

BVI Corporate update

Service area / [Corporate](#)

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The BVI Business Companies (Amendment) Act, 2015 (the “Amendment Act”) was enacted in the BVI House of Assembly on 21 December 2015 and is due to come into force shortly. The Amendment Act introduces a number of important changes to the provisions of the BVI Business Companies Act (the “Act”) which are anticipated to have a beneficial effect for companies registered in the British Virgin Islands (the “BVI”). The key changes to be introduced by the Amendment Act include:

- confirmation that registered agents are required to act on the instructions of the directors of companies registered in the BVI (“BVI companies”)
- the introduction of the ability for legal practitioners to settle fees of a BVI company upon a change of a BVI company’s registered office or registered agent;
- the introduction of a time limit of 14 days for a BVI company to inform its registered agent of any changes to its private register of charges;
- the introduction of a requirement for all BVI companies to file a register of directors with the BVI Registrar of Corporate Affairs (the “Registrar”)
- clarification of the provisions regarding the issue of bonus shares, the issue of shares for non-cash consideration and the ability of shareholders to surrender shares; the introduction of provisions allowing a BVI company to enter voluntary liquidation notwithstanding the fact that it has security interests registered against it;

- changes to the requirements relating to the execution of deeds governed by BVI law;
- the removal of the requirement for BVI companies which are listed on recognised stock exchanges to keep a register of members containing the information required pursuant to the Act and instead allowing the BVI company to determine the contents of its register of members;
- the removal of the need for a written instrument of transfer in respect of the transfer of shares in BVI companies listed on recognised stock exchanges;
- changes to the provisions applicable to companies seeking to continue into or out of the BVI; and
- confirmation that arbitration clauses may be included in the articles of association of BVI companies.

Registered agents

A new Section 91B of the Act states that, subject to the memorandum and articles of association of a BVI company (the “M&A”), registered agents are required to act on the instructions of the directors of BVI companies where: (i) the instructions are set out in resolutions of the directors of the relevant BVI company; and (ii) copies of the resolutions are provided to the registered agent. Registered agents are no longer required to seek confirmation from their client of record before acting on any such instructions. Subject to the terms of a BVI company’s M&A, the new Section 91B also confirms that

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a registered agent must recognise and accept the appointment or removal of a director or directors by the members of a BVI company.

The Amendment Act also amends Section 92 of the Act, allowing legal practitioners to pay any relevant fees due by the BVI company when filing a notice of change of registered office or registered agent. This should help streamline the process of changing a BVI company's registered agent, particularly where the outgoing registered agent refuses to cooperate with the process.

Register of charges

The Amendment Act amends Section 162 of the Act and obliges each BVI company, where its private register of charges is maintained by its registered agent in the BVI, to provide details of any changes to the register of charges to its registered agent within 14 days of such changes occurring.

Register of directors

The Amendment Act amends Section 118 of the Act, inserting a new Section 118B which requires all existing BVI companies to file their register of directors with the Registrar by 31 March 2017. New BVI companies will be required to file their register of directors within 14 days of the appointment of their first directors. Updated registers of directors will need to be filed with the Registrar within 21 days of any change being made. Failure by a BVI company to file its register of directors with the Registrar within these deadlines will result in a fine of US\$100 together with an additional fine of US\$25 for each day after the deadline on which the failure continues.

All BVI companies existing as at the coming into force of Section 118B will be permitted to file their register of directors without incurring any government filing fees provided that they file before 30 September 2016 (or a government filing fee of US\$25 if they file before 31 March 2017). BVI companies incorporated after Section 118B comes into force will be required to pay a government filing fee of US\$50 to file their register of directors. A government filing fee of US\$50 will also be payable by all BVI companies in respect of any changes made to the register of directors.

The filed registers of directors will not be publicly available (unless the BVI company elects for the filing to be public) and may only be obtained by: (i) the relevant BVI company; (ii) its registered agent in the BVI; (iii) a person authorised in writing by the BVI company to have access to it; (iv) a court order; or (v) a competent authority acting in the exercise of its powers as a regulator of financial services business, tax administrator or law enforcement agency or dealing with a matter for which it has authority under an enactment (e.g. obligations imposed by automatic exchange of tax information under, for example, FATCA).

These amendments do not apply to the filing of the registers of members and registers of charges of BVI companies which continue to be voluntary.

Bonus shares

The Amendment Act clarifies, by the insertion of a new Section 47A, that bonus shares issued by a BVI company will be deemed upon issue to have been fully paid unless the provisions of the BVI company's articles of association state otherwise.

Issue of shares for non-cash consideration

The Amendment Act has simplified the procedure for issuing shares for non-cash consideration by amending Section 48 of the Act. The Amendment Act provides that the resolutions of the directors must now simply state: (i) the amount to be credited for the issue of the shares; and (ii) that in the opinion of the directors, the present cash value of the non-cash consideration and cash consideration (if any) is not less than the amount to be credited for the issue of the shares. The amendment confirms that consideration for shares can be made up of both cash and non-cash consideration and removes the need for directors to make a determination of the reasonable present cash value of the non-cash consideration for the issue.

Surrender of shares

The Amendment Act explicitly confirms by amending Section 59 of the Act that shareholders are permitted to surrender fully paid shares in BVI companies where the shareholder agrees to the surrender in writing. The Amendment Act also clarifies that such a surrender will not constitute a distribution for the purposes of the Act.

Voluntary liquidation

The Amendment Act amends Section 197 of the Act to permit a BVI company to enter voluntary liquidation notwithstanding the fact that the BVI company has outstanding security interests noted on its register of charges. The voluntary liquidator of the BVI company will be required to apply the BVI company's assets in accordance with the rights and priorities of the claims of the secured creditors of the BVI company.

Execution of deeds

The Amendment Act amends Section 103 of the Act to permit pre-executed pages (whether under hand or under seal) to be attached to a deed or instrument governed by BVI law. Provided that the consent of the signatory is provided in respect of the attachment of its pre-executed signature page(s) to the deed or instrument, such instrument/deed will be considered to be validly executed. This effectively abrogates the uncertainty arising from the decision in the UK in

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the case of *R (on the application of Mercury Tax Group Ltd and another) v HMRC & Others* [2008] EWHC 2721.

The Amendment Act also clarifies that non-BVI entities executing deeds or instruments under seal governed by BVI law can rely on the requirements for execution of documents in the jurisdiction in which the entity is incorporated. Provided that such requirements have been satisfied, the deed or instrument will be considered to be validly executed by the non-BVI entity.

BVI companies listed on recognised stock exchanges

Along with expanding the list of recognised stock exchanges, the Amendment Act removes the requirement for BVI companies listed on recognised stock exchanges to maintain a register of members in accordance with Section 41 of the Act. The Amendment Act instead allows such BVI companies to determine the information to be included in their register of members, either in their M&A or by a resolution of shareholders, giving listed BVI companies the flexibility to operate in accordance with the rules of the relevant stock exchange.

The Amendment Act also introduces a new Section 54A which removes the requirement for a written instrument of transfer for the transfer of shares of BVI companies listed on recognised stock exchanges. The transfer must however be carried out in accordance with the laws, rules, procedures and other requirements of the relevant stock exchange, the BVI company's M&A and the Listed Companies and Funds Regulations.

Continuation

The Amendment Act amends the provisions relating to the continuation of companies into and out of the BVI.

Where a company is seeking to continue into the BVI, the Registrar may rely upon a certificate issued by a director of the foreign company confirming that the company has complied with the requirements under Section 180 of the Act provided that the certificate is: (i) in the approved form; (ii) signed by the director; and (iii) notarised and accompanied by an extract of the law under which the company is permitted to continue into another jurisdiction.

Where a BVI company is seeking to continue into a foreign jurisdiction and has security interests registered against it, the Amendment Act allows for such BVI company to provide a written declaration to the Registrar specifying that: (i) notice of release or satisfaction of that charge has been filed and registered in accordance with the Act; (ii) if the charge has not been released or satisfied, that the chargee has been notified in writing of the proposed continuation and has consented or not objected to the continuation out of the BVI; or (iii) if the charge has not been released or satisfied and after notification of the continuation has been sent to the chargee, the chargee has not consented or has objected to the continuation, that the chargee's secured interest will not be diminished or in any way compromised by the continuation into the new jurisdiction. A BVI company seeking to continue into another jurisdiction must also file a declaration with the Registrar confirming that the laws of the jurisdiction into which the BVI company wishes to continue permit continuation and that the BVI company has complied with those laws. In addition, where the continuation into a foreign jurisdiction requires the Registrar to issue a certificate of discontinuance, the Amendment Act confirms that the Registrar may rely on a provisional certificate of continuance from that foreign jurisdiction in order to issue the certificate of discontinuance.

Arbitration

The Amendment Act inserts a new Section 10A into the Act allowing for the articles of association of BVI companies to include arbitration clauses. This does not change the existing position, but rather codifies the existing common law as a result of the enactment of the Arbitration Act, 2013.

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