Feature

KEY POINTS

- The rise of parallel restructuring proceedings has become prominent in international restructurings, aided by reforms in corporate insolvency regulations across European jurisdictions.
- The key legal drivers behind this practice are "the rule in *Gibbs*" (which dictates that foreign proceedings cannot discharge a debt governed by English law) and the need to use local law tools to compromise the rights of shareholders. However, parallel proceedings can also offer additional value beyond mere recognition.
- While parallel proceedings can enhance flexibility and certainty of multi-jurisdictional restructurings, criticisms have emerged where its use is perceived by some as favouring legal certainty at the expense of maximising recoveries.

Authors Tim Lees, Sarah Jane O'Leary and Kasia Lorenc

In sync across borders: embracing parallel processes for successful restructurings

This article examines the legal and commercial rationale behind the adoption of parallel restructuring processes, focusing on recent precedents in England and Hong Kong. It then considers criticisms of parallel proceedings, and whether and when alternative mechanisms may achieve comparable results.

Financial markets are highly globalised. In many cases, debtors will raise money from financial institutions located outside of their home jurisdiction; and their operations will be spread across a variety of territories. Creditors will similarly often seek to spread their risk across geographies to maximise returns and minimise risks. Both debtors and creditors often prefer to have their finance documents governed by the laws of major financial hubs even when they have no other ties to those jurisdictions.

The result is that the laws of more than one jurisdiction may be relevant where a debtor is insolvent or needs to restructure its debts.

At least until recently, the trend in cross-border restructuring and insolvency had been towards so-called "modified universalism", where a single restructuring or insolvency proceeding would take worldwide effect (subject to certain limitations). However, and although objective statistics are hard to come by, the authors have in recent years observed an uptick in so-called "parallel" insolvency or restructuring proceeding, where a debtor uses a court or legal process to restructure its obligations in multiple jurisdictions simultaneously, often with the intent of achieving the same commercial result. The use of parallel proceedings will generally be more consistent with a so-called "territorial" approach – where, as Mellish LJ put it in *Re Oriental Inland Steam Company ex parte Scinde Railway Company* (1874) LR 9 Ch App 557 at [580]:

> "The assets are subject to the law of the place where they are."

WHY DOUBLE UP?

Broadly, there are three reasons why a debtor might use parallel proceedings to restructure.

International effectiveness

The first reason is to ensure that a restructuring is legally effective in the jurisdictions necessary for the restructuring to be successful. A long-established rule of English law provides that a debt governed by English law cannot be discharged or compromised by foreign proceedings unless the creditor voluntarily submits to the foreign jurisdiction. This rule is known as "the rule in *Gibbs*" after the case where the principle was established (*Antony Gibbs & Sons v La Société Industrielle et Commerciale des Métaux* (1890) LR 25 QBD 399). This rule in Gibbs was affirmed by the English Court of Appeal (*In re OJSC International Bank of Azerbaijan Bakhshiyeva v Sberbank of Russia and others* [2018] EWCA Civ 2802) and its continuing relevance confirmed by the UK government's decision not to currently adopt the UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments (*Insolvency Service, Open consultation: Implementation of two UNCITRAL Model Laws on Insolvency Consultation* (7 July 2022)). Other common law jurisdictions have their own version of the rule in *Gibbs* – notably including Hong Kong where the principle was affirmed in *Re Rare Magnesium Technology Group Holdings Limited (Provisional Liquidators Appointed) (For Restructuring Purposes Only)* [2022] HKCFI 1686 (*Re Rare Earth*)).

Companies with limited connection to England regularly raise money under English law financing arrangements. English law, with its established body of precedent, experienced judiciary, and body of proven legal and financial professionals, provides parties with the legal certainty they need for many of their most important transactions. However, the rule in *Gibbs* often means that a restructuring or insolvency in a debtor's home jurisdiction will be legally ineffective.

Historically, the most commonly used tool for major cross-border restructurings of English law debt has been a scheme of arrangement under Pt 26 of the Companies Act 2006 (CA 2006), and its predecessor legislation. Schemes allow a company to enter into substantially any arrangement or compromise that could be agreed contractually, with the approval of a majority in number representing 75% in value of each class of creditors who are present and

voting at a meeting convened by the court to consider the scheme; and the sanction of the court. Since their introduction in 2020, restructuring plans under Pt 26A of CA 2006 have also been used to restructure English law debts. Restructuring plans share many features with schemes, but also permit so-called "cross-class cramdown" if certain jurisdictional thresholds are met, and remove the requirement for a majority by number to have approved the plan, ie a 75% majority by value is sufficient. Schemes of arrangement and restructuring plans can compromise debts governed by other laws, as English law provides that a "sufficient connection" is grounds upon which the English court can exercise its discretion to accept jurisdiction over a foreign debtor (*Re Drax Holdings Ltd* [2003] EWHC 2743 (Ch) at [29]).

Whilst schemes of arrangement and restructuring plans are very powerful tools as a matter of English law, it will often be the case that a restructuring will need to be effective not only in the jurisdiction whose laws govern the debt, but also in the place where the principal debtor and any guarantors are incorporated and/or where significant assets are located. The English court will not act in vain in sanctioning a scheme of arrangement (*Re van Gansewinkel Groep BV* [2015] Bus LR 1046 at [71]) and will want to understand that the scheme will have a substantial effect. Parallel proceedings can provide certainty to all parties that the restructuring will be effective in those jurisdictions.

Historically, parallel proceedings have tended to be parallel schemes of arrangement. Schemes of arrangement trace their legislative history back to the Companies Act 1862, and so many other jurisdictions which share their legal heritage with the UK also have scheme processes. In *Re Drax Holdings Ltd* [2003] EWHC 2743 (Ch) (for example) three parallel (English, Cayman and Jersey) and inter-conditional schemes of arrangement were used to restructure the predominately English law governed debts of Jersey and Cayman incorporated entities. In approving the schemes, Mr Justice Lawrence Collins (at [34]) noted that an important aspect of international effectiveness of a scheme may be that it is sanctioned in the jurisdiction that the debtor is incorporated to prevent dissident creditors attempting to disregard the scheme and enforce their claims in that jurisdiction. A more recent example of the effective use of parallel restructuring processes occurred in *Re Hong Kong Airlines Ltd* [2022] EWHC 3210 (Ch) where the Hong Kong scheme of arrangement was used to compromise the Hong Kong law governed liabilities, with a parallel English restructuring plan required to vary the English law governed senior perpetual notes. This had the dual effect of giving all creditors certainty that the restructuring would be recognised in the jurisdictions of the governing law of the debt and in which the debtor was incorporated and had substantial assets.

More recently, pursuant to Directive (EU) 2019/1023 (the EU directive 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), EU jurisdictions are now required to have scheme-like processes under their domestic laws. As discussed below, we are now seeing EU processes used in parallel with English schemes or restructuring plans.

When members' rights are concerned

A second reason for using parallel restructuring processes is where the restructuring contemplates both:

- a variation to the rights of the members of the debtor (for example, in a debt for equity swap scenario); and
- a restructuring of debt documents governed by the laws of jurisdiction other than the jurisdiction of incorporation of the debtor.

Taking English case law as an example, Lord Justice Snowden noted in *Re Smile Telecoms Holding Limited* [2022] EWHC 740 (Ch) at [67]-[69], that there would be limited circumstances in which it would be appropriate for an English court to exercise its discretion to sanction a standalone law scheme of arrangement which sought to alter the constitution and share capital of a solvent overseas company. The court then went on to specifically acknowledge the utility of using parallel restructuring processes in such circumstances (although ultimately parallel restructuring processes were not used on this occasion). Even if modified universalism might be justified in insolvency, the justifications may not apply in non-insolvent situations. And indeed, there may be matters under company law which will always be matters of the law of a debtor's jurisdiction of incorporation.

The recent Vroon restructuring (*In the matter of Lamo Holding B.V.* [2023] EWHC 1558 (Ch)) reaffirmed this principle and exemplified the potential of parallel proceedings to address domestic law matters like reorganising share capital or amending constitutional documents through a process available in the jurisdiction of incorporation of the debtor, in this case the Netherlands; whilst restructuring debt under English law. The Dutch WHOA was used alongside the English law scheme of arrangement to implement a debt for equity swap, effectively compromising English law governed debt and the rights of shareholders of an overseas company.

Expanding the restructuring toolkit

The Vroon restructuring also illustrates a third reason for using parallel proceedings: they can expand the range of options available to a debtor to achieve a restructuring. In addition to implementing a debt for equity swap, Vroon applied for, and benefited from, a stay on enforcement granted by the Dutch court in the context of the WHOA. The Vroon restructuring did not see any challenge to the extra-territorial effectiveness of the Dutch moratorium. A similar stay on proceedings provided for under Italian *concordato* proceedings has recently been successfully recognised by the English court in the context of the ongoing restructuring of the Cimolai group (*Cimolai SpA* [2023] EWHC 923 (Ch)). Despite securing recognition of the Italian proceedings in England and Wales, the company was nevertheless compelled to launch parallel restructuring plans in order to effectively bind the creditors under the English-law governed debt.

Feature

Biog box

Tim Lees is a partner and Sarah Jane O'Leary and Kasia Lorenc are senior associates in the Restructuring and Insolvency team at Clifford Chance in London. They specialise in high-value, complex, and cross-border restructurings, insolvencies, and special situations, and advise a wide range of stakeholders, including banks, credit funds, financial sponsors, companies, and directors. Sarah Jane and Kasia both spent several years on secondment to the Clifford Chance Restructuring and Insolvency group in Hong Kong.

Email: tim.lees@cliffordchance.com ; sarahjane.oleary@cliffordchance.com and kasia.lorenc@cliffordchance.com

Moreover, the thresholds to achieve the proposed outcome may differ from jurisdiction to jurisdiction, making some processes relatively easier to implement than others. In the instance of Hong Kong Airlines, the availability of a restructuring plan in England allowed the debtor to compromise the perpetual noteholders' claims by benefitting from the absence of a numerosity requirement otherwise applicable to both Hong Kong and English schemes of arrangement.

By combining the English restructuring process with an appropriate foreign parallel proceeding, a debtor may therefore be able to benefit from additional breathing space to negotiate and implement a restructuring, and/or be able to implement all or part of it with lower consent thresholds, or indeed more broadly be able to implement a transaction that would otherwise be impossible. "Doubling up" may provide the debtors and creditors alike with increased flexibility compared to a standalone process.

MAXIMISING RECOVERIES AND CERTAINTY: A BALANCING ACT

However, running multiple processes in parallel comes with a cost. Synergies between processes will often help manage the effect on relative costs – for example, substantially the same explanatory statement might be used for schemes of arrangement proposed in England and other jurisdictions.

But in some cases, the increased cost could make the proposition commercially unattractive at best and prohibitively expensive at worst, and in either case it is more likely than not to affect the potential recoveries of the unsecured creditors. This line of criticism regarding the use of parallel schemes of arrangement has been explained in several judgments handed down by the Hong Kong courts in recent years. In *Re Grand Peace Group Holdings Limited* [2021] HKCFI 1563 (at [6]-[7]), Mr Justice Harris said that he could see very little justification in most cases for a scheme of arrangement being filed in a foreign company's place of incorporation as well as the jurisdiction in which most of its assets are located and most of its debt is governed by. His criticism was directed at the resulting escalation in legal fees which, he stated was contrary to the interests of unsecured creditors. This decision follows on from that in *Re China Oil Gangran Energy Group Holdings Ltd* [2021] HKCFI 1592, in which it was noted that parallel schemes of arrangement would be unnecessary in circumstances where, for example, there would be no reason to think that dissenting creditors will take action in a jurisdiction which would not recognise the compromise. As an alternative to parallel schemes of arrangement, the Hong Kong courts in *Da Yu Financial Holdings Limited* (2019) [2019] HKCFI 2531 have suggested that common law recognition be relied upon.

Opinions from independent experts as to the likelihood of a restructuring process being recognised in another jurisdiction are commonly used in English restructuring processes. In this context, the purpose of these opinions is to demonstrate to the court that "it will not be acting in vain" (*Re DTEK Energy BV* [2021] EWHC 1551 (Ch) at [27]) and that the compromise will be given effect to in the relevant jurisdictions, such as those in which the guarantors are incorporated, or which govern the law of the compromised debt. While these recognition opinions can undoubtably provide a degree of comfort to all parties involved and obviate the need for a multitude of different processes, they cannot provide the same degree of certainty as a court-sanctioned compromise in key jurisdictions. Balancing the additional cost of running a parallel process against the parties' need for certainty is therefore crucial. The relative value of the affected debt to the capital structure as a whole will often influence whether the added costs are justified, and it is possible that dealing with the relevant debtors outside the formal process might prove more economically viable than integrating them into the jurisdictional matrix.

WHAT IF THERE IS NO EQUIVALENT PROCEDURE AVAILABLE?

English restructuring processes remain an incredibly attractive and powerful tool, even when used in isolation to implement a multi-jurisdictional restructuring. The absence of an equivalent restructuring process in the jurisdiction of incorporation of the debtor should not necessarily thwart an English law restructuring process. In *Re Smile Telecoms Holding Limited* [2022] EWHC 740 (Ch), an English law restructuring plan was employed to restructure the English law governed debts of a Mauritian entity and carry out a debt-for-equity swap in respect of its shares. Notably, there was no equivalent of an English law restructuring process accessible in Mauritius. Lord Justice Snowden noted (at [70]) that a parallel scheme of arrangement was not an absolute requirement of the CA 2006 and therefore, if the court can be satisfied that the necessary alterations to the share capital and constitutional documents can be satisfactorily achieved through an alternative approach that complies with the relevant local laws then the court should not be deterred from sanctioning the plan. In this context, presenting the court with satisfactory expert evidence and obtaining local law advice in the jurisdiction where the English law restructuring process had to be recognised was crucial.

CONCLUSIONS

Parallel restructuring processes will not always be necessary, desirable, or even possible. However, in appropriate cases debtors can use them to achieve greater legal certainty than would otherwise be possible, and to deliver restructurings which otherwise may not be capable of implementation. The increasing number of restructuring tools, particularly in EU member states, is likely to result in a significant uptick in the use of parallel proceedings in the coming years. ■

Further reading:

- *Gibbs* is no bar to Hong Kong schemes compromising debts governed by Mainland and foreign laws (2020) 8 JIBFL 557.
- Foreign restructurings and English law debts: the limits to cross-border assistance (2019) 3 JIBFL 167.
- Lexis+® UK: Banking & Finance: Practice Note: Pt 26A restructuring plan – key cases.