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The Proposed New Restructuring Plan: What is it and How Will it Work? (UK)

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A new form of restructuring plan (**RP**) which can be entered into with all creditors. It is found within the Corporate Insolvency and Governance Bill (**Bill**) and assuming it is enacted in its current form, it will sit next to schemes or arrangements in the Companies Act 2006 (rather than the Insolvency Act 1986) by way of a new Part 26A, ss895-901, and as with a scheme of arrangement the RP will seek to achieve an agreed compromise / arrangement between a company, its members and/or its creditors.

However the RP is only available where the company has encountered, or is likely to encounter, financial difficulties that are affecting, or will or may affect, its ability to carry on business as a going concern and the RP's purpose is to eliminate, reduce, prevent or mitigate such financial difficulties.

As only six sections of the Companies Act cover the RP, the statutory material on this is relatively brief. Consequently the explanatory notes to the Bill make it clear that the intention is that the RP process will largely mirror Part 26 Schemes of arrangement save of course for where there are specific departures from it. It is expected that where the new legislation requires interpretation, existing case-law surrounding the Part 26 Schemes of Arrangement will be of significance.

The process

The process of structuring and implementing an RP requires the parties to a scheme to go through the following stages:

– the company (or its administrator or liquidator), a creditor, or a member proposing the scheme of arrangement must seek a court order convening creditor and/or member meetings (as relevant) in order to vote on the proposed scheme;

– the company must provide all parties required to attend the meeting(s) with a statement setting out key aspects of the proposed scheme of arrangement;

– every creditor or member affected by the RP must be allowed to participate in the meeting (unless the court is satisfied that none of the members of the class has a genuine economic interest)

– a meeting or meetings are convened at which the attendees are separated into classes and will be required to vote on the proposed RP. At least 75% in value of each relevant class of creditors must vote in favour of the RP for it to proceed to sanction- subject to the cross class cram down, referred to below;

– a class will likely be confined to those persons whose rights are not so dissimilar as to make it impossible for them to consult with a view to their common interest as per Part 26 Schemes of Arrangement. Determining how classes are to be split is often a delicate balancing exercise; and

– the RP will become effective upon delivery of the relevant sanction order to the Registrar of Companies and will bind the company and all creditors of each relevant class. Since the court can decide that certain creditors do not have an economic interest in the outcome of the RP, with the effect they cannot participate in the voting at the meeting, it is not clear from the Bill whether those creditors would be bound. It would make no sense for a creditor with no economic interest in the outcome to be able to undermine a sanctioned RP but this will need to be clarified.

Key differences to a scheme of arrangement

There are some key differences between schemes of arrangement and the RP which are likely to generate their own body of case-law as the process starts to operate. The most notable are:

– unlike a scheme of arrangement, votes on the RP will be calculated solely by the relevant debt or shares- i.e. 75% in value of the creditors or members of a class have to vote in favour for the RP to be implemented but the court can override in certain circumstances; and

– cross class cram down: if a class of creditors or members votes against the RP, the court can still sanction it if 2 conditions are met:

- Condition A: none of the members of the dissenting class would be worse off than under a relevant alternative. i.e. whatever procedure the court considers would be most likely to occur in relation to the company if the RP were not sanctioned AND
- Condition B: At least 75% by value of a class of creditor or members, which would receive a payment in such alternative procedure, had still voted in favour of the RP

Other key point

If an RP is applied for within 12 weeks from the end of a new moratorium (see our blog), debts created during that moratorium cannot be compromised in the RP (unless the relevant creditor agrees). Note this will also be introduced to schemes of arrangement

Benefits of the RP

The cross class cram down allows a degree of greater flexibility which is new in the context of schemes of arrangement. The new restructuring plan may also give more manoeuvrability to a creditor of a class who can pass the “75% value” test without needing to also pass the “majority in number” test of the scheme of arrangement.

Comment

We expect the “cross class cram down” will be the most singularly discussed element of the RP. It clearly allows more junior creditors to be crammed down, but the most significant debate may be around the ability to “cram up” secured creditors, e.g the RP could involve a body of significant unsecured creditors or second ranking secured creditors seeking to cram a first ranking secured creditor. There is likely to be much discussion on whether the built-in protection for secured creditors (condition A above) gives them protection when comparing to say, an administration- which we consider will be the most comparable procedure since the RP applies where the company is struggling financially.

Having said that for the Bill provisions with regard to RP to have real value and purpose, the ability to cram down dissenting secured creditors in certain circumstances will prove a useful tool for financially stressed companies

Where a company has availed itself of the new moratorium the viability of an RP may depend on the effect of and the actions taken during the new moratorium, in particular:

- if the moratorium constitutes an event of default under lender security, that would automatically accelerate the entire debt. Alternatively lenders may seek to issue a notice accelerating their debt to make it payable on demand during the moratorium, so it all becomes due and payable during the moratorium period. Since a new moratorium debt cannot be compromised within the RP, it may simply not be possible to put forward a workable RP unless the secured creditor has consented. For more information about secured creditor considerations in respect of the new moratorium, see our blog.
- there may be an argument that the new moratorium triggers a PPF assessment period.

The Bill is not yet law, and hopefully there may be changes or at least clarifications made to its provisions. Assuming it passes into law as it stands it potentially offers a new useful restructuring option, but there are already questions being asked that will need to be worked through.

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