

Managing BVI companies

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While a British Virgin Island's (BVI) company is owned by its shareholders, it is the directors of the company who are the primary agents of the company, entrusted by statute, unless the memorandum and articles provide otherwise, with the exclusive responsibility for the management, direction and supervision of the business and affairs of the company and invested with all powers necessary for that task.

The BVI Business Companies Act, 2004 (as amended) (the **Business Companies Act**) provides that, subject to any express modifications or limitations provided for in the company's Memorandum and Articles of Association, the business and affairs of the company are managed by, or under the direction or supervision of, the directors. For these purposes, the directors have all the powers necessary for managing, and for directing and supervising, the business and affairs of the company. Significantly, with the exception of amendments that alter rights of shareholders and other matters that may be specified therein, directors have the power to amend the company's Memorandum and Articles of Association without further shareholder sanction.

| The Duties and Standards of Directors

In exercising their powers or performing their duties, a director is required to act honestly and in good faith and in what the director believes to be in the best interests of the company (or, in certain limited circumstances and where expressly permitted in the Memorandum and Articles of Association, to what the director believes is in the best interests of the shareholder appointing them (in the case of a joint venture) or the company's holding company (in the case of a wholly owned subsidiary or, where the company is not a wholly subsidiary, with the prior agreement of the other shareholders).

The Business Companies Act requires that a director in exercising their powers, does so for a proper purpose and not in a manner which either contravenes the Business Companies Act or the Memorandum and Articles of Association.

When exercising their powers or performing their duties a director is required by the Business Companies Act to exercise the care, diligence and skill that a reasonable director would exercise in the same circumstances.

Where a director is interested in a transaction, they are required, immediately after becoming aware of the fact that they are interested in a transaction entered into, or to be entered into, by the company, disclose the interest to the board of directors. Having disclosed their interest, the Business Companies Act permits the intended director to attend and vote on the approval of that transaction.

However, a director is not required to disclose their interest if the transaction or proposed transaction is between the company and the director, and the transaction or proposed transaction is or is to be entered into in the ordinary course of the company's business and on usual terms and conditions.

A disclosure to the board of directors to the effect that a director is a member, director, officer or trustee of another named company or other person and is to be regarded as interested in any transaction is a sufficient disclosure of interests in relation to that transaction.

Directors and shareholders meetings and resolutions

The Business Companies Act provides that the directors may meet at such times and in such manner and at such places within or outside the BVI as they may determine to be necessary or desirable.

Meetings of the board of directors are permitted by telephone or by such other electronic means which enable all directors participating to hear each other.

Similarly, a meeting of shareholders may be held at such time and in such place, within or outside the BVI, as the person convening the meeting deems appropriate. There is no requirement for a company to have annual shareholder meetings.

An action that may be taken by the shareholders, directors or a committee of directors at a meeting may also be taken by a written resolution of the shareholders, the directors or a resolution of a committee of directors consented to in writing by all (or a majority if the Memorandum and Articles of Association otherwise specify) shareholders or directors or by all (or a majority if the Memorandum and Articles of Association otherwise specify) members of the committee, as the case may be and as specified, without the need for any notice. In such instance, the written resolutions may also be executed in counterpart.

Whilst there is no concept under BVI law of a special resolution which can be passed by the shareholders, the Memorandum and Articles of Association of the company may reserve specific matters to require a certain percentage of shareholder approval over and above a

simple majority, therefore enabling a company to build in concepts into its Memorandum and Articles of Association which are akin to special resolutions or even providing for unanimous approval.

Outside of its constitutional documents, a BVI company may also regulate its management via a shareholders agreement of similar contract which may give shareholders additional rights. Such a contract will not be public (unlike the Memorandum and Articles of Association) and so is often used when the parties wish to keep their arrangement a private matter.

Maintenance: on-going costs and administration

In order to remain in good standing with the Registrar of Corporate Affairs, a company is required to pay its annual Government licence fee and registered agent/registered office fees.

The annual licence fee is due on or by 31 May or 30 November, each year, depending on the date of incorporation.

Unless the company is an unlimited company not authorised to issue shares or a foreign company, there is no requirement to file an annual return with the Registrar of Corporate Affairs (albeit that registered agents are now required to submit annual economic substance filings in respect of companies under the amended BOSS Act, as defined below and as further explained under "Economic Substance" below).

There is no requirement for a company that is not engaged in a regulated financial services activity (see below under Licence/permits requirements) to prepare and file audited accounts with the Registrar of Corporate Affairs, and filings of a company's register of members or particulars of charges granted by a company are optional (although the filing of particulars of any charges granted by the company is usually a requirement of the secured party in a financing transaction, since the effect of filing such particulars is to create priority of that secured interest over any subsequently registered or unregistered security interests). Note however what is said below in relation to filing obligations in relation to a company's register of directors.

Significantly, the registered agent is the only person withstanding at the Registry of Corporate Affairs who may make filings on behalf of the company, with the exception of a recipient of a security interest granted by the company who may file particulars of the security interest in order to create a priority ranking for that security interest.

In addition, in certain cases, notice of a change of registered agent may be filed by a legal practitioner on behalf a company, rather than the registered agent. Generally, the only filings made by a company are those relating to amendments to its Memorandum and Articles of Association.

Where a company has elected to file copies of its registers of directors and/or members with the Registry of Corporate Affairs it must continue to file updates until it notifies the Registry of Corporate Affairs of its intent to do otherwise. Furthermore, any amendments to its Memorandum and Articles of Association are effective on the date of filing rather than the date of the resolution approving the filing.

A company is required to keep the following documents at the office of its registered agent:

- the Memorandum and Articles of Association
- the register of members or a copy of the register of members
- the register of directors or a copy of the register of directors and
- copies of all notices and other documents filed by the company with the Registry of Corporate Affairs in the previous ten years.

If a copy of the register of members or the register of directors is maintained at the office of a company's registered agent, the company is required to notify the registered agent within 15 days of any changes and to provide the registered agent with a written record of the physical address of the place or places at which the original register is maintained.

In addition, a company that has created a mortgage, charge or other security interest over its assets must also keep a register of charges setting out certain particulars of such security.

A copy of the register of charges must be kept at the registered office of the company. Where a change occurs in respect of any of the charges registered, the company must provide details of the change to its registered agent within 14 days.

A company must also keep, either at the office of its registered agent or at such other place or places within or outside the BVI, minutes of meetings and resolutions of the shareholders and the directors, together with such financial records that are 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.

All of the records outlined above can be kept either in written form or either wholly or partly in electronic form (provided that the electronic records comply with the requirements of the Electronic Transactions Act, 2001 of the BVI).

From 1 April 2016, every BVI company is now required to file a copy of its register of directors with the Registry of Corporate Affairs. However, this copy is kept confidential and not open to public or other inspection unless the company elects otherwise or if disclosure is ordered by the court or requested by a competent government authority in the course of particular investigation.

The initial copy of a company's register of directors must be filed within 21 days of the appointment of the first director.

Changes to the register of director are required to be filed with the Registry 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.

While there is no equivalent requirement on a BVI company to file a copy of its register of members with the Registry of Corporate Affairs, the Beneficial Ownership Secure Search System Act, 2017 (the **BOSS Act**) requires BVI companies to submit, through their registered agents, certain details of the beneficial owners to be held on a confidential (non-public), secure central database which is accessible only by particular financial services regulatory and enforcement bodies of the BVI Government.

Note though that certain BVI companies involved in certain types of financial service activity may also be subject to additional registration reporting obligations under BVI legislation implementing provisions of the United States Foreign Account Tax Compliance Act ("**FATCA**") and the, broadly similar but more global, Common Reporting Standard ("**CRS**").

Whether an entity falls within the ambit of FATCA and/or the CRS the level of reporting and other obligations thereunder will depend on whether the activities it engages would cause it to be considered as a "financial institution" under the applicable implementing legislation. Possible FATCA and/or CRS status should therefore be considered in connection with the incorporation of any new BVI company (particularly in relation to those involved in a financial services activity).

Tax requirements

BVI companies (other than BVI companies that own land in the British Virgin Islands), are exempt (pursuant to the statutory exemption provided for within Section 242 of the Business Companies Act) from all provisions of the Income Tax Act of the BVI, and are exempt from the payment of any taxes or duties on profits, income, capital gains, assets or appreciations and any such tax or duty or tax in the nature of estate duty or inheritance tax with respect to dividends, interests, rents, royalties, compensation and other amounts payable by the company to persons who are not persons resident in the BVI.

Licence / permits requirements

As required under the Securities and Investment Business Act, 2010 (**SIBA**), BVI companies that carry on investment business in or from within the BVI must hold an investment business licence (unless they fall into certain statutory exceptions). In general, such a licence is required if a BVI

company engages in one or more of the following activities:

- dealing in investments
- arranging deals in investments
- managing investments
- providing investment advice
- providing custodial services with respect to investments
- providing administration services with respect to investments
- operating an investment exchange

Other activities that are regulated in the BVI and so require licensing include:

- operating as an investment fund (whether an open-ended fund or a closed ended fund)
- banking
- financing and money services
- insurance, trustee services
- company administration services.

Entities subject to additional regulation by SIBA and those engaged in other regulated financial services activities are also subject to additional reporting and disclosure obligations (beyond those noted here).

If the company operates from an office in the BVI, it would require a licence to do so under the Business, Professions and Trade Licenses Act (Cap 200) (although the holder of a licence under SIBA will be exempt from the need to obtain a separate licence in respect of the investment business for which it is licensed).

Economic Substance

The Economic Substance (Companies and Limited Partnerships) Act, 2018 (the **Economic Substance Act**) which came into force on 1 January 2019 applies to BVI companies carrying out certain "relevant activities". Relevant activities are defined by the Economic Substance Act as: banking business; insurance business; fund management business; financing and leasing business; headquarters business; shipping business; holding business; intellectual property business; and distribution and service centre business.

The Act imposes certain economic substance tests for BVI companies that are "resident" in the

BVI and which carry on a relevant activity. The level of substance required in the BVI, in terms of management control or activity may vary case by case (but in some cases, such as holding businesses, may be fairly light).

The BOSS Act as amended pursuant to the Economic Substance requires (in addition to the requirements referred to above) companies to provide information about their tax residency status and activities, to enable monitoring as to whether the entity is carrying on relevant activity and, if so, whether the entity meets the applicable economic substance standard.

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