New Money

Marking the Boundaries

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The majority of all 2023 EMEA restructurings involving an equitisation and/or a maturity extension required the provision of new money.[1] While equitisation can solve for an over-leveraged capital structure, and maturity extensions can provide runway for business recovery and turnaround, those steps alone are often insufficient without there also being a contemporaneous solution for liquidity. This has been the experience on many of our recent matters, and arguably is a symptom of the covenant-lite debt documents which dominate the market, and which often don't default until there is a liquidity crunch.

Significant restructurings will often require high levels of creditor consent under existing debt documents and across multiple instruments, and it will not always be possible to secure the support of sufficient majorities of creditors to implement the restructuring consensually. In this scenario, debtors and supporting creditors often need to turn to a statutory restructuring tool to facilitate implementation; in the UK, typically via either a scheme of arrangement (Scheme) or a restructuring plan (RP).

In this article, we look at some of the key considerations for stakeholders where new money is required in connection with a restructuring that is being implemented via a Scheme or RP, including the parameters for structuring the new money in terms of creditor participation, economics and other incentives. We also reflect on structuring considerations for situations where new money is required on an urgent or interim basis to bridge through to closing of the restructuring.

1 According to research by Reorg.com in *EMEA Restructuring Wrap 2023*.

Class and Fairness

Schemes and RPs are both court processes that involve two hearings. At the first hearing (the convening hearing), the debtor seeks an order from the court to convene the relevant meeting(s) of creditor classes to vote on the terms of the proposed restructuring. The composition of the relevant classes is addressed at the convening hearing, with the court principally having regard to the similarity of the rights of creditors both pre and post the restructuring. This typically involves consideration of creditors' expected outcomes both following implementation of the Scheme or RP and if the restructuring were not approved by the court.

Once the creditor meetings have been convened, and assuming a sufficient number of stakeholders vote to approve the Scheme or RP[2], the debtor must then return to the court for a second hearing (the sanction hearing), where the court is asked to make an order sanctioning (or formally approving) the Scheme or RP. At the second hearing the court will principally consider the question of fairness.

When the court considers whether the debtor has appropriately composed its voting classes, as well as the issue of 'fairness' of the terms of the Scheme or RP, it will reflect on the terms and structure of any new money that has been or will be provided in connection with the restructuring. It is therefore important that any new money is structured to avoid creating roadblocks to successful implementation of the restructuring.

At the convening stage, the court's focus will be on the question of whether the provision of new money has created "rights" of participating creditors that differ to such an extent that new money providers form a different class to other creditors. The existence of different rights does not in itself cause a problem, the concern will arise when those rights are so different that the creditors cannot consider the restructuring proposal from a common perspective. The focus will be both on the existence of different rights and the materiality of that difference (i.e. the economic benefits attaching to the new money).

On many deals negotiations will be led by a group made up of the larger of the existing creditors, who have a strong motivation to support the proposed transaction and are typically the ones lending or underwriting new money in the restructuring. The negotiation of the new money terms will seek to balance the need to properly compensate lenders for providing finance, in what is usually a highly distressed scenario, with the need to keep equally ranked creditors within the same class

2 The approval threshold for a class of creditors is 75% by value (and a majority in number where a Scheme is proposed). Cross-class cram down is possible under a RP, provided that (i) none of the members of the dissenting class would be worse off under the RP than they would be in the relevant alternative, (ii) at least one class who would receive a payment or would have a genuine economic interest in the relevant alternative has voted in favour of the RP, and (iii) the RP is otherwise fair.

and ensure a fair deal. Fracturing a creditor class could jeopardise the successful implementation of a restructuring, were the non-participating creditors to be placed into a separate class and suddenly have a potential blocking vote.

Offering enhanced benefits to creditors in return for new money also risks a Scheme or RP stumbling on the ground of 'fairness'.

Participating creditors could be seen to have a "special interest", leading to concerns that the proposal is not fair or that a class was not fairly represented, if the benefits on offer to provide funding are disproportionality advantageous to creditors who provide the new money versus those who do not, or if the offer were not truly open for participation. Zacaroli J considered this point in New Look[3], where he considered whether certain creditors "*had reasons to vote in favour of the scheme that were additional to and not shared with the remaining scheme creditors*".[4] In that case, he was satisfied that the process around the provision of new money did not give rise to a concern, but it remains a factor for consideration in future cases.

3 *New Look Financing PLC* [2020] EWHC 3613 (Ch).
4 *New Look,* [21].

To assist in mitigating the class and fairness risks discussed above, careful consideration should be given to the following factors.

Participation

It has become common practice in Schemes and RPs that participation in new money is offered rateably to all creditors within a particular class, more often than not the class of which the ad hoc committee are a member. This does not mean that all creditor classes may be offered participation; "out of the money" classes or entirely "in the money" classes may not have the offer made to them. The rationale for the offer out is usually twofold; first as a way of demonstrating that the "rights" of the creditors are sufficiently similar (or not sufficiently dissimilar) to avoid fracturing a class, and second as a way of demonstrating that there were no "special interests" affecting creditors voting within the same class.

Whether an offer out is effective in demonstrating the above will depend on its terms; the court will usually want to ensure that participation is genuinely open to all. The creditors outside of the ad hoc committee will typically have less time to consider the offer, and potentially more limited access to information, than the ad hoc committee. This in itself is not problematic, but care will need to be taken to ensure that timelines are realistic and that creditors have equal access to material information. There is no set time period for an offer out, as timings are often dependent on the circumstances of individual cases. It would be typical for the creditor group to be provided with an approx. 2 to 3-week period to decide whether to participate in the new money, absent any particular business factors that would dictate otherwise. Debtors will also need to balance practicalities and regulatory concerns which may impose terms on the offer, for example minimum denominations or required representations as to status, against the desire to ensure the offer is capable of acceptance by the creditor group.

The court will generally try to distinguish between a lack of proper opportunity to participate, on the one hand, and an inability or reluctance to participate, on the other, with the latter often a result of a creditor's individual situation and commercial interests. Similarly, issues which make a genuine offer to all impractical or challenging from a regulatory perspective can be accepted, provided there is adequate justification.[5]

Economic Terms/Incentives

In addition to standard economics including interest, fees and OID (each of which should be set at a level comparable to market precedents of financings of a similar size and nature), new money participants can be offered certain additional benefits on the new money both to

5 See, for example, the Schemes for *Nostrum Oil & Gas PLC* [2022] EWHC 2249 (Ch), [36] and *Re Haya Holdco 2 PLC* [2022] HWHC 1079, [72].

compensate them for risk and to incentivise participation. Some selected and instructive examples are set out below, but we note that each case will be determined on its own facts, and consideration will be made on a case-by-case basis as to whether the new money terms cause concerns from a class or fairness perspective.

Backstopping and Underwriting Fees

Backstop arrangements are a market standard feature in relation to new money in restructurings. The debtor will want to ensure that the new money is fully underwritten early in the process, rather than waiting to see if there is sufficient investment appetite once the transaction is launched, so that it is clear the restructuring proposal is capable of implementation. The ad hoc committee will typically be the first port of call to backstop or underwrite the new money, as they too will want the restructuring to be a success. Creditors will require appropriate compensation for assuming the risk associated with entering into backstop or underwriting commitments; typically paid in the form of a backstop fee which will range from 3% to 5% of their new money commitments.

There may be some debate as to whether participation in the backstop should also be offered out to additional creditors, and in some recent transactions this has happened (see *Atento's* 2023 RP and *PlusServer's* 2024 Scheme).[6] However, generally it is not practical for backstop arrangements to be offered out given tight deal timelines. There is also an element of the "free rider" dilemma when creditors accede to a backstop commitment later in a restructuring process, as by that time they will likely have a greater degree of visibility on the expected participation level or prospects of the restructuring being successfully implemented. In this scenario it is sometimes difficult to justify the receipt of similar backstop economics to the ad hoc committee when the risk profile for late participation is markedly different.

6 *Atento UK Limited and Atento Luxco 1* [2023] EWHC 2754 (Ch), [35]; and *Plusholding GmbH Re* [2023] EWHC 2915 (Ch), [14]].

As a result, market practice has been not to offer out wider participation in the backstop arrangement and, to date, this has not been held in and of itself to fracture a creditor class (as between the backstopping creditors and the rest of the new money participants). The reasoning in the authorities is that, provided the backstop fee is paid for legitimate reasons and represents a proper fee for a commercial service (i.e., providing the company certainty that the new money will be provided), it is not a 'bounty' or 'windfall' for certain creditors and therefore should not lead to class fracture.[7]

Each case will be considered on its facts, but courts will generally assess the 'windfall/bounty' test by reference to the wider economics of the transaction, the benefit being received by the backstopping ad hoc committee members relative to additional creditors who participate in the new money, and whether these additional economics may themselves be seen to singularly motivate participation in the transaction. Mr Justice Adam Johnson noted in *Hilding Anders*' 2022 Scheme that he did not consider the backstop fee (in that case 4%) to "*make any material difference, as between those who will get it and those who will not, in terms of the basic choice to be made between the potential benefits of the schemes on the one hand and the potential risks of the relevant alternative on the other*".[8]

In *Codere's* 2020 Scheme, the same balancing exercise was considered by Mrs Justice Falk, who concluded that the backstop fee (2.5%) was within (and likely below) market norms and, having particular regard to the alternative of a liquidation, was not sufficiently material to fracture the class.[9]

Roll-Ups

Another mechanism used to compensate new money providers is the elevation of a portion of their existing debt (often referred to as roll-up or bootstrapping). Although a common feature of US Chapter 11 technology, roll-ups have been less common in England. However, there are three authorities which support the

7 *Re Codere Finance (UK) Ltd* [2015] EWHC 3206 (Ch), [2].
8 *Re Hilding Anders International AB* [2023] EWHC 1513 (Ch) [31].
9 *Codere Finance 2 (UK) Limited* [2022] EWHC 2441 (Ch), [89-92].

availability of roll-ups as a defensible feature of Schemes and RPs.

In the 2019 Scheme for the *Noble group*, creditors' existing debt was replaced with three new instruments: (i) new notes issued by an intermediate holding company (holdco) of the new company (newco) (the basic consideration); (ii) new notes issued by the newco itself (i.e., structurally senior to the basic consideration, the priority debt) and (iii) new money through participating in new hedging and trade finance facilities.[10] All creditors were allocated the basic consideration on a pro-rata basis by reference to their pre-restructuring debt, and, similarly, all creditors were offered a proportionate right to 'risk participate' in the new money. Only those creditors who elected to risk participate in the new money were allocated the more valuable 'priority debt' (and their allocation of basic consideration reduced as a result), effectively allowing the new money participants to 'roll-up' a portion of their existing debt into more senior new debt.

The 'priority debt' was the most attractive and valuable consideration on offer to creditors under the Scheme (with the elevated creditors expected to receive between 47.4% and 58.4% returns versus 24.7% and 33.8% for non-elevated creditors).[11] The Scheme included provisions under which creditors who wished to risk participate could do so via one of two methods: through an intermediary bank or a cash special purpose vehicle. In determining that these differences did not fracture the creditor class, Snowden J considered that it was "*undoubtedly the case that the opportunity to elect to 'risk participate' in return for the 'priority debt' was a right that was offered to all creditors*"[12] under the terms of the Scheme. The different alternatives were included to make it easier for all creditors to accept the offer if they wished to do so and did not amount to any material difference in the rights offered.

In the 2022 RP for ED&F Man, there was an elevation of pre-restructuring debt for those who elected to subscribe to a new money facility, with pre-restructuring debt being exchanged for new debt as part of the restructuring.[13] Creditors that subscribed to a new trade finance facility received higher ranking new debt in return for their old

10 *Re Noble Group Limited* [2018] EWHC 2911 (Ch) [11-14].
11 *Noble*, [104].
12 *Noble*, [154].
13 *ED&F Man Holdings Limited* [2022] EWHC 433 (Ch).

debt under the plan than those who did not subscribe. This was achieved by the company structuring the new debt across various tranches of seniority. "New money" creditors received $1 of debt under the most senior tranche for each $1 of their old debt. If the new money was under-subscribed, creditors agreeing to meet the shortfall were entitled to a 2:1 elevation ratio for the amount of new money they contributed beyond their initial subscription. In contrast, creditors who did not participate in the new money had their old debt exchanged for new debt that ranked junior to the new money.

The court considered that there was a long line of authority (including a previous ED&F Man restructuring in 2020) supporting the contention that such an elevation does not fracture a class, with the reasoning that the elevation was available to all creditors pro rata: i.e., all creditors had the same right to elevate their debt by lending more. Green J noted: "*I can see that there are very good commercial reasons why such an elevation structure is used in this plan, providing certainty that the new money will be raised and potentially reducing the pricing of the new facility. It also avoids a backstop or underwriting fee. I therefore think that the elevation rights do not fracture the classes.*"[14]

In obiter comments in the *Adler* Court of Appeal judgement, Snowden LJ also considered debt elevation permissible as long as justified, noting that "*There might, for example, be no such justification for the elevation of existing debt if the opportunity to provide the new money was not in reality available on an equal and non-coercive basis*".[15]

In this regard, it should be noted that elevation via a Scheme/RP has not yet been the subject of robust creditor challenge. As Snowden alludes to in Adler (and as is consistent with his prior comments during the Noble scheme[16]), in the absence of sufficient justification for an elevation and a truly open and adequate opportunity for all relevant creditors to participate, there could well be scope for such a challenge.

Additional Equity Participation

Creditors electing to provide new money may be compensated through equity participation, rather than debt. In the 2023 *Atento* RP, new money was provided primarily through the issuance of preference shares. New money participation was offered to certain plan creditors, and those electing to participate received a pro rata share of the ordinary equity in the post-restructured group.[17] Similarly, in the *Adler* RP new money was offered to all classes of plan creditors, and participating creditors would receive a pro rata share of 22.5% of the post-issuance equity of the ultimate parent company of the group.[18]

Similar considerations apply where compensation or economic benefit is provided through equity as with debt. The court will consider both the way the new money participation was offered (and therefore whether creditors within a class had an opportunity to participate) as well as the economic value of the compensation being provided.

14 *ED&F Man*, [75].
15 *AGPS Bondco PLC* [2024] EWCA Civ 24 (Adler), [169].
16 Noble, [35]
17 *Atento*, [5].
18 *Adler*, [23].

Interim/Bridge Financing

In certain situations, it is not possible to offer out all new money tranches. This is particularly the case where there is a liquidity need that is immediate and/or needed to ensure stability of the business whilst the restructuring proposal is being negotiated and implemented.

In these circumstances, the natural providers of interim facilities are the members of the ad hoc committee, who will usually be party to confidential information about the debtor earlier than other creditors, and who are incentivised to ensure stability to achieve a good outcome for the business, given their often substantial debt holdings.

Interim new money providers usually require that funds are provided on a super-senior basis or with recourse to/security over select ring-fenced businesses or assets, due to the risk that will generally be involved in lending new money before a restructuring has been successfully implemented. In the UK, Schemes and RPs do not provide for new money provided ahead of (or during) a restructuring process to be afforded super-senior status. Creditors and debtors therefore typically rely on contractual methods to give new money its priority ranking, which can be achieved in a number of ways.

The starting point will be for an interim new money facility to be provided using basket availability within the terms of the debtor's existing debt instruments, if necessary through amendments to the baskets. Consideration will be given to the ability to incur debt at asset-owning or valuable entities which do not guarantee or secure the existing debt. Depending on the nature of the existing debt instruments and their terms, it may also be possible to move assets into non-obligor subsidiaries, or subsidiaries not governed by the debt covenants (such as unrestricted subsidiaries), and lend to them on a ring-fenced basis. A further alternative may be to enter into "turnover" arrangements with existing debt instruments to create "first out" tranches that enjoy a degree of contractual superiority.

Several recent Scheme and RP cases[19] have involved interim new money facilities being provided by a limited group of creditors, with additional new money, provided at a later date and usually on completion of the restructuring, being offered to all. In such circumstances, the interim facility will usually be provided by an ad hoc committee of creditors at the time the

19 Including *Re Lecta Paper UK Ltd* [2023] EWHC 2908 (Ch), *Re Praesidiad Ltd* [2023] EWHC 2745 (Ch), *Re Chaptre Finance PLC* [2023] EWHC 1665 (Ch), *Re Hilding Anders International AB* [2023] EWHC 1513 (Ch).

core terms of the restructuring are agreed and announced to other creditors and/or the market. The additional new money facility will be offered to one of more classes of creditor involved in the Scheme or RP. The offer out period has varied, in some cases commencing at the time of announcement whilst in others the offer is made at the time Scheme or RP documents are provided to creditors, but invariably the election period will remain open until at least the date of the Scheme/RP meetings, to ensure that at the time of voting it cannot be argued that certain creditors (participating) have additional reasons to vote in favour that are not shared by others (non-participating).[20]

Different approaches have been taken with respect to the treatment of the interim facility. In *Codere*, the interim new money was provided by the ad hoc committee and was not refinanced by the additional new money (which was open to other creditors on a *pro rata* basis, but did not allow a "catch up" to equalise the two instruments). The *Codere* Scheme was challenged by a dissenting creditor, but ultimately the court dismissed the challenge and held that, on the facts, the *Codere* structure did not fracture the creditor class.

An alternative structure, arguably less subject to challenge, would be for the interim and additional new money facilities to be structured such that the additional facility allows creditors the opportunity to "catch up" so that all creditors can participate pro rata in the new money across interim and additional facilities. The extent to which this is achievable will depend on the size of the imminent liquidity need versus the longer-term funding gap; where the former exceeds the latter it will be more challenging to structure a catch-up.

20 An exception to this general approach is the 2020 Scheme for *New Look*, where the new money participation deadline was prior to the Scheme meeting.

Conclusion

Where new money is required as part of a restructuring implemented via a Scheme or RP, it is important to be mindful of the court's inevitable scrutiny of the terms upon which that new money will be provided. With 2024 and 2025 prospectively bringing more holistic restructurings and right sizing of capital structures, we expect the themes explored above to be considered further. Bearing up to the court's scrutiny will remain a question of balance, with a fine line to be walked between appropriately compensating the new money participants, on the one hand, and disproportionately rewarding them (at the expense of other stakeholders), on the other.

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