Cross-Border Corporate Restructurings

Perspectives from Singapore, U.S., UK, and Hong Kong

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The Speakers

Robson Lee
Partner, Singapore

Robson Lee is a Singapore qualified partner in the Mergers & Acquisitions and Capital Markets Practice Groups of Gibson Dunn.

Mr. Lee is a member of the Appeals Advisory Panel that advises the Minister-in-charge of the Monetary Authority of Singapore in respect of all appeals on matters that come under the financial and securities laws and regulations of Singapore.

Michael Rosenthal
Partner, New York

Michael Rosenthal is a partner in the New York office of Gibson Dunn and Co-Chair of Gibson Dunn’s Business Restructuring and Reorganization Practice Group.

Mr. Rosenthal has extensive experience in reorganizing distressed businesses and related corporate reorganization and debt restructuring matters, particularly in the context of multi-jurisdictional cases and cross-border transactions.

Gregory Campbell
Partner, London

Greg Campbell is an English and New York qualified partner in the London office of Gibson Dunn.

Mr. Campbell’s practice focuses on cross-border financings, restructurings and special-situations transactions. He has contributed to various articles and publications on the subjects of corporate insolvency, finance and security.

Graham Winter
Partner, Hong Kong

Graham Winter is a partner in the Hong Kong office of Gibson Dunn.

Mr. Winter specializes in complex corporate transactions, including cross-border M&A transactions, capital markets transactions and international corporate finance transactions. He has particular experience with transactions governed by the Hong Kong Takeovers Code and the Hong Kong Stock Exchange Listing Rules.
Overview

Cross-Border Debt Restructuring

1. Perspectives from Singapore
2. Perspectives from the United States
3. Perspectives from England & Wales
4. Perspectives from Hong Kong
Singapore
Corporate Restructurings in Singapore

Current Applicability of a Scheme of Arrangement or Judicial Management to Foreign Companies

• Foreign companies do not have access to judicial management under the current Companies Act.

• Foreign companies may implement a scheme of arrangement in Singapore provided that the test of “sufficient nexus or connection with Singapore” is met: *Re TPC Korea* [2010] 2 SLR 617

• Concept of “centre of main interests” (COMI) is not currently recognised in Singapore.

• Singapore is also not a party to any international treaties with regard to cross-border restructurings.
Proposed Enhancements to Corporate Restructurings in Singapore

• Companies (Amendment) Bill 2017 (“Bill”) was passed on 10 March 2017 to strengthen Singapore as an international centre for debt restructuring. Changes are expected to take effect within 2017.

• Present Companies Act contains limited provisions to deal with cross-border restructurings i.e. principles on which the court will grant discretionary stays to assist foreign liquidations still undeveloped. Changes aim to increase attractiveness of Singapore as a restructuring hub due to stiff competition from other jurisdictions. Also a move towards a more “universalist” approach in international restructurings.

• Most of the changes were adapted from the UK and U.S. regimes.
Corpore Restructurings in Singapore

Proposed Enhancements to Corporate Restructurings in Singapore

• Enhancements to the scheme of arrangement
  ➢ Enhanced moratoriums: Automatic moratorium; global effect; extension of moratorium to subsidiaries of the debtor company.
  ➢ Introducing “cram-down” provisions: Court may approve a scheme of arrangement even if a class of creditors oppose the scheme provided certain conditions are met.
  ➢ Introducing “pre-pack” provisions: Involves a restructuring plan that is pre-negotiated between the debtor company and its major creditors before formal court restructuring proceedings commence. Court may now approve such a scheme without any creditors’ meetings being called provided certain conditions are met.
Proposed Enhancements to Corporate Restructurings in Singapore

• Improving accessibility of foreign companies to local restructuring procedures
  ➢ Judicial management will be made available to foreign companies.
  ➢ Proposed test of “substantial connection” for foreign companies seeking to access the scheme of arrangement or judicial management procedures in Singapore, taking into account certain factors, including but not limited to:
    ❖ whether Singapore is the centre of main interests of the company; or
    ❖ whether the company is carrying on business in Singapore or has a place of business in Singapore; or
    ❖ whether Singapore is the choice of law governing a loan or transaction.
Proposed Enhancements to Corporate Restructurings in Singapore

• **Rescue financing**
  
  ➢ The Bill proposes to introduce the concept of “super-priority” financing to allow rescue financing to be repaid out of unsecured assets of the borrower first, ahead of unsecured claims and other administrative expenses claims should the restructuring fail.
  
  ➢ Rescue financing will apply to both scheme of arrangement and judicial management procedures.
  
  ➢ To safeguard the interests of existing secured creditors, the granting of “super-priority” status is subject to court approval.
Proposed Enhancements to Corporate Restructurings in Singapore

• **Adopting the UNCITRAL Model Law on Cross-Border Insolvency (“Model Law”) and changing judicial trends**
  
  ➢ Bill to adopt provisions of the Model Law with modifications to adapt it for application in Singapore.
  
  ➢ Singapore courts are already taking a more “universalist” approach to recognising and aiding foreign insolvency proceedings: see *Re Opti-Medix Ltd* [2016] SGHC 108 which is the first time the court applied the concept of COMI to recognise foreign liquidation proceedings.
  
  ➢ Ring-fencing rule to be abolished in the winding-up of all foreign companies – consistent with Model Law which allows states to exclude the operation of its provisions to specific entities.
  
  ➢ *Beluga Chartering v Beluga Projects Singapore* [2014] 2 SLR(R) 815: Court held that foreign company not subject to ring-fencing rule as it was not registered under the Companies Act.
United States
Main Features of Chapter 11

• **Automatic Stay**
  - Global automatic stay with ability to enforce without recognition proceedings

• **Debtor Remains in Possession**
  - Debtor remains in possession and, other than out-of-ordinary course actions, can make its own decisions
  - Out-of-ordinary course actions require court approval
  - Unsecured Creditors Committee will generally be appointed and will have standing to object to debtor’s decisions
  - U.S. Trustee also has standing to object to debtor’s decisions

• **DIP Financing**
  - Debtor-in-possession financing with priming ability
Main Features of Chapter 11

• **Foreign Entity Is Eligible**
  - Foreign entity can file chapter 11 so long as it has property in the U.S.
  - The Bankruptcy Code does not specify how much property, but courts have allowed cases to proceed with bank accounts, attorney retainers, causes of action with a situs in the U.S., and or indentures with a New York choice of law and forum selection clause
  - *In re Yukos Oil Co.*, 321 B.R. 396 (Bankr. S.D. Tex. 2005), the court found that Yukos, one the largest petroleum products oil and gas providers in Russia, met the requirements of section 109 even though it had created a new entity in the U.S. and transferred funds to that entity only hours prior to filing for bankruptcy protection

• **Contracts**
  - Ability to reject unfavorable contracts and assign contracts notwithstanding limitations
Main Features of Chapter 11 cont’d

• Chapter 11 Plan
  ➢ Lower voting thresholds than in the UK (plan approval requires more than one-half in number and two-thirds in amount of voting creditors in each class)
  ➢ Ability to cram down dissenting creditors and classes
    ❖ Third party releases can be consensually given and, in limited circumstances, forced

• Global Reach
  ➢ Bankruptcy court orders impact all creditors and can be enforced against any creditor with a connection to the U.S., which may obviate the need for multiple foreign ancillary or recognition proceedings
Cross-Border Chapter 11 Case Study

- *In re Arcapita Bank B.S.C.(c), et al., Case No. 12-11076 (Bankr. S.D.N.Y. 2012)*
  - Leading global manager of Shari’ah-compliant alternative investments and an investment bank with approximately $7 billion in assets under management and over $2.5 billion in debt
  - Minimal assets were located in the U.S.
  - Ancillary case was filed in the Cayman Islands
  - Even though substantially all creditors were foreign, bankruptcy filing halted all collection and enforcement efforts
  - Obtained $150 million Shari’ah-compliant DIP facility and $250 million Shari’ah-compliant exit facility
  - Chapter 11 plan was confirmed with 99% approval from creditors
Chapter 15 (UNCITRAL)

• Chapter 15 Recognition
  - First, the debtor must satisfy section 109 of the Bankruptcy Code (i.e., have a place of business or property in the United States)
  - Next, the court determines whether the foreign proceeding is a main or non-main proceeding based on the debtor’s COMI
    - Foreign main proceeding entitles the debtor to certain relief (including a limited stay protecting assets in the United States)
    - Recognition of a foreign non-main proceeding still provides some relief, but it is subject to the court’s discretion

• Implementation of Foreign Restructuring
  - Upon recognition of a foreign proceeding under chapter 15, a court may enter an order giving effect to a foreign restructuring, even if the foreign restructuring purports to modify debt agreements governed by U.S. law (e.g., *In re Codere Finance (UK) Ltd.*, Case No. 15-13017-jlg [Docket No. 16] (Bankr. S.D.N.Y. Dec. 22, 2015) (implementing UK Scheme Sanction Order involving New York-governed bonds))
Courts have approved foreign plan provisions, including broad third party releases, even if such relief would not otherwise be available to a chapter 11 debtor (but so long as the relief is not contrary to U.S. public policy)

In determining whether to approve third party releases, a court will focus on the scope of release and the process for approval in the foreign proceeding

- In *In re Sino-Forest Corp.*, 501 B.R. 655 (Bankr. S.D.N.Y. 2013), the court approved third party releases under a Canadian plan where the plan had near unanimous support, the support did not rely on votes from insiders, no one objected to the requested relief, and Canadian court’s decision to approve the release showed a “similar sensitivity to the circumstances justifying approving such provisions as those considered by U.S. courts”

- In contrast, in *In re Vitro S.A.B. de CV*, 701 F.3d 1031 (5th Cir. 2012), the court did not approve third party releases granted under a Mexican plan where approval was obtained through votes of insiders holding intercompany debt, and the Mexican court’s approval of releases did not reflect similar sensitivity
England & Wales
Two comparable corporate restructuring regimes in England

• **Scheme of Arrangement (s. 895-901 Companies Act 2006)**
  - Procedure on which new Singapore regime is based
  - Can be coupled with administration (below) to take advantage of moratorium and other insolvency-toolbox advantages
  - “cram-down” and “pre-pack” schemes both achievable: restrictive interpretation of separate classes for voting purposes
  - “distribution” schemes also possible

• **Administration (Part II Insolvency Act 1986)**
  - Basis for Singapore Judicial Management procedure
  - Key restructuring tool in England: can be “pre pack”
  - Executive powers of directors ceded to Administrator
  - Automatic worldwide moratorium
  - Can accompany a Scheme of Arrangement to facilitate implementation
England – applicability to foreign companies

• **Scheme of Arrangement**
  - Common law - available to companies capable of being wound up by the English court: essentially, English companies and other companies having a “sufficient connection” with England. This usually means, but is not limited to, assets within the jurisdiction (*Re Latreefers*)
  - Schemes can be used on foreign companies which have been effectively COMI-shifted to the UK (but courts are applying increasingly restrictive criteria)

• **Administration**
  - Available to English company, or a foreign company that has its COMI in England
  - Limited ability to shift COMI of EU companies to England

• **Liquidation and Provisional Liquidation**
  - Can be used for foreign companies where “sufficient connection” to England
  - Provisional Liquidation can be used to assist foreign officeholders where assets in England
U.K. – cross-border recognition

• Scheme of Arrangement
  ➢ No automatic recognition under EC Regulation
  ➢ Reliance on comity and laws relating to recognition of judgements

• Administration
  ➢ Automatic recognition in EU member states under EC Regulation
  ➢ Otherwise limited to English companies

• UNCITRAL Model Law and Cross Border Insolvency Regulations
  ➢ Aids cooperation in global cross-border insolvency proceedings
  ➢ Reliance may increase post-BREXIT (although few member states have currently signed-up)
  ➢ Provides facilitation rather than imposes choice of law
  ➢ BREXIT: impact on current cross border insolvency law and practice uncertain
Hong Kong
Hong Kong - currently available debt restructuring options

• Currently, no statutory corporate rescue procedure.

• Companies in financial difficulty have the following options:
  ➢ Informal workouts, compositions and arrangements with creditors, essentially by agreement of the parties concerned.
  ➢ Scheme of arrangement.
  ➢ Provisional liquidator effecting restructuring in the course of a winding up proceeding.
Hong Kong - currently available debt restructuring options (cont’d)

• **Scheme of arrangement:**
  - Similar to Singapore and UK regimes.
  - Can accommodate a wide range of variations in structure of the restructuring.
  - No moratorium on creditor actions against the company – a creditor may petition for winding up and disrupt the scheme.
  - A possible way to circumvent the absence of a moratorium is to seek the appointment of a provisional liquidator in parallel.
• **Provisional liquidator:**
  
  - Can only be appointed if there is a risk of dissipation of assets.
  
  - Primary purpose of appointment of provisional liquidator “must always be the purposes of the winding-up”; a provisional liquidator may not be appointed solely for the purposes of a corporate restructuring (*Re Legend International Resorts Ltd* [2006] 2 HKLRD).
  
  - Moratorium on creditor actions against the company - following appointment of a provisional liquidator, no action or proceeding can be proceeded with or commenced against the company without leave of the court.
Hong Kong – applicability to foreign companies: scheme of arrangement

• Re Winsway and Re Kaisa

➢ Hong Kong courts sanctioned schemes of arrangement which comprised debt governed exclusively by foreign law.

➢ Re Winsway Enterprises Holdings Ltd [2016] HKCFI 1915

❖ BVI company listed on Hong Kong Stock Exchange and parent of one of China’s biggest coking coal groups.

❖ Company implemented a restructuring through parallel schemes of arrangement in HK, BVI, coupled with Ch.15 recognition in US.

❖ Hong Kong courts sanctioned a scheme of arrangement which comprised debt governed exclusively by foreign law.
Hong Kong – applicability to foreign companies: scheme of arrangement

- Re Kaisa Group Holdings Ltd [2016] HKCFI 1916
  - Cayman Island company listed on Hong Kong Stock Exchange with main business of property development in PRC.
  - Company implemented a restructuring of its offshore debts by parallel schemes of arrangement in Hong Kong and Cayman Islands, coupled with Ch.15 recognition in US.
- Prevents action being taken within the jurisdiction of the Hong Kong courts, e.g., prevents a dissident creditor taking action in Hong Kong which could interfere with the company’s listing status.
- Must be both a sufficient connection to Hong Kong and sufficient evidence that the scheme would be effective abroad:
  - Listing of the company’s shares in Hong Kong “clearly constitutes a material connection within Hong Kong”.
  - Other factors: premises, staff, place where books and records kept, shareholder base, where meetings are held.
Hong Kong – applicability to foreign companies: appointment of provisional liquidator

• Section 327 of the Companies (Winding-up and Miscellaneous Provisions) Ordinance gives the Hong Kong court power to wind up a foreign company which can be shown to have a connection with Hong Kong.

• The court must be satisfied that:
  Ø the company has a sufficient connection with Hong Kong;
  Ø there is a reasonable possibility that the winding-up will benefit those applying for it; and
  Ø the court can exercise jurisdiction over one or more persons interested in the distribution of the company's assets.

• These tests, which have become known as the “core requirements”, were first formulated in this way in Real Estate Development Company in 1991.
Hong Kong – recognition of offshore insolvencies and active assistance

- UNCITRAL Model Law on Cross Border Insolvency not adopted.
- Offshore insolvencies recognised under common law cooperation principles and active assistance provided by Hong Kong courts.
The Joint Official Liquidators of A Company v B and Another [2014] HKEC 1244

- A Cayman company where liquidators had been appointed and wanted to make use of Hong Kong's section 221 powers to enable them to properly investigate the affairs of the company.
- The Cayman liquidators came armed with a "letter of request" from the Cayman court.
- The Hong Kong court said that it would grant the order provided that:
  - the liquidator is properly appointed in the place of the company’s incorporation;
  - the letter of request is from a common law jurisdiction with a similar insolvency law regime;
  - the order sought is available under Hong Kong law; and
  - the order sought is in relation to seeking information and documents, rather than assets.
- Although no applications have been made yet, it is likely that future foreign liquidators will apply to the Hong Kong court for recognition of their overseas appointment which will allow them to deal with the company's assets in Hong Kong.
• **African Minerals Ltd v Madison Pacific** [2015] HKEC 608

  - Hong Kong court to decide whether it should provide assistance re company proceedings in London.
  - African Minerals applied ex parte by way of letter of request.
  - Courts are able to take a “generous view of its power to assist a foreign liquidation process this is limited by the extent to which the type of order sought is available to a liquidator in Hong Kong under [its] insolvency regime and common law and equitable principles”.
  - Relied on *Singularis v PWC and PWC v Saad* [2014] UKPC 35, [2014] UKPC 36: common law system to empower courts to recognise and grant assistance to foreign insolvencies. However, this is subject to local law, and to local public policy: a court can only act within the limits of its own statutory and common-law powers.
In October 2016, judges from 10 different jurisdictions met in Singapore. Judges from key jurisdictions for international insolvency matters participated: Australia (Federal and New South Wales), British Virgin Islands, Canada (Ontario), the Cayman Islands, England & Wales, Hong Kong SAR (as observer), Singapore, and the USA (Delaware and the SDNY).

High on the agenda was the preparation of Draft Guidelines to provide practical assistance for judges and insolvency practitioners in dealing with difficult issues which cross-border insolvencies and restructurings commonly face.

The Draft Guidelines provide a framework of best practice to enhance key aspects of communication and cooperation among courts, insolvency representatives, and liquidation/restructuring stakeholders. Goal is to drive efficiency and transparency in cross-border insolvency proceedings which in turn will reduce costs for the parties.

The Draft Guidelines, once settled, are not proposed to be implemented as a code which must be obsequiously followed. Rather they will be introduced as practice directions or commercial guides, thereby retaining sufficient flexibility to allow tailoring to the facts of any given fact scenario.
In some jurisdictions, including Bermuda and Cayman Islands, provisional liquidation is mostly used in connection with debtor-in-possession restructuring and rehabilitation.

Recognition of the overseas insolvency proceedings and provision of assistance by the Hong Kong court under common law principles can effectively “sling-shot” the use of provisional liquidation for debtor-in-possession restructuring (and other restructuring techniques) into Hong Kong, by the appointment of provisional liquidators (or other office holders) in the overseas jurisdiction.

Avoids the restrictions applicable to Hong Kong provisional liquidators under Re Legend.
Hong Kong – reform proposal

• New legislation providing for statutory corporate rescue procedure proposed to be introduced in 2017 or 2018.

• Intended to give companies in financial difficulties an option to attempt to turn around and revive their business.

• Provisional supervisor appointed to take temporary control of the company. Functions and powers of company officers will be suspended during the provisional supervision.

• Statutory moratorium on legal actions and proceedings against the company or its assets when the company is under provisional supervision, to enable the provisional supervisor to focus on the formulation of the rescue plan.

• Predominantly out-of-court procedure.
• Will apply to Hong Kong-incorporated companies and overseas companies registered in Hong Kong.

• Pre-Conditions for use:
  ➢ Company is insolvent or likely to become insolvent.
  ➢ Prior written consent from each major secured creditor (meaning a person who holds a charge on the whole, or substantially the whole, of the company’s property).
  ➢ If company is at any stage of liquidation process, prior leave of the court.

• Initiated by ordinary resolution of shareholders or a resolution of the directors of the company. If company is at any stage of liquidation, initiated by the provisional liquidator or liquidator.
Hong Kong – status of reform proposal

- Statutory corporate rescue procedure first recommended by the Law Reform Commission in 1996.

- Bill introduced in 2001, but lapsed because it provided for all entitlements of employees to be paid in full before commencement of provisional supervision.

- Revisited in 2009 and current package of legislative proposals introduced in 2014.

- Potential issues:
  - Revised, complicated, formula for dealing with employees’ unpaid wages and exception from moratorium for employees if not paid in accordance with the formula.
  - Provisional supervisor (who must be a certified public accountant or solicitor) would be subject to personal liability for all pre-appointment contracts positively adopted by him and all new contracts entered into by him.
THANK YOU

For more information or specific enquiries, please feel free to contact the speakers directly:

- Robson Lee at RLee@gibsondunn.com
- Michael Rosenthal at MRosenthal@gibsondunn.com
- Gregory Campbell at GCampbell@gibsondunn.com
- Graham Winter at GWinter@gibsondunn.com
Our Offices

**Beijing**
Unit 1301, Tower 1,
China Central Place
No. 81 Jianguo Road
Chaoyang District
Beijing 100025, P.R.C.
+86 10 6502 8500

**Dubai**
Building 5, Level 4
Dubai International Finance Centre
P.O. Box 506654
Dubai, United Arab Emirates
+971 (0) 4 370 0311

**Frankfurt**
TaunusTurm
Taunustor 1
60310 Frankfurt
Germany
+49 69 247 411 500

**Hong Kong**
32/F Gloucester Tower, The Landmark
15 Queen’s Road Central
Hong Kong
+852 2214 3700

**Los Angeles**
333 South Grand Avenue
Los Angeles, CA 90071-3197
U.S.A.
+1 213.229.7000

**Munich**
Hofgarten Palais
Marstallstrasse 11
80539 Munich
Germany
+49 89 189 33-0

**New York**
200 Park Avenue
New York, NY 10166-0193
U.S.A.
+1 212.351.4000

**Orange County**
3161 Michelson Drive
Irvine, CA 92612-4412
U.S.A.
+1 949.451.3800

**Palo Alto**
1881 Page Mill Road
Palo Alto, CA 94304-1125
U.S.A.
+1 650.849.5300

**Paris**
166, rue du faubourg Saint Honoré
75008 Paris
France
+33 (0) 1 56 43 13 00

**San Francisco**
555 Mission Street
San Francisco, CA 94105-0921
U.S.A.
+1 415.393.8200

**São Paulo**
Rua Funchal, 418, 35º andar
São Paulo 04551-060
Brazil
+55 (11) 3521.7160

**Singapore**
One Raffles Quay
Level #37-01, North Tower
Singapore 048583
+65.6507.3600

**Washington, D.C.**
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036-5306
U.S.A.
+1 202.955.8500