NORTON ROSE FULBRIGHT

International Restructuring Newswire

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

Q2 2025

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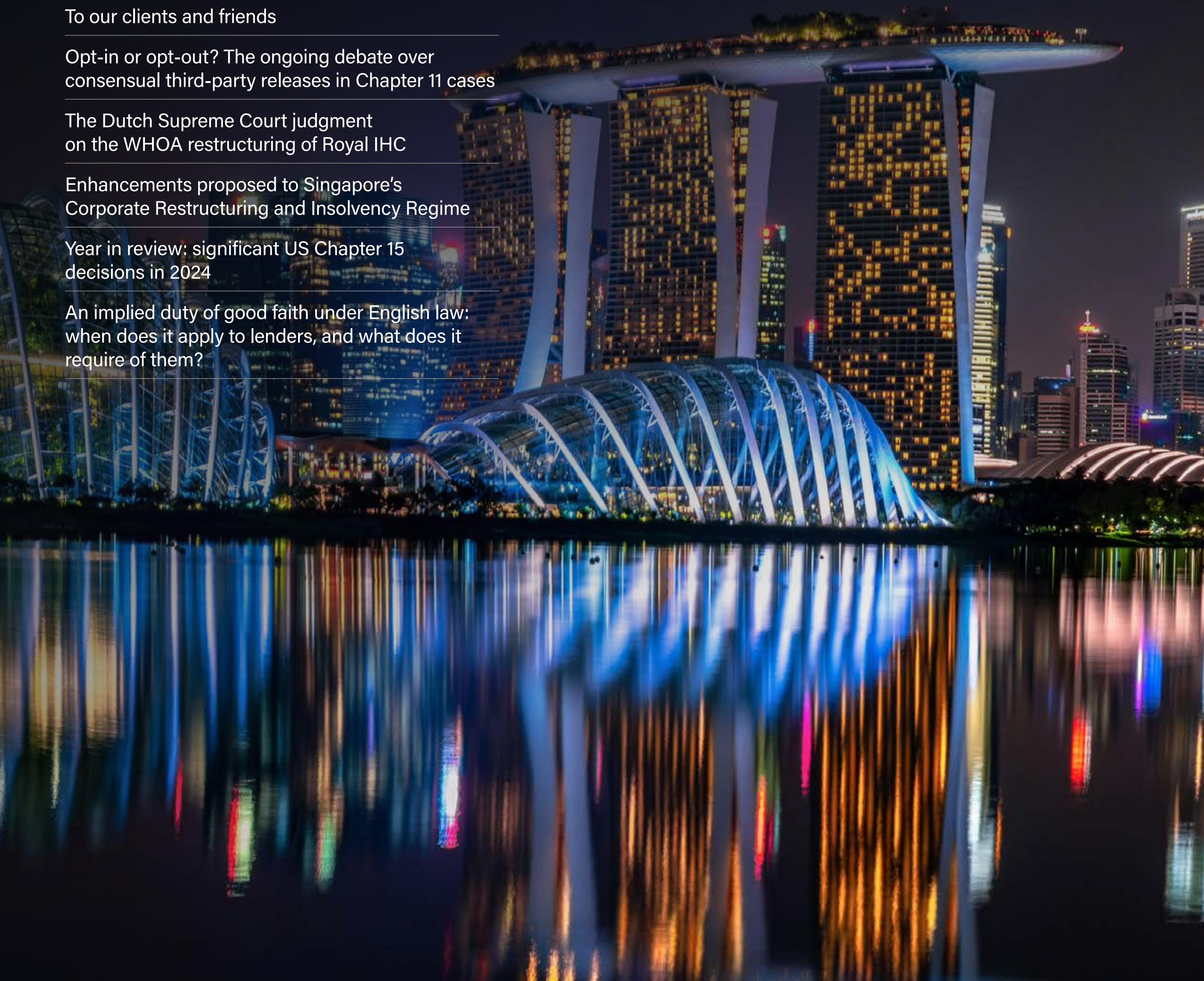

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To our clients and friends:

Welcome to the second quarter edition of our International Restructuring Newswire, where our global team of lawyers share valuable insights into the forces shaping the restructuring landscape.

As we navigate an era marked by tariff and trade disputes, inflationary pressure, broader geopolitical tensions, global markets and business operations are facing into significant and in some instances, unprecedented challenges. This dynamic reinforces the importance of proactive strategies, cross-border collaboration, and innovative problem-solving to address the complex needs of our clients. Now is a time to be adaptable and informed, and our global team of restructuring lawyers stand ready to provide critical guidance and advice during these turbulent times.

The global economic uncertainty only makes it more essential to stay on top of restructuring developments throughout the world. In this issue we look at insolvency reforms in Singapore; US Bankruptcy Courts' recent decisions on third-party releases; an annual review of Chapter 15 decisions; the Dutch Supreme Court judgment on the Royal IHC restructuring; and the English High Court decision on implying a duty of good faith when exercising contractual discretions.

We hope you find these articles useful.

If this has been forwarded to you then please get in touch if you would like to be included in our mailing list.

Scott Atkins
Australian Chair and Global Head of Restructuring
Sydney

In the news

Katie Mak Joins Norton Rose Fulbright Canada

Katie Mak recently joined our restructuring team in Vancouver. Katie's practice focuses on commercial insolvency and bankruptcy, corporate restructuring, financial services matters and related litigation matters.

Central District of California Judicial Conference

February 21, 2025
Rebecca Winthrop (Los Angeles) spoke at the 2025 Central District of California Judicial Conference. Rebecca presented a panel to 12 bankruptcy judges on "Five (years) after Subchapter V," a compendium of recent developments under Subchapter V of Chapter 11 of the Bankruptcy Code.

Concert for a Cause

February 27, 2025
Rebecca Winthrop (Los Angeles) organized a charity event in support of the Los Angeles wildfire relief efforts. The evening consisted of a cocktail reception and a performance of Robert Schumann's Piano Quartet, Op 47, featuring Los Angeles partner, Helen Kim, on piano, and the upcoming Interim President of the University of Southern California on cello. All donations went directly to various charities providing relief and recovery to those impacted by the fire.

California CLE Blitz

March 4, 2025
Rebecca Winthrop spoke at the firm's annual CLE Blitz, a two-day series of webinars planned for in-house counsel. Her panel –"Did I just hear that?" addressed practical considerations and impediments from bias in the courtroom during arbitrations or in mediations. The panel also included Los Angeles partners Debbie Birndorf and Jay Patel.

INSOL International Annual Conference

March 17–19, 2025
Norton Rose Fulbright was a main sponsor of INSOL's annual conference in Hong Kong. Our team had a large cross-border group in attendance with representation from our offices Australia, Singapore, UK, US and Germany. Over 700 professionals representing more than 300 firms from 60 countries attended the week-long conference of ancillary meetings and exceptional conference programming.

INSOL International and World Bank Group Latin America Round Table

May 5, 2025
Howard Seife (New York), chair of INSOL's Latin America Committee, led the annual invitation-only Latin America Roundtable sponsored jointly by INSOL and the World Bank in Lima, Peru. The event included judges, regulators and practitioners from over a dozen countries in the region to discuss common insolvency issues and solutions.

INSOL International Lima Seminar

May 6, 2025
Howard Seife also led INSOL's full-day in-person program in Lima. The event featured a curated program of renowned industry leaders providing insights into the latest global and offshore trends. Eric Daucher (New York) spoke on a panel: Group Insolvency and Guarantors: Navigating Cross-Guarantees and Release Complexities.

Prof. Omar Salah Speaker at CERIL 3rd International Conference

May 8–9, 2025
Prof. Omar Salah (Amsterdam) will speak at CERIL's 3rd International Conference on Schuman 2.0, where a distinguished panel of experts will examine the European Insolvency Regulation (EIR) 2015 SWOT analysis. The conference marks the 75th anniversary of the Schuman Declaration. This Declaration, signed on May 9, 1950, laid the basis for growing European collaboration and the current day European Union. It has also paved the way for various restructuring and insolvency law initiatives.

Prof. Omar Salah on INSOL Talks Podcast

Prof. Omar Salah (Amsterdam) participated in a recent episode of INSOL Talks with Sheila Ng of Rajah & Tann. They spoke on the use and implementation of cross-border protocols with perspectives from the EU and Asia. INSOL Talks is presented by INSOL International which offers a unique opportunity to listen and learn from leading restructuring and insolvency law scholars and practitioners from around the world.

Law360 2025 Editorial Board

Ryan Manns (Dallas) was named to *Law360's* Bankruptcy Editorial Board for the second consecutive year. *Law360* is a news source for legal news and analysis, covering major developments in litigation, legislation, and transactions. The advisory board provides feedback and professional insight on current and future coverage.

NRF Germany

2nd Annual Restructuring Day 2025

After a successful kick-off event last year, we are very pleased to invite you to our second Restructuring Day on Wednesday, 25 June, 2025.

In today's dynamic world, continuous exchange is essential to stay updated. We want to provide you with current insights through presentations, including case studies from our colleagues and external speakers. A panel discussion with international specialists will follow, offering exciting insights into the latest developments in European pre-insolvency restructuring proceedings.

Afterwards, we cordially invite you to join us for a relaxed get-together with familiar company.

Date:	Wednesday, 25 June, 2025
Time:	15:00 - 21:00 CET
Location:	TaunusTurm in Frankfurt
Link registration:	Register here
QR code:	Scan below

Opt-in or opt-out? The ongoing debate over consensual third-party releases in US Chapter 11 cases

Jason Blanchard

Introduction

Bankruptcy courts across the United States are engaged in a significant debate over how creditors demonstrate consent to releases of claims against non-debtors in a Chapter 11 plan, *i.e.* consensual third-party releases. One perspective holds that a creditor's silence – its failure to actively "opt-out" of the release – implies consent. The other view insists on affirmative action, requiring a creditor to explicitly "opt-in" to the release to show consent.

While this debate over what qualifies as consent is not new, the Supreme Court's decision in *Harrington v. Purdue Pharma L.P.* has amplified its importance. In *Purdue*, the Supreme Court ruled that bankruptcy courts lack the authority to confirm a Chapter 11 plan that allows for **non-consensual** third-party releases. The Court made clear, however, it was not deciding the legality of **consensual** third-party releases, which, unlike non-consensual releases, give creditors the opportunity to decline to give the release in the proposed plan. With non-consensual third-party releases off the table, the focus has shifted to the nuances of what constitutes "consensual." This in turn has prompted numerous courts across the country to re-examine the validity of the "opt-in" and "opt-out" approaches.

This article explores the essential role of consensual third-party releases in the restructuring of financially distressed companies under Chapter 11. It also examines the ongoing legal debate over what constitutes consent and the *Spirit Airlines* decision, a recent ruling from the Bankruptcy Court for the Southern District of New York that contributes to this evolving area of law.

The importance of third-party releases

Before we address the split, it's worth asking why third party releases and the approach to determining consent matter. From this author's perspective, third-party releases are a powerful tool to address the collective action problem posed by financial distress and maximize recoveries for creditors. The availability and application of this tool, therefore, has profound implications for creditors' and debtors' rights in Chapter 11 proceedings.

The absence of a mandatory and centralized process for addressing creditor claims against a failing company incentivizes creditors to "race to the courthouse" to pursue legal action and other forms of self-help to seize the company's assets before other creditors slower to act. This free-for-all often leads to the destruction of the company's value and its breakup before it has a chance to reorganize and salvage value for the benefit of all creditors. US bankruptcy law is designed to address this problem by imposing a collective, compulsory process ensuring the fair distribution of the debtor's assets to creditors based on their priority, preventing the dismemberment of the debtor's estate and maximizing the value of the common pool of assets available to pay creditor claims.

Third-party releases help mitigate this collective-action problem in the following ways:

- They incentivize non-debtors, particularly those who may hold valuable assets and are targets of litigation for a company's downfall, such as insiders and non-debtor affiliates, to contribute funding to a debtor's reorganization in exchange for protection from lawsuits. This encourages comprehensive settlements and can lead to an overall increase in value of the bankruptcy estate to the benefit of all creditors.
- They may allow a company to avoid costly and unpredictable litigation that may hinder its reorganization prospects. For example, when a debtor has an obligation to indemnify a third party, like a director or officer, a third party release may prevent a substantial indemnification claim from arising against the debtor.

- They have the effect of limiting the power of unreasonable holdout behavior by creditors demanding full payment of their claims so that creditors can be bound once the statutory voting majorities for approving a Chapter 11 plan are achieved.

Opt-in vs. opt-out: the divergent approaches to showing consent to a third-party release explained

As introduced above, courts have typically evaluated a creditor's consent to a third-party release through two different mechanisms, either an "opt-out" or an "opt-in" protocol. Under an "opt-out" model, courts view a creditor's failure to act – when provided with notice that its inaction will result in legal consequences – as sufficient indication of the creditor's consent. In practice, this means the debtor sends a ballot or opt-out form to creditors that clearly explains that the ballot or opt-out form must be returned and the "**opt-out**" box checked if the party elects **not** to approve the third-party release. Conversely, under the "opt-in" approach, courts require some affirmative indication of acceptance of the release to show consent. Typically, this means creditors must affirmatively check an "**opt-in**" box on a form or ballot cast for voting on a plan to be bound by the release.

These approaches diverge based on their underlying legal justifications. Courts favoring the opt-out method often emphasize the significant legal ramifications of inaction in bankruptcy proceedings or civil litigation following appropriate notice. For example, a defendant's failure to respond to a properly served complaint may result in the court's acceptance of the complaint's allegations as true and issuance of a default judgment for damages. Similarly, creditors in a bankruptcy case that neglect to file a proof of claim by the established bar date risk permanently losing their claims against the debtor. In addition, counterparties to leases and contracts may be bound by the debtor's valuation of cure amounts for pre-bankruptcy defaults if they remain silent during the proceedings. Conversely, courts adopting the "opt-in" method often frame a creditor's consent within a contractual framework, emphasizing that contract formation generally requires affirmative assent, not mere silence or inaction.

How these different approaches to consent affect creditors, depends on where the creditors stand in the Chapter 11 case:

- **Creditors voting to accept a plan**. Under either the "opt-out" or "opt-in" approach, most courts agree that creditors who affirmatively vote in favor of the plan may be bound by the releases because voting for the plan is a sufficient indication of consent.
- **Creditors voting to reject a plan**. For creditors who vote to reject the plan, the "opt-out" approach would bind the creditors unless they take the affirmative step of checking the opt-out box on a ballot, *i.e.* the creditor made an active choice to return the ballot without checking the opt-out box. Conversely, the "opt-in" approach would generally not bind the rejecting creditor unless it affirmatively checked the opt-in box.
- **Non-voting creditors deemed to accept or reject the plan/voting creditors who fail to cast a ballot**. The more difficult question concerns creditors who either failed to return ballots or were not entitled to vote at all (because they were presumed to accept or reject the plan's terms under the Bankruptcy Code). Under the "opt-in" approach, creditors who were not solicited to vote or failed to return a ballot and therefore have not expressly consented to releases would not be bound by them. However, under the "opt-out" method, these same creditors may be bound by the releases unless the creditor files an objection to the release or fails to separately return an opt-out form or ballot that checks the box to opt out. Several courts that have otherwise applied the opt-out model have declined to presume consent to a release by creditors deemed to reject a plan. In those cases, the deemed to reject class typically consists of equity holders whose interests are eliminated under the plan or other classes of creditors with little or no economic incentive to participate in the Chapter 11 case.

With diverging approaches yielding different results in courts across the US – even by different judges within the same courthouse – the debate over whether an "opt-out" or "opt-in" model is appropriate is likely to continue until appellate courts weigh in.

Recent developments in the evolving landscape of third-party releases: *Spirit Airlines*

In the Chapter 11 case of *Spirit Airlines*, the US Bankruptcy Court for the Southern District of New York recently issued a decision applying the opt-out approach to approving consensual third-party releases in the budget airline's Chapter 11 plan of reorganization.

Background

At the time of its bankruptcy filing, Spirit Airlines was the seventh largest airline in the US. The debtors, their subsidiaries, and affiliates operated the airline as an "ultra-low-cost carrier" servicing destinations throughout the US, Latin America, and the Caribbean. In November 2024, the debtors initiated Chapter 11 bankruptcy proceedings to implement a comprehensive restructuring supported by stakeholders holding 80% of the debt to be restructured under the plan (amounting to over US$1 billion). The parties contemplated a series of restructuring transactions, including the equitization of senior secured and convertible notes in the form of new equity interests in the reorganized parent company. As part of the negotiated restructuring support agreement, general unsecured claims would either be paid in full or "ride through" the bankruptcy case unaffected, *i.e.* left "unimpaired" under the US Bankruptcy Code. The bankruptcy court found that without the consenting stakeholders' agreement to convert their debt to equity, unsecured creditors would be fortunate to receive little, if any, recovery.

The debtors sent a ballot with an opt-out box to voting creditors and an opt-out form to non-voting creditors, but only those deemed to accept the plan. Under the plan, voting creditors were deemed to have consented to the third-party releases if they cast a vote or abstained from voting but did not check the opt-out box on their ballot by the voting deadline. Excluding creditors deemed to have rejected the plan, non-voting creditors were required to check the opt-out box on their opt-out forms to show they did not consent to the releases. Creditors and equity holders deemed to reject the plan were not subject to the release and therefore were not sent an opt-out form. Both voting and non-voting creditors could alternatively file an objection with the Bankruptcy Court to avoid being bound by the releases. The Chapter 11 plan, disclosure statement, ballots, and opt-out forms prominently featured information about the releases and instructions on the procedures to opt out of them.

Both the Securities and Exchange Commission and the Office of the United States Trustee filed objections to the opt-out protocol, arguing that the third-party releases were not consensual and therefore violated *Purdue*. The Bankruptcy Court overruled these objections in a thoughtful decision spanning nearly 50 pages.

Analysis

After examining the state of the law on third-party releases and diverging views on what consent looks like, the Court laid out several considerations courts in the Second Circuit and the Southern District of New York (the appellate courts to which the *Spirit Airlines'* Bankruptcy Court answers) have looked to evaluate whether an opt-out mechanism should be approved:

- The circumstances of the proposed releasing parties, including whether the creditors have any economic disincentive to follow the bankruptcy case;
- The procedural history of the bankruptcy case and whether the release has been clearly and consistently presented to affected creditors;
- General principles of contract law; and
- In the mass tort context, whether creditors are largely represented by counsel and the extent of counsel's involvement in the case, the consideration from the to-be-released parties offered in exchange for the third-party releases, including how that consideration affects recoveries to creditors, and the risk that using an opt-in procedure would cause the released parties to withdraw their contributions.

Turning to the case at hand, the Court focused on several key features of the case and the opt-out procedure. The opt-out protocol was explained clearly and prominently in the plan, ballots, opt-out forms, and in other court filings since the beginning of the bankruptcy. 190 ballots and opt-out forms were received from creditors electing to opt-out of the releases, suggesting that creditors understood how to exercise their right to do so. A full recovery was promised to unsecured creditors, which meant they had a strong economic incentive to follow the bankruptcy. The plan was overwhelmingly supported by voting creditors, 98.1% of creditors consented in writing through the RSA to grant the releases. As the seventh largest airline in the US, the case had drawn significant media attention. Importantly, the official committee of unsecured creditors, the body charged with representing all of Spirit Airlines' unsecured creditors in Chapter 11, did not challenge the opt-out protocol.

A few additional points about *Spirit Airlines* are worth highlighting. The decision addressed the contractual arguments raised by the objectors that are often relied on by parties in support of an opt-in model. The Court observed that applying a contract theory to the releases reliant on state law presents a choice of law problem. A creditor's treatment in a bankruptcy case is governed by federal bankruptcy law in the context of a collective bankruptcy proceeding. Having to decide which state's contract law applies for numerous different creditors would prove unworkable. Other courts have observed that applying portions of state contract law, *i.e.* the parts dealing with offer and acceptance, but not the entire body of law could prove equally unworkable.

The *Spirit Airlines* Bankruptcy Court further reasoned that if general contract principles could apply, silence and inaction may operate as acceptance of third-party releases under appropriate circumstances. For example, acceptance of a contract may be presumed when its benefits are accepted with a reasonable opportunity to reject them and reason to know the benefits were offered with the expectation of compensation. Spirit Airlines' creditors were offered the opportunity to accept or reject the third-party releases. Under the plan, creditors received and accepted the benefit of the restructuring support agreement in the form of hundreds to millions of dollars in value contributed by the consenting stakeholders. Without that contribution, unsecured creditors would have likely received little or no value in Chapter 11. The affected creditors, the Court opined, had every reason to know of this bargain and its benefits based on the disclosures made throughout the case. Thus, the Court concluded that the exception applied. The Court also rejected the argument that each third-party release must be viewed as a separate, unsolicited offer to the affected creditor by the recipients of the release. Referring to that view as "divorced from reality," the Court concluded it was more appropriate to examine the question of consent through the framework of the plan (the broader contract at issue) and the Chapter 11 process.

Takeaways

Spirit Airlines provides meaningful guidance on the evolving law on consensual third-party releases in Chapter 11. The debate is likely to continue as the process winds its way through the courts. Though the specific circumstances of each case will dictate whether a proposed opt-out mechanism is appropriate, *Spirit Airlines* shows that a court is more likely to approve an opt-out if the procedure itself and notice of the legal consequences of inaction are clearly and prominently disclosed as soon as possible in the Chapter 11 case, and the opt-out protocol is actually utilized by affected creditors, who have a meaningful economic incentive to participate in the plan process.

Jason Blanchard is senior counsel in our Dallas office in the firm's global restructuring group.

The Dutch Supreme Court judgment on the WHOA restructuring of Royal IHC

Prof. Omar Salah, Jan de Wit

Introduction

The Dutch Supreme Court issued its judgment in connection with Royal IHC, one of the most cutting-edge restructurings under the Act on Court Confirmation of a Restructuring Plan (*Wet Homologatie Onderhands Akkoord*, the WHOA) in October 2024. The Royal IHC restructuring was one of the first large restructurings that was implemented through the WHOA that involved a syndicate of lenders. The 2023 decision of the District Court of Rotterdam (the District Court) confirming the WHOA restructuring plan included various novelties under the WHOA. We discussed this decision in the *International Restructuring Newswire* (Q3 2023) here: Restructuring of Royal IHC: new developments under the Dutch WHOA. However, the Procurator General (*Procureur-Generaal*) of the Dutch Supreme Court filed for a cassation in the interest of the law (*cassatie in belang der wet*) bringing the case before the Dutch Supreme Court in a process used to seek court review on legal questions in the interest of uniformity. The result was that the Dutch Supreme Court annulled the decision of the District Court, creating ground-breaking case law. In this article, we will discuss the Dutch Supreme Court's judgment in Royal IHC.

Background

Royal IHC is a large international shipbuilder with its headquarters in the Netherlands. After going through two rounds of restructurings, it filed for a WHOA proceeding on 2 January 2023. Under the WHOA, Royal IHC offered its syndicate of nine lenders a WHOA restructuring plan that in essence aimed to (i) extend the maturity date of an already matured and due and payable facility under its senior facilities agreement, (ii) amend the waterfall in the intercreditor agreement to introduce a super senior ranking for a third party guarantee provider, and (iii) facilitate the divestment of one of its well-performing business units to a third party. The WHOA restructuring plan was adopted in all classes by the requisite majority in each class (i.e., a two-third majority of the value of the total claims for which votes have been cast). Six of its nine lenders voted in favor of the WHOA restructuring plan, whilst three lenders did not support the plan. From these three dissenting lenders, one abstained and two voted against the WHOA restructuring plan. One of them fiercely opposed the WHOA restructuring plan before the District Court challenging it on various grounds.[1] However, the District Court rejected the dissenting creditor's arguments in its decision.

The District Court's WHOA decision confronts novel issues

The District Court confirmed the WHOA restructuring plan on 9 March 2023.[2] For a complete discussion and description of this case, we refer to our *International Restructuring Newswire* (Q3 2023): Restructuring of Royal IHC: new developments under the Dutch WHOA. The confirmation of the Royal IHC WHOA restructuring plan was a novelty back in 2023, as the decision addressed various interesting and untested matters. The decision of the District Court involved the following elements:

- Non-consensual amendments to commitments under facilities agreements: In this WHOA proceeding, one of the most important questions was to what extent a WHOA restructuring plan could be used to amend commitments under a senior facilities agreement, in particular with respect to revolving credit facilities and bank guarantee facilities, and essentially force lenders to continue to provide funding to an economically different entity. The District Court ruled that this is possible;

1 Norton Rose Fulbright acted as counsel to the dissenting and opposing secured creditor in the Royal IHC WHOA proceeding. However, the views expressed in this article are the views of the authors and not of any of the parties to the WHOA proceeding. Further, the authors have expressed their views with the aim to contribute to the development of the WHOA. Therefore, any views represented in this article should be regarded as the opinions of the authors with respect to the development of the WHOA in general.

2 Rb. Rotterdam 9 March 2023, ECLI:NL:RBROT:2023:2716; Rb. Rotterdam 9 March 2023, ECLI:NL:RBROT:2023:2800.

- Non-consensual amendments to the waterfall in an intercreditor agreement and possibility for super priority for rescue financings: Another important question was whether amendments to the waterfall in an intercreditor agreement can be imposed on (dissenting) creditors under the WHOA. In a rather interesting ruling, the District Court decided that changing the waterfall of the ranking of claims of creditors is possible if it is implemented contractually through amendments imposed by the WHOA restructuring plan to an intercreditor agreement but not if it is imposed via a change to *in rem* security rights (i.e., changing the ranking of security rights);
- Impact on hedging liabilities: The WHOA restructuring plan also affected the ranking of hedging liabilities. Whilst the text of the statute explicitly states that financial collateral arrangements (*financiëlezekerheidsovereenkomsten*) and close-out netting provisions are excluded from the WHOA, the District Court ruled that these changes should be allowed under this WHOA restructuring plan as they were implemented through the WHOA restructuring plan's amendment of the intercreditor agreement (and not the underlying ISDA documents); and
- The sale of assets and claw-back protection under the WHOA: The WHOA proceeding also implemented a distressed M&A transaction through a divestment which benefited from protection against claw-back action (in a subsequent bankruptcy), due the WHOA confirmation court order.

The Dutch Supreme Court weighs in providing guidance

The WHOA does not permit parties to appeal the decision. The legislature wanted to introduce a restructuring proceeding that is effective and efficient, giving parties finality expeditiously. However, in very rare and exceptional cases, the Procurator General of the Dutch Supreme Court may file for a cassation in the interest of the law. A procedure for cassation in the interest of the law cannot be filed by the parties but can only be invoked by the Procurator General. Furthermore, the decision of the Dutch Supreme Court in a cassation in the interest of the law does not affect (the rights of) the parties involved in the case but solely serves to give guidance for future cases and for the development of the law.

What makes this WHOA restructuring special is that the Procurator General of the Dutch Supreme Court filed for cassation in the interest of the law on 26 March 2024 to present two questions to the Dutch Supreme Court:

1. Is it possible to force creditors to continue providing financing by amending their obligations under the WHOA?
2. Is it possible to non-consensually amend the ranking of claims of creditors under the WHOA?

The Procurator General invited parties to present their views before it would present the case before the Dutch Supreme Court. Norton Rose Fulbright advised the dissenting and opposing secured lender in this WHOA proceeding. On behalf of itself, Norton Rose Fulbright also filed written submissions in response to the questions raised by the Procurator General of the Dutch Supreme Court. We answered the two questions above and also pointed out in our written submissions that the ruling of the District Court on hedging liabilities and the impact of the WHOA on financial collateral arrangements and close-out netting provisions should be overturned. The Procurator General, however, limited the case filed in cassation in the interest of the law to the two questions above and concluded that the decision of the District Court should be overturned.[3]

On 25 October 2025, the Dutch Supreme Court handed down its long-awaited judgment, providing key guidance for future WHOA proceedings.[4]

- In relation to Question 1 - the non-consensual amendment of the facilities agreement, the Dutch Supreme Court ruled that the WHOA does not provide any authorization for imposing an obligation on financiers to provide new financing or keep available existing commitments on amended terms, nor that the legislature intended to permit such obligations to be imposed on financiers. The WHOA only permits the amendment of creditors' rights.
- In relation to Question 2 - the non-consensual amendment to the ranking of claims, the Dutch Supreme Court ruled that the WHOA does allow for the amendment of the waterfall of claims, regardless of whether this is occurring contractually (i.e., through the intercreditor agreement) or through an amendment of *in rem* security rights, provided that the absolute priority rule is respected. This is an important part of the decision that is opening the door for rescue financing.

3 PG bij de HR 26 March 2024, ECLI:NL:PHR:2024:346.
4 HR 10 October 2024, ECLI:NL:HR:2024:1533

- Finally, whilst the Procurator General did not raise questions on the consequences of the WHOA on financial collateral arrangements and close-out netting provisions, the Dutch Supreme Court devoted two thoughtful sentences to this topic in the interest of the law and giving guidance and clarity: The WHOA does not affect financial collateral arrangements and close-out netting provisions, and any security rights deriving from such arrangements cannot be affected by the WHOA.

Conclusion

The Dutch Supreme Court annulled the judgment of the District Court in the Royal IHC WHOA proceeding. In its judgment, the Dutch Supreme Court made clear that the boundaries of the WHOA must be respected. It emphasized that under the WHOA (i) lenders cannot be forced to continue financing through non-consensual amendments to their commitments and, hence, their go-forward funding obligations, (ii) a lender's *in rem* security rights' ranking and contractual rankings can be amended non-consensually, and (iii) affecting a counterparty's financial collateral arrangements and close-out netting provisions is not possible.

This is a landmark judgment, which further clarifies the legal framework of the WHOA confirming certain protections for lenders while clearing a path for the ability to achieve rescue financings in a WHOA proceeding.

Prof. Omar Salah is a partner in our Amsterdam office in the firm's global restructuring group and Professor of Global Finance & Restructuring Law at Tilburg University in the Netherlands. Jan de Wit is an associate in our Amsterdam office and a member of the firm's global restructuring group.

Enhancements proposed to Singapore's Corporate Restructuring and Insolvency Regime

Scott Atkins, Meiyen Tan, Hannah Alysha, Hasan Mohammad, Eibhlin Murrant

Introduction

On 11 March 2025, the Committee to Enhance Singapore's Corporate Restructuring and Insolvency Regime (the Committee) released its long-awaited report (the Report) on additional reforms to Singapore's corporate restructuring and insolvency (R&I) landscape. The Report surveys Singapore's R&I legislative framework, which came into effect in 2018, identifies challenges to its operation and proposes a number of enhancements to bolster Singapore's attractiveness as a regional and global financial restructuring hub.

This article sets out the background to the Committee and to the Report before exploring each of the reform proposals in detail. It concludes with a reflection on the Report's significance in the context of broader regional trends in the ASEAN and Oceana R&I space.

Background

The Report comes some eight years after significant amendments were made to Singapore's insolvency regime in 2017 and the passing into law of the *Insolvency, Restructuring and Dissolution Act* 2018 (**IRDA**), which took effect on 30 July 2020. The IRDA remains the chief legislative instrument governing R&I practice in Singapore. The IRDA consolidated the previously separate personal and corporate insolvency regimes, including features from foreign and international instruments, such as Chapter 11 of the United States Bankruptcy Code and the UNCITRAL Model Law on Cross Border Insolvency. Concurrently, steps have also been taken to clarify the jurisdiction of the Singapore International Commercial Court (**SICC**) to hear cross-border restructuring matters, under Order 23A of the SICC Rules.

The passage of a near decade since these amendments took effect warranted a review of their successes and challenges. To this end, the Committee was convened by Singapore's Ministry of Law and was populated by experts from private practice, government and academia.[1]

The Committee intended for its proposals to supplement the existing framework and to ensure that the effective functions of the IRDA are maintained. In particular, its Report is concerned with how corporate R&I could be further enhanced in order to attract corporate stakeholders to utilise the R&I structures in Singapore.

It is also noteworthy that the Report was preceded by the passage of the *Insolvency, Restructuring and Dissolution (Amendment) Bill 2024* by the Singapore Parliament on 7 January 2025, a law which amends the Simplified Insolvency Program that was first introduced as a temporary measure during the COVID-19 pandemic and makes it a permanent feature of the *Insolvency, Restructuring and Dissolution Act* (2018).

Key proposals

The Report sets out nine key proposals, which are grouped into four categories relating to different aspects of Singapore's R&I framework. The four categories are:

1. strengthening the Judicial Management regime;
2. refining cross-class cramdown in schemes of arrangement;
3. refining the framework and tools for efficient debt restructurings; and
4. adopting two UNCITRAL Model Laws relating to insolvency.

1 Meiyen Tan, Head of our Singapore Restructuring practice, is a member of the Committee.

Strengthening the Judicial Management regime

Singapore's Judicial Management regime was introduced in 1987. Modelled on the administration regime in the United Kingdom, it allows debtors and creditors alike to apply to the Court to take possession of and to administer the debtor's operations. While Judicial Management is underway, a moratorium remains in place to allow the judicial manager breathing space to craft a restructuring proposal to achieve one of the statutory objectives of the process, namely:

1. the survival of the company or the whole or part of its undertaking, as a going concern;
2. the approval of a scheme of arrangement; and/or
3. a more advantageous realisation of the company's assets or property than on a winding up.

The debtor company exits Judicial Management where the approved restructuring proposal is achieved, or the statutory goals of Judicial Management can no longer be accomplished.

While the multifunctionality of the Judicial Management framework was initially praised as its strength, in practice, its divergent purposes have clouded its successes. By way of illustration, a review by the Committee Secretariat notes that between the period of 23 May 2017 to 31 December 2021, 117 applications to have companies placed under Judicial Management pursuant to Part VII of the IRDA were made. Ninety-nine of those cases were ultimately reviewed, with slightly less than half being treated as having a successful outcome. Of the remaining cases, about 45% were treated as unsuccessful and 33% were dismissed or withdrawn.

The Committee also identified the key value propositions of Judicial Management as its turnaround and restructuring functions. As a judicially administered regime, Judicial Management allows creditors and debtors to access information and to change management with a view to resolving the debtor's immediate financial distress. Noting this, the Committee recommends narrowing the ambit of the Judicial Management regime to retain only the restructuring and turnaround capabilities. A more focussed Judicial Management regime would allow positive outcomes to be reached more expeditiously and at a lower cost. The Committee also notes that, as a result of this recalibration of the function of Judicial Management, parties will be obliged to rely on other processes for value recovery, including receivership and liquidation.

Concomitantly, the Committee suggested that a multi-stage remuneration model incorporating "success fees" would best serve all parties' interests and facilitate faster resolution of Judicial Management cases, while also maintaining the integrity of the Judicial Management process as a whole. In circumstances where Judicial Management continues for an extended period of time, participants are unlikely to derive much financial benefit because of the continued costs of administering the Judicial Management. The Committee considered several renumeration models to address this, and ultimately recommended a template, multi-stage renumeration model incorporating a "success fee", which judicial managers may charge if the restructure achieves its pre-determined objectives. The Committee emphasised that rather than prescribing a specific remuneration model (whether a figure, percentage or formula), it would be more commercially desirable for the conditions of "success" for the conditional payment to be mutually agreed between the judicial manager and the creditors.

The Committee has supported the continuing ability of Judicial Managers to recover costs via "clawback" actions under the reconceptualised Judicial Management framework. While traditionally considered a step in the liquidation of a company, the Committee considered that it was appropriate for judicial managers to commence clawback actions where the same supports the restructuring or turnaround objective in order to avoid the unnecessary destruction of value.

Cross-class cramdown in schemes of arrangement

The IRDA provides a tool to manage conflicts between classes of creditors at the time that a scheme of arrangement is negotiated. This mechanism is known as the "cross-class cramdown". Through cross-class cramdown, the Court is empowered to approve a scheme of arrangement which has a dissenting creditor class, provided that a majority of number in creditors representing three-quarter in value of the entire body of creditors (regardless of class) present at any meeting vote in favour of the scheme. The Court must also be satisfied that there is no manifest unfairness to the dissenting class.

While the Committee notes that the cross-class cramdown mechanism is utilised rarely, they raise a concern that the three-quarter majority threshold is too high. The Committee therefore recommends refining the cross-class cramdown tool by lowering the approval thresholds.

The Committee also recommends that the provisions be expanded to encompass shareholders in appropriate circumstances, as this would reflect the economic reality of a debtor's capital structure when financially distressed. Where shareholders are included within the scope of a cross-class cramdown, shareholders should be given the opportunity to retain an interest in the debtor if they contribute new value. In this way, the shareholder is permitted to continue its support for the debtor. Furthermore, the Committee flags additional adaptions from the US Bankruptcy Code which might be appropriate in the future, including allowing for meetings of and voting by shareholders and creditors whose claims or interests do not entitle them to receive or retain any property under a restructuring plan to be dispensed with.

Refining the framework and tools for efficient debt restructurings

In Singapore, where a company seeks to dispose of the whole or substantially the whole of its undertaking or property or issue shares in connection with a restructuring, sections 160 and 161 of Singapore's *Companies Act 1967* require the approval of the company in a general meeting. As insolvency approaches however, it is the creditors' interests that are more critical and this requirement inadvertently provides shareholders with a de facto veto power at a time where creditors' interests should take primacy.

The Committee explored the history of this requirement and noted that it appeared to be directed towards company dealings in a general business scenario, rather than in an insolvency scenario. The Committee thus recommends streamlining the approvals required by the company in general meeting for certain actions to be undertaken in a restructuring plan. This would accurately reflect the rights of the various stakeholders with respect to a financially distressed debtor and prevent the company's shareholders from possibly frustrating the restructuring plans negotiated between the company and its creditors.

The Committee has also proposed the introduction of judicial discretion to appoint a neutral, professional party to oversee the restructuring process, known as a "Restructuring Officer". The Committee envisages the role of Restructuring Officer to mirror that of the role played by a "monitor" in Canada and the United Kingdom in independently updating the Court and providing creditors with the oversight to address concerns relating to lack of transparency. Presently, parties have the capacity to appoint a neutral third-party without a Court order. However, appointing such an additional party entails additional costs and delays. As such, commercial considerations of the parties about how the additional appointment is financed may override thoughtful discussions about a Restructuring Officer's possible utility. The Committee notes that placing the decision in the hands of the judiciary will allow the Court to make an independent assessment about the merits (including consideration of costs) of a Restructuring Officer appointment and to minimise potential disputes among creditors.

Adopting UNCITRAL Model Laws

Singapore had, in 2017, adopted the UNCITRAL Model Law on Cross-Border Insolvency in 2017. This attracted numerous high-profile restructurings and furthered Singapore's aim of becoming a cross-border restructuring hub. Following that success, the Committee proposes the adoption of two UNCITRAL Model Laws related to insolvency in Singapore:

- *The Model Law on Enterprise Group Insolvency*: This Model Law outlines provisions for coordinating and cooperating in cross-border insolvency cases involving enterprise groups. It enables the development of a group insolvency solution through a single insolvency proceeding, typically at the location of a group member's centre of main interests, with voluntary participation from multiple group members. A group representative may be appointed to oversee this process, which includes approval for post-commencement finance arrangements and facilitating foreign court access. The law also supports the cross-border recognition of these proceedings, minimizes non-main insolvency filings for participating members, and ensures the fair treatment of creditor claims, including foreign claims, within the main proceeding.

- *The Model Law of Recognition and Enforcement of Insolvency-Related Judgments (**MLIJ**):* The MLIJ provides a streamlined framework for the recognition and enforcement of insolvency-related judgments, facilitating the recovery of value for financially distressed businesses with assets across multiple states. An insolvency-related judgment is defined as one associated with an insolvency proceeding, issued after its commencement, excluding judgments that initiate the proceeding. The MLIJ outlines procedures for recognition and enforcement, including provisional relief, and specifies grounds for refusal, enforceability, and the impact of reviews in the originating state. It also addresses the equivalent effect of judgments in the recognising state and the severability of judgment parts for enforcement. Recognition can be sought directly or as part of a defence or incidental matter, and the MLIJ also clarifies its relationship with the Model Law on Cross-Border Insolvency.
- The Committee notes that, if enacted, Singapore will be one of the first states to implement these two Model Laws, demonstrating its commitment to mutual cooperation and innovation in international insolvency law.

Concluding reflections

The depth and breadth of the Committee's proposals reflect Singapore's continued leadership in the design of novel R&I frameworks. Indeed, the Committee's use of empirical data and its review of international best practices in jurisdictions such as Canada, the United Kingdom and the United States is laudable and provides a paradigm example of regulatory design being informed by a comparative law perspective.

At the time of writing, the appetite for insolvency reform in ASEAN and Oceania is on the rise, with several of Singapore's regional neighbours, including Australia and Malaysia, having recently conducted reviews of various aspects of their own insolvency regimes. Given the importance of cost-effective and predictable R&I frameworks for incentivising creditors to advance capital for domestic investment and innovation, the Committee's proposals may serve as a springboard for similar innovations by those jurisdictions and others.

Additionally, the Committee's proposal for Singapore to adopt the Model Law on Enterprise Group Insolvency and the Model Law of Recognition and Enforcement of Insolvency-Related Judgements is a welcome development given the sparse adoption of those Model Laws to date. As the Committee noted in the Report, Singapore's adoption of those two Model Laws would send a signal about the importance of the Model Law regime, hopefully serving as a 'nudge' and inducing participation by other jurisdictions.

We look forward to the Committee's proposals receiving the force of law in Singapore and paving the way for similar reforms in the Asia-Pacific region and across the world.

Scott Atkins is global head of restructuring and the firm's Australian chair, and Hasan Mohammad is an associate, both based in our Sydney office. Meiyen Tan is a director and Hannah Alysha is an associate director at Ascendant Legal, a Singapore law firm in Formal Law Alliance with Norton Rose Fulbright. Eibhlin Murrant is a lawyer based in our Singapore office. All are members of the firm's global restructuring group.

Year in review: significant US Chapter 15 decisions in 2024

Francisco Vazquez

Under Chapter 15 of the United States Bankruptcy Code, a foreign debtor, trustee, administrator, liquidator, or the like (i.e., a "foreign representative") may obtain recognition of a foreign bankruptcy, insolvency, liquidation, or restructuring proceeding (i.e., a "foreign proceeding"). In general, Chapter 15 is a flexible tool that allows a foreign representative to obtain orders from a U.S. court to "aid" the foreign proceeding. Such orders may include a stay of actions against the debtor or its assets in the US, discovery, and orders enforcing a foreign court's order in the US, including an order approving the debtor's restructuring plan.

In 2024, there were 65 new Chapter 15 cases filed (after factoring in cases that were jointly consolidated for procedural purposes). These Chapter 15 cases were filed in connection with foreign proceedings pending in Bermuda (1), Brazil (5), British Virgin Islands (9), Canada (25), Cayman Islands (8), Chile (1), England (1), France (1), Germany (2), Hong Kong (3), Ireland (1), Israel (1), Japan (1), Singapore (2), Sweden (1), and United Kingdom (3). The majority of the Chapter 15 cases were filed in the Southern District of New York (15), District of Delaware (15), and the Southern District of Florida (9). The remaining 26 cases were filed across fourteen other districts.

This article highlights a handful of the more significant decisions issued in 2024. First, we discuss the Eleventh Circuit's decision holding that the debtor eligibility requirements applicable to plenary US bankruptcy cases do not apply in Chapter 15 cases in that circuit, which includes Florida, a key venue for Chapter 15 cases. We turn next to a New York bankruptcy court's decision recognizing a Hong Kong proceeding for a Cayman Islands debtor with operations and assets in the People's Republic of China, finding the debtor had its "center of main interests" in Hong Kong. We look at another New York court's decision denying recognition of a Cayman Islands liquidation of a US bank's foreign branch. Next, we analyze a Delaware bankruptcy court's consideration of a Canadian foreign representative's request to for approval under Chapter 15 of certain transactions approved in a Canadian proceeding. We also cover two decisions that elaborate on the scope of the public policy exception to Chapter 15 relief. And, finally, we discuss the Third Circuit's decision confirming that a US court may extend comity to a foreign insolvency without Chapter 15 recognition.

Section 109(a) of the Bankruptcy Code does not apply in Chapter 15 cases

In 2013, the United States Court of Appeals for the Second Circuit, which includes New York, held that an entity must be eligible to be a debtor under section 109(a) of the U.S. Bankruptcy Code before its foreign proceeding can be granted recognition under chapter 15. *See Drawbridge Special Opportunities Fund LP v. Barnet (In re Barnet*), 737 F.3d 238, 247 (2d Cir. 2013).[1] The Second Circuit's view, however, has not been followed by the majority of lower courts in others Circuits – but there had not yet been any further appellate court decisions on the matter. That changed in 2024, when the United States Court of Appeals for the Eleventh Circuit declined to follow the Second Circuit and held that section 109(a) does not apply in Chapter 15 cases based on existing Eleventh Circuit precedent. *In real Zawawi,* 97 F.4th 1244 (11th Cir. 2024).

Tala Qais Abdulmunem Al Zawawi ("Al Zawawi"), a citizen of Oman, indirectly owns several Florida entities that, in turn, own real estate in Florida valued at approximately US$94 million. In 2017, Al Zawawi and his then wife moved to the UK. Following their divorce, Al Zawawi's former wife obtained a judgment in her favor for approximately US$31 million, which Al Zawawi failed to pay. Thereafter, a UK court adjudged Al Zawawi bankrupt and appointed joint trustees, who were entrusted with recovering Al Zawawi's assets for the benefit of creditors. Given the Florida real estate, the trustees filed a petition for recognition of the UK bankruptcy proceeding as a foreign main proceeding with the United States Bankruptcy Court for the Middle District of Florida.

1 Section 109(a) states that "only a person that resides or has a domicile, a place of business, or property in the United States. . . may be a debtor" in a US bankruptcy case. 11 U.S.C. § 109(a).

Al Zawawi argued that the Chapter 15 petition should be dismissed because he was not eligible to be a debtor in the US under section 109(a) of the Bankruptcy Code. The trustees, however, argued that section 109(a) does not apply to Chapter 15 cases, and that, Al Zawawi's UK proceeding could be recognized under Chapter 15. The bankruptcy court agreed with the trustees and concluded that section 109(a) does not apply to Chapter 15. Thus, the bankruptcy court recognized the UK proceeding as a foreign main proceeding. On appeal, the United States District Court affirmed the bankruptcy court's decision.

On further appeal, the Eleventh Circuit noted that section 103 of the Bankruptcy Code provides that chapters 1, 3, and 5 of the Bankruptcy Code apply to Chapter 15. Consequently, section 109, which is found in chapter 1, applies to Chapter 15. Despite this "straightforward" statutory analysis, the Eleventh Circuit, nonetheless held that it was bound to its prior decision *In re Goerg*, 844 F.2d 1562 (11th Cir. 1988) where it held that section 109(a) did not apply to ancillary proceedings under former section 304 (the predecessor to Chapter 15). After comparing and contrasting Chapter 15 and former section 304, the Circuit found that despite the differences between the two, they "are sufficient similar in terms of their purposes such that our decision in *Goerg* controls our analysis of this case." Thus, the Eleventh Circuit adopted the holding of *Goerg* and found that debtor eligibility under section 109(a) is not a prerequisite for the recognition of a foreign proceeding under Chapter 15.

Interestingly, two of the three judges issued separate concurring opinion. Circuit Judge Barbara Lagoa and Circuit Judge Gerald Bard Tjoflat agreed that *Georg* compels the result reached. However, they disagreed as to whether, absent *Georg*, section 109(a) would apply in Chapter 15 cases. According to Judge Lagoa, "if we were writing on a clean slate, I would reverse the bankruptcy court's determination that 11 U.S.C. §109(a) does not apply to Chapter 15 cases in accordance with the plain text of 11 U.S.C. §103(a)." Because "§ 103(a) plainly provides that § 109(a) applies to cases under Chapter 15," absent *Georg*, Judge Lagoa would have reversed the lower courts. In contrast, Judge Tjoflat found that "the current statutory provisions related to ancillary proceedings should cause us to double down on the reasoning we applied in *In re Goerg*." Judge Tjoflat reasoned that the definition of a "foreign proceeding" under Chapter 15 is substantially the same as the one the Court soundly interpreted in *In re Goerg*, and whether a court can recognize a foreign proceeding depends on whether the proceeding meets that definition.

Thus, according to Judge Tjoflat, there was no reason to deviate from the *In re Georg* reasoning, which applies equally under Chapter 15 as it did under its predecessor.

US Bankruptcy Court concludes that debtors' center of main interest is Hong Kong

Under Chapter 15, a foreign proceeding may be recognized only if it is a "foreign main proceeding" or a "foreign nonmain proceeding." A foreign main proceeding is defined as a foreign proceeding pending where the debtor has its center of main interest ("COMI"). A foreign nonmain proceeding is a foreign proceeding pending where the debtor has an establishment, which is defined as "any place of operations where the debtor carries out a non-transitory economic activity." In the Second Circuit, which includes New York, a court will determine the location of a debtor's COMI as of the date of the filing of the Chapter 15 petition. In 2024, the United States Bankruptcy Court for the Southern District of New York found that the COMI of a Cayman Islands corporation whose principal activity was to finance subsidiaries that operated and had assets in the People's Republic of China was Hong Kong, which was the situs of the debtor's restructuring proceeding. *In re Sunac China Holdings Ltd*., 656 B.R. 715 (Bankr. S.D.N.Y. 2024).

Debtor Sunac China Holding Limited is a Cayman Islands corporation and the ultimate parent of a corporate group of that operates one of the largest real estate businesses in the PRC. It was registered to do business in Hong Kong and was listed on the Hong Kong Stock Exchange. Sunac, a holding company, had no material operations. Its principal assets consist of stock in subsidiaries, most of which are organized under the laws of the PRC, and intercompany claims. With one exception, all of Sunac's senior management lived and worked in the PRC. Sunac's principal liabilities consisted of approximately US$9 billion of US dollar-denominated debt governed by the laws of New York, the UK, or Hong Kong. None of the debt being restructured was governed by the laws of the PRC.

Following negotiations with creditors, Sunac filed a judicial proceeding in Hong Kong to restructure its debt pursuant to a scheme of arrangement. A scheme of arrangement is akin to a Chapter 11 plan in that it allows a company to restructure its debts without unanimous support from creditors. Under Hong Kong law, a court may approve a scheme if a majority of creditors in number, representing at least 75% in value vote in favor of the scheme. In this instance, creditors overwhelmingly voted in favor of Sunac's scheme, with 99.75% in number representing 98.3% in value of creditors voting in favor of the scheme. The Hong Kong court subsequently sanctioned the scheme finding that it complied with all of the statutory requirements.

Sunac filed a Chapter 15 case with the New York bankruptcy court seeking recognition and enforcement of the scheme as a foreign main proceeding. No party objected to the request. The bankruptcy court, however, noted that it should not "rubber-stamp" a debtor's Chapter 15 request and that it "should make its own COMI determination even if there are no objections."

The court began its COMI analysis by noting the US Bankruptcy Code does not define COMI. Instead, the US Bankruptcy Code provides that the location of a corporate debtor's registered office (i.e., place of incorporation) is presumed be a debtor's COMI. According to the court, the presumption may be rebutted by relevant facts. In particular, relevant facts include the "SPhinX Factors," named after one of the earliest Chapter 15 cases. The SPhinX Factors generally refer to the location of a debtor's headquarters, the location of those who actually manage the debtor, the location of the debtor's primary assets, the location of the majority of the debtor's creditors, and/or the jurisdiction whose law would be applicable to most disputes concerning a debtor.

Here, Sunac's COMI was presumed to be the Cayman Island because that is where it was incorporated. According to the bankruptcy court, the presumption was bolstered by the Sunac's public filings, in which it stated that a future insolvency proceeding would likely be governed by Cayman Island's law. However, Sunac had no other material connection to the Cayman Islands, such as an office, assets, or creditors there. Moreover, Sunac had not filed a proceeding in the Cayman Islands. Taken together, these facts, according to the court, were sufficient to rebut the Cayman Islands COMI presumption. Thus, the court determined that Sunac's COMI was either Hong Kong or the PRC.

The court considered the SPhinX Factors and found that they were inconclusive. In particular, Sunac's headquarters and managers were located either in the PRC or Hong Kong, depending on whether the court relied on the physical location of Sunac's offices and managers (PRC), or on the place where decisions were made on behalf of Sunac (Hong Kong). The court found that Sunac's primary assets, which consisted of intercompany claims due from its PRC subsidiaries, were located in the PRC. In contrast, Hong Kong law would govern most of the disputes involving Sunac. The court acknowledged that Hong Kong governed debt was relatively small compared to the other debt being restructured. However, Hong Kong law incorporates the "Gibbs Rule," pursuant to which debt governed by Hong Kong law may only be restructured in a Hong Kong proceeding. Thus, according to the court, any restructuring of Sunac's Hong Kong governed debt elsewhere would require a parallel proceeding in Hong Kong to avoid the risk of disgruntled creditors suing in Hong Kong to enforce their claims. The remaining factor-the location of the majority of Sunac's creditors-would have little impact on the COMI analysis because they were located in many jurisdictions outside the PRC and Hong Kong.

In the end, the court concluded that the COMI analysis should focus on a debtor's business activities and decision-making. This would ensure, consistent with existing precedent, that COMI would be found "where the debtor conducts its regular business, so the place is ascertainable by third parties." The court noted that at the time of the Chapter 15 filing, third parties, including creditors, could determine that Sunac's business activities were conducted and decisions were made in Hong Kong. Indeed, for the 18-month period prior to the Chapter 15 filing, Sunac's primary business activity was restructuring its debt. Those efforts were led by Sunac's CFO and ultimately approved by Sunac's board of directors in Hong Kong. The court also emphasized that the center of the debtor's business activities has always been in Hong Kong. Specifically, the primary business purpose of the debtor is to raise capital in the international capital markets. The debtor conducted businesses primarily in Hong Kong, was listed on the Hong Kong stock exchange, most board of directors' meetings were hosted in Hong Kong and most financial institutions with which the debtor partnered to issue its debt were based in Hong Kong. The court thus concluded that Sunac's COMI was in Hong Kong prior to and at the time of the Chapter 15 filing.

In addition, creditor expectations reflected that Sunac's COMI was Hong Kong. In this regard, the court noted that the COMI choice was really only between Hong Kong and the PRC. Because Sunac's filings described the law of the PRC as undeveloped and uncertain, creditors had no expectation that the Debtor would file in the PRC, the court concluded that creditor expectation favored finding COMI in Hong Kong where some of the Debtor's subsidiaries were located and whose laws governed some of the debt being restructured. Moreover, the overwhelming creditor support for the scheme and lack of objection to the Chapter 15 filing further bolstered a COMI finding in Hong Kong. The court emphasized that creditor support alone would not defeat a valid COMI objection. However, the court further noted that it would generally defer to a debtor's choice of forum where no creditors object, which would be consistent with the stated purposes of Chapter 15, including the facilitation of a successful reorganization. Here, creditors' overwhelming approval of the scheme, coupled with the absence of objections to COMI, provided further support for finding Hong Kong to be Sunac's COMI. Thus, the court recognized the Hong Kong proceeding of the Cayman Islands debtor that principally existed to finance the business of PRC subsidiaries as a foreign main proceeding.

US Bankruptcy Court confirms that a foreign bank is not eligible for Chapter 15 recognition

Section 1501 of the Bankruptcy Code provides that Chapter 15 does not apply to a proceeding concerning an entity that is not eligible to be a debtor in a plenary proceeding under section 109(b), with the exception of a foreign insurance company. Thus, a railroad, a domestic insurance company, and a domestic or foreign bank (with limited exceptions) are not eligible for relief under Chapter 15. Last year, the United States Bankruptcy Court for the Southern District of New York confirmed that the liquidation of a foreign bank cannot be recognized under Chapter 15. *In re Silicon Valley Bank (Cayman Islands Branch*), 658 B.R. 75 (Bankr. S.D.N.Y. 2024), *aff'd*, 2025 WL 448403 (S.D.N.Y. Feb. 10, 2025).

In 2023, Silicon Valley Bank, a California-incorporated bank, failed and the Federal Deposit Insurance Corporation (the "FDIC") was appointed as its receiver. The bank had a branch in the Cayman Island ("SVB Cayman") that was licensed to operate in the Cayman Islands. At the time of the bank's failure, customers of SVB Cayman had deposits totaling approximately US$866 million in accounts at SVB Cayman. After the bank's failure, many of SVB Cayman's account holders filed claims in the receivership. With limited exceptions, the FDIC rejected the claims of the SVB Cayman customers. Subsequently, upon a winding-up application made by several customers, the Grand Court of the Cayman Islands appointed joint official liquidators for SVB Cayman.

The SVB Cayman liquidators thereafter filed a Chapter 15 petition seeking recognition of the Cayman Islands liquidation as a foreign main proceeding. The FDIC objected to recognition, arguing, among other things, that SVB Cayman is not an entity separate from the bank. Instead, SVB Cayman is a branch of the bank, which is not eligible to be a debtor under section 109(b) of the Bankruptcy Code. The liquidators, however, contended that the bank's failure and the FDIC receivership resulted in the "transmogrification" of SVB Cayman, which was no longer operating as a bank, into an entity eligible to be a debtor.

The court agreed with the FDIC and concluded that SVB Cayman was not eligible for Chapter 15 relief. According to the court, the evidence, including testimony from one of the liquidators, demonstrated that SVB was not a separate legal entity from the bank. Moreover, "SVB Cayman's operations were that of the Bank's." In particular, SVB Cayman did not have employees, but relied on the bank for its staffing needs. Indeed, customers never went to the Cayman Islands, where SVB Cayman only had a mail drop presence, to conduct its business with SVB Cayman. Instead, all transfers were done electronically. Accordingly, the court concluded that SVB Cayman's "existence was inseparable from that of" the bank and thus, SVB Cayman itself was a bank.

On appeal by the liquidators, the United States District Court for the Southern District of New York affirmed the bankruptcy court's decision. *In re Silicon Vally Bank (Cayman Islands Branch*), Case No. 24 Civ. 1871 (S.D.N.Y. Feb. 10, 2025). The district court was unpersuaded by the liquidators' argument that the FDIC receivership caused SVB Cayman to cease being a foreign branch and resulted in SVB Cayman being "orphaned" and becoming "an estate and a trust that is subject to the Cayman Islands proceeding." The court described the liquidators' argument as "extraordinary," "faulty," and without legal support. According to the court, to find that the initiation of an FDIC receivership would convert a bank or its branches to an entity eligible to be a debtor under the Bankruptcy Code would contradict the purpose of having the FDIC administer failed banks and their branches. Instead, the court found that "SVB Cayman was at all relevant times a foreign branch of a United States, FDIC-insured bank and, as such, is ineligible to be a debtor under 11 U.S.C. § 109(b)." Consequently, the district court affirmed the bankruptcy court's decision. The liquidators have appealed the district court's decision to the United States Court of Appeals for the Second Circuit. Stay tuned.

US Court approves Canadian RVO and defers ruling on a sale order

In a US bankruptcy case, section 363 of the Bankruptcy Code requires a debtor (or a trustee) to obtain bankruptcy court approval to use or sell assets outside the ordinary course of business. Section 1520 of the Bankruptcy Code provides that, upon recognition of a foreign main proceeding under Chapter 15, section 363 applies to the transfer of a debtor's interest in property located in the US. Thus, upon recognition as a foreign main proceeding, a foreign representative must obtain US bankruptcy court approval to sell assets located in the US.

Goli Nutrition Inc., a Canadian corporation, and its US subsidiary were distributors and retailers of certain nutritional products and supplements. Facing financial difficulties, Goli filed insolvency proceedings under the Canadian Companies Creditor Arrangement Act with a court in Montreal. In accordance with Canadian law, the Canadian court appointed a monitor to, among other things, oversee Goli's operations and to act as a foreign representative in any subsequent Chapter 15 case.

In the Canadian proceedings, Goli obtained court approval of two restructuring transactions. First, pursuant to a "reverse vesting order," which is often referred to as an "RVO," the Canadian court approved a reverse vesting transaction, pursuant to which (1) Goli Canada would issue new shares of its own stock, which would be sold to a purchaser, (2) Goli Canada would redeem and cancel all preexisting shares of stock, (3) certain undesired assets and liabilities of Goli Canada would be transferred into a new "Residual Co.," which would replace Goli Canada as the debtor in the Canadian insolvency proceeding, and (4) Goli Canada would exit from the Canadian proceeding under new ownership. Second, pursuant to a separate order, the Canadian court approved the sale of certain assets located in the US over the objections of certain parties that argued over the ownership of the assets being sold. While the Canadian court approved the asset sale, it provided that US$1 million of the sale proceeds would be segregated and preserved for the benefit of the objecting parties, whose ownership interest would be addressed at a subsequent hearing.

Thereafter, upon the request of the monitor, the United States Bankruptcy Court for the District of Delaware granted recognition to the Canadian proceedings as foreign main proceedings. In addition, the court agreed to enforce the RVO, but deferred ruling on the request to approve the sale of the US inventory pending resolution of an ownership dispute. *Goli Nutrition Inc.*, 2024 WL 1748460 (Bankr. D. Del. Apr. 23,2024).

The Delaware bankruptcy court summarily concluded that it would enforce the RVO, noting that all parties had notice of the request and there were no objections to the request. The court, however, emphasized "that I do not know how I would rule on a similar reverse vesting transaction if there were objections." In enforcing the RVO, the court noted that the transaction did not involve a sale of US assets, but entailed the issuance and sale of stock in a Canadian company. Thus, according to the court, sections 363 and 1520 did not apply to the RVO transfer and it could enforce the RVO without "all the bells and whistles" of a typical US bankruptcy sale order. In contrast, the sale of US inventory did implicate sections 363 and 1520.

In addressing the inventory sale, the court found that it had *in rem* jurisdiction over the assets in the US and could not simply defer to the Canadian court's ruling. The court further found that under section 363, a sale can be approved if "(i) a sound business purpose exists, (ii) the sale price is fair, (iii) adequate notice has been provided and (iv) the purchaser has acted in good faith." Here, the court found that those factors have been met. However, it was still faced with two interrelated ownership issues that influenced the court's ability to approve the asset sale.

First, the court needed to determine whether the ownership issue had to be resolved before the sale could be approved. The court ultimately concluded that ownership must be decided before a sale could be approved. Simply stated, a court does not have authority to approve a sale of assets that do not belong to the debtor. However, a US court could approve a sale of a debtor's interest in property, even if ownership is in dispute, as long as the buyer was willing to buy the debtor's interest and not the property, in which case, the ownership dispute would survive the sale. In this instance, however, the buyer was not willing to buy just the debtors' interests in the inventory; it wanted to buy the inventory outright.

Second, having found that the ownership issue needed to be resolved before the sale was approved, the court then considered which court should decide the issue. According to the US court, it or the Canadian court could make that determination. Given that the Canadian court had already conducted one hearing and scheduled a further one, the US court found that it would be "appropriate" to defer to the Canadian court. Interestingly, the court found that it

would have reached the same conclusion in a Chapter 11 case if presented with the same facts (i.e., the Canadian court had conducted one hearing and had scheduled another to consider ownership). Thus, the US court held its ruling on the monitor's motion to approve the sale of the US inventory in abeyance until the Canadian court decided the ownership dispute.

Recognizing pre-judgment asset freeze order is manifestly contrary to US public policy

Many foreign jurisdictions permit a court to issue an order enjoining a target of litigation from transferring its assets before the court issues a judgement against it. Conceptually, this injunction or freezing order is intended to ensure that a defendant does not transfer its assets while a trial is pending. The United States Supreme Court has held that a party generally has a claim against another's assets only after a judgment. Thus, US federal courts do not have the authority to issue such a freezing order prior to a judgment. *Grupo Mexicano de Desarrollo S.A. v. All. Bond Fund, Inc.*, 527 U.S. 308 (1999). The United States Bankruptcy Court for the Southern District of Florida, citing the US Supreme Court's decision, found that a foreign court's injunction freezing a defendant's assets was not entitled to comity and could not be enforced in the US under Chapter 15. *In re Nexgenesis Holdings Ltda*, 662 B.R. 406 (Bankr. S.D. Fla. 2024).

Following recognition of Brazilian insolvency proceedings by the Florida bankruptcy court, the foreign representative requested an order enforcing a Brazilian court's order enjoining certain targets of litigation claims in Brazil from transferring their assets. The Brazilian order was obtained ex parte and prior to the issuance of a judgment. Moreover, it purportedly froze all of the assets, including cash, of the litigation targets, wherever located.

As an initial matter, the Florida court noted that recognition does not mandate that all of a foreign court's orders in the recognized foreign proceeding should automatically be extended comity. Instead, it remains the burden of the foreign representative to show that comity should be afforded to the specific orders of the Brazilian court. In this instance, the court was troubled by several aspects of the foreign representative's request to extend comity and enforce the freezing order in the US. In particular, the court noted that this sort of pre-judgement freezing order was prohibited by the Supreme Court. Moreover, the court was troubled that the order froze the assets of non-debtors, and the record did not reflect that the litigation targets had sufficient minimum contacts with Brazil to satisfy traditional standards of due process in the US. Given these critical concerns, the court refused to enforce the freezing order finding that to do so would be manifestly contrary to US public policy.

Court may limit foreign representative's ability to transfer assets to comply with US sanctions

The United States Bankruptcy Court for the Central District of California, like other courts, recognized a Russian foreign proceeding, finding that recognition did not implicate public policy concerns. However, the court limited the ability of the foreign representative to transfer assets as a result of US sanctions. *In re Sabadash*, 660 B.R. 304, 309 (Bankr. C.D. Cal. 2024).

In 2020, a Russian court entered a judgment against Aleksandr Vitalievich Sabadash declaring that he was bankrupt and owed approximately US$2 million to Tavrichesky Bank Joint-Stock Company. In addition, the Russian court appointed a "Financial Manager" to collect that amount from Mr. Sabadash for the benefit of creditors, including Tavrichesky Bank. Upon the request of the Financial Manager and over the objection of the debtor, the California bankruptcy court granted recognition to the Russian proceeding. The debtor thereafter asked the California court to reconsider its ruling, arguing that subsequently imposed sanctions by the US on the owner of Tavrichesky Bank mandated denial of recognition. According to the debtor, it would be manifestly contrary to US public policy to recognize the Russian proceeding and allow the Financial Manager to transfer assets outside the US to pay an entity subject to US sanctions. The court disagreed with the debtor and found that it was "still appropriate" to recognize the Russian proceeding. However, according to the court, it would violate US public policy to allow the Financial Manager to violate US sanctions and make any transfers that could benefit Tavrichesky Bank. "That means prohibiting any transfer of control of AFB that would benefit the Russian Bankruptcy Proceeding, because any benefit accruing to that Russian bankruptcy estate presumably will benefit Tavrichesky Bank – i.e., money is fungible, so if control of AFB would generate more assets to pay other creditors in the Russian Bankruptcy Proceeding then that will also increase the dividend to Tavrichesky Bank, which is manifestly against the public policy of the United States." Thus, the parties were directed to submit an order recognizing the Russian proceeding, but appropriately limiting the Financial Manager's ability to transfer assets.

Chapter 15 recognition is not a prerequisite to comity

On the one hand, Section 1509 of the Bankruptcy Court provides that a US court shall extend comity upon recognition of a foreign proceeding. However, Section 1509, unlike other sections of the Bankruptcy Code, applies whether or not a bankruptcy case is pending in the US. This has led to divergent results. Some courts have held that Chapter 15 recognition is a prerequisite for dismissing litigation in the US against a debtor in a foreign bankruptcy case.

Others have disagreed and have dismissed litigation under principles of comity without Chapter 15 recognition. Last year, the United States Court of Appeals for the Third Circuit concluded that litigation may be dismissed against a foreign debtor under "adjudicatory comity" without Chapter 15 recognition. *Vertiv, Inc. v. Wayne Burt PTE Ltd.*, 92 F.4th 169 (3d Cir. 1014).

Vertiv, Inc. and certain affiliates filed a complaint asserting breach of contract claims against Wayne Burt, PTE Ltd., a Singaporean company, with the United States District Court for the District of New Jersey. Prior to the filing of the complaint, the defendant Wayne Burt was placed into liquidation in Singapore. Upon learning of the lawsuit, the Singaporean liquidator filed a motion to dismiss the complaint under principles of comity. The district court granted the motion finding that dismissal was appropriate under comity. On appeal by Vertiv, the Third Circuit affirmed the district court's decision and clarified the appropriate test for dismissal under comity.

According to the Third Circuit, there are two types of comity. First, there is adjudicatory comity, which refers to a local court's discretion to defer to a foreign court. It generally applies where a US court is asked "(1) to abstain from exercising jurisdiction in deference to a pending foreign proceeding; (2) to enforce a judgment rendered by a foreign tribunal; and (3) to preclude a particular claim or issue previously adjudicate by a foreign tribunal." Second, there is prescriptive comity, which refers to a sovereign nation's respect of other countries "by limiting the reach of their laws." In this instance, the US courts were being asked to exercise adjudicatory comity and defer to Singaporean liquidation proceeding.

The Third Circuit noted that US courts generally favor extending comity to foreign bankruptcy cases, especially "where the foreign country's bankruptcy laws share the 'fundamental principles' of the United States bankruptcy law: 'that assets be distributed equally among creditors of similar standing.'" In particular, the Circuit mentioned that Chapter 15 of the Bankruptcy Code embodies the US policy in favor of deferring to foreign bankruptcy cases. However, the court did not address any of Chapter 15's specific requirements or section 1509. Instead, it took the opportunity to elaborate on the appropriate test for extending comity to a foreign bankruptcy case.

As an initial mater, the Third Circuit held that a US court should only consider granting comity to a parallel pending proceeding. According to the Circuit, US litigation is parallel to a foreign bankruptcy cases where "(1) the foreign bankruptcy proceeding is ongoing in a duly authorized tribunal while the civil action is pending before the United States court; and (2) the outcome of the United States civil action may affect the debtor's estate." Assuming the proceedings are parallel, then the party seeking comity must make a "prima facie" case, which requires a showing that the foreign bankruptcy law is similar to US law in that it promotes the "equal distribution of assets" and provides for a stay of actions against the debtor and its assets. Once the party seeking comity makes a *prima facie* case, the court must then consider the following four questions. First, is the foreign proceeding pending before a duly authorized tribunal. This question is typically not controversial. Second, does the foreign court provide for the equal treatment of creditors. This question generally requires a court to consider whether creditors of differing priority are being treated fairly and equitably in the foreign bankruptcy case. Third, would extending comity be "inimical" too the US policy of equality. The Third Circuit noted that this third inquiry is intended to ensure that the foreign bankruptcy case reflects "indicia of procedural fairness," including providing creditors and other parties with notice and the ability to participate in the bankruptcy case. The foreign bankruptcy case, however, does not have to contain the identical protections that a US case. Finally, a court must consider whether the party opposing comity would be prejudiced by dismissal.

According to the Third Circuit, the US litigation against Wayne Burt was parallel to its Singaporean liquidation. Moreover, the Third Circuit agreed with the lower court's finding that the liquidator had demonstrated a *prima facie* case for comity in that Singaporean law was akin to US law as it reflected a policy of equality of distribution of assets and provided for a stay of litigation against a debtor. However, according to the Third Circuit, the district court had not considered the other elements of the comity test. Thus, the Third Circuit vacated the lower court's judgment and remanded to the district court for further proceedings.

Following the remand, the liquidator decided to short circuit the matter and petitioned the Bankruptcy Court for the District of New Jersey for recognition of the Singaporean liquidation as a foreign main proceeding under Chapter 15. The bankruptcy court granted recognition resulting in a stay of the district court litigation. *In re Wayne Burt Pte Ltd.*, Case No. 24-19956, 2024 WL 5003229 (Bankr. D. N.J. Dec. 6, 2024). In addition, the bankruptcy court issued a decision recognizing and enforcing an order from the Singaporean court requiring the plaintiffs in the litigation to return certain assets to the liquidator. Vertiv has appealed the bankruptcy court's decision to the district court, which appeal is currently pending. Time will tell if the dispute between these parties will be centralized in Singapore or proceed in the US as well.

Conclusion

As is evident from the above, 2024 was an active year for Chapter 15 cases. This trend is likely to continue in 2025. As of the date of this article, there have already been several developments that will likely result in new decisions this year. First, as noted above, the New York district court affirmed the bankruptcy court's dismissal of the SVB Cayman Chapter 15 case. That decision has been appealed to the Second Circuit. Depending on the court's schedule, that appeal may be decided this year. Second, in a matter of first impression, the United States Bankruptcy Court for the District of Delaware enforced a Mexican *concurso plan* that contains a non-consensual third party release over an objection, finding that the Supreme Court's prohibition of non-consensual third party releases in Chapter 11 cases is not applicable to Chapter 15 cases. *In re Credito Real S.A.B. de C.V.*, 2025 WL 977967 (Bankr. D. Del. Apr. 1, 2025). That decision has also been appealed and may be decided this year. Another bankruptcy court similarly ruled in a different case. *In re Odebrecht Engenharia e Consrução S.A.*, 2025 WL 1156607 (Bankr. S.D.N.Y. Apr. 25, 2025). These and other rulings in the first quarter of 2025 suggest that this will be a banner year for Chapter 15 decisions.

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An implied duty of good faith under English law: when does it apply to lenders, and what does it require of them?

Rebecca Oliver and Helen Coverdale

Overview

The English High Court has clarified when it will imply a duty on lenders to act in good faith when exercising contractual rights under finance documents. The court in *Macdonald Hotels Ltd and another v Bank of Scotland plc* [2025] EWHC 32 (Comm) gave helpful guidance on the scope of express and implied good faith obligations and considered whether lenders must balance their own commercial interests against the borrower's interests.

What was the case about?

English law imposes no general duty on commercial parties to act in good faith in their contractual dealings with one another. However, in certain circumstances the courts may be prepared to imply a duty of good faith where one party exercises contractual discretions, even in the absence of an express contractual obligation to act in good faith. This so-called Braganza duty requires parties to exercise contractual discretions rationally, reasonably and in good faith, and not arbitrarily or capriciously.

The decision in *Macdonald Hotels* arose in the context of non-disposals and negative pledge undertakings in finance documents drafted with specific carve outs allowing the borrower to seek the lender's consent to remove assets from the lender's security package. The High Court held that a lender would not be entitled to refuse consent for a reason or reasons unconnected with what it perceived to be its own commercial best interests, nor to refuse consent when no reasonable entity in the position of the lender could have refused consent. On the facts, it was decided that the bank had not breached the implied good faith term in not granting the consents requested as the bank had acted in its own commercial best interests. Nonetheless, the decision highlights the risks of weakening restrictive covenants by adding "subject to consent" provisos.

Facts

The facts of the case concerned a lengthy discussion with existing lenders around refinancing options, during which the borrower wished to explore financing with an alternative lender but was unable to do so without being able to release certain assets from the existing lender's security package. The borrower's intention was to provide those assets as new security to the new lender. The terms of the loan and security agreements restricted disposals and the granting of security unless the prior consent of the existing lender had been obtained.

The borrower argued that this provision conferred a discretion on the lender to determine whether, when, and on what terms the borrower was permitted to dispose of its assets in order to pay down its debt. As such, the borrower considered the bank was subject to an implied term to act in good faith when exercising that discretionary power on the basis explained by the Supreme Court in *Braganza v BP Shipping Limited* [2015] UKSC 17. The Supreme Court clarified that a lender ought to (a) act in good faith and not arbitrarily or capriciously in exercising its discretion and exercise its discretion consistent with its contractual purpose; (b) take into account all relevant considerations and not take into account any irrelevant considerations; and (c) not use the discretion for an improper purpose.

In *Macdonald,* the lender argued the *Braganza* duty should not be implied because their right was an *unqualified contractual right* to give or withhold consent. It also submitted that a *Braganza* duty should not be applied to the protections provided by the general law for those who secure debt against property. In addition, the lender argued that if a *Braganza* duty were implied, they had not breached their obligations under it.

Decision

The High Court (Judge Pelling KC) considered the decision to give consent to the refinancing arrangements proposed by the borrower did not fall within the relationship of mortgagor and mortgagee and was not controlled by the equitable rules applicable to that relationship. Going on to consider whether or not the power of the lender to give permission was an absolute or unqualified right of the sort that would preclude the implication of a *Braganza* type implied term, it was noted that the right was expressly made subject to being permitted with the prior written approval of the bank. This necessarily meant that the parties had agreed that the borrower might request that consent, and it necessarily followed that the bank could accept, reject or make counter proposals and, in the judge's words, that:

"No reasonable person with all the background knowledge of the parties could have thought the Bank was entitled simply to refuse to consider the request or refuse it for reasons unconnected with its commercial best interests. Had that been the parties' intention then there would have been no purpose in inserting the provision concerning permission, because it is always open to a party to a contract to request a variation to it and to the parties to such an agreement and to control that process by an appropriately drafted entire agreement provision…..the starting point is that the parties have agreed what is an otherwise unqualified prohibition on disposal.

No reasonable person with all the knowledge of the parties could have thought that by including an express right to dispose with the prior written approval of [the Bank] it was intended to impose on [the Bank] anything approaching an obligation to act otherwise than in what it perceived to be its own best interests or even to attempt to balance its own interests against those of [the Borrower] when arriving at a conclusion or do anything other than exercise its own judgment (necessarily arrived at by its officials and subject to its own internal management controls).

However, there is nothing in the language used by the parties that would lead a reasonable person with all the knowledge of the parties to understand what had been agreed as entitling the Bank to refuse its consent when no reasonable person in its position could have refused or for a purpose unrelated to its legitimate commercial interests. A more cautious lender might have omitted the express permission qualification and left the borrower to seek a variation to the agreement. However, that is not what the parties agreed. If the express reference to permission is to have any meaning at all it cannot be treated as creating nothing more than would be available to any party seeking a contractual variation."

The judge concluded that this was a qualified right of the lender due to the borrower's right to seek consent, and therefore a *Braganza* implied duty would not contradict the express terms of that provision.

The judge went on to find that the implication of a *Braganza* type term was necessary because the drafting gave the borrower the right to seek the lender's consent. The parties could not have intended that consent could be refused for reasons unconnected with the commercial best interests of the lender. The judge commented that:

"The parties having expressly agreed that [the Bank] could agree a change in the Security, that necessarily implied that [the Borrower] was entitled to seek such a change – something that was intended to benefit at least, and perhaps only, [the Borrower]. Whilst I accept that in considering such a request, [the Bank] (a) was free to act in what it perceived to be its own best interests; (b) was not obliged to balance its interests against those of [the Borrower], when arriving at a conclusion or (c) do anything other than exercise its own judgment (necessarily arrived at by its officials and subject to its own internal management controls) in arriving at a conclusion. However, neither party could have intended that [the Bank] would be entitled to refuse consent for a reason or reasons unconnected with what it perceived to be its own commercial best interests or to refuse consent when no reasonable entity in the position of [the Bank] could have refused consent."

As such, the court found in the bank's favour.

Implications for contractual drafting

From a legal perspective, it remains unclear whether the Braganza duty of good faith can be excluded contractually by the parties. Lenders and borrowers could agree to include contractual wording excluding any such duty; however given that the duty has been implied only where parties have unequal power, it is an open question whether a court would give effect to such a clause. Borrowers may resist such clauses in any case.

A more reliable approach to drafting is to make any matters that might otherwise be subject to lender discretion outright contractual prohibitions. This is because the "good faith" duty is implied only where a contractual discretion is exercised. It always remains open to a borrower to request amendments to financing arrangements during their term; this is the most common approach in practice and indeed the safest from a lender's perspective.

Implications for restructurings

Interestingly, the bank's counsel argued that this decision would have implications for secured lending relationships. The judge's response was that restrictive undertakings should be drafted without consent provisos to avoid this risk:

"It was suggested on behalf of [the Bank] that a decision to this effect would have "serious and far-reaching implications for all mortgagor-mortgagee relationships" because "… it would risk dragging the Court into a re-examination of the merits of – or apparently the adequacy of the reasons given for – any decision taken by a mortgagee in relation to the preservation of its security." I disagree.

First, I am concerned with a bespoke not a standard form agreement. Secondly, if a lender considered such a risk a real one in any particular case, it would take steps to ensure that its lending agreements were drafted so as to avoid that risk. One straightforward way of achieving that in the circumstances of this case would have been to omit paragraph (q) and leave it to [the Borrower] to seek a contractual waiver or variation in respect of any disposal not coming within any of the other species of Permitted Disposal. Thirdly, it has for many years been the practice to include in leases covenants against particular uses of property without the consent of the lessor, subject to a qualification that consent was not to be unreasonably withheld, without the consequences to which [the Bank] alludes being perceived to be a problem. Fourthly, whilst financial institutions can normally be relied on not to act in breach of a constrained and narrow term to the effect I have implied that cannot necessarily be said to be so for all lenders in all circumstances. Excluding such a term in all circumstances would risk unfairness and injustice for those who may not be as strong or well resourced as the parties in this case."

Where one party to a contract wishes to retain absolute discretion to approve or reject an action by a counterparty to the contract, it is better to draft the relevant undertaking as an absolute prohibition on the performance of such action without the inclusion of a consent proviso. For example, if a lender wishes to have an absolute right to approve or reject the disposal of an asset by a borrower, it would be better to state, "The borrower shall not dispose of [x]" rather than "The borrower shall not dispose of [x] without the consent of the lender." If the borrower later wished to make a disposal, it could ask the lender for a variation of the contract or waiver of the prohibition to enable it to do so.

If a consent proviso is included, qualifying this by reference to "sole discretion" or a similar formulation may not be sufficient to refute an implication that the exercise of the discretion should be qualified as set out in this case.

The case did not concern a contract which was subject to an express proviso that consent should not be "unreasonably withheld." However, the judgment suggests that where this wording is used, the obligation of the party giving consent would be broadly equivalent to the term implied in the contract in this case (the implied *Braganza* duty) – i.e. that the party taking the decision would not be entitled to refuse to consent for a reason or reasons unconnected with what it perceived to be in its own commercial interests or to refuse consent when no reasonable entity in the position of the party could have refused consent.

The *Braganza* duty is perhaps not as harsh as it might seem in the context of common financing restrictive undertakings. The good faith duty is a relatively low bar and does not create a general duty to act reasonably. It is unlikely that a commercial lender or funder would make decisions in a restructuring scenario that could not be justified by its own commercial best interests. However, the case serves as a warning that consent provisos in contracts can potentially weaken absolute prohibitions. Of course, this does not apply only to finance transactions: the judge's reasoning could apply equally to any commercial contractual restriction that has been drafted subject to a consent proviso.

The rise of distressed liability management transactions on both sides of the Atlantic has seen borrowers poring over existing contracts to assess what flexibility there is to achieve an out of court restructuring without 100% lender support. Borrowers should ensure that contractual proviso clauses are reviewed carefully to determine whether an implied duty of good faith may apply to lenders, even in the absence of an express duty of good faith.

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