



Distressed schemes: significance of CIGA 2020



Raquel Agnello QC

What does CIGA do ?

- Temporary regime to prevent companies being wound up – now extended until 30 September 2021 ! Limited regime thereafter
- Temporary Wrongful Trading provision suspension
- New - stand alone moratorium
- New 'restructuring plan'- schemes part 26 – CA 2006 with additional tools- 'cram down'
- New Ipso facto termination clauses

Distressed Schemes – distressed employers

- The temporary provisions of CIGA – may keep afloat businesses which have no real future – artificial breathing space without long term prospects
- The new CIGA provisions – provide increased restructuring tools for distressed companies
- What is the actual ambit of the new tools?
- will they really affect schemes?

A few insolvency ground rules

- Insolvency golden rules – secured creditors and unsecured creditors
- Pari passu distribution
- Administration of company assets
- The rescue culture
- Liquidations, administrations CVAs, schemes (Part 26), moratoriums and RPs (part 26A)

The need for the new insolvency tools

- The lack of a debtor in possession type insolvency process – moratoriums
- The perceived need to be able to ‘cram down’ creditors who vote against a proposal
- More effective negotiations as stronger insolvency tools ?
- Moratoriums – restricted to eligible companies – no bonds in corporate structure lending

Differences between schemes, RPs and CVAs

- Schemes and RPs divide creditors into classes, CVAs deal with them all in one
- RPs require demonstration that company experiencing 'financial difficulty' – no such requirement for schemes. CVAs and RPs are therefore exclusively insolvency tools
- PPF assessment period is not triggered by RPs
- The cross class cram down

Cross class cram down

- Enables RP to be imposed on a dissenting class of creditors
- Court needs to be satisfied that it is **fair and equitable**, that no member of the dissenting class would be worse off than they would be in the event of a '**relevant alternative**' - ie liquidation or administration
- RP must also be approved by at least one class of 'in the money' stakeholder

DB considerations for RPs

- PPF assessment period is not triggered by RPs – contrast position for other insolvency processes – administration, liquidation etc
- Scheme likely to be in a class on its own
- tPR receive information, can make court representations and can consider use of moral hazard powers
- PPF exercises scheme vote in consultation with trustees

Can the scheme be crammed down ?

- Nothing in the statute which prevents this construction
- Cram down is a judge decision – tPR can attend and make representations
- Approach for trustees/PPF – really engage with the RP – is there a real alternative ?
- Stark reality of scheme being an unsecured creditor

The hard and soft power of tPR/PPF

- Negotiations to reach a consensual approach – different stakeholders may be crucial to keep on board for ongoing business
- tPR and PPF will have access to wide range of information and able to carry out the alternative comparisons – ‘seat at the table’, but.....
- Unlike RAAs requiring approval of tPR, a court can sanction a cram down even against wishes of PPF/tPR
- Moral hazard powers? On a RP sanctioned by a court ?

Advice to Trustees

- Understanding the financial position of the employer – pressures, major stakeholders etc – be ahead of the game- engage!
- Be prepared alongside PPF to play the negotiating game – employer may well seek cram down and fail !
- Cram down of other classes can also be advantage for scheme – if RP good for scheme

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Raquel Agnello QC is a sought-after specialist in insolvency, company and commercial litigation.

She is also a highly-regarded expert in the area of pensions and insolvency, in particular the 'moral hazard' provisions. She has led on many high profile cases on behalf of the Pensions Regulator, including on Nortel and Lehman in the Supreme Court. She has been retained to advise in the New Look company voluntary arrangement, advised in the Johnston Press restructuring and advised the trustees in Cobham PLC. She advises corporate groups in relation to proposed restructurings and pension issues, including risk assessment.

Since 2001, she has sat as a Deputy Insolvency and Companies Court Judge (formerly Registrars) hearing both corporate and insolvency matters.

In 2015 she was named Legal 500's Insolvency Silk of the Year. In October 2012 and October 2016, she was named 'Barrister of the Year' at the TRI Insolvency and Rescue Awards.

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