A&O SHEARMAN

Restructuring across borders
England and Wales

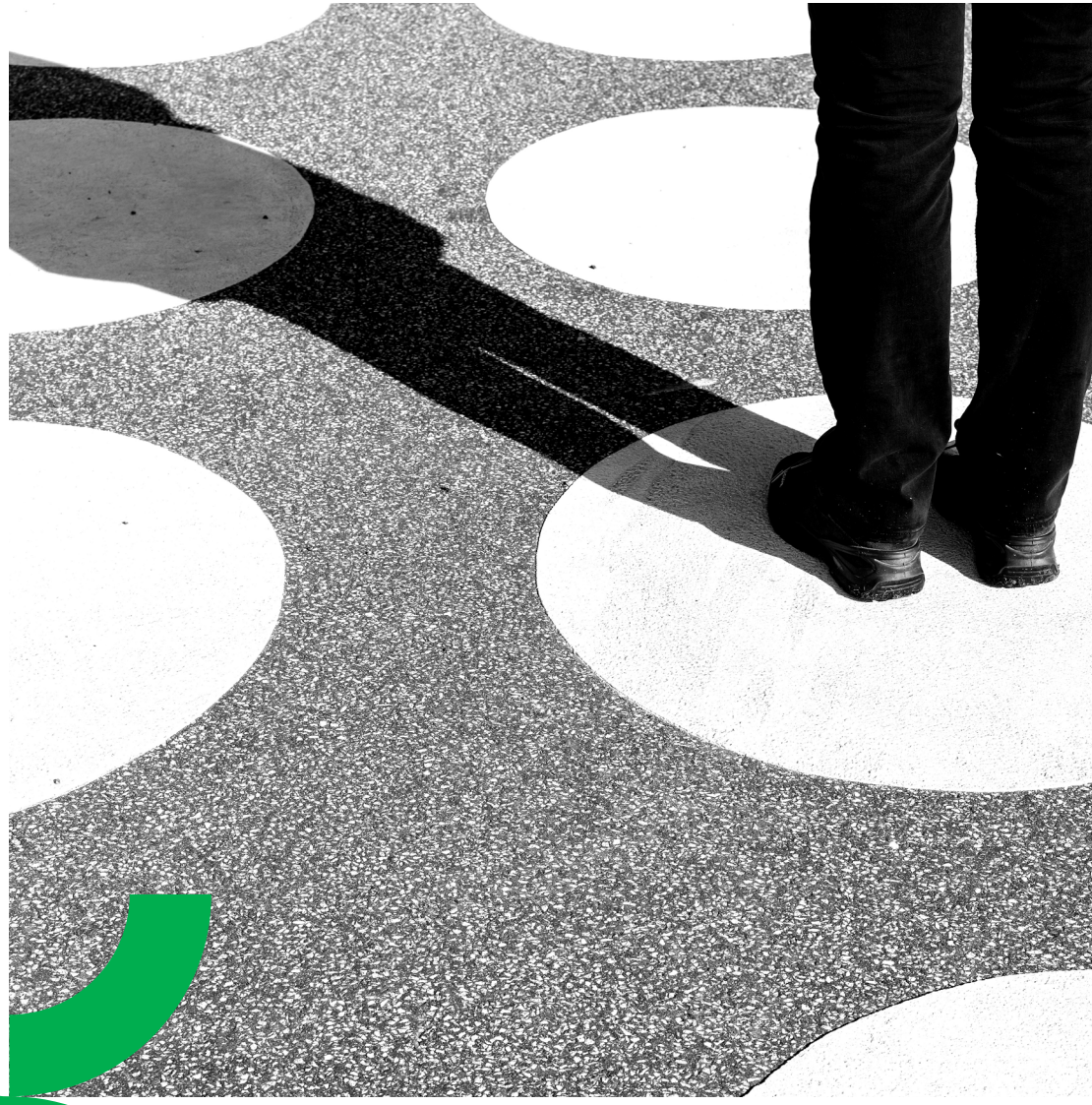
SCHEMES OF ARRANGEMENT, RESTRUCTURING PLANS AND VOLUNTARY ARRANGEMENTS | JANUARY 2026

Contents

Introduction

Where a company is essentially profitable but its debt and interest burden are too great, it may be able to persuade its creditors to convert some of their debt into equity or to reschedule its payment obligations by extending the maturity/payment dates and to continue funding the company. This is a simple example of a restructuring which may be effected through a voluntary arrangement, a scheme of arrangement or a restructuring plan. Restructurings can be pursued through the formal procedures set out in the Insolvency Act and the Companies Act, but can also be effected on a simple contractual basis and many rescue and support operations are conducted out of court in this way.

Although schemes of arrangement and company voluntary arrangements have been around for many years, the restructuring plan remains a relatively new creation of English law, having been introduced in June 2020. There is a great deal of similarity between restructuring plans and schemes of arrangement, save that a restructuring plan permits a cross-class cram down, which is not available in a scheme of arrangement. The similarities between the two procedures are helpful, as many of the case law principles that have developed in relation to schemes of arrangement may be applied to restructuring plans.[1]



[1]Re Virgin Atlantic Airways Ltd [2020] EWHC 2191 (Ch) and [2020] EWHC 2376 (Ch)

Restructuring plans

OVERVIEW

A restructuring plan is a formal arrangement between the company and its creditors and/or its members (or a class of its creditors or members) which, when approved by the relevant creditors or members (as appropriate) and sanctioned by the court, becomes binding on them all.

The procedure is provided for in Part 26A (sections 901A-901L) of the Companies Act 2006. It is not an insolvency procedure as such (ie under the Insolvency Act 1986), although in order to propose a restructuring plan, a company must have encountered, or be likely to encounter, financial difficulties that are affecting, or will or may affect, its ability to carry on business as a going concern. The restructuring plan is highly flexible and may be used by a company in financial difficulty to reach a binding compromise or arrangement with its creditors and/or members.

The terms of the arrangement will vary from case to case; it is essentially a commercial deal between the company and its creditors and/or members. A plan can only impact the rights of counterparties in their capacity as creditors or members (as applicable). A plan could, for example, vary the contractual rights of creditors including the amounts owed to them, the repayment dates or the methodology for determining their claims, and/or involve a complete write-off of debt and/or a debt for equity swap. However, as with schemes of arrangement and CVAs (as discussed below) a restructuring plan cannot affect proprietary rights without consent. Therefore, for example, the rights of landlords to forfeit their property on the occurrence of an insolvency-related event (if applicable) may not be altered by a plan.[2]

[2]Re Instant Cash Loans Ltd [2019] EWHC 2795 (Ch)

Restructuring plans (cont.)

INTERACTION WITH STATUTORY MORATORIUM

Restructuring plans have been and can be utilised to effect a moratorium or standstill on creditors (if such is a term of the sanctioned proposal), meaning a temporary suspension on the ability of creditors to exercise certain of their rights. However, this may not now be necessary given the introduction of a statutory moratorium under Part A1 of the Insolvency Act 1986 (see the "England and Wales – Moratorium" factsheet here for more details). The statutory moratorium can be used in conjunction with a plan and the court has the power (under section A15 of the Insolvency Act 1986) to extend the moratorium for the duration of a plan.

That said, imposing a moratorium or standstill via a restructuring plan may still be necessary to extend the effects to financial creditors, who are largely sheltered from the effects of the statutory moratorium and have wide powers to bring such a moratorium to an end.

Where a plan is proposed within 12 weeks of the end of the statutory moratorium, it cannot compromise "moratorium debts" (ie debts incurred during the moratorium under arrangements entered into during the moratorium) or priority "pre-moratorium debts" (ie the monitor's remuneration or expenses, goods or services supplied during the moratorium, rent for a moratorium period, wages or salary and certain redundancy payments etc).

PROCEDURE

Negotiating the terms of the plan with creditors and drafting the plan documentation is the first step. Typically, the terms will be formulated over a number of months of commercial negotiation and it is not uncommon for indicative heads of terms or proposals setting out the principles to be included in the plan to be drawn up prior to the plan documentation itself being drafted. It is also not uncommon to seek to bind supportive creditors to supporting the deal via execution of a lock-up / transaction support agreement committing any acceding party to supporting the proposed transaction, including by voting in favour of the proposal in any scheme or plan.

Companies seeking plans are usually expected to be able to demonstrate to the court (to the extent reasonable/practicable) that they have made genuine attempts to negotiate a consensual acceptable solution with affected stakeholders (and not just a core supportive group or class).

As such, the pre-court stage can be a lengthy and complex process, depending on the nature of the creditors and the debt and jurisdictions involved. Once the plan documentation has been drafted, obtaining formal approvals and sanction of the restructuring plan are the next steps –a three-stage process.

Restructuring plans (cont.)

CONVENING THE MEETINGS

A restructuring plan is formally commenced by an application to court seeking a court order that the company should convene the relevant meetings of creditors and/or shareholders. The initial court hearing to consider this application is referred to as the "convening hearing."

The two primary purposes of the convening hearing are for the court to establish whether it has jurisdiction (including whether the entry condition that the company must currently be in or likely to suffer from financial difficulties is met) in relation to the proposed restructuring plan and, if such jurisdiction is established, to determine the constitution of classes of creditors and/or members and therefore how many creditor or member meetings ought to be convened.

The test for establishing jurisdiction for a restructuring plan is whether there is a "sufficient connection" between the company proposing the plan and England and Wales. Such sufficient connection may be established in a variety of ways, for instance by the company having assets in England and Wales or an establishment, place of business or its centre of main interests in England and Wales, but it can also be founded on the basis that any obligations to be compromised by the restructuring plan are governed by English law or that under the relevant contractual arrangements the parties have submitted to the jurisdiction of the courts of England and Wales. Where assets and/or key creditors are located in foreign jurisdictions, or plan companies are incorporated outside of England and Wales, in addition to establishing sufficient connection the court will also require evidence that the plan is likely to be of some effect (ie it would be recognised by the courts) in those jurisdictions and, for this purpose, opinions are usually submitted from legal experts in those jurisdictions.

If a convening order is made in respect of a plan, this triggers a ban on the operation of so-called "ipso facto" clauses (ie rights to terminate a contract on the basis that a counterparty has entered "insolvency proceedings" – such term including plans) – see the "England and Wales – Overview" factsheet here for more details.

CLASS COMPOSITION

When determining the classes of creditors or members for the purpose of requesting the convening of relevant meetings, the court will apply the test of whether, in relation to any given group of creditors or members, their rights are not so dissimilar as to make it impossible for them to consult together with a view to their common interest. Where the rights are not so dissimilar, creditors or members should be placed in one class for the purpose of the plan meeting and voting, but where they are so dissimilar, they ought to be placed in separate classes.

Determining the relevant classes requires an analysis of the rights which are to be varied or released under or in connection with the plan and any new rights (if any) which the plan or the related restructuring gives to those creditors whose rights are to be released or varied. Even if there is a difference in such rights, the courts will not necessarily split a class where there is "more to unite than divide the creditors in the proposed class".[3] The courts have been alert to the possibility of so-called "class proliferation" – i.e. an intention by companies to artificially inflate the number of classes in order to create at least one class whose votes would enable the use of cram down powers (see below for more details).

[3]Re Apcoa Parking Holdings GmbH and other companies [2014] EWHC 3849 (Ch)

Restructuring plans (cont.)

CONVENING ORDER

If the court accepts jurisdiction in relation to the plan and agrees with the proposed class constitution then it will make an order authorising the company to convene the relevant meetings and ordering that the documents be provided to the creditors/members (in addition to a number of ancillary orders).

KEY DOCUMENTS

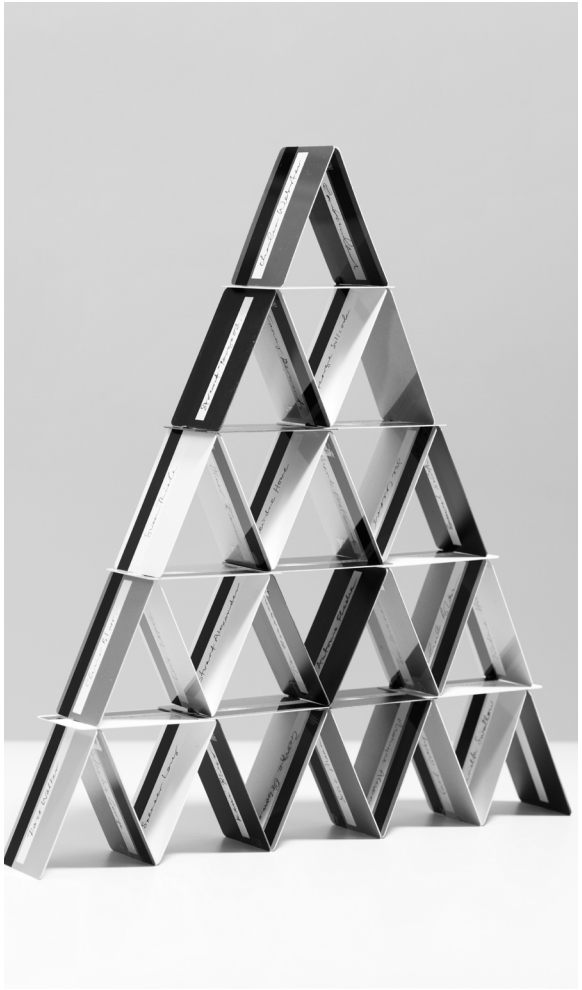
In order to give creditors an opportunity to appear at the convening hearing to contest the proposed constitution of classes for the plan, the company will usually send to all affected creditors and members a document referred to as the "practice statement letter", typically at least 14-21 days before the date proposed for the convening hearing. The practice statement letter will set out the proposed claims for the purpose of the plan and the reasons the company considers such classes to be appropriate, and will usually include a brief summary of the rights creditors or members have prior to the effectiveness of the plan and an analysis of how those rights will be impacted by the plan.

In order for the court, creditors and members (as applicable) to properly consider the proposal and any questions of jurisdiction and appropriate class constitution, they will need sufficient detail on the existing rights of creditors, and/or members and how these rights will be impacted by the plan and related restructuring. For this purpose, the company will draft the plan document and an accompanying explanatory statement (which is often a very lengthy document).

The explanatory statement must explain the effect of what is proposed by the plan in language that enables creditors and/or members to exercise their judgement as to whether the proposed plan is in their interest. The courts have stressed the importance of full and frank disclosure being made by the company both to the court and to creditors/members by way of the documentation.

Companies are increasingly commissioning "plan benefits reports" from financial advisory firms/accountants comparing the value of "contributions" made to a restructuring by a party or class (egby writing off a portion of existing debt) verses the "benefits" that will accrue to them under the plan (egnew equity instruments) in order todemonstratethe "fairness" of the proposal in respect of all affected parties (see below for more details).

Once the documents have been made available to affected creditors/members, there will usually be a period of around 21 days for the creditors/members to consider the proposed plan before the plan meetings are held.



Restructuring plans (cont.)

PLAN MEETINGS AND VOTING

Once the affected creditors/members have had a chance to consider the proposals, they are invited to attend the meetings to formally vote on whether they accept or reject the proposal. Attendance at the meetings can either be in person (where the relevant creditor/member is an individual) or by proxy, where individuals or companies can appoint an individual to vote on their behalf. In practice, many creditors will appoint the chairman of the meeting as a proxy and instruct the chairman to exercise their vote to either accept or reject the proposal. Once the votes have been cast, the votes for and against the proposal must be calculated.

A restructuring plan can either be consensual (meaning each class of creditors and/or members has approved the proposal as a class) or can be approved as a "cram-down" plan. A consensual plan will be approved where creditors/ members representing at least 75% in value of each class of creditors/members present and voting (in person or by proxy), has voted in favour of the plan. If one or more class(es) (the dissenting class(es)) do not meet this 75% by value threshold, the restructuring plan may still be sanctioned by the court if the two conditions for a cram-down are satisfied, being:

- the court must be satisfied that, if the plan is sanctioned, none of the members of the dissenting class would be any worse off than they would be in the event of the relevant alternative; and
- the plan must have been agreed by a number representing 75% in value of a class of creditors or (as the case may be) members, present and voting (in person or by proxy), who would receive a payment, or have a "genuine economic interest" in the company, in the event of the relevant alternative (ie are "in the money").

In this context, the relevant alternative is whatever is most likely to happen to the debtor in the absence of the plan – this is often (but not always) an insolvent administration or liquidation where assets are realised and distributed to creditors.

Where a court is satisfied that none of the members of a relevant class (whose rights are affected by the proposal) have a genuine economic interest in the company (ie are "out of the money") in the relevant alternative, they may exclude that class from voting on the plan.[4]

If the relevant voting thresholds and conditions have been reached then the company may apply to the court for final approval of the plan at a hearing known as the "sanction hearing".

[4]Re Smile Telecoms Holdings Ltd [2022] EWHC 387 (Ch)

Restructuring plans (cont.)

COURT SANCTION

The sanction hearing will usually take place a few days after the meetings have been held. In connection with the sanction hearing, the court will consider whether the required statutory majorities of creditors/members voting in favour of the proposal have been reached and, in a "cram-down" plan whether the two criteria have been met and, in either case, whether it should exercise its discretion to sanction the plan.

The court will consider a number of factors when determining whether to exercise its discretion (which is no mere "rubber stamp" exercise) but these are likely to include: (i) whether the statutory requirements have been met; (ii) whether those creditors voting in favour of the scheme/plan were fairly representative of their class and were acting in good faith and not coercing the minority in order to promote interests adverse to those of the class to which they belong (ie that they were not voting for an ancillary purpose unique to them); (iii) that an intelligent and honest person who is a member of the relevant class and is acting in respect of his own interest might reasonably approve the scheme or plan (the "rationality test"); and (iv) that there is no "blot" or defect on the scheme or plan.

The effect of these considerations is that the court may ignore or disregard votes in favour of the plan if it considers that the votes have been cast by creditors/members who have a special interest in promoting the plan and are not representative of the class as a whole.

This may lead to votes being disregarded where a creditor is also interested in the company in its capacity as a shareholder or affiliated company or where it has received a special inducement, such as a fee, to vote in favour of the plan where such inducement was not available to other members of the class.

[5]Re AGPS Bondco plc [2024] EWCA Civ 24

Restructuring plans (cont.)

CRAM DOWN

If the court is being asked to invoke its cram down powers in respect of a plan, some additional considerations apply:[5]

- the "rationality test" does not apply to the discretion to cram down without significant modification – the test is based on the assumption that members within the same class have a commonality of interests, whereas this cannot be applied to cross-class considerations since the classes will have been constituted on the basis of a material difference in interests;
- instead, the court will compare the position of the dissenting class with the position of that same class in the relevant alternative (the "vertical comparison"), and the position of the dissenting class with the position of the other classes if the plan is approved (the "horizontal comparison");
- in respect of the horizontal comparison, the starting point is that if creditors would be treated pari passu in the relevant alternative (e.g. a formal insolvency), such creditors should also be treated pari passu under the plan. However, there is no absolute priority rule applicable to plans and a departure from pari passu treatment is permissible provided it is justified on a proper basis (for example, creditors or shareholders
- the fairness of the allocation of the benefits arising under the plan between the parties will be highly fact dependent and will need to be evidenced by the company – simply being "out of the money" does not necessarily of itself justify the allocation of no more than token consideration to such creditors, even if they would technically be "no worse off" under the plan;
- the primary purpose of the court's cram down power is to prevent classes of creditors from exercising an "unjustified" veto right over a restructuring where there has been a genuine effort to negotiate an acceptable and reasonable deal. It is not intended to be used to allow "in the money" creditors to simply appropriate a disproportionate amount of the benefits of the restructuring for themselves.

The impact of these considerations means that the valuation evidence of what creditors are likely to recover in the relevant alternative compared with what they would receive if the plan goes ahead is crucial in demonstrating that creditors would be better off under the plan, and disputing the correct valuation has been a frequent route of challenge by dissenting creditors in respect of plans to date.

EFFECT OF THE PLAN

Having considered all relevant factors, if the court decides to exercise its discretion to sanction the plan and makes the appropriate order (and the order is registered (where appropriate) with Companies House or published in the Gazette), then the plan will become binding on all the creditors/members affected by it, including those who voted against, did not vote at all and even those who did not receive notice of the plan.

[5]Re AGPS Bondco plc [2024] EWCA Civ 24

Schemes of arrangement

Schemes of arrangement are very similar to restructuring plans in terms of process, procedure, timing and what they can do – the same sorts of commercial restructurings can be delivered by way of a scheme as through a plan. However, there are some key differences in respect of schemes as compared to plans which are summarised below:

- The procedure is provided for in Part 26 (sections 895-901) of the Companies Act 2006 rather than Part 26A (sections 901A-901L).
- There is no requirement for a company to demonstrate that it 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 in order to access the scheme. In fact, schemes have a long pedigree of use for entirely solvent corporate reorganisations and to effect M&A transactions in addition to being used to assist companies with remedying financial distress.
- On a related note, a scheme convening order does not trigger the ban on the operation of ipso facto clauses.
- The proposals will be approved if a majority in number (ie more than 50%) representing at least 75% in value of each class of creditors/members present and voting (in person or by proxy), has voted in favour of the scheme – ie there is a numerosity element in terms of those present and voting which is not a requirement in respect of voting on a plan.
- As noted above, every constituted class must vote to approve a proposal in a scheme before a court can sanction it. No cross-class cram down is available – ie it is not possible to impose a scheme on any class which has not voted in favour of the scheme. As such, unlike with plans, companies pursuing schemes will often seek to minimise the number of classes to increase the chances of each one voting in favour of the scheme.
- As cross-class cram down is not available in a scheme, the unmodified rationality test will always apply when a court is considering whether to sanction a scheme. Even though cross-class cram down is not available in schemes, valuation evidence and the most likely alternative outcome if the scheme is not sanctioned (usually referred to in a scheme context as the "comparator") is still vital in respect of determining the fairness of the proposal vis a vis the affected parties.
- It is not possible to exclude out of the money creditors or members (to the extent their rights are proposed to be compromised by the scheme) from forming a class or voting.

An indicative timeline of the key steps for both a scheme of arrangement and a restructuring plan process can be found in Appendix 1.

Company voluntary arrangements (CVAs)

OVERVIEW

A CVA under the Insolvency Act 1986 enables a company to reach an arrangement with its creditors under the supervision of an insolvency practitioner. In that sense, it is the closest we have to a debtor in-possession insolvency procedure. It is very different from a scheme of arrangement or restructuring plan in that the implementation requires practically no court involvement – merely filing requirements – and should therefore be a cheaper option to put into effect compared to a scheme of arrangement or restructuring plan.

The CVA procedure is essentially a contract between a company and its creditors whereby they agree how the company's debts should be dealt with. The procedure is very flexible and there are very few constraints on the form and content of the arrangement.

Prior to June 2020, a CVA had a distinct advantage over a scheme of arrangement and a restructuring plan for "small companies" (as defined in the Companies Act 2006) because such companies could make use of the CVA moratorium to limit creditor action. This advantage was nullified with the introduction of Part A1 of the Insolvency Act 1986 which provides for a standalone moratorium available to companies (for more information on the newly introduced standalone moratorium, please refer to the "England and Wales—Moratorium" factsheet available here).

In order to propose a CVA, a company must either: (i) be registered in England, Wales or Scotland; (ii) be incorporated in an EEA state other than the UK; (iii) be incorporated outside of the EEA but with its centre of main interests in a member state other than Denmark (iv) have its centre of main interests in the UK; or (v) have its centre of main interests in an EU Member State and an establishment in the UK.

Company voluntary arrangements (CVAs) (cont.)

PROCEDURE

PROPOSAL

The terms of the CVA are set out in the proposal. The proposal is made by the directors or, if the company is in administration or liquidation, by the administrator or liquidator. The exact terms of the proposal will, as with a scheme and plan, vary from case to case. Certain information must be set out in the CVA proposal as a matter of law. Any proposal must allow for the payment of any preferential debts in priority to unsecured creditors.

The rights of a secured creditor to enforce its security cannot be affected without its consent. The rights of landlords to forfeit their property on the occurrence of an insolvency-related event (if applicable) may not be altered by the CVA proposal because a CVA can only impact on the rights of counterparties in their capacity as creditors and not any proprietary rights.[6] As with a scheme and a plan, where a CVA is proposed within 12 weeks of the end of the statutory moratorium, it cannot compromise moratorium debts or priority pre-moratorium debts. Subject to this protection afforded to secured and preferential creditors and landlords/ other proprietary rights, there is no restriction on the arrangements which a CVA proposal may make.

NOMINEE'S REPORT

The proposal should identify a person to act as nominee in relation to the CVA for the purpose of supervising its implementation; such nominee must be an insolvency practitioner. The nominee is required to submit a report to the court stating why or why not the proposal has a reasonable prospect of being approved and implemented and why the members and creditors should or should not be invited to consider the proposal. To enable the nominee to prepare this report, those making the proposal must give the nominee a statement of the company's affairs. Where the nominee is the administrator or liquidator, the nominee may summon a meeting of members and seek a decision of the creditors without the prior need to report to the court.

Once the initial steps have been taken, the nominee will call the meeting of members and will seek the approval of creditors using one of the decision procedures set out in the Insolvency (England & Wales) Rules 2016.
The proposal must be approved by at least 75% by value of the creditors who respond in the relevant decision procedure, which must include more than 50% of the company's unconnected creditors. Votes are calculated according to the amount of the creditor's debt. Special rules apply to creditors with claims for an unliquidated amount or where the value is not ascertained. All creditors within the scope of the CVA vote within a single class (even if the CVA proposes to treat certain groups of creditors differently).

Although the CVA is a contractual arrangement between a company and its creditors, the approval of more than 50% by value of the company's members who are present and vote at a members' meeting is also required. In both cases, the majorities are calculated on the basis of those actually voting on the proposal. If the proposal is approved by the creditors but not by the members, then the decision of the creditors prevails, but the members have a right to challenge the decision on application to the court within 28 days.

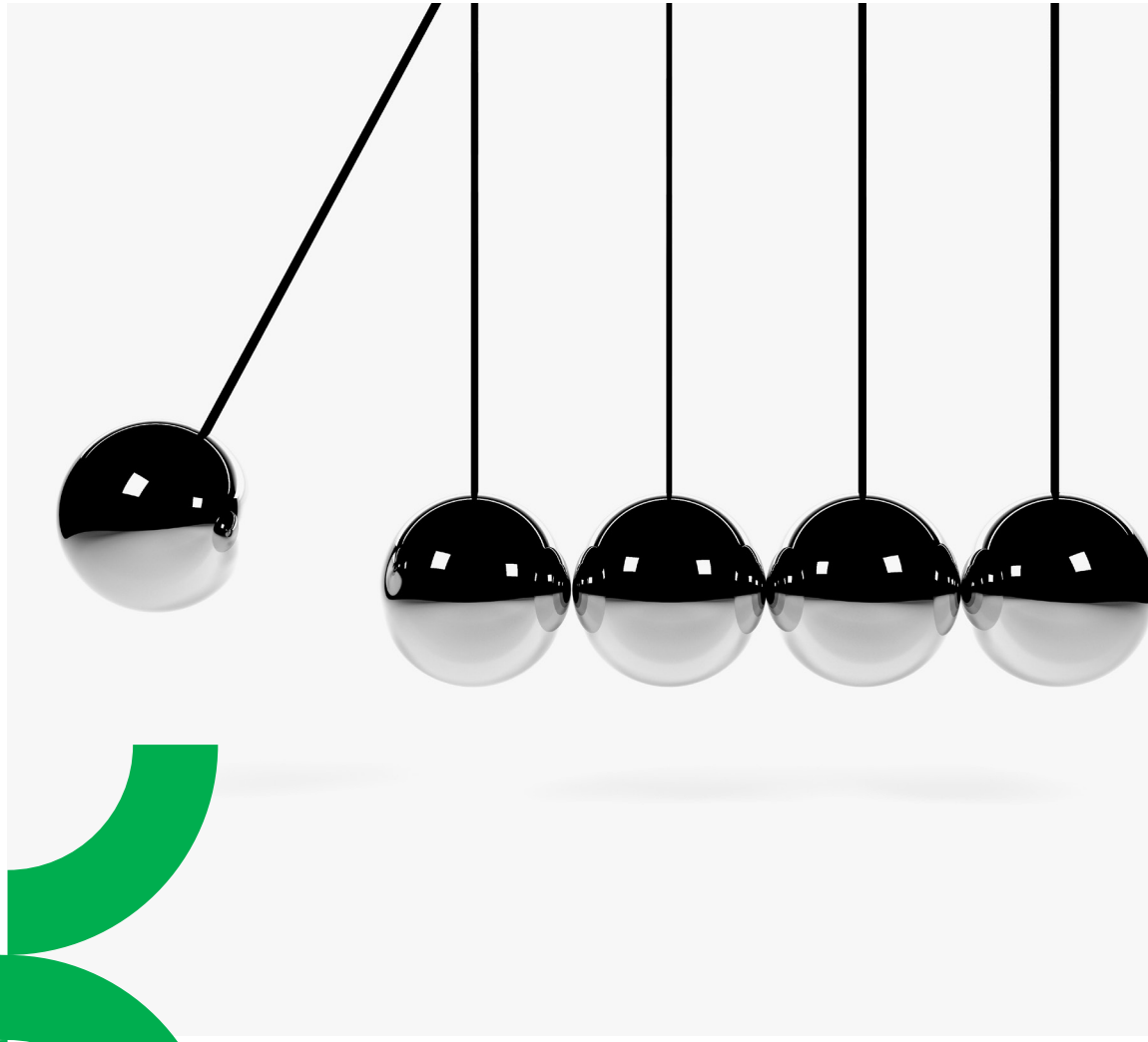
[6]Discovery (Northampton) Ltd v Debenhams Retail Ltd [2019] EWHC 2303 (Ch)

Effect of a CVA

Implementation of a CVA does not require a court order. If the proposal is approved by the creditors, then all creditors who were entitled to vote in the decision procedure, or would have been entitled to vote if they had received notice of the decision procedure, will be bound by it, subject to creditors having the right to challenge the CVA for unfair prejudice or material irregularity. Challenges should normally be brought within 28 days.

During implementation of the CVA terms, the directors will remain in control of the company although the supervisor (usually the former nominee) will have an ongoing monitoring role, as set out in the CVA.

The CVA will come to an end when its terms have been complied with (or if it fails) and/or when the CVA provides that it should end.



Scheme, plan or CVA?

The decision as to whether it is better to use a CVA, a scheme of arrangement or a restructuring plan will depend on the facts and circumstances of each case.

Moratorium and business continuity

All of these procedures can be used in conjunction with the statutory moratorium and so CVAs have lost the historic advantage they used to have in this respect.

A restructuring plan and a CVA will trigger the operation of the ban on ipso facto clauses[7] meaning that suppliers of goods and services cannot terminate or amend their contracts or do any other thing on the basis that the procedure has been launched, the same protection does not arise in relation to a scheme of arrangement.

Ability to bind creditors and members

All bind all creditors once approved/sanctioned (as applicable), except that a CVA cannot affect the rights of secured creditors without their consent nor can it affect the priority of preferential creditors vis-à-vis all other debts and their right to rank equally with each other; but a scheme/plan may give rise to class issues which it might be possible to avoid in a CVA. In this respect, a plan has a benefit over a scheme because of the ability to affect the cross-class cram down against a dissenting class. A scheme and a plan can affect members' as well as creditors' rights, but voting issues are generally more complex in a scheme particularly given the requirement for more than 50% by number of each class to approve the scheme.

Complexity and risk of challenge

A scheme and a plan are generally more time-consuming and, consequently, more expensive to put together than a CVA. The court's approval is required. One advantage of the upfront court approval for a scheme or plan is that challenges are usually dealt with at an early stage, whereas the lack of court involvement in a CVA means that challenges will be dealt with separately and after the proposal is approved.

Recognition

If the company has assets in the U.S., recognition of the proceedings could be sought in the U.S. to protect those assets from creditor action. All of CVAs, schemes of arrangement and restructuring plans are capable of recognition in the U.S. (under Chapter 15 of the U.S. Bankruptcy Code), although if U.S. securities are involved, consideration may also need to be given to the U.S. Securities Act of 1933, which may impact on whether a scheme, plan or a CVA is more appropriate.

[7]Both a convening order being made by the court in respect of a restructuring plan and/or a CVA taking effect in relation to the debtor company triggers the ban on the operation of ipso facto clauses contained in section 233B of the Insolvency Act 1986. More detail on this can be found in the "England and Wales – Overview" factsheet available here.

Key contacts

If you require advice on any of the matters raised in this document, please contact any of our partners or your usual contact at A&O Shearman, or email **rab@aoshearman.com**.

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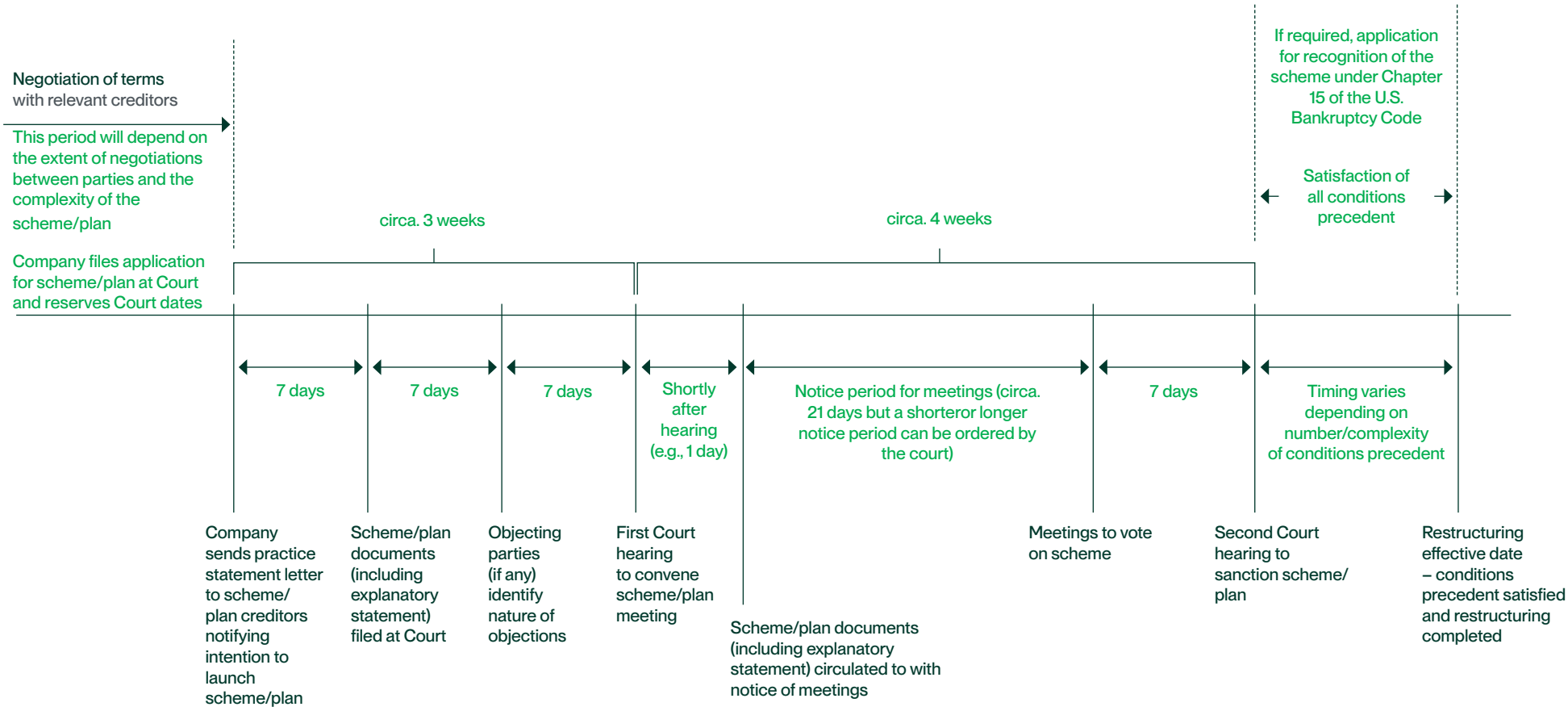
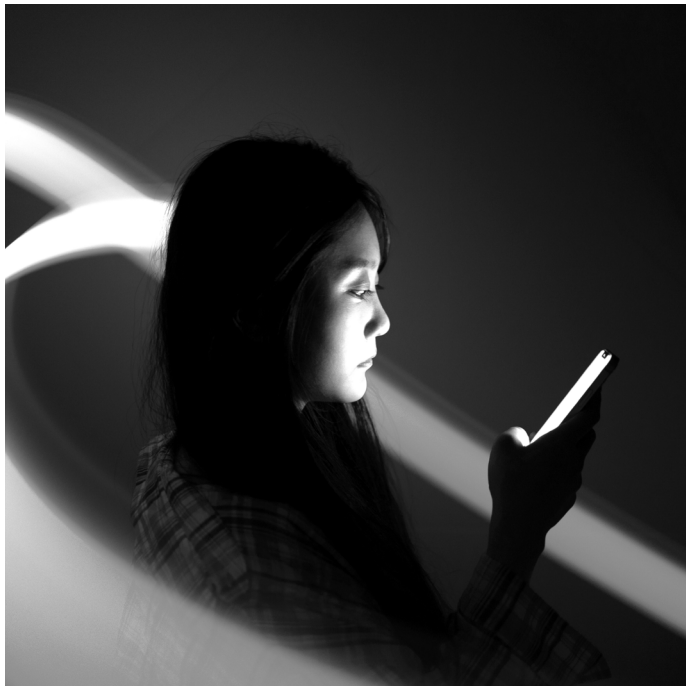
Appendix 1: Indicative scheme/plan timetable



Further information

Developed by A&O Shearman's market-leading Restructuring group, "**Restructuring Across Borders**" is an easy-to-use website that provides information and guidance on all key practical aspects of restructuring and insolvency in Europe, Asia, the Middle East and the U.S.

To access this resource, please **click here**.



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