

## Cross border: advantages of a real estate holding company incorporated in the BVI

Matthew Gilbert and Joanna Russell  
Maples and Calder

[global.practicallaw.com/8-624-3423](http://global.practicallaw.com/8-624-3423)

The use of companies incorporated in international finance centres, including the British Virgin Islands (BVI), as asset holding vehicles for cross-border investment is a well-trodden path in the global economy. The popularity of the use of such vehicles is driven primarily by their low administrative costs, flexible corporate framework and creditor friendliness. This article focuses on the advantages offered by the use of BVI companies and the positive impact of these on deal costs, and the cost and ease of ongoing maintenance and governance.

The BVI has long been established as a reputable and stable jurisdiction in which to incorporate. It is a common law jurisdiction with a modern, purpose built, dedicated commercial court and a fast and cost effective legal process, making it an attractive jurisdiction for investors and lenders alike, as discussed below.

### ACQUISITION OF THE ASSET

Whatever the pace of the acquisition of the underlying asset, the incorporation of a BVI holding company is a straightforward and quick process. The jurisdiction is recognised by international authorities such as the OECD as being compliant with international standards of transparency, including through the BVI's adoption of the Common Reporting Standard from 1 January 2016.

#### Incorporation

A company's set up costs are low and there is no minimum capital requirement. A standard BVI company is authorised to issue 50,000 shares of no par value, for which the annual government licence fee is only US\$350. The company is permitted to issue as many of the authorised shares as the directors determine. When issued, shares need not be fully paid, and can be issued for consideration in any form including cash, a promissory note, real or personal property (including goodwill and know-how), services rendered or a contract for future services. For example, a real estate asset can be contributed to the company as consideration for the issuance of shares.

The BVI's company law is solvency based: the jurisdiction has moved away from the concept of share capital, so a company is simply authorised to issue a maximum number or an unlimited number of shares. Accordingly, there are no share premium, capital maintenance or capital reduction issues to consider. In addition, distributions can be made at any time, provided the directors determine the company will pass the basic solvency test immediately following the distribution.

Once the incorporator has provided the necessary know your client (KYC) documentation, a BVI company can be formed on a same day basis. The BVI Registry of Corporate Affairs has recently introduced an expedited premium service for incorporations.

The company requires only one director and the director does not need to be resident in the BVI. Only the memorandum and articles of association are required to be filed at the Registry of Corporate Affairs, where they are available for public inspection. Details of directors and shareholders are confidential and kept only at the

company's BVI registered office: from 1 April 2016 details of directors will be filed at the Registry of Corporate Affairs but will not be publicly available.

Under the BVI Business Companies Act, the company will be exempt from all income and corporation taxes in the BVI. In addition, no stamp or other capital duties are payable in the BVI. Outside the BVI, taxes will be payable as applicable where the assets are held and where profits are remitted.

#### Flexible administration

BVI companies can model their corporate governance to suit the business needs of the company; the BVI imposes no additional mandatory corporate governance requirements. Most asset holding companies are incorporated with plain vanilla memorandum and articles of association which facilitate flexibility.

Directors' fiduciary duties are based on well understood English common law principles, but have been clearly codified into statute in the BVI which offers certainty to both directors and shareholders. The board of directors is free to manage the company without the need for shareholder involvement. While the management involved in an asset holding company is likely to be minimal, the board has freedom to deal with the day-to-day administration of the entity, as well as having power to amend the memorandum and articles of association to increase the authorised number of shares, should it be required.

If the company is carrying out a joint venture between the shareholders, the directors can be authorised in the articles of association to act in the best interests of one or more of the shareholders. This allows a property development joint venture to be structured through a BVI joint venture company, and each shareholder can be entitled to appoint a director to the board of the BVI company, who can vote in accordance with the best interests of that shareholder. This gives joint venture parties the confidence that their interests will be fully represented at day-to-day board management level, throughout the joint venture.

In the ordinary course, resolutions, both of shareholders and directors, are passed by a simple majority, and can be by way of meeting or by written resolution. There is no concept of a special resolution under BVI law, unless specifically drafted into the memorandum and articles of association. This means the corporate governance provisions, including shareholder reserved matters requiring, say, supermajority or unanimous shareholder consent, can be drafted to suit the circumstances.

### FINANCING

#### A creditor friendly jurisdiction

Most financial institutions are familiar with the BVI as a jurisdiction and are comfortable providing finance to BVI companies. The BVI is a well-established, creditor friendly jurisdiction, offering creditors lending to or taking security from a BVI obligor many advantages.

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There are no US-style Chapter 11 or UK administration equivalent provisions in force. The appointment of liquidators over a company under the BVI Insolvency Act 2003 brings about a moratorium on claims against the company, but does not prevent the enforcement of security by a secured creditor.

A secured creditor can appoint a receiver over the relevant assets on the terms of the security instrument. In the context of an enforcement over English property, joint Law of Property Act receivers will often be appointed in both the UK and BVI.

There are effective fraudulent preference rules that allow liquidators to challenge transactions at an undervalue, unfair preferences and voidable floating charges. There are limited categories of preferred creditors on its insolvency. Enforceability of netting and set off provisions, and the use of subordination deeds or deeds of priority, are recognised by statute.

Significantly for creditors, there is the ability to resurrect a company after its dissolution, on the application of a creditor, if the court considers it just and equitable to do so.

### **Security over assets**

There are no restrictions on the form of security interest that can be granted by a BVI company, or the choice of law governing security arrangements (subject to the usual conflict of laws principles). The type of security interest is likely to depend on the location and nature of the underlying assets and in the context of UK real estate can include a legal mortgage, debenture or fixed and floating charge, and the usual charges over rent accounts, for example.

In addition to direct security over the company's underlying asset, security can be granted over the shares in a BVI company, with share security being given statutory recognition under BVI law. Share security can be governed by BVI law, however the legislation provides that it can be governed by foreign law. Where a foreign law governs, BVI legislation provides that the remedies available under the governing law will be available to the secured party. This is particularly helpful if an English law governed charge over shares as the self-help remedy of appropriation is then available to the secured party.

### **Registration of security**

Short particulars of any security interest granted by a BVI company can be registered publicly in the BVI. This registration gives statutory priority to the secured creditor over subsequent security and (save for certain exceptions) prior unregistered security. A registered floating charge can take priority over a subsequent fixed charge, provided the floating charge contains a negative pledge.

There are no timeframes to make such a filing for registration, but priority is determined from the date the registration is made rather than the date of the granting of the charge. The filing should therefore be made on behalf of the secured creditor as soon as possible.

## **DISPOSAL OF THE ASSET**

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### **Transfer of the shares in the company**

Subject to any contrary provisions in the memorandum and articles of association of the company, shares in a private company can be transferred by a written instrument signed by the transferor and containing the name and address of the transferee. No stamp duty is payable in the BVI.

### **Distribution in specie of the asset to the shareholder**

Restructuring the holding of the underlying asset is typically straightforward. For example, subject to any contrary provisions in the memorandum and articles of association of the company, dividends can be declared by the directors subject only to a basic solvency test, and can be payable in cash or in specie. An underlying property will often be hived up by way of distribution in specie in a restructuring.

The funds and/or assets that can be distributed are not limited, provided the company's assets exceed its liabilities and that the company will continue to be able to pay its debts as they fall due immediately after the distribution.

The distribution in specie can be done either prior to or during the process of liquidation of the company (see below, *Liquidation of the company*).

### **Sale of the asset by the company**

Under BVI law, and subject to the company's articles of association, disposition by a company of over 50% of its assets (by value) requires shareholder approval, unless in the ordinary course of business. For a property investment company, disposals are likely to be in the ordinary course of business, but the articles of association should be drafted to provide for the company's particular circumstances and any specific shareholder protections sought.

## **LIQUIDATION OF THE COMPANY**

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Following disposal of the asset, if the company is no longer required it can, assuming it is solvent, be voluntarily liquidated.

As above, a distribution in specie of the asset can be made to the shareholder either prior to commencement of the liquidation or by the liquidator during the liquidation process.

A company's voluntary liquidation is deemed to commence at the time at which the notice of the liquidator's appointment is filed with the BVI Registrar of Corporate Affairs (Registrar) and continues until the company is dissolved by the Registrar or the liquidation is terminated by the BVI court.

### **Liquidation plan**

A liquidation plan must be prepared and adopted by the directors of the company and must specify certain prescribed details, including:

- The reasons for the liquidation of the company.
- The directors' estimate of the time required to complete the liquidation.
- Whether the liquidator is authorised to carry on the company's business, if he determines that to do so would be in the best interests of the company's creditors or members.
- The names and addresses of each individual to be appointed liquidator and the remuneration proposed to be paid to each.

Only individuals (not corporate entities) can be appointed as liquidators, although more than one individual can be appointed on a joint and several basis. The liquidation plan must also state whether the liquidator is required to send all the company's members a statement of account, prepared or caused to be prepared by the liquidator in respect of his actions or transactions.

The liquidation plan must be adopted no more than six weeks prior to the date of the resolution appointing the liquidator. A copy of the liquidation plan must be filed with the Registrar within 14 days of the appointment of the liquidator.

### **Declaration of solvency**

The directors must make a declaration of solvency, stating that in the directors' opinion the company is and will be able to discharge, pay or provide for its debts as they fall due. The declaration of solvency must incorporate a statement of the company's assets and liabilities, as at the latest practicable date before making the declaration of solvency.

### **Appointment of the liquidator**

The liquidator must consent to act as liquidator of the company prior to his appointment.

The directors and members of the company must approve the appointment of a liquidator by resolution and approve the liquidation plan.

### Advertising

There are requirements to advertise the liquidation both in the BVI and in the jurisdiction of the location of the assets. Once these advertising requirements have been fulfilled, the liquidator can distribute any remaining assets of the company and finalise the liquidation.

### Completion

As soon as the affairs of the company have been fully wound up, that is, when the liquidator is in a position to seek the dissolution of

the company, the liquidator must file a statement with the Registrar that the liquidation has been completed. On receipt of a certificate of dissolution from the Registrar, the final step for the liquidator is the publication in the BVI *Official Gazette* of a notice that the company has been struck off the register of companies in the BVI and has been dissolved.

### CONCLUSIONS

The use of a BVI company as an asset holding vehicle provides many advantages, from the certainty of common law legal principles, low establishment and administrative costs, to the simplicity of ongoing maintenance and ultimately the distribution of an asset. As such, the BVI continues to play a relevant and useful role in corporate structuring of asset holding vehicles.

## Practical Law Contributor profiles



### Matthew Gilbert, Partner

Maples and Calder  
**T** +44 20 7466 1608  
**F** +44 20 7466 1700  
**E** matthew.gilbert@maplesandcalder.com  
**W** www.maplesandcalder.com



### Joanna Russell, Of Counsel

Maples and Calder  
**T** +44 20 7466 1678  
**F** +44 20 7466 1700  
**E** joanna.russell@maplesandcalder.com  
**W** www.maplesandcalder.com

**Professional qualifications.** Admitted as a solicitor in England and Wales (does not practice as an English solicitor), 2002; admitted as a solicitor of the Eastern Caribbean Supreme Court (British Virgin Islands), 2006.

**Areas of practice.** Head of the BVI team of Maples and Calder in London; advises on finance, banking and corporate law matters involving BVI companies and partnerships, including public and private mergers and acquisitions, partnerships and joint ventures, debt and equity financings, and project, real estate and asset financing; specialises in the listing of BVI companies on international stock exchanges, including the London Stock Exchange/AIM, NASDAQ and Toronto Stock Exchange; advises on BVI insurance and regulatory law, and regularly contributes to industry journals.

**Non-professional qualifications.** Bournemouth University, UK, Postgraduate Diploma, Legal Practice (Distinction); University of Reading, UK, LLB (Hons)

**Professional qualifications.** Admitted as a solicitor in England and Wales (does not practice as an English solicitor), 2005; admitted as a solicitor of the Eastern Caribbean Supreme Court (British Virgin Islands), 2006; admitted as an attorney-at-law in the Cayman Islands, 2010

**Areas of practice.** Lawyer in the British Virgin Islands practice group based in London; deals with a wide variety of corporate and commercial law including mergers and acquisitions, joint ventures, corporate, banking and finance transactions;

**Non-professional qualifications.** College of Law, London, UK, PgDL (Commendation); LPC (Distinction); University of Bristol, UK, BSc, Sociology, 2000