

# HARNEYS

## Corporate Services

### **Re-registration of an IBC as a BVI Business Company.**

Since 1 January 2006, it has only been possible to incorporate British Virgin Islands companies as BVI Business Companies under the BVI Business Companies Act, 2004 (the "new Act"), which came into force on 1 January 2005. Prior to the new Act, the vast majority of companies established in the British Virgin Islands were incorporated as international business companies under the International Business Companies Act (the "IBC Act").

During 2006 existing IBCs continued to exist as IBCs subject to the IBC Act unless they applied to re-register voluntarily as BVI Business Companies under the new Act. IBCs which did not apply to re-register voluntarily under the new Act by 30 November 2006 were re-registered automatically as BVI Business Companies under the new Act on 1 January 2007. No specific action was needed and the re-registration process was fully automatic.

Once an IBC is re-registered under the new Act, it ceases to be an IBC governed by the IBC Act (which now ceases to exist) and is instead known as a BVI Business Company and governed by the new Act, even though, in the case of automatic re-registration, its Memorandum and Articles of Association may still refer to it as an IBC.

**Every IBC that has re-registered as a BVI Business Company under the new Act, whether automatically or voluntarily, continues in existence as a legal entity and its re-registration does not affect its identity, its assets, rights or obligations or the commencement or continuation of proceedings by or against the company.**

**Harneys had advised at the time that there were no compelling reasons for an IBC to have applied to re-register voluntarily under the new Act as opposed to waiting for automatic re-registration which took place on 1 January 2007.**

In part, this was due to the BVI Business Companies (Amendment) Act, 2005 which was enacted primarily to "grandfather" certain key provisions from the IBC Act into the new Act and applied to IBCs that were re-registered automatically on 1 January 2007. Therefore, although all such IBCs are, with effect from 1 January 2007, BVI Business Companies, certain provisions from the IBC Act have been replicated in the new Act and will therefore continue to apply to these former IBCs. The intention is that IBCs which were re-registered automatically on 1 January 2007 were able to continue their existence in as seamless a manner as is possible. As such, an IBC which was re-registered automatically under the new Act did not need to make any immediate amendments to its Memorandum and Articles to reflect the main changes effected by the new Act.

The main IBC Act features that have been “grandfathered” into the new Act (by virtue of Part IV of Schedule 2) are as follows:

- The concepts of "authorised capital", "capital" and "surplus" have been retained in respect of former IBCs which have been re-registered automatically under the new Act and these terms are defined in the same manner as in the IBC Act.
- The provisions of the IBC Act dealing with capital and surplus accounts, changes in authorised capital and issued capital, the purchase or redemption of shares, the declaration of dividends, the division and combination of shares, the kind of consideration for shares etc continue to apply to former IBCs which have re-registered automatically under the new Act instead of sections 56 to 65 of the new Act (these sections deal primarily with the new solvency test for Distributions and the new regime for the purchase or redemption of shares).
- Certain statements that are required to be contained in the Memorandum of Association of a new Act company will not apply to a former IBC which has re-registered automatically under the new Act and the statements required by the IBC Act will continue to apply to such former IBC.
- The annual licence fee that is payable to the Registrar of Corporate Affairs will continue to be based on the authorised capital of the former IBC that has re-registered automatically as a BVI Business Company rather than on the number of shares that the company is authorised to issue which is what determines the annual licence fee for companies incorporated or re-registered voluntarily under the new Act.

These “grandfathering” provisions in the new Act taken from the IBC Act apply only to IBCs which re-registered automatically under the new Act on 1 January 2007. If an IBC re-registered voluntarily under the new Act, the grandfathering provisions do not apply and the company will have to amend its Memorandum and Articles to comply with the new Act in its entirety.

Even though the grandfathering provisions in the new Act are intended to facilitate the automatic re-registration of an IBC as a BVI Business Company, the vast majority of the new Act will apply to such companies and there will be a number of specific features and provisions in the new Act affecting the former IBC which should be borne in mind. Some of the issues that should be noted are as follows:

- **Interpretation of the Memorandum and Articles** - The company's existing Memorandum and Articles may be somewhat inconsistent with or may simply not reflect certain provisions of the new Act, whereas the company is, from the time of re-registration, subject to such new Act provisions as a matter of British Virgin Islands law. In addition, certain provisions of such a company's Memorandum and Articles may be confusing or misleading without the benefit of detailed knowledge of the new Act. Certain of the matters arising in this respect are mentioned in the paragraphs below.
- **Amendment of the Memorandum & Articles** - Although the Memorandum and Articles of an IBC and the Memorandum of a BVI Business Company may authorise the

Memorandum and Articles to be amended by a resolution of directors, the position is slightly more restrictive under the new Act. For example, the directors do not have the power to amend the Memorandum or Articles in order to restrict the power of the members to so amend or to change the percentage of members required to pass a resolution to amend the Memorandum or Articles.

- **Registers of Directors, Members and other documents** - Although the IBC Act did require and the new Act now requires a company to keep registers of directors and members (and, in the case of the IBC Act, for copies of such registers to be maintained at the company's registered office), the new Act requires the company to keep the directors' and members' registers (or copies thereof), the company's Memorandum and Articles and copies of all notices and other documents filed by the company with the Registrar of Corporate Affairs in the previous 10 years at the office of its registered agent in the BVI. Furthermore, if the company keeps only copies of the registers of directors and members with the registered agent, the new Act requires the company to notify the registered agent in writing within 15 days of any changes to those registers and, in addition, to provide it with a record of the physical address where the original registers are kept.
- **Minutes of Meetings and Resolutions of Directors and Members** - As with the IBC Act, the new Act provides that a BVI Business Company is required to keep minutes/resolutions of directors/committees of directors and minutes/resolutions of members and to keep such documents either at the office of the registered agent or at such other place as the directors may determine. In the latter case, the new Act goes further and requires the company to provide the registered agent with a written record of the physical address at which these records are kept.
- **Registration of Charges** - Under the new Act, it is now compulsory for a company to keep a register of charges at its registered office (or the office of its registered agent) and particulars of the charge can be registered in a public Register of Registered Charges kept by the Registrar of Corporate Affairs. Although registration with the Registrar of Corporate Affairs is not mandatory, registration in the public Register of Registered Charges determines the priority of the interests secured by the charge. Registration will affect priority for charges created on or after the date that the company is re-registered under the new Act. Under the IBC Act, keeping a register of mortgages and charges was optional (as was filing such a register with the Registrar of Corporate Affairs), although, in the event of an action to enforce in the British Virgin Islands, priority was determined by the date of entry of the statutory particulars of the charge in the register, if any, maintained by the company at its registered office.
- **Appointment of Directors** - Unlike the IBC Act, a person cannot be appointed a director of a BVI Business Company unless he has first consented in writing to be a director.
- **Committees of Directors** - Under the new Act, the powers that can be delegated to committees of directors are somewhat more limited than under the IBC Act, for example, a committee of directors has no power to amend the company's Memorandum or Articles.

- **Removal of Directors** - Under the new Act, a members' resolution to remove a director from office may, subject to the Memorandum and Articles, only be passed either (a) at a meeting of members whose purpose includes the removal of the director or (b) by a written resolution passed by at least 75% of the members entitled to vote. A director may also be removed by the directors where expressly permitted by the Memorandum or Articles, in which case, subject to the Memorandum and Articles, the resolution to remove the director may only be passed either (a) at a meeting of directors whose purpose includes removal of the director or (b) by a written resolution passed by at least 75% of the directors. However, the IBC Act only requires a resolution of members or a resolution of directors that may be passed by a majority at a quorate meeting, or a majority of all directors by a written resolution.
- **Alternate Directors and Written Resolutions** - An alternate appointed by a director may vote at a meeting but (in contrast to the IBC Act) an alternate for a director cannot sign written resolutions under the new Act.
- **Change of Registered Office and Agent** – Under the new Act, a company which passes a resolution of members (or directors) to change its registered office or agent must file a notice of change with the Registrar of Corporate Affairs. The change takes effect from the date of registration but the change is deemed not to constitute an amendment of the company's Memorandum of Association. Unless the Memorandum or Articles of the company expressly provide otherwise, an automatically re-registered company is not required to amend its memorandum to reflect a change in the location of its registered office or of its registered agent.
- **Agents** - Under the IBC Act, an agent appointed by the directors has the powers set out in the Articles or in the directors resolution appointing him but such agent has no power in respect of any matter requiring a resolution of directors under the IBC Act. The new Act is more specific in providing that an agent has no power with respect to certain prescribed matters including, inter alia, amending the Memorandum and Articles, changing the registered office/agent, designating committees of directors, appointing or removing directors or making a solvency test determination.
- **Non-cash Consideration for Shares** - The directors of a BVI Business Company must, before issuing shares for consideration other than money, pass a resolution stating, among other things, their determination of the reasonable present cash value of the non-money consideration.
- **Financial Records** - The IBC Act required a company to keep such accounts and records as the directors consider necessary or desirable in order to reflect the financial position of the company. The new Act requires the company to keep records that (a) are sufficient to show and explain the company's transactions and (b) will, at any time, enable the financial position of the company to be determined with reasonable accuracy.
- **Disclosure of Interests** - Unlike the IBC Act, the new Act imposes an obligation upon a director to disclose to the Board the fact that he is interested in a transaction entered into or to be entered into by the company. A director who fails to disclose an

interest is guilty of an offence and is liable to a fine of US\$10,000. If they have not already done so, we recommend that all directors of funds make express disclosure to the company of any entity in which they are interested (e.g. as a member, director or officer etc or otherwise financially interested). This should act as an effective disclosure for any future transactions between the company and that entity.

Please note that an IBC which has re-registered automatically under the new Act and to which the grandfathering provisions apply may, at any time after 1 January 2007, elect to be treated as a company to which the new Act without the grandfathering provisions applies. In this case, the company would have to conform its Memorandum and Articles to the new Act without the benefit of the grandfathered provisions.

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

If you would like further information on the subject matter of this client briefing, please contact Richard Parsons at [richard.parsons@harneys.com](mailto:richard.parsons@harneys.com) or your usual Harneys funds lawyer.

April 2008