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## Shareholder activism – considerations for BVI companies

Once a fairly niche investment strategy of concern to US-listed businesses, shareholder activism is an increasingly global phenomenon. Estimates suggest assets under management (**AUM**) by activist funds increased by more than 1000 per cent over the past decade, with most of that growth occurring since the global financial crisis. Globally, activists' AUM stand at over US\$175 billion but the real volume is undoubtedly greater, as that figure excludes assets of multi-strategy funds and other types of investor who may nevertheless be active in this space. Indeed, recent market trends suggest we will see more "occasional activism" in future against an increasingly international range of targets. Last year witnessed a marked increase in non-US activity (particularly in the UK and Asia, where activity was up 35 per cent and 48 per cent on 2015, respectively), with activists focusing on mid- and smaller-cap targets as markets performed better than expected and larger businesses (particularly in the US) prove increasingly adept at defending against activists. The success of established players in creating shareholder value has inspired new entrants – including not only multi-strategy managers but also proactive shareholders hoping to address perceived poor performance by longer-term holdings<sup>1</sup>. Finally, the development of digital and alternative media has afforded activists increased influence relative to their ownership stake; it is now not uncommon to find activists with a shareholding of 1 per cent or below announcing campaigns, particularly in the case of large-cap stocks<sup>2</sup>. For example, Third Point's campaign against Nestlé was announced when the fund had acquired a 1.3 per cent stake for US\$3.5 billion and saw the Swiss group's market value jump by US\$10 billion overnight. As the resignation of Uber's founder and CEO demonstrates, venture capitalists are also increasingly active in pushing for change within private companies.

As the world's leading incorporation vehicles, BVI companies are listed on exchanges and conduct business all around the world and so may expect to be involved in activist campaigns or other challenges from shareholders from time to time<sup>3</sup>. However, many investors and their advisers may be less familiar with BVI company law than their domestic legislation. This article therefore examines the key BVI legal considerations in this area.

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### Access to constitutional documents

An essential first step for any investor considering acquiring a stake in a BVI company is to consider carefully with BVI counsel the provisions of the company's memorandum and articles of association (its **M&As**). Fortunately, a BVI company's M&As can be obtained via a public search for a modest fee. A shareholder of a BVI company also has a statutory right to inspect its M&As.

A point to note from the outset is that the default provisions of the BVI Business Companies Act (the **BC Act**) are subject to the provisions of each individual company's M&As to a greater extent than may be the case in many other jurisdictions. The M&As are therefore a key point of reference in determining the legal scope for a shareholder to bring about change should softer approaches (such as "open" or private letters to the board) fail. In the case of listed companies, it is also very common to find protective provisions included in the M&As (for example, multiple share classes with specific voting rights or supermajority voting provisions) to defend the company against hostile bidders or persons acquiring minority stakes, which may be relevant to an activist's strategy.

### Access to registers and other information

Reviewing a company's list of shareholders is another key step in identifying potential support for an activist's agenda, particularly if a proxy battle is likely.

A BVI company's share register and register of directors are not publically available, unless the company has elected to file the relevant register publically (which is seldom the case with listed companies). Broadly, a shareholder of a BVI company has a statutory right to inspect such registers and the company's minute book; however, subject to the company's M&As, the directors may refuse or limit access if they are satisfied that inspection would be contrary to the company's interests. While it is possible to apply to court to seek access in such cases, this is a relatively costly process and the court may be reluctant to make an order permitting inspection provided the directors can evidence *bona fide* commercial justifications for restricting access.

In practice, the utility of a BVI company's share register may be fairly limited since it only shows legal title "of record" so details of ultimate beneficial ownership may not be disclosed – for example, where investors hold their shares through clearing systems, depositories, custodians or nominees. Of course, a listed company may be required under applicable listing rules to disclose publically shareholders with holdings over a specified threshold and/or directors' interests.

A shareholder in a BVI company has no automatic right under the BC Act to inspect the company's financial records but the M&As should be checked for any express requirements to provide financial information to shareholders. In practice, it is not common to find such requirements – particularly if the company is required to publish accounts and other financial or "inside" information under applicable listing rules.

### Power for shareholders to requisition meetings

Where other approaches prove unsuccessful, an activist may seek to force the company to hold a shareholder meeting to consider its proposals. Under the BC Act, there is no requirement for a company to hold an annual general meeting (**AGM**) although an AGM may be required under the M&As and/or applicable listing rules.

The directors of a BVI company are required by the BC Act to convene a shareholder meeting upon written request by shareholders entitled to exercise at least thirty per cent of the voting rights in respect of the matter for which the meeting is requested, unless the M&As specify a lesser percentage. In practice, it is reasonably common to find a lower percentage specified in the M&As. A minimum of not less than seven days' notice of a shareholders' meeting is required under the BC Act, although the M&As may specify a longer notice period. Written shareholder resolutions are also generally permissible, which may be of use where the activist is able to establish sufficient support among other shareholders.

If the directors fail to convene a meeting which has been properly requested by shareholders, the court has the power to order a shareholder meeting on application by any director or shareholder. The court has broad discretion as to the costs of such applications, including the power to order that the costs of the application be borne by the company.

It is typical to find quorum and voting requirements set out in the M&As but, in the absence of express provisions, the default position under the BC Act is that (i) a shareholder meeting is quorate if at the commencement of the meeting there are present in person or by proxy shareholders entitled to exercise at least 50 per cent of the votes and (ii) unless the M&As specify a high percentage, a resolution is passed if approved by a majority of 50 per cent of shareholders entitled to vote and voting on the resolution.

The BC Act generally permits voting proxies and voting agreements between shareholders – however, the M&As of the specific company should be reviewed carefully as it is common to find express provisions regarding the use of proxies at meetings.

### Appointment and removal of directors

Gaining board representation to advance an activist's agenda is another common strategy. Studies indicate this is a feature of approximately 25-30 per cent of all campaigns and that, outside the US, it is relatively common to find activists agitating for the removal of the CEO or another board member<sup>4</sup>.

Subject to the company's M&As:

- a director may be appointed by the shareholders, and
- a director may be removed by the shareholders by: (i) a resolution passed at a meeting of shareholders called for the purpose of removing the director or called for purposes including the removal of the director; or (ii) a written resolution consented to by 75 per cent of the shareholders of the company who are entitled to vote.

Unless provided for by the M&As, there is no requirement for directors to be re-elected on a regular basis. Also, in the case of a listed BVI company, it is relatively common to encounter defensive provisions designed to defend the board against hostile shareholder action (for example, a staggered board or "golden parachute" protections for the CEO or other key personnel). Accordingly, the provisions of the M&As should be carefully reviewed, as they will determine shareholders' ability to bring about change at the board level.

## Mergers and acquisitions activism and shareholder dissent rights

M&A activity is another area where shareholders are increasingly making their voices heard – either to push for business combinations, disposals or spin-offs or to scrap or change the pricing or other terms of proposed deals<sup>5</sup>. In addition to the considerations outlined above, a shareholder scrutinising a proposed deal involving a BVI company should be aware of the rights granted to dissenting shareholders under the BC Act.

Very broadly, a shareholder in a BVI company is entitled to payment of the fair value of his or her shares upon dissenting from:

- a merger involving the company, unless the company is the surviving company and s/he continues to hold the same or similar shares
- a consolidation involving the company
- unless the relevant provisions of the BC Act are dis-applied under the M&As, certain significant disposals (broadly, any disposition of more than 50 per cent in value of the assets or business of the company made outside the ordinary course of business, subject to some exceptions)
- a redemption of his or her shares pursuant to the BC Act’s “squeeze out” provisions, or
- a plan or scheme of arrangement, if permitted by the court.

A dissent must be in respect of all of the shares held by the relevant shareholder. A statutory timetable for shareholders objecting to the proposed action and, if the action is taken, electing to dissent then applies, whereby the company must make a written offer to each shareholder purchase the relevant shares at a price it determines to be “fair value”. Failing an agreement on price within 30 days of such offer, fair value is determined by a board comprising three appraisers. The company and the dissenting shareholder each appoint an appraiser and the two designated appraisers then appoint a third appraiser.

## Shareholder remedies

A comprehensive overview of shareholder remedies under BVI law is beyond the scope of this article. However, very broadly, activists and companies should be aware of the following points:-

- **Derivative claims.** Directors should be mindful of their duties (in particular, the duty to act in the best interests of the company) when considering an activist investor’s position. However, directors’ duties are owed to the company and, as a result the company is usually the proper claimant in the event that such duties are breached. However, the court may, on the application of a shareholder, permit the shareholder to bring or intervene in proceedings in the name of the company (a **derivative claim**). In practice, derivative actions are most likely to be relevant where there has been either (i) some irregularity in the internal governance of the company, (ii) a “fraud on the minority” by the controllers of the company or (iii) a shareholder’s rights have been infringed. However, activists should note that the court is required to take into account (and may be expected to give weight to) the views of the directors on commercial matters and it will be for the shareholder bringing the derivative claim to demonstrate mismanagement, if this is alleged.

- **Injunctive relief.** A shareholder may also apply to court for an order directing the company or director(s) to comply with, or restrain from action that contravenes, the BC Act or the M&As. In practice, derivative actions and restraining/compliance orders are likely to be relevant where there has been a clear “fraud on the minority” – the court is required to take into account (and may be expected to give weight to) the views of the directors on commercial matters and it will be for the shareholder bringing the derivative claim to demonstrate mismanagement.
- **Shareholder claims and representative actions.** If the company has breached a duty owed by the company to a shareholder (for example, by breaching its M&As), the shareholder may bring an action in his own name. Where other shareholders have the same or substantially the same interest, the court may appoint one shareholder to represent all or some of the other shareholders.
- **Unfair prejudice.** Broadly, a shareholder may apply to the court for relief from oppressive, unfairly discriminatory or unfairly prejudicial conduct by the company or in relation to the company’s affairs. The court has extremely broad discretion to make such order as it thinks fit, although a typical remedy for unfair prejudice is to order a buy-out of the relevant shareholder(s) shares at fair value (as determined by the court, in the absence of any methodology agreed by the parties in settlement).

The M&As may contain arbitration clauses or other alternative dispute resolution (ADR) provisions. Such provisions generally will not preclude shareholders from enforcing their rights under BVI law (subject to the need to apply to court where the remedy sought is not of a type that is within the tribunal’s power to grant) but may be relevant when considering the anticipated cost, time period and forum for pursuing legal action.

## Conclusion

The sustained growth of shareholder activism, and in particular the spread of activists beyond the US and traditional “pure-play” funds, is changing the way companies around the world engage with shareholders. Investors and their advisers considering a BVI company should involve BVI counsel at an early stage in the engagement process, as the inherent flexibility and unique features of BVI company law make a close reading of the company’s constitutional documents essential in establishing a clear picture of the scope for bringing about the desired changes within the company.

**For more information and key contacts please visit [www.harneys.com/BVI](http://www.harneys.com/BVI).**

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- <sup>1</sup> Indeed, some of the earliest activist campaigns were led by “value investors” such as Benjamin Graham (against Northern Pipeline in the 1920s) and Warren Buffett (against Sanborn Map Company in the 1950s): J. Gramm, *Dear Chairman: Boardroom Battles and the Rise of Shareholder Activism* (New York, 2015).
- <sup>2</sup> J.P. Morgan, *The Activist Revolution* (2015). Activist Insight (in association with Schulte, Roth & Zabel), *The Activist Investing Annual Review 2017* (2017).
- <sup>3</sup> This article is primarily concerned with listed companies but the same legal points are also relevant to investors in an unlisted BVI vehicle, since the BVI draws no legal distinction between private and public companies.
- <sup>4</sup> FTI Consulting, *Global Activism on the Rise* (2016).
- <sup>5</sup> Activist Insight (in association with Kingsdale Advisors), *M&A Activism: A Special Report* (2017).