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The Structure of M&A Deals in the British Virgin Islands

Robert Briant at Conyers Dill & Pearman looks at British Virgin Islands law governing the takeover (or privatisation) of public companies.

INTRODUCTION

This guide deals in general terms with certain aspects of British Virgin Islands law governing the takeover (or privatisation) of public companies.

BVI REGULATIONS GOVERNING TAKEOVERS

- BVI Business Companies Act.
- The memorandum and articles of association of the target and any shareholder rights plan or other material contracts.

GENERAL OFFERS

PROCEDURE AND ACCEPTANCES

British Virgin Islands law allows shareholders holding 90% of the outstanding shares to give a written instruction to the company at any time directing the company to redeem the shares held by the re-maining shareholders. Upon receipt of the written instruction, the company is required to redeem the shares specified in the written instruction irrespective of whether or not the shares are by their terms redeemable. As a result, in order for an offeror to acquire all the shares of the target, the offeror must hold at least 90% of the shares in order to enable the offeror to acquire the entire company.

DISSENTING SHAREHOLDERS

A shareholder whose shares have been forcibly redeemed may dissent. The company is required to make a written offer to each dissenting shareholder to purchase his shares at a specified price that the company determines to be their fair value. The company and the dissenting shareholder then have thirty days to agree that value. However, if the company and the dissenting shareholder fail, within that thirty days window, to agree on the price to be paid for the shares, then within twenty days (i) the company and the dissenting shareholder are required to each designate an appraiser, (ii) the two designated appraisers together are required to designate a third appraiser, (iii) the three appraisers are required to fix the fair value of the shares, excluding any appreciation or depreciation directly or indirectly induced by the redemption or its proposal, which value is binding on the company and the dissenting shareholder for all purposes, and (iv) the company is required to pay this amount in money to the dissenting shareholder. Unlike a Court ordered valuation process common in other jurisdictions, the BVI Business Companies Act provides for a fast and efficient fair value determination carried out by appraisers.

Clarification on the dissent procedure was provided in *Olive Group*, a 2016 Court of Appeal decision, which confirmed that the appraisal procedure is an Expert Determination procedure with limited scope for the Court to interfere both during and after the Expert Determination.

PLANS OF ARRANGEMENT AND SCHEMES OF ARRANGEMENT

PROCEDURE

A takeover by way of plan of arrangement or a scheme of arrangement involves the target proposing a plan or scheme to its shareholders to cancel their shares (a cancellation plan/scheme) or to transfer their shares to the bidder (a transfer plan/scheme) in return for cash or securities of the bidder.

The board of the target will be in control of the plan or scheme and be responsible for drafting the composite plan or scheme document, making the applications to the Court, mailing the composite plan or scheme document to shareholders, holding the relevant meetings and making the necessary filings. The bidder will undertake to abide by the plan or scheme, and pay the plan or scheme consideration.

ROBERT J.D. BRIANT
PARTNER

TIMETABLE

An indicative timetable setting out the major steps is set out below:

Day 1: File draft petition/summons for directions.
Day 21: Directions hearing (depends on Court availability).
Day 25: Despatch composite plan or scheme document.
Day 55: Shareholder meeting to approve the plan or scheme.
Day 56: File chairman's report of the meeting.
Day 66: Petition hearing to sanction the plan or scheme.
Day 69: Effective Date – file court order with Registrar of Corporate Affairs.

SCHEME DOCUMENT

The composite plan or scheme document will include the expected timetable, a letter from the board of the target, a letter from the independent directors or board committee, a letter from the independent financial advisers, an explanatory statement, financial and general information, the plan of arrangement or scheme of arrangement document itself and notice of the relevant meeting(s).

APPROVALS

Both a plan of arrangement and a scheme of arrangement require approval from the Court as well as the approval of the directors.

A plan of arrangement (following the Canadian model) requires such approvals as may be determined by the Court, which is generally a shareholders resolution approved by shareholders holding a majority of the shares at a quorate meeting. A scheme of arrangement (following the English model) must be approved by a majority in number (head count) representing three-fourths in nominal value (share count) of the scheme shareholders voting at the requisite meeting. In both instances, the meeting will have been convened pursuant to an order of the Court.

In practice, the shareholders present and voting at the court meeting must represent a fair cross-section of the shareholders as a whole and every effort should be made to secure a good attendance by shareholders.

The statutory thresholds apply to each class of share. A class may be created if shareholders have rights against the target company which are so dissimilar as to make it impossible for them to consult together with a view to their common interest. The makeup of any classes will normally be settled at the directions hearing but this determination is not necessarily binding at the subsequent petition hearing.

The statutory majority of shareholders must also act *bona fide* with no coercion of minority shareholders and the plan or scheme must be one that an intelligent and honest man acting in respect of his interests in the class might reasonably approve.

Unlike a general offer these thresholds cannot be reduced or waived; if they are not met, the plan or scheme will fail.

DISSENT RIGHTS

On a plan of arrangement, it is expect that the Court will order dissent rights similar to those available to a dissenting shareholder in a 90% forcible redemption or a merger or consolidation. On a scheme of arrangement, there are no dissent rights.

EFFECTIVE DATE

The plan or scheme will be effective when a copy

of the court order is delivered to the Registrar of Corporate Affairs for registration.

MERGERS AND CONSOLIDATIONS

MERGER

Merger means the merging of two or more constituent companies into one of the constituent companies (the "surviving company") and the vesting of the assets and liabilities of the constituent companies in the surviving company.

CONSOLIDATION

Consolidation means the consolidation of two or more constituent companies into a new company (the "consolidated company") and the vesting of the assets and liabilities of the constituent companies into the consolidated company.

The cessation of a constituent company which participates in a consolidation or which is not the surviving company in a merger does not require a winding-up.

PROCEDURE

The directors of each constituent company must approve a written plan of merger or consolidation (the "Plan"). The Plan must contain certain prescribed information including the basis of cancelling, reclassifying or converting shares in each constituent company into shares, debt obligations or other securities of the surviving company or consolidated company, or money or other assets, or a combination thereof. British Virgin Islands law provides that some or all shares of the same class in each constituent company may be converted into a particular or mixed kind of assets and other shares of the class, or all shares of other classes of shares, may be converted into other assets.

The Plan must also include any proposed amendments to the memorandum and articles of the surviving company in a merger, or the proposed new memorandum and articles of the consolidated company in a consolidation.

APPROVALS

The Plan must be approved by a resolution of directors and a resolution of the shareholders of each constituent company. Any other authorisation required by a constituent company's articles of association must also be obtained. A copy of the Plan must be given to each shareholder, whether or not entitled to vote.

Shareholders do not need to approve a merger between a British Virgin Islands parent company and its subsidiary. For this purpose, a subsidiary is a company of which at least 90% of the issued shares entitled to vote are owned by the parent company.

FILINGS

Articles of merger or consolidation (the "Articles"), which have the Plan attached to them, are then signed by each constituent company. The Articles are filed with the Registrar of Corporate Affairs, together with the amendment to the memorandum and articles of association, if any, in the case of a merger, and the proposed new memorandum and articles of association in the case of a consolidation.

Provided the Registrar of Corporate Affairs is satisfied that the requirements of the BVI Business Companies Act have been complied with, he registers the Articles and issues a certificate of merger or consolidation. For a premium filing fee of $500, the Registrar of Corporate Affairs will process the filing within four hours. Otherwise, the processing can take two to three days.

DISSENTING SHAREHOLDERS AND APPRAISAL PROCESS

A shareholder of a constituent company may dissent (unless the company is the surviving company in a merger and the shareholder continues to hold the same or similar shares) and be paid the fair value of his shares in cash. A shareholder who dissents must dissent in respect of all his shares, and upon giving written notice of his election to dissent, the shareholder ceases to have any of the rights of a shareholder other than the right to be paid the fair value of his shares.

The following procedure will apply:

1. The dissenting shareholder must give written objection (notice of objection) to the constituent company before the vote to approve the merger or consolidation.
2. Within 20 days of the vote approving the merger or consolidation, the constituent company must give written notice of the approval (approval notice) to all dissenting shareholders who served a notice of objection.
3. Within 20 days (dissent period) of the approval notice a dissenting shareholder must give a written notice of his election to dissent to the constituent company demanding payment of the fair value of his shares.
4. Within seven days of the expiry of the dissent period or within seven days of the date on which the plan of merger or consolidation is filed with the Registrar of Corporate Affairs (whichever is later), the surviving company or consolidated company must make a written offer (fair value offer) to each dissenting shareholder to purchase his shares at a price determined by the company to be their fair value.
5. If the company and the dissenting shareholder fail to agree the price within 30 days of the fair value offer (negotiation period), then within 20 days of the expiry of the negotiation period each of the following shall apply: (a) the company and the dissenting shareholder must each designate an appraiser, (b) the two appraisers together must designate a third appraiser, (c) the three appraisers must fix the fair value of the shares, excluding any appreciation or depreciation directly or indirectly induced by the merger or consolidation, which value is binding for all purposes, and (d) the company must pay this amount in money to the dissenting shareholder.

The analysis provided in *Oliver Group* would be equally applicable to a dissent under a merger or consolidation.

EFFECTIVE DATE

The effective date of a merger or consolidation is the date the Articles are registered by the Registrar of Corporate Affairs, or such later day as may be specified in the Articles not exceeding 30 days after the date of registration.

EFFECT OF A MERGER OR CONSOLIDATION

As soon as the merger or consolidation becomes effective, all assets of every description, including choses in action and the business of each constituent company, immediately vests in the surviving or consolidated company, and the surviving or consolidated company is liable for all claims, debts, liabilities, and obligations of each of the constituent companies.

CERTIFICATE OF MERGER OR CONSOLIDATION

A certificate of merger or consolidation is issued by the Registrar of Corporate Affairs which is conclusive evidence of compliance with all statutory requirements in respect of the merger or consolidation. ■

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Robert Briant is Partner and Head of the BVI Office. He is considered one of the most senior corporate practitioners in the BVI and influences legislative changes in the jurisdiction, including by creating and chairing a committee of fifteen leading corporate lawyers in the BVI to recommend changes to Government and the Financial Services Commission on financial services legislation. Robert focuses on mergers and acquisitions, joint venture companies, public companies and investment vehicles. He also provides specialist advice to hedge funds and private equity funds, as well as advising on a broad range of financing transactions. His clients include Ziraat Bank, Diageo, Burger King, the Virgin Group, Virgin Galactic, Denham Capital, NRG Energy, Bank of America, Morgan Stanley, JP Morgan, Commerzbank AG and others.

Robert sat on the Premier's Financial Services Task Force (the only private sector lawyer to do so), a task force established by the head of the BVI Government to oversee the entirety of the financial services industry. He also sits on the Securities, Investment Business and Mutual Funds Advisory Committee and has recently completed his term as a member of the Joint Anti-Money Laundering and Terrorist Financing Advisory Committee of the BVI. Robert is a regular contributor to the media on matters of BVI law.