

BVI COMPLETES INTRODUCTION OF NEW COMPANY LAW

With the recent enactment of amendments to the BVI Business Companies Act, 2004 ("the new Act") the BVI has completed the introduction of its new company regime to replace the International Business Companies Act, 1984 ("the IBC Act")

The new Act reflects the BVI's twenty years experience as the world's leading corporate domicile during which time almost 700,000 companies were established in the jurisdiction. The legislation retains many of the attractive features of the IBC Act and includes provisions which respond to criticism that companies formed under the IBC Act lacked substance and were open to abuse.

The new Act, like its predecessor, is well drafted and easy to follow. It is likely, as was the case with the IBC Act, to become the model statute for other international corporate domiciles.

In this memorandum we explain:

- Options available for companies formed under the IBC Act.
- Features of the new Act which will be of interest to clients..

INTERNATIONAL BUSINESS COMPANIES

Companies formed before 1 January 2006 under the IBC Act can:

- During 2006 adopt new memoranda and articles of association governed by the new Act, or
- Take no action and wait until 1 January 2007 when all IBCs, which have not adopted new memoranda and articles of association, automatically will be re-registered under the new Act.

Comment: Unless there is a specific need for a company to do so, we recommend that clients allow the automatic provisions of the new Act to operate.

PROVISIONS OF INTEREST TO CLIENTS

- **New Types of Companies.** The new Act provides increased choice in the range of corporate vehicles. These include companies limited by guarantee, restricted purpose companies and segregated portfolio companies.

Comment: Inclusion of new types of companies is intended to provide a legislative framework for corporate vehicles used in structured finance transactions. For example, restricted purpose companies are frequently used in securitizations. Segregated portfolio companies, previously only used in the insurance context, can now be used by mutual funds.

- **Share Capital.** The new Act does not require, as was customary, that a company state in its memorandum the value of its share capital. Instead, the company need only state the number of shares it is authorized to issue which can be an unlimited number of shares.

Comment: Under the IBC Act a company was required to state in its memorandum of association the monetary value of its authorized share capital; for example: US\$50,000 divided into 50,000 shares of \$1 par value each. Under the new Act, a company's memorandum of association will state, for example, that the company is "authorized to issue 50,000 shares".

It is still possible to utilize the concept of par value so that the share capital can, for example, consist of 50,000 shares of \$1 par value each.

The government licence fee of US\$350 applies to companies that have the right to issue up to 50,000 shares. The government fee increases to \$1,100 where a company is authorized to issue more than 50,000 shares.

- **Classes of Shares.** Where a company is authorized to issue different classes of shares the memorandum of association must include this fact and describe the rights attaching to each class of shares.

Comment: Under the IBC Act rights attaching to classes of shares could be determined by the directors alone. The new provision is intended to provide improved protection for minority shareholders.

- **Directors.** Companies have six months in which to appoint the first director of a company. A director must consent in writing to act as a director. The new Act also disqualifies persons under 18 years of age from serving as directors.

Note: If a company does not appoint a director, any person who manages, directs or supervises the management of the company is deemed to be a director.

Comment: The six month window is intended to assist company administrators who utilize shelf companies.

- **Reserve Directors.** Where a company has only one individual member and that person acts as the sole director of the company, that individual can appoint a reserve director who will become the director of the company upon the death of the individual. The reserve director must consent in writing to the appointment.

Comment: This provision avoids many of the practical difficulties that can arise when a sole member/director dies.

- **Directors of Subsidiaries.** A director of a company is required in exercising his/her powers to act in the best interests of the company. To accommodate the many cases where a company is a wholly owned subsidiary, the new Act expressly permits a director of the subsidiary, where allowed by the memorandum or articles of the company, to act in the best interests of the holding company even though it may not be in the best interests of the subsidiary.

Comment: This new provision makes it easier for individuals and companies to accept appointment as directors. The new Act also contains similar provisions that allow a director to act in the best interests of a shareholder where a company has been formed to operate as a joint venture of its shareholders.

- **Flexibility in Company Names.** It is now possible to establish a company using a number e.g. "BVI Company No. 1765 Limited" together with a company name in foreign characters (e.g. Chinese).

Comment: This provision is intended to assist users of BVI companies located in regions such as Asia.

- **Company Seal.** A company is required to have a company seal.

Comment: As was the case under the IBC Act, documents (for example, share certificates) can still be executed by a director without the need for a seal.

- **Ultra Vires.** There is no requirement to state the objects or purposes of the company in the memorandum of association. The new Act offers flexibility on what may be included in either the memorandum or articles of association.

Comment: The new Act eliminates the applicability of the Ultra Vires doctrine by stating that every company has “full capacity to carry on or undertake any business or activity, do any act or enter into any transaction” and for these purposes has “full rights, powers and privileges”.

- **Corporate Records.**

- The new Act clarifies what records need to be maintained in the BVI. The list includes: (i) the memorandum and articles of association, (ii) the register of members; (iii) the register of directors; and (iv) copies of all notices and documents filed by the company with the Registrar of Corporate Affairs in the previous ten years. If the original register is not kept by the registered agent, the registered agent must be provided with a written record of the address where the original register is kept.
- A company must keep minutes of meetings of shareholders and directors. If these minutes are kept outside of the BVI the registered agent must be advised of the address where the minutes are kept.
- Companies are not required to prepare financial statements. The new Act states only that the company must keep records that “(a) are sufficient to show and explain the company’s transactions; and (b) will, at any time, enable the financial position of the company to be determined with reasonable accuracy”.

Comment: the new Act’s recital of what records must be maintained by a company represents a clarification of what is expected in regard to financial record keeping which was absent in the IBC Act.

- **Registration of Charges.** Companies frequently create charges (mortgages, security interests) over property which they own. The new Act requires that where a company does create a charge over its property it keeps a register of charges at its registered office or at the office of its registered agent. The new Act also allows for the optional registration of the charge in a Register of Charges maintained by the Registrar of Corporate Affairs. Either the company or the chargee (the person who has a claim against the company) may register the charge with the Registrar of Corporate Affairs.

Charges that are registered in the Register of Charges maintained with the Registrar of Corporate Affairs have priority over charges that are registered subsequently and over unregistered charges. Charges created before 1 January 2005 enjoy the same priority as if the new Act had not come into existence.

Comment: The new registration of charges provisions provide greater clarity than those which existed under the IBC Act. Note that the priorities can be changed by agreement of the parties involved. Permitting a chargee to register a charge with the Registrar of Corporate Affairs brings BVI legislation in this area into line with similar legislation in other modern jurisdictions.

- **Continuation.** The BVI continues to allow the migration (“continuation”) of companies formed under foreign company laws to the BVI Register of Companies. In order for the foreign company to be continued in the BVI, the new Act requires that the laws of the foreign country permit the migration of the company.

Comment: Under the IBC Act continuation was allowed even if the laws of the foreign company did not permit the migration of the company. The result was that the company continued to be governed under the laws of both the BVI and the foreign jurisdiction. The new Act ensures that in order to be accepted onto the BVI Register of Companies, the company’s existence under the foreign country’s laws must cease.

A copy of the Act and its most recent amendments are available on our website www.tridenttrust.com.

For questions regarding any aspect of the new legislation, its transitional provisions and what action you need to take with regard to existing companies, please contact the Trident Trust office with which you customarily work.

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