International Corporate Rescue

Published by

Chase Cambria Company (Publishing) Ltd

ChaseCambria

www.chasecambria.com

SOUTH SQUARE

Published by:
Chase Cambria Company (Publishing) Ltd
4 Winifred Close
Barnet, Arkley
Hertfordshire EN5 3LR
United Kingdom

www.chasecambria.com

Annual Subscriptions:
Subscription prices 2024 (6 issues)
Print or electronic access:
EUR 730.00 / USD 890.00 / GBP 560.00
VAT will be charged on online subscriptions.
For 'electronic and print' prices or prices for single issues, please contact our sales department at:
+ 44 (0) 207 014 3061 / +44 (0) 7977 003627 or sales@chasecambria.com

International Corporate Rescue is published bimonthly.

ISSN: 1572-4638

ARTICLE

Forum Shopping for a Friend? Availability of Third Party Releases in the UK, Singapore and the US

Andrew Cooke, Partner, Herbert Smith Freehills Kramer LLP, London, UK, **Megan M. Wasson**, Partner, Herbert Smith Freehills Kramer (US) LLP, New York, USA, and **Jonathan Tang**, Director, Herbert Smith Freehills Kramer Prolegis Alliance, Singapore

Synopsis

Third party releases ('3PRs') have been a feature of restructurings for years in the key international restructuring hubs of New York, London and Singapore. While once included in court-approved restructuring documentation without argument, recent decisions suggest an emerging focus on whether 3PRs are available or appropriate and, if so, to what extent.

This article reviews the use of 3PRs in court-approved restructurings in New York, England and Singapore. Divergence in practice between New York on the one hand and England and Singapore on the other may incentivise forum shopping by restructuring companies, especially when their affiliates or management perceive a 3PR as key to the restructuring's success.

This may increase prominence of the Chapter 15 regime in the US for recognition of foreign restructurings, potentially permitting a 3PR approved by a foreign court under foreign law to be enforced in the US. However, a US court may hesitate to give effect to a foreign 3PR where it appears that the combination of a foreign restructuring and a Chapter 15 proceeding was chosen deliberately to avoid restrictions on 3PRs in Chapter 11 proceedings.

What is a third party release?

Typically, an in-court restructuring is initiated by the restructuring company (the 'Company'). In England, for example, the Company is the applicant seeking relief in the form of court sanction of a scheme of arrangement or restructuring plan.

A 3PR is a release, within the restructuring proceeding, of liabilities owed, potentially owed or claimed to be owed by a person other than the Company (a 'Third Party').

Which liabilities of the Third Party are released?

The scope of the released liabilities of the Third Party depends on the drafting. There is no 'one size fits all' approach, not least as 3PRs in England, New York and Singapore derive not from the legislation itself but from practice in the relevant markets. That said, 3PRs generally cannot release criminal or fraud claims against Third Parties (consistent with a limitation on release of such claims against the Company).

Three use cases suffice by way of example. First, where financial indebtedness of a Company is being released but has been guaranteed by a Third Party, the Third Party's guarantee obligations are typically released by way of a 3PR. If the Third Party were not released, a creditor of the Company could pursue them for the full amount rather than recover only the compromised value of its claim against the Company through the restructuring. If the Third Party paid the guaranteed liability, they would usually acquire a subrogated claim against the Company equating to the liability discharged in place of the Company. The restructuring would have simply converted financial indebtedness owed by the Company to lenders into liabilities owed to subrogated guarantors. This can be avoided if the Third Party guarantor's obligations are also released in the restructuring.

Second, a 3PR may address a situation in which the Company shares liability with a Third Party. Consider a claim arising out of a financial product allegedly missold to many thousands of consumers. The provider of the financial product is typically the primary target for claims. There may be a number of secondary targets, including financial advisors that advised their clients to purchase the product. The provider and the advisor are not usually jointly and severally liable. However, in many jurisdictions where two parties are liable for the same loss and damage, there may be contribution claims between them in order to determine the proportions in which losses are compensated. It would be pointless for the provider to obtain a release if consumers could pursue advisors, who could then pursue the provider for a contribution. This issue is resolved if the advisor's obligations are released in the restructuring.

These two examples concern what are commonly known as 'ricochet claims', which bounce from the Third Party to the Company. Ricochet claims undermine the viability of a restructuring because they create a new liability to the Third Party by way of indemnity, subrogation or contribution, leaving the Company in the same net position.

Third, 3PRs may release potential liabilities of Third Parties involved in the formulation, preparation, negotiation or promotion of a restructuring. Common beneficiaries include the Company's:

1. lenders, particularly those providing additional or new funding to the restructured Company;
2. management;
3. shareholders; and
4. advisors.

Disgruntled creditors may seek to recover from these beneficiaries the losses that those creditors have suffered by the compromise of the liabilities owed by the Company. Even given doubt as to whether those losses would ever be recoverable from a Third Party (because there is unlikely to be a direct duty between the disgruntled creditor and the Third Party), these claims could undermine the purpose of the restructuring, be costly to resolve and create a chilling effect for those that seek to assist companies avoid insolvency by promoting restructurings.

When will 3PRs be included in restructurings?

3PRs will not be included in court-approved restructuring instruments unless somebody – generally, the Company – asks for their inclusion. In most restructuring regimes, the proposing Company controls the proposed terms of the restructuring, albeit that the terms generally reflect a position that the Company expects to be acceptable to a sufficient number of creditors as to obtain their approval.

Even if the Company has proposed and the relevant creditors have approved a restructuring containing a 3PR, the court must still determine whether the 3PR should be included in the restructuring instrument. Typically, restructuring courts approach this in two stages. The first is jurisdictional: does the court have power to sanction a 3PR? If the answer is 'yes', the court may proceed to the second question: should that power be exercised in the facts and circumstances of this restructuring?

Jurisdiction

As to jurisdiction, the English and Singaporean courts have consistently taken a flexible approach. The English court has the power to sanction a 3PR where it is 'necessary to give effect to the arrangement proposed for the disposition of debts and liabilities of the company to its own creditors'.[1] In *Re Van Gansewinkel Groep BV* [2015] Bus LR 1046, the court made clear that 3PRs must be sanctioned only where 'necessary to give legal and commercial effect to the compromise or arrangement', where a claim against the Third Party would 'undermine the compromise between the creditor and the company.'

Thus, the court will only have power to approve a 3PR where the released liabilities of Third Parties are sufficiently closely connected with the compromised liabilities of the Company. For example, in *AI Scheme Ltd* [2015] EWHC 1233 (Ch), the court considered the scope of a 3PR in relation to the misselling of a financial product, where a scheme of arrangement had been designed to provide redress to nearly 2 million potentially affected consumers. The financial product had been sold by an insurance provider, Affinion, and also by its business partners including banks. As part of the restructuring, Affinion established an orphan vehicle which would voluntarily assume liability to consumers and would enter into the scheme, establishing a system to ascertain and pay redress. The judge was satisfied that it was appropriate within the scheme of arrangement to release claims by consumers against both Affinion and its business partners, as well as claims between Affinion and its business partners. A 'simple release' was necessary to resolve interlinked contractual and tort claims, as well as warranty and indemnity cross-claims. This gave effect to the restructuring's purpose: going forward, the consumers could seek redress only from the orphan vehicle.

The Singapore courts consider 3PRs at the leave stage (where the debtor obtains permission to convene a meeting of creditors to approve the proposed restructuring) and also at the sanction stage (where the proposed restructuring is approved by the court). At the leave stage, the court's inquiry is jurisdictional, turning on whether the Singapore courts have jurisdiction under section 210(1) of Singapore's Companies Act 1967. The test is whether there is a sufficient connection between the release of the third party liability and the relationship between the debtor company and the restructured creditors.

A similar but less flexible approach applies in the US, where courts permit 3PRs necessary to achieve the goals of the restructuring if the Third Party has provided sufficient consideration to the Company's estate to justify the release. What constitutes consideration

Notes

1 *Lehman Brothers International Europe (No. 2)* [2010] Bus LR 489.

varies: it could be a director's contribution to the restructuring process or a financial contribution by the Third Party.

The key distinction between the US and English and Singaporean approaches is whether 3PRs must be consensual (where creditors have agreed to provide the 3PR) or whether it can be nonconsensual. Until recently, nonconsensual 3PRs were generally permissible in US restructurings. However, the US Supreme Court's ruling in *Harrington v. Purdue Pharma L.P.*, 603 U.S. 204 (2024) changed that paradigm. The Supreme Court concluded that *nonconsensual* 3PRs are not permissible (with a few limited exceptions). Outside those exceptions, US courts only have power to approve consensual 3PRs or 3PRs where the releasing creditors are paid in full. As a result, the focus in US restructurings has shifted to what suffices as 'consent', as discussed further below.

Exercise of discretion

Where the court has power to approve a 3PR, it must determine whether to exercise that power.

In England, judicial guidance on this discretionary element is relatively limited. Much of the judicial analysis turns on whether the 3PR is necessary and sufficiently closely connected to the compromised liabilities so as to satisfy the jurisdictional test; when the jurisdiction exists, the discretion is usually exercised without explicit application of a separate, discretionary test. This perhaps reflects the language of necessity adopted at the jurisdictional stage: the judges' language naturally leads to exercise of their discretion, because the 3PR must be necessary in order to give proper effect to the scheme or restructuring plan in order to establish jurisdiction in the first place (so failure to exercise the discretion would cause the restructuring to fail, reflecting necessity not desirability).

However, some authorities do provide guidance. In *Re La Seda de Barcelona SA* [2010] EWHC 1364 (Ch), the court referred to 'the requisite element of give and take'. The scheme of arrangement required the Third Party to release its claims against the Company and the scheme creditors to release their claims against both the Company and the Third Party. Proudman J identified give and take in the Third Party giving up rights against the Company in exchange for being released by the scheme creditors. The release also benefitted the scheme creditors, because the Third Party's claims against the Company made it insolvent; under the scheme, the scheme creditors received more value than they would have done if shared between scheme creditors and the Third Party in an insolvency.

Proudman J's analysis does not appear to have been adopted in other cases. Perhaps that is because it reflected a jurisdictional test in disguise: the language of give and take is often used by judges to identify whether there is a true compromise, which is a necessary element of an arrangement or plan. Other judges have applied a broader fairness test, perhaps following the case law in relation to company voluntary arrangements where it is possible for a creditor to bring a statutory unfair prejudice challenge. A judge's conclusion often turns on whether the compromised rights under the 3PR are proportionate to the benefit to creditors under the restructuring instrument.[2]

There are difficulties with this approach, particularly given the practice that has arisen in England around the sanctioning of restructuring plans. Plan proceedings involve an inequality between the information available to the Company and the information available to creditors. Creditors may not even know that there are grounds upon which they have a potential claim against a Third Party, let alone have sufficient documentation, information or time to make an informed analysis or argument on the claim's strength or quantum. In any event, the sanction hearing for the plan is not a forum for a mini-trial of claims against the Third Party to determine whether the creditors are receiving a fair outcome in exchange for compromising those claims. This practice produces an environment in which 3PRs may be included without proper scrutiny or a proper understanding of their intended and actual effect.

The Court of Appeal in England has recently affirmed the need for courts carefully to consider 3PRs in restructuring plans. In *Kington SARL v Thames Water Utilities Holdings Ltd* [2025] EWCA 475, the court was asked to sanction an interim restructuring plan in respect of Thames Water, the purpose of which was to provide a liquidity window in which additional funding would be provided while a final restructuring could be formulated. The interim plan included a 3PR, in a form similar to that which has appeared in earlier court-approved plans, under which both the creditors and the Company waived liabilities of (broadly) any nature in relation to the 'negotiation, preparation, sanction or implementation of the Plan and/or the Interim Platform Transaction (including, without limitation, the negotiation, preparation, sanction or implementation of any Transaction Documents).'

The 3PR's effect was that, even if the interim plan failed to provide a platform for a final restructuring, neither the Company nor its creditors would have any resultant claim against those that promulgated the interim plan. Such a claim might have included, for example, an allegation that management should not have caused the Company to incur the significant expense of

Notes

2 *Re debtor (No 574 of 1995)* [1998] 2 BCLC 124; *Mourant & Co Trustees Ltd v Sixty UK Ltd* [2010] EWHC 1890 (Ch).

an interim plan without sufficient certainty that a final restructuring was viable and could be delivered. Absent a final restructuring plan, the costs of the interim plan would effectively have come out of the creditors' insolvency return.

The first instance judge approved the 3PR because none of the released Third Parties were alleged to have breached a duty and, absent release, they faced a risk of claims disincentivising them from implementation of the court-sanctioned plan. Although the judge had some reservations about the release of liabilities owed by Third Parties to the Company itself – which involved the Company giving up potentially valuable assets – he concluded that this was insufficient reason to reject the inclusion of the 3PR in the plan, although the judge invited improvements to the drafting.

At a further hearing, the judge concluded that it was not appropriate to excise from the 3PR the claims against these Third Parties by the Company because their ability to work towards a final restructuring would be impacted if they were concerned about what claims the Company might allege against them, were the Company to become insolvent because attempts to implement a final restructuring failed.

The Court of Appeal disagreed. While there was no reason to conclude that management had breached their duties to the Company, the Court was not satisfied that a release of a potentially valuable claim which might be brought by the Company in insolvency proceedings (if the final restructuring failed) was justified to enable the interim plan. Though not explicit in the reasoning, the Court appears to have recognised that it was unable to assess the merits or value of any such claims. Doing so would require disclosure and evidence – including a significant volume of documentation internal to the Company – which is not available at a sanction hearing (including because it is the Company's current management that controls the extent of the documentation it makes available (albeit that this may change following the recent adoption of a restructuring plan Practice Statement and its detailed provisions on disclosure of information and documentation)).

The Court of Appeal therefore directed that the 3PR be amended so as not to prejudice claims brought against the Third Parties by the Company in an insolvency proceeding. Thus, the Court preserved a potentially valuable asset of the Company in a future insolvency, while protecting the Third Parties against liability if their attempts to promulgate a final restructuring plan succeeded in staving off insolvency.

Arguably, the Court's amendments did not go far enough. Why should value be preserved only if the claim is pursued by an officeholder but not by new management of the Company were its directors replaced (for example, as a result of it being sold)? Indeed, in the context of a restructuring plan between the Company and its creditors, why should the Company be required to give up potentially valuable rights against Third Parties at all, particularly where the Court cannot test whether those rights exist or their value?

It remains to be seen how the UK market will react to the *Thames* judgment as it relates to 3PRs. The market has been in something of a hiatus in recent months pending potential Supreme Court clarification of the approach to restructuring plans which is now unlikely to materialise given settlements. Restructuring companies may seek to explain away *Thames* as a decision justified by the unusual, interim nature of the plan. The court should not, until the final restructuring terms are clear, make decisions as to the valuable claims that the Company is giving up, hence the preservation of those claims in *Thames*. Restructuring companies will say that *Thames* does not affect the availability of 3PRs in final restructurings. However, this does not fully explain the reasoning in *Thames* – the claims are preserved only in an insolvency context, so not preserved if a final restructuring is successful.[3] No detailed consideration was given to whether any potential value of these claims should be shared with plan creditors in the interim or final restructuring plans and, if so, whether the Third Parties would have to contribute value to support the give and take inherent in their releases. That would bring the English courts closer to their US counterparts: as has been explained above, in the US the Third Party will need to give proper value for that 3PR.

In Singapore, a similar approach to that in England is adopted when considering the merits and reasonableness of inclusion of a 3PR.

In US restructurings, the analysis hinges on whether sufficient consent has been provided by the releasing party for the 3PR, and Companies have come up with different mechanisms to obtain creditor consent for 3PRs in Chapter 11 cases. One approach is to rely upon inaction, structuring the 3PR as an opt-out release requiring creditors to affirmatively tick a box on their ballot opting out of granting the 3PR. Where creditors fail to do so, this results in consent being deemed given. Other US courts have concluded that inaction does not equal consent and, as a result, require affirmative consent to the releases (e.g., checking a box to 'opt into' the 3PR): see *In re Smallhold, Inc.*, Case No. 24-10267 (CTG) [Dkt. No. 288], Sept. 25, 2024.

Another option is to attribute a portion of the value distributable to creditors specifically to consideration for the 3PR, with creditors who opt into (or do not opt out of) granting the 3PR receiving a higher recovery on account of their claims in the restructuring: see *In re Endo International plc*, Case No. 22-22608 (Bankr. S.D.N.Y.).

Notes

3 In *Thames*, there was not considered to be any potential outcome except a final, successful restructuring or insolvency.

The downside of a consensual 3PR is that obtaining unanimous consent is unlikely, and thus the released Third Parties may not get releases of all third party claims.

How are 3PRs effected?

Court-approved restructurings are often thought of as akin to contracts, albeit that they are imposed on a minority of creditors that objected to their terms rather than entered into voluntarily. Rules of contractual interpretation are often applied to restructuring instruments. Applying those rules, a Third Party will need to be able to show that the 3PR covers the liability which the Third Party alleges has been released.

It is generally more difficult to imply terms into a restructuring instrument which might be implied into an ordinary contract: as a result, 3PRs should be express, clear and unambiguous and called out in any evidence or explanatory statement which accompanies the proposal of the restructuring instrument to the court and creditors.[4]

In a contractual context, privity is key: this doctrine governs who can sue on a contractual right and who is bound by a contractual obligation. The same issue arises in the context of a court-approved restructuring. However, most legislative frameworks permit the court only to release the obligations of the Company seeking relief (as has been seen particularly in the US context above), not a Third Party. And many common law legal systems prevent a third party from enforcing a contract's terms.

How then does a Third Party enforce the 3PR contained in a court-approved restructuring instrument to which it is not party? In England, there is doubt as to whether a Third Party can enforce the terms of the instrument under the Contracts (Rights of Third Parties) Act 1999. In *Re Rhino Enterprises Properties Ltd* [2021] BCC 18, it was held to be at least strongly arguable for the purposes of a summary judgment application that a former administrator could not rely upon a 3PR under a company voluntary arrangement ('CVA') because it is not a 'contract' to which the Act applies.[5] A CVA is not founded upon the agreement of those bound, but upon compliance with a procedure prescribed by statute. Schemes of arrangement and restructuring plans are likewise founded upon compliance with a statutory procedure. Without the intervention of the Act, the default position is that the Third Party cannot rely on the instrument or the 3PR contained therein.

English restructuring lawyers have devised workarounds. The restructuring instrument may empower a nominated individual to execute a deed of release in favour of Third Parties as attorney on behalf of creditors.[6] The deed of release can then be enforced by a Third Party under the Act or as a deed poll.[7]

Then, how does a court-approved restructuring instrument bind creditors of the Company in their capacity as creditors of the Third Party? The power of attorney structure addresses this problem too: creditors are bound through their attorney entering into a deed of release on their behalf. A theoretical issue may arise as to whether, if the creditor pursues the liabilities which have been compromised in another forum and under another law, that other forum would recognise the attorney's acts as binding the creditor. That is a particular risk where the law governing the liability differs in the ability of attorneys to bind their principal, especially where that principal has not consented to the agency relationship having voted against the restructuring. In England, this risk is typically addressed by the judge being satisfied, on the basis of foreign law expert evidence, that the release structure will be given effect in the relevant foreign law.[8]

Under Singapore law, section 210(3AA) of Singapore's Companies Act 1967 provides that a court-sanctioned arrangement is binding on (amongst others) the creditors of the company or such class(es) of creditors as voted. The approval and registration of the Singapore scheme formalises its effect, including the binding effect of any 3PRs in the Singapore scheme. It is rare (and the Singapore courts do not appear to have considered) that any further actions are required to permit the Third Party (not the Company) to enforce a 3PR which appears in the sanctioned scheme instrument. The oversight and supervision by the Singapore Court is a strong deterrent to any follow-up claims from errant creditors against Third Parties and the Singapore

Notes

4 In *Oceanfill Ltd v Nuffield Health Wellbeing Ltd* [2022] EWHC 2178 (Ch), the English court held in the context of the Virgin Active restructuring that a release would not be implied in favour of a guarantor even where the underlying obligation owed by a tenant had been released as between tenant and landlord. US bankruptcy courts will enforce the plain language of a 3PR even if it contravenes the parties' stated intent. *See, e.g., Kravitz v. Samson Energy Company, et al.,* Adv. Pro. 17-51524 (BLS) [Dkt. No. 82] (Bankr. D. Del. Aug. 30, 2018), holding that the restructuring plan released certain third parties that creditors had intended to preserve claims against.

5 The claim against the former administrator was later struck out on different grounds and the conclusion in relation to the Act was not tested at trial.

6 *Re T&N Ltd* [2007] Bus LR 1411 at [55]; *Re Van Gansewinkel Groep BV* [2015] Bus LR 1046 at [16]; *Re Noble Group Ltd* [2019] 2 BCLC 548 at [24]; and *Re Colouroz Investment 2 LLC* [2020] EWHC 1864 (Ch) at [74].

7 The English courts have been content also to bypass the rule that if a power of attorney authorises the attorney to execute a deed, the power must itself also be executed as a deed. A deed is not required because the restructuring instrument takes effect by statute, not agreement (following the law in Scotland (*Re Premier Oil PLC* [2020] CSOH 39) and Bermuda (*Kempe v Ambassador* [1998] 1 BCLC 234)).

8 For example, *Re Gategroup Guarantee Ltd* [2021] BCC 722.

court would (in most cases) retain jurisdiction to determine and resolve such disputes.

While the US is more stringent in granting 3PRs, enforcement of 3PRs in approved restructuring plans is significantly easier. Restructuring Chapter 11 plans bind all impacted creditors who received sufficient notice and released Third Parties have standing as beneficiaries to enforce 3PRs.

3PRs as a gateway to forum shopping

If a Third Party can benefit from 3PRs contained in a restructuring instrument sought by a primary obligor, the primary obligor can also benefit as a third party from a 3PR contained in a restructuring instrument sought by one of the secondary obligors. Where primary and secondary obligors are part of the same corporate group but, by reason of their place of incorporation, centre of main interests (COMI) or governing law of their liabilities, have access to different forums and different restructuring tools, the group will need to decide where to seek a court-approved restructuring.

While the topic of forum shopping is beyond the scope of any detail in this article, the English court has approved restructurings where a group entity has voluntarily assumed liability as a secondary obligor, in order to pursue an English restructuring plan which would not have been available to the primary obligor and to secure a release for the primary obligor via a 3PR.[9]

A similarly expansive approach is expected in Singapore. Singapore is committed to broadening its inclusive restructuring repertoire to become a nodal jurisdiction for restructuring. Hence, the focus in Singapore is on the thwarting of forum shopping only where it is abusive, the Singapore Court of Appeal having distinguished between 'good' and 'bad' forum shopping for the purposes of restructuring. The manipulation of a debtor's COMI with a view to benefitting its creditors is 'legitimate and unobjectionable'.[10]

Similar considerations should apply in the case of 3PRs (provided the jurisdictional and substantive tests are met at the leave and sanction stages), especially where 3PRs are necessary to give effect to the restructuring as a whole – see, for example, *Re Babel Holding Ltd* [2024] 4 SLR 1087 where the Singapore High Court observed that the 3PRs in that case were 'appropriate given the nexus that existed between the release of [Babel's affiliate companies] and the relationship between the applicant and its creditors'. In *Pathfinder* [2019] 2 SLR 77, the Singapore Court of Appeal was of the view that without a 3PR of the primary obligor's liability, it would not be realistic or commercial to expect an affiliated guarantor to compromise its contingent guarantee liabilities through a scheme of arrangement.

Following the US Supreme Court's ruling in *Purdue Pharma*, companies with ties to the US have looked for creative ways to restructure US liabilities while benefiting from nonconsensual 3PRs that are now unavailable in the US. One such approach has been to implement a foreign restructuring (such as an English scheme) that includes a nonconsensual 3PR under applicable foreign law, and then seek recognition of that foreign restructuring (including the 3PR) through a Chapter 15 proceeding in the US. Chapter 15 implements the UNCITRAL Model Law on Cross-Border Insolvency and allows for ancillary relief to be granted in the US in aid of a foreign insolvency proceeding. In two recent cases, US bankruptcy courts have recognised and enforced nonconsensual 3PRs – which would not be available in Chapter 11 – in Chapter 15 proceedings where such 3PRs are approved as part of the foreign proceeding. Crédito Real, a Mexican financial institution that underwent a Mexican restructuring, sought and obtained recognition and enforcement of its restructuring scheme, which contained nonconsensual 3PRs for its directors and officers (among others) in the US through a Chapter 15 proceeding.[11] Similarly, Odebrecht Engenharia e Construção received recognition and enforcement of its Brazilian restructuring scheme which contained a limitation on liability similar to a nonconsensual 3PR.[12] In both cases, the US Bankruptcy Courts overruled objections to the permissibility of nonconsensual 3PRs post-*Purdue Pharma*, in one case reasoning that '[b]ecause comity is central to chapter 15, the relief granted in the foreign court does not have to be available in US courts under chapter 11.'

It remains to be seen whether the ability for corporate groups to arbitrage different restructuring tools and forums in this way will lead to increased forum shopping. The willingness of US Bankruptcy Courts to sanction restructurings seemingly designed to take advantage of the different treatment under Chapter 11 plans versus Chapter 15 proceedings may be limited. Mega NewCo, a newly-created UK subsidiary of a Mexican financial services provider, implemented an English scheme of arrangement designed to restructure certain of its USD-denominated indebtedness. The scheme included a nonconsensual 3PR of the Mexican parent (which was liable on the US debt). To obtain 3PRs for the Mexican parent and avoid ricochet claims being brought in

Notes

9 For example, *Gategroup Guarantee* (*ibid*) and *Re ALL Scheme Ltd* [2021] EWHC 1401.

10 *Re Fullerton Capital Ltd (in liquidation)* [2025] 1 SLR 432; [2025] SGCA 11

11 *In re Crédito Real, S.A.B. de C.V., SOFOM, E.N.R.*, Case No. 25-10208-TMH (Bankr. D. Del.)

12 *In re Odebrecht Engenharia e Construção S.A.*, Case No. 25-10482-MG (Bankr. S.D.N.Y. 2025)

the US, Mega NewCo sought enforcement of the English scheme through a Chapter 15 proceeding.[13] While no party objected to recognition, the US Bankruptcy Court itself raised substantial concerns about the Company's 'surgical' use of foreign proceedings to obtain relief not otherwise available in the US as part of a Chapter 11 case. The Bankruptcy Court underwent a detailed COMI analysis to assess whether Mega NewCo had sufficient ties to the UK to allow the English scheme to qualify as a foreign proceeding for the purposes of Chapter 15. Ultimately, the court concluded that Mega NewCo's COMI was in the United Kingdom, and granted recognition in large part because of the level of creditor support for the proceedings, remarking that '[i]ronically, the only thing that would thwart creditor expectations in the case before me would be if I were to decline to enforce the English Court Order.'

While US courts are generally willing to recognise English schemes of arrangement as foreign proceedings,[14] foreign proceedings from other jurisdictions that do not have the 'purpose of reorganization or liquidation'[15] may not qualify for the purposes of Chapter 15, which may be another road block to potential forum shopping in the US.[16]

Conclusion

Given the focus on 3PRs from the US Supreme Court in *Purdue Pharma* and the English Court of Appeal in *Thames*, it appears likely that practice within leading restructuring markets will tend towards greater scrutiny of the purpose, scope and effect of 3PRs in court-approved restructurings. In the US, the focus is likely to be whether a perception of forum shopping prevents enforcement of a 3PR by a US bankruptcy judge under the Chapter 15 regime, the Supreme Court having settled the position (with limited exceptions) in *Purdue Pharma*.

In England, forum shopping is likely to be less of a concern – an English scheme was, after all, approved for Mega NewCo – but there is uncertainty following *Thames* as to the permissible scope of a 3PR, including how the parties and courts should approach the release of unforeseen, unquantified or potentially unknown liabilities of Third Parties without proper disclosure, evidence and argument.

Singapore seems likely based on the present authorities to take the most expansive approach, though this optimism must be cautious given the lack of detailed consideration to date of the scope or effect (as opposed to general appropriateness) of a 3PR in restructuring cases.

Will we see the introduction of legislation that expressly permits restructuring of an entire group's (not individual companies') liabilities or Third Parties directly to enforce the terms of a restructuring instrument containing a 3PR? That seems unlikely for now, given that practitioners in the leading markets have already deployed the tools available – albeit perhaps not for their intended purpose – to achieve those ends.

Notes

13 *In re Mega NewCo Limited*, Case No. 24-12031-MEW (Bankr. S.D.N.Y. 2024)

14 *In re Avanti Communications Group plc*, 582 B.R. 603 (Bankr. S.D.N.Y. 2018).

15 11 U.S.C. § 101(23).

16 See *In re Global Cord Blood Corp.*, No. 22-11347, 2022 WL 17478530 (Bankr. S.D.N.Y. Dec. 5, 2022). (finding that Cayman Islands proceeding did not qualify as a 'foreign proceeding' as it was not brought for the purpose of reorganisation or liquidation).

International Corporate Rescue

International Corporate Rescue addresses the most relevant issues in the topical area of insolvency and corporate rescue law and practice. The journal encompasses within its scope banking and financial services, company and insolvency law from an international perspective. It is broad enough to cover industry perspectives, yet specialised enough to provide in-depth analysis to practitioners facing these issues on a day-to-day basis. The coverage and analysis published in the journal is truly international and reaches the key jurisdictions where there is corporate rescue activity within core regions of North and South America, UK, Europe Austral Asia and Asia.

Alongside its regular features – Editorial, US Corner, Economists' Outlook and Case Review Section – each issue of *International Corporate Rescue* brings superbly authoritative articles on the most pertinent international business issues written by the leading experts in the field.

International Corporate Rescue has been relied on by practitioners and lawyers throughout the world and is designed to help:

- Better understanding of the practical implications of insolvency and business failure – and the risk of operating in certain markets.
- Keeping the reader up to date with relevant developments in international business and trade, legislation, regulation and litigation.
- Identify and assess potential problems and avoid costly mistakes.