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BVI Business Companies (Amendment) Act, 2015

The BVI Business Companies (Amendment) Act, 2015 and the BVI Business Companies (Amendment) Act 2016 (the “**Amending Acts**”) were recently gazetted in the Official Gazette of the British Virgin Islands (“**BVI**”) and introduce amendments to the BVI Business Companies Act, 2004 (the “**Act**”) to provide further flexibility and certainty to transactions worldwide involving BVI companies and demonstrates the BVI Government’s commitment to ensure the BVI remains at the forefront of international compliance and anti money laundering regulations.

The Amending Act, which is complemented by amendments to the Anti-money Laundering and Terrorist Financing (Amendment) Code of Practice and the Anti-money Laundering (Amendment) Regulations, came into force on 15 January 2016 with the exception of the amendments to sections 27 and 28 of the Amending Act which relate to the maintaining and filing of the registers of directors with the BVI Registry of Corporate Affairs. These amendments are presently scheduled to come into force on 1 April 2016.

1. Summary

The changes proposed by the Amending Act have the following aims:

- to increase the use of BVI companies as publicly listed entities and as companies involved in cross-border transactions;
- to keep the BVI corporate regime at the forefront of international best practices; and
- to clarify and further enhance existing provisions of the Act.

We have examined the key amendments in more detail below.

2. Publicly listed BVI companies and cross-border transactions

2.1. Register of shareholders

Where a BVI company is listed on a recognised stock exchange¹, it is optional to maintain a register of shareholders. If such company does keep a register, the information contained therein may be kept in the form required under section 41 of

¹ The Regulatory Code (Recognised Exchanges), Notice 2015 lists the 31 exchanges which the Financial Services Commission recognises. The notice shall come into force on the same date as the Amending Act.

the Act (containing the names and addresses of shareholders, number of each class and series of registered shares, etc.) or in such other form as the company's articles of association permit or as may be approved by a resolution of shareholders.

2.2. Transfer of shares

Subject to the company's memorandum and articles and the Listed Companies and Funds Regulations, shares of a BVI company listed on a recognised stock exchange are permitted to be transferred without the need of a written instrument of transfer as long as the shares are transferred in accordance with the relevant stock exchange regulations.

2.3. Execution of BVI law governed documents

The Amending Act clarifies matters in relation to the execution requirements of BVI law governed deeds and documents in two different ways:

- In relation to transactions where pre-executed signature pages are attached to the final version of deeds or other instruments governed by BVI law, the Amending Act clarifies that such final version will be considered validly executed as long as a pre-executed signature page is attached to the document at the closing of the transaction, thereby disapplying the rule in the Mercury case².
- With respect to the execution of deeds or other instruments governed by BVI law by non BVI entities, the Amending Act confirms that said deeds or documents will be considered validly executed when they are executed in accordance with the requirements for execution of documents in the jurisdiction in which the non BVI entity is incorporated, registered or organised.

2.4. Arbitration

The Amending Act complements the position under common law and the framework introduced by the Arbitration Act, 2013 by making a specific provision permitting BVI companies to include an arbitration clause in their articles of association.

3. International best practices

3.1. Record keeping obligations

The Amending Act has included and strengthened the existing financial record keeping obligations which were found in the BVI's Mutual Legal Assistance (Tax Matters) Act,

² In the English High Court case of *R (on the application of Mercury Tax Group Ltd and another) v HMRC & Others* [2008] EWHC 2721 the judge said (1) in relation to the execution of deeds that "the signature and the attestation must form part of the same physical document"; and (2) in relation to all documents, that the document to be signed should exist "as a discrete physical entity (whether in a single version or in a series of counterparts) at the moment of signing. This led to uncertainty with respect to the way in which transaction documents should be executed at virtual signings or closings.

2003 in order to comply with the most recent OECD recommendations and requirements.

BVI companies are now required to keep the records and underlying documentation of the company at the office of the registered agent or at any other place, as determined by the directors of the company, for a period of at least five years from the date of the completion of the transaction to which the documents are related, or from the date of termination of the business relationship to which the documents are related. Should the place where records are kept, or the person maintaining them, change, the company must provide the registered agent with updated information within 14 days of the change.

The scope of the records and documentation has been clarified so that they include invoices, contracts and related documents in relation to income and expenses of the company and the matters in respect of which the receipt and expenditure takes place, all sales and purchases of goods by the company and the assets and liabilities of the company.

It should also be noted that whenever required to do so by the BVI Financial Services Commission (the “**FSC**”) or any other competent authority in the BVI, the registered agent shall request such records from the company.

3.2. Filing of Registers of Directors

Every new BVI company incorporated after 1 April 2016 will be required to file a copy of its register of directors with the BVI Registrar of Corporate Affairs (the “**Registrar**”) within 21 days of appointment of its first director(s). Existing companies will have until 31 March 2017 to file their registers of directors with the Registrar. Changes to such filed registers will need to be filed within 30 days.

The registers of directors will not be publicly available and will only be available to competent authorities or pursuant to a Court order.

The penalty for failing to file a register of directors or a change to a register within the required timescales is US\$100 with accruing, uncapped penalties for failure of an existing company to file its register of directors by 31 March 2017.

4. Other amendments and clarifications

4.1. Bonus shares

Unless otherwise provided in the company’s articles of association, bonus shares issued by BVI companies will be deemed to have been fully paid upon issue.

4.2. Surrender of shares

The surrender of fully paid shares for no consideration by BVI companies where the holder of the shares agrees in writing is now explicitly permitted and excluded from statutory distribution and redemption rules set out by the Act.

4.3. Issue of Shares for non cash consideration

The procedure and language for issuing shares for non cash consideration has been simplified so that directors just need to confirm that the value of the non cash consideration is not less than the amount to be credited to the issue of the shares.

4.4. Bearer shares

The FSC is now empowered to revoke the status of authorized or recognized custodian where said custodian acts contrary to any of its obligations or a prohibition under the Act or in relation to any agreement entered into with the FSC.

Consistent with the FSC's general approach to distance itself from the former IBC bearer share regime, fines for bearer share offences have again been substantially increased.

4.5. Shareholders' meetings

Power of the Court to order a meeting of shareholders now includes the scenario where directors breach their obligation under the Act to call a meeting of shareholders when requested by shareholders holding at least thirty per cent of total voting rights (or any lesser percentage as permitted by the memorandum and articles of association of the company).

4.6. Instructions provided to Registered Agents

The Amending Act clarifies and amends the manner in which companies and their registered agents interact:

- Subject to the memorandum and articles of a company, the registered agent of the company may act on the instructions of the directors or members of the company where said instructions are contained in a resolution provided to the registered agent. Accordingly, the registered agent is not required to confirm said instructions with the registered agent's client of record in respect of the company.
- Where a legal practitioner assists with the filing of a notice of change of registered office or registered agent, said legal practitioner may submit the payment of the fees (including any outstanding fee) payable to the Registry. It should be noted that the filing by a legal practitioner of a notice of change of registered office or

agent does not absolve a company from any liability it has to its former registered agent.

4.7. Resolutions of Directors

The Amending Act clarifies that, subject to any provision to the contrary in the memorandum and articles of association of a BVI company (i.e. it is possible to provide for weighted voting by directors in the memorandum and articles), each director of the company shall have one vote at a meeting of directors of the company.

4.8. Register of charges

BVI companies shall, within 14 days of any change occurring in the details recorded in the company's register of charges kept by the registered agent, update said register by transmitting a copy of the updated register to the registered agent.

4.9. Continuations

- **Continuation of a foreign company into the BVI:** the Registrar shall permit a foreign company to continue into the BVI by relying upon a notarized certificate issued by a director of the foreign company attesting to the foreign company's compliance with Sections 180 (1) and (2) of the Act, providing that said certificate is *in the approved form* and encloses an extract of the foreign law confirming that the company is permitted to continue to another jurisdiction.
- **Continuation of a BVI company into a foreign jurisdiction:** a BVI company wishing to continue into another jurisdiction and which has a registered charge over its assets will be required to provide the Registrar with a written declaration specifying, that either (i) a notice of satisfaction or release in respect of the charge has been filed and registered; (ii) the chargee has, upon written notification from the company, consented or not objected to the continuation out of the BVI; or (iii) the chargee's interest secured by the registered charge will not be diminished or compromised by the continuation.

A BVI company continuing into a foreign jurisdiction must file a declaration *in the approved form* confirming that the laws of said jurisdiction permit the continuation and that the company has complied with those laws.

Where the continuation of a BVI company into a foreign jurisdiction depends upon the issue by the Registrar of a certificate of discontinuance, the Registrar may rely upon a provisional certificate of continuance issued in respect of the BVI company under the laws of that jurisdiction as a basis to issue the certificate of discontinuance.

4.10. Liquidations

Contrary to the Registrar's previous practice, the Amendment Act clarifies that a BVI company may go into voluntary liquidation where there is an undischarged registered

security over its assets. The liquidator will be bound to give effect to the rights and priority of the claims of the company's secured creditors.

4.11. Striking-off

The Registrar has been conferred powers to strike off BVI regulated companies where their licences are revoked or cancelled by the FSC.

Secondly, where a company is struck off and then restored including pursuant to a direction of the Court, the Registrar will issue a certificate of restoration to the company.

4.12. Fines and Penalties

Contravention of the Act now imposes high fines and penalties on companies. As such, compliance with these provisions must be taken very seriously. Should you have any specific concerns with regards to the amendments or any provisions of the Act generally please do not hesitate to get in touch with your usual point of contact at Forbes Hare.

This alert is intended to be for the general information of the clients and professional contacts of Forbes Hare. It is not intended to be comprehensive and does not contain definitive advice.

If you would like to receive further information, or more detailed guides on a range of BVI legal topics, please do not hesitate to contact:

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