ALERT MEMORANDUM

Key Practical Takeaways from the *Adler* Restructuring Plan Court of Appeal Judgment

5 February 2024

As the dust begins to settle on the Court of Appeal's momentous decision to set aside the sanction of *Adler's* Restructuring Plan, the Cleary Gottlieb Global Restructuring Team discusses six key practical questions that stakeholders should consider when implementing a restructuring through a Restructuring Plan.

If you have any questions concerning this memorandum, please reach out to your regular firm contact or the following authors:

LONDON

Alastair Goldrein
+44 20 7614 2322
agoldrein@cgsh.com

Polina Lyadnova
+44 20 7614 2355
plyadnova@cgsh.com

James Armshaw
+44 20 7614 2216
jarmshaw@cgsh.com

1. **How would each creditor class be treated in the '*relevant alternative'* (i.e., the most likely outcome if the restructuring is not implemented) and, to the extent the Plan departs from this treatment, is there a compelling justification for doing so**? The *relevant alternative* in *Adler* was an insolvent liquidation where several different classes of noteholders with scheduled maturities from 2024 to 2029 would rank *pari passu*. The Court found that retaining the scheduled maturities of the notes in the *Adler* restructuring (and thereby diverging from the *pari passu* treatment in a liquidation) was a departure from the treatment in the *relevant alternative* that could not be justified. The one exception to this was the elevation in priority of the 2024 notes which was justified on the basis that the 2024 noteholders had provided additional support to the restructuring by agreeing to a one-year maturity extension. This means that, given that the *relevant alternative* in most Plans is likely to be an insolvent liquidation, temporally subordinated creditors are likely to enjoy a stronger position in restructuring negotiations because the debtor and temporally senior creditors will need to justify any departure from the *pari passu* treatment in the *relevant alternative*.

2. **Is the relative treatment of creditors classes in the Plan fair?** When the Court is asked to cram down a dissenting class, it will now consider whether the relative treatment and allocation of value between creditor classes is fair (including considering whether an alternative restructuring proposal would provide for a more equitable allocation of value between creditor classes). This is in addition to the pre-existing test requiring the Court to ask if dissenting creditors are '*no worse off*' under the Plan than they would be in the *relevant alternative*.

clearygottlieb.com

© Cleary Gottlieb Steen & Hamilton LLP, 2024. All rights reserved.

This memorandum was prepared as a service to clients and other friends of Cleary Gottlieb to report on recent developments that may be of interest to them. The information in it is therefore general, and should not be considered or relied on as legal advice. Throughout this memorandum, "Cleary Gottlieb" and the "firm" refer to Cleary Gottlieb Steen & Hamilton LLP and its affiliated entities in certain jurisdictions, and the term "offices" includes offices of those affiliated entities.

[EMEA_ACTIVE 302995473_2]

The Court also held that creditors cannot rely on even overwhelming support from consenting creditor classes as a justification to cram down a dissenting class. This is because, by definition, the rights of creditors in different classes are so dissimilar that they cannot consult together in the common interest and, absent this common interest, the levels of support of consenting creditors is irrelevant to whether a Plan should be imposed on a dissenting class.

3. **What valuation evidence is provided to support (or challenge) a Plan (including comparative analysis of alternative restructuring proposals)?** Debtors proposing a Plan will need to provide robust valuation evidence to the Court to demonstrate that (i) no creditor class will be worse off under the Plan than in the *relevant alternative* and (ii) the treatment/allocation of value between creditor classes is fair. The other side of this coin is that dissenting creditors are also likely to put forward alternative restructuring proposals to show that the allocation of value in the debtor's restructuring proposal is unfair (although we expect that it will continue to be challenging for creditors to present valuation evidence that is as compelling as that put forward by the debtor owing to the debtor's immediate knowledge about its business).

4. **Do the commercial restructuring terms that have been negotiated between stakeholders fit the Court's framework for Plans?** The restructuring that *Adler* proposed to implement through its Plan was substantially the same as the one it had earlier attempted to implement through a consent solicitation. Going forward, we expect there to be a shift away from the '*build them as they go*' approach to restructurings. Stakeholders will need to ensure that the commercial terms of the restructuring fit within the Court's framework for cross class cram down (rather than expect the Court's process to be so malleable that it can be shaped to fit whatever commercial deal is agreed).

5. **Have stakeholders engaged with the Court in a timely manner?** The Court stressed the importance of it being given sufficient time to properly conduct a contested Plan hearing. What constitutes sufficient time will depend on what is driving the debtor's burning platform – the Court will likely be more sympathetic to work to a more compressed timeline where the restructuring is needed for the debtor to meet critical operational liabilities (such as payroll) rather than where timing is driven by the scheduled maturities of financial instruments. At the same time, it is likely that the timetable for Plans will expand in light of the new framework for cross class cram down (the *McDermott International* Plan hearing has already been adjourned for three months and scheduled for an unprecedented six-day sanction hearing). The impact of this is that the window for debtors to negotiate and implement a Plan continues to narrow (particularly in light of the 2021 decision in *Hurricane Energy* where the Court held that where a debtor had sufficient liquidity to continue to trade for 12 months it could not determine that the most likely *relevant alternative* to the restructuring was that the debtor would be placed into an insolvent liquidation).

6. **Is the disclosure provided to creditors in connection with the Plan sufficiently comprehensive?** Debtors proposing a Plan must ensure that their disclosure to creditors in the Explanatory Statement makes clear the treatment in the restructuring for each individual class of creditors and not just the implications for creditors generally. It remains to be seen to what extent inadequate disclosure in this regard could open up a potential avenue for dissenting creditors to challenge a Plan.

…

CLEARY GOTTLIEB