

Corporate Restructuring Involving BVI Companies

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Over the last five years, the British Virgin Islands (BVI) has introduced new provisions that will be of particular interest to corporate groups worldwide that contain one or more of the hundreds of thousands of BVI companies in existence.

The BVI Business Companies Act 2004 (BCA) and Insolvency Act 2003 (IA) have strengthened the restructuring laws of the BVI by introducing new provisions in relation to schemes of arrangement and creditors' voluntary arrangements, as well as significantly improving existing legislation relating to mergers, squeeze-outs and capital restructurings.

This article will provide some restructuring options to consider and their potential benefits.

Mergers and Consolidations

Mergers are where one of the merging companies survives, while consolidations are where the two constituent companies consolidate into a new company.

The BCA allows mergers and consolidations between two or more BVI companies and between BVI companies and foreign companies, the latter if the relevant foreign law permits. A merger between a parent and a subsidiary is also possible.

The provisions for effecting mergers and consolidations are very flexible. 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.

Usefully, shares of the same class can be treated differently; so, for example, some shareholders of one of the companies could receive shares in the surviving or consolidated company, while others holding shares of the same class could have their shares bought for cash. This enables dissenting or disaffected shareholders, or those who simply wish to exit as part of the restructuring, to easily sell their shares while retaining the shareholding structure for the continuing shareholders.

The position of creditors is not affected. The company that survives the merger, or the newly consolidated company, not only takes on the rights, powers, immunities and all the business and assets of all of the constituent companies, but also becomes liable for all of their debts and obligations including any judgment or cause of action against the constituent companies. Proceedings pending against the constituent companies at the time of the merger or consolidation are not discontinued, but may be enforced, prosecuted, settled or compromised by or against the surviving, or consolidated, company, and the surviving, or

consolidated, company may be substituted in the proceedings.

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

Arrangements

Reasons for using arrangements over other types of corporate restructuring may include the necessity to obtain the consent of creditors, or to obtain court approval in order to bind all members and creditors, or for exemptions from the application of foreign legislation, for example under the U.S. Securities Act 1933.

The BCA has two forms of court-supervised arrangements – plans of arrangement and schemes of arrangement. Both can achieve a wide range of corporate restructurings by way of court approval.

Plans of Arrangement

The BCA's wide definition of 'arrangement' includes reorganisations, mergers, consolidations, separations of businesses, dispositions of assets or businesses, dispositions or exchanges of shares or securities, amendments to memorandum and articles of association, dissolutions and, importantly, any combination of these, thus enabling the implementation of a U.S.-style plan of arrangement.

There is a prescribed procedure to follow and the directors of the company must act in the best interests of the company or its creditors or members. Once the company has approved the plan, an application is made to the BVI court for an order approving the arrangement (the court has power to make interim orders imposing conditions regarding the plan). The court will issue directions regarding who should be notified and whose approval must be obtained and

whether stakeholders should have the right to exercise their statutory right of dissent. Once the court approves the arrangement, the appropriate documentary filings can be made with the BVI Registrar of Corporate Affairs.

Schemes of Arrangement

The previous BVI statutory regime lacked provisions relating to schemes of arrangement, which made it hard for BVI companies to implement certain types of restructuring. This was particularly troublesome for those companies listed on stock exchanges around the world because it prevented them from using a restructuring tool that was available under the laws of many other jurisdictions, and which can allow for privatisation in a simple and cost-effective manner.

The BCA has introduced schemes of arrangement laws similar to those found in most onshore and offshore jurisdictions. The scheme has to be approved by a high proportion of the affected creditors or shareholders, there must be total transparency throughout the procedure, and the court will only approve 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 approved by the court and, importantly for the successful implementation of the scheme; there are no statutory rights for dissenters.

With an increase in restructurings almost certain to follow the current global economic downturn, BVI companies -- especially those listed entities looking to privatise -- shareholders and creditors alike now have the opportunity to use schemes of arrangement to achieve a variety of restructuring objectives.

Squeeze-outs

Shareholders of a BVI company holding 90 per cent of its voting shares may give an instruction in writing to the company to redeem the shares held by the remaining minority of shareholders. Once a company has received such a direction, it has no choice but to redeem the minority shares, even if the shares in

question are not redeemable pursuant to their terms of issue. A squeeze-out can be undertaken at any time and for any reason, which makes it a more useful means of restructuring than in some other jurisdictions where it has to be tied to another transaction such as a takeover.

Dissenting Shareholders

Dissenting shareholders who hold a simple majority of the votes are able to prevent the transaction proceeding. However, if a majority voted in favour and the proposed action was within the powers of the company, and not otherwise unlawful, then the minority shareholders are bound by the majority -- and their only statutory remedy is the entitlement to payment of fair value for their shares. If agreement cannot be reached regarding fair value, the BCA provides an appraisal mechanism for resolving the matter.

The existence of appraisal rights for mergers, consolidations and squeeze-outs could make these restructuring methods unattractive in certain circumstances. For example, where a listed BVI company is looking to privatise, it may not want to use a squeeze-out given the potentially large number of shareholders involved and the possibility of being confronted with several dissenting shareholder claims. In those circumstances, a company may instead prefer a scheme of arrangement, where minority shareholders are bound by the views of the majority regarding the value of their shares and are simply paid out according to such valuation.

Creditors' Voluntary Arrangements (CVAs)

Another important weapon in the armoury of BVI restructuring laws is the use of CVAs under the IA. An insolvent company may use a CVA in circumstances

where it wishes to bind all unsecured creditors (subject to their consent) to an arrangement by which the company's indebtedness to them is compromised on agreed terms. The main benefit of a CVA is that it usually results in higher returns to unsecured creditors than they otherwise would have received had the insolvent company gone into liquidation in the usual way.

Capital Restructurings

BVI companies seeking to implement capital restructurings are faced with very few limitations. Unlike in many other jurisdictions, capital reductions do not require super majority shareholder approval, nor do they require any court involvement. The procedure can be as simple as the passing of directors' resolutions approving the reduction that confirm that the company will be solvent from the moment the reduction takes effect. Similarly, there is no issue regarding the source of funds for share redemptions and repurchases, which can be paid for with company funds, provided that the company is solvent immediately after the redemption/repurchase occurs.

Conclusion

The BCA and the IA together include a myriad of options for the restructuring of BVI companies that can be easily understood and used by company owners. Some are very similar to those available in other jurisdictions, and provide owners of BVI companies with maximum flexibility and choice in restructuring their BVI investments. With the worldwide economic downturn still with us for now, such legislation can be a most effective tool for those groups looking to reorganise, revitalise and prepare for the better times that lie ahead.

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