

Cross Border Alchemy: Jurisdictional Predicates for Effective Restructurings

NCBJ and International Insolvency Institute

Joint Program

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INTRODUCTION

- **Judges:**
 - **Decide threshold jurisdictional questions**
 - **Act as gatekeepers**
- **Foreign businesses:**
 - **Can opt into US, UK or Cayman restructuring regimes with relative ease**
- **Examples**
- **Is this sort of forum shopping appropriate and desirable?**

JURISDICTIONAL PREDICATES DIFFER IN US AND UK

- **Deposit of debtor property can allow admission to the US Bankruptcy Court**
- **UK jurisdictional connections are more transactional**
- **Theoretical underpinnings are different: Presence of property in the US vs. sufficient connection to UK**
- **Each approach offers a purposeful way to gain legitimate access to one or the other system**

OUTLINE OF PRESENTATION

- **Basics of Insolvency Practice in UK**
- **Comparison of UK and US Jurisdictional Systems**
- **Long Arm Reach of Chapter 11 in the US**
- **Sufficient Connection Concept in the UK**
- **COMI Shifting and Forum Shopping**

BASICS OF UK RESTRUCTURING LAW AND PRACTICE

Corporate Reorganizations

- **Insolvency procedures under Insolvency Act 1986**
 - winding up (liquidation)
 - administration
 - company voluntary arrangement (CVA)
- **Reorganization procedure under the Companies Act 2006**
 - scheme of arrangement

BASICS OF UK RESTRUCTURING LAW AND PRACTICE

Administration

- **Only implemented when the debtor is or is likely to become insolvent (stigma)**
- **Commenced by court order on the application of directors or creditors, or by the appointment of administrators by a secured creditor**

BASICS OF UK RESTRUCTURING LAW AND PRACTICE

Administration

- **Administrators take over and displace directors**
- **Administrators are “officers of the court”**
- **Moratorium/stay of actions, subject to court control**
- **Process may, and often does, involve a business sale**
- **Can terminate in a scheme of arrangement, a CVA or a distribution to creditors**
- **Limited role for creditors’ committee**

BASICS OF UK RESTRUCTURING LAW AND PRACTICE

Schemes of Arrangement:

- **Preferred procedure for large financial restructurings:**
 - **no need for insolvency**
 - **directors remain in office**
 - **no stay – but a stay can be obtained by filing for an administration**
 - **negotiated with ad hoc committee(s) of main creditors before scheme process starts**
 - **can apply to foreign companies**

BASICS OF UK RESTRUCTURING LAW AND PRACTICE

Schemes of Arrangement

- **Three stage process:**
 - **first court hearing to convene meeting(s) of each class of creditors and/or members affected;**
 - **approval by 75% in value and majority in number of creditors and/members voting at each of the scheme meeting(s)**
 - **second court hearing to sanction the scheme**
- **Equivalent to a pre-negotiated chapter 11 but without a full insolvency proceeding**

BASICS OF UK RESTRUCTURING LAW AND PRACTICE

(Different Litigation and Professional Culture)

- **Litigation “lite” insolvency and Restructuring Procedures**
 - **Administrations can take place largely out of court**
 - **In a scheme, Court’s role is limited to ensuring:**
 - **compliance with jurisdictional requirements and procedural rules**
 - **voting classes correctly constituted**
 - **majority is representative of class as a whole and not oppressing minority**
 - **Judge does not impose own view of the merits or “fairness” of the scheme**

BASICS OF UK RESTRUCTURING LAW AND PRACTICE

(Different Litigation and Professional Culture)

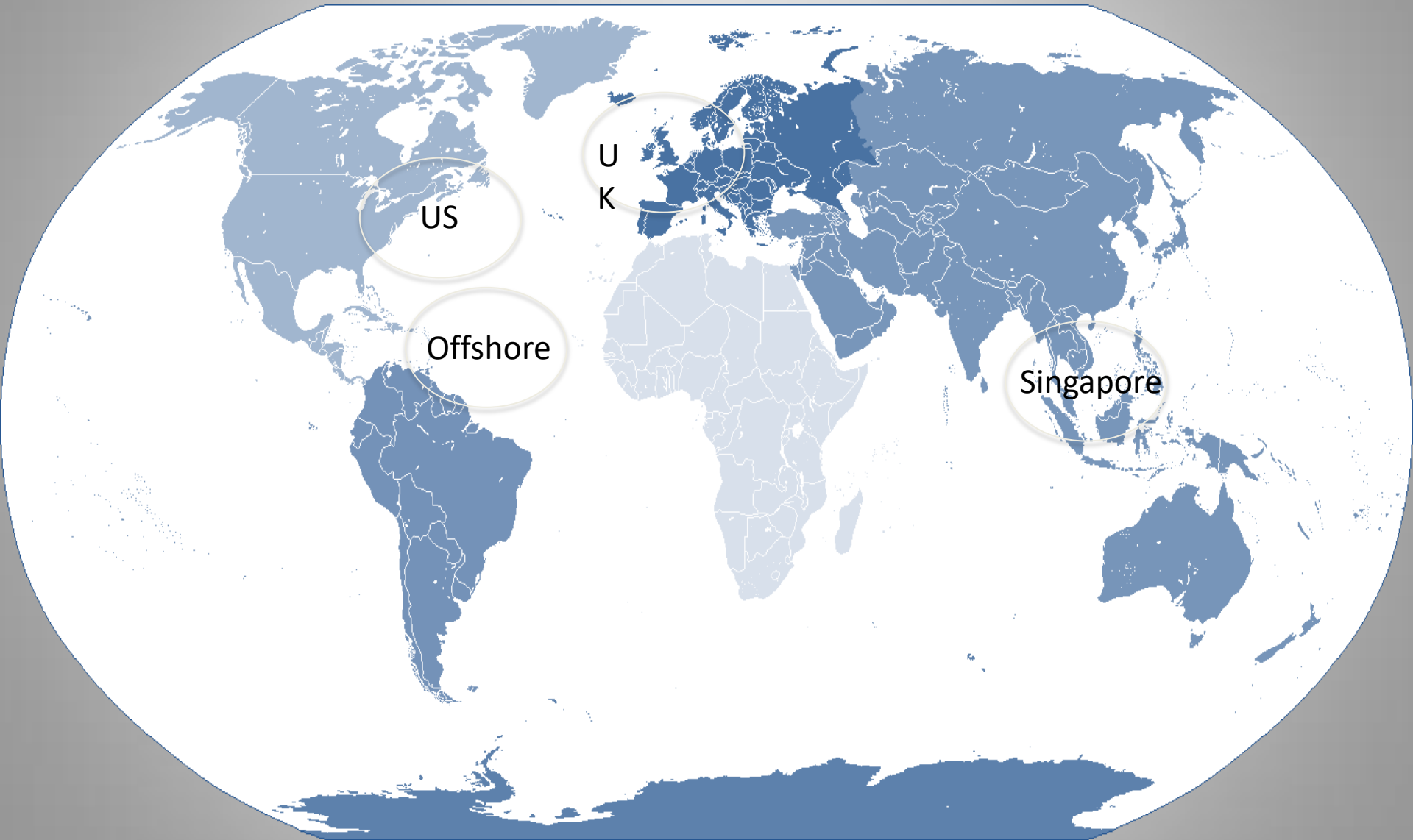
- **Qualified Insolvency Practitioners (usually accountants) act as Administrators and Liquidators**
 - **IPs provide the commercial and business expertise**
- **Split legal profession:**
 - **Barristers and Solicitors work as team**
 - **Barristers provide specialist advice and Court advocacy**
 - **Solicitors manage client relationship, conduct negotiations and draft restructuring documents**

BASICS OF UK RESTRUCTURING LAW AND PRACTICE

(Different Litigation and Professional Culture)

- **The Judiciary:**
 - **Business and Property Courts in London and the regions**
 - **High Court Judges**
 - **Bankruptcy and Companies Court Registrars (Judges)**
 - **Insolvency cases are not routinely docketed**
 - **Judge does not monitor the conduct of the whole case**
 - **Relatively few applications to court**
 - **Commercial issues left to the Insolvency Practitioners**
 - **UK Judge is more reactive and less pro-active than US judge**

EMERGENCE OF AN INTERNATIONAL FORUM SHOPPING SYSTEM



SUMMARY OF ARTICLE IN MATERIALS

- **Preconditions for successful “shopping”**
 - **Jurisdictions willing to entertain filings**
 - **Low formal barriers to entry / broad jurisdictional claims**
 - **Other jurisdictions willing to recognize foreign proceedings**

ARTICLE SUMMARY

- **Compare formal law vs. law as actually practiced:**
 - **US vs. England & Wales comparison**
 - **Common judicial concern for effective solutions**

LONG ARM REACH OF CHAPTER 11

- **US has a low formal barrier to entry**
- **US makes expansive claims about worldwide reach of jurisdiction**
- **Key Code Provisions for entry into US Case:**
 - **Section 109**
 - **Section 301**
 - **Section 303**

LONG ARM REACH OF CHAPTER 11

- **Section 109:**
 - **must reside, have domicile, place of business or property**
 - **“property” is not quantitative – peppercorn will suffice**
- **Section 301: Voluntary Case**
- **Section 303: Involuntary Case**

LONG ARM REACH OF CHAPTER 11

- **US Culture:**
 - **Liberal eligibility requirements**
 - **Presumption that debtors should have a fair chance to reorganize**
- **Consequence:**
 - **Foreign Debtors can manufacture eligibility by moving property to the US**

LONG ARM REACH OF CHAPTER 11

- **Worldwide Bankruptcy Estate:**
 - **All legal and equitable interests**
 - **Wherever located**
 - **Turnover can be ordered**
 - **Automatic Stay**
 - **Restrains creditors who are subject to US Jurisdiction**
 - **US has liberal “minimum contacts” test**

LONG ARM REACH OF CHAPTER 11

- Framework allows for *possibility of* what Walters calls “Asymmetric Overreaching”:
 - Global Case in US notwithstanding minimal US property
 - Different treatment of creditors subject to US jurisdiction and those that are not

LONG ARM REACH OF CHAPTER 11

- In Practice *US Courts have Exercised Restraint:*
 - Abstention under Section 305
 - Dismissal pursuant to Section 1112(b)
 - Coordination with Foreign Proceedings
 - Sections 1528-1529

LONG ARM REACH OF CHAPTER 11

- **Risk of “Asymmetric Overreaching” Comes into Play in “Solitary Non-Main Proceedings”**
 - **Chapter 11 in US**
 - **COMI in another Jurisdiction**
 - **No Foreign Proceeding in COMI**

THE UK'S SUFFICIENT CONNECTION CONCEPT

- **Judicially developed**
- **Looser predicates than 11 U.S.C. § 109**
 - *See e.g., In re Real Estate Development Co., [1991] B.C.L.C. 210*
- **Low barrier to entry for foreign entity “shopped” schemes of arrangement**

IN THE GLOBAL SHOPPING MALL...

You can buy American



You can buy British
(offshore)



COMI SHIFTING AND FORUM SHOPPING

- **United States, England & Wales, & Cayman as venues for bankruptcy & restructuring**
- **“Good” vs. “Bad” forum shopping?**

COMI SHIFTING AND FORUM SHOPPING

- **Race to the Bottom or Race to the Top?**
 - **Jurisdictional competition**
 - **Convergence & innovation**
 - **New product lines, e.g., chapter 16?**