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*Let's Make a Deal –  
 Pandemic Style  
 2020 in Review*

# INTERNATIONAL RESTRUCTURING TOOLS: NAVIGATING RESTRUCTURING WITH THE NEW UK RESTRUCTURING PLAN

By Alex Rogan, Ince

**T**he Covid-19 pandemic has brought considerable financial challenges to companies across a broad range of industry sectors including the maritime sector and, in particular, the cruise, ferry and offshore sectors. Distressed companies will need to consider their restructuring options early in order to maximize value for their stakeholders and avoid the spectre of insolvency. The UK has a very effective restructuring toolkit that can assist both non-UK as well as UK companies. In particular, the recent addition of a super-charged 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 that 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 non-UK, 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. In circumstances where a non-UK 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. 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.

## OVERVIEW OF THE RESTRUCTURING PLAN

The Restructuring Plan is designed to be an extremely flexible tool which, like the Scheme, is readily available for non-UK companies. The Restructuring Plan can implement a comprehensive range of restructuring solutions including extending maturity dates on secured as well as 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 interests are grouped together into classes for voting purposes. The process involves three core stages:

1. 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;
2. classes of stakeholders meet to vote on the restructuring plan; and
3. 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 as a co-obligor to the relevant financing arrangements that are the subject of the restructuring. 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 jurisdiction, the key ques-

tion 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, where a sufficient connection is established on the basis of English governing law, recognition will follow under 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 for 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 estab-



lish 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. Under the Restructuring Plan it will, therefore, 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

- 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 stake-

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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

holders. 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 such as the US Chapter 11. The Restructuring Plan is also able 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 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 international 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 step into the breach to play a key role in rescuing and restructuring companies impacted by the economic fallout from 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.



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<sup>1</sup> Please see our previous articles on schemes of arrangement in the [October 2019] edition of *Marine Money* – [Click here](#)