
VIRTUAL ROUND TABLE SERIES | INSOLVENCY WORKING GROUP 2020

# Insolvency & Restructuring: How the global pandemic changed the rules on insolvency

Read the full publication via www.irglobal.com/news/e-publications

FOREWORD BY EDITOR, ANDREW CHILVERS

# Insolvency & Restructuring: How the global pandemic changed the rules on insolvency

Insolvency and restructuring legislation changed radically in all jurisdictions in the wake of COVID-19. While governments have tried to delay the number of insolvencies in the short term, most experts agree that distressed businesses will start to fail significantly later this year and into 2021.

For insolvency practitioners and lawyers alike, the pandemic has posed problems that have not been seen on a global scale in more than 100 years. Many businesses have faced sudden and catastrophic closures along with the evaporation of their revenue as emergency lockdowns have been implemented across all jurisdictions in an attempt to control the virus.

And now as lockdown measures have eased around the globe, those companies still functioning may well be tipped over the edge into insolvency by the loss of trade during and post the pandemic. No surprise then that later this year, the number of company insolvencies and liquidations is predicted to soar.

This provides the challenge for insolvency professionals; how to retain value and restructure decent businesses that were robust and profitable before March, while allowing zombie businesses to naturally fail?

Around the world, governments are eager for insolvency professionals to restructure failing businesses rather than liquidate them – and this could be crucial in the coming months and years. Consequently, governments in different jurisdictions have hastily introduced legislation to help preserve businesses and stop them slipping into insolvency, issuing a number of measures such as state loans, staff furlough schemes and tax breaks.

Because of these measures, the number of company insolvencies and liquidations dropped dramatically during lockdown in all jurisdictions while businesses temporarily closed their doors. But insolvencies have gradually crept up as lockdown has eased, although these are still appreciably down year-on-year. For example, there were 955 company insolvencies in England and Wales in July, comprising 590 creditors' voluntary liquidations, 166 compulsory liquidations, 182 administrations and 17 company voluntary arrangements, according to The Insolvency Service. But this was 34% down on the July 2019 figures.

While the exact moment of an anticipated increase in company failures is a matter of conjecture, experts in the industry agree that it is only a matter of time. Those measures to assist businesses to get through the lockdown – for example, in the UK companies have been able to furlough employees while the government agreed to pay 80% of their wages – are starting to come to an end. This will remove the safety net that many businesses have been hanging onto for the past few months.

It also means that creditors, who have had to be patient for the past few months, may become more aggressive with their demands for action on debtors.

Insolvency and restricting legislation varies markedly around the world; while some have evolved progressive regimes that focus on restructuring and rescuing value, others are more punitive. For example, 'light touch' administrations have been introduced in several jurisdictions but there are fears they may go too far and give too much power back to directors of ailing companies.

Elsewhere, new insolvency legislation had been instituted in various jurisdictions before the pandemic, but this has yet to be tested and means that businesses will need the guidance of specialists in their fields more than ever before.

The dilemma of trying to keep trading while staving off insolvency is likely to be one faced by many companies in the coming months. But the key for any business in financial trouble – as it is in any time – is likely to be to seek help at an early point when a restructuring is more likely to be successful and the value in the business is not lost.

The following discussion took place between IR Global members from four countries who are experts in company insolvency and restructuring. Their wide-ranging discussion addresses several issues including new legislation allowing restructuring over insolvency, whether 'rushed through' insolvency measures address both large enterprises and small and medium-sized companies and whether 'light-touch' administrations give too much power back to directors. Their responses demonstrate the differences that exist across the world.

**Andrew Chilvers**
andrew@irglobal.com

## View from IR

ENGLAND

**Ross Nicholls**
Business Development Director, IR Global
ross@irglobal.com
irglobal.com

Our Virtual Series publications bring together a number of the network's members to discuss a different practice area-related topic. The participants share their expertise and offer a unique perspective from the jurisdiction they operate in.

This initiative highlights the emphasis we place on collaboration within the IR Global community and the need for effective knowledge sharing.

Each discussion features just one representative per jurisdiction, with the subject matter chosen by the steering committee of the relevant working group. The goal is to provide insight into challenges and opportunities identified by specialist practitioners.

We firmly believe the power of a global network comes from sharing ideas and expertise, enabling our members to better serve their clients' international needs.

# Featured Members

AUSTRALIA

## James Conomos

Founder and Principal Partner,
James Conomos Lawyers

jim@jcl.com.au
irglobal.com/advisor/james-conomos

James was admitted as a solicitor in 1987, having completed a year in 1986 as associate to the then Chief Justice of the Supreme Court of Queensland, The Honourable DG Andrews. In his early years, he gained experience in a wide range of areas but quickly settled into litigation. By 1990, he was established as a commercial litigation lawyer with a keen interest in insolvency matters. He established James Conomos Lawyers on 1 July 1992 as a specialist practice in commercial litigation and insolvency.

Since 1990, he has practised as a solicitor primarily in commercial litigation, dispute resolution and insolvency matters. James has acted in and advised various parties in many insolvency administrations, both corporate and individual. He has advised a range of clients including financiers, insolvency practitioners, creditors and regulators.

ENGLAND

## Frances Coulson

Senior & Managing Partner, Head of Litigation & Insolvency, Moon Beever

fcoulson@moonbeever.com
irglobal.com/advisor/frances-coulson

She is Head of Insolvency and Litigation at Moon Beever running a substantial team of insolvency and litigation specialists. She undertakes most areas of personal and corporate insolvency, specialising in contentious insolvency especially cases involving fraud, as well as provisional liquidations and injunctive work generally.

She was a member of the disciplinary and admissions committees, then Chairman of the Appeal Committee at ACCA for ten years with good regulatory experience during and since that service. She is a member of Insol Europe (Council Member) and of Insol International, and the IBA. Frances is a regular speaker in the UK and abroad on insolvency, litigation and anti-fraud issues, and practice management. Frances was recently made an Honorary Fellow of the Chartered Institute of Credit Management.

US – DELAWARE

## Rafael X. Zahralddin

Shareholder, Director, and Practice Chair, Elliott Greenleaf

rxza@elliottgreenleaf.com
irglobal.com/advisor/rafael-x-zahralddin

Rafael X. Zahralddin-Aravena is a lawyer with 25+ years of experience advising businesses in corporate and commercial litigation, insolvency, distressed M&A, compliance, corporate formation, corporate governance, commercial transactions, cyber law, regulatory actions, and cross-border issues.

In 2007, he founded Elliott Greenleaf, P.C.'s Wilmington, Delaware office which specializes in business law and litigation in all federal and state courts. Rafael represents clients in all aspects of bankruptcy and restructuring and has deep experience in international commercial law issues, including cross-border insolvency. He has represented dozens of creditors' committees and individual creditors, particularly trade creditors, in some of the largest bankruptcies filed in the United States, including key jurisdictions.

Rafael has been a part of leadership in various organizations, most recently as Co-Chair of the American Bankruptcy Institute's International Committee. Rafael is also an extensive writer and lecturer. He is the co-editor of and author of several chapters in the American Bar Association's Reorganizing Failing Businesses.

FRANCE

## Yves-Marie Ravet

Founder,
Ravet & Associés

ym.ravet@ravet-associes.com
irglobal.com/advisor/yves-marie-ravet

Yves-Marie Ravet has been advising companies and their managers for more than 30 years. His practice includes both consel and litigation, and is focused on the French Fiducie as well. He assists his clients with their day-to-day corporate and contractual legal needs, as well as with their complex external growth operations (mergers, joint-ventures). As such, he manages the legal aspects of insolvency proceedings, exchanges with creditors and debt restructuring terms.

FRANCE

## Richard Jadot

Partner,
Ravet & Associés

r.jadot@ravet-associes.com
irglobal.com/advisor/richard-jadot

Richard Jadot has more than 35 years of experience in domestic and international financing, including financing of acquisitions, assets and projects (aircraft, trains and renewable energies), real estate and factoring. He is the advisor to banks, financial institutions and French and foreign companies for the drafting and negotiation of credit contracts and related collateral.

He is also involved in regulatory matters and in debt restructuring in the context of collective proceedings and / or corporate financial difficulties.

SWITZERLAND

## Armand Brand, MBA

Attorney at Law,
Treuco

a.brand@treuco.ch
irglobal.com/advisor/armand-brand-mba

Armand advises debtors and creditors in all aspects of restructuring and insolvency cases as well as in national and international enforcement law.

He acts as liquidator and bankruptcy administrator (as well as investigating agent) for the Swiss Financial Market Supervisory Authority FINMA and as commissioner for companies undergoing debt restructuring proceedings (composition with creditors).

SESSION ONE

# Are different governments introducing new legislative or country regimes that allow for restructuring over liquidation? There is no legislation that allows restructuring, so how does it preserve its economic value?

## Frances Coulson, England

The UK government introduced some rather robust legislation at the end of June in the Corporate Insolvency and Governance Act, which has three main permanent changes, with lots of peripheral Covid-related temporary provisions and reliefs also included.

The 3 biggest permanent changes have been long under discussion and some were in the pipeline but have been delayed because our legislative programme has been stalled for three years with Parliament so tied up with Brexit.

The first major permanent change is the introduction of a breathing space, a moratorium (which doesn't have to lead to an insolvency) for eligible companies. It might allow time to refinance for example. The moratorium is achieved either by filing at court various documents -including certification by the proposed Monitor that the moratorium for the Company in his view would result in the rescue of the Company as a going concern-, or by application to court. A company which is an overseas company for example would have to apply to court rather than simply file documents to achieve the moratorium. The moratorium leaves directors in charge but monitored by the Monitor (a licensed insolvency practitioner). If they fail to supply information or if the Monitor determines the Company can no longer be rescued as a going concern he must bring the Moratorium to an end. Creditors are notified of the existence of the Moratorium.

The second permanent change is the introduction of a new restructuring plan, (and the first of those has just been approved in England for Virgin Atlantic). It allows cross class cramdown of creditors and requires a court application.

The third major permanent measure introduced is the banning of ipso facto clauses- that is contractual terms allowing suppliers to terminate contracts simply because of insolvency. There are other provisions including temporary reliefs during the Covid period and the government has given itself power to extend temporary reliefs. It is a 200+ page piece of legislation largely untested as yet but containing some welcome provisions.

## Rafael Zahralddin, U.S. – Delaware

One of the biggest changes in U.S. bankruptcy law has been the small business chapter five election, and the Trump administration increased the amount necessary to be eligible for the election to $7.5 million of uncontested debt. Under sub-chapter five designation you don't have the costs of a creditors' committee. There's a chapter five trustee put into place, but you retain command over your company like you do under a regular chapter eleven.

One of the significant features, aside from the speed and the cost reduction for these smaller businesses, is that you are able to retain equity as an owner, which is something you can't do under a normal chapter eleven where equity gets wiped away without new investment. If you're an owner of a small business you should be able to keep ownership, including what people call sweat equity, as opposed to new money coming in to retain equity.

But in this new sub-chapter five election, you are not only allowed to keep ownership in your small business, but if you have personal guarantees as an owner, you can also wipe those out. It's a little bit different from a chapter eleven, where the debts are wiped away. Instead, you're going in and paying the debts over three to five years. This is brand new. It was enacted to start in January.

## Richard Jadot & Yves-Marie Ravet, France

In France there are five different procedures which can apply in consideration of the degree of financial difficulties faced by the company.

It starts with a light proceeding, which is just the assistance of specialist for negotiating with creditors when a company starts to face financial difficulties or anticipates them; then there is the conciliation proceeding when the difficulties start to be more serious and could result in insolvency, then the so-called safeguard and judicial recovery proceedings which are heavier and court controlled proceedings, and finally in hopeless situations, the liquidation proceeding. The French system is thus really progressive. It took a long time (decades) for the French legislator to put in place instruments the purpose of which is to maximise the chances of a company to recover after having faced severe financial difficulties. Previous systems were privileging liquidation rather than helping management to anticipate and look for solutions with the creditors.

The intent of the legislature has always been to try to induce people to treat difficulties at an early stage rather than late. For decades, the French system had a reputation for failing to induce people to treat difficulties early, and the insolvency proceedings were often leading immediately to liquidation because the managers and the creditors didn't really take the difficulties sufficiently early to find solutions.

Consequently, the legislators introduced progressive proceedings, which prove to be fairly efficient. However, it is well known that the ideal system for resolving financial difficulties and preserving a fair balance between the interests of creditors and debtors is a difficult exercise in all countries.

## James Conomos, Australia

In March, the Australian Government introduced the Coronavirus Economic Response Package Omnibus Bill 2020, which made temporary changes to the Corporations Act 2001 and the Bankruptcy Act 1966.

Three main changes were, firstly, under the Corporations Act 2001, where directors are relieved from the duty to prevent insolvent trading and can avoid personal liability except if debts are incurred dishonestly or fraudulently.

Secondly, parties seeking to recover debts from companies are faced with significant delays. If a party has a debt owing by a company, which is not disputed, under the Corporations Act 2001 the party can issue a document called a Creditor's Statutory Demand for Payment of a Debt. The recipient usually has 21 days to comply or apply to set it aside. Under the COVID legislation, this time was extended to six months.

Thirdly, parties seeking recovery from an individual are faced with delays. If a party has a debt, which is the subject of a judgment, a common way to pursue recovery is to issue a Bankruptcy Notice. The recipient usually has 21 days to comply or apply to set it aside. Again, the time was extended to six months.

These changes have given protection for business by allowing breathing space in respect of debts owed, but at the same time it has given creditors the opportunity to delay payment to business, which is not necessarily helpful.

The changes – which have largely had positive feedback – last until 23 September, but I expect these will be extended as the full effects of the pandemic will be felt post September and there is likely to be a significant escalation in insolvencies then.

Australia's insolvency laws provide mechanisms to assist business and individuals to restructure their affairs and minimise even further the harmful effects of the pandemic. Delay is the enemy for business, particularly once the stimulus initiatives and temporary relief end.

## Armand Brand, Switzerland

As part of the emergency measures taken by the Swiss Federal Council to counter the negative impact of the COVID-19 pandemic on the Swiss economy, the COVID-19 Solidarity Guarantee on the granting of loans and joint and several guarantees and the COVID-19 Insolvency Ordinance have been enacted with effect as of 25 March respectively 16 April 2020 (the "Insolvency Ordinance").

On the one hand, the Insolvency Ordinance provides for temporary relief from the obligation of the directors of the debtor to submit a notification of over-indebtedness and, on the other, the possibility of a temporary and unbureaucratic so-called COVID-19 deferral for small and medium-sized enterprises is introduced. What both regulations have in common is that they are only temporary in nature and aim to protect those companies from bankruptcy, which run into liquidity bottlenecks solely as a result of the Corona crisis (The Ordinance expires six months after its enactment).

If there is no concrete prospect of remedying the over-indebtedness, a debt-restructuring moratorium can still be applied for in accordance with the already existing legal regulations. However, the relevant provisions have been temporarily relaxed slightly (in particular the debtor's ability to reorganize is not examined by the insolvency court when granting the moratorium phase and the total duration of the provisional moratorium phase is six months).

The enacted Insolvency Ordinance should not result in increased risk for insolvency practitioners (in particular in their function as administrators). Insolvency proceedings are still initiated by a provisional moratorium phase, during which administrators can familiarise oneself with the debtor's financial situation and its business. In general, the debtor may continue his business activities under the supervision of the administrator unless the insolvency court orders otherwise. Consequently, even after insolvency proceedings have been opened, the main risk remains with the directors and not the administrator.

IR Global members pictured at the 2019 Dealmakers Conference in Rome

SESSION TWO

# Do "rushed through" insolvency measures address both large enterprises and small and medium-sized companies? Is there legislation pending to address this in your jurisdiction?

### Frances Coulson, England

We've had a good combination of temporary measures and longer-term measures, and with the ability to do a lot more by secondary legislation. For instance, we haven't been allowed to petition to wind up any company unless we can specify that they haven't been affected by coronavirus, which is pretty hard. You have to go through a two-stage process to be able to wind up a company; even if the debt is historic and landlords are a particular issue, they can't do anything here, they can't forfeit the lease, they can't do anything basically. As long as you pay the surcharges, they have no ability to enforce their rent.

It's only temporary, but they keep extending. It was originally going to be till the end of June, but now it's the end of September and everybody is still talking about extensions. Sensible landlords are negotiating lower rents and monthly repayments so that they can keep some income coming in. Those who are just intransigent may well suffer.

Of course, there's a huge amount of investment, particularly by pension funds and so on in commercial property and it has got to change. You go into Central London today and it's like a ghost town. Life is starting to come back, but nobody will get back to work in the same way as they were doing prior to Covid.

We're still waiting for the tsunami of insolvencies. I think September will be too early for them to happen. What is critical is what the government does. For instance, we've had deferrals of VAT and tax payments until next year. The government has got to reschedule those long-term because people have had a period of not trading. They won't suddenly have cash in January or April next year so if the government doesn't reschedule those long-term, that's when I think more companies will tip over.

### Richard Jadot & Yves-Marie Ravet, France

"Rushed through" insolvency measures reflect well the position in France and apply to all actors. The French government has reacted promptly and efficiently when the crisis has arisen in order to "give oxygen" to companies and force creditors to grant delays of payment to debtors and extending delays of proceedings. The whole economy is on hold and lenders have accepted the idea of giving extended deadlines. Bank loans have been put in place with a guarantee from the State. Lots of actors have accepted the situation, including the tax authorities and social security, but it will not last forever. The uncertainty maintained by the virus puts a huge question mark on the economy locally and globally. And we have seen that in Australia, in Melbourne for example, in their winter the virus is coming back.

The reality of the legislation is that, yes, it gave time and the capacity for the debtors to ask for exceptional measures, forcing the creditors to be patient. But it will not last forever. Some predict a "tsunami" of insolvency proceedings and litigation cases as from the Autumn, more likely at the beginning of 2021. As a matter of fact, banks are still lending on the basis of 2019 financial statements of companies. But when the 2020 financial statements will be published, their attitude may radically change and credit committees will be reluctant to approve credit facilities or extensions of credit facilities on the then current standing of their clients.

However, one should be cautious with too negative of predictions. It is well known that when a crisis is over, everything happens except what most economists or the so called "specialists" had predicted. French economy was improving before the crisis, and I tend to think that things will not happen the way one thinks they will. In my view, a number of factors should be taken into account in a positive manner. People will adapt. It is certain that many companies will be liquidated, and/or open insolvency proceedings. However, many new businesses will emerge and, in a way, proceedings will have a cleaning effect.

The proceedings in France are reputed to be fairly "debtor protective", but they do not sacrifice the rights of the creditors. France has the reputation of being a country that gives priority and preference to the debtors rather than the creditors, but the reality is that the proceedings are designed to induce the parties to find solutions in order to preserve the businesses. The COVID crisis and the rushed through measures taken are in line with this.

### Rafael Zahralddin, U.S. – Delaware

I'm not sure what's going to happen in the U.S. because we have this little thing called an election coming up in November.

Even with the new chapter five, I saw a headline yesterday that a bank just foreclosed on 25 hotels. There is going to be more than $7.5 million dollars in debt, in maybe just one hotel. The lenders want to take over the real estate, but all that going concern value is simply wiped away.

Whoever set the thresholds on what they consider to be small businesses didn't actually talk to anyone, which isn't surprising because the small business sector is often neglected. Even with the Small Business Administration in the U.S., they are often neglected and there is very little information about them. But they are the engine of the U.S. economy. They create sustainability for a majority of people who don't want to expand. For example, an entrepreneur may have just one hotel that can hire their immediate family, their extended family, and maybe some friends.

And that's what makes the U.S. economy strong; when that goes down you have serious problems which is why there is such a wealth gap right now in the U.S. I don't know what you would do as a small-to-medium sized enterprise, and certainly if you are a smaller restaurant or hotel, and the victim of a riot on top of COVID – as riots are not covered by traditional insurance. I would suggest that you go away, sit back and take three months off to figure out what you are going to do next.


IR Global members pictured at the 2018 Annual Conference in London

### James Conomos, Australia

The changes have been of significant assistance for small business. The stimulus initiatives and temporary relief changes have given breathing space especially for small business, particularly because the ability to delay payment allows small business to survive and avoid failure. These changes, as well as other packages offered during COVID and the lack of pursuit by the Australian Taxation Office of tax revenue, has given small-to-medium business a cause for pause.

That cause will cease once the assistance available comes to an end in late September and the true effects of the pandemic are faced by all.

Experience tell us that the cessation of the stimulus initiatives and temporary relief changes, coupled with increased activity by all debtors including the Australian Taxation Office, as well as the general decline in activity over the Christmas/new year period, will lead to a significant uptake in insolvency appointments.

For large enterprises, the stimulus initiatives and temporary relief changes have had some effect, but have not cured the problems and whilst appointments overall are down, the number of large organisations to fall during the pandemic have been significant. These include Virgin, but there are also many large companies shedding significant numbers of staff or making significant changes including:

- Three of the big four accounting firms offloading significant numbers of staff
- Myer in Melbourne offloading significant numbers of staff
- News Corp closing over 100 regional papers with 500 jobs lost
- ABC shedding 250 jobs.

Some of these businesses would not be expected to be so heavily affected by the pandemic, but the effects do not spare many. A possible exception might be food retailers. It is reported that Woolworths has recorded a large increase in jobs while at the same time looking at reducing jobs including by automation.

This pandemic will spare no one.

### Armand Brand, Switzerland

For the measures and legislation implemented, see above. As already set out, some of the corona-related insolvency measures are specifically targeted at small and medium-sized companies. In principle, however, Swiss insolvency law makes no distinction between large enterprises and small and medium-sized companies. Certain protective mechanisms are only implemented in larger proceedings, though (e.g. creditors' committees, restrictions on the realisation of insolvency assets).

It is currently being proposed within the context of a general revision of Swiss corporate law, to amend certain obligations of the directors so as to force them to take restructuring actions at an earlier stage. The current triggering points for the directors to initiate restructuring proceedings are the loss of capital and over-indebtedness. In future (such rules are not currently expected to enter into force before 2022) directors are also obliged to initiate restructuring proceedings if certain liquidity ratios are no longer met. In this context, it is also proposed to extend the maximum term of a silent moratorium (not published) from four to eight months. These amendments are subject to parliamentary discussion and may still change in parts.

SESSION THREE

# With the "light touch administration" processes now being implemented in different jurisdictions, does this give too much power back to directors? What are the potential risks for the office holder?

## Frances Coulson, England

With the moratorium, for example, the directors remain in control, but the monitor has to do a lot of monitoring. We don't have in this country the same level of legal intervention or court control that you do in the US. Judges here, on the whole, just say 'we're not commercial animals, that's your job, get on with it, don't trouble us, and don't use the court as a bomb shelter to ask us to make any decisions.'

And in a CVA, obviously the directors remain in control. But it's like any contract, the people they are contracting with have got to trust them. And if they've messed up the management once, that's the risk. Unless there's some form of education, and improvement in the management, then it is going to fail again. And we have a lot of zombie businesses because they didn't clear them out from 2008 onwards.

The reason we have so many zombie businesses is that with interest rates low for so long, there is no point tipping them over. And after the banks got such a kicking last time – well deserved – they were too afraid to put anybody into administration, we had to rely on the Revenue to wind them up. Now banks are just about getting their appetite back a little bit to take some action, business owners are getting interest free loans from the government as part of the package of coronavirus bounce back measures. Consequently, you are going to have businesses that keep struggling on and spinning plates and not going to put themselves into any form of insolvency until all of those avenues of money are cut off next year.

## Richard Jadot & Yves-Marie Ravet, France

The "light touch administration" concept exists in France and has not been implemented only as a result of the COVID 19 crisis. As I said earlier, the French system with five different proceedings relates to the degrees of difficulties faced by the company. The purpose of this system is to enable the actors to select the right proceeding at the right time. And it is really when a judicial recovery proceeding, which is strictly the first insolvency proceeding per se, is open, that the directors and managers lose an important part of control of the management of the company. Even if the management keeps a certain degree of capacity to manage, the administrator has the final word on the acts of management and disposal of assets.

But all the other preventive proceedings, the pre-insolvency proceedings – you may call it prepack proceedings – the management keeps almost all of its powers of management and is assisted by the administrator. It is the court that decides the actual role of the official who is appointed for assisting or monitoring the activities of the company. So the light touch administration is in a way inherent to the preventive proceedings in France.

It is when an insolvency proceeding strictly speaking, i.e. a judicial recovery or the liquidation proceeding is opened, that we can see the management losing their 100% capacity to manage. It is really up to the debtor to select the right proceeding in order to find solutions. In the current circumstances, the one which should be given preference is the conciliation proceeding, which is flexible and confidential.

In my view, September will be too early before we actually see where companies are going. It is going to take some time before they get visibility on the future of the business and, of course, on the virus itself.

## Rafael Zahralddin, U.S. – Delaware

It's OK to make mistakes here in the U.S. You just can't do it carelessly and you can't be dishonest. Instead, you can use the advice of counsel and other professionals to work through it and I think this offers a tremendous amount of flexibility.

That said, there isn't enough flexibility in chapter eleven today. The lions of the restructuring and reorganization practices out there lament the fact that we haven't had true reorganizations in the U.S. for a long time. Most of what we have here is a distressed mergers and acquisitions market. It seems that selling businesses as a going concern is the only option. The debtor isn't really making a decision to sell because of the way that different waves of lenders have exerted control of the enterprise. You aren't really seeing management being able to continue along to preserve the value of the business and come out on the other side. There are legions of people who can no longer even use their own given name because their company was sold out from under them, and the lenders pushed them into chapter eleven and used the mechanism this way.

The only real difference between a chapter eleven and a chapter seven in the United States is who is in charge of the company. I think that the officers and directors should be given more flexibility to reorganize, but right now, the fact that they don't have flexibility is a product of the lending markets. At some point this will adjust itself because eventually the markets do adjust themselves the right way.

## James Conomos, Australia

In the UK, a solution available for companies with a strong potential for long-term viability is a type of formal administration known as 'light touch administration'. This process is particularly suited to larger companies with a high physical presence who have seen their trade decline due to enforced closure of their retail or trading space. Although stores have been made to shut temporarily, if there is the prospect of a viable business once we return to a sense of normality, then light touch administration could be an attractive solution.

Once a company enters administration, whether a light touch administration or not, a moratorium is issued that prevents legal action from outstanding creditors, giving the company time and space and the ability to formulate a viable plan for the future direction of the business.

This could involve the business continuing to trade following a process of restructuring or refinancing, entry into an alternative formal business rescue process.

In Australia, businesses, large and small, can avail themselves of the voluntary administration process, which, it would seem, can achieve the same outcomes as the 'light touch administration'.

Traditionally, a voluntary administration can achieve any outcome if agreed by creditors and often the agreement will encompass a moratorium and time to restructure or pay debts.

Care needs to be taken to ensure that the solution fits the company, but the process is intended to be flexible and accommodate any conceivable outcome.

Creditors decide in the voluntary administration process. There are sometimes winners and losers, but if prejudiced those prejudiced can challenge the arrangement.

In Australia, we are well placed to assist large and small business, but the challenge is to encourage directors not to delay and to seek advice promptly to enable a sensible solution to modeled promptly and in a competitive way.

## Armand Brand, Switzerland

The measures and legislation implemented or pending in Switzerland do not entail "light touch administration" processes. They aim of the measures implemented is to provide some breathing space to avoid unnecessary insolvency or even bankruptcy proceedings and to simplify certain aspects of the application process for a moratorium.

IR Global members pictured at the 2018 Annual Conference in London

# Contacts

## UK Head Office

IR Global
The Piggery
Woodhouse Farm
Catherine de Barnes Lane
Catherine de Barnes B92 0DJ

Telephone: +44 (0)1675 443396

www.irglobal.com
info@irglobal.com

## Key Contacts

**Ross Nichols**
Business Development Director
ross@irglobal.com

**Rachel Finch**
Business Development Strategist
rachel@irglobal.com

**Andrew Chilvers**
Editor
andrew@irglobal.com

## Contributors

**James Conomos**
Founder and Principal Partner,
James Conomos Lawyers
+61 7 3004 8200
jim@jcl.com.au
irglobal.com/advisor/james-conomos

**Frances Coulson**
Senior & Managing Partner,
Head of Litigation & Insolvency,
Moon Beever
+44 207 539 4114
fcoulson@moonbeever.com
irglobal.com/advisor/frances-coulson

**Rafael X. Zahralddin**
Shareholder, Director and Practice Chair,
Elliott Greenleaf
+1 302 384 9400
rxza@elliottgreenleaf.com
irglobal.com/advisor/rafael-x-zahralddin

**Yves-Marie Ravet**
Founder,
Ravet & Associés
+33 1 44 29 31 62
ym.ravet@ravet-associes.com
irglobal.com/advisor/yves-marie-ravet

**Richard Jadot**
Partner,
Ravet & Associés
+33 1 44 29 31 62
r.jadot@ravet-associes.com
irglobal.com/advisor/richard-jadot

**Armand Brand, MBA**
Attorney at Law,
Treuco
+41 44 289 25 25
a.brand@treuco.ch
irglobal.com/advisor/armand-brand-mba