HARNEYS
British Virgin Islands

TAKEOVERS and CORPORATE RECONSTRUCTIONS – BRITISH VIRGIN ISLANDS

A COMPARISON OF PLANS OF ARRANGEMENT, MERGERS, CONSOLIDATIONS, SCHEMES OF ARRANGEMENT AND THE "SQUEEZE OUT" UNDER THE BVI BUSINESS COMPANIES ACT, 2004 (as amended) (the "Act")

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	PLAN OF ARRANGEMENT	MERGER	CONSOLIDATION	SCHEME OF ARRANGEMENT	"SQUEEZE OUT"
Defined Terms and their meaning	"Arrangement" means (a) an amendment to the memorandum or articles; (b) a reorganisation or reconstruction of a company; (c) a merger or consolidation of one or more companies that are companies registered under the Act with one or more other companies, if the surviving company or the consolidated company is a company incorporated under the Act; (d) a separation of two or more businesses carried on by a company;	"Merger" means the merging of two or more constituent companies into one of the constituent companies; "Parent company" means a company that owns at least ninety per cent of the outstanding shares of each class of shares in another company; "Subsidiary company" means a company at least ninety per cent of whose outstanding shares of each class of shares are owned by another company; "Surviving company" means the	"Consolidation" means the consolidating of two or more constituent companies into a new company; "Consolidated company" means the new company that results from the consolidation of two or more constituent companies; "Constituent company" means an existing company that is participating in a merger or consolidation with one or more other existing companies;	"Arrangement" includes a reorganisation of the company's share capital by the consolidation of shares of different classes or by the division of shares into shares of different classes, or by both of those methods. Note: Under BVI law a scheme of arrangement is a court approved "compromise or arrangement proposed between a company and its creditors, or any class of them, or between the company and its members, or any	There are no defined terms *per se*, however a compulsory redemption of minority shares occurs when members of a BVI company who hold 90% of the votes of the issued shares (that are entitled to vote); and members who hold 90% of the votes of the issued shares of each class of shares (that are entitled to vote) give a written instruction to the BVI company directing it to redeem the minority shares.

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	(e) 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; (f) any sale, transfer, exchange or other disposition of shares, debt obligations or other securities in a company held by the holders thereof for shares, debt obligations or other securities in the company or money or other property, or a combination thereof;	constituent company into which one or more other constituent companies are merged. "Constituent company" means an existing company that is participating in a merger or consolidation with one or more other existing companies		class of them".	

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	(g) a dissolution of a company; and (h) any combination of any of the things specified in paragraphs (a) to (g).				
Procedural Steps and Approvals	1. The directors of the company must determine that the proposed arrangement is in the best interests of the company or the creditors or members thereof. 2. The directors approve a plan of arrangement that contains details of the arrangement. 3. Upon approval of the plan of arrangement by the directors, the company	1. The directors of each constituent company participating in the merger must by a resolution of directors (one would check the memorandum and articles of the constituent company to establish the required majority for a valid resolution) approve a written Plan of Merger containing the following:	1. The directors of each constituent company participating in the consolidation must by a resolution of directors (one would check the memorandum and articles of the constituent company to establish the required majority for a valid resolution) approve a written Plan of Consolidation containing the following:	1. Announcement of the takeover. This will refer to the fact that the acquisition will be by way of a Scheme of Arrangement. 2. Application to the court. The first hearing of the claim form seeking a court order to convene and hold a meeting of its members for the purposes of considering and approving the scheme, seeking	In order to force a redemption of minority shares under s.176 of the the Act, the procedure we would recommend is set out below. All references to section numbers are sections of the Act. 1. Members of the company holding 90% of the votes of the issued shares may give a written instruction to the company directing it to redeem the shares held by the remaining members. The precise shareholding will of

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	makes an application to the BVI court for approval of the proposed arrangement. 4. The next step will typically be a formal hearing or hearings at which the court may make an interim or final order that is not subject to appeal unless a question of law is involved and in which case notice of appeal must be given within the period of twenty days immediately following the date of the order. In practice, there would ordinarily be at least two hearings: 1. At the first hearing the Court would make	(a) the name of each constituent company in the merger; (b) the name of the surviving company in the merger; (c) in respect of each constituent company the designation and number of outstanding shares of each class of shares specifying each such class entitled to vote on the merger and a specification of each such class, if any, entitled to vote as a class; (d) the terms and conditions of the proposed merger including the manner	(a) the name of each constituent company in the consolidation; (b) the name of the consolidated company; (c) in respect of each constituent company the designation and number of outstanding shares of each class of shares specifying each such class entitled to vote on the consolidation and a specification of each such class, if any, entitled to vote as a class; (d) the terms and conditions of the proposed	directions and adjourn, the court's sanction of the scheme, to the second court hearing; 3. posting of the scheme document to company's members; 4. approval by members of the scheme at a court meeting. This requires 75% in value of the members or class of members to approve - correctly constituting the class(es) is a significant issue. Votes will be counted on a poll and not on a show of	course have to be verified by reference to the company's register of members. 2. Upon receipt of the written instruction from the member(s) holding 90%, the company is required to redeem the shares specified in the instruction. 3. The company must 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. 4. The written notice to be given by the company to a member under section 176(3) must specify the price being offered for the

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	an interim order setting out directions as to (i) who should be notified of the proposed arrangement and in what manner; (ii) advertisements to be made; (iii) whose approval must be obtained (typically members or creditors) and in what manner, for example, whether any class should vote as a class, (iv) who may dissent from the arrangement and receive payment of the fair value of his shares , debt obligations and other securities under section 179; (v) hearings to be held and permission to be granted to any interested person to appear; and (vi)	and basis of cancelling, reclassifying, or converting shares in each constituent company into shares, debt obligations or other securities in the surviving company, or money or other assets, or a combination thereof; and (e) in respect of a merger a statement of any amendment to the memorandum or articles of the surviving company to be brought about by the merger. 2. The Plan of Merger must be authorised by a	consolidation including the manner and basis of cancelling, reclassifying or converting shares in each constituent company into shares, debt obligations or other securities in the consolidated company, or money or other assets, or a combination thereof; and (e) in respect of a consolidation the plan of consolidation shall have annexed to it a memorandum and articles complying with Part II, Division 2 of the Act, to be adopted by the consolidated	hands. The meeting must also comply with the court's requirements, not the constitution of the company; 5. a second hearing of the claim form to seek the court's sanction of the meeting; and 6. finally, court approval of the scheme and filing of the court order with the Registrar of Corporate Affairs in the BVI so as to make the Court Order binding. A copy of the order is to be annexed to every copy of the company's	shares, procedure for redemption and should ideally give the minority shareholder no more than 7 days within which to respond to the offer. The purpose of this period of 7 days (although not required by the Act) becomes clear when read with section 179(12). This section requires the Company to make a written offer to a dissenting member (within 7 days of the original direction (referred to at 1 above) given by the 90% member(s) of the company) offering to purchase his shares at a specified price that the company determines to be their fair value. 5. We would therefore advise, that the section

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	approving or rejecting the plan as proposed or with such amendments as are seen fit. 2. Pursuant to the directions ordered by the court, if approval of the plan is required to be sought or notices are to be given, the board should the take steps towards (a) obtaining that approval from those from whom approval is required and (b) giving the appropriate notices. The directors also confirm at this stage that they remain desirous of executing the plan. . 3. Thereafter, a second and final hearing will take place at which	resolution of members (one would check the memorandum and articles of the constituent company to establish the required majority for a valid resolution) and by the outstanding shares of every class of shares that are entitled to vote on the merger as a class if the memorandum or articles so provide or if the plan of merger contains any provisions that, if contained in a proposed amendment to the memorandum or articles, would entitle the class to vote on	company. 2. The Plan of Consolidation must be authorised by a resolution of members (one would check the memorandum and articles of the constituent company to establish the required majority for a valid resolution) and by the outstanding shares of every class of shares that are entitled to vote on the consolidation as a class if the memorandum or articles so provide or if the plan of consolidation contains any provisions that, if	constitution issued after the order has been made.	179 (12) offer by the company should be made at the same time as the section 176(3) notice, as the former needs to be made within 7 days of the direction (referred to at 1 above) given to the company by the 90% member(s) to redeem the shares held by the minority shareholders and it must be made to a dissenting member(s). This offer should therefore state clearly that it is an offer to the minority shareholders if and only if it dissents (and such dissent is communicated no later than the seventh day following the date of the notice of redemption) from a redemption of their shares in the manner stipulated in the section

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	interested persons may appear and be heard and at which the approvals obtained and notices given are confirmed to the court. The court may then make a final order in which it approves or rejects the proposed arrangement with or without any amendments as it may direct. The advantage of this sequence of events is that a dissenting minority shareholder may still have an opportunity to be heard on reasons as to why the plan should not be approved. 4. Thereafter, articles of arrangement must be executed by the company containing the	the proposed amendment as a class. (a) If a meeting of members is to be held, notice of the meeting accompanied by a copy of the Plan of Merger must be given to each member whether or not entitled to vote on the merger; and (b) If it is proposed to obtain the written consent of members, a copy of the Plan of Merger must be given to each member whether or not entitled to consent to the Plan of Merger.	contained in a proposed amendment to the memorandum or articles, would entitle the class to vote on the proposed amendment as a class. (a) If a meeting of members is to be held, notice of the meeting accompanied by a copy of the Plan of consolidation must be given to each member whether or not entitled to vote on the consolidation; and (b) If it is proposed to obtain the written consent of		176 notice. As such the section 179(12) offer is conditional and will be an offer to a dissenting member. The section 179 offer will of course refer to the same price being offered for the shares as the 176 notice (which should be the fair value) but should additionally state that if the dissenting member and the company do not, within 30 days following the date on which the 179(12) offer is made, agree on the price to be paid for the shares owned by the dissenting member, then within 20 days immediately following the date on which the period of 30 days expires, the company and the dissenting member must

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	plan of arrangement, the court order and the manner in which the plan of arrangement was approved, if approval was required by the court. 5. The articles of arrangement must be filed with the Registrar of Corporate Affairs. 6. Upon registration of the articles of arrangement the Registrar of Corporate Affairs must issue a certificate certifying that the articles of arrangement have been filed. 7. The arrangement is effective on the date that the articles of arrangement are	3. After approval of the Plan of Merger by the directors and members of each constituent company, Articles of Merger must be executed and must contain:- (a) The Plan of Merger; (b) The date on which the memorandum and articles of association of each constituent company were registered by the Registrar of Corporate Affairs (public official); and (c) The manner in which the merger was authorised with	members, a copy of the Plan of Consolidation must be given to each member whether or not entitled to consent to the Plan of Consolidation. 3. After approval of the Plan of Consolidation by the directors and members of each constituent company, Articles of Consolidation must be executed and must contain:- (a) The Plan of Consolidation; (b) The date on which the memorandum and articles of		each appoint one appraiser who in turn, together appoint a third appraiser and the price agreed by those three appraisers will be the price that the dissenting member(s) will receive and is binding on the company and the dissenting member for all purposes. The company is then required to pay the dissenting member the relevant amount in money upon the surrender by him of the certificates representing the shares. 6. The minority shareholders have three choices, (a) he can either accept the 176(3) notice, and, in which case, the company can send him the agreed sum and redeem his shares; (b)

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	registered by the Registrar or on such date subsequent thereto, not exceeding thirty days, as stated in the articles of arrangement. In terms of the approvals required and specifically the requisite majority required, the BVI courts have tended to follow the level of approval required under the company's Memorandum and Articles of Association. The Act does not specify the manner of obtaining approval but leaves this up to the court to determine in accordance with its wide discretion. The provisions of the	respect to each constituent company. 4. The Articles of Merger and Plan of Merger (which is effectively the merger agreement between the constituent companies in the merger) are then submitted to the Registrar of Corporate Affairs together with any resolution to amend the memorandum and articles of the surviving company. If the Registrar is satisfied that the requirements of the legislation in respect of a merger have been met then the	association of each constituent company were registered by the Registrar of Corporate Affairs (public official); and (c) The manner in which the consolidation was authorised with respect to each constituent company. 4. The Articles of consolidation and Plan of consolidation (which is effectively the consolidation agreement between the constituent companies in the consolidation) are then submitted to the Registrar of Corporate Affairs		alternatively, he can decide to dissent from the 176(3) notice and in that case the 179 (12) offer would at that time become unconditional and the company and the dissenting member would have 30 days to negotiate the price to be paid for the shares (discussed in paragraph 5 above); or (c) he can simply ignore the 176(3) notice completely. If the final option is chosen, we would advise that once the seven day notice period has expired, the company would be within its rights to send the minority member the sum it considers to be the fair value for his shares and redeem the shares, as the minority member has chosen not to

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	Act that address plans of arrangement are sufficiently wide to provide for differing approaches in relation to obtaining the courts blessing of the proposed arrangement. Whilst for example, the notices required to be given and the approvals required to be obtained tend to precede the courts final order, it is entirely possible that such notices and approvals can follow the courts order.	Registrar shall register the articles of merger and any amendment to the memorandum or articles of the surviving company and upon registration the Registrar shall issue a certificate of merger certifying that the Articles of Merger and Plan of Merger have been registered. 5. The certificate of merger issued by the Registrar is conclusive evidence of compliance with all requirements of the Act in respect of the merger.	together with memorandum and articles for the consolidated company complying with Part II, Division 2 of the Act. If the Registrar is satisfied that the requirements of the legislation in respect of a consolidation have been met then the Registrar shall register the articles of consolidation and the memorandum and articles of the consolidated company and upon registration the Registrar shall issue a certificate of incorporation of the consolidated company certifying that the Articles of		exercise his right to dissent from the redemption under the Act. However, note that even if you follow the correct procedure and comply with all the timelines under the Act, recent BVI case law has confirmed that this would not prevent the minority shareholder from approaching the court at a later date and asking them to reconsider the value the company attributed to his shares, as the court has an inherent jurisdiction to deal "justly and fairly" with matters of such nature. 7. One further point that needs to be considered, is that before the company can redeem the shares if effected pursuant to the

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			Consolidation and Plan of Consolidation have been registered. 5. The certificate of consolidation issued by the Registrar is conclusive evidence of compliance with all requirements of the Act in respect of the consolidation.		section 176 offer, it must make a solvency determination (by way of board resolution) that immediately after the redemption of the shares, the value of the company's assets will exceeds its liabilities and the company will be able to pay its debts as they fall due.
Advantages	1. It has the court's blessing which makes it less susceptible to challenge. It makes it difficult to argue that the arrangement is not fair. 2. Subject to the scope of a plan of arrangement it allows a bidder significant latitude with respect to	1. Speed. If there are no dissenters the merger can be effected very quickly and at any rate in far less than 8 weeks. 2. Ease of implementation. Following the procedure outlined is straightforward and once correctly	1. Speed. If there are no dissenters the consolidation can be effected very quickly and at any rate in far less than 8 weeks. 2. Ease of implementation. Following the procedure outlined is straightforward	1. It has the court's blessing which makes it less susceptible to challenge. It makes it difficult to argue that the arrangement is not fair. 2. There are no dissenters rights.	1. Speed. It is often referred to as a "short form" merger because whilst the effect may be similar to a merger, it obviates the need to take all the steps that one would take in a merger context and therefore saves time and costs. 2. It is essentially a

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	the structure of a transaction. This can assist with regulatory or tax considerations. 3. Equity or debt reorganisations are entirely possible.	followed the Registrar is obliged to issue a certificate of merger. 3. Approval thresholds are whatever is required by the memorandum and articles of the constituent company and accordingly may be (and typically are) as low as 50% plus one vote. 4. Flexibility. BVI law can accommodate parent subsidiary mergers and foreign/domestic mergers where either the BVI or the foreign entity is the surviving entity. 5. Consideration.	and once correctly followed the Registrar is obliged to issue a certificate of consolidation. 3. Approval thresholds are whatever is required by the memorandum and articles of the constituent company and accordingly may be (and typically are) as low as 50% plus one vote. 4. Consideration. Shareholders of the same class of shares can be treated differently in terms of the consideration that they receive as a result of the	3. Can potentially apply to an even broader category of transactions or matters than is the case with a plan of arrangement because the language of the relevant statutory provision is more permissive. 4. Equity or debt reorganisations are entirely possible.	unilateral procedure initiated by the majority shareholders. Once the instruction is given by the majority to the company to redeem the minority, the company is obliged to take the necessary steps to implement the redemption. The only remedy available to the minority is fair value for their shares. 3. Subject to certain parameters, "Top up" options in this context are not precluded by BVI law but need to be carefully structured..

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		Shareholders of the same class of shares can be treated differently in terms of the consideration that they receive as a result of the merger and a mixture of cash, shares, debt obligations, or other securities or assets can be offered by way of consideration to a shareholder.	consolidation and a mixture of cash, shares, debt obligations, or other securities or assets can be offered by way of consideration to a shareholder.		
Disadvantages	1. Notwithstanding court approval, normally involving two hearings, there is the possibility of dissenters rights being exercised. 2. Whilst the category of matters that constitute an arrangement is quite wide, the definition of	Dissenters rights.	Dissenters rights.	1. The approval of seventy five percent in value of the creditors or class of creditors or members or class of members is required to approve the scheme of arrangement which must be "fair".	1. Very high threshold for implementation. Majority need to own 90% of the votes of the shares. 2. The use of "top up" options in this context has been criticised.

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	"Arrangement" is such that it is limited to the matters specified in that defined term. 3. It is not a quick procedure as it involves typically two court hearings and may take up to four months to complete. 4. The target's board tends to be in control of the process which would not be the case in a takeover made directly to the members of the target.			2. It is not a quick procedure as it involves typically two court hearings and may take up to four months to complete. 3. Tends to be more costly than other forms of corporate reconstruction owing to the documentation that needs to be prepared for each court hearing.	
Dissenters	Yes. Creditors position is not crystal clear but based on the provisions of section 177 it is submitted that dissenters provisions in section 179 of the Act	Yes.	Yes.	No.	Yes.

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	should apply mutatis mutandis.				
Court Approval	Yes.	No.	No.	Yes.	No.
Timing	Approximately 4 months. Clearly the overall timing will vary based on the directions given by the court at the initial hearing.	Approximately 8 weeks (including time for the exercise of dissenters rights).	Approximately 8 weeks (including time for the exercise of dissenters rights).	Approximately 4 months.	Approximately 6 weeks (including time for the exercise of dissenters rights)
When effective	The arrangement is effective on the date that the articles of arrangement are registered by the Registrar or on such date subsequent thereto, not exceeding thirty days, as stated in the articles of arrangement.	A merger is effective on the date the articles of merger are registered by the Registrar or on such date subsequent thereto not exceeding thirty days as stated in the articles of merger.	A consolidation is effective on the date the articles of consolidation are registered by the Registrar or on such date subsequent thereto not exceeding thirty days as stated in the articles of consolidation.	When the court order is filed with the Registrar of Corporate Affairs in the BVI.	When the relevant shares have been acquired through agreement as to their fair value pursuant to section 179 of the Act or following an appraisal of their fair value pursuant to that section then the redemption of the shares will have been completed.
Action post Court order	See procedure above.	Not applicable.	Not applicable.	A copy of the court's order must be filed	Not applicable.

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				with the Registrar of Corporate Affairs in the BVI. A copy of the court's order must be annexed to every copy of the company's memorandum of association issued after the order has been made.	

Further Information

The foregoing is for general information purposes only and not intended to be relied upon for legal advice in any specific or individual situation.

For more information on the subject please contact Leonard Birmingham (leonard.birmingham@harneys.com) or your usual Harneys contact.

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