



Refinements to the BVI Business Companies Act

The BVI Business Companies (Amendment) Act, 2012 (the “**Amendment Act**”) and the BVI Business Companies Regulations, 2012 (the “**Regulations**”) have recently been enacted in the British Virgin Islands (the “**BVI**”). The new legislation, which introduces various improvements and refinements to the BVI Business Companies Act, 2004 (the “**Act**”), does not make any dramatic changes to the corporate landscape in the BVI or require any positive action to be taken by BVI companies. Rather, the Amendment Act and the Regulations are designed to further enhance the flexibility and attractiveness of BVI companies and to consolidate the position of the Act as the pre-eminent corporate statute amongst the offshore jurisdictions.

While the Amendment Act and the Regulations are not yet effective, it is expected they will be brought into force over the coming months. This bulletin provides an overview of the principal changes which the new legislation will introduce.

1. **Asset and Share Security**

In respect of security interests over the assets of a BVI company which are publicly filed with the Registrar of Corporate Affairs, the Amendment Act introduces a new provision deeming third parties to have notice of such security interests. Whereas it was always the case that a filing of a security interest guaranteed priority against a subsequent security interest, this new rule will limit the circumstances in which a bona fide purchaser of an asset subject to a publicly-filed security interest can claim the asset has been purchased free and clear of the security interest. As such, this is a welcome addition to the protection given to secured lenders under BVI law.

A number of improvements have also been introduced in relation to the security filing system at the Registrar of Corporate Affairs. Most significantly, it is now possible to file a partial release of a security interest specifying that certain property has been removed from the scope of the security. Upon such a filing, the Registrar of Corporate Affairs will issue a certificate confirming the partial release. The Amendment Act also introduces additional rules in relation to the procedure for releasing security filings. In particular, BVI legal

practitioners and registered agents acting on behalf of the chargee are now permitted to directly file releases of filed security interests, whereas previously only the chargor company could do so. A chargee located outside the BVI is now also required to provide the Registrar with the name and address of a person in the BVI authorised to receive documents on its behalf.

In relation to security over the shares of a BVI company, the Amendment Act permits a chargee's power of sale and the right to appoint a receiver under a BVI law governed share charge to arise immediately upon a default. It was previously necessary to have a short grace period (for example, one day) before such powers arose.

2. Conversion of Shares

The Amendment Act also confirms that shares issued by a BVI company may be converted into another class or series of shares in the manner set out in the memorandum and articles of association. Under the current regime, there is no statutory basis for the conversion of shares, with the result that conversion rights in the BVI are frequently structured as a redemption of existing shares and an issuance of new shares. This amendment provides flexibility, particularly in relation to venture capital and private equity transactions, where convertible shares often feature, and in relation to hedge funds where it is useful to convert a series of shares into another series once a high watermark value is reached.

3. Asset Purchase and Goodwill

Of particular interest in the mergers and acquisitions context, the Amendment Act will permit a BVI company which is purchasing the assets of another BVI company to take over the name of the selling company (in addition to purchasing its intellectual property and goodwill).

4. Written Board Resolutions

The Amendment Act confirms that written resolutions of the directors of a BVI company may be adopted by such majority of directors as is specified in the memorandum and articles of association. While it was generally accepted that written resolutions of the directors could be adopted without unanimity under the current regime, the new statutory footing provides welcome clarification. However, it is important to note that the memorandum and articles of association must expressly empower a majority of directors to adopt a written resolution; otherwise, unanimity is required.



More significantly, alternate directors are now permitted to sign written resolutions in place of their appointing directors, whereas previously they were only entitled to attend and vote at board meetings. This development is also to be welcomed, not least because it eases the practicalities of collecting signatures for the adoption of written resolutions. However, as the articles of association of some BVI companies expressly prohibit alternate directors from signing written resolutions, it may be necessary for some companies to amend their articles in order to take advantage of this new provision.

5. Alternate Directors

In addition to the new powers of alternate directors to sign written resolutions (discussed in section 4 above), the Amendment Act also introduces a number of new rules clarifying the appointment and removal mechanics of alternate directors and their rights and responsibilities. In particular, the Amendment Act provides that alternate directors must sign a written consent to act as an alternate director and that the termination of an appointment of an alternate director does not take place until written notice of the termination has been given to the company. The Amendment Act also confirms that (a) an alternate director does not act as an agent of the appointing director; (b) an alternate director is subject to fiduciary duties and is liable for this own acts and omissions as an alternate director; and (c) the exercise of an alternate director's power is as effective as if the powers were exercised by the appointing director.

6. Shareholder Meetings, Electronic Notices and Additional Shareholder Protections

Additional flexibility has also been introduced in relation to convening shareholder meetings on short notice. Under the current regime, it is arguable that 90% of shareholders can always waive short notice of a shareholders' meeting, even if the memorandum and articles specify that a higher percentage is required. The Amendment Act will expressly permit the memorandum and articles of association to require a higher majority to waive short notice (including 100% of shareholders). There is also a new provision enabling notices to shareholders to be delivered electronically if the member consents to such communication, although further regulations are required before companies may take advantage of this new provision.

The Amendment Act also broadens the scope of the remedies available to shareholders by confirming shareholders may seek a statutory compliance order against a BVI company and its directors for any historical conduct that has breached the memorandum and articles of association or the Act.

7. Company Names

With over one million companies incorporated in the BVI to date, the pool of names available for new companies is becoming more limited. The Amendment Act and the Regulations seek to alleviate this problem by permitting the Registrar of Corporate Affairs to re-use names previously used by companies that have changed their name, been struck off or dissolved or which have been discontinued from the BVI. New provisions have also been introduced which expressly permit affiliated companies to have similar names.

The Regulations also introduce detailed new rules allowing BVI companies to have a second foreign character name. Given the widespread use of BVI companies throughout Asia, this is expected to be a particularly popular development. The Regulations also permit currency symbols, exclamation and question marks and the “@” symbol to be included in company names.

8. Segregated Portfolio Companies

The Amendment Act will also introduce a number of helpful rules in relation to segregated portfolio companies. In particular, there is now a new procedure to terminate segregated portfolios which no longer have any assets and liabilities and a procedure to reinstate such portfolios. There are also new procedures which allow directors to correct any failure to properly attribute a contract to a particular segregated portfolio.

9. Listed Companies and Funds

The Amendment Act also allows new regulations to be adopted for the purpose of modifying the applicability of certain provisions of the Act to listed companies and funds. In this regard, it is expected that regulations will be enacted to disapply the rule that an updated register of shareholders must be sent to the registered agent within 15 days of any change to the register (which is clearly not practicable in the case of listed companies and funds where there are frequent changes to shareholders).

10. New Certificates from the Registrar of Corporate Affairs

The Amendment Act also permits the Registrar to issue a wider range of certificates than currently available, including certificates confirming the status of a BVI company and what information is recorded on the companies register in relation to a particular company.

11. Voluntary Liquidations

A number of new rules will be introduced in relation to voluntary liquidations of BVI companies, including the following:

- directors, senior managers and other individuals closely connected to a BVI company or its affiliates will be prohibited from acting as its liquidator and only a licensed BVI insolvency practitioner may be appointed as a liquidator to a BVI company which is or has in the past been a regulated entity in the BVI (although this rule does not apply to hedge funds or licensed investment managers);
- clarificatory rules confirming that a BVI company can only be liquidated on a voluntary basis if (a) it has no liabilities; or (b) it is able to pay its debts as they fall due and the value of its assets equals or exceeds its liabilities;
- a voluntary liquidator will now be appointed on the date the notice of appointment is filed with the BVI Registrar of Corporate Affairs rather than the date of the resolution approving the appointment. Furthermore, any failure to file a notice of appointment within 14 days of the date of resolution will result in the resolution being void and of no effect; and
- new procedures have been introduced for the appointment of joint liquidators, to remove voluntary liquidators and to permit creditors to petition for the appointment of an insolvency practitioner if the relevant company is in fact insolvent.

12. Strike-Off, Dissolution and Restoration

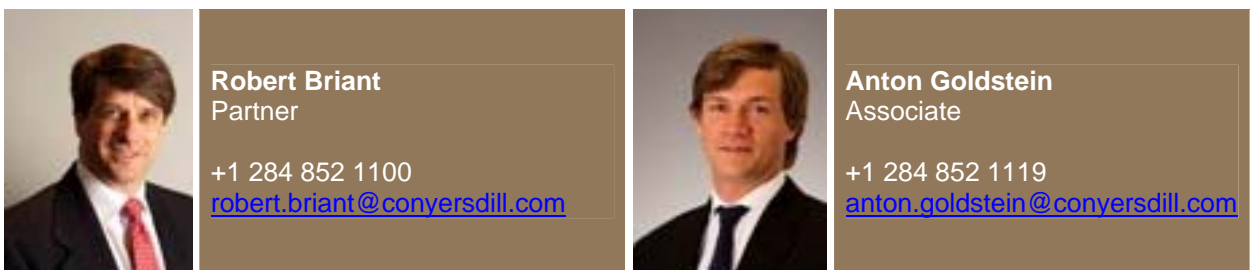
Where a BVI company has been struck-off, it will now automatically be dissolved after seven years (instead of the ten years under the current regime). As is presently the case, it will still be possible to restore a struck-off company anytime before its dissolution by payment of all outstanding fees and penalties.

Once a company is dissolved, it will also still be possible for the BVI court to order that the company be restored within 10 years of the date of dissolution. In this regard, the Amendment Act expands the pool of people who can apply to restore a dissolved company, including any person who can establish an interest in having the company restored. In connection with such a restoration, the BVI court is also given additional powers to make orders for the purpose of placing the company and other persons in as nearly as possible in the same position as if the company had not been struck-off or dissolved. The Amendment Act also provides that where a company in liquidation was dissolved, it can only be restored into a state of liquidation.

13. Miscellaneous Provisions

A number of new facilitative rules will also be introduced in relation to the appointment and removal of directors and the appointment and resignation of registered agents. Registered agents are also empowered to make a single filing to simultaneously update the records of all its companies when the registered agent changes its name or address. New provisions will also be introduced in relation to foreign companies registered in the BVI and in relation to BVI bearer share companies, including a provision deeming authorised custodians that hold bearer shares not to be shareholders and a requirement for the registered agent of a bearer share company to maintain a separate register identifying the beneficial owners of such shares.

Please do not hesitate to contact us if you would like any further information in relation to any of the above.



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