

Chambers

The cover features several large, dark green leaf-like shapes scattered across the background, creating a natural, organic feel. The leaves vary in size and orientation, with some pointing upwards and others downwards.

GLOBAL PRACTICE GUIDE

Definitive global law guides offering
comparative analysis from top ranked lawyers

Shareholders' Rights & Shareholder Activism

British Virgin Islands
Conyers

chambers.com

2019

Law and Practice

Contributed by Conyers

Contents

1. Shareholders' Rights	p.3	2. Shareholder Activism	p.8
1.1 Types of Company	p.3	2.1 Legal and Regulatory Provisions	p.8
1.2 Type or Class of Shares	p.3	2.2 Level of Shareholder Activism	p.8
1.3 Primary Sources of Law and Regulation	p.3	2.3 Shareholder Activist Strategies	p.8
1.4 Main Shareholders' Rights	p.4	2.4 Targeted Industries / Sectors / Sizes of Companies	p.9
1.5 Shareholders' Agreements / Joint Venture Agreements	p.4	2.5 Most Active Shareholder Groups	p.9
1.6 Rights Dependent Upon Percentage of Shares	p.5	2.6 Proportion of Activist Demands Met in Full / Part	p.9
1.7 Access to Documents and Information	p.5	2.7 Company Response to Activist Shareholders	p.9
1.8 Shareholder Approval	p.5	3. Remedies Available to Shareholders	p.9
1.9 Calling Shareholders' Meetings	p.6	3.1 Separate Legal Personality of a Company	p.9
1.10 Voting Requirements and Proposal of Resolutions	p.6	3.2 Legal Remedies Against the Company	p.10
1.11 Shareholder Participation in Company Management	p.6	3.3 Legal Remedies Against the Company's Directors	p.10
1.12 Shareholders' Rights to Appoint / Remove / Challenge Directors	p.6	3.4 Legal Remedies Against Other Shareholders	p.10
1.13 Shareholders' Right to Appoint / Remove Auditors	p.7	3.5 Legal Remedies Against Auditors	p.10
1.14 Disclosure of Shareholders' Interests in the Company	p.7	3.6 Derivative Actions	p.10
1.15 Shareholders' Rights to Grant Security over / Dispose of Shares	p.7	3.7 Strategic Factors in Shareholder Litigation	p.11
1.16 Shareholders' Rights in the Event of Liquidation / Insolvency	p.8		

Conyers is an international law firm, founded in 1928, with a broad client base including FTSE 100 and Fortune 500 companies, international finance houses and asset managers. The firm advises on Bermuda, British Virgin Islands and the Cayman Islands from offices in those jurisdictions and in the key financial centres of London, Hong Kong and Singapore. Conyers' expertise includes corporate law and finance including investment funds and private equity, equity and debt capital markets, M&A, banking and finance (con-

ventional and Islamic), asset finance including shipping and aircraft finance, restructuring and workouts, the formation of entities including companies and partnerships, corporate governance and insurance and reinsurance. The firm's BVI corporate practice is the market leader, particularly in off-shore mergers and acquisitions and IPOs, having advised on both the largest M&A transaction and the largest IPO in the jurisdiction to date.

Authors



Robert Briant is head of the corporate department in the BVI. He advises on all aspects of corporate and commercial law, specialising in mergers and acquisitions, joint venture companies and investment vehicles. Robert also provides specialist advice to private equity and hedge funds, as well as advising on a broad range of financing transactions. Clients include Diageo, Burger King, the Virgin Group, including Virgin Galactic, Denham Capital, Morgan Stanley, Commerzbank and others. Robert is chairman of BVI Finance, an advisor to the BVI Government and a regular contributor to the media on matters of BVI law.



Nicholas Kuria practices many aspects of corporate law, including mergers and acquisitions, joint ventures, shareholders' agreements and corporate governance. He advises a range of clients with a particular focus on the technology, media and telecommunications, financial services and insurance sectors. Nicholas has spent time on secondment with the mergers and acquisitions team of British Telecommunications plc in London, UK. He acts for public and private companies, insurers, brokers and financial institutions and has worked with infrastructure funds in relation to the funding of digital telecommunications companies in the UK.

1. Shareholders' Rights

1.1 Types of Company

The principal statute governing the formation and operation of a BVI business company is the Business Companies Act 2004, as amended (the 'BC Act'). The BC Act regulates the incorporation of all types of BVI companies, including those limited by shares, those limited by guarantee, unlimited liability companies, restricted purposes companies and segregated portfolio companies. However, the most common form of company in the BVI is a company with limited liability authorised to issue shares.

There are no qualification criteria under BVI law that impose restrictions on which shareholders may invest in a BVI business company. However, any beneficial owner owning, directly or indirectly, 10% or more of the voting shares of a BVI business company will need to satisfy the registered agent's 'know your client' requirements.

1.2 Type or Class of Shares

There is substantial flexibility as regards the types or classes of shares that a BVI business company may issue. A business company may issue shares with or without par value. The

most common type of shares are ordinary shares. The BC Act does not stipulate separate share classes or shareholders' rights attaching to particular classes of shares.

A business company may issue shares:

- with or without voting rights or with different voting rights;
- with no rights or preferential rights to distributions;
- with special, limited or conditional rights;
- which are redeemable; or
- with rights to participate only in certain assets of the company.

The rights are set out in the business company's memorandum of association ('Memorandum').

1.3 Primary Sources of Law and Regulation

The BC Act is the primary statute applicable to shareholders' rights in the BVI. In addition, the BVI courts will apply common law principles in interpreting matters relating to the exercise and enforcement of shareholders' rights in respect of a business company.

1.4 Main Shareholders' Rights

The shares issued by a business company typically confer on the holder:

- the right to one vote at a meeting of the members of the company or on any resolution of the members of the company;
- the right to an equal share in any dividend paid in accordance with the BC Act; and
- the right to an equal share in the distribution of the surplus assets of the company.

Under the BC Act it is possible for the Memorandum to negate, modify or add to the above fundamental rights. In theory, the company could issue shares which carry none of the fundamental share rights. However, in doing so it would create an unattractive scenario in which no business company shareholders are entitled to economic or voting rights. The better view is that whilst these fundamental shareholder rights may be varied, at least some shares would need to carry the fundamental rights, even if the rights are carried by shares of different classes.

Shareholder approval is generally required to vary a class right, as set out in the Memorandum or articles of association ('Articles'). Without the requisite shareholder approval, a variation of class right is ineffective. Class rights are generally considered to be the right to vote, the right to receive dividends and the right to receive payments on a winding up, although the case law is not clear as to precisely what constitutes a class right. Furthermore, the courts have tended to apply a narrow interpretation as to what constitutes a variation of a share right, particularly in relation to the determination of when a variation of a class right attached to one class of shares also has the effect of varying a class right attached to another class of shares.

A variation of shareholder rights would require an amendment to the Memorandum and Articles in order to be effective. The BC Act provides that:

- the Memorandum and Articles may be amended by a shareholders' resolution, although it is possible to provide in the Memorandum that certain provisions of the Memorandum or Articles may not be amended;
- that the required majority to pass a resolution amending all or specified provisions of the Memorandum or Articles is greater than the default simple majority; and
- that any amendments to the Memorandum or Articles will only be effective on the satisfaction of specified conditions.

Therefore, it is theoretically possible to state in the Memorandum or Articles that certain shareholder rights may not be amended, although it would be unusual to introduce such a degree of inflexibility in the business company's con-

stitutional documents. It would be more typical to set the required majority for the shareholder approval at a threshold higher than a simple majority.

The BC Act also provides that the directors of a business company may amend the Memorandum or Articles, however there are limitations on the ability of the directors to do so. In particular, the directors are not permitted to restrict the shareholders' power to amend the Memorandum or Articles, or to change the majority required for a shareholders' resolution to amend the Memorandum or Articles. In addition, if the Memorandum and Articles cannot be amended by the shareholders (for example, by express provision in the Memorandum or Articles) then the directors will not have the power to amend the Memorandum or Articles.

The shareholders of a business company may enter into shareholders' agreements and the BVI courts will generally seek to respect the commercial arrangements agreed by parties to the shareholders' agreement. However, any such shareholders' agreement does not operate to amend or modify the shareholders' rights as set out in the business company's Memorandum or Articles. The rights of the shareholders will be governed by the Memorandum and the Articles. The effect of the shareholders' agreement is that the parties to the shareholders' agreement may be stopped from enforcing the particular shareholder rights in that respect.

On occasion, one sees shareholders' agreements incorporated by reference into the Memorandum and Articles. Whilst the position is not free from doubt, it is our view that this reference is not effective and that the shareholders' agreement would not be incorporated in the Memorandum and/or Articles as a consequence of such reference. Rather, to the extent that the shareholders' agreement deals with matters that are governed by the Memorandum or Articles, then the provisions need to be expressly set out in the Memorandum and Articles.

1.5 Shareholders' Agreements / Joint Venture Agreements

The BVI is a popular jurisdiction for the establishment of corporate vehicles for the purposes of joint ventures. There are a number of reasons for this, including the speed of incorporation of business companies, the tax neutrality offered by a BVI business company and the ability for BVI business companies carrying out joint ventures to modify common law directors' duties by providing, in their Memorandum and Articles, that a director may act in the best interests of a shareholder, even in circumstances where a decision may not be in the interests of the company. Shareholders' agreements/joint venture agreements are common in the BVI and are generally enforceable if drafted in compliance with BVI law and common law principles.

The main reason why a shareholders' agreement/joint venture agreement may not be enforceable as a matter of BVI law is due to inconsistencies between the terms of such agreements and the Memorandum and Articles. While there is some case law where the courts have sought to honour the commercial agreement between the parties, even where the shareholders' agreement/joint venture agreement is inconsistent with the Memorandum and Articles, it should be noted that the relevant cases generally involve unsophisticated individual shareholders. Therefore, proceeding to draft a shareholders' agreement/joint venture agreement that is inconsistent with the Memorandum and Articles is an approach that carries some risk for sophisticated parties. A further consideration is that a shareholders' agreement/joint venture agreement is only binding on the parties to the agreement. The Memorandum and Articles bind the company as well as all current and future shareholders.

1.6 Rights Dependent Upon Percentage of Shares

The BC Act provides that the Memorandum or Articles of a business company may be amended by a resolution of the members and that the Memorandum may specify a majority, greater than 50%, that is required to amend the Memorandum or the Articles.

Shareholders holding 90% of the votes of the outstanding shares of a business company entitled to vote may direct the company to redeem the shares held by the remaining shareholders. This statutory right under the BC Act is subject to the provisions of the Memorandum or Articles of the particular business company. It should be noted that the redemption of minority shareholders under the statutory provision is applicable irrespective of whether or not the shares are, by their terms, redeemable. The price at which the shares are redeemed can be any amount and may be satisfied in the form of cash or non-cash consideration. A shareholder whose shares are the subject of this redemption procedure may dissent and demand that the company pay fair value for his or her shares in cash.

There is a provision in the BC Act that requires members meetings be convened by the directors on the written request of members holding at least 30% of the voting rights in respect of the matter for which the meeting is requested, or such lesser percentage specified in the Memorandum or Articles.

The shareholders of a business company have the power, subject to the terms of the Memorandum and Articles, to remove a director of the business company from office by passing a shareholders' resolution. This can be done by a resolution with a simple majority of the voting shares passed at a meeting of the shareholders or a majority of 75% of the voting shares where the resolution is passed as a written shareholders' resolution, in either case, subject to any different threshold set out in the Memorandum or Articles. This

shareholder right is one of the primary apparatus available to the shareholders to exercise some measure of control over the operational activities of a business company.

1.7 Access to Documents and Information

Shareholders in a BVI business company have relatively limited rights regarding access to company documents and information. A shareholder is entitled, by written notice to the business company, to inspect the register of members, the register of directors, minutes of shareholder meetings and shareholder written resolutions. A shareholder is also entitled to make copies or take extracts of such documents.

There is a provision under the BC Act which permits the directors of the business company, if they are satisfied that it would be contrary to the business company's interests to allow a particular shareholder to inspect all or part of a document, to refuse or limit access to the document. In the event that the directors refuse or limit access to documents and information, the shareholder who is seeking access may apply to the BVI courts for an order that he or she should be permitted to inspect the document or to have unrestricted access to the document.

1.8 Shareholder Approval

Subject to the terms of the business company's Memorandum and Articles and the limited number of matters requiring shareholder approval under the BC Act, the shareholders' control over the management of the business company is limited to the exercise of their voting rights in relation to the appointment and dismissal of the directors of the business company. Under BVI law, the management of the business company is primarily the responsibility of the board of directors rather than the shareholders. However, the Memorandum and Articles may be drafted to expressly reserve certain matters to the approval of shareholders holding a particular percentage of the voting shares or, alternatively, grant voting rights to particular classes of shares in specified circumstances or the occurrence of particular events.

The BC Act contains a regime which enables business companies to merge or consolidate. Under the BC Act, a merger involves the merging of two constituent companies into one of the constituent companies. A consolidation, on the other hand, involves the combination of two business companies into a new company. The process for a merger or consolidation involves the directors of each constituent company approving a written plan of merger or consolidation which contains prescribed information, such as the terms and conditions of the proposed merger or consolidation. The written plan of merger or consolidation must then be authorised by a shareholder resolution in order to be effective. The authorisation of this plan by the shareholders may be given in a shareholder meeting or by written consent of the shareholders.

There is a procedure under the BC Act for the voluntary liquidation of a business company. The voluntary liquidation procedure may only be used if the relevant business company has no liabilities or is able to pay its debts as they fall due. As part of the procedure, the shareholders (or, in certain limited cases, the directors) approve by resolution a liquidation plan which specifies, among other matters, the reasons for the liquidation of the business company and the estimated time to liquidate the business company and appoint an eligible individual as the voluntary liquidator.

The liquidation plan, a declaration of solvency made by the directors in the prescribed form under the BC Act, and a notice of appointment of the liquidator are each filed with the BVI Registrar of Corporate Affairs in order to commence the voluntary liquidation process.

1.9 Calling Shareholders' Meetings

Under the BC Act, shareholders holding at least 30% of the voting shares of a business company (or lower ownership percentage as specified in the Memorandum or Articles) may compel the directors to convene a shareholders' meeting. For completeness, there is no requirement under the BC Act for a business company to hold an annual general meeting of its shareholders.

The minimum notice for a shareholders' meeting is specified in the BC Act as being seven days. The BC Act does allow for a longer notice (but not shorter notice) to be specified in the Memorandum or Articles. Notice of a shareholders' meeting is required to be given to all persons entitled to vote at the meeting and whose names are recorded in the register of members on the date the notice is given.

Service of notice on shareholders is typically governed by the Articles, which will specify the manner in which notice may be validly given. In the absence of notice provisions in the Memorandum or Articles, notice may be given by:

- personal service;
- by mail at the address contained in the register of members; or
- by electronic means, if the shareholder has consented to receiving notice electronically.

The Memorandum or Articles may specify the information that should be contained in the notice.

1.10 Voting Requirements and Proposal of Resolutions

Typically, the quorum for a meeting of the shareholders of a business company will be stated in the Memorandum or the Articles. Where the Memorandum and Articles are silent as to the quorum requirements, the BC Act states that the quorum for a properly constituted shareholder meeting will

be shareholders entitled to exercise at least 50% of the votes, present in person or by proxy.

Under the BC Act, shareholders do not have the ability to require that specific matters be raised at a shareholders' meeting. Rather, prior to the notice of a shareholder meeting being circulated, a shareholder may recommend to the directors that particular matters be included in the notice of shareholder meeting for discussion at the meeting. However, the directors are under no legal obligation to include such matters in the notice of the shareholder meeting. Shareholders may require the directors of a business company to call a shareholder meeting if they are entitled to exercise at least 30% of the voting rights in respect of the matter for which the shareholder meeting is requisitioned (or a lower percentage as specified in the Memorandum or Articles). If the directors do not call the meeting, the shareholders may apply to the BVI court to order the meeting to be held.

1.11 Shareholder Participation in Company Management

As noted in **1.8 Shareholder Approval**, under BVI law the management of a business company is almost exclusively reserved for the board of directors unless the Memorandum or Articles provide for the shareholders to have approval/veto rights in respect of particular matters. There is no restriction in the BC Act on individual shareholders being appointed to the board of directors of the relevant business company, although a person must still satisfy the general eligibility criteria for the appointment as a director of a BVI business company. If a shareholder wishes to participate in the management of a business company, he or she may seek appointment as a director of the company.

1.12 Shareholders' Rights to Appoint / Remove / Challenge Directors

Except as may be provided for in the Memorandum or Articles, the shareholders of a business company acting by resolution have the right to appoint and remove directors from the board. In the case of the removal of directors from the board of a business company, this right may be exercised by the shareholders holding at least a simple majority of the votes in a shareholder meeting specifically called for the purposes of the removal of a director or if the purposes of the shareholder meeting include such removal. Where the shareholders exercise the right to remove a director by passing a written resolution, a majority must be of at least 75% of the shareholders entitled to vote (or, in either case, other thresholds specified in the Memorandum or Articles).

Under BVI law, shareholders are not entitled to intervene directly in decisions made or actions that may be taken by the directors. The directors of the business company are required to comply with their common law duties as well as specific duties which are imposed on the directors under the BC Act. The common law duties encompass a duty to act in

good faith, a duty to exercise powers for a proper purpose, a duty to avoid conflicts of interest and a prohibition on taking secret profits. The statutory duties imposed by the BC Act include the duty to act honestly and in good faith, and in what he or she believes to be in the best interests of the company.

Shareholders of a business company may seek remedies such as injunctions against the board proposing to take an improper action or, as is more likely to be the case, pursuing a claim for damages or other restitutionary remedies in the wake of the particular decision or action by the board of directors. The BC Act prescribes penalties for a breach by a director of his or her statutory duties. It should be noted that the mere fact that a decision taken by a director is wrong or not beneficial to a particular shareholder does not necessarily present grounds for liability on the part of the director.

1.13 Shareholders' Right to Appoint / Remove Auditors

The BC Act does not impose an obligation on business companies to prepare an annual audit or appoint auditors in relation to its financial statements. This does not preclude a business company from electing to appoint auditors and carry out an annual audit, particularly where it is part of a corporate group which is subject to audit requirements in another jurisdiction. Subject to the terms of the Memorandum or Articles, an auditor may be appointed by the directors or the shareholders.

It should be noted that certain types of business companies may be subject to regulatory obligations that require the appointment of an auditor. Typical examples are insurance companies and investment funds.

1.14 Disclosure of Shareholders' Interests in the Company

The register of members of a business company is not a public document except where the business company has elected to file its register of members with the BVI Registrar of Corporate Affairs. Public filing of the register of members is sometimes carried out where security has been granted over the shares of the business company and the lender or charge holder requires such filing.

The registered agent of the business company has a duty under the BVI 'know your client' laws to collect prescribed information in relation to the each beneficial owner of a business company. However, this information is not in the public domain.

1.15 Shareholders' Rights to Grant Security over / Dispose of Shares

Unless otherwise restricted in the Memorandum or Articles, shareholders of a business company are entitled to grant security interests over their shares. Under the BC Act,

a mortgage or charge over shares in a business company is required to be in writing and signed by, or with the authority of, the registered holder of the shares to which such mortgage or charge relates. There is no specific form for a mortgage or charge over shares prescribed in the BC Act, however whatever form is adopted must clearly state the intention to create a mortgage or charge and the amount secured by the mortgage or charge or how that amount is to be calculated.

In the absence of any restrictions or limitations on the transfer of shares contained in the Memorandum or Articles, shares in a business company are freely transferable. The process for transferring registered shares involves a written instrument of transfer signed by the transferor and containing the name and address of the transferee. The signature of the transferee is required under the BC Act where the transferee as registered holder of the share would incur a liability to the business company.

In general, upon receipt of a duly executed instrument of transfer, a business company, acting by a resolution of the directors, will enter the name of the transferee in the register of members which gives the transferee title to the shares. The directors of a business company may, if permitted to do so under the Memorandum or Articles, resolve to refuse or delay the registration of the transferee as the registered holder of the shares for reasons which must be stated in the relevant directors' resolution.

The shareholders of a business company may, if they wish, agree to be bound by transfer restrictions contained in a shareholders' agreement or joint venture agreement. Such transfer restrictions typically include pre-emption rights, coat tails, drag-along and tag-along rights. It is common to include a provision in the shareholders' agreement/joint venture agreement stating that any transfer of shares in the business company that is not in compliance with the contractual transfer restrictions will be null and void. Under BVI law, in order to ensure that any transfer of shares in breach of the transfer restrictions contained in a shareholders' agreement/joint venture agreement is null and void, the relevant transfer restrictions should be included in the Memorandum or Articles. Otherwise, a transfer in breach of such transfer restrictions will constitute a breach of contract rather than being null and void under BVI law. In addition, a benefit of including the transfer restrictions in the Memorandum and Articles is that specific performance will then be available as a remedy. If not included, it is possible the courts may only award damages for a breach of the terms of the shareholders' agreement/joint venture agreement.

Transfer restrictions may also be included in an instrument creating a charge or mortgage over the shares of a business company. If the governing law of the relevant instrument is not BVI law, in order for the mortgage or charge to be binding on the business company, the business company

will need to be a party and the instrument will need to be in compliance with the legal requirements of the applicable governing law. The remedies available to the mortgagee or charge will be determined by the applicable governing law. The relationship between mortgagor/mortgagee, in its capacity as a shareholder, and the company will be governed by BVI law regardless of the governing law of the instrument.

As an alternative option available to a shareholder wishing to dispose of his or her shares, the BC Act allows a business company to acquire its own shares for no consideration by way of the registered shareholder surrendering the share to the business company. A surrender of shares under the BC Act is effected in writing and signed by the registered shareholder.

1.16 Shareholders' Rights in the Event of Liquidation / Insolvency

The primary statute in the BVI pertaining to the insolvency of business companies is the Insolvency Act 2003 (IA 2003). Under IA 2003, a business company is insolvent if:

- it fails to comply with the requirements of a statutory demand that has not been set aside within the prescribed time limit of 14 days (which may not be extended);
- execution issued on a judgment, decree or order of the BVI courts in favour of a creditor of the company is wholly or partially unsatisfied; and/or
- it is proved to the satisfaction of the court that either:
 - (a) the value of the company's liabilities exceeds its assets; or
 - (b) the company is unable to pay its debts as they fall due.

If a business company is insolvent under the IA 2003, a shareholder may make an application to the BVI court to appoint a liquidator of the business company. The application by the shareholder to appoint a liquidator may only be made with the leave of the BVI courts. The BVI courts will not grant leave unless the courts are satisfied that there is a prima facie case that the company is insolvent based on the test in the IA 2003.

The shareholders may also appoint an insolvency practitioner as liquidator of the business company out of court by passing a 'qualifying resolution', being a resolution passed at a properly constituted meeting of the business company by a majority of 75% of the votes of the shareholders present at the meeting and entitled to vote, or any higher majority stated in the Memorandum or Articles. The shareholders are not permitted to use the out of court route if a liquidator has already been appointed by the BVI court or if an application to appoint a liquidator is pending with the BVI court.

Under the IA 2003, shareholders' equity ranks last in the priority of payment in an insolvency, including as regards

liquidation costs. Shareholders are prevented from claiming, in the liquidation of a business company, any sums due to them in their capacity as a shareholder, which includes dividends, profits, redemption proceeds or other amounts. The extent to which a shareholder has a claim for any of these amounts will be taken into account in the final determination of the rights of the shareholders (and former shareholders) between themselves only.

2. Shareholder Activism

2.1 Legal and Regulatory Provisions

BVI business companies are commonly used in international capital markets as listing vehicles. Such business companies are therefore subject to dual regulatory regimes, the first being the BC Act as the primary legislation under which the BVI listing vehicle was incorporated and the second being the rules and regulations of the relevant securities exchange.

The BC Act and the Memorandum and Articles of the BVI listing vehicle will play an important role in shareholder activism because they collectively govern matters such as the appointment and removal of directors, the power of a shareholder to requisition shareholder meetings, access to company information and the remedies available to an activist shareholder. The Memorandum and Articles are particularly significant in the context of shareholder activism due to the fact that it is not uncommon to find protective provisions in the Memorandum and Articles of BVI listed vehicles (for example, poison pills and staggered boards), designed to frustrate hostile takeovers. The listing rules and regulations of the relevant securities exchange will typically regulate matters such as the disclosure requirements in relation to stakebuilding in a listed company and the enforcement of mandatory takeover obligations once a shareholder crosses a particular ownership threshold.

2.2 Level of Shareholder Activism

An assessment of the prevalence of shareholder activism involving BVI-incorporated listing vehicles will be a matter for the jurisdictions in which the shares are listed. It should be noted, however, that BVI-incorporated business companies are listed in a number of overseas jurisdictions which have seen an increase in shareholder activism in recent years.

2.3 Shareholder Activist Strategies

Acquiring a minority stake in a business company (or increasing an existing minority stake) is likely to be a first step in the activist shareholder's strategy. Following an acquisition, the approaches taken by an activist shareholder to advance his, her or its agenda may involve an initial 'soft' approach such as open or private letters to the board of directors of the business company. If the initial approach fails, an activist shareholder may seek to use the statutory right under the BC Act to request that a shareholder meeting

be convened, subject to the activist shareholder being entitled to exercise at least 30% of the voting rights (or any lesser percentage specified in the Memorandum or Articles). Gaining board representation also features as a common activist shareholder strategy. Subject to provisions of the Memorandum or Articles, a director may be appointed or removed by the shareholders.

The BC Act permits shareholders holding 90% of the voting shares of a business company to redeem the shares held by the remaining shareholders. It should be noted that shareholders are entitled to use this statutory power at any time, subject to complying with the BC Act, and therefore it may be used in a strategy that is employed by an activist shareholder if it manages to secure the requisite majority.

Another alternative available to an activist shareholder would be to proceed by way of a squeeze-out merger under the BC Act. A squeeze-out merger requires director approval of a written plan of merger, which must also be authorised by a resolution of the shareholders of the business company. In the case of a squeeze-out merger, the required shareholder approval is by simple majority and therefore a lower ownership threshold needs to be crossed than for a redemption of shares held by the minority shareholders, as discussed in **2.3 Shareholder Activist Strategies**.

The agenda pursued by activist shareholders commonly includes seeking a change of management (the directors and/or CEO) given that under BVI law the operational matters of a business company are the responsibility of the board of directors. This is a common avenue for activist shareholders seeking to influence the future strategy of a business company.

2.4 Targeted Industries / Sectors / Sizes of Companies

As business companies are used across a variety of industries or sectors, we cannot say that there are specific industries or sectors which have been targeted by activist behaviour.

2.5 Most Active Shareholder Groups

Given the fact that BVI business companies are listed in a number of overseas jurisdictions, an assessment of the types of shareholders that are particularly active would most likely be dependent on the relevant securities market as well as a variety of macroeconomic factors.

2.6 Proportion of Activist Demands Met in Full / Part

Information on the proportion of public activist demands in the last year that were met, either in full or in part, is information more relevant to the appropriate exchanges rather than the BVI.

2.7 Company Response to Activist Shareholders

The typical strategies of an activist shareholder include a friendly transaction, a creeping acquisition and a hostile takeover. A business company's response to the activist shareholder will vary depending on the approach taken by the particular activist shareholder.

In response to a friendly transaction, the parties would likely negotiate a non-binding offer letter. The transaction, when consummated, would typically take the form of a squeeze-out merger under the BC Act, although it is also possible to utilise a BVI court-approved scheme of arrangement or plan of arrangement. The latter two methods are less common in the BVI.

Where the activist shareholder gradually acquires additional shares in the market toward a control stake (ie, a creeping acquisition) and the board of directors of the business company view such actions as hostile, the business company may seek to try to impede or prevent the activist shareholder from acquiring a controlling stake or seek a more acceptable transaction. In taking action to frustrate the potential acquirer, the board of directors of the business company will need to consider its fiduciary duties and act in the best interest of the business company.

If the activist shareholder opts to launch a hostile tender offer having been initially rebuffed by the board of directors of the business company, the board of directors should consider its fiduciary duties to determine whether it is in the best interests of the business company to frustrate the hostile takeover by, for example, seeking an alternative transaction on superior terms or deploying corporate defensive measures such as a poison pill or shareholder rights plan, which may also be deployed in the circumstances of a creeping acquisition, if structured appropriately.

3. Remedies Available to Shareholders

3.1 Separate Legal Personality of a Company

The BVI recognises the common law principle established in *Solomon v Solomon* [1897] AC 22 that a company is a separate and distinct legal entity from its shareholders, subject to very narrow exceptions. The BC Act does not permit the 'piercing of the corporate veil' in relation to a business company, meaning that shareholders cannot be held responsible for a business company's actions under the BC Act. However, BVI business companies are also subject to common law, which is similar in all material respects to English common law. The principal exception to the common-law principle in *Solomon v Solomon* is the fraud exception. This is likely to arise where a business company is involved in impropriety and the BVI court is satisfied that the business company is being used as a façade or sham.

3.2 Legal Remedies Against the Company

The shareholders of a business company have a number of statutory and common law remedies available to them in an action against the business company:

- *Restraining or compliance order*: Under the BC Act, if a business company engages, proposes to engage in or has engaged in conduct that contravenes the BC Act or the Memorandum or Articles, a shareholder (including a minority shareholder) may apply to the BVI court for an order directing the business company to comply with, or restrain from, conduct that breaches the BC Act or the Memorandum or Articles. The BVI court may also grant such consequential relief as it thinks fit. At any time prior to the determination of the shareholder's application, the BVI court may make as an interim order, any order that it could make as a restraining or compliance order under the BC Act. This is a relatively straightforward statutory procedure which allows a shareholder to enforce his, her or its statutory or share rights against a business company.
- *Personal action*: The BC Act contains a right for a shareholder to bring a personal action against a business company for any breach of duty owed by the business company to such shareholder as a member. This provision of the BC Act places a common law remedy on a statutory footing under BVI law. This is a remedy that would also be available to a minority shareholder of the business company.
- *Representative action*: The BVI court has the statutory power to make an order appointing one shareholder as a representative of some or all shareholders sharing an interest in relation to the proceedings against the business company. The BVI court may make such orders as it sees fit, including but not limited to in relation to the control and conduct of the proceedings, the costs of the proceedings and directions as to the distribution of any amount ordered to be paid by the business company to the shareholders represented.
- *Oppression, unfair discrimination, unfair prejudice*: A shareholder who is of the view that the affairs of the business company have been, are being or are likely to be conducted in a manner that is oppressive, unfairly discriminatory or unfairly prejudicial to the shareholder, has certain remedies available to him or her under the BC Act. The statutory remedies under the BC Act are discretionary and the BVI court will exercise its power to grant relief when it is just and equitable to do so. The BC Act prescribes eight non-exclusive remedies. These include requiring the business company or any other person to acquire the shareholder's shares, requiring the business company or any other person to pay compensation to the shareholder and appointing a receiver of the business company. These provisions provide robust remedies for minority shareholders and will often make up the basis of a claim in the BVI Courts by a minority shareholder.

3.3 Legal Remedies Against the Company's Directors

A shareholder may apply to the BVI court for a restraining or compliance order under the BC Act in relation to any conduct by a director of a business company that contravenes the BC Act or the Memorandum or Articles, as discussed in **3.2 Legal Remedies Against the Company**.

A shareholder may also use the statutory derivative action under the BC Act to bring a claim against a director of a business company for breach of fiduciary duty. The statutory derivative action regime is discussed further below (see **3.6 Derivative Actions**).

In both cases, the above remedies are available to a minority shareholder of a business company.

3.4 Legal Remedies Against Other Shareholders

Each of the remedies of oppression, unfair prejudice and unfair discrimination that are discussed above (**3.2 Legal Remedies Against the Company**) in relation to claims by a shareholder against a business company are also available in relation to a claim by one shareholder against another shareholder, including where the claimant is a minority shareholder.

It may be possible for a shareholder of a business company to bring an action to wind up the business company on just and equitable grounds where there is no prospect of reaching a resolution with the other shareholders as to the continued operation of the business company.

3.5 Legal Remedies Against Auditors

The BC Act does not require a business company to appoint an auditor except in limited cases, for example, where the business company is engaged in insurance business or fund management business. Therefore, there are no prescribed remedies under the BC Act that are available to shareholders in any action against the auditors of the business company.

3.6 Derivative Actions

Under the BC Act, a shareholder may apply to the BVI court for leave to bring proceedings in the name of and on behalf of the business company or intervene in proceedings to which the business company is a party for the purposes of continuing, defending or discontinuing the proceedings on behalf of the business company. Whilst leave of the BVI court is required in order to bring a derivative action, the BC Act sets out five matters which the BVI court must take into account in making its determination:

- whether the shareholder is acting in good faith;
- whether the derivative action is in the interests of the business company taking account of the views of the business company's directors on commercial matters;
- whether the proceedings are likely to succeed;

- the costs of the proceedings in relation to the relief likely to be obtained; and
- whether an alternative remedy to the derivative claim is available.

It should be noted that leave will be only be granted if:

- the BVI court is satisfied that the company does not intend to bring, diligently continue or defend or discontinue the relevant proceedings (as the case may be); and
- it is in the interests of the business company that the conduct of the action should not be left to the directors or to the determination of the shareholders or members as a whole.

The BVI court has the statutory power to grant interim relief as it may deem appropriate pending the determination of the application by a shareholder. In addition, the BVI court may, at any time after granting leave to a shareholder in relation to a derivative action, make any order it deems appropriate which could include giving directions for the conduct of the proceedings or an order requiring the business company, or its directors provide information or assistance in relation to such proceedings. The statutory provision expressly replaces the common law right to a derivative action.

Derivative actions are most likely to be used in the BVI in cases where there has been improper exercise of the voting power of the majority shareholders of a business company, an infringement of a shareholder's rights or an issue with the corporate governance of a business company.

3.7 Strategic Factors in Shareholder Litigation

The BVI is a leading offshore jurisdiction for incorporation of companies and the BVI courts routinely hear substantive matters in all areas of commercial litigation. Parties frequently turn to the BVI courts seeking relief in relation to matters such as ownership of shares in business companies, the management or administration of business companies and oppression, unfair discrimination or unfair prejudice issues. There is a dedicated Commercial Division of the High Court in the BVI which is designed to deal with resolving complex, high-value corporate, shareholder and trusts disputes.

Litigating in the BVI offers a number of tactical advantages including access to speedy judgments of a quality that is comparable to that of the English commercial court, final appeal to the Privy Council in London and access to highly regarded commercial courts with English-trained judges.

Conyers

PO Box 3140
Wickhams Cay 1
Road Town
Tortola
British Virgin Islands
VG1110

CONYERS

Tel: +1 284 852 1000
Fax: +1 284 852 1001
Email: bvi@conyers.com
Web: www.conyers.com