

# The ease of doing business through BVI, Cayman Islands, Irish, Jersey and Luxembourg vehicles under 'lockdown' conditions

COVID-19 has had an impact on diverse areas of our lives, affecting businesses and the way they perform and operate globally. The rapidly evolving situation brought to the fore the need for business to be able to adapt swiftly to changing circumstances and for directors and staff at all levels, and their advisers and service providers, to be able to operate effectively at a distance from one another. Businesses have never seen more clearly a return on the investment made in digital technologies and communication platforms.

For a business that operates investments and entities across borders, the choice of investment structure and jurisdiction have also never been more significant. Jurisdictions like the British Virgin Islands ("BVI"), the Cayman Islands, Ireland, Jersey and Luxembourg have themselves invested heavily in developing legal innovations and technological solutions that enable business to be carried out effectively through their investment holding structures and SPVs during times of global disruption.

These jurisdictions continue to offer strong economic and political stability with a robust legal framework based on established law with the ultimate court of appeal for the BVI, the Cayman Islands and Jersey being the Judicial Committee of the Privy Council in London, and the Supreme

Court and the Cour de Cassation being the ultimate court of appeal in Ireland and Luxembourg respectively. They provide a neutral forum with commercial and legal infrastructures offering innovative solutions for structuring and running international transactions.

The advantages of using international financial centres, such as the BVI, the Cayman Islands, Ireland, Jersey or Luxembourg for a cross-border transaction are well recognised by investors and regulators. These jurisdictions have creditor-friendly and innovative legislation adaptable to the needs of their international clients while remaining fully compliant with international regulations and policies.

This article highlights some areas in which the BVI, the Cayman Islands, Ireland, Jersey and Luxembourg have enabled business, transactions and entities to be managed effectively during COVID-19 and beyond, from digital incorporation and KYC regimes to virtual meetings and electronic closings.

## Focus and Flexibility

The BVI, the Cayman Islands, Ireland, Jersey and Luxembourg are all leading international finance centres, which means they are focused on

providing a streamlined and effective platform for international business. The government and regulatory authorities in these jurisdictions are commercially-minded and have demonstrated an ability to consult and legislate quickly, and adapt well to a changing environment, most recently granting extensions of the various regulatory and filing deadlines in recognition of the realities of operating during a lockdown.

## Entity Formation

The jurisdictions continue to consult on and develop new legal structures to respond to international demand. Depending upon the jurisdiction, a range of limited and unlimited liability corporate vehicles, limited partnerships, LLCs, foundations and trusts are available to meet the commercial requirements of the transaction. The formation / incorporation and registration of a BVI, Cayman Islands or Jersey vehicle can be completed on a same day basis and the jurisdictions have developed robust regimes for obtaining and verifying know your client (KYC) and Anti-Money Laundering (AML) information from international clients without the need for clients to courier 'wet ink' or notarised original documents (due to this either not being a requirement, or COVID-19 related dispensations being in place in certain circumstances).

## Entity Management

Service providers such as the Maples Group have invested in developing state-of-the-art entity maintenance platforms that enable clients directly to access (and – in some jurisdictions – maintain) statutory registers, underlying records and transactional data for entities registered in any jurisdiction globally from wherever they are working. These platforms facilitate access to entity information in real time to meet the demands of the business, as well as auditors,

investment managers and regulators. Access is often cloud-based, using bank level security.

## Directors and Decision Making

We understand that at the best of times, it can be difficult to convene physical board meetings. Directors can be based apart and travel regularly. For the longest time, the BVI, the Cayman Islands, Ireland, Jersey and Luxembourg have adopted a pragmatic approach and embraced the latest technology, seeing directors joining meetings by telephone or videoconference or passing written resolutions in lieu of a meeting. Written resolutions can typically be signed electronically and in counterparts (assuming the company's articles of association / constitution permit this – always check the constitutional documents and we can assist in updating articles / constitutions wherever required).

The advent of platforms such as Zoom and Teams has enabled the sharing of board packs, and have expanded the nature of the business that can meaningfully be conducted via remote electronic (non-physical) meetings.

While there may be additional requirements prescribed by relevant economic substance laws in certain cases, the tax authorities have been realistic during COVID-19 and decision-making by directors has, in our experience, continued on the basis of the methods outlined above. Where an entity is subject to economic substance requirements as a result of its business model, advice should be sought.

## Member Meetings – Virtual and Hybrid Options

Throughout COVID-19, companies have been considering their ability to hold a members' meeting virtually without any physical location, i.e. solely by means of electronic communication, (e.g. via Zoom, Skype, telephone or similar) to enable members to meet and hold AGMs and / or

approve major transactions during a lockdown or while respecting social distancing rules and guidance.

A BVI, Cayman Islands or Jersey company may hold a members' meeting fully virtually, without any physical location, if expressly authorised by its articles of association. Where the articles of association are silent, or refer to the holding of a meeting at a time and place, in our view, a fully virtual meeting is technically not permitted and the prudent course – particularly if there is contentious business on the agenda or concern about the possibility of a challenge to the validity of the meeting - would be for the company to make available a physical location where members can attend the meeting in person as an alternative to attending the meeting electronically (in what would be known as a hybrid meeting). Alternatively, a company may amend its articles of association to permit fully virtual meetings of members and directors or (in extreme circumstances, if applicable) seek a court order convening the virtual meeting.

In Ireland and Luxembourg, as a result of COVID-19, legislation has been enacted which facilitates an Irish or Luxembourgish company to hold a true virtual meeting without having an express authorisation in its constitution to do so. This virtual meeting option is available until June 2021, and could be further extended if need be.

The company law applicable in the BVI, the Cayman Islands, Ireland, Jersey and Luxembourg has proved sufficiently flexible to support the local social distancing regimes in the places where general meetings have been held, through the use of proxies and allowing the Chair to maintain the safety of the meeting - both physical safety (by ensuring physical attendance is limited) and cyber security (for example, by requiring members to register in advance of virtual meetings).

Please contact the Maples Group or your usual local counsel to assist you with confirming the articles of association / constitution benefit your business and facilitate the operation and management of the company.

## Execution of Documents

The closing of a transaction can be hectic at the best of times and it can be particularly onerous to execute documents by hand or with 'wet-ink' signatures, or to carry out physical closings, in particular, if there are many parties involved in different time zones and especially under the current circumstances.

Electronic closings have long been the norm in BVI, Cayman Islands, Irish and Jersey transactions, and the jurisdictions were quick to legislate for certainty around electronic execution of contracts and deeds after the Mercury decision or take a pragmatic approach to the same. In Luxembourg, although the Mercury case is not directly relevant, the procedures for electronic closing are similarly efficient and flexible.

The use of electronic signatures has become extremely relevant and common during COVID-19 (particularly where there has been a lockdown in place). To supplement the common law position, the BVI, the Cayman Islands and Jersey have enacted legislation that recognises the use of electronic signatures for most types of transactions and have put electronic records on the same footing as paper records. Both Ireland and Luxembourg benefit from the provisions of the European eIDAS (electronic IDentification, Authentication and trust Services) Regulation. The parties will still need to check that all of the key elements for contract formation are present in the electronic communication or contracting process used, but the respective laws generally remove the obstacle of signing by way of using an alternative electronic signature.

Please be aware that there may be other formalities required for certain types of instruments (witnessing / attesting documents and documents requiring a corporate seal) and there are some exceptions to the above. There are some documents that may not be allowed to be executed by way of an electronic signature, such as a will or testament, enduring power of attorney or conveyance of real property (in the local jurisdiction). Some closings will still require original documents to be delivered, such as an original share certificate being handed over for security purposes. We would be happy to guide you in relation to the particular needs of any transaction.

## Notarisation and Apostille

There is no requirement in the BVI, the Cayman Islands, Jersey or Ireland to execute documents before a notary public or to legalise or apostille documents for the legality, validity or admissibility in evidence of such documents. However, this may be required in the foreign jurisdiction in which the vehicles are operating or hold downstream assets. The same is true in Luxembourg, with the exception of certain extraordinary shareholder meetings that are required to be held in the presence of a notary.

In the event that there is a requirement for attestation by a notary, the BVI, the Cayman Islands and Jersey have quickly reacted to the current circumstances and implemented the use of audio-visual communication platforms that allow a notary public to attest signatures and verify the identity of the primary signatory to provide a notarised copy of the executed document.

It is also worth noting that the BVI, the Cayman Islands, Ireland, Jersey and Luxembourg are all contracting parties to the Hague Convention Abolishing the Requirement of Legalisation for Foreign Public Documents, and accordingly,

public documents can be certified with an apostille, thus avoiding the double-certification process, which is burdensome, lengthy and expensive. The apostille process is straightforward and can be actioned on an express basis within a day or two of application.

## Restructurings

The pandemic has strained economies, affecting cash flows and the profitability of many businesses. Where required, the BVI, the Cayman Islands, Ireland and Jersey all provide a flexible framework to enable a company to restructure its debts in the context of complex multinational structures, while respecting the rights of secured creditors. There are debt-restructuring mechanisms such as the scheme of arrangement (and, in Ireland, examinership) that can be utilised by a company to reach a commercial deal between the company's creditors and its members. These are court-based procedures, which provide flexibility in terms of structure and certainty to all affected parties once approved and sanctioned by the relevant court. The BVI, the Cayman Islands and Ireland also support the appointment of provisional liquidators, and it should be noted that for the purposes of obtaining recognition and enforcement under Chapter 15 of the U.S. Bankruptcy Code, provisional liquidators have been able to effect a pre-appointment shift of a company's centre of main interests to the Cayman Islands.

It is important to note that COVID-19 has not affected the implementation of these mechanisms as all of these jurisdictions have moved towards virtual court hearings and creditor meetings.

## Liquidations

Once it has been determined that the company in any of these jurisdictions has come to an end of its natural life, there is an easy and simple procedure,

depending on the factual circumstances, for a strike off or for the commencement of a members' voluntary solvent liquidation (or equivalent). The process is straightforward and does not require the sanction by a court.

In the BVI, the Cayman Islands, Ireland and Jersey, a liquidator must be appointed in certain (but not all) circumstances if a liquidation of the company is required. Although, with the exception of Ireland, there is no requirement to appoint a liquidator with specific qualifications, it is efficient to appoint a professional liquidator that can maximise the returns to those with an economic interest in the company. Where a liquidator is not required to be appointed (as is typically the case for a summary winding up under Jersey law), sufficiently informed directors can carry out the realisation of assets and liabilities of the company.

In Luxembourg, a liquidator must always be appointed, but often the liquidator does not need to have specific qualifications and the liquidation may be carried out by the directors or the shareholders.

These international finance centres have specialised and reputable business advisory firms and corporate services providers that can assist with this process and can make all of the relevant filings in the respective jurisdictions.

Finally, it is worth noting that advisers experienced in BVI, Cayman Islands, Irish, Jersey and Luxembourg legal, corporate services and fiduciary matters are available in every time zone, ensuring uninterrupted coverage to business globally.

## Conclusion

Besides the implications COVID-19 has had on peoples' health and safety, there has been a major impact for businesses having to work

around challenges affecting their performance and strategy. Structuring a cross-border investment or capital markets structure through a jurisdiction that is flexible, pragmatic, innovative and adaptable will assist in mitigating the impact of disruption.

If you have any specific questions or require more information, please liaise with your usual Maples Group contact or any of those listed below.

### Dublin

**Edward Miller**

+353 1 619 2028

[edward.miller@maples.com](mailto:edward.miller@maples.com)

**Sarah Comiskey O'Keeffe**

+353 1 619 2077

[sarah.comiskeyo'keeffe@maples.com](mailto:sarah.comiskeyo'keeffe@maples.com)

### Jersey

**Paul Burton**

+44 1534 671 312

[paul.burton@maples.com](mailto:paul.burton@maples.com)

### London

**Jonathan Caulton**

+44 20 7466 1612

[jonathan.caulton@maples.com](mailto:jonathan.caulton@maples.com)

**Matthew Gilbert**

+44 20 7466 1608

[matthew.gilbert@maples.com](mailto:matthew.gilbert@maples.com)

**Anna Cochrane**

+44 20 7466 1639

[anna.cochrane@maples.com](mailto:anna.cochrane@maples.com)

**Ana Lazgare**

+44 20 7466 1665

[ana.lazgare@maples.com](mailto:ana.lazgare@maples.com)

**Luxembourg**

**Marjorie Allo**

+352 28 55 12 40

[marjorie.allo@maples.com](mailto:marjorie.allo@maples.com)

**Christopher Clarke**

+352 28 55 12 48

[christopher.clarke@maples.com](mailto:christopher.clarke@maples.com)

**January 2021**

**© MAPLES GROUP**

This article is intended to provide only general information for the clients and professional contacts of the legal services division of the Maples Group. It does not purport to be comprehensive or to render legal advice.