

This quick guide sets out an overview of a Restructuring Plan (RP).

An RP enables companies to enter into an arrangement with creditors and shareholders. It is similar to a scheme of arrangement but will, if approved by the court, enable companies to bind all creditors (including potentially both secured and other dissenting creditors) by “cramming down” their debts.

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What Is a Restructuring Plan (RP)?

An RP enables a company to propose a compromise or arrangement to its creditors that can bind secured creditors, unsecured creditors, dissenting creditors and also compromise members’ rights. The RP structure largely mirrors a scheme of arrangement (with additional advantages and some differences).

Procedure

An RP is court sanctioned, and requires two court hearings. The process commences by a company proposing an RP to one or more classes of creditor and by the company (or its administrators or liquidators) applying to court for approval to convene meetings of creditors and members. Creditors or members can also propose an RP.

At the initial court hearing the court will consider jurisdiction and class composition. Following which, meetings of creditors and shareholders are convened, and those classes will then vote on the plan. All parties affected by the RP must be provided with a statement that sets out the key aspects of the proposed RP – an explanatory statement. A class is confined to those persons whose rights are not so dissimilar as to make it impossible for them to consult with a view to their common interest. Determining how classes are to be split is often a delicate balancing exercise.

Once voting in the class meetings is complete, the matter returns to court and the court will decide whether or not to sanction the plan. At least 75% in value of each relevant class of creditors must vote in favour of the RP for it to proceed to sanction, subject to cross-class cram down, referred to below. The court has ultimate discretion whether to sanction, and will consider, among other things, whether the plan is fair, whether the plan will be substantively effectively and whether creditors are “no worse off” under the plan. If sanctioned, the plan is implemented and will bind each class of creditor.

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 and the proposed RP and explanatory statement will be sent to creditors and members

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

Hearing 2: Court will decide whether to sanction

Advantages of an RP?

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| Flexible Terms | <p>There are no limits on what can be proposed, offering a blank canvas for companies looking to reorganise their businesses.</p> <p>An RP 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.</p> <p>Unlike a company voluntary arrangement an RP can be used to restructure both secured and unsecured debt.</p> |
| Cross-Class Cram Down | <p>The most notable feature of the RP 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 and the plan being agreed by a class that would receive payment under the plan).</p> <p>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.</p> |
| Cross-Class Cram Up or Across | <p>An RP 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, or even to “cram across” the plan on equal ranking, but dissenting creditors.</p> |
| Voting | <p>The voting threshold is lower in an RP, compared to a scheme of arrangement (or Chapter 11 plan).</p> <p>The RP 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.</p> |
| Disenfranchisement of Creditors | <p>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 such creditors derailing an RP but still binding them to it.</p> |
| Consensual Restructuring | <p>The fact that a company is considering an RP, or has drafted one, might be sufficient to bring all parties to the table to agree a consensual restructuring without the need for the RP to proceed formally through the court process.</p> |

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| No Absolute Priority Rule | <p>An RP, therefore, gives greater flexibility than say a US Chapter 11 plan because it allows for differential treatment of creditors. This means that shareholders or junior ranking creditors may, in certain circumstances, be paid before senior ranking creditors are paid in full.</p> |
| Court Involvement | <p>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. Although the costs of managing an RP through the court (and of a potential challenge/appeal) is something to factor into considerations when deciding whether an RP is the appropriate restructuring tool.</p> |
| Debtor in Possession | <p>Management remains in control of the business.</p> |
| Opportunity to Restructure | <p>The RP 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.</p> <p>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.</p> |
| Overcoming the “rule in Gibbs” | <p>The rule in <i>Gibbs</i> 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 RP to restructure would address this.</p> <p>That said we have seen a number of foreign companies successfully use an RP, in conjunction with a parallel processes in their own jurisdiction, making an RP a popular tool for companies based outside of this jurisdiction.</p> |
| Mid-market Restructuring Tool | <p>Typically, a scheme of arrangement has been used to restructure multinational corporates. The RP 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. The court has sanctioned a number of SME RPs, but the cost of the process can be prohibitive.</p> |

Drawbacks of an RP

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| Costs | <p>As a relatively new restructuring tool, it has taken time for the market to familiarise itself with the process, and, as it has done so, the costs of the process have increased due to creditor challenges, appeals and the process generally becoming more litigious (see further below).</p> <p>The potential for costs to escalate, uncertainties created by appeal risk, and the need for a case management conference and an expert report complying with the civil litigation rules, has made the process unattractive for some companies.</p> |
| Challenge | <p>Many RPs have been challenged by creditors at both the convening and sanction stages of the process. Although not all challenges have been successful, they increase the costs (which the company may have to bear if the challenge is fair/successful), they increase court time (potentially extending the time it takes for the RP to reach sanction) and they create uncertainty.</p> |
| Appeal | <p>There have been several high-profile appeals (<i>Adler, Thames Water</i> and <i>Petrofac</i>), some of which have resulted in the RP being set aside. The risk of an appeal adds uncertainty to the outcome of the process and the potential of an appeal, and the costs of dealing with that have to be factored in at the planning stage.</p> |
| Litigation | <p>An RP needs to be supported by a valuation report, which the courts require to be prepared in accordance with the civil procedure rules, adding additional cost to the process. More recently, the courts have introduced the requirement for there to be a case management conference, and it is expected that the courts will be more hands-on with managing the court timetable – a practice direction is expected.</p> <p>As more rules and elements of contentious litigation are introduced to the process, the more costly the process might become.</p> |
| Moratorium | <p>Commencing an RP does not provide a company with the benefit of an automatic stay on proceedings or enforcement. This means stakeholders will have to be carefully managed throughout the process.</p> |

Eligibility

- An RP is available to most companies who have encountered, or are likely to encounter, financial difficulties that are affecting, or will or may affect, their ability to carry on business as a going concern, although there are a handful of restrictions.
- A company does not have to be registered in the UK to be eligible. Provided that the company has sufficient connection to the UK the English courts have jurisdiction to consider and sanction an RP proposed by a foreign company.

Timing

- The legislation does not prescribe how long the process should take. Although the court process might only take between 8-12 weeks, if an RP is challenged, and/or appealed that time period will be stretched and could run into 4, 5, 6 months or longer. In addition to the court time, there will also be the time required to prepare the RP ahead of the formal court process. Much will depend on the complexities of the RP, creditor challenges and a potential appeal. Where the court is required to exercise the cram down power and there is no urgency, the court is likely to extend the timetable to allow more time to consider whether to cram-down.

Dissenting Creditors

- Votes on the RP will be calculated solely by the relevant debt or shares (i.e. 75% in value of the creditors or members of a class have to vote in favour for the RP to be implemented) but the court can override this in certain circumstances,
- Cross-class cram down: if a class of creditors or members votes against the RP, the court can still sanction it if two conditions are met:
 - *Condition A*: none of the members of the dissenting class would be worse off than under a relevant alternative (i.e. whatever procedure the court considers would be most likely to occur in relation to the company (perhaps most likely administration) if the RP were not sanctioned), and
 - *Condition B*: at least 75% by value of a class of creditors or members, which would receive a payment in such alternative procedure, had still voted in favour of the RP.
- If there are dissenting creditors this can add additional costs to the process if they choose to challenge the RP.

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