

BVI continuations and discontinuations

One of the many flexible features of the BVI Business Companies Act (the **BC Act**) is the ability both to continue a foreign company as a BVI company under the BC Act and also to continue a BVI company under the laws of another jurisdiction (commonly referred to, respectively, as a **continuation** and a **discontinuation** or **continuation out**). This guide provides a brief overview of the process and requirements for continuations and discontinuations.

General requirements to continue in the BVI

Broadly, to continue as a BVI company a foreign company must:

- Be permitted to continue in the BVI under the laws of its jurisdiction of incorporation (the Old Jurisdiction)
- Not (a) be in, or be the subject of any undetermined court application for, liquidation or equivalent insolvency proceedings in any other jurisdiction; (b) have a receiver or manager appointed in relation to any of its assets; or (c) have entered into an arrangement with creditors that has not been concluded

An application is then filed in the BVI, together with supporting documents (including evidence of approval of both the continuation and also the company's new memorandum and articles of association (**MAA**)). These must be approved (a) by a majority of directors or persons exercising the powers of the company or (b) in the manner established for exercise of the company's powers.

If satisfied, the BVI Registrar of Corporate Affairs (the **Registrar**) shall issue a certificate of continuation confirming the incorporation of the company under the BC Act. However, the Registrar may refuse any continuation she believes would be contrary to the public interest.

General requirements to continue out

Broadly, in order to continue out a BVI company must:

- Be in good standing (that is, up-to-date with government fees and not struck-off)
- Be permitted to continue out under its MAA
- Subject to any specific approvals required under its MAA, resolve to continue out by a board or shareholder resolution (although we generally recommend to obtain approval by shareholder resolution, for various reasons)
- As of 1 January 2023, comply with the requirements to advertise its intention to continue out and to notify creditors, members and the Registrar (as discussed further below)
- File a declaration, via its BVI registered agent, confirming that the laws of the relevant foreign jurisdiction (the **New Jurisdiction**) permit the continuation and that the company has complied with them

If satisfied these requirements have been complied with, the Registrar will issue a certificate of discontinuance, following which the company will be struck-off in the BVI and ceases to be a company under the BC Act.

Practical considerations

In practice, BVI counsel will need to consider the requirements of the Old or New Jurisdiction (as applicable) in advance with overseas counsel. For example, the laws of that jurisdiction may impose additional legal formalities (such as a BVI legal opinion). On a continuation in the BVI, the Registrar may rely on a formal director's certificate to satisfy herself that the BVI requirements have been met but this must be duly legalised under, and include an extract of, the relevant laws of the Old Jurisdiction. On a continuation out of the BVI, the Registrar must be provided with proof that the company has complied with the laws of the New Jurisdiction and, whilst this is often in the form of a certificate of registration, or equivalent document, the Registrar may also rely on a provisional certificate of continuance to allow her to issue the BVI certificate of discontinuance.

Depending on the company law requirements of the Old or New Jurisdiction (as applicable), some corporate reorganisational steps may be necessary – for example, changes to the directors or to the par value of the shares in the company.

The timings of the various filings will also need to be carefully co-ordinated. In particular, it is usually desirable to ensure “same-day” treatment of the continuation or discontinuation (to avoid the company's existing at the same time under two different company laws and any resulting conflicts of laws or other issues).

Discontinuations – advertisement and notice requirements

Following amendments to the BC Act, from 1 January 2023 onwards and on a discontinuation, certain advertisement and notice requirements apply.

Broadly, the company must file a notice (in the approved form) of its intention to continue out with the Registrar and must, at least 14 days before making such filing:

- Advertise a notice of such intention in the BVI official *Gazette* and on its website (if any) specifying the New Jurisdiction
- Notify the members and creditors of the company in writing of such intention

The notice the Registrar must include a declaration that such advertisement and notice requirements have been complied with. However, the notice to the Registrar may be rescinded (again, by formal notice to the Registrar).

Discontinuations – declaration regarding registered security interests

On a discontinuation, if a charge or other security interest (a charge) is registered publicly in the BVI in respect of the company's property which has not been released or satisfied, it must first make a written declaration to the Registrar. The declaration must state either:

- That a notice of satisfaction or release has been filed and registered in respect of the charge
- If such a notice has not been filed and registered, that the holder of the charge (the chargee) has been notified in writing of the intention to discontinue and has consented or not objected
- If the chargee has not so consented or has objected following notice, that the chargee's interest secured by the charge shall not be diminished or compromised by the discontinuation and, broadly, will continue to be a liability recognised under the relevant provisions of the BC Act (see below)

Effect of continuations and discontinuations

Broadly, under the BC Act, the effect of a continuation or discontinuation is as neutral and seamless as possible and the relevant company is regarded as one and the same legal entity. From the date of continuation in the BVI, a company is subject to the BC Act and its new MAA and, under BVI law, is no longer treated as incorporated in the Old Jurisdiction. On a discontinuation, from a BVI law perspective, a company will not cease to be subject to BVI law until a certificate of discontinuance is issued.

Broadly, the BC Act provides that (a) the company continues to be liable for all of its obligations that existed prior to its continuation or discontinuation; (b) the continuation or discontinuation does not impair or release any such liabilities or obligations or any judgments or claims against the company; and (c) any pending or actual proceedings by or against the company remain unaltered.

It should be noted that, in the case of a BVI company that has been discontinued, service of process may continue to be effected on its BVI registered agent in respect of any claim, debt, liability or obligation of the company during the period of its existence under the BC Act.

Other considerations

Any contracts or other legal arrangements to which each relevant company is subject should also be reviewed with appropriate counsel to check whether they restrict the proposed continuation or whether any third-party consents are required, for example. If security exists in relation to the shares of the company or its assets, then it may be necessary to amend the terms of such security or to re-register it in connection with the process. In particular, the terms of any existing security in relation to the company's shares may well not be appropriate for the company following the continuation or discontinuation (as applicable).

In connection with the process, each relevant company should also consider any regulatory compliance or reporting obligations to which it is subject, whether under BVI law or otherwise. These are beyond the scope of this general guide, but companies should consider any applicable compliance and reporting obligations under the Economic Substance (Companies and Limited Partnerships) Act 2018 and the Beneficial Ownership Secure Search System Act 2017. A company continuing in or out of the BVI which is part of an "MNE Group" for Country by Country Reporting purposes should consider whether it needs to register the changes with the BVI International Tax Authority. Companies which are required to be licensed or regulated by the BVI Financial Services Commission should also consider any special requirements applicable to them.



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