

ALERT
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**CORPORATE INVERSIONS THROUGH CROSS-BORDER MERGERS WITH EXISTING
BVI COMPANIES: 30 YEARS AFTER THE BVI IBC ACT**

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When the pharmaceutical giants Pfizer and AstraZeneca proposed to enter into a Trans-Atlantic merger in April 2014 to better arrange their finances thereby raising shareholder value and building market confidence, it generated great discussion. When a Brazilian-based consortium comprised of the Cultrale Group, an orange juice supplier and the Safra Group, an investment group, made an unsolicited \$611 million takeover bid for all the outstanding shares in Chiquita Brands International there was a rapid rise in share price from \$10 to over \$13 demonstrating market confidence in the proposed deal. However, the Board of Chiquita Brands International opted to reject the takeover bid in favor of continuing its plans for a corporate inversion that involved a share-for-share merger with Irish-based Fyffes to form ChiquitaFyffes headquartered in Ireland and become the world's largest banana distribution company (the "**ChiquitaFyffes Model**").

The relocation of companies, otherwise known as redomiciliation or corporate migration, has not always been a simple process, but a step forward took place in 1982 when McDermott International Inc was incorporated in Panama and through a restructuring process other group entities became subsidiaries of that entity, including the original engineering firm of J. Ray McDermott based in Houston, Texas (the "**McDermott International Model**"). However, in August 1984 the British Overseas Territory of the Virgin Islands (the "**British Virgin Islands**") enacted the International Business Companies Act (the "**IBC Act**"), based largely on Delaware corporate law, which allowed for companies existing in other jurisdictions to migrate into the British Virgin Islands through a process of continuation, whether or not the jurisdiction of the company's origin allowed it to migrate. This changed the game and the British Virgin Islands soon became the domicile of choice for corporate entities doing business around the world.

The Simple Corporate Inversion – The BVI Model

Since 1984, thousands of companies have migrated into the British Virgin Islands using a simplified process, which after testing for 30 years is now firmly enshrined in the BVI Business Companies Act, 2004 (the "**Companies Act**") which replaced the dual corporate regime under the IBC Act and the old Companies Act. However, it is no longer possible to migrate a company from outside and into the British Virgin Islands if that foreign jurisdiction does not permit it to continue to the British Virgin Islands. Therefore, it is only possible to have a corporate migration into the British Virgin Islands from those jurisdictions that permit corporate migration. However, most liberal democracies around the world permit corporate migration, subject to certain prerequisites, since it may be a violation of the right to freedom of movement of a juridical person when applying the Magna Carta of 1215 and recognized in Article 13 of the Universal Declaration of Human Rights and Article 12 of the

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International Covenant on civil and Political Rights, as well as Article 2 of Protocol 4 to the European Convention on Human Rights ("**Protocol 4**"). However, the Government of the United Kingdom never ratified Protocol 4 and it is not included in Schedule I of the UK Human Rights Act 1998 (as amended), but the Magna Carta specifically guarantees freedom of movement which was specifically provided in section 18 of the Virgin Islands Constitution Order 2007 (U.K. S.I. 2007 No. 1678). Therefore, the British Virgin Islands allows for the reciprocal recognition of corporate migration into its jurisdiction.

After determining that the laws of the foreign jurisdiction allows for the company to migrate into the British Virgin Islands it is necessary for the company to meet the following requirements:

- (a) it is not in liquidation, or subject to equivalent insolvency proceedings, in another jurisdiction;
- (b) a receiver or manager has not been appointed in relation to any of its assets;
- (c) it has not entered into an arrangement with its creditors, that has not been concluded; and
- (d) an application made to a foreign court for the liquidation of the company or for the company to be subject to equivalent insolvency proceedings has been finally determined.

If those four (4) requirements have been met for a company that is in a jurisdiction which permits it to migrate into the British Virgin Islands, then it may file an application to continue under the Companies Act by filing:

- (a) a certified copy of its certificate of incorporation, or such other document as evidences its incorporation, registration or formation from its current domicile;
- (b) a memorandum and articles of association that complies with the Companies Act, and the procedure for incorporating a new BVI company should be followed with some additional provisions included in the memorandum and articles of association;
- (c) evidence to the satisfaction of the Registrar, which will normally be a corporate resolution, that the application to continue into the British Virgin Islands and the proposed memorandum and articles have been approved:
 - (i) by a majority of the directors or the other persons who are charged with exercising the powers of the company, or
 - (ii) in such other manner as may be established by the company for exercising the powers of the company; and
- (d) evidence to the satisfaction of the Registrar, which will normally be a legal opinion from a legal practitioner qualified to practice in the domicile of the company, advising that the laws of the foreign jurisdiction allow the company to continue into the British Virgin Islands and certifying that the company is not in liquidation is not subject to insolvency proceedings.

If the Registrar is satisfied that the requirements of the Companies Act have been complied with, the Registrar will then issue a certificate of continuation to the company, and it will be a BVI company incorporated under the Companies Act from the date of the certificate of continuation. The effect of the continuation into the British Virgin Islands would be as though it had been incorporated under the Companies Act so that the company is capable of exercising all the powers of a company incorporated under the Act and would no longer be treated as a company incorporated under the laws of its former domicile.

The continuation, however, does not affect the continuity of the company as a legal entity or the assets, rights, obligations or liabilities of the company. All legal proceedings against the company, its members, directors and officers are unaffected by the continuation into the British Virgin Islands and all their obligations and liabilities remain unaffected. All the outstanding shares in the Company prior to the continuation into the British Virgin Islands are deemed to have been issued in accordance with the Companies Act, but there is no requirement to publicly file a register shareholders or register of members. Additionally, all the directors, members and officers of the company prior to the continuation into the British Virgin Islands remain unaffected and there is similarly no requirement to publicly file a register of directors.

The time to complete the entire transaction, from the time all the documents are received to file the application until the Registrar issues the certificate of continuation would be approximately 48 hours, excluding weekends and public holidays.

The Complex Corporate Inversion – The Traditional Model

A more complicated corporate inversion can take one of two forms:

- (a) the McDermott International Model; or
- (b) ChiquitaFyffes Model.

The McDermott International Model has various tax implications and, except as part of large group restructuring, would rarely achieve the purpose of tax mitigation and is only advisable where the foreign jurisdiction does not permit corporate migration. However, the ChiquitaFyffes Model is the preferred method of corporate migration where the foreign jurisdiction does not permit corporate migration, or if as a result of the Ramsey principle (or similar principles) based on the UK House of Lords decision in Ramsey v. IRC [1982] A.C. 300 which would view certain creative tax planning measures as tax avoidance, then the cross-border merger option is the most appealing.

From the introduction of the IBC Act in 1984, the British Virgin Islands has allowed cross-border mergers and this has continued under the Companies Act. It is possible to incorporate a BVI company and merge any one or more foreign companies with that BVI company (together, the “**Constituent Companies**”). All that is required is for the directors of each Constituent Company to approve a written plan of merger (the “**Plan of Merger**”) containing:

- (a) the name of each Constituent Company and the name of the surviving company, which in this scenario would be the newly incorporated BVI company, but it may also

be a new company name as long as it complies with all the requirements for incorporating a new company;

- (b) with respect to each Constituent Company:
 - (i) the designation and number of outstanding shares of each class of shares, specifying each such class entitled to vote on the merger, and noting that some or all shares of the same class of shares in each Constituent Company may be converted into a particular or mixed kind of assets and other shares of the class, or all shares of other classes of shares, may be converted into other assets; and
 - (ii) a specification of each such class, if any, entitled to vote as a class.
- (c) the terms and conditions of the proposed merger, including the manner and basis of cancelling, reclassifying or converting shares in each Constituent Company into shares, debt obligations or other securities in the newly incorporated BVI company, or money or other assets, or a combination of any of these; and
- (d) a statement of any amendment to the memorandum or articles of association of the newly incorporated BVI company to be brought about by the merger.

The Plan of Merger must then be authorized by a resolution of members and the outstanding shares of every class of shares that are entitled to vote on the merger as a class if the memorandum or articles so provide or if the plan of merger contains any provisions that, if contained in a proposed amendment to the memorandum or articles, would entitle the class to vote on the proposed amendment as a class. If a meeting of members is to be held, notice of the meeting, accompanied by a copy of the Plan of Merger, must be given to each member, whether or not they are entitled to vote on the merger. Alternatively, if there is not going to be a meeting of members and it is proposed to obtain the written consent of members, then a copy of the plan of merger must be given to each member, whether or not entitled to consent to the plan of merger.

After the Plan of Merger has been approved by the directors and authorized by the members, either at a meeting of members or by consent, of each Constituent Company then articles of merger must be executed by each Constituent Company containing:

- (a) the Plan of Merger;
- (b) the date on which the memorandum and articles of association of each Constituent Company were registered by the Registrar; and
- (c) the manner in which the merger was authorized with respect to each Constituent Company.

The articles of merger, along with any resolution to amend the memorandum and articles of association of the newly incorporated BVI company, would be filed with the Registrar.

If the Registrar is satisfied that the requirements of the Companies Act have been complied with, the Registrar will then issue a certificate of merger to the company, and the merger

will be effective on the date of the registration of the articles of merger (or some other date, not later than 30 days thereafter, as may be stated in the Articles). The effect of the merger is that assets of every description, including choses in action and the business of each of the Constituent Companies, immediately vests in the newly incorporated BVI company and the newly incorporated BVI company is liable for all claims, debts, liabilities and obligations of each of the other Constituent Companies.

In a process related to the McDermott International Model, where there is advanced restructuring after the incorporation of the BVI company, but before the approval of the Plan of Merger by the directors, there can be a merger with subsidiaries. If the other Constituent Companies are all made subsidiaries of the BVI company then the BVI company, as the parent company, may merge with them without authorization from the members of any Constituent Company. The Plan of Merger would be slightly different, but a copy or outline would be given to all the members of each subsidiary company to be merged unless waived by that member. Only the BVI company would execute the articles of merger, and if it does not own all the shares in each subsidiary company to be merged, then the articles of merger must include the date on which a copy of the Plan of Merger or outline was made available to, or waived by, the members of each subsidiary company to be merged. This normally simplifies the process depending on the ease with which the group restructuring can take place before the merger, and whether there would be any immediate tax consequences of those restructuring before the merger takes place.

Conclusion

While the British Virgin Islands remains a key player along with Delaware in the international corporate market, with the continued focus on corporate inversions it is necessary to explore the various options to migrate companies to mitigate their financial burdens and improve shareholder value. This may take the form of a simple corporate migration from one jurisdiction to the British Virgin Islands where the foreign jurisdiction permits corporate migration or it may take a cross-border merger with the surviving company being a BVI company. In either case, the management of the corporate inversion process is necessary to maximize the results of any tax planning objective.

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If you would like more information about mergers and acquisitions in the British Virgin Islands, contact Jamal S. Smith. Also see our **Guide to Takeovers and Mergers in the British Virgin Islands** and our **Guide to Corporate Continuations In and Out of the British Virgin Islands**.

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