

# Mergers and Acquisitions – A BVI Guide

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## Introduction

The British Virgin Islands (**BVI**) remains a popular and accessible jurisdiction for merger and acquisition transactions (**M&A**), with a range of flexible options for both public and private deals. Many of these options and concepts will be familiar to onshore lawyers, but are often simplified and expedited in the BVI. As a result, BVI companies are frequently used in significant global M&A deals, and listed on some of the world's largest stock exchanges.

This guide explores the types of M&A structures available for transactions involving BVI companies, highlights the regulatory issues in BVI M&A to be alive to (including rules for foreign buyers), and touches upon some recent noteworthy developments in the BVI M&A market.

## Flexible corporate laws

The BVI Business Companies Act, 2004 (as amended, the **Act**) is the main corporate legislation in the BVI, which offers an extremely flexible and modern platform to facilitate corporate transactions, avoiding many of the approval thresholds and mandatory waiting times which often impact onshore jurisdictions.

A few of the key benefits of the Act are as follows:

- most decisions are made at board level and by majority decision, avoiding the issue of (and delay in) seeking shareholder approval;
- there is no need to calculate distributable reserves in order to make a dividend or distribution, which can instead be achieved by a simple solvency determination, by the directors;
- directors of a BVI company that is a subsidiary or carrying out a joint venture can act in the best interests of its parent (in the case of the former) or a shareholder (in the case of the latter) even though it may not be in the best interests of the company, which can be helpful in relation to pre-closing reorganisation of debt and security within the target group; and
- there is no prohibition on a BVI company giving financial assistance for the purchase of its own shares, avoiding the legal issues which can arise in leveraged transactions.

Other general advantages of using BVI companies include the political stability (and tax neutrality) of the BVI, as well as BVI's developed common law legal system, straight forward administrative processes, low ongoing costs compared to other jurisdictions, and the ability to execute documents by electronic signature pursuant to the Electronic Transactions Act, 2021 (more on this below).

## M&A structures available

There are a number of potential options for structuring an M&A transaction involving a BVI company. The four structures we most commonly advise on are set out below, with a specific focus on the key BVI law considerations for the parties to such transactions:

### 1. BVI statutory merger

- The Act offers a quick and straightforward process for the merger of a BVI company and a foreign entity, or between two or more BVI companies (often a BVI SPV established by a buyer for such purpose);
- the commercial terms of such merger are often recorded under the terms of a merger agreement (which can be BVI or foreign law governed), and results in one constituent company being the surviving entity;
- the key requirements are that:
  - the directors of each company approve a Plan of Merger, which is then approved by the shareholders (typically a majority, unless the memorandum or articles of association require a higher threshold); and
  - Articles of Merger are executed and filed with the BVI Registrar of Corporate Affairs;
- the Act is flexible as to how the target shares are treated, including their exchange for shares in the surviving company, debt obligations owing from surviving company, or simply cash consideration (or a combination of such);
- shareholders who object to a merger are able to exercise dissent rights, however, compared to many other jurisdictions the process for dealing with dissenting shareholders is quick and straightforward: the dissenting shareholders are not able to block the merger (provided the requisite consent is obtained) and the process involves agreeing (or determining) fair value for the shares between the BVI company and shareholder(s) within a (relatively) short, statutory time frame; and
- BVI statutory mergers are commonly used in special purpose acquisition company (or **SPAC**) structures following an initial capital raise for the purpose of a de-SPAC (that is, merging the capitalised SPAC into the target group of companies), often due to the fact that in most cases this can be achieved by a simple majority of the shareholders (more information on SPACs is available under '*Recent BVI developments*' below).

### 2. Share sale

- Subject to limitations in a BVI company's memorandum or articles of association (or shareholders' agreement), shares in a BVI company are freely transferrable;
- legal title to shares is evidenced by a BVI company's register of members, and title passes when the register is updated to note a transferee's details;
- the terms of such share sale are typically recorded under a share sale and purchase agreement (**SPA**), which can be a BVI or foreign law governed agreement, but is typically governed by the laws of England and Wales or New York and is often determined by, among other things, location of the parties and situs of the business and/or assets of the BVI company;
- where a purchaser seeks to acquire all shares in a BVI company, this can be achieved by acquiring at least 90% of the outstanding shares entitled to vote, and utilising the BVI statutory squeeze-out procedure under the Act to acquire the shares of the remaining minority;
- the SPA should contain key BVI deliverables, which include share transfer form(s), evidence of any necessary security release (shares and/or assets), BVI corporate authorities, documents necessary to change the board of directors, an updated register of members showing the purchaser as the holder of the sale shares, cancellation of existing/issuance of new share certificates, the transfer of statutory registers and records, and the necessary BVI registered agent documentation (more on this below);
- in addition to any customary representations and warranties required for the transaction, the seller of shares in a BVI company would typically give the following BVI specific confirmations in the SPA: due incorporation and good standing of the BVI target in the BVI, legal and beneficial ownership of sale shares (free from encumbrance), compliance with the Act, solvency under BVI law, compliance with other relevant BVI laws (including record keeping), confirmation of no land, employees or subsidiaries in the BVI, and compliance with the BVI Economic Substance regime (more on this below);

- a BVI company must at all times have a registered agent in the BVI and sometimes this will change as part of a share sale transaction; alternatively, if the registered agent is not changed, its client of record for the BVI company will be changed to the purchaser (or someone associated with the purchaser) at closing (for more information on this, please see our guide on [BVI Companies: A guide](#); and
- BVI anti-money laundering legislation requires the registered agent to identify the beneficial owner which, in the context of M&A, means the purchaser must provide the target's registered agent with adequate KYC as early as possible prior to closing to avoid any potential delays.

### 3. Asset sale

- This route is often utilised where a purchaser wishes to cherry pick certain assets of a BVI target, rather than assuming all assets and liabilities, the terms of which are typically recorded under an overarching asset purchase agreement (APA);
- the sale of assets by a BVI company only requires shareholder approval in certain circumstances (set out below), so depending on the type and location of assets being sold, the transaction can often be much quicker and simpler than a share sale or merger;
- like an SPA, the governing law of an APA can be BVI law, but it is usually foreign law governed, and often driven by situs of the assets being transferred (for example, an asset sale by a BVI company which owns a UK property business would typically be governed by the laws of England and Wales);
- subject to disapplication (or variation) under its articles of association, any disposal of assets by a BVI company of more than 50% in value of its assets requires shareholder approval by a simple majority (save where this is done in the usual or regular course of the business of the BVI company); and
- where a disposal by a BVI company represents more than 50% in value of its assets (being outside the ordinary course of its business), shareholders can theoretically dissent, however this will not prohibit or delay the transfer of assets (provided a simple majority of shareholders agree) and further, where the disposal is for money on terms which require all or substantially all net sale proceeds to be distributed pro rata to shareholders within a year of sale, no such right of dissent will be available to the minority.

### 4. BVI schemes/plans of arrangement

- Hostile takeovers are rare in the BVI however, where the BVI statutory squeeze-out threshold of 90% can't be achieved, a scheme or plan of arrangement can offer a viable, court-sanctioned procedure for purchasers to acquire all of the shares in a BVI company;
- a scheme of arrangement requires the sanction of the BVI court, as well as the approval of a majority (in number) of shareholders representing 75% in value, present and voting;
- a plan of arrangement requires sanction of the BVI court, but can be proposed to the court with prior approval of the directors (not the shareholders) of the BVI company, although in practice this is generally only feasible where all parties approve the plan in advance and court approval lends legitimacy to any complicated structuring issues (and note further that a plan of arrangement also requires such approvals as may be determined by the court, which is generally a shareholders resolution approved by shareholders holding a majority of the shares at a quorate meeting);
- once approved by the BVI court, any scheme or plan of arrangement is binding on all shareholders of the BVI company;
- schemes or plans of arrangement are often a more expensive, lengthier process than the options discussed above, but offer comfort to prospective purchasers where the BVI statutory squeeze-out threshold can't be met and/or where the terms of the transaction are particularly complex; and
- there is no statutory demerger process under BVI law, so if a business and/or asset sale is not an option for a BVI company, in practice we would normally recommend using a court approved plan of arrangement.

### Regulatory consents

Save as noted above (in respect of mergers and schemes of arrangement), there are generally no BVI governmental approval or consent requirements in connection with M&A involving a BVI company.

However, special rules apply to BVI companies licensed to carry on financial services business. Typically, this applies when a BVI entity is involved in banking business, insurance business, trust business or investment business and in such case, a change of control typically requires the approval of the BVI Financial Services Commission.

## Rules for foreign buyers

BVI companies are designed for use in international transactions. As such, there are generally no restrictions on foreign buyers acquiring shares or interests in a BVI company provided the BVI company does not own assets and/or is not carrying on business in the BVI. Likewise, there are no foreign exchange controls or regulations under BVI law.

## Recent BVI developments

Recent, noteworthy developments in BVI M&A practice include the following:

- the introduction of the BVI Economic Substance (Companies and Limited Partnerships) Act, 2018 (as amended), under which BVI companies which aren't exempted (for example, by foreign tax status) and are carrying out any of the nine 'relevant activities' are required to demonstrate economic substance in the BVI and make an annual filing with the BVI International Tax Authority. For more on this topic, see our guide on [BVI economic substance legislation](#);
- the inclusion of specific COVID related material adverse change clauses and warranties which (at the time of writing) remain untested by the BVI court;
- the recent boom in the use of SPACs which, although emerging in the early 2000s, have enjoyed a recent resurgence, a significant number of which utilising offshore vehicles such as BVI business companies due to the simplicity of the BVI statutory merger process (see more on SPACs under '*BVI statutory merger*' above and our guide on [The SPACs renaissance and the offshore advantage](#); and
- the introduction of the Electronic Transactions Act, 2021 which modernises and enhances the position under BVI law on the acceptance and use of electronic signatures in order to better facilitate technological developments.

## How Mourant can help

As a leading offshore law firm advising on (among others) the laws of the BVI, Mourant regularly works on large and complex M&A transactions involving BVI companies.

We advise clients in all stages of the corporate life cycle, including sellers, purchasers, targets, investors and lenders, on the full spectrum of BVI M&A deals. This ranges from straightforward share sales, to complex cross-border BVI statutory mergers and plans or schemes of arrangement. We also regularly work with high-profile clients and leading onshore lawyers, and have strong connections globally and within the BVI market (including with BVI registered agents and BVI accountants).

As such, we offer an international-level of legal service with local market insight, coupled with a hands-on and commercial approach. Mourant was also named offshore law firm of the year again in December 2021, for the second year in a row.

## Contacts

A full list of contacts specialising in BVI M&A law can be found [here](#).

This guide is only intended to give a summary and general overview of the subject matter. It is not intended to be comprehensive and does not constitute, and should not be taken to be, legal advice. If you would like legal advice or further information on any issue raised by this guide, please get in touch with one of your usual contacts. You can find out more about us, and access our legal and regulatory notices at [mourant.com](#). © 2022 MOURANT OZANNES ALL RIGHTS RESERVED