

Bermuda Schemes of Arrangement

Delivering Global Restructurings and Reorganisations

Introduction

A court-supervised scheme of arrangement is the most straightforward and cost-effective way to facilitate a corporate rescue or restructuring of a company which is incorporated in Bermuda but has its operations or listing status in another jurisdiction. As a highly sophisticated, tax-neutral offshore jurisdiction based on English common law, Bermuda is a jurisdiction of choice for companies listed on the NYSE, Nasdaq, HKSE and SGX. Bermuda's statutory scheme of arrangement regime (either on a standalone basis, or in conjunction with a protective provisional liquidation 'wrapper') empowers such companies to restructure their financial liabilities without endangering their tax status or duplicating proceedings across the various jurisdictions in which such companies may have their operations or creditors.

The schemes of arrangement successfully implemented by Noble Group¹ and Titan Petrochemicals, and the scheme presently being negotiated by Up Energy, provide recent examples of the efficacy of the Bermuda scheme of arrangement process and its importance as the primary tool for the implementation of complex, cross-border restructurings of companies incorporated in Bermuda.

The Bermuda Scheme of Arrangement

A Bermuda scheme of arrangement is a court-approved compromise or arrangement between a company and its creditors (or classes thereof). A Bermuda scheme is most commonly used to implement a distressed financial restructuring by varying or compromising the rights of the relevant stakeholders (ordinarily, the creditors) of the company, although a scheme of arrangement can also be used to facilitate group restructurings, mergers and take-privates in a non-insolvency context.

While Bermuda schemes are often invoked in a corporate rescue context, a standalone scheme is not a formal insolvency process and the directors of a company retain all of their ordinary powers and responsibilities while a scheme is formulated and implemented. Directors' powers are tempered (or in some cases curtailed altogether) when a scheme is promoted whilst a company is in provisional liquidation, although in that context the company would gain the significant benefit of a statutory moratorium on unsecured creditor action for the term of the provisional liquidation.²

"...[T]his Court frequently approves parallel schemes linking Bermuda, the UK, Hong

¹ On 14 December 2018, Chief Justice Narinder Hargun made orders appointing a provisional liquidator over Noble Group Limited, a global commodities trader incorporated in Bermuda, to facilitate a debt restructuring by way of parallel schemes of arrangement in England and Bermuda.

² See separate summary of Bermuda's 'light-touch' provisional liquidation procedure, [available here](#).

Quick Read - Bermuda Schemes of Arrangement

What is it?

- » A compromise or arrangement between a company and a class or classes of its creditors and/or shareholders.
- » Similar to an English scheme of arrangement under Part 26 of the Companies Act 2006 or a Hong Kong scheme of arrangement under Part 13, Division 2 of the new Companies Ordinance.

What is it used for?

- » Effecting solvent reorganisations of a company or group structure, including by way of merger or take-private, and insolvent restructurings by way of a debt-for-equity swap or other debt-reduction strategy.

Who can use it?

- » Any company incorporated in Bermuda, including companies which have their operations overseas and are listed on an overseas stock exchange.

What are the voting requirements for a scheme?

- » A scheme requires at least 50% in number representing 75% in value of those voting in each class to approve the proposed scheme.

What about dissenting creditors / shareholders?

- » Provided the requisite statutory majorities have been obtained at the scheme meetings, and the Bermuda Court has sanctioned the scheme, the scheme will be binding on all affected stakeholders within the same class, regardless of whether they voted in favour of the scheme or at all.



*Kong and/or Singapore*³

The Bermuda Supreme Court has an exceptionally wide jurisdiction in respect of schemes of arrangement and has the power to sanction such schemes in most circumstances so long as the company is incorporated in Bermuda. This remains the case even when the company is listed on a foreign stock exchange and has all, or a substantial majority of, its operations overseas. The Court's inherent jurisdiction over companies incorporated in Bermuda allows it to cut across borders and facilitate the restructuring of companies with complex, cross-border operations.

The Statutory Regime

The statutory provisions applicable to Bermuda schemes of arrangement can be found in Part VII of the Companies Act 1981 (the "Act"), and specifically at sections 99 and 100. The provisions will be familiar to lawyers practising under the broadly equivalent provisions of English and Hong Kong statute. In essence, 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 (either in person or by proxy) at the meeting. The terms of the scheme will become binding on the company and all members of the relevant classes once the necessary statutory majorities are achieved, the sanction of the Bermuda Court has been obtained and the scheme filed with the Bermuda Registrar of Companies.

The Bermuda Court's Involvement

Two separate applications must be made to the Bermuda Court in order to successfully implement a scheme of arrangement.

At the first of these applications (the "First

Hearing"), a draft of the formal Scheme of Arrangement, together with its Explanatory Statement, is presented, and the Court is asked to make an order pursuant to section 100 of the Act confirming that the contents of those documents are sufficient to allow the stakeholders voting on the scheme to make an informed decision on the merits of the proposed scheme and their participation therein. At the First Hearing, the Court will also consider the proper formulation of classes for the scheme meeting (in the case of a multi-class scheme) and give directions in relation to the conduct of the scheme meeting.⁴ Importantly, the Court is not asked to consider the merits or fairness of the proposed scheme – that is a matter for the stakeholders who will be voting on the scheme.

*"It seems to me sensible that the position in Bermuda should mirror that in England, as well as that in other common law jurisdictions..."*⁵

Once the First Hearing has been held, and the Court has approved the scheme documentation and division of scheme classes (if applicable), the company (or its provisional liquidators) will convene the scheme meeting to allow the stakeholders to vote on the proposed scheme.

Assuming that the stakeholders vote in favour of the scheme at the scheme meeting, the final step is for the company (or its provisional liquidators) to approach the Bermuda Court to obtain formal sanction of the scheme of arrangement (the "Sanction Hearing"). Upon such approval being obtained at the Sanction Hearing, and the scheme being filed with the Bermuda Registrar of Companies, the terms of the scheme will become effective.

Class Constitution

The statutory scheme requires that a creditors' scheme must be between a company and its

Is Chapter 15 recognition available?

» Yes. The process for obtaining Ch. 15 recognition and orders giving full force and effect to the Bermuda Scheme in the US is relatively straightforward.

How much does it cost?

- » Typically less expensive (in terms of legal expenses) than a 'full service' reorganisation procedure such as Ch. 11 proceedings.
- » The structure imposed by the statutory regime means that a scheme can often also be less costly than ad hoc restructuring efforts.

How long does it take?

» A straightforward scheme can be completed in 6 to 8 weeks (from the date the application is filed with the Bermuda Court to the date on which the scheme is sanctioned).

The Bermuda Court

» The Supreme Court of Bermuda has extensive commercial, insolvency and restructuring experience. The Bermuda judiciary is made up of highly respected judges, many of whom have a private practice background in cross-border restructuring and schemes of arrangement.

Quick Read - Provisional liquidation in Bermuda

What is it?

- » An insolvency process subject to the supervision of the Bermuda Court.
- » Often used to provide a protective 'wrapper' in a restructuring context, shielding the company from creditor claims while the company formulates and implements a restructuring proposal.
- » The 'liquidation' terminology is somewhat of a misnomer – if a restructuring is successful, the provisional liquidators will be discharged and the restructured company will continue on as a going concern.

3 In the matter of Titan Petrochemicals Group Limited [2014] SC (Bda) 74 Com (23 September 2014), per Kawaley CJ (as he then was). Justice Kawaley now sits as a judge of the Financial Services Division of the Grand Court of the Cayman Islands.

4 Pursuant to Practice Direction No. 18 of 2017 'Guidelines applicable to Schemes of Arrangement under Section 99 of the Companies Act 1981', which follows the English Court of Appeal's decision in Re Hawk Insurance Co Ltd [2001] 2 BCLC 480 and parallels UK Practice Direction 'Scheme of Arrangements with Creditors' [2002] 3 All ER 96.

5 Kader Holdings Company Limited v Desarrollo Inmobiliario Negocios Industriales de Alta Tecnologia de Hermosillo, S.A. de CV [2014] CA (Bda) 13 Civ (10 March 2014) per Bell AJ, as cited by Kawaley CJ (as he then was) in Titan Petrochemicals.



creditors, or any class of creditors. Each class of creditors must vote in its own meeting, and must pass the scheme by the relevant statutory majorities in order for the scheme to be approved. It is customary in Bermuda for the question of creditor classes to be determined at the First Hearing, to avoid subsequent challenges to the validity of the scheme being raised after the scheme meetings have been held.

When considering the constitution of classes, the rights of a given class need not be identical, provided they are “not so dissimilar as to make it impossible for them to consult together with a view to their common interest”.⁶ The Bermuda Court typically follows English jurisprudence as regards the constitution of classes for voting purposes.⁷

“[Bermuda’s] statutory provisions derive from the same legal roots [i.e. English common law] which often apply to companies whose operations and restructurings traverse multiple jurisdictional shores”⁸

Dissenting Stakeholders

Provided that a majority in number representing 75% of the value of each stakeholder class vote in favour of a scheme, and that the scheme meetings have been convened and held lawfully and in accordance with the orders made by the Court at the First Hearing, there is relatively little which can be done to prevent a scheme from taking effect.

For example, a scheme of arrangement of a company in financial distress, which provides for the compromise of creditors’ interests, cannot ordinarily be upset by shareholders of the company (who might, for example, be dissatisfied with the terms of a debt-for-equity swap which involves their shareholding being diluted) because in circumstances where a company is insolvent and cannot pay its creditors, those shareholders have no interest in and will not be affected by the scheme. Similarly, in a creditors’ scheme involving a

compromise of debts owed by the company, an unsecured creditor unhappy with the terms of such compromise cannot ordinarily prevent such scheme from being implemented once the necessary statutory majorities have been achieved, provided that the scheme process has not been tainted by fraud or dishonesty.⁹

Restructuring Timetable

The procedure and processes to be followed in a Bermuda scheme of arrangement are set out in the Act and the timing of such steps will depend in large part upon the complexity of the contemplated restructuring. As a general proposition, a straightforward scheme will proceed on the following timetable:

Week 1: Originating Summons filed with the Bermuda Court, together with draft Scheme and Explanatory Statement.

Week 2: Order for directions made by the Bermuda Court.

Week 5: First Hearing before the Bermuda Court.

Week 7: Scheme meeting(s) held.

Week 8: Sanction Hearing before the Bermuda Court.

Week 8: Scheme filed with Bermuda Registrar of Companies.

Schemes of arrangement which interact with or impact upon a company’s listing status, and “parallel schemes” being implemented across multiple jurisdictions, can take significantly longer than the indicative timeline set out above.

Case Study One – Restructuring of Titan Petrochemicals Group Limited

Titan Petrochemicals is a listed company on the Main Board of the Hong Kong Stock Exchange and has been a major player in the offshore and marine industry in China since it was founded

What about adverse creditors?

- » The appointment of provisional liquidators invokes an automatic statutory moratorium on creditor claims, although it does not prevent secured creditors from enforcing their security.

Who can use it?

- » Any company incorporated in Bermuda, including companies which have their operations overseas and are listed on an overseas stock exchange.

What powers do provisional liquidators have?

- » Powers are bespoke to the facts and requirements of each provisional liquidation, and are set out in a formal Court Order.

How are appointees selected?

- » Typically both local and foreign insolvency practitioners will be appointed, particularly if the subject company has significant operations overseas or is listed on a foreign stock exchange.

What is a ‘light-touch’ provisional liquidation?

- » In a ‘light-touch’ provisional liquidation, the provisional liquidators are appointed with limited powers, enabling them to work alongside the existing board of directors without completely displacing the directors’ powers.

Is foreign recognition of the provisional liquidation available?

- » Yes. The provisional liquidation proceedings can be readily recognised in other jurisdictions to allow a global restructuring to be effected.
- » Typically, the appointment of provisional liquidators to a Bermuda company will be followed immediately by an application for recognition in the jurisdiction of the company’s operation and/or listing.

Cost and speed

- » Provisional liquidators can be appointed on an expedited basis – depending on the particular facts, appointments can often be secured on less than 24 hours’ notice.

6 Sovereign Life Assurance Co v Dodd [1892] 2 QB 573 at 583 per Bowen LJ.

7 Re Dominion Petroleum Ltd [2012] Bda LR 8.

8 In the matter of Titan Petrochemicals, above no. 3.

9 The Judicial Committee of the Privy Council in Kempe and another (as Joint Liquidators of Mentor Insurance Ltd) v Ambassador Insurance Co (in liquidation) [1998] 1 WLR 271 has confirmed that a minority creditor is bound by a properly established creditors’ scheme and cannot apply to the Bermuda Court to vary its terms.



in 2002. However, the oil trading and shipping downturns precipitated by the global financial crisis in 2009 forced Titan to restructure its debt in 2010 and divest itself of many of its profitable assets. By 2012, company creditors were threatening to commence insolvency proceedings and in 2013 petitions were filed with the courts in Bermuda and Hong Kong seeking the winding-up of the company.

Following the appointment of provisional liquidators to the company by the Supreme Court of Bermuda on a creditor petition, the powers of those provisional liquidators were subsequently varied to 'light-touch' powers, to consult with the directors of the company to develop and implement a restructuring proposal.

The terms of that restructuring proposal were presented to the company's creditors in 2014. Essentially, it involved the company's noteholders agreeing to 'haircuts' of between 60 and 90% of the value of their respective debts, in exchange for cash and share options in the newly restructured company. Critical to the success of the restructuring was the support of Guangdong Zhenrong Energy Co., Ltd, Titan's major shareholder and 'white knight' investor.

The First Hearing was held on 15 September 2014, at which time the Bermuda Court approved the Scheme Booklet and made orders for the convening of the scheme meetings, which were held on 22 October 2014. Titan's scheme of arrangement was sanctioned by the Bermuda Court on 5 November 2014, and became effective the following day upon being filed with the Companies Registry. Following the discharge of the provisional liquidators, the company went on to recover its listing status on the Hong Kong Stock Exchange.

Case Study Two – Restructuring of Up Energy Development Group Limited

Up Energy Development Group Limited is the holding company for a corporate group engaged in the business of mining and processing coking coal in the People's Republic of China. Trading in the shares of Up Energy - listed on the Hong Kong Stock Exchange in January of 2011 - was suspended on 30 June

2016 following the presentation of winding up petitions against the company, first in Hong Kong and thereafter in Bermuda.

On 7 October 2016, provisional liquidators were appointed to Up Energy by order of the Bermuda Court upon the petition of an unsecured creditor in respect of a HK\$150 million debt and following the filing of a winding-up petition in Hong Kong earlier in the year. The provisional liquidators took office in considerably difficult circumstances: the long-standing directors of the company had resigned and there was no unanimity amongst the unsecured creditor body which were collectively owed in excess of HK\$1 billion. Following their appointment, the joint provisional liquidators advised the Court that in a forced insolvency scenario, the company's unsecured creditors were likely to recover between 0.62 and 3.77% of the amounts owed to them by the company.

In appointing provisional liquidators, Kawaley CJ (as he then was) confirmed the integral role which provisional liquidators play in developing and promoting schemes of arrangement in Bermuda:

"It is the involvement of JPLs, embedded with the restructuring troops, which relieves this Court of the burden shouldered by US Bankruptcy Court judges of resolving a myriad of disputes between the restructuring protagonists. A scheme of arrangement is approved in principle by this Court when leave is sought to promote it, typically on an ex parte basis. A scheme of arrangement is sanctioned, if it attracts the requisite support, in the overwhelming majority of cases at a perfunctory uncontested hearing. All conflicts are typically resolved before the scheme document is finalised, out of court, with the JPLs playing a generally unheralded but crucial mediating role. They bring a high degree of efficiency and economy to Bermudian restructuring proceedings which would likely be lost in a proceeding without the usual appointment".

Under the supervision of the provisional liquidators, the company made arrangements for the construction of the coal mines and auxiliary plants which comprise its major productive assets, and presented a resumption proposal to the Hong Kong Stock Exchange. The company's ability to restructure its

- » Costs are dependent on the complexity and length of the subsequent proceedings.
- » Costs will include the fees and expenses of the provisional liquidators, which are typically paid out of the assets of the company.



operations in this manner has been aided by the statutory moratorium on creditor claims which came into effect upon the appointment of the provisional liquidators. Once trading in the company's shares has resumed, it is the provisional liquidators' intention to present a scheme of arrangement to the company's creditors which, if successful, will see a return to creditors significantly in excess of the likely return in a forced liquidation context.

The Role of Bermuda Schemes of Arrangement in Cross-border Restructurings

The Bermuda scheme of arrangement is a tried and tested mechanism for implementing the financial and operational restructuring of companies incorporated in Bermuda. A Bermuda scheme proceeds under a defined statutory procedure, with the supervision of the experienced commercial judges of the Bermuda Court and with reference to English law precedent. The Judicial Committee of the Privy Council in London remains an appellate avenue, providing legal certainty and predictability as to outcomes.

Bermuda remains at the forefront as one of the premier jurisdictions of choice for complex, cross-border restructurings. For more information, please contact your usual Walkers contact or one of Walkers Bermuda's restructuring professionals listed below.

Key Contacts



Kevin Taylor
Managing Partner, Insolvency & Dispute Resolution
T. +1 441 242 1510
E. kevin.taylor@walkersglobal.com



Nicole Tovey
Partner, Insolvency & Dispute Resolution
T. +1 441 242 1512
E. nicole.tovey@walkersglobal.com



Benjamin McCosker
Associate, Insolvency & Dispute Resolution
T. +1 441 242 1521
E. benjamin.mccosker@walkersglobal.com