

Restructurings Across Jurisdictions

Key themes, trends and considerations
in addressing cross border insolvencies

Introductions

- Panel:

- Sheila T. Smith, CIRA, Deloitte
- Ivan R. Lehon, CIRA, Ernst & Young

- Moderator:

- Jack F. Williams, CIRA, CDBV, AIRA and Mesirow

Overview

- Global financial distress
- Multi-national companies with connections to the United States
- Debtor subject to an insolvency proceeding in one jurisdiction may likely have assets and operations in a number of other sovereign jurisdictions
- Chapter 15 (Jack)
- Comparative Approach (Sheila and Ivan)

Chapter 15

- Chapter 15 was added to the U.S. Bankruptcy Code (the "**Code**") under the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005.
- It embodies the principles of the Model Law on Cross-Border Insolvency promulgated by the United Nations Commission on International Trade Law in 1997
- Replaced Section 304 of the Code.

Purposes

- Chapter 15's purposes:

- (1) to promote cooperation between the U.S. courts, trustees, debtors, examiners and other parties-in-interest and the courts and other competent authorities of foreign countries involved in cross-border insolvency cases;

- (2) to establish greater legal certainty for trade and investment;

- (3) to provide for the fair and efficient administration of cross-border insolvencies that protects the interests of all creditors and other interested entities, including the debtor;

- (4) to afford protection and maximization of the value of the debtor's assets; and

- (5) to facilitate the rescue of financially troubled businesses, thereby protecting investment and preserving employment

Commencement

- Proceedings under Chapter 15 may be initiated only upon petition by a foreign entity acting through a "foreign representative." Court enters order to proceed as either a foreign main proceeding or a foreign nonmain proceeding.
 - A "foreign main proceeding" is a foreign proceeding pending in a country where the debtor has the center of its main interests ("COMI").
 - A "foreign nonmain proceeding" is a foreign proceeding, other than a foreign main proceeding, pending in a country where the debtor has an establishment (i.e., a place of operations).

Protections – Foreign Main Proceeding

1. Section 361 applies to the debtor and the property of the debtor located within the U.S.; thus, a secured creditor's interest in collateral is afforded adequate protection.

2. Section 362's automatic stay applies enjoining virtually all actions regarding prepetition claims against the debtor and property of the debtor located within the U.S.

3. The provisions of Sections 363 (Use, Sale or Lease of Property), 549 (Postpetition Transactions), and 552 (Postpetition Effect on Security Interest) of the Code apply to the transfer of an interest of the debtor in property that is within the U.S. to the same extent as such sections would apply to property of the estate.

4. The foreign representative may operate the debtor's business and may exercise the rights and powers of a trustee under Sections 363 and 552 of the Code.

5. Section 552 applies to property of the debtor within the US.

Protections: Foreign Nonmain Proceedings

- Upon recognition by the court of foreign nonmain proceeding, the relief granted by the court is entirely discretionary and is subject to a showing that such relief "is necessary to effectuate the purpose of [Chapter 15] and to protect the assets of the debtor or the interests of creditors."
- Such relief may include:
 - ❑ stay of actions for prepetition claims against the debtor or its property located within the U.S.;
 - ❑ providing for the examination of witnesses;
 - ❑ taking of evidence or the delivery of information concerning the debtor's assets, affairs, rights, obligations or liabilities.

Coordination Through Protocols

- In chapter 15 cases, any party in interest may seek approval of an agreement, frequently referred to as a “protocol,” that will assist with the conduct of the chapter 15 case.
- Bankruptcy Rule 5012 implements recognized forms of cooperation between United States Bankruptcy Courts and foreign courts and foreign representatives.

Protocols

- Bankr. Rule 5012 does not seek to limit the form of protocol, leaving such concerns to the parties in interest on an ad hoc basis.
- Parties in interest may craft protocols to ensure that these agreements provide valuable assistance to the Bankruptcy Court in the management of the particular case.

ALI Protocol Guidelines

- Bankruptcy courts and foreign courts are receptive to the use of the American Law Institute's *Guidelines for Court-to-Court Communications in Cross-Border Cases* (the "Guidelines"). This should not surprise because the Guidelines are a thoughtful attempt at: (1) harmonizing and coordinating United States Bankruptcy Court and foreign jurisdictions, (2) ensuring separate independence of the courts, (3) promoting efficiencies, (4) fostering respect and comity, (5) addressing retention and compensation of estate representatives, (6) establishing dispute resolution mechanisms and procedures, and (7) reserving specific rights.
 - American Law Institute, *Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases* (2000), <http://www.ali.org/doc/Guidelines.pdf>.

Brazil : Recuperação Judicial



June 6, 2014

Brazil by the Numbers

- The Federative Republic of Brazil is the largest nation in South America
- Brazil is the fifth largest nation in the world by geography and population
- The Brazilian government is seeking nearly \$500 billion to invest in roads, ports, and other infrastructure projects to support the World Cup and the 2016 Summer Olympics
- Brazilian corporations are issuing a record number of bonds globally, comprising about 50% of global bond issuance for Latin America
- Economists focused on Brazil cut their 2014 growth forecast to the slowest ever
- Central bank raises interest rates to tame inflation
- President Dilma Rousseff's administration has been struggling to revive growth
- In 2005 a new bankruptcy law, Nova Lei de Falencias e Recuperacao de Empresas, was enacted to replace the highly criticized Concordata (historical creditor recovery was .2% vs. 19% since the new law was enacted)

Mega Cases Provide Opportunity for U.S. Practitioners

OGX Bankruptcy Filing Is a Stunning Fall for a Brazilian Tycoon

“The bankruptcy filing was the culmination of a decline that had been apparent for months...the company’s total debt is 11.2 billion reais (\$5.1 billion), making this filing the largest corporate default in the history of Latin America.”



OGX Bankruptcy Raises Big Questions for Brazil's Courts

“Now that the largest corporate bankruptcy in Latin American history is official, perceptions of whether it's handled fairly could have wide ramifications, helping or hindering investor interest in Brazil, South America's largest economy.”

Caruso-Cabrera, Michelle. “OGX Bankruptcy Raises Big Questions for Brazil's Courts.” *CNBC*. 31 Oct. 2013. Online.
Horch, Dan. “OGX Bankruptcy Filing is a Stunning Fall for a Brazilian Tycoon.” *The New York Times* 30 Oct. 2013. Online.

Focus on Certain Industry Verticals That are in Distress -Energy

Squeezed 101: Brazilian Utility Celpa Files for Bankruptcy, Bonds Dive... Government to Bail Out?

“State-controlled Centrais Eletricas Brasileiras SA (ELET6), or Eletrobras, may bail out Rede Energia if requested by the government, Reuters reported yesterday. Eletrobras owns about a one-third stake in Celpa.”



Celpa Files for Bankruptcy Protection - USA

“Centrais Eletricas do Para SA, commonly known as Celpa, filed for Chapter 15 Bankruptcy Protection at a US Bankruptcy Court in Manhattan, listing over \$1 billion assets and liabilities.”

Sanderson, Cliff. “Celpa Files for Bankruptcy Protection – USA.” *Dissolve* 19 Nov. 2012. Web.

“Squeezed 101: Brazilian Utility Celpa Files for Bankruptcy, Bonds Dive... Government to Bail Out?” *Brazilian Bubble*. Brazilian Bubble, 29 Feb. 2012. Web. 19 May 2014.

Focus on Certain Industry Verticals That are in Distress – Commodities

Brazil's Sugar-Cane Sector Shrinks

“The fewest mills in six seasons – 377 – will be processing cane into sugar and ethanol this season, said Plinio Nastari, president of consulting firm Datagro.

It would be the third consecutive season of declines in the number of mills, highlighting trouble in the sector in Brazil, the world's largest producer of sugar cane and the top exporter of sugar.”



Josephs, Leslie. “Brazil's Sugar-Cane Sector Shrinks.” *The Wall Street Journal*. 5 May 2014. Online.
Magee, Joan. “Brazil's Aralco has Filed to Restructure Debt - Source.” Reuters 5 March 2014. Online.

Brazil's Aralco has Filed to Restructure Debt –Source

“Troubled Brazilian sugar company Aralco has filed to restructure its debt...”

Focus on Certain Industry Verticals That are in Distress- Protein



Countries Move to Ban Brazilian Beef

Brazil-Leading world poultry company in big trouble.

Brazil Targets US & Mexico to Make Up for Lost Poultry Market

Drought Puts The Squeeze On Already Struggling Fish Farms

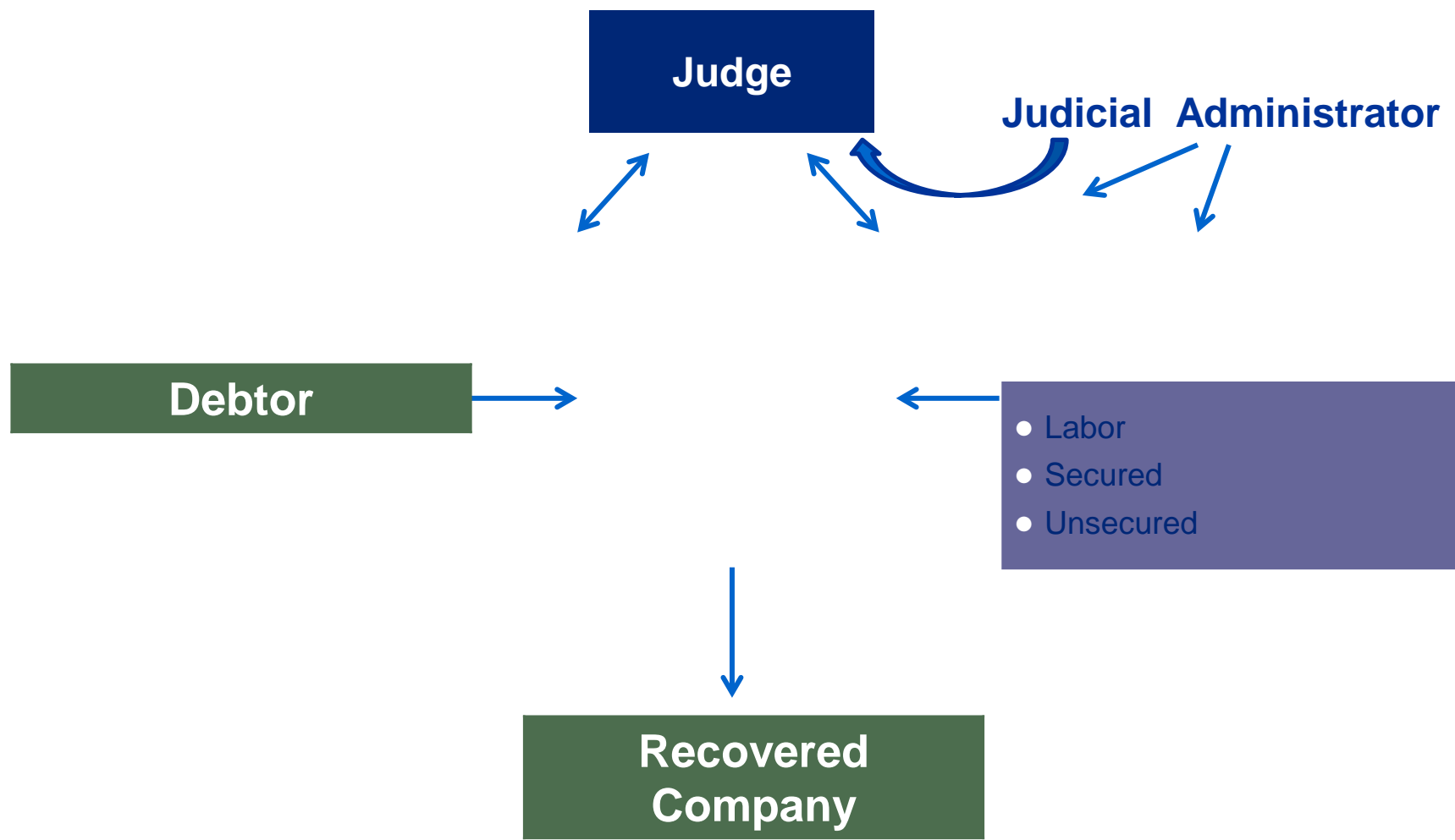


Worldwide, aquaculture has grown into a \$119 billion industry, but the lack of water and high temperatures has hurt many.

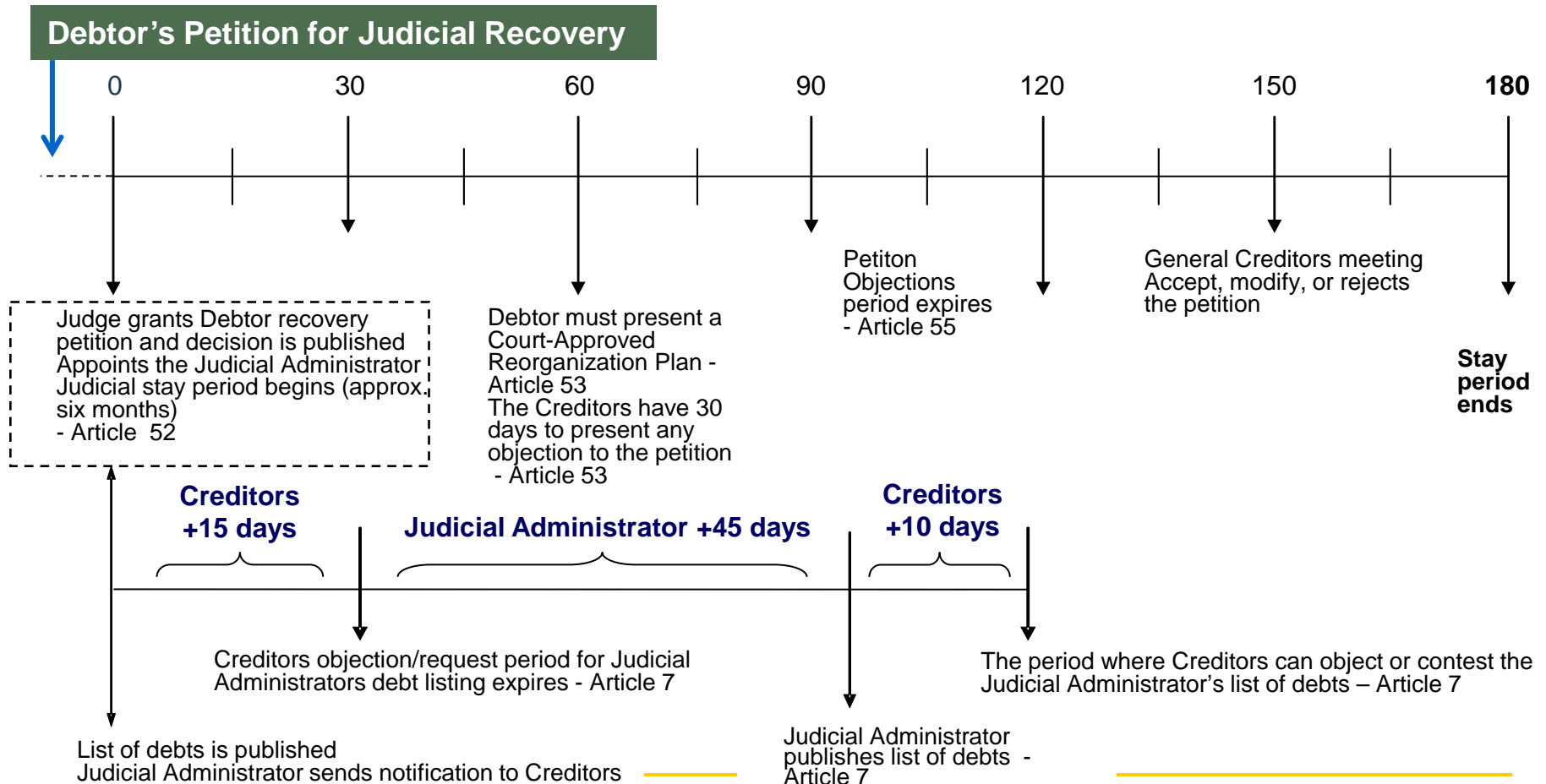


". Drought Puts The Squeeze On Already Struggling Fish Farms by Kristofor Husted NPR January 03, 2013 : Brazil Targets US & Mexico to Make Up for Lost Poultry Market hamid | 16/01/2014 Countries Move to Ban Brazilian Beef Over BSE." The Business Journal for Meat and Poultry Processors. 13 May 2014. Online.

Judicial Administrator – Restructuring (Recuperação Judicial)



Recuperação Judicial – Brazilian Bankruptcy Law



Recuperação Judicial vs. Chapter 11 – Main Differences

Judiciary	<ul style="list-style-type: none">• Most Brazilian states direct insolvency petitions to a court of general jurisdiction, wherein the judge may only have superficial familiarity with insolvency law	<ul style="list-style-type: none">• Specialized federal bankruptcy courts in every jurisdiction
Court appointed professionals	<ul style="list-style-type: none">• Brazilian courts routinely appoint in large cases a Judicial Administrator/Trustee to work with the debtors' directors, officers, and creditors. Their role very broad and judges rely heavily on them	<ul style="list-style-type: none">• Trustee, examiner, or receivers are appointed by exception due to case concerns/motions filed by a party in interest
Automatic Stay	<ul style="list-style-type: none">• Commences after court decides to grant judicial reorganization; effective for 180 days• No extensions (see below re: POR)	<ul style="list-style-type: none">• Commences as of the petition date effective for the duration of the case
DIP financing	<ul style="list-style-type: none">• Not as robust a market as US• No formal provisions for judicial reorganization treatment• OGX had an infusion of financing from bondholders	<ul style="list-style-type: none">• Robust market for DIP financing from pre existing lenders• Entitles DIP lender to extraordinary provisions such as superpriority claims and priming liens

Recuperação Judicial vs. Chapter 11 – Main Differences (cont.)

Bondholders	<ul style="list-style-type: none">• Brazilian law treats a bond issue as a single creditor and therefore does not automatically recognize the individual bondholder; the indenture trustee has the ability vote• Indenture trustee files the Proof of Claim for the entire bond holder group in the indenture in the 15 day deadline• Brazilian courts have authorized bondholders to obtain individual recognition, but process is arduous; each form has to be consularized, notarized, sworn, and translated into Portuguese	<ul style="list-style-type: none">• Individual bondholders are considered individual creditors with separate voting rights and standing• The U.S. BK Code prevents the indenture trustee from voting on a Plan of Reorganization
-------------	---	---

Recuperação Judicial vs. Chapter 11 – Main Differences (cont.)

Creditor Committees	<ul style="list-style-type: none">• Appointment of a Creditor Committee (CC) is not mandatory and rare• When formed, the CC represents all creditors, including secured, therein conflicts of interest may diminish value• General meeting of creditors within 150 days after granting the judicial reorganization• Minimal formal participation in plan development, but for activist bondholders and/or ad hocs• Fees and expenses incurred by the Committee, i.e. counsel, are not automatically paid for by the estate• Committee members may be held liable for any losses to the estate, debtor, or creditors	<ul style="list-style-type: none">• The U.S. Bankruptcy Code requires the U.S. Trustee to appoint an official committee of unsecured creditors who also represent bondholders• UCC's have active participation in plan development• UCC's fees are typically paid by the estate which may be subject to a "governor" on amount in the carve out in the DIP financing• Secured creditors are not seated on the UCC's but their professional fees are typically added to the loan and paid by the debtor/estate or paid by the secured creditor
----------------------------	--	--

Recuperação Judicial vs. Chapter 11 – Main Differences (cont.)

Reorganization Plan	<ul style="list-style-type: none">• Submitted to the court within 60 days after the court grants judicial reorganization• Creditors then have 30 days to object to the plan• If any creditor objects, the judge must call a general meeting of the creditors• Only the debtor can file and/or amend a plan• Absent Plan confirmation the non-extendable stay terminates automatically, converting the case to liquidation	<ul style="list-style-type: none">• Submitted during 120 day debtor exclusivity period• The solicitation period provides another 60 days of exclusivity• Exclusivity can be extended up to 18 months• Creditors can file competing plans after exclusivity
Disclosure	<ul style="list-style-type: none">• Brazilian law requires limited disclosure and information• Documentation is available to the court, the judicial trustee and by court authorization, any interested party substantially limited• In order to request additional information, creditors must petition the court, which may be time consuming and expensive	<ul style="list-style-type: none">• Disclosure statement required with Plan of Reorganization• Court approved disclosure statement and plan summary are distributed to all the eligible parties

Recuperação Judicial vs. Chapter 11 – Main Differences (cont.)

Voting – Who	<ul style="list-style-type: none">• Voters include:<ul style="list-style-type: none">– Labor related claims– Secured claims– Unsecured claims• No single class has priority over another• Voters who appear in person at the general meeting or via a proxy	<ul style="list-style-type: none">• All impaired classes must vote on a plan• Each class are “substantially similar” claims based on priority and nature of the security interest<ul style="list-style-type: none">– Secured– Unsecured• Votes can be mailed
Voting – Rules	<ul style="list-style-type: none">• Plan approval requires acceptance by all classes• A class is deemed to accept if:<ul style="list-style-type: none">– Approval of >50% in value– Approval by >50% in number of all creditors present at the general Meeting of Creditors	<ul style="list-style-type: none">• Plan must be approved by each impaired class• A class is deemed to accept if:<ul style="list-style-type: none">– Approval of >2/3rds in amount– Approval by >50% in number of allowed claims
Confirmation	<ul style="list-style-type: none">• Even when a plan is confirmed and goes into effect, the debtor remains under court supervision until the two year anniversary• If the debtor defaults on any obligations under the plan a liquidation ensues	<ul style="list-style-type: none">• Once a Plan is approved a confirmation order is entered• After the Plan is confirmed, the debtor is required to make plan payments and is bound by the provisions of the Plan

Accounting, Finance, and Culture *in* International Restructurings

Questions

Observations



Ivan is a Partner in EY's Capital Transformation Group based in NY. His 20+ years of professional experience crosses multiple industries assisting companies, creditors and stakeholders with a wide array of restructuring and strategy issues including assessing short and long term liquidity needs, portfolio analysis, plans of reorganization, profit enhancement, expense resolution, litigation, receiverships, fraud investigations, negotiating with secured lenders and unsecured creditors and various types of transaction support.

Ivan has an Accounting degree from Rutgers University and an MBA from Columbia Business School. Ivan is a CFA charterholder, CPA and CFE as well as a FINRA registered representative holding the Series 7, 63 and 24.

Select Experience:

- ▶ Ivan assisted a leading international shipping company that specialized in the transport of dry bulk cargo such as iron ore, coal and grains, as well as bauxite, fertilizers and steel products with its required chapter 11 reporting for over 40 individual debtor entities and B26 reporting for an additional 14 non-debtor entities. Additionally, he assisted the Company with its monthly operating reports and other interim reporting requirements as well as advised management on the preparation and circulation of communications with creditors and other constituents.
- ▶ Ivan was the lead partner advising an international lender wind down a \$20B portfolio of commercial and residential real estate assets. He and his team are advising management on restructuring issues, property cash flow analyses, loan draw reviews, funding controls, and loan servicing issues. The team is also coordinating the sale of certain loan pools. The project includes developing exit strategies and restructuring scenarios that may include existing borrowers, new money, A note/B note options, Joint ventures, among others.
- ▶ Ivan advised his client in regards to a \$450 million real estate portfolio consisting of multifamily, hospitality and commercial real estate. He advised the bank through the foreclosure process and is now working with the Court-appointed receiver around restructuring scenarios, short sales and forensic and cash tracing analyses.
- ▶ Ivan assisted a U.S. bank prepare its Recovery Plan in response to the Fed/OCC request. He assisted in defining the end deliverables and templates to collect requested information. Ivan assisted in collecting, challenging, and aggregating the information.

In addition, he assisted in managing the production and review of the formal recovery plan.

- ▶ Ivan was recently engaged to advise on multiple matters on behalf of a US Governmental entity related to transactions with financial services organizations, including credit agreement analysis and monitoring, debt covenant analysis, analysis of cash flow projections, off balance sheet debt analysis, advising on strategic alternatives and M&A due diligence
- ▶ Ivan performed analysis of insolvency and capital adequacy on a multi-billion dollar international company. He assisted in the liquidation of the derivatives book and assembled carve-out financial statements including inter and intra-company analysis and guarantee & commitment analysis
- ▶ He recently led a cross-border bankruptcy case, focusing on reconstructing the financials and intercompany transactions of the US legal entities to determine entity solvency related to equitable subordination and recharacterization claims



Sheila Smith, Principal
Corporate Restructuring Group
Deloitte Transaction & Business Analytics LLP

Sheila Smith is the Americas Region Restructuring Services Leader which provides workout, turnaround, and bankruptcy services throughout North and South America and the Cayman Bermuda cluster. Ms. Smith has more than 20 years of professional experience and has participated in hundreds of bankruptcy, restructuring, financial consulting and 363 sell side advisory engagements. She is considered a leading authority in the restructuring marketplace and as such is a sought after speaker, author, and industry pundit.

Ms. Smith was selected as the 2014 Albert Schweitzer Leadership Award recipient, the 2014 NYIC Education Leadership Award recipient, a 2013 inductee into the Turnaround Management Association (TMA's) Hall of Fame, 2012 recipient of the TMA Chairman's Award for her contributions to the restructuring industry, and was previously the 2005 recipient of the TMA's International Outstanding Individual Contribution Award for her eminence in the profession. She was the first recipient of the New York Institute of Credit (NYIC) Executive Women of the Year in 2008, and one of the 2010 Turnarounds & Workouts' Top Restructuring People to Watch.

Jack F. Williams is a tenured Full Professor at Georgia State University College of Law and the Middle East Institute in Atlanta, Georgia, where he teaches and/or conducts research in the areas of bankruptcy and business reorganizations, mergers and acquisitions, commercial law and damages models, corporate finance, financial markets, fraud and anti-corruption, Islamic markets and finance, taxation, public finance, and law and statistics. Williams is the Association of Insolvency and Restructuring Advisors Scholar in Residence. He also served as the inaugural Robert M. Zinman American Bankruptcy Institute (ABI) Scholar in Residence in 2001 and returned to that post in 2008. In 2009, Williams was recognized by the ABI with its Annual Service Award (2009), honoring the ABI member whose contributions over the past year have been extraordinary. He is a Fellow in the American College of Bankruptcy.

Williams is the National Co-Director of the Litigation, Investigation and Intelligence Services practice and is a Senior Managing Director at Mesirow Financial Consulting, LLC., in Atlanta, Georgia, and New York City. A full-service financial advisory consulting provider, Mesirow Financial Consulting provides litigation and investigative services, corporate recovery services, valuation services, interim management (interim management services provided by Mesirow Financial Interim Management, LLC), operations and performance improvement, distressed M&A and capital raising services, alternative investment services, due diligence services, and technology advisory services. For over 25 years, Williams has provided consulting and expert witness services in the areas of business restructuring, bankruptcy and insolvency taxation, distressed banking, fraud and fraudulent transfers, Ponzi schemes, distressed business valuations, forensic investigations, claims estimations, capital markets, avoidable actions, plan confirmation and cram down issues, and governance matters.

Williams has a BA in Economics from the University of Oklahoma, a JD (High Honors) from the George Washington University National Law Center, and a PhD in Archaeology from the University of Leicester.