

BVI Business Companies (Amendment) Act 2015

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The BVI Business Companies (Amendment) Act, 2015 (the **Amending Act**), which was gazetted on 12 November 2015 in the Official Gazette of the British Virgin Islands (**BVI**), introduces amendments which demonstrate both the BVI Government's commitment to continuous review, reform and modernisation of its flagship statute the BVI Business Companies Act, 2004 (the **BCA**), and its continued commitment to international standards on anti-money laundering and combating the financing of terrorism. The Amending Act is complimented by related amendments to the BVI Business Companies Regulations, 2012.

Ogier in the BVI has been very closely involved in the discussion and consultation phase in relation to the Amending Act.

The amendments to the BCA as contemplated by the Amending Act are expected to come into force within the next few months following the announcement of a commencement date for the Amending Act (until then the BCA will remain in its present form). We will issue a further update once the commencement date has been officially announced.

Key Points

Broadly speaking, the changes introduced by the Amending Act can be grouped as follows:

- changes designed to recognise the growing use of BVI companies as publicly listed entities and the use of BVI companies and BVI law in cross-border transactions;
- amendments designed to comply with and underline the BVI's commitment to best practice in international standards in relation to anti-money laundering controls and combating the financing of terrorism; and
- improvements and clarifications to existing provisions to maintain the efficiency and utility of

the BCA and reflecting, in the words of the Premier of the BVI, "*the Territory's approach to continually modernising financial services legislation to keep the Territory at the cutting edge of business innovation and development*".

Set out below are short summaries of certain of the more significant amendments or additions to the BCA in each of the above categories.

Listed Companies and Cross-Border Transactions

Arbitration

The growing use of arbitration as a dispute resolution method led to the 2013 overhaul of the BVI's regime and legal infrastructure in relation to arbitration and the enforcement of arbitration awards by, amongst other measures, adopting the Arbitration Act, 2013. This new legislation not only clarifies the rules on the enforceability of arbitration awards in the BVI, but also, by allowing the full extension of the New York Convention to the BVI and establishing the legal framework for the BVI International Arbitration Centre, sets out the groundwork for establishing the BVI as an arbitration forum.

The Amending Act complements the framework introduced by the Arbitration Act, 2013 by confirming and making express provision whereby a company's articles of association may allow for any dispute involving the company or its shareholders or between the shareholders to be settled by arbitration in the BVI.

Listed Companies

The Amending Act recognises the growing use of BVI companies as publicly listed entities and the BVI Financial Services Commission (**FSC**) has now elected to expand its list of "recognised exchanges" for legislative purposes.

In addition, the Amending Act will further clarify the provisions of the BCA on share transfers so as to expressly recognise the use of electronic clearing systems to effect transfers of shares in listed companies and to adapt the existing requirements of the BCA on the maintenance of shareholder registers to allow greater flexibility as to the form, content and upkeep of listed company registers so as to recognise market practice and limitations.

Execution of Deeds and Documents

The Amending Act clarifies matters in relation to the execution of BVI law governed deeds and instruments in two important ways.

Firstly, the rules on the due execution of BVI law governed deeds and other documents under seal by foreign companies are confirmed, such that a BVI law governed deed or document under seal will be considered validly executed by the foreign company if executed in a manner permitted by the laws of the jurisdiction in which the foreign company is incorporated.

Secondly, the Amending Act effectively removes, in relation to BVI law governed documents, some of the uncertainty and practical difficulties raised by the English case of *R (on the application of Mercury Tax Group and another) v HMRC [2008] EWHC 2721*, which would otherwise apply in the BVI. The outcome in *Mercury* raised doubt on the practice of attaching pre-signed signature pages to the final version of deeds and other documents governed by English law (or the laws of other jurisdictions following English common law, including the BVI). However, the changes to be introduced by the Amending Act will overcome the application of *Mercury* to BVI law governed deeds and other instruments by confirming that such a deed or instrument will still be validly executed if a pre-signed signature page is attached, with the signing party's authority, to the document at closing of a transaction.

AML, Counter-Terrorist Compliance and Transparency

Registration of Director Registers

That the BVI will introduce some form of mandatory filing of director information has been trailed for some time and was confirmed by a recent announcement by the BVI's Premier.

Under changes to the BCA to be introduced by the Amending Act, every BVI company will be required to file a copy of its register of directors with the BVI Registrar of Corporate Affairs (the **Registrar**). Any subsequent changes in the composition of the company's board of directors must then be notified within 21 days by filing a revised copy of the register with the Registrar. A company incorporated after the commencement of the Amending Act will be required to file a copy of its register of directors within 14 days of the appointment of the company's first directors. BVI companies existing before the commencement of the Amending Act will have until 31 December 2016 to comply with this new requirement.

However, it is important to note that the new filing requirement for director registers is a private filing only and not a public one. As is made clear by the provisions to be introduced by the Amending Act, copies of registers of director filed with the Registrar will not be publicly available and shall not be disclosed to any person unless the company elects otherwise. However, this is subject to the proviso that the Registrar may disclose copies to competent regulatory authorities acting in exercise of their powers or statutory responsibilities.

The new filing requirement stems from recommendations issued by the inter-governmental Financial Action Task Force on Money Laundering (FATF), which include that director information should be held by government regulators or company registries.

There is no requirement to file shareholder registers or other ownership information with Registrar, other than for companies engaged in any regulated financial services activity. The Amending Act makes no change to this position, albeit that the provisions dealing with the optional filing of shareholder registers (sometimes used in connection with share charges) will be moved from their current location in the BCA to an earlier section.

Maintenance of Records and Documents

Those provisions presently found in the BVI's Mutual Legal Assistance (Tax Matters) Act, 2003 requiring the maintaining by companies of records and underlying documentation will be transferred into the BCA pursuant to the Amending Act. While some changes and clarifications to the existing provisions will be made, these will not be substantive in nature.

Further Improvements

Issue of Shares for Non-Cash Consideration

Currently the BCA requires that directors not only confirm that the value of any non-cash consideration received is equal to or exceeds the value of the shares issued, but also requires directors to specify a more precise value of that consideration. This has historically occasionally caused difficulties for directors. The amending Act will remove the requirement that directors determine the actual value of the non-cash consideration and leave it as sufficient that are satisfied that the value is at least equal to the value of the shares being issued.

Bonus Shares

While the BCA has always recognised a company's ability to issue shares as bonus shares, the Amending Act will remove question marks over the compatibility of the ability to issue bonus shares with other parts of the BCA dealing with the paying up of shares. The change will ensure that shares issued for no consideration as bonus shares are automatically deemed fully paid on issue.

Surrender of Shares

While the ability to surrender shares for no consideration is not prohibited by the BCA, that any such surrender may still be subject to the statutory distribution and redemption rules set out by the BCA, even where no payment is to be made by the company, has led to certain complications in the past. The Amending Act will rectify this however by introducing an express ability for companies to receive the surrender of shares for nil consideration and such surrenders will be excluded from the other distribution and redemption rules set out in the BCA.

Shareholders' Meetings

The BCA currently requires the board of directors of a company to call a meeting or shareholders if demanded by shareholders holding 30% or more of total voting rights (or such lesser percentage as the memorandum and articles may allow). However, the BCA does not presently go on to specify the timing or other details for the convening of any such meetings and therefore, in absence of express provision in the memorandum and articles, the directors are left with a degree of latitude which could otherwise be used to frustrate convening a validly requisitioned meeting. The Amending Act however gives further force to the shareholders' rights by including an express power for the Court to order a

shareholders' meeting to be held in circumstances where the shareholders have validly requisitioned a meeting but the directors have failed to convene the meeting.

Instructions to Registered Agents

In order to clarify the status of registered agents as agents of the company and remove confusion as to who registered agents should take instructions from, the Amending Act will introduce an express requirement that a registered agent should follow any instructions to it contained in a resolution of the directors of a company.

Directors' Resolutions and Weighted Voting

While weighted director voting rights and the outcome of the case of *Bushell v Faith* [1970] AC 1099 are generally accepted as acceptable and applicable in relation to BVI companies, in order to remove any residual uncertainty, the Amending Act will confirm that the memorandum and articles of association may allow particular directors more than one vote (or a greater percentage of votes than other directors) either generally or in respect of particular matters, thus allowing for certain directors to exercise greater voting power than others.

Continuations out of the BVI

The Amending Act will introduce new requirements as regards the notification and consent of the secured creditors of a BVI company which wishes to continue or migrate out of the BVI under the provisions of Part X of the Act. Under the revised provisions, a company with a registered charge over any of its assets will be required to provide a written declaration that either: (a) notice of the release or satisfaction of that charge has been filed and registered; or (b) that the chargee has consented or not objected to the continuation out of the BVI; or (c) if no such consent have been given or the chargee has objected, that the chargee's secured interest will not be diminished or comprised by the continuation out.

Liquidations

The Amending Act will add a clarification to the provisions of the BCA dealing with the voluntary solvent liquidation of a BVI company. This will be to confirm that a company's whose assets are subject to outstanding registered charges are still eligible for the voluntary liquidation procedure, assuming that the company meets the other key criteria (i.e. that the company has no liabilities or that the value of the company's assets exceed its liabilities and that it is able to discharge, pay or provide for its debts as they fall due) and provided that the company's liquidator shall be give effect to the rights and priority of the secured creditor.

Conclusion

The amendments to be made by the BCA are welcome and indeed should serve to enhance and further advance the BVI's status as one of the world's leading incorporations jurisdictions.

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Meet the Author



Michael Killourhy

Partner

British Virgin Islands

E: michael.killourhy@ogier.com

T: [+1 284 852 7309](tel:+12848527309)

Key Contacts



Simon Dinning

Partner

Jersey

London

E: simon.dinning@ogier.com

T: [+44 1534 514251](tel:+441534514251)



Nicholas Plowman 包乐文

Partner 合伙人

Hong Kong

E: nicholas.plowman@ogier.com

T: [+852 3656 6014](tel:+85236566014)



Nathan Powell

Partner 合伙人

Hong Kong

E: nathan.powell@ogier.com

T: [+852 3656 6054](tel:+85236566054)



Simon Schilder

Partner

British Virgin Islands

E: simon.schilder@ogier.com

T: +44 1534 514298