The Restructuring Plan

The Restructuring Plan ('Plan')

The Plan is a flexible, court supervised restructuring process that was introduced in 2020 as a tool for insolvency and restructuring professionals.

The headlines of the Plan are -

a) the *“financial difficulties”* threshold condition for using the Plan;

b) the ability to exclude from voting a class has been given more emphasis with the insertion of new language “*none of the members of that class has a genuine economic interest in the company*”;

c) the sole reliance on 75% by value in each class voting in favour, with no requirement for a majority by number voting in favour; and

d) cross-class cramdown.

Whilst the Plan is very closely modelled on a Scheme of Arrangement (‘Scheme’), it is possible that the above headlines will enable it to be used in very different ways from a Scheme. For example, the first sanctioned Plan of Virgin Atlantic Airways Limited(1) compromised trade debt, which would have been unusual in a Scheme in the last decade and the enhanced ability to include trade may lead to the procedure being used for a wider range of purposes by a wider range of types of company than Schemes.

- Who can propose a Plan?

The company (debtor), any creditor, any member of the company, an administrator (if the company is in administration) and a liquidator (if the company is being wound up).

The directors remain in control of the company and they put the Plan to creditors with the assistance of professional advisers, usually involving a Insolvency Practitioner.

- What are the pre-conditions in proposing a Plan?

Two conditions, referred to A and B in the Corporate Governance and Insolvency Act 2020 must be met ("financial difficulties" threshold) –

(A) 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.

(B) a compromise or arrangement(2) is proposed between the company and its creditors, or any class of them, or its members, or any class of them. Additionally, the purpose of the compromise or arrangement is to eliminate, reduce or prevent, or mitigate the effect of, any of the financial difficulties that are affecting, or will or may affect, its ability to carry on business as a going concern.

The Plan made by the company to the creditors is similar to the proposal made to creditors in a Company Voluntary Arrangement ('CVA'). It sets out the compromises proposed to the different classes or groups of creditors. It also explains the financial outcome for the creditors in the event that the proposals are not approved by the creditors and the court. This is likely to be administration or liquidation.

The objective as with the CVA is to put together a Plan/proposal which is the same as or better for creditors that the return they would get in a formal insolvency, but without the risks and delays of that process and the damage to the business. On that basis, the directors would hope to persuade the groups of creditors to agree to the Plan.

The Plan can bind secured, preferential and unsecured creditors unlike a CVA which can only bind unsecured creditors.

- The Plan – Any restrictions on the provisions it can contain?

The provisions of a Plan must meet the above conditions. If the conditions are met, then the provisions have the possibility to be endless.

- What are the stages of the Plan?

Unlike the CVA it involves two applications to court, and therefore is more expensive, but the court then has the power to force creditors who do not agree to be bound by the Plan, so the process is more flexible that the CVA, and is able to bind all types of creditors.

Stage (1) Proposal prepared and an application is made to court

Stage (2) Court hearing No.1 - An application to the court for a meeting of creditors or members to be convened.

At the first hearing the court considers the proposal and the composition of the classes or groups of creditors, and whether the meetings of creditors should be called.

Stage (3) Meeting of creditors or members - Where a meeting is summoned, an explanatory statement explaining the effect of the Plan (the compromise or arrangement) is to be circulated to creditors or members.

At the meetings the Plan will be approved by the class if 75% in value of the class approve the proposal.

Stage (4) Court hearing No.2 – If the Plan is agreed by creditors or members, the court may sanction the Plan (subject to other provisions, detailed below).

The court has power to force the classes who have not approved the plan provided two conditions are satisfied.

(1) The first condition is that the dissenting class is no worse off than it would be in the relevant alternative *i.e. if the relevant alternative is administration that the class has the same or a better return in the restructuring plan than they would have in an administration*

(2) That the class that has approved the plan is an “in the money class” which would receive a benefit in the relevant alternative

This is called “cross class cram down” and is a very useful feature of the new procedure as it forces creditors to be realistic about their position as if they are not, and refuse a proposal that is the same as or better than in an insolvency, they could be forced to agree to the proposal by the court. This backdrop will enable the company to be able to have better conversations with “hold out creditors” who have an unrealistic expectation of their position and push for more that they would be entitled to receive in an insolvency.

<u>Stage (5)</u> Implementation – Plan becomes effective

- During the various stages, is the company protected from actions by creditors?

No. Although, the Plan can be combined with the new moratorium under the Act, which will prevent certain actions against the company.