NORTON ROSE FULBRIGHT

International Restructuring Newswire

A quarterly newsletter from the global restructuring team at Norton Rose Fulbright

Q3 2023

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To our clients and friends:

Welcome to our latest issue of the *International Restructuring Newswire*.

What legendary jazz musician John Coltrane said about music holds equally true in the restructuring world. Changes in restructuring laws and strategies are inevitable. Practitioners need to be ever vigilant of changes that will have an enormous impact on how to effectively restructure distressed companies.

In this issue, we help to keep you abreast of new developments in a variety of jurisdictions, places where Norton Rose Fulbright advises its clients on the leading cross-border restructurings. In the Netherlands, we look at new cases with far reaching consequences using the Dutch Scheme (WHOA). Our article on the UK discusses new cross-border jurisdictional techniques based on newly incorporated English companies. How Singapore courts deal with insolvency and cryptocurrencies and evolving techniques in the US for liability management are also covered in this issue. Finally, we look at how the Australia's Parliament is embracing change in its far-reaching review of Australia's insolvency laws .

Good reading! And we hope to see many of you at the upcoming INSOL International conference in Tokyo in September.

Howard Seife
Global Co-Head of Restructuring
New York

Scott Atkins
Global Co-Head of Restructuring
Sydney

In the news

VALCON 2023

May 1-3, 2023
Julie Goodrich Harrison participated on a panel at the annual VALCON conference in New Orleans. The panel spoke on "Corporate Valuation: Before, During and Post-Pandemic." The conference was sponsored by the ABI, the Association of Insolvency & Restructuring Advisors (AIRA).

Australian Restructuring, Insolvency and Turnaround Association (ARITA)

May 9, 2023
Fiona Murray-Palmer presented an update on recent decisions in the insolvency sphere at the 2023 ARITA Vic/Tas Division conference in Melbourne. **Lee Pascoe** also gave a presentation on cryptocurrencies at the conference.

2023 TMA Southwest Regional Conference, San Antonio

May 10-11, 2023
Jason Boland moderated a distinguished panel of Judges, which included the Honorable David R. Jones of the Southern District of Texas, the Honorable Meredith S. Grabill of the Eastern District of Louisiana, and the Honorable Michael M. Parker of the Western District of Texas, covering an array of topics ranging from subchapter V cases, the varying local rules and procedures among the districts, valuation and expert testimony perspectives, judicial mediation, and other recent case decisions.

R3 Annual Conference

May 11, 2023
Scott Atkins attended the R3 Annual Conference in Venice. The conference brought together industry leading speakers to provide insights on the vital role of restructuring and insolvency professionals in supporting business communities across the UK in managing the rising tide of insolvencies.

INSOL Global Insolvency Practice Course

May 14-17, 2023
Scott Atkins lectured at the INSOL Global Insolvency Practice Course (GIPC) in London. The GIPC is a postgraduate certification program with a duration of approximately nine months. The program is a result of INSOL International's strong relationship with a community of academics, specialised in international and comparative insolvency law.

Construction Law Webinar

May 18, 2023
Kristian Gluck participated in a webinar hosted by NRF's construction law team. He was joined by real estate partner, **David Barksdale**, where they discussed the looming potential for recession-caused troubled projects and assets, with a deeper look into how to guard against and mitigate such scenarios.

American Bankruptcy Institute – New York City Bankruptcy Conference

May 24, 2023
Eric Daucher spoke on a panel on subchapter V of the US Bankruptcy Code at the ABI bankruptcy conference in New York. The panel discussed the potential increase in cap for subchapter V filings and the implications for the resulting cases if the cap does or does not get raised.

Texas Bankruptcy Bench Bar Conference

June 4–6, 2023
Ryan Manns and **Julie Harrison** spoke on a panel at the Bankruptcy Bar Bench Conference in San Antonio. The panel discussed settlements, releases, and exculpations in connection with the *Talen Energy* Chapter 11 case.

International Insolvency Institute (III) Conference

June 9–11, 2023
John Martin (Sydney) and **Omar Salah** (Amsterdam) spoke at the 23rd annual conference of the III in Amsterdam. Our firm is a founding corporate member of the III and John Martin was president at the time of the conference. Omar Salah co-chaired the NextGen Conference. The III is a global membership of leading professionals, academics and judges with expertise in international insolvency law and practice.

Berne Union Claims and Recoveries Conference

June 14–16, 2023
Sylwia Maria Bea (Frankfurt) moderated a panel at the Berne Union conference in Prague which discussed restructuring comparisons in Europe. The panel included her colleagues Philippe Hameau (Paris), Gemma Long (London) and Omar Salah (Amsterdam). The Berne Union is the international association for the export credit and investment insurance industry. Members include insurance companies and brokers, export credit agencies and other professionals.

First MENA Forum

June 19–20, 2023
Scott Atkins provided opening remarks at the first INSOL International and World Bank Group MENA Forum on Insolvency Reform in Cairo. The two day forum intended to facilitate regional dialogue on the importance of restructuring regimes to address business distress through the model of regional round table forum discussions. Scott also hosted an open forum discussion on a range of topics, including developing a uniform process for effectively gathering and using data to conduct meaningful analysis, the role of insolvency administrators in the insolvency process and the intersection between climate change and insolvency and debt resolution..

Norton Rose Fulbright – Aviation Finance and Leasing School

June 28, 2023

David Rosenzweig (New York) and **Mark Craggs** (London) along with Doug Walker from Seabury Securities presented on restructurings at NRF's Aviation Finance and Leasing School, a training program for in-house counsel and commercial teams working in aviation finance and leasing.

GRR Live: Women in Restructuring

June 29, 2023

Sylwia Maria Bea was a panel speaker at the GRR Live: Women in Restructuring conference in London. Sylwia's panel provided an overview of the EU's newly introduced restructuring plans – covering Germany, the Netherlands, France and Spain. Women in Restructuring is designed to give a platform to the outstanding women practicing in the international insolvency and restructuring sphere.

ABC TV – Four Corners

July 17, 2023

Natasha Toholka appeared on ABC TV's flagship current affairs program, 'Four Corners' to discuss construction industry distress.

INSOL Focus Webinar

July 25, 2023

Noel McCoy participated in a webinar with INSOL International discussing recent developments in courts' willingness to exercise their insolvency jurisdiction and how that interacts with contractual jurisdiction clauses and the ongoing debates on cross-border recognition.

Deloitte Boardroom Program

July 2023

Jenna Scott presented at the Deloitte Boardroom Program on the intricacies of Safe Harbour and how it can assist directors in turnaround situations.

2023 Ninth Circuit Judicial Conference

July 30—August 3, 2023

Rebecca Winthrop, a Lawyers' Representative to the Ninth Circuit Court of Appeals, will moderate a panel to the Ninth Circuit bankruptcy judges on recent Supreme Court cases.

WirtschaftsWoche – German restructuring awards

Renowned German business journal *WirtschaftsWoche* has awarded Norton Rose Fulbright's **German Restructuring Practice** as TOP Law Firm for Restructuring. **Sylwia Maria Bea** was also awarded as TOP Lawyer for Restructuring.

Los Angeles Business Journal – Top 100 Lawyers

Rebecca Winthrop was recognized by the Los Angeles Business Journal as a Top 100 Lawyer in 2023. The recognition honors lawyers in the Los Angeles region who have demonstrated exceptional legal skill and achievements across the full spectrum of responsibility, exemplary leadership and contributions to the Los Angeles community at large.

Law360 2023 Editorial Board

Ryan Manns was named to *Law360*'s 2023 Bankruptcy Editorial Advisory Board. The editorial advisory board provides feedback on *Law360*'s coverage and expert insight on how best to shape future coverage.

Global Restructuring Review – Women in Restructuring

Julie Goodrich Harrison (Houston) and **Natasha Toholka** (Melbourne) were profiled in GRR's Women in Restructuring 2023 survey – GRR's first such survey since the global pandemic – aimed to discover how Covid has influenced the workplace and whether it has yielded positive results for gender equality.

Law360

Ryan Manns and **Jamila Mensah**, Co-Chairs of the firm's Racial Equity Council in the US, spoke with Law360 in an article highlighting the council and the firm's DEI efforts.

Cryptocurrency: a perspective from Singapore

Successfully striking a balance between keeping up with the times and upholding established legal principles

Meiyen Tan, Hannah Alysha

Investors suffered very significant losses as a result of the wave of collapses in the crypto sector in 2022.[1] Some of those investors have now turned to regulators and the Courts for assistance.

Governments and regulators presently face the unenviable task of making and amending laws to deal with cryptocurrency's immersion into the lives of everyday people and the mainstream economy. Courts, judges and lawyers have had to, in the meantime, grapple with interpreting and applying existing law and legal principles that have been around for centuries (much like gold coins and paper money) to cryptocurrency.

Brave new world of jurisprudence

The Singapore Courts have embraced this challenge head-on, particularly in the context of restructuring and insolvency law. Three recent decisions illustrate the willingness of Singapore courts to engage flexibly and pragmatically with the legal issues presented by cryptocurrency all while upholding quintessential legal principles, solidifying Singapore's position as an international cryptocurrency (and debt restructuring) hub.

Re Babel Holding Ltd and other matters [2023] SGHC 98 (Re Babel)

In *Re Babel*, the High Court of Singapore was presented with applications by companies affiliated with the "Babel Finance" brand (the **BF Group**), which engage in a range of cryptocurrency-related business activities. The applicants included entities incorporated in the Cayman Islands, the British Virgin Islands, and Hong Kong.

In essence, the BF Group sought moratoria extensions under Section 64 of Singapore's Insolvency, Restructuring and Dissolution Act (**IRDA**) in order to secure "breathing space" to formulate a restructuring plan, which would be implemented via a scheme of arrangement (the **Scheme**).

The Scheme proposed included a plan for the substantive consolidation of the assets and liabilities of the entire BF Group, and a deed poll structure which would allow a Singapore subsidiary to become a primary co-obligor for claims against the entire BF Group. This in turn would make Singapore the centre from which the worldwide restructuring would be conducted. It was further proposed that customers' deficits would be converted into tokens issued by Babel Finance, "Babel Recovery Coins", and pegged to certain cryptocurrencies. The BF Group also concurrently sought sealing orders, in order to safeguard commercially sensitive information in its documents.

The objecting creditor, DRB Panama Inc, argued that both applications ought not be allowed. It argued that: (i) the moratoria extensions were not *bona fide* as amongst other things, the BF Group had omitted the identities of its creditors; (ii) several of the entities in the group were incorporated outside of Singapore and had no substantial connection to Singapore; and (iii) the Scheme was unworkable. It also argued, with regard to the sealing application, that there was a need for the Scheme creditors to be able to consult with each other on the extension of moratoria and how their interests might best be protected.

The Court ultimately allowed both the applications for the extension of moratoria and the sealing of the file. In granting the extension application, the Court's primary considerations were that: (i) the applicants incorporated outside of Singapore did in fact have a substantial connection with Singapore; (ii) the applications had been made *bona fide*; and (iii) there was a reasonable prospect of the Scheme's success. In granting the sealing application, the Court balanced the competing interests in play and accepted the BF Group's argument that it was necessary to safeguard the identity of the Group's creditors.

1 In May 2022, the stablecoin TerraUSD collapsed, causing a domino effect that wiped out over US$400 billion in value in the crypto ecosystem; the collapse of FTX in November 2022 led to the loss of more than US$8 billion of its customers' assets

Several aspects of this judgment stand out:

1. First was the Court's suggestion that a scheme of arrangement *may* be proposed on the substantive consolidation of the assets and liabilities of the various entities within the BF Group (similar to what at times may occur in US chapter 11 cases). This is notable because, under Singapore law, companies within a group are usually treated as separate entities. Ordinarily, therefore, each of these companies would have to file separate applications for their respective schemes of arrangement. Restructuring and insolvency practitioners will be eagerly waiting to see if this ultimately means that a scheme of arrangement can in specific circumstances override this general rule, as this may result in the saving of substantial time and costs.
2. Second was the Court's acceptance of the BF Group's argument that it was necessary to safeguard the identity of the Group's creditors, in order to prevent these creditors from suffering a potentially negative market reaction to news of their exposure to the BF Group. The Court stated that prevention of such a potentially negative reaction would be more pressing than the need to allow creditors to consult with each other on the extension of moratoria. In our view, this was an extremely commercial and prescient decision, as the recent spate of cryptocurrency restructuring and insolvency filings in the US have led to such a contagion effect -- even despite efforts by most US Courts to similarly seal creditor identity in the cryptocurrency chapter 11 cases.

Re Zipmex Pte Ltd and other matters [2023] SGHC 88 (Re Zipmex)

One of the purposes of a "pre-packaged" scheme of arrangement under Section 71 of Singapore's IRDA is to expedite the implementation of the scheme by circumventing the need to convene a creditors' meeting to secure votes for the passing of the scheme. The applicant must nonetheless satisfy the Court that the requisite threshold of 75% in value and a majority in number of each class of creditors would be satisfied if a creditors' meeting had been held, in order to obtain the Court's sanction.

This presented a challenge in *Re Zipmex*, which concerned such an application by a group of companies operating a cryptocurrency trading platform through the "Zipmex App" (the **Zipmex Group**). Of the 70,000 creditors of the Zipmex Group, approximately 67,130 creditors (approximately 96%) had "withheld assets" which were below US$5,000 in value. These sums were but a fraction of the Zipmex Group's debts, which were in the tens of millions of dollars. The remainder of the Zipmex Group's debts were held by only approximately 2,870 vendor creditors (i.e. 4.1% of the total number of creditors), who were placed in a separate voting class.

The practical effect of the above arrangement was that in order to have its pre-packaged schemes sanctioned, the Zipmex Group would have to obtain the requisite approval by the class comprised of these 67,130 creditors even though the vendor creditors, who held the majority of the debt, had expressed overwhelming support for the scheme. This would be unduly burdensome on the restructuring entities, from an administrative standpoint.

The Zipmex Group's solution to obviate this requirement was to propose the creation of an "administrative convenience class", under which the 67,130 creditors would be excluded from the voting exercise, unless they indicated their desire to participate in it. The rationale for this was to lessen the administrative burden on the Zipmex Group in conducting the voting exercise. They relied on amongst other things, jurisprudence under Section 1122(b) of the US Bankruptcy Code, which permits the proponent of a plan to designate a separate class as "reasonable and necessary for administrative convenience", for all unsecured claims less than a specified dollar amount."

The Singapore High Court allowed the Zipmex Group's application for approval of the pre-packaged schemes, including the use of the administrative class. In particular, it agreed that "some compromise of strict rights and equitableness is sometimes required for the sake of efficacy and feasibility", and that "a poll of all 70,000 or so here would not be workable for the applicants, at least in a reasonable amount of time and at reasonable cost". In terms of the statutory mechanism which would allow the Court to create a new administrative convenience class, the Court relied on Section 210(3AB) of the Singapore Companies Act, which provides that "*unless the Court orders otherwise*", a majority in number of creditors must approve a scheme in order for that scheme to be binding. It considered that the aforementioned phrase "*allows leeway to the Court to redefine the majority required for approval*".

A key factor taken into consideration by the Court however, was that there would be no undue prejudice to the creditors within the administrative class. In this case, it accepted that there was no undue prejudice as there would be some quid pro quo (in the form of full payment) for the deemed consent to be taken from the creditors within this class, and that these creditors would still be able to vote, if they opted in.

This decision, in our view, was yet another extremely commercial decision which demonstrates the flexibility and pragmatism of the Singapore Courts. The Singapore High Court was willing to examine and adopt the practices of the Courts in other jurisdictions to deal with the unique problem presented by the facts of the *Re Zipmex* case (and undoubtedly other cryptocurrency restructuring filings) to reach a fair and practical solution, within the existing legal framework under Singapore law.

Algorand Foundation Ltd v Three Arrows Capital (HC/CWU 246/2022)

The downfall of the Singapore-based cryptocurrency hedge fund, Three Arrows Capital (**3AC**) is widely recognised as one of the reasons for the larger cryptocurrency crash of 2022. Key players in the industry had lent 3AC substantial sums of money: Genesis Global Trading, headquartered in New York City, had lent 3AC US$2.3 billion; Voyager Digital, a cryptocurrency broker, has claims against 3AC for US$650 million; Blockchain.com, another US$US270 million.

Most recently, Algorand Foundation (**Algorand**), a Singapore-incorporated company, applied to wind up 3AC, for failing to make payment of 53.5 million USD Coin (**USDC**), a stablecoin, claimed under a statutory demand. This winding up application raised the (crypto) age-old question: is cryptocurrency money?

Algorand, of course, argued that cryptocurrency is money, pursuant to which 3AC could be wound up for failure to pay the USDC 53.5 million USDC claimed under its statutory demand. It drew a comparison to the Singapore court's recognition of foreign currencies as money despite not being legal tender or widely accepted or used as a medium of exchange in Singapore, and argued that that cryptocurrency could be similarly recognised.

The Singapore High Court was not, however, persuaded. It asked "if a country uses seashells as its international medium of exchange, would the Singapore courts have to recognise that as money?". Its answer was a resounding "no" – cryptocurrency is not money for the purposes of the court's jurisdiction to grant a winding-up order, or to give rise to the presumption of insolvency under section 125(2)(a) of the IRDA. The application for winding-up was thus dismissed.

The following reasons in particular were cited for the Court's decision:

1. First, determining whether or not a particular intangible asset such as cryptocurrency was money would require a detailed examination of evidence, which was not appropriate in the context of an insolvency/winding up application.
2. In an application under section 125(2)(a) of the IRDA, the creditor is relying on the benefit of a *presumption* that the debtor is unable to pay its debts, without any positive evidence to this effect. Thus, the creditor would have to pay the price of establishing the requirements for a money debt, even if these requirements were applied in a technical manner. The court should not adopt and apply the societal view of money in the context of winding up applications and the presumption of insolvency. The word "indebtedness" must require a debt which is in fiat currency.

Critics may argue that this decision was not particularly cryptocurrency-friendly and may undermine Singapore's ambitions to market itself as a cryptocurrency hub. After all, stablecoins are fungible and can function as a unit of account. Arguably however, this decision (which was carefully circumscribed so as only to apply to the definition of "money" in the context of winding up proceedings and the presumption of insolvency) is a legally and technically sound one. It evinces the Singapore Court's commitment to applying and upholding established law instead of bending to societal pressures (particularly in light of the public sentiment with regard to 3AC and its founders).

The arguably draconian effects of insolvency merit a stricter approach than for example, an application for a freezing injunction (the Singapore Courts have previously held that NFTs are a form of property in the context of such an application: *Janesh s/o Rajkumar v Unknown Person ("CHEFPIERRE")* [2002] SGHC 264).

It will be interesting to see how the law develops. There is little doubt that the Singapore Courts will be called upon to make a determination of this very same question in a future case, ideally outside of the insolvency context and with the benefit of a full trial and with the assistance of expert evidence.

Conclusion

In our view, the three decisions above are encouraging as they illustrate clearly that the Singapore Courts are determined to strike a balance in the application of Singapore's insolvency laws against the backdrop of the increasing prominence of cryptocurrency in financial markets. As the existing insolvency framework in Singapore contains well-established principles which provides certainty, it is undoubtedly beneficial for Singapore Courts to ensure such principles are upheld even in the face of a rapidly-changing financial climate. Singapore has also shown flexibility in its application of insolvency laws where necessary, such as granting confidentiality orders or recognising a separate class of creditors where this would lead to benefits such as greater protection for investors, greater efficiency and lower costs in schemes of arrangement. This well-balanced approach paints a clear picture of why Singapore is increasingly viewed as an insolvency hub, attracting companies around the world, due to its adaptability, pragmatism and efficiency. As a jurisdiction that stays current with the dynamic financial climate while staying true to quintessential legal principles, Singapore is definitely a jurisdiction to watch in the realm of insolvency law and cryptocurrency disputes.

Meiyen Tan is a partner and Hannah Alysha is a senior associate in our Singapore office, both in the firm's global restructuring group.

Liability management transactions — providing new capital and laying the groundwork to cramdown of those left behind

James A. Copeland and Maria Mokrzycka

Introduction

Liability management is having a moment. Once a disfavored strategy, liability-management transactions, or LMTs, are now viewed as a legitimate alternative for private companies and their sponsors working to navigate near-term financial headwinds (*e.g.*, a challenging liquidity position or upcoming maturity wall) and, potentially, lay the groundwork for a comprehensive, long-term financial restructuring. Although the phrase "liability management" could cover the full range of potential restructuring transactions, in this context, it concerns a borrower's efforts to "re-align" its capital structure by working with select creditors and stakeholders to issue new senior-secured indebtedness within the confines of the borrower's existing financing documents.

For years, low interest rates and other factors combined to foster fierce competition among financial creditors, vest borrowers with real bargaining power, and, over time, dilute market-standard creditor protections. Borrowers used that leverage to roll back restrictive loan provisions that creditors used to prevent borrowers from moving collateral around the enterprise and away from the credit group (*i.e.*, a borrower and its affiliate guarantors and pledgors under a secured-financing arrangement). However, things have changed. Today's market is defined by higher interest rates, stubborn inflation, and the lingering consequences from years of global turmoil. More private companies now find themselves managing through untold operational and financial challenges in a complex post-pandemic environment with a much tighter credit market. With few attractive refinancing or restructuring options, many borrowers have tried to make good use of their legacy covenant flexibility, turning to LMTs to extend their runway and avoid an imminent bankruptcy filing or, in some cases, set the foundation for a lasting financial reorganization.

The LMT "playbook" typically calls for a struggling borrower to, first, identify how it can exploit its existing financing documents to "unlock" value to eventually secure new-money financing *without* tripping unanimous creditor voting requirements, *pro rata* sharing provisions, and other creditor protections and, second, build a coalition of supporting creditors and stakeholders willing to provide fresh capital, refinance with discounted paper, or otherwise offer better credit terms in exchange for a superior position in the borrower's capital structure and enhanced recovery expectations. In most cases, LMTs are executed over the objection of creditors that either chose not to support the transaction, or were not invited to participate at all. LMTs often sort syndicates and creditor groups into "winners and losers," as non-participating creditors are forced to watch their collateral base or lien priority—not to mention their potential recoveries—erode almost overnight.

LMTs, predictably, spawn litigation between the borrower and participating creditors on the one hand, and non-participating creditors on the other. That litigation, with its attendant cost and risk, motivates an increasingly popular notion that an LMT is the beginning of potential restructuring, not the end. Some borrowers take advantage of their revised capital structures to negotiate a more comprehensive reorganization supported by their "new" senior-secured creditors that, if circumstances require, can be implemented through a confirmed chapter 11 plan that could extinguish or haircut the non-participating and now "junior" creditors' LMT-related claims.

In this article, we identify the most common types of LMTs and various ways that the market has responded to bolster creditor protections. We then examine the *Serta Simmons* "uptier" exchange and related chapter 11 case, which could serve as a model that others try to emulate. Finally, we highlight key takeaways for market participants from *Serta* and other recent liability-management developments.

The "go-to" LMTs: drop-downs and uptier transactions

There are two species of transactions that tend to dominate the LMT landscape: "drop-down" and "uptier" transactions. These transactions, through different means, effectively enhance the participating new money creditors' exposure to the borrower and frustrate the economic expectations of other creditors (usually the non-participating creditors). Although the details always matter, and are different in every case, these kinds of transactions share certain general characteristics.

"Uptier" transactions. In a typical uptier transaction, a borrower partners with a coalition of creditors sufficient to approve an amendment to the existing financing documents (*e.g.*, "majority" lenders or holders). Those creditors then vote to amend the financing documents to allow the borrower to issue new, senior-secured debt that, in substance, primes the existing secured debt held by creditors that did not participate in the LMT (*e.g.*, "minority" lenders or holders). To help ensure majority creditor participation, such creditors are often allowed to exchange their portion of the existing (and now subordinated) debt for new, discounted debt that is junior to any new money, but senior to the old debt and minority creditors—so-called "1.5" lien debt.

Uptier transactions, in effect, contractually subordinate minority creditors through a flurry of amended and new financing documents voted through by the majority. Uptiering has been used by borrowers as early as 2017 (*e.g.*, *Not Your Daughters Jeans*) and has been a popular alternative since (*e.g.*, *Serta*, *TriMark USA*, *Boardriders*, and *TPC Group*).

"Drop-down" transactions. A borrower can structurally subordinate non-participating creditors by transferring valuable assets outside of the borrower's credit group. In a drop-down transaction, the borrower uses "basket capacity" under its existing covenants to transfer collateral out of the credit group to an "unrestricted subsidiary," that is, a subsidiary that is not an obligor or pledgor under the borrower's existing financing documents. As a result, the existing creditors' liens on the transferred assets are automatically released and the unrestricted subsidiary is then free to use those now-unencumbered assets to secure the new senior indebtedness.

Unlike an uptier transaction, a drop-down may not require majority creditor consent or support because these transactions can be executed without amending existing financing documents. A borrower might have more flexibility in a drop-down transaction to partner with other stakeholders, including its sponsor or a new slate of lenders and investors, to provide new-money financing at the unrestricted sub.

The best-known drop-down transaction, *J. Crew*, was executed in 2016 when the company transferred valuable IP assets to an unrestricted subsidiary, which subsidiary then guaranteed and pledged those assets to secure the issuance of new secured notes. Such transactions have remained a popular option in the years since (*e.g.*, *Neiman Marcus*, *Revlon*, *Cirque de Solie!*, *Travelport*, and *Envision*).

Addressing LMT risk in debt documents. In either case, it's unclear what, if anything, non-participating creditors can do to improve their position or potential recoveries after the transaction is executed. Given that an LMT's size and shape are a function of the existing financing documents' covenants and conditions, negotiated protections at the outset are crucial to limiting creditors' exposure to these transactions. Under most financing documents, sacred rights (*e.g.*, maturity extensions, changes to payment schedules or *pro rata* sharing arrangements, commitment increases, and releases of collateral) cannot be changed unless *each* creditor votes to approve the amendment. LMTs arguably do not implicate sacred rights despite the severe economic consequences they have for non-participating creditors. There is no "one size fits all" approach to addressing drop-down or uptiering risks, but in recent years creditors have focused on improving the market standard for certain creditor protections in financing documents.

In a drop-down, for example, the collateral transfer and lien release is a *permitted* transaction so an amendment or creditor approval of any kind is rarely required. After *J. Crew*, creditors began tightening covenants by requesting investment "blockers" (colloquially called *Envision* blockers) that limit a borrower's investments in unrestricted subsidiaries, often by confining such investments to an "unrestricted subsidiary basket" and limiting the borrower's ability to use its return on investments to replenish basket capacity. Creditors also routinely request additional asset-transfer limitations designed to prevent investments and transfers that might move too much collateral value or the borrower's "crown-jewel" assets outside of the credit group.

As for uptiering, decisions rendered in LMT litigation show that creditors should pay close attention not only to a borrower's covenant flexibility, but to voting mechanics and *pro rata* sharing provisions (*i.e.*, terms that require any payments or recoveries under a financing be shared *pro rata* by all creditors). Courts have held that the contractual subordination is *not* tantamount to a collateral release and, therefore, does not implicate sacred rights or require a unanimous creditor vote. Consequently, creditors now request provisions that prohibit both debt and lien subordination absent the consent of adversely affected creditors.

Uptiering transactions and other LMTs also often rely on exceptions to *pro rata* sharing provisions to offer majority creditors opportunities to exchange (or "roll up") their existing exposure for new, 1.5-priority debt at a discount to par. To implement these exchanges, borrowers frequently use "open-market-purchase" exceptions, which allow them to repurchase debt through private transactions with participating majority creditors without extending the offer to others. In response, some creditors devote more attention to defining what does, or does not, constitute an "open market purchase" to, if nothing else, create more certainty concerning their potential exposure.

Developments in LMT litigation and restructuring strategies. Minority creditors often rush to challenge LMTs in state and federal courts. So far, overall litigation results have been mixed (and occasionally contradictory). These post-transaction litigations provide market participants (both borrowers and creditors) with useful guidance for either implementing an LMT-based restructuring or dealing with LMT exposures. Increasingly, however, borrowers, with the support of their sponsors and participating creditors, are dragging their LMT-based disputes into chapter 11. Such borrowers often file for bankruptcy relief with a prepackaged or prenegotiated plan of reorganization with the senior debt in hand (*e.g., Envision Healthcare* and *Diamond Sports*) and put lingering LMT challenges before the bankruptcy court and push for a rapid resolution.

Serta Simmons: a potential model for liability management through chapter 11

Serta's chapter 11 case filed in the wake of its LMT is instructive on the use of LMTs. In late 2019, Serta faced economic challenges stemming from the restructuring of its largest retail partner and increased competition from direct-to-consumer businesses. In 2020, Serta needed new capital to, among other things, weather the COVID-19 pandemic and started working with some of its lenders to explore alternatives. Some lenders had favored a drop-down transaction, but Serta opted for an uptiering transaction supported by its majority lenders.

Generally, Serta's LMT provided a new super-priority term loan facility with two tranches: a $200 million new-money tranche and a debt-for-debt exchange tranche pursuant to which $850 million of priority terms loans were issued and exchanged by participating lenders for $1 billion of their exposure under the existing credit facility.

Serta's non-participating lenders challenged the transaction in New York state and federal courts, asserting a variety of claims, including for breach of the credit agreement and the implied covenant of good faith and fair dealing. The lenders argued that the transaction did not qualify as an "open market purchase" and otherwise trampled on their sacred rights (*e.g.*, their right to receive a *pro rata* share of payments and recoveries, and their senior lien priority and position in Serta's capital structure). After a series of apparent setbacks and seemingly inconsistent results in different courts, in January 2023, Serta and its affiliates filed for chapter 11 protection in the US Bankruptcy Court for the Southern District of Texas and the cases were assigned to Judge David R. Jones, who sits on the court's Complex Case Panel.

Serta filed with a restructuring support agreement and a chapter 11 plan prenegotiated with its majority lenders (*i.e.*, the lenders participating in the prepetition LMT) and others already in hand. The proposed plan provided for 73.7% to 100% recoveries for lenders that supported Serta's LMT and chapter 11 plan, and just .6% to 2.4% recoveries for the non-participating group and other unsecureds, but also included a "participating-lender" indemnity that covers certain losses of participating lenders related to litigation in

Serta's bankruptcy case and the prepetition uptier transaction and related matters. Within a day of Serta's bankruptcy filing, it removed LMT litigation pending in New York federal district court (where participating lenders received some adverse rulings) to the Texas bankruptcy court and filed a related adversary proceeding there that immediately teed up for Judge Jones the LMT-related claims and defenses that had been pending for years. Judge Jones agreed with Serta that the LMT disputes needed a rapid resolution and were integral to Serta's bankruptcy and proposed chapter 11 plan. On March 28, 2023, just two months after filing, Judge Jones granted summary judgment in favor of Serta and the participating lenders, ruling that the uptier transaction "clearly" fell within the unambiguous terms of the "open market purchase" provisions in the credit agreement. That decision paved the way to a quick (albeit contentious) confirmation trial where the remainder of the non-participating lenders' claims would be addressed. The nonparticipating lenders lost again. Judge Jones confirmed Serta's chapter 11 plan—including the participating-lender indemnity provisions—disposed of certain claims challenging the uptier transaction, and found that all parties knew Serta had flexibility built into the credit agreement and would have to live by the bargain they struck.

The non-participating lenders are appealing Judge Jones's decisions, including the confirmation of Serta's chapter 11 plan. Still, Serta's path from its LMT through chapter 11 stands as a notable test case for borrowers and their supporting stakeholders, and yet another cautionary tale for the rest of the creditor body.

Takeaway

LMTs are not going anywhere. Borrowers with covenant-lite financings or other generous terms are wise to explore all of their options. Creditors, for their part, should continue to carefully craft documents that help manage exposure and mitigate risk. Despite their growing popularity, LMTs are not without risk to borrowers. An LMT can extend a borrower's runway, but it cannot guaranty that a comprehensive, long-term restructuring will ever truly get off the ground. Borrowers may find themselves struggling to recover, weighed down by years of expensive litigation and unavoidable uncertainty. Indeed, many market participants question the reasoning and efficacy of LMTs and point to data that show the transactions rarely help avoid a default or bankruptcy filing and often do not improve a borrower's credit profile.

In some situations, however, avoiding bankruptcy may not be the point. In light of outcomes like those achieved in *Serta* and other chapter 11 cases, some borrowers might come to see LMTs as part of a program of transactions that culminates with a confirmed chapter 11 plan; trading years of expensive and contentious litigation and consensus building for an accelerated (but still expensive) trip through a specialized federal court that can deliver real finality and the kind of comprehensive relief only available through chapter 11. The court's decision demonstrates that an LMT can withstand judicial scrutiny where the borrower operates within the unambiguous terms of its financing documents and adheres to corporate-governance best practices in planning and executing on its strategy.

Given the number of LMT-related cases currently working their way through the bankruptcy system—and with several more on the cusp of filing—borrowers and creditors alike will need to pay close attention to keep up with the latest liability-management trends and, as always, make sure their next deal documents reflect a "state of the art" covenant package suited to their particular interests.

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Restructuring of Royal IHC: new developments under the Dutch WHOA

Prof. Omar Salah, Joël Lozeman and Jan de Wit

In its first two years, the Dutch Act on Court Confirmation of a Restructuring Plan (*Wet homologatie onderhands akkoord*) (the WHOA also known as the Dutch Scheme) was mainly used for the restructuring of SMEs (See International Restructuring Newswire Q2 2022, The Dutch Scheme (WHOA) in practice: First two large restructuring plans confirmed by the Dutch courts. In the last twelve months, large multinational companies have successfully used the WHOA in complex cross-border restructurings. In 2023, the restructurings of Vroon, Steinhoff and Royal IHC were implemented using the WHOA.[1] In this article, we will focus on the latter and discuss various novelties in this WHOA proceeding, which has resulted in ground-breaking case law with far-reaching consequences for the restructuring landscape.

Introduction

On 9 March 2023, the District Court of Rotterdam (the **Dutch Court**) sanctioned the restructuring plan of Royal IHC (the **Company**), a large international shipbuilder headquartered in the Netherlands.[2] The Company filed for the WHOA proceeding on 2 January 2023, which means that the WHOA proceeding was completed within an expedited timeline of less than three months. This EUR 950 million restructuring marks one of the largest restructuring plans under the WHOA to date and the first one involving a syndicate of lenders. The Dutch Court set new precedents across a range of issues. We will start by providing background regarding the Company's restructuring. Then, we will discuss the WHOA stay (*afkoelingsperiode*) and its impact on cash management and hedging agreements. We will address key issues that follow from the Dutch Court's order on the confirmation of the restructuring plan. More specifically, we will address: (i) the Dutch Court's decision on the scope of the WHOA and the extent to which (contractual) rights can be amended under a restructuring plan under the WHOA, in particular with respect to commitments under facilities agreements; (ii) court imposed amendments to the waterfall in an intercreditor agreement and their impact on super priority for rescue financing; (iii) the impact of the WHOA on hedging liabilities; and (iv) how debtors may deal with the sale of assets in an M&A transaction as well as claw-back protections under the WHOA. We will end this article with concluding take aways and observations.

Background

The Company had been in distress since 2018 and had completed two restructurings already. Following the two restructurings in 2018 and 2020, it again ran into financial difficulties in 2021. The Company and its secured lenders, an international syndicate of nine financial institutions, started negotiating a (financial) restructuring. The parties were not able to reach a consensual deal, given that three out of the nine secured lenders did not agree to the solution proposed by the Company. As a result, the Company commenced a WHOA proceeding. The Company requested the Dutch Court issue a stay to freeze any enforcement action or bankruptcy filing, arguing that it needed time to prepare and offer its restructuring plan under the WHOA.

On 2 February 2023, the Company offered its secured lenders a restructuring plan under the WHOA for voting which, amongst other things, provided for (i) the divestment of one of the Company's most well-performing business units to a

1 Norton Rose Fulbright has been in the lead in most of these high-profile restructurings under the WHOA. We acted as counsel to the secured creditors committee in the Vroon WHOA proceeding - with a parallel English scheme of arrangement - and as counsel to the dissenting secured creditor in the Royal IHC WHOA proceeding.

2 We acted as counsel to the dissenting secured creditor in the Royal IHC WHOA proceeding. However, the views expressed in this article are the views of the authors and not of any of the parties to the WHOA proceeding. Further, the authors have expressed their views with the aim to contribute to the development of the WHOA and not with the intention to (again) plead their case. Therefore, any views represented in this article should be regarded as the opinions of the authors with respect to the development of the WHOA in general.

third party, and (ii) various amendments to its senior facilities agreement and intercreditor agreement. The Company intended to use the sale proceeds of the divestment partially to repay its secured lenders and partially to address its liquidity constrains. In essence, the Company proposed the implementation of both an M&A transaction and a financial restructuring under the WHOA. From the secured lending syndicate, six lenders supported these plans while three lenders did not. Two of the three dissenting lenders voted against the restructuring plan with one abstaining. One of the lenders that voted against the restructuring plan also formally objected to confirmation of the plan. The Dutch Court granted its court order confirming the restructuring plan on 9 March 2023 despite the dissenting lenders' negative votes and objections.[3] The reasoned judgment followed on 30 March 2023.[4] The WHOA courts have developed a practice whereby they grant court orders within a short timeframe followed by a subsequently issued reasoned judgment. This facilitates expedition in restructurings, where time is often of the essence. In the process of confirming the restructuring plan, the Dutch Court decided various new and highly relevant issues. We will discuss these below but will first address the stay under this WHOA proceeding.

The WHOA Stay and its impact on cash management and hedging agreements

The WHOA provides debtors the option to petition for a stay of up to four months, with the option for extension(s) up to a maximum of eight months total. The WHOA stay (i) prevents parties from taking enforcement action against the assets of the debtor or taking possession of assets that are under the control of the debtor (unless this occurs with court relief), (ii) allows for court relief for lifting of attachments on the assets of the debtor, and (iii) suspends the filing for a suspension of payments or bankruptcy proceeding. In this case, the Company commenced the WHOA proceeding on 2 January 2023 and immediately petitioned for a stay of three months. On 3 January 2023, the Dutch Court granted - on an *ex parte* basis - the stay temporary by way of interim relief and ordered a hearing. The hearing took place on 18 January 2023 and the stay was granted for a period of three months.

Under the WHOA, a practice had developed where courts would invite only the debtor to the hearing and would grant the stay on an *ex parte* basis. Whilst certain forms of relief and decisions under the WHOA are suited for an *ex parte* hearing, a stay typically is not as it directly affects the rights of third parties (by definition). Obviously, affected parties could approach the court subsequently with a request to lift the stay, but this puts them at a disadvantage. In this case, the Dutch Court initially granted the stay *ex parte* on a temporary basis pending a hearing to which the secured lenders were invited. This approach - where affected parties are heard first before the stay is granted, whilst a solution is provided for the interim period - leads to a better-balanced weighing of interests.

The syndicate of secured lenders did not object to the petition for the stay, but raised various concerns and questions. Some of the consenting lenders were concerned about the impact of the stay on cash management agreements (e.g. a cash pool), ancillary agreements (e.g. an overdraft facility) and hedging agreements (e.g. currency swap derivatives), whilst one of the dissenting lenders was concerned about the ability of the Company to continue paying its due debt and raised questions on outstanding derivatives. This dissenting lender also petitioned for the appointment of an observer. The Dutch Court granted this petition and appointed an observer on 18 January 2023. The WHOA provides the debtor with the option to petition for the appointment of an observer who will (passively) monitor the WHOA proceeding and provide its views to the court throughout the WHOA proceeding. Other parties (e.g., creditors and shareholders) cannot petition for the appointment of an observer, unless they are affected by a stay. In this case, the secured lenders were affected by the stay, which opened the door for them to petition for the appointment of an observer – an outcome that debtors should consider when seeking a stay.

At the hearing on the stay, the Company amended and partially withdrew its petition for a stay. Prior to the hearing, the Company had signed a lock-up and standstill agreement with its consenting lenders, which included a contractual standstill. Thus, there was no longer a need for a statutory stay with respect to those lenders. As a result, the Company withdrew the stay as it related to the consenting lenders. Further, the Company amended its petition such that the stay would not affect the acts performed under the cash management, ancillary and hedging agreements. The Dutch Court noted that based on its parliamentary history it appears that the WHOA is not intended to affect financial master agreements (in relation to hedging liabilities) and close-out netting provisions, but in any event granted the Company's requested clarification that the stay did not affect the cash management, ancillary and hedging agreements. Whilst

3 Rb. Rotterdam 9 March 2023, ECLI:NL:RBROT:2023:2716.

4 Rb. Rotterdam 9 March 2023, ECLI:NL:RBROT:2023:2800, as delivered no 30 March 2023.

the Dutch Court did not provide a legally clear ruling on the position of hedging liabilities under the WHOA, its relief protecting cash pooling arrangements, overdraft facilities and derivatives illustrates that the courts are willing to take a pragmatic approach and provide bespoke solutions for a stay tailored to the specific needs of a debtor under the WHOA.

Confirmation of the WHOA restructuring plan

Under the supervision of the observer, the Company prepared its restructuring plan with seven classes of creditors based on the various facilities under the senior facilities agreement. Hence, the restructuring plan was offered only to the nine secured lenders since the rights of only those creditors were affected by the plan. As mentioned above, six lenders voted in favour, two lenders voted against, and one lender abstained. The plan was adopted in all classes by the majority required under the WHOA (i.e., at least two-thirds in value of the total claims for which votes were cast). One of the lenders objected to confirmation. The Dutch Court, nevertheless, confirmed the restructuring plan, making it binding on all affected creditors. We will discuss key considerations below.

Non-consensual amendments to commitments under facilities agreements

One of the key questions in this WHOA proceeding was to what extent a restructuring plan under the WHOA could be used to amend commitments under a senior facilities agreement, in particular with respect to revolving credit facilities and bank guarantee facilities. The secured lenders had made available working capital facilities as well as cash and bank guarantee facilities to the Company, which were not fully drawn. The opposing lender argued that the lenders were being forced to continue financing to a new and economically different borrower group given the significant impact of the divestment that was a part of the plan and, in addition, since the committed working capital and guarantee lines were not fully drawn, this exposed the secured lenders to being forced to provide 'new credit.' Section 370 of the Dutch Bankruptcy Act (the **DBA**) states that a restructuring plan under the WHOA may result in changes to the rights of creditors and shareholders. According to the opposing lender, the WHOA allows the debtor to amend and restructure only the creditor's existing claims. Based on established case law in the Dutch Supreme Court, a lender's obligation to provide financing under a credit facility only creates a claim after it is drawn by the borrower; until then, the claim is non-existent (and not susceptible for attachment).[5] Hence, the opposing lender argued that the undrawn commitments under the senior facilities agreement qualified as a future (i.e. non-existent) claim that could not be affected by a restructuring plan under the WHOA.

The Dutch Court, however, decided that – in principle – the WHOA may be used to force creditors to continue financing a company's working capital under existing credit facilities. Whether that is possible in a specific case depends on two factors: (i) the extent to which the financing obligations materially change; and (ii) the extent to which the changes to the facilities agreement fall within the scope of section 370 DBA. With respect to point (i) above, the Dutch Court noted that the secured lenders were already obliged to provide financing to the Company. The restructuring plan did not materially change this obligation, but rather it only reduced the amount of the total commitment under the facilities agreement. With respect to point (ii) above, the restructuring plan provided for the amendment of the waterfall in the intercreditor agreement and the maturity date of one of the facilities under the facilities agreement. The Dutch Court noted that, taking into account the flexibility and purposes that the WHOA is aimed to achieve, the language 'changes to rights' of creditors in section 370 DBA should be interpreted broadly. Both the extension of the maturity date and the amendment to the waterfall in the intercreditor agreement were necessary for a successful restructuring and closely related to the creditor's claims. Therefore, the Dutch Court ruled that such extensions and amendments fall within the scope of the WHOA. By sanctioning this restructuring plan, the Dutch Court set a precedent for the extension and amendment of commitments in facilities agreements. This is a new and important decision for the Dutch restructuring arena, given its impact on undrawn credit lines and commitments under working capital facilities, revolving credit facilities and bank guarantee facilities. Lenders should consider this new reality when entering into (syndicated) loans where a Dutch WHOA may be a relevant restructuring tool in the future.

Non-consensual amendments to the waterfall in an intercreditor agreement and a harbinger to super priority for rescue financings

Another significant issue in this WHOA proceeding was whether it was possible to amend the waterfall in the intercreditor agreement under the restructuring plan. The restructuring plan proposed the following amendments: (i)

5 HR 29 October 2004, ECLI:NL:HR:2004:AP4504 (*Van den Berg/Van der Walle*).

it purported to amend the waterfall such that priority was given to secured lenders under an uncovered bank guarantee facility and the counterparties with hedging liabilities; (ii) it purported to give priority to a third party – the buyer of the Company's subsidiary – that would enter the waterfall as a top-up guarantee provider; and (iii) secured lenders of the covered bank guarantee facility were given a higher ranking than secured lenders under certain other facilities. The opposing lender argued that such changes in priority of ranking were not possible under the WHOA, given that the Dutch legislature - despite being given the option to do so under the EU Restructuring Directive - had intentionally declined to allow for any form of imposed super priority debtor-in-possession (DIP) financing under the WHOA, regardless of whether it was part of new rescue financing or not.

The Dutch Court decided otherwise and found that the secured lenders were not adversely affected by the amendments to the intercreditor agreement. Further, the Dutch Court ruled that - whilst the Dutch legislature had not allowed for an *in rem* change in ranking of security rights under the WHOA - a contractual change of ranking is possible. The WHOA does not allow for the creation of, or changes to, the ranking of security rights, which would have property law effect. Interestingly, the same court had ruled in an earlier decision in December 2022 in a different WHOA proceeding that the WHOA does not permit changes to the priority of pledges on receivables (i.e. a new financier could not obtain a first ranking receivables pledge lowering the ranking of existing pledgees).[6] Whilst the opposing lender referred to this case -- arguing that the changes to the waterfall in the intercreditor agreement should not be permitted -- the Dutch Court dismissed this argument, distinguishing the prior case as involving the property law nature of changes to security.

The decision that contractual changes to the ranking in priority may be imposed by a restructuring plan under the WHOA is a particularly important feature for the Dutch restructuring landscape for two reasons. First, in larger financings involving two or more lenders, the security rights are often held by a security agent whereas the actual distribution of proceeds amongst lenders takes place under a (contractual) waterfall in the intercreditor agreement. The ranking among creditors often occurs through the waterfall in the intercreditor agreement and not necessarily through the creation of tiered security packages. This is not the case for smaller financings. As a result, the decision of the Dutch Court may lead to the situation where debtors with smaller financings that lack intercreditor agreements may not benefit from this ruling since any changes to ranking of security could only occur with property law effect whilst larger financings involving an intercreditor agreement may be able to benefit from such flexibility. Second, this decision may re-open the possibility for super priority in rescue financing through the backdoor, as rescue financing and DIP financing are not always structured through the creation of new security rights but may also be created through changes to the waterfall in an intercreditor agreement. The Dutch Court may have (possibly unintentionally) introduced the ability to achieve a super priority and priming rescue financing whereby a senior creditor obtains a first ranking position through changes in the intercreditor agreement under a WHOA restructuring plan.

The WHOA does not impact hedging liabilities

In this WHOA proceeding, the position of hedging liabilities was addressed at various stages. As discussed above, there were various issues raised at the hearing on the stay regarding the impact of the WHOA stay on hedging liabilities. The impact on hedging liabilities was also debated at the plan confirmation hearing. The opposing lender had entered into currency swap transactions with the Company under ISDA master agreements. As part of the amendments to the intercreditor agreement proposed by the Company under the restructuring plan, the Company sought to change the ranking of the hedging liabilities. The opposing lender, however, argued that the WHOA cannot affect hedging liabilities under financial collateral arrangements (*financiëlezekerheidsovereenkomsten*).

Rejecting these arguments, the Dutch Court ruled that no changes were made under the plan to financial collateral arrangements since the changes proposed did not amend the ISDA master agreements, but rather the priority of the hedging counterparties under the intercreditor agreement. This ruling is remarkable as it implies that changes to financial collateral arrangements are possible if such changes occur through amendments to an intercreditor agreement or the senior facilities agreement and not through changes to the ISDA master agreement itself. This is not in line with the text of the DBA that excludes financial collateral arrangements from the scope of the WHOA. Alternatively, the Dutch Court may have attempted to make a distinction between the claim right (*vorderingsrecht*) and right of recourse (*verhaalsrecht*) under financial collateral arrangements. Whether rights of creditors can be separated in such a way is debatable itself;

6 Rb. Rotterdam 15 December 2022, ECLI:NL:RBROT:2022:11016.

but in addition, such a distinction is not relevant since *all* rights under financial collateral arrangements are excluded under the WHOA.

With the further implementation of the EU Restructuring Directive[7] in the Netherlands, legislative amendments were made to the WHOA as of 1 January 2023 that resulted in the exclusion of financial collateral arrangements and close-out netting provisions from the scope of the WHOA in section 369(4)(c) DBA. These changes were necessary to ensure that the WHOA is compliant with the EU Restructuring Directive, and the EU Financial Collateral Directive.[8] It is of paramount importance to the stability in the financial markets that these financial collateral arrangements and close-out netting provisions remain outside the scope of the WHOA. Consequently, changes to financial collateral arrangements and close-out netting provisions are not possible under the WHOA. The ruling of the Dutch Court on this point raises questions and potential uncertainty. However, the statutory text of the DBA is clear and leaves no doubt that financial collateral arrangements and close-out netting provisions are excluded under the WHOA. We would expect that the WHOA courts will respect this exclusion in future WHOA cases – despite the ruling in this WHOA proceeding.

The sale of assets in and claw-back protection under the WHOA

As part of additional amendments to the WHOA that took effect on 1 January 2023, debtors may seek protection under the WHOA to implement (i) a new financing required by the debtor for the performance of its restructuring plan, and (ii) a transaction that the debtor intends to enter into or which it requires for the performance of its restructuring plan. Once the restructuring plan has been confirmed by the court, such new financing and/or transaction will be protected against claw-back risks in a subsequent bankruptcy if the WHOA plan fails.

In this matter, the Company requested the Dutch Court to approve under the plan the sale of the shares in a business unit to a third party. The Dutch Court assessed whether it was reasonably likelythat (i) the transaction was immediately necessary for the performance of the restructuring plan, and (ii) the interests of the joint creditors were materially prejudiced by the transaction. It concluded that the transaction should be approved under these tests. This proceeding illustrates how (distressed) M&A transactions can be implemented in a restructuring plan under the WHOA and protected against claw-back action (in a subsequent bankruptcy). This is a helpful feature which can also be successfully used for protection of rescue financing or other transactions under the WHOA.

Conclusion – take aways

The Royal IHC proceeding is a landmark case that has further stretched the boundaries of the WHOA. The decisions made by the Dutch Court are highly relevant for the Dutch restructuring market and will definitely change the dynamics within syndicated financings. This WHOA proceeding shows the strength of the WHOA as a tool to bind dissenting creditors and implement a restructuring successfully within an expedited timeline. The confirmation of the restructuring plan also illustrates the ability under the WHOA to impose amendments to commitments under facilities agreements and obligate secured lenders to continue financing. It also illustrates that changes to the waterfall under an intercreditor agreement may be implemented as work arounds to collateral priorities. This opens the door for super priority rescue financings, which will facilitate the further development of the WHOA restructuring process in the Netherlands. We are convinced that we will see more creativity in this space. Furthermore, the sale of assets as part of a WHOA proceeding, as well as protection against claw-back risks, will facilitate the implementation of (distressed) M&A transactions. Finally, although certain restrictions under the WHOA related to derivative contracts came under pressure in this WHOA proceeding, we expect that that the WHOA courts in future will not follow the same approach, given that the WHOA cannot affect financial collateral arrangements such as currency swap transactions and other derivates and close-out netting provisions.

Stay tuned for continued use of the Dutch WHOA in the future.

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

8 Directive 2002/47/EC of the European Parliament and of the Council of 6 June 2002 on financial collateral arrangements.

Navigating cross-border issues in UK restructuring plans: the lessons from *Adler*

Helen Coverdale, Matthew Thorn, Denis Draeger, Lorenz Scholtis

Restructuring plans are on the march.

In the UK and in member states across the European Union, new restructuring procedures introduced to implement the 2019 EU Restructuring Directive are being tested and refined.

In this article, we focus on the UK restructuring plan and its use in the recent case of German property group, Adler (*Re AGPS Bondco plc* [2023] EWHC 916 (Ch)). The English Court faced the interplay between the English restructuring plan procedure, the Adler group's German law bonds and the substitution of a Luxembourg incorporated bond issuer with a newly formed English incorporated company. The cross-border issues considered in Adler are likely to arise often in today's global economy and should be considered closely by groups and their creditors contemplating using foreign restructuring procedures.

Background to the UK restructuring plan

The UK restructuring plan under Part 26A of the (UK) Companies Act 2006 is a court-supervised restructuring procedure that is available to English companies and to foreign companies with a sufficient connection to England and Wales. The procedure is similar to the tried and tested scheme of arrangement (which has been in use for over a century), but includes a cross class cram down (i.e. an ability to cram dissenting classes of creditors into a deal that is supported by a majority in another class (or other classes), subject to the satisfaction of certain conditions).

A common technique used by foreign groups to land English jurisdiction is for the foreign group to incorporate an English subsidiary, which unilaterally undertakes, by way of contribution or substitution, the debt obligations that are to be the subject of the restructuring plan. The new (English) company then proposes the UK restructuring plan for the debt. When considering whether it has jurisdiction to sanction a restructuring plan, the English Court needs to be satisfied that it is not acting in vain and that the restructuring plan is likely to have substantial effect (i.e. be recognised) in relevant jurisdictions where the company carries on its business.

Background to the Adler group's restructuring plan

The Adler group has a substantial residential property portfolio in Germany. A key element of the group's funding originated from six series of German law governed unsecured loan notes issued by Adler Group S.A., a Luxembourg company, with maturity dates from 2024-2029, all of which were issued to qualified/professional investors. The six series of notes, amounting to €3.2bn in debt, had staggered maturity dates, but otherwise ranked pari passu with each other.

The group encountered financial difficulties and was facing a liquidity crisis as a series of separate notes, issued by Adler Real Estate AG (a German group company), was due to mature on 27 April 2023. The group was not in a position to make the payment.

Failure to pay the Adler Real Estate AG note holders would result in cross-defaults across the groups' financing arrangements. This in turn would require the directors to file for insolvency in Germany in order to avoid personal liability. It was accepted that if a restructuring of Adler's debt could not be achieved, formal insolvency proceedings (i.e. liquidation) would be the most likely outcome.

Following an unsuccessful attempt to restructure its debt using a contractual Consent Solicitation procedure under the German Bond Act (Schuldverschreibungsgesetz), the group proposed a restructuring plan. To bring the restructuring within the English court's jurisdiction, an English Newco, AGPS Bondco plc (the Plan Company), was incorporated and substituted as loan note issuer under contractual provisions.

The restructuring plan also involved the creation of a new special purpose vehicle (SPV), funded by participating creditors taking a pro rata equity stake. The SPV would hold a 22.5% equity state in the Luxembourg parent company, Adler

Group SA. The remaining 77.5% equity stake would remain with the existing shareholders, who themselves were not required to inject new capital. Conversely, the new creditor funding would provide €937.5m of super senior secured funding to the group to allow the Adler Real Estate AG notes maturing on 27 April 2023 to be paid in full, as well as allowing the group to continue trading.

The restructuring plan also envisaged varying the terms of the notes that were due to mature in 2024 (extending the maturity to 2025) in exchange for second ranking security. All other notes would retain their existing, pre-plan maturity dates and would benefit from new, third ranking security. There would also be an interest payment holiday and a temporary swap to PIK interest.

The plan proposed that all note holders eventually would be paid in full, but the group would start divesting itself of assets with a view to liquidating the companies by 2027. The opposing note holders – those holding the longest dated bonds -- described the plan as a 'liquidation plan'.

The noteholders' votes

An English restructuring plan requires two court hearings: a convening hearing (to convene meetings of creditors) and a sanction hearing (where the court will decide whether the plan can and should be sanctioned in order then to take effect in accordance with its terms). Given the imminent debt wall, the court in Adler agreed at the convening stage to defer questions on the validity (as a matter of German law) of the issuer substitution until the sanction hearing.

When the meetings of creditors were held, the holders of five series of notes overwhelmingly voted in favour of the plan. The note holders with notes maturing the latest in time (the 2029 note holders) voted against, with only 62% by value approving it, thus failing the English law initial threshold, which is 75% by value in each class.

Given one class of notes did not vote in favour of the plan, the Plan Company applied to court to have the plan sanctioned and the 2029 note holders crammed down under the statutory cross class cram down mechanism.

The English High Court decision

Did the plan offend the pari passu rule?

A key issue for the court was whether differential treatment of creditors under the plan was an unfair departure from the fundamental principle of pari passu distribution in insolvency (i.e. that creditors should be paid equally, pro rata and pari passu, with other creditors of the same class). In other words, was it fatal to the plan's sanction prospects that the 2029 note holders would be paid later than the other note holders?

Without the plan, all the notes would be accelerated and paid on a pari passu basis. Under the plan, however, all bar one series of notes would retain their original maturity dates. The practical effect was that the 2029 note holders would bear the greatest risk of the plan failing in the future.

The court confirmed that a plan may depart from the principle of equal treatment where there is good reason for it to do so. Here, the court recognized that the 2029 note holders were already subordinated in time from the moment they purchased the notes. Therefore the plan merely provided for continuity of the agreed structure.

Further, the court was clear that its role was not to determine whether the plan was the 'best plan' that could be proposed. The question was whether it was a plan that a reasonable creditor could approve, and that it was fair. The high voting turnout and margin by which each of the classes voted in favour (84% across the remaining five series of notes; even 62% of the 2029 note holders) is a relevant factor which may be taken into account in the exercise of the court's discretion. In any event, should the plan fail (which, on a balance of probabilities, the court concluded it was not likely to do), the default position would be a pari passu distribution.

Conflicting valuation evidence

With previous English restructuring plans, judges had been clear that creditors who wish to oppose restructuring plans, particularly on valuation, must 'step up to the plate' and produce their own evidence if they want their opposition to be taken seriously. With Adler, the court heard conflicting evidence both on valuation and on the effect of the purported substitution of the Luxembourg (original) issuer to an English Newco under German law.

The valuation evidence was based on analytical models but required speculative analysis of the future state of the German property market. In order to invoke the statutory cross class cram down mechanism, the court must be satisfied that no member of the dissenting class would be any worse off than they would be under the relevant alternative. In Adler's case, the relevant alternative was liquidation.

The Plan Company produced expert evidence that note holders would receive a 63% recovery in liquidation, and a 100% recovery under the plan. By contrast, the 2029 note holders produced their own expert evidence that a 56% recovery would be achieved in liquidation, and only a 10.6% recovery under the plan (on the basis that the 2029 note holders would be paid last, with the 10.6% comprising capitalised PIK interest). Preferring the Plan Company's evidence, the judge accepted that on a balance of probabilities, a 100% recovery was the most likely outcome and thus was in excess of the liquidation recovery.

The court also accepted the Plan Company's evidence that liquidation would result in an 'insolvency discount' on asset realisations of 23% of the group's development assets and 25% of its yielding assets. Crucially, the court accepted that even were the plan to fail, the 2029 note holders would be better off than in an immediate liquidation.

German law and issuer substitution

The dissenting 2029 note holders also argued that the substitution of the English Plan Company for the Luxembourg issuer was invalid as a matter of German law, the law that governed the bonds. The court therefore had to be satisfied that the substitution was valid as a matter of German law. Both parties submitted detailed expert evidence as to the validity of the substitution under German law.

German legal commentators take different views as to the prerequisites and validity of such substitution, which became apparent from the differing evidence presented to the court.

Further, certain of the 2029 note holders had applied to the Frankfurt court for a declaration that the issuer substitution was invalid as a matter of German law. That litigation has the potential to undermine the English court's jurisdiction if the Frankfurt court rules that the substitution was invalid under German law and hence the English court lacked jurisdiction to sanction a restructuring plan.

Issuer substitution clauses are actually market standard in German bond issuances. They are found in the terms and conditions of many bonds issued by larger German companies. Usually a special purpose vehicle (SPV) (for example a Dutch entity) will serve as the financing vehicle with the parent company acting as guarantor under the notes. From time to time, such SPVs are replaced by other entities incorporated in other (generally, EU) jurisdictions.

Under German law, such a substitution would require the approval of the noteholders. In principle, that approval can be granted in advance in the notes themselves subject to terms and conditions. Such pre-approval clauses are also relevant to consent solicitations where noteholders are asked to provide their consent to a substitution of the issuer for restructuring purposes pursuant to the provisions of the German Bond Act. The German Bond Act explicitly allows for such substitution upon a vote of 75% of the votes cast at a noteholders' meeting.

Although preliminary legislative materials for the German Bond Act, as well as the draft Act (2008), did foresee certain required conditions for a substitution, the final version of the Act (2009) refrained from establishing any material conditions for such substitution. Hence, some commentators argue that it is permissible to include a substitution clause even without any conditions (or restrictions) in the terms and conditions.

It is widely acknowledged (and confirmed by German court judgments) that the enforceability of terms and conditions in bonds generally falls within the scope of civil law provisions for general business terms and conditions. If the required legal restrictions are not respected, the terms and conditions can be held invalid by a German court. German law follows the concept of consumer protection and provides limits on the use of certain terms and conditions. In particular, such terms must be clear, transparent and unambiguous. In commercial business transactions, the scope for using these terms and conditions is less restrictive than in consumer transactions. In addition, the general transparency regime is superseded by specific provisions of the German Bond Act pursuant to which the required level of transparency may reflect an investor's profile. The fact that the Adler notes were placed among professional investors who are deemed to have considerable experience in investments of such nature and that the particular substitution clause is based on market standard terms was raised by the Plan Company's expert witness.

A 2012 decision by the higher regional court in Frankfurt (OLG Frankfurt) also dealt with issuer substitution. It found that the substitution in that case could deviate from basic principles of contract law even where there was not a parent company guarantee. However, the Frankfurt court did not comment on the general enforceability of substitution clauses. The facts of that case deviate from the Adler case because in Adler a guarantee (which was not already in existence) was offered by the original issuer rather than its parent company. Although the Frankfurt court did not make any further determinations on the enforceability of the issuer substitution clause, it stated that, in general, a potential deviation from the principles of contract law may be permissible if compensated for. Therefore, some commentators take the view that such clauses may be valid if there is fair compensation.

An alternative view is that the economic basis of the noteholder's investment must not change as a result of the issuer substitution. In other words, where a change of the issuing debtor would lead to a significant change in the risk profile associated with the bonds, a noteholder's meeting would need to be convened. However, if, as in the Adler case, such substitution involves the original issuer assuming the function as a guarantor under the notes, it seems hard to argue that a higher risk is assumed since the noteholders would have the benefit of two obligors (i.e. the Plan company and the original issuer as guarantor). Hence, the noteholder's position would not fundamentally change.

Recognition of the restructuring plan in Germany

An English Part 26A restructuring plan should be available to restructure German law governed debt. Unlike the rule in Gibbs under English law, German law does not provide that German contractual claims can only be discharged or amended in accordance with German law. Whether or not foreign laws (and restructuring procedures) are effective to amend German law governed debt is, from a German view, a question of jurisdiction.

Interestingly, both expert witnesses (prominent professors of German law), did not seem to have significant concerns over whether the Adler plan (i.e. involving the restructuring of German debt of an English company using an English procedure) would be recognised in Germany.

The English Court Sanctions the Restructuring Plan

Taking the above factors into account, the English Court ultimately exercised its discretion to sanction the Adler plan, holding that the substitution complied with the substitution clause in the notes and was valid under and complied with the German Bond Act.

Ongoing litigation and appeal

The 2029 note holders applied for permission to appeal the court's decision, which was denied by the judge at first instance. Leave to appeal may be sought direct from the Court of Appeal.

Little to nothing is currently known as to the status and progress of the note holders' pending litigation in Frankfurt where they are seeking an order that the issuer substitution is invalid. It is reported to have been initiated by one of the dissenting 2029 note holders in spring 2023. However, under typical civil procedural standards and procedures, it is likely to be some months before a first judgment is issued. A potential appeal may then be lodged in the weeks following that judgment.

If the Frankfurt court finds that the issuer substitution was invalid, it follows that the restructuring of the German law governed debt pursuant to the plan may not be recognised in Germany notwithstanding its sanction by the English court. This creates uncertainty, of course. Practically speaking, however, it is unclear on what basis the elements of the restructuring plan already implemented could be unwound, or the losses that the dissenting creditors could successfully claim they have suffered remedied. In any event, a German judgment finding that the substitution was invalid may have significant implications for this and future cases.

Cross border considerations

More generally, it has not yet been determined by the German courts whether UK Part 26A restructuring plans of German debtors and/or German debt are capable of recognition in Germany following the UK's departure from the European Union. In the case of an English restructuring plan that modifies English debt, the Rome I conflict of laws principles could provide some assistance to recognition, although the position is not free from doubt as a matter of German law. If a Part 26A plan can be considered an 'insolvency proceeding' within the scope of Sec. 343 of the German Insolvency Code, then recognition would be available under that route (and this was the position agreed by the experts in Adler).

Recognition is potentially a political issue as well as a legal one. EU lawmakers and the European Court of Justice have worked for many years to create a common legal framework for determining jurisdiction in insolvency and restructuring proceedings, based on the principle that a debtor's centre of its main interests (or COMI) should be the jurisdiction in which the main restructuring or insolvency proceedings are carried out. Recognition in the EU of UK Part 26A restructuring plans as insolvency proceedings in the case of a foreign debtor with a 'sufficient connection' to England and Wales, but with its COMI in the EU, would create a divergence from the EU's COMI-based approach.

The absolute priority rule

Finally, the treatment of shareholders in the Plan was also interesting and of greatest concern to the English court. The court was uncomfortable with the shareholders retaining a 77.5% equity stake in the group despite their unwillingness to inject further capital. Clearly, this could lead to a windfall for the existing shareholders despite them taking on no additional risk by providing new capital. In the end, the court concluded that the new money providers had commercially and rationally negotiated the new SPV's 22.5% equity stake in the group and those creditors were best placed to judge whether the 77.5% retention was fair. The judge considered the retained equity stake was "not so unfair" that he should refuse to sanction the plan (emphasis added).

In other jurisdictions, most notably under the absolute priority rule under US Chapter 11, the same facts might have required equity being wiped out under the plan in order to cram down the 2029 notes. In England and Wales, it remains for the 'in-the-money' creditors to decide how to share the value (or "restructuring surplus") remaining following implementation of the restructuring plan, which may result in those creditors agreeing to shareholders retaining their equity stake, provided, of course, that the plan is otherwise fair. Similarly, the German equivalent to the UK Part 26A restructuring plan, the StaRUG, allows for exceptions to be made from the absolute priority rule in order to enable flexible solutions.

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Embracing change: a timely "root and branch" review of the effectiveness of Australia's restructuring and insolvency laws

Scott Atkins, Alex Mufford, Charles Nugent-Young

Australia's Parliamentary Joint Committee on Corporations and Financial Services recently handed down its final report into the effectiveness of Australia's corporate insolvency laws in protecting and maximising value for the benefit of all interested parties and the economy.

The Committee has made some far-reaching recommendations in the Final Report, heralding the long awaited "root and branch" review of Australia's insolvency laws that ARITA (Australian Restructuring Insolvency & Turnaround Association) and other industry bodies have called for over the last decade.

It is important to note that 17 of the 28 recommendations in the Final Report are to be addressed by a further comprehensive independent review. These are identified in the coloured rows below. The other recommendations are to be addressed sooner.

	Summary	Recommendation
1	Further comprehensive and independent review	*The Committee recommends that the government commission a comprehensive and independent review of Australia's insolvency law, encompassing both corporate and personal insolvency, as soon as practicable, and progress several other near-term actions as identified in the executive summary.*
2	Further consideration of appropriate principles and objectives of insolvency law	*The Committee recommends that the comprehensive review, as part of its early work, consider and report on the appropriate principles and objectives of insolvency law. The Committee further recommends that the government respond quickly to this first report of the comprehensive review to allow the comprehensive review to continue with further stages of work in a timely way.*
3	Further review of options to enhance public interest objectives	*The Committee recommends that the comprehensive review consider and make recommendations on options to enhance public interest objectives and the effectiveness of, and interaction between, the personal and corporate insolvency systems.*
4	Improve quality and collection of data by ASIC	*The Committee recommends that the Australian Securities and Investments Commission collect high quality, granular data in relation to insolvency and provide this data in a timely way to relevant government agencies and regulators.*

5	Further review on improving access to and analysis of insolvency data	*The Committee recommends that the proposed comprehensive review of insolvency consult data holders, researchers, industry participants, and public sector organisations to progress the access to and analysis of insolvency data.*
6	Further review based on a holistic systems analysis perspective	*The Committee recommends that the proposed comprehensive review consider and report on the current system of corporate insolvency pathways from a holistic systems analysis perspective.*
7	Implement recommendations from the Safe Harbour Review	*The Committee recommends that the government implement recommendations from the Safe Harbour Review, independent and likely in advance of the further review, and consider referring the remainder of safe harbour reform issues identified in this report to a comprehensive review.*
8	Reforms to small business restructuring and simplified liquidation pathways	*The Committee recommends that as soon as practicable the government consider and consult on potential reforms to the:* • *small business restructuring pathway; and* • *simplified liquidation pathway.*
9	Further review of voluntary administration and members voluntary liquidation pathways	The Committee recommends that the comprehensive review consider the: • voluntary administration pathway; and • members voluntary liquidation pathway.
10	Improve sample size of ASIC data	*The Committee recommends that the Australian Securities and Investments Commission collect and analyse data from an appropriately sized sample of voluntary and compulsory deregistrations, to provide greater visibility of the solvency status of deregistered companies.*
11	Further review of registration requirements for small business restructuring practitioners	*The Committee recommends that the comprehensive review consider the requirements for the registration of small business restructuring practitioners to understand the reasons for the limited number of registrations to date.*

12	Address inequity and gender imbalance in the population of registered liquidators	*The Committee recommends that the government reform the experience eligibility requirements for registered liquidators, to address the inequity of the requirements and the gender imbalance in the population of registered liquidators. Reforms could potentially include:* • increasing the period over which experience is demonstrated, or • replacing part of the required hours with a competency-based exam.
13	Further review of the remuneration of insolvency practitioners	*The Committee recommends that the comprehensive review include consideration of the remuneration of insolvency practitioners, including:* • the extent to which public interest work carried out by liquidators for no or limited pay is sustainable; and • the impact of this on all stakeholders in external administrations.
14	Further review of the independence requirements for insolvency practitioners	*The Committee recommends that the comprehensive review include consideration of the operation, efficacy, and efficiency of the current independence requirements for insolvency practitioners, including:* • whether the current requirements are achieving the policy settings that inform them and whether these policy settings are optimal; and • the advantages and disadvantages of formally separating the roles of advice and restructuring from formal appointments to liquidations and administrations.
15	Further review on improving regulation and active enforcement of pre-insolvency advisers	*The Committee recommends that the comprehensive review include consideration of the nature and extent of the harm posed by 'untrustworthy pre-insolvency advisors,' and whether further regulation or enforcement measures are needed to address this issue. The Committee further recommends that in the interim, the government take prompt action to improve the regulation and active enforcement of pre-insolvency advisers.*
16	Review of the Assetless Administration Fund	*The Committee recommends that the government consider changes to the Assetless Administration Fund to ensure that it is achieving its intended policy objectives.*

17	Review of the Public Interest Administration Fund, proposed by the Productivity Commission in 2015, by Treasury	*The Committee recommends that the Department of the Treasury consider assessing the potential benefit of the Public Interest Administration Fund proposed by the Productivity Commission in 2015, including the impacts of the required increase on the annual review fee for company renewals; and either consider implementing the proposal, or provide that analysis to a comprehensive review.*
18	Further considering funding options for the administrations of assetless companies	*The Committee recommends that the comprehensive review consider and make recommendations on options for funding the administrations of assetless companies, including reforms to the Assetless Administration Fund (noting the Committee's recommendation 16) and the merits of creating a public liquidator for corporate insolvency.*
19	Further review of the current statutory reporting obligations for insolvency practitioners	*The Committee recommends that the comprehensive review consider whether the current statutory reporting obligations for insolvency practitioners are best serving the integrity, efficiency, and efficacy of the Australian corporate insolvency framework, including (but not limited to):* • the ability of the Australian Securities and Investments Commission (ASIC) to appropriately process, utilise and respond to initial statutory reports on current resources; and • the appropriateness of existing reporting thresholds, having regard to their regulatory value as well as the burden imposed on insolvency practitioners. *The Committee further recommends that in the interim, the government and ASIC consider whether any timely changes can be made to the regulations on reporting thresholds, and ASIC's response to insolvency practitioner reports.*
20	Further review of the operation of the insolvent trading regime	*The Committee recommends that the comprehensive review examine the operation of the insolvent trading regime and its impact on the broader corporate insolvency framework.*
21	Further review of ATO relief to potentially insolvent companies during hard economic times	*The Committee recommends that the comprehensive review analyse and make recommendations on the overall economic and social benefits and costs of Australian Taxation Office relief to potentially insolvent companies in hard economic times, in the context of the impacts on the purposes of the insolvency system.*

22	ATO to publish model creditor guidelines	*The Committee recommends that the Australian Taxation Office consult, act on and publish model creditor guidelines, consistent with its model litigant obligations.*
23	Further consider the relative priority of employees, liquidators, and secured creditors	*The Committee recommends that the comprehensive review consider the relative priority of employees, liquidators, and secured creditors, including the priority over circulating assets under section 561 of the Corporations Act 2001. The committee further recommends that this be a high priority topic for the comprehensive review.*
24	Address misuse of the Fair Entitlements Guarantee through phoenixing and other practices	*The Committee recommends that the government develop reforms to improve the framework designed to ensure the policy objective of access to the Fair Entitlements Guarantee as a scheme of last resort, both to prevent misuse by novel schemes of arrangement, phoenixing, and other practices and to ensure capture of all individuals with valid entitlements.*
25	Further consider franchising insolvency issues	*The Committee recommends that the comprehensive review consider and report on franchising insolvency issues.*
26	Response to the Whittaker Review (2015)	*The Committee recommends that the government provide a formal response to the Whittaker Review which was completed in 2015.*
27	Further review of unfair preferences and voidable transactions	*The Committee recommends that the comprehensive review consider unfair preferences and voidable transactions as a core aspect of potential insolvency reform.*
28	Reform to Corporations Act regarding treatment of trusts with corporate trustees during insolvency	*The Committee recommends that the government amends the Corporations Act 2001 to expressly clarify the treatment of trusts with corporate trustees during insolvency.*

This has been an extensive process, commencing on 28 September 2022, and receiving 78 submissions from individuals and organisations. The submissions included restructuring groups, law firms, liquidators, academics, government departments, industry groups and unions. The inquiry held five public hearings, two in Canberra and three in Sydney.

Norton Rose Fulbright is proud to have made a direct contribution to the work of the Committee. The call by ARITA (Australia's leading restructuring and insolvency professional body) for a root and branch review of Australia's insolvency laws has been a strategic priority for almost a decade. In 2019, that was accelerated upon our Partner and Global Co-Head of Restructuring, Scott Atkins, taking on the Presidency of ARITA, with the Committee convening and finalising its work while Scott served on the ARITA Board as Immediate Past President.

And partner Dr. Nuncio D'Angelo's written and oral submissions feature heavily in proposed reforms to trust insolvency law covered by Recommendation 28.

Australia as a restructuring hub and an issue on the horizon

The Committee has laid the groundwork for the Australian Government to focus its energy and resources on establishing Australia as a 'restructuring hub' to resolve cross-border insolvency disputes.

A globally-recognised model is the Singaporean Government's active investment in this area. This has seen the country create a debt restructuring hub, and grow and develop the professional services sector and judiciary that is required to support this type of work. In submissions, the three main steps in Singapore's strategy were recognised as:

1. the development of an attractive business and institutional environment;
2. the modernisation of Singapore's insolvency and restructuring laws; and
3. the strengthening of the restructuring ecosystem while enhancing Singapore's leadership in the international insolvency debate.

The arrival of the Committee's report comes on the heels of the recent announcement by the UK Government that it will legislate to implement the UNCITRAL Model Law on Enterprise Group Insolvency "at the earliest opportunity". The Group Model Law provides tools to manage and co-ordinate insolvencies within corporate groups, while respecting that each company within the group remains a separate legal entity. The UK will become the first jurisdiction to implement the Group Model Law into its national law, taking the lead as an early adopter. This is also an opportunity for Australia to take this step as part of broader efforts to enhance its restructuring and insolvency system. It is the space to watch.

Single, focused legislative framework

The unifying theme of submissions to the Committee were that Australia's corporate insolvency regime is highly complex in that it currently spans across multiple Commonwealth laws as well as State and Territory equivalents. This regime requires practitioners to be across Australia's corporate insolvency laws, personal insolvency laws and the full suite of state and territory tax laws, and also engage with multiple government agencies with different responsibilities.

Unification and simplification of this patchwork will bring benefits to small businesses that do not have the capacity and resources to understand the current labyrinthine regime. This reduces the effectiveness of the regime, as it is essential that the legislation is simple and comprehensible so that directors can understand their obligations without having to overly rely on an insolvency practitioner.

Having regularly advised on the scope and application of insolvency laws, we see the Committee's Final Report as providing the impetus for Australia to:

- adopt international best practice, following the approach taken by Singapore and the United Kingdom;
- clarify the safe harbour and unfair preference regimes and take action on illegal phoenixing;
- develop a framework that will provide benefits to small and medium sized businesses; and
- address the treatment of trusts with corporate trustees during insolvency.

Norton Rose Fulbright has a leading restructuring practice in Australia and across the Globe. If you have any queries or require support in engaging with this important reform, please contact Scott Atkins or Alex Mufford, or any of the partners in our national team.

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Please visit our Restructuring Touchpoint blog where you can subscribe to receive the latest developments on restructuring and insolvency across the world.

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