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THE CROSS-CLASS CRAM DOWN IN ACTION

In *Re DeepOcean 1 Limited and Ors* [2020] EWHC 3549 (Ch) the Court gave an order for the convening of creditors' meetings to consider linked restructuring plans for three companies ("the Plan Companies"), which form part of the DeepOcean Group. The Court subsequently gave an order sanctioning the restructuring plans which included a cross-class cram down.

The CIGA 2020 restructuring provisions are aimed at rescuing companies, rather than their entering, in the government's words "a *value destructive restructuring process*". Under CIGA 2020, companies in financial distress (or their members or creditors), can propose a restructuring plan, which may include restructuring complex debt arrangements and support for the injection of new rescue finance, provided that:

"the company has encountered, or is likely to encounter, financial difficulties that are affecting, or will affect its ability to carry on business as a going concern"; and

"a compromise or arrangement is proposed between the company and its creditors, or any class of them, or its members and any class of them, and the purpose of the compromise or arrangement is to eliminate, reduce or prevent, or mitigate the effect of, any of the financial difficulties" (as described in the first criteria above).

The cross-class cram down provisions within CIGA 2020, which bind dissenting creditors, require two conditions to be met:

(A) That the court is satisfied that any dissenting class will not suffer financially in contrast with the "relative alternative".

(B) The compromise or arrangement has been agreed by 75% of at least one class of creditors.

Under the DeepOcean restructuring plan, creditors were placed in four classes. One of those classes, comprising of unsecured creditors, gave less than the 75% required to pass the proposals in respect of one of the Plan Companies. Creditors would not have been worse off within the restructuring plan. In fact, there was a 4 per cent improvement in their prospective returns in contrast with liquidation.

In sanctioning the restructuring plan, the Court referred to the "National Bank/Telewest test" and the "important phrase" that "the court will be slow to differ from the meeting". In departing from that principle, the Court stated "the reason for this is where a dissenting class has not agreed the compromise or arrangement by the statutory majority and a cross-class cram down is being sought, the legislative intent is that it may well be appropriate for the court to exercise its power to differ from the dissenting class meeting if conditions A and B are satisfied".

The Court also stated that the Explanatory Notes to CIGA indicate that "an applicant company will have a fair wind behind it if it seeks an order sanctioning a restructuring plan notwithstanding a dissenting class where... conditions A and B are met".

Editor's Note

This is the third instance of the new restructuring provisions being invoked and then sanctioned by the Court, although the first to utilise the cross-class cram down provisions. With the predicted increase in distressed companies, as the effects of the pandemic continue to be felt, it is expected that recourse to the new restructuring provisions will become far more common.

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