REFORMING RESCUE MECHANISMS: A CLOSE EXAMINATION OF PART 26A IN THE COMPANIES ACT 2006

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A. INTRODUCTION

A primary focus for governments globally is to strengthen their insolvency framework by introducing a flexible and versatile mechanism to provide maximum aid to financially distressed businesses with limited disruptions to their operations.[1] Such measures would serve as a pillar for economic and financial stability by fortifying efficiency, maximizing creditors' return, preserving the value of the business, and promoting employment.[2]

The UK has been considered the centre for insolvency and restructuring avenues in the world providing effective insolvency law, an esteemed judiciary, and a hub for business-friendly investment.[3] To strengthen its position amidst the Covid19 crisis, the UK introduced reforms under the Corporate Insolvency and Governance Act, 2020 (**CIGA**)[4]. A key reform introduced is the restructuring plan.

The article will examine the effectiveness of the new scheme against the backdrop of existing rescue mechanisms available in the UK. Primarily, the article will examine the current rescue mechanism and identify the gaps prevalent in the system. Subsequently, the article will identify the measures introduced under CIGA. This will be followed by the need to introduce a new super scheme and its overall effectiveness to achieve the intended purpose of its enactment.

To conclude, this article upholds the notion that a restructuring plan is an efficient instrument in the corporate rescue landscape and provides essential fundamental recommendations to strengthen the plan.

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[1] Felicity Toube and Hilary Stonefrost and Scott Atkins and Ors, 'Evaluation of UK CIGA Reforms: A best practice model for other jurisdiction' (2023) South Square Digest < https://www.nortonrosefulbright.com/-/media/files/nrf/restructuring-touchpoint/2023/evaluation-of-the-uks-ciga-reforms.pdf > accessed 5 January 2024.

[2] Vanessa Finch, *Corporate Insolvency Law: Perspectives and Principles* (Cambridge University Press 2009) 244.

[3] Toube (n 1).

[4] Corporate Insolvency and Governance Act, 2020.

B. EXISTING RESCUE MECHANISM FRAMEWORK

One of the basic tenets in the field of UK insolvency law is to provide distressed yet viable companies the opportunity to be rescued.[5] This can be achieved through restructuring or reorganisation of the business.[6] While it seems like a simple notion, in practice, the mechanism and its success rely on numerous factors such as the value of the business, creditors' interest, the viability of the business to continue, etc., making the process highly complex.[7]

Over the last decade, there has been a growing trend towards the dependence of rescue mechanisms for restoring the *modus operandi* of the Company.[8] In practice, there are broadly two forms of rescue i.e. formal and informal rescue mechanisms.

An informal rescue mechanism implies a restructuring arrangement between debtors and creditors to restore the business of the company through out-of-court procedures.[9] While the process is straightforward, it has gained criticisms due to (i) contractual breach in arrangement, (ii) prejudice towards unsecured creditors, (iii) creditors' pursuing their self-interest, delaying the decision-making process, and (iv) time-consuming and expensive process in obtaining a unanimous consent from all creditors.[10]

Conversely, a formal rescue mechanism involves a statutory process aimed at rehabilitating and reviving the failing business by striking a balance between safeguarding the creditor's interest and enabling the company to reorganise its debts.[11] Presently, there are three forms of formal rescue measures i.e. Scheme of Arrangement,[12] Company Voluntary Arrangement (**CVA**),[13] and Administration.[14] The requirement of each form is different and while the scheme of arrangement is governed under the Companies Act,[15] the remaining two procedures are governed by the Insolvency Act (**IA**).[16]

CVA and Administration form an integral part of the IA's rehabilitation measures, playing a vital role in assisting distressed businesses to mitigate issues of insolvency. CVA was introduced as an attempt to provide a framework for a type of debtor-creditor

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[5] Sir Kenneth Cork, 'Cork Review Committee Report of Insolvency Law and Practice' (Cmmd 8558 1982) (Cork Report).
[6] R Goode, *Principles of Corporate Insolvency Law* (5th edn, Sweet and Maxwell 2010) para 12-01.
[7] Finch, *Principles of Corporate Insolvency Law* (n 2) 243.
[8] Ibid 243-293.
[9] Vanessa Finch, 'Corporate Rescue: A Game of Three Halves' (2012) 32 Legal Stud 302, 307.
[10] Alexandra Kastrinou, 'Comparative Analysis of Informal, Non-Insolvency Procedures of UK and France', (2016) International Insolvency Review 99,100 < https://doi.org/10.1002/iir.1247 > accessed 2 January 2024.
[11] Kastrinou (n 10).
[12] Companies Act 2006 s 26 and s 26A.
[13] Insolvency Act 1986 Part 1.
[14] Insolvency Act 1986 Schedule B 1.
[15] Companies Act 2006 (CA 2006).
[16] Insolvency Act 1986 (IA 1986).

negotiation, like an informal workout, while administration is a more formal process directed by an administrator.[17]

Despite the long-standing reliance on these measures within the insolvency landscape, there are persistent gaps in the mechanism undermining the rescue process. The determination of the gaps is essential in examining whether a new mechanism could resolve the existing issues.

(1) Gaps in the present mechanism?

(a) Administration

The Cork Report asserted the need for a rescue procedure that would allow businesses to continue as a going concern. Thus, the administration was introduced by IA and substantially revised by the Enterprise Act 2002[18] pursuant to which an external qualified insolvency practitioner known as an administrator would be appointed[19] to take over the control of the company.[20]

The procedure involves a general requirement, subject to certain exceptions, that a debtor should be unable or likely to be unable to pay debts.[21] On initiation of the process, one of the three hierarchical objectives must be achieved which includes rescuing the business as a going concern,[22] achieving better outcomes for the creditors as a whole than would be likely if the company were to be wound up[23] or, realising the property to be distributed amongst secured or preferential creditors.[24]

To achieve its objective, the administrator is bestowed with the powers[25] to manage the affairs of the company[26] and perform his duties. To do this, there is a displacement of management in the favour of the administrator, where the management cannot exercise their power without the consent of the administrator.[27] A statutory moratorium is imposed suspending any debt enforcement proceedings[28] whilst a survival plan or an orderly wind-down of the affairs of the company is being achieved. Usually, at the end of administration, the company may survive, but often business and assets are sold, and it ends up in liquidation. [29] It is vital to note that administration is not an end but a gateway for a variety of different exit schemes for the company.[30]

Over the years, administration procedure has garnered criticism for its operations due to:

[17] Paul J Omar and Jennifer Grant, 'Corporate Rescue in the UK: Past, Present and Future Reforms' (2016) 24 Australian Insolvency Law Journal 40.
[18] Enterprise Act 2002.
[19] IA 1986, Schedule B1 s 2.
[20] Ibid s 6.
[21] IA 1986, Schedule B1 s 11.
[22] Ibid Schedule B1 s (3)(1).
[23] Ibid Schedule B1 s (3)(2).
[24] Ibid Schedule B1 s (3)(3).
[25] IA 1986, s 59(1).
[26] Ibid.
[27] Ibid s 64.
[28] Omar (n 17).
[29] Jennifer Payne, *Scheme of Arrangement: Theory, Structure and Operation* (2nd edn, Cambridge University Press 2021) 201, < https://doi.org/10.1017/9781108883672.008 > accessed 3 January 2024.
[30] Ibid.

(i) *Lack of early intervention in the process*: The process of administration begins only when the company is insolvent or likely to be insolvent.[31] If the business of the company is not viable, it would make the process of rescuing difficult, and intervention at such a stage is not beneficial. Further, there is a reluctance by qualifying holding charge creditors and the company to initiate administration as it would attract insolvency-related stigma.

(ii) *Creditor in* possession *model:* Unlike other rescue mechanisms, the administration is a not debtor in possession model. The process displaces the managers and empowers an external manager to work in proximity to the creditors.[32] The intent for the displacement was that the company became insolvent owing to the failure of the management and hence they must not be put in charge of the company's rescue.[33] A debtor-in-possession model is beneficial as it encourages directors to tackle a company's issue at an early stage, allowing for negotiation with the creditors, particularly where the company's difficulties are not attributed to poor management.[34] Directors who oversee the company have a better understanding of the affairs of the company. Displacing their role with an external administrator, appointed to cater to needs of the creditors rather than rescuing the business as a going concern.

(iii) *Expensive and* time-*consuming process:* Administration is an expensive and time-consuming process in comparison to other debt restructuring mechanisms. The appointment of an external administrator along with multiple creditor meetings and approval of the court for sanctioning the plan can cause delay and increase the costs of the process.[35]

(b) CVA

CVA refers to a mechanism that provides for rescuing or restructuring the company through compromise or arrangement between the company and its creditors.[36] The origins of CVA, like administration date to the Cork Committee Report.[37] Cork recognised the need for a 'quick, user-friendly and inexpensive"[38] procedure that would allow companies to enter a binding arrangement with their creditors to reorganise their debts without engaging in formal procedures.[39] Thus, the CVA mechanism was created under the IA, 1968.[40]

The object of the CVA is to rescue a viable business in financial difficulties from liquidation.[41] The restructuring would enable the company to repay the creditors in full

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[31] IA 1986, Schedule B1 s 11.
[32] IA 1986, Schedule B s 64.
[33] Omar (n 17).
[34] Ibid.
[35] Ibid.
[36] IA 1986, Part 1.
[37] Cork Report (n 5).
[38] Ibid.
[39] Ibid.
[40] IA 1986, Part 1.
[41] Ibid.

or in part over a period.[42] An essential feature distinguishing CVA from administration is that there is no requirement for the company to be 'insolvent' or show its 'inability to pay its debts' to commence this procedure and the company can continue trading with its current management team.

Presently, the process of a voluntary arrangement is initiated either by a director, liquidator, or administrator. An insolvency practitioner is nominated to oversee the process to ensure the arrangement has a 'reasonable prospect of being approved and implemented'[43] between the members and creditors of the company. Where a CVA proposal is made in respect of a "small" company, the company can obtain a temporary moratorium.[44]

Approval of CVA requires a majority positive vote from its creditors and shareholders to become binding on them.[45] The effect CVA has on its stakeholders is substantial and the binding nature extends to all creditors entitled to vote including dissenting creditors. However, secured, and preferential creditors are excluded unless they have provided their consent.[46]

The number of CVAs has remained at an all-time low since its introduction in 1986.[47] Recent studies have claimed that 65% of CVAs are terminated without achieving their intended purpose.[48] The growing decline in the use of CVA can be attributed to:

(i) Lack of Automatic Moratorium: The IA 2000[49] introduced a moratorium period only for small businesses. While the government contemplated extending the moratorium obligations to larger companies, the lack thereof has imposed a big detriment for practitioners and companies in using this rescue mechanism.[50]

(ii) Long Duration of the Process: CVA typically lasts anywhere between 3 -5 years.[51] This increases the pressure on distressed companies to continue their trading, increasing their risk of failure. Further, the process of CVA is cumbersome as it requires approval from various parties, making it expensive and complex for small businesses.

(iii) Binding nature of CVA: Secured lenders such as banks are not bound by the CVA proposal and hence can initiate proceedings against the company or proceed with other forms of rescue mechanism, undermining the process as a whole.[52] Additionally, majority creditors with 25% or more may dictate

[42] Lorraine Conway, 'Briefing Paper: Company Voluntary Arrangements' (House of Commons No. 6411, 11 June 2019) < https://researchbriefings.files.parliament.uk/documents/SN06944/SN06944.pdf > accessed 3 January 2024.
[43] IA 1986, Part 1 s(2)(a).
[44] IA 1986, Part 1.
[45] Ibid.
[46] IA 1986, Part 1 s 4(3).
[47] Adrian Walters and Sandra Frisby, 'Preliminary report to the Insolvency Service into outcomes in company voluntary arrangements' (2011) < https://dx.doi.org/10.2139/ssrn.1792402 > accessed 4 January 2024; Peter Walton, Chris Umfreville and Lezelle Jacobs, 'Company Voluntary Arrangements: Evaluating Success and Failure (Report commissioned by R3, May 2018).
[48] Walters (n 47).
[49] Insolvency Act 2000.
[50] Walters (n 47).
[51] Conway (n 42).
[52] Walters (n 47)

the terms of the CVA drafting it in their favour rather than for rescuing the business.[53]

(iv) Limited credit trading: While CVA allows businesses to continue trading, suppliers may be unwilling to extend credit in the short run, amounting to cash flow problems and subsequently affecting the goodwill of the company.[54]

Thus, there is a dire need for government intervention to mitigate these issues in the system and introduce a more flexible, robust, and debtor-friendly model aimed at rescuing financially distressed yet viable businesses without disruption to their operations.

C. MEASURES INTRODUCED UNDER CIGA

The UK is considered one of the leading restructuring hubs owing to its good governance and insolvency laws.[55] The existing legislation on insolvency rescue system is a creditor-centric system established under the Cork Committee.[56] Nevertheless, the aftermath of the financial crisis witnessed a transformation in the debt landscape marked by a fragmented debt structure.[57] The apparent gaps in the system, coupled with the absence of proactive measures to resolve them prompted the government to initiate consultation into the framework. [58]

The Insolvency Services recommended the addition of the four elements into the system mainly moratorium, restructuring plan, prohibition of suppliers to terminate contracts, and rescue finance.[59] While these features were available in combination with various rescue mechanisms, however, it was not an ideal measure as it involved the transfer of the business of the company which is expensive and cumbersome, tax implications, and further caused issues in the event the creditor arrangement impose impediments to such transfer.[60] It was envisioned that a single mechanism that would combine all these benefits would mitigate the current issues in the framework. Although the introduction of the first three elements received broad support, there was pushback from stakeholders on rescue funding.[61] The availability of market-based

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[53] Ibid.
[54] Ibid.
[55] Kelly Tolhurst MP, 'Insolvency and Corporate Governance: Government Response' (Department of Business and Trade 26 August 2018)(Government Response) < https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/736163/ICG_-_Government_response_doc_-_24_Aug_clean_version__with_Minister_s_photo_and_signature__AC.pdf > accessed 3 January 2024.
[56] Cork Report (n 5).
[57] John M. Wood, *The Interpretation and Value of Corporate Rescue* (Edward Elgar Publishing, 2022) 180 < https://doi.org/10.4337/9781839101403 > accessed 3 January 2024.
[58] Insolvency Service, 'A review of the Corporate Insolvency Framework: A consultation on options for reforms.' (Department of Business, Innovation and Skills May 2016) < https://assets.publishing.service.gov.uk/media/5a816394ed915d74e33fdef9/A_Review_of_the_Corporate_Insolvency_Framework.pdf > accessed 3 January 2024.
[59] Government Response (n 55) para 5.
[60] Government Response (n 55) para 5.
[61] Government Response (n 55).

solutions and the complexity of rescue financing caused an adverse impact on the lending market which prompted the government to drop this measure.[62]

In addition to these deficiencies and consultations conducted by the Parliament, the outbreak of the Covid-19 pandemic proved to be a pivotal moment, not only due to the emergence of a deadly virus but also to the unparalleled challenges it brought to business across various sectors.[63] Disrupting the normal operations of businesses, imposing challenges to the supply chain of goods, and altering consumer behaviour patterns, created challenges for companies to continue their trade and meet their legal obligations.

Recognising the need to support financially distressed yet viable businesses, the UK Parliament in consultation with the Department of Business, Energy & Industrial Strategy in 2016[64] and 2018[65] fast tracked the Corporate Insolvency and Governance Bill to introduce measures to reform the insolvency law and corporate governance structure. Subsequently, the House of Commons enacted CIGA with the overreaching objectives to offer flexibility and relief to businesses on the brink of insolvency by reducing their burden through permanent and temporary measures amid rising economic uncertainty.[66] An essential permanent measure introduced was the introduction of a 'restructuring plan' which revolutionised the rescue mechanism.

D. A NEW SUPER SCHEME IN MAKING?

CIGA introduced various reforms to transform the insolvency landscape in the UK. A significant mechanism is the 'restructuring plan' introduced under Part 26A of the Companies Act. This plan was enacted alongside the existing scheme of arrangement[67] and CVA.[68] A new plan was envisaged under the CIGA to provide restructuring assistance to viable companies struggling with debt obligations.[69] However, a question for determination is whether a new plan was required. To understand its importance, it is essential to examine the current scheme of arrangement.

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[62] Ibid para 5.186.

[63] Insolvency Service, 'A review of the Corporate Insolvency Framework: A consultation on options for reforms.' (Department of Business, Innovation and Skills May 2016) < https://assets.publishing.service.gov.uk/media/5a816394ed915d74e33fdef9/A_Review_of_the_Corporate_Insolvency_Framework.pdf > accessed 3 January 2024.

[64] Ibid.

[65] Department of Business, Energy & Industrial Strategy, 'Insolvency and Corporate Governance: Government Response', (20 March 2018) < https://assets.publishing.service.gov.uk/media/5b826986e5274a4a77e83ebd/ICG_-_Government_response_doc_-_24_Aug_clean_version__with_Minister_s_photo_and_signature__AC.pdf > accessed 3 January 2024.

[66] Ali Shalchi, 'Corporate Insolvency and Governance Act 2020', (House of Commons Library 6 April 2022) < https://researchbriefings.files.parliament.uk/documents/CBP-8971/CBP-8971.pdf > accessed 3 January 2024.

[67] CA 2006, Part 26.

[68] IA 1986, Part 1.

[69] Lorraine Conway, 'Common Library Analysis of the Corporate Insolvency and Governance Bill: Briefing Paper', (House of Commons 1 June 2020) 10 para 1.3 (CIGA Bill) < https://researchbriefings.files.parliament.uk/documents/CBP-8922/CBP-8922.pdf > accessed 4 January 2024.

(1) Need for a new Plan?

Prior to the introduction of a restructuring plan in CIGA, the scheme of arrangement provisions dominated the restructuring landscape which was incorporated in UK Companies' legislation.[70] This rescue package provided a compromise or arrangement between a company and its members or creditors (or any class of them) to bring about a solvent reorganisation of the company or group structure as well as effect insolvent reorganisation through a wide variety of debt restructuring strategies.[71]

Essentially, the scheme involves a three-stage process, commencing from an application to the court to convene a relevant meeting of creditors or members of the company,[72] followed by the scheme being approved by 75% in value of the relevant class[73] and a majority in number within each class and lastly, sanctioning of the scheme by the court's approval.[74] The court's approval is contingent on adherence to statutory provisions, fair representation of the majority,[75] and the bonafide intent of the statutory majority.[76]

The reliance on the scheme increased due to the flexibility in the nature of the statutory provisions, imposing no restrictions on the nature of the arrangement while also providing court oversight with creditor protection.[77] It proved to be adaptable and effective in restructuring for highly leveraged companies.[78] Further, it proved its global dominance to effect restructurings provided the companies can satisfy the 'sufficient connection' test.[79]

However, the scheme faced criticism for catering to investment banking sectors and 'restructuring boutiques', side-lining the insolvency practitioners.[80] In consonance, there were three main glaring deficiencies in the process which reduced its dependency:

(i) Absence of cross-class clam down: One of the principal criticisms is the lack of the court's power to impose a scheme on the dissenting class of creditors.[81] While the English court forcibly bound dissenting stakeholders within a class, there was no scope for a cross class cram down mechanism as available under Chapter 11 of the US Bankruptcy Code.[82]

(ii) Lack of Moratorium: The process lacked a wide-ranging moratorium period to allow companies a breathing space for restructuring. While a limited

[70] CA 2006, Part 26.
[71] CIGA Bill (n 64).
[72] CA 2006, Part 26 s 896.
[73] CA 2006, Part 26 s 899.
[74] Ibid.
[75] Gerard Cormack, *The European Restructuring Directive* (Edgar Elgar Publishing Limited 20 April 2021) 336, para 3.24 < https://doi.org/10.4337/9781789908817.00010> accessed 4 January 2024.
[76] *British Aviation Insurance Co Ltd* [2005] EWHC 1621, para [71] – [75].
[77] CIGA Bill (n 69).
[78] CIGA Bill (n 69).
[79] *Drax Holdings Ltd Re; InPower Ltd, Re*, [2003] EWHC 2743 (Ch).
[80] Sarah Paterson and Mike Pink, 'Wrangling reform into the insolvency toolbox', (R3 Recovery publication 2019); CIGA Bill (n 64).
[81] Wood, *The Interpretation and Value of Corporate Rescue* (n 57).
[82] US Bankruptcy Code Title 11, Chapter 11 (§§ 1101 – 1195) (Chapter 11).

moratorium through judicial development was available, there was an inherent lack of statutory moratorium on enforcement proceedings.[83]

(iii) Failure as a rescue mechanism: Rather than a rescue mechanism, the scheme remained as a debt restructuring mechanism. It lacked essential aspects of US Chapter 11 restructuring[84] such as the executory contract regime.[85] Further, various contracts contained ‘ipso facto’ clauses allowing suppliers the right to terminate or modify their supply contract if the counterparty enters an insolvency regime or experiences financial difficulties.[86] There was a lack of sufficient provisions to protect the interest of the debtor company in such circumstances.

The existing gaps in the rescue mechanism the backdrop of the changing debt landscape, prompted the government to introduce a ‘restructuring plan’ which would provide a standalone mechanism to mitigate these concerns.[87]

(2) Notable features of the ‘Restructuring Plan’

The introduction of the restructuring plan has been considered the proverbial jewel of the UK restructuring regime.[88] This flexible statutory procedure is a powerful tool that enables companies to bind their creditors to a restructuring proposal. The plan has been introduced to mitigate the key issues prevalent in other rescue mechanisms. The four key objectives of the plan are:

(i) Address scenarios where secured creditors could block the company’s rescue despite receiving support;

(ii) Enable courts to sanction restructuring plans where it is fair and justifiable;

(iii) Enable companies to meet their debt obligations with limited disruptions; and

(iv) Provide alternative measures to schemes where agreement of all classes of creditors is not possible.[89]

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[83] CIGA Bill (n 69).
[84] Chapter 11 (n 82).
[85] Vern Countryman, ‘Executory Contracts in Bankruptcy’ (1972) 57 Minnesota Law Review 439, 479 < https://scholarship.law.umn.edu/cgi/viewcontent.cgi?article=3458&context=mlr> accessed 4 January 2024; See Gerard Cormack, *The European Restructuring Directive* (Edgar Elgar Publishing Limited 20 April 2021) 336, para 3.32 < https://doi.org/10.4337/9781789908817.00010> accessed 4 January 2024.
[86] Walters (n 47).
[87] Government Response (n 55).
[88] Philip Wells and Luke Sampson, ‘UK corporate insolvency reforms: the nuts and bolts of the future UK restructuring toolkit’ (2019) 9 JIBFL 589 < https://plus.lexis.com/uk/analytical-materials-uk/uk-corporate-insolvency-reforms-the-nuts-and?crid=a4affb18-4b3a-4856-a5ac-2727c3a9ac9e&pdproductcontenttypeid=urn:pct:241&pdiskwicview=false&pdpinpoint=> accessed on 6 January 2024.
[89] Professor Peter Walton and Dr Lézelle Jacobs, ‘Corporate Insolvency and Governance Act 2020 – Final Evaluation Report’ (Insolvency Service November 2022) (Final 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 > accessed 3 January 2024 para 2.1.

While drawing its insights from the scheme of arrangement for convening and sanctioning hearings,[90] class composition,[91] and court jurisdiction[92] the plan has the following key differences aiding in resolving the existing issues:

(a) Financial Difficulty Threshold

A key characteristic of the restructuring plan is its availability to companies. Unlike the scheme of arrangement, the plan can be utilised provided the company satisfies two conditions i. e.

(i) The company must have “encountered or is likely to encounter financial difficulties that affect or will affect its ability to carry on the business as a going concern;”[93] and

(ii) the purpose of the plan is to “eliminate, reduce, prevent, or mitigate the effect of such financial difficulties.”[94]

It is noteworthy that the right to exercise this provision is extended to a company with ‘financial difficulties’[95] yet there is no statutory definition behind this term. In the absence of a clear definition, there is a likelihood of abuse of these provisions.

The term ‘financial difficulty’ has been broadly interpreted to align with the intent of the legislator to ‘ensure businesses can maximise their chance of survival.[96] The legislators have expanded the applicability of the provisions to solvent as well as insolvent companies. By doing so, the government aims to reduce the stigma and encourage directors to take immediate actions leading to better outcomes for the creditors, unlike in the administration process.

(b) Disenfranchisement

A major change introduced under the restructuring plan is the ability to alter the rights of ‘out of money’ stakeholders in a restructuring plan. Presently, every creditor, or member whose rights are affected must participate in a meeting convened by the court to approve the plan via voting.[97] However, the new legislation has carved out an exception where the court on being reasonably satisfied that the stakeholders have no ‘genuine economic interest’ in the company can exclude them from the plan.[98]

While the statutory provisions allow for the disapplication of the right to vote on the plan by a class of stakeholders having no genuine economic interest, it does not

[90] CA 2006, Part 26 s 899.
[91] CA 2006, Part 26 s. 869
[92] CA 2006, Part 26 s. 900.
[93] CA 2006, Part 26A s 901A(2).
[94] CA 2006, Part 26A s 901A(3).
[95] CA 2006, Part 26A.
[96] Alexander Wood, Michael Scargill and Helen Walsh, ‘Financial Restructuring and Insolvency Finance: A New Restructuring Plan’ (Sherman and Sterling 16 September 2020) < https://www.shearman.com/-/media/files/perspectives/2020/09/shearman--sterling--a-new-restructuring-plan--further-notes--september-16-2020.pdf > accessed 3 January 2024.
[97] CA 2006, Part 26A s 901C(3).
[98] CA 2006, Part 26A s 901C(4).

state that such class shall not be bound by the Plan.[99] To bind the creditors, the court needs to provide a reasonable test for satisfaction that there was no economic interest.[100]

Further, the term ‘genuine’ would suggest that the creditors have a substantial interest in the company and not mere hope of an economic return.[101] The court would likely apply a similar test for cram down and the consideration for relevant alternatives while applying the test for genuine economic interest. It would be surprising to see if the court develops different thresholds as that could lead to inconsistency.

Although there is no apparent provision, the application for disenfranchisement must be made during the convening meeting, to provide the creditors with adequate notice to present their case and raise objections, if any. This would allow for enforcing cram down during the sanction stage if the majority votes against it.[102]

Overall, the incorporation of disenfranchisement provisions has safeguarded the restructuring plan from the ingenuous creditor’s attempt to disrupt the proceedings, making it a just and equitable process.

(b) Cram Down Provision

The most novel and awaited feature in the restructuring plan was the introduction of cross class cram down. Borrowed from Chapter 11 Bankruptcy Code,[103] the provision allows for approval of the plan by cramming down dissenting creditors. In comparison to the scheme where majority approval from each class of stakeholders was required, under the new legislation, the plan would be approved regardless of failure to procure majority approval from one or more classes.[104]

The provision imposes an obligation for a whole class of creditors to accept and be bound by the sanctioned plan irrespective of the class approving it.[105] However, two conditions are required to be met:

a. None of the dissenting class would be “worse off than they would be in the relevant alternative”[106] and

b. Plan is approved by “at least one class who received a payment or has a genuine economic interest under the relevant alternative.”[107]

For this section, the relevant alternative refers to the conditions that the court considers would be most likely to occur if the plan is not sanctioned.[108]

The court has the discretion to determine a ‘relevant alternative test’. The test of relevant alternative would be fact specific and the court could draw similarities from the fairness and class test available under the existing scheme of arrangement.[109] To

[99] Wood (n 96).
[100] Wood (n 96).
[101] Ibid.
[102] Wood (n 96).
[103] Chapter 11(n 82).
[104] CA 2006, Part 26A s 901G.
[105] CA 2006, Part 26A s 901G.
[106] CA 2006, Part 26A s 901G(3).
[107] CA 2006, Part 26A s 901G(5).
[108] CA 2006, Part 26A s 901G(4).
[109] Mark Lawford, Andrew J Wilkinson and Matt Benson, ‘The New Restructuring Plan – in Depth’, (European Restructuring Watch 19 June 2020) < https://eurorestructuring.weil.com/reform-proposals-and-implementations/the-new-restructuring-plan-in-depth/ > accessed 4 January 2024.

determine alternatives, the court could examine the alternative rescue mechanism available while also undertaking valuation-based evidence to determine the return that the dissenting class of creditors might receive in the absence of the plan.[110] Such measures would enable the court to sanction the plan only when no relevant alternative scheme for the benefit of the creditors exists as asserted in Hurricane Energy PLC.[111]

The court in the process of determining of 'no worse' off scenario may anticipate disputes around valuation and rights available to the parties, which might slow down the process. Given such a scenario, the companies should prepare to provide robust evidence in support of the 'relevant alternative' as well as arguments against stakeholders with no genuine interest, to fast-track the restructuring of the business.

(c) Possibility of Cram Up

Unlike in Chapter 11, the plan does not include an absolute priority rule which provides that the claims of the dissenting creditors must be satisfied in full prior to a junior class makes recovery.[112] The absence of this provision might result in the possibility of senior creditors cramming up. The possibility of such a measure is meniscal as the court would need to be satisfied that the senior class is no worse off in relevant alternatives and junior class has a genuine economic interest.[113]

The introduction of these provisions provides a layer of support to creditors to flush out or dilute existing stakeholders without any economic interest in rescuing the business while ensuring that they are not worse off than the relevant alternative, thereby attesting that all stakeholders are working towards devising the best plan to rescue the business.

(d) Voting Requirement

The voting requirement has undergone a transformative change under CIGA. The legislator intended to retain a similar threshold for voting as provided under the scheme of arrangement.[114] However, it was pointed out that the 'numerosity' threshold was a key criticism and served a limited purpose.[115] Hence the legislator modified this threshold, and the present restructuring plan requires only a single 75% majority in value threshold from its stakeholders for sanctioning the plan.[116] This enhances the appeal of the plan, as it avoids the complexity of procuring consent from multiple parties as evident in CVA.

E. IS IT A WELCOME ADDITION?

[110] Wood (n 96).
[111] *Hurricane Energy plc* [2021] EWHC 1759 (Ch).
[112] § 1129(b)(2), Chapter 11.
[113] Matthew Czyzyk and ors, 'England and Wales: Restructuring Reforms Put Into Practice' (2022) Global Restructuring Review < https://globalrestructuringreview.com/review/europe-middle-east-and-africa-restructuring-review/2022/article/england-and-wales-restructuring-reforms-put-practice#footnote-002> accessed 5 January 2024.
[114] Government Response (n 55).
[115] Government Response (n 55).
[116] CA 2006, Part 26A s 901F(1).

The introduction of the restructuring plan has caused an uproar, sparking debates about its impact and desirability. With the three-year mark approaching since its enactment, it is pertinent to examine its effectiveness.

(1) Impact of the Plan

To assess the overall impact of the CIGA, the government took a proactive step by commissioning independent research[117] with a primary objective to provide evidence-based data to determine whether the policy objectives, in line with Better Regulations Principles,[118] were achieved and identify areas for improvements.

On evaluation, the restructuring plan received a positive outlook.[119] The effectiveness of the provisions can be attributed to their versatile and adaptable nature. Cramming down was a pivotal aspect of Part 26A which set it apart from other rescue mechanisms. Approximately 54% of the stakeholders rely on a restructuring plan as an effective tool in cramming down creditors. [120] Further, the fact that 66% of stakeholder restructuring plans over schemes indicates the existing gaps in the system which precluded distressed businesses from utilising rescue mechanisms. [121]

Additionally, there has been a rise in the adoption of the UK rescue reforms by other nations to strengthen their local restructuring process.[122] Drawing insights from the restructuring plan, particularly the provisions around cram down and the ability to establish a 'sufficient connection' test indicates the widespread acceptance of the plan globally.[123]

Overall, the resounding and unequivocal acceptance of the restructuring plan indicates its effectiveness as a robust tool in rescuing businesses and mitigating areas of concern within the rescue framework.

(2) Judicial Discretion

The effectiveness of a restructuring plan from the lens of the court's approval forms a critical element in the restructuring plan's recognition and acceptance. Approximately 58% of stakeholders rely on court-sanctioned plans, considering it as just and equitable.[124]

The reliance of stakeholders on the plan has grown due to the court's oversight, adding a second layer of scrutiny to prevent misuse of the provisions. This was evident

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[117] Professor Peter Walton and Dr Lézelle Jacobs, 'Corporate Insolvency and Governance Act 2020 – Interim Evaluation Report' (Insolvency Service March 2022) < https://www.gov.uk/government/publications/corporate-insolvency-and-governance-act-2020-evaluation-reports/corporate-insolvency-and-governance-act-2020-interim-report-march-2022> accessed 3 January 2024 (Interim Report).

[118] Department for Business, Energy and Industrial Strategy, 'Better Regulation Framework: Interim guidance' (2020) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/916918/better-regulation-guidance.pdf> accessed 6 January 2024.

[119] Final Report (n 89) para 4.2.

[120] Final Report (n 89) para 4.2.

[121] Final Report (n 89) para 4.2.

[122] Toube (n 1).

[123] Ibid.

[124] Final Report (n 89) para 4.2.

in the case of Deep Ocean[125] where the English Court for the first time utilised cram down provisions to bind unsecured creditors. Despite 64.4% favouring the approval of the plan, the court's decision to bind the creditors was on the ground that they failed to demonstrate a 'worse off' scenario in the event of a relevant alternative to the plan i.e. liquidation.[126] While the case was straightforward and did not require canvassing complex issues, it was able to demonstrate the applicability of the new restructuring plan in the UK and the implications of cross clam down mechanism to achieve a positive outlook with multiple entities which would not have been possible without the enactment of CIGA reforms.[127]

Further, the widespread acceptance of the plan can be attributed to its versatile nature which extends its utilisation to creditors as witnessed in Goodbox Co Labs.[128] In this case, the court asked creditors to propose a successful part 26A plan showcasing that the tool can be an effective arsenal for creditors in distressed businesses where there is a strained relationship between stakeholders and insolvency practitioners.[129]

Despite its prominence, a crucial factor that caused a stir within the insolvency community is the interpretation of 'just and equitable' in the court's exercise of absolute discretion. The absence of guidelines has resulted in varying approaches adopted by the courts. In the landmark case of Virgin Active,[130] the court dismissed the idea of establishing a fairness test, challenging the parliamentary intent in the explanatory statement. However, subsequent cases have shown a clear departure from the court's initial stance as witnessed in the case of Prezzo Investco[131] where the court guided the interpretation of fairness, emphasizing the need for the development of a definitive test.

Tracing back to the Parliamentary intent, it is evident that the discretion was granted to expand the court's role in sanctioning the plan beyond statutory prerequisite and voting thresholds.[132] This is apparent in the explanatory statement of CIGA where the court has 'absolute discretion' to sanction the plan and can refuse in instances where it is not 'just and equitable'.[133]

As the court tackles the evolving cases in Part 26A, there is a pressing need for legislative intervention in providing a substantive test to determine the extent of discretion to prevent interpretational issues and mitigate issues in judicial activism.

Overall, the restructuring plan has emerged as a vital tool utilised by the courts in creating a legal framework to expedite corporate rescue while preserving economic value and business continuity.

F. CONCLUSIONS AND AREAS FOR IMRPOVEMENT

The restructuring plan has emerged as a transformative tool, providing impactful solutions to the prevalent challenges in the rescue mechanism by providing a nuanced

[125] *Re DeepOcean 1 UK Ltd and other companies* [2021] EWHC 138 (Ch).
[126] Ibid.
[127] Toube (n 1).
[128] *Re The Good Box Co Labs Ltd (in administration); NGI Systems & Solutions Ltd v The Good Box Co Labs Ltd (in administration)* [2023] 2 BCLC 397.
[129] Ibid.
[130] *Virgin Active Holdings Ltd and other companies Re*, [2021] EWHC 1246 (Ch) [219]-[221]
[131] *Re Prezzo Investco Ltd* [2023] EWHC 1679 (Ch).
[132] Toube (n 1).
[133] CA 2006, Part 26 Explanatory Statement.

and robust framework for restructuring proceedings. The widespread acceptance of the process attests to its efficacy in providing viable solutions to blocked proposals, providing a fair and equitable framework and an avenue for business to continue as a going concern.

A noteworthy contribution to the plan is the introduction of the cross-class cram down procedure. Modelled after Chapter 11 Code,[134] this procedure provides a fundamental element that circumvents issues around securing creditor's consent. This mechanism has proven to be instrumental in procuring a unanimous consent from all genuine creditors with economic interest which would have been tedious in the traditional model. The adaptability of the restructuring plan to various scenarios and its versatility in balancing the interests of all stakeholders while aiding financially distressed businesses in business continuity has secured its position as a prominent rescue tool.

Despite its prominence, there are certain shortcomings in the procedures that warrant revisions. A foremost concern is regarding the high costs associated with the procedure, particularly for small and medium-sized enterprises.[135] The need for a more streamlined process with a single court hearing mechanism for less complex cases is demanded.[136] This would alleviate the burden on the business seeking restructuring and would increase the accessibility of the plan.[137]

Additionally, a lack of transparency and disclosure requirements has emerged as a critical issue in the process.[138] Stakeholders have emphasised that there is a need for clear channels of communication and timely dispensation of information to allow the stakeholders to make an informed decision.[139] It is vital to strike a balance between confidentiality and transparency in optimising the efficiency of the process.[140]

Thus, in essence, the restructuring plan has proven itself to be a welcome addition to the existing rescue mechanism. A restructuring plan has demonstrated sustained effectiveness since its introduction and is a valuable tool for navigating the complexities arising in a financially distressed business. However, to make the process more comprehensive and robust, it is imperative to fine-tune the process by adopting transparent, cost-effective, and equitable provisions within the plan.

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[134] Chapter 11 (n 82).
[135] Final Report (n 89) para 4.2.5.
[136] Ibid
[137] Ibid.
[138] Final Report (n 89) para 4.2.5.
[139] Ibid.
[140] Ibid.