

Choosing your offshore listing vehicle – key factors to consider

Service area / [Listing Services](#)

Legal jurisdictions / [British Virgin Islands](#), [Cayman Islands](#), [Hong Kong](#), [Singapore](#)

Date / [January 2021](#)

Introduction

Offshore vehicles or companies incorporated in international financial centres (IFCs), including Bermuda, the British Virgin Islands (BVI), the Cayman Islands, Jersey and Guernsey have long been a popular choice for listing vehicles and feature in over 20 exchanges across the world including Australia, London, New York, Hong Kong, Singapore, Taiwan and more recently Shanghai. With just under 200 IPOs of offshore listing vehicles last year alone, and during these times of international political uncertainties, market disruptions and regulatory reforms, their popularity only looks set to continue to grow.

On the London Stock Exchange there are more than 320 offshore vehicles listed with Guernsey and Jersey companies featuring dominantly. In the US and Asia however, Cayman, Bermuda and BVI companies are the offshore heavyweights; with Cayman remaining a favourite offshore jurisdiction of choice for not only listings on Asian stock exchanges, but also listings by Asian businesses on international stock exchanges around the world including in the United Kingdom and the US.

Most notably, the listing of Alibaba was through the use of a Cayman listing vehicle on the New York Stock Exchange, which raised more than US\$25 billion in September 2014 making it the world's largest ever IPO. In Hong Kong, by the end of 2019, Cayman vehicles accounted for more than 50% of companies listed on the main board of the Stock Exchange of Hong Kong (HKEX), and between January and July 2020 approximately 95% of total listings on HKEX used a Cayman company as the listing vehicle.

In Taiwan, when the Taiwan Stock Exchange opened its doors to foreign issuers, a Cayman Islands exempted company became the first foreign company to be listed on that exchange in 2010 (and since then more than 100 Cayman companies have followed suit and listed or registered on that exchange and the Taipei Exchange). That trend is set to continue following the launch of the Science and Technology Innovation Board of Shanghai Stock Exchange (STAR Market) in July 2019, where the first ever listing of a 'red chip' company (i.e. companies incorporated in foreign jurisdictions with main business operations in China) was a Cayman vehicle. To date, 100% of 'red chip' companies listed on the STAR Market are Cayman vehicles.

More recently, we've seen a resurgence in the use of special purpose acquisition companies (SPACs) or 'cash shells' to raise funds through IPOs for the purposes of acquiring or merging with target entities (similar to a reverse merger), with Cayman SPACs accounting for a majority of non-US SPACs listed on Nasdaq. Given current geopolitical and other considerations, we've also seen US-listed Cayman incorporated Chinese businesses looking to 'return home' by seeking secondary or new listings on HKEX or Chinese exchanges.

Why are the Cayman Islands so popular for IPOs and what factors should be considered when choosing your listing vehicle?

The answer is a relatively simple one: the Cayman Islands offers stability, corporate law flexibility a trusted legal system (with their roots in English law), tax neutrality, minority shareholder protection and lower costs whilst continuing to adapt and align with international gold standards.

OFFSHORE LAW SPECIALISTS

BERMUDA BRITISH VIRGIN ISLANDS CAYMAN ISLANDS GUERNSEY JERSEY
CAPE TOWN HONG KONG LONDON SINGAPORE

Cayman vehicles are accepted by exchanges, institutional and private investors, rating agencies, underwriters and regulators around the world.

When choosing your listing vehicle whether that be the Cayman Islands or elsewhere, there are a number of key factors that should be considered. The following highlights some of the potential advantages in using a listing vehicle incorporated in Cayman and the BVI. In particular, these two offshore jurisdictions continue to have a central role in Chinese deal flows and IPOs of Chinese businesses, having already become embedded in PRC corporate structures since the late 1980s.

Trusted and reliable legal systems

Both Cayman and the BVI are recognised as leading IFCs in the world, combining advanced, flexible and business-friendly laws with balanced regulatory regimes and sophisticated professional infrastructures. As British Overseas Territories, the Cayman Islands and the BVI enjoy political and economic stability. Each jurisdiction's legal system is based on established English common law principles, with the final court of appeal being the Privy Council in London, if needed. This is a source of comfort for international investors who may seek reassurance that if rights need to be enforced before a court, it will be before a familiar and trusted system. Corporate and commercial statutes are continually being revised and improved in response to the demands of commerce. This ensures that both Cayman and BVI companies are well understood and accepted internationally.

Corporate law flexibility

Company laws in the BVI and Cayman are flexible and adaptable to the rules of most stock exchanges. Additionally, BVI and Cayman companies can adopt, institute, amend, modify or revoke corporate governance policies or initiatives as required by the listing rule requirements or expectations of the relevant exchange.

In each of these jurisdictions, many aspects of the Companies Law of the Cayman Islands (**Companies Law**) or BVI Business Companies Act 2004 (**BC Act**), together with common law, provide the basic company law framework and building blocks for the life cycle of a company. Save where required by law, companies are generally permitted to adapt their articles of association or constitutional documents to alter, expand or refine that framework to a model that may be suitable or desired for a particular exchange or set of circumstances. For example, through its articles of association a Cayman or BVI company may set out its distribution policies, provide for the specific powers and duties of directors, cater for defensive takeover tactics such as 'staggered boards' and 'poison pills', allow for weighted voting rights (with Class A Shares and Class B Shares) and/or provide for additional shareholder protections.

Both jurisdictions also have flexible distribution regimes. In the Cayman Islands, the most commonly used vehicle is an exempted company, which has both an authorised and issued share capital. Dividends may be paid out of profits or, provided that immediately following the payment the company is able to pay its debts as they fall due in the ordinary course of business (i.e. a 'cash flow' solvency test), from share premium. In the BVI, there is no concept of authorised share capital and no minimum share capital is prescribed in respect of a BVI business company. As a result, dividends may be paid provided simply that the directors are satisfied that immediately after the payment of the dividend, (i) the value of the company's assets will exceed its liabilities and (ii) the company will be able to pay its debts as they fall due (i.e. a combined 'cash flow' and 'balance sheet' solvency test).

Cayman and BVI companies can be incorporated quickly and inexpensively, and may adopt a dual foreign name in a foreign script (such as Chinese). In each of the jurisdictions, there is no prohibition on the giving of financial assistance by a Cayman or BVI company.

Regulatory considerations

In the Cayman Islands and the BVI, there is no need to prepare or file a prospectus for companies making public offers outside Cayman or the BVI respectively, unless it is a Cayman mutual fund or BVI public fund (there is legislation drafted in relation to the preparation of prospectus' in the BVI, but this has not come into force). This allows for a simplified process and the issuer may therefore focus on the listing rule requirements of the relevant exchange, without the need to consider any additional Cayman or BVI law requirements. Equally, there is generally no need to obtain the approval of any regulatory body or authority in either the Cayman Islands or the BVI in respect of the issuance or transfer of shares or depositary receipts (where the issuer is listing depositary receipts rather than shares).

More recently in 2018, the Cayman Islands Monetary Authority (**CIMA**) entered into a non-binding memorandum of understanding with the China Securities Regulatory Commission (**CRSM**) to facilitate regulatory cooperation in recognition of the increasing international activities in the securities, futures and other related investment products markets. In particular, through the MOU the regulatory bodies agreed to enhance the exchange of supervisory information and cross-border enforcement cooperation with regards to Cayman companies, which carry out public or private securities offerings in China and/or whose securities are trading on stock exchanges in China. This further strengthens and entrenches the relationship between China and the Cayman Islands. To date, there is no equivalent MOU between the competent authorities in the BVI and CRSM, but BVI and China have developed a close relationship over the years.

Continued

Both Cayman and the BVI comply with all relevant international standards on financial regulation, AML, tax transparency and information exchange and this compliance is recognised by the relevant international bodies – most recently demonstrated by the EU’s expected removal of the Cayman Islands from its temporary ‘blacklisting’ in October 2020.

Taxation

In the Cayman Islands, there is no form of income, inheritance, gift, withholding, corporate or capital gains tax imposed on any Cayman company or its shareholders. Additionally, it is possible for a Cayman company to apply for an undertaking from the government that there will be no such taxes imposed, which usually lasts for a period of up to 20 years. Stamp duty may be applicable on instruments executed in, or brought within, the jurisdiction of the Cayman Islands, which is generally at a nominal amount.

In the BVI, there is no form of inheritance, gift, withholding, corporate or capital gains tax imposed on any BVI business company or its shareholders. BVI companies are specifically exempt from income tax and stamp duty (other than instruments relating to the transfer of an interest directly or indirectly in BVI land). Individuals resident in the BVI may be subject to local payroll taxation.

Therefore, Cayman and BVI companies are tax neutral in terms of tax paid by shareholders – each shareholder will be subject to tax in its own taxable jurisdiction, but there is no ‘additional’ level of Cayman or BVI tax at the company level.

Exchange control

There are no exchange controls in Cayman or the BVI.

Transfer of shares

For Cayman companies, shares are transferred in accordance with the requirements of the articles of association. If shares are listed on an approved stock exchange, the shares can be evidenced and transferred in accordance with the laws, rules and regulations that apply to that stock exchange. There are no statutory pre-emption rights.

For BVI companies, an instrument of transfer is required to transfer shares. If shares are listed on a recognised exchange they may trade and settle freely in accordance with the rules and procedures of the recognised exchange. There are statutory pre-emption rights but those only apply when stated in the articles of association (and are usually expressly dis-applied).

Investor confidence – director’s duties

Subject to the articles of association and the law, a company incorporated in Cayman or the BVI is managed by the directors of the Company which have all the powers necessary for managing, directing and supervising, the business and affairs of the company. Cayman and BVI companies have a single-tier board structure. In both jurisdictions directors owe fiduciary duties to the company.

As a matter of Cayman Islands law, the duties of a director primarily derive from common law, the Companies Law, and the articles of association of the Company. Under common law principles that will be applied by the Cayman Islands courts, directors have fiduciary duties to a company including: (i) the duty to act honestly and in good faith in what he or she considers are the best interests of the company (generally meaning the interests of the shareholders as a whole); (ii) the duty of loyalty and to avoid actual or potential conflicts of interest arising between his or her duties to the company and his or her personal interest; (iii) a duty to exercise his or her powers as a director under the Companies Law and the articles of association of the company only for the purposes for which they are conferred and not for a collateral or improper purpose; (iv) a duty not to fetter his or her discretion as a director; and (v) a duty of care, diligence and skill.

In the BVI, there is statutory footing to the equitable and common law duties owed by a director. In particular, as a matter of statutory law, a director must (i) act honestly and in good faith and what he believes to be in the best interests of the company, and (ii) exercise power for a proper purpose. Similar to Cayman, there is also a common law duty of care and skill.

A director must also act in accordance with any specific duties set forth in the articles of association from time to time. There is no need for a Cayman or a BVI listed company to appoint Cayman or BVI resident directors.

Minority shareholder protections

Under common law principles, shareholders in a Cayman or BVI company are entitled to have the affairs of a company conducted in accordance with such company’s articles of association and applicable law.

As such, shareholders may bring personal or representative actions against a company in respect of breaches of their (and other similarly affected shareholders’) rights as shareholders under the articles of association of the company and applicable law (for example, in the event that they are prevented from exercising voting rights).

A shareholder may also bring a derivative action in the name of a company in a limited number of circumstances, including in order to challenge any matter or act of the company which (a) is ultra vires the company or illegal; (b) constitutes a ‘fraud on the minority’ where the wrongdoers control the company; (c) constitutes an infringement of individual rights of shareholders (such as a right to attend and vote at a meeting); or (d) where the company has not complied with provisions requiring approval of a special or extraordinary majority of shareholders.

The law also gives power to the courts to wind up a company if the courts are of the opinion that it would be just and equitable to do so.

Continued

Additionally for BVI companies, a shareholder who considers that the affairs of a company have been, are being, or are likely to be, conducted in a way that is, or any act of the company has been, or is, likely to be oppressive, unfairly discriminatory or unfairly prejudicial to the shareholder in that capacity may apply to the BVI High Court for relief. The BC Act confers wide powers on the High Court to grant relief in the case of unfair prejudice.

Both Cayman and BVI law provides that shareholders may be entitled to payment of the fair value of their shares upon dissenting from certain proposed transactions such as consolidations, mergers or in the case of BVI companies, where there is a disposal of a significant asset (being any sale, transfer, lease, exchange or other disposition of more than 50% in value of the assets or business of the company) not made in the usual or regular course of business.

Business combinations, migrations and takeovers

The Cayman Companies Law makes specific provision for the acquisition of a Cayman Islands company by way of a court-approved scheme of arrangement, by way of mandatory squeeze-out following a tender offer, and by way of merger or consolidation. It is also possible to migrate Cayman companies to other jurisdictions and vice versa.

The BC Act makes specific provision for the acquisition of a BVI company by way of a court-approved scheme of arrangement or plan of arrangement, by way of forced minority shareholder redemption, and by way of merger or consolidation. It is also possible to migrate BVI companies to other jurisdictions and vice versa.

In both jurisdictions, there is no takeover code or legislation applicable to BVI or Cayman listed companies (unless that company is regulated by BVI FSC or CIMA or, in the case of a Cayman company, it is listed on the Cayman Islands Stock Exchange), nor are there any statutory restrictions in respect of defensive mechanisms which the board of directors could utilise in respect of actual or potential takeover or merger offers, subject to their usual fiduciary duties.

These features offer flexibility and creative solutions to any pre-IPO restructuring and/or reverse takeovers to their onshore counterparts, outside of a typical share swap. They are also particularly ideal for SPACs as they offer a quicker, lower cost and simplified process when it comes to the acquisition of target companies. Growing tensions between the US and China, heightened regulatory scrutiny of US-listed Chinese businesses by US regulators and potentially higher trading multiples upon a re-listing in China (or Hong Kong) are key drivers for the recent spate of “take-private” transactions of Cayman and BVI companies by way of arrangement, tender offers and statutory mergers.

Economic substance

Cayman and the BVI, together with other non-EU jurisdictions, recently introduced legislation in 2019 aimed at addressing concerns raised by the Council of the European Union as to offshore structures engaged in certain activities which attract profits without real economic activity. The regime introduced certain economic substance requirements for certain in-scope “relevant entities” which are engaged in certain “relevant activities” and receive relevant income from that. A “relevant entity” includes both Cayman and BVI companies (other than those which are tax resident outside of the respective jurisdictions). The “related activities” refer to nine types of business: banking; distribution and service centre; finance and leasing; fund management business; headquarters business; holding business; insurance business; intellectual property business; and shipping. Each of the Cayman Islands and the BVI have introduced guidance or rules, which expand on the economic substance requirements.

Typically a listing vehicle will usually be a holding body. Provided that the listing vehicle only holds equity participation in other entities and only earns dividends and capital gains, it will be carrying on “holding company business” for the purposes of the economic substance regime and will be subject to reduced economic substance requirements, which requires the company to (i) comply with all applicable filing requirements under the relevant companies law; and (ii) have adequate human resources/employees and premises in the Cayman Islands or the BVI for holding and managing such equity participations in other entities. Unlike the other heads of “relevant activity”, the company will not be required to be “directed and managed” in the Cayman Islands or the BVI. When structuring the affairs of any potential listing vehicle, it is important to consider the intended activities of the listing vehicle, especially where it will be carrying on one or more ‘relevant activity’. For applications to the STAR Market, this will be a relevant factor for the exchange who will likely seek confirmation in respect of the impact of the economic substance law on not only the listing vehicle itself, but also the “controllers” of the listing vehicle (which may also be an offshore vehicle).

Offshore leader

Carey Olsen’s global corporate team is one of the largest and most widely recognised in the offshore world, advising on all aspects of corporate law including IPOs, mergers and acquisitions, joint ventures, corporate restructurings and listings of both debt and equity securities on internationally recognised stock exchanges.

Our “full service” Singapore and Hong Kong offices supply Asia-based clients with Mandarin and Bahasa language capability and on-the-ground legal advice on the laws of Bermuda, the BVI, the Cayman Islands and Jersey.

The team at Carey Olsen Singapore have particular experience in acting for PRC clients and underwriters in connection with IPOs of Cayman and BVI companies on the STAR Market and US exchanges.

Continued

Key contacts

For further information or professional advice please contact our lawyers below:



Anthony McKenzie

Partner

D +65 6911 8311

E anthony.mckenzie@careyolsen.com



Susan McKinstry

Senior Associate

D +65 6911 8314

E susan.mckinstry@careyolsen.com



Maggie Yan

Associate

D +65 6911 8316

E maggie.yan@careyolsen.com

Endnotes

An original version of this article was published by [Asian Legal Business](#), January 2021.



FIND US

Carey Olsen (BVI) L.P.

Rodus Building

PO Box 3093

Road Town

Tortola VG1110

British Virgin Islands

T +1 284 394 4030

E bvi@careyolsen.com

Carey Olsen

PO Box 10008

Willow House

Cricket Square

Grand Cayman KY1-1001

Cayman Islands

T +1 345 749 2000

E cayman@careyolsen.com

Carey Olsen Hong Kong LLP

Suites 3610-13

Jardine House

1 Connaught Place

Central

Hong Kong

T +852 3628 9000

E hongkong@careyolsen.com

Carey Olsen Singapore LLP

10 Collyer Quay #24-08

Ocean Financial Centre

Singapore 049315

T +65 6911 8310

E singapore@careyolsen.com



FOLLOW US

Visit our corporate team at

careyolsen.com



PLEASE NOTE

This briefing is only intended to provide a very general overview of the matters to which it relates. It is not intended as legal advice and should not be relied on as such. © Carey Olsen 2021.