

Statutory Mergers and Consolidations in the British Virgin Islands

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The British Virgin Islands (BVI) first enacted statutory merger legislation back in the 1980s as part of the BVI's International Business Companies Act of 1984 (IBC). When the IBC was replaced with the BVI Business Companies Act, 2004 (the BCA), the merger and consolidation provisions of the former IBC were retained, substantially unchanged, as part of the new statute.

The merger and consolidation provisions adopted in the IBC and then carried into the BCA were similar to those then found in Delaware company law. Consequently, the BVI's statutory merger procedure should already be familiar to US practitioners.

The BCA allows for the merger or consolidation of companies incorporated in the BVI with other BVI companies or, if the laws of the relevant jurisdiction permit, companies incorporated in other jurisdictions.

Effect of a merger or consolidation

The BCA defines *merger* as "the process whereby two or more existing companies (referred to as *constituent companies*) merge into one of the constituent companies (the *surviving company*)"; *consolidation* is defined as the process whereby two or more constituent companies are consolidated into a new company (the *consolidated company*).

Mergers or consolidations under the BCA are therefore "true mergers" in the sense that multiple entities become merged or consolidated into a single corporate entity. This is a result that occurs by operation of law pursuant to a specific statutory procedure laid down in the BCA, rather than simply by contract.

Upon a merger becoming effective under the BCA, the surviving company automatically:

- acquires (or has vested in it) the rights, powers, immunities and all of the business and assets of each constituent company;
- becomes liable for all of the debts and obligations of each constituent company; and
- becomes responsible, and therefore potentially liable, for or in respect of any claims or proceedings in relation to any constituent company (and may be substituted for that constituent company in any such proceedings)
- Consolidation has the same consequences as merger, save that it is the new consolidated company that acquires the assets and becomes subject to the liabilities of the constituent companies

Merger with or consolidation into a company incorporated outside the BVI, where the surviving or consolidated company is the foreign company, has the same consequences except insofar as the laws of the relevant foreign jurisdiction provide otherwise.

However, while the BCA provides for the automatic vesting of assets, rights and liabilities in the surviving or consolidated company, it remains important to check and consider the terms of contracts and other arrangements to which a constituent company is party or subject to so as to check and ensure that the merger or consolidation does not trigger any consequence or requirement under the terms of any such contract or arrangement.

Procedure for merger or consolidation

The BVI's statutory merger and consolidation procedure can be broken down into the following five steps, and whilst seemingly straightforward, it is nevertheless important to instruct appropriately qualified legal counsel familiar with the process.

Note that steps below are modified in the case of a merger between a parent and subsidiary or a merger or consolidation between or involving a BVI company and a company incorporated outside the BVI (see later for further explanation).

- First, the directors of each constituent company approve a written **plan of merger** or **plan of consolidation**. The plan must contain certain brief details of the companies involved, the terms and conditions of the proposed merger or consolidation and, in the case of a merger, a statement of any amendment to the memorandum and articles of association of the surviving company. In the case of a consolidation, the plan must annex the memorandum and articles of association to be adopted by the consolidated company.
- Secondly, the shareholders of each constituent company who are entitled to vote on the proposed merger or consolidation must approve the plan of merger or consolidation in accordance with each respective company's memorandum and articles of association.

- Thirdly, a single set of **articles of merger** or **articles of consolidation** must be executed by each constituent company, the articles of merger or consolidation must: contain the date on which the memorandum and articles of association of each company (if a BVI company) were registered with the Registrar of Corporate Affairs in the BVI (the **Registrar**); state the manner in which the merger was authorized; and attach a copy of the plan of merger or consolidation.
- Fourthly, the articles of merger must be filed with the Registrar, together with, in the case of a merger, any resolution to amend the memorandum and articles of association of the surviving company or, in the case of a consolidation, the memorandum and articles of association of the consolidated company. If the surviving or consolidated company is not a BVI company, that company must also file certain additional documents pertaining to service of process of proceedings and payments to dissenting shareholders, together with a certificate of merger or consolidation issued by the appropriate authority of the foreign jurisdiction where the surviving or consolidated company is continuing.
- Finally if satisfied that all requirements of the statutory merger or consolidation procedure have been complied with, the Registrar will register the articles of merger and, in the case of a merger, any amendment to the memorandum and articles of association of the surviving company or, in the case of a consolidation, the memorandum and articles of association of the newly consolidated company. If the surviving or consolidated company is a BVI company, the Registrar will then issue a certificate of merger or consolidation and, in the case of a consolidation, a certificate of consolidation in respect of the consolidated company.
- A merger or consolidation is effective on the date the articles of merger or consolidation are registered by the Registrar or on such later date, not exceeding 30 days after registration, as may be stated in the articles of merger or consolidation.

Procedure in the case of merger between parent and subsidiary

Where a merger is between a parent company and one or more of its subsidiaries, the statutory process set out above is modified and simplified. In such circumstances, only the directors of the parent company are required to approve the plan of merger. The approval of the plan by the shareholders of the parent or the directors and other shareholders of the subsidiaries is not required by the BCA.

However, where the parent company does not own all the shares in any subsidiary involved as constituent company, a copy of the plan of merger or an outline of it must be given to every member of the subsidiary company to be merged unless receipt of the plan is waived by the relevant member.

Mergers and Consolidations Involving Foreign Companies

The BCA allows for the merger or consolidation of companies incorporated in the BVI with or

into companies incorporated in other jurisdictions, provided the laws of the other jurisdiction permit. This is irrespective of whether the surviving company will be a BVI company or a foreign company.

The BVI constituent companies must comply with the provisions of the BCA, while the foreign companies must comply with the laws of the jurisdiction of their incorporation in relation to mergers and consolidations.

Where the surviving company or consolidated company will be a BVI company, the merger or consolidation will be effective in accordance with the provisions of the BCA – i.e. on registration of the articles of merger or consolidation or on such later date thereafter, not exceeding 30 days, as is stated in the articles of merger or consolidation.

If the surviving company is a foreign company, then the merger will be considered effective under the BCA at such time as it would be so under the laws of the relevant foreign jurisdiction. Also, as noted above, if the surviving or consolidated company is not a BVI company, that company must also file certain additional documents with the Registrar, pertaining to service of process of proceedings and payments to dissenting shareholders, together with a certificate of merger or consolidation issued by the appropriate authority of the foreign jurisdiction where the surviving or consolidated company is continuing.

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