

British Virgin Islands: continuations in and out

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Companies that have been incorporated in other jurisdictions may be permitted to change their jurisdiction of incorporation to the British Virgin Islands ("BVI"); equally BVI incorporated companies may look to migrate to other jurisdictions. Under BVI law this process is known as "continuation" - either "in" or "out" depending on whether the BVI is the end point or the starting point.

Why continue into the BVI?

Companies often migrate to the BVI from other offshore jurisdictions in order to take advantage of significantly lower annual maintenance fees, the flexibility of the BVI's legislation (which facilitates a wide range of corporate transactions) and the BVI's superior global reputation in the business world. It is not uncommon for multiple companies that have been incorporated in a variety of other jurisdictions, but which comprise a single group, to migrate to the BVI together, in order to simplify the group's audit process or to streamline a proposed reorganisation. Additional reasons to migrate to the BVI include the BVI's inclusion in the OECD White List and the quality of the BVI's service providers, legal, fiduciary, accounting and other financial services.

Business continuity

It is a commonly held misconception that the process of continuing to another jurisdiction may be disruptive to the company's business operations or otherwise. In fact, continuation to the BVI does not affect the continuity of the company as a legal entity and similarly, any assets, rights, obligations or liabilities of the company are not affected in any way under BVI law.

Simple process

The BVI's statutory procedure is very straightforward. A continuation into the BVI can be effected in a short time frame.

Pursuant to Part X of the BVI Business Companies Act, 2004 (the "Act"), the company's proposed BVI registered agent must submit an application, which must include the following documents, to the BVI Registry of Corporate Affairs (the "Registry"):

1. a certified copy of the company's certificate of incorporation (or equivalent);
2. the form of memorandum and articles of association to be adopted;
3. evidence that the application to continue and the proposed form of memorandum and articles of association have been approved by a majority of the directors (or other persons who exercise the power of the company) or in such other manner as may be established by the company for exercising the powers of the company; and
4. evidence that the company is not prohibited from migrating to the BVI (see below under *Prohibitions on Companies continuing into BVI*).

If the Registry is satisfied that the requirements for continuation have been complied with, the company shall be registered, allocated a BVI company number and issued with certificate of continuation. Such certificate of continuation shall be conclusive evidence that the company is continued as a BVI company under the Act on the date specified in the certificate of continuation.

Once the company is recognised as a company continued under the Act, that company is treated as a company incorporated under the Act and is therefore capable of exercising all relevant powers applicable to BVI companies under the Act.

Prohibitions on Companies continuing into the BVI

Notwithstanding the above, a foreign company is prohibited from continuing into the BVI in the following circumstances:

1. the laws of the jurisdiction in which the company is registered do not explicitly permit it to do so;
2. the company is in liquidation, or subject to equivalent insolvency proceedings, in another jurisdiction;
3. a receiver or manager has been appointed in relation to any of the company's assets;
4. the company has entered into an arrangement with creditors that has not been concluded;
or
5. 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.

Evidence that a company is not prohibited from continuing into the BVI on any of the above grounds must be included in its application for continuation to the Registry. Such evidence though may take the form of a simple certificate issued by a director of the company (which must also be notarised), attesting that the continuation is permitted under the applicable foreign law and that none of the other disqualifications set out above apply.

Continuing out of the BVI

Where a BVI company, for practical or financial reasons, wishes to continue out of the BVI, the Act provides that subject to any restrictions contained within the memorandum or articles of association of that BVI company, or in the terms of any publicly registered security interest (see below), if it is in good standing with the Registrar of Corporate Affairs it may, by a resolution of directors or by a resolution of members, continue as a company incorporated under the laws of a jurisdiction outside the BVI in the manner provided under the laws of that jurisdiction. Therefore, for a BVI company to continue out of the BVI, it is essential that the laws of the jurisdiction to which it is proposing to continue permit the company to so continue. Provided that this is the case, but subject to what is said below in relation to companies that have publicly registered security in the BVI, the procedure to be followed by the BVI company in order to continue into the foreign jurisdiction will be, for the most part, whatever procedure is provided for these purposes under the laws of that jurisdiction.

BVI companies that are subject to mortgages or charges that have been publicly registered in the BVI, and which have not been subsequently notified as being released or satisfied, may not continue out of the BVI under the Act if the terms of such mortgage or charge expressly prohibit continuation out to another jurisdiction. Where a company is subject a publicly registered mortgage or charge which has not been notified as released or satisfied but which does not prohibit continuation, then continuation out is permitted provided that the company first submits a written declaration to the Registry confirming that either: notice of satisfaction or release of the charge has since been filed with the Registry; or that the relevant chargee has been notified of the proposed continuation and has consented to it or has not objected to it; or that notwithstanding any objection by the chargee after having been notified, the registered charge will not be diminished or compromised by the continuation.

Restrictions in mortgages or charges not publicly registered in the BVI (for whatever reason) would not generally impede continuation under the Act, albeit that contractual implications may of course flow from a breach of any such restriction.

Following a BVI company's continuance into a foreign jurisdiction, the registered agent is required to file a notice of the company's continuance out of the jurisdiction with the Registry

and, provided that the Registry is satisfied that the requirements of the Act in respect of the continuation have been complied with, it shall:

1. issue a certificate of discontinuance;
2. strike the name of the company off the Register of Companies with effect from the date of the certificate of discontinuance; and
3. publish a notice concerning the striking off of the company in the BVI Gazette.

A certificate of discontinuance issued by the Registry is prima facie evidence that all the requirements of the Act in respect of the continuation of the company under the laws of a foreign jurisdiction have been complied with and that the company was discontinued on the date specified in the certificate of discontinuance.

As with a continuation in, the continuation out will not change a company's legal personality, nor relieve it of its obligations. The Act provides that where a company is continued under the laws of a jurisdiction outside the BVI:

1. the company continues to be liable for all of its claims, debts, liabilities and obligations that existed prior to its continuation as a company under the laws of the jurisdiction outside the BVI;
2. 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 thereof, is released or impaired by its continuation as a company under the laws of the jurisdiction outside the BVI;
3. no proceedings, whether civil or criminal, pending by or against the company, or against any member, director, officer or agent thereof, are abated or discontinued by its continuation as a company under the laws of the jurisdiction outside the BVI, 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; and
4. service of process may continue to be effected on the registered agent of the company in the BVI in respect of any claim, debt, liability or obligation of the company during its existence as a company under the Act.

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