GIPC – Short Paper – Amy Patterson

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Question 15

The US and England are jurisdictions that have relaxed rules permitting foreign entities to use their restructuring systems. Analyse and compare the mechanisms, legal rules and case law in both jurisdictions that can be employed by a foreign entity wishing to utilize the US or English law and courts for a restructuring. Also, analyse whether the rulings of the US or English court can be enforced elsewhere.

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1. Introduction

Businesses operate in an increasing globalised world and restructuring proceedings need to keep pace. For corporate entities with operations, employees, assets and liabilities situated across numerous jurisdictions, understanding the most suitable jurisdiction to carry out a restructuring (which will not necessarily be in the jurisdiction of incorporation) and how that restructuring can be effective as against assets and creditors across the world is of critical importance.

This paper will consider the requirement for foreign entities to be able to carry out a restructuring in England and the US and ways in which those court approved restructurings will/can be recognised and enforced in other jurisdictions. The paper will conclude with some thoughts on whether the current regimes strike the right balance and continue to be fit for purpose.

For the purpose of this paper, discussion shall focus on the following:

(a) from an English perspective, schemes of arrangement and restructuring plans

(b) from a US perspective, Chapter 11 proceedings.

SECTION I: FOREIGN ENTITIES AND ENGLISH RESTRUCTURING PROCEEDINGS

2. Statutory and common law requirements as to jurisdiction

The test for whether a foreign entity is able to propose a scheme of arrangement is well settled and comprises a combination of statutory and common law criteria.

Statutory

The statutory provisions regarding jurisdiction for schemes of arrangement are contained in section 895 Companies Act 2006. Section 895(2) defines "company" as "*any company liable to be wound up under the Insolvency Act 1986*".

Section 221 Insolvency Act 1986 permits the winding up of an unregistered company, the definition for which encompasses "*any association and any company with the exception of a company registered under the Companies Act 2006 in any part of the United Kingdom."*

Consequently, foreign entities fall to be treated as unregistered companies within the scope of section 221 and therefore also within the scope of Part 26 Companies Act 2006.

For the purpose of a restructuring plan, the eligibility requirements under Part 26A Companies Act 2006 are drafted in similar terms and likewise relate to a "company"[1] as defined in section 895(1) Companies Act 2006.

Common law

The Insolvency Act does not list additional criteria which an English court should apply in determining whether to wind up a foreign company as unregistered under section 221. There have, however, been a number of decisions in which the criteria to be applied by the court have been considered.

With regard to schemes of arrangement, the decision in *Re Drax Holdings Ltd*[2] made clear that the only relevant requirement[3] was that there must be **sufficient connection** with England and Wales.

Case law in the context of schemes has, in the most part, been acknowledged as applying to restructuring plans[4] such that the "sufficient connection" requirement applies in the same way.

3. Establishing sufficient connection

COMI

Centre of main interests (COMI) is not a requirement for sufficient connection. COMI would, however, undoubtedly satisfy the sufficient connection test. See for example *Smile Telecoms Holdings Limited* [5] (para 60) (emphasis added):

"Although the concept of COMI under the EU Insolvency Regulation is no longer relevant to the exercise of the English court's winding-up jurisdiction, and COMI was not one of the bases for the exercise of scheme jurisdiction considered in Re Drax Holdings Limited [2004] 1 WLR 1049 ("Re Drax"), there can be little doubt that in the modern era the ***presence of a company's COMI in England gives a legitimate basis for a finding of sufficient connection*** *for the purposes of entertaining a restructuring plan"*

[1] See section 901A(4)(b) Companies Act 2006
[2] [2004] 1 WLR 1049
[3] As distinct from winding up foreign entities where additional criteria apply
[4] See CIGA Explanatory Notes para 16: *"While there are some differences between the new Part 26A and existing Part 26… the overall commonality between the two Parts is expected to enable the courts to draw on the existing body of Part 26 case law where appropriate."*
[5] [2022] EWHC 740 (Ch)

Assets

Presence of assets is helpful and may, in and of itself amount to sufficient connection (see, for example, *Re Telewest Communications plc*[6]) but, like COMI, it is not essential.

English law governed finance documents

A common basis for founding sufficient connection, as established by a significant body of case law, is where the scheme company's financing agreements are governed by English law.

This was made clear in respect of schemes of arrangement in the case of *Re Rodenstock GmbH*[7] which involved a German incorporated company with its COMI in Germany and no assets in England which would have been affected by the proposed scheme of arrangement.

This approach has been followed in numerous cases: *Magyar Telecom BV*[8], *Re Primacom Hldings GmbH (No1)*[9] and *Re Vietnam Shipbuilding Industry Group*[10].

In respect of restructuring plans, Snowden LJ held in *Smile Telecoms* where the "overwhelming majority" of the debts to be compromised under the Plan were governed by English law:

"At least so far as the English court is concerned, since the decision in Re Rodenstock GmbH [2012] BCC 459, that has been held to be a sufficient connection to warrant the exercise of the English court's scheme jurisdiction under Part 26. I see no reason to adopt any different approach in relation to restructuring plans under Part 26A."

In terms of *how much* debt needs to be governed by English law for the purpose of sufficient connection, the English courts have shown themselves to be flexible and pragmatic in considering this question, keeping in view at all times the overall purpose of achieving a wholistic restructuring.

[6] [2004] EWHC 924 (Ch)
[7] [2012] BCC 459
[8] [2013] EWHC 3800 (Ch)
[9] [2011] EWHC 3746 (Ch)
[10] [2013] EWHC 2476 (Ch)

The court in *Re Hong Kong Airlines Ltd*[11] held that there was no specific numerosity requirement and that the sufficient connection test is fact-specific. In this instance 42% of debt was governed by English law which *was* adequate to found a sufficient connection. Although the analysis was assisted by the fact that there was a parallel scheme in Hong Kong.

Similarly, the restructuring plan in *Cimolai S.p.A*.[12] was promulgated alongside Italian restructuring proceedings. In that instance only some of the debt was governed by English law. To that Mr Justice Trower held (paras 28 – 30):

This supports a proposition that the mere fact that there is some compromised debt governed by English law may not of itself be sufficient to provide a hook on which the English court can hang its decision to accept jurisdiction in every case. In this case, most of the debt subject to these restructuring plans is not governed by English law.

Nonetheless, it can still be seen that there may be a sufficient connection when it is properly appreciated why it is that such a requirement matters. It matters because the English court is vigilant to stop illegitimate forum-shopping, and it also matters because the court will be concerned about the effectiveness of any order that it makes….

In the present case, I do not consider that there is any question of illegitimate forum-shopping per se, because the English court is being asked to lend its aid to an Italian restructuring, the effectiveness of which is sought to be avoided by members of one category of creditor."

4. Mechanisms for creating sufficient connection

COMI shift

COMI shifting has been a relatively common tool by which companies wishing to utilise the scheme or restructuring plan proceedings are able to create sufficient connection.[13]

That is the case even if the COMI shift is carried out solely for the purpose of enabling the English courts to have jurisdiction to sanction a scheme of arrangement or restructuring

[11] [2022] EWHC 3210 (Ch)

[12] [2023] EWHC 1819 (Ch)

[13] COMI shifting can involve a variety of steps including conducting negotiations with creditors in England, notifying creditors of a move in centra management, taking out leased premises in England, opening bank accounts, moving key members of management, registering as a foreign establishment at Companies House

plan. See for example *Re Noble Group Limited*[14], *DTEK Finance BV*[15] and *Smile Telecoms*[16].

In the very recent case of *Re Project Lietzenburger Strasse Holdco Sarl*[17] creditors opposing the restructuring plan argued, amongst numerous other points, that the German real estate developer's COMI shift, undertaken in the weeks prior to the convening hearing, was insufficient to effectively move COMI and, in any event, was evidence of "bad" forum shopping designed to write off debts that could not be written off under Lux law (being the jurisdiction of incorporation). The High Court's judgment following the sanction hearing is expected imminently.

Amending governing law

Another well trodden path for foreign entities involves the plan company amending the jurisdiction and governing law provisions of its secured financing agreements. Often the consent requirements for such amendments are lower than those requirements for amendments to the commercial terms of the financing arrangements which may well require unanimity.

In *Re Apcoa Parking Holdings GmbH*[18] German governing law and jurisdiction clauses were amended shortly prior to the launch of the scheme of arrangement to English law and the courts of England and Wales. Having considered whether such amendments were valid under German law, the court noted at paragraph 39:

"As I have foreshadowed, the importance of establishing sufficient connection is central; but it seems to me, at least for present purposes and assuming the validity of the alteration of the governing law and the jurisdiction clause to English law and the English court, that this court would have jurisdiction".

In *DTEK Finance BV*[19] consideration was given to whether changing governing law immediately prior to applying to the court impacted the sufficiency of the scheme company's connection to England. In applying Apcoa, Rose J considered it did not.

[14] [2018] EWHC 2911 (Ch)
[15] [2015] EWHC 11164 (Ch)
[16] [2022] EWHC 740 (Ch)
[17] [2023] EWHC 2849 (Ch) – sanction judgment pending
[18] [2014] EWHC 1867 (Ch)
[19] [2015] EWHC 11164 (Ch)

It now appears relatively settled that such amendments, even if done solely for the purpose of enabling the English courts to accept jurisdiction over the scheme/plan company but subject always to the court's wider discretion.

Co-obligor / deed of contribution / issuer substitution

A further technique by which companies are able to avail themselves on the scheme or plan jurisdiction involves the incorporation or acquisition of an English company which becomes liable for the debt which is to be restructured. That English entity then proposes the scheme or plan.

In *Codere Finance (UK) Limited* [20], a Lux incorporated company which had issued notes governed by New York law established an English incorporated company which acceded to the notes as a co-issuer. In the judgment the court acknowledged that the co-issuer structure was solely for the purpose of enabling the company to take advantage of the scheme jurisdiction and therefore, in effect, amounted to forum shopping. It, however, concluded that this had been done not to evade debts but to achieve the best possible outcome for creditors and therefore constituted "good" forum shopping.[21]

Re Gategroup Guarantee Limited[22] in which, in order to establish a connection with England to implement a restructuring plan a "co-obligor" structure was similarly utilised. In the judgment sanctioning the restructuring plan, Zacaroli J addressed the co-obligor structure and its artificiality as follows (para 22):

"Seventh, also to the extent that it may be seen as forum shopping, for the first five reasons already given this case undoubtedly falls into that class of "good forum shopping" cases…: the co-obligor structure is being used here, not to enable a debtor to exploit for its own advantage, and at the expense of a creditor class, the insolvency laws of a particular jurisdiction, but with a view to achieving the best possible outcome for all."

A note of caution was, however, sounded by Snowden LJ in the Court of Appeal decision in *Re AGPS BondCo Plc*[23] (Adler). In that case, indebtedness was transferred from the Luxembourg parent to the English plan company by way of an issuer substitution. The issue was not specifically challenged at first instance or on appeal. However, Snowden LJ nevertheless expressly noted in this regard (para 34):

[20] 2015 EWHC 37778
[21] See in particular paragraph 18
[22] 2021 EWHC 775
[23] [2024] EWCA Civ 24

"The Appellants did not oppose the Plan before the Judge on the basis that the Issuer Substitution was an artificial device that could not justify the exercise of discretion to sanction the Plan. The point did not, therefore, arise for consideration on this appeal. For the avoidance of doubt, and without expressing a view one way or the other, ***I would wish to make it clear that the fact that this judgment does not deal with this issue should not be taken as an endorsement of the technique for future cases****."*

Consequently, plan or scheme companies should assume that such structures will be subject to a greater level of scrutiny to ensure the mechanism is not being used to prejudice groups of creditors or members in a manner than may not be permissible under the laws of the jurisdiction of incorporation of the plan company.

5. Enforcement in other jurisdictions

In considering whether to exercise their discretion to sanction a scheme, even where a sufficient connection has been established, courts will want to be provided with credible evidence that the scheme or plan will have substantial effect in relevant jurisdictions (namely jurisdictions where creditors or assets are located).

In each of the cases cited above, the court had, alongside considering whether sufficient connection could be demonstrated, actively considered whether the scheme would be recognised and enforced. This is not an issue with which the court will only engage if such matters are raised by opposing creditors. Courts will address this proactively and will expect the plan company to provide evidence (usually by way of expert opinion) addressing the issue.

Four principles were set out by the court in *Re DTEK Energy BV*[24] in this regard:

(a) The court will not make an order which has no substantial effect

(b) The court will need to be satisfied that that scheme will achieve a substantial purpose in key jurisdictions in which the company has creditors or assets

(c) The court does not need absolute certainty but it does require credible evidence that it will not be acting in vain

[24] [2021] EWHC 1551 (Ch)

(d) That evidence must show that the scheme will have a real prospect of having substantial effect

There are a patchwork of options available with regard to the recognition and enforcement of English restructuring proceedings internationally and recognition and enforcement of schemes or restructuring plans which are outlined below.

Enforcement within the European Union / impact of Brexit

Prior to Brexit, the question of whether schemes of arrangement would be recognised within the EU was a vexed one.

Schemes of arrangement would not fall within the scope of the Recast Insolvency Regulation and were not listed in its annexes[25].

What was less clear was whether, under Regulation (EU) No. 1215/2012 (the "**Recast Brussels Regulation**"), the court had jurisdiction to sanction schemes with EU based creditors. Difficult questions were left unanswered by much of the case law although judgments mostly worked on the basis that the provisions of Chapter II (dealing with jurisdiction) of the Recast Brussels Regulation *would* apply and the scheme company would then need to rely on falling within the exception in Articles 8 and 25.

If one of those exceptions could be established then courts were seemingly comfortable that recognition and enforcement of the scheme would then automatically follow.

None of that is, of course, now relevant post-Brexit as both the Recast Insolvency Regulation and the Recast Brussels Regulation have been repealed with effect from 31 December 2020.

Other options from a European perspective are more limited:

(a) The UK applied to acceded to the Lugano Convention (which provides for a similar regime to the Recast Brussels Regulation) in April 2020 but, as of May 2021 its application was refused by the European Commission

[25] Although the decision in *Re Gategroup Guarantee Ltd* [2021] EWHC 304 (Ch) changed that analysis with regard to restructuring plans

(b) The Hague Convention on Choice of Court Agreements 2005 may be of relevance as the UK has acceded to the convention in its own right and the EU is a contracting party. However:

  (i) It only applies in respect of exclusive jurisdiction clauses and not asymmetric clauses (more commonly found in financing agreements)

  (ii) It may not apply to contracts entered into prior to 1 January 2021 which was when UK joined in its own right (and not as part of the EU)

  (iii) Following the decision in *Gategroup,* restructuring plans are unlikely to fall within the remit of the Hague Convention which has a similar carve out for insolvency[26] as was found in the Lugano Convention and Brussels Regulation. There may be a similar issue with regard to insolvent schemes of arrangement

(c) Rome I Regulation is likely to be of most assistance where a scheme or restructuring plan is compromising English law governed debt as it provides that the law applicable to a contract shall govern the ways in which obligations may be extinguished. This continues to apply post-Brexit.

Given that the vast majority of EU Member States have *not* implemented the Model Law[27] (see below), for restructuring plans (and most likely insolvent schemes of arrangement), plan companies will need to rely on either Rome I Regulation and/or principles of private international law / comity to demonstrate to the English courts that the scheme/plan will be enforced within Europe.

This was evidenced in *Re DTEK Energy BV & anr[28],* the first post-Brexit challenge to the potential recognition of an English scheme of arrangement in other European jurisdictions, in which the court in took what has been described as a pragmatic approach to the question of international recognition.

Norris J was satisfied with expert evidence to the effect that EU Member States would recognise and enforce the English scheme based on either the Rome I Regulation or Dutch private international law. In addressing the absence of the Brussels Regulation, Norris J commented (at para 31):

[26] See article 2(2)(e)
[27] The exceptions being Greece, Poland, Romania and Slovenia
[28] [2021] EWHC 1456

"English Courts have … never regarded the Judgments Regulation alone as a sufficient ground upon which to assess international effectiveness: and the fact that it is no longer available has not transformed the landscape"

UNCITRAL Model Law on Cross Border Insolvency (the "Model Law")

The Model Law has been enacted in 62 jurisdictions[29] including the US pursuant to Chapter 15 of the Bankruptcy Code ("**Chapter 15**").

It permits recognition and assistance to be extended by the courts of the enacting state to foreign representatives in respect of foreign (main or non-main) proceedings.

Article 2(a) of the Model Law defines a foreign proceeding as:

'…a collective judicial or administrative proceeding in a foreign State, including an interim proceeding, pursuant to a law relating to insolvency in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation.'

With regard to that definition, various aspects appear, at first blush, to pose difficulties for schemes (certainly solvent schemes) and potentially restructuring plans:

(a) neither schemes nor restructuring plans necessarily easily fall within the concept of "collective"[30].

(b) neither are they obviously pursuant to law relating to insolvency given that they are contained with the Companies Act 2006.

(c) it is not clear that a scheme or plan involves the assets and affairs of the debtor being subject to control or supervision by a foreign court (in the way that they would be in a liquidation or administration).

Whether a scheme or plan is to be considered a "foreign proceeding" will be a matter for the courts of the enacting state dependent, in part, on whether modifications have been made to the text of the Model Law during the implementation process.

[29] See: Status: UNCITRAL Model Law on Cross-Border Insolvency (1997) | United Nations Commission On International Trade Law

[30] In the context of the Recast Insolvency Regulation, schemes of arrangement were expressly excluded from being "collective proceedings" in Annex A

Helpfully, the US has been a "friendly" jurisdiction for the purposes of recognising schemes and restructuring plans under Chapter 15[31]. Taking those points in turn:

(a) Collective: despite some potential difficulties of categorising certain schemes (and subsequently restructuring plans) as "collective", there is a long line of precedent which does just that. Judge Martin Green in the fairly recent decision in *Re Avanti Communications Group Plc*[32]: commented: "*Schemes of arrangement under UK law have routinely been recognized as foreign proceedings in chapter 15 cases*" and cited 15 cases in which the US courts had been satisfied that this requirement was met.

(b) Law relating to insolvency: for the purpose of Chapter 15, additional wording has been included into the definition of foreign proceeding[33] which includes reference to "pursuant to a law relating to insolvency **or debt adjustment**" meaning this requirement is more easily satisfied for schemes and restructuring plans (which inevitably involve debt adjustment)

(c) Control of supervision by a foreign court: again, US courts have taken a pragmatic approach to this question, focusing on the fact that the scheme itself is subject to the control of the court (as it requires the court to sanction the scheme) even though the assets and affairs of the debtor are not subject to the same control

Weight is often also placed on the fact that either (a) no objections were raised or (b) the vast majority of creditors supported the scheme in its home jurisdiction. As has been commented, the US courts appear to have adopted a "no harm no foul" approach to scheme recognition.[34]

Recognition was granted in both *Re Magyar Telecom BV* and *Avanti Communications Group Plc* the former of which involved a compromise of US governed debt[35] and the latter which involved a release of third parties (which is a controversial matter under Chapter 11). In both instances the court acknowledged the importance of recognition to the effectiveness of the restructuring.

[31] Both schemes / plans sanctioned by the English courts but also more broadly including South Africa (e.g. *In re Cell C Proprietary Ltd* 571 B.R. 542 (Bankr. S.D.N.Y. 2017)
[32] Albeit one in which the scheme company was English incorporated
[33] See section 109(23) of the Bankruptcy Code
[34] Lawton, D and Wolf S, "The Thing about Schemes in the Scheme of Things: Recognition of Schemes of Arrangement under Chapter 15 of the U.S. Bankruptcy Code", March 2018, INSOL Technical Series Issue No 38
[35] The US does not apply the Rule in Gibbs

The question of recognition under the Model Law will be a fact sensitive question in each case depending on both the specifics of the scheme/ plan and the implementation and interpretation of the Model Law in that jurisdiction and not all courts may be as welcoming of English restructurings as the US.

Domestic private international law / comity

This will, by definition, differ from jurisdiction to jurisdiction and will be an incredibly fact sensitive exercise in each case.

Whilst the court will be presented with extensive expert evidence as to recognition and enforcement, the commonly cited principle of private international law is that modification of rights under the jurisdiction of the governing law of the instrument is likely to be recognised in other jurisdictions.

Broadly speaking recognition and enforcement is more likely where the debtor has its COMI in England.

Restrictions on international recognition: Rule in Gibbs

A detailed analysis of the Rule in *Gibbs*[36] is beyond the scope of this paper. It should, however, be noted that this rule is not one which applies only to English law governed debt but is a rule of general application[37].

Consequently, consideration has to be given to this rule when implementing a scheme of arrangement or restructuring plan which looks to compromise debt governed by the laws of a state which applies the Rule in *Gibbs* because recognition and enforcement in that jurisdiction will not be possible if creditors have not submitted to the English proceeding.

A recent example of that is the restructuring plan in *Re Hong Kong Airlines Ltd.*[38] The restructuring plan was sanctioned by the English courts, however, a parallel Hong Kong scheme was necessary because the restructuring sought to compromise Hong Kong governed debt and Hong Kong applies the Rule in Gibbs.

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[36] *Antony Gibbs & Sons v La Societe Industrielle et Commerciale des Metaux* [1890) LR 25 QBD 399
[37] Namely that contractual obligations can only be discharged by the law governing that contract
[38] [2022] EWHC 3210 (Ch)

SECTION II: FOREIGN ENTITIES AND US RESTRUCTURING PROCEEDINGS

6. Statutory requirements

The eligibility requirements for any Chapter 11 proceeding are set out in the Bankruptcy Code. Pursuant to section 109: *"only a person that resides or has a domicile, place of business, or property in the United States, or a municipality may be a debtor under this title".*

Unlike under the Companies Act 2006 there is no distinction drawn between entities registered pursuant to the United States Code and foreign entities[39]. The entry requirements for the purpose of Chapter 11 are, therefore, identical for domestic and foreign entities.

However, for foreign entities, reference to "property" provides the most common basis on which to satisfy section 109(a) of the Bankruptcy Code. The US courts have construed this provision incredibly broadly as being **any** property. Consequently, it is often an incredibly low threshold to satisfy.

In the 1996 case of *Re McTague*[40], seemingly the first judgment to address the issue (albeit in the context of Chapter 7)[41], the court, after noting that Congress had elected not to specifically address property of "inconsequential value", which it had done elsewhere in the Bankruptcy Code[42] held that (emphasis added):

"Consequently, as applied to the case at bar, the statute does not appear to be vague or ambiguous, and it 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. The Court will so rule."*

And further:

"the language of section 109(a) is clear, and the Court does not have discretion to look behind the language and declare that the quantity of property in the United States will be decisive of eligibility to be a debtor under the Code."

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[39] See sections 101(41) and 101(9) for definitions of "person" and "corporation" respectively
[40] 198 B.R. 432 (Bankr. W.D.N.Y. 1996)
[41] Judge Michael J. Kaplan notes *"It is surprising to the Court that no published case can be found regarding the instant question"*
[42] For example section 554 of the Bankruptcy Code in relation to abandonment of property

In that case the debtor (an individual) had $194 in a US bank account which was held to be sufficient for the purpose of the "property" requirement in section 109(a).

Numerous cases have reached the same conclusion, finding that monies in bank accounts constituted sufficient "property"[43] or alternatively payment of a retainer to US bankruptcy counsel[44]

7. Mechanisms for creating jurisdiction

The mechanisms for creating jurisdiction and, therefore, enabling a company to utilise the Chapter 11 regime are far more straightforward than would be the case for an English scheme or restructuring plan. A debtor company simply needs to take steps to e.g. open a US bank account or put money on retainer with US lawyers and does not require the more involved, time-consuming and potentially costly routes required for establishing sufficient connection under the Companies Act 2006.

8. Grounds for challenge

A Chapter 11 proceeding in respect of a foreign entity, despite the incredibly low jurisdictional threshold, can still be dismissed on various grounds although it appears the examples of dismissal are few and far between and in fairly extreme circumstances.

Two cases merit reference in this regard. The first is *In Re Northshore Mainland Services, Inc*[45] which related to the Baha Mar development in the Bahamas. The vast development project described as "the largest integrated destination resorts in the Caribbean", stalled as a result of disputes with its contractor, CCA Bahamas ("CCA").

Numerous entities within the Northshore/Baha Mar group filed for Chapter 11 proceedings which were objected to by both CCA and the group's lender on the basis that:

(a) The Debtors were not eligible for Chapter 11 relief under section 109(a) of the Bankruptcy Code

(b) The Chapter 11 cases had been filed in bad faith and should be dismissed for cause pursuant to section 1112 of the Bankruptcy Code

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[43] *Re Global Ocean Carriers Ltd* 251 B.R. 31, 38 (Bankr. D. Del. 2000)
[44] *Re Yukos Oil Company* 321 B.R. 396, 411 (Bankr. S.D. Tex. 2005)
[45] 537 B.R. 192 (Bankr. D. Del. 2015)

(c) The best interests of the debtors and creditors were better served by insolvency proceedings in the Bahamas and the court should therefore dismiss pursuant to section 305 of the Bankruptcy Code

The court was satisfied that the requirement of section 109(a) was met[46] and did not consider that the filing had been made in bad faith. However, despite the potential benefits of a Chapter 11 over a Bahamian liquidation, the court *did* dismiss the Chapter 11 proceedings[47] on the basis that the interests of the debtors and creditors would be better served by proceedings in the Bahamas and given considerations of comity.

Whilst not expressly articulated as part of the decision, it was clear from the facts as set that that there would be no cooperation within the Bahamas such that the Chapter 11 plans could not be effectuated. The debtors had filed recognition proceedings in the Bahamas in respect of the Chapter 11 proceedings which had been denied by the Bahamian court, the Bahamian Attorney General had opposed recognition and instead sought the appointment of provisional liquidators to the Bahamian debtors.[48]

The same is true of the decision in *Re Yukos Oil Co*[49] in which the court dismissed the Chapter 11 proceeding following a challenge by the secured lenders. Yukos Oil was an entity incorporated in Russia operating in oil and gas.

While the Court held that Yukos Oil *did* meet the requirement of section 109(a) of the Bankruptcy Code[50] and rejected arguments on the basis of comity and *forum non conveniens* the Court did dismiss the Chapter 11 proceedings on the basis of section 1112(b) i.e. that Yukos Oil could not effectuate a Chapter 11 plan without the cooperation of the Russian Government.

9. Enforcement in other jurisdictions

The US of course never had the suite of European legislation available to it for the purpose of recognition or enforcement of its Chapter 11 plans in European Member States.

[46] On the basis of deposits of $10k sitting in US bank accounts opened 10 days prior to the filing of the Chapter 11 petition
[47] With the exception of the Chapter 11 proceeding relating to Northshore itself which was a Delaware incorporated entity
[48] The judge did however allude to this: see para 206
[49] 321 B.R. 396 (Bankr. S.D. Tax. 2005).
[50] Having transferred a retainer to US bankruptcy counsel

Consequently, the main pathways to recognition and enforcement of a Chapter 11 plan will be via the Model Law (in jurisdictions where the Model Law has been enacted) and/or private international law or comity[51].

Model Law

Many of the restrictions with regard to recognition of English schemes of arrangement or restructuring plans under the Model Law does not apply to a Chapter 11 plan, certainly not in the context of recognition in England pursuant to the Cross Border Insolvency Regulations 2006 ("CBIR")(being the implementation in Great Britain of the Model Law).

The reason being that the three areas of "difficulty" are not relevant in a Chapter 11 process. Such a process is collective, is pursuant to a law relating to insolvency (namely the Bankruptcy Code) and is very much subject to control and supervision by the US courts.

That is made clear in the English decision in *Re Videology Ltd*[52]. This involved a UK incorporated entity which was part of a broader group of companies involved in video advertising. Following financial difficulties, the company applied for Chapter 11 relief and immediately sought recognition under the under the CBIR as foreign main proceedings.

The central focus of discussion in the *Re Videology* decision related to whether the Chapter 11 constituted main or non-main proceedings. In relation to the preceding question of whether a Chapter 11 proceeding was a "foreign proceeding", Snowden J, stated simply: *"That plainly includes proceedings in the US under Chapter 11*".[53]

The decision in *Re Astora Women's Health LLC*[54] in which a Delaware incorporated entity sought recognition under the CBIR involves a more detailed analysis of the position but reaches the same conclusion, namely that a Chapter 11 proceeding is a "foreign proceeding" for the purpose of the CBIR.

[51] The position in this regard mirrors the discussion in respect of English schemes/restructuring plans
[52] [2018] EWHC 2186 (Ch)
[53] See paragraph 25
[54] [2022] EWHC 2412 (Ch)

On the face of it, it would appear that CBIR recognition would *not* be available for those entities which have minimal "property" in the US per the examples discussed above on the basis that they would be neither main (COMI) or non-main (establishment) proceedings.[55]

The need for parallel proceedings: the rule in Gibbs

As noted above, where a Chapter 11 proceeding is designed to compromise debt governed by a foreign law and that foreign law also upholds the rule in *Gibbs* it is likely that parallel proceedings will be necessary if the relevant creditors are not willing to voluntarily submit to the Chapter 11 proceedings.

10. Conclusion

As should be evident from the above discussion, both English and US courts take a creative, flexible and pragmatic approach to enabling foreign entities to avail themselves of the restructuring regimes in their respective jurisdiction even where mechanisms have been used in a deliberate and artificial manner.

The courts' willingness to permit foreign companies access to domestic restructuring proceedings is not, however, without limits. The English court in particular will want to be addressed on the question of international efficacy prior to sanctioning a scheme or restructuring plan and such matters are also considered by the US courts where challenges are raised by creditors.

Overarching themes of benefit to creditors as a whole and the notion of good vs bad forum shopping pervade the judgments, indicating that courts will not permit debtors to flout that flexibility merely for their own gain or advantage.

With regard to recognition and enforcement, despite sophisticated and developed restructuring regimes, that remains somewhat of a hotchpot which has not been helped, from an English perspective, by Brexit.

Although is this a problem in practice? It is often said that wider adoption of the Model Law would assist with cross border recognition of restructuring proceedings and that is undoubtedly true, at least procedurally. However, the number of successful challenges (or indeed challenges at all) to recognition of sanctioned/approved restructuring procedures are

[55] Although note that whether that is correct or not, certainly within England, will depend on whether the approach taken by the court in *Re Tosia Limited* (unreported) adopting the approach in *Re Fairfield Sentry,* 714 F.3d is followed which considered COMI at the date of filing for recognition rather than the date of commencement of the Chapter 11 proceeding.

relatively few, even those where jurisdiction has been established by the presence of a few dollars in an account – which would be far less likely to benefit from Model Law recognition.

There are no doubt myriad factors at play here: advisors carefully considering enforcement issues at the outset, creditors subject to the personal jurisdiction of the relevant court (particularly relevant in the case of Chapter 11 proceedings and the penalties for breaching the automatic stay), creditors submitting to the proceedings or supporting the proceedings by way of lock up agreement or otherwise and/or dissenting creditors being offered settlement arrangements.

Whatever the dynamic on any given international restructuring, the combination of the approach of the courts, the tools available for recognition and the careful and considered approach to planning and implementing a restructuring means that both the US and UK regimes continue to demonstrate that they are more than fit for purpose.

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