International Restructuring
Regime Change

New Opportunities

Presented By:
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Overview

• Multiple jurisdictions have recently incorporated changes to their restructuring laws
  • Likely the most significant change in the restructuring landscape in decades
  • Modifications have been made, proposed, or will be required in many key shipping jurisdictions, including Singapore, DIFC, the Netherlands, Australia, the United Kingdom, and European Union Member States
• Those changes have largely been debtor-friendly
  • Gives distressed companies new opportunities to restructure and continue as going concerns
• Also seeing trend of greater cooperation between jurisdictions in multinational restructurings
• This should be viewed as a positive for both prospective debtors and creditors, although something both need to be cognizant of
  • Allows troubled firms to restructure as going concerns
  • Creditor recovery generally greater in restructuring as opposed to liquidation
• This presentation will provide a high-level review some of the revised restructuring regimes and cross-border legislation, identify common themes and shortfalls, and analyze the implications of this new legislation
Relevant Changes

• Recent changes have almost universally been debtor-friendly
• Hybrids of UK and the US insolvency laws
• Certain aspects of chapter 11 are being broadly incorporated, and can serve as a baseline for understanding and comparison
• Key Provisions
  • Access
    • Section 109 of the Bankruptcy Code includes a broad grant of jurisdiction
    • Any person that resides or has a domicile, a place of business, or property in the US may be a chapter 11 debtor
    • The property threshold is extremely low (Global Ocean Carriers, e.g.)
  • Management
    • Generally, a debtor retains control of its assets while in chapter 11
    • Section 1107 of the Bankruptcy Code places the debtor in possession in the position of a fiduciary and requires the debtor to perform certain duties, including accounting for property, examining and objecting to claims, and filing informational reports
Relevant Changes

• Moratorium
  • The automatic stay provides a period of time in which all judgments, collection activities, foreclosures, and repossessions of property are suspended and may not be pursued by the creditors on any debt or claim that arose before the filing of the bankruptcy petition

• Non-Debtor Contract Termination
  • The Bankruptcy Code invalidates “ipso facto” clauses -- provisions that declare a default in the event of insolvency or bankruptcy

• Contract Rejection
  • Under the Bankruptcy Code, a chapter 11 debtor can assume or reject an executory contract (a contract that has material performance obligations remaining on both sides)
  • Rejection is treated as a breach as of the petition date and results in an unsecured claim

• Priority Financing
  • When a chapter 11 debtor needs operating capital, it may be able to obtain it from a lender by giving the lender a court-approved “superpriority” over other creditors or a lien on property of the estate (provided other parties have “adequate protection”)

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Relevant Changes

- Cram-Down
  - A chapter 11 plan must designate classes of claims and interests for treatment
  - Generally, a plan will classify claim holders as secured creditors, unsecured creditors entitled to priority, general unsecured creditors, and equity security holders
  - A class of claims is deemed to accept a plan if the plan is accepted by creditors that hold at least two-thirds in amount and more than one-half in number of voting claims
  - If a class votes against the plan, it can still be bound if another impaired class accepts the plan, and the plan does not discriminate unfairly against the rejecting class (class is treated the same as similarly situated classes) and is fair and equitable to the rejecting class (no junior class receives a distribution and no class receives more than full payment)
Relevant Jurisdictions

- Singapore
- Dubai International Financial Centre (DIFC)
- The Netherlands
- Australia
- The United Kingdom
- The European Union
In March 2017, Singapore’s Parliament approved the Companies (Amendment) Bill 2017 to enhance Singaporean debt restructuring capabilities. Assented to by President later that month and went into effect on May 23, 2017.

Key Provisions

- Access
  - Companies with “substantial connection” to Singapore may be restructured
    - Eligible if (i) COMI in Singapore, (ii) does business or has a place of business in Singapore, (iii) substantial assets in Singapore, or (iv) Singapore choice of law provision or forum selection clause in loan agreement

- Management
  - May vary based on nature of proceeding
Singapore

• Moratorium
  • Court may order a moratorium on application of a debtor on notice to each creditor to be bound provided that the debtor has filed an application for authority to call a meeting of creditors or represents that it intends to do so.
  • Can be extended to a debtor’s domestic and foreign subs if they play a “necessary and integral” role in the scheme
  • 30-day interim moratorium goes into effect on filing of application for a moratorium order
  • Creditor may seek to modify the scope of a moratorium order, or seek an order preventing the company from seeking to make material changes

• Priority Financing
  • Debtor may incur priority debt if financing is deemed necessary to enable the debtor to continue as a going concern
  • Largely mirrors section 364 of US Bankruptcy Code

• Cram-Down
  • Court may approve scheme of arrangement over the objection of dissenting creditors if:
    • half in number, 75% of at least one class vote in favor;
    • half in number, 75% of all scheme creditors vote in favor; and
    • scheme is “fair and equitable” (creditor must receive at least what it would if scheme were not approved) and does not “discriminate unfairly”
DIFC

• On June 13, 2019, the Dubai International Financial Center Insolvency Law No. 1 of 2019 and associated DIFC Insolvency Regulations 2019 came into effect

• Introduces debtor-in-possession procedure known as rehabilitation

• Key Provisions

  • Access
    • Applies to entities registered and operating in the DIFC

  • Management
    • During rehabilitation, the directors of the distressed company are permitted to manage the company’s affairs unless there is evidence of fraud or mismanagement

  • Moratorium
    • 120 day moratorium comes into effect on application for appointment of insolvency practitioner as rehabilitation nominee

• Non-Debtor Contract Termination

  • Company in rehabilitation also benefits from protections against the termination of contracts
Priority Financing

- DIFC court able to sanction new financing

Cram-Down

- DIFC court consulted on division of the company’s creditors into different classes to vote on the plan
- Rehabilitation plan typically requires approval of 75% of creditors in each class of creditors, although a court can bypass this requirement if:
  - 75% (in value) of one class approves;
  - The court determines that the plan is not unfairly prejudicial to creditors and shareholders (best interests test); and
  - No junior creditor gets paid before senior creditors
Netherlands

• On July 8, 2019, the Dutch government sent Parliament a bill providing for a revised restructuring regime
• Still requires debate and adoption, which commentators believe will occur in 2020
• Implements the restructuring framework as dictated by the EU Directive (discussed below)

Key Provisions

• Access
  • Non-Dutch entities can access the Dutch law if the entity (or parties involved, such as creditors or shareholders) has a sufficient nexus with the Netherlands (“sufficient nexus” similar to Singapore’s “substantial connection” standard)
  • Can also extinguish non-debtor guarantees

• Management
  • Allows debtor to remain in full control throughout the entire procedure
Netherlands

- **Moratorium**
  - At request of the debtor or plan expert, the court can allow a stay for a maximum of four months, with the possibility of extension up to a maximum of eight months

- **Non-Debtor Contract Termination**
  - Ipso facto clauses cannot be triggered by a restructuring

- **Contract Rejection**
  - Debtor may seek to amend or terminate any contract with a counterparty
  - If the counterparty rejects the proposal, the debtor can request that the court allow unilateral termination

- **Priority Financing**
  - Protects post-restructuring financing from claw back, but no priority claims

- **Cram-Down**
  - Class approval required by two-thirds of the total debt that actually votes
  - Can cram down “out-of-the-money” classes if an “in-the-money” class and the fulcrum class approve the plan
Australia

• On September 18, 2017, the Treasury Laws Amendment (2017 Enterprise Incentives No. 2) Act 2017 became law
• Not wholesale change, but supplement to existing regime
• Key Provisions
  • Management
    • The legislation provides a safe harbor for directors, potentially protecting them from personal liability for insolvent trading if the company is undertaking a restructuring
    • Provides that the insolvent trading provisions will not apply to a director that took a “course of action” reasonably likely to lead to a better outcome for the company than the immediate appointment of a voluntary administrator or liquidator
  • Non-Debtor Contract Termination
    • Restricts the enforceability of ipso facto clauses in voluntary administrations, receiverships and schemes of arrangement
    • The restrictions on enforceability of ipso facto clauses were effective as of July 1, 2018
United Kingdom

- The UK announced on August 26, 2018 that it would seek to change some aspects of the UK restructuring and insolvency system
- These have not been formally implemented or approved
- Proposed reforms would supplement existing regime; have some notable debtor-friendly aspects
- Key Provisions
  - Moratorium
    - New preliminary moratorium available to solvent companies (that may become insolvent if action not taken)
    - Company must continue to pay debts as they fall due, and must have the prospect of agreeing to a compromise or an arrangement with its creditors (as determined by a monitor)
    - Moratorium would be for initial 28 day period, extendable by monitor for further 28 days (which can be extended further by agreement of 50% of secured and unsecured creditor groups by value)
    - Creditors may object to moratorium through the court at any time during the moratorium period
United Kingdom

- Cram-Down
  - New standalone procedure proposed whereby company can propose a plan to its creditors
  - Allows for cross-class cram-down with the approval of (i) more than 75% in value of creditors who vote in each class and (ii) more than 50% in aggregate value of “unconnected creditors” in each class
  - One impaired class must approve
  - A dissenting class must be satisfied in full before a junior class obtains anything under the plan
    - Court may approve a plan that deviates from this if (i) necessary to achieve aims of restructuring, (ii) it is just and equitable under the circumstances and (iii) at least one impaired class has voted in favor
The EU Directive

- On March 26, 2019 European Parliament approved a directive aimed at harmonizing Member State restructuring and insolvency laws
- Approved by Council of the European Union on June 6, 2019, and entered into force on July 16, 2019
- Establishes minimum standards for Member State insolvency laws that must be adopted and published by July 17, 2021
- Key Provisions
  - Management
    - Debtors shall be given the right to remain totally, or at least partially, in possession of their assets and the operation of their business
  - Moratorium
    - Debtors shall be afforded the protection of a stay; Member States shall have the discretion to limit the scope of the stay by excluding certain creditors/categories of creditors or excluding certain claims/categories of claims; creditors should be able to seek relief from stay
    - The initial duration of the stay shall be a maximum of four months; the total duration of the stay, including extensions and renewals, shall not exceed 12 months (stay can become indefinite if debtor is insolvent under national law)
The EU Directive

- **Non-Debtor Contract Termination**
  - Creditors are not allowed to invoke ipso facto clauses which make reference to negotiations on a restructuring plan or a stay or any similar event connected to the stay

- **Priority Financing**
  - Contemplates encouraging new lenders to take the enhanced risk of investing in a viable debtor in financial difficulties by giving financing priority at least over unsecured claims

- **Cram-Down**
  - A restructuring plan that is not approved by every voting class may become binding on dissenting voting classes if the plan, among other things, has been approved by a majority of the voting classes, provided that at least one of those classes is a secured creditors class or is senior to the ordinary unsecured creditors class
  - The dissenting class must be treated at least as favorably as any other class of the same rank and more favorably than any junior class; and no class may receive or keep more than the full amount of its claims
## Comparison

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Takeaways

- The restructuring paradigm has changed
- Indicative of, and a harbinger for, more creative multi-jurisdictional restructurings
  - Syncreon
- New opportunities for distressed companies
  - Norwegian offshore operators
- Limitations
  - While some new regimes may be intended for use by multinational corporations, may be inherent limitations
    - Regimes (and potentially court system) untested
    - Court lack of ability to enforce judgments/obtain recognition by foreign judicial systems
      - May be mitigated (to a certain extent) by implementation of UNCITRAL Model Law on Cross-Border Insolvency
        - Now implemented by 46 states
        - All of those mentioned above, save the Netherlands
  - Certain jurisdictions likely to remain preeminent in near future