**An Analysis of the Restructuring Mechanisms for Distressed Companies in the UK and Canada**

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# PART I - INTRODUCTION

 This paper compares the restructuring processes and tools available to distressed companies in the UK and in Canada. The aim of this exercise is to determine the extent to which each jurisdiction would be considered as “*pro-restructuring*” based on analysing certain variables now commonly associated with “*pro-restructuring”* regimes. In this part I will first provide a brief introduction on the restructuring regimes in each jurisdiction. That is followed by Part II where I will set out the methodology by which each jurisdiction will be analysed. In Part III I will summarise the restructuring processes in each jurisdictions. In Part IV I will apply the variables in analysing each jurisdiction. Finally, in Part V I provide my conclusion.

### United Kingdom

 In the United Kingdom during the 1980s and 1990s market participants (invariably banks) followed extra-statutory principles to deal with customers in financial distress. These rules provided that banks should *inter alia*[[1]](#footnote-1):

* forbear from immediate enforcement measures (such as foreclosing on collateral) in order to give the debtor breathing room to restructure their finances.
* lend new financing on priority terms.
* act in good faith towards to the debtor.

These principles were referred to as the “*London Approach*”. Although not backed by with hard law, these principles were enforced by the Bank of England and other market participants using informal non-legal mechanisms[[2]](#footnote-2).

 When the *London Approach* prevailed, the UK could not outwardly be described as a jurisdiction that had in place laws which were “*pro-restructuring”[[3]](#footnote-3)*. The implementation of the Insolvency Act, 1986 and Insolvency Rules 2016 have since provided restructuring mechanisms -Administration and a Creditors Voluntary Arrangement- that exhibited some of the features of a “*pro-restructuring”* regime.

 However, it is submitted that the passage of the Corporate Insolvency and Governance 2020 (“CIGA 2020”) and the reforms ushered therein have significantly burnished the UK “*pro-restructuring”* credentials.

### Canada

 In Canada the Bankruptcy and Insolvency Act (“BIA”) has its provenance in the Canadian Bankruptcy and Insolvency Act of 1919 which was reformed in 1949 and amended in 1992, 1997 and most recently in 2009. The Companies’ Creditors Arrangement Act (“CCAA”) was passed in 1933 as a depression-era measure. The CCAA fell into disuse until the 1980s when its use was revived by activist judges who adopted creative interpretations to facilitate its use. The CCAA was amended in 1997 and in 2009.[[4]](#footnote-4)

 The BIA and the CCAA exhibit all the features of that are typical of “*pro-restructuring”* regime. Buckwold et al in describing the insolvency regime in Canada have stated:

*“When one examines Canadian insolvency law three issues stand out. First the idea that substantive non-insolvency entitlements should prevail was never embraced.”[[5]](#footnote-5)*

 This demonstrates that Canada has long recognized the importance of providing tools to facilitate restructuring.

# PART II - METHODOLOGY

In evaluating where a jurisdiction is “*pro-restructuring*” we must first set out our evaluative criteria. Probably the most well-known approach to comparing jurisdictions in this context was that of La Porta, et al those scholars chosen to debt enforcement -effectiveness and quality[[6]](#footnote-6). The La Porta et al methodology is still useful but due to the fundamental paradigm shift instigated in Europe by way of *The European Directive 2019/1023 on Establishing Preventive Restructuring Frameworks*[[7]](#footnote-7) their conclusions no longer represent the present state of the law particularly in regards to civil law jurisdictions.

 Rather than adopting the approach of La Porta et al I have chosen to examine the variables that are at the present time reflective of a regime considered “*pro-restructuring*”. More specifically I will consider the extent that each jurisdiction has a mechanism/s that provides for[[8]](#footnote-8):

* A stay of enforcement proceedings that would give the debtor the opportunity to restructure its affairs.[[9]](#footnote-9)
* Board of Directors remaining in control during the stay of enforcement proceedings (referred to as a “*debtor-in-possession*”).
* Priority for new financing.
* Voting mechanisms that bind either: a dissenting creditor within a class of creditors or an entire dissenting class of creditors.

# PART III - INSOLVENCY LAWS IN EACH JURISDICTION

### United Kingdom

 For the UK I consider the following three (3) restructuring tools:

* Company Voluntary Arrangement (“CVA”)
* Administration
* Restructuring Plan

 The Scheme of Arrangement[[10]](#footnote-10) (“SOA”) has undoubtedly been recognized as a flexible restructuring tool. Indeed, it was expressly contemplated that the Administration procedure would facilitate the use of SOAs.[[11]](#footnote-11) The SOA is not considered here for three reasons. First is that the SOA procedure is really a corporate procedure rather than an insolvency procedure. Second is that the Restructuring Plan is modelled on the SOA procedure hence there will likely be significant duplication. Third is that Canada has a similar provision under the Canada Business Corporations Act which would mean that there is not significant distinction between the jurisdictions.[[12]](#footnote-12)

 It must also be noted that the CIGA 2020 created a new free-standing moratorium that is available to distressed UK companies. Although the moratorium is not tied to a particular restructuring process it must be considered as a crucial new restructuring tool that is capable of being used in combination with any of the other restructuring processes available in the UK.

#### Company Voluntary Arrangement

 A CVA is statutory procedure found in the Insolvency Act, 1986[[13]](#footnote-13). A CVA (like all rescue focused processes) is intended to preserve viable companies that find themself in financial distress. The CVA has as its aim facilitating an agreement between a company and its unsecured creditors.

 The CVA process requires the appointment of an Insolvency Practitioner (termed a “Nominee”). The Nominee is expected to be an independent and impartial restructuring professional that drives the restructuring process by assisting the board of directors in formulating a proposal which will be voted on by both shareholder/s and creditors. Approval of a CVA requires unsecured creditors representing no less than three-quarters in value to vote in favour of the proposal. All unsecured creditors (including those that are not being asked to compromise their debt) are given a vote on the proposal. If approved by the requisite majority the CVA will bind all unsecured creditors (including those that dissented or chose not to participate). Among the benefits of a CVA is that there is limited court involvement which may mean that the CVA is more cost-efficient and less cumbersome than more court intensive restructuring processes.

 Some aspects of CVAs to note are:

* Board of directors remains in control (i.e. debtor-in-possession).
* CVAs cannot compromise secured debt unless the secured creditor consents.
* creditors vote as a single class.

CVAs have been used in a number of high-profile restructurings in the retail industry[[14]](#footnote-14) including *Toys R Us (UK)* (2018), *Jamie’s Italian Limited* (2018), *Mothercare plc* (2019).

#### Administration

 The law relating to Administration is also found in the Insolvency Act, 1986[[15]](#footnote-15). Administration also involves the appointment of an Insolvency Practitioner (called an “Administrator”). The Administrator may be appointed either pursuant to a court order or out of court by the directors or certain creditors[[16]](#footnote-16).

The Administrator once appointed will take custody and control of the company’s assets displacing the board of directors. An Administrator has as a hierarchy of objectives; namely:

* First: to rescue of the company as a going concern.
* Second: try to achieve a better result for the company’s creditors as a whole than would be likely if the company were put into liquidation.
* Third: realise the company’s property to make a distribution to the company’s preferential and secured creditors.

 An important feature of Administration is an automatic statutory moratorium on enforcement action. During the moratorium all creditors (secured and unsecured) are prohibited from taking legal action against the company.

 The typical outcome of an Administration is a going concern sale of the company’s assets[[17]](#footnote-17), the net proceed will then be distributed to the company’s creditors according to their relevant (insolvency) priorities. These going concern sales are sometimes in the form of a *pre-pack* whereby the company’s assets are marketed prior to the appointment of the Administrator. Then upon appointment the Administrator moves to immediately sell the business to the winning bidder.[[18]](#footnote-18)

#### Restructuring Plan

 The CIGA 2020 amended the UK Companies Act, 2006 by inserting a new section 26A into the Companies Act, 2006[[19]](#footnote-19), that created a new restructuring tool now typically referred to as a “*Restructuring Plan*”.

The Restructuring Plan’s process is modeled on the SOA regime. However unlike a SOA, a Restructuring Plan is only available to companies in (or likely to encounter) financial difficulties that are seeking to use the procedure to mitigate those financial difficulties.

 The Restructuring Plan involves two court hearings with the first court hearing considering the constitution of the voting classes and convening the meeting to consider and vote on the Restructuring Plan. The second court hearing is to determine whether the court should sanction (approve) the Restructuring Plan.

### Canada

 In Canada the restructuring tools that I examine are:

* Proposal Procedure.
* Companies’ Creditor Arrangement.

#### Proposal Procedure

 The Proposal Procedure is found in the BIA[[20]](#footnote-20). Entry into the proposal procedure results in an automatic statutory stay of proceedings on all enforcement actions against the debtor. The board of directors will remain in control of the company however an Insolvency Practitioner (called a “*Trustee*”) will be appointed to assist the management with formulating a proposal.

 To approve a proposal requires a double majority of approval in each class of creditors. That is to say it must be approved by a majority in number of creditors in each class holding no less than two-thirds of value. A proposal that has been approved will bind creditors within each of the classes that have approved the Proposal. A Proposal will only bind a class of secured creditors with their consent.

 The Proposal Procedure provisions expressly contemplate protection for new financing including giving the court the power to grant priority over existing secured creditors to interim lenders.

#### Companies’ Creditors Arrangement

 A Companies’ Creditors Arrangement[[21]](#footnote-21) (“CCAA”) contemplates significant court involvement. A CCAA is commenced by a court application either by the company or a creditor. To enter CCAA proceedings the company must either be insolvent or have committed an “*act of bankruptcy*” and have creditor claims of no less than C$5,000,000.

 A CCAA is a debtor-in-possession process in which the existing board of directors and management retain control of the company. A CCAA application must include the appointment of an Insolvency Practitioner called a Monitor. The role of the Monitor is to supervise and advise the company on the development of a plan of arrangement or compromise (“CCAA Plan”).

 To be binding a CCAA Plan must be approved by a majority in number of creditors in each class holding no less than two-thirds in value of the claims in that class. A CCAA Plan that has been accepted by the requisite double majorities must still be sanctioned by the court.

 The CCAA grants a court the statutory power to order a priority charge to secure interim financing. A CCAA filing does not result in an automatic statutory stay of proceedings, but typically among the orders requested in the court application is a request of a stay of proceedings.

# PART IV- APPLICATION OF THE VARIABLES TO EACH JURISDICTION

 The Table below sets out a summary of the application of the variables to the restructuring processes in each jurisdiction.

## Table

|  |  |  |
| --- | --- | --- |
|  | **United Kingdom[[22]](#footnote-22)** | **Canada** |
| **Process** | **Creditors Voluntary Arrangement**  | **Administration** | **Restructuring Plan** | **Proposal** | **Companies’ Creditors Arrangement** |
| **Court Involvement**  | Supervised by Insolvency Practitioner. Court not involved unless challenged | Supervised by Administrator.Court need not be involved | Significant Court supervision with at least two Court hearings | Supervised by Insolvency Practitioner.Court must also approve Proposal once accepted by creditors  | Significant Court supervision and involvement and appointment of monitor. Court must also approve Plan or Arrangement once accepted by creditors |
| **Stay on Enforcement Proceedings** | No automatic statutory stay. | Automatic statutory stay once process commenced until administrative order granted | No automatic statutory stay. | * Automatic statutory stay for 30 days.
* May be extended up to 5 months.
 | * No automatic statutory stay.
* First day court order typically requests a stay on enforcement proceedings
 |
| **Debtor-in-Possession**  | Board of Directors and management remain in control | Insolvency Practitioner displaces Board of Directors and management | Board of Directors and management remain in control | Board of Directors and management remain in control  | Board of Directors and management remain in control |
| **Interim Financing** | No statutory provision. | * No statutory provision.
* May be rolled into administrative expenses to grant priority
 | * No statutory provision.
* May be included in the Restructuring Plan
 | Interim priority financing pursuant to statute  | Interim priority financing pursuant to statute |
| **Voting Threshold** | 75% of all unsecured creditors must vote in favourShareholder majority required but creditor vote prevails. | Not Applicable. | * Creditors separated into classes.
* 75% in gross value of debt or equity in each class of creditors or shareholders vote in favour.
* Power to *“cross-class cram down”*.
 | * Creditors separated into classes.
* Majority in number of creditors in each class holding no less than 66 2/3% in value must vote in favour.
* No power to “*cross-class cram down*”
 | * Creditors separated into classes.
* Majority in number of creditors in each class holding no less than 66 2/3% in value must vote in favour.
* No power to “*cross-class cram down*”
 |

## Analysis of Each Jurisdiction

### United Kingdom

 Assessing each variable in more detail:

* Stay of Enforcement Proceedings – Prior to CIGA 2020 the only UK restructuring process that included an automatic stay of enforcement proceedings is Administration. In the past Administration has been combined with CVAs or a SOA in order to obtain the benefits of the stay. The CIGA 2020 has brought into force a free-standing moratorium in which the board of directors remains in place under the supervisor of a monitor. It is expected that the moratorium will be utilized in combination with another of the restructuring processes including the Restructuring Plan.
* Debtor-in-possession – Both CVAs and the Restructuring Plan are restructuring tools that keep the board of directors in control of the company during the restructuring process. Administration involves the displacement of the board of directors in favour of an administrator.
* Protection for new financing – None of the UK restructuring tools explicitly provide the court with the power to grant an interim order for a priority charge for a new financing. In order to obtain protection for new financing either requires some creativity such as including the financing in the Administration Expenses or including the financing within the terms of the Restructuring Plan.
* Voting Mechanism – CVAs and Restructuring Plans provide for voting mechanisms that will bind creditors whether they approve of dissent. The CVAs procedure differs in requiring a double majority of creditors voting as a single class whereas the Restructuring Plan requires only a majority in value of the class. Additionally, and most notably the Restructuring Plan gives the court the power to “*cram down*” a Restructuring Plan on an entire dissenting class.

Save for the protection of new financing the UK regime has at least one restructuring process that satisfies each of the variables that would position the UK as a “*pro-restructuring”* regime. However, each of the three (3) restructuring tools differs materially with respect to the variables considered. For instance, the CVA and Restructuring Plan have different voting mechanisms. Additionally neither CVAs nor Restructuring Plans impose a statutory automatic stay on enforcement action by creditors.

Even so, it is important to bear in mind that the CIGA 2020 brought into effect the moratorium as a mechanism independent of any specific restructuring process and so it could be used in both CVAs and Restructuring Plans.

### Canada

 Assessing the variables with respect Canadian restructuring processes:

* Stay of Enforcement Proceedings – the Proposal Procedure includes an automatic statutory stay of proceedings. In contrast the CCAA requires that the court exercise its discretion to grant a stay of enforcement proceedings.
* Debtor-in-Possession – in both the Proposal Procedure and the CCAA the board of directors remain in control of the company.
* Protection for new financing – the laws implementing the Proposal Procedure and the CCAA expressly provide a court the discretion for interim financing orders with the possibility of granting a priority charge for new financing.
* Voting Mechanism – the Proposal Procedures and CCAA Plan regime requires double-majorities of creditors in each class to approve the proposal in the case of the former and the plan in the case of the latter.

Canada also has mechanisms that are within each of the variables that would identify it as a “*pro-restructuring”* regime. Canada’s restructuring tools are more closely aligned with each other on the variables analysed than are the UK’s restructuring tools.

# PART V - CONCLUSION

 On balance it is submitted that both the UK and Canada would be considered “*pro-restructuring”* regimes as they each have mechanisms that provide for the majority of variables characteristic of a “*pro-restructuring”* regime. Considered in more detail the UK’s restructuring tools have more variation among the variables. Whilst Canada’s restructuring tools are more closely aligned with each other.

 Taking each regime as whole, the UK (through the Restructuring Plan’s voting mechanism) provides the power of “*cross-class cram downs*” which is not available in any tool in Canada. In In *Hurricane Energy[[23]](#footnote-23)* Mr. Justice Zacaroli stated:

“*[T]he reluctance of the Court in the [SOA procedure] to depart from the outcome of a properly convened meeting of a class of creditors cannot have the same place in the court’s approach to sanctioning a restructuring plan*.”[[24]](#footnote-24)

The power to cram down a bargain on an entire dissenting class gives a substantially more evaluative and contextual role to the court to analyse the terms of the plan being put to creditors. Although of recent vintage the Restructuring Plan has already been utilized extensively[[25]](#footnote-25).

 In Canada the voting mechanism requires a double majority in which a dissenting class effectively has the power to determine whether the proposal or plan is accepted. In spite of this, the Canada proposal recognizes an automatic statutory stay of proceedings and retention of the existing board of directors. Only since the implementation of CIGA 2020 that has the UK established the power for a distressed company’s board to remain in control whilst benefiting from a stay on enforcement proceedings. Prior to CIGA 2020 the UK required a distressed debtor to combine more than one restructuring process in order to obtain the benefits of each.

In a study conducted prior to CIGA 2020, PricewaterhouseCoopers determined that 51% of all retail CVAs in the UK required some other insolvency related procedure such as an Administration.[[26]](#footnote-26)

 In contrast the Canada experience appears to be contentment with its existing restructuring tools. In a statutory review of Canada’s insolvency laws completed in 2014 concluded that:

“*The 2008 economic downturn led many developed economies into a deep recession Canada's experience was better than most as a result of positive actions taken to address the downturn … The BIA and CCAA were up to the challenge and played their part by providing individuals with the needed fresh start and offering viable but financially troubled firms the opportunity to restructure*.”[[27]](#footnote-27)

 It will be of significant interest whether the UK’s latest forms which put it squarely within the “*pro-restructuring”* camp will instigate other jurisdictions such as Canada to seek to augment their restructuring regime.

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1. Paterson, Sarah, *Corporate Reorganization Law and Forces of Change*, Oxford University Press, Oxford (2020), pp. 39. [↑](#footnote-ref-1)
2. *Ibid.* [↑](#footnote-ref-2)
3. The UK has long used the Scheme of Arrangement process as a restructuring tool. At Part III I explain why I have chosen not to analyse the Scheme of Arrangement in any detail. [↑](#footnote-ref-3)
4. Adapted from Duggan, Anthony and Ben-Ishai, Chapter 1: Introduction, in: *Canadian Bankruptcy & Insolvency Law: Bill C-55, Statute C.47 And Beyond,* pp. 1 to 7. [↑](#footnote-ref-4)
5. Buckwold, Tamara, et al, Chapter 5: Priorities, in *Canadian Bankruptcy & Insolvency Law: Bill C-55, Statute C.47 And Beyond,* pp. 135. [↑](#footnote-ref-5)
6. La Porta, Rafael, et al, Law and Finance, Journal of Political Economy, 1998. See also Djankov, Simeon, et al, Debt Enforcement around the World, Journal of Political Economy, 2008. [↑](#footnote-ref-6)
7. The directive orders European Union countries to adopt restructuring laws that gave debtors in financial difficulties the opportunity to restructure their affairs. [↑](#footnote-ref-7)
8. Adapted from Bernstein, Donald, Preface in *The Insolvency Review*, 6th Edition, (2018) pp. vii. [↑](#footnote-ref-8)
9. I treat a stay of proceedings as synonymous with a moratorium. [↑](#footnote-ref-9)
10. Part 26 of the Companies Act, 2006 [↑](#footnote-ref-10)
11. *Supra*, note 1, pp. 41. [↑](#footnote-ref-11)
12. Payne, Jennifer, *Schemes of Arrangement: Theory, Structure and Operation*, (2014). [↑](#footnote-ref-12)
13. Part I of the Insolvency Act, 1986 and the Insolvency (England and Wales) Rules 2016. [↑](#footnote-ref-13)
14. Johnson, Ian, “Chapter 5: England and Wales”, in Bernstein, Donald (eds), *The Insolvency Review*, 6th Edition (2018) pp. 67 to 70. [↑](#footnote-ref-14)
15. Schedule B1 of the Insolvency Act, 1986 and the Insolvency (England and Wales) Rules 2016. [↑](#footnote-ref-15)
16. A creditor that benefits from a “*Qualifying Floating Charge*” as defined in the Enterprise Act 2002. [↑](#footnote-ref-16)
17. *Supra,* note 1, pp. 41. [↑](#footnote-ref-17)
18. *Supra,* note 1, pp. 75. [↑](#footnote-ref-18)
19. Part 26A of the Companies Act, 2006. [↑](#footnote-ref-19)
20. Part III of the Bankruptcy and Insolvency Act. [↑](#footnote-ref-20)
21. Companies’ Creditors Arrangement Act. [↑](#footnote-ref-21)
22. CIGA 2020 made available to distress UK companies a free-standing moratorium on enforcement action. The moratorium is available initially for twenty (20) business days but may be extended. [↑](#footnote-ref-22)
23. Hurricane Energy PLC, Re [2021] EWHC 1759 (Ch) (28 June 2021) [↑](#footnote-ref-23)
24. *Ibid* at para 40. [↑](#footnote-ref-24)
25. *Deep Ocean* (January 2021), *Gategroup UK* (March 2021), *Premier Oil* (March 2021), *Smile Telecoms* (March 2021), *Virgin Active* (May 2021), *Amicus Finance* (August 2021) *Hurricane Energy* (June 2021) [↑](#footnote-ref-25)
26. PricewaterhouseCoopers UK in “Retail Restructuring: Why CVAs alone are not the answer”, at <<https://www.pwc.co.uk/services/business-restructuring/insights/retail-restructuring-cva-alone-not-the-answer.html>> [↑](#footnote-ref-26)
27. Fresh Start: A Review of Canada’s Insolvency Laws <<https://www.ic.gc.ca/eic/site/cilp-pdci.nsf/eng/cl00882.html>> [↑](#footnote-ref-27)