

Schemes of Arrangement in the British Virgin Islands: Third-Party Rights

Resulting from the recent uptick in British Virgin Islands ("BVI") schemes and plans of arrangement, the BVI Commercial Court has issued what is thought to be the first judgment in the Territory addressing the question of when a third party not bound by a scheme has standing to intervene in and / or challenge it.

By its decision in *Tristan Oil Ltd v The Scheme Creditors BVIHCM 2023/0120*, the BVI Court examined the specific criteria required of a third party to demonstrate a substantial interest in a proposed scheme of arrangement, thereby conferring upon it the requisite standing to be heard on, and raise objections in respect of, an application to sanction the scheme pursuant to the provisions of the BVI Business Companies Act (the "BCA").

Background

Tristan was incorporated in 2006 as a special purpose vehicle (SPV) to raise finance to fund the operations of two oil and gas companies operating in the Republic of Kazakhstan (the "Guarantors"). The Guarantors fell within Tristan's wider corporate group (the "Group").

Tristan issued credit notes, due in 2012, to various investors (the "Original Noteholders") and raised approximately US\$531 million which it advanced to the Guarantors to fund their oil and gas operations in Kazakhstan.

Contrary to the Group's expectations, Tristan alleged that the Republic of Kazakhstan expropriated the Guarantors' rights and interests under contracts that they had for exploiting oilfields in the west of the country.

In 2010, individuals and entities affiliated with the Group (collectively referred to as the "Claimant Parties"), excluding Tristan, initiated Swedish-seated arbitral proceedings against Kazakhstan, culminating in a favourable final judgment in the Claimant Parties' favour in the amount of approximately US\$500 million, plus interest (the "Award"). The Swedish Supreme Court dismissed two attempts by Kazakhstan to overturn the Award and, by the time the Scheme was proposed, all potential appeals against the Award had been conclusively dismissed.

Notwithstanding its failed appeals, Kazakhstan failed to comply with the terms of the Award, prompting the Claimant Parties to commence enforcement actions against it in multiple jurisdictions, including Sweden, Belgium, Luxembourg, Italy, the Netherlands, England, and the US. Eventually, the Claimant Parties ran out of money to continue funding their enforcement efforts, and so Tristan decided to take steps to raise additional funds from new investors to continue the execution proceedings. Without the additional funding, the enforcement actions would have ground to a halt and there would have been no prospect of meaningful recovery of the Award.

Having secured new sources of funding, Tristan proposed a scheme of arrangement with the Original Noteholders and the new investors (the "Scheme"). Broadly, the Scheme would see new investors becoming senior creditors who would be given priority in the waterfall of repayments by Tristan, with the Original Noteholders receiving repayment only after the senior noteholders. It was as a result of this variation of rights of the Original Noteholders that the Scheme was proposed.

In August 2023, Tristan obtained a court order to convene a creditors' meeting and, at the scheme meeting held in early October 2023, the Scheme received approval from a majority of creditors, representing 81.8% in value of those present and voting. On 1 November 2023, the BVI Court sanctioned the Scheme pursuant to section 179A of the BCA (the "Sanction Order"), which order was subsequently recognised in the US (pursuant to Chapter 15 of the US Bankruptcy Code).

Following the Sanction Order, Kazakhstan, along with the National Bank of Kazakhstan (collectively referred to as the "Kazakh Parties"), submitted separate applications in the then-concluded scheme proceedings. Their applications sought, among other things: (i) a declaration that the Kazakh Parties were interested parties in the scheme proceedings; (ii) an order formally adding them as parties to the scheme proceedings, and (iii) to set aside the Sanction Order. In support of their applications, the Kazakh Parties put before the Court certain BVI orders recognised monetary judgements obtained by them in England as against the Claimant Parties (the "Registered Judgments").

In summary, the Kazakh Parties contended that:

- (a) the Scheme would improperly equip Tristan with the financial resources to support

- enforcement efforts in respect of an award that has been secured through deceit; and
- (b) the variation of terms proposed by the Scheme would see the Claimant Parties receive less, which would prejudice the Kazakh Parties' efforts to execute the Registered Judgments against them.

Judgment

The BVI Court found the Kazakh Parties were not entitled to a declaration that they were interested parties for the purposes of the Scheme.

Notwithstanding their lack of standing, the BVI Court also found that it did not have jurisdiction to revisit the terms of the Sanction Order; it being a final sealed order of the BVI Court.

Upon careful examination of the English learning, including the principles set out *Re Lamo Holdings BV [2023] EWHC 1558*, the Court held that a 'relevant interest' is one "*that would be affected by the Scheme itself, or the implementation thereof, in a way that is sufficient for a court to say that the Scheme should not be sanctioned.*"

The judge held that the Kazakh Parties were not creditors under the Scheme, and therefore their complaints about the Claimant Parties' recoveries were a *non sequitur* for the purposes of an application under s179A of the BCA. The Kazakh Parties' rights were as against the Claimant Parties by virtue of the Registered Judgments, therefore the Scheme did not affect those rights. The fact that the Claimant Parties may have less assets against which the Registered Judgment could be enforced was not considered a sufficiently proximate event which would cause the BVI Court to withhold its sanction of the Scheme.

The Judge emphasised that the Scheme was a contractual arrangement within the creditor-

company relationship, not directly influencing third-party rights or claims external to this framework and that, while the BVI Court has a discretion to hear third-party objections on an application to sanction a scheme of arrangement, it will be reluctant to override or undermine an agreement reached between a company and its creditors.

As for the Kazakh Parties' allegations that the Award was obtained by fraud, the BVI Court held they remained entitled to pursue those arguments, albeit in the various enforcement proceedings, and not ex-post as part of the scheme proceedings, as they sought to do.

Comment

Fresh guidance on BVI court-supervised restructuring mechanisms, including schemes and plans of arrangement, is particularly well-received in current market conditions, which have seen distressed Groups turning more and more often to the BVI Court for assistance with cross-jurisdictional, intra-group restructurings.

The Maples Group continues to lead the charge on BVI restructuring engagements, having acted as offshore counsel on a number of the largest and most complex PRC real estate debt restructurings in the world, including the US\$30 billion restructuring of China Evergrande Group.

Further Assistance

If you need assistance with a recent claim, our Dispute Resolution & Insolvency team have unparalleled experience providing in-depth, pragmatic and commercial advice with cross-office cooperation and support on all litigation matters.

For further information, please reach out to your usual Maples Group contact or any of the persons listed below.

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