Legal guide

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BVI corporate reorganisations and solvent restructurings – A general guide

Harneys' specialist corporate and finance lawyers have an unrivalled depth of knowledge and experience in advising on complex cross-border reorganisations and restructurings, whether to rationalise existing business structures or in connection with M&A activity. We regularly advise the world's largest businesses, financial institutions, funds and law firms, as well as high-net-worth and ultra-high-net-worth individuals, and work alongside incorporation experts and corporate secretaries from Harneys Fiduciary Services to provide a seamless, integrated service to clients.

Our recent representative experience includes acting as BVI and Cayman counsel to the Virgin Group on various major corporate reorganisations, including the sale of Virgin Active, the listing of Virgin Money and Virgin Atlantic's £1.2 billion private-only solvent recapitalisation of the airline and holiday business; advising on a US$1.3 billion refinancing and corporate reorganisation for BVI company Sermaye Investments Limited; acting as BVI and Cayman Islands counsel to HKSE-listed PRC property development firm Kaisa Group (HK:1638) in a US$2.77 billion debt restructuring via a scheme of arrangement; and helping Alibaba.com to effect its privatization and acquisition by Jack Ma via scheme of arrangement for US$2.5 billion.

Overview

The BVI Business Companies Act 2004 (the ***BC Act***) provides an extremely flexible framework for reorganisations or restructurings involving solvent British Virgin Islands companies.[i] This guide outlines key considerations under the BC Act and other relevant law regarding the following:

- Share and asset sales, including "hive-outs" and "hive-downs"
- Inter-company financing and re-financing
- Distributions, including "hive-ups" and share buybacks
- Mandatory redemptions ("squeeze-outs")
- Mergers and consolidations, including "de-merger" structures
- Plans and schemes of arrangement
- Continuations and discontinuations
- New incorporations and voluntary liquidation

Share and asset sales and significant disposals

The terms “hive-ups, “hive-downs”, “hive-outs” and so forth may seem bewildering but most of these processes involve a sale of shares and/or assets. Both are generally simple under BVI law but BVI counsel should review each BVI company’s memorandum and articles of association (***MAA***) for potential issues. The process will typically be tax-neutral from a BVI perspective but BVI stamp duty must be considered if any (a) interests in BVI land or (b) shares, debt obligations or securities in a company which directly or indirectly holds an interest in BVI land are being transferred.

Subject to its MAA, a company’s shares are freely transferable. Registered shares are transferred by an instrument of transfer signed by the transferor (and transferee, if the share(s) impose a liability on it) and containing the transferee’s name and address.[ii] The transfer is effective when registered in the original share register, which *prima facie* evidences legal title to the shares. Subject to the MAA, a transfer cannot generally be refused or delayed by the directors unless there are unpaid amounts in respect of the share(s).

Similarly, subject to the MAA, asset sales are generally straightforward under BVI law. Most BVI companies have no assets or operations in the BVI, so in most cases foreign counsel will need to be involved. BVI counsel should advise on any BVI tangible assets or real estate involved, as well as any BVI law contracts or intangible assets.

The directors of a BVI company, which has not dis-applied the relevant provisions of the BC Act in its MAA, must consider whether any disposal is (a) of more than fifty per cent in value of the company’s assets and (b) outside the usual or regular course of business. Such significant disposals require formal shareholder approval. Subject to limited exceptions (e.g. court-ordered disposals and disposals for money where substantially all net proceeds are distributed within one year), any shareholder dissenting from the disposal is entitled to receive fair value for its shares.

The BC Act sets out a formal process and timetable for shareholders to object to a transaction and to exercise such dissenter’s rights. A shareholder exercising such rights must do so in respect of all shares it holds in the company and, upon electing to do so, ceases to have any rights as a shareholder other than to be paid the fair value of its shares. Absent agreement between the company and the shareholder, “fair value” is determined via a statutory appraisal process under the BC Act. Whilst seldom material in a purely intra-group context (and, in any event, rarely exercised), dissenters’ rights should be considered if it is possible that any shareholder(s) will not consent to the relevant transaction.

Inter-company financing and re-financing

Harneys’ corporate lawyers work closely with our specialist banking and financing lawyers to provide seamless, expert advice on both debt and equity aspects of reorganisations and restructurings. Most reorganisations involve restructuring the group’s existing intra-group and/or third party debt financing. Where third-party lenders are involved, it is relatively common to encounter BVI law share charges and/or debentures, which may restrict, or require lender consents to, the proposed reorganisation.

Subject to contractual restrictions or insolvency issues, BVI law permits most common reorganisation or restructuring features (such as the creation of intercompany receivables, inter-creditor arrangements and contractual subordination or set-offs). Subject to the BC Act, its MAA and BVI law, a company has full capacity and powers to undertake any business or activity or to enter into any transaction, irrespective of corporate benefit – broadly, this includes giving “financial assistance” in connection with the acquisition of the company’s shares, issuing debt, equity and convertible securities, borrowing or lending money or providing guarantees or security.

Distributions and share redemptions/buybacks

Subject to its MAA, a company may distribute its assets by a variety of methods (including a cash dividend or distribution in kind). The statutory definition of a “distribution” is broad and includes (a) any direct or indirect transfer of an asset (other than the company’s own shares) to or for the benefit of a member; or (b) the incurring of a debt to or for the benefit of a member, in relation to the member’s shares or entitlement to distributions (howsoever achieved). Most “hive-ups” will therefore be a distribution under BVI law.

The BC Act applies a simple balance sheet and cash-flow solvency test for distributions. Subject to the MAA, a company’s directors may authorise a distribution if they are satisfied, on reasonable grounds, that, immediately after the distribution (a) the value of the company’s assets will exceed its liabilities; and (b) the company will be able to pay its debts as they fall due. Older companies incorporated under predecessor legislation to the BC Act remain subject to certain transitional provisions (unless the company has dis-applied them), which broadly require distributions to be made out of available “surplus”. Such

older companies can elect to dis-apply the transitional provisions; indeed, many do so in order to take advantage of the simpler modern solvency test for distributions under the BC Act.

A company may redeem or otherwise acquire its own shares if the solvency test is satisfied and, subject to the MAA, the relevant shareholder(s) consent. Subject to the MAA, such shares may be cancelled or held in treasury for reissuance, provided the number of shares held in treasury in each class does not exceed fifty per cent of the total previously issued by the company (other than shares that have been cancelled).

A company may also acquire its own fully paid share(s) for no consideration by way of surrender, which must be made in writing and signed by the person holding the share(s).

Mandatory redemption of minority shareholders (squeeze-out)

Unless the MAA dis-apply the relevant provisions, the BC Act also permits shareholders holding 90 per cent of votes (and 90 per cent of votes for each share class entitled to vote as a class) to instruct a company to redeem the shares of the remaining shareholders, irrespective of whether those shares are otherwise redeemable (a ***squeeze out***).

Although unusual in an intra-group context, the mechanism may be used to "clean up" minority interests within a holding structure – for example, in anticipation of, or following, a wider transaction. Minority shareholdings can also be dealt with as part of a court-sanctioned scheme or plan of arrangement (as to which, see below).

A shareholder in a company dissenting from a redemption of its shares on a squeeze out is entitled to exercise dissenter's rights (see "*Share and asset sales and significant disposals"* above).

Mergers and consolidations

The BC Act permits the merger or consolidation of two or more BVI companies and, subject to applicable foreign laws, also allows "cross-border" mergers and consolidations (i.e. involving one or more foreign companies). The relevant provisions are substantially the same as those first introduced in the 1980s and modelled on Delaware law and so should be reasonably familiar to US clients.

Mergers and consolidations offer a very flexible method of reorganising redundant holding companies or integrating existing business divisions and do not generally require approval of the BVI courts. However, a company's MAA, constitutional documents and contractual arrangements may impose specific restrictions or requirements, and should be reviewed by BVI and foreign counsel, as appropriate.[iii]

The end result of both processes is that two or more companies (the ***constituent companies***) become a single body corporate under BVI law. On a merger, one constituent company survives (the ***surviving company***), whereas, on a consolidation, a new company is formed (the ***consolidated company***) and the constituent companies are struck-off. There is also a streamlined process for a parent company to merge with its subsidiary without any shareholder authorisations being required (a ***parent-subsidiary merger***).

Broadly, to complete a merger or consolidation (and subject to applicable foreign law):

- The directors of each constituent company (or parent only, in a parent-subsidiary merger) approve a plan setting out required details of the process (including, on a merger, any amendments to the MAA of the surviving company or, on a consolidation, the MAA of the consolidated company)
- Subject to requisite approvals under each company's MAA, the shareholders of each constituent company entitled to vote on the merger or consolidation must resolve to approve the plan (except on a parent-subsidiary merger, where a copy or outline of the plan must simply be given to each shareholder of each subsidiary, unless waived by that shareholder)
- Each constituent company (or parent only, in a parent-subsidiary merger) then executes articles of merger or consolidation containing the plan and various other details, to be filed with the Registrar (together with (i) any resolutions to amend the MAA of the surviving company or (ii) the MAA of the consolidated company, as applicable)
- Subject to applicable foreign laws (where the surviving or consolidated company is not a BVI company), the merger or consolidation is effective when such articles of merger are registered by the Registrar or such later date, not exceeding 30 days following registration, as is stated in the articles of merger

- If the surviving or consolidated company is not a BVI company, it must file documents allowing service of process to be effected on it in the BVI at the office of its registered agent (and agreeing to pay relevant amounts to any shareholders dissenting from the merger or consolidation), as well as a certificate of merger or consolidation (or similar) issued by the relevant authority in its jurisdiction of incorporation

Subject to any applicable foreign law, the surviving or consolidated company (a) assumes all the rights, powers and assets of each constituent company; and (b) becomes responsible and liable for any claims, debts, liabilities of, or proceedings against, each constituent company (and may be substituted for the relevant constituent company, in the case of existing proceedings).

A shareholder in a BVI constituent company dissenting from a merger or consolidation (except a merger where the company is the surviving company and the shareholder continues to hold the same or similar shares) is entitled to exercise dissenter's rights (see "*Share and asset sales and significant disposals"* above).

"De-mergers"

There is no statutory definition of a "de-merger" under BVI law. However, the separation of existing business operations may be achieved in a number of ways; the structure typically will be determined by non-BVI law considerations. However, the following structures are fairly typical (and raise similar issues from a BVI perspective to those discussed at "*Share and asset sales and significant disposals*" and "*Distributions"* above):

- *"Direct" demerger*. The shares in a company (***A***)'s existing subsidiary (***B***) carrying on the target business are distributed to shareholders (***S***) who then hold shares in B directly (and, in a "spin-off" demerger, B may be a newly-incorporated company to which the relevant assets are first transferred)
- *"Indirect" demerger"*. Instead of distributing the shares in B directly, a new subsidiary (***C***) may first be incorporated (typically by S) and either the relevant assets or the shares in B transferred to C by A – in some cases, A may first declare a distribution which is then satisfied by the issuance of shares in B
- *"Carve-out"*. Shares in B may be sold directly to new investors via private sale or, if A is listed, an IPO

In complex or distressed situations or for foreign securities law reasons, a plan or scheme of arrangement may be used to achieve a de-merger (as to which, see below) but this is less common in the BVI.

Plans and schemes of arrangement

Plans and schemes of arrangement both require court approval. An "arrangement" is a very broad concept and potentially includes an amendment to the MAA, a reorganisation or reconstruction, a merger or consolidation (provided the surviving or consolidated company is a BVI company), a separation of two or more businesses carried on by a company, share, securities or asset sales, transfers or exchanges or company dissolutions (or any combination thereof). Plans and schemes therefore offer enormous flexibility and, from the perspective of directors, shareholders, creditors or insolvency practitioners, comfort that the process has been approved by a court.

A plan must be approved by the directors or voluntary liquidator of the relevant company (both before and after application to the court), whereas a scheme may also be proposed by certain other persons, including any creditor or member of the company.

A shareholder in a company dissenting from an arrangement may be entitled to exercise dissenter's rights, if permitted by the court (see "*Share and asset sales and significant disposals"* above).

Continuations and discontinuations

An extremely flexible feature of BVI law is the ability to continue or "migrate" a foreign company or "body corporate" as a BVI company under the BC Act (a ***continuation***) or to continue or "migrate" a BVI company under the laws of another jurisdiction (a ***discontinuation***). The process must be permitted by the laws of the relevant foreign jurisdiction and the company must comply with specific requirements under the BC Act.

Continuations can be used to take advantage of the BVI's company law regime to achieve specific reorganisation steps or to avoid having to transfer assets to a new corporate vehicle – for example, by moving a company to the BVI to be restructured

or merged or consolidated with one or more other companies and then continuing it back to its original jurisdiction or to a different jurisdiction, as required.

Under BVI law, the effect of a continuation or discontinuation is as neutral and seamless as possible and the relevant company is regarded as the same legal person. Broadly, (a) the company continues to be liable for all of its obligations that existed prior to its continuation or discontinuation; (b) the continuation or discontinuation does not impair or release any such liabilities or obligations or any judgments or claims against the company; and (c) any pending or actual proceedings by or against the company remain unaltered.

Our full guide to continuations and discontinuations can be found **here**.

New incorporations and formations

Harneys Fiduciary Services can incorporate a standard BVI company very quickly (generally within 1-2 days) and very cost-effectively.

Most BVI companies are limited by shares, meaning their shareholders are generally not liable for the company's debts and other obligations (beyond unpaid amounts on their shares). The company must have at least one shareholder and one director but neither is required to be an individual and nor are their details published publicly. A company's MAA are a public document available via a search for a modest fee.

A wide choice of other BVI corporate vehicles, partnerships and trusts is available, including:

- Restricted purposes companies (***RPCs***). RPCs are typically used in securitisations and off-balance sheet financing work. An RPC may also be a segregated portfolio company (see below). An RPC must be a company limited by shares and its memorandum must state that it is an RPC and the company's purposes. An existing company cannot be re-registered as an RPC
- Segregated portfolio companies (***SPCs***)**.** These companies are highly specialised and regulated, allowing for the compartmentalisation of different classes of assets and liabilities within a single body corporate
- Companies limited by guarantee or unlimited companies (in each case, with or without shares)
- Partnerships and limited partnerships. Partnerships may be formed under the Partnerships Act 1996 (as amended) and limited partnerships may be formed (with or without separate legal personality) under the recently-enacted Limited Partnership Act 2017, which provides a streamlined formation process and a highly innovative new limited partnership structure designed to meet the needs of modern investment structures
- Trusts. Our BVI team offers expert advice on the establishment and restructuring of BVI trusts, including VISTA trusts, purpose trusts, unit trusts and employee benefit trusts

In addition to BVI companies and partnerships, Harneys Fiduciary Services can also assist with incorporations and formations in the Cayman Islands, Cyprus, Hong Kong and Singapore.

Voluntary liquidations

At the other end of a company's lifecycle, a company can be liquidated under the BC Act without any application to court, provided it is solvent (or has no liabilities). To ensure clients receive as seamless and cost-effective a service as possible, we generally recommend that one of Harneys Fiduciary's professional liquidators be appointed.

The BC Act sets out a prescriptive timetable for the timing of the various steps in a voluntary liquidation. As a rule of thumb, a simple liquidation of a BVI holding company without complex assets or liabilities typically takes around 6 to 8 weeks from start to finish.

In terms of documentation, the directors must make a statutory solvency declaration and pass a resolution approving a liquidation plan setting out certain details of the proposed liquidation (including the proposed liquidator(s) and their remuneration and whether the liquidator(s) may carry on the business of the company (for a maximum of two years, subject to extension by the court). A shareholder resolution will be required to approve the plan and, subject to the MAA, to appoint the liquidator(s)

Once appointed, the liquidator must notify the BVI Registry of Corporate Affairs and advertise his/her appointment both in the BVI and also any other relevant foreign jurisdiction(s). Broadly, subject to the rights of secured creditors, from the time of the appointment the liquidator has custody and control of the company's assets and broad powers to deal with them. The company's directors remain in office but cease to have any powers unless authorised by the liquidator.

Upon completion of the liquidation, the company will be struck off the BVI Registry of Companies and dissolved and a notice of such dissolution will be published in the BVI official Gazette.[iv]

Conclusion

BVI companies are the world's leading offshore holding vehicles, thanks primarily to the modern and extremely flexible company law regime under the BC Act, which is supported by the legal certainty and stability provided by a common law jurisdiction offering experienced lawyers and financial services providers. Nowhere is this flexibility more evident than in the wealth of options available to companies (and their advisers) undertaking reorganisations and restructuring.

For more information and key contacts please visit **harneys.com**

[i] This guide does not consider insolvent reorganisations or restructurings or any special regulatory or other compliance requirements that may apply (for example, to entities required to be licensed or regulated by the BVI Financial Services Commission (***FSC***) or under the Economic Substance (Companies and Limited Partnerships) Act 2018). Clients undertaking a reorganisation or restructuring involving a BVI regulated entity or an entity which is subject to economic substance requirements should contact Harneys' economic substance and regulatory specialists. For simplicity's sake, references in this article to a company are to a BVI business company limited by shares, unless otherwise stated.

[ii] Special rules apply to companies whose shares are listed on a "recognised exchange" – very broadly, in such circumstances the transfer may be carried out in accordance with the rules and procedures of the relevant exchange. Shares in a BVI company may also be transferred by operation of law, irrespective of any restrictions in the MAA.

[iii] References to the "MAA" of a constituent company in this part include the equivalent documents of a foreign company, in the case of a cross-border merger or consolidation.

[iv] Note that an application to restore the company may be made to the court by various interested persons during the period of ten years after the dissolution date.