



Guide to Mergers in the British Virgin Islands

TABLE OF CONTENTS

PREFACE	2
1. Introduction	3
2. Plan of Merger	3
3. Articles of Merger	4
4. Merger Between Parent and Company Subsidiary	5
5. Merger Involving Foreign Companies	5
6. Effect of a Merger under BVI Law	5
7. Striking Off of Non-Surviving Company	6

PREFACE

This Guide summarises some of the key provisions under the BVI Business Companies Act, 2004 (the “**Act**”) relating to mergers between BVI companies. Although the focus of the Guide is on mergers between BVI companies, the procedure for the merger between a BVI company or companies and a foreign company or companies is also provided.

The Act permits the merger of two or more BVI companies in accordance with the Act. A consolidation occurs when two or more constituent companies are united into one new company. A company incorporated under the Act may also, subject to the foreign law, merge with a foreign company and continue as either a BVI company or as a foreign company (the surviving company). The procedure for mergers and consolidations is essentially the same under the Act. This Guide deals only with mergers. It also does not deal with Court-sanctioned plans of arrangement under section 177 or schemes of arrangement under section 179A of the Act by which mergers of BVI companies can also be effected.

It is recognised that this Guide will not completely answer the detailed questions that individuals may have. It is intended to provide a sketch of the statutory provisions in the BVI relating to mergers. The Guide is, therefore, designed as a starting-point for a more detailed and comprehensive review of particular issues.

Whilst we have made every effort to ensure the accuracy of the statements made herein, we accept no liability for any errors. In all cases expert legal advice from a qualified practitioner of BVI law should be obtained.

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Road Town, Tortola
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1. INTRODUCTION

The Act allows mergers between companies incorporated and registered under the Act, as well between a company incorporated under the Act and a foreign company, i.e. a company incorporated outside the BVI, if the foreign law permits it. It also allows a merger between a parent and a subsidiary (including where one or more of them are incorporated outside the BVI) with small modifications to the procedure.

The provisions for effecting a merger are very flexible and allow shares to be cancelled, reclassified or converted into money or other assets, or into shares, debt obligations or other securities in the surviving company. Shares of the same class can be treated differently, e.g. some shareholders can be given shares in the surviving company, while others of the same class can be bought out, that is, have their shares converted to cash.

The Act sets out the following useful definitions for concepts used in this Guide. A “constituent company” means an existing company that is participating in a merger with one or more other existing companies; a “parent company” means a company that owns at least 90 per cent of the outstanding shares of each class of shares of another company; a “subsidiary company” means a company at least 90 per cent of whose outstanding shares of each class of shares are owned by another company, and “surviving company” means the constituent company into which one or more constituent companies are merged.

The procedure followed to effect a merger between two or more constituent BVI companies involves four main stages which, in outline, are as follows:

- approval of a written plan of merger by the directors of each constituent company;
- following approval by the directors approval of the plan by a resolution of the members of each constituent company;
- execution of articles of merger by each constituent company; and
- filing of the executed articles of merger with the BVI Registrar of Corporate Affairs (the “**Registrar**”).

2. PLAN OF MERGER

Overview

The directors of each constituent company proposing to merge must approve a written Plan of Merger. The Plan of Merger must contain:

1. the names of each constituent company and of the surviving company; in relation to each constituent company:
 - a. the designation and number of outstanding shares of each class of shares, specifying each such class entitled to vote on the merger; and
 - b. a specification of each such class, if any, entitled to vote as a class.

2. the terms and conditions of the proposed merger, which shall include the manner and basis of cancelling, reclassifying, or converting shares in each constituent company into shares, debt obligations or other securities in the surviving company, or money or other assets, or a combination thereof; and other securities in the surviving company, or money or other assets, or a combination thereof; and
3. a statement of any amendment to the memorandum or articles of the surviving company to be brought about by the merger.

Process

After approval have been granted by the directors of each constituent company, the Plan of Merger needs to be authorised by a resolution of members and the outstanding shares of every class of shares that are entitled to vote on the merger as a class, if the memorandum or articles so provide, or if the Plan of Merger contains any provisions that, if contained in a proposed amendment to the memorandum or articles, would entitle the class to vote on the proposed amendment as a class.

If a meeting of members is to be held to obtain a resolution of members, then notice of the meeting, along with a copy of the Plan of Merger, must be provided to each member, whether or not they are entitled to vote on the merger.

If it is proposed to obtain the written consent of members, a copy of the Plan of Merger must be provided to each member, whether or not they are entitled to consent to the Plan of Merger.

3. ARTICLES OF MERGER

Once the Plan of Merger is approved by the directors and members of each constituent company, Articles of Merger must be executed by each constituent company.

Pursuant to the Act, the Articles of Merger need to contain (a) the Plan of Merger; (b) the date the memorandum and articles of each constituent company were registered by the Registrar; and (c) the manner by which the merger was authorized by each constituent company.

The following documents then need to be filed at the Registry: (a) the executed Articles of Merger; and (b) any resolutions to amend the memorandum and articles of the surviving company.

If the Registrar is satisfied that the requirements of the Act with regard to mergers are satisfied, including that the proposed name of the surviving company complies with the Act, the Registrar will then register both the Articles of Merger, and any amendment to the memorandum or articles of the surviving company, and will issue a Certificate of Merger.

A Certificate of Merger issued by the Registry is credible evidence of compliance with all requirements of the Act in respect of the merger.

Under the Act, the current fee to file Articles of Merger is US\$600.00 (except where the surviving company is authorised to issue more than 50,000 shares, in which case the registration fee is US\$800.00)

4. MERGER OF A PARENT COMPANY AND SUBSIDIARY

The Act sets in place an alternative procedure for a merger between a parent company and one or more subsidiary companies, in which members' approval is not required. It is only the directors of the parent company that approve the Plan of Merger.

The Plan of Merger needs to be in the same form as section 2 above, except that the following is to instead be included in relation to each constituent company: the designation and number of shares of each class of shares, and the number of shares of each class of shares in each subsidiary company owned by the parent company.

Some of all shares of the same class of share in each company to be merged may be converted into assets of a particular or mixed kind and other shares of the class, or all shares of other classes, may be converted into other assets, but, if the parent company is not the surviving company, shares of each class of shares in the parent company may only be converted into similar shares of the surviving company.

A copy of the Plan of Merger or an outline thereof is to be given to every member of each subsidiary company to be merged unless the giving of that copy or outline has been waived by that member.

Articles of Merger need only be executed by the parent company. Where the parent company does not own all the shares in the subsidiary company or companies to be merged, the Articles of Merger must also include the date on which a copy of the Plan (or an outline of such) was either made available to, or waived by, the members of each subsidiary company to be merged.

5. MERGERS WITH FOREIGN COMPANIES

As regards mergers involving foreign companies, these are only permitted if the law of the foreign jurisdiction(s), where one or more of the constituent companies are incorporated, permits it. The BVI constituent companies must comply with the provisions of the Act with regard to mergers, while the foreign companies must comply with the law of the jurisdiction of their domicile. If the foreign company will be the surviving company in the merger, there are provisions for ensuring that proceedings for any claim under the Act can be served on it in the BVI by requiring an irrevocable appointment of its registered agent to accept service of such proceedings. The Act also requires the surviving foreign company to enter into an agreement that it will promptly pay dissenting members of a constituent company that is a BVI company the amount, if any, to which they are entitled under the Act with respect to the rights of dissenting members. Such appointment and agreement must be filed with the Articles of Merger at the Registry. A foreign surviving company must also file with the Registrar its certificate of merger from its jurisdiction of incorporation, or, if no such certificate is issued by the foreign authority, such evidence of merger as the Registrar considers acceptable.

6. EFFECT OF A MERGER UNDER BVI LAW

A merger takes effect on the date that the Articles of Merger are registered by the Registrar, or such a later date subsequent thereto as is specified in the Articles of Merger, which date must not be more than later than 30 days. Where the surviving company is a company incorporated outside the BVI, the merger is effective as provided by the laws of that jurisdiction.

Once the merger takes effect, the Act specifies that: (a) the surviving company in so far as is consistent with its memorandum and articles, as amended or established by the articles of merger or consolidation, has all rights, privileges, immunities, powers, objects and purposes of each of the constituent companies; (b) the memorandum

and articles of the surviving company are automatically amended to the extent, if any, that changes in its memorandum and articles are contained in the articles of merger; (c) assets of every description, including choses in action and the business of each of the constituent companies, immediately vests in the surviving company; and (d) the surviving company is liable for all claims, debts, liabilities and obligations of each of the constituent companies.

The Act further provides that where a merger occurs (a) no conviction, judgment, ruling, order, claim, debt, liability or obligation due or to become due, and no cause existing against a constituent company (or against any member, director, officer or agent thereof) is released or impaired by the merger; and (b) no proceedings (whether civil or criminal) by or against a constituent company (or against any member, director, officer or agent thereof) pending at the time of the merger are abated or discontinued by the merger, however (i) such proceedings may be enforced, prosecuted, settled or compromised by or against the surviving company or against the member, director, officer or agent thereof, as the case may be, or (ii) the surviving company may be substituted in the proceedings for a constituent company.

7. STRIKING OFF OF NON-SURVIVING COMPANIES

A constituent company that is not the surviving company in the merger is struck off the Register of Companies by the Registrar once the merger takes effect.

For more specific advice relating to mergers under the BVI Business Companies Act 2004, we invite you to contact one of the following:

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