

Irish Schemes of Arrangement and Cross-Border Debt Restructuring

The Irish High Court has approved a scheme of arrangement in respect of Nordic Aviation Capital, the world's largest regional aircraft leasing company. The scheme restructured approximately US\$5.9 billion of English, New York and German law governed debt owed by: the Irish-incorporated company, Nordic Aviation Capital DAC ("Nordic") and related Irish and foreign-incorporated companies (the "NAC Group").

The decision reinforces that the Irish courts will adopt a pragmatic and commercial approach, which is similar to (and arguably broader than) the approach taken by the courts of other common law jurisdictions in relation to comparable complex international restructurings.

In particular, the Irish court took a wide approach to the ability to release liabilities owed to scheme creditors by third parties. The court approved of the release of debt owed by primary obligors which were not themselves subject to the scheme – provided that there is a "sufficient nexus" between the guarantee liabilities and the primary obligations. Nordic had guaranteed the US\$5.9 billion of debt. It was, therefore, only Nordic that needed to be subject to a scheme of arrangement (the "Nordic Scheme").

Background

COVID-19 has had a significant impact on the NAC Group's business, in particular by

disrupting the ability of its lessee customers to meet their obligations. The consequence was a drop in cash collection and the market value of the NAC Group's asset base, and a risk of a potential covenant breach under the group's financing arrangements. The NAC Group took the view that bilateral waivers and deferrals with each of its lenders (of which there were more than 85) would not be possible. Nordic put forward evidence to the effect that, in the event of a covenant breach or other event of default, the NAC Group might have to file under Chapter 11 of the US Bankruptcy Code and / or be liquidated. Instead, a waiver and deferral binding on all of the NAC Group's lenders was implemented via the Nordic Scheme.

What is a Scheme of Arrangement?

A Scheme of Arrangement under Part 9 of the Companies Act 2014 ("Part 9 Scheme") is a flexible mechanism which allows for the restructuring of a company's debt and / or shareholding. The company does not need to be insolvent in order to avail itself of a Part 9 Scheme.

A Part 9 Scheme should be differentiated from a scheme of arrangement used in an examinership (an "Examinership Scheme"):

- (i) Examinership Schemes are only available to companies that are an insolvent or likely to become insolvent;

- (ii) An independent court officer is required to oversee the proceedings (which is not required for a Part 9 Scheme); and
- (iii) Unlike a Part 9 Scheme, an Examinership Scheme can be approved even if each class of creditors and/or shareholders does not vote in favour.

The Nordic Scheme was a Part 9 Scheme.

The judgment approving the Nordic Scheme contains a useful summary of the approach the Irish courts will take to Part 9 Schemes.

As the Nordic Scheme was, in some respects novel, the Irish court gave important guidance on key matters which arise in structuring complex cross-border restructurings and some issues particularly relevant to aviation restructurings. We highlight three key areas of guidance below.

Ancillary Third Party Releases

The Nordic Scheme bound creditors in respect of their claims against Nordic and as against other companies in the NAC Group (including certain orphan SPVs) who were debtors under the relevant facilities, even though those other companies were not party to the Nordic Scheme.

As it had done in *Re Ballantyne Re: plc* [2019] IEHC 407, the court adopted a so-called "pro-release" view, and held that, where the primary obligations are subject to a scheme, it is permissible for the scheme to release the liabilities of sureties. The court held that such a release is permissible, not only where it is "necessary", but where there is a "sufficient nexus" to the primary obligations.

In extending the scope of the third-party release mechanics to release primary obligations where the guarantee obligations are subject to a Scheme, the Irish court approved the approach taken by the Singapore courts to the effect that it does not matter whether the company proposing a Scheme is a guarantor rather than a primary obligor. In either case the third-party debt can be released under a Scheme because there is "sufficient nexus" between the directly schemed guarantee obligations and the principal debt obligations being released through the third party release mechanics.

To hold otherwise would, the court held, defeat the effectiveness of the Nordic Scheme.

Recognition and Enforcement

It is accepted in the Nordic decision that the Irish courts will generally only make an order if it will have "substantial effect". In the context of Schemes of Arrangement this means asking whether the Scheme would likely be effective in the relevant foreign jurisdictions. Based on expert evidence of foreign law (the governing law of the debt obligations and the law of the jurisdictions in which primary obligors were incorporated), it was held that the Nordic Scheme would likely be effective in the required foreign jurisdictions. The Maples Group provided the relevant expert evidence in respect of the Cayman Islands orphan SPVs.

Importantly, in addressing certain issues under the Brussels Recast Regulation (the "Regulation") which were relevant to the question of English recognition, the court held, following English case law, that a Part 9 Scheme fell within the Regulation and that the Irish court would have jurisdiction to sanction a Scheme under the Regulation if one or more creditors is domiciled in Ireland.

The Cape Town Convention and Schemes of Arrangement

The Cape Town Convention and its accompanying Aircraft Protocol (both of which have force of law in Ireland since 2017) potentially raise issues which (in a future case) might be relevant considerations when pursuing a Part 9 Scheme. The Protocol provides for particular remedies for creditors (in particular secured creditors), in respect of "aircraft objects" on the occurrence of an "insolvency-related event". Such rights might, at least in some cases, be considered inconsistent with the intention behind a Part 9 Scheme.

The Cape Town Academic Project has indicated that in its view Schemes of Arrangement (such as a Part 9 Scheme) constitute insolvency proceedings and therefore are "insolvency-related events".

Nordic made legal arguments and put forward expert evidence that a Part 9 Scheme did not constitute an insolvency-related event and so any restrictions that the Cape Town Convention may have imposed did not apply.

The Irish court stated that, while a "strong case was made" by Nordic on this issue, it was not necessary to decide the point. This was because of the overwhelming support for the Nordic Scheme, including most significantly from secured Scheme creditors and the lack of any opposition from any creditor to the Nordic Scheme.

Conclusion

The approval of the Nordic Scheme demonstrates that Part 9 Schemes can provide a flexible and efficient tool for complex international debt restructurings. The Nordic Scheme builds upon the recent trend of Part 9

Schemes being used to effect debt restructurings of large international groups and showcases Ireland's ability to act as the jurisdiction of choice for such restructurings.

The Nordic Scheme also highlights the potential for aircraft leasing companies encountering financial difficulties in utilising a Part 9 Scheme to restructure their debts.

Another important issue, namely whether the Irish courts have jurisdiction to sanction a Scheme in respect of a foreign company, remains to be decided in another case, but parties considering that issue will note with interest the Irish court's findings in respect of the Regulation.

Further Information

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