The first creditor schemes of arrangement to be sanctioned in the BVI

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The first creditor driven schemes

The Commercial Court has very recently sanctioned four schemes of arrangement pursuant to section 179A of the BVI Business Companies Act 2004. These were the first two creditor-driven schemes to be proposed and sanctioned in the BVI. There has been one other scheme proposed and sanctioned in the BVI but this was a member's scheme and was altogether more straightforward. Ogier BVI was instructed in relation to all four schemes.

The first scheme

The first scheme was a scheme that was proposed by a holding company that held all of the shares of a Ukrainian company that held the licence to run Ukraine's national lottery. As a result of currency rate fluctuations, by December 2009, the Ukrainian company was facing insolvent liquidation.

The scheme anticipated the company's creditors being paid what they were owed in full over a period of six years. It also anticipated certain creditors being treated preferentially. These 'preferential' creditors would not have enjoyed a similar preference in the liquidation of the company. They were given preferential treatment because of the risk that they had taken by lending the BVI company money at a time when its future was uncertain. The Commercial Court accepted that there was nothing wrong in principle with a scheme treating certain of a company's creditors preferentially.

The Court gave the company permission to convene a meeting of its creditors for the purposes of

considering and, if thought fit, approving the scheme of arrangement. At the meeting 94.6% in value of the company's creditors approved the meeting and one creditor, holding the remaining 5.4% of the votes, objected.

The objecting creditor objected for a number of reasons including: (i) that the scheme provided that the creditor should be paid a rate of interest that was different to the interest rate provided in the arbitration award that made it a creditor; and (ii) that the preferential treatment of the preferential creditors was unfair. Regarding (i), the company accepted that this had been an oversight on its part when drawing up the scheme. Regarding (ii) and notwithstanding the fact that the company had good grounds to argue that the scheme was still fair notwithstanding the treatment of the preferential creditors, given the size of the objecting creditors' debt, one of the preferential creditors was prepared to give some of its preference to the objecting creditor thereby converting that creditor into a preferential creditor. The company made a further application to the Court to convene a further meeting of its creditors with a view to proposing an amended scheme that took account of interest rate error and treated the objecting creditor as a preferential creditor. The scheme was approved by 100% in value of the company's creditors and subsequently sanctioned by Justice Bannister QC in the Commercial Court.

The remaining schemes

The remaining schemes were part of a series of multi-jurisdictional schemes of arrangement involving eight separate schemes of arrangement in Hong Kong, Bermuda and the BVI. Three of the schemes of arrangement were in the BVI.

The scheme was designed to distribute the sale proceeds of three valuable subsidiary companies to various other companies in the group that had owed money to third party creditors and by way of inter company loans to other group companies. The scheme sought to achieve this purpose without having to go to the time and expense of putting each of the group companies into liquidation. It was generally accepted by the companies that were proposing the schemes that they were insolvent.

Each of the scheme companies made an application to the Commercial Court for permission to convene meetings of their respective creditors. Given that the scheme companies were all insolvent, for the purposes of convening meetings of the scheme companies' creditors, the Court was prepared to identify creditor classes with reference to the typical creditor classes in an insolvent liquidation. On this basis each of the scheme companies convened a single meeting of its unsecured creditors. The schemes were approved and subsequently sanctioned by the Court.

At the hearing for permission to convene a meeting of the company's creditors, Justice Bannister QC expressed his concern that as well as trying to bind the companies' various creditors, the scheme appeared to be seeking to bind its debtors, in as far as it appeared to fix the value of the debtors' assets available for distribution. Although section 179A of the BVI Business Companies Act

2004 permits the former, the Judge remarked that it did not permit the latter. He was ultimately persuaded that this was not what the scheme contemplated: what it contemplated was the debtor companies receiving sale proceeds in their capacity as a creditor and then using these proceeds, in turn, to meet the claims of their own creditors.

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Meet the Author

Nicholas Plowman 包乐文

Partner 合伙人

Hong Kong

E: nicholas.plowman@ogier.com

T: +852 3656 6014

Key Contacts

Skip Hashimoto

Managing Director

Tokyo

E: skip.hashimoto@ogier.com

T: + 81 3 6402 5635

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