HSF Kramer Bankruptcy & Restructuring Group Global reach, local knowledge

Debtors and creditors have options when choosing where to pursue a restructuring – particularly with operations across jurisdictions and debt instruments issued under different laws. Local knowledge is key to navigate those options and understand the pros and cons associated with each forum.

Combining the capabilities and network of our firms, we now cover the major centres of bankruptcy and financial restructuring across the globe – the US, the UK, Hong Kong, Singapore and Australia, in addition to a number of other centres of restructuring across of the globe. This short guide introduces the key themes in those five jurisdictions.

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The broad powers and reach of specialized and dedicated Bankruptcy Courts in the United States make Chapter 11 proceedings a perennially popular forum for restructurings and bankruptcies of all types, from smaller individual companies to larger multinational businesses (among other types of debtors). These cases cut across a wide spectrum of issues facing debtors and businesses including operational turnaround, financial restructuring (and de-leveraging) to a centralized forum to address mass tort and litigation-driven claims affecting companies. Bankruptcy Courts are federal courts of equity and have inherent authority to fashion relief that is necessary or appropriate to carry out the provisions of the Bankruptcy Code.

"the bankruptcy courts are necessarily entrusted with broad equitable powers to balance the interests of the affected parties, guided by the overriding goal of ensuring the success of the reorganization."

***PIONEER INVESTMENT SERVICES CO.*, JUSTICE WHITE**

Once a debtor initiates a Chapter 11 case, the Bankruptcy Code (section 362) provides for a worldwide automatic stay of actions against the debtor – both of enforcement actions and general litigation – and attempts to exercise control over property of the debtor's bankruptcy estate. Moreover, a debtor can request that the Bankruptcy Court extend that automatic stay to pause actions against related non-debtor entities, including non-debtor affiliates and directors and officers, upon a sufficient demonstration of cause to do so. U.S. Bankruptcy Courts also interpret personal jurisdiction broadly due to nationwide service of process provisions in the Bankruptcy Rules, and minimal contacts with the U.S. (such as using the American banking system), can be sufficient to allow a debtor to bring claims against a third-party in Bankruptcy Court. This combination of equitable authority and expansive jurisdiction allows U.S. Bankruptcy Courts to impact and bind creditors and other parties-in-interest across the globe (subject, of course, to recognition of U.S. Bankruptcy Court orders outside the U.S. or other jurisdictional reach to the affected party within the U.S.).

The Chapter 11 cases among related debtor entities are generally "jointly administered," or administratively consolidated before a single Bankruptcy Court. This allows debtors with complex corporate structures to address their combined liabilities in a single Chapter 11 proceeding. (Of course, "administrative consolidation" is not the same thing as "substantive consolidation" among different businesses that effectively combine multiple bankruptcy estates, assets and claims into a single estate).

If a debtor satisfies the relatively low threshold for qualifying as a "debtor" in the U.S. under section 109(a) of the Bankruptcy Code, it can use a U.S. bankruptcy proceeding to restructure both U.S.-law governed, and in many cases, non-U.S. law governed indebtedness, without unanimous or even majority creditor support through use of "cross-class cramdown" plans. Chapter 11 plans can provide for a reorganization of the business as a going concern to liquidation of the debtor's assets or even a combination of both (with a debtor reorganizing part of its business and selling its non-core assets and businesses).

In order to confirm a Chapter 11 plan, a debtor will need to show, among other things, that (i) its proposed plan is feasible (meaning that the debtor will be able to satisfy the expectations that underlie the Chapter 11 plan as a restructured business), and (ii) it can pay all of its post-bankruptcy obligations (that the debtor is "administratively solvent") as well as any priority unsecured claims (like wages up to a threshold). The debtor must also meet certain voting thresholds if there are any "impaired" classes (two-thirds in dollar amount and majority in number of creditors in that class who actually vote accept the Chapter 11 plan).

Eligibility as a Chapter 11 Debtor

The Bankruptcy Code has fairly liberal requirements for what entities qualify as debtors eligible to file for relief under Chapter 11. First, the filing party must be a "person," and second, that person must reside, have a domicile, place of business, or property in the United States. For these purposes, a "person" can be an individual, partnership, or a corporation. Those requirements are easily satisfied for U.S. corporate debtors.

> "...the Court [has] no discretion to consider whether it was the intent of Congress to permit someone to obtain a bankruptcy discharge solely on the basis of having a dollar, a dime or a peppercorn located in the United States."
>
> ***MCTAGUE*, JUDGE KAPLAN**

For non-U.S. debtors, the question often becomes what constitutes a "place of business" or sufficient "property" in the United States. In some cases, having a single U.S.-based employee that engages in business in the U.S. on the business' behalf or a general partner located in the U.S. has qualified as having a "place of business" in the U.S.

Quantifying "property" can be somewhat more complex, although courts have generally found that even a "peppercorn" (minor amount) of property is sufficient for these purposes. Examples of tangible and intangible property that courts have found qualifies an entity to be eligible as a debtor include:

- Having obligations, including funded indebtedness, governed by U.S. law;
- Pending litigation in the U.S.;
- Having a bank account or interest in a bank account in the U.S.;
- Having an interest in a retainer advanced to counsel in the U.S.; or
- Having contractual obligations in the U.S., or contracts with forum selection clauses designating a U.S. jurisdiction.

While "property" is generally construed expansively, in the event of multiple debtors filing together, each Chapter 11 debtor must satisfy the eligibility requirements in order to commence a Chapter 11 proceeding. For that reason, retainer accounts are most commonly used by non-U.S. debtors as a basis for Chapter 11 eligibility, as under section 541(a) of the Bankruptcy Code, a retainer account for restructuring counsel is property of the estate that each debtor accordingly has an interest in. (This assumes that the retainer agreement is drafted properly to include all of the filing debtors).

Being eligible to file a Chapter 11 petition does not mean that a debtor can remain in Chapter 11, however. A non-U.S. debtor that has constructed artificial ties to the U.S. to justify a Chapter 11 proceeding can have their bankruptcy cases dismissed under sections 305 or 1112(b) of the Bankruptcy Code, which allow a Bankruptcy Court to dismiss a proceeding if it is in the best interests of creditors, or otherwise for "cause." Courts have different views on what qualifies as "cause," but have held that bankruptcies filed by debtors not in financial distress or seeking solely to gain an advantage in litigation or to frustrate legitimate collection efforts by creditors do not have a valid purpose and, therefore, the Chapter 11 cases cannot proceed. On the other hand, non-U.S. debtors with U.S. law governed debt documents and/or contracts or material creditors in the U.S. can seek to argue that cause exists for the Chapter 11 case to proceed. Debtors with no legitimate connections to the U.S. and no valid reorganizational purpose to their bankruptcy filings, however, may have difficulty remaining in Chapter 11. This is a highly fact-specific analysis.

All told, Chapter 11 has a relatively low barrier to entry, and its global reach and dedicated Bankruptcy Courts and practitioners make it appealing to potential debtors (both U.S. and non-U.S. based).

Choice of Venue

One of the most important decisions a potential Chapter 11 debtor can make is where to file for bankruptcy (including (i) whether to file in the U.S. if there are other non-U.S. options and (ii) where to file within the U.S. for a case under the Bankruptcy Code). The permissibility and merits of "forum-shopping," or manufacturing jurisdiction in a specific venue for the purposes of a bankruptcy filing have been hotly debated. While there is a uniform federal Bankruptcy Code in the U.S., there are multiple federal "districts" within the U.S. (such as the Second Circuit covering New York and New Jersey, the Third Circuit covering Delaware and New Jersey and the Fifth Circuit covering Texas) that can have different precedent on interpreting the Bankruptcy Code or other law affecting bankruptcy cases. This precedent can vary and affect the pace and potential success of the Chapter 11 case.

A debtor may file for bankruptcy in the U.S. in any federal district (i) in which the debtor's "domicile, residence, principal place of business, or principal assets in the United States" are located during the 180 days preceding the bankruptcy filing (or more of the 180 days preceding the filing than any other jurisdiction), or (ii) in which a bankruptcy case in the U.S. concerning the debtor's affiliate, general partner, or partnership is already pending. Once U.S. venue is established for one debtor entity, other entities in the debtor's corporate or business family can seek to "tag-along" as affiliates and file bankruptcy cases in the same venue, even if venue would not otherwise be proper for those specific entities in that district. If venue is proper in a U.S. district for any filing entity in the corporate or business family, it will be proper for all filing entities.

> "...my decision makes a critical distinction between creating the facts to fit the statute, which I believe is undeniable here, as opposed to applying the statute to fit the facts. Again, in the context of forum shopping, this is a very big distinction."
>
> ***PATRIOT COAL*, (CITING *WINN-DIXIE*), JUDGE CHAPMAN**

The ability to "tag-along" bankruptcy cases has led to allegations of forum-shopping. As noted above, bankruptcy precedent can vary among the federal Circuits and districts. Debtors may pick a jurisdiction favorable on certain legal issues that may be central to their bankruptcy cases, and then seek to establish the necessary facts to justify venue there. For example, *Patriot Coal*, which was headquartered in and primarily operated in Missouri, had New York corporations formed on the eve of its bankruptcy filing, and those two entities filed for bankruptcy first (in the Southern District of New York), with the remaining debtor entities "tagging-along." Multiple venue transfer requests were filed. While the Bankruptcy Court agreed that the plain language of the venue statute had been satisfied because the new entities were, and had only even been, domiciled in New York, the Court ultimately transferred venue to where the debtors' headquarters were located because while "taking advantage of the facts as they existed before" the bankruptcy was permissible (ie, strategically picking one potential venue over another), creating the facts to fit the venue statute was not permissible.

Forum-shopping is an inherently risky endeavor, and its success ultimately depends on whether venue is challenged by any parties in interest, as a Bankruptcy Court is unlikely to transfer venue of its own accord (although a court has the authority to do so on its own). Additionally, many Bankruptcy Courts have denied venue transfer requests on facts more tenuous than those in *Patriot Coal*. As a result, Chapter 11 debtors often pick the potential venue most favorable on legal issues likely central to their bankruptcy cases – and savvy debtors will, in anticipation of a bankruptcy filing, undergo corporate transactions to credibly establish venue in a number of potential jurisdictions.

Recognition Inside and Outside the United States

The U.S. has implemented the UNCITRAL Model Law on Cross-Border Insolvency ("**Model Law**") through Chapter 15 of the Bankruptcy Code, which provides mechanisms for recognition of foreign insolvency, liquidation, debt-restructuring and bankruptcy proceedings. As a result, U.S. Bankruptcy Courts can recognize and enforce restructurings undertaken outside of the U.S., and other jurisdictions that have implemented the Model Law are likely to recognize U.S. bankruptcy proceedings.

> "...the Court should be guided by the main policy goals of chapter 15—cooperation and comity with foreign courts and deference to those courts within the confines established by chapter 15."
>
> ***CRÉDITO REAL*, JUDGE HORAN**

Where a Chapter 11 debtor needs to bring a confirmed plan to a non-U.S. court for enforcement and recognition in a jurisdiction that has not recognized the Model Law, it may need to undertake a more comprehensive restructuring in that jurisdiction but may still be able to use the confirmed Chapter 11 plan to streamline non-U.S. proceedings. One example of this is the restructuring of *Endo International plc*, where the company confirmed a Chapter 11 plan addressing its financial and mass tort liabilities, and needed to implement that restructuring in Ireland, where the company was based. Ireland has not recognized the Model Law, and so Endo needed to pursue a scheme of arrangement in Ireland that mirrored the terms of the Chapter 11 plan. Endo used a "deed of indemnity and contribution" to consolidate all of its liabilities at a single entity, and that entity sought approval of the scheme that implemented the Chapter 11 plan. This consolidation approach allowed creditors of Endo's subsidiaries to vote on and be bound by Endo's scheme of arrangement, and thus implement the U.S. reorganization abroad.

Conversely, non-U.S. debtors that undertake restructuring or insolvency proceedings abroad can ask U.S. courts to recognize and enforce those proceedings by filing for relief under Chapter 15 of the Bankruptcy Code. Chapter 15 proceedings are relatively streamlined, and recognition is typically granted when:

- The foreign proceeding has taken place in a jurisdiction where the debtor has its center of main interests, or "COMI," or has a place of establishment;
- The entity seeking recognition (the "foreign representative") was authorized to do so in the foreign proceeding; and
- Evidence is presented that the non-U.S. proceeding affords creditors with a full and fair opportunity to be heard similar to U.S. due process standards.

While the scope of a Chapter 15 proceeding is generally much more limited than that of a Chapter 11 case, Bankruptcy Courts have authority to grant, upon request, more expansive relief in aid of the Chapter 15 proceeding, including:

- Granting discovery requests and facilitating the pursuit of litigation;
- Selling assets free and clear of claims and liens;
- Forcing turnover of assets located inside the United States; and
- Enforcing non-consensual third-party releases.

The availability of non-consensual third-party releases through Chapter 15 proceedings has become a hot topic following the Supreme Court's general bar on such releases in the Chapter 11 context in *Purdue*. In *Crédito Real* and *Odebrecht Engenharia e Costrução S.A*, bankruptcy judges in the District of Delaware and the Southern District of New York enforced – over objection – non-consensual third-party releases that had either been granted or were consistent with applicable law in the non-U.S. jurisdiction. Both courts found that *Purdue* applied only to Chapter 11 cases, and that enforcing relief granted in other jurisdictions, even if not available in a Chapter 11 proceeding, was consistent with U.S. public policy.

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England and Wales

London's leading role as a restructuring hub is a product of:

- the principle commonly referred to as "*the rule in Gibbs*" in which an English law liability cannot generally be compromised by a non-English restructuring process;
- established international treaties which have the effect that an English restructuring will likely be given effect to in other relevant jurisdictions; and
- the relative attractiveness of the English law restructuring toolkit when compared to alternatives across Europe and elsewhere. See for example the flexibility and certainty of schemes of arrangement under Part 26 of the Companies Act 2006 ("**English Schemes**") and the increased flexibility of the recently introduced restructuring plan under Part 26A of the Companies Act 2006 ("**English RPs**").

With the new restructuring processes recently introduced across the EU following Directive (EU) 2019/1023, London has continued to adapt. The English restructuring toolkit is now often used in the context of restructurings implemented with parallel English and European processes. See for example the Spanish restructuring plan, Dutch *WHOA*, Italian *Concordato preventivo*, and German STARug.

Threshold to engage English Court jurisdiction

English law has a different jurisdiction requirement for a debtor:

- seeking to file for administration (the most common large insolvency process); and
- asking the English Courts to grant permission for the debtor to propose an English Scheme or English RP.

In the former, parties generally need to be satisfied that the debtor's centre of main interests or COMI is in the UK.

For the latter, the English Court requires only that:

- a non-English company show a "*sufficient connection*" to England and Wales in order to allow the debtor to convene creditor meetings to consider and vote on an English Scheme or English RP. Absent that "sufficient connection" the English Court has commented that it would be exercising an exorbitant jurisdiction contrary to international comity; and
- expert evidence being provided demonstrating that there is a reasonable prospect of the English Scheme or English RP having substantial effect in other relevant jurisdictions. This is driven by the applicable international treaties and the approach of Courts in the relevant jurisdiction.

"*Sufficient connection*"

Examples of where a non-English debtor has had a sufficient connection include:

- COMI in England
- shift of COMI to England
- English law governed debts
- debts changed to English governing law
- new English obligor/issue/guarantor accedes to, or assumes liabilities for, the financing for the purposes of engaging the jurisdiction

"Good" v "bad" forum shopping

The English Courts have been alive to the risk that the nature of the "*sufficient connection*" test enables forum shopping which can either be:

- for the purposes of achieving the best possible outcome for creditors; or
- undesirable or abusive.

The English Court has been willing to find that it has jurisdiction, even where debtors use artificial techniques (including those set out below) to satisfy the jurisdiction requirements.

COMI shift

The COMI of a debtor is the place where the debtor conducts the administration of its interests on a regular basis and is ascertainable by third parties. It is capable of changing over time. For a holding company with no day to day trading operations, moving a company's COMI is relatively straightforward (subject to tax analysis). For an operating company, this is a more onerous task given the large number of creditors who deal with the company on a daily basis.

There are a number of examples of COMI shifts being used to support an English Scheme or an English RP. This came before the English Court again recently where a Luxembourg incorporated holding company shifted its COMI to England for the sole purpose of compromising German and Luxembourg law debts (the *Aggregate* restructuring). The English Court was satisfied that the plan company had genuinely shifted its COMI to England and expert evidence indicated that such shift did not breach Luxembourg law and would be recognised in

Germany. As a practical point, debtors also have the opportunity to "fix" any technical issues with the COMI shift during the course of the c. 2-3 month Court process – a material practical advantage for the debtor over a dissenting creditor.

Mr Justice Richards rejected the proposition that English law has formulated a test for what constitutes "good" and "bad" forum shopping. Instead the Judge simply has to assess whether there was a basis to refuse to exercise discretion to sanction the English RP.

> "...the COMI Shift could conceptually indicate that the Plan is being put forward for illegitimate and abusive reasons...
>
> ... The question I must address ... is whether despite the fact that I have jurisdiction to sanction the Plan I should exercise my discretion and decline to do so on the basis of [the] arguments based on "forum shopping"."
>
> **-*AGGREGATE*, RICHARDS J**

Changing governing law and/or jurisdiction clauses in contracts to be affected

There are a number of examples of the governing law of financing arrangements to create a "sufficient connection" – often made possible as this is a change that can commonly be made with a lower consent threshold than certain entrenched or sacred rights.

There is however some commentary that this route may not be entirely free from scrutiny. For example, in the *Apcoa* English Scheme case, Mr Justice Hildyard laid out the following non-exhaustive set of circumstances where a change in governing law/jurisdiction clause might be unacceptable:

- where the new choice of law appeared "*entirely alien*" to the parties' previous arrangements;
- if the change in law had "*no discernible rationale or purpose other than to advantage those in favour at the expense of dissentients*"; or,
- where the Court would consider the extent of alteration of rights a "*step too far*".

Substitute issuer/borrower or deed poll

Certain restructurings have involved a new English entity being incorporated for the purposes of then immediately acceding to the relevant financing arrangements by way of an existing mechanism under the relevant finance documents or unilaterally agreeing to become liable for the relevant financing by way of a deed of contribution.

> "I also noted at [174] of the convening judgment, however, that "it is possible to envisage a case where the artificial structure is the only solution to enable a restructuring to be effected, all other possible alternatives having been explored and rejected for one or other reason of law or practicability; where the alternative is a value-destructive liquidation; and where the terms of the restructuring demonstrably benefit the affected creditors. In such a case, there would be a powerful argument that the artificiality of the structure should not prevent the company and its creditors being able to take advantage of the English scheme or plan jurisdiction."
>
> I am satisfied that this is just such a case..."
>
> **-*GATEGROUP*, ZACAROLI J**

This deed of contribution technique was tested before Zacaroli J (now one of the two leading insolvency Lord Justices in the English Court of Appeal) in the *Gategroup* English RP. It was common ground that the rationale for the artificiality was solely to enable the company to propose the English RP. Zacaroli J was satisfied in that case that it is appropriate to sanction the English RP.

Notwithstanding the English Court's support for such techniques, note that Snowden LJ (the other leading insolvency Lord Justice in the English Court of Appeal) took care to state *obiter* in *Adler* that the Court of Appeal was not endorsing the issuer substitution used in that case.

> "The Appellants did not oppose the Plan before the Judge on the basis that the Issuer Substitution was an artificial device that could not justify the exercise of discretion to sanction the Plan. The point did not, therefore, arise for consideration on this appeal. For the avoidance of doubt, and without expressing a view one way or the other, I would wish to make it clear that the fact that this judgment does not deal with this issue should not be taken as an endorsement of the technique for future cases."
>
> **-*ADLER*, SNOWDEN LJ**

With the two leading insolvency judges in the Court of Appeal indicating potential differing levels of comfort with these more artificial techniques, it is likely these issues will arise in future cases. Although, if a Judge is satisfied that (using the *Gategroup* formulation) the restructuring is for the purposes of achieving the best possible outcome for creditors, then it may make it easier for a Judge to satisfy themselves that any artificial techniques represent "good" forum shopping and therefore do not present a reason not to approve the restructuring.

Relation with non-English restructuring processes

Parallel processes

There are many examples of English law processes being used in parallel with processes in other jurisdictions. Reasons vary, but examples are:

- the English Court will want to be satisfied on the evidence that there is a reasonable prospect that the restructuring will have substantial effect in relevant jurisdiction. This turns on the expert evidence as to the effect of the English Scheme or English RP in all relevant jurisdictions. It may be necessary to use a local process to ensure that the restructuring has substantial effect;
- in *Re Cimolai SpA*, English RPs were necessary to restructure disputed claims under English law-governed financial derivative contracts, whilst parallel Italian proceedings were accepted as necessary to restructure certain Italian law debts.

Another example is the use of a local process to effect a restructuring of the equity. Although note that in *Smile Telecoms* the English Court was satisfied on the evidence that it could sanction an English RP which granted a power of attorney to effect a restructuring of the equity of a Mauritian debtor;

- non-English processes could expand the range of options available for a restructuring. In particular, foreign law processes have been used that provide for a local moratorium on action against a debtor (eg, in the case of *Cimolai*); and
- there has been a rise in interconditional parallel processes. See for example:
  - *Vroon* featured parallel processes in an English Scheme and Dutch WHOA;
  - *McDermott* repeated this with an English RP and Dutch WHOA;
  - *Hong Kong Airlines* and *Sino-Ocean* used parallel English RPs and Hong Kong schemes of arrangement.

Recognition

There are two key routes for a non-English restructuring or insolvency processes seeking recognition in the UK or assistance from the English Courts:

- an application for recognition as a foreign main or non-main insolvency proceeding under the Cross Border Insolvency Regulations which implements the Model Law; and
- an application for assistance under section 426 of the Insolvency Act 1986. This mechanism is only available to Courts in specified jurisdictions, mainly within the commonwealth.

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Hong Kong

Hong Kong continues to cement its position as a leading restructuring hub in Asia.

With continued willingness by the Hong Kong Courts to recognise and assist foreign liquidators, as well as the well-established Mainland-Hong Kong cooperation mechanism, we expect to see more complex and cross-border insolvency proceedings before the Hong Kong Courts. The enhanced cooperation and increasing sophistication will further solidify Hong Kong's role as a key jurisdiction for insolvency matters in the region.

Toolkit of liquidation and schemes

Corporate insolvency procedures available in Hong Kong include contractual arrangements, schemes of arrangement, creditors' voluntary liquidation, compulsory liquidation, and court liquidation under a regulating order. In more detail:

- **Contractual arrangements.** A company and its creditors may agree to restructure the company's debts outside of formal insolvency proceedings. These arrangements are typically negotiated between the parties involved and can include various forms of debt restructuring eg extending payment terms, reducing the amount owed.
- **Schemes of arrangement.** This is a court-approved agreement between a company and its creditors or shareholders (or a class thereof) to restructure the company's debts or share capital. The process is governed by sections 670 to 674 of the Companies Ordinance (Cap 622). The scheme must be approved by a majority in number representing at least 75% in value of the creditors or shareholders (of the same class) present and voting at the meeting. The scheme must also be sanctioned by the court in order for it to be binding on all creditors or shareholders who are subject to the scheme.
- **Creditors' voluntary liquidation.** This is initiated by the company when it is insolvent and unable to pay its debts. The process is governed by the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap 32) ("**CWUMPO**"). The company passes a resolution to wind up voluntarily, and a meeting of creditors is held where the creditors can appoint a liquidator and form a committee of inspection. A liquidator then takes control of the company's assets, realises them, and distributes the proceeds to creditors.
- **Compulsory liquidation.** This is initiated by a court order, usually upon the petition of a creditor, the company, or a shareholder. The process is also governed by the CWUMPO. A petition is presented to the court, usually by a creditor, on the grounds that the company is unable to pay its debts. The court hears the petition and, if satisfied, makes a winding-up order. The Official Receiver then becomes the provisional liquidator until a liquidator is appointed by the court or creditors.
- **Court liquidation under regulating order.** This is a process where the court regulates the winding-up of a company. This can occur in situations where there are disputes among creditors or other complexities. The process is also governed by the CWUMPO. An application is made to the court for a regulating order to oversee the liquidation process. The court may issue directions on the conduct of the liquidation, including the appointment of a liquidator and the manner of asset distribution.

Established pathway for parallel processes

English Schemes and English RPs continue to provide reliable and effective tools to assist restructuring and recapitalisation of businesses in Hong Kong and Mainland China (in particular HK-listed businesses operating in Mainland China).

- **Rule in *Gibbs*** – The rule in *Gibbs* applies in Hong Kong, such that in most cases a debt can only be discharged in accordance with its governing law. A Hong Kong scheme of arrangement is therefore generally required to compromise Hong Kong law debt and English Schemes and English RPs remain an important tool for Hong Kong companies seeking to compromise English law governed liabilities. In some cases it may be appropriate to undertake parallel processes under both English and Hong Kong law (for example where there are debts to be compromised that are governed by both English law and Hong Kong law).
- **Hong Kong Airlines** – This was the first restructuring implemented by way of parallel Hong Kong scheme and English RP. Hon. Harris J sanctioned HKA's Hong Kong

scheme of arrangement, following the sanction of the English RP.

- In considering whether to sanction the scheme, the court applied the established principles in *Re China Singyes Solar Technologies Holdings Ltd*.
- The English and Hong Kong courts both considered whether the plan/scheme would be effective in other foreign jurisdictions of practical importance (eg Mainland China) as it would not be a proper exercise of discretion to sanction a scheme that serves no purpose. Since no creditors with debt governed by Mainland law had opposed the plan/scheme, it was unlikely that they would attempt to challenge it. Further, the company had no meaningful assets in the Mainland. Consequently, risk of adverse enforcement of the Mainland law debt was considered remote.

- **Sino-Ocean** – This is a more recent example of a company successfully having its restructuring sanctioned in both England and Hong Kong. Hon. Linda Chan J sanctioned Sino-Ocean's Hong Kong scheme of arrangement, following the sanction of the English RP.
- While there is an established body of case law supporting the use of parallel processes in appropriate circumstances, each situation must be carefully considered on its own facts. Undertaking parallel processes out of an abundance of caution but which are not necessary has been frowned upon by the Hong Kong courts – as demonstrated recently in several cases including *Re China Oil Gangran Energy Group Holdings Ltd* [2021] HKCFI 1592.

Interplay with winding up petitions and approach of the Companies Court

In recent years, companies (especially listed companies) seeking to defer the immediate impact of a winding up petition have cited ongoing restructuring efforts as a reason to adjourn. Adjourning the petition allows the company to continue to benefit from the automatic stay of proceedings, while sparing it from the immediate consequences of a winding up. However, the Companies Court has adopted an increasingly robust approach to attempts to defer a petition where there is no genuine intention or prospect of a restructuring:

China Evergrande [2024] HKCFI 363:

"*It is clear that far from ironing out the details of the revised proposal put forward before the last hearing, the Company now seeks to put forward yet another "new restructuring plan" which is nothing but some general ideas about what it may or may not be able to put forward in the form of a restructuring proposal.*"

"*I do not see any proper ground for the court to grant a further adjournment of the Petition, which has been ongoing for over 19 months. The Company has not demonstrated that there is any useful purpose for the court to adjourn the Petition – there is no restructuring proposal, let alone a viable proposal which has the support of the requisite majorities of the creditors. To the contrary, it seems to me that the interests of the creditors will be better protected if the Company is wound up by the court, so that independent liquidators can take control over the Company, secure and preserve its assets and review and formulate a restructuring proposal if they consider that such course is appropriate. It is not uncommon for a company to put forward and implement a scheme of arrangement after it is wound up by the court.*"

Interplay with the Mainland

Looking forward, we can expect to see continued fall-out from the property crisis in Mainland China and those indirectly exposed to the property sector.

Cooperation between Hong Kong and the Mainland will become increasingly important and we expect to see continued efforts to develop more sophisticated mechanisms for cooperation and mutual recognitions of and assistance. This progress will further enable creditors to achieve positive outcomes from distressed situations where significant assets are located in the Mainland.

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Singapore

Over the past two decades, Singapore has taken solid steps to consolidate its position as a leading arbitration, financial, and restructuring hub in Asia.

Singapore's corporate restructuring and insolvency regime, implemented through Singapore's omnibus Insolvency, Restructuring and Dissolution Act 2018 ("**IRDA**"), draws on various UK and Chapter 11 influences to promote the island nation as an attractive nodal jurisdiction for managing transnational insolvencies in Asia.

Key features of this regime include:

- its suite of debtor-friendly tools. These include (i) an automatic moratorium on the filing of *moratoria* applications; (ii) the availability of super-priority for rescue financing, which has been expanded to include both roll-ups (*Re Design Studio Group*) and cross-collaterisation; (iii) the ability to cram down dissenting creditors; (iv) an ability to constitute "mega-classes" of creditors in large retail restructurings; and (v) group *moratoria* protection to facilitate large group restructurings;
- the complete adoption of the Model Law joining the UK and US as one of the notable jurisdictions in which foreign insolvencies can be easily recognised and given effect to;
- an oft-stated aversion to the "*rule in Gibbs*", being one of the only common law jurisdictions that has expressly disavowed the application of the rule that foreign law liabilities cannot generally be compromised outside their home jurisdiction (except where the creditor submits to such foreign jurisdiction); and
- a deep international insolvency bench, enhanced by the appointment of experienced foreign insolvency judges like Judge Sontchi, Justice Lady Arden, and Judge James Peck on Singapore's International Commercial Court.

Establishing jurisdiction in Singapore for foreign debtors

Under the IRDA, a foreign debtor can rely on Singapore's restructuring regime if it is able to show that it has a substantial connection with Singapore.

In the seminal case on the application of the substantial connection test, *Re Zipmex Co Ltd*, the Singapore Court accepted jurisdiction over the group restructuring of the Zipmex group as its Thai, Australian, and Indonesian subsidiaries were able to show that their COMI was in Singapore, substantial assets were sited in Singapore, and the management and nerve centre of the company was situated in Singapore.

This decision was the first, and the springboard, for several notable restructurings in Singapore, including the group restructuring of the Babel Group (including significant Hong Kong elements) in Singapore the year after.

"*Sufficient connection*" test in Singapore

Factors that point to a substantial connection being established between a debtor and Singapore will include:

- COMI in Singapore
- siting of assets in Singapore
- management being seated in Singapore
- the submission to Singapore law or the Singapore courts.

Super-priority rescue financing

Singapore's adoption of super-priority rescue financing regime, which is most closely associated with DIP financing procedure in the US, provides access to capital for debtors who may otherwise not be able to seek traditional financing.

Thus far, Singapore is the only jurisdiction across the Asia-Pacific to extend super-priority status to incentivise rescue financing. This is designed to promote consideration by debtors in Asia, especially those without a US connection, to centre their restructuring in Singapore to take advantage of these tools.

The Singapore courts have demonstrated significant flexibility in the consideration of these rescue financing packages. Assuming the statutory steps and necessary procedures are satisfied, the possibilities are limited only by the creativity and experience of the practitioners crafting the super-priority structure:

- in Singapore's first successful application for rescue financing, *Asiatravel*, the super-priority package included the provision of hotel rooms and attraction park tickets in addition to a cash-element for the financing, with the value of the hotel rooms and associated entertainment packages being included in the total value of the primed financing;
- in *Re Design Studio*, the Singapore court confirmed that 'roll up' financings fall under the definition of rescue financing for the purposes of Singapore's rescue financing regime;
- in *No Signboard Holdings* and *Re Zipmex*, the applicants successfully applied for super priority financing for cash injections to finance working capital. In the latter case, the Singapore court approved the collaterisation of hitherto unsecured shares as security for new lending.

Pre-packaged schemes of arrangement/creditor-led judicial management

As Singapore's insolvency jurisprudence matures, debtors are increasingly turning to the adoption of various features of the IRDA that are designed to save time and costs.

Singapore's IRDA allows the Singapore court to sanction a scheme of arrangement without a meeting of creditors having been called. Instead, a formalised plan is presented for the Singapore court's approval after having solicited the agreement of the necessary classes of affected creditors. Among other benefits, a pre-packaged scheme process minimises the time that a debtor company is under a formal scheme process; and also flexibly accommodates multiple circumstances and situations.

In recent years, the Singapore courts have approved pre-packaged schemes of arrangements that included (i) the exchange of Notes listed on the Singapore exchange into shares or new Notes; (ii) a senior lender debt settlement and cash distribution; (iii) a full debt for equity conversion; (iii) the use of a lock up agreement, with the Singapore court determining that the use of a lock up agreement is permissible provided that it does not fracture the creditor class.

Similarly, there is also a subtle shift towards the consideration of the appointment of judicial managers (administrators) by consensus between the debtor company and its creditors, thereby saving the time and costs of a potentially contested judicial management application before the Singapore courts.

The non-observance of the rule in *Gibbs* as a feature of Singapore's restructuring framework

Singapore is not bound by the rule in *Gibbs*, and indeed has overtly departed from that principle. Chief among the criticisms of the rule are that:

- the Singapore courts have recognised that where a contracting party has established connections with foreign jurisdictions through either residence or ties of business, the possibility of adverse insolvency proceedings in those foreign jurisdictions must enter into the parties' reasonable expectations in entering their relationship, and as such may furnish a ground for the discharge to take effect under the applicable law;
- the rule in *Gibbs* is inimical to "*good forum shopping*", where forum shopping in a *bona fide* attempt to restructure and so as to take advantage of a juridical advantage was permissible.

> "I am therefore of the view that the principle in *Gibbs* does not create an obstacle to the exercise of jurisdiction. Accordingly, if the Court has subject matter jurisdiction and there exists assets in or sufficient nexus to jurisdiction that warrants the exercise of jurisdiction, debts which are not governed by Singapore law may be legitimately compromised by a scheme proposed under s 210."
>
> **-JUDICIAL COMMISSIONER KANNAN RAMESH (AS HE THEN WAS) IN *PACIFIC ANDES RESOURCES DEVELOPMENT LTD AND OTHER MATTERS* [2016] SGHC 210**

Hence, the current position in Singapore is that as long as the Singapore court has subject matter jurisdiction and there exists sufficient nexus to exercise that jurisdiction, the restructuring of foreign law debts under a Singapore scheme is permissible. this view has also been endorsed by international judges on the SICC.

This willingness to extend the Singapore restructuring regime to debts that are not governed by Singapore law, at the first instance and prior to the receipt of consent, remains an attractive tool promoting Singapore as a one-stop destination for complex multi-jurisdictional restructurings.

Interplay with foreign insolvency proceedings

In a world where debts and assets are increasingly multi-jurisdictional, Singapore and Singapore-based companies have increasingly found themselves both considering and availing themselves of cross-jurisdictional insolvency networks and treaties.

Outbound

Notable outbound insolvency and restructuring mandates involving Singapore companies and foreign bankruptcy proceedings in recent years include:

- Zetta Jet Singapore's Chapter 7 bankruptcy proceedings (2018);
- Eagle Hospitality's Chapter 11 bankruptcy proceedings (2021);
- Prosafe's recognition in Brazil and attempted recognition in Scotland (2021);
- Pan Brothers' Chapter 15 recognition of its Singaporean scheme (2022);
- Wayne Burt (in liquidation)'s Chapter 15 recognition as a foreign main proceeding (2024).

It is expected that this trend will increase in the coming years, especially as Singapore expressly recognises the possibility of third-party releases under its scheme of arrangement framework – a topic in issue in the US following the *Purdue Pharma* and *Creditor Real* series of decisions.

Inbound recognition

Since the adoption of the Model Law in the Third Schedule of the IRDA, the Singapore courts have established precedents for the recognition of foreign insolvency proceedings from a host of foreign officeholders seeking to establish control and protection over the debtors' assets located in Singapore and creditors sited in Singapore. These include:

- Three Arrows Capital (BVI);
- Genesis Global Capital (US Chapter 11);
- MTBL Global Fund Limited (in Official Liquidation) (Cayman Islands);
- PT Garuda Indonesia (Persero) Tbk (Indonesia);
- Sapura entities (Malaysia);
- Fullerton Capital Limited (in liquidation) (BVI);
- Compuage Infocom Limited (India); and
- The Delong stainless steel group (PRC).

The process of obtaining recognition in Singapore is both speedy, and efficient. Typically, the time from filing to hearing of the applications is a matter of weeks. Once recognised, foreign officeholders obtain access to the suite of protections and powers granted to foreign representatives (whether main, or non-main) under the Model Law as adopted by Singapore.

It is common for the Singapore court to impose conditions on recognition. These are intended, and will be crafted, for the protection of Singapore-based creditors and/or assets. These can include regular reporting requirements; or in a rare case, the formation of a Singapore Committee of Inspection to sit alongside the Liquidation Committee (this was the case in MTBL Global Fund) to monitor the conduct of the liquidation.

Reverse flips into foreign jurisdictions

In late 2024, and early 2025, we have seen a wave of "reverse flips" where Singapore's scheme of arrangement mechanism is emerging as a key legal mechanism for Indian startups seeking to redomicile their parent companies back to India. Case studies include Zepto and Pine Labs, both of which have successfully completed reverse flips using Singapore's scheme of arrangement structure.

There are various reasons for this trend. Pine Labs, for example, cited "*business synergies*", "*economies of scale*", "*reduction in overheads*", "*potential for growth, diversification... [and] optimisation of costs and resources*". This move allows startups to tap into India's buoyant capital markets and favourable regulatory environment.

In this structure, Singapore's shareholder scheme of arrangement is used (instead of a share swap) in order to avoid potentially triggering capital gains tax for shareholders. At the same time, a parallel scheme of arrangement may be proposed in India to formalise the transaction under Indian companies law.

Upcoming changes in Singapore's insolvency framework

On 11 March 2025, Singapore's Committee to Enhance Singapore's Corporate Restructuring and Insolvency Regime ("**Committee**") released its report ("**Report**") recommending updates to Singapore's restructuring and insolvency regime.

The Report highlights five main areas of potential reform:

- to reimagine the role of judicial managers and highlight the value proposition of judicial management's restructuring and turnaround functions, including the potential to incorporate "success fees" to facilitate flexible and cost-effective administrations;
- to lower the threshold requirements for cross-class cramdown, especially in relation to overall numerosity and value cramdown conditions, and expanding the scope of cross-class cramdown to include shareholders;
- to streamline the requirements in Singapore's Companies Act for shareholders' approval to (i) dispose of the whole, or substantially the whole, of the company's undertaking or property; and (ii) for the company to issue new shares, in order to ensure greater facilitation for debtor companies to carry out their restructuring plans in a judicial management or scheme of arrangement;
- the option for the Court to appoint a Restructuring Officer or a neutral third-party individual as an officer of the Court to perform a range of roles in a restructuring; and
- adopting the UNCITRAL Model Law on Enterprise Group Insolvency and the UNCITRAL Model law on Recognition and Enforcement of Insolvency-Related Judgments, to strengthen Singapore's ability to deal with international, cross-border bankruptcy and restructuring matters.

These proposed amendments are in the consultation phase and follow proposed amendments to enhance Singapore's Simplified Debt Restructuring Programme and the Simplified Winding Up Programme.

These proposed changes, if adopted, will enhance the tools presently available to creditors and debtors in a restructuring helmed in Singapore.

Credentials

The team from Herbert Smith Freehills Kramer Prolegis Alliance acts for debtors, creditors, and stakeholders in contentious insolvency proceedings in Singapore. Lawyers from the team acted as lead counsel or advised in many of the cited cases in this brief, notably as debtor's counsel in (i) the Zipmex restructuring; (ii) No Signboard; (iii) Genesis Global Capital; and in a variety of other roles in (i) Asiatravel (investor's counsel); (ii) Three Arrows, Babel Group, and MTBL Global Fund (creditors' counsel).

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Australia

Key tools for restructurings in Australia

The main corporate reorganisation procedures in Australia are:

(i) voluntary administration ("**VA**") (including deeds of company arrangement ("**DOCAs**")); and

(ii) creditors' schemes of arrangements.

Voluntary administration

Administration is the most common corporate reorganisation procedure in Australia. The primary purpose of administration is to maximise the chances of the company or its business continuing in existence (or, if that is not possible, to obtaining a better return for the company's creditors and members than in a winding up). This objective may be achieved by way of a DOCA which primarily deals with unsecured liabilities. Administration is usually initiated by directors of the company or, in some instances, by a creditor with security over all or substantially all of the assets of the company that is enforceable, and from its commencement there is a broad moratorium on creditor action against the company, including enforcement by secured creditors and repossession of leased property by lessors (subject however to some important exceptions).

Creditors' scheme of arrangement

A creditors' scheme of arrangement is a court approved compromise, or arrangement, between a company and its creditors (or any class of creditors). Australian schemes of arrangement are similar to schemes in the UK and other common law jurisdictions. Whilst the use of schemes of arrangement in Australia has been, and remains, less frequent than DOCAs (owing perhaps to the speed and efficiency of the voluntary administration process and the potential to avoid court involvement and reduced costs with the use of a DOCA as compared to a scheme), there has been an increased use of schemes over the last decade in connection with financial restructurings involving larger secured syndicated loans or secured notes structures where the parties may be seeking to effect a more targeted restructuring of the finance debt of the company, without impacting trade creditors (or where the debt is secured and a DOCA may not be able to achieve an effective compromise of the secured debt).

Receivership

In Australia, secured creditors will usually have the power to appoint receivers[1] to take possession of and sell the secured property for the purpose of repaying the secured debt. Often when an administrator is appointed, receivers are also appointed by a creditor with security over all or substantially all of the assets of the company (a key exception to the administration moratorium if done within 13 business days). Where this occurs, the receiver will typically take control over the secured assets in priority to the administrator. However, the parallel operation of the administration process may benefit the receivership, given the moratorium (particularly in respect of the risk of lessor repossessions) and the additional sale options that the DOCA can provide (compromising some or all of the unsecured debts of the company, and transferring its shares).

Liquidation

A company may also enter liquidation although, as the objective of a liquidation is to collect in the company's assets, realise them and distribute the proceeds to creditors, rather than to restructure the company or its business on a going concern basis, we do not consider liquidation in detail here.

Domestic Australian restructurings

Most restructurings in Australia involve wholly or predominantly Australian corporate groups (which would usually have Australian law governed financing arrangements) and in such circumstances any restructuring (whether consensual or involving formal processes) would generally be conducted in Australia utilising Australian procedures where necessary.

Use of Australian processes for non-Australian companies

There are limited circumstances where Australian restructuring procedures can be used in respect of non-Australian incorporated companies. The administration regime only applies to Australian companies (and certain other Australian bodies). The Australian scheme of arrangement process is available to 'Part 5.1 bodies', being either: (i) a company incorporated in Australia; or (ii) a foreign body corporate that has been registered as such under the Corporations Act.

1. There has not been an abolition of administrative receivers in Australia the way there has in the UK.

Accordingly, it is fairly uncommon for Australian restructuring processes to be commenced in respect of non-Australian companies. This can present challenges where an Australian-centric corporate group has significant non-Australian subsidiaries, and a moratorium or formal restructuring procedure is required to across the group as a whole. Where a scheme of arrangement is being undertaken by an Australian corporate, it might still be able to deliver third party releases in respect of certain related liabilities of the non-Australian entities (such as guarantees of non-Australian entities given in respect of the debt being compromised under the scheme of the Australian company) as a matter of Australian law. In other cases, Australian procedures may need to be combined with restructuring procedures in other jurisdictions.

Use of Australian schemes of arrangement and deeds of company arrangement in respect of debt governed by foreign law

As a matter of Australian law, schemes of arrangement may be used to compromise foreign law governed debt, and this has been done on a number of occasions (typically where the debt is governed by New York law). This departure from the normal rule (that the discharge of debts is governed by the governing law of the debts – ie the rule in *Gibbs*) has been justified on the basis that the provisions of the Corporations Act relating to schemes of arrangement are laws relating to the insolvency of corporations, and as such will be effective in accordance with the law of Australia, even if disregarded elsewhere (*Re Bulong Nickel Pty Ltd* (2003) 21 ACLC 191).

However, whether that compromise is binding in the jurisdiction governing the debt (and what action creditors may be able to take in that or another foreign jurisdiction to enforce the debt) will depend on that other country (or where enforcement is being undertaken).

Chapter 15 recognition of Australian schemes of arrangement in respect of New York law governed debt

As such, where Australian schemes of arrangement have been used to compromise New York law debt, this has commonly been combined with an application to the US Bankruptcy Court for orders granting recognition of the scheme of arrangement and giving enforcement and effect to it (including of any releases thereunder) in the United States, pursuant to Chapter 15 of the US Bankruptcy Code (for example, in respect of the restructurings of Bis Industries, Emeco, Boart Longyear and Quintis).

Chapter 15 relief has included giving effect to third party releases of guarantee obligations under Australian schemes. In the Boart Longyear scheme of arrangement, the Australian scheme provided for both the discharge of various primary debt obligations under notes and credit arrangements of the scheme companies, but also for the third-party releases of various other group entities that had given guarantees in respect of the primary obligations. The US Bankruptcy Court order specifically gave effect to those third-party guarantee releases in respect of the US affiliates of the scheme companies.

As discussed in the US section above (Recognition Inside and Outside the United States) above, notwithstanding the decision in *Purdue* to bar non-consensual third-party releases in the Chapter 11 context in *Purdue*, it has been held that this will not apply where the non-consensual third-party releases that had either been granted or were consistent with applicable law in the non-U.S. jurisdiction. As such, it can be expected that Australian companies will continue to use Australian schemes of arrangement to compromise New York debt obligations in appropriate cases going forwards.

Recognition of Australian schemes in other jurisdictions

However, as explained in the England & Wales and Hong Kong sections above, pursuant to the rule in *Gibbs*, debt governed by English or Hong Kong law will generally not be discharged by an Australian process as a matter of English or Hong Kong law respectively (unless there has been submission to the jurisdiction), even if the discharge is effective in Australia.

Depending on the circumstances, this may mean that it is desirable to undertake a scheme of arrangement in the UK (or Hong Kong) to either instead of, or in parallel with (see the commentary regarding parallel processes in the England & Wales and Hong Kong sections above), an Australian scheme of arrangement (depending on where the scheme of arrangement needs to be effective in practice to achieve the desired protection).

Alternatively, similar to some of the "good" forum shopping techniques seen in England & Wales, in some cases, it has been possible for the parties to change the governing law of the debt from, for example, English law to Australian law to bring the purported discharge within the governing law of the debt at the time of the discharge. For example, in the *Wollongong Coal* scheme of arrangement, the parties contractually amended the debt documents (with requite majority lender consent) to change the governing law from English law to New South Wales law, prior to proposing the schemes of arrangement. The debt was then compromised and the terms of the documents amended by an Australian creditors' scheme of arrangement, which was expected to be recognised as effective in the United Kingdom (as a discharge made consistently with the rule in *Gibbs*). Following the scheme taking effect, the governing law for the debt documents reverted to English law.

Foreign recognition of administrations and DOCAs

In principle, a restructuring of foreign debts by way of a deed of company arrangement should be subject to similar considerations as those schemes of arrangement. In practice however, the issue has garnered less attention to date.

In the administrations of NewSat and Virgin Australia, Chapter 15 recognition was sought and granted in the United States in respect of Australian administration proceedings (which gave the relevant debtor companies (among other things) the benefit of the automatic stay against actions in the United States). However, in neither case was an application made for recognition or enforcement of a DOCA in the United States (in the case of NewSat no DOCA was approved, and in the case of Virgin Australia orders were only sought in respect of the administration, not the subsequent DOCA).

Recognition of foreign restructuring and insolvency processes in Australia

There are two main statutory routes for a non-Australian insolvency processes to seek recognition in Australia or assistance from the Australian courts:

- an application for recognition of the foreign insolvency proceedings and assistance pursuant to the Model Law as applied in Australia pursuant to the *Cross-Border Insolvency Act 2008* (Cth); or
- an application for assistance under section 581 of the Corporations Act.

In addition, recognition and assistance may be available under the common law in appropriate cases.

Recognition under the Model Law has been used in a number of cases to obtain a stay in Australia, or other assistance, such as entrustment, in support of insolvency proceedings offshore. Recognition under the Model Law is premised on the foreign insolvency proceedings occurring in a jurisdiction which is the company's centre of main interest (COMI) or where it has an establishment.

However, the Australian courts have generally adopted the rule in *Gibbs*, holding that the governing law of a debt is the appropriate law

to govern its discharge. As such, it is generally assumed (although there is no specific authority to date on the point) that neither of the aforementioned recognition processes would allow Australian courts to give effect to a discharge of debts governed by Australian law through a foreign restructuring or insolvency process. Similarly, challenges arise in respect of foreign processes that purport to affect a compulsory transfer of shares in Australian companies as part of a restructuring.

Increasing use of Chapter 11 to restructure Australian groups

Notwithstanding these challenges, in recent years, there have been a number of high profile Australian centric corporate groups that have restructured by way of Chapter 11 of the US Bankruptcy Code, including the restructurings of Speedcast, GenesisCare and Jervois. These cases have generally involved situations where the key finance debt was governed by New York law (or in the case of GenesisCare, changed to New York law).

Chapter 11 can offer advantages over Australian restructuring processes in various circumstances, such as where the group has significant US or global operations to be restructured, the worldwide stay provides more robust protection from creditors around the world, or the super priority DIP funding regime provides a relatively expeditious and familiar mechanism to obtain interim liquidity while a restructuring is undertaken.

However, as a matter of Australian law, as discussed above, recognition of the Chapter 11 in Australia may be challenging if the Australian company has little or no presence in the US and, in any event, may not empower the Court to give effect to a discharge or modification of Australian debts or a change of shareholdings of an Australian entity under a US plan of reorganisation. In practice, this is a fact-specific exercise and a number of Australian law mechanisms have been used to give effect to a US plan of reorganisation in Australia, depending on the required outcome. Many Chapter 11 restructurings of Australian entities have been relatively light touch – focusing on restructuring finance debt while continuing to pay local trade creditors (potentially utilising funding obtained from the DIP facility).

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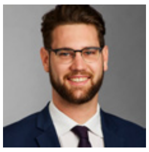

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