

Irish schemes of arrangement

– a restructuring option for aircraft lessors?

On 21 July 2020, the Irish High Court approved a scheme of arrangement for the world's largest regional aircraft lessor Nordic Aviation Capital DAC (NAC).

The scheme, which included a 12-month standstill and deferral of c. US\$5bn of secured and unsecured debt, is a market-first for the aircraft leasing industry in Ireland whose customer base has been seriously impacted by COVID-19. We look at the NAC scheme of arrangement and consider whether it is a viable restructuring option for the aviation sector more generally.

What is a Scheme of Arrangement?

- a flexible statutory procedure under the Companies Act 2014 to facilitate a debt restructuring with creditors or any class of creditor
- it is available to Irish companies and foreign companies with a place of business in Ireland
- the provisions of a scheme (which can include deferral or right down of debt obligations) are binding on all creditors if supported by a majority in number representing 75% in value of creditors present and voting at the meeting of each class of creditor and sanctioned by the Irish High Court in a formal “fairness” hearing
- allows release of guarantees (or guaranteed obligations) if necessary to give effect to the scheme
- offers scope to provide a broad range of restructuring solutions including debt for equity swaps, re-setting of payment terms, standstill periods or simple debt compromise
- an efficient process which preserves value for the company and its creditors
- the NAC Group had accessed a diverse range of funding sources including secured, unsecured, export credit and private placement funding typically using a different subsidiary of NAC to act as borrower under different credit facilities
- NAC guaranteed all of the debt the subject of the scheme of arrangement
- the scheme process was completed in a six week timeframe
- secured creditors of the NAC Group held registered “international interests” for purposes of the Cape Town Convention (CTC)
- Ireland has adopted Alternative A under CTC

Points to note:

- NAC was the sole applicant for approval of the scheme but the court found that the NAC guarantees of the NAC Group debt created sufficient nexus to release both (a) the obligations of NAC under the guarantees and (b) the guaranteed obligations of the NAC Group subsidiaries
- an exceptionally high percentage of creditors in each class voted in favour of the scheme
- there were no dissenting creditors in either class
- an application has been made to have the scheme recognised in the US via the Chapter 15 process

The NAC Scheme

Background:

- NAC is the parent of a large group principally comprised of special purpose companies (the NAC Group)

The Cape Town Convention and Schemes of Arrangement

Article XI (10) of the Alternative A remedies set out in the Aircraft Protocol to CTC provides that “No obligation of the debtor under the agreement may be modified without the consent of the creditor.”

There has been much debate among practitioners and academics in the UK (and elsewhere) as to whether this protection would apply in the context of a scheme of arrangement. In this case, NAC submitted to the Irish court that Alternative A protections were inapplicable on the basis that an Irish scheme of arrangement is not an “insolvency proceeding” or an “insolvency-related event” for the purposes of the CTC.

A finding by the court that schemes of arrangement are in fact either “insolvency proceedings” or “insolvency-related events” for the purposes of the Aircraft Protocol to CTC could have had the effect of rendering the terms of the scheme non-binding on secured creditors who had not voted in favour of the scheme.

However, the court cited the high level of secured creditor support for the scheme (>90%) and noted that, by not voting against the scheme or raising any objection to the scheme at the sanction hearing, any secured creditor who had abstained from voting at the meeting would be deemed to have given implied consent to the scheme.

Since Article XI (10) of the Alternative A remedies seeks to protect non-consenting creditors, the point became largely moot in this case and the court made no determination as to whether an Irish scheme of arrangement is or is not an “insolvency proceeding” or an “insolvency-related event” for the purposes of the Aircraft Protocol to CTC.

Conclusion

In the context of Irish schemes of arrangement generally, the NAC scheme has further confirmed Ireland as an effective and reliable venue for companies with a significant capital structure and a broad creditor make up to, among other things, restructure their debt.

In the context of the aviation sector, given the current uncertainty around the applicability of Alternative A remedies to schemes of arrangement and the competing commentary among academics on the topic, schemes should be viewed with caution by aircraft leasing companies looking at restructuring options unless there is confidence that the scheme will receive unanimous approval (either actual or implied) from the company’s secured creditors with CTC registered “international interests”.

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