

The International Scene

BY TALLY M. WIENER¹

Foreign Company Restructurings: There's No Place Like Home

The 1989 Woody Allen movie *Crimes and Misdemeanors* includes the observation by a character named Lester (played by Alan Alda): “If it bends, it’s funny. If it breaks, it isn’t.” The same can be said about the situation of over-leveraged foreign companies that try to restructure their debt outside of their home courts.

Some of these companies will pursue a counterintuitive strategy that works out remarkably well and others will follow a counterintuitive strategy that fails miserably. Consider the Mongolian Mining Corporation’s tour of courthouses. As the name suggests, the company is based in Mongolia.² The company “owns and operates two open-pit coking coal mines — Ukhaa Khudag and Baruun Naran, both located in the Umnugobi aimag of Mongolia.”³ It trades on the Hong Kong Stock Exchange.⁴

Following an “enforcement action by one of its creditors and failure to achieve consensus among stakeholders,”⁵ it restructured its debt via a scheme of arrangement sanctioned (*i.e.*, approved) in the Cayman Islands and Hong Kong. The company also obtained chapter 15 recognition in the Southern District of New York.⁶

If you were to ask a person on the street about foreign company restructurings, “How does a Mongolian mining corporation restructure its debts?,” the person would likely say something like, “I don’t know,” laugh and ask, “Restructuring proceedings in Mongolia?” If you were to complicate the question with, “Say there are no restructuring laws where the Mongolian company’s business operations or management are, or there are but the Mongolian company chooses to restructure elsewhere; what happens then?” The person would probably say something like, “Well, the company can’t do that, right?” The short answer is, “It can try.”

The Mongolian Mining Corporation appears to have successfully restructured. That it bent common sense assumptions about where a restructuring can take place is, in hindsight, funny — because things worked out.

Why Discuss Where and How Companies Can Restructure Now?

Bloomberg described what is going on with some “corporate giants” weighed down with debt after a decade of “rock-bottom interest rates” as: “In fact, a lot of these companies might be rated junk already if not for leniency from credit raters. To avoid tipping over the edge now, they will have to deliver on lofty promises to cut costs and pay down borrowings quickly, before the easy money ends.”⁷ Easy money came to companies not only through borrowing money, but also through private-equity placements or making their equity available for purchase on public stock exchanges. In addition to equity trading on exchanges, there is also a lot of *debt* trading on exchanges, including bonds and instruments with comparable payouts.

Companies will either find a way to get out from under their excessive debt load or be crushed by it. A domestic example is the iconic American brand Sears. As of the time of this article, there was only one bid to try to rescue the company from liquidation: its chairman’s.⁸

Exposure in Offshore Jurisdictions Presents Challenges and Creates Opportunities for Restructuring

Offshore registration can be an attractive choice to companies as part of a tax-reduction strategy. It is among alternatives to Delaware registration,⁹ and it comes with exposure. Companies registered in offshore jurisdictions that are delinquent in honoring their payment obligations can readily be put into involuntary insolvency proceedings in offshore jurisdictions, including so-called havens such as the Cayman Islands and Bermuda.¹⁰



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1 Views expressed are those of the author, who also thanks Prof. **Adrian J. Walters** (IIT Chicago-Kent College of Law; Chicago) for providing comments on this article.

2 See “About Us,” Mongolian Mining Corporation, available at mmc.mn/pages/about-us (unless otherwise specified, all links in this article were last visited on Jan. 3, 2019).

3 *Id.*

4 See *id.*

5 See “PwC Leads Successful Restructuring of Mongolian Mining Corporation’s US\$900M Debt,” available at pwc.com/en/restructuring-and-insolvency/publications/pwc-leads-successful-restructuring-of-mongolian-mining-corporations-us-900m-debt.pdf.

6 *Id.*

7 *Id.*

8 Lauren Hirsch, “Court Allows Chairman Eddie Lampert Another Chance to Buy Sears, Pushing Off Decision to Shut Stores,” CNBC (Jan. 8, 2019), available at cnbc.com/2019/01/06/sears-rejects-eddie-lamperts-bid-to-save-company-will-liquidate-.html.

9 See Jana Kasperkevic, “Forget Panama: It’s Easier to Hide Your Money in the U.S. than Almost Anywhere,” *The Guardian* (April 6, 2016). Beyond the scope of this article are tax-reduction strategies such as including both Delaware and offshore registrations within a corporate group, and the legality of endeavoring to use such registrations to try to avoid paying taxes in jurisdictions where companies do business.

10 See generally “Guide to Liquidation of Companies in the Cayman Islands,” Dillon Eustace, available at www.dilloneustace.com/uploads/files/Guide-to-Liquidation-of-Companies-in-the-Cayman-Islands-July-2012.pdf; “Bermuda Winding-Up Procedures,” Conyers Dill & Pearman (November 2016), available at conyersdill.com/publication-files/2016_12_BDA_Bermuda_Winding_Up_Procedures.pdf.

Overleveraged companies are also vulnerable to being put out of business when they have debts governed by English law, a popular choice of law among lenders because it has developed over the course of centuries. Among exposures under English law is the fact that it includes the remedy of putting debtors into involuntary proceedings in England in order to collect debts they owe.¹¹ English legal tradition is also intolerant of attempts to discharge debts incurred under English law in foreign proceedings.¹² Taking on English debt does not preclude corporate debtors from having debt governed by other laws. Companies overleveraged by English debt can also have debt governed by U.S. statutory law, such as bonds that are subject to the Trust Indenture Act¹³ and other debt with contractual New York choices of law and venue. This creates an exposure to being sued in the U.S.

A strategy for corporate groups in this situation can be pursuing permutations of (1) filing voluntary proceedings in the offshore jurisdictions where companies in the corporate group are registered in order to avoid being bankrupted there on an involuntary basis; (2) causing a “COMI-shift” of part of a corporate group to the U.K. or other jurisdictions that have adopted restructurings via schemes of arrangement (*i.e.*, taking steps causing the appearance of a shift in the location of the corporate group’s actual ongoing COMI or entering into English schemes of arrangement based on cases, including *In the Matter of Rodenstock GmbH*¹⁴ that clarify that there can be English schemes for companies based outside of the U.K.); and (3) seeking recognition in the U.S. under chapter 15 of the Bankruptcy Code in order to achieve injunctions protecting against the collection of debt in the U.S. that (a) is not dischargeable in a foreign proceeding under the Trust Indenture Act or (b) can otherwise be the basis for litigation in New York under the choice of law and venue in deal documents.

However, there are risks. The delay associated with engineering and implementing these strategies extends the time for creditor collection of the debt under the laws of countries governing the debts (such as the U.S. or England) or in other countries in which the debtors are based or have assets (outside of the U.S. and England). Shareholders can also oppose debtor deals with creditors that jeopardize returns to shareholders (possibly in other locations, such as where the debtors’ stock trades). For example, Hong Kong-based commodities trader Noble Group, which trades on the Singapore Stock Exchange, was sued by shareholder Goldilocks Investment in Singapore.¹⁵

Goldilocks obtained an order enjoining a shareholder meeting in furtherance of the company’s restructuring strategy,¹⁶ which included schemes of arrangement in Bermuda and England following a planned COMI shift¹⁷ to England from Hong Kong. Noble Group and Goldilocks worked out a deal providing shareholders with a better payout than initially offered and entitlement to nominate one person to be appointed to the board of directors of the restructured Noble Group,¹⁸ and Noble Group was granted chapter 15 recognition by the U.S. Bankruptcy Court for the Southern District of New York.

If It Breaks, It’s Not Funny

Let’s go back to the person willing to talk about foreign company restructurings and let’s ask the following question: “What happens if a Hong Kong company that trades on the Singapore Stock Exchange restructures outside of Singapore; does it get to keep trading in Singapore?” If you ask the question in this manner, then the answer is likely, “Probably not.” This is the right answer with respect to the Noble Group case as of the time of writing this article.

Bloomberg reported that “Singaporean authorities said the trader wouldn’t be allowed to list as a new entity and announced a probe into its finances.... As part of the investigation, the Monetary Authority of Singapore is looking into whether officers of Noble Group and Noble Resources Pte Ltd. played a role in any breaches of the law. Authorities also said in late November that they had expanded their investigation to Noble’s longstanding auditor, Ernst & Young LLP.”¹⁹

Conclusion

We can expect to see more companies on the brink of defaulting on financial obligations they took on when interest rates were very low. To the extent that past is prologue, iconic U.S. brands that file bankruptcy cases can be expected to continue filing them outside of the judicial districts where they are headquartered, like the chapter 11 filing in the suburbs of New York City by Hoffman Estates, Ill.’s-headquartered Sears Holding Corp.²⁰ What lies ahead for insolvent foreign corporate groups touring the legal system outside of their home courts remains to be determined. **abi**

11 Tally M. Wiener and Adrian J. Walters, “Promise and Perils of Involuntary Insolvency Proceedings,” XXXI *ABI Journal* 3, 46-47, 122, April 2012, available at abi.org/abi-journal.

12 See *Antony Gibbs & Sons v. La Societe Industrielle et Commerciale des Metaux* (1890) 25 QBD 399, discussed in Ian G. Williams and Prof. Adrian J. Walters, “Modified Universalism in Our Time? A Look at Two Recent Cases in the U.S. and U.K.,” XXXVII *ABI Journal* 7, 24-25, 52, July 2018, available at abi.org/abi-journal.

13 15 U.S.C. §§ 77aaa, *et seq.*

14 [2011] EWHC 1104 (Ch.).

15 Kentaro Iwamoto, “Commodity Trader Noble Group’s Restructuring in Doubt: Founder Resigns as Company Misses Bond Payment, Faces Shareholder Lawsuit,” *Nikkei Asian Review* (March 22, 2018).

16 Anshuman Daga, “Noble Group’s Shareholder Meeting Blocked by Singapore Court,” Reuters (April 27, 2018), available at reuters.com/article/us-noble-group-lawsuit/noble-groups-shareholder-meeting-blocked-by-singapore-court-idUSKBN1HY0N2.

17 See Kyriaki Karadelis, “Noble Group Enters Agreement for Schemes, Plans COMI Shift in Case They Fail,” *Global Restructuring Review* (March 16, 2018), available at globalrestructuringreview.com/article/1166715/noble-group-enters-agreement-for-schemes-plans-comi-shift-in-case-they-fail (“Asian commodities trader Noble Group will likely restructure via schemes of arrangement in England, Bermuda and Hong Kong — but it has already started a centre of main interests shift from Hong Kong to the U.K. where it will enter administration if shareholders block the schemes.”).

18 Jamie Lee, “Noble Shares Soar as Firm Secures Goldilocks’ Backing for Sweetened Restructuring Plan,” *Business Times* (June 20, 2018).

19 Josh Saul, “Noble Group Restructuring Gets Green Light in Bermuda Court,” Bloomberg (Dec. 14, 2018), available at bloomberg.com/news/articles/2018-12-14/noble-group-restructuring-gets-green-light-in-bermuda-court.

20 See Lauren Zumbach, “Sears Files for Bankruptcy Protection, Will Close Another 142 Stores,” *Chicago Tribune* (Oct. 15, 2018).

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