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29th Annual IBA Global Insolvency and Restructuring Conference

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Litigation in distressed situation



Cia Mackle
Pachulski Stang
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Guilherme Fontes Bechara
Demarest Advogados



Gion Jegher
Prager Dreifuss



Tomohiro Okawa
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Alexandra Szekely
Le 16 Law

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29TH ANNUAL IBA GLOBAL
INSOLVENCY AND
RESTRUCTURING
CONFERENCE

LITIGATION IN DISTRESSED SITUATIONS

3 JUNE 2024 | 2:00 PM
KUNSTHAUS, ZÜRICH,
SWITZERLAND



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Panel Bios

Cia Mackle (U.S.) – Moderator and Panelist

A partner at the firm, Ms. Mackle's practice has focused on a broad range of domestic and international business reorganization and restructuring matters, including the representation of debtors in possession, chapter 11 trustees, creditors' committees, and other constituencies in the largest chapter 11 cases nationwide, including, most recently, Party City, Cineworld, Chinos Holdings (J. Crew), Neiman Marcus, and Ascena (Ann Taylor). She has over fifteen years' experience representing committees, chapter 11 trustees, and liquidating trusts in financial fraud and Ponzi cases, including Professional Financial Investors, Inc. and Woodbridge Financial. Ms. Mackle has prosecuted and defended numerous multimillion-dollar fraudulent transfer and breach-of-fiduciary-duty actions. With detailed knowledge of e-discovery issues as well as skill in the substantive and technological presentation of electronic evidence, Ms. Mackle counsels clients on e-discovery issues and has managed dozens of large reviews or productions.

She is a graduate of Duke University and received her J.D. from University of Southern California where she was a member of the Southern California Law Review.



Alexandra Szekely (France) - Panelist

Alexandra Szekely is a founding partner at Le 16 Law, a French law firm specializing in commercial and corporate litigation, white-collar crime, restructuring and insolvency, as well as international arbitration.

With more than 20 years of experience as a litigation lawyer, she has worked on numerous high-profile and cross-border cases for clients across a broad range of sectors. She regularly advises clients in distress situations, representing clients on both the debtor and creditor sides. Ms. Szekely has most recently represented a large group of bondholders in the restructuring of the Casino group.

She started her career in the Restructuring & Insolvency department of Fried Frank Harris Shriver & Jacobson LLP in New York before joining the Dispute Resolution team of Freshfields Bruckhaus Deringer LLP in Paris where she worked for over a decade.

Ms. Szekely was admitted to the New York State Bar in 1999 and to the Paris Bar in 2002. She graduated from Columbia University School of Law (LL.M), University of Panthéon-Assas (Paris II) and University of Panthéon-Sorbonne (Paris I).



Guilherme Fontes Bechara (Brazil) - Panelist

Partner of Demarest's Dispute Resolution, Restructuring and Bankruptcy and Alternative Investments areas, Guilherme Fontes Bechara has a Master's Degree (LLM) in Corporate Governance and Practice by Stanford Law School, Stanford University (USA) and Civil Law by Pontifical Catholic University – PUC-SP. He is specialized in Civil Litigation, Arbitration and Restructuring, acting more specifically in judicial reorganization and bankruptcy proceedings. Among his main clients are investment funds, financial institutions companies from various sectors and national and international financial institutions, focusing on the recovery of credits, judicially or extrajudicially, investments in credits or investment in companies in crisis.



Gion Jegher (Switzerland) - Panelist

Dr Gion Jegher is a partner at Prager Dreifuss, a mid-sized Swiss law firm with offices in Zurich and Berne. Gion is a member of the Insolvency & Restructuring, Dispute Resolution and Banking & Finance teams.

In the area of Insolvency & Restructuring, Gion's practice focuses on the acquisition of distressed debt and distressed debt litigation, including in the context of insolvency proceedings. He has been involved in some of the largest insolvency cases in Switzerland, including Swissair, Lehman Brothers and Petroplus. He also specializes in cross-border litigation, including worldwide enforcement

Dr. Gion Jegher received his law degree from the University of Basel, Switzerland (magna cum laude), where he also obtained his PhD with a thesis on cross-border litigation (summa cum laude). He later also graduated from Duke University (LL.M.). He was a lecturer in private international law at the University of Zurich. He is admitted to the Zurich bar.



Pending Arbitration when Insolvency Proceedings Commenced

Issue: If a party to a pending arbitration in a foreign venue files for bankruptcy, what happens to the arbitration?

Case Study: *Fotochrome, Inc. v. Copal Co.*, 517 F. 2d 512 (2d Cir. 1975)

A Tokyo-seated arbitration was ongoing between Fotochrome (a Delaware corporation) and Copal (a Japanese corporation)

- 16 arbitration sessions had already occurred over prior 25 months
- Fotochrome failed to produce witnesses after 14th session; was warned arbitration might be terminated

Fotochrome filed for reorganization in the U.S. and an automatic stay was triggered under U.S. bankruptcy law

- Arbitration tribunal decided that the bankruptcy court's stay was not effective and issued an award in favor of Copal
- Bankruptcy court held that the award issued in violation of the U.S. stay was not valid, and that it could revisit the merits of the dispute.

On appeal, the Second Circuit rejected the bankruptcy court's position

- Bankruptcy court has authority to stay an international arbitration only if it has *in personam* jurisdiction over the foreign party
- Arbitration award could be enforced in the United States

Case Study Issues

- Does the bankruptcy filing stay a foreign arbitration proceeding?
- Considerations for Foreign Counterparty
 - Risk of proceeding with foreign arbitration?
 - If goal is to extinguish liability on the part of the foreign company
 - If goal is to enforce a claim in the U.S.
 - Seek relief from automatic stay/move to compel arbitration
 - Consider challenging bankruptcy filing as made in bad faith (i.e. motion to dismiss)

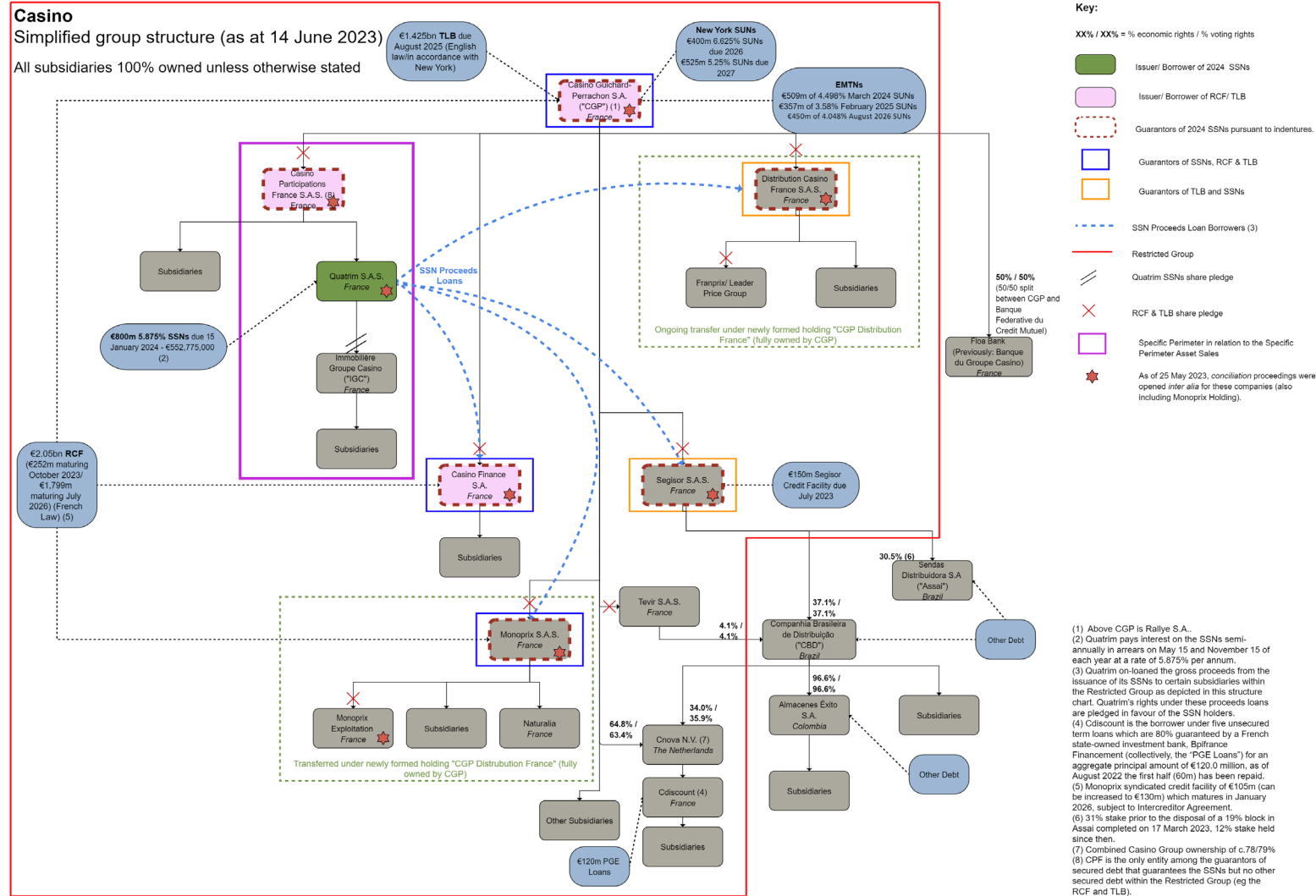
Litigation & enforcement after insolvency
proceedings have been opened

Bringing legal action against a debtor in insolvency proceedings: applicable restrictions

Global Context

- Most insolvency regimes impose a stay of payments and a stay of proceedings
- In France, *Conciliation* proceedings: a recent reform makes it possible to impose a standstill on creditors who would not voluntarily agree to a standstill
- Safeguard, reorganization and liquidation proceedings: an automatic stay of payments and proceedings is in place and applies to all the debtor's assets wherever located
- Should creditors ignore the automatic stay and bring action against the debtor in another jurisdiction than the one which opened insolvency proceedings, the foreign judgment or arbitral award could not be granted exequatur and be enforced in France

The Casino Group Structure



The Casino Group Case Study

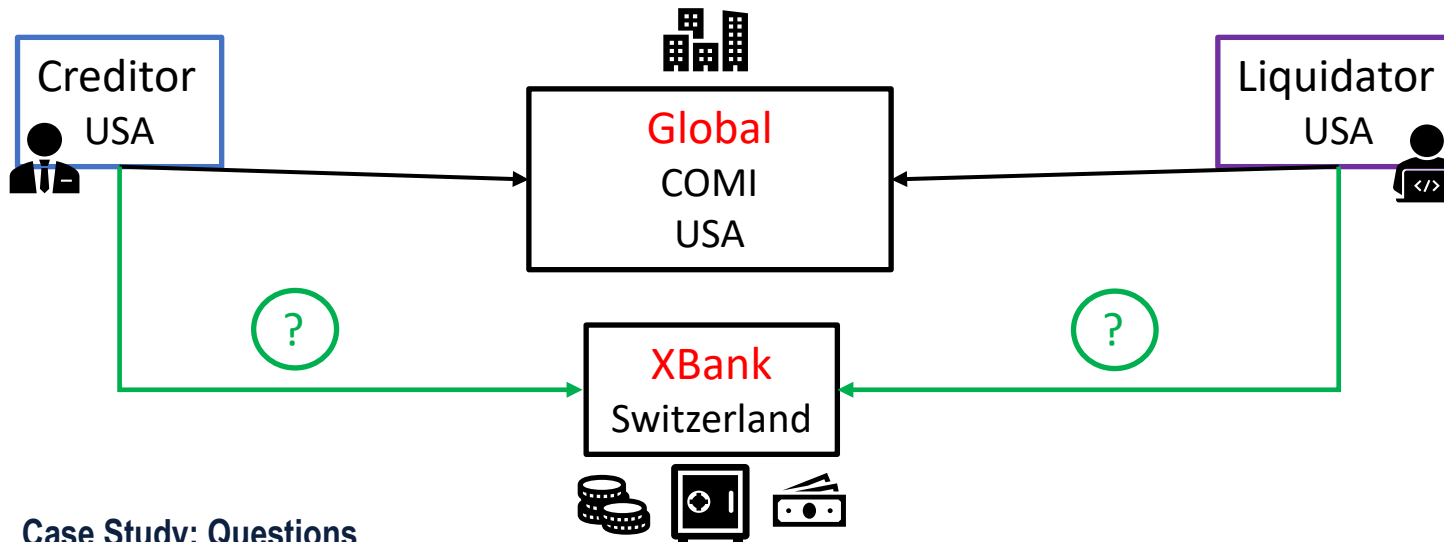
- Once *conciliation* proceedings were opened in respect of the Casino group companies by the French court, could the bondholders accelerate the debt and bring legal action against the debtor and other obligors and guarantors in the US?
- Once a restructuring plan was agreed upon and approved by the French court, did it make sense for the Casino Group companies to file for Chapter 15 bankruptcy protection in the US?

Recognition of Foreign Bankruptcy Proceedings

Recognition of Foreign Bankruptcy Proceedings

Case Study: Facts

- In May 2024, a US court declared bankruptcy over Global Ltd. ("Global"). Global is a limited liability company with its center of main interests (COMI) in the sense of the EU Insolvency Regulation (2015) in the USA. Global holds a number of bank accounts with substantial funds at XBank, a bank in Switzerland. In December 2023, a US creditor (the "Creditor") had obtained an enforceable judgment against Global in New York.



Case Study: Questions

- Question 1: Global's liquidator wants to include Global's funds held at XBank in the bankruptcy estate. What are his options?
- Question 2: The Creditor wants to enforce his judgment against Global's funds held at XBank in Switzerland. What are his options and what obstacles might he encounter?

Recognition of Foreign Bankruptcy Proceedings

General Legal Framework in Switzerland

- General:
 - International insolvency law: polarity between *principle of universality* and *principle of territoriality*.
 - Today, most international insolvency laws provide for a middle way between the two principles.
 - Also the Swiss international insolvency law provides for a middle way between the two principles.
 - The Swiss international insolvency law is governed by Chapter 11 of the Swiss Federal Act on Private International Law ("PILA") (subject to applicable international treaties, which are rare in this area of law).
 - One can identify "Five Main Principles" of Swiss international insolvency law.
- Principle 1: No Automatic Recognition:
 - No automatic recognition of foreign insolvency proceedings in Switzerland (contrary to Article 19(1) of the EU Insolvency Regulation).
- Principle 2: No Effect without Recognition:
 - Without recognition, no effect of foreign insolvency proceedings in Switzerland.
- Principle 3: Recognition of Foreign Insolvency Decree as Step 1:
 - Requirements for recognition of a foreign bankruptcy decree in Switzerland (see Art. 166 para. 1 PILA):
 - Foreign Bankruptcy Decree.
 - Enforceability.
 - Indirect Jurisdiction (review of the jurisdiction of the court of origin): The foreign bankruptcy decree must have been issued (i) in the debtor's state of domicile or (ii) in the state of the center of the debtor's main interests (COMI), provided the debtor was not domiciled in Switzerland when the foreign proceedings were opened.
 - No violation of Swiss public policy.

Recognition of Foreign Bankruptcy Proceedings

General Legal Framework in Switzerland

- Principle 4: Upon Recognition: Secondary Bankruptcy Proceedings:
 - Upon recognition, generally, Swiss secondary bankruptcy proceedings are conducted by the competent bankruptcy office according to Swiss substantive bankruptcy law, but with certain special features provided for in the PILA (see Art. 170(1) and Art. 170-174 PILA):
 - Swiss Assets. Only assets located in Switzerland are part of the secondary bankruptcy proceedings (Art. 170(1) PILA) (similar to secondary insolvency proceedings under the EU Insolvency Regulation: Art. 34 EulnsReg).
 - Satisfaction of Certain Creditors. Only a group of special claims are included in the schedule of claims (other claims are to be satisfied in the main bankruptcy proceedings abroad; this is contrary to European Insolvency Regulation: Art. 45(1) EulnsReg):
 1. Claims secured by a pledge;
 2. Certain privileged claims of creditors domiciled in Switzerland (in particular, certain claims of employees); and
 3. Claims arising from liabilities incurred for the account of a branch of the debtor entered in the Commercial Register (Art. 172(1) PILA).
 - Transfer of Surplus. Any surplus remaining after satisfaction of the group of special claims shall be transferred to the foreign liquidator (Art. 173(1) PILA). For such a transfer to take place, the schedule of claims of the main bankruptcy proceedings must first be recognized by the competent Swiss court (Art. 173(2) PILA) (contrary to Art. 49 EulnsReg).
- Principle 5: Exception: Waiver of Secondary Bankruptcy Proceedings:
 - Waiver of SBP if No Special Group of Creditors. As of 1 January 2019, the conduct of secondary bankruptcy proceedings may be waived by the Court at the request of the foreign bankruptcy administrator, if there are no claims of the special group to be satisfied from the Swiss assets and if other claims of creditors domiciled in Switzerland are adequately protected in the main bankruptcy proceedings abroad (see Art. 174a PILA).
 - Foreign Bankruptcy Administrator: Powers under *Lex Fori Concursus*. If the conduct of secondary bankruptcy proceedings is waived, the foreign bankruptcy administrator may, within the limits of Swiss law, exercise all the powers granted to him under the foreign bankruptcy law (*lex fori concursus*). In particular, the foreign bankruptcy administrator may transfer assets from Switzerland abroad and conduct legal proceedings. However, these powers may not include the performance of sovereign acts. (Art. 174a(4) PILA).

Recognition of Foreign Bankruptcy Proceedings

Case Study

Question 1: Global's liquidator wants to include Global's funds held at XBank in the bankruptcy estate. What are his options?

- Step 1: Recognition of US Bankruptcy Decree in Switzerland:
 - Due to principles 1 (No Automatic Recognition) and principle 2 (No Effect without Recognition) of the Swiss international insolvency law, Global's liquidator must act according to principle 3 and have the US bankruptcy decree be recognized in Switzerland as Step 1.
 - According to the facts, Global's liquidator should be able to have the bankruptcy decree issued at Global's COMI in the US recognized in Switzerland.
- Option 1: Swiss Secondary Bankruptcy Proceedings:
 - According to principle 4, upon recognition, normally Swiss secondary bankruptcy proceedings are conducted by the competent bankruptcy office according to Swiss substantive bankruptcy law relating to the debtor's assets located in Switzerland.
 - Global's funds held at XBank would be considered to be located in Switzerland. After the group of special claims, if any, have been satisfied from Global's Swiss assets, any surplus would finally be likely transferred to Global's bankruptcy estate in the US.
- Option 1: Waiver of Swiss Secondary Bankruptcy Proceedings:
 - According to principle 5, upon recognition, Global's liquidator may request the court that the conduct of secondary bankruptcy proceedings may be waived. The requirements for such waiver are (i) that there are no claims of the special group to be satisfied from the Swiss assets and (ii) that other claims of creditors domiciled in Switzerland are adequately protected in the foreign bankruptcy proceedings (see Art. 174a PILA).
 - If granted, Global's liquidator may in principle exercise, within the limits of Swiss law, all the powers granted to him or her under US bankruptcy law. The liquidator may therefore him- or herself ask XBank to transfer Global's funds held at XBank to the US. However, Global's liquidator may not exercise coercive powers in Switzerland.
- Questions to other panelists.

Recognition of Foreign Bankruptcy Proceedings

Case Study

Question 2: The Creditor wants to enforce his judgment against Global's funds held at XBank in Switzerland. What are his options and what obstacles might he encounter?

- Due to principle 1 (No Automatic Recognition) and principle 2 (No Effect without Recognition), individual enforcement measures remain permissible in Switzerland until the foreign bankruptcy decree is recognized.
- Upon recognition, according to principle 4 (Secondary Bankruptcy Proceedings upon Recognition) and applicable ordinary Swiss bankruptcy rules:
 - All debt enforcement proceedings against the foreign debtor in Switzerland are terminated (Art. 206 DEBA).
 - Any attached assets that have not yet been realized are included in the assets of the Swiss secondary bankruptcy proceedings (Art. 199 DEBA).
 - No new debt enforcement proceedings may be initiated until the end of the secondary bankruptcy proceedings.
 - These principles also apply if the conduct of secondary bankruptcy proceedings has been waived.
- In Switzerland, a creditor may provisionally attach a debtor's assets located in Switzerland under civil law by means of a so-called freezing order (see Art. 271 et seq. DEBA) if he can establish prima facie (i.e. in summary proceedings) that (i) it has a claim against the freezing debtor, (ii) there are specific assets of the freezing debtor located in Switzerland and (iii) there is a specific ground for a freezing order (see Art. 272 para. 1 DEBA). Such specific ground exists, inter alia, if the creditor has an enforceable domestic judgment or a foreign judgment that is recognizable and enforceable against the debtor.
- According to the facts, as long as Global's bankruptcy decree from the US has not been recognized in Switzerland, it should therefore be possible for the Creditor to attach Global's funds held at XBank by means of a Swiss freezing order. The Creditor's New York judgment against Global should be recognizable in Switzerland. In particular, the indirect jurisdiction of the New York court according to Swiss private international law should be given.
- However, once Global's bankruptcy decree from the US is recognized in Switzerland, any pending attachment of Global's funds held at XBank will be terminated and no new attachment will be possible. The attached funds of Global held at XBank would become part of the assets of the secondary bankruptcy proceeding, if one is opened.
- Questions to other panelists.

Director and Officer Liability Exposure to Litigation

Director and Officer Liability Exposure to Litigation

Global Context

- In some jurisdictions, the fiduciary duties of directors and officers change upon the debtor entering into an insolvency zone.
- Likewise, certain jurisdictions allow creditors to file claims against directors and officers based on alleged breach of their fiduciary duties
- Proceeds from litigation may enhance distribution to creditors
- Breach of fiduciary duties claim – potential litigation strategy to induce increased recovery

Director and Officer Liability Exposure to Litigation

Case Study

- Breach of fiduciary duties – irregular wind down?
- Piercing of corporate veil as alternative to traditional breach of fiduciary duties?

Questions?

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THANK YOU

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