



Legal Insights

Corporate Rescue in the British Virgin Islands

Introduction

In the British Virgin Islands (“BVI”), there are three main ways that a company can restructure or reorganize.

These are:

- 1) a Plan of Arrangement - governed by the BVI Business Companies Act, 2004 (as revised) (“**BCA**”);
- 2) a Scheme of Arrangement - governed by the BCA; and
- 3) a Company Creditors' Arrangement (“**CCA**”) - governed by the Insolvency Act, 2003 (as revised) (“**Insolvency Act**”) as this is a debt-related procedure.

It should be noted that a Plan of Arrangement and a Scheme of Arrangement focuses on restructuring equity. On the other hand, a Creditors' Arrangement is available for restructuring debt. This Legal Insight will explore these three procedures.

Plan of Arrangement

A BVI Plan of Arrangement is used for significant corporate restructurings, such as mergers, asset sales, re-organisation, reconstructions, and the dissolution of a company. It offers a flexible, court-supervised method to implement complex transactions, providing greater certainty and protection for directors and stakeholders compared to purely private corporate restructurings.

A Plan of Arrangement is commenced by a company's directors. Alternatively, if a company is in voluntary liquidation, it will be initiated by the voluntary liquidator. The company need not be insolvent before a Plan of Arrangement can be considered.

The BCA defines an “arrangement” and the definition includes a reorganisation or restructuring of a company. The company's directors need to consider whether a Plan of Arrangement is in the company's best interests, or its creditors or its members. A Plan of Arrangement may permit a company to, *among other things*, reorganise, merge, consolidate or separate its businesses as well as dissolve the company.

The directors will need to approve the Plan of Arrangement. Once they have, the company must make an application to the BVI court to approve the proposed arrangement. The court has the power to approve, amend or reject the proposed Plan of Arrangement which is the subject of the application. The court will also determine (i) to whom notice of the proposed Plan of Arrangement is to be given, (ii) whether the approval by any person should be obtained and the manner of obtaining the approval, and (iii) whether to conduct a hearing and permit any interested person to appear.

Further, the court will also determine whether any holder of shares, debt obligations or securities in the company may dissent to the proposal – if so, any dissenting party may receive payment of fair value in respect of their shares, debt obligations or other securities. It should be noted that the BCA provides for the right of dissenters (unlike the Scheme of Arrangement provisions).

In the event that the court confirms the proposed Plan of Arrangement, the directors must give notice to and (if required) seek approval from the relevant persons. Once the Plan of Arrangement is approved by those persons, the directors will, on behalf of the company, execute the articles of arrangement which shall contain:

- 1) the Plan of Arrangement;
- 2) a copy of the court order which approved the Plan of Arrangement; and
- 3) information of how the Plan of Arrangement was approved.

The executed articles of arrangement are then required to be filed with the Registrar of Corporate Affairs (“**Registrar**”) who shall register them. Once registered, the company will be issued with a certificate. The effective date of a Plan of Arrangement is the date that the articles of arrangement are registered by the Registrar (or on such date subsequent thereto, not exceeding 30 days, as is stated in the articles of arrangement).

Scheme of Arrangement

In the BVI, Schemes of Arrangement are used for corporate restructuring and transactions like takeovers, allowing companies to achieve a court-sanctioned compromise with their creditors or members. They are typically used to bind all affected parties to the arrangement, provide greater certainty than private transactions, facilitate exemptions from other laws (like the US Securities Act), and manage complex restructurings, including demergers or consolidations.

A Scheme of Arrangement under the BCA is a statutory mechanism which enables a company to enter into a compromise or arrangement with its creditors, or its members. Similar to the Plan of Arrangement, there is no requirement that the company be insolvent when the application to the court is made.

An application for a Scheme of Arrangement can be commenced by (i) the company, (ii) a creditor, (iii) a member, (iv) if the company is in administration within the meaning of the Insolvency Act, by the administrator, or (v) a liquidator (either a voluntary liquidator or one appointed under the Insolvency Act) by applying to the court for a meeting of creditors or members.

A meeting will be convened and the Scheme of Arrangement will be voted on. The Scheme of Arrangement will be approved if a majority in number representing at least 75% in value of the creditors (or class of creditors) or members (or class of members), as the case may be, present and voting either in person or by proxy at the meeting agree to the compromise or arrangement. If approved, the applicant must then return to the court for the court to sanction the Scheme of Arrangement, and, if sanctioned by the court, is binding on all the creditors or class of creditors, or the members or class of members, as the case may be, and also on the company or, in the case of a company in voluntary liquidation or in liquidation under the Insolvency Act, on the liquidator and on every person liable to contribute to the assets of the company in the event of its liquidation.

The Scheme of Arrangement will only be binding on all creditors, members, the company, and (where applicable) a liquidator once the court order (which sanctioned the Scheme of Arrangement) has been filed with Registrar. A copy of the court order shall be annexed to every copy of the company’s memorandum of association issued after the order has been made.

Company Creditors' Arrangement

In the BVI, a CCA is typically used when a company is insolvent or likely to become insolvent and needs to restructure its debts with the approval of its creditors to avoid liquidation. The process is initiated by the directors or a liquidator and supervised by a BVI-licensed insolvency practitioner, with the aim of implementing a debt-restructuring plan that, if approved by 75% in value of the creditors, becomes binding on all creditors.

A CCA is a compromise between a company and its creditors which enables the parties to vary the rights of the creditors and to cancel the liability of a debtor (in whole or in part).

The directors of the company initiate the process by proposing an arrangement and nominating an interim supervisor to act. The board of directors can commence this procedure if it believes on reasonable grounds that the company is insolvent or is likely to become insolvent. If the company is already in liquidation, the liquidator can make the proposal.

The directors must pass a resolution:

- 1) stating that the company is insolvent or is likely to become insolvent;
- 2) approving a written proposal which explains how the creditors' rights will be varied or cancelled; and
- 3) nominating an eligible insolvency practitioner to be appointed interim supervisor.

Unless the secured creditors agree in writing to the contrary, a CCA will not affect a secured creditor's right to enforce its security interest or vary the liability secured by the security interest. It is the same in relation to preferred creditors. It should be noted that unless agreed in writing, a preferred creditor will not receive less than it would have received in a liquidation had the company liquidation commenced on the same date as the CCA.

The proposal must be approved by 75% of the creditors (calculated by reference to the value of the debt rather than on a poll vote basis). If the proposal is approved by 75% of the creditors in value, the supervisor will be appointed. The CCA will be binding on the company, each member and each creditor. The supervisor will immediately take possession of the company's assets. It should be noted that the directors (or the liquidator, if applicable) will remain in control of the company. The supervisor's main function is to ensure that the CCA terms are implemented. After the approval of an arrangement, the board (or the liquidator, if applicable), shall forthwith take all necessary steps to put the supervisor into possession of the assets included in the arrangement.

It should be noted that there is no statutory time period within which a CCA must be completed. To date, CCAs are not popular in the BVI. A reason for this is perhaps because the supervision aspect discourages a company from considering this option and opting for a Scheme of Arrangement instead. Further, given that the BVI is a creditor friendly jurisdiction, it is common for a creditor to serve a statutory demand and apply for the appointment of a liquidator as the procedure set out in the Insolvency Act is fairly straightforward.

This publication is not intended to be a substitute for specific legal advice or a legal opinion. For specific advice on the matters covered in this Legal Insight, please contact your usual Loeb Smith attorney or any of the following:

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About Loeb Smith Attorneys

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