

CONYERS

A photograph of a modern glass skyscraper with a grid-like facade, viewed from a low angle. The building is partially obscured by a semi-transparent blue overlay containing text. The foreground shows a paved plaza with a pattern of light and dark tiles.

Barbados to the British Virgin Islands: Companies Transferring By Way of Continuation

Preface

This publication has been prepared for the assistance of those who are considering the process of transfer by way of continuation to the British Virgin Islands (the "BVI") of certain types of Barbados companies. It deals in broad terms with the requirements of BVI Companies Law for the process of transfer by way of continuation and the requirements of Barbados Companies Law for the process of discontinuance. It is not intended to be exhaustive but merely to provide brief details and an outline of the relevant rules.

The information regarding the laws in Barbados and the effect of such laws has been provided to us. We have made no investigation of and express no opinion in relation to the laws of any jurisdiction other than the BVI. In particular, Conyers Dill & Pearman does not advise on the laws of Barbados and this document must not be construed as advice on the laws of Barbados.

Before proceeding with any steps in the process of transfer by continuation in the BVI, clients are advised to consider the implications in Barbados and to consult with other professional advisers as appropriate. We also recommend that our clients seek legal advice in BVI on their specific proposals before taking steps to implement them. Conyers Dill & Pearman would be pleased to assist.

Conyers Dill & Pearman

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1. INTRODUCTION

The BVI Business Companies Act (the “BVI Law”) provides that a company with limited liability and a share capital under the laws of any jurisdiction outside the BVI (“the Registrant”) may apply to the Registrar of Corporate Affairs (the “BVI Registrar”) to be registered in the BVI by way of continuation as a business company. The BVI Law makes it clear that a new legal entity is not created.

The Barbados Companies Act (the “BCA”) provides that companies may migrate from Barbados upon continuance in another jurisdiction. Barbados companies licensed as International Business Companies, Exempt Insurance Companies and International Financial Services Companies are sufficiently similar to the BVI business company so as to comply with the BVI Law and allow the continuation in the BVI.¹

2. CONTINUATION INTO THE BRITISH VIRGIN ISLANDS

2.1. Procedure

The BVI Registrar will register a Registrant by way of transfer if the following conditions are satisfied:

- The Registrant is incorporated, registered or existing in a jurisdiction which permits or does not prohibit the transfer of the Registrant. We confirm that Barbados is such a jurisdiction.
- The Registrant has paid to the BVI Registrar a fee equal to the fee payable on the registration of a business company.
- The Registrant has delivered to the BVI Registrar a certified and authenticated copy of its charter, statutes or memorandum and articles of association or by-laws, and a list of its directors, containing the required particulars (the “Charter Documents”).
- The name of the Registrant is acceptable to the BVI Registrar or the Registrant has undertaken to change the name to an acceptable name within thirty days of registration.
- The Registrant has filed with the BVI Registrar a notice of its proposed registered office and name of its registered agent.
- The Registrant is constituted in a form or substantially a form which could have been incorporated as a business company under BVI Law.
- The BVI Registrar determines that it would not be against the public interest to register the Registrant.
- The Registrant, if it is (or will when registered by way of continuation be) prohibited from carrying on its business in or from within the BVI unless licensed under any law, has applied for and obtained the requisite license, e.g. an insurance license.

¹ This publication does not address International Societies with Restricted Liability registered in Barbados. We are able to provide information on their migration on request.

The Registrant must also file evidence satisfactory to the BVI Registrar (i.e. a director's certificate) to the effect that the following requirements have been met:

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

2.2. Consequences of Continuance

Once all the required filings are made with the BVI Registrar's office, the Registrant will be registered. The certificate of registration should be issued within 10 business days.

On registration, the BVI Registrar will issue a certificate under his/her hand and seal of office to the effect that the Registrant has been registered as a business company and specifying the date of such registration. The BVI Registrar is also required to enter the date of registration in the register of companies. The BVI Registrar will also give notice in the BVI Gazette of the registration of the Registrant, the fact that it was previously incorporated in Barbados and the previous name of the Registrant, if changed.

From the date of the registration, the Registrant continues as a body corporate for all purposes as if incorporated and registered as a business company, but without limitation to the generality of the foregoing:

- (a) the capacity to perform all the functions of a business company;
- (b) the capacity to sue and be sued; and
- (c) the power to acquire, hold and dispose of property.

Note, however, that registration will not operate:

- (a) to create a new legal entity;
- (b) to prejudice or affect the identity or continuity of the Registrant as previously constituted;
- (c) to affect the property of the Registrant;
- (d) to affect any appointment made, resolution passed or any other act or thing done in relation to the Registrant pursuant to a power conferred by any of the Charter Documents of the Registrant or by the laws of the jurisdiction(s) under which it was previously incorporated, registered or existing;

- (e) except to the extent provided by or pursuant to this part of the BVI Law, to affect the rights, powers, authorities, functions and liabilities or obligations of the Registrant or any other person; or
- (f) to render defective any legal proceedings by or against the Registrant, and any legal proceedings that could have been continued or commenced by or against the Registrant before its registration may, notwithstanding the registration, be continued or commenced by or against the Registrant after registration.

3. REQUIREMENTS AND PROCEDURE FOR DISCONTINUANCE

3.1. BCA Requirements

The BCA provides that the following conditions must be met for continuation in the BVI and discontinuance in Barbados:

- Authorisation by the Registrant’s shareholders, by way of special resolution, given at a meeting duly convened. The notice of the meeting must state that dissenting shareholders are entitled to be paid the fair value of their shares. Each share, regardless of stated voting rights, can be voted.
- The continuation in the BVI will not adversely affect the Registrant’s creditors or shareholders.
- The property of the Registrant will continue to be its property.
- The obligations of the Registrant continue to be its obligations.
- Any existing cause of action, claim or liability to prosecution is unaffected.
- A conviction against or ruling, order or judgment in favour of or against, the Registrant can be enforced by or against it.
- The Registrant has no liabilities to discharge to the National Insurance Office.
- The Registrant has no liabilities to discharge to the Commissioner of Inland Revenue.

3.2. Filing Requirements

The Registrar of Barbados will discontinue the Registrant on the receipt of the following evidence in a Director’s Declaration (supported by attached documents and certificates) stating that:

- notice of the shareholders meeting was duly sent to the shareholders, directors and auditor of the Registrant;
- a special resolution approving the continuation in the BVI and discontinuance in Barbados was passed;
- an opinion from an attorney-at-law of the BVI was obtained and that it states:
 - the continuation will not affect any obligations or liabilities of the Registrant;

- the continuation will not affect the choice of law applicable to the Registrant prior to the registration of the continuation;
- a conviction against, or ruling, order or judgment in favour of or against, the Registrant may be enforced by or against it;
- the property of the Registrant will continue to be property of the body corporate;
- the Registrant will continue to be liable for its obligations;
- any existing cause of action, claim or liability to prosecution is unaffected; and
- a civil, criminal or administrative action or proceeding pending by or against the Registrant may be enforced by or against it.

The opinion demonstrates that:

- the conditions precedent in the BCA will be satisfied;
- continuation will not adversely affect the Registrant's shareholders;
- continuation will not adversely affect the Registrant's creditors;
- the Registrant has no liabilities to discharge to the National Insurance Office; and
- the Registrant has no liabilities to discharge to the Commissioner of Inland Revenue.

Upon the Barbados Registrar being satisfied that the requirements have been met and that the Registrant has been continued in the BVI, he must file the notice and issue a certificate of discontinuance (and send it to the Registrant's representative) and publish notice in the Barbados Gazette. The Registrant then becomes an external company for the purpose of the BCA. Usually the discontinuance application takes four to six weeks to process.

4. TAXATION ISSUES

BCA companies licensed as International Business, Exempt Insurance, and International Financial Services Companies are taxed on profits on a sliding rate of tax from a maximum of 0.5% to 1%. These companies are excused from paying ad valorem stamp duty (except in respect of real estate) and customs duty on certain business related imports, and certain specially qualified employees are allowed concessions on income tax otherwise due. When a Registrant becomes an external company for the purposes of the BCA it incurs no additional tax liability in Barbados. That is, there is no tax liability triggered by discontinuance and tax liability on profits ends on discontinuance in Barbados.

The BVI does not tax the income or profits of companies or their employees, but business companies are not excused from paying stamp duty or customs duty on imported items used in business.

This publication should not be construed as legal advice and is not intended to be relied upon in relation to any specific matter. It deals in broad terms only and is intended merely to provide a brief overview and give general information.

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