Plans and schemes of arrangement in the British Virgin Islands

Service area / Corporate
Location / British Virgin Islands
Date / March 2017

The British Virgin Islands ("BVI") is a long-standing jurisdiction of choice for incorporating joint venture and private equity vehicles. In more recent years it has also become an established option for investment funds. This is due to its business-friendly and flexible main corporate statute, the BVI Business Companies Act (the "Act"), as well as the BVI's modern regulatory and judicial regime.

The Act provides for two mechanisms for achieving a wide range of corporate restructurings by way of court approval:

- schemes of arrangement, which are equivalent to those available in England; and
- plans of arrangement, which are equivalent to those available in U.S. jurisdictions.

Both mechanisms provide for compromises to be reached between a BVI company and its creditors or members (or a class of them). These mechanisms are available when directors do not have sufficient member or creditor support to carry out a proposed action, or where it is otherwise desirable to "wrap" an action in a court approved plan or scheme of arrangement. These arrangements provide a mechanism for BVI companies to deal with dissenting voices and result in an arrangement that binds the company and its members and/or creditors (or a class of them) (together the "Interested Parties" and each an "Interested Party").

While plans and schemes of arrangement achieve similar results, the procedures that need to be followed in respect of each differ. There are advantages and disadvantages to each, which should be carefully considered.

Schemes of arrangement

BVI companies can use a scheme of arrangement (a "Scheme") in much the same way as an English company can under English law, to reach a compromise or arrangement between the company and its Interested Parties. First, the Scheme must be approved by the directors of the BVI company. It must then be sanctioned by the Court.

Before sanctioning a Scheme, the Court may, upon the application of:

- the company;
- an Interested Party;
- an administrator (if the company is in administration); or
- a liquidator (this can be a voluntary liquidator appointed under the Act or a liquidator appointed under the Insolvency Act 2003), order a meeting of the Interested Parties to be summoned by the company to approve the Scheme (a "Scheme Meeting").

A Scheme can affect Interested Parties in different ways. If this is the case, Interested Parties should be divided into separate classes, so those with similar rights and interests are grouped together. The separate classes of Interested Parties should hold separate Scheme Meetings, to ensure that the rights of genuinely dissimilar classes are protected and not simply created to give minorities a veto. If the classes are incorrectly identified, the Court is unlikely to sanction the Scheme.

If a Scheme Meeting is summoned, a majority (representing 75%) of the Interested Parties at the Scheme Meeting must approve the Scheme. No meeting needs to be summoned of any class of Interested Parties that is not involved in a proposed Scheme.

Once the Scheme has been duly approved and sanctioned by the Court:

- it will bind the company and its Interested Parties;
- it will bind the liquidator, and every person liable to contribute to the assets of the company (if the company is in liquidation); and
- the Interested Parties will no longer have a Right to Dissent (defined below).

An order of the Court in respect of a Scheme will not be effective until it has been filed with the BVI Registrar of Corporate Affairs (the "Registrar"). A copy of the Court order must be annexed to every copy of the company's memorandum and articles of association ("M&A") issued after it is made. Failure to do so will result in the company committing an offence and being liable on summary conviction to a fine of US$5,000.

The primary advantage of a Scheme is that once it has been sanctioned by the Court, the Interested Parties typically have no Right to Dissent. In light of this, if the Court considers that a Scheme is unfair, it can refuse to approve it, even if it has been approved by the Scheme Meeting(s).

An "arrangement" in a Scheme includes a reorganisation of a company's share capital by consolidating shares of different classes and/or by dividing shares into different classes.

Plans of arrangement

The directors can approve a plan of arrangement (a "Plan"), if they determine that doing so is in the best interests of the company or its Interested Parties. Once the Plan has been approved by the directors, the company must apply to the Court for it to approve the proposed Plan. The Interested Parties do not have to approve the Plan, unless the Court determines that additional approval is required.

Before granting the Court order, the Court will review the fairness of the proposed Plan to determine what notice (if any) should be given about the Plan, to whom such notice should be given and whether or not any Right to Dissent should be granted.

Once the directors and the Court have approved the Plan, articles of arrangement ("Articles") must be executed and filed with the Registrar. The Articles must include the Plan, the court order, and an explanation about how the Plan was approved (if additional approval was required by the Court). Upon receipt, the Registrar will issue a certificate confirming that the Articles have been registered.

The Plan will be effective from the date the Articles are registered by the Registrar, or on such date set out in the Articles (provided it is no more than 30 days from the date the Articles were registered).

One of the primary advantages of a Plan is that if the Court determines that additional approval is required (for example from specified Interested Parties), this is usually satisfied if a simple majority of such Interested Parties approve the Plan. This threshold is lower than that which is required for a Scheme (which requires the approval of 75% of the relevant Interested Parties). However the Court will usually grant a Right to Dissent to a Plan, which is typically not the case for Schemes.

An "arrangement" in a Plan includes:

- an amendment to the M&A of a company;
- a reorganisation or reconstruction of a company;
- a merger or consolidation of one or more companies (provided the surviving company is a company incorporated under the Act);
- a separation of two or more businesses carried on by a company;
- 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;
- 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;
- a dissolution of the company; or
- any combination of the actions specified in the bullet points above[1].

1 It should be noted than a court approved Plan is not necessarily required in order to carry out the Actions, provided that the requisite shareholder approvals are obtained in accordance with the Act and a company's M&A.

Continued

Redemption of minority shares

Provided that a company has standard form M&A, a popular alternative to a Scheme or Plan is for the company to take advantage of the BVI's statutory redemption rights. The Act provides that members who hold 90% of the votes of the: (1) outstanding shares of the company entitled to vote; and (2) outstanding shares of each class of shares of the company entitled to vote as a class (the "Majority Shareholders") may give a written instruction to the BVI company, directing it to redeem the shares held by the remaining members (the "Minority Shareholders"). It should be emphasised that this statutory "squeeze-out" exists irrespective of whether any takeover or tender offer has been made or accepted by the Majority Shareholders.

Upon receipt of this written instruction from the Majority Shareholders, the BVI company must give notice to each Minority Shareholder, stating the redemption price and the manner in which the redemption is to be effected. The shares must be redeemed irrespective of whether or not they are, by their terms, redeemable. The Minority Shareholders have the right to have their shares redeemed at their fair value.

Dissenter rights

A member (a "Dissenting Member") who dissents from any of the following actions (each an "Action") is entitled to exercise his or her right to dissent ("Right to Dissent"):

- a merger (unless the company is the surviving company and the member continues to hold the same or similar shares);
- a consolidation;
- any sale, transfer, lease, exchange or other disposition of more than 50% in value of the assets or business of the company if not made in the usual or regular course of the business carried on by the company other than:
  a. a disposition pursuant to an order of the court having jurisdiction in the matter;
  b. a disposition for money on terms requiring all or substantially all net proceeds to be distributed to the members in accordance with their respective interests within one year of the date of the disposition; or
  c. a transfer pursuant to the powers of the company under the Act to:
     1. issue and cancel shares and hold treasury shares;
     2. grant options over unissued shares and treasury shares;
     3. issue securities that are convertible into shares;
     4. give financial assistance to any person in connection with its own shares;
     5. issue debt obligations and grant options, warrants and rights to acquire debt obligations;
     6. guarantee an obligation or liability of any person and secure any obligation by a mortgage, pledge or other charge over any of its assets; or
     7. to protect the assets of the company for the benefit of the company, its Interested Parties and, at the discretion of the directors, for any person having a direct or indirect interest in the company;
- a redemption of his or her shares if they are a Minority Shareholder; or
- a Plan, if permitted by the court.

To exercise his or her Right to Dissent, a Dissenting Member must provide the company with a written objection to the proposed Action ("Written Objection"). The Written Objection must include a statement that the Dissenting Member proposes to demand payment (of fair value) for his or her shares if the proposed Action is taken. The Written Objection must be given to the company: (1) before the meeting of its members at which the proposed Action is submitted to the vote; or (2) at the meeting itself, provided it is given before the vote. If the company fails to notify a Dissenting Member of the meeting at which the proposed Action is to be considered, or if the proposed Action was approved by a written resolution of the members (without a meeting being held), a Dissenting Member can exercise his or her Right to Dissent without having to provide a Written Objection.

The company must give written notice of the proposed Action (an "Action Notice") to each Dissenting Member that has provided a Written Objection (or from whom a Written Objection was not required). The Action Notice must be given within 20 days from the date the members meeting was held, or the written resolutions of the members was passed, that approved the proposed Action (the "Member Resolutions"). A company does not have to give an Action Notice to members who voted in favour of, or who consented in writing to, the proposed Action in the Member Resolutions.

2 A Dissenting Member, who elects to dissent from a merger, shall give a Dissent Notice within 20 days of receiving a copy of the plan of merger.

Continued

Within 20 days receiving an Action Notice (the "Dissent Notification Period"), the Dissenting Member must give the company written notice of his or her decision to dissent (a "Dissent Notice"). The Dissent Notice must state:

- the Dissenting Member's name and address;
- the number and classes of shares held by the Dissenting Member in respect of which he or she dissents (this must be all the shares held by the Dissenting Member); and
- a demand for payment of the full value of the Dissenting Member's shares[2].

Upon giving a Dissent Notice, the Dissenting Member, will cease to have any rights as a member of the company other than the right to be paid the fair value of his or her shares.

The company must, within 7 days immediately following the expiration of the Dissent Notification Period (or the date on which the proposed Action is put into effect, whichever is later), make a written offer to each Dissenting Member to purchase his or her shares at a specified price that the company determines to be their fair value (the "Offer").

If the company and the Dissenting Member agree on the price noted in the Offer, the company must, within 30 days of making the Offer, pay the Dissenting Member the amount due upon the surrender of the relevant share certificates. If the company and the Dissenting Member fail to agree a price during this 30 day period, then three appraisers must be appointed to determine the fair value of the shares. The company and the Dissenting Member will each appoint one appraiser and they will jointly appoint a third appraiser. The three appraisers will fix the fair value of the shares as of the close of business on the day prior to the date the Member Resolutions were passed. This fair value will exclude any appreciation or depreciation directly or indirectly induced by the Action or its proposal. The fair value determined by three appraisers will bind the company and the Dissenting Member for all purposes.

The shares acquired by the company from the Dissenting Members shall be cancelled. However such shares will be available for reissue if they are shares of a surviving company.

Please contact any of our Carey Olsen BVI contacts for further information about Schemes, Plans, redemptions of the shares of minority shareholders or information about other mechanisms that can be used to effect a "squeeze-out" of minority shareholders.

Subscribe for more

FIND US

Carey Olsen (BVI) L.P.
Rodus Building
PO Box 3093
Road Town
Tortola VG1110
British Virgin Islands

T +1 284 394 4030
E bvi@careyolsen.com

FOLLOW US

Subscribe for more

Visit our corporate team at careyolsen.com

PLEASE NOTE