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WHAT DOES IT TAKE TO HAVE AN EFFECTIVE RESCUE FINANCE MARKET?

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ACKNOWLEDGEMENT

INSOL International is pleased to present this new technical paper, "What Does it Take to Have an Effective Rescue Finance Market?", written by Debra A. Dandeneau, Partner, Baker & McKenzie LLP, New York, USA*.

The paper provides a refreshing view on the complex issue of rescue finance, from the perspective of the very investors that often provide this capital. The paper goes beyond the mere formalities and theory of how rescue finance is meant to work and explores key practical limitations that can undermine the efficacy of a rescue finance market. Among other things, the paper addresses the role of alternative capital providers (beyond commercial banks), the regulatory and market infrastructure needed to incentivise rescue finance, and changes to restructuring processes such as credit bidding and simplified processes for SMEs that could be pursued by policy makers in the future.

In the current period of economic adversity and business distress – leading to an enhanced demand for effective restructuring tools and outcomes to ensure economic stability – this paper is timely. As the lifeblood of any business, working capital is critical to an effective restructuring outcome, and an active and functioning rescue finance market is properly seen as a key pillar of a best practice restructuring and insolvency regime.

The paper will be an important resource for INSOL International's members, and we wish to thank the author for her novel insights and expertise in writing the paper.†

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* Special thanks to Alexis Marin, who will be joining Baker McKenzie as a first-year associate in 2025, for his valuable research and contributions to this article.

† In 2022 the author chaired a technical session at the INSOL London conference titled - *Developing a Rescue Finance Market – Straight from the Investors Mouth.* This paper includes some of the content that was covered by the panel members. The panel members were - Damon Meyer of Highbridge Capital Management USA, Federica Pietrogrande of Gordon Brothers (then), Italy, Pierre Bour of Fidera, France and Ashok Kumar of BlackOak LLC, Singapore.

1. Introduction

Throughout 2024, interest rates have remained high globally, and companies around the world have continued to experience distress at an increasing rate.

In good times or bad times, though, the ability of a distressed company to access rescue financing remains a key component of its successful restructuring. As lawmakers enact new laws in an effort to reform restructuring regimes throughout the world, "rescue financing" often gets lip service. But do the statutory provisions go far enough? And, even if the statutes on their face provide for the legal mechanisms needed to encourage rescue financing, is that sufficient?

This paper addresses what it takes to have an effective rescue finance market from the perspective of the investors that often provide such capital.

2. Rescue financing basics

2.1 What is rescue financing?

"Rescue financing" can be defined broadly to include any financing to a company that is stressed or heading to financial distress. Often, the company will need to refinance, restructure or find additional sources of liquidity. However, it is very difficult to achieve that via traditional debt markets. Rescue financing will help facilitate the restructuring process, whether in-court or out-of-court.

Rescue financing generally can be broken down into three time periods:

- pre-insolvency support, either as a bridge to a larger transaction or as part of an out-of-court workout;
- "DIP financing" – adopting the United States term for "debtor in possession financing," which typically arises after the commencement of a formal restructuring process and may require approval of the court supervising the restructuring case; and
- exit financing to facilitate the debtor's emergence from the formal restructuring process and potentially provide the reorganised debtor with an ongoing source of liquidity.

Depending on how the restructuring of a distressed company proceeds and gets resolved, a borrower may require all three of these types of rescue financing. Often, the existing senior secured lenders become the source of DIP financing, especially when the borrower already has pledged all its assets, and no other meaningful collateral exists to secure new debt.

In the United States, the provider of the rescue financing is almost always an incumbent lender and likely at the top of the capital structure, but by the time the company files for bankruptcy, most of the senior secured lenders are alternative capital providers. Except for these commercial practicalities, however, it is not necessary that the same lender group be the source of all three of the above categories of rescue financing.

The role that exit financing plays as a component of rescue financing often is overlooked. If a company emerging from a restructuring does not have sufficient capital, has it really been restructured properly? Exit financing is the one type of rescue financing in which it may be more possible to bring in new capital providers, especially if the restructuring process has led to a "right-sizing" of the company's balance sheet.

For example, Hertz Global Holdings confirmed a Chapter 11 plan that paid all its creditors in full as a result of new investors providing approximately US $5.9 billion of new equity capital, and the company was able to put in place approximately US $2.8 billion of new corporate financing.[1] LATAM Airlines also succeeded in lining up exit financing from new lenders for approximately US $2.25 billion of new debt and a new US $500 million revolving line of credit.[2]

2.2 What are the typical sources of rescue financing?

"Alternative capital providers" are the most likely source of rescue financing in most markets today. Generally speaking, an alternative capital provider is any non-bank source of financing, such as a hedge fund or private equity firm, and the term is defined more by the nature of the lender than by the nature of the investment. The term "alternative capital provider" encompasses direct lenders, credit funds and distressed funds. The different types of alternative capital providers often overlap, but their approach and investment strategies may differ.

In the past, many of the alternative capital providers that provided rescue financing referred to themselves as "distressed debt investors" (an upgrade from early characterisations such as vulture funds). More recently, though, the concept of alternative capital providers has broadened, and true distress may only be one part of an alternative capital provider's investment strategy. The shift towards using words such as "opportunistic" and "dislocation" in recent years signalled the lack of opportunities in true distress. With the changing economic climate, will the nomenclature once again change?

1 Hertz's Press Release`, 10 June 2021, announcing confirmation of its Chapter 11 plan,
2 LATAM's Press Release, 11 June 2022. See also, David Skeel, "Pandemic Hope for Chapter 11 Financing", *Yale Law Jorunal Forum* (10 November 2021) (discussing the Neiman Marcus bankruptcy and noting that a "new lender may also be more willing to provide exit financing – that is, new financing for the debtor as it emerges from bankruptcy – given that it will have the benefit of all the information produced by the bankruptcy case when it offers to make an exit loan, assuming the exit financing offer is made during or at the end of the case, rather than at the outset").

2.3 What is the importance of alternative capital providers to the rescue financing market?

It is often difficult for traditional banks to provide rescue financing. The reasons may vary by jurisdiction, but some common themes arise globally:

- When a company needs rescue financing, it needs it quickly. Traditional banks often are slower to respond in providing new money. Many factors can contribute to the time within which a bank can respond, including institutional or regulatory approvals required before new money can be advanced. In addition, syndicated loans can involve many lenders, all of whose approval may be needed to provide new capital or agree to the subordination needed for a new money lender to participate. In contrast, alternative capital providers tend to have more streamlined approval processes and are not burdened by the same regulatory requirements. These factors enable them to respond quickly to distressed and potentially distressed situations.
- Traditional banks often do not want to, or cannot, be part of the longer-term solution for their borrower. This means that they have less incentive to invest more money into the process or to accept incentives, such as potential equity in the borrower, that other investors might find attractive. In Europe, for example, the group of investors willing to invest in risk-based equity is considered to be quite small compared to the United States.[3] In some circumstances, this can become an obstacle for restructurings. In contrast, the term "loan to own" is often used in connection with the motives of alternative capital providers, many of which view rescue financing as a means to acquire an equity stake in a company.[4]
- Because of regulatory restrictions, alternative capital providers may be able to provide riskier layers of capital than banks.[5]
- Similarly, alternative capital providers that focus on asset-based lending may place value on assets that might be overlooked by traditional lenders, including the value of recognised brand names.[6]
- In some jurisdictions, however, alternative capital providers are not common players in restructurings, even in sophisticated commercial markets that have seen a lot of growth in non-distressed investments by alternative capital providers. In Singapore, for example, there have been very few new DIP financings by alternative capital providers.[7] As explained below, a variety of explanations exist for the absence of alternative capital providers in some jurisdictions, including regulatory barriers, unwillingness of banks to sell their distressed debt and the lack of a functioning market for the trading of commercial bank debt.

2.4 In contrast, what is the typical role of traditional lenders, such as commercial banks, in restructurings?

For these and other reasons, commercial banks often are not significant players in restructurings and tend to sell their loans in those jurisdictions in which a market exists, and the regulatory regime permits, such sales. Traditionally, two key factors have influenced banks' decisions to sell their loans.

The first factor relates directly to the bank's balance sheet. In some jurisdictions, banks are required to mark their loans to market. As a result, when a loan experiences distress, the bank will need to increase its regulatory capital to account for the potential losses on its loan. For that reason, the bank may make the decision that it is better to exit the potentially distressed situation by selling its debt, even at a discount, than wait and hope for a better recovery, especially if the "waiting and hoping" strategy requires the bank to advance more funds to its borrower.

In other jurisdictions, a different dynamic exists. If a bank is not required to reflect the value of a distressed loan until and unless it ultimately fails to collect on the loan, then the bank may have the incentive to hold on to the loan so as not to adjust its regulatory capital downwards. For many years, this was the situation in Europe until regulators stepped in and forced banks to take more aggressive measures to reserve for non-performing loans.[8] For the most part, European banks in recent years have been financially more capable of bearing the immediate loss, as well as more willing to sell their distressed loans.

The second factor is concern about the bank's reputation. This takes the form of the commercial sensitivity in some jurisdictions – a sentiment that still exists in many regions today – that a bank that sells its loan, especially a sale

3 European Commission, *Study on Equity Investments in Europe: Mind the Gap* (2021) (independent expert report edited by Copenhagen Economics arguing that the EU is trailing the US in equity investment).

4 "[D]istressed debt investors … take on the long and risky task of finding new ways to generate profits from a company that is failing or already in bankruptcy." Further, "private equity firms and other corporate financiers who buy distressed debt don't asset-strip and liquidate the companies they purchase. Instead, they can make good returns by restoring them to health and then prosperity. These buyers first become a major creditor of the target company. This gives them leverage to play a prominent role in the reorganisation or liquidation stage." See World Economic Forum, *Alternative Investments 2020: An Introduction to Alternative Investments* (July 2015).

5 Fabio Cortes et al., *Global Financial Stability Report April 2024*, International Monetary Fund, The Last Mile: Financial Vulnerabilities and Risks (imf.org). Although discussing the growth of private credit in performing corporate credit, the Report notes: "Private credit creates significant economic benefits by providing long-term financing to firms too large or risky for banks and too small for public markets. However, credit migrating from regulated banks and relatively transparent public markets to the more opaque world of private credit creates potential risks." The Report goes on to note, though, that "[p]rivate credit managers also claim to have much greater resources to deal with problem loans than either banks or public markets, thereby enabling fewer sudden defaults, smoother restructurings, and lower costs of financial distress."

6 For example, Authentic Brands Group has pursued a successful "buy and build" strategy by acquiring and then investing in troubled brands. See "Authentic Brands Group's Acquisition Strategy: A Look at the Past Five Years." This strategy has included partnering with retail landlords to acquire some brands out of bankruptcy, such as Brooks Brothers. See Brooks Brothers to be sold for $325 million to Simon, Authentic Brands (cnbc.com). Gordon Brothers also has invested in brands, but its focus on "non-traditional" assets extends beyond brand acquisitions.

7 Pierre Dzakpasu, et al., "An Updated Look at Singapore's DIP Financing Regime," *Global Restructuring Review*, 15 August 2024 (noting that the reasons for the limited use of Singapore law's super priority financing option include greater reliance on workouts and the strength of banking relationships to restructure distressed situations). See also Lim Cheng Khai, Alternative Investment Management Association Singapore Forum 2023 Speech, Monetary Authority of Singapore (28 March 2023), "Growth Opportunities of Alternative Investment Industry and its Ecosystem in Singapore" - Speech by Mr Lim Cheng Khai, Executive Director, Financial Markets Development Department, Monetary Authority of Singapore, at the Alternatives Investment Management Association Singapore Forum 2023 (mas.gov.sg) (private credit is still relatively more nascent in Asia compared to the US and Europe.).

8 Regulation (EU) 2019/630 (amending Regulation (EU) No 575/2013 as regards minimum loss coverage for non-performing exposures).

to an alternative capital provider, will not be perceived in the market as a good "relationship bank." In the United States, that ship sailed a long time ago. Within the past decade, many European banks were reluctant to sell their loans because of this concern. Now, the European commercial banks seem to have tackled the reputational dilemma, although the sentiment may still exist outside of Europe, the United Kingdom and the United States.

3. Barriers to entry faced by alternative capital providers in certain markets

In some jurisdictions, alternative capital providers face barriers to participating in distressed situations.

3.1 Developing a regulatory framework that permits and promotes financing by alternative capital providers

Perhaps the most important and pervasive barrier to entry is a regulatory regime that does not permit non-bank lending to commercial borrowers.[9] These restrictions exist in many otherwise commercially sophisticated jurisdictions.[10] In some jurisdictions, even if foreign investors may buy and hold bank debt, foreign investors may face a minimum holding period requirement that restricts their ability to re-sell the purchased debt.[11] Especially in distressed situations, alternative capital providers may be hesitant to lock themselves into a debt position for any length of time.

The issue is compounded by a lack of consistency in some jurisdictions. For example, no unified approach to non-bank lending exists in the countries comprising the EU.[12]

Historically, the United States and individual states within the United States have not regulated commercial lending activities by non-traditional lenders, except for certain jurisdictions that still have usury laws on the books for commercial loans. Although some states have started to adopt disclosure laws for certain commercial loans, similar to the federal Truth in Lending Law, very few restrictions are placed on commercial lending by non-bank lenders in the United States.

3.2 Robust market and infrastructure for debt trading

Some jurisdictions, such as the United States, also benefit from a well-developed market and established process for the trading of commercial bank debt. In the absence of having trading desks that are able to connect sellers with potential buyers, it is more difficult for alternative capital providers to enter potentially distressed situations unless they have developed their own relationships with commercial banks in the region.

4. Challenges faced in jurisdictions

It is not enough to have laws on the books that facilitate debt trading and provide a comprehensive restructuring regime. Even as many countries work to reform their restructuring laws and invite alternative capital providers to participate in developing restructuring solutions, many jurisdictions have faced problems with implementation of the new laws.

4.1 Enforcement of the laws as written

One consideration is whether the jurisdiction has in place the processes – and the sheer willingness – to enforce the laws as written. In some countries, meddling in the background by regulators and others can result in legal reforms being on the books, but not really being enforced.

Investors want predictability. This is perhaps the single most important factor cited by alternative capital providers when they determine whether to invest in a particular jurisdiction. Many elements comprise predictability, but in the end it revolves around the ability to understand the laws and know how (and if) the laws will be enforced. Predictability requires that a secured lender be able to enforce its rights against its collateral in accordance with the law, as written. In common law jurisdictions, it requires swift and clear determination by lower courts and appellate courts of the developing legal issues.

Predictability also requires that enforcement of the laws be free of political meddling, which can be characterised as having government systems and agencies interfering and "fiddling" with the law in the background based on whatever the particular prevailing political agenda may be. Of course, any new set of laws likely will have to undergo a period of seeing what works well and what should be changed. This has occurred, for example, with the development and implementation of India's Insolvency and Bankruptcy Code (IBC). The adoption of the IBC and its subsequent modifications largely have been driven by the Reserve Bank of India, the predominant regulator of the credit ecosystem in India.[13]

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9 For a theoretical analysis arguing that deregulation contributes to an increase in non-bank lending, see Mary Chen et al., *Less Bank Regulation, More Non-Bank Lending*, Finance and Economics Discussion Series 2023-026, Washington Board of Governors of the Federal Reserve System.

10 For example, France requires loans to be originated from French-domiciled Alternative Investment Funds (AIFs) in order to lend to nonfinancial enterprises. Additional, direct lending by certain French AIFs is allowed based on some conditions (including type of entities receiving loan, duration of loan and microfinancing), but it does not apply generally. See Decree no. 2018-1004 and Decree no. 2018-1008. See, also Alternative Credit Council, "Non-Bank Lending in the European Union" (2019), 20-21.

11 In India, for example, a foreign investor looking into External Commercial Borrowings (ECBs) would be subject to a minimum average maturity period of three years, making any option not exercisable. See Master Direction No. 5 on 'External Commercial Borrowings, Trade Credits and Structured Obligations. 26 March 2019. Additionally, any transferor of a loan would be subjected to a minimum holding period (MHP) that amounts to "a. Three months in case of loans with tenor of up to 2 years; b. Six months in case of loans with tenor of more than two years." Reserve Bank of India: Master Directions (rbi.org.in). For an overview of available instruments, see Vikas Saluja, *Debt Funding in India: Options Available to Foreign Investors, Entrepreneurs,* India Briefing (2021), Debt Funding in India: Options for Foreign Investors and Entrepreneurs (india-briefing.com).

12 *EBA Report on Other Financial Intermediaries and Regulatory Perimeter Issues*

13 In January 2024, Shaktikanta Das, the Governor of the Reserve Bank of India, gave a speech in which he offered his reflections on the implementation of the IBC, as well as suggestions for improvements of the law. See the Keynote Address at the Conference on Resolution of Stressed Assets and IBC – Future Road Map, at the Centre for Advanced Financial Research and Learning (CAFRAL), Mumbai, 11 January 2024.

4.2 Controlling expenses associated with restructurings

But is there a price to pay for predictability? Even long-standing restructuring systems have their issues. The United States restructuring regime is widely recognised as the gold standard and many of the new restructuring laws that jurisdictions have adopted incorporate features of the United States Bankruptcy Code. These include laws on the books in the EU, Japan, Saudi Arabia and Singapore, as well as, potentially, any country that uses the term "cram down" in the text of its restructuring statutes.

One of the chief criticisms of the United States restructuring process, particularly when a troubled company must use a formal Chapter 11 filing to facilitate its restructuring, is that the Chapter 11 process is far too expensive. One problem (perceived or real) is that "everyone" gets their fees paid in the process – secured lenders, official committees and even ad hoc groups participating in the process.

Critics also point to the Chapter 11 process as involving more legal wrangling before the bankruptcy court. United States bankruptcy judges, by and large, are known for their willingness and ability to address complex legal issues in an expeditious manner. Many rule from the bench after hearing argument on a matter. These are qualities that make the United States bankruptcy system attractive to investors. Has the United States, however, made it too easy to have disputing parties run to their "parent" than attempt to resolve differences themselves?

It is also worth noting that litigious behavior is not limited to fighting between the borrower and its creditors, but often involves infighting among creditors. Perhaps euphemistically, the transactions that generate these disputes have been called "liability management exercises," and the disputes have been (less euphemistically) labelled "creditor on creditor violence."

This latest chapter in United States bankruptcy history arises as a result of complex debt restructuring transactions[14] that occur prior to the commencement of a formal court-supervised restructuring case. In recent years, many of these transactions have been criticised as being designed to favor a select group of lenders – even within the same lending group. Some academics have alleged that the practice also works to help the private equity sponsors of debt-laden companies.[15]

Despite the hand wringing about professional fees in United States Chapter 11 cases, no one has identified a viable solution to the problem. Valuation disputes often arise in contested restructuring cases, but, even under more recently adopted regimes such as the Dutch *Wet Homologatie Onderhands Akkoord* (more familiarly called WHOA), approval of a scheme over the dissent of a creditor will require the traditional submissions by all interested parties of liquidation and reorganisation values.[16] Even in arbitration, parties have the right to submit expert reports on disputed valuation issues, although parties may agree in their contract to have certain disputes resolved by an independent valuation expert. To date, no major restructuring regime has adopted a system under which a key issue such as valuation is left to an independent expert, and it is likely that such an approach would not receive a favorable reaction from alternative capital providers. The same investors who complain about the fees involved in litigious restructuring cases also are likely to want the flexibility to come into court and litigate disputes; they do not want to be bound by the determinations of independent experts.

One argument is that the high cost of Chapter 11 encourages out of court restructurings or at least prepackaged cases, but that is not always the case. Although a benefit of the US process is that it allows for robust participation by all stakeholders, that right, along with the thresholds for a consensual restructuring and the cost of a non-consensual restructuring, can encourage hold-outs and "economic terrorism." A large, complex corporate debtor may have the resources to go through such a process, but these issues make it particularly hard to restructure SMEs.

In Chapter 11, the debtors are obligated to pay the professional fees of the unsecured creditors' committee.[17] It also is routine as part of negotiated adequate protection orders for debtors to agree to pay the fees of secured creditors. Although the United States Bankruptcy Code grants over-secured creditors the right to receive fees to the extent provided by their underlying debt documents, debtors often will agree to pay the fees and expenses of other creditor groups, such as ad hoc committees, as an inducement to come to the bargaining table prepetition and then may continue that practice post-petition. Although, ultimately, creditors should have an incentive to keep fees to a minimum because the funds, after all, are likely "their money," these competing interests of the groups often create a prisoner's dilemma when it comes to fees.

Academics have come forward with various approaches to evaluating fees in United States Chapter 11 cases. For example, Professor Nancy Rappoport is a proponent of using big data and legal analytics to improve efficiency in staffing in matters,[18] whereas Professor Bussel has argued for a modified English rule approach to allow fee shifting in Chapter 11 cases under certain circumstances.[19]

14 Sergio Padilla, "Barclays: Creditor on Creditor Violence to Continue," Private Debt Investor" (8 August 2024); Matt Wirtz, "Coming to a Cash-Strapped Company Near Your: Creditor-on-Creditor Violence," *The Wall Street Journal* (19 August 2024).
15 Parikh, Samir D., "Financial Disequilibrium" (13 December 2023). 171 U. Pa. L. Rev. 1925.
16 Vincent van Liere and Menno Booij, "The New Dutch Scheme: Valuations Emerge as Main Battleground Between Stakeholders Under the WHOA," Alvarez & Marsal.
17 11 U.S.C. § 328.
18 Rapoport, Nancy B., Client-Focused Management of Expectations for Legal Fees in Large Chapter 11 Cases (19 February 2020). 28 *American Bankruptcy Institute Law Review* 39, 2020.
19 Bussel, Daniel J., Fee-Shifting in Bankruptcy, 95 *American Bankruptcy Law Journal* 613 (2021), UCLA School of Law, Law-Econ Research Paper No. 21-09.

5. What changes can encourage the participation of alternative capital providers in a jurisdiction?

Of course, it is not enough simply to identify the various obstacles and challenges faced by alternative capital providers in different jurisdictions. This paper proposes various solutions that jurisdictions can adopt, both in the laws that affect restructurings, as well as in the functioning of the courts and the processes relating to the treatment of distressed companies, to encourage investment in distressed companies by non-traditional lenders.

6. Necessary changes to the law to encourage the participation of alternative capital providers

6.1 Allowing procedural consolidation of cases

The legal system needs to recognise that it often serves the interests of no one (except the professionals) to reorganise (or even liquidate) complex commercial entities in a piecemeal fashion. More liberal *procedural* consolidation of cases relating to affiliated corporate debtors can accomplish that.

In 2017, the EU adopted the European Insolvency Regulation (recast) (Recast EIR).[20] Chapter V of the Recast EIR has procedures for "group coordination proceedings," which, among other things, allow a "group coordinator" to be appointed to facilitate the coordination of the insolvency cases of group members of a distressed company. Germany also has a similar concept, the *Koordinationsverfahren*, which pre-dated adoption of the Recast EIR. Some commentators, however, have questioned the efficacy of these group coordination processes and suggested means to make them more easily available to consolidated groups.[21] Adopting laws that allow global enterprises to commence restructuring cases in as few jurisdictions as possible and enabling debtor entities to run their cases as a seamless, procedurally consolidated process may be key to a successful sale of the corporate enterprise as a going concern and obtaining the highest possible price for the business, if not a successful restructuring of the group.

A lack of procedural consolidation of enterprise restructurings also affects the ability of the company to obtain financing as capital providers may be forced to look solely to pieces of the corporate group instead of taking a holistic approach to valuing the company.

If greater procedural consolidation and reducing the number of jurisdictions in which main proceedings must be commenced are worthy goals, it is also worth considering whether the requirement that a company within a corporate enterprise commence its main proceeding where its centre of main interests (COMI) is located should be retired in favor of a more flexible system that allows a single court to preside over the restructuring cases of a parent and its subsidiaries without having to push the sometimes fictional (and arguably contrary to notions or corporate separateness) notion that the parent company is the nerve center for each and every one of its subsidiaries. Even under the Recast EIR, if each of the companies within a corporate group has a COMI in a different country, it will need to commence a local proceeding.[22] The EU has made strides in adopting similar (but not uniform) insolvency laws within the EU, but the need to navigate and cooperate across borders can lead to delays and uncertainty, which, in turn, serve as a deterrent to rescue financing. Even if a company's operations were located exclusively in the EU (an increasingly rare occurrence in this age of globalisation), the EU has left so many details for the restructuring of companies to individual member countries that a global, cross-border restructuring becomes unworkable.

Some countries have created a bigger tent for restructuring. In the United States, a company need only have assets in the United States to commence a Chapter 11 case. This requirement has been interpreted broadly to include a single bank account, a retainer paid to United States counsel, and even having documents that are governed by United States law (on the theory that the documents create "rights" in the United States that constitute assets).

Under section 210 of the Singapore Companies Act, Singapore broadened its definition of companies that can apply for judicial management proceedings to include any company that has a "substantial connection" to Singapore. It is no coincidence that Singapore's definition of "substantial connection" is similar to (and perhaps even broader than) the United States definition, requiring that the company:

- has its COMI in Singapore;
- conducts business or has a place of business in Singapore;
- has "substantial" assets in Singapore; or
- has a Singapore choice of law provision or forum selection clause in a loan agreement or contract.[23]

Although use of a single forum to address a cross-border enterprise's restructuring may present a concern about trying to enforce the restructuring in a local jurisdiction, the philosophy underpinning these more open

20 Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast).

21 Sid Pepels, "Group Coordination Proceedings Under the Recast EIR in Practice," *European Insolvency and Restructuring Journal* (2022); Christoph Thole and Manuel Dueñas, "Some Observations on the New Group Coordination Procedure of the Reformed European Insolvency Regulation," INSOL International Insolvency Review (October 2015).

22 Sid Pepels, "Defining Groups of Companies Under the European Insolvency Regulation (r=Recast): On the Scope of EU Group Insolvency Law", *International Insolvency Review* 96 (2020). At the same time, the Recast EIR introduced the possibility of a "group coordination proceeding" (GCP), wherein a group coordinator is appointed and tasked with finding a solution for group members' insolvency. Participation in such a meta-proceeding, however, is voluntary and has not been widely used (if at all). See Andreas Geroldinger et al., Conference on European Restructuring and Insolvency Law Statement 2021-2, ("[S]ome four years after the European Insolvency Regulation (Recast) became binding, not a single significant case of a cross-border group insolvency has been handled under the rules on group coordination proceedings").

23 Sections 246(1)(d) and 261(3) of the Insolvency, Restructuring and Dissolution Act of 2018 adopt a test of "substantial connection."

restructuring regimes is that most significant creditors that will be affected by the restructuring will have a presence in the country in which the restructuring case is pending, thereby enabling the bankruptcy court to enforce its orders directly through exercising *in personam* jurisdiction over such creditors.

In the United Kingdom, under the Corporate Insolvency and Governance Act (CIGA),[24] which became effective in 2020, foreign companies with a "sufficient connection"[25] to the United Kingdom may use the new "super scheme" tool created under English law, thereby eliminating the need to shift COMI.[26]

6.2 Specific changes to the sale process in a formal restructuring

Knowing that the underlying laws allow efficient sales of a senior secured lender's collateral, including substantially all of the debtor's assets as a going concern, gives a rescue finance provider the assurance that an exit strategy exists in a formal restructuring that likely achieves a better result than the lender would receive out of court. Not all jurisdictions, however, have laws that promote the efficient marketing and sale of a business or its assets after the debtor commences a formal restructuring process. The US "363 sale" process is a good example of elements that can easily be incorporated into the laws of other restructuring regimes, although even that process has room for improvement. The following are some suggested changes to restructuring laws that would help facilitate sales of debtors as a going concern, or even of parts of their assets, and thereby encourage the participation of new providers of rescue financing to participate in the process.

6.3 Allowing credit bidding

Some jurisdictions, such as France, do not permit senior secured lenders to credit bid when their collateral is being sold.[27] A "credit bid" is the vehicle that allows a senior secured creditor to bid on its collateral by agreeing to reduce its secured claim in lieu of paying cash. Underlying the concept of credit bidding is the premise that the net proceeds from the sale of the lender's collateral should be used to repay amounts owed to the senior secured lender. Therefore, allowing the bidder to reduce its loan amount instead of paying cash simply avoids the "round tripping" that would occur if an all-cash bid is required.

Although credit bidding is expressly allowed[28] when a United States debtor conducts a "363 sale" during its Chapter 11 case, the United States Bankruptcy Code permits a bankruptcy court "for cause" to override this right. Unhelpfully, the Bankruptcy Code does not define "cause."

Less controversial assertions of "cause" might include the existence of a serious challenge to a lien's validity or a secured lender's untimely assertion of its credit bidding right. What has generated controversy is the notion that a bankruptcy court should disallow credit bidding if doing so would chill the bidding by other prospective bidders, or the debtor or its unsecured creditors' committee makes vague accusations of lender misconduct against the secured lender.[29] By and large, this approach has been rejected by United States bankruptcy courts,[30] although the absence of defined statutory standards leaves the door open to unnecessary challenges to lenders' credit bidding rights. Moreover, until a United States Supreme Court decision[31] in 2012, it was not clear that a senior secured lender had the right to credit bid when its collateral was being sold pursuant to a Chapter 11 plan (as opposed to a 363 sale). The United States clearly has a robust market for rescue financing, but formalising the standards for objecting to credit bidding would enhance the level of certainty and avoid unnecessary litigation (and the accompanying "shakedown" of lenders) over the issue.

Credit bidding is a significant consideration for alternative capital providers, especially ones coming into a distressed situation. One of the incentives for an alternative capital provider to provide rescue financing to a potentially distressed company is that, if the capital provider cannot be repaid, it may convert its debt into equity in the borrower or ownership of the collateral. Credit bidding prevents the senior secured lender from having effectively to pay twice to obtain recourse against its bargained-for collateral and then perhaps be subject to delays in receiving repayment from the proceeds of its collateral. A secured lender having to deploy twice as much capital in a distressed situation serves as a deterrent to rescue financing. This problem is only exacerbated by jurisdictions in which a significant delay may exist between the conclusion of a sale transaction and the repayment of a senior secured loan.

6.4 Bidding procedures and break-up fees

It is not always the case, however, that a secured lender wants to credit bid and take ownership of its collateral. For the right price, a secured lender might be perfectly happy to have another bidder acquire a debtor or its assets. Therefore, part of the process of promoting efficient sales of a debtor's business or its assets should include the

24 Corporate Insolvency and Governance Act 2020; see also Ali Salchi, *Commons Library Research Briefing*, House of Commons (6 April 2022) ("All UK companies are eligible to apply for a restructuring plan provided that certain conditions are met. Some non-corporate entities, such as limited liability partnerships, and overseas companies with sufficient connection to the UK might also apply").

25 Cases involving a "sufficient connection" include *In the matter of Rodenstock GmbH* [2011] EWHC 1104 (Ch), and *In the matter of Tele Columbus GmbH* [2010] and *Re La Seda De Barcelona SA* [2010] EWHC 1364 (Ch).

26 The UK, however, is not so open-minded when it comes to debtors with English law-governed agreements that seek to restructure their debts outside of the UK. The "rule in *Gibbs*," developed in 1890, still stands for the proposition that, unless a creditor affirmatively submits itself to the jurisdiction of the foreign court, the English law-governed debts cannot be discharged in a foreign court. *Antony Gibbs & Sons v La Société Industrielle et Commerciale des Métaux* (1890) LR 25 QBD 399).

27 See France: Restructuring & Insolvency – Country Comparative Guides (legal500.com) ("Credit bidding is not permitted in reorganisation proceedings, the sale plan being the only option").

28 11 U.S.C. § 363(k).

29 *In re Fisker*, 510 B.R. 55 (Bankr. D. Del. 2014); *In re Free Lance-Star*, 512 B.R. 798 (Bankr. E.D. Va. 2014).

30 *In re Aeropostale*, 555 B.R. 369 (Bankr. S.D.N.Y. 2016).

31 *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 132 S. Ct. 2065 (2012).

ability of the court to bless procedures designed to maximise the value obtained in a sale. As a general rule, the debtor will be better off if it is able to obtain a prospective purchaser that is willing to act as a "stalking horse." Not only does a stalking horse set the floor for the purchase price for the debtor's assets, but its purchase agreement also sets the standard for the terms and conditions that other prospective purchasers may (and, more importantly, may not) impose in their bids. Unlike a regular M&A deal, however, the stalking horse bidder cannot insist upon exclusivity and knows that its bid will be subject to an auction process to determine the highest and best bid for the debtor's assets. Accordingly, as an inducement for a bidder to take the lead – conducting due diligence, drafting a purchase agreement and making a binding and largely unconditional offer for the debtor's assets – the court presiding over the purchase should have the ability to give the stalking horse bidder assurance that: (i) the bidder will receive a negotiated break-up fee and expense reimbursement if its bid is topped by another bidder; and (ii) the debtor will run a process that balances fairness to creditors with the need to sell the business or the debtor's assets expeditiously.

Notwithstanding the prevalence of 363 sales, the United States Bankruptcy Code does not contain any guidelines for the approval of break-up fees and expense reimbursements or even for the approval of bidding procedures. Case law, however, has developed in the United States bankruptcy courts that allows a court to approve break-up fees and expense reimbursements, as well as bidding procedures. As with credit bidding, though, the process suffers from the lack of specific guidelines. For example, if existing equity serves as the stalking horse bidder, should it be entitled to a break-up fee? Should a secured lender that is using the bankruptcy process to facilitate a sale (or repossession) of its collateral and is serving as a stalking horse be entitled to a break-up fee? Also, a debtor in possession is entitled to use its reasonable business judgment in selecting the highest and best bidder. Bidding procedures, however, often do not spell out what "highest and best" means under the circumstances. This sometimes results in the debtor and its advisers imposing new requirements on bidders, sometimes during the auction. One example would be how to value whether a bidder agrees to take (or not) an assignment of the debtor's existing contracts. Although sophisticated financial buyers may be willing to jump into the process, the lack of clear guidelines can discourage other participants from taking the time and incurring the expense of submitting competing bids.

6.5 Limiting appeals and protecting the purchaser

It is rare in the United States to see appeals from the bankruptcy court's approval of a bidder as the successful bidder. That is principally because a losing bidder does not have standing to challenge the selection of a bidder unless the losing bidder otherwise is a party in interest in the bankruptcy case (i.e. a creditor or an equity holder).

Moreover, even if a bankruptcy court order approving the sale to the winning bidder is later reversed on appeal, the United States Bankruptcy Code protects a "good faith" bidder, and the sale itself cannot be reversed. Failure of the bankruptcy court, however, to make a "good faith" finding can leave the door open to challenges. It is standard operating procedure to present evidence of good faith, lack of collusion and arm's length negotiations or participation in the auction and then contain such findings in the order approving the sale.

The sale order in a Chapter 11 case can be quite lengthy, mostly because it contains a number of other findings designed to protect the winning bidder. Among other things, the sale order likely will include a finding that the acquirer is not a successor to the debtor. Except in cases involving actual fraud or bid rigging, a sale or confirmation order transferring assets in a United States bankruptcy case also is the only foolproof way to protect a purchaser from subsequent, hindsight-driven clawback claims that the purchaser underpaid for the assets.

6.6 Allowing quick closing of sales

Another advantage of the United States process is that it facilitates a quick closing of a 363 sale after court approval of the successful bidder. Although the United States Bankruptcy Rules provide for a 14-day stay of a sale order,[32] many sale orders contain judicial waivers of a stay so that the sale can close as soon as any conditions precedent are satisfied. Moreover, with the exception of sales requiring regulatory approval (e.g., CIFIUS, antitrust or approvals relating to regulated entities), the purchase agreements typically contain few conditions precedent other than the entry of the sale order. Although a party that has standing to appeal from a sale order has the ability to seek a stay of the order pending appeal, such stays are rarely sought (much less obtained) because of the requirement that the party seeking the stay post a bond to secure any damages resulting from the delay in closing the sale.

Unfortunately, other jurisdictions have seen significant closing delays, often years, occasioned by parties (sometimes disgruntled bidders) seeking to upset a proposed sale. In India, ArcelorMittal's US $6.1 billion purchase of Essar Steel was delayed for over two and a half years because of, among other things, legal wrangling between the banks and operational creditors on how the proceeds of such a sale would be split.[33] In the United States, absent a specific contractual condition, the sale would go forward, the proceeds would be set aside and the creditors would be left to fight over how the cash should be divvied up.

In one case in France, a French company, Hermione SAS, and certain of its subsidiaries owned through another French holding company, BVA SAS, commenced judicial reorganisation (RJ) proceedings in 2020 before the Commercial Court in Toulouse. In the RJ, four groups submitted bids to acquire the debtors' business, including the secured bondholders (principally, a United Kingdom-based alternative capital provider) and another group comprised of the former shareholders and management of the debtors. After the Toulouse Commercial Court declared the bondholder group the winning bidder, the public prosecutor appealed from the Commercial Court's order and argued that the bid

32 Bankruptcy Rule 6004(h).
33 ArcelorMittal's $6bn takeover of Essar Steel has last hurdle removed | Financial Times (ft.com).

submitted by the former shareholder / management group should have been accepted.[34] As a result of the appeal, the sale to the winning bondholder group bidder was stayed. Four months later, the Toulouse Court of Appeals overturned the ruling of the Toulouse Commercial Court and ruled that the bid submitted by the shareholder / management group should have been accepted as the winning bid.[35] The primary justification for the reversal was the speculation that the proposed purchaser (which was not a French company) would not preserve as many jobs as the French shareholders and management.[36] The bondholder group then appealed from that decision. Although the dispute ultimately was settled by the end of 2021, the appeal was still pending, and the sale still in limbo, at the time of the settlement.

These results can lead investors wondering whether it is too much trouble to invest in a particular jurisdiction.

6.7 Respecting the capital structure

A senior secured lender wants to know that its position in the capital structure will be respected in a restructuring. This is often not the case in jurisdictions that permit certain types of unsecured claims, such as those of employees and certain vendors, to leapfrog those of the senior secured lender and become the senior claims.[37] Of course, even in those jurisdictions, so long as the rules are laid out clearly, a lender can factor those contingencies into its investment decision.

6.8 Corporate governance laws that do not stymie restructuring efforts

All investors agree with the importance of having clear and strong corporate governance principles. Where should the laws draw the line? The laws need to strike a balance between protecting directors who act in good faith so they have the incentive to remain involved and participate in developing a solution, but also holding directors accountable for breaches of fiduciary duties that occur on their watch. In many jurisdictions, directors face criminal liability if a distressed company continues to "trade while insolvent" or if the directors do not comply with their mandatory obligation to commence a formal process if the company is insolvent.[38] Often, the "insolvency" of the company is dictated by technical terms and not by the ongoing willingness and ability of a company to continue paying its trading debts. This may be the case, for example, where the company is in talks with its lenders, the lenders agree to facilitate payments to allow the company to continue to operate as a going concern, but the particular test for "insolvency" in that jurisdiction requires the directors to play it safe and commence a proceeding rather than allow the restructuring process to develop further in the hope of achieving a potential out of court resolution.

Even where no meaningful risk of criminal prosecution exists, directors still face concerns about getting sucked into endless litigation. Over the past several decades, United States law on the scope of directors' fiduciary duties has become fairly well developed. Directors of troubled companies in the United States, especially in states such as Delaware, know their rights and responsibilities when dealing with a troubled company. Moreover, most United States companies have directors' and officers' liability insurance to protect directors and officers from lawsuits challenging their actions (other than actions constituting gross negligence or wilful misconduct).[39] It is difficult to find a person willing to sit on a board of a distressed company without being protected by D&O insurance. The existence of such insurance, though, also serves as catnip for the lawyers in charge of pursuing actions on behalf of the ubiquitous litigation trusts established in United States Chapter 11 cases. Directors of a troubled company, particularly those who are truly independent from the existing owners and managers of the company, should not necessarily be assured of a risk-free process, but they and their insurers need to have the protection that enables them to act in a less risk averse manner, step away from the traditional playbook, and develop creative solutions for a distressed company without fear of reprisal from disgruntled stakeholders.

6.9 Harmonising and limiting clawback risks

The lookback (also referred to as hardening) periods for avoiding liens and other transfers as preferences are quite literally all over the map and often difficult for creditors to navigate in cross-border deals. For example, in Turkey, the hardening period could be one year, two years, or five years, all depending upon the subsequent characterisation of the transaction.[40] For example, a transaction that is later deemed not to be at arm's length or in accordance with market terms can be subject to a five-year lookback period.[41] Even within the EU, despite efforts to achieve consistency for the restructuring laws within the EU, the laws on clawback actions are set by each country. In France, for example, the hardening period starts when the debtor becomes insolvent and can be as long as 18 months before a court enters a judgment of insolvency.[42] In Germany, though, the clawback period extends to four years.[43]

34 F. Fical, "BVA court decision appealed by public prosecutor" (18 September 2020).
35 Court of Appeal of Toulouse, 2nd Chamber, February 17, 2021, No. 20/02599 | Doctrine.
36 G. Podeur and L. Renucci, "Restructuring in France: Lessons to learn from the BVA insolvency" (1 March 2021); F. Fical, "Court of Appeal overturns 1st BVA judgment; approves disposal to Naxicap" (14 January 2021).
37 F. Mucciarelli, *Employee insolvency priorities and employment protection in France, Germany and the United Kingdom*, 44 Journal of Law and Society 255 (2017).
38 For example, Germany has *Insolvenzstraftaten* (criminal conduct related to insolvency) outlined in Sections 283-283d of the *Stafgesetzbuch* (the German Criminal Code), https://www.gesetze-im-internet.de/englisch_stgb/. Similarly, the UK's Insolvency Act of 1986 includes both fraudulent trading (criminal) and wrongful trading (civil) sanctions. See Insolvency Act 1986, sec 213, 214 respectively. Insolvency Act 1986 (legislation.gov.uk)
39 Next Move Strategy Consulting, *U.S. Directors and Officers (D&O) Insurance Market Overview*, Next Move Strategy Consulting Report (January 2023).
40 Execution and Bankruptcy Law (Law No. 2004). See also Beril Cetin *et al.*, *In review: credit support and subordination in Turkey* (Lexology (15 July 2022) ("The one-year hardening period applies to security interests if (1) the security interest is created after a debt is incurred, in order to secure such existing debt; (2) payments are made via instruments other than cash or ordinary payment instruments; and (3) payments are made before their due date. The two-year hardening period applies to donations or gifts. The five-year hardening period applies to preferential and fraudulent transfers. Under Turkish law, any transaction that is not made on an arm's-length basis or that is not in accordance with the market or is made without any consideration may be construed as a preferential and fraudulent transaction").
41 *Ibid.*
42 This period is referred to as *période suspecte*, *See* Article L 631-8, Code de Commerce, Translation: "The court sets the date for cessation of payments after requesting the debtor's observations. If this date is not determined, the cessation of payments is deemed to have occurred on the date of the judgment opening the procedure. It may be postponed one or more times, without being more than eighteen months before the date of the judgment opening the procedure."
43 Insolvenzordnung (InsO) § 133(2); see also Holger Ellers, *Germany: Claw-back reform improves the position of suppliers and service providers in German insolvency proceedings*, Baker McKenzie Global Restructuring & Insolvency Blog (2017).

6.10 Reduced voting thresholds for in-court restructurings

As restructuring laws around the world are reformed, countries increasingly are adopting the United States approach of reducing the threshold for voting to approve a plan, scheme of arrangement or similar restructuring. The United States, for example, deems a class of claims to have accepted a plan if two-thirds of the claims (by amount) actually voting and a majority of the number of creditors voting accept the plan.[44] The United Kingdom restructuring plan requires approval of 75% in value of all creditors voting within a class and does not contain a numerosity requirement.[45] In these cases, limiting the voting requirement to creditors who actually vote helps to facilitate acceptance. For example, in Japan, all creditors vote as one class, and the test for acceptance is a majority in number of rehabilitation claims holders voting at the meeting (or in writing) *and* a majority by value of *all* rehabilitation claims having voting rights.[46]

The reduced voting thresholds often are accompanied by other tools that enable plans to be structured to secure approval by the creditors without facing the risk of a minority of creditors holding up the process. These may include giving flexibility to placing creditors into different classes and allowing a plan to be approved so long as one affected class votes to approve the plan, subject of course to standards that ensure the fair treatment of dissenting creditors. This is universally known as "cram down" in the United States. Some countries consider "cram down" to be the binding of dissenting creditors within a class and "cross-class cram down" to refer to binding classes that reject the plan. In the United States, the standards that protect dissenting creditors and rejecting classes include that the plan cannot unfairly discriminate against a dissenting class, a creditor that rejects the plan (even if the creditor is in an accepting class) must receive at least what it would receive in a Chapter 7 liquidation of the debtor, all creditors within a class must receive the same treatment and junior classes may not receive or retain any value if a class of unsecured creditors has rejected the plan (absolute priority rule).[47] The United Kingdom has adopted a variation of the United States rule, allowing cross-class cram down if at least one affected class has met the 75% approval threshold for accepting the plan, and the dissenting class would not be "any worse off" than it would in the "relevant alternative" (most often defined as liquidation).[48] The classification approach under CIGA has been especially harmful to landlords as debtors have used it to classify landlords into multiple, separate classes based upon the relative profitability and importance of the leases to the debtor's business, which perhaps signals a more liberal approach to classification and cram down than one might expect in a United States Chapter 11 case.[49]

Singapore's restructuring regime has taken steps to reduce the voting threshold and incorporate cross-class cram down, although its test sets a high bar. A class accepts a scheme or arrangement if a majority of creditors and 75% in value of claims that vote within the class vote to accept the scheme. In addition, a majority in amount and 75% in value of all creditors voting, regardless of class, must vote to accept the scheme.[50] Borrowing from the United States nomenclature, the plan must be "fair and equitable" and must not "unfairly discriminate" against any dissenting classes.

In practice, cross-class cram down is not used as often as one might assume based upon its inclusion in nearly every newly updated restructuring regime. The notion of reduced voting thresholds, however, should be a fundamental part of every restructuring regime as it allows parties negotiating in good faith to resolve a company's financial difficulties to have a means of discouraging holdouts. The standard Loan Syndication and Trading Association (LSTA) form documents require the consent of *all* lenders (or all affected lenders) for any modification to "sacred rights," including the principal, interest, collateral, and payment, outside of a bankruptcy case.[51] Japan also currently requires 100% approval for out-of-court workouts, but is reported to be considering introducing a "majority vote" rule to facilitate out-of-court workouts similar to a United States prepackaged case.[52]

7. Ideal features of restructuring regimes

Although certain changes in the restructuring laws are critical to provide alternative capital providers with an incentive to invest in certain markets, these changes need to be coupled with broader changes in the ways in which jurisdictions function to facilitate market efficiency, ensure that alternative capital providers are able to participate in restructurings, and give all investors confidence that the laws on the books will be enforced thoughtfully, fully and fairly.

44 11 U.S.C. § 1126(c).
45 Section 901(F) Corporate Insolvency and Governance Act 2020 (legislation.gov.uk).
46 Bankruptcy Act - English - Japanese Law Translation, Article 172-3(1)(ii).
47 11 U.S.C. § 1129(b).
48 Section 901G of CIGA, Chapter 12, ("Sanction for compromise or arrangement where one or more classes dissent (1) This section applies if the compromise or arrangement is not agreed by a number representing at least 75% in value of a class of creditors or (as the case may be) of members of the company ("the dissenting class"), present and voting either in person or by proxy at the meeting summoned under section 901C. […] (3) Condition A is that the court is satisfied that, if the compromise or arrangement were to be sanctioned under section 901F, none of the members of the dissenting class would be any worse off than they would be in the event of the relevant alternative (see subsection (4)). (4) For the purposes of this section "the relevant alternative" is whatever the court considers would be most likely to occur in relation to the company if the compromise or arrangement were not sanctioned under section 901F. (5) Condition B is that the compromise or arrangement has been agreed by a number representing 75% in value of a class of creditors or (as the case may be) of members, present and voting either in person or by proxy at the meeting summoned under section 901C, who would receive a payment, or have a genuine economic interest in the company, in the event of the relevant alternative.").
49 K. Stephenson, "English Court Crams Down Dissenting Landlords in Fitness First's Restructuring Plan" (also noting that the approach was similar to that used in *Virgin Active* and *Lifeways*).
50 Sections 70(3)(a), 70(3)(b) of the Insolvency, Restructuring and Dissolution Act. See also Terry Xu Hongli, *Cramdown Powers under Singapore's Scheme of Arrangement*, Singapore Global Restructuring Initiative Blog (2021), https://ccla.smu.edu.sg/sgri/blog/2021/02/26/cramdown-powers-under-singapores-scheme.
51 Standard Documents Archives - LSTA
52 Japan to introduce long-awaited majority voting rule for out-of-court workout | Center for Commercial Law in Asia (smu.edu.sg)

7.1 Robust market for distressed debt trading

Unless alternative capital providers have participated in funding an entity at the outset of a deal, they have to be able to identify and participate in opportunities as they arise. In the United States, a robust market for debt trading exists, with investment banks, hedge funds and even traditional banks having active desks for debt trading. In addition, the LSTA publishes forms of standard documentation for use in trading distressed, syndicated bank loans in the United States. The LSTA also offers a user's guide to accompany such documentation, which discusses market standards and market practice guidance for the trading of distressed bank debt. The Loan Market Association (LMA), which was established in London to assist in the development of the secondary loan market in London, also publishes recommended forms and guidance for both par and distressed debt trading.[53]

The LMA was established only one year after the LSTA and about two years after Pen Kent, the then Executive Director of the Bank of England, gave a speech at the Euroforum Conference, in which he encouraged extending the "London Approach" to distressed debt trading. He described the "London Approach" as embracing four main tenets:

- supportive banks that do not rush to appoint receivers;
- decisions being made on the basis of sharing reliable information with the parties involved in a workout;
- banks and "where appropriate, other creditors" reaching a collective view of providing financial support to a distressed company; and
- sharing of pain "on an equitable basis."

Mr Kent also noted that "debt trading should be conducted in a positive and constructive spirit; sellers should ensure that potential buyers are aware of the United Kingdom culture for dealing with companies in financial difficulty including, particularly, the London Approach."[54]

Even in jurisdictions with established forms and guidelines for distressed trading, relationships sometimes form the basis for spotting investment opportunities. In other jurisdictions that lack trading desks, relationships may be the only way to promote the market for trading distressed bank debt, and the standards for trading have evolved on a more *ad hoc* basis. Systematising distressed debt trading is one means for encouraging alternative capital providers to invest in distressed debt in more markets.

7.2 Regulatory framework that facilitates investment by alternative capital providers

Implementing systems that facilitate the trading of bank debt is not sufficient if the existing regulatory framework does not allow foreign investors and non-regulated entities to make loans and to buy and hold bank debt. Even if alternative capital providers are permitted to hold bank debt, they have less incentive to do so with respect to a distressed company if they are not able to provide the borrower with sufficient liquidity to enable a successful restructuring.[55]

7.3 A reliable court system: composition and procedures of the commercial courts

With all of the right laws and processes in place, a jurisdiction can still fail to attract alternative capital providers. Why? Investors lack confidence that the laws will be enforced fairly, consistently and expeditiously.

The factor that investors single out as the most important in this category is the quality of the judges who are assigned to handle complex, commercial restructuring and insolvency cases. Judges play a significant role in developing (or failing to develop) confidence in a jurisdiction's restructuring regime. Judges who are able to rule promptly and knowledgeably are critical to fast-moving restructuring situations in which delay often can make the difference between saving a company or selling it off in non-operating pieces. Judges also must be able and willing to harmonise the potential interpretations and develop precedence on which practitioners and investors can rely.

Several jurisdictions have set up specialised courts to handle restructuring cases. The most notable of these is the United States, which has a special bench of judges that solely handle bankruptcy matters. Many of these judges tend to have distinguished backgrounds in private practice or government positions participating in cases under the Bankruptcy Code. Even those who were not pure bankruptcy practitioners tend to have had a successful career practicing commercial law, often as litigators. United States bankruptcy judges, by and large, tend to bring to each case a commercial sensibility and knowledge that enables them to decide complex matters quickly.

In reforming its restructuring laws, Singapore took a page out of the United States practice. Beginning in October of 2022, the Singapore International Commercial Court (SICC) has jurisdiction over all formal restructurings that are international and commercial in nature.[56] The SICC, which initially was created to help Singapore become a

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53 https://www.lma.eu.com/about-us

54 https://www.bankofengland.co.uk/-/media/boe/files/quarterly-bulletin/1994/the-london-approach-distressed-debt-trading.pdf?la=en&hash=48934E22B26C2AF52B9709B99BAF15BBDA2D3388

55 Limiting access to the debt market can create additional issues. See Yi Ding et al., *Issuance Overpricing of China's Corporate Debt Securities*, Journal of Financial Economics (2002) 328, Issuance overpricing of China•s corporate debt securities (princeton.edu) (arguing that the inter-bank market produces issuance overpricing, and that "the secondary market for debt securities tends to be highly illiquid, which makes the secondary-market price more manipulable and thus less reliable than the issuance price").

56 Singapore International Commercial Court (Amendment No 2) Rules 2022 (S 754/2022); Singapore International Commercial Court Rules 2021 (S924/2021) O 2 r 1(2)(*da*) (explicitly extending the SICC's processes to "proceedings relating to corporate insolvency, restructuring or dissolution that are international and commercial in nature.").

leading centre for arbitration and international commercial arbitration, also has brought in international judges from other countries, including Australia, the United Kingdom, France and the United States. Singapore's focus on creating a world class restructuring regime was highlighted by its hiring of Christopher Sontchi, a highly regarded United States bankruptcy judge from the busy Delaware court, to become an international judge following his retirement from the United States bankruptcy bench.[57]

In the early stages of implementing changes in the restructuring laws, the absence of a legal roadmap can be difficult to inspire confidence in the process. It is, therefore, not sufficient simply to have commercially savvy and qualified judges, but to have a system in place that ensures prompt rulings by the lower courts, as well as efficient appellate review of lower court decisions. One suggestion would be for jurisdictions to consider how to aggregate test cases on important disputed legal issues to facilitate the development of a new law.

Some investors highlight additional structural changes they believe could help in attracting alternative capital providers, particularly foreign investors. One suggestion is to have a system that facilitates online access to court pleadings.[58] Through the Federal Government's Public Access to Court Electronic Records (PACER) system, every document filed with the United States bankruptcy court is readily available online, unless the court orders that the document be filed "under seal."[59] This electronic access allows the United States bankruptcy process to be open and transparent. In addition, claims agents retained by debtors (generally required for all large cases in most districts in the United States) maintain a separate website for each case that clearly sets forth key information items and allows for easy searching of the court docket and the claims that have been filed in the case.[60]

Some countries historically have made it difficult even for creditors to obtain access to court documents.[61] In Japan, for example, only a creditor could have access to court documents. The creditor or its representative would be required to go to the court, request access to a particular document and then hope that the document is available (and had not, for example, had been checked out by the judge's chambers). In May of 2022, however, Japan enacted amendments to its Code of Civil Procedure, which are designed to facilitate the development of e-filing and electronic access to court records.[62] Other countries, however, remain in the Dark Ages when it comes to facilitating electronic access to court records.

Perhaps more controversially, some investors based outside of English-speaking countries have argued that requiring all court documents to be published in English (as well as in the native language of the country) will facilitate investment by alternative capital providers in any given market.[63] Although this idea comes across as quite ethnocentric, it also reflects the reality that English is now considered the "global language of business."[64]

7.4 More streamlined process for SMEs

Finally, no wish list of restructuring features would be complete without including a requirement that jurisdictions adopt a more streamlined process for small and medium-sized companies (SMEs). The United States Bankruptcy Code has "small business case" provisions, but the streamlined processes only apply to companies with liquidated debts of US $7.5 million or less. Before COVID-19, the limit was about US $2.75 million. The limit was increased to US $7.5 million as part of the Small Business Reorganisation Act of 2019.[65] Although the increased debt threshold was considered to be temporary, it has been extended year-to-year through 2024.[66]

57 Ben Clarke, "Delaware's Judge Sontchi to Serve in Singapore", Global Restructuring Review (15 November 2021) https://globalrestructuringreview.com/article/delawares-judge-sontchi-serve-in-singapore.

58 The European Commission, for example, has a portal showing all registers by country on information related to parties partaking in insolvency proceedings. However, some countries do not have specialised registers, nor are there registers including pleadings or court documentation. See European e-Justice Portal - Bankruptcy and insolvency registers (europa.eu). It is worth noting that the EU only as of December 2023 has agreed to make public all pleadings to the Court of Justice of the EU after a judgement is released, provided no one objects. See Council of the EU, *Reform of the Statute of the Court of Justice: Council and Parliament Negotiators Reach Provisional Agreement*, Council of the EU Press Release (7 December 2023), Reform of the Statute of the Court of Justice: Council and Parliament negotiators reach provisional agreement - Consilium (europa.eu).

59 https://pacer.uscourts.gov/about-us#:~:text=The%20PACER%20system%20was%20established,trip%20to%20the%20local%20courthouse.

60 Kroll Restructuring Administration (website for the FTX Bankruptcy).

61 Benjamin L. Liebman, Rachel E. Stern, Xiaohan Wu & Margaret Roberts, "Rolling Back Transparency in China's Courts", 123 *Columbia Law Review* 2407 (2023) (analysing China's practice of deleting court cases from public databases as a way of curbing criticism and ensuring authority).

62 Amended Code of Civil Procedure (CCP), 民事訴訟法 - 日本語／英語 - 日本法令外国語訳DBシステム (japaneselawtranslation.go.jp). . Relevant Articles include: Article 132-10 (allowing e-Filing); Articles 109-2 and 109-3 (allowing e-Service); Articles 91-2, 132-12, and 132-13 (electronic documents will be recorded on the court server and accessible to anyone using the server). See also Monami Nohara, *Digital Reformation of Japanese Civil Procedures and its Future Prospects*, Visiting Scholar Working paper from Stanford Law School Gould Negotiation and Mediation Program (10 August 2023), Monami-Nohara_digital-reformation-of-Japanese-civil-procedures1.pdf (stanford.edu).

63 Heikki E. S. Mattila, Comparative Legal Linguistics 24 (Christopher Goddard trans., 2006) (noting how English is currently the best candidate for a global legal language); Patrizia Anesa, *Towards a Conceptualization of Legal English as a Lingua Franca* *(PDF) Towards a Conceptualisation of Legal English as a Lingua Franca? (researchgate.net)*?, International Journal of English Linguistics (2019). Notably, Rakuten's CEO mandated that English would be the Japanese retailer's official language of business in 2010. See T. Neely, *Global Business Speaks English*, Harvard Business Review (May 2012).

64 *Ibid.*

65 CARES Act § 1182(1).

66 Small business bankruptcy rules get tighter after US law expiration | Reuters.

The need for a comprehensive approach to restructuring SMEs was highlighted in a report published by the International Monetary Fund (IMF) in December of 2021, entitled, "Insolvency Prospects Among Small and Medium Enterprises in Advanced Economies: Assessment and Policy Options."[67] The IMF report recommended a "three-pronged-approach combining continued liquidity support, quasi' equity injections and comprehensive insolvency and debt restructuring tools." With respect to the third prong, the IMF noted that liquidation often is the only option for many SMEs because of (among other things) restructuring regimes that do not facilitate restructurings:

The wave of SME insolvencies should also be tackled with a comprehensive set of insolvency and debt restructuring tools. These include dedicated out-of-court restructuring mechanisms, hybrid restructuring, as well as strengthened reorganisation and liquidation procedures, including simplified reorganisation procedures for smaller firms. In particular, out-of-court restructuring mechanisms and hybrid restructuring could be especially important in countries where restructuring is currently not an option for SMEs, given that the scope for increasing the capacity of judicial insolvency systems is more limited in the short-term.[68]

Although the IMF was more focused on the importance of governments providing liquidity solutions to SMEs, the development of procedures that streamline the process for restructuring SMEs also may lead to increased attention by alternative capital providers and better access to rescue financing from private sources.

8. Conclusion

Countries around the world have been making significant strides in modernising their restructuring laws to incorporate the best practices from other jurisdictions. It is now time to focus on some of the structural and procedural impediments to inviting a new class of investors – alternative capital providers – to invest in distressed companies in their regions.

67 SDNEA2021002 (1).pdf
68 *Ibid.*

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