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Things Every Finance Lawyer Should Know About the British Virgin Islands

1

Registered agents

BVI companies are required to maintain a registered agent in the BVI at all times. The registered agent maintains (or holds copies of) the company's register of members, register of directors and register of charges, and its minute book; provides its registered office; and acts as a liaison between the company and the BVI Registry of Corporate Affairs.

Details of the directors and shareholders of a BVI company are not publicly available. The registered agent will need to provide a registered agent certificate/certificate of incumbency to confirm this information. Provision of a registered agent certificate in respect of each BVI obligor should be a condition precedent and will be required in order for a BVI legal opinion to be obtained.

2

Conditions precedent and certificates of good standing

Conditions precedent for obligors incorporated in the BVI should include director (and, if necessary, shareholder) resolutions, director certificates certifying, *inter alia*, the copy documents delivered, registered agent certificates and certificates of good standing.

Certificates of good standing can be obtained from the BVI Registrar of Corporate Affairs by BVI registered agents or legal counsel on a same/next day basis.

3

Striking Off

If a BVI company fails to maintain a registered agent in the BVI, or fails to pay its annual government fees to the BVI Registrar, the company will be "struck off" the register of companies and cannot carry on business, deal with its assets, or defend or commence legal proceedings. Where a company has been struck off for non-payment of its annual fees, it can be restored to good standing very simply by the payment of all outstanding fees and late payment penalties. If a company is struck off for a continuous period of seven years (there are proposals to shorten this period to one year) it will be dissolved and a court application will be required in order to restore the company.

4

Perfection and registration of security

There are no required BVI formalities (e.g. notarisation or apostilling) and no perfection requirements in order to make a charge or other security interest over the assets of a BVI company valid or enforceable. Charges over assets of a BVI company should however be entered on the company's private register of charges maintained at its registered office and may be publicly registered with the BVI Registrar of Corporate Affairs. Although public registration of security is not mandatory (and failure to do so will not affect the validity of the security), a secured party should ensure that such public filings are made in order to secure the priority of the security: charges that are publicly registered take priority over those that are not so registered.

5

Dispositions of more than 50% of assets

Section 175 of the BVI Companies Act requires that a sale, transfer, lease, exchange or other disposition of more than 50% in value of the assets of a BVI company must be approved by both the directors and the shareholders of the BVI company.

This requirement does not apply (i) where specifically disappled by the BVI company's articles of association; (ii) in respect of the granting of a mortgage, charge or other encumbrance, or the enforcement thereof; or (iii) to dispositions made in the usual or regular course of the business carried on by the BVI company.

6

Taxes, stamp duty and exchange controls

The BVI is a "tax neutral" jurisdiction. There is no income, VAT or other tax imposed on BVI companies by withholding or otherwise. In addition, BVI companies are not subject to stamp duty in the BVI and no registration, documentary, recording, transfer or other similar tax, fee or charge is payable in the BVI in connection with the execution, delivery, filing, registration or performance of transaction documents (other than filing fees in respect of the public registration of security).

There is no exchange control legislation under British Virgin Islands law. The official currency of the BVI is the US Dollar.

7**Financial assistance and guarantee limitations**

There are no financial assistance restrictions or guarantee limitations applicable to BVI companies. BVI companies have clear statutory power and capacity to grant guarantees regardless of corporate benefit. A BVI company's memorandum and articles may also provide that, where the BVI company is a wholly owned subsidiary, the directors may act in the best interests of the parent even where that action may not be in the best interests of the BVI company itself. It is however prudent for guarantees to be approved by a shareholder resolution (including guarantees in favour of a parent if the above provisions are not included in the guarantor company's memorandum and articles).

8**Distributions and upstream guarantees**

The directors of BVI companies may declare distributions, provided that the relevant solvency test is met. Failure to satisfy the solvency test could result in the recovery of any funds from the relevant member, but will not affect the validity of the distribution itself. For BVI business companies the test is that (i) the value of the company's assets exceed its liabilities and (ii) the company is able to pay its debts as they fall due. A "distribution" is widely defined under the BVI Companies Act and includes incurring a debt for the benefit of a member. Guarantees granted in favour of a parent company arguably therefore fall within the definition of "distribution" and the necessary solvency test should be considered and specifically set out in the director resolutions approving the giving of the upstream guarantee.

9**Enforcement of foreign judgments and arbitral awards**

The BVI courts will recognise as a valid judgment a final and conclusive judgment obtained in a foreign court against a BVI company under which a sum of money is payable (other than a sum of money payable in respect of multiple damages, taxes or other charges of a like nature or in respect of a fine or other penalty). Awards granted pursuant to foreign arbitration proceedings against BVI companies are, subject to certain restrictions, enforceable in the courts of the BVI either by action or by leave of the court in the same manner as a judgment or order of the BVI court that has the same effect, and where leave is so given, judgment may be entered in the terms of the award.

10**Where is the BVI anyway?**

The BVI is a British Overseas Territory located in the Caribbean. The islands are located in the Leeward Islands of the Lesser Antilles, to the east of Puerto Rico, and are part of the West Indies. The BVI consists of the main islands of Tortola, Virgin Gorda, Anegada and Jost Van Dyke along with over 50 smaller islands and cays. The capital, Road Town, is on Tortola, the largest island. The BVI uses Atlantic Standard Time and does not observe daylight savings.

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We are here to help

For more information on doing business in the BVI please reach out your usual Conyers contacts or those listed to the right. Tailored professional advice should be sought in respect of the individual circumstances of any transaction.