TO THE RESCUE: ENGLISH RESTRUCTURING PLANS FOR INTERNATIONAL COMPANIES

In the latest 'super scheme' case *Re Smile Telecoms Holdings Limited* [2022] EWHC 740 (Ch), the English Court has reached a high-water mark in approving a restructuring plan under Part 26A of the Companies Act 2006 that allowed the exclusion of all creditors and shareholders who did not have an economic interest in the company from voting on a plan.

Key issues

- Court approves the Plan
- Court approves of the exclusion of certain creditors and investors from voting on the Plan
- Creditors objecting should 'stop shouting from the spectator seats and step up to the plate'
- The Court must be satisfied where there is overseas enforcement that it will not be acting in vain

COMI shift provides English Court with jurisdiction

Smile is a Mauritian incorporated company whose centre of main interests (COMI) had been moved to England in 2021 for the purposes of establishing a sufficient connection to the English courts so it could approve a restructuring plan. The recent case was not the first time the company had sought the approval for an English restructuring plan – just a year earlier, the same Super Senior Creditors had provided $63m to Smile in exchange for priority over its existing Senior Lenders. This was also facilitated by a restructuring plan.

Compromise needs to involve 'give and take'

This time round, the Super Senior Creditors provided a further $35.6m and extended the maturity of their facility, in exchange for the acquisition of 100% ownership and control of the company under the restructuring plan (the Plan). On this basis there was no question as to the necessary 'give and take' in respect of the compromise under Part 26A between Smile and the Super Senior Creditors. While the Senior Lenders and investors were to receive small amounts under the Plan (by way of the transfer of the Senior Facilities for nominal consideration and the full compromise and release of any liability owed by the company), they were not asked to vote on the Plan. Allocation of the small amounts under the Plan ensured that the Senior Lenders and investors were no worse off than in the alternative, as their interests were deemed "worthless" by the Court. The provision also satisfied the requirements for a compromise. In this respect, the expropriation of the Senior Lenders' rights (e.g., release of their claims and security) and investor rights (disenfranchisement of shareholding) were 'compensated' by the allocations made under the Plan. In future cases therefore describing such allocations as 'ex gratia' payments ought to be avoided.

Exclusions of Senior Lenders and investors from voting

In an earlier hearing (the convening hearing) the Court considered how creditors had been classified for the purposes of the Plan and provided directions in relation to the creditors' meeting at which creditors vote on the Plan. In Smile's case, at that convening hearing, the Court had been content with the company's decision to exclude Senior Lenders and investors from the vote. This was based on the expert valuation evidence that they had no economic interest in the company, and it was therefore permissible to exclude them. This was because the alternative to the Plan was a formal insolvency, which would only facilitate a distribution of proceeds to the Super Senior Creditors, leaving nothing for the Senior Lenders or investors, meaning they were no worse off under the proposed restructuring plan. The exclusion of the Senior Lenders and investors was also approved along with the Plan itself by the subsequent judge at the latest sanction hearing. In this case, the valuation evidence provided by Smile showed that the Senior Lenders and investors were clearly 'out of the money' with value breaking within the Super Senior Creditor ranking. The valuation was based on a recent unsuccessful sales process. The competing evidence put forward by Senior Lender Afreximbank (relied upon in correspondence) was simply based on a desktop valuation and the experts were not available to explain or support their findings. The judge was critical of the Senior Lenders' approach to challenging the Plan, which was limited to correspondence, especially as they did not appear at the sanction hearing, nor did they provide any explanation for their absence. While this case represents the first time the statutory mechanism under section 901C(4) of the Companies Act 2006 has been relied upon – the facts in this case made it difficult for the Court to come to any other conclusion i.e., the exclusion was appropriate.

Power of Attorney under the Plan used to alter the company's constitution

Perhaps the other significant area of note to be derived from the case is the approval of the Plan which facilitates the disenfranchisement of shareholders using a power of attorney conferred under the Plan. The use of a power of attorney to implement the necessary formalities required in a restructuring is not new. In this case however, it was the first time such a mechanism was to be used to bring about local law changes (in this case in Mauritius) to Smile's constitution and share capital to facilitate the transfer of ownership to the Super Senior Creditors. It is important to note that the judge rejected arguments that the Plan itself could directly affect and alter the company's constitution and share capital in Mauritius. In doing so he considered the question in reverse (and placing reliance on Rule 175(2) Dicey, Morris and Collins and the common law Rule in Gibbs) and commented that it would be "astonishing" if, as a matter of English law, alterations to the constitution of a company incorporated and registered under the English Companies Act 2006 could be achieved without more, i.e., simply by the order of a foreign court. However, based on the expert local law opinions, the judge was persuaded that the evidence did demonstrate that the changes to the company's constitution and share capital were likely to be capable of being implemented in Mauritius by the use of the power of attorney granted under the Plan.

The judge was also satisfied that the Plan is likely to be recognised and given effect in each of the jurisdictions in which the company has its main assets and business (in this case, Mauritius, Nigeria and South Africa).

Practical Considerations

Other points of interest that may be derived from the case include certain practical considerations:

- creditors or members seeking to challenge a plan should attend the hearings and address the Court with their arguments at the earliest possible instance. In the judge's words they must 'stop shouting from the spectator seats and step up to the plate';
- the judge in this case considered that where creditors or members do appear and raise genuine issues which assist the Court, they are unlikely to face adverse costs orders, and depending on the facts, may be able to recover their costs, even if the challenge itself is unsuccessful;
- judges cannot be expected to engage in vicarious challenges based on rival reports without the help of the expert responsible for the competing report or the benefit of cross-examination;
- expert evidence should be presented to the Court in a satisfactory form and in accordance with the CPR 35.3 and CPR PD 35; and
- there is no strict legal requirement to use a parallel scheme or plan to ensure the international effectiveness of English restructuring proceedings, but the English Court must be satisfied on the evidence that it is compliant with local courts and acceptable to the local courts without the need for a parallel scheme to ensure they would not be acting in vain. Local law advice in the jurisdiction where the scheme or plan is to be recognised is crucial.

Clifford Chance's restructuring and insolvency team has acted on several successful Super Schemes including Virgin Atlantic and gategroup. With its global network of specialists, Clifford Chance is uniquely placed to advise stakeholders in any cross-border restructuring, wherever that may be.

CONTACTS

Melissa Coakley
Partner

T +44 20 7006 1963
E melissa.coakley
@cliffordchance.com

Philip Hertz
Partner

T +44 20 7006 1666
E philip.hertz
@cliffordchance.com

John MacLennan
Partner

T +44 20 7006 1642
E john.maclennan
@cliffordchance.com

Gabrielle Ruiz
Knowledge Director

T +44 20 7006 1615
E gabrielle.ruiz
@cliffordchance.com

David Towers
Partner

T +44 20 7006 8036
E david.towers
@cliffordchance.com

Iain White
Partner

T +44 20 7006 2825
E iain.white
@cliffordchance.com