NORTON ROSE FULBRIGHT

International Restructuring Newswire

A quarterly newsletter from the bankruptcy, financial restructuring and insolvency team at Norton Rose Fulbright

Q1 2021

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International Restructuring Newswire

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To our clients and friends:

I write this on a momentous day in the history of the United States: the successful transition of power to Joseph Biden, the 46th president of the United States. Mr. Biden's inaugural address was an optimistic one. He noted that "democracy has prevailed" after a test of the system by a defeated president who sought to overturn the results of the election. He called for Americans to put aside their deep divisions and to come together to confront the difficult problems the country—and the world—are facing: "a once in a century virus that silently stalks the country…that has taken many lives….millions of jobs have been lost…hundreds of thousands of businesses closed." But Mr. Biden committed to putting "people to work" and " to overcoming the deadly virus." Mr. Biden's remarks give added resonance to the work we do as restructuring professionals. In the broadest sense our work is to resuscitate businesses, save jobs, and support the economy. The pandemic and the resultant economic crisis creates new challenges for us and for the laws in place that facilitate business rejuvenation. As the new president said, "now we're going to be tested."

In that regard, the pandemic has proven to be an impetus for reform of national restructuring frameworks. In this issue we look at some of those changes: in the most significant insolvency reform in Australia in 30 years, we examine the new legislation to help small and medium businesses. We also look at other crucial recent developments: Brexit's impact on UK-EU cross-border restructurings; the seminal decision by the Canadian Supreme Court impacting the treatment of contracts in bankruptcy; and the limitations of Hong Kong's cross border recognition laws. These articles all deal with critical issues we face as global insolvency practitioners.

I would be remise if I do not note another momentous event today. Kamala Harris was sworn in as vice president of the United States—the first Black American and the first woman to hold the nation's second highest office. Not to be outdone, Norton Rose Fulbright was pleased to announce last month that Shauna Clark became its new Global Chair. Shauna is the first woman of color to hold this important position and will focus on a myriad of issues, including diversity and inclusion and client relationships.

I hope you enjoy our new issue.

Howard Seife
Global Head
Bankruptcy, Financial Restructuring and Insolvency

In the news

Norton Rose Fulbright – Webinar

July 14, 2020
Ryan Manns and Rebecca Winthrop presented on a Norton Rose Fulbright webinar on managing internal financial challenges and evaluating opportunities in the distressed healthcare market.

IINSOL International - Webinar

September 29, 2020
David Rosenzweig spoke on webinar for INSOL International which focused on cross-border aviation restructuring trends and issues.

Norton Rose Fulbright – Webinar

September 23, 2020
David Rosenzweig and Fiona Henderson presented a Norton Rose Fulbright aviation finance webinar which focused on airline restructurings under chapter 11.

Annual Jay L. Westbrook Bankruptcy Conference

November 5-6, 2020
Ryan Manns participated on a panel discussing valuation issues in an economic downturn at the University of Texas School Law's 39th Annual Jay L. Westbrook Bankruptcy Conference.

Norton Rose Fulbright – Webinar

November 23, 2020
Rebecca Winthrop and Ryan Manns presented on a Norton Rose Fulbright webinar on what every in-house counsel needs to know about bankruptcy risk for the next economic downturn.

St. John's University School of Law - Webinar

January 13, 2021
Frank Vazquez participated on a panel discussing "Fundamentals of Bankruptcy During the COVID-19 Crisis" hosted by St. John's University School of Law.

Turnaround Management Association – Webinar

January 28, 2021
Michael Parker will moderate a webinar sponsored by Turnaround Management Association where his panel will discuss "UCC Article 9: Extracting Business Value from Distress."

INSOL International – Latin America Newsletter

David Rosenzweig and Francisco Vazquez published an article in *INSOL International's Latin America Newsletter* (December 2020) entitled "Airline Restructurings: Section 1110 of the US Bankruptcy Code, the Cape Town Convention, and Recent Developments in US Chapter 11 Cases."

California Bankruptcy Journal

Rebecca Winthrop's 46-page article "So Many Troubled California Health Care Districts, So Many Have Filed Chapter 9—Lessons to be Learned" was recently published in the Special Health Care Issue, Volume 35, No. 3, of the *California Bankruptcy Journal* (January 2021).

INSOL International

March 4, 11 and 18, 2021
Howard Seife is Chair of INSOL International's upcoming annual Latin America conference.

Insolvency law reform in Australia: big benefits for small and medium enterprises?

Jeffery Black, Tim Mornane

The COVID-19 pandemic has proven to be a prominent opportunity for reform of national corporate restructuring frameworks around the globe. In the Fourth Quarter 2020 edition of our *International Restructuring Newswire*, we examined the new developments in a number of the tools available for financial restructurings in the United Kingdom, Germany and the Netherlands (all of which were designed to incorporate some of the benefits of restructuring available under Chapter 11 in the United States). In this issue, we turn our attention to Australia and discuss the proposed changes to its restructuring laws, which were introduced in January 2021.

The *Corporations Amendment (Corporation Insolvency Reforms) Act 2020* (Cth) (**Legislation**) represents the most significant reform to Australia's corporate insolvency regime in almost 30 years, and is the latest in a series of measures introduced in response to the economic impact of the pandemic. The main objective of the Legislation is to help small and medium enterprises (**SMEs**) in Australia overcome the economic, financial and operational challenges caused by the pandemic. The reforms also recognise that, for a variety of reasons, the current insolvency processes in Australia have become compromised or impractical in the SME space.

The Legislation centres on the introduction of two new restructuring and insolvency processes for SMEs, and consist of:

1. a simplified debtor-in-possession restructuring process
2. a simplified liquidation pathway
3. additional "complementary measures" aimed at increasing the number of insolvency practitioners available to regulate the new processes

The new restructuring process draws on some debtor-in-possession aspects of Chapter 11 of the US Bankruptcy Code, and introduces a new process for eligible businesses to work with specialist restructuring practitioners to restructure existing liabilities under a restructuring plan approved by creditors.

The Legislation, which establishes the framework for the insolvency reforms, has been available for eligible small businesses since 1 January 2021. The details governing the operation of the new simplified processes have been included in subordinate legislation. The regulations to the Legislation were released on 21 December 2020 (**Regulations**) and the rules were released on 22 December 2020 (**Rules**), just ten days before the new processes were enlivened.

Context

When law reform is proposed, it is important to first look at the context in which the new laws are being introduced. In the case of Australia, there are two key factors which have led to the reforms (i) the SME market and its importance to the Australian economy, and (ii) the existing legal framework and its preparedness and ability to deal with the disruption caused by the pandemic.

SMEs play a significant role in the Australian economy, and so it is important that Australia has strong SME insolvency laws. To this end, it is worth noting that:

- 97.5% of businesses in Australia employ less than 20 employees (i.e. are small businesses).
- Small businesses employ 4.7 million people in Australia, representing 44% of the total number of people employed in the private, non-financial sector.
- SMEs have been particularly badly affected by the pandemic.

As a result of the pandemic, many SMEs will need to restructure both operationally and financially and others will cease to exist entirely. Accordingly, it is no surprise that the Australian Government has focused the proposed insolvency law reforms on the SME sector.

While the decision to enact the Legislation in Australia was triggered by the pandemic, there has long been pressure on the Australian Government to reform the "one size fits all" approach to insolvency law in Australia. The existing formal rescue process for insolvent companies in Australia is voluntary administration under Part 5.3A of the *Corporations Act 2001* (Cth) (**Corporations Act**), which involves the approval and implementation of a deed of company arrangement (**DOCA**). The voluntary administration process takes a "one size fits all" approach to financial distress, subjecting an insolvent café to exactly the same regime and processes as were recently applied to the insolvency of Virgin Australia.

Accordingly, the existing insolvency processes in Australia are criticised as being too expensive and complex for SMEs, and these criticisms are exemplified by the most recent annual corporate insolvency statistics published by the Australian Securities and Investments Commission (**ASIC**), as follows:

- SMEs dominate external administrators' reports.
- 85% of businesses entering into external administration had assets of AUD $100,000 or less, 76% had fewer than 20 employees and 38% had liabilities of AUD $250,000 or less.
- 96% of creditors in this group received a dividend between 0–11 cents in the dollar (as an outcome of the external administration), reflecting the asset/liability profile of SME insolvencies.

Overview of the Legislation

Restructuring process

In a limited sense, the "restructuring" process is derived from Chapter 11 of the US Bankruptcy Code. It is intended to provide "financially distressed but viable" small businesses with a "simple, cheap and faster" method of restructuring their debt than the existing regime.

The new process sees the introduction of the debtor-in-possession model into Australian insolvency law, with business owners continuing to operate the business under a moratorium whilst they develop a restructuring plan with the assistance of (and, ultimately, certification by) an independent "small business restructuring practitioner" (**SBRP**). The restructuring plan is then put to the company's creditors (within 20 business days) and voted on by them (within a further 15 business days). The company must pay its employee entitlements before the creditor vote.

To address the time needed for practitioners to become familiar with the new process and register, the Legislation will also include a transitional process. This will enable a company to declare its intention to access the process, which will act to extend the existing insolvency relief to that company for up to three months to enable a practitioner to be engaged.

Simplified liquidation pathway

The "simplified liquidation pathway" is a streamlined version of the existing Australian liquidation process. The key differential is the reduction of the statutory obligations imposed upon the liquidator for "straightforward" liquidations of small businesses without evidence of director misconduct.

These include:

- reducing the circumstances in which a liquidator can recover unfair preferences from unrelated creditors
- removing the obligation to report on misconduct unless there are reasonable grounds to believe misconduct has occurred
- removing requirements to call creditor meetings
- simplifying the dividend and proof of debt procedures

The measures are intended to reduce the costs associated with the administration of the liquidation process for small companies (which can impose an administrative burden without commensurate benefit to creditors). The intention of the new process is that it will increase the dividends paid to creditors of small businesses.

In recognition of the potential for misuse, each of the processes will include "safeguards", which include:

- in both processes:
  - administration by an independent practitioner
  - the preservation of the rights of key creditors, e.g. secured creditors with 'all asset' security
  - a bar on the same company or directors using the process in a seven year period
- in the restructuring process:
  - a power for the practitioner to stop the process if misconduct is identified
  - the right of creditors to vote on the proposed restructuring plan
- in the liquidation process:
  - the power for creditors to convert the liquidation to a "full" liquidation process
  - the obligation for company directors seeking to use the process to declare the company is eligible and has not engaged in illegal 'phoenixing' activity

Complementary measures

To deal with the expected increase in the number of businesses that may seek to use the new processes, the legislation will also include incentives designed to increase the availability of practitioners to take appointments.

These include:

- temporarily waiving registration fees for registered liquidators until 30 June 2022 in order to encourage practitioners to enter or re-enter the market
- changes designed to allow greater flexibility in the registration of insolvency practitioners
- introducing a new class of practitioner who will be limited to the new restructuring process only.

Comparison with the US and the UK

The Legislation bears resemblance to similar provisions recently introduced in the US and the UK. In the US, the *Small Business Reorganization Act 2019* (US) (**SBRA**) was enacted in August 2019 and took effect in February 2020.

The SBRA added a new Subchapter V to Chapter 11 of the US Bankruptcy Code to address deficiencies identified in the existing process for SMEs, including high costs, monitoring deficits, and procedural roadblocks.

A key distinction between the new restructuring process in Australia and Subchapter V is the eligibility requirements, with the requirements being much more restrictive in Australia.

In summary:

- Only incorporated Australian businesses will be able to access relief under the new restructuring process, whereas any business is eligible to file for Subchapter V (so long as 50% of their liabilities constitute business debt).
- The new measures in Australia are only available to SMEs with liabilities of less than AUD $1m (which the Australian Government states represents 76% of businesses subject to insolvency today); in comparison, Subchapter V initially had a debt ceiling of USD $2.7m (approx. AUD $3.8m), however the US Congress increased Subchapter V's eligibility threshold to USD $7.5m (approx. AUD $10.6m) in response to the projected increased demand caused by the pandemic.
- Related-party loans do not count towards Subchapter V's debt cap, which may be significant in the current economic climate; it *appears* from the Regulations that related-party debt will count towards the AUD $1m threshold in Australia.

The Legislation is not a full-scale adoption of all the powers afforded to a debtor-in-possession under Subchapter V. However, certain features of Subchapter V, which are not presently contemplated by the Legislation, may be also beneficial for Australian SMEs and perhaps the focus of further legislation - particularly, the ability to reject burdensome contracts and pay administrative expenses over the life of the restructuring plan.

In the UK, the *Corporate Insolvency and Governance Act 2020* (UK) (**CIGA**) came into force in June 2020. CIGA is part of the UK's response to the pandemic and introduces a number of "debtor friendly" measures to English restructuring and insolvency law. A key aspect of the restructuring measures introduced by the CIGA is the wide-ranging moratorium, pursuant to which directors apply to Court for an initial 20 business day enforcement moratorium, which can be extended for a further 20 business days without creditor consent or indefinitely with creditor consent, while a restructure is negotiated. The moratorium is broad-based and extends to the enforcement of claims by landlords and secured creditors.

In contrast, the new Australian process appears to leave open the prospect of secured creditors enforcing against assets of the company that are critical to the success of a rescue attempt. The apparently limited nature of the moratorium while a plan is being prepared under the new laws, and the inability to bind dissenting secured creditors to a plan submitted to creditors, may restrict the potential for the SME rescue alternative to significantly advance the number of successful debt restructurings for small businesses.

Other key considerations

Eligibility

As previously mentioned, the new measures introduced by the Legislation apply to eligible incorporated SMEs with total "liabilities" of less than AUD $1m.

The term "liabilities" is defined broadly in the Regulations. When one considers unpaid rent, tax debt, employee entitlements, and bank or other lending, total aggregate liabilities for SMEs are likely to reach, if not exceed, the AUD $1m threshold in a large number of cases. In addition, the *final* Regulations do not exclude contingent liabilities from the calculation of debts and claims for the purposes of the AUD $1m threshold. This represents a noteworthy change from the *draft* Regulations, which excluded contingent liabilities from the definition of admissible debt or claim which is used to determine eligibility.

Will the current threshold represent a 'barrier to entry' for a number of insolvent SMEs?

Secured creditors

It is proposed that secured creditors will only be bound to the extent of their unsecured debt. If the entire amount of their debt is secured (that is, the value of their collateral security is equal to or greater than the value of their debt), the secured creditor can only be bound to the extent that it consents to be bound by the plan.

Furthermore, it is proposed that the fact that the restructuring plan has been made will not prevent a secured creditor from realising or otherwise dealing with their security interest unless the Court makes orders to that effect, or the:

- secured creditor accepted the proposal to enter into the plan (i.e. 'voted' in favour of the plan)
- plan prevents the secured creditor from doing so

This position is therefore similar to that of a secured creditor in relation to a deed of company arrangement in voluntary administration.

In a similar way, it is also proposed that SBRPs will be prohibited from disposing of property of the company that is subject to a security interest unless the disposal is in the ordinary course of the company's business, with the written consent of the secured party or with leave of the Court.

These factors may represent challenges for an SME to successfully restructure under the new process.

Remuneration

The Rules provide that the SBRP is to only charge a fixed fee for the new process, such fee to be agreed upon by the board prior to the appointment of the SBRP. That said, the Rules also include an exemption from charging only a fixed fee as agreed with the board where costs are incurred by an SBRP associated with defending legal actions brought by other parties, by stipulating that the board must decide on a method for working out the SBPR's remuneration in the event of legal proceedings.

Interestingly, the provision for the SBPR's remuneration is separated into:

- a fixed agreed fee, decided by the board - for the restructuring generally
- further remuneration specific to the work performed for the restructuring plan, to be calculated as a percentage of payments made to creditors

Conclusion

It will take some time for the full effect of these reforms to have an impact within the SME space in Australia.

First, it will be necessary to assess the 'first wave' of eligible companies that undertake the new process in order to gauge their success (or otherwise).

Secondly, as with any new legislative regime, it is anticipated that the Courts will be asked to intervene in order to clarify, or develop, the Legislation in meaningful respects.

Thirdly, the Australian Government has recognised that it will take time for directors, accountants and other professionals to embrace and test these reforms and, to ensure that SMEs do not miss out on utilising these reforms, eligible SMEs will be able to declare their intention to use the new process (which declaration must be lodged with ASIC), after which time the directors of the company will then be afforded certain further temporary relief in connection with the insolvent trading liability (for up to three months) and compliance with 'statutory demands' (for up to six months).

In terms of broader reform, it is understood that the Australian Government intends to consider structural corporate and insolvency law reforms as part of its ongoing economic recovery model for Australia in 2021.

This may be undertaken through a 'root and branch' review of our existing law and to this end, commentators have speculated that specific areas of consideration could include:

- an enforcement moratorium to be made available for an insolvent entity *prior to* the initiation of formal insolvency proceedings
- a cross-class cram down mechanism under a DOCA or under a creditors' scheme of arrangement
- a dedicated Court-sanctioned process for super-priority debtor-in-possession financing during formal external administration processes
- a legislative process to permit pre-positioned sales (or 'pre-packs') for distressed business.

Again, time will tell.

Jeffery Black is a partner in our Perth office and Tim Mornane is a partner in our Sydney office, both in the firm's financial restructuring and insolvency group.

The authors gratefully acknowledge the assistance of Mitchell Rosario, a lawyer in the Firm's Australian Financial Restructuring & Insolvency team, for his invaluable assistance in preparing this article.

Cross-Border insolvency in Hong Kong: Common law limitations and how the Model Law could drive foreign investment and economic growth

Scott Atkins, Dr Kai Luck

Synopsis

For countries that have adopted, and implemented in local legislation, the United Nations Commission on International Trade Law (**UNCITRAL**) Model Law on Cross-Border Insolvency (**Model Law**)**,** there is a streamlined process which enables a liquidator, or other insolvency administrator, of a company in a foreign jurisdiction to apply to the court in the Model Law jurisdiction to:

- have the foreign insolvency proceeding recognised;
- take control of assets of the foreign company located in the Model Law jurisdiction; and
- pursue investigations and institute recovery proceedings, for example in relation to voidable transactions and breach of directors' duties, in the Model Law jurisdiction according to the local insolvency laws of that jurisdiction.

Where an insolvency process is taking place in a Model Law jurisdiction, the Model Law also contains provisions which give foreign creditors the same rights as local creditors to participate in the insolvency process, for example by lodging a proof of debt and voting.

Importantly, there is no requirement of reciprocity in either of these cases, insofar as the foreign jurisdiction need not have itself adopted the Model Law for a foreign insolvency administrator and foreign creditors to have substantive rights in the Model Law jurisdiction.

Singapore adopted the Model Law with the passage of the *Singapore Companies (Amendment) Act 2017*, which came into force on 23 May 2017. This was part of an effort by the Singapore Government to position the country as a leading hub for insolvency and restructuring in the Asia-Pacific, and the adoption of the Model Law has helped Singapore to achieve that goal in the three years since.

Indeed, for every country, an efficient, fair and effective insolvency regime, which provides means for coordinated cross-border rescue and restructuring processes for global enterprises and preserves the value of foreign creditors' rights if a venture does not have the success intended, is critical in driving foreign investment in support of innovation, value creation and growth. With the rapid pace of globalisation continuing – notwithstanding the immediate impact of the pandemic – and supporting the expansion of multi-national corporations and business operations, countries that implement best-practice cross-border insolvency processes will enhance their attraction as primary destinations for the flow of foreign capital.

Recognising this important link, Myanmar is the most recent jurisdiction to have adopted the Model Law, implementing it as part of its new Insolvency Law 2020, which is now becoming a model for developing and developed nations alike in the Asia-Pacific region in adopting best practice domestic and cross-border insolvency processes.

In contrast, Hong Kong has still not adopted the Model Law. While the courts have made significant progress in establishing a common law framework for the recognition of foreign insolvency proceedings and the administration of creditors' claims in Hong Kong, there are ongoing substantive and procedural limitations which act as a deterrent to business investment.

The formal adoption and implementation of the Model Law in Hong Kong would help to sustain foreign investment as an important feature of economic and financial system stability as the challenges of the pandemic continue across the globe over the next year and beyond.

The common law cross-border insolvency process in Hong Kong

Common law recognition

As noted, Hong Kong has not adopted the Model Law, nor are there any other statutory provisions which give Hong Kong courts the express power to recognise foreign insolvency proceedings and make orders assisting foreign insolvency administrators and creditors. Nevertheless, the common law continues to apply in Hong Kong, and it was affirmed in *Joint Official Liquidators of A Co v B & C*[1] that the Hong Kong Companies Court, if issued with a formal letter of request to provide assistance from a foreign court, may recognise foreign insolvency proceedings and provide assistance in their discretion in accordance with the principle of modified universalism. This was also recently affirmed in *Re CEFC*

1 [2014] 4 HKLRD 374.

Shanghai International Group Limited,[2] in which the Hong Kong Companies Court for the first time granted recognition and assistance to bankruptcy administrators appointed to a Chinese company.

Substantive limitations

However, the current position of the Hong Kong Companies Court is that assistance will not be provided to a foreign insolvency administrator unless the orders sought would be available to an insolvency representative under Hong Kong's local laws. This is on the basis that the courts are bound by the limits of their own statutory and common law powers.

Thus, in *Joint Administrators of African Minerals Ltd v Madison Pacific Trust Ltd*,[3] the English High Court issued a letter requesting that the Hong Kong Companies Court make orders recognising an administration occurring under the supervision of the English High Court and preventing a Hong Kong entity from enforcing a security interest over the shares of the foreign company in administration. Justice Harris declined to do so on the basis that, in the absence of an administration regime in Hong Kong, including moratoria restricting the enforcement rights of secured creditors, granting the requested orders would enable the administrators to exercise powers not available to a liquidator appointed to an insolvent company in Hong Kong.

While it may be possible for a foreign rescue process to be recognised if the relief sought is an order restricting the enforcement of unsecured creditors' claims (with a moratorium of that kind already part of the liquidation process in Hong Kong), the inability to obtain a cram down order preventing secured creditors from enforcing their claims during the negotiation of a restructure and the implementation of a restructuring plan is problematic. The implementation of stronger rescue processes is currently being prioritised by multiple jurisdictions across the world as one of the key ways to assist businesses impacted by the pandemic. Indeed, where a company or business is viable, notwithstanding an existing period of financial distress, a successful restructure is in the interests of all creditors, secured and unsecured alike, not only in ensuring the payment of their current outstanding debts but also in preserving an ongoing trading relationship. Recent amendments in the United Kingdom, which among other things introduce a pre-formal insolvency enforcement moratorium binding on secured and unsecured creditors where that is likely to result in a successful corporate or business rescue attempt, as well as a new restructuring plan formal rescue alternative which includes a cross-class cram down permitting the court to order a plan to take effect against the wishes of different classes of creditors, will become a model for other jurisdictions globally.[4] Singapore's even broader restructuring laws, introduced in May 2017 and based on the United States Chapter 11 process (including a worldwide enforcement moratorium that also applies to secured creditors),[5] will likewise influence the law reform process in the region as stronger rescue laws are being encouraged by the World Bank, INSOL International and UNCITRAL as part of its Working Group V.

If Hong Kong not only does not adopt laws incentivising both informal and formal rescue and restructuring for distressed but viable businesses and companies, but continues to rely on a common law cross-border recognition process which does not permit orders to be made implementing broad-based enforcement moratoria necessary to support a restructuring attempt, there will be a significant deterrent for both:

- global enterprises to extend their operations in Hong Kong, knowing the prospect of a restructure will be compromised (likely resulting in premature liquidation) if an enterprise encounters a period of financial distress; and
- investors to advance funds to enterprises that do have Hong Kong operations, given the absence of the usual protections that would apply during a restructuring attempt.

These limitations are echoed in UNCITRAL's Guide to the Enactment of the Model Law, in which it is noted that:

> The increasing incidence of cross-border insolvencies reflects the continuing global expansion of trade and investment. However, national insolvency laws have by and large not kept pace with the trend, and they are often ill-equipped to deal with cases of a cross-border nature. This frequently results in inadequate and inharmonious legal approaches, which hamper the rescue of financially troubled businesses, are not conducive to a fair and efficient administration of cross-border insolvencies, impede the protection of the assets of the insolvent debtor against dissipation and hinder maximisation of the value of those assets. Moreover, the absence of predictability in the handling of cross-border insolvency cases impedes capital flow and is a disincentive to cross-border investment.[6]

This indeed has been the primary incentive for the adoption of the Model Law now in 51 jurisdictions, including the United States, the United Kingdom, Australia, New Zealand, Singapore, the Republic of Korea, South Africa, Japan, Canada and the Philippines.

Singapore's progress in particular to become a leading insolvency and restructuring hub in the Asia-Pacific region since adopting the Model Law as part of its progressive restructuring reform package is testament to the efficiency and investment growth facilitated by the Model Law's cooperative and flexible framework.

With the regional consensus on the need for efficient and effective cross-border laws, particularly as an adjunct to flexible rescue and restructuring

2 [2020] HKCFI 167.

3 [2015] HKEC 641.

4 These reforms were introduced under the *Corporate Insolvency and Governance Act 2020* (UK), which came into effect on 26 June 2020.

5 These laws were introduced under the *Companies (Amendment) Act 2017*.

6 UNCITRAL, Guide to the Enactment of the Model Law, [13].

processes, and the dynamic and evolving insolvency law reform agenda underway in response to the pandemic, Hong Kong cannot afford to be left behind.

Procedural limitations

Hong Kong's common law recognition process has nevertheless resulted in benefits for foreign liquidators and creditors. Foreign liquidations have been recognised and foreign liquidators have obtained a range of orders to support their investigations and expand the pool of assets available for distribution to creditors in the foreign liquidation, including:

- the freezing and/or seizure of assets, books and accounts of a foreign company located in Hong Kong;[7]
- the oral examination of officers and other parties located in Hong Kong in relation to the affairs of the foreign company;[8] and
- the production of documents and information by creditors of the foreign company and other parties located in Hong Kong.[9]

Hong Kong courts have also developed a standard-form order to guide applications for recognition and assistance from foreign liquidators, designed to facilitate the grant of orders on the papers where possible.[10] This significantly increases efficiency and reduces costs, preserving capital for the benefit of creditors. At the same time, however, Justice Harris cautioned in *Re Joint and Several Provisional Liquidators of China Oil Gangran Energy Group Holdings Ltd*[11] that while he personally was familiar with applications for recognition and assistance, 'they will not necessarily be familiar to other judges who hear company matters.' Indeed, there is no specialist insolvency list in Hong Kong courts and the number of judges with specific insolvency expertise, let alone cross-border experience, remains limited. This tempers, to some degree, the potential for continued efficiency benefits for foreign liquidators, and also raises the prospect of inconsistent judgments that could be avoided with the adoption of the Model Law. Doing so would also ensure a specific method for cooperation and communication between Hong Kong courts and foreign courts, in place of the more cumbersome and inefficient letter of request process mandated under Hong Kong's current common law recognition regime.

Looking ahead

While there have been important efficiency and cost benefits from the Hong Kong Companies Court's recognition, under common law principles, of foreign liquidation proceedings and its willingness to make orders allowing foreign liquidators to conduct investigations and pursue enforcement options concerning the company in Hong Kong, there are substantive and procedural limitations from the common law regime.

Substantively, in the absence of similar local laws in Hong Kong, the broad-based enforcement moratoria applying to the claims of secured creditors in other jurisdictions cannot be ordered under the common law recognition framework in Hong Kong. Procedurally, the absence of a Model Law-type cooperation process between Hong Kong and foreign courts, and the potential for inconsistency between different judges in Hong Kong in the application of the developing common law recognition framework, undermines efficiency and cost savings.

These limitations compromise confidence in Hong Kong's insolvency regime and deter foreign investment in Hong Kong from businesses, creditors and shareholders. This is reflected in measurable terms. For example, in the World Bank's 2020 Ease of Doing Business rankings, Hong Kong ranked 45th out of 190 nations in the perceived strength and efficiency of its insolvency laws and processes, compared to its overall ranking of 3rd, while Singapore, which has adopted the Model Law, ranked 18 places higher for its insolvency regime with an overall rating of 2nd.

Now is the time for Hong Kong to revisit its stalled insolvency law reform process. Only by doing so will Hong Kong keep pace with a global push for nations to adopt streamlined cross-border insolvency processes under the Model Law, in conjunction with local laws incentivising corporate and business rescue, and in turn develop a best-practice insolvency regime to position itself as a rival to Singapore and other nations as a leading insolvency and restructuring hub in the Asia-Pacific. That would provide an important building block for enduring economic growth in the years ahead.

Scott Atkins is a partner, Deputy Chair and Head of Risk Advisory in our Sydney office. Dr. Kai Luck is Executive Counsel and Director of Strategic Insights in our Brisbane office. Both are in the firm's financial restructuring and insolvency group.

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7 See, for example, Joint Official Liquidators of Centaur Litigation SPC [2016] HKEC 576; Rennie Produce (Aust) Pty Ltd [2016] HKEC 2012.

8 See, for example, Joint Official Liquidators of Centaur Litigation SPC [2016] HKEC 576; BJB Career Education Co Ltd [2017] 1 HKLRD 113.

9 See, for example, Joint and Several Liquidators of Pacific Andes Enterprises (BVI) Ltd [2017] HKEC 146.

10 Re Joint and Several Provisional Liquidators of China Oil Gangran Energy Group Holdings Ltd [2020] HKCFI 825, [11].

11 [2020] HKCFI 825, [10].

Chandos upheld by Supreme Court of Canada: the anti-deprivation rule in Canada

Aditya Badami, Meghan Parker, Aaron Stephenson

In a split decision issued on October 2, 2020, the Supreme Court of Canada (SCC) upheld the Alberta Court of Appeal's majority decision in *Chandos Construction Ltd. v. Deloitte Restructuring Inc. in its capacity as Trustee in Bankruptcy of Capital Steel Inc., a bankrupt* (*Chandos*).

The practical effect of the *Chandos* decision is that, if a contracting party enters insolvency proceedings, certain contractual clauses that are triggered by insolvency and remove value from the debtor's estate are void and will not be given effect by Canadian courts. The SCC rejected the United Kingdom's more lenient view of the anti-deprivation rule and aligned more closely to the policy underlying the anti-*ipso facto* clause provisions in the United States Bankruptcy Code.

Background

Case facts

As general contractor, Chandos subcontracted a project's steel work to Capital Steel. The subcontract included a term under which Capital Steel agreed to forfeit ten percent of the contract price if it became insolvent "as a fee for the inconvenience of [Chandos] completing the work using alternate means and/or for monitoring the work" (the **Insolvency Clause**).

Capital Steel completed most of its work under its subcontract with Chandos before making an assignment in bankruptcy. Deloitte was appointed as trustee of the estate of Capital Steel and Capital Steel ceased operations at that time. As a result, Chandos had to complete the steel work at its own cost. Even after costs of completion were accounted for, Chandos owed a balance to the estate of Capital Steel based on the remaining unpaid contract price. However, Chandos took the position that it could rely on the Insolvency Clause to deduct ten percent of the contract price and that, once deducted, Chandos owed nothing to Capital Steel. The trustee brought an application seeking a judicial determination of whether the Insolvency Clause was enforceable.

The lower court decisions

At first instance, the Chambers Judge ruled in favour of Chandos. He held that the Insolvency Clause was akin to a liquidated damages clause. It was enforceable as part of a *bona fide* commercial transaction.

The trustee appealed

A majority of the Alberta Court of Appeal held that the Insolvency Clause violated the "anti-deprivation rule," which prevents parties from agreeing to remove property from a bankrupt's estate that would otherwise have vested in the trustee for distribution amounts creditors. It invalidates provisions that are "engaged by a debtor's insolvency and remove value from the debtor's estate to the prejudice of creditors."

The Insolvency Clause was also held by the Alberta Court of Appeal majority to constitute an unenforceable "penalty" clause because ten percent of the contract price did not reflect a genuine pre-estimate of Chandos's damages.

The dissenting judge at the Alberta Court of Appeal wrote lengthy reasons in which he accepted the Insolvency Clause as being consistent with "freedom of contract" principles. He would have enforced the Insolvency Clause.

The international context

Courts in the US and the UK had ruled on the "anti-deprivation rule" in the context of the Lehman Brothers bankruptcy before *Chandos* was heard by the Alberta Court of Appeal. The US Bankruptcy Court and the Supreme Court of the UK came to opposite conclusions about the enforceability of "flip" or *ipso facto* clauses. In *Chandos*, the general contractor urged the courts to adopt the UK precedent, which recognized such clauses as enforceable.

The UK Supreme Court held in *Belmont Park Investments Pty Ltd. v. BNY Corporate Trustee Services Ltd.* that the anti-deprivation rule does not apply to "bona fide commercial transactions which do not have as their predominant purpose, or one of their main purposes, the deprivation of the property of one of the parties on bankruptcy." The Court adopted a purpose-based test pursuant to which a clause will only be rendered unenforceable by the anti-deprivation rule if it has a predominant or main purpose of depriving the estate in the event of a bankruptcy. The disputed clause in *Belmont* was recognized as enforceable.

In *Lehman Brothers Special Financing Inc. v. BNY Corporate Trustee Services Limited*, which ran in parallel to *Belmont* and dealt with the same agreement, the US Bankruptcy Court made a broad pronouncement about the invalidity of *ipso facto* clauses under the US Bankruptcy Code. In so doing, the Court applied a statutory effects-based test to arrive at the

opposite conclusion to that of the UK Supreme Court.

In *Chandos*, the majority of two judges from the Alberta Court of Appeal declined to adopt the precedent set by the UK Supreme Court in *Belmont* on the basis that a purpose-based test was contrary to established Canadian jurisprudence. The majority observed how British legal scholars had questioned whether a purpose-based test would defeat the purpose of the anti-deprivation rule.

The SCC decision

A majority panel of eight judges who heard the SCC appeal upheld the Alberta Court of Appeal majority decision. It concluded that the Insolvency Clause was void and therefore unenforceable.

The following determinations were key to the analysis of the SCC majority:

- The anti-deprivation rule continues to exist at common law, even though in Canada, it is not fully codified in the *Bankruptcy and Insolvency Act*.
- The anti-deprivation rule operates by voiding contractual terms that prevent property from passing to the bankruptcy trustee.
- The anti-deprivation rule is triggered upon satisfaction of a two-part test: (1) the clause must be triggered by an event of insolvency or bankruptcy, and (2) the effect of the clause (irrespective of its purpose) is to remove value from the estate.

In so holding, the SCC, like the Alberta Court of Appeal, did not adopt the precedent set by the UK Supreme Court in *Belmont*. The SCC majority instead preferred to adopt an effects-based test. Looking at the clause through this lens, the SCC majority concluded that the Insolvency Clause in the subcontract between Chandos and Capital Steel was a "direct and blatant violation of the anti-deprivation rule," thereby rendering it void.

The SCC majority declined to analyze whether the Insolvency Clause was also unenforceable as a penalty clause.

One SCC judge dissented in lengthy reasons, principally on the basis that the anti-deprivation rule should not apply if a contractual term is serving a *bona fide* commercial purpose.

Implications

The SCC majority decision in *Chandos* confirms that, in Canada, contracting parties will not aid themselves by drafting terms into their agreements that remove monetary value upon or because of a counter-party's insolvency.

With that said, there are contracts whereby contractual rights are altered by one party's insolvency that do not clearly remove monetary value from the estate; for example, where a party's insolvency alters responsibility for the operatorship of jointly owned property. This issue was not addressed by the SCC and it remains to be seen how *Chandos* will apply to such contracts.

In reaching its conclusion, the SCC majority adopted an effects-based analytical approach to the anti-deprivation rule that is substantially aligned with the analytical approach used in the US, but deviates from purpose-based analytical approach used in the UK.

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Aditya Badami and Meghan Parker co-authored and presented a paper titled "Canada's Tired Anti-Deprivation Rule: Capital Steel Inc v Chandos Construction Ltd" in the 2019 Annual Review of Insolvency Law.

Rolling with the punches; Brexit's impact on UK-EU cross-border restructuring

Matthew Thorn and Mark Craggs

With the global economy reeling from the body-blow dealt by the COVID-19 pandemic, Brexit – the UK's exit from the European Union – became fully effective at the turn of the year with the expiry of the implementation period on 31 December 2020. The economic impact of this combination will be felt for years to come and it remains to be seen how the UK will manage its Rocky Balboa style comeback.

It seems inevitable that debtor companies and their stakeholders in the UK and Europe will increasingly be looking to restructuring and insolvency regimes for support to rescue businesses or, where that is not achievable, to liquidate businesses and their assets and facilitate the efficient redistribution of capital for use elsewhere in the economy. In a global marketplace, this invariably relies on cross-border cooperation between states and their courts and practitioners, depending on where a business carries out its operations.

Prior to 1 January 2021, recognition and enforcement of restructuring and insolvency procedures and judgments between the UK and EU member states was subject to common EU regulations which had direct effect and broadly offered automatic recognition. Those common regulations no longer apply to the UK. This article considers the changes to the cross-border restructuring and insolvency regime in the UK and Europe brought about by Brexit.

In summary, there remains an effective legal framework for recognition of inbound proceedings and judgments from EU member states to the UK. Recognition of UK proceedings and judgments in the EU will be subject to the local laws (including EU law) of the individual member states concerned; this is not expected to be unduly difficult in most cases but, as matters stand, will not be as straightforward as it was prior to Brexit. However, some additional court applications and procedural hurdles are likely to be encountered, requiring expert navigation.

Background to Brexit

On 23 June 2016, the UK voted to leave the EU by a narrow margin of 3.8%. The political turmoil caused by that vote has been considerable; with two prime ministers and two elections in the period between the June 2016 referendum and the end of the implementation period on 31 December 2020. A deal was finally struck between the UK and the EU on 24 December 2020 relating to the sale of goods across the UK-EU border but with the omission of much detail (including on the offering of services across the border) further negotiations on the future UK-EU relationship may continue for a significant period.

Legal implications of Brexit

Following the implementation of Brexit, new EU law (including decisions of the Court of Justice of the European Union (**CJEU**)) does not apply to the UK. Existing EU law, in so far as it was operative immediately before Brexit implementation, now forms a part of UK domestic law. Ministers have broad delegated authority to remedy failures or deficiencies in such retained EU law so that it works in a UK domestic context, including where that retained EU law makes provision for reciprocal or other arrangements between the UK and the EU which no longer exist or are no longer appropriate. EU legislation that governed recognition and enforcement of insolvency procedures and civil judgments across European borders (the Recast Insolvency Regulation[1] and the Recast Brussels Regulation[2], among other rules relating to specific sectors) relied largely on reciprocity and so were substantially revoked.

The Recast Insolvency Regulation lays down mandatory jurisdictional (including conflict of laws-related) rules relevant to the opening and conduct of insolvency proceedings, as well as prescribing certain automatic and multilateral consequences of the opening of such proceedings (including, crucially, automatic recognition of those proceedings across EU member states (except Denmark)). In the UK, the Recast Insolvency Regulation applied to administrations, company voluntary arrangements and court-supervised winding-up proceedings, but not schemes of arrangement. Despite the revocation of the reciprocal elements of the Recast Insolvency Regulation, the UK unilaterally retained the benefit of the regulation's jurisdictional hooks (which will sit alongside the UK's pre-existing jurisdictional tests) so EU parties will enjoy at least the same level of access to the UK courts post-Brexit as they previously did.

The Recast Brussels Regulation governs recognition and enforcement of judgments in civil and commercial matters and provides for recognition and enforcement across EU member states. Prior to Brexit, the question of whether schemes (and, now, the new so-called "restructuring plans" (as to which, see below)) were subject to the Recast Brussels Regulation was subject to significant judicial debate in the UK and will likely now remain undecided.

1 The Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast)

2 Regulation (EU) No 1215/2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters

To mitigate the loss of the Recast Brussels Regulation, the UK acceded to the Hague Convention in its own right following Brexit implementation[3]. The Hague Convention provides for allocation of jurisdiction and enforcement of judgments given by a court designated by an exclusive jurisdiction clause. EU member states are already a party to the Hague Convention. The UK has also applied to re-accede to the Lugano Convention[4] as an independent contracting state. The Lugano Convention governs jurisdiction and the recognition and enforcement of judgments in civil and commercial matters between the EU and other contracting parties on terms similar to the Recast Brussels Regulation. Unlike the Hague Convention however, acceptance of accession to the Lugano Convention requires unanimous agreement of the contracting parties; with accession becoming effective three months later.

Under the post-Brexit arrangements in the UK, by virtue of secondary legislation enacted in anticipation of Brexit, EU laws determining the law governing contractual and non-contractual obligations will continue to apply in the UK (as in the EU).

So, where are we now on cross-border recognition of insolvency proceedings?

The loss of automatic recognition means that insolvency proceedings in EU member states are now treated in the UK on the same footing as those in the rest of the world; foreign representatives will need to request recognition of those insolvency proceedings and any related assistance from the UK courts. The UK has a range of measures that can be used to facilitate such assistance, including the Cross-Border Insolvency Regulations 2006 (**CBIR**) (Great Britain's enactment of the UNCITRAL Model Law on Cross-Border Insolvency), section 426 of the Insolvency Act 1986 (**Section 426**) and the common law. Recognition of civil (restructuring) judgments is considered below.

In broad terms, debtors and/or appointed insolvency office-holders must identify and specifically request from the UK courts, on a case-by-case

3 Hague Convention of 30 June 2005 on Choice of Court Agreements

4 Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, concluded at Lugano on 30 October 2007

basis, the forms of relief desired within the UK prior to the courts being satisfied that such relief is appropriate and ought to be granted in the circumstances, in the exercise of their discretion.

Request-based forms of assistance may involve additional delay, complexity and cost when compared with automatic recognition. They can be less effective in dealing with the immediate consequences of "free-fall" insolvencies; that is, insolvencies which are the result of last-minute or knee-jerk filings by directors, debtors themselves, or creditors, and/or are not commenced on a pre-planned basis, and/or are not commenced in a manner calculated to optimise returns to creditors and other stakeholders. Section 426 is limited and applies only in the case of requests from courts in certain designated countries and territories (only one of which, the Republic of Ireland, is another EU member state). A further drawback is that the UK courts could not be confident that any assistance provided under CBIR would be reciprocated in many other member states; to date, only Poland, Greece, Romania and Slovenia have implemented the Model Law in their national law.

Foreign office-holders do, however, have a great deal of flexibility and the ability to devise bespoke solutions in any given case when using the request-based forms of assistance. There are additional advantages of using other measures above and beyond what was available under the Recast Insolvency Regulation, such as the ability for the English court under Section 426 to apply either UK insolvency law to the issue the subject of the request, or the applicable foreign law, depending on how the request is framed.

However, as things stand, the English courts will not give effect to the purported discharge of English law-governed claims in foreign insolvency proceedings (as occurred in the context of EU proceedings under the Recast Insolvency Regulation). This rule dates from 1890 and is known as the rule in *Gibbs*[5]. The sun may soon set on this rule, however. The UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments was adopted by a decision of UNCITRAL on 2 July 2018 and published with a recommendation that all states give favourable consideration to its implementation. The new Model Law arguably provides for an abrogation of the *Gibbs* rule and so it will be for the UK legislature to decide whether to implement the new Model Law (and, if so, on what terms). Encouragingly, in December 2020 the UK passed the Private International Law (Implementation of Agreements) Act 2020 which gives the appropriate national authority (in England and Wales, the Secretary of State) the power to make regulations for the purpose of implementing any international agreement relating to private international law. This authority could be used to give effect to the new Model Law (as, presumably, to be modified).

Recognition in remaining EU member states of insolvency proceedings opened in the UK, i.e. "outbound recognition", will be a matter for the laws of the relevant member state (including the Recast Insolvency Regulation, which continues in remaining member states). In many cases, there will be pre-existing frameworks in remaining member states which are capable of operating between the UK and that other state so as to mitigate the effects of the Recast Insolvency Regulation ceasing to apply to the UK. In Germany, for example, the position would fall to be regulated under § 343 of the German Insolvency Code which provides, generally, for recognition of foreign insolvency proceedings without separate exequatur proceedings, subject to certain conditions. One such condition is that there will be no recognition in Germany if the UK courts did not have jurisdiction based on German law principles ("mirror principle"); the mere assertion of jurisdiction by an English court (e.g. on the basis of "sufficient connection" rather than jurisdiction of incorporation of the debtor) is no longer sufficient *per se*.[6] Accordingly, it may be the case that, even where EU debtors have access to the UK courts and UK insolvency proceedings, recognition of those proceedings in home (and other) jurisdictions will prove to be more difficult.

What about recognition of restructuring judgments?

As noted above, the CBIR and Section 426 only apply to recognition and assistance requested in the context of insolvency proceedings. There is a separate regime in the UK governing jurisdiction and enforcement of judgments in civil proceedings. The laws of certain EU member states make a similar distinction; in Germany, recognition of foreign civil judgments are governed by Sec. 328 German Code of Civil Procedure, ZPO.

To the extent required by the EU Restructuring Directive[7] (in the case of remaining member states) and in response to the COVID-19 pandemic, European countries have been reforming their restructuring regimes in favour of more debtor-friendly preventative restructuring frameworks. Restructuring measures may not necessarily fall within a relevant definition of insolvency proceedings but where those restructuring measures result in or involve a judgment from a court that judgment may need to be recognised in another jurisdiction in order to ensure the international effectiveness of the underlying measures (as was the case with schemes in the pre-Brexit regime).

In terms of the recognition of "inbound" judgments from EU member states to the UK, where the Hague Convention applies (including where the judgment is from the courts of the jurisdiction where the parties have chosen exclusively to resolve their dispute), that judgment will be recognised and enforced in the UK. Historic bilateral treaties (i.e. pre-1987 when the previous EU regime took effect) between the UK and certain EU member states (including France, Germany, Italy and the Netherlands) may also assist with recognition and enforcement of money judgments, but the position is uncertain. Where the Hague Convention (or a bilateral treaty) does not apply, English common law requires the judgment creditor

5 Antony Gibbs & Sons v La Sociětě Industrielle et Commerciale des Mětaux (1890) 25 QBD 399 (Gibbs)

6 See: Regina Rath and Matthew Thorn, 'UK and Germany: New Restructuring Tools and Cross-border Recognition Post-Brexit', *INSOL World*, 4th Quarter 2020, pg 24.

7 Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132 (Directive on restructuring and insolvency)

to commence a fresh cause of action against the judgment debtor in the English courts with the foreign judgment being the cause of action. This should not be problematic in practice but will be slower than enforcement under the Recast Brussels Regulation.

In terms of the recognition of "outbound" judgments from the UK in to EU member states, absent any alternative arrangement (such as accession to the Lugano Convention) and to the extent the Hague Convention does not apply (as above), then recognition would be a matter for the laws of the relevant member state. It is possible that enforcement of English judgments in EU member states will, at least procedurally, be more complicated than under the Recast Brussels Regulation, although this should not undermine the reasons parties choose the English courts in the first place.

Where do schemes of arrangement fit in?

Schemes of arrangement are a statutory form of compromise under companies legislation which have extensive application outside the insolvency and restructuring context but which have long been a cornerstone of the UK's restructuring regime. In June 2020, the UK introduced a new scheme of arrangement or "restructuring plan", similar to the existing scheme of arrangement but "super-charged" with the ability to effect a "cross-class cram–down" of dissenting classes of creditors and an ability to disenfranchise out-of-the-money creditors.

Given the prominence of English schemes in European cross-border restructuring transactions and the introduction of the new restructuring plan, a great deal of attention has been focused on whether Brexit will impact the use of schemes as a restructuring tool. The short answer is that the effects of Brexit on the use of schemes are likely to be limited.

In deciding whether it has jurisdiction to sanction (i.e. approve) a scheme proposed by a foreign company, the English court will consider: (i) whether the company has a "sufficient connection" to England (which is a low threshold, able to be satisfied by English law-governed debt agreements); and (ii) whether the scheme is likely to achieve a substantial effect in the foreign jurisdictions in which the company conducts significant business (which is a matter for the local law of the relevant state; requiring foreign debtors to adduce evidence as to the likelihood of recognition in relevant foreign states as a part of the scheme proceedings).

Pre-Brexit, there was a third consideration: where the company has creditors in the EU, whether the English court's jurisdiction to sanction the scheme is limited by the Recast Brussels Regulation. As noted above, the loss of the Recast Brussels Regulation will remove this potential jurisdictional hurdle.

The laws of the relevant foreign (e.g. EU) jurisdiction will dictate the process for recognition of an English court's scheme sanction order, which process will likely depend on whether the scheme is considered to amount to insolvency proceedings or if the scheme sanction order constitutes a civil judgment under relevant foreign law. Schemes have never been insolvency proceedings within the Recast Insolvency Regulation (as noted above) and so, pre-Brexit, EU debtors often relied on the Recast Brussels Regulation as a basis for recognition of the order as a civil judgment in their home jurisdiction. The new restructuring plan is only available to a company likely to encounter financial difficulty that may affect its ability to continue as a going concern, potentially bringing that new procedure closer to "insolvency proceedings" (if and to the extent relevant in the foreign state in question). Whether insolvency proceedings or a civil judgment, recognition and enforcement of the English court's scheme sanction order in the EU would be subject to the principles applicable to outbound recognition, as described above.

EU debtors may be able to rely on the substantive effects of the English proceedings where the parties have chosen English law to apply to the subject debts based on universal EU rules on the law applicable to contractual obligations, which rules provide that the law applicable to the contract shall govern the various ways of extinguishing obligations.

What does the future hold?

Whilst the post-Brexit landscape presents new challenges, for so long as there has been a corporate restructuring market in Europe, the UK's legislature, courts, practitioners and other market participants have consistently demonstrated their ability to innovate and devise cutting-edge solutions to pan-European complexities arising in situations involving distressed debtors with operations in multiple jurisdictions. There is little reason to believe that Brexit will have any permanent impact on the lustre and appeal of the UK as a destination of choice for the implementation of cross-border restructuring transactions, particularly in view of the recently-augmented tool-kit of measures and options available in the UK.

Returning to the boxing metaphor at the beginning of the article, even though it may appear to some as though it has its back to the ropes, it is a safe bet that the UK will continue to "float like a butterfly and sting like a bee" in restructuring stakes, in the face of all adversity.

Mark Craggs and Mathew Thorn are partners is our London office in the firm's financial restructuring and insolvency group.

Firm news

Montreal team successfully represents a purchaser in the first contested sale transaction based on a "RVO" structure, a recent innovation in the Canadian insolvency and distressed M&A practice.

A sale and solicitation process was implemented as part of the restructuring of the Nemaska Group, a lithium mining company. The winning bid was based on a novel deal structure, named reverse vesting orders ("RVO"), whereby instead of vesting the acquired assets to the acquirer, or purging the target business from its liabilities by way of a plan of arrangement, the transaction rather involves divesting the target entities from their unwanted assets and liabilities to special purposes entities (ResidualCos). The share capital of the target entities is then reorganized, the result being the acquirer becoming the sole shareholder of the target entity containing only its restructured assets and liabilities together with any permitting, licencing and tax attributes which a RVO allows to preserve. A RVO takes place without a vote of the creditors, in situations where such a structure represents the best realistic outcome to creditors and stakeholders. The advent of the RVOs in the Canadian insolvency landscape occurred and was popularized in the last year, but the use of RVOs was contested for the first time in Canada in the Nemaska matter, up to the Quebec Court of Appeal, and was ultimately approved.

Luc Morin, Guillaume Michaud and Arad Mojtahedi from our Montreal Insolvency team, together with the Tax and M&A teams of our Montreal office, represented Investissement Québec as co-acquirer, both in the implementation of the transaction and in defending it against the contesting stakeholders before the first level and appellate courts in Québec. The contesting parties are currently seeking leave to appeal to the Supreme Court of Canada.

Montreal team represents CCAA Monitor in major retail restructuring as court renders key decision on landlords' rights

On January 5, 2021, the court supervising the *Companies' Creditors Arrangement Act* (CCAA) proceedings of Groupe Dynamite, a major clothing retailer operating in Canada and the United States, rendered an important decision affecting the rights of landlords and potentially other post-filing suppliers in Canadian restructuring proceedings. The court decided that a debtor company that continues to occupy leased premises cannot be relieved of its obligations to pay rent merely because its use of those premises is limited by COVID-19 restrictions. The judgment offers helpful guidance to landlords, tenants and other stakeholders and will likely have important implications for Canadian restructuring proceedings, where large retail insolvencies are expected to escalate through 2021. The decision may also have a broader impact on civil disputes relating to commercial leases, which have already given rise to several rulings by Canadian courts dealing with the application of doctrines such as *force majeure* in the context of the pandemic.

Luc Morin and Noah Zucker from our Montreal Insolvency team currently act for Deloitte Restructuring Inc, the court-appointed Monitor in Dynamite's CCAA proceedings.

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