Ogier

Sales and acquisitions of BVI business companies

Insights - 12/10/2020

With the continued popularity of British Virgin Islands ("BVI") companies as a business entity worldwide, it is increasingly common that these companies become the subject matter of substantial sales and acquisitions. This briefing seeks to identify some of the structuring options for such a transaction, and the preparatory steps and other issues that may be of relevance.

Due diligence and BVI regulation

Any purchaser wishing to acquire a BVI company (or a group containing BVI companies) will naturally want to undertake appropriate due diligence to identify any potential risks or defects affecting the target company.

In the BVI, this will involve undertaking a company search at the Registry of Corporate Affairs to ensure the company is in good standing, and to obtain a copy of its memorandum and articles of association, which should always be reviewed in detail to uncover any restrictions on sales, or third party rights, such as a right of first refusal on any transfer. A company search will also reveal any charges publicly registered against the company, which will be of particular relevance if the deal is to be structured as an asset sale.

It should be noted that (except in certain circumstances) a BVI company search will not reveal the directors and shareholders of the company. For this reason it is customary to also obtain a Registered Agent's Certificate (also sometimes called a Certificate of Incumbency) from the registered agent of the company which will contain certified copies of the register of directors and register of members. As the information contained in this Certificate is not on the public record, it is only released with the consent of the company in question, so if the acquisition is not consensual it may not be forthcoming.

Bearing in mind the limits of the information available via public search, it is advisable to also prepare a full due diligence questionnaire for the target and/or its shareholders to complete, to give further information on the financial and commercial position of the company.

One other particular point to note is that if the company is one that falls within the BVI's regulatory regime, then it is likely that the consent of the BVI Financial Services Commission will be required before any change in ownership can take place. Regulated companies in the BVI include mutual funds, those engaging in investment business, insurers, banks, trust companies and financing and money services providers. Extra caution should be taken in transactions involving regulated companies, as failure to comply with the relevant legislation could result in the commission of a criminal offence.

Listed companies

For those BVI companies with London listings, the UK's City Code on Takeovers and Mergers (the "City Code") will not apply and as a consequence, the regulation of a takeover bid for a BVI company will have three sources, common law, in statute under the BVI Business Companies Act 2004 (the "Act") and in the company's memorandum and articles of association.

Where a BVI company is looking for liquidity and seeks funding through access to the public markets in London, it is not uncommon to incorporate into the company's articles of association certain provisions of the City Code (particularly dealing with mandatory offers akin to the provisions of Rule 9 of the City Code). However, there remain conflicting opinions as to whether this is the correct approach. A number of English lawyers still believe that it is unnecessary to restrict the flexibility of a BVI company in this way. There is, of course, no "one size fits all" approach in this area and ultimately the approach taken will be investor driven and will depend on the investors being targeted. The key in this is to ensure a balance is struck and that the end product is both sufficiently familiar and palatable to investors, whilst keeping an eye on the exit/takeover scenario.

Structuring options

Flexibility of corporate vehicle and light regulation have long been attractive features of BVI company law, leading to the increased use of BVI vehicles in corporate structures. In considering a bid for a BVI company, that flexibility is also apparent as there are a number of available structuring options that may be utilised, and are equally applicable whether the target company is a listed or not.

Offer for all of the issued shares

A bid for a BVI company will often be structured as an offer for all the shares in the target company.
On a successful bid, having acquired 90 percent or more of the target's shares, a bidder will then want to focus its attention on the "squeeze out" mechanics provided for in the Act. The BVI law equivalent to the English law compulsory acquisition of shares provisions is contained within

Section 176 of the Act. This enables the remaining minority in a takeover situation to be swept up. One distinction between the English law regime and the BVI law regime in this respect is that, rather than the squeeze out being structured as an acquisition of the remaining shares by the bidder, under BVI law, the squeeze out is structured as a redemption of the minority shares by the target company at the instigation of the bidder.

Significantly for a bidder, this ability to squeeze out minority shareholders can be exercised at anytime and is not limited to a specified period following a successful takeover offer. Therefore, there is no compulsion for a successful bidder to implement a "squeeze out" of minority shares following a successful bid. A point of note in this regard is that unlike the rights of minority shareholders under English law, minority shareholders in BVI companies have no specific statutory rights (save for the right to bring an action for unfair prejudice, which is a statutory right available to any shareholder). Consequently, a successful bidder, having acquired a majority stake in target company, can opt to carry the minority shareholders if it so chooses.

Under the BVI law equivalent to the English law compulsory acquisition of shares provisions, Section 176(1) provides a mechanic which, subject to the target company's memorandum and articles of association, enables shareholders holding 90% of the votes of the outstanding shares to give a written instruction to the company directing it to redeem the shares held by the remaining shareholders. Such a redemption is funded either from the target company's own resources or, more likely, by the bidder via the target. Upon receipt of the written instruction in these circumstances, the company is required to:

- redeem the shares, irrespective of whether or not the shares are by their terms redeemable and
- give written notice to each member whose shares are to be redeemed stating the redemption price and the manner in which the redemption is to be effected.

One important element to be aware of when considering a squeeze out is that the Section 179 of the Act provides a mechanic for minority shareholders to dissent from a redemption of their shares under Section 176.

Significantly, these dissenting rights do not give a minority shareholder the right to prevent the redemption happening (and so prevent their being squeezed out), rather, the dissenting rights give the shareholder the opportunity to dissent to the price being offered for their shares. With this in mind, where a "fair value" for the shares can not be agreed between the company and the dissenting shareholder, Section 179 of the Act also provides for an appraisal procedure to enable the fair value to be determined by independent appraisers appointed by each of the company, the dissenting shareholder and a third appraiser appointed jointly. Once determined, this fair value needs to be paid in cash (which might be significant for a bidder on non cash offers).

As a drafting note, the offer document used in a bid for a BVI company should include detail on the squeeze out provisions and indeed the rights of dissenting shareholders to receive fair value for their shares. The Act is clear that the entitlement of a dissenting shareholder is to be paid cash, as opposed to other property or payment in kind.

Scheme of arrangement

As with takeover offers for English companies, a bidder for a BVI company can structure a takeover offer by way of a scheme of arrangement. The BVI company law equivalent to the English company law scheme of arrangement regime is contained within Section 179A of the Act.

A BVI scheme requires the approval of a majority in number representing 75% by value of the target company's shareholders (or each relevant class thereof) present and voting on the arrangement at a meeting convened by the BVI Court under Section 179 A (1) of the Act. Once the outcome of the Court convened meeting is sanctioned by the BVI Court, the decision is binding on all shareholders. The dissent rights provided for in Section 179 and described above are not available in this situation.

Plan of arrangement

In addition to schemes of arrangement, the Act also provides for plans of arrangements. There is a clear overlap between the two concepts in that they both permit various corporate transactions to be court sanctioned. There are, however, some significant differences which are worthy of comment. A plan of arrangement can be instigated by the directors making an application to the Court for its approval. It is usual for the Court approval to require shareholder and creditor approval and to impose certain advertising requirements. Shareholder approval in this instance will simply be by way of resolution of the shareholders - typically a simple majority - and therefore a lower threshold than under a scheme.

The provisions for a plan of arrangement do permit the dissent rights provided for in Section 179 (and detailed above) to be utilised and so, despite clearing the relevant shareholder approval threshold to satisfy the Court, it may still be necessary to cash out those who disapprove. Dissenters cannot, however, prevent the arrangement from happening.

Statutory mergers and consolidations

Two company law concepts frequently utilised in offshore jurisdictions, but which are alien to English law, are the uses of the statutory merger regime or statutory consolidation. Both of these mechanics are provided for under the Act.

Under the merger provisions, two or more BVI companies (or a BVI company and a foreign company provided that the laws of the jurisdiction of the foreign company permit a statutory merger) can merge in accordance with a procedural process involving approval by each respective companies' directors and shareholders of a plan of merger and the filing of this plan of merger, together with articles of merger, with the Registrar of Corporate Affairs in the BVI. The fundamental difference between a merger and a consolidation is that with a merger, the two constituent companies merger together with one company surviving, whilst, with a consolidation, the two constituent companies come together to form a new entity - the consolidated entity.

The legal effect of a statutory merger or consolidation is that with effect from the effective date of the merger or consolidation, the assets and liabilities of each constituent company automatically vest in the surviving company or the consolidated company. The non-surviving company in a merger and both constituent companies in a consolidation are automatically struck off the register of companies in the BVI.

A virtue of either process is that the threshold for shareholder approval of the transaction will, subject to the company's memorandum and articles of association, be a simple majority. As with arrangements, the procedure available in Section 179 of the Act for dissenting shareholders to receive "fair value" for their shares also applies where a statutory mergers or consolidation is used.

Disposition of assets

A further option available as an alternative to structuring a deal as a takeover of the target company, would be for the bidder to agree to purchase the pertinent assets of the target company.

However, it should be noted that if the assets sold represented more than 50% in value of the assets of the target company, then Section 175 of the Act would apply (unless that section has been expressly excluded in the target company's memorandum and articles of association), such that the sale would require the approval of shareholder resolution (a simple majority unless the memorandum and articles of association provide for a higher threshold). As before, the procedure available to dissenting shareholders to receive "fair value" for their shares also applies in a disposition of assets under Section 175 of the Act.

When faced with the acquisition of an offshore target, it is essential for advisors to consider all possible structuring options, appreciating that the offshore jurisdictions can often provide a flexible and appealing solution not always available in the onshore world.

About Ogier

Ogier is a professional services firm with the knowledge and expertise to handle the most demanding and complex transactions and provide expert, efficient and cost-effective services to all our clients. We regularly win awards for the quality of our client service, our work and our people.

Disclaimer

Meet the Author

Michael Killourhy

Partner

British Virgin Islands

E: michael.killourhy@ogier.com

T: +1 284 852 7309

Key Contacts

Simon Schilder

Partner

British Virgin Islands

E: simon.schilder@ogier.com

T: +44 1534 514298

Nathan Powell

Partner □□□

Hong Kong

E: nathan.powell@ogier.com

T: +852 3656 6054

Related Services

Corporate

Legal