INSOL INTERNATIONAL

COMPARATIVE REVIEW OF APPROACHES TO "RESCUE"OR "DEBTOR-IN-POSSESSION" (DIP) FINANCE IN RESTRUCTURING AND INSOLVENCY REGIMES

INSOL INTERNATIONAL

International Association of Restructuring,
Insolvency & Bankruptcy Professionals

INSOL International, 6-7 Queen Street, London, EC4N 1SP
Tel: +44(0) 20 7248 3333 | Fax: +44(0) 20 7248 3384
www.insol.org

ISBN: 978-1-907764-30-1

Published in March 2022

CONTENTS

PRESIDENT'S INTRODUCTION

I am very pleased to share INSOL International's latest publication, a comparative review of approaches to rescue or debtor-in-possession financing in restructuring and insolvency regimes.

Rescue finance plays a critical role in restructuring – often being the determinative factor in an enterprise surviving or folding. In recent times, local and global factors have created economic and financial pressure, causing access to finance to be a key issue for enterprises of all sizes and across many markets.

This outstanding INSOL International publication provides a comparison of the availability and frequency of the use of rescue finance in 14 jurisdictions. It highlights the differing approach to such finance across these jurisdictions, from formal and established processes to other markets where it is still an emerging trend. There are lessons to be learned from jurisdictions where rescue finance is more commonly used, and interesting trends to watch in regions where its deployment is nascent.

Given the critical role it has in successful restructuring processes, I have no doubt that rescue finance will continue to be a developing and significant area of law reform for restructuring and insolvency regimes across the globe.

This is a compelling and complex topic and this INSOL International publication contains significant detail across a range of mediums – including video – to help practitioners understand the differences and developments in and across various regimes.

On behalf of INSOL International and our global membership, I extend our thanks to Orla McCoy, INSOL Fellow, Clayton Uts, Australia who led the development of this terrific resource and project, and to everyone who contributed to this landmark work.

Scott Atkins
Fellow and President
INSOL International

FOREWORD

The ability of a distressed company to obtain finance to enable it to trade through a restructure, or a formal insolvency administration, can determine the ultimate rescue or demise of the enterprise. For a debtor company in financial distress, any restructuring or sale of the business as a going concern requires cash, or assets which can be turned into cash sufficiently quickly to finance the trade-on or reorganisation. Where credit has been frozen, or selling liquid assets would harm the viability of the business - or where neither is available -rescue financing (or debtor-in-possession financing) can be the debtor company's lifeline. When successful, rescue financing offers the company, and its key stakeholders, the prospect of a viable restructured business. It also offers providers of rescue finance acquisition opportunities via loan-to-own strategies, often attractive interest rates and repayment priority over other debts, potentially on a secured or even senior secured basis. Those attributes alone would seem to make rescue finance an essential tool in the restructuring armoury. Nonetheless, the degree to which different jurisdictions have created formal regimes to cater for such finance, including whether it is even permissible, whether if permissible it can be repaid in priority to existing debt, the extent to which the financier may take security over the assets of the debtor, and with what priority, varies significantly across the globe.

The genesis of this project was an earlier comparative study I had conducted in relation to whether access to rescue finance could be the balm to soothe a spate of retail insolvencies in Australia around that time. It compared the Australian rescue finance and US debtor-in-possession (DIP) finance regimes. A much broader analysis of the availability of rescue finance in restructuring and insolvency regimes around the globe is, of course, a more worthwhile endeavour and INSOL's Technical Research Committee is to be commended for giving this project its seal of approval.

This comparative study of rescue finance regimes consists of chapters written by INSOL members in 14 jurisdictions, each responding to a series of 16 questions in relation to the availability and market prevalence of rescue finance in their jurisdiction. It is intended to be an at-a-glance aid for (often time-poor) practitioners conducting cross-border restructuring, or considering the selection of an appropriate jurisdiction for the commencement of an insolvency proceeding. It should be a valuable resource for the profession.

The results of the comparative review are interesting. Some jurisdictions, like the US (see Craig Martin's chapter 15) and Canada (see Jane Dietrich and Jeffrey Oliver's chapter 4), have deep, well established, rescue finance regimes with sophisticated market participants, developed jurisprudence and large sums of capital available and deployed. However, in recent years a number of other jurisdictions have undertaken significant insolvency reforms, aimed predominantly at facilitating corporate debt restructuring. Examples include the new scheme of arrangement and DIP financing provisions introduced in the Insolvency, Restructuring & Dissolution Act 2018 which, as described by Jo Tay and Ee Jia Min in chapter 12, have now been tested in the Sinagaporean Courts. In January 2021, Law 14.14112/202 reformed the Brazilian Bankruptcy Law, which, as described by Liv Machado in chapter 2, now authorises the Courts in Brazil to approve financing agreements to allow a debtor to fund its activities, restructuring costs or to preserve the value of assets. The caselaw in that jurisdiction on the new legislation is yet to develop but the opportunities are significant. Likewise, India, a beacon for insolvency law reforms to meet the needs of a modern market, introduced the Insolvency and Bankruptcy Code, 2016, which provides for "interim finance" and allows financiers to provide super priority lending to companies undergoing a corporate insolvency resolution process, as described by Dhananjay Kumar and Aishwarya Gupta in chapter 9.

The position in Europe is evolving. The EU Directive on Preventive Restructuring, to be implemented in each member state by 17 July 2021, requires member states to ensure that, in furtherance of preventative restructuring, financing that is reasonably and immediately necessary for the continued operation or survival of the debtor's business or the preservation or enhancement of the value of that business pending the confirmation of a restructuring plan is protected. Our comparative review reveals the incremental and different forms of implementation of the EU Directive. In chapter 13 Ferdinand Hengst discusses the position in The Netherlands: rescue finance is available, either via informal (bilateral) negotiation, or under the preventive restructuring framework implemented in the form of the WHOA (*Wet homologatie onderhands akkoord*). In the Czech Republic, Petr Sprinz and Jiri Rahm note (in chapter 6) that although there is no developed market for rescue finance, a (little used) rescue finance framework similar to Chapter 11 of the US Bankruptcy Code exists under ss 41 and 42 of Act No. 182/2006 Coll. of the Act on Insolvency and its Resolution. In other jurisdictions, there may be no formal rescue finance framework, and no established market for rescue finance, but debtors nonetheless have access to forms of rescue finance. Simon Dickson and Nicholas Fox describe this position in the Cayman Islands (in chapter 5), in which rescue finance is made available through schemes of arrangement and formal insolvency proceedings. We learn from Nicholas Partouche (in chapter 7) that in France, forms of finance are available to corporate entities in distress or in formal insolvency proceedings, though there is no codified rescue finance regime or established "market" for rescue finance. The French ordinance transposing the EU Directive should further enhance the promotion of rescue finance in that jurisdiction. To Germany, in chapter 8 Ivo-Meinert Willrodt outlines a similar system to France - forms of finance and financial accommodation are available, albeit via informal systems (rather than a codified regime). The United Kingdom's Corporate Insolvency and Governance Act 2020, which introduced a "restructuring plan" and added features to the already well utilised English scheme of arrangement including a mechanism for "cross-class cramdown" is discussed in chapter 14 by Charlotte Møller. In that jurisdiction, while there is no codified rescue finance regime, there are established "work arounds" which can be utilised to allow a company in financial difficulty to seek rescue financing. The position is similar in Australia. In chapter 2, I (Orla McCoy) describe how rescue finance is addressed in the Australian restructuring market and note that, like other jurisdictions, further legislative reform, potentially emulating some of the successful aspects of the US DIP finance regime, is under consideration. Our final two jurisdictions are the geographically diverse Nigeria and Russia. In chapter 10, Chief Anthony Idigbe explains that, though the market is nascent, rescue finance is possible in Nigeria through certain provisions in the Companies and Allied Matters Act 2020 (which introduced CVAs and administration, with implications for post-commencement financing and, therefore, rescue finance), in addition to finance advanced by the Asset Management Company of Nigeria in respect of assets it has under management. In Russia, Federal Law No. 127-FZ "On Insolvency (Bankruptcy)" dated 26 October 2002 provides some opportunities for post-commencement finance according to Pavel Novikov, Yulia Skiteva and Oksana Tyusina. There is also proposed insolvency reform legislation before the Russian Duma.

If corporate rehabilitation rather than liquidation is to be an imperative of the contemporary global insolvency landscape, the ability of a debtor to obtain fresh credit, and on commercially attractive and acceptable terms may be one further factor which determines the choice of jurisdiction in which proceedings are commenced. More broadly, given the potential opportunities and returns for distressed debt and investment funds, it may also influence where capital is deployed.

The overarching takeaway from the review, as explained by our eminent contributors (the majority of whom are INSOL Fellows), is that while we still have opportunities for improvement, progress is being made across the globe to facilitate corporate restructuring. Lessons can be learned from those jurisdictions in which the market is deep, and developed, as well as from those jurisdictions whose regimes are newer, being road-tested and the wrinkles ironed out. As to the preferred framework, while 11 U.S.C. § 364 is clearly influential, rescue finance via other guises and forms is also possible and enhancements via schemes of arrangement are becoming more prevalent.

Orla M. McCoy
INSOL Fellow
Clayton Utz, Australia

CONTRIBUTORS

Foreword	**Orla McCoy,** INSOL Fellow Clayton Utz
Australia	**Orla McCoy,** INSOL Fellow Clayton Utz
Brazil	**Liv Machado,** INSOL Fellow Tozzini, Freire, Teixeira e Silva Advogados
Canada	**Jeffrey Oliver,** INSOL Fellow **Jane Dietrich,** INSOL Fellow Cassels Brock & Blackwell LLP
Cayman Islands	**Nicholas Fox,** INSOL Fellow **Simon Dickson,** INSOL Fellow Mourant Ozannes
Czech Republic	**Petr Sprinz** **Jiri Rahm** Allen & Overy (Czech Republic) LLP, organizační složka
France	**Nicolas Partouche,** INSOL Fellow Peltier Juvigny Marpeau & Associes
Germany	**Ivo-Meinert Willrodt,** INSOL Fellow PLUTA Rechtsanwalts GmbH
India	**Dhananjay Kumar,** INSOL Fellow **Aishwarya Gupta** Cyril Amarchand Mangaldas
Nigeria	**Anthony Idigbe,** INSOL Fellow PUNUKA Attorneys & Solicitors
Russia	**Pavel Novikov,** INSOL Fellow **Yulia Skiteva** **Oksana Tyusina** Baker & McKenzie - CIS, Limited
Singapore	**Jo Tay,** INSOL Fellow **Ee Jia Min** Allen & Gledhill LLP
The Netherlands	**Ferdinand Hengst,** INSOL Fellow De Brauw Blackstone Westbroek
United Kingdom	**Charlotte Møller,** INSOL Fellow Brown Rudnick
USA	**Craig Martin,** INSOL Fellow DLA Piper LLP (US)

AUSTRALIA

1. Is there an established market for rescue finance?

Australia does not have a codified rescue finance regime, unlike, for example, the "debtor-in-possession" (or DIP) funding regime accessible pursuant to Chapter 11 of the United States Bankruptcy Code (Chapter 11). However, forms of rescue finance are available to Australian corporate entities in distress or formal insolvency proceedings including voluntary administration or schemes of arrangement, and are given statutory support in Australian corporate insolvency legislation.

While rescue finance is available to distressed debtors, the market for rescue finance is still very nascent in Australia.

One of the more recent high-profile, and the only contested, examples of the use of rescue finance in an Australian external administration was the AU$125m secured interim facility made available by entities affiliated with Bain Capital to the administrators of Virgin Australia Airlines during the voluntary administration of the Virgin Australia Airlines group.[1] While the group was in voluntary administration, the funds were advanced upon execution of a sale transaction, to finance the continued trading of the group. That funding enabled the Virgin Australia Airlines group to continue to trade while a significant operational and financial restructure was undertaken prior to completion of the acquisition of the group by Bain Capital.

2. If not, how do debtors fund or finance corporate reorganisation or trade on?

To address this question in the context of the Australian market, a brief overview of the key Australian corporate restructuring and insolvency processes may be of assistance.

In Australia, voluntary administration pursuant to Part 5.3A of the Australian *Corporations Act 2001* (Cth) (**Corporations Act**) is the most common vehicle by which debtor companies seek to restructure their affairs. Creditors' schemes of arrangement are also used, albeit with less frequency,[2] and this chapter will therefore focus on rescue finance in voluntary administration. Key features of voluntary administration (a statutory moratorium, statutory power to expeditiously

[1] A matter on which the writer acted for the Virgin Companies and their administrators.

[2] Statistics compiled and published by the Australian Securities and Investments Commission (ASIC) reveal 37,741 voluntary administration appointments during the period 1999-2020, compared with 25 schemes of arrangement during the same period.

sell all or part of a business as a going concern and / or an opportunity formulate a rescue plan - via deed of company arrangement) make it the closest Australian analogue to the Chapter 11 procedure.

An important distinction between administration and Chapter 11 is that, in Australia, an independent insolvency practitioner (an administrator) assumes exclusive control of the company's business, property and affairs. The powers of the executive (the board of directors and shareholders) of the debtor company are immediately suspended for the duration of the administration period.

Administration is, by design, an interim regime following which, if a rescue plan cannot be achieved, the debtor company will be placed in liquidation by resolution of its creditors. The statutory administration period is 25 business days, which may be extended by the court. It has become quite common for that period to be extended in a complex administration, to better enable the objects of the voluntary administration process to be achieved. During the administration period the administrator must investigate the debtor company's affairs, will seek to elicit sale or restructuring proposals and must ultimately make a recommendation to creditors who vote on the company's future at a determinative meeting of creditors at the end of the administration period.

Administration may be initiated by the debtor company's board of directors, or by certain secured creditors (holding the Australian equivalent of a qualifying fixed and floating charge), or by the company's liquidator. In contrast to Chapter 11, for which insolvency is not a prerequisite, voluntary administration may only be initiated by a debtor company if its directors formally resolve that the company is insolvent or "likely to become insolvent" at some future time. Anecdotally, it is often initiated relatively late, when options have dwindled, meaning that cashflow is challenged and funding to undertake a meaningful restructure is in short supply. In order to trade-on a business with a view to selling it as a going concern, or to successfully restructure its operations in external administration, the availability of cash to meet ongoing administration expenses, such as wages, supply and rental liabilities will be critical. If that funding is not available from the company's cashflow, administrators may seek bridging finance or other funding to meet continued trading costs and / or to facilitate a restructure or rescue of the business.

This underscores another key difference between voluntary administration and Chapter 11. The Australian Corporations Act makes administrators personally liable for debts which they cause the debtor to incur for services rendered, goods bought, property hired, leased, used or occupied, the repayment of money borrowed, interest on money borrowed and borrowing costs.

An administrator's broad powers to operate a debtor company's business encompass the power to cause the company to borrow. The Corporations Act makes provision for such borrowing by:

- as noted above, imposing on the administrator personal liability for the repayment of money borrowed, interest and borrowing costs; and
- granting the administrator a right of indemnity out of the assets of the debtor company in respect of such debts, which right of indemnity has priority over other unsecured debts (effectively treating it as an administrative expense)).

An administrator has a statutory and equitable lien over the assets of the company to support the right of indemnity, and priority in right of repayment over other unsecured (and certain secured) creditors.

Where the funding is of significant magnitude and / or where the administrator is concerned about the company's ultimate ability to indemnify the administrator in respect of the obligation to repay the advance, a prudent administrator will seek orders from the court seeking relief from personal liability for the funds borrowed, and limiting the rescue financier's right of recourse to the assets of the debtor. While the court retains discretion in relation to the grant of relief, applications for such relief are becoming more common, see for example: *Re Griffin Coal Mining Company Pty Ltd (admins apptd)* (2010) 82 ACSR 142; *Re Hughes Drilling Limited (Administrators Appointed)* [2016] FCA 1175; *Re Surfstitch Group Ltd (Administrators Appointed)* [2017] FCA 1244, *Ten Network Holdings Ltd (Administrators Appointed) (Receivers and Managers Appointed)* [2017] FCA 1144; *Re RCR Tomlinson Ltd (administrators appointed) & Ors* [2018] NSWSC 1859; *Re Flow Systems Pty Ltd (Administrators Appointed)* [2019] FCA 35; *Re McWilliams Wines Group Ltd (Admins Apptd)* (No 2) [2020] FCA 417; *Re Virgin Australia Holdings Ltd (administrators appointed)* (No 4) [2020] FCA 927; *Re Autocare Services Pty Ltd (administrators appointed)* [2021] FCA 167 and *Re Adaman Resources Pty Ltd (Administrators Appointed) (No 4)* [2021] FCA 644. The increase in number, and frequency, of such applications corresponds with an increase in access to rescue finance, and the judgments shed light on the funding sources, the quantum of funds borrowed and, occasionally, the terms.

Under Australia's personal property securities regime, certain types of security interest must be perfected by registration on the Australian Personal Property Securities Register to be enforceable against third parties. While the usual implications of failure to register promptly are loss of priority, a grantor's insolvency also poses a key risk to unregistered security interests, or security interests which have not been registered within certain prescribed periods. The consequences of failing to register within the relevant time periods (or at all) are that the security interests may "vest" or be ineffective on a grantor's insolvency. The language of the statutory provisions exposes security granted after the commencement of a debtor company's insolvency proceeding to the same risks, notwithstanding the administrator's concurrence in any such transaction. Market practice has, therefore, been to seek orders from the court modifying the time for valid registration of any security interests created in connection with post-administration rescue finance (see: *Re Virgin Australia Holdings Ltd (administrators appointed)* (No 4) [2020] FCA 927; *Re Ten Network Holdings Ltd (Administrators Appointed) (Receivers and Managers Appointed)* [2017] FCA 1144*; K.J. Renfrey Nominees Pty Ltd (Trustee)*, *Re OneSteel Manufacturing Pty Ltd v OneSteel Manufacturing Pty Ltd* [2017] FCA 325. Whether this remains market practice remains to be seen and perhaps the outcome of appeal court consideration of the issue. In September 2021, a single judge decision of the NSW Supreme Court (*In re Antqip Hire Pty Ltd (in liq)* [2021] NSWSC 1122) held, contrary to the previously assumed or accepted position, that an order extending the time for registration is not necessary in respect of security granted post-petition / post-appointment.

3. If yes, what are the main sources of funds for rescue finance?

The conventional sources of funding in Australia are the existing secured lenders or, in the case of retail businesses, liquidity providers like Gordon Brothers, Hilco and Great American or even, occasionally, a significant landlord of a retail business.

Funding may also be advanced by related companies, directors or shareholders.

Loan-to-own strategies are also seen in Australian administrations, with potential purchasers of the business advancing critical funding to facilitate continued operations while the transaction is effectuated (or a deed of company arrangement proposed by that purchaser put to creditors for approval - such as in the CBS acquisition of the Network Ten group, or the Bain Capital acquisition of the Virgin Australia Airlines group).

4. Is rescue finance codified or subject to specific legislation?

Other than the Corporations Act provisions outlined above in relation to an administrators' personal liability for repayment of funds borrowed, interest on those funds and borrowing costs, and the statutory right to indemnity from the assets of the debtor company in respect of those liabilities, no.

In August 2021, the Commonwealth Treasury published a consultation paper on the reform of schemes of arrangement which, among other things, invites submissions on whether Australia should enact statutory rescue finance provisions. If implemented, these would allow rescue finance to be extended on more flexible terms, including by allowing roll-ups (i.e. where existing (pre-appointment) lenders offer, and obtain, a post-appointment facility that effectively pays off (or rolls-up) the pre-appointment secured debt), and court orders with respect to the 'super' priority of the new money in relation to existing secured and unsecured debt. The deadline for submissions was 10 September 2021. At the time of writing there are no further developments to report in relation to potential reform.

5. Are there any legislative or regulatory restrictions or requirements for foreign investment which rescue finance providers need to consider?

Foreign investments in Australian entities, businesses and land are regulated by the *Foreign Acquisitions and Takeovers Act* 1975 (Cth) (**FATA**) and associated regulations. The Australian Foreign Investment Review Board (**FIRB**) advises the Australian Federal Treasurer on foreign investment proposals submitted for approval, and administers the FATA and its associated regulations.

Approval may be required under the FATA if a "foreign person" or "foreign government investor" is involved in an acquisition of an entity, business or land in Australia.

Other regulatory requirements and tax consequences may apply if a lender, arranger, facility agent or security agent is deemed to be carrying on business in Australia. Whether the foreign lender is deemed to be carrying on business will depend on the particular circumstances. A foreign company that carries on business in Australia must be registered with the Australian corporate regulator (ASIC) under the Corporations Act and must comply with various disclosure and other requirements imposed on registered foreign companies under the Corporations Act.

6. Is court approval required for rescue finance or any security granted to the lender? If so, what considerations does the court take into account in approving or rejecting a proposal for rescue finance?

Court approval is not required for rescue finance. However, as noted in answer to question 2 above, administrators will generally seek orders from the court for relief from personal liability for the funds borrowed, and limiting the rescue financier's right of recourse to the assets of the debtor.

The factors which the court takes into account on an application for relief from personal liability include:

- whether the proposed arrangements are in the interests of the debtor company’s creditors and consistent with the objectives of Part 5.3A (the voluntary administration provisions) of the Corporations Act. (Typically the arrangements proposed are to enable the company's business to continue to trade for the benefit of the company's creditors);
- whether the creditors of the debtor company may be prejudiced or disadvantaged by the types of orders sought and, if not, whether they otherwise stand to benefit from the administrators entering into the arrangement;
- whether notice has been given to those who may be affected by the order; and
- in making orders relieving administrators from personal liability in respect of borrowing, the courts have observed that to do so may permit the administrator to make commercial decisions about the ongoing operations of the debtor company, by focusing on what is in the best interests of the creditors ‘*uninfluenced by concerns of personal liability*': *Secatore, Re Fletcher Jones and Staff Pty Ltd (admins apptd)* [2011] FCA 1493

Interestingly, our research has also not identified any application by an administrator for relief which a court has declined.

In terms of security, subject to restrictions in any security agreements (including negative pledges) to which the debtor company is party, security can be granted by a company in administration over unencumbered property, and no application to court is necessary. On the other hand, if the debtor company's property is encumbered, in a voluntary administration the rights of secured creditors of a debtor company cannot be compromised or subordinated by court order (in contrast to the compromise of secured debt which can be achieved via a scheme of arrangement, for example).

The personal property securities "vesting" provisions in the Corporations Act (discussed in answer to question 2 above), have been construed to mean that security taken after an external administrator is appointed (i.e. post-petition) immediately "vests" in the grantor company. The conventional approach has therefore been to make an application to court for relief, relevantly, fixing a later (post-administration) date for registration, if security is taken for rescue finance. The court may make orders fixing a later date for registration of security interests (to a date after the commencement of the administration) if the court is satisfied that:

- the failure to register at an earlier time is not of such a nature as to prejudice the position of creditors or shareholders; and
- it is just and equitable to grant relief. In this regard, the relevant prejudice the court considers in the context of an application of this nature is the prejudice attributable to the delay in registration (if any), rather than prejudice from making the order (which is inevitable).

As noted in answer to question 2 above, a recent (September 2021) decision of the Supreme Court of NSW has reconsidered these provisions and either distinguished, or declined to follow, earlier authorities in determining that the vesting provisions "do not apply" to security interests which are granted pursuant to a security agreement *made after* the date of appointment of the administrator. While the eradication of an extra, costly, step is likely to be welcomed, at the time of writing, the market response to that decision is yet to be gauged. We expect practitioners will likely await appellate level guidance (or a legislative amendment) before abandoning the practice of seeking an extension of time as a "belts and braces" approach to ensure the validity of security for large advances

7. Is creditor or secured creditor approval required for rescue finance?

See 6 above.

Approval of unsecured creditors is not required.

Prior notice of an administrator's application for relief from personal liability for borrowing is not normally required to be given to unsecured creditors. The judicially developed practice in respect of such orders are that the orders are made on terms that notice of the orders be given to all creditors, with creditors granted liberty to apply to the court (to vary or discharge the orders) if they are able to demonstrate relevant prejudice or interest.

In practical terms, an administrator will seek the consent or approval of any senior secured creditor(s) of the debtor company in relation to any proposed borrowing, in particular if a secured creditor holds security over assets of a debtor company which are subject to a circulating security interest (i.e. a floating charge). Common security granted by Australian companies includes security granted over specific property or equipment, or land, and security granted over all assets (including cash, receivables or and assets circulating in the business) in the form of a "general security deed" (akin to a fixed and floating charge).

Absent the written consent of a party holding security over the company's circulating assets, the administrators' statutory right of indemnity in respect of borrowings will only have priority over the debtor company's unsecured debts.

8. What role does a creditors' committee play in approving rescue finance (if any)?

There is no express statutory requirement to seek approval from a creditors' committee. In contrast to the power they wield in Chapter 11, Creditors' committees in Australian external administrations function as consultative bodies, only.

Depending on the timing and nature (or magnitude) of the borrowing by the administrator, the administrator may consider it prudent to notify and consult with the Creditors' Committee (if one has been appointed) in relation to any significant borrowing or application for relief from personal liability, or an extension of time to register a post-administration security interest granted to a rescue financier: see, for example: *Re Virgin Australia Holdings Ltd (administrators appointed) (No 4)* [2020] FCA 927 (at [6]).

9. What priority of repayment is available to unsecured rescue financiers, if any?

Since the Corporations Act imposes personal liability on an administrator for the repayment of money borrowed, interest and borrowing costs, and grants the administrator a right of indemnity out of the assets of the debtor company in respect of such debts, in Australia, rescue finance is effectively treated as an "administrative expense", which has priority in right of repayment out of the unencumbered assets of the debtor company.

Even if the Court relieves the administrator from personal liability, it will make orders allowing the funding to be repaid from the assets of the debtor company in priority to other unsecured claims, including claims for employee entitlements.

10. Can rescue finance be provided on a secured basis?

Yes, it can.

The nature and priority of security granted to a rescue financier will depend on the particular debtor company's circumstances, including what unencumbered assets are available to pledge by way of security (if any), whether other secured creditors hold security over the debtor company's property and whether the company's existing finance documents restrict the granting of security to other financiers.

Unless the debtor company's property is unencumbered (which would be very rare), post-appointment financing is usually a matter of delicate negotiation with the existing secured financiers, who rarely wish to be subordinated but may equally be reluctant to advance further funds to a debtor company.

11. Can rescue finance be provided on a super-priority secured basis?

Australia does not have a statutory provision analogous to the US priming lien provision (11 U.S.C. § 364(d)).

As a general rule, first-in-time perfected security has priority over later registered security interests in the same collateral, absent any subordination arrangements between the secured parties.

The priority of security granted to a rescue financier over existing senior secured creditors is therefore:

- a matter of negotiation and agreement between the rescue financier, administrator and existing senior secured parties; or
- effected by refinancing the existing senior secured debt (see e.g.: *Re Ten Network Holdings*).

12. Can priority or additional security be obtained for pre-petition financing?

The concept of "roll-up" DIP financing (where a pre-petition lender advances DIP financing on terms that the proceeds of the DIP finance will first be applied to repay pre-petition indebtedness in part or in whole), is not a term of art known to the Australian restructuring market, certainly not in the sense in which it is used in Chapter 11.

Priority and enhanced security can be obtained for pre-petition / pre-appointment financing subject to:

- voidable transaction risk - if the additional security is found by a liquidator subsequently appointed to have constituted an unfair preference or uncommercial transaction;
- "green charge" risk - if the additional security is taken over circulating assets, to the extent it does not secure any fresh advance, it may be void against a court appointed liquidator if the debtor company was not solvent immediately after the grant of security;
- due consideration of corporate benefit and appropriate exercise of directors' duties by the debtor company's directors; and
- priority or subordination arrangements being agreed with existing secured creditors,

see, for example: *The Bell Group Ltd (in liq) v Westpac Banking Corporation (No 9)* (2008) 39 WAR 1 and on appeal, *Westpac Banking Corporation v Bell Group Ltd (in liq) (No 3)* (2012) 89 ACSR 1.

13. Is security granted for rescue finance be automatically perfected, or is additional perfection required and, if so, what steps must be taken?

No. As noted at 2 and 6 above, as a result of certain provisions of the Corporations Act which have been interpreted in Australian case law to mean that post-petition security interests "vest" in the debtor company, it is conventional to make an application to court for relief from the personal property securities "vesting" provisions in the Corporations Act (relevantly, fixing a later (post-administration) date for registration) if security is taken for rescue finance. As noted above, the law in this area may be ripe for change. While that has been the conventional practice, In *re Antqip Hire Pty Ltd (in liq)* [2021] NSWSC 1122, in a September 2021 decision, the NSW Supreme Court distinguished or expressly declined to follow earlier authorities and held that an order extending the time for registration is not necessary in respect of security granted post-petition / post-appointment.

14. Is it common for the rescue finance provider to require milestones or other deliverables to be met, or to exercise control over the bankruptcy process?

Yes, is very conventional for the rescue finance provider to require milestones. Those may, include, for example, recommendation of a restructuring proposal to creditors or even exclusivity in respect of a sale transaction, with or without a "fiduciary out".

The rescue finance provider can exert a significant degree of influence and control over the process of the external administration by virtue of the advance of funds, particularly if the funds are secured, but ultimately the external administrator has statutory duties in respect of the administration of the debtor company and its affairs and must retain the ability to discharge those duties.

15. Have there been any cases in which the rescue finance provisions have been analysed by the courts?

As noted at question 4 above, other than the Corporations Act provisions which impose personal liability on administrators for borrowing and confer a right of indemnity from the assets of the debtor company in respect of those liabilities, there are no express "rescue finance provisions" in Australia.

There have been a substantial number of cases in Australia[3] which have considered:

- the administrators' power to borrow and whether relief from personal liability for such borrowing should be granted;
- extensions of time to register security interests for security granted in respect of rescue finance; and
- the statutory powers of an administrator to sell the assets or business of the debtor company without seeking judicial directions or putting the proposed sale to a vote of creditors "even if their doing so potentially narrows the range of other options that may be available to creditors": *Re TEN Network Holdings Limited (Admins Apptd) (Recs and Mgrs Apptd) and Others* [2017] NSWSC 1247 at [38] to [40].

A recent discussion of the principles, upholding the broad powers of a voluntary administrator to effect a sale of the business of the companies in the face of an unsuccessful underbidder challenge, is *Re Virgin Australia Holdings Ltd (administrators appointed) (No 8)* [2020] FCA 1344, at [39]-[50].

---

[3] See, for example, *Patrick Stevedores Operations No 2 Pty Limited and Others v Maritime Union of Australia & Others* (1998) 195 CLR 1; *Re Eisa Ltd* (2000) 35 ACSR 394; *Hausmann v Smith* [2006] NSWSC 682; *Re Keystone Group Holdings Pty Ltd (recs and mgrs apptd) (admins apptd) & Ors* [2016] NSWSC 1604; *Re TEN Network Holdings Limited (Admins Apptd) (Recs and Mgrs Apptd) and Others* [2017] NSWSC 1247; *Robit Nominees Pty Ltd v Oceanlinx Limited (in liq) (Receivers and Managers Appointed), in the matter of Oceanlinx Limited (in liq) (Receivers and Managers Appointed)* [2016] FCA 225; *Re Virgin Australia Holdings Ltd (administrators appointed) (No 8)* [2020] FCA 1344.

16. How has the market for rescue finance been impacted by the COVID19 pandemic?

The principal and immediate consequence of the COVID19 pandemic for the Australian restructuring and insolvency market has been record low numbers of Australian debtor companies commencing insolvency proceedings. While that seems counterintuitive, it is explained by multi-billion dollar Commonwealth and State Government support for business in the form of wage subsidies, suspension of insolvent trading provisions, increased thresholds and timeframe for payment of creditors' statutory demands, rent relief for eligible businesses and other measures. The reduction in formal external administration appointments has diminished opportunities for rescue finance providers in post-petition scenarios. However, there has been significant fund activity in Australia and funds are finding ways to put capital to work in refinancing, taking equity positions or advancing debt to corporate debtors which alleviates potential insolvency filings. Traditional lenders are eschewing certain asset classes, like coal, opening up the opportunities for offshore funds to refinance those operations.

One of the sectors of the market hardest-hit by the COVID19 pandemic is undoubtedly the tourism, travel and aviation sector. Australia is no exception in this regard. One of the largest and most complex rescue finance packages in the Australian market in recent years was negotiated and documented, mid-pandemic. That rescue finance took the form of an interim funding facility advanced by Bain Capital to the administrators of Virgin Australia Airlines, as part of a sale and restructuring proposal put forward by Bain. As noted in answer to 15 above, aspects of that transaction, including the post-petition security, were challenged by certain unsecured bondholders and those challenges dealt with by the Australian Court in *Re Virgin Australia Holdings Ltd (administrators appointed) (No 5)* [2020] FCA 986; and *Re Virgin Australia Holdings Ltd (administrators appointed) (No 8)* [2020] FCA 1344.

BRAZIL

1. Is there an established market for rescue finance?

There is not a well-established market for rescue finance. Such market is still to evolve in Brazil.

Brazilian Bankruptcy Law n. 11.101/2005 until the recent reform brought by Law 14.14112/202, that came into force in January 2021, did not have any specific provision concerning rescue finance for companies in judicial reorganization. For this reason, DIP lenders had a priority in case of bankruptcy for being post-filing claims, but other credits, such as the fees of the judicial administrator, amounts paid by the creditors to the bankruptcy state, expenses related to gathering, management and sale of the assets and court fees had priority over them.

However, the recent reform of the Brazilian Bankruptcy Law brought up more incentives to financing companies in difficulties. According to the new law, the judge, after hearing the committee of creditors, if such committee had been elected, can authorize financing agreements to the debtor fund their activities and the expenses of restructuring or to preserve the value of assets.

Moreover, the priority of the DIP lenders is more favorable, clear and brings more legal certainty. After the modifications, the DIP lender will have a super priority, if the judicial reorganization is converted into bankruptcy, the DIP lender will receive only after labor claims that became due 3 months before the bankruptcy, limited to 5 minimum wages per employee, and essential expenses of the management of the bankruptcy estate.

Considering the new legislation only came into force in 2021, a more mature market is yet to develop. However, it is already possible to observe an increase of DIP finance cases as a consequence of the chances in Brazilian Bankruptcy Law.

2. If not, how do debtors fund or finance corporate reorganisation or trade on?

Until the recent modification of the Brazilian Bankruptcy Law, debtor usually obtained funds by selling assets and from corporate financing. Only a few cases involved DIP financing.

3. If yes, what are the main sources of funds for rescue finance?

N/A.

4. Is rescue finance codified or subject to specific legislation?

Yes, the new legislation, considering the reform of the Bankruptcy law, provides for financing of the debtor or debtor group during the reorganization in articles 69-A to 69-F, as follows:

Article 69-A – During the judicial reorganization, the judge may, after hearing the Creditor's Committee, authorize the signing of Financial Agreements with the debtor, guaranteed by the encumbrance or by a fiduciary lien of assets, owned by the debtor or third parties, pertaining to the non-current assets, to finance its activities and expenses related to the reorganization or the preservation of the value of assets.

69-B. The amendment of the decision authorizing the signing of Financial Agreements on appeal cannot change the nature of priority of the credit, neither the guarantees provided by the debtor in favor of the good faith lender, if the disbursed of resources have already been made.

69-C. The judge may authorize the constitution of a subordinate guarantee on one or more assets from the debtor in favor of the lender of the debtor undergoing judicial recovery, dismissing the consent from the holder of the original guarantee.

69-D. If the judicial reorganization is converted into bankruptcy before the complete release of the values of the DIP Finance, the Financial Agreement will be considered automatically terminated.

Single Paragraph. The securities lodged and the preferences will be conserved until the limit of the values given to the debtor before the day of the sentence that converts the judicial reorganization into bankruptcy.

69-E. The financing discussed in this Section can be made by any person, including the creditors, subjected or not to the judicial reorganization, relatives, partners, and members of the debtor's group.

Art. 69-F. Any person or entity can guarantee the financing discussed in this Section by the encumbrance or by a fiduciary lien of assets, including the own debtor and the other members of its group, subjected or not to the judicial recovery.

5. Are there any legislative or regulatory restrictions or requirements for foreign investment which rescue finance providers need to consider?

No. The financial rescue can be provided by any person or legal entity, including creditors, relatives of the debtor, shareholders, among others.

Moreover, with the reform, Brazil adopted the UNCITRAL Model Law, which provides for equality of rights between Brazilian and foreign creditors.

6. Is court approval required for rescue finance or any security granted to the lender? If so, what considerations does the court take into account in approving or rejecting a proposal for rescue finance?

Yes. The court shall authorize the loan after hearing the committee of creditors, provided that such committee was elected. These financing agreements may be guaranteed by fiduciary lien of assets and / or rights, owned by the debtor or third parties, belonging to the debtor long-term assets. The further modification of the decision that authorized the financing may not alter its bankruptcy remote nature or the guarantee constituted if the amount has already been disbursed.

7. Is creditor or secured creditor approval required for rescue finance?

Except for fiduciary lien (where the debtor no longer owns the asset), the court may authorize the debtor to encumber former pledged assets without hearing the prior secured creditor that also has that specific guarantee. In other words, the court may authorize a 2° rank pledge, without listening the pledgee of the 1° rank pledge.

The court must listen to the creditors' committee, provided that it was formed, which is formed by secured and unsecured creditors.

8. What role does a creditors' committee play in approving rescue finance (if any)?

The creditor's committee is not mandatory and is formed by one representative and 2 spares of each class of creditors (class I – labor creditors; class II – secured creditors; class III – unsecured creditors and class IV – small companies). The decisions of the committee are held by majority.

However, creditors' committees are rarely formed in Brazil because the costs related to its activities shall be borne by creditors and the members of the committee may held liable for its acts and the debtor may seek compensation from them.

The court shall hear the creditors 'committee before granting DIP finance.

Brazilian bankruptcy Law provides that if the Committee was not formed the judicial administrator will take its role. This means that, in the absence of the committee, the court must hear the judicial administrator before granting the finance.

9. What priority of repayment is available to unsecured rescue financiers, if any?

The unsecured rescue financiers will be paid with priority if the reorganization is converted into bankruptcy.

The DIP lender, even an unsecured one, will have a super priority, if the judicial reorganization is converted into bankruptcy, the DIP lender will receive only after labor claims that became due 3 months before the bankruptcy, limited to 5 minimum wages per employee, and essential expenses of the management of the bankruptcy estate.

10. Can rescue finance be provided on a secured basis?

According to the new bankruptcy legislation, the court may authorize financial rescue guaranteed by fiduciary lien or encumbrance of assets and rights. Once the lender pays the money, the respective guarantees and super priority cannot be modified by the court or the court of appeals.

11. Can rescue finance be provided on a super-priority secured basis?

The highest possible guarantee is the fiduciary lien, in which the debtor transfers the property of the asset temporarily until the full payment of debt. If the repayment is not made, the financier keeps the property of the asset.

12. Can priority or additional security be obtained for pre-petition financing?

No, since all pre-petition debt is subject to the judicial reorganization plan.

13. Is security granted for rescue finance be automatically perfected, or is additional perfection required and, if so, what steps must be taken?

The first step is to require judicial authorization from the judicial reorganization court. After that, each type of security has its own requirements that must be attended to perfect the security.

14. Is it common for the rescue finance provider to require milestones or other deliverables to be met, or to exercise control over the bankruptcy process?

The finance provider may require some standards to be followed and monitor closely the reorganization procedure, but we are not aware of any milestone measurement of accomplishments.

15. Have there been any cases in which the rescue finance provisions have been analysed by the courts?

Yes, the most relevant cases are OGX (Oil and gas conglomerate) and OAS (construction conglomerate), in which DIP Financing was provided in the judicial reorganization plan and was approved at the creditor's meeting.

In the case of the judicial recovery of Renova Energy Group, case n. 1103257-54.2019.8.26.0100, 2nd Bankruptcy Court of São Paulo/SP, two different DIP financings were provided. The first one was provided before the approval of the judicial reorganization plan and had to be accepted by the judge. This DIP financing was provided in the amount of BRL 10 million. The second DIP financing was provided in the amount of BRL 362, 5 million, and it was approved in the judicial reorganization plan, by the creditors' committee.

In the case of the judicial recovery of Viver Incorporating and Construction Company, case n. 1103236-83.2016.8.26.0100, 2nd Bankruptcy Court of São Paulo/SP, DIP financing was provided in the amount of BRL 20 million.

In the case of the judicial recovery of Grupo Aralco, n. 1001985-03.2014.8.26.0032, 2nd Civil Court of Araçatuba, DIP financial was provided in the amount of BRL 42 million. The DIP was authorized by the creditors' committee, and it was one of the first cases of Debtor in Possession Financing in Brazil. In this transaction, the company did not have to give assets in guarantee, keeping control over them. The financiers had credit priority, and they will be paid first.

In the case of the judicial recovery of OceanAir Airlines (Avianca), case n. 1125658-81.2018.8.26.0100, 1st Bankruptcy Court of São Paulo, DIP financing was provided in the amount of BRL 31 million, by Azul Airlines. In this transaction, the financing was analyzed and approved by the Court, and the amount lent was set to be paid to Azul in the acquisition of a UPI. Azul had priority in this acquisition because of the DIP it had provided.

In the case of the judicial recovery of SSC Displays Ltda. (SSC) – LP Displays Amazônia Ltda. was lately included in the judicial recovery- n. 0340582-43.2007.8.26.0577, 8th Civil Court of São José dos Campos, "SSC" claimed that in order to the reorganization to succeed, a DIP had to be provided and requested authorization for an agreement with ABN Amaro Bank. It was conceded, and on 15/08/2007, the agreement – by the time called a 'Facility Agreement' – was done. A DIP financing was provided in the amount of USD 46 million.

In the case of the judicial reorganization of Grupo Abril, case n.1084733-43.2018.8.26.0100, 2nd Bankruptcy Court of São Paulo/SP, in 2018, DIP financing was provided in the amount of BRL 70 million. The respective DIP financing was related to a sale contract of shares of the company, concluded between Grupo Abril and Cavalry Investments. This contract gave the buyer total priority in receiving its credit.

In the case of the judicial reorganization of FAS Empreendimentos e Incorporações Ltda., case n. 1062847-56.2016.8.26.0100, 1st Bankruptcy Court of São Paulo/SP, there was an important decision concerning the possibility of concession of DIP financings.

Recently, there were cases under the regime of reformed law:

(i) Laboratórios Baldacci Ltda., under judicial reorganization, n. 1057089-57.2020.8.26.0100, 2nd Bankruptcy Court of São Paulo/SP, had a DIP finance of BRL 15 million, in accordance with the judicial reorganization plan approved by the creditors;

(ii) AFG Brasil S.A., under judicial reorganization, n.1048110-09.2020.8.11.0041, 1st Civil Court of Cuiabá/MT, had a DIP finance of BRL 1.4 billion authorized by the Court;

(iii) João Fortes Engenharia S.A. under judicial reorganization, 0085645-87.2020.8.19.0001, 4th Corporate Court of Rio de Janeiro/RJ had a DIP finance of BRL 40 million authorized by the Court and

(iv) Loctec Engenharia LTDA. under judicial reorganization 0391837-48.2016.8.09.0011, 4 th Corporate Court of Aparecida de Goiânia/GO, had a DIP finance of BRL 12 million authorized by the Court.

16. How has the market for rescue finance been impacted by the COVID19 pandemic?

The COVID19 pandemic affected Brazilian economy, which influenced the approval of the reform of Brazilian Bankruptcy law, which brings more legal certainty to DIP finances. It is possible to already identify an increase of DIP finance cases in Brazil only a few months after the reform of the Bankruptcy Law came into force.

CANADA

1. Is there an established market for rescue finance?

Yes, although in most cases in Canada, rescue financing (**Rescue Financing**, the providers of which will be referred to herein as **Rescue Financiers**) during an insolvency proceeding is provided by an existing creditor or interested party. However, there are a number of lenders that are expanding into the market such that it is becoming more common for Rescue Financing to be provided by a third-party financier.

2. If not, how do debtors fund or finance corporate reorganization or trade on?

See response to Question 1.

3. If yes, what are the main sources of funds for rescue finance?

The main sources of funding for Rescue Financing are from existing creditors, related parties or potential sponsors / purchasers. However, third-party financiers, such as private funds or institutional investors are becoming more common.

4. Is rescue finance codified or subject to specific legislation?

Yes, the two principal statutes dealing with insolvency in Canada are the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (BIA) and the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (CCAA). Both individuals and small companies qualify for relief under the *BIA*, while the *CCAA* only apples to corporations or corporate "families" having at least $5,000,000 in debt.

Section 11.2 of the CCAA and section 50.6 of the *BIA* provide the court with the authority to approve interim financing and grant a priority charge or lien to secure repayment of such Rescue Financing. The decision by the court to grant Rescue Financing is largely discretionary (with some limits), and the above statutory sections also set out a number of factors to be considered by the court when exercising such discretion (see response to Question 6 for further details).

5. Are there any legislative or regulatory restrictions or requirements for foreign investment which rescue finance providers need to consider?

It is a criminal offence in Canada to: (i) enter into an agreement or arrangement to receive, or (ii) to receive, interest payments exceeding 60% of the total value of the credit advanced.

6. Is court approval required for rescue finance or any security granted to the lender? If so, what considerations does the court take into account in approving or rejecting a proposal for rescue finance?

Yes, both section 11.2 of the CCAA and section 50.6 of the *BIA* require a debtor to apply to the court, on notice to the secured creditors who are likely to be affected by the security or charge, for an order declaring that all or part of the debtor's property is subject to a security or charge in an amount that the court considers appropriate. The security or charge may not secure an obligation that exists before the order is made. However, court approval is not required if the Rescue Financing is advanced on an unsecured basis.

In determining whether to grant an order for a security or charge on a debtor's property, the court is required to consider the following factors, among other things:

a) the period during which the company is expected to be subject to proceedings;

b) how the company's business and financial affairs are to be managed during the proceedings;

c) whether the company's management has the confidence of its major creditors;

d) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;

e) the nature and value of the debtor's property;

f) whether any creditor would be materially prejudiced as a result of the security or charge; and

g) the monitor / trustee's report, if any.

7. Is creditor or secured creditor approval required for rescue finance?

No, with one exception. Rescue Financing by subsequent Rescue Financiers will not be given priority over an earlier Rescue Financier's security without the consent of the earlier Rescue Financier.[1]

Typically Rescue Financing is secured with a blanket encumbrance or "super-priority charge" over all of the debtor's assets in priority to existing secured creditors (commonly known as priming). Notice must be given to secured creditors who are being effected. Rescue Financing can be approved without notice to unsecured creditors. In practice, the support of the most significant secured lenders is often influential.

[1] Adiele, citing CCAA, s. 11.2(3).

8. What role does a creditors' committee play in approving rescue finance (if any)?

There is no statutory framework for the appointment or formation of creditors' committees in Canadian insolvency proceedings. Despite this lack of legislation, debtors, key stakeholders, and Canadian courts routinely recognize and accept ad hoc creditors' committees, particularly in respect of noteholder or bondholder groups in *CCAA* proceedings. However, unless these *ad hoc* committees are organized and part of the *CCAA* process at the time of filing they play little if any role in the approval of Rescue Financing. Even when *ad hoc* committees are involved from the start, there is no formal recognition of a committee *per se* – it is functionally the same as a creditor expressing their opinion.

9. Can rescue finance be provided on a secured basis?

It is unusual for Rescue Financiers to advance funds on an unsecured basis. However, if they were to do so they would not have a legal priority over the debtor's other creditors.

10. Can rescue finance be provided on a secured basis?

Yes, it is typically provided on a secured basis with the priority of such security established by court order. See response to Question 11.

11. Can rescue finance be provided on a super-priority secured basis?

As mentioned above, Rescue Financing is typically secured with a "super-priority charge" over all of the debtor's assets. Under both the *CCAA* and *BIA* provisions, the court is entitled to order that the security or charge rank in priority over the claim of any secured creditor of the debtor.[2] Though, as discussed in Question 7, if there has already been an order for Rescue Financing, the court can only order that the security or charge rank in priority over any security or charge arising from the previous order if the previous Rescue Financier consents.[3]

However, this super-priority charge in favour of the Rescue Financier will be given the priority set out in the court order and may be subject to other court ordered charges (i.e. for the fees of the monitor / trustee and its counsel).

The Supreme Court of Canada has also held that Rescue Financing may be granted super priority over certain statutory deemed trusts,[4] including federal deemed trusts.[5]

12. Can priority or additional security be obtained for pre-petition financing?

Section 11.2(1) of the *CCAA* expressly prohibits the granting of security or a charge for pre-existing obligations. However, Canadian courts have approved roll-ups under the foreign recognition sections of the *CCAA*.

---

[2] *CCAA*, s. 11.2(2); BIA, s. 50.6(3).
[3] *CCAA*, s. 11.2(3); BIA, s. 50.6(4).
[4] *Adiele* at 4, citing *Sun Indalex Finance, LLC v United Steelworks*, 2013 SCC 6.
[5] *Canada v Canada North Group Inc*, 2021 SCC 30.

Further, "creeping roll-ups" have been approved in *CCAA* proceedings. A creeping roll-up for this purpose is where the debtor satisfies pre-filing debt obligations, or a portion thereof, with the proceeds that it generates post-filing from its continued operations during the *CCAA* proceeding, as made possible by the Rescue Financing facility (i.e. the debtor uses the advances it receives under a Rescue Financing facility to continue operating its business and then pays down its pre-filing debt to the lender with revenue generated from ongoing operations).

13. Is security granted for rescue finance automatically perfected, or is additional perfection required and, if so, what steps must be taken?

Court orders approving Rescue Financing typically provide for the automatic perfection of the encumbrances securing Rescue Financing without the need for further action. Despite this assurance, Rescue Financiers may also choose to enter into contractual security agreements and register their security interests in accordance with applicable registration legislation.

14. Is it common for the rescue finance provider to require milestones or other deliverables to be met, or to exercise control over the bankruptcy process?

Yes, Rescue Financiers often include milestones in Rescue Financing agreements such as those related to the completion of a court approved sale and investment solicitation process, the filing of a plan of arrangement, the granting of applicable court orders, the appointment of a chief restructuring officer, the entering into of certain agreements, and other deliverables related to the restructuring.

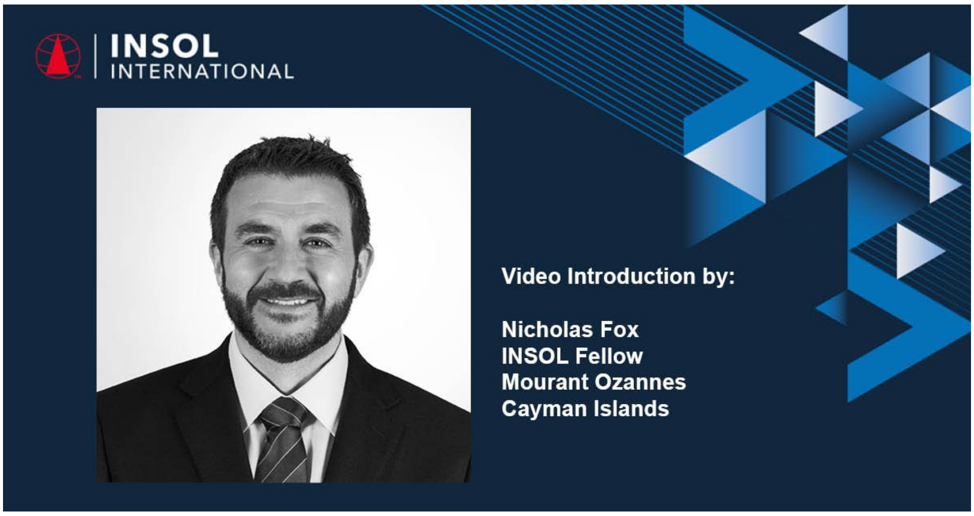
15. Have there been any cases in which the rescue finance provisions have been analysed by the courts?

Yes, numerous cases before the courts in Canada have considered these provisions. Courts in Canada have expressly emphasized the importance of Rescue Financing in restructuring. For example, in *Canada v Canada North Group Inc*, 2019 ABCA 314, the Alberta Court of Appeal found that: "[Rescue Financing] is necessary to achieve the purposes of the *CCAA*, with approximately 75% of restructurings requiring the aid of interim lenders" (para 50). This case was recently considered by the Supreme Court of Canada, but a decision has not yet been released.

16. How has the market for rescue finance been impacted by the COVID19 pandemic?

We have not seen an impact from the ongoing COVID-19 pandemic to the availability or terms of Rescue Financing in Canada.

CAYMAN ISLANDS



1. Is there an established market for rescue finance?

There is no specific "DIP finance" legislative framework in the Cayman Islands. However, forms of rescue finance are available under to entities in distress, including through schemes of arrangement and formal insolvency proceedings.

There is also not an established local market for rescue finance in the Cayman Islands. Any financing is typically of a cross-border nature, provided by onshore financial institutions.

2. If not, how do debtors fund or finance corporate reorganisation or trade on?

While there is not necessarily an established local market specializing in rescue financing, a Cayman Islands debtor can source such funding from a wide variety of financial institutions in the global finance markets (as described further at question 3 below).

3. If yes, what are the main sources of funds for rescue finance?

Commonly, rescue financing is provided by one or more bank working capital facilities but depending on the exact funding needs, financing can also be obtained from other sources. Those sources include credit funds, insurance companies, distressed debt or special situations funds, or through capital markets issuances, as well as from existing lenders, shareholders, or affiliated companies. If the company is backed by a private equity sponsor, that sponsor may also decide, for strategic reasons, to inject new equity in order to support a restructuring of the company's debt.

4. Is rescue finance codified or subject to specific legislation?

As noted above, rescue finance is not codified in the Cayman Islands.

The principal route into a restructuring in the Cayman Islands is by filing a winding-up petition and then appointing provisional liquidators to 'hold the ring', allow the company to benefit from the moratorium on legal claims against it and enable a restructuring to take place. Such provisional liquidators can either be 'light touch', performing a supervisory and assistance function whilst the company's directors remain responsible for its day-to-day business; or displace the functions of the company's Board. Provisional liquidator appointments of this nature are frequently utilized in a cross-border group restructuring situation, including court-approved restructurings (e.g. US Chapter 11) to enable the Cayman entities to be protected whilst these restructurings take place.

There is provision in the Companies Act for companies to petition for their own winding-up and the appointment of provisional liquidators over them, to facilitate a restructuring.

Please note that, later in 2021, it is anticipated that substantive amendments to our Companies Act will be brought into force, which will usher in a new regime in which a Restructuring Officer will be able to be appointed over Cayman companies, without the need for a separate winding-up petition. There will also be clarification around the circumstances in which a Restructuring Officer's appointment can be terminated, following a successful restructuring. This is intended to further facilitate and clarify Cayman's already successful restructuring regime.

The primary mechanism for restructuring a company's liabilities is a scheme of arrangement between the company and its creditors or members, or classes of creditors or members, pursuant to section 86 of the Companies Act. A scheme can be pursued outside of any insolvency process, although it is often combined with the presentation of a winding up petition and the appointment of provisional liquidators pursuant to Part V of the Companies Act in order to obtain the benefit of an automatic stay of actions against the company while the scheme takes place.

5. Are there any legislative or regulatory restrictions or requirements for foreign investment which rescue finance providers need to consider?

There are generally no regulatory restrictions on cross-border foreign investment imposed by Cayman Islands law. In particular, the Cayman Islands has no foreign currency exchange controls and foreign financial instructions are not required to be regulated in the Cayman Islands unless established in or carrying on business in the Cayman Islands.

6. Is court approval required for rescue finance or any security granted to the lender? If so, what considerations does the court take into account in approving or rejecting a proposal for rescue finance?

Court approval is not required for rescue finance, in and of itself.

However, where borrowing is taken on during a provisional liquidation, then as a matter of course provisional liquidators will often seek court sanction approving taking on such debt, especially if it relates to anticipated litigation and the sharing of the proceeds of such. Court approval is also required for the appointment of provisional liquidators themselves.

Similarly, court approval is required for a scheme of arrangement, which is the mechanism within which rescue finance is often injected. For a scheme to be approved by the court, the terms of the scheme must first be approved by more than 50% by number and 75% by value of those attending and voting in each class. The court will also need to be satisfied that sufficient notice was given to each class member, that the majority fairly represent the class, and whether the arrangement seeking to compromise the rights of each class member is clear and documented properly so that each class member can make an informed decision. Once approved by vote and sanctioned by the court the scheme will bind all scheme participants including any dissentient minority.

Any company that is liable to be wound up can be put into provisional liquidation following the presentation of a winding up petition. A creditor, shareholder, or the company itself can apply for the appointment of provisional liquidators between the presentation and the hearing of the winding up petition. If a scheme of arrangement is put forward within a provisional liquidation then the extent of the court supervision will depend on the terms of the order appointing the provisional liquidators. In some situations the directors will remain in control and the provisional liquidators will merely have a supervisory 'light-touch' role, or in other situations, the provisional liquidators will temporarily displace the directors entirely for the duration of the scheme. In either case, the provisional liquidators will be subject to the court's supervision and the court's involvement in the scheme process will be the same as if the company was not in provisional liquidation. If the scheme is sanctioned by the court, then the winding up petition would typically be dismissed and the provisional liquidators would be discharged of their duties and the restructured company would regain full control of its management and affairs.

7. Is creditor or secured creditor approval required for rescue finance?

The exact position will be determined by the existing capital structure of the company, and in particular the contractual terms of any pre-petition banking facilities. There is no statutory provision which requires secured creditor consent in order to implement a rescue financing package.

However, note that Cayman insolvency law does not impose an automatic stay binding on secured creditors which would prevent such creditor from enforcing its security. For this reason, in the majority of cases a rescue financing proposal will likely require the support of any existing secured creditors in order to prevent a situation where such lender's security was enforced over the company's assets.

As noted above, in many cases it will be the debtor's senior secured banks that will actually be providing the emergency financing.

8. What role does a creditors' committee play in approving rescue finance (if any)?

In almost all compulsory liquidations there will be a liquidation committee comprising of a number of stakeholders of the company. If the company is insolvent, these stakeholders will be creditors. The liquidation committee's role is to act as a sounding-board, and liquidators may take rescue finance proposals to their liquidation committee for their views and approval, often as a preparatory step before a court sanction application.

In a different context, we also see creditors' committees on consensual restructurings whereby the finance parties agree to a standstill arrangement until rescue financing or a debt / equity restructuring can be agreed. These are contractual arrangements formed with the mutual consent of all creditor parties and the debtor(s).

9. What priority of repayment is available to unsecured rescue financiers, if any?

In our experience, outside of liquidation or restructuring through a scheme of arrangement, it would be uncommon for rescue financing to be provided on an unsecured basis, unless it took the form of an equity injection from existing shareholders or its private equity sponsor. Such funding can be unattractive as it would not receive any special preference under Cayman law, and would rank behind claims of secured and unsecured creditors.

When a company is in liquidation, any borrowing incurred by provisional liquidators will rank as a liquidation expense and therefore rank ahead of ordinary unsecured creditors.

When rescue finance is injected through a scheme of arrangement, the terms of that scheme will govern the company's continuing liabilities after the scheme has been approved.

10. Can rescue finance be provided on a secured basis?

Yes. Rescue finance can and would typically be provided on a secured basis, and often by the company's existing relationship bank or key syndicate banks. In that context, the rescue funding will commonly be secured by the existing security package (assuming the terms of that security are flexible enough to accommodate such further loan advances). Note that if the debtor company is in liquidation, the consent of the Cayman Islands courts would be required in order for the company to grant new security after the commencement of liquidation (which is deemed to be the date the winding up petition is filed).

11. Can rescue finance be provided on a super-priority secured basis?

Yes. Rescue financing would most commonly be provided on a super-priority secured basis, whereby the right of repayment for any new funding ranks ahead of pre-petition secured indebtedness. As the Cayman Islands has no statutory DIP financing regime, the super-priority ranking is typically provided for by contract, in an applicable intercreditor agreement

12. Can priority or additional security be obtained for pre-petition financing?

Cayman law does not automatically extend priority or additional security for roll-up financing. This can, however, be achieved by contract (but note our comments at question 10 above regarding court consent for additional security granted post-petition).

13. Is security granted for rescue finance be automatically perfected, or is additional perfection required and, if so, what steps must be taken?

Cayman law perfection requirements will depend on the nature of the collateral. The most common forms of Cayman law governed security are security over shares in the Cayman Islands company and security over contractual rights.
In the case of security over shares, strictly speaking no steps are required to perfect such security, but it is customary to obtain certain deliverables (including blank undated share transfers and irrevocable voting proxies) to facilitate

enforcement of the security. It is also customary to record details of the security in the relevant company's register of members.

In the case of security over contractual rights, notice must be given to the applicable counterparty in order to establish priority of the security as against any competing interests. Security interests over bank accounts domiciled in the Cayman Islands are perfected in substantially the same way, by delivery of notice to the account bank. Security taken over specific tangible collateral such as Cayman-registered vessels, aircraft and land is perfected by registration in the applicable register. However, unlike the United States and other jurisdictions, the Cayman Islands has no centralized, publicly searchable register covering security interests generally. Where any security interest is granted by a Cayman Islands company, details must be recorded in that company's register of mortgages and charges. This is an internal statutory record and a failure to update such register does not invalidate or render the security interest unperfected.

14. Is it common for the rescue finance provider to require milestones or other deliverables to be met, or to exercise control over the bankruptcy process?

Yes, while this will vary based on the terms of the transaction and the parties involved, it is common for a rescue finance provider to require monitoring of key milestones. These would typically cover matters such as asset disposals, prepayments or operational restructuring and cost-cutting measures.

15. Have there been any cases in which the rescue finance provisions have been analysed by the courts?

As stated above, rescue finance in the Cayman Islands is not codified or subject to specific legislation. However, a number of cases in the Cayman Islands have demonstrated the provisions of the Companies Act which might be used to implement rescue finance due to their flexible nature. *See Re Ocean Rig* [2017 (2) CILR 495] in which the Cayman Islands Grand Court sanctioned a scheme of arrangement in relation to a company incorporated in a foreign jurisdiction but which shifted its centre of main interests to the Cayman Islands before initiating the scheme process. Schahin II Finance Company (SPV) Limited is a 2018 case in which a scheme of arrangement was used to inject $15m of DIP priority rescue finance.

16. How has the market for rescue finance been impacted by the COVID19 pandemic?

To date, strong central bank stimulus and other government measures have prevented large scale defaults and thus cushioned the impact of the pandemic across many sectors. Many corporate borrowers responded to initial pressures by drawing on existing credit facilities to maximize available cash. However, in other cases the pandemic has led to, or amplified, existing issues for companies in heavily affected industries (particularly retail, energy, aviation and hospitality) which have been required to restructure their balance sheets. This often requires rescue finance to support the business while it undergoes restructuring. The Cayman Islands continues to see a large amount of restructuring activity as it is a stable and creditor-friendly jurisdiction in which financial counterparties have ultimate recourse to the common law court system.

CZECH REPUBLIC

1. Is there an established market for rescue finance?

The Czech DIP finance regime (in Czech: *úvěrové financování*) is similar to Chapter 11 of the Bankruptcy Code in the United States. The rescue finance framework in the Czech Insolvency Act is called credit financing and is set out under Sections 41 and 42 of Act No. 182/2006 Coll., Act on Insolvency and Its Resolution (the Insolvency Act).

The credit financing scheme allows the debtor to look for financing either among existing secured creditors, who have a priority right to provide such credit financing, or among other parties – external investors.

In order to motivate creditors or investors, credit financing grants the creditors better ranking in the insolvency proceedings, qualifying their claim as the claim against the insolvency estate (in Czech: *pohledávka za majetkovou podstatou*), which is a class of claims that may be satisfied anytime during the insolvency proceedings. Under certain circumstances, the creditor providing the creditor financing may share the pre-insolvency security granted to the pre-insolvency secured creditor.

This regime creates a relatively certain legal environment for rescue finance in the Czech Republic. Such regime is not limited only to the reorganization, but can be applied in bankruptcy (in Czech: *konkurs*) as well.

In practice, however, credit financing is rarely used. Typically, creditors willing to provide credit financing are either crucial business partners (customers) of the debtor or financial investors interested in acquiring the assets from reorganization of the debtor.

2. If not, how do debtors fund or finance corporate reorganisation or trade on?

See answer in para. 1 above.

3. If yes, what are the main sources of funds for rescue finance?

The Czech credit financing regime is specific in the way that the provisions of Sections 41 and 42 of the Insolvency Act cover not only the financial rescue, but also the supply of raw materials and energy. That is, claims arising from the provision of material and the supply of energy to the debtor may also qualify as credit financing under the Insolvency Act.

As regards rescue finance, the main sources of funds are either customers depending on the debtor or private equity investors who tend to invest in distressed assets. In terms of resources and energy suppliers, the main sources of such support are creditors, whose business is so tied with the debtor's one, that providing such credit to the debtor are vital for the creditor as well.

4. Is rescue finance codified or subject to specific legislation?

As mentioned above, rescue finance is codified in Sections 41 and 42 of the Insolvency Act. The credit financing framework set out in the Insolvency Act is very limited and as described above, in contrast to the American Chapter 11 regime, the scope of the rescue finance provisions extends to resources and energy supplies.

The Insolvency Act sets out five specific conditions under which rescue finance is granted to the debtor:

a) the purpose of rescue finance is to maintain the debtor as a going concern or to revive it;

b) the agreement must be in form of loan agreement or similar form of agreement (as stated above in paragraph 3, to be sure that the facility under such agreement falls under DIP regime);

c) the agreement must be entered into on behalf of the company by the person that has legal power to do so;

d) credit financing must be approved by creditors' committee, including interim creditors' committee; and

e) credit financing must be entered into on standard market conditions.

Considering the purpose of the credit financing, Section 41 of the Insolvency Act sets out the purpose as the "*maintaining or restoring debtor's enterprise*", with no distinction made between OPEX and CAPEX.

Credit financing must be provided via loan agreement or similar form of agreement. It is our position that similar arrangements might include inter alia financial guarantees (in Czech: *finanční záruka*), letters of credit (in Czech: *akreditiv*), factoring or financial leasing. Since the supply of resources can be provided via credit financing, such agreements are also eligible for credit financing.

The agreement must be entered into by the person that has legal power to do so. Section 41 of the Insolvency Act contains a rule that sets out the insolvency trustee as the person eligible to enter into credit financing agreement on behalf of the debtor. This can vary depending on the time the credit financing is concluded. Before the court decision commencing the insolvency process, the debtor can conclude such a financing, just like in the reorganization. The insolvency trustee usually concludes credit financing during the bankruptcy.

Credit financing must be approved by creditors' committee (or creditors' representative) as described in paragraph 7 of this Questionnaire below.

Credit finance must be entered into on standard market conditions: we understand this to mean not only the cost of the credit financing (e.g. interest on the loan or price of the resources), but other covenants in the agreement that may affect the debtor. Nonetheless, credit financing may be concluded under conditions that are not standard, if such conditions do not adversely affect the debtor.

5. Are there any legislative or regulatory restrictions or requirements for foreign investment which rescue finance providers need to consider?

There are no special restrictions or requirements in this regard limited to credit financing under the Insolvency Act.

6. Is court approval required for rescue finance or any security granted to the lender? If so, what considerations does the court take into account in approving or rejecting a proposal for rescue finance?

Approval of the court is not required by the Insolvency Act stricto sensu. However, approval of the insolvency court might be required in cases where the creditors' committee or creditors' representative is absent. The mechanics of rescue finance agreements are described below in Section 7 of this Questionnaire.

7. Is creditor or secured creditor approval required for rescue finance?

Credit financing has to be approved by the creditors' committee (in Czech: *věřitelský výbor*) or creditors' representative (in Czech: *zástupce věřitelů*). If there is no creditors' committee appointed at the time the rescue finance is being concluded, approval shall be given by an interim creditors' committee (in Czech: *prozatímní věřitelský výbor*), which is a body appointed by the court. A creditors' committee usually consists of both secured and unsecured creditors.

Approval is required since entering into agreement providing the rescue finance may adversely affect other creditors, especially unsecured creditors. Approval of the court is not required by the law.

Since the credit financing regime in the Czech Insolvency Act is very strict, strict precision is recommended when approving the specific agreements. The rescue finance agreement should contain explicit reference to the credit financing under Section 41 of the Insolvency Act.

Pre-existing secured creditors are entitled, in priority, to provide the new rescue financing.

8. What role does a creditors' committee play in approving rescue finance (if any)?

As described above in paragraph 7 of this Questionnaire, the creditors' committee (or creditors' representative, respectively) needs to approve the credit financing provided to the debtor. In other words, it is the crucial stakeholder in approving the credit financing.

9. What priority of repayment is available to unsecured rescue financiers, if any?

As mentioned above, the rescue financer (the lender) receives a super-priority in respect of its claim, ranking as a claim against the insolvency estate pursuant to Section 168(2)(f) of the Insolvency Act.

In practice this means that the claim of the lender may be satisfied in full at any time during the insolvency proceedings.

Also, under certain circumstances, the lender may be able to share the same security as the pre-insolvency secured creditors.

10. Can rescue finance be provided on a secured basis?

The credit financing provisions establish an exemption from the general rule set out in Section 109 of the Insolvency Act prohibiting the creation of new security interests after insolvency proceedings have commenced and been published in the insolvency register. In other words, credit financing can be provided on a secured basis. The necessity to provide a security interest may be well substantiated since, in certain cases, the insolvency estate may not contain enough assets to cover all claims against estates.

11. Can rescue finance be provided on a super-priority secured basis?

Security provided for credit financing is, as mentioned above, a claim against the insolvency estate, meaning that the claim can be satisfied during the course of the insolvency proceedings, on a super-priority basis.

In addition, Czech credit financing constitutes a scheme under which assets and property obtained under the rescue finance (in the credit financing proceedings) are carved out from the security interest of the existing pre-insolvency secured creditors. In other words, the pre-insolvency secured creditors cannot have the position of secured creditors vis-à-vis the proceeds from the rescue finance (including inventories bought from the rescue finance).

Moreover, in reorganization, if the credit financing serves the purpose of fulfilling the aim of reorganization, the lender may be able to share in same collateral secured in favour of the pre-insolvency secured creditors.

12. Can priority or additional security be obtained for pre-petition financing?

Although the Insolvency Act does not provide an unambiguous answer, it is likely not possible to obtain either cross-collateralization or roll-up in terms of the Czech insolvency law. The aim of credit financing is to motivate creditors to provide new finance to the debtor and to increase the value of the insolvency estate.

Both roll-up and cross-collateralization may constitute a step to satisfy pre-petition debts from post-petition financing, which is not the main purpose of credit financing. However, there is no case law on these issues in the Czech Republic.

13. Is security granted for rescue finance be automatically perfected, or is additional perfection required and, if so, what steps must be taken?

A security interest that is granted in respect of rescue financing has no special treatment, meaning that any requirement stipulated by general law for perfection has to be met even in respect of rescue financing.

14. Is it common for the rescue finance provider to require milestones or other deliverables to be met, or to exercise control over the bankruptcy process?

It is not uncommon that the ultimate goal for the creditor who is providing credit financing to the debtor is to eventually take over its business (e.g. by purchasing it from the insolvency proceedings), noting that the main purpose of the credit financing is to maintain value of the debtor's estate.

15. Have there been any cases in which the rescue finance provisions have been analysed by the courts?

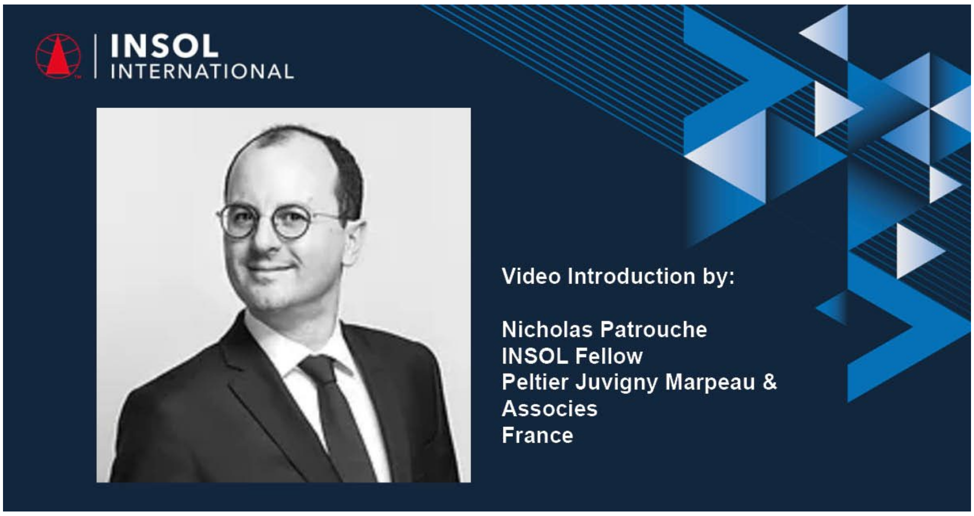
Since using credit financing is not common market practice, there is very little case law in the Czech Republic. Although some decisions touch upon the issues related to credit financing in obiter dicta, they do not, unfortunately, discuss any details. In other words, no proper court guidelines exist in connection with credit financing.

16. How has the market for rescue finance been impacted by the COVID19 pandemic?

The Covid-19 pandemic has brought changes to the Insolvency Act such as postponing the duty to file an insolvency petition but no changes to credit financing have been introduced.

The Czech Republic is scheduled to implement the "EU Directive on Restructuring and Insolvency" in the course of summer 2022. The draft law was published at the end of July 2021. It seeks, inter alia, to introduce interim financing in connection with the preventive restructuring of a debtor. However, no changes are anticipated in respect of the Insolvency Act.

FRANCE



1. Is there an established market for rescue finance?

In France, the market for rescue finance is quite limited and not as developed as it is in common law countries. Debt financing for regular size companies is mainly operated by two types of actors:

- banks and financial creditors who are already creditors of the debtor (i.e., the company subject to an insolvency proceeding) and who agree to bring in new money in the process of a negotiated restructuring. This type of financing allows creditors to avoid the insolvency of the debtor which can lead to a loss (in whole or part) of their claim, and to secure their old debt while providing new resources to keep the company and the business going; and

- banks which specifically developed the activity of financing distressed businesses and for which it is either their main / sole activity or a division among the activities of a global player. This is however a very small market and only a few banks offer these types of services. Among them, we can mention Thémis Banque, BESV, Delubac & Cie and Banque Populaire.

Such banks usually request securities based on liquid assets to secure the repayment of the loans, such as a pledge / security on inventories / stock, raw materials, or a mortgage on real estate. They usually request in this context a ratio of LTV of 1,5, *i.e.*, a value of security(ies) of 150 to finance 100.

The largest listed companies can also see debt investment funds buying distressed debt from regular banks or previous corporate bond holders at a highly discounted price to make a profit depending on the result of a reorganisation plan but also to buy a seat to provide new money financing to the distressed company.

The lack of predictability for foreign players of the outcome of insolvency proceedings in France is usually presented as one of reasons for the poor level of development in the country of rescue finance.

We also have a couple of domestic investment funds focused on special situations who will mainly invest in equity in distressed companies as a majority shareholder with at least a medium-term exit strategy.

2. If not, how do debtors fund or finance corporate reorganisation or trade on?

When the sources of financing above mentioned in Question 1 are not available or sufficient to finance a corporate reorganisation, alone or together with asset sales, the debtor has no choice but to opt for a collective proceeding (*i.e.*, safeguard [*sauvegarde*] or receivership [*redressement judiciaire*].

The opening of such proceedings will generate positive cash flows for the debtor:

- The automatic stay on all pre-petition claims will immediately have a positive impact on the cash status of the debtor. Indeed, the debtor will not pay any pre-petition claim while at the same time, it will be able to continue operating its business and collecting its receivables. Cash flow projections are usually made to optimise the timing of the filing of the proceedings, in order to maximise the effects of the automatic stay on the cash available to the debtor. The automatic stay is applicable during what is known as the "observation period" (up to 12 to 18 months from the date of the opening judgment), which is given to the debtor to build a plan (i.e., reorganisation plan or sale plan).

- If the debtor is insolvent, the opening of a receivership proceeding enables it to access a support fund called the AGS (*Association pour la gestion du régime d'assurance des créances des salariés*). This organization (funded by taxes collected from employers in good standing) will lend to the debtor the money to cover the part of employees' wages unpaid as of the date of the opening judgment. The leverage of the financing of employees' wages is usually estimated to a maximum of 1 month of wages.

The approval of a reorganisation plan by the Insolvency Court will also have a positive impact on the cash flows of the debtor, in two main ways:

- first, within a reorganisation plan, pre-petition claims may be repaid by the debtor during a period of up to ten years; such a plan – provided no write-off is required - can be imposed by the Insolvency Court on the creditors. The date of payment of the first dividend can occur up to 1 year after the plan's approval and the amount of the annual dividend can be very progressive for the duration of the plan.

- second, the AGS can also be activated to support the financing of redundancy plans to be implemented as part of the reorganisation plan approved by the Insolvency Court. In such context, redundancy costs will be financed by the AGS and repaid by the debtor, usually within the 24 months following the plan's approval.

These tools may constitute real leverage in the context of the restructuring of the debtor.

3. If yes, what are the main sources of funds for rescue finance?

As mentioned in Question 1, the main source of funds for rescue finance are bank loans. However, in the context of large international cases involving French entities, French debtors may benefit from foreign "rescue" or "debtor-in-possession" financing systems. This was for instance the case with the international insolvency proceeding of Toys R Us.

4. Is rescue finance codified or subject to specific legislation?

Because rescue finance does not exist in itself in France, it is not codified per se. However, the French Commercial Code contains specific provisions dedicated to the consequences (for the creditor and the debtor) of loans which are granted during conciliation proceedings (pre-insolvency tool) and during collective proceedings.

(i) During conciliation proceedings

Article L. 611-11 of the French Commercial Code provides that any creditor who, in the context of a conciliation proceeding, lends money to the debtor or provides a new good or service in order to ensure the continuation of the debtor's business and its survival, shall be paid in priority to other creditors in the event of the subsequent opening of a collective proceeding.

In order for the creditor to benefit from this priority payment ranking, several criteria must be met:

1. the conciliation agreement under which the new money was loaned must be recorded by the court. To do so, the court must verify three cumulative conditions:
   - the debtor must not be in a state of insolvency (*état de cessation des paiements*) or the conciliation agreement must end this state;
   - the terms of the agreement must ensure continuity of the debtor's business; and
   - the agreement must not affect the interests of non-signatory creditors. In particular, their protection requires that the court verifies that the contractual guarantees are not disproportionate compared to the contributions made.
2. the priority conferred can only cover claims for new money or for the supply of new goods or services. The grant of a term extension or the rescheduling of a pre-existing claim, a debt waiver or a mere promise of a loan do not qualify for the new contribution priority.
3. the new contribution of cash, goods or services must be made to ensure the continuation and viability of the debtor's business. This excludes loans for non-business purposes.

It should be noted that equity investments made by the debtor's shareholders or new investors in the context of a share capital increase are not eligible for new contribution priority. However, new shareholders' loans are eligible for new contribution priority.

The interest of the new contribution priority arises in the event of a subsequent insolvency proceeding (see Question 10 for more details).

(ii) During collective proceedings

After the opening of a collective proceeding, the debtor may, with the authorisation of the insolvency judge, enter into a loan agreement or grant new securities under the conditions developed in Question 6.

In parallel to the new money priority granted in conciliation proceedings, the ordinance of May 20, 2020 no. 2020-596 adapting the rules relating to the difficulties of companies and farming activities to the consequences of the Covid-19 pandemic introduced a new money priority inspired in part by Article 17 of Directive (EU) 2019/1023 on restructuring and insolvency and by Article 60, I, 14° of Law No. 2019-486 of May 22, 2019, on the growth and transformation of companies. This new money priority is applicable until December 31, 2021 pending the ordinance transposing EU Directive No 2019/1023 of June 20, 2019.

In accordance with Article 5 (IV) of the ordinance no. 2020-596 of May 20, 2020, the terms of the "new money priority in safeguard or receivership" are as follows:

- it is granted only for new cash contributions (compared to the priority granted to new money in a conciliation which is also granted to contributors of new goods or services);
- it covers cash contributions made by creditors:
  - during the observation period, in order to ensure the continuation and viability of the debtor's business, in which case an authorisation from the insolvency judge is required. According to the authors of the ordinance, this authorisation is not a condition of validity of the loan, but it is a condition for the validity of the preferred payment ranking;
  - for the execution of a safeguard or receivership plan adopted or modified by the court. In this case, the authorisation of the insolvency judge is not required.
- it does not apply to contributions made by the debtor's shareholders and partners in the context of a share capital increase;
- it ranks in similar priority to that of post-petition preferred creditors.

This interim regime has been integrated permanently in French law with the ordinance of September 15, 2021 no. 2021-1193 transposing the EU directive.

5. Are there any legislative or regulatory restrictions or requirements for foreign investment which rescue finance providers need to consider?

Under French law, as of 2003, foreign investments may be subject to prior authorisation from the Minister of the Economy. This will be the case when:

- the investor is:
  - a natural person of foreign nationality,
  - a natural person of French nationality who is not considered to be a resident for tax purposes in France,
  - an entity under foreign law, or
  - an entity under French law controlled by one or more of the above-mentioned persons or entities.
- the transaction is an investment within the meaning of article R. 151-2 of the French Monetary and Financial Code, i.e.:
  - the acquisition of control, within the meaning of article L. 233-3 of the French Commercial Code, of an entity governed by French law (whether or not the foreign investor is European);
  - the acquisition of all or part of a branch of activity of an entity governed by French law (whether or not the foreign investor is European);
  - the crossing, directly or indirectly, alone or in concert, of the threshold of 25% of the voting rights of an entity governed by French law (only when the investor is from a non-EU country),
- and the investment involves an entity governed by French law that carries out a sensitive activity likely to undermine public order, public security or the interests of national defence, falling within the areas listed in articles L. 151-3 and R. 151-3 of the French Monetary and Financial Code.

The purpose of this regulation is mainly to cover investment in equity leading to the control of the target company.

However, under the law applicable before 2003, the French Supreme Court (*Cour de cassation*) held that in exceptional circumstances, the grant of a loan or of a security could lead to the takeover of a company in a way which would call for the application of the foreign investment legislation (see *Cour de cassation*, 29th March 1994, no. 91-20.394). It is however unclear whether this caselaw, the scope of which is very limited, would still apply under the current law on foreign investments. In any event, it seems that foreign rescue finance providers should be wary when dealing with a company the area of expertise of which is listed in articles L. 151-3 and R. 151-3 of the French Monetary and Financial Code as mentioned above.

6. Is court approval required for rescue finance or any security granted to the lender? If so, what considerations does the court take into account in approving or rejecting a proposal for rescue finance?

When a loan is granted to the debtor in the context of a conciliation proceedings, French law does not require the grant of this loan, in itself, to be subject to court approval. However, as mentioned in Question 4 above, the lender will only benefit from the new money priority if the conciliation agreement in which it is embedded is registered by the court.

The court may not refuse to approve and register the conciliation agreement for reasons other than the agreement failing to meet the criteria set out in Question 4: the approval is automatically granted as soon as the three conditions are met.

In the context of a collective proceeding and during the observation period, the grant of a new loan to the debtor must be authorised by the insolvency judge, to the extent necessary for the continuation of the debtor's business during the observation period. The authorised loans must then be published on a special register held by the Commercial Court.

In addition, the grant of any new security by the debtor or the insolvency practitioner (as the case may be), whether in safeguard or in receivership proceedings, is subject to the authorisation of the insolvency judge, and these securities may only be granted to secure post-petition preferred claims.

When a loan is granted during a safeguard or receivership as mentioned in Question 4. above, the prior authorization of the insolvency judge is required for financings granted during the observation period (i.e., before the approval of a plan). With respect to financings granted during a safeguard or receivership plan, no prior authorization of the insolvency judge is required but the plan (or any amendment to it) must be approved by the commercial court.

7. Is creditor or secured creditor approval required for rescue finance?

In the context of conciliation proceedings, under French insolvency law, the grant of a new loan to the debtor is not subject per se to the authorisation of the debtor's creditors. There is no provision specifically requiring such approval. However, loan agreements frequently (if not always in the context of structured financings) include a provision stating that the borrower may not enter into a new loan agreement without obtaining prior approval from or without informing the existing lenders. Therefore, in order to avoid the triggering of an event of default, debtors will usually request a waiver from their creditors, thus indirectly giving them some control over "rescue finance".

In any event, it should be noted that French law does not require all of the debtor's creditors to participate in the conciliation proceeding. This means that, should a creditor refuse to approve any or all of the restructuring plan set out for the debtor (including for instance the grant of a new loan), this refusal will not prevent the adoption of a conciliation agreement with the approving creditors, subject to the powers of dissenting creditors according to existing documentation (e.g., event of default).

As for collective proceedings, creditors may not individually interfere with the conduct of the proceeding and the possible decision of the debtor or the insolvency administrator to take out a new loan. This should however be tempered by two factors:

- first, creditors (who may not act individually) are represented during the insolvency proceeding by the creditors' representative, whose mission is to defend and preserve the rights of creditors including employees; any decision from the insolvency judge to approve a rescue finance seek the opinions of the administrator in charge and the creditors' representative. These opinions are not binding but they can have a significant impact on the appraisal of the request by the judge as these two positions are run by insolvency practitioners who are independent from other stakeholders (i.e., they are court appointed and are not creditors).

- second, creditors may petition the insolvency judge to be appointed as controlling creditors (*contrôleurs*). Their role is to assist the creditor's representative and the insolvency judge in their duties and as such, they are regularly asked to give their opinion at various stages of the proceedings (takeover bids, sale of the debtor's assets in liquidation proceedings, etc.). Without being binding, their views can be taken into account even if they are less powerful than that of the administrator or the creditors' representative (i.e., allegation of lack of objectivity as they are creditors of the company).

8. What role does a creditors' committee play in approving rescue finance (if any)?

Creditors' committees are not provided for by the law in conciliation proceedings unless the parties decide to provide for one or more contractually.

With respect to collective proceedings, creditors' committees are only mandatory in large companies, specifically those exceeding one of the following two thresholds: 150 employees or an annual turnover before tax of 20 million euros.

There usually are two to three committees: the credit institutions committee, the main suppliers committee and an assembly of bondholders when applicable.

They only participate in the proceeding to adopt the safeguard or receivership plan aimed at setting the terms and conditions for the extinguishment of debts. Once the draft plan has been finalized, it is presented to each of the creditors' committees who will then vote on the proposal. The vote is carried out by a two-thirds majority of the votes, based solely on the amount of claims.

In theory, creditors' committees have no say or vote on the debtor's financing. However, if they disagree with the financial conditions of the plan, they can try to block its adoption by raising issues with other aspects over which they have control.

9. What priority of repayment is available to unsecured rescue financiers, if any?

As we understand it, an unsecured rescue financier (or more generally an unsecured creditor) is a creditor who does not benefit from any legal or contractual priority or preferential payment rank in the proceeding.

By definition, French "rescue finance" providers will always be secured creditors: they will either benefit from the new money priority if the financing was provided in the context of a conciliation proceeding or from a preferred payment rank as post-petition preferred creditor if the financing was granted during a collective proceeding.

In any event, rescue finance providers may also benefit from a specific security they would require to provide such financing, in which case the priority of their claim will depend on the specific rules applicable to this security in the context of the collective proceeding.

10. Can rescue finance be provided on a secured basis?

As explained in Question 9 above, "rescue finance" as we understand it will always be provided on a secured basis.

11. Can rescue finance be provided on a super-priority secured basis?

Under French law, the payment ranking of creditors is set out in the French Commercial Code and differs depending on whether a safeguard / receivership proceeding or a judicial liquidation has been opened.

In the context of a safeguard or receivership proceeding, the French Commercial Code specifies that post-petition debts, arising for the purpose of the conduct of the proceeding or the observation period or in consideration of a service provided to the debtor during that period, shall be paid when due. If not, such claims shall be paid before any other claim with the exception of:

- the claims secured by the preferential status afforded to wages as provided by the French Employment Code;
- the court fees regularly incurred after the opening judgment for the purpose of the proceedings; and
- the claims secured by the new money priority (i.e., new money provided in the course of a conciliation proceeding opened prior to the pending collective proceedings).

In the context of a judicial liquidation, the rule is similar, except for the fact that post-petition claims are paid before any other claim with the exception of:

- the claims secured by the preferential status afforded to wages as provided by the French Employment Code;
- the court fees regularly incurred after the opening judgment for the purpose of the proceedings;
- the claims secured by the new money priority; and
- the claims secured by a real estate security interest.

Rescue finance providers as we understand it in France are therefore not included in the super-priority secured creditors category. It should however be noted that the AGS benefits from a super-priority security for a small portion of the sums it "loans" to the debtor with respect to the sums due to the debtor's employees.

12. Can priority or additional security be obtained for pre-petition financing?

With "roll-up" provisions, a creditor can benefit from a better payment ranking (equivalent to that of the claim arising from the DIP financing) for its pre-petition debt.

As explained in Question 2, the opening judgement of an insolvency proceeding freezes all payments of pre-petition claims. The equality of creditors being a core principle of French Insolvency law, creditors are also prohibited from bringing any action against the debtor, the purpose of which would be to obtain a payment of a pre-petition debt. It should also be noted that as a general principle, the French Commercial Code prohibits the registration of moveable and immoveable property security interests after the opening judgment and, as mentioned in question 6, securities may only be granted with the authorisation of the insolvency judge to secure post-petition preferred claims.

Therefore, "roll-up" mechanisms do not exist in France as they would be illegal.

13. Is security granted for rescue finance be automatically perfected, or is additional perfection required and, if so, what steps must be taken?

With respect to new money priority granted in the context of a conciliation proceeding, as explained in Question 4, the security will only be perfected by the recording of the conciliation proceeding. There are no additional steps to benefit from the preferential payment rank.

There is no general rule for the perfection of security interests, which will be specific for each type of security. For instance, mortgages must be registered to be perfected, while a pledge on stock will be perfected by dispossession of the stock itself or by its registration.

14. Is it common for the rescue finance provider to require milestones or other deliverables to be met, or to exercise control over the bankruptcy process?

No, it is not. The only control that rescue finance providers may have over the debtor stems from (i) provisions of the finance documentation (i.e., representations and warranties, covenants, negative pledges etc.) and (ii) the legal regime and the operation of the security that may have been granted. For instance, lenders may be granted a pledge / security on stock. By definition, stock will eventually move around and be replaced regularly. Regarding this type of security, the French Commercial Code provides that in some situations, the creditor may request from the debtor reinstatement of the security or the reimbursement of part of the loan in proportion to the stock which has been disposed of. The control the creditor may have over the loan therefore only stems from the regime which is specific to the security.

It should be noted that in the context of conciliation proceedings, it is quite frequent to provide a control and / or information mechanism for the benefit of all creditors, which allows them to monitor the implementation of the conciliation agreement. For instance, the agreement can provide that all the parties will meet on an annual or bi-annual basis or that the debtor will have to regularly provide the creditors with documents to enable them to monitor the achievement of the restructuring and of the undertakings made in the conciliation agreement.

15. Have there been any cases in which the rescue finance provisions have been analysed by the courts?

There is little case law regarding what can be considered as rescue finance in France.

One decision is however worth mentioning: on September 25th 2019, the French Supreme Court (*Cour de cassation*) ruled on the effects of the opening of a subsequent insolvency proceeding on the contractual undertakings of creditors taken at the time of the conciliation agreement.

As a reminder, the French Commercial Code provides that the opening of safeguard, a receivership or a judicial liquidation automatically terminates the previous conciliation agreement, either recorded or approved. The creditors recover all of their claims and securities, minus the sums collected, without prejudice to the new money priority.

In the court decision of 25 September 2019, the French Supreme Court clarified the fate of new securities granted in the context of a conciliation agreement in return for partial waiver of claims and grant of term extensions in the event of the opening of a subsequent insolvency proceeding.

The highest court held that a creditor does not retain the benefit of the new securities it was granted under the conciliation agreement if the agreement lapses due to the opening of a subsequent insolvency proceeding. This ruling does not, however, affect the priority of new money which has been specifically granted in view of the opening of an insolvency proceeding.

Academics / legal commentators in France are still debating whether this should affect securities taken as collateral for new loans, but it seems that a distinction can be made between securities granted in exchange for a waiver of claims and term extensions (which are void in the event of the opening of a subsequent insolvency proceeding) and securities granted in exchange for new loans, which have the benefit of the new money priority, which will remain valid.

It should be noted that the European Directive no. 2019/1023 of June 20, 2019 on restructuring and insolvency provides in its article 17 that Member States must ensure that new or interim financing should be adequately protected, at least in the event of the opening of a subsequent insolvency proceeding for the debtor. Such financing should therefore not be declared void, voidable or unenforceable. These stipulations could influence the upcoming French ordinance which will be adopted for the transposition of the EU Directive.

16. How has the market for rescue finance been impacted by the COVID19 pandemic?

In response to the Covid-19 pandemic, the French Government has introduced a State guarantee scheme (Scheme) to secure new money loans granted by financial institutions and crowd-funding institutions to companies facing difficulties in the context of this crisis.

The legal framework applicable to the Scheme is set out in the arrêté (i.e., administrative decision of the French Government) of March 23rd, 2020 (*Arrêté*), subsequently modified by various other arrêtés. More specifically, this framework defines eligible loans, eligible borrowers and the main characteristics of the guarantee granted by the French State.

To be eligible, the loan must be granted between the dates of 16th March 2020 and 30th June 2021, without any guarantee or collateral, by a financial institution, a finance company or a finance intermediation company and include:

- a schedule of repayments spread out over a minimum period of 12 months; and
- the unilateral option, for the borrower, at the end of the 12 months period, to immediately repay or to amortize the loan over an additional period of one, two, three, four or five years (i.e., maximum total duration of 6 years including the first 12 months).

In any event, the loan may not be granted for an amount exceeding 25% of the 2019 gross turnover of the borrower (subject to minor exceptions, for instance regarding companies created as of January 1st 2019).

Second, the Scheme will only benefit non-financial companies registered in France, regardless of their sector of activity, size or legal form. Some companies, such as civil real estate companies, finance companies and institutions, companies subject to insolvency proceedings and companies facing financial difficulties within the meaning of EU Regulation 641/2014, are excluded.

Third, with respect to the Scheme, the State guarantee (State Guarantee) is a personal guarantee which is directly granted by the State through BPI France Financing (the operating entity of BPI France, a French State Bank) to the lender, and which is exclusive of any other guarantee or security. The State Guarantee is irrevocable, unconditional and valid for the duration of the loan.

The guarantee applies to the principal amount of the loan, interest on the loan and ancillary costs and charges, without exceeding a certain percentage of the loan, which depends on the size of the company (e.g., 90% for a company which employed less than 5,000 employees and which recorded a turnover of less than EUR 1.5 billion during its last completed financial year; which appears to be the case for Club Med Invest according to the representation made in the French State Guaranteed Loan Agreement (article 20.23)).

The State Guarantee may be exercised when a credit event (évènement de crédit) occurs, defined by the Arrêté as essentially (i) a default of payment of any sum due to the lender(s), (ii) a restructuring of the borrower's debt which entails a loss, or (iii) the opening of an insolvency proceeding.

However, the State Guarantee cannot be exercised (i) within the first two months following the date of drawing down of the loan, and (ii) after a period of three months following the final maturity date of the loan.

In any event, the indemnifiable base to which the above-mentioned percentages will apply corresponds to the loss recorded by the lender(s) as a result of the occurrence of a credit event. The Arrêté provides guidelines to determine the indemnifiable amount for (i) a credit event in relation to a restructuration of the loan and (ii) a credit event in relation to liquidation proceedings.

There is no legal provision at this stage regarding the possibility for the French State to be subrogated in the rights and obligations of the lenders against the borrowers. In other words, should the State Guarantee be called, the ability of the French State to act against the borrower for repayment remains to be determined.

GERMANY

1. Is there an established market for rescue finance?

Germany does not have a codified "DIP finance" regime, unlike, for example, the USA.

However, forms of finance are available to corporate entities in distress or formal insolvency proceedings and are possible under the German legislation.

While rescue finance is available to distressed debtors, the market for "rescue" finance is still not very large in Germany.

2. If not, how do debtors fund or finance corporate reorganization or trade on?

To address this question, first: a brief background of the key German corporate restructuring and insolvency processes may be of assistance. Management of a company in Germany is obliged to file for insolvency in the event of illiquidity or over-indebtedness.

In Germany, there are two main types of insolvency procedure, the general insolvency proceeding and the self-administration proceeding (also called: Debtor in possession Proceeding). The general proceeding mostly ends with a liquidation, often combined with a sale of the business assets to a buyer who continues part or all of the business, and the winding up of the company. The self-administration proceeding is an in court restructuring through self-administration and an insolvency plan. The main prevailing function of the insolvency administrator in the general insolvency proceeding is to achieve the best return for all unsecured creditors by realization of the assets. On 1 January 2021 a complex pre-insolvency restructuring procedure was introduced via the Act on the Stabilization and Restructuring Framework for Business (StaRUG). But the general insolvency procedure pursuant to the German Insolvency Act (InsO) remains the most common process, used in more than 90% of corporate insolvency cases, ending with a liquidation and a winding-up of the company. It only makes sense to use the self-administration procedure combined with an insolvency plan in larger and substantial or special cases, because this procedure requires a profound going-concern perspective and planning, professional advisers, lawyers and normally experienced turnaround management (e.g. CRO's). This self-administration procedure makes it the closest German analogue to the United States Bankruptcy Code Title 11 (Chapter 11) procedure.

The general insolvency proceedings (Part 2-6 InsO)

German general insolvency proceedings are comprised of the preliminary insolvency proceedings and the general insolvency proceedings. After the application for insolvency by the debtor or a creditor, the insolvency court (county court) appoints a preliminary insolvency administrator. At the same time, he / she is the legal expert who has to examine for the court whether the company is actually insolvent or over-indebted and if there are sufficient assets to cover the costs of the proceedings. The preliminary insolvency administrator controls the management and has to agree to any disposal of assets, which leads to the "control" of nearly all actions of the debtor. The company can continue its business as long as the preliminary insolvency administrator approves transactions. In Germany these proceedings do not usually exceed more than three months because for that period the salaries of the employees are covered by the "German Bundesagentur für Arbeit", a state authority. If the expert opinion of the preliminary insolvency administrator shows that one of the opening reasons is present and the cost of the proceedings are covered, the court opens the general insolvency proceedings. From that moment on, the insolvency administrator takes over full control of all assets of the debtor and is responsible for the company. The company's management is still in place, but loses control of the debtor.

Self-administration proceedings (Part 7 InsO)

These proceedings are also comprised of preliminary self-administration proceedings and general self-administration proceedings. In these proceedings the management of the company continues to manage the company (Debtor in possession Proceeding). The court appoints an insolvency monitor, who supervises the debtor and has, to some extent, limited rights similar to an insolvency administrator, but does not have an influence on the management and the disposal of the assets in the day-to-day business. A special alternative to these proceedings is the so-called umbrella protection proceeding. The advantage is that the debtor company can have real influence on the selection and appointment of the trustee. Under the umbrella protection proceeding the debtor and its advisor have to present an insolvency plan for the restructuring of the company in a granted grace period. The other advantage is, that these proceedings are not regarded as "typical" real insolvency by the public. From a legal point of view these are court involved insolvency proceedings. If the proceedings fail at some stage, they are transformed into general insolvency proceedings.

As is elsewhere the case, in Germany insolvency is also often initiated relatively late, when options have dwindled, meaning that cash flow is challenged and funding to undertake a worthwhile self-administration and restructuring process is in short supply. In order to trade on a business in bigger general insolvency proceedings and especially in self-administration proceedings with a view to selling the assets and transferring employees as a going concern (transferring of the operations to a new entity), or successfully restructuring its operations with a insolvency plan, the insolvency administrators and the debtor in possession management need cash to meet ongoing costs like administration expenses, wages, supply, rental liabilities etc.. If such funding is not available from the company's cash flow, insolvency administrators and the debtor in possession management may look for bridging loans or other funding, to meet continuing trading costs and / or to facilitate a restructure or rescue of the business.

There are different financing options for the insolvency administrators and debtor in possession management:

- **Insolvency Payments (*Insolvenzgeld*) by the Employment Agency (*Bundesagentur für Arbeit*):**

  Insolvency payments are not a financing by a credit institution but a major financing measure during insolvency proceedings. It is a kind of lost grant or insurance payment. If the insolvency is timed right before the next monthly salary payment is due, the future monthly salaries of the employees can be pre-financed by a credit, which is covered for maximum 3 months by future insolvency payments of the German employment Agency. This tool is used in preliminary insolvency proceedings and enables personnel costs to be saved for up to 3 months. Since the insolvency payments can only be disbursed after the general insolvency proceedings or self-administration proceedings have been opened, it has to be financed through a loan. As security, the employees assign their claims against the Employment Agency to the financing bank.

  In detail: If an employer is insolvent and employees have received their wages or salaries only in part or not at all, the Employment Agency settles the outstanding payments to the employees concerned under certain circumstances in the form of insolvency payments. An entitlement to insolvency payments exists in case of insolvency for the past three months (period of insolvency payments) of the employment relationship.

  Before financing the insolvency payments, the approval of the Federal Employment Agency is required. Otherwise, there is no entitlement to insolvency payments. This financing method for an insolvent company creates considerable liquidity scope in the short term and often ensures the temporary continuation of business operations.

- **New loan**:

  The Insolvency code distinguishes between two basic types of preliminary insolvency administrator. If a preliminary insolvency administrator is appointed at the same time as a general prohibition on disposal is imposed on the debtor in accordance with section 21 (2), the right to manage and dispose of the debtor's assets vests in the preliminary insolvency administrator in accordance with section 22 (1). In this case the preliminary administrator is known as a "strong" preliminary insolvency administrator.

  If the preliminary insolvency administrator is merely granted a reservation of approval, the preliminary insolvency administrator is known as a "weak" preliminary insolvency administrator.

  In principle, it is possible that both a "strong" preliminary insolvency administrator and a "weak" preliminary insolvency can take out a new loan during the period of the preliminary insolvency administration period.

  In the opening of proceedings right after the preliminary insolvency administration period (opening of the proceeding), these new loan liabilities are regarded as preferential claims. This means that they must be repaid with priority pursuant to § 55 (2) S.1 and § 209 (1) No. 3 InsO before quota payments are made to all unsecured bankruptcy creditors § 38 InsO. In practice, the bank or new lender will only grant a new loan against the provision of valuable collateral which is not subject to existing security. The risk for the bank in the event of a mass inadequacy or an impending mass inadequacy of not getting its new loan repaid in full when the proceeding is opened, despite the priority according to § 209 (1) No. 3 InsO, is too high. An additional specific individual authorization by the court enables the "weak" provisional insolvency administrator to use specific free assets from the debtor to secure a new loan to be taken out. The provision of collateral is a transaction, that cannot be disputed pursuant to § 142 InsO of the German avoidance law. However, the debtor will often not have sufficient unsecured assets and it is unusual, without collateral, to get new loan financing from lenders.

In addition, it would also be possible for the preliminary insolvency administrator to assume personal liability for the repayment of a loan. However, this would only happen in exceptional cases.

- **"False" insolvency estate loan with revolving collateral**:

  The existing credit provider may grant a "new" loan by what is known as an "agreement loan" (*Vereinbarungsdarlehen*). Under this new agreement loan the secured bank permits the preliminary insolvency administrator to attempt the temporary continuation of the business, to use existing secured current assets of the debtor and the income of existing secured sales receivables to finance the business. In the agreement loan, the insolvency administrator has to ensure that the new current asset and future sales receivables are collateral for the existing security, and to the same extent. If the bank assumes the intrinsic value of its collateral, it will only accept a discount on the proceeds of realisation of its security if it accepts that it cannot realise the collateral itself.

- **Variant of the "false" insolvency estate loan where the bank has already withdrawn the right to use collateral comprising unfinished end products**:

  In general, the debtor's loans are secured by the debtor's current assets. Often, due to the nature of the loan collateral, the bank may have restricted the debtor from reselling secured unfinished products or collecting the proceeds of secured assets prior to the commencement of the preliminary administration period. In those circumstances, the preliminary insolvency administrator has the possibility to negotiate an agreement with the secured bank that, in order to maintain business operations, the bank will lift the restriction to allow the preliminary insolvency administrator to complete and sell the unfinished products. This is another form of an "agreement loan" (*Vereinbarungsdarlehen*), but is much more complicated. In these circumstances, the bank must receive new or replacement collateral in the form of the finished items / products and future sales receivables. In other words, this arrangement contemplates not only revolving collateral, but the bank must be given new security in the finished product. This new agreement has to take into account, for example, the working time which still has to be invested to complete the items / end products and the fact that unfinished products are usually worthless. The cost and value of those aspects have to be calculated by the administrator and is another indirect source of new financing, because a bank will generally accept a discount in order to monetise or make their otherwise worthless collateral valuable, at least to a small extent.

- **New payment to complete an order already paid for**:

  In the project or construction business, it is often the case that the customer has made down payments without security. At the beginning of the preliminary insolvency period the administrator does a fresh calculation of all these projects or construction sites. In general, these new calculations show that the construction cannot longer be completed within the originally conceived costings. Often the distressed debtor has already used the project-related down payments to finance other projects. In this case, the customer will only have the option of recommissioning the project or construction work from a new third party and paying the full price again. In such cases, the preliminary insolvency administrator can try to make a new agreement with the customer and offer the customer to finalize the project for a "new price". The administrator will only make such an offer if the order can be implemented on time, with a profit and maintaining the existing employees. This leads to a significantly higher price for the customer, but it may still be better for it than having to rewrite and finance the project again from scratch.

- **Other types of financing**:

  Another "type of financing" is that the preliminary administrator is not required to pay liabilities from pre-appointment / pre-petition obligations, such as leasing or renting of commercial space, if these are no longer needed in the future of the business and have to be surrendered to the respective owners after the opening of the insolvency proceeding.

  For the preliminary insolvency administrator in Germany in the beginning of the insolvency it is also quite usual to commit to payments only after the creditors have made demands for payment to the insolvency administrator. Until then, the debtor may continue to use the without paying the respective invoices for that period, effectively relieving pressure on cash flow.

- **Mass costs subsidy**:

  In order to enable the opening of insolvency proceedings, third parties are permitted to pay a sum of money into the proceedings to cover the procedural costs. In general, this form of funding will not be advanced to finance the continuation of the ongoing business.

3. If yes, what are the main sources of funds for rescue finance?

The conventional sources of funding in Germany are the shareholders, related companies, directors or often the family of the shareholders.

The existing secured lenders or borrower banks, factoring institutions, companies / banks who offer sale and lease back arrangements, may also pre-finance. Potential investors who buy the company out of its distressed situation may also advance finance. For an investor, German insolvency law § 39 (5) InsO also provides the prospect of a better position in a later insolvency case. If, in the case of the company's impending or existing insolvency or its over-indebtedness, a creditor acquires shares for the purpose of the company's rehabilitation, this shall, until the company has been rehabilitated to become sustainable, not lead to the application of subsection (1) no. 5 to its claims from existing or newly granted loans or to claims from legal transactions which correspond in economic terms to such a loan.

Occasionally, suppliers may be prepared to accept longer terms of payment.

In the case of retail businesses, liquidity providers like Gordon Brothers and Great American also operate in Germany.

Property owners may be willing to waive unpaid rent or to reduce rent. Because of the crisis in the retail industry landlords are willing to accept reductions up to 50 % or even more even for premium rental locations. It is due to the general economic downturn in the retail business area. The impact of covid on retail businesses has accelerated this evolution.

Loan to own strategies are also seen in Germany, but these are rare.

4. Is rescue finance codified or subject to specific legislation?

Rescue finance is not codified in a specific law or sections of a law. But there are specific regulations about shareholder financing and the handling of "new loans" in restructuring or crisis situations in the German InsO and the new StaRUG. There are different rules regarding the handling of such new loans or investments pursuant to avoidance (voidable transaction) laws.

InsO:

There are some special regulations for shareholder financing in §§ 39 (see above), 44a and 135 German InsO. This relates to the subordination of shareholder loans pursuant to § 39 (1) Nr. 5 InsO in the waterfall and the possibility of claw back action in cases in which shareholder loans were repaid prematurely during the crisis, § 135 InsO.

The only case in which a later priority can be given to a financing under German law is regulated in § 264 InsO.

§ 264 InsO Loan Ceiling

(1) The constructive part of the insolvency plan may provide for lower-ranking status for the insolvency creditors compared with creditors with entitlements deriving from loans or other credits entered into by the debtor or the takeover company during the period of monitoring or held open by a preferential creditor to extend into the period of monitoring. In such a case the maximum amount of such loans shall also be fixed (loan ceiling). It may not exceed the value of property listed in the survey of assets contained in the plan (section 229, first sentence).

(2) The insolvency creditors shall rank lower under subsection (1) only in comparison with creditors entering into an agreement that and to which

amount the main claim, interest and costs of the loans granted by them are under the loan ceiling, and receiving confirmation of such agreement in writing from the insolvency administrator.

(3) Section 39 subsection (1) no. 5 shall remain unaffected.

Act on the Stabilisation and Restructuring Framework for Business (StaRUG):

The German Parliament passed the new StaRUG, which entered into force 1 January 2021. It brings significant changes to the German restructuring and insolvency landscape and offers several new tools to professionals to do proper pre-insolvency restructuring with or without court involvement. Particularly noteworthy is the "StaRUg-Scheme" which has similarities to the new UK Restructuring Plan and the new Dutch WHOA-Scheme. This new scheme enables a debtor to implement a restructuring plan outside a formal insolvency proceeding. Furthermore, it allows a cross class cram down system and a moratorium of a maximum of 8 months. This new act deals with new financing and safe harbour in detail.

According to § 12 StaRUG provisions on new financing of the restructuring project can also be included in the new German restructuring scheme. These new loans are subject to the protection against avoidance actions in case of a later insolvency pursuant to § 90 StaRUG. § 90 StaRUG provides for special protection against avoidance actions for new financing in later insolvency proceedings, but only if the plan is approved by a court. For the protection of § 90 StaRUG to take effect, it is necessary that the new financing is explicitly regulated in the new restructuring plan. This includes new collateral for these loans. The offering and supply of stock, services or raw material is considered a form of credit or loan by § 12 StaRUG. The fact that the insurance with collateral of new financing is also permitted is regulated in § 12 S 2 StaRUG. No new financing within the meaning of Section 12 of the StaRUG is merely supplementary collateral for already existing "old" financing / loans. § 12 StaRUG grants security only, if this new financing is required to avoid that the debtor becomes insolvent without the new financing. No super-priority for a new loan is granted in the StaRUG.

Prolongations, deferrals, renewals and additional collateral for existing loans are not covered by § 12 StaRUG, because these tools are not considered to be a new kind of financial support intended to be privileged by the legislator.

5. Are there any legislative or regulatory restrictions or requirements for foreign investment which rescue finance providers need to consider?

Germany:

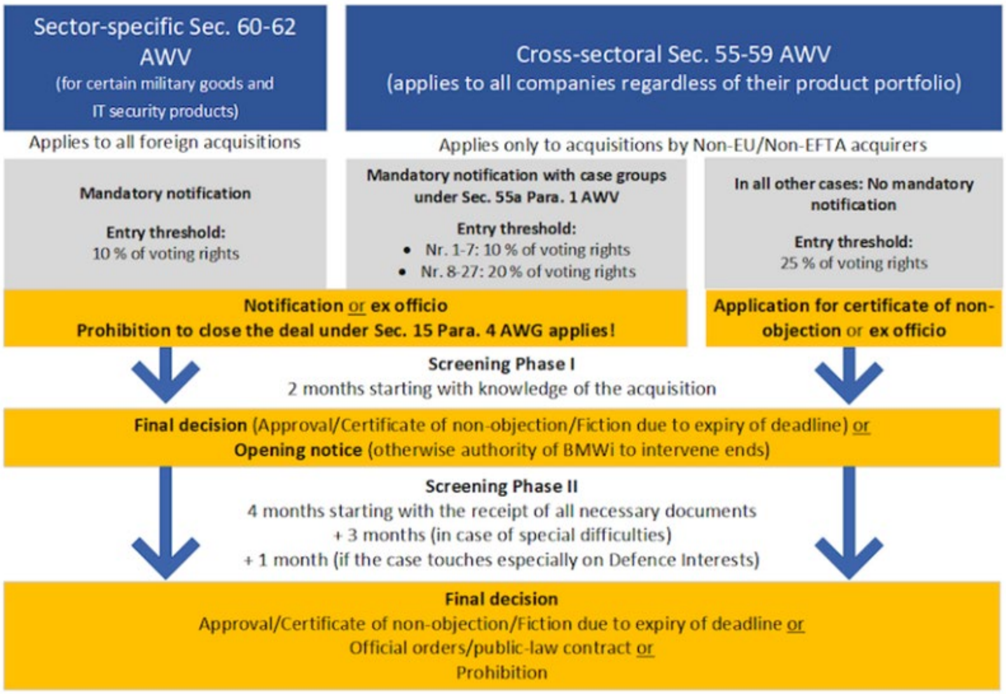
In order to prevent security risks, the Federal Ministry for Economic Affairs and Energy (BMWi) may review the acquisition of German companies by foreign buyers on a case-by-case basis. The Foreign Trade and Payments Act (AWG) and the Foreign Trade and Payments Ordinance (AWV) provide the legal basis for this.

Screening procedure:

As a rule, the cross-sector investment review procedure applies here (Section 4 Subsection 1 number 4, Section 5 Subsection 2 of the AWG, Sections 55 - 59 of the

AWV). In principle, this procedure applies to all sectors regardless of the size of the companies involved in the acquisition. Special rules apply to the acquisitions of certain defence and IT security companies (in these cases, there is a sector-specific investment review, Section 4 Subsection 1 number 1, Section 5 Subsection 3 of the AWG, Sections 60 - 62 of the AWV). Further information is found under BMWi - Federal Ministry for Economic Affairs and Energy - Investment screening

Special rules for investment reviews apply to the acquisition of companies that operate in sensitive security areas. This includes manufacturers and developers of military weapons and other key military technologies, especially designed engines and gearboxes for military tracked armoured vehicles, and products with IT security features that are used to process classified government information. Similarly, special rules also apply to the acquisition of a company that operates a high-grade earth remote sensing system (Section 10 of the Act on Satellite Data Security). Any acquisition of a company by foreign investors whereby these acquire ownership of at least 10% of the voting rights of a company resident in Germany can be subject to such a review. The review considers whether the respective acquisition poses a threat to essential security interests of the Federal Republic of Germany. In this context, relevant EU legislation and the case law of the European Court of Justice (ECJ) needs to be taken into account.



Review of company acquisitions

Europe:

At the European level, the Federal Government is working to place a greater focus on strategic direct investment by non-EU investors in security-critical European high-tech companies. In particular, the transparency about non-EU direct investments in the EU and the strategies pursued by third countries is likely to be increased, cooperation between the Member States on the screening of non-EU direct investment improved, and the powers of the Member States to intervene strengthened.

In September 2017, the European Commission presented a proposal for a regulation. On this basis, representatives of the Member States and the European Parliament agreed on a framework for the screening of foreign direct investments in the EU at the end of 2018. The relevant Regulation was adopted by the Council and the European Parliament in spring 2019 and entered into force on 10 April 2019.

6. Is court approval required for rescue finance or any security granted to the lender? If so, what considerations does the court take into account in approving or rejecting a proposal for rescue finance?

Court approval is not required for rescue finance, but a preliminary insolvency administrator should obtain specific authorization from the court pursuant to § 22 (2) InsO in the event that a loan is taken out or security is required to be provided. This also applies to self-administration proceedings.

In respect of pre-financing of Insolvency Payments (Insolvenzgeld) the preliminary administrator must also obtain a specific authorization from the court pursuant to § 22 (2) InsO. As a rule, this will be a step the financing bank will also want to see.

In pre-insolvency restructuring proceedings court approval for the restructuring plan is necessary to obtain protection for new finance and security in a German scheme pursuant to §§ 12, 90 StaRUG (see above Question 4).

7. Is creditor or secured creditor approval required for rescue finance?

Approval by secured or unsecured creditors is not required. Nevertheless, in practical terms, the administrator will seek the consent or approval of any preliminary creditors' committee and of the final creditors' committee, to reduce its potential liability.

In pre-insolvency restructuring proceedings approval from every creditor affected by the restructuring scheme is necessary. They have to agree to the restructuring scheme in which the new financing is regulated.

8. What role does a creditors' committee play in approving rescue finance (if any)?

Despite its rights, the creditors' committee is not an executive, but only a supporting or controlling body. One of the main tasks of the creditors' committee is the examination of money transactions and holdings, which must be extended to all accounts and receipts. Accordingly, depending on the timing and nature (or magnitude) of the borrowing by the administrator, he / she may consider it prudent to notify and consult with the creditors' committee (if one has been appointed) in relation to any significant borrowing. In practice, this means that the administrator always informs the creditors' committee and that the committee has to check the purpose and the terms of the loan.

9. What priority of repayment is available to unsecured rescue financiers, if any?

InsO:

The bank will require that the loan be a "mass obligation". As a mass obligation, repayment occurs in the waterfall after the cost of the proceeding and new incumbent obligations § 209 (1) Nr. 3 InsO, but before “ordinary” unsecured creditors. Nevertheless, the bank will insist on further collateral as already mentioned. Thus, in Germany, there is no equivalent to American "super priority".

As to the peculiarities of financing in the time after a successful insolvency plan, see above question 4 and § 264 InsO.

10. Can rescue finance be provided on a secured basis?

Yes, that is possible.

The nature and priority of security granted to a rescue financier will depend on the particular debtor company's circumstances, including what assets are available to pledge by way of security (if any), whether other secured creditors hold security over the debtor company's property and whether the company's existing finance documents restrict the granting of security to other financiers. If all assets are secured, the administrator / debtor can only offer newly produced finished products or the proceeds of future recoveries as new security.

11. Can rescue finance be provided on a super-priority secured basis?

Germany does not have a statutory provision analogous to the US priming lien provision (11 U.S.C. § 364(d)).

Generally, first-in-time perfected security has priority over later registered security interests in the same collateral, absent any subordination arrangements between the secured parties.

12. Can priority or additional security be obtained for pre-petition financing?

The concept of "roll-up" DIP financing is not a term of art known to the German restructuring market, certainly not comparable to Chapter 11. Such a system does not exist in Germany.

The financing creditor has the option of using unencumbered or free collateral to secure a new loan. However, a lender will only be willing to do so in rare cases. In general, the value of collateral is usually declining in the event of a borrower's crisis. At that point there is usually no delta that would allow further granting of credit.

13. Is security granted for rescue finance be automatically perfected, or is additional perfection required and, if so, what steps must be taken?

There are no differences in the way securities are dealt with, whether they are granted to secure a loan or rescue finance.

First of all, Germany does not have a floating charge, but different types of securities. I present the most important ones below:

Pursuant to § 18 InsO any creditor who can claim on the basis of a property right (in rem) or a personal right (in personam) that an asset does not form part of the insolvency estate is not an insolvency creditor. The creditor's right to separate the asset is determined in accordance with the laws applicable outside the insolvency proceedings. The property subject to entitlement, to separation or separate satisfaction must be identified or at least be identifiable. The following examples of legal positions can be subject to the right of separation (to name a few):

- Sole ownership
- Jointly-held property
- Consignment
- Industrial Property Rights, Copyrights, Personal rights
- Retention of Title (Eigentumsvorbehalt): In the case of retention of title the seller is entitled to claim segregation unless the insolvency administrator opts to perform the purchase contract in accordance with § 103 InsO and the condition of the payment of the purchase price is met. The seller must claim this right by writing to the insolvency administrator, who must consider it. Either he / she pays for the property, or he / she must relinquish it to the seller after the insolvency proceeding has been opened.

Pursuant to § 49 InsO creditors with a right to satisfaction from assets which are subject to compulsory enforcement against the debtor's immovable property (immovable assets) are entitled to separate satisfaction in accordance with the provisions of the Act on Forced sale and Sequestration (Gesetz über die Zwangsversteigerung und die Zwangsverwaltung).

Also pursuant to § 50 InsO Creditors holding a contractual pledge, a pledge acquired by attachment or a legal lien in an object forming part of the insolvency estate shall be entitled to separate satisfaction in respect of the main claim, interest and costs from the pledged object under sections 166 to 173 InsO. The following examples of statutory liens can be subject to segregation pursuant to § 50 InsO (to name just a few):

- Landlords, over attachable items brought in by the lessee
- Lessees, over inventory items
- Shippers over freight, and freight carriers over freight
- Contractors over the movable items of a customer that they have produced or repaired

The insolvency administrator has the right to collect and realize the debtor's accounts receivable that have been assigned for security purposes. After the deduction of the cost contribution pursuant to § 167 InsO the insolvency administrator must allocate the appropriate share of the proceeds the secured creditor. The secured creditor does not have an independent right of realization.

14. Is it common for the rescue finance provider to require milestones or other deliverables to be met, or to exercise control over the bankruptcy process?

It depends on the creditor. External professional creditors will require milestones. In general, local banks want to see progress in the restructuring process, compliance with financial planning, compliance with the restructuring plan and implementation of the agreed measures.

15. Have there been any cases in which the rescue finance provisions have been analysed by the courts?

There are many court decisions in relation to the provision of services or loans which have the character of equity capital. Their reimbursement before or during a crisis can be contested in an avoidance action.

16. How has the market for rescue finance been impacted by the COVID19 pandemic?

Due to the extensive support measures for business and consumers by the German State, the number of bankruptcies decreased significantly in 2020 (15,921 company insolvency cases). This is the lowest rate since 1993. Even now in 2021, there is no significant increase. Only consumer insolvencies have increased, since the debtors can only get full discharge from their debts after 3 years. Euler Hermes, Europe's leading credit insurer, estimates for 2021 about 16,900 and in 2022 about 19,500 company insolvency cases. Overall, I do not expect a significant increase in corporate insolvency cases in 2021 and 2022.

The measures of the German State have therefore worked quite well and avoided a brutal wave of bankruptcies in Germany. The German state spent a total of 108,4 billion € in propping up the German economy[1] and provided an additional 30 billion € in the form of German "*Kurzarbeitergeld*" (or short-term work allowances) to employees:

▪ KFW Loans	51,6 billion €
▪ Direct grants for companies	43,3 billion €
▪ Economy stabilization fond	8,5 billion €
▪ Guaranties	5 billion €

[1] BMWi - Coronahilfen: Bewilligungen und Auszahlungen in Milliarden Euro, Stand: [22.06.2021].

INDIA

1. Is there an established market for rescue finance?

The (Indian) Insolvency and Bankruptcy Code, 2016 (**IBC**) provides for "interim finance" (similar to rescue finance) and which allows financiers to provide super priority lending to companies undergoing corporate insolvency resolution process (**CIRP**), typically to meet the company's working capital costs, trading costs, and the costs of the CIRP.

Despite the enabling provisions, the market for interim finance is still very nascent in India. The primary reasons for reluctance on the part of the financiers to advance interim finance are the uncertainty on the length of the CIRP, non-availability of collateral (existing lenders often refuse to permit furnishing of such collateral) and in case of existing lenders to the debtor company, the impression of throwing good money after bad. The interim financiers also charge a high interest rate which may not be amenable to the lenders.

The country's first significant interim finance was raised in the CIRP of Alok Industries Limited. Further, one of the more high-profile examples of interim finance was the funding made available to Jet Airways (India) Limited.

2. If not, how do debtors fund or finance corporate reorganisation or trade on?

Please see 1 above.

3. If yes, what are the main sources of funds for rescue finance?

Primary sources of Interim finance in India are banks and non-banking financial companies specifically those who are the existing creditors of the insolvency debtor and are participating in the CIRP. In recent times, non-traditional lenders such as private equity firms and family offices have also been eyeing the market for interim finance.

4. Is rescue finance codified or subject to specific legislation?

To address this question, a brief background of CIRP under the IBC may be of assistance.

The IBC was envisioned with the objective of reviving distressed companies and ensuring that such companies remain a 'going concern entity'. Upon initiation of the CIRP against a debtor company, the relevant National Company Law Tribunal (**NCLT**), which is the relevant insolvency court, appoints an interim resolution professional (**IRP**) for managing the affairs of the company as a going concern before the formation of the committee of creditors (**CoC**). Once the CoC is constituted, it then appoints a resolution professional (**RP**) to conduct the CIRP and manage the affairs of the debtor company.

Where the existing funds are not sufficient to manage the affairs of the company as a going concern, the IBC empowers the IRP and the RP to raise interim finance. Interim finance has been defined under Section 5(15) of the IBC to include any financial debt raised during a CIRP or a pre-packaged insolvency process, in order to protect and preserve the value of the property of a corporate debtor and to manage its operations as a going concern. Interim finance can be raised by both the IRP (before the constitution of the CoC) and the RP (after the CoC has been constituted and with the approval of the CoC).

Further, any funds raised as interim finance and cost of raising such finance form part of the CIRP costs under Section 5(13)(a) and pre-packaged insolvency resolution process costs under Section 5(23C)(a), and thus are to be paid in priority to all other payments made to the lenders of the corporate debtor in the reorganization (Section 30(2)(a) and Section 53).

5. Are there any legislative or regulatory restrictions or requirements for foreign investment which rescue finance providers need to consider?

Foreign investment in an Indian company is governed by the Foreign Exchange Management Act, 1999 (**FEMA**) and the associated regulations, guidelines, notifications, directions, rules, regulations issued by the Reserve Bank of India and the Ministry of Finance. Specifically, lending and borrowing of money is regulated under FEMA and regulations as well. Lending of money in a currency other than Indian Rupee is regulated under the Foreign Exchange Management (Borrowing and Lending) Regulations, 2018 and the Master Direction - External Commercial Borrowings, Trade Credits and Structured Obligations and importantly, is subject to, among others, minimum maturity requirements and pricing caps, which make lending of interim finance in non-Indian Rupee denomination infeasible. As regards Rupee lending, foreign investors would be able to invest only as foreign institutional investors or as investors in Alternate Investment Funds.

6. Is court approval required for rescue finance or any security granted to the lender? If so, what considerations does the court take into account in approving or rejecting a proposal for rescue finance?

No, the approval of the NCLT is not required for availing interim finance or for granting any security in relation to the same. Under the IBC, all commercial decisions on matters of business, including evaluating proposals to keep the entity as a going concern, the sale of business or units, etc., are taken by the CoC which comprises of unrelated financial creditors. If the CoC exercising its commercial wisdom, decides to permit the RP to raise interim finance, secured or unsecured, it is automatically granted as per the agreed terms. CoC approves such decision by a resolution passed by 66% by value.

7. Is creditor or secured creditor approval required for rescue finance?

The RP can raise interim finance and grant security to the interim financier upon the approval and subject to the limits imposed by the CoC. Once approved by the CoC, no further creditor approval is required for security to be extended to interim finance.

No prior consent is required for an IRP raising interim finance or creating security over unencumbered assets of the corporate debtor. However, if the IRP is creating charge on encumbered assets, the approval of the requisite lender holding the prior security interest over those assets is required (Section 20(2)(c)). No prior consent of such secured creditor is required where the value of such encumbered assets is not less than the amount equivalent to twice the amount of the debt. However, this power is valid only for about 30 days, being the term of the IRP, from the commencement of insolvency.

8. What role does a creditors' committee play in approving rescue finance (if any)?

See 6 and 7 above. While an IRP is permitted to raise interim finance without the approval of the CoC, the resolution professional can raise interim finance only upon the approval of CoC by a majority of 66% by value and subject to the limits imposed by the CoC.

9. What priority of repayment is available to unsecured rescue financiers, if any?

Funds raised as interim finance (including the principal and interest), whether secured or unsecured, form part of the CIRP cost and the pre-packaged resolution costs, as the case maybe. The payment towards such costs gets the highest priority in a resolution plan (Section 30(2)(a) of IBC) and is paid out prior to any recoveries being made by any other creditor. Similarly, in liquidation, the distribution waterfall under Section 53 provides for the highest priority to be given to CIRP Costs and liquidation costs, which need to be paid out of the liquidation estate.

10. Can rescue finance be provided on a secured basis?

Please see 7 above. IRPs and RPs are permitted to create security over the unencumbered and encumbered assets of a corporate debtor.

After the CoC has been constituted, the RP needs to get the approval of the CoC for creation of any security interest over the assets of the debtor company.

11. Can rescue finance be provided on a super-priority secured basis?

Yes, please see our response to 7, 9 and 10 above.

12. Can priority or additional security be obtained for pre-petition financing?

The concept of "roll-up" DIP financing, is not a concept recognized under the Indian insolvency and restructuring market. If any priority of enhanced security is granted for pre-petition financing, there may be a risk of it being dis-allowed. It is also relevant to note that Section 53(2) of the IBC provides that, any contractual arrangement which disrupts the liquidation waterfall in Section 53 is required to be disregarded by the liquidator.

13. Is security granted for rescue finance be automatically perfected, or is additional perfection required and, if so, what steps must be taken?

No, the security granted for rescue finance is not automatically perfected and the RP, on behalf of the corporate debtor, would be required to take steps for the perfection of such security. Section 77 of the Companies Act, 2013 (**Companies Act**) mandates a company to file the particulars of charges with the Registrar of Companies within thirty days of the creation a charge within or outside India, on its property or assets or any of its undertaking. Such registrations, filings and payment of fees are required to be made promptly after the date of execution of the relevant definitive finance and security documents by the corporate debtor, and in any event within the time specified in the Companies Act and / or in such definitive documents. Failure to duly file the charges in accordance with the Companies Act would result in the company being liable to pay fines.

14. Is it common for the rescue finance provider to require milestones or other deliverables to be met, or to exercise control over the bankruptcy process?

It is conventional for the rescue finance provider to require certain conditions and milestones to be met before and after the execution of the definitive finance and security documents, including for example, written approval of the CoC, evidence of receipt of internal approvals of the lenders, approved end use certificate and certificate from the RP certifying that the facility constitutes an interim finance facility and forms part of the CIRP costs under the IBC.

While the RP performs its statutory duties of managing the affairs of the debtor company, the CoC exercises control over the commercial decisions in relation to the CIRP of the corporate debtor, including approving the resolution plan and distribution of proceeds among the different classes of creditors etc. Though the interim financiers can affect the CIRP by virtue of the advance of funds, they do not get a seat in the CoC and are not able to exercise significant control over the CIRP of the corporate debtor.

15. Have there been any cases in which the rescue finance provisions have been analysed by the courts?

As noted in 1 above, interim finance is not very common in India.

There have been a few cases in India which have considered / concluded:

- the purpose for which interim finance can be raised (*Edelweiss Asset reconstruction Company v. Sai Regency Power Corporation Pvt. Ltd*., Company Appeal (AT) (Ins) No. 887 of 2019). It was decided that interim finance can be raised for supply of essential goods and direct costs as well as the manufacturing input costs.

- advance payments for supply of goods cannot be treated as interim finance (*Tuf Metallurgical Private Limited v. Impex Metal & Ferro Alloys Limited, Company Appeal* (AT) (Insolvency) No. 190 of 2020)

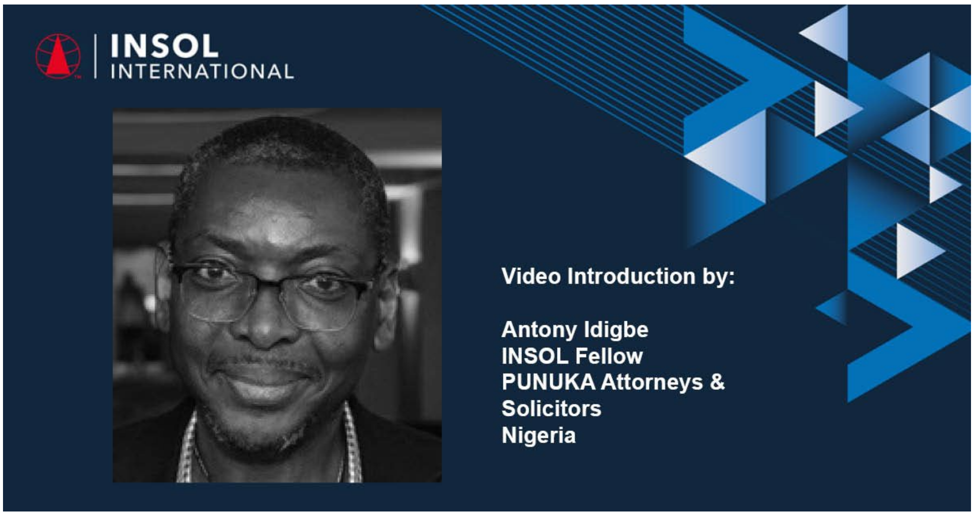
- only the collective decision of the CoC is enforceable, therefore, the CIRP costs including interim finance can be recovered from both secured financial creditors and dissenting unsecured financial creditors (*Edelweiss Asset Reconstruction Company v. Sai Regency Power Corporation Pvt. Ltd., Company Appeal* (AT) (Ins) No. 887 of 2019).

- The RP can raise interim finance only upon the receipt of the requisite approval of the CoC (*Committee of Creditors of EMCO Limited v. Mary Mody, Company Appeal* (AT) (Insolvency) No. 307 of 2020)

16. How has the market for rescue finance been impacted by the COVID19 pandemic?

In order to mitigate the financial and economic distress caused to businesses due to the COVID- 19 pandemic, the Indian government suspended initiation of fresh insolvency proceedings against the debtor companies in respect of defaults arising during the period of 1 year commencing from March 25, 2020 to March 24, 2021. As a direct consequence, the opportunities for rescue finance providers in post-petition scenarios were diminished. While obtaining interim finance was a challenge even before the pandemic, the economic crisis led to existing and new lenders becoming more reluctant to provide any additional credit to the debtor companies.

NIGERIA



1. Is there an established market for rescue finance?

The market for rescue finance in Nigeria is nascent. Before the Companies and Allied Matters Act 2020 (**CAMA 2020**), the framework for insolvency was liquidation focus with limited provision for business rescue. Receivership was the primary means of creditor recovery, followed by liquidation. Those tools were management displacing and could be value-destroying. The weak debtor and creditor rights and insolvency framework with a limited restructuring menu meant a weak secondary market for distressed assets. The enforcement and realisation of creditors' rights left little room for debtors to manoeuvre. There is debtor resistance to management displacing tools. The result is that the insolvency system was not efficient enough to attract new investors into the rescue finance market, and the chance of recovery on distressed assets prolonged, as found by the World Bank Ease of Doing Business 2019 Report on Nigeria.

Some proactive commercial judges to attract new investors into the finance market encourage the process by using the directive powers and the amicable dispute resolution powers of the court available under the law and the court's rules. There are few instances where (new) lenders are willing to provide post-commencement finance. In *United Bank for Africa Plc & Tower Aluminium (Nigeria) Plc (in receivership) v Chief (Dr.) Ernest Shonekan & 6 Ors*,[1] the court directed parties to explore settlement, mainly as all the secured creditors were before the court. The parties held OCW meetings, reporting to the court on progress made. The company in-receivership was able to finance corporate reorganisation, and the terms of the settlement entered as a consent judgment.

Consequently, the market for rescue finance was stunted under CAMA 1990. However, CAMA 2020 came into force on 1 January 2021, repealing and replacing the previous CAMA 1990. It introduced two new insolvency and restructuring procedures: Company Voluntary Arrangement (**CVA**) and Administration while retaining Schemes of Arrangement (**Scheme**) and Liquidation (**Winding-up**), which existed under the old law.[2] Under these new procedures, debtors can now propose a business rescue plan to creditors through a CVA without displacing the management, unlike the previous receiver-manager procedure. The Board of a debtor company or qualified creditors can also appoint an administrator

[1] Suit No: FHC/L/CS/178/2016.
[2] See Chapters 17 and 18 CAMA 2020 respectively.

(management displacing procedure) who can also make a similar business rescue proposal to the creditors on the back of a statutory moratorium against creditors enforcing their securities. The old procedures of receivership and managership, winding-up and arrangem ents and compromise were retained under CAMA 2020 in varying degrees.[3] However, the receiver-manager is likely to fade out over time, favouring Administration given the new law's provision. The Scheme of arrangement is likely to continue to be helpful as a way of achieving business rescue, particularly where it involves the merger and acquisition of more than one company.[4]

CAMA 2020 provides for a single portal entry for insolvency as receivership fades. Administration is the entry portal. The purpose of Administration as set out under the law is first to pursue the business or company's rescue, second to get a solution better than liquidation, and lastly to distribute the company's assets to secured and preferential creditors. With the expanded policy space for restructuring, the growth of the rescue market will likely pick up the pace.

2. If not, how do debtors fund or finance corporate reorganisation or trade on?

Debtors fund and finance corporate restructuring primarily through equity contribution. Such contribution could be directly by the shareholder or by related or holding entities or family members. Before CAMA 2020, there was no formal procedure for the debtor-in-possession corporate reorganisation. It follows that the debtor relied solely upon out-of-court workouts to achieve reorganisation. The Scheme under the old CAMA 1990 was more suited to mergers and acquisitions than pure reorganisation.

Another source of funding for reorganisation is cheaper loans from existing or new creditors. Usually, these loans take out the more expensive existing debt giving the debtor relief. However, we observe that obtaining such finance from new creditors could be challenging as existing creditors may be reluctant to continue their exposure with the debtor and reluctant to share their security, resulting in their withholding of consent.

As observed earlier, the debtors are usually reluctant to accede to new investors in their distressed business because of fear of displacement. The CVA now allows debtors to remain in possession and make a proposal to creditors, obtain a moratorium by affidavit and cramdown on dissenting creditors. Such relief may enable the debtor to restructure the business by asset disposal or going concern sale.

On the other hand, although management displacing, Administration provides for an automatic moratorium and allows the Administrator to preserve the business as a going concern, including considering a CVA or Scheme by the debtor.

The purpose of the Administration as provided under the law is to prioritise a) rescue of the business, b) outcome for creditors better than liquidation, and c) realisation and distribution for secured and preferential creditors. Where

[3] See Chapter 19 on receivership and management, Chapter 20, on winding-up and Chapter 27 on arrangements and compromise.
[4] See section 710 of CAMA 2020.

Administration is the preferred procedure, then the Administrator who has displaced the equity owners can borrow to fund the reorganisation and grant security over the company's property. The receiver and manager have similar powers under the law. However, as noted above, receivership is a diminishing concept.

The Asset Management Company of Nigeria (**AMCON**), a government-owned distressed asset purchaser of bank eligible assets (**EBAs**), has been actively financing some of its acquired assets. Two notable such assets are Arik Air and Aero, two acquired airlines from which AMCON intends to create a national airline called Nigeria Eagle.

The Central Bank of Nigeria (**CBN**) has been licensing private asset management companies (**AMCs**). AMCON has stopped purchasing EBAs from banks. Private AMCs are now active in the distressed asset market. They acquire distressed assets from banks. Private AMCs realise the distressed assets or restructure them for either securitisation or sale to international AMCs.

3. If yes, what are the main sources of funds for rescue finance?

The source of rescue finance in Nigeria depends on the provider of the funding. If the equity holder is providing finance, the source is usually past profit taken out of the company or obtained from other businesses or sources such as loans and family, which they return or invest in the distressed firm if they believe the reorganisation will return the investment.

Existing creditors or subject to the consent of secured creditors if new creditors require security over already encumbered assets, new creditors may provide rescue finance to keep the operations going or restructure the existing debt, thereby providing relief.

Utility providers and critical suppliers are a source of funding for reorganisation upon Administrators' guarantee recognised under the law. The services of critical suppliers and utility providers help the organisation continue as a going concern. The law allows the Administrator to make payment to these providers of critical supplies likely to assist the purpose of the Administration.

The Administrator can borrow from rescue finance suppliers against the company's unencumbered assets or the secured creditors' consent against the encumbered assets.

AMCON issued bonds in exchange for EBAs. AMCON's intervention was in the context of a bank resolution measure for non-performing loans (**NPLs**), which arose in the wake of the 2008/2009 Global Meltdown severely impacting the Nigerian economy by late 2009 and early 2010.

We have seen new investors acquire distressed assets in the context of receivership for creditor realisation without a proposal for reorganisation. Since CAMA 2020 is new, we are yet to see investor funding of asset acquisition as a basis for a CVA or Scheme.

4. Is rescue finance codified or subject to specific legislation?

There is no specific legislation on rescue finance in Nigeria. However, CAMA 2020 has implications for post-commencement financing and, therefore, rescue finance. Post-commencement financing refers to finance provided to the company after the commencement of an insolvency procedure under CAMA 2020. Section 537 generally deals with the charges and liability of an Administrator on vacation or cessation of office. It provides in subsection 2 for priority of the Administrators claims and expenses. The provision further provides that:

- a debt or liability arising out of a contract, including a contract for post-commencement financing, entered into by the former Administrator or a predecessor before cessation shall be–(a) charged on and payable out of property of which the former Administrator had custody or control immediately before cessation; and (b) payable in priority to any charge arising under subsection (2).

In other words, post-commencement financing would enjoy priority over the Administrator's cost, remuneration and expenses. The subsection also recognises the existence of the concept of post-commencement financing or rescue finance without stating any details of what it entails.

However, the scope of post-commencement financing under CAMA 2020 is uncertain but can be grouped according to the priority they enjoy. The first set falls under administration cost. This includes critical utility suppliers under the law, and they require no court order to continue providing their services post-commencement and enjoy priority under the Administrator's cost. Creditors' financing under the Administrator's guarantee enjoys priority under the law as administration cost. The last set of creditors under this head are payments likely to assist the Administration.

Under CAMA 2020, the principal person to raise rescue finance is the Administrator. The law sets the standard of performance, which is to act quickly and efficiently as reasonably practicable. To achieve this, the Administrator can do anything necessary or expedient to manage the company's business or assets. The law vests the power of managing the company, including the Tenth Schedule powers in the Administrator, and stipulates that the Administrator is an officer of the court. Several provisions create criminal liability for the Administrator concerning the formal performance of his / her functions. However, civil liability is prescribed under the law only when the Administrator is found liable for misfeasance. In which case, the court can order restoration or account or contribution to the company property. The Administrator's decisions can be challenged if he or she acted in a manner that unfairly harms the applicant's interest, proposes to act so or does not act quickly or efficiently in the function. There is no specific section imposing personal liability on the Administrator even where the Administrator creates an Administrator Guarantee. It seems that the law manages the risk by discharging the Administrator from liability upon vacation of office and providing priority to the obligations created by the Administrator. Section 537 stipulates that any debt or liability incurred by the Administrator may be charged against the company's property in possession of the Administrator. This suggests that it cannot be charged against the personal assets of the Administrator unless a misfeasance order is made. By directive made under the law, the court can discharge the Administrator in addition to the statutory discharge discussed above.

The second set of post-commencement financing is secured financing over an already encumbered asset. Such financing would require the creditors' consent under the law, and even though no court order is required, a report is sent to the court on the outcome of creditors' consent under the law.

The third set of post-commencement financing relates to the extent to which the priority of secured creditors could be primed without their consent under CAMA 2020. By section 504, the Administrator takes custody and control of the company's property and manages the company's affairs, including implementing any approved CVA or Scheme under section 505. Under section 505(2), the Administrator must comply with all directives of the Court issued under section 500. However, section 505(3) provides that no court direction can be contrary to the approved proposal except for a change of circumstances or desirable misunderstanding.

Under the law, the Administrator can propose to achieve the purpose of the Administration under section 444. The proposal could be in the form of a CVA or a Scheme. Although no such CVA or Scheme can affect the secured creditors without their consent under s.490 (2), the law allows the Administrator to apply to court for directions. The jurisprudence in this area is yet to develop. However, under the law, no payment can be made to unsecured creditors unless the court permits. It is not clear the circumstances where the court would permit because any court direction cannot be contrary to an approved proposal though the law allows the Administrator to make payment likely to assist the purpose of the Administration such as to critical suppliers and utility providers. No court order is required for payment to critical suppliers on the Administrator's guarantee (invites personal liability) and for payment likely to assist the purpose of the Administration. These are in the ordinary course of business.

Under the law, the court may order the Administrator to dispose of property subject to security where the Administrator so applies, and it will promote the purpose of the Administration as set out in section 444 provided that the net proceeds are applied to discharge the secured amount. Even property under hire purchases can be disposed of under the law to promote the purpose. This is similar to the US Chapter 11 moratorium and ipso facto clause. A court order is required to create secured interest post-commencement or realise secured assets as part of a going concern.

The fourth set of post-commencement financing relates to those based on the unencumbered assets of the debtor company. The Administrator can obtain finance based on such an unencumbered asset, and as shown earlier, it would enjoy super-priority over Administration cost. However, it seems that such a transaction would not be in the ordinary course of the Administrator managing the business. Consequently, court direction is required under the law to create secured interest over the company's unencumbered assets.

5. Are there any legislative or regulatory restrictions or requirements for foreign investment which rescue finance providers need to consider?

The Nigerian Investment Promotion Commission Act (**NIPC Act**) allows foreign investors to own 100% of their business in Nigeria except for a few exceptions, such as military and aviation-related business. However, any such foreign investment is expected to have a minimum issued capital of =N=10 million. The NIPC Act offers protection to foreign investors by providing a statutory right to ICSID arbitration.[5] Also, under the provisions of CAMA 2020, a foreign company can conduct business in Nigeria for six months, after which it must register as a Nigerian company. Although a foreign investor can engage in many businesses, any investor, including a foreign investor, must comply with sector-specific restrictions or requirements. For instance, to engage in the finance business, the Banks and Other Finance Institutions Act BOFIA requires a CBN licence. Also, to engage in the investment business, the Investment and Securities Act 2007 (**ISA 2007**) requires registration with the Securities and Exchange Commission (**SEC**). Other sectors such as telecommunications, banking, insurance, aviation and oil / gas sectors, etc., have their requirements.

For a foreign investor to repatriate a dividend from its investment, the investor must import the capital into Nigeria through a licensed bank that would issue a certificate of capital importation (**CCI**). CCI is a CBN certificate issued by banks to a foreign investor as evidence of authorised importation of capital into Nigeria. It is not limited to the importation of capital in cash and applies to consideration in kind, including importation of raw materials, plants, and machinery. CCI enables repatriation of the net of tax proceeds from the investment and capital.

Further, where the investment brings about full ownership of the company, there is the need for a business permit from the Ministry of Interior. Other requirements applicable to a foreign investor include registration of transfer of technology agreements with the National Office for Technology Acquisition and Promotion, expatriate quotas, work / residence permits for foreign officers of the investor, registration for tax, etc. The remittance of license and royalty fees is subject to such registration.

6. Is court approval required for rescue finance or any security granted to the lender?

Whether rescue finance or any grant of security to lender post-commencement requires court approval depends on the rescue finance option adopted by the debtor company. Rescue finance and accession in or grant of security to a lender may be an outcome of various restructuring arrangements under CAMA 2020 (including Liquidation, Administration, Scheme and CVA). In some cases, the sanction of the court is mandatory. For instance, a restructuring done within a Scheme requires the court sanction for holding shareholders or creditors meetings to approve and sanction the Scheme.[6] Also, in an Administration procedure, recourse to the court is mandatory where the Administrator wishes to dispose of

[5] Section 20 of the NIPC Act.
[6] Section 715.

property subject to security other than a floating charge or if not subject to security, where it will promote the purpose of the Administration.

Apart from the limited circumstances mentioned above, court approval is not required for an Administrator to incur administration costs. Administration cost consists of orders to critical suppliers and utilities, issuing an Administrator's guarantee and payment likely to assist the Administration. Also, creating a charge over assets in possession of the Administrator does not require court approval under the law.

The creating of secured financing over already encumbered assets could be done without court approval if the secured creditors give consent. Although it does not require a court order to create such secured financing with secured creditor consent, the Administrator must report to the court regarding the consent of preferential or secured creditors.

Where rescue finance requires court approval, the court's paramount consideration in approving or rejecting the proposal as provided under the law is whether it would promote the purpose of Administration.

7. Is creditor or secured creditor approval required for rescue finance?

The structuring of post-commencement finance (**PCF**) often impacts the rights of secured and preferential creditors. There may be a proposal to increase the tenure of the debt, reduce the interest rate, obtain a haircut on accrued interest and principal or convert the debt to equity. The law provides that an Administrator's statement of a proposal shall not affect the right of a secured creditor to enforce its security except with the secured creditor's consent. Under section 502, an administrator can distribute to secured and preferential creditors without a court approval but not to unsecured creditors unless the court so directs.

It follows that any rescue finance usually included in a proposal / plans for reorganisation requires the approval of secured creditors where their rights are affected. The approval of secured creditors is through the appropriate majority obtained at the creditors' meeting. If the required majority is obtained, a cramdown is effective against dissenting creditors. However, the problem is that CAMA 2020 did not specify the required majority for a CVA. Further, a CVA may not impact secured creditors.[7] Where the consent of secured creditors is required and not obtained, the proposal risk constituting an unlawful preference.

8. What role does a creditors' committee play in approving rescue finance (if any)?

In a liquidation, the law provides that a creditors' meeting may establish a creditors' Committee. The Committee is empowered to engage with the Administrator or Liquidator on the exercise of their function. The report from the Committee would guide the creditors on their decision to approve, reject or modify the Insolvency Practitioner's proposal. The Committee may also endorse a commercially justifiable proposal featuring rescue finance. The Committee can also replace directors or company-appointed Administrators. Where in doubt, it is

[7] Sections 437, 438 and 490 of the CAMA 2020.

advisable to obtain the Creditor Committee approval for significant decisions. They act as the Board to the Administrator as the Board is to the CEO.

9. What priority of repayment is available to unsecured rescue financiers if any?

CAMA 2020 stipulates that the distribution rules applicable to winding up apply to Administration. Ordinarily, as entrenched under the law, the priority rules stipulate the preferential payments such as employees' salaries, wages, cost and expenses of the proceedings, etc., are to be made without prejudice to the settlement of the claims of secured creditors.[8] The equity holders rank last. The unsecured creditors are generally settled before the equity holders from the company's available assets (if any). Section 502 empowers the Administrator to make a distribution to secured and preferential creditors. However, section 502 (3) of CAMA 2020 stipulates that no payment shall be made to unsecured creditors unless the Court permits.

The unsecured rescue financier is an unsecured creditor and so ordinarily does not enjoy any payment priority. However, the court has the discretion to direct payment in priority to an unsecured rescue financier. This is based on the court's discretion to permit payment and give directions under the law. Also, the Administrator has section 503 power to make payments likely to assist the purpose of the Administration under s.444.

As pointed out earlier, there is no personal liability imposed on the Administrator except where there is malfeasance. Any debt or liability incurred by the Administrator enjoys statutory priority. A court order is not necessary to relieve the Administrator from personal liability in those circumstances. However, under section 500, a direction could conceptually be issued discharging the Administrator from personal liability.

10. Can rescue finance be provided on a secured basis?

Yes, an Administrator can provide a guarantee for the rescue finance under the law. The Administrator can also create a charge over assets in his or her possession under s.537(3). He or she may also obtain accession of (new) lender into the security in place or provide unencumbered assets as security to the rescue financier. With the secured creditors' consent, rescue finance could be secured over the encumbered assets.[9] It follows that whether rescue finance can be provided on a secured basis depends on the availability of unencumbered assets or the approval of the secured creditors if available assets are encumbered.

11. Can rescue finance be provided on a super-priority secured basis?

The law provides a window for an Administrator to give super-priority to rescue finance under different options. In certain circumstances, the rescue finance may be treated as Administration Cost, or as being the first charge before the Administration Cost, or when the consent of secured creditor has been obtained as ranking above or *pari passu* with the secured claim (Section 490 and 510 CAMA).

---

[8] Section 657 (6) (a) CAMA.
[9] Section 510 (2) (a) CAMA.

Notwithstanding the above flexibility, an Administrator has the discretion to make any payment he thinks is likely to assist the achievement of the purpose of the Administration (s.503). However, the Administrator cannot distribute to a creditor who is not secured or preferential except with the leave of the court. This rule seeks to forestall the unlawful preference of a creditor over and above others. Therefore, an administrator must justify a greater priority given to rescue finance in the ranking of priorities.

Besides section 537, rescue finance can achieve super-priority through negotiation or pari pasu agreement with prior creditors as a basis for the injection of fresh funds. However, the success of this method would depend on prior creditor perception that they would get a better value in the restructuring than in a liquidation.

12. Can priority or additional security be obtained for pre-petition financing?

There is no specific provision allowing pre-petition financing to be rolled into post-petition rescue finance. The risk of unlawful preference requires that fresh consideration be provided for any additional security provided for already existing financing. It is possible that a restructuring of the terms of the pre-petition financing may enable it to be secured as rescue finance.

Any transaction which puts a creditor at an undue advantage over other creditors is considered invalid under the law. Also, where no consideration is offered for a benefit, the transaction is at an undervalue unless the company has benefit. Depending on the structuring, rescue finance could justify providing consideration and benefit, requiring additional security over old credit because of access to new additional finance which it offers.

13. Is security granted for rescue finance be automatically perfected, or is additional perfection required and, if so, what steps must be taken?

There is no requirement for the perfection of additional administration cost under s.537(2) or the grant of super-priority under s.537(3).

There is no provision for automatic perfection in the law. Section 222 CAMA mandates the registration of charges created by the company on its property, including mortgage with the Corporate Affairs Commission (**CAC**) within 90 days after creating the charge. By s.222(14), the registration requirement does not apply to a security financial collateral arrangement such as charges over shares, deposits, and stock lending and repo arrangements.

The perfection also attracts the payment of relevant stamp duties to the Federal Inland Revenue Service (**FIRS**), and in the case of a charge on land or other real property, the consent of the Executive Governor of the state where the real property is located is mandatory. Also, perfection requires registration of security over land at the various states' land registries.

For movable assets, the Secured Transactions in Movable Assets Act 2017 (**STMAA 2017**) provides for filing of financing statement at the National Collateral Registry for security interest created in security agreements to gain priority according to the date of registration. Section 53 of the STMAA provides that the commencement of insolvency proceedings does not displace choice of law respecting the creation, perfection, priority and enforcement of security interest. It follows that post-petition security over movable assets requires registration under the STMAA 2017.

14. Is it common for the rescue finance provider to require milestones or other deliverables to be met, or to exercise control over the bankruptcy process?

There is no codification or specific legislation on rescue finance in Nigeria. The concept was only recently introduced by CAMA 2020. The jurisprudence is still developing. However, the practice of financiers setting milestones and deliverables to be met and exercise control over the debtor through the appointment of a receiver-manager or putting the company in liquidation is fairly developed under the old law CAMA 1990. There is no reason why a CAMA 2020 rescue financing arrangement cannot set milestones and deliverables and assert some control over the bankruptcy process. Our experience includes an insistence on observer position for the creditor on the Board of the distressed company and limitations on dividend payment. Others are budget targets, etc. We have also seen waivers of principal and interest tied to the achievement of agreed instalment terms.

Under the old law (CAMA 1990), the receiver-manager was an agent of thecreditor to realise the collateral. The creditor could sue directly in its name as principal of the receiver-manager. Consequently, the creditor exercised control over the receiver-manage. However, under CAMA 2020, the Administrator is an officer of the Court and expected to act independently of the creditors.

15. Have there been any cases in which the rescue finance provisions have been analysed by the courts?

DIP finance jurisprudence is yet to develop to the best of our knowledge, mainly as most of the provisions considered above were only recently introduced in January 2021.

16. How has the market for rescue finance been impacted by the COVID-19 pandemic?

The index case of the Corona Virus (Covid 19) was recorded in Lagos State, Nigeria, on February 27, 2020, and the relevant framework (CAMA 2020) for the business rescue regime was enacted on August 7, 2020 (effective January 1, 2021). Before the said enactment, the insolvency regime was mainly creditor friendly, and liquidation and receivership prevailed.

The Central Bank of Nigeria (CBN) announced the following stimulus and fiscal measures to support the flow of credit and ameliorate the impact of the COVID-19.

1. The creation of N50 billion target credit facility for affected households and small and medium enterprises;

2. Additional N100 billion intervention fund in healthcare loans to pharmaceutical companies and healthcare practitioners intending to expand / build capacity;

3. Identification of few key local pharmaceutical companies that will be granted funding facilities to support the procurement of raw materials and equipment required to boost local drug production;

4. N1 trillion in loans to boost local manufacturing and production across critical sectors etc.

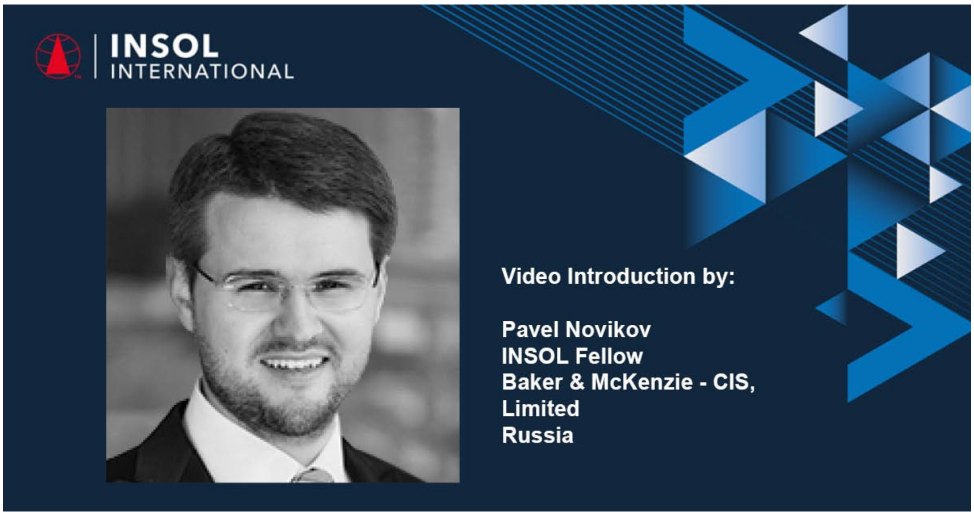
The Government also introduced some additional employee-specific measures through tax reliefs and incentives in the Finance Act 2020, which amends portions of various extant tax legislations, including that of the Personal Income Tax Act 2007 (as amended). The amendments re-introduce:

- Life assurance premium tax relief and redefines what constitutes gross income for PAYE to prevent the consideration of non-taxable income in the computation of applicable consolidated relief allowance

- Exemption of minimum wage earners from tax liabilities; and

- Redefines the purport of exemption of compensation for loss of office from capital gains tax.

RUSSIA



1. Is there an established market for rescue finance?

No. There is no codified DIP-finance regime in Russia, likewise, there is no established market for rescue finance. However, Federal Law No. 127-FZ "On Insolvency (Bankruptcy)" dated 26 October 2002 (Russian Insolvency Law) provides for some opportunities to finance the debtor after the initiation of insolvency as described below.

Moreover, a bill on reforming the insolvency proceedings has recently been submitted to the State Duma of the Russian Federation.[1] The purpose of the reform is to make insolvency primarily a mechanism of rehabilitation and debt restructuring instead of liquidation.

In particular, it is proposed to abandon insolvency procedures such as supervision, financial rehabilitation and external management. At the same time the draft law envisages introduction of a new procedure applied in the insolvency proceedings - debt restructuring. Its purpose is to restore the solvency of a legal entity, to keep the business entity operational and to satisfy the claims of creditors.

The bill does not limit the methods of restoring solvency that can be used by creditors. In particular, the restructuring plan may include a change in the timing and procedure for fulfilling obligations; conversion of claims into shares in the authorized capital; debt forgiveness; increase in authorized capital, etc. Third parties also may participate in the implementation of the plan, including those interested in relation to the debtor.

2. If not, how do debtors fund or finance corporate reorganisation or trade on?

The methods of financing the debtor differ depending on the stage of insolvency. Generally, the insolvency proceedings consist of the following stages (not all of them are mandatory):

(1) supervision;

(2) financial rehabilitation;

[1] Draft Federal Law No. 1172553-7 "On Amending the Federal Law "On Insolvency (Bankruptcy)" and Certain Legislative Acts of the Russian Federation". (introduced on 17 May 2021 by the Government of the Russian Federation)

(3) external management; and

(4) insolvency liquidation.

2.1 Supervision stage

Description: Supervision is usually the first insolvency stage, except for simplified insolvency proceedings that consist only of the insolvency liquidation stage. The main aim of the supervision stage is to secure and value the debtor company's assets and compile a list of creditors. During the supervision stage, the debtor's business is largely run in the same way as before, since the temporary administrator has only limited powers over the debtor's activities. The company's management generally remains in place. However, the temporary administrator's approvals are needed for some transactions.

Financing of the debtor: According to Art. 64(2) of the Russian Insolvency Law, with the consent of the temporary administrator expressed in writing, the debtor's management bodies may conclude transactions related to obtaining loans (credits) and trust management of the debtor's property.

Additionally, according to Art. 64(5), the debtor may increase its authorized capital by placing additional ordinary shares by private subscription at the expense of its founders (participants) and third parties in the manner prescribed by federal laws and the constituent documents of the debtor. In this case, the state registration of the report on the results of the issue of additional ordinary shares and amendments to the constituent documents of the debtor must be carried out before the date of the court hearing on the consideration of the insolvency case.

2.2 Financial rehabilitation

Description: Financial rehabilitation is rarely used in practice and introduced if the creditors and the court believe that there is a reasonable chance to avoid insolvency liquidation and restore the debtor's solvency. The debtor’s management remains in place and business is largely carried out as it was during the supervision stage, with certain minor exceptions. The debtor presents a plan for repaying the outstanding debts, and if the plan is fulfilled, then the insolvency proceedings will be terminated.

Financing of the debtor: Financial rehabilitation may be effective, if there is an investor seeking to acquire the distressed assets of the insolvent debtor and ready to cover the outstanding debts.

Pursuant to Art. 79 of the Russian Insolvency Law, a third party can ensure that the debtor performs its obligations by providing a pledge (mortgage), an independent guarantee, a state or municipal guarantee and a surety, as well as in other ways that do not contradict Russian Law. An agreement to secure the debtor's obligations in accordance with the debt repayment schedule must be concluded in writing before the date of the court's decision to introduce financial rehabilitation and shall be signed by the person who provided the security and by the temporary administrator.

As prescribed by Art. 82(4) of the Russian Insolvency Law, after the introduction of financial restructuring, loans and credits can be granted to the debtor with the consent of the administrative receiver.

Finally, Art. 85.1 of the Russian Insolvency Law provides that founders (participants) of the debtor, owners of property of the debtor-unitary enterprise and (or) third parties may redeem claims against the debtor for payment of obligatory payments included into the register of creditors' claims.

2.3 External management

Description: External management also aims to restore the debtor's solvency. The main difference from financial rehabilitation is that during external management the debtor’s management is dismissed and a court-appointed administrator manages the debtor according to an external management plan, which is prepared by the administrator and approved by the creditors’ meeting.

Financing of the debtor: In accordance with Art. 94(2) of the Russian Insolvency Law the management of the debtor may decide to increase the authorized capital by placing additional ordinary shares or to ask the creditors' meeting for the inclusion of an additional issue of shares in the external management plan.

Moreover, the debtor's management or owner of the property of the debtor-unitary enterprise may decide to conclude an agreement with third parties on providing funds to settle the debtor's obligations (Art. 94(3) of the Russian Insolvency Law).

Furthermore, under Art. 101(4) of the Russian Insolvency Law, upon consent of the meeting of creditors (creditors' committee), the external manager may conclude agreements on obtaining loans by the debtor, disposal of shares or establishment of trust management. Such transactions may be concluded by the external manager without the approval of the creditors' meeting (creditors' committee) if the possibility and conditions of such transactions are stipulated by the external management plan.

Finally, like in financial rehabilitation, founders (participants) of the debtor, owners of property of the debtor-unitary enterprise and (or) third parties may redeem claims against the debtor for the payment of obligatory payments included in the register of creditors' claims (Art. 112.1 of the Russian Insolvency Law). Apart from that founders (participants) of the debtor, owners of the property of the debtor-unitary enterprise or third parties may satisfy all the claims of creditors included in the register of creditors' claims or provide the debtor with sufficient funds to satisfy all creditors' claims in accordance with the register of creditors' claims at any time before the end of the insolvency proceedings in order to terminate the insolvency proceedings (Art. 113 of the Russian Insolvency Law).

2.4 Insolvency liquidation

Description: This stage is commonly introduced after the supervision and aims to collect and dispose of all the debtor's assets, proportionately distribute all the insolvency estate between the creditors and liquidate the debtor. At this stage, the administrator takes action on the debtor's clawback transactions, debt collection and bidding and brings controlling persons to subsidiary liability. All the debtor's assets must be sold to pay creditors' claims in the order prescribed by law. Once the liquidation is completed, the debtor is wound up and it ceases to exist.

Financing of the debtor: Pursuant to Art. 125 of the Russian Insolvency Law, the owner of the property of a debtor-unitary enterprise, founders (participants) of the debtor or third parties at any time before the end of insolvency proceedings have the right to satisfy simultaneously all claims of all creditors in accordance with the register of creditors' claims or provide the debtor with funds sufficient to satisfy all claims of creditors in accordance with the register of creditors' claims. In this case, the court orders the termination of the insolvency proceedings.

Like in other stages, founders (participants) of the debtor, owners of property of the debtor-unitary enterprise and (or) third parties may redeem claims against the debtor for the payment of obligatory payments included in the register of creditors' claims (Art. 129.1 of the Russian Insolvency Law).

3. If yes, what are the main sources of funds for rescue finance?

Methods of financing of the debtor are almost never used in Russia. Nevertheless, according to the Russian Insolvency Law, the main sources of funds are loans from interested parties, placing additional ordinary shares or settlement of the claims against the debtor by third parties.

4. Is rescue finance codified or subject to specific legislation?

There is no codified regime of rescue finance or DIP financing, but all available methods of financing of the debtor described in the Russian Insolvency Law are explained above in question No. 2.

5. Are there any legislative or regulatory restrictions or requirements for foreign investment which rescue finance providers need to consider?

No, there are no special provisions in respect to rescue finance providers in Russian investment legislation. Foreign investments in Russia are regulated by a complex of international treaties and Russian laws. The most general are Federal Law No. 160-FZ "On Foreign Investments in the Russian Federation" dated 9 July 1999 and Federal Law No. 39-FZ "On investment activities in the Russian Federation carried out in the form of capital investments" dated 25 February 1999. Additionally, there are some more specific laws and normative acts adopted by the Russian government that also constitute a substantial part of the foreign investment legislation.

In some sectors of the economy, foreign investors are prohibited from acquiring control over Russian business entities (for instance, gas supply, ownership of agricultural land, foreign trade activities in relation to products for destination, etc.). In other cases, investment activities are governed by general and special regulations of Russian legislation.

6. Is court approval required for rescue finance or any security granted to the lender? If so, what considerations does the court take into account in approving or rejecting a proposal for rescue finance?

Yes, but in limited cases. First of all, the court approves the introduction of the insolvency proceedings against the debtor and introduction of any stage of insolvency (supervision, financial rehabilitation, external management and insolvency liquidation). In this case, the court considers the report of the insolvency administrators and objections (if any) of the creditors and other parties of the insolvency proceedings.

Moreover, the court may declare invalid the plan on financial rehabilitation or external management, which may include measures on rescue finance. For that, the interested person should file the application to the court and should prove that its rights and legitimate interests have been violated by the approved plan.

The court also considers and approves application of founders (participants) of the debtor, owners of property of the debtor-unitary enterprise and (or) third parties for repayment of claims against the debtor for the payment of obligatory payments in full or for repayment of all creditors' claims included in the register of creditors' claims.

7. Is creditor or secured creditor approval required for rescue finance?

Approval from a particular creditor is not required, but in some cases approval from a creditors' meeting (creditors' committee) is needed, as set out in question No. 8 below.

8. What role does a creditors' committee play in approving rescue finance (if any)?

The creditors' meeting or creditors' committee approval is necessary for the most essential questions.

In particular, the creditors' meeting decides on the introduction of financial rehabilitation or external management and on petitioning the court to that effect, and approves plans on financial rehabilitation or external management, which may include measures on rescue finance.

In addition, the creditors' meeting (creditors' committee) approves certain transactions. For instance, in the external management, the creditors' meeting (creditors' committee) approves the conclusion of agreements on obtaining loans by the debtor, disposal of shares or establishment of trust management.

9. What priority of repayment is available to unsecured rescue financiers, if any?

Under the Russian Insolvency Law, a person providing financing to the debtor after the commencement of the insolvency proceedings has the priority status of a so-called "current" creditor. Current claims of such creditors have priority over claims of all other creditors. The Russian Insolvency law sets out the following order for settling current expenses:

(i) court expenses and insolvency manager remuneration, and expenses associated with engaging other persons, whose participation is mandatory under the Russian Insolvency Law;

(ii) claims regarding salaries and severance pay;

(iii) expenses associated with engaging persons whose participation in the insolvency proceedings is not mandatory;

(iv) utility and maintenance charges and

(v) other current claims.

It means that the claims of the rescue financiers will be repaid after other current claims of the first four ranks but before the claims of the creditors included in the creditors' register of the debtor.

10. Can rescue finance be provided on a secured basis?

Yes, it can. However, such security must be approved by the creditors' meeting of the debtor. Otherwise, it may be clawed back as a preferential transaction.

Rescue finance may be secured, for example, by suretyship or independent guarantee agreements. Since the insolvency proceedings have already been initiated against the debtor, it is highly unlikely that the independent persons or banks will provide such securities. Thus, said agreements will most likely be concluded with the debtor's affiliated persons.

Rescue finance may also be secured by the pledge of the debtor's property (if any). Since such pledge secures the current claims of the rescue financier, foreclosure on the property will be conducted through out-of-insolvency proceedings (i.e. bypassing the insolvency priority ranks).

11. Can rescue finance be provided on a super-priority secured basis?

The Russian Insolvency Law does not have a provision similar to the US super-priority provision. Special priority status granted to the claim of the rescue financier allows it to be paid ahead of all other post-petition claims, but only after other prepetition claims of the creditors in compliance with the ranks set by the Russian Insolvency Law (see para. 9 of this questionnaire).

The only provision that is vaguely similar to the super-priority provision is a pledge securing the current claims of the rescue financier (see para. 10 of this questionnaire). Since foreclosure on the property under such pledge will be conducted through out-of-insolvency proceedings bypassing all the insolvency priority ranks (including administrative and labor priority claims), it can be regarded as a form of super-priority.

12. Can priority or additional security be obtained for pre-petition financing?

The Russian Insolvency Law does not directly describe or regulate pre-petition financing in Russia. Under Art. 30 of the Russian Insolvency Law, creditors and a debtor may conclude an agreement that regulates measures aimed at restoring the debtor's solvency. However, the Russian Insolvency Law is silent on the specific forms or provisions of such agreement. Art. 31 of the Russian Insolvency Law briefly describes only one form of out-of-court work out mechanism – out-of-court financial recovery. Under out-of-court financial recovery, the creditors may provide financing to the debtor in an amount sufficient to pay off all its monetary obligations and restore its solvency.

The pre-petition agreement regulating measures aimed at restoring the debtor's solvency must comply with norms of the Russian Civil Code and have the following essential terms: (a) subject matter – measures aimed at restoring the debtor's solvency; and (b) time frames for the implementation of such measures. Moreover, since the purpose of the agreement is to prevent insolvency, the amount of debt and the amount of income / funds that is expected to be received must be determined. The measures indicated in the agreement should create a real opportunity to repay all debts in full. Other terms of the agreement depend on the will of the parties. For example, the agreement may contain provisions on measures of control over the fulfillment of the terms of the agreement, on additional guarantees for the implementation of the right of the parties, on the amount of remuneration provided by the debtor, etc.

Additionally, the Russian Insolvency Law does not prohibit a debtor from concluding the agreements with each of the creditors separately. These can be, for example, agreements on deferral, installment or debt relief, on a commodity or commercial loan, on a simple partnership or, on a merger or acquisition.

Since pre-petition financing is provided before a formal insolvency proceeding is initiated, all creditors that provided such financing must include their claim in the creditors register of the debtor within its insolvency proceeding to recover their claims on a pro-rata basis in compliance with the priority ranks established by the Russian Insolvency Law. It means that an existing pre-petition creditor cannot improve the priority of its claims by just advancing pre-petition funding. To obtain the priority status, the financiers must conclude with a debtor additional security agreements (e.g., pledge agreement, suretyship agreement, etc.). However, if the pre-petition financing is ineffective and the insolvency proceedings against the debtor are initiated, such security agreements are subject to claw back as preferential transactions.

If the existing creditor additionally provides financing after a formal insolvency proceeding is initiated, its claim to return such financing has the priority status of a so-called "current" claim (see para. 9 above). However, the claims of such creditor that existed before the initiation of the insolvency proceeding will not have such priority status since the claims arose before a formal insolvency proceeding is initiated shall be included in the debtor's creditors register, i.e. recovered on a pro-rata basis. Therefore, the existing creditor cannot improve the priority of its pre-petition claims by advancing post-petition funding.

13. Is security granted for rescue finance be automatically perfected, or is additional perfection required and, if so, what steps must be taken?

As mentioned in para. 9 of the questionnaire, rescue financiers automatically acquire the priority status of the current creditor. The additional perfection of such status (e.g., a court's or creditors' approval) is not required.

However, to obtain the additional security for rescue financing, the creditors' approval is essential. This is because such additional security will give a financier an extra-priority over other existing debts the debtor has (see question 10 above) and therefore will affect the interests of the other creditors.

14. Is it common for the rescue finance provider to require milestones or other deliverables to be met, or to exercise control over the bankruptcy process?

The Russian Insolvency Law does not prohibit the rescue finance provider from requiring milestones or other deliverables to be met. Such milestones or deliverables will be set by the agreement between the debtor and the financier, which is approved by the creditors' meeting of the debtor. The creditors' approval is necessary, since such provisions of the agreement may directly affect the interests of the creditors.

The rights of rescue financiers to control the insolvency proceedings are limited by the Russian Insolvency Law. As mentioned in question 9 of the questionnaire, the financiers have the status of current creditors. Such creditors do not include their claims in the creditors' register of the debtor and do not have the status of a person participating in the insolvency case. Current creditors may only control the actions of the insolvency administrator that relate to the repayment of the current creditor's claims. They cannot participate in the creditors' meetings and do not have a decisive role within the insolvency proceedings. This can be explained by the fact that the current creditors do not have the necessity to control the insolvency proceedings since their claims are already prioritized and therefore their vested interest is secured.

15. Have there been any cases in which the rescue finance provisions have been analysed by the courts?

In Russia, the rescue finance institution is deeply unpopular. The financial rehabilitation and external management stages, where such finance may be provided, are rarely used because they usually do not lead to restoration of the debtor's solvency but create additional current obligations for the debtor. More than 98% of insolvency proceedings end in liquidation procedures.

However, there are a few cases where the debtors managed to save the business, terminate the insolvency proceedings by concluding amicable agreements with creditors and rebuild their economic activity. For example, in April 2019 the external management procedure was initiated against OOO Ussuriyskaya Poultry Farm[2] (UPF). UPF is the largest chicken processing plant in Primorsky Krai of Russia. UPF's insolvency proceedings were caused by objective economic reasons and the financial crisis in the industry. According to the Russian Poultry Union, the average annual egg prices have been falling since 2014, and 2017 was fatal for the poultry farmers of Primorsky Krai, as the average annual egg price dropped by 15% compared to the previous year.

At the beginning of the insolvency proceedings it seemed that UPF did not have enough funds to repay all of its obligations and was on the edge of insolvency and liquidation. Despite this, the management and the insolvency administrator of UPF managed to draw the attention of the regional administration to the financial problems of the plant and attract sufficient public sector financial support. As a result of monthly state subsidies for egg production, UPF overcame the financial crisis and improved the production process. As a result of the external management

[2] See Resolution of Arbitrazh [State Commercial] Court of Primorsky Krai on case No. A51-10934/2018 dated 8 April 2019.

procedure, in May 2021 UPF terminated the insolvency proceedings by concluding an amicable agreement with its creditors.

16. How has the market for rescue finance been impacted by the COVID19 pandemic?

As mentioned in question 15 above, in Russia rescue finance institution is highly unpopular. Given this, rescue finance in Russia has barely been impacted by the COVID-19 pandemic.

However, the pandemic affected the pre-petition stage of the insolvency. On 3 April 2020, the Russian government enacted a six-month moratorium on insolvency claims by creditors against companies and on the recovery of debts and penalties. The moratorium applied to companies whose activities were most affected by COVID-19 (including travel, tourism, culture, entertainment, sports, catering and services) as well as to strategic and systematically important companies. During the moratorium, the obligation of a protected company to file a voluntary insolvency petition under the Russian Insolvency Law was suspended. The government also provided measures of support to businesses affected by COVID-19 (e.g. soft loans at 0% for a period of six months, credit vacations, possibility to ask for an installment plan for the execution of the court's act etc.). This encouraged the companies suffering from the financial crisis to save their business and refrain from commencing their insolvency proceedings.

SINGAPORE

1. Is there an established market for rescue finance?[1]

There is a growing market for rescue financing in Singapore. This should, to a large extent, be credited to the introduction of statutory provisions for rescue financing in Singapore's judicial management and creditor scheme of arrangement regimes in 2017, following recommendations by the Insolvency Law Review Committee in 2013,[2] and the Committee to Strengthen Singapore as an International Centre for Debt Restructuring in 2016.[3]

This introduction came amidst a slew of other amendments to enhance Singapore's restructuring and insolvency regimes, making it "*the first common law system in the world to introduce a unique hybrid regime combining the flexibility of the English regime with the powerful arsenal of US Chapter 11 provisions*".[4]

The rescue financing provisions are now contained at section 67 (for creditor schemes) and section 101 (for judicial management) of the Insolvency, Restructuring & Dissolution Act 2018 (IRDA). Under each of these statutory provisions, "rescue financing" is defined as:[5]

> "…any financing that satisfies either or both of the following conditions:
>
> (a) the financing is necessary for the survival of a company that obtains the financing, or of the whole or any part of the undertaking of that company, as a going concern;
>
> (b) the financing is necessary to achieve a more advantageous realisation of the assets of a company that obtains the financing, than on a winding up of that company."

---

[1] The writers would like to thank Alexander Yeo (Partner, Restructuring & Insolvency Practice, Litigation) and Julian Ho (Counsel, Mergers & Acquisitions) for their helpful input on this paper.
[2] Report of the Insolvency Law Review Committee dated 4 October 2013 (the "ILRC Report").
[3] Report of the Committee to Strengthen Singapore as an International Centre for Debt Restructuring dated 20 April 2016.
[4] "Enhancing Singapore as an International Debt Restructuring Centre for Asia and Beyond", a note from Indranee Rajah S.C., Senior Minister of State for Law and Finance (20 June 2017).
[5] Section 67(9) and section 101(10) of the IRDA.

The introduction of a statutory regime for rescue financing was expected to bring about two changes: (a) the entry of funds and other investors specialising in distressed debt into the Singapore restructuring space, and (b) increased demand for high quality business valuation.[6] Anecdotally, we have seen a steady increase in interest in rescue financing since 2017, though we should add that there was already a market for distressed debt and rescue financing prior to that.

2. If not, how do debtors fund or finance corporate reorganisation or trade on?

By way of background, there are two main restructuring regimes available in Singapore.

1. First, a company may propose a compromise or arrangement with its creditors or class of creditors. This is usually referred to as a creditor scheme of arrangement, and is a debtor-in-possession proceeding.

2. Second, a company may enter judicial management (whether voluntarily or by a court order),[7] which involves the appointment of an independent insolvency officer to the company.

Prior to the introduction of a statutory regime for super priority for rescue financing, priority for new finance was obtained in the formal restructuring of the company in a number of ways.[8]

1. In judicial management, new unsecured loans granted to the company could enjoy priority and rank equally with other commitments taken up or adopted by the judicial manager. The judicial manager was also statutorily equipped with the power to borrow money and grant security over the property of the company.[9] If the incoming financier required security over an asset which was already encumbered, this had to be achieved with the consent of the existing security-holder.

2. As to schemes of arrangement, there were no statutory provisions that conferred priority for rescue financing prior to 2017 either. If priority were to be conferred on an incoming rescue financier, a practical way of achieving that would be to include such priority into the terms of the scheme, which would then be binding on each class of creditors if it was passed by the requisite majority in each such class.[10]

For the avoidance of doubt, these mechanisms and techniques remain available even with the introduction of the statutory rescue financing provisions.

---

[6] "Enhancing Singapore as an International Debt Restructuring Centre for Asia and Beyond", a note from Indranee Rajah S.C., Senior Minister of State for Law and Finance (20 June 2017).
[7] Sections 91 and 94 of the IRDA.
[8] See ILRC Report, at page 109.
[9] Section 227G(4) read with the Eleventh Schedule of the Companies Act, Chapter 50 of Singapore (the "Companies Act"), prior to 23 May 2017. These provisions have now been repealed. See instead section 99(4) and the First Schedule of the IRDA.
[10] The scheme takes effect only if it is subsequently approved by the Court and a copy of the order is lodged with the Registrar of Companies: section 250(5) of the Companies Act.

3. If yes, what are the main sources of funds for rescue finance?

Rescue financing offers may come from various sources (e.g. existing shareholders, related companies, existing lenders, offshore investors). There does not appear to be any statutory restriction on where or how such financing is to be obtained for it to qualify as "rescue financing".[11] We are aware of various rescue financing offers that have come in from local financial institutions and investors, and also from foreign sources located in e.g. Middle East, Malaysia, and Indonesia.[12]

For commercial reasons, a rescue financing offer is usually kept confidential until there is more certainty around the deal.[13] At that point the identity of the investor(s) and the terms of such financing often find their way into a process involving a wider group of creditors, e.g. where an application is sought in court for super priority, or where the proposed compromise or arrangement is put forward for creditors' consideration.

The table below sets out details about the sources of rescue financing in applications that have been filed before the Singapore High Court in recent times.

Case	Rescue Financier	Form of priority sought / Outcome
Re Attilan Group Ltd [2018] 3 SLR 898	Advance Opportunities Fund 1, an intended subscriber of the company	The applicant company sought an order for sums to be disbursed by the Subscriber to be treated as "rescue financing" and to be given super priority under section 211E(1)(a) or (b) of the Companies Act.[14] The application for dismissed, i.e. super priority status was not granted to the proposed financing.[15]
Re Asiatravel.com Holdings Ltd (unreported) (8 April 2019)	UGP Limited, a BVI-incorporated special purpose vehicle and an affiliate of Hatten Group Sdn. Bhd. (Malaysia)[16]	Debt arising from rescue financing (Rescue Debt) of approximately S$1,500,000, to rank above all preferential and unsecured debts if the applicant company enters winding up.[17]

[11] See definition of "rescue financing", replicated at Q1. See also the discussion at Q5 for additional considerations where foreign investment is concerned.
[12] For example, Hyflux Ltd. (a water treatment company in Singapore) had investment offers from SM Investments (a tie-up between Indonesia's Salim Group and Medco Group), Utico FZC (Middle East), and Pison Investments (an investment vehicle of Indonesian magnate Johnny Widjaja).
[13] Where information about the investor needs to be provided to the Court as part of a formal court proceeding, the company sometimes applies for the relevant affidavit to be sealed.
[14] Now section 67(1)(a) of the IRDA.
[15] See Q15 below for further details.
[16] Asiatravel.com Holdings Ltd – General Announcement: Monthly update pursuant to rule 704(22) of the Catalist Rules (10 June 2019). Available here: https://links.sgx.com/FileOpen/AsiaTravel%20-%20Monthly%20Update.ashx?App=Announcement&FileID=562976.
[17] Under section 211E(1)(b) of the Companies Act (now section 67(1)(b) of the IRDA).

Re Swee Hong Limited (unreported) (7 February 2020)[18]	CIIC Group Pte Ltd, a company solely owned by one of Swee Hong's executive directors.[19]	(1) Rescue Debt of S$2,889,281.17 previously provided to rank above all preferential and unsecured debts if the applicant company enters winding up.[20] (2) Rescue Debt of S$3,100,000 to be provided, to be secured by a first fixed charge over the applicant company's unencumbered assets.[21]
Re Design Studio Group Ltd and other matters [2020] 5 SLR 850 ("*Re DSG*")[22]	(1) The Hongkong and Shanghai Banking Corporation (HSBC), an existing secured lender; and (2) Depa United Group PJSC, a major shareholder.[23]	Rescue Debt of S$62.8 million to be provided (part of which constituted roll-ups) to rank above all preferential and unsecured debts if the applicant company enters winding up.[24]
Re Antanium Resources (unreported) (12 July 2021)[25]	Omni Bridgeway, a third party disputes funder of an arbitration at the Hong Kong International Arbitration Centre (HKIAC) against a creditor of the applicant company.	The Court ordered that the rescue financing provided by Omni Bridgeway to the applicant company to pursue the HKIAC arbitration be granted super-priority status. In this regard, the Rescue Debt will be secured by security interests over recoveries made by the applicant company in the HKIAC arbitration, and Omni Bridgeway will rank above the applicant company's preferential and unsecured debts

[18] General Announcement dated 17 Feb 2020 by Swee Hong Limited "Applicatin for Super Priority under Section 211E of the Companies Act (Cap. 50)" Available here: https://links.sgx.com/FileOpen/Announcement%20SHL-super%20priority.ashx?App=Announcement&FileID=596728.
[19] "Swee Hong proposes S$4m placement as part of restructuring" (15 Jan 2020) The Business Times. Available here: https://www.businesstimes.com.sg/companies-markets/swee-hong-proposes-s4m-placement-as-part-of-restructuring.
[20] Under section 211E(1)(b) of the Companies Act (now section 67(1)(b) of the IRDA).
[21] Under section 211E(1)(c)(i) of the Companies Act (now section 67(1)(c)(i) of the IRDA).
[22] Available here: https://www.supremecourt.gov.sg/docs/default-source/module-document/judgement/-2020-sghc-148-pdf.pdf.
[23] *Re DSG*, at [3].
[24] Under section 211E(1)(b) of the Companies Act (now section 67(1)(b) of the IRDA).
[25] 'Third-party funding gets "super priority" status in Singapore restructuring' (3 September 2021) Global Arbitration Review. Available here: https://globalarbitrationreview.com/third-party-funding-gets-super-priority-status-in-singapore-restructuring.

		in respect of recoveries from the HKIAC arbitration.

4. Is rescue finance codified or subject to specific legislation?

As mentioned above, the statutory provisions for super priority for rescue financing are now contained at section 67 (for creditor schemes) and section 101 (for judicial management) of the IRDA. They are largely similar and will be discussed together.

By way of background, these statutory provisions are similar to, but are not wholly the same, as the rescue financing provisions under the US Bankruptcy Code.[26] The Singapore High Court in *Re Attilan* [2018] 3 SLR 898 (*Re Attilan*) took the view that US authorities could be helpful in interpreting the relevant provisions, but it also recognised that in any case Singapore will develop its own jurisprudence around sections 67 and 101 of the IRDA:

> "51 …*Despite the differences in statutory language, I was of the view that the US authorities could be helpful in illuminating the appropriate construction of the newly enacted provisions … concerning rescue financing… I must emphasise that the US authorities and doctrine are referred to only as a useful guide as we develop our own law in this area. We may stick close to the US position, or we may depart from it: much will depend on the arguments put before us.*"

With this in mind we now turn to the Singapore statutory provisions on rescue financing:

(1) As mentioned above, "rescue financing" is statutorily defined at section 67(9) and section 101(10) of the IRDA as:

> "…any financing that satisfies either or both of the following conditions:
>
> (c) the financing is necessary for the survival of a company that obtains the financing, or of the whole or any part of the undertaking of that company, as a going concern;
>
> (d) the financing is necessary to achieve a more advantageous realisation of the assets of a company that obtains the financing, than on a winding up of that company."

(2) Where a company has applied for leave to convene a scheme meeting[27] or applied for a scheme moratorium,[28] or at any time when the company is in judicial management, the court may make one or more of the following orders in respect of Rescue Debt obtained by the company:

 (a) that the Rescue Debt be treated as if it were part of the costs and expenses of winding up;[29]

[26] See section 364 of the US Bankruptcy Code.
[27] Section 210(1) of the Companies Act.
[28] Section 64(1) of the IRDA.
[29] Section 67(1)(a), 101(1)(a) read with section 203(1)(b) of the IRDA. Section 203(1) sets out certain

(b) that if the company is wound up, the Rescue Debt is to have priority over all the preferential debts in a winding up (set out at section 203(1)(a) to (i) of the IRDA) and all other unsecured debts[30] -- this is available only if the company would have not been able to obtain the rescue financing from any person unless the Rescue Debt was given such priority;

(c) that the Rescue Debt be secured by (a) a security interest on property of the company that is not otherwise subject to any security interest (i.e. unencumbered); or (b) a subordinate security interest on property of the company that is subject to an existing interest (e.g. a second-ranking charge) – this is available only if the company would not have been able to obtain the rescue financing from any person unless the Rescue Debt was given such priority;[31] and

(d) that the Rescue Debt be secured by a security interest, on property of the company that is subject to an existing security interest, of the same priority as or a higher priority than that existing security interest (sometimes referred to as a "priming lien") – this is available only if the company would not have been able to obtain the rescue financing from any person unless the Rescue Debt was secured in this manner, and there is "adequate protection" for the interests of the holder of that existing security interest.[32]

(3) In respect of sub-paragraph 2(d) above, sections 67(6) and 101(7) of the IRDA provide that:

"There is "adequate protection" for the interests of the existing security-holder if:[33]

(1) the Court orders the company to make certain cash payments to the security-holder, which would be sufficient to compensate the holder for any decrease in the value of its existing security interest;

(2) the Court orders the company to provide to the security-holder additional or replacement security of a value sufficient to compensate the security-holder for any decrease in the value of its existing security interest; or

(3) the Court grants any relief (other than compensation) that will result in the realisation by the security-holder of the indubitable equivalent of the security-holder's existing security interest."

(4) We note the following aspects of the definition of "adequate protection" under these sections:

(a) The term "indubitable equivalent" is not statutorily defined and, at the time of writing, has not been examined by the Singapore Courts. Given that the

categories of debts that must be paid in priority to all other unsecured debts in the winding up of a company.

30 Section 67(1)(b), 101(1)(b) read with section 203(1)(a) to (i) of the IRDA.

31 Section 67(1)(c), 101(1)(c) of the IRDA.

32 Section 67(1)(d), 101(1)(d) of the IRDA.

33 Section 67(6), 101(7) of the IRDA.

rescue financing provisions were "at least inspired by"[34] the US Bankruptcy Code, it is expected that the Singapore courts will, at first instance, have regard to US case law in determining what this term actually means and how it should apply in each context.

(b) The language of section 361 of the US Bankruptcy Code, from which sections 67(6) and 101(7) of the IRDA appear to have been adapted, is permissive:

> "When adequate protection is required under section 362, 363, or 364 of this title of an interest of an entity in property, such adequate protection may be provided by –…"

Such language was not fully adapted in Singapore, which raises an issue as to whether the Singapore provisions leave scope for the "adequate protection" requirement to be fulfilled by other means, apart from the three expressly set out under sections 67(6) and 101(7) of the IRDA. While this remains to be decided by the Courts, we note that the Singapore High Court has already recognised that *"the statutory framework for rescue financing is meant to be flexible"*.[35] In any case, the large majority of cases should fit within one of the three categories set out in sections 67(6) and 101(7) of the IRDA, and in particular sections 67(6)(c) and 101(7)(c) of the IRDA should provide the Court with sufficient flexibility to determine whether, on the whole, there is adequate protection for the security-holder on a case-by-case basis.

(c) In any determination of whether a security-holder has or will have "adequate protection", the court will likely require evidence as to the valuation of the security, and the compensation offered or relief sought. As such, any party bringing or contesting a rescue financing application should obtain such valuations beforehand, so as to avoid any unwanted delays in the litigation process.

(d) We note also that sections 67(6) and 101(7) of the IRDA do not prescribe the applicable valuation standards to be adopted. It is likely that the court will have to determine, in each case, which valuation standard to refer to, e.g. the market value or forced sale value, in respect of the asset in question.

5. Are there any legislative or regulatory restrictions or requirements for foreign investment which rescue finance providers need to consider?

Singapore generally does not have specific legislation or regulations governing foreign investments, save for certain restrictions and controls over foreign investments in strategic industries such as financial services, professional services, telecommunications, media and real estate. Examples of such restrictions in some of these industries include limiting foreign equity ownership and requiring certain regulatory approvals and licenses to do business.

[34] *Re Attilan*, at [50].
[35] *Re Design Studio Group* [2020] SGHC 148 ("Re DSG").

A foreign company which establishes (or intends to establish) a place of business or carry on business in Singapore may be required to register with the Registrar of Companies.[36] The question of whether a foreign company is regarded to be carrying on business in Singapore is a fact-dependent one. In this regard, some guidance may be gleaned from Section 366(2) of the Companies Act, which states that a foreign company shall not be regarded as carrying on business solely because inter alia it invests any of its funds or holds any property, or it creates evidence of any debt or creates a charge on movable or immovable property.

6. Is court approval required for rescue finance or any security granted to the lender? If so, what considerations does the court take into account in approving or rejecting a proposal for rescue finance?

If priority for rescue financing is sought under sections 67(6) and 101(7) of the IRDA, then court approval will have to be obtained as part of the process. The main statutory requirements (including the pre-conditions for each level of priority) have been discussed at Q4 above. The Singapore High Court in Re Attilan provided further guidance in determining whether to grant an order sought in respect of these statutory provisions:[37]

(1) For super priority to be granted,

  (a) the proposed financing must constitute "rescue financing" under sections 67(9) and / or 101(10) of the IRDA;

  (b) the applicant must meet the condition(s) under one of the limbs specified in sections 67(1) and / or 101(1) of the IRDA; and

  (c) the Court exercises its discretion to grant super priority.[38]

(2) Some thought should be given by the applicants to the appropriate type or level of super priority sought. The applicants should also be prepared to provide the rationale for what they seek.[39]

(3) As to the standard of proof that the applicant has to meet in establishing its case for super priority, the court must be sufficiently satisfied on a "balance of probabilities" that there is a basis for the matters raised in the supporting affidavit, to satisfy the statutory requirements set out in sections 67(9) and / or 101(10) of the IRDA. The court was of the view that a high threshold for the evidence was not necessary, and it should be sufficient that there is credible evidence before the court.

(4) Where super priority is sought under sections 67(1)(a) and 101(1)(a) of the IRDA respectively (i.e. for the Rescue Debt to be treated as the costs and expenses of the winding up of the company), there is no express statutory requirement that the company show that it cannot otherwise get financing. However, in the court's exercise of discretion to grant super priority, the court

[36] See section 368 of the Companies Act.
[37] In this case, the Court examined section 211E of the Companies Act, which was the predecessor of section 67 of the IRDA. The same principles and guidance should apply.
[38] *Re Attilan*, at [53].
[39] *Re Attilan*, at [56].

will take into account whether any efforts had been made to secure financing on a normal basis, i.e. without super priority. The rationale is that it would be fair and reasonable to reorder the priorities in winding up, only where there is evidence that the company cannot otherwise get financing.[40] As such the applicant will be required to expend reasonable efforts to secure other types of financing, before making an application to court for super priority, even if the priority sought is merely that under section 67(1)(a) or 101(1)(a).

(5) For each of the other levels of super priority, one of the preconditions is that the applicant shows that it would not have been able to secure financing but for the super priority. In establishing this precondition, the applicant must demonstrate that reasonable efforts were undertaken to secure financing without the type of super priority sought (e.g. failed negotiations with other potential lenders).[41] What constitutes "reasonable efforts" is a matter for the Court's assessment.[42] The inquiry is fact-sensitive and no bright-line rule can be drawn.[43]

As mentioned above, if super priority is sought under section 67(1)(d) or 101(1)(d) of the IRDA, the court will also have to consider whether the existing security-holder will be "adequately protected", which again is likely to be a fact-sensitive question.

Further, as the decision to grant super priority is discretionary, the court may consider various other factors as well, including whether the deal was negotiated in good faith, at arms' length, and with the exercise of sound business judgment, and whether it would be in the best interests of the company and its creditors.[44]

7. Is creditor or secured creditor approval required for rescue finance?

Under section 67(1) or 101(1) of the IRDA, there is no strict requirement for creditor or secured creditor approval. However:

(1) Under section 101(3) of the IRDA, there is an express right for any creditor of the company to oppose an application for super priority for rescue financing (in judicial management).

(2) While the above provision does not appear to be replicated under section 67 (for rescue financing in schemes), in practice the court will have regard to the views of other creditors of the company, in determining whether to exercise its discretion to grant such super priority.[45] As such creditors should have an

[40] *Re Attilan*, at [61].
[41] *Re Attilan*, at [70].
[42] *Re Attilan*, at [70].
[43] *Re Attilan*, at [70].
[44] *Re DSG*, at [9].
[45] In *Re Antanium Resources*, the court considered the issue of whether a creditor, who is also a counterparty to the proceedings to be funded, should also be permitted to participate in the company's application to secure funding, particularly when seeking to obtain disclosure of the confidential funding agreement which it would otherwise be unable to access. The court permitted the said creditor to participate in the hearing after appropriate redactions and sealing orders were made to preserve the confidentiality of the arbitration funding agreement. The creditor's objections were rejected and the applicant company's application for rescue financing was granted in full.

opportunity to be heard on the issue of whether super priority should be granted.

If a rescue financing arrangement is sought in other ways (see Q2), it will depend on what mechanisms are involved. For example, if the rescue financing deal is simply presented to creditors as part of a scheme of arrangement, it will have to be passed by the requisite majority of each class of scheme creditors.[46]

8. What role does a creditors' committee play in approving rescue finance (if any)?

Where an order for rescue financing is sought under section 67(1) or 101(1) of the IRDA, please refer to the discussion at Q7 above.

If a rescue financing arrangement is sought in other ways (see Q2), a creditors' committee may be involved in other ways. For example, in judicial management, within 90 days (or such longer period as may be allowed by the court or the requisite majority of creditors) after the company's entry into judicial management, the judicial manager must circulate a statement of proposals for achieving one or more of the purposes of judicial management.[47] A meeting of creditors must decide whether to approve the judicial manager's proposals.[48] As such the general body of creditors are involved in approving the judicial manager's proposals, whether or not they include a proposal for rescue financing. Further, where the proposals have been approved at the creditors' meeting, a creditors' committee. The creditors' committee is established to obtain information from the judicial manager regarding the exercise of his / her functions, which may include seeking, obtaining and implementing rescue financing.

In a creditor scheme of arrangement, there is no statutory provision for the constitution of a creditors' committee. However, as mentioned above, if the rescue financing deal is presented to creditors as part of a scheme of arrangement, it will have to be approved by the general body of creditors at the scheme meeting.

9. What priority of repayment is available to unsecured rescue financiers, if any?

Please refer to the discussion at Q4 above.

10. Can rescue finance be provided on a secured basis?

Yes, please refer to the discussion at Q4 above.

11. Can rescue finance be provided on a super-priority secured basis?

Yes, please refer to the discussion at Q4 above.

[46] The company will also have to apply for the court's approval of the scheme, after the meeting.

[47] Section 107(1) of the IRDA. Under section 89(1) of the IRDA, the three purposes of judicial management are: (a) the survival of the company, or the whole or part of its undertaking, as a going concern; (b) the approval of a compromise or an arrangement between the company and any such persons under section 210 of the Companies Act or section 71 of the IRDA; and (c) a more advantageous realisation of the company's assets or property than on a winding up.

[48] Section 108(1) of the IRDA.

12. Can priority or additional security be obtained for pre-petition financing?

Yes. The Singapore Courts have been clear that the "roll-ups" are not disqualified from being considered as rescue financing for the purposes of section 67 and 101 of the IRDA. Generally, the reasons are that the relevant statutory provisions impose no such restriction, the statutory framework for rescue financing is meant to be flexible, and that the statutory definition of "rescue financing" does not prohibit a rescue financier from stipulating conditions for the grant of rescue finance.[49]

That is not to say that all rescue finance deals involving "roll-ups" would, as a rule, fall within the rescue financing provisions. The Court in Re DSG (in which super priority was granted for a rescue financing deal involving a roll-up) was quick to clarify that each rescue financing offer has to be considered on its own facts.[50] In fact, the court expressly observed that part of the rescue financing offer before it in Re DSG involved fresh working capital.[51]

13. Is security granted for rescue finance be automatically perfected, or is additional perfection required and, if so, what steps must be taken?

There is no statutory provision for automatic perfection of any security granted in respect of rescue finance. The perfection requirements will depend on the nature of the security granted in each case, e.g. a charge that requires registration under section 131 of the Companies Act will still have to be registered with the Accounting and Corporate Regulatory Authority.

14. Is it common for the rescue finance provider to require milestones or other deliverables to be met, or to exercise control over the bankruptcy process?

Yes, it is common for the rescue financier to require certain milestones or conditions, e.g. timelines to be met, or funds to be allocated to certain purposes. The rescue financier can influence and exercise control over the rescue process, by stipulating conditions in the granting of rescue finance.

The courts recognise that the decision to extend financing (and on what terms) is ultimately a commercial matter, and have clarified that the presence of conditions in the offer does not disqualify it as "rescue financing" for the purposes of section 67 and 101 of the IRDA.[52]

15. Have there been any cases in which the rescue finance provisions have been analysed by the courts?

There have been two reported decisions thus far which provide useful guidance on the approach of the Singapore courts in assessing an application for super priority rescue financing.

In *Re Attilan Group Ltd* [2018] 3 SLR 898 (*Re Attilan*), the applicant was a listed company in the media and education industry that was seeking to put together a scheme of arrangement for its creditors. Its application for super priority rescue

---

[49] *Re DSG*, at [8].
[50] *Re DSG*, at [8].
[51] *Re DSG*, at [8].
[52] *Re Attilan*, at [54].

financing was not granted by the Singapore High Court, on the basis that the applicant failed to demonstrate that reasonable efforts had been undertaken to secure financing from other sources without any super priority – this was required in order to show that the applicant would not have been able to obtain rescue financing but for the super priority sought. The court also held that it was not necessary for the proposed financing to be entirely new, and clarified that it could take the form of additional financing from an existing creditor or it can be premised on a prior obligation, e.g. where the injection of funds is at the option of the creditor such that its exercise of that option can be made contingent on its obtaining super priority status for the injected funds.

In *Re Design Studio Group Ltd* and other matters [2020] 5 SLR 850 (Re DSG), the applicant was a listed company involved in the construction and interior fit-out industry that was, along with its related companies, under the protection of the statutory moratorium under Section 64 of the IRDA. Its application for proposed financing of over S$62 million from its existing secured lender and major shareholder to be granted super priority status was granted by the Singapore High court. In relation to the court's approach to such rescue financing applications, it was held that an applicant had to first show that, on a balance of probabilities, the mandatory statutory requirements were fulfilled. Thereafter, the court would consider four main factors in determining whether it should exercise its discretion in favour of granting super priority, i.e., whether other creditors would be unfairly prejudiced, whether the restructuring was viable and likely to succeed, whether better financing proposals are available and whether the terms of the proposed financing are reasonable and fair. The court also clarified that there was no prohibition against roll-up financing and that roll-ups can constitute rescue financing as long as the statutory requirements are met. However, in the case of roll-up financing, the court would pay special attention to the interests of specific creditors who were previously prioritised equally or above the pre-petition debt, but who will be prioritised below or equal to the post-petition debt, in order to ensure that they would not be prejudiced.

16. How has the market for rescue finance been impacted by the COVID19 pandemic?

Travel restrictions imposed in 2020 to curb the spread of COVID-19 made it more difficult for certain rescue financiers to conduct full due diligence (especially where physical inspection was necessary) on the target company. We have observed that, as a result, certain rescue financing deals progressed more slowly or simply just fell through altogether. Nevertheless with a global effort at vaccination and the reopening of travel, we expect this to be only a temporary issue.

Contrary to expectations, the number of the insolvency proceedings in Singapore has not spiked dramatically since the start of the COVID-19 pandemic.[53] This could in large part be due to the commitment of nearly S$100 billion (approximately US$75.2 billion) by the Singapore Government in response to COVID-19, in FY2020.[54] Further, a number of protective measures for companies were introduced for a large part of 2020, including stays on certain enforcement

[53] In fact, the number of winding up applications filed fell from April 2020 onward. See the graphical statistics provided by the Ministry of Law: https://io.mlaw.gov.sg/corporate-insolvency/statistics/.

[54] In fact, the number of winding up applications filed fell from April 2020 onward. See the graphical statistics provided by the Ministry of Law: https://io.mlaw.gov.sg/corporate-insolvency/statistics/.

measures against companies affected by COVID-19, and more onerous standards for proving that a company was unable to pay its debts.[55] Less information is available on changes in the number of companies applying for restructuring proceedings, e.g. judicial management or schemes of arrangement, as these proceedings are heard in chambers and not in open court.

Finally, we note that the Singapore rescue financing regime is available not only to Singapore-incorporated companies, but also to foreign companies that choose to restructure in Singapore. A foreign company may be subject to the Singapore judicial management or creditor scheme regime, as long as it is liable to be wound up in Singapore.[56] For a foreign company to be liable to be wound up in Singapore, it needs to have a "substantial connection" to Singapore.[57] The court may rely on one or more of the following matters to support a determination that a foreign company has a substantial connection to Singapore:[58]

(1) Singapore is the centre of main interests of the company;

(2) the company is carrying on business in Singapore or has a place of business in Singapore;

(3) the company is a registered foreign company;

(4) the company has substantial assets in Singapore;

(5) the company has chosen Singapore law as the law governing a loan or other transaction, or the law governing the resolution of one or more disputes arising out of or in connection with a loan or other transaction; and

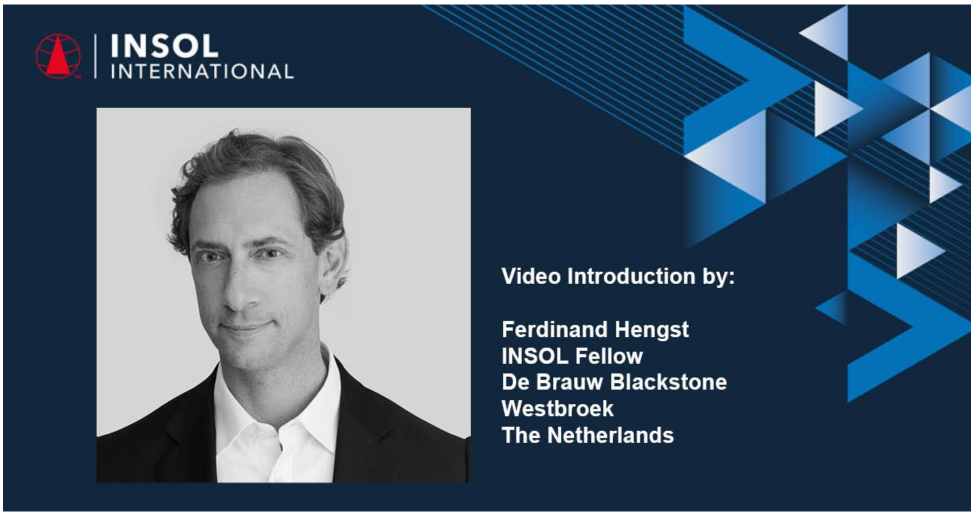
(6) the company has submitted to the jurisdiction of the court for the resolution of one or more disputes relating to a loan or other transaction.

This list is not exhaustive and the court may have regard to other connecting factors (e.g. listings on the Singapore Exchange) in determining whether the foreign company has a "substantial connection" to Singapore.[59]

As such, even in any slowdown in the restructuring market in respect of Singapore-incorporated companies, there will be a market for the restructuring of foreign companies (especially those with Singapore subsidiaries) in Singapore, which in turn spells more opportunities for rescue financing.

[55] See the COVID-19 (Temporary Measures) Act 2020 (No. 14 of 2020). Available here: https://sso.agc.gov.sg/Act/COVID19TMA2020.
[56] Section 63(3) and section 88 of the IRDA.
[57] Section 246(1)(d) of the IRDA.
[58] Section 246(3) of the IRDA.
[59] *PT MNC Investama Tbk* [2020] SGHC 149.

THE NETHERLANDS



General

In order to comprehend the various options, we need to briefly map out the Dutch insolvency framework and introduce some definitions. There are three primary insolvency regimes under Dutch law for companies that are set forth in the Dutch Bankruptcy Act (*Faillissementswet*):

(i) the preventive restructuring framework "WHOA" or "Dutch Scheme"

- Very similar to US Chapter 11 in set-up and features
- provides for a debtor-in-possession procedure
- allows for direct protection of new money if so petitioned, plus other tools to improve the position of the new money financiers, such as restructuring of debt service and other financing liabilities, the award of equity instruments and restructuring or termination of onerous contracts
- initiated by either the debtor or any creditor (or certain others)
- outcome of a WHOA is the adoption of a restructuring plan which, through majority voting and cross-class cram-down can be made binding on all or, if so designed, some of the debtor's creditors (once approved by a two-thirds majority of creditors in one of the in-the-money classes and confirmed by the court), but many of the protective measures may be included through provisional court measures

(ii) suspension of payments (*surseance van betaling*)

- intended to facilitate reorganization of a debtor, but in practice, stigma around suspension of payments often means this is a gateway to bankruptcy proceedings, unless it concerns a debtor with no active business undertaking
- does not provide a reprieve from liabilities to which the law has granted a preferential ranking, such as employee claims and tax debt, which complicates restructuring efforts and may impede new financing efforts

- neither the debtor, nor the administrator have the ability to grant preferential status to new money, or to prime existing security
- the debtor is only allowed to act with the approval of a court-appointed administrator

(iii) liquidation bankruptcy (*faillissement*)

- primarily designed to liquidate and distribute the proceeds of the assets of a debtor to its creditors
- offers a reprieve from all debt
- the debtor loses control over its enterprise to the bankruptcy trustee (curator). Bankruptcy is therefore not well suited to DIP financing.

1. Is there an established market for rescue finance?

The Netherlands does not have a formal DIP-finance regime similar to the U.S. regime. However Dutch legislation does permit other forms of rescue finance that are available both before and during formal insolvency proceedings. These include the possibility to obtain court sanctioning of emergency funding, which would take away the risk of challenge in a bankruptcy.

2. If not, how do debtors fund or finance corporate reorganisation or trade on?

In the absence of formal rescue finance regulations, debtors turn to informal rescue finance, meaning that they attract new money with priority repayment rights or high ranking security through cooperation between the debtor's creditors and shareholders. Most frequently, this leads to either new money liabilities being attracted and secured using existing collateral (which is possible only with the consent of the pledgee, but also subject to hardening for the additional secured liabilities), or the creditors agreeing on turnover or equalization provisions to provide the new money providers with contractual priority. In practice, this form of financing occurs within the same framework as financings in the ordinary course of business and originates primarily from banks and shareholders.

In the event of dissent among the creditors, distressed companies can make use of the WHOA. Under the WHOA-framework, subject to adoption of a restructuring plan, the court may be requested to authorize all legal acts deemed necessary to continue the debtor's business during the restructuring, provided that these legal acts serve the interests of the debtor's joint creditors and no material harm is done to the interests of any individual creditor.

Finally, a so-called "estate credit" (*boedelkrediet*) may be negotiated and attracted by the administrator in suspension of payments proceedings or trustee in bankruptcy proceedings. This estate credit is not historically intended to rescue the business, but to allow the trustee or debtor-and-administrator a small budget to work on a going concern sale of parts of the business or to increase the value of the estate. However, when a suspension of payments or bankruptcy is used to implement a restructuring and revert to a going concern of all or part of the group, the "estate credit" may also be used as rescue financing. However, this type of rescue financing is to date provided only when there is very low risk, where the statutory priority given to this kind of financing is sufficient to ensure full recovery.

3. If yes, what are the main sources of funds for rescue finance?

Rescue financing overwhelmingly has the same origin as regular financing. The conventional sources of funding in the Netherlands are leveraged bank loans and shareholder loans or equity. Credit funds and direct lenders have not been very active, but will no doubt take on a larger share of the market in coming years.

4. Is rescue finance codified or subject to specific legislation?

Rescue finance is not codified and not subject to specific legislation other than the provisions under WHOA, as explained above. With the WHOA, rescue financiers are offered protection against claw-back risks on interest paid and security granted, provided that the rescue finance package was court-sanctioned.

To explain, the risk that a WHOA court sanctioning addresses is that under Dutch law a legal act, including the entry into security agreements, may be avoided if the creditors (or following bankruptcy, the trustee) establish that there was insufficient consideration and that the act was therefore prejudicial to the interests of creditors. Depending on whether the act was voluntary or involuntary, avoidance requires proof of knowledge of the prejudice on the part of either the debtor or on the part of both the debtor and of its counterparty.

Under the WHOA-framework, the court can be petitioned to authorize specific legal acts, such as the creation of security rights. This prior authorization protects such financing and security from claw-back and is given if the financing and security facilitate restructuring itself, the continuation of the debtor's business during the restructuring or the payments due under the restructuring plan.

5. Are there any legislative or regulatory restrictions or requirements for foreign investment which rescue finance providers need to consider?

No specific restrictions other than customary selling / trading restrictions that result from the relevant EU directives on the issuance of debt instruments and information requirements.

6. Is court approval required for rescue finance or any security granted to the lender? If so, what considerations does the court take into account in approving or rejecting a proposal for rescue finance?

Under the WHOA-framework, the court may be requested to authorize any acts deemed necessary to continue the debtor's business during the restructuring, provided that these acts serve the interests of the joint creditors and no material harm is done to the interests of any individual creditor. This may include the provision of collateral over assets that would otherwise be available for the unsecured creditors. This court authorization is not a requirement to attract the financing, but it will almost always be a prerequisite for the lenders, to protect them against claw-back risks.

Debtors and rescue financiers should take into account that newly-attracted financing is a reason for the court to refuse to sanction a restructuring plan if the terms of that new financing are detrimental to the interests of the other creditors. Any estate credit provided is by definition court-approved, as the trustee requires court approval to attract funds and needs to argue that it will likely increase the value of the estate for benefit of the joint creditors.

7. Is creditor or secured creditor approval required for rescue finance?

Not to the extent that the legal acts involved in the rescue finance scheme are court-approved under the WHOA-framework referred to above, although adoption of the plan itself will require the affirmative vote of the requisite majority of one in-the-money class of creditors.

8. What role does a creditors' committee play in approving rescue finance (if any)?

The Dutch system does not provide for either formalized or ad hoc creditors' committees with powers to steer the course of the restructuring in the way that US or UK law does. A specific committee with limited authority may be appointed in bankruptcy proceedings, but its advice to the trustee is non-binding. In practice, the nomination of a creditors' committee is exceptional, and only large financing groups tend to appoint a core group to negotiate on their behalf (but also then, on a contractual basis as between them and without formal standing in the process).

9. What priority of repayment is available to unsecured rescue financiers, if any?

Unsecured rescue financiers rank as ordinary unsecured creditors and behind all priority creditors such as the tax authorities and some employee claims, and have no recourse on any secured assets (other than any excess value in those). However, as mentioned above, this is different if the rescue finance scheme was entered into by the administrator (in suspension of payments proceedings) or bankruptcy trustee (in bankruptcy proceedings). Obligations entered into or sanctioned by those parties (which take the form of estate credit) will rank above all other creditors with respect to the liquidation proceeds of the unsecured assets, and immediately below the secured creditors with respect to the liquidation proceeds of the secured assets.

10. Can rescue finance be provided on a secured basis?

If there are unsecured assets, they can be used to secure the financing of an extrajudicial restructuring. However, a rescue lender should take note of the avoidance (claw-back) risks referenced above. Those risks are mitigated if WHOA proceedings are opened and if the court can be successfully petitioned to authorize the creation of the security rights. This prior authorization is given if the financing and security facilitate restructuring itself, the continuation of the debtor's business during the restructuring or the payments due under the restructuring plan.

In order to provide first-ranking security over already secured assets, the rescue financier requires the cooperation of everyone with an interest in the security that has been created earlier in time in order to switch the rankings of the security rights (without that cooperation, the older security right would have the higher ranking). First and second-ranking mortgage security rights can be swapped, but pledges cannot be swapped, which means the first (prior tempore) ranking right of pledge needs to be released in order to grant a first ranking right of pledge to the new financiers, followed by a re-take of the security for the existing financiers. As this exposes the existing financiers to hardening periods and preference claims, the market solution is to instead create a second ranking pledge for all financiers and relay on turn-over provisions.

11. Can rescue finance be provided on a super-priority secured basis?

At the moment, Dutch law does not provide super senior status to emergency funding. Security rights rank in sequence of their creation (prior tempore). If a security right is created after one or more other security rights have been created over the same asset in favor of other creditors and the last security right is supposed to take a higher ranking, the latter creditors have to agree to this change in priority.

In addition, the financing attracted by the administrator (in suspension of payments proceedings) or bankruptcy trustee (in bankruptcy proceedings) have a very high preference in liquidation proceedings.

12. Can priority or additional security be obtained for pre-petition financing?

As stated above, priority security may be obtained over (i) unsecured assets or (ii) over secured assets through cooperation of the secured and other interested parties. There are no restrictions that would prevent the same treatment to be given to pre-petition financing.

13. Is security granted for rescue finance be automatically perfected, or is additional perfection required and, if so, what steps must be taken?

Regular perfection requirements apply. Properly granted security is automatically perfected. However, in a suspension of payments proceeding, the debtor is no longer in sole possession and the administrator would need to sign-off on the creation of a new security right.

14. Is it common for the rescue finance provider to require milestones or other deliverables to be met, or to exercise control over the bankruptcy process?

It is common in practice that the rescue financier imposes such conditions. However, these conditions are in the form of ordinary agreements between the financier and the debtor and are not protected by a specific legal framework. The rescue financier cannot exercise control over the bankruptcy process.

15. Have there been any cases in which the rescue finance provisions have been analysed by the courts?

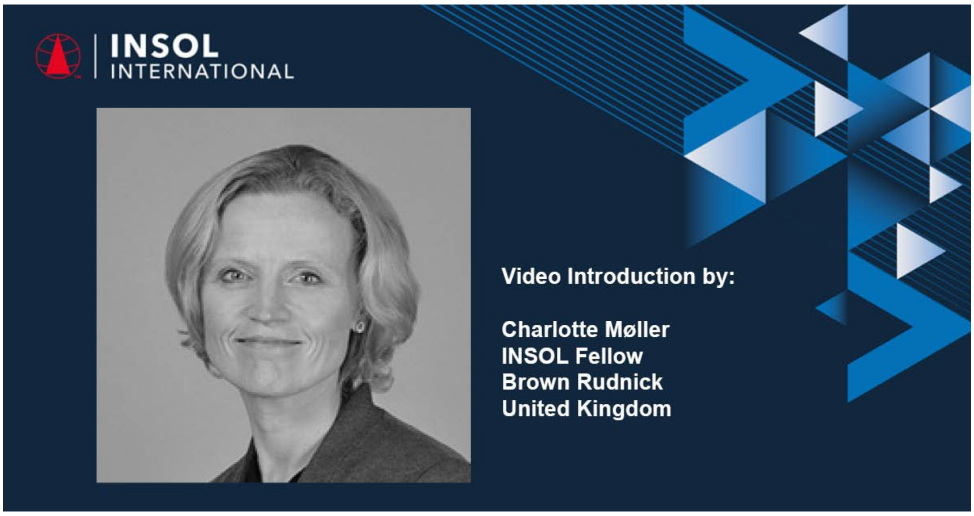
Although the WHOA framework has just entered into force on 1 January 2021, courts already have tested to what extent prior court authorization protects agreements from claw-back provisions. In March 2021, a Rotterdam court confirmed that court-authorized DIP financing is protected to the extent that it has been provided after the date on which the authorization request was filed. In May 2021, a The Hague court specified that, in order for it to be able to authorize an agreement, it has to be clearly ascertainable that the agreement is on market terms, and therefore not detrimental to the interests of the other creditors, and primarily aimed at providing the debtor with financing to continue its business during the restructuring process.

16. How has the market for rescue finance been impacted by the COVID19 pandemic?

The rescue finance market has been impacted not only by COVID-19 but also to a large extent by the entry into force of the WHOA on 1 January 2021. As a result of these coinciding events, it is difficult to ascertain to what extent changes in market conditions were caused by the pandemic. In our experience, banks have generally not be less willing to provide rescue financing.

Finally, we see a sharp increase of the market share of direct lenders in other parts of the financing market, mainly acquisition financing. We have no reason to doubt that direct lenders will also pick up a larger part of the rescue financing market in the next few years.

UNITED KINGDOM



1. Is there an established market for rescue finance?

With few exceptions, there are no statutory measures in place in this jurisdiction for rescue financing which are equivalent to those that exist in the US. Nevertheless, there are established "work arounds" which can be utilised to allow a company in financial difficulty to seek rescue financing, particularly in situations where existing lenders are prepared to advance further funds, the debtor has the option to grant security over unencumbered assets and / or existing secured lenders are prepared to revisit contractual priority arrangements in order to allow the debtor the opportunity to obtain rescue financing and thereby maximise value for all creditors.

It is also possible to carry out restructurings in conjunction with certain statutory procedures, such as administration or a company voluntary arrangement under the Insolvency Act 1986 (**IA86**), or by scheme of arrangement or part 26A restructuring plan under the Companies Act 2006. Each of these procedures require a proposal be prepared by the debtor, to be approved by (a proportion of) the creditors, and may implement a wide variety of measures with the aim of reaching a compromise or arrangement with its members and / or creditors. The proposal itself, and approval by creditors, may be conditional on new money being injected with the ultimate goal that the debtor can bring itself back to trading as a going concern over a period of time.

Further, where the debtor has entered an administration process, the statutory expense regime will allow a lender advancing funds to obtain priority over the majority of other creditor categories in respect of the new monies. This type of funding is typically provided where either: (a) the debtor does not have the cashflow to meet the running costs of the administration, but administration would result in a better return for the lender; the purpose of such funding being to ensure that the company isn't forced into liquidation resulting in the destruction of any value in the business and a significantly diminished return to creditors generally; and / or (b) funding is required to pursue contingent assets of the debtor, for example, claims that will require investigation or litigation in order to be realised. Funding of this nature gains super-priority over the debts of unsecured creditors and floating charge secured creditors by virtue of it being deemed a cost or expense of the administration and are thereby being payable immediately after realisations from fixed charge assets to fixed charge secured creditors.

A limited exception to the general position as regards rescue financing in this jurisdiction was introduced by the Corporate Insolvency and Governance Act 2020 (**CIGA20**) as part of the U.K. government's response to the COVID pandemic. This exception is largely untested at the time of writing, but is contained in Part 1A of the IA86 and relates to the granting of a (partial) moratorium (**Moratorium**) to a debtors, whose management will remain in control for the period of the Moratorium albeit overseen by a monitor who is a licensed insolvency practitioner. The purpose of the Moratorium is to provide the debtor with the breathing space to restructure its affairs and s.174A IA86 provides for the variation of the order of priority in this regard such that funding (or credit more generally) provided to the debtor during the Moratorium period attracts a right of priority of payment in any subsequent administration or liquidation which commences within 12 weeks of the end of the Moratorium. It remains to be seen whether the Moratorium will be widely in the future, but there is no established market for financing this process at the time of writing. It should also be noted that the Moratorium is only available to eligible companies (excluding, among others, companies which are party to capital market arrangements) and in a situation where it is considered that the procedure will, or is likely to, result in the rescue of the company as a going concern.

2. If not, how do debtors fund or finance corporate reorganisation or trade on?

Please see above. A debtor in financial difficulty will often look to their current lenders in in the first instance to restructure their debt position. Any new or external financing will be subject to the terms of the current lending arrangements and, where there is more than one financial creditor in situ, will likely be subject to the consent of all other creditors. A restructure will often be more attractive to lenders than formal insolvency as it gives both parties the opportunity to consensually amend the terms of financing with a view to being repaid in full or, at least, more than would be available should the company enter a formal insolvency procedure.

There is no "typical" consensual restructuring, however, the process normally begins with the debtor engaging its stakeholders, financial advisers and gathering data (debtor's prospects, capital structure, creditor composition). The debtor will likely explore various solutions from consensual restructuring or formal insolvency to raising cash via other means, such as asset disposals.

Consensual restructuring discussions often begin with relevant stakeholders entering into a contractual standstill agreement to give the debtor "breathing space" to explore restructuring options. Creditors may form groups or committees at this stage to try and control or influence the process. Once the company has secured its breathing space, it will look towards agreeing a restructuring plan. Engaging financial advisers helps to determine, among other things, which creditors are effectively "out of the money" (i.e. would not make a recovery in a winding-up of the company). Restructuring negotiations are invariably driven by those creditors which are in-the-money. Subject to the exceptions already referred to above, priority of security is respected unless the security is vulnerable to challenge for some reason. It is also possible to change the security package and / or the priority of security by way of contractual agreement between the creditors and the company.

3. If yes, what are the main sources of funds for rescue finance?

New financing was traditionally made via current lenders, however it increasingly falls to more specialist, distressed investors (whether funds or family offices) to provide the source of rescue finance.

4. Is rescue finance codified or subject to specific legislation?

No. Rescue financing or debt restructuring is a largely non-legislated process, undertaken privately between the debtor and its lenders. As noted above, it is possible to combine rescue financing with other statutory procedures, at which point the high-level principles of the funding may be disclosed more widely.

5. Are there any legislative or regulatory restrictions or requirements for foreign investment which rescue finance providers need to consider?

Yes. The National Security and Investment Act 2021(**NSIA**) received Royal Assent in April 2021 and grants the UK Government the power to "call-in" transactions in which there is or may be a risk to national security. Once a transaction is "called-in", the Government has wide ranging powers to demand disclosure of information, impose conditions on a transaction or ultimately block completion / unwind a transaction that has already completed. Though not exclusively focused on foreign investment, the jurisdiction of the investor is a relevant consideration when the Government is assessing whether a national security concern exists.

The NSIA is predominantly aimed at the acquisition of entities or assets by third parties but becomes relevant to financing transactions where either (i) the granting of the financing itself results passing such a degree of control / material influencer to the lender that the relevant thresholds under the NSIA are breached; or (ii) on enforcement of security where the lender takes control of the entity or asset. All lenders should have in mind that seeking Government approval where relevant under the NSIA will result in delay in the deal timetable albeit the government anticipates swift approval in the majority of cases.

Certain types of lending or credit may also require regulatory approval. Rescue finance providers will also need to ensure that they comply with relevant anti-money laundering and know your customer checks.

6. Is court approval required for rescue finance or any security granted to the lender? If so, what considerations does the court take into account in approving or rejecting a proposal for rescue finance?

No, not in the ordinary course.

7. Is creditor or secured creditor approval required for rescue finance?

Typically, the current finance documentation will contain a negative pledge or similar restrictive covenants preventing any further lending or security being granted without the consent of the lenders which benefit from those restrictions.

8. What role does a creditors' committee play in approving rescue finance (if any)?

Where there are multiple creditors or different types of creditors in a company's restructure, committees may be formed to act as liaison between the company and other creditors and negotiate the terms of any new rescue finance. This is not always the case and is not a requirement. Typically, if a financing agreement is entered into by an administrator during the course of a debtor's administrator (for example, in respect of litigation funding), the administrator may consult the debtor's creditors' committee around its terms in advance. However, it is more common for a proposed administrator to line up any essential financing prior to his or her appointment and therefore without any formal consultation as to the terms of the financing.

9. What priority of repayment is available to unsecured rescue financiers, if any?

Unsecured creditors are not afforded priority of repayment above other unsecured creditors unless there is an intercreditor agreement in place. This is very unusual and, in any event, any intercreditor agreement between unsecured creditors would not give priority over secured or preferential creditors or the costs incurred as a result of a formal insolvency. In the ordinary course, in an insolvency situation, an unsecured creditor will be paid in accordance with the statutory order of priority, pari passu with other unsecured creditors. The statutory order of priority is as follows:

(a) fixed charge holders;

(b) administrators' / liquidators' costs;

(c) preferential creditors (for example, employee wages);

(d) Her Majesty's Revenue and Customs (for example, National Insurance contributions, PAYE and VAT);

(e) the prescribed part (if any);

(f) floating charge holders;

(g) unsecured creditors;

(h) shareholders.

There are two caveats to the above waterfall which give unsecured creditors priority:

(a) where a lender has provided administration funding (see question 1), which is deemed a cost of the administration and therefore falls within limb (b); and

(b) where a company has been through a Moratorium. The debts that do not benefit from a payment holiday, or are incurred during the Moratorium and must be paid as they fall due, are given super-priority in any formal insolvency procedure that commences within 12 weeks of the Moratorium ending. These types of debts will usually consist of the Moratorium monitor's remuneration, debts for good and services supplied, rent, wages and salaries.

10. Can rescue finance be provided on a secured basis?

Restructuring finance is often provided on a secured basis, either to be covered by an already existing security package where lending is being provided by a current creditor, such security which will be confirmed to secure both the old and the new money, or by new security. Provided security is being provided in conjunction with new money, the security should not be voidable on insolvency – security granted for existing indebtedness to a company which is technically insolvency is at risk of being set aside if the rescue fails and formal insolvency procedures commence by virtue of being deemed a transaction at an undervalue, preference or an invalid floating charge under the IA86.

11. Can rescue finance be provided on a super-priority secured basis?

New money can be provided on a super-priority secured basis in that it may be subject to private intercreditor arrangements with other secured lenders, agreeing that new money shall be secured and paid first. There is no automatic or legislative right to super-priority.

12. Can priority or additional security be obtained for pre-petition financing?

The concept of pre-petition financing does not apply under English law and a company would not seek financing as a condition of engaging in a formal insolvency process. Restructuring (or rescue financing) is a private process used with the aim of avoiding formal insolvency.

13. Is security granted for rescue finance be automatically perfected, or is additional perfection required and, if so, what steps must be taken?

As a matter of English law, security must always be perfected to be legally, rather than equitably, effective. If the loan is being increased and covered by security already in place, perfection requirements need to be double checked, but likely perfection will occur via the refinancing documentation rather than specific notification or registration. New security will need to be properly perfected in accordance with the nature of that security (for example, by registration at Companies House, the Land Registry and / or the relevant intellectual property registry).

14. Is it common for the rescue finance provider to require milestones or other deliverables to be met, or to exercise control over the bankruptcy process?

Where a standstill agreement is entered into, this will often include milestones to give the creditor(s) being stood still an element of control, ensuring that the restructuring is being progressed in a timely and effective manner, and to ensure a creditor's enforcement rights are not simply being put on hold for an indefinite period of time.

Within the restructuring finance documentation there will certainly be strict financial covenants and reporting requirements to be fulfilled and it may be that certain milestones are agreed to ensure the entity being rescued is working towards more long-term and sustainable liquidity. Often, financial covenants and repayment obligations will be staged, becoming more onerous as the company's financial position improves.

15. Have there been any cases in which the rescue finance provisions have been analysed by the courts?

There is case law relevant to the terms of finance documentation more generally where such finance documentation has become the subject of litigation, however restructuring or rescue financing in England and Wales is a private matter, not generally subject to the scrutiny of the court.

It is likely that matters relating to CIGA will be brought before the courts in due course, but given the relative recentness of this legislation, there is not presently specific court consideration of financings linked to CIGA procedures other than general commentary in the context of overall restructuring packages advanced pursuant to a part 21A restructuring plan.

16. How has the market for rescue finance been impacted by the COVID19 pandemic?

During the Covid-19 pandemic, the U.K. Government has brought in a number of safe-guarding measures to protect companies which may otherwise fall victim to the economic impact caused by the shut-down of the economy. Measures such as the Coronavirus Business Interruption Loan Scheme, furlough, relief from business rates, and restrictions on the forfeiture of commercial leases and issuance of winding up petitions has meant that businesses have not yet had to rely on rescue or debt refinancing in the way they may otherwise have needed to, or may need to once these measures are brought to a close.

UNITED STATES OF AMERICA

1. Is there an established market for rescue finance?

The United States has an established market for rescue finance in bankruptcy cases initiated to restructure a company or bridge to a going concern sale or liquidation under chapter 11 of the United States Bankruptcy Code, 11 U.S.C. § 101, et seq. (**Bankruptcy Code**). These rescue loans, called “debtor in possession financing” or “DIP Loans,” in nearly all cases are subject to approval by the bankruptcy court under applicable provisions of the Bankruptcy Code, discussed below in response to questions 4 and 6. In 2020 in the United States there were final DIP commitments of $23.7 billion across all sectors, according to Reorg Research’s DIP Database, which features DIP loans sized at $1 million and above. In the great majority of chapter 11 cases there is a DIP Loan proposed on the first day of the insolvency case, which is typically approved soon thereafter on an interim basis (usually between 2 and 7 days after the case is filed) and then approved on a final basis (the average approval time for a final DIP order is about 35 days, but can be as early as 15 days after the interim order is approved).

Not only is the DIP Loan market established and robust, but it is flexible and highly dynamic, with courts having approved a variety of lending arrangements from revolving loans, to term loans, amendments to existing facilities, DIP loans with syndication options, and even a Sharia-complaint Murabaha DIP loan. While there are legal standards for obtaining approval of any DIP Loan, the structuring and financial aspects of a loan are driven in large part by commercial realities and exigencies facing the debtor. And lenders are often willing to provide rescue financing, because from a commercial standpoint, there are preferred rates and fees on DIP Loans that are typically well above the non-distress market. As a result of the over 40 years of application of those legal standards and a market understanding of them, and the debtor’s obligation to obtain the best terms for its estate, there are situations where multiple potential lenders compete to make a DIP Loan. Ideally, the debtor moves for approval of a DIP Loan on the day it files its bankruptcy case. Accordingly, management and its advisors usually spend several weeks prior to filing a chapter 11 case negotiating term sheets with several lenders before selecting the best available terms for the business.

Additionally, many debtors delay their efforts to restructure as market forces or opportunities may enable the debtor to delay filing. In these situations, there are several examples of small pre-petition bridge financings that are funded with a view of being added to rolled-up into a DIP Loan post-petition, which will provide additional protections to the lenders post-petition for such pre-petition loans.

2. If not, how do debtors fund or finance corporate reorganisation or trade on?

Absent rescue financing or a DIP loan that permits continued trading and funding of the insolvency proceeding, debtors would need to evaluate whether they can adequately fund a chapter 11 case using the proceeds of their operations and assets sales. Alternatively, debtors that cannot reorganize would typically file a chapter 7 bankruptcy case (a liquidation) or pursue a state law out of court liquidation (e.g., a secured creditor foreclosure, an assignment for the benefit of creditors, or some other state law dissolution proceeding).

3. If yes, what are the main sources of funds for rescue finance?

The main sources of funding in the United States are existing lenders that have already provided a loan facility to a business prior to the chapter 11 case. These loans from existing lenders are often called "defensive DIPs" as they are designed to ensure the existing lenders maintain as much control as possible to maximize their recovery and to protect against their lien being "primed" by a new lending party. And, when a debtor is in or near distress (and there are anticipated defaults under the credit facilities), it is often already in (or will commence) discussions with its existing lenders regarding the distress and those existing lenders will often be willing to provide a DIP Loan on a consensual basis, subject to negotiating acceptable terms, milestones expected to maximize the lenders' recoveries, and a budget.

In 2020, defensive DIP loans made up about 80% of all of the DIP loan market. It is worth noting that often the Agent on the pre-petition facility will continue to act as agent for a DIP Loan, but the members of the syndicate may trade out of the facility and the composition of the actual lenders may change from traditional financial institutions to funds specializing in distress or other specialty alternate funding entities. Additionally, in certain syndicated situations, the existing lenders in the syndicate will be offered the first chance to participate in the new DIP Loan and even in any exit financing and, if they refuse, participating existing lenders and other non-traditional lenders may participate in the DIP Loan syndicate obtaining a higher priority than the existing non-participating lenders. Moreover, it is not unusual for a DIP Loan to be made with an initial advance and to contain a syndication clause that permits the Agent and the DIP Lender that made an initial advance to syndicate the loan after approval of the loan facility.

Funding may also be advanced by related companies, directors, creditors (often by an ad hoc group of bondholders, for example), or shareholders. If a DIP Loan is funded by an insider (i.e., an officer, director, or affiliate company) of the debtor courts will often apply additional scrutiny to the fairness of the terms of the facility to ensure that the insider is not taking undue advantage of superior knowledge or position and any insider must demonstrate that the terms of the DIP Loan it has offered are "entirely fair". For example in the bankruptcy case involving the Los Angeles Dodgers baseball team, the team's management negotiated a superpriority, secured, delayed draw term loan facility of $150 million from a lender that also had a separate loan with the team's owner. The debtor rejected a proposal from Major League Baseball for an unsecured loan with better terms because the team's owner claimed the league was hostile to the team. The court refused to approve the proposed DIP Facility because unsecured lending was available (see question 6 below for an explanation of the lending standards) and because it would not defer to management's decision because the team had not satisfied the higher scrutiny of "entire fairness" required of an insider transaction, namely it failed to show that the price of the loan and process to obtain the loan were "entirely fair". See In re *Los Angeles Dodgers LLC*, 457 B.R. 308 (Bankr. D. Del. 2011).

Additionally, a direct or indirect (purchase of controlling secured debt) loan-to-own strategy can be used in the chapter 11 case, with potential purchasers of the business advancing critical funding to facilitate continued operations, while substantially all of the assets are marketed. In the subsequent auction, the pre-petition secured lender and DIP Lender are typically allowed to credit bid the pre-petition lien and DIP Loan as purchase price consideration. If the loan-to-own lender prevails at the auction (or there are no other bidders for the business), then the DIP Lender will own the business as purchaser of the assets out of the bankruptcy case and will credit the pre-petition lien and DIP Loan to the extent of the purchase price. If another party outbids the DIP Lender at the auction, then part of that bidder's purchase price will be used to repay the DIP Lender (and may also have to pay a breakup fee and reimburse the lender for its expenses in providing the loan and acting as the initial bidder, often referred to as the "stalking horse").

4. Is rescue finance codified or subject to specific legislation?

Yes, the Bankruptcy Code contains a specific section for "Obtaining Credit" in section 364 of the Bankruptcy Code, the provisions of which are discussed in response to Question 6 below. There is also a related procedural rule that governs the filing of a motion to obtain credit, which requires, among other provisions, that a copy of the proposed credit agreement and proposed form of order approving that credit agreement be attached to the Motion. *See* Fed. R. Bankr. Pro. 4001(c) (Rule 4001).

Rule 4001 provides that a motion to obtain creditor must summarize, and set out the location within the relevant documents of, all material provisions of the proposed credit agreement and form of order approving the credit facility, including interest rate, maturity, events of default, liens, borrowing limits, and borrowing conditions. Rule 4001 also requires that the motion describe the nature and extent of any of the following provisions:

(i) a grant of priority or a lien on the debtor's property;

(ii) any provision of "adequate protection" or priority for a claim that arose before the debtor filed the case, including the granting of a lien to secure the claim, or the use of credit obtained or other of the debtor's property to make cash payments on account of the claim;

(iii) a determination of the validity, enforceability, priority, or amount of a claim that arose before the case started or of any lien securing the claim;

(iv) a waiver or modification of Code provisions or applicable rules relating to the automatic stay / moratorium;

(v) a waiver or modification of any entity's authority or right to

(a) file a plan of restructuring;

(b) seek an extension of time in which the debtor has the exclusive right to file that plan;

(c) request the use of cash collateral; or

(d) request authority to obtain additional credit;

(vi) the establishment of deadlines for filing a plan of reorganization and related deadlines;

(vii) a waiver or modification of the applicability of non-bankruptcy law relating to the perfection of a lien on property of the estate, or on the foreclosure or other enforcement of the lien;

(viii) a release, waiver, or limitation on any claim or other cause of action belonging to the debtor, including any modification of the statute of limitations or other deadline to commence an action;

(ix) the indemnification of any entity;

(x) a release, waiver, or limitation of any right to surcharge the lender's collateral if necessary to preserve the value of that collateral; or

(xi) the granting of a lien on any claim or cause of action the debtor has under various provisions of the Bankruptcy Code (e.g., clawback actions like preferences and fraudulent transfers).

In addition to these national rules, many of the courts have their own local rules of procedure and standing orders that require additional elements to be disclosed and may impose specific formatting requirements on the presentation of a motion to obtain credit. While many of the provisions that a debtor must identify under Rule 4001 may be viewed as controversial (i.e. not in the best interests of the bankruptcy estate) and not always approved, including them in the disclosures does not mean they are entirely impermissible; rather, since a DIP Loan is often submitted on an emergency basis, highlighting these potentially controversial terms permits a court and debtor's creditors more quickly to address the traditionally debatable terms.

5. Are there any legislative or regulatory restrictions or requirements for foreign investment which rescue finance providers need to consider?

There are no material regulations specifically related to foreign investment for DIP Loans. However, if the DIP Loan is to be converted to purchase price, gives the DIP Lender an interest in the profits of the business, or if the foreign DIP Lender seeks to foreclose on assets after a default of the DIP Loan, in instances involving assets relevant to the United States National Security, the Committee on Foreign Investments in the United States (CFIUS) must approve the foreign investment in the United States. The purpose of CFIUS review is to determine the effect of the proposed transaction on the national security of the United States. The approval process is an administrative one managed by the Treasury Department.[1] Thus, while CFIUS review is typically not an issue when the financing is authorized, it can become an issue depending on the contemplated transaction or in the event of a default if the DIP Lender is a foreign entity and the business is important to the strategic national interest of the United States.

The Bankruptcy Code also exempts DIP Loans from registration for offer of a sale of a security or licensing of an issuer of a DIP Loan, so long as the offered security is not an equity security. This exemption does not apply to an underwriter, however. In the recent case of Hertz Global Holdings, Inc., the company sought and obtained approval to sell over $500 million in equity securities as a means of raising capital "rather than being subjected to potentially onerous terms that could be attached to traditional DIP financing," argued Hertz's counsel. The court approved this proposed equity offering and three days later Hertz filed their prospectus for this first of its kind at the market offering. In its prospectus, Hertz disclosed that due to the ongoing chapter 11 process the stock (176.7 million shares offered at a price of US$2.83 per share) may ultimately be rendered worthless. Three days later, Hertz filed a public statement that notified the markets that "the Securities and Exchange Commission's Division of Corporation Finance verbally notified [Hertz] that the [SEC] was reviewing the Prospectus Supplement." Promptly thereafter, the Company suspended all sales of Common Stock under the proposed at the market program. This all happened in less than a week after the court initially approved this equity offering. Later in the case Hertz proposed and the court approved authority to enter into a $1.65 billion DIP Loan. Thus, while regulatory review and issues generally do not apply to a debtor's effort to incur credit; alternate means of raising capital by a chapter 11 debtor from whatever source may remain subject to standard regulatory review.

One item of consideration from a regulatory compliance standard for a foreign lender is the Foreign Account Tax Compliance Act or "**FATCA**" (26 U.S.C. § 1471, et seq.). FATCA imposes a 30% gross withholding tax on certain amounts, including interest, paid by US borrowers to a foreign lender unless that lender (i) enters into an agreement with the IRS to identify and report specific information regarding US account holders and investors or (ii) is resident in a jurisdiction that has entered into an intergovernmental agreement with the United States related to sharing similar information. A list of the countries that have entered into applicable agreements with the United States is available from the U.S. Department of Treasury.[2]

The standard DIP Loan will have a provision that obligates the Lender to provide the Agent or the DIP Borrower with the appropriate paperwork to permit compliance with this tax withholding act.

6. Is court approval required for rescue finance or any security granted to the lender? If so, what considerations does the court take into account in approving or rejecting a proposal for rescue finance?

Court approval is generally required for a debtor to obtain credit in a bankruptcy case in the United States, with one exception, the debtor may incur unsecured

[1] https://home.treasury.gov/policy-issues/international/the-committee-on-foreign-investment-in-the-united-states-cfius.

[2] https://home.treasury.gov/policy-issues/tax-policy/foreign-account-tax-compliance-act.

trade debt in the ordinary course of operating its business. These ordinary course of business claims will be allowed as a cost of administration of the case and afforded a higher priority than unsecured claims that arose before the bankruptcy case was filed.

In determining whether to approve the debtor's request to obtain credit, the court will consider those items specifically articulated in the relevant statute, 11 U.S.C. § 364, depending on the type of credit sought, including focus on the disclosures required by Rule 4001, discussed in Question 4 above. The Bankruptcy Code generally requires a debtor to prove that it obtained the best available terms.

If the debtor seeks unsecured credit other than in the ordinary course of business, the court must conduct a hearing as is practicable based on the circumstances. If the proposed financing is from an arms'-length third party lender, the court often defers to the debtor's business judgment, meaning if the debtor's management is generally well informed and has appropriate advisors assisting it, i.e. attorneys, financial advisors, or investment bankers, the bankruptcy court likely will not second guess the terms of the proposed DIP Loan. As noted above in response to Question 3, if an insider is the proposed DIP Loan lender, the Court will not defer to the debtor's business judgment, but will apply heightened scrutiny to ensure the entire fairness of the DIP Loan to the debtor and its creditors.

If the debtor is not able to borrower money on an unsecured basis with an administrative priority, then the court may approve a DIP Loan that has a priority over other administrative expenses, or secured by a lien on property of the estate not already pledged to another lender, or secured by a lien junior to existing liens on another secured lender's collateral.

Finally, the court may authorize a DIP Loan that is secured by a senior or equal lien on property of the estate that has already been pledged to a lender only if the debtor cannot obtain credit otherwise and "adequate protection" is provided to the existing lender with a lien on property pledged to the new lender. These type of DIP Loans are referred to as "priming DIP Loans" or loans with "priming liens." The debtor as borrower has the burden of proof to demonstrate that "adequate protection" has been provided to an existing lender that is "primed."

"Adequate protection" itself is a term defined by statute and may be provided by periodic cash payments to the primed lender, a replacement lien or other relief other than an administrative priority claim that provides the primed lender with the "indubitable equivalent" of the value of the lender's interest in the property pledged to the new lender. The key aspect of adequate protection is that it is only available to the extent of the decrease in value of the primed lender's interest in its collateral. Typically, a borrower that wants to pursue a priming lien will offer adequate protection to the primed lender and seek consent based on the "adequate protection package" provided.

Absent consent to an adequate protection package, the existing secured lender may object to the proposed DIP Loan. If so, the debtor can still obtain the priming DIP Loan if the court approves it. To obtain that the approval, the debtor will need to show that there is sufficient other collateral or payments in cash to provide protection to the existing secured lender for the deterioration in the value of its interest in its collateral that will occur upon the debtor's pledge of such property to another lender. Often this will include evidence of enterprise value or value of collateral, like appraisals, expert testimony, any offers for the property made by a third party, or other indications of value. If the court determines from this evidence that the proposed adequate protection is sufficient, it can approve the DIP Loan over the existing secured lender's objection. Thus, while a contested priming DIP Loan is not ideal due to the execution risk and costs of fighting for it, it is possible and does provide an option for a debtor whose existing lenders do not consent to a new rescue finance package.

7. Is creditor or secured creditor approval required for rescue finance?

Generally, no, however, as noted in response to question 6 above, if the debtor proposes to prime an existing lender, then consent from that lender will increase the likelihood of approval of the DIP Loan. Additionally, under section 363 of the Bankruptcy Code, if any lender has a lien in cash or cash proceeds of collateral or dominion over bank accounts (cash collateral), then a debtor may not use that cash collateral without either the consent of the lender or if the court authorizes the proposed use after notice and a hearing. The court may authorize the use of cash collateral on an interim basis until a final hearing can be held if it appears at that interim hearing that the debtor is likely to prevail at a final hearing. At the final hearing, the court must determine whether the debtor has provided the lender who does not consent to the use of the cash collateral with adequate protection. The adequate protection analysis for cash collateral is similar to that described in response to Question 6 above.

Approval of unsecured creditors is not required; however, unsecured creditors are entitled to notice of any DIP Loan or proposed use of cash collateral and may object to approval of either. The Bankruptcy Code provides for an Official Creditors' Committee of Unsecured Creditors to be formed from the larger creditors in a chapter 11 case. In practice, this Official Committee is usually formed after the interim hearing on any DIP Loan or proposed cash collateral use. The role of this Committee in the DIP Loan process is described in response to question 8.

8. What role does a creditors' committee play in approving rescue finance (if any)?

The Creditors' Committee often serves as a check on DIP Loan terms as creditors often view that the debtor in need of funds lacks bargaining power to bargain for more favorable terms or to challenge a lender's liens.

The two most common issues a Committee will focus on is a higher "carve out" from the lender's collateral to pay the debtor's and committee's professional fees and obtaining the right to investigate and potentially challenge a pre-petition lender's claims and liens when that lender is the DIP Lender because the debtor usually stipulates to the extent, validity, perfection and priority of the lender's claims that arose before the bankruptcy was filed and grants broad releases. Numerous courts include in their Local Rules of Procedure that this challenge period should be included in any order approving a DIP Loan if the debtor does make those stipulations. For example, Delaware, New York, and Houston all generally provide that a final order should not contain provisions or findings of fact that bind the debtor's estate or other parties in interest with respect to the validity, perfection or amount of the secured creditor's prepetition lien or the waiver of claims against the secured creditor without first giving the official Committee time to challenge those findings or stipulations. In Delaware, an order granting a DIP Loan must provide at least 75 days from the entry of the initial interim order for the Committee to investigate these matters. In New York, the order must provide at least 60 days from the date of entry of the final order authorizing the use of cash collateral or the obtaining of credit (or such longer period as the Court orders for cause shown before the expiration of such period). And in Houston, the period is 60 days from the date the committee is formed. It is not unusual for this initial period to be included in the order and for the Committee and the Lender agree to extend the period to permit negotiations over any deficiencies discovered by the Committee to the lender's liens and claims.

This ability to challenge the pre-petition lender's claims and liens gives the Committee leverage that it can use to negotiate a larger carve out for an unsecured creditor distribution and payment of its professionals' advisor fees or to extend milestone dates proposed in the DIP Loan. Thus, while the Committee's consent is not formally required by the Bankruptcy Code, in practice, the Official Committee of Unsecured Creditors often has a significant role in negotiating modifications to the proposed DIP Loan proposed by the debtor and the DIP Lender.

9. What priority of repayment is available to unsecured rescue financiers, if any?

As noted in response to Question 6, a lender that provides ordinary course credit during the bankruptcy case is entitled to a priority as a cost of administration of the bankruptcy case and the same priority can be given to other than ordinary course of business unsecured lender (and the Bankruptcy Code provides that trade creditors that provide credit 20 days before the bankruptcy case is filed also receive this priority). Additionally, if a lender is not willing to provide unsecured credit with an administrative priority, which would be equal to all other costs of administration, then the court may grant it a "superpriority" administrative expense claim. A debtor can also propose a superpriority claim to a secured lender for any deficiency claim not paid from the collateral granted to secure the DIP Loan. This superpriority claim is senior to all other costs of administration, such as rent, trade credit, wages, and the fees and expenses of the debtor's chapter 11 professional advisors.

10. Can rescue finance be provided on a secured basis?

Yes, it can. As discussed in response to Question 6, a debtor can grant a secured claim and lien to a DIP Lender on any unencumbered assets. If the debtor's assets are all already subject to a lien, then the debtor can grant a DIP Lender a junior lien on those same assets. This occurs most frequently in situations where the value of the collateral exceeds the amount of the pre-petition debt. And, as mentioned, so long as it provides "adequate protection" to the existing secured lender, a debtor may grant a "priming lien" in favor of the DIP Lender, giving it superpriority secured status.

11. Can rescue finance be provided on a super-priority secured basis?

Yes, as noted in responses to Questions 6 and 10, a rescue financier can be given a senior, secured priming lien, as long as the pre-petition secured lenders that are primed by DIP Loan are given "adequate protection" in the form of cash payments or replacement liens, or some other "indubitable equivalent" of their existing lien.

The term "indubitable equivalent" comes from a 1935 legal decision by a well-known US jurist, the Honorable Learned Hand, who wrote in *In re Murel Holding Corp*., 75 F.2d 941, 942 (2d Cir. 1935), that the creditor's right to "get his money or at least the property" may be denied "only if the debtor provides a substitute of the most 'indubitable equivalence.' Such a substitute clearly must both compensate for present value and insure the safety of the principal." Another appellate court has stated that the term is broad but not unclear and that indubitable means "'not open to question or doubt,' while equivalent means one that is 'equal in force or amount' or 'equal in value[.]' The Code fixes the relevant 'value' as that of the collateral. Thus the 'indubitable equivalent' . . . is the unquestionable value of a lender's secured interest in the collateral. *In re Bryant,* 439 B.R. 724, 746 (Bankr. E.D. Ark. 2010) (citing cases; citations omitted). In short, the term indicates some provision of value to the lender that compensates if for loss to its collateral value. In practice, in the DIP Lending arena, the term "indubitable equivalence" is not often relied on as primed lenders usually receive cash payments or replacement liens.

12. Can priority or additional security be obtained for pre-petition financing?

Under some earlier DIP Loans, lenders sought to "cross-collateralize" their pre-petition debt by using post-filing collateral to secure both their prior loan and their new DIP Loan. The term "cross-collateralization," however, became disfavored. Some of the controversy surrounding cross-collateralization arises from an appellate decision that held these types of provisions were unlawful. See *Matter of Saybrook Mfg. Co., Inc.,* 963 F.3d 1490 (11th Cir. 1992) (holding that because "cross-collateralization is not explicitly authorized by the Bankruptcy Code and is contrary to the basic priority structure of the Code," it is "an impermissible means of obtaining post-petition financing."). Because cross-collateralization became disfavored, "roll-ups" became a viable option. A "rollup" is similar to cross-collateralization but instead of using pre- and post-petition collateral to secure both pre-and post-petition debt, roll-ups use a portion of the DIP Loan to pay, in whole or in part, prepetition secured debt. A roll-up where each draw under the DIP Loan is partially used to pay pre-petition debt and partially used to fund post-bankruptcy obligations is called a "creeping roll-up".

Roll-ups have become quite common under chapter 11, albeit often subject to objection by creditors. In 2020 about 37% of all DIP Loans contained a roll-up component, which accounted for 55% in value of the 2020 DIP Loan market, including, according to the Reorg Research DIP Database, two large rollups: Chesapeake Energy recorded the largest rollup through its $1.85 billion DIP revolving credit facility, of which $925 million was funded in the form of a roll-up of prepetition debt, followed by McDermott's DIP term loan, which contemplated a roll-up of $800 million of prepetition debt relative to total commitments under the DIP term loan of just over $2 billion.

Notwithstanding the controversy around cross-collateralized DIP Loans, many bankruptcy courts continue to approve them and in doing so will often consider various factors, like whether the pre-petition secured lender is over-secured. And if so, by how much and whether it remain over-secured or is its collateral is deteriorating. Bankruptcy courts also frequently want to see that the cross-collateralization can be unwound in the event that the relief later appears to have been improvidently granted.

As the 2020 market data set forth above demonstrates, courts frequently approve roll-ups, even over significant objection. The courts' determination of the propriety of a roll-up will often consider the same factors as for a cross-collateralized DIP Loan plus several other factors, such as whether the advantages of the DIP Loan justify the loss to the estate and the extent to which difficult "priming" issues would have to be addressed in the absence of a roll-up. The court may also be more sympathetic to a roll-up where the DIP Loan advances are used to repay a prepetition "emergency" liquidity facility secured by first priority liens on the same collateral, like the emergency loans discussed in response to Question 1.

13. Is security granted for rescue finance be automatically perfected, or is additional perfection required and, if so, what steps must be taken?

Yes, it is generally understood that a secured lien authorized by a bankruptcy court in a DIP Loan Order is automatically perfected. This is because bankruptcy law is federal and is supreme to state law under the United States Constitution so the bankruptcy court can simply order a perfected lien. Thus, issues of perfection are normally a matter of state law, requiring certain terms and actions, such as a security granting clause, a description of collateral, and the lender filing a form under the Uniform Commercial Code in the jurisdiction mandated by those provisions (e.g., often in the state in which the entity was formed). Because it is not certain that every party will respect the automatic perfection in the bankruptcy court's order authorizing the DIP Loan, lenders usually require a provision in that order that gives them the option to take any action to further perfect their lien if the lender elects to do so. Furthermore, perfection action should be taken by the DIP Lender to perfect its interest in any collateral that is subject to non-US laws and jurisdiction.

14. Is it common for the rescue finance provider to require milestones or other deliverables to be met, or to exercise control over the bankruptcy process?

Yes, is conventional / ordinary for the rescue finance provider to require business, disposition and legal milestones. The most common DIP Loan milestone is to require dates by which the DIP Loan is approved on both an interim and final basis. From there, the direction / strategy of the case will often determine the nature of the milestones. For example, if the plan is for the debtor to sell all its assets, then there may be milestones for entry of an order approving a bidding process and deadline for the auction and sale hearing approving the sale. If the debtor has borrowed the DIP Loan to support a restructuring, then the milestones may include a date by which a disclosure statement and plan of reorganization must be filed and dates by which those items should be considered and approved by the court and when the plan will become effective.

A DIP Lender can thus have significant influence over its borrower's bankruptcy case by imposing deadlines as a condition to advancing new money. To combat this influence, debtor's sometimes negotiate for a contractual "fiduciary out" that will allow them either to miss the deadline if that is in the best interest of the debtor or to seek an emergency hearing for cause to justify missing a milestone. The Official Committee of Unsecured Creditors will often be involved in negotiating and opposing milestones.

There are no provisions of the Bankruptcy Code or Procedural Rules that dictate proper time periods for milestones and what may be used in one jurisdiction as a matter of practice may be considered excessive or burdensome in another jurisdiction. As such, well-counseled lenders and their borrowers will consider the local practice before considering or proposing specific milestones. There can also be testimony before the court on what the proper timing may be for a given deadline. For example, in the sale context, the debtor may have its investment banker testify as to why the proposed deadlines are necessary and reasonable, while an objecting creditor, often the Official Committee of Unsecured Creditors, may have a financial advisor testify regarding why extending certain of the proposed milestones will create greater value for the debtor and its creditors.

15. Have there been any cases in which the rescue finance provisions have been analysed by the courts?

While there are daily examinations of the principles related to DIP Loans in the Bankruptcy Courts, there is little appellate court guidance on the issues and the United States Supreme Court has never addressed a DIP Loan issue, other than discussing when adequate protection is required when an existing secured lender is not able to foreclose on its collateral due to the stay imposed by the Bankruptcy Code. *See United Sav. Ass'n of Texas v. Timbers of Inwood Forest Assoc. Ltd.*, 484 U.S. 365 (1988).

The reason there are few published appellate decisions is that there is a special provision in the statute regarding DIP Loans that provides that if an appellate court reverses or modifies an order authorizing a DIP Loan it may not affect the validity of any debt incurred or any priority of any lien granted, as long as the DIP Lenders extended the credit in good faith and the appellant did not obtain a stay pending appeal, which stay can be difficult to obtain (e.g., it often requires the posting of a sizeable bond and demonstration of likelihood of success of the appeal). And this provision also precludes any collateral attack on DIP Loan claims and liens. Appellate courts consider this restriction on granting appellate relief as one that often moots out any appeal or restricts an appellate court's ability to even exercise jurisdiction over that appeal. Consequently, there are few court decisions from appellate courts and none from the Supreme Court on DIP Lending. Most of the decisions on DIP Lending are issued by the bankruptcy courts, many of which are the unpublished orders approving the loan. From these orders comes the practice of what terms and conditions are acceptable and which ones are too onerous and counsel in various jurisdictions are usually well-versed in what is acceptable and what is troublesome for the judges in any specific judicial district.

16. How has the market for rescue finance been impacted by the COVID19 pandemic?

The market for DIP Loans increased significantly from May to July 2020 as the Covid-19 pandemic had its impact on the economy. According to Reorg Research DIP Finance Database, DIP Loans by dollar amount increased 140% from the first quarter to the second quarter 2020 before falling 41% in the third quarter and dropping 84% in the fourth quarter. All together during 2020 there were a record-setting 57 chapter 11s filed by companies with more than $1 billion in debt and 182 by companies with over $100 million in debt, including final DIP Loans of $23.7 billion across all sectors and filing districts, 60% of which is attributable to chapter 11s filed during the three-month period of May through July. One item that helped prevent even more bankruptcy filings were various state and federal legislative and administrative directives designed to dampen the economic impact of the COVID-19 shut-downs, such as rules prohibiting evection or foreclosure and other government subsidies offered to businesses impacted by the pandemic.

For example, in response to COVID-19-induced economic fallout, US Congress passed the Coronavirus Aid, Relief, and Economic Security Act (CARES Act). See Coronavirus Aid, Relief, and Economic Security Act, Pub L. No. 116-136, 134 Stat. 281 (2020). One component of the CARES Act, was a provision that helped businesses make payroll, called the Payroll Protection Program (PPP), administered by the Small Business Administration in accordance with existing conditions and regulations under existing loan programs as modified by the CARES Act. The PPP provided businesses could apply for a loan to pay rent, payroll, and other specified expenses, and if the business used the funds for those specified purposes, the loan would revert to a grant and not have to be repaid. The Small Business Administration issued regulations for the PPP loans, one of which provided that if the borrower was a debtor in a chapter 11 process, it would not be eligible for a PPP loan. This issue lead to litigation in the bankruptcy courts regarding whether this rule was lawful or not. The only appellate court that addressed the issue held that the rule was reasonable and was not arbitrary or capricious and that as a result, the PPP loans were not available to a debtor in bankruptcy. *See USF Fed. Credit Union v. Gateway Radiology Consultants, P.A*. (In *re Gateway Radiology Consultants, P.A.*), 983 F.3d 1239 (11th Cir. 2020). Thus, these government-backed loans, convertible to grants, were available to help a business in distress avoid a chapter 11, but were not available to debtors in chapter 11 at the time of the loan application.

GROUP OF THIRTY-SIX

AlixPartners LLP
Allen & Overy LLP
Alvarez & Marsal
Baker McKenzie
BDO
Brown Rudnick LLP
Clayton Utz
Cleary Gottlieb Steen & Hamilton
Clifford Chance LLP
Conyers
Davis Polk & Wardwell LLP
De Brauw Blackstone Westbroek
Deloitte LLP
Dentons
DLA Piper
EY
Freshfields Bruckhaus Deringer LLP
FTI Consulting
Grant Thornton
Greenberg Traurig LLP
Harneys
Hogan Lovells
Houthoff
Interpath
Jones Day
Kalo
King & Wood Mallesons
Kirkland & Ellis LLP
Kroll
Linklaters LLP
Morgan Lewis & Bockius LLP
Norton Rose Fulbright
Pinheiro Neto Advogados
PwC
Quantuma
Rajah & Tann Asia
RSM
Shearman & Sterling LLP
Skadden, Arps, Slate, Meagher & Flom LLP
South Square
Sullivan & Cromwell LLP
Troutman Pepper
Weil, Gotshal & Manges LLP

MEMBER ASSOCIATIONS

American Bankruptcy Institute
Asociación Argentina de Estudios Sobre la Insolvencia
Asociación Uruguaya de Asesores en Insolvencia y Reestructuraciones Empresariales
Associação Portuguesa de Direito da Insolvência e Recuperação
Association of Business Recovery Professionals - R3
Association of Restructuring and Insolvency Experts (Channel Islands)
Australian Restructuring, Insolvency and Turnaround Association
Bankruptcy Law and Restructuring Research Centre, China University of Politics and Law
Business Recovery and Insolvency Practitioners Association of Nigeria
Business Recovery and Insolvency Practitioners Association of Sri Lanka
Business Recovery Professionals (Mauritius) Ltd
Canadian Association of Insolvency and Restructuring Professionals
Commercial Law League of America (Bankruptcy and Insolvency Section)
Especialistas de Concursos Mercantiles de Mexico
Finnish Insolvency Law Association
Ghana Association of Restructuring and Insolvency Advisors
Hong Kong Institute of Certified Public Accountants (Restructuring and Insolvency Faculty)
INSOL Europe
INSOL India
Insolvency Practitioners Association of Malaysia
Insolvency Practitioners Association of Singapore
Instituto Brasileiro de Estudos de Recuperação de Empresas
Instituto Iberoamericano de Derecho Concursal
Instituto Iberoamericano de Derecho Concursal – Capitulo Colombiano
International Association of Insurance Receivers
International Women's Insolvency and Restructuring Confederation
Japanese Federation of Insolvency Professionals
Korean Restructuring and Insolvency Practitioners Association
Law Council of Australia (Business Law Section)
Malaysian Institute of Accountants
Malaysian Institute of Certified Public Accountants
National Association of Federal Equity Receivers
NIVD – Neue Insolvenzverwaltervereinigung Deutschlands e.V.
Professional Association of Bankruptcy Administrators (Insolvency Practitioners' Professional Association)
Recovery and Insolvency Specialists Association (BVI) Ltd
Recovery and Insolvency Specialists Association (Cayman) Ltd
Restructuring and Insolvency Specialists Association (Bahamas)
Restructuring and Insolvency Specialists Association of Bermuda
Restructuring Insolvency & Turnaround Association of New Zealand
South African Restructuring and Insolvency Practitioners Association
Turnaround Management Association (INSOL Special Interest Group)
Turnaround Management Association Brasil (TMA Brasil)

INSOL INTERNATIONAL