

BVI Business Companies (Amendment) Act, 2012 - Update

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Following our note circulated earlier this year on enhancements proposed to be made to the BVI's corporate legislation, on 16 July 2012 the BVI Business Companies (Amendment) Act, 2012 (the Amendment Act) was passed into law. The Amendment Act will come into force on a date to be proclaimed and a further update will be issued once the Amendment Act is in force. This is likely to be later this year.

In addition to the Amendment Act, the BVI Business Companies Regulations 2012 (the Regulations) were approved by the Cabinet in April 2012 and are expected to come into force alongside the Amendment Act.

Background

The BVI is regarded as one of the world's leading offshore jurisdictions. The Territory's success owes much to the firm legal foundation offered by its corporate legislation and in particular the current BVI Business Companies Act 2004 (as amended) (the BCA), which has been praised as a highly pragmatic and practical piece of legislation.

The BVI is keen to preserve the BCA's favourable recognition amidst changes in the global business market place. The aim of the Amendment Act and the Regulations is therefore to ensure that the BCA continues to offer a clear and modern approach to corporate law by clarifying a number of existing provisions and updating or adapting others to meet recent developments.

The enactment of the Amendment Act followed both a detailed review of the BCA by the Company Law Review Advisory Committee and an industry wide consultation process.

Key Points

While many of the overriding features and qualities of the BCA remain unaltered, the Amendment Act and Regulations will introduce a number of key changes that users, or prospective users, of BVI companies and their advisers should be aware of. These are as follows:-

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The number of BVI companies whose shares are listed on international stock exchanges (including NYSE, NASDAQ, LSE, AIM and, most recently, the Hong Kong Stock Exchange) has increased significantly over recent years. The Amendment Act recognises this development by the introduction of the Listed Company Regulations. These regulations are intended, inter alia, to enhance the flexibility of the BCA to dovetail with the rules and trading systems of international exchanges.

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At present the BCA does not expressly allow for the conversion of shares from one type or class to another. A new provision has been introduced which expressly allows for the issue of convertible shares with the mechanism for conversion to be specified in the memorandum and articles of the company.

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Although the BCA already allows BVI companies to use foreign character names, the Amendment Act introduces a detailed framework to bring this into every day practice. This will be of particular interest to clients operating in the Asian, Middle Eastern and Eastern European markets.

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The Regulations introduce a number of provisions aimed to facilitate the re-use of former company names.

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At present the BCA requires that where a shareholder written resolution procedure is used to remove a director, the resolution must be passed by 75% of the members (as opposed to 75% of the votes of members). This anomaly will be removed by the Amendment Act and the requirement will become 75% of the votes of members.

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The Amendment Act seeks to clarify the current BCA provisions on directors' written resolutions. The clarifications include: confirmation that a company's Memorandum and Articles may provide

for written resolutions to be passed by majority approval, rather than unanimity; and confirmation that the rights afforded to an alternate director include the right to sign written resolutions in place of his appointor.

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In addition to confirming that alternates have the right to sign directors' written resolutions, the Amendment Act seeks to clarify the law on alternate directors more generally. The existing provisions of the BCA dealing with alternate directors will be replaced by clearer statements on the appointment formalities and the rights and powers of alternate directors.

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Provisions are included to limit the persons who have standing to file charges on behalf of chargors and chargees. In effect, such persons will be limited to a registered agent or BVI legal practitioner acting for the relevant party. This move is intended to reduce inaccurate filings and improve the overall efficiency of the registration system whilst ensuring that the BVI remains secured-creditor friendly.

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The Amendment Act introduces changes to the statutory regime applicable to the default and enforcement provisions of share charges governed by BVI law. The new provisions will allow remedies to be exercisable immediately upon default if so provided in the charging instrument. It is hoped that this will add greater clarity and flexibility in this area.

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The Amendment Act will change the deemed time at which a liquidation commences from the time the resolution appointing the liquidator is passed to the date when the notice of the appointment of the liquidator is filed with the Registry of Corporate Affairs. The revised commencement provisions should provide more certainty and clarity in this area. In addition, the company must now be both cash flow and balance sheet solvent (rather than simply cash flow solvent).

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The Regulations will introduce restrictions on the ability of directors and former directors (and other classes of persons with a close connection to the company) to act as liquidators in a voluntary (solvent) liquidation.

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Companies that have been struck off the Register of Companies (as a consequence of default or inactivity) will now be dissolved after 7 years, rather than 10 years.

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