Schemes of Arrangement:

The court's jurisdiction, its exercise and recognition

Following the Judgments of Snowden J, in ***Re Noble Group Ltd*** at the convening hearing stage ***[2018] EWHC 2911 (Ch)*** and the sanction hearing stage ***[2018] EWHC 3092 (Ch)***, it has been suggested that the Courts of England & Wales are not the most suitable for schemes of arrangement. The reason for that suggestion is the "Snowden factor." and, implicitly, the suggestion that the courts of other jurisdictions may be more amenable to the promotion of a scheme of arrangement.

There can be no doubt that Snowden J has turned the spotlight on to the practices hitherto adopted in relation to creditors' schemes, and, indeed, other schemes for reconstruction, with renewed intensity.

However, it is not the purpose of this article to seek to attack or defend the approach adopted by Snowden J. In fact, I applaud his approach. Internationally, the reputation for integrity of the scheme jurisdiction is highly dependent upon judicial scrutiny of the highest quality.

Noble Group Ltd (the "**Company**") is a company incorporated, and with its registered office, in Bermuda. Its shares were listed on the mainboard of the Singapore Exchange. It is the holding company of a group which is a major global commodities trader. The Group had corporate hubs in London, Hong Kong and Singapore. It fell into financial difficulties, particularly between 2014 and 2016 as a result of a worldwide and industry wide decline in commodity prices, resulting in a default on its main financial obligations. All of the Company's liabilities were unsecured.

In October 2018, the Company issued a Claim Form, in London, seeking an Order for the convening of scheme meetings.

Three issues are always of paramount importance in relation to the court's jurisdiction: (1) Does the court to which application is made have jurisdiction to sanction the scheme; (2) will the court exercise that jurisdiction; and (3) if it does, will the scheme and its effect be recognised by courts in other jurisdictions.

The court's jurisdiction

The starting point for any consideration of the jurisdiction of the Court is the Companies Act 2006 ("**CA 2006**"). Section 895 applies the provisions of Part 26 CA 2006 to any scheme of arrangement proposed between a company and its members and/or creditors, or some of them. Save in relation to the powers conferred by section 900 for the purpose of facilitating a reconstruction or amalgamation, the word "company" is defined as "any company liable to be wound up under the Insolvency Act 1986" or the Northern Irish equivalent.

Thus, the jurisdiction conferred by statute is apparently extremely wide.

The exercise of the court's jurisdiction

However, the courts have developed 3 "requirements" to be considered in relation to applications for the winding up of foreign companies:

(a) that the company has a sufficiently close connection with England, usually, but not invariably in the form of assets within the jurisdiction ("**sufficient connection**");

(b) that there exists a reasonable possibility of benefit accruing to creditors from the winding up ("**tangible interest**");

(c) that there are persons interested in the distribution of assets over whom the English court could exercise jurisdiction ("***in personam jurisdiction***");

See ***Re Drax Holdings Limited [2003] EWHC 2743 (Ch)*** Lawrence Collins J**;** ***Re Noble Group Ltd [2018] EWHC 2911 [66]***.

Historically, different views have been expressed as to whether these limitations or requirements are relevant to the court's jurisdiction or only to the exercise of its discretion. The prevailing view is that they are matters which go to the exercise of the court's discretion.

The tangible interest and *in personam jurisdiction* requirements are clearly matters for the exercise of discretion. They ensure that the courts order will serve a useful purpose. The sufficient connection requirement ensures that the court does not seek to exercise exorbitant jurisdiction, save where it is appropriate to do so: ***Re Rodenstock GmbH [2011] EWHC 1104 (Ch)*** Briggs J.

What amounts to a sufficient connection is incapable of precise definition. It is a bit like an elephant; easier to recognise than to describe. The English courts historically have adopted a flexible approach. In **Stocznia Gdanska SA v Latreefers Inc (No 2) [2001] 2 BCLC 116**, 140, the Court of Appeal confirmed that the presence of assets of the company in England was not a precondition to the exercise of jurisdiction to make a winding up order.

A substantial asset in the UK of a Jersey company (***Re Telewest Communications plc [2004] EWHC 924 (Ch) [2]*** David Richards J), and financing arrangements containing English law and jurisdiction clauses (***Drax Holdings Ltd [2003] EWHC 2743 (Ch)*** Lawrence Collins J), have been held to provide a sufficient connection with England for scheme purposes.

The provisions of the Recast EU Insolvency Regulation (2015/848) which limit the English court's jurisdiction to wind up companies incorporated in an ERU member state to those companies which have their Centre of Main Interests ("**COMI**") in England are not thought to apply to schemes, and certainly they cannot apply in relation to companies which were not incorporated in, and do not have their COMI in, an EU member state: ***Re Noble Group Ltd [2018] EWHC 2911 [71]***.

As Snowden J pointed out in ***Re Noble Group Ltd [2018] EWHC 3092 [93],*** "the "sufficient connection" test is plainly separate and distinct from the issue of where the scheme company has its COMI for the purposes of, say, the recast EU Insolvency Regulation."

The sufficient connection requirement and the need to show that the scheme, if approved, will have a substantial effect are at least closely related: see ***Re Magyar Telecom BV [2013] EWHC 3800 (Ch) [21],*** David Richards J.

A practice has developed over recent years of companies moving their COMI so as to establish sufficient connection with their jurisdiction of choice. As Newey J observed in ***Re Codere Limited [2015] EWHC 3778 (Ch) [18]***, in a sense, what is sought to be achieved, is forum shopping. The proponents of the scheme are seeking to give the court jurisdiction over the company and/or its obligations, so that advantage can be taken of the scheme jurisdiction which may be more readily available in some jurisdictions than in others.

Both Snowden J in ***Re Noble Group Ltd [2018] EWHC 3092 [95]-[97]***, and Newey J in ***Re Codere Limited [2015] EWHC 3778 (Ch)*** recognised that the potential for abuse

exists, where, for example, a debtor seeks to move its COMI to a more "favourable jurisdiction", with a view to evading debts rather than with a view to achieving the best possible outcome for creditors.

In a sense, the ability of a recalcitrant debtor to move "jurisdictions" has been facilitated by legislation in a number of different offshore centres, by the introduction of "continuation" legislation.

Whether it is the aim of the legislature in other jurisdictions to obtain revenue from registering companies, or whether the aim is to enable advantage to be taken of the scheme jurisdiction which may be more readily available in that jurisdiction than in others jurisdictions, is, perhaps, a moot point. But that is a debate for another day.

Part X of the BVI Business Companies Act 2004 ("**BCA**") provides for "continuation" of a foreign company under that Act. S 180 provides that a foreign company may continue as a company incorporated under the BCA if the laws in which that company is registered permit it to continue in another jurisdiction.

Application for a continuation involves the filing with the Registrar of Companies a few prescribed documents (S 181(1)). If the Registrar is satisfied that the requirements of the BCA have been complied with Act, the Registrar issues a certificate of continuation. Hardly very taxing! However, the Registrar may refuse to continue a foreign company if he believes that that would be contrary to the public interest.

The effect of continuation is that the BCA applies as if the Company had been incorporated under the Act. S 177 of the BCA provides for various forms of court approved plans of arrangement.

Interestingly, however, a foreign company may not continue as a company incorporated under the BCA if it is in liquidation (or equivalent insolvency proceeding), if a receiver or manager has been appointed over any of its assets, it has entered into an arrangement with its creditors which has not been concluded, or if there is a pending application for the liquidation (or other insolvency proceeding) in another jurisdiction.

Similarly in the Cayman Islands, continuation is permitted under Part XII Companies Law. S 201(2) is more prescriptive than the BCA as to the circumstances in which continuation is permitted. It provides, amongst other things that the registrar shall register a company by way of continuation if it is able to pay its debts as they fell due. The commercial test for solvency in Cayman is the same as in England, that is as set out in the observations of Lord Walker in ***BNY Corporate Trustee Services Limited v Eurosail 2007-3BL PLC [2013] UKSC 28*** *(see* ***Skandinaviska Enskilda Banken AB (Publ) v Conway (as joint official liquidators of Weavering Macro Fixed Income Fund Ltd) Case ID: JCPC 2017/0022***)

Ocean Rig UDW Inc. ("**Ocean Rig**") and its subsidiaries were companies which were continued under the Cayman legislation. They had done so from their place of incorporation in the Marshall Islands. Why they were ever incorporated in the Marshall Islands in the first place is a bit of a mystery. But certainly they do not do too much restructuring in the Marshall Islands.

In 2016, the Ad Hoc Creditors of the Group, promoted a group restructuring involving, amongst other things, 4 related schemes of arrangement, described, at the time, as the largest group restructuring ever. The justification for the schemes was the dire consequences which would befall the Group if the companies were to go into liquidation. The forum shopping undertaken, as it was at the instance of the Ad Hoc Creditor Group, no doubt would be considered by Snowden J and Newey J as "good forum shopping," having been undertaken with a view to achieving the best possible outcome for creditors.

A question inevitably must arise as to whether a company which, when solvent, has taken the benefit and advantage of jurisdictions with lesser requirements for transparency should, when nearing insolvency, be permitted to continue in another, "more rigorous" jurisdiction so as to take the benefit of the legislation in that other jurisdiction. In relation to Ocean Rig, however, reliance can no doubt be placed on the facts (1) that the schemes were being promoted by the companies' creditors not their management, and (2) that such continuation was with a view to achieving the best possible outcome for creditors.

Bermuda, also has provisions permitting continuation of foreign companies. They are contained in Part XA Companies Act 1981. The application for continuance, as an exempted company, under s 132C is made to the Minister. The Companies Act 1981

contains, in Part VII, provisions relating to schemes of arrangement, reconstructions, amalgamations and mergers.

Recognition of the scheme and of its effect

As Lawrence Collins J said in ***Re Drax Holdings Limited [2003] EWHC 2743 (Ch):***

> "[30] In the case of a creditors' scheme, an important aspect of the international effectiveness of a scheme involving the alteration of contractual rights may be that it should be made, not only by the court in the country of incorporation, but also (as here) by the courts of the country whose law governs the contractual obligations. Otherwise dissentient creditors may disregard the scheme and enforce their claims against assets (including security for the debt) in countries outside the country of incorporation."

In ***Re Magyar Telecom BV [2013] EWHC 3800 (Ch)***, David Richards J was concerned with a scheme involving a company registered in Netherlands but with Notes governed by New York Law. The Judge said that because of those two facts "serious issues arise as to whether (the English court) would consider it appropriate to sanction the scheme." Although those facts did not go to the court's jurisdiction, they were "sufficiently fundamental to an exercise of the court's power under Part 26 that the court might decline jurisdiction even if there were no opposition from any creditors to the scheme."

The purpose of the scheme was to affect the rights enjoyed by the Note Creditors under New York law by exchanging the existing Notes for new Notes and equity. The court therefore needed to be satisfied that the scheme would achieve its purpose: ***Sompo Japan Insurance Inc v Transfercom Ltd*** **[2007] EWHC 146 (Ch),** ***Re Rodenstock GmbH*** **at [73]-[77]**.

David Richards J said ***[23]***:

> "In the present case, the significance of moving the COMI of the company to England again lies not so much in the establishment in the abstract of a connection between the company and England but, on the basis that any insolvency process for the company would be undertaken under English law in England, providing a solid basis and background for a scheme under English law which altered contractual rights governed by a foreign law."

There was before the court detailed expert evidence of US law which established that it was likely that the US Courts would, under Chapter 15 of the US Bankruptcy Code which gives effect to the UNCITRAL Model Law on Cross-Border Insolvency, recognise and give effect to the scheme, notwithstanding that it alters and replaces rights governed by New York law. On the basis of that evidence, David Richards J was satisfied that it was reasonably likely that the US court would recognise the present scheme and give effect to it. 26. The scheme further provided that it would not become effective, unless the company obtained an order of the US Bankruptcy Court for the recognition of the scheme under Chapter 15 of the US Bankruptcy Code.

The recognition of the courts in one jurisdiction of the effectiveness of foreign law processes in another jurisdiction has come a long way since ***Adams v National Bank of Greece [1961] AC 255***. In that case, the House of Lords held that an English law obligation was unaffected Greek legislation which purported to alter or discharge its terms. But, since then, international recognition has developed exponentially as a matter of comity and as the direct result of international conventions and regulations.

The extent to which and precisely how that development has taken place is perhaps for another day. However what is clear is that the courts from which sanction to a scheme of arrangement is sought will require compelling evidence that the scheme is likely to be effective.

As Snowden J said in ***Re Van Gansenwinkel Groep BV [2015] EWHC 2151 (Ch) [71]:***

> "The English court does not need certainty as to the position under foreign law – but it ought to have some credible evidence to the effect that it will not be acting in vain."

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Erskine Chambers
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