The UK Restructuring Plan (RP) in an age of uncertainty

The Corporate Governance and Insolvency Act 2020 (CIGA) introduced a new kid on the block in terms of UK restructuring law and practice namely, the 'restructuring plan' or RP. The new procedure was introduced to 'eliminate, reduce or prevent, or mitigate the effect of, any of the financial difficulties' which have affected or will affect the ability of a company to carry on its business as a going concern. In many ways, the new procedure is similar to the existing scheme of arrangement procedure contained in the companies legislation that dates back to 1870 and is now found in Part 26, Companies Act 2006.[1] The new restructuring procedure is contained in a Part 26A added to the Companies Act 2006.[2]The parallels with the scheme of arrangement are much closer than with the company voluntary arrangement (CVA) under the Insolvency Act.[3] CVAs are relatively straightforward in that they do not need to come before the court for approval and creditors are not divided into classes, but neither secured creditors nor preferential creditors become bound by a CVA unless with their consent.[4]

In official reviews, CIGA in general, and the RP in particular, has been hailed for expanding the range of options available to distressed companies in the UK and for keeping the UK at

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1 See generally C Pilkington and W Stoner, *Pilkington on Creditor Schemes of Arrangement and Restructuring Plans* (3nd ed, London, Sweet & Maxwell 2022); G O'Dea ed *Restructuring Plans, Creditor Schemes and other Restructuring Tools* (Oxford, OUP, 2022); J Payne, *Schemes of Arrangement: Theory, Structure and Operation* (Cambridge, CUP, 2nd ed 2021).

2 See 2020 Act, s 7 and Sch 9. For a detailed analysis, see generally R Dicker QC and A Al Attar 'Cross-Class Cram Downs', *South Square Digest* special issue on Corporate Insolvency and Governance Act 2020 at p 34 and available at https://southsquare.com/wp-pdf. See also new *Practice Statement (Companies: Schemes of Arrangement under Part 26 and Part 26A of the Companies Act 2006)*, available at https://www.judiciary.uk/wp-content/uploads/2020/06/Schemes-Practice-Statement-FINAL25-6-20.pdf.

3 Part 1 Insolvency Act 1986. For a valuable study of CVAs carried out on behalf of R3 see P Walton, C Unfreville and L Jacobs, *Company Voluntary Arrangements: Evaluating Success and Failure* (April, 2018) and available at https://www.icaew.com/-/media/corporate/files/technical/insolvency/publications/cvas-evaluating-success-and-failure.ashx

4 Insolvency Act 1986, s 4(4).

the forefront of international insolvency developments, not least by introducing a cross class cram-down power which the scheme of arrangement previously lacked.[5]

This paper will critically analyse the RP procedure which was also recently done by Snowden LJ in the *Adler Group* restructuring.[6] This judgment, while recognising the origins of the RP in the scheme procedure highlights the important differences between the two.

Snowden LJ said that the court was not generally required to make a horizontal comparison between voting classes in scheme cases, because of the particular requirement of 'Part 26 that all of the classes must have voted in favour before a scheme can be sanctioned. If the rationality test (and its preconditions) is satisfied within each class, the affirmative vote in each class indicates that the different classes of creditors are all content with the allocation of the required compromises and anticipated benefits of the restructuring as between them. The position is very different under Part 26A. Given the inherent nature of the cross-class cram down power which enables the assenting votes of one class to form the basis of imposing a restructuring plan …upon a dissenting class … it is obviously appropriate for the court to conduct some form of horizontal comparison when deciding whether to sanction a plan in circumstances' in which Part 26A is engaged.[7]

Apart from this first introductory part, the second part of this paper will examine in more detail the extent to which the RP differs from the scheme procedure. The third part asks whether the RP can be regarded as an insolvency procedure. The fourth part compares the RP with

[5] See *The CORPORATE INSOLVENCY AND GOVERNANCE ACT 2020 - FINAL EVALUATION REPORT* (November 2022) by P Walton and L Jacobs and commissioned by the UK Insolvency Service. The final report and an interim report are available at https://www.gov.uk/government/publications/corporate-insolvency-and-governance-act-2020-evaluation-reports

[6] *Strategic Value Capital Solutions Master Fund LP & Ors v AGPS BondCo PLC* [2024] EWCA Civ 24. Snowden LJ spoke for a unanimous Court of Appeal with Nugee LJ and Sir Nicholas Patten agreeing with his judgment.

[7] Ibid at 155, 156. Snowden LJ referred in this connection to Trower J in *Re DeepOcean 1 UK Ltd* [2021] EWHC 138 (Ch) at [63] and Zacaroli J in *Re Houst Ltd* [2022] EWHC 1941 (Ch) at [29]-[31].

Chapter 11 of the US Bankruptcy Code focusing in particular on the 'absolute priority' principle enshrined in Chapter 11. The fifth and longest part, is split into 9 subsections – (a) to (i). It analyses the RP in some detail. While introducing cross-class cramdown and in this respect similar to the US Chapter 11, the RP differs from the American antecedent in many respects not least by not having an 'absolute priority' principle. The final part concludes and suggests that, at the very least, the RP keeps the UK at the forefront of international insolvency developments. In a fragmented Europe, there is a certain merit in having a main mover position.

2. ***The RP compared with Scheme of arrangement***

The UK scheme of arrangement has been highly praised.[8] The scheme is opened by the filing of documents with the court and an application to the court to convene meetings of relevant creditors and shareholders to approve the scheme. The scheme procedure can be used for various purposes such as share takeovers but its use includes that by companies of doubtful solvency to restructure their debts or rearrange their affairs. It has proved extremely attractive as a restructuring vehicle of choice for companies incorporated outside the UK, since the UK courts have jurisdiction to sanction a scheme if the company is deemed to have 'sufficient connection' with the UK irrespective of where it was incorporated.[9] The procedure does not have any bankruptcy or insolvency stigma since it is a procedure based on company law rather than insolvency law.

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[8] The scheme has indeed been spoken of as a model for the 'early stage' restructuring procedures envisaged by the EU's Restructuring Directive 2019/1023 – see S Madaus, 'The EU recommendation on business rescue - only another statement or a cause for legislative action across Europe?' [2014] *Insolvency Intelligence* 81 at 84 suggesting that the Commission obviously had this tool in mind.

[9] See *Re Seat Pagine Gialle SpA [2012] EWHC 3686; Primacom Holdings GmbH v Credit Agricole* [2011} EWHC 3746; *Re Rodenstock GmbH* [2011] EWHC 1104 and see generally LC Ho, 'Making and enforcing international schemes of arrangement' (2011) 26 *Journal of International Banking Law and Regulation* 434; J Payne, 'Cross-Border Schemes of Arrangement and Forum Shopping' (2013) 14 *European Business Organization Law Review* 563.

The UK scheme, while once described as a blunderbuss and somewhat cumbersome,[10] is now used as a powerful debt restructuring tool and altering in various ways the financial obligations of companies. Snowden J said in *Re Van Gansewinkel Groep BV:*[11]

‘The use of schemes of arrangement in this way has been prompted by an understandable desire to save the companies in question from formal insolvency proceedings which would be destructive of value for creditors and lead to substantial loss of jobs. The inherent flexibility of a scheme of arrangement has proved particularly valuable in such cases where the existing financing agreements do not contain provisions permitting voluntary modification of their terms by an achievable majority of creditors, or in cases of pan-European groups of companies where co-ordination of rescue procedures or formal insolvency proceedings across more than one country would prove impossible or very difficult to achieve without substantial difficulty, delay and expense.’

Like the scheme, the new RP procedure involves ‘debtor-in-possession’.[12] The company management can prepare a restructuring plan and submit it to creditors, though obviously in practice there is likely to be a high degree of interaction and consultation with creditors in formulating the detailed terms of the plan and making sure that it is likely to meet with creditor approval.

[10] K Cork, *Insolvency Law and Practice: Report of the Review Committee* (Cmnd 8558, 1982) para 419 and see also The Insolvency Service, *Report of the Joint DTI/Treasury Review of Company Rescue and Business Reconstructions Mechanisms* (May 2000), para 43.

[11] [2015] EWHC 2151, [5].

[12] It should be noted that CVAs and schemes of arrangement may be coupled with administration in which case they are no longer debtor-in-possession. See generally on debtor-in-possession versus creditor-in-possession: D Hahn, ‘Concentrated Ownership and Control of Corporate Reorganizations’ (2004) 4 JCLS 117; S Franken, ‘Creditor and Debtor-Oriented Corporate Bankruptcy Regimes Revisited’ (2004) 5 *EBOR* 645.

Essentially, the RP, like the scheme, involves a ‘compromise’ or ‘arrangement’ between a company and its creditors and/or members. It has been held that the scheme involves some element of ‘give and take’[13] on both sides.[14]

It has been argued however that the position however with respect to a RP is somewhat different. For instance, it was held in *Re Prezzo Investco Ltd*[15] that because the cross-class cram down feature of the RP only requires each class to be no worse off in the RP than it would be in the relevant alternative (and not any better off), a zero return would satisfy this condition where a class would receive nothing in the relevant alternative.

In the *Adler Group* restructuring[16], on the other hand, this view was firmly rejected by the Court of Appeal. The provisional view of the court was that there was no jurisdiction under Part 26A to sanction a compulsory cancellation or transfer of the shares in a debtor company for no consideration.[17] Snowden LJ referred to the central statutory concept of a ‘compromise or arrangement’ which did not include a confiscation or expropriation of rights without compensating advantage.[18] In his view, there was not the slightest indication anywhere in the legislative history of Part 26A or in the legislation itself that Parliament intended to introduce any power to sanction the extinction of creditor claims or the confiscation of shares for no consideration.[19]

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[13] In *In re NFU Development Trust Ltd* [1972] 1 WLR 1548 Brightman J observed that a compromise implies some element of accommodation on each side and that an arrangement implies some element of give and take. Total surrender or confiscation was not within either of them. In *In re Savoy Hotel Ltd* [1981] Ch 351 at 359 Nourse J said that the word ‘arrangement’ is one of very wide import. There must be some element of give and take. Beyond that it is neither necessary nor desirable to attempt a definition’.

[14] The legislation does not define ‘compromise’ or ‘arrangement’.

[15] [2023] EWHC 1679 (Ch) at 43. The point was also considered in *Re Smile Telecoms Holdings Ltd* [2023] 1 BCLC 352 and *Re Great Annual Savings (GAS) Co Ltd* [2023] EWHC 1026 (Ch) (convening hearing), though neither court was ultimately required to decide the issue.

[16] *Strategic Value Capital Solutions Master Fund LP & Ors v AGPS BondCo PLC* [2024] EWCA Civ 24.

[17] *Ibid* at 258.

[18] At 265.

[19] At 266. Reference was also made at para 271 to the views of Professor J Payne in her influential work on *Schemes of Arrangement* (CUP, 2nd ed, 2021) at p 319.

The sanctioning of a RP, like a scheme, is a three-stage procedure with, firstly, an application to the court to convene relevant meetings of creditors or members of a company.[20] Secondly, the relevant class meetings are held and the proposal is required to be approved by 75% in value and a majority in number of creditors within each class. The third stage involves the proposal coming again before the court. The court must be satisfied that what is proposed is reasonable such that a reasonable member of the class concerned and acting in respect of its own interests could have voted for it.[21]

The scheme, however, lacks a facility that the RP contains, namely a cross-class creditor cram-down. While dissenting creditors within a class may be 'crammed-down', there is no scope for dissenting classes of creditors in their entirety to be 'crammed-down'. This fact makes the composition of creditor classes very important in the context of a scheme of arrangement. It also leads to more complicated strategies.

It has been held that it is only necessary to get the consent of those with an economic interest in the proposed restructuring. Schemes might therefore be used to 'squeeze out' creditors who are 'out of the money' as in *Re MyTravel plc*[22] and *Re IMO Carwash.*[23] In broad essence, company assets are transferred to a 'newco', together with some liabilities of creditors who are 'in the money', but 'out of the money' creditors are left stranded with claims against the 'oldco' which no longer has any assets. Such schemes are usually implemented as part of a 'pre-packaged' administration and are generally referred to as 'prepack' or 'business transfer' schemes.

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[20] A creditor- led restructuring is possible, though unlikely, since creditors are likely to lack the necessary information about a company's affairs – see *Re Good Box Co Labs Ltd* [2023] EWHC 274 (Ch), [2023] Bus LR 562.

[21] See Snowden J in *Re Virgin Atlantic Airways Ltd* [2020] EWHC 2376 (Ch) at paras 51,52 and Trower J in *Re Deep Occean* [2021] EWHC 138 (Ch) at paras 20,21. These are RP cases which draw an analogy with scheme cases.

[22] See *Re My Travel Group plc* [2004] EWHC 2741 (Ch) and *Re Tea Corp Ltd* [1904] 1 Ch 12. For a general discussion, see CL Seah, 'The Re Tea Corporation Principle and Junior Creditors' Rights to Participate in a Scheme of Arrangement: A View from Singapore' (2011) 20 *International Insolvency Review* 161.

[23] This case is also referred to as *Re Bluebrook* [2009] EWHC 2114 (Ch).

Under the 'business transfer' scheme, the assets or business of the company is normally transferred to a new creditor owned company with the latter assuming an agreed amount of the company's existing liabilities equalling to or exceeding the value of the business or assets being transferred. The transfer is carried out by administrators who are appointed once the scheme has been sanctioned. There is no need, however, to obtain the approval of junior creditors who no longer have any economic interest in the business, given the current value of the business. These junior out of the money' creditors are left behind in the old scheme company with their rights unaltered but now essentially valueless since the 'oldco' has been stripped of assets.

Business transfer schemes may be complex but they also give rise to questions of fairness and procedural propriety.[24] The courts consider the question of valuation at the sanction stage but there may be difficult questions about where in the debt structure the value 'breaks'; how one assesses value and what the relevant comparator for assessing fairness and value is – whether it is liquidation value, going concern value, or something else? [25]

While clearly modelled on the existing scheme, the new RP procedure allows the cross-class cram-down of a company's restructuring proposals on entire non-assenting classes of both secured and unsecured creditors. Cross-clam cramdown may be accomplished in a much simpler fashion than in a scheme coupled with an administration.

[24] See generally M Crystal QC and R Mokal, 'The Valuation of Distressed Companies: A Conceptual Framework Parts 1 and 11' (2006) 3 *International Corporate Rescue* 63 and 123; N Segal, 'Schemes of Arrangement and Junior Creditors – Does the US Approach to Valuations Provide the Answer?' (2007) 20 *Insolvency Intelligence* 49.

[25] In the UK, *A Review of the Corporate Insolvency Framework: A Consultation on Options for Reform* (n 4) states at [9.9]: 'The cram-down of a rescue plan onto 'out of the money' creditors is currently possible in the UK only through a costly mix of using a scheme of arrangement and an administration. The Government believes that developing a more sophisticated restructuring process with the ability to 'cram-down' may facilitate more restructurings, and the subsequent survival of the corporate entity as a going concern.' See https://www.gov.uk/government/consultations/a-review-of-the-corporate-insolvency-framework, para 5.148.

The new Part 26A option to implement a RP can be used where two statutory conditions are met. The first condition is that the company has encountered, or is likely to encounter, financial difficulties that are affecting, or will or may affect, its ability to carry on business as a going concern. The second condition is that a compromise or arrangement is proposed between the company and its creditors, or any class or them, or its members, or any class of them.[26]

The explanatory notes on the legislation suggest that the commonality between the RP and the scheme should allow courts to draw on the existing body of case law where appropriate.[27] The new RP clearly has a more limited remit than the scheme but there are no set parameters as such in the legislation on what the plan should cover. It is up to the plan proponent to strike the right balance between compromising sufficient claims to enable the company to mitigate the financial difficulties that have led to the plan being proposed.

Unlike schemes, which require 75% by value of the relevant creditors who are compromised by the scheme to vote in favour of it, an RP contains the cross-class cram-down procedure. An RP may be approved by the court if there is a 'dissenting class', that is, less than 75% of a particular class of creditors have approved the plan, if these two conditions are met:

Condition A: The court is satisfied that if the plan were to be approved, none of the members of the dissenting class would be any worse off than they would be in the event of the relevant alternative.

Condition B: The plan has been agreed by at least 75% in value of a class who would receive a payment, or have a genuine economic interest in the company, if the relevant alternative were to occur.

[26] Companies Act 2006, s 901A.
[27] HL explanatory notes at para 16 and available at https://publications.parliament.uk/pa/bills/lbill/58-01/113/5801113en.pdf.

The 'relevant alternative' is whatever the court considers would be most likely to occur in relation to the company if the RP were not sanctioned by the court.[28]

Unlike the position for the traditional Part 26 scheme, there is no additional numerosity requirement, that is, a majority in number of affected persons. The utility of this additional test is questionable. Numerosity requirements can generally be overcome by the splitting of debts. This may be done through the assignment of part of the debt to a 'friendly' assignee who is likely, or may indeed be legally compelled, to vote in accordance with the assignor's wishes. The debt splitting and assignment process may be legally complex, however, and will add to delay and expense.[29]

Class classification is likely to be a hot topic in any RP as it is with a scheme, though the dynamics are different in the two contexts. A plan needs only a single assenting class whereas in a scheme all classes need to assent. With a scheme, classes are generally determined based on a test of 'those persons whose rights are not so dissimilar as to make it impossible for them to consult together with a view to their common interest'. This will likely need to be determined on a case-by-case basis. In a scheme, a 'rights and interests' distinction has also resolved some of the difficult issues over class composition by narrowing the number of classes that have to be formed.[30]

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[28] Companies Act 2006, s 901G.4.

[29] For criticisms of numerosity or 'headcount' requirements see generally American Bankruptcy Institute (ABI) Commission to Study the Reform of Chapter Full Report at pp 261 to 263, available at www.commission.abi.org/full-report.

[30] See *Re Lehman Brothers International (Europe)* [2018] EWHC 1980 (Ch) per Hildyard J at para 69 who held that a material difference in legal rights did not necessarily preclude their respective holders from being included in a single class. To require separate classes, the rights of the holders had to be "so dissimilar as to make it impossible for them to consult together with a view to their common interest". He said that this formulation introduced a subjective assessment that may have influenced changing judicial perceptions over the years on class constitution. There was now a judicial inclination not to be 'too picky about different classes' and thus ending up 'with virtually as many classes as there are members of a particular group.'

The courts have distinguished between legal rights, and private interests not derived from legal rights. In one of the classic cases, the judge cautioned against giving small groups veto powers over the decision-making procedures in a restructuring process. It must be confined to those persons whose rights are not so dissimilar as to make it impossible for them to consult together with a view to their common interest.[31] The relevant test for what constitutes a separate class is based on the similarity, or dissimilarity, of the creditor's legal rights against the debtor and not on the similarity, or dissimilarity, of the interests that may be derived from these legal rights. If creditors held divergent views that were based on private interests not derived from their legal rights against the debtor, this was not sufficient ground for saying that the creditors formed separate classes.[32]

In an RP, any creditor or member whose rights are affected by the plan must be permitted to participate in the process, but those who have no genuine economic interest in the company may be excluded.[33] Affected members and creditors must be given sufficient information to be able to vote on the plan.[34] Valuation issues are particularly important at the sanction stage (and even at the initial convening stage), including consideration of what is the likely alternative if confirmation is refused,[35] and whether those with a genuine economic interest have been excluded from participation in the process.[36]

3 Is the RP an insolvency procedure?

Part 26A and the RP is a new set of provisions intended to achieve outcomes that could not be achieved under Part 26 and the scheme. There is no reason however, why the 'rights' and

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[31] *Sovereign Life Assurance Company v Dodd* [1892] 2 QB 573, at 582- 583.
[32] See the recent decisions in *Re Lehman Brothers International (Europe)* [2018] EWHC 1980 (Ch) and *Re Noble Group Ltd* [2018] EWHC 3092 (Ch). These decisions demonstrate the flexibility and versatility of the UK scheme of arrangement jurisdiction and the facilitative role of the courts.
[33] See *Re Smile Telecoms Holdings Ltd* [2022] EWHC 387 (convening hearing) and [2022] EWHC 740 (sanction hearing)
[34] Companies Act 2006, s 901D.
[35] Possibly an alternative plan or a sale of the business rather than a liquidation/administration.
[36] See HL Explanatory Notes at para 205 'When determining the "relevant alternative" the court should consider what would be most likely to occur in relation to the company if the restructuring plan were not sanctioned' and available at https://publications.parliament.uk/pa/bills/lbill/58-01/113/5801113en.pdf.

'interests' distinction should not apply in the same way to RPs as it does in the same way to schemes. The question arises though whether the RP is an insolvency procedure?

The procedure is intended to address financial difficulties although it is fair to say that a company may have to face financial difficulties, without necessarily experiencing insolvency. Moreover, the procedure is in the Companies Act rather than the Insolvency Act. It is submitted that the answer to the question ultimately turns on the wording of the relevant law and the context in which it appears.[37] There was detailed consideration of the issue in *Re Gategroup Guarantee Ltd*[38] where Zacaroli J addressed whether the jurisdiction of the UK court to sanction a RP plan in respect of a UK registered company had been affected by the Lugano Convention and should be considered as an insolvency matter in that context.[39]

As of 1 January 2021 the UK is no longer a party to the Lugano Convention but the claim form was issued before that date. The company argued that the Lugano Convention had no application to a claim under Part 26A because it is not a 'civil and commercial matter' as it fell within the bankruptcy exception in Article 1(2)(b) of the Lugano Convention; namely 'bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings.'

Zacaroli J said that the question should be considered from first principles. One should identify the particular features of insolvency proceedings which meant that they require special treatment and inquire whether the RP contained the same features. In his view, the principal

[37] See H Eidenmüller, 'What is an Insolvency Proceeding' (2018) 53 *American Bankruptcy Law Journal* 53; I Mevorach & A Walters, 'The Characterization of Pre-insolvency Proceedings in Private International Law', (2020) 21 *European Business Organization Law Review* 855; R Mokal, 'What is an insolvency proceeding? *Gategroup* lands in a gated community' (2022) 31 *International Insolvency Review* 418.

[38] [2021] EWHC 304 (Ch).

[39] The Lugano Convention forms the basis of the EU's private international law relationship with Norway, Iceland and Switzerland and is based on the original version of the Brussels 1a Regulation – Regulation 44/2001 recast as Regulation 1215/2012/EU. The Lugano Convention also applied to the UK when the UK was am EU Member State. The text of the Convention is available at https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A22007A1221%2803%29

'peculiarity' of insolvency proceedings which required special rules relating to jurisdiction and recognition is that they were a collective process. They are driven by the need to solve the problem that the debtor's assets are insufficient to satisfy the claims of all of its creditors, thus raising at least the possibility of competition among the debtor's creditors and stakeholders.[40]

He said 'proceedings designed to enable a company in financial difficulties to reach a composition or arrangement … with its creditors involves the same peculiar feature as a straightforward bankruptcy or winding-up. The need for the composition or arrangement arises from the company's inability to satisfy the claims of all its creditors. There is inherently competition between the company's creditors, requiring a collective solution that is fair to all. …. In any event, rules which allocate jurisdiction by reference to the domicile of each creditor, or the legal nature of each creditor's claim, or by reference to bi-lateral contractual provisions with different creditors, are as inapposite and impractical in the context of Part 26A proceedings, which are premised on the financial difficulties of the company, as they are for traditional insolvency proceedings.'[41]

The judge concluded that RP proceedings complied with the definitional requirements in Article 1(1) of the EU's Insolvency Regulation[42] and could have been listed in Annex A of the Regulation were the UK still an EU Member State.[43] Therefore, they were to be regarded as insolvency proceedings for the relevant purpose. [44]

It is more than likely that RPs will be recognised as foreign insolvency proceedings under Chapter 15 of the US Bankruptcy Code which implements the UNCITRAL Model Law on Cross

[40] Ibid, para 91.
[41] Ibid, para 100. For discussion and analysis see R Mokal, 'What is an insolvency proceeding? *Gategroup* lands in a gated community' (2022) 31 *International Insolvency Review* 418.
[42] Regulation 2015/848.
[43] According to Article 2(4), for the purpose of the Regulation, 'insolvency proceedings' means the proceedings listed in Annex A.
[44] Mokal argues more generally that the 'scheme is (quite plainly) a judicial composition which constitutes an insolvency proceeding for relevant purposes when deployed in relation to insolvent companies'- Mokal, fn 37 above. See also J Payne, 'Debt Restructuring in transition' (2023) 139 LQR 10 who talks about a blurred boundary between restructuring and insolvency.

Border Insolvency[45] in the US.[46] In the UK, the Model Law has been implemented through the Cross Border Insolvency Regulations (CBIR) 2006. [47] The US Chapter 15 however, encompasses procedures for the adjustment of debt as well as insolvency procedures strictly so called.[48] It is therefore the case that UK schemes have been recognised as failing within this definition. [49]

4. RPs compared with the US Chapter 11

RPs introduce cross-class cramdown to the UK as is done in the US under Chapter 11 US Bankruptcy Code. Further comparison with the position in the US appears appropriate. The Chapter 11 system is founded on certain fundamental assumptions such as that businesses in financial distress are generally worth more as going concerns than if they are liquidated piecemeal. Moreover, their financial distress should be resolved through adjustment of their contracts with shareholders, trading partners and other stakeholders. The traditional view of a successful Chapter 11 outcome is that it results in a reorganisation plan agreed by a majority of creditors. For example, Stevens J remarked in the US Supreme Court in *Bank of America*

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[45] https://uncitral.un.org/en/texts/insolvency/modellaw/cross-border_insolvency

[46] See *Re Virgin Atlantic Airways Ltd* [2020] EWHC 2376 (Ch) per Snowden J at para 74/

[47] SI 2006/1030. Reg 2 provides that '(1) The UNCITRAL Model Law shall have the force of law in Great Britain in the form set out in Schedule 1 to these Regulations (which contains the UNCITRAL Model Law with certain modifications to adapt it for application in Great Britain)'.

[48] 'Foreign proceeding' is defined in section 101(23) of the US Bankruptcy Code as '[A] collective judicial or administrative proceeding in a foreign country, including an interim proceeding, under a law relating to insolvency or adjustment of debt in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation.' See generally A Walters, 'Giving Effect to Foreign Restructuring Plans in Anglo-US Private International Law' (2015) 3 *Nottingham Insolvency and Business Law E-Journal* 376, 380, citing the observation of NY Bankruptcy Court Judge Sean Lane that 'schemes have routinely been recognized as foreign proceedings, including cases in this court'. See also JL Westbrook, 'Ian Fletcher and the Internationalist Principle' (2015) 3 *Nottingham Insolvency and Business Law E-Journal* 565, 567, discussing the 'active current American practice enforcing English schemes of arrangement in the United States'.

[49] *In re Agrokor* (2018) 591 B.R. 163 at 192. For different perspectives on the US/UK judicial divide, see A Walters, 'Modified Universalism & The Role of Local Legal Culture in the Making of Cross-Borders Insolvency Law' (2019) 93 *American Bankruptcy Law Journal* 47; S Block-Lieb, 'Reaching to Restructure Across Borders (Without Over-Reaching), Even after Brexit' (2018) 92 *American Bankruptcy Law Journal* 1.

v 203 North LaSalle Street Partnership:[50] 'Confirmation of a plan of reorganization is the statutory goal of every chapter 11 case. Section 1129 provides the requirements for such confirmation, containing Congress' minimum requirements for allowing an entity to discharge its unpaid debts and continue its operations.'

Cram-down of affected parties within a class and also the cram-down of whole classes of creditors is a feature of the US Chapter 11.[51] A class of creditors, including secured creditors, can be crammed down in the US, that is, forced to accept a restructuring plan against its wishes provided that at least one other class of impaired creditors has accepted the plan.

Creditors in Chapter 11 are protected by the 'best interests test'[52] and also by an extensive list of conditions set out in section 1129. The restructuring plan must not discriminate unfairly and has to be fair and equitable.[53]

Secured creditors are effectively entitled to payment of the amount secured in full over time.[103] Unsecured creditors are protected by the absolute priority principle.[54] This means that shareholders cannot, in principle, be paid before the creditors unless the creditors consent or the shareholders are providing some new or additional value.[55] Section 1129(b)(2)(C)(ii) provides that the 'holder of any claim or interest that is junior to the claims of such class [of

[50] (1999) 526 US 434 at fn 4 of his judgment.

[51] For a general discussion of the issues, see J Payne, 'Debt Restructuring in English Law: Lessons From the United States and the Need for Reform' (2014) 130 *LQR* 282. See also J Payne, 'Debt Restructuring in transition' (2023) 139 LQR 101; S Paterson and A Walters, 'Selective Corporate Restructuring Strategy' (2023) 86 MLR 436.

[52] US Bankruptcy Code, s 1129)(7)(A)(ii).

[53] See US Bankruptcy Code, s 1129(b)(i): 'the court, on request of the proponent of the plan, shall confirm the plan … if the plan does not discriminate unfairly, and is fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted, the plan.'

[54] For arguments that the 'absolute priority' principle in the US is less absolute than it might superficially appear, see M Roe and F Tung, 'Breaking bankruptcy priority: How rent-seeking upends the creditors' bargain' (2013) 99 *Virginia Law Review* 1235 and also S Lubben, 'The Overstated Absolute Priority Rule' (2016) 21 *Fordham Journal of Financial and Corporate Law* 581.

[55] See B Markell, 'Owners, Auctions, and Absolute Priority in Bankruptcy Reorganizations' (1991) 44 *Stan L Rev* 69 at 123, arguing that this priority scheme is recognised as 'the cornerstone of reorganization practice and theory'.

unsecured creditors] will not receive or retain under the plan on account of such junior claim or interest any property'.

The 'absolute priority' principle was explained in detail by the US Supreme Court in *Czyzewski v Jevic Holding Corp.*[56] The court said that the Bankruptcy Code sets forth a basic system of priority that ordinarily determines the order in which the court will distribute assets of the debtor's estate. Secured creditors are highest on the priority list in that they must receive the proceeds of the collateral that secures their debts.[57] Special classes of creditors, such as those that hold certain claims for taxes or wages, come next in a particular order followed by lower priority creditors, including general unsecured creditors. Equity holders are at the bottom of the priority list and they receive nothing until all previously listed creditors have been paid in full.[58] In the liquidation of a debtor's assets under Chapter 7 of the Bankruptcy Code, a distribution must follow this prescribed order.[59] There is somewhat more flexibility for distributions in Chapter 11 plans, which may impose a different ordering with the consent of affected parties. Nevertheless, the court may not confirm a plan with priority-violating distributions over the objection of an impaired creditor class.[60]

In short, the absolute priority principle requires that unless creditors are to be paid in full, or unless each class of creditors consents, the company's 'old' shareholders are not entitled to receive or retain any property on account of their old shares.[61] Law and economics scholars

[56] (2017)137 S. Ct. 973. For an analysis, see J Lipson, 'The Secret Life of Priority: Corporate Reorganization after JEVIC' (2018) 93 *Washington Law Review* 645.
[57] US Bankruptcy Code, s 725.
[58] *Idem*, ss 507 and 726.
[59] *Idem*, ss 725 and 726.
[60] *Idem*, ss 1129(a)(7), 1129(b)(2).
[61] For a history of absolute priority in the US, see eg D Baird, 'Present at the Creation: The SEC and the Origins of the Absolute Priority Rule' (2010) 18 *Am Bankr Inst L Rev* 591; S Lubben, 'The Overstated Absolute Priority Rule' (2016) 21 *Fordham J Corp & Fin L* 581 (2016), and see also the original US Supreme Court decision in *Case v Los Angeles Lumber Products Co* (1939) 308 US 106, 115-119. The US Supreme Court introduced the idea of a 'new value exception' to the absolute priority rule on the basis that distributions to shareholders were valid as long as the shareholder provides new value to the company of (at least) the same amount. See also American Bankruptcy Institute (ABI) *Commission to Study the Reform of Chapter Full Report* at pp 224-226 and available at www.commission.abi.org/full-report.

have argued that deviations from the priority are costly and will increase the cost of borrowing since lenders adjust their rates to reflect the fact that shareholders retain some value that would otherwise have gone to the lenders.[62] The argument is that the failure to enforce the absolute priority rule will affect investment decisions; drive up the cost of capital and distort allocations between equity and debt. On the other hand, however, it may be the case that these propositions are based on perfect market theories that are not necessarily sound in practice.[63]

Moreover, the absolute priority rule makes it rather difficult to award value under a restructuring plan to 'old equity'. In this connection, it should be noted that the US Small Business Reorganization Act 2019[64] is designed to protect the equity interest of the small business owner. The Act introduces a new subchapter V into the US Bankruptcy Code which eliminates the rule that a shareholder cannot retain equity in a business unless creditors are paid in full. The provision allows existing owners of a business to retain their 'full equity' ownership without providing any 'new value' if the plan provides for the debtor to distribute all of its projected disposable income over at least three years and no more than five from the date the first payment is due under the plan.[65]

The new Act statutorily reverses a US Supreme Court case, *Norwest Bank Worthington v Ahlers*,[66] which held that the 'absolute priority rule' barred confirmation of a restructuring plan

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[62] See generally D Baird, 'Priority Matters: Absolute Priority, Relative Priority and the Costs of Bankruptcy' (2016) 165 *U Penn L Rev* 785; AJ Casey, "The Creditors' Bargain and Option Preservation Priority in Chapter 11' (2011) 78 *U Chi L Rev* 759; E Janger, 'The Logic and Limits of Liens' (2015) *U Ill L Rev* 589.

[63] See S Lubben, 'The Overstated Absolute Priority Rule' (2016) 21 *Fordham J Corp & Fin L* 581

[64] For an analysis of the Act and the background to its enactment see EJ Janger, 'The U.S. small business bankruptcy amendments: A global model for reform?' (2020) 29 *International Insolvency Review* 254.

[65] See the US Congressional testimony online: https://www.congress.gov/event/116th-congress/house-event/109657 and in particular the statement by the ABI Commission Co-Chair, Robert Keach, 'Chapter 11 doesn't work for small and medium-sized businesses because the Bankruptcy Code …(d) makes it difficult for a small business owner to maintain an ownership interest in the business under the current Chapter 11.'

[66] (1988) 485 US 197.

where the old owners' sought to reclaim the company, as it were, through a contribution of 'sweat equity.' The 2019 Act specifically validates this approach.

It is appropriate now to turn the attention back to UK RP and to ascertain whether the US Chapter 11 comparison bears any further fruit. The UK RP introduced cross-class cramdown but does it make any further moves in the Chapter 11 direction?

5. *Look to the future now, the RP is just beginning*

With the RP, the UK has now adopted a legal model on corporate and business restructuring that contains a cross-class cramdown facility like the US Chapter 11 but it contain less statutory guidance for the courts. There is no explicit absolute priority rule, never mind a 'new value' corollary. A lot is left up to judicial interpretation and depend on how the key expressions of 'genuine economic interest in the company' and 'relevant alternative' are interpreted and applied.

Initially the exercise of the cramdown power under the RP procedure was considered by Trower J in *DeepOcean*[67] and by Snowden in the 'sanctioning' hearing in *Re Virgin Active*.[68] As both judges pointed out, that the statute gives little guidance on the factors that are relevant when the court is exercising its discretion to sanction a restructuring plan. There are the requirements of at least a single assenting class of 'in the money' creditors and that dissenting classes are not any worse off than then would be if the RP were not sanctioned. But apart from these gateway conditions, there is no express test or identification of any factors that should be taken into account.[69]The emerging case law has however sketched out some relevant principles.

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[67] *Re DeepOcean 1 UK Limited* [2021] EWHC 138 (Ch) (28 January 2021).
[68] *Re Virgin Active Holdings Ltd* [2021] EWHC 1246 (Ch) (12 May 2021).
[69] See Snowden J in *Re Virgin Atlantic Airways Ltd* [2020] EWHC 2376 (Ch) at para 213 and Trower J in *Re Deep Occean* [2021] EWHC 138 (Ch) at para 44.

(a)No rebuttable presumption that RP should be sanctioned if 'gateway' conditions are met and perhaps not even a 'fair wind'

There is no rebuttable presumption that a restructuring plan will be sanctioned if the gateway conditions are met. This conclusion was strongly articulated by the Court of Appeal in the *Adler Group* restructuring.[70]

This conclusion goes in a somewhat different direction from the suggestion of Trower J in *Re DeepOcean*[71] that there would be a 'fair wind' behind sanction for such a plan.

Moreover, in Re *Nasmyth Group Ltd*[72], Adam Johnson J the court was minded to accept the proposition[73] that while s 901G did not provide an express test nor identify the factors relevant to the exercise of discretion, the plan company will have a 'fair wind' behind it if the gateway conditions are satisfied.[74] These conditions were described as a 'sound starting point for the exercise of the discretion'.[75]

Nevertheless, in the *Adler Group* restructuring Snoweden LJ emphasised that the cross class cramdown exercise cannot, however, properly be carried out merely by asking whether any dissenting creditor will be any worse off as a result of the RP plan than in the relevant alternative. He said:

'That would simply be to restate Condition A in s 901G. As a matter of principle, when the court exercises its discretion to impose a plan upon a dissenting class, it subjects that class to an enforced compromise or arrangement of their rights in order to achieve a result which the assenting classes of creditors consider to be to their commercial advantage. In my judgment, that exercise of a judicial discretion to alter the rights of a dissenting class for the perceived benefit of the assenting classes necessarily requires the court to inquire how the

[70] *Strategic Value Capital Solutions Master Fund LP & Ors v AGPS BondCo PLC* [2024] EWCA Civ 24. The judgment of Snowden LJ was agreed to by the other members of the Court of Appeal

[71] [2021] EWHC 138 (Ch) at para 48.
[72] [2023] EWHC 988 (Ch).
[73] [2023] EWHC 988 (Ch) at [94].
[74] See *Re DeepOcean* at [48] per Trower J; *Amicus Finance Plc (In Administration)* [2021] EWHC 3036 (Ch) at [78] per Sir Alistair Norris
[75] See *Re E D & F Man Holdings Ltd* [2022] EWHC 687 (Ch) at [39] per Trower J.

value sought to be preserved or generated by the restructuring plan, over and above the relevant alternative, is to be allocated between those different creditor groups.'[76]

The court made reference to the expressions ‘fair distribution of the benefits of the restructuring’ or a ‘fair distribution of the restructuring surplus’. An alternative expression would be to ask whether the assenting class or classes of creditors are getting too much of a good thing.[77]

(b)No ‘absolute priority’ principle for UK RPs

The UK RP does not specifically address the policy of absolute priority. The 2018 UK government proposals on reform of the corporate insolvency framework, suggested that there may be very good reasons to deviate from absolute priority, for example where an essential supplier insists on payment ahead of others.[78] It said that US experience highlighted the potential for abuse of absolute priority whereby sophisticated parties seek to benefit at the expense of others. It said that ‘the trend of predatory market players cheaply acquiring junior secured debt as existing bondholders sell out, and then using restructuring negotiations to extract maximum value for themselves, regardless of the interests of other creditors or the rescue of the debtor, is well documented. Allowing opportunistic creditors to exploit restructurings by blocking restructuring plans that the majority of creditors support, until they are given unreasonably favourable treatment, would not assist the Government’s aim of improving the prospects for company rescue.’[79]

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[76] *Strategic Value Capital Solutions Master Fund LP & Ors v AGPS BondCo PLC* [2024] EWCA Civ 24 at 160.

[77] At para 161 Snowden LJ also made reference to Professor Sarah Paterson who adopted a dictum of Mann J in the scheme case of *Re Bluebrook Ltd* [2009] EWHC 2114 (Ch) at [49] and suggested that the essential question for the court is whether any class of creditor is getting ‘too good a deal (too much unfair value)’.

[78] The original consultation is available at https://www.gov.uk/government/consultations/a-review-of-the-corporate-insolvency-framework and see the 2018 UK government response to the consultation at para 5.161.

[79] Ibid at para 5.162.

It was suggested that courts should be permitted to confirm a restructuring plan even if it did not conform to absolute priority where non-compliance was considered necessary to achieve the aims of the restructuring; and was just and equitable in the circumstances.[80] The 2020 Act does not explicitly contain this additional measure of flexibility or indeed say anything about the matter at all. The assumption may have been that it would introduce too much uncertainty into the law and impact negatively on the cost and availability of credit, and in particular secured credit.

In the *Virgin Active* case the absolute priority rule was considered in the UK RP context. Dissenting creditors objected to the fact that the old shareholder class had been allowed to retain part of their ownership stake in return for putting up new capital whereas this opportunity had been denied to the dissenting creditors. In support of this objection, reference was made to *Bank of America v 203 North LaSalle Street Partnership*[81]where the US Supreme Court refused to confirm a Chapter 11 plan that provided for the existing holders of equity in an insolvent entity to be able to subscribe for new equity in the reorganised entity. The Supreme Court held that the plan violated the codification of the absolute priority rule and the 'new money' section in s 1129 US Bankruptcy Code because there had been no opportunity for anyone else to subscribe for the equity.

In *Virgin Active,* it was pointed out that *North La Salle Street* turned on the US statutory language and its codification of the absolute priority rule. In the UK, an equivalent absolute priority rule was not enacted in any form as a principle for the exercise of the Part 26A discretion.[82]Part 26A provides two conditions to enable the court to exercise cram down. If these gateway conditions are satisfied, the court then has discretion to impose cramdown.

In this particular case, commercial landlords objected to a RP that saw existing shareholders retain 100% of the equity of the restructured group, albeit as part of a package in which they

[80] Para 5.164.
[81] (1999) 526 US 434
[82] *Re Virgin Active Holdings Ltd* [2021] EWHC 1246 (Ch) (12 May 2021), para 289.

would provide new money on a lower ranking basis than the existing secured lending and write off, or capitalise, substantial intercompany loans. The argument was that this was contrary to basic principles of insolvency law in that the shareholders, who would be at the bottom of the priority hierarchy waterfall in an administration or liquidation of a plan company, would receive the so called ‘restructuring surplus’ at the expense of unsecured creditors.

The court in *Virgin Active* refused to read an ‘absolute priority rule’ into the legislation. The UK legislation leaves more room for judicial discretion and an open textured approach rather than rigidly fashioned statutory principles. Prima facie, it is for the ‘in the money’ creditors to decide whether value should be allocated to ‘old equity’ in the restructured entity, whether for goodwill, hold-up value or the provision of new finance. Moreover, the allocation of value is not necessarily dependent on any ‘market testing’ element.

More generally, the Court of Appeal in the in the *Adler Group* restructuring suggested that a departure from the principle of *pari passu* distribution of the benefits of the restructuring is permissible and can be approved by the court provided that there is a good reason or proper basis for that departure. [83]

The court added that it was neither possible nor advisable to attempt to prescribe an exhaustive list of the criteria that might qualify.[84] Nevertheless, some examples were given of creditors receiving some priority or a proportionately enhanced share of the benefits of the restructuring with a view to facilitating that restructuring in the interests of creditors as a whole. These examples encompassed the providers of new finance, or the exclusion of trade creditors or employees from the RP’s ambit.

References was made to rough analogies for such priority payment or exclusion in other aspects of insolvency law. These included provision for and administrator to make a payment to a creditor in full otherwise than in accordance with the statutory rules as to priority if to do so was necessary or incidental to the performance of his functions, or if the administrator thinks it likely to assist achievement of the purposes of the administration. The facility for such

[83] *Strategic Value Capital Solutions Master Fund LP & Ors v AGPS BondCo PLC* [2024] EWCA Civ 24 at 166.

[84] *Ibid* at 167.

payments was made for such payments in para 13 Schedule 1 and para 66 Schedule B1 Insolvency Act 1986.

Another example was the *Lundy Granite* principle.[85] This is the long-established ‘salvage’ principle under which, if a liquidator or administrator retains and uses property of a creditor (such as land leased to the company) in order to achieve a better realisation of the company’s business and assets, the court could, as a matter of ‘common sense and ordinary justice’, direct that liabilities to the creditor in respect of the property be treated as if they were expenses of the liquidation.

(c)Preferential creditors and HMRC may be crammed down but only in exceptional circumstances

Part 26A does not seek preserve the creditors over shareholders distribution doctrine nor the order of priorities that would otherwise apply in an insolvency such as preferential creditors over unsecured creditors. The case law has recognised that a different order of priorities can be justified if there is good reason for it. A case in point is *Re Houst Ltd.*[86] Here the good reason was the need for critical suppliers to be paid in order for an enhanced dividend to be paid to the unsecured creditors, including HMRC.

In *Houst*, HMRC did not appear at the sanction hearing and argue against RP confirmation. In more recent cases, personified in judgments by Adam Johnson J in *Re Great Annual Savings (GAS) Co Ltd* [87] and Leech J in Re *Nasmyth Group Ltd*[88], HMRC appeared at the relevant hearings and argued successfully against RP confirmation.

In *Re Great Annual Savings Co Ltd*[89] the relevant company was the broker of energy supply contracts and made its money through the payment of commissions. It was held that the plan

[85] Se *Lundy Granite, ex parte Heavan* (1871) LR 6 Ch App 462 and *Oak Pits Colliery* (1882) 21 ChD 322. The principle was explained by Lord Hoffmann in *Toshoku Finance UK plc* [2002] 1 WLR 671 and further considered by the Court of Appeal in *Jervis v Pillar Denton* [2015] Ch 87.

[86] [2022] EWHC 1941 (Ch); [2022] BCLC 1143 at [35].

[87] *Re Great Annual Savings(GAS) Co Ltd* [2023] EWHC 1141 (Ch).

[88] [2023] EWHC 988 (Ch).

[89] [2023] EWHC 1141 (Ch)

Company has not discharged the burden of showing that HMRC would not be any worse off under the RP. According to the judge, the RP assumptions took too pessimistic a view of likely recoveries in respect of certain book debts in the relevant alternative, and ignored completely the possibility of claims which might be made by insolvency officeholders against third parties.

Apart from the conclusion that the gateway conditions were not met, the judge in *Re Great Annual Savings Co Ltd* also concluded that the RP did not pass muster on a discretionary basis since it involved a serious imbalance in the way that the anticipated benefits of the restructuring were allocated.[90]

In Re *Nasmyth Group Ltd,*[91] HMRC opposition also sank an RP. The court held that there was a 'blot' or 'roadblock' preventing the plan from taking effect in that it was dependant on HMRC entering into 'time to pay' ('TTP') arrangements with a number of the plan company's subsidiaries and HMRC had now rejected the proposed arrangements.

Preferential creditor or HMRC objection to a RP is not however fatal as the recent *Prezzo* case[92] shows. In this case, the court sanctioned the cram down of HMRC in an RP**. T**he return to HMRC was substantially greater however, than it had been in either *GAS* or *Nasmyth*. Ultimately, the Court found that almost all the restructuring surplus was being allocated to HMRC.

This provided a ground of distinction from the previous HMRC cases. The courts however have recognised that HMRC is an 'involuntary creditor' in that it does not choose to trade with companies as other creditors do. It performs a critical public function and the floodgates should not be opened generally to allow RPs to cram down unpaid tax bills.

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[90] Reference was made at [104] to the paper by Prof S Paterson '*Judicial Discretion in* Part 26A *Restructuring Plan Procedures'* available at: https://ssrn.com/abstract=4016519 or https://dx.doi.org/10.2139/ssrn.4016519

[91] [2023] EWHC 988 (Ch).

[92] [2023] EWHC 1679 (Ch).

(d)Prima facie, it is for the 'in the money' creditors to decide how the restructuring surplus should be distributed.

The leading case here is *Virgin Active*[93] where it was held that significant weight should be given to the views of the 'in-the-money' creditors, in contrast to those creditors who would be 'out-of-the-money' in the relevant alternative.

Snowden J said:[94]

'That established approach in relation to scheme cases reflects the view that where the only alternative to a scheme is a formal insolvency … business and assets in essence belongs to those creditors who would receive a distribution in the formal insolvency. The authorities take the view that it is for those creditors who are in the money to determine how to divide up any value or potential future benefits which use of such business and assets might generate following the restructuring ….'

The judge said he need only consider the relevant alternative at the date of the sanction hearing. It is not relevant if the plan companies (or their directors) might have acted differently or if the plans were negotiated in a way that was unfair to certain creditors or inappropriately elevated shareholder interests at the expense of certain creditors.

Ultimately, it seems that court sanction turns on whether there is a fair allocation of benefits under the RP. Relevant in this regard are the existing rights of creditors and how they would be treated in the relevant alternative. Additional contributions made by creditors to support RP success and whether additional risk is incurred by making new money available are also relevant as is whether any class is disadvantaged under the RP when compared with the relevant alternative and whether this is justified.

[93] *Re Virgin Active Holdings Ltd* [2021] EWHC 1246 (Ch).
[94] Ibid, para 242. See also Riz Mokal in two articles on Part 26A in *Butterworths Journal of International Banking and Financial Law* in December 2020 ('The two conditions for the Part 26A cram down') and January 2021 ('The court's discretion in relation to the Part 26A cram down').

The general issue was also to some extent revisited in the *Adler Group* restructuring.[95] In this case, the RP gave holders of notes maturing in 2024 enhanced security in the form of priority over other series of notes. The additional security was offered as a *quid pro quo* for the 2024 noteholders deferring their maturity date. The Court of Appeal concluded that while offering enhancement to the 2024 noteholders did depart from the *pari passu* principle,[96] the maturity deferral could be a good reason or proper basis for such deviation.[97]

(e)Valuation evidence may be challenged

In many of the RP cases, the focus on valuation evidence and challenges to the plan company's valuation appears to put dissenting creditors at a disadvantage. They are in the unenviable position of needing to incur significant costs in what is likely to be a short space of time to consider and, where appropriate, to challenge the valuation evidence. The (potentially) dissenting creditors face an uphill battle to obtain the necessary information from the company to prepare an alternative valuation or any alternative assessment of the 'relevant alternative'.

According to Snowden LJ in *Smile Telecom*[98]they must stop 'shouting from the spectators' seats and step up to the plate.'[99]

The court outlined the proper route to be followed by a stakeholder opposing a plan on valuation grounds. This consisted of the following

1. obtain any financial information from the company that may be required, either on a voluntary basis or by making a timely disclosure application;
2. file expert evidence of its own, instruct the expert to engage in the production of a joint report in the normal manner and tender the expert for cross-examination; and

[95] *Strategic Value Capital Solutions Master Fund LP & Ors v AGPS BondCo PLC* [2024] EWCA Civ 24 at 166.
[96] [2024] EWCA Civ 24 per Snowden LJ at 226.
[97] *Ibid* at 231. This issue was not one that would have led to the Court allowing the appeal as it did in the case.
[98] [2022] EWHC 740 (Ch), [2023] 1 All ER (Comm) 519.
[99] Para 53.

3. attend the hearing and address argument for the assistance of the court at the appropriate stage in the process at which the point is to be determined:

(a) if an order is sought to disenfranchise out-of-the-money stakeholders from voting, that will be at the convening stage; and

(b) if the court is being asked to approve a plan that not every class has approved, that will be at the sanction hearing.

In *Re Great Annual Savings Co Ltd*[100] Adam Johnson J however, was not persuaded that in Snowden LJ was laying down an invariable rule that, in the absence of expert evidence from an opposing party, the Court is bound to accept the valuation analysis put forward by the plan company. That would be too restrictive an approach, and was not intended. Moreover, in other contexts it was clearly established that the court could choose to disregard expert evidence put forward by a party, even if the opposing party had adduced no expert evidence of its own It was an important part of the judicial function in considering an RP or scheme to scrutinise the company's proposals[101] This included the possibility of scrutinising the valuation figures the company relied on in light of any criticisms made of such figures, in order to determine whether the burden of proof was nevertheless made out.

(f)No 'just and equitable' test in an RP

The leading case is *Re Virgin Active.* Here the judge, Snowden J, noted that while the parliamentary explanatory notes to the 2020 Act refer to the discretion to cram down only

[100] [2023] EWHC 1141 (Ch).

[101] Reference was made to *Re Amicus Finance plc* [2021] EWHC 3036 (Ch) at [23] per Sir Alastair Norris and also the latter's comments at [65]: 'Where the court is required to be "satisfied" it is normally so satisfied on the balance of probabilities. … The dissentient creditor (who bears only an evidential burden of providing a factual basis for his challenge, and does not need to satisfy the Court that the most likely outcome from the relevant alternative is a beneficial return to him) can criticise and seek to undermine what is said to be the more beneficial return to him under the plan. The question then is whether the propounder of the plan can refute that challenge and still satisfy the court on the balance of probabilities that the dissentient creditor would not be any worse off than he would be in the event of the immediate liquidation.'

being exercised where ‘just and equitable’, these should not be read into Part 26A. In his view, there was no justification for the court to impose its own views of what is (or is not) fair or just and equitable, particularly in relation to the destination of any potential upside, and in what proportions. should the company return to good health.[102]

Snowden J held found that it was for the ‘in the money’ creditors (those with a ‘genuine economic interest’) to determine how the ‘restructuring surplus’ was to be divided and that the allocation of that value to the existing shareholders in this instance was permissible. Accordingly, the objections of landlords, all of which were ‘out of the money’, carried no weight. Consequently, any complaint about the way negotiations were conducted prior to the plans being launched were of little significance.[103]Notably however, while acknowledging that plans may legitimately provide for differential treatment of creditors, and such treatment could be justified by reference to factors such as commercial importance and profitability, the door was left for plan challenges where landlords were ‘in the money’ but were nevertheless treated differently.

(g)RPs contain provisions to facilitate debt/equity swaps

RP also contains certain provisions that facilitate debt for equity swaps. This includes facilitating a new issue of shares by disallowing the pre-emption rights of existing shareholders if there is an allotment of shares pursuant to a RP. In *Re Hurricane Energy PLC*[104] a restructuring plan was proposed that would increase the interest rate payable to bondholders and provide them with a fresh allotment of shares in the company. In consequence, the plan would also leave existing shareholders with only 5% of the equity in the restructured entity.

[102] *Re Virgin Active Holdings Ltd* [2021] EWHC 1246 (Ch) (12 May 2021) at paras 210-221.
[103] Para 277.
[104] [2021] EWHC 1418 (Ch) (Convening hearing, 25th May 2021).

Interpreting the relevant legislation, Zacaroli J held that the rights of shareholders to participate in the capital and profits of a company are 'affected by' a RP that would dilute such participation. This construction ensures that the views of shareholders whose economic interest in the company is directly, and potentially significantly, affected by the RP are taken into account in the process mandated by Part 26A.[105]

There was an argument that the contractual rights of shareholders were not altered by the dilution of their shareholding, and it was merely their economic value that had changed. The court however, concluded that 'affected by' was a phrase of much broader ambit than 'amended by' or 'altered by'. In accordance with what was now s 901C(3) Companies Act, every creditor or member of the company whose rights are affected by the compromise or arrangement must be permitted to participate in a meeting ordered to be summoned under s 901(C)(1). Moreover, even if the class of shareholders voted against the RP, the plan could still be sanctioned if the cramdown conditions were satisfied.

Ultimately, the court per Zacaroli J refused to sanction the plan[106] since one of the conditions for cross-class cram down was not met. The existing shareholders, who still had an economic interest in the company, were judged to be better off in the event of the likely relevant alternative to the RP. The latter would see them lose 95% of the equity in the company. In the likely alternative scenario, the existing shareholders would retain 100% of the equity and the company would continue to trade.

There was no immediate cash flow crisis and there was a realistic prospect of the company being able to repay the bonds in full on maturity. The RP was put forward by a board of directors that the shareholders wished to see replaced. This was their right under company law since the shareholders had rights under the company's articles of association to appoint

[105] Ibid at para 34.
[106] *Re Hurricane Energy PLC* [2021] EWHC 1759 (Ch) (Sanctioning hearing, 28th June 2021).

and remove directors. In contrast, the judge pointed out that the bondholders contracted on terms which gave them unsecured debt and no rights to control appointments to the board.[107]

Ultimately, many of the decided cases turn on fulfilment of the gateway conditions for cross-class cram-down, i.e. the relevant class is no worse off than in the event of the likely alternative and secondly, there is at least one class of assenting 'in the money' creditors. In theory, the one assenting class could appropriate the entire restructuring surplus but the necessary 'buy in' from the relevant constituencies to make a success of the restructuring is unlikely to be obtained if such an outcome is proposed.

(h)Relevant factors in Scheme cases may also be relevant in an RP context insofar as they apply in particular to 'assenting' classes

This point was emphasised by Leech J in Re *Nasmyth Group Ltd*[108]*.* He said that the correct approach to the exercise of the cramdown discretion under s 901G Companies Act is to identify specific factors that are relevant to the exercise of that discretion. Such factors may be drawn from existing authorities relating to Part 26 schemes with appropriate modifications.[109]

For instance, where no creditor appears to oppose RP sanction, that will be a relevant factor for the court to take into account in the exercise of its discretion.[110] Moreover, the court will also consider whether there is any blot or defect in the plan that may hinder its operational effectiveness.[111]

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[107] Para 131.

[108] [2023] EWHC 988 (Ch).

[109] See Re *DeepOcean* at [44] and [62] per Trower J and *Re Virgin Active* at [222] and [225] per Snowden J and see also para 16 of the Explanatory Notes ('while there are some differences between the new Part 26A and existing Part 26 (for example the ability to bind dissenting classes of creditors and members), the overall commonality between the two Parts is expected to enable the courts to draw on the existing body of Part 26 case law where appropriate ')

[110] *Re E D & F Man Holdings Limited [2022] EWHC 687 (Ch) at [39]* per Trower J; *Re Houst [2022] B.C.C. 1143 at [42]* per Zacaroli J.

[111] See *Re DeepOcean* at [66] and *Re Virgin Active* at [313].

Specific factors also include whether affirmative votes in the assenting class are representative of the class, the overall level of support for the plan and whether the plan provides a fair distribution of the benefits of the restructuring.[112]

These comments from Leech J in Re *Nasmyth Group Ltd*[113] must however, be read in their proper context and important caveats were introduced by the Court of Appeal the *Adler Group* restructuring.[114]Snowden J said that there was no reason why the principles that had been developed in relation to schemes should not be applied under Part 26A within an assenting class as the basis of an exercise of discretion to impose the plan on the dissenting minority within that class.

It was a different story, however, when considering whether to exercise the plan on a dissenting class under Part 26A. In his view, the court could not simply apply the same rationality test, either (i) as regards the voting within the dissenting class, or (ii) as regards the overall voting across the different classes.[115]

(i)CVA cases may also be relevant in an RP context

Apart from the RP (and the scheme), there is an alternative corporate debt restructuring procedure available in the UK i.e. the company voluntary arrangement (CVA).[116]Traditionally, the usage of CVA has been low for various reasons. It is an Insolvency Act procedure with the implicit insolvency stigma.[117] Moreover, it does not bind secured or preferential creditors

[112] See *Re DeepOcean* at [53]-[65] per Trower J and *Re Virgin Active* at [256]-[300] per Snowden J.
[113] [2023] EWHC 988 (Ch).

[114] *Strategic Value Capital Solutions Master Fund LP & Ors v AGPS BondCo PLC* [2024] EWCA Civ 24 at 166.
[115] *Ibid* at 128,129. At [132] he adapted David Richards J's memorable phrase from Telewest Communications plc (No.1) [2005] BCLC 752 at [40] that creditors will have been placed into separate classes because there is more about the plan that divides than unites them.
[116] For the definition of CVA see s 1(1) Insolvency Act 1986 which requires a proposal by a company for a composition of its debts or a scheme of arrangement in respect of its affairs.
[117] See N Cooper, 'The Death of the CVA? Landlord Compromises and the Restructuring Plan' [2020] *International Corporate Rescue* 270 at 273 who suggests that CVAs are 'frequently misunderstood by the press, customers and suppliers. Being a procedure under IA 1986, reporting on large retail CVAs invariably refers to the "insolvency" of the company and this does nothing to aid customer and supplier confidence at an already difficult time for a business, despite the valorous efforts of PR departments and company press releases.'

without their consent.[118] Therefore, it only seems appropriate for companies with less complicated capital structures. On the other hand, the CVA is quite flexible since creditors are not divided into classes and neither are creditors divided into impaired and unimpaired categories. The CVA only needs approval from 75% in value of those voting. This means that impaired creditors might find that the statutory threshold has been achieved through the votes of unimpaired creditors. Moreover, the CVA does not have to come before the court for approval. Necessarily, the CVA will only come before the court if it is challenged within tight limits and either on grounds of failure to disclose adequate information or on the basis of unfair prejudice to an interested party.[119]

In recent years however, CVAs have become more popular as a restructuring vehicle for businesses in the service sector, particularly in the retail and casual dining sectors and there have been a number of high profile uses of CVAs in this respect. These CVAs invariably involve the differential treatment of creditors and a reduction in leasehold liabilities depending on the popularity (and profitability) of a particular leasehold location.

In challenges by creditors to CVAs attention has focused on horizontal and vertical treatment of creditor groups i.e. treatment across creditor groups and between different restructuring scenarios.[120] The 'horizontal comparator' compares the treatment of creditors under the CVA as between each other. Whilst there is no prohibition on differential treatment, any differential treatment must be justified. The 'vertical comparator' compares the projected outcome of the CVA with the projected outcome of a realistically available alternative process (usually liquidation) and sets a lower bound below which a CVA cannot go. While the context is different, these tests are also useful in a RP context

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[118] J Payne, 'Debt Restructuring in English Law: Lessons from the United States and the Need for Reform' (2014) 130 *Law Quarterly Review* 282 at 289.

[119] See the high profile challenge in the CVA involving Debenhams Stores – *Discovery (Northampton) Ltd v Debenhams Retail Limited [2019] EWHC 2441 (Ch).* See generally N Cooper, 'The Death of the CVA? Landlord Compromises and the Restructuring Plan' [2020] *International Corporate Rescue* 270.

[120] These expressions were first used judicially by Etherton J in the context of an unfair prejudice challenge to a CVA in *Prudential Assurance Co Ltd v PRG Powerhouse Ltd* [2007] EWHC 1002 (Ch).

In *Lazari Properties v New Look*[121] the court however, rejected a root and branch challenge by a number of landlords to CVAs. According to Zacaroli J, differential treatment of different creditor groups was not necessarily unfairly prejudicial. Moreover, obtaining the statutory majority through the votes of unimpaired creditors was also not necessarily unfairly prejudicial.

In his view, there were four key factors when considering whether unfair prejudice exists and this will depend on all the circumstances. Firstly, whether there was a fair allocation of assets available within the CVA between impaired compromised creditors and the other sub-groups of creditors. Secondly, the nature and the extent of any different treatment, its justification and its impact on the voting outcome was relevant. Thirdly, also relevant was to the extent that others in the same positions as objecting creditors approved the CVA. Fourthly, a finding of unfair prejudice was not precluded merely because the same result might have been achieved in an RP. Zacaroli J said:[122]

'The process under part 26A contains important safeguards for creditors that are absent from the CVA process. Most importantly, there is significant court oversight *before* the scheme becomes effective. In particular, the court is closely involved with identifying whether the class meetings are properly constituted before they are convened. Creditors know at the outset, therefore, with whom they are to consult and are able to negotiate with the company and other groups of creditors with clarity as to the strength of their position.'

In *Carraway v Regis UK Ltd,*[123] the same judge, set some clear parameters for how far CVAs can go without being deemed unfair. In this case, it was held that the CVA should be revoked on the basis that it favoured shareholders at the expense of landlord creditors. Under the terms of the CVA, landlords' rights were significantly impaired since rents were reduced by between 25% and 75%, and arrears compromised at just 7% of their value. By contrast, a long list of 'critical creditors' – including debt owing to a related company – were left entirely unimpaired

[121] [2021] EWHC 1209
[122] Ibid at para 199.
[123] [2021] EWHC 1294 (Ch).

by the CVA. The ultimate owner of the business was a global private equity firm and, to the extent that the company's debt burden, in particular to landlords, was reduced, the equity holder stood to benefit.

The judge held that compromising the related party debt would not have jeopardised the effectiveness of the CVA. Therefore, there was not sufficient justification for leaving this debt unimpaired. It appeared to have been given favourable treatment only because it was debt owing to the shareholder, rather than for any objectively justifiable reason. This was unfairly prejudicial against the impaired creditors. On this basis, the judge held that the CVA should be revoked, meaning that it should be treated as never having taken effect.

The horizontal and vertical tests were also considered in the RP context by the Court of Appeal in the *Adler Group* restructuring.[124]The RP proposed in that case was ultimately considered to fail the horizontal comparison test and the *pari passu* principle which provides that all unsecured creditors must share equally any available assets of the company in proportion to the debts due to each creditor.

The plan was opposed by a creditor group who held the final series of notes due to mature in 2019. They argued that the plan unfairly deprived them of the *pari passu* treatment which they would otherwise receive in a German insolvency of the Group, which was accepted as the 'relevant alternative' for Part 26A purposes.

The first instance court found that there was a risk that the Group might run out of money from realisations and be unable to meet the obligations under the 2029 notes. The appeal was allowed on the basis that adherence to the principle of pari passu distribution of the Group's assets would have eliminated that risk by proportionate distributions being made rateably to all noteholders from time to time. 'Put shortly, sequential payments to creditors from a potentially inadequate common fund of money are not the same thing as a rateable distribution of that fund'.[125]

6. ***Conclusion***

[124] *Strategic Value Capital Solutions Master Fund LP & Ors v AGPS BondCo PLC* [2024] EWCA Civ 24 at 149.
[125] *Ibid*. at 193.

In one of the first of the RP cases, it was argued that Part 26A represents an incremental development in available techniques for restructuring a company's indebtedness which can in practice achieve a similar effect to the binding of a dissenting class.[126] Reference was made to *Re Tea Corp*[127] and more recent cases including *Re MyTravel,*[128] *Re Bluebrook Ltd,*[129] and *Re Noble Group Ltd*[130] in which the court considered and discussed various forms of restructuring mechanism where junior creditors are excluded from a scheme because they are 'out of the money' and have no economic interest in the company.

The judge appeared sympathetic to the argument that the RP was an incremental development. On the other hand, the RP is perhaps best viewed as a game changer since it explicitly introduces cross-class cram-down. The RP however, builds on the success of the existing scheme procedure[131] which has a long pedigree.

RPs may also be used for creative solutions as in the Adler Group restructuring[132] where a co-obligor structure was used and a solvent wind down of a German property development group accomplished that made use of the RP procedure. This case ultimately however, kicked the issue into touch. Snowden LJ said that 'for the avoidance of doubt, and without expressing a view one way or the other … this judgment … should not be taken as an endorsement of the technique for future cases.'[133]

The Court of Appeal's judgment in *Adler* also highlighted some significant procedural considerations for companies proposing a restructuring plan. The court made it clear that, while genuine urgency can almost always be accommodated, companies with an impending

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126 See *Re DeepOcean 1 UK Limited* [2021] EWHC 138 (Ch) (28 January 2021) at [50].
127 [1904] 1 Ch 12.
128 [2005] 1 WLR 2365
129 [2010] BCC 209
130 [2019] BCC 349
131 Underfunded defined benefit pension schemes are one of the few remaining typical restructuring stakeholders yet to be crammed down. The impart of the Pension Schemes Act 2021 should however, be noted. The Act potentially imposes criminal liability on those who seek to restructure to the detriment of the pension scheme.

132 Reported as *Re AGPS Bondco Plc* [2023] EWHC 916 (Ch).

133 *Ibid* at 34. Snowden J however, had previously shown an eagerness to examine this technique as in Re *Port Finance Investment Ltd* [2021] EWHC 387 at 58-75.

maturity or liquidity event should not delay plan applications. Short shrift will be given to parties approaching the court with insufficient time, whether intentionally or not, for a fair court process to be accommodated, including exchange and testing of relevant valuation evidence.[134]

Moreover, the court suggested that where an appeal is contemplated, parties should consider applying for implementation of the RP to be stayed until after permission to appeal is determined.[135] It is the case however, that many potential applicant groups in a dissenting class might be dissuaded from so doing by the need to provide a cross-undertaking in damages.

While the RP has overwhelmingly been used by large companies since its introduction, *Re Good Box Co Labs Ltd*[136] serves as an important reminder of its intended applicability to smaller restructurings. Costs are however, an obvious disincentive in the latter scenario.[137]

It is also the case that the UK has a menu of different restructuring possibilities, such as the scheme and the CVA, as well as the RP. These different options come with slightly different access requirements and confirmation conditions.

In restructuring and insolvency cases, however, the UK has a highly specialist judiciary with well developed expertise and working against a background of long established precedents even if they do not bear directly on the new statutory frameworks. This bodes well for the UK remaining a restructuring venue of choice for larger international companies with cross-border operations. The UK has been an attractive shopping venue both for individual bankruptcies and for corporate insolvencies and restructurings.

It remains to be seen whether this state of affairs will continue for a long after Brexit, which jeopardises the prospects of UK proceedings receiving straightforward recognition throughout

[134] *Ibid* at 65.

[135] *Ibid* at 98. On appeal it was submitted that the court of appeal should be slow to interfere with the High Court judgment given that implementation of the plan was well under way. Ultimately however, it was accepted that if the High Court had been wrong in exercising its discretion to sanction the plan, the judgment could not stand and the appeal should be allowed – see para 97. It should be noted however, that while the Court of Appeal judgment is binding as matter of English law it does not purport to rule on German law. The Adler Group has stated that it intends to continue with its restructuring as planned and that '*the terms and conditions of the bonds remain valid regardless of the decision'* – *see* https://www.ft.com/content/82d23ce7-3aeb-4052-a8ff-a08c5f69fbe4

[136] [2023] EWHC 274 (Ch), [2023] Bus LR 562.

[137] For some suggestions on how to mitigate costs, see the final evaluation report (fn 5 above).

Europe.[138] Brexit leaves a large question mark over the continued recognition of UK proceedings. The UK government can take unilateral steps to mitigate any adverse consequence of Brexit and it has taken some such steps[139], but it cannot legislate for the EU institutions or for the 27 EU Member States.[140]

The UK government wishes to maintain the UK's pre-eminent position; certainly for high end cases, and is taking steps to keep UK law up to date and in line with international best practices. But, certainly, the Netherlands and Ireland at least see themselves as stronger competitors for international restructuring business.[141] The European Union, as well as individual Member States, are also taking steps to put in place modern restructuring and corporate insolvency frameworks. Therefore, despite the familiarity and expertise that the UK has to offer, the need to forum shop cases to the UK may be less.

[138] See generally N Stolowy, 'Insolvency and Brexit, an example of forum shopping in business law' [2023] JBL 99; E Vaccario, 'WHOA, Brexit! What future for London as Europe's (largest) insolvency forum?' (2022) 37 JIBLR 46.

[139] (UK) Insolvency Service 'Implementation of two UNCITRAL Model Laws on Insolvency Consultation' and available at https://www.gov.uk/government/consultations/implementation-of-two-uncitral-model-laws-on-insolvency/implementation-of-two-uncitral-model-laws-on-insolvency-consultation

[140] It should be noted however that the final evaluation report on CIGA (see fn 5) suggested reforming legislation to provide expressly that RPs have extra-territorial effect with a view to reducing costs and creating more certainty.

[141] See Netherlands Commercial Court (NCC0 'Pioneering English language dispute resolution in a civil law jurisdiction' and M Murphy/D O'Dea, 'Ireland: An International Restructuring Destination' (2019) 16 *International Corporate Rescue* 276 and the report by the Law Society and Bar Council of Ireland, 'Promoting Ireland as a leading centre globally for international legal services' available at https://www.lawlibrary.ie/media/lawlibrary/media/Secure/ Promoting-Ireland-as-a-leading-centre-globally-for-international-legal-services.pdf