

Reasons to Continue: Why in Tough Times Offshore Companies May Consider Continuations into the BVI

By Michael Gagie and Leon Mao

What can you do if the jurisdiction in which you incorporated your offshore company did not work for your planned transaction, was too expensive to maintain, or was the “wrong” one? Continuation offers a useful solution.

As the global financial crisis impacts Asia, offshore companies incorporated during prosperous times may consider moving from the jurisdiction in which they have been domiciled. If past experience is a guide, hard times may highlight the high annual maintenance costs or inflexibilities in the corporate laws in the jurisdiction of domicile. One redeeming feature in the corporate law of a number of offshore jurisdictions such as, the British Virgin Islands (“BVI”), the Cayman Islands and Bermuda is the ability to “continue” or “migrate” into and out of a jurisdiction.

Asian clients are familiar with the BVI and the advantages of incorporation under the BVI Business Companies Act (the “Act”) in terms of cost, speed and flexibility. The decision by an existing offshore company to continue to a more facilitative jurisdiction - like the BVI - could be motivated by any of the following:

- offshore companies seeking to reduce maintenance costs in their current jurisdiction of domicile, which may, for some jurisdictions such as Bermuda, tally up to more than USD29,000 in annual government fees;
- corporate clients looking to standardize the jurisdictions of domicile of companies across their group in order to simplify their audit process and add to cost-saving initiatives;
- offshore companies intending to restructure their share capital, only to discover that procedures in their current jurisdiction involve complex court action and a lengthy time-frame; or
- offshore companies (Bermuda or Cayman Islands) listed on Asian stock exchanges who are taking the opportunity now that the value of their listed shares are at lows to privatise and de-list, and as part of this process, would like to continue into a more “user-friendly” jurisdiction.

Continuation into the BVI

Part X of the Act provides for continuation into the BVI and details the procedure by which a company from another jurisdiction can continue into the BVI as a BVI Business Company. Continuation of a company into the BVI does not result in any change to a company's legal identity but merely changes its jurisdiction of registration and the legislative regime by which the company's actions are governed: a company continues into the BVI taking along with it the corporate history, track record and goodwill which it had in its previous jurisdiction.

First Considerations in Moving to the BVI

A company incorporated, registered or formed outside of the BVI may continue into the BVI if the laws of the jurisdiction in which it is currently registered permit it to continue into another jurisdiction, including the BVI¹. Examples of jurisdictions which provide facilitative laws are Bermuda, the Cayman Islands and Samoa.

However, under the Act there are exceptions to the general rule and a company may be prohibited from continuing into the BVI on any of the following grounds²:

- it is in liquidation, or subject to equivalent insolvency proceedings in another jurisdiction;
- a receiver or manager has been appointed in relation to any of its assets;
- it has entered into an arrangement with its creditors that has not been concluded; or
- an application made to a court in another jurisdiction for the liquidation of the company or for the company to be subject to equivalent insolvency proceedings has not been determined.

Procedure and Documentation on the BVI Side

Under the Act, an application to enable a foreign company to continue into BVI needs to be filed with the Registry of Corporate Affairs (the "BVI Registry") by the proposed "registered agent", a licensed entity in the BVI which provides the registered office address, assists with registrations required to be made at the BVI Registry and is designated to receive service of process on behalf of the BVI Business Company.

Documents required to be filed as part of the application include³:

¹ Section 180 (1) of the Act.

² Section 180(2) of the Act.

³ Section 181(1) of the Act.

- a certified copy of the company’s certificate of incorporation or equivalent that evidences its incorporation, registration or formation;
- the memorandum and articles of association which the company proposes to adopt once it continues into the BVI;
- evidence that the application to continue and the proposed memorandum and articles of association (for use in the BVI) have been approved, either (a) by a majority of the directors of the company or the other persons who are charged with exercising the powers of such company; or (b) in such other manner as may be established by the company for exercising the powers of such company; and
- evidence that the company is not disqualified from continuing into the BVI (e.g. a legal opinion from a lawyer in the originating jurisdiction which confirms that the foreign company is able to continue into the BVI).

Subject to satisfaction that the Act’s requirements have been complied with, the BVI Registry will register the above documents to give effect to the company’s continuance as a BVI Business Company, allot a unique registration number and issue a certificate of continuation. In terms of the legal effect, continuation under the Act does not affect the continuity of the company as a legal entity or its assets, rights, obligations or liabilities⁴.

Continuation Examples

The following two examples illustrate potential scenarios for continuation into BVI:

Example A: “Taking Private” a Bermudian Company

Company X, involved in the construction industry, had been incorporated in the early 1990s as an exempted company under the Companies Act 1981 of Bermuda (as amended) (the “Bermuda Act”). Incorporation in Bermuda had been advised by professional advisers in line with that jurisdiction’s designation in the late 1980s and 1990s as a “jurisdiction of choice” for listings on the Hong Kong stock exchange. However, in 2003 as the building and construction industry faltered during SARS, Company X’ share price plummeted to become a “penny stock”– this led to a determination to privatize Company X.

⁴ Section 183(2) of the Act. Section 183 (3) of the BCA goes on to provide that (a) no conviction, judgement, ruling, order, claim, debt, liability or obligation due or to become due, and no cause existing, against the company or against any member, director, officer or agent, is released or impaired by its continuation as a company under the Act; and (b) no proceedings, whether civil or criminal, pending at the time of the issue by the Registrar of Corporate Affairs of a certificate of continuation by or against the company, or against any member, director, officer or agent, are abated or discontinued by its continuation as a company under the Act, but the proceedings may be enforced, prosecuted, settled or compromised by or against the company or against the member, director, officer or agent thereof, as the case may be.

Privatization had to be effected via a Bermudian scheme of arrangement pursuant to the Bermuda Act, whereby the controlling shareholder proposed under the terms of the scheme to repurchase all outstanding shares from the other shareholders. Once Company X was controlled by the controlling shareholder, and de-listed, attention turned to further cost-savings and ease of administration for Company X, which as a Bermuda company attracted approximately US\$20,000 in annual government fees. The decision was made to continue Company X into the BVI, a jurisdiction where the group already had a number of subsidiaries and a move which could reduce annual registration/maintenance fees to as little as US\$350 per annum.

The Bermuda Act permits discontinuance, enabling Company X to discontinue out of Bermuda and be continued into a jurisdiction outside Bermuda as if it had been incorporated under the laws of that other jurisdiction.

Once procedures had been actioned on the BVI side and a certificate of continuation had been issued by the BVI Registry, a certificate of discontinuance was issued by the Bermuda registrar of companies upon which Company X ceased to be registered as a company in Bermuda.

Example B: Cayman Company seeking to reduce capital

Company Y was incorporated as an exempted company in the Cayman Islands under the Companies Law (Cap. 22 (Law 3 of 1961) as amended) (the “Cayman Act”). Company Y was forced by its financial circumstances to identify sources which could be used to offset accumulated losses, with the balance to be transferred to a distributable reserve.

One account which was topped-up and could be applied was the capital redemption reserve account, however Cayman Law mechanics required a special resolution of shareholders to reduce capital⁵, and confirmation by the Grand Court of the Cayman Islands of the reduction. The Grand Court application and consideration process normally entails a 4 to 6 month time-frame before a matter can be listed and heard.

In view of the imminent needs of Company Y and the client’s perception that the Cayman capital reduction process was a potentially difficult route, an alternative procedure of continuation into BVI and effecting the reduction of capital under the less restrictive BVI law procedures was considered as an alternative. Under the Act, the concept of share capital has been abolished, and capital which would originally have been attributed to the capital redemption reserve account of the company as a Cayman entity would, following continuation, be regarded purely as an asset of the (then) BVI company potentially distributable or capable of application under Division 4 of the Act, subject to fulfilment of a simple solvency test. The application or distribution of the monies could then be effected by resolutions of the company, without the need for a court process.

⁵ Sections 14(2) and 37(4)(d) of the Cayman Act

The Cayman Act enables an exempted company to be registered by way of continuation under the laws of a jurisdiction outside of the Cayman Islands by an application to the Cayman registrar of companies to be de-registered⁶.

As part of deregistration, the Cayman registrar of companies issued a certificate of deregistration which specified the date of de-registration of Company Y and an entry indicating de-registration was duly entered in the register of companies. The continuance process was completed within 6 weeks, which was within the client's time-frame.

Summary

The global financial crisis is challenging businesses in Asia and businesses utilising offshore companies may be compelled to review their cost of operations. Laws and circumstances permitting, continuation of a company into another jurisdiction may be one way to streamline corporate structures and reduce overheads. The following factors single the BVI out when it comes to corporate migration:

- BVI as a jurisdiction is well known and well regarded in Asia;
- BVI as an offshore jurisdiction offers a lower cost-base and facilitative modern corporate law;
- continuation is straightforward and takes place within a relatively short time-frame; and
- the end result is that corporate domicile is changed, but corporate identity is left intact as are the assets, rights, obligations and liabilities of the company.

If from a decision-maker's angle, there exist reasons to continue, then there are indeed many good reasons to now consider the "BVI move".

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⁶ Section 226(1) of the Cayman Act.