



Fountain Court
CHAMBERS



Corporate Restructuring and Insolvency under the AIFC Rules and Regulations

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Options for companies in financial difficulties



- **Scheme of Arrangement**
 - AIFC Companies Regulations, Part 9
- **Company Voluntary Arrangement**
 - AIFC Insolvency Regulations, Part 2
 - AIFC Insolvency Rules, Part 2
- **Receivership**
 - AIFC Insolvency Regulations, Part 3
 - AIFC Insolvency Rules, Part 4
- **Winding Up (liquidation)**
 - AIFC Insolvency Regulations, Part 4
 - AIFC Insolvency Rules, Part 5



1. Receivership

- **Receivership**

- Remedy used by a secured creditor
- Receiver vs Administrative Receiver
- The role of the AIFC Court: Regulation 14(7)



2. Winding Up/ Liquidation



- **Winding up or Liquidation**

- Compulsory (by order of the court): AIFC Insolvency Regulations, Part 4, Chapter 5
- Voluntary (by resolution of the company)
 - Members' voluntary liquidation: AIFC Insolvency Regulations, Part 4, Chapter 2
 - Creditors' voluntary liquidation: AIFC Insolvency Regulations, Part 4, Chapter 3
 - The role of the AIFC Court: Reg 46



3. Schemes of arrangement



- **Key features:**
 - Versatile: no prescription as to the subject matter of a scheme
 - Court-approved: the subject-matter must be such that the court will approve it, i.e. *the scheme's proposals must be fair, reasonable and represent a genuine attempt to reach agreement between a company and its creditors and/or shareholders. A scheme that simply expropriates the rights of members or creditors is not a compromise or arrangement with the company (Re NFU Development Trust Ltd [1973] 1 All ER 135).*
 - Company is a party to the scheme
 - AIFC Companies Regulations, Part 9



3. Schemes of arrangement



Examples of when schemes can be used

- Restructuring insolvent companies: to enable the company to avoid insolvent liquidation (winding up).
- Group reorganisations.
- Mergers/Acquisitions.
- Demergers.
- Removing minority shareholders.
- Return of capital to shareholders (e.g. issue new shares to shareholders and then buy them back in a court-approved reduction of capital scheme).



3. Schemes of arrangement



Outline of the procedure

- *An application* for a court order summoning a meeting to vote on the scheme and *court hearing*: **Reg 124(2)**
- Company notifies the attendees of the meeting (*circular to meeting attendees*): **Reg 125**
- Attendees meet to consider the proposed scheme (*court meeting*): **Reg 124(3)**
- Company asks the court to sanction the proposed scheme (*scheme sanction hearing*): **Reg 124(3)**
- Copy of the Order (certified by the Registrar of the Court) is delivered to the Registrar of Companies: **Reg 124(5) and Reg 124(8)** (sanction for non-compliance – fine)
- *Scheme becomes effective* on delivery of sanction order to the Registrar of Companies: **Reg 124(6)**.
- Registrar of Companies includes the order for the scheme in the companies articles of association: **Reg 124(7)**.



3. Schemes of arrangement



Application to the court (1): outline

- Who can apply (Reg 124(2)):
 - The company itself
 - Any creditor of the company
 - Any shareholder of the company
 - The liquidator (if company is being wound up)
- Issue a claim form: Abridged Procedure under Part 23 of the AIFC Court Rules
- File and serve written evidence with the claim form (r. 23.15 of the AIFC Court Rules)
- No defence or a reply (r. 23.4 of the AIFC Court Rules)



3. Schemes of arrangement



Application to the court (2): content of the claim form

- The Claim Form must include (r. 23.5):
 - Claim is brought under the Abridged Procedure.
 - The question which the Claimant wants the Court to decide; or the remedy which the Claimant is seeking and the legal basis for the claim to that remedy (e.g. convening the meeting to approve the scheme; approving scheme documents).
 - If the claim is being made under a legislative provision, what that legislative provision is: Reg 124 of the AIFC Companies Regulations.
 - If the Claimant is claiming in a representative capacity, what that capacity is.
 - No Defendant to be named, e.g. “*In the Matter of a [Company] under Regulation 124 of the AIFC Companies Regulations*”.



3. Schemes of arrangement



Application to the court (3): supporting evidence

- Witness statement explaining the scheme and its context/rationale and exhibiting various scheme documents the Claimant wants the court to approve, e.g.
 - Scheme notice documents including
 - Letter from company directors/chairman
 - Expected timetable of events
 - Terms of the scheme
 - Explanatory Statement (Reg 125)
 - Notice of meetings (inc any General Meeting)
 - Advertisement (if needed)
 - Proxy forms (for class meeting(s) and, if needed, a General Meeting of shareholders)



3. Schemes of arrangement



Court hearing 1: application for an order summoning the meeting (1)

- Factors considered by the court:
 - Whether the scheme has a chance of being approved (see *Re Savoy Hotel Ltd [1981] Ch 351*).
 - Whether the proposed division of the members and/or creditors into one or more voting classes appears to be correct.
 - Fairness of the scheme will not be considered by the court at this hearing (*Re Hawk Insurance Company Ltd [2001] 2 BCLC 675*).



3. Schemes of arrangement

Court hearing 1: application for an order summoning the meeting (2)

- Judge may (but does not need to) approve the following:
 - The form of the notice convening the meeting(s)
 - Any advertisements for each meeting
 - Proxy forms
 - Notice period for each meeting



3. Schemes of arrangement

Explanatory Statement – content

Regulation 125(2)

The notice calling for the meeting of Creditors or Shareholders must include a statement containing the following:

- (a) an explanation of the effect of the compromise or arrangement;*
- b) any material interests of Directors in the compromise or arrangement, including interests as an Officer, Creditor or Shareholder of the Company;*
- (c) if there any Debt Securities issued by the Company - how the arrangement or compromise would affect the rights of the Debt Security holders;*
- (d) any other matter that has a material impact on the Company, and its Creditors and Shareholders and Debt Security holders, resulting from the compromise or arrangement.*



3. Schemes of arrangement

Court hearing 2: scheme sanctioning hearing (1)

Evidence:

- Company Chairman's report of the meeting
- Witness statement/affidavit confirming:
 - (a) the scheme was approved by requisite majority
 - (b) numbers present/votes cast at the meeting



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3. Schemes of arrangement



Court hearing 2: scheme sanctioning hearing (2)

Factors considered by the court:

- The approval of the scheme is reasonable: "*the [scheme] proposal is such that an intelligent and honest man, a member of the class concerned, acting in respect of his interests might reasonably approve*" (***Re Dorman Long & Co Ltd (1934) 1 Ch 635***).
- Each class was fairly represented by those attending the meeting and the statutory majority acted bona fide.
- The statutory provisions have been complied with, including:
 - correct notice of the meeting(s)
 - proper despatch of the explanatory statement;
 - relevant majority voted in favour
- The scheme complies with the law.
- The scheme is not subject to conditions subsequent.
- The scheme is actually needed.



3. Schemes of arrangement



Court hearing 2: scheme sanctioning hearing (3)

The issue of class constitution:

- *Who determines?* The applicant
- *What constitutes a class?* To determine, consider whether:
 - The members' or creditors' rights to be released or varied under the scheme are so distinct that the scheme has to be treated as an arrangement or compromise with more than one class of member or creditor.
 - The new rights (if any) that the scheme gives to those whose rights are to be released or varied lead to a conclusion that there is more than one class of members or creditors. (*Re Hawk Insurance Company*) potentially
- *What if a class is incorrectly constituted?* Court has no jurisdiction to sanction the scheme (*Re British Aviation Insurance [2005] EWHC 1621*)



3. Schemes of arrangement



Dealing with material changes of circumstances

- New material information arising after the despatch of the explanatory statement must be communicated to creditors/shareholders (*Re Jessel Trust Limited [1985] BCLC 119*).
- The court will likely assume that changes to directors' interests in the scheme/arrangement will influence shareholders/creditors.
- Timing of the changes:
 - Before the first court hearing
 - After the despatch of the scheme circular
 - After the second court meeting sanctioning the scheme



3. Schemes of arrangement



Advance planning: steps needed

1. Before issue claim form: book court dates and prepare scheme documents/court documents.
2. Issue claim form and evidence in support.
3. Court hearing of claim: approval of the meeting (and all of the draft scheme documents).
4. Post all notices and, if necessary, advertise the meeting(s).
5. Court meeting and any general meeting (if required).
6. Complete report of chairman of court meeting(s) for the court and prepare and sign witness evidence.
7. Court hearing to sanction the scheme.
8. Obtain court order sanctioning the scheme and certify with the Registrar of the Court.
9. File a certified copy of the court order with the Registrar of Companies w/n 7 days of the court order.
10. The scheme comes into effect.



4. Company Voluntary Arrangements (CVA)



- **Key features:**
 - A compromise, or other arrangement, between a company and its creditors. Typical proposal will include a rescheduling or reducing the company's debt.
 - Implemented under the supervision of an insolvency practitioner ("Nominee").
 - Binds all unsecured creditors provided necessary majority votes in favour.
 - Does not affect the rights or secured or preferential creditors.
 - No need for court approval.
 - Can apply to court for a moratorium (application by the Nominee following proposal by Company's directors).



4. Company Voluntary Arrangements (CVA)



Outline of the procedure (1)

- Directors **appoint a Nominee** (insolvency practitioner) to supervise the implementation of a CVA: Reg 8(2).
- Directors prepare and give the Nominee a **Proposal** (to the company and its creditors) for a scheme: Reg 8(1). (See Rule 2.1 for content of the Proposal).
- Directors give the Nominee the **Statement of Affairs** (within 7 days of the Proposal”): Rule 2.2.
- Nominee calls **meetings** of (a) the company; (b) its creditors to consider the CVA proposal: Reg 10. **Notice of the meetings** to contain (i) the Directors’ Proposal; (ii) Statement of Affairs; (iii) Nominee’s comments on the Proposal: Rule 2.4.
- **Meetings:** resolution passed by a majority of more than $\frac{3}{4}$ in value of the creditors/shareholders present and voting: Rule 2.5 and Reg 11.



4. Company Voluntary Arrangements (CVA)



Outline of the procedure (2)

- If the company is eligible, Directors can prepare a ***proposal for a moratorium*** (to explain why directors consider that a moratorium would be of benefit to creditors). Moratorium proposal to be accompanied with all relevant supporting documents. Can be the same document as the Proposal: Rule 3.1.1
- Proposal for a moratorium to be given to the Nominee who will then apply to court: Rules 3.1.2 and 3.1.3.
- If the CVAs approved at the meetings differ, “*a Person who appears to the Court to be interested*” may apply to the Court to decide which of the CVAs is to be taken as approved: Reg 12(3).
- Approved CVA ***takes effect and binds*** every person who had notice of and was entitled to vote at the meeting: Reg 12(4).



4. Company Voluntary Arrangements (CVA)



Outline of the procedure (3)

- Nominee becomes **Supervisor** of the CVA once it takes effect: Reg 13(2).
- Anyone dissatisfied with the Supervisor's actions/omissions may apply to Court: Reg 13(3).
- Within 28 days of the completion/termination of the CVA, the Supervisor must send all creditors/shareholders of the Company who were bound by it Notice that the CVA was fully implemented or has terminated: Rule 2.10.1. Copy to Registrar of Companies and the Court: Rule 2.10.3.
- Notice to be accompanied by a copy of the Supervisor's report summarising all receipts and payments made by him in or in connection with the CVA and (if applicable) explaining why CVA terminated/departed from CVA that took effect: Rule 2.10.2.



4. Company Voluntary Arrangements (CVA)



Moratorium: eligibility and effect

- *Eligibility:* Rule 3.4 – any Company with some notable exceptions (e.g. if have liabilities under an agreement of USD \$20 million or more).
- *Effect:* Rule 3.5 – breathing space for the Company to implement the CVA (no winding up, no administration, no Company meetings etc)



5. Questions

- Any Questions?



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