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“CRAM DOWN”—CROSS-CLASS
PLAN APPROVAL IN INSOLVENCY PROCEEDINGS

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I. WHY THIS TOPIC IS IMPORTANT

Pre-insolvency restructurings often fail not because of economic logic, but because individual creditors (or groups of creditors) block a viable restructuring solution, e.g., to negotiate a better outcome. If insolvency then occurs, an insolvency plan proceeding can still enable a restructuring despite potential resistance from individual creditors (or groups of creditors).

The so-called “cram-down,” i.e., the overruling of a dissenting group, is the central mechanism for preventing strategic blockades and enabling court confirmation of the plan despite dissenting votes—provided that the dissenting group is legally protected and not unduly disadvantaged. This creates predictability for the company, management, and investors, because a restructuring does not necessarily have to fail due to resistance from individual stakeholders.

Those who understand the cram-down logic in the insolvency plan can better assess options and risks “prior to insolvency” (particularly with regard to group formation, valuation, and protective mechanisms).

II. LEGAL BASIS AND PREREQUISITES

The insolvency plan procedure allows for the conduct of the proceedings and the satisfaction of creditors to be structured differently from the statutory provisions. Voting takes place in groups, with parties having comparable interests typically forming a group. The following rules generally apply to plan approval: each group requires a majority of creditors by headcount and, in addition, a majority by total amount (more than half of the total claims of the voting creditors in the group). If a group does not consent, the court may replace its consent under the conditions of section 245 InsO (*Insolvenzordnung*) (prohibition of obstruction) (“cram-down”). Key elements of the cram-down are:

- **Prohibition on worsening the position of creditors:** The plan must not be expected to place members of the objecting group in a worse position than they would be in without the plan (the comparative analysis or the alternative scenario is decisive).
- **Prohibition on impermissible preferential treatment of others (ranking logic):** The plan must not result in creditors of equal rank being placed in a better position than the dissenting group. Furthermore, no creditor who would be subordinated without the plan may receive a value that is not covered by a (counter)performance of corresponding value for the debtor’s assets (simplified: no value extraction at the expense of the dissenting group).

- **Appropriate participation:** The dissenting group must have an appropriate share of the plan value, although what constitutes “appropriate” depends heavily on valuation and the ranking. The law contains various guidelines and special provisions on this matter.

III. RECOMMENDATIONS

For the plan creator (debtor, insolvency administrator or trustee, investors):

- **Ensure that the valuation and the comparative analysis are robust:** The cram-down stands or falls on the test for disadvantage. Documentation, plausibility checks, and transparent derivation of assumptions are crucial.
- **Observe rules regarding group formation and equal treatment:** Errors in group formation can provide grounds for challenge; within the group, comparable creditors should be treated consistently.
- **Structure the ranking logic and value distribution to be “cram-down-proof”:** Without justification, holders of equal or subordinated claims must not be placed in a better position than the objecting group.
- **Anticipate risks of legal challenges:** Plan confirmation and implementation are sensitive to legal challenges; however, the system also provides mechanisms to stabilize plan implementation despite filed appeals.

For those affected by the cram-down (outvoted creditor group):

- **Examine equal treatment/ranking violations, and challenge valuation assumptions as well as alternative scenarios early on:** If a creditor of equal rank or another group is ultimately placed in a “better” position, this may cause the cram-down to fail.
- **Utilize legal remedies:** Parties generally have the right to file an immediate appeal against the confirmation or rejection of the plan.

Whether a cram-down “holds up” or is vulnerable often depends on details (valuation, priority, group formation, procedural issues). Therefore, in insolvency plan proceedings—especially those with cram-down potential—seek guidance from specialized restructuring and insolvency attorneys.

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