Introduction

Cross-border restructurings often present a number of challenging issues for practitioners not least where the company in financial difficulty is incorporated in a jurisdiction without an efficient or sophisticated restructuring regime. It is typical for such companies to look to other jurisdictions for assistance or parallel processes such as, for example, the United States to commence Chapter 11 and/or 15 proceedings in the US Bankruptcy Courts or England to implement a restructuring by way of an English scheme of arrangement where the company is able to demonstrate that it has a sufficient connection to England. However, it has become increasingly the case that US Chapter 11 proceedings or an English process may not be appropriate in circumstances where, for example, cost and timing are a priority, the requisite jurisdictional nexus is not achievable or adverse tax consequences are a significant consideration.

The Cayman Islands is a highly sophisticated tax neutral offshore jurisdiction with a legal system based on English common law. Although the Cayman Islands has no formal rehabilitation process for companies in financial distress similar to US Chapter 11 proceedings or English administration, a Cayman Islands scheme of arrangement (with or without a restructuring provisional liquidation protective wrapper) may be used to restructure a company’s financial liabilities.

The Ocean Rig group successfully restructured around US$3.7 billion of New York law governed debt. This was one of the largest cross-border restructurings to take place outside of the United States and involved the first ever use of Cayman Islands schemes of arrangement of foreign incorporated companies. The restructuring deployed a COMI shift from the Marshall Islands and also took advantage of the automatic stay on creditors’ claims provided by a Cayman Islands provisional liquidation. The Ocean Rig case demonstrates that a Cayman Islands scheme of arrangement offers an alternative option for complex cross-border restructurings in the right circumstances.

The Cayman Scheme of Arrangement

A Cayman Islands scheme of arrangement is a court approved compromise or arrangement between a company and its creditors or shareholders (or classes thereof). A scheme of arrangement is frequently used to implement a financial restructuring by varying or cramming in the rights of the relevant creditors and/or shareholders of a company but may also be

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1 Ocean Rig is an international offshore drilling contractor providing oilfield services for offshore oil and gas exploration, development and production drilling and specializing in the ultra-deepwater and hard environment segment of the offshore drilling industry.

2 For a more detailed analysis as to the Ocean Rig restructuring, see the Walkers article entitled - “Treading Ultra-Deep Water in the Cayman Islands: Key Points from the Ocean Rig Restructuring”. Walkers acted on the Ocean Rig (2017) schemes of arrangement and restructuring.
used to complete corporate transactions such as a group restructuring or reorganisation, acquisitions, mergers and take-private transactions. Accordingly, a scheme is not a formal insolvency process as such and the directors would remain in control of the company whilst formulating the terms of and promoting a scheme outside of a liquidation. However, a scheme of arrangement implemented outside of a Cayman Islands liquidation would not have the benefit of the automatic stay from unsecured claims that a provisional or official liquidation can offer.

The Grand Court has wide jurisdiction with respect to Cayman schemes and can consider a scheme in relation to any company that is liable to be wound up in the Cayman Islands, including if it has property, carries on business or is registered in the Cayman Islands. In practice, so as to ensure the Grand Court will not object to the scheme, there is clear precedent to establish or shift a company’s centre of main interests (‘COMI’) to the Cayman Islands to ensure that a dissenting stakeholder does not object on this basis.

A scheme is a statutory procedure under the Cayman Islands Companies Law and the provisions are similar to those set out for an English scheme under the English Companies Act. The process involves a meeting of each class of stakeholder whose rights will be affected by the scheme. The proposed scheme must be approved by a majority in number representing 75% in value of each class of stakeholder attending and voting at the meeting. If the necessary statutory majorities are obtained and the Grand Court grants an order sanctioning the scheme, the order must then be filed with the Cayman Islands Registrar of Companies. The terms of the scheme will only become effective and binding on the company and all members of the relevant classes (including any dissenting stakeholder and regardless of whether or not they voted) once the court order has been filed. It may be possible to complete a Cayman scheme in six to eight weeks (from the date the application is first filed with the Grand Court to the date on which the scheme is sanctioned by the Grand Court) in the absence of any complications or objections to the scheme.

**Dissenting Scheme Creditors or Members**

A Cayman scheme requires the approval of each class of affected stakeholder that is, at least a majority in number representing 75% in value of those actually voting need to vote in favour of the terms of the proposed scheme. As such, the level of consent for a scheme is higher than that required to approve a plan of reorganisation in Chapter 11 Proceedings (a majority in number representing two-thirds in value of those voting is required) however a scheme remains a powerful company restructuring and rescue tool. In addition, unlike in Chapter 11 proceedings, where a plan can sometimes be confirmed in circumstances where there is a non-accepting class (subject to certain controls, such as ‘the absolute priority rule’) and cram down dissenting creditors/members, if any class of stakeholder that would be affected by a proposed Cayman scheme does not approve such scheme, then the scheme as a whole will not be able to be sanctioned by the Grand Court and will fail. However, depending on the specific circumstances, it may be possible to structure the constitution of classes and the scheme to avoid this situation.

All affected stakeholders including any dissenting stakeholders will have the right to attend the sanction hearing and have their objections to the scheme be heard by the Grand Court. However, provided the prescribed procedures have been followed and the requisite statutory majorities have been achieved at the scheme meetings, the Grand Court will usually consider that the affected stakeholders of the company are the best judges of their own commercial interests and will typically sanction the scheme.

It is usual for a restructuring that is implemented by way of a Cayman scheme of arrangement to be conducted within a

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3 In addition, to ensure the scheme is capable of recognition in the US as a foreign main proceeding pursuant to Chapter 15.

4 Examples include the Ocean Rig, Mongolian Mining Corporation, LDK Solar and Suntech schemes of arrangement.

5 For example, schemes need only be proposed with creditors whose rights are affected. It might be possible to adopt a wide conception of class based on similarity of rights in a liquidation scenario, including grouping guarantee claims with primary claims; or leave a junior class behind in an oldco structure, if they do not have relevant security and/or using release provisions in the finance documents.
provisional liquidation wrapper so as to take advantage of the automatic stay on creditors’ claims whilst the restructuring is ongoing. The company will typically emerge from the provisional liquidation and continue as a going concern once the restructuring has been successfully completed.

A restructuring of New York law governed indebtedness typically requires recognition pursuant to US law. Both Cayman schemes and a Cayman provisional liquidation are able to be recognised under Chapter 15 and there is established precedent for the entry by a US Bankruptcy Court giving full force and effect to the terms of the Cayman scheme in the United States and thereby preventing dissenting creditors from taking action in the United States or seizing US property of the debtor.

When to Use A Cayman Scheme of Arrangement
A Cayman scheme and/or provisional liquidation are often used as parallel proceedings in support of Chapter 11 proceedings where there is a Cayman debtor. Whilst there are advantages to Chapter 11 proceedings in particular with the benefits of having the ability to cram down a class, the cost of a Chapter 11 case tends to be a significant factor in certain circumstances together with the ability of creditors to impede progress in the restructuring resulting in the company looking to other jurisdictions for alternative restructuring solutions.

A Cayman scheme of arrangement may become an attractive option for entities that can demonstrate that their COMI is in the Cayman Islands. In the Ocean Rig case, English schemes of arrangement were not pursued as a COMI shift to the UK would have resulted in adverse tax consequences for the Ocean Rig whereas a COMI shift to the Cayman Islands resulted in no Cayman tax implications given the tax neutrality of the jurisdiction.

Where it is possible for a company to shift COMI to the Cayman Islands, a Cayman scheme offers a reliable and sophisticated alternative to implement a financial restructuring. In addition, the Cayman Islands is a leading international offshore finance centre which has the benefit of providing a neutral venue for stakeholders which can prove useful in a contested situation by eliminating any home advantage brought by proceedings being commenced by an opposing party’s home jurisdiction.

The Cayman scheme restructuring option follows a statutory procedure, operates under well-tested laws and is supervised by the experienced judges of the Financial Services Division of the Grand Court with reference to English precedent and the Judicial Committee of the Privy Council in London as the ultimate appellate court providing legal certainty and predictability as to outcomes.

With the successful implementation of high-profile cross-border restructurings such as Ocean Rig together with a sophisticated restructuring toolkit, the Cayman Islands remains at the forefront as one of the premier jurisdictions of choice to implement complex cross-border restructurings.

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