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ENFORCEMENT OF THIRD-PARTY RELEASES ORDERED BY FOREIGN COURTS

The UNCITRAL Model Law on Cross Border Insolvency, incorporated into the U.S. Bankruptcy Code as chapter 15, provides frameworks for businesses to obtain recognition of a foreign insolvency proceeding and enforcement of a foreign plan of reorganization. In this article, the authors discuss how courts have addressed requests for recognition and enforcement. In particular, the authors discuss how U.S. courts have addressed the limits of those frameworks in the context of foreign restructurings that provide for third-party releases in circumstances where such releases may not be available under domestic U.S. law.

By David A. Herman and Allyesha Hall *

A central issue in cross-border insolvency practice is how courts will address inconsistencies across the legal regimes of different nations. In the most challenging cases, what is required under the laws of one country may be forbidden or disfavored under the laws of another. More commonly, there are tensions that must be navigated to effectuate a successful restructuring in different jurisdictions. When tensions arise, courts must assess how much deference to give foreign rulings that may not be fully consistent with our laws.

The UNCITRAL Model Law on Cross Border Insolvency (the “Model Law”), which is incorporated into the United States Bankruptcy Code as chapter 15, provides a formal framework for addressing such

tensions. Section 1521(a) provides that, upon recognition of a foreign proceeding, the court may “grant any appropriate relief.” Similarly, section 1507 permits the court to grant “additional assistance” to the representative of a foreign debtor. Such relief is discretionary, however, and depends upon principles of international comity. In addition, section 1506 provides that a bankruptcy court may refuse to grant relief if doing so would be “manifestly contrary to the public policy of the United States.” All of these provisions are subject to judicial interpretation, and they leave open the question of how readily U.S. courts may enforce aspects of foreign restructurings that may not be permissible in a domestic bankruptcy case.

* DAVID A. HERMAN is a partner, and ALLYESHA HALL is an associate, in the Financial Restructuring Group at Dechert LLP. Their e-mail addresses are david.herman@dechert.com and allyesha.hall@dechert.com.