



Take-Private Transactions

BVI Law Considerations

November 2020

## Introduction

Take-private transactions have long been a feature of the legal landscape in the British Virgin Islands, whether as a tool for acquiring a company or as precursor to re-listing the company on a more favourable or convenient stock exchange.

The BVI Business Companies Act, 2004 as amended (the **BCA**) provides a number of avenues to take-private a British Virgin Islands company - from the traditional court approved schemes, to simpler and more cost-effective mechanisms for mergers and consolidations.

This document sets out an overview of the different options for stakeholders and the key considerations in respect of each option to assist in determining which mechanism might best suit the needs of particular companies. Ogier has been involved in a number of recent high value take-private transactions in the British Virgin Islands. Our corporate specialists also work closely with our cross-jurisdictional dispute resolution teams who have significant expertise in the area of shareholder and valuation disputes.

With British Virgin Islands specialists based in the North American, Asian and European time-zones, Ogier is able to provide its clients with seamless round the clock advice on take-private matters.

Our lawyers and professional staff based in Hong Kong speak English, Cantonese and Mandarin to better service our Asia-based clients in their native languages.

## Take-private methods

### Shareholder considerations

| Take-private option          | BCA reference    | Required Approvals  | Indicative Timing  | Court process?   |
|------------------------------|------------------|---|--|--|
| Statutory merger             | Sections 170-174 | Board resolution and shareholder resolution of each company (no shareholder resolution required for participants in a parent/subsidiary company merger).  | Provided fair value appraisal procedure is not implemented, process can be completed in a short time-frame (as little as 1 to 2 months). | No. Court approval is not required. However, dissenting shareholders could invoke fair value appraisal rights under section 179 of the BCA which could result in uplift for dissenting shareholders' shares.   |
| Tender offer and squeeze-out | Section 176      | A direction needs to be given to the company by shareholders holding 90% of the votes of the outstanding shares/ each class of shares.  | Can be implemented at any time, so not tied to the tender offer process.   | No. Court approval is not required. However, dissenting shareholders could invoke fair value appraisal rights under section 179 of the BCA which could result in uplift for dissenting shareholders' shares.   |
| Plan of arrangements         | Section 177      | Board resolution, followed by Court application. Court will make an interim or final order and will determine what approvals should be obtained and the manner for obtaining them and whether dissent rights are available. | Between 3 to 6 months (but could be longer depending on number of classes of shares, court availability etc.)                            | Yes. This process requires the approval of the Court before it can be implemented. There will likely be at least two hearings (a convening hearing and a sanction hearing). Unless the Court has determined that dissent rights under section 179 shall not apply, dissenting shareholders could invoke fair value appraisal rights under section 179 of the BCA which could result in uplift for dissenting shareholders' shares. |
| Scheme of arrangement        | Section 179A     | Requires the approval of a majority in number representing 75% in value of the members of each class of shares issued by the company.   | Between 3 to 6 months (but could be longer depending on number of classes of shares, court availability etc.)                            | Yes. This process requires the approval of the court of the scheme before it can be implemented. There will be at least two hearings (a convening hearing and a sanction hearing).   |

## Advantages and Disadvantages

| Take-private option          | Advantages  | Disadvantages  |
|------------------------------|---|--|
| Statutory merger             | Can be completed quickly and efficiently if sufficient shareholder support.   | <p>Dissenter rights available.</p> <p>Fair value appraisal could jeopardise commercial viability of acquisition.</p>   |
| Tender offer and squeeze-out | <p>Squeeze-out can be implemented at any time, so not tied to tender offer process.</p> <p>As a consequence, following a successful tender offer, the successful bidder could simply refrain from implementing the squeeze out and continue to carry the small minority shareholders until some future time (but would need to be careful of not giving grounds to become subject to a Court application by the minority shareholder under Part XI (e.g. unfair prejudice etc).</p> | <p>Squeeze out requires a direction to be given to the company by shareholders holding 90% of the votes of the outstanding shares/each class of shares, so requires the bidder to be holding (or controlling) 90% of the votes of shares.</p> <p>If squeeze out is implemented, dissenter rights available. Fair value appraisal could jeopardise commercial viability of acquisition.</p> |
| Plan of arrangement          | <p>If sanctioned by the Court, the proposed plan becomes binding on all members to whom it applies, irrespective of whether those members approved the plan in the meeting.</p> <p>As well as effecting a take-private transaction, you can also incorporate other elements into the arrangement (for example, corporate restructurings).</p>   | <p>Because of the court process, it is relatively expensive and can take quite a long time to implement.</p> <p>Unless the Court has determined that dissent rights under section 179 shall not apply, dissenting shareholders could invoke fair value appraisal rights, which could jeopardise commercial viability of acquisition.</p>   |
| Scheme of arrangement        | <p>If sanctioned by the Court, the proposed scheme becomes binding on all members to whom it applies, irrespective of whether those members approved the scheme in the meeting.</p> <p>As well as effecting a take-private transaction, you can also incorporate other elements into a scheme (for example, corporate restructurings).</p>  | <p>Higher approval threshold than a statutory merger.</p> <p>Because of the court process, it is relatively expensive and can take quite a long time to implement.</p>   |

## Contact us



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