
THE MERGERS & ACQUISITIONS REVIEW

SIXTH EDITION

EDITOR
SIMON ROBINSON

LAW BUSINESS RESEARCH

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THE MERGERS & ACQUISITIONS REVIEW

Sixth Edition

Editor
SIMON ROBINSON

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EDITOR'S PREFACE

Deal-making has remained on the agenda in the past year, although the first half of 2011 showed a stronger performance than the second half, which saw a significant fall in transactional activity. In the wake of continuing economic uncertainty, opportunities for acquisitions remain limited to companies and institutions on a stable financial footing. At the same time, corporates are beginning to focus on their core business and looking for ways to return value. Valuations remain favourably low for purchasers, and the prospect of striking a bargain makes cross-border M&A attractive for those who can afford it. While access to the loan market has remained difficult, cash-rich corporations have begun to swing the balance in their favour. Shareholder participation and a desire for control and accountability are on the rise, and an atmosphere of increased regulation, reform and austerity is building. We remain in a state of geopolitical flux, and these factors continue to complicate the global economic scenario. The period of widespread unrest in the Middle East and North Africa seems to be reaching a settled conclusion, although the situation in Syria (and possibly Mali and Sudan) is still volatile. A number of countries have seen fresh elections and a transition of leadership, including France and Russia, and a change of leadership in China is expected following the 18th National People's Congress this autumn, when the US presidential elections will also take place. The sovereign debt crisis and the ongoing uncertainty over the fate of the eurozone are further contributing to the lack of confidence in the markets.

All is not doom and gloom, however, and whereas the global picture remains difficult, there are signs of hope. The emerging markets have shown a persistent growth in outbound investment, spurred on by a desire to build a more prominent global presence and for the purpose of accessing new markets. European targets remain of interest to both US and Middle and Far-Eastern buyers. Inbound investment from the emerging markets into both Africa and Australia is on the rise, and this has strengthened activity in the energy, mining and utilities sector. The technology, media and telecoms sector has also shown signs of promise with some high-profile deals, and must be watched with interest in the coming year. There is hope that, as political and economic factors

stabilise, M&A activity will once more gather pace and momentum, and enter a new era of resurgence. We shall see.

Once again, I would like to thank the contributors for their continued support in producing this book. As you read the following chapters, one hopes the spectre of the years past will provide a basis for understanding, and the prospect of years to come will bring hope and optimism.

Simon Robinson

Slaughter and May

London

August 2012

Chapter 13

BRITISH VIRGIN ISLANDS

Leonard A Birmingham and Simon Hudd¹

I OVERVIEW OF M&A ACTIVITY

Given the international financial climate, it is perhaps unsurprising that the past 12 months have seen unpredictable deal flows involving British Virgin Islands ('BVI') companies, with spikes of high activity interspersed with more cautious periods where clients adopt a 'wait and see' approach to the financial markets, and to doing deals generally. Deal volumes involving BVI companies have largely followed the global economic conditions; while Asia has continued to thrive and Russia and CIS have remained strong, the levels of transaction activity in the United States, the United Kingdom and European markets have been less consistent. As has been the case throughout the global financial crisis, certain clients will always have the means to close high-profile and high-value transactions, but the overall volume of activity remains below 2007–2008 levels. Transactions are often delayed, credit committees are less willing to commit to release funding on accelerated timescales and transaction documents are negotiated more heavily than ever. On the whole, while there are certainly pockets of activity with interesting deals still being done, it remains a relatively uncertain time for transactional lawyers.

While the prospects at the more mature end of the market remain mixed, there remains hope for the coming years in terms of new structures being incorporated in the BVI, which, depending on market conditions in the coming years, may well be the big-ticket mergers and acquisitions of the short to medium term. The BVI Financial Services Commission ('the FSC') publishes quarterly statistics relating to the number of BVI company incorporations, which are a useful barometer of the popularity of the jurisdiction and activity levels, shown in the following table.²

1 Leonard A Birmingham is a partner and Simon Hudd is a senior associate at Harney, Westwood & Riegels LLP.

2 Source: BVI Financial Services Commission Q1 2012 Statistical Bulletin.

<i>Number of incorporations</i>	<i>Q1</i>	<i>Q2</i>	<i>Q3</i>	<i>Q4</i>	<i>Total</i>
2008	20,752	15,831	16,133	9,000	61,716
2009	12,307	9,871	13,368	11,931	47,477
2010	16,596	12,815	15,946	14,267	59,624
2011	19,010	15,689	17,056	12,974	64,729
2012	17,865				17,865

As can be seen, the jurisdiction has enjoyed a successful year in terms of incorporations with the market for BVI incorporations regaining the ground lost since 2008. Given the rules relating to client confidentiality of BVI business companies, it is not possible for the FSC to calculate activity by geographical spread, although we know, based on the clients' locations and where deals take place, that the above volumes continue to be driven in large part by the BRIC economies.

II GENERAL INTRODUCTION TO THE LEGAL FRAMEWORK FOR M&A

The key legislation applicable to BVI companies is the BVI Business Companies Act 2004 (as amended), which is the successor to the old International Business Companies Act 1984 (as amended). The BVI Business Companies Act sets out the standard provisions relating to a wide range of company law issues including, without limitation, incorporation of BVI Business Companies, the memorandum and articles of association ('Memorandum and Articles'), authorised and issued shares (such as their issue, transfer and repurchase), dividends and distributions, corporate governance (directors, officers, committees, general meetings and board meetings), company records, security over assets and shares (granting and registration of security interests), material transactions (mergers, consolidations, compulsory repurchase, material disposals, plans of arrangement and schemes of arrangement), continuation in and out of the BVI, voluntary liquidations and members' remedies.

While being a relatively detailed piece of legislation, the BVI Business Companies Act gives BVI companies a large degree of flexibility in 'contracting out' of certain statutory provisions in their Memorandum and Articles and, as a result, those constitutional documents form an important part of the process determining how an M&A transaction involving a BVI company might be structured. This is especially important in structuring a joint venture or negotiating amendments to the Memorandum and Articles upon a strategic investment into a BVI business company, where the new investor has negotiated particular rights under the shareholders' agreement or joint venture agreement. Often the standard position under the BVI Business Companies Act will not be suitable (such as, for example, where the parties wish to impose restrictions on share transfers, rules governing pre-emption on issues or transfers of shares, more stringent rules relating to dividends, a list of veto rights for particular share classes, among others) and the role of BVI counsel will include drafting the shareholders' agreement or tailoring the Memorandum and Articles to track the agreed commercial position under the shareholders' agreement.

The flexibility alluded to above is often used by BVI companies to mirror the rules and regulations expected by investors in other jurisdictions (such as the practice, in the context of an AIM listing or a listing on the London Stock Exchange, of including in the Memorandum and Articles equivalent provisions to the Takeover Code in the UK – of which there is no equivalent in the BVI). Further, where shareholder activist and institutional investor groups would expect limits on the powers of directors (such as to limit the powers of the directors to issue shares on a non-preemptive basis), notwithstanding the fact that BVI law would not typically impose such restrictions, parties are free to include such restrictions in their Memorandum and Articles.

The BVI remains a relatively ‘light-touch’ jurisdiction as regards regulation. As previously mentioned, the BVI has not adopted legislation relating to takeovers (such as an equivalent to the UK Takeover Code) nor are there detailed statutory provisions relating to listed companies (as befitting a jurisdiction without a stock exchange), so there are limited circumstances where such issues will be relevant, namely where bespoke provisions have been drafted into the Memorandum and Articles, as discussed above.

The BVI has adopted the Securities and Investment Business Act 2010 (‘SIBA’), which will only be of interest in an M&A transaction in relatively limited circumstances, namely where the target company is regulated under SIBA (such as where the company conducts investment business, is a regulated fund or otherwise requires a licence under SIBA). We have seen an increasing number of BVI companies being set up with the sole purpose of providing advisory services on M&A transactions (and charging fees and commissions for such services), and clients should be sure to take advice in case such companies might be caught by the provisions of SIBA.

The BVI is a common law jurisdiction and, therefore, jurisprudence from both the English courts and, in certain circumstances, other common law jurisdictions, will be persuasive before the BVI courts. The ultimate court of appeal from the BVI courts is the Privy Council in the United Kingdom, and the robust legal system in the BVI is often cited as one of the reasons for its popularity as a jurisdiction (not only due to the Privy Council as the ultimate appellate court but also because of the opening of a dedicated BVI Commercial Court in 2009).

III DEVELOPMENTS IN CORPORATE AND TAKEOVER LAW AND THEIR IMPACT

It is anticipated that by the end of 2012 the BVI will have enacted into law the BVI Business Companies (Amendment) Act 2012 and the BVI Business Companies Regulations, which as at the time of writing, are in the process of being voted through the BVI legislature. The adoption of these legislative changes are part of a continuing process to keep the BVI’s company regime up to date and attractive and to ensure that it retains its position as the world’s number one offshore corporate domicile.

At this time, the proposed changes to BVI company law do not appear likely to have a material impact on M&A transactions involving BVI companies. Some welcome clarifications have been included in the new legislation confirming that BVI companies may convert and re-designate between share classes (which was not clear under the previous legislation and will be a useful tool in some joint ventures and other similar

transactions), that alternate directors may sign written resolutions (providing a practical – and long overdue – solution to some logistical issues for completion meetings) and also that, in some circumstances, previously used company names may be re-used (as a corporate domicile that has seen over 950,000 incorporations in its history, this is a welcome step from a practical perspective). Some further clarifications were also made to the use of non-English characters in company names, which has been widely used both in the Chinese and Russian markets.

IV FOREIGN INVOLVEMENT IN M&A TRANSACTIONS

Given that the BVI is a jurisdiction of only 25,000 inhabitants, it is not surprising that practically all M&A transactions involving BVI companies relate to underlying assets that are foreign to the BVI. In terms of deal flow, the past year has seen a particular focus on M&A in the BRIC economies as the volume of capital markets transactions has fallen, and anecdotally, the BVI remains a jurisdiction of choice for corporate and finance transactions for Russian and Chinese participants. An interesting trend in the past year has been the increased use of BVI companies in the structuring of transactions in Africa, both in sub-Saharan and north African jurisdictions. It will be interesting to see whether this continues in these developing jurisdictions.

i Hong Kong/China

Hong Kong, China and the Far East in general have historically been strong supporters of the BVI, both in terms of the very high volumes of incorporations that flow from clients in those markets but also with the variety of corporate and finance transactions in which those companies are involved on a regular basis. In 2010, the BVI was ranked as the second-largest jurisdiction for foreign direct investment ('FDI') into China, representing 9.9 per cent (or \$111.8 billion) of all FDI into China.³ For many years, BVI companies have been synonymous with offshore entities generally in the Hong Kong and Chinese markets, and those markets remain critical to the success of major offshore law firms in the current financial climate.

ii Russia/CIS

The double-taxation treaties in place between Cyprus and many of the ex-Soviet states (Russia and Ukraine being the most prominent) have given rise to the very popular use of BVI companies in 'sandwich structures' (with the Russian or Ukrainian asset at the bottom, which asset is wholly owned by a Cypriot holding company, which, in turn, is wholly owned by a BVI business company). Regular exposure to BVI companies as a result of these structures has also seen clients in Russia/CIS using BVI companies independently of Cypriot vehicles, often where taxation benefits are not the primary objective and where, for example, they wish to take advantage of the slightly more relaxed company law regime in place in the BVI, as well as the additional layers of confidentiality

3 Source: Chinese Ministry of Commerce and Chinese Statistical Yearbook 2010.

in place for BVI companies (where the registers of directors and shareholders are not in the public domain).

iii India

While the BVI has not entered into any double-taxation treaties with India (unlike Mauritius, Cyprus and Singapore, among other jurisdictions), BVI companies are increasingly found within the group structures of large Indian clients (such as United Spirits and Reliance Industries, *inter alia*), which are used in the context of M&A transactions. A study by the Reserve Bank of India showed that the BVI was the sixth-largest recipient of outward FDI from India in the first quarter of 2012, placing it ahead of the United Kingdom and marking sharp growth against the position in 2008.⁴

V SIGNIFICANT TRANSACTIONS, KEY TRENDS AND HOT INDUSTRIES

As one of the most popular corporate domiciles globally (with approximately 470,000 BVI companies currently on the Register of Corporate Affairs in the BVI),⁵ BVI companies are used in an incredibly diverse sphere of industries ranging anywhere from mining and natural resources to real estate. We set out below some of the headline transactions involving BVI companies in the past year.

i DV4/Qatari Diar Olympic village joint venture

DV4 Limited, a BVI closed-ended fund, and related BVI entities (advised by Delancey, a specialist real estate investment and advisory company) entered into a joint venture with Qatari Diar in connection with the acquisition of the London Olympic village for \$892 million from the Olympic Delivery Authority. Qatari Diar is the property arm of Qatar's sovereign wealth fund.

ii Equity Trust/TMF merger

Equity Trust and TMF Group were involved in a merger transaction following the \$496 million acquisition of Equity Trust by private equity house Doughty Hanson. The merger created the world leader in corporate compliance and reporting services, which acts for over 50 per cent of the Fortune 500 companies. The second part of the merger dealt with the local implementation of Equity's planned merger with the TMF Group in more than 15 different jurisdictions. The finalisation of the merger also required the consolidation of the existing financing arrangements of the group.

The past year has continued to see consolidation in the offshore fiduciary, corporate services and company secretarial industry, which plays a major role in the administration

4 Source: Harun R Khan, Deputy Governor, Reserve Bank of India, 'Outward Indian FDI – Recent Trends & Emerging Issues: Top ten country wise overseas investments by Indian companies', p. 8), available at <http://rbidocs.rbi.org.in/rdocs/Speeches/PDFs/OV27022012.pdf>.

5 Source: BVI Financial Services Commission Q1 2012 Statistical Bulletin.

of BVI companies globally. In addition to the TMF/Equity Trust merger, the owners of Vistra Group (a leading provider of fund administration, trust and corporate services in Europe) have acquired the Offshore Incorporations group of companies, which is the Asian market leader in company formation and associated services. It is anticipated that Acceptor (one of the leading corporate services firms in Asia) and Credence Trust (Offshore Incorporations' trust and fiduciary service firm) will be integrated with Vistra under the Vistra brand, whereas OIL (Asia's leading company formation specialist) will continue to operate independently from Vistra.

iii Virgin Active sale to CVC Capital Partners

CVC Capital Partners acquired a controlling interest in Virgin Active in a deal that values the health and fitness club at £900 million. Virgin Active is the world's leading health club operator with 254 clubs and 1.1 million members across the United Kingdom, South Africa, Italy, Iberia and Australia.

iv West African Minerals Corporation reverse takeover

West African Minerals Corporation (an alternative investment market ('AIM')-listed west Africa-based company focused on the mining industry), announced a placing to raise £3.25 million for the proposed acquisition of Ferrum Resources Limited by way of a reverse takeover. This deal is interesting because it involved BVI companies both as acquirer and target, the exercise of the acquirer's option to acquire the target being a related-party transaction for the purposes of the AIM Rules, and the fact that the transaction was undertaken in conjunction with a placing and readmission to the AIM.

v Sale of shares in Sierra Rutile Limited

Sierra Rutile Limited, a BVI company listed on the AIM, made a cash offer to acquire all of the shares in the company by Pala Investments Holdings (an existing shareholder of the company). Given that the company is a BVI business company, the City Code on Takeovers and Mergers would not ordinarily have applied to the cash offer; however, the company had adopted specific provisions of the City Code in its Memorandum and Articles, which meant that certain City Code provisions needed to be complied with by the company with respect to the cash offer.

VI FINANCING OF M&A: MAIN SOURCES AND DEVELOPMENTS

How M&A transactions involving BVI companies are financed will be dictated by market conditions in the underlying geographical location where the deal is taking place, and (as a result) it is difficult to determine any discernible pattern or trend in M&A financing practice, which is particular to the BVI itself. The leading markets for BVI M&A transactions remain Russia and China (followed by Canada, the United Kingdom and the United States), and the acquisition finance markets in those jurisdictions have, in our experience, been relatively less affected by the current market conditions than their counterparts in the United Kingdom and United States. We think that the primary sources of funding for M&A transactions will likely remain as debt finance or private equity.

During the past year the Russian state banks have been enthusiastic participants in M&A transactions involving BVI companies, and it has been common to see both the bank lending and capital divisions of such banks on the same transaction (i.e., with transactions being funded by a mixture of debt and equity).

VII EMPLOYMENT LAW

Given that practically all M&A transactions relate to businesses that are geographically located outside of the BVI, the treatment of employees of BVI companies is nearly always governed by the jurisdiction where the employees are located. As such, BVI employment laws are practically never a key driver on M&A transactions, except in the very small percentage of annual transactions involving businesses in the BVI itself. In any event, there have been no amendments to BVI employment laws in the past year.

VIII TAX LAW

Except where parties are acquiring real estate in the BVI itself, or paying employees located in the BVI, the BVI is a tax-neutral jurisdiction. There are no stamp duties, income taxes, corporate or capital gains taxes, withholdings, levies, registration taxes, estate duties, inheritance taxes or gift taxes, or other duties or similar taxes or charges now imposed, or which under the present laws of the British Virgin Islands could in the future become imposed. Tax-neutrality is fundamental to the success of the BVI as an offshore jurisdiction and no changes have been made, nor are any scheduled to be made, to amend this position.

IX COMPETITION LAW

There are no anti-monopoly or anti-competition laws of any kind in the BVI.

X OUTLOOK

BVI companies are popular across a variety of categories of end users, from asset-holding vehicles to joint ventures, from listed entities to private equity and hedge funds. As such, the jurisdiction is not overly reliant on one particular market sector, which can have both positive and negative consequences. On the one hand, the jurisdiction is hedged against recessive tendencies in individual markets (take the current downturn in capital markets, which has been counterbalanced by an upturn in joint-venture transactions, for example), but it perhaps has not always benefited fully from focusing on a particular sector (the BVI had investment funds legislation before the Cayman Islands, although by placing an emphasis on funds the Cayman Islands have long since overtaken the BVI as a funds jurisdiction in terms of market share, number of funds and assets under management).

The popularity of the jurisdiction in the emerging markets and the use of such companies in M&A transactions will only increase as those markets continue to evolve and become more sophisticated. Despite the legislative changes in the United Kingdom

announced in the 2012 Budget (where it is a possibility (although there is no such evidence yet) that the use of BVI companies as holding companies for UK residential real estate may decline), the jurisdiction remains very popular in the United Kingdom, and there continue to be referrals on BVI matters from US law firms. In light of the global political and financial climate, there is no reason to foresee that the volume of BVI M&A transactions in the coming year will be any different to recent years, namely that deals will continue to be done, albeit at an unpredictable rate and from a variety of sources, both in terms of the geographical location of the ultimate client and the market sector.

Appendix 1

ABOUT THE AUTHORS

LEONARD A BIRMINGHAM

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Leonard Birmingham is global head of corporate and head of Harneys' London office. He has extensive experience in all aspects of BVI corporate law and also advises on banking and insolvency law. His client base spans the globe and consists mainly of established public and private companies, founders and investors in start-up companies, company directors and shareholders, law firms, and banks. This international practice has afforded him the opportunity to be involved in initial public offerings and listings on major stock exchanges in New York, London, Singapore, Amsterdam and Oslo. Mr Birmingham advises on joint ventures and private placements, mergers, takeovers, corporate restructuring, director's duties, shareholder rights, banking, insolvency, project finance, asset finance and special purpose vehicles for tax or corporate structures.

SIMON HUDD

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Simon Hudd is a senior associate in Harneys' London office and specialises in British Virgin Islands and Cayman Islands law. He is involved in and regularly advises on corporate transactions (mergers and acquisitions, dispositions, strategic joint ventures, takeovers, international stock exchange listings, corporate restructurings and reorganisations), structured and asset finance, project and acquisition finance, Islamic finance (including *murabaha* facilities and *sukuk* issues) and capital markets. Mr Hudd's practice has a particular focus on the Russian and CIS markets, and he heads up Harneys' Russia, CIS and CEE group.

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