

Disposal of assets by a BVI company

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Introduction

Directors of BVI companies have wide ranging powers to manage the company pursuant to the BVI Business Companies Act, 2004 (as amended, the **BCA**). Under section 109 of the BCA, the business and affairs of the company are managed by, or under the direction or supervision of, the directors of the company. Section 109 of the BCA also provides that the directors have all the powers necessary for managing, directing and supervising the business and affairs of the company.

However, a company's memorandum and articles of association (**M&A**) may reserve specific powers for the shareholders. There are also certain matters that are specifically reserved for shareholders under the BCA. Section 175 of the BCA (**s.175**) provides an important safeguard for shareholders which prevents the disposal of more than 50% of a company's assets without the approval of its shareholders.

Application of s.175

Unless a company has disapplied s.175 in its M&A, any disposal (including a sale, transfer¹, lease, or exchange) of more than 50% in value of the company's assets (a **Disposal**) requires shareholder approval.

This requirement does not apply if the Disposal is made in the company's usual or regular course of business, and does not apply to a mortgage, charge or other encumbrance.

Steps required

Where s.175 applies, the following steps must be taken prior to making a Disposal:

- the Disposal must be approved by the directors;
- once approved by the directors, details of the Disposal must be submitted to all shareholders, regardless of whether a shareholder is entitled to vote on or consent to the Disposal; and
- the Disposal must be authorised by a resolution of shareholders (subject to the company's M&A, a resolution of shareholders is typically passed by a simple majority - ie more than 50%).

Right to dissent

Where a resolution of shareholders has been passed to authorise a Disposal but a minority of shareholders do not approve, the minority shareholders have a statutory right to dissent from the proposed transaction and are entitled to payment of the fair value of their shares. However, this right of dissent will not be available where the Disposal is:

- pursuant to a court order;
- for money on terms requiring all, or substantially all, net proceeds to be distributed to the shareholders in accordance with their respective interests within a year of the Disposal; or

¹ Other than a transfer pursuant to the power described in section 28(3) of the BCA, under which a company may transfer its assets in trust to trustees.

- a transfer pursuant to the power described in section 28(2) of the BCA.

Recent case law

There is not a vast amount of judicial guidance on s.175. However, the recent case of *Fang Ankong and Green Elite Limited (in Liquidation)* provides some useful clarification around the BVI court's willingness to use s.175 as protection for members' rights, which directors should be alive to when considering a disposal of company assets.

The case involved a BVI company that had made payments totalling HK\$150 million, comprising sale proceeds of assets previously owned by the company, to three of its directors. The company subsequently went into liquidation and its liquidators alleged that, among other things, those payments were in breach of s.175.

It was held at first instance² that, despite three separate payments being made, which individually did not constitute more than 50% in value of the company's assets, the transfer of the sale proceeds was a single transaction – the value of which did satisfy the 50% threshold. Further, although it was accepted that the transaction was 'potentially' made in the usual or regular course of the company's business (being a holding company), it was held that the directors had not complied with the requirements of s.175.

In the Court of Appeal, the defendants' appeal was dismissed. The obiter judgment clarified that:

- individual transfers of less than 50% in value of the company's assets which amount to one composite transaction exceeding the 50% threshold are, in principle, subject to the requirements of s.175;
- the company did not carry on business in the sense of 'ongoing commercial activity' as its sole purpose was to hold shares; therefore the dispositions could not be in the usual or regular course of its business; and
- a breach of s.175 provides a basis for directors to be personally liable under section 121 of the BCA where payments made to directors are not for a proper purpose.

Directors of BVI companies (and, in particular, holding companies) ought to be aware of the Court of Appeal's views in this case when carrying out transactions involving the potential application of s.175. To find out how we can help with the necessary corporate authorisations required in a s.175 transaction, please speak to a member of our team.

Contacts

A full list of contacts specialising in BVI law can be found [here](#).

² BVIHC (Com) 2018/0222 (unreported, delivered 17 January 2022).

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