



## \$100 million interim distribution order obtained by Three Arrows Capital Ltd liquidators

Insights - 01/05/2024

On 28 March 2024, the BVI Court granted the Joint Liquidators of Three Arrows Capital Ltd (in liquidation) ("3AC") sanction to make an interim distribution of up to US\$100 million of 3AC's assets to its creditors in *BVIHC(COM)2022/0119 Russell Crumpler and Christopher Farmer (as Joint Liquidators of Three Arrows Capital Ltd (in Liquidation)) v Three Arrows Capital Ltd (in Liquidation)*.

3AC operated a high-profile and prominent cryptocurrency and digital asset hedge fund, with reported assets under management in excess of US\$9 billion in 2021. 3AC entered liquidation in June 2022. Since then, the Joint Liquidators ("the 3AC Liquidators") have received claims from creditors in excess of US\$3 billion and have acted swiftly to protect and realise 3AC's assets.

3AC's BVI feeder fund, Three Arrows Fund Ltd ("TAFL") was placed into liquidation in January 2023. On 20 December 2023, the 3AC Liquidators stated in a report to creditors that a distribution from 3AC's estate was expected in late Q1 of 2024. On 9 February 2024, the liquidators of TAFL ("the TAFL Liquidators") filed a petition for Chapter 15 recognition in the US, asserting legal or equitable claims in respect of US assets under the control of the 3AC Liquidators. TAFL was granted Chapter 15 recognition on 11 March 2024. On 14 March 2024, the TAFL Liquidators filed a substantial claim in 3AC's liquidation (in the alternative to any proprietary claim). The legal or equitable claims asserted by TAFL and claim in 3AC's liquidation are referred to as "the TAFL Claims".

In light of the TAFL Claims, the 3AC Liquidators made an application for sanction of an interim distribution of US\$100 million.

Applications for sanction are made under s 186(5) of the Insolvency Act 2003. There are two categories: Category 1 - where an office holder asks the court to sanction (approve) a particular course of action, i.e. because he or she does not have the power to take that course of action or surrenders it to the court; and Category 2 - where an office holder has the power to take a particular course of action and has not surrendered it to the court but seeks the court's approval of his or her decision as that decision is significant or momentous (*Phoenix Group Foundation v*

*Jackson; JTrust Asia Pte Ltd v Konoshita & Anor*, applying *In re Nortel Networks (UK) Ltd*).

In *JTrust*, the ECSC Court of Appeal distilled the following principles from *Phoenix*:

1. The principles from *Re Nortel* apply if an office holder seeks the court's sanction to take a significant course of action where he or she has not surrendered his or her power to the court to decide whether to take a particular course of action.
2. If the court gives sanction in these circumstances, creditors are unable to challenge the decision as flawed.
3. If the court is left in doubt as to the propriety of the course of action, the court's sanction should be withheld.
4. The burden rests on the office holder to put relevant material before the court to show that:
  - a. the course of action is a lawful exercise of the office holder's powers
  - b. the office holder genuinely holds the view that the proposed course of action is in the best interests of the company, its creditors and beneficiaries
  - c. in coming to that decision, the office holder acted rationally and without any conflict of interest.
5. The evidential burden is on the office holder to put all relevant material before the court so the court is not left in doubt as to the propriety of the course of action.
6. "Relevant material" will include the office holder's reasons for taking the course of action (which may include advice given to the office holder by his or her legal practitioners).
7. The office holder is usually better placed to know what is in the best interest of the company - accordingly the court will usually defer to the assessment of the office holder unless it is shown that the office holder's assessment is perverse.

Following the TAFL Claims, the 3AC Liquidators made a Category 2 application for sanction of the interim distribution of US\$100 million.

Counsel drew the Court's attention to r 191(1) of the Insolvency Rules 2005 ("IR 2005"), which requires a liquidator to make provision for (1) any claims which creditors may not have had sufficient time to make (2) any claims which have not yet been determined and (3) any disputed claims.

In granting sanction, Webster J (Ag) was satisfied that notwithstanding the interim distribution of US\$100 million, the 3AC Liquidators had made adequate provision under r 191 IR 2005, including for the TAFL Claims.

The interim distribution will be welcome news to 3AC's creditors. The decision of Webster J (Ag) demonstrates the BVI Court's pragmatism in resolving insolvency matters and that the BVI is a creditor friendly jurisdiction.

The 3AC Liquidators (Russell Crumpler and Christopher Farmer of Teneo (BVI) Ltd) were represented by Nicholas Brookes, Daniel Burkitt and Romauld Johnson of Ogier, David Chivers KC and Jack Rivett of Erskine Chambers, and Daniel Kessler of 4 Stone Buildings who is currently on secondment at Ogier.

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