SQUIRE PATTON BOGGS

Restructuring Plans: Restructuring Foreign Companies in England

April 2022

This note provides an overview of the English restructuring plan, giving insight into when a foreign company might be able to restructure in England, an overview of the process and the advantages that a restructuring plan offers over other processes.

It should not be relied on as legal advice. Should you require legal advice in relation to your specific circumstances, please contact one of our team members whose contact details are at the end of this note.

What Is a Restructuring Plan ?

A restructuring plan enables a company to propose a compromise or arrangement to its creditors that can bind secured creditors, unsecured creditors, dissenting creditors and compromise members' rights.

Introduced in 2020, the restructuring plan is a court driven process that is relatively new in England and a number of English companies and foreign companies have successfully restructured using it.

Although new, the plan largely mirrors a scheme of arrangement (with additional advantages and some differences).[1]

Can a Foreign Company Propose a Restructuring Plan in England ?

Yes, provided a company can show that it has "sufficient connection" with England, the English courts have discretion to sanction a plan proposed by a foreign company.

A foreign company does not need to trade from, be domiciled, or situate in England to propose a plan, neither is it necessary to demonstrate that its centre of main interests (COMI) is in England – although an English COMI can assist with recognition of the plan in other jurisdictions.

The threshold for establishing sufficient connection is low, which means that it is can be relatively easy for a foreign company to prove.

How Does a Foreign Company Establish That It Has "Sufficient Connection"?

There are number of factors that will help, including whether the company has assets, creditors, an establishment or carries on activities in England, but these are not decisive.

One key consideration is often how creditor rights' are governed – if the company's finance documents are governed by English law and the parties have submitted to the jurisdiction of the English court, then this on its own can be enough to show that the foreign company has sufficient connection to England.

1 To date, the English courts have applied and followed scheme case law when deciding whether to sanction a restructuring plan. This is relevant to considerations set out in this note about "sufficient connection" and recognition where we have given examples and taken guidance from those cases.

What Can a Foreign Company Do to Bring It Within the Jurisdiction of the English Courts?

Changing Jurisdiction/Choice of Law Provisions

Practically speaking, a foreign company may be able to show that it has sufficient connection to England by changing the governing law and/or jurisdiction provisions in its contracts and finance documents to English law and jurisdiction, either unilaterally or by consent. Given the relatively low threshold to establish connection to England, this might be all that is required.

- Do the company's finance documents and contracts allow the choice or law and/or jurisdictions to be changed?
- What steps will a company need to undertake to enable it to amend the terms of those documents – is unanimous consent required?

We have seen the English court sanction schemes of arrangement proposed by a foreign company, where the company made amendments to its documents shortly before proposing the scheme. It is likely that the English court would take the same approach with a restructuring plan. Therefore, the timing of the change is not likely to be critical.

COMI Shift

A foreign company could move its COMI to England, although this is not a pre-requisite, particularly given the low threshold to establish "sufficient connection". However, shifting COMI to England has other advantages; in some cases, this may help with securing recognition of a restructuring plan in other jurisdictions.

A COMI shift can be achieved in a number of ways – moving the head office, registering the company as a foreign company under UK laws, carry out restructuring negotiations in England, incorporating a company and appointing English directors, holding key meetings and conducting business from England, opening (and using) a bank account, changing address to an English address and receiving correspondence, and owning property or other assets situate in England.

The list is not definitive or decisive but gives an indication of factors that can demonstrate that a company's COMI has moved.

Additional Differences to a Scheme of Arrangement

In addition to the potential to cram-up/down, the main difference between a restructuring plan and a scheme of arrangement is the financial condition test. This requires a company to have encountered or likely to encounter financial difficulties that are affecting, will or may affect its ability to carry on business as a going concern. However this has so far been construed quite broadly by the English courts and is a fairly low bar, but it does potentially narrow which companies can propose a plan compared to a scheme of arrangement which does not require the financial position of the company to be taken into consideration.

What Is the Process ?

A restructuring plan is court sanctioned, and requires two court hearings. The process commences by a company proposing a plan to one or more classes of creditor and by the company applying to court for approval to convene meetings of creditors and members.

There will be an initial court hearing at which the court will consider jurisdiction and class composition only. Following which, meetings of creditors and shareholders are convened, and those classes will then vote on the plan. If stakeholders vote in favour, the matter returns to court and the court will decide whether to sanction the plan. The court has ultimate discretion whether to sanction, and will consider, among other things, whether the plan is fair. If sanctioned, the plan is implemented.

Company prepares plan and applies to court for approval to convene meetings

↓

Hearing 1: Court decides whether to convene meetings of creditors and members

↓

If the court is satisfied that the convening conditions are met, meetings are called

↓

Meeting of creditors and members are held to vote on the plan

↓

Hearing 2: Court will decide whether to sanction

What Are the Advantages of a Restructuring Plan?

Flexible Terms	There are no limits on what can be proposed, offering a blank canvas for companies looking to reorganise their businesses. A restructuring plan can, and has in some cases, been used to effect a debt-for-debt or debt-for-equity swap, restructure landlord claims, manage a solvent wind-down, enable the issue of new notes and equity interests, and amend and extend maturity dates, loan facilities, or bonds.
Cross-Class Cram Down	The most notable feature of the restructuring plan is the ability for the court to cram down dissenting creditors and/or shareholders (subject to the court being satisfied that they would be no worse off than in the relevant alternative[2] and the plan being agreed by a class that would receive payment under the plan). Although creditors can be crammed down in other processes, such as under a US Chapter 11 plan, unlike a Chapter 11, there is no "absolute priority rule" – making a restructuring plan potentially a more attractive process. Cram down limits the ability of creditors to "hold out" or block a proposal, which has support of those creditors that retain an economic interest in the business.
Cross-Class Cram Up	A restructuring plan might also allow junior creditors to "cram up", forcing a plan on more senior creditors provided that they are no worse off than in the relevant alternative.
Voting	The voting threshold is lower in a restructuring plan, compared to a scheme of arrangement (or Chapter 11 plan). The plan simply requires 75% in value of each class of creditor to approve it. There is no requirement for a majority in number to vote in favour.
Disenfranchisement of Creditors	A class of creditors or members can be excluded from voting if the court is satisfied that they have no economic interest in the company, preventing "out of the money" creditors derailing a plan but still binding them to it.

No Absolute Priority Rule	This means that shareholders or junior ranking creditors may, in certain circumstances, be paid before senior ranking creditors are paid in full. A restructuring plan, therefore, gives greater flexibility than say a US Chapter 11 plan because it allows (where treatment is justified) for differential treatment of creditors.
Cheaper?	Costs may be significantly less than alternative processes, particularly those that rely more heavily on the court. Reduced court oversight also means costs can be more predictable and planned.
Court Involvement	Although the court oversees the process, once sanctioned, the company implements the plan without having to go back to court to get permission to action its decisions.
Debtor in Possession	Management remains in control of the business.
Opportunity to Restructure	The restructuring plan offers an option for a foreign company to reorganise its business in circumstances where that company's local laws do not permit or enable that. This could be advantageous in situations where the only option locally might be to liquidate the company, which could destroy the integrity and value of the company.
Overcoming the "rule in *Gibbs*"	The rule in *Gibbs* provides that obligations governed by English law cannot be discharged by foreign proceedings, unless the party submits to those proceedings. This could lead to parallel proceedings (and more cost) if a company wishes to restructure English law governed debts in its local jurisdiction. Using an English process to restructure would address this.
Mid-market Restructuring Tool	Typically, a scheme of arrangement has been used to restructure multinational corporates. The restructuring plan was introduced as a tool that could also be used to assist smaller, mid-market corporates and the English courts are keen to promote that.

International Recognition and Effectiveness of a Restructuring Plan

The English court will need to be satisfied that a plan proposed by a foreign company will be recognised and take effect in the jurisdiction(s) where the company has assets and liabilities.

In most cases, recognition will be dependent on foreign local laws. There are several steps that a foreign company can take to assist in obtaining recognition and satisfying the court that it should sanction a plan, such as:

- Changing governing law and jurisdiction provisions
- Obtaining creditor support
- Expert evidence
- COMI shift

In practice, if creditors and key stakeholders support the plan (which can be achieved through lock-up agreements), contractual provisions are governed by English law, the parties submit to the jurisdiction of the English courts, supported by evidence that there is a reasonable prospect that the scheme will be recognised and given effect in the relevant foreign jurisdiction, the plan is likely to be sanctioned.

A recent example of a foreign company's English restructuring plan receiving recognition is Virgin Atlantic, where the plan was recognised as a foreign proceeding under Chapter 15 of the US Bankruptcy Code by the US Bankruptcy Court (Southern District of New York).

Examples of Successful Foreign Restructurings

Although a scheme of arrangement is different to a restructuring plan, the court applies the same "sufficient connection" test to a scheme of arrangement when determining whether it has discretion to sanction a scheme proposed by a foreign company. It also takes into account whether a scheme will take effect and be recognised in the relevant foreign jurisdiction.

The case law on schemes of arrangement is, therefore, relevant to restructuring plans.

Of course, each case will need to be considered on its own facts but the table below gives an overview of some cases where a restructuring plan or scheme of arrangement proposed by a foreign company was sanctioned by the English court.

SMILE Telecoms (First RP)	The company was based in Mauritius, but the rights creditors were subject to were almost all governed by English Law and contained in agreements in which English courts had jurisdiction. The company had also taken steps to shift its COMI from Mauritius to England and Wales.
Gategroup (RP)	This is an interesting example of establishing a connection with England to implement a restructuring plan. The company's restructuring plan utilised a "co-obligor" structure. This involved the incorporation of a new English company, which then executed a deed of indemnity and contribution (a deed poll) in favour of the senior lenders and the bondholders. This subsequently allowed Gategroup to propose a plan compromising the claims of the senior lenders and the bondholders against the English company under the deed poll and the creditors' claims against the original obligors.
Re Noble Group Limited (SA)	The company, whose registered office was in Bermuda and whose shares were listed on the Singapore stock exchange, moved its COMI prior to the commencement of the scheme of arrangements from Hong Kong to England, establishing "sufficient connection". Local law expert evidence also supported the fact that if the scheme were sanctioned in England, then a US Bankruptcy Court would be likely to recognise it as a foreign main proceeding under Chapter 15 of the US Bankruptcy Code.
La Seda (SA)	The company was registered and domiciled in Spain. The senior facilities agreement was governed by English law and subject to the jurisdiction of the English court. The majority of lenders were based in the UK and Le Seda also had subsidiaries, a branch office and an employee based in the UK. Sufficient connection was established as a result of the English law governed credit facility.
Re Hibu Finance (SA)	There were several companies in the Hibu group located in the UK, the US and Spain. The restructuring involved a modest cash payment to lenders, debt for equity swaps and amendments to and restatement of existing facilities. Sufficient connection was established because the rights to be altered under the scheme were those under the senior facility agreement, which was governed by English law and provided for the English court to have non-exclusive jurisdiction. The court was also satisfied by expert evidence that the schemes would be recognised and given effect in the US (through Chapter 15) and Spain (under the Rome I Regulation).

Magyar Telekom (SA)	The company was incorporated and registered in the Netherlands. The main business and operations were in Hungary. The principal creditors were note holders issued under a New York law governed indenture that was subject to the non-exclusive jurisdiction of the New York courts. The governing law provision was changed to English law, and the jurisdiction provision to the non-exclusive jurisdiction of the English court. A COMI shift to the UK occurred in the month prior to the convening hearing. The court clarified that making the change a month prior for this purpose was not a barrier to sanctioning the scheme.
Apcoa Parking Holdings GmBH (SA)	There were several interlinked schemes relating to companies incorporated in England, Germany, Austria, Belgium, Norway and Denmark proposing to restructure the group's finance facilities. The only connection with England was the governing law and exclusive jurisdiction clauses of finance documents, which had been changed from German law and jurisdiction, to English law and jurisdiction, shortly before the scheme was proposed and with the express intention of thereby enabling a scheme to be undertaken. Expert evidence was provided that the change of governing law and jurisdiction plus the schemes themselves were likely to be recognised in each of the jurisdictions of incorporation.
SMILE Telecoms (Second RP)	After its first restructuring plan did not produce the desired outcome, SMILE sought to apply for a second instead of heading into formal insolvency. The court accepted expert evidence that the plan would likely be recognised in the overseas jurisdictions and that actions proposed could compromise the rights of foreign shareholders. The court highlighted the importance, where foreign law was concerned, of receiving expert evidence in the form required under the civil procedure rules.

RP – Restructuring Plan **SA** – Scheme of Arrangement

There are many advantages and opportunities for a foreign company to restructure and reorganise its business in England, which may not be available in local jurisdictions, and also many ways that a foreign company can bring itself with the English court's jurisdiction in order to propose a plan.

This alert does not propose to address all of the legal considerations for foreign corporates thinking about restructuring in England, but to offer a high-level overview of why they may wish to.

Stephen D. Lerner
Global Chair, Restructuring & Insolvency Practice, Cincinnati and New York
T +1 513 361 1220
M +1 513 293 4305
E stephen.lerner@squirepb.com

John Alderton
Partner, Leeds
T +44 113 284 7026
M +44 788 505 8896
E john.alderton@squirepb.com

Devinder Singh
Partner, Birmingham
T +44 121 222 3382
M +44 772 139 9625
E devinder.singh@squirepb.com

Rachael Markham
Professional Support Lawyer, Leeds
M +44 754 511 0781
E rachael.markham@squirepb.com