Mapping Preventive Restructuring Frameworks and the EU Directive for the JCOERE Project

Country Report

England and Wales

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Introduction

England and Wales have been a favoured destination for restructuring for decades. Though its well-known Scheme of Arrangement is not listed in Annex A of the EIR Recast, this has not been detrimental to its use by a variety of foreign companies seeking to restructure in the UK. Rather, the flexibility of the "sufficient connection test" as opposed to COMI has made it possible to extend the availability of the process more broadly than might have been possible had the procedure been subject to COMI. It is unclear yet how Brexit will affect the use of Schemes of Arrangement by European companies as it will not be affected by the disapplication of the EIR Recast. However, the recognition of judgements under the Judgments Regulation[3] had supported the general effectiveness of English Schemes of Arrangement and whilst some doubt has been cast over this approach in recent decisions of Snowden J, such as the Far East Shipping restructuring,[4] this was relied upon by English practitioners. It is not entirely clear what issues might arise post-Brexit in relation to various Member States.[5] In addition there may be political and practical reasons why companies may not be as keen to forum shop to the UK post-Brexit.

As described below use is also made of the creditors' voluntary arrangement and both processes are sometimes combined with the Administration provisions to avail of a court ordered stay amongst other matters. These are described below.

PART 1: The General Context of Preventive Restructuring

Function and Aims of Insolvency and Rescue

The UK's modern insolvency law regime was designed firstly in response to the Cork Committee's Report,[6] which was convened as a response to recognised deficiencies in the UK's insolvency law

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[3] Council Regulation (EC) No 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters recast by Regulation (EU) 1215/2012 of the European Parliament and of the Council on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters.
[4] See 'English Schemes of Arrangement: Points to Note from a Recent Example' (Cleary Gottlieb Alert Memorandum 2018) <https://www.clearygottlieb.com/-/media/files/alert-memos-2018/english-schemes-of-arrangement-points-to-note-from-a-recent-example.pdf> accessed 8 April 2020.
[5] See Chris Umfreville, Paul Omar, Heike Lucke, Irene Lynch Fannon, Michael Veder, and Laura Carballo Pineiro, 'Recognition of UK Insolvency Proceedings Post-Brexit: The Impact of a "No Deal" Scenario' (2018) 27(3) IIR 422.
[6] Report of the Review Committee on Insolvency Law and Practice (1982) Cmnd 8558 (the "Cork Report").

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framework as well as in response to pressure from the UK's accession to the ECC.[7] The broad philosophy of Cork represented a movement toward stricter control of directors, but also moved in favour of an increasing emphasis on rehabilitation of a company in distress.[8] The underpinning justification for an emphasis on rehabilitation was given that "business is a national asset and, that being so, all insolvency schemes must be aimed at saving businesses."[9] Further, Cork recognised that saving businesses could mean reducing unemployment as the previous focus on liquidation was the "kiss of death for [the company] and the creator of unemployment."[10] The resulting Insolvency Act of 1986 did not go as far as Cork perceived was necessary to achieve the rehabilitation of economically viable companies,[11] though the stated aims and principles were endorsed in a subsequent Government White Paper in 1984.[12]

The Enterprise Act 2002 effected some significant changes that brought the UK insolvency framework closer in line with Cork's vision, reducing some formalities, taking some power away from the secured creditor (significantly reducing the role of receiverships), and repealing the Crown preference (which as of 2020 will come back into effect). The Enterprise Act opened the way for the development of pre-pack restructuring by making it possible for out-of-court administrator appointments. This in turn opened the way for more the development of more effective preventive frameworks.

One key aspect of UK insolvency law is that it generally still adheres to the principle of creditor wealth maximisation,[13] with some departures. Fundamentally, most formal procedures take the form of collective proceedings in which creditors lose their pre-insolvency rights to pursue claims of enforcement by way of separate actions, and in exchange they are given the same right to participate in the collected property along with all other unsecured creditors.[14] The *pari passu* principle is also particularly important for the UK system, which explains why some of the provisions recommended in the Directive are not yet fully present in the UK system. Respecting priority is often viewed as paramount. That said, there are many exceptions present in legislation and case law, rendering it into a default rule rather than a fundamental principle. [15]

There have been recent discussions about the corporate insolvency framework in the UK in a consultation and response by the Insolvency Service,[16] including potential changes to the UK's preventive restructuring regime and the introduction of a new restructuring plan.

<u>Existing Legislative Frameworks</u>

There are two procedures available in the UK that can be used before a debtor enters into a state of insolvency. The Scheme of Arrangement in the Companies Act 2006, Part 26 and the Company Voluntary Arrangement (CVA), which is contained in the Insolvency Act 1986, Part 1 and Schedule A1.

The Scheme of Arrangement aims to coordinate an arrangement with the company's creditors, which can include a reorganisation of the company's debt in addition to its share capital.[17] The CVA is a composition between the company and its creditors in satisfaction of the company's debts or a scheme of arrangement of its affairs. A CVA typically involves either a sale of assets and a distribution of the proceeds to creditors, or a continuance of trading under which the company makes periodic payments from its trading income to the supervisor of the CVA for distribution in accordance with its terms.[18] It

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[7] Vanessa Finch and David Milman, *Corporate Insolvency Law: Perspectives and Principles* (3rd edn, Cambridge University Press 2017) 12.
[8] *idem* 14.
[9] The Cork Report (n 5) 202-203.
[10] *ibid.*
[11] Jennifer L. L. Gant, *Balancing the Protection of Business and Employment in Insolvency: An Anglo-French Perspective* (Eleven International Publishing 2017) 115; Vanessa Finch and David Milman, *Corporate Insolvency Law: Perspectives and Principles* (3rd edn, Cambridge University Press 2017) 15.
[12] *A Revised Framework for Insolvency Law* (Cmnd 9175, 1984).
[13] See for example T H Jackson, *Logic and Limits of Bankruptcy* (Harvard University Press 1986); and D G Baird and T H Jackson, 'Corporate Reorganisations and the Treatment of Diverse Ownership Interest: A Comment on Adequate Protection of Secured Creditors in Bankruptcy' (1984) 51 U Chi L Rev 97.
[14] Andrew Keay and Peter Walton, *Insolvency Law Corporate and Personal* (4th edn, LexisNexis 2017) 23.
[15] *idem* 23.
[16] See Insolvency Service (BEIS), *A Review of the Corporate Insolvency Framework* (May 2016); *Summary of Responses: A Review of the Corporate Insolvency Framework* (September 2016); and *Insolvency and Corporate Governance: Government Response* (August 2018).
[17] England and Wales Companies Act 2006, s 895(2).
[18] K van Zweiten (ed), *Goode on Insolvency of Corporate Insolvency Law* (5th edn, Sweet & Maxwell 2018) 588-589.

is used mainly as a vehicle for trading and though it rarely succeeds in saving the business of the company, it is still available to a debtor company outside of a state of insolvency, so should qualify as preventive in nature if used in such circumstances. The Scheme of Arrangement is specifically excluded from the EIR Recast as it is a process based within company law, rather than insolvency law.[19]

Both of these procedures are often used in the context of a pre-pack administration in order to take advantage of the additional benefits provided by that procedure,[20] such as efficiency, secrecy, and control with the ability to appoint an administrator out-of-court, delaying the required formalities till the last minute. The pre-pack is a procedure within which a number of things can happen, such as the restructuring of the company, the rescheduling of debt, and the selling of the going concerns of the company.[21] While the pre-pack is technically an insolvency procedure, it has grown in popularity and in parallel with a focus on pre-insolvency procedures. It now serves an important role in recovery and contingency planning,[22] thus qualifies in some degree as a preventive restructuring procedure. The overarching administration procedure does have an insolvency requirement, so the pre-pack is not by definition pre-insolvency. That said, it does often operate to prevent corporate failure.

It should be noted that a recent government consultation on insolvency law reform in the UK has presented a recommendation for a new restructuring plan that closely aligns with the PRD, but it is not necessarily *because* of the PRD, apart from the UK recognising a need to continue being competitive in terms of restructuring in Europe given its departure from the EU.[23]

PART II: Specific Substantive Aspects of Preventive Restructuring in Domestic Processes and in the Directive

The Stay of Individual Enforcement Actions

Neither the making of an application for a Scheme of Arrangement nor the initiation of a Company Voluntary Arrangement provides for an automatic stay of enforcement actions. A moratorium will only be available if the CVA expressly provides for it; it does not arise automatically.[24] The CVA does, however, make an exception for small eligible companies which can take steps to obtain a moratorium of 28 days initially, with provisions to extend.[25] It should be noted that one of the criteria that disallows a moratorium is if the company is already in administration.[26]

The absence of a stay for both of these procedures is often the impetus for combining them with a pre-pack procedure in order to take advantage of the stay that is available under Administration.[27]

The Insolvency Service's Response to its consultation recommends the introduction of a comprehensive moratorium to "help business rescue".[28] The majority of respondents to the consultation[29] were positively disposed to the introduction of a moratorium (apart from creditor respondents), during which "distressed but still viable businesses could consider their options for rescue."[30] The government's

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[19] See Recital 16 of the EIR Recast:

> "This Regulation should apply to proceedings which are based on laws relating to insolvency. However, proceedings that are based on general company law not designed exclusively for insolvency situations should not be considered to be based on laws relating to insolvency. Similarly, the purpose of adjustment of debt should not include specific proceedings in which debts of a natural person of very low income and very low asset value are written off, provided that this type of proceedings never makes provision for payment to creditors."

[20] Administration is a procedure provided for in the English and Welsh Insolvency Act 1986, schedule B1. The pre-pack is a practitioner devised process, but it is governed by guidelines set out by R3, the Statement of Insolvency Practice 16 (SIP 16).

[21] David Christoph Ehmke, Jennifer L. L. Gant, Gert-Jan Boon, Line Langkjaer, Emilie Ghio, 'Restructuring Europe – The EU Preventive Restructuring Framework: a Hole in One? A Comparative Study on the Occasion of the 10th Anniversary of the INSOL Europe Younger Academics Network of Insolvency Law' (2019) 28(2) IIR 184.

[22] Finch and Milman (n 4) 373-374.

[23] Insolvency Service (BEIS), *A Review of the Corporate Insolvency Framework* (May 2016) and *Summary of Responses: A Review of the Corporate Insolvency Framework* (September 2016); and *Insolvency and Corporate Governance: Government Response* (August 2018).

[24] van Zwieten (n 15) 595.

[25] Pursuant to the definition of small companies in s 382(3) of the Companies Act 2006, a small company so defined can qualify for a moratorium under Schedule A1 of the Insolvency Act 1986.

[26] Insolvency Act 1986, Schedule A1, para 4 (1)(a).

[27] Insolvency Act 1986, Schedule B1 paras 42-44.

[28] Insolvency Service (BEIS), *Insolvency and Corporate Governance: Government Response* (August 2018) 9.

[29] Insolvency Service (BEIS), *A Review of the Corporate Insolvency Framework* (May 2016).

[30] BEIS (n 20) 42.

response favoured a moratorium modelled on the administration moratorium to facilitate rehabilitation of companies in the longer term, resulting also in the preservation of employment.

For the CVA, one option mooted was to lift the size restrictions on the small company moratorium, making it available to all companies, although the moratorium as it currently stands is rarely used in practice.[31]

For the Scheme, it was noted that the court has often been willing to stay enforcement proceedings through injunctive relief, which has represented a workaround to overcome the absence of a statutory moratorium. Other workarounds have also been used, but they are uncertain and costly due to the requirement to apply to a court. The Government favours the introduction of a moratorium with a clearly defined and streamlined entry process, which will reduce the cost of restructuring and be accessible to companies of any size, allowing breathing space for rescue processes.[32]

The second question of the consultation reviewing the insolvency law framework in 2016 queried if the best way to gain relief by way of moratorium, and for creditors to seek to dissolve it, should be by court application. This aligns with article 6(9) of the PRD. The stay being discussed would require an application to court to initiate it. In addition, the government proposed that while requiring creditors to file their objection to the stay with the court would amount in costs to the creditor, stakeholders responding to the consultation were clear that they thought that recourse to a judicial authority would be necessary to ensure the protection of both debtor and creditor rights.[33]

If the UK were to remain aligned to the EU, certain changes would need to be made in order to bring the CVA and Scheme of Arrangement into line with the proposals of the Directive. While the Administration procedure is often used to take advantage of its stay for the CVA and Scheme, it requires a state of insolvency, which does not align with the concept of preventive restructuring, necessarily, as a company only needs to be in a "likelihood of insolvency". The Administration procedures is only available if a company is unable to pay its debts.[34] Further, the current stay available only to small companies does not meet the 4-month duration set out in the PRD.

<u>The Adoption of Restructuring Plans</u>

The Scheme of Arrangement uses the term "arrangement" and the CVA a "composition" to refer to what is essentially a restructuring plan as defined under the PRD. Both the Scheme and the CVA provide voting rights to approve the plans.[35]

Under the Scheme, creditors and members (shareholders) are specifically referred to as being permitted to vote on the plan. The law does not specify any exclusion in terms of voting rights. A Scheme can be approved at a meeting of the relevant classes of creditors convened at the approval of the court.[36] If approved, the Scheme becomes binding as between the company and all its creditors (or all those creditors within the class of creditors with which the compromise or arrangement is made) and between the company and all of its members. The composition of classes must be comprised only of creditors whose rights are sufficiently similar to enable them to properly consult and identify their true interests.[37] When creditors have similar rights, they can properly be required to consult together and should not be allowed a separate meeting,[38] as this could lead to a minority group gaining a veto-like power.[39] Clearly, unsecured and secured creditors will, at the least, be in separate classes.

Under the CVA, an arrangement will be adopted upon the approval of creditors and the *company* (members/shareholders). There are not any exclusions from voting specified in the law; a plan will be adopted and bind every person who was entitled to vote or would have been entitled if they had notice of the vote. Specific classes are not identified in the same way as in the Scheme. Rather, a plan will be approved if a majority of at least three quarters in value of the creditors voting is achieved. This will

[31] *idem* 43.
[32] *idem* 43-44.
[33] *idem* 45.
[34] Insolvency Act 1986, s 123 *et seq*.
[35] Companies Act 2006, s 899(1); and Insolvency Act 1986, s 4(1) and 4(1A).
[36] Companies Act 2006, s 896.
[37] *Primacom Holding GmbH & Anor v A Group of the Senior Lenders & Credit Agricole* [2011] EWHC 3746 (Ch), per Hilyard J para 44.
[38] van Zwieten (n 15) 580.
[39] *Re Hawk Insurance Co Ltd* [2002] BCC 300, para [33].

also apply to those minority creditors who do not approve the plan if it has passed the 75% by value threshold, applying a super-majority rule, which aligns with maximum threshold provided for in the PRD.[40] Shareholders are also given an opportunity to vote and a CVA will be approved if 50% of them in value of members present at a shareholders meeting.[41] The CVA does not bind secured creditors.[42]

Under a Scheme, it is the applicant's responsibility to ensure that classes are constituted properly for the purposes of approving a Scheme, however, the court will give due consideration to the identification of classes.[43] The Scheme has three stages. First, there is an application for an order that meetings should be summoned at which time it is decided as to whether further meetings should be summoned. Secondly, Scheme proposals are presented to a meeting, are voted upon, and if approved by the requisite majority in number and value of 75%, the Scheme proceeds to the third and final stage. During the final stage, the court's sanction must be obtained.[44]

As one of the preventive restructuring procedures already provides for voting in classes, it is unlikely that the UK will need to make any serious changes in this regard. The Government's proposal for a restructuring plan suggests applying a similar class approach to the current Scheme of Arrangement,[45] which is viewed as already working well and having the support of years of case law to assist with interpretation.

Should the UK be bound to implement the PRD, as the wording of the PRD is obligatory, some changes may need to be made to codify current practices. The new restructuring plan proposed by the government is likely to require the following in terms of court involvement:

- Examination of the class formation after a restructuring has been filed at court, before permitting a debtor company to arrange a vote;
- Confirmation of the restructuring plan, if creditors and shareholders have approved the proposal including applying a cross-class cram-down of dissenting classes; and
- On appeal by any creditor or shareholder following confirmation of the restructuring plan.[46]

As both the CVA and Scheme already provide for simple cram-downs, there is little need for reform in this area. However, the UK does go beyond a simple majority in the value of claims, which is further than the PRD requires. The Government's new proposed restructuring plan is likely to retain the Scheme's threshold approach to confirmation, which is 75 percent in value of the creditors within each class (who vote) to vote in favour of a restructuring plan, "cramming-down" the 25% in each class who may dissent.[47]

<u>The Confirmation of Restructuring Plans</u>

The nominee under the CVA is required to submit a report to the court as to whether the CVA has a reasonable prospect of success, which will usually be positive because the nominee tends to have a hand in putting together the plan in the first place.[48] Ultimately, court approval is not required unless there is disagreement about the contents of the plan, in which case an application can be made.[49] If the plan is challenged under the Insolvency Act 1986 s 4A(3), the court can decide to order a decision of the company meeting to have effect instead of the decision at the creditors' meeting or it can make any other order as it sees fit.[50]

For the Scheme of Arrangement, the procedural requirements for implementation are set out in Part 49 and Practice Direction 49A of the Civil Procedure Rules 1998, Chapter 21 of the Chancery Guide and

[40] Insolvency Act 1986, s 5(2)(b).
[41] Finch and Milman (n 4) 418-419.
[42] 'Company Voluntary Arrangements (CVAs)' by Practical Law Restructuring and Insolvency (Thomson Reuters 2018).
[43] Practice Statement (Companies: Scheme of Arrangement) [2002] 1 WLR 1345 as cited in van Zwieten (n 15) 581.
[44] *Re BTR Plc* [2000] 1 BCLC 740, 742 and *Re My Travel Group Plc* [2005] 2 BCLC 123, para 8.
[45] BEIS (n 20) 70.
[46] *idem* 69-70.
[47] *idem* 70.
[48] A Keay and P Walton, *Insolvency Law Corporate and Personal* (4th edn, LexisNexis 2017) 144-145.
[49] Insolvency Act 1986, s 4A(3-4).
[50] Insolvency Act 1986, s4A(6).

Practice Statement (Companies: Schemes of Arrangement) [2002] 1 WLR 1345.[51] The court is involved in several aspects of the Scheme. At the first hearing, it must decide whether to order meetings of members and/or creditors to be convened to vote on the Scheme.[52] The court will base its decision on whether the Scheme has sufficient general support to have a prospect of success;[53] and whether the class design is correct[54] by reference to an assessment as to whether the creditors as a whole have interests that are aligned closely enough to be considered together or whether they are so dissimilar as to render it impossible for them to consult together on the aspects of the plan.[55]

At the second hearing, it must decide whether to sanction the Scheme if it has been approved,[56] which will be based on if the approval of the Scheme is reasonable; if each class was fairly represented by those attending the meeting and the statutory majority acted bona fide; whether statutory provisions have been complied with, including:[57] correct notice of the court convened meetings; proper despatch of the explanatory statement; and the relevant majority in number and value of the appropriate classes passed a resolution to approve the Scheme.[58]

During the third stage, the court is concerned:

> "(1) to ensure that the meeting or meetings have been summoned and held in accordance with its previous order, (2) to ensure that the proposals have been approved by the requisite majority of those present at the meeting or meetings and (3) to ensure that the views and interests of those who have not approved the proposals at the meeting or meetings (either because they were not present, or, being present, did not vote in favour of the proposals) receive impartial consideration."[59]

It is at this third stage that a court will consider issues of fairness, including that the views and interests of affected creditors who may not have voted in favour of the Scheme.[60] The meaning of fairness in this context reflects the requirements of the CVA as not being 'unfairly prejudicial'.[61] Following *Re Hawk Insurance*, the court will not take a mechanical approach to determining the composition of a class, but will instead look at the Scheme's impact on the substantive rights of different creditors.[62] Technically, a court could refuse to sanction a Scheme even if the preconditions have been met, and will do so if it is not satisfied that the Scheme is fair to creditors generally,[63] and particularly that the majority has not taken advantage of its position.[64]

The CVA clearly does not comply with the requirements of the PRD, given the limited court involvement, mainly as layer of oversight rather than having any real influence on the arrangement. Equally, the Scheme requires the court to sanction, but does not give a similar prescription as does the PRD.

The Government's suggested preventive restructuring plan is following some respondent's consideration that the court should have absolute discretion whether or not to confirm a restructuring plan, which is in line with this provision. In its response, the Government agreed and will provide for this and that there be a right to appeal to court following confirmation of a plan.[65]

[51] Much of the answer to this question was drawn from 'Scheme of Arrangement: Overview' by Practical Law Corporate and Practical Law Restructuring and Insolvency (Thomson Reuters 2018).
[52] Companies Act 2006, section 896(1).
[53] *Re Savoy Hotel Ltd* [1981] Ch 351.
[54] See *Re T & N Ltd* [2005] 2 BCLC 488.
[55] van Zweiten (n 15) 581.
[56] Companies Act 2006, section 899(1).
[57] *Re Anglo-Continentalk Supply Co Ltd* [1922] 2 Ch 723
[58] Keay and Walton (n 45) 195, citing the *Practice Statement (Companies: Schemes of Arrangement)* [2002] 1 All ER 96.
[59] *Re Hawk Insurance Co Ltd* [2002] BCC 300, 511 (b-g).
[60] *idem* para 12 as cited in van Zweiten (n 15) 577.
[61] Keay and Walton (n 45) 195, citing the *Practice Statement (Companies: Schemes of Arrangement)* [2002] 1 All ER 96.
[62] *RE Hawk Insurance Co Ltd* [2002] BCC 300 and *Re UDL Holdings Ltd* [2002] 1 HKC 172.
[63] van Zwieten (n 15) 585.
[64] See *Re Industrial Equity (Pacific) Ltd* [1991] 2 HKLR 614, per Nazareth J 625B.
[65] BEIS (n 20) 70.

Cross-Class Cram-Down

The UK does not currently have an explicit statutory cross-class cram-down mechanism; however, the courts have approved Schemes where votes have not been given to "out-of-the-money" creditors.[66]

The Government proposal on a new restructuring plan recommends introducing a cross-class cram-down. The proposal suggests that the restructuring plan will represent a streamlined procedure in which dissenting classes of creditors, most importantly those who are out-of-the-money, may be bound to an arrangement that is in the best interests of all stakeholders.[67]

The government proposal for a restructuring plan aligns with the absolute priority rule, which provides that the claims of a class of creditors must be paid in full before any class of creditors junior to that class may receive or retain any property in satisfaction of their claims, *unless the more senior class consents to any departure from that principle.* The government's mooted approach is that strong creditor protections are essential to create the right conditions for business. So, for the cross-class cram-down being recommended, the government believes that a requirement is needed to safeguard creditor interests that respects and applies the ordinary order of priority in liquidation and administration. The restructuring plan legislation will therefore likely provide that a dissenting class of creditors must be satisfied in full before a more junior class may receive any distribution or keep any interest under the restructuring plan. However, the government also intends to permit the court to confirms a restructuring plan if it does not comply with the APR where non-compliance is (1) necessary to achieve the restructuring; and (2) just and equitable in the circumstances.[68]

Both the CVA and Scheme have mechanisms through which fairness through an examination of unfair prejudice can be considered. With regard to the potential cross-class cram-down in the new restructuring plan, given its modelling on the current Scheme of Arrangement, the application of a fairness test by the court, which mirrors the CVA's consideration of 'unfair prejudice', it is likely that the new framework will contain the same test.

Protection of New and Interim Financing

England and Wales do not have priority for new and interim finance within either the Scheme of Arrangement or the CVA. There is an existing framework in the UK that affords a conceptual priority to rescue finance counting the costs of plan financing as an expense of an Administration, which is repaid first. However, this is specific to the Administration procedure. Neither the Scheme nor the CVA make provision for the priority of rescue financing.

In the government's proposed restructuring plan, the initial proposals were twofold: to re-order the current priority of administration expenses to introduce provisions permitting companies to grant security to new lenders over company property already subject to fixed charges, which would rank as a first or equal first charge or an additional but subordinate charge on the property. However, following the response to the consultation and the negative reception of this idea, the Government has decided not to proceed with the rescue finance proposals, but will keep the matter under review.[69] UK respondents certainly viewed the current framework for rescue financing in the UK as working well and in no need of reform, considering it already "adequately protected" under the circumstances.

PART III: Specific Procedural Aspects of Preventive Restructuring in Domestic Processes and in the Directive

The Threshold of Insolvency

In England and Wales, both the CVA and Scheme of Arrangement can be used prior to the debtor becoming functionally insolvent by reference to the balance sheet or cash flow tests. The Scheme of Arrangement can be used for the reorganisation of a solvent or insolvent company so there is no threshold test to be applied, which also explains why it remains a procedure available under the Companies Act 2006, rather than under the Insolvency Act 1986. It only needs court approval of an

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[66] See *Re Bluebrook Ltd* [2009] EWHC 2114 (Ch).
[67] BEIS (n 20) 69.
[68] *idem* 71-72.
[69] BEIS (n 20) 75-76.

arrangement agreed between the company and its creditors or a class of them.[70] The CVA may also be made whether or not the company is insolvent or likely to become insolvent,[71] so there is no threshold test here either. However, if the Scheme or the CVA is being used in the context of an Administration procedure (pre-pack), which often happens so that a moratorium is available, then the company will need to meet the relevant threshold, which is that the debtor is or is likely to become unable to pay its debts.[72]

Debtor in Possession

For both the Scheme of Arrangement and the CVA in England and Wales, insolvency practitioners play an important role, but they do not take over the running of the business as they would in an administration, leaving the debtor in possession. The new restructuring plan is likely to reflect the framework already provided by the Scheme of Arrangement. However, the provisions in the PRD state that an insolvency practitioner shall be assigned where there is a general stay, cross-class cram-down, or at the request of the creditor or debtors, so the new restructuring plan may need to account for this aspect if the intention is to comply with the PRD.

Rights *in Rem* under the EIR Recast and the PRD

A right *in rem* is considered a right that is attached to an object or property. A fixed charge or mortgage would be considered a debt in which a right *in rem* arises. A retention of title clause in a supply contract would also be considered a right *in rem* in the property over which the RoT applies because it attaches to the property. Given the UK's apparent reluctance to deviate too much from absolute priority as noted in the Government Response, it is probable that there will continue to be a focus on the protection of secured creditor rights over charged property.

[70] Companies Act 2006, s895(1).
[71] Insolvency Act 1986, part I.
[72] *idem* schedule B1, para 11(a).