

CONYERS

A photograph of a modern glass skyscraper with a grid-like facade, reflecting the sky and surrounding environment. The building is set against a clear sky. In the foreground, there is a paved plaza with a pattern of light and dark tiles. A semi-transparent blue rectangle is overlaid on the left side of the image, containing the title text.

Continuation of Companies into and out of the British Virgin Islands

Preface

This publication has been prepared for the assistance of those who are considering the continuation of companies into and out of the British Virgin Islands ("BVI"). It deals in broad terms with the requirements of BVI law for the continuation 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 continuation of a company into or out of 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 1st 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 this Act. Further, as of 1st 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 “SPV’s”) and segregated portfolio companies, whether their business is local or international in scope. The BC Act also regulates the continuation of companies incorporated in a foreign jurisdiction into the BVI. 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 us upon request.

2. CONTINUATION INTO THE BVI

2.1. Continuation

A company already incorporated in a foreign jurisdiction (a “foreign company”) may continue as a company incorporated under the BC Act if the laws pursuant to which it is registered permit it to continue in another jurisdiction, including the BVI. A foreign company will be disqualified from continuing if it is in liquidation or 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. The documents required to file a continuation with the BVI Registrar of Corporate Affairs (the “Registrar”) are:

- (a) a certified copy of its certificate of incorporation or its 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. Certified copies of the appropriate resolutions will suffice; and
- (d) evidence satisfactory to the Registrar that the laws of the country in which the foreign company is registered permit it to continue in the BVI and that it is not disqualified from continuing under the BC Act. Satisfactory evidence for this purpose is an approved form certificate issued by a director of the foreign company attesting to the foreign company’s compliance with such foreign laws for the continuation of the company in the BVI and the

non-application of the disqualifications together with an extract of the law relied upon to support the statement. The certificate is required to be signed by the director of the foreign company and notarised or otherwise duly legalised in accordance with the laws of the jurisdiction of the foreign company. Upon registering the necessary documents, the Registrar will issue a certificate of continuation certifying that the company is incorporated under the BC Act.

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.

If time permits, 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.

2.3. 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.

2.4. 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 of each BVI company 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.

In addition, the memorandum of association of a company applying to continue into the BVI must also include:

- (j) the name of the company at the date of the application and the number under which it proposes to be continued;
- (k) the jurisdiction under which it is incorporated, registered or formed; and
- (l) the date on which it was incorporated, registered or formed.

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 therefore is 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 inside 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 setting out detailed information. The register of directors is required to be filed with the Registrar but will not, unless the Company elects otherwise, be available for inspection by the public.

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, is half the total number of directors present in person or by alternate, at the commencement of the meeting.

An 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. If the articles expressly permit it, a written resolution of the directors may be passed by such majority of the directors that the articles specify. In the absence of an express provision, 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. An alternate director may sign written resolutions in the place of his appointor.

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 in or outside the BVI.

3.8. Books of Account

A BVI business company must keep at the office of its registered agent or at such other place or places, within or outside the BVI, as the directors may determine, the records and underlying documentation of the company. The records and underlying documentation of the company shall be

sufficient to show and explain the company's transactions and will, at any time, enable the financial position of the company to be determined with reasonable accuracy. The company shall retain the records and underlying documentation for a period of at least five years from the date (i) of completion of the transaction to which the records and underlying documentation relate; or (ii) the company terminates the business relationship to which the records and underlying documentation relate; and provide its registered agent without delay any records and underlying documentation requested by the registered agent of the company pursuant to a request by the Financial Services Commission or any other competent authority within the BVI.

The business company must also keep minutes of all meetings and copies of all resolutions consented to by the directors, members and officers.¹

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 share register containing:

- (a) the names and addresses of the holders of registered shares;

¹ 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.

- (b) the number of each class and series of registered shares;
- (c) the date on which the member was entered in the register; and
- (d) the date on which the member ceased to be a member.

With respect to shares issued to bearer, the share register 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 certificate and the name and address of the custodian of the certificate.

4. BOARD MEETINGS

In order to effect and complete the continuation of the company into the BVI, the directors of the company will need to pass two sets of resolutions, as follows:

- (a) resolutions approving the continuation of the company into the BVI; and
- (b) resolutions in order to put the company in good standing under BVI law.

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. However, a directors meeting called without reasonable notice can 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.

An 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 did 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 member's 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.

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 the BVI’s anti-money laundering and counter-terrorism financing legislation;
- (c) are required to appoint an “authorized representative” in the BVI to act as the liaison points with the FSC (note that Conyers Trust Company (BVI) Limited 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 Repurchase 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. However, no such acquisition 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 may elect to submit for registration by the Registrar its register of charges and may cease such registration by informing the Registrar in writing. Third parties are deemed to have notice of charges entered on the register if it is publicly filed.

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:

- (a) the memorandum and articles of association and any amendments thereto; and
- (b) 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:

- (a) register of members; and
- (b) register of charges.

A business company is required to file a copy of its register of directors with the Registrar. A 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 such a company may be struck off the register of companies by the Registrar.

Companies continued in have 21 days to comply with the filing obligation; the 21 day period runs from the date of continuation in.

Despite the filing requirement, the Registrar may issue a certificate of good standing (a) during the first six months and 21 days of a company's existence, where it has not yet appointed directors (as permitted by the BC Act) and (b) within 21 days of a company's continuation in to the British Virgin Islands.

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 a notice of amendment 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. 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.

Where the company that wishes to continue as a company incorporated under the laws of jurisdiction outside of the BVI has a charge registered in respect of the property of the company under the BC Act which has not been released or satisfied, it shall, before continuing and provided the charge does not contain a covenant prohibiting continuation outside the BVI, provide a written declaration to the Registrar specifying that:

- (a) a notice of satisfaction or release in respect of the charge has been filed and registered under the BC Act;
- (b) where the charge has not been satisfied or released, that the chargee has been notified in writing of the intention to continue the company outside of the BVI and the chargee has given his or her consent or has not objected to the continuation; or
- (c) where the charge has not been satisfied or released or, after notification in (b) above, the chargee has not given his or her consent or has objected to the continuation, the chargee's interest secured by the registered charge will not be diminished or in any way compromised by the continuation and the charge shall continue as a liability of the company.

The business company does not cease to be a company incorporated under the BC Act unless the laws of the jurisdiction outside the BVI permit the continuation and the company has complied with those laws, the registered agent of the company has filed with the Registrar the required notice of continuation and the Registrar has issued a certificate of discontinuance of the company. To support evidence that the company has complied with the laws of the jurisdiction outside of the BVI, the company is required to file a declaration in the approved form confirming that the laws of the jurisdiction outside the BVI permit the continuation of the company and that the company has complied with those laws. 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.

11. 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 to 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.

12. GOVERNMENT FEES

A business company is required to pay a fee to the Registrar after it is continued into the BVI 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

13. 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 first Financial Period starts on 30 June 2019 and ends on 29 June 2020. A BVI company (which includes a company continued as a BVI business company) or a limited partnership 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”. A Legal Entity carrying on only Holding Business (as defined in the ES Act) has less onerous economic substance requirements. A Legal Entity carrying on one or more of the other eight Relevant Activities will be required to ensure that the Relevant Activity is directed and managed in the BVI, has an adequate number of suitably qualified employees, appropriate premises and adequate expenditure in the BVI and Core Income Generating Activity (as defined in the ES Act) is carried on in the BVI. Irrespective of whether it is carrying on a Relevant Activity, all BVI companies and limited partnerships will need to submit a report within six months of the end of each Financial Period.

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.

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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² A list of applicable fees is available upon request.