

In this note, we provide a high-level overview of key restructuring cases from last year in the US, Asia Pacific and Australia and consider the outlook in 2024 for restructuring transactions.

## US

Many forecasters began 2023 predicting that the US would experience an inevitable recession. There were many indicators that this would be the case. The Federal Reserve increased interest rates 0.25% four times between February and July 2023.<sup>1</sup> There were a total of 642 bankruptcy filings in the US last year.<sup>2</sup> This was the most filings in a year since 2010.<sup>3</sup> However, despite this increase in bankruptcy filings, the US economy grew at an annualised rate of 2.5%, with a very strong rate of 3.3% in the final quarter of 2023.<sup>4</sup> Consumer spending increased, likely buoyed by lower inflation and low unemployment rates.<sup>5</sup>

As for bankruptcies filed in 2023, what dominated the headlines was the US banking crisis. Two banks, Silicon Valley Bank (SVB) and Signature Bank, failed within a couple days of each other in March 2023. SVB's failure was the most significant, being the largest US banking failure since the global financial crisis and the second largest in US history.<sup>6</sup> A week before its collapse, Moody's informed SVB that it faced a potential double-downgrade of its credit rating.<sup>7</sup>

On 8 March 2023, SVB announced that it had sold over US\$21 billion in investments, borrowed US\$15 billion and would hold an emergency sale of its stock to raise US\$2.25 billion to shore up its balance sheet.<sup>8</sup> This led to a hysterical bank run with customers withdrawing US\$42 billion by the following day.

The US federal government stepped in, announcing that it would guarantee all deposits at SVB and Signature Bank.<sup>9</sup> The costs were covered by proceeds the FDIC received from winding down the bank, and any additional costs from the FDIC's deposit insurance fund. The government was largely successful at quelling fears of a spillover crisis, with no additional major banking failures in 2023.

## Asia Pacific

Asia Pacific was a key driver of global growth last year, with the International Monetary Fund (IMF) projecting that the region would contribute up to 70% of all global growth.<sup>10</sup> However, China went against the grain of this trend, experiencing a real estate crisis after decades-long growth fuelled, in large part, by its real estate sector. Real estate investment fell 9.6% in 2023, while property sales fell 23% in December from the year prior.<sup>11</sup> These declines were likely the result of a suite of government measures introduced in 2020 that made it more difficult for developers to secure credit.<sup>12</sup>

- 1 Federal Reserve, "Federal Reserve issues FOMC statement", Press Release, 1 February 2023 <<https://www.federalreserve.gov/newsevents/pressreleases/monetary20230201a.htm>>; Federal Reserve, "Federal Reserve issues FOMC statement", Press Release, 22 March 2023 <<https://www.federalreserve.gov/newsevents/pressreleases/monetary20230322a.htm>>; Federal Reserve, "Federal Reserve issues FOMC statement", Press Release, 3 May 2023 <<https://www.federalreserve.gov/newsevents/pressreleases/monetary20230503a.htm>>; Federal Reserve, "Federal Reserve issues FOMC statement", Press Release, 26 July 2023 <<https://www.federalreserve.gov/newsevents/pressreleases/monetary20230726a.htm>>.
- 2 Ingrid Lexova and Umer Kham, "US bankruptcies hit 13-year peak in 2023; 50 new filings in December", S&P Global, 9 January 2024 <<https://www.spglobal.com/marketingintelligence/en/news-insights/latest-news-headlines/us-bankruptcies-hit-13-year-peak-in-2023-50-new-filings-in-december-79967180>>.
- 3 Ibid.
- 4 Lucia Mutikani, "US economy brushes aside recession fearmongering with strong Q4 performance", Reuters, 25 January 2024 <<https://www.reuters.com/markets/us/us-fourth-quarter-economic-growth-handily-beats-expectations-2024-01-25/>>.
- 5 White House, "December 2023 CPI Report", 11 January 2024 <<https://www.whitehouse.gov/cea/written-materials/2024/01/11/december-2023-cpi-report/>>.
- 6 Hugh Son, Rohan Goswami, et al, "Here's how the second-biggest bank collapse in U.S. history happened in just 48 hours", CNBC, 10 March 2023 <<https://www.cnbc.com/2023/03/10/silicon-valley-bank-collapse-how-it-happened.html#:~:text=Within%2048%20hours%2C%20a%20panic,and%20the%20second%20largest%20ever.>>>.
- 7 Brian Chappatta, "SVB's 44-Hour Collapse Was Rooted in Treasury Bets During Pandemic", Bloomberg, 10 March 2023 <<https://www.bloomberg.com/news/articles/2023-03-10/svb-spectacularly-fails-after-unthinkable-heresy-becomes-reality>>.
- 8 Ibid.
- 9 US Department of the Treasury, "Joint Statement by the Department of the Treasury, Federal Reserve, and FDIC", Press Release, 12 March 2023 <<https://home.treasury.gov/news/press-releases/jy1337>>.
- 10 Please note that at the time of writing, the IMF has not yet released its year-end evaluation. See IMF, "Despite weakening external demand and monetary tightening, domestic demand has so far remained strong, with China's reopening providing fresh impetus", May 2023 <<https://www.imf.org/en/Publications/REO/APAC/Issues/2023/04/11/regional-economic-outlook-for-asia-and-pacific-april-2023>>.
- 11 Liangping Gao and Ryan Woo, "China's property market slide worsens despite government support", Reuters, 16 January 2024 <<https://www.reuters.com/world/china/chinas-dec-new-home-prices-fall-fastest-pace-since-feb-2015-2024-01-17/#:~:text=Overall%20for%202023%2C%20property%20investment,to%20roll%20out%20fresh%20support.>>>.
- 12 Kripa Jayaram, Sumanta Sen, et al, "The Massive Scale of China's Property Sector", Reuters, 26 September 2023 <<https://www.reuters.com/graphics/CHINA-PROPERTY/SCALE/zpnzjdqapl/>>.

The government has since stepped in an effort to minimise the crisis, with China's central bank increasing its pledged supplementary lending facility to help fund infrastructure and housing projects.<sup>13</sup> With real estate contributing up to 30% of China's GDP, this crisis will have long-term effects on China's growth prospects and the world economy.<sup>14</sup>

One victim of China's real estate crisis was Evergrande, which went from being one of China's largest real estate developers to the world's most heavily indebted real estate developer.<sup>15</sup> Its losses totalled US\$81 billion in 2021-2022 and rose further to about US\$340 billion by the end of 2022.<sup>16</sup> As a result, last year, Evergrande entered into restructuring proceedings in Hong Kong and filed a US chapter 15 petition for recognition of the Hong Kong proceedings as its foreign main proceedings.<sup>17</sup> After more than two years of failing to agree on a restructuring plan, on 29 January 2024, the Hong Kong court ordered Evergrande's liquidation.<sup>18</sup> The situation in China is far from certain and the demise of Evergrande is symptomatic of the economic challenges in China.



## Australia

After emerging from the pandemic with a healthy spending appetite, Australia's 2023 was defined by high inflation and rising interest rates. Australia ended the year with a 4.35% interest rate – a record 12-year high.<sup>19</sup> Inflation continued to grow but at a slower annualised pace of 4.1%, down from 7.8% in December 2022.<sup>20</sup> Unsurprisingly, the number of Australian companies that went into external administration increased in 2023. The numbers were up nearly 50% from 2022 – 7,942 companies entered administration or had a controller appointed in the 2023 financial year, up from 4,912 in 2022.<sup>21</sup>

Although no poster child emerged from Australia's bankruptcy filings in 2023, there were a couple of landmark rulings that came out of the High Court of Australia. The first was *Bryan v. Badenoch Integrated Logging Pty Ltd* [2023] HCA 2, where the High Court found that section 588FA(3) of the Corporations Act does not incorporate the peak indebtedness rule. The High Court reviewed the statutory context surrounding section 588FA(3) and found that the peak indebtedness rule cannot be applied given its inconsistency with other legislative requirements under Part 5.7B, which sets out the claw-back regime for insolvent companies.

Those other requirements include (i) sections 588FE(2) to (6B), which identify when a transaction is voidable; and (ii) section 588FC, which provides that an insolvent transaction is only an unfair preference if the transaction was entered into when a company was insolvent or the transaction had the effect of causing the company to become insolvent.

The second case was *Metal Manufactures Pty Limited v. Morton* [2023] HCA 1, where the High Court considered whether a defendant to a liquidator's claim to recover unfair preferences was entitled to rely on a right of set-off under section 553C of the Corporations Act 2001 (Cth). *Metal Manufactures* paid AUS\$50,000 and AUS\$140,000 to MJ Woodman Electrical Contractors during the relation back period. After MJ Woodman's liquidator sought to recover both payments as unfair preferences, *Metal Manufactures* argued that it had a right to set off its potential liability to repay the alleged unfair preferences against the separate debt owed to it pursuant to section 553C.

13 Reuters, "China lifts policy bank loans, raising housing support expectations"; 2 January 2024 <<https://www.reuters.com/world/china/china-boosts-policy-bank-loans-amid-expectations-housing-support-2024-01-02/>>.

14 Matt Phillips, "China's real estate struggles could threaten global economic growth"; Axios, 11 October 2023 <<https://www.axios.com/2023/10/11/chart-chinas-real-estate-struggles>>.

15 Associated Press (Beijing), "China Evergrande reports its debt rose to \$340 billion in 2022. It plans meetings with creditors"; 18 July 2023 <<https://apnews.com/article/china-evergrande-property-economy-debt-7af0c0372b64abb8e90ff576e8cb25cd>>.

16 Ibid.

17 *In re China Evergrande Group*, et al, "Declaration of Jimmy Fong in Support of the Motion for (I) Recognition of Foreign Main Proceedings, (II) Recognition of Foreign Representatives, and (III) Related Relief Under Chapter 15 of the Bankruptcy Code with Respect to Debtor China Evergrande Group"; Case No. 23-11332 (MEV), Docket No. 6, 17 August 2023.

18 Clare Jim and Xie Yu, "China Evergrande ordered to liquidate in landmark moment for crisis-hit sector"; Reuters, 29 January 2024 <<https://www.reuters.com/business/embattled-china-evergrande-back-court-liquidation-hearing-2024-01-28/>>.

19 Sumeyya Ilanbey, "Businesses that survived as result of pandemic tipped to collapse in 2024"; *Sydney Morning Herald*, 26 December 2023 <<https://www.smh.com.au/business/the-economy/businesses-that-survived-as-result-of-pandemic-tipped-to-collapse-in-2024-20231218-p5es4c.html>>.

20 Reuters, "Australia Q4 inflation slows sharply to two-year low, bringing rate cuts nearer"; 30 January 2024 <<https://www.reuters.com/markets/australia-inflation-slows-sharply-two-year-low-q4-2024-01-31/>>.

21 Karen Maley, "The worrying rise in corporate busts"; *Australian Financial Review*, 17 October 2023 <<https://www.afr.com/companies/financial-services/the-worrying-rise-in-corporate-busts-20231017-p5ecx0#:~:text=According%20to%20insolvency%20statistics%20from,in%20the%202021%20financial%20year.>>>.

The Federal Court unanimously held that section 553C did not apply because the requirements of mutuality had not been met, those being (i) the credits, debts or claims arising from other dealings must be between the same parties; (ii) the benefit or burden of the credits, debts or claims must lie in the same interests; and (iii) the credits, debts or claims arising from other dealings must be commensurable for the purposes of set-off. The High Court upheld the Federal Court's ruling, finding there was no mutuality of interest between MJ Woodman and Metal Manufactures because (i) the company owed money to the appellant but the appellant owed nothing to the company immediately before the winding up commenced; and (ii) the amount the liquidator would recover from the unfair preference claim could not be seen as being for the benefit of the liquidator.

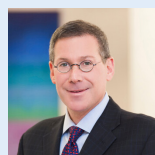
## Outlook

Three factors that will largely set the tone for this year include interest rates, inflation and geopolitical conflict. A fourth factor being political uncertainty and elections nearing in key jurisdictions will also likely play a role in determining the road ahead for economic activity. Despite those challenges, the outlook for economic growth in 2024 is generally positive, with the IMF predicting global growth of 3.1%, representing the same rate of growth as in 2023.<sup>22</sup>

Over in the US, there is a fair outlook for continued economic growth in 2024. The Federal Reserve recently indicated that it would maintain interest rates at 5.4% (though it does not seem ready to cut them either).<sup>23</sup> In one survey conducted by the National Association for Business Economics, more than 75% of economists expected US economic growth to slow down in 2024, but put the likelihood of a recession in the next 12 months at less than a 50% probability.<sup>24</sup> Respondents expect a slowdown in core inflation, while citing tight monetary policy and broadening conflicts in Ukraine and the Middle East as the largest downside risks for the US economy.<sup>25</sup> In keeping with 2023, analysts believe that a high level of bankruptcy filings may continue into 2024, albeit at a slower pace, with the retail sector leading the charge.<sup>26</sup>

In Asia Pacific, despite downward pressure from China's economic crisis, the IMF is predicting that the region will again deliver roughly two-thirds of global growth in 2024.<sup>27</sup> However, in Australia more specifically, the economic outlook remains "soft"<sup>28</sup> Two-thirds of the Australian Taxation Office's collectable debt is owed by small firms.<sup>29</sup> Insolvencies are now trending higher than pre-pandemic levels, with high interest rates and supply chain issues as a result of increasing geopolitical conflict expected to result in increasing business failures, particularly towards the second half of 2024.<sup>30</sup> The net result of those circumstances is that there will inevitably be corporate renewal and that brings both challenges and opportunities. We anticipate continuing to work on domestic and cross-border transactions where existing stakeholders or third parties are prepared to take calculated risks in order to secure growth assets, a stronger (or new) market presence or businesses with real turnaround potential.

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<sup>22</sup> International Monetary Fund, "Transcript of Press Briefing: Regional Economic Outlook Update for Asia and Pacific"; 31 January 2024 <<https://www.imf.org/en/News/Articles/2024/01/31/tr013124-press-briefing-regional-economic-outlook-asia-pacific-department>>.

<sup>23</sup> Federal Reserve, "Implementation Note issued January 31, 2024: Decisions Regarding Monetary Policy Implementation"; Press Release, 31 January 2024 <<https://www.federalreserve.gov/newsevents/pressreleases/monetary20240131a1.htm>>.

<sup>24</sup> National Association for Business Economics, "NABE Panelists Forecast Slower Growth in 2024; Three out of Four Panelists Put Recession Risk at 50% or Less in Next 12 Months"; December 2023 <[https://www.nabe.com/NABE/NABE/Surveys/Outlook\\_Surveys/December\\_2023\\_Outlook\\_Survey\\_Summary.aspx](https://www.nabe.com/NABE/NABE/Surveys/Outlook_Surveys/December_2023_Outlook_Survey_Summary.aspx)>.

<sup>25</sup> Ibid.

<sup>26</sup> Bansari Kamdar, "US bankruptcy wave may stretch into 2024, but pace could slow"; Reuters, 13 December 2023 <<https://www.reuters.com/business/finance/us-bankruptcy-wave-may-stretch-into-2024-pace-could-slow-2023-12-13/>>.

<sup>27</sup> International Monetary Fund, "Transcript of Press Briefing: Regional Economic Outlook Update for Asia and Pacific"; 31 January 2024 <<https://www.imf.org/en/News/Articles/2024/01/31/tr013124-press-briefing-regional-economic-outlook-asia-pacific-department>>.

<sup>28</sup> Deloitte Access Economics, "Economy to grow, but stuck in second gear"; 29 January 2024 <<https://www.deloitte.com/au/en/about/press-room/business-outlook.html>>.

<sup>29</sup> Sumeyya Ilanbey, "Businesses that survived as result of pandemic tipped to collapse in 2024"; *Sydney Morning Herald*, 26 December 2023 <<https://www.smh.com.au/business/the-economy/businesses-that-survived-as-result-of-pandemic-tipped-to-collapse-in-2024-20231218-p5es4c.html>>.

<sup>30</sup> Ibid.