

# Using BVI companies for joint-venture transactions involving India

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Chetan Nagendra examines the advantages of setting up a joint venture in the British Virgin Islands for doing business with India

The British Virgin Islands ('BVI') has long established itself as the world's leading corporate domicile with nearly 825,000 companies in use worldwide. BVI companies are regularly used in cross-border transactions, and particularly in structuring joint venture vehicles for both inbound and outbound transactions involving India.

BVI companies are typically used as holding companies, with a tax-advantaged intermediary vis-à-vis India (in jurisdictions such as Cyprus or Mauritius) and an operating company that is based onshore.

## Versatility

The advantages of using a BVI company in joint venture ('JV') structures are manifold:

- Comprehensive corporate and insolvency code
- Flexibility on the form of company structure (choice of seven types of companies including segregated portfolio companies); share capital and share transfers, financial assistance, company administration, and the conduct of directors and shareholders of the company
- Tax neutral with no compulsory audit requirement
- A common-law jurisdiction with a fast-track Commercial Court and appeals to the Privy Council
- Straightforward merger, consolidation and arrangement provisions and an effortless company dissolution process
- A neutral jurisdiction with which American, European and Asian investors are comfortable.

## Legal certainty

The BVI Business Companies Act (the 'Act') is very

flexible and complements evolving corporate requirements. In the context of a JV, the commercial requirements of the parties may directly be drafted onto the memorandum and articles of association (the 'M&A') of the JV company in combination with the shareholders agreement, and the courts will ordinarily enforce the commercial intent as recorded in these documents.

## Share capital and rights of shareholders

BVI companies are not restricted on the type of business that they may carry out. There is also no concept of 'share capital' under the Act, and shares can effectively be issued at no par. Moreover, a BVI company may be authorised to issue an unlimited number of shares, and for any form of consideration. The rights of the shares can be structured as deemed fit by the shareholders.

## Corporate governance

The business and affairs of a BVI company are managed by the directors, who have wide-ranging powers for effective direction and supervision. The constitution of a JV board normally represents the underlying shareholding of each JV partner, and a BVI company requires a single director to be appointed at all times. Directors may also be given wide-ranging powers to amend the M&A, form committees, and even approve a plan of merger. The Act expressly provides that a director of a JV company, if authorised by the M&A and with the agreement of shareholders, may act in a manner which is in the best interests of shareholders, even though it may not be in the best interests of the company.

## Company administration

Every BVI company is required to have a registered office in the British Virgin Islands and appoint a Registered Agent (the 'RA'). The RA maintains the company records and may be authorised by the company to receive service of process.

As regards financial records, a company is required to keep records that are sufficient to show and explain the company's transactions and enable the financial position of the company to be determined with reasonable accuracy. Records may be maintained in written or electronic form.

## Flexibility in holding meetings

In the case of shareholders' meetings, the Act is flexible and there is no requirement to hold a meeting in the BVI. Shareholders may participate by proxy, via telephone or by other electronic means. The quorum is often fixed by the M&A, and groups of shareholders may even agree in writing to constitute a voting trust and vote en bloc.

Similarly, directors may meet at such times within or outside the BVI as they may determine to be necessary. A director may participate in a meeting of directors by telephone or other electronic means, so long as the other directors who are participating in the meeting are able to hear each other. Quorum is once again fixed by the M&A, and an alternate may be appointed to attend and vote at meetings in the absence of a director.

## Simple share transfers

Share transfers in a BVI company may be restricted by the M&A or not at all. The Act mandates that the directors may not pass a resolution refusing the transfer of shares, unless the Act or the M&A expressly permit them to do so.

## Ease of distributions and buybacks

Of particular relevance in the JV context is the ease in which profits can be distributed by a BVI company. The Act requires that a company satisfy the Solvency Test prior to making a distribution. The test mandates that: (i) a company's assets exceed its liabilities, and (ii) that the company is able to pay its debts as they fall due. There is no need to show a surplus, or make a distribution out of reserves, as is required in more traditional jurisdictions.

A company may also acquire, purchase or redeem its own shares so long as it satisfies the Solvency Test, and such activity is in accordance with the provisions of its M&A.

## Tax neutrality

Companies in the BVI are not subject to corporate taxes (income, capital gains, dividends and profit taxes) or document based charges such as stamp duty and registration fees. The combination of a BVI holding company with a subsidiary in a tax-advantaged jurisdiction with India, achieves true tax neutrality.

## Shareholder remedies

Various remedies are available under the Act to oversee breakdowns in JV structures.

- **Compliance orders:** a shareholder may apply to the BVI courts to make an order directing the JV company or its directors to comply or restrain from engaging in conduct that contravenes the Act or the M&A.
- **Derivative actions:** the courts may permit a shareholder to commence a derivative action on behalf of a JV company, or intervene in proceedings to which the company is a party.
- **Personal actions:** the Act permits a shareholder to bring an action against a JV company for breach of a duty owed by the company to him as a member.
- **Representative actions:** The court may appoint a shareholder to represent all or some of the shareholders having the same interest in proceedings against the JV company.
- **Actions against unfair prejudice:** if a shareholder considers that the affairs of the JV company have been, are likely to be conducted in a manner that is, or likely to be oppressive, unfairly discriminatory or unfairly prejudicial to him, then he could apply to the court for a remedy. Remedies can include an order regulating the future conduct of the company's affairs; amending the M&A; winding up the JV company; forcing a majority shareholder or the company to purchase a minority shareholder's shares at a fair and reasonable price; or even setting aside any decision made by the directors in breach of the Act or the M&A.

The BVI offers a flexible and versatile company law regime, and at the same time affords a comprehensive set of remedies to shareholders involved in JV transactions. The BVI company is thus most-suited for cross-border JV transactions involving India.



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