

BVI companies: rights and remedies of members

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Members' rights

The rights attaching to shares in a British Virgin Islands ("BVI") business company are determined by the provisions of the BVI Business Companies Act, 2004 (as amended) (the "Act") and that company's memorandum and articles of association.

The Act gives great flexibility as to what rights can be attached to shares under the memorandum and articles of a BVI company, and it is common to see companies with multiple share classes, with each class having different rights. Often the rights attaching to a class will be negotiated and specifically incorporated when new investment takes place, and so the extent of the rights and protection and benefits they afford the member will depend upon the relative bargaining position at the time of the subscription for the shares. A major investor is likely to be able to obtain better terms than one acquiring a small minority interest.

The Act sets out certain default statutory rights attaching to the shares of BVI companies. These are as follows:

- the right to one vote at a meeting of the members of the company or on any resolution of the members of the company;
- the right to an equal share in any dividend paid in accordance with the Act;
- the right to an equal share in the distribution of the surplus assets of the company.

However, these statutory rights are limited and are merely the default rights in the absence of any more extensive rights and protections under the memorandum and articles of association and a company may issue shares subject to terms that negate, modify or add to these rights.

It is not unusual for a BVI company to therefore supplement or amend these provisions and

incorporate into its memorandum and articles of association provisions such as:

- pre-emption rights on transfer of shares;
- “drag along” and “tag along” rights of the members on a sale of shares in the company;
- additional voting rights in respect of certain matters (for example, the appointment or removal of directors or material commercial issues) or designation of these as “reserved matters” which require shareholders’ approval;
- redemption rights.

Such additional rights can also be granted contractually in a shareholders agreement or similar document, but they will not be enforceable as a matter of company law, and any remedies will be those for breach of contract.

It is also possible for the statutory default rights to be removed by the memorandum and articles of association, so that, for example, non-voting and/or non-participating shares may be created.

Beyond any rights directly attaching to the shares or explicitly granted by the memorandum and articles of association or a shareholders agreement, there exist very limited statutory rights that a minority shareholder in a BVI company is able to rely upon to protect their interests. In general these relate to the conduct of the business of the company, and do not give a shareholder any powers to object to the day-to-day commercial decisions of the directors.

The following is a summary of the statutory rights and protections afforded to the members of BVI companies:

1. Under the Act, the entry of the member’s name onto the register of members is a prima facie evidence of that member’s title to the shares in the company. In the event that any information which is required to be entered onto the register has been omitted or there is an unreasonable delay in entering the information in the register, a member has the right to apply to the BVI court for an order to have the register of members of that company rectified.
2. The Act sets out statutory pre-emption rights on the issue of new shares in the company, but for these provisions to apply a BVI company has to expressly incorporate in their articles of association. If so incorporated, any new issue of shares by the company would have to be first offered to the existing shareholders on a pro-rata basis. In practice, many companies opt for bespoke pre-emption provisions (or no pre-emption provisions) in their articles rather than the statutory provisions.
3. Members to of a BVI company are entitled under the Act to inspect the books and records of the company kept at the office of its registered agent. However, this right is subject to the

director's discretion not to allow such inspection should it be contrary to the interests of the company.

4. In the event of any sale, transfer, lease or other disposition (other than a mortgage or charge) by a BVI company of 50% or more in value of the assets of the company made outside of the ordinary course of business the Act provides that the company should seek the approval of the members before undertaking such action, unless the memorandum and articles of association of that company provide otherwise. This "section 175 approval" gives the members the opportunity to consider the actions of the directors and acts as a checks or balances against the inadvisable disposal of key assets.
5. The members who choose not to approve such a disposition have a statutory right to dissent from the proposed transaction. The statutory dissent rights are not just applicable to "section 175 transactions" but also enable the members to dissent from proposed mergers, consolidations or a proposed redemption by a company of minority shares pursuant to section 176 of the Act (the "minority squeeze out" provisions) or a proposed arrangement if permitted by the BVI court (see below under Dissenters Rights for more details).
6. If any of the members decide to dissent from any of the transactions proposed by a BVI company to which such right applies the Act provides them with entitlement to receive "fair value" for their shares in accordance with section 179 of the Act. Significantly, this right to dissent relates only to the price paid for their shares in the event of the squeeze-out, a merger or consolidation or a disposition that such dissenting members do not approve of and not to any question about whether or not the company is able to proceed with the proposed transactions.

Minority protection and remedies

The Act provides for statutory remedies which minority members of a BVI company can rely upon in certain circumstances or to enforce certain provisions of the memorandum and articles of association of the company.

Restraining or compliance orders

If a company or a director of a company engages in or proposes to engage in or has engaged in, conduct that contravenes the Act or that company's memorandum and articles of association a member may apply to the BVI court for an order directing the company or its director(s) to comply with or restraining the company or a director from engaging in conduct that contravenes the Act or the company's memorandum and articles of association.

Derivative actions

The Act allows a minority member to bring a derivative action in the name of and on behalf of

the company in circumstances where a company has cause of action against its directors. In order to bring such an action however the member first obtain the leave of the BVI court. In determining whether a member be granted leave to proceed with a derivative action, the court must take into account a number of factors, including (a) whether the member is acting in good faith, (b) whether the action is in the interests of the company, (c) whether the proceedings are likely to succeed, (d) the costs of the proceedings (relative to the likely relief) and (e) whether alternative remedies are available.

Personal actions by members

A member of a company may bring an action against the company for breach of duty owed to him as a member. This would normally be relevant in a situation where a member is aggrieved by the company for breach of an entitlement or right under the company's memorandum and articles of association for example in relation to dividends or class rights.

Unfair prejudice

A member of a company who considers that the affairs of the company have been, are being or likely to be, conducted in a manner that is, or any act or acts of the company have been, or are, likely to be oppressive, unfairly discriminatory, or unfairly prejudicial to him in that capacity, may apply to the BVI court for an order to remedy the situation. Again, this is a discretionary remedy and the BVI court will only award it if they are satisfied that it is just and equitable to do so.

Liquidation

Almost as a last resort, a member may apply for a liquidation of the company under the Insolvency Act 2003, and the BVI court should not refuse such an application merely because there are no assets to distribute to the member. Members can also by resolution appoint a liquidator of a BVI company under the Act if the company is solvent or under the Insolvency Act 2003 if the company is insolvent.

Dissenters Rights

In addition to rights of action in the cases of actual wrong doing, members of BVI companies also have statutory rights to dissent from certain corporate transactions or arrangements – as previously noted above in relation to section 175 transactions.

Applicable transactions

Statutory dissent rights apply in respect of:

- (a) a merger, if the company is a constituent company, unless the company is the surviving

company and the member continues to hold the same or similar shares;

(b) a consolidation, if the company is a constituent company;

(c) any sale, transfer, lease, exchange or other disposition of more than fifty per cent 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 (i.e. a "section 175 transaction") and if not otherwise excluded or provided in the memorandum and articles of association of the company;

(d) a compulsory redemption of a member's minority shareholding by the company pursuant to the statutory "squeeze-out" power under section 176 of the Act as described above; and

(e) a [plan of] arrangement, if permitted by the court.

A member who wishes to dissent from any of the situations described above is entitled to receive payment of fair value, but significantly is unable to prevent the relevant transaction or restructuring taking place, by following the procedure for dissenters provided in the Act. The onus is on the member to exercise his statutory rights. Where a member dissents and a price cannot be agreed, there is an appraisal procedure which is used to determine fair value. Both the member and the company are bound by this procedure and time limits prescribed for it, and there is nothing in the legislation which appears to permit any variations or derogations from these.

A member who exercises dissent rights under the Act cannot enforce any rights to which the member might otherwise be entitled by virtue of his shareholding. The one exception to this is that the member is not prevented from instituting proceedings for relief on the grounds that the action is illegal.

Outline of the procedure for dissenting members

The procedure involves a number of detailed steps on both the part of the dissenting member and the company with prescribed statutory time limits and, for the sake of brevity, only an outline will be provided here. The procedure applies in full to all dissenting members, except in the case of redemption of minority shareholders where only the steps described below in relation to appraisers will apply. The procedure is as follows:

(a) A dissenting member must first give the company written objection to the proposed action before the meeting of members or at the meeting but before the vote, except where the company did not give notice of the meeting in accordance with the Companies Act or where the proposed action is to be authorised by members' written consent. The objection must state that the member proposes to demand payment for his shares if the proposed

action is taken.

(b) Within 20 days of the approval, the company must give a written notice to each member who gave written objection, or from whom written objection is not required, that the proposed action has been approved.

(c) The member has 20 days to elect whether or not to dissent and give the company a notice in writing electing to dissent, but in the case of a merger between a parent and subsidiary, the 20 days begin to run from when a copy of the plan of merger or its outline is given to him. On giving such notice, the member ceases to have any of the rights of a member of the company except for the right to be paid the fair value of his shares.

(d) The company (or surviving or consolidated company) must then make a written offer to each dissenting member to purchase his shares at a specified price that the company determines to be their fair value. The written offer must be made within seven days of the end of the period in which members may dissent or seven days following the proposed action, whichever is later. There is no obligation to offer the same price to each member.

(e) The company and the member have 30 days thereafter to agree the price. If they do, the company must pay that price in money (and not in property or other consideration) when the member surrenders his share certificate. If they fail to agree the price in that 30 day period, then an appraisal procedure applies:

(i) Within 20 days following the end of the 30 day period, the company and the dissenting member must each appoint an appraiser, and the two appraisers together must appoint a third appraiser.

(ii) The three appraisers must fix the fair value as at the close of business on the day prior to the date on which members' approval was obtained. The value is binding on the company and the dissenting member for all purposes.

(iii) The company must pay the amount in money on the surrender by him of his share certificate.

The shares that are acquired must be cancelled, except if they are shares in a surviving company in which case they are available for reissue.

Fair value

There is no statutory guidance on what constitutes fair value for these purposes or the basis on which it is to be calculated. The only matter that is dealt with by the Act is that any appreciation or depreciation directly or indirectly induced by the action or its proposal is to be left out of account. Otherwise, there is no indication of what factors the appraisers can

or cannot take into account, and the matter is left entirely to their discretion. The Act does not specify any procedure for the carrying out the appraisal nor does it require the disclosure of any information (even financial information) from the company to the appraisers. The appraiser's fixing of a fair value is binding on the company and the member for all purposes.

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