

PORTCULLIS TRUSTNET NEWSLETTER NEWSFLASH BULLETIN (2005/1)[↓]

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BRITISH VIRGIN ISLANDS COMPANY LAW AMENDMENTS

On 21 November the British Virgin Islands Financial Services Commission (“FSC”) released to the BVI financial services industry a copy of the draft amendment (“the Amendment”) to the BVI Business Companies Act 2004 (“BCA”).

The FSC has indicated its intention to pass the Amendment into law in December 2005 together with related transitional provisions and regulations. The Amendment may be subject to some changes but should be substantially in the form supplied to the industry.

The FSC has also held discussions (“the Discussions”) with the industry in November and December to explain in general the BCA, the Amendment and answer questions relating to the same.

The following is a summary of the main points of the Amendment and indications arising from the Discussions;

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The Amendments

a. Extension of 30 day Director Appointment Rule

The BCA provides that the first registered agent of a company shall, within thirty days of the date of incorporation of the company, appoint one or more persons as the first directors of the company. The Amendment extends that appointment period to 6 months.

The Amendment also deals with a problem that arose from the BCA provision requiring that a company have a member at all times. The issue being that upon incorporation clearly a company would not have a member. The Amendment provides that this requirement does not apply during the period from the incorporation of the company to the appointment of its first directors.

The combination of above requirements means that immediately upon the appointment of directors, the company must issue membership interests i.e. shares in the case of a company limited by shares.

b. Reserve Directors

The Amendment provides for reserve directors. The relevant provisions are very similar to the Hong Kong Companies Ordinance. The provisions will be applicable in situations where a company has only one member who is an individual and that member is also the sole director of the company. In such cases the sole member /director may, by instrument in writing, nominate a person as a reserve director of the company to act in the place of the sole director in the event of his death.

The new provisions are extremely useful in cases where a sole director/member dies leaving no person with proper authority to update the register of members to show the administrator as the new member. The new provisions now provide a means to deal with cases where this issue arises.

c. “Shadow Directors”

Whilst the term is not used in the BCA or the Amendment, the Amendment sets out provisions that will be applicable to so called “shadow directors”. A shadow director may be seen as one who can be said to have a 'real influence' on the affairs and management of a company. The Amendment seems to some extent to reflect this interpretation but does not go so far as to deem a person as a ‘shadow director’ where there is already a director. Accordingly the Amendment provides that where at any time a company does not have a director, any person who manages, or directs or supervises the management of, the business and affairs of the company is deemed to be a director of the company. The effect of the new provision is that the deemed

director will in addition to appointment also take on all the duties owed by a director as well as the consequential liabilities for breach of duty.

The provision will obviously have ramifications for parties involved in the management of a company where there is no director. The provision could potentially affect Registered Agents during the period from incorporation till the date the Registered Agent appoints directors. Issues however should not arise provided proper control is exercised over the incorporation documents of companies prior to directors being appointed.

d. Priority of Charges

The Amendment resolves an issue arising from the BCA in relation to the priority of charges. The BCA provisions are drafted such that charges created by an international business company (“IBCs”) from 1 January 2005 to 31 December 2006 lose priority to a charge created on or after voluntary re-registration or automatic re-registration on 1 January 2007 and filed with the Registrar under the BCA. Clearly this is concerning for holders of charges given by IBCs prior to re-registration.

The Amendment resolves the issue by giving priority to all charges created by an IBC prior to re-registration (automatic or voluntary). Thus a charge created and registered under the BCA after voluntary or automatic re-registration will not take priority over charges created prior to the IBC’s re-registration.

The Discussions

As mentioned above the following is a summary of the indications given by the FSC in the Discussions. The summary is given based solely on the Discussions and is not based on a review of any relevant provisions. It is therefore in no way intended to be comprehensive, exhaustive or conclusive with respect to the matters discussed.

a. Grandfathering in of IBCs Automatically Re-registered on 1 January 2005 under the BCA

There are two general issues that arise under the BCA, which may have resulted in the suggestion to include grandfathering provisions in the BCA. The issues are as follows;

- i. For companies limited by shares the BCA determines annual registration fees by reference to the number of shares a company is authorised to issue. Under the International Business Companies Act 1984 (“the IBC Act”) fees for the same type of company are determined by reference to the company’s authorised capital. Given authorised capital has been abolished and that the bulk of companies incorporated in the BVI are limited by shares, apparent

problems arise as to how to determine annual fees for IBCs upon automatic re-registration on 1 January 2007.

The solution appears to be to allow IBCs to continue to determine fees by reference to their authorised capital. This will avoid the substantial administrative issues that we believe would have occurred for the Registrar, Registered Agents, legal practitioners and clients in general.

- ii. The BCA contains a deeming provision, which provides that the memorandum and articles (“M&A”) of a company have no effect to the extent that they contravene or are inconsistent with the BCA. One result of this provision is that where IBCs are automatically re-registered on 1 January 2007 they may be prejudiced if they continue to follow any provisions of their M&A which, whilst they may be consistent with the IBC Act, are inconsistent with the BCA. Although it is not certain, the capital and surplus provisions of an M&A may be inconsistent with the BCA and thus fall within the deeming provision. This becomes problematic for companies who continue to follow such provisions after automatic re-registration.

A possible solution is to allow IBCs to elect to continue to use the provisions in their M&A and the IBC Act relating to capital and surplus. It is understood however that the provisions of the BCA will need to prevail in some circumstances. Where that happens the company will need to follow the provisions in the IBC Act, the M&A and also the BCA. For example, where a dividend is declared following the provisions of the company’s M&A and the IBC Act, the company will also need to satisfy the solvency test under the BCA. Accordingly in some cases companies will need to follow the provisions of each Act.

The FSC has indicated that the above will be given effect by way of transitional provisions, which may be included in regulations or released as a separate piece of subsidiary legislation.

b. Approved Forms

The BCA contains references throughout to approve forms, which are to be published in the Gazette. To date this has not happened. Approved forms include those for registration of a charge and variations of the same, registered agent incorporation consent form, certificate of incorporation, certificate of dissolution and others. Notwithstanding the forms have not been published the Registry of Corporate Affairs has since the commencement of the BCA accepted from and supplied to Registered Agents approved forms so that

matters can be processed. The FSC has indicated all approved forms will be published in the Gazette in December.

c. Regulations

The FSC indicated that Regulations would be prescribed in December.

From the Discussions, some indication was given that the Regulations may cover the following matters;

- i. Grandfathering in provisions mentioned above;
- ii. Provisions setting out the rules for the reuse of names;
- iii. Provisions allowing bearer shares issued by IBCs prior to 1 January 2005 (“relevant bearer shares”) to be given till 31 December 2010 to be deposited with an authorised or recognised custodian. The IBC Act currently provides for relevant bearer shares to be given till 31 December 2010 to be deposited with a custodian. After that date relevant bearer shares will lose all entitlements. However the BCA does not provide for a similar grace period. The result is that on automatic re-registration of all IBCs on 1 January 2007 the grace period for relevant bearer shares will cease. This issue should be addressed in the regulations.
- iv. Any limitations on the business a BCA company may carry on which will need to be stated in the memorandum. We understand the limitations will be similar as those provided for under the IBC Act i.e. restrictions from carrying on banking, trust, mutual fund, insurance or similar business that requires licencing.

Portcullis TrustNet will provide further updates with respect to the BCA as soon as they become available.

Please refer any questions you may have to any one of our Singapore, Hong Kong or British Virgin Islands offices.

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