Corporate Rescue Reanimated

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Abstract

The CIGA 2020 reforms designed to aid corporate rescue outcomes in the United Kingdom have had two significant effects. First, the implementation of the permanent measures contained in CIGA 2020 has further shifted the UK's insolvency framework towards a business rescue culture more associated with the debtor-in-possession model. Second, the introduction of a standalone moratorium along with the Part 26A restructuring plan has moved the focus further away from its traditional creditor-friendly approach to one that is pro-debtor. The extent and significance of both the creditor and debtor regimes and the policy direction created by CIGA 2020 is critiqued in this article.

Key words: insolvency; pro-creditor and debtor frameworks; Corporate Insolvency and Governance Act 2020

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1. Introduction

The Corporate Insolvency and Governance Act 2020 (hereafter "CIGA 2020") provides the UK's insolvency framework with a new mechanism to aid the restructure of debt via the Part 26A restructuring plan.[2] This new procedure is not merely designed to strengthen a pro-debtor approach to financial difficulties in the UK, but it also broadens the options in which corporate rescue outcomes can be achieved.[3] While the coronavirus pandemic in 2019 accelerated reforms in this area, the measures adopted were largely justified on wider commercial grounds to ensure that the UK's insolvency regime was both fit for purpose, and competitive, when compared with international practice. At the time when the potential reforms were being explored, much was made of how the UK's regime compared to other regimes worldwide as published by the World Bank,[4] and

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[2] The operative provisions are contained in the Companies Act 2006, inserted by Sch. 9 to the CIGA 2020.

[3] The CIGA 2020 agenda related to restructuring, which is often necessary to enable a corporate rescue outcome to be achieved, but it is not typically required to achieve a sale of the business on a going concern basis to a third party (a 'business rescue' outcome), see *Re DeepOcean 1 UK Ltd* [2021] EWHC 138 (Ch) at [49]. Instead, going concern sales to third parties should be pursued using the administration process under Sch. B1 of the IA 1986.

[4] The World Bank's Ease of Doing Business Report set global benchmarks that helped to develop law reform initiatives until it was discontinued in 2020 due to data irregularities and manipulation. The extent of these issues can be found in the report by international law firm WilmerHale, 'Investigation of Data Irregularities in *Doing Business 2018* and *Doing Business 2020*: Investigation Findings and Report to the Board of Executive Directors' (15 September 2021).

in comparison to the 2019 EU Restructuring Directive.[5] In response to these international developments, trade representative bodies argued that the UK remained competitive because its laws were able to readily evolve to meet such challenges due to there being a sympathetic legal framework that provided clarity, predictability and flexibility.[6] Nonetheless, in practice, competition in the insolvency industry had continued to increase, and despite the opinion of many insolvency practitioners ('IPs') that the UK's framework was adequate,[7] an comparable but enhanced restructuring tool in the UK was considered necessary.[8]

A recent review of the CIGA 2020 measures suggest that they have largely been welcomed by various stakeholders.[9] However, more recently, case law that concern Part 26A restructuring plans indicate that there is a need to re-assess the significance and impact of these measures on the debtor company and its creditors. On this point, this article aims to address two unresolved questions. First, with a focus on the Part 26A restructuring plan, to what extent has the CIGA 2020 rendered the UK's corporate rescue regime as pro-debtor. The significance of the creditor-friendly or pro-debtor distinction, while in practice can be overstated, still contains importance as regime classifications can broadly influence the development, and direction, of laws within an insolvency regime. The most obvious implications of this can be seen in regard to creditor or debtor interests, with the laws often designed to protect or diminish certain rights in accordance with the overarching objective(s) of the chosen regime. A such, the consequences of CIGA 2020 on corporate rescue, and its impact on both the debtor company and the creditors will be explored in this article.

Second, while a pro-debtor regime has the capacity to produce measures that may account for rescue outcomes, pro-debtor characteristics may alter *how* companies are rescued. Here, it is critical to note the different criteria that is required for the procedures to be utilised, with a distinction between insolvency and financial difficulties.[10] This is a significant observation to note, particularly if other rescue mechanisms co-exist within an insolvency framework that are more creditor orientated. To illustrate the implications that this could have on the UK's regime, along with the likely impact that this may have on creditor rights, a contrast will be made between the other rescue-orientated procedures contained within the Insolvency Act 1986, the Enterprise Act 2002 ('EA 2002'), and the Companies Act 2006.[11]

The article will conclude that while the UK's insolvency framework has become more identifiable as a pro-debtor regime, it still has, and will continue to have, creditor friendly tendencies due to its reliance on a credit-based finance system and its development of a comprehensive security regime.[12] The implication of this ensures that creditor interests may still be afforded wide

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[5] Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132 (Directive on restructuring and insolvency).

[6] BEIS, 'Insolvency and Corporate Governance: Government response', (26 August 2018), at 6.

[7] Ibid.

[8] See generally, P Walton and L Jacobs, 'Corporate Insolvency and Governance Act 2020 – Interim report March 2020' (published by the Insolvency Service 19 December 2022), part 2.

[9] See, The Insolvency Service's Post Implementation Review of the Corporate Insolvency and Governance Act 2020 (26 June 2023), section 2.

[10] J Payne, 'Debt restructuring in transition' (2023) 139 *L.Q.R.*, 101, at 116.

[11] While the scheme of arrangement under Part 26 of the Companies Act 2006 did not have to be utilised by an insolvent company, or result in rescue outcomes, the practice of restructuring debt through compromise often leads to rescue outcomes. See, S Payne, 'Debt restructuring in transition' (2023) 139 *L.Q.R.* 101; S Paterson and A Walters, 'Selective Corporate Restructuring Strategy' (2023) 86(2) *M.L.R.* 436.

[12] See, K Akintola, *Creditor Treatment in Corporate Insolvency Law* (Edward Elgar Publishing, 2020), pp.2-14.

consideration and protection even if the insolvency regime places prominence on the debtors' interests.

2. Characteristics of the creditor-friendly and pro-debtor regimes

Insolvency regimes, figuratively speaking, tend to follow either a creditor-friendly or pro-debtor approach. The labels are intended to be broad, but they do contain some distinctiveness. Some authors have construed the terms from an efficiency perspective,[13] while others have focused on the practical trade-offs that distinguish the regimes.[14] From a traditional perspective, a creditor-friendly regime is understood to encompass measures that permit the creditor to protect their interests that result from a debtor default, for example, by security or set-off. In essence, a creditor-friendly regime provides the platform for creditors to pursue their interests against the backdrop of losses that result from the debtor company. This is in contrast to a pro-debtor regime that conventionally tends to focus more on the debtor company and includes measures that could increase its assets available for distribution. Naturally, there is an overlap between the two since both regimes must focus on the debtor company as this is the root of where the financial difficulties arise. The type of regime that prevails is not always predetermined or fixed, since it may merely be the result of economic and legal realities, and as such choice may be an illusion in regime selection.

In a creditor-friendly regime, to protect creditor interests a sufficient penalty to the debtor company and its management is required to ensure that they refrain from excessive risk, and strategic default.[15] While the intent is to encourage, or rather discourage, reckless behaviour from directors that could harm creditor interests, it may instead have the opposite effect and lead to the financial distress of a company. This is because the company recognises that it is in a relatively weak position in comparison to the creditors, and as such the management may take measures that would either postpone insolvency by hiding the financial losses or increase cash flow through the sale of assets or by cuts to R & D investment and product quality.[16] Thus, it is evident that creditor orientated measures are not without fault and are capable of being counterproductive to creditor interests. It is plausible that such measures can exacerbate the scale of the insolvency, which may in turn provide creditors with the incentive to liquidate the company rather than restructure the debt. Yet, in instances where rescue outcomes are viable, the natural preference is to avoid needless liquidations; an objective that was highlighted in the CIGA 2020 reforms. Further, the implications caused by liquidations not only affect company creditors, but also that of society. It is within the creditor orientated regime that the broader issues that concern society and the insolvency framework itself can be assessed.[17] There are however limits to the extent that the broader societal implications associated with insolvency can be considered since there are practical issues with what can be done with scarce resources. As such, the focus often remains firmly on creditors with security.

In contrast, a pro-debtor regime tends to focus on the debtor company and measures that could increase its assets available for distribution. This type of regime heavily focuses on what can

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[13] A Franken, 'Creditor- and debtor-orientated corporate bankruptcy regimes revisited' (2004) 5(4) *E.B.O.L.R.* 645, pp. 653-656.
[14] See, PR Wood, 'Principles of International insolvency' (1995) 4(1) *I.I.R.* 94, pp. 96-98.
[15] M A McGowan and D Andrews, 'Insolvency Regimes and Productivity growth: A Framework for analysis' (2016) OECD Economic Department Working Papers No.1309, at 17.
[16] Ibid.
[17] PR Wood, 'Principles of International insolvency' (1995) 4(1) *I.I.R.* 94, at 96.

enhance the debtor's estate, but it is not entirely limited to this aim. These measures can include those of which promote corporate rescue, which can in turn benefit the unsecured creditors and also help safeguard jobs.[18] A pro-debtor regime expects creditors to contribute to the debtor's company survival; an act that may be detrimental to their own interests, beneficial to all, or the few.

The extent to which a jurisdiction is creditor-friendly or pro-debtor is largely suggestive since within individual insolvency frameworks it is possible for both regimes to permit all outcomes, some of which may be classified as pro-creditor or debtor. As such caution is needed since the labels can be misleading.[19] Besides this point, there are also other variables at play which can influence the type of insolvency regime. For example, jurisdictions that are associated with more rapid technological diffusion often indicate debtor-friendly bias.[20] This is because of the common risk associated with such industries, namely the speed in which technology advances and eclipses current models in relatively short timeframes, and as such these companies are likely to require debt restructuring devices or are at high risk of entering insolvency.[21] It is therefore crucial that the insolvency regime in place can deal with the issues prevalent in that jurisdiction. It is on this point that the creditor and debtor distinction hold importance as it can provide the basis on which policy objectives can be promoted and achieved. The classifications, even if broadly conceived, can help to dictate, direct, and shape the focus of a particular insolvency framework. It can determine which interests should be made prominent, and if necessarily, which can be impaired. It may also provide for outcomes that benefit both the debtor and creditors, despite the regime being classified as one or the other. For example, pro-debtor regimes tend to permit managers to stay in possession on commencement of an insolvency procedure. Yet while this may assist the interests of the debtor, it may also be beneficial to select creditors where there is a focus on 'payoffs' *ex post*. The exact payoffs are of course fact specific and would require further information on the conditions under which the managers stay on, and what control that the managers may continue to exercise. Only when this is known could the classification of a regime be determined to avoid instances of mis-classification.[22] To avoid this pitfall it is advisable to refer to suggestive classifications or tendencies within regimes rather than provide absolute labels.

In design, how these tendencies are determined is often decided on political grounds, with policies shaped to address the significant socio-economic conditions within a jurisdiction. As mentioned, CIGA 2020 was an example of where this occurred. The reforms required to address any creditor-debtor imbalance in the insolvency framework were significant and in response the changes needed to reflect this.[23] Outside of major events like a recession or a pandemic that may act as a catalyst to change, reforms can be instigated by culture, and general attitudes towards insolvency may change over time as seen from the treatment of debtors in the Victorian era, and the realisation that a discharge should be given more prominence.[24] That said, path dependency issues ensure that regime reform or the re-classification of a regime is exceptionally difficult to achieve since some

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[18] Ibid.

[19] A Gurrea-Martinez, 'Building a Restructuring Hub: Lessons from Singapore' (2022) *Singapore Management University School of Law*, Research Paper 16/2021, at 17.

[20] B Westmore, 'R&D, Patenting and Productivity: The Role of Public Policy', (2013) *OECD Economics Department Working Paper*, No. 1046.

[21] In accordance with s.123 IA 1986.

[22] S Franken, 'Creditor- and Debtor-Orientated Corporate Bankruptcy Regimes Revisited' (2004) 5(4) *E.B.O.L.R.* 645, at 650.

[23] BEIS, 'Insolvency and Corporate Governance: Government response', (26 August 2018), pp.8-9.

[24] For a detailed account of this period, see V M Lester, *Victorian Insolvency: Bankruptcy, Imprisonment for Debt, and Company Winding-up in Nineteenth Century England*, (OUP, 1995).

legal principles, typically those associated with creditor rights, are woven into the very fabric of the law.[25]

To alter the direction of a regime requires intent by the legislators to not treat the interests of creditors and debtors as equal. Debtor interest in this context is understood to be those associated with the company's shareholders insofar they are aligned with rescue outcomes that address the company's financial difficulties. While there will naturally be some balance between the interests, in the event of a conflict, or where the financial position is parlous, the creditors' interests are likely to dominate.[26] This is however subject to the exact nature of the financial difficulties. If the company is insolvent then a procedure like administration or a company voluntary arrangement may be appropriate since it may specifically deal with companies that are technically insolvent. If the company is in financial difficulties, but not necessarily insolvent, then the scheme of arrangement or the Part 26A restructuring plan may instead be applied. The distinction between these two financial positions is critical since each procedure prioritises interests slightly different as the next section of the article examines.

On this point, what is also important to note is that the approach across jurisdictions varies, and priorities for legal systems do change. Some jurisdictions like Singapore, Australia, England, Ireland, Germany, Netherlands, Sweden, and Switzerland have by tradition been creditor-friendly.[27] On the opposite scale, there is Greece, Spain, Portugal, most of Latin America, Belgium, Luxembourg, France, and many French former colonies. In the middle, where there is a slight preference for either regime, there is United States,[28] Canada, Austria, Denmark, South Africa and Italy. While there are some differences, it is also true that the same policy objective can be pursued but is implemented and developed on different features of creditor protection. For example, in civil law jurisdictions (France and Germany) the high level of protection for creditors has been formed by controls over the management of debtor companies, while in common law jurisdictions (UK and United States), a high degree of creditor protection has been pursued through secured creditors' contractual rights over company assets.[29] It has been suggested that the former position that strengthens creditors' control over the debtor company can have a better long-term positive effect on the expansion of private credit, while the latter tends to have a negative impact.[30] This distinctions is however not that straightforward since creditor rights may have to be altered for long term benefits to the company in the form of a corporate rescue strategy to emerge. On this basis the common and civil law distinction offers little in terms of results. Instead, what matters is the approach taken towards creditor protection and in what circumstances may creditor interests be varied. Variation as to what type of regime a jurisdiction wishes to promote recognises that creditor-debtor interests can be pursued irrespective of the legal system. It is also possible, to reiterate the point, that elements of both regimes may co-exist in the same laws. It is accepted that this may lead to conflicts, but it also presents flexibility within the legal framework, with preference for either the creditor or debtor

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[25] "[t]he roots of insolvency law are embedded deep in our legal, social and economic history." See K. Cork "Report of the Insolvency Law Review Committee: Insolvency Law and Practice" (1982) Cmnd 8558, at 14.

[26] This will be fact specific. See, *BTI 2014 LLC v Sequana SA* [2022] UKSC 25, at [81].

[27] Such jurisdictions because they are creditor-friendly are more inclined to embrace the notion of safe harbours, which can provide a financial institution with a considerably better position in insolvency. This can have implications on traditional security, see P Paech, 'The Value of financial Market Insolvency Safe Harbours' (2016) 36(4) *O.J.L.S.* 844.

[28] Often classified as a hybrid country, where well-defined laws and procedures exist for both liquidation (Chapter 7) and restructuring (Chapter 11).

[29] See, S Deakin et al., 'Varieties of creditor protection: insolvency law reform and credit expansion in developed market economies' (2017) 15(2) *Socio-Economic Review* 359.

[30] Ibid, at 376, 379-381.

dependent on the economic and legal circumstances. In this respect, the question that goes to the core of the creditor-friendly and pro-debtor debate is how strongly their respective interests are, and can, be pursued, and what significance does this have on how rescue outcomes are pursued. The answer requires the rescue orientated procedures prior to CIGA 2020 to be examined so that the impact of the Part 26A restructuring plan can be properly determined.

3. Rescue oriented procedures prior to CIGA 2020

To appreciate the impact of the Part 26A restructuring plan and the standalone moratorium in the wider context of assisting companies in financial difficulties, it is first necessary to understand the procedures that were available prior to CIGA 2020. This section will first examine administration as it provides for the traditional business rescue as a going concern under Schedule B1 of the Insolvency Act 1986. The second part will review the statutory mechanisms: company voluntary arrangement, and scheme of arrangement. The distinction between the mechanisms should be noted since they can result in similar outcomes but are reached in different ways. This is particularly important as the interests that are impaired may differ, a point that may alter the optics on which regime classification is dominate. After this section a review of the CIGA 2020 measures will take place.

3.1. Administration

Of the rescue procedures, administration has often been described as the most used,[31] and most effective.[32] This however does not mean that rescue is prevalent. In fact, few companies utilise the administration procedure in comparison to liquidation.[33] As such, it is more appropriate to describe administration as a successful rescue procedure that is applied only in limited circumstances. Reasons for this tend to concern procedural barriers and better alternatives being available for financially distressed companies. Before these are explored further, it is necessary to first contextualise the purpose of administration and how it operates in practice.

To determine whether administration is appropriate for the company, the court may appoint an administrator to oversee the process. [34] The appointment of an administrator is in fact a management displacement tool that is conventionally perceived as a creditor-friendly mechanism designed to ensure the creditors' interests are protected.[35] This may certainly be the case where a rapid sale to a third party is in the creditors' interests. The act of management displacement feeds into the general belief that managers are the reason why the company has failed, yet this is not always the case. In some instances, the removal of key managers could be detrimental to some of the creditors interests, particularly if this leads to further financial losses that in turn prevents alternatives to liquidation from being explored. In other cases where management have been left with some management power to assist the IP, it has effectively created a soft Debtor-in-Possession ('DIP') orientated approach to administration. Yet, it has been necessary in such cases to produce a protocol which develops the boundaries for the respective roles of management and the

[31] S Frisby, 'Of Rights and Rescue: A Curious Confidence?' (2019) 20(1) *J.C.L.S.* 1, at 10.
[32] S Ellina, 'Administration and CVA in Corporate Insolvency Law: Pursuing the Optimum Outcome' (2019) 30 *I.C.C.L.R.* 180, at 190.
[33] For example, in May 2023 there were 151 administrations, compared to 2,181 creditors' voluntary liquidations, and 189 compulsory liquidations. See Insolvency Service, Monthly Insolvency Statistics, May 2023.
[34] IA 1986, sch. 1.
[35] IA 1986, Sch B1, para 64 provides that management cannot exercise power without the consent of the administrator.

administrator.[36] That said, in practical terms, it is the administrator who remains fully in control and who must determine what can be done with the debtor company.

The key consideration for the administrator is to establish whether the company is or is likely to become unable to pay its debts as they fall due and would an administration order reasonably likely to achieve the purpose of administration.[37] In this decision, there is scope for broad discretion, but the judgment should still be based on commercial grounds.[38] These grounds do require the interests of creditors as a whole to be taken into account, but the extent to which this occurs is dependent on the circumstances, and which purpose of administration is pursued. The creditors, should they choose to do so, may petition for an administration order on the basis that the company cannot pay its debts,[39] but to determine inability to pay debts as stated in section 123 is not always easy to establish, nor does it necessarily mean that the creditors through administration will improve their position.

Once an administrator is appointed, it is the creditors' interests that predominate all considerations.[40] Yet there is also another matter that needs to be noted. The primary purpose of administration is to rescue the company as a going concern, but this may not be entirely compatible with the creditors' interests as a whole. Given that administration contains pro-debtor tendencies that encourage rescue strategies, it is plausible to suggest that it is also creditor-orientated given that rescue can offer protection to other type of creditors, such as those unsecured and employees. The overlap between the regimes reflective of the abstract nature of the principles contained in the Cork Committee's Report.[41] Given that the recommendations represented the first attempt to articulate a list of objectives that a modern insolvency framework should address, the efforts of the committee have become embedded in aspects of law reform since the Insolvency Act 1986.

One of those recommendations included the involvement of a qualified insolvency practitioner to oversee the administration. This remained in place post EA 2002, and like the court route, directors would be subject to the control of the administrator who would have the powers to deal with the company as they saw fit.[42] This inevitable raises several questions that concern the type of regime that the legislation and case law promotes. IPs are afforded broad discretion, which provides much leeway in their decision making.[43] This is further influenced by judge-made law despite judicial pleads to the contrary that it occurs.[44] Over time, this has created some challenges as judicial input

[36] See the consent protocol produced by Mark Phillips KC, William Wilson and Stephen Robins at South Square, 'Joint Administrators' Consent under Paragraph 64 of Schedule B1 to the Insolvency Act 1986', ILA <https://www.ilauk.com/docs/ILA.consent_.protocol_.17.April_.2020.V2_.pdf>.

[37] IA 1986, sch. B1, para 11.

[38] See, JM Wood, 'Insolvency office-holder discretion and judicial control' (2020) 6 *J.B.L.* 451-475.

[39] This is also relevant to an appointment out of court by the company or directors, see para 27 of Sch. B1, IA 1986.

[40] See, *BTI 2014 LLC v Sequana SA* [2022] UKSC 25, at [81], [176], [288]. See also, J Quinn and G Phillip*, 'The creditor duty post Sequana: lessons for legislative reform' (2023)* 23(1) *J.C.L.S.* 271.

[41] See Cork Report, para 198. Also see, JM Wood, *Interpretation and Value of Corporate Rescue* (Edward Elgar Publishing 2022) pp. 35-40.

[42] *Davey v Money* [2018] Bus LR 1903, para 255; *Moulds Fencing (Torksey) Ltd. and Others v John William Butler and* Another [2020] EWHC 2933 (Ch), at para 18. The standard of review has been recently supported by *One Blackfriars Ltd (In Liquidation)* [2021] EWHC 684 (Ch), at [249]–[250].

[43] Which may also be difficult for creditors to challenge, see JM Wood, 'Insolvency office-holder discretion and judicial control' (2020) 6 *J.B.L.* 451, at 451, 468.

[44] There is a major body of case law that has contributed to the development of key legal principles in insolvency law, such as *Ex parte James* (1874) LR 9 Ch App 609 (CA); *Bristol Airport v Powdrill* [1990] Ch 744; *Re*

in certain matters have recognised the limits of the law and created legal principles that exceed the scope of the insolvency legislation. Between the statutory provisions and judge-made law, the latter creation can run perpendicular, in others instances it may interwind with the legislation. The effect of this approach, while in some cases has brought some clarity to areas of law that lacked direction or were overly complex, has blurred the lines that define the characteristics typically expected to be present in the creditor-friendly and debtor dichotomy. This is evident in the EA 2002, which was promoted as a step towards a pro-debtor regime with the emphasis on corporate rescue, but the case law that has pursued has placed importance on creditors within that pursuit.

Further, given the entry options to administration as discussed above, a key reform contained in the EA 2002 reforms was to remove the need for the court to be involved. In its place, the administrator gained powers to place a company into administration if they were satisfied that one of the objectives of administration could be achieved.[45] If this objective threshold was satisfied, then the company would be issued with an automatic moratorium,[46] an important mechanism that prevents creditors from enforcing their security over the company's property or continuing with any ongoing litigation against the company and its property.[47] The moratorium is by design a pro-debtor mechanism that is often found in DIP regimes such as Chapter 11 in the US Bankruptcy Code. The usefulness of moratoriums in its ability to rescue companies was reflected in the CIGA 2020 reforms when a standalone moratorium was included. Originally, the Part A1 moratorium intended, when first proposed, to be similar to the moratorium in administration in para 43, schedule B1. Similarities between the two moratoria has led to suggestions that the administration moratorium may have untapped potential to be used as a restructuring tool.[48] However, given the development of the administration procedure, there is a credible argument to be made that it has historically not been viewed as a good vehicle to realise restructures,[49] and because of this it was necessary for a new moratorium to be specifically designed to promote corporate rescue.[50]

Designed to primarily rescue the company as a going concern,[51] the purpose of administration contains a hierarchy that includes two other potential objectives should the primary objective not be feasible. These include to achieve a better result for the creditors as a whole than would be likely if the company was wound up;[52] if this fails, the third objective is to realise assets and distribute to creditors according to priority status.[53] The latter objective is not concerned with corporate rescue or going concern plans, instead it largely imitates liquidation, and more broadly speaking administrative receivership. The purpose of administration with its three objectives therefore

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*Spectrum Plus Ltd (In Liquidation) [*2005] UKHL 41; *Re NT Gallager & Son Ltd* [2002] EWCA Civ 404; and *Re Nortel Networks SA (In Administration)* [2018] EWHC 1812 (Ch), to name but a few.

[45] IA 1986, sch. B1, para 3(1).

[46] IA 1986, sch. A1.

[47] IA 1986, s.251G(2). This also includes winding up petitions which would be dismissed, see IA 1986, sch. B1, para 37(3).

[48] For an excellent examination of this issue, see S Paterson 'Restructuring moratoriums through an information processing lens' (2023) 23(1) *Journal of Corporate Law Studies* 37.

[49] Ibid, at 62. Some of the issues concern the news of the administration as broadcasted by news outlets, and how this is then processed by stakeholders to determine the company's prospects and their own fate.

[50] Ibid. However, note the treatment of financial creditor claims, see K van Zwieten, 'Mid-Crisis Restructuring Law Reform in the United Kingdom' (2023) 24 *E.B.O.L.R.* 287.

[51] IA 1986, sch. B1, para 3(1)(a). There are variations as to the degree in which the company must remain whole for the objective of company rescue to be satisfied. See JM Wood, *Interpretation and Value of Corporate Rescue* (Edward Elgar Publishing, 2022), at 11, 127, 211, 213-214, 216-218.

[52] IA 1986, sch. B1, para 3(1)(b).

[53] IA 1986, sch. B1, para 3(1)(c).

contains distinct outcomes that are not concurrent. The hierarchical nature of para 3 of Schedule B1 illustrates how different philosophies can be promoted within the same regime. Company rescue aligns with characteristics associated with a pro-debtor regime given that it aims to protect or increase the asset value for the creditors, which may lead to the rescue of the company as a going concern.[54] Yet it is important to ensure the correct interpretation of the hierarchy and how it operates in practice. Para 3(3) requires the administrator attempt to achieve rescue, but this is subject to whether he or she thinks that it is not reasonably practical or that the creditors as a whole would do better under objective (b). This would dictate rescue is on the condition that the creditors' interests cannot be further maximised; a realisation that restrains the move towards a debtor-friendly regime.[55]

In cases where rescue is pursued this could also benefit unsecured creditors more generally since they have a greater chance of receiving payment if liquidation is avoided. This encroaches into creditor-friendly territory, but in situations where there is a conflict between secured and unsecured creditors, para 3(4) provides that the longer-term interests of the latter prevail over the short-term interests of the former.[56] This provision was an attempt to curb the main criticisms of administrative receivership, whereby floating charge holders may pursue their interests at the cost of other creditors. It has been noted that this does not necessarily prejudice floating charge holders financially as they would be no worse off than in a straight asset sale,[57] but this would be dependent on the costs of the process.

The better result for the creditors as a body can also include business rescue, but this does usually lead to significant business and economic changes to the company. Designed to be focused on the creditors usually means that this is predominately a creditor-friendly measure even if it does in practice lead to the sale of the business to a third party on a going concern basis. The last objective of administration concerns realising assets for distribution to creditors as a whole; a measure that mirrors liquidation and hence a creditor-orientated mechanism that protects the interests of secured creditors. However, in this objective, the interests of unsecured creditors are likely to be poorly addressed.

3.2. Company Voluntary Arrangements

Despite its practical nature, CVAs have not been frequently used, and in comparison to other procedures, they also have a high failure rate.[58] Reasons often attributed to the low uptake refer to the fact that rescue attempts occur in fewer than 10 per cent of administrations,[59] and administrators tend to favour a sale as a going concern of the company's business rather than a

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[54] In comparison to the Part A1 moratorium, it would appear that administration has much better liquidity-creating potential, see S Paterson 'Restructuring moratoriums through an information processing lens' (2023) 23(1) *J.C.L.S.* 37, at 56.
[55] S Frisby, 'In Search of a Rescue Regime: The Enterprise Act 2002' (2004) 67(2) *M.L.R.* 247, at 263.
[56] A McKnight, 'The Reform of Corporate Insolvency Law in Great Britain — The Enterprise Bill 2002' (2002) 17 *J.I.B.L.* 324, at 326.
[57] Because of the priority afforded by the security. See, S Frisby, 'In Search of a Rescue Regime: The Enterprise Act 2002' (2004) 67(2) *M.L.R.* 247, at 263.
[58] See, P Walton et al., 'A snapshot of company voluntary arrangements: Success, failure and proposals for reform' (2020) 29(2) *I.I.R.* 267, at 268. In the Insolvency Service, *A Review of the Corporate Insolvency Framework: A consultation on options for reform* (May 2016), it was identified that in 2014 there were 563 CVAs, of which 388 failed, equating to a failure rate of 60%.
[59] See A Katz and M Mumford, *Study of Administration Cases – Report to the Insolvency Service* (2006).

rescue of the company.[60] It is likely with the introduction of the new restructuring plan,[61] the usage of CVAs could be further diminished. This is particularly noted in *Houst Ltd*,[62] where it was noted that the plan proposed under a restructuring plan would not have been approved had it been a scheme of arrangement or a CVA. The secrecy afforded under the restructuring plan ensured the rescue of the company could be realised.[63]

That said, CVAs are still considered to hold enough practical importance for both the company and its creditors to be retained. The CVA comes into force at the point when the creditors approve a CVA proposal made in respect to the company. The proposal, which includes a review of the company's assets and liabilities,[64] is considered and voted on by the company's creditors by way of a number of permitted procedures,[65] but this does not include approval by deemed consent.[66] The approval of the CVA (or any modification of it) by the company's creditors requires a vote in favour of at least 75 per cent (by value) of the creditors who vote.[67] It is also required that no more than 50 per cent of creditors by value who vote against the proposal are creditors who are unconnected with the company. While it is inevitable that some interests are not addressed, from a practical viewpoint to do otherwise would likely defeat the CVA since there are likely to be disgruntled creditors who not happy with a proposed outcome.[68] Furthermore, a CVA recognises that rescue is dependent on the alteration of pre-existing legal rights and as such trade-offs are expected so long as the terms of the agreement are reasonable. While this is dependent on the secured creditors, should they approve the CVA it is likely to also benefit the broader creditor interests associated with the company, such as the employees, suppliers, and the general unsecured creditors. Consideration to the wider creditors provides for some creditor-orientated reflection, but it should be noted that this benefit is a by-product of what is realised from the application of a pro-debtor mechanism.

However, a CVA does not provide a company with automatic protection against creditor action, which often limits pro-rescue objectives. Instead, the usual practice was to apply for a small company moratorium,[69] or if the company did not satisfy the criteria for this, then it would use administration as a vehicle in which a CVA could be achieved. This approach has changed as the practical implications of CIGA 2020 led to the repeal of the small company moratorium,[70] with the introduction of a new standalone moratorium. Arguably, this has gone some way to address the concerns that the lack of an accessible moratorium had the potential to hinder rescue options for the debtor company. The moratorium has broad application and would only come to an end when a company entered a restructuring plan or a scheme of arrangement or when a voluntary

[60] See IA 1986, Sch B1, para 65; and *Re CHE Realisations Ltd* [2005] EWHC 2400 (Ch). It is worth noting that events like the pandemic may have made the possibility of selling the business as a going concern very difficult and therefore not viable, see *Taylor Pearson (Construction) Ltd (In Administration)* [2020] EWHC 2933 (Ch).
[61] Discussed below.
[62] [2022] EWHC 1941 (Ch).
[63] See, Insolvency service, 'Corporate Insolvency and Governance Act 2020 – Final evaluation Report November 2022 (19 December 2022), at 4.2.4.2.
[64] The Insolvency (England and Wales) Rules 2016, r 2.3.
[65] See IA 1986, Part 1, s.4.
[66] See IA 1986, Part I, s.3(2).
[67] However, see *Nero Holdings Ltd* [2021] EWHC 2600 (Ch) discussed below.
[68] A CVA cannot affect the right of a secured creditor to enforce its security, except with its consent, see s.4(3), IA 1986.
[69] IA 1986, Sch. A1.
[70] CIGA 2020, Sch. 3, para 2 with effect from 26 June 2020.

arrangement has been implemented,[71] or if the company entered administration or liquidation.[72] While in theory the moratorium could increase the use of CVAs,[73] the introduction of the restructuring plan, which is examined in the next section, has likely hindered this possibility.

This is not to say that there are no concerns associated with the new moratorium. For example, protection is provided for creditors of unpaid moratorium debts and priority pre-moratorium debts,[74] where the company had no payment holiday during the moratorium, in a subsequent CVA that occurs within 12 weeks of the moratorium being granted.[75] Yet, such protection would mean that the holders of such debt have a veto right in respect of the CVA as neither the company nor the creditors may approve a CVA unless these debts are paid in full (unless the creditors consent).[76] The creditor-orientated measures here have wide implications that could sideline rescue attempts, and lead to companies needlessly failing.

Despite these measures, recent case law has provided scope on how far the pro-debtor objective of rescue should be pursued. The position has been clear for some time that the duration of a CVA should not be extended if it is clear that it would be unattractive to do so.[77] More recently, in *Re TXU Ltd (In Administration)*, it was made clear that supervisors would be permitted to bring a CVA to an end, particularly if it was clear that the longer the CVA continued, the less money would be available to creditors.[78] It would seem that the pro-rescue option does have limits, and this case would suggest that there is a benchmark set where the benefit of the CVA begins to dimmish. This in practice would act as a trigger point whereby measures are taken by the supervisory to terminate the CVA. To establish this may be difficult in certain circumstances, but there has been some assistance on this in cases that relate to the rights of landlords under commercial leases. In *Lazari Properties 2 Limited,* the courts inferred that a CVA would not be invalid on the premise of its differential treatment to landlords.[79] Prior to this case there had been the assumption that to interfere with the landlords' rights, a CVA would likely fail and so a safer route would be in the form of a Part 26A restructuring plan. Given that this is unlikely now to be the case, it may act as a turning point to convince debtors to pursue CVAs.[80] Conversely, in *Carraway Guildford (Nominee A Ltd)*, the court was asked to revoke a CVA on the grounds that it was unfairly prejudicial to landlord creditors in leaving its shareholder unimpaired.[81] Nevertheless, a closer inspection of this case shows that the outcome had not only little significance given that the CVA had already been terminated in 2019, but

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[71] IA 1986, Part A1, s14.

[72] IA 1986, Part A1, sA16.

[73] This is further enhanced as a monitor appointed during a moratorium is not prevented from taking a subsequent role as supervisor to a CVA, see IA 1986, Part A1, ssA14 – A16. See also, S Paterson 'Restructuring moratoriums through an information processing lens' (2023) 23(1) *J.C.L.S.* 37, at 55.

[74] CIGA 2020, para 4 of Sch. 3. Pre-moratorium debts are defined in IA 1986, s.174A.

[75] Also applied to administration or liquidation.

[76] IA 1986, Part A1, s4A.

[77] Similarly, liquidators need not refrain from taking steps in a liquidation just so that they could wait for contingent claims to crystallise, see *Re Danka Business Systems Plc (In Liquidation)* [2013] EWCA Civ 92.

[78] See *Re TXU Ltd (In Administration)* [2021] EWHC 758 (Ch), where the court directed that a CVA that had been in place for 16 years could be ended without a reserve for contingent personal injury and pension claims.

[79] *Lazari Properties 2 Limited & Ors v New Look Retailers Ltd & Ors* [2021] EWHC 1209 (Ch), see Zacaroli J.

[80] Ibid. While the case did not concern a Part 26A plan, parallels were drawn between the two regimes. Two days after this decision, Snowden J in *Re Virgin Active Holdings Ltd and other companies* [2021] EWHC 1246 (Ch), sanctioned a restructuring plan under CA 2006, Part 26A that crammed down the rights of certain landlords.

[81] *Carraway Guildford (Nominee A) Ltd and others v Regis UK Ltd and others* [2021] EWHC 1294 (Ch), at [183].

also the grounds for challenge were specific to certain clauses in the CVA that do not often feature in other CVAs.[82]

The debtor and creditor division has often been blurred in a CVA, and this was highlighted in *Nero Holdings Ltd*,[83] which held that it was permissible to modify a CVA which was on the brink of approval by creditors. It may be the case that these types of cases are to be viewed under special circumstances since they collectively suggest tenants of commercial premises have been afforded unprecedented protection against landlord action. Yet, it is worth noting the obiter comments, which suggest that the presence of an investor with a stake in the outcome would not be judged as an "illegitimate collateral purpose".[84] Thus, it is likely that future cases between landlords and third parties seeking to acquire a distressed asset or business will not automatically be obstructed by the courts. Outside of this type of case, such outcomes are likely to also assist the recovery of businesses since the focus will be on the going concern value.

3.3. Scheme of arrangement

Under Part 26 of the Companies Act 2006, a scheme of arrangement is a statutory mechanism designed to help companies make a compromise or arrangement with its members or creditors, or any class of them.[85] A legislative review of the scheme reveals little about the exact subject matter, but it is understood to be broad enough to encompass anything that the company and its creditors or members may agree. Designed to assist companies in its efforts to restructure its business, the company need not be insolvent to resort to the scheme, and it can also be used for mergers or demergers should court sanction the plan. Similar to the Part 26A restructuring plan, the scheme displays pro-debtor characteristics insofar it permits measures that are taken to protect the value of the business. This is however subject to the several conditions that need to be satisfied before the court modify creditors' interests.

One such consideration is the voting process. Unlike the process that takes place with the restructuring plan, in a scheme the creditors and/or members are divided into classes, which reflect the similarity of the rights which are to be varied or released by the scheme, and the similarity of the rights which they are to be granted (if any). Uneven treatment of creditors is likely to emerge amongst the non-financial unsecured creditor class, and this will likely lead to the scheme being defeated unless the statutory majority in each class (75 per cent by value of those present and voting) support the proposal. Should this be achieved then the scheme will be sanctioned by the court. [86] The extent to which creditors can control their impairment naturally varies, but those creditors that will have their rights altered do have some input into the scheme's fate when compared to some other procedures.[87] That said, not all creditors and/or shareholders may be included in the scheme;[88] a matter that would leave some creditors unimpaired. The difference between the treatment of those included in the scheme, and those outside may influence the vote in terms of whether it is accepted or rejected.

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[82] The CVA was revoked on the basis that treatment of an impaired intercompany loan as a "critical creditor" which was not compromised by the CVA was not justified given that the claims of other impaired creditors (for example, landlords) were being compromised. See *Carraway Guildford (Nominee A) Ltd,* at [160].
[83] [2021] EWHC 2600 (Ch).
[84] [2021] EWHC 2600 (Ch), paras 329-338.
[85] CA 2006, ss. 895-899.
[86] *Re Hawk Insurance Co Ltd* [2001] EWCA Civ 241; [2002] BCC 300.
[87] S Paterson and A Walters, 'Selective Corporate Restructuring Strategy' (2023) 86(2) *M.L.R.* 436, at 442.
[88] *Sea Assets v Perushaan Penerhanagen Garuda Ltd* [2001] EWCA Civ 1696.

The scheme must be fair, reasonable and represent a genuine attempt to reach agreement between company and its creditors and/or members. Naturally, what is fair, reasonable and genuine will be fact specific, but the courts will need to be satisfied that the compromise does provide some form of compensation for the creditors (and every class of creditor or member)[89] to agree to the scheme that alters their rights. Should a scheme simply expropriate the rights of members or creditors, then this would not constitute a compromise or arrangement with the company.[90] In essence, there needs to be a demonstration of intent from the debtor that the creditors' rights in the proposed scheme is contained in a valid compromise.[91] To help determine this, the court has the discretion to look at the wider context of the agreement,[92] but the relevance of the wider context is not concerned with whether voting classes are properly constituted.[93] The court insofar it can use its discretion to determine whether a scheme is fair,[94] it is not within its power to assess whether the best proposal has been suggested since competing valuations are likely to be evident.[95] All that appears to be required is that the consideration payable is modest.[96]

If the court is satisfied that the proposed scheme has a chance of being approved, and the proposed voting classes are correctly constituted, the court will then order meetings of the relevant class(es) of members and /or creditors to be convened. The review of all relevant documents by the judge is of critical importance, with it a possibility that if they are not all read then this may prevent the approval of the scheme.[97] What is assessed varies, but the court will be focused on whether creditors had sufficient information to reach an informed decision,[98] and did the company engage with the different groups of creditors.[99] Since the principle of majority rule applies, what the majority group votes for, follows through, and as such much will be made about how transparent the proposal was and were the effects on the creditors outside of the scheme sufficiently known to allow the scheme creditors to make an informed decision.[100]

With these issues in mind, what makes the scheme particularly pro-debtor is that a scheme of arrangement is rarely pursued by a debtor unless there is high confidence that the statutory majority in each voting class will be achieved. Should there be uncertainty as to whether the scheme would be supported by the creditors, the company would turn to the cross-class cram down powers contained in the Part 26A restructuring plan. It is because of this recent procedural option that permits certain dissenting creditors to be out manoeuvred, that strengthens efforts to rescue companies, even if that

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[89] *Re Project Lietzenburger Strasse Holdco S.A.R.L.* [2024] EWHC 468 (Ch), at [50].
[90] *Re NFU Development Trust Ltd* [1972] 1 WLR 1548, at 1555. If creditor rights were cancelled with no compensation, the court has no jurisdiction to sanction a plan (applicable also to the scheme), see *Re AGPS Bondco plc* [2024] Civ 24.
[91] *Re Bluebrook Ltd* [2009] EWHC 2114 (Ch), at [72]-[75].
[92] *Re Uniq plc* [2011] EWHC 749 (Ch), at [47]-[48].
[93] *Re Noble Group Limited* [2018] EWHC 2911 (Ch), at [82].
[94] This can also include questions of artificiality, where the scheme company has been newly formed to take on third party liabilities. See, *Re Port Finance Investment Ltd* [2021] EWHC 378 (Ch).
[95] However, see *AGPS BondCo Plc* [2024] EWCA Civ 24, at [160], and [173]-[181], where it was suggested that the court could inquire how value sought to be preserved or generated by the plan, over and above the relevant alternative, to be allocated between those different creditor groups. This information could then be used to determine whether a fairer or better plan might have been available. In practice, the focus is likely to be on whether the dissenting creditors would be out of the money in a relevant alternative, see *Hurricane Energy plc* [2021] EWHC 1759 (Ch).
[96] *Re Project Lietzenburger Strasse Holdco S.A.R.L.* [2024] EWHC 468 (Ch), at [192]; *Re AGPS Bondco plc* [2024] Civ 24, at [277].
[97] *Re Zlomrex International Finance SA* [2013] EWHC 4605 (Ch).
[98] *Re Heron International* [1994] 1 BCLC 667, at 672-673.
[99] *Re Sunbird Business Services Ltd* [2020] EWHC 2493 (Ch); [2020] Bus LR 2371, at [23], [103]-[123].
[100] S Paterson and A Walters, 'Selective Corporate Restructuring Strategy' (2023) 86(2) *M.L.R.* 436, at 443.

results in the impairment of specific creditor interests. We will however see in the next section, that the restructuring plan should not be viewed as an isolated attempt to support pro-debtor policies, but rather it represents a more general shift in the approach for insolvency law to follow.

4. The Corporate Insolvency and Governance Act 2020

CIGA 2020 introduced both temporary and permanent measures, with the former designed to specifically assist companies in dealing with financial problems related to the coronavirus pandemic. After the temporary measures ceased, attention turned firmly to the permeant measures.[101]

4.1. The standalone moratorium

As first mentioned above, the standalone moratorium is designed to operate as a "beathing space" for eligible companies to ensure that creditors cannot pursue rights against the company while the directors of the company devise a plan to alleviate its financial problems.[102] At first appearance, the moratorium is similar in substance to the one that is available in administration, except that this is a standalone option for a company.[103] During this period, the company benefits from a payment holiday in respect of certain debts falling due before and during the moratorium period, whilst also restricting the initiation of insolvency proceedings, enforcement of security and other legal proceedings such as forfeiture by landlords. Yet, the lack of a payment holiday in relation to financial creditors is seen as a weakness that may require further reforms.[104] Further concerns are also noted on the alteration of debt priorities in any subsequent insolvency procedure, and how this may act as a disincentive to use moratoriums. The complexity of assessing debts and what falls within the definition of "financial contracts" is also noted as a potential barrier to the measure.[105]

The standalone element of the moratorium is a crucial component of the new procedure as it may act as a gateway for rescue to occur through other procedures that previously did not evoke an automatic moratorium.[106] Here, a Part 26A restructuring plan can now be formulated without the concern that creditors may initiate an insolvency procedure. This is also applicable to a CVA, which had previous only have access to a moratorium if it was classified as a small company for the purposes of the small company moratorium.[107] To what extent the new moratorium will be used remains to be seen since the uptake so far has been limited with only one notable case.[108] There are concerns that the moratorium may be interpreted as a negative signal by suppliers, employees and customers, who may assess the chances of a restructuring as slim and one that may lower the

[101] Suspension of serving statutory demands ceased September 2021; restrictions on winding-up petitions where unpaid debt is due to Covid-19 ceased in March 2022 (modified rules applied); suspension of wrongful trading rules ceased in June 2021.
[102] For eligibility, see IA 1986, Sch. ZA1. For regulated companies, see s.A49.
[103] Insolvency Act 1986, s.A6(1)(d) and (e).
[104] Insolvency service, 'Corporate Insolvency and Governance Act 2020 – Final evaluation Report November 2022 (19 December 2022), at 4.3.
[105] ibid, at 4.3.1, 4.3.4.2.
[106] The development of a modular system, whereby the moratorium is not automatic, indicates that insolvency and restructuring are distinct. This can be useful as it provides wide flexibility for debtors, see J Payne, 'Debt restructuring in transition' (2023) 139 *L.Q.R.*, 101, at 116.
[107] The small companies optional CVA moratorium in Sch. A1 to the IA 1986 was immediately abolished by CIGA 2020 and replaced by a new Part A1 moratorium.
[108] *Minor Hotel Group MEA DMCC v Dymant*; *Re Corbin & King Holdings Ltd v Dymant* [2022] EWHC 340 (Ch).

confidence in their relationship with the debtor after the restructuring.[109] As such, moratoriums may be held off until the benefit of moratorium protection is crucial to the debtor company, and the worries associated with negative signals are outweighed by the need to stabilise the situation.[110] Whatever signals it may project, it appears to be clear that the moratorium is primarily designed to benefit the debtor company, since it intends to facilitate the rescue of a company as a going concern.[111] This is however conditional that the moratorium proposal satisfies the litmus test; in other words, the plan shows that the company is likely to be rescued as a going concern. Should this threshold be met, which provides a higher bar than the “real prospect” test found in administration,[112] then the directors of the company can expect the monitor (appointed IP) to consent to the moratorium proposal and for the court to make that order. In practice, this has caused concerns amongst IPs who have expressed worry about the reputational risk of acting as a monitor in cases where rescue is not subsequently achieved.[113] The threat to reputation could negate rescue attempts, particularly in cases where the proposal suggests a marginal success. In such instances, the moratorium may be defeated.

In response to the concerns that some companies prior to the CIGA 2020 may have or could fail since they did not have access to a moratorium, concerns remain how effective the moratorium has been and whether it would deliver the policy objective of promoting a genuine rescue culture.[114] These apprehensions have been examined elsewhere,[115] with a key issue on whether DIP mechanisms of this type have any meaningful impact on business rescue.[116] To answer this question, the focus will be firmly on the success of the new Part 26A restructuring plan since the moratorium is likely to be used as vehicle for such plans.

4.2. Part 26A restructuring plan

The new Part 26A was inserted into the CA 2006 entitled “Arrangements and reconstructions for companies in financial difficulty”.[117] While the restructuring plan should aim to reduce, eradicate, limit, or mitigate the financial difficulties of a company, this should be expansively construed.[118]. The broadness of what can be included in a Part 26A plan is only kept in check by the need to ensure that

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[109] S Paterson ‘Restructuring moratoriums through an information processing lens’ (2023) 23(1) *J.C.L.S.* 37, at 46.
[110] Ibid.
[111] At the expense of creditors, who have their rights curtailed. For a full examination on this, see A James, ‘Curtailment of individual rights by statutory moratoria’ (2023) 22(2) *J.C.L.S.* 1017.
[112] See *Re Gove Independent School Ltd* [2023] EWHC 2546 (Ch). The case provides the comparison of two outcomes (a moratorium and a liquidation), and if it is likely, on the balance of probabilities, a moratorium would be better for unsecured creditors, then the court may make the order. It remains to be seen whether the narrow focus on unsecured creditors will be followed by subsequent judges.
[113] Insolvency service, ‘Corporate Insolvency and Governance Act 2020 – Final evaluation Report November 2022 (19 December 2022), at 4.3.3.
[114] Note the shortcomings in the final CIGA 2020 report, already noted in this article.
[115] See JM Wood, ‘Creative destruction and the post COVID-19 economy: a critique of the (un)creative rescue value contained within the permanent CIGA 2020 reforms’ (2023) 3 *J.B.L.* 197, pp. 201-205.
[116] Although it has been argued that directors remaining in charge during the moratorium can contribute to a successful restructuring, see S Paterson ‘Restructuring moratoriums through an information processing lens’ (2023) 23(1) *J.C.L.S.* 37, at 48.
[117] CIGA 2020, s.7 of and Sch. 9.
[118] *Re Virgin Atlantic Airways* [2020] EWHC 2191 (Ch), at [39].

a compromise is properly reached between the company and its creditors,[119] and that the agreement does not contravene any legal principles.[120] The pro-debtor tag applied to restructuring plans is ambiguous since there is no requirement that the plan seeks to preserve the company as a going concern.[121] What is required is that the court must be satisfied that the jurisdictional requirements of s.901A of the CA 2006 are met.[122] In practice, this requires the purpose of the compromise or arrangement to be to address the 'effect of the financial difficulties', and these are the difficulties that affect the ability of the company to carry on business as a going concern. It should be noted that the compromise or arrangement has a low jurisdictional threshold and case law suggests that any evidence of a compromise arrangement, however minimal, is likely to suffice for this purpose.[123]

The plans can be complex and have previously included those designed to effect a debt-for-equity swap whereby the secured lenders would take ownership of the group in exchange for the reduction of their secured indebtedness.[124] Such plans are not only time consuming, but expensive, which has the potential to undermine the accessibility of this procedure to SMEs.[125] In terms of ambiguity as to which regime the Part 26A restructuring plan reflects, the plan requires both the involvement of creditors in a convening hearing (first stage),[126] and the courts to sanction a proposal, with 75 per cent majority in value for each voting class required.[127] There is however an important exception that separates the Part 26A plan with that of the Part 26 scheme. While the self-alteration of the creditors position may indicate a creditor-friendly element, the Part 26A plans permit the "cross-class cram down", which binds dissenting creditors or members even where the 75 per cent threshold has not been agreed.[128] In regard to how well a plan has been received, the level of support has been rejected as a relevant factor in exercising discretion to cram down.[129] This suggests that the majority threshold is the only consideration that needs to be met, and as such it does not intend to place further obstacles in the way of potential rescue outcomes. The cross-class cram

[119] Which should apply to every class of creditor or member to who it is directed, see *Re Project Lietzenburger Strasse HoldCo Sarl* [2023] EWHC 289 (Ch), at [50].

[120] See *AGPS BondCo Plc* [2024] EWCA Civ 24, which is examined below.

[121] *Re DeepOcean 1 UK Ltd* [2020] EWHC 3549 (Ch).

[122] The four conditions are: company is liable to be wound up under IA 1986; company has encountered or is likely to encounter financial difficulties that are or may affect its ability to carry on business as a going concern; there must be a compromise or arrangement proposed between the company and its creditors, or a class of them; the company must consent and agree to enter the relevant scheme. The fourth condition was noted in *NGI Systems & Solutions Limited v The Good Box Labs Co Ltd* [2023] EWHC 274 (Ch) [2023] EWHC 274 (Ch), at [49].

[123] *Re CB&I UK Ltd* [2024] EWHC 398 (Ch), at [86].

[124] The companies form part of the Lifeway Groups. The matter was decided in *Re Listrac Midco Ltd and other cases* [2023] EWHC 460 (Ch).

[125] It is however possible on commercial urgency grounds to convene meetings despite the absence of sufficient notice of the convening hearing being given to plan creditors. If creditors could have made enquiries of the court as to the precise place and time, then this would suffice. See, *Project Verona Ltd* [2024] EWHC 1261 (Ch), at [19].

[126] CA 2006, s.901C.

[127] CA 2006, s.901F. The court's functions at the sanction hearing are noted by Miles J in *Re Project Lietzenburger Strasse HoldCo Sarl* [2023] EWHC 289 (Ch), at [27].

[128] CA 2006, s.901G.

[129] Snowden LJ rejected the notion in *AGPS BondCo Plc* [2024] EWCA Civ 24, at [138], thereby disagreeing with the judgments made by Trower LJ in *ED&F Man Holdings Ltd* [2022] EWHC 687 (Ch), at [50] and also Johnson J in GAS, at [110], which had relied on the decision in *Re DeepOcean 1 UK Ltd* [2020] EWHC 3549 (Ch). According to Snowden LJ, GAS had misinterpreted *DeepOcean* as authority that a strong overall support for a plan could be an important discretionary factor (at [142] and [147]).

down in this sense is recognised as a pro-debtor mechanism designed to stop malicious intentions undertaken by investors to disrupt the company, yet in practice it is not that simple. The impact on intercreditor dynamics and the attention creditor interests are afforded due to the cross-class cram down has shown the complexity of dealing with competing interests, and this is reflected in the judgments of recent case as discussed in this section.

The application of this provision only applies where the investors will be no worse off under the plan, and where another class of investors that would have a "genuine economic interest" in the company even if the plan did not proceed approves the plan.[130] The assessment to determine whether a creditor or member is "out of the money" could cause disputes, but it is considered a necessary pro-debtor mechanism in that it allows for the troublesome creditors to be excluded from meeting to vote on the proposed plan.[131] Yet, recent case law has shown that the courts may refuse to approve a restructuring plan where the debtors sought to cram down HMRC as a dissenting class.[132] The critical consideration in these cases would appear that HMRC was actively opposed to the restructuring plan and as such the court in *Nasmyth Group Ltd, took* notice and used its discretion, cautiously it may be added, despite that no member of a dissenting class would be any worse off.[133] In contrast, the court found in *The Great Annual Savings Company Ltd ('GAS'),* that the plan failed the "no worse off" test, and as such had not discharged the burden of showing HMRC would not be any worse off the plan. The court added, if it had passed, it would have used its discretion to decline approval because the arguments were not sufficiently robust, particularly in the valuation of the company's principal asset.[134] In that respect, the court has the capacity to enquire when looking at the benefits of the restructuring surplus, whether a fairer or better plan might have been available.[135] Nevertheless, as a matter of law the court does not have to be satisfied that the plan is the best plan or that it could not be fairer;[136] the test is whether an honest creditor looking after their own interest might reasonably approve.[137]

In situations where compromise is required there are expected to be conflicts amongst creditors as to whether a plan is fair. In the cases of *Nasmyth* and *GAS,* both judgments thought that the plans were unfair to HMRC.[138] The weight given to the objections raised by HMRC will be crucial, and this will tend to be considerable given HMRC's role as the collector of taxes. The objections are expected to be well supported with robust evidence, and the court will be on notice to watch out for any abuse of the process, and not sanction plans that attempt to use Part 26A to avoid unpaid tax bills. Given the courts willingness to hear challenges from HMRC there is a concern that a vocal HMRC

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[130] CA 2006, s.901G(5).
[131] *Re Smile Telecoms Holdings Ltd* [2022] EWHC 387 (Ch).
[132] *Nasmyth Group Ltd* [2023] EWHC 988 (Ch); and *The Great Annual Savings Company Ltd* [2023] EWHC 1141 (Ch).
[133] *Nasmyth Group Ltd* [2023] EWHC 988 (Ch), at [132].
[134] *The Great Annual Savings Company Ltd* [2023] EWHC 1141 (Ch), at [138]. This follows the decision in *Hurricane Energy* [2021] EWHC 1759 (Ch).
[135] In *C-Retail* [2024] EWHC 1194 (Ch), at [9], it was stated that the court does not seek to distinguish between the different approaches for schemes and restructuring plans that do not include cross-class cram down and restructuring plans that do seek approval on that basis. Yet, in *AGPS BondCo Plc*, at [173]-[181], guidance was provided on the different approach of fairness in cross-class cram down cases, relating to the appropriateness of considering whether a fairer plan is available. This may however merely be the result of the judge summarising the general position.
[136] *AGPS BondCo Plc* [2024] EWCA 24 (Ch), at [203].
[137] *C-Retail* [2024] EWHC 1194 (Ch), at [9].
[138] In the decision in *The Great Annual Savings Company Ltd*, it was made clear that "fairness" was the main area of dispute. See, at [98].

who opposed a plan could disrupt viable rescue plans. Based on practicalities, this possibility is likely to be a rare occurrence for two reasons. First, HMRC will consider its options and may conclude that it has a better chance of recovery if it offers support to companies to restructure, particularly in cases where they believe that the company has a realistic chance of succeeding. Second, recent case law illustrates that the court is prepared to use its cross-class cram down powers even in instances where there are objections raised by HMRC.[139] But it should be noted that this will be only in exceptional circumstances.[140]

On the use of judicial discretion, one such case can be seen in the recent and highly significant decision of *AGPS BondCo Plc* (otherwise referred to as Adler).[141] Here, the Court of Appeal set aside the restructuring plan sanction order made by the High Court in the previous year.[142] It was an unusual restructuring plan where no debt was written off and the relevant alternative was a straight liquidation, as opposed to a different restructuring plan or sale process. There are many aspects to this case, not all of which can be examined here, yet a standout issue was the court's unwillingness to sanction a plan because it departed in a material respect and without justification from the scheme of *pari passu* distribution to noteholders that would have applied in the relevant alternative.[143] This is not to say that all parties should be treated equally. Nor is it a requirement that creditors be treated in line with what their rights would be in the relevant alternative. Instead, the requirement is not for priority in the relevant alternative to be perfectly mirrored under the plan, but for departures to be justified.[144]

Because of the lack of reasoning for the departure, the judge in Adler could not use his discretion under s.901F and s.901G to impose the plan on dissenting noteholders.[145] In one respect this decision may indicate that the courts are now actively looking to reduce the scope of what can be achieved with the restructuring plan. This may be useful as it helps to create greater certainty as to how the plans will be utilised. That said, the increasingly burdensome nature of satisfying the detailed information requirements and the costs has the potential to make restructuring plans less appealing. This is particularly so since there is a requirement to show that creditors have information on the total benefits of the plan and as such disclosure will be an important consideration.[146] Thus, estimates are unlikely to satisfy the information threshold as it would not project the real expectations.[147] Given these challenges, it is likely that SMEs will come to favour other procedures, while the larger companies with the necessary finances may be able to justify the costs.

Another issue that has persisted is that of the secured creditors, who have seen their position strengthen, particularly in cases where the value breaks in the secured debt, at the cost of out-of-the-money creditors; namely, those who are not considered essential to the company's ongoing business. In the above cases, HMRC have recognised this predicament and have made efforts to distinguish their position from that of other creditors. As a creditor, there is a need to avoid being categorised as irrelevant to the company's ongoing business, yet in a Part 26A plan it should be appreciated that the shareholders, who would traditionally be out-of-the-money, are often in a

[139] *Re Prezzo Investco Ltd* [2023] EWHC 1679 (Ch), at [74].
[140] G McCormack, 'The UK restructuring plan (RP) in an age of uncertainty' (2024) *J.B.L.* 438, at 452.
[141] [2024] EWCA Civ 24.
[142] *AGPS BondCo Plc* [2024] EWCA 24 (Ch).
[143] Ibid, at [189]-[238].
[144] Ibid, at [165]-[172].
[145] *AGPS BondCo Plc*, at [280].
[146] *Project Verona Ltd* [2024] EWHC 1261 (Ch), at [32].
[147] Ibid, at [36].

stronger negotiating position than unsecured creditors as they, as the company, must approve any Plan.[148]

Despite the position that secured creditors generally enjoy, they could be part of a class of unsecured creditors in situations where the security is insufficient to cover the claim and so the deficiency may be subject to a compromise.[149] Also, a creditor meeting that was attended by a single creditor or no-one would suffice, a move designed to assist pro-rescue strategies.[150] Yet, it is important that this change is viewed in context since it is well noted that creditors tend to be disengaged, and previous efforts have been taken to address this some years ago, as seen in the Insolvency Rules 2016 and the "deemed consent" notion.[151] Further, the Part 26A restructuring plan can be used as an exit from administration, a route that promotes going concern interests, and hence a pro-debtor regime.[152]

More recently, the court has shown that it would sanction restructuring plans in respect to companies which were part of a group if the conditions in s901G of the Act had been satisfied.[153] Where consent was not given by the company in respect of the restructuring plan,[154] the court can direct administrators to provide the necessary consent;[155] a measure that acknowledges the creditor-led usage of a restructuring plan, and one that permits administrators of a company to pursue the primary objective of administration with a greater degree of consistency, thus encouraging the corporate rescue regime in the UK and giving effect to the policy drivers behind CIGA 2020.

5. Rescue regime re-classified?

An examination of the CIGA 2020 procedures demonstrates that the UK's regime does not fit neatly into a creditor or debtor classification. This should not come as a surprise given that a singular approach would create an over simplistic view of what is a highly sophisticated insolvency framework. A view of the prevailing case law has solidified this position, along with the influence of three major factors.

First, a review of the procedures available prior to CIGA 2020 to deal with insolvency and financial difficulties illustrate how the creditor-friendly and pro-debtor narrative developed organically. This resulted in a belief that they could co-exist, but perhaps more crucially, it also provided the platform for the suggestion that the creditor-friendly or pro-debtor membership is rarely so distinct. Characteristics from both groups are often found in procedures even if the attributes of one group

[148] See generally, J Windsor, 'The impact of Pt 26A Restructuring Plans on intercreditor dynamics' (2023) 6 *JIBFL* 385.
[149] *Re Hong Kong Airlines Ltd* [2022] EWHC 3210 (Ch), at [30].
[150] See, *Re Listrac Midco Ltd and others* [2023] EWHC 460 (Ch).
[151] IR 2016, r.6.14.
[152] CA 2006, s.901C(2)(d).
[153] In *Re Listrac Midco Ltd and other cases* [2023] EWHC 460 (Ch), while the conditions in s901G had been complied with, the requirements for sanction under s901F of the act were not satisfied for some of the companies. Nonetheless, the court exercised its power to sanction the plans by means of the cross-class cram-down under s.901G(2). This was decided on the premise that a meeting of the dissenting class had been summoned under s 901C, and the conditions A and B set out in ss 901A(2) and 901A(3) of the Act had been met.
[154] See *Re Savoy Hotel Ltd* [1981] 1 Ch 351, which Norse J (as he was then) refused to sanction a scheme of arrangement under what was then s.206 of the Companies Act 1948.
[155] *NGI Systems & Solutions Limited v The Good Box Labs Co Ltd* [2023] EWHC 274 (Ch), at [104]-[109].

generally dominate. This occurrence is a result of drivers that influence policy. In a society where public interests are an important policy consideration,[156] it is difficult to disregard measures that serve broader common good objectives.[157] In this regard, while creditor treatment has long remained a critical principle to insolvency law,[158] so has the need for corporate rescue objectives.[159] The need to protect creditor rights, but to also offer companies an alternative to liquidation provides a delicate balance that attempts to limit how far the creditor and debtor regime can dominate the other. While the UK's insolvency framework was not strictly designed to be a hybrid model, the characteristics of both regimes is evident in the legislative text and has been the subject to judicial commentary.[160] Yet, while the creditor and debtor labels are useful, the degree of overlap between the two groups and the general use of the terms remains highly ambiguous since one regime may pursue multiple objectives that share features that can be found in either of the two regimes. To that end, it is more accurate to suggest that the UK has a DIP regime that possesses creditor friendly tendencies.

Second, in recent years there have been significant changes to business practices and the way that companies secure credit and rescue finance, with noticeable developments on the increase of credit derivatives; growth of hedge funds and the private equity group as vehicles for making investments in companies.[161] Within this practice, it also includes changes to the role of banks, from arranging and then selling on loans and loan risks to other investors.[162] Changes to company finance have led to complex relationships between the company and its creditors, which have created creditor rights that may act as a barrier to the implementation of certain rescue procedures.[163] In response to potential creditor behaviour designed to cause disruption to debtor led plans, CIGA 2020 includes both the standalone moratorium and the Part 26 restructuring plan to override such acts to ensure genuine rescue outcomes are unhindered. The moratorium may further aid the rescue objective since it may provide a route to a CVA, a possibility that helps to broaden the appeal and scope of the pro-debtor measure.[164]

Third, the impact of the coronavirus pandemic on businesses and the need to counter unchecked creative destruction tendencies led to the government to bolster corporate insolvency law to include specific pro-debtor measures designed to assist insolvent companies.[165] While the destruction of

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[156] Within an insolvency context, public policy has often been synonymous with public confidence, an overall objective that was noted since the Cork Report.

[157] JM Wood, *The Interpretation and Value of Corporate Rescue* (Edward Elgar Publishing, 2022), at 16, 100, 140, 198, 229-230; see also, JM Wood, 'Creative destruction and the post COVID-19 economy: a critique of the (un)creative rescue value contained within the permanent CIGA 2020 reforms' (2023) 3 *J.B.L.* 197, at 209.

[158] See generally, K Akintola, *Creditor Treatment in Corporate Insolvency Law* (Edward Elgar Publishing, 2020).

[159] JM Wood, *The Interpretation and Value of Corporate Rescue* (Edward Elgar Publishing, 2022), pp.33-48.

[160] "Case law establishes principles which can be applied by all companies", see South Square Digest (September 2022), available at <https://southsquare.com/wpcontent/uploads/2022/09/SSQ_Digest_September_2022_Final-2.pdf>, at 11.

[161] S Paterson, 'The Paradox of Alignment: Agency Problems and Debt Restructuring' [2016] 17 *E.B.O.L.R.* 497, at 501.

[162] B James and E Karaindrou, 'COVID-19 measures from a lender's perspective' (2020) 7 *J.I.B.F.L.* 460.

[163] For example, as the moratorium will not usually prevent a bank from demanding payment of debts due during the Moratorium, it is not seen as an effective rescue tool in such cases. See, Insolvency service, 'Corporate Insolvency and Governance Act 2020 – Final evaluation Report November 2022 (19 December 2022), at 4.3.1.

[164] CIGA 2020 abolished the small company moratorium, see above.

[165] Creative destruction was popularised by Joseph Schumpeter in his *book Capitalism, Socialism and* Democracy (Harper & Brothers 1942); JM Wood, *The Interpretation and Value of Corporate Rescue* (Edward Elgar Publishing, 2022) pp. 33-48.

inefficient companies assists long-term economic growth in an economy, and encourages the advancement of efficient and improved companies, the pandemic threatened to accelerate this process. The extent to which failure could occur posed the concern that few companies would be subject to the natural ebb and flow of the process, and instead a non-insignificant number of companies would fail when they otherwise may have not.[166] On that basis, the purpose of CIGA 2020 was to create effective measures to ensure that companies were not needlessly liquidated – a measure that could be beneficial for both the creditors and debtors.[167] On this point it would appear that the moratorium and the restructuring plans have proven successful, even if their reach has been somewhat limited.

This brings the importance of corporate rescue and its role within a DIP regime into the spotlight. Given the variables that are in play with any assessment of an insolvency framework, this article is not concerned with establishing which regime is best, but rather to note the characteristics of each within the insolvency framework and the opposing policies that they promote. The significance of this critique permits the implications to be noted and the impact that this may have on the creditors and debtors' interests.

6. Conclusion

While regime classification labels are over simplified, the characteristics of each act as useful guides to assist certain interests. This is useful to ensure certain interests in an insolvency framework are properly catered for in the law. The focal point of legal frameworks may alter over time to adapt to new events or reflect changes in society or legal practice. Classifications therefore help to identify what a regime is predominately designed to address and how the laws may affect certain interests.

Following CIGA 2020, the UK's insolvency framework has become more pro-debtor, but this is not the full story. A distinction should be noted between insolvency procedures such as administration, and the restructuring mechanisms, which are designed to deal with different types of financial problems in a company. It is therefore plausible, and accurate, to recognise that interests may be impaired in different ways in accordance with the procedure pursued – even if they share a common desired outcome such as rescue.

With this in mind, a pro-debtor regime does not necessarily lead to more rescues, nor does it always favour the debtor. Instead, what it does provide is greater choice in how a company that could be rescued, is rescued. Broadening rescue outcomes naturally benefits the debtor company, but this is not unchallenged. The courts have used their discretion, particularly in the sanction hearings regarding Part 26A restructuring plans, to ensure certain conditions are met, and that creditor interests, while they may be altered, are not infringed contrary to the law.

It is within this judicial commentary that clarity has been brought as to how creditors interests can be impaired. It should however be noted that the extent of the courts discretion in this area has the potential to undermine genuine rescue strategies that are procedurally defective, as well as create commercial uncertainty for the parties. Whether the defects, if left unchallenged, would improperly undermine creditor interests would depend on the specific facts. The case law would suggest that the jurisdictional requirements should be followed, and creditor-orientated interests are only considered on the basis that those interests have been given due consideration in accordance with

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[166] JM Wood, 'Creative destruction and the post COVID-19 economy: a critique of the (un)creative rescue value contained within the permanent CIGA 2020 reforms**'** (2023) 3 *J.B.L.* 197, at 211.
[167] JM Wood, *The Interpretation and Value of Corporate* Rescue (Edward Elgar Publishing, 2022), at 106.

the law. Here, concerns regarding fairness is likely to be a real issue that could prevent a plan from being sanctioned. If this, or other concerns are not present then the Part 26A plan if correctly implemented consciously limits creditor interests and this in turn provides the scope for pro-debtor interests to prevail.

The precise extent to which the balance between creditor and debtor interests is to be assessed remains to be seen. What the case law reveals is that a combination of creditor-friendly elements will continue to be examined and feature in judgments all the while an overarching pro- rescue agenda is pursued. Thus, future developments will likely see an overlap between the creditor and debtor characteristics in a regime that is largely recognised, at least in name, as pro-debtor.