

# Schemes of arrangement under Guernsey law

GUIDE

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## What is a scheme of arrangement?

A scheme of arrangement (**Scheme**) is a court-sanctioned compromise or arrangement between a company and its creditors or members (or any class of them) in accordance with Part VIII of the Companies (Guernsey) Law, 2008 (the **Law**). The Guernsey provisions on Schemes are largely similar to those in England.

The scope for using a Scheme is wide. In this guide, we consider Schemes between a company and its members in the context of a takeover bid where the members agree to sell their shares to a bidder as an alternative to the takeover provisions in the Law.

## Statutory requirements

A Scheme must be approved by the members of the company (or of the relevant class concerned) at a special meeting convened at the direction of the court. At that meeting, the Scheme must be approved by a majority in number representing 75 per cent of the voting rights of the members (or class of members) present and voting, either in person or by proxy, at the meeting and excluding any shares held as treasury shares.

Once approved by the requisite majority of members, the Scheme must be sanctioned by the court. In considering the application, the court may consider whether the majority is acting in good faith in the interests of the members (or class of members) and whether the different interests of members are such that they should be treated as belonging to a different class of members. In *Puma Brandenburg Limited* 2017 GLR 127 (**Puma**), the court was not satisfied that the shareholders who had voted for the Scheme were in fact acting in the best interests of the class as a whole – there were class issues which were not appropriately dealt with. For further information on the decision in Puma, read our update [here](#).

Once sanctioned, the company must file a copy of the court order with the Guernsey Registry within seven days.

Unlike the position in the UK and Jersey, the Law does not specify when the Scheme becomes effective which provides a degree of flexibility for the entity undertaking its Scheme to determine at what point in time the Scheme becomes effective.

There are broadly two approaches taken to a Scheme becoming effective:

- the Scheme becomes effective at the time that the court order is received, or
- the Scheme becomes effective at the point in time that the court order is filed with the Guernsey Registry (as is required under UK law).

Once effective, the Scheme is binding on all members (or all members of the relevant class) and a copy of the court order must be annexed to every copy of the memorandum or articles of incorporation of the company (unless otherwise amended to incorporate the effect of the court order).

## Why use a Scheme?

The biggest advantage of a Scheme (over other takeover or merger alternatives) is the certainty around acquiring 100 per cent of the target company. Once the court has sanctioned a Scheme, all the members of the class concerned are bound whether they voted in favour of the Scheme or not.

Although under a traditional takeover offer (as opposed to a Scheme) only a holding of shares carrying over 50 per cent of the voting rights is required to obtain control, in order to acquire 100 per cent of the target, the bidder needs acceptances into the bid of not less than 90 per cent in value of the shares to which the offer relates in order for the bidder to exercise its statutory squeeze-out rights for the remaining outstanding shares. This contrasts with a Scheme where, subject to receiving a vote in favour of the proposal by a majority in number representing at least 75 per cent in value of the members entitled to vote, the remaining 25 per cent will be forced into the bid.

Another potential advantage of using a Scheme over a traditional takeover bid is that the period for acquiring 100 per cent control can, in circumstances, be shorter under a Scheme than a takeover offer because of the time limits imposed by the statutory squeeze-out procedures. In the case of a takeover offer, the bidder may not find out until several months after it makes its bid whether there is opposition to compulsory acquisition. In the unlikely event that the opposition is upheld by the court, the bidder will not be able to achieve 100 per cent control but will have irrevocably acquired the overwhelming majority of the shares in the target.

## What are the disadvantages of using a Scheme?

Though flexible, a Scheme is not suitable for every eventuality and cannot be used to overcome or circumvent other specific requirements of the Companies Law (for example, in *Puma* which attempted to structure its selective buyback of shares as a court-sanctioned Scheme).

Potential disadvantages are comparatively few but merit consideration whether your strategic aim is best met by deploying a Scheme, or some other takeover method.

The potential disadvantages of a Scheme include:

- the inability of a bidder to control the process such that the target and its directors control the timetable and ultimately the implementation of the Scheme
- the consideration of differing class rights in that there may be a requirement for different Scheme meetings to account for different classes and
- procedural complexities that stem from involving the courts in the takeover process.

## The Scheme procedure

There are four main steps involved in undertaking a Scheme and these broadly mirror the process in the UK, namely:

- application to the court for a court order to call a Scheme meeting of members, ie the company files an application for an order requisitioning a meeting of members (or class of members, as the case may be) to consider and vote on the proposed Scheme, including any request for the court to give directions
- notification, ie a requirement for every notice summoning the court meeting to be sent to members, accompanied by a statement including information on:
  - the effects of implementation of the Scheme
  - the consideration payable (being cash, shares or a combination of both)
  - the disclosure of any material interests of the directors (whether in their capacity as directors, members, creditors or otherwise) and the effect on those interests of the Scheme, in so far as it is different from the effect on the like interests of other persons,

and generally must, as far as possible, give all information reasonably necessary to enable the members to decide how to vote at the meeting.

- convene a court meeting, ie a majority in number representing 75 per cent in value of the members (or class of members) present and voting at this meeting, in person or by proxy (excluding any shares held as treasury shares) to agree and approve the Scheme, and

- a second court application – the court will consider whether:
  - the statutory requirements set out in the Law have been complied with
  - each relevant class of member was fairly represented by those who attended the meeting(s) ordered by the court
  - the statutory majority are acting in good faith and are not coercing the minority in order to promote interests adverse to those whom they purport to represent, and
  - the Scheme is such that an intelligent and honest person, a member of the class concerned and acting in respect of their interest, might reasonably approve.

### Implementation timeline

The court timetable for a Scheme is established at the outset of the process and it generally takes between four to six weeks, from the commencement of proceedings for the Scheme to be implemented, depending on notice requirements. An indicative timetable is set out below but, in practice, will be determined by each company's articles of incorporation, court availability and any listing rule requirements:

<b>Filing Day (FD)</b>	Company finalises Scheme documents and files court bundle and application for an order requisitioning the proposed Scheme meeting (filing of documentation must be two business days before the first hearing)
<b>FD+[3]</b>	First court hearing. Directions made by the court
<b>FD+[5]</b>	Post Scheme documentation to shareholders <sup>1</sup>
<b>FD+[12]</b>	Deemed receipt of Scheme documentation <sup>2</sup>
<b>FD+[13]</b>	Notice period starts <sup>3</sup>
<b>FD+[28]</b>	Scheme shareholder meetings held (court meeting and EGM)
<b>FD+[31]</b>	Chairman to swear affidavit verifying that, amongst other things, notice was duly sent; that the meeting was duly held; and giving particulars of the result of the meetings
<b>FD+[34]</b>	File court bundle and application for an order sanctioning the Scheme (filing of documentation must be two business days before the sanction hearing)
<b>FD+[37]</b>	Second court hearing. Order sanctioning the Scheme is given
<b>FD+[44]</b>	File court order with Guernsey Registry (within seven days of the court order being given)

### UK Takeovers Code

When a Scheme or other proposal is designed to affect a takeover, subject to the status of the bidder or the target, the Takeover Panel (the **Panel**) and the City Code on Takeovers and Mergers (the **Code**) may have a role to play. The Panel's role will mainly be concerned to ensure the documentation complies with the Code, but consideration needs to be given to these regulations prior to launching a Scheme.

In addition to the standard court process, companies regulated by the Guernsey Financial Services Commission (the **Commission**) or listed on the International Stock Exchange (**TISE**) will need to liaise with the Commission or TISE (as the case may be) regarding the Scheme in accordance with applicable rules.

### Contacts

For further information, please get in touch with your usual Mourant contact or, alternatively, a list of contacts can be found [here](#).

<sup>1</sup> Allow approximately two days for printing of shareholders circular and Scheme documentation for despatch.

<sup>2</sup> Standard practice is three days deemed receipt for shareholders resident in the UK, the Channel Islands or the Isle of Man and seven days for shareholders in other jurisdictions, but will be subject to any applicable requirements in the articles of incorporation.

<sup>3</sup> Allowing a standard 14 day notice period. Noting that it will depend on the provisions in each company's articles of incorporation and will be subject to any applicable listing rule requirements.