HARNEYS

KEY FEATURES OF THE BVI BUSINESS COMPANIES ACT, 2004

1. Introduction

With effect from 1 January 2009 the BVI Business Companies Act, 2004 (as amended, [1] the ***Companies Act***), became the sole corporate statute for the British Virgin Islands and will regulate all British Virgin Islands companies.

On that date British Virgin Islands corporate law completed the extended three year transition[2] from a multiple statutory regime to a single statutory regime. The Companies Act now exclusively governs the incorporation of British Virgin Islands companies; the old International Business Companies Act, 1984 (the ***IBC Act***) and the Companies Act, 1884 have been repealed.

However certain provisions from the IBC Act and the Companies Act, 1884 are replicated in a schedule to the Companies Act, and will continue to apply to these older companies. However, these older companies may elect to amend their constitutional documents and disapply these transitional provisions as set out in section 26 below.

2. Range of corporate vehicles

The principal aim of the Companies Act is to provide flexibility and choice in the range of corporate vehicles available under it. There are seven different types of companies that can be incorporated:

(a) companies limited by shares;[3]

(b) companies limited by guarantee not authorised to issue shares;[4]

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1 As at 1 January 2009, the following amending legislation has been passed: the BVI Business Companies (Amendment) Act, 2005 (No. 26 of 2005), the BVI Business Companies (Amendment) Act, 2006 (No. 12 of 2006), the BVI Business Companies (Amendment of Schedules) Order, 2006 (Statutory Instrument No. 84 of 2006), the BVI Business Companies (Amendment of Schedules) Order, 2007 (Statutory Instrument No. 44 of 2007) and the BVI Business Companies (Amendment of Schedules) (No. 2) Order, 2007 (Statutory Instrument No. 80 of 2007). Unless otherwise indicated, references to sections in this Guide are to section of the Companies Act.

2 Which eventually took four years

3 Section 5(a)

(c) companies limited by guarantee authorised to issue shares;[5]

(d) unlimited companies authorised to issue shares;[6]

(e) unlimited companies not authorised to issue shares;[7]

(f) restricted purposes companies;[8] and

(g) segregated portfolio companies.[9]

Restricted purposes companies are companies limited by shares but with restricted objects or purposes[10] and whose certificate of incorporation will state that they are restricted purposes companies.[11] Their primary use is in structured finance and securitisation transactions. Segregated portfolio companies (***SPCs***) are companies limited by shares, and they may only be incorporated if written approval of the Financial Services Commission (***FSC***) has been obtained.[12] Previously, only insurance companies could register as segregated portfolio companies.[13] However, the opportunity has been taken to expand their scope by also allowing mutual funds[14] to register as SPCs pursuant to the Segregated Portfolio Companies Regulations, 2005. Regulations may also be made to extend the provisions to other types of businesses.[15]

The Financial Services (Exemption) Regulations, 2007 (Statutory Instrument No. 50 of 2007) have introduced provisions for the incorporation of private trust companies under the Companies Act which are exempt from licensing requirements under the Banks and Trust Companies Act, 1990 (No. 9 of 1990). In conjunction therewith the fee schedule in the Companies Act has been amended to introduce fees for private trust companies.[16]

3. Restrictions on carrying on local business

The Companies Act does not impose any restrictions on the ability of companies to carry on business with persons resident in the British Virgin Islands.[17] The Companies Act provides that Regulations may require a company's memorandum

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4 Section 5(b)
5 Section 5(c)
6 Section 5(d)
7 Section 5(e)
8 Section 8(1)
9 Part VII of the Companies Act
10 Section 10(2)
11 Section 8(1)(b)
12 Sections 6(1)(d) and 135(1) and (2)
13 Section 135(2)(a)
14 Section 135(2)(b)
15 Section 135(2)(c)
16 Schedule 1, Part I
17 cf. IBC Act section 5(1)(a)

to contain a statement in a specified form as to any limitations on the business the company can carry on,[18] but to date, no such Regulations have been issued.

4. Company names

All companies are required to use a corporate suffix, but the different types of companies can have different name endings. Unlimited companies must end with either "Unlimited" or "Unltd".[19] Restricted purposes companies must have a name that ends with the phrase "(SPV) Limited" or "(SPV) Ltd",[20] and SPCs must have either "Segregated Portfolio Company", or its abbreviation "SPC", in the name immediately before one of the endings specified for limited companies.[21] Limited companies (including companies limited by guarantee) must end their name with either "Limited", "Corporation", "Incorporated", "Societe Anonyme", "Sociedad Anonima", and their respective abbreviations such as "Ltd", "Corp", "Inc" and "S.A." The name of a limited company that is a private trust company must end with the designation "(PTC)" placed immediately before one of the required endings.[22]

An application may be made to the FSC to use a company name without one of the required endings.[23] Such authorisation may be granted if the memorandum limits the objects of, and making of distributions by, the company to charitable or non-commercial purposes and the FSC is satisfied that the activities will be carried out principally within the British Virgin Islands.[24]

If required, the company number can be used as a name in the form "BVI Company Number 1234567 Limited".[25] A company can also have an additional name in foreign characters if approved by the Registrar.[26] These features will prove to be very useful for incorporation agents, particularly in Hong Kong and Asia more generally.

5. Incorporation procedure

An application for incorporation can only be made by a licensed registered agent. To incorporate a company the memorandum of association (***memorandum***) and articles of association (***articles***)[27] signed by the registered agent must be filed with the Registrar of Corporate Affairs (the ***Registrar***),[28] together with the registered agent's consent to act in the approved form,[29] and any other documents that may

18 Section 9(4)
19 Section 17(2)
20 Section 17(3)
21 Section 17(4)
22 Regulation 2, Company Names Regulations
23 Section 17A(1)
24 Section 17A(2)
25 Section 19
26 Section 20(1)
27 An unlimited company that is not authorised to issue shares does not need to file articles
28 Section 6(1)(a) and (b)
29 Section 6(1)(c)

be prescribed.[30] For segregated portfolio companies, the written approval from the FSC must also be filed.[31]

If she is satisfied that all the requirements of the Companies Act have been met, the Registrar will register the documents, allot a unique number to the company, and issue a certificate of incorporation.[32] The company is incorporated from the date specified in the certificate.[33]

6. Memorandum and Articles, no objects clause or authorised share capital

The corporate constitution of the company are its memorandum and articles and, together with the Companies Act, they regulate the relationship between the company, its members and its directors. The Companies Act provides that the memorandum and articles are binding as between the company and each member and between the members themselves[34] and thus in effect constitute a "statutory contract" between them.[35]

Besides the name and type of company, its registered office, and the name and address of its first registered agent,[36] there are certain matters that must be stated for the different types of companies, for example, (i) companies authorised to issue shares must state the maximum number of shares that can be issued or that the company is authorised to issue an unlimited number of shares;[37] (ii) companies limited by guarantee must specify the amount which a guarantee member must contribute to the assets on liquidation;[38] (iii) restricted purposes companies must state that they are such companies;[39] and (iv) SPCs must state that they are segregated portfolio companies.[40] Beyond the specified compulsory matters, the Companies Act gives total flexibility on what may be included in either the memorandum or articles.

There is no requirement to state the objects or purposes in the memorandum.[41] Whilst there is nothing to prevent a company from stating its objects or purposes (and in practice many companies still do so), it is not required to do so. The only exceptions to this rule are a restricted purposes company which must state in its

30 Section 6(1)(e)
31 Section 6(1)(d)
32 Section 7(1)
33 Section 7(2)(b) and cf. IBC Act section 15(1)
34 Section 11(1). The wording of this provision is considered further in the *Guide on Incorporation, Corporate Constitution, Corporate Capacity and Internal Management under the BVI Business Companies Act*
35 Characteristics of the statutory contract were analysed in *Bratton Seymour Service Co Ltd. v Oxborough* [1992] BCLC 693
36 Section 9(1)(a) to (d)
37 Section 9(1)(e)(i)
38 Section 9(1)(f)
39 Section 10(1)
40 Section 9(1)(g)
41 See Section 9 on what a memorandum must contain

memorandum the purposes for which it is incorporated[42] and a private trust company which must state in its memorandum that it is a private trust company.[43]

Further, there is no concept of authorised share capital, and companies authorised to issue shares must state only the maximum number of shares they are authorised to issue or that they are authorised to issue an unlimited number of shares.

7. Alteration to the memorandum or articles

The memorandum and articles may be amended by the members,[44] or by the directors if authorised by the memorandum[45] but subject to certain restrictions on the directors' ability to amend (for example, they cannot amend to restrict the rights of members to amend the memorandum or articles[46]). In general, a majority of those entitled to vote and voting is needed for an amendment.[47]

The right of amendment can be restricted with the Companies Act allowing provisions to be entrenched so that they cannot be amended, or requiring a specified majority greater than 50% to amend, or requiring that they may only be amended if certain conditions are met.[48] However, this does not apply to any provision in the memorandum restricting the purposes of a company that is not a restricted purposes company.[49]

The company must file either a notice of amendment in the approved form, or a restated memorandum or articles incorporating the amendment made, with the Registrar.[50] The amendments take effect from when they are registered by the Registrar,[51] but there is power to apply to the court for an order that the amendments take effect from another date not earlier than the date of the resolution to amend,[52] and this power has been used successfully on a number of occasions where amendments were passed by resolution but not subsequently filed with the Registrar.

42 Section 10(2)
43 Paragraph 1, Schedule to the Financial Services (Exemption) Regulations, 2007 (Statutory Instrument 2007 No. 50)
44 Section 12(1)
45 Section 12(4)
46 See section 12(5) generally
47 Section 81(2), which deals with members. The position with regard to directors in section 129 is not so clear-cut
48 See Section 12(2) generally
49 Section 12(3)
50 Section 13(1)
51 Section 13(2).
52 Section 13(3) to 13(5)

8. Corporate capacity and *ultra vires*

The Companies Act abrogates the *ultra vires* doctrine by:

(a) not requiring companies to specify their objects or purposes (except restricted purposes companies);

(b) providing that a company[53] has, irrespective of corporate benefit, full capacity to carry on any business or activity, do any act or enter into any transaction;[54] and

(c) for those purposes a company has full rights, powers and privileges.[55]

However, this latter provision is subject to the rest of the Companies Act,[56] any other statute, and the company's memorandum and articles.[57]

Save in the case of restricted purposes companies,[58] no act of a company or a transfer of property is invalid by reason only of the fact that the company did not have the capacity, right or power to perform the act or to transfer or receive the asset.[59] This provision applies equally to the company and third parties dealing with it, and means that the mere fact that the company's act is beyond its memorandum does not mean it is invalid. Consequently, something more will be needed to impugn the transaction, for example, knowledge by the third parties that the matter is beyond the powers of the directors.

The concept of constructive notice of documents (including the memorandum and articles) filed with the Registry is abolished by the Companies Act,[60] except in relation to particulars of charges registered in the Register of Registered of Charges[61] and with respect to documents relating to a restricted purposes company.[62] Further, it provides that the company cannot assert against a person dealing with it that the Companies Act or its memorandum or articles have not

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53 Including a restricted purposes company
54 Section 28(1)(a)
55 Section 28(1)(b)
56 So for example, the company cannot do something that is forbidden by the Companies Act, such as making a distribution when it does not satisfy the solvency tests – see below. This is, strictly speaking, not a matter of capacity but of legality: see *Ashbury Railway Carriage & Iron Co Ltd. v Riche* (1875) LR 7 HL 653
57 Section 28(1). Thus, if the memorandum contains an objects clause, or if it prohibits certain matters, the company will not have the capacity to do something that is beyond the objects clause or which is prohibited
58 Section 29(2)
59 Section 29(1)
60 Section 32
61 The Companies Act implies that there is constructive notice of particulars of charges in the register of registered charges, but never states this. It seems doubtful that the common law rules on constructive notice would be sufficient to assert constructive notice in relation to voluntary filings of that nature.
62 Section 32(2)

been complied with unless that person either knew, or ought to have known, by virtue of his relationship to the company, of the matter.[63]

While there is no provision under Companies Act allowing lack of capacity to be pleaded by members in proceedings against the company in order to prohibit an *ultra vires* act, or by the company in proceedings against directors for loss or damage due to the *ultra vires* act, the directors are still under a duty to act for a proper purpose. They may not to act or agree to the company acting in a manner that contravenes the Companies Act or its memorandum or articles.[64]

9. Members

A member is a person whose name is entered as such on the register of members.[65] The Companies Act provides for three types of members:[66]

(a) shareholders;

(b) guarantor members; and

(c) members of an unlimited liability company who are not shareholders.

In general, the memorandum and articles will define the rights and liabilities of members. The Companies Act specifies that in the absence of any other provisions each share will carry the following rights: (i) the right to one vote, (ii) the right to an equal share of any dividend, and (iii) the right to an equal share in the distribution of surplus assets.[67] These rights may be negated, modified or added to where expressly authorised by the memorandum.[68]

In the case of limited liability companies members are not liable for the debts and obligations of the company.[69] The shareholders of a limited liability company are only liable for the amount unpaid on their shares and as may be specified in the memorandum.[70] Guarantee members of a company limited by guarantee are only liable to contribute to the assets of the company on liquidation in the amount stated in the memorandum, and for any other liability provided in the memorandum or articles.[71] Unlimited members have unlimited liability for the debts and obligations of the company.[72]

63 Section 31(1)(a)
64 Section 121
65 Section 78
66 Section 2, definition of "members"
67 Section 34(1)(a) to (c)
68 Section 34(2)
69 Section 80(1)
70 Section 80(2)
71 Sections 9(1)(f) and 80(3)
72 Section 80(4)

10. Members' remedies

Minority shareholders have a statutory right to bring a derivative action in exceptional circumstances.[73] These circumstances would include where a company or a director of the company engages in, or proposes to engage in, conduct that contravenes the Companies Act or the memorandum or articles of the company.[74]

A member must obtain the leave of the Court before commencing a derivative action.[75] The Court must take into account, and be satisfied as to, a number of matters in determining whether to grant leave.[76] If leave is granted the Court may make an order directing the company or director to comply with, or restraining the company or director from engaging in, conduct that contravenes the Act or the memorandum or articles.[77]

If the Court grants leave to a member to bring or intervene in proceedings, it may on the application of the member order that the costs of the proceedings be met by the company unless it considers it unjust or inequitable for the company to bear those costs.[78] The Court may also appoint a member to represent all or some members having substantially the same interest where that member brings proceedings against the company and other members have substantially the same interest in the proceedings.[79]

Whilst it is still possible to appoint a liquidator on the "just and equitable" ground, there are limitations to this remedy: (i) application to the Court for appointment of a liquidator is a fairly drastic procedure that could, in itself, seriously damage the company, and (ii) the applicant would have to establish that a special relationship with other shareholders that has broken down and that there was an understanding that all shareholders will participate in management. The Companies Act now permits a member who feels the affairs of the company have been or are likely to be conducted in a manner that is likely to be oppressive, unfairly discriminatory or unfairly prejudicial to him as a member, to apply to the Court for an order.[80] The Court may, if it considers it just and equitable to do so, make one or more orders including appointment of a liquidator or receiver, requiring the company or another person to acquire the shares of the applicant, requiring the company or another person to pay compensation to the applicant, regulating the future conduct of the affairs of the company or setting aside any

73 Sections 184A to 184H generally.
74 Section 184B(1)
75 Section 184C(1)
76 Section 184C(2) and (3)
77 Section 184B(1)
78 Section 184D
79 Section 184H
80 Section 184I(1)

decision or action taken by the company or its directors in breach of the Companies Act or the memorandum or articles of the company.[81]

11. Members' resolutions

Members may pass resolutions either at a meeting of members or by a written resolution.[82] Under the Companies Act a majority in excess of 50% (or such higher majority as specified in the memorandum or articles) of the votes of those entitled to vote and voting on the resolution is sufficient for passing a resolution at a meeting or as a written resolution.[83] A guarantee member and a member of an unlimited company without shares is entitled to one vote unless the memorandum and articles provide otherwise,[84] and a shareholder is entitled to the votes attaching to the shares held by him.[85]

12. Class rights and pre-emption rights

A company may create various of classes of shares, but the rights, privileges, restrictions and conditions attaching to each class must be specified in the memorandum,[86] so that they are set out in one document that is publicly available.

The Companies Act contains pre-emption provisions upon the issuance of shares which the company can "opt into" (i.e. they only apply if the memorandum specifically states that they are to apply),[87] although in practice companies rarely do so.

13. Directors

A company must have at least one director,[88] but this requirement does not apply during the period between the incorporation of the company and the appointment of first directors.[89] A company must keep a register of directors.[90] The business and affairs of the company shall be managed by, or under the direction or supervision of, the directors, but subject to any modifications or limitations in the memorandum and articles.[91]

The directors can delegate most of their powers to committees of directors[92] but certain important powers cannot be delegated to committees,[93] e.g. the power to

81 Section 184I(2) generally
82 Section 81(1)
83 Section 81(2), and see definition of "resolution" in section 2
84 Section 81(3)(b)
85 Section 81(3)(a). The memorandum can specify that shares carry no voting rights: see sections 9(1)(e) and 34(2)(b)
86 Section 9(1)(e)(ii), and see definition of "class" in section 2
87 Section 46(1)
88 Section 109(4)
89 Section 109(4A)
90 Section 118(1)
91 Section 109(1)
92 Sections 110(1)(b) and (2)

amend the memorandum or articles, the general power to delegate to committees (but certain powers can be sub-delegated if authorised by the directors[94]), the power to appoint and remove agents, and the power to appoint and remove directors. The directors remain responsible for the exercise of the power by the committee unless they believed on reasonable grounds that the committee would exercise the power in conformity with the statutory duties imposed on the directors.[95]

A director's equitable duties of acting honestly, in good faith and in what he believes to be in the best interests of the company are given a statutory footing,[96] as is his common law duty of care and skill.[97] The Companies Act also allows a director of a subsidiary to act in the best interests of its holding company even though it may not be in the best interests of the company, provided he is expressly permitted to do so by the memorandum or articles,[98] and has the prior agreement of all shareholders where the company is not a wholly owned subsidiary.[99] He is also under a statutory duty to exercise his powers as a director for a proper purpose and he must not act in a manner that contravenes the Act or the memorandum or articles.[100]

A director is required to disclose to the board any interest in a transaction to be entered into by the company.[101] A transaction entered into by a company in respect of which a director is interested is voidable[102] by the company unless:

(a) the directors interest was disclosed to the board;[103]

(b) disclosure is not required;[104]

(c) the material facts of the director's interest in the transaction are known by the members and the transaction is approved by them;[105] or

(d) if the company received fair value for the transaction.[106]

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93 Section 110(2)
94 Section 110(3)
95 Section 110(4)
96 Section 120(1)
97 Section 122
98 Section 120(2)
99 Section 120(3)
100 Section 121
101 Section 124
102 The right to avoid is probably lost by the usual common law bars: affirmation, delay, intervening third party rights and where it is not possible to restore the parties to their original positions.
103 Section 125(1)(a)
104 Section 125(1)(b)
105 Section 125(2)(a)
106 Section 125(2)(b)

Nevertheless, he may, subject to the memorandum and articles, vote on the transaction or attend a meeting relating to it and be counted for the purposes of a quorum.[107]

It appears that these requirements are in addition to the common law duties of a director, and not a substitute for them.

14. Appointment and removal of directors

The registered agent must appoint the first director(s) within six months of incorporation.[108] Subsequent directors can be appointed by resolution of members (unless the memorandum or articles provide otherwise), or by the directors if permitted by the memorandum or articles,[109] for such term as may be specified in the resolutions appointing them.[110] The directors may also fill a vacancy on the board unless the memorandum or articles provide otherwise.[111] A person cannot be appointed to act as a director unless they have consented in writing to be a director.[112]

Where an individual is the sole member and sole director of a company, that sole member/director may by written instrument nominate a person not disqualified from being a director as a reserve director to act in place of the sole director upon his death.[113] The nomination of the reserve director ceases to have effect if the reserve director resigns,[114] the sole member/director revokes the nomination before the death of the sole member/director[115] or the sole member/director ceases to be the sole member/director other than by reason of death.[116]

A director may resign by giving written notice of his resignation.[117] Subject to the memorandum and articles of a company, a director may be removed from office by a resolution of members.[118] That resolution may, subject to the memorandum and articles, only be passed either at a meeting of members whose purpose includes the removal of the director or by a written resolution passed by at least 75% of the members (irrespective of the number of shares held by those members) entitled to vote.[119] A director may also be removed by the directors where expressly permitted by the memorandum or articles,[120] in which case, subject to the memorandum and articles, the resolution to remove the director

107 Section 125(4)
108 Section 113(1)
109 Section 113(2)(a) and (b)
110 Section 113(3)
111 Section 113(4)
112 Section 112
113 Section 113(7)
114 Section 113(8)(a)(i)
115 Section 113(8)(a)(ii)
116 Section 113(8)(b)
117 Section 115(1)
118 Section 114(1)
119 Section 114(2)(a) and (b)
120 Section 114(4)

may only be passed either at a meeting of directors whose purpose includes removal of the director or by a written resolution passed by at least 75% of the directors.[121]

15. Shares

There is no concept of authorised share capital, or indeed of share capital, under the Companies Act.[122] Companies that are authorised to issue shares are not required to state in their memorandum[123] an authorised share capital. Instead, the memorandum of such companies must state the maximum number of shares they are authorised to issue or that they are authorised to issue an unlimited number of shares.[124]

A consequence of not having an authorised share capital is that the Companies Act does not contain any specific provisions relating to capital. Instead, these matters are now part of the provisions relating to distributions and the purchase by the company of its own shares.

The Companies Act retains the distinction between registered shares and bearer shares. In the case of registered shares, title is *prima facie* evidenced by entry on the register of members[125] that must be kept by the company.

Shares may be issued at the discretion of the directors on the terms and consideration determined by them.[126] Shares can be issued for consideration in kind[127] but it must not be less than the par value[128] if the share in question is a par value share. A company may in its memorandum or the terms on which shares are issued specify provisions for the forfeiture of any shares which are not fully paid for on issue.[129] Further, subject to the memorandum or articles, the directors may refuse or delay the registration of a transfer of shares if the holder has failed to pay any amount due in respect of them.[130] Companies now have a statutory power to give financial assistance in connection with the acquisition of their own shares.[131]

If the memorandum provides, a company can issue shares of different classes,[132] but the rights, privileges, restrictions and conditions attaching to each class of

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121 Section 114(5)
122 It is not strictly true to say that share capital has been removed entirely; in relation to former IBCs which have not disapplied Schedule 2 to the Act, the concept of share capital remains in relation to declaration of dividends. See section 26 below.
123 See section 9 generally
124 Section 9(1)(e)(i)
125 Section 42(1)
126 Section 45
127 Section 47(1)
128 Section 47(2)
129 Section 51(1)
130 Section 54(7)
131 Section 28(2)(a)(iv)
132 Section 34(2)(a)

shares must also be specified.[133] Subject to the memorandum and articles a company may issue a class of shares in one or more series.[134] However, there is no need to specify the number of shares of each class or series or their par value that the company is authorised to issue.

As noted above, the Companies Act sets out the default rights that a share confers on its holder,[135] but these can be modified, varied or excluded.[136] A company may issue redeemable shares, preference shares, shares with no or only limited rights to distribution, shares with no or limited or conditional voting rights.[137] It can, subject to the memorandum and articles, also issue bonus shares, partly paid shares and nil paid shares.[138] Subject to its memorandum and articles, a company may issue fractional shares.[139] It may also hold treasury shares (i.e. where the company has acquired its own shares but not cancelled them) if not prohibited by its memorandum or articles.[140]

Transfer of registered shares is by a written instrument of transfer signed by the transferor and containing the name and address of the transferee.[141] The instrument must be sent to the company for registration[142] and the company must enter the transferee's name in the register of members.[143] The transfer is effective when the name is so entered.[144] However, the directors may resolve to refuse or delay registration[145] but only if permitted by the Companies Act or the memorandum or articles.[146]

16. Bearer shares

A company cannot issue bearer shares unless expressly authorised by its memorandum to do so[147] and, similarly, registered shares cannot be converted to or exchanged for bearer shares unless specifically permitted in the memorandum.[148] The memorandum must state whether the company is or is not authorised to issue such shares.[149] However, segregated portfolio companies are

133 Section 9(1)(e)(ii)
134 Section 35
135 Section 34(1)
136 Section 34(2)(b)
137 See section 36(1)
138 Section 36(2)
139 Section 39(1)
140 Section 64(1)
141 Section 54(1)
142 Section 54(3)
143 Section 54(4)
144 Section 54(8)
145 Section 54(4)
146 Section 54(5)
147 Section 38(1)(a)
148 Section 38(1)(b) and (c)
149 Section 9(2)(b)(i) to (iii)

not allowed to issue bearer shares or convert registered shares into bearer shares under the Companies Act.[150]

Bearer shares must be deposited with a custodian authorised or recognised by the FSC otherwise the shares are immobilised (any purported transfer of the certificate is void) and the rights normally attaching to them are disabled.[151] The custodian becomes the member of the company[152] but the beneficial ownership of the share vests in the intended bearer.[153]

17. Acquisition by the company of its own shares

A company is allowed to purchase, redeem or otherwise acquire its own shares in accordance with two distinct regimes:

(a) under sections 60, 61 and 62 of the Companies Act;[154] or

(b) in accordance with its own memorandum or articles[155] (in which case the provisions of sections 60 to 62 do not apply to the extent that they are modified, negated or inconsistent with the provisions in the memorandum or articles).[156]

Under section 60, directors can make an offer to acquire shares either to all the shareholders[157] or to one or more shareholders.[158] An offer to all the shareholders must be one which if accepted would leave the relative voting and distribution rights unaffected.[159] An offer to one or more shareholders can only be made if either all the shareholders have consented in writing,[160] or if permitted by the memorandum or articles[161] and the directors have passed a resolution stating that in their opinion the acquisition is for the benefit of the remaining shareholders,[162] and the offer and consideration are fair and reasonable to the company and the remaining shareholders.[163]

Section 62 deals with the situation where redemption is at the option of the shareholder. If the shareholder gives the company proper notice of his intention to redeem them, the company must redeem the shares on the date specified in the

150 Section 38(3)
151 See sections 68(1) and 70(1), and Part III Division 5 generally
152 Section 41(1)(d)(iv)
153 Section 71(1)(a)
154 Section 59(1)(a)
155 Section 59(1)(b)
156 Section 59(2)
157 Section 60(1)(a)
158 Section 60(1)(b)
159 Section 60(1)(a)(i)
160 Section 60(1)(b)(i)
161 Section 60(1)(b)(ii)
162 Section 61(1)(a)
163 Section 61(1)(b)

notice (or, if no date is specified, on the date of receipt of the notice),[164] and from that date he ranks as an unsecured creditor of the company for the sum payable on redemption.[165] The shares are deemed cancelled unless held as treasury shares.[166]

The acquisition of its own shares, whether under the statutory regime or in accordance with its own memorandum or articles, is treated as a distribution to members (except that an acquisition is deemed not to be a distribution where shares are redeemed pursuant to a right of a shareholder to have his shares redeemed). This places an important restriction on the company: the directors must be satisfied on reasonable grounds that the company will satisfy the solvency test for distributions immediately after the acquisition,[167] i.e. that the value of its assets will exceed its liabilities and it will be able to pay its debts as they fall due,[168] and a resolution authorising the distribution must contain such a statement.[169] Therefore, there is no need to satisfy the solvency test where the acquisition is pursuant to a shareholder's right whether under section 62, under the memorandum or articles or pursuant to the rights of dissenters under section 179.[170]

18. Distributions and dividends

Distributions of the company's money or assets can only be made if the directors are satisfied on reasonable grounds that the company will, immediately after the distribution, satisfy the solvency test[171] (i.e. that the value of its assets will exceed its liabilities and it will be able to pay its debts as they fall due).[172] These provisions are not confined to dividends but relate to any "distribution" to a member. The definition of distribution is wide, encompassing the direct or indirect transfer of an asset, other than the company's own shares, to or for the benefit of a member, or the incurring of a debt to or for the benefit of a member, and includes the purchase of an asset, the redemption or other acquisition of shares, and dividends.[173]

19. Registration of charges and priorities of charges

A company must keep a private register of charges at its registered office or at the office of its registered agent.[174] In addition, particulars of the charge can now also

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164 Section 62(1)(a)
165 Section 62(1)(c)
166 Section 62(1)(b)
167 Section 57(1), and 59(1) which states "*Subject to section 57…*"
168 Section 56(a). This is similar to the requirement under the IBC Act for the acquisition of its own shares and reduction of capital in sections 33(4) and 35(4) respectively, except that under those provisions deferred taxes were not taken into account
169 Section 57(2)
170 Section 63(a), (b) and (c)
171 Section 57(1). This must be stated in any resolution authorising the distribution: see section 57(2)
172 Section 56(a)
173 Section 56(b)
174 Section 162(1) and (2)

be registered in the public register of registered charges maintained by the Registrar in respect of each company.[175] Either the company or the chargee can apply to the Registrar for registration in the public register,[176] and there is no time limit for making such an application. Registration is not mandatory, and failure to register does not affect the charge's validity or enforceability even as against a liquidator or other secured creditors.

Registration will affect priority for charges created on or after the "relevant date", which is either:

(a) in the case of a company formed under older legislation, the date on which the company is re-registered under the Companies Act ;

(b) in all other cases,[177] 1 January 2005.[178]

After the relevant date, a registered charge takes priority over an unregistered charge, as well as over a charge subsequently registered.[179] Charges created on or after the relevant date which are not registered rank in the order they would have done had the section not come into effect.[180] Charges created before the relevant date will continue to enjoy the priority they did, and if they would have taken priority over a charge created on or after that date, they will continue to take such priority.[181] The priority rules can be varied by agreement or consent.[182] The main exception to the order of priorities under the Companies Act relates to registered floating charges: these rank after a subsequently registered fixed charge unless the floating charge contained a negative pledge clause.[183]

20. Registered Agents, records and seals

A company must at all times have a registered agent in the British Virgin Islands.[184] Failure to do so can result in the company being struck off the register.[185]

The company must keep certain documents with the registered agent:

(a) the memorandum and articles;

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175 Section 163 generally
176 Section 163(1)
177 Which seemingly includes companies which were incorporated in a foreign country and subsequently continued into the British Virgin Islands
178 Section 166 generally and definition of "commencement date" in section 160(1) as amended
179 Section 166(1)
180 Section 166(2)
181 Section 167. In practice, older security interests can give rise to extremely complicated priority issues.
182 Section 168(a)
183 Section 168(b)
184 Section 91(1)
185 Section 213(1)(a)(i)

(b) the register of members (or a copy of it);

(c) the register of directors (or a copy of it); and

(d) copies of all notices and other documents filed by it with the Registrar in the previous 10 years.[186]

It the company provides the registered agent with copies of the register of members or directors rather than originals, then it must notify the registered agent in writing within 15 days of any changes to those registers,[187] and provide the registered agent with a record of the physical address where the originals are kept.[188] Minutes of meetings and resolutions of members, classes of members, directors and committees of directors may be kept with the registered agent or at some other place[189] in which event the registered agent must be given a written record of the physical address where they are kept.[190]

A company is required to have a seal an imprint of which must be kept at the office of the registered agent.[191] However, an instrument is validly executed as a deed by a company even if it is only signed by a director or other agent provided that it is expressed to be a deed or expressed to be executed as a deed, or otherwise makes clear that it is intended to be a deed,[192] even if the seal is not affixed.

21. Merger, consolidation, sale of assets, forced redemptions, arrangements and dissenters

Part IX of the Companies Act regulates merger and consolidation of multiple British Virgin Islands companies (i.e. the consolidation of two or more companies into a new company,[193] or merger between parent and subsidiary companies[194]) or merger or consolidation with foreign companies.[195] It also regulates sale of more than 50% in value of the assets of the company otherwise than in the ordinary course of business;[196] forced redemption of minority shares;[197] and two types of court approved schemes of arrangement.[198] See generally the *Guide on Corporate Reconstructions under the BVI Business Companies Act*.

186 Section 96(1)
187 Section 96(2)(a)
188 Section 96(2)(b)
189 Section 97(1)
190 Section 97(2)
191 Section 102(2)
192 Section 103(4)(b)
193 Section 170
194 Section 172
195 Section 174
196 Section 175
197 Section 176
198 Sections 177 and 179A

22. Continuation

A foreign company may continue (i.e. redomicile) as a company incorporated under the Companies Act but only if the laws under which it is registered authorise it to continue in another jurisdiction.[199] However, in certain circumstances a foreign company will be prohibited from continuing into the British Virgin Islands, for example (i) if it is in liquidation, (ii) an application has been made in another jurisdiction for its liquidation, (iii) a receiver or manager has been appointed in relation to any of its assets, or (iv) it has entered into an arrangement with its creditors.[200]

Subject to its memorandum or articles, a company may continue under the laws of another jurisdiction if the Registrar would issue a certificate of good standing in respect of it,[201] but it does not cease to be incorporated under the Companies Act unless the laws of the other jurisdiction permit continuation and the company has complied with those laws.[202] The registered agent may file a notice in the approved form with the Registrar to the effect that the company has continued its incorporation under foreign law[203] whereupon the Registrar will, if satisfied that the requirements of the Companies Act have been met, issue a certificate of discontinuance and strike the name of the company off the Register.[204]

23. Foreign companies

Foreign companies cannot carry on business in the British Virgin Islands unless they are registered under the Companies Act or have applied to be registered.[205] As with companies incorporated under the Companies Act, they must also have a registered agent at all times.[206]

24. Voluntary liquidation

A company may enter into voluntary, solvent liquidation through the appointment of a voluntary liquidator by members or directors. A company can only go into voluntary liquidation under Part XII if it either has no liabilities or it is able to pay its debts as they fall due;[207] if it is insolvent, it must go into insolvent liquidation under the Insolvency Act, 2003.

The procedure requires the directors to make a declaration of solvency,[208] stating that in their opinion the company is and will continue to be able to discharge, pay

199 Section 180(1)
200 Section 180(2)
201 Section 184(1)
202 Section 184(2)
203 Section 184(3)
204 Section 184(4)
205 Section 186(1)
206 Section 189(1)
207 Section 197
208 Section 198(1)(a)

or provide for its debts as they fall due, not more than four weeks before the appointment of a voluntary liquidator.[209] They must also approve a liquidation plan[210] no more than six weeks prior to the appointment of a voluntary liquidator.[211] The liquidation plan must specify certain matters including the reasons for the liquidation, the voluntary liquidator's name and address and whether he is authorised to carry on any business of the company.[212] The voluntary liquidator must be an eligible individual.[213]

The appointment of a voluntary liquidator is by a resolution of directors or members. The directors can appoint a voluntary liquidator in certain defined circumstances, for example, if the time for the company's existence as specified in its memorandum or articles has expired, or if the company has never issued shares, or if the memorandum or articles permit them and the members have approved a liquidation plan.[214] Members have a more general power to appoint on the approval of the liquidation plan.[215] The voluntary liquidator need not be a licensed insolvency practitioner. However, a voluntary liquidator may not be appointed if an administrator or liquidator has been appointed under the Insolvency Act or an application to appoint them is pending, or the voluntary liquidator has not consented in writing, or the directors have not made a declaration of solvency or approved a liquidation plan.[216] A resolution to appoint in contravention of these provisions is void and of no effect.[217]

A voluntary liquidator has custody and control of the company's assets[218] (although this does not affect the rights of secured creditors[219]), and although the directors remain in office, they cease to have any powers or functions.[220] The directors can however authorise the voluntary liquidator to continue the business of the company if he determines that it would be in the best interests of the creditors or members where the liquidation plan does not give the voluntary liquidator such authorisation.[221] A voluntary liquidator's duties are to realise the assets of the company, provide for the payment of all claims and liabilities, distribute any surplus to members, and prepare a statement of account,[222] and for these duties he has all the powers of the company not reserved to members by the Companies Act or by the company's memorandum or articles.[223] Once he has completed his duties, he must file a statement with the Registrar that the

209 Section 198(2)(a)
210 Section 198(1)(b)
211 Section 198(3)
212 Section 198(1)(b)(i) to (v)
213 Section 199(2)
214 Section 199(2)
215 Section 199(3)
216 Section 203(1)
217 Section 203(2)
218 Section 205(1)(a)
219 Section 205(2)
220 Section 205(1)(b)
221 Section 205(3)(a)
222 Section 206(1)
223 Section 206(2)

liquidation has been completed, and the company is then struck-off and dissolved.[224]

A voluntary liquidator or a director, member or creditor of a company in voluntary liquidation may apply to the Court for an order terminating the liquidation. If the Court considers it just and equitable to do so, it will order the termination of the liquidation subject to such terms and conditions as it considers appropriate.[225]

If the voluntary liquidator is of the opinion that the company is insolvent (either on a balance sheet (net assets) basis or on a cash flow basis), he must notify the Official Receiver[226] and call a meeting of creditors within 21 days.[227] This is treated as a first meeting of creditors under the Insolvency Act[228] and the liquidation continues as under the Insolvency Act.[229]

25. Striking-off, restoration to the Register and undisposed of property

The Registrar can strike the name of a company off the Register on five grounds:

(a) if the company fails to appoint a registered agent;

(b) if it fails to file any document required to be filed;

(c) if the Registrar is satisfied that it has ceased to carry on business;

(d) if the Registrar is satisfied that it is carrying on business without a licence; or

(c) it fails to pay its annual fee or penalty.[230]

However, before striking off a company for any reason other than failing to pay its annual fee or any penalty the Registrar must send the company a notice warning that it will be struck off unless the company shows cause,[231] and she must also publish a notice in the *Gazette*.[232] Where a company is struck off, it or its directors, members or any liquidator cannot carry on its business or deal with its assets, or commence or defend legal proceedings,[233] but it is not prevented from incurring liabilities and a creditor is not prevented from making a claim or

224 Section 208(1)
225 Section 207A
226 Section 209(2)
227 Section 210(1)
228 Section 210(2)
229 Section 211(2)
230 Section 213(1) generally
231 Section 213(3)(a)
232 Section 213(3)(b)
233 Section 215(1)

pursuing a claim to judgment or execution.[234] The company or its directors, members, liquidator or receiver may continue to defend or carry on legal proceedings commenced against or on behalf of the company prior to the striking off.[235]

The company, its members, directors, its liquidator or receiver can apply to the Registrar for the restoration of the company to the Register.[236] A person aggrieved by the striking off, for example, a creditor, can apply to the Court for relief.[237] If the company remains struck off for a period of 10 years, it is dissolved automatically.[238]

Where a company has been dissolved, an application can be made to the Court within 10 years of dissolution to declare the dissolution of the company void and to restore the company to the Register.[239] The application can be made by the company, a creditor, a member or liquidator,[240] and the Court has a wide jurisdiction to declare the dissolution of the company void and to restore the company subject to such conditions as it considers just.[241] Where a company is restored to the Register by the Court, it is deemed never to have been struck off.[242]

A company's property that is not disposed of at the date of its dissolution vests in the Crown.[243] Such property (save for money) that is not disposed of by the Crown must be returned to the company upon its restoration;[244] as regards money, the company is entitled to be paid out of the Consolidated Fund.[245] The Crown can disclaim onerous property.[246] The effect of disclaimer is that the property does not vest in the Crown[247] and the company's rights, interests and liabilities in the property are released with effect from prior to the dissolution.[248]

26. Transitional provisions for IBCs

The amendment act legislation has ensured that those IBCs that were automatically re-registered under the Companies Act on 1 January 2007 will

234 Section 215(3)
235 Section 215(2)(b) and (c)
236 Section 215(2)(a)
237 Section 214(1)
238 Section 216
239 Section 218(1) and (1A). In the case of *In the matter of Lanbridge Management Inc* (Civil Suit No. 118 of 2002), judgment of D'Auvergne J of 23 November 2002, the High Court held that it had inherent jurisdiction to restore a company following a liquidation. Although that case related to the IBC Act, it is thought it would be followed under the Companies Act.
240 Section 218(1)
241 Section 218(2)
242 Section 218(3)
243 Section 220(1)
244 Section 220(2)
245 Section 220(3)
246 See generally section 221
247 Section 221(5)
248 Section 221(6)

continue their existence under the Companies Act in a relatively seamless manner. This has been done by grandfathering into the Companies Act certain unique features that were contained in the IBC Act which would otherwise necessitate almost every IBC that was automatically re-registered to re-organise itself through substantial amendment of its memorandum and articles.

The main IBC features that have been grandfathered into the Companies Act in Part IV of Schedule 2 of the Companies Act are as follows:

26.1. The concepts of "authorised capital", "capital" and "surplus' have been retained and these terms are defined in the same way as in the IBC Act.[249]

26.2. In place of the requirements specified in section 9 of the Companies Act, the memorandum of an IBC that is automatically re-registered under the Companies Act must include those statements that were required under the IBC Act.[250]

26.3. In place of sections 56 to 65 of the Companies Act (all of Division 4 of Part II save for section 66), most of the sections in Part III of the IBC Act, which sections deal with changes in authorised capital and capital, and the redemption of shares and declaration of dividends, have been incorporated into the Companies Act to apply to IBCs that are automatically re-registered.[251]

26.4. The annual fee will continue to be based on the authorised capital of the IBC that was automatically re-registered under the Companies Act. The two annual fees are therefore $350 for a company with an authorised capital that does not exceed $50,000 and $1,100 in the case of a company with an authorised capital that exceeds $50,000.[252] (This is effectively equivalent to annual fees of $350 for companies incorporated under the Companies Act that have an authorised number of shares that does not exceed 50,000 and $1,100 for companies incorporated under the Companies Act that have an authorised number of shares that exceeds 50,000 or an unlimited number of shares.)

26.5. The annual fees for grandfathered bearer share companies are the same as for companies with registered shares until the end of 2009.[253] For this purpose a "grandfathered bearer share company" is an IBC that meets the following five conditions:[254]

26.5.1. it was on the Register of IBCs as at 31 December 2004,

249 Schedule 2, Part IV, Division 1
250 Schedule 2, Part IV, Division 2
251 Schedule 2, Part IV, Division 3
252 Schedule 2, Part IV, Division 4
253 Schedule 1, paragraph 12
254 Schedule 1, paragraph 9(6)

26.5.2. its memorandum as at 31 December 2004 did not prohibit it from issuing bearer shares,

26.5.3. the company has been automatically re-registered under the Companies Act,

26.5.4. a notice to disapply the provisions from the IBC Act that have been grandfathered into the Companies Act to apply to automatically re-registered IBCs has not been registered, and

26.5.5. its memorandum has not at any time since 31 December 2004 been amended to prohibit it from issuing bearer shares.

26.6. The memorandum of a grandfathered bearer share company is deemed to be amended with effect from midnight on 31 December 2009 to state that the company is not authorised to issue bearer shares, convert registered shares to bearer shares or exchange registered shares for bearer shares.[255] However, before 31 December 2009 a grandfathered bearer share company may elect to disapply the deemed amendment provision by filing a notice to disapply the provision in the approved form and a declaration that as of the date of the notice all bearer shares in the company have been delivered to a custodian or there are no bearer shares in the company in issue.[256]

The above-mentioned provisions that are grandfathered into the Companies Act from the IBC Act apply only to IBCs that have been automatically re-registered under the Companies Act.[257] If an IBC voluntarily re-registered under the Companies Act from 1 January 2005 to 30 November 2006, the grandfathered IBC provisions will not apply and the company will have to have been reconstituted with a number of amendments being made to its memorandum and articles.[258]

An IBC that is automatically re-registered and to which Part IV of Schedule 2 applies may elect to disapply the grandfathered IBC provisions in Part IV of Schedule 2 by filing a memorandum and articles that comply with the Companies Act (without Part IV of Schedule 2) and a notice in the approved form.[259]

Every IBC that is re-registered under the Companies Act, whether automatically or voluntarily, continues in existence as a legal entity and its re-registration does not affect its identity, its assets, rights or obligations or the commencement or continuation of proceedings by or against the company.[260]

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255 Schedule 2, Part IV, Division 5, paragraph 34A(1)
256 Schedule 2, Part IV, Division 5, paragraph 34A(2)
257 Schedule 2, Part III, Paragraph 6(1)(a) and Part IV, Division 1, Paragraph 10
258 Schedule 2, Part II
259 Schedule 2, Part IV, Division 1, Paragraph 12
260 Schedule 2, Part VIII, Paragraph 61

Application may be made to the Registrar to restore an IBC that has been struck off the Register prior to the re-registration date but not dissolved prior to the re-registration date.[261] Every application made to the Court to rescind the dissolution of an IBC dissolved under the IBC Act may be made under the Companies Act as if it were a company dissolved under the Companies Act on the date it was dissolved under the IBC Act.[262]

If you would like further information on the subject matter of this Guide please contact Leonard Birmingham at leonard.birmingham@harneys.com, Jacqueline Daley-Aspinall at jacqueline.daley@harneys.com or your usual contact at Harneys. Alternatively, you can visit the Library section of our website at www.harneys.com for a listing of all our Guides in respect of the New Act.

This Guide is general in scope and is not intended to be comprehensive. It is not a substitute for legal advice.

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261 Schedule 2, Part VII, Paragraph 58(1)(b)
262 Schedule 2, Part VII, Paragraph 57