Changes to the UK Insolvency Regime – Restructuring Plan

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On 25 June 2020 the Corporate Insolvency and Governance Act (the Act) received Royal Assent. The Act makes both temporary and permanent changes to the UK insolvency laws.

As part of these measures, a new restructuring plan (RP) has been inserted into existing legislation to enable companies to enter into an arrangement with their creditors. The RP (similar to a scheme of arrangement) will, if approved by the court, enable companies to bind all creditors (including potentially both secured and other dissenting creditors) by "cramming down" their debts.

Benefits

- The "cross-class cram down" (see further below), which is a new concept compared to schemes of arrangement, allows a degree of greater flexibility.
- The RP 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 a scheme of arrangement.

Eligibility

- The RP will apply to most UK companies who have encountered, or are likely to encounter, financial difficulties that are affecting, or will or may affect, their ability to carry on business as a going concern.
- There are a handful of restrictions and the Secretary of State can make regulations to exclude certain companies from the scope of the RP.

Procedure

- The company (or its administrator or liquidator), a creditor, or a member proposing the RP 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 the key aspects of the proposed RP.
- 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 have 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 the current rules on schemes of arrangement. Determining how classes are to be split is often a delicate balancing exercise.
- 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. This would likely include those in an "out of the money" class who the court has excluded from voting, since it would not make sense for a creditor with no economic interest in the outcome to be able to undermine a sanctioned RP. The courts are however likely be faced with some disputes about whether a creditor has an economic interest in the first place.
- If a RP is applied for within 12 weeks from the end of a new moratorium (see below), debts created during that moratorium cannot be compromised in the RP (unless the relevant creditor agrees).

Timing

- The legislation does not prescribe the length of the RP.
- Creditor approval and court sanction to the timing of the arrangement will be key to establishing how long the RP will run for.

Dissenting Creditors

- 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 this in certain circumstances,
- Cross-class cram down: if a class of creditors or members votes against the RP, the court can still sanction it if two 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 (perhaps most likely administration) if the RP were not sanctioned), and
  - *Condition B*: at least 75% by value of a class of creditors or members, which would receive a payment in such alternative procedure, had still voted in favour of the RP.

Impact on Secured Creditors

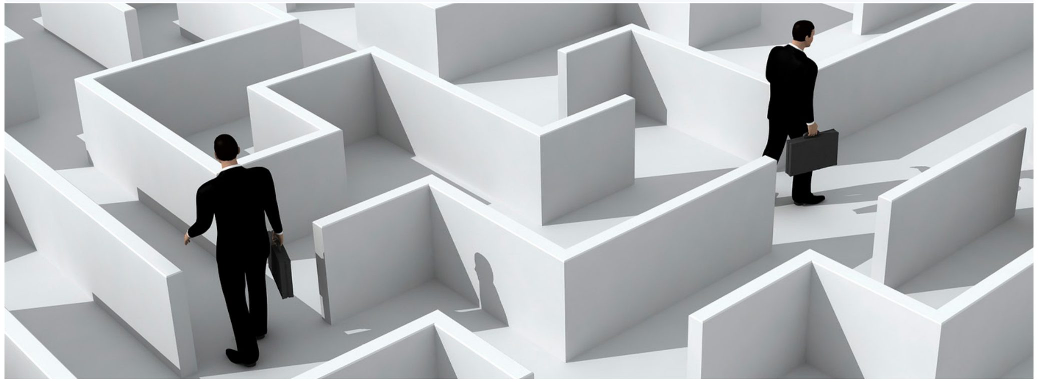
- Secured creditors will be keen to explore the extent to which they might be crammed down in the RP and whether the safeguard in condition A above gives them protection, when compared to an administration.
- For the RP provisions to have real value and purpose, the ability to cram down dissenting secured creditors in certain circumstances will need to be effective for it to prove a useful tool for financially stressed companies. This could be a key area for challenge in a proposed RP as a secured creditor seeks to show conditions have not been met to cram it down.
- Where a company has availed itself of the new moratorium and that moratorium itself constitutes an event of default under lender security, that could automatically accelerate the entire secured debt. Alternatively, lenders may seek to issue a notice accelerating their debt. Whilst it appears the lender will be entitled to accelerate its debt, its full debt would not be given super-priority in the RP (as appeared possible at the draft stages and which may have undermined the effectiveness of an RP) and could be crammed/ compromised as part of the RP.

The New Moratorium

In addition to the RP regime, the Act introduced a 'new moratorium'.

This will provide a simple way for companies who cannot or are unlikely to be able to pay their debts, to obtain the benefit of a moratorium for an initial 20 business days, with the option to extend that by a further 20 business days (up to 12 months with creditor/court consent), providing breathing space from creditor pressure and a payment holiday for certain debts. The ipso facto provisions will also apply when a company enters a new moratorium.

Similar to a Chapter 11 restructuring in the US, the company remains in the directors' control during the period of the moratorium, but is 'monitored' by an insolvency practitioner.



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