

A guide to redemption of shares under BVI law

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Ogier in the British Virgin Islands regularly advises on high profile transactions involving the redemption of BVI company shares under the BVI Business Companies Act, 2004 (as amended).

In this article, Corporate experts Michael Killourhy and Odane Lennon summarise some of the key aspects of BVI law on the purchase or redemption of a company's own shares.

What is a redemption under BVI law?

Under the BVI Business Companies Act, 2004 (as amended) (the **Act**), a BVI company may acquire its own shares by purchase or redemption for consideration or simple surrender for nil consideration. Once acquired, those shares may then either be cancelled or held in treasury.

In what ways can BVI shares be redeemed?

The main ways in which BVI shares may be repurchased or redeemed are through:

- a BVI company exercising its right to redeem its own shares under sections 60 and 61 of the Act
- a holder of BVI shares exercising its right to have its shares redeemed under section 62 of the Act; or
- where sections 60, 61 and 62 have been disapplied (expressly or impliedly), an alternative process as set out in that BVI company's memorandum and articles of association (the **M&As**) may be followed^[1].

A company may also receive the surrender of its own fully paid share for nil consideration with the written consent or direction of the relevant shareholder under section 59(1A) of the Act.

Share surrender is a simple procedure which, for the most part, falls outside the statutory rules and restrictions described below in relation to repurchase.

Statutory redemption process (at the option of the company)

The redemption or repurchase process under section 60 of the Act permits an offer to be made by the directors of a company, either to all the shareholders or to one or more shareholders, to acquire their shares. If an offer is made to all the shareholders it must be one which, if accepted, would leave the relative voting and distribution rights of all shareholders unaffected. The offer must also give each shareholder a reasonable opportunity to accept.

In the case of such an offer, however, section 60(2) also allows the company to acquire additional shares from a shareholder to the extent that another shareholder either does not accept the offer or accepts the offer only in part.

If the directors wish to make an offer to one or more shareholders - but not the whole body - then section 60 states that such an offer can only be made either (a) if all the shareholders have consented in writing or (b) if the M&As permit it and the offer is made in accordance with section 61. Where the latter option applies, then the offer cannot be made unless the directors have first passed a resolution.

The directors' resolution must:

- state that in their opinion the acquisition is for the benefit of the remaining shareholders
- ensure that the terms of the offer and the consideration offered for the shares are fair and reasonable to the company and the remaining shareholders
- set out the reasons for the directors' opinion

Any shareholder may also apply to the court for an order to restrain the proposed acquisition on the grounds that it is not in the best interests of the remaining shareholders, or that the terms of the offer and the consideration are not fair and reasonable to the company or the remaining shareholders.

Statutory redemption process (at the option of the shareholder)

While sections 60 and 61 of the Act apply to situations where a purchase or redemption is being made at the option of the company, section 62 applies where shares are issued as redeemable under their terms - either at the option of the shareholder or on a specified date. Where shares are redeemable at the option of the shareholder, redemption is initiated by the shareholder

giving the company notice of its intention to redeem the shares. If the shareholder gives such a notice, then the company must redeem them on the date specified in the notice or, if no date is specified, then on the date the notice is received. If shares are redeemable on a specified date, then the company must redeem them on that date.

Disapplication of statutory process rules

The rules set out at sections 60-62 of the Act may be disapplied in favour of a simplified or bespoke alternative process set out in the company's M&A - as was the case in relation to the recent transaction. Companies are afforded considerable flexibility as to any alternative process they may adopt. It is not uncommon for a BVI company's M&As to provide for the redemption of BVI company shares subject only to the consent of the holder and compliance with the statutory solvency test in relation to distributions.

Is shareholder consent required for redemption?

Even where the statutory procedure has been disapplied, a BVI company's M&As will usually provide that any redemption or purchase of own shares is subject to the consent of the holder of those shares.

The Act (section 59(3)) also provides that in all cases the consent of the shareholder is required where that shareholder's shares are being redeemed - unless the company's M&As permit the company to redeem those shares without consent.

Distribution and solvency test

Under the Act^[2], the redemption by a BVI company of its shares constitutes a distribution under section 57 except where the company:

- a. redeems the shares at the option of the shareholder or on a specified date in accordance with section 62
- b. redeems the shares pursuant to a right of the shareholder to have the shares redeemed or to have them exchanged for cash or other property of the company
- c. redeems the shares under a squeeze-out under sections 176 -179
- d. acquires its own fully paid shares by way of surrender for nil consideration pursuant to section 59(1A)

Given the above - as with any distribution made by a BVI company - unless the redemption, purchase or acquisition is one referred to at (a) through (d) above, no shares may be redeemed or acquired by a BVI company unless the directors pass a resolution. stating that they are

satisfied, on reasonable grounds, that that BVI company will, immediately after the redemption, satisfy the solvency test.

The Act, under section 56, states a BVI company satisfies the solvency test if:

- the value of the Company's assets exceeds its liabilities
- the company is able to pay its debts as they fall due

Recovery of distributions made in circumstances where solvency test not satisfied

A distribution made to a shareholder in circumstances where the solvency test was not satisfied may be recovered from the shareholder unless:

- the shareholder received the distribution in good faith and without knowledge of the BVI company's failure to satisfy the solvency test
- the shareholder has altered his or her position in reliance on the validity of the distribution
- it would be unfair to require payment in full or at all^[3]

If a director:

- after a distribution has been authorised but before it is made, ceases to be satisfied on reasonable grounds that the company would satisfy the solvency test immediately after the distribution is made
- fails to take reasonable steps to prevent the distribution being made

The director is personally liable^[4] to repay to the company any part of the distribution that is not recovered from the shareholder^[5].

The above would apply equally to a redemption or acquisition made in similar circumstances.

Further questions

Please note that the above does not purport to be an exhaustive or comprehensive guide to redemptions or purchases of own shares by a BVI company. We would be delighted to discuss any aspects of the process in greater detail should you wish to contact us.

^[1] See section 59(1) of the Act.

^[2] See section 63.

[3] See section 58(1) of the Act.

[4] Note that this will only happen if a distribution is deemed not to have been authorised under section 57(3) of the Act.

[5] See Section 58(2) of the Act.

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