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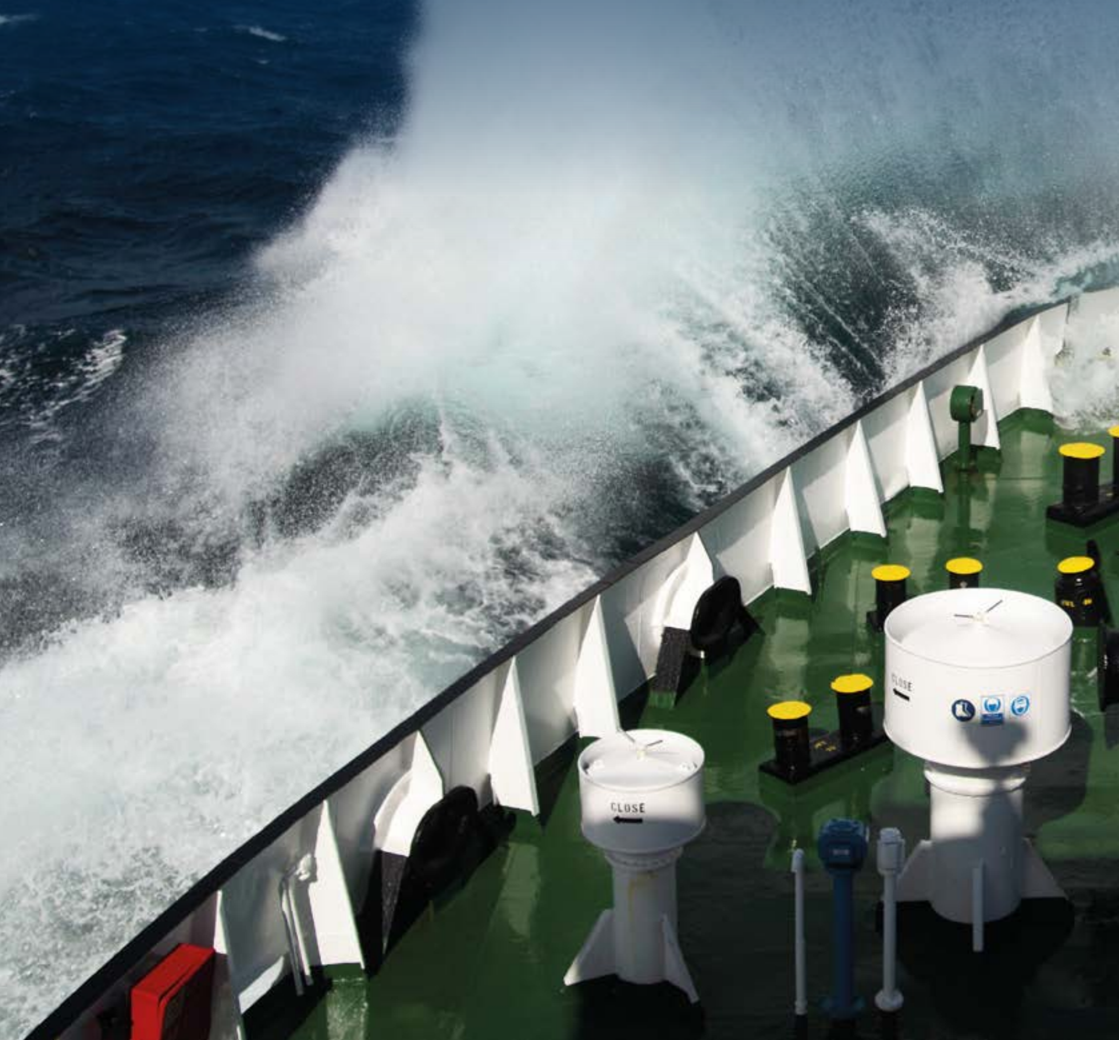
Managing Your Capital

A Practical Guide for Issuers and Borrowers Facing Economic Uncertainty



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Introduction

The current market environment, created by the global COVID-19 pandemic, has few parallels. During periods of economic uncertainty, many issuers and borrowers face significant and difficult issues in managing their capital structure. The purpose of this guide is to provide issuers and borrowers with practical guidance to proactively manage these issues and control their capital structure. In particular, this guide:

- Considers key bond covenants to focus on when making crucial decisions to achieve certain financing objectives and, most importantly, avoid covenant breaches or worse.
- Outlines liability management options for issuers to manage outstanding bond obligations.
- Maps a course for a review of loan documentation.
- Offers strategic insights and positioning in restructuring and work-out scenarios.

The considerations set out in this guide are not intended to be exhaustive or constitute advice relating to particular situations. Issuers and borrowers should take appropriate legal and commercial advice before taking any action in respect of their outstanding debt obligations.

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Bonds

Bond Covenant Considerations

During periods of economic uncertainty, bond covenants are tested and issuers may need to make crucial decisions to achieve financing objectives, and most importantly, avoid covenant breaches and potentially an event of default. The table below provides important considerations for issuers regarding certain bond covenants during periods of distress.

COVENANT	CONSIDERATION
Reporting Covenants	• Reporting covenants are especially focused on by investors in declining markets. To the extent annual or interim reports will be delayed, it could cause a covenant breach. • Timing relief provided by regulators and exchanges usually will not relieve an issuer of its reporting obligations to bondholders set out in the Indenture or Trust Deed. • Issuers should review their reporting covenants and delivery and timing requirements early so they have an opportunity to manage any potential delays with bondholders.
Limitation on Indebtedness	• Ratio debt and certain categories of permitted indebtedness could be impacted negatively by declining EBITDA and asset values.
Ratio Debt	• Any changes to an issuer's fixed charges (i.e., borrowing costs) or EBITDA will impact the ratio debt calculation. • Increased borrowing costs and/or decreased EBITDA will have a negative effect on the ratio and could preclude an issuer from relying on the ratio debt carve-out entirely. • Any other ratio test included in the ratio debt test (i.e., a multi-pronged ratio test) also could be impacted negatively by changes in asset values, EBITDA or amount of indebtedness, among other things. • Availability of ratio debt is usually a condition to other covenants and carve-outs and it is not just isolated to debt incurrence. See discussions below on "Limitation on Restricted Payments" and "Limitation on Asset Sales".

COVENANT	CONSIDERATION
Permitted Indebtedness	• As a general matter, certain categories of permitted indebtedness may contract and threshold amounts may be reduced significantly, thereby limiting certain carve-outs.
Total asset thresholds	• Categories of permitted indebtedness that are subject to a cap tied to total assets (i.e., capitalised leases, mortgage financing and purchase money obligations) would be impacted negatively by declining asset values. The amount of indebtedness allowed under these carve-outs will correspondingly decline.
Refinancing carve-out	• Refinancing carve-outs include a number of conditions. It is important that an issuer review these conditions carefully in a refinancing setting to avoid a covenant breach.
Guarantees	• Guarantees are considered indebtedness. Any guarantee provided by the issuer will need to be considered in light of the Limitation on Indebtedness covenant. See also the discussion on "Limitation on Restricted Payments" for other considerations.
Limitation on Restricted Payments	• The ability to make restricted payments may be limited due to declining consolidated net income ("CNI") and an inability to incur ratio debt, a pre-condition to making a restricted payment out of the restricted payment basket ("RP Basket").
Restricted Payments Basket	• The RP Basket is comprised of numerous components that are typically impacted negatively when an issuer is facing financial adversity.
Consolidated Net Income	• A significant contributor to the RP Basket is CNI. Any reduction in CNI correspondingly reduces the amount of cash available to an issuer in the RP Basket. • CNI typically builds from a particular measurement date (e.g., the first or last issuance date). It is important to calculate the amount of CNI from the proper date (i.e., the most restrictive date in the event there are multiple series of notes outstanding with different measurement dates) to avoid a breach. Also, going forward, to help facilitate growth of the RP Basket, if possible, negotiate a measurement date back to the first issuance of notes, not the last issuance of notes. This is often overlooked when deal teams take a "same papers" approach to a new transaction.

COVENANT	CONSIDERATION
Consolidated Net Income (Cont'd)	• CNI is calculated using audited or reviewed financials. Given the impact of an immediate period of economic decline and potential corresponding adverse impact on an issuer's financials may not be reflected in an issuer's available financials, issuers should consider making any restricted payments (e.g., a dividend) before the next interim financials are produced (which will likely reflect the negative impact of adverse results). Note that if the restricted payment is a dividend it must actually be paid, not just declared, during the relevant measurement period.
Primers and general carve-out basket	• Primers or starter amounts to a RP Basket are tailored to specific issuer circumstances and can range from US$1 million to US$50 million (and potentially even more). These can be extremely helpful for issuers that, due to time (e.g., a new issuer that has not produced its interim financial statements from its first issuance) or cash flow issues, have not built enough cash to make a desired or required restricted payment. • General baskets and carve-outs allow restricted payments to be made even if the issuer does not meet a condition to incur ratio debt or has no cash or not enough cash in the RP Basket. If there is no cash in the RP Basket, look here for relief.
Permitted Investments	• Categories of permitted investments that are subject to a cap tied to total assets would be impacted negatively by declining asset values. The amount of investment allowed under these carve-outs will correspondingly decline.
Loans and Guarantees	• Loans and guarantees are considered "investments" and must be considered under the Limitation on Restricted Payments covenant.
Limitation on Liens	• Categories of permitted liens that are subject to a cap tied to total assets would be impacted negatively by declining asset values. The dollar value of the lien allowed under these carve-outs will correspondingly decline.

COVENANT	CONSIDERATION
Limitation on Asset Sales	• There are numerous conditions to be met with respect to the use of proceeds so issuers should carefully review these conditions to avoid a covenant breach or an obligation to offer to purchase any notes from holders. A breach of this covenant is typically an event of default.
Consolidation, Merger and Sale of Assets	• An issuer must be able to incur ratio debt in order to conduct, consolidate with or merge with or into another person or dispose of substantially all of its assets. See discussion above on "Limitations on Indebtedness". A breach of this covenant is typically an event of default.
Amendments and Waivers	• Amendments and waivers are conducted through the consent solicitation process and the timing for any amendment or waiver is usually 30 days from kick-off. Consent solicitation fees are common.
Events of Default	• Government relief packages involving moratorium, deferral or another method may trigger an event of default. Indenture or Trust Deed provisions regarding events of default must be reviewed and relief measures/agreements must be drafted carefully to avoid any inadvertent triggering of cross-default provisions. • Ratings downgrades of the issuer, any guarantor or even the sovereign credit of an issuer's home country could trigger an event of default. • Issuers facing liquidity issues should review cross-default provisions and thresholds in the Indenture or Trust Deed early to plan and provide time to manage a credit event with another lender.

Liability Management Exercises

Issuers may evaluate potential liability management transactions with respect to outstanding bonds during challenging economic circumstances. Potential reasons for conducting liability management exercises include deleveraging, taking advantage of bonds trading at a discount, addressing LIBOR-based exposures and addressing maturities in anticipation of a recession. What follows is a description of liability management options for issuers during these periods.

The most common liability management tools include redemptions, repurchases, tender offers, exchange offers and consent solicitations.

Redemptions

An issuer may redeem outstanding bonds in accordance with their terms, assuming the governing documents permit redemption. Certain bonds may have call protection (i.e., not redeemable) or limited call protection (i.e., not redeemable for a certain period of time after issuance). Other bonds may prohibit early redemption. Issuers will need to carefully review the existing terms of their bonds and other debt instruments to determine whether a redemption is possible.

The Indenture or Trust Deed will usually specify the redemption procedures and it typically requires a notice period (typically not less than 30 nor more than 60 days). If not all bonds are being redeemed, redemption is usually by lot or *pro rata*. The Indenture or Trust Deed specifies the redemption price at which the bonds are to be redeemed.

Repurchases

A repurchase of bonds can be effectuated in a number of ways. The issuer may (i) negotiate the purchase price directly; (ii) engage a financial intermediary to negotiate and effectuate open market repurchases; or (iii) agree with a financial intermediary to repurchase bonds that the financial intermediary purchases on a principal basis.

Repurchases require very little preparation and little to no documentation. A repurchase of bonds is effective if the issuer is seeking to repurchase only a small percentage of debt or if the debt is not widely held.

An issuer repurchasing any Rule 144A or US-registered bonds, whether privately negotiated or in open market repurchases, runs the risk of inadvertently triggering the US federal tender offer rules. These rules were adopted to ensure that the issuers and others conducting the tender offer would not engage in manipulative practices. The term "tender offer" is not defined by statute in the United States. Instead, US courts apply an eight-factor test (known as the *Wellman test*)[1] to determine whether a repurchase is a tender offer and therefore subject to the US federal tender offer rules.

In order to avoid triggering an inadvertent tender offer under the US federal tender offer rules with respect to repurchase of Rule 144A or US-registered bonds, repurchase programs should be structured (i) for a limited amount of bonds; (ii) to a limited number of holders (preferably institutional investors); (iii) over an extended period of time (with no pressure on holders to sell); (iv) at prices privately and individually negotiated; and (v) with offers and acceptances independent of others. All major financial intermediaries should be aware of these issues and would be expected to appropriately structure the transactions to include these features. Home country and listing exchange rules may also apply.

Tender Offers

Tender offers are an offer to purchase from holders all or a portion of an issuer's bonds for cash. The advantages of a tender offer include allowing an issuer to capture a large part of a series of bonds, relatively

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1 The eight factors were set out in the US federal court case, *Wellman v. Dickinson*, 475 F. Supp. 783, 823-24 (S.D.N.Y. 1979). The eight factors of the *Wellman* test are: (1) active and widespread solicitation of holders for the securities; (2) solicitation is made for a substantial percentage of an issuer's securities; (3) offer to purchase is made at a market premium over the prevailing market price; (4) terms of the offer are firm rather than negotiable; (5) the offer is contingent on the tender of a fixed number of securities, often subject to a fixed maximum number to be purchased; (6) offer is open for a limited time; (7) offeree is subjected to pressure to sell its securities; and (8) public announcement of a repurchase of securities precedes or accompanies a rapid accumulation of large amounts of the securities.

straightforward documentation and a short timeframe for execution (usually within 30 days from kick-off). Typically, an issuer will engage an investment bank to act as a dealer manager to undertake the tender and manage the overall process.

The principal document for a tender offer is an Offer to Purchase which specifies the series and amount of bonds the issuer is seeking to purchase, as well as the price at which it will purchase the bonds (or method of calculating the price). The Offer to Purchase also provides all of the details to the holders as to timing and method of participation. Other key transaction documents include a Dealer Manager Agreement, which governs the relationship between the issuer and the dealer managers, an Information/Tabulation Agent Agreement which governs the relationship between the issuer and the information/tabulation agent that manages the communication with holders and provides tallies of bonds tendered. Counsel also provide standard transaction opinions to the dealer managers.

If subject to the US tender offer rules (i.e., bonds issued pursuant to Rule 144A or US-registered shelf programs), debt tender offers must be held open for a specified time period (typically ranging from 5 to 20 days absent any interim modification of terms) and be in compliance with certain other conditions. Home country and listing exchange rules may also apply.

There are several pricing mechanisms that an issuer can use to determine the consideration that it will pay holders to tender their bonds. For example, issuers may chose fixed spread pricing which permits the issuer to choose a specific yield spread between the debt being tendered and a benchmark US Treasury security. In addition, an issuer has the flexibility to choose to accept tenders of securities on a first-come, first-served basis, or offer limited or no withdrawal rights, or conduct a Dutch auction or modified Dutch auction for pricing purposes. In a Dutch auction, a holder submits a bid at a specified price, which the issuer can accept or reject. No matter the pricing mechanism, tendering holders must be paid promptly by the issuer, which has been interpreted to be no later than three business days after the conclusion of the tender offer.

Tender offers may be paired with consent solicitations. See the "Consent Solicitations" discussion below.

Switch Tender Offers for Sovereign Issuers

Sovereign issuers may be able to take advantage of an accelerated tender offer intermediated by an investment bank with a new offering component. This is known as a "switch" tender offer and it allows sovereign issuers to simultaneously run a tender offer for outstanding bonds and "switch" investors into a new bond on an accelerated timeline. The execution for a "switch" tender offer is set out below.

DAY 1 *New Offering and Tender Offer Launched*

- Investors
  - » current holders submit "switch" orders to syndicate, indicating amount instructed into the new offer
  - » new cash investors submit orders to syndicates
- Syndicate Teams
  - » one-on-one investor calls on mechanism as needed
  - » collect both "switch" and cash sell orders
  - » size the new issue to match "switch" orders and to fund cash sell orders accepted in the tender offer

DAY 2 *Tender Offer Results Announcement and Trade Date*

- Press release to announce results and bonds accepted by morning (may be released night before)
- Trade date for tender offer, with trade tickets being written to accounts whose instructions have been accepted

DAY 5 *Tender Offer Settlement Between the Dealer Managers (as buyers) and the Tendering Holders (as sellers)*

DAY 6 *New Issue Settlement and Dealer Manager and Sovereign Issuer Settlement for Tender Offer*

Exchange Offers

An exchange offer is an offer by the issuer to exchange new bonds for certain of its outstanding bonds. This approach allows the issuer to achieve a similar result as a debt tender offer by purchasing its outstanding bonds for non-cash consideration in the form of new securities (thereby obviating the need to deploy cash).

Because an exchange offer involves the offer of new securities, the process and documentation is similar to the original offering of bonds and is fairly robust. For example, the issuer will need to prepare an Exchange Offer Memorandum that includes all material information regarding the issuer and the new securities, and also includes track-record financials of the last three fiscal years (audited) plus, typically, the most recent interim period (reviewed). Other key transaction documents include a Purchase Agreement, Indenture or Trust Deed, the new Notes, auditor comfort letters, standard closing certificates and counsel opinions. Due diligence also will need to be conducted at the same level as the original offering. As a result, the documentation is more involved and the time line is much longer as compared to a tender offer. An issuer should expect it to take from four to 10 weeks to complete an exchange offer.

Like all offerings of securities, an exchange offer must be registered with the US Securities and Exchange Commission (the "SEC") or be exempt from registration. Any US-registered or Rule 144A offering subjects the issuer (and potentially the underwriting banks) to US anti-fraud liability with respect to the disclosure in the Exchange Offer Memorandum.

Exchange offers may be paired with consent solicitations. See the “Consent Solicitations” discussion below.

Consent Solicitations

A consent solicitation is a request by the issuer to the holders to amend or modify existing bond terms.

Consent solicitations may be sought on a standalone basis or coupled with a tender or exchange offer, known as an “exit consent”. Exit consents are used to change significantly restrictive provisions in connection with a tender or exchange offer and are given by tendering or exchanging holders (who are about to give up their securities) and bind non-tendering or non-exchanging holders. The exit consent serves as a useful incentive to avoid any "holdout" holders because non-tendering and non-exchanging holders are left with securities that have lost most, if not all, of their protections.

The principal document for a consent solicitation is a Consent Solicitation Memorandum. This document contains the background and full description of all amendments and modifications and a draft of the supplemental indenture to be entered into once the consents have been received. An issuer may include a consent payment to consenting holders as part of the consideration and this information would be detailed in the Consent Solicitation Memorandum along with instructions for providing consents and overall timing and deadlines.

Consent solicitations must be permitted under the terms of the Indenture or Trust Deed. Consent solicitations are not subject to any particular legal framework other than contract law principles. Consent solicitations are typically kept open for 10 business days and the process can be completed usually within 30 days from kick-off.

The illustration below provides an overview of the documentation burden and time required to complete various liability management exercises.

Loans

The issues faced by borrowers during periods of economic uncertainty will vary considerably and be influenced by factors such as the particular circumstances of the borrower, the sector in which it operates, its jurisdiction of incorporation and the terms of the relevant loan documentation. Borrowers will need to review their loan documentation to identify, amongst other things, any actual or potential covenant breaches and events of default. We identify below some of the key practical, legal and documentary considerations which may be relevant to borrowers when carrying out this review.

Identity of the Lenders

One of the first practical steps a borrower should take is to establish the identity of the lenders under its loan documentation. Knowing who holds what percentage of its loans should inform the way a borrower seeks consents, amendments or waivers or indeed any significant debt restructuring. In addition, the outcome of any consent process or significant debt restructuring will depend to a large extent on the identity and commercial motives of the lenders and the relationship the borrower has with those lenders.

Although this step seems straightforward, it is not always the case, especially in the context of syndicated loans. The original lenders party to the facility agreement on signing may no longer be lenders, or may remain lenders of record but have sub-participated their economic and/or voting interests through a sub-participation agreement or similar instrument. Even if there have been no changes since the loan was documented, it is important to understand the circumstances in which the syndicate composition may change.

An analysis should be carried out as to (a) the terms on which lenders can transfer their commitments and participations under the facility agreement and (b) whether the borrower is entitled to receive information relating to such transfers and/or a current list of lenders from the facility agent under the facility agreement. Although these terms are often heavily negotiated and vary from transaction to transaction, the following considerations are likely to be relevant:

- Whether the borrower has a right to consent to any transfer by a lender or a right to be consulted prior to the transfer by a lender.
- Whether there is a list of pre-approved or non-approved potential new lenders in the facility agreement.
- Whether any consent or consultation right or pre-approved or non-approved list falls away on, for example, an event of default.
- Whether any consent or consultation right or pre-approved or non-approved list has been complied with.
- Whether the borrower has a right to receive copies of transfer documentation relating to any transfers and/or a right to obtain a list of current lenders under the facility agreement from the facility agent.
- Whether there are any controls on lenders entering into sub-participations or requirements for lenders to disclose any sub-participations.

In addition to the identity of the lenders the identity and the role of any other finance parties under the relevant loan documentation is also important, particularly when considering enforcement mechanics. The Appendix to this guide provides a summary of certain finance party roles in syndicated loans and bond issuances and the *Restructuring* section to this guide outlines some key considerations for borrowers when dealing with other finance parties.

For multi-tiered financings (for example, a senior and junior financing or a bank/bond financing with a common security package and an intercreditor agreement governing the relationship between the other lenders, bondholders and/or hedge counterparties), the identity and commercial motives of the other creditors and any holdings by creditors across the various debt or hedging instruments will be of particular relevance in any restructuring discussions, including as to where "value breaks" and which group of creditors (if any) forms an instructing group for the purposes of any enforcement action. For such multi-tiered financings, the intercreditor agreement governing the relationship among the creditors and the debt documentation for each debt obligation will need to be reviewed in detail and indeed, if there is no formal intercreditor agreement in place, structural subordination may inform who the key creditors or groups of creditors are.

Payment of Interest and Principal

Borrowers whose businesses have been impacted by adverse economic conditions will need to consider whether payments of interest and principal can be made when due. As a non-payment of interest and/or principal under a facility agreement typically results in an immediate event of default (absent any non-payment caused by a failure of the payment system), borrowers will need to have a clear strategy in place to deal with any potential payment issues. In particular, borrowers should consider whether it is viable to request an extension of the time period to make a payment and/or (if the payment is of interest) to request a capitalisation of interest. Any request to extend the time period for payment or to capitalise interest will (in the context of a syndicated facility) most likely require the consent of all of the lenders (or all of the lenders providing the relevant facility) and should therefore be made well in advance of the due date for the applicable payment.

One point to note when considering the viability of a request to capitalise interest is whether the legal systems in the relevant jurisdictions permit capitalisation of interest. Certain emerging markets in Asia – such as Vietnam – may not have a clear position as to the legality of such capitalisation. Borrowers who have issued bonds or who have multiple debt obligations should also consider any potential cross-defaults with respect to interest payment delays or defaults under their loan documentation.

In addition to considering the payment dates for interest and principal, borrowers should also consider the final maturity date for any loan facilities. If a facility is due to terminate in the short term, a borrower will need to consider:

- Whether adequate resources are available to refinance that facility through, for example, a new bank loan, a bond or other debt instrument or through equity or cash resources.
- Whether its existing facility agreement includes any form of extension option to extend the termination date and, if that option is available, the terms of that extension and whether it is desirable to exercise that extension.

New Borrowings/Rollovers

Borrowers should not assume that their ability to borrow new money under existing facilities or roll-over existing working capital lines is unrestricted.

Under a typical Loan Market Association (LMA) and Asia Pacific Loan Market Association (APLMA) style loan agreement, certain conditions precedent must be met by the borrower before any utilisation of a loan can be made. Outside of initial documentary conditions precedent which will be satisfied on closing of the transaction, further conditions precedent must be satisfied prior to each new utilisation of a loan or, in respect of working capital loans, prior to the rolling over of the maturity of that loan. These typically include:

- A condition that no default (for new utilisations) or no event of default (for existing utilisations of working capital facilities that are being rolled over on maturity) has occurred and is continuing. This is, by and large, the market position adopted on most deals but will not always be the case. If rollovers of existing lines is conditioned on there being no default, then the borrower may find that it needs to enter into discussions with its lenders sooner than expected (see the Notification of Defaults/Events of Default section below for further thoughts on defaults versus events of defaults).
- A confirmation that the repeating representations in the facility agreement remain true (or true in all material respects).

Other conditions, such as financial covenant look-forward or look-back tests, loan-to-property value ratios (in the case of real estate or other asset-backed financing) or use certifications may apply in respect of utilisations for particular purposes, such as acquisitions or capex.

Borrowers should consider whether the further conditions precedent can be met. If any of the further conditions precedent cannot be met, new utilisations under the facility will not be possible and any existing revolving credit loans may not be rolled over and will need to be repaid at the end of the current interest period. In this event, the following points will be relevant:

- Whether it is viable to request a waiver of the relevant further conditions precedent from the lenders.

- Whether any remedial option is available to cure a default to enable new utilisation or roll over. For example, in the case of breach of financial covenants or loan-to-property value ratio, facility agreements may provide an equity cure right or top-up or remedial option by way of providing additional cash collateral or security to cure the breach before the lapse of a grace period (though in the case of cash collateral the benefits of tying up cash to maintain existing lines at a time when the borrower is facing potential liquidity issues will need to be weighed carefully).
- If a waiver or remedial option is not possible or unlikely to be granted consideration will need to be given to:
  - in respect of new utilisations, how expenditure that would usually be funded from a utilisation of the working capital facility will be funded; or
  - in respect of the rollover of existing revolving credit loans, how the repayment of that existing loan will be made.

Financial Covenants

Where facility agreements contain maintenance financial covenants, the terms of those financial covenants should be reviewed in detail. A failure to meet the financial covenants under a facility agreement when tested typically results in either an immediate event of default or, in some transactions, an event of default following the expiry of a period of time to cure the relevant breach through the injection of additional equity (an equity cure) or cash collateral or additional security (typically in real estate or other asset-backed financing transactions).

If any financial covenant may not be met when tested, the borrower should consider, among other things:

- Whether it is possible to agree an amendment to the relevant financial covenant(s) based on a revised base case model; the conditions lenders may attach to any consent to that amendment (such as a fresh injection of equity or provision of additional security); and whether any other amendments are required and can be sought at the same time. In this regard, borrowers should consider re-casting the base case model/ financial projections on which the covenant ratios were originally agreed and be prepared to robustly defend the assumptions underpinning the revised numbers. Bearing in mind most financial covenants are tested on a look-back/historic basis and testing will not occur until the relevant quarterly, semi-annual or annual (as the case may be) financial statements are available, there will usually be an in-built time lag between the testing date and the period by reference to which such testing will occur. Borrowers would do well to make the most of this time in preparing for discussions with creditors.

- Whether the facility agreement contains cure provisions which allow the borrower to cure a breach by injecting additional equity or providing additional security either prior to or after the breach has occurred. Whether it is viable for the borrower to make use of any cure provisions will depend on a number of business-specific and documentation considerations. These include:
  - Whether the shareholders/sponsors of the borrower are able and willing to inject additional equity into the borrower.
  - In the case of real estate or other asset-backed financing, whether there are any other sources of cash collateral or security available within the borrower's group to regularise the loan-to-property value ratio.
  - Whether the loan documentation has an overall cap on the number of cures that may be used (and, if so, whether that cap has been exhausted).
  - How any cure amount, once injected, will be applied under the terms of the equity cure clause.
  - Whether the loan documentation has restrictions on cures being injected in consecutive testing periods and/or over-cures.
  - Whether there are any withdrawal mechanisms to allow release of additional equity or security once the financial covenants have been complied with and the period required for such release. While not standard for all types of financing products, where this is relevant it will typically become applicable when the market recovers after some short-term volatility events, and the period required for such release is therefore an important consideration for borrowers' cash flow and asset liquidity planning.

It is worth noting that certain categories of borrowers, in particular financial institutions, may face unique challenges with respect to potential covenant breaches. Generally, financial institution borrowers in Asia are subject to Basel II compliance covenants focused on capitalisation and funding stability. Ratios include those for capital adequacy, tier 1 capital, solvency, long-term stable funding, and liquidity. In periods of crises, short-term covenants (such as liquidity ratios measured over a 30-day period), may be particularly susceptible to breach. Moreover, unlike certain other categories of borrowers and financial covenants, financial institutions are generally not in a position to cure covenant breaches through equity injections.

Notification of Defaults/Events of Default

Most facility agreements include a requirement for the borrower to notify the facility agent or (in the case of a bilateral facility, the lender) of any event of default (an actual breach) or default (a potential breach).

Such requirements should be carefully considered by borrowers, including in respect of the following:

- If the notification requirement only applies in respect of an event of default (rather than any default), whether it is feasible for the borrower to remedy the breach within the applicable grace period and, even if the breach can be remedied within that grace period, whether the facility agreement includes a requirement for any remedy to be to the satisfaction of the agent or lenders.
- If the notification requirement extends to defaults, whether the borrower, to a certain degree, needs to exercise its judgment and form a view as to whether a default has indeed occurred. Note that there is scope here for a default to be elevated to the status of an actual event of default should the borrower fail to comply with the notification requirements.
- The impact making such a notification will have on outstanding bonds and other loan or debt or hedging obligations (including any cross-default triggers).

Provision of Information to the Lenders

Borrowers should determine whether their loan documentation contains a covenant to promptly provide information as may be reasonably requested by the lenders (or, for syndicated transactions, the agent on their behalf) regarding the business, financial condition, assets and operations of the business of the borrower. This covenant is typically negotiated and the terms need to be considered on a case-by-case basis. However, if the terms of this covenant are in line with the LMA or APLMA standard form, lenders may request information under the covenant to assist them in determining the impact of any adverse economic event, market downturn or pandemic on the business of the borrower. To the extent there is a reasonable likelihood of the borrower receiving a request from lenders under this clause, borrowers should ensure they have information to hand to comply with any requests from lenders in a prompt manner.

Events of Default

The events or circumstances which constitute events of default under the relevant loan documentation will need to be reviewed in detail. A determination will need to be made, based on the drafting, whether any event of default has occurred or is likely to occur. We have set out below some of the issues that may need to be considered as part of any such review.

Material Adverse Effect

The material adverse effect event of default creates an event of default if an event or series of events occur or are reasonably likely to occur which constitute a material adverse effect. The definition of material adverse effect and terms of this event of default are often heavily negotiated. The definition of material adverse effect may include events which arise directly due to the performance of the business of the borrower, the condition of the borrower's property (including any property subject to mortgage) or its ability to meet its obligations under the loan documentation, but may also capture, for example, events which may impact on the future prospects of the business. The definition of material adverse effect will typically also have a wider application throughout the loan documentation, as it is usually used to qualify a number of the representations and undertakings in the loan documentation.

While the generic nature of the material adverse effect event of default may limit the likelihood of lenders calling that event of default, unless there is a very clear event which constitutes a material adverse effect, careful analysis will need to be carried out as to whether the impact of any adverse economic event, market downturn or pandemic, for example, triggers any elements of the material adverse effect event of default or impacts on any of the qualifications in the representations and covenants in existing loan documentation.

Discontinuance of Construction Project and Delay on Milestone Dates

In real estate or other asset construction project financing, typically, discontinuance or abandonment of the construction work for a period of time and/or the delay of certain construction milestone dates (for example, commencement date of foundation work and superstructure work, project completion date and pre-sale/sale commencement) would constitute an event of default.

Borrowers should check the wording of the relevant event-of-default provisions to determine whether the circumstances in a particular situation would be considered an event of default.

Borrowers should closely monitor any actual and/or potential delays of the construction schedule caused by events such as the COVID-19 pandemic and where necessary, approach lenders and/or the facility agent well in advance to apply for a waiver and/or extension of those construction milestone dates.

Cross-Default

The cross-default event of default is often heavily negotiated. The event of default may apply only to a borrower or may also capture debt in related entities such as subsidiaries of the borrower, the holding company(ies) of the borrower or other guarantors or security providers. Carve-outs may have been included, such as a *de minimis* basket, to ensure a default in respect of non-material amounts of debt does not trigger a cross-default event of default.

Borrowers should consider whether any defaults have occurred (or are likely to occur) under other loans, bonds or other instruments, creating financial indebtedness that would constitute a cross-default event of default under their loan documentation, or vice versa. Depending on the precise drafting of the documentation, borrowers may find that even the act of entering into discussions with creditors on rescheduling of debts may trigger an event of default under its loan, which then cross-defaults into other debt instruments.

In addition, it is important to note that the cross-default analysis for any financing may differ depending on the relevant loan product. For example, in a project financing, it is important to ascertain the extent of impact caused by cross-default of a project financing at group/sponsor level. Where the borrowing and security structure is ring-fenced at the project level (i.e., non-recourse to shareholders), generally the cross-default event of default would also capture obligors at the project level only, thus it is less likely to result in any knock-on effect to cross-default other loans, bonds, or debt instruments of other members of the group and entities managed/controlled by the sponsors. Priority of safeguarding defaulting loans would be given to those loans of full-recourse nature where cross-default will impact on the financial conditions of the group as a whole.

Audit Qualifications

In the current environment, it is conceivable that auditors may take a cautious view on companies' abilities to continue as going concerns, with the result that either audited accounts may include qualifications or additional company support may be required by way of a parent guarantee or standstill. Facility agreements often contain an event of default if the audited financial statements of the borrower or borrower group are qualified and may include other covenants relating to the audited financial statements. Any proposed or actual audit qualifications or additional support should be carefully considered against the relevant provisions of the facility agreement to establish whether a breach has occurred or will occur.

In addition, as facility agreements often require borrowers to deliver audited financial statements within a set period of time, borrowers should check and ensure that their audited financial statements can be delivered on time by their auditors and that there are no delays due to, for example, extensive travel restrictions in place during the COVID-19 pandemic.

Suspension from Trading

A delay in releasing financial statements by a listed borrower may trigger a suspension from trading. Facility Agreements often include an event of default if a listed borrower, or its listed subsidiary or the shares in a listed company which are used to secure outstanding debts, is/are suspended from trading for a certain period of time. Any listed borrower with loan facilities in place will need to consider if this event of default has been or could be triggered.

Events of Default Unique to Emerging Markets

The LMA facility agreement template for emerging-market financings contains certain events of default that are unique to borrowers in emerging markets. In particular, a moratorium on payments of foreign currency indebtedness generally (without reference to the particular borrower) may result in an event of default. As "moratorium" is not a defined term, borrowers should review their government's policies and response to events such as the COVID-19 pandemic, for example, to ensure that this event of default (if included in its loan agreement) is not triggered inadvertently. The exact terms of the loan documentation will need to be reviewed in detail to establish how any moratorium event has been dealt with and the implications if a moratorium event occurs (for example, some lenders, including some development finance institutions, may have elected to restructure this clause on moratorium as a draw-stop event rather than an event of default).

Ability to Remedy

We discuss financial covenant cures above but the facility agreement will also usually regulate whether, as a general matter, the borrower has the ability to remedy or cure defaults and events of default or whether, once a default or event of default has occurred, the only available option is to seek a waiver from the lenders. These issues often come to the fore in the context of satisfying conditions to rollovers of existing lines and can raise (difficult) questions of whether there is, or indeed can be, a potential breach of a financial covenant.

Consents, Amendments and Waivers

Once it has been established whether any consents, amendments or waivers are required, the consent level for that consent, amendment or waiver will need to be established. If the facility agreement is a bilateral loan between the borrower and one lender, the consent of that lender will be required. If the loan is in syndicated format, the facility agreement typically sets out whether a consent, amendment or waiver requires all lender consent or majority lender consent.

If a matter requires all lender consent, but the likelihood of receiving all lender consent is low, consideration should be given as to whether the facility agreement contains:

- Excluded commitment provisions (which typically provide that a lenders commitment will be excluded in determining whether a consent threshold has been met if that lender does not respond to a request for consent within a specified number of business days (or other formulations which achieve a similar result)).
- Non-consenting lender provisions (which typically allow a borrower to request a non-consenting lender to transfer its commitments and participations in the facility at par to another lender or new lender arranged by the borrower if a percentage of the other lenders (typically the majority lenders or a higher threshold) have consented to the relevant consent, amendment or waiver request).

Both of these provisions may assist a borrower (and the lenders that have consented to the relevant consent) in reaching the consent threshold required to be obtained under its facility agreement.

In addition and as mentioned in the Identity of Lenders section above, for multi-tiered financings the intercreditor agreement is a critical agreement governing the relationship and position among creditors. The terms of the intercreditor agreement will need to be reviewed to establish if the consent of other creditors such as junior lenders, bondholders or hedge counterparties, is required for any consent, amendment or waiver.

Regulatory Approvals

A number of the emerging markets in Asia, including China, Vietnam, Bangladesh, and Malaysia, maintain cross-border foreign exchange controls. For example, in China, the lack of applicable SAFE (State Administration of Foreign Exchange) registrations may prove fatal to any proposed payment from onshore to offshore and in Vietnam, payments of principal in an acceleration scenario may require amendments to the loan registration (which essentially provides the Central Bank or equivalent regulator with an approval right). Given the cross-currents of politics and economic policy, it is unclear whether regulators will act affirmatively to process such amendments to regulatory dossiers which may negatively impact domestic borrowers.

Debt Buybacks

If a borrower is aware that its syndicated debt is being transferred by lenders in the secondary market at significantly below par value, the borrower may consider whether it is viable to carry out a debt buyback of that debt. As part of the debt buyback process, the borrower (or a shareholder or affiliated entity of the borrower) would purchase its debt in the secondary market from one or more of the lenders at below par value.

Facility agreements sometimes contain provisions which prohibit the borrower (and/or its shareholders or affiliated entities) from carrying out debt buybacks or set out provisions which require all lenders to be given an opportunity to participate in any debt buyback. This is because debt buybacks may result in one lender (or a selected group of lenders) exiting their position and receiving payment from the borrower (or its shareholder or affiliated entity) ahead of other lenders, which is contrary to the general principle that lenders receive repayment *pro rata*. Facility agreements also sometimes contain provisions which disenfranchise (or otherwise restrict rights in respect of) any debt purchased by a shareholder or affiliated entity of the borrower in the secondary market and/or provisions which govern how debt purchased by the borrower is treated.

Any debt buyback requires a very detailed review of the relevant loan documentation (particularly where there is no express permission or prohibition in the loan documentation relating to debt buybacks) and may not be appropriate in all circumstances.

Restructuring

Assisting companies with an underlying viable business, whether by way of operational or debt restructuring, generally offers the greatest return for creditors. In addition, it may also have the benefit of assuring continued employment and contributing to the general wellbeing of the economy.

We identify below some of the key considerations for borrowers wishing to restructure. For the purposes of this discussion the term "borrowers" means borrowers under financing arrangements and includes issuers of bonds, as the context requires.

Entry into Negotiations

Periods of economic uncertainty and associated financial distress will see borrowers seeking extensions and perhaps repayment forbearance outside relief measures introduced by governments and/or central banks. Entering into negotiations with creditors carries with it risks. A borrower will be seeking to consummate a favourable arrangement while creditors will feel discussions should not of themselves waive existing rights and obligations. Accordingly, it is preferable at this stage to have in place a written understanding that all discussions are non-binding until any agreed terms are consummated by binding written agreements. Even at subsequent stages where the parties may have reduced their terms to a term sheet or memorandum of understanding (MOU) it should be expressed to be "non-binding" on the parties.

While the terms that are documented in the term sheet or MOU should be made non-binding, the parties may want to add a legally-binding confidentiality clause in an effort to prevent the content of the negotiations from being divulged. More generally, formal arrangements among creditors and the debtor group, to enable sharing of information for the restructuring without breaching any confidentiality requirements, should be addressed.

Should any discussions take on a more adversarial nature, parties will be keen to avoid weakening their position in any formal dispute which may take place in the future, so correspondence and discussions between the parties should be expressed to be "without prejudice".

During this time it is worthwhile considering what claims can be conceded or waived as a price of doing the deal.

Review of Existing Debt Documentation, Debt Profile and Waiver and Standstill Arrangements

Review of Existing Debt Documentation

The *Bonds* section of this guide summarises certain covenants typically included in bond documentation; and the *Loans* section summarises certain covenants that may be included in many loan documents, in each case also addressing some of the key points a borrower should consider when reviewing compliance with those covenants.

The terms of the covenants in the relevant bond or loan documentation will need to be reviewed in detail and all actual or potential breaches will need to be identified. Cross-default provisions are generally an area of key focus as part of this review, particularly if triggering cross-default clauses could result in the cash flow insolvency of the debtor and ultimately materially reduce recoveries for the creditors (particularly if inadequately secured). In addition, the bond or loan documentation will need to be reviewed to consider the impact of any potential restructuring steps. For example, the rescheduling of debt repayment and forbearance may themselves trigger cross-defaults in the borrower's other financing arrangements and the provision of new money may require consents from all or the majority of creditors under the bond or loan documentation, particularly if security is already in place for existing indebtedness.

Borrowers and creditors alike should consider these points well in advance of implementing any restructuring steps as it can take time to assess the viability of, for example, obtaining consents under existing bond or loan documentation.

Debt Profile

In addition to the initial action regarding entry into negotiations and review of the debt documentation referred to above, borrowers should undertake basic debt profiling, noting credit information including details of the following, in order to assess how any restructuring should be structured, which is especially important when multiple debtor entities (such as holding companies and subsidiaries) are involved.

- Name of borrower/issuer entity.
- Details of guarantors.
- Details of security trustee.
- Details of current lender(s)/bondholders.
- Currency of the loan/bond.
- Confirmation that the loan is fully drawn down.
- Amount outstanding plus details of any due but unpaid interest.
- Details of any recent prepayments.
- Security – details of ranking; grantor(s); and over which assets.
- Hedging – details of any hedging arrangements in place and ranking of the hedging with the facilities.
- Governing law; exclusive or non-exclusive jurisdiction; details of any arbitration or dispute resolution provisions that deviate from submission to courts.
- Any enforcement action already undertaken.
- Details of any current outstanding default(s).

Putting in Place Waiver and/or Standstill Agreements

Where there are multiple creditors, borrowers may sometimes request to "stand still". The need for a standstill agreement is triggered by a borrower facing financial difficulties, usually calling the creditors together and asking for "breathing space" or time to assess the situation to enable the creditor to put a viable proposal to all creditors. Normally during entry into a standstill creditors of the borrower agree not to enforce their rights against the borrower. The creditors will also usually be requested to keep their financing at the same level as on the standstill date even if some of the loans are not fully drawn. However, should there be any repayment creditors may be expected to allow "redraws" during the standstill period.

The non-statutory guidelines issued jointly by the Hong Kong Association of Banks and the Hong Kong Monetary Authority (HKMA) provide principles as to how regulated banks should deal with customers in financial difficulty, encouraging a standstill, during which an information gathering assessment can be undertaken with a view to reaching an informal decision as to the customer's long-term future. Even though the guidelines are non-statutory, regulated banks are expected to adhere to them and to act cooperatively and in an expeditious manner in trying to agree a restructuring plan, and will be subject to scrutiny from the regulators if they fail to do so. Similar guidelines have been issued in other jurisdictions.

However, the guidelines are applicable only to banks and, therefore, other creditors such as bondholders, funds, employees and trade creditors may proceed with enforcement actions during the period in which banks are seeking to implement a restructuring plan with the debtor company/group.

Standstill agreements will typically need to deal with:

- Suspension of current payment obligations and defaults.
- Maintenance of facilities without acceleration but possibly being placed on-demand.
- Restrictions on transfers of debt positions pending agreement (or adherence of transferees to standstill arrangements).
- No unilateral enforcement by any creditor party to the standstill.

During the standstill period, creditors will often expect to carry out legal and accounting investigations of the borrower group to gather information about the borrower and for the formulation of a restructuring plan.

The legal investigation typically includes obtaining information about the borrower and its group companies; identifying assets and liabilities; and analysing the likely impact of any insolvency proceedings or security enforcement against the borrower or any other group companies.

The accounting investigation usually includes verifying financial data provided by the borrower; critically assessing cash flow, budgets and financial forecasts provided by the borrower; and reporting on the borrower's business and any business plan produced by the borrower's management.

Based on the information obtained, the creditors may consider whether to progress from a standstill to a restructuring of the borrower's debt stack, provide new monies, implement an asset disposal programme and/or other cost cutting measures or even request replacement of management.

At this stage it is vitally important that the creditors trust historical information being provided and that there is no indication of fraud or misfeasance. Accordingly the financial adviser will also often be required to address these aspects in any report.

It may be important for the standstill agreement to deal with any new monies to be advanced to the borrower. Where jurisdictions permit it, debtor-in-possession (DIP) financing may be available.

A provider of new monies will understandably require priority of repayment, ahead of the facilities that existed on the standstill date ("old money") from any recoveries or, if possible by way of security, in any formal insolvency or rescue proceeding regarding the company; and will often charge a fee as well as requiring new security and possibly, if available, guarantees.

Priority can also be achieved through formal intercreditor arrangements which are routinely agreed in restructurings. Creditors may agree between them to apply any amounts they receive from the debtor to repay the new money lending, or indeed any tranche of borrowings, in a specified manner rather than the more familiar *pari passu* approach.

Creditors having the benefit of a negative pledge may be asked to waive that provision to permit any new security to be taken. Creditors already holding security may be required to accept that their existing security will rank behind any security provided for new monies.

If existing overdraft facilities continue during the standstill, any fluctuation in balances may constitute new money (if the overdraft increases) or repayment of debt (if the overdraft is reduced), and the standstill agreement should deal with the issues that arise from this. This is referred to as "equalisation". Simply stated, it means that, generally speaking, creditors should not be better or worse off as a consequence of any standstill from a particular point of time, in the absence of factors that may justify unequal treatment.

Finance and Administrative Parties

As mentioned in the *Loans* section of this guide, the identity of the relevant lenders and other creditors will be critical in assessing whether a standstill and/or waivers can be put in place. The same is true under any bond documentation. The role of other administrative or finance parties under the loan or bond documentation will also be relevant.

In the context of the restructuring of a syndicated loan, the most important administrative parties will be the agent/facility agent and security agent/ trustee.

Agent/facility agent – The facility agent carries out an administrative role in relation to the facility. It will act as the primary point of contact between the various parties and manage the flow of communication and funds between the borrower and the lenders. In practice, the agent will often be the same entity as the loan arranger.

Security agent/trustee – For a secured loan, the agent will also usually act as security agent (or security trustee if the security is to be held by it on trust), holding the security on behalf of all of the lenders and other finance parties.

The identity and intentions of these parties should be established at an early stage in a restructuring transaction. Agents and trustees often have a right to resign their role under the loan documentation and require the lenders to appoint a replacement. The impact (both on documentation and timing) of any such resignation during a restructuring of the loan facility will need to be assessed in detail.

In the context of the restructuring of bond debt, the most important administrative party is the trustee. The issuer under the bond documents is typically required to file certain information with the trustee by way of an officers' certificate on an annual basis or to confirm and notify compliance with the financial covenants of the issuer. In addition, a trustee may be authorised under the relevant bond documents to agree technical or other breaches by the issuer.

The Appendix to this guide contains a more detailed overview of certain finance party roles in syndicated loans and bond issuances and the *Security*

Enforcement section below sets out some of the considerations relating to amendments and acceleration involving agents and trustees.

Initial Restructuring Considerations

Restructuring Viability

Assuming a standstill of some sort is implemented, then during its existence – as a starting point for discussions – the creditor group will typically want to:

- Review the debtor group's cash flow projections and other financial information, which may involve the appointment of a monitoring accountant.
- Assess the adequacy and performance of the debtor group's management.
- Consider the viability and performance of the debtor group including any business plan provided by the debtors.
- Consider the availability of additional security for creditors and prepare or obtain an insolvency model, identifying projected returns for creditors, based on certain agreed assumptions, in the event of an insolvency.

Steering Committee and Collective Approach

In the early stages, it is important to determine quickly whether the approach will be collective and whether certain key creditors can take the lead to pursue the restructuring with the debtor group.

Interplay of Factors for Standstill/Restructuring

There is an interplay of factors that needs to be considered in propounding any debt repayment moratorium. These include:

- Duration of the standstill and the mechanism for any extension.
- Whether interest continues to accrue and at which rate: contractual non default; contractual default; or harmonised.
- Dealing with debt as it matures.
- The rights that may be enjoyed by those creditors holding security, if any.

- Collective decision-making thresholds.
- Negotiating arrangements bilaterally or collectively.
- The possibility of security enforcement and/or debt and security sales by individual lenders.
- The lending arrangements being bilateral or syndicated.
- The arrangements that may be required by creditors to monitor the debtor so as to ensure proper cash management and no leakage.
- In the event that a collective approach is preferred by the majority of lenders, how to deal with those lenders who are adamant on an early exit and regimes available to the debtor to deal with such lenders.
- Whether the engagement of monitoring accountants is warranted and beneficial.

The above may be further complicated when considering restructuring of a particular sector. For example:

- For a shipping enterprise, ownership of the vessels is structured around SPVs for each vessel and siloed security, which can encourage lenders to take decisions individually rather than collectively.
- Different debt maturity profiles may affect decision making of individual lenders especially if there is residual equity in the relevant secured asset over which they have an interest.
- The type of secured asset and market sentiment concerning that particular type of asset.
- The cyclical nature of the market (if applicable). Lenders may be reluctant to bring to book significant losses by a sale at a downward point in the relevant market cycle.

More specific considerations may include:

- *Pricing* – In addition to harmonisation of interest rates, considerations include whether the lenders' restructuring costs and expenses and fees on account (including legal and professional fees) are to be paid by the debtor group.
- *New money* – Assuming the debtor group has no free cash resources, any new finance coming into the debtor group will come from new facilities or, perhaps more likely, from the disposal of assets. Lenders

may consider supporting a restructuring on the condition that debt is paid off through fresh finance being made available from a different lender.

- *Cash preservation* – Controls may be needed on what the debtor group can do with its cash, both immediately and in future weeks (e.g. restrictions on: paying dividends, capital expenditure, acquisitions, further borrowings, disposals, further security, changes in business and changes to management).
- *Additional returns* – Lenders may want enhanced returns and may seek to do this by a combination of: (i) consent fees; (ii) participation fees; (iii) return incentives, such as a higher coupon for signing up to a restructuring early; and (iv) success fees.
- *Information* – The lenders will also need comprehensive information from the debtor group about its cash flow on a regular basis.
- *Immediate cash generation* – Consider a programme to sell non-core assets of the debtor group, applying the proceeds to pay down debt. This aspect needs to be considered in light of knowledge to be obtained (during any restructuring) as to the debt profile and corresponding secured assets within lending groups.
- *Security* – Consider existing and future security positions. Are there any remaining assets against which to grant security? Issues over hardening periods for new security and challenge in the event of insolvency.

Restructuring Options

Any restructuring may involve some of the following and in combination:

Financial Options

- Debt-for-equity swaps.
- Sale and lease back arrangements.
- Asset sale programme for non-core assets: proceeds used to pay down debts and/or service ongoing working capital.
- Debt tranching with different repayment and coupon profiles.
- Security tranching with security attaching to some but not all of the restructured debt.

Equity Options

- New private equity, alternative credit providers.
- Structured products.
- Resumption of trading in group shares and/or issue of new listed, tradable instruments.

Security Perfection and Enforcement

Reviewing Security

Borrowers should expect that creditors will focus on seeking to ensure that any security held is valid, binding and enforceable against the borrower group, including where necessary that it has been registered and has "hardened". In other words the requisite period of time has passed from the creation of the security until its enforcement, to avoid challenge by a subsequent liquidator.

Other considerations may be relevant to that process, including:

- that the formalities of the loan documentation have been complied with;
- whether constitutional documents authorise the transactions; and
- due execution and passing of required resolutions.

Security Perfection

If any deficiencies are identified in the review, a creditor or security agent or trustee on behalf of the creditors may consider it necessary to take steps to perfect the security. However, while perfection is necessary for a creditor to ensure that the security has the intended priority over other creditors of the security provider, it does not guarantee validity and priority in all circumstances; this is especially so when there are registration requirements.

Security Enforcement

An agreement to standstill, whether formal or informal, among the creditors may allow lenders to assess the viability of the debtor group's business and the possibility of further pay down of debt before enforcement action on a bilateral basis by one or more lenders precipitates the collapse of the debtor group.

The relevant debt documents will set out who can take the decisions to accelerate the loans and enforce security, or otherwise to waive defaults and/or amend the debt and security documents, as well as the thresholds for doing so.

The Appendix to this guide provides some summary overviews of certain finance and administrative party roles in syndicated loans and bond issuances.

Syndicated Loans

If enforcement becomes necessary, the security agent/trustee will be responsible for negotiating with the borrower and taking any enforcement action on behalf of the lenders and any other creditors that share common security. They would also distribute any proceeds following the enforcement where relevant.

The express terms of any finance document are paramount and ordinarily the role of the agent/security trustee remains mechanical so far as possible. English courts, for example, are reluctant to import wide-ranging duties on the basis of implied terms or broader concepts of agency or fiduciary relationships. If a party wants a facility agent or security trustee to undertake a specific duty, or an entity acting in several capacities requires a specific right, these will need to be expressly set out in the documentation.

Bonds

In practice, the bond trustee will require written instructions from the requisite number of holders and an indemnity, pre-funding and/or the provision of security to its satisfaction before agreeing to take action.

The threshold under most New York law-governed indentures to declare an event of default is generally holders representing 25% of the aggregate principal amount of bonds outstanding. A holder would be able to pursue a remedy only if the requisite number of holders have instructed the trustee to pursue a remedy and provided indemnity, security and/or prefunding to the trustee’s satisfaction, the trustee does not comply with such request within a reasonable period of time (typically 60 days) and if holders of a majority aggregate principal amount outstanding have not provided any contrary instructions.

Under English law-governed trust documents, the ability to request definitive certificates may be of importance in an insolvency context, potentially leading to an underlying holder's status as a contingent creditor, which itself may provide a basis for underlying beneficial holders of the bonds to institute winding-up proceedings against the issuer for unpaid debts, without the involvement of the security agent/trustee.

Following an event of default, any monies received or collected by the trustee will be distributed to all holders in accordance with the terms of the trust deed or the indenture (as applicable), thereby ensuring that all holders are paid on a *pro rata* and *pari passu* basis in accordance with the terms of the applicable trust deed or indenture. Following any court-sanctioned restructuring, the court will generally take into account the payment waterfall included in the documents governing the restructured debt, whereas upon a liquidation of the issuer, distribution of monies will be made by the liquidator and the payment waterfall may or may not be applied in accordance with the terms of the documents.

Both New York and English law-governed trust and agency documentation will usually include provisions to the effect that the paying agent is an agent of the issuer unless the trustee gives notice for it to act as the trustee's agent if an event of default has occurred.

Prior to an event of default, trustees under a New York law-governed indenture are not deemed to owe fiduciary obligations and are only required to perform express contractual obligations; but, following an event of default, would be held to a “prudent person standard”, requiring the trustee to use the same degree of care and skill in its exercise as a prudent person would exercise or use under the circumstances in the conduct of that person’s own affairs.

Trustees have a discretionary power to agree to certain amendments to the bond documentation, or waive breaches of the conditions, without consent of the bondholders but provided, under English law, that they are not (in the opinion of the trustee) materially prejudicial to the interests of the bondholders or, under New York law, that they have received an officers' certificate from the issuer and an opinion of counsel.

Certain amendments to indentures governed by New York law (in particular those relating to the right to repayment of principal or payment of interest (subject to certain exceptions relating to postponement of interest payments under the United States Trust Indenture Act)) must be approved unanimously by all bondholders. By contrast, English law trust deeds often only require a two-thirds or three-quarters majority of bondholders to approve such an amendment, via an extraordinary or special resolution passed at a meeting of bondholders.

Unlike trust deeds, however, indentures rarely provide for meetings of bondholders. Amendments or waivers are instead typically made by written consent or, if the securities are held in global form and through the clearing systems, electronically through a consent solicitation process. Amendments and modifications are generally made effective upon the execution of a supplemental indenture, while a one-time waiver would generally be effected by a waiver letter.

Trustees under both English and New York law documentation generally have discretionary power to declare an event of default, whereupon the securities would be immediately due and payable. However, trustees are required to declare an event of default if a specified percentage of bondholders instructs the trustee to declare an event of default and provides it with indemnity, security and prefunding to its satisfaction. Examples of events of default are non-payment of principal, premium or interest; breach of the issuer's other contractual obligations under the bonds; cross-default of the issuer's other debt obligations and enforcement proceedings initiated against the issuer such as winding-up actions.

Under an English law trust deed, the trustee has discretion to decide whether or not an event of default is capable of remedy and/or materially prejudicial to the interests of holders. A trustee would not typically have such discretion under a New York law-governed indenture.

Group Issues

Often a restructuring involves a group of debtor companies and not an individual debtor company. Most instances of a corporate group collapse involve cross-border structures. The ability to resolve disputes and take control of assets depends to a significant degree on whether a foreign corporation may be subject to the relevant insolvency regime under consideration, and whether foreign officeholders will be provided assistance by courts in other jurisdictions relevant to the debtor entities.

The concept of "group insolvency" is not generally followed in Asia – that is, the formal insolvency regimes found across the region do not provide procedures whereby more than one corporate entity may be placed into the same procedure on the same application and administered collectively. Accordingly, each corporate entity within a corporate group is considered on its own in any restructuring. A caveat to this is if the creditors of each entity collectively agreed in a restructuring, whether by a scheme of arrangement or otherwise, to implement a consolidated restructuring, effectively creating one balance sheet.

Deciding under which regime to effect a restructuring may be critical and the expected cross-border reach of any particular process (such as an asserted worldwide moratorium under Chapter 11) should be considered.

Valuation Issues

In economically difficult times, valuation of security may become more difficult. In valuing security, it is common for the valuer to make reference to market transactions of the same or similar class of assets. However, there may be fewer transactions completed in the market or the market price may fluctuate greatly, making it hard for valuers to form their opinions on the fair market price of the security.

This is particularly so where there are certain consequences such as a possible default regarding a LTV (loan-to-value) ratio. From a borrower's perspective, if there is any concern about adverse consequences associated with lower valuations, ensuring compliance with the valuation methodology contained in the loan documentation may be useful, for example, valuations may only be permissible on a yearly basis.

Given the volatility in the market during difficult times, including margin calls and forced-sale enforcement scenarios, the valuation of security may become outdated quickly and particularly prior to disposal. Bearing in mind a lender owes certain duties to the borrower in disposing of secured assets, enforcement presents its own challenges and obligors and security providers will be quick to scrutinise creditor processes.

Debt Exit Options

There are a variety of debt exit options that will depend on rights afforded in debt and security documentation or as part of the legislative framework in a particular jurisdiction. Debtors will want to control, where possible, how such exits will be implemented, or otherwise be aware of the options so as to assess their possible impact on restructuring proposals. A changing creditor profile will inevitably affect parties' negotiation priorities and evaluations. For example, a bondholder who acquired its interest at 40 cents in the dollar will more readily accept potential recoveries at 60 cents in the dollar on the face value of the bonds than will a creditor who bought at par.

Common exit strategies include those mentioned below.

Transfer or assignment of the Debts to a Third Party

This may be the easiest way, in the context of a loan transaction, for a lender to exit completely. It can save the lender considerable time, costs and effort. However, it may not necessarily provide the highest recovery of the debt as a buyer will likely apply a heavy discount in acquiring distressed assets. Also, the buyer will consider the value of the underlying security, if any. Parties will need to check whether there is a transfer or assignment clause in the loan documentation allowing the lender to assign its participation in the relevant loans without obtaining approval from the borrower and whether any particular transferees are prohibited. The Loans section of this guide contains further details on such approvals and prohibitions.

Consensual Restructuring

Workout arrangements, pursuant to which a debtor company/group enters into contractual arrangements with its bank and other creditors, may be used in conjunction with, for example, a scheme of arrangement, as discussed below. This allows greater flexibility for the parties to agree on the terms of the restructuring plan. Note the impact of the "Hong Kong Approach to Corporate Difficulties" referred to above in this context. Other jurisdictions offer similar approaches.

Receivership

It is customary for an English or Hong Kong law-governed security agreement to contain a clause authorising the security holder (for example, the security trustee) to appoint a receiver should an event of default occur; and also the receiver's powers. The appointment of a receiver usually does not involve the courts unless the right to appoint is absent from the security agreement. A receiver is usually authorised to, among other things, take possession of and dispose of secured assets.

A receiver will generally be the agent of the chargor and the security trustee will be insulated from general liability in respect of steps taken by the receiver. Although the receiver is described as the agent of the chargor, it does not in any way accept instructions from the directors or shareholders of the chargor.

Credit Bids

With a credit bid a creditor can bid the debt that the borrower owes in whole or part and if required make whole other creditors at the same level by cash payments that those creditors would have proportionally received had the bid been a cash bid rather than a credit bid.

In the context of security, a secured creditor may be able to acquire secured assets via credit-bidding provided that (as a matter of English and Hong Kong law, for example) it does not contravene the general rules of "self-dealing" and "fair dealing". It is likely that a receivership sale will overcome the hurdle of "self-dealing", which would otherwise restrict a secured creditor from purchasing the assets secured in its favour. The next concern for a creditor would be whether its acquisition of the secured assets through a receivership sale constitutes "fair dealing", i.e. has the secured creditor contracted to deal honestly, fairly and in good faith so as not to unduly prejudice the rights of the debtor and/or the chargor as security provider. If the receivers run a proper auction/sale process, the auctioned/sale assets are acquired at market price and the secured creditor's debt (which is extinguished upon acquisition of the asset) is higher than the market price, it would be unlikely that a court would view the transaction as being in breach of the principle of "fair dealing".

Scheme of Arrangement

This is a court-approved arrangement between the borrower and its creditors or certain classes of them (with the support of at least 75% in value and 50% in numbers of the creditors in each relevant class voting at the requisite meeting convened at the court's direction) and is typically used if it is not possible or practicable to obtain consent from all of the borrower's creditors. However, since court sanction is required – possibly in more than one jurisdiction (that is, the jurisdiction of incorporation and other jurisdictions where creditors might otherwise take action) – the implementation of a scheme of arrangement can be a time-consuming and expensive process. Furthermore, the initiation of procedures to implement a scheme of arrangement generally does not provide the benefit of a moratorium on creditor actions prior to the scheme becoming effective, which may encourage "rogue" behaviour by individual creditors while the company pursues sanction of the scheme. Singapore has updated its legislation in this regard to provide for a moratorium as part of the scheme process.

Appointment of Provisional Liquidator

A lender may apply to court for the appointment of a provisional liquidator ("PL"). The lender must show that the appointment is necessary to protect the assets of the borrower where the same are in jeopardy and would remain so without the immediate appointment of a PL. The courts in Hong Kong are not supportive of using PLs solely to facilitate a corporate rescue, although if an appointment on traditional grounds is made and subsequently a restructuring is in the interests of parties involved, the appointment of a PL can provide the breathing space required to implement a restructuring. Where the debtor's business is run through Hong Kong but its place of incorporation is elsewhere, that jurisdiction (typically Caribbean) may also provide a forum and mechanism for restructuring with the appointment of "soft-touch" PLs, whose powers may to some extent be recognised in Hong Kong and other relevant jurisdictions so that implementation can be effectively achieved in tandem.

Winding-up

If the debtor group's business is not viable as a going concern and/or it is not possible to find cash to repay debts that have fallen due and been demanded, it may be that liquidation, at the company's behest or because of creditor action, becomes necessary. Winding-up proceedings may be initiated in one of three ways:

1. Members' voluntary winding-up occurs where a company is solvent and its members pass a resolution to wind-up the company and appoint a liquidator.
2. Creditors' voluntary liquidation occurs where a company is insolvent and its members and creditors pass resolutions to wind up the company and appoint a liquidator.
3. Compulsory liquidation is made by a court order after the company or its creditors or contributories file a winding-up petition based on one or more specified grounds (for example, if a company is unable to pay its debts).

Administration

Where available in relevant jurisdictions (notably, not Hong Kong), upon application to a court or by resolution, the company may have an administrator appointed with the aim of causing minimal business disruption on the restructuring of the company's affairs and to take advantage of a moratorium against creditor action. It may also be possible to take advantage of DIP regimes such as the US Chapter 11 or Singapore scheme of arrangement with moratorium (see *Strategic Considerations* below).

Foreclosure

Depending on the jurisdiction, foreclosure occurs either via a court-approved process or outside the court process, by which the borrower's rights in property are extinguished and that property becomes vested in the lender. The lender becomes the absolute owner of the property and may then sell it free of the borrower's rights and free of the rights of any lower-ranking security holders. As a matter of English and Hong Kong law, the process is rarely used by creditors as the process is controlled by the court and can be time-consuming and expensive. Borrowers/security providers should be wary of threats of foreclosure where there is a significant disparity between the value of the secured property against which foreclosure is threatened to be applied and the amount owing on the covenant to pay.

Continuation of Activities

Director Duties

In times of tightened liquidity and business disruption, directors must be mindful of duties imposed on them both at common law and under legislation. Directors are facing critical issues concerning ongoing trading at a time when their business may be facing insolvency or indeed be insolvent. In the current economic environment, this position may be due to factors entirely out of the directors' control, such as delayed payments by debtors and supply chain disruption.

When considering the reviews and actions outlined above, directors of borrower groups will also be mindful of the steps they take (and how they record them) should action ultimately be instigated against them, and will want to demonstrate that their actions were in the circumstances reasonable.

Directors are required to consider the interests of creditors where the company is doubtfully solvent or is on the verge of insolvency. Issues regarding personal liability for insolvent trading come into play, as does the availability of "safe harbour" defences, if available in the applicable jurisdiction. Directors should seek legal advice in relation to directors' duties and compliance with company law when the company encounters financial difficulties or a real risk of insolvency.

Relevant legislation may also provide a summary method of enforcing existing duties owed by past and present officers of a company subject to winding-up proceedings. Conduct that may give rise to such liability may include a breach of directors' duties, or claims arising from preferential transactions or fraudulent trading.

International group company directors need to familiarise themselves with their duties in the relevant jurisdictions pertaining to different companies in the group for which they are officers; and to consider issues on an entity-by-entity basis, rather than taking a group view. A director who is a director of several companies within a group owes his or her duties to each particular company and when a corporate group is in financial distress, conflicts may arise. For example, allowing group funding practices to continue (such as diverting cash from one company to another via a group cash pooling mechanism) may require reconsideration in insolvency, if an insolvent company would otherwise thereby be deprived of assets.

Directors will therefore need to consider when insolvency looms. Subject to jurisdictional variations, two alternative tests are generally applied: (a) applying the "cash flow" test, a company is likely to be insolvent if it cannot pay its debts as they fall due; (b) applying the "balance sheet" test, a company is likely to be deemed to be insolvent if its liabilities (taking into account its contingent and prospective liabilities) exceed its assets. If directors think their company may be insolvent on either test, duties are owed primarily to creditors as a whole.

Safe Harbours

In light of the COVID-19 outbreak, governments are mindful of the need to balance between safeguarding creditors and at the same time ensuring that there is no economic collapse, given the need to look to the future to ensure business continuity once the epidemic is brought under control. Governments around the world may provide relief from certain duties for a limited time, but directors should keep in mind their duties to the company and creditors to avoid risk of liability.

For example, the Australian government announced a moratorium on directors' liability for insolvent trading which may arise from debts incurred during the six months from 25 March 2020. This is an additional measure to the current safe harbour provisions in Australia's corporations law to protect directors from the restrictions of insolvent trading.

Similar proposals have been announced and tabled for the UK Parliament's approval by the UK government, for example, proposed temporary suspension of wrongful trading provisions and a moratorium for companies from creditors enforcing their debts for a period of time while they seek a rescue or restructuring.

Director Considerations

- When insolvency looms, duties are generally owed to creditors rather than shareholders
- Consider issues on an entity-by-entity basis rather than taking a group view
- Document decisions carefully

Government Initiatives

Governments have been relatively quick to promulgate substantial and broad-ranging economic rescue and stimulus packages as a result of the COVID-19 pandemic.

In response to the pandemic, the Hong Kong Monetary Authority (HKMA) encouraged banks to continue to offer proactively to delay repayments or extend loan tenors and to reduce fees.

Other jurisdictions have announced policies relating to lending arrangements, such as a moratorium on term loans and deferment of interest payments. For example, on 27 March 2020, the Reserve Bank of India permitted all banks and other lending institutions, including non-banking finance companies, to allow a three month moratorium on payment of instalments of all term loans outstanding as at 1 March 2020. The repayment schedule for such loans and the residual tenor will be shifted across the board by three months after the moratorium period, but interest will continue to accrue on the outstanding portion of the term loans during the moratorium period. The Singapore government has also announced relief measures for certain businesses.

The practical implications of how a borrower may access a state-backed lending or other support programme will need to be assessed on a case-by-case basis. A borrower will need to consider carefully how a particular measure sits with its existing financing arrangements, noting in particular that waivers and/or consents to access the funding may be required. With regard to additional funding, consideration will need to be had as to where in the corporate structure funds should be taken in and how disbursed.

Position of Courts

An important consideration regarding the likelihood of speedy creditor action will be the availability of court procedures. Many courts are stated to remain available to hear urgent actions including injunctive relief but a backlog will be building, which may still have a material effect on the timing of, for example, winding-up petitions and hearings, as matters of a routine nature have been adjourned for later dates.

Please see our *Government Responses* document, which includes details regarding certain initiatives in the Asia region, as well as in respect of the status of various courts.[2]

Strategic Considerations

A debtor individually or in a group context may consider:

- bilateral negotiations with different sets of creditors;
- consensual restructuring with the general body of creditors; and
- making use of some sort of administration procedure under a suitable jurisdiction.

A holistic solution may be suggested by the debtor company/group – such as a third party agreeing to acquire all of a particular set of assets – and this may require all lenders' sign off.

If the debtor group pursues a "divide and conquer" approach by discussing with each creditor group separately in the initial stages, it will likely result in a protracted and expensive process: lenders/bondholders are unlikely to agree any proposal without assurances that others are not getting

2 https://www.mayerbrown.com/en/perspectives-events/publications/2020/03/government-responses-to-covid-19-in-asia-effect-on-lending-arrangements

preferential treatment or are getting information or analysis that is not available to other lenders.

The early creation of an informal creditors' committee can assist negotiations with the debtor company and may expedite the process if such a committee can give a realistic view of the wider creditor group's expectations and requirements. The debtor group may be asked to pay the reasonable costs and expenses of the committee, including advisers' fees.

Critical will be an evaluation of the creditors' profile: debtors should understand that creditors who acquired debt at a discount will have different thresholds at which they are willing to proceed with a restructuring from par creditors, but may also look for additional enhancements such as consent fees.

Formal Proceedings

Initial strategies may involve simple steps such as postponement of debt repayments and interest moratoria but in certain circumstances a full and more robust strategy might need to be put in place.

Directors of distressed companies may seek relief through a formal procedure aimed at business continuity, the access to ongoing financial accommodation and a moratorium from creditor claims. These features are present in, for example, the US Chapter 11 corporate rescue regime. However, in Asia, such relief measures are not common. Singapore's new regime has some similar features but it is an exception. Both existing lenders and new money lenders are attracted to the Chapter 11 regime and its DIP financing as they allow an opportunity to finance at a premium, with enhanced prospect of repayment and in many cases DIP lending may be secured against underlying assets.

Interest in the reorganisation process under Chapter 11 of the US Bankruptcy Code has grown in Asia over the past few years, for example *TMT Procurement Corporation, et al* and In re: *China Fishery Group Limited (Cayman), et al.* The DIP approach alongside the purported worldwide moratorium are attractive, although the cost can still be seen as prohibitive. The relatively easy grounding of jurisdiction in the US bankruptcy courts despite no US operations or even creditors adds to the attraction for debtors.[3]

Hong Kong does not have a corporate rescue regime involving a creditor moratorium. Commonly, upon the presentation of a winding-up petition which stays all proceedings against the company, the period between the presentation of a winding-up petition and the making of a winding-up order would be a functional 'moratorium' for the company and creditors to conduct restructuring negotiations.

Hong Kong's insolvency regime also does not have DIP-related provisions, but like other regimes, ingenuity has resulted in the current regime being moulded to the task. In the context of liquidation, the legislative provisions provide incentive for creditors to fund liquidators to preserve the companies' assets or conduct investigations or litigation. Where a lender is willing to provide new money for the purpose of preserving and realising the assets of a company, such post-winding up order borrowing of the company may amount to an expense properly incurred by the liquidator that will rank in priority to any pre-liquidation debts.

Hong Kong legislative provisions also provide that where a creditor has undertaken a substantial risk when giving the liquidator an indemnity for costs in liquidation, the court may grant the creditor in question a greater share of the particular assets recovered than would normally be available under the *pari passu* principle.

Introduction of Independent CRO

Creditors' support may require that someone is appointed onsite at the debtor company. The appointment of a Chief Restructuring Officer (CRO) may help the company to implement the turnaround plan. The CRO's

3 Section 109(a) of the Bankruptcy Code provides the basic requirements for commencing a case under the Bankruptcy Code: "*Notwithstanding any other provision of this section, only a person that resides or has a domicile, a place of business, or property in the United States, or a municipality, may be a debtor under this title.*" The most common way to satisfy the property requirement is to have a bank account in the US, or to pay a US law firm a retainer on behalf of the debtor and its affiliates. See for example *TMT Procurement Corporation, et al* and *In re: China Fishery Group Limited (Cayman), et al.*

primary role throughout the restructuring is bringing objectivity and driving stability to the restructuring process, and building consensus among stakeholders about the direction of the restructuring. The appointment of a CRO can help to bridge the gap between the debtor group's management and the financial creditors.

Appendix

Appendix: Finance Parties

Syndicated Loans

Facility Agent

To facilitate the process of administering a syndicated loan, the syndicate will appoint one of the lenders (or its affiliate) or a third party to act as agent of the lenders (not the borrower) with a number of important functions, including:

- maintaining contact with the borrower and representing the views of the syndicate;
- receiving notices, compliance certificates, financial statements and other required information from the borrower and distributing them to the lenders; and
- receiving payments of interest and repayments of principal and other payments required under the loan agreement, which the agent then passes on to the lenders to whom they are due. Similarly, the lenders advance funds to the borrower through the agent, with the agent being responsible for organising the utilisation/drawdown of the facility.

The facility agreement will set out the duties of the agent and will usually contain a number of exculpatory provisions to limit the scope of the agent's relationship with the syndicate lenders and with the borrower. The borrower will generally be required to pay the agent an annual agency fee for acting as agent.

The agent will generally avoid discretionary powers and, absent a clear authority to act under the loan documentation, will typically seek majority lender approval before acting.

Security Agent/Trustee

If the syndicated loan is to be secured, the lenders will usually appoint one of the lenders (or its affiliate) or a third party to act as security agent (under English and Hong Kong law commonly referred to as a security trustee) to hold the security for the benefit of all the lenders. With this structure, a single entity is responsible for the administrative aspects of the security (for example, holding documents relating to the secured assets) and for making distributions to the secured lenders upon enforcement; and there should be no need to revisit the security package whenever a lender assigns or transfers its interest to another entity. The duties imposed upon the security agent will be set out either in a separate security trust deed or in the facility agreement or intercreditor agreement. The borrower will generally be required to pay the security agent an annual security agency fee, for acting as security agent.

Bonds

Trustees

In many bond issues, the issuer appoints a trustee – usually a professional specialist entity or a specialist trustee subsidiary of a financial institution – to represent the bondholders. Although the entity that acts as trustee is chosen and appointed by the issuer, the trustee's role is to act on behalf of bondholders in accordance with the terms of an indenture or a trust deed.

The indenture or trust deed is between the issuer and the trustee (and other obligor entities such as the guarantors or keep-well providers).

Indentures and trust deeds will usually contain provisions enabling the bondholders to meet and discuss issues that arise and agree upon a joint course of action, such as calling a bondholders' meeting.

The bonds will provide that a decision will be binding on all bondholders if it is passed by a specified majority of a specified quorum.

If a trustee structure is in place, it can allow additional flexibility as the trustee may agree to waive technical and other breaches by the issuer which would otherwise require the consent of bondholders.

Fiscal Agents

If a trustee is not appointed to represent the bondholders, then the alternative "fiscal agency" or direct issuance structure would put bondholders into a direct contractual relationship with the issuer. Whoever holds the bond has the direct right to receive payment on it, and to sue the issuer, if the terms of the bond are not performed. As, in that case, the bondholders are not represented they would themselves have to monitor issuer compliance with the terms of the bonds and associated contractual documentation. In a fiscal agency structure, each bondholder would have to take individual action against a defaulting issuer. The fiscal agent has no role in that process: it does not assume any relationship of agency or trust with the bondholders and it takes no action on their behalf.

Other Agents

- A principal paying agent has similar functions to a fiscal agent but is appointed in a bond issue where there is a trustee.
- A registrar is appointed by the issuer and assists with maintaining a register of bonds:
  - » for bonds held in definitive form – including address and bank account details of bondholders and the principal amount of bonds held by each bondholder;
  - » for bonds held in global form – including maintaining a record of the registered holder of the bonds and any increases or decreases in the aggregate principal amount of bonds outstanding following early redemption or buyback.
- A transfer agent is appointed by the issuer and assists with transfers of bonds and exchange of bonds from global to definitive upon occurrence of certain events such as an event of default or if the clearing systems cease to operate.
- A common depositary is appointed by the clearing systems and is necessary when the bonds are issued and held in global form, as is now typical. The common depositary (or its nominee entity) is the registered holder of the bonds and payment of interest and principal is made to the common depositary as the registered holder. The common depositary then forwards those interest and principal payments to the clearing systems which in turn distribute them to their participants.
- When debt securities are issued through the clearing systems, they will typically require an authorised institution to act as principal paying agent. The entity generally belongs to the same corporate group as the trustee but is an agent of the issuer and provides administrative support to it.