

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.

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.

Conyers Dill & Pearman

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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;
 - (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.

¹ Companies incorporated on or after 1 April 2016 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 had until 31 March 2017 to comply with the requirements.

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 "authorised 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. ECONOMIC SUBSTANCE

The Economic Substance (Companies and Limited Partnerships) Act, 2018 (the “ES Act”) requires all **Legal Entities** carrying on a **Relevant Activity** during a **Financial Period** to establish economic substance in the BVI. For Legal Entities incorporated before 1 January 2019, the Financial Period starts on 30 June 2019.

The bold faced capitalised terms in the previous paragraph are defined in the ES Act. Their definitions are not ‘standard’ definitions, but rather are precise definitions which determine the application of the ES Act. Reference is made to the ES Act and the Rules on Economic Substance (the “Rules”) for the definitions.

6.1. Legal Entity

A BVI company or a limited partnership with legal personality is a Legal Entity unless (a) it is resident for tax purposes in a jurisdiction outside of the BVI and (b) that jurisdiction is not on Annex 1 to the EU list of non-cooperative jurisdictions for tax purposes, the “EU blacklist”.

6.2. Relevant Activities

A Legal Entity is carrying on a Relevant Activity if it carries on any of the following activities:

- Banking business
- Distribution and service centre business
- Financing and leasing business
- Fund management business
- Headquarters business
- Holding business
- Insurance business
- Intellectual property business
- Shipping business

6.3. Financial Period

Economic substance is assessed over a period of time, generally one year. The ES Act refers to this period as a Financial Period, although the period is unrelated to a Legal Entity’s accounting period.

For an entity incorporated before 1 January, 2019 the first Financial Period starts on 30 June, 2019. For all other entities, the first Financial Period starts on the date of incorporation or formation. The Financial Period repeats every year. It is possible for a Legal Entity to change the start date of future Financial Periods by applying to shorten its current Financial Period.

A Legal Entity must have economic substance in the BVI any time it carries on a Relevant Activity in a Financial Period.

6.4. Requirements on Entities Not Carrying on a Relevant Activity

All BVI companies and all limited partnerships with legal personality will need to make a report, irrespective as to whether they are a Legal Entity (as defined), as to their compliance with the economic substance requirements during their Financial Period. If an entity has not carried on a Relevant Activity at any time during its Financial Period, the report will be a simple statement to this effect. Please see Timing and Reporting below.

6.5. Requirements on Those Entities Claiming Tax Residence Outside of the BVI

If an entity is carrying on a Relevant Activity, it is not required to establish economic substance in the BVI if it is tax resident outside of the BVI. In this instance it is not a Legal Entity (as defined). However, in order to claim tax residency outside of the BVI, it will be necessary to provide evidence of this residency in the other jurisdiction. This evidence could be a letter or certificate from the foreign competent tax authority to this effect or could be an assessment for tax or other evidence that tax has been paid.

It is recognised that some entities are considered “transparent” for tax purposes. In this case, it will be necessary to demonstrate tax residency in another jurisdiction by reference to each of the participators (shareholders, partners or the like).

It is also recognised that some jurisdictions do not tax based on a concept of residency. In these instances, it will be necessary to demonstrate that the income of the entity is subject to tax in the other jurisdiction.

It is not possible to claim tax residency in a jurisdiction which is on the EU blacklist.

There are also provisions for provisional tax residency in a foreign jurisdiction in the event evidence is not available at the time of the BVI reporting as to the foreign tax residency but is expected at a later date.

6.6. Requirements on Legal Entities if carrying on Holding Business

Unlike the other eight categories of Relevant Activities, the ES Act looks only at the assets of the Legal Entity to determine if it is carrying on Holding Business. There is no analysis of the activities of the Legal Entity other than a review of its assets.

A Legal Entity is carrying on Holding Business if it only holds equity participations in other entities and only earns dividends and capital gains. The definition is deliberately narrow intending to capture Legal Entities which hold nothing but equity participations which yield dividends or capital gains. If a Legal Entity holds any other assets or owns any other form of investment (such as an interest bearing bond) then it is not carrying on Holding Business. However, a Legal Entity which carries on any number of businesses could still be carrying on Holding Business if its only assets are equity participations.

To the extent a legal entity is carrying on Holding Business, then the economic substance requirements of the Act are less onerous. Specifically, the legal entity will need to have “adequate employees and premises for holding equitable interests or shares” and, where it manages those equitable interests or shares, it will need to have “adequate employees and premises for carrying out that management”.

For a Legal Entity carrying on a passive Holding Business (i.e. it is not “managing” the equity participations), the Rules note that the Legal Entity will have a registered agent and that this will be taken into account when assessing economic substance. It is also noted in the Rules that it is not the function of the ES Act to require a Legal Entity to incur more expenditure or engage more employees than it really needs. As such, while the analysis will be fact sensitive, it appears that Legal Entities carrying on a passive Holding Business will likely fulfil the economic substance requirements with their BVI registered agent and their BVI registered office (and the BVI based secretary in the case of clients of Conyers Corporate Services). An annual filing will still be required starting in 2020. Please see Timing and Reporting below.

To the extent a Legal Entity is carrying on an active Holding Business (i.e. it is “managing” the equity participations), then it will need to establish economic substance in the BVI.

6.7. Requirements on Legal Entities if Carrying on Other Relevant Activities

A Legal Entity carrying on one or more of the other eight Relevant Activities will need to establish economic substance in the BVI. This will require that (i) the Relevant Activity is directed and managed in the BVI, (ii) the Legal Entity has an adequate number of suitably qualified employees, appropriate premises and adequate expenditure in the BVI, and (iii) Core Income Generating Activity is carried on in the BVI.

6.8. Timing and Reporting

All BVI companies and limited partnerships will need to make a report, irrespective as to whether they are a Legal Entity or carrying on a Relevant Activity.

A report as to compliance with the economic substance requirements during the previous Financial Period must be submitted within six months of the end of the Financial Period. For Legal Entities incorporated or formed before 1 January 2019 this means the first report must be made no later than 30 December 2020, and for Legal Entities incorporated or formed on or after 1 January 2019, the first report must be made no later than 18 months from the date of incorporation or formation (in each case assuming the Legal Entity has not applied to shorten its Financial Period).

For an entity that has not carried on a Relevant Activity at any time during the Financial Period, the report will simply be a statement to this effect. For an entity that has carried on a Relevant Activity at some point during the Financial Period but does not satisfy the definition of Legal Entity because it was resident for tax purposes in another jurisdiction during the Financial Period, the report will need to include evidence of the entity being resident for tax purposes in the other jurisdiction.

Otherwise, a Legal Entity carrying on a Relevant Activity other than Holding Business at any time during a Financial Period will be required to report the following information:

- the total turnover generated by the Relevant Activity,
- the amount of expenditure incurred on the Relevant Activity,
- the amount of expenditure incurred on the Relevant Activity within the BVI,
- the total number of employees engaged in the Relevant Activity,
- the number of employees engaged in the Relevant Activity within the BVI,
- the address of any premises within the BVI which is used in connection with the Relevant Activity,
- in the case of an intellectual property business, the nature of any equipment located within the BVI which is used in connection with the Relevant Activity, and
- the names of the persons responsible for the direction and management of the Relevant Activity, together with their relationship to the company and whether they are resident in the BVI.

In addition, in respect of each Financial Period commencing on or after 1 January 2022, the Report will need to include:

- the Legal Entity's tax identification number, if any,
- the type of mobile income,
- the amount and type of gross income in relation to the Relevant Activity,
- the amount and type of assets and premises held in the course of carrying out the Relevant Activity,
- the net book values of tangible assets held in the course of carrying out the Relevant Activity,
- the total number of employees engaged in the Relevant Activity generally,
- details of the employees engaged in the Relevant Activity including:
 - name,
 - whether the employee is full time or part time and qualification or years of relevant experience,
 - the core income generating activities in relation to the Relevant Activity, and
 - details of the board meetings held by the Legal Entity including:
 - total number of board meetings held generally,

- total number of board meetings held in the BVI,
- quorum for board meetings,
- whether the meetings and decisions were minuted and kept in the BVI,
- whether the quorum of directors was physically present in the BVI,
- details of the directors of the Legal Entity including name, qualifications, years of relevant experience and whether they are physically present in the BVI, and
- in the case of an intellectual property business, additional information if the Legal Entity wishes to contest the rebuttable presumption.

6.9. Monitoring and Enforcement

The ITA will be responsible for implementing, monitoring and enforcing the economic substance regime.

Failing to provide information or providing false information attracts criminal penalties. The penalties can be severe, including in the case of conviction on indictment to a fine not exceeding US\$75,000 or imprisonment for a term not exceeding five years.

Otherwise, a Legal Entity carrying on a Relevant Activity which fails to comply with the ES Act is subject to penalty, strike off or both (although not a criminal penalty).

7. 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.

7.1. 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.

7.2. 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.

7.3. 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.

7.4. 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.

7.5. Public Offers

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

7.6. 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.

8. 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.

9. 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 is required to file a copy of its register of directors with the Registrar. The copy of the register of directors will not, unless the company elects otherwise, be open to the public except on order of the court or on request by a competent authority in the usual course. The initial copy of the company's register of directors shall be filed for registration with the Registrar within 21 days of the appointment of the first director. Changes to the register of directors are required to be filed with the Registrar within 30 days of any changes occurring. Penalties are payable in the event that the company fails to file a copy of its register of directors within the specified time period. In addition, a certificate of good standing cannot be obtained in respect of a company which has not filed a copy of its register of directors and from 1 January 2019, such a company may be struck off the register of companies by the Registrar.

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

- register of members; and
- register of charges.

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

10.1. 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.

10.2. 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.

11. 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.

12. 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.

13. 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.

14. 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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