

Statutory Mergers in the British Virgin Islands

The statutory merger regime in the British Virgin Islands ("BVI") is straightforward, well established and effective. It has been used on a number of high profile, public transactions including, for example, Apax Partners' \$1.6 billion buyout of Tommy Hilfiger Corporation, and most recently by Essilor International SA for its recommended US\$565 million takeover of NASDAQ listed FGX International Holdings Limited.

This briefing examines the mechanics of the statutory procedure, its increasing popularity and pitfalls to be avoided.

A statutory merger is a [merger](#) between two or more companies, one of which will be a BVI company, effected pursuant to a specific statutory procedure, with the following events occurring simultaneously at the time of the merger:

1. only one of the merging companies continues to exist as a [legal entity](#) (the "**Surviving Company**");
2. all the assets and liabilities of the other merging company or companies become assets and liabilities of the Surviving Company; and
3. the Surviving Company becomes entitled to all the rights, privileges, immunities, powers, objects and purposes of each of the merging companies.

The BVI's statutory merger regime, contained in Part IX of the BVI Business Companies Act, 2004 (the "**BCA**"), allows one or more companies that are not incorporated in the BVI to merge with one or more BVI companies, if permitted by the laws of the jurisdictions of incorporation of those foreign companies. Alternatively, eligible foreign companies can first migrate into the BVI in order to effect a statutory merger under BVI law, following which the surviving company will remain domiciled in the BVI.

A common transaction structure is for a BVI company ("**Newco**") to be incorporated by a bidder ("**Bidco**"), the Newco to pay or procure via Bidco the merger consideration to the shareholders of the target company (the "**Target**") in exchange for their Target shares, and the Target to merge into the Newco, with the Target being the survivor of the merger, pursuant to the BVI statutory merger procedure. This statutory procedure therefore enables the Target to become a wholly owned subsidiary of the Bidco, with the shareholders of the Target receiving

merger consideration (e.g. cash or shares/securities in Bidco) in exchange for their shares. Only a single filing with the BVI's Registrar of Corporate Affairs (the "**Registrar**") is required and there is no court involvement.

The BVI's statutory merger legislation was enacted in the 1980s, and its provisions are similar to the equivalent provisions in Delaware company law. Consequently, the statutory merger procedure will be familiar to US lawyers.

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

First, the directors of each constituent company approve a written plan of merger. The plan of merger must contain certain brief details of the companies, the terms and conditions of the proposed merger, and a statement of any amendment to the memorandum and articles of association (the "**M&A**") of the surviving company.

Secondly, the shareholders entitled to vote on the proposed merger approve the plan of merger in accordance with each respective merging company's constitutional documents.

Thirdly, a single set of articles of merger are executed by each company, containing the plan of merger, the date on which the M&A of each constituent company (if a BVI company) were registered with the Registrar, and the manner in which the merger was authorised.

Fourthly, the articles of merger are filed with the Registrar, together with any resolution to amend the M&A of the surviving company. If the surviving company is not to be a BVI company, it must also file certain additional documents pertaining to service of process of proceedings and payments to dissenting shareholders, together with a certificate of merger issued by the appropriate authority of the foreign jurisdiction where it will be continuing.

Finally, the Registrar registers the articles of merger and any amendment to the M&A of the surviving company, and, if satisfied that all requirements of the BCA's statutory merger procedure have been complied with, issues a certificate of merger.

In the case of a statutory merger between a parent company and one or more subsidiary companies, where the parent company owns at least ninety per cent of the

Statutory Mergers in the British Virgin Islands

outstanding shares of each class of its subsidiary/subsidiaries, the merger procedure is modified such that: (a) shareholder approval is not required; (b) only the directors of the parent company need approve the merger; and (c) only the parent company need execute articles of merger.

Under the BCA, shareholders in a BVI company have the right to dissent to a statutory merger. However, a dissenting shareholder's entitlement is limited to payment of the fair value of his shares, in accordance with the procedure set out in the BCA.

A BVI statutory merger is a tried and tested, straightforward acquisition procedure. Its popularity has increased in recent years, and the BVI Registrar's familiarity allows for a BVI statutory merger to be effected in a timely and cost-effective manner.



Statutory Mergers in the British Virgin Islands

About Ogier

Ogier is an award winning offshore legal and fiduciary services provider. We provide advice on all aspects of BVI, Cayman, Guernsey and Jersey law together with trust and administration services through a global network of offices covering all time zones and key financial markets.

Ogier continues to be recognised as a leading law firm by the principal legal directories, including Legal 500 and Chambers.

Statutory Mergers in the British Virgin Islands

Contact details

NORTH & SOUTH AMERICA

British Virgin Islands

Legal:
Ray Wearmouth
+1 284 852 7364
ray.wearmouth@ogier.com

Simon Schilder
+1 284 852 7307
simon.schilder@ogier.com

Fiduciary:
Gareth Thomas
+1 284 852 7322
gareth.thomas@ogier.com

EUROPE, MIDDLE EAST & AFRICA

London

Legal:
Simon Dinning
+44 (0)20 7160 5070
simon.dinning@ogier.com

Fiduciary:
Philip Norman
+44 (0) 1534 504430
philip.norman@ogier.com

ASIA & AUSTRALASIA

Hong Kong

Legal:
Nathan Powell
+ 852 3656 6054
nathan.powell@ogier.com

Fiduciary:
Aby Wong
+852 3656 6021
aby.wong@ogier.com

This client briefing has been prepared for clients and professional associates of the firm. The information and expressions of opinion which it contains are not intended to be a comprehensive study or to provide legal advice and should not be treated as a substitute for specific advice concerning individual situations.

Ogier includes separate partnerships which advise on BVI, Cayman, Guernsey and Jersey law. For a full list of partners please visit our website.

Please check with the relevant contact listed above for specific details regarding the legal services we offer from each office as we do not always practice the law of the jurisdiction where our offices are located. Please note that the named contact may not be qualified to advise on all the laws practiced from that office.