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SPECIAL ISSUE PREVENTIVE RESTRUCTURING 2. The UK Preventive Restructuring Framework after Brexit: Acknowledging EU's Supremacy?

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This article assesses the degree of cross-fertilisation between the English and European preventive restructuring frameworks, by looking at the innovations introduced in the respective restructuring frameworks since the enactment of the preventive restructuring directive ('PRD 2019'). The purposes of the article are to highlight the peculiarities of the English approach; discuss their significance for facilitating corporate restructuring in the UK; and finally assessing the likelihood of London remaining one of the leading restructuring centres in the world after Brexit.

1. Introduction

Despite withdrawing from the EU, the UK has continued to align its corporate insolvency framework to international best practices, including those provided in the European Preventive Restructuring Directive 2019/1023 ('PRD 2019'). The UK was not required to implement PRD 2019. Thus, the PRD 2019 has only influenced and "fertilised" an ongoing debate on optimal preventive restructuring procedures in this jurisdiction.

The purpose of this article is to assess the degree of cross-fertilisation between the EU and UK preventive restructuring frameworks. "Cross-fertilisation" can be defined as the practice of importing ideas from different laws and mixing these provisions with the existing framework and legal culture, to produce better outcomes for domestic stakeholders.

The article provides an overview of the English pre-reform restructuring framework (section 2) and the regulatory debate following the enactment of the PRD 2019 (section 3). It then analyses the statutory changes to key aspects of the English preventive restructuring framework (section 4). The purpose of this analysis is to assess the impact that recent reforms have had on professional practise and identify areas ripe for further regulatory reform (section 5). The article concludes with an overall evaluation of the effectiveness of the British legislator's regulatory reform effort in the area of preventive restructuring frameworks.

2. Overview of domestic pre-reform restructuring and insolvency law regime

Companies in the UK can rely on a varied restructuring toolkit, which includes:

i. informal workouts;
ii. administration procedures, including pre-packaged plans and "light-touch" administrations;[1]
iii. company voluntary arrangements;[2] and
iv. Pt 26 schemes of arrangement.[3]

Informal workouts are contractual arrangements between debtors and creditors. They are confidential and allow debtors to avoid the stigma of insolvency, but they only bind the signatory parties.

Administration is a practitioner-in-possession ('PIP') procedure designed to rescue a company as a going concern.[4] If this is not possible, administrators try to achieve a better result for the company's creditors than in a liquidation, or as a final alternative, to distribute the company's assets and proceeds to the creditors. An administration procedure can be triggered by the company, its directors or its creditors, as well as by the Secretary of State and some other regulatory authorities. The administrator - a qualified insolvency practitioner ('IP') - can be appointed by a court, by the debtor or a qualified creditor out of court. The creditors vote on the plan proposed by the administrator, who is responsible for running the business and implementing it. *Sui generis* forms of administration are pre-packaged sales and light-touch administrations.[5] The latter is a debtor in possession ('DIP') procedure,[6] where the existing directors run a company under the supervision of a qualified IP.

Other rescue mechanisms have traditionally been company voluntary arrangements ('CVAs') and Pt 26 schemes of arrangement. CVAs are agreements between a registered company (not necessarily insolvent), its shareholders, and its creditors. The IP acts as a nominee and provides an opinion on the viability of the proposal. If the plan obtains the statutory majority, it is then implemented by the directors – meaning that this is a DIP procedure – under the supervision of an IP.

Pt 26 schemes of arrangement are a company law procedure available to companies that are not yet insolvent and 'liable to be wound up under the Insolvency Act 1986',[7] including foreign entities with a limited connection to the UK. Creditors and members[8] are divided into classes and vote on the plan. After that, a court may sanction the Pt 26 scheme if it is fair and reasonable to do so.

The English corporate insolvency framework was quite sophisticated before the enactment of the PRD 2019.[9] Despite this, consultations on corporate governance and insolvency law launched in 2016[10] and 2018[11] suggested that further reforms were needed to align the UK to the best practices implemented in the US and other common law countries, such as Singapore, Australia, and Canada.

3. PRD 2019: reforming/introducing domestic preventive restructuring laws

The industry's response to the consultations on corporate governance and insolvency law supported many governmental proposals.[12] There was less support on implementation strategies on the identification of "essential supply contracts" and on the introduction under English restructuring law of the absolute priority rule ('APR').

The UK Government acted on this proposal by means of the Corporate Insolvency and Governance Act 2020 ('CIGA 2020') and the Administration (Restrictions on Disposal etc. to Connected Persons) Regulations 2021 ('2021 Regulations'). Besides temporary changes to address the challenges arising from the COVID-19 pandemic, CIGA 2020 applied a general prohibition on the validity of contractual termination clauses. It also introduced the new Pt 26A restructuring plan procedure and a new Pt A1 statutory moratorium.

The 2021 Regulations introduced revised rules on pre-packs, preventing administrators from disposing of all or substantially the whole of a company to a connected buyer in the first 8 weeks of the procedure unless one of two conditions are satisfied: (1) the creditors have approved the sale, and (2) an independent "qualifying" report has been written by an evaluator. Despite requirements for the evaluator to be independent, they shall not necessarily be a qualified IP.

Further reforms are being considered, including a comprehensive overhaul of the regulatory landscape.[13] However, CIGA 2020 and the 2021 Regulations represent the most direct and comprehensive answers to the features covered by the PRD 2019 (see below).

Overall, academia, professional bodies, and legal practice were largely supportive of the changes implemented by means of CIGA 2020 and the 2021 Regulations, except for the re-introduction of the preferential treatment of some categories of tax claims[14] (not suggested by the PRD 2019).

4. Main features introduced by UK reforms aligning with the PRD 2019

4.1. Objective and scope of the framework/proceeding

The purpose of the compromise or arrangement in Pt 26A restructuring plans is to eliminate, reduce, prevent, or mitigate the effect of any of the debtor's financial difficulties.[15] There are no specific provisions on the treatment of debtors who are part of an enterprise group, and there are no time limits for the plan to be implemented. The timetable is expected to be similar to that of Pt 26 schemes of arrangement (6-8 weeks from launch to completion). The approved plan will then need to be implemented by the parties.

CVAs are similar to Pt 26A restructuring plans, as s.1(1), Pt I IA 1986 dictates that the proposal for a CVA may include a composition in satisfaction of the company's debts or a scheme of arrangement of its affairs. In contrast, Pt 26 schemes have broader eligibility criteria, as they can be used by companies that are not (yet) in financial difficulties. However, they are potentially narrower in their content, as no mention is made in the law of the possibility of reaching a "compromise" with the company's creditors.

4.2. Criteria/test to enter the new framework/proceeding

According to Article 4(1) PRD 2019, these are the likelihood of insolvency and the company's long-term viability.

4.2.1. Likelihood of insolvency[16]

Preventive restructuring frameworks should only be available to companies that are or are likely to become insolvent. Under English law, insolvency is generally understood as the "inability to pay debts".[17]

There are two general tests to determine if a company is unable to pay debts: the cash-flow and the balance-sheet tests. These tests work simultaneously, meaning that if a company is able to pay its debts as they fall due, it can still be declared balance sheet insolvent. The opposite is also true.[18]

Traditionally under English law the definition of "inability to pay debts" is only relevant for non-voluntary liquidation petitions and administration orders made by a court.[19] In CVAs and Pt 26 schemes, the petitioner does not need to prove the debtor to be insolvent. Pt 26 schemes are frequently used to restructure a company's debt as part of takeover and merger transactions.[20]

Except for the newly enacted Pt 26A plans, none of these procedures fully comply with the "likelihood of insolvency" requirement dictated by PRD 2019. Pt 26A plans are only available to companies that are encountering or are likely to encounter financial difficulties that either are affecting, will affect, or may affect their ability to carry on business as a going concern (eligibility condition "A").[21] The petitioner needs to show that the debtor's liquidity will reach critical levels or they will run out of cash soon after the commencement of the restructuring procedure.[22] Being in administration is not by itself proof that this condition is met.[23] It follows that, absent a "burning platform"[24] and where a restructuring could reasonably be

undertaken at a later stage, junior stakeholders (shareholders and unsecured creditors) might have an arguable case against the commencement or sanctioning of a Pt 26A plan that wipes out almost all of their equitable interests in or claims against the company.[25]

4.2.2. Viability test[26]

The petitioner must show that the debtor's business is sound and has chances of thriving once the company's economic and financial issues have been addressed.

The second eligibility condition requires that the proposed "compromise or arrangement" is aimed to 'eliminate, reduce or prevent, or mitigate the effect of, any of the financial difficulties' (condition "B").[27] Whilst this requirement falls short of introducing a proper "viability" test in Pt 26A plans, it is certainly influenced by the European provisions.

English courts are willing to use their discretion to refuse sanctioning the plan at the confirmation hearing.[28] Courts will not sanction a plan if it is not proven to their satisfaction that the statutory majority of members and creditors are acting *bona fide* and not coercing the minority in order to promote interests adverse to those of the class they purport to represent ("fairness and reasonable" test).[29] This does not mean that a court will impose its own opinion on what is in the best interests of creditors or even what constitutes the "best" scheme for a company. It only means that the proposal must be one that a competent and honest person could fairly endorse.[30] Therefore, English law broadly aligns to the viability standard advocated by PRD 2019.

4.3. Involved actors

The actors involved in restructuring procedures and their roles and powers vary significantly depending on the rescue tool in question. In CVAs, IPs and courts retain supervisory and managerial roles. Such roles have no direct equivalent in Pt 26 schemes and Pt 26A restructuring plans. Finally, in Pt A1 moratoria, the monitor is a qualified IP and an officer of the court, whilst in pre-packaged sales the evaluator of the business viability needs not be. As CVAs and pre-packaged sales do not represent a "direct implementation" of the PRD 2019, this article focuses on the role, powers and duties of the actors involved in Pt A1 moratoria, Pt 26 schemes and Pt 26A restructuring plans.

Debtors have the right to propose a Pt 26 scheme or a Pt 26A restructuring plan. They must also implement the plan and obtain preliminary approval of any variation to it. If the debtor applies for a Pt A1 moratorium, the company's activity is overseen by a monitor for its duration.

Creditors may have a leading role in petitioning for the opening of a Pt 26A restructuring plan. Creditors must ensure that the directors are acting in the best interest of the company and in compliance with the law. Creditors may set up a creditors' committee and all types of claims can be compromised by Pt 26 schemes and Pt 26A plans.[31] If the creditors are dissatisfied with the way the procedure was conducted or its outcome, they may petition the court.

Under English law, there are no practitioners in the field of restructuring ('PIFOR'). There is, however, a category of unregulated turnaround professionals who may assist the debtor and its directors in formulating a Pt 26 scheme or Pt 26A restructuring plan. However, in most cases, debtors will tend to rely on qualified IPs for drafting these plans. Pt 26 schemes and Pt 26A plans may be submitted by liquidators and administrators, who have to be a qualified IP.

Courts are one of the key actors in Pt 26A plans and Pt 26 schemes. Courts have different roles, depending on the stage of the procedure in which they are involved. In *Re Noble Group Ltd*,[32] the Court held that in convening hearings the following elements must be considered:

1. adequate notice of meetings;
2. jurisdictional issues, particularly whether the company can be wound up under IA 1986;
3. creditor (and member) class composition;
4. arrangements for ensuring the members and creditors can participate in the vote; and
5. potential obstacles to the implementation or the sanctioning of the plan.

In the sanctioning hearing, courts will sanction the vote and approve the plan if the statutory conditions for approval are met, and it is just and equitable to do so. The court order needs to be delivered to the Registrar of Companies.[33]

4.4. Stay

The provisions of a stay are included in Article 6 PRD. It is prescribed that the initial duration period should not exceed 4 months[34] and the overall duration cannot exceed 12 months.[35] The consequences of the moratorium are dealt with by Article 7 PRD 2019.

4.4.1. The Pt A1 Moratorium

Chapters 1-3, Pt A1 IA 1986 have introduced a general moratorium on executory actions against companies that are not subject or, in the previous 12 months, have not been subject to a similar stay;[36] are not subject to an outstanding winding-up petition;[37] and are not incorporated abroad.[38]

The Pt A1 moratorium is triggered by the directors of an ailing company (out-of-court process) or by an order of a court following the debtor's application (in-court process). The directors are required to state that they believe that a company is or is likely to become unable to pay its debts.[39]

The Pt A1 moratorium is overseen by one or more monitors[40] who are IPs and officers of the court.[41] Nevertheless, this is a DIP procedure, as the directors remain in control of the company. The monitor(s) must remain of the view that rescue of a company as a going concern is possible.[42] Otherwise, the Pt A1 moratorium must be terminated early.[43]

The entrance into force of the Pt A1 moratorium must be notified to the monitor(s), the known creditors, and the Registrar of Companies.[44] The 20-business-day initial period can be extended by the directors without creditor consent for an analogous period.[45] In case of an agreement with the creditors, the extension is granted for the agreed date [46] but in any case, for no more than 12 months. Courts also have the power to grant one or more extensions upon petition from the directors.[47] It seems that courts are not limited in the powers to grant an extension to the Pt A1 moratorium.

A free-standing Pt A1 moratorium can be terminated in three circumstances. The first and most common circumstance is following its expiry due to time passing.[48] Second, a Pt A1 moratorium may terminate where a company enters into a compromise or arrangement with its creditors (e.g., Pt 26 scheme or Pt 26A restructuring plan) or any other formal insolvency procedure (e.g., administration, CVA or liquidation).[49] Finally, a Pt A1 moratorium will terminate if the monitor files a notice to a court in which they state that:[50]

1. it is the monitor's opinion the Pt A1 moratorium is no longer likely to result in the rescue of a company as a going concern; or
2. the rescue has been achieved; or
3. they cannot carry out their functions or believe that a company cannot pay the debts it is required to pay.

4.4.2. Effects of the Stay

The Pt A1 moratorium covers debt that has fallen due during or before the commencement of the moratorium itself. In this period, no legal action can be taken against the debtor or its assets without leave of the court. This includes enforcement of security (except financial collateral or collateral security charges)[51] and repossession of goods under hire-purchase agreements (or retention-of-title clauses).[52] No insolvency proceedings can be commenced against the company during the moratorium, unless the petition is submitted by the directors.[53]

In addition, the holder of an uncrystallised floating charge on the property of a company is prohibited from giving notice that would have the effect of either (i) causing the floating charge to crystallise; or (ii) restricting the disposal of the property of a company.[54] Similarly to what happens in other insolvency procedures, landlords cannot exercise their rights of forfeiture and may be forced to accept a reduction in their rents.[55]

All these restrictions provide debtors with powerful tools to continue trading. Whilst the European legislator did not introduce explicit exceptions to the stay, the English provision relies on several carve-outs.

First, there are restrictions on the transactions that companies can complete during a Pt A1 moratorium. For instance, new security can only be granted where the monitor consents and believes that granting security will support the rescue of a company.[56] The debtor is prohibited from entering into contracts such as market contracts or financial collateral arrangements.[57] Disposal of a company's property is only admissible if made in the ordinary course of business with the monitor's consent or following a court order.[58] Other restrictions apply to loans of more than £500[59] and payments of pre-moratorium debts.[60]

Second, certain moratorium debts are not subject to a payment holiday. These include goods or services supplied during the moratorium; rents in respect of the period during the moratorium; wages, salaries, and redundancy payments; liabilities arising under a contract involving financial services.[61] Additionally, all debts incurred during the Pt A1 moratorium must be paid in full as they fall due (or earlier should a pre-moratorium debt be subject to acceleration). These include the monitor's remuneration and expenses.

The carve-out of such debts means that a company could still require access to significant funds during a Pt A1 moratorium, as it encompasses most forms of commercial lending. Finally, debts incurred under the Pt A1 moratorium are given priority ranking if the debtor falls into a formal insolvency procedure within 12 weeks after the end of the moratorium.[62]

4.5. The plan

This section is concerned primarily with the treatment of Pt 26A restructuring plans, as these are the procedures implemented in the UK (ostensibly) to implement the PRD 2019.

4.5.1. Application and Information Requirements

Pt 26A restructuring plans are triggered by an application to a competent court to convene a meeting of the creditors or a class of creditors, or of the members of the company or class of members, as the case may be.[63] The application can only be submitted by the company and its directors; any creditor or member of the company; a liquidator if the company is being wound up; or an administrator if the company is in administration.[64] There is no need for the involvement of an IP or a PIFOR, though as aforementioned debtors do generally avail themselves of the assistance of experienced and qualified experts.

Courts have the jurisdiction to make a convening order in respect of a company that is liable to be wound up under IA 1986.[65] The creditors and members must be allowed to participate in those meetings,[66] unless the court is satisfied that none of the members of that class has a genuine economic interest in the company.[67]

When a meeting is summoned, the creditors and the members shall receive a notice of the meeting and an explanatory statement under s.901D CA 2006.[68] The explanatory statement must outline the effects of the compromise or arrangement; any material interests of the directors of the company; and the effect on those interests of the compromise or arrangement, insofar as it is different from the effect on the like interests of other persons.[69] Explanations must also be given if the compromise or arrangement affects the rights of the debenture holders.[70]

Any failure to comply with these notice requirements constitutes an offence,[71] unless "the default was due to the refusal of a director or trustee for debenture holders to supply the necessary particulars of the director's or (as the case may be) the trustee's interests".[72] If the latter fails to provide this information, they are the ones who commit an offence.[73]

4.5.2. The Plan

English law does not replicate the detailed requirements for the content of the restructuring plan outlined in Article 8 PRD. This means that parties have *de facto* unrestricted freedom, provided that the plan results in a compromise with the debtor's creditors and/or an arrangement of its financial liabilities.[74] It is also possible to propose a plan with some but not all of the debtor's creditors, provided that it is not arbitrary or manipulated to exclude some trade creditors from one of the classes.[75]

Pt 26A restructuring plans and CVAs share several elements with reference to the content of the proposal. CVAs may be asset- or trade-based, depending on whether the money for the implementation of the plan is collected predominantly from the sale of assets or from proceeds arising in the ordinary course of business. There is no reason to suppose that the plan could not be asset-based and mainly geared towards the liquidation of the company's assets.

However, should the Pt 26A plan not be approved by all classes of impaired creditors, the compromise or arrangement can be sanctioned by the court only if none of the members of the dissenting class would be any worse off than they would be in the event of the relevant alternative.[76] The "relevant alternative" is whatever the court considers would be most likely to occur in relation to the company if the compromise or arrangement were not sanctioned.[77] There is, however, no explicit absolute priority rule ('APR') under English law.

The sanctioned plan is binding on both secured and unsecured creditors,[78] and any changes will need to be approved by them. The court order needs to be delivered to the Registrar of Companies.[79]

Usually, Pt 26 schemes are implemented shortly after the court's sanction, as they entail the transfer of assets and shares to one or more new companies. CVAs and Pt 26A restructuring plans may require more time for their implementation. Normally, Pt 26A plans outline the consequences of a deviation from the agreed path.

4.5.3. The Composition of Members' and Creditors' Classes

The overall commonality between Pt 26 schemes and Pt 26A restructuring plans allows the courts to draw on existing case law on Pt 26 schemes. Courts have long refrained from offering guidance on what constitutes a class of members or creditors at the application stage[80] beyond the obvious consideration that different classes of shareholders (preferential, ordinary, etc.) and creditors (secured, preferential, unsecured, etc.) deserve separate treatment.

Both in Pt 26A plans and in Pt 26 schemes, stakeholders should vote in the class where their rights are 'not so dissimilar as to make it impossible for them to consult together with a view to their common interest'.[81] This assessment is dependent upon the rights that the creditors or members would have if the Pt 26 scheme or Pt 26A plan were not implemented, and the rights that the creditors or members would have if they were implemented. As a preliminary matter, courts should consider class formation issues at the convening, rather than the sanctioning hearing.[82]

Courts have interpreted this requirement with a "degree of pragmatism", and creditors have been treated as a single class when their interests were "sufficiently closely aligned".[83] Courts have generally refrained from the creation of small classes of creditors to avoid granting to their members either a potential power of veto on the Pt 26 plan or unequal bargaining powers.[84]

In the sanctioning hearing of *DeepOcean*,[85] the Court observed that issues might arise where it appears that the chosen classes were artificially formed to obtain the majorities required by the law to approve the plan. On this point, it held that if the artificial formation of the classes only becomes apparent at the sanctioning hearing, 'that may be a ground on which the court will be prepared to revisit the conclusion that it reached on classes at the convening hearing'[86] and refuse the sanctioning of a creditors' vote. However, it seems likely that a court would only make such a decision if the issue was raised by one of the interested parties. More recently, in *gategroup* the Court concluded that 'where the terms of the

restructuring would demonstrably benefit the affected creditors, there was a powerful argument that the artificiality should not prevent the company and its creditors from being able to take advantage of the English scheme jurisdiction'.[87] These decisions suggest that English courts will continue adopting a light-touch approach to second-guessing the composition of members' and creditors' classes in both Pt 26 schemes and Pt 26A restructuring plans.

4.6. Adoption and confirmation of the Pt 26A plan

The Pt 26A restructuring plans are the rescue mechanisms designed to implement in the UK the provisions in Articles 9-11 PRD 2019 and will, therefore, be the focus of discussion here.

4.6.1. Adoption of Pt 26A Restructuring Plans

A Pt 26A plan is approved if 75% in value of the creditors or class or creditors, members or class of members affected by the compromise or arrangement vote in favour of it.[88] Despite the broad reading of the word "affected" in *Hurricane Energy*,[89] it is understood that a creditor does not fall into this category if their claims are not impacted in form and substance or otherwise *negatively* affected by the compromise or arrangement, as they would have no need that justifies being protected through their participation in the Pt 26A plan.[90]

Crucially, two requirements applicable to Pt 26 schemes and CVAs have not been replicated with reference to the new restructuring plan procedure, thus making it easier to achieve the requisite majority. These are the requirements that more than half in value of unconnected creditors ("unconnected creditors test") and that the majority in number ("numerosity test") vote in favour of the plan. In fact, for Pt 26 schemes, the law requires a majority in number (50% or more) and in value (75%) for the approval of the proposal.[91] For CVAs, the plan must be approved by a majority of 75% in value of creditors and members, and unconnected creditors need to represent 50%

or more in value of the creditors voting in favour of the plan.

4.6.2. Cross-class Cram-down Provisions

To further facilitate the approval of a plan, the new restructuring procedure features a cross-class cram-down.[92] This allows dissenting classes of creditors to be bound by the plan if a court sanctions it where they consider it fair and equitable. Two conditions need to be met for the cross-class cram-down to be ordered. First (condition "A"), a court must be satisfied that, if the compromise or arrangement is sanctioned, none of the members of the dissenting class would be any **worse off** than in the event of the **relevant alternative**. The relevant alternative is whatever a court considers most likely to occur in relation to the company if the compromise or arrangement is not sanctioned ("no worse off" test).[93]

The "no worse off" test is the English equivalent of the best-interest-of-creditors test. Case law has demonstrated that there is no obligation to comply with the APR, and deviations from it have been sanctioned by competent courts. For instance, in *DeepOcean*,[94] the Court noted that the Pt 26A plan may provide differential treatment for some creditors that are "out of the money", if such differential treatment is justified. In *Virgin Active*, the Court ruled that shareholders could receive some value in the new company because they provided new money under the plan, whilst more senior-ranking creditors (landlords) had their obligations compromised and were crammed-down.[95]

Finding the relevant alternative is analogous to establishing a suitable comparator for class purposes in the context of a Pt 26 scheme.[96] It is also comparable to the analysis that a court may be asked to perform when applying a "vertical" comparison for an unfair prejudice challenge to a CVA.[97] In a vertical comparison, courts identify the projected outcome of a realistically available alternative process and use it as the boundary below which a CVA (and in this case, the Pt 26A restructuring plan) cannot go.[98] As evidenced by *Hurricane Energy*, English courts are not afraid to challenge the debtor's evidence as to the relevant alternative. If, as in that case, the petitioning creditors can prove that the company is not hopelessly insolvent, the court will not consider liquidation as the adequate comparator.[99]

Second (condition "B"), the plan must receive the consent of at least one class of creditors who would receive a payment or have a **genuine economic interest** in the company in the relevant alternative ("economic interest" test).[100]

Virgin Active[101] marked the first time a Pt 26A restructuring plan had been used to compromise landlord claims despite the opposition of this class of creditors to the plan. Previously, the High Court held that a commercial landlord's claim for rent arrears could be stayed whilst the Court considered the tenant's proposals for a Pt 26A restructuring because the interests of the wider class of creditors superseded the private interests of the landlord.[102]

In the sanctioning hearing, the Court held that, provided that the statutory requirements are met, it was for a company and its creditors who were "in the money" to decide how the value of the business and assets of the company should be divided. A dissenting class of "out of the money" creditors could not be granted a veto power on the outcome of such procedures.

Overall, courts have claimed that the test is 'a broad concept taking into account the impact of the restructuring plan on all incidents of the liability to the creditor, but primarily focused upon on anticipated returns based upon assumptions and projections and comparing them with a counterfactual based upon the relevant alternative'.[103]

4.6.3. Confirmation of Pt 26A Restructuring Plans

Even if the statutory conditions are satisfied, courts retain discretion over whether to sanction a restructuring plan pursuant to s.901F(1) CA 2006. In exercising this discretion, courts evaluate factors such as (i) the support for the plan from other classes of creditors; (ii) the benefits provided by other companies in the group; (iii) any issues regarding the fair representation of the category of dissenting creditors; (iv) the relative treatment of creditors under the proposals, similar to the "horizontal comparison" carried out when considering an unfair challenge to a CVA;[104] and (v) whether the plan operates as 'a mechanism for varying creditor rights and effecting a distribution of the available assets'.[105]

It is generally accepted that courts will not exercise their discretion if, overall, an intelligent and honest person would have voted in the same way as the majority of creditors.[106] However, courts are willing to exercise their discretion where there had been alleged negligent or fraudulent misconduct from the proponents of the plan, unfairness towards the dissenting creditors, unreasonable breach of the order of priority of distribution, or multiple and similar concerns raised by a variety of creditors.[107]

4.6.4. Analysis with Respect to Articles 9-11 PRD 2019

As evidenced above, UK law is broadly compliant with the EU directive. For the moment, the legislator has not opted for the introduction of special rules applicable to workers and MSME debtors. With reference to workers, a partial reason can be found in the preferential treatment that some of their claims have under employment and insolvency law. Regarding MSMEs, R3 (the UK association of business and restructuring professionals) is working on a "model" Pt 26A plan to reduce costs and complexities for these claimants.

Additionally, there are no specific provisions on new financing. New financing is possible and may give rise to entitlements to some returns even in breach of the APR.[108] However, there is no provision for super-priority status in an ensuing insolvency procedure.

4.7. Possibilities for a debt-for-equity swap

Pursuant to s.895(2) CA 2006, "arrangement" includes a reorganisation of the company's share capital by the consolidation of shares of different classes or by the division of shares into different classes, or by both of those methods. As a result, debt-for-equity swaps are allowed under the law.

The first Pt 26A restructuring plan to effect a debt-for-equity swap contrary to the wishes of existing shareholders was *Hurricane Energy*.[109] The fact that the plan was not sanctioned does not mean that debt-for-equity swaps might not work in the future.

4.8. Executory contracts

Provisions on the treatment of executory contracts are included in Article 7(4) PRD 2019. Whilst the UK has long refused to curtail the parties' autonomy to vary or terminate contracts by reason of insolvency,[110] there was evidence of a more rescue-oriented approach even before the enactment of PRD 2019. Since 1986, the suppliers of goods and services (such as gas, electricity, and water) to insolvent companies could not make a condition for further supplies that the office holder personally guaranteed for their payment, or that pre-insolvency charges were paid.[111] The Insolvency (Protection of Essential Supplies) Order 2015 (SI 2015/989) expanded the list of contracts subject to this regime to the supply of communications services. However, such provisions only applied to companies that entered into administration, liquidation or a CVA.

After CIGA 2020,[112] if the debtor is subject to any relevant insolvency procedure, a creditor cannot terminate the supply of any goods or services or do "any other thing" by reason of the commencement of the relevant insolvency procedure.[113] Additionally, a supplier shall not make it a condition of any supply of goods and services after the time when the company becomes subject to the relevant insolvency procedure that any outstanding charges in respect of a supply made to the company before that time are paid.[114]

It would be incorrect to hold that *ipso facto* clauses can no longer be enforced under English law. This is so for five reasons. First, the list of relevant procedures does not include Pt 26 schemes of arrangement (even if the discipline applies to companies benefiting from a Pt A1 moratorium and Pt 26A restructuring plans).[115] Second, invalidation of the enforceability of *ipso facto* clauses is much narrower in scope than the US equivalent provision,[116] which applies to *any* types of contracts, not simply those for the supply of goods and services. Third, the prohibition excludes several types of suppliers or contracts (e.g., contracts for the supply of goods or services from banks, insurers, and financial providers). Fourth, the supplier can obtain the consent of the office holder or a court to terminate the supply.[117] Finally, under certain circumstances, the supplier may also require additional guarantees from the office holder to perform the contract as originally agreed.[118]

Suppliers can be relieved of the requirement to supply if it causes hardship to their business. Suppliers also retain the power to terminate these contracts for breaches that occur after the commencement of the relevant procedure. Permanent exclusions still apply for the benefit of certain financial contracts and institutions.

The creditor's prohibition to terminate a contract is mirrored by an analogous prohibition on the debtor to disclaim it,[119] at least in restructuring procedures. However, in all UK restructuring procedures the debtor can unilaterally change the terms of the contract, although without creating new obligations[120] and provided that other conditions are met. In Pt 26 schemes, the courts will sanction the plan if the statutory majorities are reached, and the plan meets the reasonable person and fairness test. In Pt 26A plans, the court will have to check that the dissenting classes of creditors (if

any) are not worse off than in the relevant alternative,[121] as it happened in *Virgin Active*.[122] In CVAs, debtors can modify any (unsecured) pecuniary obligation in executory contracts (including tenancy agreements), upon breach of which the right of re-entry (i.e., the creditor's right to terminate the contract) might be exercised.[123] Provided that a landlord can terminate a lease or receive a better outcome than in the alternative procedure (usually administration), any challenge of unfair prejudice stemming from the changes to the terms of a lease is denied.[124] In other words, in all of the restructuring procedures covered in this paper, the company's potential insolvency may justify a unilateral change in the terms of existing contracts.[125]

4.9. Jurisdiction for and recognition of court decisions in Europe

Following the UK's withdrawal from the EU ('Brexit'), the regulation on insolvency proceedings (EIR 2015)[126] is no longer applicable to the UK. Consequently, English courts no longer automatically recognize insolvency judgments from EU Member States, and vice versa.

The relationship is now regulated by the EU-UK Trade and Cooperation Agreement (24 December 2020), which was implemented in the UK via the European Union (Future Relationship) Act 2020. These documents fail to replicate the seamless and straightforward system for the recognition of civil and insolvency judgments outlined by the EIR 2015 for insolvency judgments and the Brussels Recast Regulation 2012 ('Brussels Recast Regulation')[127] for civil and commercial judgments.

Starting with insolvency procedures, the easiest way to recognise an English insolvency judgment in another EU Member State is if such country has adopted the UNCITRAL Model Law on Cross-Border Insolvency ('MLCBI').[128] MLCBI results in merely streamlined rather than automatic recognition of foreign insolvency proceedings. In all other cases, the recognition of English insolvency proceedings is dependent on the domestic private international law governing recognition of foreign judgments in a particular Member State.

With reference to inbound recognition of those insolvency proceedings that are listed and could be listed in "Annex A" of the EIR 2015, there are two alternative options. Irish practitioners can rely on the broad assistance granted under s.426(4) IA 1986. Assistance is not automatic; however, if required, it can only be denied if it would be improper to grant such assistance,[129] if such assistance would impinge on the UK's public policy,[130] or cause oppression.[131] A more limited but equally effective form of assistance is the streamlined recognition granted by the Cross-Border Insolvency Regulations 2006 ('CBIR 2006'), which enacts the MLCBI in the UK.

Whilst Pt 26 schemes of arrangement are not formal insolvency procedures, the recent decision in *gategroup*[132] established that Pt 26A restructuring plans are. As a result, the recognition of Pt 26A restructuring plans by European Member States should follow the rules outlined above with reference to insolvency proceedings. Outside Europe, Pt 26A plans will be recognized under Chapter 15 of the US Bankruptcy Code.

Special rules apply to the outbound recognition of Pt 26 schemes of arrangement, and to the inbound recognition of all restructuring proceedings that fall outside the scope of "Annex A" EIR 2015. It used to be possible to recognize Pt 26 schemes based on the Brussels Recast Regulation. The case of *Lecta Paper*[133] validated this practice. However, reliance on the Brussels Recast Regulation is no longer possible.[134] The alternative route has traditionally been to utilise Regulation (EC) No 593/2008 (Rome I Regulation).[135] However, this alternative route applies only in case the restructuring plan involved a compromise of contracts governed by English law.

It may have been possible to rely on the 2007 Lugano Convention on Jurisdiction and the Recognition and Enforcement of Judgments (Lugano Convention)[136] for restructuring plans submitted by distressed but not yet insolvent companies, and which do not result in the liquidation of the debtor's assets. The UK applied to join the Lugano Convention in April 2020. Acceding to the Lugano Convention requires unanimous consent from all parties, including the EU. Whilst EFTA Member States supported the UK's application, the EU formally blocked the UK's accession. This means that outbound recognition of Pt 26 schemes is subject to local private international laws.

Beyond Lugano and bi-lateral agreements with EU Member States, it might be possible in the future to rely on the 2019 Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters.[137] When ratified by enough states, it will establish an international framework for the recognition and enforcement of such judgments. However, the 2019 Hague Convention is not yet in force, and it is unlikely it will be ratified by enough states in the near future.

5. Outlook: focus points for domestic practice

The process that led to the enactment of Pt 26A restructuring plans was long and fraught with setbacks. The "implementation" is not fully in line with PRD 2019, especially due to the UK government's decision not to introduce any form of absolute or relative priority rule or any special category of PIFORs. Despite the expedited passage through Parliament and some questionable choices in drafting the regulatory framework, the British restructuring community is largely supportive of the new rules.[138] The cases discussed in this article suggest that debtors and creditors are making appropriate use of this instrument, meaning that they are not using the procedures for purposes not outlined in the law. The judiciary has drawn on the existing body of case law on Pt 26 schemes to support the implementation of the new Pt 26A plans.[139] At the same time, all that glitters is not gold.

5.1. Objective and Scope of the framework

The uptake number of Pt 26A plans has so far fallen short of the Government's expectations of between 50 to 100 cases per year.[140] In the first year since its enactment, only 9 plans were commenced. The low number can be explained by a variety of reasons, including costs, the general fall in restructuring procedures caused by the COVID-19 pandemic and the uncertainties associated with Brexit. Additionally, it might take time for practitioners to leave tried-and-tested measures for the newly enacted Pt 26A plans.

Conflicting guidance on the interpretation of key aspects of the Pt 26A plans may have also contributed to this slow start. For instance, in *DeepOcean*[141] Trower J held that where the cram-down conditions are met, the plan is likely to be sanctioned unless a court considers it unjust and inequitable. However, in *Virgin Active* Snowden J cautioned against the use of too much discretion and invited courts to rely on the rationality test for sanctioning a Pt 26 scheme.[142]

5.2. Eligibility Criteria

While some commentators argued that the "financial difficulties" threshold is too low,[143] there is evidence that courts adopt a case-by-case approach to determine whether sanctioning a plan is in the best interest of the creditors. It is unfortunate that courts seem to be willing to exercise such discretion only at the sanctioning hearing and mainly upon a petition from crammed-down creditors rather than on their own motion.[144]

5.3. Players in Restructuring

Courts have not refrained from using their discretion to refuse sanctioning plans that fell short of the statutory requirements,[145] as in *Hurricane Energy*.[146] Some commentators observed that in Pt 26 schemes and Pt 26A plans UK courts have moved towards a quasi-inquisitorial approach in which they undertake a holistic review of the inclusion and treatment of creditors, even if no specific objections are raised.[147]

Besides the enhanced judicial supervision in these restructuring procedures, there are still areas where further judicial guidance is awaited. This is particularly around the treatment of crammed-down shareholders and on other innovations introduced pursuant to the PRD 2019, such as the ban on the enforceability of *ipso facto* clauses.

5.4. Preparation and Confirmation of the Plan

When Pt 26A restructuring plans were first launched, there was much speculation and criticism of the deliberate omission of any form of absolute or relative priority rule from the UK restructuring rescue framework. Clearly, the lack of stringent requirements such as the APR is good news for the experienced British restructuring profession and judiciary, who have been proven to thrive on the flexibility granted in the implementation of Pt 26 schemes. Additionally, the strong links between Pt 26 schemes and Pt 26A plans suggest that parties have reasonable expectations as to how courts will exercise their discretion in given cases.

However, this also results in restructuring procedures treating impaired creditors differently,[148] as evidenced when discussing the treatment of executory contracts in restructuring procedures.[149] The cross-class cram-down power heightens the risks that a selected group of debtors and creditors 'may be tempted to use the cram-down feature to write off debts in ways which generate too much unfair value for other stakeholders'.[150] This is even if courts have declared – and put into practice[151] – that they will not be reluctant to differ from the vote at class meeting[152] while not imposing their views of what is "fair" or "just and equitable" in exercising their discretion.[153]

5.5. Treatment of Contracts in Preventive Restructuring Procedures

Section 4.8 of this paper has already discussed the issues associated with granting too much power to debtors – especially in CVAs – to unilaterally modify the terms and conditions of executory contracts.

5.6. Jurisdiction

The jury is still out on determining whether treating Pt 26A restructuring plans as insolvency procedures may restrict their use and the prospects of successful recognition in other EU Member States. Arguably, the fact that Pt 26A plans fall within the scope of Chapter 15 of the US Bankruptcy Code should promote their use from financially distressed European companies, especially in the current wake of uncertainties surrounding the recognition of Pt 26 schemes.

5.7. Concluding Remarks

Moving forwards, more should be done to encourage the use of Pt 26A plans by MSMEs. The key aspects of Pt 26A plans that need to be reformed to ensure widespread use among MSMEs are: (i) the cost of devising the plan; (ii) the degree of control over the process exercised by courts; and (iii) the longer time to the sanction of the plan compared to other rescue mechanisms.[154]

Construction of new provisions, especially formidable and potentially disruptive ones, requires a careful and balanced approach. So far, the British restructuring profession and judiciary has proven capable of exercising a firm but creative use of these powerful mechanisms, particularly in those procedures such as Pt 26 schemes and Pt 26A plans where the court's supervision is a necessary part of the restructuring process.[155]

6. Conclusion

In the corporate insolvency world, restructuring hubs like Singapore, Malaysia, Dubai and – to a lesser extent – the Netherlands are the Teslas and BYDs of the automotive industry. Countries like the US and the UK are, on the other hand, the legacy kids, those who need to "adapt to survive". This paper shows that the UK has not adopted a passive approach to corporate reform.

The UK has been influenced and "fertilised" by the regulatory debate in international fora, but it has not become a not passive recipient of innovations devised elsewhere, for the best benefit of different legal cultures and systems. The UK is looking to its own unique way to deal with increasingly global challenges, whilst not dismissing the importance of established principles and common law rules, including controversial ones such as the *Gibbs*[156]and *Dicey*[157]rules.

To conclude, the old saying "not to judge a book by its cover" may be particularly apt to describe what is happening to the UK's restructuring framework. Whilst modern electric cars look like their 1970s siblings, if you look under their bonnets, you can appreciate the technological leap forward that occurred in the last four decades. Similar to electric cars, the English judicial and professional insolvency and restructuring framework is most definitely not "more of the same old". The UK is not – as somehow provocatively suggested by the title of this article – acknowledging the EU's supremacy. The UK is charting its own path to remain one of the largest and most successful restructuring centres in the world.[158]

Part of the material included in this article is sourced from a manual written by Dr Eugenio Vaccari and Dr Emilie Ghio titled English Corporate Insolvency Law: A Primer, due for publication by Edward Elgar Publishing by the end of 2022. The article covers literature and case law published before 15 February 2022. All sources have been checked on the same date. The usual disclaimer applies.

[1] Part II Insolvency Act 1986 ('IA 1986') and Schedule B1.

[2] Part 1 IA 1986

[3] Part 26 Companies Act 2006 ('CA 2006').

[4] para. 3, Sch. B1, IA 1986.

[5] For more details on light-touch administrations (and a preliminary assessment of Pt 26A restructuring plans), see: E Vaccari, 'Corporate Insolvency Reforms in England: Rescuing a "Broken Bench"? A Critical Analysis of Light Touch Administrations and New Restructuring Plans' International Company and Commercial Law Review, 2020, 31(12), p. 645-667.

[6] para. 64, Sch. B1 IA 1986. There is a parallel with s.103 IA 1986, which provides that on the appointment of the liquidator, all of the directors' powers cease. However, the liquidation committee or the creditors can sanction their continuance.

[7] s.895(2)(b) CA 2006. A company "liable to be wound up" is a company eligible to enter into a liquidation procedure governed by English law.

[8] These are either the shareholders or the owners of the company.

[9] Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 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, and amending Directive (EU) 2017/1132 (Directive on restructuring and insolvency), O.J. L 172/18.

[10] The Insolvency Service, A Review of the Corporate Insolvency Framework. A consultation on options for reform, available at: <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/525523/A_Review_of_the_Corporate_Insolvency (last viewed 15 February 2022).

[11] Department for Business, Energy and Industrial Strategy, Insolvency and Corporate Governance, available at: <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/691857/Condoc_-_Insolvency_and_Corporate_Governance_FINAL_.pdf> (last viewed 15 February 2022).

[12] Department for BEIS, Insolvency and Corporate Governance: Government Response, available at: <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/736163/ICG_-_Government_response_doc_-_24_Aug_clean_version__with_Minister_s_photo_and_signature__AC.pdf> (last viewed 15 February 2022) p. 41.

[13] The Insolvency Service, The Future of Insolvency Regulation, available at: <https://www.gov.uk/government/consultations/the-future-of-insolvency-regulation> (last viewed 15 February 2022).

[14] HM Revenue & Customs, Protecting your taxes in insolvency. Summary of Responses, available at: <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/816290/Protecting_your_taxes_in_insolvency_-_summary_of_responses.pdf> (last viewed 15 February 2022).

[15] s.901A(3)(b) CA 2006.

[16] The "likelihood of insolvency" test is also mentioned in other parts of PRD 2019, such as recitals 24, 79 and 96, and Articles 1(a), 2(b) and 3(1) of the main body of the directive. Article 19 deals with the duties of the directors where there is likelihood of insolvency.

[17] s.123 IA 1986.

[18] Re Casa Estates (UK) Ltd (in liq.) [2014] EWCA Civ 383; and Re HLC Environmental Projects Ltd [2013] EWHC 2876 (Ch).

[19] s.122(1)(f) IA 1986 for liquidations and para.11, Sch. B1 IA 1986 for administrations.

[20] On takeovers, see: Re Savoy Hotel Ltd [1981] Ch. 351; Re Jelf Group Plc [2015] EWHC 3857 (Ch); Re SABMiller Plc [2016] 10 WLUK 31.

[21] S.901A(2) CA 2006.

[22] Re Virgin Atlantic Airways Ltd [2020] EWHC 2376 (Ch) (where the debtor showed that certain bondholders were about to initiate enforcement processes against the company's landing and departure slots at Heathrow airport by 21 September 2020 and that, in any case, the company would run out of cash by 5 October 2020); Re Pizza Express Financing 2 Plc [2020] EWHC 2873 (Ch) (where the company demonstrated that its cash-flow forecast was negative).

[23] Re Amicus Finance Plc [2021] EWHC 2255 (Ch). Snowden J also observed at [70] that 'it will be a rare case in which the fact of being in administration will not mean that a company is experiencing financial difficulties, particularly (as in the instant case) where the administrators are pursuing the second statutory purpose of achieving a better result for creditors as a whole than would be likely in an immediate liquidation'.

[24] This is a term used to describe the situation in which the company's insolvency is imminent and unavoidable.

[25] Re Hurricane Energy Plc [2021] EWHC 1759 (Ch). For an analysis, see: K. Stephenson & Z. Stembridge, 'Sanctioning a restructuring plan: not a port for every storm' PLC Magazine, 2021, 32(7) p. 10-11; and K. Crinson et al., 'UK cross-class cram down rejected in Hurricane Energy' Corporate Rescue & Insolvency, 2021, 14(4), p. 124-126.

[26] Similar to the "likelihood of insolvency" test, also the "viability" test is frequently mentioned in many other parts of PRD 2019.

[27] s.901A(3) CA 2006

[28] Discussed below *sub* 4.6.

[29] Re Hawk Insurance Co Ltd [2001] EWCA Civ 241.

[30] Virgin Atlantic above note 22.

[31] s.901F(5) CA 2006.

[32] [2018] EWHC 2911 (Ch).

[33] s.901F(6) CA 2006.

[34] Article 6(6) PRD 2019.

[35] Article 6(7) PRD 2019.

[36] para. 2, Sch. ZA1 IA 1986.

[37] Despite this, the courts may use their discretion to grant a stay upon a petition from the directors of a company subject to an outstanding winding-up petition (s.A4, Pt A1 IA 1986) or an overseas company (s.A5, P A1 IA 1986).

[38] s.A3, Pt A1 IA 1986.

[39] s.A6(1)(d), Pt A1 IA 1986.

[40] The Parliament's proposals (2016) originally made reference to "supervisor". The term "monitor" was adopted in 2018 to avoid confusion with a CVA supervisor. In earlier proposals, there was to be no requirement for the new form of office holder to be a licenced IP. Guidance on the role and powers of the monitors was published by the Insolvency Service on 26 June 2020 it is available here: <https://www.gov.uk/government/publications/insolvency-act-1986-part-a1-moratorium-guidance-for-monitors/test-doc> (last viewed 15 February 2022).

[41] s.A34, Pt A1 IA 1986. Guidance on how to act in these procedures has been drafted by the Insolvency Service (26 June 2020) and it is available here: <https://www.gov.uk/government/publications/insolvency-act-1986-part-a1-moratorium-guidance-for-monitors/test-doc#role-and-functions-of-monitor> (last viewed 15 February 2022).

[42] s.A6(e), Pt A1 IA 1986.

[43] s.A38, Pt A1 1986.

[44] s.A8, Pt A1 IA 1986.

[45] s.A10, Pt A1 IA 1986.

[46] s.A11, Pt A1 1986.

[47] s.A13, Pt A1 IA 1986.

[48] s.9(1), Pt A1 IA 1986.

[49] s.A16, Pt A1 IA 1986.

[50] s.A38, Pt A1 IA 1986.

[51] s.A21(1)(c), Pt A1 IA 1986.

[52] s.A21(1)(d), Pt A1 IA 1986.

[53] s.A20, Pt A1 IA 1986.

[54] ss.A21(3)-22, Pt A1 IA 1986.

[55] s.A21(10(a), Pt A1 IA 1986.

[56] s.A26, Pt A1 IA 1986.

[57] s.A27, Pt A1 IA 1986.

[58] s.A29, Pt A1 IA 1986.

[59] s.A25, Pt A1 IA 1986.

[60] s.A28, Pt A1 IA 1986.

[61] s.A18(3), Pt A1 IA 1986. The words "contract or other instrument involving financial services" has the meaning given by Sch. ZA2 IA 1986.

[62] para. 64A, Sch. B1 IA 1986 (administration) and s.174A IA 1986 (liquidation).

[63] s.901C(1) CA 2006.

[64] s.901C(2) CA 2006.

[65] S.901A(4)(b) CA 2006.

[66] s.901C(3) CA 2006.

[67] s.901C(4) CA 2006.

[68] The Pension Regulator and the Pension Protection Fund also need to be informed of the procedure in the cases outlined in s.901I CA 2006.

[69] s.901D(2) CA 2006.

[70] s.901D(3) CA 2006.

[71] s.901D(5) CA 2006.

[72] s.901D(7) CA 2006.

[73] s.901E CA 2006.

[74] Among others, see: Re Virgin Atlantic [2020] EWHC 2191 (Ch) at para. 38; Pizza Express above note 22 at para. 27.

[75] Virgin Atlantic above note 22. The question in front of the court was whther adding 1,000 creditors owed less than £50,000 to the plan would have materailly changed the return to the other creditors or simply created additional administrative complexity to the procedure.

[76] s.901G(3) CA 2006.

[77] s.901G(4) CA 2006.

[78] s.901F(5) CA 2006.

[79] s.901F(6) CA 2006.

[80] V. Finch & D. Milman, Corporate Insolvency Law. Perspectives and Principles (3rd edn) CUP: Cambridge, 2017, p. 412.

[81] Sovereign Life Assurance v Dodd [1892] 2QB 573 at 583; Re BTR Plc [2000] 1 B.C.L.C. 740; Re Sovereign Marine & General Insurance Co. Ltd [2006] B.C.C. 774 (with reference to Pt 26 schemes); Virgin Atlantic above note 22 at para. 44 (with reference to Pt 26A plans).

[82] Above note 29 at para. 22.

[83] Re APCOA Parking Holdings GmbH [2014] EWHC 3849 (Ch); Re Obrascon Huarte Lain SA [2021] EWHC 859 (Ch) at para. 25.

[84] Re Provident SPV Ltd [2021] EWHC 1341 (Ch), where the Court held that a single class meeting could be convened, because borrowers and guarantors were not being treated differently in principle under the proposed plan, and guarantors comprised only 0.024% of potential claims.

[85] Re DeepOcean 1 UK Ltd [2021] EWHC 138 (Ch).

[86] Ibid. [41].

[87] Re gategroup Guarantee Ltd [2021] EWHC 775 (Ch) at para. 14, citing para. 174 of the convening judgment.

[88] s.901F(1) CA 2006.

[89] Re Hurricane Energy Plc [2021] EWHC 1418 (Ch) at paras. 27-34.

[90] S. Paterson & A. Walters, Selective Corporate Restructuring Strategy, available at: <https://ssrn.com/abstract=3924225> (last viewed 15 February 2022) p. 10.

[91] s.899(1) CA 2006.

[92] s.901G CA 2006.

[93] s.901G(3) and (4) CA 2006.

[94] Above note 85.

[95] Re Virgin Active Holdings Ltd [2021] EWHC 1246 (Ch).

[96] Above note 85 at para. 29. See also: Re Telewest Telecommunications Plc [2004] B.C.C. 342 at 351; Re The British Aviation Insurance Co. Ltd [2006] B.C.C. 14 at paras. 82, 88; and Re ColourOz Investment 2 LLC [2020] EWHC 1864 (Ch) at para. 74.

[97] Above note 85 at para. 30.

[98] See Re T&N Ltd [2004] EWHC 2361 (Ch) at para. 82; and Prudential Assurance Co. v PRG Powerhouse Ltd [2007] EWHC 1002 (Ch) at paras. 75–81.

[99] Hurricane Energy above note 25.

[100] s.901G(5) CA 2006.

[101] Above note 95. For a comment, see: L. Linklater, 'Virgin Active and New Look: a new dawn for the rescue culture?', Insolvency Intelligence, 2021, 34(3), p. 55-57; N. Cooper et al., 'Landlord's day in court? Lessons learned from the New Look CVA and Virgin Atlantic restructuring plan judgments', International Corporate Rescue, 2021, 18(4), p. 253; A. Cohen et al., 'Imposing a restructuring plan: a sign of times?', PLC Magazine, 2021, 32(5), p. 4-5; and C. Lamont, 'A new look at leasehold restructuring', L. & T. Review, 2021, 25(5) p. 192-195.

[102] Riverside CREM 3 Ltd v Virgin Active Health Clubs Ltd [2021] EWHC 746 (Ch).

[103] Re Amicus Finance Plc (in admin.) [2021] EWHC 3036 (Ch) at para. 50.

[104] Above note 85, at para. 63: 'justice may require the court to look at questions of horizontal comparability in the context of a cross-class cram down to see whether a restructuring plan provides for differences in treatment of creditors *inter se*, and if so whether those differences are justified'.

[105] Ibid. at para. 66.

[106] Ibid. at para. 61.

[107] Above note 103 at para. 78.

[108] Above note 95.

[109] Hurricane Energy above note 25.

[110] E. Vaccari, 'National Report for England and Wales', in J. Chuah and E. Vaccari (eds), Executory Contracts in Insolvency Law: A Global Guide, EE Publishing: Cheltenham, 2019; E. Vaccari, 'Conceptualising the Anti-Deprivation Principle *Vis-à-Vis* Freedom of Contract', International Insolvency Review, 2022, 31(2) (awaiting publication).

[111] s.233-233A IA 1986.

[112] This provision included a temporary exclusion for small suppliers, which expired on 30 June 2021. This date has been extended to reflect The Corporate Insolvency and Governance Act 2020 (Coronavirus) (Extension of the Relevant Period) Regulations 2021.

[113] s.233B(4) IA 1986.

[114] s.233B(7) IA 1986.

[115] s.233B(2) IA 1986.

[116] §.541(c), 11 U.S. Code.

[117] s.233B(5) IA 1986. The court's consent is subject to the proof that the supplier would suffer hardship if termination was not granted.

[118] s.233A(s) IA 1986.

[119] Re Instant Cash Loans Ltd [2019] EWHC 2795 (Ch).

[120] APCOA Parking above note 83 at paras. 133-167.

[121] s.901G(4) CA 2006.

[122] Above note 95.

[123] Discovery (Northampton) Ltd v Debenhams Retail Ltd [2019] EWHC 2441 (Ch).

[124] Lazari Properties 2 Ltd v New Look Retailers Ltd [2021] EWHC 109 at para. 222.

[125] Ibid. at para. 220.

[126] Regulation (EU) 2015/838 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast), O.J. L 141/19,

[127] Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2012] OJ L 351/1.

[128] U.N. Comm'n on Int'l Trade Law, 'UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation', U.N. Sales No. E.14.V.2 (2014), available at: <https://www.uncitral.org/pdf/english/texts/insolven/1997-Model-Law-Insol-2013-Guide-Enactment-e.pdf> (last viewed 15 February 2022).

[129] Re Focus Insurance Co. Ltd [1996] B.C.C. 659; New Cap Reinsurance Corp. Ltd (in liq.) v Grant [2011] EWHC 677 (Ch).

[130] Re Levy's Trusts (1885) 30 Ch. D. 119; Galbraith v Grimshaw [1910] A.C. 508; Re Osborn Ex p. Tree [1931-32] B. & C.R. 189; Re Jackson [1973] N.I. 67; Re Dallhold Estates (UK) Pty Ltd [1992] B.C.C. 394; Re Bank of Credit and Commerce International SA (No.9) [1994] 2 B.C.L.C. 636; Re Focus Insurance Co. Ltd [1996] 3 WLUK 155; Hughes v Hannover [1997] B.C.C. 921.

[131] *Focus Insurance* above note 130; England v Smith [2001] Ch. 419.

[132] Re gategroup Guarantee Ltd [2021] EWHC 304 (Ch) at paras. 85-137.

[133] Re Lecta Paper UK Ltd [2020] EWHC 382 (Ch) at para. 45 ('I shall adopt what has become the usual practice of assuming without deciding, that Chapter II of the (Brussels Recast Regulation) applies to this application on the basis that the scheme creditors are sued by the company and, that they are defendants to the scheme application').

[134] The regulation was repealed pursuant to *The Civil Jurisdiction and Judgments (Amendment) (EU Exit) Regulations 2019*, which also revoked the Brussels Regulation, the Lugano Convention and certain other frameworks.

[135] Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) [2008] OJ L 177/6. For Denmark, reference should be made to the 1980 Rome Convention on the law applicable to contractual obligations (consolidated version) [1998] OJ C 27.

[136] Convention on Jurisdiction and the Recognition and Enforcement of Judgments [2007] OJ L 339/3.

[137] HCCH, 'Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters', available at: <https://assets.hcch.net/docs/806e290e-bbd8-413d-b15e-8e3e1bf1496d.pdf> (last viewed 15 February 2022).

[138] Linklater above note 101; J. Walker and J. Hollingshead, 'The future of CVAs for restructuring lease liabilities: is Part 26A restructuring plan the new tool of choice?', Corporate Rescue and Insolvency, 2021, 14(4), p. 115-117.

[139] Virgin Atlantic above note 22 at para. 45.

[140] Corporate Governance and Insolvency Bill Impact Assessment, available at: <https://publications.parliament.uk/pa/bills/cbill/58-01/0146/SIGNED%20-%20IA%20Insolvency%20and%20Corporate%20Governance%20Enactment%20Stage.pdf> (last viewed 15 February 2022), at para. 6.92.

[141] Above note 85 at para. 48.

[142] Above note 95 at para. 221.

[143] I. West, 'Reflections on a year of restructuring plans', Insolvency Intelligence, 2021, 34(3), p. 62-67, p. 63.

[144] Hurricane Energy above note 25.

[145] On the increasing role of the judiciary in Pt 26 schemes and Pt 26A plans, see: J. Watson & T. Smyth, 'All rise: increasing judicial scrutiny in recent restructurings?', Corporate Rescue and Insolvency, 2021, 14(5), p. 160-162.

[146] Hurricane Energy above note 25.

[147] Above note 90.

[148] Ibid.

[149] See above section 4.8 of this article.

[150] Above note 90, p. 9.

[151] Hurricane Energy above note 89.

[152] Above note 95 at para. 214.

[153] Ibid. at para. 221.

[154] Linklater above note 101, p. 56.

[155] Above note 90, p. 30.

[156] Antony Gibbs & Sons v La Société Industrielle et Commerciale des Métaux (1890) LR 25 QBD 399. The "rule in *Gibbs*" has formed an integral part of English common law since the 19th century. The rule provides that a debt governed by English law cannot be discharged or altered by foreign law (including a foreign insolvency proceeding).

[157] Dicey et al., Conflict of Laws, Sweet & Maxwell: London, 1896. This rule dictates that the enforcement of foreign judgments *in personam* is possible only where the person against whom the foreign judgment has been entered meets certain criteria, including taking part to the foreign procedure or otherwise submitting to that jurisdiction.

[158] E. Vaccari, 'WHOA, Brexit! Which future for London as Europe's (largest) insolvency forum?', Journal of International Banking Law and Regulation, 2022, 37(2), p. 46-68.

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