Jersey first for finance: Jersey schemes of arrangement

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A marked development in offshore corporate restructuring in recent years has been the upsurge in the use of Jersey schemes of arrangement. Under the provisions of Article 125 and 126 of Jersey's Companies Law, the Royal Court can sanction a compromise or arrangement between a company and its creditors or members or any class of them.

To do so, the scheme must first have been approved by a majority in number representing 75% in value of each class of the creditors or members present and voting (either in person or in proxy) at a specific meeting (or meetings) convened for these purposes.

Jersey schemes are now a procedure of choice for complex and ultra-high value cross border M&A deals. Q4 of 2018 and Q1 of 2019 have seen the two highest value mergers by scheme of arrangement in Jersey history: Shire Plc's merger with Takeda Pharmaceutical and the merger of Randgold Resources with Barrick Gold Corporation. Every current indication in the market is that the popularity of schemes of arrangement with multinationals and their legal advisers will continue.

Jersey schemes have plenty to recommend them to complex cross border deals. They have a defined structure, a set timetable and a methodology for the swift, effective and fair gathering of shareholder consensus. The 75% threshold, whilst sufficiently stringent to protect minorities, is seen as a commercially viable route to progressing a transaction which enjoys ostensibly significant shareholder support. The final seal of approval by the Royal Court sanctioning a scheme ensures scrutiny and fairness to all shareholders, as well as lending finality and commercial certainty.

The structural benefits

However, the structural benefits are not the be all and end all. Many large London law firms and their clients' comment that Jersey as a restructuring jurisdiction, particularly as regards schemes, is a powerful attraction in and of itself. The Island is increasingly competing with and in many cases exceeding the reputation of other offshore jurisdictions more traditionally associated with restructuring and insolvency (R&I).

The strength, reputation and accessibility of the Royal Court is seen as a crucial factor in this. The proponent of a scheme must first demonstrate to the Royal Court that a meeting should be called (or meetings if there are multiple classes of shareholders or creditors an issue that will be carefully considered by the Royal Court at the early stages of the process). The Royal Court will then, at the end of the process, consider whether the scheme is a proper one for sanction and that the proposals are in the best interest of shareholders or creditors as a whole. Where shareholders or creditors object, the application can be contentious and fully argued.

In any shareholder scheme, then, the legal team will comprise corporate and dispute resolution specialists. Whilst the corporate lawyers will have particular expertise on the technical aspects of the deal itself, the litigators will take responsibility for the Court facing aspects, including preparation and presentation of the supporting documents and oral advocacy. Getting a scheme through to completion is very much a joint effort.

The creditor scheme

The litigation input is even greater where the other main use of schemes comes into play the creditor scheme. The scheme jurisdiction was originally conceived as a way for a struggling business to enter a compact with its creditors,with the 75% creditor threshold being required to support the proposal. Creditor schemes are now a major and developing part of offshore R&I practice. For example, in the Cayman Islands, in the Ocean Rig matter, such a scheme was recently recognised as foreign main proceedings for the purposes of obtaining US Chapter 15 bankruptcy protection.

Creditor schemes tend, due to the pressure of imminent insolvency and risk to creditors, to be considerably more contentious than shareholder schemes.

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The litigation advocate will, therefore, often have complex and nuanced objections to address when presenting the proposal for the Court’s approval. This is potentially compounded as Jersey does not have the statutory concept of “provisional liquidation”, which is used in other jurisdictions to confer the benefits of a moratorium on proceedings against the company during the period of negotiation or presentation of the scheme.

As litigators regularly presenting schemes to the Royal Court, we receive consistent feedback from clients (large onshore law firms and the business they advise) that the dependability of the scheme jurisdiction in Jersey is seen as key. Jersey is very much seen as a safe, reliable and well-regulated jurisdiction to do business in.

In particular, as regards both shareholder and creditor schemes of arrangement, Jersey's compendious scheme jurisprudence and the rigorous and thorough approach of the Royal Court are seen as major advantages. The Royal Court has naturally observed the upsurge in Jersey schemes of arrangement in the last decade. The presiding Judges are all commercially experienced (having worked in Jersey private practice during their careers) and are careful in setting down in reasoned judgments the relevant principles to be addressed. The Royal Court's guidance on schemes leaves few stones unturned, resulting as it does from so wide a range of commercial transactions and restructurings, with all their individual facets, which have come before it. With Jersey's company law being heavily based on English principles, if there is any issue which has not yet been determined in previous Jersey case law, English jurisprudence on the point will be highly persuasive.

A particular advantage of the Jersey court system in relation to schemes is the role of the two Jurats, who sit alongside the presiding Judge to determine issues of fact. These are experienced and respected lay people, with sound judgment and common sense in spades. When considering whether to sanction a scheme, the Jurats will place themselves in the shoes of the putative shareholder/creditor in the company and ask: "If it were me, how would I vote? How would I perceive this proposal as affecting my interests?" The merits of a scheme when addressed on those terms are thoroughly assessed and fairly determined. Our clients often comment that this established jurisprudence and robust Court structure, combined with its equivalent time zone and proximate location, makes Jersey as sure and reliable a scheme jurisdiction as England & Wales, despite the comparative sizes of the two jurisdictions.

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