

CONTINUATION OF A FOREIGN COMPANY INTO THE BVI

Companies often consider “what if” they could transfer to another jurisdiction based on what is currently happening in their current jurisdiction or simply to take advantage of developments within another jurisdiction.

The BVI Business Companies Act, 2004 (the “Act”) permits just that and allows companies incorporated outside of the British Virgin Islands (“BVI”) to continue into the BVI. It also allows companies incorporated in the BVI to continue to a jurisdiction outside of the BVI. From our experience, the former is usually the case and therefore this article will only focus on continuations into the BVI.

Statutory basis and reasons for continuation

Section 180 of the Act provides that a foreign company may continue as a company incorporated under the Act in accordance with the Act, if the laws of the jurisdiction in which it is registered permit it to continue to the another jurisdiction.

Pursuant to that section of the Act, many companies from various jurisdictions have over the years continued into the BVI, including companies from Barbados, Cayman Islands, Bermuda and Canada. The reasons for their continuation vary but some reasons typically include: (i) reduced maintenance costs (for example, in Bermuda maintenance fees can be more than US\$20,000 per year and this can be reduced to less than US\$1,000 per year in the BVI), (ii) restructuring in their current jurisdiction is complex and typically involves court application procedures; (iii) the standardization of company domiciles across a group to simplify their audit process and add cost saving elements; and (iv) to find a more user friendly jurisdiction for corporate transactions generally.

Additional reasons to continue into the BVI include, the BVI’s internationally recognized reputation (e.g., BVI companies are listed on some of the world’s largest stock exchanges including the New York Stock Exchange, NASDAQ, the London Stock Exchange and the Hong Kong Stock Exchange) plus the quality of service providers in the BVI including legal, fiduciary, accounting and other financial services providers.

Continuation restrictions

A company will not be permitted to continue into the BVI if:

- (i) the laws of the jurisdiction in which the company is registered do not expressly allow it to continue to a foreign jurisdiction;
- (ii) the company is in liquidation, or subject to equivalent insolvency proceedings, in another jurisdiction;

- (iii) a receiver or manager has been appointed in relation to any of the company's assets;
- (iv) the company has entered into an arrangement with creditors that has not been concluded; or
- (v) an application made to a Court in another jurisdiction for the liquidation of the company, or for the company to be subject to equivalent insolvency proceedings, has not been determined.

Continuation process

Having determined that a company can continue into the BVI then the next step would be to comply with the continuation process under the Act which is a fairly straightforward.

Firstly, the application to continue must be submitted by the company's proposed registered agent in the BVI to the Registrar of Corporate Affairs (the "**Registrar**") and must include the following documents:

- (i) a certified copy of the company's certificate of incorporation or equivalent document which evidences its incorporation, registration or formation;
- (ii) the form of memorandum and articles of association to be adopted;
- (iii) evidence that the application to continue and the proposed form of memorandum and articles of association have been approved by a majority of the directors (or other persons who exercise the power of the company) or in such other manner as may be established by the company for exercising the powers of the company; and
- (iv) evidence that the company is not disqualified from continuing into the BVI (this usually takes the form of a legal opinion issued by a lawyer practising in the jurisdiction where the company is incorporated).

If the Registrar is satisfied that the requirements for continuation have been complied with, the company shall be registered, allocated a BVI company number and issued with certificate of continuation. Such certificate of continuation shall be conclusive evidence that the company is continued as a BVI Business Company under the Act on the date specified in the certificate of continuation.

Once the company is recognised as a company continued under the Act, that company is treated as a company incorporated under the Act and is therefore capable of exercising all relevant powers applicable to BVI Business Companies under the Act.

Effect of continuation

It is important to note that the continuation of a foreign company under the Act, does not affect the continuity of the company as a legal entity or the assets, rights, obligations or liabilities of the company. In addition: (a) no conviction, judgment, ruling, order, claim, debt, liability or obligation due or to become due, and no cause existing, against the company or against any member, director, officer or agent, is released or impaired by its continuation as a company under the Act; and (b) no proceedings, whether civil or criminal, pending at the time of the issue by the Registrar of Corporate Affairs of a certificate of continuation by or against the company, or against any member, director, officer or agent, are abated or discontinued by its continuation as a company under the Act, but the

proceedings may be enforced, prosecuted, settled or compromised by or against the company or against the member, director, officer or agent thereof, as the case may be.

Also, all shares in the company that were outstanding prior to the issue by the Registrar of a certificate of continuation shall be deemed to have been issued in conformity with the Act.

O'Neal Webster is leading law firm in the British Virgin Islands and is able to assist with all aspect of BVI continuations.

For further information, please contact Christopher Simpson at csimpson@onealwebster.com or your usual O'Neal Webster lawyer.

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

June 2011

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