The enigma of 21st century corporate restructuring: successes and failures (ten-step best-practice framework)

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The focus of this article is two-fold: first, it briefly probes the relevance of corporate restructuring both in periods of solvency and insolvency; second, it explores challenges faced in 21st century corporate restructuring by means of a case study. In light of this and other case studies, it proposes a ten-step best-practice framework for corporate restructuring, with a view to identifying success factors. This piece is non-jurisdictional, and thus raises specific concerns that are generally applicable to any legal framework. The distinct advantage of restructuring is that there is often more than one credible response to corporate distress. This article proposes but one of many plausible responses in cases of restructuring.

Context
In the midst of financial crises, many corporations have investigated the potential benefits of restructuring. It has, however, been a persistent corporate cry that despite the well-documented crises across the world, including in Asia, the US and Europe in the past two decades, the development of a viable framework for corporate restructuring has been quite slow. Added to this, it is, unfortunately, often described by larger entities as a trail of complex documentation, processes and procedures, many of which are counter-productive. On the other hand, many smaller inexperienced entities struggle to effectively and efficiently restructure, with the unfortunate outcome of ultimate corporate collapse. Increasing complexities of financial products on offer and the wider range of players involved in the company’s affairs have compounded these challenges.

Despite these challenges, larger and smaller companies have proven that though restructuring is particularly relevant in the period of insolvency, loosely defined, many successful restructurings occur in periods of solvency at the first signs of imminent danger. It is therefore arguable that even in the post-global financial crisis period, where balance sheets are recovering from the onslaught of the crisis, corporate restructuring is increasingly relevant in ensuring the adaptation and continued relevance of the entity.

Though the scale of the problem may be exacerbated by other mitigating factors, a company must first understand the range of the legislative tools in a state’s toolbox, which would facilitate a speedy restructuring. This is particularly challenging when the company operates an overseas market with a divergent legal framework. Though entering the overseas market is quite important for corporate awareness and development, it raises many challenges in cases of restructuring, not least the clash of procedures or language barriers. Formal restructuring is outside the purview of this article. Nonetheless, outside of the strict legislative tools, which would often enable the opening of a formal proceeding, other mechanisms, like contract, are becoming increasing relevant in 21st century corporate restructuring: for example, the structure of UK schemes of arrangement are slowly being informally adopted as a cross-border solution, which could be organised in a similar manner to pre-packs.

In addition, depending on the time at which the restructuring is attempted (solvency versus insolvency), the selected administrator must ensure compliance with any licensing requirements. Where no such requirements are imposed (particularly in cases of informal restructuring), the company must be extremely careful in choosing professionals with validated practical experience, as some failed companies have unknowingly appointed ruthless
practitioners resulting in their demise, where, all other things being equal, a more favourable result could have been achieved. Though this article will focus primarily on the potential for informal restructuring, the value of court assistance, even within the framework of informal processes, should not be negated.

Is corporate restructuring only relevant in periods of corporate decline?

Though restructuring is often juxtaposed with an impending failure of the company, there are a number of reasons why healthy companies restructure. These include changes in the nature of the business; the evolution of the industry (which includes new work and/or management methods, new markets, changes in demand, greater focus on innovation); finance-related matters, though not insolvency (decreased profit margins, high employee turnover including declining employee morale and inefficiency, increased cost of customer acquisition); statutory and legal compliance; mergers and acquisition-related or corporate buyouts. The wide spectrum of reasons is proof of the relevance of restructuring to companies in all sectors and industries, irrespective of size and financial state; though restructuring has been more dominant in some industries at certain times. For example, the PricewaterhouseCoopers Restructuring Update for Quarter 1 of 2015 reported that most restructuring activity is taking place in the oil and gas and mining sectors. It suggested that this is present in the former industry because of the lag between activity in the exploration and production sub-sector and the oilfield services sector. In the mining sector, it linked the increased restructuring to the depressed commodity price.

Below is a sample of some of the significant restructurings within the last decade. These comprise varying reasons for restructuring and serve as a benchmark for identifying success/failure factors included in the factual matrix below. Hewlett-Packard Co struggled to adapt to the new era of mobile and online computing and thus restructured its company by splitting it into two listed companies, thereby separating the computer and printing arms from the corporate hardware and services operation. Another useful example is Kodak, which remained resistant to changes in the print industry, thereby losing market share. Though declining into insolvency, it created a restructuring plan, which took effect from 1 January 2015, with a view to increasing corporate competitiveness and entrepreneurship.

Industry developments demanded a restructuring in the automotive industry and two of the major players that restructured their corporations were General Motors and Ford Company. Another recent example is Air Products, an industrial gas company that, while securing the confidence of thousands of employees, has undertaken restructuring with a view to regaining industry leadership. More popular examples include Microsoft whose restructuring plan is intended to simplify the organisation by the streamlining of operations and the alignment of the recently acquired Nokia Devices and Services business with the company’s overall strategy in the hope of increasing speed to market. Well-known e-commerce company, is restructuring with a view to repositioning the company to take advantage of multiple opportunities in line with its simplification of the organisation and the creation of a competitive cost structure.

Factual matrix: JTS Limited

To preface the use of the fictitious factual matrix below, it should be noted that if a single factual matrix of a recent corporate restructuring were to be discussed, a number of pertinent issues, which are highly relevant to the success or failure of a corporate restructuring in the 21st century generally, would be missed, as no single restructuring has raised all the key issues. With an attempt to secure the best of both worlds, this article makes use of a carefully constructed simplified factual matrix, which raises a combination of these issues. It should also be noted that the factual matrix is not tied to the legislative framework of any specific jurisdiction, as this would limit the potential impact of the article that seeks to identify general success factors in corporate restructuring.

The fictitious state of Malagos lies south of the equator and is an international leader in food production. It uses the Malago dollar (MAL) which is classified as a floating currency. The official language of Malagos is English. JTS Limited, registered in 2006, is the world-leading producer of confectionery. Malagos does not regulate the composition of its board of directors. Consequently, the board of JTS Limited is comprised of two executive directors, one non-executive director, the financial controller and an attorney-at-law. It employs 650 employees and sources its base materials from three suppliers, one of which is located offshore. At the time of registration, its debt-to-equity ratio is 30:70. From conception, one of the challenges faced by this company, which has commonly been flagged by management at board meetings, is the inaccurate transaction recording. No system, however, has been implemented to correct these errors.

Its equity base is comprised of three classes of shareholders: Class A, Class B and preferential
shareholders (the respective rights of each class of shares are not critical). Its debt portfolio is, however, more complex. It has secured a debt of MAL300,000 from Malagoan National Bank (MNB), against its industrial oven, which was purchased finance-free in 2006. One of the newer forms of debt added to the company’s portfolio in 2007 is a credit card, with an upper limit of MAL500,000. Though previously offered through its local bank, MNB, this section of the local banking business, unknown to JTS Limited, has been sold to CashInstant Ltd, a company whose registered office is located in a neighbouring jurisdiction, with French as its official language. Monthly payments are, however, still paid through the local branch. There are quite a few derivative products held on the company’s books: first, the company purchased its production facility in 2008 for MAL5m, through a mortgage-backed security. There is also a forward contract with its sugar supplier (SS) that irrespective of the cost of sugar on the open market, SS agrees to sell 10 tonnes of sugar on the 28th of every month at MAL5,000 per tonne from 2008–2014. This predictability is highly desirable given the volatility of the sugar market. It has also made investments in a range of insurance products from Malagos Insurance Limited. The true implication of many of these financial products was never explained to the management team.

Its debt-free assets include two industrial boilers, five free-standing mixers, three integrated mixers and blenders and a state-of-the-art packaging machine. In 2008, its net profit stood at MAL10m. Though the company was current with its taxes up until 2008, since 2009, the required state taxes have not been paid.

Due to an updated 2010 framework published by the Malagoan Food Standards Agency (MfSA), a number of changes must be made to the composition and labelling of all of JTS Limited’s products. This requirement coincided with a loss of profits due to reduced market demand in both 2009 and 2010. By mid-2011, the management team agreed that the entire production system needed to be overhauled but refused to do this, opting for quick-fix measures in the hope that profits would rebound. To this end, the management team of JTS Limited agreed that the following assets should be sold: an industrial boiler and an integrated mixer and blender. In an effort to conclude the sale for the integrated mixer and blender, with a view to averting the demise of the company, the directors agreed that a quick sale would be in the best interest of the company as a whole. This asset, however, was sold below market value. The management team was aware of this but justified it on the basis that this needed finance may resuscitate the failing company. They intended to commence informal restructuring in the first quarter of 2012 but anticipated that profits would increase in the third quarter of that year. Profits, however, further declined.

By the end of 2013, the company had depleted all existing profits and maxed out its credit card to pay some of its suppliers. Employee salaries are now paid one month in arrears. The present debt to the local treasury department for corporation tax stands at MAL800,000. They intend to challenge this debt, but have faced challenges sourcing accurate information due to their poor transaction record. The management embarks on a debt-restructuring plan with some of its creditors but the plan is poorly constructed. The company, however, has not yet formally communicated any restructuring plans to employees and some of the key suppliers but there are extensive rumours of the company’s impending doom. This has affected employee morale with some on a ‘go-slow’ while others have begun employment searches. In February 2014, correspondence is sent to suppliers and mid-level managers but there is no consultative process. The company’s application to MNB for an overdraft is declined due to its poor accounting records and it refuses to hire a forensic accounting team to rectify this state of affairs, pointing to its cash-strapped nature. It has defaulted on a number of payments and its debt is being called in. It is due to receive the equivalent of MAL375,000 from one of its purchasers located on a nearby island; however, due to uncertainty in that island’s economic market, the currency conversion would result in a 15 per cent loss of income to JTS Limited if that debt is called in.

Ten-step best-practice framework: corporate restructuring

It should be emphasised that different teams of professionals may scrutinise the above factual matrix and arrive at varying conclusions, all of which may be viable. As it is commonly phrased in medical commercials, always consult with your doctor before changing your dietary habits or switching medications. This is equally applicable here – any management team should consult its team of practitioners, inclusive of a legal professional and an accountant prior to restructuring. The below non-jurisdictional framework focuses on informal corporate restructuring, thus, does not depend on established legislative procedures usually relevant in a formal, statutory restructuring. Despite the adopted approach, the company’s key focus must be the formulation of a long-term solution. Given the extensive literature on cross-border restructuring, this article, though raising some relevant points, will not
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be primarily focused in that regard as similar steps are relevant, even if a wider gamut of international players are included. These steps have been identified as the difference between success and failure in a number of large corporate restructurings.

First step: legal framework and inclusion of key professionals
The company should be cognisant of the relevant legal framework, which varies across jurisdictions and in a single jurisdiction, with multiple legal structures, and may even vary across that state. In addition, it should seek to assess its true financial position without placing any significant emphasis on debts that may be due and can be called in as there is no guarantee that these will be settled on time. Some of the relevant persons to be included at this stage are attorneys and forensic accountants. Though the compensation for these services may be regarded as a depletion of already limited resources, this is necessary to determine the true financial state of the company and will guide the types of legal action that can be taken. At the genesis of this restructuring, the company should run as normal as possible and it must be ensured that all accounting is transparent, particularly where this may be relevant to the securing of future finance. At the end of this stage, the company should be aware of its true financial state and the extent to which additional finance must be secured to guarantee the success of the restructuring.

Second step: meeting with major players and securing of liquidity facility
At this stage, the company is usually cash-strapped, the management team should therefore seek to secure a liquidity facility. This is quite critical as this assures creditors, who can easily pull the plug on the company, that there is some facility from which debts will be repaid, in the absence of this, there may be a run on the company’s assets. Though sounding quite simplistic, this is one of the most challenging steps of the restructuring process. With the state of the corporate balance sheet, it may face difficulty securing the confidence of other lending institutions as it is quite unlikely that there is any available security to cover the desired loan. Given that lenders are becoming more sophisticated and many of the debt structures are increasingly complex, the natural solution in such cases may be to seek the confidence of an existing lender. The direct advantage of this support is that the relevant sum is secured without the inclusion of another player. In the absence of this or any other banking support, the company may have to seek recourse from more creative lenders, which will usually carry more risk, such as hedge funds; however, these complex financial products with actors holding ulterior motives should be carefully scrutinised before proceeding. The attendant risk of the addition of players to the pot should also be considered.

By this time, the management committee should have met with its existing lenders, including banks and other key financial institutions. Outside of this, informal meetings, whether singly or jointly, should be held with other major creditors and key suppliers. It is usually best to communicate with creditors in person rather than by correspondence, which is quite impersonal and open to misinterpretation. The company must ensure that the creditors are permitted to voice any specific concerns and/or solutions that may ease the restructuring process. By the end of this stage, there should be greater clarity as to the purpose of the restructuring and any proposed completion period (which is subject to change once the restructuring plan is drafted). Informal communication should also be made to employees.

Third step: restoration of market confidence
Usually by this time, the financial woes affecting the company have been leaked and issues of market confidence come into play. Where there is a likelihood of a detrimental leak, rather than being reactive the company – having addressed the major players – should be proactive and make an announcement to the market, which will indicate the company’s vision for growth and its commitment to the provision of its goods and/or services. From experience, this is usually the time at which there is much negative advertisement by competitors with a view to affecting the company’s market share. Despite this, the company must remain honest with the market.

Fourth step: assurance to government
It is well accepted that one of the largest debts in many insolvencies is non-payment of government taxes and fees. Where the company’s goods or services is deeply embedded in the life of the citizens of that state, the management team should attempt to negotiate with the government for some form of relief. Though usually presumed to be the best solution, forgiveness of debt should not be the primary target as a depletion of state coffers will have a wider detrimental effect. Rather, debt deferral or a payment plan is a more desirable solution. Having secured some form of finance, the management team should seek to convince the state of its worthiness for tax relief. Depending on the jurisdiction, there is a wide range of direct and indirect
state assistance potentially useful at this stage of the company’s lifecycle. In regional blocs, such as the European Union, such assistance may be classified as state aid and other procedures may have to be followed. It should be emphasised as noted in the first step that despite the procedures, access to such relief is often dependent on sound accounting practice, which is invaluable throughout the lifecycle of the company.

Fifth step: consent of lenders/approval of restructuring plan

While the above steps are proceeding, the management team should discuss and conclude a restructuring plan for the company. As noted above, the company may identify a range of possible solutions to achieve the desired ends. This plan(s) should be sent to the creditors for their approval and deadlines for acceptance should be stated. The consultation at this stage often refers to smaller creditors as larger creditors would have been active in the formulation of the plan. It is unlikely, though desirable, that all creditors, both small and large, will consent to the restructuring plan, as the risk may not be distributed evenly amongst all creditors. Nonetheless, the key conclusion will rest on the size of the player who has rejected the plan. Often, bigger creditors may consent to the exclusion of small creditors by affording them some form of priority, thus reducing the number of parties having access to the restructured pot. In other cases, the negligible debt of the small creditors, and possibly their miniscule power, may mean that their rejection can be ignored in the short-term. Quite importantly, despite the size of the debt, the management team must be confident that this dissenting creditor does not wield the power to frustrate the entire restructuring plan.

Sixth step: identification of assets

Usually at this stage of corporate decline or distress, the company has no available assets as the few remaining assets would have been used to secure a debt when the company faced initial financial difficulty (which may be shortly before the implementation of a restructuring plan). Alternately, the remaining assets may be necessary for continued productivity. Notwithstanding, where such assets are available these assets should be identified and sold. There are two key considerations at this stage:

- First, the management team must ensure that these assets are sold at true market value to purchasers in arms-length transactions to ensure that no claims are raised to void these transactions, on the basis, for example, that the sale constitutes a preference or a transaction at an undervalue. Though the term may vary, jurisdictions have mechanisms which recover any loss in value to the company shortly before the initiation of any formal insolvency proceeding – should the informal restructuring fail.

- Second, it must be determined whether there is a potential loss/gain to the company when these assets are sold on a piecemeal basis rather than on a going concern basis. Such issues are relevant to creditors when assessing the capability of management’s execution of the restructuring plan.

Seventh step: conclusion of agreements

With the consent of the creditors for the restructuring plan, the management team must ensure that as few agreements as possible are concluded while wading through the company’s turbulent financial waters. Two of the key players with whom agreements should be made are suppliers and employees. Though amassing a debt to these two parties – which is generally insignificant when compared to other debts – both employees and suppliers are the key drivers of the company’s economic prosperity. Further, given the desire of the company to continue its operations as normal, with the hope of minimal impact on its market share, the interests of these groups should be closely considered. Layoffs should be avoided at this time unless it is absolutely necessary, as this may affect general employee morale as ‘survivor’ employees may begin to feel uncertain about their own existence in the company. In some jurisdictions, this has created the ‘unnecessary’ monsters of strikes and public campaigns against the use of the company’s products. It has been proven that restructurings where employees (amongst other stakeholders) are included in the process are more successful than those where they are excluded. This may be directly linked to the fact that employees are the driving force of production.

Eighth step: effective and efficient collection and payment of debt

Within the restructuring plan, the company would have listed any outstanding debt. At this time, it should seek to secure any outstanding payment. As it relates to its satisfaction of debt, the company should also have identified in its plan the mechanisms which it will use to pay its outstanding obligations and the order in which they will be paid. These may include creative mechanisms like debt to equity swaps.
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Ninth step: frequent updates to all stakeholders

The management team should ensure that it provides regular, timely and accurate updates to creditors and other relevant stakeholders, which will include corporate forecasts. These should be accessible by creditors at all levels of the debt spectrum. Frequently, a company will be given a margin to adjust the plan as the reality of the company’s financial situation changes. Before proceeding, any key changes to the approved plan should be vetted as the creditors’ approval is usually contingent on the execution of the scrutinised restructuring plan.

Tenth step: avoidance of ‘patchwork’

Though tempting at every stage of the restructuring, the company must avoid any ‘patchwork’. It may be necessary (and more costly) in some restructurings to revamp the entire operational system. Where identified as the best solution this should be done. The ultimate goal of the company should be the production of a long-term solution. Failing this, the company may appear to be reformed but many of the institutional issues that led to the first restructuring will resurface again.

A review of JTS Limited

Apart from the disregard of many of the key steps outlined above in the ten step best practice framework, there are other specific considerations that are particularly relevant in this factual matrix as they serve as additional signposts that increase or decrease a company’s chances of success during restructuring. First, a common challenge with many restructurings is the lack of clarity on the purpose for which the company is being restructured. This is evident in the factual matrix as a number of indicators that the company should have begun the process of restructuring were evident from 2009–2010 (though the restructuring process was only started at the end of 2013). Nonetheless, a mere loss of profits is insufficient to commence a restructuring. A company must have a clear focus of how, why and when the restructuring will take place – this will often require a clear demarcation of the key phases of the restructuring. Though it is often the case, it is not necessary to do a wholesale restructuring all at once – often, the implementation of phases of restructuring ensures that the business can run smoothly during this process. The devil is in the detail. No area is this more applicable than corporate restructuring.

Another issue, one of which was raised in the Lehman case, is the issue of loss due to currency conversions. JTS Limited and its neighbouring purchaser both have floating currencies. In addition, economic distress in the purchaser’s market will result in a loss to JTS Limited should the debt be called in. In such cases, the company can choose to delay the debt with a hope that the currency would rebound (assuming that the supplier is not in a position to pay) or it could call in the debt to avert further loss. To avoid this when dealing with cross-border transactions, some companies list their prices in equivalence to a more stable, strong currency. The local currency must still be paid for the transaction, as other approaches may contravene foreign exchange laws. This is commonly practiced in developing countries, though the legality of this may vary across jurisdictions.

Another challenge facing many companies as they seek to restructure is the absence of the right people in the right place at the right time. This is particularly relevant where members of the management team may never have successfully drafted and/or implemented a restructuring plan. This will often lead to corporate missteps such as a quick sale of assets and refusal to invest in the company during its decline, for example, in the retention of a financial consultancy team. Such errors are often avoided where knowledgeable professionals are intimately connected with the drafting of the restructuring plan. Outside of management, the employee pool must be retrained to tactfully manoeuvre the challenges brought by the restructuring. It should be noted that an average full-time employee has fully invested their future with the company – in many respects, they have placed all their eggs in one basket.

As in the factual matrix, the failure to communicate promptly with the employees will breed distrust and uncertainty as to their future. The decisions of the employees to either ‘go-slow’ or invest their energies searching for other opportunities will affect the productivity of the already fragile economy of the company. Further, their perception of the wielding of managerial power is quite critical at this time. Given that their efficiency bears the closest link to client satisfaction, the company must ensure that, as far as possible, employees buy in to the proposed plan. Consultation is key at this stage: employees must be given the opportunity to voice their concerns about the proposed restructuring. Linked to this is the interplay between different areas of employment law, including the specific rights of employees (timely remuneration, notice, severance payments, benefits, among others) and general rights (trade union action). Any indiscriminate tipping of the scale, whether actual or perceived, may result in a loss of productivity and ultimately, market share.
Access to capital, including soft products, has become increasingly complex. In past times, banks offered direct credit card services; however, many banks have sold this arm of the business to a non-banking entity. In the factual matrix above, CashInstant Ltd offers this product. The implications of this is that in the past, where banks provided credit services, the London Approach (possibly) facilitated an unspoken heavy-handed approach by larger banking players where all the players were originally banks; however, the interests of CashInterest Ltd is unlikely to be aligned with the interests of banks (therefore the absence of commonality of interests) and any heavy-handed approach is likely to bear less fruit. Further, this new player to the game is likely to hold its own varying incentives and motivations. This is further complicated where the credit entity operates outside of the legal framework of Malagos. In addition, the presence of derivatives on the company’s books, including mortgage-backed securities and the forward contract, means that the company must ensure that it is compliant with any attendant obligations to avoid breach and/or penalties. The company may seek to renegotiate these contracts where there is a reduced demand, however, this is potentially difficult unless the supplier is facing similar distress.

Lastly, restructuring is highly dependent on accurate financial information. As it relates to JTS Limited, one of the repercussions of improper recording was the rejection of its overdraft application. The accuracy of a corporate entity’s accounts ensures that a well-informed business decision can be made, where a company is unaware of its true financial state, poor decisions will be made. Compliance with the bare minimum statutory or professional reporting requirements may be insufficient in some cases. The additional detail needed to make an informed decision will vary across industries; however, this information will ensure that important information can be sourced quickly and planning for liabilities including the avoidance of any interest and/or penalties where possible. Though JTS Limited is under the impression that the revenue authority has incorrectly computed its corporation tax, the absence of proper financial records means that in terms of risk-reward, it may possibly invest more in identifying the error than will be discounted from its tax liability.

Reconsideration of the restructuring framework

Within the restructurings discussed above and stemming from the factual matrix of JTS Limited, the guidance above is equally relevant to corporations and policy-makers worldwide, though the extent of applicability will vary from jurisdiction to jurisdiction. On the policy level, there must be a reduction of red tape, with a concomitant increase in the leverage which a corporation has to restructure itself informally. Second, banking policies (where banking is heavily regulated) must incentivise institutions that provide financing solutions to viable, restructuring entities. These two former issues are being tackled in the UK under the purview of the Small Business, Enterprise and Employment Act (SBEEA) 2015. This legislation is intended to reduce red tape, improve access to funding for small and medium enterprises, increase transparency in ownership structures and generally reform key parts of the UK’s insolvency and restructuring frameworks.

Another innovative implementation was the UK’s Red Tape Challenge, where businesses were given the opportunity to identify regulation that affected them, determining what worked, what should be scrapped or and what should be simplified. As it related to insolvency, while affirming the importance of rescuing and restructuring, the reported changes to insolvency regulations is estimated to bring more than £30m of savings per year for businesses. These included the scrapping of two pieces of legislation: Insolvency (Land Registration) Rules 1996 and the Insolvency Practitioners Tribunal (Conduct of Investigations) Rules 1986, while 67 other regulations will be reformed and streamlined to increase efficiency and reduce administrative burdens. Some of these reforms have been included in the SBEEA.

Third, the reality of cross-border implications on corporate entities, both small and large, must be a continuous discussion. Intervention on the cross-border level has been given further attention by the Association for Financial Markets in Europe. The High Yield Division of this Association has suggested that the differences between national insolvency regimes across the European Union, inter alia, discourages cross-border investment and results in liquidation rather than providing an opportunity for the company to be restructured. In brief, the following areas should be prioritised: (1) a common moratorium or stay where absent in some jurisdictions; (2) consistent and clear method of valuing companies in a restructuring process; (3) clarity and consistency in the need for consent of lower ranking shareholders; (4) clarity and consistency in the creditors’ ability to propose a restructuring plan; and (5) no priority to rescue financing. The resolution of a number of these elements is equally valuable where the restructuring does not contain any cross-border elements, as similar provisions reduce the temptation of forum shopping. At the corporate level, higher level management must consistently pay attention to...
detail at all levels of the corporate structure ensuring that the company is restructured where possible when the restructuring has the greatest chance of success (usually when the company is solvent or bordering on insolvency). The attention to detail must include the value placed on employees in feeding back inefficiencies to the management. If the reorganisation is linked to a merger and/or acquisition, any control regulation should be closely scrutinised to determine the ambit of the corporation’s power.

These are, but a few of the factors that have determined over the past two decades whether a company’s restructuring will be successful. Though the legal framework is quite important in supporting the informal restructuring process, the company itself must bear the bulk of the burden in identifying when to take action and navigating a path of hurdles. Given that, the guidance herein stated must be taken seriously by any management team if they intend that their ship should stay afloat.

Introduction

Environmental liability in Brazil is, as in many countries, a complex network of rules that seek to maximise the chances of restoration and indemnification of damages to the environment. The underlying logic of the insolvency regime, in turn, could be understood as the exact opposite: to limit liability in order to allow for a ‘fresh start’ either for the distressed company, for a potential investor or the buyer of distressed assets. The tension between the overarching principles that guide each of these regimes is likely to rise over the next few years in Brazil.