Guernsey Schemes of arrangement

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This client briefing provides a general overview of schemes of arrangement for Guernsey companies under the Companies (Guernsey) Law, 2008 (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, there are some recent precedents in Guernsey, and such schemes of arrangement can be used to assist in insolvent/quasi-insolvent restructurings.

What is a scheme?

A scheme of arrangement is a procedure available under the Companies Law through which a company may make a compromise or an arrangement (a Scheme) with its creditors, or members, or any class of them. Sections 105 to 112 of Part VIII of the Companies Law specifically provide for such schemes.

A scheme can include a reorganisation of the company's share capital by the consolidation of shares of different classes or by the division of shares into shares of different classes, or by both of those methods. It also provides a mechanism to settle an arrangement with a class of creditors where not all of those creditors agree to the proposals; this can be a particularly useful tool in the context of near insolvent restructurings. A scheme can be used in conjunction with an administration to obtain a moratorium on proceedings against the company although, in an administration in Guernsey, rights of set off, secured interests and rights of enforcement thereof are unaffected by the moratorium.

Schemes can be used when a company seeks an arrangement with its creditors, or with its members. Creditor schemes will usually involve creditors agreeing to compromise their debts on the basis that such compromise will promote a restructuring of the company's business which is better than the company failing altogether. They will usually take place in the jurisdiction where the company is seen to have its centre of main interests. Member schemes, which often relate to shareholders agreeing to sell their shares to a bidder company as an alternative to the takeover provisions in the Companies Law, must take place in the jurisdiction of incorporation.

The largest member scheme in Guernsey was the 2015 takeover of Friends Life (a Guernsey registered company) by Aviva.

Features of a scheme of arrangement in Guernsey

The Royal Court of Guernsey (the Court) has the power, on an application made by the company (or any creditor, member, liquidator or administrator of the company, or, if a cell of a protected cell company has a receivership order in force, the receiver) to order a meeting of the creditors or class of creditors, or of the members or class of members (as the case may be) to be summoned in such manner as the Court directs to consider a scheme. This is normally called the convening hearing.

If a majority in number representing 75% in value of the members or class of members (excluding any shares held as treasury shares) or creditors or class of creditors (as the case may be), present and voting either in person or by proxy at the meeting, agree a compromise or arrangement, the Court may sanction the compromise or arrangement, at a subsequent hearing called the sanction hearing.

In exercising its discretion when deciding whether to sanction the scheme, the Court may consider whether the majority is acting in good faith in the interests of the creditors or class of creditors, or members or class of members (as the case may be) it professes to represent, and whether the different interests of creditors or members are such that they should be treated as belonging to a different class of creditors or members. Issues as to the Court's exercise of its discretion to approve Schemes are likely to be resolved by reference to English authorities which are persuasive in the Court.

A Scheme sanctioned by the Court is binding upon all creditors or class of creditors, or on the members or class of members (as the case may be) even if some of those creditors or members did not vote in favour of the scheme.

There is no automatic stay on proceedings in connection with a scheme.

Where a meeting is summoned, every notice summoning the meeting that is sent to a creditor or member must be accompanied by a statement (called the explanatory statement) explaining the effect of the Scheme and, in particular, state any material interests of the directors of the company (whether directors, members, creditors or otherwise), and the effect on those interests of the compromise or arrangement, in so far as it is different from the effect on the like interests of other persons.

Every notice summoning the meeting that is given by advertisement must either include such a statement or state where and how creditors or members entitled to attend the meeting may obtain copies of such a statement.

Every company in relation to which an order is made must cause a copy of the order to be delivered to the Registrar within seven days after its making and a company which fails to comply with this requirement is guilty of an offence and liable to a daily default fine.

The advantages of a Scheme are that if the appropriate stakeholder approvals and court sanction are obtained, they are binding on all the creditors (or class of creditors), including secured and preferential creditors (if that is the class affected), or on all the shareholders (or relevant 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 wider range of corporate transactions.

Finally, if a company in administration enters into a scheme of arrangement with its creditors, there is provision in the legislation (due to come into force shortly) for the administration to end as a result of the successful implementation of the scheme and for assets to be distributed as part of the scheme process without the need for the company to move into a court ordered liquidation first.

Recent Relevant Cases

Re Montenegro Investments (in Administration) (22 July 2013)-The Bailiff, Sir Richard Collas, (as he then was) confirmed that the Guernsey court would have regard to the English authorities in relation to schemes as the English legislation is almost identical to the Guernsey legislation. The case also confirmed that the Court when considering whether to make an order should be satisfied that:

- All of the procedural requirements have been complied with;
- The classes are properly represented and the majority of the shareholders/creditors are acting *bona fide* and not unfairly oppressing the minority shareholders/creditors;
- A honest and intelligent member of each class, acting in support of his own interests, would vote in favour of the scheme; and
- There is no "*blot*" on the scheme.

Re Assura Group Limited **(Unreported) 27 January 2015** - in this case the then Deputy Bailiff Richard McMahon confirmed that the principles set out in the Montenegro case would be followed by the Court when deciding whether to sanction a scheme in Guernsey and that the "*blot*" criteria should remain as a fourth limb of the test rather than be subsumed into the third limb.

Re Puma Brandenburg Limited 24 February 2017 – in the judgment of Sir Richard Collas, Bailiff (as he then was) he stated that the Court will be, "*slow to differ*" from the majority in the

exercise of its discretion, particularly in circumstances where Scheme Shareholders, "*in commercial matters … are much better judges of their own interests than the courts*":

In the Guernsey Court of Appeal decision in **Puma Brandenburg** [2017] it was stated (at paragraph 8) that: "*In the applications under Part VIII of the Companies Law which have come before the Royal Court, decisions of the courts of England and Wales on the comparable provisions of what is now Part 26 of the Companies Act 2006 have been taken (rightly, in our judgment) to offer guidance on the interpretation and operation of the relevant sections of the Companies Law*".

Judge Russell Finch (as he then was) in ***NYX Gaming Group Limited*** (5 January 2018) again confirmed the four elements (set out in previous authorities) that needed to be satisfied at the sanction hearing before a scheme could be approved by the Court.

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Meet the Author

Mathew Newman

Partner

Guernsey

E: mathew.newman@ogier.com

T: +44 1481 752253

Key Contacts

Alex Horsbrugh-Porter

Partner

Guernsey

E: alex.horsbrugh-porter@ogier.com

T: +44 1481 752272

Bryon Rees

Partner

Guernsey

E: bryon.rees@ogier.com

T: +44 1481 752312

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