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Industry Chapter

1 International Insolvency Institute – An Overview
Justice Kannan Ramesh, International Insolvency Institute

Expert Analysis Chapter

4 The UK's Restructuring Plan – Ahead of the Pack or Playing Catch Up?
Simon Beale & Jat Bains, Macfarlanes LLP
Emil Kleinhaus & Kate Waldock, Wachtell, Lipton, Rosen & Katz

Q&A Chapters

9 Austria
Schindler Attorneys: Martin Abram & Florian Cvak

16 Bermuda
Kennedys: Mark Chudleigh & Nick Miles

25 Canada
Goodmans LLP: Joe Pasquariello & Andrew Harmes

34 England & Wales
Macfarlanes LLP: Jat Bains & Adam Ridley

42 France
De Pardieu Brocas Maffei A.A.R.P.I.:
Joanna Gumpelson, Philippe Dubois & Dorine Chazeau

51 Germany
Noerr Partnerschaftsgesellschaft mbB:
Dr. Thomas Hoffmann, Marlies Raschke, Sabrina Lux &
Dr. Marco Foerderer

58 Hong Kong
ONC Lawyers: Eric Woo & Cloris Lai

65 India
Solaris Legal: Debarshi Dutta, Trinath Tadakamalla &
Nikita Rathi

72 Indonesia
SANDIVA Legal Network: Allova Herling Mengko,
Dudi Pramedi & Adinda Annisa Madani

77 Ireland
McCann FitzGerald LLP: Michael Murphy &
Áine Murphy

84 Italy
CBB Law: Giovanni Bravo & Sara Piccardo

96 Japan
Anderson Mōri & Tomotsune: Daisuke Asai,
Kanako Watanabe, Mitsuo Shimada & Mai Kurano

102 Mexico
Pérez Correa González: Fernando Pérez Correa
Camarena, Zulima Myriam González García,
María Fernanda García Zamora &
Mileva Maric González González

109 Netherlands
Stibbe: Job van Hooff & Daisy Nijkamp

117 Nigeria
The Trusted Advisors: Deborah Onafadeji,
Ajibola Olaosebikan, Muhiz Adisa & Olufe Popoola

123 Singapore
Fullerton Law Chambers LLC: Tham Wei Chern,
Ling Yuanrong & Samuel Ang Rong En

130 Spain
Monereo Meyer Abogados, SLP: Michael Fries

138 Sweden
NORMA Advokater HB: Louise Lindahl &
Jonathan Ramsten

144 Switzerland
Lenz & Staehelin: Tanja Luginbühl & Anna Pellizzari

154 Turkey/Türkiye
Aksu Çalışkan Beygo Attorney Partnership:
Levent Yetkil, Fulya Sert Topçu, Merve Mert &
Serdar Şahin

163 USA
Paul, Weiss, Rifkind, Wharton & Garrison LLP:
Elizabeth R. McColm & Sean A. Mitchell

170 Zimbabwe
ChimukaMafunga Commercial Attorneys:
Norman Chimuka & Tonderai Sena

The UK's Restructuring Plan – Ahead of the Pack or Playing Catch Up?

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Introduction

Imagine, if you will, that the complex world of debt restructuring is a sporting match. Did the UK lead the rest of the world onto the field? Or did it spend most of the evening watching from the sidelines, only to join the game when it saw how much fun everyone else was having?

It depends how you look at it. For a century and a half, the UK has had a procedure resembling its present scheme of arrangement. However, the UK's Restructuring Plan (or "RP") is a youngster, at less than four years old. One aim of introducing the RP was to improve the UK's standing in the World Bank's annual "Doing Business Reports".

The RP has been well received within the UK and is being increasingly widely used. Earlier this year the English Court of Appeal gave its first judgment in relation to an RP in the Adler case and provided guidance as to how the court might deal with certain issues which frequently arise on RPs.

There is a view, however, that any new restructuring process will only meet its real test when it is compared to similar processes in other countries. For this reason, as the RP approaches its fourth birthday, we have chosen to compare the RP with the restructuring procedures available under Chapter 11 of the US Bankruptcy Code. We are conscious that Chapter 11 is still widely regarded as the gold standard against which other processes are judged.

One area where these two processes differ is the extent to which they apply an "absolute priority" rule. However, we have also looked at cost, funding and questions of international application more generally. In addition to Adler, there have been some other notable English court decisions in relation to RPs which allowed shareholders to retain equity despite compromising creditor claims and where the valuable assets of the groups in question were in other jurisdictions.

The Basics

Chapter 11

The objective of Chapter 11 is generally for the debtor to emerge as a going concern following a plan of reorganisation. Because debtors have the exclusive statutory right to propose a plan for 120 days, with an option to extend exclusivity for up to 18 months, constructing and negotiating a plan is usually the province of the debtor. After a plan has been finalised and information about the plan has been distributed, all impaired classes of claimholders (as defined in the plan) are entitled to vote on it. Acceptance by a class requires at least two-thirds in dollar amount and one-half in the number of claimants in that class. If the plan is not fully consensual, the court must determine whether to cram the plan down on dissenting classes. So long as at least one impaired class of creditors votes to accept the plan, the court may cram a plan down if it meets three main criteria, in addition to a general "good faith" requirement:

- it must deliver each claimant more than that claimant would receive under a Chapter 7 liquidation plan (the so-called "best interests" test);
- it must respect the "absolute priority" rule, discussed below; and
- it must treat similarly situated creditors in a like fashion.

Chapter 11 is a useful tool for companies with valuable operational assets to achieve balance sheet de-leveraging. For companies that are balance sheet insolvent going into Chapter 11, the class of creditors where the "value breaks" (often called the "fulcrum") usually receives some or all of the new equity in the reorganised company. Depending on the company's financial position, that new equity is sometimes shared with new investors, which are often members of the fulcrum class. Classes junior to the fulcrum can, and often do, get completely wiped out, although in practice, various provisions of the Bankruptcy Code provide junior constituencies with the power to extract some value.

Provisions of the Bankruptcy Code can also be used to achieve operational or other objectives. These include provisions relating to the acceptance and rejection of executory contracts, which allow debtors to reject unfavourable contracts, as well as provisions relating to the sale of assets, which can be accomplished free and clear of liens. Indeed, it has become fairly common for Chapter 11 debtors to sell all or material portions of their assets and to distribute cash proceeds to creditors.

RPs

The RP is a tool for achieving court-sanctioned compromises in order to eliminate, reduce, prevent or mitigate financial difficulties. The surrounding legislation is not nearly as extensive as the US Bankruptcy Code, which may be an advantage or a disadvantage, depending on what the company and its group are seeking to achieve.

The RP was deliberately designed to share many characteristics of the UK scheme of arrangement. Thus:

- it involves a meeting of each class of creditors and/or members affected by the proposed plan;
- for a class of creditors or members to approve the plan, at least 75% by value of those creditors or members must vote in favour;
- it may bind secured as well as unsecured creditors; and

- the process will involve a first court hearing to identify the classes affected and convene meetings of those classes, and then a second hearing once the classes have voted to sanction the plan.

In this way, the UK planned to benefit from the 150+ years of decisions in relation to schemes of arrangement and create a process which was relatively predictable. However, it also included various novel features. Most importantly, for the first time, the UK has a statutory restructuring process which allows for the possibility of "cross-class" cram-downs at the sanction hearing of classes of creditors or members who did not vote in favour.

Cross-class cram-down is a three-stage process:

- First, the court must be satisfied that none of the members of the dissenting class could be any worse off than they would be in the "relevant alternative". This is known as "Condition A". The relevant alternative is whatever the court considers would be the most likely outcome for the company if the RP were not sanctioned. This is somewhat similar to the Chapter 11 "best interests" test, although the "relevant alternative" is not necessarily a straight liquidation.
- Second, the court must be satisfied that the RP has been approved by the requisite majority of 75% by value by at least one class of creditors or members who would receive a payment under the plan or who would receive a payment under the RP in the event of the relevant alternative. This is known as Condition B. Again, this condition overlaps to some extent with the Chapter 11 voting requirements.
- Finally, even if both Conditions A and B apply, the court must also still exercise its general discretion to permit the cross-class cram-down and sanction the RP. Among other things, the court must be satisfied the RP is "fair".

Does an "Absolute Priority" Rule Apply?

Chapter 11

Yes, broadly speaking. Generally, priority in Chapter 11 starts with secured claims at the top, moves down to unsecured claims with statutory priority (such as certain tax claims), then to general unsecured claims and finally to equity. "Absolute priority" refers to the idea that a particular class of claims is not entitled to receive anything unless the claims in all classes senior to it have been paid in full. Its origins lie in a case called Boyd, in which the United States Supreme Court, in 1913, established the principle that equity-holders are generally not entitled to a recovery if creditors are not first paid in full.

A major exception to this rule is consent by a senior class. If a Chapter 11 plan provides for a distribution to a junior class despite failing to pay senior classes in full, the senior class can effectively waive the deviation from absolute priority with an affirmative vote. In addition, under a US Supreme Court case called LaSalle, equity holders can obtain new equity in a company through investment of "new value", provided that the sale of new equity is subject to an appropriate market test.

RPs

By contrast, there is no rigid absolute priority requirement in the UK. In appropriate circumstances, English law does not prevent an RP from compromising senior creditors while leaving junior debt in place, or from compromising junior creditors while leaving existing equity in place.

There was much early speculation as to whether an assenting class of junior creditors might "cram up" a dissenting class of senior creditors. In practice, this could only occur if the RP would leave the senior creditors in no worse position than the relevant alternative. In most cases, this will be a formal insolvency and, at least for financial debt, there will be an intercreditor agreement providing for the senior creditors to be paid in full before making payments to the junior creditors. It therefore seems unlikely that we will see an RP where a dissenting class of senior finance creditors is obliged to write down its debt, although it remains possible that senior creditors might be compelled, for example, to extend the maturity date of their debt or to relax covenants.

Things become more interesting when an RP supported by the senior creditors but opposed by a class of junior creditors not only allows for other junior creditors to be paid in full on unamended terms, but also allows the equity to "ride through". The court will need to consider the fairness of this when exercising its discretion as to whether to permit a cross-class cram-down.

In doing so, it will consider how the plan allocates the value and benefits created and preserved by the plan. These values and benefits are known as the "restructuring surplus". It will also look at horizontal fairness, i.e., the treatment of the dissenting class compared to other similarly ranked creditors and "vertical" fairness, i.e., treatment compared to the equity. It might ask whether any party is getting "too good a deal".

In 2021, in the RP of Virgin Active, for example, the court was prepared to sanction a plan which reduced the future rent payable to certain landlords to zero and left them with little compensation other than the ability to terminate their lease in exchange for 120% of their estimated return in a formal insolvency. Meanwhile shareholders were able to retain equity.

Virgin Active was a case where the landlords, whose claims were unsecured, would only have derived a return from the "prescribed part", the small proportion of recoveries from the secured assets which is ring-fenced under English law for the benefit of all unsecured creditors. They were otherwise out of the money. The court's view was that it was for the in-the-money secured finance creditors to decide the allocation of the restructuring surplus and that they were entitled to share it with the shareholders rather than unsecured landlord creditors.

However, the court considered what would have happened had the landlords also been in the money. In that case, the court indicated that it would have been influenced by the fact that the shareholders, who had already provided some new money, would provide further new money should the RP be sanctioned.

This issue re-emerged in the Adler case. The RP was of AGPS Bondco Plc, an English special purpose vehicle formed specifically to assume the liability under certain notes originally issued by a German company. The English company proposed then to amend the terms of those notes through an RP while leaving the existing shareholders with more than three-quarters of their equity. The remainder of the equity was to be allocated to the providers of new money.

The purpose was to allow the group's assets to be realised over a period of time through an orderly wind-down, which was projected to generate a better return than the relevant alternative, an immediate liquidation. Adler was an unusual RP, in that the company predicted that it could pay the noteholders in full if this wind-down went to plan. The first-instance judge sanctioned the plan notwithstanding that the shareholders had failed to contribute towards the new money, although he commented that he found this the hardest aspect to decide.

The decision to sanction the plan was successfully challenged on appeal. The Court of Appeal regarded the plan as horizontally unfair. The plan departed without good reason from the *pari passu* basis of distribution that would have applied on a liquidation. The noteholders with the longer maturity dates risked being worse off under the plan because, if the company were

forced into liquidation when the wind-down was part complete, some noteholders might already have been paid in full leaving fewer assets for those whose notes had not yet matured. The Court of Appeal noted nevertheless that the treatment of the shareholders was not in itself fatal, and indeed observed that the court would have no power to sanction an RP which confiscated shares but provided nothing in return.

The same issue emerged in another recent case, the RP of CB&I UK Ltd. This English company is part of the McDermott Group, an international group which provides services to the oil and gas sector. The RP proposed to compromise a debt owed to a Colombian company, Refineria de Cartagena S.A.S. ("Reficar"), arising from an arbitration award while leaving other unsecured creditors unaffected and while allowing existing shareholders in the group to retain equity.

The judge had originally had much sympathy for Reficar. However, during the course of proceedings it emerged that Reficar would receive nearly 11% of the ordinary shares in the group's parent through parallel Dutch WHOA proceedings. It would potentially be able to acquire nearly 20% of the ordinary shares in the parent were it to accept a settlement offer made to it. The judge therefore held that Reficar had been treated more than fairly, and sanctioned the plan.

Overall therefore, the English courts' present position might be summarised as follows:

- when an RP is opposed by a class of junior creditors but allows shareholders to retain equity, the court will look at whether those junior creditors would be in or out of the money under the relevant alternative;
- if those junior creditors are out of the money, the court may take the view that it is solely for the in-the-money senior creditors to determine how the restructuring surplus should be divided between the junior creditors and the shareholders;
- if the junior creditors are in the money, however, the company proposing the plan will need to give the court some compelling reason why the shareholders should be permitted to retain their equity. The most obvious reason would be that the shareholders are contributing new money as part of the plan on more favourable terms than could otherwise have been obtained. Failing that, the proposer may well need to demonstrate more clearly how the junior creditors are to share in the restructuring surplus, either by receiving an allocation of equity or an upside payment at some future date when the surplus is capable of being determined; and
- separately, the court will be unable to sanction a plan which deprives shareholders of their equity with no compensation, although in practice a court would likely still sanction a plan where such shareholders received a small, but not merely nominal, sum.

What is the Cost of the Procedure?

Chapter 11

Once a debtor is in Chapter 11, business decisions outside the ordinary course must receive court approval. It is typical to have court hearings on a regular basis, separate from, and in advance of, the ultimate "confirmation" hearing. Thus, although many US bankruptcy courts make serious efforts to manage costs – and a US government monitor known as the US trustee is also involved in each case to help achieve that goal – Chapter 11 can be extremely costly.

Due to the cost of the process, it is commonplace for distressed firms to accomplish most if not all of plan negotiation out of court and commence bankruptcy proceedings with a "pre-packaged" or "pre-negotiated" plan in hand so that the debtor can take advantage of the benefits provided by the Bankruptcy Code without having to bear the costs of the process for very long.

The cost of Chapter 11 stems, in part, from the need to pay professionals involved in the process. The debtor's lawyers, bankers, and other advisors are paid by the estate. In addition, the formation of an unsecured creditors' committee is generally mandatory under Chapter 11, and the lawyers and advisors for that committee are also paid out of the estate. In many cases, professionals for secured lenders are also paid by the estate to provide "adequate protection" of the lenders' security position.

Another cost consideration is that firms that undergo lengthy Chapter 11 cases may be bound up in significant litigation. While Chapter 11 can be a tool for efficiently resolving litigation in a single forum, when litigation costs are borne by the estate and not necessarily internalised by all litigating parties, the costs can be significant and resolutions can be delayed.

RPs

It is possible for a company to complete many UK restructuring or insolvency processes without encountering a judge at all. Most UK administrations and liquidations proceed without any court hearings. Similarly, a court hearing will only be required for a company voluntary arrangement if a creditor decides formally to challenge it.

When plans for the RP process were first mooted, UK restructuring professionals were concerned that the need to prepare for at least two court hearings would make it costly compared to the tools already available. Costs would increase further should the RP be contested. They worried that this might result in RPs remaining a little-used, and selected only for the largest debt restructurings where fees, while large, would be dwarfed by the value of the debt involved.

It is true that fees have limited use of RPs among small to medium-size enterprises. In addition to lawyers, valuers need to provide evidence to support the relevant alternative. Valuation fees have often exceeded legal fees.

However, the English courts have sought to avoid parties proposing RPs, or stakeholders challenging those proposals, where the resulting process would lead to major cost outlays. As well as wishing to limit costs, the courts wish to avoid contested sanction hearings routinely taking up several days of court time. The Court of Appeal in Adler indicated that, going forwards, the court would expect the parties and their advisers to cooperate to focus and narrow the issues which the court would need to decide in order to ensure that sanction hearings were manageable. If the parties fail to do so, the court might give directions of its own limiting the issues to those it considers most relevant. This may in turn assist in managing fees.

Is Debtor in Possession Funding an Option?

Chapter 11

Debtor in possession funding is the norm in large Chapter 11 cases. Although the Bankruptcy Code contemplates different forms of funding, the practical reality is that, in many cases, firms enter Chapter 11 with few unencumbered assets. As a result, debtor in possession financing is rarely available on an unsecured basis. The Bankruptcy Code gives the court the power to order "priming" liens where the debtor cannot obtain

unsecured financing, as long as the secured creditors being primed received "adequate protection" against the risk of their collateral position being diminished, which can take the form of liens on unencumbered assets, junior liens on other assets, and payment of interest, fees and expenses. Given the need for such adequate protection, and for other reasons, debtor-in-possession funding is often provided by the existing secured lenders themselves, who can consent to priming. As a result of this dynamic, existing secured lenders often have a powerful bargaining chip and, from the outset, have a central role in the process on account of their post-bankruptcy financing.

RPs

The UK considered whether to create greater opportunities for companies to obtain additional funding while undergoing restructuring processes but chose not to do so. As such, a company requiring new money in conjunction with an RP will likely need to rely upon its existing stakeholders to provide this. If this new money is to be introduced on a super-priority basis, the company will also need to obtain any necessary consents to this. Despite the dynamics of the US process often having led to existing secured lenders providing debtor in possession funding, there is still a significant difference between UK and US practice.

To What Extent is it Applicable Internationally?

Chapter 11

The broad reach of the automatic stay, the many precedents for successful cases, and the relatively debtor-friendly orientation of the US Bankruptcy Code make Chapter 11 an attractive option for distressed firms across the globe. In addition, the Bankruptcy Code is fairly permissive with respect to eligibility for a US filing – in general, having property in a US jurisdiction can suffice as a jurisdictional nexus. In part because many debt agreements are governed by New York law, the Southern District of New York is a popular venue for international debtors. Although judicial comity and foreign recognition are sometimes a concern, the principles put forth by international bodies such as UNCITRAL have helped facilitate successful cross-border Chapter 11 cases. Where necessary, debtors have also filed companion cases in local jurisdictions to help implement Chapter 11 resolutions. Chapter 11 thus continues to be a widely used tool by businesses in many jurisdictions.

RP

There are two main issues. The first is whether the English courts will recognise themselves as having jurisdiction. In this regard, a company is eligible if it is liable to be wound up under UK insolvency legislation. On this basis, the English courts have in practice been prepared to find that they have jurisdiction where the company has a "sufficient connection" with the UK.

This has enabled the English courts to sanction schemes of arrangement, and latterly RPs, of overseas companies even where they have no assets in the UK. A company may still have a sufficient connection if its debt is governed by English law. However, RPs have also been used to restructure debt governed by the laws of other jurisdictions. In Adler, this was achieved by substituting an English company as issuer. In the case of Smile Telecoms Holdings Limited, a Mauritian company moved its centre of main interests (or "COMI") to England. A Luxembourg company, Project Lietzenburger Straße Holdco S.à.r.l., which is part of the German Aggregate group, has recently accomplished a similar COMI shift, despite the validity of that shift being contested by creditors.

The second question is whether the RP will be recognised in the company's own jurisdiction, and in any other relevant jurisdictions. The English court will need to rely upon expert evidence from lawyers with expertise of the relevant jurisdictions in order to determine this. However, in some cases the company may apply to the courts of another jurisdiction for recognition, for example, to the US court under Chapter 15 of the Bankruptcy Code.

Concluding Thoughts

Chapter 11 remains the big-name player who others seek to emulate.

However, the introduction in the UK of a flexible procedure which enables dissenting classes to be crammed down in appropriate cases, has certainly helped the UK keep pace. The lack of an absolute priority rule may make the UK process an attractive option for restructuring debts of groups that otherwise have little connection with the UK, provided there is sufficient connection to establish jurisdiction. Although some professionals believed that Brexit might harm the UK's attractiveness as an international restructuring jurisdiction, it appears now as if their concerns were largely unfounded. Similarly the lack of a statutory mechanism for obtaining debtor in possession funding may not be a disadvantage, at least in some situations, as it has ensured that RPs often need to proceed fairly rapidly.

There will still be things Chapter 11 can achieve that RPs cannot. Nevertheless, the RP has emerged as a valuable addition to the roster, and may be exactly the right choice to bring onto the field for the game-winning drive.

Simon Beale acts for troubled companies and their directors and shareholders, for individuals in financial difficulty, and for the major financial creditors of such entities or individuals. His clients also include distressed debt investors, insolvency officeholders and a variety of other parties with an interest, or potential interest, in a troubled company's business. Simon was the author of the *Insolvency and Restructuring Manual*, which was first published shortly after the 2008 financial crisis. A fourth edition of that work was recently published by Bloomsbury Professional Ltd. Simon is also the co-author of Bloomsbury's *Guide to the Corporate Insolvency and Governance Act 2020*, the latest major piece of UK insolvency legislation.

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