

UPDATE

Mourant advises on significant redomiciliation scheme of arrangement

Update prepared by Peter Hayden (Cayman Islands), Ramesh Maharaj (Cayman Islands), Andrew Grant (Cayman Islands), Harry Rasmussen (Cayman Islands) and Adam Barrie (Cayman Islands)

The Grand Court of the Cayman Islands (the **Court**) has recently sanctioned a redomiciliation scheme of arrangement pursuant to section 86 of the Companies Act (2021 Revision) (the **Act**), used by the Endeavour Mining group of companies (the **Group**) to redomicile the jurisdiction of incorporation of the parent company of the Group from the Cayman Islands to England & Wales.

Background

A scheme of arrangement is a Court supervised restructuring process which allows for the rights of creditors or shareholders to be varied, by 'cramming down' on non-consenting creditors/ shareholders, where the requisite statutory voting majorities required for the approval of the scheme of arrangement have been met. Although often used in the context of a financial restructuring, schemes can also be used to facilitate non-distressed group restructurings, reorganisations and mergers.

Pursuant to the scheme, Endeavour Mining Corporation (the **Company**), a Cayman Islands incorporated company and (what was) the ultimate parent company of the Group, sought to change the jurisdiction of incorporation of the Group parent company, from the Cayman Islands to England & Wales (the **Scheme**). The Group is one of the world's senior gold producers and the largest in West Africa. The Group sought to redomicile its business in order to secure the inclusion of its shares on the premium segment of the Official List of the Financial Conduct Authority (the **FCA**) and the trading of its shares on main market of the London Stock Exchange (the **LSE**). The Company was already listed on the Toronto Stock Exchange (the **TSX**) before the Scheme effective date and the Scheme envisaged that the shares of the new parent company, incorporated in England & Wales (**New EDV**), would have the benefit of being listed on the TSX as well as the main market of the LSE.

The Scheme involved the transfer of all of the Company's issued shares to New EDV, in exchange for each Company shareholder as at the relevant time being entitled to receive New EDV shares on a one-for-one basis.

The legal framework

The overview of the relevant Cayman Islands legal principles and process set out below applies generally to Cayman Islands schemes of arrangement.

Directions Hearing

Once the proposed scheme has been documented, it is necessary to obtain permission from the Court to convene a meeting of the relevant class of creditors, or, as in this case, members of the Company, to allow them to consider and, if appropriate, approve the terms of the scheme (the **Court Meeting**). This permission is obtained at a directions hearing, at which the Court must be satisfied that the relevant class or classes of stakeholder have been identified and appropriately grouped and that the documentation which is to be provided to the stakeholders contains adequate information to enable them to make an

informed decision as to the merits of the proposed scheme. If the Court is satisfied on these points, it will give directions addressing how the company should put the proposed scheme to the relevant stakeholders at the Court Meeting.

Court Meeting

Section 86 of the Act requires that the terms of the proposed scheme must be approved by a majority in number representing 75 per cent in value of the creditors (or class of creditors), or members (or class of members), as the case may be, present and voting at the relevant Court Meeting(s). In this respect, the Court has regard for the rights of those persons with the real economic interest at stake that is subject to the scheme and, where applicable, the Court will '*look through the [share] register*' for the purposes of determining whether the statutory voting majorities have been met. This is pertinent where, for instance, clearing houses or custodians act as the registered nominees for those holding the ultimate beneficial interest in the shares of the company (i.e. those with the requisite '*economic interest*'). This commonly applies where the shares in question are listed on a public stock exchange, as in the present case. The process of '*looking through the register*' enables such a nominee to vote each underlying investor's shares in accordance with that investor's voting instructions. Each underlying investor counts as a voter, for the purpose of determining the '*majority in number*' test mandated by section 86 of the Act.¹

Sanction Hearing

If the requisite voting majorities are attained at the Court Meeting(s), the Court will consider whether to sanction the scheme at a sanction hearing. All members or creditors who voted at the Court Meeting(s) are entitled to attend and be heard at the sanction hearing, including those who objected to the scheme.

In deciding whether to sanction a scheme approved by the members/ creditors, the Court must be satisfied *inter alia* that the procedures previously ordered in respect of convening and holding the Court Meeting(s) were followed and that the interests of all relevant stakeholders were fairly represented by those attending the meeting(s), and that the statutory majority acted *bona fide* and did not coerce the minority.

The Court will usually place a lot of weight on the views of the creditors/ members, as reflected in the vote at the Court Meeting(s), recognising that they are the best judges of their own commercial interests.

Sanction of the Scheme

Following the above principles and process, and following the approval by an overwhelming majority of the Company's members at the Court Meeting on 25 May 2021, the Court sanctioned the Scheme on 9 June 2021. The Scheme became effective upon the delivery of the Sanction Order to the Registrar of Companies in the Cayman Islands. On 14 June 2021 the Company announced that New EDV had successfully issued its entire ordinary share capital to the premium listing segment of the Official List of the FCA and would begin trading on the LSE's main market, as well as the TSX.

The Mourant team advised on all aspects of Cayman law and process, including working closely with the Company's other advisors and successfully appearing before the Court at the directions and sanctions hearings.

¹ The Cayman Islands Practice Direction No 2 of 2010 provides further insight into the Court's expectations regarding the process of '*looking through the register*'. For a deeper analysis of this principle, see *In the Matter of Uni-Asia Holdings Limited* (Unreported, 16 May 2017) which confirmed the practice set out *inter alia* in *Re Little Sheep Group Limited* [2012 (1) CILR 34].

Contacts



Peter Hayden
Partner, Mourant Ozannes
Cayman Islands
+1 345 814 9108
peter.hayden@mourant.com



Ramesh Maharaj
Partner, Mourant Ozannes
Cayman Islands
+1 345 814 9170
ramesh.maharaj@mourant.com



Andrew B Grant
Counsel
Cayman Islands
+1 345 814 9194
andrew.b.grant@mourant.com



Harry Rasmussen
Senior Associate
Cayman Islands
+1 345 814 9214
harry.rasmussen@mourant.com

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