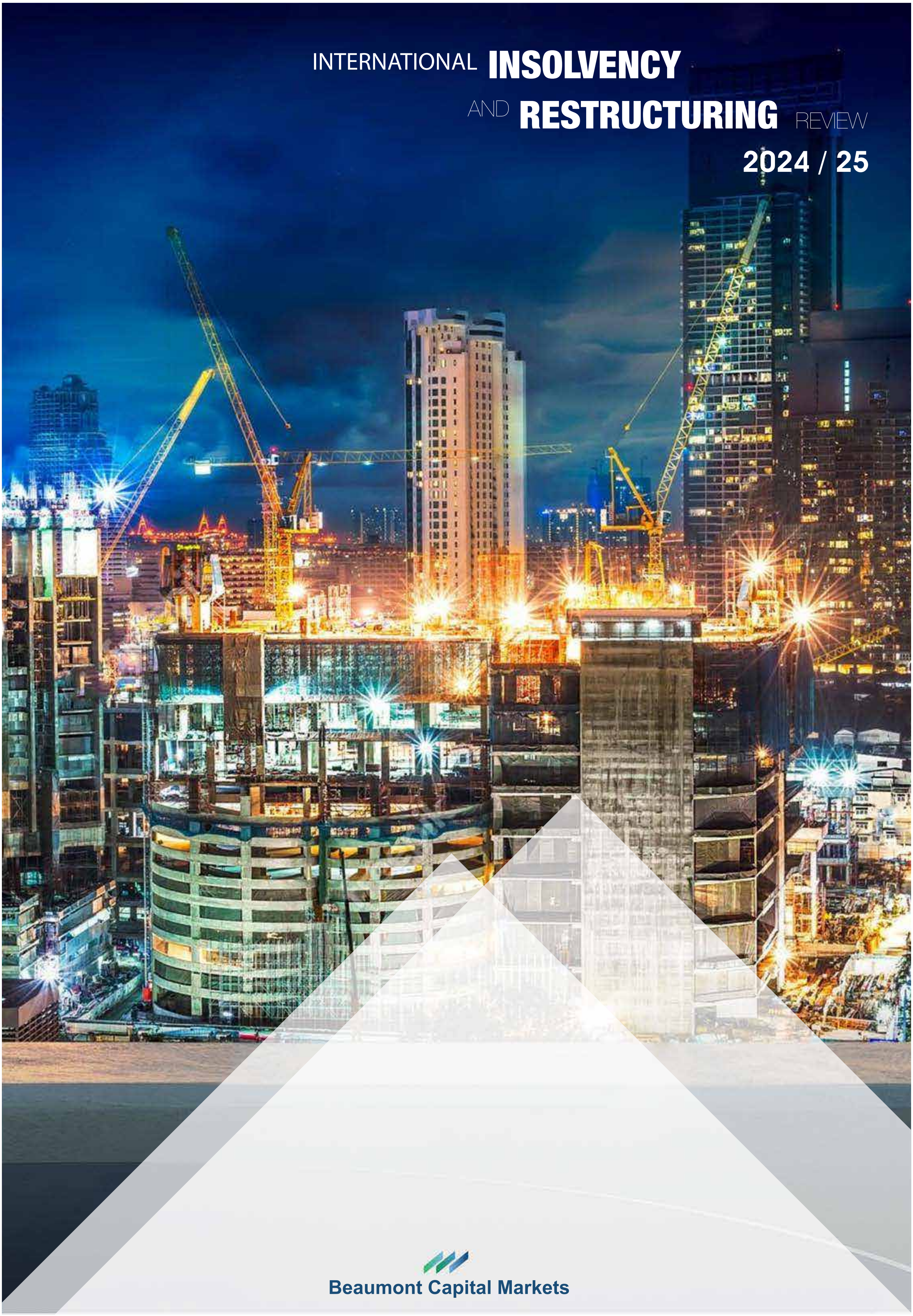
INTERNATIONAL INSOLVENCY AND RESTRUCTURING REVIEW

2024 / 25



Beaumont Capital Markets

The International Insolvency & Restructuring Review 2024/25

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FOREWORD

THE IMPORTANCE OF PREDICTABLE INSOLVENCY SYSTEMS

THE WORLD BANK

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BIO

Andres F. Martinez is a senior fi nancial sector specialist with the World Bank's Insolvency and Debt Resolution team, in the Finance, Competitiveness and Innovation ("FCI") Global Practice.

Andres has been a lawyer for over 20 years, has a master's degree in Corporate law and specialises in insolvency and creditors' rights. For over 12 years, Andrés has been advising countries from Latin America, Middle East, Europe and Asia on legal reforms with focus on debt recovery, insolvency laws and workout mechanisms.

Before joining the World Bank in 2008, Andres worked in private practice representing large creditors in debt recovery and insolvency cases.

Andres has published extensively, is an "INSOL Fellow", is a member of the International Insolvency Institute, a member of the international advisory committee of the Singapore Global Restructuring Initiative (SGRI), co-chairs the World Bank Insolvency Task Force and Chairs the World Bank and INSOL International Legislative and Regulatory Colloquium.

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THE IMPORTANCE OF PREDICTABLE INSOLVENCY SYSTEMS

Professionals engaged in restructuring and liquidation processes, at the same time, contribute indirectly to macroeconomic activities. Insolvency systems are crucial in distinguishing between viable companies that should be reorganised and preserved, and nonviable ones that should exit the market promptly, allowing for the swift reallocation of their assets to more productive activities[1]. The sum of these individual cases, as well as their publicity, contributes to foster the development of a predictable system. Predictable and efficient insolvency systems yield numerous benefits, such as improved access to and reduced costs of credit, the encouragement of entrepreneurship, the maintenance of financial stability, and the creation and preservation of better jobs, among others[2]. They also help the creation or strengthening of a system of distressed assets[3].

Predictability is often linked to the robustness of bankruptcy laws, but this is only part of the equation. For predictability to be achieved, several other elements must be in place. Firstly, all institutions involved must possess a degree of specialisation. This requirement extends beyond judges and insolvency practitioners to include advisors and the broader legal and business communities. Secondly, insolvency decisions must be publicly accessible to establish precedents. Even in jurisdictions where precedents are not legally binding, they contribute to the system's credibility and provide a reference on how similar cases are likely to be resolved in the future. The more predictable the system, the more likely financial distress will be resolved by means of out-of-court workouts[4]. Lastly, authorities must collect and disseminate insolvency data[5]. Globally, there is a lack of comprehensive data on critical aspects such as the value of assets and debts managed in reorganisation and liquidation proceedings, or the average duration from case initiation to plan approval or rejection, just to cite two examples. Large-scale data collection is essential to identify bottlenecks, guide legal reforms, and assess their impact. Legal systems are increasingly recognising the importance of this practice. For instance, the EU Directive on restructuring and insolvency, already transposed in the domestic legal system by all EU member countries, lists a series of data collection activities that countries will undertake on key aspects of insolvency procedures[6].

With insolvencies on the rise worldwide, the demand for predictable insolvency systems has intensified. In the Eurozone, bankruptcies in Q4 of 2023 reached their highest level since 2018[7], and in the US, commercial chapter 11 filings saw a 28 percent increase in April 2024[8]. As highlighted in our foreword article[9] last year, should non-performing loans (NPLs) increase significantly, several pillars need to be examined by authorities to help address high NPLs[10], including an environment that encourages workouts[11] as well as debt restructurings (including favourable or neutral tax treatment), protected creditors' rights, a legal environment conducive to NPL sales and, of course, efficient and predictable insolvency proceedings.

The World Bank Principles for Effective Insolvency and Creditor/Debtor Regimes and the UNCITRAL Legislative Guide on Insolvency Law have been recognised by the Financial Stability Board as representing the international consensus on best practices for evaluating and developing national insolvency regimes. To reap the benefits of robust insolvency regimes, it is imperative for more countries to adopt legal frameworks aligned with international best practices and to continue strengthening the institutions responsible for enforcing their laws, with the ultimate goal of establishing predictable insolvency systems.

1. Principles for Effective Insolvency and Creditor and Debtor Regimes (English). Washington, D.C. : World Bank Group. http://documents.worldbank.org/curated/en/391341619072648570/Principles-for-Effective-Insolvency-and-Creditor-and-Debtor-Regimes
2. World Bank Group. 2014. "Insolvency Reform for Credit, Entrepreneurship and Growth." Insolvency & Debt Resolution Viewpoint. World Bank, Washington, DC.
3. DARP—Creating Distressed Assets Markets – Lessons Learned Since the Global Financial Crisis and Opportunities for Investors in Emerging Markets Today. Available in: https://www.ifc.org/content/dam/ifc/doc/mgrt/201910-distressed-assets-recovery-program.pdf
4. A Toolkit for Corporate Workouts (English). Washington, D.C. : World Bank Group. http://documents.worldbank.org/curated/en/982181642007438817/A-Toolkit-for-Corporate-Workouts.
5. IMF Working Paper Legal Department "The Use of Data in Assessing and Designing Insolvency Systems." https://www.imf.org/en/Publications/WP/Issues/2019/02/04/The-Use-of-Data-in-Assessing-and-Designing-Insolvency-Systems-46549
6. Art. 29 of the Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019 on Restructuring and Insolvency https://eur-lex.europa.eu/eli/dir/2019/1023/oj
7. Compared to the previous quarter. Eurostat, 'Quarterly registrations of new businesses and declarations of bankruptcies – statistics'. Available at: https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Quarterly_registrations_of_new_businesses_and_declarations_of_bankruptcies_-_statistics#Quarterly_comparison_in_the_EU_and_euro_area
8. From April 2023 levels. American Bankruptcy Institute, 'Bankruptcy Statistics'. Available at: https://www.abi.org/newsroom/bankruptcy-statistics
9. https://beaumont-capitalmarkets.co.uk/featured_item/international-insolvency-and-restructuring-review-2023-24/
10. Dijkman, M., A. Martinez, V. Salomao, and K. Bauze. 2020. "COVID-19 and Non-Performing Loan Resolution in the Europe and Central Asia Region: Lessons Learned from the Global Financial Crisis for the Pandemic." Policy Note, December 2020, World Bank, Washington, DC. https://thedocs.worldbank.org/en/doc/460131608647127680-0130022020/original/FinSACCOVID19andNPLPolicyNoteDec2020.pdf .
11. Enterprise workouts as well as their enabling environment was the topic of the recent World Bank Insolvency & Creditor/Debtor Regimes ICR Task Force (May 2024).

BELGIUM

EVOLVING DYNAMICS OF INSOLVENCY AND RESTRUCTURING IN BELGIUM

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BIO

Charles-Albert Dumont de Chassart is a qualified Belgian attorney admitted to the Brussels Bar since 2006.

He has a strong experience in insolvency procedures (bankruptcy, liquidation, continuity of undertakings), business restructuring and corporate law. He acts on a regular basis for creditors, banks and companies in distress. He is regularly appointed as trustee and liquidator by the Undertaking Court of Brussels.

He is also an experienced litigator in commercial and corporate matters, white collar crimes and directors liability.

He has over 15 years of professional expertise in business restructuring and insolvency law: law on continuity of undertakings, collective negotiations with creditors, debts restructuring and haircuts, distressed acquisitions and transfers under supervision of the Court, bankruptcy and liquidations. He also assists in drafting commercial contracts, especially in the aviation sector.

He also acts in the context of the continuing responsibility of directors, in particular in case of distressed situations.

Charles holds a Master's degree from the Université catholique de Louvain and a Master of Laws in European Law from the University of Aberdeen. He also did an Erasmus in Universität Wien.

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Stéphanie Nachsem is a member of the Brussels Bar since 2021.

She practices business law with a special focus on litigation, companies restructuring and insolvency law.

She represents clients in commercial disputes and corporate litigation matters through court proceedings and alternative dispute resolution procedures such as arbitration and mediation. She also assists financially distressed companies as well as creditors and other stakeholders in restructuring negotiations and judicial reorganisation proceedings.

She holds a Master's degree in Business law from the University of Liège, during which she took part to the 28th Willem C. Vis International Commercial Arbitration Moot (Vis moot). In 2020, she did an exchange program at the University of Kobe (Japan) in International Business Law. She is a member of CEPANI40 since 2023.

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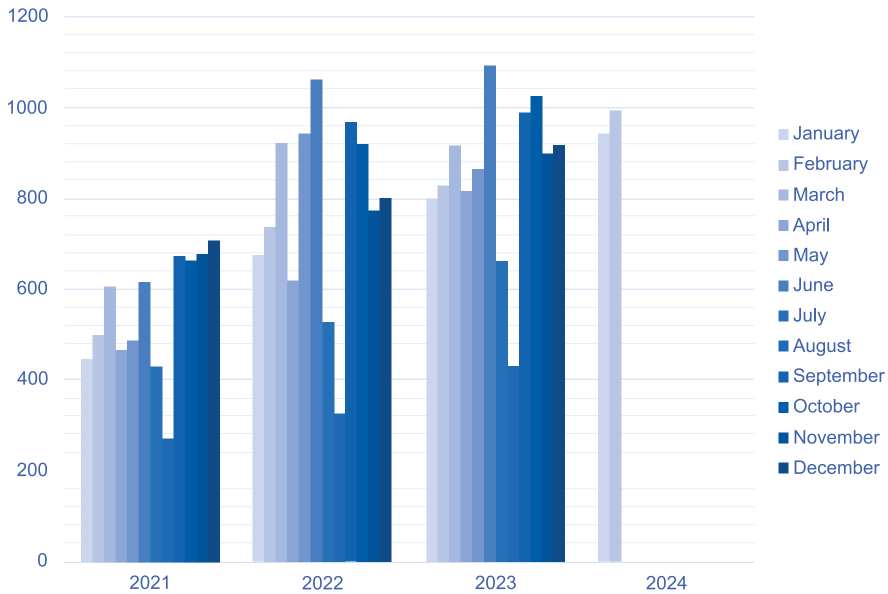
Introduction

Belgium's insolvency and restructuring framework has undergone significant revisions with the enactment of the Belgian Act of 7 June 2023, which aligns the country's laws with the EU Directive 2019/1023 on restructuring and insolvency.[1] Effective from 1 September 2023, these reforms introduce substantial changes aimed at enhancing flexibility, promoting value-maximising transfers, and safeguarding the interests of all stakeholders involved in insolvency proceedings.

In this article we delve into the latest bankruptcy figures in Belgium and the key amendments introduced by the Act, exploring the implications for debtors, creditors, investors, and stakeholders.

Latest trends and developments in Belgium

Latest figures



1. Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132 (Directive on restructuring and insolvency), Document 32019L1023, ELI: http://data.europa.eu/eli/dir/2019/1023/oj.

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In 2023, 10,243 companies were declared bankrupt in Belgium. This marks an 11% increase compared to 2022 (9,265 bankruptcies) and the third-highest result in the last decade.

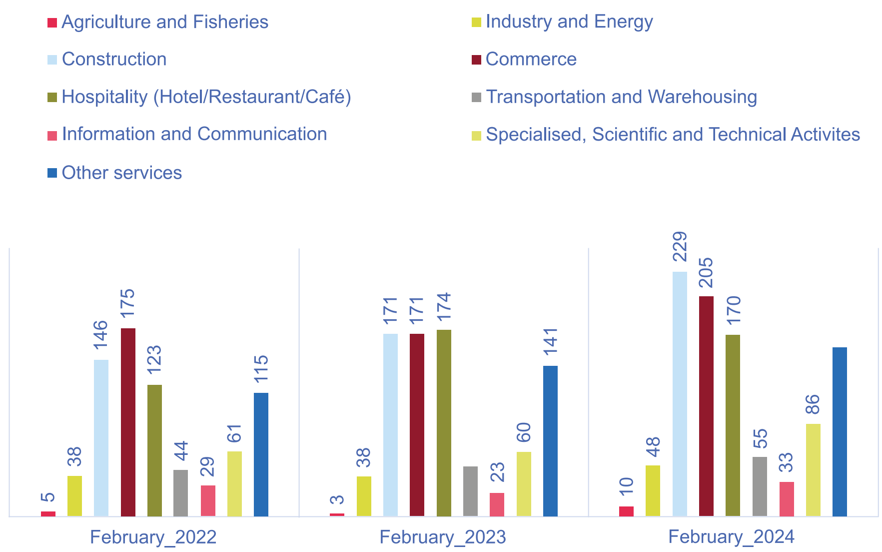
With 917 bankruptcies, December strongly confirms this annual trend.

These findings should however be nuanced according to the Belgian regions (Flemish Region, Walloon Region and Brussels-Capital Region). It's notable that the 5,908 bankruptcies recorded in the Flemish Region in 2023 is the highest total over the period 2014-2023, surpassing the previous record set at 5,287 in 2022. Although the number of bankruptcies in the Walloon Region increased by 21% compared to 2022, the 2,656 bankruptcies only represent the fourth highest result in the last decade. The Brussels-Capital Region recorded 1,679 bankruptcies, which is 5% lower than in 2022, putting 2023 among the lowest, behind 2020 and 2021.

Regarding the early trends of 2024, we've seen that the number of bankruptcies recorded in February 2024 exceeded both February 2023 (+20%) and February 2022 (+35.1%), reaching the highest value for the month since 2014 (931).[2]

Sectors concerned

With the exception of the information and communication sector, all sectors experienced an increase in the overall number of bankruptcies in 2023 compared to 2022. The Undertaking Courts pronounced 2,230 bankruptcies in construction and 648 bankruptcies in transportation and storage. These figures exceed the previous records established in 2014 for construction (1,977) and in 2022 for transportation and storage (577) by 12.8% and 12.3%, respectively.



2. StatBel, *Faillites mensuelles*, 15 March 2024, https://statbel.fgov.be/fr/themes/entreprises/faillites/faillites-mensuelles.

In February 2024, bankruptcies surged across various sectors compared to the previous year, with significant increases in six industries. Construction saw the highest number of bankruptcies in February 2024 (229) since the previous record in February, which stood at 174 bankruptcies in 2014.[3] The commercial sector also witnessed a notable increase in early 2024.

These increases could be attributed to the economy now grappling with the additional challenge of escalating energy and raw material costs, stemming from international tensions arising from conflicts in Ukraine and the Middle East. With high international tensions, 2024 could bring an even greater challenge for Belgian companies, particularly in certain sectors directly affected by these rising costs.

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Main reorganisation options under Belgian law: An overview

As a reminder, there were three primary options for companies facing financial distress to get protection against enforcement actions and bankruptcy filings by its creditors and to effectively continue its activities while restructuring them (ie the equivalent of Chapter 11 of the *United States Bankruptcy Code*):

- Either in the form of a settlement with one or more select creditors (amicable agreement/*accord amiable*/*minnelijk akkoord*), or;
- a comprehensive debt restructuring plan put to approval by all creditors that will be binding on all creditors (collective agreement/accord *collectif*/*collectief akkoord*), or;
- a transfer of all or part of its assets or activities to a third party and under court supervision (transfer under judicial authority/*transfert sous autorité de justice*/*overdracht onder gerechtelijk gezag*).

It was found that the success of judicial reorganisation procedures was very low. These procedures were found to be most effective for companies that are profitable or have a prospect of profitability with a good future business plan, but are faced with too much debt that is crippling them.

This low rate of success was also explained by the fact that these procedures impose a significant challenge on the company because of their public nature and the immediate loss of value and reputation as a result of the publications imposed by the opening of the judicial procedure. The moratorium period was granted to a company if the reorganisation procedure is published in the Belgian Official Gazette (*Moniteur Belge*/*Belgisch Staatsblad*) and in the Belgian register of companies (*Banque Carrefour des Entreprises*/*Kruispuntbank van Ondernemingen*). As a result, the debtor's financial problems are made public, often creating unrest among employees, suppliers and investors. They will adapt their behaviour accordingly and, for instance, demand pre-payment, stop providing credit, insist on additional security from suppliers and banks and loss of customers. In many cases, the mere initiation of such proceedings brings the company into serious disrepute.

3. StatBel, *Faillites mensuelles*, 15 March 2024, https://statbel.fgov.be/fr/themes/entreprises/faillites/faillites-mensuelles.

Reforms introduced by the Act of 7 June 2023: Enhancing confidentiality and efficiency

On 20 June 2019, the European Parliament adopted the EU Directive 2019/1023 on restructuring and insolvency[4] harmonising insolvency law at European level.

This directive was finally transposed into Belgian law by the Act of 7 June 2023 creating opportunities for a distress company and all its stakeholders by introducing more adaptable insolvency rules and advanced procedures tailored to the needs of today's restructuring market.

The new insolvency provisions are effective for insolvency proceedings initiated on or after 1 September 2023.

In this section, we will present four primary changes:

- the introduction of private reorganisation procedures
- private bankruptcy procedure
- the revision of the judicial transfer of activities to comply with the TUPE Directive[5]
- the classification of creditors into distinct categories for voting on restructuring plans in large companies

a. Private reorganisation proceedings: Mitigating negative publicity

Recognising the challenges posed by public proceedings, especially in terms of loss of value and reputation, the new law aims to foster a more conducive environment for restructuring by enhancing confidentiality. Notably, the Act of 7 June 2023 introduces a significant reform by introducing a permanent private procedure for the first two reorganisation options: amicable and collective agreements. This private procedure allows for discreet negotiations and decision-making, minimising the adverse effects of negative publicity on the debtor's business operations while safeguarding the interests of creditors and employees.

In practical terms, the fact that the procedure is private means that decisions are not published. The information contained in the register of the procedure is confidential and is only accessible to the debtor, the creditors involved in the procedure (the ones deliberately chosen by the debtor) and the members of the courts and tribunals in the performance of their duties (Art. XX.83/22 of the Belgian Code of Economic Law).

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> The EU Directive 2019/1023 on restructuring and insolvency was finally transposed into Belgian law by the Act of 7 June 2023. The new insolvency provisions are effective for insolvency proceedings initiated in Belgium on or after 1 September 2023.

The court will appoint a restructuring expert to oversee the process and help the debtor negotiate an amicable agreement or prepare a collective plan. As opposed to traditional public reorganisation proceedings, the debtor will not automatically enjoy protection against its creditors. The restructuring expert may, however, ask the court to grant an ad hoc moratorium to the debtor against specific creditors for a maximum of four months.

4. Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132 (Directive on restructuring and insolvency), Document 32019L1023, ELI: http://data.europa.eu/eli/dir/2019/1023/oj.
5. Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses.

The effectiveness of this measure remains to be assessed in practice. In our opinion, a judicial reorganisation procedure by amicable agreement will certainly be easier to manage in a confidential context, as the debtor can select the creditors they wish to involve in the amicable agreement. On the other hand, concluding a private collective agreement is expected to present greater challenges due to the involvement of all creditors. The debtor's true situation is then quickly known to everyone, which quickly triggers precautionary measures that reduce the chances of success of the reorganisation.

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> The new restructuring provisions now allow preparatory work to be carried out before the bankruptcy as such is declared.

b. Private bankruptcy preparation: Streamlining procedures

Until 1 September 2023, under the bankruptcy regime, the court first declared the bankruptcy, after which the trustee had the option to sell the business that could be saved. This process invariably had to be done in extreme urgency and by someone who did not know the business.

The sequence of events can now be inverted. The new restructuring provisions now allow preparatory work to be carried out before the bankruptcy as such is declared. Before the court formally declares bankruptcy, the debtor can request private preparations for the transfer of all or a portion of its assets and operations. This preparatory procedure is available to debtors who meet the legal criteria for bankruptcy, demonstrating that the liquidation of the business is facilitated and allows for the highest possible amount for creditors and employment can be preserved as much as possible.

This innovative legal reform aims to mitigate the adverse effects of public bankruptcy filings, which often lead to a significant loss of enterprise value for debtors. Moreover, it facilitates value-maximising transfers of assets or activities as a going concern at market value, in the interest of creditors and employees, by enabling debtors to discreetly prepare for bankruptcy under court supervision. The procedure is once again not subject to any publication, at least as far as the preparatory phase is concerned.

Under the preparatory phase, the court appoints a "future bankruptcy trustee," who will later be appointed as trustee at the time of the subsequent actual bankruptcy. The future bankruptcy trustee supervises the process, assesses the feasibility of the asset or activity transfer, and represent(s) creditor interests during negotiations with potential acquirers. Although the debtor retains control over the business during this phase, the future bankruptcy trustee ensures compliance with legal obligations and safeguards creditor interests. The procedure typically lasts up to 30 days, with the possibility of extension for another 30 days upon the debtor's request, providing adequate time to identify a suitable acquirer and negotiate terms. Upon completion of the preparatory phase, the prepared transfer of assets or activities will take effect promptly after the debtor's public declaration of bankruptcy, subject to court approval on the prepared transfer.

c. The judicial transfer of activities: Adhering to EU Directives

The Belgian reorganisation procedure by way of a business transfer under judicial authority has undergone significant revisions to align with the European TUPE Directive.[6] From 1 September 2023, it will be transformed into a liquidation procedure. This re-establishes the transferee's possibility to choose the employees it takes over together with the business. By realigning the procedure with EU directives and CJEU case law, Belgium seeks to enhance legal certainty for transferee-buyers by reinstating their choice of employees based on technical, economic, or organisational reasons while ensuring the fair treatment of employees.

Traditionally, the Belgian judicial reorganisation procedure by way of a business transfer under judicial authority (formerly known as GRP 3/PRJ 3) allowed the interested candidate-buyer to choose the employees it would take over together with the business, provided that this choice was based on technical, economic, or organisational reasons (Article XX.86, §3 of the Belgian Code of Economic Law and Collective Labour Agreement no. 102[7]). As a burdensome (social) cost structure is often, at least partly, the cause of a debtor's decreasing profitability and financial difficulties, the Belgian legislator considered this choice for the transferee to be crucial for this reorganisation procedure to be effective.

In 2019, the CJEU denounced this option for employee selection possibility in the renowned Plessers' case[8], ruling that it was contrary to the European TUPE Directive, which mandates the inclusion of all employees associated with the business. Despite the practical likelihood of the debtor undergoing liquidation or bankruptcy shortly after the business transfer, this reorganisation procedure was by law oriented towards the "preservation of activities." Consequently, according to the CJEU, it was not eligible for the exception under the TUPE Directive.

As a result, both the objective and the procedure underwent revisions through the Belgian Act of 7 June 2023 transposing the EU Directive (2019/1023) to adhere to the CJEU's case law. The transfer under judicial authority has been transformed into a liquidation procedure explicitly aimed at "the efficient liquidation of the legal entity or of the assets of the company" (new Art. XX.84 of the Belgian Code of Economic Law) and a new Art. XX.93/1 of the Belgian Code of Economic Law has been introduced requiring the courts to convene the debtor once the business transfer is court-approved and declare it either bankrupt or in liquidation. In addition, courts now have to validate the transferee's motivation, potentially resulting in a refusal of the transfer on such grounds. Furthermore, in cases of comparable takeover offers, the offer that preserves the highest number of employees will prevail by law.

> “The Belgian reorganisation procedure by way of a business transfer under judicial authority has undergone significant revisions to align with the European TUPE Directive.

d. Collective plan reorganisations: Empowering stakeholders

The new rules regarding collective restructuring plans in large companies represent a significant change from the previous framework. Under the previous system, which continues to apply by default to SMEs, all creditors voted together without classification.

6. Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses.
7. Collective Labour Agreement no. 102 of 5 October 2011 concerning the preservation of workers' rights in the event of a change of employer due to judicial reorganisation by transfer under judicial authority.
8. CJUE 16 May 2019, 'Plessers', C-509/17. See also before the CJEU ruling in the Dutch '*Smallsteps*' case (CJUE, 22 June 2017, 'Smallsteps', C-126/16) and later in the Dutch '*Heiploeg*' case (CJUE, 28 April 2022, 'Heiploeg', C-237/20).

The new provisions effective as from 1 September 2023 provide that, for large companies only, creditors must be divided into different "classes" based on their rights in a liquidation scenario or their rights under the proposed plan. Additionally, shareholders will now be part of a separate category and have the right to vote when their interests are affected by the plan. Moreover, approval of a restructuring plan now requires a majority vote in each category, with at least 50% in value of creditors (or shareholders) in favour of the plan, eliminating the need for a majority in number. Under exceptional circumstances, the court can confirm a plan even if not all categories approve it, provided that the plan is approved by the majority of classes, with at least one secured or higher-ranked class having voted in favour and meets specific criteria aimed at preventing dissenting categories from being manifestly disadvantaged. This change aims to preserve creditor interests and ensure fairness through the implementation of a "best interests of creditors" test, preventing dissenting creditors from seeing their situation worsen under the plan in contrast to a bankruptcy scenario.

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> The transformative reforms introduced by the Belgian Act of 7 June 2023 represent a significant milestone in the evolution of Belgium's insolvency and restructuring framework.

For a more comprehensive analysis, check the dedicated series of updates written by the DLA Piper Restructuring Team of Brussels, which delves into these legislative changes: Belgium's Insolvency Law Reform – Update Series | DLA Piper.

Conclusion: Navigating the evolving landscape

The transformative reforms introduced by the Belgian Act of 7 June 2023 represent a significant milestone in the evolution of Belgium's insolvency and restructuring framework. As the regulatory landscape continues to evolve, it becomes imperative for businesses to adapt and leverage these changes effectively.

Our Belgian Restructuring Team (Ranked Tier 1 for Insolvency and Restructuring in Belgium by the Legal 500 since 2015) comprises insolvency practitioners and lawyers with extensive experience in navigating the complexities of the evolving regulatory landscape. We offer comprehensive support tailored to meet the unique needs of each client and achieve their restructuring objectives.

DLA Piper, your partner for restructuring and insolvency

Having significant experience in advising clients on matters relating to insolvency, restructuring, litigation and asset recovery, our Belgian team offers top-notch advice on underperforming and distressed situations at public and private companies and our client base is broad - from debtors or lenders to government entities and distressed debt buyers and investors.

Together with our clients, we identify appropriate goals and solutions for the issues and competing interests which may act as obstacles to achieving these goals.

Tier 1
Insolvency and Restructuring
- Legal 500 EMEA since 2014

International Law Firm of the year
- Law.com 2020

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CYPRUS – RECENT DEVELOPMENTS AND EXPECTED FUTURE TRENDS

KPMG is a global organisation of independent professional services firms, dedicated to a broad range business recovery services including Insolvency, Asset Recovery, Restructuring and Debt Advisory, with an international focus and proven track record. KPMG's international footprint provides practical banking, restructuring, turnaround and insolvency experience across the business lifecycle.

KPMG in Cyprus provides a wide spectrum of specialised services, backed by years of accumulated international and local expertise. Our dedicated Restructuring and Debt Advisory team can assist on the adjacent services:

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Rennos has almost 30 years of experience in the financial and advisory fields respectively with a deep understanding of the lending and NPL sectors. He has been involved for over 20 years in the management of corporate and retail loans, both performing and distressed, as well as with distressed and onboarded real estate assets.

Since joining KPMG in Cyprus in 2016, Rennos has taken a key role in leading the fields of corporate financial restructurings and insolvency work, being a licensed Insolvency Practitioner (receiverships, liquidations, examinerships, corporate and personal schemes of arrangement), independent business reviews and lenders' due diligence for existing and new financing, the provision of debt advisory services to corporate clients and expert training to the financial and corporate sectors. Rennos has also been involved in various real estate market studies, real estate onboarding, options assessment and monetisation strategies.

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Elena started with KPMG in Cyprus in 2012. She has completed numerous engagements with clients in a number of industry sectors including financial services, retail, tourism & leisure and other sectors.

Elena has an extensive experience in the provision of financial restructuring services as she was involved in various projects including option analysis on the restructuring/ recovery strategy of major banks, independent Business Reviews on the financial performance of corporate clients, and review of Borrower Summaries at the request of financial institutions, providing an insight into the background, current position and recoverability of their NPL exposure.

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Athos joined KPMG in Cyprus in 2014. He has been involved in delivering various engagements to clients in a number of industry sectors including real estate, financial services, retail, tourism & leisure and other sectors.

Athos has a wide experience in the provision of debt advisory services, financial restructuring services and insolvency work. He has been involved in many projects including receiverships for trading and non-trading companies, Independent Business Reviews on the financial performance of corporate clients, options analysis on the restructuring/ recovery strategy of major banks and review of Borrower Summaries at the request of financial institutions, providing an insight into the background, current position and recoverability of their NPL exposure.

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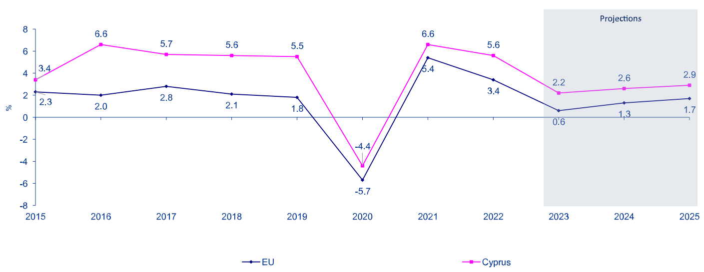
CYPRUS ECONOMY AT A GLANCE

The Republic of Cyprus, a member country of the European Union and the Eurozone, is a small, open and service-oriented economy.
Located at the crossroads of Europe, Middle East-Asia and Africa, Cyprus is considered to be a business gateway between the East and the West.

In the first half of 2023, the real GDP growth rate reached 2,2%.
It is expected that it will reach 2,2% for the full year compared to 0,6% in the EU.

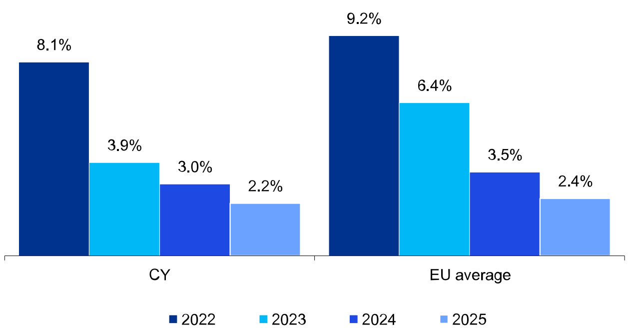
Real GDP Growth Rate



Source: Eurostat, European commission, KPMG analysis

After peaking in 2022, inflation is now slowing. It declined from 8,1% in 2022 to 3,9% in 2023, and is expected to further decline to 2,2% in 2025.

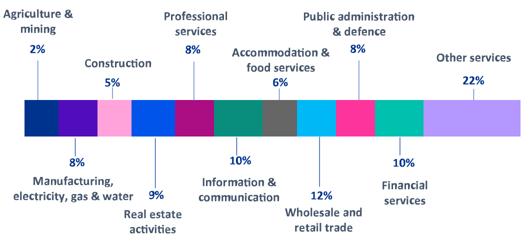
Inflation



Note: Figures for 2024 and 2025 are projections.
Source: European commission, KPMG analysis

The economy is dominated by services, which accounted for 85% of gross value added in 2022.

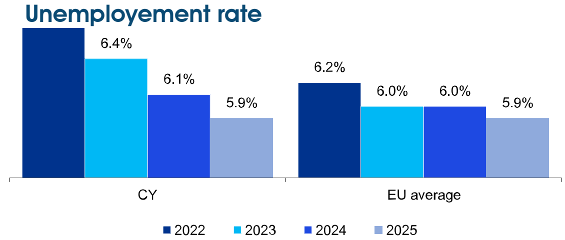
Gross value added (GVA) by sector in 2022 (% of total)



Note: Other services include transportation and storage, administrative and support service activities, education, human health and social work activities, activities of households as employers, arts, entertainment and recreation and other service activities.
Source: CyStat

The unemployment rate is expected to decline at a slow pace in the next few years.

Unemployement rate



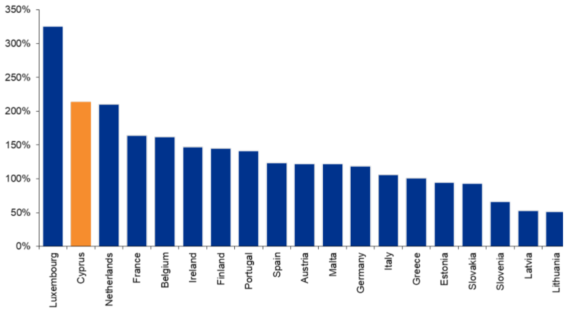
Note: Figures for 2023, 2024 and 2025 are projections.
Source: European commission, KPMG analysis

Note: Figures for 2023, 2024 and 2025 are projections.
Source: European commission, KPMG analysis

CYPRUS ECONOMY AT A GLANCE

By the end of 2022, the private debt has reached approximately 213% of GDP, falling from nearly 250% of GDP at the end of 2021.

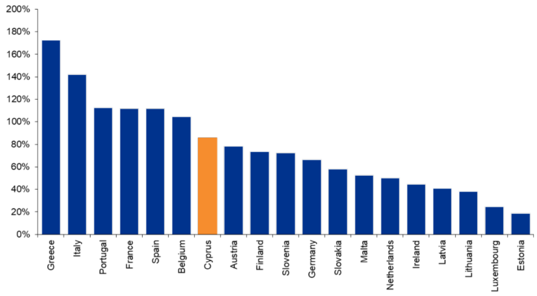
Private sector gross debt (% of GDP)



Source: Eurostat, KPMG analysis

In 2022, the public debt ratio fell by approximately 15% to 85,6% of GDP, and it is projected to continue on a downward path in the coming years driven by economic growth.

General government gross debt (% of GDP)



Source: Eurostat, KPMG analysis

FACILITATING INVESTMENTS IN CYPRUS

In an effort to modernise and minimise the administrative burden on businesses, Cyprus has recently undertaken several initiatives to improve current procedures. The ultimate goal is to facilitate strategic investments and have a positive impact on growth. Such initiatives include, inter alia:

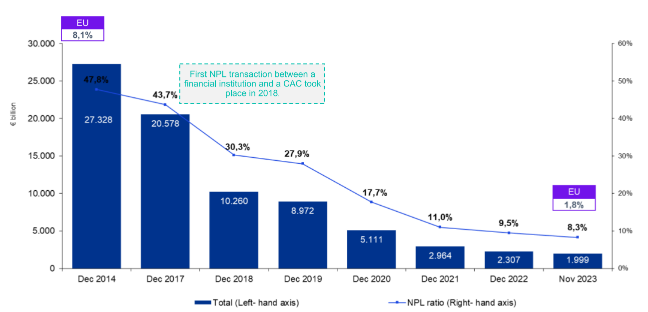
- Establishment of the Business Facilitation Unit (BFU) in January 2022, which facilitates a fast and efficient processing of requests from foreign companies regarding their establishment in Cyprus.
- Implementation of the "Facilitation of Strategic Development Projects" law of 2023 which aims to simplify and accelerate the licensing of procedures for strategic investments.
- Establishment of the "Hippodamus" System for the digitisation of the submission and examination of planning permits in June 2021 with further reforms in the relevant legislation expected in 2024 aiming into the simplification of the overall procedure especially for small scale construction projects.
- Invest Cyprus' tool "Project Bank" was introduced in 2021. This is an online tool that helps investors to identify market opportunities in Cyprus.

The primary market

The Cyprus banking sector has experienced a noteworthy drop in the Non-Performing Loan ("NPL") volumes. The NPL ratio within the local banking system has plummeted by 39.5 percentage points, resulting in a €25.3 billion reduction between 2014 (47.8%, €27.3 billion) and November 2023 (8.3%, €2.0 billion). However, the NPL ratio is still considerably higher than the EU average.

A key catalyst behind this reduction has been the purchase of approximately €17 billion, predominantly real estate-backed loans, by Credit Acquiring Companies (CACs). Additionally, organic means have contributed to NPL volumes reduction, such as write-offs, cash repayments, loans cures, and debt-to-asset swaps.

Non-Perfoming Loans



Note: EU average ECB data as of June 2023, CBC data for CY as of November 2023
Source: CBC, ECB

The establishment of CACs in Cyprus was introduced as a measure for tackling the high volumes of NPLs that burdened the island's financial system. The Sale of Credit Facilities and Related Matters Law which governs the establishment of such companies came into effect in 2015 allowing local banks to "catch a breath", by enabling the securitisation of NPLs.

10 CACs

5 Credit servicers

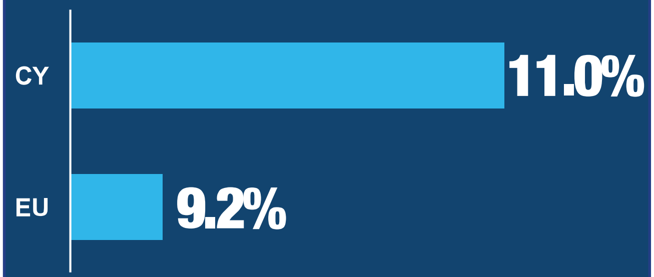
Recent data suggests a deceleration in this downward trend. Specifically, comparing the substantial reductions of €2.2 billion in 2021 and €0.7 billion in 2022 to the more modest €0.3 billion reduction up to November 2023, raises the question of whether the primary market is navigating a period of contraction.

Despite the significant strides by the island's systemic banks in reducing "bad loans" to meet EU targets, the latest reported results suggest that there is still a considerable journey ahead at an aggregate level. This is particularly evident in the Less Significant Institutions (LSIs). As per the Financial Stability report published by CBC in December 2023, the NPL ratio for the LSIs was approx. 25% as at 31 December 2022, much higher than the average local NPL ratio.

The primary market (continued)

Share of Stage 2 loans (June 2023)

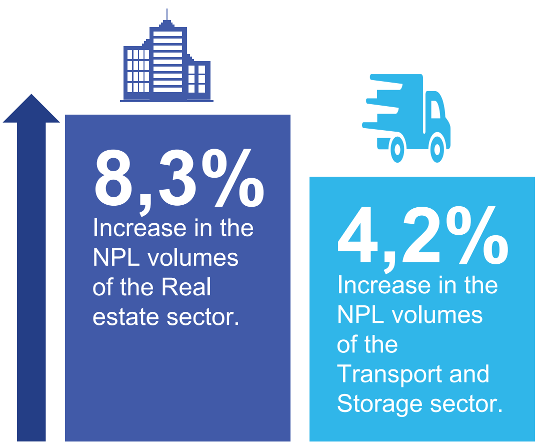
Cyprus remains one of the EU countries with the highest proportion of Stage 2 exposures.



Source: Post- Programme Surveillance Report, Cyprus, Autumn 2023, European Banking Authority 2023, KPMG Analysis

Adding a layer of concern, the European Banking Authority (EBA) warns that early signs of asset quality deterioration, due to geopolitical tensions, higher interest rates and inflationary pressures, are visible at an EU level.

According to the EBA, this is especially visible for sectors that are most vulnerable to economic downturns, such as real estate activities. In Cyprus, this is exemplified by an increase in the NPL volume of the Real Estate and Transport and Storage sectors between Q2 and Q3 2023.



Source: CBC, KPMG Analysis

Amid potential future challenges, ongoing developments in the primary market are expected to shape forthcoming sales and securitisations, albeit on a reduced scale. The changing dynamics within this shrinking primary market, already populated by prominent key players, have made it less appealing to new private equity investors.

Additionally, the prevailing uncertain macroeconomic landscape complicates NPL recoveries, with decreasing household disposable income and increasing operating costs and declining turnover for NFCs, creating a less favorable environment in the primary market.

Therefore, the trajectory of Cyprus' primary NPL market future depends significantly on smaller banks effectively deleveraging, a pivotal factor influencing its upcoming prospects.

The secondary market

Amidst a shift in the primary market dynamics, where bank disposals ease, it is expected that investors will increasingly opt for strategic offloading of NPL portions in the secondary market, which is poised for greater attention and activity.

Types of secondary market transactions

Re-entry of re-performing loans into the banking system

In a recent development in Cyprus with reference to the former approach, the State-Owned Cyprus Asset Management Company (Kedipes) announced an agreement with the Bank of Cyprus Public Company Limited in December 2023, involving the sale of a portfolio comprising serviced and re-performing loans which will effectively re-enter the banking system.

Re-sale of targeted/smaller portfolios to specialised acquirers

This trend extends across the European Union, where private equity investors, aligning with deleveraging strategies, seek to divest segments of their portfolios in the secondary market. A notable approach involves segmenting portfolios into specific themes or sectors, catering to specialised acquirers. A recent example is Intrum's Tethys Project in Greece, featuring the sale of hospitality-related NPLs to a consortium of investors, including a hotel and commercial real estate investment group in 2022.

Technology and data

The evolution of the market has significantly improved data availability, with a broader and better quality dataset now accessible

Regulatory measures, including the adoption of data templates like EBA's Implementing Technical Standards (ITS) for NPL transactions, along with other data initiatives, seek to improve the availability, quality, and comparability of NPL data.

In addition, the preparatory work leading up to these transactions, such as data remediation efforts, not only enhances the attractiveness of these opportunities but also guarantees transparent portfolio performance, providing investors with valuable insights into their potential returns.

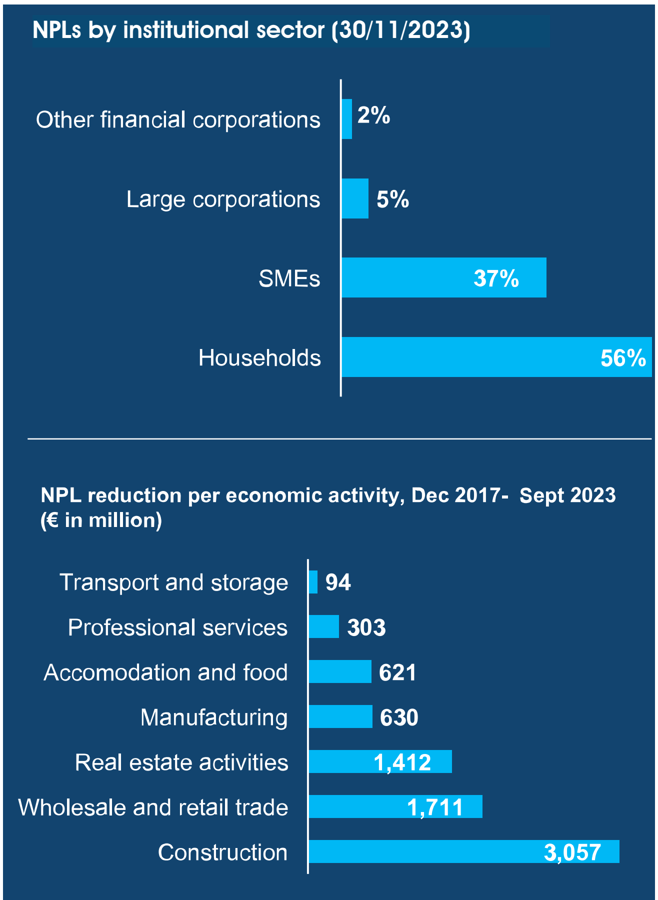
Use of sophisticated tools for achieving a deeper insight into portfolio performance

The use of sophisticated tools, such as Artificial Intelligence and Machine Learning, further enhances transparency in portfolios performance, offering a strategic advantage to investors navigating the dynamic landscape of the secondary market.

Secondary market opportunities in Cyprus

Analysing the data published by the CBC with respect to NPL volumes per economic activity, it is apparent that significant reductions have been consistently witnessed over the years within sectors such as real estate activities, construction, wholesale and retail trade. In a lesser extend this pattern is also visible for the manufacturing, accommodation & food service activities, professional, scientific & technical activities, and the transport & storage industries.

While acknowledging that these reductions stem from a combination of organic processes, and not solely from loan portfolio sales via the primary market, one can recognise the inherent opportunities awaiting exploration within the secondary market for these sectors. This nuanced perspective underscores the potential for strategic investments in the evolving landscape of NPLs, presenting a captivating prospect for forward-thinking investors.



Source: CBC, KPMG Analysis

ENHANCING JUDICIAL SYSTEM EVOLUTION

New Civil Procedure Rules

Over the years, the legal system of Cyprus has evidenced significant evolution, adapting both to internal and external legal changes and developments, especially to those arising from the European Union. The implementation of legal reforms was deemed essential to align Cypriot laws with the standards set by the EU.

Since September 1, 2023, there has been a transformational change in the way that civil cases are handled by the Cyprus District Courts. This change stems from the replacement of the previously in-force Civil Procedure Rules with an entirely new code, signifying a noteworthy reform within the Cypriot Legal System.

<u>Scope</u>

Overload of courts and delays

The overload of courts in Cyprus with a vast number of cases has led to prolonged delays in the adjudication of those cases, causing concerns about the effectiveness of the legal system, as well as the timely protection of citizens' rights.

The new Civil Procedure Rules aim at addressing the above issues. The introduction of clearer procedural guidelines could assist in eliminating ambiguity and potential misinterpretations that lead to delays. Furthermore, the enforcement of stricter timelines could ensure that cases are adjudicated within a shorter timeframe.

The formalisation of the pre-trial protocols process

The process of pre-trial protocols is being introduced. This is a mandatory procedure that one must adhere to before resorting to court. Specifically, a detailed demand letter shall be send to the other party, and if settlement of the demand is not achieved through negotiation efforts, only then can a legal action be initiated at court. If one fails to follow this procedure and/or does so inadequately, it may have consequences during the adjudication of the case.

ENHANCING JUDICIAL SYSTEM EVOLUTION

New Civil Procedure Rules (continued)

<u>Main changes compared to previews rules</u>

Pre-trial Protocols

According to the new regulations, as noted earlier, the procedure of pre-trial protocols must be followed before a legal action can be initiated at court. The newly assigned responsibilities of the parties and their legal representatives, along with the more 'active' role of the court are intended to induce the parties of legal proceedings to undertake significantly more actions. This is aimed at either facilitating the resolution of a claim at the early stages or ensuring a more thorough preparation of a case, which ultimately aims in expediting the judicial process.

Role of the court

Until recently, the court did not have an active role in case management. More specifically, the court's mission was to adjudicate the case and not to intervene in matters related to settlement efforts. With the new rules in place, the courts have an active role in encouraging settlement and compromise through assistance and settlement efforts.

Costs and fees

The new rules have introduced a more transparent fee structure for civil court cases. There are now clear guidelines for costs and provisions regarding the calculation of legal expenses. Additionally, judges have the authority to issue cost management orders to control the expenses of the judicial proceedings.

POTENTIAL TECHNOLOGICAL ADVANCEMENTS IN THE CYPRIOT JUDICIAL SYSTEM

In a rapidly evolving technological landscape, the promise of a highly efficient and backlog-free judicial reality looms large. This transformation holds particular significance in the context of the regulatory framework, especially in jurisdictions like Cyprus where specialised courts for corporate proceedings are lacking. The infusion of advanced technology into the legal system can bring about a profound shift, fostering harmonised proceedings and homogeneity in case handling.

The advantages stemming from the implementation of cutting-edge technology are far-reaching, extending beyond the scope of the following list:

- Automation of Document Processing: Streamlining the routing and filing of all incoming documents without manual intervention.
- Digitalisation of Physical Documents: The conversion of physical documents into digital formats, enhancing accessibility and reducing reliance on paper-based processes.
- Efficient Data Analysis: Harnessing the power of advanced technology to analyse vast datasets and extract information swiftly, thereby drastically increasing overall efficiency.
- Automated Legal Document Drafting: The creation of initial drafts of legal documents, revolutionising the time-consuming process of document preparation.

The adoption of such technological advancements, will open-up new possibilities for efficiency, transparency, and a more streamlined legal process.

ESG considerations shaping the local economy

While Cyprus is making progress in embracing the ESG principles, there are several challenges to overcome which may present great opportunities in the future. ESG is expected to shape the local economy in the future in several ways.

ESG Integration Services

- Consulting firms and service providers specialising in ESG integration are acquiring the essential expertise needed to offer assistance in reporting, compliance, and implementing sustainable business practices.
- Board members and employees will need to engage in training programmes to acquire specific skills and knowledge pertinent to the green transition and ESG.

Renewable Energy Projects

- During 2023, the proportion of solar energy in Cyprus, comprised only 15% of the overall electricity mix. To address the fossil fuel dependency of the Cypriot economy, a more ambitious and rapid deployment of renewables in energy production is essential.
- Cyprus has ample sunshine, making it well-suited for solar energy projects. Government incentives and the overall EU commitment for sustainable energy make this sector attractive with investments in solar farms, wind energy, and other renewable sources gaining traction.

Green Finance / Sustainable Banking

- Financial institutions that prioritise ESG considerations are gaining prominence. Sustainable banking, green bonds, and investment funds focused on ESG criteria are expected to emerge in the following years.
- ESG ratings are now integrated into the early stages of the loan transaction process. The evaluation of the presence, monitoring, functionality, and effectiveness of ESG policies is emerging as a new element in financial due diligence and affects the final terms agreed between lenders and borrowers.

ESG considerations shaping the local economy (continued)

Green Infrastructure Development	• Cyprus is grappling with challenges in meeting the EU greenhouse gas emission reduction obligations, particularly in the transport sector, which accounts for 40% of the final energy demand. Additionally, the country faces challenges in waste management, with per capita waste generation exceeding the EU average, and a recycling rate of 14.9% far lower than the EU average of 48,5% in 2021. • Investments in sustainable infrastructure, such as energy-efficient transportation and waste management systems, are crucial in addressing the above challenges.
Water Conservation and Management	• Establishing a sustainable water management system is crucial for Cyprus due to its high water stress levels, exacerbated by low precipitation and high temperatures. Water scarcity is a pressing issue, necessitating investments in water conservation technologies, desalination projects, and efficient irrigation systems.
Technology for Environmental Monitoring	• Environmental responsibility is expected to push the growth in demand for technologies that monitor and mitigate environmental impacts such as environmental monitoring solutions, sustainable agriculture technologies, and waste reduction innovations.
ESG-Compliant Real Estate	• Real estate developers and investors are expected to be involved in constructing or retrofitting buildings to meet ESG standards. Eco-friendly, energy-efficient buildings with sustainable features can attract environmentally conscious tenants and buyers.
Social Impact Investments	• Socially responsible investing involves supporting initiatives that contribute positively to society. Therefore, investments in companies engaged in education, healthcare, affordable housing, and community development are expected to occur.

Special thanks to our colleagues from Restructuring & Debt Advisory, KPMG Cyprus, for their contribution to the above publication: Andreas Papamichael, Ioanna Kanari, Vagia Dimoyianni, Dionysios Kollyriotis, Alexandros Demetriou and Nicolas Yiannakou.

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Andreas has two decades of experience in strategic operations and restructuring businesses. Combining that with his engineering background and mindset for solving the most complex of challenges, he takes pride in finding the best solutions for clients' biggest challenges.

His career prior to EY-Parthenon includes leading operations in mid-cap firms, and once in consulting, heading up restructuring services in Germany and Central Europe. He has also led value creation services across EMEIA, deploying private equity and operational restructuring techniques to identify and deliver performance improvement with a sharp focus on delivery of cash and earnings before interest, taxes, depreciation, and amortization (EBITDA) benefits.

Andreas holds a Diploma in Engineering and a Master's degree in Science (production management) from the Chalmers University of Technology, Sweden.

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Korbinian Gennies is a Partner at EY-Parthenon's Turnaround and Restructuring division. With more than 15 years professional experience, he is a proven expert in advising clients in challenging business environments in a wide variety of projects and across various industries. His areas of expertise include planning and executing large scale transformation programs, restructuring concepts and target operating models as well as optimizing SG&A costs.

Before joining EY-Parthenon in 2020, he held various interim management roles after starting his career in a restructuring consulting boutique in 2008.
Having worked both in consulting and management roles, Korbinian developed a pragmatic, solution-oriented and empathic approach, highly valued by his clients. Korbinian takes responsibility for EY-Parthenon's restructuring business in Frankfurt am Main and the greater Stuttgart area, focusing mainly on automotive, retail, machinery equipment industry and real estate sector.

Korbinian holds a Diploma in International Economics and Business Administration from the University of Innsbruck, Austria.

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BIO

Marius Herminghaus is a Senior Manager in the Turnaround and Restructuring practice at EY-Parthenon. With more than 8 years of professional experience, he provides clients with trusted leadership in urgent, complex and business-critical situations. He has expertise in planning and implementing complex transformation programs and new business models, as well as performance improvement and restructuring projects.

He is currently the EY Global Development Leader for Reshaping Results and Turnaround and Restructuring Strategy. In this role, he supports EY's global leadership in shaping and executing strategic priorities on a global scale. His responsibilities include driving initiatives across multiple geographies and industries, providing strategic guidance, facilitating organizational change, and monitoring performance metrics.

Prior to joining EY, Marius gained extensive experience in restructuring and transformation at a leading global management consulting firm. He holds a Master of Science in Business Administration from the University of Muenster in Germany.

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NAVIGATING FINANCIAL CHALLENGES IN A CHANGING ECONOMIC LANDSCAPE

In today's rapidly evolving business environment, business leaders are faced with the imperative of adopting transformative strategies to maintain their competitive edge. However, financing these ambitious initiatives has proven to be a formidable challenge. Once considered a reliable option, external financing has lost its luster, forcing companies to explore alternative funding options.

Moreover, the global economy is displaying signs of deceleration, which are raising concerns among both businesses and investors. According to projections by EY economists, global GDP grew by just 2.7% in 2023 – the slowest pace since 2001, excluding the global financial crisis and pandemic. The outlook for 2024 is only slightly higher at 2.9%. Most advanced economies are bracing for below-trend growth, with Europe facing localised recessions, the U.S. and Japan experiencing stagnant growth, and emerging markets on a path of moderate dynamism. Within this complex economic landscape, China faces notable downside risks, with weakening manufacturing and consumer activity taking a toll.[1]

> “
>
> Business leaders must shift their focus inward and explore internal performance improvement strategies to fund their business transformation.

In this context, the prevailing sentiment among central banks in advanced economies is to maintain a "higher for longer" stance. Central bankers are closely monitoring inflation risks and leaning toward overtightening to mitigate potential inflation persistence.

In the midst of this fast-paced and dynamic business landscape, business leaders are facing a crucial stage – the need to transform their business models to stay competitive, relevant and retain the ability to secure financing. However, traditional financing methods for these transformations, such as loans, have become increasingly costly and challenging to secure due to rising interest rates and market uncertainties. In addition, for businesses seeking to secure financing, lenders want to see ongoing transformational efforts that focus on profitability for the provision.

"Businesses not only require financing for their transformation but also need to transform to secure their financing."

To surmount these financial obstacles, business leaders must shift their focus inward and explore internal performance improvement strategies to fund their business transformation, growth, and risk mitigation strategies (e.g., increasing cybersecurity threads). By aligning their financial resources, business leaders can adeptly navigate the complexities of the current economic landscape and achieve transformative growth. Strategic approaches, such as optimising working capital and reassessing capital expenditures, provide viable pathways to success. Embracing these internal financing measures empowers businesses to not only thrive amidst economic challenges but also pave the way towards a prosperous and innovative future. In this quest for financial resilience, resourcefulness and adaptability become indispensable virtues. Escalating external financing costs require a thoughtful exploration of innovative solutions. By strategically leveraging internal resources, optimising financial processes, and forging collaborative partnerships, businesses can overcome challenges and seize growth opportunities, even in the middle of a challenging economic landscape.

1. Global economic outlook: finding balance in 2024 | EY - US

Navigating transformation in today's economic landscape: Unlocking internal financing strategies

As part of EY CEO Outlook Pulse survey, EY teams asked approximately 1,200 executives to identify the biggest risks to their business growth.[2] Therein, CEOs are driving business transformation in a challenging low-growth environment. Despite obstacles such as persistent inflation and higher interest rates, CEOs remain optimistic about their outlook. The main focus is on transforming the business portfolio, with 95% of CEOs planning to maintain or accelerate transformation in 2024. However, there are internal and external risks associated with this ambitious stance. Activist shareholder pressure has reached historic highs in 2023, prompting CEOs to more clearly articulate transformation plans. CEOs are proactively using internal levers, reallocating capital, and emphasizing core capabilities, with 48% seeking internal financing. Furthermore, 25% of CEOs are considering external financing, specifically through debt. Despite a positive outlook on debt market funding, CEOs remain cautious about the continued higher cost of money.

Embracing internal financing: Adapting to current market dynamics for transformative growth

In addition to the need for transformation, executives are also realising the shift in the financing landscape. Fears of higher input prices, inflation, and prolonged high interest rates have tightened the credit market, making external financing for transformation initiatives more challenging. Corporate refinancing and highly leveraged transactions, once readily funded, now encounter difficulties, evident in the decline of loan volumes in the U.S. over the last twelve months.[3] Also, the hopes of a short-term return to zero interest rate policies have been forlorn as interest rates are expected to stay higher for longer than for pre-rate-hike levels that started in March 2022.[4]

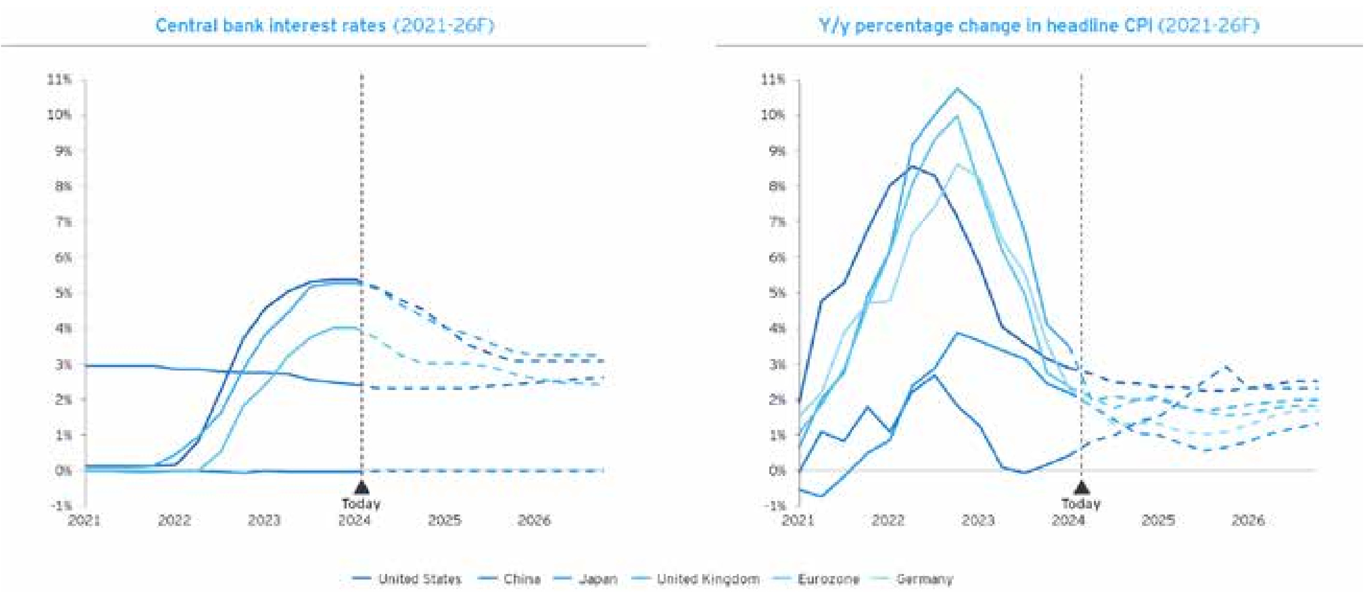


Figure 1: Interest rate and inflation projections[5]

2. CEO Outlook January 2024 on transformation strategy ; EY - Global; Majority of CEOs fear recession could be worse than the financial crisis | EY - Global
3. Q2 US Volume Wrap: Leveraged loan issuance weak again; refinancings remain in play - PitchBook
4. Interest Rate Statistics | U.S. Department of the Treasury
5. Oxford economics; EZB; Federal Reserve; Eurostat; EY analysis

In addition to higher interest rates, external financing continues to come under pressure[6]:

- **Monetary policy uncertainty and the rise in the cost of capital** are exacerbating the financing challenges facing business leaders. As higher input prices and inflation drive up the cost of capital, it becomes increasingly unattractive for businesses to finance their transformation efforts externally.
- **Current global economic uncertainties**, such as geopolitical tensions, trade wars, and re-shoring incentives, are having a significant impact on investor sentiment in equity markets. This volatility affects the availability of debt financing and can lead to increased risk aversion among investors.
- In the aftermath of the global financial crisis, regulators implemented **stricter lending standards** to protect the financial system. While these measures have increased stability, they have also made it more difficult for business leaders, particularly those with limited operating histories or non-traditional business models, to secure external financing. The higher bar for creditworthiness has further limited the availability of affordable external financing options.

As a result, businesses should refrain from postponing transformative actions to "wait out the storm" and instead focus on finding alternative financing solutions to propel their business transformation forward. By doing so, they can mitigate the potential impact of weaker macro trends on corporate earnings and balance sheets. In fact, the results from the latest EY CEO Outlook Pulse survey reveal a striking shift in executives' approaches, with only 5% (-32%pts. vs. Q1/2023) planning to pause or reduce transformational change, while the majority (95%) are either maintaining or accelerating their transformational efforts. Among this bold cohort, performance improvement emerges as the primary source of funding for their transformation initiatives.[7]

This shift in mindset reflects the evolving economic environment over the past 18 months. Previously, the focus was on growth at any cost, driven by the availability of extremely cheap money and elevated liquidity. However, the current paradigm places a premium on sustainable growth, where a clear path to profitability or value creation must be evident from the outset. Businesses are now realising the importance of securing funding through continuous performance improvement and internal resources, paving the way for a transformation built on a solid financial foundation.

Continuous performance improvement amidst external financing challenges: Improve to invest

As we usher in this new economic phase, it brings a unique set of challenges. Only businesses that can sustainably and efficiently operate while perpetually adjusting to future challenges will prosper. This scenario aptly illustrates the concept of "survival of the fittest." It's not necessarily the largest organizations that will prevail, but the most adaptable ones, those best suited to evolve and embrace change effectively, that will succeed. This requires business leaders to put the topic of continuous performance improvement as a priority on their agenda. Depending on their business model and industry sector, leaders have a variety of performance improvement levers at their disposal to navigate external financing challenges and internally finance their transformation. Approaching continuous performance improvement comprehensively and consistently, beyond merely optimising existing setups, allows businesses to effectively identify, detail, implement, and communicate the levers within their organization. This empowers them to leverage their strengths and respond appropriately to market conditions. By utilizing the right levers, financial resources are freed, enabling the redirection of capital towards high-priority strategic goals. Depending on the industry, these levers can include:

6. Global Financial Stability Report, April 2023: Safeguarding Financial Stability amid High Inflation and Geopolitical Risks (imf.org)
7. CEO Outlook January 2024 on transformation strategy | EY - Global ; Majority of CEOs fear recession could be worse than the financial crisis | EY - Global

Figure 2: Continuous performance improvement levers to improve to invest[8]

1. Optimising Cost of Goods Sold (COGS) for enhanced performance and gross margins

Businesses need to conduct comprehensive cost assessments and identify areas for optimisation. Implementing cost reduction measures involves cutting the cost of goods sold, fostering workforce flexibility (e.g., through short-term work arrangements, and implementing hiring freezes or terminating fixed-term contracts) but also production efficiency. By optimising labor costs and reducing temporary workers, business leaders can redirect resources towards their transformation initiatives, improving overall performance and margins. This step is essential in improving profitability and releasing capital for reinvestment into critical areas of business operation and transformation. Herein, strategic sourcing and vendor optimisation can significantly reduce the cost of raw materials and services procured – in the case of the automotive industry this can also secure and optimise the supply chain. It involves consolidating the vendor database, leveraging volume discounts, and improving vendor relations to ensure better terms and lower costs. Portfolio optimisation helps identify low-margin or non-core products for discontinuation, thereby lowering complexity and associated direct costs. Make-or-buy decisions allow businesses to assess if producing goods or services internally is cost-effective or if they should be sourced from external suppliers. This can lead to operational improvements, manufacturing cost reductions, and enhanced focus on core competencies. Lastly, footprint optimisation can help to achieve increased efficiency, shorter lead times, reduced costs, lower environmental impact, and a more competitive position in the market. All these levers can help improve gross margins, enabling leaders to allocate more resources toward strategic transformation. For example, the implementation of AI and automation technologies can dramatically increase production efficiencies, while optimisations of sales (pricing, claims, etc.) and salesforce productivity can offer additional potential.

8. How cost take out can enable a performance mindset | EY - Global

2. Streamlining structural cost for optimised net margins

Streamlining structural costs, and notably Selling, General and Administrative (SG&A) costs, is a critical step for businesses when financing their transformation. This process can improve efficiency, bolster profitability, and free up capital for growth and reinvestment in crucial aspects of operation. For example, operating model reviews can shed light on potential inefficiencies and overlapping roles, helping organizations identify areas for structural cost reduction. The implementation of AI and automation technologies can dramatically reduce manual administrative tasks, allowing leaders to reallocate resources towards innovation and strategic decision-making. Furthermore, standardization and harmonization of processes not only reduces expenses but also improves consistency and efficiency, fostering better collaboration and transparency. Lastly, business leaders should also focus on optimising cash and cash-equivalents by evaluating the possibility of tax optimisations and implementing prudent cost-saving measures such as travel bans and spend freezes. Redirecting funds towards essential items ensures business continuity and creates a cash buffer for transformation efforts. Through these levers, businesses can make significant strides in their transformation journey, financed by cost savings derived from a streamlined SG&A function.

3. Maximizing working capital efficiency and strategic CapEx

Efficient working capital management is crucial for internal financing. Businesses can generate cash through the reduction of inventory, which can be achieved by optimising supply chain strategies, logistics and sourcing models. In addition, selling slow-moving inventory can free up valuable capital. Finally, reducing outstanding invoices by implementing robust receivables collection processes enhances cash flow and provides the necessary funds for transformation initiatives. In addition, to maximize internal resources for financing transformation, businesses should evaluate existing projects and identify non-core low-priority investments and assets. By allocation of CapEx or disposal of non-core assets, businesses can make efficient use of their resources and free up additional cash for business transformation. Exploring alternative investment models, equipment sharing, or outsourcing certain functions, can also provide cost savings and flexibility, reducing the need for significant upfront capital expenditures.

“ Based on the project experience, it has been seen that executives are recognizing the urgency to implement continuous holistic performance improvement programs, citing overall cost reductions, as well as optimising working capital and capital expenditures as key priorities for their businesses.”

Achieving sustainable and transformative growth requires a customised and ongoing strategy for performance improvement that is tailored to each industry. By concentrating on enhancing gross margins and optimising SG&A, businesses can effectively manage complexity and operational overlap to unlock synergies. Figure 3 (overleaf) provides a practical example of this approach, highlighting the key performance improvement drivers across different industry sectors.

To implement these performance improvement levers, it is necessary to address operational, compliance, and capital investment challenges. Operational hurdles, such as lead times and inventory, require significant time and financial investments. The next set of obstacles are compliance and quality considerations, including testing and qualification, which ensure adherence to standards and regulations. The third category, capital investment, involves securing contracts, upskilling employees, and investing in technology for cost reduction.

	Automotive	Healthcare	Chemicals	Retail (non-food)	Real Estate (Developer)
1 AI, digitization & automation	●	●	●	●	●
2 Strategic sourcing & vendor optimization	●	●	●		●
3 Portfolio optimization		●	●	●	
4 Standardization & harmonization		●		●	●
5 Operating model review	●	●		●	
6 Footprint optimization	●		●		
7 Make vs. buy					●
8 R&D efficiency			●		
9 Sales excellence	●				●
10 SKU rationalization				●	
11 Delivery & returns optimization					●

Gross margin · Gross margin / SG&A · SG&A

Figure 3: Exemplary key performance improvement levers of improve to invest concepts by industry sector

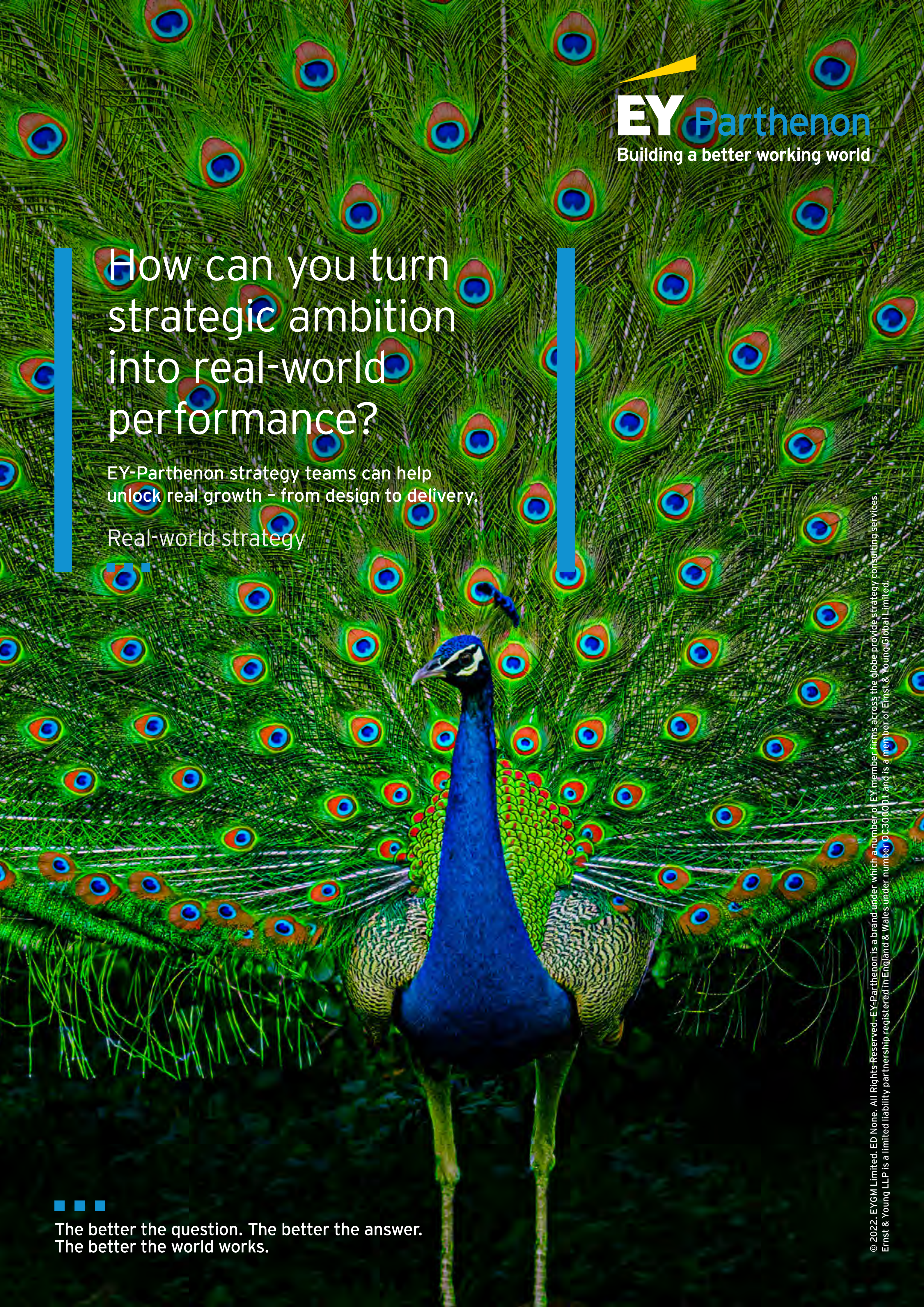
Considering these barriers, companies are recognizing the central role of operating model design in financing transformation initiatives. By strategically structuring and optimising operating models, companies can achieve cost savings, revenue growth, and improved financial performance. This, in turn, strengthens their ability to finance transformation projects. In addition to operational streamlining, redesigning the business model promotes a culture of innovation and adaptability that is crucial for managing the complexity of today's business landscape.

"Operating model redesign is not merely a blueprint but serves as the financial guide to transformation. Each strategic adjustment becomes a means of exchange, unlocking resources to fuel the journey towards financing the future."

It requires careful planning, a commitment to change, and strategic resource investment. Key strategies include transparent communication, collaborative data sharing, evidence-based decision-making, and coordinated incentives among stakeholders. These efforts align objectives, provide uniform data access, and foster successful and continuous performance improvement. By prioritizing these factors, business leaders can enhance their potential for sustainable, long-term cost reductions.

Conclusion: Empowering transformation with improve to invest concepts

In conclusion, with high interest rates posing challenges in external financing, business leaders face the imperative of implementing improve to invest concepts containing a holistic package of continuous performance improvement measures tailored to the business situation. With these internal performance improvement levers, leaders can execute strategic cost reductions, efficient working capital management, and optimised cash resources to unlock growth potential and foster resilience in the global economy. Success lies in effectively managing complexity and adopting a holistic internal transformation strategy, securing a competitive edge in the market both now and in the future.



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GERMANY
KEY DEVELOPMENTS AND LATEST TRENDS IN GERMANY

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Julia is a Senior Associate in the Frankfurt Banking team. She has particular experience in syndicated lending and acquisition finance. Her current focus is on restructuring and insolvency, where she specialises in pre-insolvency restructuring proceedings.

As a knowledge management lawyer, she monitors key legal developments to ensure that the firm and its clients remain informed and prepared for changes in the legal landscape. She creates and maintains up-to date precedents and streamlines access to critical information and precedents. Julia develops and delivers training to improve understanding of complex legal processes and prepares workshops and publications that enhance the firm's reputation as a thought leader.

She is responsible for integrating innovative tools into the firm's practice, implementing legal tech solutions that enhance the firm's service delivery and client engagement.

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Market overview

When talking about the economy, the mood tends to be subdued these days in Germany. Economic output kept shrinking slightly in 2023. Entrepreneurs must deal with uncertainties resulting from geopolitical risks, price increases for energy and raw materials, rising transport costs and delays in supply chains. The current budget crisis and the shortage of skilled labour, both of which play a big role in Germany, are also contributing factors. The loss of purchasing power due to high inflation (albeit slightly lower at the end of the year) and the resulting increase in interest rates are weighing on consumption and investment. Industrial production has continued to decline.

> "it needs to be pointed out that Germany has not been hit by the widely feared "insolvency tsunami".

Some sectors, such as retail, construction and real estate are particularly affected. Those suffering from a shortage of skilled workers, such as healthcare, or those accounting for a high energy consumption, such as chemicals, are increasingly under distress.

Of course, the fact that government aid, provided during the coronavirus pandemic, has expired by now, also plays a major role.

All of this leads to companies having to deal with increased pressure on German businesses.

It is of no surprise therefore that the topic of reorganisation and restructuring is back on the agenda in the board meetings of many companies.

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Market Trends

Insolvencies

Nevertheless, it needs to be pointed out that Germany has not been hit by the widely feared "insolvency tsunami". Instead, we are still seeing a normalisation of insolvency activity compared to the situation before the coronavirus pandemic. At the end of 2023, corporate insolvencies were still just below the pre-pandemic level in 2019.

However, what changed in 2023 is that we were starting to see an increase in insolvencies also among mid-cap and larger companies. For those with more than 250 employees, the number of insolvencies in 2023 was 50 per cent higher than in 2022.

The economic crisis affects almost all sectors, but some are being hit particularly hard by formal insolvencies. Last year, these were textile companies and fashion retailers, automotive suppliers, companies from the mechanical engineering and metal industries and companies from the construction sector.

Several companies in real estate, especially project developers, had to file for insolvency. Trade bottlenecks and a vast increase in material costs led to construction stopping and late payments. Together with high leverage and high interest rates, this resulted in a massive increase in insolvencies in this sector.

The list can be continued with hospitals. After almost 40 insolvencies in 2023, this figure is expected to double in 2024 due to the shortage of skilled labour and the foreseeable sharp rise in personnel costs.

A further overall increase in the number of insolvencies can be expected.

But this does not mean that the companies concerned will necessarily go into liquidation and disappear from the market forever. The German insolvency process comprises a toolbox for court-based restructurings as well as for compulsory liquidations.

Where restructuring is still an option in the event of insolvency, German law offers two potential routes: (i) the so-called "insolvency plan" as a court driven and well tested way to restructure and thus free the company from its predicament or (ii) a "reorganisation by transfer" based on an asset deal in which the assets relevant to the business are sold to an investor, while the existing liabilities remain with the insolvent company which will dissolve after the completion of the insolvency process.

Whenever an insolvency process attempts to achieve a restructuring, debtor-in-possession (or the German equivalent, self-administration) is typically the chosen procedural framework. In this case, the authority to manage the company is not transferred to an insolvency administrator when insolvency proceedings are commenced. The management must act in the best interests of the creditors and is subject to the supervision of a custodian but retains the ability to manage the restructuring / sales process and basically keeps hold of the reins.

As contracts cannot be terminated under German pre-insolvency restructuring plan proceedings (please see below with regards to these), an insolvency might sometimes be a preferred option for a fresh start of a business while escaping from the financial or operative burden of operative contracts. From a shareholder point of view, an insolvency process as restructuring process needs to be carefully considered and evaluated. Shareholders lose their influence and potential direction rights because of the shift in duties that applies upon filing for insolvency which requires the management to act in the best interest of creditors.

An interesting trend is the combination of insolvency and preventative proceedings. We have seen a combination of proceedings in which the financial restructuring of the parent company was carried out with the help of a restructuring plan and the operational business of the subsidiary was restructured with the help of an insolvency plan. It will be interesting to observe the combination of different types of proceedings, both from the national and international toolkit, in the coming year.

Restructuring plan proceedings

In addition to the insolvency plan, German law offers a pre-insolvency restructuring procedure under the so-called "StaRUG". Here, the company is restructured with a restructuring plan developed by the debtor itself.

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>
> In addition to the insolvency plan, German law offers a pre-insolvency restructuring procedure under the so-called "StaRUG".

The StaRUG procedure was launched in Germany at the beginning of 2021 at a time when the number of restructuring cases in Germany was at a historic low. That resulted in a limited number of situations that would have been suitable for the use of a StaRUG. Since then, however, the procedure has been gaining momentum. Twice as many companies used it last year than in the previous year. The fact that the procedure is now being used more frequently, also by larger companies, is a positive development. Court decisions confirming or rejecting restructuring plans are gradually reducing legal uncertainties.

Restructurings in a national context

So far, the German restructuring plan under the StaRUG has primarily been in demand for transactions in a purely domestic German law context, mainly for the restructuring of bonds (*Schuldverschreibungen*) and promissory loan notes (*Schuldscheindarlehen*).

Prior to StaRUG, bonds were restructured solely under the German Bond Act (*Schuldverschreibungsgesetz*), which provides for a simple and efficient procedure. This is still a good option. But in a restructuring under the German Bond Act, each bond must be restructured separately. This is where the German restructuring plan has come into play. It can be designed much more comprehensively by looking at the capital structure of the company as a whole. All bonds, loans and equity may be restructured in one procedure. At the same time, the StaRUG enables a "partial-collective" restructuring. This means that only certain creditors may be included in the restructuring, and it is possible to undergo a financial restructuring only. This is where restructuring plan proceedings differ from insolvency plan proceedings.

> "
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> We are still seeing a desire of debtors, as well as creditors, to head to the UK for restructurings where possible.

Restructurings in an international context

The German restructuring plan has so far only been used rarely in international restructurings. In international comparison, it is exposed to strong competition, particularly from the UK, and enjoys rather limited trust outside Germany. One of the main reasons seem to be a lack of trust in the predictability of the StaRUG process and the decision making of the competent courts. In addition, the fact that the court language is German and related restructuring documents that are submitted to the restructuring court are generally to be in the German language makes the process less attractive for international creditors.

We are still seeing a desire of debtors, as well as creditors, to head to the UK for restructurings where possible. Various techniques are used to establish jurisdiction, such as changing the governing law and jurisdiction of the debt documents, relocating the companies' centre of main interest, or the subsequent integration of English companies into existing financing arrangements. In this context, we expect to see an increasing number of untested legal issues concerning both the German and English restructuring plan in the coming years.

Advising in international restructurings, it is exciting for us to see the interplay of the various restructuring tools in different jurisdictions and to work out how to combine them in the best possible way.

Restructuring trends

"Amend and extend" instead of "haicut"

In the past year, financiers and financed companies focussed on creating flexibility for existing financings through "amend & extend" transactions. The aim here was primarily to avoid harsh interventions, such as debt waivers, and agree on maturity extensions to be then able to wait and exploit the chances for a recovery of external market conditions in the coming years.

Exclusion of creditor minorities

We are seeing an increasing willingness to negotiate solutions involving the exclusion of minority creditors and to implement these even against their will or without their involvement. This is where the various pre-insolvency restructuring procedures available nationally and internationally come into play. The possibility of outvoting entire creditor groups under certain conditions by means of a "cross class cram down" is available under English, German and, for example, Dutch procedural laws. The question of majority ratios within financing structures as a means of asserting interests is therefore becoming increasingly relevant for financing creditors.

What about consensual solutions?

We are also observing that where stakeholders used to try to reach a consensus for as long as possible in a restructuring, they are now quicker to enter into formal restructuring plan proceedings. Most likely there is an elaborate restructuring plan in the drawer as a "Plan B" right from the start of each restructuring. In many cases this does not lead to the wind shifting in the direction of a consensual agreement.

Alternative financiers, such as private debt funds, are still playing an increasingly important role in a restructuring scenario alongside traditional lenders such as banks. Banks do have stricter requirements now and demand more collateral when they are asked to provide new money. This is where alternative financiers come into play and may create a high dynamic with a view on negotiating and defending creditors' interests.

Legal Developments

Minority shareholding privilege

German insolvency law stipulates that in the event of the insolvency of a company, any claims for the repayment of shareholder loans are subordinated to the claims of the other creditors.

Shareholder loans repaid in the last year, and collateral provided for the benefit of the shareholders in the last 10 years prior to filing for insolvency, are subject to clawback risk.

This is fundamentally problematic for shareholders who wish to participate in the rescue of their business with a crisis-related financing. But German insolvency law provides for exceptions. One of these is known as the "Kleinbeteiligungsprivileg". The subordination rules do not apply to non-managing shareholders who hold an equity stake of 10 per cent or less in the company.

It is regrettable that at the beginning of last year, the Federal Court of Justice set a limitation for this exception in the context of so called "coordinated financings" that makes it more difficult for shareholder consortia to invoke the protection of a minority shareholding. Shareholders who coordinate their activities as part of a financing arrangement and act as a consortium in this respect will be denied access to the "Kleinbeteiligungsprivileg" because it is assumed that they exercise "entrepreneurial responsibility going beyond their respective nominal share in the company".

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> Recent case law creates a more difficult environment for financial institutions that are professionally engaged in syndicated financing as well as stock trading and related transactions.

It is questionable whether this assessment is helpful when it comes to motivating minority shareholders to participate in a restructuring.

Moreover, the recent case law creates a more difficult environment for financial institutions that are professionally engaged in syndicated financing as well as stock trading and related transactions.

Shareholder resolution required

Shareholders might, however, at one point have effective leverage in German restructuring plan proceedings. This is at least if the debtor is organised in the form of a limited liability company ("GmbH"). This leverage lies in the question of whether a shareholder resolution is needed for the notification of a restructuring matter to the restructuring court (and the commencement and feasibility of the proceedings). The question has not yet been fully clarified. All we currently have are contradictory decisions by German local and regional courts, which, roughly speaking, answer the question in the negative regarding a stock corporation ("AG") and in the affirmative regarding a GmbH.

> "
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> Expectations for German economic growth in 2024 have been reduced further and stood at 0.3 per cent in February 2024.

Even if the different treatment of GmbHs and AGs is based on differences in company law, it appears impractical. In addition, the fact that this unresolved legal issue could potentially result in liability risks for managing directors is likely to play a role in future restructurings.

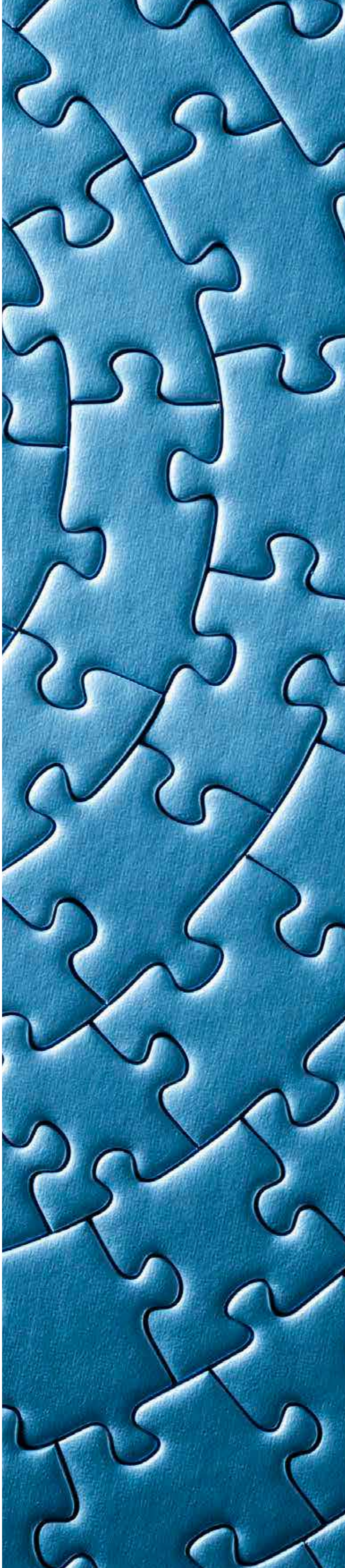
German restructuring courts tasked with deciding this matter in the future will not be bound by these decisions. Hence, it is hoped that the position for a GmbH will be aligned with the position for an AG – i.e., the admissibility and feasibility of plan proceedings will not be dependent on obtaining shareholders' consent. Anything else would run contrary to the objective of the German restructuring plan as a quick, preventative procedure under which shareholder rights can be impaired even, under certain circumstances, against their will.
The outcome of that legal question might play a significant role in how Germany will compete against preventive restructuring regimes in other jurisdictions.

Outlook

Expectations for German economic growth in 2024 have been reduced further and stood at 0.3 per cent in February 2024. A slight improvement of 1.2 per cent is expected for 2025.

The head of the German Bundesbank assumes that inflation will be under control by 2025, but nevertheless favours a wait-and-see policy and calls for interest rates not to be lowered prematurely. The wholesale gas price continues to normalise at an elevated level compared to the years before 2020. Skilled labour shortages will probably not be eliminated any time soon in Germany. Therefore, companies in the real estate and construction, chemical and metal, and health care sectors might in particular face distress, at least in the year ahead.

However, the German restructuring toolkit is not alone in providing for effective procedures. There are similar restructuring regimes in other jurisdictions. Market participants will watch with keen interest how the various restructuring techniques, both nationally and internationally, are used in practice (including their use in parallel) and will focus on how resulting legal difficulties are solved (particularly in an international context).



JAPAN

JAPANESE INSOLVENCY LAW: TRENDS, PROCESSES, AND FUTURE OUTLOOK

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I. LEGAL SYSTEM OVERVIEW

i. Introduction

Japan has two categories of in-court insolvency proceedings:

a. restructuring-type insolvency proceedings, which are processes for restructuring the debtor's business without extinguishing its juridical personality, based on a restructuring plan that includes changes to the rights of creditors; and

b. liquidation-type insolvency proceedings where all of the debtor's assets are liquidated and, if it is a legal entity, the entity itself is extinguished upon completion of the proceedings.

> "In terms of how voting for the restructuring plan works, there is only one class that can vote consisting of holders of rehabilitation claims.

We have four types of in-court insolvency proceedings. Civil rehabilitation proceedings (*minji-saisei*) and corporate reorganisation proceedings (*kaisha-kosei*) fall within restructuring-type insolvency proceedings, whereas liquidation-type insolvency proceedings consist of bankruptcy proceedings (*hasan*) and special liquidation (*tokubetsu-seisan*).

Out-of-court workouts are becoming more commonly used to restructure financial debts without starting the above-mentioned in-court insolvency proceedings, which usually damage the debtor's going concern value.

ii. Main features of each type of in-court insolvency proceedings

Civil rehabilitation proceedings

Civil rehabilitation proceedings, governed by the Civil Rehabilitation Act, are the most common form of in-court, restructuring-type insolvency proceedings in Japan, and these proceedings can be used for any type of company.

In general, civil rehabilitation proceedings are a DIP (debtor-in-possession) process: the debtor's management team remains in control of the debtor and its assets throughout the process unless there are exceptional circumstances that lead to the taking of control from management. Having said that, this does not mean said management's control is completely unaffected by the commencement of civil rehabilitation proceedings. Courts may and usually do require the debtor to obtain their prior permission before it engages in certain types of activities, typical examples of which include disposal of property and accepting the transfer of property that is out of the ordinary course of the debtor's business, borrowing money, filing an action, settling a dispute and waiving a legal right. In addition, courts usually appoint a supervisor who monitors the debtor's activities throughout the process and gives consent to the debtor to engage in the above-mentioned permission-required activities on behalf of the court.

In terms of how voting for the restructuring plan works, there is only one class that can vote consisting of holders of rehabilitation claims, which are, roughly speaking, claims that existed before the commencement of the proceedings. The rehabilitation plan must be approved by:

a. a simple majority in number of rehabilitation claims holders voting at the meeting (or in writing); and
b. a simple majority by value of all rehabilitation claims, the holders of which have voting rights.

Under the standard schedule of the Tokyo District Court, the entire process of civil rehabilitation proceedings takes approximately five months; however, the actual length may vary depending on the complexity and circumstances of each case.

A shorter form of civil rehabilitation proceedings known as simplified rehabilitation proceedings (SRP), wherein debtors can skip the process of examining and determining creditors' claims, can usually be concluded within one to two months with the consent of 60% or more of the creditors who have filed claims. Despite a long discussion among insolvency practitioners about using SRP as a tool for debtors who failed to obtain unanimous consent in out-of-court corporate workouts to quickly effectuate the restructuring plan that they proposed in the preceding workout, we had never seen this idea be implemented until recently. The Marelli case, however, proved that by using SRP, the debtor can cram down minority lenders who oppose its restructuring plan in the preceding (see Section III.i for details).

Corporate reorganisation proceedings

Corporate reorganisation proceedings, another form of in-court, restructuring-type insolvency proceedings governed by the Corporate Reorganisation Act, have a similar process to civil rehabilitation proceedings; however, there are some key differences, such as:

a. corporate reorganisation proceedings are available only for stock corporations – various other corporate forms, such as unlimited partnerships, limited partnerships and LLCs cannot use these proceedings;
b. a trustee takes possession of and control over the debtor's business and assets; and
c. secured creditors cannot exercise their security interests outside the proceedings.

Corporate reorganisation proceedings are mainly used in complex cases with large debts. Although the trustee, who is appointed by the court with the exclusive right and authority to manage the debtor's business and to administer and dispose of the debtor's assets throughout the process, is usually an attorney who has expertise in insolvency cases (administrative-type corporate reorganisation), there have been some cases in which the court appoints trustees from the debtor's current management (DIP-type corporate reorganisation).

Bankruptcy proceedings

Bankruptcy proceedings, governed by the Bankruptcy Act, are the most commonly used form of liquidation for insolvent companies. Broadly speaking, the main purpose of bankruptcy proceedings is to liquidate the debtor's assets (including sales of its businesses) into cash to be distributed equitably to creditors. Upon commencement of bankruptcy proceedings, a trustee is appointed by the court and takes possession of and control over the debtor's property, unless the debtor does not have enough assets to fund the expenses of the process (in which case, the bankruptcy procedure is closed immediately with the juridical personality of the corporate debtor being diminished).

"

A shorter form of civil rehabilitation proceedings known as simplified rehabilitation proceedings (SRP).

Special liquidation

Special liquidation, governed by the Companies Act, is a form of liquidation that is only available to stock corporations that have been placed into a voluntary liquidation process by their shareholders. It is a simpler, less onerous and more expeditious form of liquidation than bankruptcy, which is frequently used by parent companies to liquidate loss-making subsidiaries.

iii. Out-of-court corporate workouts

> "Recently, the Industrial Competitiveness Enhancement Act (ICEA) provides specific measures that facilitate a smooth transition from turnaround ADR to SRP.

In Japan, out-of-court corporate workouts generally refers to processes where debtors facing financial difficulties attempt to negotiate with financial creditors on amending their existing debts. Out-of-court corporate workouts cause less deterioration of the debtor's business value mainly because processes are private in principle and trade creditors such as suppliers and vendors are not involved in the process and are kept intact. For this reason, out-of-court workouts are becoming more commonly used to restructure debtors' businesses.

One unique aspect of Japanese out-of-court corporate workouts is that in addition to purely consensual, ad hoc negotiations with financial creditors, there are a variety of processes or guidelines for workouts, which are chosen based on the circumstances such as the amount of financial debts, the number of the creditors to be involved and the size of the debtor.

Among the variety of schemes, the turnaround ADR process, one of the standardised forms of corporate workouts, is the most popularly used in recent years, especially for large companies. Turnaround ADR is a process in which the debtor tries to restructure its debts owed to financial creditors based on their unanimous consent. Although the success rate of turnaround ADR is generally high and debtors in many cases successfully restructure their debts without shifting to in-court insolvency proceedings, there are cases where the debtor cannot obtain unanimous consent for its restructuring plan. In such cases, the debtor must consider initiating in-court insolvency proceedings.

Recently, the Industrial Competitiveness Enhancement Act (ICEA) provides specific measures that facilitate a smooth transition from turnaround ADR to SRP, which are a form of in-court insolvency proceedings that simplify and speed up the ordinary civil rehabilitation proceedings. By using these measures provided by the ICEA, the restructuring plan proposed in turnaround ADR may be approved by a majority vote (not unanimous consent) and carried out in SRP much more smoothly and quickly than in ordinary in-court insolvency cases.

II. RECENT AND FUTURE MARKET OVERVIEW

In Japan, the number of in-court insolvency cases and large out-of-court workouts is increasing due to various global factors such as the COVID-19 pandemic and the significant rise in the cost of raw materials. In addition to these factors, Japan has a distinct circumstance where in 2022 the repayment of so-called 'zero-zero loans' (interest-free and unsecured loans formerly granted by financial institutions as a special governmental rescue package for companies affected by the pandemic) commenced in full force. As a result of these factors, several large, out-of-court corporate workouts were filed 2022 and onwards, which are detailed in Section III.i. Recent statistics indicate that there were 4,006 in-court insolvency cases in the first half of 2023, seeing an increase from the previous year's first half for the first time in the last five years, and the number of in-court insolvency cases for all industries exceeded the same period of the previous year for the first time in fourteen years.

Also, from April 1, 2024, the annual limit for overtime work hours in vehicle driving operations will be restricted to 960 hours. This new legislation has created a fear that this will lead to a severe shortage of drivers in the logistics industry, often referred to as the "2024 Issue."

With the abovementioned general trend and the expected increase in labor-shortage-induced bankruptcies in this specific industry, the upward trend in the insolvency arena is expected to continue for the next several years.

III. RECENT AND FUTURE LEGAL DEVELOPMENTS

i. Marelli case and the upcoming legislation opening the door to more powerful pre-insolvency regime

As mentioned in Section I.iii, while out-of-court workouts have become increasingly prevalent in recent times, such workouts in Japan always require unanimous consent from all creditors, which can be a significant hurdle for debtors.

In the recent case of the Marelli group, however, the debtor successfully crammed down, in a very short time frame, the lenders who had opposed the debtor's restructuring plan in turnaround ADR by switching to SRP. This case could have a significant impact on the practice of out-of-court workouts, and thus warrants mention in this chapter.

The Marelli group, who we represented, was and is one of the world's leading independent suppliers to the automotive industry with around 150 subsidiaries in more than 20 countries. While the group's performance is declining as a result of a combination of various external factors – such as a decline in automobile production because of the pandemic, the severe shortage of semiconductors, and soaring prices of aluminium and other raw materials – the highly leveraged capital structure of Marelli has been putting pressure on its cash flow.

Marelli chose to use turnaround ADR in Japan to drastically improve and restructure its financial structure with the support of banks while avoiding a serious deterioration of its corporate value by involving suppliers and customers in the in-court insolvency proceedings. After a series of creditors' meetings in the turnaround ADR, Marelli submitted its restructuring plan to the banks, including a substantial amount of debt forgiveness and a new equity injection from its existing shareholder KKR. At the final creditors' meeting held in late June 2022, although approximately 95 per cent (in value) of the banks, including non-Japanese banks, agreed to the plan, Marelli's turnaround ADR, which requires unanimous consent to the plan, was not successfully concluded because a few non-Japanese banks did not give their consent.

Upon the failure of the turnaround ADR, Marelli immediately switched to SRP because SRP is a quicker version of civil rehabilitation proceedings with some of the proceedings being omitted and only requiring 60 per cent approval to commence the process and only 50 per cent approval to pass the plan. Given the approval rate in the turnaround ADR, it was certain that Marelli would effectively cram down the opposing non-Japanese banks by using SRP.

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In addition to these cramdown functions, there are a few more key factors that make this case unique and prominent in Japanese turnaround history. The first and most important is that Marelli's SRP did not affect any creditors other than the banks that participated in the turnaround ADR despite being in-court insolvency proceedings where, in principle, all of the debtors' creditors were involved. This arrangement had a tremendous impact on Marelli's business because it would have been severely damaged had the group stopped payments to its suppliers and other business partners, which is common for debtors in in-court insolvency proceedings. The second important factor would be the extraordinarily short duration of SRP. Marelli's restructuring plan was approved by the banks and the court as early as 25 days after the filing for the proceedings, which is considerably faster than ordinary civil rehabilitation proceedings that usually take around five months to pass a plan. Clearly, the shorter duration of in-court insolvency proceedings causes less damage to corporate value. The introduction of such special arrangements for SRP was envisaged in the recent amendments to the ICEA, with Marelli's SRP being the first practical example.

Incidentally, the Japanese government established the 'Subcommittee to Study Legislation for Out-of-court Workouts for New Business Restructuring' on 27 October 2022 in order to deliberate on the possibility of implementing a system where debtors can cram down opposing lenders with a majority vote and court approval but without going into in-court insolvency proceedings. The Marelli case has been noted in the subcommittee's discussion as a case highlighting the necessity of such legislation.

ii. Introduction of comprehensive collateral system

In the Japanese collateral system, comprehensive security interests over entire businesses of the debtors essentially do not exist. During its 29th meeting held on 6 December 2022, the Collateral Legislation Subcommittee of the Legislative Council compiled an 'Interim Draft on the Review of Collateral Legislation', which was subsequently released on 20 January 2023. As per the Interim Draft, the committee will continue to evaluate the advantages and disadvantages of the comprehensive collateral system, which involves designating the entire property utilised for a business as a target property.

Apart from the discussions held by the Legislative Council, the Financial System Council's 'Working Group on the System to Support Business-Focused Financing Practices' also deliberated on a comprehensive collateral system and issued a report on 10 February 2023. Thus, it is imperative that we remain attentive to upcoming discussions.

iii. Digitisation of in-court insolvency proceedings

The Subcommittee on Procedures for Civil Execution, Civil Provisional Remedies, Insolvency, and Domestic Relations Cases (IT-related) was established in 2022 with the objective of adapting to changes in socioeconomic conditions, including recent advancements in information and communications technology and making court procedures, including in-court insolvency proceedings, more suitable, prompt, and accessible for the public.

On 20 January 2023, the Subcommittee released the 'Draft Outline of Review of Procedures for Civil Execution, Civil Provisional Remedies, Insolvency, and Domestic Relations Cases', which proposes a legal framework allowing for petitions for in-court insolvency proceedings to be filed online, the digitisation of court documents in these proceedings, and the option for telephone or online participation in court hearings.

On June 6, 2023, a bill based on the above draft was passed and enacted by the House of Representatives, and it will be fully enforced by five years from June 14, 2023, the date of its promulgation.

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> In the Japanese collateral system, comprehensive security interests over entire businesses of the debtors essentially do not exist.

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Kumarakuru Jai has over 16 years of experience specialising in insolvency and restructuring.
He has worked with clients from a vast array of industries including Transportation, Monorail, Oil and Gas, Property Development and Construction, Manufacturing, Resort and Hotel Management, Port Management, Revival of Abandoned Housing Developments, Plantation, Palm Oil Mill and several others.

His work includes various insolvency assignments comprising liquidation, receivership and advisory work for distressed companies. He has also managed many other assignments such as formulation of schemes of arrangement, debt restructuring, judicial management and has also been involved in monitoring accountant roles.

Kumarakuru Jai is a licensed Insolvency Practitioner from the Ministry of Finance Malaysia and Labuan Financial Services Authority. He is also a Chartered Global Management Accountant with the Association of International Certified Professional Accountants (CIMA) and a Chartered Accountant with the Malaysian Institute of Accountants (MIA).
He has also acted as a special advisor for Bank Negara Malaysia in a matter related to Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 (AMLA).

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BIO

Patrick has more than 36 years of experience in Corporate Restructuring, Forensic Investigations, Transaction Advisory, Corporate Recovery, Litigation Support Services and Corporate Advisory. He is also a fellow of CPA Australia.

He rejoined Ferrier Hodgson since 2014 after completing three-year contract to open and build a new office for the KRyS Global Group in Hamilton, Bermuda as Managing Director. KRyS Global is a boutique firm dedicated to resolving complex cross border Insolvencies, Corporate Recovery Services and Fraud Investigations.

During Patrick's initial contract with Ferrier Hodgson in Malaysia between 2005 to 2011, he held roles as lead partner for Investigation and Forensic assignments and Litigation Support Services. In addition, he has also acted as CFO and Company Secretary of several major publicly listed companies in Australia. He also has formal professional experience with two international accounting firms namely Deloitte and Ernst and Young.

He managed various insolvency assignments comprising liquidations, receiverships, Judicial Managements and Schemes of Arrangements and advisory work for financially distressed companies. Patrick is also experienced in conducting financial valuations on behalf of individual banks and syndicates.

In 2019 Patrick was appointed as Managing Partner of Baker Tilly Insolvency and Advisory formerly Ferrier Hodgson Malaysia. He continues in that role and leads what is now regarded as one of the largest insolvency and restructuring teams in Malaysia.

In 2022 Patrick was appointed as Chairman of the Baker Tilly Insolvency and Restructuring Committee for the Asia Pacific region (APAC) and continues in that role currently. The Asia Pacific Baker Tilly Network members comprise of 23 member firms across the region.

Recent trends and more effective measures for the management of insolvencies for corporate entities in Malaysia have developed in a positive direction over recent years in the form of restructuring and rehabilitation. The insolvency laws for companies in Malaysia have changed from that of a liquidation culture to that of a corporate rehabilitation framework culture under the governing legislative framework (i.e., Companies Act 2016 ("**CA 2016**") and the Companies Winding Up Rules 1972). The earlier insolvency framework in Malaysia nurtured a liquidation culture with winding-up as the only viable option for insolvent companies and receivership culture reserved for secured creditors. The only available option to undertake a restructuring plan under the then Company's Act 1965 were Schemes of Arrangement, however, it was limited to that of enabling companies to undergo a compromise of their debts with their creditors and in the event with their members; a compromise or arrangement regarding their shares.

The modern insolvency laws in Malaysia have recognised and acknowledged that not all insolvent companies should be liquidated unless they are no longer economically and commercially viable. As such, the adoption of the rehabilitation framework culture aims to protect the interests of all stakeholders, including that of the company's creditors, company's shareholders' and the company itself, whilst providing a structured and transparent process administered by an independent Insolvency Practitioner for financially distressed companies to better facilitate their financial recovery. The rehabilitation framework available to corporate entities in Malaysia includes (i) Corporate Voluntary Arrangement ("**CVA**"); (ii) Judicial Management ("**JM**"); and (iii) Scheme of Arrangement ("**SOA**").

(i) CVA

The CVA framework allows for cash-strapped companies to work out an amicable arrangement with their unsecured creditors that includes the rescheduling of its debts with minimal court involvement and a requisite approval of seventy-five per centum (75%) of its creditors.

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The company must aim to complete its restructuring arrangement within twenty-eight (28) to sixty (60) days during which a moratorium is granted.

An independent Insolvency Practitioner is required for the application to ensure the feasibility of the restructuring arrangement where there are reasonable prospects that the proposal put to the creditors in a formal meeting can be approved and implemented and there are sufficient funds available during the moratorium period.

However, the limitations provided under the CVA limbs pursuant to Section 395 of the CA 2016 attributes to the difficulty of implementation of a CVA by financially distressed companies. The foremost limitation of a CVA is that it is not applicable to public companies and companies that have created charges.

The number of reported CVA cases are depicted as

Years	2021	2022	2023*
Lodgements	2	1	0
Plan approved by Creditor	2	1	0

*Statistics reported as at 31 October 2023
Source: Companies Commission of Malaysia

(ii) JM

JM is a framework available to financially distressed companies to carry out a holistic rehabilitation plan (including restructuring of business and debts) that will turnaround the business of the company and achieve any of the following pursuant to Section 405(b)(i) of the CA 2016:

(i) the survival of the company, or the whole or part of its undertaking as a going concern;
(ii) the approval under section 366 of a compromise or arrangement between the company and any such persons as are mentioned in that section; or
(iii) a more advantageous realisation of the company's assets would be effected than on a winding up.

The JM framework provides for a wider scope of coverage for financially distressed companies in comparison to the CVA. A moratorium is in force from the time of application similar to a CVA until the end of the judicial management period however as opposed to a CVA, the tenure of appointment under the JM framework provides for an appointment for six (6) months and at the discretion of the Court, for a further six (6) months.

The number of reported JM cases are depicted as follows:

Years	2021	2022	2023*
Number of Application	27	41	48
Number of JM Order Obtained	15	11	17

*Statistics reported as at 31 October 2023
Source: Companies Commission of Malaysia

(iii) SOA

SOA under Section 366 of the CA 2016 is a debt compromise arrangement which can be undertaken by companies facing financial constraints and by solvent companies with the intention to restructure its business, reorganise its capital, debts, or corporate structure. The SOA framework here in Malaysia is often used to facilitate financial restructuring, mergers, acquisitions, or other significant changes within the company to facilitate the company as a going concern. It is a court-approved arrangement that requires class of members/creditors to obtain the requisite approval of seventy-five per centum (75%) at each class of members/creditors for the implementation of the proposed restructuring plan.

Unlike the other rehabilitation framework (i.e., CVA and JM) where an automatic moratorium is granted upon the filling of an application, companies whom opts to embark on a SOA framework is required to file an application at the Court to obtain a restraining order (similar to a moratorium) for a period of three (3) months and may be further extended up to nine (9) months upon meeting certain conditions subject to the Court's discretion.

The number of reported SOA cases are depicted as follows:

Years	2021	2022	2023*
Number of Cases	37	108	92

*Statistics reported as at 31 October 2023
Source: Companies Commission of Malaysia

The three (3) key rehabilitation framework do provide a general corporate restructuring framework for financially distressed companies in Malaysia. However, it is noted that there are limitations that sets each mechanism apart.

Details	CVA	JM	SOA
Supervision by the court	Limited court involvement. Only requires filing of documents with the court	Under the supervision of the court. Creditors may apply to the court for discharge of the Judicial Management order if there is an abuse of process	Once the court grants the order to convene a meeting of creditors (upon hearing any opposing intervening creditors), the creditors only avenue is to vote against the proposed scheme during the court convened meeting.
Types of creditors	Deals only with unsecured creditors	Deals with all classes of creditors	Creditors are treated according to their respective class
Voting	75% of the total value of creditors present and voting at the meeting	75% of the total value of creditors present and voting at the meeting	75% of the total value of creditors present and voting at each class of meeting
Protection from creditors	Automatic moratorium upon application. Moratorium will provide against:- 1. Passing a resolution or making of an order for winding-up; or 2. Steps to enforce a charge, security and/or repossession except with leave of the court; or 3. Commencement or continuation of proceedings and initiation or other legal processes except with the leave of court.	Automatic six (6) months moratorium upon application. Moratorium will provide against:- 1. Passing a resolution or making of an order for winding-up; or 2. Steps to enforce a charge, security and/or repossession except with leave of the court; or 3. Commencement or continuation of proceedings and initiation or other legal processes except with the leave of court.	A restraining order application under Section 368 of the CA 2016. The court may grant a restraining order of not more than three (3) months and may extend this period for not more than nine (9) months. No protection in the interim.
Affairs of the company	Management in control	Judicial Manager in control	Management / Judicial Manager / Liquidators in control of the Company's affairs
Duration of process	Twenty-eight (28) days to sixty (60) days	Six (6) months with a further six (6) months extension (i.e., twelve (12) months) unless extension granted by the court. No further extension is allowed and if required, to apply afresh.	Nine (9) months unless further extension is granted by the court

Notwithstanding the above, the usefulness of the CVA, JM and SOA framework as a rehabilitation framework for financially distressed companies are hampered by its limitations. As such, the Companies (Amendment) Bill 2023 ("**Bill**") was passed by Dewan Rakyat and the Senate (Dewan Negara) on 28 November 2023 and 13 December 2023 and will be presented for Royal Assent and subsequently gazette into law. The proposed amendments aim to better align the rehabilitation framework with the current circumstances and surrounding insolvency outlook in Malaysia.

(i) Amendments to CVA provisions

Two main amendments under the proposed Bill provides that CVA provisions shall include the following:

- Be extended to all companies whether private or public regardless of whether a charge exists over its property or any of its undertaking except for certain companies.
- Enhancement of secured creditor's rights of recovery pursuant to a new section under the new Bill

The proposed amendments aim to promote the utilisation of the CVA by all companies as opposed to the prior act which prohibited the use for companies with a secured charge and publicly listed companies. With these new amendments, we see a significant enhancement of the provisions in which financially distressed companies may be in a better position to promote out-of-court negotiations, which should be less costly and more time effective.

(ii) Amendments to JM provisions

The amendment under the proposed Bill provides that the JM provisions shall include the following:

- Be extended to public listed companies except for certain categories of companies in their respective industries.
- Enhancement of secured creditor's right of recovery pursuant to a new section under the new Bill
- Empower the court to extend the JM Order beyond twelve (12) months.
- Protection for supply of essential goods and services during the JM Order.
- Introduce super priority for rescue financing which offers the financier super priority over all preferential debts and all other unsecured debts, if the company is wound up.

The proposed amendments aim to address several limitations faced by Insolvency Practitioners where there is a genuine proposal to restructure financially distressed companies where it can now be applied to more companies.

(iii) Amendments to SOA provisions

The amendments under the proposed Bill provides that the SOA provisions shall include the following:

- The restraining order shall set out the exact forms of proceedings and actions to be restrained against the financially distressed companies.
- Allow for an automatic restraining order upon application, for a period of two (2) months or until the application is decided by the court, whichever is earlier.
- Allow a group of related companies who plays an integral role in the SOA to apply for a restraining order.
- To curb abuse of process - a cooling-off period of twelve (12) months is introduced before a fresh SOA is re-applied.
- Introduce a cram-down powers which allows the court to force through a debt restructuring plan even if there are dissenting classes of creditors, subject to certain conditions.
- Introduce the power of court to order as meeting to revote under a new section.
- Introduce the power of court to approve a SOA without a creditors meeting under a new section
- Improvement of the SOA procedures (i.e, introduce a pre-pack SOA)
- Introduce super priority for rescue financing which offers the financier super priority over all preferential debts and all other unsecured debts, if the company is wound up,
- Amendments on the appointment and duties of the insolvency practitioner in relation to the SOA.

The proposed amendments aim to enhance the overall Scheme of Arrangement by clarifying provisions on the moratorium, role of insolvency practitioners and introducing new provisions such as rescue financing and cram down provisions to facilitate financially distressed companies undertaking a restructuring via the SOA framework.

As seen from the proposed amendments to be introduced, the Bill aims to establish provisions to accord a more comprehensive framework at par with other foreign jurisdictions to ensure that the corporate rehabilitation framework can be used as a more effective rehabilitation tool for companies facing financial difficulties.

It is worth mentioning that reforms in foreign jurisdiction sets the reasonings for the proposed reforms over the restructuring and insolvency framework in Malaysia. This enables financially distressed companies to increasingly opt for CVA, JM and/or SOA to restructure their financial debts and obligations. The proposed reforms would be applicable across diverse industry segments including aviation, hospitality, retail, construction, oil and gas. The restructuring landscape in Malaysia is working towards aligning to the ever-changing domestic market dynamics and those of foreign jurisdictions. We at Baker Tilly Malaysia foresee a rise in insolvency related matters particularly in the hospitality, property and construction sectors. This new Bill will provide the necessary tools and flexibility to both companies in distress and Insolvency Practitioners to formulate arrangements and enter into compromises to restructure and eventually a return to profitability.
In tandem, we are also likely to see these corporate rehabilitation frameworks being used in multiple manners and evolving further with landmark decisions under the Malaysian Courts.

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Paweł Kuglarz is an attorney-at-law with over 30 years of professional experience working as a partner for international law firms, such as Beiten Burkhardt, Wolf Theiss and Taylor Wessing. He is currently head of the international desk at Tatara & Partners. He is a director of the Austrian Law School at the Jagiellonian University in Krakow, a European Commission expert for preparing a new directive for the harmonisation of insolvency and restructuring law, vice-president for International Matters of the INSO Section of the Allerhand Institute, and Poland's representative at INSOL Europe Council. He is an author of commentaries on bankruptcy and real estate-related law, including "Commentary to the Act on Land Register and Mortgages", "Consumer Bankruptcy" and "Bankruptcy of a Developer". Paweł is a member of the International Exchange of Experience on Insolvency Law (IEEI).

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Mateusz Kaliński is the communications manager and lawyer at Tatara & Partners Restructuring & Insolvency Law Firm, and focuses on various aspects of bankruptcy and restructuring law. He graduated from the Jagiellonian University and gained his master's degree in law from the Catholic University of America. Mateusz handles complex insolvency and restructuring proceedings, both domestic and international. He specialises in dispute resolution (including directors' and officers' liability issues) and corporate and commercial law. He is a secretary of the INSO Section of the Allerhand Institute and a member of INSOL Europe (and also YANIL – younger academics branch), as well as an expert for the World Bank Doing Business report and Global Indicators analysis.

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Overview

Polish law offers a number of proceedings for businesses and individuals in distress. They span business insolvency proceedings, consumer bankruptcy as well as four restructuring proceedings. These solutions aid debtors but also create opportunities or risks for creditors. Please note that opportunities will arise as a rule for active creditors. Restructuring proceedings are as follows:

1. Arrangement approval proceedings (including version with an announcement in the National Debtors Register (Krajowy Rejestr Zadłużonych, KRZ) and more private one, without an announcement);
2. Arrangement proceedings accelerated;
3. Arrangement proceedings;
4. Remedial proceedings.

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> Insolvency is defined as within Bankruptcy Law, namely a state, when the debtor lost ability to satisfy the mature pecuniary liabilities.

With regard to insolvency proceedings, in Poland there is a regular one, regulated within Bankruptcy Law, as well as consumer bankruptcy, which sometimes can be a useful tool for over indebted former entrepreneurs or members of the management boards.

Within insolvency proceedings, an application for arrangement in bankruptcy may be filed and to such situation, some relevant provisions of Restructuring Law apply.

Corporate insolvency proceedings may be accompanied by pre-pack sale application.

Legal grounds for opening proceedings

Legal grounds for opening of restructuring proceedings is insolvency or threat of insolvency. Insolvency is defined as within Bankruptcy Law, namely a state, when the debtor lost ability to satisfy the mature pecuniary liabilities.

Other basis (legal grounds – specified in Bankruptcy Law) for insolvency is the over indebtedness – a situation when assets are higher than liabilities and this state of facts lasts for more than 24 months.

Bunch of statistics

Currently in Poland the statistics for insolvency & restructuring raise significantly.

In 2023 we observed 408 companies declared insolvent, 611 bankruptcy petitions dismissed, mainly because of non-sufficient money to conduct the proceedings; and the following numbers of restructuring proceedings:

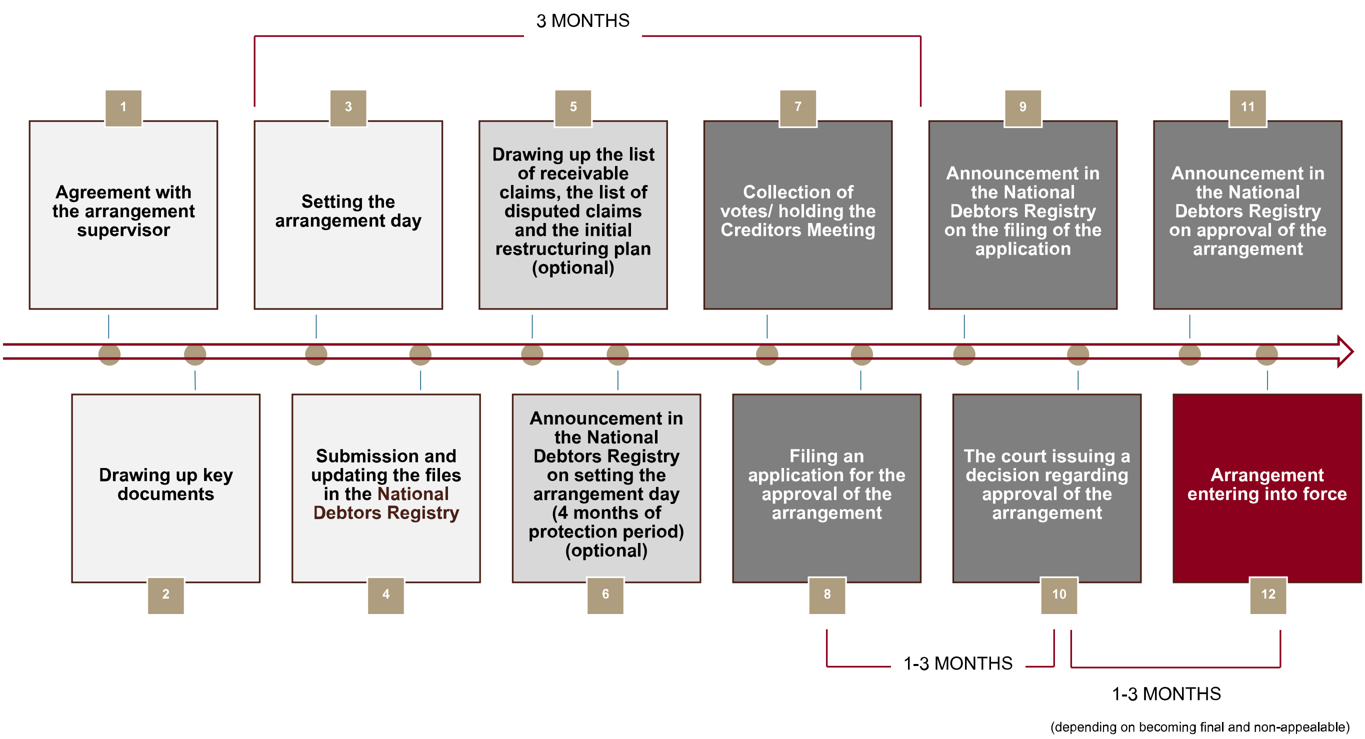
1. 3919 arrangement approval proceedings;
2. 158 arrangement proceedings accelerated;
3. 54 arrangement proceedings;
4. 101 remedial proceedings.

Most popular types of proceedings

In Poland, as numbers are growing, the most popular proceeding is arrangement approval proceedings, counting up to over 92% of all restructuring proceedings.

This popularity is because of mainly out-of-court nature of arrangement approval proceedings ("AAP").

AAP is opened based upon decision of the debtor in cooperation with arrangement supervisor, who should hold insolvency practitioner's license (regular of qualified one). The course of the AAP is shown on the graph below:



Electronic proceedings

Since December 2021, in Poland the National Debtors Register (KRZ) operates and all kinds of proceedings should be conducted and carried out within the system – at least with regard to companies.

Unfortunately, the KRZ system is only in Polish language version and is currently under expansion towards other elements, aimed to enhance and facilitate the method of conducting the proceedings.

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> Unfortunately, the KRZ system is only in Polish language version and is currently under expansion towards other elements.

Future developments

Poland is ahead of important changes in the restructuring & insolvency framework.

The EU Restructuring Directive (also known as the Second Chance Directive) is still planned to be implemented.

Issues that need to be addressed with this regard include automatic stay of enforcement, cross-class cram-down issues, as well as treating secured creditors.

Moreover, in December 2022, the European Commission published Proposal for a Directive of the European Parliament and of the Council harmonising certain aspects of insolvency law, opening discussions on some of the potential changes into national laws, together with the remarks and positions towards the Proposal.

49 entities issued their positions within this legislative process, and now the European Commission analyses these documents, aiming to propose a Directive soon.

The Proposal covers, according to Article 1.1, the following areas:

1. avoidance actions;
2. the tracing of assets belonging to the insolvency estate;
3. pre-pack proceedings;
4. the duty of directors to submit a request for the opening of insolvency proceedings;
5. simplified winding-up proceedings for microenterprises;
6. creditors’ committees;
7. the drawing-up of a key information factsheet by Member States on certain elements of their national law on insolvency proceedings.

Within the whole European Union the level of coherence of the abovementioned issues is relatively low, thus many Member States are now facing the need to assess what changes are required and what amendments to the law are necessary.

The proposed amendments regarding prepared liquidation (pre-pack) merit special attention.

In the section on pre-pack, the Proposal provides, among other things, for the appointment of a special, independent body (the so-called monitor) to evaluate the pre-pack procedure and the benefits to creditors. It is envisaged that this body may next be a bankruptcy trustee and at the same time a party to the pre-pack transaction concluded with the investor. In Poland, such a person could successfully be the Temporary Court Supervisor, who would then become the Trustee of the bankruptcy estate.

Test of best satisfaction of creditors

The proposal of the Directive also provides for the preparation of a test of the best satisfaction of creditors, as a basis for evaluating the price proposed by the investor.

Such a test is also postulated in the EU Restructuring Directive, and could be standardised, for example, in the practice of drafters, so as to serve the broadest and most reliable knowledge for creditors – parties in bankruptcy proceedings.

Possible auction

The Directive provides for the auction procedure, both with the involvement of an IP or without it. Where the court decides to appoint an IP (insolvency practitioner), the public auction is not required. Where the court refuses to appoint an IP, however, then the public auction procedure is obligatory.

Polish insolvency law creates certain risks for an investor who decides to invest in the preparation of the prepack procedure, however. The investor makes a substantial financial effort as they need to carry out the required audits and due diligence reports. Once they lose the bid, all this financial involvement is wasted – the investor stands to recover nothing. Whereas the other participant, who may have offered 1 EUR more in the bidding process and then wins the auction, not only collects the assets (free from any collateral, with the execution sale effect) but also without any financial effort whatsoever on their part connected with the preparation of the pre-pack procedure.

That is why, the popularity of the pre-pack procedure in Poland has collapsed drastically after this rule was introduced in March 2020.

How to remedy the situation?

The solution is included in the proposed Directive as it envisages the possibility to get the investor's ancillary costs of preparing the pre-pack reimbursed.
This is an excellent example of how EU law can enormously improve national law.

The proposal of the Directive emphasizes the efficiency of the procedure, but also mentions the need to ensure its transparency. These values must always be properly balanced, as must the often conflicting interests of different categories of participants in the proceedings.

Preserving value for creditors

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> The Directive provides for the auction procedure, both with the involvement of an IP or without it.

It is expedient to emphasise that pre-pack significantly increases the preservation of the value of the debtor's enterprise from the point of view of its creditors. It is also of considerable importance from the point of view of preserving the enterprise itself, as well as jobs and the principle of a smooth transition between ownership entities.

Protection from enforcement

Interestingly, also Article 23 of the Proposal explicitly provides for the suspension of enforcement proceedings, including in the case of preliminary proceedings - in the pre-bankruptcy phase.

Changes to contracts and preemptive rights

The Proposal provides for changes to contracts entered into by the debtor, by allowing them to pass to a new buyer and even without the consent of the other party, and it would also be desirable to clarify what happens to the right of first refusal in the case of a sale in a pre-pack liquidation proceedings.

Urgent issue in Poland is also required changes in the judiciary system.

The issue of an appropriate organisational structure for the insolvency-related judicial system, which is nowadays inefficient, despite the idea of reform having been discussed for at least 20 years so far. Secondly, important changes may be introduced to insolvency practitioners formal self-government structures, endowing them with the possibility to enforce disciplinary responsibility.

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> We believe the regional courts should also become specialised second-instance courts for cases from district courts.

With regard to the organisation of the judiciary system, nowadays, first instance bankruptcy and restructuring cases are processed in district courts (*sądy rejonowe*), which are the lowest level of Polish courts, irrespective of the value of the case and its complexity. Therefore, a first-instance judge has to deal with complex restructuring cases valued at billions of Polish zloty as well as simple consumer bankruptcy cases of relatively small value. The workload is overwhelming. First-instance judges are dealing with approximately 200 consumer bankruptcy cases and ten corporate restructuring cases at the same time – an untenable work load.

A better system would leave consumer bankruptcy cases at the district court level, so that individuals would have easy access to justice, whereas complex restructuring cases could be moved to regional courts. Such a reform has been discussed for over 20 years now, and lately has been emphasised by the INSO Section of the Allerhand Institute.

We believe the regional courts should also become specialised second-instance courts for cases from district courts. Moreover, cases heard in regional courts (*sąd okręgowy*) could be appealed to the appellate courts (*sądy apelacyjne*), which will help to make judgements more uniform in restructuring cases. Currently, Poland struggles with differing judgements in similar cases, which is a pitfall that needs to be addressed.

There is also a need to create a special chamber or unit within the Supreme Court (*Sąd Najwyższy*), which would be responsible for restructuring and insolvency cases. In our opinion, this reform complies with the requirements set forth in the Restructuring Directive, which places the stress on efficient judicial systems and also the proper training of insolvency practitioners.

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Our experienced Team acts within the full landscape of restructuring and insolvency possibilities and opportunities in Poland, also with cross-border elements.

We combine the issues of insolvency law and reorganization proceedings with widely understood commercial law, in particular with company law and capital market law.

The LEGAL 500 EMEA LEADING FIRM 2023

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With over 25 years of experience, Swee Siang has extensive cross-border litigation and international arbitration experience, representing clients from multiple jurisdictions in high-value and complex disputes. His areas of expertise include contractual and tortious claims, including construction, defamation, professional negligence and employment disputes. Swee Siang's practice also encompasses insolvency and restructuring. He has acted as lead counsel in numerous cases in the State Courts as well as the Supreme Court of Singapore, and he has appeared on various occasions before the Court of Appeal which is the highest court in the jurisdiction.

In addition, he has represented clients as counsel in domestic as well as international arbitrations conducted under various institutional rules, such as SIAC, ICC, LCIA and Swiss Rules of Arbitration.

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Suchitra Kumar is a litigation and arbitration lawyer, specialising in commercial and civil disputes. She focuses on corporate disputes and international arbitration. Suchitra has gained exposure to a diverse range of contentious matters before the Supreme Court and the State Courts of Singapore. She also has experience in arbitration proceedings administered under the SIAC Rules.

Suchitra represents both local and international clients in complex cross-border claims. She advises on director and shareholder disagreements, minority oppression, breach of contract claims and data protection work.

Suchitra is developing a broad practice in a variety of sectors, with a keen interest in retail and consumer industries, regulatory compliance and white-collar fraud actions. She is qualified as an Advocate and Solicitor of the Supreme Court of Singapore and practises out of Premier Law LLC.

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SINGAPORE CLARIFIES ITS TAKE ON THE MODEL LAW ON CROSS-BORDER INSOLVENCY

1. In 2017, Singapore adopted the UNCITRAL[1] Model Law on Cross-Border Insolvency (the "**UNCITRAL Model Law**") into its national legislation with some modifications (the "**SG Model Law**", presently set out in the Third Schedule to the Insolvency, Restructuring And Dissolution Act 2018 (2020 Revised Edition), known as 'IRDA' for short). In this article, we briefly examine how Singapore's jurisprudence has shaped itself in applying the SG Model Law almost seven years from the time when the SG Model Law came into effect.

<u>What Constitutes A Foreign Proceeding?</u>

2. The Singapore Court of Appeal ("**SGCA**") recently issued a landmark judgment in *Ascentra Holdings, Inc (in official liquidation) and others v SPGK Pte Ltd* [2023] SGCA 32 ("***Ascentra Holdings***") confirming that overseas liquidation proceedings involving solvent companies can be granted recognition under the SG Model Law as 'foreign proceedings'. The matter concerned a company which had been placed under court-supervised voluntary liquidation in the Cayman Islands, following a dispute amongst its shareholders. The company's liquidators had filed an application under Article 17 of the SG Model Law ("**Art 17**") for the company's Cayman liquidation to be given recognition in Singapore as a '*foreign proceeding*', in order to gain access to powers available to local liquidators under the IRDA. The Singapore High Court ("**SGHC**") declined to grant the application at first instance, and the liquidators appealed successfully to the SGCA.

3. In order to be recognised under Art 17, an overseas liquidation proceeding must qualify as a '*foreign proceeding*' within the meaning of Article 2(h) of the SG Model Law, which defines the term as being "*a collective judicial or administrative proceeding in a foreign State, including an interim proceeding, under a law relating to insolvency or adjustment of debt in which proceeding the property and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganisation or liquidation*". In its judgment, the SGCA identified the following cumulative elements that must exist for a proceeding to qualify as a '*foreign proceeding*' under Art 2(h)[2]:-

(a) The proceeding must be collective in nature;
(b) The proceeding must be a judicial or administrative proceeding in a foreign State;
(c) The proceeding must have its basis in a law relating to insolvency or the adjustment of debt;
(d) The foreign court must exercise control or supervision over the property and affairs of the debtor in the proceedings; and
(e) The purpose of the proceeding must be the debtor's reorganisation or liquidation.

<u>No Requirement For Insolvency Or Severe Financial Distress</u>

4. The crux of the appeal in ***Ascentra Holdings*** related to the third element, i.e., whether the solvent liquidation of the company had its basis in a law relating to insolvency. The first-instance Judge narrowed down the focus to the particular provision of the Cayman Companies Act[3] governing the company's liquidation,[4] rather than referring to the entire Act in full. The Judge explained that construing the word '*law*' to encompass any provision so long as it was located in a statute that touched on the subject of insolvency would be too broad-brush in that it would sweep any proceeding into the parameters of Art 2(h) even if the proceeding only had a remote connection to insolvency[5]. Having interpreted '*insolvency*' as being a '*company's inability to pay debts*'[6], the Judge dismissed the application on the basis that the debtor in question was '*hopelessly and irretrievably solvent*'[7] and that the specific provisions under the Cayman Companies Act governing the company's liquidation[8], which provided for voluntary winding up by special resolution, did not relate to insolvency.

1. United Nations Commission on International Trade Law
2. ***Ascentra Holdings*** at [29]
3. Section 124 of the Companies Act (2021 Revision) (Cayman Islands)
4. Re Ascentra Holdings, Inc (in official liquidation) and others (SPGK Pte Ltd, non-party) [2023] SGHC 82 ("***Ascentra Holdings SGHC***") at [162] – [165]
5. ***Ascentra Holdings SGHC*** at [59]
6. ***Ascentra Holdings SGHC*** at [52]
7. ***Ascentra Holdings SGHC*** at [19]
8. Namely, Section 116(c) read with Section 124 of the Cayman Companies Act; ***Ascentra Holdings SGHC*** at [165]

5. On appeal, the SGCA reversed the lower court's decision, endorsing a broad approach to the interpretation of Art 2(h) to include foreign companies that are neither insolvent nor in severe financial distress. The SGCA gave due consideration to policy considerations and the overarching objectives of the SG Model Law in handing down its judgment, as follows:-

(a) ***Deliberate drafting***[9] – The SGCA highlighted that Art 2(h) of the SG Model Law had been modified from the corresponding Article 2(a) of the UNCITRAL Model Law with the manual addition of the wording '*or adjustment of debt*'. This was analogous to Section 101(23) of the US Bankruptcy Code. The phrase 'adjustment of debt' also showed up in Chapter 11 of the US Bankruptcy Code, the purpose of which is the preservation of going concerns and to allow for restructuring to ensure the continuity of struggling businesses. Chapter 11 was not limited only to companies which were insolvent. The SGCA took the position that the deliberate inclusion of the phrase 'or adjustment of debt' in Art 2(h) must have aimed at extending recognition to alternative modes of dissolution, such as schemes of arrangement and/or US Chapter 11 reorganisations (neither of which required insolvency or severe financial distress as a prerequisite)[10].

(b) ***Preparatory material***[11] – The SGCA cautioned against over-reliance on extraneous material pertaining to the UNCITRAL Model Law, given that the original form had not been ported over into the SG Model Law due to the textual amendments contained therein. In any event, the SGCA was not satisfied that such evidence went so far as to exclude liquidations of solvent companies from being afforded recognition. There was also no suggestion that expanding the cover of the UNCITRAL Model Law to solvent companies would undermine its object.

(c) ***Harmony with international approach***[12] – The SGCA referred to the position across different insolvency regimes, ultimately noting that the predominant view tipped in favour of a wider reading of Art 2(h). In particular, the SGCA:-

(i) Agreed with the US approach in Re *Betcorp Limited (in liquidation)* 400 BR 266 (Nevada US Bankruptcy Court, 2009), which considered a proceeding to be conducted under a law relating to insolvency or adjustment of debt insofar that the underlying law engaged the topic insolvency, even if the specific provision governing the provision was not implicated[13]; and

(ii) Refused to follow the contrary position taken by the English High Court in *Re Sturgeon Central Asia Balanced Fund Ltd (in liquidation)* [2020] EWHC 123 (Ch), that the UNCITRAL Model Law is not aimed at solvent companies and proceedings which produce the result of generating a return to members and not creditors[14].

9. ***Ascentra Holdings*** at [39] – [42]
10. ***Ascentra Holdings*** at [59]
11. Ascentra Holdings at [47], [59]
12. Ascentra Holdings at [69] – [92]
13. Ascentra Holdings at [71]
14. ***Ascentra Holdings*** at [88] – [89]

6. For the reasons set out above, the SGCA was satisfied that the Cayman liquidation qualified as a 'foreign proceeding' under the meaning of Art 2(h), and the appeal was allowed.

Requirement For Foreign Proceeding To Be Collective

7. The decision in ***Ascentra Holdings*** was most recently followed by the ***SGHC*** in *Re Thresh, Charles and another (British Steamship Protection and Indemnity Association Ltd and another, non-parties)* [2023] SGHC 337 ("***Thresh, Charles***"), which involved an application for the recognition of a winding up order made against a Bermuda-incorporated company regulated by Bermuda Monetary Authority ("**BMA**"). For background, the winding up order in question was issued in respect of proceedings initiated by the BMA in Bermuda ("**Bermuda Proceeding**") – the company subject to the order was not being wound up due to insolvency, but on grounds of its non-compliance with Bermudian regulations. The present application for recognition had been initiated by the joint provisional liquidators appointed by the Supreme Court of Bermuda ("**Applicant**"), and opposed by the sole shareholder of the company, as well as its manager ("**Opposing Parties**").

8. One of the points in contention was whether the first element set out in paragraph 3(a) above, i.e., that the requirement for the proceeding to be 'collective' in nature in order to fall within the meaning of a '*foreign proceeding*' under Art 2(h), had been fulfilled. The SGCA had, in ***Ascentra Holdings***, dealt with each of these elements, and the SGHC in ***Thresh, Charles*** referred to the SGCA's guidance on the relevant principles to be applied when determining whether a proceeding was collective[15]:-

   (a) For a proceeding to be collective, it must concern all creditors of the debtor generally (as opposed to, for example, a proceeding initiated at the request and for the benefit of a single secured creditor).

   (b) In evaluating whether a proceeding is collective, a primary consideration is whether substantially all of the assets and liabilities of the debtor are dealt with in the proceeding.

9. In ***Thresh, Charles***, the Opposing Parties argued that the criterion under Art 2(h) for the Bermuda Proceeding to be a collective one had not been satisfied, and therefore that it should not be granted recognition, because[16]:-

   (a) The Bermuda Proceeding had been "*unilaterally initiated*" by the BMA;

   (b) It had not been shown that the company's creditors had notice of, and were able to participate in, the Bermuda Proceeding;

   (c) The Bermudian winding-up order was obtained without providing the company or its creditors an opportunity to be heard; and

   (d) The Applicant had not reached out to the company's creditors to provide them with a right to submit claims for determination and to receive an equitable distribution, and had not consulted the creditors before bringing the present application.

15. A***scentra Holdings*** at [104]; ***Thresh, Charles*** at [25]
16. ***Thresh, Charles*** at [27]

10. In applying the principles set out in paragraph 8 above, the SGHC found these arguments unmeritorious, and decided that the Bermuda Proceeding did satisfy the requirement of being a collective one, because:-

(a) There was no evidence that the Bermuda Proceeding had been initiated by BMA for its sole benefit – whilst it may be presumed to have an interest in ensuring that lapses and failures in compliance with statutory and regulatory requirements would result in a business being wound up, this was in furtherance of an underlying objective to safeguard public interest[17];

(b) There was no evidence of steps taken by any creditor to challenge the Bermudian winding-up order[18];

(c) The proposition that all creditors must receive notice in order for a proceeding to be collective was too broad and unsupported[19]; and

(d) The argument that Applicant had not reached out to the company's creditors was a "*non-starter*". Before the Applicant actually reached out to creditors, it was entitled to better understand the company's financial affairs. Indeed, the very aim of the present application for foreign recognition of the Bermudian winding-up order was to allow the Applicant the time and breathing room to conduct this exercise[20].

<u>*Public Policy Considerations*</u>

11. The Opposing Parties also submitted that the grant of the foreign recognition order would be contrary to public policy relying on the overriding exception under Article 6 of the SG Model Law ("**Art 6**"), which provides that "*[n]othing in this [SG Model Law] prevents the Court from refusing to take an action governed by this [SG Model Law], if the action would be contrary to the public policy of Singapore*". The SGHC took this opportunity to determine the scope of the Art 6 exception, since the UNCITRAL Model Law differs from the SG Model Law in that the former allows a court to exercise its jurisdiction to deny recognition of a foreign proceeding only if doing so would be "*manifestly contrary*" to public policy. On the other hand, Art 6 omits the word '*manifestly*'. Accordingly, the SGHC concluded that public policy grounds for refusing any action under the SG Model Law "*may be invoked for reasons less stringent than those concerning matters of fundamental importance for Singapore*"[21].

12. Notwithstanding that the standard for refusing recognition on public policy grounds is lower in the SG Model Law than that set out in the UNCITRAL Model Law, the threshold is a high one, and is not easily met[22]. Although the SGHC declined to exhaustively define the phrase '*contrary to public policy*' in Art 6, it nevertheless noted that limiting one's rights on the basis of public policy grounds is an exceptional measure, and that the burden is on a party seeking to invoke such an exception to identify and show how the precise public policy is engaged and how it has been violated[23].

17. ***Thresh, Charles*** at [28]
18. ***Thresh, Charles*** at [34]
19. ***Thresh, Charles*** at [35]
20. ***Thresh, Charles*** at [34]
21. ***Thresh, Charles*** at [38] – [41]
22. ***Thresh, Charles*** at [42]
23. ***Thresh, Charles*** at [42]

13. In this regard, the Opposing Parties contended that there had been a breach of public policy on the following grounds[24]:-

    (a) There was a breach of the rules of natural justice; namely the right to a fair hearing in the conduct of the Bermuda Proceeding, as the company and its directors had no actual notice of the Bermuda Proceeding until after the winding up order was made, due to ineffective service of the petition; and

    (b) The Applicant failed to protect the relevant interests in commencing the present application with no due regard to the interests of the creditors and their wishes. In particular, complaints were made against the Applicant for acting dishonestly, and of incurring exorbitant costs.

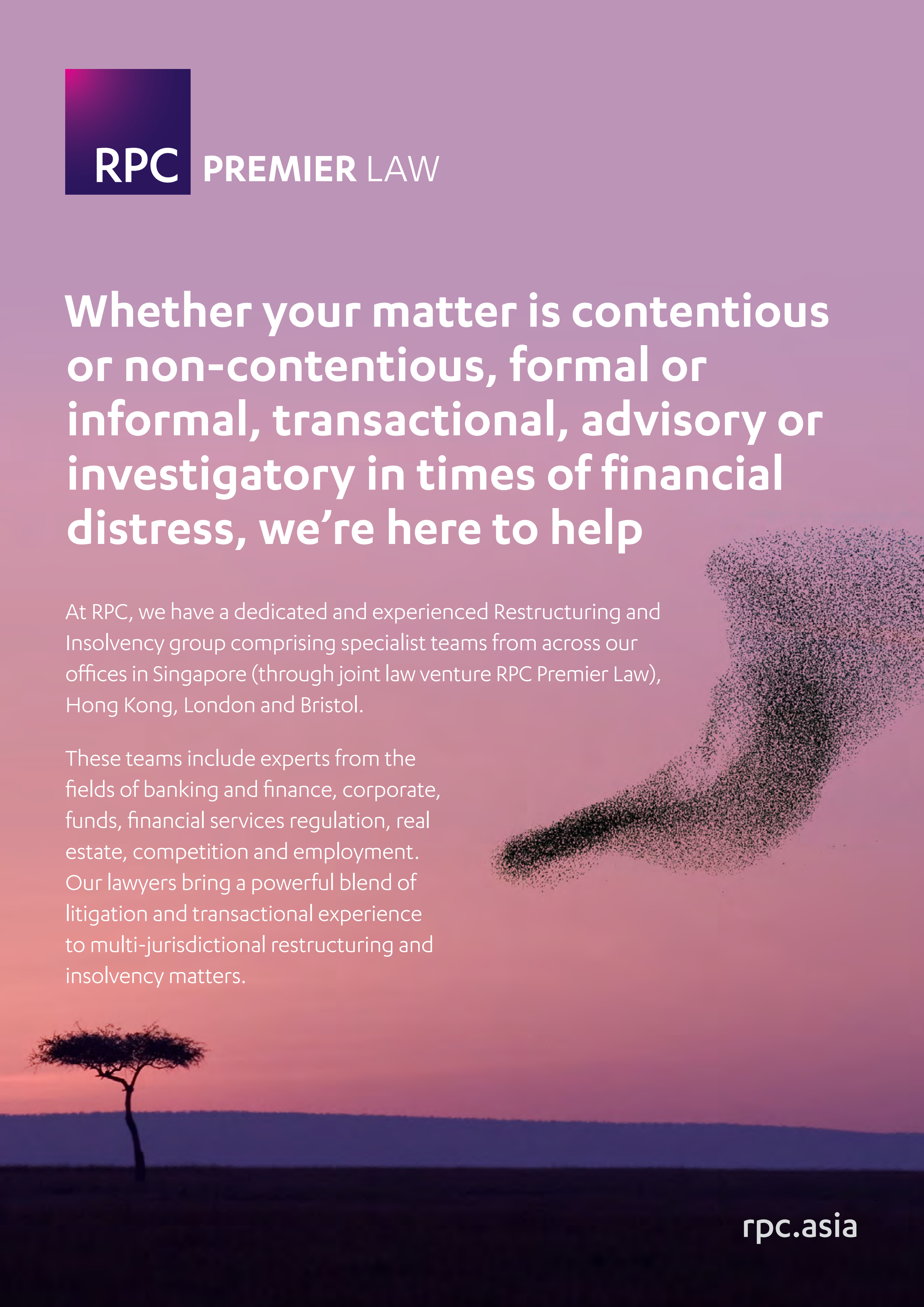
14. Apart from noting that the Opposing Parties failed to state what public policy was breached, how it was attributable to a constitutionally authoritative source, or the weight to be given to the alleged public policy as opposed to any countervailing concern in favour of recognition[25], the SGHC rejected the Opposing Parties' arguments set out above, because, amongst other things:-

    (a) There was no evidence that the manner in which service had been effected was impermissible under the laws of Bermuda. There was also no application filed to set aside the Bermudian winding up order on this ground (or any other, for that matter)[26].

    (b) There was nothing in the material before the SGHC to rise to the level of being contrary to any public policy. In particular, the SGHC was not in a position to assess whether the Applicant had incurred exorbitant costs as alleged, without having before it proper accounting of such matters. Such allegations of misconduct levelled against the Applicant were, in any event, matters for the Supreme Court of Bermuda[27].

15. The decisions in ***Ascentra Holdings*** and ***Thresh, Charles*** provide much-welcome guidance for the interpretation of various provisions under the SG Model Law[28]. They also show a clear trend towards prioritising international comity, in promoting the overall purposes of the UNCITRAL Model Law, which are to facilitate co-operation between courts and stakeholders involved in insolvencies that transcend borders and to provide a clear-cut avenue for direct access by foreign liquidators to local courts in states which have adopted the UNCITRAL Model Law.

24. ***Thresh, Charles*** at [43], [47]
25. ***Thresh, Charles*** at [44]
26. ***Thresh, Charles*** at [45] – [46]
27. ***Thresh, Charles*** at [48]
28. ***Ascentra Holdings*** at [64]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Daniel Hayek is chairman of the management committee and head of the insolvency and restructuring team as well as the corporate and M&A team of Prager Dreifuss, one of Switzerland's leading firms for commercial law. He graduated from the University of Zurich in 1990 (lic iur) and from New York University School of Law in 1995 (LLM in corporate law). He was admitted to the Bar in 1993. Before he joined Prager Dreifuss in 1997, he worked for another well-known business law firm. Daniel has been a partner with Prager Dreifuss Ltd since 2001.

Daniel Hayek's practice focuses on all aspects of insolvency and restructuring matters, including representing creditors in bankruptcy-related litigation, registering or purchasing claims or in enforcing disputed claims before courts. His longstanding expertise includes M&A, corporate finance, takeovers, banking and finance and corporate matters, also in restructuring situations. He represents a broad range of corporate clients as well as private clients in all types of domestic and cross-border transactions in court and before arbitration tribunals.

Daniel's recent practice comprises, amongst others, the representation of a large bondholder in the gategroup restructuring against the company which raised interesting issues regarding the application of the Lugano Convention upon the UK exiting the EU in connection with bond issued under Swiss law. Further Daniel also represented the trustee and the security agent of the bondholders regarding their claims against one of Europe's largest independent oil refiners, Swiss-based Petroplus group, enforcing a large claim based on derivatives in a litigation against the bankrupt estate of the Swiss Lehman entity and advising the trustee of the Kodak pension plan on the acquisition of assets and restructuring. Further, Daniel is leading a group of bondholders in negotiations and litigation proceedings against Banca Monte dei Paschi di Siena and the European Commission. He is also advising on the assignment of large claims raising complex cross-border issues against bankrupt estates such as Swissair, Erb and Lehman. Daniel and his team have been leading asset recovery against sovereign states and have a broad network of law firms world-wide they are working with.

KEY DEVELOPMENTS & THE LATEST TRENDS IN SWITZERLAND FROM A LEGAL PERSPECTIVE

In 2023, Switzerland underwent a transformative period marked by substantial legal and political advancements. This article explores these pivotal developments, focusing on how Switzerland's evolving legal landscape continues to shape its status as a major financial centre. Against a backdrop of global economic shifts, Switzerland's response through legal reforms and strategic initiatives highlights its agility and foresight in maintaining a competitive edge in international finance.

1. Switzerland's Legal and Economic Framework

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> In 2023, Switzerland underwent a transformative period marked by substantial legal and political advancements.

1.1. Global Economy

The global economy was marked by rising inflation rates, fluctuating interest rates and shifts in GDP growth rates in 2023. Inflation rates are driven by lingering supply chain disruptions, as a result of various geopolitical changes and long-lasting impacts from the epidemic and energy price volatility. Whilst Switzerland is relatively insulated due to the strong Swiss franc, it is not immune to these global trends. The Swiss National Bank ("SNB") faces the challenge of balancing inflation control with economic growth throughout the past year. Switzerland's inflation rate stood at around 2.1%,[1] which is comparatively lower to its European neighbours (around 5.5%) and the US (around 4.1%),[2] but still substantially higher than the usual rates observed in the country. To address the issue, the SNB cautiously adjusted interest rates to 1.75%, ensuring they remained conducive to economic stability and within the range consistent with the goal of price stability in the medium term. The SNB expects the interest rates to ease in 2024 and 2025 (1.7% in 2024 and 1.0% in 2025).

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2. Administrative and Tax Reforms

Several administrative and tax reforms were implemented in the recent years, aimed at boosting Switzerland's appeal to international investors and aligning with global market dynamics. The reforms were designed to streamline bureaucratic process, making it easier for international businesses to operate within the Swiss financial system. In particular, the tax reforms have been significant. They included strategic reductions in corporate tax rates, while remaining compliant with global tax standards. In May 2019, Swiss voters approved the new corporate tax reform TRAF, which entered into force on 1 January 2020. The TRAF is aimed at providing new incentives for foreign investments, such as tax breaks and subsidies for research and development (R&D) activities, particularly in the technology sectors.

In order to be compliant with the OECD's minimum tax rate for large multinational enterprises, the Swiss Federal Council further introduced a supplementary tax for companies with a global turnover of more than EUR 750 million per year as of 1 January 2024.

1. Schweizerische Nationalbank, Geldpolitische Lagebeurteilung, 14 Dezember 2023.
2. KOF Swiss Economic Institute, Inflation will remain high by Swiss Standards in 2023, 6 January 2023.

3. The Credit Suisse / UBS Merger and Recent Changes in Swiss Banking Laws

3.1. The Credit Suisse / UBS Merger

In 2023, the Swiss banking sector witnessed significant changes particularly following the landmark merger of Credit Suisse and UBS. After witnessing a prolonged crisis of confidence from clients, investors and the markets, Credit Suisse was facing exceptionally high fund withdrawals in mid-March 2023, leading to the risk of insolvency. It then became the first global systemically important bank ("**G-SIB**") to face imminent resolution. The Swiss Federal Council introduced an emergency ordinance on 19 March 2023, which established a framework for rescuing Credit Suisse. This framework provided the basis for the state-backed takeover of Credit Suisse by UBS. The swift reacting by the Swiss Authorities strengthened confidence in the Swiss financial system and created global stability in the markets

This event has triggered a comprehensive reevaluation of banking laws and regulations, not only in Switzerland but globally. Critical questions regarding market concentration – note that UBS is now the only G-SIB in headquartered in Switzerland -, risk management practices and resilience are being raised. Policy makers and regulators are now prompted to scrutinise existing laws and evaluate the too-big-to-fail framework, with the goal to prevent the use of fiscal revenues to rescue G-SIBs in the future.

2.3. FINMA Report on the Merger

On 19 December 2023, the Swiss Financial market Supervisory Authority ("**FINMA**") published its report[3] on the events leading up to the Credit Suisse / UBS merger. FINMA analysed the development of Credit Suisse between 2008 and 2023 with regard to strategy, business performance, management decisions and risk decisions. In essence, FINMA found that Credit Suisse had lost confidence of its clients, investors and the markets due to inadequate implementation of its strategic focus areas, repeated scandals and management errors. FINMA had taken far-reaching and invasive measured in the context of its supervisory activities to rectify deficiencies long before March 2023. From summer 2022 onwards, it had also asked Credit Suisse to take various measures to prepare for an emergency. FINMA draws several lessons in its report. It calls for a stronger legal basis, specifically instruments such as the Senior Managers Regime, the power to impose fines and more stringent rules regarding corporate governance. In the area of capital requirements, FINMA is calling for stricter standards for regulation in the context of a review of the "too big to fail" requirements". The report also mentions the topic of high remunerations, even in years in which the bank had reported large losses. It remains to be seen if and how the findings from the FINMA report will be implemented in practice. It may well be that Swiss voters will decide at the ballot about new minimum capital requirements and maximum compensation rules.

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> In 2023, the Swiss banking sector witnessed significant changes particularly following the landmark merger of Credit Suisse and UBS.

3. FINMA Report, Lessons Learned from the CS Crisis, 19 December 2023.

3. Updates in Corporate and Insolvency Law

3.1. ESG Updates

Several new provisions have entered into force recently, aligning Swiss companies with the global trend of integrating ESG (Environmental, Social, and Governance) factors into corporate strategies. The updates necessitate increased transparency in companies' sustainability practices.

> "There have been efforts to streamline bankruptcy procedures, aiming to facilitate more efficient restructuring processes for financially distressed companies.

On 18 June 2023, the Swiss electorate voted in favour of the Federal Act on Climate Protection Targets, Innovation and Strengthening Energy Security. The so-called Climate Innovation Act is expected to enter into force on 1 January 2025 and aims to make Switzerland less dependent on energy imports while strengthening climate protection, which is line with the commitments with the Paris Agreements.

Further, the Ordinance on Climate Disclosures has entered into force on 1 January 2024, which specifies reporting obligations pursuant to Article 964b CO. From the fiscal year 2023 onwards, companies meeting certain criteria (public companies, banks and insurance companies with at least 500 employees and at least CHF 20 million in assets or more than CHF 40 million turnover) must now prepare an annual report on non-financial matters, covering environmental matters, social issues, respect for human rights and measures to combat corruption (specification of Art. 964a et seq of the Swiss Code of Obligations "**CO**"). As of 2024, these organisations are also required to disclose their climate impact. Companies are expected to integrate these ESG factors into their annual reports, providing shareholders and stakeholders with a comprehensive understanding of their sustainable practices and policies. These changes also bring about a heightened level of accountability. Non-compliance or inadequate disclosure can result in penalties, including fines and reputational damage. This legal shift aims to encourage Swiss companies to take more proactive and responsible roles in addressing global sustainability.

Additionally, companies domiciled in Switzerland that import or process certain minerals or metals from conflict-affected areas or offer products or services for which there are reasonable grounds to suspect that child labor was involved, must comply with due diligence and reporting requirements in connection to their supply chains. In particular, a supply chain policy and management system ensuring traceability is now required. Further alignments with the EU's regulations are expected to be developed continuously throughout the next years.

3.2. Streamlined Bankruptcy Procedures

Additionally, there have been efforts to streamline bankruptcy procedures, aiming to facilitate more efficient restructuring processes for financially distressed companies. The goal is to enable quicker resolution processes, which can help preserve economic value and protect employment. This includes simplifying the filing processes for bankruptcy, reducing administrative burdens, and providing clearer guidelines for the restructuring of debts. The new laws in force since 1 January 2023 emphasise early intervention in cases of financial distress (Articles 725 et seq CO). Companies are encouraged to engage in restructuring discussions with creditors at earlier stages to prevent the escalation of financial issues. The laws also facilitate smoother negotiations between debtors and creditors, promoting mutually beneficial agreements that can lead to the recovery of the distressed company.

4. The Federal Council, Press Release, 25 October 2023.

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3.3. Combating Abusive Bankruptcy

On 1 January 2025, the Federal Act on Combating Abusive Bankruptcy ("CABA") will enter into force, together with corresponding amendments the CO, the Debt Enforcement and Bankruptcy Act ("DEBA") and the Swiss Criminal Code.[4] Going forward, debtors should not be able to abuse bankruptcy proceeding in order to be released from financial obligations such as payment of salaries and other debts and thereby harm creditors. In view of this, the Federal Parliament has introduced an amplitude of new measures, such as the possibility of searching individuals in the commercial register and the abolition of the possibility for smaller companies to retroactively opt out of their limited audit obligations. Further, trading of shell companies and transferring shares of an over-indebted company without business activity and realisable assets("Mantelhandel"), will be regarded as null and void.

The CABA is intended to inform, simplify and generally combat the abuse of bankruptcy proceedings. The underlining motivation of the parliament was to lessen the legal and de facto hurdles for creditors. On the other hand, the debtors will be controlled more closely, even before a bankruptcy filing occurs. This comprehensive approach of the cantonal and federal administrations will lead to a state-of-the-art combat against abusive bankruptcy proceedings.

3.4. Data Privacy and Security Regulations

Switzerland significantly updated its data privacy regulations as of 1 September 2023, notably aligning the Federal Act on Data Protection ("**DPA**") with the EU's General Data Protection Regulation ("**GDPR**"). These amendments aim to enhance data subject rights and introduce stricter penalties for non-compliance. Responding to these reforms, Swiss financial institutions have significantly invested in their data protection strategies. This includes implementing advanced encryption technologies, stringent data access controls, and comprehensive cybersecurity measures to safeguard client data and uphold trust in the digital age.

3.5. Sustainable Finance

Sustainable finance is a much-discussed topic and saw significant strides in Switzerland in 2023. In particular, the Federal Council formulated sustainable finance goals in December 2022[5] to strengthen Switzerland's role as a leading hub for sustainable finance, which have been taken into account by organisations such as the Swiss Banking Association. The association issued two sets of self-regulations as of 1 January 2023 with binding rules on integrating ESG criteria into investment advice and portfolio management. Further, the Federal Council is expected to tackle the issue of greenwashing in financial markets in due course, after having instructed a working group led by the Federal Department of Finance to examine the issue.

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> The CABA is intended to inform, simplify and generally combat the abuse of bankruptcy proceedings.

Generally, Swiss financial institutions have responded to the growing importance of ESG topics with dedicated ESG divisions, launching sustainable investment funds, and shifting strategically towards green initiatives.

3.6. Current Legal Challenges and Risks

Swiss financial institutions continue to navigate a complex array of legal challenges and risks. These include the ongoing need for stringent regulatory compliance, the ever-present threat of cybersecurity breaches, and the complexities brought about by Switzerland's unique position in international geopolitics. This position is characterised by its traditional stance of neutrality, which presents both opportunities and challenges. Navigating international sanctions, regulatory changes in international trade agreements and maintaining its reputation as a secure financial hub will be crucial in the coming years. Switzerland is likely to continue its collaborative approach, engaging in international dialogue and partnerships to align its financial sector with global standards and practices.

5. The Federal Council, Sustainable Finance in Switzerland, 16 December 2022.

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