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## Legal ease

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The BVI provides a supple solution for mergers and schemes of arrangement that you would be hard-pressed to find elsewhere, says Rachel Graham

For companies incorporated in the British Virgin Islands (BVI), the BVI Business Companies Act 2004 (as amended) (the act) provides a flexible statutory framework for mergers, plans of arrangement and schemes of arrangement.

### **Mergers**

The act permits mergers between two or more companies registered under the act and between BVI companies and foreign companies, if the relevant foreign law permits. A merger between a parent and a subsidiary (where both are BVI companies and or where one or more are foreign companies) is also possible.

The provisions for effecting mergers are innovative and flexible and allow shares to be cancelled, reclassified or converted into money or other assets, or into shares, debt obligations or other securities in the surviving or consolidated company. An attractive aspect of the merger regime is that shares of the same class can be treated differently - for example some shareholders of the target company could receive shares in the surviving company, while others in the same class are bought out for cash.

Financial and corporate due diligence will, of course, be uppermost in the offerer's mind, particularly as the company that 'survives' the merger not only acquires the rights, powers, immunities and all the business and assets of the target(s), but also becomes liable for all of their debts and obligations. Such debts and obligations, and any judgment or cause of action against the constituent companies, are not released by the merger. Proceedings pending against the constituent companies at the time of the merger are not abated or discontinued, but may be enforced, prosecuted, settled or compromised by or against the surviving company, and the surviving company may be substituted in the proceedings.

The procedure to effect a merger is straightforward. The directors of the relevant companies must approve a plan of merger before submitting the plan to the members of each company for approval. Articles of merger are then executed and filed with the Registrar of Corporate Affairs in the BVI and a certificate of merger issued.

### **Rights of dissenting members**

It is not unusual for some shareholders to oppose a merger. If those shareholders hold a simple majority of the votes, then they will be able to prevent the transaction proceeding. However, if a majority voted in favour and the proposed action was intra vires the company

and not otherwise unlawful then, as one would expect, the minority will be bound by the majority. However, dissenting members have a remedy in the form of a statutory right to be bought out by the company for fair value.

### **Arrangements**

While a merger may be the preferred lifeline for some companies, others may consider arrangements instead.

The act has two types of court-supervised arrangements - 'plans of arrangement' and 'schemes of arrangement'. Both are mechanisms for achieving a wide range of corporate restructurings by way of court approval.

There may be a number of reasons for using arrangements over other forms of corporate restructuring: it may be necessary to obtain the consent of creditors; or to obtain court approval in order to bind all members and creditors; or for exemptions from foreign legislation to apply, for example under the US Securities Act 1933.

### **Plans of arrangement**

There is a wide definition of 'arrangement' in the act and it includes reorganisations, mergers, consolidations, separations of businesses, dispositions of assets or businesses, dispositions or exchanges of shares or securities, amendments to memorandum and articles, dissolutions and, importantly, any combination of these.

There is a set procedure that must be followed and the directors of the company must act in the best interests of the company or its creditors or members. Once the plan has been approved it is sent to the court for approval. The court will issue directions as to who should be notified and whose approval must be obtained and whether stakeholders should have the right to exercise their statutory right of dissent

### **Schemes of arrangement**

The relevant provisions in the act borrow heavily from Section 425 of the English Companies Act; as such they are not intended to be confiscatory in nature, but to provide a statutory and court-sanctioned exchange of collective rights of creditors or shareholders. The scheme must be approved by a high proportion of the affected creditors or shareholders, there must be complete transparency throughout the procedure, and the court will only sanction a scheme if it is fair to do so.

If a majority in number representing 75 per cent in value of the creditors, members, or class of either agree to the scheme, it is binding on all of the relevant stakeholders in the company once sanctioned by the court and, importantly, there are no statutory rights for dissenters.

In conclusion, structures involving BVI companies continue to offer flexibility for decision-makers that may not exist in other jurisdictions.

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