

# Compromises and Schemes of Arrangement

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The recent economic difficulties have given wider prominence to the uses and importance of compromises and schemes of arrangement, for both solvent and insolvent companies and groups. They may be used in a wide variety of circumstances including reconstructions, reorganisations and demergers as well as for mergers and acquisitions, redomiciliations and return of capital to members.

They may be used on a stand-alone basis or in conjunction with other procedures such as reduction of share capital and may provide useful alternatives to administration and other insolvency procedures, often with a cross border element. The latter was demonstrated by the Drax Power cases where schemes in Jersey, Cayman and England were used to restructure well over a billion pounds worth of debt and were contemporaneously sanctioned in those jurisdictions.

## WHAT IS A COMPROMISE OR ARRANGEMENT?

A compromise or scheme of arrangement is a court sanctioned compromise or arrangement made by a company with its members and/or creditors (or a class of them). It is a statutory procedure carried out in Jersey pursuant to Article 125 of the **Companies (Jersey) Law 1991** (the "Law"). The Jersey provisions are very similar to the English ones and as a consequence of this, English authorities supplement local Jersey cases. In **Re The Representation of TSB Bank Channel Islands Limited 1992** JLR 160, the court held that the wording of the Jersey provisions was so similar to their corresponding English counterpart that the court would, therefore, have the fullest regard to the interpretation given by the English Courts to the relevant sections of the English legislation at that time. Accordingly it held that Article 125 of the Law should be broadly construed to enable a wide variety of schemes to be put forward. The main procedural steps are described below.

## DIRECTIONS HEARING

An application is made to the court by the company (or any member, creditor or liquidator) for directions to convene a meeting of the relevant class(es) of members and/or creditors to be summoned in such manner as it directs. The applicant is represented by a Jersey advocate. The following documents are required:

- a representation (a formal document which originates the process summarising the basic facts and the orders sought);
- supporting affidavits (which sets out the background facts and exhibits the documents to be sent to the members/creditors);
- a skeleton argument setting out the legal submission to be made; and
- a draft order.

The court does not consider the merits or fairness of the compromise or arrangement at the directions hearing. However, issues relating to class(es) of members and/or creditors should be raised at this hearing. As in England the classification of creditors into either a single class or different classes can be problematic but revolves around similarity of rights and common interests (**Re Telewest Communications plc** [2004] EWHC 924 and **Re Telewest Finance (Jersey) Limited** [2004] JRC 109).

## NOTICE TO MEMBERS AND/OR CREDITORS

A notice is sent to the members and/or creditors summoning the meeting(s) in accordance with the court's directions. The notice must include an explanatory statement as required by Article 126 of the Law:

- explaining the effect of the proposed compromise or arrangement; and
- setting out the effect of the compromise or arrangement on the material interests of directors; and
- if applicable, setting out the effect of the compromise or arrangement on the material interests of the trustees of a deed for securing issue of debentures of the company (if the compromise or

arrangement affects the rights of debenture holders of the company).

Whilst the court may not retrospectively sanction a compromise or scheme of arrangement agreed at an unauthorised members or creditors meeting, it may order a new meeting to take place at short notice for the purposes of authorising the arrangement previously proposed and may allow proxy votes already cast at the unauthorised meeting to remain valid (**In Re Royal Bree's Hotel Ltd 1994** JLR Notes 6a and **In Re Plus 500 Emerging Mkts. High Yield Fund Ltd 1996** JLR Notes 8a).

## MEMBERS/CREDITORS MEETING

Approval of the scheme by the requisite class(es) of the members and/or creditors must be given at the meeting(s) convened in accordance with the court's directions. If a majority in number representing shareholders with 75% of the voting rights and/or representing 75% in value of the creditors agree to the compromise or arrangement and it is then sanctioned by the court, the arrangement will be binding on the Company and the members and/or creditors. In some cases an EGM may be required after the relevant creditors meeting (e.g. to approve a reduction of capital necessary on a cancellation scheme as occurred **In the Matter of Real Estate Opportunities Limited** [2008] JRC 025).

## SANCTION HEARING

The court exercises its discretion when deciding whether or not to sanction the compromise or arrangement at the sanction hearing. Affidavit evidence is required dealing with the holding of the meeting and exhibiting the chairman's report.

The court will primarily consider whether the compromise or arrangement is fair and proper and one which the shareholders or creditors could reasonably consider to be in their interests (as in **Telewest** and also **In the matter of Real Estate Opportunity Limited** [2008] JRC 025). Thus the court will ensure that the compromise or arrangement is one which "an intelligent and honest man, a member of the class concerned in

acting in respect of his interest, might reasonably approve". Also relevant is whether the provisions of the Law have been complied with, whether the shareholders, creditors and relevant classes were fairly represented by those who attended and voted at the meeting(s) and whether the statutory meeting majority are acting bona fide and not under coercion.

## DELIVERY OF THE COURT ORDER

Once made, the order must be delivered to the registrar of companies within 14 days in order for the compromise or scheme of arrangement to become effective. Also, where the company is subject to the City Code on Takeovers and Mergers, the Rules of the Takeover Code have to be followed as well as any applicable competition and regulatory laws.

In the current economic climate we are likely to see increasing use of this flexible statutory

procedure to implement compromises and arrangements, particularly those which are not fully consensual.

Should you have any questions or requests for further information, please contact:

**Mark Estella**

**English Solicitor**

mestella@applebyglobal.com

Tel: +44 (0)1534 818 325

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## The Right People. The Right Places.

### Bermuda

Canon's Court  
22 Victoria Street  
PO Box HM 1179  
Hamilton HM EX  
Bermuda

Tel +1 441 295 2244  
Fax +1 441 292 8666

### Jersey

PO Box 207  
13-14 Esplanade  
St Helier  
Jersey JE1 1BD  
Channel Islands

Tel +44 (0)1534 888 777  
Fax +44 (0)1534 888 778

### British Virgin Islands

No 56 Admin Drive  
Wickhams Cay 1  
PO Box 3190  
Road Town  
Tortola VG 1110  
British Virgin Islands

Tel +1 284 494 4742  
Fax +1 284 494 7279

### London

2nd Floor  
2 Royal Exchange Bldgs  
London EC3V 3LF  
United Kingdom

Tel +44 (0)20 7283 6061  
Fax +44 (0)20 7469 0540

### Cayman Islands

Clifton House  
75 Fort Street  
PO Box 190  
Grand Cayman KY1-1104  
Cayman Islands

Tel +1 345 949 4900  
Fax +1 345 949 4901

### Mauritius

8<sup>th</sup> Floor  
Medine Mews  
La Chaussée  
Port Louis  
Mauritius

Tel +230 203 4300  
Fax +230 210 8792

### Hong Kong

8<sup>th</sup> Floor  
Bank of America Tower  
12 Harcourt Road  
Central  
Hong Kong

Tel +852 2523 8123  
Fax +852 2524 5548

### Zurich

Bahnhofstrasse 52  
CH-8001  
Zurich  
Switzerland

Tel: +41 44 214 6525  
Fax: +41 44 214 6524