



You, Restructuring & Ince

The international application of the updated UK
restructuring toolkit

Alex Rogan
Partner, Restructuring & Insolvency



The international application of the updated UK restructuring toolkit

The Covid-19 pandemic has brought considerable financial challenges to companies across a broad range of industry sectors. Distressed companies will need to consider their restructuring options early in order to maximise value for their stakeholders and avoid the spectre of insolvency. The UK has a very effective restructuring toolkit which can assist both foreign, as well as, UK companies. In particular, the recent addition of a supercharged Scheme of Arrangement process, the so-called new restructuring plan introduced under the Corporate Insolvency and Governance Act 2020, is expected to be a game changer. This will sit alongside the English Scheme of Arrangement and the US Chapter 11 as one of the international restructuring tools of choice.

There are a variety of reasons for the success of the Scheme as the go-to restructuring tool for foreign as well as UK companies. Its key attributes are that it is readily available to foreign companies and it is a flexible restructuring tool capable of delivering tailored, expeditious and cost-effective restructuring solutions with minimal execution risk. The new restructuring plan largely mirrors the much-vaunted English Scheme. However, the restructuring plan also includes a cross-class cram-down mechanic which will make it an even more effective restructuring tool in many circumstances than the Scheme.

Key considerations for a cross-border restructuring strategy

There are a complex range of factors which need to be considered by any debtor when determining which restructuring tools will be most effective at maximising value for its stakeholders. These factors will depend on the nature of the restructuring that is required; whether that be an incisive balance sheet restructuring to access liquidity to a fully-fledged financial and operational restructuring.

The starting point is to consider the local restructuring tools that are available in the home jurisdiction of the distressed debtor. To the extent that these tools are not capable of delivering an effective restructuring which maximises value then it may be appropriate to consider what the UK restructuring toolkit has to offer. Depending on the nature of the restructuring, the relevant factors to consider when determining which international restructuring tools are best fit for purpose include:

- The location of the key stakeholders and the jurisdictions in which the debtor's assets are situated;
- The nature of the required restructuring tools, this will include an analysis of:
 - The threshold of support that is required from different creditor and shareholder groups to impose the plan on dissenting stakeholders;
 - The ability to impose the plan on secured creditors and shareholders;
 - Any restrictions on the type of compromise that can be proposed under the restructuring plan;
 - The availability of a moratorium to provide breathing space from hostile stakeholder action to allow for the implementation of the restructuring;
 - The availability of so-called ipso facto clause protection against the termination of contracts as a result of the restructuring;
- The jurisdictional gateway to provide access to the relevant restructuring tool;
- The recognition of the restructuring in the relevant jurisdictions, such as where the debtor company is incorporated or holds assets;
- The level of execution risk associated with the restructuring tool; and
- The ability to deliver an expeditious and cost-effective restructuring solution.

In circumstances where a foreign company has English law governed debt, the Scheme or the restructuring plan will often be the only viable option, as the English Courts will only recognise the discharge of English law governed debt through a foreign restructuring process in very limited circumstances.



¹ Please see our previous articles on schemes of arrangement in the cases of Syncreon (<https://www.incegd.com/en/news-insights/restructuring-new-uk-restructuring-tool-set-jack-floundering-offshore-sector>) and Premier Oil (<https://www.incegd.com/en/news-insights/scottish-court-sanctions-premier-oil-scheme-arrangement-confirming-flexibility-scheme>).



Overview of the restructuring plan

The restructuring plan is designed to be an extremely flexible tool which, like the Scheme, is readily available for foreign companies. The plan can implement a comprehensive range of restructuring solutions; including extending maturity dates on secured and unsecured financing, debt for equity swaps, and the amendment of above-market contracts to reflect prevailing market rates. The only restriction is that the proposed plan must address a company's actual or likely financial difficulties and include an element of consideration for the variation of stakeholders' rights.

The restructuring plan provides for a mechanism to impose a restructuring solution on all creditors and shareholders where a restructuring proposal has the support of the requisite majority of those stakeholders. Stakeholders whose legal rights are sufficiently similar to allow them to vote together with a view to their common interest are grouped together into classes for voting purposes.

The process involves three core stages:

- A convening hearing at which jurisdiction and class composition are considered, and the court orders the convening of meetings for each stakeholder class affected by the restructuring plan to vote on it;
- Classes of stakeholders meet to vote on the restructuring plan; and
- A sanction hearing at which the court considers issues of fairness and whether the statutory requirements have been fulfilled, before determining whether to exercise its discretion to sanction the restructuring plan.

Establishing jurisdiction for foreign companies to access the restructuring plan

Foreign companies can apply to the English courts to restructure pursuant to the restructuring plan process, as long as they have a sufficient connection to the jurisdiction of England and Wales. This is a very low threshold test and can be readily satisfied by non-UK companies in a variety of ways. Common grounds to satisfy this test include; shifting the debtor's centre of main interest to England ahead of launching the restructuring plan process, or incorporating an English company within the group, which then accedes to the relevant financing arrangements, that are the subject of the restructuring, as a co-obligor. A sufficient connection can also be established on the basis that the obligations

which are being restructured are subject to English law; this ground can even be satisfied where foreign law obligations have been amended to English law obligations ahead of the restructuring.

Recognition of the restructuring plan for foreign companies

Provided it is possible to establish the jurisdiction, the key question for a foreign company seeking access to the restructuring plan is whether the restructuring will be recognised in the relevant jurisdictions where it could be potentially challenged, such as where the debtor or its assets are situated. This involves an analysis of the available mechanisms for recognition in the relevant jurisdictions. This analysis will, in turn, often depend on the manner in which a sufficient connection was established to implement the restructuring.

As a starting point, it is generally the case that where a sufficient connection is established on the basis of English governing law, recognition will follow on the basis of the private international law principle that an amendment or discharge implemented pursuant to the law governing the obligation will be valid and recognised. Another common route to recognition is under the UNCITRAL Model Law on Cross-Border Insolvency (1997), which has been implemented in a number of key jurisdictions including the US. This provides a route to recognition of a restructuring that has been implemented in a jurisdiction where the debtor has either its centre of main interest or an establishment. However, there are a variety of further means to achieve recognition depending on the relevant jurisdictions in which it is required, and the nature of the sufficient connection to establish jurisdiction in the first place.





Cross-class cram-down and out of the money stakeholders

In contrast to the Scheme, the restructuring plan provides for a cross-class cram-down and cram-up mechanic. This means that, subject to certain criteria set out below being met, a restructuring plan approved by the requisite majority (75% in value of those present and voting) of any class of stakeholders can, with the sanction of the court, be imposed on any dissenting class of stakeholders. This is a major game-changing development from the Scheme, which requires 75% in value and a majority in number of stakeholders present and voting in each class (not just one) to approve the restructuring proposal, in order for the court to be able to make it binding on all stakeholders. Therefore, under the restructuring plan, it will become quicker and cheaper to implement a restructuring, as it will be substantially more difficult for a class of stakeholders to hold up the restructuring process where their approval is not a pre-requisite for the plan to be sanctioned.

Further, if a class of stakeholders does not have any genuine economic interest in the case of the relevant alternative to the restructuring plan, their interests can be disregarded and they can be bound to the plan - even though they have not voted on it. For example, if the relevant alternative is insolvent liquidation and there is not enough value in the business for company shareholders or junior lenders to recover any value, then they would not be required to even vote on the plan.

Dissenting stakeholder protections

A plan that has been approved by the requisite majority of stakeholders must then be sanctioned by the court. At this stage, the court will consider whether the plan is fair and the statutory requirements have been complied with. The court may also only sanction a restructuring plan which involves a cross-class cram-down or cram-up if:

- The plan does not leave any of the dissenting classes worse off than they would be in the most likely alternative scenario if the plan were not to be sanctioned (this alternative will likely be the anticipated recoveries from an insolvent liquidation or a distressed sale); and
- At least 75% by value of one class of stakeholders with a genuine economic interest in the company or that would receive a payment, in the event of that relevant alternative, have approved the restructuring plan.

Conclusion

The restructuring plan is a flexible restructuring tool, designed to provide for innovative and commercial restructuring solutions which can be implemented expeditiously and maximise value for stakeholders. It will be important for financially distressed companies considering their restructuring options to consider the restructuring plan as, in many circumstances, it will likely be cheaper and quicker to implement than other international restructuring tools. The restructuring plan is expected to provide for greater flexibility in crafting appropriate restructuring solutions than the US Chapter 11 restructuring procedure as it does not require support from an impaired stakeholder class or for a more senior class of impaired creditors to be satisfied in full before a more junior class can derive a benefit from the plan – the so-called US “Absolute Priority Rule”.

Following the global financial crisis in 2008, the Scheme became the go-to restructuring tool of choice, alongside the US Chapter 11 restructuring procedure, for foreign companies to maximise value through a restructuring process. Although new to the restructuring toolkit the restructuring plan has already proved its worth on two high profile domestic restructurings, Virgin Atlantic and Pizza Express. It is expected that in 2021, the restructuring plan will pick up from where the Scheme left off and step into the breach to rescue and restructure foreign, as well as UK companies impacted by the pandemic. Companies that are facing actual or likely financial stress should start to consider their restructuring options early in order to preserve optionality and maximise value. Understanding the available restructuring tools is a key step in this process.

Key contact



Alex Rogan
Partner, London
Corporate, Insolvency and Corporate Recovery

D +44 (0) 20 7551 8640
M +44 (0) 7515 196 718
alexrogan@incegd.com

Alex regularly advises on high-profile complex cross-border restructurings and insolvencies. His clients, many of whom are based overseas, operate in a wide range of industry sectors, including energy, shipping and financial services. Alex advises distressed debtors, their boards, management, owners, creditors, lenders, investors and insolvency practitioners to deliver innovative and cost-effective solutions to maximise value for stakeholders in distressed scenarios.

Disclaimer Notice:

The contents of this document and any attachments are strictly confidential to the intended recipient(s) and may be privileged. If you are not the intended recipient(s) please do not use or publish its contents and notify us as soon as possible. If received by email, please also delete the message from your system and destroy any copies.

Office Information:

Ince Gordon Dadds LLP and its affiliated entities practise law internationally as 'Ince' (the "affiliates"). References in this brochure and elsewhere to Ince means Ince Gordon Dadds LLP, its subsidiaries, the Affiliates, and the other partnerships and other entities or practices authorised to use the name 'Ince' or describe themselves as being in association with Ince as the context may require.

United Kingdom, Beijing and Shanghai

Ince is a trading name of Ince Gordon Dadds LLP. Ince Gordon Dadds LLP is a limited liability partnership registered in England & Wales (registered number: OC383616) authorised and regulated by the Solicitors Regulation Authority (SRA number: 596729). A list of members of the LLP, and of those non-members designated as partners, is displayed at our registered office: Aldgate Tower, 2 Lemman Street, London, E1 8QN. The term 'partner' used in relation to the LLP, refers to a member of the LLP or an employee or consultant of the LLP or any affiliated firm of equivalent standing. Ince Gordon Dadds LLP is a subsidiary of The Ince Group plc.

Germany

Ince & Co Germany LLP is a limited liability partnership registered in England and Wales (with registered number OC362945). It operates an office in Hamburg. Our registered office is at Aldgate Tower, 2 Lemman Street, London E1 8QN, UK. A full list of members is available for inspection at its registered office in London.

Piraeus

Ince is a trading name of Herring Parry Khan Law Office. Regulated by the Piraeus Bar.

Limassol

G. Zambartas LLC is a member of the Ince International network of law, consultancy and advisory firms. It is licensed to use the trade mark 'Ince' by Ince Gordon Dadds International LLP. G. Zambartas LLC is a Cyprus private company limited by shares with company number H.E. 412500, and is registered as a lawyers' limited company with the Cyprus Bar Association under registration number 854.

Gibraltar

Ince is a trading name of Rampart Corporate Advisors Limited. Company registration No. 107531. Registered Office: 6.20 World Trade Center, 6, Bayside Road, Gibraltar GX11 1AA / PO Box 1324 / T +350 20068450 / F +350 20068453. Rampart Corporate Advisors is a subsidiary of The Ince Group plc.

Dubai

Ince is a trading name of Ince & Co Middle East LLP, a limited liability partnership registered in England and Wales (with registered number OC361857) authorised and regulated by the Solicitors Regulation Authority (SRA number: 563759). A list of members is available for inspection at the above address and at our registered office, Aldgate Tower, 2 Lemman Street, London E1 8QN, UK. The term 'partner' used in relation to the LLP, refers to a member of the LLP or an employee or consultant of the LLP or any affiliated firm of equivalent standing.

Hong Kong

Ince is a trading name of Ince & Co, a firm of solicitors regulated by the Law Society of Hong Kong.

Singapore

Incisive Law LLC is a member of the Ince Group and is a limited liability company incorporated in Singapore with Unique Entity Number 201015337C. Incisive Law LLC is regulated by the Legal Services Regulatory Authority (under the auspices of the Ministry of Law) pursuant to the terms of the Legal Profession (Law Practice Entities) Rules 2015, made under the Legal Profession Act (Cap.161).

24 Hour International Emergency Response Tel: + 44 (0)20 7283 6999

LEGAL ADVICE TO BUSINESSES GLOBALLY FOR 150 YEARS.

©Ince