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**AGPS Bondco: Testing English Courts’ Flexibility and Ability to provide**

**Imaginative Solutions to Cross-border Insolvency Issues**

*Eugenio Vaccari, Senior Lecturer, Department of Law and Criminology, Royal Holloway and Bedford Colleges, University of London, UK; Co-chair, Insolvency Law Academy, India.*

*Email: <eugenio.vaccari@rhul.ac.uk>.*

*Introduction*

On the one hand, it is widely acknowledged that one of the ostensible objectives of the EU Insolvency Regulation was to prevent ‘forum shopping’ in the insolvency market.[[1]](#footnote-1) The ‘recast’ Regulation toned down this goal, by focusing primarily on mechanisms to prevent fraudulent or abusive forum shopping.[[2]](#footnote-2)

On the other hand, it is equally widely acknowledged that the English restructuring framework built its success by offering a flexible and adaptable mechanism to foreign companies to restructure their debt in the UK through schemes of arrangement.

UK schemes have long been criticised for the absence of any provision to bind dissenting classes of creditors. The Corporate Insolvency and Governance Act 2020 (CIGA 2020), which made major changes to the UK’s corporate restructuring and insolvency laws, introduced a flexible ‘restructuring plan’ procedure (Part 26A plans), capable of cramming down not simply dissenting creditors, but also dissenting classes of creditors.

Part 26A plans have more stringent procedural and entry requirements, as they can only be used where 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.[[3]](#footnote-3) Additionally, a cross-crass clam-down can only be ordered, if the court is satisfied that any members of the dissenting class would be worse off than in the relevant alternative and that the plan has been approved by at least one class that had a genuine economic interest in the company’s restructuring.

Part 26A plans have operated for a few years now and they have received much attention by commentators and the Government. Recently, the case of *AGPS Bondco* has raised novel issues.

**Facts**

The applicant company, the subsidiary of a Luxembourg parent operating in the real estate market in Germany, applied to the court to sanction a Part 26A restructuring plan that involved a cross-class cram down against a class of senior unsecured note holders maturing in 2029.

The group was in financial difficulties and it did not have sufficient funds to repay certain notes issued by a German subsidiary, which were due in April 2023. The relevant alternative was likely liquidation. The plan involved amending six series of notes due on dates between 2024 and 2029 worth roughly half of the company’s debt. While the notes were governed by German law, the applicant had been incorporated in England and Wales and had replaced the parent company as issuer of the notes in order to promote and implement the plan.

The plan involved several measures, including extending the maturity of some notes to alleviate the group's immediate liquidity pressures in exchange for a priority ranking of the creditors’ claims. The plan was approved by all classes of creditors except for the holders of the 2029 notes, which approved the plan by a majority, but not the required 75%. As mentioned, the restructuring plan envisaged an orderly wind-down of the group.

The dissenting creditors submitted that the issuer substitution was ineffective under German law, so that the court lacked jurisdiction to sanction the plan and that they would receive less than in the relevant alternative.

The court held that the substitution was valid and effective under German law and, as a result, that the court had jurisdiction to sanction the plan. The court also rejected the opponents’ claim that they would be worse off under the plan, as they found that there was some likelihood they will be paid in full under the plan.

**Analysis**

While under English law, there is no requirement that the proponents of the plan comply with either the absolute or the relative priority rule of distribution of assets, the dissenting creditors objected to the court using its discretion to sanction the plan. This is because the plan did not comply with the basic rule of *pari passu* distribution amongst unsecured creditors in an insolvency, which is a fundamental principle of insolvency law and a rule of public policy. Because there was no attempt at rescuing the group as a going concern, the dissenting class of creditors argued that there was no justification for the deviation from the *pari passu* rule of distribution.

For a long time, scholars have debated whether the *pari passu* rule is still a central tenet of insolvency law.[[4]](#footnote-4) This case presented the perfect opportunity for English courts to clarify their position on this matter. Yet, Mr Justice Leech avoided being drawn into this slippery theoretical debate by focusing on the valuation issues and the methodology to be applied to determine if a creditor is worse off than in the relevant alternative.

The court observed that it was not unfair to either provide a priority status in exchange for an extension of the maturity date or to allow the existing shareholders to retain a significant equity stake in the company after the restructuring was completed. To be fair, the court raised serious concerns in allowing the shareholders to retain a significant stake in the company, while they provided no support for the plan and no additional funding. At the same time, the court found that this questionable aspect of the plan was not sufficient on its own to deny the requested sanction.

The case turned into a “valuation battle”[[5]](#footnote-5) between the applicant and the opponents, with the court eventually (and conveniently)[[6]](#footnote-6) agreeing with the analysis provided by the debtor company.

While the court reinstated the traditional view that the *pari passu* principle is a fundamental principle of corporate insolvency law, it listed many legitimate ways for departing from that principle. It concluded that differences in treatment among equally ranking creditors do not impede the sanctioning of a plan, if there are good reasons for departing from equality of treatment. In other words, horizontal equality can be easily excepted and, as a result, it is highly questionable that the *pari passu* principle still holds a central and fundamental role in English corporate insolvency law.

Finally, the court argued that there would be no departure from the *pari passu* principle, even if the debtor’s plan was not successful. In the court’s view, this would lead to a default event and to the enforcement of the notes and distribution of assets in accordance with the *pari passu* principle (even if some noteholders gained priority status as a result of the implementation of the plan).

**Conclusion**

As expected, the case showed the importance of trusted and accurate expert evidence whenever valuation issues are at stake. It also showed that English courts are reluctant to interfere with the decisions taken by the creditors. Even if the court did not seem fully persuaded that this was the best possible plan, it observed that:

‘[the] best judges of this are the plan creditors themselves, who voted by the requisite majority in every class for the plan and by 62% in the dissenting class.’[[7]](#footnote-7)

While the decision is under appeal and there are still concurrent proceedings in Germany, it is evident that this decision falls within an established line of precedents designed to promote flexible and imaginative solutions to valuation and distribution issues (among others).

1. Recital 5, Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings, [2000] OJ L 160. [↑](#footnote-ref-1)
2. Recitals 29 and 31, Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast) [2015] OJ L 141. [↑](#footnote-ref-2)
3. Section 901A, Companies Act 2006. [↑](#footnote-ref-3)
4. Vanessa Finch, ‘Is *pari passu* passé?’ (2000) 5(Oct) *Insolv L* 194; Riz Mokal, ‘Priority as pathology: the *pari passu* myth’ (2001) 60(3) *CLJ* 581. [↑](#footnote-ref-4)
5. Kate Stephenson, ‘Adler: English court approves contested restructuring plan’ (2023) 16(3) *CR & I* 83. [↑](#footnote-ref-5)
6. The court observed that the full payment of the 2029 notes will be “ambitious” given that ‘future forecasts of property prices are inherently uncertain’: *AGPS Bondco Plc* [2023] EWHC 916 (Ch), [291]. [↑](#footnote-ref-6)
7. *AGPS Bondco Plc* [2023] EWHC 916 (Ch), [302]. [↑](#footnote-ref-7)