

Indah Kiat Scheme – Preparation is Key

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The judgment of Snowden J. in the adjournment of the convening hearing relating to a scheme of arrangement (the “**Scheme**”) proposed by Indah Kiat International Finance Company B.V. (“**Indah Kiat**”) emphasises some important points that must be borne in mind by debtors, investors and advisers when preparing for a scheme, such as the importance of allowing sufficient time for preparation of all relevant supporting evidence and documentation, and allowing for a realistic notice period for creditors.

The judgment also highlights the increasing scrutiny of the courts on schemes of arrangement. In particular, courts will not look favourably on any attempts to cut corners and any deficiencies in the documentation or process may give dissenting creditors an opportunity to derail a complex restructuring process.

Background

Indah Kiat is a member of the APP Group, which is primarily engaged in manufacturing paper pulp, paper and other paper-related products. The APP Group declared a global standstill on its debt in 2001, resulting in a default on Indah Kiat’s debt, including the \$200 million 11.875% guaranteed secured notes due 2002 and the \$150 million 12.5% guaranteed secured notes due 2006 subject to the Scheme (the “**Notes**”). Litigation in New York resulted in judgments of US\$1.1 billion against Indah Kiat and the parent entity guaranteeing the Notes (the “**US Judgments**”), but following further litigation in Indonesia attempting to enforce the Notes, the Supreme Court of Indonesia delivered a judgment purporting to invalidate the Notes and obligations of Indah Kiat and its parent arising from them.

In March 2015, a creditor, APP Investment Opportunity LLC (“**APPIO**”) became a judgment creditor under the US Judgments pursuant to an assignment from the Note trustee and became entitled to take action directly in its own name. APPIO began taking steps to enforce the US judgments, which appears to have prompted Indah Kiat to pursue the Scheme.

The Scheme seeks to discharge all liabilities and obligations under the Notes in return for either (i) new unsecured notes (or loan participations) issued by the parent entity and a cash payment by the parent entity of about 13.5% of the face value of the Notes; or (ii) a cash-only payment of 25% of the face value of the Notes (but subject to a low overall cap of US\$ 8 million).

Key Lessons: Insufficient Notice and Deficiencies in Documentation

At a convening hearing held on 21 and 22 January 2016, Snowden J. agreed with an application from APPIO, requesting the adjournment of the Scheme meetings. Snowden J. reserved judgment at the time but, on 12 February 2016, his judgment was released and provided the reasoning for his decision to adjourn the convening hearing for at least 6 weeks from 21 January 2016 (i.e. the period requested by APPIO) and that it be relisted before him on a date not before 3 March 2016.

Inadequate Notice of Convening Hearing

Snowden J. agreed with APPIO's assertion that inadequate notice of the convening hearing had been given, in particular because of:

- the complexity of the scheme; and
- the lack of justification for urgency.

What constitutes sufficient notice will depend on the circumstances. In this instance, Indah Kiat had distributed the 'practice statement letter' via the clearing systems two weeks prior to the date of the convening hearing - a period previously understood to be standard for schemes of arrangement - and Snowden J. held that this was inadequate. Sufficient notice should enable scheme creditors enough time to consider the matter, take advice, and participate at the convening hearing. Snowden J stated that courts must be "astute to detect any attempt to "bounce" creditors into a convening hearing".

This judgment reinforces the point that that when proposing a scheme, a debtor must carefully consider the amount of notice to be provided to scheme creditors and any urgency requiring a hearing within two weeks or less will need to be supported by convincing evidence.

Robust Evidence Required

Snowden J also took issue with the evidence provided by Indah Kiat, including the disclosures made in the explanatory statement. Some key points to note:

- The only witness statement provided by Indah Kiat was from a director who had recently been appointed and had no personal knowledge of the matters subject to the Scheme.
- Lack of clarity on the sources of information in the witness statement and references to "colleagues" and the "APP group" as sources for any matters of information and belief were not compliant with the relevant practice direction.
- More information and a full analysis should be provided on the alternatives to the Scheme.
- Attention should be drawn to the releases to be given to current and former directors and some assessment on the potential financial effects of those releases on scheme creditors.
- The debtor should make clear whether the authors of any fairness opinion provided to scheme creditors are prepared to accept responsibility to the scheme creditors for that opinion.
- The judgment also questions the independence of the largest supporting creditor.

Snowden J. highlighted that:

- the company has a "duty to make full and frank disclosure to the court of all material facts and matters which may be relevant to any decision the court is asked to make"; and
- while it is not the court's function at the convening hearing to approve the contents of an explanatory statement, the court must be entitled to decline to convene a scheme meeting until any manifest deficiencies to which its attention has been drawn have been corrected.

This aspect of the judgment emphasises the importance of preparation in any scheme process – parties must take the time to ensure the supporting evidence (including the disclosure in the explanatory statement) is as robust as possible and that any assertions in witness statements are clearly verifiable.

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