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Enforcement Risk: Solving the Restructuring Challenge for Extra-territorial Plans

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CONTENTS

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Acknowledgment

INSOL International is pleased to publish this new technical paper, "Enforcement Risk: Solving the Restructuring Challenge for Extra-territorial Plans", authored by Tim Castle SC.

This paper has been adapted from the work originally submitted by the author as part of INSOL's Global Insolvency Practice Course.

The author identifies that an effective restructuring system involves three key elements: ease of access to a jurisdiction, the procedural and substantive rules of that jurisdiction, and the enforceability of the orders made by that jurisdiction. This paper contrasts the first and third of these elements. Specifically, as extra-territorial jurisdiction is increasingly assumed by courts in key commercial centres, so too does the risk of enforcement of the restructuring plan. Where universalism might be found at the jurisdiction stage, there continues to be a risk of a territorial approach at the enforcement stage, which undermines the restructuring.

The author aptly identifies that practitioners should address potential enforcement risks before concluding that an extra-territorial restructuring is worth the effort.

INSOL expresses its sincere thanks to the author for his exceptional insights and expertise in writing this paper.

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Enforcement Risk: Solving the Restructuring Challenge for Extra-territorial Plans

By Tim D. Castle SC,* F. INSOL, FCIArb[1]

1. Introduction – global competition for reorganisation plans

The preservation of value in a financially troubled business is a key driver of contemporary restructuring law and practice. The rationale is clear – a restructured going-concern entity offers the possibility of retaining value for stakeholders that would otherwise evaporate in a distressed sale.[2] An effective restructuring solution requires both a restructuring plan and a process that binds all relevant stakeholders to that plan. The assumption made in this article is that the restructuring plan is one which is approved by a court, and represented by a court order, rather than a consensual plan agreed out of court.

Multiple solutions now exist in jurisdictions around the world, which compete to offer their services as restructuring venues for global businesses, within a general normative framework of "collectivity, equality of treatment and efficiency".[3] These include a number of European jurisdictions, which have followed the 2019 European Directive on preventive restructuring frameworks,[4] as well as Singapore.[5] The general aim of these jurisdictional initiatives is that of universality, which Professor Goode describes as "the concept of both a single law and a single jurisdiction covering all assets".[6]

Despite the different restructuring options now available, the ultimate question remains: how can a restructuring plan be made in a foreign jurisdiction and implemented elsewhere to bind all relevant stakeholders, in respect of all of the company's assets and liabilities?

To simplify the analysis, this question is examined with reference to the well-established restructuring jurisdictions of the United States and England, from which conclusions can be drawn that are also relevant to the other, newly emerging, global restructuring jurisdictions mentioned earlier.

2. The restructuring challenge

The decision to start a business necessarily involves risk-taking, and some businesses will fail. The entity which is taken to be the subject of this article is a company (although it could equally be a non-corporate vehicle) operating internationally.[7] At some point, a risk of loss materialises, and the company becomes financially distressed. Assuming the core business is sound and does not require an operational restructure, the commercial

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* The views expressed in this technical paper are the views of the author and not of INSOL International.

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[2] UNCITRAL Legislative Guide (2004), objective 3, para 6.

[3] S Goplan and M Guihot, *Cross-Border Insolvency Law* (2016) LexisNexis Butterworths, Australia, [1.17], [1.25].

[4] EU Directive 2019/1023 has been implemented in The Netherlands, Germany, France, Spain and Italy.

[5] Insolvency, Restructuring and Dissolution Act 2018 (Sing).

[6] K Van Zweiten, *Goode on Principles of Corporate Insolvency Law* (5th ed, 2018, London).

[7] To avoid overcomplicating the analysis, the entity is assumed to be a single company, rather than a group, with international operations.

problem for stakeholders is one of allocating current or future losses between them, depending on the extent of the company's financial distress. This may be called the "restructuring challenge".

To understand this challenge, it must be acknowledged that the company is an artificial entity created and recognised by law to exist and have a legal personality. The business and affairs of a company exist due to a range or "nexus" of different contracts with and between stakeholders.[8] All of those counterparties will now assess the company's financial distress against their individual contractual or other legal rights – including their security interests and their extra-contractual bargaining leverage, for example as vital suppliers to the business. Any one or more of these stakeholders may therefore have the ability to open formal insolvency proceedings and force a value-destructive liquidation, or other distressed sale of the business or its assets.

Financial restructuring requires the company to make new or different contracts with some or all of its debt or equity stakeholders to facilitate the survival of the core business.[9] The insolvency literature recognises this process as "informal reorganisation", which operates "in the shadow of the law" of formal liquidation.[10] In its strict sense, "informal" reorganisation contemplates a mutual and voluntary agreement between affected stakeholders to adjust or re-form their contractual rights, using a consensual process such as that contemplated by the INSOL Principles,[11] or some other "soft law" instrument.[12]

The restructuring challenge arises more distinctly if one or more affected stakeholders will not agree to a variation or re-formation of their contractual or other rights.[13] This is because most legal systems assume that the decision to enter into a contract, or vary a contract, is a voluntary one based on the free and autonomous will of the contracting party.[14]

Thus, the function of restructuring legislation is to impose a variation or re-formation of the contractual rights upon dissenting stakeholders, within a collective procedure that transforms multiple individual rights and relationships.[15] In the United States and England, this is done by way of a "cram down" for individual creditors, or a "cross-class cram down" for dissenting classes,[16] which forces them to relinquish or vary their pre-existing rights

[8] M C Jensen and W H Meckling, "Theory of the Firm: Managerial Behaviour, Agency Costs and Ownership Structure" (1976) 3(4) *Journal of Financial Economics* 305-360.
[9] S Sundarsnam and J Lai, "Corporate Financial Distress and Turnaround Strategies: An Empirical Analysis" (2001) 12 *British Journal of Management* 183-199.
[10] J Adriaanse and J Kujil, "Resolving Financial Distress: Informal Reorganisation in The Netherlands as a Beacon for Policy Makers in the CIS and the CEE/SEE Regions?" (2006) *Review of Central and East European Law* 135-154.
[11] INSOL International, *Statement of Principles for a Global Approach to Multi-Creditor Workouts II* (2017).
[12] B Wessels and G J Boon, "Soft Law Instruments in Restructuring and Insolvency Law: Exploring its Rise and Impact" (2019) Tijdschrift voor vennootschapsrecht, rechtspersonenrecht en ondernemingsbestuur.
[13] For the purpose of this paper, to simplify the analysis, other rights such as statutory rights are assumed to involve an analogous approach to contractual rights.
[14] A Chrenkoff, "Freedom of Contract: A New Look at the History and Future of the Idea" (1996) 21 *Australian Journal of Legal Philosophy* 36-55.
[15] See above, n 3 at [1.17], quoting Fletcher.
[16] In the United States, see the US Bankruptcy Code Chapter 11, 11 USC §1141. In England, ss 899 and 901F provide for a "cram down" of individual class members under Parts 26 and 26A of the Companies Act 2006, and s 901G provides for a "cross class cram down" under Part 26A only.

upon approval by the court of the reorganisation plan, scheme or arrangement (referred to generically in this article as the Plan).

In this way, court-assisted reorganisations have the potential to fill the gap that exists in a classic "informal reorganisation". They do this by seeking to overcome the lack of consent, to enable the Plan to be finalised and implemented by the company in order to save its valuable business. It is the effectiveness of these court-assisted reorganisations that is the subject of the following sections of this paper.

3. Jurisdiction to restructure global businesses

The threshold issue in any court-assisted reorganisation is that of jurisdiction. That is, whether the court (or tribunal) in which the proceedings are filed has the power under the *lex concursus* – being the place of the filing – to hear and make the orders sought in the proceedings. Establishing jurisdiction does not mean the court will make the orders sought. Rather, it simply means the court will enter into the substantive consideration of the application.

Here, the jurisdiction question is whether a company can utilise court-assisted reorganisation mechanisms in another jurisdiction, specifically the United States and England. For this purpose, a foreign company is defined as a company that would not ordinarily be subject to the jurisdiction of the restructuring court, without entering into the debate about how one determines ordinary jurisdiction over a company for private international law purposes, including for example by reference to its centre of main interests (COMI)[17] or its place of incorporation.[18] Further, the exercise by a court of its regular restructuring jurisdiction for a foreign company may conveniently be called "extra-territorial" jurisdiction for the purpose of this article.

In the United States, Chapter 11 of the US Bankruptcy Code is concerned with the confirmation by the United States Federal Court of a reorganisation "Plan". That Plan is one that will ordinarily be filed by the "debtor", although it may also be filed by other interested parties, including creditors and equity holders of the "debtor" (11 USC §1121). Jurisdiction therefore depends upon the definition of "debtor" in 11 USC §109, and specifically subsection (a), which provides that "only a person who resides or has a domicile, a place of business, or property in the United States, or a municipality, may be a debtor" under the US Bankruptcy Code.

Courts in the United States have taken an expansive view of their jurisdiction under Chapter 11 by reference to the words "has … property in the United States" that appear in the definition of "debtor". In *McTague*, the placing of US $194 in an attorney's trust account to pay the filing fees for a Chapter 11 petition was held to be sufficient to meet this definition, and to ground the court's jurisdiction.[19] On this approach, any company from any part of the world could potentially file a valid Chapter 11 petition and invoke the jurisdiction of United States courts to effect a global reorganisation. Such a view may

[17] Cf. European Insolvency Regulation, EU 2015/848, art 3(1); UNCITRAL Model Law on Cross-Border Insolvency, art 2 (definition of "foreign main proceeding").
[18] Cf. *Lazard Brothers v Midland Bank Ltd* [1933] AC 289. See also M Davies et al *Nygh's Conflict of Laws in Australia* (2010) LexisNexis Butterworths, Australia at [35.36].
[19] *In re McTague*, 198 B.R. 428 (Bank. W.D.N.Y. 1996); *In re: Global Ocean Carriers Ltd* 251 B.R. 31 (Bank. D. Del. 2000)

be appropriately characterised as fulfilling a "universalist" approach to reorganisation, within Professor Goode's definition cited earlier.

A different route to jurisdiction, but one which is equally expansive, prevails in restructuring proceedings in England under the Companies Act 2006, in respect of schemes of arrangement under Part 26 or restructuring plans under Part 26A. The relevant test is whether there is a "sufficient connection" between the scheme or restructuring plan and England. This is based on the view that the English court has jurisdiction to approve schemes or restructuring plans over both registered and unregistered companies pursuant to section 895(2)(b) of the Companies Act.[20] The logical extent of this approach would allow the English courts to approve a scheme in respect of any company anywhere in the world. In order to avoid claiming such "exorbitant" jurisdiction, the English courts have developed a flexible "sufficient connection" test as the gateway to jurisdiction.[21]

Unlike the objective "property in the United States" test of Chapter 11, which can be satisfied in a relatively formalistic manner, the "sufficient connection" test involves a weighing of factors for and against the acceptance of jurisdiction by the English courts based on a consideration of the actual interests involved. Thus, for example, in *Rodenstock*,[22] a scheme was approved for a German company that was neither incorporated in England, nor had its COMI in England, on the basis that the senior lenders in that case had nominated English law as the governing law, and English courts as the venue, for resolving disputes arising under their financing documents. English courts have also been open to permitting "jurisdictional manoeuvring" by foreign companies to take advantage of English schemes, particularly where the outcome is viewed by the court as beneficial to creditors, and no "serious challenge" is made to the court's jurisdiction.[23]

The difference between the two approaches, in the United States and England, may not be as great as it seems, because of the ability of a disaffected party to challenge the invocation of the United States court's jurisdiction. The most direct route for a challenge is the abstention clause (11 USC §305), which permits a case to be dismissed and proceedings suspended "if the interests of the creditors and debtors would be better served by such dismissal or suspension". This was the course taken in the *Baha Mar Resort case*, where Carey J considered the "expectations" of stakeholders as to where disputes will be resolved to be a key factor in declining jurisdiction and dismissing the Chapter 11 proceedings in the United States.[24] However, other possible grounds include the abuse of process ground under 11 USC §105(a), or the doctrine of *forum non*

[20] See, by way of example, *In the matter of Rodenstock GmbH* [2011] EWHC 1104 (Ch); *Primacom Holding GmbH v Credit Agricole* [2012] EWHC 164 (Ch); *In the matter of Magyar Telecom BV* [2013] EWHC 3800 (Ch).

[21] A recent example of this was the decision of Johnson J in *In the matter of Safari Holding Verwaltungs GmbH* [2022] EWHC 781 (Ch), where the "sufficient connection" was found to exist upon the revision to the governing law of the notes from New York law to English law: at [9], [57]-[63]. The company was otherwise a German company operating gaming arcades in Germany and the Netherlands, and ultimately owned by a Luxembourg parent: at [2]-[6].

[22] *In the matter of Rodenstock GmbH* [2011] EWHC 1104 (Ch).

[23] Allen & Overy, "The Rise and Rise of the English Scheme of Arrangement" (2015).

[24] *In re Northshore Mainland Services, Inc.*, 537 B.R. 192, 208 (Bankr. D. Del. 2015).

conveniens, if the "oppression and vexation to a defendant" would be "out of all proportion to plaintiff's convenience".[25]

This brief review of the position suggests that both the United States and the United Kingdom statutes provide a very broad reach for their respective "extra-territorial" jurisdiction to open reorganisation proceedings for foreign entities. Second, it will be difficult for a dissentient shareholder to challenge jurisdiction in either a United States or United Kingdom court unless there are clear and compelling reasons why the court should decline to open these proceedings.

4. Enforcing the restructuring plan

Once the jurisdictional threshold is satisfied, the foreign company must address the substantive issues of law and procedure required by the reorganisation law of the *lex concursus,* in order to "cram down" the known or expected dissentients.

In the United States, a Plan will be confirmed if it is "fair and equitable", is not unfairly discriminatory, and is passed by at least one impaired class by a majority of 2/3 in value and 50% in number (§1129(b)). The court's discretion is relatively confined by §1129(b)(2), which deems a plan to be "fair and equitable" if creditors are no worse off under the Plan than they would be in a liquidation.

A broader discretion is conferred on the court in England by the use of the words "may ... sanction" in sections 899 and 901F of the Companies Act.[26] This is generally understood as being a test of fairness and reasonableness,[27] provided the requisite class majorities are obtained – being 75% in value and 50% in number for a scheme under Part 26 (section 899) or 75% in value for a Plan under Part 26A (section 901F). Where a "cross-class cram down" is sought under Part 26A, the court must also be satisfied that "none of the members of the dissenting class would be any worse off" than the next best alternative (section 901G).

One important additional discretionary factor in England, to which reference was made in *DeepOcean*, was that of enforceability of the scheme or the Plan in "relevant jurisdictions outside England and Wales".[28] In *Safari Holding*, Johnson J explained the test to be one of whether expert evidence "provides sufficient support for the conclusion that the scheme is likely, or will have a real prospect of having a substantial effect".[29] Apart from the abstention clause mentioned earlier, there is no equivalent requirement for a United States court to consider the extra-territorial effect of its approval of a Plan under Chapter 11 once jurisdiction is established or confirmed.

Upon the Plan being approved, focus then shifts to the enforcement of the Plan and the role of an enforcing court. The resolution of this problem will be straightforward in many

[25] *American Dredging Co. v Miller*, 510 U.S. 443 (1994).
[26] The English courts adopt the same general approach to the discretion in Part 26A as they do to Part 26: *In the Matter of DeepOcean UK Ltd* [2021] EWHC 138 (Ch) at [44].
[27] *DeepOcean* at [20] quoting, inter alia, *Re Telewest Communications plc (No. 2)* [2005] BCC 36 at [20]-[22].
[28] *Idem* at [67], citing also *Re Magyar Telecom BV* at [16].
[29] *Re Safari Holding Verwaltungs GmbH* [2022] EWHC 781 (Ch) at [68], citing *Re Codere Finance 2 (UK) Ltd* [2020] EWHC 2683 (Ch) at [34]. Johnson J answered that question in the affirmative on the basis of expert evidence that a German court would accept an English court order extinguishing obligations owed under existing notes, where the governing law of the notes was English law.

cases, such as *Rodenstock* or *Safari Holdings*, where the governing law of the relevant contracts was English law, and it was an English court that approved the scheme. In such circumstances, it would be relatively safe to conclude that the private international law rules at the place of enforcement would likely determine the contractual rights of the parties by reference to English law, including orders made under the scheme.
On the other hand, the refusal of the Isle of Man court to effect share transfers, as ordered under a Chapter 11 Plan in *Cambridge Gas*, demonstrated "territoriality" at work. This refusal was overcome by a powerful appeal made by Lord Hoffman in the Privy Council to a sentiment of "universalism", based on equating the outcome between the Chapter 11 Plan and an English scheme that could have achieved the same result.[30] In a later decision in *Singularis*, Lord Sumption criticised Lord Hoffman's approach on the basis that "the principle of modified universalism is part of the common law, but it is necessary to bear in mind, first, that it is subject to local law and local public policy". [31]

The tension referred to by Lord Sumption is that a Plan may be valid under the orders of the approving court (located in State A), but not enforceable against the stakeholder who matters (located in State B). To avoid a pyrrhic outcome of this type, three possible solutions can be identified.

First, there may be a law of general application in State B that allows judgments of the Plan approving jurisdiction, State A, to be "automatically" recognised and enforced. An example of such a law is the Australian Foreign Judgments Act 1991 (Cth), which allows judgments of specified States to be registered in Australia.[32] These include judgments of the English High Court, but not judgments of the United States courts. Even where a judgment is entitled to recognition, it can be set aside if the Australian court is satisfied the original court "had no jurisdiction in the circumstances of the case".[33] This is a question for the enforcing court (in State B) to judge by its private international law rules, and is not pre-empted by an assumption of jurisdiction by the Plan approving court (State A).[34]

Another possible example is the European Judgments Regulation (EJR), also known as the Recast Brussels Regulation.[35] However, even before Brexit, the EJR excluded "bankruptcy proceedings", as well as "judicial arrangements, compositions and analogous proceedings", which arguably encompass restructuring Plans.[36] In any event, the pre-Brexit application of the EJR to English schemes depended on certain preconditions being satisfied – such as whether there was submission to the English court's jurisdiction by all affected parties, or one creditor was domiciled in England. The existence of gateway conditions in general recognition statutes will require close

[30] *Cambridge Gas Transport Corporation* v *The Official Committee of Unsecured Creditors of Navigator Holdings PLC* [2007] 1 AC 508.
[31] *Singularis Holdings Ltd v Pricewaterhouse Coopers* [2015] 1 AC 1675 and see also *Rubin v Eurofinance SA* [2013] 1 AC 236, in which reference was made at [20] to a similar statement of principle in *Re Maxwell Communication Corp* 170 B.R. 800 (Bankr. SDNY 1994).
[32] *Rubin* referred to another example, s 426 of the English Insolvency Act 1986.
[33] Foreign Judgments Act 1991, s 7(2)(a)(iv).
[34] *Henry v Geoprosco International Ltd* [1976] 1 QB 726 at 734; *Rubin v Eurofinance SA* [2012] UKSC 426; [2013] 1 AC 236 at [7]-[9]; *Quarter Enterprises Pty Ltd v Allardyce Lumber Company Ltd* [2014] NSWCA 3, 85 NSWLR 404 at [53].
[35] EU 1215/2012.
[36] EJR, art 2 [Scope of Application text behind tab 11: German Graphics in CJEU, Nickel & Goeldner Case C-157/13, Nortel Networks Case C-649/13].

examination in each individual case, as it cannot be assumed that simply because the English, United States or other court has accepted jurisdiction, the Plan will be recognised by the enforcing court in another State.

Second, there may be insolvency specific laws and texts which are incorporated into the law of State B that contemplate recognition of the subject matter of the judgment (irrespective of the place it was delivered). This is an evolving area of international law and practice, led by the work of UNCITRAL, in relation to two of its model laws, the Model Law on Cross-Border Insolvency (MLCBI) and the Model Law on Insolvency Related Judgments (MLIJ). The first of these, the MLCBI, was promulgated in 1997 and has been adopted in 57 States.[37] The latter, the MLIJ, is more recent, from 2018, and has not yet been adopted in any State.

These Model Laws may be complemented by other regional laws, such as the European Union's Insolvency Regulation 2015 (EUIR).[38] The solution to the problem of "territoriality" adopted by the Model Laws and the EUIR is one of "modified universalism", based on the predicate that the appropriate court to open any insolvency proceeding,[39] and in the case of the EUIR any pre-insolvency proceeding,[40] is determined by the debtor's COMI. However, on the assumption made earlier in this article, acceptance of "extra-territorial" jurisdiction in respect of a foreign debtor excludes the COMI as a basis for jurisdiction. Thus, in principle, the Model Laws and the EUIR will, or may be, of little assistance in the enforcement of a reorganisation order of a foreign court, acting extra-territorially. It is also difficult to see how express or implicit disfavour of "forum shopping" under these texts would lead to a relaxation of the basal COMI requirement.[41]

There may also be other problematic issues under the MLCBI and MLIJ in relation to the reorganisation of foreign companies, which may also be noted. For example, English schemes may not satisfy the requirements in the MLCBI and MLIJ that Part 26 of the English Companies Act is a "law relating to insolvency", to be a "foreign proceeding" under article 2 of the MLCBI or an "insolvency proceeding" under article 2 of the MLIJ.[42] More critically, as noted in the Guide to Enactment to the MLIJ, the need for the MLIJ was a result of significant "uncertainty" about the application of the MLCBI to the recognition and enforcement of judgments given in foreign insolvency proceedings, and the fact that very few States had specific recognition and enforcement regimes for insolvency related judgments.[43]

Although the MLIJ seeks to solve some of these problems, it does not expressly remove the "territoriality" concerns. In particular, one of the grounds for refusal of recognition and enforcement of an insolvency related judgment under article 14(h) is whether "the

[37] UNCITRAL, Status: UNCITRAL Model Law on Cross-Border Insolvency (1997), https://uncitral.un.org/en/texts/insolvency/modellaw/cross-border_insolvency/status, accessed 5 April 2023.
[38] EU Regulation 2015/848.
[39] MLCBI art 2(b) describes "foreign main proceedings" with reference to COMI; MLIJ art14(h)(i) provides a ground of refusal for a judgment which does not comply with the MLCBI.
[40] EUIR arts 19, 20 and 32 tie recognition and enforcement of judgments to art 3 jurisdiction based on the COMI.
[41] See for example EUIR recital para 5 which does not look favourably upon forum shopping.
[42] Cf. the "financial difficulties" precondition to jurisdiction in s 901A(2) under Part 26A, which has no equivalent in Part 26.
[43] UNCITRAL (2019) at [2], citing inter alia the *Rubin* decision, and [8].

judgment originates from a State whose insolvency proceeding is not or would not be recognised" in the enforcing State, with certain exceptions to this rule. As Borraine has noted wryly, "in general, States are more willing to export than import insolvency proceedings".[44]

Third, the company could seek to rely on general principles of comity as between the courts in the enforcing State, State B, for the approval of the reorganisation Plan in State A.[45] Principles of comity are inherently discretionary and therefore uncertain, and may produce inconsistent results.[46] Implicit in such cases are normative, "territorial" judgments based on the enforcing court's standards about the appropriateness of proceedings being filed in a foreign jurisdiction and / or the exercise by the foreign court of that jurisdiction, as Lord Sumption addressed in *Singularis*, quoted above.

Examples of "territorial" approaches exist even within the well-established international enforcement regime for arbitration awards. An example of such a case in which the author was involved was the refusal of an Australian appellate court in *Hub* to enforce an award made by an arbitral tribunal constituted by an order of a Qatar court, on the basis that the Australian court considered the Qatar court should not have exercised the jurisdiction which it did.[47] To underscore the risk of relying on comity, it will usually be the case that the enforcing court will be asked, as it was in *Hub*, to enforce an order made in a foreign jurisdiction against a party resident in the place of enforcement.

By way of summary, there is more work to be done at an international level to support the emergence of a global market for court-assisted restructuring to ensure the same spirit of "universalism" exists at the enforcement stage, as it does at the jurisdiction stage. However, at present, the enforcement options examined in this section do not inspire confidence that orders of the approving court that "cram down" individuals or classes under the *lex concursus* will necessarily be enforceable against the dissentient creditors or classes - in which case the Plan, in relation to which the company and its consenting stakeholders will have invested considerable time and money to gain approval, will not achieve its intended effect of binding dissentient creditors.

5. Conclusion – addressing enforcement risk is critical

The answer to the underlying question addressed in this Paper is that enforcement issues are an important constraint on the use of a foreign court to provide assistance in the reorganisation of an entity in financial distress. As the United States and English examples demonstrate, the jurisdictional threshold is a relatively low bar to cross in most cases. Once satisfied, these courts have the "cram down" powers to overcome the objections of dissenting stakeholders, by approving a Plan that re-forms the contracts between those stakeholders and the entity, or between the stakeholders themselves, to allow the underlying business to survive. However, the "universalist" nature of these low

[44] A Boraine, "A Framework for International Insolvency", INSOL International, Global Insolvency Practice Course Guide.
[45] *Hilton v Guyot,* 159 US 113 (1895) at 163-164; see also *Rubin* at [29]-[34].
[46] Borraine cites, by way of example, the difference in approaches between the Privy Council decisions in *Cambridge Gas* and *Singularis*, discussed above. Another example of lack of comity, from the United States, is the anti-suit injunction granted in *Laker Airways v Sabena* 731 F 2d 909 (1984) (DC Circ.) at 937, cited in Goplan & Guihot (see above, n 3).
[47] *Hub Street Equipment Pty Ltd v Energy City Qatar Holding Company* [2021] FCAFC 110 at [49], [60], [82].

jurisdictional bars may falter when confronted with the "territorial" nature of the need to enforce the Plan in the uncertain environment of other courts.

Unless restructuring advisers carefully consider the enforceability of the proposed Plan, there is a risk that the approving court's orders will not be effective, and the reorganisation may fail. The critical issue for the restructuring of a foreign company is identifying which court's orders will be required to enforce the Plan against any likely dissentients. This may be seen to invert the choice of jurisdiction for the approving court, but it may be the only way to answer the restructuring challenge, absent a global recognition convention or model law. An interesting aspect of the English cases that have considered the issue of enforceability is the high level of support that existed for the respective schemes in those cases, indicating the enforcement risks were likely to have been low, at least in terms of a disaffected stakeholder seeking to challenge the application of the Plan to it.

Approving courts can assist in the process of addressing enforcement risks associated with "extra-territorial" jurisdiction by posing the question of enforceability at the initial stages, as was done in *Safari Holdings*, and not merely at the approval stage as was done in *DeepOcean*. Although the answer to that question will be neither conclusive nor binding on the enforcing court, it will at least force the company and those promoting the Plan to consider the enforcement risks at an early stage. Better still is for the practitioner to ask, when considering where to open proceedings, which court-approved Plan is mostly likely to be enforceable against the likely opponents of the Plan to rescue the entity, to best meet the restructuring challenge for the entity in question.

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