

## THE BVI BUSINESS COMPANIES ACT 2004

### **1. Introduction**

Since its enactment 20 years ago, the BVI's International Business Companies Act (Cap. 291) (the "IBC Act") has become one of the most widely-used corporate statutes with over six hundred thousand IBCs incorporated under it. Notwithstanding such phenomenal success, practitioners and users have for some time been calling for amendments to the IBC Act as well as for an additional and more flexible range of corporate vehicles, and its twentieth anniversary marked an appropriate occasion for reform. The result is a new corporate statute for the BVI called the BVI Business Companies Act 2004 (the "new Act"), which came into force on 1 January 2005, and which will eventually replace the IBC Act. In this paper we focus on the key features of the new Act and highlight some of its differences with the IBC Act.

### **2. Scope of the new Act**

The new Act came into force on 1 January 2005.<sup>1</sup> Unlike the current regime, this single statute allows for the incorporation of international offshore companies as well as locally owned companies doing business in the BVI. In order to give flexibility, there is a two-year transition period during which both the IBC Act and the new Act will be in force. Key features of the transition period are discussed below. After the two-year period, the new Act will be the sole corporate statute for the BVI and will regulate all BVI companies.

### **3. Range of corporate vehicles**

The aim of the new Act is to provide flexibility and choice in the range of corporate vehicles available under it. Seven different types of companies can be incorporated: companies limited by shares<sup>2</sup> (the only type of company that could be incorporated under the IBC Act); companies limited by guarantee not authorised to issue shares;<sup>3</sup> companies limited by guarantee authorised to issue shares;<sup>4</sup> unlimited companies authorised to issue shares;<sup>5</sup> unlimited companies not authorised to issue shares;<sup>6</sup> restricted purposes companies;<sup>7</sup> and segregated portfolio companies.<sup>8</sup>

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1 Section 1(2)  
2 Section 5(a)  
3 Section 5(b)  
4 Section 5(c)  
5 Section 5(d)  
6 Section 5(e)  
7 Section 8(1)  
8 Part VII of the new Act

Restricted purposes companies are companies limited by shares but with restricted objects or purposes<sup>9</sup> and whose certificate of incorporation will state that they are restricted purposes companies.<sup>10</sup> It is expected that their primary use will be in structured finance and securitisation transactions. Segregated portfolio companies (SPCs) are companies limited by shares that previously could only be incorporated under the Insurance Act 1994, but are now dealt with under the auspices of the new Act, and they will only be permitted if written approval of the Financial Services Commission (FSC) has been obtained.<sup>11</sup> Previously, only insurance companies could register as segregated portfolio companies,<sup>12</sup> but the opportunity has been taken to expand their scope by also allowing mutual funds<sup>13</sup> to register as SPCs. Regulations will be made to extend the provisions to other types of businesses.<sup>14</sup>

#### **4. Restrictions on carrying on business in the BVI**

The IBC Act did not permit IBCs to carry on business with persons in the BVI<sup>15</sup> and the restrictions were required to be set out in their memorandum.<sup>16</sup> There is no such prohibition in the new Act itself, but instead a company's memorandum will have to have a statement in the approved form specifying limitations on the business they carry on.<sup>17</sup>

#### **5. Company names**

The different types of companies can have different name endings. Unlimited companies must end with either "Unlimited" or "Unltd".<sup>18</sup> Restricted purposes companies must have the phrase "(SPV) Limited" or "(SPV) Ltd" in the name,<sup>19</sup> and SPCs must have either "Segregated Portfolio Company", or its abbreviation "SPC", in the name.<sup>20</sup> Limited companies (including companies limited by guarantee) continue to enjoy the endings permitted under the IBC Act,<sup>21</sup> e.g. Limited, Corporation, Societe Anonyme, and their respective abbreviations such as Ltd, Corp, S.A.

Two innovative features of the new Act are that the company number can be used as a name in the form "BVI Company Number 1234567 Limited",<sup>22</sup> and, if a name is in that form, the company can also have an additional name in foreign characters.<sup>23</sup> These features will prove to be very useful for incorporation agents, particularly in Hong Kong and Asia more generally.

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9 Section 10(2)  
10 Section 8(1)(a)  
11 Sections 6(1)(d) & 135(1), 135(5)  
12 Section 135(2)(a)  
13 Section 135(2)(b)  
14 Section 135(2)(c)  
15 IBC Act section 5(1)(a)  
16 IBC Act section 12(1)(l)  
17 Section 9(4)  
18 Section 17(2)  
19 Section 17(3)  
20 Section 17(4)  
21 Section 17(1), and see IBC Act Section 11(1)  
22 Section 19  
23 Section 20(1)

## 6. Incorporation procedure

To incorporate a company under the new Act, the memorandum and articles of association signed by the registered agent must be filed with the Registrar of Corporate Affairs (“the Registrar”),<sup>24</sup> together with the registered agent’s consent to act in the approved form,<sup>25</sup> and any other documents that may be prescribed.<sup>26</sup> For segregated portfolio companies, the written approval from the FSC must also be filed.<sup>27</sup> Only the registered agent can file an application for incorporation; the Registrar will not accept it from any other person.<sup>28</sup>

If he is satisfied that all the requirements of the new Act have been met, the Registrar will register the documents, allot a unique number to the company, and issue a certificate of incorporation.<sup>29</sup> The company is incorporated from the date specified in the certificate.<sup>30</sup>

## 7. Memorandum and Articles, no objects clause or authorised share capital

As with IBCs, the memorandum and articles are the company’s corporate constitution and together with the legislation regulate the relationship between the company, its members and directors. The new Act provides that they are binding as between the company and each member and between the members themselves<sup>31</sup> and thus in effect constitute a “statutory contract” between them.<sup>32</sup>

Besides the name and type of company, its registered office, and the name and address of its first registered agent,<sup>33</sup> there are certain matters that must be stated for the different types of companies, e.g. companies authorised to issue shares must state the maximum number of shares that can be issued;<sup>34</sup> companies limited by guarantee must specify the amount which a guarantee member must contribute to the assets on liquidation;<sup>35</sup> restricted purposes companies must state that they are such companies;<sup>36</sup> and SPCs must state that they are segregated portfolio

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24 Section 6(1)(a) & (b). This requirement is the same as under the IBC Act section 3

25 Section 6(1)(c)

26 Section 6(1)(e)

27 Section 6(1)(d)

28 Section 6(2)

29 Section 7(1). There is no requirement in the new Act for the registered agent or a solicitor engaged in the formation of the company to certify that the provisions of the legislation have been complied with, as under the IBC Act s.14(1). It remains to be seen whether this requirement will be brought in as part of the prescribed documents under section 6(1)(e) of the new Act.

30 Section 7(2)(b) and cf. IBC Act section 15(1)

31 Section 11(1). The wording of this provision, whilst differing considerably from ss. 12(2) and 13(3) of the IBC Act (and s. 14 of the UK Companies Act 1985), is thought to give effect to the many decisions which interpreted the equivalent UK provisions: see e.g. *Hickman v Kent or Romney Marsh Sheepbreeders’ Association* [1915] 1 Ch 881; *Wood v Odessa Waterworks Co.* (1889) 42. Ch.D 636; *Welton v Saffrey* [1897] AC 299

32 Characteristics of the statutory contract were analysed in *Bratton Seymour Service Co Ltd. v Oxborough* [1992] BCLC 693

33 Section 9(1)(a) – (d)

34 Section 9(1)(e)(i)

35 Section 9(1)(f)

36 Section 10(1)

companies.<sup>37</sup> Beyond the compulsory matters, the new Act, like the IBC Act, gives total flexibility on what may be included in either the memorandum or articles.

However, two fundamental changes that should be noted. First, there is no requirement to state the objects or purposes in the memorandum of association.<sup>38</sup> Whilst there is nothing to prevent a company from stating its objects or purposes, it is not required to do so. The only exception to this rule is a restricted purposes company which must state the purposes for which it is incorporated.<sup>39</sup> Second, there is no concept of authorised share capital for such companies, and companies authorised to issue shares must state only the maximum number of shares they are authorised to issue.

## **8. Alteration to the memorandum or articles**

As with the IBC Act, the memorandum and articles may be amended by the members,<sup>40</sup> or by the directors if authorised by the memorandum<sup>41</sup> but subject to certain restrictions on the directors' ability to amend, e.g. they cannot amend to restrict the rights of members to amend the memorandum or articles.<sup>42</sup> In general, a simple majority of those entitled to vote and voting is needed for an amendment.<sup>43</sup>

The right of amendment can be restricted with the new Act allowing provisions to be entrenched so that they cannot be amended, or requiring a specified majority greater than 50% to amend, or requiring that they may only be amended if certain conditions are met.<sup>44</sup> However, this does not apply to any provision in the memorandum restricting the purposes of a company that is not a restricted purposes company.<sup>45</sup>

The company must file either a notice of amendment in the approved form, or a restated memorandum or articles incorporating the amendment made, with the Registrar,<sup>46</sup> whereas under the IBC Act it is the resolution amending the memorandum or articles that must be filed.<sup>47</sup> The amendments take effect from when they are registered by the Registrar,<sup>48</sup> but there is power to apply to the court for an order that the amendments take effect from another date not earlier than the date of the resolution to amend.<sup>49</sup>

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37 Section 9(1)(g)

38 See Section 9 on what a memorandum must contain, and cf. IBC Act section 12(1)(d)

39 Section 10(2)

40 Section 12(1)

41 Section 12(4). See IBC Act section 16(1)

42 See section 12(5) generally

43 Section 81(2), which deals with members. The position with regard to directors in section 129 is not so clear-cut

44 See Section 12(2) generally. The IBC Act did not contain such explicit provisions, but it nevertheless allowed restrictions to be imposed on the ability to amend, for section 16(1) provided that the ability to amend was "*Subject to any limitations in the memorandum or articles...*"

45 Section 12(5)

46 Section 13(1)

47 IBC Act section 16(2)

48 Section 13(2). This is also the case under the IBC Act – see section 16(3)

49 Sections 13(3) – 13(5)

## 9. Corporate capacity and ultra vires

Corporate capacity and ultra vires are dealt with differently under the new Act compared to the IBC Act. Four key points should be noted.

First, the new Act attenuates the ultra vires doctrine by: (a) not requiring companies to specify their objects or purposes (except restricted purposes companies); and (b) providing that a company<sup>50</sup> has, irrespective of corporate benefit, full capacity to carry on any business or activity, do any act or enter into any transaction,<sup>51</sup> and for those purposes it has full rights, powers and privileges.<sup>52</sup> However, this latter provision is subject to the rest of the new Act,<sup>53</sup> any other statute, and the company's memorandum and articles.<sup>54</sup>

Second, the new Act (as with the IBC Act<sup>55</sup>) provides that no act of a company or a transfer of property is invalid by reason only of the fact that the company did not have the capacity, right or power to perform the act or receive the asset.<sup>56</sup> This provision, which applies equally to the company as well as to third parties dealing with it and can therefore be relied upon by either, means that the mere fact that the company's act is beyond its memorandum does not mean it is invalid; something more will be needed to render the transaction invalid. That further element is usually knowledge by the third parties that the matter is beyond the powers of the directors.

It is with regard to this further element, i.e. knowledge, that the third key point in the new Act should be noted. The new Act abolishes constructive notice and knowledge of documents (including the memorandum and articles) registered at the Registry or available for inspection at the company's registered office,<sup>57</sup> except in relation to charges registered on the Register of Charges (see below).<sup>58</sup> Further, it provides that the company cannot assert against a person dealing with it that the new Act or its memorandum or articles have not been complied with unless that person either knew, or ought to have known, by virtue of his relationship to the company, of the matter.<sup>59</sup>

Finally, the IBC Act allowed the lack of capacity to be pleaded by members in proceedings against the company to prohibit an ultra vires act,<sup>60</sup> and by the company in proceedings against

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50 Including a restricted purposes company

51 Section 28(1)(a). Cf. the IBC Act section 12(2), which states that if the memorandum states that the object or purpose of the company is to engage in any act or activity that is not prohibited under any law for the time being in force in the BVI, the effect is to make all acts and activities that are not illegal part of the object or purpose, but subject to limitations in the memorandum

52 Section 28(1)(b)

53 I.e. the company cannot do something that is forbidden by the new Act, e.g. make a distribution when it does not satisfy the solvency tests – see below. This is, strictly speaking, not a matter of capacity but of legality: see *Ashbury Railway Carriage & Iron Co Ltd. v Riche* (1875) LR 7 HL 653

54 Section 28(1). Thus, if the memorandum contains an objects clause, or if it prohibits certain matters, the company will not have the capacity to do something that is beyond the objects clause or which is prohibited

55 See IBC Act section 10(1)

56 Section 29

57 Section 32(1)

58 Section 32(2)

59 Section 31(1)(a)

60 IBC Act section 10(1)(a)

directors for loss or damage due to the ultra vires acts.<sup>61</sup> There are no equivalent provisions under the new Act but the directors are under a duty not to act or agree to the company acting in a manner that contravenes the new Act or its memorandum or articles.<sup>62</sup>

## **10. Members, their rights and liabilities**

The new Act provides for three types of members, i.e. shareholders, guarantee members, and members of an unlimited company who are not shareholders.<sup>63</sup> A member is a person whose name is entered as such on the register of members.<sup>64</sup>

In general, members will have the rights conferred on them in the memorandum and articles. However, one of the new features of the new Act is that it specifies the rights that a shareholder has, namely, the right to one vote, the right to an equal share of any dividend, and the right to an equal share in the distribution of surplus assets.<sup>65</sup> These rights can of course be negated, modified or added to where expressly authorised by the memorandum.<sup>66</sup>

The new Act also provides for the liability of members for the debts and obligations of the company. In the case of limited liability companies, i.e. companies limited by shares and companies limited by guarantee whether or not authorised to issue shares, members are not liable for the debts and obligations of the company.<sup>67</sup> The shareholders of a limited liability company are only liable for the amount unpaid on their shares and as may be specified in the memorandum.<sup>68</sup> Guarantee members of a company limited by guarantee are only liable to contribute to the assets of the company on liquidation in the amount stated in the memorandum, and for any other amount provided in the memorandum.<sup>69</sup> Unlimited members have unlimited liability for the debts and obligations of the company.<sup>70</sup>

The new Act does not contain any provisions for members' remedies along the lines of s.459 of the UK Companies Act 1985 for unfair prejudice (which is consistent with the IBC Act). Nor are there any provisions in the new Act for derivative actions where members can bring proceedings on behalf of the company.

## **11. Members' resolution**

As with the IBC Act, members may pass a resolution either at a meeting of members or by a written resolution<sup>71</sup> but there is one important difference with the IBC Act. Under the new Act a simple majority (or such higher majority as specified in the memorandum or articles) of votes of those entitled to vote and voting on the resolution is sufficient for passing a resolution at a

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61 IBC Act section 10(1)(b)

62 Section 121

63 Section 2, definition of "member"

64 Section 78

65 Section 34(1)(a)-(c)

66 Section 34(2)

67 Section 80(1)

68 Section 80(2)

69 Sections 9(1)(f), 80(3)

70 Section 80(4)

71 Section 81(1)

meeting or as a written resolution,<sup>72</sup> whereas under the IBC Act, a written resolution requires an absolute majority of the votes of all shares entitled to vote (or such higher majority as may be specified).<sup>73</sup> A guarantee member and a member of an unlimited company without shares is entitled to one vote unless the memorandum and articles provide otherwise,<sup>74</sup> and a shareholder is entitled to the votes attaching to the shares held by him.<sup>75</sup>

## 12. Class rights and pre-emption rights

The new Act allows for the creation of classes of shares, but the rights, privileges, restrictions and conditions attaching to each class must be specified in the memorandum,<sup>76</sup> so that they are set out in one document that is publicly available, whereas the IBC Act allows directors to specify these matters if specifically authorised, i.e. they did not have to be stated in the memorandum<sup>77</sup> and could be set out in a resolution of directors.

Unlike the IBC Act, the new Act contains pre-emption provisions upon the issuance of shares which the company can “opt into”, i.e. they only apply if the memorandum specifically states that they are to apply.<sup>78</sup>

## 13. Directors

A company must have at least one director<sup>79</sup> and it must keep a register of directors.<sup>80</sup> As with the IBC Act, the new Act specifically provides that the business and affairs of the company shall be managed by, or under the direction or supervision of, the directors, but subject to any modifications or limitations in the memorandum and articles.<sup>81</sup>

The directors can delegate most of their powers to committees of directors<sup>82</sup> but certain important powers cannot be delegated to committees,<sup>83</sup> e.g. the power to amend the memorandum or articles, the general power to delegate to committees (but certain powers can be sub-delegated if authorised by the directors<sup>84</sup>), the power to appoint agents, and the power to appoint directors. The directors remain responsible for the exercise of the power by the committee unless they believed on reasonable grounds that the committee would exercise the power in conformity with the statutory duties imposed on the directors.<sup>85</sup>

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72 Section 81(2), and see definition of “resolution” in section 2

73 IBC Act section 2(6)(b)(ii) on definition of resolution of members where the resolution is consented to in writing

74 Section 81(3)(b)

75 Section 81(3)(a). The memorandum can specify that shares carry no voting rights: see sections 9(1)(e) and 34(2)(b)

76 Section 9(1)(e)(ii), and see definition of “class” in section 2

77 IBC Act section 12(1)(h)

78 Section 46(1)

79 Section 109(4)

80 Section 118(1)

81 Section 109(1). See IBC Act section 42

82 Sections 110(1)(b), 110(2)

83 Section 110(2)

84 Section 110(3)

85 Section 110(4)

A director's equitable duties of acting honestly, in good faith and in what he believes to be in the best interests of the company are given a statutory footing,<sup>86</sup> as is his common law duty of care and skill.<sup>87</sup> The new Act also allows a director of a subsidiary to act in the best interests of its holding company even though it may not be in the best interests of the company, provided he is expressly permitted to do so by the memorandum or articles,<sup>88</sup> and has the prior agreement of all shareholders where the company is not a wholly owned subsidiary.<sup>89</sup> He is also under a statutory duty to exercise his powers as a director for a proper purpose and he must not act in a manner that contravenes the Act or the memorandum or articles.<sup>90</sup>

The new Act also requires a director to disclose to the board his interest in any transaction to be entered into by the company,<sup>91</sup> and failure to do so renders the transaction voidable by the company<sup>92</sup> unless the material facts of the director's interest in the transaction are known by the members and the transaction is approved by them,<sup>93</sup> or if the company received fair value for the transaction.<sup>94</sup> Nevertheless, he may vote on the transaction or attend a meeting relating to it and be counted for the purposes of a quorum.<sup>95</sup>

#### **14. Appointment and removal of directors**

The registered agent must appoint the first director(s) within 30 days of incorporation.<sup>96</sup> Subsequent directors can be appointed by resolution of members (unless the memorandum or articles provide otherwise), or by the directors if permitted by the memorandum or articles,<sup>97</sup> for such term as may be specified.<sup>98</sup> The directors may also fill a vacancy on the board unless the memorandum or articles provide otherwise.<sup>99</sup> However, unlike the IBC Act a person cannot be appointed a director unless he has consented in writing to be a director.<sup>100</sup>

A director may resign by giving written notice of his resignation.<sup>101</sup> A director may be removed by a resolution of members<sup>102</sup> that may only be passed either at a meeting of members whose purpose includes the removal of the director, or by a written resolution passed by at least 75% of

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86 Section 120(1)

87 Section 122

88 Section 120(2)

89 Section 120(3)

90 Section 121

91 Section 124

92 Section 125(1)

93 Section 125(2)(a)

94 Section 125(2)(b)

95 Section 125(4)

96 Section 113(1)

97 Section 113(2)(a) & (b). This provision is similar to section 43(1) of the IBC Act except that the IBC Act does not allow the memorandum or articles to exclude the right of members to appoint directors

98 Section 113(3)

99 Section 113(4). Under section 43(4) of the IBC Act, a vacancy may be filled by a resolution of members or of the majority of the remaining directors, subject to any limitations in the memorandum or articles

100 Section 112

101 Section 115(1). See IBC Act section 43(3)(b)

102 Section 114(1)

the members entitled to vote.<sup>103</sup> A director may also be removed by the directors where expressly permitted by the memorandum or articles.<sup>104</sup>

## 15. Shares

There are important differences between the new Act and the IBC Act in relation to shares, of which one of the most fundamental is that there is no longer a concept of authorised share capital, or indeed of share capital, under the new Act. Thus, companies that are authorised to issue shares, i.e. companies limited by shares, companies limited by guarantee authorised to issue shares, and unlimited companies authorised to issue shares, are not required to state in their memorandum<sup>105</sup> an authorised share capital, or the par value of shares with par value or the aggregate of such shares, or the amount to be represented by shares without par value,<sup>106</sup> or the currency of shares that the company is authorised to issue.<sup>107</sup> Instead, the memorandum of such companies must state the maximum number of shares they are authorised to issue.<sup>108</sup>

One consequence of not having an authorised share capital is that the new Act does not contain any specific provisions relating to capital.<sup>109</sup> Instead, these matters are now part of the provisions relating to the alteration of the memorandum and the purchase by the company of its own shares.

The new Act retains the same division between registered shares and bearer shares as the IBC Act. In the case of registered shares, title is prima facie evidenced by entry on the register of members<sup>110</sup> that must be kept by the company. The company's articles must state the circumstances in which share certificates will be issued.<sup>111</sup>

Shares may be issued at the discretion of directors on the terms and consideration determined by them.<sup>112</sup> Shares can be issued for consideration in kind<sup>113</sup> but it must not be less than the par value<sup>114</sup> if the share in question is a par value share. The new Act allows the memorandum or the terms on which shares are issued to contain provisions for the forfeiture of shares which are not fully paid for on issue.<sup>115</sup> Further, subject to the memorandum or articles, the directors may refuse or delay the registration of a transfer of shares if the holder has failed to pay any amount

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103 Section 114(2)(a) & (b). However, see IBC Act section 43(3)(a), which, subject to any limitations in the memorandum or articles, only requires a resolution of members or of directors for removal of directors that may be passed by a simple majority at a meeting, or an absolute majority by a written resolution

104 Section 114(4)

105 See section 9 generally

106 Cf. IBC Act section 12(1)(f)

107 Cf. IBC Act section 12(1)(e)

108 Section 9(1)(e)(i)

109 Cf. IBC Act sections 24 & 35

110 Sections 41(3), 42(1)

111 Section 44(1). See IBC Act section 27(1)

112 Section 45. See IBC Act section 17A

113 Section 47(1). See IBC Act section 19

114 Section 47(2). See IBC Act section 20

115 Section 51(1)

due in respect of them.<sup>116</sup> There is now a statutory provision that confirms that a company can give financial assistance in connection with the acquisition of its own shares.<sup>117</sup>

If the memorandum provides, a company can issue shares of different classes and different series within a class,<sup>118</sup> but the rights, privileges, restrictions and conditions attaching to each class of shares must also be specified.<sup>119</sup> Unlike the IBC Act, however, there is no need to specify the number of shares of each class or series or their par value<sup>120</sup> that the company is authorised to issue.

As noted above, the new Act sets out the default rights that a share confers on its holder, i.e. the right to one vote, and an equal share in any dividend and distribution of surplus assets,<sup>121</sup> but these can be modified, varied or excluded.<sup>122</sup> As with IBCs, a company can issue redeemable shares, preference shares, shares with no or only limited rights to distribution, shares with no or limited or conditional voting rights.<sup>123</sup> It can, subject to the memorandum and articles, also issue bonus shares, partly paid shares and nil paid shares.<sup>124</sup> It can issue fractional shares if permitted by its memorandum.<sup>125</sup> A company can also hold treasury shares, i.e. where the company has acquired its own shares but not cancelled them, if permitted by the memorandum or articles.<sup>126</sup>

Transfer of registered shares is by a written instrument of transfer signed by the transferor and containing the name and address of the transferee.<sup>127</sup> The instrument must be sent to the company for registration<sup>128</sup> and the company must enter the transferee's name in the register of members.<sup>129</sup> The transfer is effective when the name is so entered.<sup>130</sup> However, the directors may resolve to refuse or delay registration<sup>131</sup> but only if permitted by the new Act or the memorandum or articles.<sup>132</sup>

## 16. Bearer shares

Under the IBC Act the memorandum must contain a statement of the numbers of shares to be issued as registered shares and to bearer or an express grant of power to the directors to issue

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116 Section 54(7)

117 Section 28(2)(a)(iv)

118 Section 34(2)(a)

119 Section 9(1)(e)(ii). Cf. IBC Act section 12(1)(h) under which the directors can be expressly authorised in the memorandum to fix the rights, qualifications, limitations of each class or series of shares

120 IBC Act section 12(1)(g)

121 Section 34(1)

122 Section 34(2)(b)

123 See section 36(1)

124 Section 36(2)

125 Sections 39(1) & 9(3). Contrast the position under section 21 of the IBC Act where an IBC may issue fractional shares subject to any limitations or provisions to the contrary in its memorandum or articles

126 Section 64(1)

127 Section 54(1). See IBC Act section 30(1)

128 Section 54(3)

129 Section 54(4)

130 Section 54(8)

131 Section 54(4)

132 Section 54(5)

registered shares or shares to bearer at their discretion.<sup>133</sup> The new Act is more restrictive. A company cannot issue bearer shares unless expressly authorised by its memorandum to do so<sup>134</sup> and, similarly, registered shares cannot be converted to or exchanged for bearer shares unless specifically permitted in the memorandum.<sup>135</sup> The memorandum must state whether the company is or is not authorised to issue such shares.<sup>136</sup> However, segregated portfolio companies are not allowed to issue bearer shares or convert registered shares into bearer shares under the new Act.<sup>137</sup>

Bearer shares must be deposited with a custodian authorised or recognised by the FSC otherwise the shares are immobilised and the rights normally attaching to them are disabled, in particular any transfer of the certificate is void.<sup>138</sup> The custodian becomes the member of the company<sup>139</sup> but the beneficial ownership of the share vests in the intended bearer.<sup>140</sup>

## 17. Acquisition by the company of its own shares

The provisions relating to the acquisition of its own shares highlight the flexibility of the new Act. It allows a company to purchase, redeem or otherwise acquire its own shares in accordance with two distinct regimes: either under sections 60, 61 and 62 of the new Act,<sup>141</sup> or in accordance with its own memorandum or articles,<sup>142</sup> in which case the provisions of sections 60-62 do not apply to the extent that they are modified, negated or inconsistent with the provisions in the memorandum or articles.<sup>143</sup> The ability to provide for the acquisition of shares in the memorandum, to the exclusion of the statutory regime, will be of considerable benefit to companies, particularly mutual funds.

The statutory regime in sections 60-62 is itself very different from the provisions of the IBC Act. Under section 60, directors can make an offer to acquire shares either to all the shareholders<sup>144</sup> or to one or more shareholders.<sup>145</sup> An offer to all the shareholders must be one which if accepted would leave the relative voting and distribution rights unaffected.<sup>146</sup> An offer to one or more shareholders can only be made if either all the shareholders have consented in writing,<sup>147</sup> or if permitted by the memorandum or articles<sup>148</sup> and the directors have passed a resolution stating that in their opinion the acquisition is for the benefit of the remaining shareholders,<sup>149</sup> and the

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133 IBC Act section 12(1)(i)

134 Section 38(1)(a)

135 Section 38(1)(b) & (c)

136 Section 9(2)(b)(i)-(iii)

137 Section 39(3)

138 See sections 68(1) and 70(1), and Part III Division 5 generally

139 Section 41(1)(d)(iv)

140 Section 71(1)(a)

141 Section 59(1)(a)

142 Section 59(1)(b)

143 Section 59(2). By contrast, the regime for IBCs is statutory and related to the provisions for reduction of capital: see sections 33 and 35 of the IBC Act

144 Section 60(1)(a)

145 Section 60(1)(b)

146 Section 60(1)(a)(i)

147 Section 60(1)(b)(i)

148 Section 60(1)(b)(ii)

149 Section 61(1)(a)

offer and consideration are fair and reasonable to the company and the remaining shareholders.<sup>150</sup>

Section 62 deals with the situation where redemption is at the option of the shareholder. If the shareholder gives the company proper notice of his intention to redeem them, the company must redeem the shares on the date specified in the notice (or, if no date is specified, on the date of receipt of the notice), and from that date he ranks as an unsecured creditor of the company for the sum payable on redemption. The shares are deemed cancelled unless held as treasury shares.

The acquisition of its own shares, whether under the statutory regime or in accordance with its own memorandum or articles, is treated as a distribution to members which places an important restriction on the company: the directors must be satisfied on reasonable grounds that the company will satisfy the solvency test for distributions immediately after the acquisition,<sup>151</sup> i.e. that the value of its assets will exceed its liabilities and it will be able to pay its debts as they fall due,<sup>152</sup> and a resolution authorising the distribution must contain such a statement.<sup>153</sup> However, there is no need to satisfy the solvency test where the acquisition is pursuant to a shareholder's right whether under section 62 or under the memorandum or articles.<sup>154</sup>

## 18. Distributions and dividends

Under the IBC Act, dividends could only be declared and paid out of surplus<sup>155</sup> which was defined as the excess of the total assets over the sum of its liabilities as shown in the books of account and its capital.<sup>156</sup> However, under the new Act, there are two changes. First, the concept of surplus is no longer retained. Instead, distributions of the company's money or assets can only be made if the directors are satisfied on reasonable grounds that the company will, immediately after the distribution, satisfy the solvency test,<sup>157</sup> i.e. that the value of its assets exceeds its liabilities and it is able to pay its debts as they fall due.<sup>158</sup> Second, the provisions are not confined to dividends but relate to any "distribution" to a member. The definition of distribution is wide, encompassing the direct or indirect transfer of an asset to or for the benefit of a member and includes the purchase of an asset, the redemption or other acquisition of shares, and dividends.<sup>159</sup>

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150 Section 61(1)(b)

151 Section 57(1), and 59(1) which states "*Subject to section 57...*"

152 Section 56(a). This is similar to the requirement under the IBC Act for the acquisition of its own shares and reduction of capital in sections 33(4) and 35(4) respectively, except that under those provisions deferred taxes are not taken into account

153 Section 57(2)

154 Section 63(a) & (b)

155 IBC Act section 36(2)

156 IBC Act section 2(1) definition of "surplus"

157 Section 57(1). This must be stated in any resolution authorising the distribution: see section 57(2)

158 Section 56(a)

159 Section 56(b)

## 19. Registration of charges and priorities of charges

Under the new Act, a company must keep a register of charges at its registered office or at the office of its registered agent.<sup>160</sup> However, a feature of the new Act is that particulars of the charge can now be registered in a new, public Register of Registered Charges maintained by the Registrar in respect of each company.<sup>161</sup> Either the company or the chargee can apply to the Registrar for registration,<sup>162</sup> and there is no time limit for making such an application. Registration is not mandatory, and failure to register does not affect the charge's validity or enforceability even as against a liquidator or other creditors including secured creditors.

However, registration will affect priority for charges created on or after 1 January 2005.<sup>163</sup> Thus, a registered charge takes priority over an unregistered charge created on or after that date, as well as over a charge subsequently registered.<sup>164</sup> Charges created on or after 1 January 2005 which are not registered rank in the order they would have done had the section not come into effect.<sup>165</sup> Charges created before 1 January 2005 will continue to enjoy the priority they did, and if they would have taken priority over a charge created on or after that date, they will continue to take such priority.<sup>166</sup> The priority rules can be varied by agreement or consent.<sup>167</sup> The main exception to the order of priorities under the new Act relates to registered floating charges: these rank after a subsequently registered fixed charge unless the floating charge contained a negative pledge clause.<sup>168</sup>

## 20. Registered Agents, records and seals

As with IBCs, a company incorporated under the new Act must at all times have a registered agent in the BVI.<sup>169</sup> Failure to do so can result in the company being struck off the register.<sup>170</sup>

The company must keep certain documents with the registered agent viz. the memorandum and articles, the register of members (or a copy of it), the register of directors (or a copy of it), and copies of all notices and other documents filed by it in the previous 10 years.<sup>171</sup> It if keeps only copies of the register of members or directors with the registered agent, it must notify the registered agent in writing within 15 days of any changes to those registers,<sup>172</sup> and provide it with a record of the physical address where the originals are kept.<sup>173</sup> Minutes of meetings and resolutions of members, classes of members, directors and committees of directors may be kept

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160 Section 162(1) & (2). Cf. under the IBC Act it was optional to maintain a register of charges at its registered office: see section 70A(2) of the IBC Act

161 Section 163 generally

162 Section 163(1)

163 Section 166 generally

164 Section 166(1)

165 Section 166(2)

166 Section 167

167 Section 168(a)

168 Section 168(b)

169 Section 91(1) and IBC Act section 39

170 Section 213(1)(a)(i)

171 Section 96(1)

172 Section 96(2)(a)

173 Section 96(2)(b)

with the registered agent or at some other place<sup>174</sup> in which event the registered agent must be given a written record of the physical address where they are kept.<sup>175</sup>

Fortunately, unlike the IBC Act the new Act does not require a company to have a seal. Unfortunately, this reform was not carried forward to eliminate the need to have a company seal affixed to instruments governed by BVI law that are executed as deeds.

## **21. Merger, consolidation, sale of assets, forced redemptions, arrangements and dissenters**

The provisions relating to these matters in Part IX of the new Act are very similar to the equivalent provisions in ss.75-83 of the IBC Act, although the opportunity has been taken to clarify some of the provisions.<sup>176</sup> Thus, subject to their detailed provisions, Part IX of the new Act allows for: merger or consolidation, i.e. the consolidation of two or more companies into a new company, between companies<sup>177</sup> or merger between parent and subsidiary companies,<sup>178</sup> or merger or consolidation with foreign companies;<sup>179</sup> sale of more than 50% in value of the assets of the company otherwise than in the ordinary course of business;<sup>180</sup> forced redemption of minority shareholders;<sup>181</sup> and court approved schemes of arrangement.<sup>182</sup>

## **22. Continuation**

The provisions of Part X of the new Act allow a foreign company to continue as a company incorporated under the new Act but only if the laws under which it is registered authorise it to continue in another jurisdiction.<sup>183</sup> This is more restrictive than the IBC Act which allows a foreign company to continue as a company incorporated under the IBC Act notwithstanding any laws to the contrary in the place of incorporation of the foreign company.<sup>184</sup> However, there are certain defined circumstances when a foreign company cannot continue in the BVI, e.g. if it is in liquidation, or an application has been made in another jurisdiction for its liquidation, or a receiver or manager has been appointed in relation to any of its assets, or it has entered into an arrangement with its creditors.<sup>185</sup>

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174 Section 97(1)

175 Section 97(2)

176 E.g. compare sections 175 and 176 of the new Act with sections 80 and 81 of the IBC Act

177 Section 170

178 Section 172

179 Section 174

180 Section 175

181 Section 176

182 Section 177

183 Section 180(1)

184 IBC Act section 84(2)

185 Section 180(2)

A company<sup>186</sup> may continue under the laws of another jurisdiction if the Registrar would issue a certificate of good standing in respect of it,<sup>187</sup> but it does not cease to be incorporated under the new Act unless the laws of the other jurisdiction permit continuation and the company has complied with those laws.<sup>188</sup> The registered agent must file a notice with the Registrar to the effect that the company has continued its incorporation under foreign law within 30 days of company's continuation.<sup>189</sup>

## 23. Foreign companies

Foreign companies, i.e. companies incorporated outside the BVI and not continued in the British Virgin Islands,<sup>190</sup> cannot carry on business in the BVI unless they are registered under the new Act or have applied to be registered.<sup>191</sup> As with companies incorporated under the Act, they must also have a registered agent at all times.<sup>192</sup>

## 24. Voluntary liquidation

Part XII of the new Act allows a company to enter into voluntary, solvent liquidation through the appointment of a liquidator by members or directors. A company can only go into voluntary liquidation under Part XII if it either has no liabilities or it is able to pay its debts as they fall due,<sup>193</sup> if it is insolvent, it must go into insolvent liquidation under the Insolvency Act 2003.

The procedure requires the directors to make a declaration of solvency,<sup>194</sup> i.e. that in their opinion the company is and will continue to be able to discharge, pay or provide for its debts as they fall due, not more than four weeks before the appointment of a liquidator.<sup>195</sup> They must also approve a liquidation plan<sup>196</sup> at least six weeks before the appointment of a liquidator.<sup>197</sup> The liquidation plan must specify certain matters including the reasons for the liquidation, the liquidator's name and address and whether he is authorised to carry on any business.<sup>198</sup> The liquidator must be an individual.

The appointment of a liquidator is by a resolution of directors or members. The directors can appoint a voluntary liquidator in certain defined circumstances, e.g. if the time for the company's existence as specified in its memorandum or articles has expired, or if the company has never

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186 I.e. a company incorporated under the new Act, or continued as BVI business company under section 182, or a company incorporated under the IBC Act or under the Companies Act (Cap. 285) which re-registers as a BVI business company under Schedule 2 of the new Act: see definition of "company" in section 3(1) of the new Act

187 Section 184(1)

188 Section 184(2)

189 Section 184(3)

190 Section 3(2)

191 Section 186(1)

192 Section 189(1)

193 Section 197

194 Section 198(1)(a)

195 Section 198(2)(a)

196 Section 198(1)(b)

197 Section 198(3)

198 Section 198(1)(b)(i)-(v)

issued shares, or if the memorandum or articles permit them and the members have approved a liquidation plan.<sup>199</sup> Members have a more general power to appoint on the approval of the liquidation plan.<sup>200</sup> The voluntary liquidator need not be a licensed insolvency practitioner. However, a voluntary liquidator may not be appointed if an administrator or liquidator has been appointed under the Insolvency Act or an application to appoint them is pending, or the voluntary liquidator has not consented in writing, or the directors have not made a declaration of solvency or approved a liquidation plan.<sup>201</sup> A resolution to appoint in contravention of these provisions is void and of no effect.<sup>202</sup>

A voluntary liquidator has custody and control of the company's assets<sup>203</sup> (although this does not affect the rights of secured creditors),<sup>204</sup> and although the directors remain in office, they cease to have any powers or functions.<sup>205</sup> However, they can authorise the liquidator to continue the business if he determines that it would be in the best interests of the creditors or members.<sup>206</sup> A voluntary liquidator's duties are to realise the assets of the company, provide for the payment of all claims and liabilities, distribute any surplus to members, and prepare a statement of account,<sup>207</sup> and for these duties he has all the powers of the company not reserved to members by the new Act or by the company's memorandum or articles.<sup>208</sup> Once he has completed his duties, he must file a statement with the Registrar that the liquidation has been completed, and the company is then struck-off and dissolved.<sup>209</sup>

If the voluntary liquidator is of the opinion that the company is insolvent (either on a net assets basis or on a cash flow basis), he must notify the Official Receiver<sup>210</sup> and call a meeting of creditors within 21 days.<sup>211</sup> This is treated as a first meeting of creditors under the Insolvency Act<sup>212</sup> and the liquidation continues as under the Insolvency Act.<sup>213</sup>

## **25. Striking-off, restoration to the Register and undisposed of property**

The Registrar can strike the name of a company off the Register on five grounds, i.e. if it fails to appoint a registered agent, or file any document required to be filed, or if he is satisfied that it has ceased to carry on business, or it is carrying on business without a licence, or it fails to pay its annual fee or penalty.<sup>214</sup> However, before striking off in all cases except payment of annual fees or penalties, the Registrar must send the company a notice warning that it will be struck off

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199	Section 199(2)
200	Section 199(3)
201	Section 203(1)
202	Section 203(2)
203	Section 205(1)(a)
204	Section 205(2)
205	Section 205(1)(b)
206	Section 205(3)(a)
207	Section 206(1)
208	Section 206(2)
209	Section 208(1)
210	Section 209(2)
211	Section 210(1)
212	Section 210(2)
213	Section 211(2)
214	Section 213(1) generally

unless the company shows cause,<sup>215</sup> and he must publish a notice of his intention in the Gazette.<sup>216</sup> Where a company is struck off, it or its directors, members or any liquidator cannot carry on its business or deal with its assets, or commence or defend legal proceedings,<sup>217</sup> but it is not prevented from incurring liabilities and a creditor is not prevented from making a claim or pursuing a claim to judgment or execution.<sup>218</sup>

The company, its members, directors, its liquidator or receiver can apply to the Registrar for the restoration of the company to the Register.<sup>219</sup> A person aggrieved by the striking off, e.g. a creditor, can apply to the Court for relief.<sup>220</sup> If the company remains struck off for a period of 10 years, it is dissolved automatically.<sup>221</sup>

Where a company has been dissolved, an application can be made to Court within 10 years of dissolution to restore the company to the Register.<sup>222</sup> The application can be made by the company, a creditor, a member or liquidator,<sup>223</sup> and the Court has a wide jurisdiction to restore the company subject to such conditions as it considers just.<sup>224</sup> Where a company is restored to the Register by the Court, it is deemed never to have been struck off.<sup>225</sup>

A company's property that is not disposed of at the date of its dissolution vests in the Crown.<sup>226</sup> Such property (save for money) that is not disposed of by the Crown must be returned to the company upon its restoration;<sup>227</sup> as regards money, the company is entitled to be paid out of the Consolidated Fund.<sup>228</sup> The Crown can disclaim onerous property,<sup>229</sup> i.e. unprofitable contracts, or, e.g. property that is unsaleable or which may give rise to a liability to pay money, e.g. a lease. The effect of disclaimer is that the property does not vest in the Crown<sup>230</sup> and the company's rights, interests and liabilities in the property are released with effect from prior to the dissolution.<sup>231</sup>

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215 Section 213(3)(a)

216 Section 213(3)(b)

217 Section 215(1)

218 Section 215(3)

219 Section 215(2)

220 Section 214(1)

221 Section 216

222 Section 218(1). This provision is wide enough to apply to a dissolution following liquidation as well as dissolution following the striking-off of the company's name. The IBC Act did not contain any provisions for restoring a company that was dissolved after liquidation but in the case of *In the matter of Lanbridge Management Inc* (Civil Suit No. 118 of 2002), judgment of D'Auvergne J of 23.11.02, the High Court held that it had inherent jurisdiction to restore a company following a liquidation

223 Section 218(1)

224 Section 218(2)

225 Section 218(3)

226 Section 220(1)

227 Section 220(2)

228 Section 220(3)

229 See generally section 221

230 Section 221(5)

231 Section 221(6)

## 26. Transitional provisions

Given the large volume of companies incorporated under the IBC Act, a flexible transition period will operate for two years during which time both the IBC Act and the new Act will remain in force. In outline, the following timetable will apply during the transition period:<sup>232</sup>

- 1 January – 31 December 2005: it will be possible to incorporate new companies under either the IBC Act or the new Act. Existing IBCs will be able to re-register under the new Act.<sup>233</sup>
- 1 January – 31 December 2006: new incorporations will only be possible under the new Act.<sup>234</sup> Existing IBCs will be permitted to continue under the IBC Act but they will be able to re-register under the new Act.<sup>235</sup>
- 1 January 2007: all remaining IBCs incorporated under the IBC Act will be automatically re-registered under the new Act.<sup>236</sup>

During 2005, appropriate transitional provisions will be drafted to allow for the final transition of all remaining IBCs to the new Act on 1 January 2007.

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232 Section 248 & Schedule 2

233 Schedule 2, paragraph 2

234 Section 250 and Schedule 3, repeal of IBC Act section 3 from 1 January 2006

235 Schedule 2, paragraph 2

236 Schedule 2, paragraph 4