Plans and schemes of arrangement in the British Virgin Islands

Insights - 07/01/2022

Under the BVI Business Companies Act, 2004 (the "Act") there are two types of court supervised arrangements.

Plans of arrangement (each a "Plan") are a mechanism for achieving a wide range of corporate restructurings by way of court approval involving the company and its members predominantly, while schemes of arrangement (each a "Scheme") (which are based on UK company law) are an arrangement between a company and some or all of its creditors or members to compromise or change their rights against the company subject to court supervision. Whilst there is some degree of overlap between the two, there are also significant differences making one more suitable than the other in certain circumstances.

There are numerous reasons why a BVI company may wish to use a Scheme or a Plan rather than another form of corporate restructuring in any given case: it may be necessary to obtain the consent of creditors; to bind all members and creditors; or to have court approval for other reasons.

Plans of arrangement

The definition of "arrangement" in the Act is very wide and encompasses reorganisations, mergers, consolidations, separations of businesses, dispositions of assets or businesses, dispositions or exchanges of shares or securities, amendments to memorandum and articles, dissolutions and/or any combination of these different activities. As such, a Plan is a very useful and flexible tool that can be employed in a number of situations.

In terms of procedure, first, the directors must approve a Plan (giving details of the proposed arrangement) if they consider that such approval is in the best interests of the company or its creditors or members.

The directors must then apply to the Court for approval of the Plan. The Court can amend the Plan as it sees fit and make orders as to (i) the persons who should be notified of the Plan (and in what manner), for example members or creditors; (ii) the persons whose approval of the Plan should be obtained (and in what manner); (iii) whether a hearing should be held; and (iv) if any holders of shares or securities should have the right to dissent (as discussed below). The usual member approval threshold for a Plan is a simple majority of votes (ie 50% plus one vote)

The approval of the Court will often involve an initial hearing and a final hearing. At the initial hearing the Court can give directions as to notifications and approvals, and once this has been dealt with a final hearing will take place at which any interested persons may appear and be heard, and the Court may then approve or reject the arrangement with or without any amendments as it may direct.

Following approval of the Plan by the Court (and any other person whose approval has been required) the directors must confirm if they wish to proceed with it, given the amendments (if any) and other orders prescribed by the Court. If so, they will proceed to execute and file Articles of Arrangement with the Registry of Corporate Affairs, and the Plan will be effective on the date such Articles are registered at the Registry (or such later date not exceeding 30 days later as is stated therein).

Dissent rights

The provisions of the Act allow a member who dissents from a Plan (if permitted by the Court) to receive payment of fair value for his shares by following the procedure set out in section 179 of the Act. Both the member and the company are bound by the procedure and time limits prescribed by the legislation, and there is no prima facie ability under the legislation to contract out of their application.

A member must give the company a notice in writing electing to dissent from the Plan. A dissenting member may only elect to dissent in respect of the whole of his shareholding and not part only. On giving such notice, the member ceases to have any of the rights of a member of the company except for the right to be paid the fair value of his shares.

The company must then make a written offer to each dissenting member to purchase his shares at a specified price that the company determines to be their fair value. The company and the member have 30 days thereafter to agree the price. If they do, the company must pay the price in money when the member surrenders his share certificate. Significantly, this must be cash and not in shares or other consideration, so this can create a considerable structuring hurdle when the Plan relates to an otherwise non-cash transaction.

If they fail to agree the price in that 30-day period, then the appraisal procedure applies. The company and the dissenting member must each appoint an appraiser, and the two appraisers together must appoint a third appraiser. The three appraisers must fix the fair value as at the close of business on the day prior to the date on which members' approval was obtained and the value is binding on the company and the dissenting member for all purposes.

There is no statutory guidance on what constitutes fair value or the basis on which it is to be calculated, other than that any appreciation or depreciation directly or indirectly induced by the action or its proposal is to be left out of account. Therefore once appointed, the appraisers have a great deal of discretion in determining what factors to take into account when assessing fair value, thus making the process and the eventual cost of buying out the dissenters somewhat uncertain if the dissenting process is invoked.

Schemes of arrangement

An application for a Scheme may be made to the Court by the company or a creditor, member, administrator or liquidator of the company. The arrangement or compromise must be proposed between a company and its creditors or members, or a class of either. It is less wide-ranging in scope than a Plan, but also less subject to amendment by the Court. A further key benefit is that once the requisite resolution has been passed and sanctioned by the Court, there are no statutory rights for dissenters under a Scheme, so although the consent threshold (a majority in number representing 75% in value of the creditors or members) is higher than for a Plan, there is greater certainty once it has been reached. The procedure for putting a Scheme in place is also simpler, as set out below:

Upon the application the Court may order a meeting of the members or creditors (or class of either). If a majority in number representing 75% in value of the creditors, members (or class of either) agree to the Scheme then once sanctioned by the Court it is binding on them and the company. If the company is in liquidation it is also binding on the liquidator and on every person liable to contribute to the assets of the company upon its liquidation.

A Court order in respect of a Scheme does not have effect until a copy of the order has been filed with the Registry of Corporate Affairs. A copy of the Court order must also be annexed to every copy of the company's memorandum issued after the date of the order.

Practical uses

Plans could be used for a number of corporate transactions (as noted above). The court approval element has been utilised in the past to assist in securing registration exemption from registering securities under the US Securities Act 1933 and obtaining certain taxation exemptions.

Schemes are typically creditor driven, as compared to Plans, and their use in the BVI has often been as part of a creditor imposed compromise. The BVI has seen a number of successful creditor schemes in recent years including that in relation to the financial reorganisation of the Brazilian offshore oil and gas rig operater Constellation Oil Services (where Ogier acted as lead counsel - see our briefing here).

However, as with a Plan, a Scheme can also be utilised to effect a takeover and bind in all the members of a target company, as was done so successfully in relation to Amber Petroleum Ltd's reverse takeover of AfNat Resources Limited which utilised a BVI Scheme. One of the the most significant advantages to structuring a takeover as a Scheme rather than a Plan, is the absence of the statutory dissent rights available under the Act (referred to above). In addition, given the similarity of a Scheme to a UK company law scheme of arrangement, the procedure, structuring and considerations applicable to a Scheme will be substantially the same as those applicable for a takeover structured as a UK scheme, which will be of comfort to English advisors advising their clients on a takeover of a BVI company.

About Ogier

Ogier is a professional services firm with the knowledge and expertise to handle the most demanding and complex transactions and provide expert, efficient and cost-effective services to all our clients. We regularly win awards for the quality of our client service, our work and our people.

Disclaimer

This client briefing has been prepared for clients and professional associates of Ogier. The information and expressions of opinion which it contains are not intended to be a comprehensive study or to provide legal advice and should not be treated as a substitute for specific advice concerning individual situations.

Regulatory information can be found under Legal Notice

Meet the Author

Simon Schilder

Partner

British Virgin Islands

E: simon.schilder@ogier.com

T: +44 1534 514298

Key Contacts

Michael Killourhy

Partner

British Virgin Islands

E: michael.killourhy@ogier.com

T: +1 284 852 7309

Nicholas Plowman □□□

Partner □□□

Hong Kong

E: nicholas.plowman@ogier.com

T: +852 3656 6014

Nathan Powell

Partner □□□

Hong Kong

E: nathan.powell@ogier.com

T: +852 3656 6054

Simon Dinning

Partner

Jersey

London

E: simon.dinning@ogier.com

T: +44 1534 514251

Related Services

Corporate

Legal