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Cross-class cram downs on dissenting creditors in a scheme

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Bermuda, the British Virgin Islands and the Cayman Islands all have legislation that enables a company to present a scheme of arrangement to restructure its debts.

One of the defining features of a scheme of arrangement carried out under the relevant legislation in each jurisdiction is the ability to cram down dissenting creditors or members (or classes of them, as the case may be) if the requisite statutory majorities are satisfied and Court sanction of the proposed scheme is obtained.

This mechanism ensures a balance is struck between the differing views of minority creditors or members (or classes of them, as the case may be) and the requisite majority (typically a majority in number representing 75% in value) who desire the implementation of the restructuring proposals to, one would hope, enable the company to continue as a going concern.

It is helpful to consider such schemes in their global context, as the approach in different jurisdictions can be instructive. In this article we highlight, by way of a recent worked example, an English decision concerning a powerful tool known as a "cross-class cram down" and consider its relevance for the British Virgin Islands, Bermuda and the Cayman Islands.

What is a "cross-class cram down"?

The concept of cross-class cram downs should not be foreign to practitioners in the restructuring arena, being one that is common under the US Chapter 11 process, and now a part of the UK regime with the introduction of the Part 26A restructuring process in June 2020.

A cross-class cram down is a cram down that is wider in reach, as the nomenclature would suggest, as it envisages the approval of a scheme in circumstances where the voting thresholds have not been met in respect of some classes of creditors. This is a potentially very powerful tool in a debtor company's toolkit given its potential to stop a dissenting minority class vetoing a scheme.

Re Listrac Midco Limited [2023] EWHC 460 (Ch)

Re Listrac Midco Limited concerned an application for sanction of a number of restructuring plans brought under Part 26A of the Companies Act 2006 (the "**CA 2006**" and the "**Restructuring Plans**").

At the hearing to convene scheme meetings, the judge dealt with class compositions and found that as there were seven companies in question for which Restructuring Plans had been proposed, each with different classes of creditors, a total of 22 meetings were to be called.

The focus turned on the meetings of one particular group of creditors, where three class meetings were called but in one out of those three meetings, no creditors attended.

The English Court had to first deal with when the cross-class cram down provisions may be invoked.

Section 901F of CA 2006 sets out the relevant provisions governing the requisite thresholds for a vote to carry, and section 901G of CA 2006 provides when the Court may exercise its discretion to order a cross-class cram down. Section 901G (1) and (2) read:

> *"(1) This section applies if the compromise or arrangement is not agreed by a number representing 75% in value of a class of creditors or (as the case may be) of members of the*

company ("the dissenting class"), present and voting either in person or by proxy at the meeting summoned under section 901C.

(2) If conditions A and B are met, the fact that the dissenting class has not agreed the compromise or arrangement does not prevent the court from sanctioning it under section 901F."

The English Court thus concluded that it must first ensure that the conditions in section 901G were met before the power to grant sanction under section 901F could be exercisable relying on the cross-class cram down provision.

The next question the English Court had to grapple with was whether, where there was limited or no attendance at the class meeting(s) which failed to achieve the requisite majorities, could it be said that there had been "meetings" at all. The English Court cited *Re Altitude Scaffolding* [2006] BCC 904 where David Richards J took the view that a meeting logically required the attendance of at least two persons, and opined that strictly speaking, creditor meetings for which only one or no creditors attended could not have been meetings all.

Be that as it may, the English Court held that that did not present a problem in terms of compliance with the statutory requirements, particularly because the provision relied on as providing power to sanction the Restructuring Plans was by means of the cross-class cram down: where there was a dissenting class, section 901G(1) only required a meeting of the dissenting class to have been *summoned* under section 901C.

The English Court added that this conclusion was consistent with the policy and logic of the cross-class cram down. Were it to be found otherwise, dissenting creditors could disable the operation of the cram down machinery by simply not turning up at the meeting.

Closing comments

Whilst a powerful tool, cross-class cram down is a creation of statute. Apart from the US and UK, jurisdictions like Singapore[1] have it, and Australia is considering potential reforms to its Corporations Act 2001 to implement legislation to allow for the same.

Presently, there are no express legislative provisions enabling a cross-class cram down in Bermuda, the British Virgin Islands or the Cayman Islands. Given the potential of the tool, and its power, no doubt the industry will be keeping a close eye on any developments in this sphere.

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