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Cross Border Jeopardy: A Comparative Analysis on Key Insolvency Topics Across Various Jurisdictions

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Introduction

In today's globally interconnected world, it is common for an insolvency proceeding to have a cross-border element. Typical features of an international insolvency proceeding: the debtor conducts business or holds assets in multiple jurisdictions, creditors are located in different jurisdictions, assets have been transferred across jurisdictions, and/or proceedings have been commenced at different times in different jurisdictions.

Much has been said about the movement from territorialism to universalism, and then modified universalism.[1] Theory aside, an advisor to any international insolvency needs to recognize that there are differences in approaches taken in various jurisdictions, and evaluate how these differences can be marshalled to answer the practical question that an insolvency practitioner is ultimately confronted with— "*How do I coordinate the proceedings of the debtor company and deal with the assets to the benefit of the creditors?*"[2]

This paper conducts a multi-jurisdictional review of specific aspects of restructuring and insolvency proceedings, which commonly arise in multi-jurisdictional proceedings. It compares the different approaches of Canada, the United States, the Netherlands, and Singapore toward rescue financing, statutorily appointed bodies, third-party releases, sale processes, receiverships and liquidations, and the identification of a debtor's centre of main interests ("**COMI**"). The paper concludes with some further observations on practical issues to consider in any cross-border insolvency.

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1. Debtor-in-Possession Financing / Rescue Financing

Debtor in possession ("**DIP**") financing is financing provided to an insolvent debtor. Financiers may be reluctant to provide such additional funding when the company is under such distress, even though such financing may be crucial to the successful restructuring of a viable company.

To encourage the inflow of new financing in such situations of distress, various jurisdictions have introduced legislation or regulations to encourage lenders to provide such rescue financing, such as by granting priority status to fresh financing given as part of the debtor's rescue efforts.

a. Canada

In Canada, insolvent debtor companies with debts exceeding $5 million are entitled to make an application under Canada's *Companies' Creditors Arrangement Act* ("**CCAA**"),[3] which provides the statutory scheme for such company to restructure. As part of its ability to undergo a restructuring, and in light of the liquidity issues such company is likely facing, the CCAA authorizes such companies to obtain DIP financing that is subject to a charge (the "**DIP Charge**") against the debtor company's assets in favor of the DIP lender in priority over the claim of any secured creditor of the company.[4]

In considering whether to grant an order approving the DIP financing and its related terms, the court will consider the following factors: (i) the period during which the company is expected to be subject to proceedings under the CCAA; (ii) how the company's business and financial affairs are to be managed during the proceedings; (iii) whether the company's management has the confidence of its major creditors; (iv) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company; (v) the nature and value of the company's property; (vi) whether any creditor would be prejudiced materially as a result of the security, or charge, and (vii) the report of the court-appointed monitor.[5]

In 2019, the CCAA was amended to provide for an initial application period of only 10 days. This means that any debtor company that applies for protection under the CCAA is required to return to court within 10 days of the initial order to seek an extension to the rights and protections granted in the initial order. Accordingly, the CCAA now provides that the DIP financing obtained in the first day initial order shall only be in an amount to what is "reasonably necessary" for the continued operations of the debtor company in the ordinary course of business in that first 10-day period.[6]

The CCAA provides that the DIP Charge may not secure an obligation that existed prior to the filing date under the CCAA.[7] In the United States, such DIP financing and associated charge is commonly referred to as a "roll up" DIP, and although permitted, this is expressly prohibited in Canada.[8]

b. United States

In the United States, DIP financing must be approved by the bankruptcy court and the protections provided by the Bankruptcy Code are intended to

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incentivize lenders to lend to debtors in possession. These protections can include priority in payment (as an administrative claim), the ability to prime existing liens, court approval of the terms of the financing, and court supervision of how the funds are used. DIP lenders can be a pre-petition lender or a new lender. As noted, DIP financing in the United States may include a "roll up", which means a prepetition claim is "rolled" into DIP obligations and secured by DIP liens with superpriority.

Section 364 of the Bankruptcy Code provides a DIP lender with administrative expense priority, giving a DIP lender priority over pre-petition unsecured claims. Section 364(c) of the Bankruptcy Code provides that if a debtor can demonstrate that it is otherwise unable to obtain unsecured credit, the bankruptcy court may authorize a debtor to obtain credit that (i) has priority over all administrative expenses; (ii) is secured by a lien on property of the estate that is not otherwise subject to a lien; or (iii) is secured by a junior lien on property of the estate that is subject to a lien.[9] Financing provided under section 364(c) as an administrative expense gives the DIP lender superpriority over all administrative expenses, in addition to a lien on unencumbered property of the estate, or a lien junior to encumbered property of the estate.[10]

If the debtor can demonstrate it is unable to obtain financing by any other means—including section 364(c)—the bankruptcy court may authorize the debtor to obtain financing that is secured by a "senior or equal lien on property of the estate that is subject to a lien" pursuant to section 364(d) of the Bankruptcy Code. Called a priming lien, a DIP lender will have a lien on property of the estate that is senior to the pre-petition liens on such property.[11] A priming lien can only be granted by the bankruptcy court if (i) the lenders being primed consent or (ii) there is "adequate protection" of the lenders whose liens are being primed.[12]

A prepetition lender generally may consent to the priming of their liens where it is providing DIP financing (*i.e.*, it is priming itself), and/or where they receive certain protections for their pre-petition debt that will be primed. A credit agreement may provide that a majority or super-majority of lenders can consent to subordinate their liens to other lenders. Absent consent, the debtor must demonstrate a lender being primed is adequately protected. Adequate protection is governed by section 361 of the Bankruptcy Code and can take the form of (i) cash payment or periodic cash payments by the debtor to the extent that the priming lien results in the decrease in value of the lenders interest in the collateral; (ii) an additional or replacement lien to the extent of the decrease in value of the lenders interest in the collateral; or (iii) other relief that will result in the "indubitable equivalent" of a lenders' interest in the collateral.[13]

c. Singapore

Superpriority for rescue financing[14] is available to a debtor company that is formally in a scheme of arrangement procedure (a DIP regime) or in judicial management, (which involves the appointment of a third-party

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insolvency professional to the company). Both of these procedures were adapted from English law regimes. The introduction of such superpriority for rescue financing in Singapore[15] in 2017 married U.S.-style rescue financing arrangements with UK-style restructuring regimes, resulting in a hybrid system designed to offer more solutions to debtors that chose to formally restructure in Singapore. This of course also opened the doors for funds and other distressed debt investors to enter the Singapore restructuring space.[16]

Under the Insolvency, Restructuring and Dissolution Act 2018 (''IRDA''), a debt arising from rescue financing can be treated in one of the following ways: (i) as if it were part of the costs and expenses of winding up;[17] (ii) if the company is wound up, the rescue debt would have priority over certain preferential debts;[18] (iii) the rescue debt can be secured by security interest over an unencumbered asset, or by a second-ranking security over an encumbered asset (only if the company would not have been able to obtain the rescue financing from any person unless the rescue debt was given such priority);[19] and (iv) the rescue debt can be secured on encumbered assets (only if the company would not have been able to obtain the rescue financing from any person unless the rescue debt was secured in this manner, *and* there is "adequate protection" for the interests of the holder of that existing security interest).[20] Even though the statutory provisions were adapted from the U.S. Bankruptcy Code, local case law has been developed around the rescue financing provisions that are now part of Singapore law.[21] In interpreting these local statutory provisions, the Singapore courts may take guidance from U.S. case law but they are not bound by it.

d. Netherlands

In the Netherlands, there are three relevant insolvency procedures for companies: (i) a Dutch bankruptcy proceeding (*faillissement* — an insolvency proceeding aimed at the liquidation of the assets of the debtor's company), (ii) Dutch suspension of payments proceeding (*surseance van betaling*—an insolvency proceeding aimed at the voluntary reorganisation of a company) and (iii) the Dutch Scheme, entered into force on January 1, 2021, also known by its Dutch acronym "WHOA". In the various paragraphs below, reference will be made to those three Dutch proceedings.

The Dutch Scheme, enacted by means of the "Act on Court confirmation of extrajudicial restructuring plans", introduced a pre-insolvency procedure in the Netherlands, which combines elements of the UK scheme (such as the ability to implement a plan outside formal insolvency proceedings), with elements of Chapter 11 under the U.S. Bankruptcy Code (such as a cram down mechanism), while innovating on both. The result is a fast and flexible restructuring procedure containing all the powers needed to do the job. The Dutch Scheme is compliant with the recently adopted EU Restructuring Directive (EU 2019/1023).

DIP financing under the Dutch Scheme allows the debtor to request the court to pre-approve new contractual arrangements while preparing for the Scheme, which includes bridge financings and related (new) security. If the

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court has given its approval, such contractual arrangements cannot be annulled at a later stage if the plan were to fail, and the debtor becomes insolvent.

2. Statutorily Appointed Bodies

Restructurings are not only confined to the involvement of the debtor and its creditors. Jurisdictions around the world may have in place legislation or regulations that mandate or address the appointment of other bodies (sometimes of a supervisory nature) to oversee the proceedings. To this end, the debtor should be aware that it will have additional parties that it needs to factor into its rescue efforts.

a. Canada

The CCAA contains a unique feature, which is arguably the backbone of Canadian restructuring matters. That feature is the court appointment of a monitor. The CCAA provides that when an order is made on the initial application in respect of a debtor company, the court shall (at the same time) appoint a person (who is required to be a licensed trustee) to monitor the business and financial affairs of the company.[22]

The monitor acts as the eyes and ears of the court, and regularly reports to the court and stakeholders on the status of the debtor company's restructuring efforts. The monitor acts as a key role and assists the company with its proceedings, including with respect to preparing cash flow statements, determining liquidity needs, assisting with the debtor company's claims procedure, and providing input in the debtor company's restructuring plan. The monitor is an independent officer of the court and does not have a personal stake in the debtor company or the success of its restructuring. In acting in a neutral capacity, the monitor is expected to comment and provide its views to the court on specific relief sought by the company, and the monitor's recommendations on such matters does carry influence.[23]

In exceptional circumstances, a court-appointed monitor may be granted enhanced powers, such as the ability to commence litigation on behalf of the debtor company or conduct an investigation into the affairs or assets of the debtor company.[24] This is commonly referred to as a "super-monitor." Justice Penny recently stated that "orders of the court in CCAA proceedings which carve out an ongoing role for the monitor post-plan sanction are not unusual and may be granted where there are valid reasons to do so, including where necessary to resolve and administer outstanding claims."[25]

b. United States

The United States Bankruptcy Code provides for several statutorily appointed bodies. In a Chapter 7 case, which is meant to liquidate a company, a Chapter 7 trustee is appointed (as further discussed below). In a Chapter 11 case, which is designed to reorganize a company, the debtor's management remains in place, but under certain conditions, a Chapter 11 trustee or an

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examiner can be appointed. Section 1104 of the Bankruptcy Code provides that at any time during the case (before confirmation of a plan), on request of a party in interest or the United States Trustee (the "**UST**"—which is a governmental body that oversees bankruptcy cases), the court will appoint a trustee for cause, including fraud, dishonesty, incompetence or gross mismanagement, or if it is in the interest of creditors, equity holders or other interests of the estate. In such case, a Chapter 11 trustee will step into the management's place. Section 1104 also provides for the appointment of an examiner (similarly the request of a party in interest or the UST) for a more limited role of conducting an investigation of the debtor as appropriate, including any allegations of fraud, dishonesty, or irregularities in the affairs of the debtor.

An important statutorily-appointed body in Chapter 11 cases is a statutory committee. Section 1102 of the Bankruptcy Code provides that "as soon as possible" following the commencement of a Chapter 11 bankruptcy proceeding, "the United States trustee shall appoint a committee of creditors holding unsecured claims and may appoint additional committees of creditors or of equity security holders as the United States trustee deems appropriate."[26] This provision of the Bankruptcy Code permits a UST to appoint statutory committees to represent unsecured creditors, other groups of creditors, or equity security holders in Chapter 11 cases. While certain unofficial, ad hoc groups of creditors may appear in a bankruptcy case, such groups are not statutory committees under section 1102 of the Bankruptcy Code.

A UST will generally appoint a creditors' committee as soon as practicable after the petition date. The UST will generally solicit creditors from the list of the debtors' 20 largest creditors disclosed in the bankruptcy petition to serve on a statutory creditors' committee and will typically circulate a questionnaire to creditors to gauge their interest in serving on a committee. Section 1102(b)(1) provides that a creditors' committee should consist of "the persons, willing to serve, that hold the seven largest claims against the debtor of the kinds represented on such committee."[27] But this is only a guideline, and the UST has discretion in putting together a committee so long as the members of the committee are (i) persons; (ii) holders of claims against the debtors; and (iii) representative of the claims represented.[28]

Section 1102(a)(1) states that a UST "shall" appoint a committee of unsecured creditors.[29] Such committees are typically titled the official committee of unsecured creditors. The purpose of an official committee of unsecured creditors is to protect the interests of unsecured creditors in the Chapter 11 proceeding as such creditors would likely not otherwise have a meaningful representation or impact on a Chapter 11 proceeding due to their unsecured status. The existence of an official committee of unsecured creditors provides unsecured creditors with the ability to participate in a Chapter 11 proceeding with a unified voice and with greater influence than individual unsecured creditors would otherwise have to protect the interests of and secure enhanced recoveries for unsecured creditors. While section 1102(a)(1) states a UST "shall" appoint a committee of unsecured creditors, a UST is

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not required to do so and a committee may not be appointed if there is insufficient interest from creditors, particularly in smaller Chapter 11 cases.

A UST is also entitled to appoint "additional committees of creditors or of equity security holders" as the UST deems appropriate.[30] Additional creditor committees may include committees of the debtors' retirees, employees, or tort claimants to represent the interests of such classes of creditors. For example, in the bankruptcy cases of the Commonwealth of Puerto Rico;[31] the City of Detroit, Michigan;[32] Kodak;[33] and Armstrong Flooring Inc.,[34] the bankruptcy courts entered orders directing the appointment of committees of retired employees. Committees of a debtors' employees have been appointed in the bankruptcy cases of Enron.[35] In bankruptcy cases involving mass torts, official committees of tort claimants have been appointed, including in the bankruptcy cases of Johnson & Johnson's LTL[36] and PG&E.[37] In bankruptcy cases where there are victims of the debtors' action—particularly victims of abuse—official committees representing those victims were appointed, including the bankruptcy cases of the Boy Scouts of America,[38] multiple Roman Catholic Church dioceses,[39] and USA Gymnastics.[40] Equity security holder committees represent holders of a debtors' equity holders. Further, where secured creditors are deemed out of the money, a statutory committee representing those creditors may be formed, such as the official committee of second-lien noteholders appointed in the Caesars Entertainment bankruptcy case.[41] These committees have the same powers and duties of an official committee of unsecured creditors but will only be appointed by a UST in certain circumstances, such as where existing committees will not represent the interests of a particular class.[42]

A statutory committee and the members of a committee are fiduciaries for the class such committee represents.[43] This requires a committee to act in the best interest of the class as a whole, rather than in the best interest of an individual member. Members of a committee also owe a fiduciary duty to each other but do not owe a fiduciary duty to any other party in a bankruptcy proceeding.[44]

The purpose of statutory committees is to ensure that the interests of the class represented by the statutory committee are protected and promoted within the bankruptcy case. To enable statutory committees to do so, statutory committees appointed by a UST pursuant to section 1102 of the Bankruptcy Code are entitled to hire counsel and advisors at the expense of the bankruptcy estate and are provided with broad rights and powers under the Bankruptcy Code.[45] These include the right to: (i) consult with the trustee or debtor in possession concerning the administration of the case; (ii) investigate the acts, conduct, assets, liabilities, and financial condition of the debtor, the operation of the debtor's business and the desirability of the continuance of such business, and any other matter relevant to the case or to the formulation of a plan; (iii) participate in the formulation of a plan, advise those represented by such committee of its determinations as to any plan formulated, and collect and file with the court acceptances or rejections of a plan; (iv) request the appointment of a trustee or examiner under section 1104 of

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this title; and (v) perform such other services as are in the interest of those represented.[46]

c. Singapore

Unlike in the United States and Canada, the relevant statutory provisions in Singapore do not mandate the appointment of creditor committees or a monitor, though creditor committees are often formed in both liquidation and judicial management proceedings.[47] Recently, creditors in DIP proceedings and judicial management proceedings have formed ad hoc committees as well.[48] As such, even if there is no statutory provision that mandates the formation of a creditors' committee in a formal restructuring or insolvency proceeding, a debtor should be aware that in practice, it may nevertheless find itself negotiating with creditor committees in Singapore.

d. Netherlands

In the above-mentioned Dutch bankruptcy proceeding (*faillissement*) it is possible that a (preliminary) creditors' committee is appointed, provided this is in the interest of the joint creditors. The task of the creditors' committee is mainly to advise the bankruptcy trustee. This can sometimes be useful, especially in technical and commercial matters, as the appointment of the bankruptcy trustee focuses more on legal and administrative knowledge than on knowledge of the bankrupt's industry. Either in the bankruptcy order or in a subsequent order, the court may (if the importance or the nature of the estate give reason to do so) appoint a provisional creditors' committee to advise the bankruptcy trustee.[49] The creditors' committee has an odd number of members, and important groups of creditors are represented in it. The court has sole discretion in determining whether or not to establish the creditors' committee. The condition for setting up a committee is often whether it has added value in the given case. Interestingly, the members of the creditors' committee need not be creditors themselves. Representatives of important groups of creditors can also be appointed to the committee, such as a trade union representative on behalf of the employees or a representative of a trade association. Such members do not represent in a formal legal sense the group of creditors they represent.

Whether there will be a final creditors' committee is left to the decision of the creditors. Irrespective of whether or not a provisional committee has been appointed, the supervising judge (*rechter-commissaris*) will consult the creditors at the sanctioning meeting after the verification about the appointment of a definitive commission. If the meeting deems this desirable, the supervising judge will appoint the committee.[50]

The creditors' committee needs information to be able to perform its task properly. That is why the committee has access to the books, documents and other data carriers relating to the bankruptcy; the bankruptcy trustee is also obliged to provide the creditors' committee with all required information.[51] The bankrupt is also obliged to provide the committee with all information, if this is required of it.[52]

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The bankruptcy trustee is obliged to obtain the advice of the creditors' committee in the cases referred to in article 78, paragraph 1 of the *Dutch Bankruptcy Act* ("**DBA**"). This concerns important decisions taken by the bankruptcy trustee in the context of the management and liquidation of the estate. However, this obligation to advise will lapse if the committee fails to advise.[53] Importantly, the committee only gives advice, and the bankruptcy trustee is not bound by the committee's advice.[54] The creditors' committee can also challenge the bankruptcy trustee's actions or request an order from the bankruptcy judge on the grounds of art.[55]

3. Sale Process

As part of a formal restructuring process, a debtor may dispose of its property or assets, in an effort to generate liquidity. Given that sales (of core and/or non-core assets) occur so often in the restructuring and insolvency process, various jurisdictions have developed their own rules surrounding such disposals and sales—some are more debtor-friendly, some have additional protections in place for creditors, and some require greater court supervision.

a. Canada

Under the CCAA, a debtor company is required to seek approval from the court prior to disposing of any of its property or assets outside of the ordinary course of business.[56] In deciding whether to grant the authorization, the court is to consider the following factors: (i) whether the process leading to the proposed sale or disposition was reasonable in the circumstances; (ii) whether the monitor approved the process leading to the proposed sale or disposition; (iii) whether the monitor filed with the court a report stating that, in their opinion, the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy; (iv) the extent to which the creditors were consulted; (v) the effects of the proposed sale or disposition on the creditors and other interested parties; and (vi) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.[57] There are additional factors for the court to consider if the proposed sale or disposition is to a person related[58] to the company.[59]

Further, in reviewing a proposed sale of assets in the insolvency context, the court will consider the following principles (commonly referred to as the "*Soundair* principles"):[60] (i) whether sufficient efforts have been made to obtain the best price and that the debtor (or receiver) has not acted improvidently; (ii) whether the interests of all the parties have been considered; (iii) the efficacy and integrity of the process by which offers had been obtained; and (iv) whether there has been unfairness in the working out of the process.[61]

The debtor company will typically seek an "Approval and Vesting Order", which authorizes the proposed sale of assets of the debtor company to the proposed purchaser free and clear of any encumbrances (other than express

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permitted encumbrances). The net proceeds of the sold assets will stand in place and stead of the sold assets, with the result that any claims attach to the net proceeds of sale with the same priority they had with respect to the sold assets immediately before the sale.

b. United States

Section 363 of the Bankruptcy Code permits a debtor—following a motion and the approval of the bankruptcy court—to sell assets outside of the ordinary course of business in connection with a bankruptcy proceeding.[62] The primary benefit of a section 363 sale is that the sale of assets may be sold "free and clear" of existing liens and liabilities. A section 363 sale is free and clear of such interests if the bankruptcy court determines that one of the following conditions is met:[63] (1) applicable non bankruptcy law permits sale of such property free and clear of such interest; (2) such entity consents; (3) such interest is a lien and the price at which such property is to be sold is greater than the aggregate value of all liens on such property; (4) such interest is in bona fide dispute; or (5) such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest.

A debtor may accomplish the sale of certain assets or the sale of substantially all of the debtors' assets through a section 363 sale. Typically, a debtor will first conduct a marketing process for the sale of assets to select and enter into a purchase agreement with a "stalking horse bidder" which will establish the floor price for the sale of assets.[64] The stalking horse bidder will perform diligence on the debtor and serve as the stalking horse in return for certain incentives from the debtor including reimbursement of expenses incurred in negotiating the stalking horse agreement and break-up fees owed to the stalking horse bidder if a higher bid is accepted by the debtor.[65] If a debtor has entered into an agreement with a buyer for the sale of assets pursuant to section 363 of the Bankruptcy Code, it must then file a motion on 21-days' notice seeking the bankruptcy court's approval of the proposed sale and seeking the bankruptcy court's approval of bidding procedures, which will govern how other entities can submit a bid for the purchase of the debtors' assets.[66]

If there are no other bids received for the purchase of a debtors' assets and no objections to the sale are received or such objections have been resolved, a bankruptcy court may enter an order approving the sale of the debtors' assets pursuant to section 363 of the Bankruptcy Code. If there are additional bids received for the debtors' assets, the debtor will conduct a court-supervised auction for the assets. A debtor has a fiduciary duty to obtain the highest and best price for assets and a bankruptcy court may generally approve a sale of assets where a debtor has exercised their sound business judgment in deciding to enter into the proposed transaction, the purchase of the assets is in good faith, and the offer is the highest or otherwise best offer received by the debtors.[67]

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c. Singapore

In Singapore, a company in DIP proceedings is entitled to dispose of its property or assets as it deems fit. However, where it has obtained a court-ordered moratorium[68] in support of its plans to restructure via a scheme of arrangement, the court order will also impose certain disclosure obligations on the company. Where the company acquires or disposes of any property, or grants any security over any property, information relating to such acquisition, disposal, or grant of security must be submitted to the court no later than 14 days after the date of such acquisition, disposal, or grant of security.[69] Separately, a creditor may also apply specifically for an order restraining the debtor from disposing of its property other than in good faith and in the ordinary course of business.[70]

Where the company is placed under judicial management, the judicial manager may dispose of property of the company, even if it is subject to a floating charge.[71] Where the property is otherwise encumbered, or subject to a hire-purchase agreement, chattels leasing agreement, or retention of title agreement, the judicial manager will have to apply to court for authorization to dispose of the property. To obtain such authorization,[72] the judicial manager will have to satisfy the court that such disposal would be likely to promote one or more of the purposes of judicial management.[73] As a form of protection to secured creditors or the owner of the goods, the judicial manager must apply the net proceeds of the disposal toward discharging the sums secured by the security or payable under the hire-purchase agreement, chattels leasing agreement, or retention of title agreement.[74] Where the net proceeds of the disposal are less than the sums secured or payable, the creditor will have to prove on a winding up for any balance due.[75]

Where the company is in liquidation, the liquidator must take into his or her custody or control all property and things in action to which the company is or appears to be entitled.[76] The liquidator has the power to sell the immovable and movable property, and things in action of the company by public auction, public tender or private contract, with power to transfer the whole of the immovable and movable property and things in action of the company to any person or company or to sell the same in parcels.[77]

However, as a check on the liquidator's powers, the statutory provisions also clarify that the exercise by the liquidator of such powers is subject to the court's control, and any creditor or contributory may apply to the court with respect to any exercise or proposed exercise of such powers.[78]

d. Netherlands

The bankruptcy trustee can sell all or part of the debtor's company, a so-called 'restart' (*doorstart*). A restart is often attractive to creditors. The buyer who wishes to continue part of the business, and to that end takes over that part of the estate as a whole, is usually willing to pay a purchase price that is higher than the proceeds from the sale of the various assets to various buyers. This applies in particular to obsolete and intangible assets (names, brands,

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websites, domain names, software, goodwill, etc.), which are often difficult or impossible to sell without a restart.

The assets that the bankruptcy trustee sells during a restart are often subject to third-party rights, such as pledge and mortgage rights, retention of title, etc. During the sale process, the bankruptcy trustee usually makes agreements with these third parties about the release of their rights against payment of that part of the property. If the bankruptcy trustee does not do this, he can be liable toward these third parties.

Furthermore, the buyer often requires that crucial contracts (rental contracts, ICT contracts, contracts with important suppliers) are continued after the takeover. With some leases, the bankruptcy trustee can request substitution from the court. In most contracts, the bankruptcy trustee cannot enforce the transfer and will only be able to facilitate the consultation between the counterparty and the buyer of the company. In addition, part of the employee base is almost always retained in the event of a restart. The bankruptcy trustee stipulates that the buyer offers a number of employees of the bankrupt a new employment contract. This is also in the interest of the debtor's creditors. If the staff members enter the employment of the buyer during their notice period and leave the estate, significant estate debts for wage costs can be avoided.

4. Third-Party Releases

Very often, in negotiating a restructuring of the company's debts, third-party releases also will have to be obtained as well. For example, rights held by creditors against the company's equity holders, employers' liability insurers,[79] or against the company's guarantors,[80] may also have to be released or varied to prevent scheme creditors from undermining the terms of the restructuring plan.

a. Canada

Under the CCAA, the courts have wide discretion to make any order that they think fit.[81] This includes the ability to grant releases as provided for in a plan of compromise or arrangement that has been approved by the debtor company's creditors, not only in favor of the debtor company, but also in favor of third parties such as the debtor company's directors and officers, DIP lender, plan sponsor, the monitor, and such parties' advisors, among others, if the circumstances permit.

It is accepted that Canadian courts have jurisdiction to sanction plans containing releases if the release was negotiated in favor of a third party as part of the "compromise" or "arrangement" where the release reasonably relates to the proposed restructuring and is not overly broad.[82] There must be a reasonable connection between the third-party claim being compromised in the plan and the restructuring achieved by the plan to warrant inclusion of the third-party release in the plan.[83]

In considering whether to approve releases in favor of third parties, courts will consider the particular circumstances of the case and the objectives of

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the CCAA.[84] While no single factor will be determinative,[85] the courts have considered the following factors: (i) whether the parties to be released from claims were necessary and essential to the restructuring of the debtor; (ii) whether the claims to be released were rationally connected to the purpose of the plan and necessary for it; (iii) whether the plan could succeed without the releases; (iv) whether the parties being released were contributing to the plan; and (v) whether the release benefitted the debtors as well as the creditors generally.[86]

b. United States

In a Chapter 11 plan of reorganization, a debtor will frequently provide releases to certain non-debtor parties who participated in or are impacted by the Chapter 11 proceeding. A third-party release may be either consensual or non-consensual; a consensual third-party release is where creditors consent to the third-party releases, while with a non-consensual third-party release those whose claims are released do not consent to the release. Such non-consensual third-party releases have come under increased scrutiny recently due to questions over whether a bankruptcy court has the authority to approve such releases and the use of third-party releases in Chapter 11 cases. Recent decisions in the Southern District of New York (*Purdue Pharma*)[87] and the Eastern District of Virginia (*Ascena Retail Gro*up)[88] have called into question whether such third-party releases are viable—specifically, whether they are actually authorized by the United States Constitution and the Bankruptcy Code, whether a bankruptcy court has authority to adjudicate claims released via third-party releases, and the amount of consideration that is required by such third parties to be contributed into the bankruptcy estate in exchange for the releases.

c. Singapore

Third-party releases are available as part of a scheme of arrangement under section 210 of the *Companies Act* 1967. The fact that a proposed scheme seeks to release third-party liabilities may be considered both at the leave stage and the sanction stage in the scheme proceedings, but the focus of the court's inquiry at each stage is different.[89]

At the leave stage, the fact that the scheme seeks to release third-party rights goes to the issue of *jurisdiction*. Here, the Singapore Court of Appeal clarified in *Pathfinder Strategic Credit LP v Empire Capital Resources Pte Ltd.*[90] that the test is whether there is a sufficient nexus or connection between the release of the third-party liability and the relationship between the company and the scheme creditors. In doing so, the court considered and found persuasive the approach of the Australian court in *Re Opes Prime Stockbroking Ltd.*[91] As such, it would be possible for a guarantor to seek a release of the primary obligor's (i.e. the borrower's) obligations as part of a compromise or arrangement proposed by the guarantor, provided this "sufficient nexus" test is met.

Alternatively, at the sanction stage, the court's focus will primarily be on

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the *merits* and the *reasonableness* of the inclusion of such third-party releases in the proposed scheme (though jurisdictional challenges may also be raised then).

Netherlands

The Dutch Scheme explicitly provides for the release of third party liability, albeit that the relevant statutory provision only deals with group guarantees and only allows a release under certain conditions. A Dutch Scheme may amend the rights of creditors against legal entities that form a group with the debtor as meant in Article 2:24b of the Dutch Civil Code, provided that: (i) the rights of those creditors against the relevant legal entities entail payment of or security for the obligations of the debtor or obligations for which the legal entities are liable together with or alongside the debtor, (ii) the relevant legal entities are in a state as meant in Article 370(1) DBA, (iii) the relevant legal entities have approved the proposed amendment or the plan is proposed by a restructuring expert as meant in Article 371 DBA; (iv) the court would have jurisdiction if these legal entities were to propose their own plan under this section and submit a request as meant in Article 383(1) DBA; (v) the relevant group company has not already offered a scheme in respect of these obligations; (vi) the debtor (or restructuring expert, if appointed) must supply all relevant scheme information pursuant to Article 375 DBA also in relation to the non-debtor group companies, which includes, amongst other things, reorganization and liquidation valuations of the company; and (vii) the court petitioned to confirm the scheme examines whether the scheme also complies with the confirmation requirements from Article 384 DBA in relation to those non-debtor group companies. This latter article most notably prescribes that non-consenting creditors or shareholders that are part of a non-consenting class may petition the court to deny confirmation of the creditor scheme if, briefly stated, it is not in accordance with the Dutch principles of priority.

In respect of jurisdiction, it is relevant what kind of scheme procedure has been chosen. The debtor (or restructuring expert if appointed) can opt to offer the plan in a "private" or "public" procedure. This choice affects when the plan procedure falls within the scope of the European Insolvency Regulation ("**EIR**") or not, as the EIR only applies to public proceedings.

i. Public procedure: EIR

For the public procedure, Dutch courts have jurisdiction if the COMI or a branch of the debtor is located in the Netherlands (Article 3 EIR). The opening of the procedure and its consequences, including a possible stay, are automatically recognized in all countries of the European Union with the exception of Denmark (Article 19 and 32 EIR). There are also disadvantages to application of the EIR. Under the EIR, the Dutch court has fewer options to assume jurisdiction than under Dutch private international law (see below). Also, Article 8 EIR restricts the effects of the plan and a stay versus creditors that have a security right over assets of the debtor that are located

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outside the Netherlands. Under the EIR, the Dutch scheme does not affect such security rights over foreign assets.

ii. Private procedure: domestic private international law

For a private procedure, the Dutch court must establish its jurisdiction according to the Dutch Code of Civil Procedure, that gives the general rules for jurisdiction for petitions and provides the courts freedom to determine jurisdiction. Dutch courts have jurisdiction if any of the affected parties is domiciled in the Netherlands, or other aspects provide sufficient connection with the Netherlands. The Dutch legislator listed several circumstances that—each individually—lead to sufficient connection: (i) the debtor has his COMI or a branch in the Netherlands; (ii) the debtor has substantial assets in the Netherlands; (iii) a (substantial) part of the debts that would be part of the plan follow from obligations that are governed by Dutch law or for which a choice of forum is made for the Dutch courts; (iv) a (substantial) part of the group that the debtor is part of consists of companies located in the Netherlands; or (v) the debtor is liable for debts of another debtor for which the Dutch courts have jurisdiction. A private plan is not eligible for automatic recognition within the EU. Recognition of the plan therefore depends on the private international law of the country in which recognition is requested.

5. Receiverships / Liquidations

Receiverships and liquidations are major stalwarts of corporate law and insolvency law. They may have, perhaps, received less attention in recent times given a shift in focus to restructuring regimes—nevertheless, they remain essential to every insolvency regime around the world. It would not be possible (nor practical) to delve into detailed aspects of receiverships and liquidations in this paper. However, we set out brief descriptions of these regimes here, which helps us observe that the officers involved in receiverships and liquidations generally have very similar functions across jurisdictions.

a. Canada

The appointment by the court of a receiver in Canada is governed by the *Bankruptcy and Insolvency Act* ("**BIA**").[92] Under the BIA, the court may appoint a receiver (which is required to be a trustee) upon application by a secured creditor, if it is just or convenient to do so, to either (i) take possession of all or substantially all of the property and assets of an insolvent person or debtor that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt; (ii) exercise any control that the court considers advisable over that property or the insolvent person's business; and/or (iii) take any other action that the court considers advisable.[93] The powers and authorities of the receiver will be set out in the order appointing the receiver. Several of the jurisdictions across Canada have a "model order" for the appointment of a receiver.[94]

Prior to appointing a receiver over substantially all of the assets of a debtor

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company, a secured creditor is required to send to the insolvent company a notice of intention to enforce security pursuant to section 244 of the BIA and wait until at least 10 days have elapsed from the date of such notice, unless the notice period is waived by the insolvent company or the court considers it appropriate to appoint a receiver before then.[95]

The receiver, in its capacity as a court officer, acts in the interest of all of the insolvent company's stakeholders (and not merely the secured creditor appointing it). It also has duties to regularly report to the court and stakeholders on the status and affairs of the insolvent company and the receiver's enforcement and collection efforts. The receiver has duties to act honestly and in good faith, and deal with the insolvent person's property in a commercially reasonable manner.[96] The typical activities of a receiver include, but are not limited to, ceasing the insolvent party's business operations, selling or disposing of any assets (subject to court approval in certain circumstances), collecting receivables, calling for and resolving claims against the insolvent party, preparing reports and otherwise dealing with the assets, business and affairs of the insolvent party.

b. United States

A liquidation under the U. S. Bankruptcy Code (state law receivership and other winding down proceedings are also available) is usually accomplished through a Chapter 7 bankruptcy proceeding, in which the bankruptcy court will supervise the orderly liquidation of a debtors' estate and use proceeds from the liquidation to pay amounts owed to creditors.[97] In contrast to a Chapter 11 bankruptcy proceeding where the aim is usually a restructuring to permit the debtor to continue as a viable economic entity, in a Chapter 7 case, the aim is to collect and liquidate the debtors' assets for the benefit of creditors. A debtor in a Chapter 7 case may be an individual or an entity.[98] An entity will generally file a Chapter 7 case where it would be unlikely to successfully restructure as a viable entity under Chapter 11, and a Chapter 11 case may also be converted to a Chapter 7 case.[99]

Following the filing of a Chapter 7 case, the UST will appoint a trustee to manage and administer the property of the estate. A debtor's operations will generally terminate upon filing and the trustee will take control of the entity, unlike in a Chapter 11 case where the debtor remains in control of an entity's operations while in bankruptcy as a debtor in possession. A Chapter 7 trustee has a fiduciary duty to maximize the value of the estate for creditors and is primarily tasked with collecting and taking possession of all of a debtors' eligible assets and then liquidating those assets through a public or private sale.[100] The trustee has a duty to "*close such estate as expeditiously as is compatible with the best interests of parties in interest*."[101]

To accomplish this, a Chapter 7 trustee has broad authority over a debtor and its assets. While a Chapter 7 trustee need not receive court approval to sell assets under section 704 of the Bankruptcy Code, a trustee must comply with the requirements of section 363 of the Bankruptcy Code for notice and a hearing where the sale is outside of the ordinary course of business.[102] In

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addition to the collection and sale of the property of the estate, a Chapter 7 trustee further shall "*investigate the financial affairs of the debtor*" and "*examine proofs of claims and object to the allowance of any claim that is improper*."[103] A Chapter 7 trustee may further institute necessary legal actions, submit claims for arbitration or other compromise, reject prepetition executory contracts, and set aside fraudulent or preferential transfers or liens.[104]

c. Singapore

Unlike in Canada, in the sphere of corporate insolvency in Singapore receivers tend to mostly be privately appointed.[105] Private receivership would not generally be considered a collective insolvency process or a court-administered insolvency proceeding under Singapore law. Instead, it should be understood as a way of enforcing security, which involves the appointment of a receiver over the assets granted as security by the company.[106] The appointment of the receiver is usually based on and governed by the contractual provisions of the agreement between the creditor and the company; statutory law on receivership exists but is limited.[107] The statutory provisions on receivership have been observed to be "*largely procedural in nature*" and "*do not deal with the substantive rights, duties and liabilities of a receiver, the debenture holder, the company and its stakeholders*."[108] The rules around receiverships are largely governed by common law, and in this regard the Singapore courts have largely followed the law as established in England and other Commonwealth jurisdictions.[109]

Similarly, the liquidation regime in Singapore was adapted from the winding up provisions in the *UK Companies Act* 1948 and the *Australian Victorian Companies Act* 1961. A company may be wound up voluntarily[110] or pursuant to an order of court. Where the company is insolvent, it can be wound up only by way of a creditors' voluntary winding up[111] or a court-ordered winding up.[112] The powers and duties of the liquidator are generally similar to that set out in relation to a Chapter 7 trustee above. For example, the liquidator will take control of the company and take into custody all the property of the company;[113] the liquidator has broad powers to carry on business for the beneficial winding up of the company and to bring or defend any action or other legal proceed in the name and on behalf of the company (with authorization of the court or the committee of inspection);[114] the liquidator may sell the property of the company and compromise any debts due to the company.[115] Like the Chapter 7 trustee, a liquidator may also disclaim certain onerous property,[116] and investigate past transactions and apply to set aside any transactions on various grounds, e.g. transactions at undervalue or unfair preferences.[117] The property of a company must, subject to security and other considerations such as preferential payments, be applied *pari passu* in satisfaction of its liabilities.[118]

d. Netherlands

In the Dutch system, liquidation of the assets of the bankruptcy estate

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(and distributing the proceeds of such a process to the creditors entitled to the respective proceeds) is, briefly stated, the purposes of the bankruptcy trustee. For this purpose, the assets can be sold piecemeal in a public auction or as part of a going concern sales process (the 'restart'), as already explained above. Therefore, the process for distributing proceeds is explained below.

Once goods have been sold and/or receivables have been collected, and if any income has therefore been realized, the proceeds will be divided among the verified creditors (i.e. 'distributed'). Especially in the case of large bankruptcies, it can take quite some time before the entire estate is liquidated. There may be lengthy proceedings, the winding up of the business or the sale of certain goods can take a lot of time, or the estate is a creditor in another bankruptcy and waiting for its settlement. As soon as sufficient funds are available for distribution, (interim) distributions will follow.

Every distribution begins with an order from the supervisory judge (*rechter-commissaris*). Each time, when in his opinion sufficient ready tokens are available, he orders a distribution to the verified creditors.[119] After the order of the supervisory judge, the bankruptcy trustee prepares a distribution list and submits it to the approval of the supervisory judge.[120] In the vast majority of bankruptcies in which a distribution is made, the assets are distributed at once. There is then only one distribution list. The distribution list contains (i) a statement of the receipts and expenses (including the salary of the curator), (ii) the names of the creditors, (iii) the verified amount of each claim, and (iv) the payment to be received on it.[121]

The distribution list is based on the ranking of the claims as determined during the verification, or follows from the determined characteristics of the claims that give entitlement to priority or a reduced rank, by subordination. The bankruptcy trustee must therefore first determine the ranking of the claims, insofar as this has not yet been done during the verification. The proceeds are then first used to settle the highest-ranking claims. If these have been paid in full, lower ranking claims are always paid until the remaining proceeds are insufficient to settle one or more equal ranking claims. The remaining proceeds are divided between these claims, *pro rata*, so that each creditor of equal rank receives an equal percentage of payment in proportion to the size of his acknowledged claim.

6. Identifying a Debtor's COMI

There is the obvious question about identifying the COMI. The United Nations Commission on International Trade Law ("**UNCITRAL**") drafted the Model Law on Cross-Border Insolvency (Model Law) as "a uniform approach" to having a single proceeding—a foreign main proceeding—be primarily responsible for managing a debtor's insolvency regardless of the number of jurisdictions in which the debtor has assets or creditors.[122]

Determining the proper location of a foreign main proceeding is a key concept of the Model Law. A foreign proceeding is a foreign main proceeding if it is pending in the country where the debtor has its COMI.[123] The Model Law does not define COMI, however, leaving courts to determine

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how to apply the term.

This has given rise to a divergence in the approach of the courts of various jurisdictions, particularly in deciding which date is the most important for making the COMI determination. There appears to be *less* divergence around the world on this issue (compared to the other issues explored above), and in this regard the views taken by the courts and commentators generally fall into three categories:

(1) *The date the foreign proceeding commenced.* It has been suggested that using the filing date for a foreign proceeding to determine COMI provides a fixed and readily identifiable date.[124] It also avoids different outcomes in different jurisdictions where applications for recognition are made at different times for the same debtor. The UK,[125] Europe,[126] Japan,[127] the National Bankruptcy Conference,[128] and the drafters of the Model Law have supported use of this date.[129]

(2) *The date of the recognition application.* This is—by far—the prevailing view in the United States. These courts generally examine the post-liquidation activities of a debtor to determine its COMI.[130] This avoids a key problem: the inability to recognize a foreign proceeding that has been pending for several years with full creditor and investor support if—all those years ago—the debtor's COMI was located in a different country.[131] In addition to the U.S., Singapore has adopted this interpretation.[132]

(3) *The date the court hears a recognition application.* This date is suggested to be consistent with article 18 of the Model Law for notifying changes of statutes and for modifying or terminating recognition based on changed circumstances. This flexible approach has been adopted by Australian courts.[133]

Every court has to agree that the date used to determine COMI should be consistent across all jurisdictions. Otherwise, the Model Law undercuts its own objectives with the possibility that different courts could determine a debtor's COMI differently, leading to multiple foreign main proceedings. Nonetheless, differences exist. These differences exist because valid competing policies are colliding, namely predictability and preventing abuse versus speed and flexibility.[134]

The debate is highlighted with insolvency proceedings for offshore jurisdictions, like the Cayman Islands, Bermuda, and the British Virgin Islands. Entities incorporate in these jurisdictions with exempted status to ensure that they have access to well-established legal systems that are equipped to handle specialized businesses. While these entities are incorporated in offshore jurisdictions, many have no real actual business in their place of incorporation. In addition, these entities are generally required to liquidate in their jurisdiction of incorporation. If COMI is determined at the date of the foreign proceeding, this could automatically foreclose recognition *ab initio* for a large portion of an entire set of valid and useful insolvency proceedings.

In part to deal with this problem, in 2013, the Second Circuit unequivo-

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cally held that a court should determine COMI as of the date of the recognition application and should consider actions taken in the foreign proceeding to make that determination.[135] Following this decision, many other courts granted recognition primarily based on activities occurring after the foreign proceeding began. Indeed, *In re Suntech Power Holdings Co. Ltd.* held that although the debtor's COMI was not in the Cayman Islands before the foreign proceeding was commenced, its COMI became the Cayman Islands as a result of liquidation activities.[136]

A recent case, *In re Modern Land (China) Co., Ltd.*, shows how material post-foreign-proceeding activities can be.[137] In *Modern Land*, the debtor was incorporated in the Cayman Islands, but had its assets, management, and business all in China.[138] The debtor merely negotiated a scheme of arrangement that was approved by the Cayman Islands' courts while maintaining its business operations in China.[139] Nonetheless, the U.S. court observed the practical realities of the case and granted recognition.[140] No scheme creditor objected to the debtor's COMI being located in Cayman and denying recognition would convert a highly consensual scheme into a Cayman liquidation in an effort to then obtain Chapter 15 at a later date.[141] In other words, denying recognition would be a lose-lose proposition for all parties involved.

Will we ever get a world-wide consensus on when to determine a debtor's COMI? Who knows? Let's just hope that Judge Clark's prediction from 2008 comes true and that "*common sense will tend to prevail over technicalities.*"[142]

Conclusion

A number of observations can be fairly drawn from the exercise that the writers have, as a group, entered into in this paper. First, there is increasing convergence in the restructuring and insolvency processes introduced around the world. More established regimes such as receiverships and liquidations appear to grant similar powers to the insolvency officers that take on roles within these procedures — whether they are known as "trustees" or "liquidators" or by any other name. Other features such as DIP financing have gradually been introduced to various jurisdictions such as Singapore, bringing them in line with older, perhaps more established jurisdictions for restructuring.

Second, while the Model Law has brought about in large part uniformity in the approach to cross-border insolvency, differences still exist. We see that, for example, as even the date for determining COMI may differ across jurisdictions.

Finally, the paper notes that such similarities or differences are not necessarily good or bad. They simply exist because different jurisdictions take into account various considerations each time these regimes are introduced or amended. Their value lies in the opportunities they present for strategic planning of cross-border insolvency and rescue efforts across jurisdictions. At their very core, these are tools that help all parties involved to work together, as advisors, to answer the same question the paper started with—

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NOTES:

[1]See, e.g., *Cambridge Gas Transportation Corporation v. Official Committee of Unsecured Creditors of Navigator Holdings plc* [2007] 1 AC 508.

[2]See Goode, *Principles of Corporate Insolvency Law* (2011, Sweet & Maxwell, Fourth Ed.), at 16-03.

[3]*Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ["**CCAA**"]. Although interim financing is also available in other statutory restructuring proceedings, such as proposal proceedings under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, this section will focus on interim financing under the CCAA.

[4]CCAA, section 11.2.

[5]CCAA, section 11.2(4).

[6]CCAA, section 11.2(5).

[7]CCAA, section 11.2(1).

[8]Although the courts have in the past recognized roll-up DIPs in Canada that were granted under Chapter 11 of the U.S. Bankruptcy Code, such a result is dependent on the circumstances. For instance, in Payless Holdings Inc. LLC, Re, 2017 ONSC 2321, the Ontario Superior Court of Justice (Commercial List) refused to recognize the roll-up DIP financing facility granted in Payless' proceedings pursuant to Chapter 11 of the U.S. Bankruptcy Code, as it encumbered assets of the Canadian entities that were neither borrowers nor guarantors under the pre-filing facility with the DIP lender.

[9]11 U.S.C.A. § 364(c).

[10]11 U.S.C.A. § 364(c).

[11]11 U.S.C.A. § 364(d).

[12]11 U.S.C.A. § 364(d)(1).

[13]11 U.S.C.A. § 361.

[14]See sections 67 and 101 of the Insolvency, Restructuring and Dissolution Act 2018 (the "**IRDA**").

[15]These provisions were first introduced by the Companies (Amendment) Act 2017 and came into effect on 23 May 2017.

[16]Indranee Rajah SC, Senior Minister of State for Law and Finance "Enhancing Singapore as an International Debt Restructuring Centre for Asia and Beyond" 20 June 2017.

[17]Section 67(1)(a), 101(1)(a) read with section 203(1)(b) of the IRDA. Section 203(1) sets out certain categories of debts that must be paid in priority to all other unsecured debts in the winding up of a company.

[18]Section 67(1)(b), 101(1)(b) read with section 203(1)(a) to (i) of the IRDA.

[19]Section 67(1)(c), 101(1)(c) of the IRDA.

[20]Section 67(1)(d), 101(1)(d) of the IRDA.

[21]Re Attilan, [2018] 3 SLR 898.

[22]CCAA, section 11.7(1). There are certain restrictions on who may be appointed as a monitor, including if such person (or such person's employer) was the debtor company's auditor at any time in the preceding two years.

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[23]See, e.g., Ernst & Young Inc. v. Essar Global Fund Limited, 2017 ONCA 1014 ["***Essar***"], at para. 109.

[24]For example, the monitor in *Essar* was permitted to bring an oppression action.

[25]Endorsement of Justice Penny in the CCAA proceedings of Boreal Capital Partners Ltd. et. al., Court File No: CV-21-00672654-00CL. In this case, Ernst & Young Inc., in its capacity as court-appointed Monitor, was authorized to continue and conduct an investigation into transfers of property that took place prior to the commencement of the proceedings, despite the debtor companies emerging for CCAA protection upon plan emergence.

[26]11 U.S.C.A. § 1102(a)(1).

[27]11 U.S.C.A. § 1102(a)(1).

[28]11 U.S.C.A. § 1102(a)(1).

[29]11 U.S.C.A. § 1102(a)(1).

[30]11 U.S.C.A. § 1102(a)(1).

[31]*Appointment of Official Committee of Retirees in the Commonwealth of Puerto Rico*, Case No. 17-03283-LTS, ECF No. 340 (D.P.R. June 15, 2017).

[32]*Order Pursuant to* Section 1102(A)(2) of the Bankruptcy Code, Directing the Appointment of a Committee of Retired Employees, Case No. 13-53846, ECF 279 (Bankr. E.D. Mich. Aug. 2, 2013).

[33]*Motion to Appoint a Retiree Committee*, Case No. 12-10202-mew, ECF No. 562 (Bankr. S.D.N.Y. Mar. 13, 2012).

[34]*Notice of Appointment of Non-Represented Retiree Committee*, Case No. 22-10426-MFW, ECF No. 383 (Bankr. D. Del. June 17, 2022).

[35]*Enron Employee Committee statement on Enron's reorganization plan*, PowerGrid Int'l (18 July 2003), https://www.power-grid.com/news/enron-employee-committee-statement-on-enrons-reorganization-plan/#gref.

[36]*Order Appointing the Official Committee of Tal Claimants*, Case No. 21-30589, ECF No. 355 (Bankr. W.D.N.C. Nov. 8, 2021).

[37]*Appointment of the Official Committee of Tort Claimants*, Case No. 19-30088-DM, ECF No. 453 (Bankr. N.D. Cal. Feb. 15, 2019).

[38]*Notice of Appointment of Committee—Tort Claimants*, Case No. 20-10343-LSS, ECF No. 142 (Bankr. D. Del. Mar. 5, 2020).

[39]*United States Trustee's Notice of Appointment of Official Committee of Tort Claimants*, Case No. 20-bk-00599 (HWV), ECF No. 83 (Bankr. M.D. Pa. Mar. 6, 2020).

[40]*Notice of Appointment of Additional Tort Claimants Committee of Sexual Abuse Survivors*, Case No. 18-09108-RLM-11, ECF No. 97 (Bankr. N.D. Ind. Dec. 19, 2018).

[41]*Notice of Appointment of Official Committee of Second Priority Noteholders*, Case No. 15-01145 (ABG), ECF No. 266 (Bankr. N.D. Ill. Feb. 5, 2015).

[42]11 U.S.C.A. § 1102(a)(2). Statute and case law impose a 'heavy burden' for the appointment of additional official committees. *See, e.g., In re M&G USA Corporation, 599 B.R. 256, 67 Bankr. Ct. Dec. (CRR) 44 (Bankr. D. Del. 2019).*

[43]See, e.g., In re Adelphia Communications Corp., 544 F.3d 420, 424 fn.l, 50 Bankr. Ct. Dec. (CRR) 166, 60 Collier Bankr. Cas. 2d (MB) 453, Bankr. L. Rep. (CCH) P 81328 (2d Cir. 2008) (citation omitted); In re Smart World Technologies, LLC, 423 F.3d 166, 175 fn.12, 45 Bankr. Ct. Dec. (CRR) 78, 54 Collier Bankr. Cas. 2d (MB) 1709, Bankr. L. Rep. (CCH) P 80353 (2d Cir. 2005) (citation omitted); Westmoreland Human Opportunities, Inc. v. Walsh, 327 B.R. 561, 573 (W.D. Pa. 2005) (outlining the fiduciary duties owed).

[44]See, e.g., *Adelphia Commc'ns*, 544 F.3d at 424 fn.l (citation omitted) (noting that a

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committee does not owe fiduciary duties to "the debtor, other classes, or the estate").

[45]11 U.S.C.A. § 1103(c).

[46]11 U.S.C.A. § 1103(c).

[47]See, for example, sections 109, 150, 165, 166 of the IRDA.

[48]Smitha Menon, Clayton Chong and Muhammed Ismail Noordin, Global Restructuring Review "Relevance of ad hoc committees in Singapore restructurings," 3 December 2020 (available here: https://globalrestructuringreview.com/guide/the-art-of-the-ad-hoc/edition-2/article/singapore).

[49]*Dutch Bankruptcy Act* ("**DBA**"), art. 74 at paragraph 1.

[50]DBA, article 75 at paragraph 1.

[51]DBA, article 76.

[52]DBA, article 105 at paragraph 1.

[53]DBA, article 78 paragraph at 2.

[54]DBA, article 79.

[55]DBA, article 69.

[56]CCAA, section 36(1).

[57]CCAA, section 36(3).

[58]For the purpose of this section under the CCAA, a person who is "related" to the debtor company includes (i) a director or officer of the debtor company, (ii) a person who has had, directly or indirectly, control in fact of the company, and (iii) a person who is related to a person that falls in either of those categories (CCAA, section 36(5)).

[59]CCAA, section 36(4).

[60]These principles originally were applied in the context of a sale of assets by a receiver, however, they have been applied in the context of CCAA proceedings.

[61]Royal Bank of Canada v Soundair Corp. (1991), 4. O.R. (3d) 1 (C.A.).

[62]11 U.S.C.A. § 363(a).

[63]11 U.S.C.A. § 363(f).

[64]3 Collier on Bankruptcy P 363.02 (16th 2022).

[65]*See In re APP Plus, Inc., 223 B.R. 870, 874, 34 Bankr. Ct. Dec. (CRR) 1153, 42 Collier Bankr. Cas. 2d (MB) 964 (Bankr. E.D. N.Y. 1998).*

[66]Fed. R. Bankr. P. 2002(a)(2); 3 Collier on Bankruptcy P 363.02 (16th 2022).

[67]3 Collier on Bankruptcy P 363.02 (16th 2022)

[68]Section 64 of the IRDA.

[69]Section 64(6) of the IRDA.

[70]Section 66(1) of the IRDA.

[71]Section 100(1) read with 100(3) of the IRDA.

[72]Section 100(2) of the IRDA.

[73]The three purposes are set out in section 89(1) of the IRDA: (a) the survival of the company, or the whole or part of its undertaking, as a going concern; (b) the approval under section 210 of the Companies Act 1967 or section 71 of the IRDA of a compromise or an arrangement between the company and any such persons as are mentioned in the applicable section; (c) a more advantageous realisation of the company's assets or property than on a winding up.

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[74]Section 100(5)(a) of the IRDA.

[75]Section 100(5)(b) of the IRDA.

[76]Section 140 of the IRDA.

[77]Section 144(2) of the IRDA.

[78]Section 144(3) of the IRDA.

[79]E.g. Re T&N Ltd, [2006] EWHC 1447 (Ch).

[80]E.g. Re La Seda de Barcelona SA, [2010] EWHC 1364 (Ch).

[81]CCAA, section 11.

[82]Metcalfe & Mansfield Alternative Investments II Corp., (Re), 2008 ONCA 587 ["***Metcalfe***"] at para. 61.

[83]Canwest Global Communications Corp., 2010 ONSC 4209 at paras. 28–30; Kitchener Frame Limited (Re), 2012 ONSC 234 ["***Kitchener Frame***"] at paras. 85–88.

[84]SkyLink Aviation Inc. (Re), 2013 ONSC 2519 at para. 30.

[85]*Kitchener Frame* at paras. 80–83.

[86]*Metcalfe* at para. 71; Cline Mining Corporation (Re), 2015 ONSC 622 at paras. 22–28.

[87]In re Purdue Pharma, L.P., 635 B.R. 26 (S.D. N.Y. 2021), certificate of appealability granted, 2022 WL 121393 (S.D. N.Y. 2022).

[88]Patterson v. Mahwah Bergen Retail Group, Inc., 636 B.R. 641 (E.D. Va. 2022).

[89]Pathfinder Strategic Credit LP v Empire Capital Resources Pte Ltd, [2019] 2 SLR 77, at para 76 ["***Pathfinder***"].

[90]Pathfinder Strategic Credit LP v Empire Capital Resources Pte Ltd, [2019] 2 SLR 77.

[91]Re Opes Prime Stockbroking Ltd., [2009] FCA 813. *Pathfinder*, at para. 81.

[92]R.S.C. 1985, c. B-3 ["**BIA"**].

[93]BIA, section 243(1).

[94]For example, Ontario's model receivership order is available online.

[95]BIA, section 243(1.1).

[96]BIA, section 247.

[97]11 U.S.C.A. § 704.

[98]11 U.S.C.A. § 109(b).

[99]11 U.S.C.A. § 1112(a).

[100]11 U.S.C.A. § 704.

[101]11 U.S.C.A. § 704(a)(1).

[102]11 U.S.C.A. § 363(b).

[103]11 U.S.C.A. § 704(a); 6 Collier on Bankruptcy P 704.02 (16th 2022).

[104]6 Collier on Bankruptcy P 704.02 (16th 2022).

[105]Court receiverships exist, but they apply in many other situations outside of the realm of corporate insolvency. For example, the Court may appoint a receiver to preserve property pending the resolution of a dispute between parties.

[106]The Insolvency Law Review Committee, Singapore (2013), *Final Report of the Insolvency Law Review Committee* (the "**ILRC Report"**), at p 50.

[107]Part 6 of the IRDA.

[108]ILRC Report, at p 51.

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[109]ILRC Report, at p 51.

[110]Section 160 of the IRDA.

[111]See, for example, section 166 of the IRDA.

[112]Section 125 of the IRDA.

[113]Section 140(1) of the IRDA.

[114]Section 144(1)(a) of the IRDA.

[115]Section 144(2)(a) and (b) of the IRDA.

[116]Section 230 of the IRDA.

[117]See, for example, sections 224 and 225 of the IRDA. There are other grounds for challenging past transactions entered into by the company; they are not exhaustively listed here. These clawback claims are generally also available to a judicial manager.

[118]Section 172 of the IRDA.

[119]DBA, article 179.

[120]DBA, article 180 at paragraph 1.

[121]*Id.*

[122]UNCITRAL Guide to Enactment and Interpretation of the Model Law (Guide to Enactment) paras. 3, 31, *available at* https://www.uncitral.org/pdf/english/texts/insolven/1997-Model-Law-Insol-2013-Guide-Enactment-e.pdf (the Guide to Enactment).

[123]Model Law, Art. 2(b).

[124]In re Kemsley, 489 B.R. 346, 354 (Bankr. S.D.N.Y. 2013); UNCITRAL Model Law: The Judicial Perspective para. 134 available at https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/judicial-perspective-2013-e.pdf; Guide to Enactment, para. 159

[125]See In the Matter of Videology Ltd. v. In the Matter of Cross-Border Insolvency Regulations 2006 [2018] EWHC 2186 (Ch); In re Stanford Int'l Bank. Ltd. and another [2010] 3 WLR 941. But see *Charlotte Moller, Helena Clark & Harry Rudkin, Clarity on Cross-Border Conundrum* (2019), available at https://www.globalrestructuringwatch.com/2019/04/clarity-on-cross-border-conundrum/.

[126]See generally Interedil Srl v. Fallimento Interedil Srl, Case C-369/09, [2011] ECR I-9939 at [55] [2012] Bus LR 1582, http://europa.eu.int/eurlex/en/index.html.

[127]*think3*, Tokyo High Court, chapter 3-2, p. 6; Tokyo District Court, chapter 3, issue 2-1, pp. 12–14.

[128]Letter from Jane Vris, Vice Chair, National Bankruptcy Conference to Reps. Tom Marino, David Cicilline, Chuck Grassley, and Dianne Feinstein (Aug. 20, 2018) available at https://drive.google.com/file/d/1DIfvi1wP9vQHFugAk1rcsPChmhw6VDX1/view.

[129]*Guide to Enactment*, para. 159.

[130]See for example, In re Fairfield Sentry Ltd., 714 F.3d 127, 138 (2d Cir. 2013) ["***Fairfield***"].

[131]*Fairfield* at paragraph 134 (quoting and agreeing with In re Ran, 607 F.3d 1017, 1025, 53 Bankr. Ct. Dec. (CRR) 59, Bankr. L. Rep. (CCH) P 81782, 5 A.L.R. Int'l 861 (5th Cir. 2010)) ("a meandering and never-ending inquiry into the debtor's past interests could lead to a denial of recognition in a country where a debtor's interests are truly centered, merely because he conducted past activities in a country at some point well before the petition for recognition was sought.").

[132]See in re Zetta Jet Pte Ltd., [2018] SGHC 16, [19] (Sing.).

[133]in re Zetta Jet Pte Ltd., [2018] SGHC 16, [19] (Sing.).

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[134] See Judge (Ret.) Leif M. Clark, "Center of Main Interests" Finally Becomes the Center of Main Interest in the Case Law, 43:14 Tex. Int' L J. Forum 17 (2008).

[135] *Fairfield* at paragraph 138.

[136] In re Suntech Power Holdings Co., Ltd., 520 B.R. 399, 416–17, 60 Bankr. Ct. Dec. (CRR) 90 (Bankr. S.D. N.Y. 2014).

[137] In re Modern Land (China) Co., Ltd., 641 B.R. 768 (Bankr. S.D. N.Y. 2022).

[138] 2022 WL 2794014 at * 8.

[139] *Id*. at *10.

[140] *Id.* at *13–16.

[141] *Id.*

[142] Judge (Ret.) Leif M. Clark, "Center of Main Interests" Finally Becomes the Center of Main Interest in the Case Law, 43:14 Tex. Int' L J. Forum 18 (2008).