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## An arrangement for any occasion - how plans of arrangement are being used to restructure in the BVI

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*A plan of arrangement under the Business Companies Act 2004 in the BVI is increasingly being used by corporates to restructure with the aid of the courts. Harneys' Jacqueline Daley-Aspinall (pictured first) and Keisha Durham (pictured second) explain*

The macro-economic conditions in the period since 2008 and the attendant liquidity crisis have left many companies trading in increasingly deep and treacherous financial waters.

Such companies, particularly those with operations or substantial holdings in mature markets directly affected by the reduced availability of credit, have found themselves searching for time and cost-effective mechanisms to address illiquid assets, mounting debt, increasing costs and declining revenue while seeking to capitalise on opportunities, especially in emerging markets, with a view to increased productivity and higher profits.



The British Virgin Islands (BVI), having been home to almost one million registered companies (thereby accounting for at least 41% of the offshore companies in the world), is unsurprisingly the domicile of choice for many multinational corporations when considering where to incorporate a subsidiary or a holding company.

The global challenges faced by multinationals have led them to seek out effective solutions and, against this backdrop, corporate restructuring, involving mergers, consolidations, de-mergers, acquisitions and a medley of other options, are being carefully scrutinised and increasingly utilised. The BVI Business Companies Act 2004 (the BVIBCA), which has been heralded for its flexibility and utility, provides a number of options in this context. One such option is a plan of arrangement.

### **Arrangements under the BVIBCA**

Section 177 of the BVIBCA provides that a plan of arrangement may be utilised to affect any one or more of the following corporate actions:

- an amendment to the memorandum or articles of association;
- a reorganisation or reconstruction of a company;
- a merger or consolidation of one or more companies that are registered under the BVIBCA with one or more other companies, if the surviving company or the consolidated company is a company incorporated under this Act;
- the separation of two or more businesses carried on by a company;
- any sale, transfer, exchange or other disposition of any part of the assets or business of a company to any person in exchange for shares, debt obligations or other securities of that other person, or money or other assets, or a combination thereof;
- the sale, transfer, exchange or other disposition of shares, debt obligations or other securities in a company;
- the dissolution of a company; and
- any combination of the things specified above.

The breadth of this list and the many outcomes that the process may yield underscore the general flexibility of the legislation.

### **The procedure**

As an arrangement is a combination of corporate solutions and court oversight, effecting the arrangement under BVI law can be looked at as a multistep process. The exact steps to be taken would vary on a case-by-case basis.

First, the directors of the BVI company must determine which proposed corporate steps are in the best interest of the company, its creditors or its members and must thereafter approve a plan of arrangement that sets out details of the proposed arrangement. An application is then made by the company to the court for approval of the proposed arrangement.



The second step involves a formal hearing or hearings at which the court may make an interim or final order giving directions which may require that certain approvals be obtained (typically shareholder approval) and it may also require that certain notices be given or advertisements be made, typically for the benefit of members and other interested parties, such as creditors.

A further step, assuming that an interim order was granted, is the final hearing at which interested parties may appear and be heard. At the final hearing, the court will reject or approve the plan of arrangement with or without amendments.

Note that the directors, if they wish to execute the plan, must confirm the same and take the steps necessary in accordance with the court's interim or final order.

Provided that the court approves the plan of arrangement, there will be a final step in which articles of arrangement (which attach the plan of arrangement) must be executed by the BVI company and submitted to the BVI Registrar of Corporate Affairs. Upon registration of the articles of arrangement, the Registrar will issue a certificate of arrangement certifying the arrangement has been effected.

### **Timing**

The overall timeframe for effecting a plan of arrangement varies based on the directions given by the court at the initial hearing.

It is important to note that legislation gives the court a wide discretion so that it may determine, among other things:

- what notice, if any, of the proposed arrangement needs to be sent and to whom such notices should be sent;
- whether approval of the arrangement needs to be obtained and, if so, from whom; and
- whether shareholders, creditors or other security holders may dissent from the arrangement.

The nature of the given transaction, the nature of the approvals that need to be obtained and the notice periods in connection with those approvals will dictate the timing for completing the process.

Clearly, where the court may be persuaded to waive the requirement for notice or reduce the timeframe for giving a notice then the process will be shortened.

Also, it should be noted that the BVI courts and registries are willing to act with speed and efficiency in scheduling court dates if a particular urgency can be demonstrated.

The plan of arrangement will only be effective when the articles of arrangement are filed with the BVI Registrar of Corporate Affairs. The effective date may either be the date of the filing or such later date, not exceeding 30 days after the filing date, as stipulated in the articles of arrangement.

### **Potential benefits of an arrangement**

Although the BVIBCA allows a company to engage in many of the activities permitted by the plan of arrangement without the courts' intervention, in many instances having a company's actions 'blessed' by a recognised court of law has undeniable advantages. This has the effect of essentially precluding an accusation that the arrangement is not fair.

The ability to combine several corporate actions, to effect a de-merger, to shorten the timeframes needed to send notices or to avoid sending notices and the prospect of managing dissenters rights are also quite beneficial.



In addition, although a BVI company must be involved in the process, non-BVI entities may also be involved in the plan.

While the attractiveness of utilising a plan of arrangement will depend on the particular circumstances, the flexibility of the BVIBCA and the finality and binding nature of the court order make this restructuring tool worthy of careful consideration.

## **Conclusion**

Given Harneys' recent involvement in advising on and effecting the first plan of arrangement under the BVIBCA, it has certainly become evident that this option is worth careful consideration, as it can be usefully employed in a number of scenarios for the benefit and increased profitability of BVI companies and, ultimately, their shareholders.

It pays to plan ahead, and where companies can examine their existing structure with the aim of increasing productivity and competitiveness, then a plan of arrangement may just be the tool they should be using.

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