



While traditional business areas in Guernsey continue to experience consistent growth – notwithstanding the slight hiccup following the Brexit result – the public mergers and acquisitions activity being

undertaken via scheme of arrangement in Guernsey is unprecedented. With the primary activity being seen within the island’s real estate, financial services and resources sectors, it seems that schemes of arrangement have become the favoured alternative to the well-established contractual takeover route.

This is not to say that contractual bids are becoming the ‘ugly cousin’ of the M&A family – it is, however, in so far as Guernsey is concerned, a reflection of the introduction of new law and the relative slow-burn in market confidence, both here and in the City, around the use of Guernsey schemes of arrangements as a viable alternative.

Why use a scheme?

Schemes of arrangement (or ‘schemes’ as they are colloquially called) unfairly have a stigma attached to them that they are slow, expensive and document-heavy. The fact is schemes are a safe and reliable way of effecting a takeover or restructure. The biggest advantage of a scheme (over other takeover or merger alternatives) is the certainty from the outset that, at completion, the bidder will acquire 100% of the target.

Although under a traditional takeover offer (as opposed to a scheme) holding more than 50% of the voting rights is required to obtain control, in order to acquire 100% of the target, the bidder needs acceptances into the bid of not less than 90% in value to which the offer relates in order for the bidder to exercise its statutory squeeze-out rights for the outstanding shares. This is in contrast to a scheme where, subject to receiving a vote in favour of the proposal by a majority in number representing at least 75% in value of the shareholders present and entitled to vote, the remaining 25% will be bound by the bid if it is sanctioned by the Guernsey Court. Until the recent decision of the Court of Appeal in Puma Brandenburg, no scheme before the Guernsey Court had failed where the scheme had been approved by the requisite statutory majority

Other advantages of using a scheme over a traditional takeover bid are:

the period for acquiring 100% control can be shorter because of the time limits imposed by the statutory squeeze-out procedures;

the avoidance of many, particularly the US, overseas security law implications; and

the ability to extend the timetable to accommodate lengthy regulatory (often anti-trust) clearances.

The restructure

Schemes can be used effectively in a wide range of scenarios and can extend to cover any agreement which the court is satisfied will amount to a ‘compromise’ or an ‘arrangement’ between a company and its shareholders and/or creditors, or any classes of them. So while more commonly utilised in Guernsey as a takeover tool, the scheme can also be used to undertake a corporate restructure such as a redomiciliation via a ‘top hat’ transaction, or as a way to reduce a company’s debt obligations (in some cases an exchange of debt for equity) – often being used as an alternative to various forms of insolvency procedures.

Square peg in a round hole

Though highly flexible, a scheme is not suitable for every eventuality. While there are comparatively few, the disadvantages are worth considering when deciding if your strategic aim is best met by deploying a scheme, or some other takeover method. Disadvantages include:

the inability of a bidder to control the process – the target directors control the implementation of the scheme;

the consideration of differing class rights – there may be a requirement for different scheme meetings to account for different shareholder classes, thereby adding costs; and

procedural complexities that stem from the involvement of the Guernsey Court in the process.

Here to stay?

Not to be left out, and notwithstanding the trend in using schemes of arrangement, the traditional contractual takeover bid has still had its time in the sun in 2017. While significantly outweighed by the number of schemes by volume (Mourant Ozannes’ Guernsey office has acted on five schemes so far this year), we have also acted on two successful contractual bids in 2017 (for a combined total of £1.1bn in value) proving that, in the right circumstances, they continue to be a trusted takeover tool. However, all indications are that schemes are here to stay.

It seems that their application in Guernsey has been embraced not only by law firms, but also by the Guernsey Court as a viable alternative to a traditional takeover bid, so for now, contractual takeovers will have to be content with their bridesmaid status as schemes take their position, front and centre as the ‘in vogue’ transaction of choice.

Schemes of arrangement in vogue

Alex Davies, counsel in Mourant Ozannes Guernsey corporate team, explains why and how schemes of arrangement have become so popular in mergers and acquisitions in recent years

