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Political, regulatory competition and the UK debt restructuring regime at the crossroads

Hamiisi Junior Nsubuga*

Abstract

This article analyses CIGA 2020 reforms to the UK insolvency and debt restructuring regimes, particularly, the new part 26A restructuring plan, the creditor cross-class cramdown and the new standalone moratorium and their impact on the UK insolvency and debt restructuring landscape. The article contends that these permanent changes were not needed immediately, in the aftermath of Brexit and COVID19 experiences. Rather, temporary time-limited changes would have been ideal, followed by an impact assessment that would inform desired course of reforms, rather than fast-tracked reforms that may have been driven by political and regulatory competition. The article further argues that these CIGA 2020 reforms could instigate a policy shift, from a pro-creditor to a pro-debtor restructuring regime, that questions the UK's overall policy objective moving forward.

Introduction

The United Kingdom's (UK)[1] exit from the European Union (EU), which became to be known as Brexit, precipitated the drive to ensure that it remained one of the leading destinations for insolvency filing and debt restructuring, and at the same time, maintain its ability to compete with key EU and other international competitors, such as the United States of America (US) and Singapore.[2] As reported by the New Financial[3] in October 2019,[4] shortly after Brexit, 332 firms had relocated their headquarters or main offices, staff and assets outside the UK with 310

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[1] Reference to the UK in this paper is to England and Wales only, although the UK is made of England, Wales, Scotland and Northern Ireland.

[2] H.P. Morris, G. Moss, F. M. Mucciarelli and C.G. Paulus, 'Cross-Border Insolvency after Brexit: Views from the United Kingdom and Continental Europe' BIICL Paper No.17, (March 2018); N. McCoy, 'Will Singapore become an international centre of debt restructuring? a comparative analysis of Singapore's bold insolvency reforms' *INSOL International* (London, November 2018).

[3] New Financial Institute is forum and think tank set up in 2014 to consider capital markets in Europe. https://newfinancial.org/ (last visited 30 December 2024).

[4] Elvind F. Hamre & William Wright, 'Rebooting UK Capital Markets Post Brexit' *New Financial* (Online, October 2019) https://newfinancial.org/topics/rebooting-uk-capital-markets-post-brexit/ (last visited 30 July 2024).

firms choosing post-Brexit specific business hubs for their EU business operations.[5] The UK sought reforms that not only responded to these challenges, but also, would ensure that the introduced reforms matched international trends, such as those introduced under the EU Preventive Restructuring Directive (PRD)[6] across EU Member States that provided legislative and policy competition to the UK.[7]

Prior to the Brexit referendum in 2016, the UK government had undertaken two consultations, in 2016,[8] and 2018,[9] in a bid to reform its insolvency and debt restructuring laws and processes. This was following concerns that many of its basic insolvency laws and debt restructuring procedures had remained unchanged since 2004 and through the global financial crisis of 2007/2008.[10] On the other hand, the outbreak of COVID19 in December 2019, and its exigencies had precipitated the need for a rapid response from the UK government. The 2016 and 2018 consultations were fast-tracked and debated by parliament in a bid to foster legislative changes to guide and support businesses during the COVID19 crisis.[11]

On 20 May 2020, the Corporate Insolvency and Governance Bill was published,[12] and was enacted into the Corporate Insolvency and Governance Act 2020 (CIGA 2020)[13] on 25 June

[5] W. Wright, C. Benson and E. Friis Hamre, 'Analysis of how the banking system and finance industry has responded to Brexit — and who is moving what to where' *New Financial*, (Online, April 2021) https://newfinancial.org/wp-content/uploads/2021/04/2021.04-Brexit-the-City-the-impact-so-far-New-Financial-FINAL.pdf?R6wF9AvbqY=F37D262705816792AB1B36FCBB87A19F (last visited 30 December 2024).

[6] Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency, and discharge of debt, and amending Directive (EU) 2017/1132, [2019] OJ L 172/18-55.

[7] J. Payne, 'Debt restructuring in transition' (2023) 139 *LQR* 101-125.

[8] Insolvency Service, *A Review of the Corporate Insolvency Framework: A Consultation on the Options for Reform* (May 2016).

[9] 'Insolvency and Corporate Governance' (Department for Business, Energy and Industrial Strategy, (March 2018) at https://www.gov.uk/government/consultations/insolvency-and-corporate-governance (last visited 24 December 2024).

[10] J. Payne, 'Debt Restructuring in English Law: Lessons from the US and the Need for Reform' (2014) 130 *LQR* 282; Frisby, 'Of rights and rescue: a curious confluence' [2020] *JCLS* 39; Gerard McCormack, 'Permanent changes to the UK's corporate restructuring and insolvency laws in the wake of Covid-19' (London, INSOL International, October 2020).

[11] See for example, the press release to this effect by the then UK Business Secretary Alok Sharma announced on 28 March 2020 at https://www.gov.uk/government/news/regulations-temporarily-suspended-to-fast-track-supplies-of-ppe-to-nhs-staff-and-protect-companies-hit-by-covid-19 (last visited 05 December 2024).

[12] Corporate Insolvency and Governance HC 21 (2019) at https://services.parliament.uk/Bills/2019-21/corporateinsolvencyandgovernance/documents.html (last visited 29 December 2024).

[13] Corporate Insolvency and Governance Act 2020, c.12. (Hereafter, CIGA 2020).

2020, implementing both temporary (time-limited) changes,[14] as a response to COVID19, and permanent changes to the UK insolvency and debt restructuring laws and processes. Key changes included *inter alia*, the new part 26A restructuring plan (under the Companies Act 2006),[15] with the creditor cross-class cramdown mechanism,[16] a new standalone moratorium,[17] and a ban on ipso facto termination clauses.[18] However, due to the scope of this paper, only three permanent changes; the new part 26A restructuring plan with creditor cross-class cramdown, and the new standalone moratorium are analysed to explore whether indeed, these permanent changes were desired in the aftermath of Brexit and Covid19, their perceived shortcomings and whether a more balanced approached to legislative reform was desirable in implementing the CIGA 2020 reforms.

This article analyses CIGA 2020 reforms to the UK insolvency and debt restructuring regimes, particularly, the new part 26A restructuring plan, the creditor cross-class cramdown and the new standalone moratorium and their impact on the UK insolvency and debt restructuring landscape. The article contends that these permanent changes were not needed immediately, in the aftermath of Brexit and COVID19 experiences. Rather, temporary time-limited changes would have been ideal, followed by an impact assessment that would inform the desired course of reforms, rather than fast-tracked reforms that may have been driven by political and regulatory competition. The article further argues that the CIGA 2020 reforms may instigate a policy shift, to the UK's insolvency and debt restructuring characterisation from a pro-creditor to a pro-debtor restructuring regime, that may question the UK's overall policy objective moving forward.

CIGA 2020 reforms analysed

The new restructuring plan under part 26A was introduced to be utilised by companies that are experiencing or are likely to experience financial difficulties that could affect their ability to

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[14] These include for example, the suspension and/or relaxation of wrongful trading liability for company directors and restrictions on winding up petitions between 1 March 2020 to 30 September 2020. See further; Hamiisi J. Nsubuga, 'A reconsideration of directors duties for wrongful trading in the UK and EU in the COVID19 era' In Vaccari, E. (eds), *A Collection of Short Papers by INSOL Early Research Academics*, (London: INSOL International, 2022) 128 – 138.

[15] Corporate Insolvency and Governance Act 2020, s.7 and Sched 9 and CA 2006, Part 26A, s.901A.

[16] Companies Act 2006, Pt 26A, ss.901F — 901G.

[17] Corporate Insolvency and Governance Act 2020, ss A3(2) and A6 on the required documentation for obtain the moratorium.

[18] For analysis of overall changes introduced by CIGA 2020, see: McCormack (n 10); John M. Wood, 'Creative destruction and the post COVID-19 economy: a critique of the (un)creative rescue value contained within the permanent CIGA 2020 reforms' (2023) 3 *JBL* 197-221; Payne (n 7).

continue operating as a going concern.[19] This new restructuring plan is somewhat like the already existing scheme of arrangement procedure under Part 26 of the Companies Act 2006.[20] However, the key most notable differences between these two procedures are the absence of the requirement on the debtor to demonstrate insolvency but to provide evidence of actual or likely financial difficulties under the new part 26A restructuring plan. The second difference is that the new part 26A restructuring plan comes with new provisions on creditor 'cross-class cram-down' (discussed below) which wasn't available to debtors under the old restructuring plan under Part 26 of the Companies Act 2006.[21]

However, the new restructuring plan is a legal construct, that is, it is created and/or established by law, rather than a contractual workout between the debtor and its creditors. Consequently, it offers the debtor an upper hand in designing and driving the procedure unlike the old scheme of arrangement under part 26, of the Companies Act 2006 that is purely based on contractual workout between the debtor and the creditors who are divided into classes.[22] The new part 26A restructuring plan can only be utilised where the debtor has encountered, or is likely to encounter financial difficulties that are affecting, or likely to affect its ability to carry on business as a going concern.[23]

The overall purpose (of the proposed restructuring plan) is either to reduce, prevent, eliminate, or mitigate the impact/effects of the debtor's financial difficulties.[24] Prior to approval of the proposed plan by the court, it ensures that minority creditor protection is undertaken such that approving the debtor's restructuring plan would be fair and equitable to the minority (dissenting) creditors, otherwise, it may exercise its discretion to decline to sanction the proposed plan.[25] The new part 26A restructuring plan requires a simple 75 percent majority (in

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[19] *Re Deep Ocean 1 UK Ltd* [2021] EWHC 138 (Ch); [2021] B.C.C. 483 on the interpretation of the threshold on financial conditions.

[20] On the old scheme of arrangement procedures, see generally, J. Payne, *Schemes of Arrangement; Theory, Structure and Operation* (Cambridge, CUP 2014); C. Pilkington, *Schemes of Arrangement in Corporate Restructuring* (2nd ed, Sweet & Maxwell 2017). See also, *New Practice Statement (Companies: Schemes of Arrangement under Part 26 and Part 26A of the Companies Act 2006),* at https://www.judiciary.uk/wp-content/uploads/2020/06/Schemes-Practice-Statement-FINAL-25-6-20.pdf. (last visited 25 December 2024).

[21] Companies Act 2006, Part 26A, ss.901F – 901G; Robin Dicker KC and Adam Al-Attar, 'Cross-Class Cram Downs Under Part 26A Companies Act 2006, Corporate Insolvency and Governance Act 2020 Schedule 9' *South Square Digest* (June 2020) 34 - 54.

[22] J. Payne, 'Debt Restructuring in the UK' (2018) 15 *ECFR* 449, 471.

[23] Companies Act 2006, s.901A(2).

[24] Companies Act 2006, s.901A(3)(b).

[25] ibid para 190.

value),[26] to be approved whereas in other creditor compromises, such as a the part 26 scheme of arrangement, other activities, such as a head count has to be undertaken.[27]

In addition, the new part 26A restructuring plan comes with the ability by the debtor to utilise a creditor cross-class cramdown. The creditor cross-class cramdown process refers to the imposition of a restructuring plan on dissenting creditors of one or more classes of affected creditors including both secured and unsecured creditors, provided at least one other class of affected creditors has accepted the plan.[28] This applies to creditors within a single class and, the cramdown of whole classes of creditors.[29] This provides an inherent advantage to the debtor to address 'hold-out' problems that may slow, if not, totally impede the debtor's restructuring plan subject to minority creditor protection.[30]

The other key change brought by CIGA 2020 is the new standalone moratorium to be utilised by debtor companies in financial distress to facilitate their debt restructuring endeavours.[31] Prior to the passage of CIGA 2020, debtors could only utilise an automatic moratorium from creditor actions where administration proceedings, which were insolvency proceedings, other than debt restructuring proceedings were initiated.[32] The other form of moratorium was the so-called (small company moratorium) available to small companies undergoing company voluntary arrangement proceedings but have since been abolished by CIGA 2020.[33]

Like the new part 26A restructuring plan, the new standalone is initiated by the current management/directors who have the power to adopt it to offer protection from creditor enforcement actions as they execute their debt restructuring plan.[34] Apart from protection from creditor enforcement of their debts, the moratorium can also be used to constrain creditors from

[26] Companies Act 2006, s.901F(1).
[27] Companies Act 2006, s.899(1).
[28] For an overview of the approaches in both the UK and US on cramdown, see: J Payne, 'Debt Restructuring in English Law: Lessons from the United States and the Need for Reform' (2014) 130 *LQR* 282.
[29] G. McCormack, 'The UK restructuring plan (RP) in an age of uncertainty' [2024] *JBL* 438 – 461.
[30] For more exploration on this point, see: *Department of Business, Energy and Industrial Strategy, Explanatory Notes accompanying the Corporate Insolvency and Governance Act 2020 (TSO, 2020),* para 190.
[31] Corporate Insolvency and Governance Act 2020, ss A3(2) and A6 on the required documentation for obtain the moratorium.
[32] Insolvency Act 1986, Sched B1 paras. 42 – 43.
[33] ibid s.1A and Sch.A1.
[34] Corporate Insolvency and Governance Act 2020, s. A3(2).

initiating insolvency proceedings against the debtor to recover their interests,[35] and the debtor also enjoys some payment holidays from pre-moratorium debts courtesy of the moratorium.[36]

Provided the debtor company meets the eligibility criteria, that is, it is experiencing, or likely to experience or to be affected by insolvency,[37] directors can apply to utilise a moratorium,[38] for an initial period of twenty business days,[39] during which, they remain in charge and control of the business operations.[40] Directors would then work alongside a licenced insolvency practitioner/monitor (who also serves as an officer of the court),[41] to monitor the company's affairs for the purpose of forming a view as to whether, it remains likely that the moratorium will result in the rescue of the company as a going concern.[42] The initial moratorium period of twenty business days can be extended by directors for a further twenty business days with or without any creditor consent,[43] or extended for up to twelve months with consent of pre-moratorium creditors or the court after the first fifteen business days.[44]

Nevertheless, the policy objectives underlying CIGA 2020 reforms was to ensure that previously identified and/or perceived weaknesses with the UK's insolvency and debt restructuring laws and processes could be fixed and to reinforce the UK's position as one of the leading global players in the insolvency and debt restructuring arena.[45] However, whether the passage of CIGA 2020 is to be heralded as a needed timely intervention in the aftermath of Brexit and COVID19 remains a question subject to varying debates.[46]

CIGA 2020 reforms – a timely or superfluous intervention?

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[35] ibid Pt A1, Ch.4.

[36] Insolvency Act 1986, s. A18(3).

[37] On eligibility criteria for the moratorium, see, CIGA 2020, s.A2 and Sch. ZA1. See also s.A5 on eligibility for overseas companies to obtain the moratorium.

[38] Directors can do this by applying or lodging required documents with the court. See, CIGA 2020, s.A3 and s.A6 for the required documents.

[39] Corporate Insolvency and Governance Act 2020, s A9(2).

[40] ibid ss. A3(2), (3) and A4.

[41] Corporate Insolvency and Governance Act 2020, s.A34.

[42] Corporate Insolvency and Governance Act 2020, s.A35(1).

[43] Corporate Insolvency and Governance Act 2020, ss. A10 and A11.

[44] Corporate Insolvency and Governance Act 2020, s.A13.

[45] See for example, *Insolvency Service, A Review of the Corporate Insolvency Framework: A Consultation on Options for Reform, (TSO, 2016)*; *Department of Business, Energy and Industrial Strategy, Insolvency and Corporate Governance: Government Response* (TSO, 2018).

[46] Wood (n 18); Payne (n 7); K. van Zwieten, 'Mid-Crisis Restructuring Law Reform in the United Kingdom' (2023) 24 *EBOR* 287 – 315.

Arguably, legislative reforms were needed at some point (following Brexit and COVID19) to align the UK with international trends, in line with the perceived weaknesses following the 2016 and 2018 consultations. However, CIGA 2020 and its introduced reforms were fast-tracked to respond to crises broadly exacerbated by Brexit and COVID19 exigencies in an unusual manner. The usual process of legislative reforms mainly through parliamentary scrutiny and consideration of opinions and/or recommendations from interest groups were not afforded adequate audience due to time constraints (the need to respond to COVID 19 -induced exigencies).[47] From this perspective, these reforms may be perceived as being driven by both political (Brexit) and regulatory competition to respond and match international competitors that had recently made changes to their corporate insolvency and debt restructuring regimes by introducing similar mechanisms like those introduced by CIGA 2020.[48]

Rather than fast-tracking political and competition-driven changes, the UK could, for example, have opted for short-term temporary measures to deal with Brexit and COVID19 exigencies, remain competitive as an international debt restructuring hub and consider permanent changes after carefully analysing market and competitive international trends. For example, during COVID19, the UK introduced temporary time-limited measures that supported its companies to navigate the threat of mass business failures at the time. This was through temporary suspension of liability on company directors for wrongful trading (between 1 March 2020 – 30 September 2020, and 26 November 2020 – 30 April 2021) pursuant to CIGA 2020[49] and the Corporate Insolvency and Governance Act 2020 (Coronavirus) (Suspension of Liability for Wrongful Trading and Extension of the Relevant Period) Regulations 2020. This was to ensure that company directors did not take irrational business decisions to file unnecessary insolvency proceeding during the COVID19 crisis period in fear of potential wrongful trading liabilities.[50]

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[47] On this point see, House of Lords Select Committee on the Constitution, 3rd Report of Session 2021-22, 'COVID-19 and the use and scrutiny of emergency powers', HL Paper 15, 10 June 2021, pp 2, 7. See further, Junk, et al 'Changes in interest group access in times of crisis: no pain, no (lobby) gain' (2022) 29(9) *J Eur Publ Policy* 1374.

[48] McCormack (n 10).

[49] Corporate Insolvency and Governance Act 2020, s.12.

[50] In England and Wales, if a company is experiencing financial difficulties, and is therefore, at risk of becoming insolvent, directors are expected to minimise potential losses to the company and creditors by discontinuing to trade. If directors continue trading and the company enters insolvent liquidation, they may be liable for a civil sanction for wrongful trading as set out in the Insolvency Act 1986, ss.214 and 246ZB.

This was timely and advantageous to companies as they navigated the tides of economic and financial instabilities exacerbated by both Brexit and COVID19.[51] It is therefore, the argument that rather than rolling out permanent CIGA 2020 changes in the immediate aftermath of Brexit and COVID19, temporary measures followed by an impact assessment and/or review to inform future directions would have been desirable.[52] This approach was debated by Parliament but robustly rejected by the Government on the basis that the changes to English insolvency and restructuring laws and processes had been the subject of extensive consultations in 2016[53] and 2018[54] and it was the opportune moment to effect the changes.[55]

However, whether indeed, this was the opportune moment for these changes remains a contentious issue.[56] Some stakeholders were of the opinion that pre-CIGA 2020 insolvency law processes and procedures remained competitive enough to be adapted to emerging international trends and challenges.[57] However, the UK Government was not moved by these opinions and opted for the introduction of CIGA 2020 as being necessary.[58] Nevertheless, there was a need to take time prior to the passage of CIGA 2020 to evaluate how existing debt restructuring and rescue procedures, such as administration and the scheme of arrangement would fare alongside the new provisions established by CIGA 2020. This is especially, with the new part 26A restructuring plan (with similar but non-identical features to the part 26 Scheme of Arrangement) and the new standalone moratorium (considering the already existing moratorium attached to the administration procedure).[59]

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[51] D. M. Collins, 'Insolvency Act 1986 Section 214: A Suspension' (2020) 31(8) *ICCLR* 441; Hamiisi J. Nsubuga, 'A reconsideration of directors duties for wrongful trading in the UK and EU in the COVID19 era' in Vaccari, E. (eds), *A Collection of Short Papers by INSOL Early Research Academics*, (London: INSOL International, 2022) 128 – 138.

[52] Kristin v Zwieten suggests this approach was desirable where a so-called sunset clause, for example, for two years was set for future review of the temporary provisions save for Parliamentary choice to extend the temporary period. See, van Zwieten (n 46).

[53] Insolvency Service, *A Review of the Corporate Insolvency Framework: A Consultation on the Options for Reform* (May 2016).

[54] "Insolvency and Corporate Governance" (Department for Business, Energy and Industrial Strategy, (March 2018) at https://www.gov.uk/government/consultations/insolvency-and-corporate-governance (last visited 24 December 2024).

[55] Hansard, HL Deb (9 June 2020), vol. 803, col. 1730.

[56] van Zwieten (n 46).

[57] *BEIS, Insolvency and Corporate Governance: Government Response* (26 August 2018), p.6.

[58] See particularly, the interim report by P. Walton and L. Jacobs, *Corporate Insolvency and Governance Act 2020—Interim report March 2020* (The Insolvency Service, 19 December 2022), Pt 2.

[59] IA 1986, Sch. B1, para. 43.

Questions, such as what form of advantage(s) the new standalone moratorium would have over the administration moratorium or a prepackaged administration business sale and the intended policy objectives moving forward, needed broader deliberations. Some of these concerns were explored during the House of Lords debate of the CIGA 2020 Bill but were not broadly scrutinised.[60] For example, the answer to the question on the intended relationship between the new standalone moratorium and pre-packaged administration business sales and how these two procedures could be approached was that the former was not to be used as a precursor to the latter, with no detailed justifications given.[61]

The oversight and inadequate scrutiny of the intended legislative reforms by the UK government have meant that some of the introduced reforms have yet to achieve the intended policy objectives - a position that would arguably have been avoided had the notion of permanent CIGA 2020 reforms been approached with full and/or adequate scrutiny. A look at the approach taken by the Netherlands in its reforms to its insolvency and debt restructuring law would perhaps, support the contention that the CIGA 2020 reforms were not fully or properly thought through.

Dutch WHOA

On 1 January 2021, the Netherlands introduced the Act on Court Confirmation of Extrajudicial Restructuring (*Planswet homologatie onderhands akkord* - WHOA) into its legislative framework. The WHOA is a mainly out-of-court restructuring procedure available to companies experiencing insolvency or those in financial distress that is binding on all dissenting creditors and/or class creditors, upon application by the debtor, creditor or shareholder.[62]

Unlike the UK part 26A restructuring plan, the WHOA comes with a non-automatic stay (moratorium) on creditor enforcement actions that is only availed after application by the debtor or restructuring expert.[63] The WHOA restructuring plan can be prepared by the debtor or restructuring expert and offered as a public or private procedure. A public procedure is openly conducted and is published in both the Insolvency Register and in the Trade Register

[60] Hansard, HL Deb (23 June 2020), vol. 804. Particularly, see the response from the Parliamentary Under-Secretary of State, Department for Business, Energy and Industrial Strategy (Lord Callanan) at columns 150 - 151).

[61] Hansard, HL Deb (23 June 2020), vol. 804, cols 134 and 150).

[62] DBA arts 370(1) and 371(1).

[63] DBA art.376. Initially granted for a period of up to four months but can be extended to another four months.

of the Dutch Chamber of Commerce,[64] while a private procedure is conducted as a closed session.[65] The two choices provide flexibility and freedom to the debtor or restructuring expert to design and execute the desired plan. The WHOA may be used to balance both debtors' and creditors' interests as it may be initiated by creditors as well as debtors and it equips creditors an option to appoint a restructuring expert to prepare the restructuring plan.[66]

Prior to the passage of WHOA in 2021, the Netherlands lacked a scheme-like restructuring procedure for companies in financial distress as existing procedures could only bind general unsecured creditors, but not secured or preferential creditors and shareholders.[67] This proved a challenge to Dutch companies as some companies opted for the US Title 11 proceedings or English Part 26 scheme of arrangement to restructure their debts.[68] However, the WHOA has to a large extent mitigated these challenges as it provides an attractive tool for Dutch companies in financial distress to restructure their debts locally due to its flexibility and ability to bind certain dissenting class creditors. This is in addition to the possibility that WHOA related agreements and judgements would be recognised in other jurisdictions, such as the EU and the USA under Chapter 15 of the US Bankruptcy Code.[69]

Therefore, in a quest to design an insolvency framework that would place the Netherlands among the top competitive places for debt restructuring, the Dutch legislators drew inspiration from both Title 11 of the US Bankruptcy Code and the UK Part 26 Scheme but then combined the best elements from both frameworks into their framework – the WHOA. Elements, such as creditor cramdown and stay (moratorium) and setting up a pool of specialised judges (among others) were introduced into the WHOA to ensure that intended policy objectives are met. This is an approach that the UK could have taken to enroute the passage of CIGA 2020 and its introduced reforms.

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[64] DBA art.370(4).
[65] DBA art.369(6).
[66] DBA arts 215(2) and 228.
[67] T. Bil, 'An overview of the upcoming Dutch scheme' 2020 33(3) *Insol. Int*. 99, 105.
[68] See cases such as *Re Almatis BV et al., case number 10-12308-mg*, (SDNY); *Re Versatel Telecom International NV, case number 02-13003 (RDD)* SDNY); *Re Global Telesystems Europe B.V., case number 01-11280 (EIK)* in the US Bankruptcy Court for the District of Delaware) filed in the US. For cases filed in the UK, see: *Re Magyar Telecom BV [2013] EWHC 3800 (Ch); [2014] B.C.C. 448*) and *Re Van Gansewinkel Groep BV [2015] EWHC 2151 (Ch); [2015] Bus. L.R. 1046*).
[69] J. Volkers, 'WHOA! The state-of-the-art Dutch scheme of arrangement: the best of both worlds?' (2020) 35(1) *B.J.I.B. & F.L.* 50; A. Walters, 'European restructuring after Brexit: the Dutch alternative' (2020) 41(5) *Comp. Law*. 121.

For example, although the WHOA is partially inspired by Title 11 of the US Bankruptcy Code and UK Scheme of Arrangement under Part 26 of the Companies Act 2006, the legislators were able to leave out certain provisions from both jurisdictions they thought would not fit local context and/or serve intended policy objectives. For instance, the stay introduced by the WHOA is not granted automatically upon filing for bankruptcy proceedings as is the case under Title 11 and the UK Part 26A restructuring plan but only triggered upon request by the debtor. This was to ensure flexibility, especially, in regard to the protection of both creditor and debtor interests during debt restructurings.

Perceived shortcomings

As discussed above, CIGA 2020 reforms were fast-tracked with less parliamentary scrutiny and consideration of opinions and/or recommendations from interest groups due to time constraints.[70] As a corollary, the UK government promised a review of the CIGA 2020 reforms and their impact on the intended objectives within three years of commencement. Two reviews were subsequently undertaken in March and November 20222.[71] Interestingly, the Final Review acknowledged that although some of the policy objectives were being met, especially, under the new part 26A restructuring regime, other objectives, such as those under the new standalone moratorium were not.[72]

In relation to the standalone moratorium, the Final Review Report specifically reported that the policy objective of the new standalone moratorium as envisaged was not being fully met.[73] The standalone moratorium had not been fully utilised by insolvency practitioners. Regrettably, insolvency practitioners felt that the new standalone moratorium was ineffective as a stay tool for providing a breathing space within which impacted companies could explore and

[70] On this point see, House of Lords Select Committee on the Constitution, 3rd Report of Session 2021-22, 'COVID-19 and the use and scrutiny of emergency powers', HL Paper 15, 10 June 2021, pp 2, 7. See further, Junk, et al 'Changes in interest group access in times of crisis: no pain, no (lobby) gain' (2022) 29(9) *J Eur Publ Policy* 1374.

[71] See, P. Walton and L. Jacobs, 'Corporate Insolvency and Governance Act 2020 – Interim report March 2022' (Interim Report) <https://www.gov.uk/government/publications/corporate-insolvency-and-governance-act-2020-evaluation-reports/corporate-insolvency-and-governance-act-2020-interim-report-march-2022> (last accessed 20 December 2024) and 'Corporate Insolvency and Governance Act 2020 – Final Evaluation Report November 2022' (Final Evaluation Report) <https://www.gov.uk/government/publications/corporate-insolvency-and-governance-act-2020-evaluation-reports/corporate-insolvency-and-governance-act-2020-final-evaluation-report-november-2022> (last accessed 24 December 2024).

[72] Ibid, Final Evaluation Report.

[73] Final Evaluation Report, para [4.3]; [4.3.1].

implement rescue objectives and/or agree objectives with creditors.[74] Two years on following the Final Evaluation Report in November 2022, only one notable case involving the new standalone moratorium has been reported.[75] One of the prominent insolvency scholars, Professor Patterson opined that the new standalone moratorium would be seen as a negative signal by invested stakeholders, such as suppliers upon restructuring, and may impact confidence in the debtor's restructuring objectives.[76]

This is in addition to the contention that the new standalone moratorium is primarily beneficial to the debtor company's restructuring endeavours since it stays potential creditor enforcement rights.[77] This raises questions as to whether the new standalone moratorium would have any incremental impact to the objectives of preventive restructuring as per the intended policy objectives underlying its introduction in the CIGA 2020 in the years to come, or another form of legislative tools introduced in a wave of 'mid-crisis restructuring law reform' as posited by Professor van Zwieten.[78]

Moreover, pre-moratorium debts, such as debts and liabilities arising under a contract or other instruments involving financial services loan agreements may not be subject to a standalone moratorium under what is termed as carve-out for financial services contracts.[79] Without the support of such creditors, the debtor company may be unable to file a moratorium which may impact the overall rescue and/or restructuring endeavours. In *Re Corbin & King Holding Ltd*,[80] Sir Alastair Norris observed that the purpose of the exclusion of finance debts from the payment holiday effects of a moratorium was to encourage continued lending to companies who were struggling but is somewhat surprising.[81] The carve-out provision impacts the flexibility of the new standalone moratorium to be fully utilised by debtors to execute effective restructuring plans as originally intended by CIGA 2020. This concern was also noted in the Final Evaluation Report by Professor Walton and Dr Jacobs where surveyed stakeholders observed that inability of a moratorium to prevent a bank from requiring payment of its debt (including accelerated

[74] Ibid.
[75] *Minor Hotel Group MEA DMCC v Dymant [2022] EWHC 340 (Ch); [2022] Bus. L. R. 908*.
[76] S. Paterson, 'Restructuring Moratoriums Through an Information Processing Lens' (2023) 23(1) *JCLS* 37, 46. See further, G. McCormack, 'The UK restructuring plan (RP) in an age of uncertainty' [2024] *JBL* 438 – 461.
[77] A. James, 'Curtailment of Individual Rights by Statutory Moratoria' (2023) 22(2) *JCLS* 1017.
[78] van Zwieten (46); Wood (n 18).
[79] IA 1986, Part A1, s. A18(3)(f).
[80] *Re Corbin & King Holding Ltd* [2022] EWHC 340 (Ch).
[81] *Re Corbin & King Holding Ltd* [2022] EWHC 340 (Ch), at [14];[16].

debt) was one of the major reasons why the standalone moratorium may be of limited use in practice.[82]

New Part 26A Restructuring Plan

Prior to the passage of CIGA 2020, the administration procedure was described as the most effective and successful rescue procedure within English insolvency and debt restructuring frameworks.[83] The administration procedure was instigated by the Cork Report of 1982,[84] and has since inspired many insolvency systems of the world to be based on the UK regime.[85] Its perceived success may have been attributed to the procedural flexibility of the three hierarchical objectives to be pursued by the appointed insolvency practitioner with the main objective to rescue the company as a going concern for the benefit of the company as a whole.[86] The second and third objectives of achieving a better result for the creditors as a whole than would be likely if the company was wound up,[87] and realising assets to distribute to creditors according to priority status.[88] The appointed administrator has broader scope to devise the purpose of administration based on commercial judgement and significant court oversight.[89] The procedure is creditor friendly as it requires the interests of creditors as a whole to be taken into account depending on the circumstances and purpose pursued by the administrator.

On the other hand, the scheme of arrangement under part 26 of the Companies Act 2006 had made the UK, one of the leading debt restructuring hubs within Europe due to its unique features.[90] This is especially, on the notion that UK courts had jurisdiction to sanction a scheme of arrangement if applied for by a company outside the UK provided the company is deemed to have 'sufficient connection' with the UK irrespective of where it was incorporated.[91]

[82] Final Evaluation Report, para [4.3].

[83] S. Frisby, 'Of Rights and Rescue: A Curious Confidence?' (2019) 20(1) *JCLS* 1, 10; S. Ellina, 'Administration and CVA in Corporate Insolvency Law: Pursuing the Optimum Outcome' (2019) 30 *ICCLR* 180, 190.

[84] Sir Kenneth Cork, *Insolvency Law and Practice: Report of the Review Committee*, (1982; Cmd 8558).

[85] B. Xie, *Comparative Insolvency Law* (Cheltenham: Edward Elgar, 2016), Ch.1: Corporate rescue — the new orientation of insolvency law; Hamiisi J. Nsubuga, 'Reinvigorating corporate rescue in developing economies – a Ugandan perspective' (2021) 34(4) *Insolv Intel*, 95-102; Hamiisi J. Nsubuga, 'The Statutory Derivative Regime under the Companies Act 2006 – a reflection on an unfulfilled superfluous statutory regime' (2023) 15 *CIL* 63.

[86] IA 1986, Sch. B1, para. 3 (1)(a).

[87] IA 1986, Sch. B1, para. 3 (1)(b).

[88] IA 1986, Sch. B1, para. 3 (1)(c).

[89] John M. Wood, 'Insolvency office-holder discretion and judicial control' [2020] *JBL* 451.

[90] G. McCormack, 'Control and Corporate Rescue—An Anglo-American Evaluation' (2007) 56(3) *ICLQ* 515; J. Payne, *Schemes of Arrangement; Theory, Structure and Operation* (Cambridge, CUP 2014); Sarah Paterson, 'Rethinking Corporate Bankruptcy Theory in the Twenty-First Century' (2016) 36(4) OJLS 697–723.

[91] See cases such as *Re Rodenstock GmbH* [2011] EWHC 1104 and *Re Seat Pagine Gialle SpA [2012] EWHC 3686).*

However, the introduction of the new part 26A restructuring plan, although perceived as an incremental procedure to provide more options for companies experiencing or likely to experience financial difficulties to navigate such challenges, it could blur the boundaries between these two as they are somewhat similar, save for some minor differences.

The main difference being the need to demonstrate financial difficulties and/or likelihood of insolvency which is not a requirement under the old scheme of arrangement. In addition, under the original part 26 scheme of arrangement, dissenting creditors in their entirety, within a class, could not be crammed down like is the case under the new part 26A restructuring plan. This provides more protection to pre-restructuring creditor rights and re-enforces the position of the scheme of arrangement as one of the UK's most attractive procedure for companies to adopt in restructuring their financial affairs.[92]

Moreover, under the scheme of arrangement, creditors' say is given more protection, especially at the convening stage, to workout issues, such as creditor class composition, creditor legal rights and interests, and those with no genuine economic interest in the company are excluded.[93] At the sanctioning stage hearing, although creditor votes on the scheme will already have taken place, the court ensures that the proposed plan under the scheme is reasonable to all affected creditors such that a reasonable member of the affected class and in their interest, could have voted in favour of the proposed plan, taking issues, such as creditor democracy as paramount.[94]

Although the court plays a key role in ensuring that the proposed restructuring plan meets the best interest of creditors' test, the new part 26A restructuring plan affords the debtor broader discretionary powers in determining the nature and extent of minority creditor protection and the court may put more weight of consideration to the debtor/monitor's opinion on the potential success of the proposed restructuring plan.

In *Re DeepOcean I UK Ltd*,[95] the court held that under a part 26A restructuring plan, there exists no requirement on the debtor to utilise the proposed plan to rescue the company as a

[92] Sarah Paterson, 'Bargaining in Financial Restructuring: Market Norms, Legal Rights and Regulatory Standards' (2014) 14 (2) *JCLS* 333-365; Sarah Paterson 'Restructuring moratoriums through an information-processing lens' (2023) 23(1) *JCLS* 37-67.

[93] G. McCormack, *Special Report*, 'Priorities and Fairness in Restructuring and Insolvency Law' (INSOL International, London, November 2021).

[94] See cases, such as *Re British Aviation Insurance Co Ltd* [2005] EWHC 1621; *Anglo-Continental Supply Co Ltd* [1922] 2 Ch 723.

[95] *Re DeepOcean I UK Ltd* [2021] B.C.C. 483, [50].

going concern like is the case under administration proceeding. The key requirement is for the debtor's proposed plan to address the financial difficulties impacting the company's ability to carry on its business as a going concern as set out under s.901A of the Companies Act 2006.[96] Therefore, in this case, Trower J made an order approving the creditor cross-class cram down despite only 64.6% of unsecured creditors voting in favour of the plan on the basis that the unsecured creditors failed to provide evidence that they would be worse off under the proposed plan than under the relevant alternative, in this case, liquidation.

Although Trower J considered factors, such as the overall support for the restructuring plan across all creditor classes; fair representation of dissenting creditor classes; existence of any collateral interests that influenced voting and the treatment of creditors in different classes – (horizontal comparability) in exercising his discretion, it remains questionable, whether such a plan would have been approved prior to CIGA 2020. This further reaffirms the lack of a clear approach on how the cross-class cram down is to be used to achieve a positive restructuring outcome post-CIGA 2020.[97]

The concern is that the threshold used by the debtor to determine the creditors/members that have or do not have genuine economic interest in the company and are excluded from participation in the negotiations and sanctioning of the restructuring plan remains questionable.[98] The scope within which the debtor determines which of the creditors or equity holders to be involved, and based on valuation of the creditors 'within' or 'out of the money' is currently unclear. There is no outlined valuation threshold to determine exactly, the factors upon which valuation is to be based, or evidence required to indicate whether a creditor indeed, has genuine economic interest in the company, and therefore, involved. This even gets more complicated where different class creditors with different rights and interests are affected by the proposed part 26A restructuring plan.[99]

Moreover, the notion of 'genuine economic interest' would entail the consideration of fairness as not all creditor interests are similar or equal, and some may not be considered in an

[96] On these factors, see further, *Re Good Box Co Labs Ltd (In Administration) [2023] EWHC 274 (Ch); [2023] Bus. L.R. 562* at [49].
[97] Toube et al, 'Evaluation of the UK's CIGA Reforms: A Best Practice Model for Other Jurisdictions?' (2023) *South Square Digest*, 53 – 60.
[98] This point was reemphasised in *Virgin Atlantic Airways [2020] EWHC 2191 (Ch)* at [44].
[99] G. McCormack, 'The UK restructuring plan (RP) in an age of uncertainty' [2024] *JBL* 438 – 461.

insolvency or debt restructuring setting. The financial failure of a company impacts creditors differently. Some guidance on the key aspects such as fairness and cramdown of creditors into classes has been previously given by the courts in cases, such as *Re Telewest Communication Plc (No.1)*,[100] and recently, in *Re Sunbird Business Services Ltd*,[101] and *Virgin Atlantic Airways*,[102] respectively. However, the guidance is not conclusive.

The new part 26A restructuring plan is a relative new procedure introduced by CIGA 2020 and not a great deal of caselaw has come through courts upon which jurisprudential key issues, such as valuation, fairness and determination of genuine economic interests could be drawn to fully attribute the 'exact' threshold and this will take time.[103] The explanatory note accompanying CIGA 2020 indicates that the commonality between the new part 26A restructuring plan and the scheme of arrangement should allow courts to draw on the existing body of case law where appropriate.[104] However, under the new part 26A restructuring plan there are no set criteria that the plan should cover.

Therefore, it remains a concern that the ability by the debtor to cramdown creditors under the new part 26A restructuring plan and ability to constrict potential creditor actions through a restructuring moratorium may be used selfishly to write-off or shake-off liabilities that the debtor company would otherwise meet or settle. This is in addition to the debtor being able to utilise the moratorium to prop-up a non-viable company that is not worthy of rescue.[105] Although the intention of the CIGA 2020 mechanisms was the need to provide the debtor with a broader pool of resources to deal with financial difficulties or distress, this may have profound implications and consequences to a range of stakeholders, including the company itself, employees, creditors, and the economy at large.[106] Consequently, this may impact the UK's

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[100] *Re Telewest Communication Plc (No.1) [2004] EWHC 924 (Ch); [2004] B.C.C. 342* at [41].
[101] *In Re Sunbird Business Services Ltd [2020] EWHC 2493 (Ch).*
[102] *Virgin Atlantic Airways [2020] EWHC 2191 (Ch)* at [44].
[103] Payne (n 7).
[104] See, HL explanatory notes at https://publications.parliament.uk/pa/bills/lbill/58-01/113/5801113en.pdf at 16. (last visited 24 December 2024).
[105] J. Payne, 'Debt Restructuring in the UK' (2018) 15 *ECFLR*, 449, 471; Sarah Paterson 'Restructuring moratoriums through an information-processing lens' (2023) 23(1) *JCLS* 37-67.
[106] Wood (n 18); Payne (n 7).

position as a global player in debt restructuring market place by opening the door to jurisdictional forum shopping[107] for debt restructuring, especially in Europe and elsewhere.[108]

Creditor cross-class cramdown

In its consultation in May 2016, the UK government, under the Insolvency Service, believed that 'developing a more sophisticated restructuring process with the ability to cramdown creditors and processes may facilitate more restructurings, and the subsequent survival of the corporate entity as a going concern.'[109] This is a shift from the traditional approach to class creditors' rights within the UK insolvency and debt restructuring framework. This process is an import from Title 11 of the US Code and later adopted by the UK under CIGA 2020.

In the US, however, creditors undergoing a bankruptcy reorganisation proceeding and are subject to a cramdown are protected by the best interest of creditors' test,[110] guided by conditions set out in section 1129 of Title 11 of the US Code. This is to ensure that the proposed plan meets the principles of fairness and equity, such that creditors with similar rights and interests are treated comparably and fairly.[111]

In addition, the best interest of creditors' test/principle is supplemented by the absolute priority principle. The absolute priority principle is a system of priority set by Title 11 of the US Code, that determines and guides the order in which bankruptcy courts distribute assets of the debtor's bankruptcy estate in accordance with priority rules.[112] This means that in principle, shareholders cannot be paid ahead of creditors without their consent and/or unless, they are providing some form of new or additional value. Otherwise, secured creditors always rank in

[107] Forum shopping is the practice of comparing the available international legal systems by the plaintiff and deliberately choosing the one that is more likely to offer the best chance of a favourable outcome. See further: A. Walters and A. Smith, 'Bankruptcy tourism under the EC regulation on insolvency proceedings: A view from England and Wales' (2012) 19(3) *IIR* 181–208; Nicole Stolowy, 'Insolvency and Brexit: an example of forum shopping in business law' [2023] JBL 99 -119.
[108] J. Payne, 'Cross-Border Schemes of Arrangement and Forum Shopping' (2013) 14 *EBOR* 563; A. Gurrea-Martinez, 'The Future of Reorganization Procedures in the Era of Pre-Insolvency Law' (2020) 21 *EBOR* 829-854.
[109] Insolvency Service, *A Review of the Corporate Insolvency Framework: A Consultation on Options for Reform*, (May 2016) para 9.9.
[110] 11 US Code, s. 1129 (7)(A)(ii).
[111] J Payne, 'Debt Restructuring in English Law: Lessons from the United States and the Need for Reform' (2014) 130 *LQR* 282.
[112] 11 USC, 1129(b)(2)(C)(ii). See further; D. Baird, 'Priority Matters: Absolute Priority, Relative Priority and the Costs of Bankruptcy' (2016) 165 *Uni Penn L Rev* 785; S. Lubben, 'The Overstated Absolute Priority Rule' (2016) 21 *Fordham J Corp & Fin L* 581.

priority,[113] and the court may decline to approve a bankruptcy reorganisation plan that would violate the creditor class priority rights.[114]

The UK, however, did not adopt this approach in its CIGA 2020 reforms, especially under the new part 26Arestructuring plan with creditor cross-clam cramdown. This raises the question as to whether, CIGA changes, especially the ability for a debtor to utilise a creditor cross-class cramdown to impose a debt restructuring plan on dissenting creditors were needed at the time, or merely, a responsive reaction premised on political and regulatory competition.

The concern is that Title 11 of the US Code, from which these mechanisms are borrowed is characteristically known for being a debtor-friendly regime, under what is has become to be known as a debtor-in-possession model.[115] This was not a form of characterisation of the UK regime prior to the CIGA 20202 reforms, despite CIGA 2020 reforms, especially the new part 26 restructuring plan embodying a DIP norm like is currently the position in the US. The DIP is defined as the 'same' person as a pre-petition debtor unless a trustee is appointed.[116] The DIP is, therefore, existing management/directors of the debtor before filing for bankruptcy reorganisation proceeding,[117] and it is traceable to the US bankruptcy reorganisation of the equity railroad receiverships of the 19th and early 20th centuries.[118]

Nevertheless, the DIP regime is a relatively new phenomenon in the UK. Prior to the passage of CIGA 2020, there were some iterations of the DIP norm that provided for the debtor to remain in possession of the business during corporate rescue processes, such as a scheme of arrangement,[119] and company voluntary agreements (CVAs).[120] Under the new part 26A

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[113] 11 USC, s 725 – 726. See further; A. J. Casey, 'The Creditors Bargain and Option-Preservation Priority in Chapter 11' (2011) 78 *Univ Chic L Rev* 759; Lipson, 'The Secret Life of Priority: Corporate Reorganization after JEVIC' (2018) 93 *Wash L Rev* 645.

[114] 11 USC, ss 1129(a)(7), 1129(b)(2).

[115] E. Warren and J. L. Westbrook, 'The Success of Chapter 11: A Challenge to the Critics' (2009) 107 *Mich L Rev* 603.

[116] 11 U.S.C. s.1101(1).

[117] On this aspect, see further; Thomas G. Kelch, 'The Phantom Fiduciary: The Debtor in Possession in Chapter 11' (1991) 38 *Wayne Law Review* 1323; G. Triantis, 'A Theory of the Regulation of Debtor-in-Possession Financing' (1993) 46 *Vand L Rev* 901.

[118] Peter Tufano, 'Business Failure, Judicial Innovation, and Financial Innovation: Restructuring U.S. Railroads in the Nineteenth Century' (1997) 71 *Bus Hist Rev* 1; David A. Skeel, Jr., 'The Past, Present, and Future of Debtor-in-Possession Financing' (2004) 25 *Cardozo L. Rev.* 1905.

[119] Companies Act 2006, Part 26. A scheme of arrangement is a compromise between a company and its creditors or members or any class to the composition of the debtor's debts.

[120] A company voluntary arrangement is a form of compromise between the debtor and its creditors for a

restructuring plan the current management (directors) remain in control and work alongside the appointed insolvency practitioner in executing the proposed debt restructuring plan with aid of tools, such as creditor cross-class cramdown and standalone moratorium.[121]

Apparently, the debtor is afforded broader powers to undertake business actions, such as making amendments and/or rejection of executory contracts, changes to absolute priority rules, obtaining post-petition financing, *et cetera*, in the ordinary course of business, to facilitate the restructuring plan.[122] Proponents of the DIP model attribute key advantages to it. One of such advantages, is the retention of the debtor's existing management in control and management of the business.[123] This has the advantage that existing directors' knowledge, expertise, and network of business contacts concerning the debtor's business and financial affairs is uninterrupted. This may mean that directors may undertake timely and voluntary initiation of debt restructuring proceedings, which may be beneficial to the debtor's rescue prospects.[124]

However, these CIGA 2020 reforms, especially the new part 26A restructuring plan, creditor cramdown and new standalone moratorium were inspired by Title 11 of the US Bankruptcy Code and introduced into the UK's regime (with some minor modifications in some instances). Yet, Title 11 of the US Bankruptcy Code characteristically adopts a DIP Model unlike the position in the UK prior to CIGA 2020 reforms. As these new reforms are debtor-driven, that is, adopting a DIP norm, this may lead to the UK regime being characterised as a debtor-friendly regime, a move away from its known characterisation as a creditor-friendly regime prior to CIGA 2020 reforms.

Regime categorisation as either debtor-friendly or creditor friendly plays a big role, not only in influencing decision-making by debtors seeking a destination for business domicile but also, for debt restructuring or insolvency filing due to jurisdictional competition.[125] Regime categorisation can also shape legal development, direction and policy objectives within an

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composition in satisfaction of its debts or a scheme of arrangement of its affairs but different from a scheme of arrangement (under Companies Act 2006, Part 26). In a company voluntary arrangement, secured and preferential creditors are not bound by the compromise or arrangement whereas in Part 26 scheme of arrangement they are.

[121] McCormack (n 10); Hamiisi J. Nsubuga, 'The debtor-in-possession model in the EU insolvency and restructuring framework - a domino effect?' (2022) 3 *JBL* 238 -251.

[122] See for example, 11 USC, ss.365 and 1113.

[123] E. Warren and J. L. Westbrook, 'The Success of Chapter 11: A Challenge to the Critics' (2009) 107 *Mich L Rev* 603.

[124] Jennifer Payne, 'Debt Restructuring in English Law: Lessons from the United States and the Need for Reform' (2014) 130 *LQR*, 282; Kristin Van Zwieten, 'Disciplining the Directors of an Insolvent Company' (2020) 33(1) *Insolv Intell* 2 – 10.

[125] John M. Wood, 'Corporate rescue reanimated' [2025] *JBL* 1- 23.

insolvency regime.[126] It further informs the basis upon which certain insolvency and debt restructuring policy objectives are advanced by that particular jurisdiction/regime. For example, determining whether creditors interests should be made prominent against those of debtors.

An analysis of some of the new tools introduced by CIGA 2020, especially, the new part 26A restructuring plan, creditor cross-class cramdown and the standalone moratorium supports the argument that the UK's insolvency and debt restructuring landscape is enroute to a so-called debtor in possession (DIP) model,[127] which again, leads to the question of whether, this is the route that the UK government sought to take in their policies underlying the CIGA 2020 reforms, or an outcome of fast-tracked legislative reforms absent adequate due diligence.

Conclusion

In every sovereign jurisdiction, the term debt restructuring does not always come with good news to all creditors invested with the debtor company. It is a message to creditors and equity holders alike, that the company's financial health needs attention. This is because debt restructuring involves key aspects, such as tempering with already existing pre-insolvency creditor interests, especially, the priority of enforcement upon default.[128] Moreover, preventive restructuring proceedings, being mainly out of court-initiated (although the in-court route is also available), equip the debtor with more bargaining power in a bid to achieve the desired outcome, which may come at the expense of some creditors and other equity holders where possible.[129]

This is why, an efficient insolvency and/or debt restructuring regime ought to be designed by sovereign states to ensure a balanced approach to protecting both debtors' and creditors' interests once debt restructuring and/or insolvency proceedings are initiated. The core function of debt restructuring is to direct and facilitate a new arrangement between the debtor and existing creditors, especially, those that are still keen to remain invested in the company (despite it being in financial distress). The rationale is to reach a comprise/new arrangement as to their future rights and interests with the debtor. This may involve the debtor, taking necessary

[126] A. Franken, 'Creditor- and Debtor-Orientated Corporate Bankruptcy Regimes Revisited' (2004) 5(4) *EBOR* 645, 653 – 656.
[127] Hamiisi J. Nsubuga, 'The debtor-in-possession model in the EU insolvency and restructuring framework - a domino effect?' (2022) 3 *JBL* 238 -251.
[128] J. Payne, 'Debt Restructuring in the UK' (2018) 15 *ECFLR*, 449, 471.
[129] Jennifer Payne, 'Debt Restructuring in English Law: Lessons from the United States and the Need for Reform' (2014) 130 *LQR* 282; J. Payne, 'Debt Restructuring in the UK' (2018) 15 *ECFLR* 449 471.

constraints against the so-called 'anticommons' problems,[130] from dissenting creditors, both individual and class creditor rights to ensure that the new arrangement with creditors is ratified.[131]

Although legal reform is needed to align with several factors, such as market trends, economic forecasts, political and economic exigencies, due diligence ought to be taken to ensure that changes ensuing legal reforms fit local contexts and practices.[132] This is because, legal concepts may call for different transposition approaches which may have a knock-on effect to the already existing legal framework.[133] If approached otherwise, this may cause procedural concerns as to contextual fit and the blurring of the proper or core function of the UK's insolvency and debt restructuring regimes.[134]

It may be noted that an unfavourable insolvency framework is one of the identified factors underscoring the efficiency and effective of a debt restructuring regime and/or jurisdiction.[135] The concern is that CIGA 2020 reforms were fast-tracked without adequate legislative scrutiny and impact assessment. As a consequence, the new reforms have instigated new norms, such as creditor cross-class cramdown imposing a restructuring plan on dissenting creditors and a DIP norm within the UK's insolvency and debt restructuring landscape which may underscore the UK regime's categorisation as a top debt restructuring hub in Europe, at least, in the short term until the actual parameters of the new mechanisms, and a body of case law comes through courts to fully attribute the UK's position.

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[130] Problems, such as actions by individual creditors who are seeking to frustrate the wishes of the majority in a debt restructuring process. See further; Stephan Madaus, 'Leaving the shadows of the US Bankruptcy Law: A proposal to divide the realms of insolvency and restructuring law' (2018) 19 *EBOR* 615.

[131] T. H. Jackson, *The Logic and Limits of Bankruptcy Law* (Cambridge MA, 1986); R. de Weijs, 'Harmonisation of European insolvency law and the need to tackle two common problems: common pool and anticommons' (2021) 21 *IIR* 67.

[132] H. Spamann, 'Contemporary Legal Transplants – Legal Families and the Diffusion of (Corporate) Law' (2010) 2009 *Brigham Young University Law Review* 1813; D Cabrelli and M Siems, 'Convergence, Legal Origins and Transplants in Comparative Corporate Law: A Case-Based and Quantitative Analysis' (2015) 63 *American Journal of Comparative Law* 109.

[133] Armour *et al*, 'How Do Legal Rules Evolve? Evidence from a Cross-Country Comparison of Shareholder, Creditor and Worker Protection' (2009) 57 *Am J. Comp. L.* 79.

[134] Wood (n 18).

[135] DebtWire, 'Asia-Pacific Distressed Debt & Special Situations Update' (Online, November 2016) www.pwc.com/sg/en/publications/distressed-debt-special-situation-mkt-2016.html (last visited 23 December 2024); Sean Thomas, 'Law and the circular economy' [2019] *JBL* 62-83; M. Stubbins, 'What kind of world are we living in? Creditor wealth maximisation, contractarianism or multiple values in the post-Enterprise Act 2002 insolvency regime?' (2019) 32(2), *Insolv Intell* 78-84.