

GUIDE TO MERGERS IN THE BRITISH VIRGIN ISLANDS

CONTENTS

PREFACE	1
1. Introduction	2
2. Plan of Merger	3
3. Articles of Merger	3
4. Merger of a Parent Company with a Subsidiary	4
5. Mergers involving Foreign Companies	4
6. Effect of a Merger under BVI Law	5
7. Striking off of Non-Surviving constituent Companies	5
8. Rights of Dissenters	5

PREFACE

This Guide is a summary of the law and procedures relating to mergers in the British Virgin Islands (**BVI**).

We recognise that this Guide will not completely answer detailed questions which clients and their advisers may have; it is not intended to be comprehensive. If any such questions arise in relation to the contents, they should be addressed to a member of the team, using the [contact information](#) provided at the end of this Guide.

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British Virgin Islands

January 2016

1. INTRODUCTION

This Guide summarises some of the key provisions under the BVI Business Companies Act, 2004, as amended (the **Act**) relating to mergers. Although the focus of the Guide is on mergers between two or more 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 mergers between:

- (a) BVI companies incorporated and registered under the Act,
- (b) a BVI company (or companies) incorporated under the Act and a foreign company (i.e. a company incorporated outside the BVI, assuming that the applicable foreign law permits it) or companies; and
- (c) a parent and one or more of its subsidiaries, including where one or more of them are incorporated outside the BVI (albeit with a slightly different procedure to that required for (a) and (b) above).

The term “merger” is defined in the Act as the merging of two or more constituent companies into one constituent company. It should not be confused with a “consolidation” which differs slightly from a merger and occurs when two or more constituent companies are united to form one entirely new company. The procedure for “mergers” and “consolidations” is essentially the same under the Act, however, this Guide deals only with mergers. This Guide also does not deal with court-sanctioned plans of arrangement under section 177 of the Act or schemes of arrangement under section 179A of the Act (procedures by which mergers of BVI companies can also be effected).

The provisions for effecting a merger are flexible. As part of the process, they 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. Also, 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 into cash or other assets.

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 the outstanding shares of each class of shares of which are owned by another company, and **surviving company** means the constituent company into which one or more other constituent companies are merged.

The procedure followed to effect a merger between two or more constituent BVI companies involves the following main stages:

- (a) approval of a written plan of merger (**Plan of Merger**) by the directors of each constituent company;
- (b) following approval by the directors, approval of the Plan of Merger by a resolution of the members of each constituent company;
- (c) execution of articles of merger (**Articles of Merger**) by each constituent company; and
- (d) filing of the executed Articles of Merger with the BVI Registrar of Corporate Affairs (the **Registrar**).

2. PLAN OF MERGER

2.1 Overview

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

- the names of each constituent company and the name of the surviving company;
- in relation to each constituent company:
 - the designation and number of outstanding shares of each class of shares, specifying each such class entitled to vote on the merger; and
 - a specification of each such class, if any, entitled to vote as a class;
- 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
- a statement of any amendment to the memorandum or articles of the surviving company to be brought about by the merger.

The Act specifically provides that, notwithstanding anything to the contrary in the memorandum or articles of association, the directors' approval referred to above cannot be delegated to a committee of directors.

2.2 Process

After the directors of each constituent company have approved the Plan of Merger by resolution, the Plan of Merger needs to be authorised by a resolution of each constituent company's members. Where a constituent company has more than one class of shares outstanding and its memorandum and articles so provide (or if the Plan of Merger contains any provision 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), the holders of each class will be entitled to vote on the Plan of Merger separately as a class.

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

If the written consent of members is sought, a copy of the Plan of Merger must be provided to each member, whether or not he is 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 company.

Pursuant to the Act, the Articles of Merger must 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 in which the merger was authorised by each constituent company.

The following documents then need to be filed with the Registrar: (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 and that the proposed name of the surviving company complies with the Act, the Registrar will register the Articles of Merger, and any amendment to the memorandum or articles of the surviving company, and will issue a certificate of merger (**Certificate of Merger**).

A Certificate of Merger issued by the Registrar is conclusive 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 with the Registrar is USD600 (except where the surviving company is authorised to issue more than 50,000 shares, in which case the registration fee is USD800).

4. **MERGER OF A PARENT COMPANY WITH A SUBSIDIARY**

The Act sets out an alternative procedure for a merger of a parent company with one or more subsidiary companies, in which members' approval is not required. Only the directors of the parent company are required to approve the Plan of Merger.

The Plan of Merger needs to be in the same form as described in section 2 above, with the additional requirement that the number of shares of each class of shares in each subsidiary company owned by the parent company be stated.

Some or all shares of the same class of shares in each constituent company may be converted into assets of a particular or mixed kind and other shares of the class, or all shares of other classes of shares, 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 of Merger (or an outline thereof) was either made available to, or delivery thereof was waived by, the members of each subsidiary company to be merged.

5. **MERGERS INVOLVING FOREIGN COMPANIES**

Mergers between BVI companies and foreign companies are only permitted under the Act if permitted by the law of the foreign jurisdiction in which one or more of the constituent companies is incorporated. The BVI constituent companies must comply with the provisions of the Act with regard to mergers, whilst any foreign company must comply with the laws of its jurisdiction. If the foreign company will be the surviving company in the merger, the Act requires that the foreign company (a) file an agreement that service of process may be effected on it in the BVI in respect of proceedings for the enforcement of any claim, debt, liability or obligation of a constituent company registered under the Act and (b) irrevocably appoint 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 such members are entitled under the Act's dissenting members' rights. Such appointment and agreement must be filed with the Articles of Merger with the Registrar. 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 the merger as the Registrar considers acceptable.

The effect of a merger with a foreign company is the same as in the case of a merger between two BVI companies (see below), but if the surviving company is a foreign company, the effect of the merger is the same as under the Act except in so far as the laws of the other jurisdiction otherwise provide.

6. **EFFECT OF A MERGER UNDER BVI LAW**

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

The Act specifies that as soon as the merger takes effect: (a) the surviving company in so far as is consistent with its memorandum and articles, as amended or established by the Articles of Merger, 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 vest 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 CONSTITUENT 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.

8. **RIGHTS OF DISSENTERS**

Under the Act, a member of a BVI company is entitled to payment of the fair value of his shares upon dissenting from a merger, if the company is a constituent company, unless the company is the surviving company and the member continues to hold the same or similar shares. The Act sets out the procedure that must be followed by a member wishing to dissent.

Upon the giving of a notice of election to dissent, the dissenting member ceases to have any of the rights of a member except the right to be paid the fair value of his shares. If the surviving company and dissenting member cannot agree upon a fair value to be paid for the dissenting member's shares (in accordance with the procedure set out in the Act), the Act provides that they may each designate an appraiser and the two designated appraisers together shall then appoint a third appraiser and the three appraisers shall fix the fair value of the shares owned by the dissenting member as of the close of business on the day prior to the date on which the vote of members authorising the merger was taken, excluding any appreciation or depreciation directly or indirectly induced by the merger. The value fixed by the three appraisers is binding on the company and the dissenting member for all purposes.

For more specific advice on mergers in the British Virgin Islands, we invite you to contact:

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For the convenience of clients in other time zones, a list of contacts available in each of our jurisdictions may be found [here](#).