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English Court Approves First UK Restructuring Plan in Parallel to a European "Preventive Restructuring" Process

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At a Glance

The English Court on Friday, 25 August approved the restructuring plans of Cimolai S.p.A. and its holding company, which operate in parallel to Italian *concordato preventivo* restructuring proceedings. The latter remain subject to the approval of the Court of Trieste.

This case is the first English restructuring plan in parallel to any European "preventive restructuring" process; it is also the first time such a process has been formally recognised in the UK.

The English restructuring plans were necessary to restructure disputed claims under English law-governed financial derivative contracts, whilst the parallel Italian proceedings were necessary to restructure the companies' debts under Italian / other EU laws. (Had the restructuring been implemented in Italy only, it would not have been effective as a matter of English law owing to the "Rule in *Gibbs*".[1])

This case involved "cramming-down" non-consenting classes in both plans.

Facts

Parallel Proceedings: The English restructuring plans implement the same restructuring proposal in England as that proposed in the parallel Italian *concordato*

preventivo proceedings. The Italian proceedings commenced in October 2022 and included a stay on creditor action. The vast majority of plan creditors are based in Italy or have contracts subject to Italian law (or that of another EU member state). As noted, certain English law claims could not be effectively compromised under the Italian proceedings owing to the "Rule in *Gibbs*", unless the claimants submitted to the jurisdiction of the Italian Court.

The English restructuring plans are conditional on the Italian *concordato preventivo* proceedings being approved in Italy.

The restructuring terms were framed to comply with the strict hierarchy in Italian law between different categories of creditors, where more senior creditors must receive greater returns than more junior creditors. Certain liabilities must be excluded from the Italian law process, including (a) liabilities accruing after the date on which the proceedings were opened and (b) amounts owed to preferred creditors under Italian law, including certain payments to employees, tax authorities and strategic suppliers. The voting classes were broadly aligned in the parallel proceedings, except that a disputed claim in respect of a joint venture was granted a vote under the restructuring plan but (in accordance with Italian accounting rules) not included as a creditor in the Italian proceedings.

The Italian proceedings have been approved by the requisite majorities of creditors but remain subject to final approval from the Italian Court; the hearing is scheduled for 12 September 2023.

International Recognition: The *concordato preventivo* proceedings, if approved by the Court of Trieste, will be automatically effective in the EU pursuant to the European Insolvency Regulation. The proceedings have also received recognition in the U.S. pursuant to Chapter 15 of the U.S. Bankruptcy Code and in the UK under the Cross-Border Insolvency Regulations 2006. This marks the first time an EU "preventive restructuring" process has been formally recognised in the UK, as noted.

Classes/Voting: In Cimolai's restructuring plan, two in-the-money classes and three out-of-the-money classes approved the plan; no votes were cast at three single-creditor out-of-the-money class meetings, i.e., those three classes did not approve the plan. In the holding company's restructuring plan, one in-the-money class approved the plan and no vote was cast at one single-creditor (in-the-money) class, i.e., that class did not approve the plan.

The court was therefore asked to approve the plans by means of "cross-class cram-down".

This case was unusual in that the non-consenting classes only contained one creditor each and none of these creditors actually voted against either plan.

Relevant Alternative: Two relevant alternatives to approval of the English restructuring plans were explored: (a) approval of the Italian proceedings and the imposition of the restructuring as a matter of Italian law only and (b) the less likely alternative of the failure of the Italian proceedings, resulting in liquidation proceedings in Italy.

Retention of Equity: The existing shareholder retained 100% of the equity in the holding company, in return for an injection of new equity. The group is a family-owned business. The terms of the restructuring include equity upside instruments for Cimolai's unsecured creditors that entitle holders to payments ahead of future distributions to the shareholder.

Judgment

The English Court held as follows.

- **Jurisdiction**: The requisite "sufficient connection" to the UK was established on the basis of the English law claims (notwithstanding that these did not comprise a majority of the plan companies' debts).
- **"No worse off" than in relevant alternative**: The correct relevant alternative to the plans was the scenario in which the Italian proceedings were approved and the restructuring would take effect as a matter of Italian law only. The court ultimately found that members of the non-consenting classes would be no worse off under the restructuring plans than in either potential alternative. (In Cimolai's plan, the non-consenting classes were out-of-the-money in the relevant alternative. In the holding company's plan, the only member of the only non-consenting class will shortly cease to be a creditor.)
- **Discretion**: In all the circumstances, the court was satisfied that it was appropriate to sanction the plans as a matter of discretion. In particular, for commercial reasons[2] it was reasonable for creditors to agree that equity be retained by the existing shareholders.

- **Parallel proceedings/effectiveness**: The desirability of rendering the *concordato preventivo* proceedings as effective in as many jurisdictions as possible provided rational grounds for concluding that the restructuring plans were appropriate in conjunction with the Italian proceedings. The exclusion of certain creditors from the *concordato preventivo* proceedings provided good commercial reasons to exclude such creditors from the restructuring plans, given the need for consistency between the processes. The element of uncertainty as to whether the Italian proceedings would be sanctioned did not mean the English Court would be acting in vain in approving the English plans, as the Italian proceedings had been approved by the requisite majorities of creditors and there was (at least) a realistic prospect that the Italian Court would approve the Italian proceedings. The proceedings would operate together as part of a coordinated restructuring effort.

The convening judgment is here; the sanction judgment is here.

Kirkland & Ellis advised Cimolai group on the English restructuring plans and other English law aspects of its restructuring. The team was led by Thomas Jemmett, Mallika Abidi, Ken Au and Georgina Vale.

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1. This rule provides that, where a contract specifies that it is governed by a particular country's law, it cannot be compromised or discharged by insolvency proceedings under a different law (stemming from the case of *Antony Gibbs & sons v La Société Industrielle et Commerciale des Métaux* (1890)) — unless the affected parties have taken part in the proceedings or otherwise submitted to them (e.g., by voting) or were present in the foreign jurisdiction when the proceedings were commenced. This effect was illustrated in *Re OJSC International Bank of Azerbaijan* (2018), when certain creditors with debts governed by English law did not participate in the Azeri restructuring proceeding and — based on the "rule in Gibbs" — successfully opposed the granting of a permanent moratorium (which would have effectively amounted to a permanent compromise of their claims).↩

2. Specifically: (a) the plans respect the statutory priorities that would apply in a liquidation under Italian law; (b) the retention of equity by the existing shareholder was justified by the new equity provided and the family's continued involvement in the business; and (c) the retained equity was determined to have nil value by reference to the transaction terms and upside instruments to be issued to creditors.↩

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