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Restructuring plans post-Adler: a Jersey law perspective

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In a seminal judgment of the Court of Appeal of England and Wales in the case of *In the Matter of AGPS Bondco plc* (Adler), the Court of Appeal overturned the first instance judgment of the High Court of England and Wales sanctioning a restructuring plan between AGPS Bondco plc (Plan Company) and its creditors. In doing so, it restated and clarified the law in England and Wales insofar as it relates to restructuring plans. Post-Adler, the High Court has sanctioned a restructuring plan in the case of *In the Matter of Project Lietzenburger Straße Holdco S.A.R.L.* (commonly known as the Fürst case), in which Adler was cited, and others may well follow shortly.

The facts

Briefly stated, the proposed restructuring plan (which was sanctioned at the first instance by the High Court) would have seen the Plan Company amending its indebtedness arising under a series of six senior unsecured notes (SUN) governed by German law, divided into six classes for the purposes of voting on the plan. Each of the classes carried with them different maturity dates (ranging between July 2024 and January 2029) and interest rates applicable to them.

The Plan Company's parent company, Adler Group SA, guaranteed the Plan Company's obligations under the SUNs (which were initially issued by Adler Group SA, before being substituted for the Plan Company).

The Adler Group faced significant financial difficulties due to German domestic and global economic downturns, including the war in Ukraine, rising energy and building costs and the ongoing impacts of Covid-19. A number of other subsidiaries within the Adler Group, including Adler Real Estate AG, had their own liabilities that fell due for payment during 2023 but which the Adler Group had insufficient funds to repay.

It was common ground between the parties that if the Court did not sanction the proposed restructuring plan, key members of the Adler Group would have no choice but to file for formal insolvency proceedings in Germany.

The proposal of the plan was to implement (amongst other measures) the following:

1. An extension of the maturity date for the 2024 SUNs to July 2025. No other SUN maturity dates were proposed to be amended.

2. The insertion of new covenants into the terms and conditions of the SUNs, including for the Adler Group to maintain a specified loan to value ratio of its assets. In default, all SUNs would be accelerated and immediately due and payable.

3. Cash interest payments were to be suspended for approximately two years on all SUNs, in return for which they would receive an uplift of 2.75% until 31 July 2025 (reverting to their current level thereafter).

4. Certain members of the Adler Group would be permitted to take on new indebtedness, which could be used to refinance existing indebtedness and the ability to create new security over the Group's assets.

5. Adler Group SA and the Plan Company would enter into intercreditor agreements with certain subsidiaries in the group, certain intra-group lenders and others to govern the administration and enforcement of the guarantees and distribution of proceeds between the parties.

The plan was approved by all classes of creditors, apart from those holding the 2029 SUNs.

The law

Section 901G of the Companies Act 2006 empowers the Court to sanction a restructuring plan in circumstances where less than the requisite 75% in value of creditors (or a class of creditors) do not approve the plan.

The three questions for the Court to answer when considering an application under Section 901G, as laid down by the earlier High Court case of *In Re Virgin Active Holdings Ltd*, are as follows:

1. If the restructuring plan is sanctioned, would any members of the dissenting class be any worse off than they would be in the event of the relevant alternative? This is often described as the "no worse off" test. This is known as Condition A.

2. Has the restructuring plan been approved by 75% of those voting in any class that would receive a payment, or have a genuine economic interest in the company, in the event of the relevant alternative? This is known as Condition B.

3. In all the circumstances, should the Court exercise its discretion to sanction the restructuring plan?

The "relevant alternative" in this context is whatever the Court considers would be most likely to occur in relation to the company if the compromise or arrangement were not sanctioned.

Court sanction of a restructuring plan where not all classes of plan creditors have approved it is often referred to as a "cross-class cram down".

The High Court decision

The High Court sanctioned the plan. In doing so, it approved an arrangement where the maturity dates of the SUNs (with the exception of the 2024 SUN) were to be staggered to reflect pre-plan maturity dates (noting that that all SUNs would mature together in the event of the relevant alternative).

The Court of Appeal decision

Lord Justice Snowdon, in delivering the leading judgment of the Court, indicated in paragraph two the importance of the case, signalling that it was the first time that the Court of Appeal had been asked to consider a restructuring plan under Part 26A of the Companies Act 2006.

Part 26A of the Companies Act 2006 introduced a new set of provisions during the Covid-19 pandemic to provide a restructuring tool to supplement the more traditional scheme of arrangement process under Part 26.

Whilst there are similarities between the two processes, there are also a number of important differences. The most important difference is that a scheme of arrangement under Part 26 can only be sanctioned by the Court if each of the classes of creditors or members have voted in favour of the scheme by the requisite majorities at their class meetings. This creates, in effect, a potential right of veto over the scheme. A restructuring plan under Part 26A allows the Court a discretion to sanction a plan even if the requisite approval of one or more of the classes of creditors or members has not been obtained.

The Court of Appeal confirmed that before the cross-class cram down power can be exercised, the two pre-conditions – listed above as Condition A and Condition B – need to be satisfied.

In setting aside the plan sanctioned by order of the High Court, the Court of Appeal clarified that the principle of *pari passu* treatment of creditors is a fundamental principle that equalises the risk of a shortfall amongst creditors with similar rights (paragraphs [183] – [186]).

The plan altered the treatment of the SUN holders' rights by imposing staged maturity dates that (apart from the 2024 SUN holders) reflected the pre-plan maturity. This represented a divergence from the principle of *pari passu* treatment of all creditors: this was, in summary, because the "relevant alternative" would have been a wind down in a German insolvency process that would have accelerated the plan creditors' SUNs of differing maturity dates such that they would have been immediately due and payable (rather than of staggered maturity). In the absence of sufficient justification for diverging from the principle of *pari passu* treatment of creditors, the Court of Appeal concluded that it was not appropriate for the plan to be imposed on the dissenting class by virtue of the cross-class cram down (paragraphs [187] – [224]).

The Court of Appeal also confirmed the following points:

1. The Condition A and Condition B pre-conditions are applicable for both schemes of arrangement under Part 26 and restructuring plans under Part 26A (paragraphs [108] – [113]).

2. If no cross-class cram down is proposed, the test to be applied by the Court is the "rationality test" (established in the Telewest case [2004] EWHC 1466 (Ch)) (paragraphs [114] – [116]).

3. If a cross-claim cram down is proposed, there are two elements for the Court to consider (paragraphs [119] and [130 – 133]):

    a. Within the assenting class(es), the rationality test is applied (which binds the minority within the class(es)).

    b. Within the dissenting class(es), the Court will consider the "horizontal comparator", which is a comparison of the position of the class in question with the position of other creditors or classes of creditors in the assenting classes, if the restructuring goes ahead.

4. In looking at the position of the dissenting class(es), the Court cannot place reliance on or take comfort from the views of creditors in assenting classes; it can do so with regard to the majority in the dissenting class, but this should not undermine the importance of the 75% consent threshold (paragraphs [149] and [156]).

5. If the treatment of certain creditors (or classes of creditors) differed from the treatment of others – i.e. a departure from the *pari passu* principle - there would need to be a good reason, justified on a proper basis, for the departure.

The Jersey law position

Unlike in England and Wales and other jurisdictions which have a corporate rescue process allowing a company to be restructured and trade out of financial difficulty, Jersey has no such analogous statutory procedure such as administration. In this regard, and insofar as it relates to companies, most of the options available are liquiditive rather than rescue processes (save for legal developments in the last two decades in relation to the use of just and equitable winding up for restructuring purposes).

The Companies (Jersey) Law 1991 (the Law) is based on the Companies Act 1985 from England and Wales, albeit that it has been updated on a number of occasions since implementation to modernise its provisions.

Part 18A of the Law permits a Jersey company to enter into a Scheme of Arrangement (Scheme), which is a formal compromise or arrangement with its creditors or members to achieve specified rescue plan. In an analogy with the position in England and Wales, this requires approval of 75% by value of creditors, or 75% of shareholders holding voting rights, for the Scheme to be approved. The sanction of the Royal Court is then required which, if the sanction is granted, renders the Scheme binding on all creditors or shareholders (as the case may be) and the company. The Adler judgment, to the extent that it informs Scheme of Arrangement jurisprudence, may be of persuasive value to future Jersey scheme cases.

It remains to be seen whether a foreign law restructuring plan, such as that proposed (but ultimately not sanctioned) in Adler, would be recognised in Jersey where such a plan involved Jersey's jurisdiction.

The *Virgin Active* case saw the High Court of England and Wales sanction a restructuring plan under Part 26A of the Companies Act 2006. There was a considerable cross-border element to the restructuring, with guarantors and properties situated outside the jurisdiction, with obligations in some cases arising from contracts governed by "foreign law" (notably Spanish and Portuguese) in respect of properties outside the jurisdiction of England and Wales. The effect of the restructuring plan was to compromise claims governed by the laws of Spain and Portugal.

Nonetheless, the sanction order of the High Court was ultimately recognised in Spain and Portugal.

Jersey's Royal Court

The position has yet to be tested by the Royal Court in Jersey and is likely to come down to a case-by-case analysis of whether a foreign law governed restructuring plan will be recognised. We think the better view is that it would be, and that the appropriate route might be common law enforcement of a non-money judgment, pursuant to the discretion the Royal Court held to itself in *Brunei Investment Agency v Fidelis*.

There also exists under Article 49 of the Bankruptcy (Désastre) (Jersey) Law 1990 the ability for the Royal Court of Jersey, at the request of a Court of a "relevant country or territory", to assist in all matters relating to the insolvency of a person (including an individual or body corporate) in that jurisdiction.

In practice, a request is made at the instigation of the party, rather than the Court of the "relevant country or territory" of its own volition. Presently, the "relevant countries" are limited to the United Kingdom, the Isle of Man, Guernsey, Australia, Finland and the Republic of Ireland. As a restructuring plan has been held by the High Court of England and Wales to be "insolvency proceedings" for the purposes of the insolvency exclusion to the Lugano Convention, it is conceivable that a party might consider invoking the Article 49 jurisdiction regarding Jersey *situs* assets or companies. Whilst this may be unhelpful as a definition in the context of the Lugano Convention, it may be of assistance in construing Article 49.

Looking in the other direction, it will be interesting to see whether the flexibility of the Restructuring Plan jurisdiction will attract parties to seek to subject Jersey companies with sufficient connection to the UK to that regime: such "passporting" has been effected previously in the case of Jersey companies with sufficient connection to the UK, where an English-law administration was sought by outgoing letter of request as opposed to liquiditive proceedings in Jersey.

Given the novelty, flexibility and popularity of this new regime in England and Wales, it may not be long before we see some practical examples of these cross-border questions.

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