Jersey schemes of arrangement

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This client briefing provides a general overview of schemes of arrangement for Jersey companies under the Companies (Jersey) Law 1991 (the "Companies Law"). A scheme of arrangement can involve almost any kind of corporate reorganisation, merger, acquisition or restructuring so long as the appropriate approvals and court sanction are obtained. In the context of restructurings, Jersey schemes of arrangement have been used as part of the Drax and Telewest restructurings and in the Investkredit case described below.

What is a Scheme?

Under Article 125 of the Companies Law, the Royal Court of Jersey may sanction a compromise or arrangement (a "Scheme") between a company and its creditors or shareholders (or a class of either of them). The court may, on application of the company (or its creditor, shareholder, or liquidator if it is being wound up), call a meeting at which the Scheme will need to be agreed to by a majority in number of the creditors or shareholders (or a class of either of them) representing:

- 75% in value of the creditors (or class of creditors); or
- 75% of the voting rights of the shareholders (or class of shareholders).

If the Scheme is so agreed and sanctioned by the court, it is binding on all the creditors (or class of creditors) or on all the shareholders (or class of shareholders), as well as on the company itself and, where the company is in the course of being wound up, on the liquidator and all contributories. A Scheme is concluded when the court order sanctioning the Scheme is filed with the Jersey Companies Registry.

Article 167 of the Companies Law provides that an arrangement between a company and its creditors entered into immediately preceding the commencement of, or in the course of, a

creditors' winding up is binding:

- on the company, if sanctioned by special resolution of the shareholders; and
- on the creditors, if acceded to by 75% in number and value of them.

However, a creditor or contributory may appeal to the court against the arrangement within 3 weeks from its completion, and the court may then amend, vary or confirm the arrangement as it thinks just.

Although we do not advise on English law, we understand that the above statutory provisions on Schemes are similar to Sections 425 to 427 of the UK Companies Act 1985, which have now been superseded by Part 26 (Sections 895 to 901) of the UK Companies Act 2006. Therefore as confirmed in the Jersey case of Re TSB Bank Channel Islands Limited [1992] JLR 160, English cases will be highly persuasive in this area and the Jersey courts will have the fullest regard to the interpretation given by the English courts to the corresponding sections of the English legislation.

Jersey Case Law on Schemes

As established in a line of Jersey cases including In Re Andsberg [2007] JRC 179 and In Re CPA [2010] JRC 011, when considering applications for shareholders' Schemes under Article 125 of the Companies Law, the Royal Court must consider the following three-fold test:

- whether the provisions of the Companies Law have been complied with;
- whether the class of shareholders to be affected by the proposed Scheme was fairly represented by those who attended the meeting and whether the statutory majority are acting bona fide and not coercing the minority in order to promote interests adverse to those of the class whom they purport to represent; and
- whether the arrangement is such that an intelligent and honest man, a member of the class concerned and acting in respect of his interest might reasonably approve.

In addition to this three-fold test, an fourth element was considered by the English court in Re: TDG plc [2009] 1 BCLC 445 and by the Royal Court in Representation of Vallar Plc [2011] JRC 125 and Representation of APIC [2013] JRC 034, namely that there must be no "blot" on the Scheme. This additional consideration reflects the Court's discretion to consider the overall commercial and factual context of the proposed Scheme, including any consequences of it. For this additional consideration, the Court may have regard to the interests of creditors, even though there is no formal requirement to do so.

In the recent case of Representation of FRM Holdings Limited [2012] JRC 120, the main issue for the Court was to identify different classes of shareholder to establish whether it was necessary for separate class meetings to be held. Applying the classic test for identification of classes from

the English case of Sovereign Life Assurance Co V Dodd [1892] 2 QB 573, it was found on the facts that the rights of the shareholders who were not indebted to the company and those who were (whose loans would be waived under the Scheme, with the costs of the waiver being borne by the other shareholders) "are so dissimilar that they cannot consult with a view to a common interest" and therefore the Court ordered that they should be treated as parties to two distinct arrangement with two meetings of members to take place.

There have been a couple of recent cases on voting and notice issues where securities are held by depositories. In Representation of Investkredit Funding Limited [2012] JRC 121, a Jersey wholly owned issuer subsidiary of Investkredit Bank AG sought to enter into a Scheme with its creditors. The company's only material creditors were its bondholders, and the bonds were represented by a single global note held by a depository. The Royal Court held that the creditors entitled to vote on the Scheme were the ultimate beneficial owners of the bonds (as opposed to the depository). As the company had no way of knowing the identity of the bondholders or communicating with them directly, notice of the meeting was advertised in newspapers and given to the depository, which in turn communicated with the bondholders. For the shareholders' Scheme in Re Polyus Gold International Ltd [2011] JRC 230, the Royal Court was of the view that a single meeting of shareholders was required, with one of the shareholders being a custodian holding nearly 2/3 of the company's shares on behalf of a depository, which in turn had issued global depository receipts (GDRs) to investors. No separate step needed to be taken in respect of the GDR holders, because they had the opportunity of expressing their views on the proposed Scheme by giving instructions to the depository, which in turn would ensure that the custodian voted in accordance with the investors' wishes.

Schemes and Restructurings

There is no direct equivalent in Jersey of the English administration procedure, meaning a Scheme cannot be used in conjunction with administration to obtain a moratorium protecting the company from its creditors enforcing their security or other rights (unless an English administration is sought for this purpose, on which please see our separate client briefing entitled Jersey Companies and English Administration). There is no automatic stay on proceedings in connection with a Scheme.

The advantages of Schemes are that if the appropriate approvals and court sanction are obtained, they are binding on all the creditors (or class of creditors), including secured and preferential creditors, or on all the shareholders (or class of shareholders). In the current economic climate, we expect to see increasing use of Schemes as alternatives to consensual restructurings, as well as for a wide range of corporate transactions.

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