RPC

The UK's new restructuring plan

Background to the Restructuring Plan

The UK has introduced the Restructuring Plan; a new, flexible court supervised restructuring tool. The Restructuring Plan draws upon features of the existing Companies Act 2006 scheme of arrangement procedure (which remains available) but includes features which are new to the UK but similar to those under U.S. Chapter 11 bankruptcy proceedings.

The Restructuring Plan is part of a major package of reforms to UK insolvency law introduced in June 2020 as a direct response to the Covid-19 pandemic. The concept had long been planned and consulted upon but the economic disruption caused by the pandemic catalysed its introduction.

Restructuring Plan – an overview

A Restructuring Plan is an 'arrangement' or 'compromise' between the company and its creditors (including secured creditors) and/or shareholders – and can be proposed by any of them. It is influenced by the UK's long-established scheme procedure but with a number of enhancements, including 'cross-class cram down' provisions, as further discussed below.

> *"Restructuring Plans' flexibility should reduce costs and offer a route to a holistic restructuring"*

Qualifying conditions to the Restructuring Plan:

To be eligible to use the Restructuring Plan, a company need not be insolvent but must:

- have encountered (or be likely to encounter) financial difficulties that are affecting (or will/may affect) its going concern status, and
- propose to eliminate, reduce, prevent or mitigate the effect of those financial difficulties through the Restructuring Plan.

There is no requirement that a company establish its Centre of Main Interests in England to be eligible. Rather, it must simply establish a 'sufficient connection' to the English jurisdiction. It is expected that the test of 'sufficient connection' will be aligned with the jurisdiction test for schemes – a relatively low bar which has enabled a significant number of non-English companies to establish jurisdiction under the English courts to implement a restructuring.

The Restructuring Plan procedure

Procedurally, a Restructuring Plan is very similar to a scheme; with both requiring court sanction. Typically, directors of a company will prepare a Restructuring Plan proposal and apply to court for approval to convene meetings of the company's creditors and members. As noted above creditors and shareholders may also propose a Restructuring Plan, although this is likely to be more difficult since third parties will have an information imbalance compared to companies.

A wide-range of restructuring options can be implemented within a Restructuring Plan and they have already been used to effect: a solvent recapitalisation, a combination of debt-for-debt and debt-for equity swaps and most recently a solvent wind-down (DeepOcean).

Two hearing court process

Implementation of a Restructuring Plan involves two court hearings. At the first, when deciding whether to convene creditor and member meetings, the court will consider whether:

- the company meets the eligibility criteria
- the creditor classes have been formulated correctly
- there are any creditors who do not have a genuine economic interest in the outcome and therefore should be excluded from voting, and
- there are any jurisdictional issues.

Creditors can, if they wish, make representations at this hearing. If the court is satisfied the convening conditions have been satisfied, it will make an order convening the creditor and member meetings. The company then sends to all creditors and members notice of the meetings and documentation outlining the Restructuring Plan its effect on them. The meetings will then be held and votes recorded. Subject to voting thresholds being met (as detailed below), a second hearing is held to decide whether the court, at its absolute discretion, sanctions the proposed Restructuring Plan.

Notable features of the Restructuring Plan:

Voting thresholds

A Restructuring Plan requires the approval of 75% in gross value of debt or equity that votes in each class of creditors or members. The absence of a majority in number threshold, present in a scheme, should provide greater flexibility.

Cross-class cram down

Cross-class cram down is new to the UK. It enables a dissenting class of creditors to be crammed down so as to prevent hold-out creditors blocking otherwise viable Restructuring Plans. This adds a flexibility, and a route to restructurings, that was previously unavailable in the UK but will be familiar from US Chapter 11.

Cross-class cramdown will be available where:

- the court is satisfied that no member of the dissenting class(es) would be any worse off under the plan than they would be in the event of the 'relevant alternative'
- at least one class that would benefit from the 'relevant alternative', has voted in favour of the Restructuring Plan, and
- the court is prepared to sanction the Restructuring Plan.

The 'relative alternative' will be whatever the court considers the most likely to occur in relation to the company should the Restructuring Plan not be sanctioned by the court (eg a formal insolvency process).

Comparison with other UK and international processes

Schemes of Arrangement

Schemes and Restructuring Plans both compromise creditor claims through a combination of consent, drag along and court sanction but there are also some major differences:

- Restructuring Plans are available only to distressed companies whereas schemes do not have that eligibility requirement
- Restructuring Plans offer cross-class cram down
- voting thresholds in Restructuring Plans are only value based.

Restructuring Plans' flexibility should reduce costs and offer a route to a holistic restructuring in contrast to the sometimes cumbersome and expensive use of schemes combined with a CVA or other formal insolvency process.

Chapter 11

Chapter 11 and Restructuring Plans are both court sanctioned, debtor-in-possession processes with cross-class cram down available. The key differences between them are:

- Chapter 11 concept of 'absolute priority' under which junior creditors can only receive value in the proceedings where senior ranking creditors have been paid in full/received sufficient value. This does not feature in Restructuring Plans; although there is an anticipation that the court will consider it at the sanction hearing
- Chapter 11 has voting thresholds of both value and number
- Chapter 11 is a formal insolvency process involving a high level of court oversight. Restructuring Plans are intended to operate outside of insolvency with court involvement limited to the sanction decision.

Dutch Scheme

In January 2021, the Netherlands introduced its own new restructuring regime containing many similarities to Restructuring Plan and Chapter 11 processes.

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It too requires court involvement although to a much lesser degree than its US and UK equivalents. It is therefore expected to be a cheaper and quicker alternative. As with Chapter 11 and the Restructuring Plan, the Dutch Scheme benefits from a cross-class cram down feature.

Brexit means that in contrast to the Dutch Scheme, the Restructuring Plan will not benefit from automatic recognition across EU member states – this may increase uncertainty and cost if extra-territorial recognition is required to implement a Restructuring Plan.

Practical application of the Restructuring Plan

In the recent DeepOcean Restructuring Plan, the UK court considered cross-class cram down for the first time. Although the DeepOcean Restructuring Plan was uncontested the key takeaways are:

- the court showed a willingness to reach a definitive view on what constituted the correct 'relevant alternative' comparator
- 'no worse off' will be considered broadly, to cover all aspects of a Restructuring Plan's impact on the creditor concerned, eg timing and security as opposed to just value
- the court may revisit class constitution if it becomes aware of artificiality in the creation of classes, and
- in exercising its discretion, the court will consider whether the Restructuring Plan (i) has overall support and affected parties were fairly represented at the meetings; (ii) provides for differences in treatment of creditors; and (iii) satisfies other considerations applied in a scheme eg acting in good faith.

This is just the start of the court's consideration of Restructuring Plans, but the successful sanction of the DeepOcean Restructuring Plan is a clear signal that the UK is well-positioned to remain a leading global restructuring hub based on its flexible and innovative restructuring regimes and experienced and dependable judiciary.

RPC's restructuring and insolvency team is recognised for its work in financially distressed situations. This is because we provide expert advice and wide-ranging expertise to all affected stakeholders. We're regularly called upon to provide support in mid- to large-scale distressed and formal insolvency situations.

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