

2022 Amendments to BVI the Business Companies Act

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As both a leading and highly responsible international finance centre, the British Virgin Islands (BVI) is committed to complying with international standards on transparency and doing its utmost to facilitate international co-operation to combat against the use of financial services for money-laundering and other criminal conduct.

These commitments and objectives have been achieved by various means over the past decades, but in particular through a continued review and reform of the jurisdiction's legislative framework. It is in this vein that the BVI has recently enacted the BVI Business Companies (Amendment) Act 2022 (**BCA Amendment Act**) and the associated BVI Business Companies (Amendment) Regulations, 2022 (**BCA Regulations Amendment**). The BCA Amendment Act and BCA Regulations will make certain key changes to the BVI Business Companies Act (BCA) and BVI Business Companies Regulations (the BCA Regulations) respectively when and from each become effective on 1 January 2023.

The changes to be made by the BCA Amendment Act and BCA Regulations Amendment will include those described briefly below. For the most part these changes are well measured, designed to strengthen the reputation of the BVI and its laws amongst all stakeholders without prejudicing the fundamental qualities of BVI companies law.

Struck-off companies and dissolution

"Striking-off" is a particular feature of BVI companies law and the current BCA provides that the Registrar of Companies (the **Registrar**) can strike the name of a company off the Register of Companies on six separate grounds, albeit that by far the most common of these in practice are (a) if the company fails to pay its annual fee or penalty; or if the company fails to appoint a registered agent or that agent resigns without being replaced.

At present where a company is struck-off the Register it is not actually deemed dissolved (or at least not immediately) but continues to exist in an "suspended state" in which neither the

company (nor its directors or members nor any receiver or liquidator of the company) may take any actions or act in any way in connection with the company's assets. In the current law a struck-off company may be simply and quickly restored at any time (and as if it had never been struck at all) by paying any unpaid annual fees and penalties due and/or rectifying any other default which caused the striking-off (eg appointing a new registered agent). If, however, the company fails to take such remedial action within seven years of being struck-off, then it will be automatically dissolved by operation of law and any property of the Company vests *bona vacantia* in the Crown.

However, the current striking-off regime will be effectively abolished by the BCA Amendment Act as from 1 January 2023 by way dispensing with the seven-year period, such that all newly struck-off companies from 1 January 2023 will be dissolved on the date the Registrar publishes a notice of striking off in the Gazette (ie almost immediately).

While certain transitional or saving arrangements will apply to companies currently struck-off under the current law prior to 1 January 2023, these will be very brief in effect and therefore persons whose companies may already be or be in danger of becoming struck-off in the near future should not delay in taking appropriate remedial action.

Restoration of dissolved companies

While the abolition of struck-off status may raise some concern, there is some off-set in that the statutory process for restoring dissolved companies will change significantly and a new fast track restoration process will be introduced to accommodate companies that may have simply been temporally struck under the current law.

Under the current law, companies that are dissolved may only be restored following application to the Court (a process that may come with considerable expense and the risk that success in obtaining the order to restore is not necessarily guaranteed). The BCA Amendment Act will introduce a faster simpler method for companies which have been automatically dissolved under the new regime, enabling them to be restored by a simple application to the Registrar without the need to apply to Court, provided that such application is made within five years of the date of dissolution and a duly licensed registered agent has agreed to act as such for the company and that registered agent has declared that it holds all such information for the company, its directors and owners, and such information is up to date, as it is required to maintain under BVI anti-money laundering laws and other regulatory compliance measures.

In cases where a company has been dissolved while still holding assets, and those assets have thereby vested in the Crown *bona vacantia*, there is also a requirement to notify the responsible government official (the BVI Financial Secretary) that the company is to be restored.

When a company is restored under the above process, just as was the case following strike-off under the current law, it is deemed never to have been struck off and dissolved and restored

accordingly in that state.

End of bearer shares

The BCA Amendment Act will finally abolish and remove the concept of a bearer share from BVI law. While the ability to issue new bearer shares had previously been abolished and existing bearer shares were immobilized unless held by a licensed custodian and subject to certain record keeping obligations, bearer shares did still remain as a "thing" under BVI law. These last vestiges of bearer shares though should vanish when all existing bearer shares are deemed converted to registered shares on 1 July 2023.

Director names publicly available

At present, the names and other details of persons acting as directors of BVI companies, whilst filed with the Registry of Corporate Affairs, are not publicly available. However, the BCA Amendment Act will make certain changes to Section 118B of the BCA such that the Registrar may on application provide a list of the persons recorded as directors of the company (in the registers required to be filed with Registrar under the current law) to registered users of the online VIRRGIN search system. Whilst it has still to be formally announced, it is anticipated that director names will be provided as an add on to the existing company search facility in the BVI, likely for an additional fee.

It is our understanding that only the names of current directors will be disclosed following the changes introduced by the BCA Amendment Act, and address, nationality, date of birth and other information required to be filed with Registrar under Sections 118A and 118B will remain confidential.

Furthermore, director names will only be available by way of a search against a particular company. It will not be possible to search against names of individuals to see if that person is a director of any company.

New financial reporting rules

All BVI companies are required under the current BCA to maintain financial records and underlying documentation that show (and explain) their transactions. These records must be sufficient to enable the company's financial position to be determined with reasonable accuracy, at any time. Financial records must be kept for a minimum of five years. However, unless a company is operating a business regulated by the FSC (eg a fund, fund manager, insurance company, bank etc), there is no requirement to prepare those records in a particular form, have them audited or file them with any regulator or government body or other third party.

As from 1 January 2023, however, the current position will change such that BVI companies will

be required to file an annual return which will include specific financial information with their registered agent. The actual form of return remains under development, but it will likely consist of a relatively simple form balance sheet and profit and loss account.

The changes to the BCA and BCA Regulations will require that the annual return be filed with the registered agent within nine months following the end of company's financial year. Critically though:

- the return will not be made public (though the registered agent will have an obligation to inform the FSC if it has not received the return); and
- there will be no requirement that the financial information included in an annual return be audited.

The requirement to file an annual return will not apply to companies whose shares are listed on a recognised exchange and certain BVI regulated entities and companies that file tax returns in the BVI. Certain concessions are also made for companies whose accounts or financials are consolidated into group accounts.

Charitable and non-commercial companies

While it has always been considered possible to form a BVI company to pursue wholly charitable or non-commercial objects, previously the BCA only specially recognised or dealt with such entities whose operations were confined to the territory of the BVI. The BCA, as amended by the BCA Amendment Act, will however recognise and confirm the ability of BVI companies to be used for wholly charitable or non-commercial purposes globally. However, recognising how the charitable status of companies incorporated elsewhere in the world has been used to assist in money laundering and terrorist financing and wishing to adopt international best practice methods, the amended BCA will subject charitable companies operating outside the BVI to increased financial oversight (which may include the preparation of audited accounts and the filing of these with the Registrar). While this still falls short of the regulation and oversight imposed on home operating charities and non-governmental organisations, it is nevertheless an important step in protecting against the abusive use of BVI entities.

BVI residency requirement for liquidators in solvent liquidations

At present a liquidator appointed to conduct a solvent voluntary liquidation of a BVI company under Part XII of the BCA need not have any particular qualification other than being an "eligible individual" (meaning not being a person who is a bankrupt, a minor, a disqualified director or a person who is or was a director or in a senior management position with responsibilities including financial management of the company or an affiliated company within the previous two years), meaning that a proposed liquidator, provided he or she was an eligible individual could be located anywhere in the world.

The BCA Amendment Act will though significantly narrow the class of persons who may act as a liquidator under a BCA solvent liquidation by introducing a residency requirement for liquidators. To qualify, an individual must have physically lived in the BVI for at least 180 days, either continuously or in aggregate, prior to their appointment.

However, in a concession to companies whose main operations have been in jurisdictions and time zones far removed from the BVI, and where having a locally based liquidator might be of great practical benefit and importance, it will also be possible to appoint joint liquidators where only one of the liquidators meets the residency test.

Continuation outside the BVI

The ability of companies to continue or re-domicile into or out of the BVI with ease has long been an attractive feature of BVI companies law. It is a flexibility that allows entities and corporate groups to respond and adapt rapidly to potential adverse legal change or revised legal, administrative or economic conditions.

The BCA Amendment Act, whilst not substantively changing or affecting the ease by which a company can continue or re-domicile into or out of the BVI, does recognise a concern, particularly among creditors and investors, that the current law allows company boards almost absolute freedom to redomicile out of the BVI without the need to consult with or even give advance notification to key stakeholders. Under the present law, unless a company's memorandum and articles or other specific contractual or financial arrangements provide otherwise, the directors of a BVI company may elect to redomicile, provided the intended new jurisdiction will allow, without any statutory need for shareholder or creditor consent or consultation – except that secured creditors must be notified in advance.

However, the BCA Amendment Act will change this in a measured way by requiring that a BVI company intending to continue or redomicile out of the BVI must at least 14 days before filing to continue out:

- advertise notice of its intention to continue out in the BVI's Official Gazette and its own website (if any); and
- notify all of its members and creditors in writing of its intention.

This change, which brings the continuation/re-domicile provisions of BVI companies law into line with the comparable provisions found under the laws elsewhere, should deliver enough protection and comfort to creditors and members without undermining one of the key freedoms of the BCA.

Register of Persons with Significant Control

While it does not set out full details, the BCA Amendment Act does introduce and provide loosely

for the framework by which the BVI might introduce a public register of "Persons with Significant Control" (essentially beneficial owners – but with some modifications) at some point in the future.

The above is in line with the BVI Government's previously stated commitment to introduce some form of publicly accessible beneficial ownership register by 2023 – subject though to a number of caveats and qualifications, which include a proviso that such registers having become an international standard by that time.

However, it should be noted that the new provisions to be inserted into the BCA do not actually impose, create or make operational the register, rather they simply authorise the creation of a register by future regulations, which specify the requirements for its format, management, data handling, accessibility and possible exemptions therefrom. Until such regulations are introduced, the provisions added by the BCA Amendment Act will not be sufficient on their own to impose the Register.

The future and our recommendations

While some of the changes discussed above may require some enhanced or additional administrative measures, we don't believe any are prejudicial to the BVI's core financial services business and none should undermine or even impact on those key features of BVI companies law, and our jurisdiction generally, that have led to the BVI becoming one of the world's most successful corporate domiciles. Rather, we agree that the changes should work to strengthen the reputation of the jurisdiction generally in the eyes of all stakeholders and those dealing with BVI companies – and in doing so should enhance the already well founded popularity of BVI companies.

Ogier will provide further general guidance on the changes being brought by the BCA Amendment Act and BCA Regulations Amendment as the law and its interpretation develops (and in the event further changes are made) and we stand ready to assist our clients in detail as they navigate relevant changes.

In the meantime however, given the proposed changes to the struck-off companies regime, we would strongly recommend to all clients that they should check and ensure that their BVI entities are presently in good standing, in terms of not being struck-off and being up to date with the payment of their annual fees, as well as being up to date with all obligations to their registered agents.

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Meet the Author



[Michael Killourhy](#)

Partner

[British Virgin Islands](#)

E: michael.killourhy@ogier.com

T: [+1 284 852 7309](#)

Key Contacts



[Christian Burns-Di Lauro](#)

Partner

[British Virgin Islands](#)

E: Christian.Burns-DiLauro@ogier.com

T: [+44 1534 514246](#)



Tim Clipstone

Partner

British Virgin Islands

Guernsey

E: tim.clipstone@ogier.com

T: [+44 1481 752265](tel:+441481752265)



Michael Killourhy

Partner

British Virgin Islands

E: michael.killourhy@ogier.com

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



Nathan Powell

Partner 〰〰〰

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](tel:+441534514298)



Marie-Claire Fudge

Partner

British Virgin Islands

E: marie-claire.fudge@ogier.com

T: [+44 1534 514307](tel:+441534514307)

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