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Insolvency: Editor's Preface

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This 12th edition of *The Insolvency Review* continues to offer an in-depth review of current market conditions and insolvency developments spanning the globe. As with prior editions, insolvency professionals around the world have contributed their time and expertise to this book. Their insights reflect diverse perspectives and experiences on this year's developments in in-court and out-of-court restructuring practices and provides a high-level view of current insolvency trends.

While the coronavirus pandemic's direct economic impact has mostly faded, restructuring activity levels have remained high in 2023 and thus far in 2024, due in part to comparatively high interest rates and inflationary pressures. Predictions for a near-term recession in the United States have not materialised so far, and it remains to be seen whether the US Federal Reserve can successfully manage a 'soft landing', with signals that it will cut interest rates in autumn of 2024. The sectors experiencing the most distress across the United States and Europe have been commercial real estate, consumer goods and healthcare, impacted by a sustained shift to remote work.

Over the past decade, US restructuring practitioners have watched as aggressive liability management exercises by borrowers shifted from the surprising exception to the norm. Companies or private equity sponsors looking to extend maturities, obtain liquidity or deleverage out of court have taken advantage of relatively flexible debt covenants to alter their capital structures. The wide syndication and trading of distressed bank loans to hedge funds, the availability of credit fund capital and the rapid growth of a private direct lending market have all contributed to the growth of this trend. Transaction structures have evolved from the prototypical scenarios of

'dropping down' collateral out of a restricted borrower group (*J. Crew*) or 'uptiering' the claims of selected lenders (*Serta*). As loan documents tightened to block recognised tactics, market participants have found increasingly innovative ways to read debt agreements that create ambiguities and opportunities to implement newer manoeuvres.

In many of these liability management transactions, a participating majority lender group captures value from left-behind minority lenders, who are forced into deeply subordinated positions. Those minority groups have sometimes organised and filed suit in high profile cases, as discussed in detail in this volume. Judges have taken different approaches to analyse the legality of these transactions, some focused on parsing complex debt document terms and others taking a more holistic approach, assessing the fairness or unfairness of the transaction. These varied legal approaches have made it difficult for lenders and professionals to predict outcomes. This trend, sometimes referred to as 'creditor-on-creditor violence', has evolved to generate an increase in transactions where all lenders are ultimately offered an opportunity to participate in order to avoid litigation and relationship risk.

While these types of transactions have historically occurred less frequently in European and other markets, the past year has seen the 'pari plus' transaction by Ardagh, a Luxembourg-based metal and glass packaging producer, a new money uptiering transaction by the Dutch lingerie retailer, Hunkemöller, and market discussion of potential liability management options by Altice, a French telecom company. There are a few reasons to think this approach will remain less frequent outside the United States. First, directors in many other jurisdictions may be more cautious about personal liability in the absence of the protection of the US 'business judgment rule'. Second, European and English documents often require unanimity to implement uptiering or other manoeuvres and do not permit exit consents in consent solicitations. Third, the creditor and sponsor community in Europe is to date more close-knit and collaborative than in the United States. However, as European companies and sponsors increasingly look at possible liability management transactions as options, it is likely they will become more common where the circumstances permit.

The US Supreme Court's June 2024 decision in *Purdue Pharma* prohibiting non-consensual third-party releases in plans of reorganisation could also have cross-border implications.[1] Prior to this decision, non-consensual third-party releases were often approved in US Chapter 11 proceedings. Although the US courts that permitted them imposed strict requirements, non-consensual third-party releases offered an attractive way to resolve cases where directors, shareholders, insurers and joint tortfeasors could contribute value and obtain releases that bind all potential plaintiffs.

Non-consensual third-party releases remain available in appropriate cases in several other countries.[2] Prior to the *Purdue* decision, US courts recognised orders in foreign main proceedings approving such releases.[3] When recognition has been challenged, US courts have rejected the notion that enforcing third-party releases could be 'manifestly contrary to public policy' under section 1506 of the US Bankruptcy Code, citing as one of the reasons the fact that third-party releases were not categorically prohibited in the United States.[4]

Following the *Purdue* decision, more debtors may look to non-US insolvency proceedings where non-consensual third-party releases remain available and then seek recognition of proceedings in the United States. It remains to be seen whether, under Chapter 15 of the Bankruptcy Code, US courts will continue to recognise foreign restructuring proceedings that include non-consensual third-party releases.[5] Even if they are inclined to do so, US courts could be more sceptical if they sense that the foreign proceedings were the product of forum shopping.

As always, we want to thank each of the contributors to this book for their efforts to make *The Insolvency Review* a valuable resource. As each of our authors knows, this book is a challenging undertaking every year. This is especially so in light of the major legal developments and innovations we have seen over the past year in our field. As in previous years, our hope that this year's volume will help all of us, authors and readers alike, reflect on the larger picture, keeping our eyes on developments on both the near and distant horizons.

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Footnotes

1. ^ See Harrington v. Purdue Pharma L.P., 144 S. Ct. 2071 (2024).
2. ^ See, e.g., Luc Morin and Arad Mojtahedi, Catch Me If You Can: Third-Party Releases Under the Companies' Creditors Arrangement Act, 19 Annual Review of Insolvency Law, 2021 CanLIIDocs 13544, https://canlii.ca/t/tt2n, retrieved on 2024-08-30 ('Third-party releases are now a key component of most restructuring processes conducted under the CCAA'.); In re Avanti Commc'ns Grp. PLC, 582 B.R. 603, 606 (Bankr. S.D.N.Y. 2018) (a UK scheme of arrangement included the releases of non-debtor affiliate-guarantors).

3. ^ See, e.g., In re Avanti Commc'ns Grp. 582 B.R. at 606 (recognizing an order under the UK scheme of arrangement where 98 per cent of the impaired creditors approved the scheme, including the releases of non-debtor affiliate-guarantors, but the remaining impaired creditors did not vote) ('The issues presented by third-party releases in Chapter 15 cases have received a different analysis than in Chapter 11 cases, focusing primarily on the foreign court's authority to grant such relief. The issue in Chapter 15 cases then is whether to recognize and enforce the foreign court order based on comity'.).
4. ^ See, e.g., In re Sino-Forest Corp., 501 B.R. 655, 665 (Bankr. S.D.N.Y. 2013).
5. ^ See Ho, G. (2024) After Purdue Pharma: The future of nonconsensual third-party releases in Chapter 15 proceedings, Columbia Business Law Review, available at: https://journals.library.columbia.edu/index.php/CBLR/announcement/view/684#_ftn17 (Accessed: 30 August 2024) ('The Fifth and Second Circuit have both stated that bankruptcy courts could still grant enforcement of such releases as a permissible form of 'additional assistance' not otherwise available under the Bankruptcy Code or US law'.)