KIRKLAND & ELLIS

English Court Approves McDermott's Restructuring Plan

in First Restructuring Plan Post-*Adler*

29 FEBRUARY 2024

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At a Glance

The English Court has approved the restructuring plan of the McDermott Group.

The plan was opposed by Reficar over an unprecedented six-day sanction hearing, with settlement discussions running in parallel. The Court's judgment is a comprehensive approval of McDermott's plan.

In summary, the Court held that:

- the plan company had proved on the balance of probabilities that the relevant alternative to the plan was a worldwide formal liquidation of the Group;
- the "no worse off" condition was satisfied, therefore there was jurisdiction to consider sanctioning the plan despite there being dissenting classes;
- the amount offered to Reficar was sufficient to constitute a "compromise or arrangement";
- while Reficar's points in relation to the retention of equity by existing shareholders might have carried some weight in relation to discretion, the offer made to it (see right) meant that the existing equity holders were now being impaired and Reficar would be benefitting from the allocation of substantial equity in the Group; and
- accordingly, the Court would sanction the plan.

This is the first restructuring plan judgment since the Court of Appeal's landmark decision in *Adler*, with its revised framework for courts' discretion when considering whether to bind dissenting classes to a restructuring plan (see our *Alert*).

McDermott's restructuring plan will amend and extend the Group's secured debt and compromise 'out of the money' unsecured claims, including a $1.3 billion arbitration award owed to Reficar and $718 million ongoing litigation claim of Contraloria.

The UK restructuring plan is intended to operate in parallel to two Dutch restructuring plans ('**WHOAs**') promulgated by two Dutch companies in the Group, to ensure that the compromise will bind creditors of those companies as a matter of Dutch law. The restructuring plan and the WHOAs are inter-dependent. The WHOAs are expected to be sanctioned mid-March; the voting has taken place and 100% approval has been obtained among the secured creditor classes; Reficar does not oppose the WHOAs. A hearing for recognition of the processes in the U.S. under Chapter 15 of the Bankruptcy Code is scheduled for 22 March.

Kirkland & Ellis advise the McDermott Group.

Settlement discussions

- The Court described developments through the course of the trial as "extraordinary", as the state of "without prejudice" negotiations between the parties became clear to the Court and settlement proposals continued.
- The Dutch "Restructuring Expert" appointed in the WHOAs formulated a proposal involving Reficar receiving the equivalent of 19.9% of equity in the Group's parent company (or 10.9% if Reficar were to continue to oppose the plan and the WHOA).

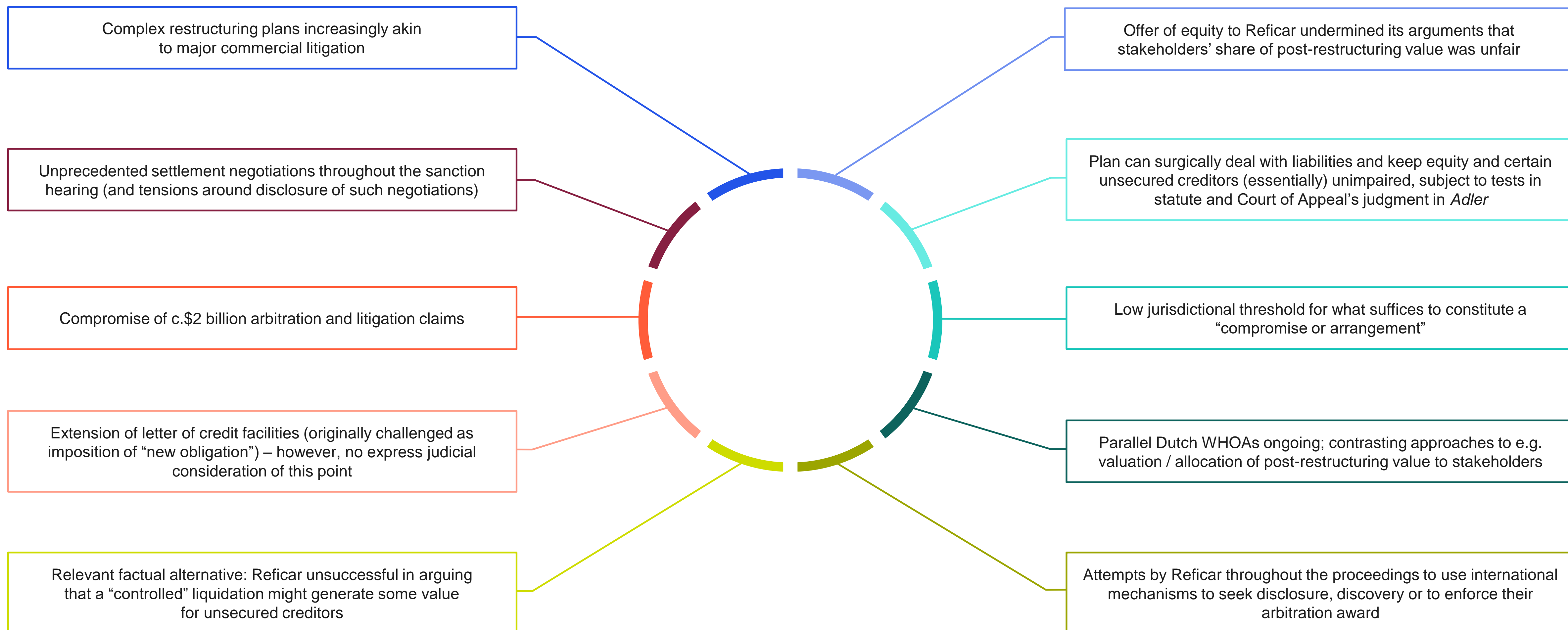
"Reficar has clearly secured for itself a fair distribution of between 10.9% and 19.9% of [equity in the Group's parent] …

Reficar has therefore been treated more than fairly by the Plan Company and the Secured Plan Creditors."

Extracts from sanction judgment, 27 February 2024

See Key Takeaways on next page.

Key Takeaways



Background and Terms of the Restructuring Plan

- *Business:* McDermott Group provides engineering, procurement and construction services to customers in the oil, gas and energy sector; >300 legal entities across the globe
- *Background:* McDermott entities filed for reorganisation under U.S. Chapter 11 in 2020; this process resulted in a transfer of the equity to the Group's financial creditors
- *Plan Company:* CB&I UK Ltd
- *Purpose of Plan:* To avoid the Plan Company and other Group companies' insolvency, via:
  - an extension of the maturity dates of the secured credit facilities (among other amendments); and
  - a compromise of the unsecured plan claims.
- *Relevant Alternative:* Formal insolvency, save for an accelerated sale of part of the business as a going concern. Particular trigger on 27 March 2024, given requirement to cash collateralize nearly $2bn letters of credit on that date. The factual relevant alternative was disputed; see next page.
- *Opposition:* The plan was opposed:
  - by Reficar, an unsecured creditor holding an arbitration award against the Plan Company;
  - at the convening hearing only, by:
    - a minority ad hoc group of sub-participants in respect of certain letter of credit facilities. The Plan Company reached agreement with this group, such that they supported the Plan at the sanction hearing; and
    - certain contribution claim creditors.

		CREDITOR CLASSES	TREATMENT UNDER PLAN	EST. DIVIDEND IN RELEVANT ALTERNATIVE	APPROVED?
Secured	1	**Super senior letter of credit facility**	Extension of maturity dates to 2027 (from June 2024 / 2025) Changes to covenants	76-100%	✓ Unanimous approval in all 5 secured classes
Secured	2	**Make-whole term loan facility**		0-100%	
Secured	3	**Senior LC facility**		0-10%	
Secured	4	**Escrow LC facility**		0-10%	
Secured	5	**Takeback term loan facility**		0%	
Unsecured	6	**Dispute Proceeding Plan Creditors (including $1.3bn Reficar claim)**	Released; variable contingent cash payment based on Group's EBITDA performance; pro rata share of min. £800,000, max $8m (**plus** 10.9/19.9% non-voting equity through the WHOA, per settlement offer)	Zero	X
Subordinated	7	**Contribution Claim Plan Creditors** (for rights of contribution against the Plan Company)	Released in return for pro rata share of £100,000	Zero	X

Other unsecured liabilities, e.g. trade and intercompany creditors, and shareholders were left outside the plan.

Decision

	ISSUE	CHALLENGE	JUDGMENT
1	Was the plan a **"compromise or arrangement"** (within s.901A(3) of the Companies Act 2006) vis-à-vis the Dispute Proceeding Plan Creditors?	▸ Reficar argued that the Court did not have jurisdiction to sanction the plan because it was not a "compromise or arrangement": ▸ there was no "give" if the Plan Company simply proposed to give Reficar that to which it was already entitled under the Plan Company's relevant alternative; and ▸ even if the Group's EBITDA targets were met, the variable consideration that would then be provided was nominal when compared to the debt being released.	▸ Even if the (minimum) £800,000 payment was very small by comparison with the total debt, the Court was satisfied it was sufficient to pass the apparently low jurisdictional threshold for it to be a "compromise or arrangement".
2	What was the **relevant alternative** to the plan?	▸ As it had been conceded that the Plan Company's relevant alternative would leave Reficar no worse off under the plan, the only issue was whether the Plan Company had proved, on the balance of probabilities, that its relevant alternative was the most likely to occur if the plan failed. ▸ Reficar initially contended that, if the plan failed, there would be negotiations between the Group, its key stakeholders and the Dispute Proceeding Plan Creditors towards a deal which would provide a fairer distribution of value to Reficar, including equity. ▸ After the third day of the sanction hearing, the Group made an open offer to Reficar of the equivalent of 19.9% of equity in the Group's parent, in parallel to the same deal under the WHOAs. "The offer was essentially what Reficar had been asking and negotiating for", as the Court noted. The offer was also supported by the secured creditors (who hold the majority of equity in the Group's parent).[1] ▸ In closing submissions, Reficar switched to promoting two other relevant alternatives (principally, more orderly liquidation) allegedly emerging from oral evidence given by supporting creditors.	▸ This was the core issue at trial as it is a condition of the use of the cross-class cram down power that the dissenting class would be no worse off under the plan than it would be in the relevant alternative. ▸ The Court held the fact that Reficar has still been unable to accept the offer on the table, approved by the Dutch Restructuring Expert, "demonstrates exactly why the Plan Company's evidence is most likely to be correct and there would be little prospect of a new deal being done with Reficar should the Plan fail". ▸ Reficar's case that a better-managed and more orderly liquidation could ensure secured creditors were repaid in full (such that unsecured creditors would then recover something more than zero) was described as "fanciful". What was most likely to occur if the plan failed was a liquidation of the Group, and Reficar was "so far out of the money in that eventuality, that there [was] no possibility that the changes suggested… would materially affect the outcome for unsecured creditors". ▸ The Court is nonetheless conscious that it is often in the interests of the company and its supporting creditors to present a "doomsday" scenario in order to justify the treatment of a dissenting creditor. Where a plan company presents liquidation as the relevant alternative, "its evidence must … show that there is real substance to its assertion that such a liquidation is the most likely to occur". ▸ The Court found that the Plan Company had proved on the balance of probabilities that the relevant alternative was a worldwide formal liquidation of the Group.

1 The offer was subsequently revised to protect against future dilution, on the fourth day of the sanction hearing.

Decision (cont.)

	ISSUE	CHALLENGE	JUDGMENT
3	Did the plan satisfy the **"no worse off" test**?	► It was accepted by Reficar that, if the Plan Company succeeded on Issue 2, i.e. that the relevant alternative was a formal liquidation scenario, then the unsecured creditors would be wholly out of the money in the relevant alternative.	► Accordingly, the "no worse off" condition was satisfied; the Court had jurisdiction to consider sanctioning the plan despite there being dissenting classes.
4	Was the plan **unfair** to the Dispute Proceeding Plan Creditors because of the manner in which the **restructuring surplus** of the Group is allocated under the plan?	► The alleged unfairness in this case stemmed from the fact that the equity in the Group (which was largely held by some of the secured plan creditors as a result of the previous U.S. Chapter 11 process) was unaffected by the plan and might mean that that equity had some value as a result of the success of the Group following the sanction of the plan. In other words, even though the equity ranks below the unsecured creditors in priority on a liquidation, nevertheless the equity holders might receive a share of the restructuring surplus, whereas Reficar's debt would be released for next to nothing. ► To counter the Group's submission that no weight should be accorded to Reficar's views given it was "out of the money" in the relevant alternative, Reficar challenged the definition of a creditor being "out of the money", in particular as to whether it necessarily has to be considered by reference to the relevant alternative.	► The Court held that "[w]hile Reficar's points in relation to the equity might have carried some weight in relation to discretion, the offer that has been made to it, and the equity which it will receive anyway under the WHOA Plan, mean that the existing equity holders are now being impaired and Reficar will be benefitting from the allocation of substantial equity in the Group". ► "Reficar has clearly secured for itself a fair distribution of between 10.9% and 19.9% of MIL's equity, and I do not see that it is in a position now to complain that it has not. … Reficar has therefore been treated more than fairly by the Plan Company and the Secured Plan Creditors." ► The Court declined to determine the question of whether "out of the money" should be tested by reference to possible alternatives other than the formal relevant alternative. It did however indicate some sympathy for Reficar's submission that there should be some scope for making a horizontal comparison between out of the money creditors and shareholders in testing the fairness, as between them, of the proposed distribution of the restructuring surplus under the Plan. Such an approach would be more akin to that in the Netherlands.
5	Should the Court refuse to sanction the plan on the basis that the **Explanatory Statement** was inadequate and/or misleading?	► While this was raised as an issue by Reficar, it did not pursue the point at the trial. ► The Court held "it was difficult to see that any [alleged] deficiencies in the Explanatory Statement could have had any impact on the voting at the class meetings". Accordingly, the Court did not consider this issue further.	

Decision (cont.)

	ISSUE	CHALLENGE	JUDGMENT
6	Should the Court sanction the Plan if it would **violate the New York Arbitration Convention** and thereby the obligations of the United Kingdom as a Contracting State?	► Reficar raised this as a matter of the Court's discretion, claiming that the plan was a clear attempt to eliminate Reficar's arbitration award without fair value and would place the UK in breach of its obligations under the New York Arbitration Convention.	► Reficar's original argument depended on the equity being unimpaired whereas Reficar was having its debt released. ► As that was no longer the case, and having decided that the plan plus the offer of equity was fair to Reficar, the Court concluded that this issue went nowhere.
7	Should the Court refuse to sanction the Plan on the basis that the Plan is **not likely to have substantial effect** in the U.S.?	► This issue was conceded by Reficar's expert and not pursued at trial. ► The Court therefore assumed that the plan was likely to be recognised and enforced in the US. The issue therefore did not affect the exercise of its discretion.	

Role and Importance of Settlement Discussions

In our experience, plan companies have typically been reluctant to enter settlement discussions with stakeholders opposing a restructuring plan, lest doing so might jeopardise the plan company's case as to the relevant alternative to the plan (i.e. the opposing stakeholders could argue that a different factual alternative was the "true" relevant alternative to the plan, for the purposes of the "no worse off" test when the Court considers whether to bind a dissenting class of stakeholders to the plan).

Our experience in McDermott's case has shown that it is possible for plan companies to explore relevant options with their stakeholders, in a manner which does not cut across the relevant alternative.

We would be happy to discuss this further with interested clients.