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BANKRUPTCY & RESTRUCTURING 2016

VIRTUAL ROUND TABLE

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Introduction & Contents

Bankruptcy & Restructuring Roundtable 2016 features nine international experts with a discussion on recent regulatory changes, interesting developments, and key trends in their jurisdiction. The chosen experts outline how they would assist a company on the verge of declaring bankruptcy; highlight difficulties arising from multinational cases; identify debt restructuring options and processes; and analyse noteworthy bankruptcy and insolvency proceedings such as Mezhprombank JSC in Russia and Corporación Geo, URBI and HOMEX in Mexico. Featured countries are: Canada, Finland, Japan, Mexico, Nigeria, Russia and United Kingdom.

James Drakeford
Editor In Chief



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MEET THE EXPERTS



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Christa is a problem solver and her 20+ year long legal practice focuses on helping corporations and individuals effectively and efficiently manage and resolve insolvency situations and other disputes through litigation and alternative dispute resolution, including negotiation, mediation and arbitration ("ADR").



Can you talk us through the current bankruptcy & restructuring landscape in your jurisdiction?

Novikov: The insolvency regime for corporations and individuals in Russia primarily consists of the Civil Code and the Federal Law "On Insolvency (Bankruptcy)" N 127-FZ (the "Bankruptcy Law").

Bankruptcy proceedings are subject to the exclusive jurisdiction of state commercial courts in case of company and individual entrepreneur insolvencies, and courts of general jurisdiction for natural persons not engaged in business. Out-of-court restructurings in Russia are relatively uncommon. There are a few examples of out-of-court agreements between the management of the bankrupt company and its creditors by virtue of refinancing or renegotiation of terms of existing agreements. However, court restructurings and bankruptcy still prevail.

A bankruptcy procedure may be initiated by both creditors and debtors. Creditors and employees (both current and former) can file a bankruptcy petition in relation to a debtor after obtaining an enforceable court judgment that establishes its claims against such debtor in excess of RUB 300,000 and provided that the debt has been unpaid for more than three months. In relation to debtors that are individuals, the bar is set at RUB 500,000.

The Bankruptcy Law envisages four bankruptcy procedures for legal persons:

- Supervision;
- Financial rehabilitation;
- External management; and
- Liquidation.

However, in practice, financial rehabilitation and external management are rarely applied. It is commonly understood that once a company is under supervision, there is a high certainty that it is unable to pay any of its debts and liquidation is inevitable.

As for natural persons, the Bankruptcy Law provides for two types of procedures:

- Debt rescheduling; and
- Seizure of property.

At the liquidation or seizure of property stages of bankruptcy (and in some cases during external management), creditors may obtain the satisfaction of their claims according to priority established by the Bankruptcy Law.

Velasco: On 10 January 2014, a financial reform bill was enacted which included amendments to 34 statutes, including the Mexican Insolvency Law (*Ley de Concursos Mercantiles*, the "Insolvency Law"). Many of the amendments to the Insolvency Law addressed understandable concerns of creditors derived from several cases in Mexico's recent past. These precedents included slow and uncertain proceedings and suspect cramdowns imposed on creditors by related parties.

The Insolvency Law contemplates a single proceeding (the "Insolvency Proceeding") with two successive stages:

(A) Mediation: the first stage, known as the "mediation" stage is designed to reorganise the insolvent entity; and

(B) Bankruptcy: the second stage, known as the "bankruptcy stage" provides for the bankruptcy and liquidation of the insolvent entity.



Parties to an Insolvency Proceeding, including judges, shall act at all times according to five main principles: (i) transcendence; (ii) judicial economy; (iii) celerity; (iv) publicity; and (v) good faith. In order to reinforce such principles, specifically celerity and judicial economy, the recent amendments to the Insolvency Law provide that the competent judge of an Insolvency Proceeding may not extend any judicial term provided for in such law. Additionally, an electronic platform for filing promotions, documents and consulting resolutions has been created.

Ekpenyong: Insolvency and restructuring of companies is generally governed by the Companies and Allied Matters Act ("CAMA"), Cap, C20, Laws of the Federation of Nigeria, 2004 and the Companies Winding-up Rules. The Investment and Securities Act 2007 and Securities and Exchange Commission Rules 2013 regulate mergers, takeover and acquisitions of shares in publicly quoted companies in Nigeria.
The provisions of CAMA are applicable to the liquidation of an insurance company subject to the provisions of the Insurance Act 2003 ("the Insurance Act"). Section 32(1) of the Insurance Act provides for the liquidation of an insurance company upon the petition of either 50 policyholders who have held a policy for no less than three years or the National Insurance Commission. Section 33 of the Insurance Act prohibits the voluntary liquidation of a life insurance business except for the purpose of effecting an amalgamation, transfer or acquisition.

The Banks and other Financial Institutions Act ("BOFIA"), Cap B3, Laws of the Federation of Nigeria, 2004 regulates banking business, restructuring, reorganisation, mergers and disposal of banks. Under section 7 of BOFIA, the consent of the Central Bank of Nigeria's Governor must be sought and obtained before an agreement or arrangement may be carried out for change of control of bank, sale and transfer of whole or part of a bank, merger of banks, reconstruction of banks, and employment of management agent for transfer of banks' business. It is an offence to contravene the section. Under Section 8 of BOFIA, a foreign bank may obtain approval from the Central Bank of Nigeria to operate a branch office or representative offices in Nigeria. The Central Bank of Nigeria may also grant a Nigerian Bank license to undertake offshore banking business from Nigeria.

The Nigeria Deposit Insurance Corporation Act, Cap N102, Laws of the Federation of Nigeria, 2004 regulates insurance of deposit liabilities of licensed banks and other financial institutions to protect the interest of depositors in the event of imminent or actual financial difficulties of banks. The Assets Management Corporation of Nigeria Act, 2010 ("AMCON Act"), establishes the Assets Management Corporation of Nigeria for the purpose of efficiently resolving non-performing loan assets of banks. Section 2 of Asset Management Corporation of Nigeria Act 2010 provides the Corporation with an authorised share capital of 10 billion naira wholly subscribed by the Federal government and held in trust by the Central Bank of Nigeria and the Ministry of Finance for the purpose of managing and realising the takeover of bad loans of banks in Nigeria, in order to keep the banks afloat and instill confidence in the Nigerian banking sector.

Bankruptcy of natural and corporate persons is regulated by the Bankruptcy & Insolvency (Repeal and Re-enactment) Act 2016 ("the Bankruptcy Act") and Bankruptcy Rules. Section 4 of the Bankruptcy Act provides that a person commits acts of bankruptcy if he or she, either in Nigeria or abroad, makes an assignment to a trustee for the benefit of creditors, makes fraudulent gift or transfer of property, transfers property that is interpreted to be a fraudulent preference under the Act, leaves Nigeria and remains abroad with intent to defraud his or her creditors, fails to redeem his or her property after 21 days of seizure pursuant to an execution, discloses to his or her creditors statements that he or she is insolvent, and gives notice that he or she is about to suspend payment of debts to his creditors. Section 5 of the Bankruptcy Act states that a creditor may file a bankruptcy petition if the debtor owes him or her debt up to 1 million naira or committed any acts of bankruptcy within six months before presenting the petition.

Nicholson: Canadian commercial bankruptcy and restructuring law is governed by complex and interrelated statutory and common law rules dealing with debtor and creditor rights and responsibilities that operate when the debtor is insolvent.

The Companies' Creditors Arrangement Act ("CCAA") is a federal statute that serves as the principal legislation for the restructuring of larger insolvent corporations with significant debts. It provides a flexible and judicially driven process, comparable to the U.S. Bankruptcy Code's Chapter 11 process, with some technical differences. Because of its flexibility, the CCAA is often the preferred process for restructuring larger debtor companies, provided they qualify (including by having at least $ 5 million CAD in debt and being insolvent) and can afford the significant professional fees associated with the process.

The Bankruptcy and Insolvency Act ("BIA") is another federal statute. It provides a restructuring process for corporations (and individuals) which is commenced by the filing of a "Notice of Intention to Make a Proposal" under that Act. Unlike the CCAA, the BIA is available to companies with debts totalling under $ 5 million CAD, although it is available to those with larger debts as well. The BIA restructuring process has more rigid timelines and is more rule-oriented compared to the CCAA process. The BIA also includes provisions to facilitate the bankruptcy of a debtor company. The liquidation provisions under the BIA may be compared to a Chapter 7 proceeding under the U.S. *Bankruptcy Code*.

Proceedings under both the CCAA and the BIA are initiated in the province where the debtor resides and the federal government's Office of the Superintendent of Bankruptcy has certain oversight in respect of each.

In addition to the CCAA and the BIA, provincial legislation is also often engaged in insolvency situations. The Personal Property Security Acts are applicable provincial legislation enacted in all provinces except Quebec. They address the rights and obligations, and priorities, of secured creditors following a debtor's default.

In general, the provisions include remedies for secured creditors to enforce their security and dispose of assets, including through the appointment of a receiver or receiver manager (collectively, "Receiver") which is also contemplated by the BIA.

Court appointed Receivers owe a duty to the Court and all of the insolvent corporation's stakeholders. Their objective is to maximise value through a going concern or piecemeal sale process and thereafter, under the Court's supervision, pay the proceeds in accordance with legal priorities.

Abe: The bankruptcy/insolvency landscape in Japan appears to be quiet for the time being. Compared to 9,044 cases in the prior 12 month period ended 30 March 2015, the number of insolvent companies for the period between April 2015 and 30 March 2016 was 8,408. Among this number, only two were listed companies and 72% had less than five employees. 98% of the cases were filed under Bankruptcy Act (liquidation). Of the remainder, 247 cases were filed under the Civil Rehabilitation Act, the smallest number since 2000, and only one case was filed under the Corporate Reorganization Act.

Siimes: Finnish legislation provides for one formal insolvency procedure (bankruptcy) where the debtor is wound up, and one formal restructuring procedure (restructuring) where the debtor continues to trade. Bankruptcy proceedings are governed by the Bankruptcy Act (120/2004) and restructuring proceedings by the Restructuring of Enterprises Act (47/1993). In addition, Finnish legislation does not prohibit informal work-outs being conducted outside of the two statutory alternatives available; however, neither does it expressly provide support for them. Informal work-outs are feasible if the pool of material creditors to be negotiated with is limited, or if LMA-style documentation and an intercreditor agreement are in place.

On a general level, Finland can be considered a creditor-friendly jurisdiction. Enforcement of debts through bankruptcy proceedings as well as execution outside bankruptcy proceedings are both effective in Finland. In addition, the bankruptcy proceedings are creditor-driven, with no formal powers granted to the debtor and its shareholders. The rights of a secured creditor are also quite extensive in bankruptcy proceedings.

On the other hand, the statutory restructuring procedure available to debtors is considered debtor-friendly, with extensive protection from enforcement by pre-existing creditors during the restructuring procedure. In practice, a successful restructuring requires cooperation between the debtor and its stakeholders.

Courtman: The current UK bankruptcy and restructuring landscape is challenging. New work flows for both Turnaround and formal restructuring professionals remain benign. Increasing trust and transparency obligations in relation to the accelerated disposal of a business's business and assets through a 'Pre-pack' and practitioner's fees face new regulatory challenges. The UK government also most recently released a consultation on proposed reforms to the corporate insolvency landscape in the UK, and the provision of a new extended moratorium and consolidation of the insolvency rules 1986 are shortly to be released to take effect next April.

The turnaround and formal insolvency markets in the UK remain benign. Largely because of a 'loosening' of monetary policy Europe-wide (state owned/supported banks, HMRC time to pay), measures designed to alleviate the worst effects of the credit crunch post 2008.

In addition, there's also been a seismic shift in the 'market', which has finally recognised the benefits that can flow from the preservation of enterprise value and 'light touch' insolvencies. Insolvency practice in the UK is becoming 'desk-top', few trading skills remain in the profession, and increasingly insolvency practitioners are being sort simply to 'bless' pre-ordained accelerated M&A transactions and oversee a statutory regime,

largely remunerated at commodity prices. A whole different world from the early 1990's when Insolvency Practitioners provided leadership in Restructuring. So the future looks pretty dire for those that fail to reform.

Also, as if the market changes in both approach and competitive pressures were not enough, the former governments trust and transparency agenda has consequences too. Creditor outcry's to 'Pre-pack' Administrations, particularly those to the incumbent management/owners, has required an increased regulatory regime in the form of a revised SIP16 and the evolution of the 'Pre-pack' pool to enhance trust and in an attempt to legitimise the practice. This places increased burdens and accountability, and rightly so, on the Insolvency practitioner to demonstrate that he has sort to market the business and its assets to maximise their value or face the wrath of his professional regulator, and possibly claims from creditors that he has failed in his fiduciary duties. The Administrators PI policy is certainly a pot worthy of attack for any disgruntled creditor nursing a claim where the assets appear to have been robbed from them.

October 2015 saw the introduction of a new fees regime requiring practitioners to provide detailed fees estimates as soon as practicable after their appointment (which ordinarily you would expect from a custodian of third party monies, albeit it been a long standing practice simply for practitioners to be remunerated on a time cost basis, typically without limit when fees are at the behest of the unsecured creditors!) But it will present challenges when it's not entirely clear what additional future work the case may require. If it becomes clear that additional work is necessary, then the practitioner will need to secure further agreement to those costs or face not being able to recover them. Alternatively, the practitioner may choose another basis such as a fixed sum fee or a percentage of realisations or a combination of bother if though appropriate, which may be totally alien to some traditional practices and place even more pressure on their historical margins.

The UK government recently released a consultation of the UK's Corporate Insolvency regime, despite it enjoying a flexible statutory regime which is ranked sixth in the world by the World Bank.

One criticism that is often made of the UK regime is the absence of a Creditor moratorium to allow Debtors sufficient time to formulate a recovery plan (albeit a moratorium is available to small enterprises but it is not used in practice) without recourse to the protections afforded by the statutory regime. But by then it is often too late and the support of the enterprises wider stakeholder group, most notable its principle funders, will be waning and they themselves will be looking to take their own protective steps if management have not already done so.

Another shortcoming, albeit somewhat controversially, is the rights afforded to a floating charge holder to appoint (or sanction the appointment) Administrators. Administration is supposed to be an all-inclusive procedure, designed to protect the interests of all Creditors, and that should be the basis upon which Administrators act. All too often in practice, Administrators are appointed and act in the best interests of the floating charge holders only, which may be adversely prejudicial to the interests of the wider stakeholder group and of the enterprises value.

This is brought into even sharper focus where the appointed Administrator is a member of a Floating charge holders preferred supplier 'panel' status. This must give rise to an irreconcilable conflict as to who the appointed Administrator is acting for.

The other major issue of the UK regime, is that notwithstanding the flexibilities incorporated within it and the best intentions of the current primary legislation, is that all too often stakeholders see the utilisation of one of those tools simply to be the prelude of the enterprises demise rather than a tool to bring about its salvation.

Awataguchi: In Japan, there are four types of judicial insolvency proceedings available for the debt-restructuring of companies in financial distress: (i) corporate reorganisation, (ii) civil rehabilitation, (iii) bankruptcy and (iv) special liquidation. Corporate reorganisation and civil rehabilitation are reorganisation proceedings while bankruptcy and special liquidation are liquidation proceedings. Out-of-court workouts are also common in Japan.

In recent years, there has been a significant drop in corporate reorganisation and civil rehabilitation proceedings. Specifically, there were only 158 cases of civil rehabilitation in 2015 compared to, for example, 2002, when there were 1,093 cases. By contrast, recent years have seen a rise in the number of out-of-court workouts where debtor companies and lender banks reach agreement on a plan of reorganisation under which debt repayment is rescheduled or discharged.

This trend is attributable to a few reasons. Firstly, the Japanese government has enacted several statutes that facilitate systemised out-of-court proceedings such as the Turnaround ADR scheme, the REVIC scheme, and the SME Rehabilitation Support Association scheme. Secondly, out-of-court workout proceedings provide lender banks with more information and transparency than court proceedings. Thirdly, the value of a debtor's business will not be impaired by out-of-court workouts because trade creditors are not involved in such workouts and the existence of such workouts are known only to the lender banks. For the above reasons, banks are also more likely to enjoy better recovery rates than they would under court insolvency proceedings.

The prevalence of workouts is also due to the after-effects of the so-called Moratorium Law (precisely, the Act Concerning Temporary Measures to Facilitate Financing for Small to Medium-sized Enterprises), which was enacted in 2009 and expired in 2013. Under the Moratorium Law, Japanese banks were obliged to endeavor to lessen the burden of debts owed by SMEs to the extent possible by taking measures such as change of terms and conditions of debts, refinance of debts, debt-to-equity swap and so forth, if so proposed by the SMEs. Notwithstanding the expiration of the Moratorium Law, the Japanese government still enjoined banks to continue with the same approach toward SMEs as if the law were still in effect. This has helped distressed SMEs which would otherwise have gone bankrupt continue in operation. Accordingly, the Moratorium Law is often criticised as protecting so-called zombie companies.

On the other hand, corporate bankruptcy and special liquidation proceedings are on an upward trend. Specifically, there were 7,881 corporate bankruptcy cases in 2015 compared to, for example, 2002, when there were 3,203 such cases. Special liquidation is often used for liquidating the loss-making components of a company after the profit-generating component has been split off to a third party.

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

Novikov: On a company's insolvency, creditors will rank in the following order of priority.
Current expenses, which are monetary obligations that arise after the application for bankruptcy has been filed with the court, have priority over the claims of all other creditors.

Afterwards, there is a ranking list providing the following order of priority:

- First priority (Article 135): personal tort claims, including compensation for pain and suffering;
- Second Priority (Article 136): claims for severance pay, outstanding wages and authors' royalties. Among these, claims of employees regarding their salaries and severance payments in the amount of RUB 30,000 per month per person are to be settled first. This is then followed by the remaining claims of employees regarding their salaries and severance payments. Should any property remain after that, royalties to the authors of intellectual property items become subject to payment; and
- Third Priority (Article 137): claims of all other creditors, including, specifically:
  - Claims arising out of violation of environmental legislation;
  - Claims of mandatory payments;
  - Secured creditors' claims (i.e. to the extent the creditors were unable to receive a full satisfaction under any security arrangements established to secure their claims against the debtor);
  - Unsecured creditors; and
  - Creditors whose claims arose from challenged suspicious or preferential transactions.

The Bankruptcy Law does not prescribe ranking of claims within one priority. Claims from creditors in any category may only be met once those from creditors in the higher category have been fully granted. Should it be impossible to satisfy claims in full, the claims of the same priority are met on a *pro rata* basis.

Velasco: The proceeds obtained from the eventual liquidation of an insolvent entity's assets will be applied by the receiver[1] to make payments to creditors in the following order of priority:

(i) Labour claims for salaries and severances for the calendar year immediately preceding the insolvency judgment[2] (the "Insolvency Judgement");

(ii) Claims derived from financing incurred for the management of the estate of the insolvent entity or financing that is indispensable to maintain the ordinary operations of the company and the necessary liquidity during the insolvency proceeding, in each case, as approved by the mediator[3] (the "Mediator")

1 The Receiver or "*Síndico*" is the person in charge of the management of the insolvent entity during the liquidations stage and until its liquidation and is appointed by the Federal Institute of Insolvency Specialists (*Instituto Federal de Especialistas de Concursos Mercantiles*, the "Insolvency Institute").

2 A judicial resolution declaring the legal insolvency of an entity, which marks the beginning of the Insolvency Proceeding.

3 The mediator is the person in charge of facilitating negotiations between the insolvent entity and the creditors leading up to a reorganization agreement with creditors. Among other tasks, the mediator will be in charge of supervising the accounting books and all transactions carried out by the insolvent entity, with the goal of maintaining the insolvent entity as an ongoing business.

(iii) Liabilities and obligations of the estate of the insolvent entity (*i.e.* management costs, fees and expenses incurred after the insolvency judgment is issued);

(iv) Costs and expenses derived from judicial and extrajudicial proceedings for the benefit of the insolvency estate;

(v) Amounts owed to secured creditors as described below;

(vi) Labour claims (other than those described in numeral (i) above) and tax claims;

(vii) Claims of creditors that qualify as "privileged" under Mexican commercial laws (*e.g.* creditors that are entitled to retain an asset until payment is made), but only to the extent of the value of the respective privilege;

(viii) Unsecured creditors' claims; and

(ix) Claims of (a) subordinated creditors, and (b) creditors that are related parties of the insolvent company.

Notwithstanding the foregoing, secured creditors' claims hold a "super-priority" up to the amount of the respective collateral and only the following claims would have priority over the amount of such collateral:

(i) Labour claims for salaries and severances for the calendar year preceding the issuance of the Insolvency Judgment;

(ii) Litigation expenses related for the defense or recovery of secured assets; and

(iii) Necessary expenses for the repair, maintenance and disposition of the secured assets.

Ekpenyong: Section 492 of CAMA states that in every liquidation proceedings, all present or future claims or debts payable against a company whether contingent, ascertained or damages shall be admissible to proof the value of claim against the company subject to any contingency or damages which does not have a certain value.

Section 493 of CAMA provides that the same rules apply in respect to the respective rights of secured and unsecured creditors and to debts provable and to the valuation of annuities and future and contingent liabilities with respect to the estates of insolvent persons. All persons who in any such case would be entitled to prove and receive dividends out of the assets of the company may appear at the liquidation proceedings and make such claims against the company as they are entitled to. This also applies to bankruptcy proceedings against bankrupt persons and companies.

The priority of payment upon bankruptcy or liquidation of a company in Nigeria is in this order; liquidation expenses, staff remuneration, secured creditors claims; unsecured creditors' claims; before shareholders dividends.

Section 31(4) of the Insurance Act provides that the priority of settling debts owed by an insurance company at liquidation is: liquidation fees; secured creditors; policy holders; other creditors; staff; shareholders and directors.

Gordon: In a chapter 11 reorganisation case, claims treatment and property distributions are governed by the terms of a confirmed chapter 11 plan of reorganisation. The plan of reorganisation must satisfy the "absolute priority rule," under which distributions cannot be made to a class of claims or equity interests unless all "senior" claims or interests are first satisfied in full. Thus, for example, holders of common stock or other equity interests cannot receive any property under a plan unless all creditors, including the holders of general unsecured claims, receive property with a current value equal to 100% of the allowed amount of their claims. For purposes of the absolute priority rule, claims and interests must be satisfied according to the following general priorities: (i) secured claims, but limited to the extent of the value of the collateral securing such claims; (ii) unsecured claims that are entitled to priority under applicable provisions of the Bankruptcy Code

(e.g., postpetition claims for the costs and expenses of preserving the debtor's estate, prepetition employee wage and benefit claims (subject to certain limits) and certain prepetition tax claims); (iii) nonpriority, general unsecured claims; and (iv) equity interests. In a chapter 7 liquidation case, claims and interests are ranked in the same order as a chapter 11 case.

Abe: Claims of secured creditors are ranked first in priority with respect to specific collateral owned by a debtor. Second in priority are unsecured claims, which are further divided into three sub-categories (priority, regular, and subordinated claims). Administrative claims (common claims) which usually emerge after the commencement of a case include, among other things, the fees/costs of the trustee, taxes, wages and retirement allowance for employees, etc.

Investors will generally not be able to recover if the debtor is in balance sheet insolvency or is unable to pay debts due.

Siimes: The ranking of creditors in a debtor's insolvency is governed by the Act on the Ranking of Creditors (1578/1992), which is relevant in bankruptcy or execution proceedings. The general rule is that all creditors rank equally in the event the debtor's assets are not sufficient to satisfy all creditors. However, there are certain exceptions to this general rule.

Firstly, secured creditors are entitled to be paid in full from the amount realised from the assets covered by their security before the security can be used to satisfy debts owed to any other creditors. This also includes interest payable on the secured debt for the last three years. If the value of the secured assets is less than the amount of the debt, the secured creditor can claim the balance as an unsecured creditor, ranking equally with other unsecured creditors.

The second major exception is if a floating charge has been taken over the debtor's assets (and duly registered). The holder of a floating charge is entitled to receive 50% of the proceeds of the liquidation of the debtor's assets (which are not otherwise subject to a security interest). There is also an exception regarding child support relevant only in the case of the insolvency of a natural person. Another exception concerns debts incurred during a restructuring procedure that preceded the bankruptcy.

In addition, some debts are considered to be payable only after the debts of all other creditors have been satisfied. These include, (i) interest payable on unsecured debts post-bankruptcy, (ii) various administrative or criminal sanctions such as competition law sanctions or forfeiture of assets (although not e.g. ordinary fines, penalty payments or tax penalties, which rank equally with other unsecured debts), and, (iii) principal and interest payable on capital loans (which is a regulated subordinated loan under the Companies Act) as well as certain specific types of junior bonds, among others.

The initiation of restructuring proceedings does not affect the ranking of creditors *per se*, but there is a moratorium on payments for debts incurred prior to the initiation of the restructuring procedure until a restructuring plan is approved, after which the debts are paid according to the plan. Debts incurred during a restructuring process must generally be paid as they fall due.

Finnish insolvency legislation does not have a separate concept of contributory ranking. If a third party is under an obligation to contribute something to the debtor (e.g. unpaid share capital), it is treated as a debt owed to the debtor and must generally be paid according to the terms agreed prior to the occurrence of an insolvency event.

Awataguchi: Under Japanese law, the rank and priority of creditors varies depending on the type of claims and proceedings involved. Specifically, under Corporate Reorganisation proceedings:

(i) administrative claims will be paid in full when they become due;
(ii) security interests will be unenforceable once an order has been issued for commencement of the Corporate Reorganisation proceedings. (If a special order prohibiting enforcement is issued, then security interests will be unenforceable even before commencement of the Corporate Reorganisation proceedings.) Instead, claims in respect of security interests will be treated as secured up to the value of the collateral as of the commencement of the case, and will be repaid in accordance with the reorganisation plan. The remaining portion not covered by the value of the collateral will be treated as ordinary reorganisation claims;
(iii) preferred reorganisation claims (such as certain types of tax claims and a certain range of labor and retirement allowance claims) will be subject to the plan of reorganisation;
(iv) ordinary reorganisation claims will be paid in accordance with the plan of reorganisation; and
(v) contractual subordinated claims will be assigned the lowest priority; and
(vi) Usually, shareholders will not be paid and will be extinguished under the plan of reorganisation.

Under Civil Rehabilitation proceedings:

(i) administrative claims will be paid in full when they become due;
(ii) security interests are independent from the proceedings and are therefore enforceable. In many cases, the debtor (debtor-in-possession) and secured creditors will reach agreement on the value of the collateral, the repayment schedule thereof, and enjoinment in respect of enforcement to the extent that such repayment is duly performed;
(iii) general preferred claims (such as pre-commencement tax claims and pre-commencement labor and retirement allowance claims) will be paid in full when they become due;
(iv) ordinary rehabilitation claims will be paid in accordance with the plan of rehabilitation;
(v) contractual subordinated claims will be assigned the lowest priority; and
(vi) shareholders will not be paid and will usually be extinguished under the plan of rehabilitation.

Under Bankruptcy proceedings:

(i) administrative claims will be paid when they become due to the extent that the bankruptcy estate is sufficient to satisfy such claims; and
(ii) security interests are independent from the proceedings and are therefore enforceable.

Other claims will be distributed in the following order:

(iii) preferred bankruptcy claims;
(iv) ordinary bankruptcy claims;
(v) subordinated bankruptcy claims; and
(vi) contractual subordinated bankruptcy claims.
(vii) residual funds after all of the above have been satisfied in full will be distributed to shareholders. Such scenarios are, however, very rare.

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

Novikov: The key trend of the Russian bankruptcy regulatory framework today is the facilitation of imposing subsidiary liability upon chief executive officers of bankrupt companies. Courts gradually simplify the burden of proof and presume that bankruptcy is caused by the actions of management, which places the general directors of companies into a fragile and unprotected position.

The current version of the Bankruptcy Law provides for a large list of obligations for a general director, violation of which may result in his subsidiary liability. Thus, art. 10 of the Bankruptcy Law prescribes the obligation to apply for bankruptcy in proper time once it is clear for the director that there are circumstances leading to bankruptcy. There is an extensive list of such circumstances, including:

- the fact that satisfaction of claims of certain creditors may lead to financial impossibility to fulfil the claims of other creditors;
- insolvency and/or insufficiency of funds;
- the decision on bankruptcy taken by general shareholders' meeting; and
- the impossibility to continue business in case of debt recovery.

In this regard, general directors tend to apply for bankruptcy preventively, even when there are no substantial risks of bankruptcy, just to avoid liability.

Subsidiary liability of individuals' controlling bankrupt companies is also worth mentioning. There have been a few cases heard by Russian courts on the issue. However, practitioners expect the reversal of court practice after the notable Pugachev case, where the court imposed a multi-billion liability on the factual owner of the insolvent institution (see question no. 5).

Ekpenyong: Under the Asset Corporation of Nigeria (Amendment) Act, 2015, the Corporation shall appoint a receiver over the assets of a debtor company and the receiver shall exercise power over all the assets of the debtor company and not the particular asset which was charged as security for the loan. This shall be without prejudice to the rights of secured creditors or third parties in such assets. The receiver shall manage the affairs of the company upon publication of his appointment in two newspapers circulating in Nigeria. The receiver shall within 30 days of publication of the notice, prepare a comprehensive plan for rehabilitation of the company. The receiver shall be a fiduciary of the debtor company and priority for payment of the company's debts shall be in accordance with the provisions of CAMA. Consequently, upon appointment of receiver, apart from wages of the staff, all judgments and claims against the company shall be suspended.

Under the Bankruptcy Act, one or more creditors may file a petition for a receiving order against a debtor or commit acts of bankruptcy within six months before filing the bankruptcy petition. In the case of a secured creditor, the petitioner may state that in the event of a receiving order being made against the debtor, he shall give up his security or make an estimate of the value of the security. An insolvent person may with leave of court, make an assignment or proposal of all his property to the benefit of creditors.

Nicholson: One interesting strategy of note that is operative in the Alberta insolvency context relates to "pre-packaged sales". These refer to arrangements to sell the insolvent debtor's assets which have been made prior to the appointment of a Receiver or a filing under the federal Canadian Companies' Creditors Arrangement Act ("CCAA"). In a recent case involving a large oilfield service group of insolvent companies which had been "severely impacted by the catastrophic drop in oil and gas prices since mid-2014", the Alberta Court was willing to approve such a transaction for the benefit of the senior secured lender.



Specifically, in Sanjel Corp., Re 2016 ABQB 257, the Court notes that the Sanjel Group of companies had filed for CCAA protection and had total consolidated liabilities of over $1 billion CAD. Over the objections of junior creditors, the Court authorised the sale of substantially all of Sanjel Group's assets based on a pre-filing sales process.

The Court analysed the factors set out in s. 36 (3) of the CCAA and the leading case of *Royal Bank v Soundair Corp., 1991 CarswellOnt 205* (Ont. C.A.) which addresses approval of sale applications and determined, among other things, that:

(a) the pre-filing sales process was reasonable and though brief, not unreasonably so given the economic climate and the deteriorating financial position of the Sanjel Group;
(b) the Court appointed Monitor's opinion that the process was robust and that in all of the circumstances it was improbable that another post-filing process would yield better offers was to be accepted;
(c) even though the senior secured lender was the only creditor which would receive any of the sales proceeds, other creditors had been consulted and the Monitor was of the view that the proposed sales were more beneficial to creditors than a sale or disposition under bankruptcy; and
(d) the consideration contemplated by the sale was fair and reasonable.

Thus, in Alberta, a pre-packaged sale which is properly undertaken prior to an insolvency filing may offer a senior lender who is likely to be the only stakeholder in an insolvent's estate, a cost efficient and timely strategy to realise on its claims.

Gordon: One of the key trends in 2016 has been the

continuing and perhaps increasing use of "pre-negotiated" and "pre-packaged" chapter 11 bankruptcy strategies. In a pre-negotiated chapter 11 case, a financially distressed company negotiates a restructuring support agreement with its key creditor constituencies before filing for chapter 11 bankruptcy. In a pre-packaged case, the company both negotiates the agreement and solicits the necessary creditor approvals for the restructuring before filing. Because, in both cases, the material terms of the restructuring have been agreed to by the key constituents pre-filing, the court process is significantly shortened and the cost of the bankruptcy is considerably less. Cases that, in the past, may have lasted a year or two, or perhaps longer, are in these circumstances shortened to as little as 120 days or less. Indeed, in at least two cases recently, the company succeeded in exiting the chapter 11 case in less than a month.

Awataguchi: In the recent history of Japan, debt workouts and court proceedings have improved and developed through competition between each other. Given that several systemised workout schemes (such as Turnaround ADR, REVIC, etc.) were enacted by the government, this could also be deemed as a competition between the administrative power and the judicial power in the revitalisation of Japanese companies. As workouts increased and court proceedings decreased, there seems to be a shift in the mindset of the court and insolvency professionals whereby they are gradually becoming more respectful of creditors' rights than before and are also being more open-minded about information disclosure to the creditors. In addition, considering that trade creditors are not subject to haircut under workouts, there are some cases where the court admitted 100% payment to trade creditors to the extent that such creditors promised to keep trading with the debtor on the same terms and conditions as before and the debtor had enough cash for such trading transactions.

That being said, it is also true that workouts and court proceedings complement each other. If a workout fails, then most likely the debtor will file for the court proceedings. In other words, workout negotiation is supported by a fear of the potential decrease of recovery of debt when the matter comes in to the court for legal proceedings. In recent years, there has been much discussion about how to smoothly shift to court proceedings once the workout fails – for example, whether or not, and to what extent, the result of a plan of reorganisation discussed in the workout is useable under the court proceedings. Also, treatment of pre-petition finance is a common and relevant topic of concern. A loan to the debtor during the workout (i.e., prior to a petition for court insolvency proceedings) will be treated as a pre-petition claim subject to haircut in the court insolvency proceedings as a general rule; however, there was an amendment of law which enables such pre-petition finance during workouts of Turnaround ADR or REVIC scheme to be treated as an administrative claim provided certain conditions are met.

As discussed before, the Japanese government declares that it will consider introduction of majority rule into workouts. I believe that the rule would be introduced only to a certain type of systemised workout (for example, Turnaround ADR). If introduced, there is a possibility that such workout will increase instead of the court proceedings. Such competition between workouts and insolvency proceedings would provide debtors with variety of options to pursue, and prospects of revitalisation will increase drastically.

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

Novikov: Recently, bankruptcy lawyers have been paying particular attention to the case of Mezhprombank JSC's bankruptcy. The case is noticeable primarily due to the subsidiary liability imposed upon the beneficiary owner of the bank, Sergey Pugachev. In 2010, Mezhprombank JSC was declared bankrupt upon the motion of the Central bank of Russia as it had secure loan debts of over RUB 30 billion. Due to the insufficiency of the bank's funds to satisfy all of the creditors' claims, the Deposit Insurance Agency has initiated a subsidiary liability claim against the chief of executive board Marina Illarionova, temporary chief of executive board Alexey Zlobin and de facto owner of the bank Sergey Pugachev. In the outcome, subsidiary liability amounting to RUB 75,642,466,311.39 was imposed upon Sergey Pugachev (partially jointly with Mr. Zlobin and Ms Illarionova).

The case is notable since it is the first example of subsidiary liability in such a great amount to be imposed upon the controlling person rather than on the management of the bankrupt company. The Russian court acted in an unusual manner as it went further into the details of the case to establish the factual connection between the bankrupt Mezhprombank JSC and its beneficiary owner. The Moscow commercial court has pointed out that Mr. Pugachev had a real opportunity to give binding instructions to the bank due to two main reasons:

(i) Sergey Pugachev de facto owned the bank through a chain of offshore companies and the New Zeeland trust controlling all Russian companies affiliated to the Mezhprombank; and

(ii) Sergey Pugachev personally coordinated key and strategic decisions made by the bank.

The case is also interesting for its evidentiary matters since, to prove the key role of Pugachev, the court used witnesses' testimonies and an affidavit of an English solicitor who had represented Pugachev in an English court.

This case is expected to serve as a good example for resolving similar disputes on subsidiary liability. The court demonstrated its ability to disclose the chain of ownership, to prevent asset stripping and to impose liability on the real bankruptcy causers. It is, however, questionable if courts will treat minor cases on subsidiary liability with the same level of thoroughness.

Velasco: Several noteworthy Insolvency Proceedings have occurred since the amendments to the Insolvency Law back in 2014. For example, the restructurings of three of the main housing companies, Corporación Geo, URBI and HOMEX, have recently made the headlines of major newspapers.

Due to a recent judicial ruling issued in August 2016, GEO's insolvency proceeding has been the recent subject of conversation of the financial community. The publicly traded corporation underwent an insolvency proceeding which was supposed to have ended by virtue of the approval and execution of a reorganization agreement (the "Reorganization Agreement") among the company and its recognized creditors[1] (the "Recognized Creditors"). Notwithstanding the foregoing, a

1 Creditors holding title to claims recognized by the insolvency court.

judge admitted an *amparo*[2] filed by an alleged former financial advisor of the company, against the judicial recognition of the Reorganization Agreement on the grounds that it was unduly excluded as a GEO's Recognized Creditor under the Reorganization Agreement.

The effects of the admission of the *amparo* lawsuit were to render the judgement that recognized the Reorganization Agreement between GEO and its Recognized Creditors ineffective until the corresponding judge decides whether such alleged creditor was unduly excluded from such Reorganization Agreement or not. Depending on the final judgement of such *amparo*, the effectiveness of the Reorganization Agreement could at some extreme point be overturned, which could in theory lead ultimately to the need to renegotiate a new Reorganization Agreement. Notwithstanding, there are other interesting arguments in the sense that all creditors are bound by their previous vote and should not be able to change it, and that the *amparo* should only cause the recognition of a new unsecured creditor. In the meantime, the insolvency court issued a judgement declaring GEO in *concurso mercantil* again.

Ekpenyong: Nigerian legislations have become robust in tackling recalcitrant debtors. It was reported that Guaranty Trust Bank commenced an action to recover over 9 Billion naira in which one Mr. Kola Aluko owes the Bank through a loan given to H-Media Ltd. The parties entered into a terms of settlement which was made the judgment of the court and Mr. Aluko started paying the debt but refused to pay the last balance of close to 500 million naira. Further to this the Bank filed a bankruptcy petition against him urging the court to grant an order declaring Mr. Aluko bankrupt and that his property and shares be liquidated towards settlement of the outstanding debts. Mr. Aluko's Lawyer's application for the court to dismiss the bankruptcy petition because the petitioner did not comply with the condition precedent before filing the petition is still pending in court.

2 An *amparo* proceeding is a judicial proceeding seeking protection of constitutional rights.

The influx of foreign loans into the Nigeria has boosted growth in the oil and gas, telecommunication, admiralty, real estate and construction sector. This has led to the restructuring and reorganisation of existing companies to ensure productivity and efficiency. Interestingly, the Corporation under the AMCON Act has powers to dispose eligible bank assets, including the collection of interest, principal and capital due and the taking over of collateral securing such assets. The Act also empowers the Corporation to apply to court for forfeiture of the debtor's property upon inability to liquidate its debts. Also, both secured and unsecured creditors may file a bankruptcy petition against an individual or company or commence winding up proceedings against a company if is it is unable to pay its debts. The courts have been very proactive in protecting the interest of both foreign and local creditors in a bankruptcy and winding up proceedings.

Recently, Nigeria's Minister of State for Petroleum Resources announced that in other to make the Nigerian National Petroleum Corporation (NNPC) more productive, the Nigerian President has approved the restructuring of the Nigerian National Petroleum Corporation into 7 divisions namely; upstream, downstream, refining, gas and power, ventures, finance and service groups. The focus of the restructuring is to change NNPC from a mere regulatory and administrative body in the Nigerian oil and gas sector to a major business player through private sector participation. This will position NNPC towards bringing to an end the importation of petroleum products to the country for local consumption. Though, the House of Representative believes the restructuring of NNPC without an executive Bill to the National Assembly to amend the NNPC is unconstitutional, the Minister for Petroleum Resources opines that the NNPC Act permits the President to sanction the restructuring of NNPC.

In a related development, the decline of economic activities in Nigeria in recent months is made worse by low crude oil prices. This has led to slow economic growth, unemployment and inflation. Some State Governments require Federal Government bailout to pay monthly salaries and pension benefits. Many economic analysts believe that the solution is for Nigeria to be restructured by the Federal Government. This could be achieved by reduction of the Federal Government's its administrative responsibilities, cutting down on the number of Ministries and Parastatals, giving more powers to States to develop their water ways, abolishing the law vested all the land and mineral resources in the Nigeria on the Federal Government, reducing taxes for startup and existing companies and entrepreneur, implementing deliberate policies to encourage private sector participation in the economy, deregulating the oil and gas sector, removing subsidy on oil products, divesting transmission of power by breaking the national grid to regional grid amongst others.

The lessons from this experience has made the Federal Government of Nigeria to take urgent steps to restructure the economy of Nigeria by offering for sale some planes in the national fleets and some redundant assets. Some Federal Government companies may be privatised or commercialised to boost them and ensure their productivity. The President's recent agreement with China will strengthen the trade relations between both countries. There is a genuine attempt by the Nigerian Government to diversify the economy by developing non-oil sectors including solid minerals, tourism, entertainment, agriculture, real estate and manufacturing. More Nigerians are now interested in starting and growing their businesses rather than work in a Government offices. The diversification of the economy offers investors a veritable platform to invest in. All these factors make the current economic challenges in Nigeria to be a blessing in disguise.

Gordon: The Swift Energy chapter 11 case is notable because it was one of the first large E&P companies to file for chapter 11 and the first to emerge from bankruptcy. Swift filed with a restructuring support agreement in place with its noteholders, and the agreed restructuring plan included a significant recovery for the equity holders – 4% of the common equity plus three and four year warrants for an additional 30% of the equity. The chapter 11 case was filed on New Year's Eve 2015 and Swift emerged from bankruptcy in mid-April 2016.

The primary take away from the Swift chapter 11 case is that careful planning and successful, pre-bankruptcy negotiations with the company's key constituents and lending sources can both significantly minimise the disruption, duration and costs of a chapter 11 case and maximise the prospects that the restructuring will be successful. Many other companies have followed the Swift example and, as a result, have been able to expedite their restructuring efforts. Recent additional examples include Halcon Resources and Atlas Energy.

Abe: Daiichi Chuo Kisen Kaisha, a shipping company is one of the companies that filed for proceedings under the Civil Rehabilitation Act during April 2015 to March 2016. Its debts were reported to be approximately JPY 1 billion (approximately USD 105 million). New equity of the company was issued to a group of investors consisting of 17 Japanese shipping companies.

Siimes: One notable recent bankruptcy was the case of the omnichannel retailer Anttila Oy. Anttila was previously a non-performing subsidiary of a Finnish listed retail giant, Kesko Oyj, which was then spun-off and sold to a turnaround investor in 2015 because the business was not profitable. Anttila sold mainly consumer electronics, clothing and decoration items and operated both in brick-and-mortar locations as well as through a web store and mail order catalogues. Anttila was then declared bankrupt on 19 July 2016.

In the bankruptcy of Anttila, scores of consumers had purchased items from its web store and prepaid via bank transfers or by debit card. According to Finnish bankruptcy law, items purchased and paid for belong to the bankruptcy estate up to the point at which they have been separated from the general stock (e.g.

by identifying the customer that has purchased them). Thus, a number of consumers lost their money, since even though some of the purchased items were available and in stock at the time of bankruptcy, they had not yet been separated from the general stock for the relevant consumer.

The case has led to some discussion on the potential need for improvements to consumer protection in bankruptcy cases, by e.g. amending the law so that paid items must be delivered to consumers if they are in stock at the time of bankruptcy. However, we are not aware of any actual proposed new legislation at this stage.

The case also highlighted the reputational risks faced by a seller when non-performing or distressed companies are sold.

Awataguchi: The Japanese insolvency proceedings have been recognised as debtor-friendly proceedings in general. However, in recent years, there have been several high-profile cases where creditors did their best to achieve maximised recovery. I would like to introduce two cases.

In 2015, Skymark Airlines, the third largest airline in Japan, filed for civil rehabilitation proceedings with the Tokyo District Court. It was a remarkable case in which the debtor's rehabilitation plan and the largest creditor's competing plan were both submitted to the court and the court admitted both the plans for voting. The two plans contemplated different sponsors/investors, and there was cut throat competition in seeking affirmative votes for each side. Finally the debtor's plan was approved by the majority of creditors, but this case will be remembered as a case where the debtor and the largest creditor fought for its best scenario through the competition of two plans.

In 2009, Spansion Japan filed for corporate reorganisation with the Tokyo District Court, and 10 secured creditors corresponding to 99% of secured claims in value formulated a statutory secured creditors committee which was approved by the court for the first time in Japan. The committee took every imaginable measure possible in order to maximise recovery including participating in the US chapter 11 proceedings of Spansion LLC, which is the parent company of Spansion Japan which nevertheless gave up on the idea of rescuing its Japanese subsidiary. After long and tough negotiations amongst the committee, Spansion Japan and Spansion LLC, they reached a settlement agreement which provided Spansion Japan with more funds (i.e., payment resource for the secured creditors) than it had originally expected. In addition, the committee served as the court-approved agent of Spansion Japan to remarket its assets, and it finally brought Texas Instruments not only as an asset purchaser but also as a viable sponsor of Spansion Japan. The committee also negotiated the terms and conditions of the reorganisation plan through a very unique scheme of mediation where the committee and Spansion Japan submitted both arguments and information relevant to the arguments before the three mediators, two of whom were selected by both parties and the remaining one was selected by the two appointed mediators, all three being insolvency practitioners. The mediation went on 11 times, during which both parties separately filed reorganisation plans with the court, and finally reached a settlement on the terms and conditions of the plan (the debtor's plan was amended to reflect the settlement, and the committee's competing plan was withdrawn). Through these endeavors, the creditors belonging to the committee enjoyed full recovery of JPY27.5 billion in total as was an unusual case in the history of Japanese corporate reorganisation. Moreover, the Tokyo District Court, admitting that the committee contributed to revitalisation of the debtor's business, issued an unprecedented order approving payment of JPY500 million in total from the estate of Spansion Japan to the committee, which led to the successful recovery of JPY28 billion (corresponding to USD280 million assuming that JPY100 equals to USD1) in total by the committee.

These two cases – Skymark and Spansion Japan – are good examples of creditors' passionate challenges that were witnessed in the Japanese insolvency proceedings.

How do labour and employment considerations, such as collective redundancies and pension obligations, feature in bankruptcy and restructuring proceedings?

Novikov: The Bankruptcy law provides certain guarantees for the employees of insolvent companies. First, employees' claims for wage and salary are ranked as second priority, just after personal tort and injuries claims. Most importantly in this regard, the Bankruptcy law establishes the obligation of the bankruptcy manager to make necessary deductions (maintenance payments, income tax, trade union and insurance contributions and other payments) with regard to employees continuing their labour activity in the course of liquidation proceedings.

Russia has also made certain steps to comply with the international practice of protection of employees' rights in the course of bankruptcy. For instance, in 2012, Russia ratified the Convention of International Labour Organisation No. 173 providing for priority right of employees to receive a salary and other payments.

Velasco: The Insolvency Law grants the highest degree of priority to labour claims related to salaries and severances for the calendar year immediately preceding the insolvency judgment. This is consistent with the protection provided by our legal system to labour rights.

Other labour claims, different from those claims arising from salaries and severances for the calendar year immediately preceding the insolvency judgment, also receive a high degree of priority.

Ekpenyong: Section 494 of CAMA provides that during winding up proceedings, the following shall have priority over other debts -

- Pay-As-You-Earn tax deductions, not exceeding deductions made in respect of one year of assessment and, in any other case, not exceeding the whole one year's assessment;
- Deductions under the National Provident Fund Act 1961;
- All wages or salary of any clerk or servant in respect of services rendered to the company:
- All wages of any workman or labourer whether payable for time or for piece work, in respect of services rendered to the company;
- All accrued holiday remuneration becoming payable to any clerk, servant, workman or labourer (or in the case of his death to any other person in his rights) on the termination of his employment before or by the effect of the liquidation order or resolution;

The debts in Section 494 shall rank equally among themselves and be paid in full, unless the assets are insufficient to meet them, in which case they shall abate in equal proportions. Where the company's assets for payment of general creditors are insufficient to meet the debts in Section 494, the claims in the section shall have priority over the claims of holders of debentures under any floating charge created by the company and be paid accordingly out of any property comprised in or subject to that charge. Nevertheless, this is subject to payment of liquidation costs and expenses.

By virtue of Section 24 of the Bankruptcy Act, except when the court ratifies a proposal made to creditors,

the priorities for distribution of a bankrupt property shall be in accordance with the provisions of CAMA. Restructuring addresses the problem of overstaffing and the exorbitant cost of running a corporation or a nation. In the course of restructuring, the employment of redundant staff may be terminated or transferred to a new management. In both cases, the severance packages of the staff will be paid. Restructuring may establish new groups which create jobs for redundant staff to enable them generate wealth for the company and ensure equitable remuneration of staff.

Abe: Employment considerations such as collective redundancies and pension obligations are big issues for distressed companies. One example is the Japan Air Line (JAL) case. JAL filed under the Corporate Reorganization Act and then terminated several employees, leading some to file lawsuits against the company. However, the court ultimately affirmed the terminations.

Siimes: Once a restructuring procedure has been initiated, a shorter notice of termination period than usual applies. As part of the procedure, an employment contract may be terminated on two months' notice if the termination derives from an action to be taken under the restructuring plan. Additionally, an employment contract may be terminated on two months' notice if the restructuring plan results in the job no longer existing or a reduction of the overall amount of work required by the employer. The employees themselves may each terminate their employment on 14 days' notice at will during the restructuring process.

Upon a company being declared bankrupt, the employment contracts of its employees may be terminated on 14 days' notice without the requirement for any grounds except the bankruptcy itself. However, it should be noted that in the event the business of the bankruptcy estate is transferred or sold, special considerations apply which may prevent the dismissal of employees that were employed as part of the transferred business prior to bankruptcy.

Awataguchi: Under Japanese law, a labour agreement is treated as an executory contract, and the trustee (or debtor-in-possession under civil rehabilitation) may elect to assume or terminate the labor agreement. In termination of the labor agreement (i.e., dismissal), the trustee must abide by a rule that a dismissal shall, where the dismissal lacks objectively reasonable grounds and is not considered to be appropriate in general societal terms, be treated as a misuse of that right and invalid.

Collective redundancies sometimes become necessary for revitalisation of a debtor company. Under Japanese court precedents and prevalent practice, in case of dismissal as a means of employment adjustment (i.e. collective redundancies), the following four requirements shall all be satisfied: (i) necessity of reduction; (ii) effort to avoid dismissal; (iii) rationality in selection of target employees; and (iv) Procedural appropriateness. According to prevalent views, even during the insolvency proceedings, the four requirements are applicable but they are not so strictly applied as before the insolvency petition. Validity of collective redundancies during the corporate reorganisation of Japan Airlines ("JAL") has been disputed in several lawsuits, and the courts held it valid in most of the cases.

With respect to pension, there are several kinds of pension schemes in Japan and treatment of pension obligation varies depending upon the types of insolvency proceedings. Among all things, treatment of defined-benefit ("DB") corporate pension with underfunded portion in the corporate reorganisation proceedings has often been at issue. DB is a system whereby pension benefits payable in the future to participants are predetermined. There are two types of DB pensions – agreement type and fund type. The former was at issue in the Spansion Japan ("SPJ") case, and the latter was at issue in the JAL case. In the SPJ case, SPJ (i.e., employer) and its employees entered into a pension agreement, and SPJ executed a trust agreement with a trust bank. The pension to retirees had been paid from the trust asset, and not from the estate of SPJ. Based on the



pension agreement, the employees had a claim against SPJ whereby SPJ had to pay the pension premiums to the trust bank, and thereby SPJ made instalment payments of the premium to the trust bank. The pension was underfunded and hence there existed a deficiency in the pension asset. There are two kinds of premiums, one is a standard premium for the purpose of funding for the future service liability and the other is a special premium for the purpose of funding for the past service liability (i.e., making up for the underfunded portion). Under these facts, in the SPJ case, the standard premium was treated as an administrative claim which would be paid in full as it became due. As to the special premium, it was treated similar to a retirement allowance claim, and hence one-third was treated as an administrative claim, while two-thirds of it was treated as a preferred reorganisation claim which was subject to stay and would be paid in accordance with the reorganisation plan (in the SPJ case, it was fully paid in accordance with the plan). In the JAL case, since the premium claim was held by an independent body corporate and not by the employees, the claim was treated as an ordinary unsecured claim. Treatment of pension under the Japanese insolvency proceedings is very complex as illustrated above.



What changes are needed to create an insolvency regime that is more business-friendly but also maintains protection for creditors - for example, do you support the proposals included in the UK government's review of the corporate insolvency framework?

Courtman: I do support the spirit of the government's latest review of the corporate insolvency framework, and members of the TMA's Certified Turnaround Professionals group, EACTP, are well placed to help. Preservation of enterprise value is key. We know that in the vast majority of cases formal insolvency proceedings are in most cases, value destructive, but should they be capable of being avoided at any price?

The inherent difficulty is in reconciling the interests of current creditors and their desire to get paid, with management's desire to turn the business around, at a time when their ability to do so and their integrity to do so is in doubt. Allowing them to do so without the provision of expert support? Most managers are not skilled at managing businesses that are in financial crisis and do benefit from the rigour required by the current statutory regime.

Furthermore, a balance needs to be struck in the operation of the free market. Failure must have consequences if management are to be sufficiently motivated to get it right in the first place. In addition, in any free market ideal, there are always going to be winners and losers, and the losers should be given the opportunity to fail in order for the free market to be capable of operating effectively. Otherwise we run the risk, in my view, that turnaround and recovery becomes another form of state aid nationalisation.

Has there been too much emphasis on the potential of insolvency as a 'turnaround' mechanism for failing businesses rather than a means of winding up such businesses in an orderly fashion?

Courtman: I think the UK insolvency regime is extremely flexible and sadly it is often utilised as the turnaround tool of last resort. Why? Because other options were either not explored or none of the alternative options were capable commercially of delivering the desired result for stakeholders.

I think the situation has improved significantly in the last 15 years, after reflection upon the impact on business of the early 1990s approach. The insolvency legislation and the practice of Turnaround, Rescue and Recovery have matured. Particularly so since the introduction of the Enterprise Act 2002, and post the 2008 crisis.

There has been a growing 'Rescue Culture' as a response to an increasing realisation that formal insolvency procedures are massively value destructive and should, where ever practicable, be avoided at almost any cost. But formal insolvency procedure provides two critical aspects. Firstly, they are available to do as you say, as a means to wind up businesses in an orderly fashion, but secondly, and perhaps more importantly they provide a base line against which all other options can be meaningfully measured and in that way cause stakeholders to endeavour to bring about a consensual resolution without recourse to them.

How would you assist a company on the verge of declaring bankruptcy?

Novikov: The first issue to be noticed is the consequences of bankruptcy for the management, owners and controlling individuals of a company. Once there is evidence of bankruptcy, a company shall consider applying for self-bankruptcy preventively in order to escape the subsidiary liability of the owners or the general director.

It should also be noted that if the company eventually falls into bankruptcy, there is a substantial risk of a challenge to all the transactions preceding the bankruptcy (suspicious, preferential transactions, transactions in the prejudice of creditors). This means that particular consideration shall be paid to the business activity of the company on the verge of bankruptcy. It is highly recommended to avoid major transactions or to reinforce business activity once a company faces financial difficulties and insufficiency of funds. These actions may be considered as asset stripping by the court.

Finally, the company may challenge the debts it acquired in court since it is impossible to initiate bankruptcy in the absence of the debt confirmed by the final and enforceable court decision.

Ekpenyong: I will advise the company to make a proposal to its creditors. Under Section 26 of the Bankruptcy Act, the proposal may be made to the creditors in group or separate classes. Secured claims may be made in the same class if the creditors have common interest such as nature of priority of claims, remedies available in the absence of a proposal, or treatment of the claims. A trustee named in the notice of intention or proposal shall within five days send the notice to the creditors subject to the direction of court. The trustee shall examine the property, premises, records, books and financial document of the bankrupt and file a report of the bankrupt's company business. The trustee shall file the report with the receiver who shall issue an assignment certificate which is equivalent to an assignment by an insolvent person under the Act.

Nicholson: Prior to voluntarily pursuing bankruptcy, a Canadian company on the verge of doing so would be wise to seek advice and assess whether it would benefit from pursing restructuring options instead. If restructuring is not available, such a company should be advised that its next steps are likely to be influenced by the nature of its debt.

If the debt is secured in nature, normally the company can expect the first secured creditor to enforce its security, including through the appointment of a receiver or receiver and manager (the "Receiver"). If the Receiver is appointed by an Alberta Court, it will owe duties to the Court and all of the insolvent company's stakeholders. A Receiver's objective is to maximise value through a sales process and pay the proceeds in accordance with legal priorities. In these circumstances, a bankruptcy may not be useful or necessary.

If there is no secured debt and all of the liabilities are unsecured ones but they exceed the assets of a failed company, the company's officers and directors ought to be concerned about preferentially paying certain unsecured creditors ahead of others. As such, they may decide to voluntarily place the company into bankruptcy to ensure an orderly and fair liquidation where creditors are paid in accordance with legal priorities. To initiate the bankruptcy process, they must contact a trustee in bankruptcy ("Trustee") who will evaluate the debtor company's financial situation. Thereafter, the debtor may be assigned into bankruptcy. The Trustee will be appointed and the assets of the company will vest in the Trustee.

Unlike an involuntary bankruptcy which occurs at the instance of a creditor and where the creditor selects the Trustee, in a voluntary bankruptcy, the debtor company is able to itself select a Trustee, subject to confirmation by its unsecured creditors. Upon a bankruptcy, a stay of proceedings will operate to stay all unsecured creditors (but not secured ones) from taking action to collect on their debt claims. Once a Trustee is appointed, unsecured creditors will be provided with a notice of the meeting of creditors, and the Trustee will liquidate the debtor company's assets. It is important to note that the Trustee has power to impugn and seek to set aside fraudulent or preferential transactions entered into by the debtor company. This is one reason such transactions should be avoided by companies on the verge of insolvency.

Gordon: As an initial matter, we would assist the company in retaining an appropriate set of qualified professionals to provide advice and services during the course of the process. These could include one or more of the following: accountants and auditors, financial advisors with expertise in restructurings, investment banks, public relations consultants, a chief restructuring officer, and a bankruptcy claims and noticing agent.

With respect to the filing itself, we would (a) assist the company in determining whether affiliates and subsidiaries should commence bankruptcy cases, which would depend on various operational, financial and legal considerations, (b) advise the company regarding an appropriate venue for the chapter 11 case and (c) work with the company on a task list and timeline for the bankruptcy filing.

Because the success of a company's chapter 11 case will depend on whether it has adequate financing to operate its business, we would also assist the company in soliciting and negotiating proposals for post-bankruptcy debtor in possession financing and thereafter documenting the terms of the financing facility.

Further, we would work with the company to identify whether any aspects of its business or operations would be adversely affected by the bankruptcy filing and, if so, what relief from the bankruptcy court could be sought to alleviate or mitigate those potential adverse impacts. As an example, we might advise the company on the development of a key employee retention program to help minimise employee turnover that may result from its financial difficulties

Finally, effective communications with key constituencies, including vendors, suppliers, and customers, both before and after a filing, is critical. Strong internal communications with employees is likewise important. Accordingly, we would typically assist the company with the development of an external and internal communications plan to minimise the potentially disruptive effects of the bankruptcy filings on, among other things, customer and vendor confidence, dealer support and loyalty, and employee morale.

Abe: I would recommend that the company commence an out-of-court workout at an early stage because this procedure is more efficient and less costly than a court supervised process. Japan has "Turnaround ADR," which is Japan's equivalent to INSOL 8 principles.

Siimes: If I am approached by a company on the verge of declaring bankruptcy, there are two key questions for considering possible solutions. Firstly, does the company have an owner capable of injecting further capital into the company or willing to sell the company? Secondly, is there an investor who is willing to buy the company, possibly on very short notice? If the owner is able to inject further capital into the company or if there are realistic prospects that the company can be sold to a new investor, it is a realistic proposition to try to avoid the bankruptcy.

If the answers to the questions are negative and it is im-

possible to find an amicable solution for avoiding the bankruptcy, the assistance I can provide as an attorney is mostly focused on advising how to avoid board members' liability. Under Finnish law, the directors/officers of a company may incur criminal liability if they continue to enter into further commitments once it becomes evident that the company will not be able to pay its existing liabilities. As such, the directors/officers may need to file for bankruptcy or convene a shareholders' meeting to approve an application for restructuring if the financial situation of the company becomes dire enough to warrant this.

Courtman: Our focus is on helping ailing businesses to survive and prosper. Our passion is to bring about a sustainable recovery for any distressed business and help their owner mangers sleep comfortably at night!

Our approach is to immediately focus on stabilising the crisis that has given rise to any contemplation of declaring bankruptcy, and working out how big the cash hole is to make sure the business has enough liquidity to bring about the changes critical to its very survival in the short term, without recourse to a formal insolvency procedure. Only then can we focus in on the medium term, and decide what changes will be required to continue the stabilisation for the subsequent few months. So as to provide a firm foundation to affect those additional changes which will bring about a turnaround in the business's mid-long term fortunes.

At a macro level that necessarily involves consideration of the market the business is operating within, what transformational changes are happening in its sector, the businesses capabilities, where the opportunities are within it. It is also necessary to consider the motivations of the business owners and what they want from the business. In short what is the business owner's vision for both themselves and the business. Only then can we look to help them develop the strategic actions necessary to implement the delivery of their vision and transform the businesses and place its fortunes on a more sustainable footing, which could involve its disposal.

At a micro level, it involves consideration of the myriad of businesses commercial processes, with a view to re-engineering them, in support of developing the strategic plan to transform the businesses fortunes.

If our analysis shows, however, that the business simply doesn't have the ware withal to afford a turnaround and transformation piece, then we will look to either secure a refinancing or alternative financing sources to do so, or alternatively utilise the statutory tools available e.g. propose a Company Voluntary Arrangement or seek the appointment of an Administrator. All with a strategy to effecting a solution which has the best opportunity of maximising enterprise value.

Awataguchi: I would immediately meet with the CEO, CFO and limited officers of the company and first learn about the business of the company, corporate structure, financial status, name of the creditors, nature of the debts, important transactions, important stakeholders, prospective buyers of the business (we call them "sponsors" in Japan), and most importantly, cash liquidity of the company. Taking all the facts into account, I would advise the client when and what type of proceedings the company should take, illustrating advantages and disadvantages of relevant proceedings. Out-of-court workout is usually preferable, however, under circumstances where the debt workout is difficult (for example, when there is little prospect of obtaining unanimous consent from the lender banks, or there is not enough time to conduct the debt workout), I would accordingly file for civil rehabilitation or corporate reorganisation with the court. Civil rehabilitation is debtor-in-possession proceedings where the existing managers of the company can run the company, whereas corporate reorganisation is trustee proceedings where a court-appointed trustee runs the company. Another important difference is that under civil rehabilitation, security interest is exercisable, while under corporate reorganisation it is not the case. Either way, I would advise the client on the best solution and suggest a way ahead based on my experience in this area of law.



What are the main challenges of efficient bankruptcy compliance?

Ekpenyong: Due to poor record keeping in some land registries and incomplete information at the corporate registry, it may be difficult for the petitioner to ascertain all assets and detailed information of the bankrupt person or company. The bankrupt petition may encounter difficulty where the debt which forms the basis of the petitioner's case is unliquidated and need to be proved. If creditors are not vigilant, bankrupt persons may attempt to transfer the title in their assets to third parties in order to prevent a receiving order being made against those properties. The aim of this is to buy time to either pay back the debts or resuscitate their businesses in order to settle their creditors. The Bankruptcy Act is still nascent and most of the procedures have not been tested in court. Inevitably, the technicalities in these procedures may slow down bankruptcy proceedings. But as more people seek redress under the Act, the jurisprudence and the procedures under the Act will be clearly spelt out.

What new difficulties arise from multinational cases?

Novikov: The most difficult issue in multinational bankruptcy is the issue of enforcement and recognition of foreign bankruptcy decisions, especially when an insolvent debtor has its assets in many jurisdictions.

The Russian bankruptcy law provides for two options for the enforcement of foreign bankruptcy judgments: by virtue of a relevant international treaty, or on the basis of reciprocity. There is no clear understanding of what reciprocity is since there is no legal definition of reciprocity in Russian law. However, Russian commercial courts have given some guidance to define reciprocity. For instance, the commercial district court of the North-Western district, while dealing with the enforcement of a German court decision, has pointed out that reciprocity is understood as the possibility to enforce the foreign bankruptcy decisions on the territory of Russia, provided that Russian bankruptcy decisions taken on the basis of the Bankruptcy law are similarly enforced on the territory of that particular foreign state.

It should be noted that Russian courts are unlikely to enforce interim rulings which are not part of final and binding bankruptcy decisions. This is a consequence of the formal approach Russian courts take, which involves applying the restrictive interpretation of "bankruptcy decision" as a final and binding court decision in the context of the Bankruptcy law.

Enforcement of foreign bankruptcy decisions is also challenging because of the difficulties in tracing insolvent debtor's assets and proving that they actually exist on the territory of Russia. Needless to say, the procedure is time and cost consuming.

Ekpenyong: Foreign creditors have the same rights as local creditors. They may either file a winding-up petition against a company or file an affidavit in court upon receiving notice of winding-up petition against the company. Their claims will be considered by the court in order of the priority of claims.

In the same vein, Section 238 of the Bankruptcy Act provides that where there is a bankruptcy or insolvency and a reorganization order made against a debtor in a foreign proceeding, a certified copy of the order is, in the absence of contrary evidence, proof that the debtor is insolvent and appointment of a foreign representative has been made. In such an instance, upon the application of the foreign representative, the court may limit the property in which the authority of the Nigerian trustee extends. On application by a foreign representative in a Nigerian court in respect of a foreign proceeding commenced for the purposes of effecting a composition, an extension of time or a scheme of arrangement, the court may grant a stay of proceeding against the debtor.

Notwithstanding the orders in a foreign proceeding, the Nigerian court cannot make an order contrary to the provisions of the Bankruptcy Act. The Nigerian court is not compelled to enforce the order of the foreign court. Again, a stay of proceeding on creditors of a debtor in a foreign proceeding does not apply to creditors carrying on business in Nigeria. Nigerian creditors are only bound by a stay of proceeding by a Nigerian court. There is no provision for joint hearings of bankruptcy proceedings by Nigerian and foreign courts.

Siimes: The biggest difficulties arising from multinational cases relate to the coordination of various related bankruptcy proceedings e.g. in the case of an insolvency of a group of companies. Although the difficulties themselves aren't exactly novel, they have become more and more pronounced as integration of international businesses has progressed even further.

The most fundamental issues relate to the fact that the bankruptcy proceedings of related entities in a group do not generally interact in any way. There may well be competing claims, and intra-group receivables complicate matters further, when, for example, the parent company has receivables from its subsidiaries and vice versa. The lack of coordination generally results in a piecemeal sale of the group in smaller assets, which easily destroys business value, whereas a coordinated group-level process could lead to a better common outcome for the creditors.

Awataguchi: Japan has long adopted a rigid territoriality principle under which insolvency proceedings commenced in Japan do not extend to the debtor's assets outside Japan, and, correspondingly, insolvency proceedings commenced outside Japan do not extend to the debtor's assets in Japan. This principle was, however, abolished in 1999 and 2000, and replaced with the extra-territoriality principle. Accordingly, under current Japanese laws, the power of the trustee/DIP extends to the debtor's assets located outside Japan. On top of that, taking account of the UNCITRAL Model Law on Cross-Border Insolvency, Japan has also enacted the Act on Recognition of and Assistance for Foreign Insolvency Proceedings in 2001, which sets out measures to extend foreign insolvency proceedings to the debtor's assets in Japan. There have been 15 foreign insolvency proceedings to date that have been recognised by the Tokyo District Court under the Act. In rendering the recognition, examination of COMI (Center Of Main Interest) is sometimes at issue.

Although the extra-territorial principle has been adopted under Japanese insolvency law, it is up to foreign courts whether to give effect to Japanese insolvency proceedings. Accordingly, a debtor with important assets outside Japan would have to consider whether to file for recognition of Japanese insolvency proceedings with the relevant foreign court. For example, I was involved in filing for Chapter 15 proceedings in the US as bankruptcy trustee for a Japanese company in order to halt a lawsuit in the US against the company and prevent foreclosure against the company's asset in the US. Chapter 15 filings have been quite common recently in global cases, including those involving Spansion Japan, Japan Airlines, Elpida Memory, Sanko Steamship and Mt. Gox. In the case of Elpida Memory (where cash injection by the sponsor contemplated under the reorganisation plan was conditional upon the US court's recognition of the plan), the Japanese reorganisation plan was recognised by a US court for the first time in the history of Chapter 15 filings.

A further issue is how to deal with the assets in the foreign country where UNCITRAL-type recognition systems have not been introduced. In this connection, I have visited Hong Kong as bankruptcy trustee for an individual for the purpose of investigating the bank accounts he might have maintained there. Because UNCITRAL-type recognition proceedings are not available in Hong Kong, and it was uncertain whether or not the bank would accept me as the bankruptcy trustee of the bankrupt individual, I had the bankrupt and his attorney accompany myself to Hong Kong and conducted investigation with them at the banks. Such issues are common in cross-border cases.

In 2015, Anderson Mori &Tomotsune represented creditors in filing for corporate reorganisation proceedings against about 40 SPCs in Panama and Singapore. This is a landmark case because it was the first corporate reorganisation case where the foreign entities were deemed equivalent to Japanese stock companies which are subject to corporate reorganisation. In the Spansion Japan case in 2009, the semiconductor manufacturer filed for corporate reorganisation in Japan and its US parent company filed for Chapter 11 soon after that. This case was unique because the two insolvency cases proceeded in Japan and US, and there occurred many cross-border insolvency issues between them. In this case, I represented the secured creditors committee which was admitted by the Tokyo District Court for the first time in Japanese history and participated in US Chapter 11 proceedings, which ultimately resulted in successful recovery by the creditors.

How does a restructuring differ from bankruptcy? What are the advantages and disadvantages?

Novikov: Restructuring is commonly understood as an out-of-court procedure of debt recovery. Companies may take on new loans to pay off existing debts or to initiate the reorganisation of their own business. When it comes to bankruptcy, the procedure is different. In case of personal bankruptcy, once there is evidence of an individual's impossibility to satisfy his/her creditors' claims, the court may find the application for bankruptcy justified and approve the debt restructuring plan. As a result, there is a moratorium for an individual to satisfy any of his/her pecuniary liability claims, since all claims shall be reviewed in the course of initiated bankruptcy proceedings.

In relation to companies, the Bankruptcy law provides for financial rehabilitation. During supervision, the debtor company (based on a decision of its shareholders), or third persons in agreement with the debtor, may request the creditors present at the first creditors' meeting to sanction the introduction of financial rehabilitation. If the creditors vote in favour, the court will resolve to commence the financial rehabilitation. However, the creditors may vote against the introduction of financial rehabilitation and instead opt to proceed to external management or liquidation.

If the first creditors' meeting votes against financial rehabilitation, the court may still decide to introduce financial rehabilitation if the debtor (or a third party) provides a security for all of the registered claims in the form of a bank guarantee for the claims in the debt repayment schedule.

Apart from the debtor, a request to introduce financial rehabilitation may be lodged by a third party providing the security discussed above.

The court introduces financial rehabilitation for the period (not exceeding two years) stated in the petition upon introduction of financial rehabilitation. If the claims of all creditors are discharged in full prior to the end of the period established by court, the debtor may petition the court for an early termination of financial rehabilitation and the bankruptcy proceedings in connection with the reinstatement of the debtor's solvency.

Velasco: As mentioned before, pursuant to the Insolvency Law, Insolvency Proceedings have two stages: the Mediation Stage and the Bankruptcy Stage.

The Mediation Stage is aimed towards the conservation of the insolvent entity as an on-going business, by achieving the execution of a Reorganisation Agreement among the company and its Recognised Creditors. This stage, which commences on the date the Insolvency Judgment is rendered and concludes no later than 365 days after the last date of publication of such Insolvency Judgment in the Federal Official Gazette (*Diario Oficial de la Federación*) (an initial term of 185 days which can be extended, if certain conditions are satisfied, for two additional 90 days periods). If a valid Reorganisation Agreement has not been reached upon the conclusion of the 365 days term, the insolvent entity will be automatically declared in bankruptcy.

The Bankruptcy Stage, which provides for the bankruptcy and liquidation of the insolvent entity, may be declared by the insolvency court in the following events: (i) at the request of the insolvent entity (or its creditors, but only to the extent that the insolvent entity accepts and complies with the relevant judgement), or (ii) if the Mediation Stage expires without the execution and filing of an approved Reorganisation Agreement before the insolvency court or (iii) at the request of the Mediator participating in the insolvency proceeding.

Ekpenyong: Restructuring is a procedure in which a business changes its strategy or direction. In most cases, restructuring involves downsizing. It may also require eliminating some departments, closing some locations or creating more divisions to ensure productivity.

The merits of downsizing a company by restructuring would reduce operation and overhead cost. It gives room for concentrated effort towards achieving company's objectives, eliminates bureaucracy and management bottlenecks and ensures productivity. Where more divisions are established, it creates more jobs and lead to greater efficiency and specialisation.

The demerits of restructuring is that it may lead to hardship due to termination of employment of some employees, loss of highly skilled workers, reassignment of duties at an extra cost, additional training and less productivity due to the huge workload on existing employees.

On the other hand, bankruptcy affects the liquidation of a debtor's asset by an appointed trustee to settle the debts of the debtor. It can either be voluntary or involuntary. It is voluntary if the bankruptcy proceedings is commenced by the bankrupt debtor himself and involuntary if it is commenced by the bankrupt's creditors. However, bankruptcy proceedings do not extend to Banks and Insurance companies. This is because the process regulating bankruptcy of Banks and Insurance companies are regulated by BOFIA and the Insurance Act respectively.

The merits of a bankruptcy proceeding on the part of a creditor are that it affords the creditor who a debtor owes a liquidated sum of one million naira and above, the opportunity to file bankruptcy proceedings against it to recover the debt. A bankruptcy petition may be filed against a bankrupt person whether deceased or alive, or an insolvent company. Upon appointment of a receiver, the debtor is compelled to furnish the receiver with the particulars of all his debtors. The debtor or its estate shall pay the cost incurred by the petitioner in a bankruptcy proceeding.

The merits of a bankruptcy proceeding on the part of a debtor is that it affords the bankrupt an opportunity for the court to ratify his proposal or assignment to its creditors. The debtor's assets which is to be shared amongst its creditors does not include property held in trust for another person, property exempted from execution or seizure and property which is to be acquired or devolved on the debtor before his discharge.

The demerit of bankruptcy proceedings to creditors is that where two or more creditors commences bankruptcy proceedings against the same debtor, the proceedings will be consolidated and their respective claims ranked *pari passu* with the claims of other creditors and are settled in the order of their priority. The debtor's assignment of his existing and future wages, commission or professional fees before bankruptcy does not affect his wages, commission and professional fees after bankruptcy. Upon the filing of the debtor's proposal, the creditors do not have a remedy against the debtor or his property, or a right of action for the recovery of claims provable in bankruptcy until the trustee is discharged or the debtor becomes bankrupt. Upon the bankruptcy of the debtor, no creditor has any remedy against the debtor or his property or shall commence an action for claims provable in bankruptcy until the trustee is discharged. Where a creditor makes a false claim with intent to defraud, the creditor is guilty of an offence.

The demerits of bankruptcy proceedings to the debtor are that it gives creditors an opportunity to proceed against him and his property even in death or insolvency in the case of a company. The courts in Nigeria will give effect to orders made in local or foreign bankruptcy proceedings against the debtor. Upon the creditor filing a bankruptcy petition, the court may deny the debtor proceeds from his property by appointing an interim receiver. A debtor who makes a fraudulent disposition

of his property after committing an act of bankruptcy, fails to answer truthfully to questions put to him in the bankruptcy proceedings, makes false entry in the statement of accounting, within one year of committing an act of bankruptcy destroys document concerning his property, leaves Nigeria within six months after filing a bankruptcy petition against him, commits an offence.

Nicholson: An insolvent Canadian company which is unable to meet its financial obligations may consider restructuring options under the federal Companies' Creditors Arrangement Act ("CCAA") and the proposal provisions of the federal Bankruptcy and Insolvency Act ("BIA"); or it may become bankrupt under the BIA, through a voluntary or involuntary proceeding.

The restructuring process facilitates the social and economic policy goals of encouraging a business to survive and succeed for the benefit of its employees, customers and those with whom it does business,. It is advantageous for insolvent companies which have a strong core business and a financially viable outlook for the future, but find themselves in temporary financial distress.

As part of and during the restructuring process, a temporary and comprehensive stay of proceedings against secured and unsecured creditors and others ("Stay") is on offer to provide a period of protection and "breathing room" in order for the company to put in place a plan or proposal to reorganize its financial affairs while it continues its operations. During the restructuring, the directors of the debtor company maintain control of the company and its operations continue under the supervision of an officer of the court referred to as a Monitor (under the CCAA) or a proposal trustee (under the BIA).

The disadvantages of restructuring include that it is not available to all insolvent companies and cannot be successfully pursued if the debtor company does not have any realistic prospect of emerging from a restructuring with a viable business. It is also costly. The cost concern is especially applicable for a CCAA proceeding, which is initiated by a complex, omnibus Court application. The BIA proposal process is less expensive, in part, because it does not require a Court application to be engaged to secure the Stay which is automatically available upon the mere filing of a Notice of Intention to File a Proposal.

In contrast, the disadvantage of bankruptcy for a company is that it essentially signals its end. This reality may be seen an advantage if there is nothing to be restructured. The directors of a bankrupt company lose control over it and its assets which, by law, become vested in a bankruptcy trustee with a view to liquidating the assets for the benefit of those legally entitled. The stay of proceedings afforded to a bankrupt is limited and only operates to stay unsecured creditors from pursuing their rights.

Gordon: Bankruptcy is one type of restructuring. As I will discuss in my response to the next question, most of the other restructuring alternatives are out of court options. Because the other options are out of court, they have decided advantages over a bankruptcy filing. First, they are more certain. Once the restructuring transaction is structured and negotiated, the terms of the restructuring are largely set. In a bankruptcy, the ultimate terms of the restructuring are subject to litigation and an uncertain outcome. Second, the timing of the out of court restructuring is more certain. The company has more control over the process and the timeline for the process. A company has less control over the timing of the restructuring in bankruptcy because of the rights of other parties to participate and the need for court approval of key aspects of the process. Third, the out of court options are typically more controllable and less expensive. Because of the litigation uncertainty in bankruptcy, the cost of the bankruptcy is not controllable and can be very high. In that regard, in addition to the costs of its own advisors, the company has to pay the costs of the advisors for an official committee of unsecured creditors as well as, potentially, the fees and

> *"Under Japanese law, rehabilitation and reorganisation plans cannot be confirmed by the court unless unsecured creditors receive at least the amount they would receive if the debtor were liquidated under bankruptcy proceedings*
>
> *- Awataguchi"*

expenses of secured creditors. As a result, the costs of a bankruptcy can be substantially higher than the costs of an out of court restructuring. On the negative side, however, it may not be possible in an out of court restructuring to achieve the extent of operational change and debt reduction necessary. Instead, the company may require access to the tools that chapter 11 provides in order to achieve both the operational and balance sheet improvements necessary for the company to survive.

Siimes: In Finnish legislation, restructuring and bankruptcy are completely separate processes. In Finland, the restructuring process of a company is governed by the Restructuring of Enterprises Act. The purpose of a restructuring procedure under the Act is to adopt a restructuring plan acceptable to the creditors. The restructuring plan aims to restore the solvency of the debtor by various changes to its debts.

Bankruptcy proceedings, on the other hand, are governed by the Bankruptcy Act. The purpose of bankruptcy proceedings under the Act is to serve as an insolvency procedure for all of the debts of the debtor, in which all of the assets of the debtor are used to satisfy the bankruptcy debts to the extent possible.

Thus, the most significant difference between insolvency and bankruptcy under Finnish law is that the purpose of restructuring is to save the company in financial distress while the purpose of bankruptcy is to liquidate the company to satisfy the creditors. However, it is possible to sell parts or the whole of the business of the bankruptcy estate.

Overall, a restructuring procedure tends to lead to more favourable results for those creditors who are unable to recoup their debts in full from the security they hold. Generally speaking, the shareholders of a financially distressed company receive nothing in a bankruptcy. A creditor can usually expect to collect a fraction of its debts in bankruptcy proceedings since the most valuable assets of the debtor have usually been granted as security to secured creditors. However, a company in an extremely dire financial situation does not generally benefit from restructuring unless the cause of the financial situation can be remedied through restructuring, and for such a company, bankruptcy is generally the preferred option.

Awataguchi: Under Japanese law, rehabilitation and reorganisation plans cannot be confirmed by the court unless unsecured creditors receive at least the amount they would receive if the debtor were liquidated under bankruptcy proceedings. In other words, creditors would be able to recover more value under civil rehabilitation or corporate reorganiaation proceedings as compared to bankruptcy proceedings.

Can you detail the different debt restructuring options and processes?

Ekpenyong: A debtor facing cash flow problems or financial distress may renegotiate the debt sum or the payment structure to give him room to restore liquidity to his business in order to continue operations. This is prevalent in cases, where the interest on the debt is more than the debt sum. The debtor may urge the creditor to either collect the debt sum or a compromised sum which includes the debt sum and the creditor's administrative cost to collect the debt.

A debtor may transfer its debts to a third party who takes over his company in which case, the third party will be liable to repay the debt to the creditor. The debtor may dispose its debts to a third party to raise funds to settle outstanding debts to its creditors. The creditor who commences an action against the debtor may agree to an out of court restructuring of debts to save time and obtain the debt plus a little interest.

The creditor may also agree to a reduction of debt and an extension of the payment dates. This is usually a less expensive alternative to bankruptcy proceedings. Though the creditor may expend time and effort in negotiating with debtors, vendors and tax authorities, debt mediation has over time proved to be more effective than litigation.

Nicholson: Debt restructuring in Canada can be facilitated under two main federal statutes: the *Companies' Creditors Arrangement Act* ("CCAA"); or the proposal provisions of the *Bankruptcy and Insolvency Act* ("BIA").

A CCAA restructuring is preferred by larger companies with significant debts because it offers more flexibility, although it is often more costly than the BIA proposal process. In order to take advantage of the CCAA process, the debtor must meet certain statutory requirements, including that it must have at least $5 million in debt and be "insolvent" on a cash-flow or balance sheet basis.

To initiate a CCAA process, a court application must be made in the locale of the debtor for an Initial Order. If granted, the Initial Order puts in place a comprehensive 30 day stay of proceedings against secured and unsecured creditors and others ("Stay") and appoints a court officer referred to as a Monitor to oversee the operations of the debtor and assist it in the formulation of a restructuring plan which sets out the proposed compromises to be made by all stakeholders (the "Plan"). If granted, the Stay may be the extended from time to time as appropriate by the Court, provided certain conditions are met, including that a Plan is not "doomed to fail". If the Plan is approved by the requisite stakeholders and the Court, it can be implemented and the company can emerge from insolvency protection. If the Plan is not approved, the debtor may submit a new or amended Plan and there is no statutory deadline within which it must do so.

The BIA process is more commonly used for smaller and less complicated restructurings. It requires no minimum indebtedness but is less flexible than CCAA proceedings and involves strict timelines. As part of the process, a court officer referred to as a Proposal Trustee oversees the operations of the debtor. To initiate a BIA proposal, an insolvent debtor company customarily files a Notice of Intention to make a proposal which, unlike the CCAA process, provides for an automatic Stay for an initial 30 days. This Stay can be extended by the Court for additional periods of 45 days each, for a total of up to six months. If a Stay extension is not granted, or if the proposal is rejected by the voting creditors or the Court, the debtor is deemed to have made an automatic assignment in bankruptcy.

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>
> *- Emmanuel Ekpenyong*

Gordon: In addition to filing for chapter 11 bankruptcy, whether in a pre-negotiated or prepackaged form or not, troubled companies have available to them a number of out of court restructuring options. With respect to operations, companies have the ability to reduce costs by cancelling or deferring capital projects, engaging in aggressive negotiations with vendors, customers and suppliers, reducing headcounts, downsizing office and other space, and selling non-core assets. On the financial side, companies have an array of alternatives, the use of which will largely be dictated by the extent of the restructuring required. One type of financial restructuring is a refinancing of debt. At its simplest, this option involves a negotiation of modified financing terms with the applicable lender. A second option is to purchase debt at a discount. This may involve a one-time transaction with a bondholder or a more formal tender offer to a tranche or tranches of bonds. The objective of this option is to take advantage of a trading discount in the debt to reduce a company's leverage. Another option is to pursue an exchange offer pursuant to which debt is converted into debt, equity or a combination of debt and equity. In order to be successful, the company would need a high level of participation by the targeted debt holders in order to achieve the desired debt reduction.

Siimes: In Finland, the only formal alternative to insolvency proceedings is the restructuring of a company under the Restructuring of Enterprises Act. The purpose of a restructuring procedure under the Act is to adopt a restructuring plan acceptable to the creditors. A restructuring plan may include changes in the debt repayment schedule, reductions in interest payments, or a scaling down of the amount of principal owed. In practice, the most common element in restructuring plans is a reduction in the amount of principal owed. It should be noted that the principal owed to secured creditors cannot be reduced below the amount secured by the charge, pledge, etc.

Debt-for-equity swaps and pre-packaged sales are both possible, if agreed upon. There is no statutory obligation to accept debt-for-equity swaps or pre-packaged sales as part of a restructuring procedure. Pre-packaged sales are not used in Finland in the same form as in e.g. the United States or the UK.



Awataguchi: As noted above, out-of-court workouts are increasingly popular for purposes of corporate debt-restructuring, and there are several statutory out-of-court workout schemes such as (i) the Turnaround ADR, (ii) the REVIC scheme, and (iii) the SME Rehabilitation Support Association scheme. These statutory workout schemes are more advantageous than non-statutory out-of-court workouts (also known as "genuine out-of-court workouts") because of the special treatment in respect of bridge loan and the tax advantages available under such schemes.

Among them, the Turnaround ADR (*Jigyo-Saisei* ADR) is the most important out-of-court workout process for large companies. It was established in 2007, based on the Industrial Competitiveness Enhancement Act (formerly known as the Act on Special Measures for Industrial Revitalization and Innovation). As of March 2014, 16 listed companies have applied for a Turnaround ADR. The process is initiated by a debtor's application to the JATP (Japanese Association of Turnaround Professionals), the only organisation recognised for Turnaround ADR by the METI (Ministry of Economy, Trade and Industry). If the debtor's application meets certain threshold requirements, the JATP and the debtor will jointly send a stand-still notice to target creditors requesting them not to undertake any collection, set-off, collateralisation or filing of insolvency proceedings. The process thereafter consists of three kinds of creditors' meetings:

(i) a meeting in which the creditors will be given an outline of the rehabilitation plan (the "First Meeting");
(ii) a meeting to discuss details of the plan (the "Second Meeting"); and
(iii) a meeting to approve the plan (the "Third Meeting").

The above process is mediated by normally three turnaround professionals (usually comprising two experienced insolvency lawyers and an accountant appointed by the JATP) approved by the target creditors at the First Meeting. These turnaround professionals will then examine the rehabilitation plan and opine on its fairness, appropriateness and economic feasibility at the Second Meeting. The plan must be unanimously approved by the target creditors at the Third Meeting. Otherwise, the debtor would likely be forced to file for judicial insolvency proceedings, such as civil rehabilitation or corporate reorganisation. These requirements have also received criticism, and as discussed above, the Japanese government is thinking of reforming the requirement of unanimous approval from the target creditors.

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

Novikov: In response to the growing number of bankruptcy cases and suspected instances of asset-stripping prior to and during the bankruptcy process, the most efficient measure would be to introduce the possibility of imposing an injunction on all of a debtor's assets once the motion on bankruptcy is filed. The court proceeding on bankruptcy is extremely time-consuming and, as a rule, this time is enough to hide the assets in offshore jurisdictions. The further tracing of the assets may be challenging so the immediate interim injunction would resolve the problem of asset stripping. This would facilitate the accomplishment of the goals of the bankruptcy proceedings by satisfying the creditors' claims in full.

Finally, in an ideal world, there would be no corrupt judges. There is a noticeable inequality in relation to parties in bankruptcy proceedings where representatives of state bodies (for instance, the Federal Tax Service) benefit from preferential treatment from judges.

Velasco: Although certain particular changes to the Insolvency Law will be required in the near future to clarify certain issues that have come up in recent cases, today we have a solid insolvency law, similar to the one that other countries like the United States and some European countries have adopted. We are now facing a practical challenge in terms of implementation of the Insolvency Law by our court system. Judges are becoming more knowledgeable and sophisticated on a day to day basis, however, there is still work to be done on this front.

Ekpenyong: The world is becoming more and more a global village. There is a need for joint hearings in bankruptcy and insolvency cases. Courts should respect foreign bankruptcy proceedings and give effect to their orders. There should be reciprocity of orders in foreign bankruptcy proceedings amongst countries.

It is easier to contract business across countries and continents through electronic means these days. Most times the validity of the contract and jurisdiction clause in the contract is in doubt. There is a cogent argument in favour of the adoption of the UNITRAL Model Law on Electronic Commerce to regulate technical areas such as variation of agreement, signature of e-document, formation and validity of contracts, recognition of parties in an e-transaction. The Convention on Cybercrime should be domesticated by sovereign nations to address internet and computer crime by harmonising national laws, improving investigative techniques, and increasing cooperation among countries.

Countries should adopt the UNICITRAL Model Law on Cross-Border Insolvency to ensure uniformity in insolvency proceedings. There should be more bilateral and multilateral treaties amongst countries and members of international organizations for recognition and enforcement of judgments. Reciprocity of judgment should not be limited to monetary judgments alone but extended to taxes, penalties and fines across borders.

The implementation of the above suggestions will led to a reduction of transaction costs, cost of proceedings and cost of enforcement of a foreign judgment. This will encourage a direct flow of business, business opportunities as well as corroboration amongst countries. Contracts will be promptly concluded and easier payment options will lead to an increase in international trade.

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> *- Toni Siimes"*

This is the vision of the 21st Century world economy.

Siimes: In an ideal world, legislation should be amended to include more support to perform pre-packaged sales of companies. Currently, there are no alternatives to restructuring (in which debts are altered, but the debtor remains in control of its assets) and bankruptcy (in which the debtor is liquidated, most commonly through the sale of individual assets). Such a pre-packaged sale would allow for the sale of a financially distressed business, which would benefit creditors and cause minimum disruption to the business.

Currently, bankruptcy proceedings are organized in such a way that they almost always cause disruption to the business of the company. There is no legislative support to enable pre-packaged sales in bankruptcy proceedings and they are thus only feasible if the pool of creditors to be negotiated with is small and they are willing to accept a markdown. On the other hand, a restructuring process cannot force the owners of a company to accept a change to their ownership of the company.

Awataguchi: Although orderly out-of-court workouts are now common in Japan, the importance of judicial insolvency proceedings should not be underestimated. Indeed, given the increasing unpredictability of global economic circumstances, the relevance to judicial insolvency proceedings is likely to rise in the near future. Should judicial insolvency proceedings regain prominence, issues such as (i) timely disclosure of sufficient information to large creditors, (ii) protection of trade creditors and (iii) appropriate handling of international issues would be key factors that the courts will consider. Every insolvency professional should be well prepared for such a development.

