AMERICAN BANKRUPTCY INSTITUTE

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Cross-Border Insolvency Complications: Practical Considerations

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Cross-border insolvency proceedings come with many challenges. Both lawyers and insolvency professionals must face sometimes divergent jurisdictional issues and navigate competing motivations and complicated structures, while trying to act in the best interests of the estate, creditors, investors and contributories. This panel will explore several prominent issues that have arisen in practice during the past decade since the credit crisis.

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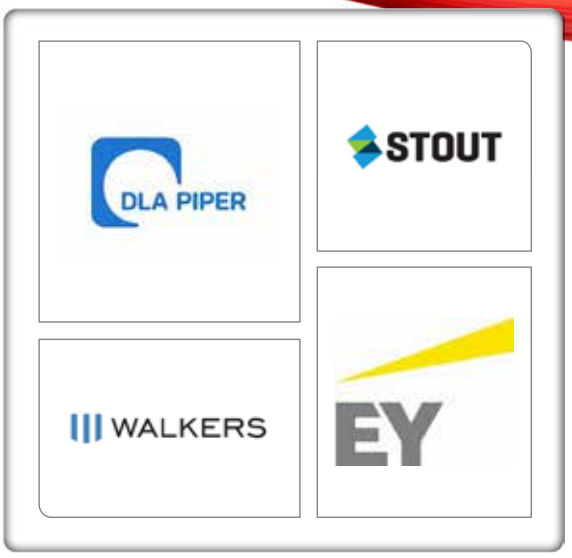

OVERVIEW – TOPICS TO COVER

1. Restructuring in the Cayman Islands
2. Concept of COMI (Center of Main Interest): Caymans and U.S.
3. Financial and Operational Considerations in a Cross-Border Restructuring
4. Chapter 15 Recognition

RESTRUCTURING IN THE CAYMAN ISLANDS

RESTRUCTURING IN THE CAYMAN ISLANDS OVERVIEW

- Forum shopping - consider the Cayman Islands
- Cayman Islands scheme of arrangement
- Restructuring provisional liquidation
- Ocean Rig case

WHY THE CAYMAN ISLANDS?

- Creditor-friendly jurisdiction
- Legal system based on English common law
- No formal rehabilitation process for companies in financial distress like US Chapter 11 proceedings or English administration
- Flexible restructuring toolkit available
- Accessibility of foreign incorporated companies to utilise Cayman restructuring toolkit
- Numerous high-profile and complex cross-border restructurings successfully implemented in the Cayman Islands (Ocean Rig, Mongolian Mining Corporation, CHC Helicopters etc.)

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WHAT IS A SCHEME OF ARRANGEMENT?

- Court-approved **compromise** or arrangement between a company and a class or classes of its creditors and/ or shareholders
- Similar to English schemes thereby providing legal certainty and predictability
- Scheme must be approved at a scheme meeting by a majority in number representing 75% in value present and voting at the meeting (in person or by proxy)
- If more than one class, the scheme must be approved by the same majority at the meeting of <u>each</u> class (no cross class cram down)
- Once sanctioned by the Court and the scheme has become effective, it will be binding on all affected stakeholders regardless of whether or not they voted in favour or at all thereby cramming down any dissenting creditors
- No automatic moratorium/ stay (see later re provisional liquidation process)
- Not a formal insolvency process (frequently used to implement financial restructurings but also used to compete corporate reorganisations/ take-privates/ mergers/ acquisitions)

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SCHEME OF ARRANGEMENT 3 STAGE PROCESS

Stage 1 - CONVENING HEARING:

- Application to the Cayman Court to convene a meeting(s) of appropriate class(es) of creditors or shareholders

Stage 2 - SCHEME MEETING:

- Scheme is put to the vote at scheme meeting(s)
- Scheme must be approved by 50% in number and 75% in value

Stage 3 - SANCTION HEARING:

- If Scheme approved, second application made to Court to sanction the scheme

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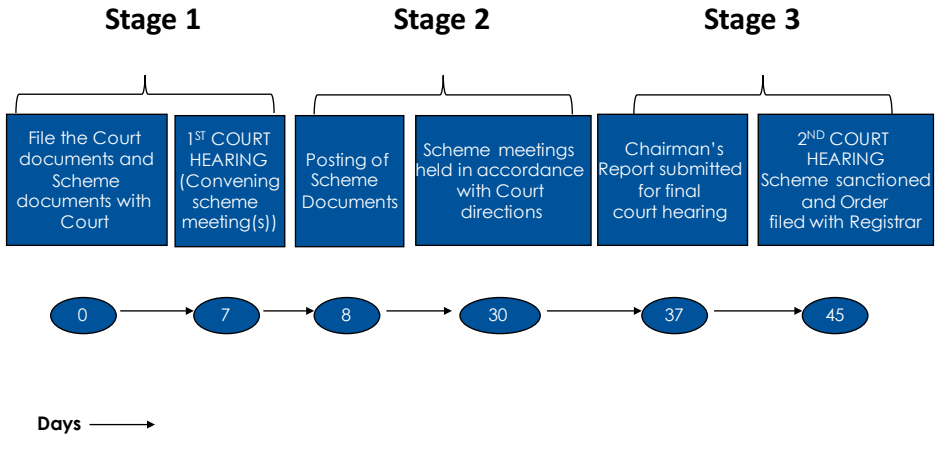
SCHEME OF ARRANGEMENT EXPEDITED TIMELINE



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PROVISIONAL LIQUIDATION (1)

- An insolvency process subject to the supervision of the Cayman Court
- Company can apply to appoint provisional liquidators on the grounds it

  (1) is or is likely to become unable to pay its debts; **and**

  (2) the company intends to present a compromise or arrangement to its creditors

  (*s.104(3) of the Companies Law (2018 Revision)*)
- Compromise or arrangement has been held to include US Chapter 11 plan of restructuring, Cayman scheme of arrangement or foreign scheme of arrangement
- Company not necessarily wound up and liquidated at the end of the process. If a restructuring is successful, provisional liquidators are often discharged and the company continues as a going concern
- Provisional liquidation proceedings trigger a statutory automatic stay on claims but does not prohibit secured creditors from enforcing their security (often used in conjunction with schemes of arrangement)

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PROVISIONAL LIQUIDATION (2)

- **Who can use it?** Any company liable to be wound up in the Cayman Islands including foreign companies where COMI can be shown to be in the Cayman Islands, that is, has property, carries on business or is registered in the Cayman Islands

- **What is a 'soft-touch' provisional liquidation?** Provisional liquidators work alongside the existing directors to develop and propose a restructuring without completely displacing the directors' powers

- **What powers does a Provisional Liquidator have?** The powers are set out in the Court Order appointing the provisional liquidator and tailored to the specific circumstances

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COMI

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COMI

- Cayman Court has wide jurisdiction - many companies are able to create the jurisdictional hook to access the Cayman restructuring regime
- COMI is important and relevant – critical to get appropriate recognition in all relevant jurisdictions to protect restructuring
- Must ensure that the discharge of debt will be effective as a matter of the relevant law
- Most Cayman restructurings typically involve some form of US law governed debt
- Chapter 15 recognition application – recognition as a **foreign main proceeding** requires COMI in Cayman Islands in order to obtain automatic entitlement to relief including a moratorium.
- Outside of the Caymans, the same rules apply. To qualify as a foreign main proceeding and to benefit automatically from the automatic stay under section 362 of the Bankruptcy Code, COMI must be established in the jurisdiction where the foreign insolvency proceeding is pending.

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COMI

- **How is COMI identified?**
  - Registered office presumption/"Letterbox Jurisdiction" (Ascot)
  - Fact specific: the "SPhinX Factors"
    - location of headquarters;
    - location of management;
    - location of primary assets;
    - location of majority of creditors (or majority of creditors who would be affected by the insolvency proceeding); and
    - the jurisdiction whose law would apply to most disputes.
- COMI is determined on a debtor-by-debtor basis. As such, in a foreign proceeding, COMI can lie in more than one place, allowing for a foreign representative to achieve foreign main recognition with respect to certain debtors and foreign non-main recognition with respect to others (Servicos de Pretroleo Constellation, Zetta Jet). This is an issue with large foreign enterprises with operations all over the world.

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COMI

- **When is the relevant time for determining COMI?**

  - Generally, at the time of filing Ch. 15 application.
  - However, if there are allegations of a foreign representative's bad faith manipulation of a foreign entity's COMI, the courts will examine the activities of the debtor prior to the filing of the Ch. 15 application.
  - Allegations of bad faith manipulation – US Courts look at actions taken pre Ch. 15 filing (Suntech, Ocean Rig, Ascot, Oi Brasil, Creative Fin.)
  - Key inquiry: are third-party (creditor) expectations being thwarted by COMI manipulation?
  - Shifting COMI: COMI can be lodged with the foreign representative by virtue of its activities prior to the filing of the foreign proceeding or leading up to the Ch. 15 filing.

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OCEAN RIG [2017]

- COMI shift from the Marshall Islands to the Cayman Islands, NASDAQ listed
- Cross-border restructuring reducing $3.7bn of NY law governed debt to $450m providing cash and equity to existing creditors
- Utilized the Cayman Islands "soft-touch" provisional liquidation and scheme of arrangement regime
- PLs worked with management. Scheme companies promoted schemes under the supervision of the PLs
- Dissent from minority creditors who argued the scheme class analysis was incorrect but
- Cayman provisional liquidation enabled the companies to obtain a temporary restraining order pending Ch.15 recognition

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FINANCIAL AND OPERATIONAL CONSIDERATIONS

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FINANCIAL AND OPERATIONAL CONSIDERATIONS

- Working with other stakeholders, foreign regulators, and insolvency frameworks
  - Varying legal frameworks impact operations and restructuring decisions in a variety of ways
    - Foreign labor laws can constrain the abilities to downsize operations and reduce headcount as each country has its own set of rules regarding the termination of employees
      - Considerations include the country, the size of the entity, and the number of employees involved
      - Various countries may have specific provisions regarding severance amounts, garden leave, or required time to look for new employment positions
    - Capital controls and other banking restrictions on moving cash outside of the country may require further analysis of 'trapped cash'
      - Some countries may view keeping local liquidity as a higher priority than transferring funds to be used in other jurisdictions
      - Multi-jurisdictional borrowing bases can make liquidity management more complex for the distressed international enterprise
    - Differing priority claim schemes than the U.S. require further consideration
      - Unpaid wages, including statutorily mandated severance, can rank higher in priority than secured debt in some jurisdictions

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FINANCIAL AND OPERATIONAL CONSIDERATIONS

- Differences in legal agreements, credit documents, and capital structures
  - It's a big world – advisors can run into structures and concepts that do not exist in the U.S. (e.g. Sharia compliant financing)
    - Standards in documentation and formalities can vary widely
    - Intersection of legal frameworks and lending documents
  - Banks regulated under different regimes have differing speeds and enthusiasm for enforcing lender remedies
    - Lenders doing business outside the U.S. may not be as concerned with 'lender liability' – or may be more concerned
  - Some industries that are inherently international (such as shipping and maritime commerce) have differences in local administration
    - For example, certain jurisdictions enforcing admiralty law are notoriously strict while others are more lax
    - These differences can change through the passage of time as well, depending on events in local market, changes in government, etc.

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FINANCIAL AND OPERATIONAL CONSIDERATIONS

- Legal agreements in foreign languages increase the time needed to analyze their terms, which increases the administrative burden on a distressed enterprise
  - Leveraging local staff and advisors in local jurisdictions who speak English may be more economical and speedy
  - U.S. based translation services can provide more organized and consistent translation and can manage multiple document translations simultaneously
- Cultural differences with foreign companies and their teams
  - Working norms are closely tied to cultural considerations as well as worker protections in each country
  - Sophistication of client management can vary greatly
  - Managerial control (or autonomy) of foreign subsidiaries can vary greatly
  - Countries with lower employment costs tend to encourage manual processes, whereas countries with high labor costs tend to encourage automation

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FINANCIAL AND OPERATIONAL CONSIDERATIONS

- Corporate governance issues and liability for those charged with governance can have a broad impact on how local subsidiaries consider their role in the wider restructuring
  - For example, German directors face civil and criminal liability for failure to file for insolvency within three weeks of becoming insolvent
  - German directors are also personally liable for any payments made after such dates not consistent with prudent care of a director
- Foreign currencies make claims reconciliation and financial reporting more complex
- Differing accounting principals also increase the degree of complexity in financial reporting
  - U.S. GAAP vs. IFRS vs. Japanese GAAP – and others
  - Accounting systems and internal controls exist within a broader cultural context

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FINANCIAL AND OPERATIONAL CONSIDERATIONS

- The decision whether to file the local subsidiaries in their own insolvency proceeding depends on facts of the case
  - Liquidations under chapter 7 or chapter 11 will likely require simultaneous filings in multiple jurisdictions
  - Reorganizations where the jurisdictional impact has been assessed and liquidity is available may avoid the need to file separate foreign proceedings
  - If businesses operating in foreign jurisdictions are profitable (or at least do not drain the resources of the estate), many times they can also avoid filing insolvency proceedings
  - Ideally subsidiaries in foreign jurisdictions:
    - Are profitable and do not rely on liquidity of parent debtors
    - Operate independently from parent debtors
    - Are part of the reorganization and preservation of value is a key requirement

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LEGAL CONSIDERATIONS

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CHAPTER 15 OVERVIEW

- Chapter 15 is the chapter of the U.S. Bankruptcy Code governing international insolvencies.
- Chapter 15 was enacted in 2005 after the U.S. adopted the U.N. Model Law on Cross-Border Insolvency promulgated by the United Nations Commission on International Trade Law (UNCITRAL). Legislation based on the Model Law has been adopted in over 40 countries.
- Chapter 15 is intended to provide effective mechanisms for dealing with cross-border insolvency cases with the goals of:
  - Promoting cooperation between U.S. courts and other competent courts and authorities of foreign countries;
  - Providing a greater legal certainty for international trade and investment;
  - Providing for the fair and efficient administration of cross-border insolvencies while protecting the interests of the debtor, its creditors, and other parties in interest;
  - Protecting and maximizing the value of the debtor's assets; and
  - Facilitating the recovery of financially troubled businesses, thereby protecting investments and preserving employment.
- U.S. courts are directed to interpret chapter 15 consistent with its international origin and the application of similar statutes adopted by foreign jurisdictions.

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- Chapter 15 does **not** apply to:
  - certain entities such as railroads, domestic insurance companies, banks, savings and loan associations, building and loan associations, among others;
  - an individual, or individuals and his/her spouse, who have a certain debt limit, and who are citizens or permanent residents of the U.S.; or
  - an entity subject to a proceeding under the Securities Investor Protection Act of 1970 (SIPA), a stockbroker, or a commodity broker subject to chapter 7 of the Bankruptcy Code.
- Chapter 15 of the Bankruptcy Code defines "debtor" as "an entity that is the subject of a foreign proceeding."
- Section 109(a) of the Bankruptcy Code, which applies to all chapters of the Bankruptcy Code, requires a "debtor" to have a "**domicile, a place of business or property in the U.S.**"

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- There is a split in authority regarding whether a foreign debtor must have a domicile, place of business, or property in the U.S. in order to obtain recognition under chapter 15.
  - There is a line of case law in the Second Circuit, which imposes the requirements of section 109(a) on a debtor in Chapter 15 because all sections of the Bankruptcy Code apply to Chapter 15 cases.
  - That being said, courts have found that this requirement is satisfied if the foreign debtor has property in the U.S. in the form of:
    - A retainer held by U.S. counsel;
    - A U.S. bank account (even if held by an agent);
    - An indenture governed by U.S. state law, e.g., an indenture agreement containing New York choice of law and forum selection clauses satisfies "property in the U.S." eligibility requirement; or
    - Fiduciary duty claims against U.S. defendants.
  - Unlike the line of authority in the Second Circuit, a Delaware Bankruptcy Court has held that the requirements of section 109(a) do **not** apply in a Chapter 15 case because the debtor's foreign representative was petitioning for recognition (as opposed to the debtor).
    - The Delaware Bankruptcy Court noted that nowhere in the definition of "debtor" under chapter 15 was there any indication of a property requirement.
    - Therefore, the Bankruptcy Court found that an entity subject to a foreign insolvency proceeding may be a debtor under Chapter 15, even if it does not possess property in the U.S.

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- Chapter 15 enables a "foreign representative" to seek recognition of a foreign insolvency proceeding in the U.S.
  - The chapter 15 case is ancillary to the foreign proceeding.
  - A "foreign representative" is a person or body appointed in the "foreign proceeding" who is authorized to either administer the financial restructuring, liquidation, or reorganization of a debtor's assets, or who is authorized to act as a representative of such foreign proceeding.
  - A "foreign proceeding" means a judicial or administrative proceeding in a foreign country, under a law relating to insolvency or adjustment of debt, in which the assets and affairs of the debtor are subject to control or supervision by a foreign court. Under Chapter 15, a foreign representative petitions the U.S. court for "recognition" of the foreign insolvency proceeding.

- Upon recognition, any relief granted in the chapter 15 case applies only with respect to the property of the debtor that is within the territorial jurisdiction of the U.S.
  - The extraterritorial effect of a U.S. court order will depend on the jurisdiction in which it is sought to be enforced.
  - By contrast, the relief granted in a chapter 11 case (a plenary proceeding) is intended to provide extraterritorial relief as to a debtor's assets wherever located.
  - In both cases, however, the Bankruptcy Court is constrained by the limits of personal jurisdiction.

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CHAPTER 15
FOREIGN MAIN V. NONMAIN PROCEEDINGS

- The relief available upon recognition depends upon whether the foreign insolvency proceeding is a "foreign **main** proceeding" or a "foreign **nonmain** proceeding"

FOREIGN MAIN PROCEEDINGS

- A "foreign main proceeding" is a foreign proceeding that is pending in the country where the debtor has its COMI. See earlier slides regarding COMI.

- In the U.S., the COMI determination is made at the time of the filing of the chapter 15 petition for recognition, with certain exceptions (as discussed in the earlier slides regarding COMI). As discussed below in the case study, when the COMI determination is made differs in foreign jurisdictions.

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FOREIGN NONMAIN PROCEEDINGS

- A "foreign nonmain proceeding" is a foreign proceeding, other than a foreign main proceeding, pending in a country where the debtor has an "establishment."

- Registered agent and post office box/"letterbox alone are **not** sufficient for "establishment."

- An "establishment" is defined as any place of operations where the debtor carries out a non-transitory economic activity.

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IMMEDIATELY AVAILABLE PROVISIONAL RELIEF UNDER CHAPTER 15

- Under Chapter 15, certain relief is available prior to the Bankruptcy Court's decision on a recognition request. More specifically, Immediately after filing the chapter 15 petition, the foreign representative may request, on an emergency basis, **"provisional relief"** from the Bankruptcy Court "where relief is urgently needed to protect the assets of the debtor or the interest of creditors." Types of provisional relief include:
  - staying execution against the debtor's assets;
  - entrusting the administration or realization of all or part of the debtor's assets located in the U.S. to the foreign representative or another person authorized by the court to protect and preserve the value of the assets;
  - suspending the right to transfer, encumber or otherwise dispose of any assets of the debtor;
  - providing for discovery; and
  - granting any additional relief that may be available to a debtor or trustee (except for certain avoidance powers).
- Unless extended by the Bankruptcy Court, provisional relief is terminated when the petition for recognition is granted.
- It typically takes 3-4 weeks before recognition is granted, to allow for appropriate notice to parties in interest.

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RELIEF AVAILABLE UPON RECOGNITION UNDER CHAPTER 15

- Upon recognition of a foreign proceeding as a **foreign main proceeding**, the following Bankruptcy Code provisions **automatically** apply to property of the debtor within the territorial jurisdiction of the U.S.: (a) the automatic stay; (b) adequate protection; (c) use, sale, or lease of property; (d) avoidance of unauthorized postpetition transfers; and (e) postpetition security interests.
- If the foreign proceeding is recognized as a **foreign nonmain** proceeding, then the Bankruptcy Court may (but is not required to) grant any of the protections set forth above.
- Whether a case is recognized as a foreign main proceeding or a foreign nonmain proceeding, the Bankruptcy Court has discretion to grant additional relief, including staying actions, executions against the debtor's assets, suspending the right to transfer, encumber, or otherwise dispose of the debtor's assets, permitting discovery and extending provisional relief previously granted prior to recognition. In addition:
  - The Bankruptcy Court may grant this additional relief only if the interests of the creditors and other interested entities, including the debtor, are sufficiently protected.
  - The Bankruptcy Court can grant additional relief regarding a debtor's assets (to the extent not already stayed) if the standard for injunctive relief is satisfied.
  - The Bankruptcy Court must have personal jurisdiction over a particular party to enforce its orders against such party.

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CHAPTER 15 - COMITY

- If the Bankruptcy Court grants recognition of a foreign proceeding, the court may, consistent with the principles of comity, provide "additional assistance" to the foreign representative under the Bankruptcy Code or other laws of the U.S.
- The Bankruptcy Court must consider whether such additional assistance will reasonably assure:
  - just treatment of all holders of claims against or interests in the debtor's property;
  - protection of U.S. claim holders against prejudice and inconvenience in the processing of claims in the foreign proceeding;
  - prevention of preferential or fraudulent dispositions of property of the debtor;
  - distribution of proceeds of the debtor's property substantially in accordance with the order prescribed in the Bankruptcy Code; and
  - if appropriate, the provision of an opportunity for a fresh start for the individual that such foreign proceeding concerns.
- The Bankruptcy Court may refuse to take action if doing so would be "manifestly contrary to the public policy of the United States." This exception should only be invoked under exceptional circumstances concerning matters of fundamental importance for the U.S.
- Chapter 15 requires U.S. courts to cooperate "to the maximum extent possible with a foreign court or a foreign representative, either directly or through the trustee." This often involves direct communications between foreign and U.S. courts and often times with Canadian debtors under the CCAA, joint hearings.
- Furthermore, a trustee or any other person (including an examiner) who is "authorized by the court shall, subject to the supervision of the court, cooperate to the maximum extent possible with a foreign court or a foreign representative." Forms of cooperation include: (a) appointment of a person or body, including an examiner, to act at the direction of the court; (b) communication of information by any means considered appropriate by the court; (c) coordination of the administration and supervision of the debtor's assets and affairs; (d) approval or implementation of agreements concerning the coordination of proceedings; and (e) coordination of concurrent proceedings regarding the same debtor.

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LEGAL CONSIDERATIONS - SUMMARY

- Why file for Chapter 15 in the United States? As will be discussed, there are several benefits to a foreign debtor availing itself of the protections of Chapter 15 of the Bankruptcy Code.
  - If the foreign debtor has assets in the U.S. that the foreign representative needs to protect from creditors (i.e., get the automatic stay in place with respect to assets located in the U.S.) or otherwise control or dispose of a foreign debtor's assets.
  - If there is pending litigation or collection efforts from creditors in the U.S. that the foreign representative seeks to stop or slow down.
  - The foreign representative needs to take discovery from parties in the U.S.
  - The foreign debtor has claims against parties in the U.S.
- The same holds true for U.S. entities seeking similar relief under UNCITRAL in foreign jurisdictions.

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BENEFITS FOR A FOREIGN DEBTOR

- The Bankruptcy Code's automatic stay is imposed against all actions taken against the foreign debtor in the U.S. or against its U.S. assets.
- Chapter 15 enables the foreign representative to take broad discovery concerning property and affairs of the foreign debtor.
- The Bankruptcy Code's tolling provision (which allows foreign representative an extension of time from the date upon which it steps into the shoes of the debtor to assert causes of action and meet applicable deadlines on the debtor's behalf with respect to currently pending and potential litigation) is automatically available to foreign representatives.
- If the foreign debtor has assets in the U.S., after recognition of a foreign main proceeding, the debtor may commence a plenary case under another chapter of the Bankruptcy Code.
- The Bankruptcy Court could permit the debtor to assume or reject executory contracts and leases, even if doing so would contradict the laws of the jurisdiction in which the foreign proceeding is pending.
- Upon recognition of a foreign main proceeding, the foreign representative is automatically vested with the authority to use, sell or lease property of the estate that is located within the territorial jurisdiction of the U.S. Note, that while this relief is not automatic upon recognition of a foreign nonmain proceeding, to the extent a foreign representative in a foreign nonmain proceeding needs it, the foreign representative may request such additional discretionary relief.

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BENEFITS FOR CREDITORS

- Foreign creditors have the same rights regarding commencement of, and participation in, a chapter 15 case as domestic creditors. Chapter 15 does not modify the current statutory priority scheme for distribution.
- Correspondingly, a foreign creditor's claim may not be given a lower priority than that of a general unsecured creditor without priority solely because the holder of such claim is a foreign creditor.
- A foreign representative can be sued in U.S. after recognition in his/her capacity as representative of the debtor.
- Favorable law in the U.S. could apply over the laws of the jurisdiction where the foreign proceeding is pending; but only if applying the foreign law would be manifestly contrary to the public policy of the U.S.
- For example, in *Jaffe v. Samsung Elecs. Co.*, 737 F.3d 14 (4th Cir. 2013) (where licenses would have been rendered automatically unenforceable under German law, Bankruptcy Court applied section 365(n) to foreign debtor's U.S. license agreements to allow U.S. licensees to continue to benefit under the licenses).

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CERTAIN PROPOSED REFORMS TO CHAPTER 15

- The expansion of certain sections of the Bankruptcy Code to Chapter 15, including safe harbor provisions, section 1511 (which permits a foreign representative to initiate another chapter 15 post-recognition of the first case), section 1523 (extending strong-arm powers in chapter 5 of the Bankruptcy Code to a foreign representative), providing that a foreign representative is not subject to the jurisdiction of U.S. Courts for any purpose outside of the Chapter 15 case.
- The elimination of the application of section 109(a) to Chapter 15 cases.
- Clarifying that, upon recognition, a foreign representative may file involuntary cases in the U.S. under chapters 11 and 7 of the Bankruptcy Code.

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CERTAIN PROPOSED REFORMS TO CHAPTER 15

- With respect to COMI, if the debtor's COMI is not in the United States, the Bankruptcy Court cannot exercise jurisdiction over the debtor's assets or the debtor. This could result in dismissal of the Chapter 15 case or the Bankruptcy Court's abstention from taking certain actions.
- As noted above, the current U.S. rule is that COMI is determined as of the date of the filing of the Chapter 15 petition. As noted below, foreign jurisdictions differ on this point. The proposed change seeks to align the U.S.'s determination of COMI with that of certain foreign jurisdictions, making it the date the foreign proceeding is commenced.
- Amending how far the foreign representative can look back to claw back assets in avoidance proceedings under Chapter 5 of the Bankruptcy Code by limiting such look back period to the date of the filing of the Chapter 15 case.

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CASE STUDY - A U.S. DEBTOR SEEKING RECOGNITION ABROAD

- We have been discussing the benefits of foreign debtors seeking protection under Chapter 15 of the Bankruptcy Code, but I wanted to provide some real life context about when a U.S. debtor is forced to seek recognition abroad and the how COMI is determined.
- U.S. debtors seek foreign recognition for the same reasons that foreign debtors seek recognition in the U.S. pursuant to Chapter 15.
- For example:
  - Protect estate assets via the automatic stay;
  - Assets can be sold or "liquidated" in the non-US jurisdiction (by appointing a liquidator (which may be the trustee));
  - Allow the trustee, if applicable, to be the debtor's "foreign representative" under UNCITRAL;
  - Allow preference and other litigation to be initiated in the non-U.S. jurisdiction;
  - Commence litigation as a citizen/resident of the foreign jurisdiction is entitled under the local foreign laws
  - Stay pending or future litigation against the estate;
  - Prevent frivolous or other litigation being brought personally against a trustee; and
  - Requires claims to be brought in the U.S. Bankruptcy Court or else they will be extinguished.

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- On September 15, 2017, luxury private jet charter company Zetta Jet USA, Inc. and its Singapore-incorporated affiliate, Zetta Jet PTE Ltd., filed for Chapter 11 in the United States Bankruptcy Court for the Central District of California, which automatically triggered a global stay of all proceedings against Zetta.
- Zetta filed for Chapter 11 due to severe liquidity constraints that were the result of alleged fraud, mismanage, theft, and the like. The board member who was believed to have undertaken these activities had been removed prior to the Chapter 11 filing and took the position that the filing had been done without requisite corporate authority.
- Shortly after Zetta initiated its voluntary proceedings in the U.S., this board member, his company, and another company obtained an injunction from the Singapore court for purposes of preventing the Chapter 11 cases from moving forward.
- The California Bankruptcy Court found that the injunction issued by the Singapore court did not prevent the U.S. Chapter 11 cases from continuing.

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- Shortly after Zetta filed for Chapter 11, a Chapter 11 trustee was appointed, but not long thereafter, the cases were converted to Chapter 7 due to liquidity issues. The Chapter 11 trustee served as the Chapter 7 trustee.
- On December 11, 2017, the U.S. Bankruptcy Court authorized the Chapter 7 trustee to commence recognition proceedings in Singapore under the Singapore Model Law. This was necessary as there potentially were significant assets located in Singapore that belonged to the U.S. debtors' estates.
- As the injunction was in place, the Singapore court found that it could not rule on the Chapter 7 trustee's motion for full recognition as a foreign main proceeding, but that in order for the Chapter 7 trustee to seek to lift the injunction, some form of recognition needed to be granted. As such, the Singapore court granted the Chapter 7 trustee limited recognition for purposes of attempting to set aside the injunction.

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- The Chapter 7 trustee successfully had the injunction lifted, leaving the Singapore court in a position to rule on his motion for Zetta's recognition in Singapore as a foreign main proceeding.
- Determining whether Zetta's COMI was located in the U.S. or Singapore was an issue of first impression. In determining the COMI of the Zetta USA and Zetta PTE under the Singapore Model Law.
- Under the Singapore Model Law, there is a rebuttable presumption that a debtor's COMI is the location of the debtor's registered office.
- Key to this analysis was which date to use when determining COMI. As noted earlier, in the U.S., COMI is determined as of the date of the filing of the recognition petition.
- In other jurisdictions, other dates are used. For example, in Great Britain and Europe, COMI is determined as of the date of the application to open the foreign insolvency proceedings and in Australia, COMI s determined as of the date of the recognition hearing.

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- Singapore had not yet adopted its approach, and the Chapter 7 trustee argued why the U.S. approach was the most appropriate and urged the Singapore court to consider the activities of the debtor group as a whole, and not view each entity separately.
- The Singapore court adopted the U.S. position, with slight modifications. This was key to the Chapter 7 trustee ultimately receiving full main recognition.
- The Singapore court considered: (a) where Zetta was being controlled from; (b) Zetta's dealings with third parties; and (c) the location of Zetta's creditors.
- As noted above, the management of Zetta was changed prior to the initial U.S. bankruptcy filing, and at that time, Zetta's corporate operations were moved to the U.S. Also, Zetta marketed its business to customers as being based out of Los Angeles, and indeed, catered to executives at large Silicon Valley companies and parties in the entertainment industry. Finally, 50% of Zetta's creditors were located in the U.S.
- Based on the foregoing, the Singapore court determined that Zetta's COMI was in the U.S. In other words, the presumption that Zetta PTE's COMI was in Singapore was overcome by virtue of the above COMI analysis.

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- To add another wrinkle to the Zetta cases, Zetta applied for foreign nonmain recognition in Australian.
- Nonmain recognition was sought, because there was one asset that was located in Australia that the Chapter 7 trustee was seeking to recover for the Zetta debtors' estates—a yacht named the Dragon Pearl, and various accoutrements and vehicles that were maintained with the Dragon Pearl in Australian waters.
- These assets were allegedly purchased by the displaced board member using Zetta's corporate funds.
- Had more than one group of assets been located in Australia, as in Singapore, the Chapter 7 trustee may have sought foreign main recognition in Australia as well.

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KEY TAKEAWAYS

1. The Cayman Islands is one of the premier jurisdictions of choice to deliver cross-border restructuring solutions
2. Although foreign main recognition is preferred, foreign debtors can obtain both foreign main and foreign nonmain recognition with respect to the same foreign insolvency filing.
3. Business may be conducted globally, but the path of a restructuring and its ultimate success will be heavily influenced by local legal issues and foreign customs
4. Hiring professionals within the jurisdictions is key to maneuvering multiple authorities
5. Communication, Communication, Communication

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QUESTIONS?

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