NORTON ROSE FULBRIGHT

International Restructuring Newswire

A quarterly newsletter from the global restructuring team at Norton Rose Fulbright

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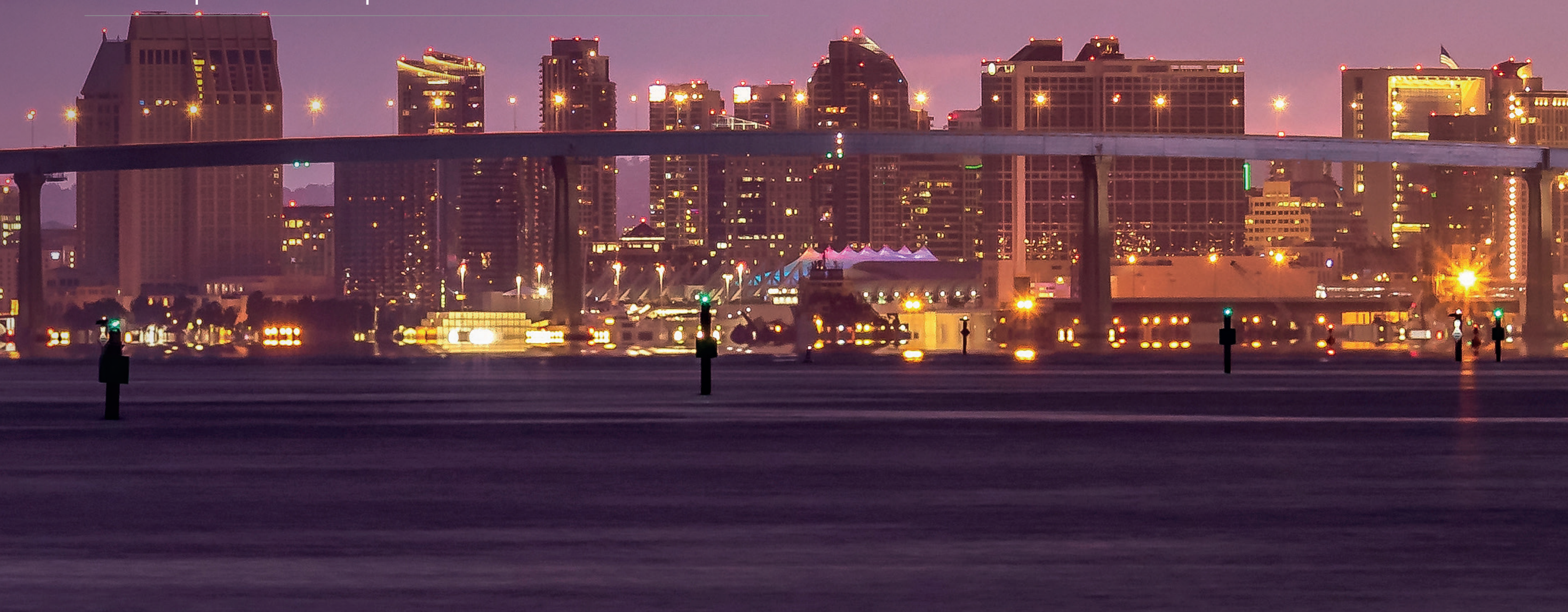

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To our clients and friends:

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Those of us practicing in the insolvency world are often called upon to make plans based on predictions as to the future of the global economy. As recently reported in the *Wall Street Journal,* the International Monetary Fund sees 2024 growth at 3.2%, up from an earlier forecast of 2.9%. The improved outlook owes mainly to the continued strength of the US economy. The IMF, however, suggests that prospects for longer-term are far less rosy: "By 2030, the world economy is likely to be growing 2.8% a year—a full percentage point less" than in recent years. According to the IMF, that is largely due to slower growth in the labor supply because of aging populations in much of the world. In addition, geopolitical risks posed by elections and conflicts between states have inevitable knock-on effects on the global economy.

All the more reason for insolvency practitioners to stay current on restructuring news throughout the world. In this issue our lawyers bring you up to date on developments in the UK, Singapore and the Netherlands as well as insolvency reform in Armenia and Bhutan. And don't miss our annual review of cross-border cases in Chapter 15 in the US.

Good reading and look forward to seeing many of you at the upcoming INSOL International conference in San Diego!

Howard Seife
Global Co-Head of Restructuring
New York

Scott Atkins
Global Co-Head of Restructuring
Sydney

In the news

INSOL Cayman Islands Seminar

November 15, 2023

Meiyen Tan (Singapore) participated in a panel at the INSOL Cayman Islands Seminar discussing some of the innovative corporate structures established in the last decade to deal with the dynamically changing financial landscape and additionally address some of the unique issues to be considered in wind-down scenarios. This was the first in-person seminar to be held in the Cayman Islands since the pandemic and was extremely well attended by delegates from the Caribbean and the USA.

INSOL Kual Lumpur Seminar

December 5, 2023

Meiyen Tan (Singapore) participated in a panel at the INSOL Kuala Lumpur Seminar together with some of Asia's leading lights to discuss insights and strategic foresight as the panellists delve into key themes likely to shape the insolvency and restructuring landscape in 2024 and beyond. Global and regional trends, market dynamics and regulatory developments were examined to identify the potential opportunities and challenges that lie ahead.

Academic Research and Data Centre (WODC) Conference on Dutch WHOA

January 29, 2024

Prof. Omar Salah (Amsterdam) was invited as an expert to share his views on the Dutch WHOA at the Academic Research and Data Centre (Wetenschappelijk Onderzoek- en Datacentrum, **WODC**) conference at The Hague, the Netherlands. In 2021, the Dutch government had announced that it would evaluate the WHOA three years after its enactment, and the conference was organized to discuss the results. Omar also participated in a panel on the sanctioning of restructuring plans and creditor protection under the WHOA.

International Insolvency Institute – Global Perspectives Podcast

February 2024

Prof. Omar Salah (Amsterdam) was a panelist in a recent episode of International Insolvency Institute's Global Perspectives podcast discussing third-party releases in three European jurisdictions – UK, Netherlands and Italy. The other distinguished panellists discussing the topic from the perspective of their jurisdictions included Prof. Gerard McCormack (University of Leeds), and Prof. Alessandra Zanardo (Università Ca' Foscari Venezia). The episode was moderated by Dr. Eugenio Vaccari (Royal Holloway, University of London).

Insolvency Law Academy (ILA) Annual Conference

February 9-11, 2024

Scott Atkins (Sydney), spoke on a panel at the ILA annual conference in Goa, India. The panel topic was "Insolvency Policies and Systems- The Global Shifts and Developments" and chaired by ILA President, Mr. Sumant Batra.

Insolvency Law Academy (ILA) Roundtable on Mediation in Insolvency

February 12, 2024

Scott Atkins (Sydney) addressed a roundtable on mediation in insolvency following the annual ILA conference in Goa, India. The roundtable was held in collaboration with INSOL India and organized by ILA and India International University for Legal Educational and Research.

INSOL International Latin America Seminar

March 12, 2024

Howard Seife (New York), chair of INSOL International's Latin America Committee, led the full-day in-person program in Cartagena, Colombia. As INSOL President, Scott Atkins (Sydney) delivered an opening address at the seminar. Francisco Vazquez (New York) spoke on a panel discussing "Critical Capital and Financing the Rescue-a regional overview."

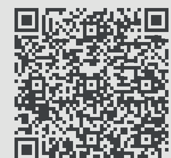
NRF Germany is launching a new event series – the first event to be held in Frankfurt in June

Restructuring Day 2024

The challenges of today's dynamic world require more than ever a continuous dialogue. We would like to take this as an opportunity to share with you exciting insights into the latest restructuring topics in the context of short presentations and case studies by our colleagues, followed by a panel discussion with external experts.

After the technical part, we invite you to a relaxed get-together in a familiar circle.

Date:	June 26, 2024
Time:	03.00 pm CST
Location:	TaunusTurm in Frankfurt
Link registration:	Register here
QR code:	Scan below



INSOL International and World Bank Group Latin American Round Table

March 11, 2024

Howard Seife also co-chaired the annual Latin America Round Table, jointly organized by INSOL and the World Bank. Howard led a panel on enhancing the use and effectiveness of corporate workouts across LATAM. The event featured judges, regulators, practitioners and academics from over a dozen countries in the region. Scott Atkins delivered opening remarks to the gathering.

Australian Restructuring Insolvency and Turnaround Association (ARITA) National Conference

April 11-12, 2024

Scott Atkins (Sydney) spoke at ARITA's national conference held on the Gold Coast of Australia on "Global Trends in Insolvency Law", presenting a panel showcasing the insights of nine restructuring and insolvency experts from across the globe.

David Goldman (Sydney) spoke at the conference where his panel discussed "Balancing Professional Duties".

Asian Development Bank Stakeholders Roundtable Workshop on New Bankruptcy Act

April 15-17, 2024

Scott Atkins and Rodney Bretag (Sydney), as advisors to the Asian Development Bank and the Department of Finance of Bhutan, led the stakeholders workshop held in Paro, Bhutan on the new bankruptcy act. The objectives of the three-day workshop were to introduce the design of a new restructuring and insolvency law, respond to feedback and comments on the law, and gather feedback and guidance during the review process to enable a final draft. The Ministry of Finance and partner agencies, including the office of the Attorney General and selected stakeholders, discussed the roadmap to the passing of the proposed new law and regulations and the planned capacity building and training to support implementation.

CERIL Conference on Preventive Restructuring in Europe

April 17-18, 2024

Prof. Omar Salah (Amsterdam) chaired and spoke on a panel at the CERIL conference on Preventive Restructuring in Europe in Villnius, Lithuania. His panel discussed confirmation of restructuring plans. The conference focused on the adoption of the EU Preventive Restructuring Directive across Europe. CERIL is an independent invitation-only organisation of restructuring and insolvency practitioners, law professors and (insolvency) judges committed to the improvement of restructuring and insolvency laws and practices in Europe.

Dutch Association for Insolvency Lawyers (NSOLAD)

May 31, 2024

Prof. Omar Salah is invited to deliver a keynote at INSOLAD's annual conference in Utrecht, the Netherlands. He will discuss the role of ESG in restructuring and insolvency scenarios.

International Insolvency Institute

June 9-11, 2024

Scott Atkins (Sydney), Meiyen Tan (Singapore), Mark Craggs (London) and Omar Salah (Amsterdam) will attend International Insolvency Institute's 24th annual conference in Singapore. The annual conference is the premier international insolvency conference for practitioners, academics, and members of the judiciary.

Australian Banking Association Annual Conference

June 24, 2024

Natasha Toholka (Melbourne) is moderating a panel session at the ABA's annual conference in Melbourne. Panellists include Shayne Elliott, CEO of Australia and New Zealand Banking Group and Peter Gartlan, CEO of Financial Counselling Australia. The panel will discuss customer resilience.

International Corporate Rescue

Meiyen Tan and Josiah Tham (Singapore) published an article in *International Corporate Rescue*, Volume 21, Issue 2 – "Singapore: International Debt Restructuring Hub or More to Do?" The article examines the impact of the Insolvency Restructuring and Dissolution Act 2018, alongside other complementary initiatives, in establishing Singapore as a key jurisdiction for cross-border restructuring and insolvency.

Singapore Global Restructuring Initiative (SGRI) Blog

The SGRI blog recently published an article by Gemma Long and Helen Coverdale (London) -- "English High Court confirms validity of Galapagos SA out of court restructuring".

Practical Law: How to obtain recognition of a foreign insolvency process and how to enforce insolvency-related judgements

Meiyen Tan (Singapore) co-authored together with Hannah Alysha (Singapore) a practice note which provides a guide to the domestic process and requirements for gaining legal recognition of a foreign insolvency process in Singapore. This guide also details any separate considerations around the enforcement of insolvency-related judgments in Singapore.

IFLR Europe Awards – Winner of Europe Restructuring Deal of the Year

James Stonebridge (London) and Omar Salah (Amsterdam) attended the IFLR Europe Awards Gala Dinner on April 24 where they received the Award for the Europe Restructuring Deal of the Year for their work on the restructuring of international shipping group Vroon, whereby the Dutch WHOA and English scheme of arrangement were combined for the first time ever as parallel restructuring proceedings to implement the financial restructuring.

UK restructuring plans – what does the future hold following the English Court of Appeal's landmark ruling in Adler?

James Stonebridge, Mark Craggs, Matthew Thorn, Helen Coverdale

Almost four years after it came into existence, the UK restructuring plan has been considered by the English Court of Appeal for the first time. On 23 January 2024, the Court of Appeal handed down judgment in relation to the Adler group plan and seized the opportunity to provide guidance on a wide range of issues. The judgment is already shaping the restructuring landscape, with two further large-scale restructuring plans receiving sanction in the weeks that followed: first in relation to the McDermott group, and second in relation to the Aggregate group. This article considers the practical takeaways and reflects on what the future might hold for UK restructuring plans.

Adler[1]

In the first appeal of a restructuring plan, the Court of Appeal unanimously overturned the High Court's decision to sanction the Adler Group's (**Adler**) restructuring plan (the **Adler Plan**). In doing so, the Court clarified how judges will exercise their discretion when asked to impose the cross class cram down (**CCCD**) mechanism on a dissenting class of creditors.

A somewhat unusual (if not novel) feature of the Adler Plan was that the objective was not to achieve a rescue, but rather a controlled wind-down that would provide a better realisation of the group's assets than would be achievable in an immediate formal insolvency process. Prior to the Adler Plan, Adler's Luxembourg incorporated issuer had €3.2 billion of face value debt constituted by six series of senior unsecured notes (the **Notes**). The Notes had staggered maturities between 2024 and 2029, but in any insolvency proceedings, would rank *pari passu* (that is, all note holders would receive a rateable share of the funds available to pay down the noteholders).

The Adler Plan proposed to retain the staggered maturity dates, save that the holders of 2024 notes would accept second-ranking security in return for a one-year extension to their maturity date. New money would be provided by willing noteholders, who would receive first-ranking security. The five other series of Notes would also benefit from the grant of new security which would rank equally as between themselves.

To bring the restructuring within the English court's jurisdiction, an English newco was incorporated as substitute issuer for the Luxembourg parent.

The Adler Plan proposed six classes of creditors – one for each series of Notes. All but one class voted in favour of the plan with the requisite 75% in value majority. The holders of the notes due to expire in 2029 (the **2029 Noteholders**) rejected the plan, principally on the basis that in the 'relevant alternative' to the plan (in this case, liquidation) they would be treated *pari passu* with the other noteholders, whereas under the Adler Plan they would be paid last and therefore bear the greatest risk of the plan failing.

The High Court sanctioned the Adler Plan and agreed to order CCCD in respect of the 2029 Noteholders. The 2029 Noteholders appealed.

Appeal decision

The Court of Appeal held that by retaining the staggered maturity dates, the Adler Plan departed in a material respect from the *pari passu* principle, without justification. The Court clarified that in relation to plans where the court is asked to apply CCCD on a dissenting class, it is inadequate to apply the usual rationality test applied in schemes of arrangement (which looks at whether the plan is one that an intelligent and honest person of the class concerned might reasonably approve) when the court exercises its discretion. Instead, the court should apply the "horizontal comparator" test and

1 Re AGPS Bondco Plc [2024] EWCA Civ 24

compare the rights of the dissenting creditor class with other classes, considering whether the distribution of the benefits of the plan is fair and whether any differences in treatment are justified. The court may also ask itself whether a fairer or improved plan might have been available having regard to the position of the dissenting class. This represents a sea change as it had previously been understood that, when faced with CCCD, courts could only consider the plan on the table, as is the case with Part 26 schemes of arrangement and part 26A restructuring plans that do not rely on CCCD.

Crucially, the Court of Appeal was unconvinced that the Adler Plan would result in payment in full for the 2029 Noteholders. The property valuations relied on a small margin for error, were inherently speculative, and highly dependent on prevailing market conditions. While the 2029 Noteholders had commercially accepted a later maturity when they purchased the notes (which later maturity was reflected in the reduced price of the notes when compared to earlier dated notes), in the event of liquidation, the notes would be treated *pari passu* with all other notes. In the Court of Appeal's view, it was this 'relevant alternative' against which the Adler Plan should be tested. Under the Adler Plan, the 2029 Noteholders would lose their *pari passu* status without justification, when a fairer plan could have been proposed to align the maturity dates of the notes.

The Court of Appeal went on to remark that retention of equity by shareholders did not depart from the *pari passu* principle in this case, because the shareholders would receive nothing until the creditors had been paid in full. The "provisional" view of the Court was that it does not have the power to sanction a cancellation or transfer of shares, nor a complete compromise of debts of out-of-the-money creditors, for no consideration. Like Part 26 schemes of arrangement, Part 26A plans require an element of "give and take" and even out-of-the-money parties should receive something.

It remains unclear what practical impact the English Court of Appeal's decision will have on Adler. The English judgment provides that, at least as far as English law is concerned, the alterations to the notes effected by the plan are ineffective, and the parties would have to consider their respective positions in the light of the judgment. Notwithstanding this position, Adler has publicly stated that, in its view, the Court of Appeal's decision to set aside the Plan has "no effect on the previously implemented financial restructuring" as it contends the amendments to the Notes are effective as a matter of German law. It remains to be seen whether further cross-border litigation will resolve the matter.

McDermott[2]

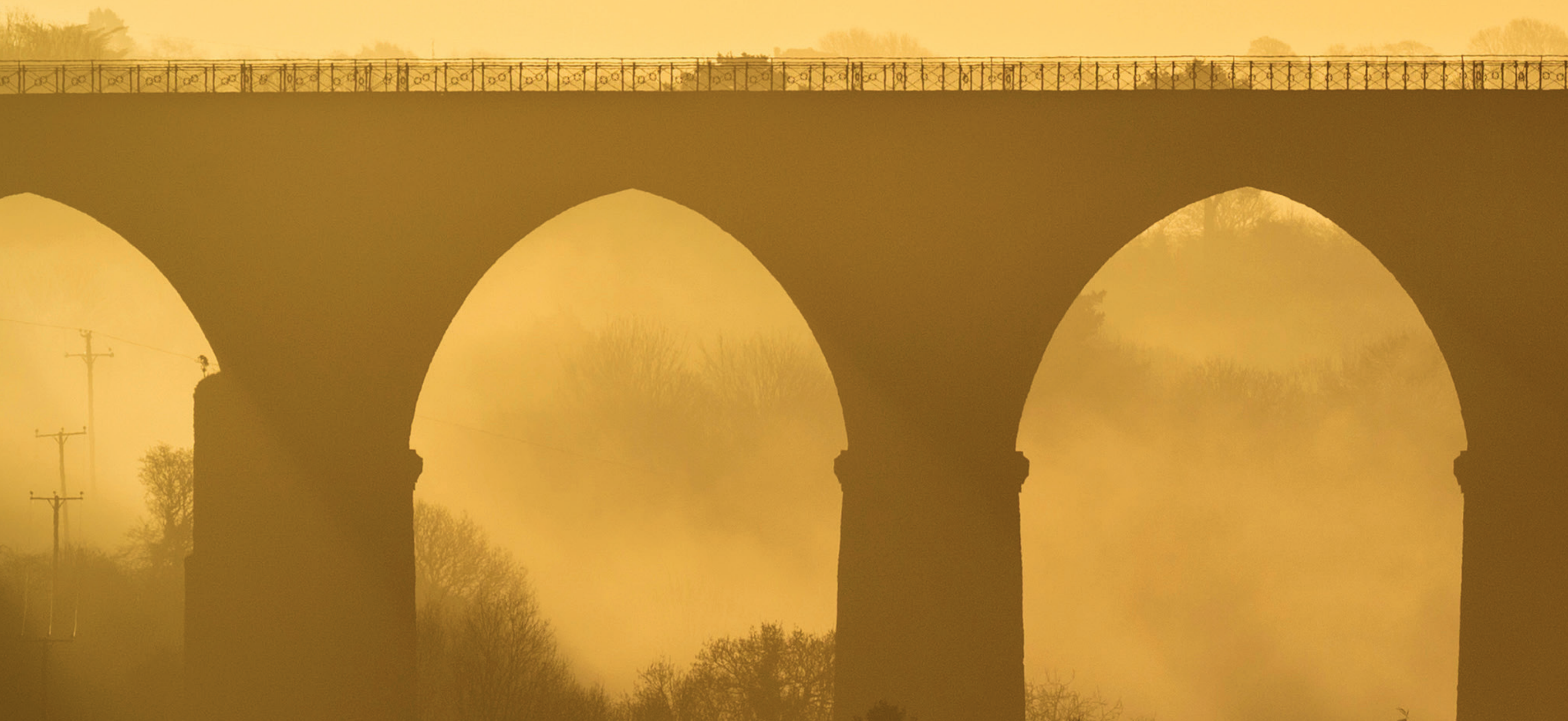
Hot on the heels of the Adler judgment, the High Court sanctioned the McDermott group's UK restructuring plan (the **McDermott Plan**). The case illustrates how restructuring plans should be regarded as a piece of potential complex litigation from the beginning. The McDermott Plan involved inter-dependent parallel proceedings with two other group companies proposing Dutch WHOAs. The UK aspect involved successful applications for an extended timetable culminating in a six-day trial and 'without prejudice' negotiations taking place while the trial was conducted.

The UK plan company, CB&I UK Ltd, is one of more than 300 companies in the global McDermott group, which operates in the engineering, procurement, and construction sectors. The ultimate parent company is McDermott International Ltd (**MIL**) and as part of a 2020 US Chapter 11 process, equity had been transferred to financial creditors. The McDermott Plan proposed no new money and no amendments to its existing letters of credit facilities. Rather, it proposed (amongst other matters) to extend secured debt maturity dates, leave equity whole, and extinguish the claims of two large unsecured litigation creditors (the dispute proceeding creditors). One such creditor, Refinería de Cartagena S.A.S. (**Reficar**), opposed the plan at the sanction hearing.

Reficar, a Columbian state-owned company, was owed approximately US $1.3 billion under an arbitration award. The plan as originally proposed was to compromise the 'dispute proceeding creditors' (including Reficar) in exchange for the greater of a variable contingent cash payment based on the group's EBITDA and a pro rate share of the 'prescribed part.' This is a pot of money set aside from floating charge realisations for the benefit of unsecured creditors in an English liquidation. This could have amounted to Reficar receiving a maximum of approximately 0.2% of the value of its arbitration award. Two out of seven classes rejected the McDermott Plan. The High Court was asked to apply CCCD and sanction the plan regardless.

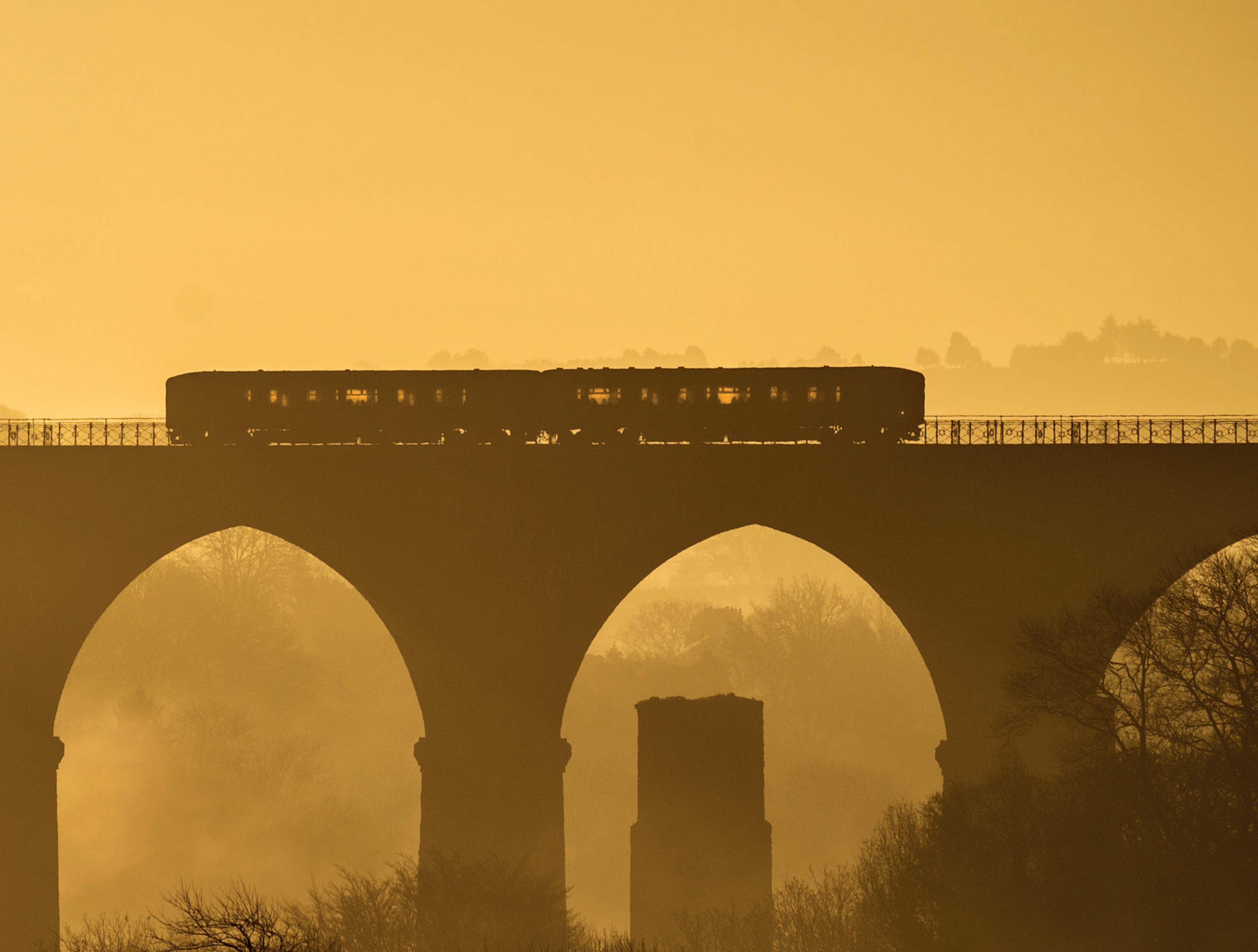
Following the Court of Appeal's decision in Adler, the High Court needed to determine whether the payment to Reficar amounted to a 'compromise or arrangement' rather than a mere extinguishment of rights, particularly given that the original proposal was to keep equity whole.

2 Re CB&I UK Ltd [2024] EWHC 398 (Ch)



One of the interesting aspects of the McDermott plan was the impact of the parallel WHOA proceedings in the Netherlands. Interdependent schemes are not uncommon where recognition is required in multiple jurisdictions, as occurred in the recent restructuring of the Vroon shipping group. In the case of McDermott, the Dutch restructuring expert appointed by the Dutch court recommended a proposal that would allow Reficar to acquire up to 19.9% of the ordinary shares in MIL, the parent company. During the course of the English hearing, the same offer was extended to Reficar under the UK McDermott Plan. If Reficar rejected the offer, it would still be guaranteed 10.9% of MIL's equity, assuming the WHOAs were sanctioned. As the English judge commented, the offer '*was essentially what Reficar had been asking and negotiating for'*, although by the time of the English Court's judgment, Reficar had not accepted the offer. Despite the judge's earlier sympathies with Reficar's position, he considered its failure to accept the offer in respect of its unsecured claim when it was clearly 'out of the money' curious. In the judge's view, that failure demonstrated that the 'relevant alternative' to the McDermott plan was not likely to be an alternative negotiated settlement, as Reficar had argued.

Having exercised the Court's discretion to sanction the McDermott Plan in the light of the revised offer, the judge went on to comment that the original offer, representing more than Reficar would have received in the 'relevant alternative' of liquidation through its share of the prescribed part, but still a fraction of the face value of its claim, would have been sufficient to amount to a 'compromise or arrangement.' While the Court of Appeal in Adler left unresolved the question of how much consideration is adequate for a plan to constitute a compromise, the High Court in McDermott appears to suggest that the answer is merely something more than the creditor would receive in the relevant alternative.



Aggregate[3]

Shortly after the High Court sanctioned the McDermott Plan, it sanctioned a further, revised plan (the **Aggregate Plan**) in respect of a member of Project Lietzenburger Straße Holdco S.À.R.L., a Luxembourg-incorporated company within the Aggregate group whose key asset was a large, uncompleted development project site in Berlin. The plan company was guarantor of secured debt having entered into a Deed of Contribution to assume the obligations of the principal group debtors. It was accepted that, given the risk of contribution claims, it was possible for the plan to compromise claims against the plan company and the group's principal debtors.

In order to engage the English court's jurisdiction, the plan company shifted its COMI to England.

The Aggregate Plan proposed three classes of creditors in respect of the senior debt, the subordinated 'Tier 2 Debt', and the junior debt. The Tier 2 Debt and junior debt was to be released in full, with the senior creditors having their maturity dates extended and the option to participate in new, super senior money in return for elevated priority for a portion of their existing claims. The Aggregate Plan was rejected by the junior creditor class and although the Tier 2 Debt class voted in favour, the low turnout in that class (representing 10.67%) meant that the class was assumed to have dissented.

In the meantime, the Court of Appeal delivered judgment in Adler, prompting the plan company to propose an amendment to the Aggregate Plan. The Court of Appeal's confirmation that a plan must represent a compromise or arrangement resulted in the plan company offering €150,000 in respect of the Tier 2 Debt and €50,000 in respect of the junior debt. The value of the Tier 2 Debt was €150 million, while the value of the junior debt was €95 million.

3 Re Project Lietzenburger Straße Holdco S.À.R.L.[2024] EWHC 468 (Ch); [2024] EWHC 563 (Ch)

At the sanction hearing, the judge accepted that the dissenting creditors were out of the money and that the relevant alternative was liquidation. However, in light of the Adler judgment, the original Aggregate Plan that the classes had voted on did not represent a compromise in respect of the dissenting creditors. Reasoning that the court had no power to sanction a plan that did not represent such a compromise or arrangement - and that it had no power to approve an amendment to a plan in respect of which it had no power to sanction - the High Court ordered a further meeting of the senior creditors to vote on the revised plan on three business days' notice. In doing so, the judge agreed to exclude the dissenting creditors from a further vote on the basis that they were out of the money. Having already indicated that the Court considered the revised plan to be a fair one, the judge sanctioned the revised Aggregate Plan at a further sanction hearing three days later.

What next for UK restructuring plans?

In light of these decisions, what does the future hold for UK restructuring plans? Evidently the procedure continues to be a successful tool for restructuring companies, including foreign companies. However, the cases demonstrate that, as flexible as the restructuring plan may be, it does not give debtor companies *carte blanche* to extinguish creditors' rights. The following points should be considered in relation to future plans:

- **No absolute priority rule, but the pari passu principle applies to restructuring plans**

Following the Court of Appeal's decision in Adler, plan companies must have regard to the *pari passu* principle when negotiating a restructuring plan and seeking to implement a CCCD. A departure from this principle is permissible only where there are good reasons. This might include the case of key suppliers or employees, or creditors who are supporting the restructuring by providing new money. Whether a departure can be justified will be fact-sensitive and the parameters of this test will be developed by future cases.

- **Discretion to sanction**

It has long been established that the sanction hearing in schemes and restructuring plans is not a rubber-stamping exercise. However, Adler confirms that where a plan involves CCCD, the court will exercise its discretion robustly and carefully. Satisfying the statutory conditions for CCCD merely opens the gateway to possible sanction, and the "fair wind" that blows with schemes of arrangement that have the benefit of a strong majority approval does not blow with a restructuring plan seeking to implement a CCCD. When exercising its discretion, the overall levels of support from assenting classes is irrelevant to assessing whether the plan is fair in respect of the dissenting class(es).

- **Compromise or arrangement?**

It is now clear that a plan must offer a genuine compromise or arrangement and not merely an extinguishment of rights. This applies to shareholders as well as 'out of the money' creditors. The Court of Appeal in Adler suggested that the amount of such a payment need only be modest. It appears from the High Court's decision in McDermott that something more than the party would receive in the relevant alternative will suffice. As a result, establishing the true 'relevant alternative' to demonstrate what the creditor would receive should the plan fail is likely to be a key battleground in future cases. In light of the decision to exclude the subordinated creditors from voting on the amended Aggregate Plan, we may see more applications by plan companies to exclude out of the money creditors from voting.

- **Elevation**

In Adler, the Court of Appeal considered the elevation of creditors' existing claims in return for providing new money (rather than simply granting senior priority in respect of the new money). While this may be permissible, the Court was sceptical as to whether enhanced priority could be granted to existing debts where the opportunity to provide new money is not offered to all creditors or where the money is provided on more expensive terms than would be available in the market. The Court also suggested that any elevation in priority would need to be proportionate to the benefits provided by the new money. In both the Adler Plan and the Aggregate Plan, elevation was considered permissible.

- **Procedure**

In Adler, the Court of Appeal fired a shot across the bow of any company looking to achieve a court-sanctioned restructuring in an artificially condensed timeframe. The Court confirmed that it will not sacrifice fundamental principles of procedural fairness between the parties, nor will it be railroaded into a decision when the circumstances giving rise to the urgency are entirely foreseeable (such as a looming maturity date). Any company that does not propose a realistic timetable will risk hearing dates being adjourned. Indeed, the McDermott trial was listed for a later date and extended in duration in the interests of procedural fairness.

Given the difficulties of unwinding a plan that is implemented shortly following sanction, the Court of Appeal in Adler suggested that in future cases parties wishing to appeal the sanction decision should seek a stay or a delay in the plan becoming effective. It will be interesting to observe the circumstances in which the courts may be prepared to grant such stays in the future, whether they become common practice and, if so, how this will impact on the perceived utility of restructuring plans.

- **Cost**

While a UK restructuring plan is likely to be less expensive than a US Chapter 11 process, the costs are often relatively high. The professional fees in McDermott amounted to approximately US $150 million. It seems likely that restructuring plans in the mid-market will remain less common. Where a plan is opposed, challenges in relation to valuation evidence and the 'relevant alternative' will inevitably increase costs. The successful appeal in Adler is also likely to encourage future appellants, increasing the risk and cost of plans for the proposing company. For SME and mid-market businesses, other solutions such as a pre-pack administration may be more cost-effective.

- **Foreign companies**

The Court of Appeal in Adler made clear that the judgment should not be taken as an endorsement for future cases of the technique of substituting an obligor or creating an English co-obligor of debt owed by a foreign entity to bring a plan within the English court's jurisdiction. This may provide a potential ground for challenge in future cases.

Ultimately uncertainties remain for creditors who are out of the money, particularly those with claims against a company that had no previous connection with England and Wales at the time of entering into the contractual relationship, but which subsequently engaged the English court's jurisdiction, for example by way of change of governing law in the underlying contract, COMI shift, or establishing an English newco to act as assignee of the debt.

James Stonebridge is EMEA Co-Head of Restructuring, Mark Craggs and Matthew Thorn are partners, and Helen Coverdale is a senior knowledge lawyer in our London office and members of the firm's global restructuring group.

Garuda Indonesia's restructuring recognised in Singapore: The SICC delivers its first insolvency judgment

Scott Atkins, Charles Nugent-Young, Erin Gordon

The Singapore International Commercial Court (SICC), which officially launched in January 2015, has released its first insolvency-related judgment. The matter of *PT Garuda Indonesia (Persero) Tbk and another matter* [2024] SGHC(I)1 is the latest in a series of international cases relating to the restructure of Garuda Indonesia, an Indonesian state-owned airline, and provides a range of insights into Singapore's application of the UNCITRAL Model Law on Cross-border insolvency (Model Law) that holds lessons in Australia and elsewhere.

In the matter, International Judge Christopher Sontchi, in agreement with International Judge Anselmo Reyes and Singapore Appellate Judge Kannan Ramesh, granted recognition of Garuda Indonesia's Indonesian restructuring as a foreign main proceeding and consequently, that recognition and enforcement of their restructuring plan occur in Singapore.

The application was objected to by two non-parties, entities within the Greylag Goose Leasing group of companies (**Greylag Entities**) that are the lessors of two aircraft to an entity within the Garuda Indonesia group. The Greylag Entities did not challenge that the Indonesian restructuring was a foreign main proceeding; however, they argued the application was filed prematurely due to pending proceedings before the Indonesian Courts, which would lead to the annulment of the restructuring plan and secondly that it would be contrary to the public policy of Singapore under Article 6 of the Third Schedule that implements the Model Law.

Was the recognition application premature?

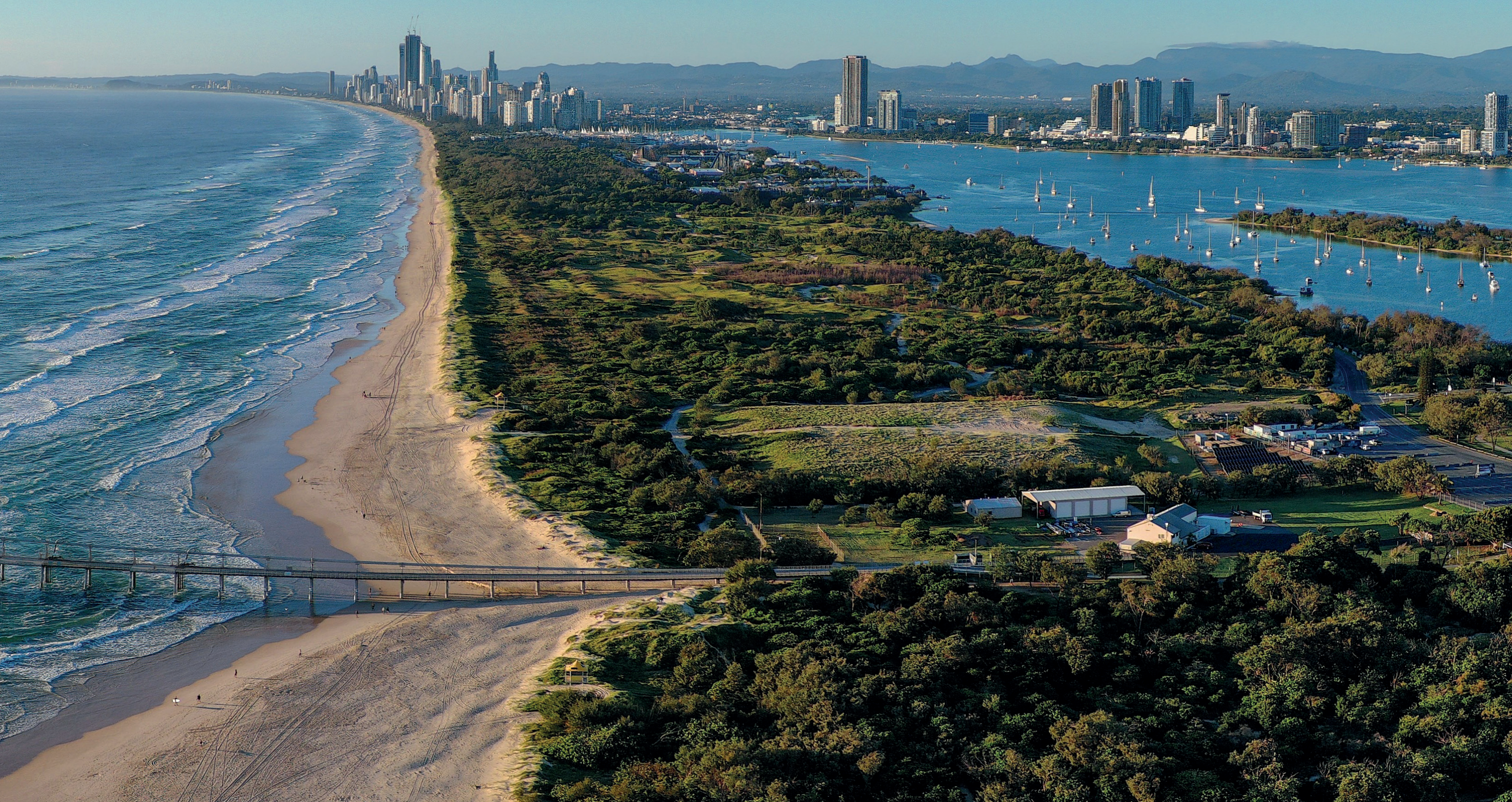
The Court confirmed that recognition of foreign proceedings can occur even if they are ongoing. The SICC Judges noted that in fact there was no legal basis under Singapore's insolvency law to support that objection and it would be counter to the requirements in Article 17 of the Third Schedule and the purpose of the model law to recognise foreign proceedings as expeditiously as possible. The Court found that Article 17(4), which wholly adopts the language from Article 17(4) of the Model Law, accounts for the above scenario by allowing for termination of recognition if the grounds for granting recognition were lacking or cease to exist.

Is there a public policy exception?

Singapore's Article 6 of the Third Schedule differs from Article 6 of the Model Law in only one respect, which is the omission of the word "manifestly" before "contrary to public policy". The Greylag Entities argued that the omission of the word "manifestly" creates a lower public policy standard to deny recognition, in line with the Singaporean High Court case of *Re Zetta Jet Pte Ltd and others (Asia Aviation Holdings Pte Ltd, intervener)* [2019] 4 SLR 1343. This was overwhelmingly rejected by the Court, which found that when the context of the Model Law, including its development and purpose of modified universalism were considered, the term "manifestly" was merely incorporated to emphasize the existing intention that public policy exceptions should be determined restrictively. The word was not meant to affect the standard of public policy but rather provide clarity on what the test already was.

The Court found this was supported by larger international interpretive trends which treat Article 6 restrictively, and within Singaporean case law in relation to other model laws such as the UNCITRAL Model Law on International Commercial Arbitration.

The Greylag Entities argued that recognition of the Garuda Indonesia Proceedings would be contrary to Singapore's public policy as the restructuring plan was conducted without adequate disclosure of information and equitable treatment of creditors.



The Court reinforced that foreign insolvency laws and procedures that operate differently from the domestic insolvency regime cannot, without more, give rise to a finding that the foreign proceeding is contrary to public policy. Whilst the Court confirmed that a failure to accord due process to creditors and stakeholders would likely be a breach of public policy, this was focused on procedural fairness rather than the substantive law. Other examples where the Court found the public policy exception was likely to succeed included where:

- relief sought would open individuals to criminal prosecution in the forum state;
- where the foreign representative is acting in bad faith;
- if proceedings were commenced in breach of a moratorium; or
- where proceedings were tainted by fraud.

The Court found that the true nature of the Greylag Entities' arguments was a criticism of the structure of the Indonesian insolvency regime, as opposed to an issue of equitable treatment of creditors and that the public policy exception did not apply. In addition, the Greylag Entities were not able to show how the requested documents were material to the issue of public policy and their request was dismissed.

Enforcement of foreign insolvency orders: UK v US approach

While examining the relevant jurisdictional requirements, the Court noted that the Indonesian restructuring plan compromised debts under the Greylag Entities' leases that were governed by New York law. Whilst the Gibbs Rule typically creates a barrier against recognition of a foreign proceeding and/or a foreign restructuring plan, where such proceeding and the product of that proceeding involve the compromise or discharge of a debt governed by foreign law, the Court found that the principle did not apply in this case as the Greylag Entities had voluntary bound themselves to the restructuring plan by participating in the Indonesian proceedings and voting in relation to the restructuring plan.

Once the Court determined that the Indonesian restructuring was a foreign main proceeding, the question turned to whether relief sought in relation to the recognition and enforcement of the restructuring plan can and should be granted. Whether Article 21(1) of the Third Schedule permits the recognition and enforcement of a foreign insolvency order (including a court order sanctioning a restructuring plan) is an issue that has received diverging treatment in different jurisdictions.

The SICC distanced itself from the UK approach in *Rubin v Eurofinance SA* [2012] 3 WLR 1019, which found that the Model Law was not designed to provide for the reciprocal enforcement of judgments. Instead, the Court affirmed that a US style approach to recognition of foreign insolvency orders and judgments confirming foreign restructuring plans is preferable, as it greater reflected the intention of Singapore's drafters, who specifically removed the qualifier seen in the UK that additional relief granted must be available under the laws of the jurisdiction in which enforcement is sought.

However, the Court made clear that it's role is not merely to act as a "rubber stamp" for foreign orders. In granting "appropriate relief", the Court must ensure that the interests of creditors and other stakeholders are protected. As such, the Court granted the relief sought by the applicants subject to two caveats, namely that the stay of proceedings under Article 20 of the Third Schedule would not extend to claims for the portion of the debts not admitted by Garuda Indonesia's administrators during the Indonesian proceedings and the recognition would be without prejudice to ongoing arbitration proceedings between the non-party lessors and any Garuda subsidiaries in Singapore.

Public Policy Exception in Australia – Takeaways for Australian insolvency practitioners

The Public Policy Exception operates narrowly in Australia. The explanatory memorandum for the Cross Border Insolvency Bill 2008 (Cth) states the public policy exception should be interpreted restrictively and that Article 6 is only intended to be invoked under exceptional circumstances concerning matters of fundamental importance for the enacting state.

Whilst there has been little judicial consideration in Australia of the meaning of the phrase "manifestly contrary to public policy", similarly to other countries that have adopted the model law, the Australian Courts have confirmed that the public policy exception is 'narrow and reserved for the most serious of cases' and the courts will be slow to invoke public policy as a reason for refusing recognition or enforcement of a foreign judgement.

In *Indian Farmers Fertiliser Cooperative Ltd and Another v Legend International Holdings Inc* [2016] VSC 308, the Supreme Court of Victoria determined that merely because a different approach or regime has been taken to a common issue in an overseas jurisdiction does not indicate an approach contrary to public policy in Australia. In the case, it was argued that the applicant was using Ch. 11 in the US to circumvent the winding up proceedings commenced in Australia, which should be considered contrary to public policy. However, the Court found that seeking the protection of Ch. 11 was not contrary to public policy as the purpose of Ch. 11 proceedings was protection that is not so dissimilar to Australia's voluntary administration regime.

Rather than mere differences in substantive law, the Australian courts prefer the question of whether recognition would "impinge the value and import of the statutory rights" of the Australian company and its liquidator creditors. The Australian courts have implied that this could occur in situations where there is a basis for suspecting that the recognition of foreign proceedings had occurred with the intent to defraud or defeat its creditors.

This narrow approach has been said to be in the 'interest of comity' and that recognition and respect of other jurisdictions is important. However, comity is not limited to countries that have applied the Model Law. In *Naumets (Trustee), Dorokhov (Bankrupt) v Dorokhov* [2022] FCA 748, Russia's lack of reciprocity when it comes to recognising cross-border insolvencies was not a factor relevant to the Court's decision that the recognition of Russian proceedings would not be manifestly contrary to the public policy of Australia.

The explanatory memorandum to the model law provides that it is expected that Australian courts will make use of the international precedents in interpreting the provisions of the Model Law. Thus, it will be interesting to see whether the examples of situations where public policy exceptions would likely succeed that Justice Sontchi provided in the Garuda Indonesia decision, would be confirmed in Australia.

Garuda Indonesia Australia proceedings

The Greylag Entities have opposed Garuda Indonesia's restructuring in several countries, including the US, France, Indonesia, and Australia. To date only the Indonesian and Australian appeals remain outstanding.

In Australia, the New South Wales Court of Appeal recently dismissed the Greylag Entities' proceedings to wind up Garuda Indonesia. The High Court of Australia has now granted special leave to hear an appeal, which will provide an interesting test as to whether Garuda Indonesia falls within an exception to foreign immunity that applies to winding up proceedings. The result of this application will provide clarity on a question of law not commonly considered and could provide a further step forward in Garuda Indonesia's cross-border restructure.

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The cross-border restructuring of Diebold Nixdorf: US Chapter 11 meets Dutch WHOA meets US Chapter 15

Prof. Omar Salah, Kristian Gluck, Maryam Malakotipour

Introduction

On 11 August 2023, the Diebold Nixdorf group (Diebold Nixdorf), a multinational service provider and manufacturer of cash handling machines (i.e., ATMs), successfully restructured approximately US$2.7 billion debt by using a parallel Dutch WHOA and US Chapter 11. The restructuring of Diebold Nixdorf in the Netherlands and its recognition as a foreign main proceeding under US Chapter 15 marks the first time that a Dutch WHOA proceeding has been recognized in the US. The US Bankruptcy Court for the Southern District of Texas (US Court) gave full force and effect to orders of the District Court of Amsterdam (Dutch Court) entered in the Dutch WHOA proceeding and imposed an automatic stay with respect to the property of the Dutch WHOA parties in the US.

Background

Diebold Nixdorf is a multinational company with more than 100 subsidiaries across the globe and approximately 21,000 employees worldwide. Diebold Nixdorf, Incorporated (**Diebold Inc.**) is the holding company of the group and based in the US. Diebold Nixdorf had a highly leveraged capital structure, consisting mostly of secured bond debt and term and revolving loans. At commencement of the restructuring proceedings, Diebold Nixdorf owed a total of approximately USD 2.7 billion debt under 13 financing facilities. The credit facilities were mostly secured and provided to Diebold Inc. and Diebold Nixdorf Dutch Holding B.V. (**Diebold Dutch Holding**). Diebold Dutch Holding and the European subsidiaries (the **Diebold WHOA Entities**) were jointly and severally liable under almost all credit facilities.

Starting in 2016, Diebold Nixdorf's liquidity started to deteriorate mainly due to declining sales, the increase in its debt burden and the acquisition of its German subsidiary (German Wincor Nixdorf). The Covid 19-pandemic and other global developments exacerbated the situation and by 2022 several of the credit facilities were approaching maturity. Against this backdrop, Diebold Nixdorf reached an agreement with certain of its financiers in October 2022 on the terms of a refinancing under which certain bonds were exchanged, various debt instruments were amended and additional liquidity was provided through a new Super-priority Term Loan and a new Asset Based Lending Facility. The 2022 refinancing was completed on 29 December 2022. It became clear in early 2023, however, that the restructuring and new financing were insufficient.

Consequently, Diebold Nixdorf commenced another round of negotiations with its financiers for a more comprehensive restructuring. The negotiations led to the signing of a restructuring support agreement (the **RSA**) on 30 May 2023, with an overwhelming majority of its secured creditors. The agreements would substantially deleverage Diebold Nixdorf by approximately USD 2.1 billion. The main elements of the RSA were as follows:

- The restructuring concerned only financial debt, namely the debt under the credit facilities and outstanding bonds (general unsecured claims were not impaired);
- Diebold Nixdorf would seek approval of a US$1.25 billion debtor-in-possession financing (**DIP facility**) as part of a Chapter 11 case to (i) repay in full the obligations under Diebold Nixdorf's 2022 Super-priority Term Loan, (ii) repay in full its 2022 Asset Based Lending Facility, (iii) repay costs and expenses related to the reorganization proceedings, (iv) make certain adequate protection payments, and (v) fund the working capital expenditures during the restructuring proceedings;

- Upon successful reorganization, the DIP facility would be converted into a US$1.25 billion exit term loan credit facility (**Exit facility**). If, however, the restructuring plans were not sanctioned/approved by the relevant courts, the DIP facility would become due and payable;
- The 1st lien creditors would receive 98% of the reorganized equity (new shares in Diebold Inc.), the 2nd lien noteholders would receive 2% of the reorganized equity, and the existing common shares of Diebold Inc. would be cancelled; and
- The holders of unsecured 2024 Stub Unsecured Notes received a limited cash payment.

To ensure that the restructuring was binding in its entirely and on all affected creditors, the RSA contemplated the effectuation of debt restructuring through, *inter alia*, (i) a pre-packaged WHOA plan to be filed by Diebold Dutch Holding, (ii) a pre-packaged Chapter 11 plan of reorganization to be filed by Diebold Inc. and certain of its subsidiaries, and (iii) a US Chapter 15 proceeding to recognize the WHOA proceeding.

The WHOA plan and the Chapter 11 plan were linked in several respects. The confirmation of one plan was a contractual condition for implementation of the other plan, and *vice versa*. Creditors under both plans were identical, but their positions were different. The distributions under the WHOA plan were made by cross-references to the Chapter 11 plan.

WHOA proceeding

Based on the Dutch Bankruptcy Act (**DBA**), a debtor may offer its creditors and shareholders a restructuring plan to amend their rights when it is reasonably assumed that the debtor is unable to pay its debts. On 30 May 2023, Diebold Dutch Holding offered its WHOA restructuring plan (the **WHOA Plan**) to its financial creditors who were deemed affected under the WHOA Plan. Those creditors were entitled to vote on the restructuring plan. On 1 June 2023, the Diebold Dutch Holding commenced the WHOA proceedings in the Netherlands.

Pursuant to Section 369 (6) DBA, a restructuring plan may be prepared and offered through a confidential procedure or a public procedure. Confidential WHOA proceedings take place behind closed chambers, and Dutch courts have jurisdiction in these proceedings if there is a sufficient connection with the Netherlands (e.g., if the debtor has assets in the Netherlands or it has Dutch law governed debt). The public version of the WHOA proceeding is listed on Annex A of the EU Insolvency Regulation (Recast) **(EIR)** and Dutch courts have jurisdiction in these proceedings only if the debtor has its centre of main interest (**COMI**) in the Netherlands. Diebold Dutch holding opted for the confidential WHOA procedure, mainly due to the lower threshold for the Dutch Court to accept jurisdiction in respect of Diebold Dutch Holding and the Diebold WHOA Entities, and in particular the non-Dutch entities.

Group-wide stay under the WHOA

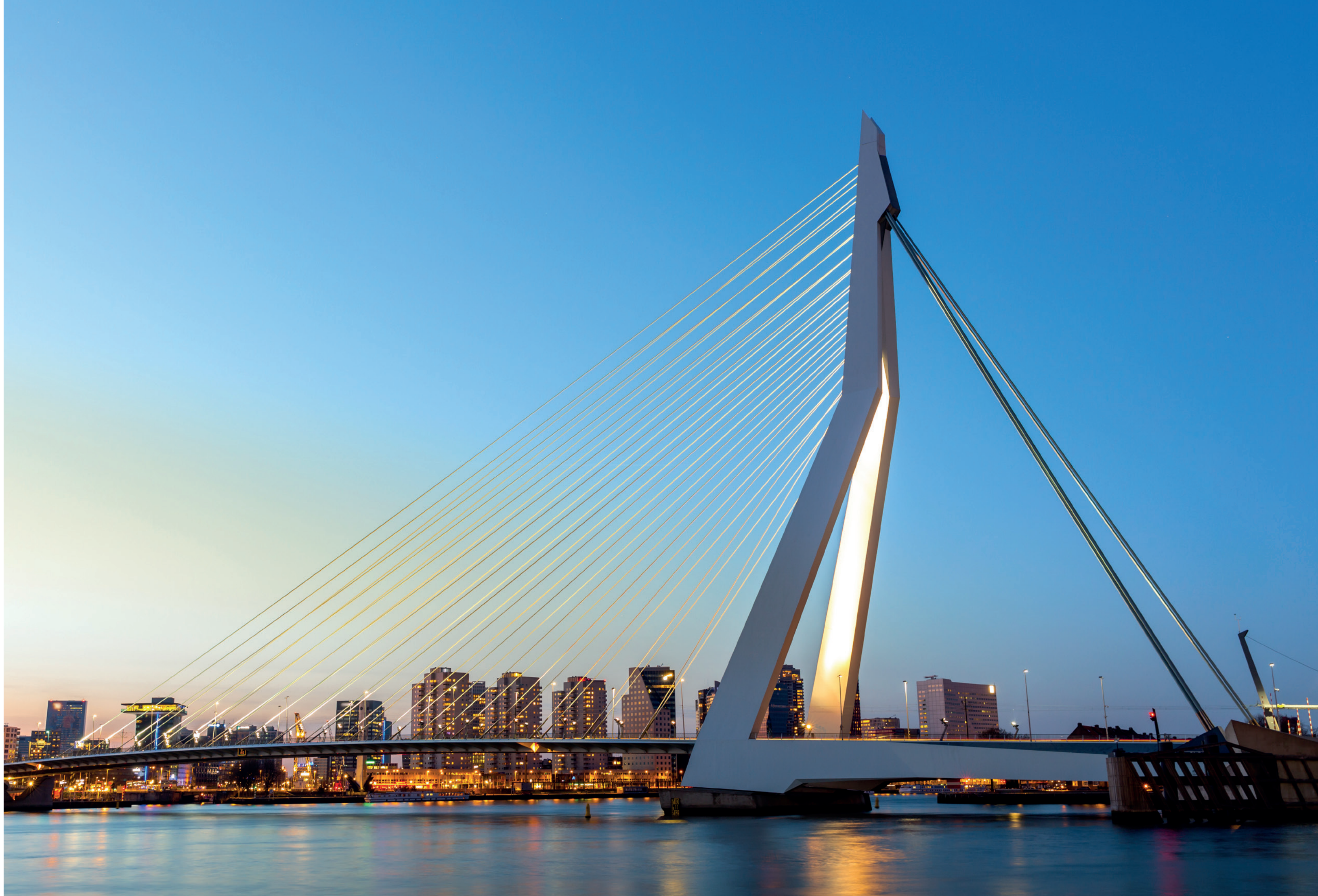
Unlike Chapter 11, the Dutch WHOA proceeding does not provide for an automatic stay. However, the WHOA debtor may request the court to issue a stay for a limited period of time. In a Dutch WHOA proceeding, the maximum duration of such a stay is four months, which can be extended to up to eight months provided that the debtor establishes that important progress has been made on the restructuring plan. The WHOA stay (i) prevents parties from taking enforcement actions against the assets of the debtor or taking possession of assets that are under the control of the debtor, (ii) allows for the lifting of attachments on the assets of the debtor, and (iii) suspends any pending suspension of payments or bankruptcy cases.

On 1 June 2023, Diebold Dutch Holding requested a group-wide stay with respect to itself and the WHOA entities for a period of three months. A week later (on 8 June 2023), the Dutch Court granted the stay on an *ex parte* basis.[1]

The Dutch Court assessed whether the request for a stay could be granted in light of the three required conditions. First, the Dutch Court ruled that the stay was necessary for the continuation of business during the WHOA proceeding because potential enforcement action by creditors would make it difficult to reach a successful restructuring. Second, the stay was in the interest of the joint creditors of the debtor for two reasons: The stay applied to only a limited group of creditors, namely creditors under the facility agreements and the affected creditors were unlikely to be prejudiced during the stay given that the debtor was able to satisfy its current obligations under the DIP facility based on the cashflow forecasts. Third, no interests of creditors or third parties were substantially prejudiced given that a large majority of the financial creditors had given their consent by entering into the RSA.

It bears emphasizing that Diebold Dutch Holding requested a group-wide stay in this particular case. The WHOA provides for the possibility of a stay for group companies of the debtor

1 District Court of Amsterdam 2 August 2023, ECLI:NL:RBAMS:6159.



that are not formally debtors under the WHOA proceeding. Based on Section 2:24 (b) of the Dutch Civil Code (**DCC**), a group is an economic unit in which legal persons and partnerships are organizationally interconnected. According to the Dutch Court, Diebold Dutch Holding and the Diebold WHOA Entities together formed a group as referred to in Section 2:24 (b) DCC. Therefore, the Dutch Court granted the request to impose a group-wide stay. We have seen in other international restructurings, such as the international restructuring of the Vroon group where a parallel Dutch WHOA proceeding and English scheme of arrangement was used,[2] that this is a powerful feature of the WHOA to facilitate large, international restructurings – and differs from the scope of the US automatic stay which absent separate court order is limited to the Chapter 11 debtors.

In addition to the request for a stay, Diebold Dutch Holding also requested appointment of an observer to supervise the WHOA proceeding for the benefit of the joint creditors. The Dutch Court granted this request and appointed an observer who was tasked with providing periodic updates about important developments in the WHOA process to the Dutch Court.

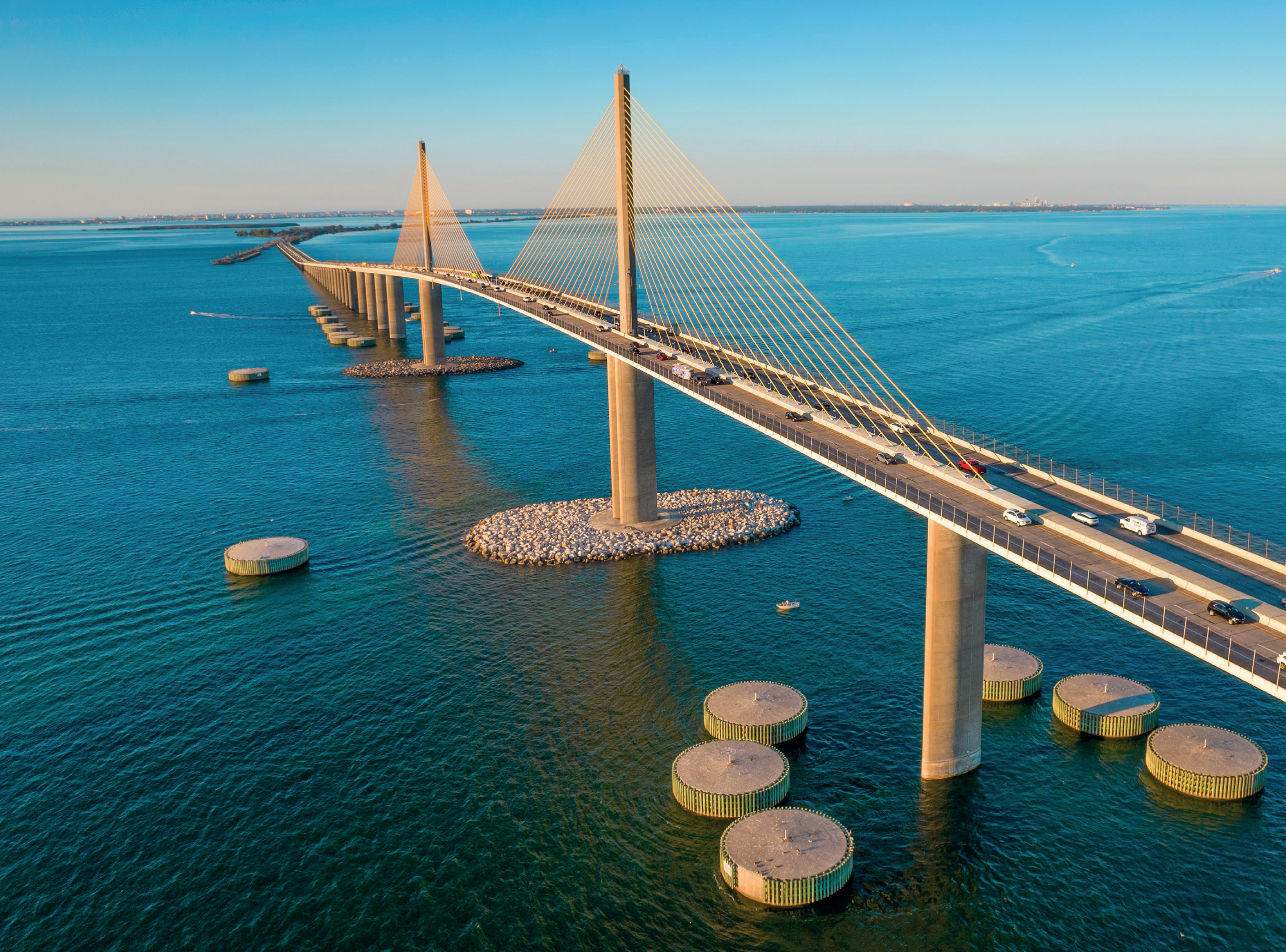
Sanctioning of the WHOA Plan

On 2 August 2023, the Dutch Court sanctioned the WHOA Plan of Diebold Dutch Holding.[3] Whilst the WHOA Plan mirrored the US Chapter 11 plan, the class composition was different. Under the DBA, only impaired creditors are required to be classified and vote on the WHOA Plan and must be divided into different classes. Under the WHOA, there were four classes of creditors: (i) the First Lien Claims (**Class 1**); (ii) the 2023 Stub First Lien Term Loan Claims (**Class 2**); (iii) the Second Lien Notes Claims (**Class 3**), and (iv) the 2024 Stub Unsecured Notes Claims (**Class 4**, and together with Class 1, Class 2 and Class 3, the **WHOA Classes**). The WHOA Plan was adopted by all WHOA Classes, except for Class 4. Certain creditors in Class 4 also argued that the WHOA Plan should not be sanctioned by the Dutch Court.

The Dutch Court rejected these arguments and sanctioned the WHOA Plan. Under the WHOA, a court will sanction a restructuring plan – that has been adopted by the requisite majority (i.e., 2/3rd of the value of votes casted) in at least one "in the money" class of creditors – unless statutory rejection grounds apply. The court will assess the general rejection

2 James Stonebridge, Omar Salah, Jade Porter and Bas van Hooijdonk, 'Vroon restructuring: A lesson in adapting to and overcoming challenges' (Q4 2023, Norton Rose Fulbright).

3 District Court of Amsterdam 2 August 2023, ECLI:NL:RBAMS:6160.



grounds (which are mainly focused on due process) and the additional rejection grounds (such as the "best-interest-of-creditors test" and the "absolute priority rule"). The general rejection grounds are assessed *ex officio* by the court, whilst the additional rejection grounds will only be assessed if a creditor or shareholder invokes them. Whilst certain Class 4 creditors had argued that the sanctioning of the WHOA Plan should be rejected, they did not invoke any additional rejection grounds, but mainly relied on the general rejection grounds under the WHOA.

Therefore, the Dutch Court only assessed the WHOA Plan on the basis of the general rejection grounds. The Dutch Court had to test, *inter alia*, whether there was a threat of imminent insolvency, that the class composition was in accordance with the DBA, and that all relevant information as statutorily required was included in the WHOA Plan. Based on the documents, the Dutch Court reasoned that in the absence of a successful restructuring proceeding, the DIP Facility would become immediately due and payable. The Dutch Court found that Diebold Dutch Holding and the Diebold WHOA Entities would be unable to repay this debt. Therefore, the Dutch Court concluded that there was a threat of imminent insolvency. It also ruled that the class composition was appropriate, and that all relevant information required by the DBA had been included in the WHOA Plan. The Dutch Court concluded that none of the general rejection grounds were applicable and, hence, sanctioned the WHOA Plan.

Interestingly, in this restructuring two forms of third-party releases (or non-debtor releases) were included in the WHOA Plan. On the one hand, Diebold Dutch Holding as the debtor under the WHOA would restructure all financial debt against the Diebold WHOA Entities (which were group companies of Diebold Dutch Holding but were not debtors under the WHOA). Given that the WHOA provides specifically in Section 372 DBA that such group guarantees may be restructured, the Dutch Court also sanctioned this part of the WHOA Plan. On the other hand, the WHOA Plan also included far-reaching third-party releases of (former)

directors and shareholders from potential litigation claims. Diebold Dutch Holding, however, requested the court not to rule on this third-party release as the debtor considered it doubtful that such provision was valid under Dutch law. The Dutch Court respected this move and thus sanctioned the WHOA Plan, but explicitly stated that its ruling did not address the effectiveness and enforceability of those third-party releases. Hence, should the third-party release provision be implicated in the future, its enforceability will only then be considered by court.

US Chapter 11 proceeding

Similar to the solicitation process in the WHOA, on 30 May 2023, Diebold Inc. and nine affiliates (the **Diebold Chapter 11 Entities**) commenced solicitation of votes on their Joint Prepackaged Chapter 11 Plan of Reorganization (the **Chapter 11 Plan**). Thereafter, on 1 June 2023, the Diebold Chapter 11 Entities filed voluntary petitions for relief under Chapter 11 of the United States Bankruptcy Code in the United States Bankruptcy Court for the Southern District of Texas (the **US Bankruptcy Court**). On the same day, the Diebold Chapter 11 Entities filed the Chapter 11 Plan, which sought to implement the restructuring outlined in the RSA, and the accompanying disclosure statement (the **Disclosure Statement**).

Unlike the WHOA, upon the filing of the Chapter 11 cases, Section 362 of the US Bankruptcy Code provides for a self-effectuating worldwide automatic stay enjoining all persons and governmental units from, among other things, (i) commencing or continuing any judicial, administrative or other proceeding against the Diebold Chapter 11 Entities that was or could have been commenced before the Chapter 11 cases were commenced, (ii) recovering upon a claim against any of the Diebold Chapter 11 Entities that arose prior to the commencement of the Chapter 11 cases, (iii) taking any action to collect, assess or recover a claim against any of the Diebold Chapter 11 Entities that arose before the commencement of the Chapter 11 cases, and (iv) acting to obtain possession of, or exercise control over, property of the Diebold Chapter 11 Entities bankruptcy estates. In furtherance of these protections, the US Bankruptcy Court entered an order confirming these protections in order to advise third parties of the existence of the self-effectuating nature of the automatic stay.

The US Bankruptcy Court conducted its "first day" hearing on 2 July 2023. At that hearing, the court entered an order conditionally approving the Disclosure Statement and set a hearing to consider confirmation of the Chapter 11 Plan, and the adequacy of the Disclosure Statement, on 12 July 2023.

Only impaired creditors receiving distributions under the Chapter 11 Plan are permitted to vote on the Chapter 11 Plan and are also divided into different classes. Those voting classes were: (i) the First Lien Claims (**Class 5**); (ii) the Second Lien Notes Claims (**Class 6**); and (iii) the 2024 Stub Unsecured Notes Claims (**Class 7** and together with Class 5 and Class 6, the **Plan Classes**). The Chapter 11 Plan was adopted in all Plan Classes, except for Class 7, which comprise the Stub Unsecured Notes Claims that had also not accepted the WHOA Plan. All other classes of claims and interests in the Chapter 11 Plan were either unimpaired and conclusively presumed to accept the Chapter 11 Plan, or impaired and deemed to reject the Chapter 11 Plan because they received no recovery on account of their claims or interests.

The US Bankruptcy Court conducted a hearing on 12 July 2023 (the **Confirmation Hearing**) to consider confirmation of the Chapter 11 Plan and approval of the Disclosure Statement. Despite Class 7 voting to reject the Chapter 11 Plan, the Chapter 11 Plan was still confirmed because it met the requirements for confirmation under Section 1129 of the US Bankruptcy Code, including that the Chapter 11 Plan was fair and equitable, and did not "discriminate unfairly." With respect to classes of impaired unsecured creditors, a plan is fair and equitable if it satisfies the "absolute priority rule," meaning that no class of creditors or interests junior to the objecting class is receiving a distribution under the plan. Similarly situated creditors may be treated differently under a plan and still be confirmable if the treatment does not equate to "unfair" discrimination.

The valuation evidence submitted in support of the Chapter 11 Plan established that holders of First Lien Claims were under-secured and were only receiving an approximately 38% recovery at the Total Enterprise Value (**TEV**) midpoint. As a result, the value of the liens securing the Second Lien Notes Claims were zero and thus the claims were unsecured. Accordingly, the Chapter 11 Plan waterfall resulted in no value to be distributed to unsecured creditors, which included the holders of claims in Class 6 and 7. Nevertheless, the holders of First Lien Claims agreed under the Chapter 11 Plan to provide a "gift" to holders of Class 6 and 7, resulting in each receiving the same 4.8% recovery on their claims based on the TEV midpoint. The Chapter 11 Plan, therefore, did not discriminate unfairly as to holders of claims in Class 7. The Chapter 11 Plan was also fair and equitable because no claim or interest junior to Class 7 received an economic recovery under the Chapter 11 Plan.

At the Confirmation Hearing, the Bankruptcy Court approved entry of, and entered an order confirming the Chapter 11 Plan, which went effective on 11 August 2023.

US Chapter 15 proceeding

In parallel to the WHOA proceedings in the Netherlands, on 12 June 2023, Diebold Dutch Holding, filed a voluntary petition for relief under Chapter 15 under the US Bankruptcy Code. On the same day, Carlin Adrianopoli,[4] in his capacity as the duly appointed foreign representative of Diebold Dutch Holding, filed a motion seeking recognition of the Dutch reorganization proceeding, including the stay order.

On 12 July 2023, the US Court recognized the WHOA proceeding as a "foreign main proceeding" as Diebold Dutch Holding had its COMI in the Netherlands. Immediately upon the recognition of the WHOA proceeding as a foreign main proceeding, Diebold Dutch Holding was entitled to, *inter alia,* an automatic stay with respect to the property of the Dutch WHOA parties within the territory of the US. Also, the US Court recognized the stay order of Dutch Court and prohibited creditors in the US from taking actions (i.e., enforcement actions) that would be in violation of the Dutch stay.

On 7 August 2023, following the filing of an emergency motion by the foreign representative, the US Court entered an order, *inter alia,* recognizing and giving full force and effect to the WHOA Plan that was sanctioned by the Dutch Court. The US Court's order permanently enjoined all parties who were affected or bound by the sanctioned WHOA Plan from a number of actions including the following: treating the WHOA proceeding, the Chapter 15 case, the sanctioned WHOA Plan as a default or event of default; taking or continuing any act to create, perfect or enforce a security interest, set off or take other actions that would be against the sanctioned WHOA Plan; and commencing or continuing an individual action against Diebold Dutch Holding or any other party involved in the Dutch proceeding or the Dutch WHOA parties' assets, rights, and obligation to the extent that they have not been stayed. Such injunctions are effective solely within the territorial jurisdiction of the US. Diebold Dutch Holding and the foreign representative were also entitled to additional assistance and discretionary relief provided that the requests are consistent with "the principles of comity" as stipulated in Section 1507 (b) US Bankruptcy Code.[5]

Takeaways

The successful reorganization of Diebold Nixdorf under the parallel Dutch WHOA and US Chapter 11 proceedings, and the recognition of the sanctioned WHOA Plan in the US once again proves the capacity of the WHOA to successfully be used in cross-border reorganization cases. There are several lessons learned from the smooth implementation of the Diebold Nixdorf restructuring. First, in parallel Dutch-US cases it is important to initiate a Chapter 15 proceeding as soon as the respective Dutch court grants a stay to minimize the gap between the Dutch court's stay order and the recognition of such order in the US. Next, the appointment of an observer is one of the positive elements of the WHOA proceedings, particularly in cross-border reorganization matters due to the complexity of such cases. The observer brings an objective view to the restructuring, which can facilitate court approval. Appointment of an observer at an early stage of cross-border cases is of paramount importance. Furthermore, the length of WHOA proceedings may in general be shorter than a Chapter 11 proceeding. This must be considered especially when two plans are very much interrelated to each other -- since it is unclear whether and to what extent Dutch courts allow amendments to a sanctioned reorganization plan (if the Chapter 11 plan is revised due to objections by parties or rulings of the Bankruptcy Court). Last but not least, in Diebold, the Dutch Court seemed to have flexibility as to the incorporation of clauses that were inspired by the Chapter 11 practice. Nevertheless, the extent to which the Chapter 11 practice can be reflected in WHOA plans is yet uncertain and may become clearer in future parallel Dutch-US cases.

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4 Mr. Adrianopoli was also authorized to act as the foreign representative of the Diebold Chapter 11 Entities. On 13 July 2023, Mr. Adrianopoli applied for an Initial Recognition Order, a Supplemental Order and a Plan Confirmation Recognition Order pursuant to Part IV of the Companies' Creditors Arrangement Act (CCAA) in Canada. On 18 July 2023, the CCAA court entered such orders in the recognition proceedings. The CCAA proceedings were terminated on 19 September 2023

5 Pursuant to the principles of comity, the court will reasonably assure: (1) just treatment of all holders of claims against or interests in the debtor's property; (2) protection of claim holders in the United States against prejudice and inconvenience in the processing of claims in such foreign proceeding; (3) prevention of preferential or fraudulent dispositions of property of the debtor; (4) distribution of proceeds of the debtor's property substantially in accordance with the order prescribed by this title; and (5) if appropriate, the provision of an opportunity for a fresh start for the individual that such foreign proceeding concerns.

Proprietary trading: Decision in Canada highlights the broad scope of receivership remedies in cross-border securities transactions

Evan Cobb

A recent decision of the Ontario Superior Court of Justice highlights the unique utility of Ontario receivership remedies to respond to cross-border investment fraud concerns.

In the second half of 2023, both the United States Commodities Futures Trading Commission (the **US CFTC**) and the Ontario Securities Commission (the **OSC**) identified concerns that the business of Traders Global Group Inc. (**TGG**) was conducted in violation of applicable securities laws. The concerns included fraud contrary to the Ontario Securities Act.

The TGG business

The OSC described the TGG business as follows:

- TGG conducted business through a website myforexfunds.com and represented itself as a retail foreign exchange and commodities trading firm.
- The website offered retail investors, who paid fees to open an account, the opportunity to trade in foreign exchange and commodities using the assets of third-party 'liquidity providers' and share in any trading profits.

A participant in the TGG structure was able to place trades worth many multiples of the amount of cash posted by that participant due to the apparent involvement of liquidity providers to cover the bulk of the capital for trading.

The model is a version of what would often be described as a proprietary trading firm. The rationale is to provide individual investors access to capital, trading activities, and trading resources that those individuals would not be able to access on their own. Even if legitimate trading takes place, the structure is not without significant risk as investors can be required to contribute significant cash to the endeavour with limited transparency about the mechanics of the trading process or the counterparties.

In the TGG case, however, the OSC alleged that "There is virtually no real trading taking place at TGG. For the vast majority of investors, trading is simulated by TGG.". In aggregate, the OSC and CFTC believed TGG had generated more than US $310 million in cash inflows from trading participants through this model, with virtually no real trading occurring. The OSC provided evidence to demonstrate that registration fees paid by customers were used to pay the few customers who notionally generated profits from their trading, in the manner of a Ponzi scheme.

The CFTC and OSC proceedings

The CFTC filed a Complaint for Injunctive Relief, Civil Monetary Penalties, and other Equitable Relief against TGG in New Jersey. A temporary receiver was appointed by the United States District Court for the District of New Jersey in August 2023.

The OSC issued several freeze directions in respect of TGG as well as a temporary cease trade order in August and September of 2023. No further immediate remedies were sought in Ontario in view of the temporary receivership in New Jersey, which could be recognized in Canada.

Complications arose when the temporary receivership in New Jersey was terminated by the US District Court. This was a significant concern to the OSC, which estimated that over CDN $90 million in funds and assets needed to be preserved through a receivership either the US or in Canada.

The OSC moved for the appointment of a receiver in Ontario notwithstanding the decision of the US District Court to terminate the US receivership. Given the cross-border nature of the potential fraud, regulators from multiple jurisdictions may exercise jurisdiction over the same scheme. The fact that the matter was pursued by the US CFTC to a different outcome, does not prevent the matter from being pursued by the OSC in Ontario.

The allegations by the OSC included that TGG:

- breached Ontario securities laws providing that no person or company shall engage in any act, relating to a security or derivative that the person or company knows or reasonably ought to know may perpetrate a fraud on any person or company.
- engaged in the business of selling securities without registration.

Importantly, under applicable law in Ontario, the OSC did not need to prove a breach of the Ontario Securities Act or prove that funds or assets were at risk of imminent dissipation or theft, as may be required in some other jurisdictions to support the appointment of the receiver. A receiver could be appointed by the OSC upon establishing there was a serious concern with respect to the alleged breaches of Ontario securities law by TGG. These questions were already largely dealt with in the US District Court, which found that there was a *prima facie* case that TGG had made misrepresentations regarding their business and a *prima facie* case that they had engaged in fraudulent conduct in violation of the US Commodity Exchange Act and Regulations.

In Ontario, the receiver can be appointed even before the OSC's investigation has been completed and before any formal Notice of Allegations of breach of securities laws has been issued by the OSC, provided that the OSC then completes its investigation within a reasonable time. The OSC receivership process is described as a 'collateral safeguard.'

In addition, whereas the US District Court determined the assets that could be disgorged under US law were limited to US $12 million, the potential reach of the receivership in Ontario was significantly broader. The US District Court's approach was focused only on a subset of the funds generated by TGG that were attributed to fees paid by a subset of loss generating participants. In contrast, under Ontario law, the receivership would include any amounts received by TGG in contravention of Ontario securities laws, without the need to connect these amounts to a specific loss by a specific investor.

The Ontario court concluded that freeze orders already granted in the United States over limited assets were not sufficient to foster fair and efficient capital markets or confidence in capital markets in Canada. As a result, the Ontario court engaged the broader receivership remedy available under Ontario securities law where a serious concern about an alleged breach of Ontario securities law has occurred and appointed a receiver over TGG's assets in Ontario.

Cross border considerations

As retail investors continue to have increased access to global investment markets, one can expect regulators to seek to protect their local investing public from cross-border threats. However, the scope of that authority is not limitless. Unless recognized outside the local jurisdiction, a receiver appointed in the Ontario court will not be expected to take control of assets in other countries. The receivership order is only as powerful as the assets the receiver can access either directly or on behalf of the investment firm subject to receivership.

Future cases

A receiver is a very well understood, powerful, and commonly used tool in the commercial court's toolkit in Ontario and in other Canadian jurisdictions. The receiver is usually a licensed insolvency firm with expertise in restructuring and forensic matters.

Most often, a receiver is appointed by a secured creditor to realize upon collateral. Where a secured creditor seeks to appoint a receiver, courts in Ontario exercise their authority keeping in mind that the appointment of a receiver is an extraordinary remedy and proceed to review a variety of factors including the risk of irreparable harm and the balance of prejudice between parties.

The analysis is different where an Ontario securities regulator seeks the appointment of a receiver to establish a temporary 'collateral safeguard' as a preliminary step in an investigative process. The TGG case suggests in such a case the regulator need only identify a serious concern. The Ontario court, needed to be satisfied only that: "there is a serious concern the respondents knew that what was being represented to customers was not true and that customers were intentionally misled."

Market participants engaged in cross-border securities dealings that have a material connection to Canadian jurisdictions must be aware of this regulatory authority to take broad control over assets where serious concerns of a breach of law exist.

As just one example, one could see this remedy deployed by Ontario securities regulators in the cryptocurrency space. Securities regulators have made extensive efforts in Canada and other jurisdictions to determine an appropriate characterization of crypto assets as securities under applicable law and to regulate dealings with those assets accordingly. Cryptocurrency operations are regularly cross-border in scope. In at least one recent crypto asset case, the Ontario securities regulators have provided guidance that: "This matter should serve as a warning that all persons who deal in crypto securities with Ontario investors, wherever the business is domiciled, cannot circumvent compliance with, or evade enforcement of, Ontario securities law." Based on the experience in the TGG case, there is a route to utilize the Ontario securities regulatory regime to take control of crypto assets that may be active in the local market through similar receivership processes if deemed necessary by the regulators -- even if similar remedies may not be available in other jurisdictions.

The receivership remedy is also a powerful tool in more traditional investment frauds or Ponzi scheme cases, where it may not be possible at the outset to prove a fraud but there is serious concern about an alleged breach of securities laws. In those cases, no individual participant may have a sufficient economic interest in commencing a proceeding to seek remedies. If those participants bring sufficient attention of these matters to a regulator in Ontario, a receiver can be appointed by the regulator quickly to aid in the investigation process and safeguard assets and significant value may be preserved.

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UK restructuring plan: cramming up a super-senior creditor class in a unitranche structure

Christopher Akinrele, Matthew Thorn, Jade Porter, and Matthew Roderick

In this article we consider how the UK's Part 26A restructuring plan has opened up opportunities for "cram up" in unitranche structures – a type of hybrid structure that brings together senior and subordinated debt under one loan.

Given the current headwinds facing leveraged businesses, there is some nervousness on the part of super senior creditors in unitranche structures that their debts may be modified by a UK restructuring plan imposed by a debtor and a more junior class of creditors. This is particularly the case where an intercreditor agreement between voting classes prevents the super senior creditor from taking enforcement action while a restructuring plan is being implemented.

While cram up of the super senior class is technically possible in a restructuring plan, certain tests need to be met before such a plan can be implemented. In the case of a (super senior) revolving credit facility (RCF), for example, particular issues need to be considered where the debtor seeks to re-open and access any undrawn element of the facility.

Background

Arrangements and reconstructions

In the UK, a company may agree an arrangement with a majority of its creditors, or any class of them, binding dissenting creditors to a modification of their debts. A scheme of arrangement under Part 26 of the Companies Act 2006 (the Act) requires the support of 75% in value and 50% in number of creditors in each affected class in order to bind dissenting creditors within that class to the arrangement.

The restructuring plan mechanism under Part 26A of the Act, implemented in June 2020, builds on the UK's extensive scheme of arrangement jurisprudence with the addition of a new "cross class cram down" feature, which provides for the imposition of an arrangement on a dissenting class, provided that the following two-part test is met:

1. members of the dissenting class would be no worse off than under the relevant alternative, which is the most likely outcome if the plan is not sanctioned – often a terminal administration or liquidation; and
2. the arrangement has been agreed by a number representing 75% in value of a class that would receive a payment or have a genuine economic interest in the company in the event of the relevant alternative.

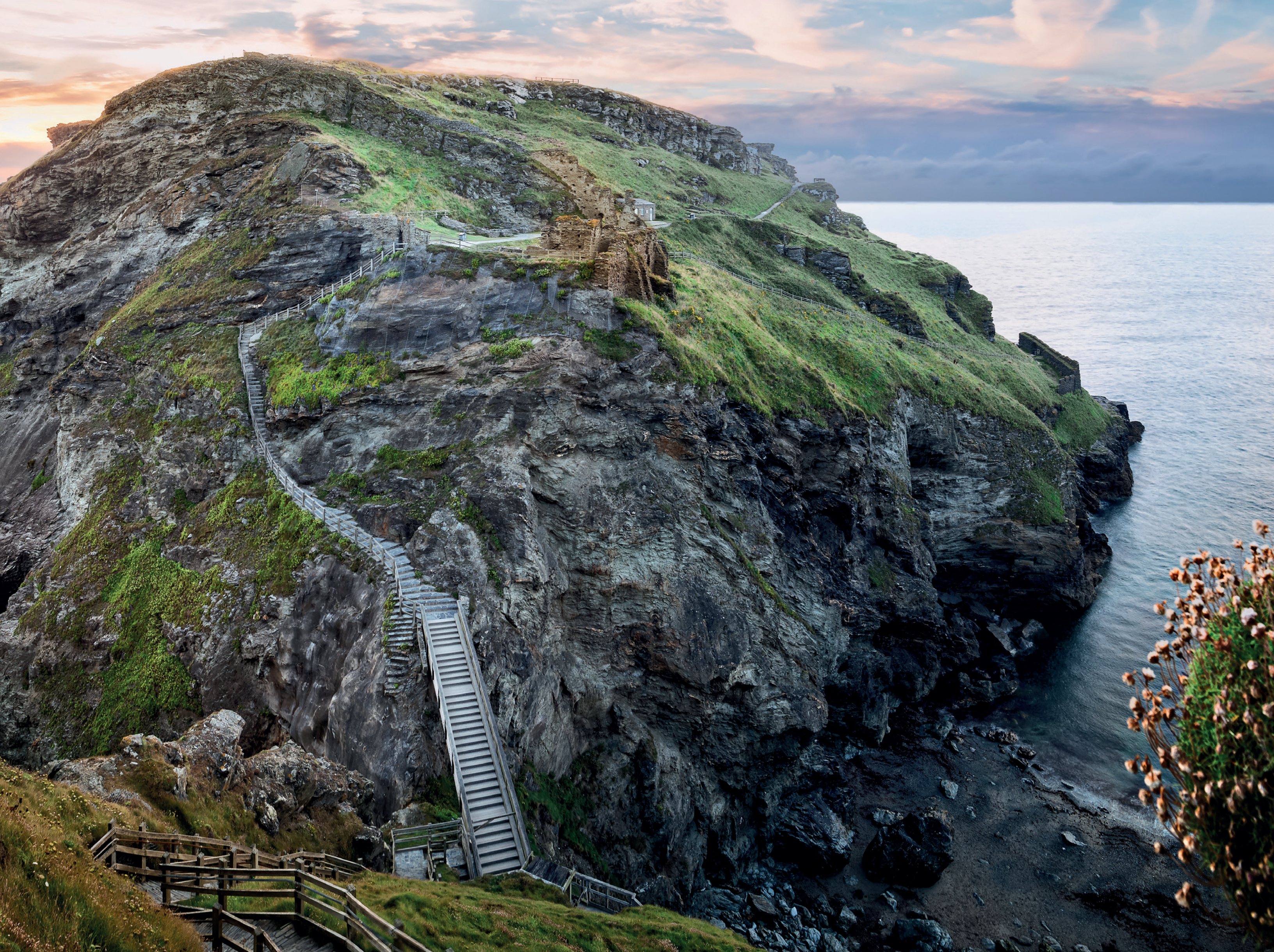
Unitranche structures

The supply-side dominance of the UK leveraged finance market by private credit has sat alongside the popularity of the unitranche financing structure, both in new acquisition financings and debt refinancing transactions. A typical unitranche financing will see a super senior working capital facility (usually an RCF) provided alongside a senior term loan facility (i.e. the unitranche facility) with both facilities benefitting from a common security package and the super senior facility being paid in advance of the senior facility in enforcement or insolvency proceedings.

In March 2020, the Loan Market Association (LMA) released its form of super senior/ senior intercreditor agreement with this structure at its core. While each transaction will have its own specific terms reflecting the commercial agreement between the parties, the unitranche finance market has very much been built up around the principles set out in this form.

In short, it will usually be the senior term loan lenders that will initially constitute the instructing group (or the majority of it) capable of giving instructions to the security agent to enforce security or remedies in a default situation.

In the typical scenario, super senior lenders will be restricted from taking enforcement action they would otherwise be entitled to take, including entering into an arrangement with the debtor, unless (among other circumstances) a super senior step-in event or an insolvency event has occurred. A super senior step-in event is commonly preceded by a standstill period and failure by the senior lenders to enforce or realise security. These standstill periods will vary depending on the nature of the event of default that has given rise to the creditors' enforcement rights. Often the standstill period



will be at least 90 days, which should be sufficient time for consummation of a UK restructuring plan. This structure may therefore give the debtor and senior lenders the ability to modify the debts of the super senior lenders by way of cross class cram up – assuming the relevant tests are met – before the super senior lenders are in a position to take enforcement action and disrupt the plan.

Intercreditor agreements may include provisions for relevant creditors to exercise their voting rights in a certain way in restructuring proceedings (an optional term in the LMA form). If this provision requires the super senior lenders to vote as instructed by the instructing group, then the statutory cross-class cram up mechanic may not even be required to implement the plan, because the super senior lenders will actually be contractually bound to support the cram up plan.

Cross class cram up and the "no worse off" test

The principles governing the operation of the cross-class cram down in circumstances where the debtor is using the support of a senior class to cram a junior class are now quite well established and so we do not propose to cover them in this article. In any event, in a typical (LMA-based) unitranche structure, the expectation is that the super senior standstill will restrict the ability of super senior lenders to enter into a restructuring plan with the debtor, without the consent of senior lenders, and, even if the super senior lenders are not so restricted, the expectation is that the senior lenders would take enforcement action on notice of the commencement of proceedings (assuming they are entitled to do so) derailing the restructuring plan.

The courts have had to consider the cram down of a senior secured class by more senior administration expense and preferential creditors, as well as junior secured and unsecured

creditors in *Re Amicus Finance plc (in administration)* [2021] EWHC 3036 (Ch) – a so-called "cram-sandwich" – but in that case the senior secured creditors were subject to an administration moratorium so could not take enforcement action and, further, were expected to get a nil recovery in the relevant alternative (a liquidation) and so the plan needed only to ensure they would receive something more than nothing.

In contrast, the courts have not yet had to consider a cross class cram up where the (super) senior class would be paid out in full in the relevant alternative and how the "no worse off" test may be satisfied in these circumstances. As per Lord Justice Snowden in *Re Virgin Active Holdings Ltd, Virgin Active Ltd and Virgin Active Health Clubs Ltd* [2021] EWHC 1246 (Ch):

> *"the "no worse off" test can be approached, first, by identifying what would be most likely to occur in relation to the plan companies if the plans were not sanctioned; second, determining what would be the outcome or consequences of that for the members of the dissenting classes (primarily, but not exclusively in terms of their anticipated returns on their claims); and third, comparing that outcome and those consequences with the outcome and consequences for the members of the dissenting classes if the plans are sanctioned."*

Applying this formulation in a procedure where the relevant alternative is a terminal administration or liquidation, the outcome or consequences for the super senior creditors would ordinarily be the payment in full of their debt (assuming the value broke below, i.e. in the senior debt), plus interest, costs and other amounts payable, within a specified period of time. The outcome and consequences for the super senior lenders if the plan were to be sanctioned would need to be compared against that outcome.

Super senior lenders will need to be offered appropriate economic uplifts or other benefits to ensure their anticipated returns are no worse than they would be in the relevant alternative. Where the maturity of the super senior facility is to be extended, the present value of expected cash flows should be taken into account, as should the opportunity cost of redeploying the funds that would be paid out in the relevant alternative: e.g. where the recoveries in the relevant alternative would be received earlier, and attract a more favourable return in the market, than under the plan. These arguments are supported by the ruling in *Re Fitness First Clubs Ltd* [2023] EWHC 1699 (Ch) where it was held that returns from third parties in the relevant alternative could be taken into account for the "no worse off" test.

While focussed primarily on the anticipated returns on their claims, the court will also consider other consequences of the plan that could put the super senior lender in a worse position. In addition to the cram up of the super senior class by the senior class, there is also the possibility of a cram up of the senior classes by more junior, sponsor-controlled subordinated classes (e.g. intra-group liabilities or parent liabilities) in a restructuring plan.

While this is a technical possibility, assuming those junior subordinated classes were in the money, as with a cram down of the senior class by the super senior class, it would be normal to have restricted the right of those junior classes to take such action under the intercreditor agreement and for the senior classes to be entitled to take enforcement action to scupper the plan.

The debtor could also seek to counter any dissenting creditor enforcement rights by appointing an administrator who could run a "light touch" administration through to plan effectiveness with the benefit of a statutory moratorium on enforcement action. This course of action would, however, be subject to the right of any qualifying floating charge holder to appoint their nominated administrator ahead of the debtor's nominee, and it would come with the downsides of administration for the debtor.

We would not expect the standalone moratorium available under Part A1 of the Insolvency Act 1986 to be effective in these circumstances on account of, among other things, the exclusion of financial creditors.

Of course, the super senior creditors may not agree with the company on the likely success of the cram up plan, and, if that is the case, then it will be for the super senior creditors to challenge the plan with appropriate supporting evidence. Ultimately, even if the two-stage test is satisfied, the court's sanction is required for the plan to become effective. The court has a wide discretion in this regard and will consider matters of procedural and substantive fairness.

Treatment of an undrawn revolving credit facility (RCF)

The super senior class in a unitranche structure often includes an RCF, which permits the borrower to draw down and repay the facility at will, up to an agreed commitment limit, subject to there being no draw-stop event. The commencement of a restructuring plan proceeding normally constitutes an event of default and draw-stop event under an RCF, entitling the RCF

lenders to cancel any outstanding commitments and take any acceleration or other enforcement action permitted by the finance documents. However, such action will be subject to any standstill moratorium in favour of the senior lenders discussed above that would restrict certain enforcement action until the occurrence of a super senior step-in event.

It may be that the borrower has drawn the facility in full in advance of the commencement of the plan (a likely scenario, if permitted), but to the extent there remains undrawn commitments, then the RCF lenders may want to consider the cancellation of those commitments to the extent permitted by the finance documents.

The LMA super senior / senior intercreditor agreement does not expressly include the cancellation of commitments in the restriction on enforcement action, so such cancellation may not fall foul of any standstill. RCF lenders, however, may want to consider explicit provisions for such cancellation in new deals in order to be crystal clear.

While it has been held in *Re Yunneng Wind Power Co., Ltd (In the Matter of the Companies Act 2006)* [2023] EWHC 2111 (Ch) that a restructuring plan is capable of waiving a draw-stop on an undrawn facility in an intra class cram down, (note that this position has not been tested in a cross-class cram down/cram up scenario), a restructuring plan cannot impose new and extensive obligations on dissenting creditors – see the *Re APCOA Parking Holdings GmbH* [2014] EWHC 3849 (Ch) and *Re Noble Group Limited* [2018] EWHC 2911 (Ch) schemes of arrangement whose authority would apply to restructuring plans – and so it would be open for the RCF lenders to argue that they are no longer contingent creditors in respect of the cancelled commitment and any attempt to re-open a cancelled commitment would constitute the imposition of a new obligation. This argument would not assist with any drawn portion of the RCF which could be restructured (e.g. termed out and extended) as a part of the plan.

Conclusion

Unitranche deals written prior to June 2020 will not have had the restructuring plan in contemplation. Therefore, we may not need to wait long for the first attempt to cram up a super senior class.

It remains open to parties to negotiate restrictions in the intercreditor agreement that would prevent the company and senior lenders from cramming up the super senior lenders. Without those restrictions, cram up remains an option (or a risk, depending on the party concerned) under a UK restructuring plan, subject to the issues discussed in this article. Individual voting thresholds and dynamics will impact any scenario, but it is important for parties to have a cram up (or down) in contemplation at the inception of the deal when negotiating the intercreditor agreement and/or when restructuring negotiations loom.

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Year in review: Significant US Chapter 15 decisions in 2023

Francisco Vazquez

Introduction

Chapter 15 of the United States Bankruptcy Code implements the Model Law on Cross-Border Insolvency in the US, and provides "effective mechanisms for dealing with cases of cross-border insolvency." Chapter 15 and the Model Law accomplish this goal by providing a procedure for granting recognition to a "foreign proceeding" and other relief to a "foreign representative." The US Bankruptcy Code contains specific definitions for both terms, which are discussed in greater detail below, but they generally refer to foreign insolvency, bankruptcy, liquidation, or debt-restructuring proceedings pending outside the US and the individuals or entities that are entrusted with their administration, respectively.

In 2023, there were forty nine new Chapter 15 petitions filed in the US for orders recognizing foreign proceedings pending in a number of different jurisdictions across the globe: Bermuda, Brazil, British Virgin Islands, Canada, Cayman Islands, Denmark, England, Germany, Hong Kong, Isle of Man, Italy, The Netherlands, New Zealand, Poland, Russia, Scotland, South Africa, United Kingdom, and Ukraine. The majority of these cases were filed in the Southern District of New York (16), Southern District of Florida (10), and District of Delaware (10). The remaining thirteen cases were filed across seven other districts.

US courts issued several decisions in 2023 analyzing important issues in Chapter 15. This article highlights a handful of the most significant decisions. First, we discuss a decision that confirms that a foreign court's appointment is not required for a person or an entity to be a foreign representative under Chapter 15. Next, we examine a decision that concludes that a new Chapter 15 case is not required to be filed after a recognized reorganization proceeding is converted to liquidation. We turn to a decision that highlights the potential consequence of a foreign representative failing to comply with its obligation to inform a US court of developments in the foreign proceeding. We then tackle interesting decisions that address the availability of discovery to creditors and other interested parties under Chapter 15. Finally, we round out the survey with a review of two decisions that analyze the appealability of Chapter 15 discovery orders.

Foreign representative need not be appointed by a foreign court

One of the conditions precedent to recognition of a foreign proceeding under Chapter 15 is that "the foreign representative applying for recognition is a person or body." The status of a foreign representative is rarely contested where it is appointed by a foreign court. However, nothing in the Bankruptcy Code mandates court appointment. In certain circumstances, a debtor may appoint a foreign representative for purposes of seeking Chapter 15 relief. In 2023, the US Bankruptcy Court for the Southern District of New York confirmed that principle when it overruled a creditor's objection to recognition of a Bulgarian bankruptcy proceeding. *In re Agro Santino, OOD*, 653 B.R. 79 (Bankr. S.D.N.Y. 2023).

Agro Santino OOD ("Agro") is a Bulgarian limited liability company that was a defendant in certain litigation in the US. Prior to trial, a Bulgarian court opened a bankruptcy proceeding and appointed a trustee for Agro. Under Bulgarian law, Agro was generally allowed to continue to operate under the trustee's supervision. Agro, by its sole manager, appointed a different person ("Ms. Panchovska") to serve as its foreign representative. Agro informed the trustee of such appointment, but never obtained the trustee's consent. Following her appointment, Ms. Panchovska filed a Chapter 15 petition seeking recognition of Agro's Bulgarian bankruptcy case as a foreign main proceeding with the New York bankruptcy court. Upon recognition of the Bulgarian bankruptcy case, the US litigation would be automatically stayed.

StoneX Markets LLC ("StoneX"), the plaintiff in the US litigation and Agro's largest creditor, opposed recognition, arguing that Agro had failed to prove that Ms. Panchovska was qualified to serve as the foreign representative under Bulgarian law. StoneX emphasized that, under Bulgarian law, a debtor "may conclude new transactions" only with the trustee's consent. According to StoneX, Ms. Panchovska's appointment was a new transaction that required the trustee's prior approval, which Agro never obtained.

Citing existing case-law, the New York bankruptcy court found that the appointment of a foreign representative is not governed by foreign law. Instead, it is governed by section 101(24) of the US Bankruptcy Code, which defines a foreign representative as "a person or body…authorized in a foreign proceeding to administer the reorganization or the liquidation of the debtor's assets or affairs or to act as a representative of such foreign proceeding." That section does not require that a foreign representative be appointed in accordance with foreign law or by a foreign court. According to the bankruptcy court, that section authorizes the appointment of a foreign representative by a debtor in certain circumstances and should be interpreted broadly to facilitate the purposes of Chapter 15.

Here, according to the New York bankruptcy court, Agro was functioning like a traditional "debtor in possession" in that it retained control of its operations. Indeed, Agro's trustee confirmed that Agro was generally in control of its affairs in a letter to Argo's sole manager. Because Agro was authorized to manage its affairs, it could (as it did) appoint Ms. Panchovska as its foreign representative by executing a power of attorney. Thus, according to the bankruptcy court, the appointment of Ms. Panchovska as a foreign representative satisfied the section 101(24) definition. The court further noted that the Bulgarian court was aware of the Chapter 15 case and Ms. Panchovska's appointment, but had not taken any action to enjoin or otherwise affect Ms. Panchovska's appointment. According to the court, this fact "lends further credence" to the court's conclusion that Argo had the authority to appoint the foreign representative.

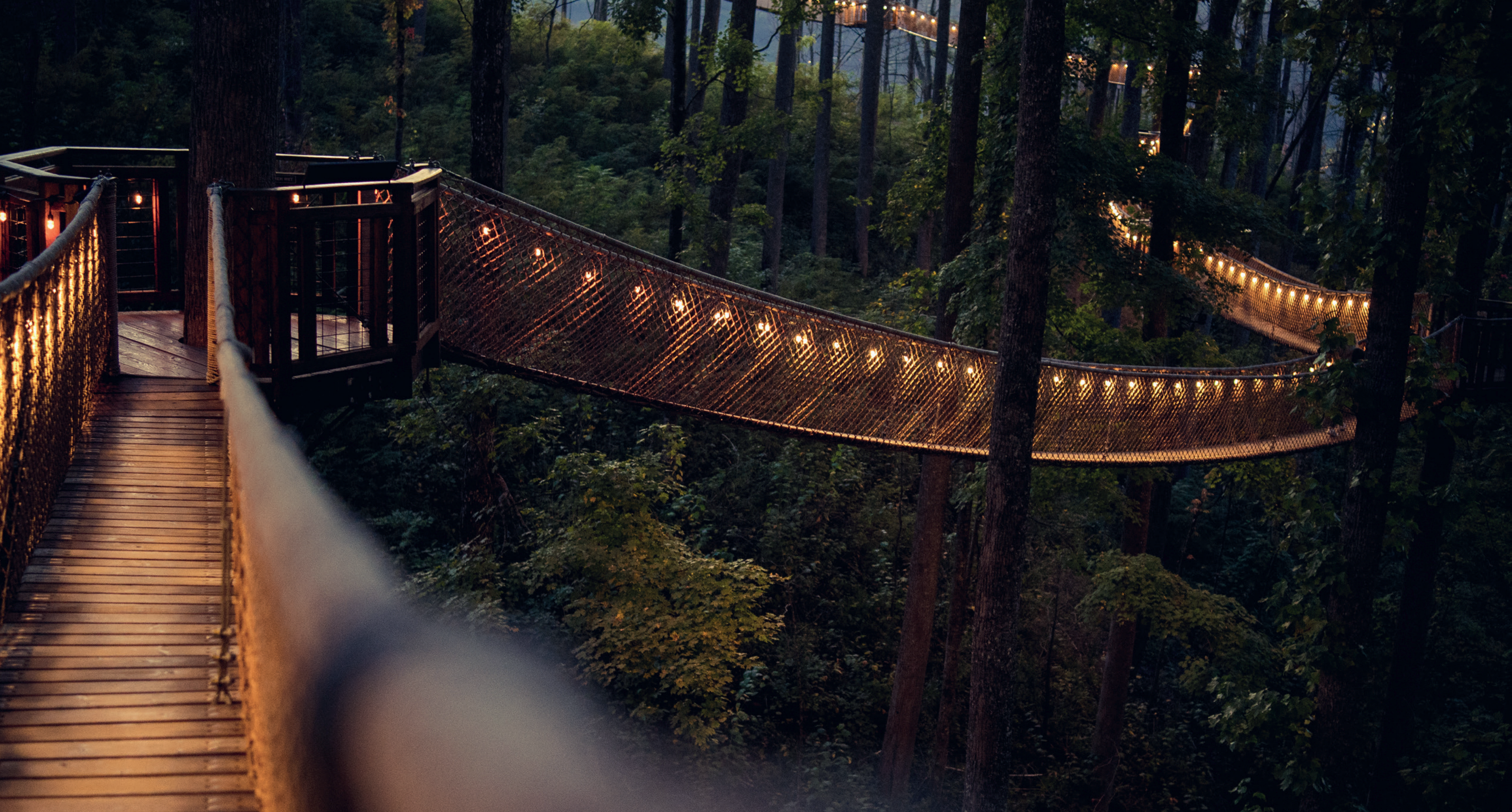
In coming to its conclusion, the bankruptcy court emphasized that it was not opining on Bulgarian law, specifically whether the appointment was a new transaction that required the trustee's consent. According to the bankruptcy court, that was an issue that the Bulgarian court was best suited to address. The bankruptcy court nevertheless noted that the appointment of a foreign representative was likely not a new transaction under Bulgarian law. Moreover, to the extent it was a new transaction, the bankruptcy court determined that the trustee's approval was likely only required if the debtor was going to pay Ms. Panchovska's fees, which was not the situation here as a creditor had agreed to pay her. The bankruptcy court further noted that its conclusion that Agro was authorized to appoint the foreign representative was bolstered by the lack of action from the trustee to challenge Ms. Panchovska's appointment. Ultimately, the court granted Ms. Panchovska's Chapter 15 petition and recognized the Bulgarian bankruptcy case as a foreign main proceeding, resulting in a stay of the US litigation.

The conversion of a foreign restructuring to a liquidation does not require the filing of a new Chapter 15 case

Following the filing of a Chapter 15 petition, a foreign representative is obligated to inform the US court as to "any substantial change" in the status of the foreign proceeding. Like a US Chapter 11 case, a foreign restructuring may be converted to a liquidation. When that happens, the foreign representative is obliged to inform the US court. However, the Bankruptcy Code is silent as to the process for obtaining recognition of a converted foreign proceeding. Faced with a request by provisional liquidators to amend a prior order recognizing a South African restructuring, the US Bankruptcy Court for the Southern District of New York held that the provisional liquidators did not have to file a new Chapter 15 petition. Instead, the court held that it could amend its prior order to recognize the liquidation, and substitute the newly appointed provisional liquidators for the previously-recognized "Business Rescue Practitioners" ("BRPs") in a pending discovery dispute. *See In re Comair Ltd*, Case No. 21-10208, 2023 WL 1971618 (Bankr. S.D.N.Y. Feb. 12, 2023).

Comair Ltd. is a commercial airline that was in a reorganization proceeding before the High Court of South Africa. Following approval of a rescue plan by the South African court, the New York bankruptcy court issued an order granting recognition of (1) the South African reorganization as a foreign main proceeding, and (2) Comair's BRPs, who were entrusted with developing a business rescue plan, as the foreign representatives. In addition, the New York bankruptcy court allowed the BRPs to take discovery from an aircraft manufacturer.

As a result of, among other things, COVID-19 related restrictions and rising fuel prices, the BRPs concluded that Comair could not survive as a going concern. Consequently, the



BRPs requested, an order from the High Court discontinuing the rescue proceeding and placing Comair into liquidation. The High Court granted that request and appointed joint provisional liquidators to administer Comair's liquidation (the "JPLs"). The High Court also authorized the JPLs to bring legal proceedings on behalf of Comair and to request an amendment of the New York court's recognition order.

In accordance with the authority conferred by the High Court, the JPLS filed a motion with the New York court for an order modifying its prior orders to (1) recognize Comair's liquidation as a foreign main proceeding, (2) recognize the JPLs as the foreign representatives, and (3) substitute the JPLs for the BRPs in matters before the New York court, namely in the discovery order. The aircraft manufacturer opposed the motion, arguing that the liquidation is a different proceeding than the business rescue proceeding. Accordingly, the manufacturer argued that the JPLs must file a new Chapter 15 petition for recognition of the liquidation and separately justify the request for discovery that was previously granted to the BRPs. The New York court was unpersuaded by the manufacturer's arguments.

Section 101(23) of the Bankruptcy Code defines a foreign proceeding as a "collective judicial or administrative proceeding in a foreign country…under a law relating to insolvency or adjustment of debt in which proceeding the assets and affairs of the debtor are subject to control or supervision of a foreign court, for the purpose of reorganization or liquidation." The New York court found (as advocated by the JPLs) that the "South African business rescue proceeding and the liquidation are parts of one foreign proceeding." Indeed, by necessity, according to the New York court, a reorganization proceeding must permit liquidation of a company that is unsuccessful in its reorganization efforts. Here, the only material difference between the liquidation and the rescue proceeding is the replacement of the BRPs with the JPLs, and that was insufficient to find that they were separate proceedings. "The deliberately flexible nature of Chapter 15 is designed to accommodate exactly this kind of administrative difference among international insolvency proceedings."

Having concluded that the liquidation was a continuation of the business rescues proceeding, the New York court conducted a "fresh analysis" of the liquidation to ensure that it satisfied the requirements of Chapter 15. In particular, it concluded that (1) the liquidation was a foreign main proceeding (i.e., pending in Comair's center of main interests), and (2) the JPLs were the foreign representatives. The court further concluded that the JPLs satisfied the procedural and evidentiary requirements of Chapter 15 by, among other things, filing a copy of the order placing Comair into liquidation and appointing the JPLs. Moreover, recognition of the liquidation would not be manifestly contrary to US public policy.

In addition to modifying its prior recognition order to provide for recognition of the liquidation and the JPLs, the New York court modified the discovery order to permit the JPLs to continue pursuing discovery from the aircraft manufacturer. The court was satisfied that substitution of the JPLs for the BRPs was appropriate under Rule 25(c) of the Federal Rules of Civil Procedure, which permits the substitution of parties in an action if an interest is transferred. Here, because BRP's interest in investigating claims and in the discovery was

transferred to the JPLs and the JPLs replaced the BRPs as Comair's fiduciary, the court authorized the JPLs to obtain discovery from the manufacturer. Accordingly, the New York court modified its prior order and recognized the liquidation as a foreign main proceeding, and the JPLs as the foreign representative, and authorized them to seek discovery without requiring them to file a new Chapter 15 case.

A US court may bar a foreign representative from appearing before it

As noted above, a foreign representative is required to inform the US court in a Chapter 15 case of any "substantial change" in the status of the foreign proceeding or the foreign representative's appointment. Last year, a bankruptcy court barred a foreign representative from appearing before it because the foreign representative failed to inform the court of key developments in the foreign proceeding. *See In re Ace Track Co., Ltd., 647 B.R. 919 (Bankr. N.D. Ill. 2023).*[1]

Ace Track Co. Ltd. was a debtor in a rehabilitation proceeding in the Republic of Korea. Upon the request of the foreign representative, the US Bankruptcy Court for the Northern District of Illinois issued an order recognizing the Korean proceeding as a foreign main proceeding under Chapter 15. After nearly five years without activity in the Chapter 15 case, US counsel for the foreign representative filed motion to withdraw as counsel on the basis that there had been no contact with the foreign representative. Thereafter, the Illinois bankruptcy court contacted the Korean court and learned that the Korean court had approved a restructuring plan for Ace Track in 2015 and terminated the Korean proceeding in 2018.

Given the status of the Korean proceeding and lack of information from the foreign representative, the Illinois court scheduled a hearing to consider, among other things, entry of an order closing the Chapter 15 case and barring the foreign representative from appearing as a foreign representative in future Chapter 15 cases. The foreign representative did not appear at the hearing. Finding that the foreign representative failed to fulfill its duty to inform, the Illinois court barred the foreign representative from acting as a foreign representative before the Bankruptcy Court until it demonstrates that "he understands and will abide by his obligations to this court as petitioner in matters before it." In addition, the court closed the Chapter 15 case given that the Korean proceeding had previously been terminated.

Creditor may obtain discovery under Chapter 15

Chapter 15 provides that a foreign representative may obtain discovery "concerning a debtor's assets, affairs, rights, obligations, or liabilities." *See* 11 U.S.C. §1521(a)(4). Chapter 15, however, is silent as to the ability of a creditor or other party to obtain discovery in a Chapter 15 case. Consequently, foreign representatives have opposed discovery requests from creditors and other parties, arguing that they were not entitled to discovery under Chapter 15. Last year, two bankruptcy courts considering the issue determined that (in at least some instances) creditors may be entitled to discovery aimed at a foreign representative or relevant third parties.

In the Chapter 15 case of *In re Golden Sphinx Ltd.,* Case No. 22-14320, 2023 WL 2823391 (Bankr. C.D. Calif. March 31, 2023), the US Bankruptcy Court for the Central District of California concluded that there are two principal sources for a court's power to authorize discovery in a Chapter 15 case. First, section 1521(a)(4) of the US Bankruptcy Code generally provides that a foreign representative may obtain discovery. Second, Bankruptcy Rule 2004 generally authorizes a court to order discovery upon the request of any party in interest, which may be a creditor. Discovery under Bankruptcy Rule 2004 must relate "to the acts, conduct, or property or to the liabilities and financial condition of the debtor, or to any matter which may affect the administration of the debtor's estate, or to the debtor's right to a discharge." Courts have described the scope of discovery under Bankruptcy Ruler 2004 as broad and as authorizing a "fishing expedition." Because Bankruptcy Rule 2004 applies to Chapter 15, according to the California court, it is thus available to any party in interest.

In this instance, the court's ruling proved a pyrrhic victory for the creditor as the court limited a creditor's ability to obtain discovery in a Chapter 15 case. In particular, the court observed that a party other than a foreign representative may be entitled to discovery in connection with its challenge to recognition of the foreign proceeding (e.g., discovery related to the definitional requirements of a foreign proceeding). In addition, a party may be entitled to discovery under Chapter 15 if (1) a foreign court requests a US court's assistance in overseeing discovery in the US, or (2) discovery could facilitate the US court's assistance of the foreign proceeding by, for example, disclosing a valuable claim that the foreign representative was "wrongfully refusing to pursue." However, the court found that it would not be proper to allow a creditor

1 For a more detailed discussion of the Ace Track decision, see US Bankruptcy Court dismisses Ch. 15 case, bars foreign representative from appearing before it | Restructuring touchpoint | Global law firm | Norton Rose Fulbright

to use Bankruptcy Rule 2004 as a "fishing expedition" in a Chapter 15 case. According to the court, that would defeat "the whole point of Chapter 15," which "is to avoid a multiplicity of international proceedings and instead focus most litigation in the foreign main proceeding." Moreover, the court would not permit the creditor to obtain discovery in the Chapter 15 case that related to pending litigation elsewhere. Thus, the court denied the creditor's discovery request, which were broad and sought information to be used in litigation pending elsewhere.

In the Chapter 15 case of *In re Ascentra Holdings, Inc.*, Case No. 21-11854, 2023 WL 8446208 (Bankr. S.D.N.Y. Dec. 5, 2023), the US Bankruptcy Court for the Southern District of New York similarly held that a party that asserted an interest in US assets was entitled to discovery in a Chapter 15 case. Following entry of an order recognizing a Cayman Islands liquidation that included a provision restraining the transfer of certain funds, a party claiming an interest in such funds requested that the New York bankruptcy court vacate its prior recognition order. In connection with that request, the party requested discovery from certain individuals who submitted declarations in support of the liquidators' Chapter 15 petition. The liquidators opposed both requests.

Overruling the liquidators' objections, the court noted that Bankruptcy Rule 1018 provides that certain discovery rules that would be applicable in an adversary proceeding and traditional litigation in US federal court apply to a contested Chapter 15 petition or a request to vacate a recognition order. Thus, in this instance, the party was entitled to discovery because it filed a request to vacate the recognition order. Moreover, because the liquidator opposed the vacatur request, it was a "contested matter," which is not defined by the Bankruptcy Code or Bankruptcy Rules, but is generally understood to refer to a dispute before a bankruptcy court (other than an adversary proceeding). Under the Bankruptcy Rules, a party is entitled to certain discovery in connection with a contested matters. Thus, the court concluded that the party claiming an interest in the funds subject to the injunction could obtain discovery in connection with its request to vacate the recognition order.

A US court may limit use of discovery

As noted above, section 1521(a)(4) of the Bankruptcy Code generally provides that a foreign representative may obtain discovery. Section 1522 further provides that in granting relief under Section 1521, including discovery, a court must ensure that "the interests of the creditors and other interested including the debtor, are sufficiently protected." 11 U.S.C. §1522. According to the US Bankruptcy Court for the Southern District of New York, "section 1522 is the basis for assessing and, where appropriate, imposing a protective or confidentiality order to accompany discovery authorized under section 1521." *In re Historic & Trophy Buildings Fund FCP-SIF*, Case No. 22-11461, 2023 WL 5525044 (Bankr. S.D.N.Y. Aug. 25, 2023).

Following recognition of a Luxembourg liquidation proceeding under Chapter 15, a Luxembourg liquidator obtained an order authorizing discovery from several US affiliates of the debtor. The US affiliates consented to the discovery order, subject to an agreement with the liquidator on the form of a protective order that would preserve the confidentiality of commercially sensitive information. Unable to reach an agreement, the US affiliates filed a motion for a protective order that would (1) limit access to confidential information to the liquidator's counsel, and (2) preclude the transmittal of confidential information to the liquidator, the Luxembourg court, or Luxembourg prosecutors. The bankruptcy court denied that request.

The court acknowledged that a target of discovery may obtain a protective order that protects confidential information from public disclosure. In this instance, after balancing the interests of the parties as required by section 1522, the court rejected the US affiliates' request to limit access to the information produced to the liquidator's counsel. According to the court, the liquidator has a "clear and substantial need for the information" requested. In particular, the liquidator intended to use the information to analyze and develop potential claims that could result in meaningful recoveries to the debtor's creditors. In contrast, the US affiliates did not demonstrate that they faced "any significant risk" of public disclosure by not limiting access to the liquidator's counsel. The parties understood that the liquidator could be obligated under Luxembourg law to share the fruits of the discovery with the Luxembourg court and/or prosecutors. In neither instance, however, would the documents necessarily be available to the general public. Indeed, the liquidator pledged to preserve the confidentiality of the information if used in Luxembourg. According to the bankruptcy court, the risk that the governmental authorities would disregard this pledge and disclose such information was not sufficient to support a protective order. Moreover, such a limitation on sharing the discovery with the Luxembourg court would contravene one of the purposes of Chapter 15, which is to

facilitate cooperation between US courts and foreign courts. Consequently, the bankruptcy court held that it had authority to issue a protective order but would not limit sharing of discovery with the Luxembourg court or prosecutors.

Chapter 15 discovery orders are not appealable

In general, a discovery order is not a final order and thus not appealable unless the target of discovery is held in contempt for refusing to comply with the discovery order. However, the US Court of Appeals for the Second Circuit, which covers New York, Connecticut, and Vermont, previously concluded that a Chapter 15 discovery order is appealable. *In re Barnet*, 737 F.3d 238 (2d Cir. 2013). According to the Second Circuit, a discovery order in a Chapter 15 case is generally final because a discovery order is (often) the ultimate result of a Chapter 15 case and there is no expectation that the bankruptcy court will take any further action. Despite the *Barnet* decision, two United States District Courts in 2023 dismissed appeals from Chapter 15 discovery orders on the basis that they were not final orders.

In the first case involving Comair Limited, the US District Court for the Southern District of New York held that the bankruptcy court's discovery order was not a final disposition of an issue from which the discovery target could appeal as of right. *In re Comair Ltd.*, Case No. 21 Civ. 10146, 2023 WL 171892 (S.D.N.Y. Jan. 12, 2023). There, the South African foreign representative obtained a discovery order over the objection of an aircraft manufacturer. On appeal by the manufacturer, the district court concluded that the discovery order was not a final, appealable order. Foremost, the bankruptcy court noted that the discovery order "left open the question of the potential scope of discovery" and directed the parties to meet and confer to negotiate the terms of the discovery order. The order further provided that the parties should contact the bankruptcy court if they could not agree to the terms. Moreover, there were other pending issues in the Chapter 15 case, particularly those resulting from the conversion of the business rescue proceeding to a liquidation discussed above, that supported the conclusion that the discovery order did not resolve the Chapter 15 case. Thus, according to the district court, the bankruptcy court's role was not over in the Chapter 15 case and its discovery order was not a final order subject to appeal. In addition, the court concluded that there were no "exceptional circumstances" that would warrant granting a request for leave to appeal the interim discovery order. Thus, the appeal was dismissed.

In the second case, the US District Court for the Southern District of Florida similarly held that a Chapter 15 discovery order is not a final order subject to appeal. *See Hood v. Magno (In re SAM Industrias S.A.)*, 655 B.R. 245 (S.D. Fla. 2023). Following recognition of a Brazilian liquidation, the foreign representative obtained an order from a bankruptcy court compelling production of documents from one of the Brazilian debtors' former counsel, who appealed the bankruptcy court's decision. On appeal, the district court noted the US Court of Appeals for the Eleventh Circuit, which includes Florida, Georgia, and Alabama, previously refused to adopt the *Barnet* rationale and held that Chapter 15 discovery orders are not always final. In this instance, the district court concluded that discovery was not necessarily the ultimate goal of the Chapter 15 case. According to the foreign representative, "the purpose of the Chapter 15 proceedings is to locate and attempt to seize any assets that the Debtor has hidden in the United States and elsewhere." Discovery was likely only a step towards accomplishing that purpose. Because there was at least a potential for future action by the bankruptcy court in the Chapter 15 case, the district court held that the discovery order was not final and thus not subject to appeal. Moreover, like the court in *Comair,* the Florida district court denied the appellant's request for leave to appeal the interim discovery order, and thus dismissed the appeal.

Conclusion

A debtor with cross-border operations or assets in multiple jurisdictions will often find itself needing relief from multiple courts. In the US, Chapter 15 provides a flexible tool to assist with the administration of a foreign liquidation or debt restructuring. Relief under Chapter 15, however, is not limited to relief that is coextensive to what is available in the foreign forum. Instead, Chapter 15 provides foreign debtors and their representatives with benefits that may not be available outside the US. For example, foreign debtors and their representative can utilize Chapter 15 to obtain discovery or pursue claims that may not be available elsewhere. However, a US court can only grant such relief if it is satisfied that the interests of all interested entities are sufficiently protected and that the relief does not violate US public policy. Assuming those thresholds are met, a US court may grant relief beyond what may be available in the debtor's home court.

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ESG and directors' duties – are they compatible?

Scott Atkins, Sarah Coucher, Francisco Vazquez, Kai Luck

Investors, financiers, customers, employees and, of course, regulators are increasingly taking an interest in environmental, social and governance (ESG) issues, putting pressure on businesses with their money, their feet and the law. A team from Norton Rose Fulbright across the UK, the US and Australia asks whether positive action on things like climate risk can be seen as a new type of director's duty and considers the personal liability risks that might arise from breaching it.

Introduction

The transition to a greener, more sustainable future has been gaining significant momentum for some time. There is now a high level of pressure for companies to take action on various environmental, social and governance matters – with climate change and environmental responsibility and sustainability areas of particular focus. The pressure comes from multiple sources.

The investors

First, investors are increasingly using ESG metrics and ratings to shape their investment decisions in companies. According to figures from July to September, there are now over 5,300 signatories, representing more than US $120 trillion in assets under management worldwide, to the United Nation's Principles for Responsible Investment (PRI), a group with a core goal of helping investors protect their portfolios from climate-related risks.

The financiers

Banks and insurers are also actively transitioning their loan, insurance and investment portfolios away from high-emitting customers – including under the auspices of global sustainability frameworks such as the Equator Principles, the UN Principles for Sustainable Insurance *and* the UN Net Zero Banking Alliance – as green bonds and finance are becoming more prevalent in the market.

The Equator Principles are a set of 10 principles that are intended to serve as a common and risk baseline and management framework for financial institutions to identify, assess and manage environmental and social risks when financing projects. At the end of 2022, 138 financial institutions from 38 different countries had signed up as Equator Principles Financial Institutions.

The UN Principles for Sustainable Insurance, meanwhile, are a global framework for the insurance industry to address environmental, social and governance risks and opportunities launched at the 2012 UK Conference, and the UN Net Zero Banking Alliance is a group of leading global banks committee to finance ambitious climate action to transition the real economy to net-zero greenhouse gas emissions by 2050.

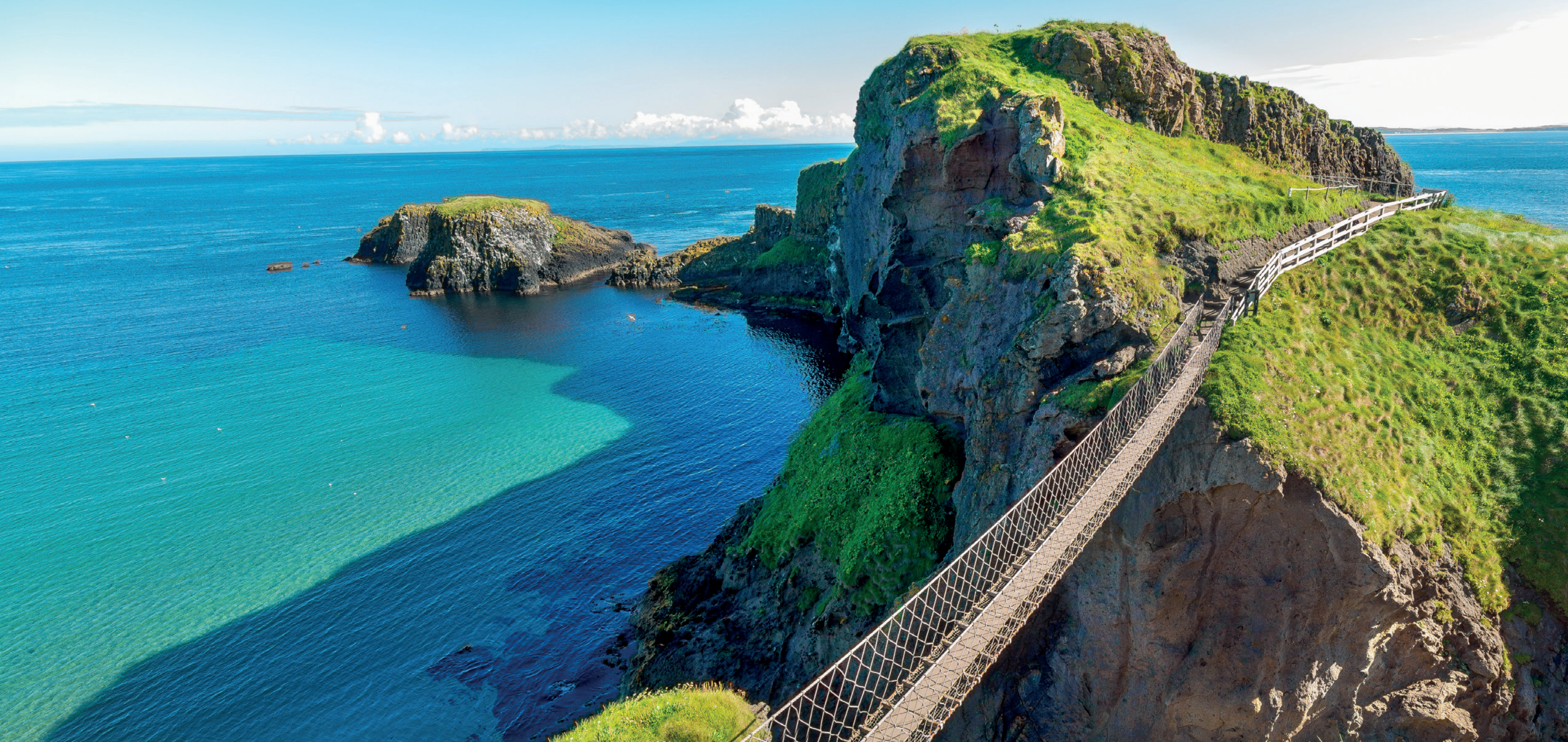
The customers and the employees

The expectation to take action on climate change and other sustainability goals is also reinforced by customers and employees. A recent IBM study released on 13 April 2022 found that 68% of respondents are more willing to accept jobs from organisations they consider to be environmentally sustainable. A PwC study also found that 83% of consumers think companies should be actively shaping ESG best practices.

The regulators

New regulations have also been introduced that require companies to actively consider, measure, manage and disclose the key climate risks impacting their businesses.

The United Kingdom was one of the first jurisdictions to introduce these requirements, with large entities required to include material disclosures on climate risks in their annual financial reports with effect from 6 April 2022 under the Companies (Strategy Report) (Climate-related Financial Disclosures) Regulations 2022 and the Limited Liability Partnerships (Climate-related Financial Disclosures) Regulations 2022.



The disclosure standards in that legislation align with a framework established by the Financial Stability Board's Task Force on Climate-Related Financial Disclosure which was established in 2015 to increase reporting of climate-related financial information and disbanded last year after fulfilling its remit.

In the US, California has enacted two laws, the Climate Corporate Data Accountability Act and Greenhouses gases: Climate-Related Financial Risk (see below for full references) that would require large companies that do business in California to disclose certain climate-related information, including direct and indirect carbon emissions starting in 2026, upstream and downstream indirect emissions of customers and suppliers starting in 2027 and to publicly disclose a climate-related financial risk report every other year.

In addition, the United States Securities and Exchange Commission has proposed similar disclosure rules for all US public companies. The final rule remains pending.

The Australian government is currently in the process of drafting legislation with a view to mandatory climate reporting from the 2024-25 financial year, commencing with listed entities and large financial institutions ahead of other entities in later years.

In all three jurisdictions, the form of the disclosure requirements is expected to align with the new standards released by the International Sustainability Standards Board (ISSB) in June 2023 – a sustainability standard (IFRS S1) and a climate-related disclosure standard (IFRS S2).

Directors' duties

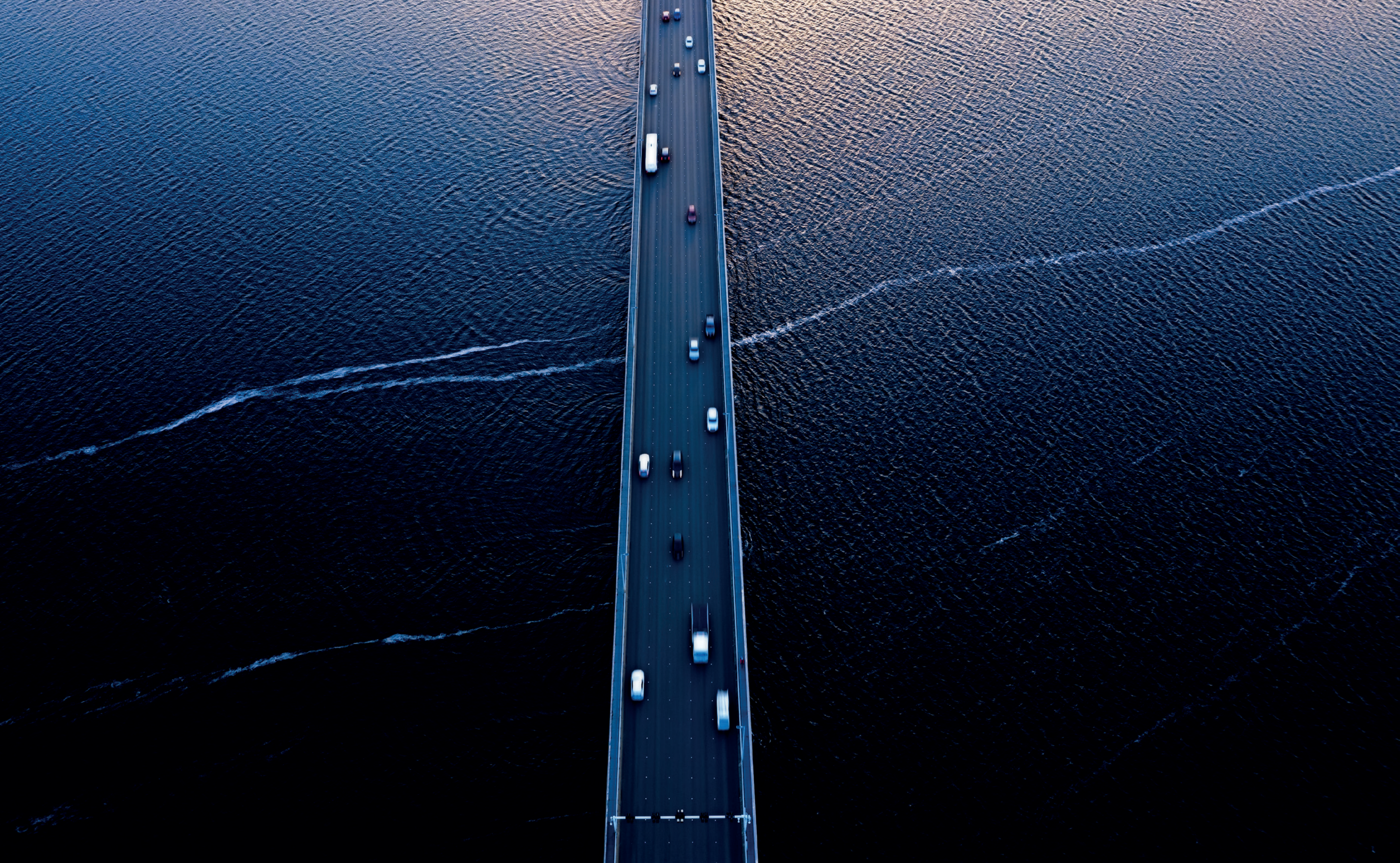
An important question is whether these developments fit comfortably with the core duties and responsibilities owed by directors of a company. Aside from any mandatory disclosure rules to what extent can taking *positive action* on mitigating climate risks and driving sustainability be seen as an incident of directors' existing duties to the company? What are the personal liability risks if climate and sustainability measures are not adopted? And finally what improvements might be needed to existing laws to provide a clearer climate and sustainability governance framework for directors in the future?

This article seeks to address these issues focusing particularly on directors' duties, with reference to recent developments in the United Kingdom, Australia and the United States.

United Kingdom

Under the UK Companies Act 2006 a director has a duty to act *in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of the members as a whole,* having regard to certain considerations including the likely consequences in the long term and impact of the company's operations on the community and the environment (section 172). In addition, section 174 requires directors to exercise care, skill and diligence both measured on an objective and a subjective basis in carrying out their duties.

In 2023 ClientEarth, a non-profit environmental law organisation and UK registered charity, took a derivative action against the directors of Shell Plc for breach of those



duties in relation to the company's climate strategy. The claim was rejected by the court for not having a *prima facie* case that the directors were in breach but more notably on the basis that it was not for the court to interfere with the commercial decisions taken by directors.

Although this decision was dismissed on *prima facie* grounds and therefore the actions of the directors were not considered in detail, it is difficult to see at present how in the absence of exceptional circumstances, a UK court will give weight to the duties of directors to have regard to the cost to the environment as a consequence of their actions and it may always be a defence for them if such actions were, nevertheless, in the interests of the shareholders alone.

If there were more support among other shareholders as encouraged by the PRI – and if the agitating shareholders held more than a de minimis shareholding – then the result may be different in a similar matter in future. Of course, it is important to note that there is no easy way to take an action for breach of directors' duties if you are not a shareholder.

In addition to the promotion of the PRI among the investment community, it is also interesting to see that the UK's Institute of Directors is increasingly focussing on reforming directors' duties in section 172 to reflect changing attitudes towards ESG. In its Corporate Governance paper from September 2023, *Shareholders or Stakeholders – For whom do directors govern the corporation*, the merits of stakeholder value over shareholder value were discussed and the paper concluded that the balance is changing "...towards a situation in which company direction is more complex than simply maximising shareholder value".

That said, given the difficulty of pursuing directors for personal liability for the failure to manage ESG risks on the current framing of the legislation, a policy goal to achieve greater alignment of corporate conduct with climate change mitigation and the management of other ESG issues may only be pursued through legislative change.

This is what the "Better Business Act" coalition in the UK seeks to achieve, a campaign for a change to section 172 to ensure businesses are legally responsible for benefitting workers, customer, communities, and the environment while delivering profit.

Australia

In Australia, directors have core statutory duties under sections 180 and 181 of the *Corporations Act 2001* (Cth) – and corresponding general law duties – to act with reasonable care, skill and diligence, and in good faith in the best interests of the company.

There is a basis to argue that, if directors do not take action on climate change, for example seeking to reduce emissions and moving lending and investment portfolios and supply chains away from heavy emitting entities and projects, they may breach these duties by exposing the company to clearly foreseeable risks. Those risks may take the form of a quantifiable impact on profits, not only as climate physical and transitional risks materialise under current forecasts, but also as customers, employees and investors decline to do business with the company and as financiers and insurers become more unlikely to offer credit and insurance at affordable commercial rates.

In that sense, climate risks are not "non-financial" risks at all, and it could be argued that the "shareholder primacy" model, under which directors' duties to the company are commonly understood as a duty to maximise profits and shareholder value, inherently reflects a need to take into account and properly balance ESG risks.

Recent test cases have sought to explore this theory, including a claim lodged by Friends of the Earth against ANZ Bank with the Australian National Contact Point for Responsible Business Conduct – an organisation responsible for promoting the OECD Guidelines for Multinational Enterprises on Responsible Business Conduct – asserting non-compliance. Another claim filed by a shareholder of ANZ in the Federal Court of Australia in November 2023 asserts that ANZ has failed to properly manage the material risks of climate change and biodiversity loss.

While targeted at the corporate level, it would not be a difficult link to assert personal liability for directors on a "stepping stone" basis – that, in exposing the company to legal breaches, the directors have breached their own duties to the company. Such a claim would be advanced under section 180 of the Corporations Act and framed as a breach of the duty to act in the best interest of the company.

At the same time, however, it cannot be assumed that ESG risks impact all companies equally, and in balancing the extensive range of competing interests and factors impacting the success of the company in both the short-term and the long-term, it may be the case that investment in a potentially costly climate change mitigation program, and other ESG-focused measures, need not be pursued in the commercial judgment of the directors.

Indeed, given the difficulties experienced by ClientEarth in its derivative action filed against Shell's board in the UK, which emphasised the managerial prerogative of directors in commercially assessing the best interests of the company and determining the relative importance of ESG risks among many other commercial factors, the basis for personal liability for directors resulting from the failure to mitigate and manage ESG risks is anything but certain.

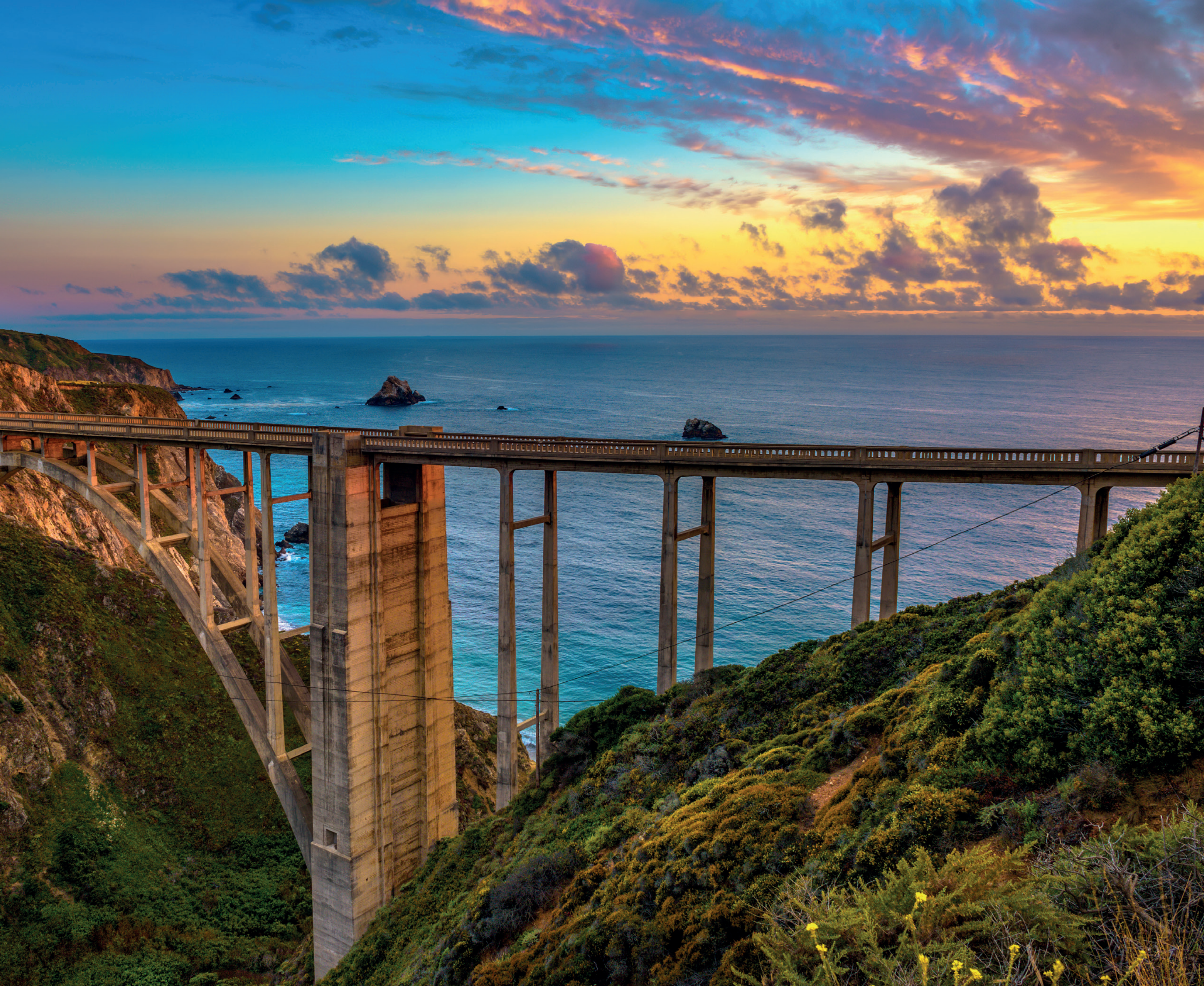
United States

In the US, the standard for director liability is governed by the law of incorporation of a company. Given that Delaware has historically been the preferred place of incorporation, this article focuses on director duties under Delaware law.

Under Delaware law, a director has two principal duties: a duty of care and a duty of loyalty. Duty of care generally requires a director to exercise the amount of care that an ordinarily careful and prudent person would reasonably believe to be appropriate in similar circumstances. The focus is generally on the decision-making process. In this respect, a director should inform himself or herself of all material information reasonable available and otherwise act prudently. The duty of loyalty requires a director to protect the interest of the company and avoid conduct that would harm the company. The duty of loyalty includes (1) a duty to deal candidly with fellow directors, and (2) a duty to inform directors of information material to the company, and (3) a duty to act in good faith with honesty of purpose and a genuine care for the company and its shareholders.

Directors may be considered to have a duty to at least consider ESG issues when they present material risks to the company. However, a board's decisions are typically entitled to deference under the "business judgment rule." The Business Judgement Rule recognises that for a board to maximize value of the company, it has to take risks without undue fear that the decision will be overturned or result in liability.

Accordingly, a court will rarely substitute its judgment (or another's) absent a showing of fraud, illegality, or a conflict of interest. In that respect, in *re Simeone v. The Walt Disney Company* (see full citation below) the Delaware Court of Chancery held that a board's decision to "speak (or not speak) on public policy issues is an ordinary business decision" and not evidence of wrongdoing. Accordingly, the court denied a shareholder's request to inspect the company's corporate books and records.



The business judgment rule seemingly presents a substantial impediment to the pursuit of directors of traditional companies for personal liability relating to climate change and other ESG risks.

In addition to the traditional corporate entities, Delaware law authorises the formation of a "Public Benefit Corporation" or "PBC." Under Section 362(a) of the Delaware General Corporation Law a PBC is a for-profit corporation that "is intended to produce a public benefit or public benefits and to operate in a responsible and sustainable manner." The same section states that a director must balance "the pecuniary interests of the stockholders, the best interests of those materially affected by the corporation's conduct, and the specific public benefit or public benefits identified in its certificate of incorporation." Under section 365(b) of the Delaware law, that balancing requirement is satisfied if the director's decision is "informed and disinterested and not such that no person of ordinary, sound judgment would approve."

The protections given to a director's decision-making may explain why there apparently have not been substantial legal proceedings filed against directors for alleged breach of duties relating to ESG risks in the United States.

There does, however, appear to be an increase in litigation involving allegations of deficiencies in corporate disclosure relating to key climate risks and "greenwashing" (i.e. the misrepresentation of credentials relating to climate issues and risk management).

Concluding remarks

Businesses are led and operated through their boards and while legislation in the UK, Australia and the US appear to focus directors to maximise benefits to their shareholders and courts remain reluctant to interfere in directors' commercial decisions, it is difficult to see that a director can be criticised or held liable when a company's actions to do so conflict with the interests of the environment or indeed encourage directors to prioritise ESG matters.

However, there is a significant movement from a multitude of organisations representing all stakeholders towards change, and it might just be a matter of time when the relevant governments look to amend their laws to reflect these changing attitudes.

There are important insolvency and restructuring implications at play here also. To comply with obligations that will arise in a future focusing on sustainability and net zero emissions, companies will need to effectively operationalise climate commitments, especially in energy-intensive sectors, as they restructure core business functions, supply chains and relevant investment and finance portfolios. And conversely, given the changing attitudes of investors, lenders and other important stakeholders towards a more sustainable future, companies that do not embrace such change may not be in a position to invest and/or refinance their businesses.

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ClientEarth v Shell plc [2023] EWHC 1897 (Ch)

Shareholders or Stakeholders – For whom do directors govern the corporation - taken from the text of a speech delivered by Dr Roger Barker at the NEXT Corporate Governance Conference, Seoul National University 22 September 2023

In re Simeone v. The Walt Disney Company, 302 A.3d 956, 969 (Del. Ch. 2023).

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Scott Atkins is Australia Chair and Global Co-Head of Restructuring and Kai Luck is special counsel in our Sydney office; Francisco Vazquez is senior counsel in our New York office; and Sarah Coucher is Global Restructuring Strategy Director in our London office. All are members of the firm's global restructuring group.

Insolvency law reform and capacity building in emerging markets update on our experience in Armenia and Bhutan

Scott Atkins, Rodney Bretag

In the mystical Himalayas; in a valley beneath the nest of a flying tiger, lies the old town of Paro; gateway to the Kingdom of Bhutan and venue for a workshop where Australian Chair & Global Co-Head of Restructuring, Scott Akins and Special Counsel, Rodney Bretag will conduct a workshop with the Kingdom's insolvency practitioners and other stakeholders to discuss the first draft of a new insolvency law.

In the Q2 2023 edition of the *International Restructuring Newswire*, we provided a brief insight into our work in reforming insolvency law in Myanmar, Armenia, and Bhutan. Since that time, the sausage factories of law reform in Armenia and Bhutan have moved slowly but relentlessly towards the adoption of new insolvency laws.

In Bhutan, we have worked closely with the Asian Development Bank (**ADB**), its Bhutanese consultant, and Bhutan's Ministry of Finance (**MoF**) to draft a comprehensive new law to be known as the Insolvency Rescue Act. Informed by our previous work for the ADB in Myanmar as well as our wealth of experience in insolvency practice in Australia and elsewhere, the new law will include provisions for corporate rescue and rehabilitation, as well as the adoption of special provisions for Micro and Small to Medium Enterprises, Individual Rescue Arrangements, and Debt Relief Orders. These provisions have been drafted with the small scale of most business activity in Bhutan at the front of our minds.

Such provisions remain especially important in emerging markets and developing economies (**EMDEs**). In its latest World Economic Outlook Report issued in October 2023, the International Monetary Fund (**IMF**) scaled back its projection for GDP levels in EMDEs at the end of 2024 to 3.8%. The IMF commented in its Report, "… a full recovery towards pre-pandemic trends appears increasingly out of reach, especially in emerging markets and developing economies."

While an EMDE GDP growth of 3.8% compares favourably with the 1.4% projected by the IMF for advanced economies, it suggests that business in EMDEs will face many challenges in the months ahead and sets the context for the important work that Scott and Rod are doing in Bhutan and Armenia.

Global Co-Head of Restructuring, Scott Akins, pictured here with the ADB's representative in Bhutan, Sonam Lhendup

The next ADB-led mission to Bhutan from 10 to 19 April 2024 will be the third for NRF teams led by Scott and will include meetings with the MoF and other government and institutional stakeholders in the capital, Thimphu, before the three-day workshop in Paro to work through the first draft of the law (and accompanying rules and regulations) with insolvency practitioners and stakeholders from across Bhutan.

The implementation of the UNCITRAL Model Law on Cross-Border Insolvency as part of Bhutan's new insolvency law is another key feature of a best practice insolvency process which forms part of the proposed insolvency law reform in Bhutan. If enacted, the adoption of the Model Law will enhance foreign investment and business confidence due to the predictable, principled system for cross-border

recognition and cooperation that promotes efficiency, minimises costs, and increases the likelihood of successful restructuring outcomes. This is highly appealing for both creditors and debtors in determining where and how to invest funds and structure businesses in a globalised, interconnected world.

In the meantime, work on insolvency reform continues in the ancient land of Armenia in the shadow of Mount Ararat. Reflecting the fierce independence of a people who have fought encircling foes over the many centuries since this land became the first anywhere to call itself Christian, the Yerevan resident consultants retained by the ADB have taken the lead in the preparation of a final Concept Report, recently approved by the Ministry of Justice. This Report will be the subject of stakeholder consultations (attended by Scott and Rod) at what promises to be an interesting two day retreat in the hills outside Yerevan in early June 2024. It is anticipated that drafting work on a new insolvency law will be under way by the time of the retreat.

Institutional building efforts remain the focus of our attention in both Bhutan and Armenia as we seek to establish effective insolvency regimes, driven by a skilled, specialised body of insolvency practitioners who are, in turn, supported and regulated by strong institutions responsible for interpreting and administering the underlying laws.

Leading the design and implementation of new insolvency laws across Asia and the World remains amongst the most exciting and rewarding projects that Scott and Rod have undertaken in their long careers; at the vanguard of NRF's contribution to economic growth and development in EMDEs.

We'll keep you updated on the progress of these projects from time to time.

Scott Atkins is Australia Chair and Global Co-Head of Restructuring and Rodney Bretag is special counsel in our Sydney office in the firm's global restructuring group.

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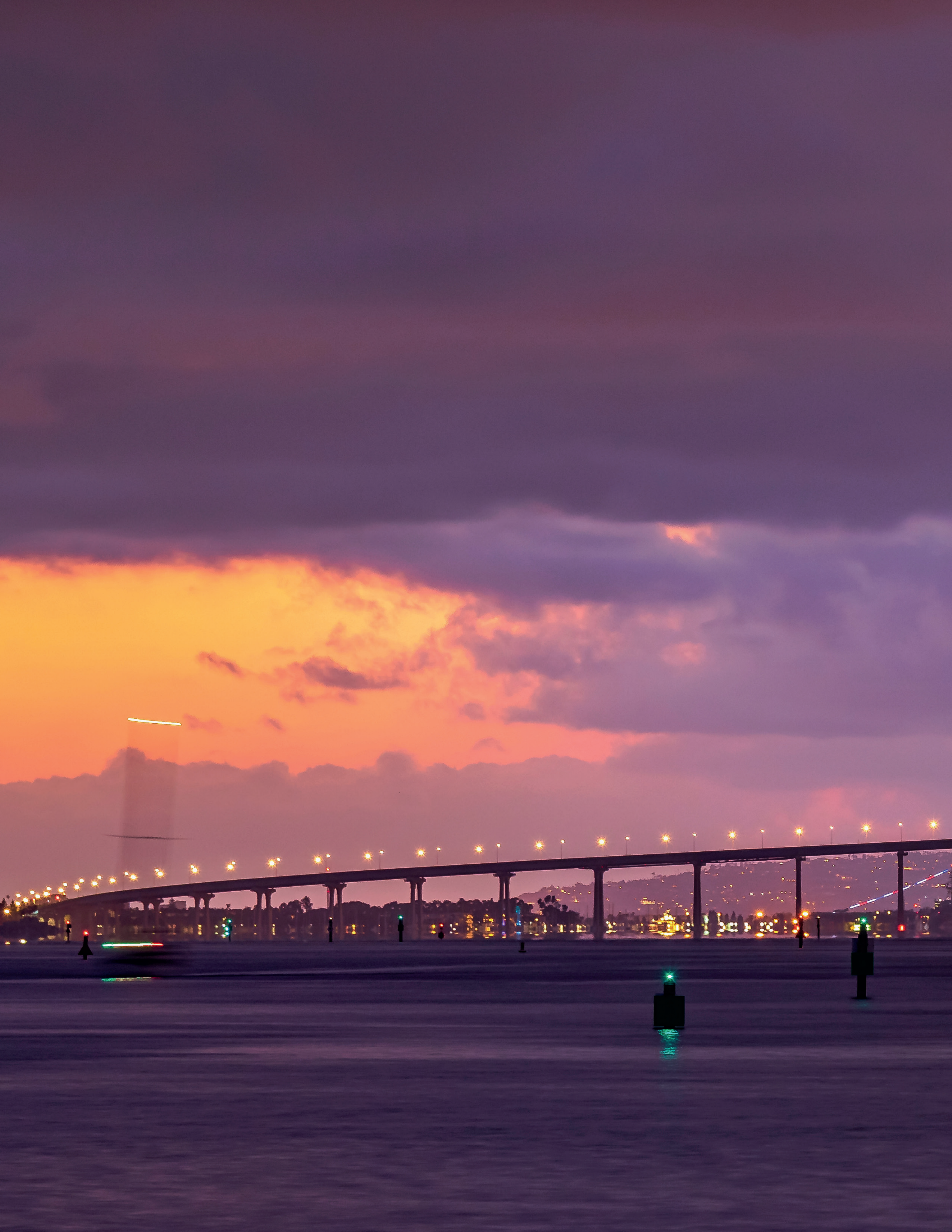

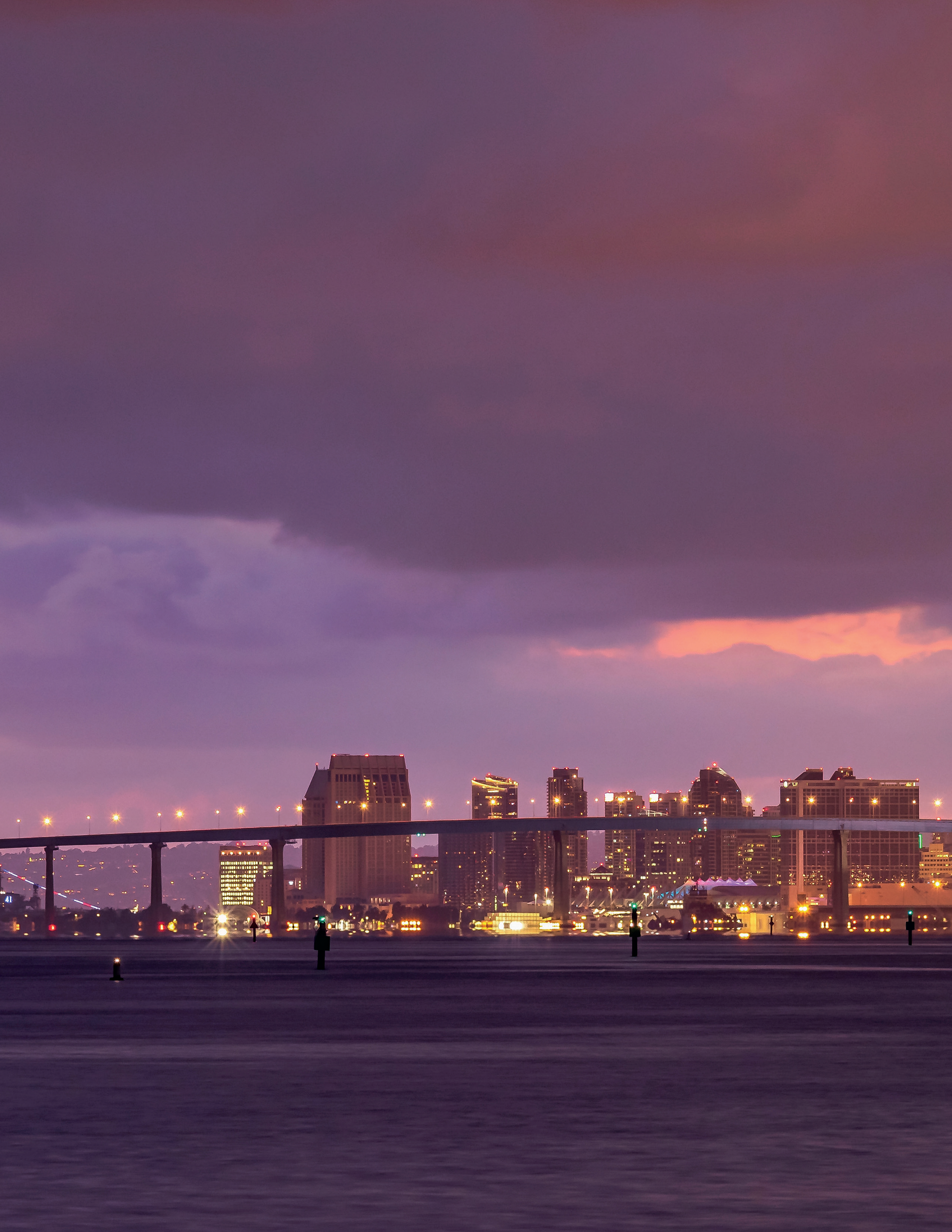

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