

PART 26A RESTRUCTURING PLANS

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A practice note on the process of implementing a restructuring plan for a company in financial difficulty under Part 26A of the Companies Act 2006.

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SCOPE OF THIS NOTE

This practice note sets out the process for implementing a restructuring plan under Part 26A of the Companies Act 2006 (CA 2006) (Part 26A restructuring plan). It describes the statutory context, similarities and differences compared to the scheme of arrangement process (under Part 26 of the CA 2006) and particular areas in which the law is relatively novel and yet to be developed.

STATUTORY FRAMEWORK

Section 7 of and Schedule 9 to the Corporate Insolvency and Governance Act 2020 (CIGA 2020) introduced a new Part 26A into the CA 2006 entitled "Arrangements and reconstructions for companies in financial difficulty". Part 26A provides for a company to enter into a restructuring plan with the approval of its creditors or members (Part 26A restructuring plan).

The Part 26A restructuring plan provisions are based on the existing scheme of arrangement provisions under Part 26 of the CA 2006, and the Explanatory Notes to CIGA 2020 make clear that the procedure is intended to draw on the practice and principles applied by the court in respect of such provisions. However, the Part 26A restructuring plan provisions differ in three important respects:

- A Part 26A restructuring plan is only available in order to eliminate, reduce, prevent or mitigate the adverse effect on a company's ability to carry on business as a going concern caused by serious "financial difficulties" that the company encounters or is likely to encounter (*section 901A, CA 2006*). There is no statutory guidance that limits the meaning or scope of "financial difficulties" which, on the face of it, can be given a broad interpretation. The only defining feature is that the financial difficulties will or may impact on the company's ability to operate as a going concern. Similarly, the requirement that the plan should 'eliminate, reduce, prevent or mitigate' the effect of the financial difficulties should be expansively construed (*Re Virgin Atlantic Airways Ltd, Re [2020] EWHC 2191 (Ch) at [39]*).
- The requirement for approval of a Part 26A restructuring plan is for a 75% majority in value of each voting class. There is no need for an additional simple majority in number of creditors in favour, as is required to approve a scheme of arrangement (*section 901F CA 2006*).
- Part 26A restructuring plans benefit from a "cross-class cram down" provision that allows the court to sanction the plan as binding even if a dissenting group in a class of creditors or members results in the plan not being agreed by 75% in value of that class (*section 901G, CA 2006*). This provision stops obstructive investors holding the company to ransom, but it only applies where those investors will be no worse off under the plan, and where another class of investors that would have a "genuine economic interest" in the company even if the plan did not proceed approves the plan (*section 901G(5), CA 2006*). For more information, see [Cross-class cram down](#) below.

THE STATUTORY PLAN PROCESS

Convening hearing

The first stage in the process of implementing a plan is that the company, any creditors or member or any administrator or liquidator appointed over the company may apply to court for directions to summon a meeting of creditors or class of creditors, or the members or class of members in order to consider a Restructuring Plan (*section 901C, CA 2006*). The procedure for making such an application is set out in [Practice Statement \(Companies: Schemes of Arrangement under Part 26 and Part 26A of the Companies Act 2006\) \(26 June 2020\)](#) (Practice Statement) (for more information on which, see [Legal update, New Practice Statement \(Companies: Schemes of Arrangement under Part 26 and Part 26A of the Companies Act 2006\)](#)).

Class composition

At the initial hearing of the application the court will consider the various proposed voting classes of creditors and members. As paragraph 3 of the Practice Statement makes clear, it is the responsibility of the applicant company to determine whether more than one meeting of creditors or members is required and, if so, to ensure that the meetings are properly constituted. As the restructuring plan is modelled on the existing schemes of arrangement process, the court will apply the same test in determining into which class creditors or members fall (*Re Virgin Atlantic Airways Ltd [2020] EWHC 2191 (Ch) at [45]-[48]*). On that basis creditors and members will vote in the same class where their rights are similarly tied to a common interest (for information on class constitution in a schemes context see [Practice note, Schemes of arrangement: role of the court: Issues when classifying voting classes](#)).

The purpose of class meetings under Part 26A is to enable those with "a genuine economic interest" in the company (as to which see *section 901C(3)-(5), CA 2006*) to reach a collective conclusion on whether the company's proposals for the variation of their rights ought to be approved. The general rule is that every creditor or member whose rights are affected by the proposed restructuring plan must be permitted to participate in the meeting. However, this right to participate in the meeting (and further stages in the process) may be removed if, on an application, the court is satisfied that, in relation to a particular class of creditors or members, none

within that class has a genuine economic interest in the company. This will almost certainly give rise to disputes as to the nature and value of the economic interest that certain creditors or members claim in respect of the company and will require the court to provide some clear guidance as to what constitutes a “genuine economic interest”.

Despite the potential for disputes to arise, this provision presents the company, or those proposing a restructuring plan on its behalf, with the chance to remove from the equation troublesome creditors or members who do not have an economic interest (known as being “out of the money”). This aligns restructuring plans with schemes of arrangements where it is established that it is unnecessary for the scheme company to consult any class of creditor or member that has no economic interest in the company (*Re Bluebrook Ltd [2009] EWHC 2114 (Ch)*; *Re Tea Corporation [1904] 1 Ch 12*). As is the case with schemes sanctioned under Part 26 of CA 2006, the court has jurisdiction at the convening hearing to direct that meetings of the creditors/members be held virtually (*Re Virgin Atlantic Airways Ltd [2020] EWHC 2191 (Ch) at [65]*).

Explanatory statement

Where a meeting is directed, the notice sent to creditors and members summoning the meeting must include a statement explaining the effect of the restructuring plan and identifying any material interests of the company’s directors and stating how those interests are affected by the restructuring plan (*section 901D, CA 2006*). Where the notice summoning the meeting is given by an advertisement, the notice must include the explanatory statement or give details of how and where the creditors and members may obtain copies of the statement.

Sanction decision

If the requisite majorities are obtained at the meeting of creditors or members summoned pursuant to the court’s convening order, at a hearing on a further application, the court may exercise its discretion to sanction the restructuring plan (*section 901F, CA 2006*). The requisite majority is the number representing 75% in value of the creditors or members or class of creditors or members (as the case may be) in attendance and voting in person or by proxy. In a departure from the procedure applicable for schemes, there is no additional requirement for a majority in number. Although there are no provisions which expressly set out how the discretion is to be exercised, the court will draw on the principles applicable to schemes. For example, the court may refuse to grant sanction, notwithstanding if all the procedural requirements are met, if it considers that the restructuring plan is not just and equitable (*Re Virgin Atlantic Airways Ltd [2020] EWHC 2376 (Ch) at [45]-[52]*).

Where the court makes an order sanctioning the restructuring plan, if the company is in administration or liquidation, the court order may:

- Order a stay of the administration or liquidation.
- Direct that the appointment of the administrator or liquidator should cease to have effect.
- Give directions for the conduct of the administration or liquidation which the court thinks necessary or appropriate to facilitate the Restructuring Plan.

(*Section 901F(4), CA 2006.*)

The order sanctioning the restructuring plan is binding on all affected creditors and members once notice is delivered to Companies House (*section 901F(5)-(6), CA 2006*).

CROSS-CLASS CRAM DOWN

A restructuring plan may be sanctioned using a cross-class cram down notwithstanding that it has not been approved by 75% in value of a class of creditors or members (the dissenting class) (*section 901G, CA 2006*). In order for the court to grant sanction two conditions must be met:

- Condition A is that the court is satisfied that, if the restructuring plan were 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”. For these purposes, “the relevant alternative is whatever the court considers would be most likely to occur in relation to the company if the restructuring plan were not sanctioned.

- Condition B is that the restructuring plan has been approved by at least one class of creditors or members who would receive payment or have a genuine economic interest in the company in the event of “the relevant alternative”. These are described as “impaired creditors” in the Government’s response to the consultation on which the Part 26A provisions are based, presumably because they give up some of their entitlements as a result of the restructuring and because this resonates with terminology used in a US Chapter 11 context, on which Part 26A restructuring plans are partly based.

As in cases where there is no dissenting class, the court will still have a broad discretion as to whether or not to sanction the restructuring plan and may refuse to do so if the plan or the process followed by the company is not considered just and equitable.

In contentious scenarios, where the cross-class cramdown provisions are likely to be invoked, these provisions are likely to spawn a multitude of difficult and complex disputes involving competing valuations and comparisons between the estimated outcome of the restructuring plan and “the relevant alternative” which, given that the companies involved are in or on the verge of financial distress, may take the form of an administration, a liquidation or an alternative restructuring plan. A particularly contentious aspect of the cram down is likely to centre on the court’s jurisdiction to sanction the restructuring plan on the approval of only one class of creditors or members. If the other creditors and members within the dissenting class(es) would not be any worse off compared with their likely position in the relevant alternative then, if the plan is sanctioned by the court, they will be bound by the plan regardless of whether they rank as senior or junior to the approving class.

OVERSEAS COMPANIES

As in the case of schemes of arrangement, Part 26A restructuring plans are available to a “company” as defined in the CA 2006 (*section 901A(4)(b), CA 2006*). This includes overseas companies that would be subject to the UK courts’ winding-up jurisdiction under Part V of the Insolvency Act 1986. Therefore, in order to qualify, the overseas company must have “sufficient connection” with the UK, although that is a flexible concept offering wide scope to establish jurisdiction in the English court (see *Practice note, Schemes of arrangement for foreign companies: Companies within the scope of Part 26*).

Where a Part 26A restructuring plan is promulgated for an overseas company, the same process is followed as for a UK company, except that the order sanctioning the restructuring plan must be published in the Gazette if the company is not otherwise required to register particulars with Companies House (*section 901F(6), CA 2006*) and the provisions for reconstruction or amalgamation do not apply (*section 901A(4), CA 2006*). For more information on the process of publishing in the Gazette in this context, see *Dear IP Issue 112 (October 2020)*.

MORATORIUM AND PRIORITY PRE-MORATORIUM DEBTS

Where an application to court to convene meetings to vote on a Part 26A restructuring plan is made before the end of the period of 12 weeks commencing on the day after the end of a Part A1 moratorium and the proposed plan includes provisions affecting creditors with moratorium debts or priority pre-moratorium debts, the court may not sanction the plan if the relevant creditor has not agreed to that provision (*section 901H, CA 2006*). An equivalent provision has also been introduced in respect of schemes of arrangement under the existing Part 26 of the CA 2006 (*section 899A, CA 2006*).

RECONSTRUCTIONS AND AMALGAMATIONS

Where the court sanctions a restructuring plan involving the reconstruction of one or more companies or the amalgamation of two or more companies, the court has powers to facilitate the reconstruction or amalgamation. These include powers to provide for the:

- Transfer of the whole or part of the undertaking, property or liabilities of one company to another.
- Allotment or appropriation of shares, debentures, policies or other interests.
- Continuation by or against the transferee company of any proceedings by or against any transferor company.

- Dissolution of a transferor company.

(*Section 901J, CA 2006.*)

ARTICLES OF ASSOCIATION

Where the court sanctions a restructuring plan and in doing so amends the relevant company's articles of association or any constitutional resolution or agreement, the company must send a copy of the amended articles or resolution or agreement to Companies House together with a copy of the court order (*section 901K, CA 2006*). If the company fails to comply with this requirement then the company and every officer in default commits an offence.

REGULATORY OVERSIGHT

As well as amendments to the CA 2006, CIGA 2020 effects other amendments to legislation to allow banking and pensions regulators to have oversight of Part 26A restructuring plans for companies that they regulate. The following examples are illustrative and not exhaustive:

A new section 355A in the Financial Services and Markets Act 2000 (FSMA 2000) allows the Financial Conduct Authority or Prudential Regulatory Authority to receive notice of applications under Part 26A and to participate in the resulting hearings and meetings, where the Part 26A restructuring plan concerns an authorised person under FSMA 2000, a recognised investment exchange, or certain other financial institutions.

The PRA's consent is required before an application to convene meetings to vote on a Part 26A plan can be made in respect of PRA-regulated companies (*section 355A(3), FSMA 2000*).

Under new s355B of FSMA 2000, the relevant regulator has the power to impose public censure or financial penalties for any breach of the notification and consent requirements of s355A.

A new section 124A in the Financial Services (Banking Reform) Act 2013 allows the Bank of England to receive notice of applications under Part 26A of the CA 2006 and to participate in the resulting hearings and meetings, where those concern an infrastructure company; the Bank of England's consent is also required to make applications under s901C in respect of infrastructure companies. The Bank's existing powers of enforcement, including public censure, financial penalties and injunctive relief, apply to any breach of the notification and consent requirements.

Section 901I of the CA 2006 provides that documents that must be sent to creditors must also be sent to the Pensions Regulator and to Board of the Pension Protection Fund, where the company operates a specified kind of pension scheme. The Board may also be able to intervene by exercising the powers as creditors of the trustees or managers of the pension scheme, for example by exercising a right to vote on the restructuring plan; but this will have to be provided for by regulations made by the Secretary of State.