Shareholder B, exit left: Exit options for BVI company investors

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There are a number of reasons why investors opt to use British Virgin Islands (BVI) companies to conduct business: the "BVI Advantage" is well documented. Although the road to incorporation is paved with the very best intentions, not every business venture is successful and not every business relationship can stand the test of time. In this article we explore exit options for investors wishing to withdraw from BVI joint ventures.

Subject at all times to the memorandum and articles of association of a BVI joint venture company (**JVCo**) and any shareholders' agreement binding on it, there are a number of exit options available to investors, depending on whether the desire is to walk away from the business, or terminate operations. In this article we consider:

- redemption of shares;
- transfer of shares;
- surrender of shares; and
- a member's right to wind a company up and statutory rights of dissent.

Redemption of shares

BVI companies may acquire their own shares, which may then either be cancelled or held in treasury. There are broadly three ways to redeem BVI shares:

- exercise of a redemption right at the option of the shareholder;
- exercise of a redemption right at the option of the company; or
- redemption by agreement (either pursuant to sections 60-62 of the BVI Business Companies Act 2004 (the **BVI Act**) or by an alternative process set out in the JVCo's articles of association).

Under (ii) and (iii), the JVCo's ability to purchase its own shares is subject to it being able to meet the solvency test for distributions.

Shares redeemable by nature

If a share is intended to be redeemable by right, then such right must be expressly contained in the memorandum of association of the JVCo. Where a shareholder gives the company proper notice (or *vice versa*) of its intention to redeem the share, the company is obligated to redeem the share(s) on the date and for the consideration specified in the notice, and in accordance with the redemption rights set out in the memorandum of association.

Redemption at the option of the company is typically used to create hybrid securities (eg redeemable preference shares) whereas shares that are redeemable at the option of an investor confer the right to exit the investment on a specified trigger event, which might be connected to the valuation of the JVCo or initial public offer. Either way, exit is a foreseen event.

Redemption of shares by agreement (repurchase or buyback)

Alternatively the board of the JVCo may agree to buy back the shares of its investor(s). The agreement must be carried out either in accordance with sections 60-62 of the BVI Act or whatever alternative process for share buyback has been prescribed in the JVCo's articles of association. This facilitates exit in unforeseen circumstances.

Sale/transfer of shares

An investor that no longer wishes to be an equity participant in a BVI company can of course sell its shares, either to an existing shareholder or to a third party. In a joint-venture scenario, it is common for the articles of association (or a shareholders' agreement) to specify some or all of the following limits on a shareholder's ability to freely to divest itself of its shares:

- rights of first refusal: provisions requiring a selling shareholder to offer its shares to the other shareholder(s) before selling to a third party;
- permitted transferees or white/blacklists: provisions preventing the selling shareholder from selling to, for example, a competitor, or allowing it to transfer to affiliates without consent;
- drag and tag rights: provisions allowing (tag) or forcing (drag) the other shareholder(s) to the terms of a third party sale.

Any contractual restrictions should be consulted and, if necessary, waivers obtained in order to facilitate an exit sale. Most companies also grant their directors broad discretions to refuse to register an instrument of transfer, and so an exiting investor should ensure that the company approves the sale and transfer by way of board resolution. The sale and transfer from A to B will only be effective once the transferee's name is entered in the company's register of members.

Surrender of shares

Where an investor who holds fully paid shares wishes to exit, and particularly where the company may not have brought any financial gain to that investor, it may simply choose to surrender its shares for zero consideration via an instrument in writing which is signed and then served on the company. The effect of this is to release the exiting investor from any and all rights and obligations in relation to those shares in the company and, critically, cannot be frustrated by contractual restriction.

Accordingly, it may be considered a last resort option for an investor that simply wants out and is not minded to seek (or sees no value in pursuing) consideration for its shares. The BVI Act is silent on when a share surrender takes effect; our view is that it should be the date of the surrender, and any rights accruing on the shares post-surrender but prior to registration of surrender would be considered to be held on bare trust for the company.

Liquidation

In many cases, an investor will wish to completely wind down a JVCo's operations. A shareholder generally has the right, subject to the company's memorandum and articles of association and any shareholders' agreement binding on the shareholder, to put the company into liquidation if:

- the company is solvent and it has or can obtain a majority shareholder vote to appoint a voluntary liquidator;
- the company is insolvent and it has or can obtain 75% majority vote to appoint an insolvency practitioner as liquidator of the company; or
- it has grounds to petition the court for winding up on a just and equitable basis.

In addition, shareholders' agreements may contemplate and regulate the liquidation of a JVCo in advance.

Statutory dissent rights

Finally, the BVI Act confers upon dissenters to substantial asset disposals, merger, consolidation, minority squeeze out or plans (but not schemes) of arrangement, the right to be bought out for fair value. The right does not confer the ability to block a transaction, but rather, to step away from the investment and receive fair economic compensation in cases where the majority wish to take the business in a different direction.

Conclusion

As detailed above, there are a number of exit options that are available or can be made available to shareholders of a BVI company who no longer wish to do business with their partners, or continue the business at all.

It is important to note that the particular exit option that will be used will depend on whether exit is foreseen or unforeseen, the circumstances of the situation and the goal the exiting shareholder wishes to accomplish.

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