

SUMMARY GUIDE TO THE BVI BUSINESS COMPANIES ACT, 2004

The BVI Business Companies 2004 (as amended) (the “Act”) came into force on 1 January 2005 and after a two year transition period it completely replaced the International Business Companies Act, 1984 (the “IBC Act”) on 1 January 2007. The Act is now the sole corporate statute in the BVI and regulates all BVI companies. The Act has been internationally recognised for its flexibility and clarity on some typically uncertain or undeveloped areas of company law. This guide is intended to highlight the main features of the Act.

1. Types of companies

Seven different types of companies can be incorporated under the Act: (i) companies limited by shares; (ii) companies limited by guarantee not authorised to issue shares; (iii) companies limited by guarantee authorised to issue shares; (iv) unlimited companies authorised to issue shares; (v) unlimited companies not authorised to issue shares; (vi) restricted purposes companies; (vii) and segregated portfolio companies.

2. Company names

Companies regulated by the Act are required to use a corporate suffix. Limited companies (including companies limited by guarantee) must end their name with either “Limited”, “Corporation”, “Incorporated”, “Societe Anonyme”, “Sociedad Anonima”, and their respective abbreviations such as “Ltd”, “Corp”, “Inc” and “S.A.” Unlimited companies must end their name with either “Unlimited” or “Unltd”. Restricted purposes companies must end their name with the phrase “(SPV) Limited” or “(SPV) Ltd”, and SPCs must have either “Segregated Portfolio Company”, or its abbreviation “SPC”, in the name immediately before one of the endings specified for limited companies. The name of a limited company that is a private trust company must end with the designation“(PTC)” placed immediately before one of the required endings.

If required, the company number can be used as a name in the form “BVI Company Number 1234567 Limited”. A company can also have an additional name in foreign characters if approved by the Registrar, and this has been welcomed by Asian clients in particular.

3. Memorandum and Articles

The memorandum and articles of association are the company’s corporate constitution and together with the Act regulate the relationship between the company, its members and its directors.

There is no requirement to state the objects or purposes in the memorandum of association. Whilst there is nothing to prevent a company from stating its objects or purposes, it is not required to do so. This is because the Act also provides that a company has, irrespective of corporate benefit, full capacity to carry on any business or activity, do any act or enter into any transaction. And for those purposes a

company has full rights, powers and privileges. However, this latter provision is subject to the rest of the Act, any other statute, and the company's memorandum and articles. The only exception to the rule that a company need not state its object and purposes in the memorandum of association is where the company is a restricted purposes company. In that case, the company must state the purposes for which it is incorporated.

The concept of constructive notice of documents (including the memorandum and articles) filed with the Registry is abolished by the Act, except in relation to particulars of charges registered in the Register of Registered of Charges and with respect to documents relating to a restricted purposes company.

In addition to the name and type of company, its registered office, and the name and address of its first registered agent, there are certain matters that must be stated in the constitution for the different types of companies, for example, (i) companies authorised to issue shares must state the maximum number of shares that can be issued or that the company is authorised to issue an unlimited number of shares (it should be noted that there is no longer a concept of authorised share capital or for that matter any concept of capital and surplus); (ii) companies limited by guarantee must specify the amount which a guarantee member must contribute to the assets on liquidation; (iii) restricted purposes companies must state that they are such companies; and (iv) SPCs must state that they are segregated portfolio companies. Beyond the specified compulsory matters, the Act gives great flexibility on what may be included in either the memorandum or articles.

4. Directors

A company must have at least one director and it must keep a register of directors. The requirement to appoint a director does not apply during the period between the incorporation of the company and the appointment of first directors. The Act specifically provides that the business and affairs of the company shall be managed by, or under the direction or supervision of, the directors, but subject to any modifications or limitations in the memorandum and articles.

The directors can delegate most of their powers to committees of directors or agents but certain important powers cannot be delegated, e.g. the power to amend the memorandum or articles, the general power to delegate to committees (but certain powers can be sub-delegated if authorised by the directors), the power to appoint agents and the power to appoint directors.

A director's equitable duties of acting honestly, in good faith and in what he believes to be in the best interests of the company has a statutory footing, as is his common law duty of care and skill. He is also under a statutory duty to exercise his powers as a director for a proper purpose and he must not act in a manner that contravenes the Act or the memorandum or articles.

A director is required to disclose to the board any interest in a transaction to be entered into by the company. Where a director has an interest in a transaction, he may, subject to the memorandum and articles, vote on the transaction or attend a meeting relating to it and be counted for the purposes of a quorum.

5. Appointment of directors

The registered agent must appoint the first director(s) within six months of incorporation. Subsequent directors can be appointed by resolution of members (unless the memorandum or articles provide otherwise), or by the directors if permitted by the memorandum or articles, for such term as may be

specified in the resolutions appointing them. A person cannot be appointed to act as a director unless they have consented in writing to be a director.

6. Reserve directors

Where an individual is the sole member and sole director of a company, that sole member/director may by written instrument nominate a person not disqualified from being a director as a reserve director to act in place of the sole director upon his death. The nomination of the reserve director ceases to have effect if the reserve director resigns, the sole member/director revokes the nomination before the death of the sole member/director or the sole member/director ceases to be the sole member/director other than by reason of death.

7. Members rights, liabilities and remedies

In general, members have the rights conferred on them in the memorandum. However, the Act specifies the rights that a shareholder has, namely, the right to one vote, the right to an equal share of any dividend, and the right to an equal share in the distribution of surplus asset. These rights can be varied by the memorandum.

In the case of limited liability companies, members are not liable for the debts and obligations of the company. The shareholders of a limited liability company are only liable for the amount unpaid on their shares and as may be specified in the memorandum. Guarantee members of a company limited by guarantee are only liable to contribute to the assets of the company on liquidation in the amount stated in the memorandum, and for any other liability provided in the memorandum or articles. Unlimited members have unlimited liability for the debts and obligations of the company.

Minority shareholders have a statutory right to bring a derivative action in exceptional circumstances. These circumstances would include where a company or a director of the company engages in, or proposes to engage in, conduct that contravenes the Act or the memorandum or articles of the company. The Act also permits a member who feels the affairs of the company have been or are likely to be conducted in a manner that is likely to be oppressive, unfairly discriminatory or unfairly prejudicial to him as a member, to apply to the Court for an order. The Court may, if it considers it just and equitable to do so, make one or more orders including appointment of a liquidator or receiver, requiring the company or another person to acquire the shares of the applicant, requiring the company or another person to pay compensation to the applicant, regulating the future conduct of the affairs of the company or setting aside any decision or action taken by the company or its directors in breach of the Act or the memorandum or articles of the company.

8. Class rights and pre-emption rights

The Act allows for the creation of classes of shares, but the rights, privileges, restrictions and conditions attaching to each class must be specified in the memorandum. The Act contains pre-emption provisions upon the issuance of shares which the company can “opt into” (i.e. they only apply if the memorandum specifically states that they are to apply) which is rarely done in practice.

9. Shares

There is no a concept of authorised share capital, or indeed of share capital, under the Act. The memorandum of such companies must state the maximum number of shares they are authorised to issue.

One consequence of not having an authorised share capital is that the Act does not contain any specific provisions relating to capital. Instead, these matters are part of the provisions relating to the alteration of the memorandum and the purchase by the company of its own shares.

With respect to bearer shares, a company cannot issue bearer shares unless expressly authorised by its memorandum to do so and, similarly, registered shares cannot be converted to or exchanged for bearer shares unless specifically permitted in the memorandum. In addition, bearer shares must be deposited with a custodian authorised or recognised by the Financial Services Commission otherwise the shares are immobilised (any purported transfer of the certificate is void) and the rights normally attaching to them are disabled. Segregated portfolio companies are not allowed to issue bearer shares or convert registered shares into bearer shares.

10. Redemption of shares

The provisions relating to the acquisition of its own shares highlight the flexibility of the Act. It allows a company to purchase, redeem or otherwise acquire its own shares in accordance with two distinct regimes: either under provisions in the Act or in accordance with its own memorandum or articles, in which case the statutory provisions do not apply to the extent that they are varied in the memorandum or articles.

The acquisition of its own shares, whether under the statutory regime or in accordance with its own memorandum or articles, is treated as a distribution to members which places an important restriction on the company. In order to make a distribution, the directors must be satisfied on reasonable grounds that the company will satisfy the solvency test for distributions immediately after the acquisition, i.e. that the value of its assets will exceed its liabilities and it will be able to pay its debts as they fall due, and a resolution authorising the distribution must contain such a statement. However, there is no need to satisfy the solvency test where the acquisition is pursuant to a shareholder's right whether under the statutory provisions or under the memorandum or articles.

11. Distributions and dividends

Distributions by a company can only be made if the directors are satisfied on reasonable grounds that the company will, immediately after the distribution, satisfy the solvency test. The term distribution is not confined to dividends but relate to any "distribution" to a member. The definition of distribution is wide, encompassing the direct or indirect transfer of an asset to or for the benefit of a member and includes the purchase of an asset, the redemption or other acquisition of shares, and dividends.

12. Registration of charges and priorities of charges

Under the Act, a company must keep a register of charges at its registered office or at the office of its registered agent. However, particulars of the charge may also be registered in a public Register of Registered Charges maintained by the Registrar in respect of each company. Either the company or the chargee can apply to the Registrar for registration, and there is no time limit for making such an

application. Registration is not mandatory, and failure to register does not affect the charge's validity or enforceability even as against a liquidator or other creditors including secured creditors.

Registration will affect priority for charges created on or after the "relevant date", which is either: (a) in the case of a company formed under older legislation, the date on which the company is re-registered under the Act; (b) in all other cases, 1 January 2005. After the relevant date, a registered charge takes priority over an unregistered charge, as well as over a charge subsequently registered. Charges created on or after the relevant date which are not registered rank in the order they would have done had the registration section in the Act not come into effect. Charges created before the relevant date will continue to enjoy the priority they did, and if they would have taken priority over a charge created on or after that date, they will continue to take such priority. The priority rules can be varied by agreement or consent. The main exception to the order of priorities under the Act relates to registered floating charges: these rank after a subsequently registered fixed charge unless the floating charge contained a negative pledge clause.

13. Company records

A company regulated by the Act must at all times have a registered agent in the British Virgin Islands. Failure to do so can result in the company being struck off the register of companies.

The company must keep certain documents with the registered agent: (a) the memorandum and articles; (b) the register of members (or a copy of it); (c) the register of directors (or a copy of it); and (d) copies of all notices and other documents filed by it with the Registrar in the previous 10 years. If the company provides the registered agent with copies of the register of members or directors instead of the originals, then it must notify the registered agent in writing within 15 days of any changes to those registers, and provide the registered agent with a record of the physical address where the originals are kept. Minutes of meetings and resolutions of members, classes of members, directors and committees of directors may be kept with the registered agent or at some other place in which event the registered agent must be given a written record of the physical address where they are kept. A company is required to have a seal, an imprint of which must be kept at the office of the registered agent.

14. Merger, consolidation, sale of assets, forced redemptions, arrangements and dissenters

Part IX of the Act regulates merger and consolidation of multiple BVI companies (i.e. the consolidation of two or more companies into a new company, or merger between parent and subsidiary companies) or merger or consolidation with foreign companies. It also regulates sale of more than 50% in value of the assets of the company otherwise than in the ordinary course of business; forced redemption of minority shares; and two types of court approved schemes of arrangement.

15. Continuation

A foreign company may continue (i.e. redomicile to the BVI) as a company incorporated under the Act but only if the laws under which it is registered authorize it to continue in another jurisdiction. A foreign company will be prohibited from continuing into the BVI, for example (i) if it is in liquidation, (ii) an application has been made in another jurisdiction for its liquidation, (iii) a receiver or manager has been appointed in relation to any of its assets, or (iv) it has entered into an arrangement with its creditors.

Subject to its memorandum or articles, a company may continue under the laws of another jurisdiction if the Registrar would issue a certificate of good standing in respect of it, but it does not cease to be incorporated under the Act unless the laws of the other jurisdiction permit continuation and the company has complied with those laws.

16. Voluntary liquidation

The Act allows a company to enter into voluntary, solvent liquidation through the appointment of a liquidator by members or directors. A company can only go into voluntary liquidation if it either has no liabilities or it is able to pay its debts as they fall due; if it is insolvent, it must go into insolvent liquidation under the Insolvency Act 2003.

17. Companies automatically re-registered under the Act

Certain provisions from the IBC Act are replicated in a schedule to the Act, and continue to apply to some companies originally incorporated under the IBC Act and automatically re-registered under the Act on 1 January 2007. The schedule applies unless such a company has taken certain steps to disapply those provisions and make their memorandum and articles fully compliant with the Act. Those provisions primarily relate to the concepts of “capital” and “surplus” and the rules applicable to redemption of shares and payment of dividends.

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This Guide is general in scope and is not intended to be comprehensive. It is not a substitute for legal advice.

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