Expert Views

Cross-Border Restructurings and the New Jurisdictional Chessboard

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Editor's Note: Below is the latest in Reorg's Expert Views series, an article written by Heather Lennox, Dan Moss, Ben Larkin, David Harding, Jasper Berkenbosch, Alexander Ballmann and Olaf Benning.[1] The authors are lawyers in the business restructuring and reorganization practice at the global law firm Jones Day. In addition to reviewing recent groundbreaking cross-border restructurings, they discuss legal developments in Germany, the Netherlands, Singapore and the United Kingdom and how restructuring proceedings in these jurisdictions can be used to expand multinational corporations' restructuring options.

Historically, chapter 11 of the U.S. Bankruptcy Code and schemes of arrangement in the United Kingdom under the Companies Act have dominated the complex cross-border restructuring scene. Over the past several years, however, the frequency of complex cross-border restructurings has increased, and the method for approaching such matters is evolving. Indeed, companies and lenders are turning more and more to sophisticated restructuring jurisdictions outside the United States and United Kingdom. This article discusses the developing cross-border restructuring chessboard and highlights two recent examples where companies and lenders strategically used foreign restructuring regimes coupled with U.S. chapter 15 proceedings to achieve holistic financial restructurings.

I. The Cross-Border Chessboard

Germany, the Netherlands and Singapore have each recently adopted sophisticated restructuring regimes that, in many ways, resemble both the English scheme of arrangement and U.S. chapter 11 in addition to offering their own unique benefits.[2] In addition, as part of the EU member states' adoption of the Insolvency Harmonisation Directive, the United Kingdom supercharged its well-established scheme of arrangement by introducing its new restructuring plan (known as the "super scheme").[3] Each of these regimes effectively enables debtors and lenders to restructure a company's balance sheet and achieve a result that is nearly identical to U.S. chapter 11 (generally at materially lower costs).

As the various economies of the world become more integrated, with capital flowing to all corners of the globe and companies expanding operations into multiple jurisdictions, it will be increasingly easier for a debtor or lender group to have various restructuring frameworks to select from. An important consideration for determining whether a restructuring effectuated in the United States or United Kingdom is a proper tool for a global reorganization necessitates an analysis of the risk that certain key jurisdictions where a debtor operates may not recognize the results in a U.S. chapter 11 or U.K. scheme (or U.K. super scheme). To mitigate such risk, it may be necessary to initiate proceedings in multiple jurisdictions to ensure that a comprehensive restructuring is consummated and protected from collateral attack. To wit, it is not uncommon for a complex cross-border restructuring to involve parties-in-interest that may not be subject to the jurisdiction of a U.S. bankruptcy court or a U.K. court. As such, to minimize implementation risk, obtaining relief from a court in a single jurisdiction may no longer be sufficient - companies and lenders must seek relief from other foreign jurisdictions to achieve comprehensive restructurings.

Other significant and practical considerations in favor of looking beyond U.S. chapter 11 include (i) the potential cost savings attendant to restructuring under a different regime even if coupled with the costs associated with a U.S. chapter 15 case (for recognition purposes); (ii) the absence of statutory and procedural mandates present in U.S. chapter 11 that often slow down the process and result in additional expense (e.g., each debtor entity must file versus a single filer to restructure the entire group, U.S. Trustee involvement, official committees, professional retention requirements); (iii) the well-trodden precedent under foreign regimes with respect to certain hot-topic issues in the United States such as third-party releases; (iv) the availability under U.S. chapter 15 for (a) recognition of foreign relief that may not be as readily achievable in a plenary chapter 11 proceeding (e.g., third-party releases), and (b) utilization of certain tools that may not be available under a foreign proceeding (e.g., robust U.S.-styled discovery); and (v) the sophistication and

experience of the judiciary overseeing such restructurings (e.g., notably, the recent appointments of experienced former U.S. bankruptcy judges to the Singapore International Commercial Court).

While the U.K. scheme (and the new "super scheme") remains a powerful tool, particularly in light of the rule in *Gibbs* and the absence of the absolute priority rule, recognition across Europe is no longer automatic after Brexit, and, accordingly, a multi-jurisdictional solution may often be beneficial in cross-border restructurings.

II. Key Foreign Restructuring Regimes / Pros and Cons

As noted, restructuring laws enacted in the United States, United Kingdom, Germany, the Netherlands and Singapore share many similar features and, in certain instances, view each other's decisions as persuasive authority. There are, however, notable distinguishing elements. Depending on the ultimate purpose and goals of the restructuring, each national restructuring law can be creatively deployed to achieve various desired outcomes.

For example, in many instances involving a U.K. scheme, German StaRUG, Dutch WHOA or Singapore IRDA proceeding, obligors and guarantors of all tranches of debt within a corporate structure can effectuate a comprehensive financial restructuring (including releases for co-obligors or guarantors) with a single or limited number of filing entities. Each jurisdiction's restructuring law also enables (i) initial moratorium relief that is automatic upon filing or available upon request with possible extensions; (ii) a mechanism to cram down dissenting classes of creditors; (iii) minimal court oversight to administer and effectuate the restructuring, which can generally be accomplished with one to two formal hearings; and (iv) an expedited timeline of a few months for a comprehensive financial restructuring.

Access to the U.K., Netherlands and Singapore restructuring regimes is governed by sufficient or substantial connections tests - e.g., where the filing entity has a center of main interest, or COMI, in the respective jurisdiction or its finance documents are governed by the law of such jurisdiction - whereas entities must have COMI in Germany to restructure under German StaRUG. Through this broad jurisdictional test and the specific group debt release mechanism, the Dutch WHOA provides a valuable platform for centralized group restructurings for multinational enterprise groups. Subject to certain conditions, Dutch WHOA and German StaRUG proceedings benefit from automatic recognition in the EU (except for Denmark).

Post-Brexit, automatic recognition in the EU is theoretically no longer available for U.K. schemes or restructuring plans, but potential alternative routes exist to achieve EU recognition. As a practical matter, U.K. courts continue to sanction schemes of arrangement with the expectation that the results will be respected (outside cross-border insolvency laws) throughout Europe and the rest of the world. More broadly, a scheme or restructuring plan approved by a court within any of the four jurisdictions has universal effect and is generally able to be recognized in foreign jurisdictions. Dutch courts, for instance, have issued worldwide stays of creditor actions on multiple occasions in the WHOA framework in respect of both Dutch and foreign debtors vis-à-vis funded debt obligations. Relatedly, Singapore and the United Kingdom (in addition to the United States) have adopted the UNCITRAL Model Law on Cross-Border Insolvency, further facilitating recognition of such jurisdictions' restructuring orders worldwide.

There are, however, certain aspects of U.S. chapter 11 that are not currently available in restructuring proceedings abroad. For example, under U.K., German and Dutch law, there is no corollary to U.S.-style debtor-in-possession financing permitting superpriority priming liens. Such superpriority rescue financing is, however, available under Singapore law. In Germany and the Netherlands, DIP financing can be made an integral part of a StaRUG or WHOA restructuring plan (including collateral); this lacks, however, any super senior collateral effect in cases where all assets are already used to secure pre-restructuring liabilities of the debtor.

Each jurisdiction adopts similar requirements to U.S. chapter 11 for creditor class voting thresholds to approve a plan or scheme (i.e., generally 66.66% to 75% of the votes in each class). However, unlike U.S. chapter 11, out-of-the money shareholders are entitled to vote in a Dutch WHOA or German StaRUG proceeding if they will be affected by the restructuring plan - i.e., lose their equity position entirely or receive marginal compensation (though it is worthwhile noting that while requiring them to vote, the German StaRUG and Dutch WHOA will often prescribe for the cramdown of

out-of-the-money equityholders). Free and clear sales are permissible in appropriate circumstances and will generally be recognized in a U.S. chapter 15 proceeding.

There are only limited avoidance powers, if any, in a German StaRUG or Singapore IRDA scheme proceeding, and it is more difficult or not permissible at all to reject or compromise commercial contracts (though such relief, if available, could be implemented in the United States through chapter 15).

III. Case Studies

Two recent cross-border cases involving Diebold Nixdorf Inc. and Spark Networks SE demonstrate the versatility of foreign restructuring regimes to strategically address multi-jurisdictional funded debt. Specifically, Diebold restructured pursuant to dual Dutch WHOA and U.S. chapter 11 proceedings, coupled with a U.S. chapter 15 proceeding. Spark Networks restructured via a German StaRUG supplemented by a U.S. chapter 15 proceeding. Each of these restructurings was a first of its kind and proved successful.

a. Diebold Nixdorf

Facing liquidity challenges after a 2016 acquisition, supply-chain issues relating to Covid-19, a $1.4 billion order backlog and over $2.7 billion in funded debt obligations, Diebold Nixdorf Inc. and certain of its subsidiaries (collectively, "Diebold") commenced court-supervised prepackaged restructuring proceedings in the United States under chapter 11 and a Dutch WHOA in the Netherlands. On June 1, 2023, Diebold Nixdorf Inc. and certain of its U.S. and Canadian subsidiaries (the "U.S. Debtors") filed voluntary petitions for relief under chapter 11 in the U.S. Bankruptcy Court for the Southern District of Texas (the "Texas Bankruptcy Court"). That same day, Diebold Nixdorf Dutch Holding BV ("Diebold Netherlands") initiated the Dutch WHOA proceeding on behalf of itself and certain EU-domiciled affiliates in the District Court of Amsterdam (the "Dutch Court"). Jones Day served as lead restructuring counsel for the company in both the U.S. chapter 11 and the Dutch WHOA proceedings. The German members of Diebold Nixdorf group were kept outside any insolvency or restructuring proceedings through extensive intercompany financing measures and a closely monitored solvency opinion.

Diebold attempted to right-size its balance-sheet in the years preceding the court-supervised restructuring proceedings through cost-cutting measures and certain refinancing transactions in late 2022 that left Diebold with $2.7 billion in new funded debt in the form of an ABL revolving loan, superpriority term loan, first lien term loan, secured notes and second lien notes, in addition to legacy debt that was not restructured as part of the refinancing transactions. The borrowers and guarantors on the refinanced debt included entities in the United States, the Netherlands, the United Kingdom, Germany, Italy, Canada and France, among others. The December 2022 refinancing generated maturity runway but did not deleverage Diebold's balance sheet.

During the months following the refinancing, Diebold, advised by Jones Day, and its lenders negotiated a restructuring support agreement (the "RSA"), which was executed on May 30, 2023, and contemplated a worldwide and comprehensive deleveraging of Diebold through chapter 11 and the Dutch WHOA proceeding, including a chapter 15 case in the United States to recognize and extend comity to the orders entered in the Dutch WHOA proceeding. This global approach was required because in many EU jurisdictions where Diebold operated, local laws impose stringent obligations on local directors and officers to commence local insolvency proceedings when faced with imminent liquidity or operational issues. And, if such proceedings are not commenced, local directors and officers can face personal civil and criminal penalties. Thus, to ensure maximum protection of the Diebold's businesses and assets worldwide, the decision was made to commence chapter 11 proceedings for the U.S. Debtors and a Dutch scheme proceeding for Diebold Netherlands.

Upon the commencement of the chapter 11 cases, the U.S. Bankruptcy Code's automatic stay provisions came into immediate effect and protected the U.S. Debtors' assets. Diebold Netherlands petitioned the Dutch Court for a four-month moratorium, which the Dutch Court granted on June 8, 2023, that prevented funded debt creditors from, among other things, taking action against the company's assets or operations in the EU. The Texas Bankruptcy Court recognized

and extended comity to the Dutch Court's moratorium order on July 12, 2023, which effectively enacted a worldwide stay to protect all Diebold's assets.

To finance dual proceedings in the United States and the Netherlands, the RSA memorialized the terms on which certain prepetition funded debtholders would fund and backstop a $1.25 billion DIP financing facility, which would ultimately convert to an exit facility upon Diebold's emergence from the court-supervised restructuring process. The Texas Bankruptcy Court approved the DIP financing in connection with the U.S. chapter 11 proceedings.

The prepackaged plans in chapter 11 (the "U.S. Plan") and the Dutch WHOA proceeding (the "WHOA Plan") provided for the repayment of Diebold's prepetition ABL facility and superpriority term loan upon entry of an interim order approving the DIP financing, equitized over $2.1 billion in debt and brought in $500 million in new cash to fund worldwide operations. Both the U.S. Plan and WHOA Plan provided that general unsecured creditors - including employees, retirees and trade creditors - would be unimpaired.

Following majority support from all classes of Diebold's prepetition secured debt, the Texas Bankruptcy Court confirmed the U.S. Plan on July 12, 2023, and the Dutch Court sanctioned the WHOA Plan on Aug. 2, 2023. The Texas Bankruptcy Court entered an order under chapter 15 recognizing the Dutch Court's sanctioning order on Aug. 7, 2023, the first instance of a U.S. bankruptcy court recognizing a sanctioned restructuring plan under the Dutch WHOA. On July 18, 2023, the chapter 11 cases of two Canadian debtors party to the proceedings were recognized pursuant to a Canadian recognition proceeding.

Both plans ultimately went effective on Aug. 10, 2023. As contemplated by both the U.S. Plan and WHOA Plan, on Aug. 14, 2023, Diebold was re-listed on the New York Stock Exchange under the ticker DBD.

b. Spark Networks SE

Germany-based social dating platform Spark Networks confronted financial headwinds after the acquisition of another social dating platform, Zoosk Inc., which Spark financed with a $100 million loan from MGG Investment Group LP ("MGG"), a U.S.-based credit fund, as well as notes issued by Spark and later acquired by MGG. Other factors also contributed to Spark's declining revenue and earnings, including insufficient marketing strategy, personnel realignment and cyberattacks on the dating platforms. These events caused Spark to fall out of compliance with certain covenants of the MGG loan agreement, permitting MGG to exercise all rights and remedies under the agreement, including immediate acceleration of all obligations under the loan. In an attempt to address the liquidity crisis, Spark Networks SE, the top-level company, its major subsidiaries, Spark Networks Inc. and Zoosk Inc. (both Delaware corporations), and MGG entered into a series of amendments and forbearances. Spark also evaluated other strategic alternatives, including pursuing a potential sale, merger or other transaction. Ultimately, this M&A process did not lead to a transaction.

To address Spark's imminent illiquidity and the risk that a going concern might cease to exist, Spark Networks SE, advised by Jones Day and Brinkmann & Partner, commenced on Oct. 9, 2023, the first-ever cross-border restructuring under (i) the German StaRUG in the Berlin-based Local Court Charlottenburg - Restructuring Court (the "German Restructuring Court"), and (ii) U.S. chapter 15 in the U.S. Bankruptcy Court for the District of Delaware (the "Delaware Bankruptcy Court"). Such restructuring proceeding had deleveraging effects for Spark Networks SE as well as certain of its U.S. and German subsidiaries (collectively, the "Spark Group") due to the structure of Spark Group's indebtedness.

Notwithstanding the Spark Group restructuring the obligations of various U.S. subsidiaries in the German StaRUG proceeding, commencing U.S. chapter 11 proceedings would have immediately triggered a value-destructive freefall into German insolvency proceedings. Moreover, the Spark Group's creditors and shareholders included entities that may have not been subject to a U.S. court's jurisdiction. As such, a chapter 11 filing alone would have been insufficient to address the Spark Group's financial distress and, in fact, could have been a death knell. Utilizing StaRUG enabled the Spark Group to deleverage its balance sheet without impairing its obligations to, among others, its employees, customers and suppliers; provide the liquidity to effectuate its operational turnaround plan; and avoid the commencement of any insolvency proceeding.

The StaRUG proceeding of Spark Networks SE involved restructuring over $100 million in secured debt issued by MGG to Spark and two subsidiaries as primary obligors, with such debt also being guaranteed by certain other German and U.S. subsidiaries. Such StaRUG proceeding also restructured over $13 million of unsecured debt issued by Spark Networks SE to prior owners of one of its operating subsidiaries in connection with the Zoosk acquisition.

Pursuant to the StaRUG restructuring plan (the "Restructuring Plan") approved by the German Restructuring Court, Spark eliminated over $30 million of secured debt and over $13 million of unsecured debt, improved the terms on its $100 million secured loan facility with MGG, and obtained approximately $24 million in interim liquidity from MGG to support Spark's business operations and strategic initiatives, all in exchange for MGG becoming Spark's sole equityholder. The Restructuring Plan was approved by Spark's creditors in December 2023 and confirmed by the German Restructuring Court on Jan. 4, 2024.

In the U.S. chapter 15 proceedings, on Dec. 14, 2023, the Delaware Bankruptcy Court recognized Spark's StaRUG proceeding as a foreign main proceeding with regard to Spark Networks SE and as a foreign non-main proceeding with regard to the two U.S. subsidiaries.

Jones Day and Brinkmann also successfully defended Spark Networks SE against an immediate appeal filed by certain plan-affected shareholders challenging the German Restructuring Court's order confirming the Restructuring Plan. On Feb. 22, 2024, the appellate court - the German Regional Court Berlin - entered an order denying the immediate appeal and rejecting the request to suspend the legal effectiveness of the Restructuring Plan.

On May 17, 2024, the Delaware Bankruptcy Court entered an order in the chapter 15 proceedings, recognizing and enforcing in the United States both the German confirmation order and the Restructuring Plan itself.

IV. Outlook

The recently enacted restructuring regimes in the United Kingdom, Germany, the Netherlands and Singapore are very attractive alternatives or companions to U.S. chapter 11 and chapter 15 for cross-border companies and lenders to achieve comprehensive and global balance-sheet and group-wide restructurings. Undoubtedly, U.S. chapter 11 will continue to be a reliable restructuring tool, particularly for complex financial and operational restructurings, because of its proven framework and well-established precedents. Foreign jurisdictions, however, are proving that both their legal framework and judiciary are open and able to handle modern complex cross-border restructurings through the sanctioning of restructuring plans that reflect creative solutions to balance-sheet problems.

Moreover, given the U.S. Supreme Court's recent ruling in *Harrington, United States Trustee, Region 2 v. Purdue Pharma L.P.* , No. 23-124, 2024 WL 3187799 (U.S. June 27, 2024) prohibiting nonconsensual third-party releases in most U.S. chapter 11 cases, foreign restructuring regimes coupled with a chapter 15 proceeding could offer avenues for obtaining nonconsensual third-party releases that would otherwise be prohibited in chapter 11. Specifically, section 1507 of the U.S. Bankruptcy Code enables a chapter 15 bankruptcy court to authorize relief not otherwise available under the U.S. Bankruptcy Code so long as, among other things, such relief is not manifestly contrary to U.S. public policy. The Supreme Court in the *Purdue* ruling did not state that nonconsensual third-party releases contravene U.S. public policy; rather, its ruling was that such nonconsensual releases are not permitted under the applicable provisions of the U.S. Bankruptcy Code under the facts presented in that case.

The tools available under non-U.S. law, the relative cost savings of utilizing such proceedings and the synergistic capabilities to operate in tandem with U.S. chapter 11 and/or 15 proceedings make foreign jurisdictions appealing on a number of levels. As such, it behooves companies and lenders alike to get up to speed and stay tuned as the chessboard of cross-border restructurings continues to evolve.

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1. Associates Ryan Sims, Sid Pepels and Kit Shu contributed to this article. The opinions expressed herein are those of the author(s) and do not necessarily reflect the views of Jones Day or its clients or any of their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.

2. The German restructuring law - the Corporate Stabilization and Restructuring Act (*Gesetz über den Stabilisierungs- und Restrukturierungsrahmen für Unternehmen (StaRUG)*) ("StaRUG") - was introduced on Jan. 1, 2021. The Dutch restructuring law *Wet homologatie onderhands akkoord* ("WHOA") - came into effect on Jan. 1, 2021, as well. The Netherlands and Germany both implemented WHOA and StaRUG, respectively, in response to a 2019 EU directive to member states to implement preventative restructuring frameworks. Various reforms to the Singapore scheme of arrangement including the transplantation (with modifications) of certain provisions from U.S. chapter 11 were introduced in 2017 when Singapore reformed its insolvency laws and again in 2018 when Singapore enacted the Insolvency, Restructuring and Dissolution Act 2018 ("IRDA"), which came into force on July 30, 2020.

3. The U.K. "super scheme" was enacted pursuant to the Corporate Insolvency and Governance Act, which received royal assent on June 25, 2020.

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