Jersey schemes of arrangement

This briefing outlines the statutory provisions relating to Jersey schemes of arrangement.

Under the Companies (Jersey) Law 1991, (the “1991 Law”), schemes of arrangement can be made (a) between a Jersey company and its creditors (or any class of them) or (b) between a Jersey company and its shareholders (or any class of them).

Under the 1991 Law, a scheme of arrangement can be implemented subject to obtaining (a) the required level of votes at a meeting of the relevant creditors or shareholders and (b) the sanction of the Royal Court.

The provisions of the 1991 Law relating to schemes of arrangement are based on the UK Companies Act 1948 (as re-enacted in the UK Companies Act 1985). Consequently, the decisions of the English courts in respect of the UK statutory provisions are likely to be followed by the Jersey courts.

What is a scheme of arrangement?

Arrangement: a wide meaning
The term “arrangement” has a wide meaning. By reference to English case law, an arrangement is wide enough to cover any legal transaction between a company and its creditors or shareholders. An arrangement may be used, for example, to reorganise the share capital of a company, effect a takeover or merger or implement a restructuring with creditors.

Reorganisation of share capital
Schemes of arrangement can be used to implement a reorganisation of a company’s share capital.

Article 1(1) of the 1991 Law defines arrangement so as to include a reorganisation of a 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.

Takeovers
Schemes of arrangement can be used to effect a takeover. For example, the takeover may be structured as a share exchange. The scheme of arrangement may be drafted so that (i) the shares in the target company are cancelled, (ii) the capital reserve then created is used by the target company to issue fully paid up shares to the offeror and (iii) in exchange for such issue, the offeror issues shares in the offeror to the shareholders of the target company. In this way, the target company becomes a subsidiary of the offeror and the shareholders of the target company become shareholders of the offeror.

Using a scheme of arrangement to implement a takeover is potentially more advantageous than relying on the takeover provisions contained in the 1991 Law. The 1991 Law contains provisions enabling a person to offer to acquire all the shares in a company and once a certain level of acceptances have been reached, the offeror can compel any remaining shareholders to sell their shares to the offeror. These “squeeze out” provisions are contained in Article 117 of the 1991 Law and only apply if the offeror has acceptances as regards (in the case of a par value company) not less than 9/10ths in nominal value of the shares to which the offer relates or (in the case of a no par value company) not less than 9/10ths in number of the shares of any class to which the offer relates. Therefore,
in broad terms, the offeror needs to obtain at least 90% acceptances before being in a position to exercise the "squeeze out" rights.

In contrast, subject to the sanction of the Royal Court, a scheme of arrangement will be binding on all the shareholders of a company without requiring such a high level of approval. Under Article 125(2) of the 1991 Law, subject to the scheme of arrangement being sanctioned by the Royal Court, a scheme of arrangement will be binding on all the shareholders of the company if approved by a majority of shareholders present and voting (either in person or by proxy) at the shareholders’ meeting convened by the Royal Court provided they represent at least 3/4ths of the voting rights of the relevant shareholders.

However, a scheme of arrangement may present some disadvantages in a takeover context. With a scheme of arrangement, some time will be needed to make the necessary court applications and convene the necessary shareholder meeting(s). This delay may possibly give others time to organise a competing bid.

**Mergers**

Schemes of arrangement can be used to effect the merger of companies.

This is made clear by Article 127 of the 1991 Law which refers, inter alia, to a scheme which has the purpose of amalgamating two or more companies.

**Restructuring with creditors**

Schemes of arrangement with creditors may be used by a company as an alternative to a formal insolvency procedure. The company may look to implement such a scheme in the hope of avoiding a formal insolvency procedure.

If, however, the company is already subject to a creditors’ winding up, then Article 167 of the 1991 Law makes separate provision for an arrangement to be effective between a company and its creditors. Article 167(1) of the 1991 Law provides that an arrangement entered into between a company immediately preceding the commencement of, or in the course of, a creditors’ winding up and its creditors is (subject to the right of appeal under Article 167(2) of the 1991 Law) binding (a) on the company, if sanctioned by a special resolution and (b) on the creditors, if acceded to by three-quarters in number and value of them.

Under Article 167(2) of the 1991 Law, a creditor or contributory may, within 3 weeks from the completion of the arrangement, appeal to the Royal Court against the arrangement and the Royal Court may amend, vary or confirm the arrangement as it thinks just.

**Meeting of creditors or shareholders**

**Order convening the meeting**

An application is made to the Royal Court to convene a meeting of shareholders or (as the case may be) creditors of the company.

Article 125(1) of the 1991 Law provides that where an arrangement is proposed between a company and its creditors (or a class of them) or between the company and its shareholders (or a class of them), the Royal Court may on the application of the company or a creditor or a shareholder or a liquidator order a meeting of the creditors or shareholders to be called in such manner as the Royal Court directs.

**Circular**

Article 126 of the 1991 Law stipulates that certain information has to be included with the notice calling the meeting of the shareholders or creditors. In particular, a statement has to be included (a) explaining the effect of the arrangement and (b) stating any material interests of the directors of the company (and the effect on those interests of the arrangement in so far as it is different from the effect on the same interests of other persons).

**Votes at the meeting**

Under Article 125(2) of the 1991 Law, a majority in number of the creditors or shareholders present and voting (either in person or by proxy) at the meeting have to agree to the arrangement. It is, however, not enough for there to be a simple majority resolution. The majority in number also has to represent (i) 3/4ths in value of the creditors (or class of creditors) or (as applicable) (ii) 3/4ths of the voting rights of the shareholders (or class of shareholders).

**The court order**

If the required number and representation of creditors or shareholders agree to the scheme, then a further application is made to the Royal Court to sanction the scheme.

Under Article 125(2) of the 1991 Law, the
Royal Court has discretion to sanction the scheme. If the Royal Court sanctions the scheme, then the scheme is binding on all the creditors or shareholders of the company (or the relevant class of creditors or shareholders) and also on the company.

The Jersey case of Representation of Andsberg Limited [2007] JRC 179 2007 JLR Note 53 is a leading Jersey case on the approach of the Royal Court in sanctioning a proposed scheme of arrangement. The Deputy Bailiff summarised the test that the Royal Court should apply before sanctioning schemes of arrangement in the following terms:

"... the test which the Court must apply in such matters is well established. The Court has convened the necessary meetings, which have now been held, and the Court must now consider three things: first, that the provisions of the Statute have been complied with; secondly, that the class was fairly represented by those who attended the meeting and that the statutory majority are acting bona fide and are not coercing the minority in order to promote interests adverse to those of the class whom they purport to represent; and thirdly, that the arrangement is such as an intelligent and honest man, a member of the class concerned and acting in respect of his interest, might reasonably approve."

This three-fold test has been applied in subsequent Jersey cases (including the Representation of CPA [2010] JRC 021).

The three-fold test has recently been extended to include a fourth element in the Jersey case of Representation of WPP PLC [2013] JRC 035. Commissioner J.A. Clyde-Smith referred to the English case of Re TDG Plc [2008] EWHC 2334 (Ch), [2009] 1 BCLC 445 which found a fourth element that must be considered by the courts when requested to exercise its discretion to sanction a scheme of arrangement: the fourth element is that there must be no "blot" on the scheme.

Commissioner J.A. Clyde-Smith applied this fourth element and commented (at paragraph 19 of the judgment) that: "Palmer's Company Law at paragraph 12.070 indicates that this additional consideration reflects the Court's discretion to consider the overall commercial and factual context of the proposed scheme, including any consequences of it."

Under Article 125(3) of the 1991 Law, the order of the Royal Court sanctioning the scheme has no effect until the relevant Act of the Royal Court has been delivered to the registrar of companies for registration.

Use of schemes for non-Jersey companies

Article 125 of the 1991 Law allows the Royal Court to sanction a scheme of arrangement in relation to a "company" being a company which is incorporated under Jersey law.

A team from Bedell Cristin acted for Longreach Oil & Gas Limited (a Jersey company) on its successful acquisition of APIC Petroleum Corporation (a Canadian company) ("APIC").

The acquisition was structured as a scheme of arrangement under Article 125 of the 1991 Law and involved a novel application to the Royal Court requesting that the Royal Court exercise its jurisdiction in relation to a foreign company.

At the time of APIC making an application for the court to convene a shareholders meeting, it was not a Jersey company but a Canadian company. Importantly, however, APIC intended to continue into Jersey pursuant to Part 18C of the 1991 Law.

If a foreign company continues into Jersey under Part 18C of the 1991 Law, it ceases to be a company incorporated under the laws of its original country of incorporation and instead becomes a company incorporated under the laws of Jersey.

Therefore, although APIC was making an application to the Royal Court at a time when it was a Canadian company, the meeting of its shareholders pursuant to Article 125(1) of the 1991 Law would only take place when APIC had continued into Jersey and was therefore a Jersey company.

The application was considered by Commissioner J.A. Clyde-Smith in the matter of APIC Petroleum Corporation and APIC Petroleum (Jersey) Limited [2012] JRC 228. The Commissioner held that the Royal Court had the ability to order a meeting of the shareholders of a foreign company under Article 125(1) of the 1991 Law subject to the foreign company having continued into Jersey at the time of the relevant shareholders meeting.

At paragraph 9 of the judgment, the Commissioner commented as follows: "An arrangement which involves a company..."
first continuing into Jersey, is in our view but one example of the wide variety of arrangements that Article 125 of the Companies Law is intended to cover and the Court should be flexible in its approach. It was proposed that the order would be made conditional upon APIC first completing its continuance into Jersey so that the order would only become effective if and when APIC is registered under the Companies Law. The essential point is that the meeting, if and when it takes place, will be a meeting of the members of a Jersey registered company and the scheme the Court will be asked in due course to sanction ... will be a scheme proposed between a then Jersey registered company and its members.”

At paragraph 10 of the judgment, the Commissioner further commented as follows: "This was not a case in which the Court was seeking to extend its reach over non-Jersey companies in an exorbitant manner; APIC had come to the Court and asked for an order conditional upon it becoming a Jersey company. We thought it appropriate to accept that invitation and to make the order."

The application demonstrates the flexibility of the Jersey courts in facilitating complex cross-border transactions. Schemes of arrangement can only be made by a Jersey company. However, the process can be initiated whilst the company is still a foreign company and in the process of continuing into Jersey.

**Conclusion**
Schemes of arrangement provide a flexible mechanism to effect a wide range of transactions between a Jersey company and its creditors or shareholders.

The statutory provisions are taken from the UK Companies Act 1948 (as re-enacted in the UK Companies Act 1985) and English case law authorities are likely to be followed by the Jersey courts in this area.

Given the current economic climate, it will be interesting to see whether there will be an increased use of Jersey schemes of arrangement to effect binding restructurings between a Jersey company and its creditors.