International Corporate Rescue

Published by:
Chase Cambria Company (Publishing) Ltd
4 Winifred Close
Barnet, Arkley
Hertfordshire EN5 3LR
United Kingdom

www.chasecambria.com

Annual Subscriptions:
Subscription prices 2015 (6 issues)
Print or electronic access:
EUR 730.00 / USD 890.00 / GBP 520.00
VAT will be charged on online subscriptions.
For 'electronic and print' prices or prices for single issues, please contact our sales department at:
+ 44 (0) 207 014 3061 / +44 (0) 7977 003627 or sales@chasecambria.com

International Corporate Rescue is published bimonthly.

ISSN: 1572-4638

© 2015 Chase Cambria Company (Publishing) Ltd

All rights reserved. No part of this publication may be reproduced, stored in a retrieval system, or transmitted in any form or by any means, mechanical, photocopying, recording or otherwise, without prior permission of the publishers.

Permission to photocopy must be obtained from the copyright owner.
Please apply to: permissions@chasecambria.com

The information and opinions provided on the contents of the journal was prepared by the author/s and not necessarily represent those of the members of the Editorial Board or of Chase Cambria Company (Publishing) Ltd. Any error or omission is exclusively attributable to the author/s. The content provided is for general purposes only and should neither be considered legal, financial and/or economic advice or opinion nor an offer to sell, or a solicitation of an offer to buy the securities or instruments mentioned or described herein. Neither the Editorial Board nor Chase Cambria Company (Publishing) Ltd are responsible for investment decisions made on the basis of any such published information. The Editorial Board and Chase Cambria Company (Publishing) Ltd specifically disclaims any liability as to information contained in the journal.

ARTICLE

Parallel Schemes of Arrangement

Polina Lyadnova, Partner, and **Sui-Jim Ho**, Associate, Cleary Gottlieb Steen and Hamilton LLP, London, UK, and **Edward Drummond**, Partner, Bedell Cristin, Jersey, Channel Islands

Introduction

There has been continued growth in companies incorporated outside England using the scheme of arrangement regime contained in the UK Companies Act 2006 to restructure debts governed by English law. But in what circumstances should the debtor also initiate a parallel (or mirror) scheme in the debtor's home jurisdiction under its own local law?

The purpose of this article is to explore the use of parallel schemes of arrangement, taking in particular the example of a Jersey company with English law governed debts and operations worldwide.

Scheme procedure

Jersey has its own scheme of arrangement procedure. The scheme provisions contained in Part 18A of the Companies (Jersey) Law 1991 are in near identical terms to Part XIII of the UK Companies Act 1985 on which they are based, and remain similar to the current provisions in Part 26 of the UK Companies Act 2006. In the context of a debt restructuring, those provisions permit a compromise or arrangement proposed between a company and its creditors (or any class of them), if approved by the requisite majority of creditors and if sanctioned by the Court, to bind all creditors (or the relevant class of creditors) whether or not they voted in favour. In this context, it can be seen as a form of statutory cram-down procedure, which can be used even where the contractual documents only permit amendments with (for example) the unanimous consent of all lenders.

There are three key stages in implementing a scheme:[1]

1. An application to court for an order convening a meeting of the creditors, or relevant class of creditors, to be considered at a 'directions hearing';
2. The creditors' meeting at which the compromise is voted on; and
3. Assuming the relevant majorities are obtained (a majority in number of creditors or the relevant class of creditors representing 75% in value), a further application to court for sanction to be considered at a 'sanction hearing'.

The scheme becomes effective on the delivery of the Court order sanctioning the scheme to the Registrar of Companies for registration.

Why is English law relevant at all?

Under English common law, it is well established that a variation or discharge of a contract (including via a composition with creditors) is only effective if the contract is varied or discharged under the law applicable to the contract. The earliest authority for this principle is the case of *Antony Gibbs and sons v La Société Industrielle et Commerciale des Métaux* (1890) 25 QBD 399 where the English Court of Appeal held that the French liquidation proceedings did not discharge a French guarantor from its liabilities under an English law governed guarantee. So in a case where the debt facility is governed by English law, the English courts expect any variation or discharge of the debt (by a scheme or otherwise) to be carried out in accordance with English law.

This is so irrespective of the fact the borrower is incorporated in a foreign country and the law of that foreign country has its own scheme of arrangement procedure. A challenge to the principle was attempted in the English case of *Global Distressed Alpha Fund One Limited v PT Bakrie Investindo* [2011] EWHC 256 (Comm), where a creditor sued an Indonesian company in England under an English law guarantee. The

Notes

1 In an English scheme, a 'practice statement letter' is typically sent to all creditors in advance of the directions hearing in accordance with the Practice Statement [2002] 1 WLR 1345 dated 15 April 2002 and will typically include details of the proposed scheme including background, purpose, key features, proposed composition of the classes and timeline. One of the purposes of the 'practice statement letter' is to put the creditors on notice of any issues which may arise as to the constitution of meetings of creditors or which otherwise affect the conduct of those meetings. The Practice Statement is also followed in Jersey (see *Re Vallar plc* [2011] JRC 120 and JLR Note 25).

Indonesian company resisted the claim on the basis that the Indonesian company had completed an Indonesian debt reorganisation composition plan discharging the debt under Indonesian law. Mr Justice Teare held (despite the desirability of promoting the principle of universality of bankruptcy proceedings) that he was bound by the earlier English authorities and found that the discharge under Indonesian law was of no effect in England. The creditor obtained judgment.

So in the case of a Jersey company with English law debts, the use of a Jersey law scheme of arrangement will not be effective as a matter of English law, and will not prevent creditors taking action in England.

English schemes for foreign companies

But how can a foreign company such as a Jersey company (which by definition is incorporated outside the UK) seek to use the scheme provisions of the UK Companies Act 2006? English law approaches this indirectly:

1. 'Company' is defined in the UK Companies Act 2006 as 'any company liable to be wound up under the Insolvency Act 1986'. For these purposes, the reference to 'company' includes 'unregistered companies' which in turn include 'any association and any company, with the exception of a company registered under the Companies Act 2006 in any part of the UK'. The definition of 'unregistered companies' is therefore broad enough to cover companies incorporated in a foreign state (*Re Sovereign Marine & General Insurance Co Ltd* [2006] EWHC 1335 (Ch)).
2. As a result, a foreign company such as a Jersey company which does not have its centre of main interests in England and Wales may nonetheless be considered an 'unregistered company' for the purposes of section 220 of the UK Insolvency Act 1986 and susceptible to being wound up on certain grounds under section 221 of the UK Insolvency Act 1986.
3. The English courts have held that when considering a scheme, the key issue is that the foreign company has a 'sufficient connection' with England and Wales (*Re Drax Holdings Limited* [2003] EWHC 2743 (Ch)).
4. There have been a compelling number of cases where 'sufficient connection' with England and Wales was established merely by the fact that the facilities were governed by English law (e.g., *Re Rodenstock* [2012] BCC 459; *Re PrimaCom* (No. 2) [2013] BCC 219; *Re Vietnam Shipbuilding Industry Groups* [2013] EWHC 2476 (Ch)). Indeed in the case *Re APCOA Parking GmbH and others* [2014] EWHC 997 (Ch), [2014] EWHC 1867 (Ch), the English Court sanctioned schemes of arrangement for foreign companies which had no connection with England save that the governing law and jurisdiction clauses in the facilities documents were changed to English law shortly before the scheme commenced and solely for the purpose of implementing an English law scheme.

So a Jersey company with debts governed by English law could potentially use the scheme procedure in the UK Companies Act 2006 and such a scheme (if sanctioned) will be effective in England.

Effect of an English scheme outside England

The English Court, when exercising its discretion whether to sanction a scheme, will want to be certain that its order will have substantial and practical effect in any other relevant jurisdictions where the company operates, in particular its place of incorporation and the jurisdictions where its key assets are located. The English Court (and equally the debtor) would be keen to ensure that the creditors could not circumvent the scheme and enforce their claims against the debtor and its assets in other jurisdictions.

To satisfy the English court, expert opinions on recognition and legal effectiveness of the schemes in the relevant jurisdictions are normally adduced.[2]

The Jersey Courts do generally follow and apply English conflict of laws principles, and so Jersey law would accept that debts governed by a foreign law (e.g. English law) are modifiable via a procedure led by the courts of that foreign country. Nonetheless, the Jersey Courts will not apply such principles blindly, and in particular where the English courts are obliged by the doctrine of precedent to continue to apply principles that are subject to criticism (usually from academics or judges writing extra-judicially), the Jersey courts can choose to follow a different path. Moreover, there is no statute or precedent for the Jersey courts to give recognition to an English scheme of arrangement. So an opinion from a Jersey law expert dealing with the effectiveness of an English order in Jersey may well be qualified.

A qualified opinion of this nature may be sufficient for the English court, but it does not of course guarantee that this is what will in fact happen. An opinion is just that: an opinion. It is in the interests of the debtor

Notes

2 While there have been precedents where such opinions were delivered by legal counsel advising the parties involved in the scheme, the English Court in *Re Magyar Telecom B.V*. [2013] EWHC 3800 (Ch) expressed the view that the independence of such opinions would be enhanced if such reports were provided by experts unconnected with law firms professionally engaged in the scheme.

© 2015 Chase Cambria Publishing

to ensure that once the scheme becomes effective, it will be binding on the creditors and respected in all the relevant jurisdictions. As there is no statutory gateway for recognition of an English law scheme in Jersey, any recognition of an English scheme in Jersey would proceed on the grounds of comity. The Jersey court will scrutinize the English order, and may not adopt it in full, or may grant recognition on terms. Alternatively, the company could wait until a creditor pursues proceedings in Jersey and raise the English scheme as a defence, but this gives rise to the risks inherent in fighting a rear-guard action before a court unfamiliar with the background, perhaps when circumstances have changed and under new time pressures. In short, risks remain.

A parallel Jersey scheme

For a Jersey debtor with English law debt those risks can be removed by implementing parallel schemes in England and Jersey. The schemes are likely to be interdependent, such that they either stand or fall together.

Where Jersey is the place of incorporation of the debtor, Jersey has a specified scheme regime that can be used, and the Jersey Court will have jurisdiction. Whilst there is no Jersey statute or case that says parallel schemes are necessary, parallel creditors' schemes in England and Jersey have been used on several occasions. The company will have complete comfort that the variation of the debt by the English courts will be effective under English law, but also that the domestic process has been followed and will be binding in Jersey – and thus prevent creditor actions in Jersey.

For its part, the English court has no difficulty with parallel schemes being initiated in the place of incorporation and also in England (in the case of Jersey, see for example, *In Re Drax Holdings Limited* [2003] EWHC 2743 (Ch), [2004] 1 BCLC 10 at para 34; and *Re Telewest Communications plc* (No. 1) [2004] EWHC 924 (Ch), [2005] 1 BCLC 752 at para 2). The English court will also be satisfied that it is not exercising exorbitant jurisdiction, or making orders which may be ineffective in Jersey, because the parallel Jersey scheme, if approved by the Jersey Court, will be binding in Jersey.

As to mechanics, the scheme document is likely to be the same in both countries, creditors will be able to raise any substantive objections in either court, and because identical scheme documents (with identical classes) and similar court papers can be used, the costs ought not to be prohibitive. It will only be necessary to summon one meeting of creditors to vote on both schemes at the same time.

As to effectiveness elsewhere (beyond England and Jersey), having parallel schemes in the country of the law of the debt and the place of incorporation maximises effectiveness in third countries, in particular any countries which recognise the Jersey law scheme but not the English law scheme and vice versa.

A final note

Of course, the initiation of (or even the threatened use of) a statutory mechanism which is effective to cram down creditors in both jurisdictions may be sufficient to persuade the holdouts to agree to a consensual restructuring.

Indeed, the authors' firms (Cleary Gottlieb Steen & Hamilton LLP in London and Bedell Cristin in Jersey), working together with Robin Knowles CBE QC and Daniel Bayfield of South Square, recently acted on the implementation of parallel creditors' schemes of arrangement in England and Jersey as part of the recent successful restructuring of syndicated bank facilities of over USD 5 billion for United Company Rusal plc ('Rusal'), a Jersey company listed on the Hong Kong Stock Exchange, which is one of the world's largest producers of aluminium with operations in 19 countries and more than 61,000 employees.

The schemes came before the Courts of England and Jersey on 10 and 15 July 2014, respectively. Having obtained orders from the respective Courts to commence the scheme process, Rusal's further negotiations with lenders led to a consensual restructuring.

© 2015 Chase Cambria Publishing

International Corporate Rescue

International Corporate Rescue addresses the most relevant issues in the topical area of insolvency and corporate rescue law and practice. The journal encompasses within its scope banking and financial services, company and insolvency law from an international perspective. It is broad enough to cover industry perspectives, yet specialized enough to provide in-depth analysis to practitioners facing these issues on a day-to-day basis. The coverage and analysis published in the journal is truly international and reaches the key jurisdictions where there is corporate rescue activity within core regions of North and South America, UK, Europe Austral Asia and Asia.

Alongside its regular features – Editorial, The US Corner, Economists' Outlook and Case Review section – each issue of *International Corporate Rescue* brings superbly authoritative articles on the most pertinent international business issues written by the leading experts in the field.

International Corporate Rescue has been relied on by practitioners and lawyers throughout the world and is designed to help:

- Better understanding of the practical implications of insolvency and business failure – and the risk of operating in certain markets.
- Keeping the reader up to date with relevant developments in international business and trade, legislation, regulation and litigation.
- Identify and assess potential problems and avoid costly mistakes.

Editor-in-Chief: Mark Fennessy, Proskauer Rose LLP, London

Emanuella Agostinelli, Curtis, Mallet-Prevost, Colt & Mosle LLP, Milan; Scott Atkins, Henry Davis York, Sydney; Samantha Bewick, KPMG, London; Geoff Carton-Kelly, FRP Advisory, London; Gillian Carty, Shepherd and Wedderburn, Edinburgh; Charlotte Cooke, South Square, London; Sandie Corbett, Walkers, British Virgin Islands; Ronald DeKoven, DeKoven Chambers, London; Hon. Robert D. Drain, United States Bankruptcy Court, Southern District of New York; Stephen Harris, Ernst & Young, London; Christopher Jarvinen, Berger Singerman, Miami; Matthew Kersey, Russell McVeagh, Auckland; Prof. Ioannis Kokkoris, Queen Mary, University of London; Ben Larkin, Jones Day, London; Professor John Lowry, The University of Hong Kong; Neil Lupton, Walkers, Cayman Islands; Lee Manning, Deloitte, London; Ian McDonald, Mayer Brown International LLP, London; Professor Riz Mokal, UCL, London; Lyndon Norley, London; Karen O'Flynn, Clayton Utz, Sydney; Professor Rodrigo Olivares-Caminal, Queen Mary, University of London; Christian Pilkington, White & Case LLP, London; Susan Prevezer Q.C., Quinn Emanuel Urquhart Oliver & Hedges LLP, London; Sandy Purcell, Houlihan Lokey Howard & Zukin, Chicago; Professor Philip Rawlings, Queen Mary, University of London; Dr Arad Reisberg, UCL, London; Peter Saville, Zolfo Cooper, London; Daniel Schwarzmann, PricewaterhouseCoopers, London; Richard Snowden Q.C., Erskine Chambers, London; Anker Sørensen, Reed Smith, Paris; Kathleen Stephansen, AIG, New York; Dr Shinjiro Takagi, Nomura, Tokyo; Lloyd Tamlyn, South Square, London; Stephen Taylor, Isonomy Limited, London; Richard Tett, Freshfields, London; William Trower Q.C., South Square, London; Professor Edward Tyler, Department of Justice, Hong Kong Special Administrative Region Government, Hong Kong; Mahesh Uttamchandani, The World Bank, Washington, DC; Robert van Galen, NautaDutilh, Amsterdam; Miguel Virgós, Uría & Menéndez, Madrid; Maja Zerjal, Proskauer, New York; Dr Haizheng Zhang, Beijing Foreign Studies University, Beijing.

For more information about *International Corporate Rescue*, please visit www.chasecambria.com