

Summary of Features of the Act

The BVI Business Companies Act, 2004 (“the Act”) is, in effect, a consolidation of the provisions of the International Business Companies Act (“IBC”) and the Companies Act under a single corporate regime. The Act will repeal and be used in place of the existing IBC Act and domestic Companies Act (Cap.285). However there will be a transitional period to allow existing BVI companies to prepare for the Act. Under the transitional provisions:

- In 2005 new incorporations are possible under the Act as well as under the IBC Act and domestic Companies Act
- From 1st January 2006 all incorporations will only be possible under the new Act. However, existing IBC and domestic companies will be able to operate under the IBC Act or domestic Companies Act, as applicable, until the end of 2006.
- From 1st January 2007 any IBC and domestic companies maintained under the existing IBC Act or domestic Companies Act will automatically be re-registered under the new Act. As such, all companies registered in the BVI from 2007 will be operating under the new Act.

1. Seven types of companies can now be formed:

- Companies limited by shares;
- Companies limited by guarantee authorised to issue shares
- Companies limited by guarantee not authorised to issue shares
- Unlimited companies with shares
- Unlimited Companies without shares
- Restricted purpose companies
- Segregated portfolio companies

2. No Objects Clause or Authorised Share Capital

There is no requirement to list the objects of the Company under the Memorandum although the Company is not restricted from doing so. The IBC’s concept of authorized capital has also been superseded and has now been replaced in the Act by a maximum number of shares that the Company is entitled to issue (although not required to issue), e.g. 50,000 shares of no par value. The Directors can then attach such value to the issued shares as they feel appropriate. It should be noted however that if the Company elects to retain an authorized share capital, it can do so.

3. Re-Use of Company’s Name

The Act provides for the re-use of names previously used by companies that have changed their names, been struck off or dissolved either under the new Act or prior Acts.

4. Company number can be used as a name

A Company number can be used as a name in the form of “BVI Company Number 123456 Limited” and, if a name is in that form, the Company can also have an additional name in foreign characters.

5. Director' Duties better defined

Not only does the Act provide for a person/entity's consent to be obtained prior to appointment as a director but clarifies the procedures for the disclosure of the director's interests and addresses the conflicts that may arise in the course of a director's duties. For example, a director is required to disclose to the board of directors any conflict of interest in a proposed transaction before the Company enters that transaction. If he fails to do so, then the transaction is voidable by the Company unless the Company received fair value for the transaction or the members know of the conflict of interest and still approved the transaction.

6. New Solvency Test for Distributions/Dividends

Whereas the IBC Act stated that dividends could only be paid from surplus (which does not exist under the Act), the Act only requires the Directors to satisfy themselves that the company will comply with the solvency test that is, that immediately after the dividend is paid, the value of assets will exceed the value of liabilities and that the Company is able to pay its debts as they fall due. The above should be stated in a minute or resolution authorizing the dividend.

7. Clarification of Registration of Charges

Every Company must now keep at its registered office a register of all charges showing particulars of the charge and the parties involved. A new regime for the registration of security at the Registry of Corporate Affairs now exists, which will govern priority based upon date of registration. Secured lenders can file their security documents themselves, rather than relying upon the borrower to do so.

8. Clarification of Records and Registers

The Act formalizes the record keeping obligations of the company. Should companies fail to comply they can be fined up to US\$10,000. The key provisions are: (1) companies must maintain accurate financial records so that the Company's financial position can be determined at any time; (2) copies of members and directors' resolutions/minutes of meetings must be kept at the office of the registered agent, or at another place known at all times to the registered agent; (3) the Company's name must appear on all official correspondence; (4) a copy of the Memorandum and Articles of Association, copies of the registers of directors and members, copies of all notices and other documents filed by the company for the last ten years must be kept at the office of the registered agent, or at another place known at all times to the registered agent.

9. New Liquidation Regime

The Insolvency Act, 2003 will apply to the liquidation of any insolvent BVI Business Companies. The liquidation of solvent companies, however, is provided for under the Act. A voluntary liquidator must now be an individual as opposed to a corporate entity under the IBC.

9. New Liquidation Regime (continued)

Certain other formalities must be adhered to such as a declaration of solvency to be made by the directors at least four weeks before the appointment of a liquidator.

If it appears to the liquidator that the company is insolvent, he must notify the Official Receiver and the liquidation will then proceed under the terms of the Insolvency Act.

10. Bearer Shares

Under the Act a Company may only issue bearer shares if authorized to do so under its M&A. Any bearer shares that are issued must be deposited with an authorized custodian immediately upon issue.

It should be further noted that, as of the 1st January 2005, all companies incorporated under the IBC Act must appoint directors within thirty days of incorporation. In addition to the existing requirement for maintenance of an up to date Register of Shareholders, all BVI Companies are legally required to maintain an accurate Register of Directors with their BVI Registered Agent. Each director's full name, address, date of their appointment/retirement must be recorded in the Register. Please note that the Registers are not documents of public record and will be held by Sable Trust Limited in its capacity as Registered Agent.

The Directors of Sable Trust Limited will be happy to discuss any issues arising from the new law, in relation to existing entities or new structures under consideration.

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