

Continuations and mergers or consolidations involving BVI companies

The amendments to the BVI Business Companies Act, 2004 (as amended) (the **Act**) bring into focus the different options for owners and operators of BVI companies who may wish to rationalise or simplify group structures in terms of the jurisdictions in which they operate. Historically a migration or continuation out of the BVI to another jurisdiction was a commonly employed mechanism as it was a relatively speedy process which required little paperwork.

Since 1 January 2023, additional advertising and notification requirements designed to protect both shareholders and creditors of BVI companies seeking to migrate from the BVI have extended the timeframe in which a migration out of the BVI can be effected. This article seeks to explain the new requirements and to also remind readers of the statutory merger provisions in the Act which may provide an alternative means of achieving a similar result.

Continuation out of the BVI

Under the Act, a BVI company can continue out of the BVI and continue as a company incorporated under the laws of a jurisdiction outside of the BVI (the **Foreign Jurisdiction**) provided the laws of the Foreign Jurisdiction permit the continuation.

Subject to a company's memorandum and articles of association (the **M&A**) and the company being in good standing, a BVI company may continue out of the BVI if authorised to do so by either resolution of directors or by resolution of members (the **Authorising Resolutions**) although the laws of the Foreign Jurisdiction may require approval of the members regardless of the position in the BVI. The Approving Resolutions authorise the company's continuation into the Foreign Jurisdiction and generally will also include matters such as the appointment or resignation of directors and/or other officers of the company and the approval and adoption of the company's new constitutional documents and the company's name, all of which will be stated to come into effect on completion of the continuation into the Foreign Jurisdiction.

As of 1 January 2023, a company wishing to continue into a Foreign Jurisdiction must:

- advertise a notice of its intention to continue out of the BVI in the Government Gazette (the **Gazette**) and on its website (if any) which must set out which jurisdiction the company intends to continue into (the **Advertisement**); and
- notify all of its members and creditors in writing of its intention to continue out of the BVI,

(the **Notice Requirements**).

Once the Notice Requirements have been complied with, the company must wait 14 days (the **Notice Period**) before it can file a notice of its intention to continue out (the **Notice of Intention**), which must include a statement that the company has complied with the Notice Requirements and Notice Period.

The directors are also required to make a declaration confirming that the laws of the Foreign Jurisdiction permit the continuation and that the company has complied with those laws. Complying with the laws of the Foreign Jurisdiction (which may require amongst other things, a BVI law opinion that confirms the BVI company's ability to continue under the laws of the Foreign Jurisdiction) will require cooperation with overseas counsel. The process of registration under laws of the Foreign Jurisdiction can generally begin and run in parallel to the continuation out process under the Act.

To the extent that there are any charges registered over any property owned by the company, an additional written declaration must be filed (more details below).

Once the BVI Registrar of Corporate Affairs (the **Registrar**) is satisfied that the requirements under the Act pertaining to the continuation out have been complied with, the Registrar will issue a certificate of discontinuance, the company's

name will be struck off the register of companies and a notice of its striking off will be published in the Government Gazette.

Practical considerations

Security registered over any property of the BVI company

If a company has a charge registered over any of its property, prior to the company's continuation out, the company will need to have the charge released and provide the Registrar with confirmation of its release. However, if the charge cannot be released, the company will need to provide the Registrar with:

- written confirmation that the chargee has been notified of the company's intention to continue out of the BVI; and
- that the chargee has given consent or has not objected to the planned continuation.

Where the chargee has been notified and has not given its consent or has objected to the intended continuation out, the registered charge will operate in such manner that it continues to be a liability of the company for which the company will continue to be liable for despite its continuation out of the BVI.

Timing considerations

The timing of a continuation out will be driven by the requirements under the Act as well as the requirements under the laws of the Foreign Jurisdiction. The process of continuing out of the BVI is generally straightforward. However, the Notice Requirements (as of 1 January 2023) will now need to be incorporated into the continuation out timeline.

The Gazette publication schedule should be consulted to ensure that the placement of the Advertisement in the Gazette is aligned with the timeline of the continuation out. The publication date of the Gazette is scheduled to be every Thursday of each week (the **Publication Date**). The Advertisement will need to be lodged no later than the Monday of the week before the Publication Date (the **Notice Deadline**). Publication Dates and Notice Deadlines may differ to accommodate public holidays.

Once the Notice of Intention is filed with the Registrar, the final continuation out documents can then also be filed.

Merger with a foreign company – An alternative process to a continuation out

As an alternative to the continuation out process, a BVI company may also merge or consolidate with a company that is incorporated in a Foreign Jurisdiction (the **Foreign Company**), provided the laws of the jurisdiction where the Foreign Company is incorporated allow for the merger or consolidation.

A merger is the merging of two or more companies (the **Constituent Companies** or a **Constituent Company**) into one of the companies (the **Surviving Company**). While a consolidation, is the consolidation of two or more Constituent Companies into a new company (the **New Company**).

Under the Act, there is flexibility to tailor the structure and terms of a merger or consolidation to meet specific needs and objectives and in particular, in respect of the shares of each of the Constituent Companies and the Surviving Company or New Company.

Shares of a Constituent Company may be cancelled, reclassified or converted into shares, debt obligations or other securities in the Surviving Company or the New Company and shares of the same class may be treated differently. Alternatively, shares may be converted into money or other assets or a combination of the two. This allows shares to be bought out in consideration for money or assets or combination thereof.

The process for a merger or consolidation under the Act is fundamentally the same save for a few nuances in respect of the constitutional documents of the Surviving Company and the New Company.

The Process under Part IX of the Act (Merger or Consolidation)

In both a merger and a consolidation, the first step is to prepare a written plan of merger or consolidation (the **Written Plan**) which must be approved by the directors of the Constituent Companies and also by a resolution of the members of the Constituent Companies. The Written Plan must be circulated to all members of the Constituent Companies notwithstanding that some members of one (or more) of the Constituent Companies may not be entitled to vote on the Written Plan.

Following the approval of the Written Plan, the articles of merger or consolidation must be prepared and filed with the Registrar which must contain amongst other items, the Written Plan of merger or consolidation.

If the Registrar is satisfied that the requirements of the Act have been complied with, the Registrar shall register the articles of merger or consolidation and issue a certificate of merger or a certificate of consolidation (as applicable).

A certificate of merger or consolidation is conclusive proof that all requirements under the Act in respect of the merger or consolidation have been fulfilled.

Merger or consolidation with a Foreign Company

A BVI company that intends to merge or consolidate with a Foreign Company must comply with the merger or consolidation requirements under the Act, while the Foreign Company must comply with the applicable laws of the jurisdiction of its incorporation.

Following a merger or consolidation, where the Surviving Company or the New Company (as applicable) is to be incorporated under the laws of a Foreign Jurisdiction, a process agent in the BVI must be appointed and certain filings must be made with the Registrar. These filings include filing the certificate of merger or consolidation that is issued by the respective Foreign Jurisdiction where the Surviving Company or the New Company is incorporated.

The effect of a merger or consolidation with a Foreign Company is the same as in the case where two or more BVI companies merge or consolidate, except in so far as the laws of the Foreign Jurisdiction provide.

Where the Surviving Company or the New Company (as applicable) is to be incorporated under the laws of a Foreign Jurisdiction, dissenting minority members of the Constituent Company may require the Constituent Company to purchase its shares at fair value. If the proposed merger or consolidation was *intra vires* the Constituent Company and not otherwise unlawful, ordinarily the minority members would be bound by the majority and would not be able to restrain the Constituent Company from carrying on with the proposed merger or consolidation with the Foreign Company. The Act therefore provides a remedy for such dissenting members in the form of a statutory right to have their shares bought out by the Constituent Company for fair value.

The onus is on the dissenting member to exercise its statutory rights and both the dissenting member and the Constituent Company are bound by the procedure and timeframes set out in the Act. If the Written Plan is approved, those members who are eligible to dissent (generally, this is a member who gave a written objection to the transaction or a member who did not vote in favour of the action and was not required to submit a written objection prior to the approval of the transaction) will be given an opportunity to elect whether or not to dissent. A dissenting member may only elect to dissent in respect of the whole of its shareholding and not only a portion. Where the dissenting member elects to dissent, the Constituent Company and the dissenting member are to try to agree on the fair value to be paid for the shares of the dissenting member. Where an agreement on the fair value of the dissenting member's shares cannot be reached, the Constituent Company and the dissenting member will each appoint an appraiser who in turn will appoint a third appraiser. The three appraisers will fix the fair value of the shares as at the date immediately prior to the date the transaction was approved. Thereafter, the dissenting member's shares will be acquired and cancelled.

Similarities between a continuation out and a merger or consolidation

While a continuation out by a BVI company into a Foreign Jurisdiction and a merger or consolidation by a BVI Constituent Company with a Foreign Company are two distinct processes, the legal effect of each is not dissimilar.

A continuation out and a merger or consolidation have the following similarities in relation to the assets, debts and liabilities, and proceedings:

	Continuation out	Merger or consolidation
Assets	Continue to be the assets of the continued company	Will be the assets of the <u>Surviving Company</u> or the <u>New Company</u>
Debts and liabilities	The continued company is liable for all debts and liabilities	The <u>Surviving Company</u> or <u>New Company</u> is liable for all debts and liabilities of each of the <u>Constituent Companies</u>

	Continuation out	Merger or consolidation
No conviction, judgment, ruling, order, claim, debt, liability or obligation, due or to become due and no cause existing, or against any member, director, officer or agent thereof is released or impaired	Applies to the continued company and against any member, director, officer or agent thereof	Applies to <u>each Constituent Company</u> and against any member, director, officer or agent thereof
No proceedings, whether civil or criminal are abated or discontinued	Applies to the continued company and against any member, director, officer or agent thereof. However, the proceedings, may be enforced, prosecuted, settled, or compromised by or against the continued company, or against the member, director, officer, or agent thereof	Applies to <u>each Constituent Company</u> and against any member, director, officer, or agent thereof. However, the proceedings, may be enforced, prosecuted, settled, or compromised by or against the <u>Surviving Company</u> or <u>New Company</u> or against the member, director, officer, or agent thereof; or the <u>Surviving Company</u> or <u>New Company</u> may be substituted in the proceedings against a Constituent Company
Rights of Dissenters	Not applicable	Applicable if exercised within the timeframes set out in the Act

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