BVI companies: rights and remedies of members

Publication - 21/01/2011

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.

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.

Members’ remedies

The Act has introduced 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.
If a company or a director of a company engages in or proposes to engage 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.

Under the Act the minority members have a statutory right 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. This remedy is available at the discretion of the BVI court which will take a number of factors into account before granting or refusing a leave to proceed to the member, including whether such action is in the interests of the company, the cost of such action and whether there are alternative remedies that the member concerned may rely upon.

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.

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.

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.

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