COLLAS CRILL

When two become one: How BVI statutory mergers can help your business

OCTOBER 2023

British Virgin Islands (**BVI**) law permits a merger of (i) two or more BVI companies, and (ii) one or more BVI companies with one or more foreign companies whose laws permit statutory merger. The statutory merger is a merger in its purest sense: each company designated a merging company ceases to exist and its assets and liabilities vest by operation of law in the company designated as the surviving company upon merger.

Our team has recently been flat out solving client problems with statutory mergers - but not necessarily for the purpose for which merger was conceived. It is a testament to the flexibility of BVI law that this superb statutory tool seems to be germane to so many corporate conundrums. We have described a few of the most common as well as the less well known uses for statutory merger here, which we hope will be useful to your BVI business going forward.

- **M&A activity**. The classic use of merger is in the acquisitions space. Rather than purchase the shares of a target company, a buyer can merge with the target (either itself, or through an existing or newly formed BVI company in its group) and absorb its assets and liabilities as the surviving company to the merger. Since there is no transfer or conveyance of assets and liabilities, the buyer may enjoy tax advantages, save time and cost, and avoid the administrative burden of asset transfer registrations. For a merger of equals, a consolidation may be more appropriate: this involves two (or more) companies merging to form a completely new company in which the assets and liabilities of each merging company vest.
- **Take-privates**. BVI statutory mergers can also be used in the take-private context: merger does not require the court sanction of a scheme of arrangement or plan and has much lower voting thresholds than a statutory squeeze out. It can also be achieved far more quickly and less expensively than a court procedure and for these reasons, it is the most common way to take a BVI company private.
- **Asset transfers**. Rather than purchase assets from a corporate seller, a purchaser may wish to merge with it: in this case, the assets vest in the purchaser as a matter of law while the seller ceases to exist. This can be very useful for single asset owning vehicles where the UBO seller no longer has need of the corporate owner (and avoids a subsequent liquidation of a shell entity).
- **Transposing a new corporate entity in an existing structure.** We have recommended the use of merger to clients who needed to replace an existing BVI business company limited by shares with (i) a company limited by guarantee and (ii) a restricted purpose company (**RPC**). You cannot convert a company limited by shares to a company limited by guarantee and cannot re-register a BVI business company as an RPC, but you can use merger to swap out one entity for another. Merger can also be used as an alternative to redomiciliation, in the event that a foreign company's laws permit merger but not redomiciliation.

This note is a summary of the subject and is provided for information only. It does not purport to give specific legal advice, and before acting, further advice should always be sought. Whilst every care has been taken in producing this note neither the author nor Collas Crill shall be liable for any errors, misprint or misinterpretation of any of the matters set out in it. All copyright in this material belongs to Collas Crill.

- **Balance sheet rationalisation**. We are increasingly advising on merger as an efficient alternative to liquidation. One client we are currently advising has four dormant BVI companies, and one dormant Cayman company, on their balance sheet. In a single transaction we are able to merge all five into a separate active BVI company, saving significant cost and reducing the timetable of the balance sheet rationalisation from eight to 12 weeks (which is standard for a voluntary liquidation) to one to two weeks.
- **Exiting problematic minority shareholders**. BVI law has a statutory squeeze out procedure whereby the holders of 90% or more of a company's shares can direct the company mandatorily to redeem the shares of the minority. Squeeze out affords the board no discretion and is a great way to exit difficult minority holders, who may dissent from the squeeze out, but cannot prevent the merger from going ahead and only receive a right to be paid out fair value for their shares. We recently advised a client who wanted to exit a fellow shareholder but did not have the requisite 90% control. In this case, we suggested a merger, which (absent any upward adjustment in the articles of association) only requires a majority vote of shareholders or shareholders in each class. A merger also gives rise to the right to be paid out at fair value, so the minority shareholder in this case was left in the same position. Our client got the result they wanted without running the risk of the minority prejudice claims that often accompany a deliberate dilution of shareholding to achieve 90%.

A brief note on process

- The BVI legal requirements for merger are board and shareholder approval which, as noted above, will be a majority vote unless bespoke provisions in the company's articles of association or any shareholders' agreement provide a higher threshold. Shareholder approval of subsidiary entities is not required in a parent-subsidiary cram-down.
- In addition, the Registrar requires the submission of a plan of merger and articles of merger, which must contain various prescribed information relating to the merging entities, the effect of merger and the merger consideration.
- BVI law affords huge flexibility in terms of the consideration paid to the former shareholders of each merging company: it can be a share swap, cash, other assets, or nothing at all.
- In cases of merger with foreign entities, the foreign entities must observe the laws and regulations of their home jurisdiction, and a non-surviving BVI entity must make various additional BVI Registry filings relating to service of process and dissenters' rights.
- Attention should be paid to all contracts (in particular, financing contracts) entered into by the constituent companies to a merger, as creditor consent is very often required as a matter of contract.
- A merger can be filed and approved by the BVI Registrar on a same-day basis using the premium filing service which costs just $500.

In conclusion, the BVI statutory merger regime lends itself to many more scenarios than just classic M&A. It is a deeply flexible, time and cost-efficient tool and a potentially viable alternative to almost every other BVI corporate procedure. If you would like to learn more, or if we can help you use merger to restructure your business or acquire another, please get in touch.

This note is a summary of the subject and is provided for information only. It does not purport to give specific legal advice, and before acting, further advice should always be sought. Whilst every care has been taken in producing this note neither the author nor Collas Crill shall be liable for any errors, misprint or misinterpretation of any of the matters set out in it. All copyright in this material belongs to Collas Crill.

COLLAS CRILL

For more information please contact:



Ellie Crespi

BVI Managing Partner | BVI

t: +1 284 852 6335 | **e:** ellie.crespi@collascrill.com

This note is a summary of the subject and is provided for information only. It does not purport to give specific legal advice, and before acting, further advice should always be sought. Whilst every care has been taken in producing this note neither the author nor Collas Crill shall be liable for any errors, misprint or misinterpretation of any of the matters set out in it. All copyright in this material belongs to Collas Crill.