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BOOK REVIEW

Ben Larkin (ed.), *Restructuring and Workouts – Strategies for Maximising Value*

Reviewed by: EW (Sandy) Purcell, Managing Director, Houlihan Lokey, London, UK

They say 'timing is everything'. This publication comes along at the right time. Globe Business Publishing has published a book that is the amalgamated works of several participants in the restructuring and workout world in a book entitled *Restructuring and Workouts – Strategies for Maximising Value*. This review is written so the reader can get a quick overview of the contents of the book and its chapters – and does not do proper justice to the underlying content. Ben Larkin (Head of Restructuring at Berwin Leighton Paisner LLP) wrote the 'Introduction' and sets the tone in the current climate where even 'the Bank of England formally accepted that the UK is heading into recession'.

While the titles of the chapters are diverse, the content is generally quite good. The chapters deal with the real intricacies of workouts in the corporate world from contributors that have much to offer from their knowledge and depth of experience.

Chapter 1, written by Martin R Gudgeon and Sharish A Joshi of Blackstone, acknowledges the complexities of workouts in the EU where there is no pan-European insolvency protocol which accounts for the high percentage of European restructurings being accomplished on an out-of-court or 'consensual' basis. Consensual restructurings have their own complexities with jurisdictional issues, complex capital structures, and types of debt and investor classes. These complexities lead to increased uncertainty and execution risk in the restructuring process.

In chapter 2, Mahish Uttamchandani of the World Bank describes the development of World Bank principles for effective insolvency and creditor rights systems. In cooperation with a number of institutions and organisations, a key source for guiding policymakers has been created and articulated by the World Bank. Additionally, the article provides seven lessons from experiences in developing countries before delving into *Shariah*-compliant banking transactions and how Islamic finance transactions will be treated in case of insolvency. This chapter provides insights into the types of issues that are likely to arise in non-traditional financing transactions.

Chapter 3 is written by Karl Clowry of Cadwalader, Wickersham & Taft LLP and is entitled 'Debt for equity swaps'. The chapter seeks to focus on the common factors with any debt-for-equity swap and how they are addressed by the various stakeholders. Historical examples including Telewest, British Energy, and Jarvis are cited. The article reveals the principal methods of effecting conversion of debt-to-equity and provides an up-to-date jurisdictional road map providing comparisons among statutory schemes and arrangements. An overview of tax issues on both the creditor and debtor sides of a restructuring is included.

'Pre-packs at an operational level' is the subject for Chapter 4 by Mark Shaw of BDO Stoy Hayward LLP. The article recognises the increasing use of pre-packs with the clear aim of preserving value. In this context, the 'pre-pack' is defined to cover a multitude of transactions resulting in the sale of a business. The chapter is a high-level discussion of the issues affecting pre-pack sales at an operational level, starting with the decision to pre-pack, documenting the decision, and choosing the appropriate insolvency process.

Chapter 5 is a fairly comprehensive overview of the 'Valuation of distressed businesses' by Alastair Beveridge, Paul Hemming and Graeme Smith with Zolfo Cooper. This chapter describes the more rigorous examination that needs to take place with a distressed business. A relevant discussion on a company's business plan and the pitfalls of taking the financial forecasts at face value is important – especially in these difficult times and with so much future uncertainty. Particular areas to be explored include an in-depth review of earnings, working capital and other cost cutting that could have material impact on value. The authors also provide a probability-weighted valuation analysis to the discounted cash flow valuation methodology.

'Schemes of arrangement for long-tailed liability claims', written by Don Schwarzmann with Pricewaterhouse Coopers LLP, chapter 6 takes a look at the financial obligations arising from a company's historic activities – where claims may emerge for many years into the future. In addition to the well-known asbestos issues, there are other claims that can arise from warranty, financial mis-selling, and pharmaceutical production, as examples. While the scheme-of-arrangement is a UK process, its application can be proposed where non-UK entities have sufficient connection to the UK. A practical example of Cape plc – an AIM listed company in the energy sector with asbestos history – provides a good

conceptual framework for the fundamentals of what is required in the scheme.

Chapter 7 describes how 'Jurisdiction shopping' – or selecting the most favourable place for insolvency proceedings to occur – is thriving. Written by Christine L Childers of Jenner & Block LLP and Ronald DeKoven of 3-4 South Square, the chapter discusses the debtor's 'centre of main interests' and the two opposite forms of jurisdiction, being 'territorialism' (courts exercise jurisdiction over assets and parties within their borders) and 'universalism' (the 'home country applying its bankruptcy law over all the debtor's assets and creditors, wherever located'). Case studies of Parmalat, Hans Brochier Holdings Limited, Schefenacker and Bear Stearns illustrate that control over the jurisdiction is not always easy and will continue to be an important part of the insolvency process.

The next three chapters deal with country-specific insolvency law. Chapter 8 is written by Matthieu Barthelemy, Philippe Dubois, and Jacques Henrot of De Pardieu Brocas Maffei and is entitled 'France'. French insolvency laws were materially reformed by the so-called 'Safeguard Law' which came into effect on 1 January 2006, and was in part inspired by the US Chapter 11 procedure. An overview of French rescue and insolvency procedures is presented in the chapter including: i) pre-bankruptcy procedures; ii) safeguard proceedings and iii) insolvency proceedings. 'Germany' is the subject of Chapter 9 and is written by Heinrich Meyer of Beiten Burkhardt. German insolvency distinguishes between 'ordinary insolvency proceedings', 'consumer insolvency proceedings', 'insolvency plans' and 'insolvency proceedings of a deceased person'. The chapter discusses debtor's assets and the German insolvency law based on the principle of universality – where all of the debtor's assets are opened in a German insolvency proceeding, including foreign assets. Chapter 10 is written by Matthew J Williams from Gibson, Dunn & Crutcher LLP and deals with the distinct issues related to 'United States' bankruptcy proceedings where the debtor company has foreign claims, foreign assets and foreign domicile. The US Bankruptcy Code provides a broad definition for those wishing to file bankruptcy under the Code in the US. However, that broad jurisdictional mandate does not give the court the authority to adjudicate a dispute or proceeding under US law. A US parent company may choose to file for bankruptcy protection in the US, but continue to operate its foreign subsidiaries outside of the insolvency proceedings. In most cases, the stock of the subsidiary is the property of the debtor, not the underlying assets. A discussion of Chapter 15 providing a framework for creating an ancillary proceeding is included in the chapter.

'Workouts of structured vehicles' discusses the background of the SIVs – victims of the credit crunch that went through restructuring processes. Written by Phil Bowers of Deloitte & Touche LLP, chapter 11 provides a good overview of how the vehicles are structured, the stakeholders and the events that can trigger an insolvency proceeding. English law 'receivership sale' is used to provide a restructuring framework – which includes the receiver's obligation to obtain the best price under the circumstances and the ability to hold back sufficient cash to meet contingencies.

Chapter 12 is 'The role of the trustee in restructuring' written by Tamara Box and Hugh Mildred of Berwin Leighton Paisner LLP. The role of bondholder trustee in a restructuring is becoming more important as trustees look to the courts for guidance in the restructuring process in light of increasingly litigious parties. The role of trustees in three high-profile cases are examined by the authors. The *Elektrim* and *Concord* cases dealt with the ability of the trustee to indemnify itself from claims, and the court's decision clarifying the ability to retain sums to cover idemnity losses, respectively. In the case of *Whistlejacket*, the Court of Appeals provided clarity to the priority of payments and the discretion on distributions when a company is in receivership.

Laura Barlow of Alix Partners writes on 'Rescue financing' in Chapter 13. The author describes the benign financing conditions that lead up to the distressed companies that have not met operational performance, the role of rescue financing, the types and sources of financing available to viable businesses. Management is expected to have a thorough understanding of the causes and symptoms of the distress on the company. Moving from crisis to stabilisation, the rescue financing will have different requirements for structure, security and covenants than the traditional financings.

The final chapter is entitled 'Will a UK defined pension scheme deficit affect a workout situation?' and is written by Richard Favier of the Pension Protection Fund and Alex Hutton-Mills and Darren Redmayne of Lincoln International Pensions Advisory. The trustees of pension plans, along with the Pension Fund Regulator, as stakeholders have exerted considerable influence in restructurings since the the Pensions Act of 2004 came into effect and has given wide-ranging powers to the Regulator in supporting pension schemes and the tools available where the restructuring could adversely impact the pension scheme.

Conclusion

This book is exactly what the restructuring and workout professional will need on their desk as they navigate through the current economic downturn. The articles provide the latest up-to-date information on a wide variety of topics and issues that will be faced by practitioners in the up-coming restructurings in the UK, the EU and across international borders. Get this as a reference book and keep it on your desk.

Globe Business Publishing, 2008, 220 pages,
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International Corporate Rescue

International Corporate Rescue addresses the most relevant issues in the topical area of insolvency and corporate rescue law and practice. The journal encompasses within its scope banking and financial services, company and insolvency law from an international perspective. It is broad enough to cover industry perspectives, yet specialized enough to provide in-depth analysis to practitioners facing these issues on a day-to-day basis. The coverage and analysis published in the journal is truly international and reaches the key jurisdictions where there is corporate rescue activity within core regions of North and South America, UK, Europe Austral Asia and Asia.

Alongside its regular features – Editorial, The US Corner, Economists' Outlook and Case Review section – each issue of *International Corporate Rescue* brings superbly authoritative articles on the most pertinent international business issues written by the leading experts in the field.

International Corporate Rescue has been relied on by practitioners and lawyers throughout the world and is designed to help:

- Better understanding of the practical implications of insolvency and business failure – and the risk of operating in certain markets.
- Keeping the reader up to date with relevant developments in international business and trade, legislation, regulation and litigation.
- Identify and assess potential problems and avoid costly mistakes.

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