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Acceptance Remarks

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**2019 EMORY BANKRUPTCY DEVELOPMENTS JOURNAL
ANNUAL BANQUET**

**ACCEPTANCE REMARKS OF JAMES H.M. SPRAYREGEN*
LIFETIME ACHIEVEMENT AWARD**

**INTERNATIONAL INSOLVENCY: FROM PUNITIVE
REGIMES TOWARD RESCUE CULTURE¹**

Thank you for this distinguished award. It's an honor and a privilege to be included among the previous recipients of this award, who have contributed so much to contemporary bankruptcy law and practice. Like many of them, I've spent my career in the field of corporate restructuring. These restructurings are often carried out through chapter 11 filings or against the backdrop of a potential chapter 11 filing.

It's easy to take chapter 11 of the U.S. Bankruptcy Code for granted, but it was a novel piece of legislation when adopted and remains unique in some respects today. I want to talk a little this evening about what I'll call the "rescue model" of insolvency legislation. Chapter 11 embodies, and really pioneered, the rescue model. And now, outside the U.S., there is a growing trend toward the rescue model—and away from punitive, morality-based insolvency regimes, what I'll call the "punitive model."

The international trend toward the rescue model comes in various forms. Some jurisdictions have new legislation that deliberately adopts the rescue model, whereas other jurisdictions have developed ad hoc or extra-statutory processes that bend old, punitive-type insolvency statutes toward a more rescue-based regime.

The punitive model is as old as insolvency law itself.² Insolvency regimes have historically been creditor-centric—focused specifically on liquidating assets for the benefit of creditors. Regimes in this model focus on equitably

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¹ Thanks to Kirkland & Ellis LLP associates Spencer A. Winters, Jack R. Luze, Scott J. Vail, and Matt Taylor for their research and assistance in preparing these remarks.

² See, e.g., *Matthew* 18:30-34 ("In anger his master handed him over to the jailers to be tortured, until he should pay back all he owed."); Sapora Sison et al., *The Impact of Religiosity on Financial Debt and Debt Stress*, 140 *PROCEDIA: SOCIAL AND BEHAVIORAL SCIENCES* 300, 301 (2014) (quoting ancient Islamic religious texts to the effect that "the soul of a believer is held hostage by his debt in his grave until it is paid off").

dividing debtor property among creditors and preventing debtors from engaging in detrimental conduct that would harm creditor recoveries.³ These factors ultimately led to insolvency processes that punished a debtor for its inability to pay debts—a colorful example being the “debtor’s prisons” of old, which remained in use in the United States and Europe until the mid-1800s.⁴ Some relatively extreme elements of the punitive model are still in force today, for instance in Germany, where directors can risk jail time for holding off filing insolvency proceedings too long.⁵

Over time, the United States moved away from the punitive model toward a rescue model that promotes going-concern value and rehabilitation. The system encourages and rewards appropriate risk-taking and focuses on value-creating potential. As other jurisdictions shift to the rescue model, they have drawn on a number of chapter 11 hallmarks:

- The “debtor in possession” concept allows existing management of a company to stay in control and continue to operate the business, acting as the bankruptcy trustee.⁶ This is a powerful incentive to reorganize, although it’s not always an entirely positive construct. In some instances, it leaves the group of people that caused the problem in charge of finding the solution. The extra-statutory correction that has developed in the U.S. is the chief restructuring officer, or restructuring advisors, to provide “brakes” and “governors” for the comfort of creditors.
- The automatic stay prevents creditor enforcement actions and provides the company a breathing spell during which to seek to rehabilitate.⁷ The worldwide effect of this provision makes it even more powerful, although it depends on creditors having some nexus to the U.S. Most major creditors do have that nexus, given the centrality of the U.S. economy and legal system.
- The concept of “cram down” allows approval of a plan of reorganization against the will of an entire class or multiple entire classes of creditors.⁸

³ See generally Louis Edward Levinthal, *The Early History of Bankruptcy Law*, 66 U. PA. L. REV. 223 (1918).

⁴ *Id.* (such punishments also included death, jail time, and involuntary servitude, among others).

⁵ See *Insolvenzordnung [InsO] [Insolvency Code]*, §15a(5), https://www.gesetze-im-internet.de/englisch_inso/index.html#gl_p0012, (Ger.).

⁶ 11 U.S.C. § 1107 (2019).

⁷ 11 U.S.C. § 362 (2019).

⁸ 11 U.S.C. §§ 1129(a)–1129(b) (2019).

This is a powerful tool to encourage creditors to cooperate with a debtor's efforts to reorganize rather than liquidate.

- And chapter 11 provides multiple avenues to pursue value-maximizing strategies, such as a reorganization plan or a going-concern sale.⁹ It is a highly flexible regime, which makes reorganization all the more attractive.

Other jurisdictions have started to implement variations of these chapter 11 hallmarks as they move toward a rescue model. In many of these jurisdictions, old regimes provided little or no alternative to liquidation. It's useful to analyze some examples to understand the core chapter 11 principles that have resonated in other jurisdictions.

In Australia, insolvency laws recently underwent wide-ranging reforms to improve efficiencies in formal insolvency processes and foster a rescue culture.¹⁰ The old system penalized directors who continued to trade when an entity became insolvent.¹¹ A new safe harbor for directors and officers marks a significant softening of this policy. The old law resulted in a chilling effect on actions that would otherwise preserve a debtor's value. Concerns around the penalties for insolvent trading influenced directors to act early to appoint an insolvency practitioner instead of exploring restructuring options and taking reasonable risks to maintain going-concern value.¹² The new safe harbor protects directors and officers when their actions are "reasonably likely to lead to a better outcome."¹³

⁹ See, e.g., 11 U.S.C. § 363 (2019) (permitting a sale of assets free and clear of claims and interests).

¹⁰ Treasury Laws Amendment (2017 Enterprise Incentives No. 2) Act 2017, No. 112, (Austl.), <https://www.legislation.gov.au/Details/C2017A00112>.

¹¹ AUSTRALIAN SECURITIES & INVESTMENTS COMMISSION, DIRECTORS - CONSEQUENCES OF INSOLVENT TRADING (Oct. 15, 2014), <https://asic.gov.au/regulatory-resources/insolvency/insolvency-for-directors/directors-consequences-of-insolvent-trading/>.

¹² Explanatory Memorandum, Treasury Laws Amendment (2017 Enterprise Incentives No. 2) Bill 2017, https://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r5886_ems_c467a515-bd64-4961-a9e2-4dfec65910d0/upload_pdf/633305.pdf;fileType=application%2Fpdf#search=%22legislation/ems/r5886_ems_c467a515-bd64-4961-a9e2-4dfec65910d0%22.

¹³ Treasury Laws Amendment (2017 Enterprise Incentives No. 2) Act 2017, No. 112, (Austl.), <https://www.legislation.gov.au/Details/C2017A00112>.

On Thursday,¹⁴ the European Parliament is expected to formally adopt the “Harmonization Directive,”¹⁵ which is designed to, among other things, “enhance the rescue culture in the EU.”¹⁶ The directive echoes chapter 11 on a number of fronts—most notably, the ability to create a restructuring plan outside formal insolvency proceedings. This includes the debtor-in-possession model that keeps the company in control of its assets.¹⁷ It also requires Member States to ensure debtors can benefit from a moratorium of up to twelve months.¹⁸ And it includes a cross-class cram-down feature that incorporates the best interest of creditors test and absolute priority rule.¹⁹ Although the timing for implementation remains uncertain, the U.K. recently announced proposed insolvency reforms that generally track the EU directive, including a new flexible restructuring plan construct and, for the first time, a standalone moratorium against creditor enforcement actions.²⁰

These reforms should set the foundation for the rescue model across Europe. Key jurisdictions, such as the Netherlands, are expected to incorporate the directive into their existing insolvency frameworks by the end of 2019, though all jurisdictions have up to two years to do so. Upon implementation, significant differences will inevitably remain between member states’ insolvency regimes and the effectiveness of their courts in implementing the legislation. While implementing these features represents a step in the right direction, Europe still has a long way to go in order to enact and embody the rescue model.

India recently created the “Corporate Insolvency Resolution Process” that incorporates rescue features of chapter 11 but functions as a creditor-controlled

¹⁴ European Parliament Legislative Observatory, 2016/0359 (COD) Preventive restructuring frameworks, second chance and measures to increase the efficiency of restructuring, insolvency and discharge procedures (March 22, 2019), <https://oeil.secure.europarl.europa.eu/oeil/popups/ficheprocedure.do?reference=2016/0359%28COD%29&l=en#tab-0>.

¹⁵ DRAFT DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL ON PREVENTIVE RESTRUCTURING FRAMEWORKS, SECOND CHANCE AND MEASURES TO INCREASE THE EFFICIENCY OF RESTRUCTURING, INSOLVENCY, AND DISCHARGE PROCEDURES AND AMENDING DIRECTIVE 2012/30/EU, final compromise text, 17 (2018) [hereinafter “Directive”]; <https://data.consilium.europa.eu/doc/document/ST-15556-2018-INIT/en/pdf>.

¹⁶ COUNCIL OF THE EU, DIRECTIVE ON BUSINESS INSOLVENCY: COUNCIL AGREES ITS POSITION (2018) <https://www.consilium.europa.eu/en/press/press-releases/2018/10/11/directive-on-business-insolvency-council-agrees-its-position/> (emphasis added).

¹⁷ *Directive supra* note 15, Title II, art. 5.

¹⁸ *Id.* at art. 6.

¹⁹ *Id.* at arts. 10–11.

²⁰ Kate Stephenson, *New Horizons: Major UK insolvency and Corporate Governance Reform Announced*, KIRKLAND ALERT (Sept. 5, 2018), <https://www.kirkland.com/-/media/publications/alert/2018/09/new-horizons-major-uk-insolvency-and-corporate/newhorizonsmajorukinsolvencyandcorporategovernance.pdf>.

process. A new judicial body oversees the process and a new class of insolvency professionals, called “Resolution Professionals,” who report to a committee of the debtor’s creditors, solicit proposals for “resolution plans” which attempt to resolve the affairs of the debtor as a going concern. A resolution plan requires approval by two-thirds of value of the creditors’ committee to be implemented, and must be implemented within 270 days or the company will be liquidated. This process has created a market for out-of-court rescue solutions since “promoters,” or owners, are prohibited from submitting a plan.

In 2017, Singapore introduced major reforms to its restructuring laws, with certain elements specifically modeled after certain chapter 11 features with the stated strategy of becoming the Delaware of Asia and the regional hub for restructurings.²¹ Like chapter 11, the new Singapore law’s moratorium can be given a global effect and applies to all creditors if the creditor is within the jurisdiction of the Singapore court.²² Singapore’s new legislation also introduced a “pre-pack” concept.²³ Although the moratorium and pre-pack voting thresholds are less favorable to debtors than those under chapter 11, they are a significant departure from Singapore’s previous system.

These examples all involved legislation that has been formally adopted or proposed. In some jurisdictions, particularly in the offshore space, courts and practitioners have found ways to foster a rescue model without express legislation. Creditor-focused liquidation proceedings and schemes of arrangement are generally the primary form of insolvency proceedings in offshore regimes such as Bermuda, Cayman Islands, Bahamas, and Hong Kong.

In general, schemes of arrangement may be used to implement a going-concern reorganization with creditor consent. There is no statutory analogy to the chapter 11 cram down—a majority in number representing at least seventy-five percent in value of each class of scheme creditors must approve the scheme.²⁴ This seemingly reflects a policy that a company will either agree to a reorganization with a supermajority of its creditors in every class—or liquidate.

But a modern practice has developed where liquidation proceedings can be used, sometimes in conjunction with another insolvency proceeding, to facilitate

²¹ G. Christopher Meyer, *International Insolvency: Singapore—Becoming ‘Delaware’ of Asia Pacific Region?*, NAT’L L. REV. (June 15, 2016), <https://www.natlawreview.com/article/international-insolvency-singapore-becoming-delaware-asia-pacific-region>.

²² Companies Act, ch. 50, sch. 211B(5) (2006) (Sing.), <https://sso.agc.gov.sg/Act/CoA1967#pr210->.

²³ *Id.* at ch. 50, sch. 211I.

²⁴ See, e.g., J. Wasty, GETTING THE DEAL THROUGH, Restructuring & Insolvency Bermuda (2019), <http://gettingthedealthrough.com/area/35/jurisdiction/106/restructuring-insolvency-bermuda>.

the company's reorganization. For example, a provisional liquidator can be appointed with "light touch" powers.²⁵ In these "light touch" liquidations, management can remain in control of the company and continue to operate the company in the ordinary course. Additionally, companies may pursue a "pre-pack" liquidation where a company seeks a quick sale of its business shortly after commencing a liquidation, leaving liabilities behind and allowing the business to continue.²⁶

The Bankruptcy Code can serve as a standard for other countries moving away from the punitive model toward the rescue model. This movement demonstrates a global trend of countries implementing legislation that effectively causes economies to recycle assets and maximize value of insolvent entities. As is shown by these examples, even in countries without new or proposed legislation, momentum toward the rescue model may nonetheless develop to address the practical needs of businesses. Some of these solutions may even be cheaper and more efficient than those under chapter 11, although without the full range of tools chapter 11 may offer. Over time, these practical accommodations may develop into formal legislation.

In other cases, jurisdictions have recognized certain shortcomings of the punitive model—for example, extreme aversion to risk-taking or an aversion to pursuing an insolvency proceeding even when it is truly necessary—and enacted changes to increase the utility and efficiency of their insolvency regimes. As noted in a recent speech by Judge Kevin Carey of the Bankruptcy Court for the District of Delaware, the rescue model is being adopted not only in the countries I discussed today but in many other countries, including Brunei, Cape Verde, Chile, Cyprus, Jamaica, the Netherlands, Poland, Thailand, Slovenia, and Spain.²⁷ In all of these instances, the changes have been toward a rescue-based system.

This trend toward rescue culture is complemented by a trend toward "universalism" that Judge Carey also discussed in his speech.²⁸ Countries are adopting a more universal set of insolvency principles, and those principles in turn tend to adopt rescue culture. *Agrokor*, a big case from last year, illustrates

²⁵ I. Mann, S.J. Hurron, M. Kish, "Light Touch" Restructuring Provisional Liquidator: Cross-Border Rehabilitation of Bermuda and Cayman Islands Companies Listed in Hong Kong, *INSOL WORLD—FIRST QUARTER* 2016, 23–24 (2016), https://www.insol.org/_files/INSOL%20World/Fellows%20Articles/2016/Fellows%20Articles%20INSOL%20World%20Q1%202016.pdf.

²⁶ See, e.g., J. Wasty, *supra* note 24.

²⁷ Kyriaki Karadelis, *GRR Live, Offshore: Cooperation is Key—Judge Carey on the State of Modified Universalism*, *GLOB. RESTRUCTURING REV.* (2019).

²⁸ *Id.*

this convergence. Agrokor accounted for about 15% of Croatia’s GDP, so even though Croatia didn’t have a rescue regime, the legislature effectively adopted one to facilitate the restructuring of Agrokor and other essential companies.²⁹ Judge Martin Glenn of the Bankruptcy Court for the Southern District of New York issued a decision granting recognition of the Agrokor restructuring in the U.S.³⁰ This was despite a potential conflict with the so-called “Gibbs rule,” an English common-law principle restricting recognition of the discharge or modification of debt, except as permitted by the law governing that debt.³¹ Judge Glenn cited Judge Kannan Ramesh of Singapore, who issued a similar ruling a couple years earlier.³²

These decisions highlight the trend toward a more universal rescue culture. Another product of increasing universalism in global insolvency is the Judicial Insolvency Network, or “JIN,” a program designed to improve communication and cooperation between the courts of different jurisdictions.³³ Guidelines promulgated by JIN have been adopted by ten jurisdictions, including Singapore, Delaware, the Southern District of New York, as well as jurisdictions in the Caribbean, Australia, the UK, and Asia.³⁴ Other examples of greater international cooperation include the cross-border protocol established in the insolvency of Lehman Brothers³⁵ and the Model Laws promulgated by UNCITRAL.³⁶

While none of the international regimes I discussed today yet have the established track record of chapter 11, every country developing their own system should take into account its own form of government as well as

²⁹ *In re Agrokor*, 591 B.R. 163 (Bankr. S.D.N.Y. 2018).

³⁰ *Id.*

³¹ *Anthony Gibbs and Sons v. La Société Industrielle et Commerciale des Métaux*, 25 Q.B.D. 399 (1890); see also Adam Paul, Kate Stephenson, Brad Weiland, and Daniel Rudewicz, *Agrokor’s Landmark Dual Recognition Proceedings in the U.K. and U.S.; Bankruptcy Court Finds Gibbs Rules Does Not Prevent Recognition and Enforcement Under Chapter 15*, KIRKLAND ALERT, (November 5, 2018), <https://www.kirkland.com/publications/kirkland-alert/2018/11/bankruptcy-court-finds-english-gibbs-rule-does-not>.

³² *In re Pacific Andes Food (Hong Kong) Company Limited*, Originating Summons No. 814 of 2016 at 24 (High Ct. of Sing. 2016) (“It should be noted that the principle in Gibbs has received academic criticism.”).

³³ JUDICIAL INSOLVENCY NETWORK, ABOUT US (2018), <http://www.jin-global.org/about-us.html>.

³⁴ JUDICIAL INSOLVENCY NETWORK, *JIN Guidelines* (2018), <http://www.jin-global.org/jin-guidelines.html>; see also United Nations Commission on International Trade Law, *UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation*, 27 (2010), https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/practice_guide_ebook_eng.pdf.

³⁵ *In re Lehman Brothers Holdings Inc.*, No. 08-13555 2008 Bankr. LEXIS 4154 (Bankr. S.D.N.Y. Nov. 6, 2008).

³⁶ UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW, *UNCITRAL MODEL LAW ON CROSS-BORDER INSOLVENCY WITH GUIDE TO ENACTMENT AND INTERPRETATION* (2013), <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/1997-model-law-insol-2013-guide-enactment-e.pdf>.

sociopolitical and cultural issues to ensure it works for them. Chapter 11 is not necessarily the best possible system, and there is a lot of room to learn from what is developed elsewhere. Further, as other insolvency regimes transition to the rescue model, it may be that companies seek opportunities to pursue a cheaper or quicker restructuring in a jurisdiction outside of the United States. Whatever the case may be, it is an exciting time to be an insolvency practitioner (and student) as the profession becomes more global and new opportunities arise.

To all the students from the Journal that are here tonight, you should be commended for your work on this excellent publication. When you get out there into the legal field, hopefully practicing restructuring law, keep an eye out for cross-border restructuring opportunities, and don't let national borders get in the way.

Thank you again for the award, thank you all for listening, and have a great evening.