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By Adam Gallagher[1]

The U.K. Restructuring Plan: Striking a Balance in Cross-Border Restructurings

Coordinating Editor
Adam Gallagher
Simpson Thacher & Bartlett LLP
London

Adam Gallagher is a partner and head of Simpson Thacher & Bartlett LLP's London-based Restructuring Team. With more than two decades of experience and a leading restructuring advisor in the U.K., he advises on complex, cross-border restructurings, distressed refinancings and intercreditor-agreement disputes.

Four years have passed since the introduction of the U.K. restructuring plan, often heralded as one of the most significant changes to the country's restructuring landscape in a generation. Since its inception, commentators have compared the restructuring plan to U.S. chapter 11.

There are a number of similarities. Notably, and by contrast to a scheme of arrangement, the court has the ability to sanction a restructuring plan opposed by dissenting classes of creditors and shareholders (called a "cramdown"). There are also differences. For example, the restructuring plan contains no absolute-priority rule in a cramdown plan, and the legislation does not provide a framework for debtor-in-possession (DIP) or priority new money financing.[2]

This article reflects on notable features coming out of restructuring plans to date, in particular how overseas debtors have come to use the plan and its flexibility as a restructuring solution. There is also commentary on some of the potential vulnerabilities and areas of challenge, illustrating that debtors need to strike a balance in their restructuring proposals to ensure a successful outcome.

How Have Overseas Debtors Come to Use the Restructuring Plan?

The U.K. has long been a default choice of forum for debtors outside of the U.K.[3] seeking to implement a restructuring solution. The scheme of arrangement, available as a pre-insolvency tool for more than 100 years, became (and remains) a renowned tool for restructuring large capital structures. The restructuring plan built on that precedent and, by introducing a cramdown mechanism, supercharged the scheme.

By contrast, while many European jurisdictions have recently introduced their own cramdown procedures,[4] there is not a comparable level of precedent for utilizing those tools in cross-border restructurings. Consequently, the U.K. remains an attractive forum for overseas debtors. Time will tell whether that position will come under increased pressure from Europe, noting that the Dutch *Wet Homologatie Onderhands Akkoord* (WHOA), in particular, is starting to offer some competition.

Recent examples of overseas debtors utilizing the restructuring plan include U.S.-headquartered McDermott International and German real estate groups Adler and Aggregate. When presented with an overseas debtor's restructuring plan, the court will consider its jurisdiction to sanction that plan. This is a question of whether there is a "sufficient connection" between the overseas debtor and England and Wales.

Well-trodden paths used by overseas debtors to establish a sufficient connection include the debtor having (1) substantial assets, and an establishment or place of business in England and Wales; (2) English law-governed liabilities and choice-of-jurisdiction clauses in favor of the English courts; and/or (3) its center of main

1 With thanks to Shayan Farooqi, Siân Perez and Jon Webb for their contributions to this article.

2 For a discussion of the restructuring plan and certain notable similarities and differences to a chapter 11 plan under the U.S. Bankruptcy Code, *see* Adam Gallagher, Toby Smyth & Madlyn Gleich Primoff, "Is the New U.K. Restructuring Plan a Viable Alternative to Chapter 11?," XXXIX *ABI Journal* 9, 24-25, 68-69, September 2020, *available at* abi.org/abi-journal.

3 Referred to throughout as "overseas debtors."

4 Introduced in recent years in accordance with Directive (EU) 2019/1023 of the European Parliament and of the Council of June 20, 2019, on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt.

interests (COMI) in England and Wales. Overseas debtors have also pursued creative routes to establish jurisdiction.

Governing Law and Jurisdiction

Precedent shows that an overseas debtor will have a sufficient connection to England and Wales on the basis that the liabilities to be compromised under the restructuring plan are governed by English law (often supported by a choice-of-jurisdiction clause in favor of the English courts). In the recent Hong Kong Airlines restructuring plan,[5] not *all* of the debt affected by the plan needed to be governed by English law for the debtor to have a sufficient connection. In this case, the court found that 42 percent of the debt by value being governed by English law created a sufficient connection (when other factors were taken into account). This case indicates the jurisdictional flexibility of the English courts where only part of an overseas debtor's liabilities are governed by English law.

Where English law is not the sole governing law of the rights compromised under the plan, the parties will need to consider the effectiveness of an English law compromise outside of the jurisdiction. This is discussed later in this article.

Shifting COMI

The debtor's COMI is the place where it regularly conducts its business and that is ascertainable to third parties. An overseas debtor does not need to have its COMI in England and Wales to avail itself of the restructuring plan. However, a debtor may shift its COMI to England and Wales to create a sufficient connection. Recently, a Luxembourg-incorporated debtor successfully moved its COMI to England and proposed a restructuring plan.[6] The court adopted a flexible stance toward "forum-shopping" in finding that this COMI shift created a sufficient connection, notwithstanding that the shift was made for the purposes of proposing a restructuring plan.

Creative Routes

Debtors have established a sufficient connection through more creative routes. One route is to have an English-incorporated subsidiary become an obligor under the terms of the finance contracts. Another approach sees an English subsidiary unilaterally assume, directly or indirectly, the liabilities of the overseas debtor outside the terms of the finance contracts (without creditor consent or involvement).

However, these routes have not been without scrutiny. The Adler restructuring plan saw a compromise of German law-governed debt owed by a Luxembourg-incorporated issuer.[7] A sufficient connection to England and Wales was established by an English-incorporated entity replacing the Luxembourg issuer as primary obligor using an issuer-substitution provision in the underlying finance contracts.

The Court of Appeal commented that while this technique was not opposed before that court, the fact that the court's judgment did not deal with the point "should not be taken as an endorsement of the technique for future cases."[8] In Gategroup's restructuring plan,[9] the plan debtor was a newly incorporated English subsidiary that had unilaterally assumed liability for the group's financial debt. A dissenting creditor attempted to disclaim that unilateral assumption in an attempt to undermine the proposed restructuring. The dissenting creditor later withdrew this assertion, so the complex legal question of the impact of the disclaimer on the restructuring plan remains unresolved. It remains to be seen whether a dissenting stakeholder could successfully challenge similar steps taken by overseas debtors to establish jurisdiction.

Testing the Flexibility of the Process

Parallel Proceedings

The English law rule in *Gibbs*[10] (often briefly cited as the rule that a contractual right may only be compromised or discharged under the governing law of the contract[11]), the prevalence of English law-governed debt in international financial markets, and the flexibility of the U.K. restructuring toolkit has meant that debtors continue to turn to the English courts to implement restructurings of their English law-governed debt. Where the debtor is incorporated or has material assets in, and/or has debt governed by the laws of, another jurisdiction, the debtor and its stakeholders will be concerned that the restructuring has effect in those other jurisdictions.

The English courts also consider this question to avoid sanctioning a restructuring plan that is unlikely to be effective in those other jurisdictions. Unsurprisingly, this has seen a number of overseas debtors proposing a restructuring plan in parallel with overseas proceedings. For example, Hong Kong Airlines (Hong Kong scheme of arrangement), McDermott International (Dutch WHOA),[12] Cimolai (Italian *concordato preventivo*)[13] and China Fishery Group (U.S. chapter 11)[14] each used restructuring proceedings outside of the U.K. alongside a restructuring plan.

While the English courts are accommodating of parallel processes, they require careful planning. The commercial outcomes proposed under the restructuring plan will need to align with the requirements and criteria of the overseas process, with differences potentially resulting in leverage for dissentient stakeholders. For example, certain jurisdictions may require that the claims of particular types of creditors be given a particular ranking, or prescribe certain conditions with respect to valuation. Other jurisdictions may even lack comparable processes to impose a compromise on a class of creditors and will therefore need to be deftly navigated to give the proposed restructuring full effect.

Absolute Priority and Allocation of the Restructuring Surplus

One of the defining features of the cramdown power in a restructuring plan, unlike in chapter 11, is the absence of an absolute-priority rule. Put briefly, absolute priority in chapter 11 requires (among other things) that unsecured creditor claims are paid in full before a more junior class of claims or interests receives any property (recovery) under the plan.

The restructuring plan's approach allows for restructuring solutions where the economic interests of different stakehold-

5 *Hong Kong Airlines Ltd., Re* [2022] EWHC 2975 (Ch), [2022] EWHC 3210 (Ch).
6 *Project Lietzenburger Straße Holdco S.À.R.L., Re* [2024] EWHC 468 (Ch), [2024] EWHC 563 (Ch).
7 *AGPS Bondco PLC, Re* [2023] EWHC 916 (Ch), [2024] EWCA Civ 24.
8 *AGPS Bondco PLC, Re* [2024] EWCA Civ 24 at [34].
9 *Gategroup Guarantee Ltd., Re* [2021] EWHC 304 (Ch), [2021] EWHC 775 (Ch).
10 *Antony Gibbs & Sons v. La Société Industrielle Et Commerciale Des Métaux*, [1890] 25 QBD 399.
11 *See, e.g., Dicey, Morris & Collins on the Conflict of Laws* (16th ed. 2022) at [31-106].
12 *CB&I UK Ltd., Re* [2023] EWHC 2497 (Ch), [2024] EWHC 398 (Ch).
13 *Cimolai SpA & Anor, Re* [2023] EWHC 1819 (Ch), [2023] EWHC 2193 (Ch).
14 *CFG Invs. SAC, Re* [2021] EWHC 2780 (Ch), [2022] EWHC 2520 (Ch).

er classes can be rebalanced in line with the desired commercial outcome. A critical aspect is the allocation of the "restructuring surplus" (being the value upside generated by the restructuring). The courts have determined that those creditors who are in the money should control how this surplus is allocated (subject to certain guardrails). The court will examine whether the proposed allocation is fair and justifiable.

The allocation of the restructuring surplus has come to the fore in recent restructuring plans where shareholders retained their equity while junior creditors' claims were compromised. For example, the court sanctioned the *Virgin Active* plan[15] in the face of dissenting compromised unsecured creditors. In doing so, the court made clear that there would need to be commercially justifiable reasons for keeping shareholders materially unimpaired while more senior ranking stakeholders are impaired.

New Money

A criticism of the restructuring plan is that there is no statutory provision for DIP or priority new-money financing. However, that has not been a roadblock to the injection of priority new money under the terms of the plan.

A tool that has been used by plan debtors to incentivize lender participation in the provision of priority new money is "elevation." Basically, lenders that participate in the new money also benefit from a roll-up of part of their existing claims. Elevation clearly benefits the debtor, as it drives participation in the priority new money (and possibly achieves better economic terms on that new money than would be available without elevation). Participating lenders also benefit by improving estimated recoveries on their rolled-up existing claims.

However, elevation sees nonparticipating creditors (whose claims prior to the restructuring may have ranked alongside the claims of participating lenders) sitting behind both the new money and the rolled-up claims of participating lenders. Put another way, the upside allocated to the elevated claims may in turn reduce the estimated recoveries of nonparticipating lenders. The consequences of elevation have not been subject to adverse argument in plans to date.[16] As such, plan debtors that utilize elevation to incentivize participation in new-money funding may need to exercise caution when constructing the terms and pricing of the new money and associated elevation.

Testing the Boundaries and Striking a Balance

As debtors and their supportive stakeholders continue to test the boundaries of the legislative framework, they will need to be aware of potential points of scrutiny and vulnerability.

Scrutiny of the Relevant Alternative

Before sanctioning a cramdown plan, the court will need to be satisfied that dissenting creditors will be no worse off under the plan than they would be in the most likely alternative to the plan (the "relevant alternative"). It is common for plan debtors to present a formal insolvency proceeding or an accelerated sale process as the relevant alternative — with worse outcomes for all stakeholders. Although it might be in the debtor's interests to portray the worst-possible scenario as the relevant alternative, that scenario will need to be supported by robust evidence. The court may decline to sanction where it considers that the proposed relevant alternative is not credible.[17]

A creditor that wishes to oppose a restructuring plan by disputing the plan debtor's relevant alternative may struggle to gather sufficient information to put forward a credible case. While dissenting stakeholders were successful in disputing the plan debtor's relevant alternative in the Hurricane Energy restructuring plan, a dissenting creditor's assertion that the alternative to the McDermott International restructuring plan was a different restructuring proposal was rejected by the court.

Fairness to All Affected Stakeholders

Disputes might concern the fairness of the proposed restructuring plan and its proposed treatment of all affected stakeholders, particularly where the cramdown power is being invoked. As part of this assessment, the court will consider the treatment of stakeholders both as against their outcomes in the relevant alternative to the plan (the "vertical" comparator, as previously discussed), as well as the allocation of value under the plan as between affected stakeholders (the "horizontal" comparator). The Adler restructuring plan was set aside on appeal, with the court finding that the differential treatment of equally ranking creditors under the plan was "without justification."[18] The Court of Appeal's judgment has sharpened the teeth of the fairness test for future plans.

Conclusion

The restructuring plan is designed to be a flexible tool for complex cross-border restructurings, striking a balance between the carrot of building stakeholder support for a solution and the stick of cramdown. Use of the plan to date — in cases where the court has sanctioned, or refused or overturned sanction of the plan — provides useful precedent going forward.

Looking to the future, debtors, their stakeholders and their advisers will need to balance the desire to push the boundaries of what the restructuring plan, and the power of cramdown, can be used to achieve against the risk of challenge and heightened court scrutiny of more aggressive strategies (and the timing implications that follow). Striking this balance will be crucial in ensuring that the restructuring plan remains a viable and effective tool in the complex landscape of global corporate restructuring. abi

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15 *Virgin Active Holdings Ltd., Virgin Active Ltd. and Virgin Active Health Clubs Ltd., Re* [2021] EWHC 814 (Ch), [2021] EWHC 1246 (Ch).
16 *AGPS Bondco plc, Re* [2024] EWCA Civ 24 at [169].
17 *See, e.g., Hurricane Energy Plc, Re* [2021] EWHC 1418 (Ch), [2021] EWHC 1759 (Ch).
18 *AGPS Bondco plc, Re* [2024] EWCA Civ 24 at [280].