

# “To Bid or not to Bid”

## - practical considerations for takeovers of British Virgin Islands listed companies

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**W**ith the listing of British Virgin Islands (BVI) companies now commonplace on the public markets and in view of current market conditions, it is inevitable that some of these companies will become targets for takeover offers.

For those BVI companies with London listings, the UK’s City Code on Takeovers and Mergers (the City Code) will not apply and as a consequence, the regulation of a takeover bid for a BVI company will have three sources:

- (1) common law;
- (2) in statute under the BVI Business Companies Act 2004 (the Act); and
- (3) in the company’s memorandum and articles of association.

Where a BVI company is looking for liquidity and seeks funding through access to the public markets in London, it has become standard practice to incorporate into the company’s articles of association certain provisions of the City Code (particularly dealing with mandatory offers akin to the provisions of Rule 9 of the City Code). However, there remain conflicting opinions as to whether this is the correct approach and a number of English lawyers still believe that it is unnecessary to restrict the flexibility of a BVI company in this way. There is of course no “one size fits all” approach in this area and ultimately the approach taken will be investor driven and will depend on the investors being targeted. The key is to ensure a balance is struck and that the end product is both sufficiently familiar and palatable to investors, whilst keeping an eye on the exit/takeover scenario.

In considering any bid for a BVI company (as with any jurisdiction), it is essential for a bidder to review the target company’s memorandum and articles of

association in detail.

Flexibility of corporate vehicle and regulation have long been attractive features of BVI company law and, in considering a bid for a BVI company, flexibility is again afforded via a number of structuring options that may be utilised.

### Offer for all of the Issued Shares

Often a bid for a BVI company will be structured as an offer for all the shares in the target company.

On a successful bid, a bidder, having acquired 90% or more of the target’s shares, will then want to focus its attention on the “squeeze out” mechanics available in the Act. The BVI law equivalent to the English law compulsory acquisition of shares provisions is contained within Section 176 of the Act. This enables the remaining minority in a takeover situation to be swept up. One distinction between the English law regime and the BVI law regime in this respect is that rather than the squeeze out being structured as an acquisition of the remaining shares by the bidder, under BVI law, the squeeze out is structured as a redemption of the minority shares by the target company at the instigation of the bidder.

Significantly for a bidder, this ability to squeeze out minority shareholders can be exercised at anytime and therefore not within a specified period following a successful takeover offer. There is no compulsion for a successful bidder to implement a “squeeze out” of minority shares following a successful bid. A point to note in this regard is that, unlike the rights of minority shareholders under English law, minority shareholders in BVI companies have no specific statutory rights (save for the right to bring an action for unfair prejudice, which is a statutory right available to any

shareholder). Consequently a successful bidder, having acquired a majority stake in a target company, can opt to carry the minority shareholders if it so chooses.

Under the BVI law equivalent to the English law compulsory acquisition of shares provisions, Section 176(1) provides a mechanism which, subject to the target company's memorandum and articles of association, enables shareholders holding 90% of the votes of the outstanding shares to give a written instruction to the company directing it to redeem the shares held by the remaining shareholders. Such a redemption is funded either from the target company's own resources or, more likely, by the bidder via the target. Upon receipt of the written instruction in these circumstances, the company is required to redeem the shares, irrespective of whether or not the shares are by their terms redeemable, and give written notice to each member whose shares are to be redeemed stating the redemption price and the manner in which the redemption is to be effected.

One important element to be aware of when considering the squeeze out is that the Act goes on to provide a mechanism in Section 179 of the Act for minority shareholders to dissent from a redemption of their shares under Section 176. Significantly, this dissent right does not give a minority shareholder the right to prevent the redemption from happening (and so prevent their being squeezed out), rather, the dissent right gives the shareholder the opportunity to dissent to the price being offered for their shares. With this in mind, where a "fair value" for the shares cannot be agreed between the company and the dissenting shareholder, Section 179 of the Act also provides for an appraisal procedure to enable the fair value to be determined by independent appraisers. Once determined, this fair value needs to be paid in cash which might be significant for a bidder on non-cash offers.

As a drafting note, the offer document used in a bid for a BVI company should include detail on the squeeze out provisions and the rights of dissenting shareholders to receive fair value for their shares. The Act is clear that the entitlement of a dissenting shareholder is to be paid money as opposed to other property.

## Scheme of Arrangements

As with takeover offers for English companies, a bidder for a BVI company can, as an alternative to an offer for all the issue shares, structure a takeover offer by way of a scheme of arrangement. The BVI company law equivalent to the English company law scheme of arrangement regime is contained within Section 179A of the Act.

A BVI scheme requires the approval of 75% of the target company's shareholders present and voting on the arrangement and, once sanctioned by the BVI court, is binding on all shareholders. This will be entirely familiar to English lawyers. The dissent rights provided for in Section 179 and described above are not available in this situation.

## Arrangements

In addition to schemes of arrangement, the Act also provides for plans of arrangement. There is a clear overlap between the concept of a scheme and plan of arrangement and we may see amendments being made to the legislation to formally unite the two going forward. Both permit various corporate transactions to be court sanctioned. There are, however, some significant differences which are worthy of comment. A plan of arrangement can be instigated by the directors making an application to the court for its approval. It is usual for the court approval to require shareholder and creditor approval and to impose certain advertising requirements. Shareholder approval in this instance will simply be by way of a resolution of the shareholders – typically a simple majority – and therefore a lower threshold than under a scheme.

The provisions for a plan of arrangement do permit the dissent rights provided for in Section 179, as detailed above, to be utilised and so, despite clearing the relevant shareholder approval threshold to satisfy the court, it may still be necessary to cash out those who disapprove. Dissenters cannot however, prevent the arrangement from happening.

These arrangement provisions are frequently discussed as a structuring option. We have seen arrangements being used by clients to afford different advantages in different jurisdictions, for instance to mitigate tax liabilities in Russia and to reduce regulatory requirements in the US. The possibility of having a court sanctioned process involving a relatively low requirement for shareholder consent is indeed attractive.

## Statutory Mergers and Consolidations

Two company law concepts frequently utilised in offshore jurisdictions as a structuring tool for transactions, but which are alien to English law, are the uses of the statutory merger regime or statutory consolidation. Both of these mechanics are provided for under the Act.

Under the merger provisions, two or more BVI companies (or a BVI company and a foreign company provided that the laws of the jurisdiction of the foreign company permit a statutory merger) can merge in accordance with a procedural process involving approval by each

respective companies' directors and shareholders of a plan of merger and the filing of this plan of merger, together with articles of merger, with the Registrar of Corporate Affairs in the BVI. The fundamental difference between a merger and a consolidation is that with a merger, the two constituent companies merge together with one company surviving, whilst, with a consolidation, the two constituent companies come together to form a new entity – the consolidated entity.

The legal effect of a statutory merger or consolidation is that with effect from the effective date of the merger or consolidation, the assets and liabilities of each constituent company automatically vest in the surviving company or the consolidated company. The non-surviving company in a merger and both constituent companies in a consolidation are automatically struck off the register of companies in the BVI.

A virtue of either process is that the threshold for shareholder approval of the transaction will, subject to the company's memorandum and articles of association, be a simple majority. As with arrangements, the procedure available in Section 179 of the Act for dissenting shareholders to receive "fair value" for their shares also applies where a statutory merger or a consolidation is used.

## Disposition of Assets

A further option available as an alternative to structuring a deal as a takeover of the target company, would be for the bidder to agree to purchase the pertinent assets of the target company.

However, it should be noted that if the assets sold represent more than 50% in value of the assets of the target company, then Section 175 of the Act would apply (unless that section has been expressly excluded in the target company's memorandum and articles of association), such that the sale would require the approval of a shareholder resolution (a simple majority unless the memorandum and articles of association provide for a higher threshold). As before, the procedure available to dissenting shareholders to receive "fair value" for their shares also applies in a disposition of assets under Section 175 of the Act.

In the current market conditions we are seeing more M&A activity, including a significant amount of public M&A. When faced with the acquisition of an offshore target, it is essential for advisors to consider all possible structuring options, appreciating that the offshore jurisdictions can often provide a flexible and appealing solution not always available in the onshore world.