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Recent Developments in DIP Financing for International and Domestic Debtors

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In summary

This article discusses the ability of foreign-domiciled debtors who pursue Chapter 11 bankruptcies to obtain debtor-in-possession (DIP) financing and recent trends in the DIP financing market, including equity conversions, roll-ups and pre-packaged bankruptcies.

Discussion points

- The types of DIP lenders
- Considerations regarding the recognition of the DIP order in foreign jurisdictions
- Trends in DIP loans including equity conversions and roll-ups
- DIP financing in pre-packaged bankruptcies

Referenced in this article

- *In re Alto Maipo Delaware LLC, et al*
- *In re Automotores Gildemeister Spa, et al*
- *In re Avianca Holdings SA*
- *In re Bed Bath & Beyond Inc, et al*
- *In re California Pizza Kitchen, Inc, et al*
- *In re Fairway Group Holdings Corp, et al*
- *In re Grupo Aeroméxico, SAB de CV*
- *In re Instant Brands Acquisition Holdings Inc, et al*
- *In re LATAM Airlines Group SA*
- *In re McDermott International, Inc, et al*
- *In re Monitronics International, Inc, et al*
- *In re Phoenix Services Topco, LLC*
- *In re Rockall Energy Holdings, LLC, et al*
- *In re RTI Holding Company, LLC*
- *In re SAS AB, et al*
- *In re SiO2 Medical Products, Inc, et al*
- *In re Yellow Corporation et al*

Chapter 11 has gained a strong foothold as a possible pathway for foreign-domiciled companies to reorganise, whether or not such companies have substantial operations in the United States. One key attraction to Chapter 11 for foreign-domiciled companies is the access Chapter 11 debtors have to a broader base of funding sources so they can finance their operations through their bankruptcy case. Known as debtor-in-possession[1] (DIP) financing, potential debtors either obtain financing from their existing secured lenders or through other third-party lenders through well-established market processes in the United States. This article provides an overview of DIP financing with a focus on international Chapter 11 debtors and discusses recent developments in DIP financing, including roll-ups of a debtor's pre-petition debt into DIP financing, conversions of DIP financing into equity upon a debtor's emergence from Chapter 11 and the use of DIP financing in pre-packaged and pre-negotiated bankruptcy plans.

DIP financing in Chapter 11 cases

DIP financing is routinely utilised in Chapter 11 cases, where the debtor seeking relief seeks to preserve its going concern operations and to emerge from bankruptcy or sell its business as a going concern. The US Bankruptcy Code (the Code) contains several provisions designed to encourage lenders to provide DIP financing in Chapter 11 cases. Due to protections provided under the Code, domestic and foreign debtors are often able to access liquidity that they would not be able to obtain outside of a US bankruptcy proceeding.[2] Under the Code, post-petition lenders are provided automatic administrative expense priority for DIP loans and related obligations, and are routinely granted super-priority administrative claim status, wherein debt must be repaid upon the emergence of the debtor from Chapter 11 prior to nearly all other administrative obligations

1 When a company files for Chapter 11 bankruptcy, the company's management and board of directors remain in possession of the business as a 'debtor-in-possession' except in the exceptional circumstance where the bankruptcy court appoints a Chapter 11 trustee, which will either occur for 'cause' such as fraud, dishonesty, incompetence or gross mismanagement, or the appointment of a trustee is found to be in the interests of 'creditors, any equity security holders and other interest of the estate'. 11 USC section 1104(a)(2).

2 Non-US incorporated debtors have been able to obtain DIP financing even where a substantial portion of their assets are located in jurisdictions outside of the United States. See, for example, Final Order Granting Debtors' Motion to (I) Authorize Debtors in Possession to Obtain Post-Petition Financing Pursuant to 11 U.S.C. §§ 105, 362, 363 and 364; (II) Grant Superiority Administrative Expense Claims to DIP Lender(s) Pursuant to 11 U.S.C. §§ 364 and 507; (III) Modify Automatic Stay Pursuant to 11 U.S.C. §§ 361, 362, 363, 364 and 507; and (IV) Granted Related Relief [ECF No. 166], *In re Alto Maipo Delaware LLC, et al*, No. 21-11507 (Bankr. Del. 2021); Order Granting Motion to Approve Debtor in Possession Financing, [ECF No. 1091], *In re LATAM Airlines Group SA*, No. 20-11254 (JLG) (Bankr. SDNY.2020) (approving LATAM's proposed US$2.45 billion DIP financing facility); Final Order (I) Authorizing the Debtors to (A) Obtain Postpetition Financing, and (B) Grant Liens and Superpriority Administrative Expense Claims, (II) Modifying the Automatic Stay, and (III) Granting Related Relief [ECF 1031], *In re Avianca Holdings SA* 20-11133 (MG) (Bankr. SDNY 2020), Order (I) Authorizing the Debtors to Obtain Senior Secured, Superpriority, Postpetition Financing, (II) Granting Liens and Superpriority Claims, and (III) Granting Related Relief, [ECF No. 331], *In re SAS AB*, No. 20-10935 (MEW) (Bankr. SDNY 2022).

incurred during the case. In addition, upon notice and a hearing, the bankruptcy court may authorise a debtor to enter into a DIP facility that is secured by a first priority lien on the unencumbered assets of its estate and by a second priority lien on collateral subject to pre-petition liens.[3] To obtain authorisation to grant such liens, the debtor must show that it is unable to obtain post-petition financing on unsecured terms, which is often relatively easy for a debtor to establish. Throughout the years, DIP financing has become increasingly attractive as DIP lenders exert considerable influence on the outcome of the Chapter 11 case through strict covenants, milestones and certain notice and consent rights.

If the debtor is still unable to obtain financing on such terms, the Code provides that a debtor can be authorised to grant liens on its assets that are senior or equal to existing liens, provided that such priming is consensual or that the pre-petition secured lender is otherwise adequately protected.[4] When DIP financing is provided by pre-petition secured lenders, this priming is generally consensual. However, when new lenders that are not creditors of the debtor (ie, 'offensive' DIP lenders, as discussed below) are seeking priming liens in pre-petition collateral, the debtor must show that it is unable to obtain such credit otherwise and that either the existing secured lenders have sufficient equity value in their collateral or that they will be 'adequately protected' against any possible diminution in the value of their security interests.[5] Adequate protection is designed to ensure the existing lender will not be worse off if the DIP loan is approved. Such protection can take on many forms, including periodic cash payments to the secured lender, payments of post-petition interest or granting of additional liens to the creditor on previously unencumbered assets or replacement liens on collateral that do not continue to attach to property post-petition. Additional protection is guaranteed under section 552 of the Bankruptcy Code as it cuts off certain pre-petition security interests over after-acquired property under a security agreement upon commencement of the bankruptcy proceeding.[6]

Once a debtor has lined up a lender to provide DIP financing, the debtor is required to obtain bankruptcy court approval for the proposed DIP financing.[7] Although typically a debtor will seek such approval at the outset of the Chapter 11 case as part of its 'first day' motions, if the debtor's liquidity needs are not as immediate, it may wait for some time after filing its bankruptcy petition to obtain such approval.[8] Creditors and other parties in interest have a right to object to the terms of a proposed DIP financing and the bankruptcy court will ultimately

3 See 11 USC section 364(c).
4 See 11 USC section 364(d).
5 See 11 USC section 364(d)(1).
6 See 11 USC Section 552(a).
7 11 USC section 364 governs bankruptcy financing. If the debtor is seeking to obtain financing in the ordinary course of business, such as for trade credit, it may do so under 11 USC section 362(a) without court approval. However, financing that is not in the ordinary course of a debtor's business, such as DIP financing, whether secured or unsecured, requires notice and a hearing. See 11 USC section 364(b)–(d).
8 This was the case, for example, in four recent Chapter 11 bankruptcies for airlines and other companies based in South and Central America. See, for example, *In re LATAM Airlines Group SA*, No. 20-11254 (JLG) (Bankr. SDNY 2020); *In re Avianca Holdings SA* 20-11133 (MG) (Bankr. SDNY 2020); *In re*

decide whether to approve the financing after a review of the relevant pleadings and objections (if any) and after conducting an evidentiary hearing if required.[9]

Types of DIP lenders

DIP financing can either be provided by a debtor's existing lenders or by new third-party lenders. Pre-petition secured lenders that provide DIP financing are termed 'defensive' DIP lenders because they are willing to make a DIP loan, in part, to mitigate the likelihood of a decline in the value of their collateral. The credit extended under the DIP facility will command higher interest rates and fees than the pre-petition credit, and the loan documents will contain tighter covenants and more detailed reporting than is required under the pre-petition facility, as well as bankruptcy case milestones and events of default. Additionally, in their capacity as DIP lenders, such pre-petition lenders will be able to exert more influence over the debtor and can help ensure that they will play a central role in the debtor's restructuring negotiations. As discussed further below, in cases where existing lenders provide the DIP loan, it is not unusual for such facilities to contain a 'roll-up' of a portion of such lenders' outstanding pre-petition debt.

If the DIP financing is provided by third parties that are not existing creditors of the debtor, the lenders are termed 'offensive' or 'new money' lenders. New money DIP lenders are often attracted by the generous economics of DIP facilities and, in some cases, are interested in extending post-petition credit because they view DIP financing as a means to pursue a loan-to-own strategy (either through credit bidding their DIP claims or through a debt-to-equity conversion, as discussed below).[10] These lenders are generally willing to finance DIP facilities where there exists sufficient unencumbered collateral to support the DIP obligations (or they believe there is little risk of a liquidation and they are willing to rely on the Code's administrative expense priority that ensures they are repaid ahead of other parties upon the emergence of the debtor from Chapter 11), where pre-petition lenders are over-secured or where the pre-petition lenders otherwise consent to having the debtor grant the DIP lender a priming lien.

Grupo Aeroméxico, SAB de CV No. 20-11563 (SCC) (Bankr. SDNY 2020); *In re Alpha Latam Management, LLC*, No. 21-11109 (JKS) (Bankr. SDNY 2021).

9 Typical objections from creditors include objections to the cost of the DIP facility, that the debtors did not conduct a sufficient market test upon entering into a proposed DIP facility, that the debtors did not use proper business judgement in obtaining the facility and that the proposed DIP is inconsistent with requirements contained in the Code.

10 As discussed further, the proposed DIP facilities of Avianca, Aeroméxico and LATAM Airlines all contained an equity conversion feature at some point in the drafting of the documentation.

Recognition of the DIP order in foreign jurisdictions

Upon the commencement of a Chapter 11 case, the debtor is protected by the Code's statutory 'automatic stay', which goes into effect immediately upon a bankruptcy filing and has purported worldwide applicability.[11] The stay operates to enjoin substantially all creditor enforcement actions during the pendency of the Chapter 11 case against the debtor and property of the debtor's estate – both within the United States and within foreign jurisdictions. Despite the purported worldwide applicability of the automatic stay, in the absence of a parallel local recognition proceeding supporting the Chapter 11, a debtor, and its prospective DIP lender, will need to assess whether the stay will be honoured by non-US parties that may hold debtor assets or hold claims against the debtor and whether non-US courts will recognise and enforce the stay against such parties if required.

A debtor's decision to seek local recognition of the DIP order involves an analysis of the particular situation including the jurisdictions involved, the composition and nature of the debtor's creditors (including, most importantly, their jurisdictional and commercial nexus to the United States) and the location of the debtor's assets. In certain jurisdictions and situations, the debtor may decide (or be required) to obtain formal recognition of the DIP order in a local proceeding to ensure that the DIP obligations and claims and liens on collateral are properly authorised under local law and will be enforced in the local jurisdiction. For example, the DIP facility in the *LATAM Airlines* Chapter 11 case included a closing condition that the debtors obtain local recognition of the DIP order by the Colombian Superintendence of Companies, authorising the incurrence of the debt and the pledge of collateral (where the local court also required such approval).[12] By contrast, in the *Alto Maipo* Chapter 11 case, the debtors, though domiciled and primarily operating in Chile, chose to not commence local recognition proceedings and did not seek recognition of the US$50 million DIP financing in Chile.

In other jurisdictions and situations, local approval of the DIP may not be feasible or it may entail additional risks that the lenders or the debtors do not want to take on. In these situations, the debtors may seek to obtain local law pledges of collateral and perfect such pledges through the requisite local law processes.[13] The debtors and DIP lenders also may take some comfort in the power of the automatic stay – even in situations where a foreign Chapter 11

11 11 USC section 362.

12 Obtaining approval of the Colombian Superintendence of Companies was a condition precedent to closing the transaction included in the DIP Agreement itself. See Amended Motion to Approve Debtor in Possession Financing/Debtors' Supplemental Submission in Furtherance of the Debtors' Motion for Order (I) Authorizing the Debtors to (A) Obtain Postpetition Financing and (B) Grant Superpriority Administrative Expense Claims and (II) Granting Related Relief, [ECF No. 1079], Exhibit A, Superpriority Debtor-In-Possession Term Loan Agreement, Section 4.01, *In re LATAM Airlines Group SA*, No. 20-11254 (JLG) (Bankr. SDNY 2020). Section 4.01.

13 Note that with respect to the Aeroméxico DIP facility, the parties took this approach.

debtor does not commence a parallel local recognition proceeding, to the extent that the debtor's major creditors are international financial institutions or have substantial business or other interests in the United States, such creditors may nonetheless be disincentivised from violating the stay in the United States given the potential that they may have repeat interactions with United States bankruptcy courts.

Roll-ups

In the context of defensive DIP loans, DIP lenders may seek to have their pre-petition secured debt repaid with the proceeds of the new post-petition financing or otherwise 'converted' into DIP obligations. In this scenario, a certain amount of newly borrowed funds from the proposed DIP facility will be deemed to repay either all or part of the pre-petition loans or such loans will be deemed converted into post-petition loans. This transformation is termed a 'roll-up' because the existing pre-petition lender gets to roll-up its pre-petition claims and liens into post-petition administrative claims and liens via the DIP facility. Roll-up features can be structured a number of different ways – some are effectuated by a single draw on the DIP facility and some provide for a 'creeping' roll-up over time on a dollar-for-dollar, or similar, basis. While the roll-up does not provide a debtor with additional liquidity, the debtor's existing pre-petition lenders, who may already have liens on substantially all of the assets of the debtor, can be encouraged to provide new money in exchange for the ability to transform the rolled-up portion of their pre-petition debt into debt that will benefit from super-priority claims and liens, better economics and tighter controls.[14] Indeed, in negotiations with pre-petition secured lenders, it is often used as enticement to encourage all lenders to participate in post-petition financing, with debtors and the lead lenders offering the roll-up feature only to those lenders that agree to extend new money. For these same reasons, roll-ups of pre-petition obligations can be subject to challenge by unsecured creditors. Bankruptcy courts pay careful attention to the percentage of new money provided in the roll-up and whether the roll-up benefits any pre-petition lenders that are not providing DIP financing (measured most often by the ratio of new money to roll-up debt).

In more recent years, the roll-up has become a fairly standard feature of defensive DIP financings for both domestic and foreign-domiciled Chapter 11 debtors, although creditors and courts still scrutinise the terms and structure of the roll-up feature, and it is typically not approved until the final DIP hearing. On 12 June 2023, multinational kitchen appliances company Instant Brands Acquisition Holdings Inc and certain affiliates spanning the United States, Canada and Latin America initiated Chapter 11 proceedings in the Southern District of Texas, where on the first day, the company sought approval of a US$132.5 million new

14 Alan Resnick and Henry Sommer, Collier Guide to Chapter 11, Chapter 2.06[1][a][b] (2012).

money DIP facility plus a US$125 million asset-based lending (ABL) DIP facility that featured a roll up.[15] The debtors' motion noted that, in addition to addressing liquidity constraints, the DIP financing was critical to effectuate an unwinding of a pre-petition financing transactions of two unrestricted subsidiaries through a US$55 million payment to the company's pre-petition equity sponsor.[16] At the interim hearing, the United States Trustee objected to the motion, arguing that the unwinding transaction should not be indefeasible and should be subject to lien challenge by a creditors' committee. Over the objection, Judge David R Jones approved access to US$100 million in DIP financing on an interim basis.[17] At the final hearing, the DIP motion proceeded on an uncontested basis largely due to concessions the debtors made in negotiations with the creditors' committee, including release carve-outs, marshalling provisions, extended sale milestones and an increased budget for the creditors' committee's investigation.[18]

In a petition filed on 27 September 2022 by Phoenix Services Topco, LLC, an international steel-producing company with a global footprint across North America, Europe, the Middle East, South Africa and South America, the debtors' proposed roll-up of pre-petition debt came under heavy scrutiny by United States Bankruptcy Judge Mary F Walrath.[19] Here, the debtors sought to enter into a super-priority senior secured DIP facility with an aggregate amount of up to US$200 million being provided by Credit Suisse Loan Funding LLC; however, only US$50 million of the DIP facility consisted of new money – the debtor sought to convert US$150 million of pre-petition debt to a new post-petition 'roll-up facility'.[20] At the time of the bankruptcy filing, the debtors only had approximately US$6 million in cash on hand; thus, without the DIP financing, the debtors would be in a negative cash position in the early days of the case. While the debtors solicited interest from several financial institutions to assess the extent to which an offensive lender would be willing to provide post-petition financing to the debtors, the search yielded zero interest and the debtors' only

15 See Debtors' Emergency Motion for Entry of Interim and Final Orders, Pursuant to 11 U.S.C. §§ 105, 361, 362, 363, 364, 503, 506, 507, and 552 (I) Authorizing the Debtors to (A) Obtain Senior Secured Superpriority Postpetition Financing and (B) Use Cash Collateral, (II) Granting Liens and Superpriority Administrative Expense Claims, (III) Providing Adequate Protection to Prepetition Secured Parties, (IV) Scheduling a Final Hearing, and (V) Granting Related Relief, [ECF No. 31], *In re Instant Brands Acquisition Holdings Inc., et al.*, No. 23-90716 (Bankr. S.D. Tex. 2023).

16 *Id*.

17 Transcript, [ECF No. 163], *In re Instant Brands Acquisition Holdings Inc., et al.*, No. 23-90716 (Bankr. S.D. Tex. 2023). Following entry of the interim DIP order, the court approved an incremental US$10 million 'pull forward' of the remaining US$32.5 million final draw.

18 Final Order (I) Authorizing the Debtors to (A) Obtain Senior Secured Superpriority Post-Petition Financing and (B) Use Cash Collateral, (II) Granting Liens and Superpriority Administrative Expense Claims, (III) Providing Adequate Protection to Prepetition Secured Parties, and (IV) Granting Related Relief, [ECF No. 257], *In re Instant Brands Acquisition Holdings Inc., et al.*, No. 23-90716 (Bankr. S.D. Tex. 2023).

19 *In re Phoenix Services Topco, LLC, et al*, No. 22-10906 (Bankr. Del. 2022).

20 See Motion of Debtors for (I) Authority to (A) Obtain Postpetition Financing, (B) Use Cash Collateral, (C) Grant Liens and Provide Superpriority Administrative Expense Status, (D) Grant Adequate Protections, (E) Modify the Automatic Stay, and (F) Schedule a Final Hearing and (II) Related Relief [ECF No. 14], *In re Phoenix Services Topco, LLC, et al*, No. 22-10906 (Bankr. Del. 2022).

financing option was the roll-up facility.[21] Despite these facts, the proposed DIP financing proposal was met with resistance from Judge Walrath, who remarked that a roll-up of US$150 million of pre-petition loans while authorising interim relief for US$25 million of new money was 'a big stretch'.[22] The judge and other parties commented on the concerning 3:1 ratio of pre-petition debt as compared to new money. Judge Walrath ultimately approved the US$200 million DIP financing, which was supported by the creditors' committee following certain 'hard-fought' concessions.[23]

Similarly, though less extreme, the proposed roll-up in *In re Rockall Energy Holdings, LLC* came under scrutiny by the Office of the United States Trustee and unsecured creditors, where the oil and gas exploration debtors sought to roll up US$34 million in pre-petition debt in a DIP facility containing US$17 million in new money being provided by Goldman Sachs Bank USA.[24] The parties in interest were primarily concerned about the 2:1 ratio of pre-petition debts to new money in the US$51 million DIP financing, especially where the DIP lender could be subject to causes of action in the case. United States Bankruptcy Judge Mark X Mullin did not share the concerns of the United States Trustee and ultimately approved the DIP financing on a final basis. Subsequently, on 2 June 2022, the judge confirmed the Chapter 11 plan and approved the sale of Rockall Energy Holdings' assets to private equity fund Formentera Partners for US$85 million. Under the terms of the plan, the DIP loan would be repaid using the proceeds from the sale such that the DIP loan served as effective bridge financing to conduct and consummate a sale process.[25]

Another example is the Bed Bath & Beyond Chapter 11 case, which was filed in the District of New Jersey on 23 April 2023. The Bed Bath & Beyond US$240 million DIP facility provided by Sixth Street comprises US$40 million in new money and a US$ 200 million roll-up of pre-petition first-in last-out (FILO) secured obligations.[26] While the motion eventually proceeded on an uncontested basis at

21 *Id*.

22 Transcript of Hearing Held on 28 September 2022 [ECF No. 72], *In re Phoenix Services Topco, LLC, et al*, No. 22-10906 (Bankr. Del. 2022).

23 Final Order (I) Authorizing the Debtors to Obtain Postpetition Financing, (II) Authorizing the Debtors to Use Cash Collateral, (III) Granting Liens and Providing Superpriority Administrative Expense Claims, (IV) Granting Adequate Protection, (V) Modifying Automatic Stay, and (VI) Granting Related Relief [ECF No. 237], *In re Phoenix Services Topco, LLC, et al*, No. 22-10906 (Bankr. Del. 2022). In a filing, the creditors' committee highlighted the favorable modifications to the DIP facility included (i) limiting extension fees, (ii) reducing the DIP liens on unencumbered property to US$150 million from US$200 million; (iii) leaving the prepetition equity sponsor's claims fully unencumbered; (iv) soft marshalling of the DIP lien collateral; and (v) certain consultation rights.

24 Emergency Motion for Entry of Interim and Final Orders (I) Authorizing Debtors to (A) Obtain Postpetition Financing Pursuant to 11 U.S.C. §§ 105, 361, 362, 364(c)(1), 364(c)(2), 364(c)(3), 364(d)(1) and 364(e) and (B) Use Cash Collateral Pursuant to 11 U.S.C. §§ 361, 362, 363 and 364 and (III) Scheduling Final Hearing, [ECF No. 21], *In re Rockall Energy Holdings, LLC, et al*, NO. 22-90000 (Bankr. N.D. Tex. 2022).

25 Findings of Fact and Conclusions of Law [ECF No. 629], *In re Rockall Energy Holdings, LLC, et al*, No. 22-90000 (Bankr. N.D. Tex. 2022).

26 See Debtors' Motion for Entry of Interim and Final Orders (I) Authorizing the Debtors to (A) Obtain Postpetition Financing and (B) Utilize Cash Collateral, (II) Granting Liens and Superpriority

the first day hearing, the United States Trustee initially asked the court to only approve the roll-up at the final hearing once a creditors' committee had been formed. The objection was withdrawn on the basis that the interim DIP order included language reserving the right to challenge.[27] At the final hearing, where the DIP was approved, the debtors, the ad hoc group of unsecured noteholders and the creditors' committee spoke to the 'hard fought' negotiations that led to various compromises, including marshalling and detailed collateral sharing provisions. Sixth Street also announced that it intended to credit bid the DIP amount in the Bed Bath & Beyond asset sale.[28] Intriguingly, less than a month following entry of the final DIP order, the ad hoc bondholder group sought to vacate the DIP orders, arguing the DIP financing was unwarranted given the debtors' cash position and described the US$200 million roll-up as 'fruit of this poisonous tree'.[29] The ad hoc group also noted that the DIP facility benefited ABL and FILO pre-petition lenders to the detriment of the unsecured creditor body, where the collateral sharing provisions contemplated unsecured creditors would receive no recovery until the FILO lenders recover their US$515 million loan principal in full.[30] Following an evidentiary hearing, Judge Vincent F Papalia lamented that vacating the DIP orders would be 'extraordinarily unjustified' and the DIP financing was appropriate based on the information available to the debtors and other parties at the time.[31]

Lastly, the Yellow Corporation and affiliates bankruptcy proceedings featured an entertaining DIP war, where following the filing of the company's DIP motion on 7 August 2023, the company received several alternative DIP financing offers from other parties with comparable financing structures but additional terms that provided the debtors with more flexibility. In the initial DIP motion, the debtors sought approval of a DIP facility provided by Apollo Capital Management, LP, comprising US$142.5 million of new money and a 3.5:1 roll-up of approximately US$502 million to take place upon entry of the interim order. The new money portion of the DIP, which carried a 17 per cent interest rate and fees near US$32 million, would become available to the debtors on a rolling basis depending on the success of the debtors' auction process.[32] The agreement also provided

Administrative Expense Claims, (III) Granting Adequate Protection, (IV) Modifying the Automatic Stay, (V) Scheduling a Final Hearing, and (VI) Granting Related Relief, [ECF No. 25], *In re Bed Bath & Beyond Inc., et al.*, No. 23-13359 (VFP) (Bankr D. N.J. 2023).

27 Transcript, [ECF No. 161], *In re Bed Bath & Beyond Inc., et al.*, No. 23-13359 (VFP) (Bankr D. N.J. 2023).

28 Transcript, [ECF No. 769], *In re Bed Bath & Beyond Inc., et al.*, No. 23-13359 (VFP) (Bankr D. N.J. 2023).

29 See Motion of the Ad Hoc Group, Pursuant to 11 U.S.C. § 105(a), Fed. R. Civ. P. 60(a), and Fed. R. Bankr. P. 4001(c) and 9024, for (A) an Order Vacating the Interim and Final Orders Authorizing the Debtors To, Among Other Things, Obtain Postpetition Financing, and (B) Other Related Relief, [ECF No. 982], *In re Bed Bath & Beyond Inc., et al.*, No. 23-13359 (VFP) (Bankr D. N.J. 2023).

30 *Id*.

31 See Transcript, [ECF No. 1196], *In re Bed Bath & Beyond Inc., et al.*, No. 23-13359 (VFP) (Bankr D. N.J. 2023); see also Order Denying Motion of the Ad Hoc Group, Pursuant to 11 U.S.C. § 105(a), Fed. R. Civ. P. 60(a), and Fed. R. Bankr. P. 4001(c) and 9024, for (A) an Order Vacating the Interim and Final Orders Authorizing the Debtors To, Among Other Things, Obtain Postpetition Financing, and (B) Other Related Relief, [ECF No. 1131], *In re Bed Bath & Beyond Inc., et al.*, No. 23-13359 (VFP) (Bankr D. N.J. 2023).

32 According to the debtors' motion, US$60 million would become available upon entry of the interim order; US$37.5 million would become available upon entry of the bidding procedures order, which

that the DIP would mature 90 days following the petition date, subject to a 15-day extension if the debtors received sufficient cash bids to pay the DIP loan in its entirety.

However, prior to the first day hearing, the debtors adjourned the DIP motion then announced at the first day hearing that the company received two competing DIP proposals. The new proposals by MFN Capital and Estes Strategic Lines contained similar economics, but a longer runway for the debtors to administer the Chapter 11 cases and also no roll-up.[33] The MFN Capital proposal contemplated the overall fees would be less than the initial DIP, provided the debtors with 180 days for the sale process and would be *pari passu* with the US$502 million pre-petition debt, while the Estes Strategic Lines DIP proposal featured a 15 per cent interest rate and a similar timeline to the MFN Capital DIP and would be junior to the pre-petition debt.[34] At the hearing, counsel for one of the pre-petition lenders, Beal Bank, protested the competing DIP proposals, noting the Estes Strategic Lines DIP financing proposal was 'junior in name only' and will likely result in a contested interim DIP financing hearing.[35] Following days of negotiations, counsel to the debtors announced at a status conference that MFN Capital had agreed to restructure its proposal to also provide the new money DIP facility on a junior basis and that the company had also received additional offers for DIP financing on a junior basis.[36] However, in an unexpected twist days following the status conference, Apollo Capital and Beal Bank announced they sold their holdings in the US$502 million pre-petition to loan to Citadel Credit Master Fund and rescinded the initial DIP proposal. The sale created a pathway for Citadel and MFN Capital to join forces to offer consensual DIP financing to the debtors, where US$100 million would be provided by Citadel on a *pari passu* basis with the US$502 million pre-petition loan, and US$42.5 million would be provided by MFN Capital on a junior basis. The DIP facility also provided for a 4 per cent interest rate on the new money portion of the DIP, 15 per cent non-default interest otherwise, a 180-day maturity and no roll-up. The DIP term sheet also included a stalking horse bidder, Old Dominion Freight Lines, with a bid of no less than US$1.5 billion for some or all of the debtors' real property.[37]

was to be accomplished within 10 days of the petition date; US$20 million upon the debtors' receipt of bids for DIP priority collateral that would generate at least US$250 million in cash proceeds; and the last US$25 million upon the debtors' receipt of bids for DIP priority collateral that would generate at least US$450 million in cash proceeds. See Motion of Debtors for Entry of Interim and Final Orders (I) Authorizing the Debtors to (A) Obtain Postpetition Financing and (B) Utilize Cash Collateral, (II) Granting Liens and Superpriority Administrative Expense Claims, (III) Modifying the Automatic Stay, (IV) Authorizing the Debtors to Use UST Cash Collateral, (V) Granting Adequate Protection, (VI) Scheduling a Final Hearing, and (VII) Granting Related Relief, [ECF No. 16], *In re Yellow Corporation, et al.*, No. 23-11069 (CTG) (Bankr. D. Del. 2023).

33 See Transcript, [ECF No. 182], *In re Yellow Corporation, et al.*, No. 23-11069 (CTG) (Bankr. D. Del. 2023).

34 *Id*.

35 *Id*.

36 See Transcript, [ECF No. 233], *In re Yellow Corporation, et al.*, No. 23-11069 (CTG) (Bankr. D. Del. 2023).

37 See Notice of DIP Financing Term Sheet and Budget, [ECF No. 297], *In re Yellow Corporation, et al.*, No. 23-11069 (CTG) (Bankr. D. Del. 2023).

The DIP was approved on an interim basis by United States Bankruptcy Judge Craig T Goldblatt on 18 August 2023.[38]

Equity conversions

Traditionally, DIP facilities are required to be repaid in full and in cash at the end of a debtor's Chapter 11 case, whether in connection with a plan of reorganisation, a 363 sale or a combination of the two. In certain situations – in particular, pre-packaged or prearranged bankruptcies – DIP facilities can be structured to provide that the outstanding DIP obligations convert into secured exit financing upon emergence from bankruptcy. Even more recently, in certain cases, DIP lenders have increasingly sought high rates of return on DIP loans, which approach equity-like rates of return, or a right to participate in an exit capital raise at a specified value approved at the start of the case.

Some DIP facilities provide for conversion of outstanding DIP obligations into equity of the reorganised debtor on emergence, most commonly at the debtor's election. These conversion features can be of great benefit to debtors that are seeking a quick exit from bankruptcy (such as in the case of a prepack) or that are looking to mitigate the risks associated with obtaining the funding necessary to repay the DIP obligations at the end of the case. Equity conversions grew increasingly popular during the covid-19 era, where the debtor's projected revenues and its relative access to international debt or equity markets at the end of the case were extremely difficult to predict. Mitigating the risk of misiming the debtor's exit from Chapter 11 has become extremely important to certain businesses that want to avoid being in the situation where they are poised to emerge from Chapter 11 but cannot obtain attractive exit financing to do so.

Equity conversions are potentially attractive from the perspective of cash-strapped debtors and also for lenders that may recognise the underlying value of a business, even in the face of exogenous factors. When presented with a DIP facility containing an equity conversion feature, the bankruptcy court will often scrutinise which parties are provided the ability to participate in the DIP financing, the economic terms of the conversion and other conversion features (such as which entity controls the conversion election). As with roll-ups, some practitioners believe equity conversions are a feature of weak credit markets and should be less prevalent when credit markets are robust.[39] However, as

38 Interim Order (I) Authorizing the Debtors to (A) Obtain Postpetition Financing and (B) Use Cash Collateral, and (C) Grant Liens and Superpriority Administrative Expense Claims, (II) Granting Adequate Protection to Certain Prepetition Secured Parties, (III) Modifying the Automatic Stay, (IV) Scheduling a Final Hearing, and, (V) Granting Related Relief, [ECF No. 302], *In re Yellow Corporation, et al.*, No. 23-11069 (CTG) (Bankr. D. Del. 2023).

39 Practice Note, Key Developments and Trends in DIP Financing, Practical Law (19 February 2015) (http://us.practicallaw.com/6-600-9845) ('As the credit markets improve, equity conversions are likely to decline').

described further below, equity conversions have featured prominently in certain recent bankruptcies in the airline industry.

Given the additional pressures brought to bear on liquidity, especially in certain hard-hit industries, such as the airline industry during the covid-19 pandemic, the ability to convert DIP obligations into reorganised equity at the end of a case provides meaningful flexibility for debtors in situations where liquidity may not be readily available on emergence. The approved DIP facility in *Avianca*, which contains a senior Tranche A of US$1.296 billion and a junior Tranche B of US$722.3 million, contains an equity conversion option where the borrower can elect to pay the entire US$722.3 million junior Tranche B DIP facility (together with any fees) with equity of the reorganised debtors on exit.[40] The approved conversion feature has proven valuable, where the debtors have not been able to identify any financing that would pay the DIP facility in full, and have filed a plan that contemplated such conversion would occur.[41]

Similarly, the *Aeroméxico* DIP facility contains an equity conversion feature – although the conversion in *Aeroméxico* is at the lenders' option.[42] The lenders have the ability to elect to receive common stock of the reorganised debtors as repayment for their loan subject to satisfactory tax, legal and regulatory review.[43] In support of the equity conversion aspect of the DIP facility, the debtors argued that the inclusion of the equity conversion:

> *substantially increases the odds of a successful reorganization as a going concern, as it provides a potential pathway to emergence from Chapter 11 without having to raise substantial exit financing.*[44]

The debtors subsequently revised the equity conversion feature to remove drag-along rights that would have enabled the DIP lender to drag the minority investors along as part of the restructuring if it chose to convert its holdings into equity.[45] Under the revised election procedures, minority DIP lenders may

40 Final Order (I) Authorizing the Debtors to (A) Obtain Postpetition Financing, and (B) Grant Liens and Superpriority Administrative Expense Claims, (II) Modifying the Automatic Stay, and (III) Granting Related Relief [ECF 1031] *In re Avianca Holdings SA* 20-11133 (MG) (Bankr. SDNY 2020).

41 Notice of Filing of Third Amended Joint Chapter 11 Plan of Avianca Holdings S.A. and its Affiliated Debtors [ECF 2130], *In re Avianca Holdings SA* 20-11133 (MG) (Bankr. SDNY 2020).

42 Final Order Granting Debtors' Motion to (I) Authorize Certain Debtors in Possession to Obtain Post-Petition Financing; (II) Grant Liens and Superpriority Administrative Expense Claims to DIP Lenders; (III) Modify Automatic Stay; and (IV) Grant Related Relief, [ECF 527], *In re Grupo Aeroméxico, SAB de CV* No. 20-11563 (SCC) (Bankr. SDNY 2020).

43 *Id*.

44 Motion to Authorize / Motion of Debtors for Entry of Interim and Final Orders, Pursuant to 11 USC sections 105, 361, 362, 363, 364, 503, 506, 507 and 552 (I) Authorizing the Debtors to Obtain Secured Superpriority Postpetition Financing, (II) Granting Liens and Superpriority Administrative Expense Claims, (III) Scheduling a Final Hearing, and (IV) Granting Related Relief, [ECF 271], paragraph 44 *In re Grupo Aeroméxico, SAB de CV* No. 20-11563 (SCC) (Bankr. SDNY 2020).

45 Notice of Filing of Revised Debtor in Possession Loan Agreement Schedule, [ECF 525], *In re Grupo Aeroméxico, SAB de CV* No. 20-11563 (SCC) (Bankr. SDNY 2020).

choose whether to take stock or cash out after the majority DIP lender makes its own election.[46]

Although the DIP facility that was ultimately approved in the *LATAM Airlines* Chapter 11 cases did not provide for equity conversion, the initial proposed DIP facility contained such a feature.[47] The initial DIP facility provided that one of the three tranches of post-petition debt could be converted into equity on emergence (originally the conversion feature was at the DIP lenders' option, but as part of a subsequent amendment, the debtors obtained control of the election). The proposed equity conversion feature was limited to a specific tranche of the DIP facility that was provided by certain LATAM shareholders in exchange for, among other things, a commitment to approve the necessary capital increase under local Chilean law and a waiver of their pre-emptive rights as shareholders to participate in any issuance of reorganised equity of the debtors on exit.[48] The unsecured creditor's committee and ad hoc bondholder groups objected to the DIP on a number of grounds, including that the limited equity conversion feature subverted the reorganisation process and gave rise to improper *sub rosa* plan treatment with respect to those shareholder DIP lenders. The bankruptcy court ultimately found that, although the terms of the DIP financing were reasonable and proposed in good faith, it would not approve the DIP facility as proposed because the equity conversion, which was limited to those lenders that were shareholders of the company and was connected to a waiver of the exercise of such shareholders' pre-emptive rights, was a *sub rosa* plan.[49] Following further negotiations between the debtors, the DIP lenders and the unsecured creditors' committee, a revised DIP facility that did not include an equity conversion feature was approved by the bankruptcy court.[50]

Separate from the airline industry, the *Alto Maipo* Chapter 11 cases featured an equity conversion where, pursuant to the plan, the DIP lender would receive new common equity upon emergence. Debtor Alto Maipo SpA, a special purpose company that developed, constructed and operates a hydroelectric energy project in the Santiago Metropolitan Region of Chile, sought bankruptcy protection in the United States despite having primarily Chilean creditors.[51] As of the petition date, AES Andes SA, which later became the DIP lender in that case, owned 100 per cent equity interest in Norgener Renovables SpA, which owned 93 per cent

46 *Id*.
47 Motion to Approve Debtor in Possession Financing, and, Motion to Authorize Debtors to Grant Superpriority Administrative Expense Claims, [ECF No. 391], *In re LATAM Airlines Group SA*, No. 20-11254 (JLG) (Bankr. SDNY 2020).
48 *Id*.
49 *In re LATAM Airlines Grp. SA*, 2020 Bankr. LEXIS 2405 (10 September 2020).
50 Order Granting Motion to Approve Debtor in Possession Financing, [ECF No. 1091] *In re LATAM Airlines Group SA*, No. 20-11254 (JLG) (Bankr. SDNY 2020).
51 Final Order Granting Debtors' Motion to (I) Authorize Debtors in Possession to Obtain Post-Petition Financing Pursuant to 11 U.S.C. §§ 105, 362, 363 and 364; (II) Grant Superiority Administrative Expense Claims to DIP Lender(s) Pursuant to 11 U.S.C. §§ 364 and 507; (III) Modify Automatic Stay Pursuant to 11 U.S.C. §§ 361, 362, 363, 364 and 507; and (IV) Granted Related Relief [ECF No. 166], *In re Alto Maipo Delaware LLC, et al,*, No. 21-11507 (Bankr. Del. 2021).

equity interest in the Chilean debtor. Under the DIP financing agreement, AES Andes SA provided US$50 million in liquidity to the debtors, which, under the plan of reorganisation, was converted to new equity and resulted in AES Andes SA becoming the sole owner of the reorganised debtors.[52]

As previously noted, DIP lenders have sought higher, equity-like rates of return, along with additional protections. These features have not gone unscrutinised by courts. For example, the *SAS AB* DIP facility contained certain equity-linked features that were heavily scrutinised by the court. SAS AB, together with its affiliated debtors (SAS), one of Scandinavia's leading airlines, filed for Chapter 11 protection on 5 July 2022.[53] During the proceedings in connection with the court's consideration of the US$700 million SAS DIP facility, the court expressed certain reservations regarding two equity conversion features.[54] While no formal objections to the DIP were filed, the court raised these concerns *sua sponte*, ultimately granting the DIP but noting its 'significant reservations' in respect of the equity-linked features.[55]

First, the court expressed concern about a call option under the DIP, pursuant to which the DIP lenders would have the right to convert their outstanding DIP loans or pay cash to acquire equity to be issued by the debtors under a plan of reorganisation (the 'call option'). Pursuant to the DIP facility, the call option is exercisable based on a US$3.2 billion assumed total enterprise value, effectively permitting the DIP lenders to acquire equity at a discount in the event a plan was premised on a total enterprise value of US$3.2 billion.[56] The court also expressed concern about certain tag rights that would give the DIP lenders the right to subscribe to up to 30 per cent of any new money equity raise with a third party to be issued under a plan of reorganisation, on the same terms made available to such third party (the 'tag right'). Both options are terminable, subject to substantial termination fees (a US$19.52 million call option termination fee, and a US$21 million tag right termination fee).

More precisely, the court raised questions as to whether the call option and tag right constituted a *sub rosa* plan, and whether such options could only be granted as part of a plan process. The court questioned whether 'the right to participate in a plan process' is a property right that a debtor can sell under Bankruptcy

52 Findings of Fact, Conclusions of Law, and Order Confirming the Joint Chapter 11 Plan of Reorganization of Alto Maipo SpA and Alto Maipo Delaware LLC Pursuant to Chapter 11 of the Bankruptcy Code [ECF No. 614], *In re Alto Maipo Delaware LLC, et al,*, No. 21-11507 (Bankr. Del. 2021).

53 Declaration of Erno Hildén Pursuant to Rule 100-2 of Local Bankruptcy Rules for Southern District of New York, [ECF No. 3], *In re SAS AB*, No. 20-10935 (MEW) (Bankr. SDNY 2022).

54 Bench Decision (I) Authorizing the Debtors to Obtain Senior Secured, Superpriority, Postpetition Financing, (II) Granting Liens and Superpriority Claims, and (III) Granting Related Relief, [ECF No. 376], *In re SAS AB*, No. 20-10935 (MEW) (Bankr. SDNY 2022).

55 Bench Decision (I) Authorizing the Debtors to Obtain Senior Secured, Superpriority, Postpetition Financing, (II) Granting Liens and Superpriority Claims, and (III) Granting Related Relief, [ECF No. 376], *In re SAS AB*, No. 20-10935 (MEW) (Bankr. SDNY 2022).

56 Bench Decision (I) Authorizing the Debtors to Obtain Senior Secured, Superpriority, Postpetition Financing, (II) Granting Liens and Superpriority Claims, and (III) Granting Related Relief, [ECF No. 376], *In re SAS AB*, No. 20-10935 (MEW) (Bankr. SDNY 2022).

Code section 363 outside the context of a plan process. In response to the court's concerns, the debtors drew parallels between recent airline restructurings, noting that approval of equity conversions in the *Aeroméxico* and *Avianca* DIPs (and, in particular, that the debtors in *Aeroméxico* could not terminate the DIP-to-equity election right).[57] In its bench decision, the court noted that it thought the precedent was 'very clear that decisions about the issuance of equity in the reorganized debtors should be reserved for the plan process', but accepted, with noted discomfort, the SAS debtors' argument that the inclusion of termination rights did not actually lock in any particular rights to buy equity, and noted that the termination fees were unlikely to pose an impediment to the plan process given their relative magnitude to the equity that would eventually be raised.

The court also questioned the economics of the deal, noting the challenge of assessing the costs and benefits of the call option and tag right and the potential for abuse by 'insiders, large creditors or friendly buyers'. While the court approval noted the absence of objections in approving the DIP notwithstanding this reservation, the court expressed concern about opening the door to seeing such equity-linked features become more commonplace.

Viewed together, the decisions in the *LATAM Airlines* and *SAS* cases suggest that there may be limits to the ability of debtors and DIP lenders to negotiate equity conversion and equity-linked options in DIP facilities.

Pre-packaged bankruptcies

In the case of pre-packaged or prearranged bankruptcies, the provision and terms of DIP facilities, if any, may figure prominently in the negotiation and terms of the debtor's Chapter 11 plan. Pre-packaged bankruptcies reduce uncertainty and risk in the plan confirmation process, which in turn offers the same benefits in the negotiation of a DIP. The posture of negotiating a DIP together with the terms of a plan with a debtor's pre-petition lenders can allow for greater certainty in the source of repayment of the DIP, for example, through conversion into exit financing or equity, or the repayment of the DIP from the proceeds of the sale of certain of the debtor's assets.

Many pre-packaged bankruptcies make use of a DIP-to-exit financing model. For example, in a recent partially pre-packaged bankruptcy filing in the Southern District of Texas, Monitronics International, Inc, and affiliates sought approval of a US$398.6 million DIP facility as part of its suite of first day filings. Interestingly, as part of their interim relief, the debtors proposed to indefeasibly pay US$294 million in super senior first-out exit loans held by DIP lenders from the

57 Supplement to Motion of Debtors for Order (I) Authorizing the Debtors to Obtain Senior Secured, Superpriority, Postpetition Financing, (II) Granting Liens and Superpriority Claims, and (III) Granting Related Relief, [ECF No. 305], *In re SAS AB*, No. 20-10935 (MEW) (Bankr. SDNY 2022).

company's prior bankruptcy.[58] The Office of the United States Trustee objected to the relief at the hearing, noting payment of the exit loans should be subject to clawback, where a creditors' committee may be appointed and could bring a lien challenge; otherwise, the challenge period would be 'superfluous'.[59] During the hearing, one of the debtors' declarants agreed that ordering the interim relief would make the challenge period superfluous; however, the DIP was the 'best deal on the table'.[60] While sympathetic to the United States Trustee's position, Judge Christopher Lopez found the indefeasible payment was proper under the circumstances and the debtors needed the financing to operate.[61]

In a prearranged filing in the District of Delaware, life sciences company SiO2 Medical Products, Inc, featured a DIP facility supplied by Oaktree Capital Management LP (Oaktree), which comprised US$60 million in new money and US$60 million in roll-up.[62] To complement the DIP, the restructuring support agreement also contemplated Oaktree receiving all the reorganised equity of SiO2 for an existing US$225 million loan and the new money portion of the DIP facility.[63] The proposed DIP faced scrutiny from the creditors' committee, which argued, among other things, that the funding came at a high cost (14 per cent interest plus a 5 per cent facility fee and a 5 per cent exit fee), the milestones were unrealistic (plan confirmation in 78 days), the pre-petition market check was 'woefully inadequate' and the DIP stifled the creditors' committee's fiduciary duties.[64] Following a hearing on the motion, Judge John Dorsey approved the DIP facility on a final basis.[65]

58 Debtors' Emergency Motion for Entry of Interim and Final Orders (I) Authorizing the Debtors to Obtain Postpetition Financing, (II) Authorizing the Use of Cash Collateral, (III) Granting Liens and Superpriority Claims, (IV) Modifying the Automatic Stay, (V) Scheduling a Final Hearing, and (VI) Granting Related Relief, [ECF No. 21], *In re Monitronics International, Inc., et al.*, 23-90332 (CML) (Bankr. S.D. Tex. 2023).

59 Transcript, [ECF No. 110], *In re Monitronics International, Inc., et al.*, 23-90332 (CML) (Bankr. S.D. Tex. 2023).

60 *Id*.

61 Interim Order (I) Authorizing the Debtors to Obtain Postpetition Financing, (II) Authorizing the Use of Cash Collateral, (III) Granting Liens and Superpriority Claims, (IV) Modifying the Automatic Stay, (V) Scheduling a Final Hearing, and (VI) Granting Related Relief, [ECF No. 70], *In re Monitronics International, Inc., et al.*, 23-90332 (CML) (Bankr. S.D. Tex 2023).

62 Motion of Debtors for Entry of Interim and Final Orders (I) Authorizing the Debtors to Obtain Postpetition Financing, (II) Granting Liens Superpriority Administrative Expense Status, (III) Modifying the Automatic Stay, (IV) Scheduling a Final Hearing, and (V) Granting Related Relief, [ECF No. 14], *In re SiO2 Medical Products, Inc., et al.*, 23-10366 (JTD) (Bankr. D. Del. 2023).

63 Disclosure Statement for the Joint Chapter 11 Plan of Reorganization of SiO2 Medical Products, Inc., and its Debtor Affiliates, Ex. B, [ECF No. 19], *In re SiO2 Medical Products, Inc., et al.*, 23-10366 (JTD) (Bankr. D. Del. 2023).

64 Objection of the Official Committee of Unsecured Creditors of to the Debtors Emergency Motion for Entry of Interim and Final Orders (I) Authorizing the Debtors to Obtain Postpetition Financing, (II) Granting Liens Superpriority Administrative Expense Status, (III) Modifying the Automatic Stay, (IV) Scheduling a Final Hearing, and (V) Granting Related Relief, [ECF No. 162], *In re SiO2 Medical Products, Inc., et al.*, 23-10366 (JTD) (Bankr. D. Del. 2023).

65 Final Order Pursuant to 11 U.S.C. §§ 105, 361, 362, 363, 364 and 507 (I) Authorizing the Debtors to Obtain Postpetition Financing, (II) Granting Liens Superpriority Administrative Expense Status, (III) Authorizing the Use of Cash Collateral, (IV) Granting Adequate Protection to Prepetition Secured Parties, and (V) Granting Related Relief, [ECF No. 216], *In re SiO2 Medical Products, Inc., et al.*, 23-10366 (JTD) (Bankr. D. Del. 2023).

In other examples, the case of California Pizza Kitchen, which filed for Chapter 11 in the Southern District of Texas on 30 July 2020, featured a restructuring support agreement (RSA) that included US$46.8 million in new DIP financing and was funded through a new first lien exit facility.[66] The DIP facility consisted of a roll-up of US$60.8 million in pre-petition first lien loans in addition to the US$46.8 million in new money, totalling an aggregate amount of approximately US$107.7 million.[67] Upon emergence from Chapter 11, the entirety of the DIP facility was converted into a new first lien term loan facility, which was supplemented by a second lien term facility.[68] In *Automotores Gildemeister*, a Chilean vehicle importer and distributor that filed for Chapter 11 in April 2021 in the Southern District of New York, an ad hoc group of consenting noteholders, in connection with the negotiation of a restructuring support agreement, agreed to provide a US$23.6 million DIP.[69] The plan provided that the DIP claims were to be paid, at the reorganised debtor's election dollar for dollar with new senior secured notes or in cash.[70]

In other cases, pre-packaged bankruptcy plans negotiate a DIP to be repaid through asset sales. In *Fairway Group Holdings Corp*, the debtors, a regional grocery retailer in the New York area, filed for Chapter 11 in the Southern District of New York in January 2020 to implement a strategic asset sale of substantially all of the debtor's assets pursuant to an RSA, with an ad hoc group of stakeholders holding over 91 per cent of the approximately US$227 million outstanding obligations under a pre-petition credit agreement.[71] The ad hoc group agreed to provide a US$25 million new money DIP, in addition to a roll-up of approximately US$42.8 million of pre-petition letters of credit and term loans. Following multiple auctions and the sale of substantially all of the debtor's assets, the debtor paid down substantially all of the DIP prior to commencement of solicitation of the debtor's plan.[72] Similarly, in the *McDermott* bankruptcy, an RSA with the debtor's key secured and unsecured stakeholder groups contemplated an aggregate US$2.81 billion DIP provided by the debtor's senior secured lenders, to be substantially repaid with the proceeds of the sale of the debtor's Lummus Technology Business (pursuant to a pre-petition

66 Disclosure Statement for the First Amended Joint Chapter 11 Plan of Reorganization of California Pizza Kitchen, Inc. and Its Debtor Affiliates, [ECF 434], *In re California Pizza Kitchen, Inc., et al*, No. 20-33752 (MI) (Bankr. TXSB 2020).
67 *Id*.
68 *Id*.
69 Amended Disclosure Statement for the Joint Prepackaged Plan of Reorganization of Automotores Gildemeister SpA and its Debtor Affiliates Pursuant to Chapter 11 of the Bankruptcy Code [ECF 27], *In re Automotores Gildemeister Spa, et al*, 21-10685 (LGB) (Bankr. SDNY 2021).
70 *Id*.
71 Disclosure Statement for the Joint Chapter 11 Plan of Fairway Group Holdings Corp. and Its Affiliated Debtors [ECF 679], *In re Fairway Group Holdings Corp., et al*, No. 20-10161 (JLG) (Bankr. SDNY 2020).
72 Pursuant to a stipulation with the DIP lenders, US$3 million was held back and placed in a segregated account to reserve cash for the payment of 503(b)(9) administrative expense claims. id.

stalking horse agreement that provided for the sale of the business for at least US$2.7 billion).[73]

In such pre-packaged or prearranged bankruptcies, the promise of a roll-up of pre-petition debt also may be a critical inducement for pre-petition lenders to offer pre-filing 'bridge' financing, which is later rolled up in the DIP, to provide a company sufficient liquidity to engage in pre-filing negotiation over the terms of an RSA, when the debtor might otherwise file a free-fall bankruptcy. In *McDermott*, certain of the debtor's pre-petition lenders agreed to extend an addition US$1.7 billion super-priority senior secured financing, which permitted the company to continue to engage in discussions with its key secured and unsecured stakeholder groups regarding the terms of a potential restructuring, as well as to engage in a marketing process for the sale of its Lummus Technology Business.[74] Similarly, in *Ruby Tuesday*, the debtor's pre-petition secured lenders agreed to extend US$2 million in bridge financing, giving the company sufficient liquidity to support the company's operations until the petition date, including engaging in negotiations with said secured lenders about the terms of a restructuring support agreement.[75] The US$2 million bridge loan was included as a roll-up of term loans in the DIP.[76]

Conclusion

International debtors filing for Chapter 11 in the United States are able to take advantage of an established market for DIP financing. Chapter 11 debtors are increasingly successful in including features in DIP facilities such as roll-ups and equity conversions that were previously subject to greater levels of scrutiny and that some practitioners thought were limited to times of illiquid financial markets. The recent cases discussed in this article suggest that these features may have gained a stronger foothold in the DIP financing toolkit.

73 Disclosure Statement for the Joint Prepackaged Chapter 11 Plan of Reorganization of McDermott International, Inc. and its Debtor Affiliates [ECF 4], *In re McDermott International, Inc., et al*, No. 20-30336 (Bankr. S.D. Tex. 2020).

74 Disclosure Statement for the Joint Prepackaged Chapter 11 Plan of Reorganization of McDermott International, Inc. and its Debtor Affiliates [ECF 4], *In re McDermott International, Inc., et al*, No. 20-30336 (Bankr. S.D. Tex. 2020).

75 Declaration of Shawn Lederman, Chief Executive Officer, In Support of First Day Pleadings [ECF 3], *In re RTI Holding Company LLC*, No. 20-12456 (JTD) (Bankr. D. Del. 2020); Disclosure Statement for Debtors' Chapter 11 Plan [ECF 354], *In re RTI Holding Company LLC*, No. 20-12456 (JTD) (Bankr. D. Del. 2020).

76 Final Order (I) Authorizing Debtors to (A) Obtain Postpetition Financing Pursuant to 11 USC. sections 105, 361, 362, 364(c)(1), 364(c)(2), 364(c)(3), 364(d)(1), and 364(e) and (B) Use Cash Collateral Pursuant to 11 USC section 363 and (II) Granting Adequate Protection Pursuant to 11 USC sections 361, 362, 363, and 364 [ECF 558], *In re RTI Holding Company LLC*, No. 20-12456 (JTD) (Bankr. D. Del. 2020).

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Richard Cooper's practice focuses on domestic and international restructurings. He has advised clients involved in some of the most prominent and noteworthy restructurings in the United States and Latin America over the past two decades.

Rich is recognised as one of the leading restructuring lawyers in the United States and the 'go-to' person for cross-border restructurings. Rich was part of the Cleary team that represented the US Treasury in its financial assistance programme to US air carriers, and the Mexican government in the restructuring of the Mexico City Airport. He represented Garuda Airlines, the state-owned Indonesian airline, in its restructuring of over US$9.5 billion of debt and other obligations and has represented the governments of Puerto Rico, Mexico, Lebanon, Indonesia and Colombia in restructuring and liability management matters.

Among other recently completed matters, Rich represented LATAM Airlines as debtors, as well as advising Apollo Capital as DIP lender (and various creditors) to Grupo Aeroméxico, in their respective restructurings under Chapter 11. He also represented an ad hoc creditor committee in the out-of-court restructuring of Azul, the Brazilian airline, an ad hoc creditor committees in the Chapter 11 proceedings of Stoneway Capital and the DIP lenders and ad hoc creditor committee in Alphacredit. Rich represented Groupo Posados, one of the region's largest hotel and resort companies, in its pre-packaged Chapter 11 proceeding and is currently representing, among others, ad hoc creditor committees in the SAS Airline Chapter 11 case, and two ongoing restructurings of companies involved in the petrochemicals and cement industries.

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Lisa has served as lead counsel in some of the world's most high-profile bankruptcy matters, advising parties around the table, including corporate debtors, creditors, strategic investors, and counterparties in US Chapter 11 proceedings as well as in restructurings and risk mitigation advice. Lisa regularly advises parties in financings, sales and in-court and out-of-court restructurings, as well as multibillion-dollar litigation disputes.

Lisa's recent representations include representation of the Official Committee of Unsecured Creditors in the ViewRay bankruptcy; LATAM Airlines in its voluntary reorganisation and Chapter 11 restructuring of over US$7 billion of debt including various DIP financings and exit financing structures; FullBeauty Brands in its acquisition of Ascena's branded e-commerce business; Total SA as a major contract counterparty in the McDermott bankruptcy; and strategic lenders, creditors and acquirers in various retail cases.

Lisa has also provided strategic advice to several Fortune 100 US and multinational companies on liquidity and restructuring advice arising from the covid-19 pandemic as well as several leading financing institutions in matters relating to their resolution plans.

Lisa received a JD from New York University School of Law and a BA, *magna cum laude*, from the University of Pennsylvania.

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Richard received a JD from Northwestern Pritzker School of Law and a BA from the University of Florida. During his time at Northwestern, Richard served as senior development editor of the *Northwestern University Law Review*.

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