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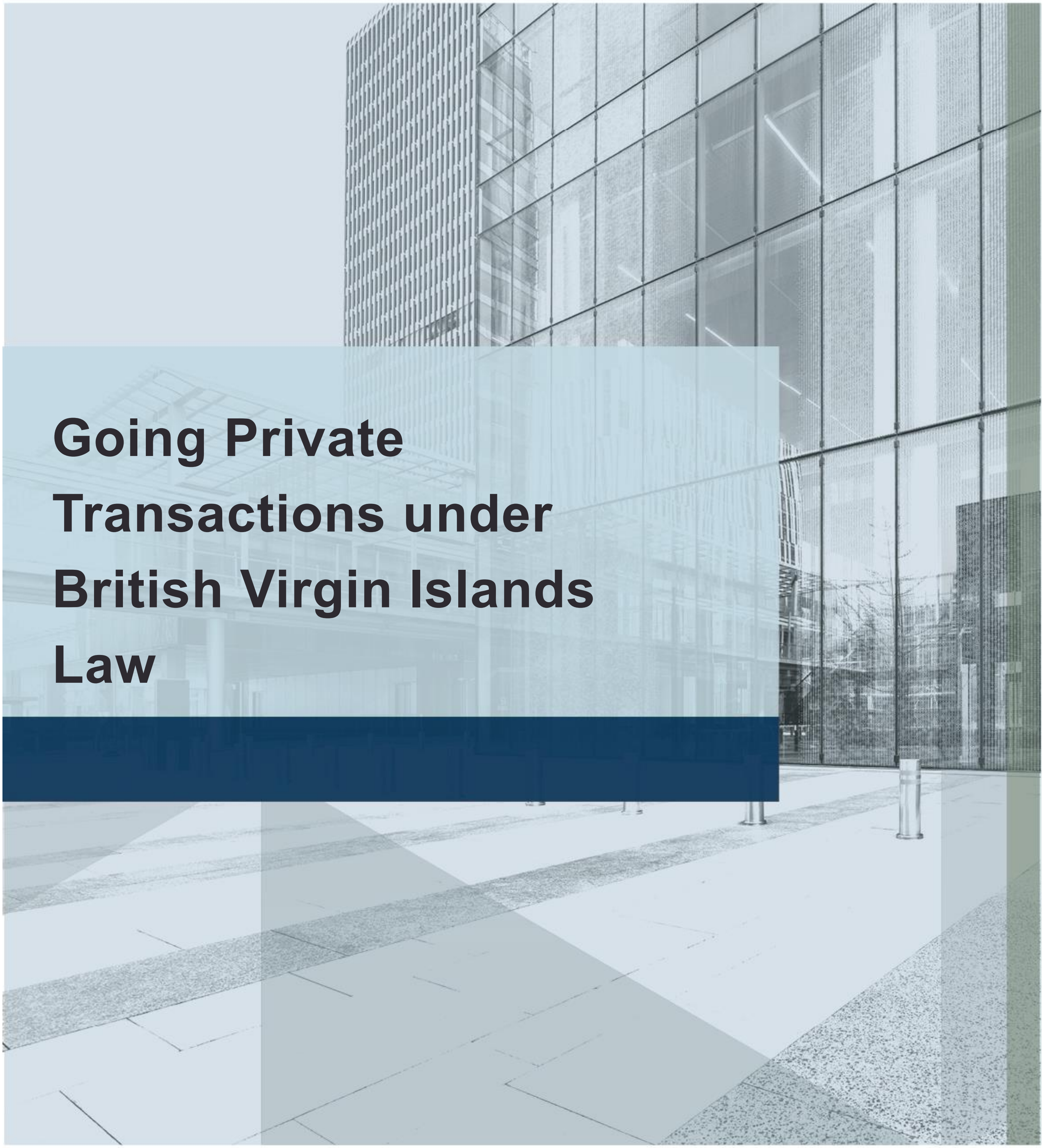

Going Private Transactions under British Virgin Islands Law

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Preface

This publication has been prepared for the assistance of those who are considering the law of the British Virgin Islands with respect to ‘going private’ transactions. It deals in broad terms. It is not intended to be exhaustive but merely to provide brief details and information which we hope will be of use to our clients. We recommend that our clients and prospective clients seek legal advice on British Virgin Islands law in respect of their specific proposals before taking steps to implement them.

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1. INTRODUCTION

A publicly traded or widely held British Virgin Islands business company may go private under British Virgin Islands law by (i) a mandatory redemption of minority shares pursuant to section 176 of the BVI Business Companies Act (the "Act"), (ii) an arrangement pursuant to section 177 of the Act, (iii) an arrangement pursuant to section 179A of the Act or (iv) a merger or consolidation pursuant to section 170 of the Act. Dissenting shareholders may exercise certain dissent rights and be paid the fair value of their shares in cash. The four methods of going private and the dissent rights are considered below.

2. REDEMPTION OF MINORITY SHARES

Section 176 of the Act permits shareholders holding 90% of the votes of the outstanding shares of a company entitled to vote to direct the company to redeem the shares held by the remaining shareholders. On receipt of the direction, the company must redeem the shares irrespective of whether or not the shares are by their terms redeemable. Such shareholders do not need to be connected or affiliated in any way, provided they are able to act in concert to provide the required direction to the company to redeem the shares.

The company must then give written notice to each shareholder whose shares are to be redeemed stating the redemption price and the manner in which the redemption is to be effected. The redemption price may be any amount and the redemption proceeds may be paid in cash or goods, but a shareholder whose shares are being redeemed may dissent and demand to be paid the fair value of his shares in cash.

Shareholders entitled to use the power under section 176 of the Act may do so at any time, whether pursuant to a tender offer or otherwise.

3. PLAN OF ARRANGEMENT

An arrangement includes a transfer of shares in a company for shares, debt obligations or other securities in the company, or money or other property, or a combination thereof. It also includes a reorganisation or reconstruction of a company. If the directors of a company determine that an arrangement is in the best interests of the company, its creditors or its shareholders, they may approve a plan of arrangement. The company must then apply to the court for its approval of the proposed arrangement. The court will review the arrangement for fairness and will determine whether certain additional approvals (such as shareholder or creditor approval) must be obtained and whether dissent rights should be granted. The court may approve or reject the plan of arrangement as proposed or may approve the plan of arrangement with such amendments as it may direct.

If a court approves the plan of arrangement, the directors may confirm the plan of arrangement as approved by the court. After the directors have confirmed the plan and obtained such approvals as may be required by the court, articles of arrangement (which include the plan of arrangement) are executed and filed with the Registrar of Corporate Affairs. The arrangement will become effective on its registration by the Registrar of Corporate Affairs (or up to thirty days thereafter if the articles of arrangement so provide).

4. SCHEME OF ARRANGEMENT

Where a compromise or arrangement is proposed between a company and its creditors, or any class of them, or between a company and its shareholders, or any class of them, a court in the British Virgin Islands may, on application, order a meeting of the relevant creditors or relevant shareholders, as the case may be, to be summoned in such manner as the court directs. The application to court may be made by the company, a creditor, a shareholder, or an administrator or liquidator of the company. If a majority in number representing 75% in value of the relevant creditors or shareholders, as the case may be, agree to the compromise or arrangement, then the compromise or arrangement, if sanctioned by the court, is binding on all the relevant creditors or shareholders, as the case may be.

A plan of arrangement and a scheme of arrangement achieve similar results. Where court approval is considered beneficial (for example, if it is intended to extinguish warrants), a plan of arrangement is typically the preferred form of arrangement for a going private transaction. The court will usually require a resolution approved by a simple majority of the relevant persons for a plan of arrangement, whereas for a scheme of arrangement, the statutory threshold is 75%. However, with a scheme of arrangement, there are typically no dissent rights, whereas for a plan of arrangement, it is expected that the court will grant dissent rights.

5. MERGER OR CONSOLIDATION

By far the most common method of going private is the statutory merger or consolidation. Two or more companies may merge or consolidate in accordance with Section 170 of the Act. A merger means the merging of two or more constituent companies into one of the constituent companies, and a consolidation means the consolidating of two or more constituent companies into a new company. In order to merge or consolidate, the directors of each constituent company must approve a written plan of merger or consolidation which must be authorised by a resolution of shareholders. The plan of merger or consolidation must include:

(a) the name of each constituent company and the name of the surviving company or the consolidated company, as the case may be;

(b) in respect of each constituent company,

(i) the designation and number of shares entitled to vote on the merger or consolidation, and

(ii) a specification of such shares, if any, entitled to vote as a class or series;

(iii) the terms and conditions of the proposed merger or 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 surviving or consolidated company, or money or other asset, or a combination thereof;

(c) in respect of a merger, a statement of any amendment to the memorandum or articles of association of the surviving company to be brought about by the merger; and

(d) in respect of a consolidation, the memorandum and articles of association for the consolidated company.

The plan of merger must be approved and authorised by a resolution of shareholders. Further, shareholders not otherwise entitled to vote on the merger or consolidation (for example if they have non-voting shares) may still acquire the right to vote if the plan of merger or consolidation contains any provision which, if proposed as an amendment to the memorandum or articles of association, would entitle them to vote as a class or series on the proposed amendment. In any event, all shareholders must be given a copy of the plan of merger or consolidation irrespective of whether they are entitled to vote at the meeting or consent to the written resolution to approve the plan of merger or consolidation. However, subject to the memorandum and articles of association of the constituent companies, there are no super majority or majority of minority approvals required.

As indicated above, the shareholders of the constituent companies are not required to receive shares of the surviving or consolidated company but may receive debt obligations or other securities of the surviving or consolidated company, or money or other assets, or a combination thereof. Further, some or all the shares of a class or series may be converted into a particular or mixed kind of assets while other shares of the same class or series may receive a different kind of assets. As such, not all the shares of a class or series must receive the same kind of consideration. It is on this basis that a merger or consolidation is especially useful as a going private technique.

After the plan of merger or consolidation has been approved by the directors and authorised by a resolution of the shareholders, articles of merger or consolidation are executed by each company and filed with the Registrar of Corporate Affairs. Articles of merger or consolidation must include the following:

(a) the plan of merger or consolidation and, in the case of a consolidation, the memorandum and articles of association of the consolidated company;

(b) the date on which the memorandum and articles of association of each constituent company were registered by the Registrar of Corporate Affairs; and

(c) the manner in which the merger or consolidation was authorised with respect to each constituent company.

6. DISCLOSURE OF INTERESTS

A director who has an interest in the transaction is required to disclose the interest to the board of directors of the company forthwith after becoming aware of the fact that he is interested in the transaction. Such director may vote on any matter relating to the transaction, attend a meeting of the directors at which a matter relating to the transaction arises, be included among the directors present at the meeting for the purposes of a quorum, and sign a document on behalf of the company, or do any other thing in his capacity as a director, that relates to the transaction. However, the transaction is voidable by the company unless:

(a) the interest was disclosed prior to the company entering into the transaction;

(b) the transaction is between the director and the company and was entered into in the ordinary course of the company's business and on usual terms and conditions;

(c) the material facts of the interest of the director in the transaction are known by the shareholders entitled to vote at a meeting of shareholders and the transaction is approved or ratified by a resolution of shareholders; or

(d) the company received fair value for the transaction.

7. DISSENT RIGHTS

A shareholder may dissent from a mandatory redemption of his shares, an arrangement (if permitted by the court), a merger (unless the shareholder was a shareholder of the surviving company prior to the merger and continues to hold the same or similar shares after the merger) and a consolidation. A shareholder properly exercising his dissent rights is entitled to payment in cash of the fair value of his shares.

A shareholder dissenting from a merger or consolidation must object in writing to the merger or consolidation before the vote by the shareholders on the merger or consolidation, unless notice of the meeting was not given to the shareholder or the proposed action was authorised by written resolution of the shareholders. If the merger or consolidation is approved by the shareholders, the company must within 20 days give notice of this fact to each shareholder who gave written objection, and to each shareholder who did not receive notice of the meeting or to any shareholder who did not consent to the merger or consolidation if consent was obtained by written resolution. Such shareholders then have 20 days to give to the company their written election in the form specified by the Act to dissent from the merger or consolidation, provided that, in the case of a merger, the 20-day period starts when the plan of merger is delivered to the shareholder.

Upon giving notice of his election to dissent, a shareholder ceases to have any rights of a shareholder except the right to be paid the fair value of his shares. As such, the merger or consolidation may proceed in the ordinary course notwithstanding the dissent.

Within seven days of the later of the delivery of the notice of election to dissent and the effective date of the merger or consolidation, the company must make a written offer to each dissenting shareholder to purchase his shares at a specified price that the company determines to be their fair value. The company and the shareholder then have 30 days to agree upon the price. If the company and a shareholder fail to agree on the price within the 30 days, then the company and the shareholder shall each designate an appraiser and these two appraisers shall designate a third appraiser. These three appraisers shall fix the fair value of the shares as of the close of business on the day before the shareholders approved the transaction without taking into account any change in value as a result of the transaction. That value is binding on the company and the dissenting member for all purposes.

8. OTHER CONSIDERATIONS

The directors when considering a going private transaction must always act in the best interests of the company. While a consequence of the transaction may be to benefit a shareholder or a group of shareholders, this benefit cannot be the basis for the directors approving the going private transaction.

As well, a shareholder must not cause the company to act in a manner which is oppressive, unfairly discriminatory or unfairly prejudicial to another shareholder. Otherwise, the company and the shareholder could expose themselves to an action by the prejudiced shareholders.

In going private transactions, it is not uncommon for an independent committee of the directors to be formed to consider the transaction and/or for a fairness opinion to be obtained, in both cases to demonstrate that the transaction is in the best interests of the company and is not unfairly prejudicial to certain shareholders or creditors. However, whether an independent committee or fairness opinion is required will depend on the facts of each going private transaction.