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# INDIA

## BANKRUPTCY LAW REFORM

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# POLICY CONSIDERATIONS

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- Protection of creditors – creates efficient financial markets
- Collective Procedures
  - differences in rights between secured and unsecured creditors
  - Incentivise creditors to provide debt capital or services on credit
  - Encourage significant creditors to monitor the business
  - Encourage directors to continuously disclose information to creditors
    - Listed Companies
    - Private companies
  - Promote director responsibility – and enforce director liability
  - Promote shareholder responsibility
    - Increase capital; or
    - Lose economic value
  - Clarity of legal process; transparency of information; empowerment of office holder

# THE PROPOSAL

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- Create an Insolvency and Bankruptcy Regulator
- Establish an Insolvency Resolution Process
- Appoint an Interim Resolution Professional
- Establish a moratorium for 180 days
- Appoint a Creditors' Committee – all classes of creditor
- Interim RP has power to run business, remove directors, incur credit to keep business running
- Creditors' committee involved in key decision making
- Propose a solution
- If the solution is not approved place the Company into liquidation in 180 days

# INTERNATIONAL PERSPECTIVE

- The proposal, in effect, creates a "stick" to beat a company and differing categories of creditors
  - It causes creditors to negotiate or liquidate
  - It assumes that mandatory liquidation will produce a worse economic outcome than a negotiated settlement
  - It therefore assumes that creditors will be economically rationale and that they will therefore negotiate a sensible outcome
- Secured creditors may seek to avoid the process entirely by negotiating a restructuring outside of the process as secured creditors will want to protect their priority. Will there be clarity around the rights of secured creditors? International creditors will want clarity of security ranking or clarity of unsecured rights
- A key benefit to secured creditors will be the moratorium if unsecured creditors or the company seek to take action
- Like any good insolvency process, it is a wrapper to something else – therefore you need a means to force the creditors, secured and unsecured into the ultimate solution and you need to override the rights of the minority dissenting creditors
- Query – linking this to future use of schemes or unsecured creditor restructuring devices

# QUESTION

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Should secured creditors have an immediate right to initiate a restructuring process following non-payment?

# UK APPROACH

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- Absolute right of lenders to enforce payment defaults severally immediately upon default in payment
- Right of security trustee to enforce security immediately upon non-payment
- Security trustee will be required to act to enforce if directed to do so by an agreed percentage of creditors
- Results
  - If administrator appointed, corporate control vests in administrator. Administrator has power to sell all of the assets of a company whether unsecured or secured by floating charge. Requires a court order to sell fixed charge assets
  - A receiver may be appointed over certain types of asset with immediate right of sale
  - **BUT** – has actually resulted in increased use of Schemes of Arrangement as a debt restructuring tool

# QUESTION

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Should unsecured creditors have an immediate right to initiate a restructuring process following non-payment?

# UK APPROACH

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- The result will depend upon whether there are secured as well as unsecured creditors
- Secured creditors unlikely to permit unsecured creditors to take control of a restructuring proceeding without their consent
- Any unsecured creditor can petition for the administration or liquidation of a UK company if owed more than £750.
- Company Voluntary Arrangements (CVA) used to restructure unsecured creditors debt – requires the company's proposal to be approved by 75% by value of those unsecured creditors attending and voting (with restrictions on voting intra-group debt)
- Can be used to restructure debt, exchange debt, modify the terms of property leases etc.
- Almost all CVAs proposed by major corporates have been approved by unsecured creditors



# QUESTION

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Should an administrator or Interim Resolution Professional have power to take over the management of the affairs of an insolvent company?

# UK EXPERIENCE

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- Unlike Chapter 11 (USA) where a debtor remains in possession, the directors of a company cease to have the power to direct the affairs of a company immediately upon the appointment of an administrator
- The aim is to remove dysfunctional management
- In practice, many members of management are retained by the administrators and given power on the first day of the administration to run the company – there being a recognition that administrators need to keep the company running under knowledgeable management
- Appointment enables a proper review of director mismanagement and misfeasance
- Query – in the Interim Resolution Process – the rights of the Creditors' Committee to make decisions to guide the business or solution – difficulty persuading creditors, particularly international creditors to participate in that process
- Query – in the interim Resolution Process should the Interim RP have similar powers to an administrator

# QUESTION

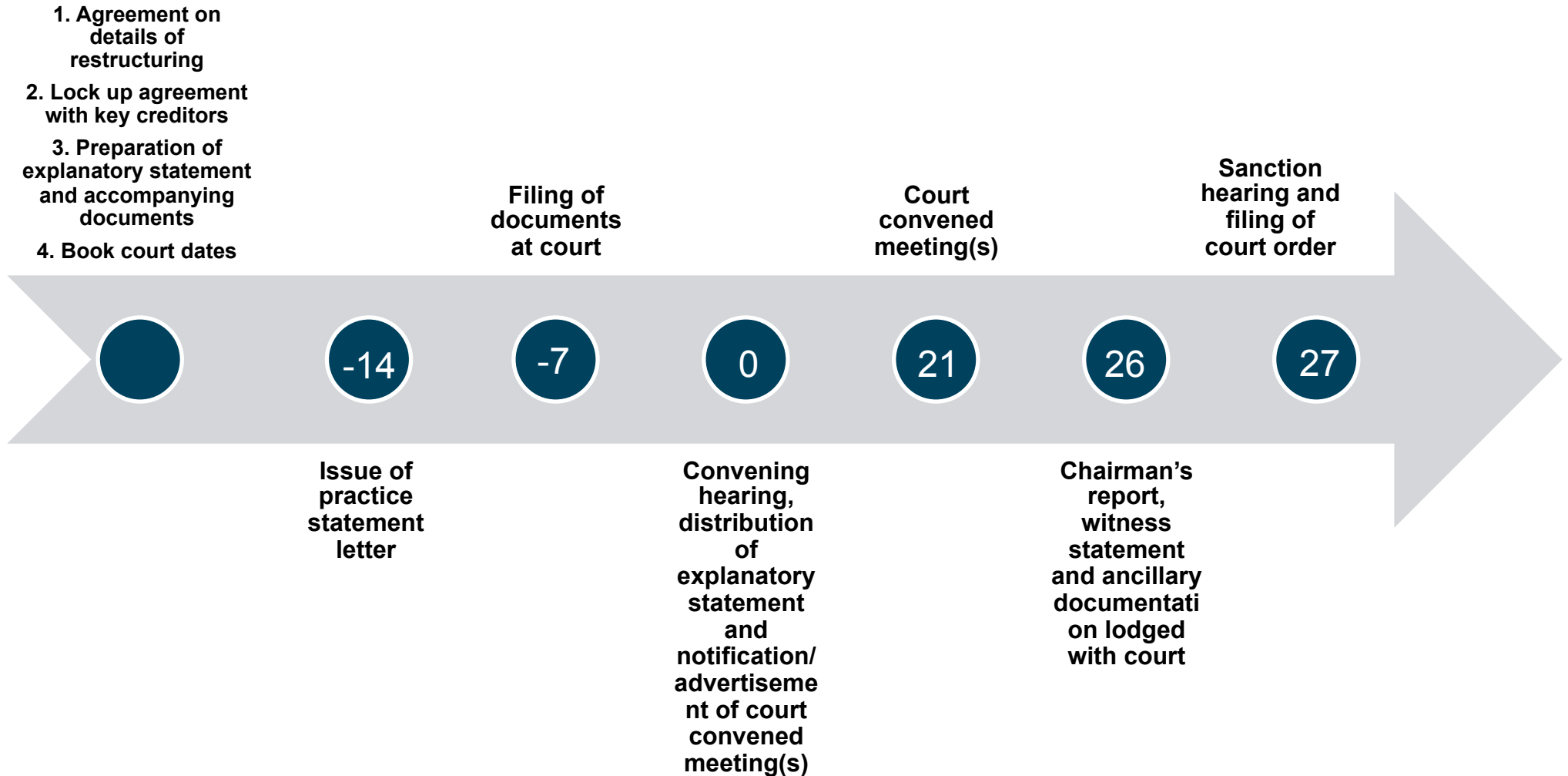
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Should the scheme of arrangement process be improved?

# Should the scheme of arrangement process be improved?

- UK Perspective
  - Schemes have become the predominant tool for restructuring:
    - Bond debt
    - Secured debt
    - Any debt where 100% of lenders would be required to a modification
    - The English law governed debt of any company incorporated in any jurisdiction
  - The Growth of the pre-packaged insolvency – i.e. on the day of the appointment of the administrator the assets are sold either to a third party or a new vehicle owned by the existing lenders
  - Extensively used in conjunction with a scheme of arrangement to transfer debt and assets to a new vehicle

# SCHEME PROCEDURE: TIMELINE OF A SCHEME IN DAYS

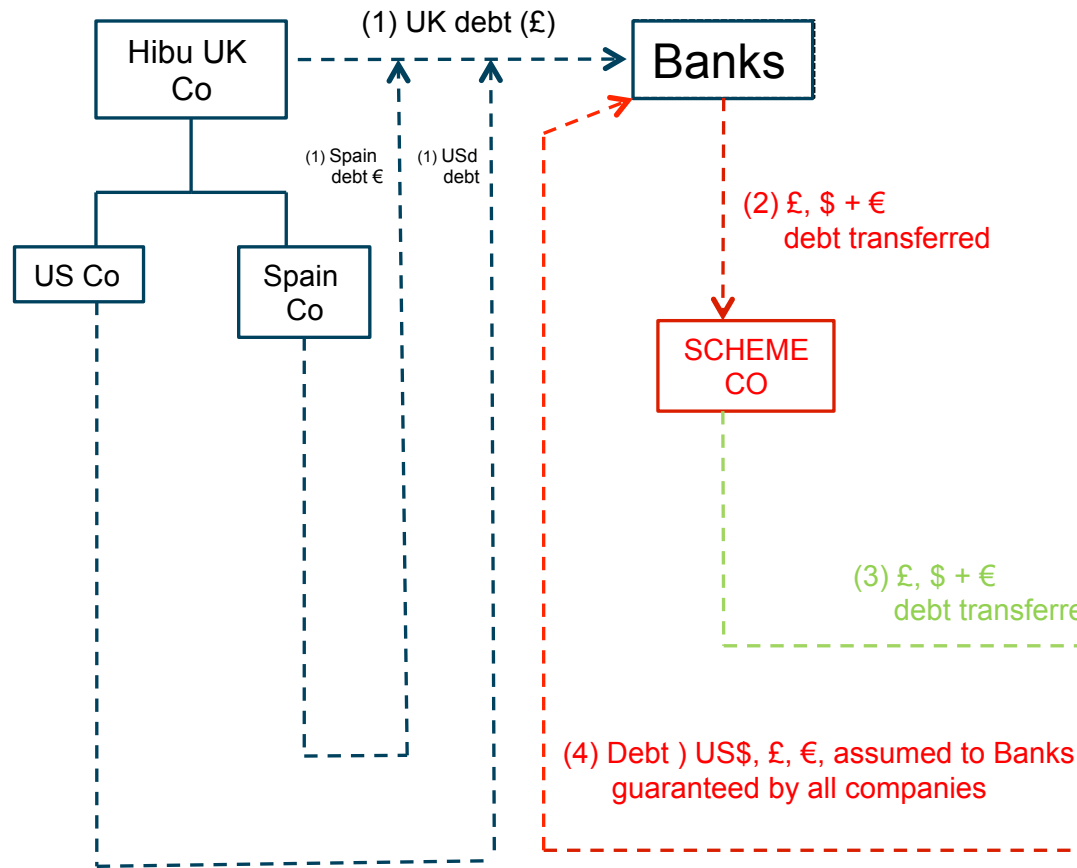


# Schemes of arrangement: use by foreign companies

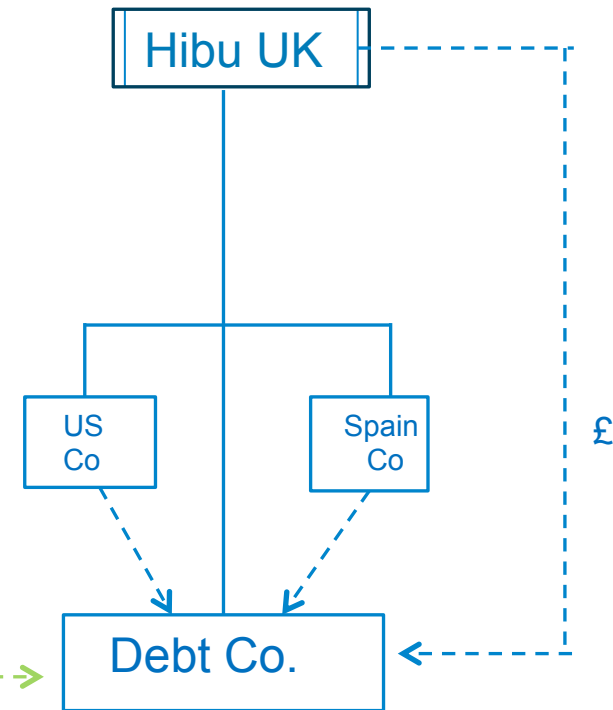
- s895(2) CA 06 – any company liable to be wound up under IA86
- *Re Drax Holdings Limited* [2004] 1 WLR 1049:
  - sufficient connection with England & Wales
  - reasonable possibility that it benefits applicants
  - court can exercise jurisdiction over at least one person interested in distribution
- Examples
  - finance documents governed by English law (*Telewest*)
  - assets located in jurisdiction (*Telewest*)
  - submission to jurisdiction (exclusive and non exclusive) of English court (*Re Rodenstock GmbH* [2011] EWHC 1104 (Ch), *Vietnam Shipbuilding*)
  - COMI (*Magyar Telecom BV* [2013] EWHC 3800 (Ch), *Re Zlomrex International Finance SA* [2013] EWHC 4605 (Ch))
- Strategy
  - amend governing law in finance documents (*Apcoa Parking*, *DTEK*)
  - shift COMI to England (*Magyar Telecom*; *Zlomrex*)
- Recognition overseas
  - sanction
  - expert evidence (independent solicitor)

# Hibu debt restructuring across three jurisdictions

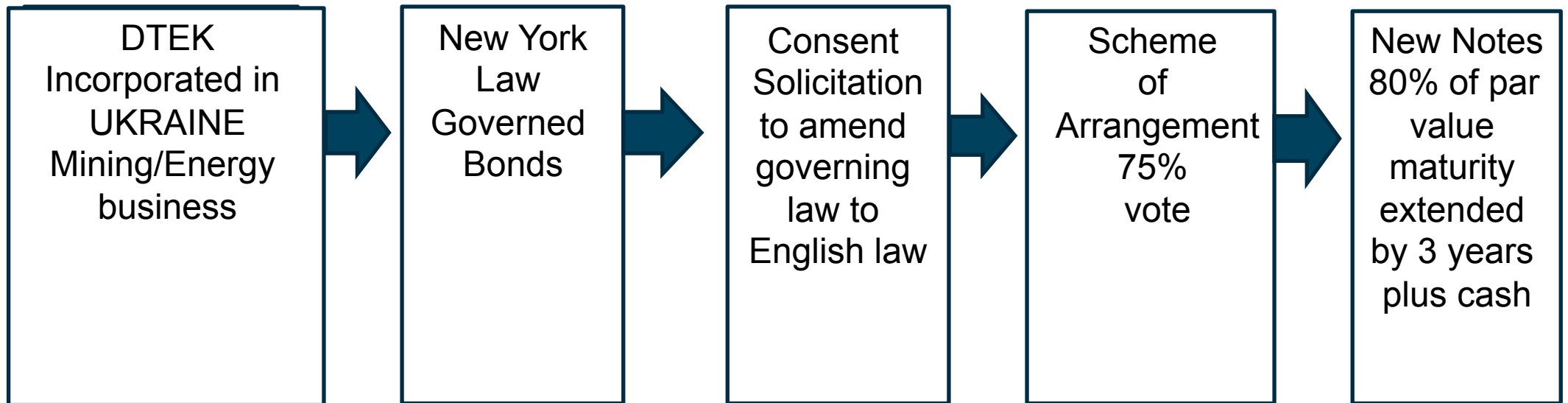
## STARTING POSITION



## END POSITION



# DTEK RESTRUCTURING FORCED EXTENSION OF MATURITY DATES



Absent a Scheme, 100% of bond creditors would have been required to vote for the change to the maturity date



# QUESTION

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Should DIP financing be allowed?

# UK AND US APPROACH

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- UK Experience
  - Most developed restructuring regimes allow some form of super-priority financing
  - The USA has a statutory mechanism for dip financing
  - In the UK:
    - An administrator can borrow as an expense of the administration
    - A scheme of arrangement can cater for super-priority financing

# QUESTION

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Should rights to litigate be strengthened in order to facilitate restructuring transactions and improve insolvency powers generally against shareholders and directors etc.?

# Should provisions on the avoidance of transactions in winding up be strengthened?

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- Such laws have prevented asset stripping
- Disposals to family groups
- Disposals that prefer creditors
- In essence, company's are restricted to selling their assets for market value if there is a risk of insolvency
- Personal liability for directors / disqualification enforces the regime

# Litigation to force restructuring

## Litigation can present opportunities for extracting value in distressed situations

- Distressed debt outside a formal process
  - Leveraging a position in the debt ranking through inter-creditor disputes
- Distressed debt in a formal insolvency process
  - Maximising the creditor protections offered by the EU Insolvency Regulation (and issues as to COMI and possible secondary or non-main proceedings) or UNCITRAL Model Law on Cross-Border Insolvency
  - Capitalising on the availability of stakeholder claims including against directors, shadow/ de facto directors, accessories and recipients
  - Identifying and utilising claims against third parties, including advisers, and leveraging value distribution across group entities
- Alternative opportunities for value
  - Opportunities for funding or acquiring claims



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-  Group

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