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British Virgin Islands

MERGERS & ACQUISITIONS

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This country-specific Q&A provides an overview of mergers & acquisitions laws and regulations applicable in British Virgin Islands.

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BRITISH VIRGIN ISLANDS
MERGERS & ACQUISITIONS

1. What are the key rules/laws relevant to M&A and who are the key regulatory authorities?

Sources of Regulation

The primary source of law relevant to M&A in the British Virgin Islands (BVI) is the BVI Business Companies Act 2004, as amended (the Act).

The Act permits mergers between:

1. BVI companies incorporated and registered under the Act; and
2. a BVI company or companies incorporated under the Act and a foreign company or companies (assuming this is permissible under the applicable foreign law).

In the case of a merger between a parent and one or more of its subsidiaries, a simplified procedure is available under the Act.

The Act also permits mergers through plan of arrangement or scheme of arrangement and provides for a minority squeeze-out procedure.

There are change of control rules applicable to entities regulated by the British Virgin Islands Financial Services Commission under the relevant financial services legislation, including the Banks and Trust Companies Act, 1990 and the Insurance Act, 2008.

2. What is the current state of the market?

The 2021 M&A market witnessed a resurgence to pre-pandemic levels driven by renewed optimism from continuing low interest rates and strategic divestment and consolidation particularly within the high-tech and infrastructure sectors. M&A deal activity has seen a faltering start to 2022 with activity in Q1 registered lower than every quarter in 2021 due in large part to geopolitical uncertainties (including Russia's invasion of Ukraine), supply chain disruptions and inflation.

Recent developments in the BVI relevant to M&A transactions are set out below:

- a notable increasein the use of SPACs, utilising offshore vehicles such as BVI business companies due to the simplicity of the BVI statutory merger process;
- the inclusion of specific COVID related material adverse change clauses and warranties which remain untested in thecourts;
- the introduction of the Electronic Transactions Act, 2021in relation tothe acceptance and use of electronic signatures which became increasingly utilized during the Covid pandemic; and
- the introduction of the BVI Economic Substance (Companies and Limited Partnerships) Act, 2018 (as amended), under which BVI companies (unless exempted or out of scope)are required to demonstrate economic substance in the BVI and make annual filingswith the BVI International Tax Authority.

3. Which market sectors have been particularly active recently?

The real estate sector, financial sector and high-tech industry recorded the most activity in the first quarter of 2022.

4. What do you believe will be the three most significant factors influencing M&A activity over the next 2 years?

Global trade instability and volatile energy prices due to the Russian invasion of Ukraine, inflation and continuing supply chain disruptions will likely be the most significant factors affecting deal volumes over the next two years.

5. What are the key means of effecting the acquisition of a publicly traded company?

There is no stock exchange in the BVI and, as such, BVI law does not have particular rules governing takeovers of public companies. Where a BVI company is listed on a foreign stock exchange the takeover and listing provisions of the relevant exchange will apply.

The key means of effecting the acquisition of a publicly traded company are set forth below.

5.1 Merger / Consolidation

The term "merger" is defined in the Act as the merging of two or more constituent companies into one constituent company. It should not be confused with a "consolidation" which differs slightly from a merger and occurs when two or more constituent companies are united to form one entirely new company. The procedure for "mergers" and "consolidations" is essentially the same under the Act.

The provisions for effecting a merger are flexible. As part of the process, they allow shares to be cancelled, reclassified or converted into money or other assets, or into shares, debt obligations or other securities in the surviving company. Also, shares of the same class can be treated differently, e.g. some shareholders can be given shares in the surviving company, while others of the same class can be bought out, that is, have their shares converted into cash or other assets.

In order to effect a merger or consolidation,

(a) the directors of each company must approve a plan of merger or consolidation. The companies' constitutional documents will provide the thresholds required for this to be passed;

(b) a simple majority of each class of shareholders entitled to vote on the merger or consolidation must also approve the merger or consolidation, unless a higher threshold is stipulated in the constitutional documents. A quorum for a meeting will be the shares representing not less than 50% of the issued shares; and

(c) articles of merger must be executed by each company and filed at the Registry of Corporate Affairs in the BVI, at which point the merger is effective assuming the surviving company is a BVI company (unless some later date within 30 days of the filing has been specified in the articles of merger as the effective date). If the surviving company is a non-BVI company, the effective date of the merger will be subject to the laws of the jurisdiction of incorporation of that company.

Dissenting shareholders who do not vote in favour of the merger are entitled to payment in cash of fair value for their shares.

All the non-surviving company's rights, obligations and liabilities will be transferred to the surviving entity and the non-surviving entity will then be struck off the Register and dissolved.

(a) Merger of a Parent Company with a Subsidiary

The Act sets out an alternative procedure for a merger of a parent company with one or more subsidiary companies, in which members' approval is not required. Only the directors of the parent company are required to approve the Plan of Merger.

Some or all shares of the same class of shares in each constituent company may be converted into assets of a particular or mixed kind and other shares of the class, or all shares of other classes of shares, may be converted into other assets, but, if the parent company is not the surviving company, shares of each class of shares in the parent company may only be converted into similar shares of the surviving company.

A copy of the Plan of Merger or an outline thereof is to be given to every member of each subsidiary company to be merged unless waived by that member.

Articles of Merger need only be executed by the parent company. Where the parent company does not own all the shares in the subsidiary company or companies to be merged, the Articles of Merger must also include the date on which a copy of the Plan of Merger (or an outline thereof) was either made available to, or delivery thereof was waived by, the members of each subsidiary company to be merged.

(b) Mergers Involving Foreign Companies

Mergers between BVI companies and foreign companies are only permitted under the Act if permitted by the law of the foreign jurisdiction in which one or more of the constituent companies is incorporated. The BVI constituent companies must comply with the provisions of the Act with regard to mergers, whilst any foreign company must comply with the laws of its jurisdiction. If the foreign company will be the surviving company in the merger, the Act requires that the foreign company (a) file an agreement that service of process may be effected on it in the BVI in respect of proceedings for the enforcement of any claim, debt, liability or obligation of a constituent company registered under the Act and (b) irrevocably appoint its registered agent to accept service of such proceedings. The Act also requires the surviving foreign company to enter into an agreement that it will

promptly pay dissenting members of a constituent company that is a BVI company the amount, if any, to which such members are entitled under the Act's dissenting members' rights. Such appointment and agreement must be filed with the Articles of Merger with the Registrar. A foreign surviving company must also file with the Registrar its Certificate of Merger from its jurisdiction of incorporation, or, if no such certificate is issued by the foreign authority, such evidence of the merger as the Registrar considers acceptable.

The effect of a merger with a foreign company is the same as in the case of a merger between two BVI companies as set out below, but if the surviving company is a foreign company, the effect of the merger is the same as under the Act except in so far as the laws of the other jurisdiction otherwise provide.

(c) Effect of a Merger under BVI Law

A merger takes effect on the date the Articles of Merger are registered by the Registrar (or on such later date as is specified in the Articles of Merger, which date must not be more than 30 days later). Where the surviving company is a company incorporated in a jurisdiction outside the BVI, the merger is effective as provided by the laws of that jurisdiction.

The Act specifies that as soon as the merger takes effect: (a) the surviving company in so far as is consistent with its memorandum and articles, as amended or established by the Articles of Merger, has all rights, privileges, immunities, powers, objects and purposes of each of the constituent companies; (b) the memorandum and articles of the surviving company are automatically amended to the extent, if any, that changes in its memorandum and articles are contained in the Articles of Merger; (c) assets of every description, including choses in action and the business of each of the constituent companies, immediately vest in the surviving company; and (d) the surviving company is liable for all claims, debts, liabilities and obligations of each of the constituent companies.

The Act further provides that where a merger occurs (a) no conviction, judgment, ruling, order, claim, debt, liability or obligation due or to become due, and no cause existing against a constituent company (or against any member, director, officer or agent thereof) is released or impaired by the merger; and (b) no proceedings (whether civil or criminal) by or against a constituent company (or against any member, director, officer or agent thereof) pending at the time of the merger are abated or discontinued by the merger, however (i) such proceedings may be enforced, prosecuted, settled or compromised by or against the surviving company or against the member, director, officer or agent thereof, as the case may be, or (ii) the surviving company may be substituted in the proceedings for a constituent company.

5.2 Schemes of Arrangement

A scheme of arrangement can also be used to effect a takeover of a public company. The steps are as follows:

(a) an application may be made to the court by a member of the target or the target itself (by its directors) proposing an arrangement;

(b) a majority in number representing 75% in value of the shareholders or class of shareholders, as the case may be, present and voting at the meeting must agree to the arrangement; and

(c) if the court then sanctions the arrangement, all the members or class of members, as applicable, and the company, are bound by the scheme and there are no rights to payment of fair value for the shares held by the dissenting members.

Schemes of arrangement provide flexibility in terms of structure and the dissenting shareholder provisions available for plans of arrangement do not apply.

5.3 Plans of Arrangement

Plans of arrangement are similar to schemes of arrangement, but are easier to implement as they have a lower threshold for approval.

(a) The directors of the BVI company/companies involved may approve a plan of arrangement if it is determined that the arrangement is in the best interests of the company, its creditors or its members.

(b) Upon such approval by the directors, the target must then apply to court for approval of the arrangement.

(c) The court has flexibility to, among other things, determine if notice should be given to any person, whether the approval of any person should be obtained, determine whether the dissenting rights should apply allowing dissenting shareholders to receive fair value and/or approve the plan with amendments. In practice there will often be two hearings: the first where the court sets the conditions, and the second where interested persons may appear. The Court may then approve or reject the arrangement with or without any amendments as it may direct.

(d) The directors must then confirm the plan as approved by the court and must give notice or obtain approval, if directed by the court to do so.

(e) Once these conditions are met, the directors may register the articles of arrangement at the Registry, at which point (or up to 30 days thereafter if the plan so provides) the arrangement takes effect.

An attractive feature of a plan of arrangement is that, unlike under a scheme of arrangement, the Act does not prescribe the threshold in number or value of shareholders/shares or creditors who must approve the arrangement. The plan of arrangement route enables the directors to submit to the Court a threshold for approval which they consider appropriate.

6. What information relating to a target company will be publicly available and to what extent is a target company obliged to disclose diligence related information to a potential acquirer?

Publicly available company information for companies incorporated in the BVI is available from two main sources (a) the Registry of Corporate Affairs and (b) the High Court. Information held by the Registry can be accessed via an online search which will grant access to the BVI company's memorandum and articles of association, certificate of incorporation, details of its registered agent and registered office along with the company's fee payment record and whether or not it is in good standing.

A recent amendment act that came into force in April 2016 requires companies to provide a register of directors to the Registrar however, unless they opt to do so it is not required for a BVI company to make this information publicly available. Similarly a register of public charges may also be published, however unlike a private registration, it is not mandatory for a BVI company to carry out a public registration of any charges over its assets. The private registers in relation to directors, shareholders and charges will only be released to a potential acquirer on the instruction of the target company's client of record.

A high court search will reveal any proceedings currently filed against the target company.

7. To what level of detail is due diligence customarily undertaken?

Customary due diligence will take the form of reviewing the memorandum and articles and any other public information filed with the Registrar as set out in question 6 above. The registered agent of the target company will be asked to provide copies of the target company's registers of directors, shareholders and charges. Copies of all material contracts, the minute book and financial statements are also routinely requested.

In the case of a hostile bid the amount of due diligence information will be limited to the public information available from the Registrar and any other information in the public realm.

8. What are the key decision-making organs of a target company and what approval rights do shareholders have?

The Board of Directors of the target company will be integral in consummating a merger or acquisition, whether by statutory merger, plan or scheme of arrangement, equity acquisition or asset acquisition.

In the context of a statutory merger, the directors will be required to approve the terms of the transaction. In the case of a plan or scheme of arrangement, the approval of the directors will be required. The standard position for a BVI company (other than a listed company) is that any transfer of shares is subject to the consent of the directors.

It is common for the directors of a listed company to elect to establish an independent committee of uninterested directors to consider takeover offers. Whilst this may assist from a risk-management perspective, it does not provide the same "safe harbour" or "roadmap" protection it may offer in other jurisdictions.

Member's Approval

After the directors of each constituent company have approved the Plan of Merger by resolution, the Plan of Merger needs to be authorised by a resolution of each constituent company's members. Where a constituent company has more than one class of shares outstanding and its memorandum and articles so provide (or if the Plan of Merger contains any provision that, if contained in a proposed amendment to the memorandum or articles, would entitle the class to vote on the proposed amendment as a class), the holders of each class will be entitled to vote on the Plan of Merger separately as a class.

If a meeting of members is to be held to obtain a resolution of members, then notice of the meeting, together with a copy of the Plan of Merger, must be provided to each member, whether or not he is entitled to vote on the merger.

If the written consent of members is sought, a copy of the Plan of Merger must be provided to each member,

whether or not he is entitled to consent to the Plan of Merger.

As mentioned above, in the case of a merger of a parent company with one or more subsidiary companies, shareholder approval is not required.

9. What are the duties of the directors and controlling shareholders of a target company?

BVI directors' duties have two main sources; (i) the fiduciary duties under common law, which are generally described as being those of loyalty, honesty and good faith to the company; and (ii) the Act with Section 120 of the Act codifying the requirements for a director to exercise his duties honestly, in good faith and in the best interests of the company and section 121 of the Act requiring directors to exercise their powers for a proper purpose and not act in a manner that contravenes the Act or the company's memorandum and articles of association.

As with most jurisdictions it is common practice for directors of BVI companies to be indemnified for breaches of duty and any ensuing fees, costs, claims, judgements and fines but the Act limits the instances in which such an indemnity can be provided. Section 132 of the Act requires the directors of BVI companies relying on an indemnity to have acted in the best interests of the company, honestly and in good faith. Where criminal proceedings have been brought against the director they will need to show that they had no reasonable cause to believe that their actions were dishonest.

Section 122 of the Act sets out the duty of care under the Act to be that of the reasonable director in the same circumstances taking into account, without limitation, the nature of the company, the nature of the decision and the positions of the director and the responsibilities undertaken by them.

10. Do employees/other stakeholders have any specific approval, consultation or other rights?

A dissatisfied member may dissent from a merger (unless the member will continue to hold the same or similar shares after the merger) or a consolidation. A dissenting member is entitled to payment in cash for the fair value of his shares. The value of the shares is determined without reference to the effect or impact of the proposed merger (whether positive or negative).

To initiate the dissent process, the member must object in writing to the merger or consolidation before the vote on the plan. If the merger or consolidation is not approved, then of course no further action need be taken with respect to or by the dissenter. If the merger or consolidation is approved by the other members, however, the company has 20 days give notice of this fact to each objector, and to each member who did not receive notice of the meeting. Such persons have 20 days to give to the company their written election to dissent from the merger or consolidation, provided that in the case of a merger, the 20 days starts when the Plan of Merger is delivered to the member.

Upon giving notice of his election to dissent, a member ceases to have any rights of a shareholder except the right to be paid the fair value of his shares.

Within seven days of the later of the delivery of the notice of election to dissent and the effective date of the merger or consolidation, the company must make a written offer to each dissenting shareholder to purchase his shares at a specified price that the company determines to be their fair value. The company and the member then have 30 days to agree upon the price. If the company and the member fail to agree on the price within the 30 days, then the company and they must each designate an appraiser and these two appraisers designate a third. These three appraisers shall fix the fair value of the shares as of the close of business on the day before the shareholders approved the transaction without taking into account any change in value as a result of the transaction.

There is no requirement under BVI law for any consultation with employees in relation to an offer. In the limited circumstances where the company has BVI employees, the BVI Labour Code, 2010 (Labour Code) deals with continuing employment of employees in a surviving company and provides that those offered continuing employment will carry forward their service and accrued rights.

11. To what degree is conditionality an accepted market feature on acquisitions?

Conditionality, subject to the directors of the BVI company common law fiduciary duties and complying with the terms of the Act in relation to the best interests of the company, is a generally accepted market feature on acquisitions.

12. What steps can an acquirer of a target company take to secure deal exclusivity?

Subject to directors of the BVI constituent company

(whether acquirer or target) complying with the terms of the Act and their fiduciary duties, the BVI entity may permit exclusivity, however the directors of the target company will be required to consider whether granting exclusivity will be in the best interests of the Company or whether they should be holding out for a better offer or creating more competitive tension.

13. What other deal protection and costs coverage mechanisms are most frequently used by acquirers?

As with exclusivity discussed at question 13 above, subject to complying with their fiduciary and other duties under the act, cost coverage mechanisms such as break fees can be entered into between the acquirer and the target's board of directors. Similarly no shops, go shops and lock ups are all permitted however the directors of the target company will need to consider their fiduciary duties and duties under the act and the application of such protection and cost coverage mechanisms will be highly deal specific.

14. Which forms of consideration are most commonly used?

Under BVI law parties are generally free to contract as they wish with regards to terms, price and nature of consideration. However, if the constituent BVI company is a regulated fund under SIBA consideration for issued shares must be cash unless the Commission has consented in writing or where permitted by the regulatory code issued by the Commission.

15. At what ownership levels by an acquirer is public disclosure required (whether acquiring a target company as a whole or a minority stake)?

There is no BVI regulation relating to the documentary requirements for public disclosure regarding ownership levels. Once applying for listings on a stock exchange BVI companies may amend their memorandum and articles of association so that their constitutional documents require disclosure of any stake building or acquisitions of shares above certain thresholds.

16. At what stage of negotiation is public disclosure required or customary?

See above, there is no BVI law requirement relating to documentary requirements for public disclosure.

Whether such disclosure is customary will be driven by non-BVI related factors.

17. Is there any maximum time period for negotiations or due diligence?

There is no BVI law requirement in respect of a maximum period for negotiations or due diligence.

18. Are there any circumstances where a minimum price may be set for the shares in a target company?

There is no limit on the value of a share that has already been issued by a target company, to the extent it is necessary to issue further shares in a company the price paid must not be below the par value of the share as stated in the memorandum and articles of association.

19. Is it possible for target companies to provide financial assistance?

Yes. There are no financial assistance limitations applicable under BVI law, again subject to fiduciary duties and acting in the company's best interests in accordance with the Act.

20. Which governing law is customarily used on acquisitions?

It is typical for BVI law to govern a Plan of Merger and Articles of Merger whilst the law of the operative legal agreements in relation to the merger will usually be governed by BVI, New York or English law or by the law of the purchaser's jurisdiction.

21. What public-facing documentation must a buyer produce in connection with the acquisition of a listed company?

There are no BVI laws or regulations requiring disclosure of discussions of acquisition decisions. The listing rules of the relevant stock exchange on which a BVI company may be listed will be relevant for such public documentary disclosure requirements.

22. What formalities are required in order to document a transfer of shares, including any local transfer taxes or duties?

There are no transfer taxes or duties in the BVI, unless

the merger relates to a company which holds real estate in the BVI. The merger plan and corporate authorisations will deal with all necessary transfer formalities. The transfer of shares outside of a merger is dealt with by a share transfer form and requires the company's registered agent to update the register of members following the transfer.

23. Are hostile acquisitions a common feature?

As a result of the limited amount of due diligence available on BVI companies and the requirement that the boards of both constituent companies must consent, hostile acquisitions, whilst permitted, are not a common feature in the BVI.

24. What protections do directors of a target company have against a hostile approach?

Under the Act there are no applicable stakebuilding rules, however, as any transfer of shares in any BVI company is subject to the consent of the directors, the target company will be able to resist a hostile approach provided they are complying with their duties to act in the best interests of the Company. To the extent that the target's constitutional documents do not include anti-takeover provisions or "poison pill" type provisions, such as staggered boards or limited director removal rights, the directors of the target will be limited in their ability to resist a change of control by complying with their fiduciary duties to the company. The directors will be obliged to consider the terms of the acquisition in good faith and act bona fide in the best interests of the company as a whole in relation to any acquisition proposal.

25. Are there circumstances where a buyer may have to make a mandatory or compulsory offer for a target company?

The BVI does not have any laws or regulations requiring an acquirer to make a mandatory or compulsory offer for a target company.

26. If an acquirer does not obtain full control of a target company, what rights do minority shareholders enjoy?

Minority shareholders have limited rights in the British Virgin Islands which primarily relate to; (i) information rights; (ii) the right to bring legal action – personal, representative and derivative action; and (iii) just and equitable winding up.

Unfair Prejudice

Under the Act, a Shareholder of a target company may apply to the court if it considers that the affairs of the company have been, are being or are likely to be, conducted in a manner which is, or any act or acts of the company have been, or are likely to be, oppressive, unfairly discriminatory or unfairly prejudicial to the shareholder in its capacity as a shareholder.

If the court agrees with the shareholder, and considers it to be just and equitable that an order be made in relation to the particular conduct, it may make any order that it thinks fit, including an order requiring the company or any other person to acquire the shareholder's shares or to pay compensation to the shareholder; regulating the future conduct of the company's affairs; amending the memorandum or articles of the company; appointing a receiver or liquidator of the company; directing the rectification of the records of the company; and/or setting aside any decision made or action taken by the company or its directors in breach of the Act or the company's memorandum or articles.

Derivative Actions

A derivative action refers to an action initiated by a shareholder to enforce a wrong done to the company, the action being taken in the company's name rather than the shareholder's name. Accordingly, the shareholder obtains no direct benefit if judgment is given in the company's favour.

A derivative action is typically used where no action would otherwise be taken by the company because the wrongdoers are also the company's decision-makers. A minority shareholder may need to resort to a derivative action if, for example, directors of the company have breached their fiduciary duties to the company, if the directors are also the majority shareholders and can control the vote at a general meeting, or because the directors may be able to prevent (or at least delay) a general meeting being convened to vote on whether the company should sue the directors.

If the shareholder can bring himself within one of the exceptions to the rule in Foss v Harbottle, he may be able to bring a derivative action, whereby he may bring an action in his own name but on behalf of the company (for example, where the alleged act is beyond the capacity of the company or illegal (i.e. ultra vires), constitutes a "fraud on the minority" or infringes the

personal rights of an individual shareholder).

Winding Up on Just and Equitable Grounds

Under section 162 of the Insolvency Act 2003 (Insolvency Act), one of the grounds upon which the court can appoint a liquidator to wind up a company is that "the Court is of the opinion that it is just and equitable that a liquidator should be appointed".

The Insolvency Act provides that the court must not appoint a liquidator on the basis of just and equitable grounds if it is of the opinion that some other remedy is available to the applicant, and the applicant is acting unreasonably in seeking to have a liquidator appointed instead of pursuing that other remedy. With the unfair prejudice remedy and derivative action available to shareholders, the winding up order can be considered as a last resort.

27. Is a mechanism available to compulsorily acquire minority stakes?

BVI law provides for squeeze out provisions under section 176 of the Act in certain circumstances. Where an individual shareholder or shareholders acting in concert hold 90% of the votes of the issued shares in the target entitled to vote, section 176 provides that such shareholder(s) can instruct the target to redeem the remaining 10%, and the target shall so redeem the shares on the terms given by the majority shareholder(s). The majority shareholder(s) can use this power at any time and it applies irrespective of whether the shares are, by their terms, redeemable.

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