Debt Restructuring: an alternative to insolvency proceedings

Debt Restructuring: an alternative to insolvency proceedings is the essential reference guide for financial institutions, legal professionals and investors. Covering 20 major jurisdictions worldwide, it provides a clear overview of the law and regulation governing debt restructuring in each one, and is structured to allow easy comparisons between jurisdictions.

- Offers a well-organised starting point for international reference
- Covers the law in 20 major jurisdictions
- Includes contributions from leading local practitioners who are experts in the field
- Uses a reader-friendly Q&A format that enables quick and easy cross-jurisdictional comparisons
- Addresses the key questions of multinational organisations
- Provides straightforward, practical commentary on each jurisdiction and the respective legal systems

FIRST EDITION 2015

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General Editors: Ole Borch & Lars Lindencrone Petersen, Bech-Bruun & Alessandro Varrenti, CBA Studio Legale e Tributario
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Foreword

Alessandro Varrenti, CBA Studio Legale e Tributario
Lars Lindencrone Petersen & Ole Borch, Bech-Bruun

The financial crisis that started quite dramatically with the bankruptcy of Lehman Brothers in 2008 has been historic. Several other financial crises have been confined to a certain area and have been quite short lived, but the one that started in 2008 has affected all parts of the world to varying degrees and is not fully over more than eight years later. It has not only stress-tested undertakings and banks; it has also tested countries and the entire way of perceiving the financial structure.

At the outset of the financial crisis, quick fixes were desperately needed. During this phase, countries had to ensure that their banking sectors did not collapse. At the same time, undertakings in crisis had to be handled, and in this process an adjustment of the set of rules available to such situations has taken place. These sets of rules could be said to have many similarities, but if you look at the finer details quite a few differences become apparent. As an experienced specialist in the law of your own country, you have not been able to rely on your experience and judgement to figure out how a specific situation would be handled in another country.

With this in mind, Thomson Reuters asked one of the grand old men of the world of insolvency, Jacques Henrot of De Pardieu Brocas Maffei, to lead a project in which Jacques and we – Alessandro Varrenti of CBA Studio Legale e Tributario (Milan), and Lars Lindencrone Petersen and Ole Borch of Bech-Bruun (Copenhagen) – were to work together to prepare an easily accessible yet detailed presentation of the sets of rules applicable to restructuring and distressed undertakings in a number of countries.

Jacques undertook the task and was a driving force during the start-up phase, and this in spite of the fact that Jacques was quite seriously ill. Sadly, Jacques passed away in the summer of 2014 and thus before the book was ready for publication. We are dedicating this book to Jacques in honour of his huge effort with the book and a number of similar projects in the past.

We hope that the readers of the book will share our enthusiasm about the finished project and that the book may contribute to understanding and decision-making in cross-border situations where there is a need to understand at least the fundamental principles of the rules of other countries.

We would like to extend our thanks to all the contributors for their efforts on the project. The dialogues we have had with the contributors from the various countries in the course of the project have confirmed the great expertise involved as well as the high level of enthusiasm for the project. We would also like to take this opportunity to express our respect – which is perhaps done too rarely – for the legislators of the

many countries. Restructuring legislation is quite difficult to draft as it requires decisions according to which some parties are to relinquish rights to the advantage of other parties for the sake of the bigger picture. It is the quality of such legislation which determines the possibilities of obtaining successful restructuring – and this applies to both in-court and out-of-court restructuring. Out-of-court restructuring will typically reflect the possibilities of the in-court options, as the rights holders will hardly be willing to contribute to an out-of-court solution providing them with a poorer result than an in-court process. At the same time, in-court restructuring is presumably still the very last thing you want. Professor Lawrence P King was quoted as saying that the American rules on restructuring, Chapter 11, may well be effective, but for him they are the equivalent of using a hammer to put out the fire in your hair. We believe that this book will demonstrate that it is not quite that bad, either in the US or in other countries.

1 November 2014

Jacques Henrot

1952–2014

As mentioned in the foreword, this book has been dedicated to our partner, Jacques Henrot. No better tribute could be paid to Jacques, who, until the very end of his long fight to overcome his terminal illness, remained strongly committed to ensuring the publication of what he considered to be a significant contribution to the merging into a single instrument an analysis and description of the complexities of a wide variety of policy and legal issues in the work-out and restructuring areas across many countries.

Our partner and friend Jacques passed away late this summer. Above all, Jacques was a very talented lawyer, dedicated to the long tradition of the practice of law rooted in the old cultural values of a general practitioner and combining those values with a remarkable understanding of the diversity of legal cultures and conceptual diversities between the continental legal tradition and the common law approach. Often those skills turned out to be material in bridging the gap between the different cultures prevailing in those different environments, paving the way to consensual approaches to resolving difficulties in complex matters.

He combined unequalled expertise in the property area with a unique practice in the insolvency sector and a strong understanding of the needs of the financial services industry. Moral integrity and compliance with the highest ethical standards were among his key attributes.

Jacques had a great sense of human relationships, and was most sensitive to the needs and aspirations of our younger professionals. He was a great team builder, dedicated to training his assistants and colleagues towards excellence and achievement of the highest standards in the practice of law.

In the pursuit of that goal, he has paved the way to the emergence of a younger generation to develop a practice based on those values.

Before leaving us, Jacques has passed the torch on to that new generation sharing those values to continue to develop a practice rooted in the high standards he advocated.

For those accomplishments he will be forever remembered.

Antoine Maffei
De Pardieu Brocas Maffei

Poland

Sołtysiński Kawecki & Szlęzak
Marcin Olechowski & Borys D Sawicki

1. WHAT COURT-MONITORED RESTRUCTURING PRE-INSOLVENCY PROCEEDINGS OR SCHEMES HAVE BEEN DEVISED BY THE LAW OF YOUR COUNTRY TO LIMIT VALUE DESTRUCTION FOR FAILING BUSINESS ENTITIES?

The only pre-insolvency proceedings is the restructuring proceedings regulated by the Act of 28 February 2003 on the Law of Bankruptcy and Restructuring (LBR).

1.1 What is the objective of the proceedings?

The aim of the restructuring proceedings is to recover the debtor's ability to compete on the market. The aim is reached through the conclusion of a restructuring arrangement agreed during a creditors' meeting.

1.2 Do all kinds of businesses qualify?

In general, the restructuring proceedings is available for all types of entrepreneurs (including, among others, individual entrepreneurs, partnerships and commercial companies), regardless of their turnover or the value of their assets.

The restructuring proceedings may be started only if the entrepreneur is facing a risk of insolvency, ie if, despite not being insolvent yet, it is obvious, based on a reasonable assessment of its financial standing, that the entrepreneur will be insolvent shortly. This prerequisite is not, however, connected to any fixed threshold. Needless to say, the restructuring proceedings is not admissible if the entrepreneur is already insolvent.

The restructuring proceedings cannot be conducted with respect to the entrepreneur who:

- had previously conducted restructuring proceedings, if less than two years has passed since their discontinuation;
- had been subject to an arrangement concluded within restructuring proceedings or bankruptcy proceedings, if less than five years has passed since the performance of the arrangement;
- had been subject to a liquidation bankruptcy or a liquidation arrangement, if less than five years has passed since the final and non-appealable conclusion of such proceedings; or
- had an application for the declaration of his bankruptcy dismissed or had his bankruptcy proceedings discontinued due to insufficient assets to cover the costs of proceedings, if less than five years has passed since the proceedings have become final and non-appealable.

1.3 What are the necessary approvals?

There is no statutory requirement for the approval of any corporate bodies and the request for commencement of the restructuring proceedings may be submitted by any duly authorised representative of the entrepreneur (usually, a member of the management board or a commercial proxy). While the articles of association may stipulate the requirement of the approval of another governing body, such a requirement does not affect the validity of the request itself and failure to obtain it may only constitute grounds for civil/corporate liability towards the company of the person(s) acting contrary to the articles of association.

1.4 What is the procedure?

The only way to start the restructuring proceedings is to submit a statement of the commencement of restructuring proceedings to the court.

Along with the statement, the entrepreneur shall submit:

- a statement on the non-existence of negative prerequisites of the restructuring proceedings;
- a restructuring plan;
- a list of assets with their valuation;
- the balance sheet as of a day within 30 days preceding the submission of the statement;
- a list of creditors and their receivables;
- a list of security interests;
- a statement on the repayment of obligations within six months preceding the submission;
- a list of the entrepreneur's debtors and their debts;
- a list of enforcement titles against the entrepreneur; and
- information regarding the proceedings related to encumbrances over the entrepreneur's assets.

The entrepreneur shall also submit a signed statement confirming the accuracy of the data provided in the above-listed documents, witnessed by a notary public.

Within 14 days from the submission of the statement, the court may forbid the start of the restructuring proceedings. Following the lapse of the deadline for the court decision (if the court does not forbid the start of the proceedings), the entrepreneur shall publish the statement of the commencement of the proceedings in *Monitor S dowy i Gospodarczy* (MSiG; a Polish official journal dedicated to entrepreneurs' announcements) and in at least two other (one local, one countrywide) daily newspapers. The day of publication of the statement in the MSiG is deemed to be the day of commencement of the restructuring proceedings.

The restructuring of an entrepreneur's debts requires the creditors' meeting to adopt the arrangement. The entrepreneur shall notify its creditors on the date and place of the creditors' meeting at least two weeks prior to the meeting. The notification shall be sent by registered mail or delivered in any other way with confirmation of receipt of delivery.

The entrepreneur shall also deliver the restructuring plan along with the notification.

1.5 Is there recourse against the opening judgment?

Since there is no opening judgment, no recourse is available. If the court issues a decision forbidding the start of the restructuring proceedings, the entrepreneur may appeal against it. The second-instance decision is usually issued within a few months (there is no statutory deadline for the court's decisions and time frames vary between different courts).

1.6 What are the substantive tests/definitions?

As mentioned above, the restructuring proceedings is available for entrepreneurs facing the risk of insolvency, which means that they are still solvent; however, based on the reasonable assessment of their financial standing, it is obvious that they will shortly become insolvent.

An entrepreneur is deemed to be insolvent if:

- it fails to perform its due financial obligations; or
- the sum of its liabilities exceeds the value of its assets (the entrepreneur has negative own capital).

The second prerequisite applies only to a debtor who is a legal person (eg a commercial company) or an organisational unit with legal capacity (eg a partnership).

1.7 What is the role of a court-appointed agent?

Restructuring proceedings involve a 'court supervisor'. The court supervisor has the authority to supervise the entrepreneur's activities and his enterprise at any time during the restructuring proceedings, and, if the court so determines, during the performance of the arrangement. The supervisor may also verify whether an entrepreneur's assets that do not constitute part of an enterprise are sufficiently protected against deterioration. The court supervisor also acts as the chairman of the creditors' meeting, and determines with the debtor the date and venue of the creditors' meeting.

1.8 What protection is there from creditors?

As of the day when the restructuring proceedings starts:

- performance of the entrepreneur's obligations and accrual of interest are suspended;
- deduction (set-off) of reciprocal claims of the entrepreneur and creditors is limited (generally, to the claims which arose prior to the commencement of the restructuring proceedings);
- execution (debt enforcement) proceedings, as well as proceedings to secure claims, cannot be brought against the entrepreneur; and
- pending proceedings are suspended (except proceedings pertaining to claims which are not included in the arrangement).

If, during the restructuring proceedings, a creditor files an application to declare an entrepreneur bankrupt, such application may be considered once

the restructuring proceedings has been completed or jointly with the court's approval of an arrangement with creditors in the restructuring proceedings.

1.9 What is the usual duration of the restructuring process?

The arrangement with creditors shall be concluded within four months (three months in the case of small or medium entrepreneurs) from the start of the restructuring proceedings, otherwise the proceedings is discontinued.

The conclusion of an arrangement is not, however, the end of the restructuring proceedings as it is subject to the court's approval. There is no statutory deadline for the court's decision, and the time in which the decision is adopted depends on a given court's practice. Usually it takes approximately 1–2 months.

The duration of restructuring process is set out in the restructuring arrangement. The LBR does not indicate the maximum time of the restructuring process.

1.10 Who prepares the restructuring agreement and what are the available tools?

The proposal of the restructuring arrangement is prepared by the entrepreneur. Neither the creditors nor any other participant to the restructuring proceedings (eg the court supervisor) has the right to present a competing proposal.

The restructuring arrangement is adopted by the creditors' meeting. Adoption of the restructuring arrangement requires a majority vote of the creditors entitled to participate in the creditors' meeting holding jointly at least two-thirds of the total amount of receivables, which give voting rights. If the creditors are divided into separate classes of interest (see section 1.11 below), the consent of each group is required. However, the arrangement will also be adopted despite not being accepted by a part of the groups if the majority of creditors voting in other groups holding at least two-thirds of the total value of claims voted for the arrangement and if creditors in groups against the arrangement will be satisfied with the arrangement to a degree at least equal when compared to bankruptcy involving liquidation.

Each creditor entitled to participate in the creditors' meeting may object against the adopted restructuring arrangement. Objections may also be raised by a creditor not entitled to participate in the creditors' meeting provided such creditor proves that the arrangement may impede the pursuit of its claims.

If the proposal regarding the restructuring arrangement has been rejected, the creditors' meeting may be convened again and new/amended restructuring arrangements may be presented.

The restructuring arrangement shall determine the restructuring of debts, assets and employment in the enterprise. The proposal of debt restructuring may include in particular:

- the deferment of payments,
- the payment of debts in instalments;
- the reduction of debts;

- the conversion of claims into shares; and
- the modification, exchange or cancellation of security interests.

1.11 Are subordination agreements necessarily given full effect?

The LBR does not stipulate specific provisions regulating subordination agreements. A subordination agreement has only contractual effect and is not binding *vis-à-vis* third parties in either restructuring or bankruptcy proceedings.

All creditors shall be treated equally; however, the LBR provides for some exemptions, the most important being that the creditors may be divided into separate classes of interest (one of the classes may include shareholders). In such case, there is a possibility that different categories of creditors will be treated unequally. Also, certain groups of creditors are excluded from voting on the arrangement (see section 2.9 below).

1.12 How is exit managed?

Following the adoption by the creditors' meeting, the restructuring agreement is subject to the court's approval. The court issues a decision after a hearing. The date of the hearing is announced in the MSiG, a local daily newspaper and the court building, and both the entrepreneur and creditors who raised objections are notified.

The court examines the admissibility of the restructuring proceedings and will refuse to approve the arrangement if there are no grounds for the proceedings. The court shall also refuse approval if the entrepreneur has failed to submit the required documents (or if the information provided was untrue) or to notify all known creditors of the date of the creditors' meeting. Moreover, the following circumstances constitute grounds for refusal:

- the court supervisor had no possibility of exercising supervision;
- provisions of law have been violated in a manner which might affect the way in which creditors vote;
- the entrepreneur has disposed of or encumbered his assets contrary to the provisions of the LBR;
- the circumstances of the case imply that the arrangement will not be performed;
- the arrangement is detrimental to the creditors, who have raised objections; or
- the restructuring plan does not ensure the recovery of the entrepreneur's ability to compete on the market.

The arrangement is binding for all creditors notified of the creditors' meetings as well as those who reported their participation in the creditors' meeting, unless the entrepreneur denied the existence of their claims.

The court may appoint a court supervisor for the time of the performance of the arrangements.

If the entrepreneur does not perform the restructuring arrangement or if the grounds for refusal of the arrangement become known after the court's positive decision, the arrangement may be revoked by the court.

1.13 Who are the necessary parties?

The conduct of the restructuring proceedings requires the participation of (i) the entrepreneur and (ii) his/her/its creditors, both included in the list of creditors and receivables attached to the statement of the commencement of restructuring proceedings and those who later reported their participation in the creditors' meeting. The creditors act through the creditors' meeting.

The appointment of a court supervisor is mandatory (see section 1.7 above for more details).

The new Restructuring Law

At the beginning of October 2014, the Polish government submitted to the Parliament a draft of the new Restructuring Law.

According to the proposal, the restructuring regulations would be extracted from the LBR into a separate act, while the LBR itself would be significantly revised. The key goals of the proposed amendment are to improve the efficiency and pace of the restructuring proceedings and to deliver effective means of conducting a restructurisation process to entrepreneurs and their contractors, while at the same time increasing the protection of creditors and, finally, remodelling of the bankruptcy proceedings (under the amended LBR) into a last resort procedure to be employed in case of failure of the (new) restructurisation process, with the latter obtaining priority as means of assistance to businesses in distress. The latter goal is of particular practical importance because currently the provisions on restructuring included in the LBR are virtually dead, with only a few successfully completed restructurisations over the 10 years of the act being in force.

2. POST-INSOLVENCY PROCEEDINGS

2.1 What is the objective of the proceedings?

The objective of the bankruptcy proceedings is to satisfy creditors' claims at the highest possible level and to save the enterprise of the debtor if reasonably possible. Bankruptcy proceedings may involve either the liquidation of the debtor's enterprise or the conclusion of an arrangement. The decision on the type of bankruptcy proceedings to be conducted in a given case is made by the court.

Bankruptcy proceedings with the possibility of an arrangement are conducted if it becomes apparent that a debtor will be able to satisfy creditors to a higher degree when compared to a bankruptcy involving the liquidation of the debtors' assets. The type of bankruptcy proceedings may be changed by the court in the course of the proceedings. In this brief summary we focus on the regulations pertaining to the bankruptcy with the possibility of an arrangement; however, some of the LBR's provisions are common to both types of proceedings.

2.2 Do all kinds of business entities qualify?

In general, bankruptcy proceedings are available for all types of entrepreneurs (including, among others, individual entrepreneurs,

partnerships and commercial companies), regardless of their turnover or the value of their assets. Bankruptcy proceedings start upon an application pertaining to the insolvent debtor.

As an exemption, bankruptcy may not be declared with respect to:

- the State Treasury;
- local government units;
- independent public health care institutions;
- institutions created by statutory law or in fulfilment of an obligation imposed by statutory law (*inter alia* the Warsaw Stock Exchange, the National Securities Depository, the National Bank of Poland – Poland's central bank, and the Polish Enterprise Development Agency);
- an individual person operating an agricultural farm; or
- higher education institutions (eg universities).

Bankruptcy proceedings are involuntary, which means that the debtor is required by law to file an application for the declaration of bankruptcy if it is deemed to be insolvent under the LBR. By operation of law, it will also be a party to the bankruptcy proceedings if the application is filed by other entitled parties (eg creditors).

The debtor (the entrepreneur) is deemed to be insolvent if it fails to perform its due and payable financial obligations. If a debtor is a legal person or an organisational unit with legal capacity, it is also deemed to be insolvent when the total amount of liabilities exceeds the value of its assets (the debtor has negative own capital). The LBR does not indicate the method of assessment of the value of liabilities or assets; however, in practice, the balance sheet value is primarily taken into consideration. If the balance sheet value of the debtor's own capital is negative, the debtor may try to avoid bankruptcy by proving that the actual market value of its liabilities and assets differ to the balance sheet value and therefore there are no grounds to deem it insolvent and declare bankruptcy.

The court may dismiss the application to declare bankruptcy if the delay in the fulfilment of the entrepreneur's due and payable obligations does not exceed three months and the value of the non-performed obligations does not exceed 10 per cent of the balance sheet value of the enterprise, unless the non-performance of the due and payable obligations is constant or the dismissal of the application could place the creditors in a less favourable position.

The court will, as a matter of course, dismiss an application for bankruptcy if the debtor's assets are not sufficient to cover the costs of proceedings. The same applies if the debtor's assets are encumbered with a mortgage, a pledge or other preferred security interest to such a degree that the remaining assets are not sufficient to satisfy the costs of the proceedings.

2.3 What are the necessary approvals?

The application to declare bankruptcy may be filed by the debtor or by any of its creditors. With respect to the following entities, the LBR also entitles other persons to submit an application:

- in the case of partnerships – by partners who are personally responsible for the partnership's liabilities;
- in the case of legal entities and organisational units with legal capacity – by their duly authorised representatives;
- in the case of a state enterprise – by the founding body;
- in the case of a sole shareholder company of the State Treasury – by the Minister of State Treasury;
- in the case of legal entities and partnerships in liquidation – by any of the liquidators;
- in the case of legal entities entered into the National Court Register (eg commercial companies and partnerships) – by a curator, if appointed by the register court; or
- in the case of a debtor who has received public aid (state aid) exceeding EUR 100,000 – by the entity granting the aid.

2.4 Is it valid and binding to agree that such proceedings be a default/termination event?

Contractual provisions according to which, in the event of bankruptcy, a legal relationship with a debtor is subject to change or termination are null and void under the LBR.

There is a possibility of structuring a contract in a manner that enables the other party to amend or terminate the legal relationship with a debtor in the case of the debtor's insolvency or bankruptcy. However, those solutions may be challenged as a circumvention of the law. Despite this risk, such contractual clauses are fairly common in practice in Poland.

2.5 What is the procedure?

Bankruptcy proceedings begin upon an application for the declaration of bankruptcy.

Together with the application, the applicant shall submit a statement on the entrance of the debtor into the relevant register. If the application is filed by the debtor, it should indicate whether it is applying for the declaration of bankruptcy involving liquidation or with the possibility of concluding an arrangement. If the latter is the case, the debtor should attach the following documents:

- a list of assets with their valuation;
- the balance sheet prepared as of a day within 30 days preceding the submission of the application;
- a list of creditors and their receivables and security interests;
- a statement on the repayment of obligations within six months preceding the submission of an application;
- a list of his debtors and their debts;
- a list of enforcement titles against the debtor;
- information regarding proceedings related to encumbrances upon the entrepreneur's assets;
- information on the place of residence of the debtor's representatives and liquidators;

- an arrangement proposal together with a proposal of how to finance it;
- a cash-flow statement for the last 12 months (if the debtor was obliged to keep the necessary documentation); and
- a statement confirming the accuracy of the data provided in the application.

If the debtor is not able to provide any of the above-mentioned documents, it should present and substantiate an explanation.

If the application for bankruptcy with the possibility of concluding the arrangement is submitted by the creditor, the creditor should substantiate its claim and present a preliminary arrangement proposal.

Participants to the proceedings regarding the declaration of bankruptcy are the debtor and each entity who has filed the application. The statutory deadline for the court's decision is two months from the day of submission of the application. The court hearing is optional and conduct of the hearing is subject to the court's discretional decision. The court may appoint an expert to examine the current status of the enterprise and the fulfilment of the debtor's and its representatives' obligation of filing the application within the statutory deadline.

The court may convene a preliminary creditors' meeting. The preliminary creditors' meeting may adopt a resolution on the type of bankruptcy proceedings (with the possibility of concluding an arrangement or involving liquidation) and on the appointment of the creditors' council. The initial creditors' meeting may conclude an arrangement if at least half of the creditors jointly holding three-quarters of the total sum of claims, confirmed by enforcement titles, made probable or unquestionable participate in the meeting. Only creditors whose claims are confirmed by an enforcement title may participate in the preliminary creditors' meeting; creditors whose claims are unquestionable or made probable may participate upon the court's consent. The initial creditors' meeting may render an opinion concerning the appointment of a court supervisor or administrator. The court is bound by the resolutions regarding the type of the proceedings and the appointment of the creditors' committee unless they are contrary to the provisions of law.

Upon an examination of the application to declare bankruptcy, the court may issue a decision on the declaration of bankruptcy. The decision indicates the type of bankruptcy proceedings.

In the case of a bankruptcy proceedings with a possibility of concluding an arrangement, the court decides if, and to what extent, the debtor will remain in management of its assets. If allowed to do so, the bankrupt is obliged to provide the judge-commissioner and appointed court supervisor with any required explanations concerning assets which are subject to the proceedings and to enable the court supervisor to examine its enterprise, in particular its accounting books. If the bankrupt is prohibited from the management of his assets, the court appoints an administrator instead of a court supervisor. In that case, the bankrupt is obliged to reveal and release all his assets and documents related to his business to the administrator. He/

she is also obliged to provide required explanations. The court also appoints the judge-commissioner.

The court summons creditors to file claims within a time limit not shorter than one month and not longer than three months.

The date on which the decision is issued is the date of the bankruptcy. The decision shall be immediately published in MSiG and in local daily newspapers and delivered to the bankrupt, court supervisor or administrator and the creditor(s) who filed an application to declare the bankruptcy.

2.6 Please provide information about voluntary filings

There are no material differences between bankruptcy proceedings initiated by the debtor and those initiated by the creditor. Because of the debtor's obligation to file for the declaration of bankruptcy in case of its insolvency, even the bankruptcy proceedings initiated by the debtor may not be deemed voluntary.

Once the debtor has been declared bankrupt, bankruptcy proceedings are focused on the protection of creditors rather than of the debtor. Slight differences between proceedings commenced upon an application of the debtor and those commenced following the creditor's filing are indicated *inter alia* in sections 2.5 above and 2.15 below.

2.7 How are creditors' representatives chosen?

The only body which may be referred to as the creditors' representatives is the creditors' council. The creditors' council may be appointed either at the preliminary creditors' meeting or, after the declaration of bankruptcy, by the judge-commissioner if the judge considers such appointment necessary. The judge-commissioner is also obliged to appoint the creditors' council upon the request of creditors representing one-fifth of the total value of claims acknowledged or made probable. Only creditors may be appointed as members and deputies of the creditors' council. The judge-commissioner may replace the members of the creditor's council and their deputies if they neglect their duties. Creditors representing one-fifth of the total value of the above-mentioned claims may request a change of the council's composition. If the judge-commissioner does not accept the request, the request is considered by the creditors' meeting. If the creditors representing the majority of the total value of claims support the request, the judge-commissioner is obliged to change the composition of the council in accordance with the request.

Creditors do not have any influence on the appointment of court supervisors and administrators, but the creditors' meeting and creditors' council may apply for their removal and appeal against a refusal by the court to do so.

The creditors' council provides assistance to the court supervisor or administrator, supervises their activities, monitors the bankruptcy estate's funds and expresses opinions in other matters if so requested by the judge-commissioner, court supervisor or administrator. The creditors' council grants permission to:

- encumber the bankruptcy estate with a mortgage, maritime mortgage, pledge, registered pledge or treasury pledge in order to secure the claims not included in the arrangement;
- encumber the bankruptcy estate with other rights;
- incur a credit facility or loan by an administrator; and
- allow an administrator or court supervisor to perform other actions which require the creditors' council's consent due to the decision of the judge-commissioner.

The creditors' council (and each member of the council) may submit remarks on the activities of a court supervisor or administrator to the judge-commissioner, and request the judge-commissioner to remove them. The creditors' council may also demand explanations from a court supervisor or administrator, and review the ledgers and files concerning the bankruptcy.

2.8 Is there recourse against the opening judgment?

The decision declaring bankruptcy may only be appealed by the bankrupt, whereas the decision dismissing the application to declare bankruptcy may be appealed only by the applicant. The appeal should be examined within one month from the delivery of the case file to the second-instance court. The second-instance court cannot declare bankruptcy; thus, if the appeal is granted to the applicant, the case is reconsidered by the first-instance court.

2.9 What are the roles and powers of committees?

Informal creditors' committees have no legal standing. Instead, creditors vote at the creditors' meeting. The most important role of the creditors' meeting is the acceptance or refusal of the arrangement.

According to the general rule, only creditors whose claims have been acknowledged may participate in the creditors' meeting. They vote with the value of claims recorded in the list of claims. A claim is acknowledged if a court supervisor or an administrator has entered it into the list of claims, which is then approved by the decision of the judge-commissioner (the list of claims may be changed or supplemented by the judge-commissioner). Upon a creditor's request and after hearing the debtor, the judge-commissioner may admit the creditor whose claims are probable or are subject to conditions precedent to participate in the creditors' meeting. In that case, the judge-commissioner indicates the value according to which the creditors' vote is counted.

Each creditor has one vote which represents the value of its claims. The required majority is counted in accordance with the number of votes and the value of the claims which they represent. Claims which arose after the declaration of bankruptcy (including accrued interest) are not taken into consideration.

The following creditors cannot vote on the arrangement:

- the bankrupt's spouse;
- certain relatives of the bankrupt;
- if the bankrupt is a partnership – a partner who is personally liable for the bankrupt's debts;

- if the bankrupt is a partnership or a commercial company – persons authorised to represent it;
- creditors who have acquired the claims after the declaration of bankruptcy;
- if the bankrupt is a partnership or a commercial company – affiliated, subsidiary and dominant companies and their representatives; or
- if the bankrupt is a commercial company – individual shareholders holding at least 25 per cent of shares in the share capital.

2.10 What are the consequences of opening judgments for creditors?

As of the day of declaration of bankruptcy, the bankrupt's assets become bankruptcy estate, which serves to satisfy creditors.

During the period between the declaration of bankruptcy and the court's approval of the arrangement (or discontinuation of the proceedings), neither the bankrupt nor the administrator (if appointed) can satisfy claims included in the arrangement.

2.11 What is the duration of the restructuring process?

The duration of the restructuring process is subject to the restructuring arrangement. The LBR does not indicate a maximum duration for the restructuring process.

2.12 How do creditors vote?

After the approval of the list of claims, the judge-commissioner may decide that the creditors will vote on the arrangement in groups. Otherwise, all creditors vote jointly at the creditors' meeting.

If the first option is chosen, the judge-commissioner divides creditors into groups and prepares separate lists of claims for each group. The groups may constitute, in particular:

- employees who accepted the inclusion of their claims in the arrangement;
- farmers whose claims are connected with the delivery of agricultural products from their farms;
- secured creditors who accepted the inclusion of their claims in the arrangement;
- shareholders holding at least 5 per cent of voting rights at the shareholders' meeting of the bankrupt; or
- other creditors.

The above example of a list of groups is not binding and the judge-commissioner may divide the creditors in other ways, taking into account other differences between their interests.

If creditors vote in groups, the required majority has to be reached in each group.

If the LBR does not state otherwise, a resolution of the creditor's meeting is adopted with the majority of votes representing at least one-fifth of

the total value of the claims of the creditors entitled to participate in the meeting.

2.13 What are the rules on clawback/voidability?

The LBR provides for various clawback rules which differ as to time frames and prerequisites.

The basic rule is that all legal actions (including court settlements, acknowledgement of lawsuits and waiver of claims) performed by the bankrupt within a year prior to the filing of the application to declare bankruptcy, on the basis of which the bankrupt has disposed of his assets, are ineffective towards the bankruptcy estate if such actions were performed gratuitously or if the value of the bankrupt's performance significantly exceeds the value of the reciprocal consideration.

Also, any security established to secure, or payment made on account of, an undue debt by the bankrupt within two months prior to the filing of the application to declare bankruptcy are considered ineffective. However, the other party may pursue recognition of the above-mentioned actions as effective if it is able to prove its lack of awareness of the existence of grounds for declaring bankruptcy at the moment at which the actions took place.

Moreover, legal actions for consideration are ineffective if performed by the bankrupt within six months prior to the filing of the application to declare bankruptcy with, *inter alia,* their spouse or certain relatives, partners and shareholders, affiliated companies and their shareholders, as well as the company's dominant companies.

Also, if the remuneration for the work of the bankrupt's representative is significantly higher than the average remuneration for this type of service and the same is not justified by the workload, the remuneration – in part for up to six months before the submission of the application to declare bankruptcy – shall be declared ineffective by the judge-commissioner. The judge-commissioner may also declare ineffective part or all of the remuneration for a representative's work and services due after the declaration of bankruptcy if it is no longer justified by the work input because of the introduction of the administrator's management. The judge-commissioner acts *ex officio* or upon the court supervisor's or administrator's motion.

The court supervisor or administrator may file a motion with the judge-commissioner to declare ineffective, mortgages, maritime mortgages, pledges or registered pledges that were established within a year prior to the submission of an application to declare bankruptcy and if the bankrupt was not personally liable towards the secured creditor and did not receive appropriate consideration for the establishment of the above-mentioned encumbrances.

Lastly, under the general rules of civil law, the court supervisor or the administrator may challenge the bankrupt's legal actions performed to the detriment of creditors (so-called *actio pauliana*, which corresponds to the concept of fraudulent conveyance).

2.14 What are the rules on set-off/netting?

During the course of bankruptcy proceedings, until their discontinuation or conclusion in any other way, deduction (set-off) of reciprocal claims of the debtor and creditor is limited.

Set-off is inadmissible if the creditor has become a debtor of the bankrupt after the declaration of bankruptcy. It is also inadmissible if the creditor, being the bankrupt's debtor, has become his creditor upon the acquisition (through assignment or endorsement) of claims which arose prior to the declaration of bankruptcy.

However, the set-off of reciprocal claims is admissible if the acquisition of the claim has been effected as a result of paying off the debt for which the acquirer was liable and if the acquirer's liability for the debt had arisen before the day the application to declare bankruptcy was filed.

The creditor who intends to exercise the right to set-off shall make a relevant declaration at the time of notifying his claim at the latest.

In the case of the declaration of bankruptcy of a participant of a payment system or a securities settlement system, legal effects of a settlement order and netting are legally binding for a third party only if the order was entered into the system prior to the declaration. If, however, the settlement order has been entered into the system after the declaration of bankruptcy, legal effects of the settlement order and netting are legally binding for third parties provided that an operator of the system proves that, at the time when the order became irrevocable (in accordance with the rules of a given system), it was not, nor could not be, aware of the declaration of bankruptcy.

2.15 How is exit managed?

After the declaration of bankruptcy with the possibility of an arrangement, if an arrangement proposal has not been submitted, the bankrupt is obliged to present it within one month (the judge-commissioner may extend the deadline up to three months). Within the same time frame, the court supervisor or administrator may also file arrangement proposals. An arrangement proposal may be presented by the creditor who was an applicant and who filed the initial arrangement proposal.

If the court-declared bankruptcy involves liquidation, the bankrupt, a trustee or the creditors' council may present an arrangement proposal. In such case, the court changes the type of bankruptcy proceedings if there are grounds for such change.

The bankrupt has the right to propose amendments or supplements to the arrangement during the creditors' meeting.

The creditors' meeting shall take place within one month from the approval of the list of claims. The proposal of the arrangement and information regarding the creditors' division into groups of different interest is delivered to the creditors along with notification of the creditors' meeting. Creditors whose claims are disputable cannot participate in the meeting. On the other hand, creditors who present to the judge-commissioner a

non-appealable court or administrative ruling confirming their claims may participate despite not being recorded in the list of claims.

The proposal of the restructuring arrangement describes the manner of the debt restructuring and contains a justification. The proposal of debt restructuring may include, in particular:

- the deferment of payments;
- the payment of debts in instalments;
- the reduction of debts;
- the conversion of claims into shares; or
- the modification, exchange or cancellation of security interests.

The arrangement may include satisfaction of creditors' claims through the liquidation of the bankrupt's assets (liquidation arrangement).

The conditions regarding restructuring should be equal for all creditors or, if they are divided into groups, for creditors in the same group, unless a given creditor accepts less favourable treatment. More favourable restructuring terms may be granted to creditors with small claims and those who granted or agreed to grant a facility required to perform the arrangement.

The adoption of a restructuring arrangement requires the majority vote of the creditors entitled to participate in the creditors' meeting holding jointly at least two-thirds of the total amount of receivables, which give voting rights. If the creditors are divided into separate classes of interest (see section 1.11 above), the consent of each group is required. However, the arrangement will also be adopted despite not being accepted by a part of the groups if the majority of creditors voting in other groups holding at least two-thirds of the total value of claims voted for the arrangement and if creditors in groups against the arrangement will be satisfied with the arrangement to at least an equal degree when compared to bankruptcy involving liquidation.

Participants in the bankruptcy proceedings may raise objections against the arrangement (one week after the creditors' meeting at the latest).

If the arrangement has been refused, the court will immediately change the proceedings into a bankruptcy proceedings involving liquidation. In such case, a return to the bankruptcy proceedings with the possibility of an arrangement is impossible.

Following the adoption of the creditors' meeting, the arrangement is subject to the court's approval. The court issues a decision after the court hearing. The court will refuse to accept the arrangement if it is contrary to law or it is obvious that the arrangement will not be performed. The court may also issue a negative decision if the terms of the arrangement are grossly harmful to the creditors who voted against the arrangement and raised an objection. The court's decision may be appealed.

Only claims which arose before the declaration of bankruptcy are included in the arrangement. Claims subject to a condition which has been fulfilled during the performance of the arrangement will be included in the arrangement. The LBR lists specific types of claims which are excluded from the arrangement (eg claims secured with a mortgage and certain other security

interests, social insurance premiums, alimonies). The arrangement is binding for all creditors whose claims are included within the arrangement pursuant to the LBR, even if their claims were not recorded in the list of claims (unless the bankrupt deliberately did not reveal their claims and they did not participate in the creditors' meeting). As of the day the arrangement becomes non-appealable, all injunction and enforcement proceedings against the bankrupt and concerning claims included in the arrangement are discontinued.

The arrangement does not infringe any mortgages, maritime mortgages, pledges, registered pledges or treasury pledges which encumber the bankrupt's assets (unless the secured creditor agreed to include his claims in the arrangement).

If the arrangement includes the conversion of debts into shares, the approved arrangement replaces the actions required by commercial companies law for the increase of share capital and constitutes a sole ground for the registration of the increase of share capital in the commercial register.

The arrangement may establish a supervision over the bankrupt and compulsory management of the bankrupt's assets.

When the court's decision approving the arrangement becomes non-appealable, the court issues a decision on conclusion of the bankruptcy proceedings. Upon conclusion of the proceedings, the bankrupt recovers the management of his assets within the scope described in the arrangement.

The arrangement may be amended only if an extraordinary change in economic relationships has occurred. If the entrepreneur does not perform the arrangement or it is obvious that the arrangement will not be performed, the court may revoke the arrangement upon the request of the bankrupt, creditor or supervisor indicated in the arrangement.

2.16 Are 'prepackaged' plans, arrangements or agreements permissible?

Prepackaged plans, arrangements or agreements are not regulated by the LBR. If any such agreement were concluded between the debtor and creditors, it would have only a contractual *inter partes* effect and would not have a binding effect on the bankruptcy proceedings (in particular, if a debtor is insolvent within the meaning of the LBR, then any creditor or officer of the debtor can validly file for declaration of bankruptcy even if he/she was part to a 'prepackaged' arrangement).

2.17 Is a public authority involved?

No public authorities are involved in standard bankruptcy proceedings (subject to some exceptions of minor relevance).

However, the LBR provides specific regulations regarding the bankruptcy of banks, cooperative savings and credit funds (entities similar to banks), insurance and reinsurance companies which involve participation of the Polish financial markets regulator or, in some cases, the representative of the Ministry of the State Treasury.

In addition, public authorities are obliged to assist the judge-commissioner in the performance of his duties.

2.18 What is the treatment of claims arising after filing/admission?

Only claims which have arisen prior to the day of declaration of bankruptcy are included in the arrangement. Other claims, especially those which arose after declaration, are not included. In effect, the latter claims are not subject to the prohibition of performance by the bankrupt/administrator, and therefore shall be satisfied on a current basis. The creditor may also pursue the performance of those claims through court litigation, which is not subject to suspension.

2.19 Are there ongoing contracts?

A landlord, until the discontinuance of bankruptcy proceedings, the conclusion of the arrangement or a change in the type of bankruptcy proceedings from arrangement proceedings into liquidation proceedings, may not, without the consent of the creditors' council (or the judge-commissioner if the council has not been appointed), terminate lease and commercial lease agreements regarding properties in which the bankrupt conducts business. Moreover, the arrangement may envisage that this prohibition is binding until the arrangement has been fully performed. The same applies to leasing, property insurance, bank accounts and licence agreements, as well as to sureties, guarantees and letters of credit.

Claims which arose under ongoing contracts after the declaration of bankruptcy are not included in the arrangement and shall be fulfilled on a current basis.

2.20 Are consolidated proceedings for members of a corporate family/group possible?

There are no consolidated proceedings for members of a group under the LBR.

2.21 What are the charges, fees and other costs?

The costs of bankruptcy proceedings consist of court fees and expenses necessary to conclude the proceedings. The costs are paid out from the bankruptcy estate. After the conclusion of the bankruptcy proceedings, the bankrupt pays the costs not paid out from the bankruptcy estate.

Fixed court fees apply to:

- the application to declare bankruptcy (PLN 1,000);
- the application to declare bankruptcy of an individual person (PLN 200);
- an appeal against the court's decision (PLN 200);
- an objection to the acceptance or refusal of acceptance of notified claims (PLN 200);
- an objection to the arrangement (PLN 100); and
- the application to revoke or amend the arrangement (PLN 100).

The typical expenses of the proceedings include:

- remuneration and expenses of court supervisor or administrator and their deputies;
- remuneration and expenses of members of the creditors' council;

- expenses related to the creditors' meetings;
- costs of delivery of notifications;
- costs of announcements;
- taxes and other public levies due for the period following the declaration of bankruptcy; and
- expenses related to the management of the bankruptcy estate.

The above list does not indicate all the expenses that may emerge during the proceedings and even a general estimation of the cost of a typical bankruptcy proceedings is very difficult, if not impossible.

3. LIABILITY ISSUES

3.1 What is the liability of managers/directors *vis-à-vis* creditors?

Persons authorised to represent the debtor are obliged to submit an application for the declaration of bankruptcy to the court within two weeks from the date on which the grounds for the declaration have arisen (ie the debtor has become insolvent within the meaning of the LBR). If they fail to comply with this obligation within a statutory time frame, they are liable for the damages caused as a result.

To pursue the liability of persons authorised to represent the debtor, one who has suffered damages has to prove specific loss (the negative difference between one's current financial standing and the financial standing which one would have if the application for the announcement of bankruptcy had been submitted within the statutory deadline) and the causal relationship between the representatives' infringement and the loss.

Usually the loss is suffered by creditors through the deterioration of the debtor's financial standing and the subsequent lower degree of satisfaction of their claims during bankruptcy proceedings when compared to bankruptcy proceedings which started without delay.

Creditors may pursue compensation only in a separate litigation.

Specific rules of liability apply to members of management boards of limited liability companies (*spółka z ograniczoną odpowiedzialnością*). If enforcement against a limited liability company proves ineffective, members of the company's management board are jointly and severely liable for its obligations. A member of the management board may avoid liability only if he/she proves that:

- the application for the declaration of bankruptcy was filed, or the restructuring proceedings were commenced, in due time;
- the failure to comply with the obligation was not his/her fault; or
- despite the infringement, no damage was done.

This severe regime changes the burden of proof in litigation against a member of the management board.

3.2 What is the liability of the lender?

N/A.

Contact details

FOREWORD

Alessandro Varrenti
CBA Studio Legale e Tributario
Galleria San Carlo 6
20122 Milan
Via Flaminia 135
00196 Rome
Italy
T: +39 02 778061
F: +39 02 76002790
E: alessandro.varrenti@cbalex.com
W: www.cbalex.com

Lars Lindencrone Petersen & Ole Borch
Bech-Bruun
Langelinie Allé 35
2100 Copenhagen
Denmark
T: +45 72270000
F: +45 72270027
E: llp@bechbruun.com
obo@bechbruun.com
W: www.bechbruun.com

BELGIUM

Glenn Hansen
Laga
Berkenlaan 8A, 1831
Brussels Diegem
Belgium
T: +32 2 800 70 00
+32 2 800 70 22
F: +32 2 800 70 01
E: glhansen@laga.be
W: www.laga.be

CANADA

Justin R Fogarty, Jason Dutrizac & Pavle Masic
Justin R Fogarty Barrister & Solicitors
180 Bloor Street West, Suite 1000
Toronto, ON M5S 2V6
T: +1 416 840 8992
F: +1 416 369 7610
E: justin@fogartyllc.ca
jd@fogartyllc.ca
pavle.masic@fogartyllc.ca
W: www.justinrfogarty.com

CHINA

Victor Wang
AllBright Law Offices
28th Floor, Hong Kong Plaza
No. 283 Huai Hai Road (Mid)
Huangpu District
Shanghai 200021
P. R. China
T: +86 21 2326 1888
F: +86 21 2326 1999
E: victorwang@allbrightlaw.com
W: www.allbrightlaw.com

DENMARK

Lars Lindencrone Petersen & Ole Borch
Bech-Bruun
Langelinie Allé 35
2100 Copenhagen
Denmark
T: +45 72270000
F: +45 72270027
E: llp@bechbruun.com
obo@bechbruun.com
W: www.bechbruun.com

FINLAND

Pekka Jaatinen, Salla Suominen & Anna-Kaisa Remes
Castrén & Snellman Attorneys Ltd
Finland
T: +358 20 7765 765
F: +358 20 7765 001
E: pekka.jaatinen@castren.fi
salla.suominen@castren.fi
anna-kaisa.remes@castren.fi

W: www.castren.fi

FRANCE

Joanna Gumpelson
De Pardieu Brocas Maffei A.A.R.P.I.
57 Avenue d'Iéna – CS 11610
F-75773 Paris Cedex 16
France
T: +33 1 53 57 61 96
+33 1 53 57 71 71
F: +33 1 53 57 71 70
E: gumpelson@de-pardieu.com
W: www.de-pardieu.com

GERMANY

Florian Gantenberg, LLM
LADM Liesegang Aymans Decker
Mittelstaedt & Partner Rechtsanwälte
Wirtschaftsprüfer Steuerberater
Germany
T: +49 211 300490-25
F: +49 211 300490-22
E: f.gantenberg@ladm.com
W: www.ladm.com

HONG KONG

Philip Gilligan, Richard Hudson
& Tiffany Cheung
Deacons
5th Floor, Alexandra House, 18
Chater Road
Central
Hong Kong
T: +852 2825 9211
F: +852 2810 0431
E: philip.gilligan@deacons.com.hk
richard.hudson@deacons.com.hk
tiffany.cheung@deacons.com.hk
W: www.deacons.com.hk

ITALY

Alessandro Varrenti
CBA Studio Legale e Tributario
Galleria San Carlo 6
20122 Milan
Via Flaminia 135
00196 Rome
Italy
T: +39 02 778061
F: +39 02 76002790
E: alessandro.varrenti@cbalex.com
W: www.cbalex.com

MALTA

Nicolai Vella Falzon
Fenech & Fenech Advocates
198, Old Bakery Street
Valletta VLT1455
Malta
T: +356 21241232
F: +356 25990641
E: nicolai.vellafalzon@fenlex.com
W: www.fenechlaw.com

THE NETHERLANDS

Lucas Kortmann & Niels Pannevis
RESOR NV
Symphony Offices
Gustav Mahlerplein 27
1082 MS Amsterdam
The Netherlands
T: +31 20 570 9020
F: +31 20 570 9021
E: niels.pannevis@resor.nl
lucas.kortmann@resor.nl
W: www.resor.nl

NORWAY

Jon Skjørshammer
Advokatfirmaet Selmer DA
Tjuvholmen allé 1 N-0252
Oslo
Norway
T: +47 23 11 65 00
F: +47 23 11 65 01
E: j.skjorshammer@selmer.no
W: www.selmer.no

POLAND

Dr Marcin Olechowski &
Borys D Sawicki
Sołtysiński Kawecki & Szlęzak
ul. Jasna 26
00-054 Warsaw

Poland
T: +48 22 608 7062
+48 22 608 7369
F: +48 22 608 7070
E: marcin.olechowski@skslegal.pl
borys.sawicki@skslegal.pl
W: www.skslegal.pl

PORTUGAL

Mafalda Barreto & Carlos Soares
Gómez-Acebo & Pombo
Avenida Duque d'Avila
nº 6, 6º
Lisbon
Portugal
T: +351 213 408 600
F: +351 213 408 608
E: mbarreto@gomezacebo-pombo.com
csoares@gomezacebo-pombo.com
W: www.gomezacebo-pombo.com

ROMANIA

Bogdan Bibicu
Kinstellar
8 – 10 Nicolae Iorga
010434 Bucharest
Romania
T: +40 21 307 1664
E: bogdan.bibicu@kinstellar.com
W: www.kinstellar.com

SINGAPORE

Sim Kwan Kiat
Rajah & Tann Singapore LLP
9 Battery Road
#25-01 Straits Trading Building
Singapore 049910
Republic of Singapore
T: +65 6535 3600
F: +65 6225 9630
E: kwan.kiat.sim@rajahtann.com
W: www.rajahtannasia.com

SPAIN

Fermín Garbayo Renouard & Julio Pernas Ramírez
Gómez-Acebo & Pombo
Abogados, S. L. P.
Castellana, 216
28046 Madrid
Spain
T: +34 91 582 91 00
F: +34 91 582 91 14
E: fgarbayo@gomezacebo-pombo.com
jpernas@gomezacebo-pombo.com
W: www.gomezacebo-pombo.com

SWEDEN

Odd Swarting, Mathias Winge & Nina Baecklund
Setterwalls
Arsenalsgatan 6
Stockholm
Sweden
T: +46 8 598 890 00
F: +46 8 598 890 90
E: odd.swarting@setterwalls.se
mathias.winge@setterwalls.se
nina.baecklund@setterwalls.se
W: www.setterwalls.se

TURKEY

Gokben Erdem Dirican & Erdem Atilla
Pekin & Pekin
Lamartine Cad. No:10, Taksim
Beyoglu, Istanbul
Turkey 34437
T: +90 212 313 35 00
F: +90 212 313 35 35
E: gerdem@pekin-pekin.com
eatilla@pekin-pekin.com
W: www.pekin-pekin.com

UNITED KINGDOM

Jat Bains, Simon Beale & Paul Keddie
Macfarlanes LLP
20 Cursitor Street
London EC4A 1LT
UK
T: +442078319222

F: +442078319607
E: jatinder.bains@macfarlanes.com
simon.beale@macfarlanes.com
paul.keddie@macfarlanes.com
W: www.macfarlanes.com

UNITED STATES

J William Boone, Michael A Dunn &
Doroteya N Wozniak
James-Bates-Brannan-Groover-LLP
3399 Peachtree Rd NE, Suite 1700
Atlanta, GA 30326
USA
T: +4048442766
F: +4049976021
E: bboone@jamesbatesllp.com
mdunn@jamesbatesllp.com
dwozniak@jamesbatesllp.com
W: www.jamesbatesllp.com