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British Virgin Islands Business Companies

Preface

This publication has been prepared for the assistance of those who are considering the formation of companies in the British Virgin Islands (“BVI”). It deals in broad terms with the requirements of BVI law for the establishment and operation of such entities. It is not intended to be exhaustive but merely to provide brief details and information which we hope will be of use to our clients. We recommend that our clients and prospective clients seek legal advice on BVI law in respect of their specific proposals before taking steps to implement them.

Before proceeding with the incorporation of a company in the BVI, persons are advised to consult their tax, legal and other professional advisers in their respective jurisdictions.

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1. INTRODUCTION

The principal statute governing the formation and operation of a BVI business company is the Business Companies Act (the “BC Act”).

The BC Act came into operation on 1 January 2005 and replaced the Companies Act of 1985 (as amended) and the International Business Companies Act (as amended). All new BVI companies are now incorporated under the BC Act. Further, as of 1 January 2007, any existing international business companies that were not already re-registered under the BC Act were automatically re-registered.

The BC Act regulates the incorporation and operation of all types of BVI companies, including those limited by shares, those limited by guarantee, unlimited liability companies, restricted purposes companies (also known as special purpose companies or “SPVs”) and segregated portfolio companies, whether their business is local or international in scope. This publication focuses on the most common form of BVI company, being a limited liability company authorised to issue shares which intends to carry on business outside of the BVI.

Please note that business companies proposing to carry on certain types of business, such as insurance or mutual funds, are regulated by additional legislation, and further information on those types of companies is available from Conyers Dill & Pearman upon request.

2. PRE-INCORPORATION MATTERS

2.1 Incorporation

A business company is incorporated by the filing of the company’s memorandum and articles of association with the Registrar of Corporate Affairs (the “Registrar”), together with a document in the approved form signed by the first registered agent signifying his consent to act in that capacity. There is no requirement to publicize an intention to incorporate, nor is there any pre-approval by any BVI regulatory body. The registered agent is required to perform a due diligence review on the promoters of the company.

Having been satisfied that all of the BC Act’s incorporation requirements have been met, the Registrar will register the memorandum and articles of association and issue a certificate of incorporation certifying that the company is incorporated on that date.

If all appropriate information is provided to the registered agent, the filing of the memorandum and articles of association with the Registrar for the purpose of effecting incorporation can usually be accomplished within one business day. The issuance of a certificate of incorporation will usually follow within a couple of days thereafter.

2.2 Company Name

The word "Limited", "Corporation", "Incorporated", "Societe Anonyme" or "Sociedad Anonima" or any of their respective abbreviations must appear at the end of the name of a business company.

Company names containing such words as "Bank", "Trust", "Insurance", "Fund" or words conveying a similar meaning, and names suggesting Royal or governmental patronage cannot be used except with the written approval of the Registrar. Also, the Registrar will not accept company names which are objectionable or which are identical to, or closely resemble, the names of existing BVI companies, or well known international names, unless the existing company gives its consent.

If time permits and for a modest fee, the proposed name of the business company can be registered with the Registrar for up to 90 days from the date of reservation. Name reservations can be confirmed online.

Business companies may adopt a second foreign character name. The Registrar will require an electronic copy of the foreign character name, together with a certification by a notary public fluent in the language and script in question attesting to the accuracy of the English translation or meaning of the foreign character name.

2.3 Pre-Incorporation Contracts

Where a person purports to enter into a written contract in the name of or on behalf of a business company which has not yet been incorporated, the contract will take effect as a contract entered into by that person and he will be personally liable under the contract unless the agreement specifically provides otherwise. Within a reasonable time after incorporation, the company may by any action or conduct, unilaterally adopt such a contract and will become a party thereto to the same extent as if it had been in existence at the date of the contract. Such adoption by the company will

discharge the person who purported to act on its behalf unless the contract provides otherwise.

2.4 Registered Agent

Every business company must have at all times a registered agent in the BVI. Registered agents must be licensed under either the Company Management Act or the Banks and Trust Companies Act. A register of licensed registered agents is maintained by the Registrar.

2.5 Capital Structure

A business company can issue shares either with or without par value, and in registered or bearer form. Consideration for shares can take any form not expressly excluded by the memorandum or articles of association. Shares in a business company are personal property.

3. REQUIREMENTS OF BVI LAW

The memorandum and the articles of association of a business company together form its constitution. Both documents are a matter of public record and available for inspection by the public at the offices of the Registrar.

3.1 Memorandum of Association

The memorandum of association must include:

- (a) the company's name;
- (b) whether the company is limited by shares or by guarantee or is an unlimited liability company;
- (c) the address of the company's registered office;
- (d) the name and address of the first registered agent;
- (e) the maximum number of shares that the company is authorised to issue, although the company can specify that the number is to be unlimited;
- (f) the classes of shares;
- (g) confirmation that the company is a segregated portfolio company, if that is the case;

- (h) a statement as to whether or not the company is authorised to issue bearer shares and, if so, on what terms; and
- (i) a statement as to whether or not there are any restrictions on the activities of the company.

Unless the memorandum of association restricts the activities of the company, the company has full capacity to carry on or undertake any business or activity, and may do any act or enter into any transaction. The company has the full rights, powers and privileges necessary to give effect to its capacities.

3.2 Articles of Association

The articles of association must be included when the memorandum of association is submitted for registration with the Registrar and therefore are available for inspection by the public. The articles of association prescribe the regulations of the company.

3.3 Registered Office

A business company must have at all times a registered office in the BVI maintained by its own staff or its registered agent. The address of the registered office must be included in the first memorandum of association and is, therefore, available for public inspection. A post office box cannot be used as a registered office.

3.4 Registered Agent

A business company is required to have a registered agent in the BVI. In general, the books and records of the company will be kept at the office of the registered agent. However, the directors have the discretion to keep certain records at a different location within or outside of the British Virgin Islands.

3.5 Directors

A business company is managed by its board of directors which consists of one or more persons who can be either individuals or companies. The number of directors is determined by the articles. None of the directors need to be residents of the BVI. The first directors are appointed by the first registered agent and thereafter are elected and removed either by the members or, if the memorandum or articles of association permit, by the other directors.

A company must maintain a register of directors. The register of directors or a copy of the register of directors must contain¹:

- a. in the case of an individual director, the individual's:
 - (i) full name;
 - (ii) former name, if any, unless the former name was changed by deed poll or other legal means or disused for more than 10 years;
 - (iii) date of appointment as a director or nomination as a reserve director;
 - (iv) date of cessation as a director or reserve director;
 - (v) address for the service of documents;
 - (vi) usual residential address, unless that address is the same as the individual's address for the service of documents;
 - (vii) date and place of birth; and
 - (viii) nationality.
- b. in the case of a corporate director, the corporate director's:
 - (i) corporate name;
 - (ii) corporate or registration number, if any,
 - (iii) registered office or principal office;
 - (iv) address, but if the corporate director is incorporated or registered in the BVI, its corporate or registration number only;

¹ Note this publication reflects the reporting requirements from 1 April 2016. New companies must file the initial copy of the register of directors within 21 days of the appointment of the first directors. Companies existing (meaning incorporated, registered, or continued) prior to 1 April 2016 have until 31 March 2017 to comply with the requirements.

- (v) date of appointment as corporate director;
- (vi) date of cessation as corporate director; and
- (vii) place of incorporation or registration and date of such incorporation or registration.

The register of directors is not available for inspection by the public, unless the company elects otherwise.

Directors' meetings may be held within or outside the BVI and a director participating in the meeting by electronic means will be deemed to be present at the meeting if all the directors participating are able to hear each other.

A director must be given reasonable notice of a directors' meeting.

A quorum for a meeting of directors, unless the memorandum or articles of association state otherwise, will be met if half the total number of directors are present in person or by alternate at the commencement of the meeting.

Any action that may be taken by the directors at a meeting may also be taken by a resolution of the directors in writing, without the need for any notice. Such written resolutions may be passed by such majority of directors as is specified in the articles of association. The articles of association must expressly empower a majority of directors to adopt a written resolution; otherwise, unanimity is required.

A director may by written instrument appoint an alternate who need not be a director. The alternate can attend meetings in the absence of the appointing director and vote in his place. Alternate directors are permitted to sign written resolutions in place of their appointing directors.

Neither directors nor alternate directors need hold any shares in the company in order to act as such.

3.6 Officers

There is no express requirement in the BC Act to appoint any particular officer, although we require that a secretary be appointed. Any officers or agents may be appointed by a resolution of directors and will have such powers and authority of the

directors as are set forth in the articles of association or in the appointing resolution, except that no officer or agent has any power or authority with respect to a matter requiring a resolution of directors.

3.7 Bankers

A business company may open and maintain bank accounts within or outside of the BVI.

3.8 Books of Account

A business company must keep such accounts and records as are sufficient to show and explain the company's financial transactions and will, at any time, enable the financial position of the company to be determined with reasonable accuracy. A business company must also keep minutes of all meetings and copies of all resolutions consented to by the directors, members and officers.

Pursuant to the Mutual Legal Assistance (Tax Matters) Act, 2003 (as amended) every company is also required to keep its accounts, records and underlying documentation of the company at the office of its registered agent or at such other place the directors may determine. The records must be sufficient to show and explain the company's transactions and must enable the financial position of the company to be determined with reasonable accuracy. Such records must be kept for at least five years from the date of completion of the transaction in question or the date the company terminates the business relationship to which the records relate. If such records are kept at a place other than the office of the registered agent, the company is required to provide the registered agent with a written record of the physical address of the records.

3.9 Inspection of Documents by Members

A member is entitled, on giving written notice to the company, to inspect the memorandum and articles, the register of members, the register of directors and minutes of meetings and resolutions of members and of those classes of members of which he holds shares. The directors may, if they are satisfied that it would be contrary to the company's interests to allow the member to inspect any document, decline to make it available. The member may apply to the court for an order that he should be permitted to inspect the document.

3.10 Seal

A business company is required to have a common seal and an imprint of it must be kept at the office of its registered agent. The BC Act makes no specific provision for the use of the seal, and therefore the common law in respect to company seals will apply.

3.11 Financial Year End

There are no provisions in the BC Act requiring a business company to set a date as its financial year end.

3.12 Auditors

There are no provisions in the BC Act either for an annual audit or for the appointment of auditors.

3.13 Members

A business company must maintain a register of members containing:

- the names and addresses of the persons who hold registered shares in the company;
- the number of each class and series of registered shares;
- the names and addresses of the persons who are guarantee members of the company;
- the names and addresses of the persons who are unlimited members;
- the date on which each member was entered in the register of members; and
- the date on which any person ceased to be a member.

In respect of shares issued to bearer, the register of members must contain the total number of each class and series of bearer shares held. With respect to each bearer share certificate issued by the company, the register must state the identifying number of the certificate, the number of each class or series of bearer shares specified in the certificate, the date of issue of each certificate and the name and address of the custodian of the certificate.

4. ORGANISATIONAL MEETING

Once the Registrar has issued the certificate of incorporation, the organisational meeting must be held so the company can commence business.

4.1 Memorandum of Appointment of First Directors

The first directors of a business company are appointed by the first registered agent. A memorandum of appointment of first directors signed by the first registered agent is prepared for this purpose and maintained in the company's minute book.

4.2 First Meeting of Directors

The newly elected directors will normally deal with the following matters so that the company can commence operation:

- (a) ratification of the action of the first registered agent on subscribing for the incorporation of the company, and appointing its first directors;
- (b) appointment of officers;
- (c) establishment of the registered office;
- (d) adoption of the company seal;
- (e) allotment of shares;
- (f) establishment of the financial year end; and
- (g) approving management and service contracts.

5. OPERATION OF A BUSINESS COMPANY

5.1 General

The management of a business company is the responsibility of its board of directors. Except as may be expressly reserved to them in the company's memorandum and articles of association, the members' only control over the management of the business company is through their power to appoint and dismiss the directors.

A business company has the capacity to effect any transaction, subject only to any express limitation in the memorandum of association and provided that the transaction is not itself illegal.

5.2 Directors' Meetings

The BC Act provides that subject to any limitations in the memorandum or articles of association, the directors may meet within or outside the BVI as they deem necessary or desirable, and directors must be given reasonable notice of directors' meetings. A directors' meeting called without reasonable notice, however, may still be valid if all of the directors, or such majority as specified in the memorandum or articles of association, have waived notice. The presence of a director at the meeting constitutes a waiver on his part.

A director can participate in a directors' meeting by telephone or other electronic means.

A directors' meeting is properly constituted if the quorum requirements are met. Quorum requirements are normally those fixed in the memorandum or articles of association but where no quorum is fixed, a directors' meeting is properly constituted if half of the total numbers of directors are present in person or by alternate at the commencement of the meeting.

Any action that may be taken by the directors at a meeting may also be taken by a resolution of the directors in writing without the need for any notice.

Subject to any limitations in the memorandum or articles of association, an agreement or transaction between the business company and a director, or a person in which the director has a financial interest or to whom the director is related, will be valid if the material facts are disclosed to or known by the other directors (or the members, if applicable) and they approve or ratify the agreement or transaction. However, members who do not vote in favour of the resolution or creditors of the company can invalidate the transaction if they can prove it was unfairly prejudicial to them.

5.3 Contracts

The BC Act specifically provides that any person acting under the express or implied authority of the business company can bind it to an oral or written contract. The BC Act further provides that a contract is not invalid merely by the fact that the common seal of the company was not affixed to it. Under the general rules of law concerning ostensible authority, any third party dealing with the business company in the ordinary course of its business will, generally, be entitled to rely on any written or oral contract or agreement executed or entered into by any two directors acting jointly

on behalf of the business company (or where there is a sole director, by that director). However, it is usual to present most major contracts to the board of directors for approval by resolution prior to execution. In general, the board of directors may authorise the execution either by the affixing of the business company's seal over the signature of any two officers or by any one officer under hand on behalf of the business company. Further, the board may authorise a third party to enter into a contract on behalf of the business company.

5.4 Members' Meetings

The BC Act does not require that the business company hold an annual general meeting of its members.

The BC Act provides that the minimum notice with respect to the calling of a members' meeting is seven days. The memorandum or articles of association may further extend this notice period. However, a meeting of members without notice will be validly held if members holding a 90 percent majority, or such lesser majority as specified in the memorandum or articles of association, of the shares entitled to vote waive such notice. Further, failure of a member to receive notice does not invalidate the meeting. Meetings of members can be called as the directors consider necessary or desirable and can be held within or outside the BVI. Members' meetings must also be convened by the directors on the written request of members holding more than 30 percent of the outstanding voting shares, or such lesser percentage specified in the memorandum or articles of association.

A member can participate in a members' meeting by telephone or other electronic means.

The BC Act enables members to transfer their shares to a voting trustee who holds the shares for a period of up to ten years, subject to renewal. A copy of the voting trust agreement must be filed at the company's registered office and be open to inspection by the members. Two or more members may also enter into an agreement binding them with respect to how they will exercise their votes.

Subject to its memorandum and articles of association, any action that may be taken by the members in a meeting may also be taken by a unanimous resolution of members consented to in writing without the need for any notice.

5.5 Business Activities

In order to carry on certain business activities in the BVI, a person must hold a licence issued by the BVI Financial Services Commission (“FSC”). Such activities include:

- Investment business
- Managing or administering a mutual fund
- Trust business
- Banking business
- Insurance business
- Money Services business

These activities are regulated by the FSC under various pieces of BVI legislation and, as such, are subject to closer regulatory scrutiny than standard BVI business companies. In addition, companies carrying on these activities:

- (a) are required to establish and maintain an appropriate corporate governance framework and compliance and risk monitoring systems;
- (b) must have in place appropriate procedures to carry out customer due diligence and monitoring for the purposes of BVI’s anti-money laundering and counter-terrorism financing legislation;
- (c) are required to appoint an “authorized representative” in BVI to act as the liaison with the FSC (note that Conyers Client Services provides this service to its licensed clients as part of its overall service package); and
- (d) are liable to pay additional annual licensing fees to the FSC.

6. TRANSACTIONS INVOLVING SHARES

The BC Act provides for a business company limited by shares. The shares may be in registered or bearer form. There is no minimum authorised capital.

6.1 Issue of Shares

The directors have the power to issue shares of a business company. The memorandum of association must either set out the maximum number of shares the company is authorised to issue or state that the company is authorised to issue an

unlimited number of shares. Subject to any limitations in the memorandum or articles of association, shares may be issued for such amounts as the directors may determine from time to time, provided that in the case of par value shares, the amount must not be less than the par value. In the absence of fraud, the decision of the directors as to the consideration received is conclusive, unless a question of law is involved.

6.2 Transfer of Shares

Subject to any limitations in the memorandum or articles of association, registered shares of a business company may be transferred by a standard instrument of transfer signed by the transferor and containing the name and address of the transferee. In the absence of a written instrument of transfer, the directors may accept such evidence of a transfer of shares as they consider appropriate.

A share issued to bearer is transferable by delivery of the share certificate.

6.3 Redemption and Re-purchase of Shares

Subject to its memorandum or articles of association, a business company may purchase, redeem or otherwise acquire its own shares. The acquired shares may be cancelled or held as treasury shares. No such acquisition, however, will be permitted unless the directors determine that immediately after the acquisition (i) the value of the company's assets will exceed its liabilities and (ii) the company will be able to pay its debts as they fall due. The BC Act provides for certain situations where this liquidity test is not mandatory prior to re-purchase being permitted.

6.4 Distributions

A business company may make a distribution (which term includes a dividend) provided that the directors are satisfied that immediately after the payment (i) the value of the company's assets will exceed its liabilities and (ii) the company will be able to pay its debts as they fall due.

6.5 Public Offers

The BC Act does not require a prospectus or other form of offer document where shares are offered to the public.

6.6 Mortgages and Charges of Shares

A mortgage or charge on shares must be in writing signed by, or with the authority of, the holder of the shares to which the mortgage or charge relates. In respect of a bearer share, a mortgage or charge is not valid and enforceable unless the applicable share certificate is deposited with the custodian.

7. REGISTER OF CHARGES

A business company must maintain a register of charges over any of its worldwide assets, and that register must be kept at either its registered office or the office of its registered agent. The charge will bind the business company in accordance with the law of any jurisdiction which the business company chooses to apply in respect of the charge.

A business company or a chargee may also elect to register a charge with the Registrar, which will ensure that the charge has priority over a relevant charge that is subsequently registered under the BC Act and a relevant charge over property that is not registered under the BC Act.

8. PUBLIC RECORDS OF A BUSINESS COMPANY

A business company is not required to file accounts with the Registrar. The following records of a business company are available for public inspection at the offices of the Registrar:

- the memorandum and articles of association and any amendments thereto; and
- the certificate of incorporation.

A record of the business company's registered agent and registered office is included as part of the memorandum of association.

A business company may elect to submit the following records to the Registrar for registration and thus make them available for public inspection:

- register of members;
- register of directors; and
- register of charges.

9. CHANGES TO A COMPANY'S MEMORANDUM AND ARTICLES OF ASSOCIATION

9.1 Memorandum and Articles of Association

The memorandum or articles of association of a business company may be amended by a resolution of members or, if permitted by the memorandum or articles of association or the BC Act, by a resolution of directors. The business company must submit for registration with the Registrar notice in the approved form or an amended and restated memorandum and articles of association.

9.2 Change in Maximum Number of Shares

When a business company amends its memorandum of association to change the maximum number of shares that the company is authorised to issue, the company must file notice of the amendment, together with the restated form of memorandum, with the Registrar.

10. CONTINUATIONS TO THE BVI

A company already incorporated in a foreign jurisdiction may continue as a company incorporated under the BC Act. The documents required to file a continuation with the Registrar are:

- (a) a certified copy of its certificate of incorporation, or the equivalent;
- (b) the company's memorandum and articles of association, or their equivalent;
- (c) evidence satisfactory to the Registrar that the application to continue and the proposed memorandum and articles have been approved by a majority of the directors or in such other manner as may be established by the company for exercising the powers of the company; and
- (d) evidence satisfactory to the Registrar that the company is not disqualified from continuing in the BVI. A foreign company will be disqualified from continuing if it is in liquidation, subject to insolvency proceedings, if a receiver or manager has been appointed, if it has entered into an arrangement with its creditors or if an application has been made to a court for the liquidation of the company.

Upon registering the necessary documents, the Registrar will issue a certificate of continuation certifying that the company is incorporated under the BC Act.

11. DISCONTINUATIONS FROM THE BVI

Subject to any limitations in the memorandum or articles of association, a business company in good standing with the Registrar may, by a resolution of directors or members, continue as a company incorporated under the laws of a jurisdiction outside the BVI in the manner provided under the laws of that jurisdiction. The business company does not cease to be a company incorporated under the BC Act unless the laws of the other jurisdiction permit the continuation and the company has complied with those laws. The registered agent will file a notice of the company's continuation (with a copy of the certificate of continuance or such other evidence as may be appropriate to prove that the foreign law requirements have been met). If the Registrar is satisfied that the requirements of the BC Act have been complied with, it will (i) strike the name of the business company off the register; (ii) issue a certificate of discontinuance; and (iii) publish notice of the striking off in the Gazette.

The business company continues to be liable for all claims, judgments, and proceedings against it and service of process may continue to be effected on its registered agent in the BVI up until the time it is struck-off the register.

12. TAXATION

The BVI has no corporation tax, capital gains tax, wealth tax, or any other tax applicable to a business company. Business companies are specifically exempted from income tax. The Income Tax Act also exempts a business company from the provisions of the Stamp Act and the Registration and Records Act in respect of all instruments or deeds relating to the business of the business company, including the transfer of all property to or by the business company and transactions in respect of its securities. Individuals residing and working in the BVI are subject to a modest payroll tax.

13. GOVERNMENT FEES

A business company is required to pay a fee to the Registrar after it is incorporated and thereafter on either May 31 or November 30 of each year depending on whether it was incorporated in the first or last six months of the year. Comparatively speaking, government fees for a BVI business company are modest.²

² A list of applicable fees is available upon request.

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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About Conyers Dill & Pearman

Conyers Dill & Pearman is a leading international law firm advising on the laws of Bermuda, the British Virgin Islands, the Cayman Islands and Mauritius. Conyers has over 130 lawyers in eight offices worldwide and is affiliated with the Conyers Client Services group of companies which provide corporate administration, secretarial, trust and management services.

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