

DEBT RESTRUCTURING IN THE UK

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I. Introduction

The need for regimes to contain an effective mechanism enabling the rescue of distressed but viable businesses is increasingly recognised by jurisdictions around the world.¹ For such businesses, a sale to a new owner in an auction process will not always be possible or desirable, especially in times of financial crisis, where markets are illiquid. In such circumstances, a rescue and rehabilitation of the company will be preferable to an immediate liquidation, since modern businesses typically have most value as going concerns. Restructuring the company's debt will generally be a key component in any such rescue.

In the UK, the importance of developing a rescue culture has been appreciated for some time² and a number of different mechanisms exist which can be used to restructure the debt of distressed companies. In some cases, these are standalone mechanisms, but it has also become commonplace to combine these techniques in order to maximise the effectiveness of the process for the company concerned. These issues are discussed in section II. The purpose of this paper is to assess the debt restructuring mechanisms currently available to companies in English law and to consider the recent reform plans announced by the UK Government.³ These reform proposals are considered in section III. It is argued that reform is needed, but any changes will need to be introduced with skill and care in order to ensure that the UK's regime remains fit for purpose for the future.

II. The Current UK Regime

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¹ In the EU see, for example, Proposal for a Directive of the European Parliament and of the Council on preventive restructuring frameworks, second chance and measures designed to increase the efficiency of restructuring, insolvency and discharge procedures and amending Directive 2012/30/EU, COM(2016) 723 final, 22 November 2016, recital 1.

² See Report of the Review Committee on Insolvency Law and Practice (1982) Cmnd 8558 (the Cork Report), which led directly to the Insolvency Act 1985 and Insolvency Act 1986.

³ Insolvency Service, *A Review of the Corporate Insolvency Framework: A consultation on options for reform*, May 2016 (hereafter 'Consultation Paper, May 2016') and see BEIS, *Insolvency and Corporate Governance: Government Response*, 26 August 2018 (hereafter 'Government Response, August 2018').

There are four standalone options available to a company seeking to restructure its debt in the UK at present: a contractual workout, a Company Voluntary Arrangement (CVA), a scheme of arrangement, and administration. Each of these mechanisms has its strengths and weaknesses. In addition, it is common for these mechanisms to be combined, so that, for example, companies may make use of a scheme twinned with administration in order to restructure their debt. These options are considered in turn in this section. In particular, it will be argued that combining the standalone options can provide a superior outcome for companies. Combining these mechanisms adds cost and complexity to a restructuring, however, and therefore prompts the question whether a new mechanism is required which combines the best features of the existing standalone options while avoiding these disadvantages.

1. Contractual workouts

The first, and simplest, solution to the company's problems is to organise the restructuring via a contractual workout between the creditors and the company. The advantages of agreeing an informal workout are that it can be relatively quick and cheap, with no need for the intervention of a court or insolvency practitioner, it allows difficulties to be tackled at an early stage, and the negative connotations associated with a formal insolvency process may be avoided.

There are two potential problems associated with workouts, however. First, no statutory moratorium comes into effect. Different definitions of 'moratorium' can be adopted, but the most common involves a stay on insolvency proceedings and on other legal process, in order to prevent creditors pursuing their claims against the company in a manner which could be disruptive of the attempted restructuring, for example by seeking to have the company wound up.⁴ A broad statutory stay of this kind can provide the company with a breathing space within which to try to conclude a restructuring agreement with its creditors, preventing individual creditors instituting enforcement actions against the company during the first stages of a restructuring, when negotiations are taking place. If the creditors negotiating a workout want to put something of this kind in place, a standstill agreement must be agreed between them. A second disadvantage is that all of the creditors bound by the agreement need to agree to it: there

⁴ This is the definition of 'moratorium' adopted in the UK Insolvency Act 1986. See, eg, Insolvency Act 1986, Sch B1 paras 42-43 (as regards administration), Sch A1 Pt III (as regards CVAs involving small companies).

is no possibility of the restructuring being imposed on dissenting creditors, and even a single, small creditor can potentially exercise hold-up rights in a workout. A consensual model of this kind faces challenges. In particular, the contractual approach relies on a relatively small number of like-minded creditors operating in a cohesive, collegiate manner. Consequently, the development of the credit market in the UK, the introduction of new credit-providers such as hedge funds, and the increasing fragmentation of debt, have all placed strains on this approach.

2. CVAs

A CVA is not an insolvency procedure, even though its provisions are located within the Insolvency Act 1986.⁵ As with a workout, it can therefore be utilised before insolvency as a means of restructuring a company's debts and rescuing the company at a relatively early stage in its financial difficulties. Although an insolvency practitioner will generally be involved as nominee and then supervisor of the CVA, it is still a debtor-in-possession procedure in that the management of the company remain in control throughout the recommendation and implementation of the CVA, unless the company is already in administration or liquidation, in which case the administrator or liquidator will take charge of the company's affairs. It can be advantageous for the directors to remain in charge of the company during the process of reorganisation, although this will depend on a number of factors, including the effectiveness and competence of the directors and whether the directors' behaviour was a contributing factor in the company's financial difficulties. The directors will generally know the company best and will have established relationships with the major creditors which can aid the process of negotiation. In addition, leaving the directors in charge can encourage them to tackle the company's difficulties at an early stage. Concerns about handing control of the company to an external manager may have the effect of disincentivising directors from initiating a restructuring.

CVAs have some advantages over a workout. Not all of the creditors need to agree in order for a restructuring via a CVA to be implemented: all creditors entitled to vote at the creditors' meeting will be bound by a CVA provided 75 per cent attending the meeting in person or by proxy approve it.⁶ A form of cramdown is therefore possible, although a significant limitation

⁵ Insolvency Act 1986, Pt 1.

⁶ Insolvency Rules 1986, r 1.19. The consent of the members is also required (r.1.20(1)) although where there is a conflict between the members' and creditors' meetings, see Insolvency Act 1986, s 4A.

is that it cannot bind secured creditors or preferential creditors without their consent.⁷ In addition, a CVA can only be imposed on the dissenting members of the class of unsecured creditors, and is therefore more limited than the form of cramdown available elsewhere, such as in US Chapter 11, where the restructuring can potentially be imposed on dissenting classes of creditors. Even this reduced form of cramdown, however, requires the inclusion of minority protection. In a CVA this protection is provided via the role of the nominee and the ability of creditors to apply to court to challenge the CVA on the ground of unfair prejudice or material irregularity.⁸ Another significant problem facing most companies seeking to put a CVA in place is the lack of a statutory moratorium for companies of any size.⁹ These disadvantages have proved significant and, despite the intention of the 1985-86 UK insolvency law reforms that CVAs would provide an effective mechanism for restructuring and rescuing distressed companies, the number of CVAs has remained at a low level since their introduction.¹⁰

3. Schemes of arrangement

Schemes of arrangement have been around for over a century, but until relatively recently were not valued as a debt restructuring device.¹¹ Over the last decade or so, however, schemes have been used increasingly as a mechanism for restructuring financially distressed companies, particularly in the wake of the global financial crisis. Schemes are not an insolvency mechanism, indeed their provisions are located in company legislation,¹² and, as with workouts and CVAs, they can be used whether the company is solvent or insolvent. Creditor schemes can therefore be used to restructure the debts of financially distressed companies at an early stage.

⁷ Insolvency Act 1986, s 4(3).

⁸ Ibid, s 6. See *Prudential Assurance Co Ltd v PRG Powerhouse Ltd* [2007] EWHC 1002 (Ch); *Mourant & Co Trustees Ltd v Sixty UK Ltd (in administration)* [2010] EWHC 1890 (Ch).

⁹ A statutory moratorium for the very smallest companies undertaking a CVA has existed since 2000: see Insolvency Act 1986, Sch A1 and the definition of a “small company” in Companies Act 2006, s 382(3). There are a number of conditions (Sch A1, para 4(1) and some types of companies are exempt, such as banks and insurance companies (Sch A1, paras 2-4).

¹⁰ See A. Walters and S. Frisby, “Preliminary Report to the Insolvency Service into Outcomes in Company Voluntary Arrangements” (2011) available at www.ssrn.com/abstract=1792402.

¹¹ See, eg, Report of the Insolvency Law Review Committee, *Insolvency Law and Practice* (Cmnd 8558, 1982) ch 7; Report of the Joint DTI/Treasury Review of Company Rescue and Business Reconstruction Mechanisms (2000) para 43.

¹² Companies Act 2006, Part 26.

Schemes have one particular advantage over workouts and CVAs, in that they allow the scheme to bind dissenting secured and preferential creditors in some circumstances, as well as dissenting unsecured creditors. The protection for minority creditors is two-fold. First, those whose rights are being affected by the scheme meet in classes to consider and vote upon it,¹³ and, second, there is a significant level of court involvement, both in determining the correct class composition and ensuring that creditors receive adequate information,¹⁴ and, crucially, in sanctioning the scheme.¹⁵ The latter court hearing is not a rubber-stamping exercise; even where the majority approves the scheme, the court may refuse to sanction it in order to protect minority interests, for example where that majority has a special interest separate to that of the minority. However, the court cannot sanction unless every class approves it, so that the “cramdown” here is limited: the scheme can be imposed on dissenting creditors within classes, but not across classes. The ability to bind dissenting creditors is therefore broader than that in a CVA, but still narrower than that available in US Chapter 11.

There are some disadvantages to a scheme. The procedural requirements are onerous: the issue of class meetings is complex and potentially difficult,¹⁶ and extensive and detailed explanatory statements must be produced by the company.¹⁷ A further disadvantage is the fact that it involves no statutory moratorium. As a result, in the period between the initial formulation of the scheme and the scheme becoming effective, each individual creditor is able to exercise all of the rights and remedies that they possess against the company. In general, the complexity of the scheme procedure, and the requirement for two court hearings, means that this period will be a minimum of 6-8 weeks, during which the company will potentially be unprotected from creditor enforcement procedures.¹⁸ Further, the cost and complexity of schemes mean that they tend to be utilised only in larger restructurings.

¹³ The approval level is “a majority in number representing 75% in value” of the creditors or class of creditors: Companies Act 2006, s 899(1).

¹⁴ Companies Act 2006, s 896. For detailed discussion see J. Payne, *Schemes of Arrangement: Theory, Practice and Operation* (CUP, 2014) 2.2 and 2.3.

¹⁵ Companies Act 2006, s 899(1). The scheme must be sanctioned by the court, and the court’s order becomes effective once a copy of it is delivered to the Registrar of Companies: s 899(4).

¹⁶ When a scheme involves a complex capital structure, a number of different class meetings may be required. The courts will consider both the rights which are to be released or varied under the proposed scheme, and any new rights that the scheme proposes to provide to replace those removed or varied (see *Sovereign Life Assurance Co v Dodd* [1892] 2 QB 573; *Re Hawk Insurance Co Ltd* [2001] EWCA Civ 241).

¹⁷ Companies Act 2006, ss 897-898.

¹⁸ See Insolvency Law and Practice, *Report of the Review Committee*, Cmnd 8558, HMSO, London 1982 para 406; CLR, *Modern Company Law for a Competitive Economy – Final Report*, URN 01/943, 2001, para 13.11. This weakness in the scheme procedure was also highlighted in *Bluecrest Mercantile Bv v Vietnam Shipbuilding Industry Group* [2013] EWHC 1146 (Comm).

4. Administration

Administration was introduced into English law as part of a plan to promote a rescue culture.¹⁹ In essence administration is a procedure by which an external insolvency practitioner, the administrator, is appointed to manage the company.²⁰ One particular form of administration that has arisen recently is pre-pack administration, whereby a company in financial difficulty reaches an agreement for the sale of its business or all of its assets prior to going into administration, and this is done with the involvement of an insolvency practitioner and the agreement of the creditors. The agreement is placed in escrow pending the administration and the sale takes effect immediately on administration.²¹ The business may be sold to a third party, but is often sold back to the existing management or existing senior lenders.²² The key attraction of pre-packs is that they enable a very rapid sale and this is more likely to preserve value, good will and confidence than a slower and more protracted administration process. Pre-packs have also attracted criticisms, however, largely because they are regarded as insufficiently transparent.²³

One significant advantage of administration over the other restructuring devices discussed so far in this paper is the existence of a statutory stay: one effect of an administration order is a general moratorium on the enforcement of remedies.²⁴ This statutory stay is broad in its effect. For example, during the moratorium no administrative receiver may be appointed,²⁵ no resolution can be passed for the winding up of the company,²⁶ no winding up order may be made,²⁷ and no steps can be taken to enforce security over the company's property or to repossess goods in the company's possession under any hire-purchase.²⁸

¹⁹ *Report of the Review Committee on Insolvency Law and Practice* (1982) Cmnd 8558. See Insolvency Act 1986, s 8 and Sch B1. Further changes to administration were introduced in the Enterprise Act 2002.

²⁰ See, now, Insolvency Act 1986, Pt II, Sch B1 and Insolvency Rules 1986, Pt 2.

²¹ See *Pre-Packaged Sales ("Pre-Packs"): A survey of R3 members* (May 2009).

²² See, eg, Insolvency Service, *Report on the First Six Months' Operation of Statement of Insolvency Practice 16* (July 20, 2009), 22 (81 per cent of pre-pack sales reviewed were to parties connected to the insolvent company).

²³ See S Frisby, *A Preliminary Analysis of Pre-packaged Administrations* (Report to the Association of Business Recovery Professionals, August 2007); Graham Review into Pre-pack Administration: Report to The Rt Hon Vince Cable MP, June 2014. The Joint Insolvency Committee has issued a set of guidelines for pre-pack administrations: Joint Insolvency Committee, *Statement of Insolvency Practice 16: Pre-packaged Sales in Administrations* (SIP 16).

²⁴ Insolvency Act 1986, Sch B1 paras 42-43.

²⁵ *Ibid*, Sch B1 para 43(6A).

²⁶ *Ibid*, Sch B1 para 42(1) and (2).

²⁷ *Ibid*, Sch B1 para 42(1)-(4).

²⁸ *Ibid*, Sch B1 para 43(3).

There are disadvantages, however. First, administration is an insolvency procedure and the potential for early attention being given to the company's financial difficulties is therefore reduced. Second, the entry into administration will generally trigger cross-default clauses or contractual provisions for acceleration of liability, termination of the contract or the cessation of intellectual property rights. Third, unlike schemes and CVAs, administration is not a debtor-in-possession proceeding; the approach adopted in administration has been to sideline the existing managers.²⁹ Fourth, although administration can be used in a way which de facto allows for a cramdown of the unsecured creditors, it cannot be used as a cramdown mechanism for secured debt.

5 Combining these mechanisms

Another option open to companies is to combine these different processes, rather than use any single standalone mechanism. This can be attractive because no single mechanism provides all of the features that a company in distress may find beneficial. Workouts offer early access to the restructuring mechanism and lower costs, because there is no court involvement, but they cannot be imposed on dissenting creditors, and there is no statutory moratorium; CVAs offer early access and are debtor-in-possession, they can be imposed on dissenting unsecured creditors but only if the majority consents, and there is no moratorium for CVAs involving anything other than the smallest companies; schemes offer early access, are debtor-in-possession, have a broader option for binding dissenting creditors, and the ability for companies to choose which creditors to bring into the scheme since only those whose rights are being altered need to be involved, but no moratorium, and potentially higher costs as a result of the requirement for two court hearings; and administration lacks early access, is not debtor-in-possession, and lacks a cramdown option, but does provide a moratorium. Depending on which elements companies find most desirable, combining these mechanisms can allow companies to access the most beneficial aspects of each. One particularly common combination in recent years has been the use of schemes twinned with administration, which enables a company in

²⁹ It is possible for a "light touch" administration to be put in place whereby the administrator devolves much of the responsibility for the day to day running of the company on the existing management.

distress to get access to a moratorium,³⁰ but also, more crucially, a more extensive form of cramdown than is available using a scheme alone. An example will illustrate this point.

In *Re Bluebrook Ltd*,³¹ a company and two of its indirect subsidiaries were balance sheet insolvent. The group was judged to be economically viable and therefore a rescue and rehabilitation of the group, rather than liquidation, was planned. The assets of the group were judged to be insufficient to pay even the debts of the senior lenders, and the junior creditors, whose claims were subordinated to the senior lenders, would therefore receive nothing on liquidation. Depending on the form of restructuring attempted, these bondholders could still, nevertheless, have a role in the reorganisation, and might attempt to exercise hold up rights in order to extract value for themselves. In order to restructure the group's debt without the consent of the junior creditors, the business of the group was transferred to a new corporate structure, using a pre-pack administration, and the senior lenders effectively substituted their debt in the old group for shares in the restructured group via a number of schemes. The junior creditors were left behind in the scheme companies. They did not take part in the schemes as their rights in the scheme companies were left intact (they had the same rights and the same claims against the same companies after the schemes as before) and therefore their consent to this reorganisation was not required. This enabled the business of the group to continue, in the new group companies, unburdened by the huge debt which had previously hung over the group.

The junior lenders challenged this reorganisation. They objected to the scheme at the court sanctioning hearing on the basis that, while their rights may not have been formally varied, as a consequence of being left behind in the old group (which was left with no assets) the scheme was unfair to them and should not be sanctioned. The court heard their complaint. However, after considering a number of valuations of the group, the judge concluded that the value 'broke' in the senior debt. Given that the junior lenders had no economic interest remaining in the company, the judge held that their objections did not prevent the scheme being sanctioned. Consequently, the scheme went ahead despite the dissent of the junior creditors. This was not a cramdown of a whole class per se, since the junior creditors were not party to the scheme, but the result was the functional equivalent.

³⁰ Often, the scheme is combined with a pre-pack administration, in which case access to a statutory stay is clearly not the dominant reason to combine these processes.

³¹ [2009] EWHC 2114 (Ch).

One crucial issue that arises from these cases relates to valuation, as the question of whether the junior creditors were in or out of the money was central to whether their challenge would be successful. Although this is a crucial issue, the question of valuation is not well developed in English law. Broadly, the starting point has been to ask what would happen if the scheme were not sanctioned. In some of these restructurings it has been concluded that if the scheme did not go ahead the company would have ended up in liquidation, and, consequently, a liquidation valuation for the company was felt to be appropriate.³² In *Bluebrook*, however, the judge valued the company on a going concern basis, which should generally yield a higher valuation than a liquidation valuation.³³ The judge's decision on this point should be treated with care, however, since the liquidation valuation was not argued before the court and the judge confined his statements regarding a going concern valuation to the case before him. The English courts are still at an early stage in tackling these questions.

III. The Reform of the UK Debt Restructuring Regime

The English debt restructuring regime works well at present. Although, in contrast to restructuring options elsewhere, such as US Chapter 11, there is no single mechanism which offers a statutory moratorium, a cross class cramdown, is debtor-in-possession, and operates at an early stage, nevertheless by combining existing mechanisms companies can access the beneficial elements they need when restructuring their debts. The combination of schemes and administration, in particular, has proved extremely popular for UK companies in the aftermath of the financial crisis, with the majority of large restructurings utilising this approach. Furthermore, the English courts will assume jurisdiction to sanction a scheme involving a foreign company as long as a sufficient connection between the scheme and England can be demonstrated.³⁴ In recent years the English scheme (often combined with administration) has become a useful restructuring mechanism for foreign companies, including those with their

³² See eg *Re Tea Corporation* [1904] 1 Ch 12; *Re Telewest Communications Plc* [2004] EWHC 924.

³³ See M. Crystal and R. Mokal, "The Valuation of Distressed Companies- A Conceptual Framework" (2006) 3 *International Corporate Rescue* 63 (Part 1) and 123 (Part 2); J. Westbrook, "The Control of Wealth in Bankruptcy" (2004) 82(4) *Texas Law Review* 795, 811.

³⁴ See eg *Re Rodenstock GmbH* [2011] EWHC 1104 (Ch); *Primacom Holdings GmbH* [2012] EWHC 164 (Ch); *Re Apcoa Parking Holdings GmbH* [2014] EWHC 3849 (Ch). For discussion see J. Payne, "Cross-border schemes and forum shopping" (2013) *European Business Organization Law Review* 563.

operations, assets and creditors in other EU Member States, as well as those situated outside the EU.³⁵

Despite the apparent success of the UK regime, however, there are reasons to believe that reform is necessary in order to ensure that the regime remains fit for purpose for the future. While the need for reform appears to be increasingly accepted, by business, practitioners, academics and, now, by the UK Government,³⁶ some of the details of the proposed changes remain a matter for debate.

1. The need for reform

Two features of the present UK restructuring regime are often noted as being unsatisfactory when compared to mechanisms available elsewhere, notably US Chapter 11. While the first does appear to be a gap worth filling, the arguments in favour of reform of the second issue are more problematic. The first potential gap in the UK restructuring regime is the lack of a single mechanism offering a cross class cramdown and statutory moratorium. As discussed, these features can be obtained by combining a scheme of arrangement with administration. This combination is not entirely ideal as a restructuring tool, however. In particular, this compromise solution requires a transfer of the business of the company or group, something which is costly and cumbersome, may have tax implications and can be problematic if the creditor agreements impose constraints on the ability of the company to transfer. A standalone mechanism which combines the benefits of the scheme and administration would avoid these difficulties.

The second feature is the notable absence in the UK regime of statutory support for rescue financing, to fund the company both during the negotiation and implementation of the restructuring. Some jurisdictions have developed mechanisms to encourage such financing, including provisions whereby lenders who provide funds to the company during the restructuring process can obtain “super priority” in certain circumstances.³⁷ This can increase

³⁵ See eg *Public Joint-Stock Company Commercial Bank “Privatbank”* [2015] EWHC 3299 (Ch); *Re Codere Finance (UK) Ltd* [2015] EWHC 3778 (Ch); *Re Rodenstock GmbH* [2011] EWHC 1104 (Ch); *Primacom Holdings GmbH* [2012] EWHC 164 (Ch); *Re Apcoa Parking Holdings GmbH* [2014] EWHC 3849 (Ch).

³⁶ See Government Response, August 2018, n3.

³⁷ See, eg, 11 U.S.C § 364(d). For discussion see J. Payne and J. Sarra, ‘Tripping the Light Fantastic: A Comparative Analysis of the European Commission's Proposals for New and Interim Financing of Insolvent Businesses’ (2018) 27 *International Insolvency Review* 178.

the company's chance of survival by encouraging new or existing lenders to put money into struggling businesses. However, although no statutory provisions exist in the UK which specifically relate to this issue,³⁸ neither does English law actively prevent such financing. Options for super priority do exist,³⁹ although in practice market based solutions have arisen to deal with this issue. New funding in administrations is typically provided by the existing floating charge holder, which has no need to vary its existing security, and any assets not covered by the floating charge will already be subject to fixed charges. The pressure for rescue financing is also reduced to some extent because pre-pack administrations often come with their own financing provisions in place. Further, it is possible for lenders to agree these matters amongst themselves, and existing lenders can contractually subordinate their claims to those new lenders if they choose to do so.⁴⁰ The need for legislative reform in this regard is therefore highly debatable, and indeed any reforms could disrupt the existing market solutions that have developed. This is an important reminder that merely transplanting provisions that have been successful in other jurisdictions will not always be beneficial. What works in the US, for example, may not be successful in the UK given the different legal frameworks, the different nature of the court systems, and distinctions in prevailing business culture and practice.

A number of attempts have been made to introduce reform into English restructuring law in recent years. In July 2010, for example, proposals were put forward for a restructuring moratorium encompassing reorganisations via schemes, workouts and CVAs.⁴¹ However, the Insolvency Service reported that the responses to this consultation did not support the need for urgent change, and reform plans were shelved: “[it] is generally felt that the existing UK insolvency framework is coping and adapting well to the challenges that the current round of restructurings are posing, and the urgency of the case for introducing a new moratorium is not fully made out.”⁴² One explanation for this view is that creditors can agree a standstill arrangement amongst themselves. An alternative explanation is that the development of the distressed debt market in the UK in the last decade or so means that financial creditors who no longer wish to remain invested in a company can exit without needing to go through the process

³⁸ It has been suggested that section 19(5) and schedule B1 paragraph 99 of the Insolvency Act 1986 provides a potential route to post-petition financing: G. McCormack, ‘Super-priority New Financing and Corporate Rescue’ [2007] *Journal of Business Law* 701-732; V. Finch, ‘The Dynamics of Insolvency Law: Three Models of Reform’ [2009] *Law and Financial Markets Review* 438-448, although this option has not been fully explored.

³⁹ See eg Insolvency Act 1986, Sch 1; Insolvency Rules 1986, rule 2.67.

⁴⁰ *Re Maxwell Communications Corporation plc (No 2)* [1994] 1 All ER 737.

⁴¹ Insolvency Service, *Proposals for a Restructuring Moratorium- A Consultation*, July 2010.

⁴² Insolvency Service, *Proposals for a Restructuring Moratorium- Summary of Responses*, May 2011, 5.

of enforcing their claim against the company. The possibility of such an arrangement is facilitated by the fact that many schemes involve only the financial creditors: trade creditors, being paid in full, do not need to be brought into the scheme as their rights are not altered. The number of creditors that need to agree to the standstill is therefore reduced, and the scheme creditors are a sophisticated group that may be expected to appreciate that a rescue via a scheme is likely to be better for everyone than liquidation should the scheme fail. Changes in the credit market in recent years, however, mean that it is becoming more difficult to identify all of the financial creditors and it may be that this increasing diversity means that it is harder to guarantee that creditor views will be sufficiently aligned to ensure a consensual arrangement.⁴³

In May 2016, and the Insolvency Service put forward a new set of proposals.⁴⁴ These proposals contemplated the introduction of an enhanced moratorium, provisions designed to encourage rescue financing, and the introduction of a cross class cramdown. It may be asked why reform proposals were revived and enhanced just five years after the view had been taken that the system was “coping and adapting well”. One thing that had changed in the interim was an increase in the political focus, in the UK and elsewhere, on rescuing companies. Allied to this, and perhaps more pertinently, was the fact that after a period of dominance for the UK as a restructuring centre, at least in Europe, other jurisdictions started to introduce their own restructuring regimes that contained many, if not all, of these benefits in a standalone regime. For example, Spain introduced significant reforms in the aftermath of the global financial crisis, most recently in 2014, regarding refinancing and restructurings of corporate debt with a view to allowing operationally viable companies to comprehensively transform their unsustainable financial burden into sustainable debt. Some of these reforms have been labelled the “Spanish scheme of arrangement”, and include a cramdown procedure, provisions facilitating rescue finance and a moratorium.⁴⁵ The Dutch government has also published a new draft bill seeking to introduce pre-insolvency proceedings in the Netherlands, covering much of the same

⁴³ The fact that such consensual arrangements will not always be sufficient, and that a stay of some kind can be beneficial in a scheme, is evidenced by recent case law in which judges have needed to use their case management jurisdiction under the UK’s Civil Procedure Rules to stay claims brought by certain creditors while the company’s creditors considered a scheme: *Bluecrest Mercantile NV v. Vietnam Shipbuilding Industry Group* [2013] EWHC 1146 (Comm).

⁴⁴ Consultation Paper, May 2016 and see Insolvency Service, *Summary of Responses – A Review of the Corporate Insolvency framework*, September 2016.

⁴⁵ See Spanish Law 38/2011 of October 2011 and Law 4/2014 of 7 March. For discussion see I. Tirado, ‘Debt restructuring in Spain’ [(2018) ECFR xxx].

ground.⁴⁶ Further afield, other jurisdictions, such as Singapore, are seeking to enhance their position as a centre for debt restructuring activity.⁴⁷

Within Europe, this trend looks likely to continue, prompted not only by a desire to compete with the UK, but also by the recent initiative of the European Commission to ensure that all Member States have in place adequate procedures in place to deal with distressed but viable businesses.⁴⁸ This issue forms an important plank in the EU's Capital Markets Union Action Plan.⁴⁹ The current form of this EU initiative is to be found in a draft proposal for a Directive, published in November 2016, which includes significant reform proposals regarding restructuring mechanisms.⁵⁰ Member States are required ensure that they have in place restructuring frameworks, that can consist of one or more procedures, and that provide debtors with the ability to "restructure their debts or business, restore their viability and avoid insolvency".⁵¹ There are a number of elements to the restructuring proposals in this draft Directive. First, the restructuring process should be debtor-in-possession, ie that the debtor should remain totally, or at least partially, in control of the day-to-day operation of the business while the restructuring mechanism is being used.⁵² Second, the role of "judicial or administrative" authorities in restructuring should be limited to "where it is necessary and proportionate so that rights of any affected parties are safeguarded."⁵³ Third, the debtor should be empowered to seek a stay of individual creditor enforcement action (including by secured

⁴⁶ This draft bill is a revision of a previously published draft and is referred to as the Court Confirmation of Extrajudicial Restructuring Plans to Prevent Bankruptcy Act (*Wet homologatie onderhands akkoord ter voorkoming van faillissement*, the "WHOA").

⁴⁷ See Report of the Committee to Strengthen Singapore as an International Centre for Debt Restructuring, 20 April 2016 and the Singapore Companies (Amendment) Act 2017. For further discussion see Wee Meng Seng 'The Singapore Story of Injecting US Chapter 11 into the Commonwealth Scheme' [(2018) *ECFR* xxx].

⁴⁸ European Commission, Recommendation on a new approach to business failure and insolvency, 12 March 2014 C(2014) 1500. For discussion see H. Eidenmueller and K. van Zwielen, 'Restructuring the European Business Enterprise: The EU Commission Recommendation on a New Approach to Business Failure and Insolvency' (2015) 16 *EBOR* 625.

⁴⁹ European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the regions: Action Plan on Building a Capital Markets Union, COM(2015) 468 final, 30 September 2015. This finding was confirmed by the Five-Presidents'-Report on "Completing Europe's Economic and Monetary Union" which listed insolvency laws among the most important bottlenecks preventing the integration of capital markets and therefore to be addressed as a priority: European Commission, Completing Europe's Economic and Monetary Union, a report by Jean-Claude Juncker in close cooperation with Donald Tusk, Jeroen Dijsselbloem, Mario Draghi and Martin Schulz.

⁵⁰ Proposal for a Directive of the European Parliament and of the Council on preventive restructuring frameworks, second chance and measures designed to increase the efficiency of restructuring, insolvency and discharge procedures and amending Directive 2012/30/EU, COM(2016) 723 final, 22 November 2016.

⁵¹ *Ibid*, Art 4(1) and 4(2).

⁵² *Ibid*, Art 5(1).

⁵³ *Ibid*, Art 4(3). In practice, the proposed Directive foresees a role for the court to confirm a restructuring plan (Art 10), where a stay is sought by the debtor (Art 6), and where a cram down of whole classes of creditors is to occur (Art 11).

creditors) by application to court.⁵⁴ Fourth, the restructuring should be capable of being imposed on dissenting creditors, including whole classes of dissenting creditors, in some circumstances.⁵⁵ Finally, the providers of new finance to a debtor should be shielded from the operation of avoidance provisions in insolvency law and from civil and criminal liability relating to the restructuring process except in cases of fraud, and it is open to Member States to provide the providers of new finance with super-priority over existing creditors.⁵⁶

In many ways, the key features in the proposed Directive regarding restructuring plans resemble the features of an English scheme of arrangement. This is no coincidence; the benefits of the English scheme of arrangement as a debt restructuring tool have become well recognised within Europe. It is often the lack of equivalent regimes within other Member States that has driven companies within those countries to seek the benefit of the English scheme jurisdiction. Notably, however, these proposals also include matters which are not presently part of the English scheme, such as a statutory stay for restructuring arrangements, and also differ from schemes in other ways, for example they envisage a reduced role for the court compared to the English scheme procedure.

From the UK's perspective, it is not the need to implement this anticipated directive that is the driver for reform. Indeed, the UK's response to the Commission's Recommendation gave the UK a clean bill of health, stating that the UK regime already offers the necessary flexibility to meet the Commission's plans for a more rescue-orientated approach to business failure.⁵⁷ Any future obligation on the UK to implement the final version of this Directive is, in any case, complicated by the UK's decision to leave the EU consequent upon the Brexit vote in June

⁵⁴ Ibid, Arts 6, 7. The maximum duration of such a stay in the first instance should be 4 months (Art 6(4)) but this may be extended up to a maximum of 12 months in certain circumstances (Arts 6(5)-(7)).

⁵⁵ Ibid, Arts 9(4),10, 11, 14. The protections for creditors is the requirement to meet and vote on the restructuring in classes (Arts 8,9) and the role of the court in sanctioning the scheme, particularly where a cram down of whole classes is envisaged (Arts10, 11, 13).

⁵⁶ Ibid, Arts 16,17. For discussion see J. Payne and J. Sarra, 'Tripping the Light Fantastic: A comparative analysis of the European Commission's proposals for new and interim financing of insolvent businesses' (2018) *International Insolvency Review* 178.

⁵⁷ *UK Response to Commission Questionnaire on a new approach to business failure and insolvency*, August 2015 available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/451942/UK_Response_to_Commission_Questionnaire_on_Recommendation_on_a_new_approach_to_business_failure_and_insolvency.pdf. See also Insolvency Service, *Call for Evidence: European Commission Recommendation on a new approach to business failure and insolvency*, February 2015. It is notable, however, that in order to reach that conclusion the UK response pointed to different mechanisms to satisfy different features of the Commission's Recommendation on a number of points, (at p10) and in other instances the UK response accepted that the features could only be obtained by combining existing mechanisms, for example, by combining schemes and administration (at p7).

2016, the month after the Insolvency Service’s proposals were published. A more significant influence on the UK reforms is the recognition that the UK cannot rest on its laurels and that reform is needed in order for it to stay competitive in a global market.

So, the need for reform seems reasonably clear, as are the main deficiencies of the UK’s current standalone procedures. The Insolvency Service’s proposals considered the addition of three elements to the existing UK restructuring regime: a moratorium, a full cramdown option and facilitating rescue financing. While the introduction of a restructuring moratorium and a cross class cramdown received broad support from respondents to the consultation, and, accordingly, new legislation to implement these measures will be introduced “as soon as parliamentary time permits”⁵⁸ the proposals regarding rescue finance have been dropped. The issues raised above, regarding the availability of market-based solutions, and the danger of any legislative solutions interfering with the established regime, were raised by respondents to the consultation, the vast majority of whom were opposed to their introduction.⁵⁹ The Government has therefore, rightly, decided not to proceed with the rescue finance proposals at this time.⁶⁰

The Government’s planned changes to the UK restructuring regime therefore focus on just two issues: (a) the introduction of a restructuring moratorium; and (b) the introduction of a restructuring plan. These proposals are intended to operate separately, ie the two do not necessarily have to be used together. The document published in August 2018 provides some information about the planned measures, but extensive drafting will need to follow. The devil, as always, is in the detail and the final package will need to ensure an appropriate balance between the interests of the company and interests of the creditors.⁶¹

2. The Proposed changes to the UK Restructuring Regime

a) The introduction of a restructuring moratorium

⁵⁸ Government Response, August 2018, 5.4.

⁵⁹ Insolvency Service, Summary of Responses, para 5.2.

⁶⁰ Government Response, August 2018, para 5.186.

⁶¹ A further proposal contained in the Government’s August 2018 paper relates to the sale of businesses in distress. This proposal arises not from the insolvency Service’s 2016 Consultation paper but from a separate consultation in March 2018 (see BEIS, *Insolvency and Corporate Governance*, 20 March 2018). The proposal is that directors of holding companies will be legally obliged to take into account whether the sale of a large subsidiary is in the best interests of the subsidiary’s stakeholders, as opposed to placing the subsidiary into formal insolvency Proceedings (see Government Response, August 2018, paras 2.1-2.17). Discussion of this issue falls outside the ambit of this paper.

The first proposed change to the UK restructuring regime is the introduction of a restructuring moratorium.⁶² The moratorium would be available for all forms of restructuring, including contractual workouts, CVAs, schemes of arrangement and the new restructuring plans, discussed below. While the potential value of a restructuring moratorium seems clear,⁶³ the actual benefit will depend on the precise terms of any moratorium that is introduced. In particular, a moratorium needs to find the right balance between the requirement to provide the company with a breathing space, and protection of the company's creditors whose legal rights are being suspended for the period of the moratorium.

The breadth of the proposed restructuring moratorium is broadly the same as that which exists in administration at present, namely a stay on insolvency procedures and other legal processes to pursue creditor claims, with one significant addition. While the statutory stay attached to administration is broad, it is narrower than the moratorium offered in other jurisdictions, such as US Chapter 11, in one key respect. In those jurisdictions customers and suppliers are prevented from terminating their contracts with the company on grounds of insolvency alone. By contrast, in the UK suppliers and customers can generally exercise contractual rights on insolvency, which can have the effect of frustrating otherwise viable rescue initiatives. Clearly, a broader moratorium along the lines of the US model can be beneficial for companies. The UK has already started down this road. The Insolvency Act 1986 was amended on 1 October 2015 to ensure the continuity of supply of utilities and IT goods and services to insolvent businesses.⁶⁴ The Insolvency Service's proposals sought to expand the concept of essential supplies. The Consultation Paper suggested that companies should have the right to designate some contracts as essential (in addition to the continued provision of IT and utilities) and it would then be impossible for these contracts to be terminated or varied during the moratorium.⁶⁵ This proposal recognised the fact that the withdrawal of vital services can reduce the chance of a successful business rescue and that this knowledge may lead some suppliers to demand "ransom" payments at the expense of other creditors. It did, however, raise the possibility of abuse by the company, which might designate a wide variety of contracts as "essential" in order to prevent their termination in this period. The Insolvency Service's

⁶² See Consultation Paper, May 2016, part 7; Government Response, August 2018, paras 5.5-5.113.

⁶³ Two-thirds of respondents to the Insolvency Service's Consultation paper agreed in principle that the introduction of a pre-insolvency temporary moratorium would facilitate business rescue: Insolvency Service, *Summary of Responses – A Review of the Corporate Insolvency framework*, September 2016, paras 1.6, 2.1.

⁶⁴ The Insolvency (Protection of Essential Supplies) Order 2015 SI 2015 No 989.

⁶⁵ Consultation Paper, May 2016, n3.

proposals sought to build in safeguards for the supplier, giving it the right to challenge the designation of the contract as essential, in which case the court would be required to approve the application. However, a significant number of respondents to the Consultation paper cast doubt on these proposals⁶⁶ and the Government has therefore dropped the requirement for debtor companies to designate certain suppliers as essential. Instead the Government plans to legislate to prohibit the enforcement of ipso facto clauses (termination clauses) by a supplier of contracts for the supply of goods and services where the clause allows a contract to be terminated on the ground that one of the parties to the contract has entered formal insolvency.⁶⁷ The details of this provision still need to be fleshed out. For example, the Government proposes that certain types of financial products and services will be exempted, but no further detail is provided at present.⁶⁸ Until the full details are known it is difficult to say whether an appropriate balance between creditor rights and the desire to promote rescue will be maintained.

From the creditors' perspective, a moratorium can pose a threat, as it may be misused by companies. Given that they involve a significant constraint on creditors' legal rights, they can be justified only where the imposition can be regarded as beneficial for the creditors as a whole, in order to rescue a viable but financially distressed business. One concern is that they can be used by directors to prop up a company which is not economically viable and is not capable of rescue, and that the moratorium simply prolongs the moment when the company's difficulties are dealt with, while the company continues to lose money in the meantime. Another is that directors of viable companies may utilise a restructuring to shake off liabilities which the company is capable of meeting. A number of protections are envisaged to deal with these concerns. One relates to the length of the moratorium: no longer than 28 days, although an extension is possible.⁶⁹ Eligibility requirements are also put in place. On the commencement of the moratorium a monitor will be appointed who will need to be satisfied that the company is eligible.⁷⁰ Companies will have to demonstrate a number of requirements, including that they

⁶⁶ 69% of respondents to the Consultation Paper did not agree that the proposals as drafted offered sufficient safeguards for suppliers: Insolvency Service, *Summary of Responses – A Review of the Corporate Insolvency framework*, September 2016, para 3.7.

⁶⁷ Government Response, August 2018, paras 5.88- 5.113.

⁶⁸ *Ibid*, para 5.102.

⁶⁹ *Ibid*, paras 5.46- 5.56. The initial proposal was for a three month period, but many respondents to the Consultation Paper thought that the period should be shorter than three months, citing difficulties with funding a lengthy moratorium period, and suggesting that a shorter period would reduce the risk of abuse: Insolvency Service, *Summary of Responses – A Review of the Corporate Insolvency framework*, September 2016, para 2.13.

⁷⁰ See Consultation Paper, May 2016, paras 7.18-7.20.

are already in financial difficulty, with the test being “one of prospective insolvency, that is, based upon the requirement that a company will become insolvent if action is not taken”.⁷¹ The 2016 Consultation Paper proposed including companies that were already insolvent but this has been rejected by the Government, in order to take account of respondent’s fears that the moratorium could be mis-used by directors to delay an inevitable insolvency. Furthermore, if a company has entered into a moratorium, administration or CVA in the previous 12 months it will not qualify for a moratorium, in order to safeguard creditor interests. The Insolvency Service proposed that this should extend to companies which have been subject to a winding up petition. Respondents pointed out that this could have the unintended consequence of encouraging creditors to present a winding-up petition earlier than it might otherwise, in order to prevent a moratorium being put in place. The Government therefore proposes some flexibility to this rule, so that a winding up petition should not operate as a complete bar in all circumstances.⁷²

In addition, for the duration of the moratorium the monitor’s role is to ensure that the qualifying conditions continue to be met. The first is that the company must be able to show that it is likely to have sufficient funds to carry on its business during the moratorium, meeting current obligations as and when they fall due as well as any new obligations as they arise.⁷³ Second, the company must demonstrate that although it is experiencing financial difficulties, at the outset there is a prospect of rescue, the test being that rescue is “more likely than not”.⁷⁴ These qualifying conditions seem to be targeted at the first concern raised above, namely that directors may seek to use the moratorium to prop up unviable companies. As a further protection, creditors would have the right to apply to court to challenge the moratorium either on the grounds of the qualifying conditions not being met (or the company being ineligible) or on the grounds of unfair prejudice.⁷⁵

⁷¹ Government Response, August 2018, para 5.29.

⁷² Ibid, para 5.23.

⁷³ Consultation Paper, May 2016, para 7.22; Government Response, August 2018, para 5.33. This suggests, as a minimum, that the lender(s) providing funding during the moratorium would need to consent to the proposals.

⁷⁴ Government Response, August 2018, para 5.31. This is a change from the 2016 proposals in which the standard was that there should be a “reasonable prospect” of rescue.

⁷⁵ The Insolvency Service proposed that the right to challenge should be limited to the first 28 days of the moratorium. This was rightly recognised by the Government to be an undue restraint on creditor protection: given the constraints on creditors’ rights involved in a moratorium, creditors should have the right to challenge the moratorium at any point in its existence. As a result, the Government now proposes that the right to challenge should exist at any time during the moratorium (para 5.39).

As regards directors, the Government makes it clear that directors' duties will remain unaltered in the moratorium".⁷⁶ Presumably, therefore, directors will remain liable for wrongful and fraudulent trading⁷⁷ and other breaches of duty. Although it was initially contemplated, that, in order to incentivise directors to make use of the moratorium, they would be protected from liability for trading, this proposal was subsequently dropped.

The proposed new restructuring moratorium is potentially very valuable. Although companies can (and do) find ways around the lack of a restructuring moratorium at present, for example making use of standstill arrangements, this new mechanism may be a useful tool for companies undergoing restructuring, especially once creditors become numerous and heterogeneous. The short length of the moratorium and the need for corporate rescue to be "more likely than not" may, however, limit its value to companies. The Government appears to be alert to the need to ensure that creditor interests are protected during a moratorium and significant safeguards are included, often building on the established protections available in the existing moratoria that operate in the UK (available in administration and for small company CVAs). There remain some issues of concern and doubt, however, for example regarding the operation of the ban on ipso facto clauses, which can only be finally assessed once the full legislative details are published.

b) The creation of a restructuring plan

The second major change contemplated by the proposals is the creation of a new restructuring plan, which will exist alongside existing procedures and will involve a cross class cramdown.⁷⁸ The Government's proposals recognise the value of schemes of arrangement internationally and thus leave schemes in place and unamended, so that this mechanism will continue to be available for the restructuring of large companies inside and outside the UK.

The proposals envisage a restructuring plan which will bind all creditors, including secured creditors, and will enable a cramdown of junior creditors even if (as a class) they vote against the plan, as long as certain conditions are met. The restructuring plan would be available to

⁷⁶ Consultation Paper, May 2016, para 7.31.

⁷⁷ Insolvency Act 1986, ss 213, 214.

⁷⁸ The 2016 Consultation Paper offered the option of this restructuring plan as a standalone procedure or as an extension to an existing procedure. The Government took account of the comments of respondents in deciding that the plan should be introduced as a standalone procedure: Government Response, August 2018, para 5.124.

both solvent and insolvent companies, ie there are no financial conditions in place in order to qualify for a plan. It is also envisaged that, in line with schemes of arrangement, there will be no jurisdictional requirement, ie the restructuring plan will be accessible to companies that do not have their centre of main interests in the UK.⁷⁹

Of course, a cramdown of the kind included in the restructuring plan needs to include protection for creditors. The Government envisages very similar protections for creditors to those that exist in a scheme of arrangement. First, then, the creditors will be divided into classes grouped by similar rights or treatment, the classes to be decided by the company but approved by the court. The approval requirement will be 75% by value voting in favour of the plan. This is a change from the approval test in a scheme of arrangement which has two elements: in addition to 75% by value voting in favour, there must also be a majority in number who approve the restructuring. The majority in number test has been heavily criticised,⁸⁰ and the Government removal of this aspect of the approval requirement is to be welcomed. However, in order to protect minority creditor interests the Government proposes introducing a connected party subtest which will require that “more than half of the total value of unconnected creditors vote in support”.⁸¹ After the creditors have voted on the plan a second court hearing will be required to confirm it. The requirement for class meetings and, crucially, the careful oversight of the courts, provides a significant protection for creditors.⁸² The close alignment of the plan with schemes of arrangement will presumably allow the decades of jurisprudence that have developed in relation to schemes of arrangement, regarding issues such as class formation, to be utilised in relation to the new restructuring plans.

In order to ensure the protection of dissenting creditors in a cross class cramdown, the Government is proposing that at least one class of impaired creditors will need to vote in favour of the scheme and the absolute priority rule must be followed, ie a class of creditors must be paid in full before any class of creditors junior to that class may receive or retain any property in satisfaction of their claims, unless the more senior class consents to any departure from this principle. The absolute priority rule is a feature of US Chapter 11 but has often been criticised

⁷⁹ Government Response, August 2018, para 5.133. The Government states that it will “continue to consider the issue of jurisdiction in the context of the UK’s departure from the European Union”.

⁸⁰ For discussion see J. Payne, *Schemes of Arrangement* (CUP, 2014) 61-68 and 184-187.

⁸¹ Government Response, August 2018, para 5.155.

⁸² See, eg, *Re Van Gansewinkel Groep BV* [2015] EWHC 2151 (Ch).

as being overly inflexible and a potential barrier to a debtor's successful restructuring.⁸³ The Government's proposals therefore envisage the court being able to confirm a restructuring plan even if it does not comply with the absolute priority rule where that non-compliance is (i) necessary to achieve the aims of the restructuring and (ii) just and equitable in the circumstances.⁸⁴

In order for the court to assess whether the absolute priority rule has been met, the Government proposes the use of a valuation based on the use of the "next best alternative for creditors".⁸⁵ The Government's attempt to inject some flexibility into this issue is to be welcomed. The minimum valuation test suggested in the Consultation Paper was a liquidation valuation, but this has been criticised as being too limited. It may well be the case that administration or some other form of rescue, rather than liquidation, is the most likely outcome were a plan to be rejected, in which case a higher going concern valuation will be more appropriate.⁸⁶ However, a liquidation valuation will still be appropriate where liquidation is indeed the only realistic alternative. It is helpful that the Government has recognised that a liquidation valuation in all instances is too simplistic. However, this "next best alternative" test seems likely to open up the possibility of litigation in many cases. Arguments about valuation have played a relatively minor role in restructuring cases in UK schemes cases to date,⁸⁷ but the proposed restructuring plan will place a significant burden on English judges to deal with this issue.

⁸³ See eg American Bankruptcy Institute, *Commission to Study the Reform of Chapter 11 2012-2014* and UNCITRAL Legislative Guide on Insolvency Law (2004), 220.

⁸⁴ Government Response, August 2018, para 5.164.

⁸⁵ *Ibid*, para 5.174.

⁸⁶ Over a quarter of respondents to the Consultation Paper suggested that liquidation is not the right comparator, and that a 'next best alternative' value should be used instead: Insolvency Service, *Summary of Responses – A Review of the Corporate Insolvency framework*, September 2016, para 4.10. It is notable that the EU's proposed Directive contemplates a higher, going concern, valuation, where a full cramdown of creditors take place: Proposal for a Directive of the European Parliament and of the Council on preventive restructuring frameworks, second chance and measures designed to increase the efficiency of restructuring, insolvency and discharge procedures and amending Directive 2012/30/EU, COM(2016) 723 final, 22 November 2016, Art 13(2).

⁸⁷ The decision in *Re Bluebrook Ltd* [2009] EWHC 2114 (Ch) is a notable exception. For a discussion of this point see J. Payne, 'The Role of the Court in Debt Restructuring' (2018) *Cambridge Law Journal* 124.

IV. Conclusion

An effective debt restructuring mechanism is an important part of a regime's ability to deal with corporate financial distress. English law currently provides a range of mechanisms that may be utilised in this regard, and yet none of them, used alone, provide all of the components likely to be beneficial for distressed companies wishing to restructure their debts, namely the existence of a moratorium while the restructuring is negotiated, the possibility of early intervention, an effective mechanism for cramdown, and the facility for the debtor to stay in charge of the business of the company during the restructuring. Schemes of arrangement come closest, but must be twinned with administration to access a moratorium and to facilitate a de facto cramdown of whole classes of shareholders and/or junior creditors. While these tools, alone or in combination, provide English law with a restructuring regime which works in practice, the time is ripe for the reform of English restructuring law, to allow these features to be accessed via a single mechanism, as the Government proposes. It seems likely that these reform proposals are driven in part by a need to keep up with changes elsewhere in the world, not least those proposed by the European Commission in its draft Directive, although this is not mentioned in the Government's proposals. In light of Brexit it will be important that the UK does not fall behind in the area of restructuring. These proposals allow the English scheme of arrangement to remain intact while offering UK companies (and potentially companies elsewhere in the world) the option of the new restructuring plan plus restructuring moratorium. Once implemented, these will help to ensure that the UK remains competitive in the global market. These proposals bring challenges too, however. The restructuring plan will provide the English courts with a more difficult role, particularly in relation to valuation, and it is unclear whether the detailed legislative provisions, once published, will strike the appropriate balance between facilitating rescue and protecting creditors.

