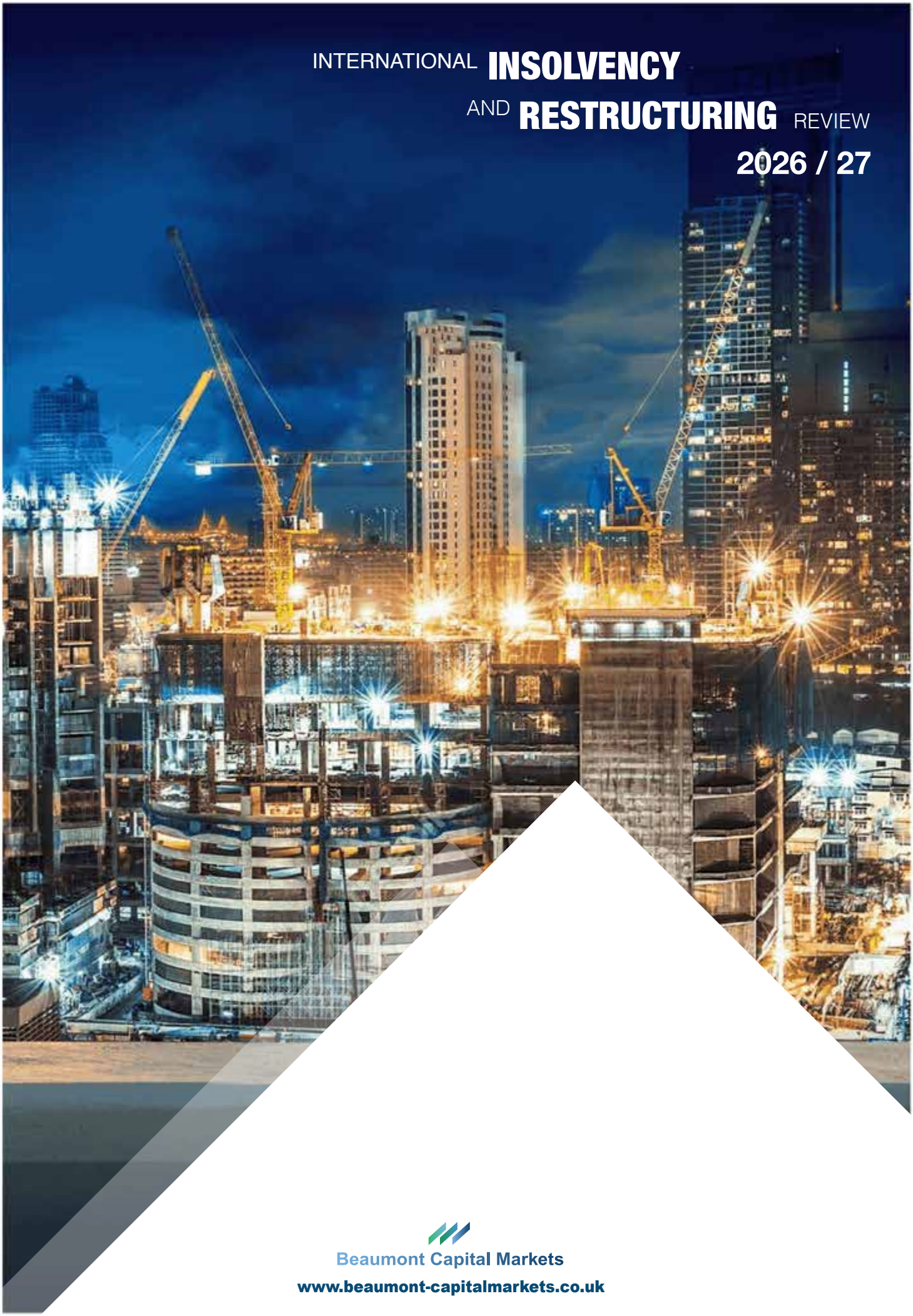
INTERNATIONAL INSOLVENCY AND RESTRUCTURING REVIEW 2026 / 27



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FOREWORD

GLOBAL INSOLVENCY TRENDS 2026–27:
PRESENT CHALLENGES AND FUTURE TRAJECTORIES

INSOL INTERNATIONAL

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Alastair guides companies through complex financial restructurings based on his three decades of experience in assisting financially stressed businesses to preserve value through a combination of dialogue with stakeholders, contingency planning, and, ultimately, insolvency processes, many of them with substantial and innovative cross-border elements.

Alastair specialises in cross-border advisory and formal insolvency appointments. Alastair has a Bachelor of Engineering in mining and petroleum engineering from Strathclyde University. He is a licensed insolvency practitioner, a Certified Management Consultant, a fellow of the Institute of Chartered Accountants in England and Wales, past president of INSOL Europe and current President of INSOL International.

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Economic headwinds are continuing to prove challenging globally. High interest rates, limited access to credit, continued inflationary pressures, declining consumer confidence and labour shortages are placing many businesses under pressure. Sectors such as construction, resources, commercial real estate, tech, healthcare, retail and hospitality are experiencing elevated financial distress. The geopolitical environment also remains volatile and unstable – creating uncertainty in previously reliable and predictable supply chains and key markets, many of which have only recently been able to return to normal post-pandemic.

In light of these downside risks, the World Bank, in its January 2026 World Economic Outlook Update, projects global growth to plateau over the next 2 years – at 3.3% in 2026 and 3.2% in 2027.[1] In its 2026-2027 Global Insolvency Outlook, Allianz projects global business insolvencies to rise by another 5% in 2026, marking 5 consecutive years of increases to reach a record high – some 24% above the pre-pandemic average.[2]

> “Creditors that would be “out-of-the-money” in the relevant alternative to the plan cannot simply be ignored.

This translates into a critical need for effective and efficient restructuring and insolvency systems. Indeed, recent empirical evidence from the World Bank suggests that laws focused on flexible restructuring measures for viable businesses and quick, simple liquidation alternatives for businesses that are no longer viable are linked to increases in productivity, innovation, job creation and long-term economic growth.[3]

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Increased restructuring activity – and the prevalence of constructive restructuring tools (such as cross-class cram down provisions, DIP finance and broad enforcement moratoria) across the US, the UK, Europe and a growing number of jurisdictions in Latin America, Asia and Africa – has led to a number of significant key court decisions in the last 12 months.

In the United Kingdom, important decisions of the English Court of Appeal in 2025 in *Thames Water* and *Petrofac* – as well as the High Court’s decision in *Waldorf* (its Supreme Court appeal having recently been withdrawn) – have made it clear that courts will apply real scrutiny before sanctioning any plan over the objection of one or more classes of creditors. Creditors that would be “out-of-the-money” in the relevant alternative to the plan cannot simply be ignored, and there must be evidence of both meaningful engagement and at least some value being offered to such creditors before a plan can be considered fair in a sanction application to the court. These matters are also reflected in the Revised Practice Statement in respect of Schemes of Arrangement and Restructuring Plans published by the High Court, which took effect from 1 January 2026.

In the US, recent bankruptcy court opinions have recognised and enforced non-consensual third-party releases under Chapter 15, despite the Supreme Court’s ruling in *Purdue Pharma* in 2024 invalidating such releases in a Chapter 11 plan. This has enabled companies to achieve outcomes in US courts that may not be possible under a Chapter 11 plan, thereby incentivising strategic filings of non-US insolvency proceedings.

1. https://www.imf.org/en/publications/weo/issues/2026/01/19/world-economic-outlook-update-january-2026.
2. https://www.allianz.com/en/economic_research/insights/publications/specials_fmo/251021-insolvency-outlook.html#:~:text=We%20find%20that%20decreasing%20exports,the%20risk%20of%20domino%20effects.
3. Andres F Martinez, Aurelio Gurrea-Martinez and Harish Natarajan, World Bank Group, “The Crucial Role of Insolvency Law in Job Creation and Preservation”, 1 July 2025, available at: https://blogs.worldbank.org/en/psd/the-crucial-role-of-insolvency-law-in-job-creation-and-preservat#:~:text=A%20key%20function%20of%20insolvency,otherwise%20be%20lost%20in%20liquidation.

The Singapore International Commercial Court has also continued to take a progressive approach to cross-border insolvency recognition. In its 2025 decisions in *Terraform* and *Re Quoine*, it was held that a court in Singapore can provide discretionary relief under the UNCITRAL Model Law on Cross-Border Insolvency (**Model Law**) in an "expansive and open-ended" manner to support multi-jurisdictional restructuring attempts.

These are but a few of the examples of courts drawing or expanding boundaries as they, and practitioners, adapt to new legislation as it operates in practice.

Away from the courts, we are also seeing a number of broader industry trends.

One such trend has been the significant growth in private credit market in advanced economies, which has provided the potential to offer new solutions in complex restructuring and insolvency matters. This growth has sparked greater competition among lenders eager to maximise returns and explore creative means for unlocking funding opportunities for high-risk distressed businesses. Some commentators worry about whether the sheer quantity of private credit could pose a systemic threat and a couple of recent cases, First Brands in the US and the MFS Group in the UK, have perhaps taken the shine off this market a little.

After years of growth in ESG-linked investments – tied to the focus on net-zero emissions – the "greenlash" against such investments has been a noticeable trend more recently. Governments, financiers and investors are now turning away from a sustainability focus. This has placed the green economy under greater pressure, leading to an uptick in insolvency filings from clean energy and solar companies such as Sunnova, Pine Gate Renewables, Solar Mosaic and Meyer Burger – which all filed for Chapter 11 in 2025. Could 2026 be the year that the green market goes from boom to bust?

Elsewhere, AI is continuing to transform insolvency practice. Apart from automating routine, time-consuming tasks, AI is now providing practitioners with more data-driven, informed decision-making capability. It is also being used in asset tracing and recovery efforts, working with blockchain analysis to track funds across decentralised finance platforms and detect irregularities in multiple accounts and jurisdictions.

The cross-border insolvency framework also continues to evolve at pace. Malaysia adopted the Model Law in July 2025, which has given renewed impetus towards further adoption throughout Asia. UNCITRAL's draft Model Law on Applicable Law in Insolvency Proceedings is also expected to be finalised in 2026 and could lead to greater convergence in substantive insolvency laws in the coming years.

Given the ongoing economic difficulties and the proven link between effective insolvency systems and economic stability and growth, continuing the momentum on insolvency law reform remains crucial.

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In 2026, the restructuring and insolvency industry will continue to evolve and there remains a great opportunity for insolvency practitioners to shape future reform and make a real contribution to supporting businesses, jobs, local communities and regional economies.

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FOREWORD

BUILDING RESILIENT INSOLVENCY SYSTEMS IN A SHIFTING GLOBAL LANDSCAPE

WORLD BANK

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Antonia Menezes is a Senior Financial Sector Specialist and leads the Insolvency & Debt Resolution Program of the World Bank Group based in Washington D.C. The focus of her work is providing technical assistance to governments on insolvency and legal aspects of NPL reforms, with a particular emphasis on work in South Asia, Sub-Saharan Africa and the Caribbean. Antonia has published widely in the field of restructuring and insolvency and represents the World Bank at Working Group V of the United Nations Commission on International Trade Law (UNCITRAL). She is also Chair of the World Bank Insolvency & Creditor/Debtor Regimes (ICR) Task Force. Antonia is a current Board Member of INSOL International, a former Board Member of the International Insolvency Institute, an INSOL Fellow and sits on the INSOL Academic Steering Committee and INSOL Africa Advisory Committee. She is also on the Advisory Panel of Columbia University's Committee of Global Thought. She is a UK qualified solicitor and practiced at two leading international law firms in London and Paris before joining the World Bank.

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Nina is a Senior Financial Sector Specialist with the Debt Resolution & Insolvency program of the World Bank Group and focuses on providing lead technical assistance to member countries in improving their credit infrastructure systems, non-performing loan resolution strategies, as well as implementing alternative dispute resolution (ADR) mechanisms, such as commercial arbitration and mediation. Her work focuses primarily on the South and East Asia, Eastern Europe, as well as MENA regions. She is particularly interested in the use of ADR in insolvency and debt enforcement processes and has published extensively on these topics. Nina is a Fellow of INSOL International, member of the International Insolvency Institute and Co-Chair of INSOL International's MENA Advisory Council. She is a CEDR and Breakthrough ADR accredited mediator and has delivered numerous workshops on commercial mediation for practitioners and policy makers.

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Akvile Gropper is a Senior Consultant with the Insolvency & Debt Resolution Program of the World Bank Group. She has over 16 years of experience advising governments and private sector clients on the design and implementation of insolvency and debt resolution frameworks, as well as arbitration and mediation laws and institutions. Her work spans multiple regions and includes broader reforms to strengthen credit infrastructure and business regulation.

Akvile has authored and co-authored various knowledge products on insolvency, debt resolution, and ADR. A Lithuanian and U.S.-qualified lawyer, she has held roles in a commercial litigation firm and in organizations such as the International Law Institute and the Carnegie Endowment for International Peace in Washington, D.C. She is currently based in Barcelona, Spain.

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Economic resilience is deeply linked to effective restructuring and insolvency systems. When economies face greater volatility and uncertainty, it becomes increasingly important for these systems to address individual and corporate financial distress, both in breadth and depth, across a wide range of scenarios. Systems designed primarily for stable and consistent environments risk leaving gaps in coverage precisely in areas where resilience is most needed.

This is especially relevant in the current global landscape, marked by geopolitical and trade tensions and persistent inflationary pressures. The IMF projects that global growth will slow to 3.1 percent in 2026 and 3.2 percent in 2027 – and this is a hopeful scenario if the conflict in the Middle East is contained.[1] In a worse scenario, such as damage to energy infrastructure in the region, global growth could fall to around 2 percent, while inflation could rise above 6 percent.[2] Intensifying these pressures, the factors that had temporarily supported resilience in some sectors over the past months - such as strong risk appetite, stockpiling of traded goods, and AI related investment—are not expected to last.[3]

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> Economic resilience is deeply linked to effective restructuring and insolvency systems.

So, in tangible terms, how can countries' insolvency and restructuring systems help address the projected massive business and consumer distress? Experience shows that sustained macroeconomic pressures and prolonged uncertainty often translates into cashflow stress, weakened balance sheets, and rising insolvency risks in the private sector, with smaller firms typically affected first. The central question for policymakers and practitioners is whether existing frameworks can absorb this level of pressure - early enough, at sufficient scale, and while preserving value where possible.

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There is, however, a solid foundation to build on following reforms and innovative solutions which emerged as a result of past crises such as the Asian financial crises, the Global Financial Crisis and more recently, the COVID-19 crisis. In the current context of political, economic, and technological change, many countries rightly continue to prioritize the development of restructuring and insolvency regimes that function credibly and efficiently in both stress and non-stress conditions. Past crises exposed structural weaknesses in insolvency systems and helped catalyze reform momentum across many jurisdictions. These efforts have often focused on making procedures more accessible, efficient, and responsive - particularly through MSME insolvency and debt resolution reforms, early warning mechanisms, and expanded use of out-of-court and hybrid workouts,[4] supported by digitalization and institutional capacity building. Given the rapid evolution of economic, political, environmental and technological factors we can expect a higher pace of disruption and change and, in turn, future insolvency measures should be ready for the new reality.

The World Bank Group, as an international standard-setter in the field of insolvency and creditor/debtor regimes (ICR) with the support of the ICR Task Force, is working to support more resilient, transparent and predictable insolvency systems in emerging markets and developing economies. The World Bank Group together with the ICR Task Force regularly reviews the adequacy of the World Bank Principles for Effective Insolvency and Creditor/Debtor Regimes and their relevance against current complexities and global challenges. In 2025, the Task Force updated the Principles, with new guidance on the enabling environment for enterprise workouts in recognition of the importance that these tools are playing to provide flexible and efficient restructuring solutions to stakeholders. The update was developed in the context of increased demand in member countries for tools that bring more informal restructuring frameworks in line with new business and financial realities. Additionally, over the past few years, there has been a marked global increase in new workout frameworks, in multiple forms, including those with and without court involvement and with different degrees of formality in both crisis and non-crisis scenarios.

1. IMF (2026). World Economic Outlook: Global Economy in the Shadow of War. April 2026. International Monetary Fund. Available at: https://www.imf.org/en/publications/weo/issues/2026/04/14/world-economic-outlook-april-2026
2. Ibid
3. World Bank. 2026. Global Economic Prospects, January 2026. Washington, DC: World Bank.
Available at: https://www.worldbank.org/en/publication/global-economic-prospects
4. Understood here as privately negotiated restructurings between creditors and financially distressed debtors to avoid full formal insolvency proceedings.

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On the operational side, the World Bank's technical assistance teams continue to support countries in designing and modernizing insolvency systems. In particular, reforms in consumer and MSME-related insolvency law have accelerated in recent years. These reforms are frequently driven by rising household debt, repeated economic shocks, and the fact that local economies are dominated by businesses with overlapping personal and business debts. The reform trends also reflect a shift from punitive, courtcentric systems toward rehabilitative and "second-chance" frameworks.

Equally important is the institutional dimension. In recent years, a number of jurisdictions have embarked on enhancing specialization among the judges and insolvency practitioners, streamlining case management and improving inter-institutional coordination. Collectively, these efforts reflect a broader shift from "law on the books" to "law in practice."

A broader data-systems agenda is also emerging. As some recent analysis highlighted, the lack of robust and standardized data collection, and not just in personal insolvency cases, is a significant gap in many countries and it urgently needs to be addressed to support effective system design and evidence-based reforms.[5] Adoption of digital tools and AI remains uneven, and both policymakers and practitioners largely lack clear guidance on which technologies are feasible, useful and safe to apply in insolvency practice.

Environment-related stresses, whether stemming from the physical impacts of natural disasters or from transition and regulatory adjustments, will also require attention. Restructuring and insolvency systems should be prepared to manage these pressures in a manner that is orderly, predictable and consistent with broader policy objectives.

Looking ahead, the systems we build must be ready for the future. Digitalization, AI, stronger data foundations, cross-border cooperation, and preparedness for new shocks will shape whether insolvency regimes can operate at scale and respond effectively to financial distress during a period of increased exposure to economic, geopolitical, or technological shocks.

> Insolvency reforms are shifting from punitive, court-centric systems toward rehabilitative and second-chance frameworks.

5. See, for example, José M. Garrido, Jason Kilborn, and Anjum Rosha. "Personal Insolvency and Data Collection Systems", IMF Working Papers 2025, 124 (2025). Available at: https://doi.org/10.5089/9798229013703.001

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He regularly advises on voluntary administrations, deeds of company arrangement, insolvent trading claims, directors' duties and safe harbour matters. Pravin is frequently involved in contested proceedings in the Federal Court of Australia and the Supreme Courts of Victoria, New South Wales and Queensland, acting in significant restructuring and insolvency disputes where commercial and legal risks intersect.

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Clementine specialises in restructuring, turnaround and insolvency, advising across the full range of corporate distress scenarios. She regularly acts for banks, debt funds, corporates and insolvency practitioners on complex finance and insolvency matters, including safe harbour engagements, informal and formal restructurings and secured debt recovery.

Clementine's experience includes refinancings and informal workouts, as well as formal processes such as deeds of company arrangement and schemes of arrangement. She also has significant expertise in Australian personal property securities (PPS) law, advising on security interests, enforcement strategies and priority issues arising in distressed situations.

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Introduction

In this article, we review developments in restructuring and insolvency in Australia over the course of 2025, discuss the emerging themes for 2026 and address the formal and informal tools available to directors, lenders and other stakeholders to navigate cashflow issues in the current environment.

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> In this challenging environment, the flexibility of Australia’s formal and informal restructuring tools is being put to the test.

Australia is a trade-dependent economy strongly influenced by international forces. Geopolitical developments over the past 12 months, including tensions in the Middle East, have recently rocked global energy markets at a time when Australia was already in the midst of a challenging (and expensive) energy transition.

Supply security and inflation have become key issues for Australian businesses in this environment. At the same time, tighter debt markets, higher interest rates and constrained household budgets are affecting the viability of businesses across a range of sectors, most notably construction, logistics, mining and retail.

As a result, Australia has experienced an increase in formal insolvency appointments over the last 12 months. Similarly, informal restructuring activity has increased, although data in relation to this is not publicly available.

Alongside this, secured lenders in Australia continue to make regular use of receivership as a tool to realise company assets where loans are unable to be serviced within terms. The ongoing elevated use of receiverships in recent years is consistent with the maturing of Australia’s growing private credit industry.

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Private credit has grown to become a significant source of finance, especially in relation to property development in Australia. This higher-risk lending is an area banks have retreated from while private credit has grown. The maturing private credit industry is now managing the fallout of construction-related inflation which has unravelled the business cases for many developments.

In addition, the regulatory environment has shifted and tightened in Australia after the end of the COVID-era stimulus period. The Australian corporate regulator, the Australian Securities and Investments Commission (**ASIC**), has strongly signalled an intention to place more scrutiny on the private credit industry.[1] At the same time, the Australian Taxation Office (**ATO**) has stepped up enforcement action, which we anticipate is a trend set to continue in the next 12 months.

In summary, there is no shortage of current pressures on Australian directors, many of which are simply beyond their control. In this environment, the flexibility of Australia’s formal and informal restructuring tools is being put to the test, as directors, lenders and other stakeholders seek creative solutions to maintain enterprise value.

Australia has a diverse suite of formal and informal restructuring and insolvency tools suitable to address these circumstances. These range from informal turnaround projects under the protection of the ‘safe harbour’ regime, through to formal restructuring via voluntary administration and deeds of company arrangement and, in irretrievable scenarios, liquidation.

1. ASIC Report 820: ‘Private credit surveillance report: Retail and wholesale surveillance’, 5 November 2025.

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Restructuring and insolvency themes in 2025

During 2025, headline inflation temporarily eased, which fuelled speculation of an interest rate cutting cycle. As it happened, while the Reserve Bank of Australia did provide some rate cuts, the rate cutting cycle has now reversed as cost volatility and geopolitical disruption have seen inflation spikes in multiple industry sectors.

Consequently, numerous businesses, particularly in the retail, logistics, manufacturing and construction sectors are facing tighter liquidity and increasing financial distress. Sustained higher interest rates have compounded these pressures. Businesses that refinanced during the low-rate environment during and after the COVID pandemic faced materially higher debt service costs on rollover, squeezed operating margins and eroded covenant headroom.

According to ASIC, 9,300 companies entered external administration in the year to 28 February 2026, a 76% increase on the previous five-year average.[2]

These are formal, public, external insolvency appointments. These figures do not include informal workouts. Our experience over 2025 was that company directors increasingly made use of informal restructuring processes, under the protection of Australia's safe harbour regime, to address solvency concerns.

Increasing use of safe harbour in 2025

Company officers in Australia face personal liability for the debts incurred by a company if the company is insolvent, or becomes insolvent, when the debt is incurred. This is a considerable risk, and it is typically addressed in one of two ways.

1. the directors can appoint voluntary administrators and commence a formal external administration process which may end in a public restructuring by way of deed of company arrangement or may end in the liquidation of the company.[3]

2. increasingly, the directors may seek to consensually and privately restructure or repair the company by implementing a turnaround plan under the protections offered by Australia's so-called 'safe harbour' regime.

The safe harbour regime ultimately protects directors from liability for insolvent trading where they can demonstrate they incurred debts or continued to trade in pursuit of a turnaround plan which was reasonably likely to lead to a better outcome than the immediate voluntary administration or liquidation of the company.

The safe harbour reforms introduced in 2017 have had slow adoption by directors. That seems to have changed in response to the macroeconomic and industry pressures summarised above.

Our experience has been that directors are now more confident in proceeding with informal, private turnaround plans under the protections of the safe harbour regime. In doing so, directors and other stakeholders enjoy greater privacy, flexibility and control than under the compulsory external procedures associated with voluntary administration. Costs can also be more carefully managed.

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> Directors are increasingly turning to Australia's safe harbour regime to pursue informal, private turnaround plans with greater privacy, flexibility and control.

As a result, early intervention is increasingly the market norm and boards are pursuing informal, private restructures aimed at stabilisation and value preservation by:

- refinancing or negotiating commercial contracts and payment plans; and/or
- an increasing resort to “unconventional” financing options associated with the burgeoning growth of private credit (including facilitation of debt-for-equity swaps).

Increasing use of loan-to-own strategies in 2025

Loan-to-own restructures are an increasingly common feature of Australian workouts (both as part of an informal consensual workout or via formal restructuring via a deed of company arrangement (**DOCA**)). The strategy is straightforward: acquire a debt position with a view to converting it into equity and, ultimately, control. Loan-to-own is now being used more frequently by corporate buyers and lenders seeking to shape outcomes in insolvency and near-insolvency settings.

2. Business insolvencies stabilising after post-pandemic spike, says RBA | Accounting Times; The rise in retail insolvencies | Grant Thornton Australia.
3. Voluntary administration can also end with control of the company returning to its directors without there being a deed of company arrangement, but this is very rare in practice.

Australia's secondary debt market remains less liquid than those in the US and Europe, but private credit's expansion is changing the dynamics. More participants and more multi-lender facilities drafted with transferability in mind have made debt trading (and strategic positioning) easier, supporting greater local use of loan-to-own strategies.

Loan-to-own outcomes are being executed through:

- Consensual restructures;
- Schemes of arrangement; and
- DOCAs.

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> Australia's maturing private credit market is driving greater use of loan-to-own strategies through consensual restructures, schemes of arrangement, and DOCAs.

Maturation of private credit in 2025

Private credit has reshaped Australia's funding landscape over the past decade – offering speed, flexibility, and a greater willingness to underwrite risk than traditional lenders. The Australian private credit market is presently estimated at approximately AUD $220 billion, heavily concentrated in commercial real estate, asset-backed lending and direct corporate loans. Capital raising sources also continue to diversify, encompassing superannuation funds, institutional investors, insurers, family offices and high-net worth "angel investors".

These features delivered strong returns in benign conditions, but have also exposed structural vulnerabilities as credit conditions tightened post-COVID. In several high-profile cases, significant valuation write-downs have unsettled investor confidence and highlighted a persistent concern: deterioration in borrower credit quality is often recognised well before it is reflected in reported fund valuations.

The failures of First Brands Group and Tricolor in late 2025 illustrate how distress in highly leveraged, private-credit-financed businesses can transmit across portfolios, triggering write-downs, valuation resets and further redemption pressure.

Private credit will remain central to restructuring activity in 2026, but in a market that is less forgiving and subject to increased regulatory scrutiny. Lenders and borrowers can no longer assume continuously available liquidity or stable valuations. Restructuring practitioners should expect private credit to feature prominently in distressed scenarios under heightened regulatory oversight. In this regard, the significant expansion of private credit has already facilitated an increased incursion of international restructuring firms into the Australian restructuring market.

The ongoing relevance and usefulness of Voluntary Administration and DOCAs in 2025

Voluntary Administration (**VA**) remains the predominant method for compulsory restructuring in Australia. It involves the formal appointment of an external administrator to the company, following which:

1. the company enjoys a moratorium on creditor action (including the termination of contracts based upon insolvency);
2. the administrator can run a competitive sale process, negotiate recapitalisation, and/or consider any turnaround proposals;
3. the administrator reports to creditors who ultimately determine the future of the company in a voting process. Creditors must choose between approving a DOCA, a return of the company to director control, or liquidation – and they must do so within a compressed timetable. That deadline concentrates minds, accelerates negotiations, and generates deal pressure that is difficult to replicate outside a formal appointment.

Australian courts have shown a consistent willingness to support the VA process and tailor the application of the statutory regime to the circumstances of different enterprises. For example, courts regularly extend statutory timeframes to facilitate complex, multi-party restructurings that would not fit within the standard VA timetable. That judicial pragmatism, combined with the moratorium protections and the compulsory nature of the VA process, make it a powerful and flexible tool for restructuring in Australia.

If the majority of creditors in number (and value of debt) approve a DOCA, the implementation of the DOCA's terms can achieve outcomes that are often impossible outside a formal process. For example, DOCAs can be used to transfer shares to creditors in exchange for a release of debt, either with shareholder consent or with leave of the Court.

Recent cases, including the Toys "R" Us restructure discussed below, reinforce judicial support for pragmatic, creditor-focused outcomes in Australia.

In *Clubb (Deed Admin), Toys 'R' Us ANZ Ltd (Subject to Deed of Company Arrangement), Re* [2025] FCA 1135, the Federal Court considered the scope of a DOCA used to implement a change of control.

In that case, the creditors of a major toy retailer approved a DOCA proposal that contemplated transferring the issued shares to a special purpose vehicle, notwithstanding that shareholders would receive no return under the proposed arrangement.

An application was made to the Court to facilitate the implementation of the DOCA. The Court had to consider whether it had the power to approve the transfer of equity-linked instruments – including share options, warrants and analogous instruments that were contingently convertible into shares – so that they could be transferred or cancelled as part of the restructure.

The Court approved the application, enabling the deed administrators to deal with those instruments as part of the DOCA implementation process.

This decision illustrates that DOCAs can be used as effective control-transaction tools. Where creditor interests are properly protected and there is no unfair prejudice to members (or holders of other forms of equity), the courts have shown a pragmatic willingness to support commercially driven outcomes, including outcomes that involve the transfer or cancellation of a variety of equity-linked "hybrid" instruments (and not just shares) as part of a change of control restructure. Such a trend is likely to be more pervasive in industries featuring frequent use of such instruments to quickly raise working capital without immediately diluting equity. Key examples here will likely include ESG-affected capital-intensive sectors such as oil and gas, which require significant upfront investments for development and exploration programmes and whose funding options are increasingly more limited and complex.

Correspondingly at the other end of the ESG spectrum, we expect the renewable energy sector to feature an increased incidence of DOCA-led change of control restructures, including as part of loan-to-own strategies. A key driver here is the significant curtailment of solar and wind farm dispatch into the National Energy Market in response to constrained energy transmission or storage infrastructure despite many of the financial models underpinning the financing of those projects typically assuming minimal curtailment. A prime example of this problem is the "rhombus of regret" region in northwest Victoria featuring numerous solar farms experiencing severe grid connection delays and curtailment of at least 50%,[4] resulting in the likelihood of severe losses for current investors in those projects.

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> Australian courts continue to show pragmatic support for creditor-driven DOCAs, including the transfer or cancellation of shares and equity-linked instruments to achieve control transactions.

Increasing regulatory scrutiny in 2025 and 2026

After taking a fairly benevolent approach during the COVID era, over the past year, the ATO has materially increased enforcement activity. Winding up applications are up across the board, with more than one-third now initiated by the ATO.

The ATO has also intensified its focus on community tip-offs about tax avoidance, with reported increases in red flags across the construction, food services and retail trade industries.[5] In response, it has committed to taking firmer action against evasion and using the full suite of recovery tools available,[6] including issuing statutory demands and garnishee orders, serving director penalty notices and commencing winding up proceedings.

Increasing government intervention in 2025 and beyond

In a theme we expect to continue into 2026 and beyond, government intervention has increased where distressed operators are viewed as economically critical or nationally significant.

4. Australian Energy Market Operator, 2025 Enhanced Locational Information Report (Report, July 2025) at [7.3], pp.97-100.
5. ATO guidance regarding tip-off procedures and results, 7 November 2025, accessible at: Making a tip-off | Australian Taxation Office.
6. ATO guidance regarding firmer enforcement measures, 5 January 2026, accessible at: Firmer action we may take | Australian Taxation Office.

By way of example, the South Australian and Commonwealth Governments elected to jointly intervene to rescue the Whyalla steelworks. The Whyalla steelworks, produces more than 75% of Australia's structural steel used in major infrastructure projects. It also employs around 1,500 people in regional South Australia.

Following default in the payment of unsecured royalties and water charges (alongside other trade debts reported to be at least $300 million), the South Australian Government moved to force the company into external administration. The appointment was enabled by urgent amendments to the *Whyalla Steel Works Act 1958* (SA), with further amendments elevating the State to a first-ranking secured creditor and conferring a right to appoint administrators.

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> In 2026, sustained diesel price shocks, higher interest rates and AI-driven workplace changes are expected to intensify distress across mining, logistics, retail and construction sectors.

The intervention to rescue the Whyalla steelworks illustrates how swiftly the "rules of the game" can shift when governments are prepared to legislate to protect a strategically important asset. For secured and unsecured creditors alike, the case is a reminder to price in sovereign risk, including the risk of priorities being upended mid-process, even in historically anti-interventionist and creditor-friendly countries like Australia.

Emerging themes for 2026

We anticipate that the next 12 months will be shaped by the following key themes:

1. ongoing distress in certain sectors e.g. mining, logistics, retail and construction;
2. increasing formal insolvencies;
3. interest rate and inflation pressures;
4. flow-on effects of the Iran war and high diesel prices; and
5. potential flow-on effects of Artificial Intelligence (**AI**) as workplaces adjust to the future.

Sustained higher interest rates, inflation and supply chain issues (particularly liquid fuels) combined with low business confidence and constrained household budgets are now creating headaches for Australia's Reserve Bank, company directors, lenders and Australian households.

It is a common sight on trucks in Australia to see a bumper sign which reads "*Without Trucks, Australia Stops*". In 2026, without diesel, the trucks stop, the freight trains stop, the excavators and rock trucks stop, the tractors stop and exports stop. For a country whose prosperity relies in large part upon growing, raising or digging up and then shipping around commodities, it is hard to overstate the significance of diesel to the Australian economy. The acute nature of this exposure has been heightened by the unfolding news at the time of publication of this article of a major fire at one of Australia's two oil refineries, which is likely to significantly impair Australia's petrol and diesel production in the short to medium term.[7]

As a core input cost for transport, logistics, construction, mining and agriculture, sustained diesel price increases will flow rapidly through supply chains, widening operating cost gaps, compressing already thin margins and accelerating cash burn in sectors with limited capacity to pass costs on to end consumers.

For transport-heavy and regional businesses in particular, the effect is compounding: higher fuel costs coincide with the same interest rate and wage pressures described above, creating multiple simultaneous stress points that are difficult to manage without operational restructuring or external intervention.

The other great source of Australia's prosperity is the brains of the nation – our highly skilled and educated workforce. Australia has a hugely valuable white-collar services industry. That industry too, faces headwinds, as the rollout and adoption of AI brings both opportunities and risks. It remains to be seen how the adoption of AI by Australia's services industry will play out, but if it unfolds in a way that results in a significant increase in unemployment (temporary or otherwise), the risks to retail businesses and other businesses reliant upon discretionary consumer spending will only increase.

What's next?

We are obviously not economists or market forecasters. However, as restructuring and insolvency lawyers, we are keenly attuned to current and emerging market and industry trends and issues. As summarised above, these market conditions present a panoply of risks, but also corresponding opportunities which Australian restructuring mechanisms (both informal and formal) are reasonably well-placed to facilitate.

7. "Major fire at Australian oil refinery to impact nation's petrol supplies", BBC, 16 April 2026, accessible at: Geelong fire: Blaze at Australian oil refinery to impact petrol supplies; "'Equipment failure' to blame for Viva refinery blaze: firefighters", Australian Financial Review, 16 April 2026, accessible at: LIVE UPDATES: Geelong oil refinery fire at Viva Energy caused by equipment failure; facility a major hazard. according to Australian Workers' Union.

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DOMINICAN REPUBLIC

Cross-Border Insolvency under Dominican Law 141-15:
Recognition of Foreign Proceedings and Emerging Jurisprudential Trends

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BIO

Fabio J. Guzmán Saladín is Co-Managing Partner of Guzmán Ariza and co-chair of the firm's corporate practice. He is widely recognized as one of the leading restructuring and insolvency lawyers in the Dominican Republic and is a trusted advisor to domestic and international companies in mergers and acquisitions, banking and finance, project finance, and complex corporate transactions.

He has served as court-appointed trustee in two of the most complex judicial restructuring proceedings conducted under Law No. 141-15, with partner Pamela Benzán Arbaje acting as expert auxiliary. In these landmark proceedings, they achieved the first court-approved restructuring plan in the country under the current insolvency framework. He also led the legal team in the first major bankruptcy and restructuring case in the Dominican Republic. Under his leadership, Guzmán Ariza has established itself as the leading firm in restructuring and insolvency matters in the Dominican Republic, having acted in most of the admitted proceedings under the current legal regime. Among these matters, the firm handled the first restructuring in Dominican history involving trust structures.

His practice further encompasses cross-border insolvency, corporate bankruptcy, financial investigations, and asset recovery. He has represented multinational companies in complex bidding processes and government contracts in the Dominican Republic. He also collaborated with the restructuring committee of the Federation of Chambers of Commerce of the Dominican Republic in the drafting process that led to the enactment of Decree No. 38-25.
Beyond his legal practice, Guzmán Saladín serves as Chair of the Board of Directors of SCG Legal, a global network of more than 125 independent law and lobbying firms across over 65 countries. He is a former president and treasurer of the German-Dominican Chamber of Commerce and Industry, where he currently serves as a board member, and is a recognized international speaker on insolvency and restructuring matters.

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Pamela Benzán Arbaje is a Partner at Guzmán Ariza and one of the leading restructuring and insolvency lawyers in the Dominican Republic, with a strong background in business and commercial law. She advises corporate clients, investment funds and financial institutions on complex business transactions, project finance, mergers and acquisitions, public procurement contracts and cross-border investments, while maintaining a particular focus on restructuring and insolvency matters.

Pamela has participated in nearly all major restructuring and liquidation proceedings under the Dominican Insolvency Law (Law 141-15), representing local and foreign debtors, creditors, and court-appointed officers, as well as serving as an ancillary expert to court-appointed trustees. She has also acted for foreign liquidators and debtors in cross-border insolvency cases formally recognized in the Dominican Republic, giving her extensive experience in both domestic and international insolvency proceedings. Her practice spans corporate reorganizations, distressed M&A, asset recovery and cross-border insolvency coordination.

She currently serves as Coordinator of the Observatory of Mercantile Restructuring of the Federation of Chambers of Commerce and Production of the Dominican Republic (FEDOCÁMARAS), where she contributes to the institutional development of the national insolvency framework.

Pamela is also Co-Chair of the Latin America Chapter of International Women's Insolvency and Restructuring Confederation (IWIRC), member of the INSOL Latin America Advisory Council and a frequent speaker at both local and international insolvency forums. She has recently participated as a speaker at the Global Restructuring Review (GRR) Americas conference and the INSOL International Latin America Roundtable and is often invited to lecture on insolvency law at leading Dominican universities. She has also been invited to write on insolvency and restructuring topics for both international and local publications.

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Introduction

Since the enactment of Law No. 141-15 on Restructuring and Liquidation of Companies and Merchant Individuals, the Dominican Republic has progressively positioned itself as one of the most modern insolvency jurisdictions in the Caribbean and Latin America. The law represented a substantial shift from the outdated bankruptcy regime inherited from the Napoleonic commercial tradition and introduced a rescue-oriented insolvency framework based on internationally recognized principles. Among its most significant innovations was the incorporation of Title IV, dedicated to international cooperation and cross-border insolvency proceedings, largely inspired by the UNCITRAL Model Law on Cross-Border Insolvency.

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> The Dominican Republic has progressively positioned itself as one of the most modern insolvency jurisdictions in the Caribbean and Latin America.

At the time of its enactment, the inclusion of cross-border insolvency provisions was particularly ambitious for a jurisdiction that had little practical experience with international insolvency matters. Yet, given the increasing globalization of commerce, the expansion of foreign investment into the Dominican Republic, and the growing presence of Dominican companies operating abroad, the need for an effective framework governing multinational insolvency situations became unavoidable.

Today, however, those provisions are becoming increasingly relevant in practice. The growing presence of multinational groups, international financing structures, airlines, tourism operators, and foreign investors with assets or operations in the Dominican Republic has led to a rise in situations where foreign restructuring or liquidation proceedings may require recognition or coordination locally. Recent international restructurings involving airlines, hospitality groups, and multinational debt structures have demonstrated the growing importance of cross-border insolvency mechanisms for the Dominican market.

Over the past decade, Dominican courts have gradually begun to test and interpret these provisions. While domestic restructuring proceedings initially dominated the jurisprudential landscape, recent years have witnessed the emergence of important cross-border cases that have exposed both the strengths and the limitations of the Dominican insolvency regime. Among these cases, the decisions involving TMS and, more recently, Franc Gajsek have become particularly relevant in shaping the interpretation of Title IV of Law 141-15.

Origins and objectives of Title IV of Law 141-15

The cross-border insolvency provisions contained in Title IV of Law 141-15 are directly inspired by the UNCITRAL Model Law on Cross-Border Insolvency adopted by the United Nations General Assembly. The Dominican legislature adopted the core architecture and many substantive provisions of the UNCITRAL Model Law, with adaptations reflecting Dominican procedural law.

In practical terms, Title IV was intended to facilitate judicial cooperation, recognition of foreign proceedings, and coordination between jurisdictions in multinational insolvency scenarios.

Article 197 of Law 141-15 establishes the circumstances under which Title IV applies. These include situations where foreign courts or foreign representatives request assistance in the Dominican Republic; where Dominican courts or insolvency officers seek cooperation abroad; where simultaneous insolvency proceedings affect the same debtor in multiple jurisdictions; and where foreign creditors seek to participate in Dominican proceedings.

Title IV also represented a substantial modernization of Dominican insolvency law. Prior to Law 141-15, Dominican legislation contained virtually no mechanisms addressing multinational insolvency situations.

The practical evolution of cross-border insolvency in the Dominican Republic

Despite the progressive nature of the legislation, the practical application of Title IV remained relatively limited during the first years following the enactment of Law 141-15. Most insolvency proceedings involved purely domestic debtors, and courts initially focused on developing jurisprudence regarding restructuring procedures, stays of enforcement actions, creditor rankings, and approval of restructuring plans.

This evolution became particularly evident in cases where debtors possessed assets located in the Dominican Republic while simultaneously undergoing insolvency proceedings abroad.

This trend has become increasingly relevant in sectors such as aviation, tourism, hospitality, and multinational real estate structures, where companies often maintain assets, regulated operations, employees, or financing arrangements across multiple jurisdictions simultaneously. As a result, foreign restructuring proceedings may now generate direct consequences for Dominican creditors, local subsidiaries, concession rights, or locally registered assets.

One of the earliest significant cases testing the practical application of Title IV was the TMS DIENSTLEISTUNGS, GMBH proceeding, arising from Order No. 975-2022-SORD-00001 issued on February 28, 2022, by the President Judge of the Seventh Chamber of the Civil and Commercial Court of First Instance of the Judicial District of Santiago. Recognition of the foreign judicial liquidation proceeding was granted, and the sole Dominican asset was subsequently sold. However, as of the date of this publication, the closure of the local liquidation proceedings remains pending due to institutional obstacles at the Mercantile Registry of Puerto Plata, which lacks an established procedure for registering the effects of recognized foreign insolvency proceedings and has been unable to record either the liquidation proceeding itself or the appointment of the foreign judicial liquidator in the commercial registry of the affected entity.

This experience illustrates a recurring limitation within Dominican cross-border insolvency practice: while the statutory framework is modern and internationally aligned, institutional implementation has not evolved at the same pace. Registries and administrative bodies often lack the internal procedures necessary to give effect to insolvency-related measures ordered within the framework of recognized foreign proceedings. Recognition alone is insufficient if the institutions responsible for executing those measures are unable to process them.

Although the Dominican courts demonstrated openness toward recognizing and cooperating with foreign proceedings, the implementation phase revealed operational difficulties. Registries often lack internal procedures for recording insolvency-related annotations, restrictions, or transfers ordered within the framework of recognized foreign proceedings. Similarly, governmental entities sometimes failed to fully acknowledge the authority of insolvency courts or foreign representatives.

The Gajsek decision and its jurisprudential significance

The most important recent development in Dominican cross-border insolvency jurisprudence is the Gajsek decision issued by the Third Chamber of the Civil and Commercial Court of Appeal of the National District on April 6, 2026[1].

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While the statutory framework is modern and internationally aligned, institutional implementation has not evolved at the same pace.

The case originated from a request filed by Grega Lippai, acting as foreign insolvency administrator appointed in Slovenia, seeking recognition and international cooperation measures in the Dominican Republic in connection with a Slovenian personal bankruptcy proceeding involving Franc Gajsek. The court of first instance granted the request, recognized the foreign proceeding, authorized international cooperation measures, designated the foreign representative as administrator of the debtor’s Dominican assets, and ordered precautionary measures affecting locally registered property, including restrictions on transfers and the suspension of individual enforcement actions.

The appeal raised several fundamental issues that had not previously been fully addressed by Dominican jurisprudence, including due process guarantees, the scope of judicial cooperation, and the substantive limits of foreign proceeding recognition under Dominican law.

1. As of the date of publication, the decision was rendered at the appellate level and remains potentially subject to review before the Dominican Supreme Court of Justice.

One of the central issues addressed by the Court of Appeal concerned the procedural nature of recognition proceedings under Title IV of Law 141-15. The court held that Article 205(I) expressly requires recognition requests to be processed as contradictory proceedings between the foreign representative and the debtor. However, the first instance court had processed the matter through a non-adversarial proceeding and imposed measures directly affecting the debtor's assets without prior participation by the debtor. The appellate court concluded that this procedural irregularity violated due process guarantees and justified annulment of the first instance ruling.

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> Dominican courts are increasingly moving away from a purely formal recognition approach and toward a more sophisticated model that balances international cooperation with constitutional safeguards and domestic public policy limitations.

The appellate court also directly addressed the tension between the recognition mechanisms contained in Title IV and the substantive scope limitations of Dominican insolvency law. In its analysis, the court emphasized that Article 2 of Law 141-15 limits the application of the Dominican insolvency regime to merchant individuals and business entities, while the Commercial Code defines merchants as persons habitually engaged in commercial activities in their own name. Based on the underlying Slovenian judgment, the court concluded that Franc Gajsek had acted solely as guarantor of obligations assumed by corporate entities rather than as a merchant debtor acting personally in commerce. Relying additionally on the UNCITRAL Guide to Enactment, which recognizes that jurisdictions may exclude non-merchant individuals from cross-border insolvency regimes, the court ultimately held that recognition remained subject to Dominican public policy and the substantive limitations of Law 141-15, preventing recognition of the foreign proceeding under the Dominican insolvency framework.

The ruling is particularly significant because it reflects Dominican courts' increasing willingness to subject foreign insolvency judgments to substantive scrutiny grounded in public policy, procedural regularity, and due process considerations, rather than granting automatic recognition.

Another particularly significant aspect of the decision was the court's clarification regarding the relationship between cross-border insolvency recognition under Law 141-15 and the traditional exequatur regime established under Law 544-14 on Private International Law. The Court of Appeal held that insolvency and bankruptcy matters are expressly excluded from the scope of Law 544-14 and therefore cannot be subject to the ordinary exequatur framework established under that statute. As a result, the court declared inadmissible the request for homologation of the Slovenian judgment and clarified that recognition and international cooperation relating to foreign insolvency proceedings must be governed exclusively by the special framework contained in Title IV of Law 141-15.

This clarification is especially relevant because earlier cross-border insolvency cases, including TMS, had generated uncertainty regarding whether foreign insolvency decisions first required traditional exequatur recognition before insolvency cooperation mechanisms could be activated locally. By distinguishing cross-border insolvency recognition from the ordinary exequatur framework, the court adopted a more modern and functional interpretation aligned with the objectives of the UNCITRAL Model Law, eliminating procedural uncertainty regarding the applicable recognition framework and avoiding the application of an incompatible statutory regime.

The decision therefore signals an important evolution within Dominican insolvency practice. Courts are increasingly moving away from a purely formal recognition approach and toward a more sophisticated model that balances international cooperation with constitutional safeguards and domestic public policy limitations.

Taken together, the TMS and Gajsek proceedings illustrate the two axes along which Dominican cross-border insolvency practice is currently developing. At the judicial level, courts are demonstrating increasing sophistication: recognition requests are now subject to substantive scrutiny on due process, public policy, and scope of grounds, and the applicable procedural framework has been clarified.

At the institutional level, however, significant gaps remain. The TMS proceeding illustrates this directly. Despite recognition having been granted and the sole Dominican asset having been sold, closure of the local liquidation proceedings remains pending due to the inability of the Mercantile Registry of Puerto Plata to process the registration of a recognized foreign insolvency proceeding — a situation reflecting a structural deficiency that judicial development alone cannot resolve.

Counsel involved in the proceedings have engaged directly with the relevant institutions to explain the nature and requirements of cross-border insolvency recognition, and the matter is currently in the process of being resolved. As the first case of its kind to reach this stage in the Dominican Republic, TMS is also expected to lay the groundwork for future proceedings: recommendations have been made to the relevant institutions to develop internal guidelines for handling this type of registration going forward.

There are reasonable grounds to expect that institutional capacity in this area will improve. For practitioners advising clients with Dominican exposure, however, both dimensions matter equally: a well-grounded recognition order is only as effective as the administrative infrastructure capable of giving it practical effect.

Conclusion

Nearly a decade after the enactment of Law 141-15, cross-border insolvency has evolved from a largely theoretical component of Dominican insolvency law into an increasingly active and jurisprudentially significant area of practice.

The incorporation of the UNCITRAL-inspired framework positioned the Dominican Republic among the jurisdictions with modern insolvency legislation capable of addressing multinational insolvency scenarios. However, only in recent years have cases such as TMS and Gajsek begun to meaningfully test the practical, procedural, and constitutional boundaries of these provisions in real-world cross-border restructurings and liquidations.

Among these developments, the Gajsek decision stands out as a particularly important milestone in the maturation of Dominican cross-border insolvency jurisprudence. The ruling demonstrates that Dominican courts are moving beyond a purely formal application of Title IV and are instead engaging in a more sophisticated analysis involving due process, constitutional guarantees, public policy limitations, and the substantive scope of Dominican insolvency law. At the same time, the court's clarification that recognition proceedings under Law 141-15 do not require a separate exequatur process reflects a more modern and efficiency-oriented approach to international insolvency cooperation, aligned with the practical realities of multinational restructurings.

These developments also reveal that the future evolution of Dominican cross-border insolvency practice will depend not only on judicial sophistication, but equally on institutional coordination and practical implementation. Recognition mechanisms cannot operate effectively if registries, administrative authorities, and governmental institutions lack the protocols and technical capacity necessary to execute insolvency-related measures consistently and efficiently.

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The Dominican Republic is steadily positioning itself as an emerging regional venue for cross-border insolvency cooperation.

This evolution carries practical significance for international practitioners. The Dominican Republic remains one of the leading recipients of foreign direct investment in the Caribbean, with substantial exposure in aviation, tourism, hospitality, energy, real estate, and free zones — sectors where multinational insolvency situations, including proceedings currently affecting major regional operators, may generate direct consequences for locally held assets, registered operations, and creditor positions. For practitioners advising on cross-border restructurings with Dominican exposure, the framework described in this article is no longer theoretical.

As international restructurings continue to increase globally, the Dominican Republic is steadily positioning itself as an emerging regional venue for cross-border insolvency cooperation. The long-term credibility of that evolution, however, will depend on the system's ability to balance efficiency, judicial cooperation, procedural fairness, and institutional predictability within an increasingly complex international restructuring landscape.

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FRANCE

French Restructuring:
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BIO

Pierre-Gilles Wogue, partner at ADVANT Altana, has over two decades of experience in distressed M&A, restructurings and insolvency proceedings, and alongside a broader transactional and litigation practice. He advises corporates, financial institutions, banks, and public authorities on complex domestic and cross-border matters.

He has contributed to legislative reforms at the French, European, and international levels.

Due to his experience in various major cases, he is regularly distinguished in directories such as Chambers or Legal 500. He has been described by Chambers as "*very up to speed and quite inventive in complex cases*" and "*good at building a platform for negotiations.*"

Before co-founding Advant-Altana with former partners of Rambaud Martel and leading international firms, he was a partner at Rambaud Martel (now Orrick) and Salans (now Dentons).

He is officer at the International Bar Association (IBA) and is active in various other national and international organizations, having a strong focus on restructuring.

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Félicité Viossat is a member of the Restructuring and Special Situations team at ADVANT Altana.

She assists French and international companies facing financial difficulties at all stages of restructuring, whether through amicable proceedings (conciliation, ad hoc mandate) or judicial insolvency proceedings (safeguard, reorganization, liquidation). She is also involved in litigation related to insolvency proceedings, as well as in broader commercial disputes.

Félicité also advises on restructuring transactions with a corporate or financial component, including matters involving M&A, commercial law, contract law and financing arrangements.

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1. French restructuring law has been shaped, over the past decade, by two forces pulling in the same direction. The first is European harmonisation: the ordonnance of 15 September 2021 transposing Directive 2019/1023 (the "***Insolvency II Directive***") introduced into French law classes of affected parties, cross-class cram-down, and the absolute priority rule. A further wave is now underway: Directive 2026/799[1], adopted on 30 March 2026 (the "***Insolvency III Directive***"), will require France to reinforce its framework, notably on pre-pack sales, with a transposition deadline of January 2029. The second force is internal: a practitioner culture built around prevention, confidentiality, and negotiated outcomes, the roots of which predate any European initiative by decades.

> "France already complies, in substance, with most of what the text requires — to the point where the French framework reads less like a system under pressure to adapt than like the reference model the European legislator had in mind.

France has absorbed ideas from abroad: the classes of affected parties' mechanism owe something to US and, to a certain extent, to German and Austrian practices, where creditor committees have long been part of the landscape. But France has also exported. The Insolvency II Directive has been described as a "*texte franco-allemand*" and the pre-pack cession — now being standardised across Europe by the Insolvency III Directive — was in place in France long before it became a European one. France already complies, in substance, with most of what the text requires — to the point where the French framework reads less like a system under pressure to adapt than like the reference model the European legislator had in mind.

2. The result is a toolkit that is both distinctively French and increasingly legible to international market participants — one that requires examining not only what each instrument does, but how they relate to one another and how they have evolved under European influence without losing their underlying logic.

3. Three instruments deserve the international stakeholder's attention: (i) the amicable proceedings that form the backbone of French restructuring practice; (ii) the classes of affected parties mechanism, which is progressively altering the balance of power between debtors, creditors, and shareholders; and (iii) the two pre-packaged tools — accelerated safeguard and pre-pack sale — which, together with the dual-track practice they enable, translate privately negotiated outcomes into judicially effective ones towards all the main creditors and shareholders.

1) Behind Closed Doors: The Power of Amicable Proceedings

4. Two procedural tools make this possible, both operating under strict confidentiality — no public filing, no disclosure to suppliers, clients, or employees. *Ad hoc* proceedings (*mandat ad hoc*) are the most flexible instrument in the French restructuring toolkit: the French Commercial Code devotes a single article to them, imposing no time limit, no mandatory scope, and no prescribed outcome. The debtor requests the appointment of a *mandataire ad hoc* or a conciliator, defines the proposed mission, and decides with the appointed *mandataire ad hoc* or conciliator which creditors and other third parties to bring to the table. Conciliation proceedings (*conciliation*) are more structured: limited to five months, they carry significant legal consequences — subject to certain conditions, a court-approved conciliation agreement grants the debtor a safe harbour against clawback actions and may confer on new-money lenders a statutory priority (*privilège de conciliation*).

1. Directive (EU) 2026/799 of the European Parliament and of the Council of 30 March 2026 harmonising certain aspects of insolvency law, OJ L, 1 April 2026.

5. Neither procedure requires the debtor to be in a state of cessation of payments, though conciliation can be opened where insolvency has not persisted for more than 45 days, reflecting the flexibility of these amicable proceedings. In practice, the two instruments are frequently used in sequence: *ad hoc* proceedings open to allow preliminary negotiations, followed by conciliation to formalise and protect the outcome.

6. The figures confirm that amicable proceedings are no longer a niche practice. According to the CNAJMJ, amicable proceedings increased by 35% between 2019 and 2024, rising from 5,788 to nearly 9,000 proceedings. In 2025, 9,101 proceedings were opened (5,156 *ad hoc* and 3,945 conciliations). Between 2018 and 2023, prevention proceedings grew nearly ten times faster than collective insolvency proceedings (+41% against +4.2%), while representing fewer than 15% of total insolvency proceedings in number but concerning, on average, companies of the largest size. The success rate reinforces the point: 70–75% of amicable proceedings result in a signed agreement, compared with around 60% for safeguard and 30% for judicial reorganisation. The most prominent recent restructurings — Pierre & Vacances Center Parcs (2022), Orpea (2022–2023), Casino (2023–2024), Atos (2024–2025) — all originated in amicable proceedings. But these large-cap cases are only the visible tip of the iceberg: behind them lies a much larger volume of mid-market and SME restructurings that routinely combine an amicable phase with judicial proceedings.

7. The Insolvency III Directive adds two further reasons to act early. First, it introduces a harmonised framework for avoidance actions (*nullités de la période suspecte*), with suspect periods extending up to three years before the opening of collective proceedings — well beyond France's current 18-month maximum. Subject to certain conditions, a court approved conciliation agreement provides a statutory safe harbour against such avoidance actions.

Second, the Directive introduces a directors' liability framework requiring directors to file for insolvency proceedings within three months of the onset of serious financial difficulties. France's existing 45-day rule is stricter and will likely be preserved, but the broader signal is clear: a director who opens conciliation at the first signs of distress builds the most credible defence against future allegations of delay.

8. A debate is underway in France about the future of amicable proceedings. The *Conseil d'État* has proposed merging *ad hoc* proceedings and conciliation into a single procedure and relaxing the five-month time limit. Most practitioners resist: the *ad hoc* proceedings offer total confidentiality, no involvement of the public prosecutor, and complete freedom of scope — advantages that a unified framework would dilute.

2) Classes of Affected Parties: A Redistribution of Power

9. The introduction of classes of affected parties (*classes de parties affectées*) is the most consequential reform of French restructuring law brought about by the Insolvency II Directive.

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The success rate reinforces the point: 70–75% of amicable proceedings result in a signed agreement, compared with around 60% for safeguard and 30% for judicial reorganisation.

10. Under the previous system, only certain creditors were grouped into two or three committees (credit institutions, main suppliers and, where applicable, bondholders) by nature rather than economic substance. Write-offs could be imposed on dissenting members by a two-thirds majority within each committee, but shareholders could not be compelled to accept any restructuring of the capital structure.

11. Under the new system, the formation of classes is compulsory in safeguard and rehabilitation proceedings for companies exceeding 250 employees and €20 million in turnover, or €40 million in turnover regardless of headcount. In accelerated safeguard proceedings, classes apply regardless of the debtor's size. Below those thresholds, classes remain optional but may be constituted at the debtor's request or on the application of the court-appointed judicial administrator (*administrateur judiciaire*), subject to the authorisation of the insolvency judge (*juge-commissaire*).

Although classes were initially perceived as reserved for large corporates, the mechanism has been adopted well beyond the mandatory perimeter, including in mid-market and SME proceedings. The Orpea and Casino restructurings, discussed below, are among the most visible illustrations. More broadly, restructurings that would previously have involved limited financial analysis are now approached with a degree of sophistication — waterfall analysis, going concern valuations, in-the-money and out-of-the-money assessments — that was until recently the preserve of large-cap transactions.

12. Classes are constituted on the basis of a community of economic interest, reflecting the priority ranking of claims in the capital structure. At a minimum, secured creditors holding *in rem* security interests form separate classes, pre-insolvency subordination agreements are respected, and equity holders form at least one separate class. Beyond this, the judicial administrator retains broad discretion to create additional classes where distinct economic interests so require.

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> For the first time under French law, shareholders can be compelled under a general mechanism to accept a restructuring plan that affects their rights or modifies the company’s articles of association.

13. Plan adoption requires a favourable vote, achieved by a two-thirds majority of votes actually cast within each class, with no quorum requirement. Where unanimity across all classes is not achieved, then cross-class cram-down becomes available. Three conditions must at least be met: approval by at least one class that would receive some recovery in a liquidation scenario (an “in-the-money” class); the best-interest-of-creditors test, ensuring that no creditor is worse off than in a liquidation; and the absolute priority rule, under which senior claims must be satisfied in full before junior claims receive anything, subject to limited flexibility in favour of the relative priority rule.

14. Perhaps one of the most strategic innovations for international investors is the possibility of imposing a plan on equity holders. For the first time under French law, shareholders can be compelled under a general mechanism to accept a restructuring plan that affects their rights or modifies the company’s articles of association.

Creditors now have a more structural role in shaping the outcome rather than merely accepting or rejecting a plan conceived without them.

The Orpea restructuring (2022–2023, since rebranded Clariane) provided a striking illustration: in a €9.5 billion debt restructuring, existing shareholders were diluted to less than 1% of post-restructuring capital through a court-approved plan adopted via cross-class cram-down.

That said, creditors have not been uncritical. One of the grievances of bank lenders relates to valuation. Cross-class cram-down requires that at least one approving class be in the money (meaning that its members would have a right to payment on the basis of the debtor’s value as a going concern) — a concept defined neither by the Directive nor by French law. Since going concern value is generally higher than liquidation value, its use as the threshold for assessing class recovery mechanically facilitates plan adoption, sometimes on foundations that creditors consider fragile.

15. The Cour de cassation, France’s highest civil court, has begun to address these issues. On 5 March 2025 (Nos. 23-22.267 and 23-22.315), it ruled on derogation from the absolute priority rule and the best-interest test in the absence of an alternative plan. On 1 October 2025 (No. 24-18.021), it confirmed that the best-interest test must be assessed by reference to a creditor’s economic rank in the waterfall, not by reference to individual regulatory constraints. The relative scarcity of judgments from the Cour de cassation reflects a reality: most dissenting parties either accept the restructuring plan or reach a negotiated settlement before disputes escalate to the highest court.

3) Pre-Packaged Tools: Plans and Sales

16. The pre-packaged plan (*plan prépacké*) is an additional technique by which a restructuring agreement negotiated privately during the amicable phase is then submitted, with minimal delay, to judicial ratification through collective proceedings. It can be deployed through a standard safeguard, a judicial reorganisation, or an accelerated safeguard procedure (*sauvegarde accélérée*).

17. The accelerated safeguard is well suited to pre-packaged restructurings and has become its natural home: it is France's domestic implementation of the Insolvency II Directive. It may be a "semi-collective" or a "collective" procedure: the debtor selects which creditors are subject to the proceedings with affected parties — those whose rights the plan will alter — determined as of the opening judgment, leaving all others entirely unaffected. Affected creditors may be drawn from any category, not merely financial creditors.

18. In practice, the debtor uses conciliation to reach agreement with a sufficient majority of creditors on the terms of a restructuring plan, typically through a lock-up agreement. The debtor then files for accelerated safeguard, available only where plan adoption is probable. Classes are constituted, the plan is submitted to a vote, and, subject to the requisite majorities, court approval typically follows within two months. The distinctive feature is the combination of confidentiality and flexibility in the amicable phase with the coercive force of collective proceedings: dissenting or absent creditors can be bound through cram-down.

19. The Insolvency III Directive introduces a harmonised framework for pre-pack sales (*prépack cession*): the sale of a distressed business is negotiated during a confidential preparatory phase under the supervision of a monitor and executed shortly after the opening of collective proceedings.

France has had a functional equivalent for over a decade, codified by the *ordonnance* of 12 March 2014. An acquirer is identified and terms substantially agreed during the amicable phase; the commercial court then approves the asset sale shortly after insolvency proceedings open.

20. The strategic value of this instrument for acquirers deserves emphasis: a pre-pack sale allows completion before the deterioration of the business that a public process invariably triggers, as every week of public uncertainty erodes enterprise value. Courtepaille (2020) illustrates the point: the restaurant chain was acquired through a pre-pack sale, preserving the business while shielding the acquirer from legacy liabilities.

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The distinctive feature is the combination of confidentiality and flexibility in the amicable phase with the coercive force of collective proceedings: dissenting or absent creditors can be bound through cram-down.

During the conciliation phase, practitioners routinely run a dual-track process in parallel: a share deal, restructuring the equity while preserving the legal entity, alongside an asset deal structured as pre-pack sale. The two tracks are negotiated simultaneously, giving the debtor and its advisers real optionality until late in the process. The track that closes is the one that delivers the best outcome for the estate. This flexibility is not written into any statute.

21. The Casino group restructuring (2023–2024) illustrates the full range of these pre-packaged tools in action. Facing over €6 billion in financial debt, the group entered conciliation where the terms of a comprehensive restructuring were negotiated with its principal creditors and concluded a lock-up agreement before filing for accelerated safeguard. Classes were constituted; the plan — involving a change of control, massive debt reduction, debt-to-equity conversion and new-money injection by a consortium led by EP Global Commerce — was adopted with the required majorities. Dissenting creditors and existing shareholders were crammed down. The process lasted approximately six months.

22. The Insolvency III Directive will require France to reinforce its framework in several respects. The Directive introduces more precise criteria for the sale process: the process must be competitive, transparent, fair, and consistent with market standards. This will affect not only pre-pack sales but potentially the broader landscape of court-supervised sales, where acquirer selection has historically been weighted towards employment preservation over creditor recovery. The Directive's best-interest-of-creditors test aligns to a certain extent the pre-pack sale with the discipline already applicable under the classes framework. The Directive further introduces creditor committees (*comités de créanciers*), a figure distinct from classes, designed to ensure structured creditor participation throughout the proceedings, with a particular focus on cross-border creditors. This will require a new legislative layer in French law.

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French restructuring law now offers international investors a coherent, prevention-oriented system that few European jurisdictions can match in both breadth and sophistication.

23. French restructuring law now offers international investors a coherent, prevention-oriented system that few European jurisdictions can match in both breadth and sophistication. Its distinctive strength lies in the seamless articulation between confidential negotiation and judicial enforcement — a feature that the European legislator is progressively validating by modelling key provisions of the Insolvency II and III Directives on French practice. Reciprocally, France has demonstrated its capacity to incorporate mechanisms drawn from European harmonisation, such as cross-class cram-down and the absolute priority rule, and to make them its own. One of the principal questions for the coming years is not whether France will adapt to European requirements, but to what extent other EU Member States will fully converge toward a comparable model — one that offers companies in distress, and their stakeholders, a flexible and more predictable legal framework within which to restructure debt, equity and business operations and provide new financing in an ever-changing global economy.

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GERMANY

Key Developments and the Latest Trends in Germany
– A Legal Perspective

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Germany's restructuring landscape is going through fundamental changes. As global economic pressures rise and once-solid industries face structural disruptions, companies are being pushed to rethink how they sustain long-term viability. The German restructuring market has therefore had to react to this tectonic shift. By implementing and promoting a modern and resilient legal framework and equipping itself with tools designed to help businesses navigate an increasingly complex and competitive environment, German restructuring law has successfully reinvented itself.

> German restructuring law has successfully reinvented itself.

I. The Economic Outset – Challenging times for German industry

"Can anything halt the decline of German industry?" – the Financial Times asked on 12 November 2025. The answer to this question is: Yes, the restructuring market can.

Admittedly, this answer is telling – it is half glum, half optimistic. It acknowledges that Germany is indeed in one of the most challenging periods of its history as "Europe's manufacturing champion". Confronted with accelerated global digitalisation, ground-shaking technological innovations (AI in general and LLMs in particular) and new competitors on the global market, especially from China, Germany's industry seems almost paralysed.

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Current restructuring and insolvency activity in Germany shows pronounced sector clustering, in particular in (i) real estate development, (ii) chemicals, (iii) fibre/broadband infrastructure, and (iv) the "evergreen" automotive sector which is currently in the transformative process of writing off 140 years of internal combustion engine expertise – values that really ought to be preserved. In real estate development, higher interest rates, a repricing of refinancing risk and persistently elevated construction costs continue to put pressure on project economics and liquidity. In the chemicals sector, structural pressure results from high energy costs (in particular in energy-intensive sub-segments), global overcapacity and fierce international competition, combined with a subdued demand in certain downstream industries. In the fibre/broadband sector, business plans are stressed by slower-than-expected take-up rates, delays in roll-outs and permit grants, and capex inflation, while refinancing windows have tightened significantly. In the automotive sector, the combination of transformation pressure (electrification, software-defined vehicles), cost inflation and global competitive dynamics continues to drive both financial and operational restructurings across OEMs and suppliers.

At the intersection of global socioeconomic pressures and the specific challenges facing the German industrial landscape, restructuring measures are there to enable the investments necessary for sustainable, future-proof and forward-thinking transformations and to give companies the leeway they need to achieve a sustainable turnaround so that they can once again become the powerhouses they once were.

II. Creative Financial Restructuring Solutions

The German legal framework offers a variety of options for conducting successful corporate restructuring proceedings, ranging from amicable out-of-court settlements to court-assisted negotiations and as a last resort to in-court insolvency and restructuring proceedings.

Even in the event of in-court insolvency proceedings, the company must not be stigmatised as a lost cause; German insolvency law encourages debtors to stay in the driver's seat (*debtor-in-possession proceedings*) or to apply for a protective shield which gives the company's management time and the necessary "wiggle room" to develop a thorough and well-thought-out insolvency plan (*protective shield proceedings*). Finally, the insolvency plan itself does not necessarily lead to a company being liquidated. On the contrary, in many cases, the plan develops alternative scenarios that preserve value and prevent the loss of expertise. This trend was further reinforced by the "StaRUG Scheme", i.e. the "Act on the Stabilisation and Restructuring Framework for Businesses" which, for the first time, introduced the possibility of restructuring imminently illiquid companies outside of insolvency proceedings and within a statutory framework. As such, the StaRUG Scheme is tailored to financial restructuring proceedings.

We currently see the most creative restructuring solutions in the real estate, energy and infrastructure sectors. Achieving a turnaround in these sectors is particularly challenging where projects are financed through multi-layered structures (SPVs, intercreditor arrangements, mezzanine tranches, bond or promissory note components). In such settings, financiers are often required to agree to sophisticated out-of-court solutions that (a) preserve the company as a going concern and its potential future monetisation and (b) address the hold-out dynamics among exiting lenders. A recurring theme is the need to offer exiting lenders a viable path to value recovery – potentially via structured exit options and value recovery instruments – while simultaneously providing the remaining lenders with a sound, forward-looking financing platform post-restructuring.

III. The Ongoing Success of the StaRUG Scheme

The StaRUG Scheme is both a testament to the ongoing trend of preventive restructuring proceedings as well as a contributor to their success. In 2025 the number of StaRUG cases rose once again: 87 proceedings before 24 courts, including major restructuring proceedings, such as *Varta AG* or *Leoni AG*. The StaRUG Scheme filled the gap between consensual pre-insolvency restructuring and restructuring in the context of formal and comprehensive in-court insolvency proceedings.

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> The StaRUG Scheme offers struggling companies a powerful toolbox for restructuring without formal insolvency proceedings.

The StaRUG Scheme offers struggling companies a toolbox that they can use for restructuring without having to open formal insolvency proceedings. At the heart of the StaRUG Scheme lies the restructuring plan, which can technically be drawn up without any or just minimal court involvement. It allows for profound changes in the legal relationships between the debtor and its creditors and shareholders, including claims, security interests, certain intra-group third-party securities as well as shareholder rights. We see the most common use cases in classical financial restructurings, ranging from haircuts and payment deferrals to the redesign of financing and workout documentation, as well as the restructuring of the equity layer through the removal of existing shareholders and the facilitation of the entry of new investors. In addition, the StaRUG Scheme is increasingly used for what are known as "Sleeping Beauty" solutions in which parts of the financing are "parked" (economically dormant) to enable the stabilisation of the company and the completion of project-driven situations.

When conceptualising the restructuring plan, the debtor makes an objective decision as to which creditors and/or shareholders should be included in the plan and which measures are to be taken, e.g. reorganising liabilities or agreeing on "fresh money".

The creditors and shareholders are strategically put into different stakeholder classes (e.g. one class for shareholders, one class for creditors, etc.). For the restructuring plan to interfere with their respective rights, it must generally be accepted by *all* of the classes. This requires a 75 % majority vote in each class, whereby the voting rights are determined by the amount of the claim, the value of the security and, in the case of share or membership rights, the debtor's share of the subscribed capital. However, if the required majority in one class is not achieved, the consent of this class may be replaced by way of a *cross-class cram-down*, i.e. the required consent of a dissenting creditor class is substituted or deemed given subject to certain conditions. This particularly applies where the debtor can demonstrate that the restructuring plan yields the best outcome compared to the next-best alternative scenario.

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> Restructurings in Germany are no longer purely financial — they have evolved into holistic transformation agendas encompassing carve-outs, digitalisation, sustainability, and comprehensive M&A solutions.

IV. Holistic Transformation Approaches

In sectors facing structural transformation, restructurings are frequently no longer purely financial. Instead, stakeholders pursue more comprehensive transformation agendas, including carve-out transactions and deeper digitalisation and sustainability-related adaptations. In practice, this has expanded the toolkit beyond classical restructuring and insolvency law measures towards a full-service approach: corporate/M&A work to implement separations, reorganisations and governance changes; general finance advice to restructure capital structures and document fresh money, super-senior and interim funding, and, increasingly, IP, IT and data-related work to implement and roll out new technical solutions, secure and transfer core intangible assets, manage software and platform dependencies, ensure continuity of critical licences, and address data protection and cybersecurity requirements. These measures are often combined with financing solutions (including fresh money and interim funding) to bridge the period until the transformed business model becomes bankable again.

V. New Wave of NPL and distressed M&A dynamics

Particularly in recent years there has been a significant rise in activities in the non-performing loan (NPL) space. For institutional lenders with concentrations in specific asset classes – most notably real estate – solutions increasingly focus on maximising value in the underlying secured assets. This includes lender-led strategies ranging from NPL enforcement and asset realisation to credit bid-driven ownership pathways, as well as structures involving external specialist players (e.g. trustee/fiduciary arrangements for asset administration and disposal). In parallel, foreign investors are seeking entry points into specific German sectors through distressed portfolio acquisitions, aiming to combine fresh money with risk capital and active stewardship to deliver sustainable turnarounds. In practice, such NPL disposals and work-outs are subject to an increasingly demanding regulatory framework in Germany, in particular under the German Secondary Credit Market Act (*Kreditzweitmarktgesetz*), which is based on and implements Directive (EU) 2021/2167 on credit servicers and credit purchasers, and amending Directives 2008/48/EC and 2014/17/EU (commonly referred to in Germany as the “Secondary Credit Market Directive”). This regulatory overlay can add execution complexity to NPL transfers and post-closing servicing, including additional documentation, governance and operational requirements. A recurring practical consequence is the need to involve a dedicated (and, where necessary, appropriately regulated) servicer for the acquired exposures where the underlying debtors are small and medium-sized enterprises (SMEs).

VI. The EU Directive Harmonising Certain Aspects of Insolvency Law (EU COM/2022/702)

On 1 April 2026 the EU Directive harmonising certain aspects of insolvency law entered into force and marked another milestone for European insolvency law. It is aimed at removing obstacles to the European single market and its capital market, arising from differing national insolvency laws. As the title of the Directive suggests, it seeks to harmonise certain aspects of the *substantive* rules of insolvency law in the EU Member States unlike the previous regulations and directives which imposed either rules of private international law for cross-border insolvency proceedings (Regulation (EU) 2015/848) or rules for preventive restructuring proceedings (Directive (EU) 2019/1023). The Directive covers five key areas: avoidance actions, pre-pack proceedings, the duty to file for insolvency, creditors' committees and asset tracing. Undoubtedly, given the significant cultural differences among the insolvency regimes of EU Member States, this is an ambitious project, and its final outcome remains subject to ongoing debate.

Nevertheless, the Directive is an indicator of a steady trend towards modern and resilient European insolvency legislation, demonstrating a European consensus on insolvency-related issues as well as on corporate issues. As to the latter, the EU plans to create a "28th regime". The 28th regime mainly focuses on company law, particularly the introduction of a uniform EU-wide legal form for companies. This, in turn, should reassure both European as well as foreign investors of a good cross-border investment climate in the EU, even in distressed situations.

VII. Summary and Outlook

Investors are advised to familiarise themselves with new financing possibilities under the StaRUG Scheme which allows for the inclusion of "fresh money" in a restructuring plan. Distressed companies can only be encouraged to implement early crisis-detection management and to rethink restructuring proceedings, whether they are preventive out-of-court restructuring measures or financial restructuring measures under the StaRUG Scheme. Both options are preferable to insolvency proceedings which often lead to bad debts for suppliers and other creditors as well as to job losses and other damage.

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> The high number of successful restructuring proceedings and Germany's enormous expertise enable companies to preserve economic value and expertise while becoming future-ready and resilient.

The high number of successful restructuring proceedings and the enormous amount of expertise in Germany mean that companies are able to preserve economic value and expertise, become future-ready and resilient amid the pressures of global transformation. Investors are offered interesting, and sometimes creative, investment opportunities to enter both traditional and future-facing industries in the German market. Persistent European efforts to harmonise insolvency law and facilitate cross-border insolvency proceedings aim to strengthen the EU's resilience to volatile market conditions and unpredictable trade policies.

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The 2019 Directive on restructuring and insolvency (the **Directive**) provides Member States with a number of options in terms of transposition, including the formation of voting classes, the classification of secured and unsecured claims, and who may vote on a plan. The law of 7 August 2023 on the preservation of businesses and the modernisation of insolvency law (the **2023 Law**) adopts an approach that may lead, in some respects, to complications in the preparation and the adoption of a plan, notably because the 2023 Law provides only two voting classes, produces a de facto absolute-priority outcome for dissenting secured creditors in cram-down, omits an express bifurcation rule for under-secured claims, contains no exclusion from voting for subordinated or related-party creditors, and imposes a double majority (headcount and amount) within each class.

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> Luxembourg’s 2023 Law implements the EU Restructuring Directive with only two voting classes, which may compress creditors with materially divergent interests into the same class.

Certain decisions of the Luxembourg District Court rendered in 2024 and 2025 show the practical application of the 2023 Law, as described below.

I. The implementation of the Directive by the 2023 Law

The Directive requires that affected parties be grouped into classes reflecting a sufficient commonality of interest on objective and verifiable criteria and, at a minimum, that secured and unsecured creditors vote in separate classes (Article 9.4). The 2023 Law provides only two classes, ordinary stayable creditors (**CSO**) and extraordinary stayable creditors (**CSE**). The CSE are defined in the 2023 Law as creditors holding claims secured by a special lien or mortgage, retention-of-title creditors’ claims, as well as stayable claims of tax authorities and social security agencies whilst the CSO are stayable creditors other than the CSE (Article 1).

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This approach may, from an economic perspective, group heterogeneous creditors into two classes. As noted in literature,[1] secured creditors’ positions vary by collateral type, value, lien rank, and coverage. A single unsecured class may also group senior and contractually subordinated lenders, bondholders, trade creditors, and small claimants alongside large institutions. Creditors with materially divergent interests may therefore vote together in one class.

The 2023 Law additionally permits categories within each class with differentiated treatment, subject to two requirements: (i) equal treatment within the category and (ii) proportionality to the amount of claims in that category (Article 43(2)). Voting, however, is tallied at class level, as the 2023 Law provides no separate vote by category (Article 49).

Categories allow differentiated economics for sub-groups, but their votes are aggregated at class level, which can complicate approval.

The statutory definition of CSE lists mortgages and special liens but does not expressly mention pledgees. Given that a pledge is a security right in rem, in light of the Directive’s minimum split between secured and unsecured creditors, pledgees affected by a plan should be treated as CSE. Separately, it is commonly held that a pledge governed by the law of 5 August 2005 on financial collateral is immune from the reorganisation procedure and therefore that pledge could be enforced without being affected by such procedure. As a result, a pledgee that can and intends to enforce outside the plan should not be an “affected” party and should therefore not vote.[2]

In practice, a plan is rarely viable if key pledged assets (typically shares in a subsidiary) are at real enforcement risk and hence a debtor would likely not even consider filing such a plan. The CSE characterisation of a pledgee should come into play in a scenario in which secured creditors elect to restructure through a plan rather than enforce (e.g., in syndicated financings).

1. See INSOL Europe, Guidance Note on the Implementation of Preventive Restructuring Frameworks under EU Directive 2019/1023: Claims, Classes, Voting, Confirmation and the Cross-Class Cram-Down, Tomáš Richter & Adrian Thery (April 2020), available at https://ssrn.com/abstract=3575511, n° 52
2. Thomas Mastrullo, “Transposing the Directive (EU) 2019/1023: The new Luxembourg preventive restructuring law”, European Insolvency and Restructuring Journal (EIRJ), 2024-4, n° 106

The Directive permits Member States to calibrate secured status to collateral value by bifurcating an under-secured claim into (i) a secured portion up to collateral value and (ii) an unsecured deficiency, i.e. the bifurcation rule. The 2023 Law does not expressly adopt this option. As one scholar notes, given the silence of the 2023 Law and the lack of precedent, it is uncertain whether an under-secured claim is CSE only up to collateral value, with the balance treated as CSO.[3]

The 2023 Law requires, for each class, that there is a majority in headcount and at least 50% of the principal of uncontested or provisionally admitted claims. In homogeneous classes this can be a sensible safeguard against domination by a single large creditor. In two heterogeneous classes, headcount can magnify the influence of many small or related-party claims. In this respect, it has been rightly noted that the interests of small or otherwise vulnerable claimants could be better protected with the tool of formation of separate class.[4]

The Directive permits either a relative or absolute priority approach in cross-class cram-down (Articles 11.1.c and 11.2). Under the 2023 Law, a de facto absolute priority rule is applicable because dissenting CSE must be paid in full if CSO receive anything.[5]

Finally, the Directive allows Member States to exclude the votes of related parties with conflicts of interest and contractually subordinated creditors (Articles 9. 3. (b) and (c)). These options have not been transposed in the 2023 Law. The consequence is that subordinated creditors and intragroup lenders may vote in the CSO class.

II. Case law analysis

A. Intra-group creditors

In its decision of 19 December 2024 (TAL-2024-03607), the court examined a plan submitted to both classes. Among the CSO, the plan included a category of intra-group creditors who would waive almost the entirety of their claims in exchange for a symbolic EUR 1. The court held that these creditors were not "affected" by the plan within the meaning of Article 48 of the 2023 Law because of this waiver. The court also incidentally characterised their conduct as a voluntary renunciation in contradiction with their own corporate interest, and referred to the Belgian doctrine of autoaffectation whereby one shall be wary of a creditor that voluntarily engineers its own "affectation" to influence the ballot. External CSO (i.e., not related to the debtor) voted, almost unanimously, against the plan, and this underscores that including the intragroup votes could have distorted the class outcome.

> Luxembourg's 2023 Law does not adopt the bifurcation rule for under-secured claims, leaving uncertainty whether the secured portion is treated as CSE and the deficiency as CSO.

Article 48 of the 2023 Law allows only affected stayable creditors to vote. In the same decision, the court decided, in respect of another category of creditors to be immediately paid in full, that a creditor whose claim was neither reduced nor rescheduled nor staged was not affected and hence decided rightly that these creditors were not affected by the plan. Treating intragroup waiver creditors as "not affected" does not appear to be consistent with the interpretation of an affected creditor. The waiver is indeed a component of the plan, stipulated therein and effective only upon confirmation. If the plan is not confirmed, the waiver does not materialise and the claim subsists in full. Therefore, those creditors' rights are obviously modified by the plan.

3. T. Mastrullo, op. cit., n°119
4. T. Richter and A. Thery, op.cit., n° 82
5. T. Mastrullo, op. cit., n° 128

In our view, the court's reasoning should be understood as a pragmatic response to the absence of an express exclusion of related parties from voting pursuant to Article 9.3(c) of the Directive in a narrow situation. As an aside, the debt waiver should not have been the subject of criticism given this is common in a restructuring plan, which is to the benefit of external creditors.

However, in the absence of an express statutory exclusion of related parties, turning to a Belgian court precedent of 2023 which neutralised the negative vote of certain creditors based on an abuse of rights,[6] that mechanism could possibly be considered in a scenario involving related parties but the threshold would certainly be very high.

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> Luxembourg's 2023 Law allows multiple categories within each voting class with differentiated treatment, but voting is aggregated at class level rather than by category.

B. Categories and classes

Two decisions rendered in 2025 illustrate that plans may create multiple categories within each class with differentiated treatment, provided creditors are treated equally within each category and proportionately to their claim amounts, and that voting results are tallied at the class - not category - level.

A decision rendered on 22 May 2025 (TAL202403627) applied this framework to CSO categories with ascending maturities and, for the largest claims, a discount over time. Then, a decision rendered on 27 November 2025 (TAL202409043) applied it to CSE categories corresponding to different German law real estate securities, one repaid in full and the other receiving residual proceeds after the first and the CSO. In both cases, the court did not raise any issue in respect of the categorisation of creditors based on the requirements of equal treatment and proportionality under paragraph 2 of Article 43 of the 2023 Law and the plans were approved following an approval at the class level.

By contrast, in the December 2024 decision, the plan had foreseen four categories of creditors but did not make any distinction between CSE and CSO. The court emphasised that creditors voted at the class level and not category level and the votes were assessed accordingly.

The November 2025 decision also illustrates that the 2023 Law does not expressly provide for an exclusion of the votes of under-secured creditors. In this case, the debtor owned a single encumbered property with a market value materially below the secured stack. It appears that one CSE category may have been economically undersecured and thus out of the money. The decision mentions that the CSE and CSO unanimously cast a favorable vote, their claims representing 100% of all claims and taken into account for the calculation of majorities. That decision therefore does not appear to have characterised the under-secured creditors at least partly into CSO.

In our view, it remains to be seen what solution would be adopted by the court in the scenario of a contentious restructuring in which the characterisation of under-secured creditors as CSE or CSO would be debated between the debtor and the creditors. In this respect, arguments could be certainly built upon the fact that, to the extent that it can be established, the value in the case of enforcement of the security shows that the creditors benefiting from that security are under-secured, that portion of the claim shall be characterised as CSO, as from an economic standpoint, it has no economic value as a secured claim. On the other hand, that type of argument is uncertain given that the 2023 Law does not expressly make such distinction. It is worth noting a controversy took place on that subject for years in Belgium over the last decade[7], the 2023 Law being primarily inspired by Belgian legislation passed in 2009 and 2013. Now, the Belgian law of 7 June 2023 implementing the Directive expressly applies the bifurcation rule.[8]

6. Tribunal de l'entreprise du Hainaut, div. Charleroi (RG Q/21/00072), quoted in Nicolas Ouchinski, La procédure de réorganisation judiciaire par accord collectif pour grandes entreprises et les classes de créanciers, available at : https://blog.oeccbb.be/fr/article/la-procedure-de-reorganisation-judiciaire-par-accord-collectif-pour-grandes-entreprises-et-les-classes-de-creanciers/29553
7. See for example Bernard Leroy, Créancier et réorganisation judiciaire, Forum Financier Belge Comité de Verviers Eupen, Séminaire du 18 février 2016, p. 5 and seq. https://www.financialforum.be/sites/financialforum.be/files/media/1660E%20B.%20Leroy.pdf
8. The Code of economic law (Code de droit économique) has been amended by including article XX. 75/2 and article XX.83/9 for such purpose.

To generally address the heterogenous nature of the classes of creditors, one could consider including directed voting provisions in intercreditor agreements, under which junior creditors undertake to vote in favour of any restructuring plan that the senior creditors accept. Intercreditor agreements may indeed include provisions for relevant creditors to exercise their voting rights in a certain way in restructuring proceedings.[9] The enforceability of such provision in the context of a Luxembourg judicial reorganisation is untested, but such covenants could potentially reduce the risk that junior votes in a single class frustrate a plan that respects the agreed waterfall.

C. Best interests of creditors

Under the 2023 Law, the court shall apply the best interests of creditors test only if a creditor challenges that such test is met in a reasoned manner (paragraph 7 of Article 49 and Article 50). The 2023 Law provides that the plan satisfies the best interests of creditors test in that no creditor is left worse off under the plan than it would be if the normal order of priorities were applied, whether in the case of bankruptcy or judicial liquidation, or in the case of the next best alternative, if the plan were not confirmed (paragraph 3 of Article 43).

In the decision rendered on 25 September 2025 (TAL-2025-01208), the plan offered CSO 10% and claimed only 4.4% would be recoverable in bankruptcy. A CSO creditor challenged the complete lack of evidence regarding the alleged recoverability of the CSO. The plan having been approved by the CSE, the court determined, in the context of the application of the cross-class cram down, that the debtor actually failed to provide evidence of the recoverability figure of the CSO. It is worth noting that the court held that the debtor provided no assessment of the dismantlement value of its assets, whether the net asset value of isolated assets, the overall value of a business transfer, or even the going-concern value established by projecting into the future the present value through the effect of the plan.

In a decision rendered on 13 October 2025 (TAL-2024-07754), the case related to a plan providing for a partial payment of the only CSO, to be financed by a third party, and the CSE being paid in full. The debtor alleged that the only asset was an indirect claim held by the parent company, evidenced by a foreign judgment the enforcement of which would require costly and uncertain action abroad, whilst the creditor argued that it would be in a better position if the company were bankrupt. As part of the application of the cross-class cram down, the court found that bankruptcy would likely produce nothing for CSO, whereas the plan delivered partial, staged distributions financed from external funds and hence, the test was satisfied and the plan homologated.

If these decisions illustrate that Luxembourg courts verify that sufficient valuation evidence be provided, it also shows that the judicial debate on valuation will take place at the last stage of the homologation of the plan, which can create some uncertainty for the parties involved.[10]

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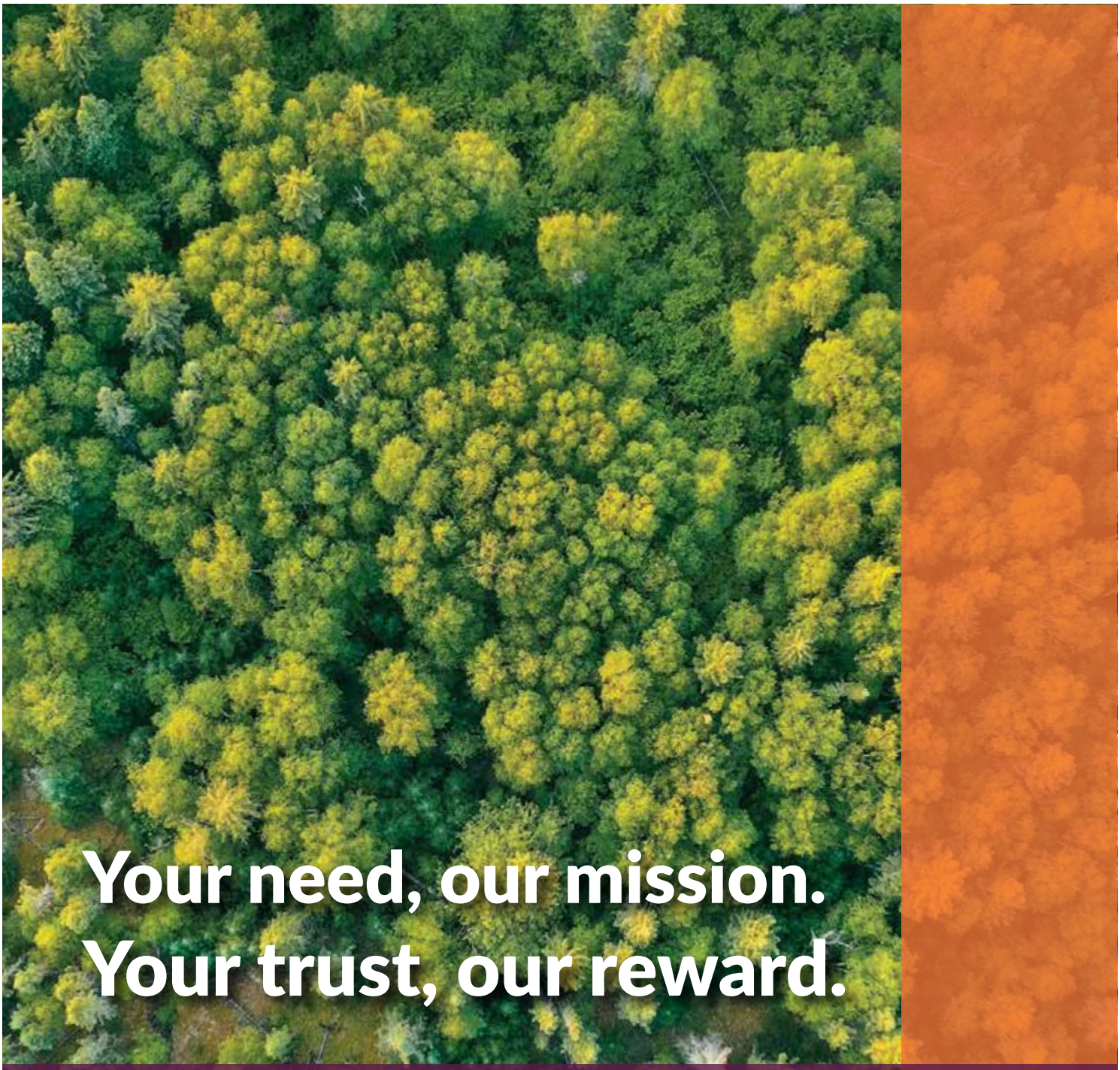
> Under Luxembourg’s 2023 Law, the best interests of creditors test is applied only if challenged, with courts requiring sufficient valuation evidence to confirm that no creditor is worse off than in bankruptcy or liquidation.

9. Mika J. Lehtimäki, Intercreditor Agreements in Leveraged Buyouts (D.Phil. thesis, University of Oxford, 2020), pp. 225–226
10. This issue has been stressed in a decision rendered by the Tribunal de l’entreprise Liège, division de Namur (4e chambre), dated 23/01/2024, J.L.M.B. 24/080, n°104



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The Dutch Route to Business Rescue

Why international companies should consider restructuring in the Netherlands

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In cross-border financial distress, the choice of restructuring venue can be as important as the restructuring strategy itself. International companies may face creditors, shareholders, assets, guarantees and financing documents spread across several jurisdictions. In that context, management needs a strategy that preserves value, creates stability and can be implemented effectively across borders.

Against that background, the Netherlands is increasingly relevant as a restructuring jurisdiction. Since the introduction of the WHOA, the Dutch restructuring plan procedure, Dutch law offers a modern framework inspired in part by leading restructuring tools in England and the United States, including the Scheme of Arrangement, the Restructuring Plan and Chapter 11. Importantly, the Dutch route is not necessarily limited to companies whose main business is located in the Netherlands. In the right circumstances, international companies may also be able to use the Netherlands as a restructuring forum where there is a sufficient Dutch connection. A credible business plan, careful preparation and a clear implementation strategy will then be critical to making that route work in practice. That assessment is highly case-specific and benefits from early coordination between management, Dutch counsel, foreign counsel and financial advisers.

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> In cross-border financial distress, the choice of restructuring venue can be as important as the restructuring strategy itself.

Introduction: why restructuring venue matters

When an international company faces financial distress, the first question is often whether the business can be saved. That is the right starting point, but it is not the only question. In cross-border situations, management must also ask where and how a restructuring can be implemented most effectively.

The choice of venue may determine whether a plan can effectively bind dissenting creditors, whether enforcement action can be stabilised, whether shareholder interests can be addressed, and whether the business can continue trading while a solution is negotiated. For companies with creditors, assets, guarantees, financing arrangements or group entities in several jurisdictions, the choice of venue is therefore an essential strategic decision.

A well-chosen venue can create momentum and preserve value. A poorly chosen or delayed process can lead to fragmented creditor action, loss of liquidity, damaged stakeholder confidence and avoidable value destruction. The WHOA offers a framework for restructuring viable businesses outside formal bankruptcy and may provide a practical route to business rescue where there is a sufficient link with the Netherlands.

Why the Netherlands belongs on the boardroom agenda

The Netherlands becomes relevant as a strategic restructuring venue where there is a meaningful Dutch connection. That connection may consist of a Dutch holding company, Dutch operating entity, Dutch assets, Dutch creditors, Dutch-law governed finance documents, a Dutch forum clause, or another sufficient link to the jurisdiction.

Whether that connection is sufficient, and how it should be used, requires a careful assessment of the group structure, finance documents, creditor base and relevant jurisdictions.

In many international groups, such a connection already exists. Dutch entities are frequently used in corporate, financing and investment structures. A company may have its headquarters elsewhere, but still have Dutch group companies, Dutch assets, Dutch financing arrangements or creditors with a Dutch connection.

For international companies, the attraction of the Netherlands lies in the combination of legal flexibility, judicial reliability and an internationally oriented court system. Dutch courts are generally regarded as effective, practical and efficient, while the costs of Dutch proceedings are often more manageable than in some other major restructuring jurisdictions. Dutch restructuring law is designed to support the rescue of viable businesses, while still protecting legitimate creditor interests. That balance matters. A restructuring process that is too debtor-friendly may struggle to gain stakeholder confidence. A process that is too rigid may fail to deliver a workable solution.

The WHOA is central to this development. It gives companies a structured route to propose a restructuring plan outside formal bankruptcy and, where the legal requirements are met, to make that plan binding on dissenting creditors or shareholders. In practice, it often functions as a powerful negotiation tool: the possibility of court confirmation encourages stakeholders to engage seriously, while the court remains available as a fall-back mechanism if consensus cannot be reached. This can make the process more efficient and help the company deal with creditor hold-outs or fragmented enforcement action.

The Netherlands should therefore be considered early in the venue analysis. Where the right Dutch nexus exists, the WHOA may provide the structure and negotiating leverage needed to preserve enterprise value and implement a solution that might be difficult to achieve through purely consensual negotiations.

What a Dutch restructuring plan can achieve

A Dutch restructuring plan under the WHOA is aimed at preserving viable businesses that are burdened by an unsustainable financial structure. It can be used to reshape the company's liabilities while allowing the business to continue operating.

A key feature is that the WHOA is based on a debtor-in-possession model. In principle, the company remains in control of its business during the process. This can be important for maintaining customer confidence, preserving employee stability, protecting supplier relationships and continuing negotiations with lenders, investors and other parties.

In practical terms, a plan may reschedule payment obligations, reduce debt, compromise creditor claims, amend certain rights, convert debt into equity or change shareholder rights. It may also provide a framework for dealing with group debt, guarantees, intra-group arrangements and financing structures that are spread across several jurisdictions.

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> Where the right Dutch nexus exists, the WHOA may provide the structure and negotiating leverage needed to preserve enterprise value.

Where full consensus cannot be reached, the court can, if the statutory requirements are met, confirm the plan and make it binding on dissenting creditors or shareholders. For companies with complex stakeholder groups, this can be decisive: unanimity is not always required, and a single hold-out stakeholder should not necessarily be able to block a serious restructuring that offers a better outcome than bankruptcy.

This flexibility can be particularly valuable where the problem is not the underlying business, but the capital structure around it. A company may have a viable operation, loyal customers and valuable assets, but still face an upcoming maturity wall, excessive leverage, enforcement pressure or a fragmented creditor group. In such cases, a Dutch restructuring plan may help create a controlled path from financial distress to a sustainable balance sheet.

However, a plan must be built on a sound commercial foundation. The court will not approve a plan merely because the company needs relief. The company must be able to explain why the business is viable after the restructuring, why the proposed treatment of creditors and shareholders is justified and why the plan offers a better route than formal insolvency.

Flexibility with safeguards: not a debtor free-for-all

The WHOA is a flexible instrument, but it is not designed to give distressed companies a free hand to impose any outcome they prefer. Its strength lies in the balance between restructuring flexibility and creditor protection. That balance is important: it is what makes the process acceptable to creditors, shareholders and other stakeholders whose rights may be affected.

A Dutch restructuring plan can be used to overcome hold-out behaviour, but it must be transparent, well-substantiated and fair. Creditors and shareholders must receive adequate information, classes must be properly composed, and the economic assumptions underlying the plan must be capable of scrutiny. Valuation evidence is often central, because the court and stakeholders need to understand how value is allocated.

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> The WHOA is a flexible instrument, but it is not designed to give distressed companies a free hand to impose any outcome they prefer.

A key safeguard is that creditors should not be worse off under the plan than they would be in a bankruptcy scenario. This requires management to compare the restructuring outcome with the likely outcome in liquidation or bankruptcy. That comparison must be realistic. Overly optimistic business plans or overly pessimistic bankruptcy scenarios may undermine confidence in the process.

Where full consensus cannot be reached, the Dutch court has an important gatekeeping role. It can refuse confirmation if the legal requirements are not met, if the plan is insufficiently supported, or if the allocation of value is unfair. For international stakeholders, this judicial scrutiny can be an advantage: it helps create a process that is more predictable, credible and capable of producing an outcome that others can rely on.

The practical limit: liquidity and funding

A restructuring plan can reduce debt, amend payment terms and create breathing space, but it cannot replace liquidity. A legally sound plan will still fail if the business does not have enough cash to trade through the process and operate after implementation. Future funding therefore needs to be addressed from the outset. That liquidity may come from continuing business revenues, available cash, consensual support from shareholders or lenders, new investors, asset sales or a combination of these sources.

The WHOA may be a powerful tool to restructure existing liabilities, but it cannot simply force financiers to provide new money or accept new obligations against their will. The strongest Dutch restructuring strategies combine legal preparation with a realistic funding plan.

Will a Dutch restructuring plan be effective abroad?

For international companies, court confirmation of a Dutch restructuring plan may not be the final step. The company must also assess whether the plan will have the intended effect in the jurisdictions where relevant creditors, assets, guarantees, security rights and key contracts are located.

That cross-border analysis should start at the outset. A Dutch plan may be effective in the Netherlands, but its practical value may depend on recognition or enforceability elsewhere. Key questions include: are material creditors based outside the Netherlands? Are finance documents governed by foreign law? Have guarantees been issued by non-Dutch group companies? Are key assets located abroad? Could enforcement action be taken in another jurisdiction?

These questions may determine whether the restructuring can actually be implemented. If a Dutch plan compromises claims under financing arrangements, the company must assess whether that compromise will be recognized in the jurisdictions where enforcement could otherwise occur. If the group relies on foreign assets, subsidiaries or guarantees, local advice may be needed to ensure that the Dutch process fits within the wider international strategy.

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Within the European Union, recognition will depend in part on the type of Dutch restructuring procedure used and the debtor's center of main interests. Outside the European Union, recognition may depend on local law, including frameworks based on the UNCITRAL Model Law on Cross-Border Insolvency. Where English-law governed debt is involved, specific recognition issues may also need to be considered. Recognition should therefore be part of the restructuring design from the beginning, ideally with Dutch and local counsel working together before key decisions are taken.

When management should act

Timing is often decisive. The earlier management identifies financial distress and explores available options, the greater the chance of preserving value. Waiting until liquidity is almost exhausted usually narrows the available routes, weakens the company's negotiating position and increases the risk of uncontrolled creditor action.

Management should act when warning signs become visible, not only once defaults have occurred. Relevant signals include liquidity pressure, covenant breaches or near-breaches, upcoming debt maturities, tax arrears, supplier tightening, overdue trade creditors, deteriorating lender confidence, shareholder deadlock or enforcement threats.

Early preparation allows management to test viability, assess the Dutch nexus, consider whether a WHOA plan may be useful and identify any cross-border recognition issues. It also supports proper governance: directors should be able to show that they monitored liquidity, considered creditor interests, obtained appropriate advice and took reasonable steps to avoid unnecessary value destruction.

A practical checklist for decision-makers

Before choosing the Netherlands as a restructuring venue, management should ask:

- Is there a sufficient Dutch connection, such as a Dutch company, Dutch assets, Dutch creditors, Dutch-law governed obligations or a Dutch forum clause?
- What problem must the restructuring solve: a maturity wall, excessive leverage, creditor hold-outs, shareholder deadlock, enforcement pressure, liquidity shortages or a combination of these issues?
- Is the business viable after restructuring?
- Which stakeholders need to be bound, and can the restructuring be achieved consensually or is court confirmation required?
- Is there sufficient liquidity to trade through the process and operate after implementation?
- Will the plan need to work outside the Netherlands, and should recognition or enforcement be assessed abroad?
- Is management acting early enough, while there is still time to prepare, negotiate and implement a credible plan?
- Has the company obtained early Dutch restructuring advice to assess whether the WHOA is available and useful in the circumstances?

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> The Dutch route is not limited to purely domestic restructurings. In the right case, it can provide the structure, flexibility and credibility needed to turn cross-border distress into a controlled restructuring.

If the answer to these questions points to a viable business, a meaningful Dutch connection and a realistic implementation strategy, the Netherlands may offer a powerful route to business rescue. The Dutch route is not limited to purely domestic restructurings. In the right case, it can provide the structure, flexibility and credibility needed to turn cross-border distress into a controlled restructuring.

Conclusion: the Netherlands as a strategic restructuring option

For international companies facing financial distress, the Netherlands deserves a place in the restructuring analysis. It offers a modern legal framework, a commercially reliable environment and a practical route to restructure viable businesses outside formal bankruptcy. Where there is a sufficient Dutch connection, a Dutch restructuring plan can help management preserve value, stabilize creditor pressure and implement a binding solution.

The key is preparation. A Dutch restructuring will be most effective where it is supported by a credible business plan, a realistic liquidity strategy, careful stakeholder mapping and a clear view on cross-border implementation. The WHOA is a powerful instrument, but its effectiveness depends on how and when it is used.

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> For international companies facing financial distress, the Netherlands deserves a place in the restructuring analysis.

When financial distress crosses borders, the Netherlands should be considered early. The Dutch route is not limited to purely domestic restructurings. In the right case, and with the right legal and financial preparation, it may provide the structure, flexibility and credibility needed to turn a difficult situation into a controlled restructuring and, ultimately, a viable business rescue.

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DISTRESSED M&A AND INSOLVENCY AND RESTRUCTURING PROCEEDINGS:
WHAT THE FUTURE HOLDS

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DISTRESSED M&A AND INSOLVENCY AND RESTRUCTURING PROCEEDINGS: WHAT THE FUTURE HOLDS

1. Introduction

In Portugal, although distressed M&A transactions may be carried out and concluded out of court - through, for instance, standard out-of-court asset or share deals -, a significant number of distressed M&A transactions occur in the context of restructuring or insolvency proceedings.

These types of transactions have a significant number of risks that, although mitigated due to judicial sanctioning in comparison to the out-of-court, still must be considered by a potential buyer of the distressed company.

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> While distressed M&A in restructuring or insolvency proceedings mitigates key risks such as clawback, it requires creditor approval and judicial sanction, adding complexity compared to out-of-court deals.

The distressed M&A landscape will benefit greatly from future legislative reforms, such as the proposed European Union Directive establishing pre-pack proceedings, which will mitigate risks, expedite the sale of the distressed company, and ensure the continuity of its activity.

For the purpose of this short article, we will analyze the risks and benefits of carrying out distressed M&A transactions in the context of restructuring or insolvency proceedings, review the current legal framework, and reflect on how distressed M&A transactions may benefit from the implementation of a pre-pack mechanism.

2. Overview of the risks and benefits in comparison to out-of-court solutions

The upside of carrying out such transactions in the context of restructuring or insolvency proceedings is that it mitigates some of the risks associated with distressed transactions carried out outside of court. For instance, asset and/or share deals, like any other act carried out by the distressed company outside of formal proceedings, may be subject to clawback.

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However, the benefit of having the transaction, once fully implemented, beyond challenge, is offset by the fact that, in formal restructuring or insolvency proceedings, the buyer will likely need to negotiate with all relevant parties, namely the creditors, in order to obtain their approval. Moreover, while uncommon, even if the transaction is approved by the distressed company’s creditors in a restructuring plan, it is possible that it fails to go through, since it will need to be judicially sanctioned by a Commercial Court, which may decide against it. It may also be challenged by any creditor through appeal.

That being said, and now referring specifically to insolvency proceedings, even if the transaction fails to be implemented in a restructuring plan – either because it was not approved by the creditors or because the Court decided not to sanction it – the buyer may still attempt to acquire the distressed company’s business unit or its assets during the liquidation phase of the insolvency proceedings. In such a scenario, the sale of the company or its assets will be conducted by the insolvency receiver, who will, as a rule, sell them through a competitive process. Depending on the specific circumstances, a secured creditor may have the possibility of acquiring the distressed company’s assets if its security right is attached to those assets.

Another downside arises from the fact that the administration of the distressed company may be handed over to the insolvency receiver until the transaction is concluded. However, it must be noted that the distressed company can request to retain its own administration during the procedure but will have to submit a plan within 30 days to maintain the administration.

Finally, it is important to note that insolvency proceedings – specifically those that are not expedited through Court sanctioning of an insolvency plan or those involving a significant number of uncooperative creditors – can be quite lengthy. A restructuring proceeding, although considerably faster than the insolvency proceeding, may still take up to three months to be fully implemented in the very best-case scenario. The time required to fully implement the transaction in the context of formal restructuring or insolvency proceedings also carries another downside: reputational damage to the distressed company, difficulties in obtaining financing, and difficulties with suppliers, since these formal proceedings are publicly announced and therefore disclose the financial state of the distressed company.

All the risks mentioned in this chapter associated with M&A transactions carried out in the context of these formal proceedings will, to some extent, be mitigated by the transposition of the Directive of the European Parliament and of the Council harmonizing certain aspects of insolvency law (Proposal COM/2022/702).

3. Overview of current legal framework

Similarly to out-of-court distressed M&A transactions, those carried out in the context of restructuring or insolvency proceedings are governed by the Portuguese Companies Code and the Portuguese Securities Code, as well as, of course, by the Portuguese Insolvency and Restructuring Code.

As with its out-of-court counterpart, a distressed M&A transaction carried out in the context of restructuring or insolvency proceedings may be implemented through an asset or share deal. The desired transaction may be implemented through a restructuring plan or, in the specific case of insolvency proceedings, during the liquidation phase.

For the purpose of this short article, since the main questions arising from implementing a distressed M&A transaction through a restructuring plan in a restructuring proceeding are similar to those arising in an insolvency proceeding, we will analyze them together.

i) implementing the transaction through a restructuring plan

In both insolvency[1] and restructuring proceedings, the restructuring plan may be presented by the debtor, who, to better justify the price of the distressed M&A transaction and to compel its creditors to approve it, may present independent evaluations of the company or of its assets' worth.

Then, the plan is presented to the creditors for their approval, who, depending on the specific nature of the proceeding, may suggest modifications.

In an insolvency proceeding the plan is approved when it is voted favorably by half of the total votes issued, of which more than half must refer to non-subordinated claims, and provided that the creditors attending the relevant meeting represent at least one-third of the total credits held by creditors with a right to vote.

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> Restructuring proceedings, even in the best-case scenario, may still take up to three months to be fully implemented.

In a restructuring proceeding, in general terms,[2] the plan is approved when it is voted favorably by creditors who represent more than half of the votes, of which more than half must correspond to non-subordinated credits, or by creditors who represent at least one-third of the total credits where the plan collects more than two-thirds of the total votes issued, of which more than half must correspond to non-subordinated credits.

As mentioned previously, the Commercial Court may ex officio refuse to sanction the approved plan in the event of a non-negligible breach of procedural rules or the rules applicable to its content, whatever their nature, and also when, within a reasonable period of time to be determined, the conditions precedent to the plan are not met or the acts or measures that must precede approval are not performed.

At the request of a creditor, the Commercial Court may refuse to sanction the plan, provided that the creditor has opposed the approval of the presented plan prior to its adoption and demonstrates that (i) their situation under the plan is likely to be less favorable than it would be in the absence of any plan, particularly in view of the situation resulting from an agreement already concluded in an out-of-court debt settlement procedure, or that (ii) the plan provides a creditor with an economic value greater than the nominal amount of their claims on the insolvency, plus the value of any contributions they may have to make.

In a restructuring proceeding, if the plan is not approved or is not sanctioned by the Court for any reason, the judicial receiver appointed must express their opinion on whether the company is insolvent. If the judicial receiver considers that the company is insolvent and the company does not oppose its insolvency declaration, the Commercial Court must declare the insolvency of the distressed company, converting the restructuring into an insolvency proceeding. In an insolvency proceeding, a plan may also be proposed; however, if it is not approved or not sanctioned by the Court, the liquidation phase of the company or of its assets will begin.

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> Pre-pack proceedings are designed to ensure the operational continuity of a distressed company and avoid the devaluation caused by the interruption of its activity.

ii) implementing the transaction through the liquidation phase

In the liquidation phase, the insolvency receiver decides on the value and type of sale of the company's business unit or of its assets, after hearing the distressed company and any creditor with a security right over the assets being sold. By law, the company's business unit should be sold as a whole, unless there is no satisfactory offer or there is a recognized advantage in liquidating or selling certain parts separately.

Preferably, the company's business and assets are sold through a competitive process, namely through an electronic auction. Secured creditors may propose to purchase the asset for the same or higher than the projected sale price and may use their claims to pay the price, provided that no creditors are ranked with a priority over them.

4. What the future holds: pre-pack proceedings

A pre-packaged insolvency, as it is traditionally known, is a formal insolvency mechanism where the sale of a distressed company's business or assets is negotiated with a buyer before the opening of insolvency proceedings. Pre-pack procedures are designed to ensure the operational continuity of an insolvent company or part thereof, thereby avoiding the devaluation resulting from the interruption of activity upon the declaration of insolvency.

The Directive (EU) 2026/799 of the European Parliament and of the Council of 30 March 2026 (from now on, “the EU Directive 2026/779”) establishes that pre-pack proceedings must be composed of two consecutive phases: the preparation phase and the liquidation phase. The preparation phase is aimed at finding an appropriate buyer for the debtor's business or part thereof, while the liquidation phase is aimed at approving and executing the sale of the debtor's business or part thereof and at distributing the proceeds to the creditors.

These two phases are briefly analyzed below:

i) the preparation phase

The preparation phase begins with a request by the distressed company for the appointment of a supervisor. The monitor shall ensure the documentation and communication of each stage of the sale process and demonstrate that the sale is competitive, transparent, fair, and in accordance with market standards.

Among other responsibilities, the supervisor shall recommend the best proposal and declare that it does not constitute a manifest violation of the best interests of creditors test.

1. In the Insolvency proceeding creditors and the insolvency receiver may also present a plan.
2. The law defines several ways of obtaining the necessary majority for approval.

During the preparation phase, the distressed company retains management powers over its assets. If it becomes apparent that the distressed company will become insolvent or is already insolvent, it may benefit from a suspension of enforcement measures, provided that such suspension is necessary for the effective conduct of the pre-pack process. The suspension is not automatic and must be ordered by the court after consulting the supervisor and the affected creditors.

The preparation phase concludes with the supervisor's selection of the best proposal.

ii) the liquidation phase

The liquidation phase begins with the declaration of the distressed company's insolvency, during which the supervisor shall be appointed as the insolvency receiver and the sale of the distressed company shall be authorized on the terms proposed by the bidder selected by the supervisor, unless the supervisor has not issued the required opinion/declarations, or if the preparation phase was not conducted in a competitive, transparent, fair, and market-compliant manner.

It is important, however, to note that, if the court or the competent authority can decide that a valuation of the business of the debtor as a going concern is carried out on the ground that the best bid might not meet the best-interest-of-creditors test. However, when, under national law, the sale of the debtor's business, or part thereof, requires the consent of the creditors, Member States may provide that the decision referred to in the first subparagraph can be taken by the creditors without the involvement of the court or competent authority.

Decisions to authorize or execute the sale are subject to appeal but shall not have suspensive effect, unless the appellant provides adequate security to cover potential losses caused by suspending the sale, or, where the appellant is a natural person, the court decides to waive the requirement to provide security, taking into account the circumstances of the case.

Once the sale is authorized and completed, the purchaser shall not assume any liability for the distressed company's debts, unless expressly agreed.

5. Conclusion

The transposition of the EU Directive 2026/799 will have a significant impact on distressed M&A transactions and will mitigate – if not entirely eliminate – most of the risks and downsides mentioned above.

Firstly, its more straightforward procedure will allow for a faster completion of the transaction and therefore reduce any reputational damage and problems with financing and suppliers arising from a declaration of insolvency or from entering a restructuring procedure.

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> The pre-pack procedure combines the convenience and benefits of an out-of-court solution with the legal certainty of a formal proceeding.

Secondly, since the transaction is subject to prior court approval, it may only be challenged where there is reasonable suspicion of abuse of the procedure, thereby eliminating the need to negotiate with the distressed company's creditors to secure their approval.

Finally, the distressed company retains management powers over its assets.

The pre-pack procedure, as designed in the Directive, combines the convenience and benefits of an out-of-court solution with the legal certainty associated with a transaction carried out within formal proceedings.

Nevertheless, until the Directive is fully implemented in Portuguese law, the current legal framework governing insolvency and restructuring procedures still allows for the relatively straightforward implementation of distressed M&A transactions.

SAUDI ARABIA

Saudi Arabia's Private Credit Market:
Regulatory Evolution and Strategic Implications

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Karim Wali is a Partner at K&A, leading on Finance and Projects matters. With over a decade of experience in Saudi Arabia and prior practice in London, Karim brings a unique blend of global and local expertise. He advises financial institutions and investors on a diverse range of Islamic and conventional finance transactions, including ESG-linked financings, as well as on complex restructurings, financial rescheduling, and turnarounds. Karim has a particular interest in the intersection of finance and technology, frequently counseling financial institutions and FinTechs on compliance with cybersecurity, data protection, and AI regulations. His deep understanding of both traditional and innovative financing mechanisms makes him a key voice in navigating the evolving landscape of Shariah-compliant and sustainable investments in Saudi Arabia.

Karim is admitted as a Solicitor in England & Wales, having qualified within the London office of Allen & Overy LLP in 2003. Karim graduated with a Bachelor of Laws (LLB) from The London School of Economics & Political Science.

Introduction

In a previous article published in 2025, we examined the convergence of legal reform and capital market development in Saudi Arabia, arguing that the conditions were, for the first time, genuinely conducive to the deployment of sophisticated private credit strategies. The year since has vindicated that assessment, but it has also materially raised the ceiling. Two regulatory developments in early 2026 have meaningfully expanded the infrastructure available to private credit participants: the Saudi Capital Market Authority's (CMA) consolidated Instructions on the Financing Investment Funds, issued in February 2026, and the Saudi Bankruptcy Commission's (EISAR) proposed amendments to the Bankruptcy Law, which recently went through public consultation. Taken together, these developments represent the next chapter in the Kingdom's deliberate construction of a world-class credit market ecosystem.

This article builds on our prior analysis to examine these two developments and their implications for fund managers, institutional investors, and other participants in the Saudi private credit market. It does not seek to rehearse the foundational analysis set out in our 2025 article, which remains a relevant backdrop to the structural themes discussed here.

The CMA's Financing Investment Funds Framework: A New Vehicle for Private Credit

An Eight-Year Architecture

The CMA's regulatory architecture for financing investment funds has been constructed with notable patience. The journey began in 2018 with a narrow circular permitting indirect lending through funds under strictly controlled conditions, private placement only, closed-ended structure, borrowing capped at fifty percent of total assets, and with credit decisions anchored in SAMA-licensed entities rather than CMA-regulated fund managers. The 2022 Instructions on Direct Financing Investment Funds represented a qualitative leap: for the first time, CMA-regulated funds could extend credit directly to legal persons and other investment funds, without routing the lending decision through a SAMA-licensed entity. The 2026 Instructions consolidate and expand both models into a unified framework, and, critically, permit public offering and exchange listing for the first time.

This eight-year arc reveals a regulator that tests concepts under controlled conditions before broadening the permissible scope. The approach is the opposite of regulatory boldness, and that deliberateness has produced a framework of genuine credibility.

What the 2026 Instructions Change

The renaming of the framework, from "Instructions on the Direct Financing Investment Funds" to "Instructions on the Financing Investment Funds", signals the broader ambition. The 2026 Instructions now formally encompass both Direct Financing Funds (which lend directly to legal persons and other funds) and Indirect Financing Funds (which deploy capital through portfolio acquisitions, co-lending arrangements, or co-investment with SAMA-licensed entities) within a single, consolidated regulatory document.

Three changes are particularly significant for private credit participants. First, public offering and exchange listing. Until February 2026, financing funds were restricted to private placements, limiting their investor base to qualified and institutional participants. The 2026 Instructions enable public financing funds to be offered on the Main Market (Tadawul) and the Parallel Market (Nomu). This is a structural shift: it creates a mechanism for price discovery and secondary liquidity, supports larger fundraising at inception, and opens these products to a broader pool of capital, including retail investors with an appetite for fixed-income-adjacent returns.

Second, open-ended private funds. The 2026 Instructions introduce a new flexibility for private funds, which may now be structured as open-ended vehicles provided their terms include clear policies for handling subscription and redemption requests and managing liquidity. This was not available under the prior regime and is significant for managers seeking to offer more accessible entry and exit mechanics to institutional investors.

Third, enhanced disclosure obligations. Public financing fund managers face materially more detailed quarterly reporting requirements, covering the number of days of default per financing contract, the percentage of default relative to total financing granted, sectoral exposures, returns from financing contracts, the ten largest financings by amount, and the fund's borrowing ratio. For traded funds, any beneficiary default must be disclosed immediately. This level of transparency is a precondition for institutional credibility and brings Saudi financing funds closer to the disclosure standards expected of credit fund vehicles in more mature markets.

Implications for the Private Credit Market

For private credit fund managers, the 2026 Instructions create a new product category with a genuinely broad investor base. The classification of public financing funds as specialised public funds brings them within the established governance and oversight framework for public funds, reducing regulatory ambiguity. The ability to list on Nomu, which carries a borrowing cap of fifty percent of total fund size, compared to fifteen percent for Main Market-listed public funds, provides a structuring option that preserves meaningful leverage capacity for credit-oriented strategies.

For the broader credit market, indirect financing funds that invest in seasoned loan portfolios, subject to a minimum six-month seasoning period under the 2026 Instructions, introduce a product with structural similarities to the credit fund and CLO vehicles familiar in more mature capital markets, adapted to the Saudi regulatory environment. This creates a new channel for liquidity and capital relief to originating finance companies, and a new regulated pathway for international investors seeking exposure to Saudi private credit.

The ring-fencing of fund assets, restricted to financing activities, money market transactions, bank deposits, and units of registered money market funds, imposes portfolio discipline that will reassure institutional investors. The standardised definition of "Default" (failure to pay any amount due for 90 days or more) provides a common trigger for reporting and provisioning, facilitating cross-fund comparability.

The Bankruptcy Law Proposed Amendments: Deepening the Restructuring Toolkit

Four Proposals, One Direction

In parallel with the CMA's regulatory evolution, EISAR published proposed amendments to the Bankruptcy Law for public consultation in late February 2026, which consultation period closed in early March. The proposals are four in number, and their collective direction is unmistakable: a more creditor-protective, rescue-oriented and institutionally independent insolvency framework.

> "The CMA has created, over eight years and through incremental expansion, a regulated vehicle for private credit that is now accessible to public markets. The significance of that achievement should not be understated.

The first proposal introduces a minimum return threshold for dissenting creditors in restructuring plans under Article 75. Creditors who vote against a plan must be guaranteed a return at least equal to what they would receive in liquidation, a "best interest of creditors" standard that mirrors leading insolvency frameworks globally, including the United States Chapter 11 regime. For private credit participants, this is a materially important development: it codifies a floor beneath which restructuring plan terms cannot fall, regardless of the composition of the creditor constituency. The protection is particularly relevant for minority creditors who may otherwise be crammed down by a majority coalition of incumbent lenders.

The second proposal introduces emergency and public interest exceptions to the automatic stay. Courts would be empowered, upon application from relevant public authorities, to lift the stay for claims related to declared states of emergency, environmental disasters, or public health and safety crises. This reflects a balance between debtor protection and broader societal interests consistent with the UNCITRAL Legislative Guide, and has limited direct impact on private credit strategies in normal market conditions.

The third and most consequential proposal is the introduction of a formal legal framework for pre-court, out-of-court restructuring agreements. Debtors and creditors would be able to negotiate and execute debt restructuring plans before any formal insolvency proceedings are filed, with court ratification available upon request. This aligns directly with the World Bank's Insolvency and Creditor/Debtor Regimes (ICR) Principles and signals a meaningful shift toward a rescue-oriented culture. For private credit participants, a recognised out-of-court framework reduces the frictional costs of distressed debt resolution, provides a structured basis for negotiating amendments, waivers and debt-for-equity exchanges outside formal proceedings, and allows parties to preserve enterprise value without triggering the reputational and operational disruption associated with formal insolvency. It also creates a clearer foundation for "amend and extend" structures that are common in more mature private credit markets.

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> The proposed out-of-court restructuring framework is perhaps the most consequential development for private credit. It creates a formal, legally recognised mechanism for the negotiated resolution of distress before formal proceedings are filed.

The fourth proposal would grant EISAR a fully independent annual budget, its own accounts, and the ability to generate revenues through fees and licensing. This is critical institutional infrastructure. An adequately and independently resourced Bankruptcy Commission is better positioned to develop expertise, attract talent and maintain the regulatory consistency that institutional market participants require.

Connecting the Dots: Proposed Amendments and Private Credit Strategy

The proposed amendments, if enacted in their current form, will reinforce several strategies discussed in our 2025 article. The best interest of creditors standard strengthens the position of minority private credit providers in restructuring negotiations, reducing the risk of value extraction by controlling creditor groups. The out-of-court restructuring framework provides a new arena for private credit deployment: rescue financings, bridge facilities, and negotiated restructurings that do not require court involvement. For DIP financing, which remains largely untested in the Kingdom, the growing sophistication of the framework reduces the structural uncertainty that has historically deterred early movers.

The proposed financial independence of EISAR is also noteworthy in a practical sense. A Commission that is self-funding through fees and licensing is less susceptible to budgetary constraints that could impair operational effectiveness, and is more likely to develop the institutional depth and regulatory consistency that sophisticated market participants require.

The Convergence: Regulatory Infrastructure Meets Capital Demand

Reading the CMA's Financing Investment Funds framework and EISAR's proposed Bankruptcy Law amendments together, a coherent picture emerges. Saudi Arabia is systematically building the regulatory infrastructure for a mature private credit ecosystem: vehicles through which capital can be raised and deployed in a regulated, transparent and scalable manner; an insolvency framework that is increasingly creditor-protective, rescue-oriented, and capable of resolving distress efficiently; and institutional bodies, the CMA, SAMA, and EISAR, that are maturing in their coordination and their capacity to support market development.

For private credit participants, the implications are direct. The financing fund framework provides a regulated and exchange-listed vehicle through which private credit strategies can be offered to a broad investor base, including, for the first time, retail investors via public offerings on Tadawul or Nomu. The Bankruptcy Law amendments, once enacted, will deepen the toolkit for distressed and special situations strategies, reduce resolution friction, and strengthen the position of minority creditors. Together, they address two of the historically significant constraints on private credit deployment in the Kingdom: the absence of a purpose-built regulated vehicle and the relative immaturity of the formal restructuring framework.

Saudi Arabia's financing backdrop continues to support the case for private credit. Bank claims on the private sector stood at roughly SAR 3.19tn in February 2026, while broader bank lending measures that include other domestic non-sovereign borrowers were above SAR 3.4tn in early 2026. At the same time, a structural funding gap persists for many mid-market and growth-stage companies. PwC estimates the GCC and Egypt private credit market could expand to roughly US$11bn-20bn over the next six years, with Saudi Arabia expected to be a major driver of that growth.

Considerations for Market Participants

Against this backdrop, several practical considerations warrant attention.

Fund managers contemplating public financing funds under the 2026 Instructions should engage early with the classification as specialised public funds and the resulting governance and disclosure obligations. The enhanced quarterly reporting requirements, covering default rates, sectoral concentrations, and individual financing details, demand robust portfolio monitoring systems and, for traded funds, real-time default disclosure capabilities. The borrowing limit differential between Nomu-listed funds (fifty percent of total fund size) and Main Market-listed funds (fifteen percent of NAV) is a structuring variable that should be assessed in light of the target strategy and investor base.

For investors in financing funds, the standardised default definition and enhanced transparency regime represent a material improvement in the ability to monitor credit quality on an ongoing basis. The seasoning requirement for indirect financing funds investing in portfolio acquisitions (minimum six months) provides a baseline quality threshold that possibly reduces adverse selection risk in the secondary market.

For distressed and special situations investors, the proposed out-of-court restructuring framework, if enacted, should be studied carefully. A formal legal mechanism for pre-court restructuring agreements, with the option of court ratification, creates a new mode of engagement with financially stressed companies that is less adversarial, less expensive, and potentially more value-preserving than formal proceedings. Market participants should begin developing the relationships, expertise, and documentation frameworks necessary to operate effectively in this space.

For all participants, the intersection of conventional legal principles with Shari ah requirements remains a structuring consideration that is unique to the Saudi market. Financing fund documentation, restructuring agreements and portfolio transfer mechanisms must be designed with both frameworks in mind. The CMA's 2026 Instructions and the proposed Bankruptcy Law amendments do not alter this fundamental characteristic of the Kingdom's legal environment; they simply provide a more sophisticated framework within which Shari ah-compliant structures must be deployed.

Conclusion

The twelve months since our 2025 article have confirmed the direction of travel, and accelerated it. The CMA's consolidated Financing Investment Funds Instructions and EISAR's proposed Bankruptcy Law amendments are not incremental adjustments; they are structural additions to a regulatory framework that is, in material respects, now fit for purpose as a foundation for sophisticated private credit activity.

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> Saudi Arabia is no longer merely aspiring to become a destination for private credit. It is actively constructing the architecture that makes such deployment viable, transparent and scalable.

For fund managers, the public financing fund is a new product category that merits serious evaluation. For investors, the combination of regulated structure, enhanced transparency, and exchange liquidity creates a private-credit-adjacent asset class with a risk-return profile that is increasingly well-defined. For distressed investors, the deepening insolvency toolkit and the proposed out-of-court framework represent a meaningful expansion of the viable strategy set.

The window of opportunity identified in our 2025 article has not closed, it has widened. Those who invest now in the expertise, relationships, and institutional infrastructure necessary to operate in this market will be positioned to capture a disproportionate share of what promises to be one of the most consequential private credit growth stories of the next decade.

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This article is intended for informational purposes only and does not constitute legal advice. Readers should consult qualified legal counsel for advice on specific matters.

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SINGAPORE

Future-Proofing Fund Vehicles:
The Road to VCC-IRDA Alignment in Singapore

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Marie Lee is the Executive Director helming the Restructuring and Recovery practice of Baker Tilly Singapore.

With over 15 years of experience in corporate restructuring and insolvency, she has built her career at Baker Tilly, specialising in judicial management, liquidation, schemes of arrangement, and bankruptcy solutions.

During her extensive tenure at Baker Tilly, Marie has not only honed her craft but has also been actively involved in assisting experienced insolvency practitioners. Her dedication has seen her assisting and gaining firsthand experience through many landmark cases, establishing her as a formidable expert.

Marie collaborates with companies, creditors, and stakeholders to maximise recoveries and streamline financial restructuring across various sectors including funds, healthcare and technology. Clients frequently commend her problem-solving ability, practicable advice and attentiveness to their concerns, reinforcing her reputation for exceptional service and effective results. She is a licensed insolvency practitioner and a member of INSOL International, the International Women's Insolvency & Restructuring Confederation (IWIRC), the Insolvency Practitioners Association of Singapore (IPAS) and the Institute of Singapore Chartered Accountants (ISCA).

Beyond her professional duties, Marie is committed to advancing her interest in the field of restructuring and insolvency through continuous education. She is deeply interested in reading judgments written by judges on insolvency matters, acquiring progressive knowledge of the decisions and intricate understanding how the laws were interpreted.

Marie Lee's comprehensive approach and unwavering commitment make her an invaluable asset to Baker Tilly and a trusted advisor to her clients. Her ability to navigate complex financial landscapes and devise innovative solutions continues to drive her success and influence in the industry.

Future-Proofing Fund Vehicles: The Road to VCC-IRDA Alignment in Singapore

Introduction

Over the past decade, Singapore has adopted a coordinated regulatory and institutional strategy aimed at entrenching its status as a major international asset management centre. This strategy has emphasised legal stability, regulatory credibility and institutional responsiveness, while capitalising on Singapore's geographical position as a hub for Asia's capital flows. Rather than displacing existing fund vehicles such as companies, limited partnerships and unit trusts, the legislators developed a complementary structure tailored specifically to the functional and commercial characteristics of investment funds.

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> The VCC framework allows fund managers to focus on investment strategy rather than resolving unnecessary corporate law frictions.

The Variable Capital Company (“**VCC**”) framework was thus conceived and jointly introduced by the Monetary Authority of Singapore (“**MAS**”) and the Accounting and Corporate Regulatory Authority (“**ACRA**”) on 15 January 2020, following the enactment of the Variable Capital Companies Act 2018 (“**VCC Act**”). The introduction of the VCC framework represented a significant legislative intervention designed to strengthen Singapore's fund domiciliation architecture and enhance its comparative appeal vis-à-vis established offshore and onshore fund jurisdictions.

The principles governing the VCC Act was a central departure from traditional company law but the VCC framework was ultimately able to resolve long-acknowledged frictions associated with using conventional entities as fund vehicles and accommodate both open-ended and closed-ended investment strategies within a single statutory framework at the same time.

Features of VCC

What truly distinguished the VCC regime from traditional corporate entities is the extent to which its statutory features are expressly tailored to the operational and commercial needs of the fund management industry. The VCC framework was designed to allow fund managers to prioritise investment execution and strategy development, rather than constantly resolving unnecessary frictions arising from corporate law constraints and duplicative compliance processes.

At a structural level, the VCC regime permits the establishment of umbrella structures comprising of multiple sub-funds, with each sub-fund benefiting from statutory ring-fencing of assets and liabilities. Although an umbrella VCC constitutes a single legal entity, the VCC Act mandates that the assets of one sub-fund cannot be used to satisfy the liabilities of another, including in insolvency. This feature enables fund managers to deploy multiple strategies, asset classes and investor mandates within a single corporate vehicle while preserving economic segregation and mitigating contagion risk across portfolios.

Complementing this structural flexibility is the concept of variable share capital. Unlike traditional companies constrained by capital maintenance rules, a VCC may freely issue and redeem shares at net asset value without shareholder approval and may make distributions out of capital. This allows for seamless investor subscriptions and redemptions, facilitates periodic distributions and supports both open-ended and closed-ended fund strategies. For investment managers, this represents a material reduction in operational friction and aligns the Singapore corporate fund vehicle more closely with global fund structuring norms.

The regime further supports operational efficiency through simplified fund administration. The umbrella VCC model allows sub-funds to share a common board of directors and centralised service providers, including fund managers, administrators, custodians and auditors. This consolidation delivers meaningful economies of scale, reduces administrative duplication and lowers ongoing compliance costs.

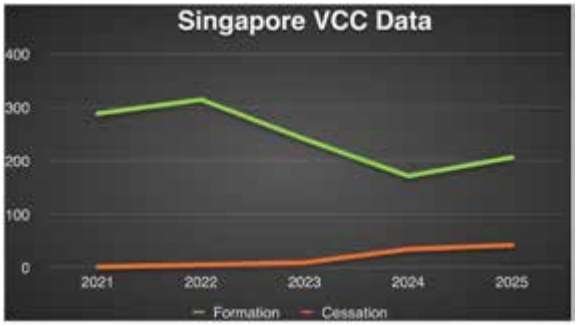
The VCC regime is supported by a calibrated fiscal framework designed to ensure continuity and alignment with Singapore's broader fund ecosystem. From the outset, Singapore adopted a policy approach that allows VCCs (subject to prescribed conditions) to access existing incentive schemes under the Income Tax Act. This facilitates a smooth transition for fund managers migrating from other Singapore structures or re-domiciling funds from overseas jurisdictions. VCCs may also leverage on Singapore's extensive network of double tax agreements to support efficient cross-border investment activity.

The interaction between tax rules and the VCC's legal architecture reinforces the regime's emphasis on functional segregation and integrity. While an umbrella VCC is treated as a single entity for income tax purposes, income attribution is computed on a sub-fund basis before aggregation. Sub-funds are also treated as separate persons for stamp duty purposes and common tax attributes are tracked independently at the sub-fund level, preventing cross-utilisation across unrelated strategies.

This dual-layered approach allows each sub-fund's financial and compliance profile to be assessed independently, while preserving the efficiencies of operating under a unified legal structure. Together with the VCC's flexible capital framework and streamlined administration, it supports operational efficiency and regulatory certainty.

Lifecycle of VCC

The lifecycle of a VCC is closely intertwined with the investment cycles it is designed to support. Following the launch of the VCC framework in January 2020, the market experienced a pronounced surge in new VCC formations as fund sponsors moved swiftly to take advantage of a purpose-built structure offering enhanced flexibility and operational efficiency. Many of these vehicles were brought to market within a short period and commenced operations across a wide range of strategies.



Accounting and Corporate Regulatory Authority statistics (https://www.acra.gov.sg/resources/business-registry-statistics/)

As these funds advanced through their respective investment horizons, the pace of new VCC formations began to moderate. This shift reflected a natural progression rather than a decline in interest. The initial wave of VCC launches gradually gave way to a more mature and stable phase of fund creation, which was consistent with the evolution of other established fund jurisdictions following the introduction of new vehicles. Over time, early-stage funds transitioned from deployment to realisation and the question of how VCCs would be brought to an orderly conclusion became increasingly relevant.

In practice, the cessation and wind-down of VCCs—particularly those structured as closed-ended funds—has emerged as a natural and inevitable phase of the fund lifecycle. Investment objectives are achieved or lapse upon expiry of fund terms, investors exit and the underlying legal structure must be wound up in a manner that is efficient, compliant and commercially sensible. This evolution highlights the fact that the true robustness of any fund vehicle lies not only in its flexibility at formation, but also in its ability to support an orderly and predictable exit.

> The true robustness of any fund vehicle lies not only in its flexibility at formation, but also in its ability to support an orderly and predictable exit.

While the concerted efforts of the MAS and the ACRA ensured that market participants were well prepared for the establishment and operation of VCCs, there was limited precedent or formal guidance addressing the mechanics of VCC wind-downs at the outset. This gap became apparent when we received instructions to wind up Singapore's first VCC and its sub-fund in 2021, a time when the practical application of winding up a VCC had yet to be tested in practice. The process required us to undertake close engagement with ACRA to address questions relating to documentation, sequencing of regulatory filings and the alignment of corporate dissolution procedures with fund-specific considerations. Practical solutions developed through this process eventually brought clearer administrative protocols and emerging best practices for VCC closures.

Taken together, the evolution of the VCC regime — from its rapid adoption, through active deployment, to its closure — demonstrates that the framework is both structurally resilient and operationally credible beyond the point of formation. The ability to both establish and conclude investment vehicles efficiently is essential to the integrity of any fund domicile. In this respect, Singapore's experience with early VCC wind-downs underscores its capacity to support the complete lifecycle of modern investment funds, further strengthening its position as a sophisticated and responsive fund jurisdiction.

Legislative Gap

Singapore's corporate, insolvency and accounting frameworks have historically evolved in tandem with industry developments and international best practices. Over the years, legislative refinements have addressed issues ranging from tax residency and anti-avoidance measures to fund-level governance and regulatory substance. This pattern of continual calibration reflects sustained engagement with market participants and has been central to Singapore's reputation as a jurisdiction that benchmarks itself against leading global standards while remaining responsive to industry feedback.

Against this backdrop, our experience of winding up early VCC structures revealed a curious legislative decision beneath the modern veneer of the VCC framework. This led to extensive discussions with veteran insolvency lawyers to assess the statutory basis governing the cessation of VCCs during the process of winding up and revealed that the VCC statute continues to defer to the Companies Act for provisions relating to winding up and dissolution, despite the introduction of the Insolvency, Restructuring and Dissolution Act 2018 ("**IRDA**") on 30 July 2020.

This legislative design choice meant that VCCs remained subject to legacy corporate winding-up provisions even as Singapore modernised its insolvency landscape to provide a comprehensive, coherent and internationally aligned framework. For a structure expressly designed to serve sophisticated fund managers and global investors, this disconnect raised legitimate questions regarding statutory coherence and the alignment of the VCC regime with Singapore's broader insolvency architecture.

While workable solutions were ultimately achieved in practice, the absence of explicit statutory alignment introduced avoidable complexity and underscored the importance of legislative coherence across the full lifecycle of innovative financial structures.

Reconciliation

After several years of continued reliance on the Companies Act for the winding-up of VCCs, legislators recognised that this legacy approach risked undermining regulatory clarity and operational certainty for fund managers, investors and other stakeholders within the fund management ecosystem. Consequently, the Variable Capital Companies (Amendment) Regulations 2026 was enacted to take effect from 01 April 2026 to align the insolvency and winding-up regime applicable to VCCs with the IRDA.

This legislative development represents an important reconciliation between the innovative objectives of the VCC framework and Singapore's modern insolvency architecture. By bringing VCC wind-ups within the scope of the IRDA, the revised regime provides a more comprehensive and contemporary set of rules that reflect international best practices.

As VCCs are fundamentally designed as investment fund vehicles rather than operating companies, the VCC regime deliberately prioritises orderly exits and liquidations over restructuring or business rescue. Core features of the VCC — such as asset segregation at the sub-fund level, investor redemption mechanics and the maintenance of net asset value integrity — sit uneasily with traditional restructuring tools typically associated with corporate rescue, including creditor cram-downs, moratoria and rescue financing. Introducing restructuring mechanisms into the VCC framework could undermine valuation certainty, disrupt investor expectations and compromise the orderly operation of collective investment schemes.

As such, the alignment with the IRDA thus does not signal a shift toward rehabilitative insolvency processes for VCCs but rather, provides a modernised and coherent legal foundation for winding-up fund vehicles in a controlled and predictable manner. This approach reflects a policy choice that balances insolvency modernisation with the unique characteristics and commercial realities of investment funds.

Future of VCC

By offering a modern, flexible and investor-centric fund vehicle, Singapore has further consolidated its position as an innovation leader in the global asset management industry. The alignment of the VCC regime with the IRDA demonstrates Singapore's continued commitment to maintain a resilient, coherent and forward-looking financial sector — one that supports investment activity across the full lifecycle of a fund, from formation and deployment through to orderly wind-down.

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> The alignment of the VCC regime with the IRDA provides a modernised and coherent legal foundation for winding-up fund vehicles in a controlled and predictable manner.

For fund managers and investors, the alignment delivers greater certainty and transparency in the event of insolvency or fund termination, enhancing Singapore's attractiveness as a fund domicile for increasingly sophisticated global capital. With its intentional focus on statutory ring-fencing, efficient administration, tax efficiency and now modernised liquidation pathways, the VCC is well positioned to remain a cornerstone of Singapore's financial ecosystem.

As regulatory refinements continue and market participants accumulate further operational experience, the VCC framework is expected to support deeper innovation in fund structuring. This will inevitably attract more complex and cross-border investment strategies and reinforce Singapore's reputation as a globally competitive and forward-thinking hub for asset management.

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USD6.8bn
worldwide revenue

147
territories

8th
largest global accounting network

754
offices

50,400
people

TIME's
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THAILAND

THAILAND'S IN-COURT BUSINESS REORGANIZATION: EXCLUSIVE BY DESIGN, EFFECTIVE IN EXECUTION

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Paralee is frequently invited to speak on restructuring and insolvency topics at industry conferences, professional organizations, and client training programs. She also teaches restructuring and insolvency subjects at Thailand's leading law schools. Alongside her client practice, she is actively involved in leadership roles within the firm, with a particular focus on pro bono work and inclusion, diversity, and equity initiatives in Bangkok.

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Alongside her client work, Karnsuda plays an active role in the development of restructuring and insolvency practice in Thailand. She lectures on restructuring and insolvency topics at professional and academic institutions and publishes on Thai business reorganization, contributing to broader thought leadership in this area.

Karnsuda holds a Master of Laws degree from Cornell Law School and a Bachelor of Laws degree from Thammasat University.

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THAILAND'S IN-COURT BUSINESS REORGANIZATION: EXCLUSIVE BY DESIGN, EFFECTIVE IN EXECUTION

1. Introduction: Evolution of Thailand's Insolvency and Restructuring Framework

Thailand's insolvency and restructuring framework is rooted in the Bankruptcy Act B.E. 2483 (1940), which originally provided only for liquidation-based insolvency and offered no statutory mechanism for rehabilitating viable businesses. This position changed fundamentally in the aftermath of the Asian Financial Crisis of 1997, commonly referred to as the "Tom Yam Koong" crisis, when widespread corporate distress exposed the limitations of a liquidation-only regime and underscored the need for a rehabilitation framework.

> "Thailand's insolvency framework evolved from a liquidation-only regime to a modern rehabilitation system following the 1997 Asian Financial Crisis.

In response, the legislature introduced Chapter 3/1 of the Bankruptcy Act, establishing court-supervised business reorganization as a central tool for rescuing large and complex enterprises whose failure could have systemic economic consequences. Inspired in part by U.S. Chapter 11, the Thai regime incorporated automatic stay protection, court oversight, and plan-based restructuring, while remaining adapted to domestic legal culture and institutional realities.

Further reforms followed in 2016, extending access to in-court reorganization to small and medium-sized enterprises (SMEs), and introducing a pre-packaged plan mechanism. In principle, SMEs could negotiate a plan with creditors in advance and submit it together with their petition. In practice, however, SME rehabilitation has remained rare. Many SMEs[1] lack the financial documentation, creditor coordination, and professional advisory support necessary to prepare a credible pre-pack, preventing the mechanism from gaining meaningful traction.

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Thailand is currently considering further amendments aimed at making pre-packaged reorganization available to both large corporations and SMEs, with the intention of streamlining proceedings and reducing procedural delays where creditor support already exists. In parallel, policymakers have proposed a separate debt-relief mechanism, referred to as the "Rehabilitation of an Individual's Status," designed to address the needs of micro-entrepreneurs and individuals with relatively low debt but high aggregate case volume. Legislative consideration of this mechanism was suspended following the dissolution of Parliament in December 2025, but has recently resumed after approval by the new cabinet on 5 May 2026.

2. Pandemic and Post-Pandemic Trends: Reorganization Versus Bankruptcy

Both liquidation-based insolvency and court-supervised business reorganization continue to play a central role in Thailand's debt-restructuring landscape. Their relevance became particularly pronounced during the COVID-19 pandemic, when large segments of the economy were forced to halt operations. The aviation sector was among the hardest hit, with carriers such as Thai Airways International Public Company Limited ("**THAI**"), Nok Air, and others entering in-court reorganization to address acute liquidity crises.

Central Bankruptcy Court statistics[2] for 2021 to 2025 (B.E. 2564 to 2568) reveal a persistent divergence between bankruptcy filings and business reorganization petitions. During the COVID-19 years, bankruptcy filings were already substantial, with 9,235 cases in 2021, representing reported debt of THB 221.78 billion, and 8,223 cases in 2022, with reported debt of THB 446.10 billion. In the same period, reorganization petitions remained limited to 19 cases in 2021 and 25 cases in 2022, notwithstanding severe liquidity stress across most industries.

1. The revised provisions of the Bankruptcy Act are published by the Office of the Secretariat of the House of Representatives (available in Thai at https://www.parliament.go.th/section77/manage/files/file_20231005174711_3_312.pdf).
2. Central Bankruptcy Court statistical data on bankruptcy and business reorganization cases for 2021–2025 (available in Thai at https://cbc.coj.go.th/th/content/article/index/id/9480).

In the post-pandemic period, overall distress intensified. Bankruptcy filings rose to 9,484 cases in 2023, with reported debt of THB 373.69 billion, before surging sharply to 14,622 cases in 2024, with reported debt of THB 244.07 billion, and remaining elevated at 13,826 cases in 2025, when reported debt value spiked to THB 1.31 trillion, driven in part by exceptionally large filings recorded in April alone. By contrast, business reorganization petitions never exceeded two digits. There were 34 cases in 2023, declining to 20 cases in 2024 and 21 cases in 2025, with corresponding debt values far lower than those observed in bankruptcy proceedings.

This numerical contrast, measured in thousands of bankruptcy filings versus only dozens of reorganization petitions, demonstrates that business reorganization in Thailand is used selectively. In practice, it is pursued primarily by debtors able to demonstrate operational viability and satisfy strict statutory entry requirements, typically with the support of major creditors.

A key factor behind this divergence is the increasingly strict scrutiny applied by the Central Bankruptcy Court at the petition-acceptance stage, which triggers the automatic stay and restricts creditor enforcement. The court has become markedly conservative in assessing whether petitions meet statutory prerequisites and has shown a readiness to dismiss defective filings swiftly. Where petitions lack clarity, completeness, credible financial information, or a plausible prospect of rehabilitation, early dismissal is increasingly likely.

The court also places strong emphasis on good faith and procedural preparedness. Where a debtor appears unprepared, such as by failing to submit evidence or witness statements in advance, while creditors actively oppose the petition, the court may regard the filing as an attempt to abuse the automatic stay and dismiss it outright. This approach is reflected in Supreme Court Decision No. 1088/2566 (2023), where repeated filings and withdrawals over several years, together with the absence of meaningful new evidence or a credible plan, led to dismissal without acceptance to prevent misuse of the process.

Overall, the data confirm that while business reorganization remains an important statutory mechanism, it is used infrequently and only in cases that meet strict viability, evidentiary, preparation, and good-faith standards. At the same time, reorganization remains a highly effective tool for large operations with substantial debt exposure, particularly when supported by experienced legal and financial advisors capable of navigating creditor dynamics and executing the process with discipline and strategic clarity.

3. Structural Pain Points in Thailand's Reorganization Regime

Thailand's reorganization framework reflects a cautious adaptation of U.S. Chapter 11 principles to local legal culture. While this approach successfully introduced rehabilitation as an alternative to liquidation, several structural differences continue to shape the regime's operation and, at times, constrain it.

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> In post-pandemic Thailand, bankruptcy filings surged into the thousands while business reorganization petitions remained in the low dozens.

(i) Absence of an Absolute Priority Rule

Unlike U.S. Chapter 11, Thailand's business reorganization regime does not adopt a formal absolute priority rule. Under Chapter 11, senior creditors must be paid in full before junior creditors or equity holders receive any distribution, unless the senior class consents otherwise. This rule places creditors firmly at the top of the value hierarchy, giving them strong negotiating leverage and ensuring predictability in the allocation of enterprise value.

In Thailand, the Bankruptcy Act adopts a more flexible allocation framework. Secured creditors remain protected up to the value of their collateral, and statutory priority unsecured claims, such as employee wages, taxes, and certain public debts under section 130 of the Bankruptcy Act, must still be satisfied in accordance with prescribed priorities. Beyond these safeguards, and in the absence of a statutory absolute priority rule, equity interests are not automatically extinguished, even where creditors do not receive full repayment. Provided that the reorganization plan is approved by the requisite creditor classes and confirmed by the court, existing shareholders may retain some or all of their ownership interests.

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> Unlike U.S. Chapter 11, Thailand’s reorganization regime has no absolute priority rule, allowing existing shareholders to retain ownership interests even if creditors are not paid in full.

This design reflects a conscious departure from creditor-centric restructuring models. On the one hand, allowing shareholders to remain invested can support business continuity, preserve institutional knowledge, and facilitate consensual solutions in industries where ownership stability, technical expertise, or long-term relationships are critical to rehabilitation. On the other hand, from a creditor’s perspective, the absence of an absolute priority rule may be perceived as a dilution of economic priority, particularly where shareholders retain value while creditors accept write-downs.

Viewed in the context of Thailand’s economic landscape, which is characterized by family-owned businesses, concentrated shareholding structures, and relationship-based financing, this flexibility serves an important functional purpose. By prioritizing enterprise preservation over rigid liquidation hierarchies, the regime can help stabilize viable businesses, maximize going-concern value, and, in many cases, deliver better recoveries to creditors than liquidation would provide.

(ii) Timing of Onerous Contract Termination

A second, highly practical, pain point in Thailand’s business reorganization regime concerns the timing and treatment of onerous contracts, particularly executory agreements such as aircraft leases, real estate leases, and long-term supply or service contracts.

Under U.S. Chapter 11, a debtor-in-possession may reject executory contracts relatively early in the process, allowing counterparties to file claims promptly and participate in creditor voting. This integrates contractual counterparties into the restructuring from the outset.

By contrast, under Thai law, the power to terminate onerous contracts generally arises only after plan approval and must typically be exercised within two months thereafter.[3] Until that point, counterparties remain contractually bound, even though the contract may later be terminated under the plan. While counterparties may submit claims for damages once termination occurs and receive repayment under the plan, they do not have voting rights at the plan-approval stage, as their claims crystallize only after termination.

In practice, this statutory sequencing makes pre-approval negotiation with contractual counterparties critical. If a counterparty elects to terminate the contract before the plan is approved, where termination rights exist, the resulting claim often falls outside the scope of the reorganization plan. Such claims cannot be restructured or compromised under the plan and instead remain enforceable after the debtor exits the proceedings. These claims are commonly referred to as “hanging debts,” meaning obligations that survive rehabilitation and resurface post-exit, potentially undermining the very purpose of the restructuring.

3. Section 90/41 bis of the Bankruptcy Act.

While the Thai approach is intended to maintain stability during plan formulation, it consequently shifts substantial execution risk onto the debtor, making professional handling indispensable. Effective business reorganization in Thailand therefore requires advisors who not only understand the legal mechanics of contract termination but also possess the commercial sophistication to manage counterparties, structure interim arrangements, and prevent the creation of hanging debts. As illustrated in the THAI case, navigating this limitation successfully demands disciplined early-stage negotiation and close coordination between legal strategy and commercial realities.

(iii) Absence of a DIP Financing Framework

A further structural pain point in Thailand's business reorganization regime is the absence of a debtor-in-possession (DIP) financing framework, a mechanism that plays a central role in U.S. Chapter 11 proceedings. Under Chapter 11, DIP financing allows distressed companies to access new liquidity during the restructuring process, often on a super-priority basis, enabling them to fund ongoing operations, preserve going-concern value, and stabilize the business while negotiations continue.

In Thailand, by contrast, the Bankruptcy Act provides no comparable statutory mechanism for interim financing during the reorganization process. New money is therefore typically introduced only through the reorganization plan itself, for example through plan-based loans, capital increases, or equity participation that takes effect upon or after plan approval. This limitation is compounded by the automatic stay, which is backed by criminal sanctions, making lenders and investors particularly cautious about providing interim funding outside a court-approved framework.

As a result, liquidity management during the pre-plan approval period becomes decisive. Debtors must rely on negotiated arrangements with existing stakeholders, such as standstill agreements or temporary support arrangements, that comply strictly with stay restrictions. This interim phase is often the most fragile. Operating cash flow is constrained, fixed costs continue to accrue, and unresolved creditor objections can delay plan approval and intensify liquidity pressure. In practice, prolonged delays in the absence of interim funding can be fatal, causing otherwise viable businesses to deteriorate before the plan takes effect. Successfully navigating this phase therefore requires disciplined execution and experienced professional advisors capable of aligning legal constraints with commercial realities and maintaining sufficient liquidity until plan implementation.

4. Case Study: Thai Airways International (THAI) — Law, Commercial Reality, and Execution

THAI represents the most significant and instructive example of Thailand's in-court business reorganization regime in practice. The case involved substantial debt exposure and highly complex stakeholder and cross-border structures.

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> Thailand's reorganization regime lacks a statutory debtor-in-possession financing framework, forcing debtors to rely on negotiated interim arrangements and making liquidity management critical during the pre-plan phase.

Among several first-of-its-kind features, THAI was the first Thai debtor to actively seek recognition of its reorganization proceedings in multiple jurisdictions. This reflected its global operations, aircraft leases governed by foreign law, international creditor base, and overseas assets. Although Thailand has not adopted the UNCITRAL Model Law and applies a territorial approach to insolvency, the case demonstrated how effective cross-border coordination can nonetheless be achieved through pragmatic court engagement and targeted recognition efforts.

In the absence of a DIP financing framework, liquidity during the early stages of THAI's reorganization presented a critical challenge, particularly as the airline generated minimal operating income during the pandemic due to global travel restrictions. With limited options for interim funding, THAI pursued an unusual court application to dispose of non-core assets prior to plan approval, a remedy that Thai courts have rarely granted.

To address judicial concerns, the application was supported by detailed evidence demonstrating acute liquidity needs, confirming the non-core nature of the assets, specifying the limited use of sale proceeds, and proposing safeguards to protect creditor interests. These safeguards included placing the proceeds in a segregated account, maintaining transparent audit trails, and reporting all transactions under the supervision of the Official Receiver, together with corresponding disclosures to creditors.

> In the absence of DIP financing, THAI secured critical pre-plan liquidity by obtaining rare court approval to sell non-core assets, supported by strong evidence and creditor safeguards.

On this basis, the court approved the asset sales, providing essential pre-plan liquidity and illustrating how careful legal structuring and transparency can bridge the survival gap in a system without formal DIP financing.

Commercially, the reorganization unfolded under extraordinary conditions. During the COVID-19 pandemic, the aviation industry came to a near-complete standstill, and aircraft leasing markets were under severe strain. While this environment was devastating to revenues, it altered negotiating dynamics. THAI undertook extensive negotiations with aircraft lessors and critical suppliers, many of whom faced systemic risk if major carriers collapsed. In this context, comprehensive lease termination was often commercially unattractive, and the court-supervised process provided a structured framework for renegotiation.

The court-approved plan enabled THAI to address onerous contracts comprehensively and, critically, without leaving any hanging debts. This included long-term aircraft leases that were no longer sustainable. Entire aircraft types, notably the A380 and certain A330 aircraft, were removed from the fleet due to structural inefficiencies in fuel consumption, maintenance, and post-pandemic demand. This rationalization reduced fixed costs and aligned capacity with realistic market conditions.

Capital restructuring formed another cornerstone of the process. After transitioning from state-owned to private status prior to the commencement of court-supervised rehabilitation, THAI implemented a large-scale debt-to-equity conversion involving the Ministry of Finance, financial institutions, and bondholders. This was complemented by a public offering and an employee stock option program, marking the first use of such equity-strengthening tools within a Thai reorganization. The result was a structural recapitalization aimed at long-term sustainability rather than short-term relief.

THAI exited court supervision after satisfying all statutory requirements under its plan and subsequently met the regulatory and listing criteria imposed by the Stock Exchange of Thailand and the Securities and Exchange Commission, enabling the resumption of trading. The case underscores a clear lesson: successful reorganization depends not only on statutory tools, but on execution. When supported by experienced legal and financial advisors capable of balancing legal discipline with commercial realities, Thailand's reorganization regime can operate as a holistic, value-preserving mechanism for large and complex enterprises.

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5. Conclusion

Thailand's in-court business reorganization framework has evolved significantly since its introduction following the 1997 Asian Financial Crisis. While legislative reforms have expanded access and introduced greater flexibility, Central Bankruptcy Court data demonstrate that rehabilitation remains a selective process, reserved for cases capable of meeting stringent viability, evidentiary, and good-faith standards. This selectivity has become more pronounced in the post-COVID period, where widespread distress has translated overwhelmingly into rising bankruptcy filings rather than a corresponding increase in reorganization petitions.

Structural characteristics, such as the absence of a strict absolute priority rule and the timing of onerous-contract termination, continue to influence creditor behavior and shape outcomes. These features may deter rehabilitation in marginal cases, but they do not undermine the regime's effectiveness where it is properly deployed.

As the THAI case illustrates, when applied to large and complex enterprises and supported by disciplined planning and professional execution, Thailand's business reorganization regime can deliver comprehensive restructuring, preserve enterprise value, and facilitate a credible return to the market. The regime's future lies not in volume, but in the quality of execution, serving as a targeted yet powerful restructuring tool within Thailand's broader insolvency landscape.

Future legislative refinement, particularly in relation to pre-packaged proceedings and SME accessibility, may further calibrate this balance. Nevertheless, the core integrity of Thailand's reorganization regime is already well established.

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> Thailand's business reorganization regime is not measured by volume, but by the quality of execution in large and complex cases.

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Businesses facing financial distress often need to make difficult decisions under pressure, while managing legal risk and operational realities. Baker McKenzie Thailand's Restructuring and Insolvency practice represents and acts for clients across the full spectrum of restructuring and insolvency matters, including complex financial restructurings and court supervised business reorganizations. The team develops and implements workable strategies and executes solutions across all stages of the process, with the objective of stabilizing businesses, preserving value, and facilitating sustainable outcomes.

UAE

Corporate Re-Domiciliation
Under the UAE Legal Framework

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Mohamed is a Partner at Matouk Bassiouny and serves as Head of Corporate and M&A for the UAE as well as Head of FinTech and ECVC. He advises on complex FinTech, venture capital, M&A, commercial, and capital markets transactions. Mohamed has assisted leading players in the FinTech and venture capital industry, ranging from local and regional to multinational and international clients.

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Recent directories have recognized Mohamed as "an outstanding lawyer who goes above and beyond" (Legal 500, 2025) and noted his "very good understanding of the sector" (IFLR1000, 2023).

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He has advised a range of corporate clients and investors, including representing DPI Venture Capital on the USD 15.7 million Series A funding round of Sylndr, a leading Egypt-based online used-car retailer, through its Nclude Fund. His experience spans due diligence, negotiation of transaction documents, regulatory approvals, and corporate restructuring.

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Alia advises on regulatory compliance, manages legal risks across sectors including international trade and commercial operations, and supports the drafting and negotiation of commercial contracts. She has assisted with a range of commercial agreements, including service contracts, vendor agreements, and employment terms, while advising internal stakeholders on contractual risks and providing recommendations aligned with commercial objectives.

Alia also supports dispute resolution matters, including case strategy and the drafting of pleadings and court submissions. She conducts legal research on regulatory developments, prepares consultation briefs for senior legal professionals, and has negotiated complex agreements with local and international entities.

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Corporate Re-Domiciliation Under the UAE Legal Framework

Introduction.

In this article, we shed light on the concept of corporate re-domiciliation, commonly referred to as corporate migration or continuance. Re-domiciliation is a legal mechanism that allows a corporate entity to transfer its registration from one jurisdiction to another without interrupting its legal personality or business continuity. By utilizing this strategic avenue, a company may seamlessly continue its operations while preserving its existing shareholding and management structures, as well as its historical track record from inception, subject to the regulatory requirements of both the departing and receiving jurisdictions. Entities typically pursue re-domiciliation for various strategic purposes, including corporate restructuring, the ability to benefit from more favorable legal and tax regimes, or the desire to access new markets.

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> Re-domiciliation is a legal mechanism that allows a corporate entity to transfer its registration from one jurisdiction to another without interrupting its legal personality or business continuity.

The UAE Jurisdictional Framework.

The United Arab Emirates (“**UAE**”) is characterized by a decentralized governance framework comprising the federal mainland and a number of independent free zones. Onshore (mainland) entities are primarily governed by federal legislation, supplemented by local regulations and oversight exercised by the competent authorities within each emirate. In parallel, the UAE hosts numerous free zones, each operating under its own distinct regulatory regime and enjoying a degree of legislative autonomy in relation to corporate matters.

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The Pre-Reform Landscape.

Historically, the UAE had no codified statutory mechanism for corporate re-domiciliation within the mainland. A company seeking to transfer its commercial registration from one emirate to another was required to follow an indirect route, typically, liquidation of the existing entity followed by new incorporation in the receiving emirate. Consequently, the company’s legal personality did not survive the transition. Employment contracts and commercial agreements would be terminated upon dissolution, necessitating renegotiation or novation; banking facilities required new documentation; and operational licenses lapsed.

Nonetheless, the concept of corporate migration was initially introduced at the emirate level in Dubai, but only for foreign entities that wish to continue in Dubai. Dubai Law No. (14) of 2015, which amended Law No. (13) of 2011 Regulating the Conduct of Economic Activities in the Emirate of Dubai, introduced a framework permitting the transfer of foreign-licensed establishments into Dubai. Pursuant to that legislation, the Department of Economic Development (“**DED**”) is empowered to transfer the registration of a foreign entity to its registers, issue a local license, and grant a certificate of continuation. The migrating entity must satisfy a number of requirements, including: (i) obtaining a certificate from its original competent authority approving the transfer of its registration; (ii) submitting its financial statements, an economic feasibility study, and a timeline for relocating its operations to Dubai; and (iii) ensuring that the constitutional documents of the migrating entity are aligned with applicable UAE laws and regulations.

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Subsequently, the concept of re-domiciliation gained significant traction across the UAE's various free zones. Prominent jurisdictions such as the Jebel Ali Free Zone (JAFZA), the Dubai International Financial Centre ("DIFC"), and the Dubai Multi Commodities Centre (DMCC) enacted their own independent regulatory frameworks. These regimes permitted the seamless migration of companies into and out of their respective zones, provided that the corresponding jurisdiction legally recognized and permitted such corporate continuation.

The Inception of the Concept in Federal Law.

At the federal level, the UAE has proactively modernized its legislative framework to enhance corporate flexibility. A landmark development in this context is the enactment of Federal Decree-Law No. 20 of 2025 Regarding the Amendment of Certain Provisions of the Commercial Companies Law (the "**CCL Amendment**") which came into effect on 15 October 2025, amending Federal Decree-Law No. 32 of 2021 on Commercial Companies (the "**CCL**"). The most consequential reform introduced by the CCL Amendment is the establishment of a statutory re-domiciliation mechanism. For the first time, commercial entities are legally empowered to transfer their commercial registration across various UAE jurisdictions, whether from one emirate's mainland to another, from the mainland to a free zone, or vice versa, while preserving their corporate continuity and legal personality, provided the receiving jurisdiction legally permits such migration. This effectively eliminates the historical requirement of dissolution and re-incorporation.

The principal operative provision is Article (15) bis, which codifies the legal mechanics of corporate migration within the UAE's corporate registry system. Under this provision, a company may pursue re-domiciliation upon securing the requisite internal corporate approvals, namely, a special resolution of the general assembly or the affirmative vote of an absolute majority of the shareholders. To effectuate a valid transfer, the migrating entity must satisfy a stringent set of statutory conditions. Specifically, the commercial registry systems of both the transferring and receiving authorities must permit the transfer. Furthermore, the company's commercial register must be free from any restrictive annotations or legal impediments. The transfer is strictly contingent upon the mutual consent of both competent authorities. For joint-stock companies (whether public or private), prior approval from the Ministry of Economy or the Capital Market Authority (the "**CMA**"), as applicable, is mandatory. Finally, a formal notice of the transfer must be published through the channels prescribed by the competent authority to ensure transparency and protect third-party rights.

Article (15) bis explicitly extends this mechanism to cross-jurisdictional transfers between the mainland and the various free zones. Entities migrating from a free zone into the mainland are subject to the aforementioned statutory conditions and are further obligated to align their constitutional documents, corporate governance frameworks, and operational affairs with the provisions of the CCL and its implementing regulations, subject to the oversight of the competent authority, the Ministry, or the CMA.

Notably, the CCL Amendment carves out a distinct regulatory pathway for the UAE's financial free zones, namely the Abu Dhabi Global Market ("**ADGM**") and the DIFC. Transfers into and out of these financial free zones are expressly exempted from the immediate application of Article (15) bis. Instead, the UAE Cabinet is mandated to promulgate specific executive regulations governing such migrations, in coordination with the Ministry, the relevant competent authorities, and the financial free zone regulators. This legislative bifurcation stems from the jurisdictional complexities inherent to the ADGM and DIFC; both operate under independent, common law-based legislative frameworks, and harmonizing the interaction between these legal systems and the federal civil law framework requires bespoke treatment. Such regulations have not been issued to date.

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> For the first time, commercial entities are legally empowered to transfer their commercial registration across various UAE jurisdictions while preserving their corporate continuity and legal personality.

Re-Domiciliation Under the ADGM and DIFC Regimes.

Notwithstanding the deferral of Article (15) bis in respect of the financial free zones, both the ADGM and the DIFC maintain their own well-established continuance regimes, which predate the CCL Amendment and remain operative.

(a) The ADGM.

The ADGM Companies Regulations 2020 address re-domiciliation under Part 7, Chapter 2 (sections 100 to 116). Pursuant to section 100(1), a body corporate incorporated outside the ADGM may apply to the Registrar for a certificate of continuance, provided it is authorised to do so under the laws of its jurisdiction of incorporation. Conversely, under section 100(2), an ADGM-registered company may apply for authorisation to seek continuance as a body incorporated under the laws of another jurisdiction. An application for inward continuance under section 102 requires the submission of articles of continuance, a statement of solvency in accordance with section 114, and evidence that the applicant is authorised by its original jurisdiction and will cease to be incorporated thereunder upon issuance of the certificate of continuance. The statement of solvency must be signed by each director confirming that the applicant is able to discharge its liabilities as they fall due. Section 101 bars applications where the entity is being wound up, is insolvent, is subject to receivership or administration, is party to a creditor compromise, or has a pending insolvency application. For outward continuance, section 111 requires, amongst other things, a solvency statement and section 109 mandates creditor notification.

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> Re-domiciliation under the current UAE legal framework is available only to solvent entities.

(b) The DIFC.

The DIFC Companies Law (DIFC Law No. 5 of 2018, sections 140 to 146) and the DIFC Companies Regulations 2018 (Section 8) provide an analogous regime. Regulation 8.1.4 of the DIFC Companies Regulations requires directors to declare that the company is solvent, there is no reasonable prospect of insolvency, and no insolvency applications are pending. Regulated entities require prior DFSA's consent. Outward continuation requires a special resolution and (where applicable) DFSA consent.

(c) The Regulatory Gap.

Until the Cabinet promulgates the contemplated executive regulations, there is no unified mechanism governing transfers between the mainland and the ADGM or DIFC. Such transfers remain governed exclusively by the respective free zone legislation, creating procedural uncertainty regarding mutual recognition of corporate continuity between the federal civil law system and the common law systems of the financial free zones.

Re-Domiciliation and Insolvency: Intersections, Constraints and Consequences.

The interaction between re-domiciliation and insolvency law raises significant questions concerning both the availability of re-domiciliation to distressed entities and the consequences of migration for pre-existing liabilities.

(a) The Solvency Threshold.

Each of the UAE's re-domiciliation frameworks imposes a solvency-related precondition. Article (15) bis requires the migrating entity's commercial register to be free from restrictive annotations or legal impediments. Section 101 of the ADGM Companies Regulations 2020 expressly bars any applicant that is insolvent, in liquidation, subject to receivership or administration, or party to a compromise or arrangement with creditors. Regulation 8.1.4 of the DIFC Companies Regulations 2018 requires a positive declaration of solvency and the absence of pending insolvency-related court applications. Re-domiciliation under the current UAE legal framework is, accordingly, available only to solvent entities.

(b) Cessation of Payments and the Timing Window.

Federal Decree-Law No. 51 of 2023 on Financial Restructuring and Bankruptcy (the "**Bankruptcy Law**") defines "cessation of payment" as the debtor's failure to pay any due debt after ten (10) days from the deadline in the relevant notice. Article 15 of the Bankruptcy Law obliges the debtor to file for preventive settlement or restructuring within sixty (60) days of cessation of payment. A company that has reached this threshold but has not yet filed may still hold a clean commercial register, creating a narrow window during which re-domiciliation remains technically available notwithstanding the entity's financial distress. Whether a re-domiciliation effected during this window could subsequently be challenged is not expressly addressed by the Bankruptcy Law, but the clawback provisions below provide a potential basis for scrutiny.

(c) Clawback Risk.

Article 148 of the Bankruptcy Law provides for the avoidance of certain transactions entered into during the six (6) months preceding the cessation of payment date. This period extends to two (2) years preceding the cessation of payment date where the transaction was executed between the debtor and an insider or a related party. Article 151 further empowers the trustee to seek non-enforcement of any debtor action occurring before the initiation of proceedings where such action is harmful to creditors. While re-domiciliation does not involve a transfer of assets (the entity retains its legal personality and all property remains vested in it), it effects a change in the applicable legal regime and potentially the insolvency framework to which the entity would be subject. If a re-domiciliation were effected during the look-back period with the purpose or effect of prejudicing creditors, a trustee might argue that the migration constitutes an "action harmful to creditors" within the meaning of Article 151. It is notable, however, that Article 150 provides a defense where the debtor acted in good faith and with the aim of carrying on its business, and there were reasons to believe the action could be beneficial to its business. Any clawback action must be filed within one (1) year of service of the decision to initiate proceedings. This remains a largely untested proposition under UAE law, though the NMC precedent provides analogical support for the principle that post-continuation insolvency claims may reach back to pre-continuation conduct.

(d) Continuity of Liabilities.

Re-domiciliation preserves legal personality. All pre-existing liabilities, debts, contractual obligations, and causes of action subsisting against the entity continue in full force. Re-domiciliation does not create a new entity, does not effect a novation of obligations, and does not discharge or extinguish any claim.

(e) The NMC Precedent.

In NMC Healthcare, 34 operating companies (originally incorporated onshore) were continued into the ADGM prior to being placed into administration. The Joint Administrators brought claims for fraudulent and wrongful trading under sections 251 and 252 of the ADGM Insolvency Regulations 2022, alleging losses of at least US$5 billion arising from conduct occurring entirely before the companies' continuation into the ADGM. The ADGM Court of First Instance (*NMC Healthcare Ltd & Ors v Shetty & Ors* [2024] ADGMCFI 0007, 8 July 2024) and the Court of Appeal (*Shetty v NMC Healthcare Ltd & Ors* [2024] ADGMCA 0001, 30 December 2024) held that: (i) an order may be made in respect of conduct predating continuation; (ii) a claim may be brought for conduct predating the enactment of the Insolvency Regulations; and (iii) no "sufficient connection" between the defendant and the ADGM is required as a jurisdictional prerequisite. Re-domiciliation into the ADGM may therefore expose directors to statutory insolvency claims under the receiving jurisdiction's regime for conduct occurring under a different legal system entirely.

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Re-domiciliation into the ADGM may therefore expose directors to statutory insolvency claims under the receiving jurisdiction's regime for conduct occurring under a different legal system entirely.

(f) Cross-Border Implications.

The Bankruptcy Law defines "debtor's assets" as including all properties inside and outside the UAE. The UAE has not adopted the UNCITRAL Model Law on Cross-Border Insolvency at the federal level, whereas both the ADGM (Part 6, Insolvency Regulations 2022) and the DIFC (Part 7, Insolvency Law 2019) have done so. A company re-domiciling from the mainland into the ADGM or DIFC would benefit from a more internationally recognised cross-border insolvency framework. Conversely, creditors who obtained claims under UAE law must assess whether the receiving jurisdiction's insolvency framework affords equivalent protections.

Strategic Implications and Practical Considerations.

The codified re-domiciliation mechanism reduces procedural complexity in corporate reorganizations and M&A transactions. Acquirers may consolidate entities registered in different emirates under a single competent authority without winding down existing vehicles. Free zone entities may migrate to the mainland to access the broader UAE market, subject to sector-specific licensing requirements, the impact on existing contracts, and the obligation to bring affairs into conformity with the CCL.

Migrating entities must coordinate with banking partners to ensure continuity of facilities and KYC records. Entities in regulated sectors will require prior approval from the relevant regulator. Companies subject to pending litigation, enforcement actions, or court-ordered restrictions must resolve those matters before transfer, given the requirement for a clean register. Contractual change-of-jurisdiction triggers in financing documents and material contracts should be reviewed.

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> The codification of re-domiciliation eliminates the historical requirement of dissolution and re-incorporation, offering a streamlined pathway for corporate migration.

The detailed procedural mechanics (documentation, timelines, interim status of the entity during transition) will be governed by implementing regulations and circulars to be issued by the Ministry and the relevant competent authorities.

Conclusion.

The CCL Amendment represents a significant advance in the UAE's corporate legal infrastructure. The codification of re-domiciliation eliminates the historical requirement of dissolution and re-incorporation, offering a streamlined pathway for corporate migration. As this article has examined, the interaction with the insolvency framework raises significant questions regarding the solvency threshold, the treatment of pre-domiciliation claims, and the exposure of directors to statutory insolvency claims in the receiving jurisdiction. These intersections, together with the regulatory licensing and financial sector dimensions, will require careful navigation as the implementing regulations are promulgated and judicial practice develops.

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Kelly is an active member of the International Insolvency Institute and a frequent speaker at global seminars. Beyond her commercial practice, she is a dedicated pro bono advocate, representing the N.Y. Police and Fire Widows' & Children's Benefit Fund and assisting military veterans.

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BIO

David J. Cohen is the Co-Managing Partner of Weil's Miami office and a Partner in the Restructuring Department. Based in New York and Miami, he advises debtors, creditors, sponsors, and bondholders in complex U.S. and cross-border corporate restructurings, with expertise spanning Chapter 11 and Chapter 15 proceedings, international insolvencies, liability management, and distressed M&A.

David is widely recognized for his impact on the global restructuring landscape. He was named Dealmaker of the Year by *The American Lawyer* for his role as lead counsel to Steward Health Care, the largest healthcare bankruptcy in U.S. History. He is also a finalist for Florida Dealmaker of the Year by the *Daily Business Review*. He is consistently featured among Lawdragon's 500 Leading Global Bankruptcy & Restructuring Lawyers and has been recognized as a *Law360* "Rising Star" in Bankruptcy, an "Outstanding Young Restructuring Lawyer" by Turnarounds & Workouts, and an "Emerging Leader" by The *M&A Advisor*.

A frequent speaker on international insolvency panels, David has served as a guest lecturer at the University of Miami and University of Florida Colleges of Law.

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This article highlights recent trends in both the liability management and chapter 11 transaction contexts. In both areas, a common theme has emerged: courts are confronting fundamental questions about form versus substance. In the liability management context, courts must decide whether to evaluate multi-step transactions as a sequence of independent, formally compliant acts or as a single integrated transaction judged by its collective effect. In the chapter 11 release context, courts must determine whether formal mechanisms — such as opt-out procedures — are sufficient to establish the consent required after Purdue Pharma, or whether something more affirmative is needed. These parallel tensions reflect a broader debate in restructuring law about mechanical execution versus the actual impact on affected parties. In both areas, courts continue to apply varying approaches and developing case law should be closely watched.

> “In recent liability management cases like Wesco and STG Logistics, U.S. courts are grappling with whether to review multi-step transactions as isolated formal steps or as a single integrated transaction judged by its overall effect.

Step-by-Step versus Holistic Review of Liability Management Transactions

The legal landscape for liability management transactions continues to shift as courts consider challenges to new, creative tactics. In recent decisions, including in Wesco and STG Logistics, courts have considered whether multi-step liability management transactions—and their practical effects on minority lenders—should be viewed holistically as an integrated transaction, which may put the transaction outside of what is permitted by the relevant debt documents. The issuers and participating creditors in both cases relied on arguments that, instead, each carefully sequenced step of the transaction should be reviewed on its own terms. As explained below, the courts in Wesco and STG Logistics arrived at different conclusions, with both decisions providing useful guidance to issuers and lenders/noteholders when structuring liability management transactions.

Wesco

Following a series of liquidity events in the second half of 2021, a noteholder group (the “**Majority Group**”) began accumulating two tranches of notes issued by Wesco Aircraft Holdings, Inc. (“**Wesco**”), and proposed a “Serta-type” uptier transaction before year end.[1] By February 2022, the Majority Group held two-thirds of Wesco’s outstanding 2024 Secured Notes, but only approximately 60% of the 2026 Secured Notes.[2] The shortfall mattered because the 2026 Secured Notes indenture required a 66⅔% supermajority vote to release liens on collateral. To bridge the gap, the Majority Group executed a multi-step transaction: it first consented to a majority-vote amendment (the “**Third Supplemental Amendment**”) permitting the issuance of additional 2026 Notes, then purchased $250 million of those new notes—diluting minority holders and achieving the 66⅔% threshold. With the requisite holdings in place, the Majority Group that same day executed a follow-on amendment releasing the liens securing the remaining notes held by non-participating minority lenders and exchanging their own notes for new super-senior first-lien notes.[3]

The central question was whether the Third Supplemental Amendment—which only required majority consent—should be evaluated in isolation, or whether its role as the enabling step in a broader lien-release transaction meant it effectively required a supermajority vote. The 2026 Secured Notes indenture provided that no amendment could “have the effect of” releasing all or substantially all collateral without 66 2/3% consent.

In its Report and Recommendation to the District Court, the Bankruptcy Court recommended a finding that Wesco breached the indenture by adopting the Third Supplemental Amendment.[4] Relying on the “effect of” language, the Bankruptcy Court determined that entry into the amendment was the first “domino” that made the subsequent lien release inevitable, and thus itself required supermajority consent.[5]

1. In re Wesco Aircraft Holdings, Inc., 2025 WL 354816, at *3 (Bankr. S.D. Tex. Jan. 17, 2025).
2. Id. at *9.
3. Id. at *3–9.
4. Id. at *18.
5. Id. at *16.

The District Court for the Southern District of Texas declined to follow the Bankruptcy Court's recommendations. The District Court reasoned that, although the amendments were executed concurrently, each separate agreement was independent and not conditioned on the others.[6] Because each amendment—viewed separately—complied with the indenture's terms, the uptier was found to be proper. The District Court also pointed to the parties' sophistication: they imposed a supermajority requirement for releasing liens, but specifically not for issuing additional notes.[7] Further, the Court noted the uncertainty that would arise from considering the consequences of an undefined universe of agreements executed after the Third Supplemental Amendment.[8] On January 6, 2026, the minority noteholders filed an appeal, seeking Circuit Court review of Judge Crane's opinion. As of April 2026, that appeal is still pending.

STG Logistics

In the STG Logistics litigation, the Supreme Court of the State of New York considered similar issues in the context of a dropdown "double dip" transaction. In October 2024, a majority lender group (the "**STG Majority Group**") implemented a liability management transaction through a series of "integrated, mutually dependent" agreements (the "**Transaction Documents**"), including a Sixth Amendment to the existing credit agreement (the "**SAA**").[9] As an initial step, the STG Majority Group consented to amendments in the SAA that permitted the borrower to designate unrestricted subsidiaries and removed restrictions on assigning assets to such subsidiaries.[10] Then, through the other Transaction Documents, STG's assets were transferred to a new unrestricted subsidiary ("**UnSub**"), the STG Majority Group exchanged its existing loans for new loans issued to UnSub (secured by the transferred collateral and a guarantee by STG), and the loan proceeds were lent upstream from UnSub to STG, with the new loans receiving a lien on the intercompany loan.

Minority lenders argued that their various "sacred" rights—provisions in credit agreements that typically require unanimous or affected-lender consent to modify—had been directly or indirectly implicated and impermissibly modified without their consent.[11] Taken as a whole, the minority lenders contended, the transactions prepaid the loans held by the STG Majority Group and granted those lenders priority in collateral transferred from the existing collateral package to UnSub.

Similar to Wesco, the New York Supreme Court's ruling on the STG Majority Group's motion to dismiss turned on whether the SAA should be reviewed separately from the other Transaction Documents. The court determined the Transaction Documents were appropriately viewed as one instrument implementing a single transaction.[12] Unlike Wesco, the STG court held the "primary standard" for determining whether contracts are severable is the parties' manifested intent, viewed in light of the surrounding circumstances.[13] The court reasoned that the intent was clear in the circumstances because the documents were executed concurrently and were mutually dependent; if any one agreement was ineffective, the transaction as a whole fell apart.[14] From that perspective, the various sacred rights implicated— including the transfer of collateral to UnSub, structural subordination of loans, and prepayment in a non-pro rata exchange—were reviewed no differently than a credit agreement amendment seeking to take such actions directly.

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> In the STG Logistics case, the New York Supreme Court viewed the multi-step liability management transaction as a single integrated instrument, unlike the Wesco court which treated each amendment separately.

6. See Wesco Aircraft Holdings, Inc v. SSD Invs. Ltd, 2025 WL 3514358, at *5 (S.D. Tex. Dec. 8, 2025).
7. Id. at *8.
8. Id. at *11.
9. See Axos Fin., Inc. v. Reception Purchaser, LLC et al., 246 N.Y.S.3d 915, 16 (NY Sup. Ct.).
10. See Amended Complaint ¶¶ 88, 91 [Docket No. 14].
11. See id. ¶ 15.
12. Axos Fin., Inc., 246 N.Y.S.3d at 36.
13. Axos Fin., Inc., 246 N.Y.S.3d at 17.
14. Id.

STG subsequently filed for chapter 11 in the Bankruptcy Court for the District of New Jersey on January 12, 2026, which automatically stayed the New York litigation. The debtors' proposed chapter 11 plan included a condition to effectiveness requiring a favorable result "reasonably acceptable" to the participating lenders with respect to the litigation claims. The litigation is proceeding under the Bankruptcy Court's supervision pursuant to an agreed-upon litigation schedule, with a final hearing and plan confirmation hearing currently scheduled for May 18, 2026.

Implications for Practitioners

> Post-Purdue, courts are split on whether 'consent' to third-party releases in Chapter 11 plans requires an affirmative opt-in or whether an opt-out mechanism is sufficient.

Wesco and STG Logistics reflect fundamentally different approaches to evaluating multi-step liability management transactions. The court in Wesco grounds its analysis in the plain language of the indenture and the parties' rights at each step in the sequence, while the court in STG Logistics explicitly looks past form to the intent of the transaction proponents.

Outcomes in liability management transactions vary depending on contract terms and the particular facts and circumstances. Because courts have taken divergent views on analyzing multi-step liability management transactions, until there is more clarity, parties who desire to execute a multi-step transaction without having it viewed on a consolidated basis should consider and "pressure test" their strategy under both analytical paths. State of "Consent" to Third-Party Releases Post-Purdue.

Following the Supreme Court's decision in Purdue Pharma barring nonconsensual third-party releases, lower courts and practitioners have focused on defining the contours of "consent" in the context of non-debtor releases in chapter 11 plans.[15] Purdue left this question open, declining to define "what qualifies as a consensual release." Two related issues have been central in the developing case law post-Purdue: courts must both determine the appropriate source of authority for interpreting consensual releases—federal due process principles or state contract law principles — and the conduct necessary by a proposed releasing party to establish consent.

These frameworks stem from pre-Purdue case law.[16] In fact, some judges have explicitly recognized that Purdue did not alter their prior approach. For example, in In re Smallhold Inc., Judge Goldblatt observed that non-consensual releases had only ever been granted in the most exceptional circumstances, and noted that judges were already split over a contract-based and due process-based approach to consent.[17]

Post-Purdue, three broad approaches to consent have emerged.

Strict Contract Approach

Under a strict contract law-based approach, a third-party release is treated as a contract between the debtor and its creditors, requiring an affirmative manifestation of assent. Inaction cannot establish consent, and opt-out releases are generally impermissible.

In Tonawanda, the Bankruptcy Court for the Western District of New York adopted this strict contractual analysis. The court rejected proposed opt-out releases, reasoning that a proposal for third parties to grant a release is an ancillary offer that becomes a contract only upon acceptance by the third party.[18] Under this framework, each party to be bound—whether voting or non-voting—must affirmatively sign a writing expressly agreeing to discharge the non-debtor parties. Absent such writing, the release is a mere proposal that no one can enforce. At least one other post-Purdue decision applied a similar analysis.[19]

15. See Harrington v. Purdue Pharma L.P., 603 U.S. 204 (2024).
16. See In re Washington Mutual, Inc., 442 B.R. 314, 352 (Bankr. D. Del. 2011) and In re Emerge Energy Services, L.P., No. 19-11563 (KBO), 2019 WL 7634308, at *18 (Bankr. D. Del. Dec. 5, 2019) (using a contract-like approach to determine that non-consensual releases are not permitted and that consent could not be inferred from silence); but see In re DBSD North America, Inc., 419 B.R. 179 (Bankr. S.D.N.Y. 2009) (holding that silence in the face of adequate notice and a meaningful opportunity to opt-out can allow an inference of consent). See also In re Arsenal Intermediate Holdings, L.L.C., No. 23-10097 (CTG), 2023 WL 2655592, at *6–8 (Bankr. D. Del. Mar. 27, 2023); Cole v. Nabors Corp. Servs., Inc. (In re CJ Holding Co.), 597 B.R. 597, 608–09 (S.D. Tex. 2019).
17. In re Smallhold, Inc., Case No. 24-10267 (Bankr. D. Del. Sept. 25, 2024), Docket No. 28.
18. In re Tonawanda Coke Corp., Case No. 18-12156 (Bankr. W.D.N.Y. Aug. 27, 2024).
19. See In re Ebix, Inc., Case No. 23-80004 (Bankr. N.D. Tex. Aug. 2, 2024), Docket No. 851.

The District Court in GOL likewise held that opt-out releases are insufficient to establish consent. Under the GOL chapter 11 plan, voting creditors were deemed to agree to third-party releases if they either voted to accept without opting out, or if they failed to vote or voted to reject but failed to submit a separate opt-out form. The Bankruptcy Court approved the releases, but the District Court reversed holding that "affirmative action" is required to express consent, and that consent cannot be inferred from silence where creditors had no obligation to participate in the opt-out process.[20]

The court rejected the debtors' position that the failure to act should be treated as consent, relying in part on New York contract law, and made clear that voting on the plan without a separate manifestation of assent to the release is insufficient to establish consent.[21] GOL does not go as far as Tonawanda's signed-writing requirement, but likewise rejects opt-out mechanisms as a standalone basis for establishing consent.

Opt-Out Permissive Approach

At the other end of the spectrum, under a due process-based approach, consent requires clear notice and a meaningful opportunity for parties to take some action, such as electing to opt out. This approach requires courts to conduct a fact-specific analysis of the debtor's notice and opt-out procedure, as well as the circumstances of affected parties.

In the *Spirit Airlines* case, the Bankruptcy Court for the Southern District of New York found opt-out releases were consensual as to both voting and non-voting creditors.[22] The court considered a number of factors, including whether the affected parties were provided with a clear and prominent explanation of the opt-out procedure and whether the proposed release was clearly and consistently presented.

Hybrid / Affirmative Participation Approach

Between these poles, a growing number of courts have adopted a hybrid approach that ties consent to some form of affirmative participation—such as voting on a plan or expressly opting in—while calibrating the required conduct differently for voting and non-voting creditors.

The evolution of this approach is well illustrated by the Southern District of New York's response to GOL, as evidenced in Azul. In Azul, the debtors initially proposed an opt-out structure similar to GOL but modified their plan—apparently in direct reaction to the GOL District Court decision—to provide that, with respect to voting creditors, releases would be granted only by creditors that both returned a ballot and did not elect to opt out, regardless of whether they voted to accept or reject. Non-voting creditors were required to affirmatively opt in to the release. Judge Lane approved this construct, finding that voting creditors who returned a ballot and remained silent on the opt-out had expressed an intent to accept the release.[23]

> Post-Purdue Chapter 11 cases reveal three emerging approaches to consent for third-party releases: strict opt-in contract requirements, permissive opt-out based on due process, and hybrid models requiring affirmative participation from voting creditors.

This hybrid model has gained traction across jurisdictions. In Container Store, Judge Rosenthal in the Southern District of Texas largely upheld confirmation of a plan with opt-out releases, carving out only non-voting classes of subordinated claims and existing equity interests.[24] In PosiGen, Southern District of Texas Bankruptcy Judge Lopez expressly followed the Container Store framework, and later confirmed a plan in Luminar over the U.S. Trustee's objection on similar grounds.[25] The U.S. trustee has appealed the district court's Container Store decision to the Fifth Circuit, whose ruling should clarify whether this hybrid opt-out framework will continue as the standard approach to third-party releases in the circuit.

20. In re Gol Linhas Aéreas Inteligentes S.A., Case No. 25-4610 (Bankr. S.D.N.Y. Dec. 1, 2025).
21. Id. at *14.
22. In re Spirit Airlines, Inc., Case No. 24-11988 (Bankr. S.D.N.Y. Mar. 7, 2025), Docket No. 520.
23. In re Azul S.A., 2026 WL 40912 (Bankr. S.D.N.Y. Jan. 6, 2026).
24. In re The Container Store Grp., Inc., 2026 WL 395898 (S.D. Tex. Feb. 12, 2026).
25. In re PosiGen, PBC., Case No. 25-90787 (Bankr. S.D. Tex. Feb. 24, 2026); In re Luminar Technologies, Inc., Case No. 25-90807 (Bankr. S.D. Tex. Dec. 15, 2025).

In the District of Delaware, the picture is mixed—some judges have endorsed the strict contract model, while others have adopted hybrid mechanisms, as reflected in FTX Trading and Lumio Holdings, respectively.[26] Most recently, Judge Silverstein agreed to grant interim approval to the disclosure statement in Salt House (In re Food2, Inc.), overruling the bankruptcy watchdog's arguments about the use of opt-out releases on the ballots.[27] In the District of New Jersey, Judge Kaplan recently confirmed *Multi-Color* over the U.S. Trustee's objection, referencing the Container Store framework in approving "properly tailored" opt-out third party releases.[28]

Implications for Plan Proponents

> Since Purdue Pharma, courts remain divided on what constitutes 'consent' to third-party releases in Chapter 11 plans, leading practitioners to adopt conservative mechanisms that satisfy both strict contract and hybrid approaches.

In the two years since Purdue, jurists have found different sources of authority for consensual third-party releases and have not agreed on the conduct required to establish consent. The landscape remains fractured, with open questions surfacing most recently in Aleon Metals, where the U.S. Trustee has objected to confirmation on account of the plans' third-party release provisions.

For plan proponents, the most conservative course would be to design release mechanisms that can survive scrutiny under any of the prevailing approaches. That would include requiring affirmative ballot submission (not mere silence) to establish consent for voting creditors; building in an express opt-in mechanism for non-voting creditors; and ensuring that notice of the release and opt-out or opt-in procedures is clear, prominent, and consistent across all solicitation materials. Practitioners should also be attentive to jurisdiction-specific preferences, as the emerging trend lines in the Southern District of New York, the Southern District of Texas, and the District of Delaware are not uniform. Unless and until higher courts and ultimately the Supreme Court provide further guidance, these jurisdictional preferences may continue to diverge.

26. In re FTX Trading Ltd., Case No. 22-11068 (Bankr. D. Del. June 26, 2024); In re Lumio Holdings, Inc., Case No. 24-11916 (Bankr. D. Del. Jan. 3, 2025).
27. In re Food2, Inc., Case No. 25-12277 (Bankr. D. Del. Dec. 29, 2025).
28. In re Multi-Color Corp., et al., Case No. 26-10910 (Bankr. D. NJ. April. 16, 2026).

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