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A FOREIGN COMPANY'S ABILITY TO ACCESS US AND ENGLISH RESTRUCTURING TOOLS

FRANCISCO VAZQUEZ
NORTON ROSE FULBRIGHT US LLP

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Introduction

In the United States, a company may restructure its debts pursuant to a plan of reorganization under chapter 11 of the US Bankruptcy Code. Similarly, a company may restructure its debts in England pursuant to a scheme of arrangement under the Companies Act 2006. This paper describes a foreign company's ability to restructure its debts under a chapter 11 plan or a scheme. Part I of this paper discusses the debtor eligibility requirements under chapter 11, and a US court's discretion to dismiss a bankruptcy case. Part II discusses the ability of a foreign company to restructure its debts using a scheme. Finally, Part III analyzes whether a US court's order confirming a chapter 11 plan or an English court's order sanctioning a scheme would be enforceable elsewhere.

Part I: United States

Under chapter 11 of the US Bankruptcy Code, a company may address its liabilities through a plan of reorganization. A plan will become effective and binding on creditors and other parties after it has been approved by the requisite majorities of creditors and confirmed by a court.[1] However, the company must be eligible to be a debtor in the US for a court to confirm its chapter 11 plan.

Section 109(a) of the Bankruptcy Code Sets Forth Debtor-Eligibility Requirements

Under section 109(a) of the Bankruptcy Code, "only a person that resides or has a domicile, a place of business, or property in the United States, or a municipality may be a debtor under this title." 11 U.S.C. §109(a).[2] Consequently, a foreign company may restructure its debts under chapter 11 if it has a residence, domicile, place of business, or property in the US when it files a bankruptcy petition. *See In re Global Ocean Carriers Ltd.*, 251 B.R. 31, 37 (Bankr. D. Del. 2000) ("The test for eligibility is as of the date the bankruptcy petition is filed.").

The debtor-eligibility requirement is a low hurdle that can be satisfied by foreign companies. *See GMAM Investment Funds Trust I v. Globo Comunicacoes e Participacoes S.A. (In re Globo Comunicacoes e Participacoes S.A.*), 317 B.R. 235 (S.D.N.Y. 2004) ("For a foreign corporation to qualify as a debtor under Section 109, courts have required only nominal amounts of property to be located in the United States, and have noted that there is 'virtually no formal barrier' to having federal courts adjudicate foreign debtors' bankruptcy proceedings.'). A foreign company can satisfy the eligibility requirement by

1 A court may generally confirm a plan only if all impaired classes of creditors (i.e., creditors whose legal or equitable rights will be altered by the plan) vote to accept the plan. Nevertheless, a court may confirm a plan over an impaired class's dissent or "crammed down" under certain circumstances.

2 In general, a commercial entity is a person and may be a debtor. Section 109(b), however, provides that certain entities, including railroads, banks, and insurance companies, cannot be debtors.

transferring property to the US before filing for bankruptcy. *See, e.g., In re Octaviar Admin. Pty Ltd*, 511 B.R. 361, 373 (Bankr. S.D.N.Y. 2014) ("Section 109(a) says, simply, that the debtor must have property; it says nothing about the amount of such property nor does it direct that there be any inquiry into the circumstances surrounding the debtor's acquisition of the property."); *In re McTague*, 198 B.R. 428, 432 (Bankr. W.D.N.Y. 1996) (noting that section 109(a) "seems to have such a plain meaning as to leave the Court no discretion to consider whether it was the intent of Congress to permit someone to obtain a bankruptcy discharge solely on the basis of having a dollar, a dime or a peppercorn located in the United States"). Indeed, a foreign company can satisfy the eligibility requirement by establishing a retainer with a US lawyer. *See Octaviar*, 511 B.R. at 372-73 ("There is a line of authority that supports the fact that prepetition deposits or retainers can supply "property" sufficient to make a foreign debtor eligible to file in the United States.").

US Court May Dismiss or Abstain from A Chapter 11 Case of an Eligible Foreign Debtor

Notwithstanding a debtor's eligibility, a US court may dismiss or abstain from a foreign company's bankruptcy case if the interests of creditors and the debtor would be better served. *See* 11 U.S.C. § 305; *see also* Allan L. Gropper, *Current Developments in International Insolvency Law: A United States Perspective*, 15 J. BANKR. L. & PRAC. 2 ART. 3 (Apr. 2006) ("[T]here is ample power under the Bankruptcy Code to dismiss where the U.S. presence of the debtor is too tenuous or is sought for ulterior purposes, or where a U.S. proceeding creates unfairness or hardship on creditors."). In addition, a court may dismiss a chapter 11 case upon a showing of "cause," which includes the inability to confirm or to effectuate a chapter 11 plan. *See* 11 U.S.C. § 1112(b). The following is a brief discussion of three instances where a US court analyzed requests to dismiss or abstain from a foreign debtor's chapter 11 case, with mixed results.

US Court Confirmed Colombian Airline's Chapter 11 Plan

Aerovias Nacionales de Colombia S.A. Avianca ("Avianca"), the leading Colombian airline, filed a chapter 11 petition with the US Bankruptcy Court for the Southern District of New York. *In re Aerovias Nacionales de Colombia S.A. Avianca*, 303 B.R. 1 (Bankr. S.D.N.Y. 2003). When it filed, Avianca had places of business, including offices and employees, and assets, including leased aircrafts, in the US. Thus, "there is no question that Avianca, which ha[d] substantial property in the United States, [wa]s eligible to file a Chapter 11 petition." *Id.* at 9.[3]

[3] This paper will not address the request to dismiss the bankruptcy case of Avianca, Inc., a wholly-owned subsidiary of Avianca, that was incorporated in New York and had its principal place of business in the US.

Certain creditors nevertheless requested dismissal of Avianca's chapter 11 case, arguing that dismissal would be in the debtor and creditors' best interests under section 305. The court noted that section 305(a)(1) requires that creditors and the debtor be "better served" by dismissal.[4] Avianca, however, had demonstrated that it and its creditors would not be better served by dismissal for at least two reasons. "First, there was no showing that Avianca could have obtained jurisdiction over its lessors and other major financial creditors in Colombia." *Id.* at 9. Absent the chapter 11 filing, aircraft lessors could have repossessed Avianca's aircraft, hindering any potential restructuring. Second, the chapter 11 filing allowed Avianca to continue operations and facilitated agreements with certain creditors in the US and Colombia, who consented to the approval of their agreements by the US court. Consequently, it appeared that the chapter 11 case better served Avianca's creditors, including Colombian creditors that willingly participated in the case and refrained from asserting their rights against Avianca or its assets in Colombia. "Contrary to the movants' prediction, Colombian creditors have not flouted the Chapter 11 process." *Id.* at 10.

The movants also requested dismissal of Avianca's chapter 11 case for cause under section 1112(b), arguing that "Avianca would never be able to effectuate a plan because it could not prevent its Colombian creditors from taking action against its interests or from imposing improper conditions on its reorganization, to the prejudice of creditors in the United States." *Id.* at 16. The court acknowledged that it may be difficult for a debtor with substantial assets or significant creditors outside the US to implement a chapter 11 plan. However, it refused to adopt a blanket rule limiting a foreign company's access to chapter 11. Instead, it found that there was no reason to presume that Avianca "cannot achieve a reorganization that is fair to all creditors, including those in the United States, without taking express jurisdiction over their Colombian creditors." *Id.* at 17. Thus, the court refused to dismiss the case. Ultimately, the bankruptcy court confirmed a plan proposed by Avianca that was supported by a majority of its Colombian creditors. *See* Gropper at 17.

US Court Dismissed Russian Oil Company's Chapter 11 Case

Yukos Oil Company, a company with substantially all of its assets and operations in Russia, filed a chapter 11 petition with the US Bankruptcy Court for the Southern District of Texas. *In re Yukos Oil Co*., 321 B.R. 396 (Bankr. S.D. Tex. 2005). Days before its filing, Yukos transferred funds to US banks,

[4] The movants also argued that Avianca's case should be dismissed under former Bankruptcy Code section 305(a)(2), which permitted dismissal of a case if a foreign proceeding was pending. That section, however, was not applicable given that no foreign proceeding was pending. *Id*. at 11. Moreover, section 305(a)(2) was subsequently amended, and applies where a foreign proceeding is recognized under chapter 15 of the Bankruptcy Code.

rendering Yukos eligible to be a debtor in the US. Despite Yukos's eligibility to be a debtor, the court dismissed the case for cause.

According to the court, the "totality of the circumstances" and several facts justified dismissal. *Id*. at 411 First, Yukos filed the case purportedly to reorganize. However, "since most of Yukos' assets are oil and gas within Russia, its ability to effectuate a reorganization without the cooperation of the Russian government [wa]s extremely limited." *Id*. Second, Yukos wanted to use US law to, *inter alia*, subordinate Russian tax claims, but the court lacked personal jurisdiction over key parties, including the Russian government, to effectuate Yukos's goals. *Id*. Finally, Yukos was responsible for approximately 20% of Russia's oil and gas production. "The sheer size of Yukos, and correspondingly, its impact on the entirety of the Russian economy, weigh[ed] heavily in favor of allowing resolution in a forum in which participation of the Russian government [wa]s assured." *Id*. at 412.

US Court Dismissed Bahamian Debtors' Chapter 11 Cases

Facing financial distress, Northshore Mainland Services, Inc., a Delaware corporation, and certain Bahamian affiliates, which were developing a resort in the Bahamas, filed chapter 11 petitions with the US Bankruptcy Court for the District of Delaware. *In re Northshore Mainland Services, Inc.,* 537 B.R. 192 (Bankr. D. Del. 2015). Following the chapter 11 filings, the Bahamian Supreme Court, upon the Bahamian Attorney General's request, appointed provisional liquidators for certain Bahamian debtors.[5]

The debtors' principal secured creditor and general contractor requested dismissal of the chapter 11 cases for three reasons. First, they argued that the debtors were not eligible for relief because they had minimal assets in the US. Second, they contended that the cases should be dismissed under section 1112(b) because they were filed in bad faith to avoid Bahamian insolvency proceedings. Finally, they alleged that the interests of the debtors and creditors would be better served under section 305 by dismissing the US cases in favor of Bahamian proceedings.

The bankruptcy court found that Northshore and its affiliates were eligible to be debtors because each of them had property in the US in the form of funds in bank accounts. The court was not troubled that several debtors opened their US bank account in the weeks leading up to the bankruptcy filing.

According to the court, in considering a request for dismissal as a bad faith filing under section 1112, it should analyze whether (i) the petition serves a valid bankruptcy purpose, and (ii) the petition solely serves as a "tactical litigation advantage." The court concluded that both factors weighed against

[5] The Bahamian court dismissed the debtors' request for recognition of the chapter 11 cases in the Bahamas, finding that the debtors should be the subject of "unitary insolvency proceedings in The Bahamas" given their substantial connections to the Bahamas, including that it was the debtors' principal place of business and the location of the majority of their creditors and assets.

dismissal. First, the petition served a valid bankruptcy purpose because the debtors were "on the edge of a financial precipice" in the days leading up to the filing. Absent a bankruptcy, creditors could have exercised remedies against the debtors, derailing any chance of a reorganization. Second, the petition was not "patently abusive" or the sort of "tactical advantage" that would equate to bad faith.

In determining whether to dismiss the case under section 305, the court considered the totality of the circumstances, including whether there was an alternative means of achieving an equitable distribution of the debtor's assets. The court found that the debtors could reorganize under Bahamian or US law. However, many of the debtors' stakeholders expected any insolvency proceedings involving the resort would occur in the Bahamas. These expectations, according to the court, "should be respected, and not disrupted unless a greater good [wa]s to be accomplished." Because the court did not perceive a greater good in disregarding the parties' expectations, the court dismissed the Bahamian debtors' cases in favor of the pending Bahamian ones.[6]

Part II: England

Under part 26 of the English Companies Act 2006, a company may restructure its debts pursuant to a scheme of arrangement. *See* Ian Johnson, *England & Wales*, THE INSOLVENCY REVIEW 45 (5th ed. 2017) (describing the possible scheme uses, including extension of outstanding loans and debt-for-equity swaps). A scheme becomes effective and binding on affected creditors and other parties after it has been approved by the requisite majorities of creditors and sanctioned by an English court.

A Foreign Company Can Implement a Scheme of Arrangement

A company can propose a scheme if it is a "company liable to be wound up under the Insolvency Act 1986 (c. 45) or the Insolvency (Northern Ireland) Order 1989." *See* Companies Act, part 26 s. 895.[7] An unregistered company may be wound up under section 221 of the Insolvency Act 1986 (the "Insolvency Act"). Section 220 of the Insolvency Act defines an unregistered company "as any association and any company, with the exception of a company registered under the Companies Act 2006 in any part of the United Kingdom."[8] Thus, a foreign company, which on its face is an unregistered

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[6] The court did not dismiss Northshore's chapter 11 case because it was a Delaware corporation and therefore parties expected that its financial difficulties would be addressed in the US.

[7] Only a company that is "formed and registered" under the Companies Act may implement a scheme that facilitates a reconstruction or amalgamation under section 900 of the Companies Act. Such schemes are beyond the scope of this paper.

[8] Pre-Brexit, England was subject to Regulation (EU) No. 2015/848 of the Council of 29 May 2000 on Insolvency Proceedings (Recast) (the "Insolvency Regulation"), which provides that a court of an EU Member State has jurisdiction to open an insolvency proceeding with respect to a debtor that has the center of its main interests ("COMI") or an establishment in such state. Accordingly, a company that was subject to the Insolvency Regulation that had its COMI outside of and did not have an establishment in England could not be

company, can implement a scheme. *See* Lucas Kortmann & Michael Veder, *The Uneasy Case for Scheme of Arrangement under English Law in Relation to non-UK Companies in Financial Distress: Pushing the Envelope?*, 3 NIBLEJ 13, 243-44 (2015) ("[B]ased on the literal wording of the Insolvency Act 1986, any foreign company that is not registered in the United Kingdom could be wound up under the Insolvency Act 1986. Consequently, any such foreign company would also fit the definition of 'liable to be wound up'"); *see also* Jennifer Payne, *Cross-border Schemes of Arrangement and Forum Shopping*, 2013 E.B.O.R. 563, 569 (2013) ("It is well established that the term 'unregistered company' includes foreign companies.").

English Courts Have Discretion to Sanction a Foreign Company's Scheme

An English court, in determining whether to consider a scheme proposed by a foreign company, will generally consider (i) whether the company has a "sufficient connection" with England; and (ii) whether the scheme will achieve a substantial effect. *See Noble Group Ltd.*, [2018] EWHC 3092 (Ch) ("In an international case, the Court must also be satisfied that it is appropriate, in its discretion, to exercise its scheme jurisdiction on the basis that there is a sufficient connection between the scheme and England, and whether there is a reasonable prospect of the scheme being effective, having regard, in particular, to its prospects for recognition in other relevant jurisdictions."). The following is a brief discussion of those requirements.

Sufficient Connection

Absent a sufficient connection to England, an English court may refrain from exercising its discretion to sanction a foreign company's scheme. *See Syncreon Group B.V.*, [2019] EWHC 2068 (Ch) (noting the court will not exercise jurisdiction over a Dutch company "without being satisfied that it has a 'sufficient connection' with the jurisdiction"); *see also Sovereign Marine & General Insurance Co. Ltd.*, [2006] EWHC 1335 (Ch) (noting that an English court may sanction a foreign company's scheme "provided it has a sufficient connection with England"). English courts have held that they have jurisdiction to sanction a scheme of a company that has its COMI in England. *See* Christian Pilkington, SCHEMES OF ARRANGEMENT IN CORPORATE RESTRUCTURING 69 (2d ed. 2017). Indeed, an English court may sanction a scheme of a foreign company that moved its COMI to England to facilitate a scheme. *See Magyar Telecom BV*, [2013] EWHC 3800 (Ch). In *Magyar*, the court noted "[b]ecause the company is

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wound up under the Insolvency Act. *See* Look Chan Ho, *Making and Enforcing International Schemes of Arrangement*, 26 J.I.B.L.R. 434, 437 (2011). Nevertheless, English courts held that such a company is "liable to be wound-up under" the Insolvency Act. *See Re DAP Holding NV* [2005] EWHC 2092 (Ch), [2006] B.C.C. 48 ("there is nothing in the Insolvency Proceedings Regulation which precludes the [English] court from concluding that a foreign corporation . . . with neither its centre of main interest in this Member State nor an establishment in this Member State, is liable to be wound up").

registered in the Netherlands and because the notes are governed by New York law, serious issues arise as to whether this court would consider it appropriate to sanction the scheme." *Id.* However, the company had transferred its COMI to England in contemplation of the scheme. Because the company's COMI was England, the court found that the only alternative to the scheme would be formal English insolvency proceedings. *Id*. Hence, the court "accepted jurisdiction to sanction the scheme, solely on the basis of COMI." Kortman at 246.

Business operations or assets in England would likely also be a sufficient connection. *See Magyar*, [2013] EWHC 3800 (Ch) (noting "the presence in England of substantial assets belonging to a company proposing a scheme with its creditors could in an appropriate case provide the requisite connection, because the scheme if sanctioned would have the practical [effect] of preventing execution by the relevant creditors against those assets, save in accordance with the terms of the scheme")*; see also* Payne, 2013 E.B.O.R. at 570-71 ("It is clearly significant for this purpose if the company carries on business in England (whether it is based in England or carries on the business through a branch in England) or has assets in England."). Moreover, the presence of creditors in England would also likely be a sufficient connection because they would be bound to comply with the scheme by the court's order sanctioning the scheme. *See Magyar*, [2013] EWHC 3800.

The sufficient connection element may also be satisfied if the agreement evidencing the debt being restructured under the scheme is governed by English law. S*ee BlueCrest Mercantile BV v. Vietnam Shipbuilding Industry Group,* [2013] EWCH 1146 (Comm) ("The courts have in recent years found a sufficient connection where the claims of the relevant creditors are governed by English law."); *Rodentstock GmbH,* [2011] EWHC 1104 (Ch) (finding a sufficient connection where the facility agreement was governed by English law and England was the forum selected for the resolution of disputes). Moreover, a change of the original law governing the instrument evidencing the debt being restructured to English law will also help establish a sufficient connection. *See* Syncreon, [2019] EWHC 2412 (Ch) ("I am satisfied that the change to English law provides a sufficient connection with the jurisdiction, and therefore that in principle the court should exercise its jurisdiction."); *Apcoa Parking Holdings GmbH*, [2014] EWHC 3849 (Ch) (noting that changes from German to English law and Frankfurt courts to English courts were done in accordance with the terms of the underlying agreements and holding that "in all the circumstances the same faith and credit should be accorded to that choice as if it were the original choice," including for purposes of concluding that there was a sufficient connection").[9]

[9] In *Apcoa*, the court noted that it would be hesitant to rely on a change in the governing law "if, for example, the new choice is of a law which appears entirely alien to the parties' previous arrangements and/or with which the

Substantial Effect

An English court will generally not exercise its discretion and sanction a scheme where it would be futile or not have a substantial effect. *See Magyar*, [2013] EWHC 3800 (Ch) ("The court will not generally make any order which has no substantial effect and, before the court would sanction a scheme, it will need to be satisfied that the scheme will achieve its purpose."). "This is because the court is keen to ensure that scheme creditors cannot disregard the scheme and enforce their claims against the debtor and its assets in other jurisdictions, rendering the court's decision to sanction the scheme ineffective in practice." Pilkington at 71.

Substantial effect does not mean that the scheme will be effective worldwide, but it must be effective in jurisdictions where the company has significant creditors or assets. *See Van Gansewinkel Groep BV*, [2015] EWHC 2151 (Ch). ("In cases such as the present, the issue is normally whether the scheme will be recognised as having compromised creditor rights so as to prevent dissenting creditors from seeking to attach assets of the scheme companies in other countries on the basis of an assertion of their old rights."). The English courts do not require "certainty" as to enforcement outside of England, but "ought to have some credible evidence to the effect that [they] will not be acting in vain." *Id*.

Pre-Brexit, a company with significant creditors in other EU Member states would generally have to demonstrate that its scheme would likely be enforced throughout the EU under European law, such as Regulation (EU) No. 1215/2012 (the "Brussels Regulation"), which provides for the reciprocal enforcement of judgments in the EU. *See* Susan Block-Lieb, *Reaching to Restructure Across Borders (Without Over-Reaching), Even After Brexit*, 92 AM. BANKR. L.J. 1, 18 (2018).[10] English courts generally applied the rules of the Brussels Regulation to a scheme on the assumption that the regulation applied without actually deciding the issue. *See Avanti Communications Group Plc,* [2018] EWHC 653 (Ch). Under Article 25 of the Brussels Regulation, contract parties are bound to the governing law and choice of forum clauses in their agreements. Consequently, some courts concluded that a creditor is bound to an English scheme restructuring English law governed debt under Article 25. *See NEF Telecom Co BV,* [2012] EWHC 2944 (Ch). In addition, as recently as January 28, 2020 (days before Brexit), English

parties had no previous connection; or if the change in law has no discernible rationale or purpose other than to advantage those in favour at the expense of the dissentients; or even more generally, where in its discretion the court considers that, in the places in which the parties are, the extent of the alteration of rights between the parties for which sanction is sought would be considered a 'step too far'."

10 Professor Block-Lieb notes that a company could satisfy the substantial effect requirement by demonstrating that the scheme is enforceable under the Insolvency Regulation or Regulation (EU) No. 593/2008 (the "Rome Regulation"). However, it is well established that the Insolvency Regulation does not apply to schemes because they are not listed in Annex A thereof. Moreover, English courts have not concluded that a scheme falls within the scope of the Rome Regulation, which generally mandates the application of the governing law selected by the parties to a contract. *See* Kortman at 254.

courts found that a scheme can be enforced against all creditors in the EU under Article 8 of the Brussels Regulations if at least one creditor is in England. *See* Benjamin Clarke, *Lecta Scheme Sanctioned in London*, Global Restructuring Review (available at https://globalrestructuring review.com/article/121375/lecta-scheme-sanctioned-in-london)(last checked Feb. 10, 2010); *see also Stripes US Holdings Inc.*, [2018] EWHC 3098 (Ch) (noting that Article 8 is an appropriate basis for an English court to exercise jurisdiction over a scheme where "there would be a risk of irreconcilable judgments if separate proceedings existed in different jurisdictions selected by reference to creditor domicile").

Post-Brexit, an English court cannot rely on the Brussels Regulation. *See* Gerard McCormack & Hamish Anderson, *Brexit and Its Implication for Restructuring and Corporate Insolvency in the UK,* 7 J.B.L. 533, 551 (2017). Absent a new bilateral arrangement, an English court would likely analyze the enforceability of scheme on a country-by-country analysis. *See* Block-Lieb at 38. An English court would likely find that a scheme will be enforced in a country that has adopted the UNCITRAL Model Law on Cross-Border Insolvency (the "Model Law") provided that the recognition requirements have been met. In addition, an English court may be persuaded that a scheme that modifies English-law governed debt will be enforceable elsewhere under the Rome Regulation, which remains binding on EU members, or generally accepted principles of private international law principles that a contract may be modified under the law governing the contract.

In the case of a scheme proposed by a company with significant US creditors, an English court may rely on expert evidence that the scheme should be recognized under the US version of the Model Law (i.e., chapter 15). *See Syncreon Group B.V.,* [2019] EWHC 2068 (Ch). Indeed, chapter 15 recognition may be a condition precedent to the implementation of a scheme. *See id.*; *but see Lehman Brothers International (Europe)*, [2018] EWHC 1980 (Ch) (noting that effectiveness of scheme was not contingent upon chapter 15 recognition).

Part III: Enforcement of US Confirmation Orders and English Sanction Orders Elsewhere

Countries that have adopted the Model Law should enforce a chapter 11 plan provided the debtor has its COMI or an establishment in the US and all of the other recognition requirements are satisfied. *See 19 Entertainment Ltd*, [2016] EWHC 1545 (Ch) (English court granted recognition to an English company's chapter 11 plan). A country that has not adopted the Model Law may nevertheless enforce a chapter 11 plan, especially one that restructures US governed debt, under that country's law, which may include traditional notions of comity and the use of cross-border protocols. *See* Jenny Clift, *The UNCITRAL Model Law on Cross-Border Insolvency-A Legislative Framework to Facilitate Coordination and Cooperation in Cross-Border Insolvency*, 12 TUL. J. INT'L & COMP. L. 307, 314 (Spring 2004)

(noting that prior to the Model Law, "case-by-case cooperation" had emerged to facilitate international restructuring).

Pre-Brexit, courts of EU Member states generally enforced English schemes in their jurisdictions. *See* Block-Lieb at 22. The consensus appears to have been that an order sanctioning a scheme was a judgment enforceable under the Brussels Regulations. *See* Kortman at 256-67 (noting that German court refused to enforce an order sanctioning an insurance company's scheme because it impaired German policyholder's German law-based claims). There is no reason to believe that EU courts will not continue enforcing schemes post-Brexit despite England no longer being subject to the EU Regulations. *See* Block-Lieb, 37-38 (noting that Brexit may complicate enforcement of schemes in the EU, but "not spell the end of foreign scheme of arrangements"). Any country, including an EU member state, that has adopted the Model Law will likely enforce a scheme provided that the recognition requirements have been met. Other countries will likely enforce a scheme on a case-by case basis under their applicable laws. *See* Pilkington at 78 (noting that a foreign court could enforce a scheme addressing English law governed debt under general principles of private international law).

A US court will enforce an English court's order sanctioning a foreign company's scheme under chapter 15 provided the debtor has its COMI or an establishment in England and all of the other recognition requirements are met even if the company would not be eligible to be a debtor in the US. *See* Howard Seife & Francisco Vazquez, *U.S. Courts Should Continue to Grant Recognition to Schemes of Arrangement of Solvent Insurance Companies,* 17 BANKR. L. & PRAC. 571 (2008) (noting that schemes for insurance companies, which are not eligible to be debtors in the US, are entitled to recognition).

As an alternative to recognition of a chapter 11 plan or a scheme, a debtor may implement parallel restructurings. For example, in *Maxwell Communication Corp. plc*, US and English courts approved separate plans addressing claims against the debtor, and in *Lernout & Hauspie Speech Products NV*, the debtor implemented separate plans in the US and Belgium where Lernout had its headquarters because the courts would not cooperate. *See* Gropper at 12-14. This alternative is generally not favored because it will entail additional costs and complexity, including the possibility of conflicting decisions. *See* Pilkington at 165.

Conclusion

A foreign company can generally avail itself of US and English restructuring processes. However, US and English courts have discretion to refrain from exercising their jurisdiction under certain circumstances, such as where key stakeholders are unwilling to participate in the restructuring, creditors expect that the financial distress would be addressed elsewhere, or there is no assurance that the foreign

debtor will be able to implement the restructuring in a jurisdiction where its significant creditors or assets are located.