International Corporate Rescue

ChaseCambria
SOUTH SQUARE
Centre for Commercial Law
UCL LAWS

Published by:
Chase Cambria Company (Publishing) Ltd
4 Winifred Close
Barnet, Arkley
Hertfordshire EN5 3LR
United Kingdom

www.chasecambria.com

Annual Subscriptions:
Subscription prices 2013 (6 issues)
Print or electronic access:
EUR 695.00 / USD 845.00 / GBP 495.00
VAT will be charged on online subscriptions.
For 'electronic and print' prices or prices for single issues, please contact our sales department at:
+ 44 (0) 207 014 3061 / +44 (0) 7977 003627 or sales@chasecambria.com

International Corporate Rescue is published bimonthly.

ISSN: 1572-4638

ARTICLE

Plans of Arrangement under the BVI Business Companies Act, 2004: *Rio Verde Minerals Corporation, EM Subco (BVI) Inc., Talon Metals Corp* (BVI High Court (Commercial) Claim 30 of 2011)

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British Virgin Islands ('BVI') legislation includes three types of statutory 'arrangement' into which a BVI company may enter. These enable a BVI company to enter into arrangements, restructurings and transactions which, with approval of the BVI Court under the relevant process, will be binding on members and creditors of the company. These three routes consist of 'schemes of arrangement' and 'plans of arrangement' each under the BVI Business Companies Act, 2004 (the 'BC Act'), and 'creditors' arrangements' under the BVI Insolvency Act, 2003.

Schemes of arrangement and creditors' arrangements are derived largely from English law, and benefit from a substantial body of well developed case law from throughout the Commonwealth, which has enabled advisers in BVI to guide companies through these arrangements with some certainty as to the process and the issues involved.

In contrast, 'plans of arrangement' in BVI were inspired by Canadian law and, although they have been available in BVI in a previous form in the (now repealed) International Business Companies (IBC) Act since 1984, and in the BC Act since 2005, BVI companies had been slow to take up the availability of the plan of arrangement until that route had been tested in the BVI Court.

The BVI Commercial Court has recently approved what is thought to be the first plan of arrangement to be used in the BVI, in the matter of *Rio Verde Minerals Corporation, EM Subco (BVI) Inc., Talon Metals Corp* (BVI High Court (Commercial) Claim 30 of 2011). This article examines the Court's approach in that matter, and concludes that the Court's application of the legislation and exercise of its powers fully supported the commercial potential for the plan of arrangement in corporate restructuring transactions.

The 'arrangements' which may be the subject of a plan of arrangement under the BC Act are:

(a) an amendment to the memorandum and/or articles of association of the company;

(b) a reorganisation or reconstruction of a company;

(c) a merger or consolidation of one or more companies that are companies registered under the BC Act with one or more other companies, if the surviving company (being one of the constituent companies) of the merger or the consolidated company (being a new company formed out of the consolidating companies) is a company incorporated under the BC Act;

(d) a separation of two or more businesses carried on by a company;

(e) any sale, transfer, exchange or other disposition of any part of the assets or business of a company to any person in exchange for shares, debt obligations or other securities of that other person, or money or other assets, or a combination thereof;

(f) any sale, transfer, exchange or other disposition of shares, debt obligations or other securities in a company held by the holders thereof for shares, debt obligations or other securities in the company or money or other property, or a combination thereof;

(g) a dissolution of a company; and

(h) any combination of any of the things specified in paragraph (a) to (g) above.

It can be seen from the above list that there is great potential for a wide variety of restructuring transactions to be effected by way of plan of arrangement. Almost any type of restructuring, reorganisation or reconstruction of a BVI company could be effected under the plan of arrangement process. In particular, it should be noted that 'reorganisation' and 'reconstruction', as referred to in paragraph (b) above are not defined and should be given a wide interpretation. The 'separation of two or more businesses carried on by a company' referred to in paragraph (d) above is likely to be available to achieve a demerger, which is itself not available as a statutory occurrence in BVI.

Plans of arrangement: the statutory provisions

If the directors of a company determine that it is in the best interests of the company or the creditors or

members of the company, the directors may approve a plan of arrangement that contains details of the proposed arrangement, even though the proposed arrangement may be authorised or permitted by any other provision of the BC Act or otherwise permitted.

Upon approval of the plan of arrangement by the directors, the company must make application to the BVI Court for approval of the proposed arrangement. An order of the Court upon such application may be an interim order or a final order that is not subject to an appeal unless a question of law is involved and in which case notice of appeal shall be given within the period of twenty days immediately following the date of the order.

In making the order, the Court may:

(a) determine what notice, if any, of the proposed arrangement is to be given to any person;

(b) determine whether approval of the proposed arrangement by any person should be obtained, and the manner of obtaining the approval;

(c) determine whether any holder of shares, debt obligations or other securities in the company may dissent from the proposed arrangement and receive payment of the fair value of his shares, debt obligations or other securities under the dissent and appraisal provisions of the BC Act;

(d) conduct a hearing and permit any interested person to appear; and

(e) approve or reject the plan of arrangement. The approval may be of the arrangement as proposed or with such amendments as the Court may direct. As will be seen, the ability to amend the plan of arrangement allows the process in BVI to reflect changes in the parties' requirements onshore.

It is an important feature of the plan of arrangement that, unlike under a scheme of arrangement, the BC Act does not prescribe the majority in number or value of members or creditors who must approve the arrangement. The plan of arrangement route enables the directors to submit to the Court a threshold for approval which they consider appropriate in the best interests of the company. The Court is not restricted to the approval of a 'majority in number representing seventy five percent in value' as required for a scheme of arrangement, and this flexibility makes the plan of arrangement an attractive alternative.

It is also important to note that there are no dissenters rights other than as may be ordered by the Court (if the Court considers a right to dissent is appropriate). Dissent rights under the BC Act apply in a limited number of circumstances and would entitle a duly dissenting member to insist on being paid the 'fair value' for his shares, as assessed by a process involving three appraisers.

Where the Court makes an order approving a plan of arrangement, the directors of the company, if they are still desirous of executing the plan, shall confirm the plan of arrangement as approved by the Court (whether or not the Court has directed any amendments to be made thereto).

The directors of the company, upon confirming the plan of arrangement, shall give notice to the persons to whom the order of the Court requires notice to be given, and submit the plan of arrangement to those persons for such approval, if any, as the order of the Court requires.

After the plan of arrangement has been approved by those persons by whom the order of the Court may require approval, articles of arrangement shall be executed by the company and shall contain the plan of arrangement, the order of the Court approving the plan of arrangement, and the manner in which the plan of arrangement was approved, if approval was required by the order of the Court.

The articles of arrangement shall be filed with the Registrar of Corporate Affairs, who shall register them publicly. Upon the registration of the articles of arrangement, the Registrar shall issue a certificate certifying that the articles of arrangement have been registered, and the arrangement will be effective on the date that articles of arrangement are registered by the Registrar or on such date subsequent thereto, not exceeding thirty days, as is stated in the articles of arrangement.

Plans of arrangement: the Court's approach

In the *Rio Verde Minerals Corporation* matter, the parties had entered into an arrangement agreement (the 'Arrangement Agreement'), subject to approval by way of a plan of arrangement. Among other things, the BVI Court ordered that:

(a) general meetings of the members of the relevant claimants be convened in accordance with their memorandum and articles of association, for the purpose of considering and, if thought fit, approving a plan of arrangement as set out in a schedule to the Arrangement Agreement;

(b) notices of the meetings be accompanied by a copy of the proposed plan of arrangement, and an explanatory note to the members setting out 'in straightforward language':

  (i) the steps to be taken if it is to be effected;

  (ii) the effect of each step;

  (iii) the commercial effect of the completion of the proposed arrangements;

  (iv) the nature of any advantage which it is anticipated would accrue to any member

of either party to the Arrangement Agreement, which in the opinion of the directors ought to be brought to the attention of members; and

(v) the nature of any detriment, whether fiscal or otherwise, which it is contemplated would be suffered as a consequence of the proposed arrangement, which in the opinion of the directors ought to be brought to the attention of members;

(c) the explanatory statement referred to at paragraph (b) above must have at its head a rubric in common form advising recipients to take appropriate advice before voting on the proposed arrangement;

(d) the Chairs of the general meetings be directed to report the results of their respective meeting to the Court by affidavit, which shall detail the resolutions put to the members as well as the number of members voting in person or by proxy; the number of members voting in favour of the resolutions, the number voting against, together with the number of members abstaining;

(e) the members listed in the respective registers of members of the relevant claimants immediately before the despatch of the notices referred to at paragraph (b) above (the record date) shall be determinative of the identity of the members and the amount of shares held by them for the purpose of considering and approving the proposed arrangements;

(f) notice of the Court proceedings and an address from which a copy of the Arrangement Agreement may be obtained by any interested parties and/or creditors of the claimant companies shall be (i) advertised twice in two consecutive weeks in newspapers in the BVI and Canada (where the parties operated); (ii) included in the management information circular to be sent to their respective members with the notice of the meetings; and (iii) send to the member of the claimant not holding a general meeting; and

(g) following conclusion to the meetings and the lodging of the reports to the Court by the Chairs of the meetings, the matter be returned to the Court for further consideration.

One of the claimants was publicly listed on the Toronto Stock Exchange and it transpired that the provisions as to the record date set out at (e) above did not comply with the applicable reporting issuer requirements of the Securities Act (Ontario). The claimants subsequently applied to the Court for an order varying the record date set in the first order, and the Court varied its first order accordingly.

The claimants also applied for a further direction to satisfy the fairness hearing requirements of section 3(a)(10) of the US Securities Act 1933. The Court ordered that all persons to whom securities were to be issued in the proposed arrangement are entitled to attend and be heard at a further hearing of the Court for the purpose of granting a final order approving, if thought fit, the proposed arrangements.

The Court ultimately ordered that the Amendment Agreement be approved.

It can be seen from the above arrangement, and the Court's orders, that the BVI Court can be expected to take a commercial view of proposed arrangements which follow due process, and it seems likely the plan of arrangement will now come of age as a further tool available to BVI companies looking to structure transactions so as to meet particular onshore considerations.

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