

UK schemes of arrangement and restructuring plans

International (EU) Recognition

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Schemes of arrangement

- a debtor in possession type restructuring procedure
- No insolvency stigma since procedure is in Companies Act (Part 26) rather than Insolvency Act
- Heavy court involvement with at least 2 court orders
- Final court order approving the scheme
- Comes after approval from relevant class(es) of creditors and/or members
- Division into relevant classes of affected groups and requires approval from 75% of those voting within the class plus a majority in number

Jurisdiction of UK court to approve schemes

- No need for debtor company to have COMI in the UK
- But must have sufficient connection with the UK e.g. UK choice of law or jurisdiction clauses or creditors located in UK
- Court will not in action
- Requires evidence scheme is likely to be effective and produce benefits for affected groups

UK restructuring plans

- New ‘super-scheme’ procedure introduced in 2020
- Modelled on the scheme
- But contains features from the EU Restructuring Directive 2019/1023
- Intended to address financial difficulties
- Allows for possibility of cross-class creditor cramdown
- But no no majority in number requirement

International effectiveness

- *Re DTEK Energy BV* [2021] EWHC 1551 (Ch) illustrates how schemes may still prove effective for international companies in post Brexit world
- The court said that ‘English Courts have ... never regarded the Judgments Regulation alone as a sufficient ground upon which to assess international effectiveness: and the fact that it is no longer available has not transformed the landscape’ - alternative bases included the Rome I Regulation (EU Regulation 593/2008 on the law applicable to contractual obligations) and autonomous private international law rules in different States.

Restructuring plans – international recognition

- *Re Gategroup Guarantee Ltd* [2021] EWHC 304 (Ch)
- Case related to whether jurisdiction of UK court to sanction a restructuring plan had been affected by Lugano Convention
- plan submitted under Part 26A UK Companies Act and proposed the restructuring of bonds that by reason of Article 23(1) of Convention were subject to exclusive jurisdiction clause in favour of Swiss Courts.
- As of 1 January 2021 the UK is no longer a party to Lugano Convention but claim form was issued before that date
- Held 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) - but for bankruptcy exclusion, the proceedings would be a civil or commercial matter

Conclusion

- While the courts will not act in vain, schemes and restructuring plans are still likely to be approved by UK courts in a post-Brexit world if expert evidence is presented to the court that the scheme/plan is likely to achieve substantial effect in relevant jurisdictions.
- UNCITRAL Model Law on Cross Border Insolvency may provide a basis for recognition in some cases - US has also implemented the Model Law and recognised UK (and Irish) schemes on this basis.
- Schemes or plans which involve the replacement or modification of contractual obligations may also be recognised pursuant to the 'Rome 1' Regulation. Article 1(2)(f) excludes from the scope of the Regulation 'questions governed by the law of companies and other bodies, corporate or unincorporated'. Insofar as it concerns matters of EU law, the proper interpretation of the Regulation ultimately falls to be considered by the CJEU.
- Since schemes/plans are likely to involve largely financial creditors and the modification of contractual debt obligations on generally a contractual basis, it is primarily up to any dissentient creditor to challenge the debt modification. Financial and related considerations are likely to militate against the prospect of such challenge in a number of cases.
- Schemes/plans are likely to achieve practical effect in many EU and other countries on the basis of their domestic private international law rules which have not been harmonised by any EU or other instrument.
- Court judgments or orders confirming (sanctioning) a scheme may be entitled to EU wide recognition under the Lugano Convention though it is doubtful whether the UK will ultimately be accepted as a member of the Lugano Convention.
- likely that restructuring plans will be excluded by Article 1(2)(b) from the scope of the Lugano Convention