

TYPES OF COMPANIES UNDER THE BVI BUSINESS COMPANIES ACT, 2004

1 Introduction

The BVI Business Companies Act, 2004 (as amended,¹ the *Companies Act*) offers a wide choice of corporate vehicles.² The Companies Act allows for the incorporation of the following types of companies:

- (a) companies limited by shares;
- (b) companies limited by guarantee;
- (c) companies limited by guarantee authorised to issue shares;
- (d) unlimited companies with or without shares;
- (d) restricted purposes companies (or SPVs); and
- (e) segregated portfolio companies (or SPCs).

The Companies Act also regulates foreign companies that intend to do business in the British Virgin Islands and companies that migrate into the British Virgin Islands and continue thereafter as British Virgin Islands companies.

¹ As at 1 January 2009, the following amending legislation has been passed: the BVI Business Companies (Amendment) Act, 2005 (No. 26 of 2005), the BVI Business Companies (Amendment) Act, 2006 (No. 12 of 2006), the BVI Business Companies (Amendment of Schedules) Order, 2006 (Statutory Instrument No. 84 of 2006), the BVI Business Companies (Amendment of Schedules) Order, 2007 (Statutory Instrument No. 44 of 2007) and the BVI Business Companies (Amendment of Schedules) (No. 2) Order, 2007 (Statutory Instrument No. 80 of 2007). Unless otherwise indicated, references to sections in this Guide are to section of the Companies Act.

² Section 5

2 Company limited by shares

A company limited by shares is one that can issue shares, its members are the holders of such shares, and the liability of the members for the debts of the company is limited.

In order to be incorporated as a company limited by shares under the Companies Act, the memorandum of association (*memorandum*) must specifically state

- (a) that it is such a company;³
- (b) the maximum number of shares that the company is authorised to issue or that the company is authorised to issue an unlimited number of shares;⁴ and
- (c) the classes of shares and (if there is to be more than one class) the rights, privileges, restrictions and conditions attaching to each such class.⁵

There must be at least one shareholder at all times,⁶ but this requirement does not apply during the period from incorporation of the company to the appointment of the first directors.⁷

A member of a limited company has no liability as a member for the debts and obligations of the company⁸ and is a statutory affirmation of the principle that the company has separate legal personality from its members.⁹ A creditor cannot sue a member of a limited company for the company's debts. However, where there are no members, any person doing business on behalf of or in the name of the company is personally liable for its debts.¹⁰

A shareholder's liability to contribute to the company's assets is limited to (i) the amount unpaid on shares held by him,¹¹ (ii) any liability expressly provided for in the memorandum or articles of association (*articles*)¹² and (iii) a liability to repay any distribution made under section 58¹³ in contravention of the solvency requirements.

³ Section 9(1)(b)(i)

⁴ Section 9(1)(e)(i)

⁵ Section 9(1)(e)(ii)

⁶ Section 79(1)

⁷ Section 79(1A)

⁸ Section 80(1).

⁹ Expressly provided for in section 27

¹⁰ Section 108

¹¹ Section 80(2)(a)

¹² Section 80(2)(b)

¹³ Section 80(2)(c)

The memorandum or articles may expressly provide for additional liability on the part of a shareholder to the company (for example, a liability to contribute further equity) and specify when such liability should accrue.

British Virgin Islands company law no longer employs traditional concepts of “authorised capital” and “capital”. These Victorian concepts are regarded as redundant for they do not represent the true capital in the company. Only the maximum number of shares that a company is authorised to issue or that the company is authorised to issue an unlimited number of shares needs to be stated in the memorandum.¹⁴

All companies that are incorporated under the Companies Act, including companies limited by guarantee, are subject to the same rules for distributions to members. Those rules, set out in Part III, Division 4 of the Companies Act, require the directors to be satisfied as to the solvency test,¹⁵ (i.e. that the company will be both balance sheet (net assets) solvent and cash-flow solvent immediately after the distribution),¹⁶ and to state this in their resolution authorising the distribution.¹⁷ This is discussed in more detail in the *Guide on Shares and Distributions under the BVI Business Companies Act*.

3 Company limited by guarantee not authorised to issue shares

Companies limited by guarantee have traditionally been used in other jurisdictions for charitable and social purposes (for example, trade unions), there is no reason why they cannot be successfully employed in business enterprises. These companies do not have shares and their members are not shareholders but are referred to as guarantee members.

In order to be incorporated as such a company, the memorandum must state that it is a company limited by guarantee that is not authorised to issue shares.¹⁸ The essence of such a company is that its guarantee members’ liabilities to contribute to the company’s assets only arise in the event that the company goes into voluntary liquidation under the Companies Act or insolvent liquidation under the Insolvency Act, 2003 and are limited to an amount that must be stated in the memorandum.¹⁹ The memorandum or articles can also expressly provide for any additional liability to the company²⁰ and, as mentioned above in relation to companies limited by shares, there is no reason why that liability cannot arise while the company is a going concern. This can be a useful mechanism for providing for annual payments or subscriptions by members. A guarantee

¹⁴ Section 9(1)(e)(i)

¹⁵ Section 57(1)

¹⁶ Section 56(a)(i) and (ii)

¹⁷ Section 57(2)

¹⁸ Section 9(1)(b)(ii)

¹⁹ Sections 9(1)(f), 80(3)(a)

²⁰ Section 80(3)(b)

member will also be liable to repay any distribution made under section 58 in contravention of the solvency requirements.²¹

The general rule of limited liability applies - guarantee members are not liable as members for the debts or obligations of the company.²² A company limited by guarantee must have at least one guarantee member at all times,²³ but this requirement does not apply during the period from incorporation of the company to the appointment of first directors.²⁴ One contrast with companies limited by shares is in the voting rights of members. For companies limited by shares, a shareholder has the total number of votes attached to the shares that he holds,²⁵ whereas a guarantee member is entitled to one vote unless the memorandum or articles provide otherwise.²⁶

4 Company limited by guarantee and authorised to issue shares

This hybrid corporate vehicle is a guarantee company but with the flexibility of being able to issue shares. In order to be incorporated as such a company, the memorandum must state that it is a company limited by guarantee that is authorised to issue shares.²⁷ As it is a hybrid vehicle, the memorandum must contain the matters required for guarantee companies as well as for companies limited by shares. Accordingly, it must state:

- (a) the amount which each guarantee member is liable to contribute to the company's assets upon a liquidation;²⁸
- (b) the maximum number of shares the company is authorised to issue or that the company is authorised to issue an unlimited number of shares;²⁹ and
- (c) the classes of shares and the rights, privileges, etc. attaching to each class if there is to be more than one class of shares.³⁰

At least one of its members must be a guarantee member,³¹ but it can also have shareholders. The guarantee member's liability to the company will be the same as set out above in relation to a company limited by guarantee not authorised to issue shares,³² and a shareholder's liability is as discussed above in relation to a

²¹ Section 80(3)(c)

²² Section 80(1)

²³ Section 79(2)

²⁴ Section 79(1A)

²⁵ Section 81(3)(a)

²⁶ Section 81(3)(b)

²⁷ Section 9(1)(b)(iii)

²⁸ Section 9(1)(f)

²⁹ Section 9(1)(e)(i)

³⁰ Section 9(1)(e)(ii)

³¹ Section 79(2)

³² Sections 9(1)(f), 80(3)

company limited by shares.³³ A shareholder member will have the votes attached to his shares,³⁴ while a guarantee member will have one vote unless the memorandum or articles provide otherwise.³⁵

5 Unlimited company not authorised to issue shares

This new type of company is one that does not issue shares and therefore has no members who are shareholders. Its members have unlimited liability for the liabilities of the company³⁶ and are therefore referred to as unlimited members.³⁷ Its memorandum must state that it is such a company,³⁸ and it must have at least one unlimited member at all times.³⁹ Each member will have one vote unless the memorandum or articles provide otherwise.⁴⁰

The definition of unlimited liability in section 80(4) appears to be very wide for it is not expressly stated to be a liability to the company (as is the case with the definition of shareholder's liability⁴¹ and guarantee member's liability).⁴² The definition has to be read together with provisions of the Insolvency Act, in particular section 195, from which the intention is clear that the liability of unlimited members is indeed a liability to the company to contribute to its assets in liquidation. This accords with the principle enshrined in the Companies Act that an incorporated company (even an unlimited company) has separate legal personality from its members,⁴³ with the consequence that its debts and liabilities are not in general those of its members.⁴⁴ However, the Companies Act does not expressly restrict the liability to when the company goes into liquidation⁴⁵ so that the memorandum could provide for the member to contribute to the assets of the company while it is a going concern.

6 Unlimited company authorised to issue shares

It is also possible to incorporate an unlimited company that can issue shares. Its memorandum must state that (i) it is such a company,⁴⁶ and (ii) it must also state the maximum number of shares that it is authorised to issue or that the company is

³³ Section 80(2)

³⁴ Section 81(3)(a)

³⁵ Section 81(3)(b)

³⁶ Section 80(4). Such liability is not expressly confined to when the company is in liquidation.

³⁷ Sections 78, 79(3)

³⁸ Section 9(1)(b)(iv)

³⁹ Section 79(3)

⁴⁰ Section 81(3)(b)

⁴¹ Under section 80(2)

⁴² Under section 80(3)

⁴³ Section 27

⁴⁴ See e.g. *Salomon v Salomon* [1897] AC 22; *J H Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1990] 2 AC 418

⁴⁵ Unlike the definition of liability for guarantee members: see section 9(1)(f). See also Insolvency Act section 195(1)(b)

⁴⁶ Section 9(1)(b)(v)

authorised to issue an unlimited number of shares,⁴⁷ (iii) the classes of shares, and (iv) if more than one, the rights, restrictions, etc. attaching to each class.⁴⁸ It must have at least one member who is an unlimited member,⁴⁹ i.e. who has unlimited liability for the liabilities of the company⁵⁰ as explained above, but this requirement does not apply during the period from incorporation of the company to the appointment of first directors.⁵¹

7 Restricted purposes companies

Restricted purposes companies are an innovation under British Virgin Islands law introduced by the Companies Act to provide special purpose vehicles especially for securitisation and off-balance sheet financing work. In order to create a restricted purposes company, three requirements are necessary:

- (a) the company must be a company limited by shares;⁵²
- (b) the memorandum as filed on incorporation must state that it is a restricted purposes company;⁵³ and
- (c) the memorandum must state the actual purposes of the company.⁵⁴

If those requirements are met, the company will be registered as a restricted purposes company⁵⁵ and will be required to have the acronym “(SPV)” in its name.⁵⁶ A restricted purposes company can also be a segregated portfolio company.

In order to be a restricted purposes company, the company must be incorporated as such from the outset - a company cannot subsequently register as one.⁵⁷ Therefore, a company that is not a restricted purposes company cannot amend its memorandum to state that it is such a company, and any resolution passed by its members or directors to that effect is void.⁵⁸

Once registered as a restricted purposes company, a company cannot amend its memorandum to delete or modify the statement that it is a restricted purposes company, and any resolution to that effect by its members or directors is void.⁵⁹

⁴⁷ Section 9(1)(e)(i)

⁴⁸ Section 9(1)(e)(ii)

⁴⁹ Section 79(3)

⁵⁰ Section 80(4)

⁵¹ Section 79(1A)

⁵² Section 2 for definition of “restrictive purposes company”; and section 8(1).

⁵³ Section 8(1)(a): “...the memorandum...as filed under section 6...”

⁵⁴ Section 10(2)

⁵⁵ Section 8(1)(a)

⁵⁶ Section 17(3)

⁵⁷ Section 8(2)

⁵⁸ Section 14(3)

⁵⁹ Section 14(1)

However, the purposes in the memorandum may be modified unless the memorandum specifically states that they cannot be amended.⁶⁰

It is intended that these companies will be exempt from the Administration provisions under Part III of the Insolvency Act if those provisions are ever brought into force. However, no amendments have yet been made to the Insolvency Act to reflect that intention.

8 Segregated Portfolio Companies

The Companies Act allows insurance companies and mutual funds to incorporate or register as segregated portfolio companies (*SPCs*),⁶¹ and there is a provision to enact Regulations to allow other types of companies to incorporate or register as SPCs.⁶² SPCs are a highly regulated specialised type of company which allows the compartmentalisation of different classes of assets and liabilities within a single corporate entity. Please see the *Guide on Segregated Portfolio Companies under the BVI Business Companies Act* for more details.

9 Foreign Companies

Whilst the Companies Act is principally concerned with companies incorporated under it or which register under it, Part XI regulates foreign companies⁶³ which do business in the British Virgin Islands. Such companies cannot carry on business in the British Virgin Islands unless they register, or have applied to the Registrar to register, as foreign companies⁶⁴ under a new Register of Foreign Companies.⁶⁵

Failure by a foreign company to register does not affect the validity or enforceability of any transaction entered into by it⁶⁶ but means that it commits an offence.⁶⁷ It must also have a registered agent in the British Virgin Islands at all times⁶⁸ and must file an annual return by 31 March of every year made up to 31 December of the previous year.⁶⁹

If the Registrar considers that the name of a foreign company that applies for registration is undesirable, he must not register the company unless it applies to be registered with an alternate name acceptable to the Registrar.⁷⁰ Where the Registrar is satisfied that the name or alternate name of a foreign company that is registered under the Companies Act is undesirable, he must serve notice on the

⁶⁰ Sections 14(2) and 12(2)

⁶¹ Section 135(2)(a) and (b)

⁶² Section 135(2)(c)

⁶³ i.e. any body corporate formed, incorporated or registered outside the BVI: see section 3(2)

⁶⁴ Section 186(1)(a) and (b)

⁶⁵ Section 187

⁶⁶ Section 195

⁶⁷ Section 186(3), and is liable on a summary conviction to a fine of \$10,000

⁶⁸ Section 189(1)

⁶⁹ Section 192(1)

⁷⁰ Section 187(2)

company to cease carrying on business in the British Virgin Islands using that name.⁷¹ Within thirty days after the date of service of the notice the company must apply to the Registrar to be registered under an alternate name acceptable to the Registrar.⁷²

A foreign company that carries on business in the British Virgin Islands must ensure that its full corporate name or its registered alternate name is used in every communication sent by it and in every document issued or signed on its behalf that creates a legal obligation of the company.⁷³ Where registered under an alternate name the foreign company must state in every communication and document that the alternate name is not the corporate name under which the company is registered in its place of incorporation.⁷⁴

10 Company names

Limited companies (i.e. companies limited by shares, companies limited by guarantee whether or not authorised to issue shares)⁷⁵ must end with any of “Limited”, “Corporation”, “Incorporation”, “Societe Anonyme” or “Sociedad Anonima”, or their corresponding abbreviations, “Ltd”, “Corp”, “Inc”, or “S.A.”.⁷⁶ An unlimited company must end with either “Unlimited” or its abbreviation, “Unltd”.⁷⁷ A restricted purposes company must end with either “(SPV) Limited” or “(SPV) Ltd”,⁷⁸ while segregated portfolio companies must include “Segregated Portfolio Company” or “SPC” immediately before one of the endings referred to above.⁷⁹ The name of a segregated portfolio company that is also a restricted purposes company must include the designation “(SPV)” immediately before or after the designation “Segregated Portfolio Company” or “SPC”.⁸⁰ By virtue of the BVI Business Companies (Company Names) Regulations, 2007 (No. 49 of 2007) a limited company that is also a private trust company in accordance with the Financial Services (Exemptions) Regulations, 2007 (No. 50 of 2007) is required to include the designation “(PTC)” immediately before one of the above endings.

In addition a company’s name can be in the form “BVI Company Number ” followed by its company number in figures,⁸¹ for example “BVI Company Number 1234567 Ltd.”, which is designed to assist those incorporating batches of off-the-shelf companies. Further, a company may have an additional foreign

⁷¹ Section 190(1)

⁷² Section 190(4)

⁷³ Section 191(1)

⁷⁴ Section 191(3)

⁷⁵ See definition of “limited company” in section 2

⁷⁶ Section 17(1)(a) to (d)

⁷⁷ Section 17(2)

⁷⁸ Section 17(3)

⁷⁹ Section 17(4)

⁸⁰ Section 17(4A)

⁸¹ Section 19

character name approved by the Registrar,⁸² a provision which is particularly aimed at the Chinese and Russian markets. The approval, use and change of foreign character names will be governed by Regulations.⁸³

10.1 Restrictions on names

Certain names cannot be used, for example:

- (a) a name under which a company is already registered;⁸⁴
- (b) a name that is so similar to that of a registered company that in the Registrar's opinion it is likely to confuse or mislead;⁸⁵
- (c) a name that is identical to a name that has been reserved or is so similar to a reserved name that in the Registrar's opinion is likely to confuse or mislead;⁸⁶
- (d) a name which contains a restricted word or phrase unless the Financial Services Commission has given prior written approval;⁸⁷ or
- (e) a name that in the opinion of the Registrar is offensive or objectionable.⁸⁸

Regulations are supposed to be made providing for the re-use of names previously used by companies (including companies originally incorporated under earlier legislation) where, for example, such companies have changed their names or been struck off,⁸⁹ although to date these have not been issued.

10.2 Use of a company's name

The company's full name and, if it has one, its foreign character name must appear in every written communication sent by or on behalf of the company⁹⁰ and in every document (which includes data stored on disc or tape)⁹¹ issued or signed by or on behalf of the company which evidences or creates a legal obligation of the company.⁹²

⁸² Section 20(1)

⁸³ Section 20(2)

⁸⁴ Section 18(1)(b)(i)

⁸⁵ Section 18(1)(b)(ii)

⁸⁶ Section 18(1)(c)

⁸⁷ Section 18(1)(d)

⁸⁸ Section 18(1)(e)

⁸⁹ Section 24

⁹⁰ Section 26(1)(a)

⁹¹ See definition of "*document*" in section 2

⁹² Section 26(1)(b)

10.3 Change of name

A company may change its name by making an application to the Registrar in the approved form.⁹³ If the Registrar is satisfied that the new name complies with the statutory provisions for names, she will register the company's new name and issue a certificate of change of name to the company.⁹⁴ The new name takes effect from the date of the certificate of change of name.⁹⁵ The company's memorandum and articles are deemed to be amended to state the new name from the date of the change of name certificate.⁹⁶

The Registrar also has the power to direct the company by written notice to change its name if she considers that the existing name does not comply with the requirements of the Companies Act.⁹⁷ If a company fails to file an application for change of name after having received the notice, the Registrar herself may assign the company a new name.⁹⁸ She must register the change of name, issue a certificate of change of name and advertise the change of name in the *Gazette*.⁹⁹

If you would like further information on the subject matter of this Guide please contact Leonard Birmingham at leonard.birmingham@harneys.com, Jacqueline Daley-Aspinall at jacqueline.daley@harneys.com or your usual contact at Harneys. Alternatively, you can visit our website at www.harneys.com.

This Guide is general in scope and is not intended to be comprehensive. It is not a substitute for legal advice.

January 2009

⁹³ Section 21(1)
⁹⁴ Section 21(2)
⁹⁵ Section 23(1)(a)
⁹⁶ Section 23(2)
⁹⁷ Section 22(1)
⁹⁸ Section 22(2)
⁹⁹ Section 22(3)(a) to (c)