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The International Comparative Legal Guide to:

Mergers & Acquisitions 2019

13th Edition

A practical cross-border insight into mergers and acquisitions

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General Chapters:

Country Question and Answer Chapters:

Continued Overleaf →

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Country Question and Answer Chapters:

EDITORIAL

Welcome to the thirteenth edition of *The International Comparative Legal Guide to: Mergers & Acquisitions*.

This guide provides corporate counsel and international practitioners with a comprehensive worldwide legal analysis of the laws and regulations of mergers and acquisitions.

It is divided into two main sections:

Three general chapters. These chapters are designed to provide readers with an overview of key issues affecting mergers and acquisitions, particularly from the perspective of a multi-jurisdictional transaction.

Country question and answer chapters. These provide a broad overview of common issues in mergers and acquisitions in 54 jurisdictions.

All chapters are written by leading mergers and acquisitions lawyers and industry specialists, and we are extremely grateful for their excellent contributions.

Special thanks are reserved for the contributing editors Scott Hopkins and Lorenzo Corte of Skadden, Arps, Slate, Meagher & Flom (UK) LLP for their invaluable assistance.

Global Legal Group hopes that you find this guide practical and interesting.

The International Comparative Legal Guide series is also available online at www.iclg.com.

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Chapter 12

British Virgin Islands

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1 Relevant Authorities and Legislation

1.1 What regulates M&A?

The primary sources of regulation of M&A in the British Virgin Islands are the Business Companies Act, 2004 (the "Companies Act") and common law.

Part IX of the Companies Act facilitates mergers and consolidations between one or more companies, provided that at least one constituent company is a British Virgin Islands company.

In addition:

- mergers and reconstructions by way of a plan of arrangement or a scheme of arrangement approved by the requisite majorities of shareholders and/or creditors and by an order of the British Virgin Islands court under section 177 or section 179A, respectively, of the Companies Act are available for complex mergers; and
- section 176 of the Companies Act provides a limited minority squeeze-out procedure.

The British Virgin Islands does not have a prescriptive set of legal principles specifically relevant to "going private" and other acquisition transactions (unlike other jurisdictions such as Delaware). Rather, broad common-law and fiduciary principles will apply.

1.2 Are there different rules for different types of company?

There are no specific statutes or government regulations concerning the conduct of M&A transactions. Whilst the British Virgin Islands does not have a Stock Exchange, the shares or other securities of many British Virgin Islands companies are listed on the major international Stock Exchanges, and the rules of the relevant Exchange will need to be considered. The usual requirement under the Companies Act for shares to be transferred by way of a written instrument is disapplied (subject to the company's memorandum and articles of association) for shares listed on a recognised Exchange, if the transfer is carried out in accordance with the laws, rules, procedures and other requirements applicable to shares registered on the Exchange.

1.3 Are there special rules for foreign buyers?

There are no foreign investment restrictions or exchange control legislation in the British Virgin Islands; however, any company with an established physical presence in the British Virgin Islands must be structured and licensed in accordance with local laws, including with respect to ownership. Any company engaging in business locally (i.e. in the British Virgin Islands) is required to be licensed under the Business Professions & Trade Licenses Act, 1990 or the applicable financial services legislation. However, foreign investment, if considered beneficial to the British Virgin Islands' economy, is generally encouraged, and the British Virgin Islands government is considering introducing further incentives, including a special economic zone.

1.4 Are there any special sector-related rules?

There are change-of-control rules applicable to entities regulated by the British Virgin Islands Financial Services Commission under the relevant financial services legislation, including, for example, the Banks and Trust Companies Act, 1990 as amended and the Insurance Act, 2008 as amended.

1.5 What are the principal sources of liability?

Pursuant to section 120 of the Companies Act, a director of a British Virgin Islands company must act honestly, in good faith and in what the director believes to be in the best interests of the company. In addition, at common law, the directors of British Virgin Islands companies owe fiduciary duties (generally described as being those of loyalty, honesty and good faith) to the company. Whilst it is common for directors of British Virgin Islands companies to be indemnified for certain breaches of this duty, pursuant to section 132 of the Companies Act, a company may not indemnify a director unless they have acted honestly, in good faith and in what they believed to be in the best interests of the company, and in the case of criminal proceedings, they had no reasonable cause to believe their conduct was unlawful.

To the extent that consent to a merger or acquisition is procured via an information memorandum or proxy statement, civil liability in tort may arise for negligent misstatement or fraudulent misrepresentation. Part II of the Securities and Investment Business Act, 2010 as amended ("Part II") will provide for rights to compensation for false or misleading advertisements of prospectuses; however, Part II is not in force.

The Insolvency Act, 2003 as amended provides a liquidator with the ability to challenge certain defined voidable transactions, including transactions at an undervalue or made with the effect of preferring a creditor.

2 Mechanics of Acquisition

2.1 What alternative means of acquisition are there?

The statutory merger regime is a longstanding feature of British Virgin Islands company law, and statutory merger is by far the most common method of structuring a complex acquisition or business combination. In certain cases, however, the statutory merger regime may not be suitable, and the traditional options, such as contractual equity or asset acquisition, remain. The threshold for a statutory merger (subject to the memorandum and articles of association of the company) requires only board approval and a shareholder resolution passed in accordance with the articles of association (typically, a simple majority of those shareholders attending and voting at the relevant meeting or by way of written resolution passed by shareholders with a majority of the voting rights). Dissenters to a merger have the right to be paid in cash the fair value of their shares as agreed with the company or, if agreement cannot be reached within the statutory timeframe, as appraised by independent appraisers pursuant to section 179 of the Companies Act. This can be a factor where the offer involves a share-for-share swap as opposed to a cash buy-out, or where the bidder anticipates issues with minority shareholders.

Plans of arrangement under section 177 of the Companies Act and schemes of arrangement under section 179A of the Companies Act are appropriate in certain circumstances. A scheme or plan of arrangement transaction will involve the production of a circular – typically a detailed disclosure document which must provide stakeholders with all information required to make an informed decision on the merits of the proposed arrangement. The principal benefit of a scheme is that if all the necessary majorities are obtained, hurdles are cleared and the court approves the scheme, then the terms of the scheme become binding on all members of the relevant class(es) of shareholders or creditors, whether or not they (a) received notice of the scheme, (b) voted at the meeting, (c) voted for or against the scheme, or (d) changed their minds afterwards. The consents for approval of a plan of arrangement under section 177 may be determined by the court and are therefore less rigid than the prescribed majorities required for a scheme of arrangement under section 179A. However, it should be noted that the court may order that dissenters' rights apply to a plan of arrangement but not to a scheme of arrangement.

In a tender offer, private contractual acquisition or public takeover, where control of the majority of the voting equity is required, the statutory squeeze-out remains available where the relevant statutory thresholds are met. Where a bidder has acquired 90% or more of the voting shares in a British Virgin Islands company, it can direct the company to acquire the shares of the remaining minority shareholders and thereby become the sole shareholder. Such a squeeze-out requires the acceptance of the offer by holders of no less than 90% of the voting shares in the company (including the holders of no less than 90% of the shares in each class entitled to vote as a class). Dissenters have the right to object to the acquisition and to receive the agreed or appraised fair value of their shares.

Contractual asset acquisitions, where the target ceases doing business and is liquidated after the consummation of the sale, are uncommon given the flexibility and ease of use of the statutory merger regime, but remain a useful option.

2.2 What advisers do the parties need?

Parties should engage British Virgin Islands counsel alongside their usual legal advisers. Generally, auditors, tax and financial advisers are also involved in deal structuring.

2.3 How long does it take?

Depending on the complexity of the transaction, the structure and regulatory status of the target and the method employed, it can take anywhere from a matter of weeks to a number of months. For example, straightforward mergers of British Virgin Islands companies, where the shareholder base is relatively limited and there is no applicable public listing, may be accomplished in a few weeks. Where the target company is listed or the merger is a cross-border transaction, a longer deal time is required.

Schemes of arrangement can run for many months depending on their complexity and given the requirements for court approval, as can complex take-private transactions.

2.4 What are the main hurdles?

A statutory merger, the disposal by a company of a majority of its assets, a squeeze-out transaction and (if ordered by the court) a plan of arrangement can provide for certain dissenters' rights which, in each case, essentially provide for dissenting shareholders to be paid in cash the fair value for their shares as agreed with the company or, if agreement cannot be reached in the statutory timeframe, as independently appraised.

For schemes of arrangement, no dissenters' rights apply; however, the key challenge is achieving the high approval majorities required of each class of shareholder.

2.5 How much flexibility is there over deal terms and price?

Parties are generally free to contract as they wish as to terms and price, subject to the directors of a British Virgin Islands company discharging their statutory and fiduciary duties, including the duty to act *bona fide* in the best interests of the company.

2.6 What differences are there between offering cash and other consideration?

Again, parties are generally free to contract as they wish as to terms and price. However, in the context of a statutory merger, where dissenters have the right to be paid in cash the fair value of their shares, a share-for-share deal may add complexity.

2.7 Do the same terms have to be offered to all shareholders?

Where an acquisition is structured by way of a statutory merger or scheme of arrangement, differing consideration can be paid to shareholders. For tender offers utilising a statutory squeeze-out, the same "offer" must be made to all shareholders.

2.8 Are there obligations to purchase other classes of target securities?

There are no statutory or common-law obligations to purchase other classes of target securities.

2.9 Are there any limits on agreeing terms with employees?

There are no such limits applicable under British Virgin Islands law, save in the context of a business acquisition, to which the Labour Code, 2010 as amended may apply with regard to employees located in the British Virgin Islands.

2.10 What role do employees, pension trustees and other stakeholders play?

Aside from a general consideration with respect to the relevant employment contracts, there are no employee or pension-specific provisions applicable to a statutory merger, save that where the surviving company is a British Virgin Islands company, it shall be liable for and subject to, in the same manner as the constituent companies, all contracts, obligations, claims, debts and liabilities of each of the constituent companies, including any employment liabilities.

For a scheme of arrangement, there are no specific employee or pension-specific provisions applicable, but where the rights of creditors are to be affected, the consent of the requisite majority will be required.

Employee, pension or creditor consideration will not be relevant to a tender offer or statutory squeeze-out or to an asset acquisition, save to the extent there are employees in the British Virgin Islands.

2.11 What documentation is needed?

Whilst not strictly prescribed by the Companies Act, any complex merger will require some form of disclosure statement, whether or not required by applicable listing rules or regulation in the jurisdiction in which the company operates or has a listing. The Companies Act requires each constituent company to enter into a written plan of merger, setting out certain prescribed information. For more complex transactions, this is usually accompanied by a long-form merger or framework agreement.

For schemes or plans of arrangement, alongside the applicable court documents, the scheme or plan circular must be provided to the scheme or plan participants, including sufficient information in order to allow them to make an informed decision in relation to the merits of the proposed arrangement.

For a tender offer, there is no British Virgin Islands prescribed documentation, but again relevant jurisdictional listing rules or regulation may be applicable. For a statutory squeeze-out, the Companies Act requires notice be given to dissenting shareholders.

For an asset acquisition, there are no specific documentation requirements, and the parties are free to contract as they see fit.

2.12 Are there any special disclosure requirements?

For schemes or plans of arrangement, the scheme or plan circular must be provided to the scheme or plan participants and must include sufficient information in order to allow them to make an informed decision in relation to the merits of the proposed arrangement. For statutory mergers, the plan of merger must contain certain limited prescribed information and be approved by the board and a resolution of the shareholders of each British Virgin Islands constituent company.

2.13 What are the key costs?

The key costs will be service provider fees. Government filing fees will generally be minimal, and no stamp duty is payable on documents entered into by a British Virgin Islands company, provided that it does not hold an interest in land in the British Virgin Islands.

2.14 What consents are needed?

Other than as set out at question 1.4 above and absent any contractual consents required, there are generally no authorisations, consents, approvals, licences, validations or exemptions that are required by law from any governmental authorities or agencies or other official bodies in the British Virgin Islands in connection with merger and acquisition transactions.

The substantive merger documents are required to be filed with the Registrar of Corporate Affairs and, upon the satisfaction of the statutory requirements, the plan of merger shall be registered.

A scheme of arrangement is subject to the sanction of the court, although the court's principal role in the scheme is to ensure procedural fairness and not to assess the commercial benefits of the proposal. Any shareholders or creditors who object to the scheme are entitled to attend the relevant court hearing to object – however, an objection solely on the grounds that it is a "bad deal" commercially is usually unlikely to succeed if the scheme has the support of the requisite majorities.

The court will determine the appropriate consents (if any) required for a plan of arrangement.

2.15 What levels of approval or acceptance are needed?

Absent any special thresholds or consent required by the constitutional documents of a British Virgin Islands company, or by contract, and the consents discussed at question 1.4 above, for a statutory merger, both board approval and shareholder approval (generally a simple majority of those attending and voting at the relevant meeting) are required.

A scheme of arrangement will require the requisite approval of each of the relevant class(es) of shareholders or creditors whose rights are to be subject to the scheme (namely, a majority in number representing 75% in value of the creditors or class of creditors, or shareholders or class of shareholders, as the case may be, present and voting either in person or by proxy at the meeting).

The court will determine the appropriate consents (if any) required in a plan of arrangement.

2.16 When does cash consideration need to be committed and available?

There are no British Virgin Islands legal considerations relevant to determining when cash consideration needs to be committed and available.

3 Friendly or Hostile

3.1 Is there a choice?

Neither a statutory merger nor a scheme of arrangement can ever be

"hostile", insofar as they require the consent of the target. The squeeze-out procedure is the only mechanism available in the context of a hostile transaction.

The British Virgin Islands does not have any applicable takeover legalisation or competition or anti-trust legislation. The constitutional documents of British Virgin Islands companies which are publicly listed may contain certain anti-takeover or "poison pill" provisions, which may make a hostile takeover more difficult to consummate or give the target superior bargaining power.

In order to comply with their statutory and fiduciary duties, the directors of a British Virgin Islands target will need to give due consideration to any *bona fide* offer, even if it is unsolicited, to determine if acceptance of such an offer is in the best interests of the company.

3.2 Are there rules about an approach to the target?

No, there are no applicable rules in the British Virgin Islands.

3.3 How relevant is the target board?

The directors of a British Virgin Islands company will be integral in consummating a merger or acquisition, whether by statutory merger, plan or scheme of arrangement, equity acquisition or asset acquisition.

In the context of a statutory merger or an asset acquisition, the directors will be required to approve the terms of the transaction on behalf of the company, and for a plan or scheme of arrangement, the company must consent to the arrangement, which by necessity will involve the consent of the directors. The usual position for a British Virgin Islands company (other than a listed company) is that the transfer of shares is subject to the consent of the directors, meaning that the directors will also generally be able to control an equity acquisition.

However, the directors of a British Virgin Islands company will, in making decisions on a proposed takeover, need to act consistently with their statutory and fiduciary duties, including (i) by acting *bona fide* in the best interests of the company as whole, and (ii) by not allowing their personal interests to conflict with their duties to the company.

At common law, directors have a strict fiduciary duty to avoid a conflict of interest. However, the Companies Act contains provisions which relax this duty, usually allowing directors to vote in connection with transactions in which they are interested, provided that they make appropriate disclosures (albeit such provisions do not modify the directors' overriding duty to act *bona fide* in the best interests of the company).

It is common for the directors of a listed company to elect to establish an independent committee of disinterested directors to consider takeover offers. Whilst this may assist from a risk-management perspective, it does not provide the same "safe harbour" or "roadmap" protection it may offer in other jurisdictions.

3.4 Does the choice affect process?

An unsolicited, "hostile" acquisition is, in practice, difficult to consummate if the target is a British Virgin Islands company, as the cooperation of the target company is required for a statutory merger, plan or scheme of arrangement or asset acquisition. In addition, it would be unusual (but certainly not unheard of) for the memorandum and articles of association of a British Virgin Islands company to do away with the requirement for directors' consent to a transfer of shares, typically making a tender offer by way of equity acquisition equally unworkable.

4 Information

4.1 What information is available to a buyer?

There is limited publicly available information in the British Virgin Islands for a company: the company name and number; the location of its registered office; details of its registered agent; and a copy of its memorandum and articles of association. If the target company is listed, additional information may be available (for example, any Stock Exchange or securities regulator filings). A search of the court register in the British Virgin Islands will disclose any actions or petitions pending before the High Court of the British Virgin Islands in which the company is identified as a claimant or defendant.

4.2 Is negotiation confidential and is access restricted?

Yes, negotiation is confidential and access is restricted.

4.3 When is an announcement required and what will become public?

There is no British Virgin Islands regulation relating to the formulation or content of any announcement.

4.4 What if the information is wrong or changes?

See question 4.3.

5 Stakebuilding

5.1 Can shares be bought outside the offer process?

Yes, save to the extent that transfers of shares in the target company are subject (by virtue of the articles of association of the company) to the consent of the directors of the company.

5.2 Can derivatives be bought outside the offer process?

There are no British Virgin Islands restrictions in this regard.

5.3 What are the disclosure triggers for shares and derivatives stakebuilding before the offer and during the offer period?

There are no stakebuilding rules applicable under British Virgin Islands law. Other than for companies listed on recognised exchanges, it should be noted that, following the enactment of the Beneficial Ownership Secure Search System Act, 2017 (known as the BOSS Act) in June 2017, non-listed companies are, with some exceptions, required to identify and collect details of the individuals who ultimately own or control 25% or more of the shares or voting rights or who otherwise exercise control over the management of the British Virgin Islands company, together with details of certain intermediate holding companies through which such interests are

held. The information is not required to be public and is held on a database accessible only by designated persons specified by British Virgin Islands competent authorities, principally on proper and lawful requests made by UK law enforcement agencies.

5.4 What are the limitations and consequences?

There are no limitations or consequences.

6 Deal Protection

6.1 Are break fees available?

There is no specific restriction on break fees under British Virgin Islands law, although directors of a British Virgin Islands company will need to give careful consideration to the break fee provisions in approving any contract on behalf of the company to ensure that they comply with their statutory and fiduciary duty to act *bona fide* in the best interests of the company.

6.2 Can the target agree not to shop the company or its assets?

Yes, subject to the directors of the company complying with their statutory and fiduciary duties.

6.3 Can the target agree to issue shares or sell assets?

Yes; this is again subject to the directors of the company complying with their statutory and fiduciary duties, including exercising their powers and discretions (for example, to issue shares) for a proper purpose, and not to frustrate or protect a particular deal.

6.4 What commitments are available to tie up a deal?

"No shop" and lock-up agreements are, in principle, acceptable under British Virgin Islands law, as are voting agreements whereby key shareholders agree to vote in favour of a transaction.

7 Bidder Protection

7.1 What deal conditions are permitted and is their invocation restricted?

The deal conditions described in section 6 above are generally permitted, subject to the compliance by the directors of the relevant company with their statutory and fiduciary duties.

7.2 What control does the bidder have over the target during the process?

The bidder will not generally gain "control" of the target until closing of the relevant transaction, but it is not uncommon for deal documentation to include restrictions on the conduct of the target's business, e.g. limiting it to the "ordinary course of business". Alternatively, the transaction documentation may provide for restrictions on, or termination in the event of, material changes in circumstances.

7.3 When does control pass to the bidder?

There is no statutory definition of "control" for these purposes in the British Virgin Islands, but the usual position is that shareholders of a British Virgin Islands company can appoint and remove directors by resolution of a simple majority. The memorandum and articles of association of a British Virgin Islands company may depart from the usual position, providing for staggered boards, removal for cause only or a higher voting threshold, which will result in effective control of the target being difficult to achieve.

7.4 How can the bidder get 100% control?

100% control can be achieved contractually under a statutory merger, equity acquisition, asset acquisition or upon the terms of a stakeholder and court-approved plan or scheme of arrangement, each as described in section 2 above. 100% control may be able to be compelled under a statutory merger by paying any dissenting shareholders of the company fair value of their shares, as required under the Companies Act, or the bidder availing themselves of the statutory squeeze-out provisions, again as described in section 2 above.

8 Target Defences

8.1 Does the board of the target have to publicise discussions?

There are no British Virgin Islands laws or regulations requiring disclosure of discussions of acquisition decisions. For listed companies, the relevant listing rules will be highly relevant.

8.2 What can the target do to resist change of control?

To the extent that the target's constitutional documents do not include anti-takeover provisions or "poison pill" type provisions, such as staggered boards or limited director removal rights, the directors of the target will be limited in their ability to resist a change of control by their fiduciary duties to the company – the directors will be obliged to consider the terms of the acquisition in good faith and act *bona fide* in the best interests of the company as a whole in relation to any acquisition proposal.

8.3 Is it a fair fight?

The balance of the British Virgin Islands M&A regime is arguably weighted slightly in favour of the target, particularly given the usual discretion available to the directors of a target to approve the commercial terms of a particular transaction or a transfer of shares (noting, however, that the directors must exercise such discretion for a proper purpose). The statutory and common-law principles applying to acquisitions are focused on fairness and reasonableness, and the duties of the directors of any British Virgin Islands target will be to ensure the best outcome for the shareholders of the company as a whole. In agreeing to any deal mechanics which seek to "rebalance the playing field", directors of a British Virgin Islands target will need to prioritise their statutory and fiduciary duties.

9 Other Useful Facts

9.1 What are the major influences on the success of an acquisition?

Deals offering a premium to market value and with market standard terms and conditions will have a greater prospect of success. The cooperation of the target's board and strategic shareholders will also be factors in achieving success.

9.2 What happens if it fails?

There is no restriction on a bidder making a new offer upon a failure to consummate an initial bid.

10 Updates

10.1 Please provide a summary of any relevant new law or practices in M&A in your jurisdiction.

Court guidance is evolving on the approach to appraising fair value on the exercise of dissenters' rights. Recent court guidance suggests that a discount for a minority holding may or may not be appropriate, depending on the circumstances. The British Virgin Islands plan of arrangement regime has not been frequently used to date, but recent publicised plans have demonstrated the potential uses of the regime, and the definition of the "arrangements" that may be subject to a plan is now an open definition. For example, there is the potential to achieve a demerger, which is itself not available as a statutory occurrence in the British Virgin Islands, although it should be noted that the courts resist the use of plans that would be confiscatory in their effect on shareholders.

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