Dispositions of assets by a British Virgin Islands company

1. Although under British Virgin Islands law, companies are (subject to limitations in their constitutional documents) generally free to dispose of their assets on such terms as the directors think fit, one particular provision of British Virgin Islands law can fetter the directors’ power of disposal.

2. Section 175 of the BVI Business Companies Act, 2004 (as amended, the “Act”) provides, in outline, that where a company proposes to dispose of 50% or more of its assets other than in the regular or usual course of its business, all shareholders (even shareholders holding non-voting shares) must be formally notified of the proposed disposal, and the disposal must then be approved by a resolution of the shareholders. Section 175 is set out in its entirety in a schedule to this note. The process is applied to all transfers even where the disposal is at arm’s length and for fair value.

3. The section regulates all types of transfers of assets, including assignments of rights in action and other transfers of intangible rights. However, the generally held view by the profession is that section 175 would not apply to a transfer of cash pursuant to a loan made by the company. Similarly, a purchase of an asset by a company using cash is thought not to require shareholder approval under the section even where the cash constitutes over 50% of the company’s assets. The grant by a company of an option over its assets is thought to be a disposition when the option is granted (rather than when it exercised). However, there is no clear judicial authority on these points.

4. It has not been definitively determined what the effect of a failure to comply with section 175 would be in relation to an arm’s length sale by a company; the statute itself is silent and there are no decided authorities in courts of the British Virgin Islands. There are broadly two schools of thought. The first is that such a transfer should be void (subject to the limitations of section 31 of the Act). The second is that the transfer is valid, but the directors may be liable for breach of duty and shareholders’ dissenting rights will be triggered under section 179 of the Act. In the only case on point in the British Virgin Islands, without hearing argument on the issue, the British Virgin Islands courts did not indicate that a transfer in breach of the provision was void although the point was not pleaded or argued.¹ What is clear is that in relation to a transaction of any substance, a company which did not comply with section 175 could not make the usual representations

¹ Technically the case related to section 80 of the International Business Companies Act, 1984 (the predecessor of the Act), but the provisions are identical.
required in sale contracts to the effect that it has obtained all necessary “consents, licenses and approvals”.

5. There is a dearth of authority in the British Virgin Islands regarding the proper interpretation of section 175. However, the view of this firm is that “assets” would probably be construed to mean “gross assets valued on an unconsolidated basis”.

6. Section 175 does not apply to transactions which are made in the “usual or regular course of business”. The natural interpretation would suggest that if the company is in the business of selling widgets, it does not need shareholder approval just to fill an unusually large order. In *Ciban Management Corp v Citco (BVI) Ltd* (BVIHCV 2007/031) the British Virgin Islands court held that if a company acts as a single asset holding vehicle, it would be within the “usual ... course of business” for it to sell that single asset. There is also some U.S. authority supporting that view. However, this interpretation is not without difficulties. Firstly, the word “course” seems to suggest there must be something ongoing in the nature of the business (as indeed the word “business” implies), rather than a one-off function. Secondly, the presumed purpose of the section must be to protect shareholders from the directors alienating the bulk of the company’s assets without their knowledge; that purpose would not be fulfilled at all if such sales by single asset vehicles fell within the exclusion. But barring further judicial consideration, the view of the court in *Ciban Management Corp v Citco (BVI) Ltd* should be assumed to be authoritative.

7. Companies are permitted to disapply the effect of section 175 under their constitutional documents, and although this is becoming more common in practice, the majority of British Virgin Islands companies still do not do so.

8. Section 175 does not apply to the grant of a mortgage or charge, even where the security interest requires title to relevant asset to be transferred to the mortgagee, as in a perfected legal mortgage over shares. However, where security is granted by way of absolute transfer, such as under an English law governed ISDA Credit Support Annex, it would appear that transfers of collateral would be subject to the restrictions in section 175. Similarly, commercial transactions which involve an absolute transfer of assets, such as stock lending, would be regulated by section 175, even if the commercial effect is more in the nature of a loan.

9. Where a company disposes of over 50% of its assets and a member disapproves of the sale and voted against it, the member has a right to dissent and require that their shares be purchased by the company for fair value under section 179. This right appears to be limited to shareholders; there is no corresponding right for guarantor members.

10. An innocent third party dealing with the company is entitled to assume that section 175 has been fully complied with unless they have actual knowledge to the contrary (section 31(1)(a) of the Act). However, where a director fails to comply with section 175 or threatens to dispose of an
asset without complying with the section, either a director or a member may apply to restrain the sale or (possibly) set it aside. In appropriate cases the relevant director(s) may also be liable for breach of duty.

The foregoing discussion and analysis is for general information purposes only and not intended to be relied upon for legal advice in any specific or individual situation.

FURTHER INFORMATION

Please contact any of the following Harneys lawyers if you require additional information on the registration of security in the British Virgin Islands.

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ABOUT HARNEYS

Harneys is the oldest and largest law firm in the BVI and enjoys a significant reputation in the offshore arena. The firm has lawyers and staff providing BVI and Cayman legal and corporate services from offices in the BVI, Cayman, Hong Kong and London. Through this network of international offices, Harneys is able to offer its worldwide client base 24-hour service.
175. Subject to the memorandum or articles of a company, any sale, transfer, lease, exchange or other disposition, other than a mortgage, charge or other encumbrance or the enforcement thereof, of more than 50 per cent in value of the assets of the company, other than a transfer pursuant to the power described in section 28(3), if not made in the usual or regular course of the business carried out by the company, shall be made as follows:

(a) the sale, transfer, lease, exchange or other disposition shall be approved by the directors;

(b) upon approval of the sale, transfer, lease, exchange or other disposition, the directors shall submit details of the disposition to the members for it to be authorised by a resolution of members;

(c) if a meeting of members is to be held, notice of the meeting, accompanied by an outline of the disposition, shall be given to each member, whether or not he is entitled to vote on the sale, transfer, lease, exchange or other disposition; and

(d) if it is proposed to obtain the written consent of members, an outline of the disposition shall be given to each member, whether or not he is entitled to consent to the sale, transfer, lease, exchange or other disposition.