E. Restructuring Proceedings and Substantive Fairness

Before delving into the matter of ensuring substantive fairness under the MLCBI, it is essential to discuss the concept of substantive fairness in a domestic restructuring context. Hence, Part E of this work will lay the groundwork for Part F. Below, this work will analyse the importance and complexity of ensuring substantive fairness in restructuring proceedings, highlighting the difference with insolvency proceedings in that regard (E.I). It will then examine the implementation of the concept, focusing on two jurisdictions as well as the PRD and provide their comparative analysis (E.II). A summary of the main points discussed will conclude this Part (E.III).

I. Importance and Complexity of Ensuring Substantive Fairness in Restructuring Proceedings

In a restructuring context, substantive fairness (fairness of outcome) refers to the fairness of the distribution under the plan.[644] In insolvency proceedings, too, fairness, as a substantive goal, concerns the distribution of the debtor's asset pool.[645] However, substantive fairness is achieved in substantially different ways in these two proceedings. Below, this work will elaborate on this difference to highlight the complexity and importance of ensuring substantive fairness in restructuring proceedings.

644 Sarah Paterson associates substantive fairness with 'some sort of imbalance', giving some examples, such as a comparison of the treatment of different parties and the balance between efforts (or expectations) and actual gain. It is noteworthy that all the examples mentioned point to the outcome of the distribution. See Paterson, 'Notions of Fairness' (n 6) 600. For a discussion of procedural and substantive goals of law regarding debt-restructuring as well as the fairness of process and outcome, see Mokal, 'Fairness' (n 571) sub-ss 1.1, 1.3.

645 See the discussion in Mokal, 'On Fairness and Efficiency' (n 572) 457-59, 462ff.

1. Substantive Fairness in Insolvency Proceedings

The fair distribution of the proceeds from the realisation of the remaining assets of an insolvent debtor is one of the principal substantive goals of insolvency law.[646] That is to say, in the case of the individual enforcement of claims against a non-performing solvent debtor, the issue of substantive fairness does not arise in a distribution context. All creditors can theoretically be fully satisfied without adversely affecting the possibility of full satisfaction of others, thus, avoiding any unfair outcomes in distribution. However, with an insolvent debtor, the situation differs significantly. For various reasons,[647] some creditors are likely to be paid in full, while others may receive less than they are owed or even nothing at all because the debtor's assets are not enough to fully satisfy all creditors.[648] To prevent such unfair outcomes, separate rules are in place that prohibit individual acts of enforcement and provide a framework for the collective satisfaction of all claims against an insolvent debtor, known as insolvency law.[649]

In traditional insolvency proceedings, which involve the realisation of the entire asset pool of the debtor, whether through piecemeal or going concern sale, and the distribution of the proceeds among the creditors, the fairness of outcome is mainly achieved during the norm-making process. There is minimal discretion when applying the law, as most insolvency laws establish strict and inflexible but relatively straightforward (to implement) distribution and priority rules.[650] That is to say, insolvency laws are typically based on the idea of treating similar claims equally, which is achieved through the *pari passu* rule, i.e. *pro rata* satisfaction of all admitted claims.[651] This default rule, however, is not absolute and comes with several

646 Bork, *Principles of Cross-Border Insolvency Law* (n 93) para 4.5.

647 The reasons may be, *inter alia*, the debtor's preference, certain creditors' (eg, banks and tax authorities) faster access to the debtor's assets, and variations in the duration of the enforcement process.

648 Bork, *Principles of Cross-Border Insolvency Law* (n 93) para 4.6.

649 ibid.

650 Baird, 'The Uneasy Case' (41) 139; Westbrook, 'A Global Solution' (n 100) 2301-02; van Zwieten (ed), *Principles of Corporate Insolvency Law* (n 29) para 16-62.

651 For a more detailed discussion of the *pari passu* rule, see van Zwieten (ed), *Principles of Corporate Insolvency Law* (n 29) paras 8-02-06. See also Bork, *Principles of Cross-Border Insolvency Law* (n 93) para 4.6. For a critical analysis, see Rizwaan Jameel Mokal, *Corporate Insolvency Law: Theory and Application* (OUP 2005) 92ff.

limitations and exceptions.[652] To begin with, secured claims are generally fully paid up to the total value of the collateral.[653] The costs of insolvency proceedings are typically prioritised for payment as well.[654] Certain claims, such as those of employees and tax authorities, may also receive preferential treatment in some jurisdictions.[655] Creditors may also have the right to set off their claims against what they owe.[656] Some creditors, on the other hand, may have a lower priority for payment, either by operation of law or through private agreements.[657]

The design of distribution rules involving all or some of the aspects mentioned above is a policy matter for each state. The fairness of various aspects of the distribution order specified in the law (e.g. the preferential treatment of tax claims) can be scrutinised or questioned by scholars but certainly not by judges during the application. That is to say, judges, insolvency practitioners, and other participants in the process are obligated to adhere to those rules once they are given legal force by legislators. This leaves little room, if any, for discretion in this context.

2. Substantive Fairness in Restructuring Proceedings

The same does not hold for restructuring proceedings, where most matters are open.[658] Setting aside the academic debate on the underpinning of restructuring proceedings (B.I), there are fundamental differences in how substantive fairness is achieved in those two proceedings. As already noted above, insolvency proceedings are relatively straightforward proceedings that lead to the distribution of the proceeds from the realisation of the debtor's asset pool. The fairness of outcome is determined during the norm-making process through the adoption of a certain distribution order, which is applied in a similar manner in each proceeding.

To begin with, the norm-maker plays an important role in restructuring proceedings, too. Most restructuring laws set certain frameworks for distri-

652 For a more detailed discussion, see van Zwieten (ed), *Principles of Corporate Insolvency Law* (n 29) para 8-07ff. See also Bork, *Principles of Cross-Border Insolvency Law* (n 93) paras 4.20-26.
653 See, eg, InsO (n 35) s 49ff.
654 See, eg, ibid ss 53, 54.
655 See, eg, LIB (n 191) art 53.
656 See, eg, InsO (n 35) s 94.
657 See, eg, ibid s 39.
658 Baird, 'The Uneasy Case' (41) 139.

bution, such as establishing a certain priority rule or a fairness test, as this work will observe later (E.II). However, due to the inherent uncertainty involved in various aspects of restructuring proceedings, which this work will analyse below, it is impossible to strictly regulate every aspect of the fairness of outcome in these proceedings. Some matters are intentionally left to be determined during the application process, considering the circumstances of each case. Compared to insolvency proceedings, therefore, much more is required during the application process to guarantee the fairness of outcome in restructuring proceedings.[659] The fairness of outcome can be scrutinised, evaluated, and eventually determined on a case-by-case basis, as long as all those occur within the framework provided by law. Accordingly, judges play a crucial role in ensuring that the outcome of restructuring proceedings is fair.[660] The respective difference in how substantive fairness is achieved in these two proceedings is mainly because of the inherent uncertainties associated with certain aspects of restructuring proceedings as well as their ability to modify substantive rights. That said, this work in no way argues that every aspect of insolvency proceedings is certain and predictable. Indeed, certain matters affecting outcomes are subject to participants' judgment and may be questioned or contested in insolvency proceedings, too. For example, it may be asked whether the insolvency practitioner obtained the best possible price in the sale of assets. What is argued is the existence of fundamental differences in how these two proceedings function and, as a result, substantive fairness is achieved in them. Put another way, ensuring substantive fairness in restructuring proceedings is a much more complex and important matter. This work identifies at least five key distinctive aspects of restructuring proceedings in that respect.

a) Value Available for Distribution

One aspect concerns the value available for distribution. In insolvency proceedings, this value mirrors the debtor's current liquidation value, which is relatively easy to calculate. In most cases, there is even no need for calculation. Generally, not the assets, but rather the proceeds generated

659 For a more detailed discussion of the challenges associated with ensuring fairness in restructuring of different types of companies, see generally Paterson, 'Notions of Fairness' (n 6).

660 For a more detailed discussion of the role of the court in restructuring proceedings, see generally Payne, 'The Role of the Court' (n 2).

from the actual sale of assets, whether a piecemeal or going concern, are distributed among creditors pursuant to the distribution order provided by law.[661] Accordingly, the exact value of the distribution is generally known before the distribution takes place. The matter is not that straightforward in restructuring proceedings. Here, what is distributed is not the actual liquidation value of the debtor or the proceeds from the actual sale but rather the *reorganisation (restructuring) surplus*,[662] which may be challenging to predict or calculate. As Stephan Madaus puts it, 'Any restructuring plan is a *bet* on the debtor's future returns, i.e. the value of its assets and of its future income'.[663] This value is distributed before implementing the plan, thus, before it is certain that it will be fully achieved or achieved at all.

b) Restructuring Measures

To maintain the flexibility of restructuring mechanisms, it is generally recommended not to prescribe an exhaustive list of specific restructuring measures of a mandatory nature in the law.[664] Most laws allow the plan proponent to select the measures that are necessary for the debtor's successful restructuring.[665] The measures to be implemented, thus, depend on the circumstances of the case and can include reducing principal amounts,

661 See, eg, InsO (n 35) s 187ff.

662 Stephan Madaus defines the *reorganisation surplus* as 'the value which can only be realised in a restructuring of the debtor'. See Stephan Madaus, 'Is the Relative Priority Rule Right for Your Jurisdiction? A Simple Guide to RPR' (18 January 2020) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3827696> accessed 21 October 2025, pt 1. According to Riz Mokal, the *restructuring surplus* is 'the value sought to be preserved and perhaps created by the implementation of the plan itself'. See Riz Mokal, 'The Two Conditions for the Pt 26A Cram Down' (2020) 11 JIBFL 730, 730. In a recent case, the EWCA preferred the term 'benefits preserved or generated by the restructuring' (as a substitute for the term *restructuring surplus*). *Kington SARL & Ors v Thames Water Utilities Holdings Ltd & Anor* [2025] EWCA Civ 475 (*Thames Water*), [117]. See also Axel Krohn, 'Rethinking Priority: The Dawn of the Relative Priority Rule and the New "Best Interests of Creditors" Test in the European Union' (2021) 30 Intl Ins Rev 75, 83, where the author defines the *reorganisation surplus* as 'the difference in value between the value recoverable in a liquidation of the debtor's assets and the assumed value of the reorganized firm'.

663 Madaus, 'Relative Priority Rule' (n 662) pt 2 (emphasis added).

664 Wessels and Madaus (n 597) s 8.8 (Recommendation 8.04 therein).

665 See, eg, BC (n 37) s 1123.

extending maturity dates, and debt-equity swaps.[666] This leads directly to the next aspect.

c) Non-Consensual Alteration of Substantive Rights

Another key distinctive aspect of restructuring proceedings is their ability to alter the substantive rights of involved parties, e.g. creditors and shareholders, against their will. As already discussed in this work, insolvency proceedings are asset-oriented and do not directly discharge the substantive rights of participants.[667] The primary goal of these proceedings is to efficiently realise the remaining assets of the debtor and fairly distribute the proceeds from the sale without affecting the substantive claims against the debtor. If, for example, additional assets of the liquidated debtor are discovered, creditors are entitled to enforce the unsatisfied part of their claims against those assets.[668] Restructuring proceedings are significantly different also in this aspect. As already mentioned several times in this work, restructuring proceedings can, and most often do, modify substantive rights.[669] On top of that, it can be done against the will of the holders of those rights and has a binding effect on them.[670] The extent and way those rights will be altered are to be determined in each case, as elaborated above regarding the previous aspect. The possibility of the non-consensual alteration of substantive rights alone underscores the importance of ensuring substantive fairness in the application process.

d) Post-Restructuring Contributions

Insolvency proceedings typically end with the debtor being liquidated, and the fairness of outcome in these proceedings does not consider any further role of one or another stakeholder in the debtor's business. The distribution rules are designed accordingly. In restructuring proceedings, on the contrary, the debtor continues to exist and, more importantly, to trade. Some stakeholders, such as a shareholder providing new funds, a family business

666 See n 1 (and accompanying text) and text thereto.
667 See text to n 35. See also the discussion in sub-ss B.I.3.a), E.I.1.
668 See n 35 and accompanying text.
669 See, eg, text to nn 36, 38.
670 See text to n 5.

owner, an employee, an essential supplier, or the debtor's bank, may have a more crucial role in the debtor's business continuation regardless of the type or amount of their claims. The fairness of outcome would require that those stakeholders are rewarded in proportion to their post-restructuring contributions. Again, many factors in this context depend on the specific circumstances of each proceeding. It is practically impossible to formulate detailed rules that encompass all such scenarios. As will be revealed later (E.II), general fairness frameworks provided by law often struggle to fully address the issue and this is one of the main factors in evaluating the suitability of a certain fairness framework in comparison with another.

e) Classification

Most laws require some creditor support behind the plan, the level of which may differ depending on the framework.[671] Therefore, creditors should vote on the plan. Most restructuring mechanisms involve placing creditors with different positions (such as varying pre-restructuring ranks or legal nature of claims) into different classes in order to ensure fairness. Most laws require such separate classification to be proper and justified.[672] It is essential to thoroughly evaluate whether the classes have been properly constituted in each case, as the process may be vulnerable to manipulation by plan proponents to achieve the desired outcome.[673]

3. Summary

To sum up, ensuring substantive fairness in restructuring proceedings is an important and complex matter which should take into account the peculiarities of the case at hand, as compared to insolvency proceedings. The courts, therefore, play a central role in this process. A restructuring case may involve a thorough judicial assessment of various matters that affect the fairness of outcome in that case, such as proper classification, justification for discrimination, and adherence to the established priority rule.

671 See, eg, InsO (n 35) s 244; BC (n 37) s 1126 (c).
672 InsO (n 35) s 222 (2).
673 For a more detailed discussion, see Mokal, 'The Two Conditions' (n 662) 732-33.

II. Substantive Fairness Frameworks

After discussing the importance and complexity of ensuring substantive fairness in restructuring proceedings, this work will now explore how the concept is implemented in different jurisdictions.[674] Specifically, this work will focus on two jurisdictions, the US and England, as well as the fairness frameworks under the PRD. Both the US and England are selected for this purpose because of their status as *restructuring hubs*. Both jurisdictions possess well-developed principles and frameworks in this area, established under statutory and case law dating back to the 19th century. Besides, these jurisdictions were also compared in this work in a cross-border context,[675] so it is important to explore how restructuring operates domestically in the same jurisdictions. The influence of US law in this field on other jurisdictions across the globe also has a significant impact on the selection.[676] The PRD will be closely examined as it significantly reshaped the laws of almost all Member States in this area and introduced a new concept of fairness that sparked heated debate in academic circles.

Examining fairness frameworks in different jurisdictions is of particular importance for the purposes of this work. It is crucial to understand how substantive fairness is ensured in a domestic context before delving into whether there is a need for a separate substantive fairness review in considering the recognition and enforcement of foreign restructuring plans. Thus, this work will set the scene for Part F, which will analyse, *inter alia*, the necessity for a substantive fairness review during the recognition stage.

The fairness frameworks in both jurisdictions and under the PRD will be examined regarding the position of individual dissenting creditors within an assenting class of creditors and that of dissenting classes of creditors.

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674 That said, this work acknowledges that the depiction of the jurisdictions examined in the present section may be somewhat academic, ie reflective of how the system is designed to operate in law. As Christoph Paulus notes 'the law in action' may be different from 'the written law' even in jurisdictions equipped with modern insolvency instruments. Christoph G. Paulus, 'Global Insolvency Law and the Role of Multinational Institutions' (2007) 32 Brook J Intl L 755, 760.

675 See s C.II.

676 See Madaus, 'A Proposal to Divide the Realms of Insolvency and Restructuring Law' (n 4) 628-29. See also Mevorach and Walters (n 34) 858 (fn 13 therein and accompanying text).

1. The US (Chapter 11)

In the US, Chapter 11 provides for a court-supervised debtor-in-possession reorganisation regime. A single corporate reorganisation regime resulted from bankruptcy reforms in the 1970s.[677] A plan under Chapter 11 should be confirmed by the court[678] and section 1129 of the BC sets forth the requirements for confirmation, such as good faith[679] and feasibility.[680] Once the plan has been duly confirmed and become final, all original obligations of the debtor are discharged and creditors can sue the debtor only with respect to the obligations under the plan.[681]

a) Impairment, Class Composition, and Voting Thresholds

Another confirmation requirement is that the plan should be accepted by at least one class of impaired claims, excluding any 'acceptance of the plan by any insider'.[682] A claim is unimpaired if the plan leaves the (legal, equitable, and contractual) rights of its holder unaltered or cures any default and compensates for any damages, and so forth.[683] Courts should and, often

677 For a discussion of the historical background of reorganisation regimes and fairness tests, see Jonathan Hicks, 'Foxes Guarding the Henhouse: The Modern Best Interests of Creditors Test in Chapter 11 Reorganizations' (2005) 5 Nev LJ 820, 822ff.

678 BC (n 37) s 1128.

679 ibid s 1129 (a) (3). S 1129 does not set forth any material (imminent) insolvency requirement.

680 ibid s 1129 (a) (11): 'Confirmation of the plan is not likely to be followed by the liquidation, or the need for further financial reorganization…'. For a discussion of the standard of the burden of proof of the feasibility test, see Olivares-Caminal and others (n 38) paras 3.150-51.

681 Olivares-Caminal and others (n 38) para 3.130. For the effects of the confirmation of a Chapter 11 plan and other post-confirmation matters, see BC (n 37) ch 11, sub-ch III.

682 BC (n 37) s 1129 (a) (10). For a critical analysis, see Mokal, 'The Two Conditions' (n 662) 731-32.

683 For the full definition, see BC (n 37) s 1124; For a more detailed discussion of the definition of *impairment*, see Kenneth N. Klee, 'All You Ever Wanted to Know about Cram Down under the New Bankruptcy Code' (1979) 53 Am Bankr LJ 133, 138-39; Denise R. Polivy, 'Unfair Discrimination in Chapter 11: A Comprehensive Compilation of Current Case Law' (1998) 72 Am Bankr LJ 191, 193; Mokal, 'The Two Conditions' (n 662) 731.

do, look at whether the class has been formed to create an 'artificial impairment'.[684]

The BC allows a separate classification of claims and interests, provided that a claim or an interest is substantially similar to those in the same class.[685] However, it does not expressly mandate that all similar claims must be placed in a single class.[686] Nonetheless, most courts do not approve of a separate classification of claims of the same rank unless there is legitimate (business) justification behind it.[687] It should also be noted that all creditors within a particular class should be treated equally under the plan unless a less favourably treated creditor provides consent.[688]

As to the requisite majority for the acceptance of the plan in each class of claims, the approval of at least two-thirds of creditors in value and a simple majority of creditors in number is required.[689] An unimpaired class (each member of it) is deemed to have accepted the plan.[690]

b) Fairness Assessment with Respect to Dissenting Creditors

Chapter 11, namely, section 1129 of the BC, also sets forth several standards regarding the (substantive) fairness of the distribution, to which courts should adhere before confirming the plan. Below, this work will examine these standards first in relation to dissenting individual creditors and then dissenting classes of creditors.

684 Polivy (n 683) 193.
685 BC (n 37) s 1122.
686 G. Eric Brunstad Jr. and Mike Sigal, 'Competitive Choice Theory and the Unresolved Doctrines of Classification and Unfair Discrimination in Business Reorganizations under the Bankruptcy Code' (1999) 55 Bus Law 1, 3
687 Bruce A. Markell, 'A New Perspective on Unfair Discrimination in Chapter 11' (1998) 72 Am Bankr LJ 227, 243; Polivy (n 683) 194. It is noteworthy that case law is inconsistent with respect to the classification issue. For a discussion of the proper classification standards under case law, see Brunstad and Sigal (n 686) 32-37.
688 BC (n 37) s 1123 (a) (4).
689 ibid s 1126 (c).
690 ibid s 1126 (f).

aa) Dissenting Individual Creditors

Section 1129 (a) (7) (A) (ii) of the BC, known as the *best interests test* ("BIT"), is designed to safeguard the interests of individual dissenting creditors whose claims are impaired by the plan.[691] According to the BIT, each impaired dissenting creditor should get under the plan at least the value that the creditor would receive if the company were liquidated under Chapter 7 of the BC on the effective date of the plan.[692] The rationale behind the BIT is that, while the consent of every impaired individual creditor is not required to confirm a Chapter 11 plan, the reorganisation of the debtor may not result in worsening the position of dissenting creditors. That is to say, dissenting creditors should get under the plan at least the value that they would obtain in a liquidation of the debtor. Anything exceeding this minimum guaranteed amount, however, is 'subject to group vote rather than individual demand'.[693] In order to demonstrate that the BIT is satisfied, the plan proponent is expected to present evidence, typically in the form of expert testimony, regarding the hypothetical liquidation analysis of the debtor.[694] That said, it is not always clear what the liquidation value of the debtor is and the process may be subject to speculation.[695]

bb) Dissenting Classes of Creditors

If a Chapter 11 plan is consensual, i.e. adopted by all impaired classes (but not necessarily by all creditors within those classes), section 1129 (a) of the BC applies, and the only requirement regarding the fairness of the distribution under the plan is the satisfaction of the BIT, as discussed above. If the BIT is met, dissenting creditors may not challenge the plan on fairness grounds.

When, however, a plan is non-consensual or *cramdown*, meaning it is not adopted by at least one impaired class of creditors, the situation

691 Olivares-Caminal and others (n 38) para 3.131.
692 ibid. For a discussion of the respective (present) values, see Timothy C. G. Fisher and Jocelyn Martel, 'Does It Matter How Bankruptcy Judges Evaluate the Creditors' Best-Interests Test' (2007) 81 Am Bankr LJ 497.
693 Hicks (n 677) 831.
694 Olivares-Caminal and others (n 38) para 3.132.
695 ibid para 3.132 (fn 208 therein and accompanying text). See also Hicks (n 677) 832ff.

changes.[696] In this case, the confirmation of the plan is subject to section 1129 (b) (1) of the BC, which sets forth two additional requirements with respect to each dissenting class.[697] Below, this work will examine the respective requirements:

(1) The *Fair and Equitable* Requirement

One of these requirements states that the plan should be fair and equitable in relation to dissenting impaired classes.

(a) Class of Secured Claims

With respect to a class of secured claims, the plan is fair and equitable when each secured creditor under the plan: (i) retains its security interest in the collateral and receives deferred cash payments equal to at least the amount of its claim; (ii) in the event of the collateral being sold, receives a security interest in the proceeds of the sale; or (iii) can realise 'indubitable equivalent' of its claim.[698]

(b) Class of Unsecured Claims: The Absolute Priority Rule

The *fair and equitable* requirement with respect to a class of unsecured creditors states that, *inter alia*, dissenting classes of senior claimants should be paid in full before any more junior claimant receives anything under the plan.[699] Put another way, old shareholders cannot retain any equity interest in the reorganised company unless all dissenting classes of creditors are paid in full and junior creditors cannot receive anything unless all dissenting classes of senior creditors are fully satisfied.[700] This requirement

696 For a more detailed discussion of cramdown plans, see generally Klee (n 683).

697 It is noteworthy that the confirmation requirements of s 1129 (a) should be fulfilled also in this scenario, except that of paragraph (8) which provides that a plan should be adopted by all affected classes. This means that, *inter alia*, a plan should be adopted at least by one class of impaired claims.

698 BC (n 37) s 1129 (b) (2) (A).

699 ibid s 1129 (b) (2) (B).

700 Stephen J. Lubben, 'The Overstated Absolute Priority Rule' (2016) 21 Fordham J Corp & Fin L 581, 581.

is known as the *absolute priority rule* ("APR").[701] The APR does not create the priority of claims but rather honours those set outside bankruptcy.[702] The APR applies to dissenting classes only and, therefore, even in the case of a non-consensual plan, dissenting creditors in assenting classes may not challenge the fairness of the distribution under the plan by referring to the APR.[703] The only available route for this purpose is, again, the BIT.

(aa) Historical Background

The APR existed before it was officially included in the BC in its current form and originated from the era of equity receiverships of railroad companies.[704] Its initial purpose was to prevent abusive scenarios under that mechanism, i.e. where old equity-holders, in collision with secured creditors, retained equity interests in the reorganised company, while junior creditors received little or nothing.[705] It was, however, in *Case v Los Angeles Lumber Products Co,* where the USSC, for the first time, defined the statutory *fair and equitable* requirement under 1930 bankruptcy reforms as a 'fixed principle' that had been developed in case law: 'rule of full or absolute priority'.[706] It is also noteworthy that, unlike the BC, under its predecessors, the *fair and equitable* requirement, and accordingly, the APR applied to all dissenting creditors irrespective of whether or not the plan was consensual.[707]

701 Klee (n 683) 143.
702 Jonathan M. Seymour and Steven L. Schwarcz, 'Corporate Restructuring under Relative and Absolute Priority Default Rules: A Comparative Assessment' [2021] U Ill L Rev 1, 3.
703 Klee (n 683) 141 (fn 67 therein and accompanying text).
704 For a historical analysis, see Edward S. Adams, 'Toward a New Conceptualization of the Absolute Priority Rule and Its New Value Exception [1993] Det C L Rev 1445, s I.A; Lubben (n 700) pt I; Bruce Grohsgal, 'How Absolute Is the Absolute Priority Rule in Bankruptcy: The Case for Structured Dismissals' (2017) 8 Wm & Mary Bus L Rev 439, pt II.
705 For initially decided cases, see *Louisville Trust Co v Louisville, New Albany. & Chicago Railway Co,* 174 US 674 (1899); *Northern Pacific Railway Co v Boyd*, 228 US 482 (1913); *Kansas City Terminal Railway Co v Central Union Trust Co,* 271 US 445 (1926).
706 *Case v Los Angeles Lumber Products Co,* Ltd., 308 US 106 (1939) 116-17.
707 Klee (n 683) 141 (fn 67 therein and accompanying text); Lubben (n 700) 594-95.

(bb) Consensual Deviations from the APR: Valuation of the Debtor

Despite its title, the absolute nature and fundamental role of the APR have been roundly questioned in the literature.[708] In practice, too, the APR is often disregarded. One case study from 1990 illustrated that in twenty-three out of the thirty sample cases under the BC, the APR had been consensually deviated from, i.e. shareholders had been paid excessive amounts, which would not have been the case in a cramdown plan scenario under the APR.[709] The authors of the study suggest that one reason for these deviations could be to avoid expensive and time-consuming valuations in a cramdown plan scenario.[710] It should be noted that a valuation of the debtor is a crucial part of the process where APR applies since the courts should also be mindful to ensure that senior creditors are not overcompensated in a cramdown scenario.[711] Other reasons include, in the authors' view, the leverage of the debtor's management against creditors at earlier stages of Chapter 11 proceedings under the BC, such as the exclusive right to file a plan, discretion in setting priority levels, and power in relation to the suspension of post-petition interests as well as the leverage associated with their 'natural information advantage'.[712]

Douglas Baird and Donald Bernstein underscore another aspect of the debtor's valuation in an APR-adhered cramdown scenario where equity is transferred to creditors, namely, the inherent uncertainty associated with judicial valuations.[713] According to them, that is one of the main factors encouraging negotiated deviations from the APR.[714] Douglas Baird argues in favour of the relative priority model over the APR, which eliminates the need to value the debtor at the confirmation stage.[715] Instead, it provides

708 See, eg, Lubben (n 700) pt III; Grohsgal (n 704) s III.C; Riz Mokal, 'The Court's Discretion in Relation to the Pt 26A Cram Down' (2021) 1 JIBFL 12, 13ff.

709 Allan C. Eberhart, William T. Moore, and Rodney L. Roenfeldt, 'Security Pricing and Deviations from the Absolute Priority Rule in Bankruptcy Proceedings' (1990) 45 J Fin 1457, 1458. For a summary of the outcomes of several other studies (illustrating the proportion of deviations from the rule in these studies and noting the declining trend in recent years), see Mokal, 'The Court's Discretion' (n 708) 16 (en 9 therein).

710 Eberhart, Moore, and Roenfeldt (n 709) 1459.

711 Olivares-Caminal and others (n 38) para 3.139.

712 Eberhart, Moore, and Roenfeldt (n 709) 1459.

713 Douglas G. Baird and Donald S. Bernstein, 'Absolute Priority, Valuation Uncertainty, and the Reorganization Bargain' (2006) 115 Yale LJ 1930, 1941-43.

714 ibid 1966.

715 See generally Baird, 'Priority Matters' (n 30).

out of the money junior creditors with a call option, allowing them to exercise this option later if the reorganised company ends up being worth more than the total owed to senior creditors.[716] He describes this model as the 'postponing the day of reckoning' from the confirmation stage until a certain later point when affected parties will have a clearer picture of the value of the reorganised company.[717]

(cc) The New Value Exception to the APR

Apart from the possibility of negotiated deviations discussed above, the APR also includes an exception known as the *new value exception*.[718] This exception allows old shareholders to maintain an equity interest in the reorganised company, even if not all creditors have been fully paid, provided that the former provides new value to the company.[719] The exception, like the APR itself, antedates the BC and was developed by courts.[720] In *Los Angeles Lumber*, the USSC recognised the possibility of retaining equity interests by old equity holders as long as the following three requirements are met: (i) the necessity of the infusion of the new value; (ii) 'contribution in money or in money's worth'; and (iii) reasonable equivalence to the retained interest.[721]. The *Los Angeles Lumber* court further clarified that old shareholders' 'financial standing and influence in the community' and role in 'continuity of management' do not fulfil the *money's worth* requirement.[722] In *Norwest Bank Worthington v Ahlers,* the USSC held that 'a promise to contribute future labor, management, or expertise' does not meet this requirement either.[723]

Unlike the APR, the exception has never been codified. As a result, there had been a lot of discussion in the literature and case law about the survival

716 According to Douglas Baird, such a call option should have two components: 'exercise date' and 'strike price' the latter being the total amount of the debt owed to senior creditors. See ibid 796.
717 ibid 815.
718 Adams (n 704) 1448; Olivares-Caminal and others (n 38) para 3.141.
719 ibid.
720 For a historical analysis, see Adams (n 704) s I.B; Douglas S. Neville, 'The New Value Exception to the Chapter 11 Absolute Priority Rule' (1995) 60 Mo L Rev 465, s III.B.
721 *Los Angeles Lumber* (706) 121-22. For a more detailed discussion of those requirements, see Adams (n 704) pt II.
722 *Los Angeles Lumber* (706) 122.
723 *Norwest Bank Worthington v Ahlers,* 485 US 197 (1988) 204-05.

of the exception after the BC codified the APR but did not mention the exception.[724] In *Bank of American National Trust and Savings Association v 203 North LaSalle Street Partnership,* the USSC acknowledged, albeit not stating expressly, the survival of the exception but limited its application with a non-exclusivity requirement.[725] Edward Adams had also previously argued, as part of his new economic approach, against the exclusivity in a cramdown scenario and for giving third parties the right to outbid the debtor's self-appraisal of the going-concern value of the company.[726]

(dd) Attempts at Non-Consensual Deviations from the APR

Several attempts have been made, both in theory and in practice, to non-consensually deviate from the APR. The *gifting* doctrine, according to which senior creditors can gift part of their entitlements under the plan to junior creditors or shareholders by bypassing intermediary classes, constitutes one of them.[727] The doctrine has been applied by several bankruptcy courts,[728] while being subsequently disapproved by some circuit courts.[729]

Another attempt for a non-consensual deviation from the APR involved structured dismissals, i.e. the dismissal of a Chapter 11 case without confirmation of a plan but with the court's approval of a priority-violating settlement of certain claims.[730] This approach, however, was expressly rejected by the USSC in *Czyzewski v. Jevic Holding Corp*.[731] Nevertheless, the USSC, *in*

724 For a summary of the arguments in favour and against the survival of the exception, see Adams (n 704) s I.C.

725 *Bank of American National Trust and Savings Association v 203 North LaSalle Street Partnership,* 526 US 434 (1999) 449ff.

726 See Adams (n 704) pt IV.

727 See generally Michael Carnevale, 'Is Gifting Dead in Chapter 11 Reorganizations? Examining Absolute Priority in the Wake of the Second Circuit's No-Gift Rule in re DBSD' (2012) 15 U Pa J Bus L 225; Olivares-Caminal and others (n 38) paras 3.145-48. See also generally Amy Timm, 'The Gift That Gives Too Much: Invalidating a Gifting Exception to the Absolute Priority Rule' [2013] U Ill L Rev 1649.

728 See Carnevale (n 727) 231-32 and cited cases therein.

729 See *In re Armstrong World Industries, Inc,* 432 F3d 507 (3d Cir 2005); *DISH Network Corp. v. DBSD North America Inc.,* 634 F3d 79 (2d Cir 2010).

730 For a more detailed discussion of structured dismissals and arguments favouring deviations from the rule in the case of structured dismissals, see Grohsgal (n 704) pts I, V-VII.

731 *Czyzewski v. Jevic Holding Corp.*,137 S Ct 973 (2017). For a brief summary of the case, see Grohsgal (n 704) 534ff.

dicta, left open the possibility of a non-consensual deviation from the APR for interim distributions.[732]

(2) The *Unfair Discrimination* Requirement

A further requirement for confirming a non-consensual plan is the absence of *unfair discrimination*.[733] This requirement, too, applies only to dissenting classes and not to dissenting individual creditors within an assenting class.[734] The *unfair discrimination* requirement represents the horizontal dimension of fairness of the distribution under a non-consensual plan, whereas the *fair and equitable* requirement constitutes its vertical pillar.[735] The *unfair discrimination* requirement, thus, focuses on the distributions to the classes of creditors of the same rank as those of the dissenting class.[736] Accordingly, there should be at least two classes of creditors with the same rank for it to apply. That said, the issue of proper classification[737] is not the subject matter of the *unfair discrimination* requirement since placing similar claims in different classes does not automatically result in discrimination between these classes.[738]

Unlike the *fair and equitable* requirement, the BC is completely silent on what constitutes unfair discrimination. One scholar, therefore, described it as 'an orphan in Chapter 11 reorganization practice'.[739] One detail is,

732 *Jevic* (n 731) 985. For the arguments in favour of the strict application of the rule at all stages, including interim settlements, of Chapter 11 proceedings, see generally Maxx M. Johnson, 'The Not-So-Settled Absolute Priority Rule: The Continued Threat of Priority-Deviation Through Interim Distributions of Assets in Chapter 11 Bankruptcy' (2017) 13 Seton Hall Cir Rev 291.

733 BC (n 37) s 1129 (b) (1).

734 Klee (n 683) 141 (fn 67 therein and accompanying text).

735 Markell, 'A New Perspective on Unfair Discrimination' (n 687) 227-28, 247.

736 It should be noted that, as already mentioned in this work, intra-class discrimination is not allowed unless the less favourably treated creditor agrees to such treatment. See n 688 and text thereto.

737 See sub-s E.II.1.a).

738 See Markell, 'A New Perspective on Unfair Discrimination' (n 687) 243 (fn 75 therein and accompanying text), where the author notes that proper classification of similar claims in different classes shall be assessed under s 1129 (a) (1) rather than s 1129 (b) (1). See also Polivy (n 683) 196-99; Committee on Bankruptcy and Corporate Reorganization of the Association of the Bar of the City of New York (ABCNY), 'Making the Test for Unfair Discrimination More "Fair": A Proposal' (2002) 58 Bus Law 83, 85-86.

739 Markell, 'A New Perspective on Unfair Discrimination' (n 687) 227.

nonetheless, clear from the language of section 1129 (b) (1): not every but only *unfair* discrimination is prohibited thereunder.[740]

(a) Forms and Rationales of Discrimination

The analysis of case law illustrates that discrimination between two or more classes of creditors with the same rank may take place in various forms: variances in payment percentage and/or maturity date, conditional payments, and source of payment, to name a few.[741] Discrimination, in one form or another, may have various rationales behind it, such as differences in the legal nature or amount of claims, differences in pre-insolvency expectations, importance for the survival of the business, rewarding or punishing the plan voting behaviour, and benefiting insiders.[742]

(b) Unfairness of Discrimination: Different Approaches and Tests

As mentioned above, the text of the BC contains no criteria to assess whether the discrimination between the classes of the same rank is unfair. The uncertainty surrounding the requirement, however, does not end there. That is to say, case law is also inconsistent on the matter.[743] Different approaches have been followed by courts, such as the *restrictive*, *mechanical*, or *broad* approaches.[744] Additionally, different competing tests have been developed to assess the unfairness of the discrimination, two of which this work will summarise below.

740 Brunstad and Sigal (n 686) 37. It should be noted that this point is one of the main arguments against the *mechanical approach*, according to which every single deviation from the *pro rata* distribution constitutes unfair discrimination. See n 744 and accompanying text.

741 See Polivy (n 683) s II.D. See also Markell, 'A New Perspective on Unfair Discrimination' (n 687) 239-41.

742 See Polivy (n 683) s II.C. See also Markell, 'A New Perspective on Unfair Discrimination' (n 687) 239-41; ABCNY (n 738) 86-87.

743 See Polivy (n 683) pt II.

744 See Polivy (n 683) sub-s II.B.1 and cases cited therein. See also ABCNY (n 738) 87-92 and cases cited therein. To sum up, the *restrictive* approach confines unfair discrimination to the cases involving subordination of claims. According to the *mechanical* approach, every single deviation from *pro rata* distribution is unfair. The *broad* approach, which is widely followed by courts, looks into the specific circumstances of each case at hand to evaluate whether the discrimination between the similarly situated classes is fair. The first two approaches have been followed by only few courts.

The *Aztec* test, which originated from Chapter 13 (of the BC) case law, consists of four parts to assess the fairness of discrimination:

> (1) whether the discrimination is supported by a reasonable basis; (2) whether the debtor can confirm and consummate a plan without the discrimination; (3) whether the discrimination is proposed in good faith; and (4) the treatment of the classes discriminated against.[745]

According to an alternative test, suggested by Bruce Markell and later known also as the *Dow Corning* test, unfair discrimination is presumed in case there is:

> (1) a dissenting class; (2) another class of the same priority; and (3) a difference in the plan's treatment of the two classes that results in either (a) a materially lower percentage recovery for the dissenting class (measured in terms of the net present value of all payments), or (b) regardless of percentage recovery, an allocation under the plan of materially greater risk to the dissenting class in connection with its proposed distribution.[746]

According to the author of this test, the presumption of unfairness can be rebutted when the disparate treatment (factors (3) (a) and (3) (b) of the test) under the plan conforms to pre-insolvency status and expectation of creditors and, in the case of disparate recovery under the plan (factor (3) (a) of the test) also when an equivalent contribution is provided by the favoured class.[747] In a relatively recent case, the Third Circuit upheld the

745 *In re Aztec Co,* 107 BR 585, 590 (Bankr MD Tenn 1989); Olivares-Caminal and others (n 38) para 3.135. For a critical analysis, see Markell, 'A New Perspective on Unfair Discrimination' (n 687) s IV.A, sub-s IV.C.2 (where the author refers to the test as the *Ambanc/Aztec standard*); ABCNY (n 738) 92-94 (where the test is referred as the *Broad Test*). For a summary of its criticism and further formulations, see Polivy (n 683) sub-s II.B.2. To summarise, the test has been criticised mainly for being too subjective in nature.

746 Markell, 'A New Perspective on Unfair Discrimination' (n 687) 249. For the judicial application of the test see, eg, *In re Dow Corning Corp*, 244 BR 696, 701-5 (Bankr ED Mich 1999). For a critical analysis, see ABCNY (n 738) 98-101.

747 Markell, 'A New Perspective on Unfair Discrimination' (n 687) 250. For a proposal to replace the test for the rebuttal of the presumption under Markel's proposal with a more objective test, see ABCNY (n 738) 106-07. For Markell's counter-argu-

application by the bankruptcy court of Bruce Markell's proposal over other tests while referring to it as the *rebuttable presumption* test.[748]

c) Summary

In subsection E.II.1, this work examined Chapter 11, focusing on the fairness assessments thereunder. Although a cross-class cramdown is available under Chapter 11, the plan should be accepted by at least one class of impaired claims. As to dissenting individual creditors in assenting classes in both consensual and cramdown plan scenarios, the court should ensure that they are not in a worse position than they would be if the debtor were liquidated. The fairness assessment in relation to dissenting classes is more complex and has two prongs. The vertical aspect, the APR, looks at the treatment of classes of unsecured claims with different ranks: junior claimants cannot receive anything unless dissenting classes of more senior claimants are fully paid (subject to the new value exception). The horizontal aspect focuses on the treatment of different classes of the same rank and whether there is unfair discrimination. The BC does not provide all the details, particularly regarding the horizontal aspect. Case law is also not consistent regarding certain matters, again, particularly in relation to the *unfair discrimination* requirement.

2. England

As already discussed, Chapter 11 provides a centralised route for the rescue of distressed companies under US law. However, no single centralised gateway exists under English law to rescue financially troubled companies.[749] Instead, there are several mechanisms available under different legislative acts, which can be used stand-alone or in combination.[750] These mechanisms provide for different entry requirements, voting procedures, and fairness assessment standards.

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ments regarding that proposal, see generally Bruce A. Markell, 'Slouching Toward Fairness: A Reply to the ABCNY's Proposal on Unfair Discrimination' (2002) 58 Bus Law 109.

748 *In re Tribune Co*, 972 F3d 228, 241-42 (3d Cir 2020).

749 Olivares-Caminal and others (n 38) para 3.233.

750 For a detailed overview of English restructuring instruments, see ibid pt I, ch 3, ss VIII-XIII.

Below, this work will examine three debt restructuring mechanisms under English law that can bind dissenting creditors:[751] Company Voluntary Arrangements ("CVA"),[752] Schemes of Arrangement ("Scheme"),[753] and Restructuring Plans ("Part 26A Plan").[754] This work will mainly examine fairness standards with respect to dissenting creditors and classes (as the case may be) as well as related issues (e.g. class composition) under the restructuring mechanisms of English law mentioned above.

a) CVA

The CVA is a mechanism that allows companies to propose 'a composition in satisfaction of its debts or a scheme of arrangement of its affairs'.[755] The CVA was introduced to English law as part of the insolvency reforms of 1985-86.[756] A company does not need to be insolvent to propose a CVA.[757]

aa) Voting Thresholds and Effects of Approval

For the CVA to be approved, it requires a majority of members in value and seventy-five per cent of creditors in value to vote in favour in their respective meetings.[758] Despite the possibility of being treated differently, creditors vote in a single class.[759] The claims of preferential and secured creditors cannot be compromised without their consent.[760] Unlike secured creditors

751 Administration (another mechanism of English law), if used stand-alone, cannot bind dissenting creditors (ibid para 3.261). Therefore, this work will not separately discuss the respective mechanism.
752 Insolvency Act 1986, pt I.
753 Companies Act 2006, pt 26.
754 ibid pt 26A.
755 Insolvency Act 1986, s 1 (1)
756 Jennifer Payne, 'Debt Restructuring in English Law: Lessons from the US and the Need for Reform' (30 January 2014) Oxford Legal Studies Research Paper No 89/2013 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2321615> accessed 21 October 2025, s 3.2.
757 ibid.
758 Insolvency (England and Wales) Rules 2016, SI 2016/1024 (Insolvency Rules), rr 2.36, 15.34 (3).
759 Payne, 'Debt Restructuring in English Law' (n 756) s 3.2; Olivares-Caminal and others (n 38) para 3.298.
760 Insolvency Act 1986, s 4 ((3)-(4)).

(with respect to the secured part of their claims), however, preferential creditors' votes are counted towards the requisite majority.[761] Once has been duly approved, the CVA becomes effective without requiring court intervention and binds, *inter alia*, dissenting unsecured creditors.[762]

bb) The *Unfair Prejudice* Challenge

A dissenting creditor can, nonetheless, challenge the CVA in court, particularly on the *unfair prejudice* grounds under the Insolvency Act 1986.[763] The statutory text, however, does not provide any guidance on what exactly constitutes *unfair prejudice* in this context.

That said, some guidelines have been established in case law. That is to say, in *Prudential Assurance Co Ltd v PRG Powerhouse Ltd*, Etherton J thoroughly examined the matter.[764] First, the judge mentioned that prejudice, although not necessarily *unfair*, can be established if a creditor is in a worse position under the CVA than before the CVA.[765] Secondly, the judge acknowledged that there is no single and universal test to assess unfairness in the respective context and all relevant circumstances, including available alternatives, should be taken into account.[766] According to the judge, a comparative analysis from different perspectives, such as vertical and horizontal comparisons, may be conducted as part of the fairness assessment.[767] In the judge's view, the vertical component of the analysis should compare the position of the creditor with the respective position that would have been in insolvent liquidation to ensure that the creditor is not worse off under the CVA.[768] However, the judge also noted that the vertical comparison alone should not be enough to establish unfair prejudice.[769]

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761 Insolvency Rules (n 758) rr 15.28 (5), 15.31 ((1), (4)-(5)). Olivares-Caminal and others (n 38) para 3.298.
762 Insolvency Act 1986, s 5 (2).
763 ibid s 6 (1). The CVA may also be challenged on the *material irregularity* ground under this section. For a more detailed discussion of the challenge of CVAs, see Olivares-Caminal and others (n 38) paras 3.305ff.
764 *Prudential Assurance Co Ltd v PRG Powerhouse Ltd* [2007] EWHC 1002 (Ch). See also *Lazari Properties 2 Ltd v New Look Retailers Ltd* [2021] EWHC 1209 (Ch).
765 *Powerhouse* (n 764) [72]-[73].
766 ibid [74].
767 ibid [75].
768 ibid [77]-[82].
769 ibid [83].

That is to say, the judge emphasised the importance of considering how other creditors are treated under the CVA and whether there is a differential treatment of creditors, which involves conducting a horizontal comparison.[770] The judge noted that differential treatment does not necessarily result in unfair prejudice and may even be necessary for fairness.[771] Additionally, the judge found it helpful to compare the respective positions of the parties under a potential Scheme, while underscoring the need for caution in that context.[772]

b) Scheme

The Scheme is a mechanism under Part 26 of the Companies Act 2006 ("Part 26") that provides for a 'compromise' or an 'arrangement' between a company and its creditors and/or members or any class of them.[773] It is worth noting that a company does not have to be insolvent or in financial difficulty to be eligible under Part 26.[774] Besides, the Scheme does not have to include all creditors and members of the company.[775]

aa) Class Composition, Voting Thresholds, and Effects of Confirmation

The proper classification of creditors is governed by case law. According to the rules established under case law, a Scheme class 'must be confined to those persons whose rights are not so dissimilar as to make it impossible for them to consult together with a view to their common interest'.[776] When determining whether classes have been properly composed, it is important

770 ibid [83]-[87].
771 ibid [88]-[89].
772 ibid [95].
773 Companies Act 2006, s 895. For a discussion of the definition of *compromise* or *arrangement*, see Jennifer Payne, *Schemes of Arrangement: Theory, Structure and Operation* (2nd edn, CUP 2021), 21-27; See also Mokal, 'The Two Conditions' (n 662) 731; Sarah Paterson, 'Judicial Discretion in Part 26A Restructuring Plan Procedures' (24 January 2022) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4016519> accessed 21 October 2025, s V.A.
774 Payne, 'Debt Restructuring in English Law' (n 756) s 3.3.
775 Olivares-Caminal and others (n 38) para 3.406.
776 *Sovereign Life Assurance v Dodd* [1892] 2 QB 573, 583 per Bowen LJ. For a detailed analysis of the class composition issue under Schemes, see Payne, *Schemes of Arrangement* (n 773) 56ff. See also Olivares-Caminal and others (n 38) paras 3-414-28.

to analyse the rights that are altered or discharged, as well as the new rights given by the Scheme.[777] If the Scheme is put forward as an alternative to the insolvent liquidation of the debtor, the rights that are altered or discharged by the Scheme are the respective rights those creditors would have in the liquidation.[778]

The Scheme shall be approved in each summoned class of creditors or members by a majority in number and seventy-five per cent majority in value present in the respective meetings.[779] The Scheme becomes binding on all affected creditors once it has been sanctioned by the court and all statutory procedural requirements have been met.[780]

bb) Fairness Assessment

Under Part 26, a stand-alone class cramdown is not possible.[781] Hence, the court has no jurisdiction to sanction the Scheme if the requisite majority in each Scheme class has not been reached.[782]

Accordingly, the fairness issue can only arise with respect to individual dissenting creditors within assenting classes. This matter is considered when the court decides whether to sanction the Scheme. That is to say, the court still has a genuine discretion not to sanction the Scheme in the sanctioning hearing, even if the requisite majority has been reached in each Scheme class.[783] When exercising their discretion, English courts apply a four-stage test originating from 19th-century cases, with the second and third stages being particularly important in safeguarding the interests of a minority within assenting scheme classes:

> ii) At the second stage, the Court must consider whether the class was fairly represented by the meeting, and whether the majority were coercing the minority in order to promote interests adverse to the class whom they purported to represent.

777 *Hawk Insurance Co Ltd* [2001] EWCA Civ 241 [30].
778 ibid [42].
779 Companies Act 2006, s 899 (1).
780 ibid s 899 ((3)-(4)).
781 Payne, 'Debt Restructuring in English Law' (n 756) s 3.3.
782 ibid.
783 *Hawk* (n 777) [33]; Payne, 'Debt Restructuring in English Law' (n 756) s 3.3. For a detailed analysis of the court's discretion, see Payne, *Schemes of Arrangement* (n 773) 84ff.

> iii) At the third stage, the Court must consider whether the scheme is a fair scheme which a creditor could reasonably approve. Importantly it must be appreciated that the Court is not concerned to decide whether the scheme is the only fair scheme or even the "best" scheme.[784]

At the second stage, when determining whether the majority fairly represents the assenting class in question, the court is likely to consider, *inter alia*, the turnout at the meeting and any collateral interests other than the interest of the class.[785] At the third stage, which involves determining whether a reasonable creditor would approve the Scheme, the court is likely to examine the position of the dissenting parties in the relevant alternative to the Scheme.[786] Additionally, the fact that the majority (both in value and in number) has supported the Scheme, as long as the requirements of the second stage have been fulfilled, is also likely to influence the court's assessment of whether a reasonable creditor would support the Scheme.[787]

c) Part 26A Plan

A new restructuring tool under Part 26A of the Companies Act 2006 ("Part 26A") for companies in financial difficulties was introduced to English law as part of the 2020 reforms.[788] In the years leading up to the reforms, numerous scholars advocated for the modernisation of English debt-restructuring law.[789] The new restructuring procedure, which reflects some

784 *Noble Group Limited* [2018] EWHC 3092 (Ch) [17] as recently paraphrased by Snowden J (as he then was). For an older version, see *Telewest Communications plc* [2004] EWHC 1466 (Ch) [20] (quoting *Re National Bank Ltd* [1966] 1 WLR 819. For a more detailed discussion, see Paterson, 'The Conceptual Foundation' (n 73) s 2.A.

785 Olivares-Caminal and others (n 38) para 3.434; See also Payne, 'The Role of the Court' (n 2) 138.

786 Olivares-Caminal and others (n 38) para 3.433.

787 Paterson, 'Judicial Discretion' (n 773) s IV.A.

788 Corporate Governance and Insolvency Act 2020, sch 9, s 1. For a critical analysis as to the implementation of the reforms, see generally Kristin van Zwieten, 'Mid-Crisis Restructuring Law Reform in the United Kingdom' (2023) 24 EBOR 287.

789 See, eg, Payne, 'Debt Restructuring in English Law' (n 756) pt 4; generally Sarah Paterson, 'Reflections on English Law Schemes of Arrangement in Distress and Proposals for Reform' (2018) 15 ECFR 472.

of these suggestions, was primarily based on the Scheme framework.[790] Despite that, Part 26A plans differ in several ways from Schemes. One major difference is the possibility of a stand-alone cross-class cramdown under section 901G of the Companies Act 2006, which will be discussed in detail below. The other differences are related to eligibility requirements,[791] voting thresholds,[792] and participants of class meetings.[793]

aa) Class Composition, Voting Thresholds, and Effects of Confirmation

Like Schemes, creditors can be placed in different classes, and the same case law principles that govern the composition of classes under Part 26 (i.e. the *similarity of rights* test)[794] also apply to Part 26A plans.[795] The Part 26A plan must be approved by at least seventy-five per cent of the majority in value present in each summoned class of creditors or members.[796] If this threshold is not met, the plan can only be confirmed under the cramdown provisions of section 901G. However, it is up to the court to decide whether to sanction the Part 26A plan in either case.[797] Once it has been sanctioned by the court and become final, the Part 26A plan binds all creditors and members, including dissenting ones.[798]

bb) Fairness Assessment

This work will now turn to the fairness framework to protect the interests of dissenting creditors under Part 26A. To begin with, the EWCA upheld the approach that the *rationality* test under Part 26 case law[799] should continue

790 Olivares-Caminal and others (n 38) para 3.472.
791 Companies Act 2006, s 901A. It is noteworthy that a company shall be or likely to be in financial difficulty to be eligible under Part 26A. For a more detailed discussion, see Olivares-Caminal and others (n 38) paras 3.475-77.
792 Companies Act 2006, s 901F. For a more detailed discussion, see Olivares-Caminal and others (n 38) para 3.488.
793 Companies Act 2006, s 901C. For a more detailed discussion, see Olivares-Caminal and others (n 38) paras 3.478-87.
794 See sub-s E.II.2.b)aa).
795 *Adler* (n 622) [114].
796 Companies Act 2006, s 901F (1)
797 ibid ss 901F (1), 901G (2).
798 ibid s 901F ((5)-(6)).
799 See sub-s E.II.2.b)bb).

to apply with respect to dissenting creditors within assenting classes of Part 26A plans irrespective of whether or not a cross-class cramdown is engaged.[800] The fairness assessment with respect to dissenting creditors within assenting classes under Part 26A, therefore, will not be addressed further in this work.

As to dissenting classes under Part 26A, the fairness assessment has two prongs. First, the court has jurisdiction to sanction the Part 26A plan only if two statutory conditions have been satisfied.[801] Second, sanctioning the plan is still at the court's discretion, even if both conditions have been fulfilled.[802] Below, this work will examine the jurisdictional requirement and the court's discretion in the respective order.

(1) Jurisdictional Requirement

If the requisite majority is not reached in at least one of the plan classes, section 901G of the Companies Act 2006 sets out two additional conditions that must be met before the court can use its discretion to sanction the Part 26A plan.

(a) Condition A

One of the conditions (Condition A) states that members of the dissenting class shall not be treated worse than they would be in case of 'the relevant alternative' that, according to the court, would 'most likely occur' if the plan were not sanctioned.[803] This condition, also referred to as the *no worse off* test, is considered a vertical limb of the fairness assessment under Part 26A.[804] That said, the test is similar in nature to the BIT under Chapter 11[805] rather than APR, which constitutes the vertical pillar of the fairness assessment with respect to dissenting classes under Chapter 11. That is to say, the statutory *no worse off* test does not take into account how the plan affects classes with lower priority but rather focuses on how the dissenting class would be treated in the relevant alternative.

800 *Adler* (n 622) [117], [128].
801 Companies Act 2006, s 901G ((2) - (5)).
802 *Adler* (n 622) [153].
803 Companies Act 2006, s 901G ((3)-(4)).
804 *Adler* (n 622) [12], [152].
805 For a more detailed discussion of the BIT, see sub-s E.II.1.b)aa).

Although Condition A and the BIT share some textual and conceptual similarities, there are two significant differences between them. First, unlike the latter, the *no worse off* test under section 901G applies only in a cramdown plan scenario and only with respect to creditors in dissenting classes[806] and, therefore, not to individual dissenting creditors in assenting classes.[807] Second, for the purpose of the statutory *no worse-off test,* the benchmark for comparison is not necessarily the liquidation or winding-up of the company (which is a low bar[808]), but rather the relevant alternative that would most likely occur without the plan. Identifying this relevant alternative and the position of the dissenting class within that alternative, therefore, is one of the central, though not always straightforward, issues under Part 26A.[809] That said, the issue is not new to English courts. Determining the relevant alternative is a familiar topic to them from the Scheme (regarding matters related to class composition or the rationality test) and CVA (regarding the unfair prejudice challenge) cases.[810]

(b) Condition B

According to the other condition (Condition B), at least one class of plan claimants who would make a recovery or have 'a genuine economic interest in the company' in the relevant alternative shall accept the plan.[811] Condition B is akin to the Chapter 11 requirement stipulating that at least one impaired class must vote for the plan.[812] However, the former does not necessitate any impairment and instead focuses on the position in the relevant alternative.[813] Nevertheless, the rationale behind these two requirements is similar, which is the indication of some actual creditor support and, thus, the reasonableness of the plan.[814]

806 Mokal, 'The Two Conditions' (n 662) 731.
807 For the avoidance of doubt, it is not argued that dissenting creditors in assenting classes can be treated worse than they would be in the relevant alternative. What is argued is that this issue is not assessed under s 901G.
808 Payne, 'The Role of the Court' (n 2) 139; Seymour and Schwarcz (n 702) 29.
809 Paterson, 'Judicial Discretion' (n 773) pt II.
810 Mokal, 'The Two Conditions' (n 662) 730. For a brief summary of the case law on the matter, see Olivares-Caminal and others (n 38) paras 3.493-95.
811 Companies Act 2006, s 901G (5).
812 See sub-s E.II.1.a).
813 Mokal, 'The Two Conditions' (n 662) 731.
814 ibid; Olivares-Caminal and others (n 38) para 3.491.

(2) Judicial Discretion

As already noted earlier in this work, Part 26A introduced a significant feature previously not found in English restructuring law: a stand-alone cross-class cramdown procedure. However, the legislation did not specify any priority rule for a cramdown scenario (such as the APR under Chapter 11), deliberately leaving the matter to be determined by courts.[815] Hence, the new restructuring tool also introduced uncertainty about how courts should exercise their discretion, particularly when sanctioning a Part 26A plan involving a cross-class cramdown.

(a) Early-Stage Academic Discussion

To that end, several initial suggestions have been made in the literature. Riz Mokal suggested that courts shall look at, as a default rule, whether the 're-structuring surplus' is distributed between different classes under the plan in a ratio that would apply to the distribution between the respective classes in the relevant alternative and deviating proportions under the plan should be justified.[816] In a paper addressing the issue, Sarah Paterson analysed several proposed frameworks, such as transplanting Part 26 or Chapter 11 frameworks and subsequently argued against both due to, *inter alia*, 'design differences'.[817] She suggested that courts should adopt a flexible approach but proposed several guidelines with a focus on whether other classes receive 'too much unfair value'.[818] In her opinion, several patterns could indicate receiving too much unfair value (such as leaving some liabilities unimpaired, retention of equity by shareholders, and so forth) and should be given special regard.[819]

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815 van Zwieten, 'Mid-Crisis Restructuring Law Reform' (n 788) 307.

816 Mokal, 'The Court's Discretion' (n 708) 15. For Riz Mokal's definition of the *restructuring surplus,* see n 662 and accompanying text. For a discussion of the potential shortcomings of or difficulties associated with the Riz Mokal's proposal, see Paterson, 'Judicial Discretion' (n 773) s IV.C.

817 Paterson, 'Judicial Discretion' (n 773) pt IV.

818 ibid pt V. For a critical analysis, see Riz Mokal, 'Cram Dos, Don'ts, and Darn Its: The 'Too Much Unfair Value' Approach to the UK Cramdown' [2025 April] South Square Digest 36, 37-41.

819 Paterson, 'Judicial Discretion' (n 773) pt V.

(b) *Adler*

In *Adler*, the EWCA brought clarity to various matters concerning the court's discretion to sanction a cramdown Part 26A plan.[820] The facts of the case are briefly summarised as follows.[821] The restructuring plan in question provided for the winding down of the entire group by gradually realising its assets and sequentially (and fully) repaying holders of different series of notes, mainly in accordance with the original maturity dates of the respective notes. The plan received approval from the requisite majority of noteholders in all classes, except for one class of noteholders who would be repaid last after the full repayment of the holders of the notes with earlier maturity dates. The EWHC sanctioned the plan based on the expert evidence that the proceeds from the sale of the group's assets would suffice to fully pay all noteholders, including those in the dissenting class. The EWHC judgment was subsequently appealed by several noteholders in the dissenting class, and Lord Snowden handed down the judgment of the EWCA.

As noted, the EWCA examined significant matters regarding the court's discretion to sanction a cramdown Part 26A plan, which will be summarised below.

(aa) Fairness Framework with Respect to Dissenting Classes of Creditors

To begin with, the EWCA held that the mere fact that the statutory jurisdiction requirement (Conditions A and B) has been fulfilled does not presume the fairness of the plan.[822] The *Adler* court also acknowledged that the same fairness concepts developed under case law for Part 26 cases, specifically the rationality test, cannot apply to dissenting classes under Part 26A Plans.[823] In the *Adler* court's opinion, due to the dissimilarity of interests between dissenting and assenting classes, the fairness of the plan towards dissenting classes cannot be judged on the basis that other

820 *Adler* (n 622).

821 The facts stated herein are taken from the judgment of Lord Snowden (ibid). For a broader summary of the facts and procedural background of the case, see ibid [13]-[104].

822 ibid [153]-[154].

823 ibid [129].

classes have voted for the plan.[824] As mentioned earlier in this work, the EWCA stated that courts should nevertheless continue to apply the Part 26 fairness concepts with respect to holdout creditors within assenting classes of cramdown Part 26A plans.[825]

In reference to the fairness assessment with respect to a dissenting class of creditors under Part 26A plans, the *Adler* court stressed the importance of the *vertical comparison* and *horizontal comparison* concepts developed in the CVA jurisprudence.[826] According to Lord Snowden, courts should focus on the horizontal comparison while exercising their discretion to sanction cramdown Part 26A plans since the vertical comparison also constitutes a part of the jurisdictional requirement (Condition A).[827] Lord Snowden agreed with the view that, in exercising its discretion to sanction a cross-class cramdown Part 26A plan, the court should determine 'whether the plan provides for differences in treatment of the different classes of creditors *inter se* and, if so, whether those differences can be justified', with the relevant alternative serving as 'an obvious reference point for this exercise'.[828]

In the court's opinion, if the relevant alternative is the insolvency of the debtor and the creditors in all the plan classes would rank equally as unsecured creditors in that alternative (which was the case in *Adler*), the distribution under the plan should generally follow the *pari passu* principle[829] to reflect the relevant alternative.[830] According to Lord Snowden, a deviation from that principle is possible, provided that there is a proper justification behind it.[831] Nonetheless, the *Adler* court deliberately refrained from formulating a full list of criteria in that regard but gave a few examples, such as favourable treatment of a class of creditors that provide additional value or are necessary for the continuation of the business.[832] Lord Snowden also endorsed the view that courts should look at whether a fairer plan would be available as part of the horizontal comparison.[833]

824 ibid [133]-[134].
825 ibid [117], [128].
826 ibid [148]-[149].
827 ibid [152]-[156].
828 ibid [159].
829 For a more detailed discussion of the *pari passu* principle, see sub-s E.I.1.
830 *Adler* (n 622) [165].
831 ibid [166].
832 ibid [167]-[172].
833 ibid [173]-[182].

Applying this reasoning to the case at hand, Lord Snowden, with whom the other judges fully agreed, reversed the decision of the EWHC on the grounds that the plan put a greater risk to the dissenting class and, thus, deviated from the *pari passu* rule without a proper justification.[834]

(bb) Retention of Equity by Old Shareholders

Another important matter analysed by the EWCA in *Adler* is the retention of equity interests of old shareholders in the restructured company in cases where creditors are not fully paid. Two observations from Lord Snowden's analysis of the matter merit brief mention.[835] First, Lord Snowden referred to his position in *Virgin Active*[836] endorsing the *gifting* doctrine.[837] In that case, Snowden J (as he then was) concluded that it was for in the money creditors to share the value that might be generated under the plan with the existing shareholders and the objections of out of the money creditors in that regard should be given no consideration.[838] Second, according to Lord Snowden, courts are not given 'a power to extinguish claims or confiscate shares for no consideration' under Part 26A since such power is not compatible with the definition of a *compromise or arrangement*.[839]

834 ibid [197], [280].

835 For a full analysis of the matter, see ibid [239]-[278].

836 *Virgin Active Holdings* Ltd [2021] EWHC 1246 (Ch).

837 *Adler* (n 622) [252].

838 *Virgin Active* (n 836) [266]. For a more cautious approach to gifting against the objection of an in the money creditor, see *Great Annual Savings Company Ltd* [2023] EWHC 1141 (Ch), [123]ff.

839 *Adler* (n 622) [271]-[275]. For a more detailed discussion of the definition of a *compromise or arrangement,* see cited sources in n 773. This argument (that out of the money creditors or members should receive something under the plan) also constituted one of the guidelines (based on the Scheme jurisprudence) of the flexible framework initially suggested by Sarah Paterson, see Paterson, 'Judicial Discretion' (n 773) s V.A. That said, shareholders and out of the money creditors may still receive nothing under Part 26 if the Scheme is combined with pre-packaged administration. See *Adler* (n 622) [260]-[262]. For a more detailed discussion, see Payne, 'Debt Restructuring in English Law' (n 756) s 3.5; Olivares-Caminal and others (n 38) pt I, ch 3, s XII; Paterson, 'The Conceptual Foundation' (n 73) s 2.B.

(c) Developments in the Literature and Case Law Following *Adler*

The emerging principles surrounding the Part 26A cross-class cramdown in the initial cases, particularly *Adler,* have been closely scrutinised in the literature. Sarah Paterson raises concerns about the limited, if any, consideration given to out of the money classes and the acceptance of the gifting doctrine in the initial cases.[840] She consequently proposes a conceptual framework in which the aim of cross-class cramdown is 'not only to motivate cooperative bargaining but also to enforce a fair bargain that the dissenting creditors could reasonably approve' (*the bargaining approach*).[841]

Riz Mokal, Stephan Madaus, Irit Mevorach, and Ignacio Tirado generally endorse most of the conclusions reached in the initial cases.[842] However, they question the approach to determining 'whether the class has a real economic interest in the debtor'[843] and highlight the need to exercise caution regarding gifting.[844] This analysis of the case law was conducted against the backdrop of a conceptual framework for cross-class cramdown they advocate (*fair allocation of the restructuring surplus*), which envisages the relative priority rule[845] as a default rule and requires any departure therefrom to be 'normatively defensible'.[846]

It should be noted that some of these issues, particularly the treatment of out of the money classes, were subsequently addressed by the EWCA in two recent cases: *Thames Water*[847] and *Petrofac*.[848] That is to say, the EWCA rejected the argument, based upon earlier case law, that out of the money classes need not be offered under the plan anything more than *de minimis*, the amount sufficient only to fulfil the jurisdictional requirement regarding the definition of a *compromise* or *arrangement*.[849] Instead, the EWCA held that:

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840 Paterson, 'The Conceptual Foundation' (n 73) 12-14.
841 ibid 17ff. For a critical analysis of Sarah Paterson's early formulation of this framework, see Mokal, 'The 'Too Much Unfair Value' Approach' (n 818) 42-47.
842 Riz Mokal and others, 'The Cramdown: A Conceptual Framework' in Jennifer Payne and Kristin van Zwieten (eds), *Corporate Restructuring Law in Flux* (Hart Publishing 2025) 120-31.
843 ibid 122.
844 ibid 129-31.
845 For a discussion of the relative priority rule, see sub-ss E.II.3.b), E.II.3.c).
846 Mokal and others (n 842) 116-118.
847 *Thames Water* (n 662).
848 *Petrofac* (n 622).
849 *Thames Water* (n 662) [120]-[156]; *Petrofac* (n 622) [111]-[117].

> ... the proper use of the cross-class cram down power is to enable a plan to be sanctioned against the opposition of those unreasonably holding out for a better deal, where there has been a genuine attempt to formulate and negotiate a reasonable compromise between all stakeholders.[850]

d) Summary

In subsection E.II.2, this work examined three English law restructuring frameworks that can bind holdouts: the CVA, the Scheme, and the Part 26A plan. Each of the frameworks mentioned differs in certain aspects, such as entry requirements and voting procedure.

The CVA is particularly distinctive since creditors vote in a single class and it does not require the court's sanctioning to bind holdouts. A dissenting unsecured creditor, however, can challenge a CVA on the *unfair prejudice* grounds. Courts conduct vertical (comparison with the possible position of the challenging creditor in the debtor's insolvent liquidation scenario) and horizontal (comparison with the position of other creditors under the CVA) comparisons in assessing fairness.

Under the Scheme and the Part 26A plan frameworks, creditors can be placed in different classes and the court's sanctioning is required by law. Unlike Part 26A plans, a stand-alone cross-class cramdown is not possible in Scheme cases. Hence, here, the fairness assessment concerns only dissenting individual creditors in assenting classes. In assessing fairness under the Scheme, courts mainly examine whether the assenting majority genuinely represents the class and whether a reasonable creditor would accept such a Scheme.

The same principles apply to assessing fairness in relation to dissenting creditors within assenting classes in Part 26A plan cases. Nonetheless, unlike Schemes, under the Part 26A plan framework, a cross-class cramdown is possible, subject to two statutory conditions and the court's discretion to sanction.

One of the statutory conditions (Condition A) ensures that members of the dissenting class are not worse off under the plan than they would be in the relevant alternative. The other condition (Condition B) requires that at least one class of the plan claimants who would be in the money in the relevant alternative shall accept the plan.

850 *Petrofac* (n 622) [191].

English courts are in the process of developing principles for the exercise of their discretion in sanctioning cramdown Part 26A plans on a case-by-case basis. As Condition A already encompasses the vertical comparison, in exercising their discretion to sanction, courts primarily focus on the horizontal comparison in assessing the fairness of the Part 26A plan with respect to the dissenting classes. That is to say, courts examine whether different classes are treated differently under the plan and, if so, whether such differential treatment is justified in light of the respective positions of those classes in the relevant alternative. If, for example, the relevant alternative is insolvent liquidation of the debtor, the distribution under the plan among the unsecured creditors of the same rank should comply with the *pari passu* principle and any deviation should be based on justifiable grounds. Notably, recent cases place greater emphasis than earlier ones on the position of out of the money classes in considering the fair allocation of the benefits of the restructuring.

3. The PRD

The PRD, adopted in 2019,[851] obliges Member States to adapt their national legislation accordingly by 17 July 2021, with the possibility of a one-year extension.[852] The aim of the PRD is, *inter alia*, to ensure that effective preventive restructuring mechanisms are in place in Member States in order to address the need for the rescue of viable businesses facing financial difficulties.[853] As to the fairness of these mechanisms and protection of dissenting creditors, the PRD offers various options for Member States. Below, this work will discuss the options related to dissenting individual creditors and dissenting classes of creditors, followed by a summary of academic opinions on the new fairness concept under the PRD.

851 PRD (n 15). For a discussion of the origins of the PRD, see Christoph G. Paulus, 'European and Europe's Efforts for Attractivity as a Restructuring Hub' (2021) 56 Tex Intl L J 95, 98-99.
852 PRD (n 15) art 34.
853 ibid rec 1.

a) Dissenting Individual Creditors

The PRD provides for the 'best-interest-of-creditors test' ("EU BIT") to protect dissenting individual creditors in assenting classes, whether in a consensual or cramdown plan scenario.[854] The EU BIT is satisfied when a dissenting creditor is not worse off under the proposed plan than this creditor would be in liquidation (through piecemeal or going concern sale) or in 'the next-best-alternative scenario' if the proposed plan were not sanctioned.[855] It is up to Member States to choose one of those baselines as a comparator.[856] What can be considered as the *next-best-alternative scenario* is unclear and the definition has been questioned in the literature.[857] It, however, is evident from the text of the PRD that the comparator for the purposes of the EU BIT should not necessarily be the liquidation of the debtor in formal proceedings, whether through piecemeal or going concern sale. It can also be an alternative plan, going-concern sale outside formal proceedings, or the continuation of ordinary business.[858]

b) Dissenting Classes of Creditors

In case a plan is not consensual, i.e. not approved by all classes, the PRD provides two options for Member States for assessing fairness with respect to dissenting classes. The default option ensures that dissenting classes receive at least the same treatment as other classes of the same rank (the

854 ibid arts 10 (2) (d), 11 (1) (a).

855 ibid art 2 (6).

856 ibid rec 52. However, as also pointed out by Jonathan Seymour and Steven Schwartz (see Seymour and Schwarcz (n 702) 29), it is not completely clear whether the choice may be made only between the liquidation scenario (which includes both piecemeal and going-concern-sale liquidation) and the next best alternative, or also within the former (between piecemeal liquidation and going-concern-sale liquidation).

857 See, eg, Riz Mokal and Ignacio Tirado 'Has Newton Had His Day? Relativity and Realism in European Restructuring' (2019) 4 JIBFL 233, 234; Giulia Ballerini, 'The Priorities Dilemma in the EU Preventive Restructuring Directive: Absolute or Relative Priority Rule?' (2021) 30 Intl Ins Rev 7, 10.

858 Madaus, 'Relative Priority Rule' (n 662) pt 1. For a discussion of different scenarios, see also Dominik Skauradszun, 'Restructuring Companies During and After the Covid-19 Pandemic: A Law & Economics Approach' (2021) 9 NIBLeJ 1 1 <https://www.ntu.ac.uk/media/documents/academic-schools/law/2021-9-NIBLeJ-1.pdf> accessed 21 October 2025, 18ff.

horizontal factor of the fairness assessment) and more favourable treatment than any class of more junior rank (the vertical factor of the fairness assessment).[859] In the literature, this priority model is often referred to as the relative priority rule ("RPR").[860] Member States can also opt for the APR, as discussed in the US context earlier, which requires that dissenting classes should be fully paid before any class of more junior rank receives anything under the plan.[861] Deviating from the APR is allowed under the PRD, provided that it is essential for achieving the objectives of the proposed plan and that affected parties are not unfairly prejudiced under the plan.[862]

As can be seen from the respective definitions, the key distinction between these two priority rules is that the RPR, unlike the APR, does not mandate full payment to senior claimants before more junior claimants can make some recovery under the plan. Providing better treatment of the former is sufficient in this context.

c) Academic Reception

The RPR has sparked controversy among scholars. Below, this work will briefly summarise the arguments for and against it.

aa) Arguments in Favour of the RPR

Stephan Madaus describes the RPR as a fairness test based on anti-discrimination.[863] In his opinion, the RPR rules out discrimination among pre-restructuring ranks of creditors by setting out a framework where dissenting classes are not treated worse than other classes of the same rank and are treated better than more junior classes, on the one hand.[864] On the other hand, says Stephan Madaus, the RPR allows some flexibility in distributing

859 PRD (n 15) art 11 (1) (c).
860 See generally Madaus, 'Relative Priority Rule' (n 662). It is essential to note the RPR is a different concept from the relative priority model suggested by Douglas Baird (see text to n 715). For a summary of the various approaches in the US scholarship associated with the term *relative priority*, see Krohn (n 662) 88-89 (en 4 therein and accompanying text).
861 PRD (n 15) art 11 (2).
862 ibid art 11 (2), sub-para 2.
863 Madaus, 'Relative Priority Rule' (n 662) pt 3.
864 ibid.

the reorganisation surplus[865] among classes within that framework, taking into consideration special circumstances.[866] Furthermore, he recommends assessing the RPR not separately but rather in conjunction with the EU BIT.[867]

According to Bob Wessels, the RPR will incentivise shareholders to initiate restructuring of viable businesses at an earlier stage, as it, unlike the APR, does not require their equity to be wiped out first.[868] He also underscores that in most Member States, there are a considerable number of creditor classes (such as employees, tax authorities, and tort victims) having a preferential status and, therefore, it would be challenging to fully settle the claims of these preferential creditors as required under the APR.[869] This, in turn, may lead to the failure of otherwise value-generating plans, according to Bob Wessels.[870]

Riz Mokal and Ignacio Tirado highlight the shortcomings of the APR, which, according to them, will probably be remedied by the RPR.[871] The APR, they say, encourages dissenting behaviour.[872] Besides, they argue that it is challenging to allocate value to existing shareholders under the APR, which can be a problematic issue, particularly in SME cases where shareholders' further participation may be necessary for the successful continuation of the business.[873] Riz Mokal refers to the RPR as a 'more realistic alternative' (to the APR), as it avoids encouraging holdout behaviour and allows old shareholders to retain equity stakes in SME cases.[874]

As far as SMEs are concerned, Axel Krohn underscores the difference in the focus of the PRD and that of Chapter 11.[875] That is to say, he argues that the PRD places considerable emphasis on SMEs,[876] which constitute

865 For the definition of the *reorganisation (restructuring) surplus,* see n 662 and accompanying text.
866 Madaus, 'Relative Priority Rule' (n 662) pt 3.
867 ibid pt 4. See also Krohn (n 662) 84-87.
868 Bob Wessels, 'The Full Version of My Reply to Professor De Weijs et al' (22 March 2019) Bob Wessels Blog (2019-03-doc10) <https://bobwessels.nl/blog/2019-03-doc10-the-full-version-of-my-reply-to-professor-de-weijs-et-al/> accessed 21 October 2025.
869 ibid.
870 ibid.
871 Mokal and Tirado (n 857) 235.
872 ibid.
873 ibid.
874 Mokal, 'Fairness' (n 571) s 9.
875 Krohn (n 662) 80.
876 ibid.

ninety-nine per cent of the business in the EU.[877] By contrast, says Axel Krohn, Chapter 11 was primarily designed for larger companies.[878] Hence, in his view, the APR, which ultimately requires existing equity to be wiped out first, was not entirely suitable for the intended focus of the European legislature.[879] He reinforces the respective argument by noting that the newly introduced Subchapter V of Chapter 11,[880] designed for restructuring small companies, does not necessitate adherence to the APR.[881]

bb) Arguments Against the RPR

Arguments against the RPR are also multi-fold. To begin with, critics argue that an unnecessary risk of changing the basis of private law is taken by opting for the RPR, which does not fully honour priority orders bargained for outside bankruptcy under private law (such as contract law and company law) rules.[882] One commentator notes that, for example, the very purpose of subordination agreements, which creditors bargained for (by also agreeing to different interest rates), would be undermined if subordinated creditors made some recovery from the insolvent debtor's estate before fully compensating senior creditors.[883] According to opponents, the RPR, which introduces the risk of a non-consensual deviation from a bargained priority order, will have practical implications, such as making debt financing less attractive and leading to higher interest rates.[884]

Additionally, critics argue that the RPR will encourage shareholders to increase leverage and, as a result, to undertake highly risky projects without

877 PRD (n 15) recs 17, 59.
878 Krohn (n 662) 80.
879 ibid.
880 BC (n 37) ss 1181-95.
881 Krohn (n 662) 80.
882 Roelf Jakob de Weijs, Aart Lambertus Jonkers, and Maryam Malakotipour, 'The Imminent Distortion of European Insolvency Law: How the European Union Erodes the Basic Fabric of Private Law by Allowing "Relative Priority" (RPR)' (11 March 2019) Amsterdam Law School Research Paper No 2019-10, Centre for the Study of European Contract Law Working Paper No 2019-05 <https://ssrn.com/abstract=3350375> accessed 21 October 2025, s 6.1; Ballerini (n 857) 12-13.
883 Ballerini (n 857) 12.
884 ibid 13; Seymour and Schwarcz (n 702) 27.

the fear of losing their entire equity if those projects fail.[885] It has been noted that this trend may undermine the stability of the entire economy.[886]

Furthermore, opponents of the RPR point out that it will lead to increased uncertainty and arbitrary outcomes, potentially encouraging opportunistic behaviours.[887] It has been argued that apart from the valuation uncertainty, which is also present in the APR, the RPR introduces additional uncertainty regarding *who* is entitled to the value and *to what extent*, as well as what is considered *fair*.[888] Critics stress that the APR encourages shareholders and senior creditors, albeit due to different reasons,[889] to avoid a cramdown scenario and come up with a consensual plan, thereby providing a clear framework for negotiations.[890] It has been noted that the RPR, by contrast, incentivises claimants, again for different reasons, to opt for a cramdown scenario and engage in fairness discussions in courts.[891]

It has also been pointed out that SMEs, whom the RPR claims to primarily protect, will suffer the most from it as creditors.[892] By referring to the original purpose of the APR, which was to protect junior creditors against the collusion of shareholders and senior creditors during the era of equity receiverships in the US, opponents argue that the RPR deprives intermediate creditors, who will be SMEs in most cases, of that protection.[893]

Finally, critics note that, despite all the concerns associated with it, the RPR does not address the problematic aspects of the APR and is mistakenly compared to the relative priority model advocated by US scholar Douglas

885 de Weijs, Jonkers, and Malakotipour (n 882) s 6.2, Ballerini (n 857) 12. See also Seymour and Schwarcz (n 702) 23-24.

886 de Weijs, Jonkers, and Malakotipour (n 882) s 6.2.

887 ibid s 6.3. See also Seymour and Schwarcz (n 702) 25-26.

888 de Weijs, Jonkers, and Malakotipour (n 882) s 6.3.

889 The rationale for shareholders is explained by the fact that under a cramdown plan, where the APR applies, shareholders would get nothing unless all creditors are fully paid. See ibid. Senior creditors do not bear that risk. On the contrary, they would be paid first under the APR. Their interest in avoiding a cramdown scenario is explained by a costly and inherently uncertain valuation that would be the case in that scenario under the realm of the APR. See Seymour and Schwarcz (n 702) 11-14. See also Ballerini (n 857) 17.

890 Seymour and Schwarcz (n 702) 14-16 (The authors refer to a valuation hearing under APR as a *penalty default rule* of Chapter 11 which encourages parties to avoid a cramdown scenario and to agree on a consensual plan). See also de Weijs, Jonkers, and Malakotipour (n 882) s 6.3; Ballerini (n 857) 17.

891 de Weijs, Jonkers, and Malakotipour (n 882) s 6.3.

892 ibid s 6.4.

893 ibid. See also Seymour and Schwarcz (n 702) 20-21.

Baird[894] as an alternative to the APR.[895] Unlike the RPR, say opponents, Douglas Baird's relative priority model fully respects the priority order among different ranks of creditors and aims to avoid the debtor's valuation during the confirmation stage.[896]

Nonetheless, opponents of the RPR acknowledge the issues linked to the APR, such as the challenges in retaining equity in SME cases or ensuring that trade creditors are fully paid.[897] That said, they suggest addressing these issues by designing carefully crafted exceptions to the APR instead of developing a new priority rule of a relative nature.[898]

4. Comparative Summary

In section E.II, this work examined restructuring frameworks and substantive fairness standards thereunder in the US and England as well as under the PRD. Both jurisdictions provide an extensive framework to ensure substantive fairness in restructuring proceedings. So does the PRD. However, there are several fundamental differences that may lead to different outcomes, even in cases with similar or identical facts.[899] To begin with, US law has a single hybrid restructuring mechanism (Chapter 11) for all corporations, whether insolvent or not yet insolvent. By contrast, English law offers numerous restructuring tools with different entry, voting, and confirmation requirements as well as fairness standards. For example, in a CVA process, creditors vote as a single class and can be treated in materially different ways, which is not the case in some other English restructuring tools and Chapter 11.

894 See text to n 715.

895 de Weijs, Jonkers, and Malakotipour (n 882) pt 5; Ballerini (n 857) 16.

896 ibid. Stephan Madaus points out that a valuation is inherent to all restructuring proceedings irrespective of a priority rule, at least for the purpose of the satisfaction of the BIT (See Madaus, 'Relative Priority Rule' (n 662), pt 4). However, Jonathan Seymour and Steven Schwartz argue that valuations for the purpose of the BIT are routine and require less extensive appraisal than those for the purposes of the cramdown. See Seymour and Schwarcz (n 702) 8 (fn 45 therein and accompanying text).

897 See, eg, de Weijs, Jonkers, and Malakotipour (n 882) pt 7; Ballerini (n 857) 18ff.

898 ibid.

899 See Paterson, 'A Qualified Defence of the Rule in Gibbs' (n 74) pt VI, where Sarah Paterson highlights certain differences between Chapter 11 and Part 26A, and argues that the plans sanctioned in some recent Part 26A cases would not have been confirmed under Chapter 11.

In addition, although both jurisdictions and the PRD agree that individual dissenting creditors cannot be worse off as a result of the restructuring, the baseline for comparison is not exactly the same. In the US, there is only one comparator: a liquidation scenario, which is a low bar. Under English law or the PRD, the bar is higher, and the respective baseline is not confined to the formal liquidation of the debtor.

More noticeable and fundamental differences are related to dissenting classes. That is to say, in the US, the APR strictly applies, subject to one exception. The rule prevents holders of more junior claims and interests from receiving anything unless dissenting classes of more senior claimants are fully paid. However, English law does not have a similar rule. In fact, existing shareholders' shares cannot be cancelled and creditors' claims cannot be extinguished without giving them something in return under Part 26 or Part 26A procedures. Recent EWCA cases have placed even greater emphasis on the fair treatment of out of money creditors in Part 26A plans. The PRD, in turn, introduces a new priority rule according to which better treatment of more senior claimants is sufficient. Besides, retention of equity by shareholders whose contribution to the continuation of the business does not constitute money's worth is not possible under Chapter 11 while being not impossible under English law or the PRD. The gifting doctrine, which allows senior classes to gift some part of their recovery under the plan to junior classes over intermediary classes, was rejected by some circuit courts in the US. In England, however, the doctrine received some endorsement in early Part 26A cases, although the initial case law was controversial in this regard. Furthermore, it remains to be seen whether this trend of endorsement will continue in light of recent EWCA decisions, which place greater weight than earlier cases on the position of out of the money creditors.

Finally, the statutory text grants English courts broader discretion than their US counterparts when sanctioning cross-class cramdown plans. That is to say, English courts still have discretion to sanction such plans under Part 26A, even if all statutory requirements have been met. It is also worth noting that English courts are still in the process of developing the principles guiding the exercise of this discretion on a case-by-case basis.

III. Summary

Part E was dedicated to the role of substantive fairness in restructuring in general, without considering cross-border elements. First, this work

elaborated on the difference between insolvency and restructuring proceedings in terms of ensuring the fairness of outcome (substantive fairness) in these proceedings (E.I). It concluded that ensuring substantive fairness in restructuring proceedings is a more critical and multifaceted issue and should take into account the peculiarities of the case at hand.

This work then examined how the concept is implemented, using the examples of restructuring frameworks under US law, English law, and the PRD (E.II). It was observed that in some issues (e.g. priority rules and rewarding post-recognition contributions), these frameworks provide for different rules, which may lead to varying outcomes in cases with similar (if not identical) facts.