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International debt restructuring: can other jurisdictions compete with London and New York?

Legislative changes in Singapore and the EU, Brexit, and the increasing importance of jurisdictions servicing debt linked to China, are about to change the global cross-border insolvency and restructuring landscape. Could these developments shake up London and New York's pre-eminent positions as hubs of cross-border insolvency and restructuring work? *GRR* invited 10 guests to find out.

Six international lawyers, a barrister, a banker, a restructuring practitioner and a judge met at Stephenson Harwood in London on a sunny morning in late November to consider whether emerging centres of international debt restructuring will be able to compete with traditional centres.

For a long time, London and New York have been important hubs for this kind of work, just as they are hubs of international debt raising. Their rise to the top has been bolstered by the 1986 Insolvency Act and the scheme of arrangement provisions in the Companies Act in the UK, as well as the US Bankruptcy Code: internationally recognised pieces of legislation that have been replicated time and time again the world over. Both the UK and US were also early adopters of the UNCITRAL Model Law on Cross-Border Insolvency.

But the traditional hegemony of London and New York appears to be facing competition from overseas, particularly as Singapore pushes to make itself a hub of debt restructuring for the Asia-Pacific region. With China facing a slowdown in economic growth, Hong Kong and several Caribbean offshore jurisdictions – where the parents of many Hong Kong and China-focused operating companies are registered – may also see new opportunities to attract Chinese debt restructuring work.

Meanwhile, the EU has just proposed a harmonisation directive to roll out modern insolvency and pre-insolvency laws across the entire European continent following initiatives in Spain and the Netherlands, and the recast European Insolvency Regulation (EIR) will be the first legislation to actively deal with multinational corporate groups when it comes into force in 2017.

Against this backdrop, Brexit has raised questions for the cross-border recognition of English insolvency proceedings in Europe and – to a differing extent – English schemes of arrangement for European companies, in the absence of the EIR and the EU Judgments Regulation. In a worst case scenario, these developments may result in a reduction in large European companies arguing a sufficient connection to, or switching their centre of main interests (COMI) to the UK to make use of its insolvency and restructuring processes.

Across the pond, even the US's famous

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Chapter 11 appears to be facing criticism that it is too expensive and getting on a bit (the US Bankruptcy Code was enacted in 1978). While there has been appetite for reform of Chapter 11 among special interest groups, such as the American Bankruptcy Institute, the US Congress has had other priorities. Will the presidency of Donald Trump – whose companies have made repeated use of Chapter 11 – put these issues higher on the agenda?

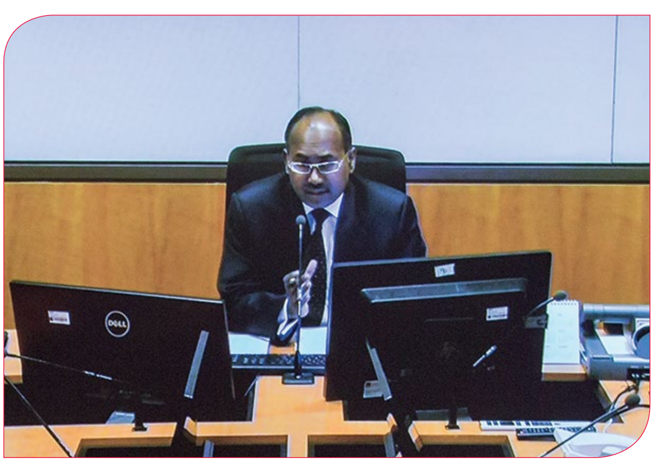
Ten guests with experience across all of the jurisdictions above gathered at *GRR*'s invitation to pool ideas on which forums cross-border insolvency practitioners should shop around for in future. They began with perhaps the newest potential hub: Singapore.

Singapore's push

"Singapore has thrown its hat into the ring," announced **Judicial Commissioner Kannan Ramesh** appearing from the Singapore Supreme Court via video link. Significant reforms are underway in the city-state to make it a more attractive landscape for cross-border restructuring and insolvency. A packet of legislative changes, including Singapore's adoption of the UNCITRAL Model Law, are expected to come before Singapore's Parliament in the first quarter of 2017, with the aim of having the changes come into force by the end of the second quarter.

The reforms follow recommendations by an Insolvency Law Review Committee in 2013, and in a report issued last April by the Committee to Strengthen Singapore as an International Centre for Debt Restructuring – a special interest group of lawyers, restructuring advisers, financiers and public servants co-chaired by Ramesh JC himself.

Among the proposed measures are a debtor-in-possession regime modelled on the UK scheme of arrangement and incorporating key features of the US Bankruptcy Code. The new scheme will permit Singapore courts to order extraterritorial moratoriums for the first time – including for related entities that are part of a restructuring plan – taking inspiration from Chapter 11. Other Chapter 11-type tools in the offering are cramdown provisions, pre-pack restructurings and super-priority for new finance providers. Singapore's existing judicial management regime, a restructuring process similar to an administration in the UK overseen by court-appointed officers, will also be available to companies incorporated outside of the city-state for the first time.



"We've created a hybrid," Ramesh JC explained: Singapore has cherry-picked the best tools deployed in the regimes of leading jurisdictions for cross-border restructuring around the world, including London and New York. "We have not gone down the US route of a Chapter 11 restructuring regime, but have taken some of the elements of Chapter 11 to case a new mould for restructuring."

Meanwhile, Singapore has also recognised that the process of setting up a cross-border restructuring and insolvency hub is not just about legislative tools, but about creating the right ecosystem, the Judicial Commissioner noted. Recommendation 3.5 of the report prepared by the Committee to Strengthen Singapore suggested that the Singapore International Commercial Court, a division of the High Court of Singapore established in 2013 to hear international commercial disputes, could also be the possible setting for cross-border restructuring cases. Judges from all over the world already sit in this court, including from the UK, Australia, Japan and mainland Europe, and foreign lawyers are permitted to appear before it in a selected class of cases. "We recognised that having judges from civil law and common law traditions presiding over cross-border restructuring matters in Singapore might give some comfort to creditors and to debtors looking to restructure here," Ramesh JC said.

In October, the Judicial Commissioner also noted, Singapore hosted the first Judicial

Insolvency Network (JIN) conference – a gathering of bankruptcy judges from key commercial jurisdictions around the world. The "principal end product" of the meeting was a set of guidelines for communication, coordination and cooperation in cross-border insolvencies that the judges could implement via practice directions in their respective courts. "So if there's a cross-border restructuring touching on New York and Singapore, parties would be invited to work out protocols for cooperation and coordination using the guidelines as parameters," the Judicial Commissioner explained. "This is part of the entire process of building a system here, a set of rules, protocols, precedents and legislative tools that would facilitate effective restructuring."

To the question of whether Singapore would need to hire foreign restructuring and insolvency lawyers, South Square barrister **Antony Zacaroli QC** pointed out that the city-state has a lot of home-grown talent already and is less dependent on foreign barristers flying in and out to do the work than other offshore jurisdictions, like some in the Caribbean for example.

He also added that Singapore had an advantage over Hong Kong, a city it is often compared to, in that it appears to be much easier to introduce new legislation in Singapore. "Singapore can make these changes and you'll see how quickly they happen. The process of legislation in many European countries is much slower. I suspect, in England, we've got little chance of insolvency legislation in the next 10 to 20 years while we focus on Brexit."

> The Judicial Commissioner said he was convinced Singapore could compete with London and New York – though he preferred the idea that it will complement them

When the forthcoming changes are in place, the Judicial Commissioner said he was convinced Singapore could compete with London and New York – though he preferred the idea that it will complement them. "While London and New York are pre-eminent centres for restructuring, the fact remains that there is no jurisdiction in Asia that plays a similar role, and to that extent, Singapore sees itself playing a complementary and not just a competitive role," he emphasised.

Ramesh JC clarified that Singapore is, in particular, aiming to attract companies structured through the city-state who invest capital raised in local stock markets in emerging economies in Asia. Having a COMI or assets in Singapore, or simply a jurisdictional provision for Singapore law in your contract, "could be regarded as sufficient connection for the purpose of exercising jurisdiction", the Judicial Commissioner explained.

One of the emerging jurisdictions that has made extensive use of Singaporean legal services in recent years, particularly in the context of international business disputes, is India. **Siddharth Srivastava**, partner at Link Legal's New Delhi offices, was reassured by Ramesh JC's confirmation that the future version of Singapore's Companies Act will no longer give preference to domestic creditors when the assets of a Singapore-registered company are liquidated. "This is one of the provisions which was preventing Singapore from becoming a complete cross-border insolvency hub … sort of projecting it as more of a territorial jurisdiction. However, with the proposed changes in the Singapore insolvency framework I think that that should create a lot of impetus towards Singapore becoming a preferred jurisdiction for cross-border restructuring," Srivastava said. "I think in future we could see a lot of scope in collaborating with Singapore."

India itself made wide-ranging improvements to its own bankruptcy law in 2016, but the new Insolvency and Bankruptcy Code is unlikely to be a substitute for collaboration with Singapore, Srivastava added, because its current focus is on speeding up domestic insolvency proceedings. Only a couple of provisions in the law, sections 234 and 235, deal with cross-border restructuring and insolvency, and they envisage bilateral arrangements to be made between

Siddharth Srivastava speaks to the roundtable participants

Susan Moore and Anthony Zacaroli QC

India and other countries to cooperate on bankruptcy matters as and when they arise.

"The government's current focus has been to make sure that the domestic laws are tweaked to ensure that the insolvency resolution process is completed within a specific time frame. Once that is achieved in totality, the government will start focusing on the cross-border insolvency issues in detail," Srivastava told the roundtable guests. This leaves a gap that Singapore's legal system could fill in the interim: Srivastava said he wouldn't rule out the possibility of Indian companies making COMI shifts to Singapore to take advantage of its new laws.

Sue Moore, a partner at Stephenson Harwood in London, raised a possible dilemma in the case of a Singapore-registered company with English law governed debt opting to restructure in Singapore. It would find it very difficult to have its restructuring recognised by English courts, she explained, in light of the common law *Gibbs* rule: an 1890 Court of Appeal precedent that found that an English law governed debt guarantee cannot be discharged in foreign insolvency proceedings.

In a decision last September known as *Pacific Andes*, Ramesh JC found that the *Gibbs* rule did not bind the Singapore High Court and ruled that a Bermuda-registered, Singapore-listed holdings company had standing to restructure English and Hong Kong law-governed debt via a Singaporean scheme of arrangement, in spite of arguments from creditors that Hong Kong and UK courts would not recognise the scheme. *GRR* understands that an article penned by the Judicial Commissioner on the *Gibbs* rule will be published soon in the *Singapore Academy of Law Journal* (for more, see *GRR*'s feature on whether Gibbs is outdated on page 25).

South Square's Zacaroli agreed that there was a "strong argument" for moving away from *Gibbs* in the bankruptcy context, but argued there was more to be said for the rule in the scheme context, where the process is concerned with varying contractual rights. Moore didn't disagree with Zacaroli's interpretation, but warned that the recognition issue was there either way. However, she framed it as a potential future threat for the UK's status as a hub of cross-border restructuring, rather than as a problem for Singapore restructuring English law governed debt, questioning the likelihood of English processes continuing to enjoy recognition abroad if the UK cannot reciprocate. "We enjoy recognition of our English schemes in many jurisdictions abroad, usually under the Model Law, and if we're not affording a similar recognition here, I think that's a potential hurdle to our competitiveness going forward," she said.

Brexit Britain and the harmonised EU

From that point, the discussion moved smoothly on to the UK's future competitiveness in light of its exit from the European Union.

Zacaroli pointed out that unless the UK enters a bilateral treaty with individual EU member states replicating the European Judgments Regulation – the regulation that governs reciprocal recognition of EU judgments and court proceedings – it may be difficult for EU member states to recognise English schemes, particularly where English jurisdiction is based on a connection with the UK that falls short of COMI, such as English law being the governing law. Brexit may result in fewer European companies shifting their COMI to the UK to take advantage of English schemes.

Ivo-Meinert Willrodt, a partner at Pluta in Munich, asked Zacaroli and other UK practitioners at the roundtable to provide some context on the current use of English schemes. The participants estimated that more than 50 English schemes of arrangement pass through the London courts per year. **Katrina Buckley**, a partner at Allen & Overy in London, noted that one week last summer her firm acted on three schemes that were in court in the same week. Moore agreed, remarking, "there seems to be almost a different one every week at the moment that makes the trade press, and there are probably others that don't".

Willrodt argued that it will be very difficult for the UK to continue "marketing" its schemes to Europe in light of the recognition issues accompanying Brexit. Add to that the fact that many European countries like Spain are putting in place "brilliant" tools so that they no longer need to use English schemes, and COMI-shifting to the UK may become a thing of the past, he said.

Willrodt also pointed to a new business insolvency directive proposed by the EU just a week before the *GRR* Roundtable, on 22 November, which would introduce harmonised

Ivo-Meinert Willrodt

restructuring rules including pre-insolvency procedures all around Europe. Taking cues from Chapter 11 as Singapore has done, the proposed directive would see EU member states similarly adopt provisions for debtor-in-possession financing, the super-priority of new finance and cramdown for holdout creditors.

"They are very, very pushy," Willrodt said of the EU's ambition to roll out harmonised insolvency procedures across all member states. "I think we will have in three years or so, a Europe which is not competitive [about attracting restructuring work from the UK or other countries], but one with a new restructuring tool on the table, which will have to be applied in Germany, Holland and Spain. That situation is completely different," he said.

One way of ensuring reciprocal recognition of pre-insolvency and insolvency proceedings between the UK and EU after Brexit, could be for the EU to adopt the UNCITRAL Model Law. Currently, only five EU countries – Greece, Poland, Romania, Slovenia and the UK (for as long as it remains a member state) – have adopted the Model Law. Asked whether that could be an answer for cross-border matters in future, including for extra-EU cases, Willrodt said that the Model Law is a little bit outdated in his eyes.

He explained that Germany's Insolvency Code (InsO) has its own, more modern chapter on cross-border insolvency enacted in 2003. Section 343 InsO permits German courts to recognise foreign insolvency proceedings outside the EU (the European Insolvency Regulation pre-empts the German Insolvency Code for intra-EU proceedings) provided the proceedings are not manifestly incompatible with German constitutional rights, and the courts of the country they have been filed in have jurisdiction under German law. While the law exists and is good, the problem is its application in practice, Willrodt said.

Where section 343 InsO is relied on to recognise foreign insolvency proceedings it can take judges a very long time to investigate whether the foreign insolvency proceedings are compatible with German public policy. "I'm pretty sure there are only a few judges in Germany who are able to handle it with the necessary speed," he noted. The answer could be to train German judges so they know how to treat such cases.

However, Willrodt made it clear that judges often play a secondary role in German insolvency proceedings, which are driven by administrators, advisers and lawyers: after the opening of a proceeding, an officer of justice typically takes control over the case. He said it would be helpful if only a few specialist German courts were allowed to take on international and cross-border insolvency cases, because the current system requires debtors to apply to a local court near its COMI.

"International creditors want to have a calculable insolvency proceeding," Willrodt said. "For example, in some courts in Germany the debtor can speak to a judge about his application at the beginning of a case, but because of internal court regulations it is not always clear if the same judge will also be one who is going to handle the case."

Willrodt argued that it will be very difficult for the UK to continue "marketing" its schemes to Europe in light of the recognition issues accompanying Brexit... COMI-shifting to the UK may become a thing of the past, he said.

The result is that some German companies have changed their COMI to be near a smaller court with fewer judges where it is more predictable who will be handling the case. German shipowners and shipping companies near Hamburg in particular have been changing their commercial registration and their COMI from the District Court of Hamburg to local courts around Hamburg. "We are COMI-shifting in our own country," Willrodt said.

Participants to the roundtable noted that COMI-shifting to take advantage of different domestic courts is also common within Spain. Willrodt asked for a summary of the Spanish pre-insolvency and insolvency system "because it's quite new – and it's working".

Ignacio Buil, a London partner at Spanish firm Cuatrecasas Gonçalves Pereira, obliged, noting that Spain has been "realistic and pragmatic" about its approach to updating what was an old-fashioned insolvency law, spread out among several different codes that didn't work. The Spanish Insolvency Act was approved in 2003 and came into force the following year, and within no time a "brand new and pretty ground-breaking law for Spanish standards" was put to the test during one of the worst financial crises the country had experienced in a century.

Despite having the "perfect framework", Buil noted how Spain continued to see an exodus of large companies fleeing to the UK to restructure via English schemes of arrangement during the financial crisis, including major groups such as real estate company Metrovacesa, fashion retailer Cortefiël and betting group holding company Codere.

The market was still favouring COMI shifts, Buil said, and people started realising that changing the law was one matter, but investing in correctly staffed courts able to decide quickly and effectively on important issues, was quite another. "In the US, which

Ignacio Buil and Hamish Mackenzie

is a perfect example, you can have a first day hearing in 36 hours, which is a competitive advantage. You generally can't go to courts in Spain if you want to have a quick pre-pack proceeding implemented in the context of an insolvency case, within, for example, 60 days," he explained.

Spain's answer to the problem was to create its own version of a scheme of arrangement, the *homologación*: an out-of-court proceeding with minimal intervention from judges that allows companies to restructure just their financial debt within their capital structure. Since 2009, the Spanish Insolvency Act (including *homologación judicial* for the first time in 2011) has seen four or five reforms, Buil noted, because Spain didn't get it right first time and the framework had to be adapted to respond to market demands. But since then, its uptake by large companies, including energy and infrastructure conglomerates Abengoa and Isolux, appears to point to a success. "I don't think that Abengoa would have restructured in Spain six years ago. It would have likely tried to use foreign restructuring tools. This is good and shows that the adequate steps have been taken and we are heading in the right direction," he noted.

Buil also pointed out that with the likes of Abengoa, construction company FCC and Isolux – to name a few – using the Spanish regime, it has started to develop case law, which creates greater certainty about the line that courts in each region will take. "The Barcelona-Madrid fight extends into restructuring and insolvency in the different case law," he joked. The different lines taken by different courts are not too much of a concern, Buil added, since even in a mature system like the US there are differences in interpretation between the Second Circuit and courts in California and Florida. But "a system that you can rely on and that you can even do a jurisdictional analysis in, that would be very good news for Spain and would show that the system is becoming more sophisticated and robust," he noted.

Overall, Buil was optimistic about the future for Spanish restructuring, at least as regards keeping Spanish groups at home. To really compete with the UK, there are structural issues that Spain would need to address first, he closed.

Hamish Mackenzie, a partner in the corporate financial restructuring team at PricewaterhouseCoopers in London who spent several years working in Spain, said the challenges coming out of Abengoa and Isolux will be the real test. "It's how the dust settles on important precedent cases that will set up a more robust foundation for the future," he told the roundtable.

Mackenzie agreed that the large body of precedent in the UK and US is what makes those jurisdictions "stand out" in terms of competitive advantage. Track record, as well as language and creditor base, is what has led those jurisdictions to take restructuring work away from other countries in Europe – and the future expectation is not that other jurisdictions will steal the work back, just that they will be seen as more credible places for locally based businesses to restructure.

Vincent Vroom, a London partner at Dutch firm Loyens & Loeff, agreed with Mackenzie's point about track record, noting that the Netherlands has been quite successful in attracting share pledge enforcements on account of a 2009 decision from the Amsterdam District Court, *Schoeller Arca*. "If people have done it before then they are not afraid to do it again," he noted.

Vroom noted that Dutch insolvency professionals had been very successful "beating the drum" about three proposals for legislative updates raised in 2014, providing for pre-pack restructuring, a scheme of arrangement and for a law requiring parties to continue performing their contracts through bankruptcy in the Netherlands. In actual fact, none of these proposals has been formally enacted yet. Though several pre-packs have been achieved in practice, there is still no legal basis for them, and while a consultation is now under way for the scheme proposal, there has been no movement on the third proposal for the continuation of contracts, Vroom noted.

Vincent Vroom

"It's going quite slow to be honest, although I think once the scheme is in place it will be quite a good tool because it tries to combine better elements of the US, and the UK scheme," he told the panel. The draft European harmonisation directive released in November includes many of the ideas that the Netherlands was proposing to implement, he added. "That may be the best way to go about it because the Dutch process is still slow. Our bankruptcy code is from the 19th century – not the 20th, the 19th century," Vroom pointed out.

He also highlighted the lack of a cross-border recognition mechanism in Dutch law for proceedings outside of Europe, leading many Dutch companies to successfully apply for US Chapter 11 bankruptcy on account of creditors being based in the US, such as in the *Almatis* case a number of years ago. Vroom explained that the process will be less straightforward when it comes to proceedings in other countries outside the EU, including Brazil, where there has been a lot of focus recently. "Because there's no recognition mechanism you need to try to run the Dutch and international processes in parallel," Vroom said. To help things along, he noted that a cross-border cooperation protocol may assist in some cases.

The US: old, expensive and stigmatising

With Singapore and the EU both seeking to enact legislation that takes many elements from the US Bankruptcy Code, participants at the roundtable were asked whether the nearly 40-year-old Chapter 11 legislation needed updating. In 2014, the American Bankruptcy Institute in fact proposed some amends to the Chapter, but they have yet to get off the ground.

"I'd say certainly, yes," agreed Charles Holmes, a former resident of New York and Chicago who moved to London in September as head of workout for the EMEA and Asia-Pacific at Goldman Sachs. "No system or industry or company should rest on its laurels of success or failures, but always seek to change and improve and keep up with the times."

Holmes accepted that the familiarity and reliability of the Chapter 11 system is actually one of its main selling points for many practitioners, although he warned the process still occasionally throws up surprises. "In a former life, my firm was involved with a couple of large automotive companies that were important to the country where the process did not work the way it should have. Secured creditors did not get the recovery they expected as a result of government intervention, which, candidly, is something that pointed out a weakness in the system," he said. But there are layers to the courts' system and opportunities to revisit key issues.

Holmes also repeated Buil's point that courts in different regions in the US, from Alabama to Delaware and Florida to New York, add a "local flavour" to their decision-making despite the existence of a Federal Bankruptcy Law.

Asked whether new US president Donald Trump, a repeat user of Chapter 11, might prioritise a reworking of bankruptcy laws more than his predecessors, Holmes said that though Trump was "accustomed to the bankruptcy system [his companies] having been through it a few times", such reform would probably be relatively low on his priority list compared to other campaign matters.

PwC's Mackenzie asked Holmes for his take on the large pipeline of high-yield bond restructurings being filed in the US by European companies like Norwegian pulp and paper maker Norske Skog, using US law-governed facilities documentation. Holmes said the sector offered "great opportunities" and emphasised the importance for the creditor base of obtaining recognition of whatever is resolved in the US, in Europe. "The high-yield market has been on fire and the investor base is much more global now than it's ever been, which increases the importance of creditors seeking certainty and seeking an understanding of how cases will be resolved across jurisdictions," he said.

Buckley of Allen & Overy pointed out that for some cases, predominantly financial restructurings, Chapter 11 could be at a disadvantage given its inability to restructure only part of a company's debt, which is one of the benefits of the English scheme of arrangement. She also noted the potential "insolvency taint" on businesses when they enter Chapter 11 bankruptcy. "We see schemes as a way to keep the debtor out of

Charles Holmes

an insolvency process: to target only the part of the capital structure you need to address, such as the note debt, which can then be recognised through Chapter 15," she noted.

Moore said she had heard comments from US advisers that Chapter 15, by facilitating too much recognition of proceedings abroad, has actually taken work away from Chapter 11. She questioned whether there would be a push for more plenary Chapter 11 proceedings, rather than recognition via Chapter 15 in future, and said there was concern in the UK to make sure English schemes retain their integrity and international respect against the possibility of US courts refusing to recognise schemes discharging New York law governed debt upon objections from US creditors.

Zacaroli noted that it is usually creditors driving the use of schemes to avoid insolvency proceedings, anyway, not the debtor. In a case like that of the Spanish group Codere, the creditors wanted to use an English scheme to avoid an insolvency process triggering cross-default in other areas.

Holmes said it was interesting to hear that pre-insolvency proceedings are creditor-led, because in his experience, debtors were generally the ones seeking to use Chapter 11 so they can restructure as much financial and non-financial debt as possible while constraining employee-related obligations. Those debtors would also "hesitate to use the term insolvency in the context of whatever they are seeking to do" in a Chapter 11 case, he agreed.

Willrodt argued that the problem with Chapter 11 wasn't with the law itself, but the price of court proceedings in the US. "The problem is not that your law is very old, I think it's that it's very expensive … so many interest groups that have to get advice from advisers and lawyers," he mused. "A real plus point for the scheme of arrangement under English law or a restructuring under German law is that it is much cheaper than Chapter 11."

"And quicker," Vroom added.

Later in the discussion, Willrodt pondered whether any US-based companies had ever engaged in a COMI shift to the UK to make use of an English scheme. Buckley recalled a previous case she and Zacaroli had worked on that involved the restructuring of English law governed debt belonging to a private-equity owned business with significant assets in the US and France, and some assets in Finland. "We had to make a choice about where we did the restructuring," she said. "Only the financial debt needed to be restructured – the trade debt and the other operational aspects of the business were fine. So we looked at the tools available in the US, France and in England. We decided to go for an English scheme, because the prospects for recognition were the best and we had the issue highlighted previously that, as a matter of English law, you're not going to necessarily get a recognition for the discharge of the debt in the other jurisdictions."

Buckley explained that the debtor created an establishment in the UK to fulfil the criteria for Chapter 15 recognition, which was also later obtained, and the scheme was successful. "The interesting thing was that the PR in the UK was positive around the company successfully restructuring through a scheme, but as soon as the Chapter 15 application was made, the *Wall Street Journal* published that the business was in bankruptcy, creating a stir with creditors in the US. That's the point around the insolvency taint, and the scheme having a different connotation," Buckley noted.

Vroom asked whether the US creditors contested that particular UK scheme, and Buckley said that a hedge fund with a significant position in the business had challenged it at the convening hearing on class grounds, but later dropped the challenge at the sanction hearing.

In light of all the factors raised, Willrodt questioned why the UK was so successful in marketing its schemes in Europe and not in the US? Buckley suggested that it simply came down to what creditors are comfortable with and the fact that US creditors are comfortable with US procedures. Hamish McKenzie proposed that the availability of debt financing in US restructuring was also a big attraction for US creditors, while Moore pointed out that a lot of US companies probably have New York law governed debt so they don't have the English law component that can be a driver for using a scheme.

Holmes agreed with the argument that Chapter 11 could be expensive and that not all of its idiosyncratic processes were "the best". "To be super clear, I would not advocate that Chapter 11 or even the US model is the best or the most applicable broadly," Holmes concluded. "I actually like the Judicial Commissioner's comments around Singapore's approach to a hybrid of the best products of the various regimes they've seen. Saying, 'we should all ask, how do we make ourselves a global complement to the best of what we're seeing out there?'"

Offshore: new centres of debt restructuring

The discussion then moved on to offshore centres of debt restructuring. Moore noted that a lot of offshore debt linked to Chinese groups, much of it New York law governed, is coming up for maturity in the next 12 to 36 months. A number of Chinese groups have resolved this type of debt via schemes of arrangement, obtaining recognition in the US under Chapter 15, with parallel proceedings in the jurisdiction of incorporation of the group's parent company – usually the Cayman Islands or the British Virgin Islands. For companies like the Chinese property developer Kaisa and coking coal supplier Winsway, which only needed restructuring of their offshore debt, the process has worked well, Moore added.

Katrina Buckley

However, she warned that where the group's issues extended to domestic debt and operations, a scheme is potentially only part of the solution. "If onshore debt needs to be addressed too then the position becomes more challenging," she said.

In April 2016, a Cayman court ordered the winding-up of Chinese renewables group LDK Solar just a year after it restructured its offshore debt via parallel mechanisms in Cayman, Hong Kong and the US. The reason creditors gave for the group's demise was that a domestic restructuring had scuppered the earlier deal. Roundtable speakers were asked how situations like that one might be dealt with in future, given the pipeline of China-related debt reaching maturity soon.

Zacaroli said he believed reform in China was "very low down on the agenda". He explained that in *Kaisa*, parallel proceedings took place in Cayman and Hong Kong to restructure the offshore debt, but the restructuring of the offshore debt was dependent on a local restructuring in China, over which the Hong Kong and Cayman companies had little control.

Holmes noted that political will is key: different regimes have different priorities. The Cayman Islands and other Caribbean offshore jurisdictions wanted to be centres of financial activity and set themselves up to attract funds and offshore investments.

Holmes noted that political will is key: different regimes have different priorities. The Cayman Islands and other Caribbean offshore jurisdictions wanted to be centres of financial activity and set themselves up to attract funds and offshore investments. There was a lot of political support to add that component to their economies and it was very high on their political agenda, as we've seen also in the EU and Singapore, he said.

Buckley argued that some jurisdictions are forced to pursue change by circumstance. She recalled a Spanish colleague at an international restructuring conference several years ago saying there are no bankruptcies in Spain so the issue wasn't on the agenda – but that changed three or four years later with the financial crisis. "Maybe for China now, with the situation not being the great boom that they've experienced over the last few years, there will be a change of political will," Buckley added.

Zacaroli highlighted differences between the Cayman Islands, which has been attracting more restructuring work for a while, and the British Virgin Islands where the work has tended to focus on shareholder disputes. In Cayman, there are proposals to modify its insolvency law so directors can petition for their companies to wind-up – a process currently prohibited because of a 1978 English precedent, *Re Emmadart*. "They are seeking to modify that to allow directors to at least put the company into a process. But they are also seeking to implement a moratorium rather like the administration moratorium in England and the proposed moratorium in Singapore to enable a scheme to get off the ground. That would be quite a significant step in Cayman if it happens," he noted. [Just as this magazine was going to press, a Cayman court allowed directors of helicopter group CHC to get around *Emmadert* in a case where a creditor of the company had also applied for its winding-up.]

Moore agreed that where a Chinese group has a BVI-incorporated parent company, it is "more challenging" to stabilise the situation while a restructuring is being implemented, because of the differing features in the tools available to help. Zacaroli also noted that there are more commercial judges stationed in the Cayman Islands than the British Virgin Islands, which helps speed up decision-making. That said, one British Virgin Islands judge, **Justice Barry Leon**, was a participant at the JIN conference in Singapore in October, and has been taking an interest in the current issues associated with cross-border insolvency and

Zacaroli (left) and Buckley (right)

restructuring, recently writing a paper on how international arbitration could assist.

The roundtable participants also discussed cooperation between US courts and Cayman courts, with Holmes suggesting that there is a good understanding and appreciation "between the typical Delaware court and Cayman", but perhaps not the same understanding between Cayman and other jurisdictions. Zacaroli argued that any connection between the jurisdictions tends to happen at the hedge fund level, rather than at the judicial level, "particularly because a Cayman scheme will very rarely get recognition in New York as a main proceeding given that almost by definition the type of Cayman company typically involved in a restructuring doesn't have a local business at all." Asked whether a US company would consider changing its COMI by setting up an establishment locally to make use of a Cayman scheme of arrangement, the barrister doubted that would ever happen because it would not go down well in the US.

Conclusions: can others compete?

As the roundtable came to an end, it was clear that most of the participants were confident that venues outside of London and New York – particularly Singapore – could become centres of international debt restructuring. But it was also made clear that, rather than taking work away from the traditional centres, they would simply offer an alternative for international companies with local businesses and assets, and perhaps local law governed debt, to restructure closer to home.

Buckley emphasised that the deciding factor for choosing a forum is the ability to obtain recognition where the creditors are based and where the assets are. "If there are other jurisdictions that offer recognition and can provide the same things as the UK has done, then certainly they're going to be up there," she added. Buckley also predicted some political backlash from European countries in light of Brexit, which could lead to recognition challenges, and, over time, the potential for English law to become a less favoured choice of law.

Moore agreed on the importance of recognition in choosing a venue and also added that it pays to consider how different jurisdictions have implemented the UNCITRAL Model Law: Chapter 15, the US version of the Model Law, facilitates recognition of schemes in addition to regular "insolvency proceedings", but that's not necessarily the case for all of the countries that have adopted it. "Subject to what happens with Brexit, we're probably going to be looking to the Model Law more and more in terms of recognition of schemes and what it facilitates in the relevant jurisdictions for any given case," she said.

Zacaroli pointed out that any state enacting the Model Law should clarify whether it enables recognition of schemes, in addition to whether its courts may apply foreign law. "It seems to me you have to apply a foreign law if you're going to implement, permanently, the contractual modification aspects of a scheme governed by that foreign law," Zacaroli said. "English law, at the moment, takes the view that we don't apply foreign law under the Model Law, which is a retrograde step I think."

Ramesh JC noted that Singapore's proposed legislative changes enacting the Model Law explicitly provide for both the recognition of schemes and the restructuring of foreign law debts. "We liked the flexibility of the scheme of arrangement," the Judicial Commissioner said, noting that most speakers at the roundtable had been overwhelmingly positive about schemes as a concept.

The discussion closed with a quip that all jurisdictions could learn from the Singaporean hybrid model of the best parts of other regimes. All the participants agreed they would be looking towards Singapore in the coming years to see how this model fares in practice.