantages. Bankruptcy itself offers many significant advantages and the Bankruptcy Code provides many tools that can be used by a debtor to effectuate a restructuring. Further, there is a finality that comes with a bankruptcy proceeding, as orders of the bankruptcy court are binding on all parties-in-interest, including all creditors of the debtor.

Bankruptcy, however, is not appropriate in every situation or for all distressed companies and carries with it several distinct disadvantages. Bankruptcies are expensive and time consuming, as the debtor is required to comply with significant and on-going disclosure obligations. In addition, a primary disadvantage that must be considered before initiating a bankruptcy is that once started, it can be difficult to emerge from bankruptcy. As a result, bankruptcies can last for a long period of time, during which expenses and time commitments continue to accrue.

In the alternative, distressed companies may seek to restructure their debt through out-of-court workouts or assignments for the benefit of creditors under state law, which have the advantage of being less costly than bankruptcies, quicker, and requiring less disclosure. The disadvantages of these courses of action are that, unlike bankruptcies, there is no automatic stay prohibiting creditors from taking actions to enforce their contractual or legal rights against the distressed business and one does not receive the resolution of pre-restructuring obligations that one receives in a bankruptcy.

In addition, out-of-court workouts and assignments for the benefit of creditors may not be appropriate for a distressed company with a significant number of creditors or creditors that are not known. If there are numerous competing interests, an out-of-court workout can become unwieldy and impractical without the structure inherent in bankruptcy proceedings. In the end, a distressed company must acknowledge its situation with frankness before deciding which restructuring option is the most appropriate.

Batra: The Code provides freedom to the interested parties to design their resolution plan. An applicant may submit a resolution plan to the resolution professional prepared on the basis of the information memorandum. A resolution plan means a plan proposed by any person for insolvency resolution of the corporate debtor as a going concern. It could be based on slump sale, merger, de-merger or any other model. The resolution professional shall examine each resolution plan received by him to confirm that each plan:

- Provides for the payment of insolvency resolution process costs in a manner specified by the board in priority to the repayment of other debts of the corporate debtor;
- Provides for the repayment of the debts of operational creditors which shall not be less than the amount to be paid to the operational creditors in the event of a liquidation of the corporate debtor and shall be paid within 30 days from sanctioning of the plan;
- Provides for dissenting financial creditors to be paid ahead of creditors voting in favour of the plan but on liquidation value;
- To confirm that source of funds to make the above payments has been identified;
- Provides for the management of the affairs of the corporate debtor after approval of the resolution plan;
- The implementation and supervision of the resolution plan;
- Does not contravene any of the provisions of the law for the time being in force.

A resolution plan, which conforms to these conditions must be placed before the creditors committee by the resolution professional for its approval. The committee may approve a resolution plan by a vote of not less than 75% of voting shares of financial creditors. The resolution applicant may attend the meeting of the creditors committee in which the resolution plan of the applicant is considered. However, the resolution applicant shall not have a right to vote at the meeting unless such resolution applicant is also a financial creditor.

All the creditors must vote. The voting is not based on "present and voting" principle. The creditors can authorise an insolvency professional or another person to attend the meeting and vote on their behalf. Voting by creditors is possible by electronic means.

The resolution plan as approved by the creditors committee must be presented by the resolution professional to the NCLT for approval. If the NCLT is satisfied that the resolution plan as approved by the creditor committee meets the requirements of the resolution plan referred above, it shall, by order, approve the resolution plan.

The resolution plan approved by the NCLT shall be binding on the corporate debtor and its employees, members, creditors, guarantors, and other stakeholders involved in the resolution plan. Because of the order of approval, the moratorium order passed by the NCLT shall cease to have effect. If the NCLT is satisfied that the resolution plan does not confirm to the stated requirements, it may, by an order, reject the resolution plan and pass an order for liquidation.

Davidson: Multiple options exist in any given distressed situation. The challenge is to determine the optimal debt restructuring alternative by weighing the various factors and circumstances. If circumstances do not allow for a debt restructuring, a liquidation may result. Each option has its own set of advantages and disadvantages, some of which are summarised below:

Out of court restructuring

Advantages:
- Less expensive and faster to implement
- Potential flexibility to treat creditors differently
- Resources can be fully applied to operations rather than depleted by administrative costs of a formal legal proceeding
- Recovery may be higher
- Relationships among parties may be easier to manage as egos, status, etc. and relationships may not be as adversarial as in litigation

Disadvantages:
- Success is dependent upon all participants agreeing to negotiate cooperatively
- May be hard to obtain consensus, since there is less leverage over uncooperative creditors
- May reduce assets available for company operations if a later, court-driven reorganization becomes necessary
- If out of court workout fails, credibility may be damaged

Chapter 11 reorganisation

Advantages:
- Management continues to operate the Company as "Debtor in Possession" (DIP) under Court supervision
- Allows Company to sort out its troubles in a calmer atmosphere than the crisis immediately preceding
- Provides good opportunity for obtaining fresh DIP (priority) financing
- Court approved plan or an order authorising an asset sale provides greater certainty (beyond informal out of court workout) regarding liabilities, ownership, and responsibilities
- Potential buyer, i.e., stalking horse bidder requires "free and clear" sale Court order under S.363 of bankruptcy code.

Disadvantages:
- Must have sufficient cash and/or DIP financing to execute
- Court supervision is pervasive and transparency to parties-in-interest is significant
- Adversarial proceeding is more difficult to control once started
- Generally, most expensive option
- Generally, most time consuming (although "prepack" / pre-negotiated may mitigate cost and time
- May dissipate going concern / value of estate by significant consumption of resources

Article 9 "Friendly Foreclosure"

Advantages:
- Consummated quickly
- More cost effective than a Chapter 11, S363 sale
- Good title can be given, because a friendly-

foreclosure eliminates junior liens
- May result in minimal disruption to operations
- Mitigates risks to buyer of claims by distressed company's creditors

Disadvantages:
- Subject to "commercial reasonableness," e.g., fair value
- Subject to senior liens, and lender may only convey assets in which it has perfected liens
- Lender liability risks, e.g., environmental, if lender takes possession of assets
- Greater risk of successor liability; therefore, buyers may only be interested if sale is cleansed through a S363

Out of court liquidation – self liquidation

Advantages:
- May be most efficient and yield highest recovery
- Management may operate to turn raw materials and work-in-process into finished goods for greater recovery
- Management may have better success than a lender in collecting receivables

Disadvantages:
- Very close oversight by lender
- Management may not manage liquidation in cost effective manner
- Collection lawsuits/costs may dissipate assets and going concern / value of estate

Chapter 7 liquidation

Advantages:
- Less expensive than Chapter 11 reorganisation
- Court oversight and trustee mitigates exposure to other creditors

Disadvantages:
- Management no longer involved; Trustee is appointed
- More expensive than other liquidation options
- Usually less recovery than other liquidation options

11. What are the most important aspects to consider in executing complex, global multi-national restructures?

Felsberg: The first obstacle that Brazil must overcome is the fact that it lacks modern cross-border insolvency legislation. This adds a layer of complexity to multi-national restructurings, since a local proceeding may have to be filed in Brazil if no consensual solution is reached. Even after the enactment of the Model Law in Brazil, there would be aspects worth considering such as (i) the venue in which a restructuring proceeding will be filed; (ii) the coordination of agreements and court procedures; (iii) the rights of local creditors and of minority shareholders of subsidiaries of a group of companies; (iv) the treatment of certain claims such as those secured by collateral, held by workers and suppliers, and by the tax authority and other governmental agencies; and (v) the timing and cost of the restructuring.

Podolski: Restructures within a single jurisdiction or economy already require significant skill, knowledge and experience to undertake. Driving global business transformations or restructures introduces several additional complexities which restructuring teams need to consider.

The first set of complexities stems from regulatory considerations – local legal system, taxation issues including transfer pricing implications, as well as varying standards governing the financial regulatory system. In many countries, there are additional labour laws and trade union complexities to navigate around. From personal experience of dealing with organisational right sizing of labour cost and labour pyramid globally, these are significantly harder and take significantly longer to work through in certain parts of the world. Geo-political implications also need to be considered as part of the broader restructure strategy and risk management approach.

There are however also some more-subtle aspects to consider, which are no less important yet sometimes underestimated. One I have seen ignored far too often is the recognition of cultural differences that need to be taken into consideration by foreign restructuring teams. Not only language and business practice differences play a role when executing change across borders. Significant differences also exist around negotiating styles and techniques, as do ways to motivate and communicate messaging to workforces in different parts of the world. Ensuring restructuring teams not only have experience working across borders from a technical, financial and legal perspective, but also are able to embrace and align with cultural aspects is often a make or break of global transformations and restructures.

12. To what extent can focusing on business management best practices benefit the organisation in the long run?

Felsberg: The adoption of corporate governance practices is an efficient measure to increase transparency and improve the decision-making process, which includes the recruitment of expert and specialised professionals. Such measures are efficient to avoid unnecessary risk taking and thus minimise the risk of bankruptcy.

In formal reorganisation proceedings, the inclusion of best practices rules in the reorganisation plan (such as the recruitment of specialised management, a CRO, the creation of a creditors committee and monitoring agents for providing disclosure of relevant information and transparency) may increase the probability of success of the reorganisation proceeding, as a more efficient supervision of the management will be in place and the debtor company will have more incentives to comply with the terms of the plan.

Podolski: Business management is a very broad area, and its scope varies organisation to organisation. Whilst every business is different, generally most organisations will focus their business management interests towards four key agendas: growth, cost management, cash flow and their key success enablers (people, plant, machinery).

There can be a lot of complexity and investment that often goes into setting up internal business management practice, with most relying on integrating vast amounts of data and information from a complex set of pan organisational tools and processes. This can be quite daunting, and without the right leadership direction to define and prioritise the key measures of success, it's not hard to sometimes lose sight of the basic goal – that is, to provide a very clear and timely health check of whether the business is heading in the right direction. Which in turn enables corrective action to be taken, much before any drastic measures are needed.

As organisations get larger and more complex, so does also the complexity of having a consistent approach to business management. Ironically, added complexity also calls for much more rigour and discipline in being crystal clear in establishing and communicating very succinct business priorities. These priorities and associated measures almost in most cases revolve at a minimum around ensuring revenue is on track against plan, costs are under control, and the company has sufficient cash to meet its obligations and invest in growth. When either of these is underperforming in isolation – this is often a trigger for corrective action. It is much harder to try to transform and restructure two or three of these elements concurrently. When revenues decrease, generally fixed costs become quite impactful to the bottom line. It is a lot easier and quicker to focus on aligning and reducing cost to the declining revenue trajectory, than to fire up the revenue engine. Sometimes there is in fact no choice to do so, for the company to survive in the short term. Achieving both at the same time is quite an art, and takes a lot more effort and strategy. Business management practices, will help in deciding on the most effective strategies both long and short term. This true in both on-going operations, as well as during major restructure and transformational activities to ensure progress against desired outcomes is being made.

13. How has digitisation and process support innovation changed the realities of business performance and improvement?

Podolski: Clearly, the digital transformation age has not only come, but is becoming a reality of how we do business on many levels. Just like various go to market channels are being digitised, so too are companies looking at their internal tools and processes to help drive efficiency in how these are delivered. We touched on the importance of business management rigour earlier on, and in ensuring there is a clear visibility of a company's health with sufficient controls and processes in place to remediate any issues quickly. In the traditional world, much of the data enabling these views would come from either manual reports, or data warehouses requiring massaging, translation and normalisation, such that data could be aggregated into useful business information. Robotics and automation, as well as system simplification and integration methodologies are changing a lot of this traditional approach, reducing the manual effort organisations need to spend on collecting and reporting data. This is a very exciting time not just for the CIO but for the COO, CEO and business functional heads alike.

With technology and process digitisation helping reduce effort and speed with which business health checks can be monitored, does this automatically reduce the pressure on leadership teams and boards in managing their business? Effort and cost wise, perhaps. In fact, large aspects of business operations activities and dedicated roles may disappear. However, the core challenge of understanding what drives a given business, what signals to look for as clues to early problem signs, and react to them quickly and decisively will not go away. An experienced leadership team will remain the critical linkage point between the company's strategy, and its effectiveness of execution. Nevertheless, the new trends around process digitisation, robotics and automation will certainly drive the efficiency and speed with which information driving decisions will become available.

14. How can the approaches associated with corporate restructures assist executives in driving successful business unit level turnarounds?

Felsberg: The inclusion of best practices rules in the reorganisation plan (such as the recruitment of specialised management, a CRO, the creation of a committee of creditors or monitoring agents and rules for providing disclosure of relevant information and transparency) may assist executives in driving successful turnarounds, as it creates incentives for executives to comply with the terms of the reorganisation plan and provides for specific duties and responsibilities of the administrator with its creditors. In a formal reorganisation proceeding, in principle, the management remains operating the business during the proceedings (debtor-in-possession), but the court appoints a judicial administrator responsible for monitoring the debtor and the compliance with the provisions of the reorganisation plan. If the management refuses to provide information requested by the judicial administrator or acts in a manner detrimental to the regular business operations or to the creditors' interest, the management may be replaced by the court.

Podolski: Having operated inside large, complex organisations for most of my career, I guess my experiences will be skewed towards the latter part of the question. I recall one example I helped turn around, where a business unit became so distressed several years ago that it not only materially impacted the performance of the entire region it was part off, but had the potential to impact key health measures of the entire global group. It's not unusual for corporate distress to start with issues stemming from a function or a large account inside large organisations, which drain resources to the extent of impacting organisational health at a corporate level.

In this case, given the size and complexity of the distressed business unit, the remediation and turnaround approach shared many principles that also apply to large corporate restructures, although with some obvious differences. A benefit of being part of a large, global corporate structure meant the need for external bank or creditor renegotiations was not needed, with the parent company absorbing and funding the resource drain until the restructure and turnaround was complete. Nevertheless, the process of identification of the root causes of the distress, homing in on the key performance indicators and prioritising them in order of criticality to address, dealing with inefficiencies and cost bubbles, renegotiation of several contractual impediments with clients and suppliers, together with a methodological governance process, were all foundational elements of the turnaround efforts. Many of these are the same ingredients that any corporate restructure will need to address as well.

We alluded to the importance of business management practices across several of the questions, as they pertain to the broader topic of bankruptcy and restructuring. This case was a good reminder as to how serious the implications of a lack of business management practices or adequate scrutiny around their governance can be for organisations.

The larger and more complex the organisation, the bigger the magnitude of the impact when things get out of control. At the same time, these organisations usually dispose higher resources to be able to absorb some tough projects or phases, buying some time in being able to drive restructuring activities. In smaller companies, where the company generally has less resources at its disposal to be able to absorb financial burdens, the quicker the implications will challenge the company's sustainability and shortening the remediation time ability before potentially solvency considerations surface. Therefore, implementing and governing a sound business management practice are no less important there.

15. Are there skills and business practices pertaining to managing corporate restructure, which extend and assist executives in managing business level restructures and turnarounds?

Felsberg: There are some accounting and financial firms (such as the Big Four and some specialised professionals) developing specific areas to deal with distressed companies, providing services related to corporate restructuring, which includes crisis management, financial, corporate and operational restructuring, designing of business plans and diagnosis. Some firms may also act as chief restructuring officers (CROs) or assume temporally the management of distressed companies.

In formal reorganisation proceedings, the management of the company remains operating the business during the proceedings (debtor-in-possession), but it is common that the company hires a financial advisor to design the reorganisation plan and to negotiate with the main creditors. In some cases, a specialised professional may assume the management of the company, as a result of the negotiations with the main creditors and as a condition for the approval of the plan.

Podolski: As mentioned earlier, there definitely is a linkage between not just some of the approaches, but also the skills required to drive corporate level and business level restructures or turnarounds.

On the skills side of the ledger, an ability to think strategically and not lose sight of the bigger picture, yet possess enough patience for understanding some of the operational detail, is a good balance to have. Understanding drivers influencing the industry and the specific business being restructured is also key. Ability to navigate complexity, both inside highly matrixed organisations as well a network of partners and suppliers, is a critical shared skill across both aspect of restructures. The aptitude to connect with people – both in driving outcomes through relationship building, and being able to take people on a journey, are also skills relevant to any restructure. Most restructures – be it at corporate or business level, involve a high degree of change and uncertainty for employees, partners, clients and financial stakeholders alike. It is very difficult to drive a convincing and successful outcome, unless all stakeholders embrace the vision and accept to go on the transformational journey.

From the perspective of methodology and approach, whilst some of the focus around corporate versus business level restructures is clearly different, particularly around navigating the insolvency and legal framework as well as different financial restructuring needs. Just like skills, many of the approaches share a common grounding and mind set. Understanding root causes of distress, reviewing and adjusting strategies around the go to market model and business portfolio, addressing underlying technical and cost structure challenges, as well as reviewing the organisational structure to ensure it is effective and efficient, are all elements which are shared.

16. In an ideal world what would you like to see implemented or changed?

Felsberg: In an ideal world all restructurings, in or out of court, result in healthy and creditworthy companies, abandoning the "pretend and extend" mode, which unfortunately prevails in many Brazilian restructurings. Unfinished business perpetuates insolvency and is contrary to the "raison d'être" or "ratio legis", i.e., the purpose of the insolvency legislation.

Golubow: Ideally, I would like small business Chapter 11 cases to be available to a larger number of businesses. While a small business Chapter 11 bankruptcy provides the same protections and tools as a standard Chapter 11 bankruptcy, a small business Chapter 11 bankruptcy has a number of unique features designed to lessen the cost and streamline the process so as to make it accessible to businesses that would not be able to afford to pursue a standard Chapter 11 bankruptcy. For example, in a small business Chapter 11, there is a longer period in which the debtor has the exclusive right to file and solicit acceptance of a Chapter 11 plan, which minimises situations in which there are conflicting Chapter 11 plans. 11 U.S.C. § 1121(e).

At the same time, a small business debtor may not be required to create and file a disclosure statement in support of its Chapter 11, an obligation that is necessary in the context of a standard Chapter 11 bankruptcy but which entails the expenditure of significant time and resources. Fed. R. Bankr. P. 3017.1. A small business Chapter 11 bankruptcy, however, is only available to debtors who hold an aggregate non-contingent liquidated secured and unsecured debt of no more than $2,566,050. 11 U.S.C. § 101(51D). Raising the debt limit from $2,566,050 to $10 million would make the streamlined nature of bankruptcy under Chapter 11 available to many more small businesses that would otherwise not be able to afford pursuing a Chapter 11 bankruptcy.

On a related note, I would also prefer to raise the debt limit on those who may file a bankruptcy under Chapter 13, a so called wage earner's plan. It enables individuals with regular income to develop a plan to repay all or part of their debts pursuant to a repayment plan to make instalment payments to creditors over three to five years. Chapter 13 is only available to individuals with non-contingent, liquidated, unsecured debts of less than $394,725 and non-contingent, liquidated debts of less than $1,184,200. 11 U.S.C. § 109(e). If these debt limits were raised, more individuals would be able to take advantage of Chapter 13 instead of being left with the only the option of filing a prohibitively expense Chapter 11 bankruptcy.

Batra: We urgently need a cross border insolvency law. Hopefully, we will get it early next year.

Podolski: In my experience there is no such thing as an ideal world. Particularly in context of the topic of this round table, business leaders need to make the most and embrace the opportunities that exist in the present. This is a very exciting time for business, with many industries undergoing significant change. The digital revolution is impacting many legacy business models in ways and at a pace which we have not experienced since the internet revolution several years ago. Whilst this is putting pressure on traditional business models and on companies who are struggling to adapt to the change, at the same time many new, innovative companies are emerging. Traditional organisations are redefining and transforming themselves to stay relevant to the market forces and competitive pressures. Legislation is also undergoing some very dramatic and exciting changes across many jurisdictions to try to keep up with the future reality and business needs. This is a very exciting time for any professional associated with business transformation or business restructuring – be it at a corporate level, or inside of organisations helping reshape corporations in the new economy.

Bryan: In 2014 the EU issued a recommendation on an EU wide pre-insolvency regime. This became a directive in 2016 so all EU countries will have to put their own laws in place to comply with the principles outlined. Very briefly these are (i) to facilitate restructuring at an early stage without lengthy or costly procedures and without court involvement; (ii) a supervised stay or moratorium period where nobody can take enforcement action against the business; (iii) preventing dissenting minorities from holding the process to ransom; (iv) facilitating continuation of the business while restructuring; and (v) generally giving a better chance of success for restructuring without resort to formal insolvency.

The UK consulted on this in 2016 with proposals of its own along the lines of the EU ones. There were a lot of responses and some things need more work, particularly the recognition of the status of accredited turnaround professionals, but it did seem there was a real willingness in government to push ahead with this. Then came Brexit, and right now it seems that the demands on the civil service and parliamentary time are pushing such legislation out into the future.

I think this could be a real game changer for the UK and would very much like to see the proposals enacted. As somebody who worked in a PLC that went into Administration I know first-hand how value destructive an insolvency can be and just how hard it hits employees and others. Surveys suggest that in excess of one-third of all insolvencies are caused by an insolvency, normally a major customer going under. We need to break this domino effect.

The "I" word is seen very negatively and the suggestion of an insolvency causes stakeholders to do nothing more than try to protect their own position, often making things worse in the process. Management fear the loss of their jobs and all too often stick their heads in the sand until it is too late. Then they rush to file due to fear they may be accused of trading while insolvent.

We need to have a major change to this business culture. A proper pre-insolvency regime presented in a positive light should encourage management to seek help earlier. Rather than the negative consequences of insolvency there should be an expectation that help should be sought and that if early enough, there should be a reasonable chance of saving the business. This would be good for business, good for the country and a major boost to the entrepreneurial spirit we are going to need post-Brexit.