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CROSS-BORDER RECOGNITION OF RESTRUCTURING PROCEEDINGS: STATE OF THE MARKET

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ACKNOWLEDGEMENT

INSOL International is pleased to present this new technical paper, "Cross-border Recognition of Restructuring Proceedings: State of the Market", written by Kate Stephenson of Kirkland Ellis International LLP.

The paper provides a comprehensive overview of recent developments and advancements in cross-border recognition principles and practices arising from a number of high-profile restructuring matters in the United Kingdom, Hong Kong, the United States, Singapore, the European Union and Brazil.

Trends towards enhanced recognition and cooperation are discussed, including the United States and Singapore approaches to overcoming the limitations of the rule in Gibbs, the Hong Kong-Mainland China cooperation protocols, the new preventive restructuring regimes in the EU and the United Kingdom's move to adopt the new Model Law on enterprise group arrangements and to re-evaluate the ongoing role of Gibbs. Limitations in the cross-border recognition framework globally are also explored, including the use of the COMI criterion as a basis for recognition.

The paper also poses issues and questions that may shape the future of cross-border recognition and cooperation in future years.

The paper is exceptionally timely, given the significant volume of cross-border restructuring matters over the last few years, a trend that is likely to continue given the expansion of business across borders, often with the use of complex group structures and assets, creditors and entities in multiple jurisdictions.

This is a very valuable and insightful paper for our members. INSOL expresses its sincere thank you to the author and Kirkland Ellis International LLP for their time and expertise in writing this paper.

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1. Introduction

As most large restructurings involve companies with assets and operations in several jurisdictions, the question of whether the chosen restructuring process is recognised on a cross-border basis is critically important.

This paper conducts a high-level comparative review and analysis of certain important recent developments in the field of cross-border recognition of restructurings in selected major jurisdictions, aiming to determine the current state of the market and key lessons or overarching themes. Such developments include:

- calls from certain leading lawyers urging UNCITRAL to abolish the concept of centre of main interests (COMI) as the basis for recognition of a foreign main proceeding under the UNCITRAL Model Law on Cross-Border Insolvency (MLCBI);
- case law developments, including *Rare Earth* and *Global Brands* in Hong Kong, *Modern Land* in the United States, *Tantleff* and *Ascentra* in Singapore and early cases under Brazil's recent enactment of the MLCBI;
- practical efforts, post-Brexit, to ensure restructurings involving the United Kingdom are likely to be substantially effective;
- the United Kingdom's decision to implement the UNCITRAL Model Law on Enterprise Group Insolvency (MLEG), with a decision on whether to implement "Article X" of the UNCITRAL Model Law on Insolvency-Related Judgments (MLIRJ) to follow, including consideration of whether or not to preserve the so-called "rule in *Gibbs*";[1] and
- the introduction of new preventive restructuring processes in European Member States, creating questions as to the cross-border recognition of such processes.

2. The end of COMI?

Certain leading academics and lawyers have urged UNCITRAL to reconsider the concept of COMI as the basis for determining whether a foreign proceeding qualifies as a foreign main proceeding under the MLCBI.[2] In an open letter, the authors' main points are as follows:

- the MLCBI errs in the policy option chosen to determine the initiation of the foreign main proceeding (i.e. the use of COMI);
- this policy option presents various flaws that can undermine the ability of insolvency law to facilitate the maximisation of returns to creditors, the effective reorganisation of viable but financially distressed businesses, and the promotion of entrepreneurship, access to finance and economic growth. Specifically, the authors of the open letter assert:
  - the MLCBI encourages debtors to initiate proceedings in the jurisdiction of their COMI even if that jurisdiction has an inefficient insolvency system or other jurisdictions would be more attractive;
  - the concept of COMI is far from clear, especially in today's market in which many companies have assets, creditors, subsidiaries, offices, employees and clients in many jurisdictions;
  - different stakeholders may have different views as to the location of a debtor's COMI; and
  - the concept of COMI can lead to opportunistic behaviour by debtors, for example in opportunistically shifting COMI once they have obtained credit;
- as a suggested alternative, debtors could be allowed to choose the insolvency forum in the company's constitutional documents – perhaps with safeguards, such as requiring the approval of a majority or super-majority of creditors; and
- as a "second-best" alternative, if UNCITRAL decides to retain the concept of COMI, debtors should be allowed to commence an insolvency proceeding in any jurisdiction that permits the initiation of insolvency proceedings by foreign companies – and the place where the proceeding is initiated should be considered functionally equivalent to the debtor's COMI for the purpose of the MLCBI, provided the debtor demonstrates that the place of filing is beneficial for creditors as a whole.

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1 The English law rule that questions of the discharge or compromise of a contractual liability are governed by the proper law of the contract. This rule is subject to certain exceptions where parties are subject to foreign proceedings which discharge the contract, such as where the relevant party has submitted to those proceedings (e.g. by voting) or was present in the relevant jurisdiction when the proceedings were commenced. This rule is not confined to foreign insolvency proceedings. Nor is it confined to debt governed by English law: as the English Court of Appeal noted (in *Re OJSC International Bank of Azerbaijan* [2018] EWHC 59 (Ch) at [30]), charges of parochialism appear unfair given the acceptance in Gibbs that questions of discharge of a contractual liability are governed by the proper law of the contract, whether or not that law is English law.

2 Letter from Anthony J. Casey, Aurelio Gurrea-Martínez, Robert K. Rasmussen and others – including Scott Atkins, President, INSOL International – to the Secretariat of UNCITRAL Working Group V, dated 14 September 2023.

The letter is a major call for action which, if implemented, would dramatically shift the fundamental approach to cross-border recognition of restructuring and insolvency proceedings. Opinion is not (yet) united behind such a move.[3] UNCITRAL's Working Group V is expected to consider the letter and its potential response in due course. Working Group V's next Session will be held in Vienna in December 2023, although the letter is not on the agenda for discussion at this stage.

Any change would need to follow serious debate and (given enacting states have each implemented the MLCBI individually[4] into their own national laws) would presumably require implementing legislation from at least a "critical mass" of the 59 enacting states. Accordingly, any such change is likely to take significant time.

3. Recent recognition-related developments and current state of the market in certain jurisdictions

3.1 United Kingdom

3.1.1 State of the market in cross-border restructurings

The United Kingdom restructuring market remains strong post-Brexit.[5] Courts have taken a pragmatic approach to recognition and major distressed international groups continue to successfully restructure using the United Kingdom's tried-and-tested implementation tools. The following table provides a few recent illustrative examples.

DEBTOR GROUP	JURISDICTION	UK PROCESS	JURISDICTION "ENGINEERED"?	SANCTION DATE
Adler	Germany / Luxembourg	Restructuring plan	✓	Apr. 2023
Atento	Latin America / Lux	Restructuring plan	✓	Nov. 2023
China Fishery Group	Peru / Hong Kong	Restructuring plan, with parallel U.S. Chapter 11 proceedings of Singaporean parent	✓	Sept. 2022
Cimolai	Italy	Restructuring plans, with parallel Italian *concordato preventivo*	X	Aug. 2023
Hong Kong Airlines	Hong Kong	Restructuring plan, with parallel Hong Kong scheme	X	Dec. 2022
Löwen Play	Germany / Netherlands	Scheme of arrangement	✓	May 2022
SGB-Smit	Germany	Restructuring plan	X	June 2023
Smile Telecoms	Mauritius / various African jurisdictions	Restructuring plans	✓	Mar. 2021 and Mar. 2022
Veon	Netherlands / various	Scheme of arrangement	X	Jan. 2023
Yunneng Wind	Taiwan	Restructuring plan	X	Aug. 2023

3 By way of preliminary response to the open letter, Daniel Glosband (a draftsman of the MLCBI) observed that UNCITRAL's decision to adopt COMI and establishment requirements for recognition was a counterweight against "unbridled and potentially detrimental" forum shopping and warned that changing the eligibility requirement for recognition would not eliminate the possibility of litigation by opportunistic opponents: interview with **Global Restructuring Review**, 15 September 2023.

4 With the exception of 17 African states which jointly adopted the MLCBI in 2015, under the umbrella of OHADA (the organisation for the harmonisation of business law in Africa).

5 The United Kingdom formally left the European Union on 31 December 2020. Upon Brexit, the European Insolvency Regulation, which provides for automatic reciprocal recognition of insolvency proceedings across the EU, was largely repealed in the United Kingdom. Eligibility for and recognition of insolvency proceedings changed substantially, as summarised in **Annex 1**.

3.1.2 Formal recognition under the Cross-Border Insolvency Regulations 2006

English courts continue to recognise foreign proceedings under the Cross-Border Insolvency Regulations 2006 (CBIR), which implement the MLCBI in the United Kingdom.[6]

Nevskoe[7] provides a vivid illustration of the consequences of the loss of automatic recognition post-Brexit. A company was in Lithuanian insolvency proceedings. Pre-Brexit, the insolvency proceedings in Lithuania would have been recognised automatically in the United Kingdom. Post-Brexit, for such a process to be recognised in the United Kingdom, recognition needs to be obtained under the CBIR. Accordingly, a creditor was able to obtain an English court order against the debtor (in respect of money the debtor held in a bank account), even though the debtor's foreign representative had actually applied for recognition under the CBIR and the recognition hearing was scheduled for the very next day.

Anecdotally, applications for recognition under the CBIR have increased since Brexit, though it is not possible to quantify this because most such cases are unreported.[8]

However, the rule in *Gibbs* continues to mean that a foreign insolvency proceeding will only effect the discharge of English (or Scottish)[9] law debt if the relevant creditor is "subject" to the foreign proceeding (as a matter of United Kingdom private international law) – for example, by voting in the proceedings or presence in the foreign jurisdiction, such that the creditor is taken to have accepted that its contractual rights will be governed by the law of the foreign proceeding. See further paragraph **3.1.3(f)** below.

3.1.3 Practical workarounds

A variety of practices have emerged to deal with potential uncertainties as to cross-border recognition.

(a) Pragmatism – comfort from strong support

English courts have adopted a pragmatic view on effectiveness when considering whether to sanction (approve) schemes of arrangement and restructuring plans. The court will not act in vain; it will require independent expert evidence of the likelihood of international effectiveness.

- Example I – *DTEK*'s scheme of arrangement[10] was the first challenge as to the prospects of international recognition of a scheme (or restructuring plan) post-Brexit. A challenging creditor argued that the court could not be satisfied as to the international effectiveness of the scheme in the EU (or in Singapore), such that any grant of sanction would be an act in vain and the court should therefore refuse sanction. However, the court held that it would decline sanction on international effectiveness concerns only if there was "no reasonable prospect of the scheme having substantial effect", such that sanction would be in vain. In a helpful, pragmatic approach, the court confirmed that it will also take account of the degree of creditor support. A scheme or plan with very solid support among relevant creditors will be substantially effective.

- Example II – *Smile Telecoms*' restructuring plan[11] was the first to compromise shareholders' rights in a foreign company. The court was careful to test the local expert's evidence as to recognition and to ensure the English court's issuing of orders would not be regarded as an exorbitant exercise of jurisdiction. It held that the real question was whether the court could be sufficiently satisfied that the procedure envisaged under the plan for altering the constitution and share capital of the company using the power of attorney conferred under the plan would be acceptable and effective in Mauritius (the company's jurisdiction of incorporation). This was essentially a matter for expert evidence as to the law of Mauritius.

  Clearly, obtaining English court approval for a restructuring process is only half the battle: the real issue arises if a dissenting stakeholder seeks to pursue remedies and / or challenge the effectiveness of the scheme / restructuring plan elsewhere (or there is a real likelihood of them doing so). This is very unusual, though it occurred in DTEK and is ongoing in Adler.

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6 However, such recognition is procedural rather than substantive and its effects are limited by the rule in *Gibbs*.
7 [2023] EWHC 15 (KB).
8 Notable reported non-EU cases post-Brexit include: *Re NMC Healthcare Ltd (in administration)* [2021] EWHC 1806 (Ch) (Abu Dhabi Global Market); *Re PJSC Bank Finance and Credit (in liquidation)* [2021] EWHC 1100 (Ch) (Ukraine); *Re Chen Yung Ngai Kenneth* [2021] EWHC 3346 (Ch) (Hong Kong); *Chang Chin Fen v Cosco Shipping (Qidong) Offshore Ltd* [2021] CSOH 94, in which the Scottish court declined to grant recognition of Prosafe's Singapore moratorium proceeding; and *Despins v Kwok* [2023] EWHC 74 (Ch) and *Re Astora Women's Health* [2022] EWHC 2412 (Ch) (United States – relatively unusual examples of recognition of Chapter 11 proceedings under the CBIR). Notable reported EU cases post-Brexit include: *Re Greensill Bank AG* [2021] EWHC 966 (Ch) in which the English court granted recognition of German insolvency proceedings - an interesting twist in this case was that, pre-Brexit, the company's proceedings would not have been eligible for recognition under the CBIR, as the company was an "EEA credit institution"; and *Re Cimolai SpA* [2023] EWHC 923 (Ch) in which the English court granted recognition of Italian *concordato preventive* proceedings - the first reported case in which the English court has recognised any of the new European preventive restructuring processes.
9 For a recent unsuccessful CBIR application in Scotland, see *Chang Chin Fen v Cosco Shipping (Qidong) Offshore Ltd* [2021] CSOH 94; see further footnote 104 below.
10 [2021] EWHC 1456 (Ch) (convening); [2021] EWHC 1551 (Ch) (sanction).
11 [2022] EWHC 387 (Ch) (convening); [2022] EWHC 740 (Ch) (sanction).

(b) Parallel proceedings

There have been a few notable examples of parallel restructuring proceedings in order to address recognition uncertainties / shortcomings.

- Example I – *Cimolai*, an Italian group, utilised Italian concordato preventivo proceedings in parallel to an English restructuring plan.[12] The latter was necessary in order to compromise English law debt, owing to the rule in *Gibbs*. The Italian proceedings were formally recognised under the CBIR,[13] in the first reported case in which the English court recognised any of the new European "preventive restructuring" processes.

- Example II – *Vroon*, a Dutch group, utilised Dutch "WHOA" (scheme) proceedings in parallel to an English scheme.[14] Again, the latter was necessary in order to compromise English law debt pursuant to the rule in *Gibbs*.

- Example III – *McDermott*, an international group which previously restructured via United States Chapter 11 proceedings, is utilising Dutch "WHOA" proceedings in parallel to an English restructuring plan.[15] The English restructuring plan is designed to restructure debt of the English plan company (a guarantor), while the parallel WHOA proceedings are designed to restructure the debt of two Dutch companies (the borrower and a guarantor). Most debt is governed by New York law. Preliminary relief has been obtained in the United States via Chapter 15.

- Example IV (outside EU) – *Cineworld*, an international group with a listed United Kingdom parent, utilised United States Chapter 11 proceedings in parallel to English administration. The latter was necessary in order to extinguish shareholders' rights in the English parent, via a pre-packaged administration sale of its assets to a new holding company. A similar technique was utilised in the restructurings of *Paragon Offshore plc* in 2017 and *Valaris plc* in 2021.

(c) "Subsequent" proceedings

As a variant on parallel proceedings, there have been a few examples of restructuring proceedings in one jurisdiction (English schemes of arrangement) being "blessed" by subsequent proceedings in another (Spanish *homologación*).

- Examples – this technique was used in *Haya*, *Lecta* and *OHL*. In each case, the Spanish borrower of English law debt first implemented an English scheme of arrangement. To avoid the uncertainty of the untested Spanish *exequatur* recognition procedure, each company then executed a Spanish law governed standalone restructuring framework agreement – effectively a shorter-form version of the restructuring documentation implemented pursuant to the English scheme – and sought *homologación judicial* in Spain. This route successfully obtained "indirect recognition" of the English scheme in Spain, without resorting to the *exequatur* procedure. The Spanish court's blessing effectively protects against the risk of clawback actions or equitable subordination which might otherwise have arisen.

This route may be more difficult to replicate if the restructuring seeks to bind a dissenting class and/or is actively opposed.

(d) Irish schemes – a "silver bullet"?

The English court has power to assist courts in certain designated countries (including Ireland) upon request, under section 426 of the Insolvency Act 1986. Section 426(5) permits the court to apply either English insolvency law or the insolvency law of the relevant foreign jurisdiction in relation to the request.

In *Silver Pail*,[16] the English court granted assistance pursuant to a letter of request from the Irish court, for the purpose of ensuring that creditors in England and Wales would be bound by the company's Irish scheme of arrangement (proposed within Irish examinership).[17] This assistance effectively involved the English court applying Irish law to compromise English law-governed claims[18] – notwithstanding the rule in *Gibbs*.

This route is particularly attractive given Ireland is an EU Member State and therefore Irish proceedings are capable of automatic recognition in the EU (under the EIR) *and* eligible for assistance in the United Kingdom (upon request under section 426). Ireland is the only EU Member State that is also a designated country under section 426.

12 [2023] EWHC 1819 (Ch) (convening); [2023] EWHC 2193 (Ch) (sanction).
13 [2023] EWHC 923 (Ch).
14 [2023] EWHC 1558 (Ch) (sanction) (convening unreported).
15 *Re CB&I UK Ltd* [2023] EWHC 2497 (Ch) (convening).
16 *Re Silverpail Dairy (Ireland) Unlimited Company* [2023] EWHC 895 (Ch).
17 The Northern Irish High Court also acceded to a similar request for assistance – see ibid at [15].
18 Reportedly, it was assumed for the purposes of the application that the British creditors' claims (comprising c.3% of the company's total debt) were subject to English law: **Global Restructuring Review**, 11 April 2023.

However, the English court's judgment in *Silver Pail* does not mention *Gibbs*; nor does it appear to take account of the Supreme Court's judgment in *New Cap*.[19] The *Silver Pail* application was conducted on an urgent basis and was unopposed. This technique may, accordingly, be open to challenge in subsequent cases.

(e) Change of governing law

Parties – such as the debtor and its "majority lenders" – could consensually amend the governing law of the debt from English law to another law (in accordance with the contractual framework and prior to opening restructuring proceedings) in order to avoid issues arising from the rule in *Gibbs*. English authorities show that the English courts will give effect to a decision by contracting parties to change the governing law of an agreement. The Rome I Regulation[20] specifically enables the parties to a contract dealing with obligations in civil and commercial matters to change the governing law.

- Example – *GenesisCare* changed the governing law of its facility agreement from English to New York law prior to entering into United States Chapter 11 proceedings.

(f) Possible implementation of "Article X" of MLIRJ / reform of the rule in *Gibbs*

The United Kingdom Insolvency Service recently consulted on whether to add "Article X" of the MLIRJ into the CBIR. Article X expressly provides that the recognition of insolvency-related judgments is a form of assistance that can be granted under that Model Law. It stems from judgments[21] raising uncertainty as to whether the original MLCBI leaves open the potential for the recognition and enforcement of insolvency-related judgments, as distinct from the recognition of insolvency proceedings *per se*.

The formal consultation response noted concerns that, without clarification on certain other points, the impact of implementing Article X could be unpredictable and hence detrimental. In particular, further development of policy questions will first be required, including:

- settling the United Kingdom's stance on the rule in *Gibbs*; and
- choice of law rules – specifically, the scope of exceptions to the general rule that the law of the place in which insolvency proceedings are commenced (the *lex fori concursus*) should govern the proceedings; at UNCITRAL, work is underway on this topic.

Accordingly, the United Kingdom Government plans to undertake further work to facilitate debate on these topics.

3.1.4 Further reform: implementation of the MLEG

The United Kingdom Government announced that it intends to legislate to implement the MLEG "at the earliest opportunity" – and looks set to be the first to do so. This new Model Law provides tools to manage and coordinate insolvencies within corporate groups, while respecting that each company within the group remains a separate legal entity.

In the short term, the practical impact of the United Kingdom's implementation will be limited, unless and until the MLEG is adopted in other notable jurisdictions.

19 *Rubin v Eurofinance SA; New Cap Reinsurance Corporation (In Liquidation) v A E Grant and others* [2012] UKSC 46 at [145-155], especially [152], albeit *obiter*. While *Gibbs* was cited in counsel's skeleton argument in *Silver Pail, New Cap* was not.
20 An EU Regulation determining applicable law in contractual matters. This Regulation does not rely on reciprocity. The United Kingdom continues to apply the rules set out in this Regulation post-Brexit and EU Member States will continue to uphold English choice of law clauses (subject to certain specific exceptions). Post-Brexit, the Rome I Regulation is potentially helpful for ongoing recognition of English proceedings in the EU where the debt to be restructured is governed by English law.
21 Principally, the UK Supreme Court's decision in *Rubin v Eurofinance – op. cit.*

3.1.5 *Further reform: 2019 Hague Judgments Convention*[22]

On 23 November 2023, the United Kingdom announced its intention to ratify and implement the Hague Convention of 2019 on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters. The Government plans to start the legislative process for doing so as soon as possible. The Convention would apply between the United Kingdom, the EU, Ukraine and Uruguay 12 months after the United Kingdom's ratification[23] - i.e. likely in early 2025, at the earliest.

Similar to the 2005 Hague Choice of Court Convention,[24] the 2019 Hague Judgments Convention specifically excludes "insolvency, composition, resolution of financial institutions and analogous matters" from its scope.[25] It remains to be determined whether this operates to exclude preventive restructuring procedures (such as those introduced in Europe (see paragraph **3.5** below) or, for "outbound" recognition, English schemes of arrangement or restructuring plans). There are certain additional limitations on the potential utility of this Convention in a cross-border restructuring context.[26]

3.1.6 *Conclusion*

It is anticipated that major cross-border groups will continue to pursue tried-and-tested English restructuring implementation tools where suitable, given the desire for efficiency and certainty of outcome and the volume of finance documents governed by English law. Of course, the "acid test" for recognition occurs if a dissenting stakeholder seeks to pursue remedies and/or challenge the effectiveness of the restructuring elsewhere. This remains extremely rare and may be mitigated (at least partially) by the practical steps explored above.

3.2 Hong Kong

3.2.1 *Introduction*

Hong Kong has no statutory provisions regarding the recognition of international restructuring or insolvency cases. Although adoption of the MLCBI is actively under consideration, for now recognition is purely a matter of common law (except that recognition of restructurings from Mainland China is subject to a special "cooperation mechanism"[27] – see paragraph **3.2.5** below).

This section covers three recent Hong Kong cases which have attracted interest from the international restructuring community – *Rare Earth*, *Global Brands* and *China Properties* – in addition to a handful of recognition cases between Hong Kong and Mainland China.

22 A judgment within the scope of the Hague Judgments Convention that was given by a court of a contracting state to the Convention must be recognised and enforced in other contracting state. Recognition or enforcement may be refused only on certain specified grounds. Following Brexit, the United Kingdom sought to re-accede to the Lugano Convention, which largely replicates the mutual recognition framework under the European Judgments Regulation, as between EU Member States and Switzerland, Iceland and Norway. The United Kingdom automatically left the Lugano Convention upon Brexit; re-accession requires the unanimous consent of all contracting states. The European Commission formally declined to consent to the United Kingdom's re-accession in June 2021. For a more detailed analysis, see the **briefing paper** from the European Parliament's Research Service: European Parliament Briefing on the United Kingdom's possible re-joining of the 2007 Lugano Convention, 18 November 2021.

23 The Convention entered into force as between the EU and Ukraine on 1 September 2023; Uruguay's ratification will become effective on 1 October 2024.

24 Since 1 January 2021, the United Kingdom is party to this Convention in its own right; accession does not require the consent of other contracting states (which include the EU). This Convention only applies when the parties have entered into an exclusive choice of court clause. It does not assist where an asymmetric or non-exclusive clause has been chosen, as is common in finance documents.

25 Art 2(1)(e) of the 2019 Hague Judgments Convention. The 2005 Hague Choice of Court Convention excludes "insolvency, composition and analogous matters": see art 2(2)(e).

26 A judgment is eligible for recognition and enforcement only in certain circumstances, such as where the defendant had a particular connection to the state in which the judgment was issued or consented to the court's jurisdiction (art 5(1)). Proceedings for the recognition of a judgment (such as exequatur proceedings in France and Spain) remain in place and are governed by the law of the state of recognition (art 13) – adding a potentially significant practical barrier. Recognition and enforcement can be refused on broader grounds under this Convention (art 7) than under the Lugano Convention (arts 34 and 35).

27 "Record of Meeting of the Supreme People's Court and the Government of the Hong Kong Special Administrative Region on Mutual Recognition of and Assistance to Bankruptcy (Insolvency) Proceedings between the Courts of the Mainland and of the Hong Kong Special Administrative Region", dated 14 May 2021 (Cooperation Mechanism). For further information, see the Supreme People's Court's **Opinion**.

3.2.2 *Rare Earth*[28]

The Hong Kong court (Harris J) speculated, *obiter*,[29] that recognition under Chapter 15 of the United States Bankruptcy Code does not constitute a substantive discharge of New York law governed debt:

> Unlike a discharge under Chapter 11…, recognition under Chapter 15 is limited in territorial effect and I think it is reasonable to assume that the reason for this is that the procedure does not discharge the debt.[30]

Specifically, the Hong Kong court cited the explanation of the United States court in *Agrokor*[31] that "section 1520(a)(1) [of the United States Bankruptcy Code] provides that the automatic stay will apply to all the debtor's property *that is located within the territorial jurisdiction of the United States*" (emphasis added).[32] From this statement, the Hong Kong court concluded that "[r]ecognition does not appear as a matter of United States law to discharge the debt".

About six weeks later, the United States Bankruptcy Court took the opportunity to address this point in *Modern Land*,[33] expressing the view that the Hong Kong court's view of the territorial reach of Chapter 15 recognition was a misinterpretation of the relevant case law. See further paragraph 3.3.3 below.

The Hong Kong court's comments must be understood in context. Notably:

- it is common for business groups operating in Mainland China, listed in Hong Kong (via holding companies incorporated in offshore jurisdictions, such as the Cayman Islands or the British Virgin Islands), to raise United States dollar-denominated debt governed by New York law. Such groups often have no assets, creditors or debtors in the offshore jurisdictions;[34]
- Hong Kong applies the rule in *Gibbs*, which requires that any substantive alteration of contractual rights be sanctioned by some substantive provision of the relevant law;[35]
- the established technique[36] of compromising such debt via a Hong Kong scheme, which is then recognised in the United States under Chapter 15, would not be inconsistent with the rule in *Gibbs*;[37]
- speaking extra-judicially following the judgment in *Modern Land*, Harris J stated that he was puzzled as to why, when the "Hong Kong scheme + Chapter 15" structure had proved successful, "people had decided, when dealing with Hong Kong-listed companies, to cut Hong Kong out of the process altogether"; [38]
- perhaps because the United States approach is so different (given the United States does not apply the rule in *Gibbs*), United States judges may not fully understand the concerns of the Hong Kong court and how those concerns might operate in practice;
- notwithstanding the judgment in *Modern Land*, it seems there remains a question (from the Hong Kong court's perspective) as to the particular restructuring technique in that case (namely, a Cayman scheme of a Hong Kong-listed company to restructure New York law debt, recognised in the United States under Chapter 15) – "people may be overlooking potential problems"; and
- as Hong Kong law presently stands, a scheme sanctioned in an offshore jurisdiction and recognised in the United States under Chapter 15 will not be treated by a Hong Kong court as compromising debt governed by New York law.[39]

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28 *Re Rare Earth Magnesium Technology Group Holdings Limited* [2022] HKCFI 1686,
29 In *Rare Earth,* a Bermuda-incorporated company listed in Hong Kong proposed a scheme of arrangement to compromise debt very largely governed by Hong Kong law. Accordingly, the Hong Kong court's comments as to the effect of Chapter 15 recognition were strictly obiter. The court's observations arose in the context that "there appears to be a surprisingly large number of Mainland [China] business groups listed in Hong Kong, whose US$ denominated debt has recently been subject to schemes only in offshore jurisdictions and recognition under Chapter 15" (ibid at [37]), citing various companies including Modern Land itself.
30 Ibid at [36].
31 *In re Agrokor d.d.*, 591 B.R. 163 (Bankr. S.D.N.Y. 2018).
32 *Ibid* at [187].
33 *In re Modern Land (China) Co., Ltd.*, 641 B.R. 768 (Bankr. S.D.N.Y. July 18, 2022).
34 See *Re Global Brands Group Holding Limited (in liquidation)* [2022] HKCFI 1789 at [10].
35 *In re OJSC International Bank of Azerbaijan* [2018] Bus LR 1270 at [158(2)].
36 See in particular *Re Winsway Enterprises Holdings Ltd* [2017] 1 HKLRD 1; [2016] HKEC 2495; see also *Re Mongolian Mining Corporation (in provisional liquidation)* [2018] HKCFI 2035 and *Re Kaisa Group Holdings Ltd* [2016] HKCU 2765.
37 Although, as the Hong Kong Court noted in *Rare Earth,* such a scheme might not be effective to compromise the debt of a creditor who has not submitted to the jurisdiction of the Hong Kong court.
38 The comments were made on an International Insolvency Institute **podcast**, 31 January 2023.
39 *Rare Earth* at [32].

3.2.3 *Global Brands*[40]

For the first time,[41] the Hong Kong court adopted COMI as the primary criterion for granting recognition and assistance to foreign insolvency proceedings. It stated that:

> the correct approach to assessing whether or not a foreign liquidation should be recognised is first to determine if at the time the application for recognition is made the foreign liquidation is taking place in the jurisdiction of the Company's COMI.

The court held that, if the foreign liquidation is outside the jurisdiction of the debtor's COMI, recognition and assistance should be declined except in very limited circumstances.[42]

This judgment was driven by:[43]

- a desire to align the criteria for recognition under Hong Kong law with the approach in the Cooperation Mechanism which – greatly influenced by the MLCBI – permits Mainland Chinese Courts to recognise liquidators appointed in Hong Kong over companies whose COMI is located in Hong Kong[44]; and
- increasing concerns as to whether a jurisdiction in which a company's business is conducted (such as Hong Kong or Mainland China) ought to recognise an insolvency process conducted in a place with which the company has no material economic connection (such as an offshore jurisdiction) – citing concerns expressed by Professors Jay Westbrook and Christoph Paulus in this regard.[45]

The Hong Kong court considers there is a "danger of allowing recognition to be misused", especially where "soft touch" provisional liquidations in offshore jurisdictions are driven not by a desire to rehabilitate a business or protect Hong Kong / Mainland Chinese creditors, but instead by a desire of the owners of a business to protect economic value.

In adopting COMI as the criterion for recognition in *Global Brands*, the Hong Kong court ostensibly sought to bring recognition into line with both the Cooperation Mechanism and the economic reality of distressed companies – focusing on the existence of a genuine connection between the relevant jurisdiction and the company's affairs. *Global Brands* was subsequently approved in *Re Guangdong Overseas Construction Corporation*[46] (Linda Chan J).

This approach contrasts with the MLCBI position, under which proceedings in a jurisdiction where the debtor has an establishment[47] would be eligible for recognition as foreign non-main proceedings (albeit relief would be discretionary rather than automatic).

3.2.4 *China Properties*[48]

The Hong Kong court made further comments in support of the adoption of COMI (or "sufficient connection") as the touchstone for recognition of foreign proceedings.

The court granted interim relief to liquidators appointed in Hong Kong, the jurisdiction of the Cayman-incorporated company's COMI, notwithstanding opposition from a former director who claimed it would interfere with the jurisdiction of the courts of the BVI (where certain of the company's subsidiaries were incorporated). In doing so, the Court affirmed the following principles:

- Hong Kong courts have a duty to assist Hong Kong liquidators to effectively discharge their duties and it is desirable, if not essential, that Hong Kong courts be able to deal with recognition and assistance using methods that are consistent with commercial practice in Hong Kong and Mainland China;
- the common law was sufficiently flexible to develop so as to be consistent with commercial practice; and
- there was nothing in principle preventing recognition of liquidators appointed in a company's COMI (or a jurisdiction with which it has a sufficiently strong connection to justify recognition).

40 *Re Global Brands Group Holding Limited (in liquidation)* [2022] HKCFI 1789.
41 The orthodox position was for the Hong Kong Court to recognise foreign insolvency proceedings opened in the debtor's country of incorporation provided they were collective insolvency proceedings.
42 *Op cit* at [50].
43 According to Harris J, speaking extra-judicially on the International Insolvency Institute's **podcast**, 31 January 2023.
44 On the flipside, the parties expect the Hong Kong Court to grant assistance to Mainland administrators, whether or not the debtor's COMI is in Mainland China.
45 See the International Insolvency Institute **podcast**, 23 April 2022.
46 [2023] HKCFI 1340.
47 Though see paragraph 3.3.3 as to the finding of the United States Bankruptcy Court in *Modern Land* that the debtor did not have an establishment in the Cayman Islands, its jurisdiction of incorporation.
48 *Re China Properties Group Limited* [2023] HKCFI 2346.

3.2.5 *Cases involving Mainland China*

As noted, Hong Kong entered the Cooperation Mechanism with Mainland China in May 2021. The Cooperation Mechanism uses the MLCBI as a template – the first time the MLCBI has been used as the basis for a bilateral agreement between jurisdictions. The Cooperation Mechanism applies to three pilot cities: Shanghai, Shenzhen and Xiamen (and notably, not Beijing), given their close trade ties with Hong Kong.

There have been a few successful recognition cases between Hong Kong and Mainland China (under the Cooperation Mechanism or under common law, as indicated below) since entry into the Cooperation Mechanism:

- Recognition under common law – *Re HNA Group*, in which the Hong Kong court granted[49] recognition of Hainan Airlines' reorganisation proceedings in Hainan (i.e. outside the formal scope of the Cooperation Mechanism). The Hong Kong court noted that reciprocity is not essential for recognition under common law;
- Recognition under common law – *Re Guangdong Overseas Construction Corporation*, in which the Hong Kong court granted[50] recognition of Guangdong Overseas Construction Corporation's bankruptcy proceedings in Guangzhou (again, outside the formal scope of the Cooperation Mechanism);
- Recognition under the Cooperation Mechanism – *Re Samson Paper*, in which the Shenzhen court granted[51] the liquidators' application for recognition and assistance (further to a letter of request from the Hong Kong court),[52] permitting the liquidators to take certain actions in the Mainland, including to take over and dispose of the company's property; and
- Recognition under the Co-operation Mechanism – *Re Hong Kong Fresh Water International Group Ltd*, in which the Shanghai Court granted[53] the liquidators' application for recognition and assistance further to a letter of request from the Hong Kong court.[54]

However, there are other cases in which the requested relief was not fully granted:

- *Re Peking University Founder Group*, in which the Hong Kong court granted[55] recognition and a general stay of proceedings in respect of a company subject to reorganisation proceedings in Beijing (i.e. again, outside the formal scope of the Cooperation Mechanism) but declined to stay actions in respect of "keepwell deed" arrangements (which were governed by English law and subject to the exclusive jurisdiction of the Hong Kong courts). The Hong Kong Court of Appeal upheld[56] the court of first instance's decision, holding (*inter alia*) that it was open to the first instance judge to conclude that a judgment of the Hong Kong court in the relevant actions would have some utility; and
- *Re Tsinghua Unigroup*, not involving recognition of onshore reorganisation proceedings but with a remarkably similar keepwell arrangement as that in *Re Peking University Founder Group*. The Hong Kong court held[57] that it had jurisdiction to determine the keepwell dispute in accordance with the contractual exclusive jurisdiction clause.

As Harris J noted when speaking extra-judicially,[58] the specific issue in the above two cases was whether it should be permissible for creditors to obtain a judgment from the Hong Kong court, which they then rely on to try to prove their claims in the reorganisation processes in the Mainland. In that context, Harris J considered that keepwell deeds can create binding and enforceable contractual obligations but, unlike a guarantee, are unlikely to generate a claim that can be submitted in a PRC reorganisation process (at least where the keepwell obligations are engaged after the onset of the PRC process).[59] Accordingly, those cases concern the distinct issue of enforceability of keepwell deeds and are not truly indicative of the Hong Kong court declining to grant the full extent of assistance sought.

3.2.6 *Conclusion*

The decision in *Global Brands* (affirmed in *Guangdong Overseas*) illustrates the Hong Kong court's ability and willingness to evolve by adjusting traditional doctrines to better reflect legitimate commercial expectations and international practices (for example, via the adoption of COMI as the primary criterion for recognition of foreign proceedings). However, Hong Kong's regime is its own and practitioners should not assume that changing international practices will be automatically or uncritically adopted in Hong Kong, as demonstrated in *Rare Earth*.

Looking ahead, the Cooperation Mechanism is expected to grow in significance, following positive signals in early cases and the gradual development of expertise in Mainland Chinese Courts in the field of cross-border restructuring / insolvency.

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49 [2021] HKCFI 2897.
50 [2023] HKCFI 1340.
51 粤 ***03*** 认港破 ***1*** 号 (2021) *Yue 03 Ren Gang Po No. 1.*
52 [2021] HKCFI 2151
53 沪03认港破1号 (2022) *Hu 03 Ren Gang Po No. 1.*
54 [2022] HKCFI 924 (see also *Re Trinity International Brands Ltd* [2023] HKCFI 1581 at [16] and [17] as to the Shanghai Court's recognition).
55 [2021] HKCFI 3817.
56 [2022] HKCA 1514.
57 [2022] HKCFI 1558.
58 See the International Insolvency Institute podcast, 31 January 2023 at 29:40.
59 [2023] HKCFI 1350 and [2023] HKCFI 1572.

3.3 United States

3.3.1 *Chapter 15: state of the market*

Applications for recognition of foreign proceedings in the United States under Chapter 15 of the Bankruptcy Code (which implements the MLCBI) have decreased over the last few years since the COVID-19 pandemic, from c.67 in 2020, c.45 in 2021 and c.38 in 2022, but ticked back up with c.43 applications in 2023 YTD.[60]

The cases vary widely by the jurisdiction of the foreign proceedings. The most common jurisdictions of the foreign proceedings over the last five years are Canada, Brazil, the United Kingdom and the Cayman Islands (in that order). About half of Cayman filings relate to Chinese groups, such as Modern Land, Evergrande, E-House and others.

New York's Southern District remains the venue of choice for Chapter 15 cases. In 2022-2023 YTD,[61] c.44% of all recognition applications in the United States were filed in the Southern District – down slightly from c.47% of applications in 2020-2021.

Nearly all applications have been granted: in 2022-2023 YTD,[62] only two applications were denied[63] (representing only c.2.5% of all applications).

3.3.2 *Potential reform of Chapter 15*

The United States National Bankruptcy Conference sent a letter to the Senate Judiciary Committee (among others) on 13 October 2023, proposing specific technical revisions to Chapter 15. This follows three previous letters in the last seven years. The proposed amendments include a "fix" to the decision in *Barnet*[64] (which held that section 109(a) of the Bankruptcy Code, which requires a debtor to have property in the United States, applies to debtors seeking recognition under Chapter 15). This would avoid the need for "contrived" property transfers solely to satisfy section 109(a). It remains to be seen whether the latest proposed reforms will gain traction with Congress.

3.3.3 *Modern Land*[65]

(a) Substantive discharge

The United States Bankruptcy Court clarified the proper effect of recognition under Chapter 15, correcting what Judge Glenn considered the misinterpretation of United States case law in the Hong Kong court's decision in *Rare Earth*. As noted, in *Rare Earth*, the Hong Kong court had speculated that "recognition under Chapter 15 is limited in territorial effect" and would not constitute a substantive compromise of debt governed by United States law (see paragrap 3.2.2 above.)

According to Judge Glenn's memorandum opinion:

> With great respect for the Hong Kong court in *Rare Earth*, that court misinterprets this Court's earlier decision in *Agrokor* as well as many other decisions in the United States which have recognized and enforced foreign court sanctioned schemes or restructuring plans that have modified or discharged New York law governed debt. Provided that the foreign court properly exercises jurisdiction over the foreign debtor in an insolvency proceeding, and the foreign court's procedures comport with broadly accepted due process principles, a decision of the foreign court approving a scheme or plan that modifies or discharges New York law governed debt is enforceable.

In recognising and enforcing Modern Land's Cayman scheme of arrangement, the United States Bankruptcy Court concluded that the discharge of New York law governed notes was binding and effective.

60 Corporate debtors only. Jointly administered proceedings only counted once. Figures through end October 2023.
61 By case commencement date, through end October 2023.
62 By case commencement date, through end October 2023.
63 *In re Global Cord Blood Corp.*, No. 22-11347, 2022 WL 17478530 (Bankr. S.D.N.Y. Dec. 5, 2022) and *In re Paul Shimmin, as Liquidator of Comfort Jet Aviation Ltd.*, No. 22-10039, 2022 WL 9575491 (Bankr. W.D. Okla. Oct. 14, 2022); see paragraph 3.3.4 below.
64 *Drawbridge Special Opportunities Fund, LP v. Barnet (In re Barnet)*, 737 F. 3d 238 (2d Cir. 2013).
65 *In re Modern Land (China) Co., Ltd.*, 641 B.R. 768 (Bankr. S.D.N.Y. July 18, 2022).

(b) Centre of main interests

Modern Land is also instructive on when minimal links to a jurisdiction can suffice for a debtor's COMI to be in that jurisdiction. The court expressed concerns regarding the debtor's COMI, describing its Cayman connections as "tenuous". However, the court ultimately found that the debtor's COMI *was* in the Cayman Islands (and therefore the Cayman scheme was capable of recognition as a foreign main proceeding), having considered the totality of the circumstances, including:

- the goals of Chapter 15 in maximising the value of the debtor's assets, facilitating the rescue of financially troubled businesses and promoting cooperation between the United States and foreign courts;
- the statutory presumption that a debtor's COMI is in its jurisdiction of incorporation;
- the scheme creditors' expectations and intentions;
- the judicial role in the Cayman scheme and activities in the Cayman Islands relating to the scheme;
- the lack of objections to recognition as a foreign main proceeding;
- Cayman choice of law principles (including that the scheme only compromised the New York law-governed notes and did not seek to compromise the group's other (Hong Kong law-governed) debt); and
- the debtor's good-faith petition for recognition of the Cayman scheme and the absence of any COMI shift.

Ultimately, the U.S. Bankruptcy Court found that:

- the Cayman restructuring could not itself constitute "non-transitory economic activity" as is required to support recognition as a foreign nonmain proceeding;
- however, the Cayman Court's supervision of the scheme sufficed to conclude that the debtor's COMI was in the Cayman Islands, in light of the other factors explored above; and
- the fact that the restructuring was the debtor's primary business activity at the time of the filing of the Chapter 15 application (and was significantly conducted in the Cayman Islands) supported this finding.

This contrasts with the recent decision in *Comfort Jet Aviation*[66], in which the United States Bankruptcy Court held that the debtor did not have either its COMI or an establishment in the Isle of Man (the debtor's jurisdiction of incorporation and of its liquidation). Accordingly, the liquidation was not a foreign main proceeding or a foreign nonmain proceeding capable of recognition. This follows earlier cases in which a United States Bankruptcy Court has refused to recognise the liquidation of offshore "letterbox" companies, such as the Cayman liquidation of Bear Stearns funds.[67]

66 *In re Paul Shimmin, as Liquidator of Comfort Jet Aviation Ltd.*, No. 22-10039, 2022 WL 9575491 (Bankr. W.D. Okla. Oct. 14, 2022).
67 *In re Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd.*, 374 B.R. 122 (Bankr. S.D.N.Y 2007), aff'd, 389 B.R. 325 (S.D.N.Y. 2008).

3.3.4 Global Cord

The United States Bankruptcy Court for the Southern District of New York denied recognition of a Cayman liquidation proceeding, essentially because it was not a collective proceeding brought "for the purpose of reorganisation or liquidation".[68]

United States Bankruptcy Courts have typically granted applications for recognition in respect of foreign liquidations.[69] However, in Global Cord's Cayman liquidation proceedings:

- "*collective proceeding*": the liquidators were not seeking to identify creditors or quantify/classify their claims; indeed, the creditors had not even received formal notice of the Cayman proceeding. Accordingly, the proceedings were not for the requisite purpose of reorganisation or liquidation[70]; and
- "*for the purpose of reorganisation or liquidation*": the liquidators were appointed in order to preserve the company's assets and investigate and seek to recover misappropriated funds; they had been appointed pursuant to a statutory provision permitting the Cayman Court to wind up a company on "just and equitable" grounds, without requiring insolvency or resolution of debts. Accordingly, the proceedings were not for the purpose of reorganisation or liquidation.[71]

This case is a helpful reminder of the stated purpose of Chapter 15: to provide effective mechanisms for dealing with cross-border insolvency cases. As illustrated in *Global Cord*, this does not extend to recognition of proceedings that are more akin to corporate governance and fraud remediation efforts.

3.4 Singapore

3.4.1 Recognition of foreign restructuring plans

In *Re Tantleff, Alan*[72] (*Tantleff*), the General Division of the High Court of Singapore granted recognition of United States Chapter 11 reorganisation plans of subsidiaries[73] of Eagle Hospitality Group pursuant to the MLCBI. *Tantleff* is the first reported decision in Singapore confirming that foreign restructuring plans (not just *proceedings*) can be recognised under the MLCBI.[74]

The Singapore court noted that the MLCBI does not explicitly provide for the recognition and enforcement of foreign insolvency orders and judgments, but took the view that the relief that may be granted under article 21 upon recognition of a foreign proceeding are non-exhaustive and may be tailored to the case at hand.[75] The court considered the conflicting United States and United Kingdom cases – the former permitting recognition of foreign orders under the MLCBI on the basis that such recognition was a form of "appropriate relief" under art 21[76] and the latter denying recognition on the basis the MLCBI was not designed for the reciprocal enforcement of judgments.[77]

The court ultimately adopted the United States approach and granted recognition pursuant to art 21(1)(g) of the MLCBI. Article 21(1)(g) provides that the court may grant "*any additional relief*" upon recognition of a foreign proceeding.[78] The pivotal factor in the court's decision was that the drafters of the provisions adopting and implementing the MLCBI in Singapore, following public consultations, had intentionally amended Singapore's version of art 21(1)(g) to align it with the United States position rather than the United Kingdom position.

Specifically, the Singapore and United States versions of art 21(1)(g) do not contain the limitation that the additional relief must be available under "the law of the [State]". Such a limitation would have circumscribed the relief available under art 21(1)(g) to that available in a hypothetical domestic insolvency proceeding.[79] The deliberate omission of this limitation was considered to permit the application of foreign insolvency law when granting discretionary relief under art 21(1)(g),[80] such as by way of recognition and enforcement of foreign insolvency judgments and orders.

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68 *In re Global Cord Blood Corp.*, No. 22-11347, 2022 WL 17478530 (Bankr. S.D.N.Y. Dec. 5, 2022).
69 For example: *In re Ocean Rig UDW Inc.*, 570 B.R. 687 (Bankr. S.D.N.Y. 2017) (Cayman provisional liquidation); *In re Olinda Star Ltd.*, 614 B.R. 28 (Bankr. S.D.N.Y. 2020) (BVI provisional liquidation); *In re Culligan Ltd.*, No. 20-12192, 2021 WL 2787926 (Bankr. S.D.N.Y. 2021) (Bermudan liquidation).
70 As is required by the definition of "foreign proceeding" under 11 U.S.C. § 101(23).
71 *Ibid.*
72 [2023] 3 SLR 250.
73 Recognition was granted for the reorganisation plans of two subsidiaries of Eagle Hospitality Real Estate Investment Trust (EH-REIT) (the ultimate holding entity of the group). Recognition was denied in respect of EH-REIT's reorganisation plan as the MLCBI in Singapore only applies to corporate entities. EH-REIT was a trust and not a corporate entity *(Tantleff* at [25]-[26]).
74 In unreported decisions before *Tantleff*, Chapter 11 reorganisation plans were recognised under the Model Law (in *CFG Peru Investments Pte. Ltd.* HC/ORC 5320/2021) and under common law prior to the enactment of the Model Law (in *EMAS Chiyoda Subsea Services Pte. Ltd.* HC/ORC 1339/2018).
75 *Tantleff* at [68].
76 *Idem at* [71], [73] and [80], in which the following U.S. cases were considered: *In re Lupatech SA 611 BR 496* (Bankr SDNY, 2020), *In re CGG SA* 579 BR 716 (Bankr SDNY, 2017), *In re Oi SA* 587 BR 253 (Bankr SDNY, 2018).
77 *Tantleff* at [75], discussing *Rubin v Eurofinance* SA [2012] 3 WLR 1019 (UK Supreme Court).
78 *Idem* at [78].
79 *Idem* at [77].
80 *Idem* at [69].

The court held that, in deciding whether to recognise and enforce a foreign insolvency judgment or order, the court will "carefully scrutinise the circumstances in which the foreign order was granted and ensure that interested parties were given an opportunity to be heard and that the relevant creditors and shareholders are adequately protected".[81]

3.4.2 Recognition of solvent liquidation

In *Ascentra*,[82] the Singapore Court of Appeal overturned the decision of the first instance court and recognised a solvent Cayman liquidation as a foreign main proceeding. This approach mirrors the approach in the United States[83] and contrasts with the approach in the United Kingdom.[84] This is explicable by reference to the relevant enactments of the MLCBI, as the Singaporean and United States enactments define "foreign proceeding" by reference to "a law relating to insolvency *or adjustment of debt*"[85] (emphasis added), broadening the scope of the MLCBI itself in this regard.

3.5 European Union

3.5.1 Introduction

Almost all European Member States have now implemented Directive 2019/1023 on preventive restructuring frameworks, etc (Directive) into their national law. The Directive establishes minimum standards to ensure that viable enterprises that are in financial difficulties have access to effective national preventive restructuring regimes.

Most European Member States have not implemented the MLCBI (save for Greece, Poland, Romania and Slovenia).

3.5.2 Recognition of (public) preventive restructuring processes under the EIR

National proceedings transposing the Directive may be covered by the automatic recognition regime under the European Insolvency Regulation (EIR)[86] if they comply with the substantive requirements of the EIR vis-à-vis national insolvency proceedings[87] and are included in Annex A of the EIR (which lists, exhaustively, the proceedings to which the EIR applies).

As shown in the table in **Annex 2:**

- certain new preventive restructuring procedures have been added to Annex A, including the *public* (but not the private) versions of the German "StaRUG" and the Dutch "WHOA";[88]
- certain Member States, including France and Ireland, opted to transpose the Directive by amending existing procedures that are already listed in Annex A; and
- certain new preventive restructuring procedures have not yet been added to Annex A but may be added in future.

3.5.3 Recognition of private preventive restructuring processes

As proceedings which are confidential are excluded from the scope of the EIR,[89] the private versions of the Dutch, German, Luxembourg, Hungarian and Czech preventive restructuring proceedings are not intended / expected to fall within Annex A. The recognition of such private proceedings is not addressed in the EIR nor in the Directive.

81 *Idem* at [81].
82 *Re Ascentra Holdings, Inc (in official liquidation)* [2023] SGCA 32.
83 Chiefly as reflected in *Re Betcorp Limited (in liquidation)* 400 BR 266 (Nevada US Bankruptcy Court, 2009).
84 *Re Sturgeon Central Asia Balanced Fund Ltd (in liquidation) (No. 2)* [2020] EWHC 123 (Ch).
85 11 U.S.C. §101(23) of the United States Bankruptcy Code; art 2(h) of the Third Schedule to the Singapore Insolvency, Restructuring and Dissolution Act 2018. The Singapore Court of Appeal inferred from Parliament's deliberate adoption of the phrase "adjustment of debt" from §101(23) of the United States Bankruptcy Code that the Singapore Parliament intended to align the scope of proceedings amenable to recognition in Singapore with that of the United States (at [40]). Further, the Court reasoned that the inclusion of the words "adjustment of debt" permitted the recognition of foreign proceedings involving (a) the restructuring of a company's debts and/or (b) the reorganisation of a company's affairs through schemes of arrangement (at [42]). Since such proceedings do not necessarily require the debtor to be insolvent or in severe financial distress as a prerequisite for commencement, this implied that there was no overarching requirement for a company to be insolvent or in severe financial distress for a foreign proceeding in relation to that company to be eligible for recognition. Hence, the court ultimately held that foreign solvent liquidations could be recognised under the Singapore enactment of the MLCBI.
86 Regulation (EU) 2015/848 (Recast), which determines the proper jurisdiction for a debtor's insolvency proceedings and the applicable law for those proceedings, and provides for automatic reciprocal recognition of such proceedings across the EU. This Regulation was largely repealed in the United Kingdom upon Brexit.
87 See art 1(1) EIR, which includes requirements for such proceedings to be public, collective proceedings, based on laws relating to insolvency.
88 See Regulation (EU) 2021/2260 amending Regulation (EU) 2015/848 on insolvency proceedings to replace its Annexes A and B.
89 Recital 13 EIR.

Such private proceedings could potentially be recognised under:

- the Brussels / Judgments Regulation[90] – although there is a specific exclusion for bankruptcy, judicial arrangements and analogous proceedings.[91] Whether this operates to exclude preventive restructuring procedures is an open legal question;
- the Rome I Regulation[92] – to the extent that restructuring plans can be categorised as a contract and their court approval be considered a matter of contract law. Notably, there is no bankruptcy exclusion in the Rome I Regulation. Recognition under this Regulation would be limited to cases in which the restructuring plan compromises debt governed by same law as the jurisdiction of the restructuring process[93]; and/or
- domestic private international law – whether in Member States' insolvency law or civil procedural law. The small number of Member States that have implemented the MLCBI – namely Greece, Poland, Romania and Slovenia – would reflect the definition of foreign proceedings in art 2(a) MLCBI, which: (a) does not specifically require such proceedings to be public; and (b) can include proceedings conducted under law that is not labelled as insolvency law but which nevertheless addresses insolvency or severe financial distress.[94] Where recognition is based on a Member State's insolvency law, it is likely to require that the restructuring process be conducted in the jurisdiction of the debtor's COMI and is likely to require a specific application rather than entailing automatic recognition.[95]

For now, there remains significant uncertainty as to recognition of these private processes in other Member States. The Conference on European Restructuring and Insolvency Law has called for EU legislative reform in this regard, including the possibility of a special cross-border framework for restructuring proceedings (whether standalone or included in the EIR).[96]

3.5.4 Recognition of preventive restructuring processes outside the EU

The definition of a "foreign proceeding" capable of recognition under the MLCBI requires that the proceeding be "pursuant to a law relating to insolvency" (among other requirements). It may be open to question whether a particular EU preventive restructuring process meets this definition. This remains to be determined on a case-by-case basis.

A noted, the enactments of the MLCBI in the United States and Singapore broaden the definition of "foreign proceeding" to include proceedings under "a law relating to insolvency or adjustment of debt"[97] and recognition in those jurisdictions is not limited to companies that are insolvent and / or in severe financial distress.[98] This may help facilitate the recognition of European preventive restructuring processes in the United States and Singapore in particular (noting that Germany's preventive restructuring process, the StaRUG, is not available to companies which are already insolvent).

Whether the 2019 Hague Judgments Convention may facilitate recognition of EU preventive restructuring processes in the UK remains to be determined; see paragraph 3.1.5.

There are a few early examples of preventive restructuring processes being recognised outside the EU under the MLCBI, namely:

- Diebold Nixdorf's Dutch WHOA (conducted in parallel to United States Chapter 11 proceedings for other group companies) was recognised in the United States under Chapter 15 of the Bankruptcy Code;[99]
- Cimolai's Italian *concordato preventivo* was recognised in both the United States (provisional relief under Chapter 15)[100] and the United Kingdom (under the CBIR);[101] and
- McDermott's Dutch WHOAs (and United Kingdom restructuring plan) were recognised in the United States (provisional relief under Chapter 15).[102]

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90 Regulation (EU) No 1215/2012 (Recast), which determines the reciprocal recognition and enforcement of judgments in civil and commercial matters between EU Member States. This Regulation was largely repealed in the United Kingdom upon Brexit.
91 *Ibid*, art 1(2)(b).
92 Regulation (EC) No 593/2008.
93 See *ibid*, art 3(1) and art 12(1)(d).
94 See para 73 of the UNCITRAL Model Law on Cross-border Insolvency, Guide to Enactment and Interpretation, 2014.
95 For further information, see INSOL Europe/LexisPSL, Joint Project on "How EU Member States Recognise Insolvency and Restructuring Proceedings of a Third Country", January 2022.
96 For further information, including on existing possibilities for recognition, see CERIL Report on Cross-Border Effects in European Preventive Restructuring: identifying and assessing the benefits and shortcomings of selecting the European Insolvency Regulation 2015 to govern proceedings in preventive restructuring frameworks, July 2022.
97 See footnote 85.
98 United States: *Re Betcorp Ltd (in liquidation)* 400 B.R. 266 (U.S. Bankr. Court, D. Nevada, Feb. 9, 2009); Singapore: *Re Ascentra Holdings, Inc (in official liquidation)* [2023] SGCA 32 at [36]; cf. UK: *Re Sturgeon Central Asia Balanced Fund Ltd* [2020] EWHC 123 (Ch) at [116]ff.
99 *In re Diebold Nixdorf Dutch Holding B.V.*, No. 23-90729, (Bankr. S.D. Texas, Houston Div., July 12, 2023).
100 *In re Cimolai S.p.A. and Luigi Cimolai Holdings S.p.A.*, No. 23-90109, (Bankr. S.D. Texas, Houston Div., March 10, 2023).
101 *Re Cimolai S.p.A. and Luigi Cimolai Holdings S.p.A.* [2023] EWHC 923 (Ch).
102 *In re. CB&I UK Ltd.,* No. 23-90795, (Bankr. S.D. Texas, Houston Div., October 10, 2023).

3.6 Brazil

Brazil implemented the MLCBI in January 2021. To date, there have been two cases.

3.6.1 Prosafe

Prosafe's Norwegian parent and its Singaporean subsidiary successfully applied for interim recognition of two separate Singaporean moratorium protection proceedings as foreign main proceedings.[103] Prosafe had three vessels in Brazilian waters, a Brazilian subsidiary and certain Brazilian employees.

The Brazilian court held that the pending court-supervised moratorium proceedings conformed to the concept of a "foreign proceeding". It found that the COMI of the Norwegian parent was in Singapore (and therefore the proceeding was a foreign main proceeding), on the basis that all its subsidiaries were headquartered in Singapore and Singapore was where it entered into most of its contracts and was recognised by its creditors.

The Brazilian court subsequently recognised extensions of the moratorium protection period and ultimately recognised the Singaporean scheme of arrangement.[104] Prosafe informed the Brazilian court of the conclusion of its financial restructuring and requested the recognition of that conclusion, which is still awaited.

3.6.2 Gutmen

The liquidators of Gutmen Investment Corp, a BVI company, successfully applied for recognition of BVI liquidation proceedings in Brazil, as the company's sole unencumbered asset was a controlling interest in a Brazilian subsidiary.[105]

The Brazilian court found that the company's COMI was in the BVI (and therefore the proceeding was a foreign main proceeding) and that recognition would not be contrary to the public interest. Recognition was intended to facilitate the liquidators' ability to take substantive action in respect of the Brazilian subsidiary (including accessing financial records), to realise value for unsecured creditors in the liquidation.

In July 2023, the Paraná State Court of Appeals granted an interlocutory appeal filed by Manacá S.A. Armazéns Gerais e Administração, a wholly owned subsidiary of Gutmen, and declared void the decision that recognised the foreign procedure in Brazil, on the grounds that, as an interested third party, Manacá ought to have had the opportunity to give an opinion on the recognition request before the recognition judgment (although the recognition order did not include Manacá, which is subject to judicial reorganisation proceedings in Brazil). Gutmen filed a motion for clarification and may file special and / or extraordinary appeals to reverse the Paraná court's decision. If the decision is not reversed, the recognition request must be ruled upon again, after granting Manacá the opportunity to give its opinion on the request, as ordered by Paraná State Court of Appeals.

103 *Re Prosafe SE*, 3rd Business Court of the Judicial District of Rio de Janeiro, State of Rio de Janeiro, 0129945-03.2021.8.19.0001, 10 June 2021.
104 Conversely, Prosafe was unsuccessful in seeking recognition of its Singapore moratorium proceedings in Scotland *(Chang Chin Fen v Cosco Shipping (Qidong) Offshore Ltd* [2021] CSOH 94), principally on the basis that the moratorium proceedings were inextricably linked to proposed schemes of arrangement which, under the rule in *Gibbs,* would not be binding on a creditor which opposed recognition and had not submitted to the jurisdiction of the Singapore Court. Whilst the Scottish Court was open to granting recognition excluding the particular opposing creditor (such that the debtor would have obtained protection in respect of other creditors), the debtor instructed its counsel to decline such partial recognition.
105 *Re Gutmen Investment Corp.,* Civil Court of the Judicial District of Ibati, State of Paraná, 0004672-25.2021.8.16.0089, 17 December 2021.

4. Conclusions

Broadly, the above developments indicate a trend of increasing cross-border recognition of restructurings in major jurisdictions over the last couple of years, as evidenced by:

- the decision of the Singapore court in *Tantleff* that relief under the Singapore enactment of the MLCBI can include recognition of foreign restructuring plans (following the broad United States approach to recognition under the MLCBI rather than the narrower United Kingdom approach);
- the clarification of the United States court in *Modern Land* that a foreign proceeding, recognised under Chapter 15 of the Bankruptcy Code, can effect a substantive discharge of underlying New York law debt (notwithstanding the Hong Kong court's *obiter* view to the contrary in *Rare Earth*);
- pragmatic solutions adopted to deal with limitations arising from the loss of automatic recognition between the United Kingdom and the EU upon Brexit – with further reforms ahead, including the landmark adoption of the MLEG in the United Kingdom, the ratification of the 2019 Hague Judgments Convention and re-evaluation of the rule in *Gibbs*;
- the successful "bedding in" of recognition regimes such as the MLCBI in Brazil and the Cooperation Mechanism between Hong Kong and Mainland China, laying the groundwork for future cases; and
- the addition of new "preventive restructuring" regimes to the automatic recognition regime under the EIR, by virtue of their addition to Annex A (although the proper framework for recognition of private preventive restructuring regimes remains to be determined).

Of course, there are limits and exceptions to the general "direction of travel" toward increasing cross-border recognition of restructurings, such as the Hong Kong court's pivot to a COMI criterion for (common law) recognition in *Global Brands*, with consequent implications for recognition of proceedings in the debtor's jurisdiction of incorporation. *Global Brands* is set against a backdrop of increasing concern as to whether a jurisdiction in which a company's business is conducted ought to recognise a restructuring / insolvency proceeding conducted in a place with which the company has no material economic connection. Yet this is not so dissimilar from the requirement for COMI or establishment for recognition under the MLCBI – as illustrated by the refusal of the United States court to recognise the Isle of Man liquidation of *Comfort Jet Aviation*, owing to a lack of COMI or establishment in that jurisdiction.

While the renewed scrutiny of restructurings in so-called "letterbox" jurisdictions appears to be the most notable "contra-flow" development, we expect courts' pragmatic approach to continue (as in the United States court's decision in *Modern Land* to find COMI despite "tenuous" connections) and for courts to continue to seek the delicate balance between facilitating rescue and protecting creditors' legitimate interests.

It remains to be seen how far recent calls to abolish the use of COMI will gain traction at UNCITRAL. Clearly, such a major change would require detailed consideration, including as to the appropriate alternative criteria for determining what qualifies as a foreign main proceeding, appropriate safeguards, and the method for implementation / adoption of the selected approach. Any such transition would be revolutionary in the field of cross-border recognition, changing the fundamental basis for recognition embedded in the MLCBI for the last 26 years. It would also entail diverging from the parallel concept of COMI in the EIR – with its precursor, the European Convention on Insolvency Proceedings, first adopting this concept in 1995. The timescale for any such revolution remains highly uncertain.

Annex 1: summary of eligibility for, and recognition of, UK / EU restructuring and insolvency proceedings post-Brexit

PROCEEDINGS	ELIGIBILITY	RECOGNITION
UK insolvency proceedings	Eligibility expanded, as EU-law-driven limitations on jurisdiction (based on COMI or the presence of an establishment) were lifted **This opened the possibility of UK insolvency proceedings in respect of a European company without the need for a COMI shift**	▶ UK insolvency proceedings **no longer automatically recognised** in the remaining EU Member States (EU27) (whether or not the debtor's COMI is in the UK), because the UK is no longer a "Member State" for the purposes of the EIR ▶ Instead, recognition is determined under conflict of law rules of each relevant jurisdiction ▶ In general, this is **easier if the debtor's COMI is in the UK** and more difficult if it is located elsewhere
UK schemes of arrangement and restructuring plans	Eligibility remained unchanged – i.e. the "sufficient connection" test remained; **COMI shifts continue to constitute a strong basis for sufficient connection**	**EU recognition is uncertain and depends on:** ▶ the facts – including the governing law / jurisdiction clauses of the debt to be compromised, and whether the procedure seeks to affect non-consenting shareholders in an EU company; and ▶ the relevant jurisdiction(s) – as different Member States take different views as to the basis of recognition, including whether or not the location of COMI is relevant
EU insolvency and restructuring proceedings	Eligibility is broadly unchanged, except that EU-law-driven limitations on jurisdiction for the EU27 to open proceedings no longer apply vis-à-vis the UK; **this opens the possibility of insolvency proceedings in Europe even where a company's COMI is in the UK** (subject to applicable tests for opening proceedings in the relevant Member State)	**No automatic recognition** of EU proceedings in the UK (whether or not COMI is in the relevant Member State); **recognition is based on other, more limited, sources of recognition**, e.g. the CBIR (which requires a court application) However, where EU proceedings seek to compromise English law debt, an English court will only recognise / enforce the compromise in respect of stakeholders subject to the foreign proceedings (owing to the rule in *Gibbs*)

Annex 2: recognition of EU preventive restructuring processes (within the EU, excluding Denmark)[106]

JURISDICTION	PREVENTIVE RESTRUCTURING PROCESS	IS IT IN ANNEX A EIR?
Austria	European restructuring proceedings	Added to Annex A
Belgium	Amendments to existing judicial reorganisation procedure	Already in Annex A
Bulgaria	Amendments to existing stabilisation proceeding	Already in Annex A
Croatia	Pre-insolvency proceeding	Not yet added to Annex A
Cyprus	Examinership	Added to Annex A
Czech Republic	Preventive restructuring	Public version expected to be added to Annex A Private version outside Annex A
Denmark	Preventive restructuring procedure	Will not be added to Annex A, as the EIR does not apply to Denmark
Estonia	Reorganisation	Expected to be added to Annex A
Finland	Early proceedings	Captured by existing inclusion of restructuring proceedings in Annex A
France	Amendments to existing processes: *sauvegarde*, *sauvegarde accélérée* and *redressement judiciare*	Already in Annex A
Germany	StaRUG	Public version added to Annex A Private version outside Annex A
Greece	Amendments to existing process: rehabilitation procedure	Already in Annex A
Hungary	Restructuring proceedings	Public version expected to be added to Annex A Private version outside Annex A
Ireland	Amendments to existing process: examinership	Already in Annex A
Italy	New variant of existing *concordato preventivo* – in addition to new *piano di ristruttarzione omologato* proceeding	Former may be considered as already captured by existing inclusion of *concordato preventivo* in Annex A Latter not yet added to Annex A

106 This table captures only corporate restructuring processes. It is broadly based on, and builds upon, the INSOL Europe / LexisPSL "Joint Project on EU Harmonisation Directive 2019/1023".

JURISDICTION	PREVENTIVE RESTRUCTURING PROCESS	IS IT IN ANNEX A EIR?
Latvia	Amendments to existing process: legal protection proceedings	Already in Annex A
Lithuania	Amendments to existing processes: restructuring and bankruptcy proceedings	Already in Annex A
Luxembourg	Out-of-court reorganisation and "collective agreement" within "judicial reorganisation" (it is envisaged the latter may become known as the "Lux RP")	Former is private therefore outside Annex A Latter expected to be added to Annex A
Malta	Preventive restructuring procedure	Not yet added to Annex A
Netherlands	'WHOA'	Public version added to Annex A Private version outside Annex A
Poland	Existing preventive restructuring processes, but not (yet) entirely aligned with the Directive	Existing processes already in Annex A
Portugal	Special revitalisation proceedings	Already in Annex A
Romania	Amendments to existing preventive concordat proceeding New restructuring agreement proceeding	Former already in Annex A Latter expected to be added to Annex A
Slovakia	Preventive restructuring proceedings	Expected to be added to Annex A
Slovenia	Amendments to existing restructuring procedure New judicial restructuring procedure	Former already in Annex A Latter expected to be added to Annex A
Spain	Restructuring plans and moratorium	Expected to be added to Annex A
Sweden	Amendments to existing corporate reorganisation procedure	Already in Annex A

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